IN THE SUPREME COURT OF FLORIDA

NO. SC03-482

DANIEL JON PETERKA,

Petitioner,

v.

JAMES V. CROSBY, JR.,
Secretary, Florida Department of Corrections,

Respondent.

PETITION FOR WRIT OF HABEAS CORPUS

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PRELIMINARY STATEMENT

This is Mr. Peterka's first habeas corpus petition in this Court. Art. 1, Sec 13 of the Florida Constitution provides: "The writ of habeas corpus shall be grantable of right, freely and without cost." This petition for habeas corpus relief is being filed in order to address substantial claims of error under the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, claims demonstrating ineffective assistance of appellate counsel, that Mr. Peterka was deprived of the right to a fair, reliable, and individualized sentencing proceeding and that the proceedings resulting in his convictions and death sentence violated constitutional imperatives.

Citations shall be as follows: The record on appeal from Mr. Peterka's 1990 trial shall be referred to as "(R. ___)" followed by the appropriate page number and the supplemental record on appeal shall be referred to as "(Supp. R. ___)" followed by the appropriate page number.

INTRODUCTION

Significant errors which occurred during Mr. Peterka's trial and sentencing were not presented to this Court on direct appeal due to the ineffective assistance of appellate counsel.

Appellate counsel's failure to present the meritorious issues discussed in this petition demonstrates that his representation of Mr. Peterka involved "serious and substantial deficiencies." Fitzpatrick v. Wainwright, 490 So. 2d 938, 940 (Fla. 1986). The issues which appellate counsel neglected demonstrate that counsel's performance was deficient and that the deficiencies prejudiced Mr. Peterka. Neglecting to raise fundamental issues such as those discussed herein "is far below the range of acceptable appellate performance and must undermine confidence in the fairness and correctness of the outcome." Wilson v. Wainwright, 474 So. 2d 1162, 1164 (Fla. 1985). Individually and "cumulatively," Barclay v. Wainwright,

444 So. 2d 956, 959 (Fla. 1984), the claims omitted by appellate counsel establish that "**confidence** in the correctness and fairness of the result has been undermined." Wilson, 474 So. 2d at 1165 (emphasis in original).

REQUEST FOR ORAL ARGUMENT

Due to the seriousness of the issues involved, Petitioner respectfully requests oral argument.

PROCEDURAL HISTORY

The Circuit Court of the First Judicial Circuit, Okaloosa County, entered the judgment and sentence under consideration.

Mr. Peterka was charged by indictment dated August 10, 1989, with one count of premeditated first degree murder (R. 1947-8).

Mr. Peterka's trial was held in late February, 1990. A jury returned a verdict of guilty on March 2, 1990.

The jury recommended a death sentence by a vote of eight to four (R. 2043). On April 25, 1990, the trial court imposed a death sentence and entered his sentencing order (R. 2077-78). This Court affirmed Mr. Peterka's conviction and sentence on direct appeal. State v. Peterka, 640 So. 2d 59 (Fla. 1994).

Mr. Peterka now files this petition for writ of habeas corpus raising issues of ineffective assistance of appellate counsel and fundamental error.

JURISDICTION TO ENTERTAIN PETITION AND GRANT HABEAS CORPUS RELIEF

This is an original action under Fla. R. App. P. 9.100(a). See Art. 1, Sec. 13, Fla. Const. This Court has original jurisdiction pursuant to Fla. R. App. P. 9.030(a)(3) and Article V, sec. 3(b)(9), Fla. Const. The petition presents constitutional issues which directly concern the judgment of this Court during the appellate process.

Jurisdiction in this action lies in this Court, see, e.g., Smith v. State, 400 So.

2d 956, 960 (Fla. 1981), for the fundamental constitutional errors challenged herein arise in the context of a capital case in which this Court heard and denied Mr. Peterka's direct appeal. See Wilson, 474 So. 2d at 1163.

This Court has the inherent power to do justice. The ends of justice call on the Court to grant the relief sought in this case. The petition pleads claims involving fundamental constitutional error. See Dallas v. Wainwright, 175 So. 2d 785 (Fla. 1965). The Court's exercise of its habeas corpus jurisdiction, and of its authority to correct constitutional errors such as those herein pled, is warranted in this action.

GROUNDS FOR HABEAS CORPUS RELIEF

By his petition for a writ of habeas corpus, Mr. Peterka asserts that his conviction and sentence of death were obtained and affirmed during this Court's appellate review process in violation of his Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendment rights to the United States Constitution and corresponding provisions of the Florida Constitution.

CLAIM I

FLORIDA'S CAPITAL SENTENCING PROCEDURE DEPRIVED MR. PETERKA OF HIS SIXTH AMENDMENT RIGHT TO NOTICE AND A JURY TRIAL AND OF HIS RIGHT TO DUE PROCESS.

Ring v. Arizona, 122 S. Ct. 2428(2002), overruled Walton v. Arizona, 497 U.S. 639 (1990), "to the extent that it allows a sentencing judge, sitting without a jury, to find an aggravating circumstance necessary for imposition of the death penalty." Ring, 122 S. Ct. at 2443. The role of the jury in Florida's capital sentencing scheme, and in particular Mr. Peterka's capital trial, neither satisfies the Sixth Amendment, nor renders harmless the failure to satisfy Apprendi v. New Jersey, 530 U.S. 466 (2000), and Ring.

On October 24, 2002, this Court rendered its decisions in Bottoson v.

Moore, 833 So. 2d 693 (Fla. 2002), and King v. Moore, 831 So. 2d 143 (Fla. 2002), relating to the Supreme Court's decision in Ring and its impact upon the constitutionality of Florida's death penalty scheme. The separate opinions in the decisions establish that Mr. Peterka is entitled to relief.

In both Bottoson and King, each justice wrote separate opinions explaining his or her reasoning for denying relief. In both decisions, a *per curiam* opinion announced the result. In neither case do a majority of the sitting justices join the *per curiam* opinion or its reasoning. In both cases, four justices wrote separate opinions explaining that they did not join the *per curiam* opinion, but "concur[red] in result only." Bottoson, 833 So. 2d at 695; King, 831 So. 2d at 145.[1]

When the four separate opinions that concur in result only are analyzed, it is clear that relief was denied in the two cases based upon facts present in those cases that are not present in Mr. Peterka's case. Under the logic of those four separate opinions, concurring in result only, Mr. Peterka is entitled to sentencing relief as a result of Ring v. Arizona.

1. MR. PETERKA'S CASE.

With the four specially concurring opinions in mind, certain facts need to be highlighted. At the penalty phase, the Judge's preliminary instructions to the jury were:

> Ladies and gentleman of the jury, you have found the defendant guilty of first degree premeditated murder. The punishment for this crime is either death or life imprisonment without the possibility of parole for twenty-five years. **Final decision as to what punishment shall be imposed rests with the Judge of this court; however, the law requires that you, the jury, render to the Court an advisory sentence as to what punishment should be imposed upon the defendant.**

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[1]In many ways, the Bottoson v. Moore decision contains the primary opinions of the seven justices. This Court had seven participating justices in that decision, while in King v. Moore, Justice Quince was recused.

> . . . You are instructed that this evidence when considered with the evidence you have already heard is presented in order that you might determine, first, whether sufficient aggravating circumstances exist that would justify the imposition of the death penalty; and second, whether there are mitigating circumstances sufficient to outweigh the aggravating circumstances, if any.

(R. 1862-3)(emphasis added).

While instructing the jurors prior to their sentencing deliberations, the judge never so much as informed the jury that their recommendation would be entitled to great weight:

> Ladies and gentleman of the jury, it is now your duty to advise the Court as to what punishment should be imposed upon the defendant for his crime of first degree murder. **As you have been told, the final decision as to what punishment shall be imposed is the responsibility of the Judge; however, it is your duty to follow the law that will now be given you by the Court and to render to the Court an advisory sentence** based upon your determination as to whether sufficient aggravating circumstances exist to justify the imposition of the death penalty and whether sufficient mitigating circumstances exist to outweigh any aggravating circumstances found to exist.

(R. 1917-8)(emphasis added).

The judge proceeded to inform the jury that:

> Should you find sufficient aggravating circumstances do exist, it will then be your duty to determine whether mitigating circumstances exist that outweigh the aggravating circumstances.

(R. 1919). The jury was further advised: "In these proceedings it is not necessary that the advisory sentence of the jury be

unanimous" (R. 1921), but that the jury's decision could be made by a majority of the jury (R. 1921-2).

The jury was provided with a verdict form which was titled "JURY RECOMMENDATION" (R. 2043). Thereafter, the jury's advisory verdict was returned and read in open court by the clerk:

> Jury recommendation, a majority of the jury by a vote of eight to four advise and recommend to the Court that it impose a death penalty upon Daniel Jon Peterka.

(R. 1930). On April 25, 1990, the presiding judge imposed a sentence of death (R. 2446-9). In its sentencing order, the court found five aggravating circumstances (R. 2077-8).

2. NO FINDING OF PRIOR CONVICTION OF A CRIME OF VIOLENCE.

Mr. Peterka's death sentence was not dependent upon the "previously convicted of a crime of violence" aggravating circumstance. Mr. Peterka had no prior conviction of a crime of violence. This is a distinction between Mr. Peterka's case and the circumstances of both Bottoson and King, on a factor that three justices found served as a basis for denying relief in those cases.

