IN THE SUPREME COURT OF FLORIDA

CASE NO. SC03-28

ROBERT BEELER POWER,

Petitioner,

v.

MICHAEL M. MOORE,
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 to address substantial claims of error under the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, claims demonstrating that Mr. Power 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 (R. ___). All other citations shall be self-explanatory.

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 Florida Constitution 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. Power requests oral argument on this petition.

PROCEDURAL HISTORY

On February 24, 1989 the grand jury of Orange County, Florida returned an indictment against Mr. Power in which he was charged with the first-degree premeditated murder, sexual battery, kidnapping, armed

burglary and armed robbery (R. 2676-2678).

The jury unanimously recommended a sentence of death following a delay of approximately five months after rendering its verdict in the guilt-innocence phase (R. 3254). The trial court imposed a death sentence on November 8, 1990 (R. 3258-3271; 3272-3279). In addition, Mr. Power was sentenced to life imprisonment on the remaining charges all to run consecutive to count two (R. 3272-3279). It was not designated in count II whether it was concurrent or consecutive to any other sentence. All sentences were ordered to be served consecutive to any other active sentences (R. 3272-3279).

On direct appeal, this Court struck the aggravating circumstance of cold, calculated, and premeditated, but nonetheless, upheld Mr. Power's sentence of death. Power v. State, 605 So. 2d 856 (Fla. 1992). The United States Supreme Court denied a petition for writ of certiorari on April 19, 1993. Power v. Florida, 113 S. Ct. 1863 (1993).

Mr. Power timely field his initial Rule 3.850 motion on June 27, 1994. Following public records litigation, Mr. Power filed an amended Rule 3.850 motion on March 17, 1995 and a third and final amended Rule 3.850 motion on November 23, 1998. The lower court granted an evidentiary hearing, which was held January and April 2001. The lower court denied all of Mr. Power's post-conviction claims. A timely notice of appeal was filed. This petition is timely filed.

CLAIM I

APPELLATE COUNSEL FAILED TO RAISE ON DIRECT APPEAL NUMEROUS MERITORIOUS ISSUES THAT WARRANT REVERSAL OF EITHER OR BOTH THE CONVICTION AND SENTENCE OF DEATH.

A. INTRODUCTION

Mr. Power 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).

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

Wainwright, 490 So. 2d 938, 940 (Fla. 1986). Individually and cumulatively, Barclay v. Wainwright, 477 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.

B. FAILURE TO RAISE PROSECUTORIAL MISCONDUCT

The prosecutors' acts of misconduct, both individually and cumulatively, deprived Mr. Power of his rights under the Sixth, Eighth, and Fourteenth Amendments.

When improper conduct by a prosecutor "permeates" a case, relief is proper. Garcia v. State, 622 So. 2d 1325 (Fla. 1993); Nowitzke v. State, 572 So. 2d 1346 (Fla. 1990). The prosecutor repeatedly made inflammatory, improper, and prejudicial comments during his guilt-innocence and penalty phase closing arguments. During the guilt-innocence phase, he argued:

> You need to look to other evidence that you speculate or imagine might be out there.
>
> Because a police officer's interest is to see justice is done. He has got no interest in seeing innocent people convicted.
>
> (In reference to defense witness, Dr. Hart) He doesn't even have a comparison microscope, ladies and gentleman, which is essential to this kind of

work.

The defendant's (sic) about the same size and build as Gary Bare.

The defendant thought about killing Welty.

And you know, isn't that interesting? When they found the gun, there were no latent prints except Rick Welty's. Welty said he didn't see any gloves. But I think the evidence is clear that whoever did it had gloves.

And, you know, we know who did it.

You remember the defense opening statement? What was it the defense didn't say anything about? The radio.

What do these gloves tell us? Well, they tell you a lot about why there were no latents on that gun that somebody took from Welty.

