SUPREME COURT OF FLORIDA

DONALD DAVID DILLBECK,
Petitioner,

-vs.- CASE NO.

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

PETITION FOR WRIT OF HABEAS CORPUS

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INTRODUCTION

This Petition for Writ of Habeas Corpus relief is being filed in order to address the effect on Mr. Dillbeck's case of the recent decisions in *Ring v. Arizona*, 122 S.Ct. 2428 (2002), *Bottoson v. Moore*, 833 So.2d 694 (Fla.2002) and *King v. Moore*, 831 So.2d 143 (Fla. 2002). Based on these decisions, Mr. Dillbeck submits that prior affirmance of his sentence must be revisited and that, as a result, habeas relief should issue. While recognizing that Dillbeck's claim may arguably have been mooted by *Bottoson* and *King*, the substantial upheaval in death penalty jurisprudence occasioned by *Ring* requires that the issue be preserved by raising it before this court.[1]

JURISDICTION

A Writ of Habeas Corpus is an original proceeding in this Court governed by Florida Rules of Appellate Procedure 9.100. This Court has original jurisdiction under Florida Rules of Appellate Procedure 9.030(a)(3) and Article 5, Section 3b(9), Florida Constitution. The Constitution of the State of Florida guarantees that "The Writ of Habeas Corpus shall be grantable of right, freely and without

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[1]The arguments herein mirror those made in Claim V in *Diaz v. Crosby*, SC03-234.

cost." Article 1, Section 13, Florida Constitution.

This Court's jurisdiction over an appeal also necessarily includes the "authority to change the law of the case previously set forth." *Jones v. State*, 559 So.2d 204, 206 (Fla. 1990), *accord, Brunner Enterprises v. Department of Revenue*, 452 So.2d 550 (Fla. 1984). This Court has not hesitated to apply intervening changes in law or intervening legislation whether they inure to the benefit of the State, *See*, *State v. Owen*, 696 So.2d 715 (Fla. 1997); *Tryder v. State*, 697 So.2d 1234 (Fla. 1996), or to a criminal defendant. *See, e.g. Thompson v. Dugger*, 515 So.2d 173 (Fla. 1987); *Riley v. Wainwright*, 517 So.2d 656 (Fla. 1987).

RELIEF SOUGHT

Dillbeck seeks to have his sentence of death vacated and the case remanded to the trial court for re-sentencing.

PROCEDURAL HISTORY

An Indictment filed in the Circuit Court for Leon County on July 10, 1990 charged Donald Dillbeck with one count each of First Degree Murder, Armed Robbery, and Armed Burglary, to which he plead not guilty. Dillbeck proceeded to

trial before the Honorable F.E. Steinmeyer, III on February 18, 1991. The jury returned a verdict of guilty finding that he had committed murder with both premeditation and during the course of a felony.

The Court heard evidence during the penalty phase beginning on February 27, 1991, and the jury, by a vote of eight to four, recommended death. On March 15, 1991 the Court accordingly sentenced the Defendant to that penalty finding that numerous mitigating factors did not outweigh the five statutory aggravating factors. Mr. Dillbeck, unsuccessfully, appealed his convictions and sentenced to this Court *Dillbeck v. State,* 643 So.2d (Fla. 1994). Dillbeck sought Petition for Certiori from the United States Supreme Court, but was denied. 115 S.Ct. 1371(1995).

Mr. Dillbeck, thereafter, filed a Motion for Post Conviction Relief, pursuant to Florida Rules of Criminal Procedure 3.850. The Circuit Court held an evidentiary hearing on all of Mr. Dillbeck's claims, which related primarily to ineffective assistance of counsel, but then entered an Order summarily denying the requested relief, without addressing the merits of each claim. Mr. Dillbeck's appeal of this ruling is presently before this Court. *Dillbeck v. State*, SC02-2044.

CLAIM I

THE FLORIDA CAPITAL SENTENCING PROCEDURES AS EMPLOYED IN MR. DILLBECK'S CASE VIOLATED HIS SIXTH AMENDMENT RIGHT TO HAVE A JURY RETURN A VERDICT ADDRESSING HIS GUILT OF ALL OF THE ELEMENTS NECESSARY FOR THE CRIME OF CAPITAL FIRST DEGREE MURDER.

