IN THE SUPREME COURT OF FLORIDA

CASE NO. SC03-1044

NORBERTO PIETRI,

Petitioner,

v.

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

Respondent.

PETITION FOR WRIT OF HABEAS CORPUS

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INTRODUCTION

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 that Mr. Pietri was deprived of the effective assistance of counsel on direct appeal and that the proceedings that resulted in his conviction and death sentence violated fundamental constitutional guarantees. Citations to the Record on the Direct Appeal shall be as follows:

"R" -- record on direct appeal to this Court;

JURISDICTION

A writ of habeas corpus is an original proceeding in this Court governed by Fla. R. App. P. 9.100. This Court has original jurisdiction under Fla. R. App. P. 9.030(a)(3) and Article V, § 3(b)(9), Fla. Const. The Constitution of the State of Florida guarantees that "[t]he writ of habeas corpus shall be grantable of right, freely and without cost." Art. I, § 13, Fla. Const.

REQUEST FOR ORAL ARGUMENT

Mr. Pietri requests oral argument on this petition.

PROCEDURAL HISTORY

The Circuit Court for the Fifteenth Judicial Circuit, in and for Palm Beach County, Florida, entered the judgement of conviction and sentence of death at issue in this case. The Palm Beach County, Florida grand jury indicted Mr. Pietri for one count of first degree premeditated murder in addition to fifteen other counts on September 13, 1988 (R. 3177). Mr. Pietri's jury trial took place before Judge Marvin U. Mounts. The trial began on January 23, 1990 and lasted until February 7, 1990. The jury found Mr. Pietri guilty of one count of premeditated murder and all other counts as charged, except that he was acquitted of false imprisonment (R. 2673, 3603). The penalty phase was held on February 22, 1990. After a one and a half day hearing, the jury voted in favor of death by a margin of eight (8) to four (4) (R. 3099-3102). On March 15, 1990, the court sentenced Mr. Pietri to die in the electric chair. (R. 3133). Trial counsel Peter Birch was also appellate counsel. On direct appeal, this Court affirmed the conviction and sentence but struck

the aggravating circumstance of cold, calculated and premeditated, holding the error to be harmless. Pietri v. State, 644 So.2d 1347 (Fla. 1994) *reh'g denied*, August 22, 1994. Mr. Pietri timely petition to the United States Supreme Court for certiorari was denied on June 19, 1995. Pietri v. Florida, 115 S. Ct. at 2588 (1995). This petition is being filed along with the Initial Brief following the denial of postconviction relief.

CLAIM I

APPELLATE COUNSEL FAILED TO RAISE ON APPEAL NUMEROUS ISSUES WHICH WARRANT REVERSAL THAT WERE PRESERVED BY OBJECTIONS ENTERED BY TRIAL COUNSEL AT THE 1992 TRIAL PROCEEDING.

A. INTRODUCTION

Mr. Pietri had the constitutional right to the effective assistance of counsel for purposes of presenting his direct appeal to this Court. Strickland v. Washington, 466 U.S. 668 (1984). "A first appeal as of right [] is not adjudicated in accord with due process of law if the appellant does not have the effective assistance of an attorney." Evitts v. Lucey, 469 U.S. 387, 396 (1985). The Strickland test applies equally to ineffectiveness allegations of trial counsel and appellate counsel. See Orazio v. Dugger, 876 F. 2d 1508 (11th Cir. 1989). Further, this Court has held that "[h]abeas petitions are the proper vehicle to advance claims of ineffective assistance of appellate counsel." Rutherford v. Moore, 774 So. 2d 637, 643 (Fla. 2000).

Because the constitutional violations which occurred during Mr. Pietri's trial were "obvious on the record" and "leaped out upon even a casual reading of transcript," it cannot be said that the "adversarial testing process worked in [Mr. Pietri's] direct appeal." Matire v. Wainwright, 811 F. 2d 1430, 1438 (11th Cir. 1987). The lack of appellate advocacy on Mr. Pietri's

behalf is identical to the lack of advocacy present in other cases in which this Court has granted habeas corpus relief. Wilson v. Wainwright, 474 So.2d 1162 (Fla. 1985). Appellate counsel's failure to present the meritorious issues discussed in this petition demonstrates that his representation of Mr. Pietri involved "serious and substantial deficiencies." Fitzpatrick v. Wainwright, 490 So. 2d 938, 940 (Fla. 1986). 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). In light of the serious reversible error that appellate counsel never raised, there is more than a reasonable probability that the outcome of the appeal would have been different, and a new direct appeal must be ordered.