For Justice Shaw, the finding of this aggravating circumstance in both the Bottoson and King cases was the basis for his vote to deny each of them relief. As Justice Shaw explained in his opinion concurring in the denial of habeas relief in Bottoson, "this particular factor is excluded from Ring's purview and standing by itself, can serve as a basis to 'death qualify' a defendant. Accordingly, I agree that Bottoson's petition for writ of habeas corpus must be denied." Bottoson, 833 So. 2d at 718-9 (Shaw, J., concurring in result only)(footnote omitted). In his opinion concurring in the denial of habeas relief in King, Justice Shaw indicated that habeas relief should be denied because King's sentence of death was based in part on the aggravating circumstance of "previous conviction of violent felony." King, 831 So. 2d at 148-9.

But for the presence of this aggravating factor, it appears from Justice Shaw's opinions that he would have voted to grant a capital habeas petitioner relief on the basis of Ring v. Arizona. Justice Shaw expressed his view that the Florida death penalty statute violated the principle enunciated in Ring v. Arizona:

> Nowhere in Florida law is there a requirement that the finding of an aggravating circumstance must be unanimous. Ring, however, by treating a "death qualifying" aggravator as an element of the offense,

> imposes upon the aggravator the rigors of proof as other elements, including Florida's requirement of a unanimous jury finding. Ring, therefore, has a direct impact on Florida's capital sentencing statute.

Bottoson, 833 So. 2d at 717.

In Bottoson, Justice Pariente agreed with Justice Shaw that "a prior violent felony conviction meets the threshold requirement of Apprendi as extended to capital sentencing by Ring." Id. at 722 (Pariente, J., concurring in result only). Accordingly, she too concurred in the denial of habeas relief in Bottoson, saying, "I would deny relief to Bottoson because one of the four aggravating circumstances found in this case was a prior violent felony." Id. Similarly in King, Justice Pariente explained that she concurred in the court's denial of King's petition because "one of the aggravators found in King's case was a 'previous conviction of violent felony.'" 831 So. 2d at 149.

In her opinion in Bottoson, Justice Pariente said, "I believe that we must confront the fact that the implications of Ring are inescapable." 833 So. 2d at 723. Later in that opinion, she elaborated:

> The crucial question after Ring is "one not of form, but of effect." 122 S.Ct. at 2439. *In effect*, the maximum penalty of death can be imposed only with the additional factual finding that aggravating factors outweigh mitigating factors. *In effect*, Florida juries in capital cases *do not do* what Ring mandates – that is, make specific findings of fact regarding the aggravators necessary for the imposition of the death penalty. *In effect*, Florida juries *advise* the judge on the sentence and the judge *finds* the specific aggravators that support the sentence imposed. Indeed, under both the Florida and Arizona schemes, it is the judge who *independently* finds the aggravators necessary to impose the death sentence.

Id. at 725 (italics in original).

Thus, it is clear that Justice Pariente believes that the Florida death penalty statute violates the principles enunciated in Ring.[2] Under her reasoning, Mr.

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[2]At one point she stated, "I agree with Justice Lewis that there are deficiencies in our current death penalty sentencing instructions." Bottoson, 833 So. 2d at 723. Justice Pariente opined that the standard jury instructions

Peterka is entitled to relief since the "prior conviction of a crime violence" aggravator was not present in his case.[3]

In his opinion in Bottoson, Chief Justice Anstead noted that he concurred in that portion of Justice Pariente's opinion discussing "a finding of the existence of aggravating circumstances before a death penalty may be imposed." 833 So. 2d at 704, n. 18.

In explaining his view of Ring and its application to the Florida death penalty statute, Chief Justice Anstead stated:

> Thus, Ring requires that the aggravating circumstances necessary to enhance a particular defendant's sentence to death must be found by a jury beyond a reasonable doubt in the same manner that a jury must find that the government has proven all the elements of the crime of murder in the guilt phase. It appears that the provision for judicial findings of fact and the purely advisory role of the jury in capital sentencing in Florida falls short of the mandates announced in Ring and Apprendi for jury fact-finding.

Bottoson, 833 So. at 706.[4]

In his opinion in King, Chief Justice Anstead specifically concurred in Justice Pariente's opinion stating her reasons for concurring in the denial of relief to Mr.

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should be changed, as well as the verdict form used in penalty proceedings.

[3]As to Mr. King, Justice Pariente also pointed out in Mr. King's case jurors "reached a unanimous (12-0) recommendation of death." King, 831 So. 2d at 149. However, in Mr. Peterka's penalty proceeding, the jury was not unanimous, but recommended the death penalty by an eight to four vote. Thus, Mr. Peterka's case is not in the same posture as Mr. King's case.

[4]Chief Justice Anstead also indicated, "another factor important to my decision to concur in denying relief [ ] is that the U.S. Supreme Court has specifically denied Bottoson's petition for review and lifted the stay it previously granted as to his execution." Bottoson, 833 So. 2d 704, n.17. However, that circumstances is not present in Mr. Peterka's case, and thus, a different result is warranted.

King. Thus, he found the presence of the "prior conviction of a crime of violence" aggravating circumstance and the unanimous death recommendation determinative in that instance.

The circumstances present in Bottoson and King which caused Chief Justice Anstead to vote to deny those petitioners relief are not present in Mr. Peterka's case. Inferentially, it would seem that he would vote to grant Mr. Peterka relief under Ring.

3. JURORS' CONSIDERATION OF IMPROPER AGGRAVATORS.

At Mr. Peterka's penalty phase, the jury was instructed on five (5) aggravating factors:

> The aggravating circumstances that you may consider are limited to any of the following that are established by the evidence beyond a reasonable doubt: **first**, the crime for which Daniel Jon Peterka is to be sentenced was committed while he was under sentence of imprisonment; **secondly**, the crime for which the defendant is to be sentenced was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody; **third,** the crime for which the defendant is to be sentenced was committed for pecuniary gain; **four**, the crime for which the defendant is to be sentenced was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws, and finally in **five**, the crime for which the defendant is to be sentenced was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification.

(R. 1918-9)(emphasis added).

The State argued that all of the aggravators applied to the case and as to the cold, calculated and premeditated aggravator, the State told the jury that "[y]ou've told us through your verdict that he premeditated this murder" (R. 1908). On direct appeal, this Court struck the pecuniary gain aggravating factor. The jury was instructed and considered this factor in reaching their recommendation for death and the trial court relied on the pecuniary gain factor in sentencing Mr. Peterka to death. This Court found: "The trial court did not make any specific factual findings that would support this aggravating circumstance. Thus, we find that the trial court

improperly considered the pecuniary gain aggravating circumstance." Peterka v. State, 640 So. 2d 59, 71 (Fla. 1994).

Further, this Court also found that the trial "erred in finding the hinder law enforcement circumstance to be a separate aggravating factor." Id. This Court found that the avoid arrest and hinder law enforcement aggravators were based upon the "same features of the case" and therefore constituted an improper "doubling". Id. Despite the jury's consideration of the improper aggravators, the Court determined that the errors were harmless. Id. at 71-2.

In Bottoson, Justice Pariente cited another concern about the constitutionality of Florida's sentencing statute – that the jury may consider improper aggravators that are later struck on direct appeal:

> For example, in Porter v. Moore, No. SC01-2707 (Fla. June 20, 2002), a case presently before this Court on a motion for rehearing, the trial court imposed the death sentence finding four aggravators. However, this Court struck one of the aggravators on appeal. See Porter v. State, 564 So. 2d 1060, 1063 (Fla. 1990). Given the nonspecific death recommendation of the jury, it is impossible to tell whether any of the jurors relied on the aggravator this Court struck when recommending death. As a result, Porter's death sentence may rest on an unconstitutional element.

Bottoson, 833 So. 2d at 724, n. 65.

Clearly, Justice Pariente believes that the Florida death penalty statute and system of review violate the principles enunciated in Ring. Under her reasoning, Mr. Peterka is entitled to relief since there is no way to know whether any of the jurors considered the invalid aggravators in recommending that Mr. Peterka be sentenced to death.

In his opinion in Bottoson, Chief Justice Anstead also noted the problem with the process of appellate review – the process employed during Mr. Peterka's direct appeal:

> In addition to the necessity for the specific determination of aggravating circumstances in the trial court, an essential ingredient to the constitutionality of Florida's death penalty scheme is this Court's careful

review of the sentencing process.

* * *

> . . . there could hardly be any meaningful review of a Florida jury's advisory recommendation to a trial judge since that review would rest on sheer speculation as to the basis of the recommendation, whether considering the jury collectively or the jurors individually. In other words, from a jury's bare advisory recommendation, it would be impossible to tell which, if any, aggravating circumstances a jury or any individual juror may have determined existed.

Bottoson, 833 So. 2d at 708.

Ring requires that the jury make the unanimous finding that a capital defendant be sentenced to death based on valid aggravating factors. Because Mr. Peterka's jury considered invalid aggravating factors, he is entitled to relief.