(Referring to the bag and its contents found in the attic) It was a murder kit, ladies and gentleman. There are gloves to get away with it. This is the knife. Maybe not this one, but one like it, would have worked just fine to kill Angeli Bare.

This is a murder kit, ladies and gentleman. A gun, a knife. Maybe it is not the knife. Maybe it is not the gloves. But they are two tools of a man who knows how to use them.

His most precious possessions.

He threw her away like she was trash.

(Referring to whether Mr. Power's actions were premeditated) You can't find otherwise from the evidence.

Number two. He killed her in the commission of a sexual battery. And, of course, you have to find that the evidence answers yes.

> Occasionally, circumstances may suggest one is guilty of something that they didn't do. But when the person is innocent, those two or three circumstances are easily explained away. The murder kit...
>
> I point to the defendant and I say he is guilty as charged and the evidence shows it.
>
> Welty came and he told you the truth.
>
> If Welty were a liar, he would have come in and he would say well, I forgot to tell Neil McDonald there was a moustache. But what he said was I didn't notice a moustache. And that's what he said on the witness stand last week. He is not a liar and he didn't shade his story to make it better for the state.
>
> And look around this jury, selected randomly. And even just looking at your head hairs, very few of them are so similar that you wouldn't be able to sort them out if you mixed them in.
>
> (Referring to the hair exhibits) But we have experts to explain evidence like this to you. And what it means. And Hart's not one.
>
> (Referring to Dr. Hart) His incompetence is so clear to everybody who was here in this courtroom when he testified.
>
> (Referring to Bill Power, Mr. Power's brother's alibi) Prickett's got no reason to lie for him.
>
> The defendant was the one who doesn't. And after all, no alibi is no alibi.
>
> And the other, there were some questions I would have liked to have asked Billy Power. You probably would have been interested in his answers.
>
> That he had a murder kit.

(R. 1943-1987; 2047-2076)(emphasis added).

The prosecutor's argument violated Rule 4-3.4 of the Rules of Professional Conduct, which says:

> A lawyer shall not: (e) in trial, allude to any matter the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence,...or state a personal opinion as to the justness of a cause, the credibility of a witness,...or the guilt or innocence of an accused.

The comments and argument of the prosecutor were (1) not supported by admissible evidence; (2) statements of the prosecutor's personal opinion as to the justness of a particular matter; (3) comments on the credibility of witnesses; (4) comments on Mr. Power's right to remain silent; and/or (5) comments on the guilt or innocence of Mr. Power.

In Bertolotti v. State, 476 So. 2d 130 (Fla. 1985), this Court expressed its disgust with "...the continuing violations of prosecutorial duty, propriety and restraint." 476 So. 2d at 133.

> The proper exercise of closing argument is to review the evidence and to explicate those inferences which may reasonably be drawn from the evidence. Conversely, it must not be used to inflame the minds and passions of the jurors so that their verdict reflects an emotional response to the crime or the defendant rather than the logical analysis of the evidence in light of the applicable law.

476 So. 2d at 134.

"Under our law, the prosecutor has a duty to be fair, honorable and just....[T]he prosecuting attorney 'may prosecute with earnestness

and vigor-indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones.'" Boatwright v. State, 452 So. 2d 666, 667 (Fla. 4th DCA 1984), citing, Berger v. United States, 55 S. Ct. 629 (1935). "It is elemental in our system of jurisprudence that the jury is the sole arbiter of the credibility of witnesses. Boatwright, 452 So. 2d at 668. "A prosecutor may not ridicule a defendant or his theory of defense, [citation omitted], or express a personal belief in the guilt of the accused." Riley v. State, 560 So. 2d 279 (Fla. 3d DCA 1990).

> We are likewise aware that the ABA Standards of Criminal Justice Relating to Prosecution Function, section 3-5.8 (1980), label as 'unprofessional conduct' expression by a prosecutor of his personal belief or opinion as to the truth of falsity of any testimony or evidence of the guilt of the defendant. [footnote omitted] That error was committed by the trial court in failing to control the improper closing remarks of the prosecutor, we are of one mind.