This Court recently articulated the standard for evaluation of appellate ineffective assistance of counsel:

> With regard to evidentiary

> objections which trial counsel made during the trial and which appellate counsel did not raise on direct appeal, this court evaluates the prejudice or second prong of the Strickland test first. In doing so, we begin our review of the prejudice prong by examining the specific objection made by trial counsel for harmful error. A successful petition must demonstrate that the erroneous ruling prejudiced the petitioner. If we conclude that the trial court's ruling was not erroneous, then it naturally follows that habeas petitioner was not prejudiced on account of appellate counsel's failure to raise that issue. If we do conclude that the trial court's evidentiary ruling was erroneous, we then consider whether such error is harmful error. If that error was harmless, the petitioner likewise would not have been prejudiced.

Jones v. Moore, WL746764 (Fla., July 5, 2001)(No. SC00-660). Mr. Pietri need not establish his claim by a preponderance of the evidence; rather the standard is less than a preponderance. Williams v. Taylor, 120 S.Ct. 1495, 1519 (2000)("[i]f a state court were to reject a prisoner's claim of ineffective assistance of counsel on the grounds that the prisoner had not established by a preponderance of the evidence that the result of his criminal proceeding would have been

different, that decision would be `diametrically different,' `opposite in character or nature,' and `mutually opposed' to our clearly established precedent ...")

B. RECORD OF TRIAL

1. Change of venue

The massive publicity in Palm Beach County associated with this case made it impossible for Mr. Pietri to receive a fair trial. Trial counsel presented a motion for change of venue with appropriate affidavits, but the motion was denied by the trial court. (R. 791, 825, 3532-37). The lower court granted a continuing objection after trial counsel stated that he wanted to renew all motions raised at the pre-trial hearings on December 28, 1989 (R. 290). After the selection of the jury, counsel again renewed his motion. (R. 1773). There were incidents during the trial involving juror exposure to publicity. (R. 2680-86). Trial counsel filed a motion to interview the jurors during the proceedings which was denied.

To the extent appellate counsel failed to properly preserve and carry forward this issue on direct appeal,

appellate counsel rendered prejudicially deficient assistance.

2. Virginia Snyder's Documents

Trial counsel filed a motion on August 23, 1989 requesting that certain documents that had been stolen from his investigator on the Pietri case by an office volunteer who was secretly working as an agent of the Delray Beach Police Department be returned.

> COMES NOW, the Defendant, NORBERTO PIETRI, by and through his undersigned counsel, and requests this Court to enter an order directing the State to return to Defendant all documents in its possession pertaining to the above-styled cause which were obtained from the office, home or auto mobile of investigator Virginia Snyder. As grounds therefor, Defendant states:
>
> 1. Virginia Snyder is the lead investigator for Defendant in the above styled cause.
>
> 2. It has been learned that the Delray Beach Police Department has obtained documents belonging to Ms. Snyder which pertain to the above styled cause.
>
> 3. The aforesaid documents fall within the purview of the attorney-client privilege and are strictly confidential.

> 4. The State's possession of the aforesaid documents constitutes a direct violation of Defendant's right to counsel as guaranteed by the Sixth Amendment to the United States Constitution and Article I, Section 16 of the Florida Constitution.

(R. 3482-83).

During a hearing on the motion on August 25, 1989, counsel requested that all copies of the document, other than the original that was to be returned to counsel, be destroyed, and that the persons who had access be deposed (R. 94-102). Defense counsel Peter Birch requested assurance from the trial court that no copies of certain documents were in the possession of the State. The depositions on the issue of the stolen privileged documents went forward on that same day and continued through September 6, 1989. On December 27, 1989, Defense counsel filed a motion to dismiss the indictment or delay proceedings, based on the actions taken by the Delray Beach Police Department through its agent, Nancy Adams, who removed documents from the office of Virginia Snyder, the investigator of trial counsel Peter Birch (R. 146, 3552-54). In the

alternative, during a hearing on his motion on December 28, 1989, defense counsel requested a continuance until the State completed its investigation of Nancy Adams, who according to defense counsel had refused to give testimony and had indicated that she would invoke her Fifth Amendment right to not incriminate herself (R. 146). The trial court denied defense counsel's motion for continuance and motion to dismiss the indictment at the conclusion of the hearing (R. 200). However, trial counsel obtained a continuing objection and preserved this matter for appellate review (R. 290).

Ms. Adams had been deposed on September 6, 1989, and in that deposition she stated that her father was the former City Attorney of Delray Beach (Deposition of Nancy Adams, September 6, 1989 at 25-26). She went on to say that after investigator Virginia Synder gave her an interview she did with Norberto Pietri document to read, she provided that document, "the Pietri document", to Delray Beach Police officer Musco (Id. at 30, 32). She stated under oath that she met with Officer Musco three to four times a week, but fewer than one hundred times (Id. at 36-37). The witness refused to answer as

to whether the defense counsel investigator had given her permission for the documents to be given to the police (Id. at 39). She admitted to twice wearing "a body bug" in Virginia Snyder's office (Id. at 41). She refused on Fifth Amendment grounds to answer the question as to whether she was working as an agent for the Delray Beach Police Department (Id. at 43, 49, 50).