I. INTRODUCTION

In *Ring v. Arizona*, 122 S.Ct. 2428 (2002), the Supreme Court held the Arizona capital sentencing scheme unconstitutional because a death sentence there is contingent upon finding an aggravating circumstance and assigns responsibility for finding that circumstance to the judge. The Arizona scheme was found to violate the constitutional guarantee to a jury determination of guilt in all criminal cases. The Supreme Court based its *Ring* holding on its earlier decision in *Apprendi v. New Jerse*y, 530 U.S. 466 (2000), where it held that "[i]t is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed." *I*d. at 490 (quoting *Jones v. United State*s, 526 U.S. 227, 252-53 (1999) (Stevens, J., concurring)). Capital sentencing schemes such as those in Florida and

Arizona violate the notice and jury trial rights guaranteed by the Sixth and Fourteenth Amendments because they do not allow the jury to reach a verdict with respect to an aggravating fact that is an element of the aggravated crime punishable by death.

II. *RING* APPLIES TO THE FLORIDA CAPITAL SCHEME.

A. The basis of *Mills v. Moore* is no longer valid.

This Court has previously held that, "[b]ecause *Apprendi* did not overrule *Walton,* the basic scheme in Florida is not overruled either." *Mills v. Moore*, 786 So.2d 532, 537 (Fla. 2001). *Ring* overruled *Walton v. Arizona*, 497 U.S. 639 (1990), and the basic principle of *Hildwin v. Florida*, 490 U.S. 638 (1989), which had upheld the basic scheme in Florida "on grounds that 'the Sixth Amendment does not require that the specific findings authorizing imposition of the sentence of death be made by the jury.'" *Ring*, 122 S. Ct. at ___ *(quoting Walton*, 497 U.S. at 648). Additionally, *Ring* undermines the reasoning of this Court in *Mills* by establishing: (a) that *Apprendi* applies to capital sentencing schemes; (b) that States may not avoid the Sixth Amendment requirements of *Apprendi* by simply specifying death or life imprisonment as the only sentencing options; and (c) that the relevant and dispositive question is whether under state law death is "authorized

by a guilty verdict standing alone."

In *Mill*s, this Court observed that the "the plain language of *Apprendi* indicates that the case is not intended to apply to capital [sentencing] schemes." *Mill*s, 786 So.2d at 537. Such statements appear at least four times. *Mills* reasoned that because first-degree murder is a "capital felony," and the dictionary defines such a felony as "punishable by death," the finding of an aggravating circumstance did not expose the petitioner to punishment in excess of the statutory maximum. *Mill*s, 786 So.2d at 538. The logic of *Mills* simply did not survive *Ring*.

B. In Florida, Eighth Amendment narrowing occurs at sentencing.

Section Fla. Stat. 921.141 provides:

> (3) FINDINGS IN SUPPORT OF SENTENCE OF DEATH--Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence is based as to the facts:
>
> (a) The sufficient aggravating circumstances exist as enumerated in subsection (5), and
> (b) That there are insufficient mitigating circumstances to outweigh the aggravating circumstances.

> In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsections (5) and (6) and upon the records of the trial and the sentencing proceedings. **If the court does not make the findings requiring the death sentence, the court shall impose sentence of life imprisonment in accordance with S. 775.082.**
> (Fla. Stat. 921.141(3))(emphasis added).

In *Stringer v. Black*, 503 U.S. 222 (1992), the United States Supreme Court was called upon to discuss and contrast capital sentencing schemes and their use of aggravating circumstances. According to the United States Supreme Court:

> In Louisiana, a person is not eligible for the death penalty unless found guilty of first-degree homicide, a category more narrow than the general category of homicide. [Citation]. A defendant is guilty of first-degree homicide if the Louisiana jury finds that the killing fits one of five statutory criteria. [Citation]. After determining that a defendant is guilty of first-degree murder, a Louisiana jury next must decide whether there is at least one statutory aggravating circumstance and, after considering any mitigating circumstances, determine whether the death penalty is appropriate. [Citation]. Unlike the Mississippi process, in Louisiana the jury is not required to weigh aggravating against mitigating factors.
>
> In *Lowenfield v. Phelps*, 484 U.S. 231 (1988)], the petitioner argued that his death sentence was invalid because the aggravating factor found by the jury duplicated the elements it already had found in determining there was a first-degree homicide. We