Bass v. State, 547 So. 2d 680, 682 (Fla. 1st DCA 1989).

Improper prosecutorial remarks can constitute reversible error when such remarks may have prejudiced and influenced the jury into finding the defendant guilty. Riley v. State, 457 So. 2d 1084, 1086 (Fla. 4th DCA 1984). These comments were not only in poor taste and unprofessional, but also highly inflammatory. Riley, 457 So. 2d at 1088. They also were cumulative in nature.

The State made no attempt to explain or justify these comments. It is improper to refer to extra-testimonial facts during a final

argument. Riley, 457 So. 2d at 1090.

The federal courts also agree "...that misconduct by a prosecuting attorney in closing argument may be grounds for reversing a conviction." Brooks v. Kemp, 762 F.2d 1383, 1399 (11th Cir. 1985).

Mr. Power's right to due process and a fair trial were undermined and violated by the prosecutor's improper comments and closing argument. While appellate counsel raised the prosecutor's improper reference to Mr. Power's right not to testify, it was not set in the context of the repeated instances of misconduct that permeated the guilt phase, to Mr. Power's substantial prejudice. (See, Initial Brief, Argument II, pgs. 24-29).

Furthermore, during the penalty phase closing argument, the prosecutor said,

> ...we are almost at the end of the chain of people who have done their duty....I'm asking you to do your duty...
>
> I don't think you are afraid. I think, well, and fear is not the reason for you to render any decision here today.
>
> I doubt that you will have forgotten the pictures.
>
> What this sentence is about is whether the people of the State of Florida are going to follow through with the laws that we have chosen for ourselves.
>
> While we're talking about these convictions, we'll look in the window at the Fearmonger Shop.
>
> What we do know about the defendant is that he

> enjoyed the suffering of others. Angeli didn't survive to tell us what happened, but when we listened to the stories of Ms. Wallace, when we listened to the testimony of the Warden children, we realized that he takes pleasure in inflicting pain.
>
> ...he likes to hear them crying.
>
> "But sometimes experts overlook things. And you can rely on your own judgment in this. That's your job. That's your duty to make a decision.

(R. 2567-2582)(emphasis added).

These comments constitute a comment on evidence not introduced at trial or the penalty phase; are expressions of the prosecutor's personal opinion or belief; and serve no useful purpose other than to play upon the prejudices and sympathies of the jury. These comments were improper and violated Mr. Power's right to due process and a fair and impartial trial. Appellate counsel's failure to raise prosecutorial misconduct was ineffective and Mr. Power was prejudiced by these impermissible inflammatory remarks. Relief is warranted.

C. MR. POWER WAS DENIED HIS RIGHTS UNDER THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS WHEN THE TRIAL COURT ALLOWED THE JURY TO HEAR EVIDENCE IN DETAIL OF PRIOR FELONIES OF WHICH MR. POWER HAD BEEN CONVICTED.

Over objection, the trial court allowed the state to introduce evidence of the specific acts and occurrences that resulted in Mr. Power's convictions for prior violent felonies used by the trial court in support of its death sentence (R. 2385; 2386-2427). Specifically, the trial court allowed Gerald Yeiter, Allison Evonne Wallace, Debra

Marie Warden, and Cindy Warden to testify before the jury during the penalty phase in detail as to specific actions on the part of Mr. Power of which he was convicted (R. 2386-2427). The admission of this irrelevant evidence was exceedingly prejudicial and violated Mr. Power's rights under the Eighth and Fourteenth Amendments.