Several Delray Beach Police officers were also deposed, including Captain Allen Cole, Major Richard Lincoln, Lt. Howard Scott Lunsford and Lt. Robert Musco. Although none of these specific officers testified at Mr. Pietri's trial, Musco was involved in the arrest and three Delray Beach Police officers did testify. Lt. Lunsford stated in his deposition that the Palm Beach County State Attorney's Office was involved in the investigation surrounding Nancy Adams providing the Pietri documents to the Delray Beach Police (Deposition of Lt. Howard Scott Lunsford, August 25, 1989 at 25).

Investigator Virginia Synder was called by the State to testify at the motions hearing on December 28, 1989 (R. 183-99). On cross-examination by Mr. Birch she specifically denied that she gave Nancy Adams any

portion of the Pietri file, which she testified was kept in a separate place in her office from other files (R. 199). She also identified the June 11, 1989 document that had been sealed in the court file and described as "the Pietri document" as an interview she had done with the defendant that she never gave permission for Nancy Adams to review or distribute (R. 198-99). No tactical motive can be ascribed to an attorney whose omissions are based on ignorance, see Brewer v. Aiken, 935 F.2d 850 (7th Cir. 1991), or on the failure to properly investigate or prepare. See Kenley v. Armontrout, 937 F.2d 1298 (8th Cir. 1991); Kimmelman v. Morrison, 477 U.S. 365 (1986). Appellate counsel was rendered ineffective by both his failure to properly investigate and litigate the issues concerning the purloined documents and by the State's action in obtaining them from his investigator.

The eventual decision to have Mr. Pietri testify at the guilt phase as the only defense witness was directly related to the exposure of the document stolen from Mr. Pietri's defense investigator's office by Nancy Adams. Defense counsel stated on the record at the hearing on

the motion to strike the indictment on December 28, 1989 that the entire defense of Mr. Pietri's case was in the document. (R. 150). Judge Mounts denied defense counsel's motion to delay or dismiss proceedings. (R. 200).

During his examination at the guilt phase of his trial, the state solicited comments from Mr. Pietri about lying to the police and his interrogation. (R. 2519). Defense counsel failed to object to this line of questioning, leaving the defendant defenseless on the witness stand. (R. 2488-2494). The evidence of collateral crimes, use of marijuana, unadjudicated offenses, and the course of conduct related to the capital offense all came into the record out of the defendant's mouth with defense counsel mute. (R. 2310-12, 2377, 2484). Even though the trial court had granted a pre-trial motion to suppress Mr. Pietri's statements to the police, all the relevant statements came before the jury. Defense counsel failed to properly examine Mr. Pietri or to prepare him for cross-examination. The infiltration of the defense team by Nancy Adams had a significant impact on these events

that prejudiced Mr. Pietri's defense.

To the extent that the sentencing jury did not receive information because the prosecution failed to disclose it to defense counsel, Mr. Pietri is also entitled to a new sentencing proceeding. Garcia v. State, 622 So. 2d 1325 (Fla. 1993). In order to insure that an adversarial testing, and hence a fair trial, occur, certain obligations are imposed upon both the state and the prosecutor. The prosecutor is required to disclose to the defense evidence "that is both favorable to the accused and `material either to guilt or punishment'". United States v. Bagley, 473 U.S. 667, 674 (1985), quoting Brady v. Maryland, 373 U.S. 83, 87 (1963). Exculpatory and material evidence is evidence of a favorable character for the defense which creates a reasonable probability that the outcome of the guilt and/or capital sentencing trial would have been different. Smith v. Wainwright, 799 F.2d 1442 (11th Cir. 1986); Chaney v. Brown, 730 F.2d 1334 (10th Cir. 1984). This standard is met and reversal is required once the reviewing court concludes that there exists a "reasonable probability that had the [unpresented]

evidence been disclosed to the defense, the result of the proceeding would have been different." Bagley, 473 U.S. at 680.

The prosecution's suppression of evidence favorable to the accused violates due process. United States v. Bagley. The prosecutor must reveal to defense counsel any and all information that is helpful to the defense, whether that information relates to guilt/innocence or punishment, and regardless of whether defense counsel request the specific information. A defendant's right to present favorable evidence is violated by such state action. See Chambers v. Mississippi, 410 U.S. 284 (1973); see also Giglio v. United States, 405 U.S. 150 (1972). This issue was adequately preserved by trial counsel, in that the trial court granted a continuing objection in open court at a hearing on January 22, 1990, allowing trial counsel to renew all the motions denied by the court at the December 28, 1989 motions hearing (R. 290-292). Mr. Birch, as appellate counsel, failed to carry this issue forward on direct appeal although it was preserved below. Mr. Pietri was denied effective assistance of counsel. Mr. Pietri's

sentence of death is the resulting prejudice. Harris v. Dugger, 874 F.2d 756 (11th Cir. 1989).

