IN THE SUPREME COURT OF FLORIDA

CASE NO. SC04-1285

ROBERT L. HENRY,

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. Henry 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. Henry requests oral argument on this petition.

PROCEDURAL HISTORY

Mr. Henry will rely on the Statement of the Case and the Facts in his Initial Brief as a source of the procedural history in his death penalty cases.

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.

Mr. Henry 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. Henry'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. Henry's] direct appeal." Matire v. Wainwright, 811 F. 2d 1430, 1438 (11th Cir. 1987). The lack of appellate advocacy on Mr. Henry'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. Henry 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 has 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. Henry 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 ...")

Mr. Henry was prejudiced by court interference with his right to effective assistance of appellate counsel.[1] Mr. Henry attempted to file a one hundred fifty-nine

[1]Appellate counsel was also handicapped by having to work with an incomplete transcript.

(159) page initial brief on direct appeal. This Court refused to accept Mr. Henry's initial brief and indicated it would only accept an initial brief that was one hundred (100) pages or less.[2] Mr. Henry was forced to either drop claims from his brief altogether or abbreviate claims to abide by this Court's ruling that he delete fifty-nine (59) pages from his initial brief. Mr. Henry was sentenced to death and yet was denied effective assistance of appellate counsel as a result of this Court's interference with the presentation of his constitutional claims.

This Court has stated that even in capital cases, appellate counsel should choose to brief only the strongest issues, Cave v. State, 476 So. 2d 180 (Fla. 1985), yet national standards for competent performance of capital appellate counsel duties are violated if less than all arguable issues for reversal are not sought. Both the American Bar Association (ABA) and National

[2]Mr. Henry recognizes that this Court attempts to conduct an independent review in all capital appeals in order to consider whether any reversible error is present. LeDuc v. State, 365 So. 2d 149 (Fla. 1978); Gibson v. State, 351 So. 2d 148 (Fla. 1977). However, a court's independent review is not an adequate substitute for the guiding hand of a zealous advocate on direct appeal.

Legal Aid and Defender Association (NLADA) agree that counsel should seek to present all arguable meritorious issues. ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases (ABA Guidelines), Guideline 11.9.2.D (1989); Standards for the Appointment and Performance of Counsel in Death Penalty Cases (NLADA Standards), Standard 11.9.2(d) (NLADA 1989).

The importance of such standards and guidelines as yardsticks for performance has been emphasized by the Supreme Court's decision in Wiggins v. Smith, 123 S. Ct. 2257 (2003), which specifically addresses failure by trial counsel to investigate a capital defendant's social history for the purpose of developing potential mitigation. More generally, Wiggins stands for the proposition that applicable professional standards are set forth in the American Bar Association Standards of Criminal Justice:

> Counsel's conduct . . . fell short of the standards for capital defense work articulated by the American Bar Association (ABA) --standards to which we have long referred as guides to determining what is reasonable" Strickland, supra at 688; Williams v.

> Taylor, supra at 396. (ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 11.41©) p. 93 (1989) (emphasis added).

(Wiggins v. Smith, 123 S. Ct at 2536-2537).[3]

When less than all arguable issues for reversal are sought, appellate counsel has not effectively served its dual roles of persuading the direct appeal court that prejudicial error occurred and preserving all arguable issues for review by other courts.

> Traditional theories of appellate practice notwithstanding, appellate counsel in a capital case should not raise only the best of several potential issues. [footnote omitted.]

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[3] The Wiggins opinion refers specifically to ABA standards which were in place at the time of Wiggins' trial, and had been in place since 1980, eight years before Mr. Henry's trial. As the Sixth Circuit recently held:

> Although the instant case was tried before the 1989 ABA edition of the standards was published, the standards merely represent a codification of longstanding, common-sense principles of representation understood by diligent, competent counsel in death penalty cases. The ABA standards are not aspirational in the sense that they represent norms newly discovered after Strickland. They are the same type of longstanding norms referred to in Strickland in 1984 as "prevailing professional norms" as "guided" by "American Bar Association standards and the like."