The evidence was not relevant, and assuming its relevance, its prejudicial effect far outweighed its probative value. Mr. Power did not raise as a mitigating circumstance no significant history of prior criminal activity. Thus, the evidence served only to inflame the jury and offered no probative value. In Rhodes v. State, 547 So. 2d 1201 (Fla. 1989), this Court cautioned:

> Although this Court has approved the introduction of testimony concerning the details of prior felony convictions involving violence during the penalty phase of a capital trial[citations omitted], the line must be drawn when that testimony is not relevant, gives rise to a violation of a defendant's confrontation rights, or the prejudicial value outweighs the probative value....
>
> The information presented to the jury did not directly relate to the crime for which [Mr. Rhodes] was on trial, but instead described the physical and emotional trauma and suffering of [other] victim[s] of a totally collateral crime committed by [Mr. Rhodes].

Id. at 1205 (emphasis added).

In Mr. Power's case, the prejudicial effect of the evidence clearly outweighed its probative value. "The admission of improper collateral offense evidence is presumed harmful." Holland v. State,

636 So. 2d 1289 (1994).

Additionally, Mr. Power's right to due process was violated through the admission of this evidence. "The Due Process Clause does not allow the execution of a person 'on the basis of information which he had no opportunity to deny or explain.'" Simmons v. South Carolina, 114 S. Ct. 2187 (1994). Appellate counsel's failure to raise this issue constituted deficient performance and resulted in substantial prejudice to Mr. Power. Relief is warranted.

D. APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE CUMULATIVE ERROR.

Mr. Power did not receive the fundamentally fair trial to which he was entitled under the Eighth and Fourteenth Amendments. See Heath v. Jones, 941 F. 2d 1126 (11th Cir. 1991); Derden v. McNeel, 38 F. 2d 605 (5th Cir. 1991). He was deprived due process because the sheer number and types of errors involved in his trial, when considered as a whole, virtually dictated the sentence that he would receive.

In Jones v. State, 569 So. 2d 1234 (Fla. 1990), this Court vacated a capital sentence and remanded for a new sentencing proceeding before a jury because of "cumulative errors affecting the penalty phase." Id. at 1235 (emphasis added). In Nowitzke v. State, 572 So. 2d 1346 (Fla. 1990), cumulative prosecutorial misconduct was the basis for a new trial. When cumulative errors exist the proper concern is whether:

> even though there was competent substantial evidence to support a verdict...and even though each of the alleged errors, standing alone, could

> be considered harmless, the cumulative effect of such errors was such as to deny to defendant the fair and impartial trial that is the inalienable right of all litigants in this state and this nation.

Jackson v. State, 575 So. 2d 181, 189 (Fla. 1991). See also Ellis v. State, 622 So. 2d 991 (Fla. 1993) (new trial ordered because of prejudice resulting from cumulative error); Taylor v. State, 640 So. 2d 1127 (Fla. 4th DCA 1994).

This Court has consistently emphasized the uniqueness of death as a criminal punishment. Death is "an unusually severe punishment, unusual in its pain, in its finality, and in its enormity." Furman v. Georgia, 408 U.S. 238, 287 (1972) (Brennan, J., concurring). It differs from lesser sentences "not in degree but in kind. It is unique in its total irrevocability." Id. at 306 (Stewart, J., concurring). The severity of the sentence "mandates careful scrutiny in the review of any colorable claim of error." Zant v. Stephens, 462 U.S. 862, 885 (1983). Accordingly, the cumulative effects of error must be carefully scrutinized in capital cases.

A series of errors may accumulate a very real, prejudicial effect. The burden remains on the state to prove beyond a reasonable doubt that the individual and cumulative errors did not affect the verdict and/or sentence. Chapman v. California, 386 U.S. 18 (1967); State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986); Larkins v. State, 655 So. 2d 95 (Fla. 1995).

These errors cannot be harmless. The results of the trial and sentencing are not reliable. Appellate counsel was ineffective for failing to raise this issue. Habeas Corpus relief must issue.

CLAIM II

THIS COURT CONDUCTED A CONSTITUTIONALLY INADEQUATE PROPORTIONALITY REVIEW AND HARMLESS ERROR ANALYSIS IN MR. POWER'S CASE.