CLAIM II

FAILURE TO RAISE ON ORIGINAL DIRECT APPEAL OTHER RULINGS

Appellate counsel also failed to raise on direct appeal other rulings which, alone or in combination, particularly with the other errors described in this petition, established that a new trial and/or a resentencing is warranted.

Under Florida law, aggravating circumstances "must be proven beyond a reasonable doubt," Hamilton v. State, 547 So. 2d 630, 633 (Fla. 1989). Florida law also establishes that limiting constructions of the aggravating circumstances are "elements" of the particular aggravating circumstance. "[T]he State must prove [the] element[s] beyond a reasonable doubt." Banda v. State, 536 So. 2d 221, 224 (Fla. 1988). Fundamental error occurred when Mr. Pietri's jury received wholly inadequate instructions regarding the aggravating circumstances.

Under Florida law, the sentencing jury may reject or give little weight to any particular aggravating

circumstance. A binding life recommendation may be returned because the aggravators are insufficient. Hallman v. State, 560 So. 2d 223 (Fla. 1990). Thus, the jury's understanding and consideration of aggravating circumstances may lead to a life sentence. Mr. Pietri's jury was not given adequate guidance as to what was necessary to establish the presence of an aggravator. This left the jury with unbridled discretion and violates the Eighth Amendment.

In Maynard v. Cartwright, the Supreme Court held that the "channeling and limiting of the sentencer's discretion in imposing the death penalty is a fundamental constitutional requirement for sufficiently minimizing the risk of wholly arbitrary and capricious action." 486 U.S. 356, 362 (1980). There must be a "principled way to distinguish [the] case, in which the death penalty was imposed, from the many cases in which it was not." Id. at 363 (quoting Godfrey v. Georgia, 446 U.S. 420, 433 (1980)). Although Cartwright was specifically concerned with Oklahoma's application of the "heinous, atrocious, or cruel" aggravator, the

principles discussed in that case are applicable to the other aggravators previously mentioned.

The failure to instruct on the limitations left the jury free to ignore the limitations, and left no principled way to distinguish Mr. Pietri's case from a case in which the limitations were applied and death, as a result, was not imposed. A properly instructed jury would have had no more than one aggravating circumstances, Mr. Pietri's imprisonment at the time of the offense, to weigh against the mitigation offered by the defense. Where improper aggravating circumstances are weighed by the jury, the "scale is more likely to tip in favor of a recommended sentence of death." Valle v. State, 502 So. 2d 1225 (Fla. 1987). Mr. Pietri's jury was left with open-ended discretion found to be invalid in Furman v. Georgia, 408 U.S. 238 (1972), and Maynard v. Cartwright. Since the jury in Florida is a co-sentencer, prejudice is manifest.

This error was compounded by the fact the jury was allowed to find the CCP heightened premeditation aggravator when, as a matter of law, the instruction should not have been given to the jury. Counsel was

ineffective for inadequately objecting to and arguing that the heightened premeditation instruction should not have been given.

Mr. Pietri's jury was not adequately or accurately instructed. The jury was in fact misled by the instructions and the State Attorney's argument as to what was necessary to establish the presence of aggravating circumstances and to support death. (see e.g. R. 2808-12, 2815-6) Undeniably, the Eighth Amendment was violated. See Downs v. Moore, 2001 WL 1130695 (Fla. September 26, 2001)(Wells, C.J. concurring)("The justification for the fundamental error exception to the preservation rule is that the error is so serious that the trial judge should have sua sponte acted to correct it even though defense counsel failed to object"). This issue either was properly raised and preserved during the trial court proceedings at the guilt phase by Mr. Birch, or his failure to do so at the penalty phase was fundamental error.

CLAIM III

THE CONSTITUTIONALITY OF THE FIRST-DEGREE MURDER INDICTMENT MUST BE REVISITED IN LIGHT OF APPRENDI V. NEW

JERSEY

a. Introduction

Ring v. Arizona, 122 S. Ct. 2428, 2002 U.S. LEXIS 4651 (June 24, 2002), held unconstitutional a capital sentencing scheme that makes imposing a death sentence contingent upon the finding of an aggravating circumstance and assigns responsibility for finding that circumstance to the judge. The United States Supreme Court based its holding and analysis of Ring on its earlier decision in Apprendi v. New Jersey, 530 U.S. 466 (2000). Apprendi 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." Id. at 490 (quoting Jones v. United States, 526 U.S. 227, 252-253 (1999) (Stevens, J., concurring)). Capital sentencing schemes such as 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. Ring, 122 S. Ct. at 2441 (quoting Apprendi,