4. JURORS' AWARENESS OF THE IMPACT OF THEIR RECOMMENDATION.

Mr. Peterka's jury was specifically instructed that its role was merely to make a recommendation by a majority vote. The jury was never told that its recommendation was binding in any way. In fact, the jury was not even instructed by the Judge that its recommendation would be given great weight. Under the circumstances, the jurors' sense of responsibility for determining Mr. Peterka's sentence was substantially diminished.

Justice Lewis explained in his view that "the validity of the jury instructions given in [Bottoson's] case should be addressed in light of [Bottoson's] facial attack upon Florida's death penalty scheme on the basis of the holding in Ring v. Arizona." Bottoson, 833 So. 2d at 733.[5] According to Justice Lewis:

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[5]Justice Lewis acknowledged that Ring has application to Florida's death penalty statute when he wrote, after Ring, a jury's "life recommendation must be respected." 833 So. 2d at 728. He concluded that as to jury overrides in favor of death, Florida law and Ring are in "irreconcilable conflict." Id.

> [I]n light of the dictates of Ring v. Arizona, it necessarily follows that Florida's standard penalty phase jury instructions may no longer be valid and are certainly subject to further analysis under the United States Supreme Court's Caldwell v. Mississippi, 472 U.S. 320 (1985), holding.

Bottoson, 833 So. 2d at 731. Pursuant to this view, Justice Lewis proceeded in his opinion to carefully review the *voir dire* proceedings and the jury instructions, thereby suggesting that a case-by-case analysis is warranted in determining whether any death-sentenced individuals are entitled to postconviction relief in light of Ring v. Arizona. In his opinion, Justice Lewis concluded, "there was a tendency to minimize the role of the jury, not only in the standard jury instructions, but also in the trial court's added explanation of Florida's death penalty scheme." Id. at 734. However, he found the standard jury instructions and judicial commentary were not so flawed in Mr. Bottoson's case to warrant reversal. Justice Lewis explained, "although the standard jury instructions may not be flawed to the extent that they are invalid or require a reversal in this case, such instructions should now receive a detailed review and analysis to reflect the factors which inherently flow from Ring." Id. Clearly, Justice Lewis' position carries with it the inference that a reversal will be required in cases where the proper analysis is conducted and the minimization of the jury's role exceeded that occurring in Bottoson.

The circumstances of Mr. Peterka's case are much more extreme than those Justice Lewis addressed in Bottoson. The jury repeatedly heard during voir dire examination that their penalty phase role was to render a recommendation (R. 387, 389, 390, 399, 542, 613, 659, 744, 851, 866, 867, 868, 869, 961, 1020, 1043, 1863-4, 1906, 1917-8). They were told that the recommendation was not binding upon the judge. They were told that the decision as to what sentence to impose was the judge's decision. In the judge's last remarks before the jury retired, he reminded them:

> As you have been told, the final decision as to what punishment shall be imposed is the responsibility of the Judge; however, it is your duty to follow the law that will now be given to you by the Court and to render to the Court an advisory sentence . . .

(R. 1917-8).

Under the analysis that Justice Lewis requires, Mr. Peterka is entitled to relief.

In her opinion in Bottoson, Justice Pariente expressed her agreement with Justice Lewis: "I agree with Justice Lewis that there are deficiencies in our current death penalty sentencing instructions." 833 So. 2d at 723.

In explaining his view of Ring and its application to the Florida death penalty statute, Chief Justice Anstead stated:

> Thus, Ring requires that the aggravating circumstances necessary to enhance a particular defendant's sentence to death must be found by a jury beyond a reasonable doubt in the same manner that a jury must find that the government has proven all the elements of the crime of murder in the guilt phase. It appears that the provision for judicial findings of fact and the purely advisory role of the jury in capital sentencing in Florida falls short of the mandates announced in Ring and Apprendi for jury fact-finding.

Bottoson, 833 So. 2d at 706.

5. Other Errors in Light of Ring.

Additionally Mr. Peterka's death sentence was imposed in an unconstitutional manner because he was required to prove the non-existence of an element necessary to make him eligible for the death penalty. Under Florida law, a death sentence may not be imposed unless the judge finds the fact that "sufficient aggravating circumstances" exist to justify imposition of the death penalty. Fla. Sat. Sec 921.141 (3). Because imposition of a death sentence is contingent upon this fact being found, and the maximum sentence that could be imposed in the absence of that finding is life imprisonment, the Sixth Amendment required that the State bear the burden of proving it beyond a reasonable doubt. Ring, 122 S. Ct. at 2432("Capital defendants. . .are entitled to a jury determination of any fact the legislature conditions an increase in their maximum punishment.") In Mr. Peterka's

case, the judge gave the following preliminary instruction:

> You are instructed that this evidence, when considered with the evidence you have already heard, is presented in order that you might determine, first, whether sufficient aggravating circumstances exist that would justify the imposition of the death penalty; and second, whether there are mitigating circumstances sufficient to outweigh the aggravating circumstances, if any.

(R. 1863). In penalty phase closing argument the prosecutor reiterated the court's instructions (R. 1909). The court then gave the jury its final instructions:

> As you have been told, the final decision as to what punishment shall be imposed upon the defendant is the responsibility of the Judge; however, it is your duty to follow the law that will now be given to you by the Court and to render to the Court an advisory sentence based upon your determination as to whether sufficient aggravating circumstances exist to justify the imposition of the death penalty and whether sufficient mitigating circumstances exist to outweigh and aggravating circumstances found to exist.

(R. 1917-8). And:

> If you find the aggravating circumstances do not justify the death penalty, your advisory sentence should be one of life imprisonment without possibility of parole for twenty-five years.
>
> Should you find sufficient aggravating circumstances do exist, **it will then be your duty to determine whether mitigating circumstances exist that outweigh the aggravating circumstances**.

(R. 1919)(emphasis added).

The Due Process Clause of the Fourteenth Amendment requires the State to prove beyond a reasonable doubt every fact necessary to constitute a crime. In re Winship, 397 U.S. 358 (1970). The existence of "sufficient aggravating circumstances" that outweigh the mitigating circumstances is an essential element of death-penalty-eligible first degree murder because it is the sole element that distinguishes it from the crime of first degree murder, for which life is the only possible punishment. Fla. Stat. §§ 775.082, 921.141. For that reason, Winship requires the prosecution to prove the existence of that element beyond a reasonable doubt. Mr. Peterka's jury was told otherwise. The instructions given

to Mr. Peterka's jury violated the Due Process Clause of the Fourteenth Amendment and the Sixth Amendment's right to trial by jury because it relieved the State of its burden to prove beyond a reasonable doubt the element that "sufficient aggravating circumstances exist" which outweigh mitigating circumstances by shifting the burden of proof to Mr. Peterka to prove that the mitigating circumstances outweigh sufficient aggravating circumstances. Mullaney v. Wilbur, 421 U.S. 684, 698 (1975).[6]

Mr. Peterka's death sentence is also invalid and must be vacated because the elements of the offense necessary to establish capital murder were not charged in the indictment in violation of the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and the Florida Constitution.

Mr. Peterka was indicted on one count of premeditated first degree murder (R. 1947-8). The indictment failed to charge the necessary elements of capital first degree murder (R. 1947-8).

Jones v. United States, 526 U.S. 227 (1999), held that "under the Due Process Clause of the Fifth Amendment and the notice and jury guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." 526 U.S. at 243, n. 6. Apprendi v. New Jersey, 530 U.S. 466, 475-76 (2000), held that the Fourteenth Amendment affords

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[6]Defense counsel raised an objection regarding this issue at trial, "Under Florida law, once one of these aggravating circumstances is present there is a presumption of death which is to be overcome only by mitigating evidence so strong as to be reasonably convincing and so substantial as to constitute one or more mitigating circumstances sufficient to outweigh the presumption." (R. 2011-2).

citizens the same protections when they are prosecuted under state law.[7] Ring v. Arizona, 122 S.Ct. 2428, 2441 (2002)(quoting Apprendi, 530 U.S. at 494, n. 19), held that a death penalty statute's aggravating factors "operate as 'the functional equivalent of an element of a greater offense."

On June 28, 2002, after the Court's decision in Ring, the death sentence imposed in United States. v. Allen, 247 F. 3d 741 (8th Cir. 2001), was overturned when the Supreme Court granted the writ of certiorari, vacated the judgement of the United States Court of Appeals for the Eighth Circuit upholding the death sentence, and remanded the case for reconsideration in light of Ring's holding that aggravating factors that are prerequisites of a death sentence must be treated as elements of the offense. Allen v. United States, 122 S.Ct. 2653 (2002).

Like the Fifth Amendment to the United States Constitution, Article I, Section 15 of the Florida Constitution provides that "[n]o person shall be tried for a capital crime without presentment or indictment by a grand jury". Like 18 U.S.C sections 3591 and 3592(c), Florida's death penalty statute, Florida Stats. §§ 775.082 and 921.141, makes imposition of the death penalty contingent upon the state proving the existence of aggravating circumstances, establishing "sufficient aggravating circumstances" to call for a death sentence, and that the mitigating circumstances are insufficient to outweigh the aggravating circumstances." Fla. Stat. § 921.141 (3). Florida law clearly requires every "element of the offense" to be alleged in the information or indictment. In State v. Dye, 346 So. 2d 538, 541 (Fla. 1977), this Court said "[a]n information must allege each of the essential elements of a crime to be valid. No essential element should be left to inference." Further, in State v. Gray, 435 So. 2d 816, 818 (Fla. 1983), this Court stated

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[7]The grand jury clause of the Fifth Amendment has not been held to apply to the States. Apprendi, 530 U.S. at 477, n. 3.

