IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC03-558
LOWER TRIBUNAL NO.: 86-6123-CF

GROVER REED

Petitioner

v.

Michael Moore, Secretary,
Department of Corrections, State of Florida

Respondent

PETITION FOR EXTRAORDINARY RELIEF AND FOR A WRIT OF HABEAS CORPUS

CHRISTOPHER J. ANDERSON, ESQUIRE

Florida Bar No. 0976385
645 Mayport Road, Suite 4-G
Atlantic Beach, Florida 32233
Telephone: (904) 246-4448
Fax: (904) 246-5559

COURT-APPOINTED ATTORNEY

FOR PETITIONER

STATEMENT OF FONT

This Petition is written in Courier New 12 font.

JURISDICTION TO ENTERTAIN PETITION AND GRANT HABEAS CORPUS RELIEF

This is an original action under Fla. R. App. P. 9.100(a). 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, and the legality of Mr. Reed's capital conviction and sentence of death. As reflected in this court's recent precedents, the merits of the claims presented are properly before the Court at this juncture. Mr. Reed was sentenced to death and direct appeal was taken to this reviewing court. The trial court's judgment and sentence were affirmed. Reed v. State, 560 So.2d 203 (Fla. 1990).

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 involved the appellate review process. *See* Wilson v. Wainwright, 474 So.2d. 1163 (Fla. 1985), Baggett v. Wainwright, 229 So.2d. 239, 243 (Fla. 1969), *see also* Johnson v. Wainwright, 392

So.2d 1327 (Fla. 1981). A petition for a writ of habeas corpus is the proper means for Mr. Reed to raise the claims presented herein. *See, e.g.* Downs v. Dugger, 514 So.2d 1069 (Fla. 1987), Riley v. Wainwright, 517 So.2d 656 (Fla. 1987); Wilson, supra.

This Court has consistently maintained an especially vigilant control over capital cases, exercising a special scope of review. *See* Elledge v. State, 346 So. 998, 1002 (Fla. 1977), Wilson v. Wainwright, supra, and has not hesitated to exercise its inherent jurisdiction to remedy errors which undermine confidence in the fairness and correctness of capital case trial and sentencing proceedings. Wilson, Johnson, Downs, Riley, supra. This petition presents substantial constitutional questions which go to the heart of the fundamental fairness and reliability of Mr. Reed's capital conviction and sentence of death, and merit the attention of this court pursuant to its habeas corpus jurisdiction.

This honorable court has the inherent power to do justice where individuals are confined within its jurisdiction. As shown below, the needs of justice call on the court to grant the relief sought in this petition, as the Court has done in similar cases in the past. *See*, Wilson, Johnson, Downs, Riley, supra. This petition pleads claims involving fundamental constitutional error. *See* Dallas v. Wainwright, 175 so.2d 785

(Fla. 1965), Palms v. Wainwright, 460 so.2d 362 (Fla. 1984). This petition includes claims predicated on significant, fundamental and retroactive changes in constitutional law. *See, e.g.* Jackson v. Dugger, 547 So. 2d 1197, 14 F.L.W. 355 (Fla. 1989, Thompson v. Dugger, 515 So.2d 173 (Fla. 1987), Tafero v. wainwright, 459 So.2d 1034, 1035 (Fla. 1984); Edward v. State, 393 So.2d 597, 600, n. 4 (Fla. 3d DCA 1981), *petition denied*, 402 So.2d 613 (Fla. 1981) *cf.* Witt v. State, 387 So.2d 922 (Fla. 1980). The petition also involves claims of ineffective assistance of counsel on appeal. *See* Knight v. State, 394 So. 2d 997, 999 (Fla. 1981), Wilson v. Wainwright, supra., Johnson v. Wainwright, supra. These reasons demonstrate that 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, as the petition shows, habeas corpus relief would be more than proper on the basis of Mr. Reed's claims.

Mr. Reed's claims are presented below. They demonstrate that habeas corpus relief is proper in this case.