530 U.S. at 501 (Cook., J., concurring)).

Applying the Apprendi test in Ring, the Court said "[t]he dispositive question . . . 'is not one of form but of effect.'" Ring, 122 S. Ct. at 2439 (quoting Apprendi, 530 U.S. at 494). The question is not whether death is an authorized punishment in first-degree murder cases,[1] but whether the "facts increasing punishment beyond the maximum authorized by a guilty verdict standing alone are found by the judge or the jury" Ring, 122 S. Ct. at 2441. "If a state makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact . . . must be found by a jury beyond a reasonable doubt." Ring, 122 S. Ct. at 2439. "All the facts which must exist in order to subject the defendant to a legally prescribed punishment

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1See Ring, 122 S. Ct. at 2440 - 41 (rejecting argument that finding of aggravating circumstances did not increase statutory maximum because "Arizona first-degree murder statute 'authorizes a maximum penalty of death only in a formal sense'" (quoting Apprendi, 530 U.S. at 541 (O'Connor, J., concurring)). Both the Florida and Arizona statutes provide for a range of punishments, the most severe of which is death. Compare Fla. Stat. sec. 775.082(1)(1979) with Arizona Rev. stat. Ann. Sec. 13-1105(C).

must be found by the jury." Ibid. at 2440.

The Court in Ring held that Arizona's sentencing statute could not survive Apprendi because "[a] defendant convicted of first-degree murder in Arizona cannot receive a death sentence unless a judge makes the factual determination that a statutory aggravating factor exists. Without that critical finding, the maximum sentence to which the defendant is exposed is life imprisonment, and not the death penalty." Ring, 122 S. Ct. at 2436 (internal quotation marks and citations omitted). In so holding, the Court 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.

b. Applying Ring to Florida's sentencing scheme

This Court 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, and the basic

principle of Hildwin v. Florida, 490 U.S. 638 (1989) (per curiam), which upheld the capital sentencing 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 2437 (quoting Walton, 497 U.S. at 648, in turn quoting Hildwin, 490 U.S. at 640-641).

Ring undermines this Court's decision in Mills by recognizing that Apprendi applies to capital sentencing schemes. Ring, 122 S. Ct. at 2432 ("Capital defendants, no less than non-capital defendants . . . are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment"). Id. Further, Ring acknowledges that States may not avoid the Sixth Amendment requirements of Apprendi by simply "specif[ying] 'death or life imprisonment' as the only sentencing options," Ring, 122 S. Ct. at 2440. Lastly, Ring holds that the relevant and dispositive question is whether under state law death is "authorized by a guilty verdict standing alone." Id. at 2441.

Florida's capital sentencing statute, like the Arizona statute struck down in Ring, makes imposing the death penalty contingent on the factual findings of a judge, not the jury. Section 775.082 of the Florida Statutes provides that a person convicted of first-degree murder must be sentenced to life in prison "**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, and in the latter event such person shall be punished by death." (Emphasis added). For nearly 30 years, this Court has held that sections 775.082 and 921.141 do not allow imposing a death sentence upon a jury's verdict of guilt, but only upon a finding of sufficient aggravating circumstances. Dixon v. State, 283 So. 2d 1, 7 (Fla. 1973)("question of punishment is reserved for a post conviction hearing").

The "explicitly cross reference[d] statutory provision" requiring the finding of an aggravating circumstance before imposition of the death penalty," Ring, 122 S. Ct. at 2440, requires the judge – after the

jury has been discharged and "[n]otwithstanding the recommendation of a majority of the jury" to make three 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 facts." Ibid. The trial judge must first find the existence of at least one aggravating circumstance. Ibid. Secondly, the judge must find that "sufficient aggravating circumstances exist" to justify imposition of the death penalty.[2] Ibid. Thirdly, the judge must make written findings that "there are insufficient mitigating circumstances to outweigh the aggravating circumstances." Ibid. "If the court does not make the findings requiring the death sentence, the court shall impose sentence of life imprisonment in accordance with sec. 775.082." Ibid.

Because Florida's death penalty statute gives the judge sole responsibility for making the findings of "sufficient aggravating circumstances" and "insufficient

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2The jurors need only find sufficient aggravating circumstances to "recommend" an "advisory sentence" of death. Fla. Stat. sec. 921.141 (2).

mitigating circumstances" necessary to impose death, it violates the Sixth Amendment.

c. The role of the jury in Florida's capital sentencing scheme neither satisfies the Sixth Amendment nor renders harmless the failure to satisfy Apprendi and Ring

Florida's death penalty statute differs from Arizona's in that it provides for the jury to hear evidence and "render an advisory sentence to the court." Fla. Stat. § 921.141 (2). However, the jury's role in Florida's capital sentencing process is insignificant under Apprendi and Ring because "under section 921.141, the jury's advisory recommendation is not supported by findings of fact." Combs v. State, 525 So. 2d 853, 859 (Fla. 1988)(Shaw, J. concurring). This is the central requirement of Ring.