"[w]here an indictment or information wholly omits to allege one or more of the essential elements of the crime, it fails to charge a crime under the laws of the state." An indictment in violation of this rule cannot support a conviction; the conviction can be attacked at any stage, including by habeas corpus.

It is impossible to know whether the grand jury in this case would have returned an indictment alleging the presence of aggravating factors, sufficient aggravating circumstances, and insufficient mitigating circumstances, and thus charging Mr. Peterka with a crime punishable by death. The State's authority to decide whether to seek the execution of an individual charged with a crime hardly overrides the constitutional requirement of neutral review of prosecutorial intentions. See e.g., United States v. Dionisio, 410 U.S. 19, 33 (1973); Wood v. Georgia, 370 U.S. 375, 390 (1962).

The Sixth Amendment requires that "[i]n all criminal prosecutions, the accused shall . . . be informed of the nature and cause of the accusation . . ." A conviction on a charge not made by the indictment is a denial of due process of law. State v. Gray, supra, citing Thornhill v. Alabama, 310 U.S. 88 (1940), and DeJonge v. Oregon, 299 U.S. 353 (1937).

Based on the foregoing, Mr. Peterka respectfully requests that his sentence of death as well as the advisory sentence be vacated in light of Ring v. Arizona and a life sentence imposed. At the very least, a re-sentencing proceeding that comports with the Sixth Amendment as explained by Ring v. Arizona is required.

CLAIM II

THE WARRANTLESS SEIZURE OF EVIDENCE FROM MR. PETERKA'S RESIDENCE VIOLATED MR. PETERKA'S FOURTH, FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS. APPELLATE COUNSEL WAS

INEFFECTIVE FOR FAILING TO RAISE THIS ISSUE.

Before Mr. Peterka's trial began defense counsel filed a motion to suppress Mr. Peterka's statements and the items seized from his apartment on July 14, 1989. After a hearing, the court denied the motion. On direct appeal, appellate counsel raised the suppression issue as to Mr. Peterka's statements, but not the illegal seizure of items from his home. Appellate counsel was ineffective for failing to raise this claim.

On July 14, 1989, at approximately 1:30 a.m., Okaloosa County Sheriff's officers arrived at Mr. Peterka's home to arrest him on a fugitive warrant from Nebraska (R. 16). Deputy Daniel Harkins explained what occurred at Mr. Peterka's residence:

> A: Sergeant Ashmore waited outside in the darkness along with Briggs and Deputy Vick outside. I went up to the doorway. I was informed to tell [Peterka] that I had to come back and check further on some other information about John being missing and lure him outside to John's vehicle just in case that he did have any weapons in the house. I knocked on the door and asked him to do as I was instructed which he did.
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> Q: You told him you needed some more information from him and asked him to come outside?
>
> A: Yes.
>
> Q: Did he come outside?
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> A: At first he was in his briefs, undershorts, and I walked in the back bedroom, his bedroom, and let him put on a pair of shorts so he could come outside. He didn't have a shirt on other than just the shorts. We walked outside to the vehicle. That's when we took him down and arrested him.
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> * * *
>
> A: We asked if we could go in the house. He asked if he could put some clothes on, and we told him he could, and we asked him if we could come into the house, and he says yes. Then we asked him, while we were in the house, if we had permission to search his house, and at that time he gave us permission to search his home.
>
> Q: Did you tell him what you wanted to search for?

A: Yes.

Q: What was that?

A: For the charge that he was charged with, any weapons, the stolen weapons.

®. 16-18). On cross examination, Deputy Harkins clarified that Mr. Peterka first asked to put some clothes on and then, after entering the house, the officers requested permission to search for stolen weapons (R. 53). He also testified that he knew Mr. Peterka was already sentenced for his Nebraska crimes and that he was "not under investigation for any stolen weapons" (R. 43). Further, Deputy Harkins admitted that Mr. Peterka never put on a shirt or shoes after going back into the house (R. 47), and that when he arrested Mr. Peterka he "didn't have any question in [his] mind" about Mr. Peterka's identity (R. 52). Moreover, Deputy Harkins admitted that earlier in the evening several people had identified Mr. Peterka and that Mr. Peterka had produced his birth certificate (R. 42).

Yet, while in the house, Deputy Harkins claimed he asked Mr. Peterka for identification and that Mr. Peterka told him that it was in his wallet on the dresser (R. 20). Officers retrieved the wallet and looked through the contents finding: "quite a bit of money in it, approximately $407.00", a Florida driver's license with Mr. Peterka's picture and Mr. Russell's name; Mr. Russell's social security card, video card, bank card and insurance card, Mr. Peterka's Nebraska driver's license and birth certificate and a clipping for a job in Alaska (R. 20-2). Law enforcement seized Mr. Peterka's wallet and the contents.

Sergeant Ashmore's testimony contradicted Deputy Harkins' testimony on a key point: Sgt. Ashmore testified that Deputy Harkins did not initially enter the house (R. 179-80). Rather, Mr. Peterka went back inside the house and got a pair of shorts without Deputy Harkins (R. 190). Further, Sgt. Ashmore testified that the officers requested permission to search the house and Mr. Peterka told them that

there were no stolen weapons inside (R. 192), but then consented (R. 181). Sgt. Ashmore did not recall Mr. Peterka requesting to put on any clothes, either inside or outside the house (R. 192).

At the suppression hearing, Mr. Peterka testified that in the early morning hours of July 14th, he awoke to law enforcement knocking on his door (R. 2083). Mr. Peterka answered the door and after Deputy Harkins told him that he wanted to search Mr. Russell's car, Mr. Peterka asked Deputy Harkins if he could put on a pair on shorts (R. 2083). Mr. Peterka then went back to his room, by himself, and put on shorts (R. 2083).

After being taken down to the ground and arrested outside, he was asked whether he had any stolen weapons in the house and he told the officers that he did not (R. 2089). He did not consent to a search of his house (R. 2089, 2112). The officers told him that they were going to search his house (R. 2090). While in the house, Mr. Peterka asked to put on some clothes, but his request was denied (R. 2090). Also, while in the house, the officers looked in Mr. Peterka's wallet (R. 2091).

Later on the morning of the 14th, about 9:00 a.m., Frances Thompson spoke to Deputy Harkins (R. 29). According to Deputy Harkins, Ms. Thompson told him that Mr. Peterka had asked her to remove his belongings from the house (R. 29).

Around 3:00 p.m. that same afternoon, law enforcement officers again returned to Mr. Peterka's house and met Ruben Purvis, Mr. Peterka's landlord. They requested and Mr. Purvis allowed them to enter the house (R. 32). While in the house, they found what they believed to be human blood on and beneath the couch (R. 37). Inv. Vinson explained that he did not obtain a search warrant because he "was going in a house where I thought was a missing person and I did not realize there could be any foul play until I saw the blood stains . . . under the couch" (R. 228). Mr. Purvis testified that at the time he allowed law

enforcement to enter Mr. Peterka's apartment he believed that Mr. Peterka was still his tenant (R. 104). In fact, Mr. Peterka had paid his rent for the month of July (R. 132-3).

During the suppression hearing, Frances Thompson explained what happened on the morning of July 14th: Mr. Peterka called her around 6:00 a.m. from the jail and needed some of his personal items brought to the jail (R. 173). During the conversation she offered to remove his things from the apartment (R. 143). That morning she took some of Mr. Peterka's belongings, but not everything (R. 146). She specifically recalled that she did not remove all of Mr. Peterka's belongings until after the Sheriff's officers searched the apartment (R. 147).

Mr. Peterka testified that when he spoke to Ms. Thompson he asked her to bring him some clothes and personal items (R. 2097). In the following days, he also asked her to take possession of his belongings (R. 2097).

The general rule in search and seizure law is that warrantless searches are per se unreasonable. Coolidge v. New Hampshire, 403 U.S. 443 (1971); Washington v. State, 653 So. 2d 362, 364 (Fla. 1994). One of the exceptions to the rule is when consent is given. Schneckloth v. Bustamonte, 412 U.S. 218 (1973); Norman v. State, 379 So. 2d 643, 646 (Fla. 1980). However, consent must be freely and voluntarily given and the search must be conducted within the scope of the search. Id. at 233. Further, it is the prosecutor's burden to prove that consent was freely and voluntarily given. Bumper v. North Carolina, 391 U.S. 543, 548 (1968). Whether consent is freely and voluntarily given is determined by reviewing the totality of the circumstances. Ohio v. Robinette, 519 U.S. 33, 39-40 (1996).

The search and seizure of Mr. Peterka's wallet was illegal and violated Mr. Peterka's fourth amendment rights. The police arrived in the early morning hours to arrest Mr. Peterka on a fugitive warrant from Nebraska. The officers testified that the teletype characterized Mr. Peterka as "armed and dangerous." Thus, law

enforcement planned a ruse to lure Mr. Peterka out of the house in order to arrest him. Deputy Harkins testimony was inconsistent with Sergeant Ashmore's testimony about what happened when Mr. Peterka answered the door.