Hamblin v. Mitchell, 354 F. 3d 482 (6th Cir. 2003), 2003 U.S.App. LEXIS 26291. Thus the standards holding appellate counsel to a zealous standard of representation were applicable long before the publication of Wiggins or Hamblin, based on the lessons of Strickland.

> Issues abandoned by counsel in one case, pursued by different counsel in another case and ultimately successful, cannot necessarily be reclaimed later. When a client will be killed if a case is lost, counsel (and the courts) should not let any possible ground for relief go unexplored or unexploited.

ABA Guidelines, Guideline 11.9.2.D Commentary; NLADA Standards, Standard 11.9.2(d)(NLADA 1989).

If appellate counsel believed that briefing many issues is in the best interest of the client as was true in Mr. Henry's case, then when this Court ruled to limit the number of issues which could effectively be raised, the Court interfered with Mr. Henry's right to effective assistance of appellate counsel. Any state interest in the appellate court having short briefs must give way to ensure the right to counsel. Geders v. United States, 425 U.S. 80 (1976). When the professional judgment of counsel is to raise all arguable issues, then impingement of that judgment through the application of a page limit rule which requires counsel to forego factual and legal arguments is an unconstitutional interference with the right to effective appellate counsel.

The prejudice to Mr. Henry resulting from this Court's ruling that his brief be limited to 100 pages is clearly evident. This Court's order that Mr. Henry submit a brief of only 100 pages required his counsel to forego his proper function to persuasively brief the issues presented, and to brief all issues he determined warranted presentation.

This Court has barred review in post-conviction of any claims, including constitutional ones, which could have been raised on direct appeal but were not. Presumably, this is because the Court nevertheless conducted its independent review and determined no reversible error was present. Despite the Court's obligation to review the record in a capital appeal for any error, some briefing of an issue is required to fully apprise the Court of the nature of the error and the prejudice which resulted. Wilson v. Wainwright, 474 So. 2d 1162 (Fla. 1985). In Wilson, this Court specifically found that its own independent review of the record was not a complete substitute for zealous advocacy. The Court's ruling limiting the number of pages Mr. Henry could file in his brief on direct appeal

was an interference with the effective assistance of his appellate and post-conviction counsel and a denial of due process under the Fourteenth Amendment to the United States Constitution. Courts cannot legitimately require counsel to fully brief issues and then limit the brief's size. Certainly application of such a page limit in Mr. Henry's case was arbitrary and capricious. It violated Eighth Amendment jurisprudence and the Due Process and Equal Protection Clauses of the Fourteenth Amendment.

Furthermore, inadequate appellate review in a capital case causes the sentencing to be arbitrary in violation of the prohibition against cruel and unusual punishment. A complete review of all claims of error in appeals from a death sentence must be performed or the appellate court cannot make a reliable individualized determination. Parker v. Dugger, 498 U.S. 308 (1991); Dobbs v. Zant, 113 S.Ct. 835 (1993); Clemons v. Mississippi, 494 U.S. 738 (1990). Whatever interest in judicial economy the courts have the duty to provide "meaningful appellate review in ensuring that the death penalty is not imposed arbitrarily or irrationally." Parker v. Dugger. Different rules cannot apply to

particular capital appellants. See Magill v. Dugger, 824 F.2d 879, 894 (11th Cir. 1987).

This Court should consider on the merits the issues that Mr. Henry raised in his original initial brief on direct appeal. Further, Mr. Henry must be allowed to provide supplemental briefing on those issues that were deleted or partially deleted from the original initial brief.

Limiting the pages of Mr. Henry's initial brief on direct appeal constituted a violation of Mr. Henry's rights under the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. The application of such a page limitation to Mr. Henry can only be described as arbitrary. Mr. Henry is entitled to relief.

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.