The trial court in Mr. Power's case instructed the jury on four aggravating circumstances; heinous, atrocious, or cruel; cold, calculated and premeditated; previous conviction involving the use or threat of violence; and committed during the commission of sexual battery, burglary and kidnapping (R. 3258-3278). On direct appeal, this Court struck the cold, calculated and premeditated aggravating circumstance, finding that Mr. Power had not demonstrated the required "careful plan or prearranged desire to kill" See Power v. State 605 So. 2d 856, 864 (Fla. 1992). However, this Court then concluded that:

> Based on the evidence in this record **and the lack of statutory and non-statutory mitigating circumstances** we conclude that the trial court would have imposed the same sentence without the [cold, calculated and premeditated] aggravator and therefore find the error to be harmless beyond a reasonable doubt

Id at 865 (emphasis added).

This Court's analysis is constitutionally inadequate for several reasons. The harmless error test was established by the United States

Supreme Court in Chapman v. California, 386 U.S. 18 (1967). For constitutional error to be harmless, the State must show "beyond a reasonable doubt that the error complained of did not contribute to the [outcome] obtained." Yates v. Evatt, 111 S. Ct. 1884 (1991), citing Chapman v. California. The burden is on the State to show the harmlessness of the error and to overcome a presumption of harm. Arizona v. Fulminante, 111 S. Ct. 1246 (1991). If there is a reasonable possibility that the constitutional error might have contributed to the jury's recommendation, the error is not harmless beyond a reasonable doubt and Mr. Power is entitled to relief. Chapman v. California; Yates v. Evatt.

Florida adopted the Chapman test in State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986), which held that the State as beneficiary of the error must prove beyond a reasonable doubt that the error complained of did not contribute to the verdict, or alternatively stated, that there is no reasonable possibility that the error contributed to the conviction or sentence.

Here, there is a reasonable probability that the error contributed to Mr. Power's death sentence being upheld. As noted in Mr. Power's initial brief appealing the denial of his Rule 3.850 motion, substantial and compelling mitigation existed. However, due to Mr. Power's alleged waiver, which Mr. Power submits was not knowing, intelligent or voluntary, these mitigating circumstances were not

presented to the jury, the trial court or this Court. Absent the invalid aggravating circumstance, it was impossible for this Court to conduct a proper proportionality review. In Muhammed v. State, 782 So. 2d, 343 (Fla. 2001) this Court noted:

> In all capital cases this Court is constitutionally required to engage in a thoughtful, deliberate proportionality review to compare the totality of circumstances in a case and to compare it with other capital cases

Muhammed, 782 So. 2d at 363-4.

This Court also noted that in cases such as Mr. Power's, involving a purported waiver of mitigation provide:

> a perfect example of why the defendant's failure to present mitigating evidence makes it difficult, if not impossible ....to compare the aggravating and mitigating circumstances in this case to those present in other death penalty cases.

Id at 364.

Thus, even notwithstanding the cold, calculated and premeditated aggravating circumstance, it was "impossible to compare the aggravating and mitigating circumstances in this case to those present in other death penalty cases." Id.

This Court's inability to conduct a proper proportionality review based on the record of Mr. Power's capital trial taints the entire harmless error analysis. This Court struck the cold, calculated and

premeditated aggravating circumstance, which this Court has recognized as one of the weightiest aggravating circumstances in the Florida capital sentencing scheme. See, Herring v. State, 580 So. 2d 135 (Fla. 1991). Because the harmless error analysis was itself based on a flawed proportionality review, it cannot stand.

In Clemons v. Mississippi, 110 S. Ct. 1441 (1990) the Supreme Court said:

> An automatic rule of affirmance in a weighing state [is] invalid under Lockett v. Ohio, 438 U.S. 586, 98 S. Ct. 2954, 57 L.Ed.2d 973 (1978), and Eddings v. Oklahoma, 455 U.S. 104, 102 S. Ct. 869, 71 L.Ed.2d 1 (1982), for it [does] not give defendants the individualized treatment that would result from actual reweighing of the mix of mitigating factors and aggravating circumstances.