According to Sgt. Ashmore, Mr. Peterka, an "armed and dangerous" convicted felon was allowed to leave Deputy Harkins at the door and return to his bedroom to obtain a pair of shorts, even though the officers believed that Mr. Peterka may have weapons in the house.

Further, there was no need to search Mr. Peterka's house for stolen weapons because he had already been convicted and the weapons were recovered. Deputy Harkins admitted that he was aware that the weapons were recovered. Therefore, he claimed that Mr. Peterka requested to reenter his house so that he could put on a shirt and shoes. However, Mr. Peterka arrived at the police station without a shirt or shoes.

Sgt. Ashmore did not recall Mr. Peterka ever asking for more clothes. Again, Sgt. Ashmore's testimony differed from Deputy Harkins. Sgt. Ashmore claimed that Mr. Peterka consented to a search of the house for weapons. Sgt. Ashmore's testimony makes no sense because there were no weapons related to the Nebraska conviction for which to search.

Mr. Peterka did not consent to the search of his house.

Furthermore, even if Mr. Peterka had consented to the search of his house, each law enforcement officer testified that the purpose of the search was for stolen weapons from the Nebraska burglary and that was what Mr. Peterka was told. Therefore, if the conflicting testimony of the officers is to be believed, the search was limited to weapons.

Mr. Peterka did not consent to a search of his wallet which was well outside of the scope of search. The search of Mr. Peterka's wallet violated his Fourth Amendment rights and the contents found in the wallet should have been

suppressed.

Similarly, the searches of the house that occurred after Mr. Peterka was arrested were also illegal. Again, law enforcement did not have a search warrant. Instead, the State argued that Mr. Peterka had abandoned the premises and therefore, no warrant was required.

Based on the totality of circumstances, a finding that Mr. Peterka abandoned his house was error. Although he had been arrested and had asked Ms. Thompson to bring him some personal belongings, she left several items behind and did not retrieve them until well after the police had searched the house. She did not return the key to the landlord until after she retrieved all of all of Mr. Peterka's belongings.

All of the evidence discovered during the afternoon search on July 14th, including the couch cushions, should have been suppressed.

Appellate counsel was ineffective for failing to raise this issue. Habeas relief is proper.

CLAIM III

THE PROSECUTOR'S INFLAMMATORY, EMOTIONAL, MISLEADING AND IMPROPER ARGUMENT TO THE JURY AT MR. PETERKA'S CAPITAL TRIAL AND SENTENCING PROCEEDING RENDERED MR. PETERKA'S TRIAL AND SENTENCING FUNDAMENTALLY UNFAIR AND UNRELIABLE IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS. APPELLATE COUNSEL WAS INEFFECTIVE IN FAILING TO RAISE THIS ISSUE.

Unchallenged prosecutorial argument during Mr. Peterka's trial and sentencing proceedings violated the Sixth, Eighth and Fourteenth Amendments to the United States Constitution. The prosecutor's arguments were fraught with improper comments, misleading comments, and comments which relied on facts not in evidence. The improper, inflammatory arguments constitute fundamental error.

This Court has held that when improper conduct by a prosecutor

"permeates" a case, relief is proper. Garcia v. State, 622 So. 2d 1325 (Fla. 1993); Nowitzke v. State, 572 So. 2d 1346 (Fla. 1990).

The improper evidence of Mr. Russell's reputation for peacefulness was a central feature of the state's case and closing argument:

> How do we know that he told lies in that interview? Where are the lies on that tape? "John Russell started a fight over the check." John Russell started a fight over the check. First, ladies and gentlemen, you can ignore it, if you want to. Everybody that told you anything about John Russell as a man as far as whether he fought or not told you he was peaceful and nonviolent.

(R. 1780). The prosecutor's argument was improper.

Furthermore, the prosecutor shifted the burden to Mr. Peterka to present evidence regarding the victim's reputation in the community: "If he had ever been in any other fights, you would have found out about it in this courtroom. He hasn't ever been in one." (R. 1780-1).

The prosecutor also misleadingly argued the evidence of the money order, when it was cashed, when Mr. Peterka paid Mr. Russell to use his identification and when Mr. Russell found out about Mr. Peterka cashing the money order. Mr. Elmore argued:

> John gave him a social security card for a hundred dollars so he could get a driver's license because he told John he was a convicted felon and needed one. Right. yeah. John was missing his check. He thought Daniel Peterka stole it and he gave Daniel Peterka the means to go cash it? That's what Daniel Peterka has told you. "John agreed to let me have his driver's license."
>
> Look at the date on this check, June 12. When did Daniel Peterka get the driver's license? June 27th. John Russell let him when he thought this check was stolen by Daniel Peterka? He is a liar.

(R. 1782). The prosecutor argued facts which were not in evidence and not supported by the evidence. The evidence clearly showed that Mr. Russell did not learn about the money order being cashed until well after he sold Mr. Peterka the means to obtain a duplicate driver's license.

In a highly improper move, the State Attorney argued that:

> I've done everything I can do. **I've showed you all the evidence that I can bring in here to you.** It proves Dan Peterka is guilty beyond any reasonable doubt.

(R. 1798)(emphasis added). This comment suggested that there was other evidence which tended to incriminate Mr. Peterka which the State was precluded from presenting. Such comment is a highly improper suggestion that additional evidence existed and that the jury should rely on the State's representation that additional evidence tending to incriminate the defendant exists.

The prosecutor also told the jury that the victim "was rotten. He was rotten because Daniel Peterka took him twenty miles away and didn't even put him in a grave, laid him on the ground and just threw a few shovels of dirt on him and throwed (sic) a couple of sticks on him and left him." (R. 1797).

The prosecutor repeatedly inflamed the jury by characterizing the shooting as: "John Russell got his brains blown out" (R. 1788); the victim was "flopping around with that head that had been blown with a .357 magnum" (R. 1789); "You can see that the tremendous force of the explosive gases from that gun also burst John Russell's head like an egg" (R. 1791).

Rather than focus on the evidence supporting his theory of premeditation to prove the only charge of first degree murder, the prosecutor attacked Mr. Peterka and called him a liar (R. 1779, 1780, 1782), and a thief (1779).

Also, the prosecutor elicited inflammatory testimony from Dr. Kielman. Dr. Kielman testified about the condition of the victim's body: "The maggots had done their job and much of [the tissue] was gone." (R. 1230). The medical examiner also described to the jury how the "insects, beetles and so forth . . . exploit[ed] [the victim's] chest and abdomen." (R. 1235). This testimony was irrelevant and highly prejudicial.

The prosecutor also made an improper argument at penalty phase. Although a decision to impose the death penalty must "be, and appear to be, based on

reason rather than caprice or emotion," Gardner v. Florida, 430 U.S. 349, 358 (1977) (opinion of Stevens, J.), here, because of the prosecutor's inflammatory argument, death was imposed based on emotion and prejudice.

The prosecutor argued that the mitigation presented by Mr. Peterka amounted to a "plea for sympathy". (R. 1909).

Arguments such as those presented in Mr. Peterka's case have been long-condemned as violative of due process and the eighth amendment. See Drake v. Kemp, 762 F.2d 1449, 1458-61 (11th Cir. 1985)(en banc). Appellate counsel was ineffective for failing to raise this issue on direct appeal. Habeas relief is proper.

CLAIM IV

APPELLATE COUNSEL FAILED TO RAISE THE PREJUDICIAL ERROR CAUSED BY THE ADMISSION OF A GRUESOME AND UNFAIRLY PREJUDICIAL CRIME SCENE PHOTOGRAPH AND THE USE OF THE VICTIM'S SKULL AS DEMONSTRATIVE EVIDENCE THAT VIOLATED MR. PETERKA'S FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS.

Because its theory of the case was almost entirely circumstantial, the State utilized a strategy of trying to evoke an emotional response to gruesome, cumulative evidence of both photographs and the victim's skull.

Over defense counsel's objection, the jury was shown a photograph of the victim's decomposing body (R. 1158-9).[8] The photograph was shown to Kevin Trently, a relative of the victim, in order to identify the body. Mr. Trently testified that he could identify the victim's body because of the tee-shirt and some hair in

[8]On direct appeal, appellate counsel challenged the admission of a photograph which depicted the victim's decomposing skull (State's ex. 36). However, despite an objection by trial counsel, appellate counsel did not challenge the admission of a photograph which depicted the victim's decomposing body (State's ex. 29).

the photograph that was similar to the victim's (R. 1156). Mr. Peterka's counsel objected to admission and argued that the photograph showed nothing of value about identity that could not be accomplished by introducing a photograph of the victim's tee-shirt without showing the extent of the decomposing body and that the photograph was prejudicial (R. 1158).

The State argued that the photograph was necessary to establish the identity of the victim (R. 1159). The court denied defense counsel's motion (R. 1159).

Photographs should be excluded when the risk of prejudice outweighs relevancy. Alford v. State, 307 So. 2d 433, 441-42 (Fla. 1975), cert. denied, 428 U.S. 912 (1976). Although relevancy is a key to admissibility of such photographs under Adams v. State, 412 So. 2d 850 (Fla. 1982), limits must be placed on "admission of photographs which prove, or show, nothing more, than a gory scene." Thomas v. State, 59 So. 2d 517 (1952).