This Court has rejected the idea that a defendant convicted of first-degree murder has the right "to have the existence and validity of aggravating circumstances determined as they were placed before this jury." Engle v. State, 438 So. 2d 803, 813 (Fla. 1983), explained in Davis v. State, 703 So. 2d 1055, 1061 (Fla. 1997). Florida's statute specifically requires the judge to

“set forth . . . findings upon which the sentence of death is based as to the facts,” but asks the jury generally to “render an advisory sentence . . . based upon the following matters” referring to the sufficiency of the aggravating and mitigating circumstances. Fla. Stat. § 921.141 (2) and (3).

Florida law does not require all jurors to agree that the State has proved any aggravating circumstance beyond a reasonable doubt. Neither does the law provide that all jurors agree on the same aggravating circumstances beyond a reasonable doubt, or agree on the same aggravating circumstances when advising that "sufficient aggravating circumstances exist" to recommend a death sentence. Therefore, it is impossible to say that "the jury" rendered a verdict as to an aggravating circumstance or the sufficiency of them. As Justice Shaw observed in Combs, Florida law leaves these matters to speculation, Combs, 525 So. 2d at 859 (Shaw J. concurring)

Moreover, it would be impermissible and unconstitutional to rely on the jury's advisory sentence as the basis for fact findings required for a death

sentence in Florida because the statutes require only a bare majority vote of the jury in support of that advisory sentence. See id. ('recommendation of a majority of the jury'). In Harris v. United States 2002 WL 1357277, No. 00-10666 (U.S. June 24, 2002), decided on the same day as Ring, the United States Supreme Court held that under the Apprendi test, "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. at 14. 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. Ring, 122 S. Ct. at 2443. Based on the reasoning in Apprendi, Jones and Ring, aggravating factors are equivalent to elements of the capital crime itself and must be treated as such.

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 made the point even more

strongly by repeatedly emphasizing that the trial judge's findings must be made independently of the jury's recommendation. See Grossman v. State, 525 So. 2d 833, 840 (Fla. 1988)(collecting cases). Because the judge must find under Fla. Stat. § 921.141(3) that "sufficient aggravating circumstances exist" "notwithstanding the recommendation of a majority of the jury," he may consider and rely on evidence not submitted to the jury. Porter v. State, 400 So. 2d 5 (Fla. 1981); Davis v. State, 703 2d 1055, 1061 (Fla. 1997). The judge is also permitted to consider and rely upon aggravating circumstances that were not submitted to the jury. Davis, 703 So. 2d at 1061, citing Hoffman v. State, 474 So. 2d 1178 (Fla. 1985)(court's finding of "heinous, atrocious, or cruel" aggravating circumstance proper though jury was not instructed on it); Fitzpatrick v. State, 437 So. 2d 1072, 1078 (Fla. 1983)(finding of previous conviction of violent felony was proper even though jury was not instructed on it) Engle, supra, 438 So. 2d at 813.

In Florida, the jury's role is merely advisory and contains no findings upon which to judge the

proportionality of the sentence. For this reason, this Court has recognized that its review of a death sentence is based and dependent on the judge's written findings. Morton, 789 So. 2d at 333 ("The sentencing order is the foundation for this Court's proportionality review, which may ultimately determine if a person lives or dies"); Grossman, 525 So. 2d at 839; Dixon, 283 So. 2d at 8.

"[Florida's] enumerated aggravating factors operate as 'the functional equivalent of an element of a greater offense,'" and therefore must be found by a jury like any other element of an offense. Ring, 122 S. Ct. at 2443 (quoting Apprendi, 530 U.S. at 494). Contrary to the dictates of Ring and Apprendi, Florida law does not require the jury to reach a verdict on any of the factual determinations required before a death sentence could be imposed. Section 921.141(2) does not call for a jury verdict, but rather an "advisory sentence." This Court has made it clear 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 . . . '" Combs,

525 So. 2d at 858 (quoting Spaziano v. Florida, 468 U.S. 447, 451 (emphasis original in Combs). "The trial judge . . . is not bound by the jury's recommendation, and is given final authority to determine the appropriate sentence." Engle, 438 So. 2d at 813. It is reversible error for a trial judge to consider herself bound to follow a jury's recommendation and thus "not make an independent ruling whether the death sentence should be imposed." Ross v. State, 386 So. 2d 1191, 1198 (Fla. 1980).

Neither Florida's sentencing statute, Florida case law, nor the jury instructions in Mr. Pietri's case required that all jurors concur in finding any particular aggravating circumstances, or "[w]hether sufficient aggravating circumstances exist[ed]," or "[w]hether sufficient aggravating circumstances exist[ed] which outweigh[ed] the aggravating circumstances." Fla. Stat. § 921.141(2). In Mr. Pietri's case, the eight (8) to four (4) recommendation of the jury was not unanimous. Thus, not all of the jurors agreed that sufficient aggravating circumstances existed to warrant a sentence of death.