> rejected the argument that, as a consequence, the Louisiana sentencing procedures had failed to narrow the class of death-eligible defendants in a predictable manner. We observed that "[t]he use of 'aggravating circumstances' is not an end in itself, but a means of genuinely narrowing the class of death-eligible persons and thereby channeling the jury's discretion. We see no reason why this narrowing function may not be performed by jury findings at either the sentencing phase of the trial or the guilt phase." [Citation]. **We went on to compare the Louisiana scheme with the Texas scheme, under which the required narrowing occurs at the guilt phas**e. [Citation]. **We also contrasted the Louisiana scheme with the Georgia and Florida scheme**s. [Citation].
>
> The State's premise that the Mississippi sentencing scheme is comparable to Louisiana's is in error. The Mississippi Supreme Court itself has stated in no uncertain terms that, with the exception of one distinction not relevant here, its sentencing system operates in the same manner as the Florida system; and Florida, of course, is subject to the rule forbidding automatic affirmance by the state appellate court if an invalid aggravating factor is relied upon. In considering a *Godfrey* claim based on the same factor at issue here, the Mississippi Supreme Court considered decisions of the Florida Supreme Court to be the most appropriate source of guidance.

*Stringe*r, 503 U.S. at 233-34 (emphasis added).

In fact, the Louisiana statute defined first degree murder as fitting within one of five circumstances in contrast to Florida's provision that first degree murder is either premeditated or felony murder. *Lowenfiel*d, 484 U.S. at 242. The Supreme

Court in *Lowenfield* found that the Louisiana capital scheme operated similar to the Texas scheme that provided for death eligibility to be determined at the guilt phase of the trial as had been explained in *Jurek v. Texas*, 428 U.S. 262 (1976):

> But the opinion *[Jurek*] announcing the judgment noted the difference between the Texas scheme, on the one hand, and the Georgia and Florida schemes discussed in the cases of *Gregg v. Georgia*, 428 U.S. 153 (1976)], and *Proffitt v. Florida*, 428 U.S. 242 (1976)]:
>
> > "While Texas has not adopted a list of statutory aggravating circumstances the existence of which can justify the imposition of the death penalty as have Georgia and Florida, its action in narrowing the categories of murders for which a death sentence may ever be imposed serves much the same purpose . . . .
> > In fact, each of the five classes of murders made capital by the Texas statute is encompassed in Georgia and Florida by one or more of their statutory aggravating circumstances . . . . Thus, in essence, the Texas statute requires that the jury find the existence of a statutory aggravating circumstance before the death penalty may be imposed. So far as consideration of aggravating circumstances is concerned, therefore, the principal difference between Texas and the other two States is that the death penalty is an available sentencing option - -even potentially - - for a smaller class of murders in Texas." 428 U.S. at 270-71 (citations omitted).
>
> It seems clear to us from this discussion that the narrowing function required for a regime of capital punishment may be provided in either of these two ways:

> **The legislature may itself narrow the definition of capital offenses, as Texas and Louisiana have done, so**
> **that the jury finding of guilt responds to this concern, or the legislature may more broadly define capital offenses and provide for narrowing by jury findings of aggravating circumstances at the penalty phas**e. See also *Zant v. Stephen*s, 462 U.S. 862, 876 n.13 (1983)] discussing *Jurek* and concluding: "[I]n Texas, aggravating and mitigating circumstances were not considered at the same stage of the criminal prosecution." *Lowenfield*, 484 U.S. 245-47 (emphasis added).

This Court has recognized that the aggravating circumstances at issue in the penalty phase performed the Eighth Amendment narrowing function in conformity with *Zant v. Stephen*s:

> To avoid arbitrary and capricious punishment, this aggravating circumstance "must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." *Zant v. Stephen*s, 462 U.S. 862 (1983)(footnote omitted). Since premeditation is already an element of capital murder in Florida, section 921.141 (5)(I) must have a different meaning; otherwise, it would apply to every premeditated murder.

*Porter v. Stat*e, 564 So.2d 1060, 1064 (Fla. 1990).

Thus, it is clear that the factual determination of "sufficient aggravating circumstances" at the sentencing is the finding of those additional facts that are necessary under the Eighth Amendment requirement that death eligibility be

narrowed beyond the traditional definition of first degree murder. *Zant*, 462 U.S. at 878 ("[S]tatutory aggravating circumstances play a constitutionally necessary function at the stage of legislative definition: they circumscribe the class of persons eligible for the death penalty"). Clearly in Florida, the narrowing of the death eligible occurs in the sentencing phase. The factual determination that - "sufficient aggravating circumstances exist" - has not been made during the guilt phase of a capital trial under Florida law as it has operated during the past 25 years.