Furthermore, a photograph's admissibility is based on relevancy, not necessity. Pope v. State, 679 So. 2d 710, 713 (Fla. 1996). And, while relevancy is the key to admissibility of photographs, this Court has indicated that courts must also consider the shocking nature of the photos and whether jurors are thereby distracted from fair factfinding. Czubak v. State 570 So. 2d 925, 928 (1990).

The State proved the victim's identity through the use of dental records and testimony of Dr. Petrey, a forensic odontologist (R. 1258-67). Dr. Petrey testified that the dental records of John Russell were the "same as the teeth of" the victim (R. 1266-7). The defense did not challenge Dr. Petrey's testimony. Therefore, it was unnecessary to call another witness to identify the body or to admit the photograph depicting the victim's decomposing body. Additionally, as the defense argued, other photos were available to prove identity.

Likewise, prejudicial error occurred, again, when the trial court, over defense counsel's objection, permitted Dr. Kielman to use the victim's skull during his

testimony. The most striking portion of Dr. Kielman's testimony concerned the decomposition of the victim's body and the subsequent removal of flesh from his bones (R. 1197-98, 1213). The State argued that Dr. Kielman needed to use the victim's skull to explain his testimony about the direction of the bullet (R. 1204). Defense counsel objected that it would be overly prejudicial to permit the use of the victim's skull during detailed testimony describing how a victim had decomposed, been eaten by insects and had tissue removed (R. 1213, 1215, 1230). A less prejudicial means existed to demonstrate the direction of the bullet. The trial court disagreed, overruled the objection, and permitted use of the skull (R. 1205). Furthermore, Dr. Kielman used the skull for the purpose of discussing the proximity of the weapon to the victim when the weapon was fired and the damage the pressure of the projectile created inside the skull (R. 1221-22). The skull was not only prejudicial, but it also served to inflame the jury.

Even the trial judge recognized the prejudice created by introduction of the victim's skull:

> MR. LOVELESS: Would the Court inform the jury what we are doing so that nobody has a heart attack out there and to identify that?
>
> MR. ELMORE: I'm going to let Dr. Kielman do that.
>
> JUDGE FLEET: You want me to tell them that this is a real sensitive matter?
>
> MR. LOVELESS: No, sir. Never mind, Judge. Like I said, Judge, I have never been in this situation before as far as having a person's skull, the murder victim's skull.
>
> JUDGE FLEET: I'll tell you from experience, counselor, leave it alone.
>
> MR. LOVELESS: I'll take the Court's advice.
>
> JUDGE FLEET: There is no way we can do or make any comment that is not going to inflame the situation.

(R. 1210-11).

Use of these gruesome photographs and the victim's skull were no more than

part of the State's strategy of evoking disgust towards Mr. Peterka. The prejudice substantially outweighed any probative value. The victim's skull had no probative value.[9] Mr. Peterka was denied a fair trial in violation of the Sixth, Eighth and Fourteenth Amendments to the United States Constitution; Duest v. State, 462 So. 2d 446 (Fla. 1985).

The State's use of the photograph and skull distorted the actual evidence against Mr. Peterka at the guilt phase and unfairly skewed the weight of aggravating circumstances at the penalty phase. Appellate counsel failed to raise this issue despite objections by trial counsel. Habeas relief is proper.

CLAIM V

MR. PETERKA WAS DENIED A FAIR TRIAL IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS BECAUSE IRRELEVANT AND PREJUDICIAL CHARACTER EVIDENCE ABOUT THE VICTIM WAS PRESENTED TO THE JURY DURING HIS TRIAL. APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE THIS ISSUE.

At Mr. Peterka's trial, the State presented improper character evidence about Mr. Russell. Section 90.404(1) of the Florida Evidence Code states:

> (1) Character evidence generally.--Evidence of a person's character or a trait of his character is inadmissible to prove action in conformity with it on a particular occasion except:
>
> (b) Character of the victim.--
> (1) ... evidence of a pertinent trait of character of the victim of the crime **offered by an accused, or by the prosecution to rebut the trait**; or
>
> (2) **Evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the aggressor.**

(emphasis added).

The State improperly presented evidence of Mr. Russell's reputation for

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[9]Dr. Kielman could have certainly used a diagram or reproduction of a skull to explain his opinion.

peacefulness. Mr. Peterka never claimed that he acted in self-defense and defense counsel did not offer any evidence of a self-defense theory. Moreover, Mr. Peterka never claimed that the shooting occurred as an accident and defense counsel never offered any evidence of an accident theory. Mr. Peterka's defense was simply that he did not plan to murder Mr. Russell and that he was not guilty of first degree murder.

The State called a relative of Mr. Russell, Kevin Trently, to testify in its case in chief. During Mr. Trently's direct examination testimony the State asked:

> Q: You knew John for around two years; is that correct?
>
> A: No, I'd say it was close to maybe thirteen months or so.
>
> Q: A little over a year?
>
> A: Yes.
>
> Q: Were you familiar with his reputation in the community for nonviolence or peacefulness?
>
> A: I don't think I understand your question.
>
> Q: Do you think you were familiar with John Russell's reputation?
>
> A: As far as his character?
>
> Q: Yes, sir. I don't want you to get into generally his character, but do you think you knew his reputation?
>
> MR. LOVELESS: Your Honor, I would note an objection at this time to the entire line of questioning.
>
> JUDGE FLEET: Objection sustained.
>
> MR. ELMORE: May we approach the bench, Judge?
>
> JUDGE FLEET: Yes.
>
> (WHEREUPON, a sidebar conference was held.)
>
> MR. ELMORE: Judge, it's the State's position that under the Florida Evidence Code the victim's character as it relates to nonviolence **has been made relevant by the Defense assertions in the statements that he gave that the victim was the aggressor in this case**. Therefore, the character traits of the victim for nonviolence are placed in issue by the defendant's statements.

JUDGE FLEET: The proper question hasn't been asked yet. The Court has sustained the objection to the question that you asked.

MR. ELMORE: Oh, I see. I'm trying to get to the proper question.

MR. LOVELESS: Your Honor, may I note an objection at this time, even if it is admissible, it's premature until the issue is proper for the jury.

JUDGE FLEET: I think you raised it in the motion, counselor.

(WHEREUPON, the sidebar conference was concluded.)

Q: Mr. Trently, are you familiar with the representation (sic) of John Russell in general? Just yes or no. Are you familiar with he his representation (sic)?

A: Yes.

Q: Are you familiar with the reputation of John Russell as it relates to peacefulness or nonviolence?

A: Yes.

Q: Would you say he has a reputation for --

MR. LOVELESS: Your Honor, objection.

JUDGE FLEET: Objection to the form of the question sustained.

Q: (By Mr. Elmore) What is his reputation for peacefulness?

MR. LOVELESS: Same objection.

JUDGE FLEET: Objection is overruled.

The Witness: He was never violent while I was with him.

MR. LOVELESS: Your Honor, may we approach the bench, please?

JUDGE FLEET: Yes, you may.

* * *

Q: (By Mr. Elmore) Mr. Trently, my question to you is whether you are familiar with John Russell's reputation in the community, that is in the community in which he lives or works, people that know him or know of him. Are you familiar with his reputation in that community for peacefulness?

A: Yes.

> Q: Can you tell me what that reputation would be without telling me about any personal observations you made of John Russell?
>
> A: A reputation of nonviolence.
>
> MR. LOVELESS: Your Honor, my objection was as to that particular entire line of questioning.
>
> JUDGE FLEET: The objection is overruled subject to your right to cross, counselor.

(R. 1165-69)(emphasis added).

The State cannot present character evidence about the victim unless and until the defense presents evidence that the victim was the aggressor in a case where the defense is self-defense. Garner v. State, 9 So. 835 (1891). In Garner, this Court stated:

> Evidence of the violent and dangerous character of the deceased is admissible to show, or as tending to show, that a defendant has acted in self-defense, ... but it is not admissible for this purpose, except where it explains, or will give meaning, significance or point to the conduct of the deceased at the time of the killing, or will tend to do so; and such conduct of the deceased, at the time of the killing, which it is proposed thus to explain, **must be shown before the auxiliary evidence** of such character can be introduced.

9 So. at 841 (emphasis added). Moreover, evidence of a struggle between defendant and victim is not the equivalent of a defense of self-defense. The State could not have claimed that the defense opened the door. The State presented Mr. Peterka's statement to the jury, not the defense. It was the State's choice to present Mr. Peterka's complete statement.

In Williams v. State, 238 So. 2d 137 at 139 (Fla. 1st DCA), cert. denied, 241 So. 2d 397 (Fla. 1970), this Court held that evidence of the victim's reputation is not admissible, "until the defendant shows some evidence that he acted in self defense ...". Mr. Peterka did not present any evidence that he acted in self-defense. Mr. Peterka did not cross-examine any of the State's witnesses to elicit testimony about the victim's character. Mr. Peterka's statement was that he shot Mr. Russell without the intent necessary for the State to obtain a first degree murder conviction,

much less a death sentence (R. 2244, 2444).