Florida law does not require a unanimous jury to 1) agree that the State has proved any aggravating circumstance beyond a reasonable doubt, 2) agree on the same aggravating circumstances beyond a reasonable doubt, or even 3) to agree on the same aggravating circumstances when advising that "sufficient aggravating circumstances exist" to recommend a death sentence. Therefore, there is no way to say that "the jury" rendered a verdict as to an aggravating circumstance or the sufficiency of them.

The State was not required to convince the jury that death was a proper sentence beyond a reasonable doubt. The jury in Mr. Pietri's case was not required to make findings beyond a reasonable doubt as required by the Sixth Amendment. “If a State makes an increase in a defendant’s authorized punishment contingent on the finding of a fact, that fact, no matter how the State labels it, must be found by a jury beyond a reasonable doubt.” Ring, 122 S. Ct. at 2439. Florida law makes a death sentence contingent not upon the existence of any individual aggravating circumstance, but on a (judicial) finding “[t]hat sufficient aggravating circumstances

exist.” Fla. Stat. § 921.141(3).

In light of the plain language of Florida's death penalty statute, the rules of criminal procedure, and 20 years of this Court's death penalty jurisprudence, it is clear that the limited role of the jury in Florida’s capital sentencing scheme fails to satisfy the requirements of the Sixth Amendment. Even if this Court were to redefine the jury’s role under Florida law, it would not make Mr. Pietri's death sentence valid. Mr. Pietri's jury was repeatedly told that their decision was merely “advisory”.

As the Supreme Court held in Caldwell v. Mississippi, 472 U.S. 320(1985)

> [I]t is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant’s death rests elsewhere. Caldwell, 472 U.S. at 328-329.

Were this Court to now conclude that Mr. Pietri's death sentence rests on findings made by the jury after they were told that Florida law clearly provided that a death sentence would not rest upon their recommendation, it

would establish that Mr. Pietri's death sentence was imposed in violation of Caldwell.

Caldwell embodies the principle stated in Justice Breyer's concurring opinion in Ring that "the Eighth Amendment requires that individual jurors to make, and to take responsibility, for, a decision to sentence a person to death." Ring, 122 S. Ct. at 2448 (Breyer, J.)

d. Mr. Pietri's sentencing did not comport with the requirements of Ring, Apprendi and the Sixth Amendment because the findings of fact made by this Court went beyond any findings reached by the jury in determining guilt.

The jury returned an advisory verdict recommending a death sentence by a vote of 8-4 (R. 3100). Despite the completely inadequate and superficial mitigating circumstances presented to the jury, four jurors voted against the death sentence (R. 1067). It is thus plausible that the four jurors who voted for life either failed to find some or all of the aggravating circumstances or failed to find the aggravating circumstances were sufficient to merit the death sentence. Furthermore, even the jurors who voted for death may have based their conclusions upon the finding of one of the aggravating circumstances rather than all

of them.[3] In any event, the jury's 8-4 vote establishes beyond reasonable doubt that no unanimous jury finding was ever made in Mr. Pietri's penalty phase of the facts that rendered him eligible for a death sentence under Florida law.

e. Mr. Pietri's death sentence is invalid because the elements of the offense necessary to establish capital murder were not charged in the indictment.

In Jones v. United States, 526 U.S. 227 (1999), the United States Supreme Court 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 the indictment, submitted to a jury, and proven beyond a reasonable doubt." Jones, at 243, n. 6. The Jones Court noted that "[m]uch turns on the determination that a fact is an element of the offense, rather than a sentencing consideration," in significant part because "elements

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3This is especially the case given that the aggravating circumstance of cold, calculated and premeditated was struck by this Court and held to be harmless. Pietri v. State, 644 So. 2d 1347 (Fla. 1994).

must be charged in the indictment." Jones, at 232. Citizens prosecuted under state law are afforded the same protections under the Fourteenth Amendment. Apprendi v. New Jersey, 530 U.S. 466, 475-76 (1999).[4]

Ring v. Arizona, 122 S. Ct. 2428; 2002 U.S. LEXIS 4651 (June 24, 2002) held that a death penalty statute's "aggravating factors operate as 'the functional equivalent of an element or a greater offense.'" Ring, 122 S. Ct. at 2443 (quoting Apprendi, 530 U.S. at 494, n. 19). Thus, 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 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, No. 01-7310, 2002 U.S. LEXIS 4893 (June 28, 2002).

4The grand jury clause of the Fifth Amendment has not been held to apply to the States. Apprendi, 530 U.S. at 477, n. 3.

The question in Allen was presented as:

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

The Eighth Circuit had rejected Allen's argument because, in the court's view, aggravating factors 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.