C. In Florida, the eligibility determination is not made in conformity with the right to trial by jury.

The Florida capital sentencing statute, like the Arizona statute struck down in *Ring*, makes imposition of the death penalty contingent upon the factual findings of the judge at the sentencing - not upon a jury determination made in conformity with the Sixth Amendment. Section 775.082 of the Florida Statutes provides that a person convicted of first-degree murder must be sentenced to life imprisonment "unless the proceedings held to determine sentence according to the procedure set forth in § 921.141 result in finding by the court that such person shall be punished by death." This Court has long held that §§ 775.082 and 921.141 do not allow

imposition of a death sentence upon a jury's verdict of guilt, but only upon the finding of sufficient aggravating circumstances. *State v. Dixo*n, 283 So.2d 1, 7 (Fla. 1973).

In *Harris v. United State*s, 122 S.Ct. 2406 (2002), the Supreme Court held that under *Apprendi* "those facts setting the outer limits of a sentence, and of the judicial power to impose it, are the elements of the crime for the purposes of the constitutional analysis." *Id*. and in *Ring*, the Court held that the aggravating factors enumerated under Arizona law operated as "the functional equivalent of an element of a greater offense" and thus had to be found by a jury. Pursuant to the reasoning set forth in *Apprendi* and *Ring,* aggravating factors are equivalent to elements of the capital crime itself and must be treated as such. The full panoply of rights associated with trial by jury must therefore attach to the finding of "sufficient aggravating circumstances."

1. No unanimous determination of eligibility.

In conformity with Florida law for the past 25 years, the guilt phase verdicts returned by the unanimous jury have not included a finding of "sufficient aggravating circumstances" necessary to render a defendant death eligible. The penalty phase jury is instructed that its recommendation is advisory and need not be

unanimous. Findings of the elements of a capital crime by a mere simple majority is unconstitutional under the Sixth and Fourteenth Amendments. In the same way that the Sixth Amendment guarantees a baseline level of certainty before a jury can convict a defendant, it also constrains the *number* of jurors who can render a guilty verdict. *See, Apodaca v. Oregon*, 406 U.S. 404 (1972) (the Sixth and Fourteenth Amendments require that a criminal verdict must be supported by at least a "substantial majority" of the jurors). Clearly, a mere numerical majority -- which is all that is required under Section 921.141(3) for the jury's advisory sentence – would not satisfy the "substantial majority" requirement of *Apodaca. See, e.g., Johnson v. Louisiana*, 406 U.S. 356, 366 (1972) (Blackmun, J., concurring) (a state statute authorizing a 7-5 verdict would violate Due Process Clause of Fourteenth Amendment).

Since Florida's enumerated aggravating factors operate as 'the functional equivalent of an element of a greater offense," that element must be found by a jury like any other element of an offense. *Apprendi*, 530 U.S. at 494. *See, Sattazahn v. Pennsylvania*, 123 S.Ct. 732 (2003). As to the determination of the presence of other elements of a crime, Florida law provides, "No verdict may be rendered unless all of the trial jurors concur in it." *Fla. R. Crim. P*. 3.440. Florida courts have held that unanimity is required at the guilt phase of a capital case. *Williams v.*

State, 438 So.2d 781, 784 (Fla. 198*3). See, Flanning v. State*, 597 So.2d 864, 866 (Fla. 3rd DCA 1992)("It is therefore settled that '[i]n this state, the verdict of the jury must be unanimous' and that any interference with this right denied the defendant a fair trial. *Jones v. State,* 92 So.2d 261 (Fla. 1956)"). The right to a unanimous jury verdict must extend to each necessary element of the charged crime. As to an element of the offense, this Court has recognized that a judge may not make fact finding "on matters associated with the criminal episode" that "would be an invasion of the jury's historical function." *State v. Overfelt*, 457 So.2d 1385, 1387 (Fla. 1984). Neither the sentencing statute, case law from this Court, nor the standard jury instructions used the past 25 years required that the jurors participating in a penalty phase to concur in finding whether any particular aggravating circumstances had been proved, or "[w]hether sufficient aggravating circumstances exist[ed]," or "[w]hether sufficient aggravating circumstances exist[ed] which outweigh[ed] the mitigating circumstances." *Fla. Stat*. §921.141(2). Because Florida law does not require that twelve jurors agree that the State has proven an aggravating circumstance beyond a reasonable doubt, or to agree on the same aggravating circumstances beyond a reasonable doubt, or to agree on the same aggravating circumstances when advising that "sufficient aggravating circumstances exist" to warrant a death sentence, there is no way to say that "the

jury" rendered a verdict as to an aggravating circumstance or the sufficiency of them. As Justice Shaw has observed, Florida law leaves theses matters to speculation. *Combs v. State*, 525 So. 2d 858, 859 (Fla. 1988) (Shaw, J., concurring).