Even if Mr. Peterka's counsel had intended to present evidence of self-defense, the State could not have anticipated this and presented rebuttal testimony in it's case in chief. Jacob v. State, 546 So. 2d 113, 115 (Fla. 3rd DCA, 1989)("We have found no authority which would allow anticipatory rehabilitation of a victim on direct examination by the prosecution. Moreover, the purpose of anticipatory rehabilitation is to mitigate damaging impeachment evidence; the tactic has no discernible application to character evidence.").

If defense counsel had presented evidence of self-defense, only then, in the State's rebuttal, would it have been proper for the State to present character evidence about Mr. Russell. The State's presentation of the character evidence was not an isolated incident. During the State's direct examination of Deborah Trently and Gary Johnson, the State asked the witnesses about Mr. Russell's reputation in the community (R. 1180-83, 1298-1300).

The State argued in closing that, "[i]f John had been in other fights you would have heard about it in this courtroom. He hasn't ever been in one" (R. 1780-81). These facts were not in evidence.

All of the evidence about Mr. Russell's reputation in the community was improper, inadmissible character evidence. The evidence was prejudicial. Appellate counsel was ineffective for failing to raise this issue. Habeas relief is proper.

CLAIM VI

THE JURY WAS IMPROPERLY INSTRUCTED AND THE TRIAL COURT IMPROPERLY CONSIDERED INVALID AGGRAVATING CIRCUMSTANCES IN VIOLATION OF MR. PETERKA'S EIGHTH AND FOURTEENTH AMENDMENT RIGHTS. APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE THIS ISSUE.

From the outset, the jury was misinformed about the aggravating and

mitigating circumstances. The trial court told Juror King that aggravating factors were "circumstances above and beyond normal." (R. 398). The trial court also defined aggravating and mitigating factors for Juror Martin: "An aggravating circumstance is one that would tend to make the juror recommend the death penalty" and "A mitigating circumstance is one that would tend to make the juror vote against the death penalty." (R. 963).

A. AVOIDING OR PREVENTING A LAWFUL ARREST AND DISRUPTING OR HINDERING A GOVERNMENTAL FUNCTION

1. Duplicative Aggravating Factors

Mr. Peterka's jury was instructed to consider duplicative aggravating factors. The prosecutor argued that each of the aggravating circumstances existed, based on a single aspect of the crime – that Mr. Peterka was a fugitive from Nebraska (R. 1908).

The trial court found the duplicative aggravating circumstances: that the crime was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody and the crime was committed to disrupt or hinder the lawful exercise of any governmental function (R. 2078).

This Court has consistently held that "doubling" of aggravating circumstances is improper. See Richardson v. State, 437 So. 2d 1091 (Fla. 1983).

The jury was allowed to rely upon these duplicative aggravating circumstances in reaching a recommendation for death. This "doubling" rendered Mr. Peterka's capital sentencing proceeding fundamentally unreliable and unfair.

2. Vague Instructions

The instruction read to Mr. Peterka's jury on the "avoiding or preventing a lawful arrest of effecting an escape from custody" aggravating circumstance was unconstitutionally vague. This factor is constitutional only when the sentencer is informed of, and applies this Court's limiting construction of this aggravating

circumstance. Failure to so instruct renders this factor vague and overbroad, see Godfrey v. Georgia, 446 U.S. 420 (1980), and, as such, fails to genuinely narrow the class of persons eligible for the death sentence. See Zant v. Stephens, 462 U.S. 862, 876 (1983).

For this aggravating circumstance to apply, the dominant motive for the homicide must be to avoid arrest. Where facts fail to establish that the dominant or only motive for the homicide was the elimination of witnesses, the avoiding arrest aggravator is improper. Melendez v. State, 368 So. 2d 1278 (Fla. 1979), appeal after remand, 419 So. 2d 312 (Fla. 1982), 366 So. 2d 19 (Fla. 1978). This Court has also explained that, when the victim is not a law enforcement officer, elimination of a witness must be shown beyond a reasonable doubt to be the sole or dominant motive for the murder. Preston v. State, 607 So. 2d 404, 409 (Fla. 1992). Nevertheless, Mr. Peterka's jury was never informed of these limiting constructions.

The instruction violated Espinosa v. Florida, 112 S. Ct. 2926 (1992); Stringer v. Black, 112 S. Ct. 1130 (1992); Sochor v. Florida, 112 S. Ct. 2114 (1992); Maynard v. Cartwright, 108 S. Ct. 1853 (1988), and the Eighth and Fourteenth Amendments to the United States Constitution.

B. PECUNIARY GAIN

Mr. Peterka's jury was instructed to consider the aggravating circumstance that the crime was committed for "pecuniary gain". This Court struck this aggravating circumstance on direct appeal. Peterka v. State, 640 So. 2d 59, 71 (Fla. 1994). In Florida, neither the judge or the jury is permitted to weigh invalid aggravating factors. Espinosa, 112 S. Ct. at 2929. As the United States Supreme Court has explained, the jury is unlikely to disregard a flawed legal theory and therefore instructing the jury to consider an invalid aggravating circumstance is not harmless error. Sochor, 112 S. Ct. at 2122.

This Court has ruled that the "pecuniary gain" aggravating factor applies only where pecuniary gain is shown to be the primary motive for the murder. Small v. State, 533 So. 2d 1137, 1142 (Fla. 1988). Without this limitation, the statute setting forth the "pecuniary gain" aggravating factor is facially vague and overbroad because it fails to adequately inform the sentencer what must be found for the aggravator to be present.

The trial court found the existence of this aggravating factor, but did not apply the required construction. Mr. Peterka's jury was also not provided with this limiting construction (R. 1918). The jury was never instructed that the State carried a burden of proving the "primary motive" element of this aggravating circumstance.

Such instruction violates Espinosa v. Florida, 112 S. Ct. 2926 (1992); Stringer v. Black, 112 S. Ct. 1130 (1992); Sochor v. Florida, 112 S. Ct. 2114 (1992); Maynard v. Cartwright, 108 S. Ct. 1853 (1988), and the Eighth and Fourteenth Amendments to the United States Constitution.

C. COLD, CALCULATED AND PREMEDITATED

Mr. Peterka's sentencing jury was also instructed that they could consider the aggravating circumstance that "the crime for which the defendant is to be sentenced was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification" (R. 1919). This jury instruction was unconstitutionally vague.

The court did not instruct Mr. Peterka's jury regarding the cold, calculated, and premeditated aggravating factor in accordance with this Court's limiting construction. Jackson v. State, 648 So. 2d 85 (Fla. 1994). This Court has held that the jury should be instructed on the limiting constructions of this aggravating circumstance, whenever they are allowed to consider it. Mr. Peterka's jury was given an invalid instruction on the cold, calculated and premeditated aggravating circumstance (R. 1919).

In Mr. Peterka's case, it is obvious that the jury was confused. The jury requested definitions of aggravating circumstances and mitigating circumstances (R. 1924).

In Jackson, this Court invalidated as unconstitutionally vague a jury instruction on the cold, calculating, and premeditated aggravating circumstance that mirrored the statute. The instruction in Mr. Peterka's case is similarly vague and unconstitutional.

The only instruction the jury ever received regarding the definition of "premeditated" was the instruction given at the guilt phase regarding the premeditation necessary to establish guilt of first degree murder. As this Court has held, this definition does not define the "cold, calculated and premeditated" aggravating factor. See Rogers v. State, 511 So. 2d 526, 533 (Fla. 1987); Gorham v. State, 454 So. 2d 556 (Fla. 1984). It must be presumed that the erroneous instruction tainted the jury's recommendation, and in turn the judge's death sentence, with Eighth Amendment error. Espinosa.

Richmond v. Lewis, 113 S. Ct. 528 (1992), requires not only that states adopt a narrowing construction of an otherwise vague aggravating factor, but also that the narrowing construction actually be applied during a "sentencing calculus."

Defense counsel objected to the instruction in a pre-trial motion (R. 15). Appellate counsel was ineffective for failing to raise this issue. Habeas relief is proper.

CLAIM VII

MR. PETERKA'S RIGHT TO A FAIR TRIAL UNDER THE DUE PROCESS CLAUSES OF THE UNITED STATES AND FLORIDA CONSTITUTIONS WAS VIOLATED WHEN THE TRIAL COURT ADMITTED IRRELEVANT AND PREJUDICIAL HEARSAY THAT HE WAS CONSIDERED "ARMED AND DANGEROUS". APPELLATE COUNSEL RENDERED INEFFECTIVE ASSISTANCE IN FAILING TO

ADEQUATELY PRESENT THIS CLAIM.[10]

At trial, Deputy Harkins testified that he had conducted a computer check and discovered Mr. Peterka was a fugitive from Nebraska, and considered "armed and dangerous" (R. 1355). Mr. Peterka's trial counsel objected to the testimony based on hearsay and unfair prejudice, but the trial court overruled the objection (R. 1355-57).[11]

This Court held in State v. Baird, 572 So. 2d 904, 907 (Fla. 1990), that "an out-of-court statement which is offered for a purpose other than proving the truth of its contents is admissible only when the purpose for which the statement is being offered is a material issue in the case." Accord Wilding v. State, 674 So. 2d 114 (Fla. 1996), receded from on other grounds, Devoney v. State, 717 So. 2d 501 (Fla. 1998).