Article I, section 15 of the Florida Constitution, like the Fifth Amendment to the United States Constitution, provides that "No 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), Florida's death penalty statute, Florida Statute sections 775.082 and 921.141, makes imposing the death penalty contingent upon the government proving the existence of aggravating circumstances, with the order

of the trial court 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 the indictment. In State v. Dye, 346 So. 2d 538 (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. Gray, 435 So. 2d 816, 818 (Fla. 1983), this Court said "[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 state, including "by habeas corpus." Gray, 435 So. at 818. Finally, in Chicone v. State, 684 So. 2d 736, 744 (Fla. 1996), this Court said "[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 Dionisio Supreme Court explained that function of the grand jury:

> 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 States and its prosecutors" with respect to "significant decisions such as how many counts to charge and...the important decision to charge a capital crime").

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. Pietri with a crime punishable by death.

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 (1984), and DeJonge v. Oregon, 299 U.S. 353 (1937).

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. Pietri's rights under Article I, section 15 of the Florida Constitution and the Sixth Amendment to the federal constitution were violated. By omitting any reference to the aggravating circumstance that would be relied upon by the State in seeking a death sentence, the indictment prejudicially hindered Mr. Pietri "in the preparation of a defense," to a sentence of death. Fla. R. Crim. P. 3.140(o).

e. Mr. Pietri's death sentence was imposed in

violation of the Due Process Clause of the Fifth Amendment and the jury trial right guaranteed by the Sixth Amendment 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 imposing the death penalty. Fla. Stat. § 921.141(3). Because imposing a death sentence is contingent on this fact being found, and the maximum sentence that could be imposed in the absence of that finding is life in prison, the Sixth Amendment required that the State bear the burden of proving it beyond a reasonable doubt. Ring, 122 S. Ct. at 2432. Nevertheless, Florida juries, like that of Mr. Pietri's jury, are routinely instructed, "Should you find that sufficient aggravating circumstances do exist, it will then be your duty to determine whether mitigating circumstances exist that outweigh the aggravating circumstances." (R. 3087, 3090).

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-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. sections, 775.082; 921.141. Therefore, under Winship the prosecution would have to prove the existence of that element beyond a reasonable doubt.

However, the instruction given to Mr. Pietri's jury violated the Due Process Clause of the Fourteenth Amendment of the United States Constitution 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" existed to outweigh mitigating circumstances. The Florida instruction shifts the burden to the defendant to prove that the mitigating circumstances outweigh sufficient aggravating circumstances. Mullaney v. Wilbur, 421 U.S. 684, 698

(1975).

In Mullaney, the United States Supreme Court held that the Maine statutory scheme delineating the crimes of murder and manslaughter violated the Due Process Clause of the Fourteenth Amendment. The Maine law at issue required a defendant to establish, by a preponderance of the evidence, that he acted in the heat of passion on sudden provocation, in order to reduce a charge of murder to manslaughter. Id., 421 U.S. at 691-692. Like the Florida statute at issue here, "the potential difference in [punishment] attendant to each conviction . . . . may be of greater importance than the difference between guilt or innocence for many lesser crimes." Id. 421 U.S. at 698. The Supreme Court held that the statutory scheme unconstitutionally relieved the state of its burden to prove the element of intent. Id. 421 U.S. at 701-702. The Florida instruction produces the same fatal flaw.

The State of Florida enacted its death penalty statute in order to comply with the Eighth Amendment's requirement that the death penalty be applied only to the worst offenders. Fla. Stat. 921.141, State v.

Dixon, 283 So. 2d 1, 10 (Fla. 1973). As a means of distinguishing between death eligible and non-death eligible defendants, Florida chose to distinguish those for whom "sufficient aggravating circumstances" outweigh mitigating circumstances from those for whom "sufficient aggravating circumstances" do not outweigh the mitigating circumstances. Id., 283 So. 2d at 8. Because the former are more culpable, they are subjected to the most severe punishment: death. "By drawing the distinctions, while refusing to require the prosecution to establish beyond a reasonable doubt the fact upon which it turns, [Florida] denigrates the interests found critical in Winship." Mullaney, 421 U.S. at 698.

Because Mr. Pietri's jury was never required to find the element of sufficient aggravating circumstances beyond a reasonable doubt, the error here cannot be subjected to a harmless error analysis. Sullivan v. Louisiana, 508 U.S. 275, 279-280 (1993). Mr. Pietri is entitled to relief.

CONCLUSION

It is clear that several meritorious arguments were available to be raised on direct appeal, yet appellate

counsel unreasonably failed to assert them. Particularly when compared with the arguments that appellate counsel did advance, the unreasonably prejudicial performance of appellate counsel is obvious. These errors, singularly or cumulatively, demonstrate that Mr. Pietri was denied the effective assistance of appellate counsel.

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 Celia A. Terenzio, Office of the Attorney General, 1515 N. Flagler Dr., 9th Floor, West Palm Beach, FL 33401-3432, on June 10, 2002.

CERTIFICATE OF COMPLIANCE

The undersigned counsel hereby certifies that this petition complies with the font requirements of rule 9.100(l), Fla. R. App. P.

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