2. No verdict in compliance with the Sixth Amendment.

Florida law does not require the jury to reach a verdict on any of the factual determinations required for death. Section 921.141(2) does not call for a jury verdict, but rather an "advisory sentence." This Court has held that "the jury's sentencing recommendation in a capital case is *only advisory*. The trial court is to conduct its own weighing of the aggravating and mitigating circumstances . . . ." *Comb*s, 525 So.2d at 858 (quoting *Spaziano v. Florida*, 468 U.S. 447, 451 (1984)) (emphasis original in *Combs*). It is reversible error for a trial judge to consider himself bound to follow a jury's recommendation. *Ross v. State*, 386 So.2d 1191, 1198 (Fla. 1980). Florida law only requires the judge to consider "the recommendation of a majority of the jury." *Fla. Stat*. § 921.141(3). In contrast, "[n]o verdict may be rendered unless all of the trial jurors concur in it." *Fla. R. Crim. Pro.* 3.440. No authority of Florida law requires that all jurors concur in finding the requisite aggravating circumstances.

In *Sullivan v. Louisiana*, 508 US. 275 (1993), the Supreme Court said, "the jury verdict required by the Sixth Amendment is a jury verdict of guilty beyond a reasonable doubt." *Sullivan*, 508 U.S. at 278. The Court explained that there must be a verdict that decides the factual issues in order to comply with the Sixth Amendment. In doing so, the Court explained:

> It would not satisfy the Sixth Amendment to have a jury determine that the defendant is *probably* guilty, and then leave it up to the judge to determine (as *[In re] Winship*, 397 U.S. 358 (1970) requires) whether he is guilty beyond a reasonable doubt. In other words the jury verdict required by the Sixth Amendment is a jury verdict of guilty beyond a reasonable doubt.

508 U.S. at 278.

In a case such as this, where the error is that a jury did not return a verdict on the essential elements of a capital murder, but instead the responsibility was delegated by state law to a court, "no matter how inescapable the findings to support the verdict might be," for a court "to hypothesize a guilty verdict that was never rendered ...would violate the jury trial right." *Sullivan*, 508 U.S. at 279. The "explicitly cross-reference[d] . . . statutory provision requiring the finding of an aggravating circumstance before imposition of the death penalty," *Ring*, requires the judge - after the jury has been discharged and "[n]otwithstanding the recommendation of a majority of the jury_" - to make two factual determinations.

Fla. Stat. § 921.141(3). Section 921.141(3) provides that "if the court imposes a sentence of death, it shall set forth in writing its findings *upon which the sentence of death is based as to the fact*s." *Id.* First, the judge must find that "sufficient aggravating circumstances exist" to justify death. *Id.* Second, the judge must find in writing that "there are insufficient mitigating circumstances to outweigh the aggravating circumstances." *Id*. "If the court does not make the findings requiring the death sentence, the court shall impose sentence of life imprisonment in accordance with § 775.082." *Id*. Because the Florida death penalty statute makes imposition of a death contingent upon findings of "sufficient aggravating circumstances" and "insufficient mitigating circumstances," and gives sole responsibility for making those findings to the judge, it violates the Sixth Amendment under *Ring*.

As the United States Supreme Court said in *Walton*, "[a] Florida trial court no more has the assistance of a jury's findings of fact with respect to sentencing issues than does a trial judge in Arizona." *Walton*, 497 U.S. at 648. This Court has repeatedly emphasized that a judge's findings must be made independently of the jury's recommendation. *See, Grossman v. State*, 525 So.2d 833, 840 (Fla. 1988). Because the judge must find that "sufficient aggravating circumstances exist" "notwithstanding the recommendation of a majority of the jury," *Fla. Stat*.

§921.141(3), he may consider and rely upon evidence not submitted to the jury. The judge is also permitted to consider and rely upon aggravating circumstances that were not submitted to the jury. *See, Davis v. State*, 703 So.2d 1055, 1061 (Fla. 1998). Because the jury's role is merely advisory and contains no findings upon which to judge the proportionality of the sentence, this Court has recognized that its review of a death sentence is based and dependent upon the judge's written findings. *Morton v. State*, 789 So.2d 324, 333 (Fla. 2001). The Florida capital scheme violates the constitutional principles recognized in *Ring*.