CLAIM I

THE FLORIDA SUPREME COURT'S DECISION IN REED V. STATE, 560 So.2D 203 (Fla. 1990) WHICH UPHELD THE DEFENDANT'S DEATH SENTENCE DESPITE THE INVALIDATION OF TWO AGGRAVATING CIRCUMSTANCES HAS BEEN EFFECTIVELY OVERRULED BY RING V. ARIZONA, 536 U.S. 584 (2002)

The Florida Supreme Court issued its decision in Petitioner's initial appeal of his judgment and sentence on March 1, 1990. Reed v. State, 560 So.2d 203 Fla. 1990). In that decision, the Florida Supreme Court invalidated two of the six aggravating circumstances that the trial judge found in support of the imposition of the death penalty. Id., p. 207. The Florida Supreme Court nonetheless upheld the Petitioner's death sentence. The court explained:

> The elimination of the two aggravating circumstances would not have affected Reed's sentence. (citations) There remain four aggravating circumstances balanced against a total absence of mitigating circumstances. We affirm the judgment and sentence.
>
> (p. 207)

In Florida's capital sentencing scheme, the jury renders an *advisory* sentence of death or life based on a two-step process. First, the jury considers "Whether *sufficient* aggravating *circumstances* exist." Second, the jury considers "Whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist." F.S. Section 921.141 (formerly Section 919.23).

Florida capital cases require a unanimous verdict by a jury of 12 Rule 3.270 and Rule 3.440, Fla. R. Crim. P. In Ring v. Arizona, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed. 2d 556, The United States Supreme Court held that "Because ...

enumerated aggravating factors operate as 'the functional equivalent of an element of a greater offense' . . . the Sixth Amendment requires that they be found by a jury. The Petitioner's death fails in the wake of Ring for two reasons. First, the jury recommended death by a margin of 11 to 1. First, Ring requires that the jury, not the judge, make the findings needed to impose the death penalty. Those findings have not been made in the Petitioner's case. Second, Ring and Rules 3.270 3.440 of the Florida Rules of Criminal Procedure require that the jury findings in a capital case be unanimous.

Florida law requires that capital crimes be charged by presentment or indictment of a grand jury. Fla. Const. Art. I, Section 15 (a)(1980). This Court has held that indictments need not state the aggravating circumstances upon which the State may rely to establish that a crime qualifies a defendant for the death penalty. State v. Sireci, 399 So.2d 964, 970 (Fla. 1981).

Early in the history of the State's post-1972 death penalty law, the Florida Supreme Court, in State v. Dixon, 283 So.2d 1, 9 (Fla. 1973), explained what constitutes a capital crime, and where the definition of "capital crime" comes from:

> The aggravating circumstances of Fla. Stat. Section 921.141 (6) actually defines those crimes – when read in conjunction with Fla. Stat. Section 782.04(1) and 794.01(1), F.S.A.– to which the death penalty is

> applicable in the absence of mitigating circumstances.

The sentence for first-degree murder is specified in Section775.082, Florida Statutes as follows:

> A person who has been convicted of a capital felony *shall be punished by life imprisonment* and shall be required to serve no less than 25 years before becoming *eligible for parole unless the proceedings held to determine sentence* according to the procedure set forth in Section 921.141 *result in a finding by the court that such person shall be punished by death*, and in the latter event such person shall be punished by death.
>
> (F.S. Section 775.082 (1979); emphasis Petitioner's)

The jury's advisory recommendation does not specify what, if any, aggravating circumstances the jurors found to have been proved. Neither the consideration of an aggravating circumstance nor the return of the jury's advisory recommendation requires a unanimous vote of the jurors.

The Florida capital felony death-penalty law violates the principles recognized as applicable to the States in Apprendi v. New Jersey, 530 U.S. 466 (200). As a result, the Florida death penalty scheme under which the petitioner was sentenced violates the Sixth and Fourteenth and Eighth Amendments of the United States Constitution. Florida's death penalty scheme violates the Sixth Amendment of the United States Constitution as well because the maximum sentence allowed upon the jury's

finding of guilt is life imprisonment. A death sentence is only authorized upon the finding of additional facts. Since, under Florida law, there is no requirement of a jury trial to determine the existence of those necessary facts, the Sixth Amendment is violated.