Although the hearsay was admitted to prove why the officers used a ruse to arrest Mr. Peterka, the officers' state of mind was not a material issue: why they tricked Mr. Peterka at the time of arrest – some thirty-two hours after the shooting – had no logical connection to the issue in dispute, i.e., whether or not Mr. Peterka shot Mr. Russell with a premeditated intent. Accordingly, the trial court erred by admitting this hearsay.

Where the sole purpose for admitting testimony that a defendant was

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[10]Mr. Peterka acknowledges that reexamination of points of law decided in an earlier appeal is a matter of grace, not a matter of right, and that it is not allowed when it would amount to nothing more than a second appeal on questions resolved in the earlier appeal. However, an exception to the doctrine is recognized where strict adherence to it would result in manifest injustice. Strazzulla v. Hendrick, 177 So. 2d 1, 4 (Fla. 1965).

[11]Notably, when Mr. Peterka's trial counsel sought to preclude this testimony before trial the prosecutor agreed that its admission would be "a prejudicial matter" (R. 370).

considered "armed and dangerous" in a homicide case is to describe the events leading up to an arrest, the need for the evidence is slight and the likelihood of misuse is great. Baird, 572 So. 2d at 908 (citing Harris v. State, 544 So. 2d 322, 324 (Fla. 4th DCA 1989)). This Court has found admission of testimony comparable to that at issue here to be reversible error under similar facts and circumstances. See, e.g., Czubak v. State, 570 So. 2d 925, 927-28 (Fla. 1990).

There is a reasonable probability the jury unfairly considered Mr. Peterka's being "armed and dangerous" not only as proof of his bad character and a propensity for violence, but also as substantive evidence that Mr. Peterka shot the victim with a premeditated intent. Thus reversal was warranted. Goodwin v. State, 751 So. 2d 537 (Fla. 1999); State v. Diguilio, 491 So. 2d 1129 (Fla. 1986).

Accordingly, habeas relief is warranted on this issue.

CLAIM VIII

MR. PETERKA'S RIGHT TO A FAIR TRIAL UNDER THE DUE PROCESS CLAUSES OF THE UNITED STATES AND FLORIDA CONSTITUTIONS WAS VIOLATED WHEN THE TRIAL COURT ADMITTED IRRELEVANT AND PREJUDICIAL HEARSAY TESTIMONY THAT THE VICTIM WAS AFRAID OF MR. PETERKA'S GUN. APPELLATE COUNSEL RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL IN FAILING TO ADEQUATELY RAISE THIS ISSUE.[12]

At trial, the prosecutor elicited from two witnesses testimony that the victim told them he was afraid of the gun Mr. Peterka had (R. 1435, 1605). Mr. Peterka's trial counsel objected on hearsay grounds, but the trial court rejected the argument

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[12]Mr. Peterka acknowledges that reexamination of points of law decided in an earlier appeal is a matter of grace, not a matter of right, and that it is not allowed when it would amount to nothing more than a second appeal on questions resolved in the earlier appeal. However, an exception to the doctrine is recognized where strict adherence to it would result in manifest injustice. Strazzulla v. Hendrick, 177 So. 2d 1, 4 (Fla. 1965).

ruling the hearsay was admissible to "show what the state of mind of [the victim] might have been on ...the date... he was killed" (R. 1434).

The State's position both at trial and on direct appeal was that the hearsay regarding the victim's fear of Mr. Peterka's gun was properly admitted to rebut Mr. Peterka's claim the shooting occurred either in self-defense or accidentally (R. 1419-28, and Answer Brief, pp. 63-4). However, Mr. Peterka never claimed he shot the victim in self-defense and did not claim the type of accidental shooting necessary to have placed the victim's fears in issue.

In United States v. Brown, 490 F.2d 758 (D.C. Cir. 1973), the Court held that a victim's statements would be relevant and admissible in a homicide case where the defendant claimed: First, self-defense and the victim's statements that he feared the defendant render it unlikely he was the aggressor; second, the victim committed suicide and the victim's statements were inconsistent with suicide; or:

> [the] third situation involves a claim of accidental death where, for example, defendant's version of the facts is that the victim picked up defendant's gun and was accidentally killed while toying with it. In such cases the deceased's statements of fear as to guns . . .(showing he would never go near [guns] under any circumstances) are relevant in that they tend to rebut this defense. Of course, even in those cases, where the evidence is of an [unfairly] prejudicial nature, it has been held that it must be excluded in spite of a significant degree of relevance.

Id. at 767 (footnotes omitted).

Mr. Peterka never claimed that the victim shot himself accidentally. Accordingly, the trial court erred by admitting the hearsay that the victim was afraid of Mr. Peterka's gun – not merely because it was irrelevant, but because it was prejudicial and not harmless beyond a reasonable doubt.

For example, in Kennedy v. State, 385 So. 2d 1020 (Fla. 5th DCA 1980), the defendant was tried and convicted of the first degree premeditated murder of her husband. Kennedy took the stand in her own defense and testified that she had no intention of killing her husband and was not present when the fatal shots were fired.

Kennedy, 385 So. 2d at 1022. The trial court then admitted the testimony of two State witnesses who told the jury, over Kennedy's hearsay objection, that her husband had told them he was afraid Kennedy would blow up his camper, shoot him, or send her boys for him. Id. at 1020-21.

On appeal, the Court held that the state of mind exception to the hearsay rule allows admission of extrajudicial statements to show the state of mind of a deceased declarant only where that is in issue. Id. at 1021-22. However, the state of mind of the victim was not in issue; instead, the issue was the state of mind of the defendant. Id. The court explained that the admission of the victim's statements was reversible error because:

> The appellant was thus accused of the premeditated murder of the deceased by the deceased's own words from beyond the grave. With no opportunity to contradict or rebut the words of the dead victim, the appellant was denied due process of law as mandated by the United States and Florida Constitutions.

Id. at 1023.

In Hunt v. State, 429 So. 2d 811 (Fla. 2d DCA 1983), the defendant was tried and convicted of the second degree murder of his live-in girlfriend. Hunt testified that he accidentally shot the victim. Hunt, 429 So. 2d at 812. The trial court then admitted the testimony of three State witnesses who told the jury, over Hunt's hearsay objection, that his girlfriend had told them she was afraid of Hunt and the guns he had in the house. Id.

On appeal, the court held that the admission of hearsay testimony dealing with the deceased's fear of the defendant and his guns was reversible error:

> Such statements may be admissible, if they are not highly prejudicial, where the defendant claimed self-defense, the victim's suicide, or that the victim accidentally killed himself. In the present case none of these situations apply.
>
> The deceased's state of mind was not placed in issue by Hunt's claim that he had accidentally shot the deceased. The admission into evidence of the testimony dealing with the deceased's fear of Hunt was erroneous. Under the circumstances of this case, where Hunt claimed

> that the deceased was accidentally shot, the improper admission into evidence of the hearsay cannot be said to have been harmless error.

Id. at 813 (citations omitted).

Likewise in this case, there is a reasonable probability the jury unfairly considered the victim's fear of Mr. Peterka's gun to be a reflection of Mr. Peterka's state of mind, i.e., to be a true indication Mr. Peterka shot the victim with a premeditated intent, especially since the prosecutor endorsed exactly this misuse of the victim's state of mind in his closing argument (R. 1781). Reversal is warranted. Goodwin v. State, 751 So. 2d 537 (Fla. 1999); State v. Diguilio, 491 So. 2d 1129 (Fla. 1986).

This ground for relief was raised in Mr. Peterka's direct appeal as Claim V and was denied. Peterka v. State, 640 So. 2d 59, 68-9 (Fla. 1994). However, this Court denied the claim because appellate counsel rendered ineffective assistance: Not only did he fail to clearly and cogently articulate the foregoing argument demonstrating a reversible error, but he also failed to point out on motion for rehearing that this Court misapprehended the law as Kingery v. State, 523 So. 2d 1199 (Fla. 1st DCA 1988), the obiter dictum of which it relied in denying the claim, factually misquoted the authoritative holding of United States v. Brown, 490 F.2d 758 (D.C. Cir. 1973)(compare Peterka, 640 So. 2dat 68-9, and Kingery, 523 So. 2d 1202, with Brown, 490 F.2d 767).

This ground for relief was raised in Mr. Peterka's direct appeal and was denied. Peterka v. State, 640 So. 2d 59, 68 (Fla. 1994). However, this Court denied the claim because his appellate counsel rendered ineffective assistance: Not only did he fail to clearly and cogently articulate the foregoing argument demonstrating reversible error, but he also failed to point out on motion for rehearing that the trial court did not give the jury the limiting instruction on the

armed and dangerous testimony which this Court concluded "eliminated any prejudice that may have resulted from [its admission]" (compare Peterka, 640 So. 2d at 68, with R. 1355-57).

Accordingly, habeas relief is warranted on this issue.

CONCLUSION AND RELIEF SOUGHT

For all the reasons discussed herein, Mr. Peterka respectfully urges this Court to grant habeas corpus relief.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing **PETITION FOR WRIT OF HABEAS CORPUS** has been furnished by United States Mail, first-class postage prepaid, to Gary Milligan, Assistant Attorney General, Office of the Attorney General, The Capitol - PL-01, Tallahassee, Florida, 32399-1050, on March 21, 2003.

CERTIFICATE OF TYPE SIZE AND STYLE

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