3. The recommendation has been merely advisory.

Moreover, it would be impermissible and unconstitutional to retroactively attach greater significance to the jury's advisory sentence than the jury was told at the time. The advisory verdict cannot now be used as the basis for the fact findings required for a death sentence because the statute requires only a majority vote of the jury in support of that advisory sentence.

4. The indictment against Mr. Dillbeck failed to include all of the elements of the offense of capital murder.

The United States Supreme Court in *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." *Id.* at 243 n. 6. In *Ring*, the Supreme Court held that a death penalty statute's aggravating circumstances operate as "the functional equivalent of an element or a greater offense."

In *Jones,* the Supreme Court noted that "[m]uch turns on the determination that a fact is an element of an offense, rather than a sentencing consideration," in significant part because "elements must be charged in the indictment." *Jones*, 526 U.S. at 232. 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 judgment of the United States Court of Appeals for the Eighth Circuit upholding the death sentence, and remanded the case for reconsideration in light of the holding in *Ring* that aggravating factors that are prerequisites of a death sentence must be treated as elements of the offense. *Allen v. United State*s, 122 S.Ct. 2653 (2002).

The question presented in *Allen* was this:

> Whether aggravating factors required for a sentence of death under the Federal Death Penalty Act of 1994, 18 U.S.C. § 3591 et seq., are elements of a capital crime and thus must be alleged in the indictment in order to comply with the Due Process and Grand Jury clauses of the Fifth Amendment.

The Eighth Circuit had previously rejected Allen's argument because in its view that aggravators are not elements of federal capital murder but rather "sentencing protections that shield a defendant from automatically receiving the statutorily authorized death sentence." *United States v. Allen*, 247 F.3d at 763.

The Supreme Court held in *Apprendi* held the Fourteenth Amendment affords citizens the same protections when they are prosecuted under state law, although the Court noted that 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. However, similar to Grand Jury Clause of the Fifth Amendment to the United States Constitution, Article I, section 15 of the Florida Constitution provides that, "No person shall be tried for a capital crime without presentment or indictment by a grand jury."

Just like the requirements of 18 U.S.C. §§ 3591 and 3592(c), Florida's death penalty statute makes imposition of the death penalty contingent upon the

government 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 circumstance. *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." In *State v. Gra*y, 435 So.2d 816, 818 (Fla. 1983), this Court held "[w]here an indictment or information wholly omits to alleged 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." *Gray*, 435 So. 2d at 818. In *Chicone v. State*, 684 So.2d 736, 744 (Fla. 1996), the Florida Supreme Court held "[a]s a general rule, an information must allege each of the essential elements of a crime to be valid."

The most "celebrated purpose" of the grand jury "is to stand between the government and the citizen" and protect individuals from the abuse of arbitrary prosecution. *United States v. Dionisio*, 410 U.S. 19, 33 (1973); *see also, Wood v. Georgia*, 370 U.S. 375, 390 (1962). The Supreme Court explained that function of

the grand jury in *Dionisio*:

> Properly functioning, the grand jury is to be the servant of neither the Government nor the courts, but of the people . . . As such, we assume that it comes to its task without bias or self-interest. Unlike the prosecutor or policeman, it has no election to win or executive appointment to keep.

Id., 410 U.S. at 35. The shielding function of the grand jury is uniquely important in capital cases. *See, Campbell v. Louisiana*, 523 U.S. 392, 399 (1998) (recognizing that the grand jury "acts as a vital check against the wrongful exercise of power by the State and its prosecutors" with respect to "significant decisions such as how many counts to charge and . . . the important decision to charge a capital crime").

The State's authority to decide whether to seek the execution of an individual charged with crime hardly overrides - in fact is an archetypical reason for - the constitutional requirement of neutral review of prosecutorial intentions.
Because the State did not submit to the grand jury, and the indictment did not state, the essential elements of the aggravated crime of capital murder, Mr. Dillbeck's right under Article I, section 15 of the Florida Constitution, and the Sixth Amendment to the federal Constitution were violated.

CONCLUSION

Based on the foregoing arguments, Mr. Dillbeck respectfully requests that the Court issue the writ of habeas corpus in his case, or such other relief as deemed just and proper.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing instrument has been furnished via U.S. Mail to Charles J. Crist, Jr., Esq., Attorney General, Office of the Attorney General, The Capitol, PL-01, Tallahassee, Florida 32399-1050; this 23rd day of June 2003.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief has been typed in Times New Roman 14-point type.

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GEORGE W. BLOW III