Id. at 1450. The analysis performed by this Court amounted to no more than an automatic affirmance of Mr. Power's death sentence without the benefit of an individualized determination as to the appropriateness of the sentence. Relief is warranted.

CLAIM III

FLORIDA'S CAPITAL SENTENCING STATUTE VIOLATES THE SIXTH AND FOURTEENTH AMENDMENTS UNDER APPRENDI V. NEW JERSEY AND RING V. ARIZONA.

In Ring v. Arizona, 122 S. Ct. 2428 (2002), the United States Supreme Court 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 in Ring on its earlier decision in Apprendi v. New Jersey, 530 U.S. 466 (2000), in which 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." Id. at 490 (quoting Jones v. United States, 526 U.S. 227, 252-253 (1999) (Stevens, J., concurring)).

Capital sentencing schemes such as Florida's and Arizona's 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 2446 (quoting Apprendi, 530 U.S. at 501 (Thomas, J., concurring)).

Florida law only requires the judge to consider the recommendation of a majority of the jury. Fla. Stat. sec. 921.141(3). In contrast, no verdict may be rendered unless all of the trial jurors concur in it. Fla R. Crim. P. 3.440. Neither the sentencing statute, this Court's cases, nor the jury instructions in Mr. Power's case required that all jurors concur in finding any particular aggravating circumstances, or "[w]hether sufficient aggravating circumstances exist," or "[w]hether sufficient aggravating circumstances exist which outweigh the aggravating circumstances." Fla. Stat. sec. 921.141(2).

Because Florida law does not require that all jurors agree that the State has proved any 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 recommend 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 observed in Combs, Florida law leaves these matters to speculation, Combs, 525 So. 2d at 859 (Shaw J. concurring) This is especially pertinent to Mr. Power's case in which this Court on direct appeal struck the aggravating circumstance of cold, calculated and premeditated. There is no way to know how many of the jurors relied on this particular aggravating circumstance as showing that "sufficient aggravating circumstances exist" to recommend a death sentence, especially since the factual predicate of this circumstance was essentially the same as that supporting the "prior violent felony" aggravating circumstance. Relief is warranted.

Furthermore, Mr. Power's death sentence is unconstitutional because the aggravating circumstances were not alleged 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. Apprendi v. New Jersey, 530 U.S. 466 (1999), held that the Fourteenth Amendment affords citizens the same protections when they are prosecuted under state law. Apprendi, 530 U.S. at 475-476.[1]

Ring held that aggravating factors operate as 'the functional equivalent of an element or a greater offense. In Jones, the Supreme Court noted that "[m]uch turns on the determinations 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 United States Court of Appeals for the Eighth Circuit upholding the death sentence, and remanded the case for reconsideration in light of Ring's holding that aggravating factors that are prerequisites of a death sentence must be treated as elements of the offense. Allen v. United States, 122 S. Ct. 2653 (2002).

The question in Allen was presented as:

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[1] 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.

> 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 rejected Allen's argument because 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.

Like the Fifth Amendment to the United States Constitution, Article I, §15 of the Florida 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. §§3591 and 3592(c), Florida's death penalty statute, Florida Statute §§775.082 and 921.141, makes imposing 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 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 grand jury's function:

> 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.

Dionisio, 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 Mr. Power's case would have returned an indictment alleging the presence of aggravating factors, sufficient aggravating circumstances, and insufficient mitigating circumstances and thus charging Mr. Power 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. Power's right under Article I, §15 of the Florida Constitution and the Sixth Amendment to the United States 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. Power "in the preparation of a defense," to a sentence of death. Fla. R. Crim. P. 3.140(o).