The Court issues its opinion in Porter v. Moore, Case No. SC01-2707 (Fla. June 20, 2002) in which this Court denied Porter habeas corpus relief. In so denying Porter's petition this Court overlooked or misapprehended essential facts and law, which has now been clarified by the United States Supreme Court. Porter challenged the constitutionality of his death sentence under Florida's capital sentencing scheme in light of Apprendi v. New Jersey, 530 U.S. 466 (2000), which requires that aggravating circumstances be handled as elements of a death-penalty eligible offense, be noticed and proven beyond a reasonable doubt to a unanimous jury. This Court denied the claim, holding:

> Contrary to Porter's claims, wh have repeatedly held that the maximum penalty under the statute is death and have rejected the other Apprendi arguments. *See* Mills v. Moore, 786 So.2d 532, 536-37 (Fla. 2001). *See also* Mann, 794 So.2d at 595. Thus, this issue is meritless.

New law establishes that this claim is not meritless. In Mills, supra, this court rejected an argument the Florida capital sentencing statutes were unconstitutional in the wake

of Apprendi. The court stated, "Because Apprendi did not overrule Walton, the basic scheme in Florida is not overruled either. Id. At 536. As this Court has grounded its post-*Apprendi* support of Florida's capital sentencing scheme on the continued viability of Walton v. Arizona, the demise of Florida's capital sentencing scheme is clear. In Ring v. Arizona, (536 U.S. 584 (2002)the United States Supreme Court clearly overruled Walton:

> Walton and Apprendi are irreconcilable; Our Sixth Amendment jurisprudence cannot be home to both. Accordingly, we overrule Walton t the extent that it allows a judge sitting without a jury to find an aggravating circumstance necessary for imposition of the death penalty. (Citations) Because Arizona's enumerated aggravating factors operate as 'the functional equivalent of an element of a grater offense,' Apprendi, . . . (and) the Sixth Amendment requires that the be found by a jury.

Implicit in the above opinion is the notion that Florida's death penalty sentencing scheme is likewise unconstitutional. In Ring, the court commented:

> 1. We repeatedly have rejected constitutional challenges to Florida's death sentencing scheme, which provides for sentencing by the judge, not the jury. [Citations to Hildwin v. Florida, 490 U.S. 638 (1989) and Spaziano v. Florida, 468 U.S. 447 (1984), Proffitt v. Florida, 429 U.S. 242 (1976)] In Hildwin, for example, we stated that this case presents us once again with the question of

> whether the Sixth Amendment requires a jury to specify the aggravating factors that permit the imposition of capital punishment in Florida (citation) and we ultimately concluded that the Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury." . . . . 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.

Unanimous, twelve-person verdicts are required to impose the death penalty under common law principles. *See, e.g.* *Burch v. Louisiana*, 441 U.S. 130, 138 (1979) and Andres v. United States, 333 U.S. 740, 749 (1948). The notion that a unanimous jury is needed to impose the death penalty is based on the long-established principle that the death penalty is different than other punishments and carries with it safeguards and fail-safe protections found nowhere else. *See* Woodson v. North Carolina, 428 U.S. 280, 304 (1976). The non-specific death recommendation in Petitioner's case violated the petitioner's rights under the Sixth, Eighth, and Fourteenth Amendments of the United State's Constitution.

In the direct appeal of Petitioner's judgment and sentence, this court struck the "previously convicted of other felonies" and "cold, calculated and premeditated" aggravating circumstances. Reed v. State, 560 So.2d 203 (Fla. 1990).

Nevertheless, in that Pre-Apprendi decision this reviewing court, not the jury, re-weighed aggravating circumstances and determined that the death penalty stood. It is doubtful that this court would so rule today, with the illumination since provided by the U.S. Supreme Court. This is particularly true in the present case where the appellate court struck two aggravating circumstances after verdict and still upheld the Petitioner's death penalty. A literal reading of Florida's death penalty sentencing scheme (F.S. Section 921.141, formerly F.S. Section 919.23) indicates that the jury must, *before considering mitigating circumstances*, determine whether the aggravating circumstances are of sufficient magnitude to warrant the imposition of the death penalty. In view of Apprendi and Ring, supra, the Petitioner's death sentence cannot stand because it is impossible to guess whether the jury would have recommended death if it had deliberated without the need to weigh the subsequently-stricken aggravating circumstances.

CLAIM 2

APPELLATE COUNSEL FAILED TO RAISE THE ISSUE OF THE PROSECUTOR'S IMPROPER REMARKS TO THE JURY

With regard to the issue of the prosecutor's improper remarks to the jury, this Florida Supreme Court stated in Reed v. State, 640 So.2d 1094 (Fla. 1994), that " . . .this

is an issue which should have been, but was not, raised on appeal. Therefore, to the extent that this issue does not relate to ineffective assistance of counsel, . . . it is procedurally barred." (citations) Id., p. 1095. The trial transcripts from the Petitioner's 1986 jury trial indicate that the State made many improper appeals to the jurors' emotions such as referring to the victim's husband as "Reverend" (TT 348, 372-411, 859-860, 878) and making an improper request that the jurors show the Petitioner the same mercy that the Petitioner showed the victim. TT 878. This violated the Petitioner's right to a fair sentencing phase and hence violated the Petitioner's rights under the Eighth and Fourteenth Amendments to the U.S. Constitution. Urbin v. State, 714 So.2d 411 (Fla. 1998). The Petitioner's appellate counsel was ineffective in failing to raise and argue these issues on direct appeal.

CLAIM 3

APPELLATE COUNSEL FAILED TO RAISE THE ISSUE OF UNCONSTITUTIONALLY VAGUE JURY INSTRUCTIONS ON AGGRAVATING CIRCUMSTANCES

With regard to the issue of unconstitutionally vague jury instructions on aggravating circumstances, this Florida Supreme Court stated, in Reed v. State, 640 So.2d 1094 (Fla. 1994), that "This issue is procedurally barred because Reed did not object to the instructions at trial nor did he raise

this issue on direct appeal." (citations) Id., p. 1096. Petitioner received ineffective assistance of appellate counsel when his appellate attorney failed to raise this challenge on direct appeal

CLAIM 4

APPELLATE COUNSEL FAILED TO RAISE THE ISSUE OF DEFENDANT'S TRIAL ATTORNEY'S FAILURE TO BRING A POST-TRIAL MOTION TO CHALLENGE THE SUFFICIENCY OF THE STATE'S EVIDENCE

Petitioner's trial attorney failed to bring reasonably argue a motion for a new trial or a motion for a judgment of acquittal or a motion for arrest of judgment or any other motion to challenge the legal sufficiency of the State's case.

Failure to pursue a post-trial motion to challenge the legal sufficiency of the evidence is *per se* ineffective assistance of counsel. Robinson v. State, 462 So. 2d 471 (Fla. 1st DCA 1984). Likewise, Petitioner's appellate counsel for the direct appeal of Petitioner's judgment and sentence was *per se* ineffective for failing to raise and pursue this issue on direct appeal.

CONCLUSION

Petitioner urges that the court grant him habeas corpus relief or, in the alternative, a new appeal for all of the reasons set forth herein, and that the court grant such other and further relief that the court deems just and proper under

the circumstances.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing document described as Motion to Withdraw as Counsel for Appellant and Motion for Order Granting Appellant Leave to File Amended Initial Brief has been served by U.S. MAIL addressed to,

2. Department of Legal Affairs
Office of the Attorney General
Criminal Division
400 S. Monroe Street
PT-1, The Capitol
Tallahassee, Florida 32301
Attn.: Charmaine M. Millsaps, Esquire

and

3. Inmate Grover Reed, DC#105661
P6201 A-1
Union Correctional Institution
P.O. Box 221
Raiford, Florida 32083-0221

on this 26th day of March, 2003.

Christopher J. Anderson, Esq.

Florida Bar No.: 0976385
645 Mayport Road, Suite 4-G
Atlantic Beach, FL 32233
(904) 246-4448
Attorney for Petitioner

#Reed State Habeas disk “CLAIMS”