This Court recently issued opinions in Bottoson v. Moore, 2002 WL 31386790 (Fla. October 24, 2002) and King v. Moore, 2002 WL 31386234

(Fla. October 24, 2002), both of which addressed the applicability of Ring to Florida's sentencing statute. In both cases, each justice wrote a separate opinion explaining his or her reasoning for denying both petitioners relief under Ring. In both decisions, a per curiam opinion announced the result. In neither case does a majority of the sitting justices join the per curiam opinion or its reasoning. In both cases, four justices (Chief Justice Anstead, Justices Shaw, Pariente, and Lewis) wrote separate opinions explaining that they did not join the per curiam opinion but concurred in result only. However, several of this Court's justices expressed the view that the Florida sentencing calculus is directly affected by Ring.

Justice Shaw expressed his view that the Florida death penalty statute violated the principle enunciated in Ring:

> Nowhere in Florida law is there a requirement that the finding of an aggravating circumstance must be unanimous. Ring, however, by treating a "death qualifying" aggravator as an element of the offense, imposes upon the aggravator the rigors of proof as other elements, including Florida's requirement of a unanimous jury finding. Ring, therefore, has a direct impact on Florida's capital sentencing statute.

Bottoson v. Moore, 2002 WL 31386790 at 18. Justice Shaw concluded that Florida's statute was flawed:

> I read Ring v. Arizona, 122 S.Ct. 2428 (2002), as holding that "an aggravating circumstance necessary for imposition of a death sentence" operates as "the functional equivalent of an element of a greater offense than the one covered

> by the jury's verdict" and must be subjected to the same rigors of proof as every other element of the offense. Because Florida's capital sentencing statute requires a finding of at least one aggravating circumstance as a predicate to a recommendation of death, that "death qualifying" aggravator operates as the functional equivalent of an element of the offense and is subject to the same rigors of proof as the other elements. When the dictates of Ring are applied to Florida's capital sentencing statute, I believe our statute is rendered **flawed** because it lacks a unanimity requirement for the "death qualifying" aggravator.

Bottoson v. Moore, 2002 WL 31386790 at 19 (emphasis added).

In her opinion "concur[ring] in result only" in Bottoson, Justice Pariente said, "I believe that we must confront the fact that the implications of Ring are inescapable." Bottoson v. Moore, 2002 WL 31386790 at 22. She elaborated:

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

Bottoson v. Moore, 2002 WL 31386790 at 24 (italics in original).

Justice Pariente opined that the Florida death penalty statute

violates the principles enunciated in Ring.[2]

Chief Justice Anstead noted that he concurred in that portion of Justice Pariente's opinion discussing "a finding of the existence of aggravating circumstances before a death penalty may be imposed." Bottoson v. Moore, 2002 WL 31386790 at 8 n.18.

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

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

Bottoson v. Moore, 2002 WL 3138670 at 10.[3]

Thus, the applicability of Ring to the Florida death penalty

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[2] At one point she stated, "I agree with Justice Lewis that there are deficiencies in our current death penalty sentencing instructions." Bottoson v. Moore, 2002 WL 31386790 at 22. Accordingly, Justice Pariente opined that the standard jury instructions should be changed, as well as the verdict form used in penalty phase proceedings.

[3] Chief Justice Anstead also indicated, "another factor important to my decision to concur in denying relief [ ] is that the U.S. Supreme Court has specifically denied Bottoson's petition for review and lifted the stay it previously granted as to his execution." Bottoson v. Moore, 2002 WL 31386790 at 7-8 n.17. However, that circumstances is not present in Mr. Power's case, and thus, a different result is warranted.

statute is plain. Mr. Power should be granted relief.

CONCLUSION

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Petition for Writ of Habeas Corpus has been furnished by United States Mail, first class postage prepaid, to Douglas T. Squire, Assistant Attorney General, 444 Seabreeze Boulevard, 5th Floor, Daytona Beach, Florida 33118, on January 6, 2003.

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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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