A. INCOMPLETE RECORD

The circuit court is required to certify the record on appeal in capital cases, Fla. Stat. Ann. Sec. 921.141(4), Fla. Const. art. 5, sec. 3(b)(1), and when errors or omissions appear, re-examination of the complete record in the lower tribunal is required. Delap v. State, 350 So. 2d 462 (Fla. 1977). Portions of the record were missing from Mr. Henry's appeal. Specifically, discussions that occurred during bench conferences and hearings were not recorded. (R. 534, 543, 758, 1230, 2033, etc.).

In Dobbs v. Zant, 113 S.Ct. 835, 122 L.Ed.2d 103, (1993), the United States Supreme Court held that

> the Court of Appeals erred when it refused to consider the full sentencing transcript. We have emphasized before the importance of reviewing capital sentences on a complete record. Gardner v. Florida, 430 U.S. 349, 361, 97 S.Ct. 1197, 1206, 51 L.Ed 2d 393 (1977) (plurality opinion). Cf. Gregg v. Georgia, 428 U.S. 153, 167, 198, 96 S.Ct. 2909, 2922, 2936, 49 L.Ed.2d 859 (1976) (joint opinion of Stewart, Powell, and STEVENS, JJ.) (Georgia capital sentencing provision requiring transmittal on appeal of complete transcript and record is important "safeguard against arbitrariness and caprice"). In this case, the Court of

> Appeals offered no justification for its decision to exclude the transcript from consideration. There can be no doubt as to the transcript's relevance, for it calls into serious question the factual predicate on which the District Court and Court of Appeals relied in deciding petitioner's ineffective assistance claim. As the Court of Appeals itself acknowledged, its refusal to review the transcript left it unable to apply the manifest injustice exception to the law of the case doctrine, and hence unable to determine whether its prior decision should be reconsidered.
>
> FN1. The concurrence suggests, post, at 837-838, that the error in this case, limited in scope to closing arguments at the penalty phase, is likely insignificant. In fact, an inadequate or harmful closing argument, when combined, as here, with a failure to present mitigating evidence, may be highly relevant to the ineffective assistance determination under Eleventh Circuit law. See King v. Strickland, 714 F.2d 1481, 1491 (CA11 1983), vacated on other grounds, 467 U.S. 1211, 104 S.Ct. 2651, 81 L.Ed.2d 358 (1984), adhered to on remand, 748 F.2d 1462, 1463-1464 (CA11 1984), cert. denied, 471 U.S. 1016, 105 S.Ct. 2020, 85 L.Ed.2d 301 (1985); Mathis v. Zant, 704 F.Supp. 1062, 1064 (ND Ga.1989).

Dobbs v. Zant, 113 S.Ct. 835, 122 L.Ed.2d 103, (1993).

Additionally, the trial court held a hearing regarding the voir dire which was later referenced

during the voir dire. This procedure resulted in an incomplete record. As a result, this Court and any reviewing court in the future is unable to determine whether Mr. Henry's constitutional rights were violated. Post-conviction counsel has no way of knowing what occurred during a critical phase of trial without a complete record. Further, there is a serious question of whether the transcript is completely accurate.

Additionally, Mr. Henry asserts that his former counsels rendered ineffective assistance in failing to assure that a proper record was provided to the court.

The beginning point for any meaningful appellate review process is absolute confidence in the completeness and reliability of the record. The appeal of any criminal case assumes that an accurate transcript and record will be provided counsel, appellant and the appellate court. Mayer v. Chicago, 404 U.S. 189, 1195 (1971) ("State must provide a full verbatim record where that is necessary to assure the indigent as effective an appeal as would be available to the defendant with the resources to pay his own way"); Entsminger v. Iowa, 386 U.S. 748, 752 (1967) ("Here there is no question but

that petitioner was precluded from obtaining a complete and effective appellate review of his conviction by the operation of the clerk's transcript procedure"). Eighth Amendment considerations demand even greater precautions in a capital case. See Penry v. Lynaugh, 488 U.S. 74 (1989); Eddings v. Oklahoma, 455 U.S. 104 (1982); Lockett v. Ohio, 438 U.S. 586 (1978); Woodson v. North Carolina, 428 U.S. 280 (1976); Proffitt v. Florida, 428 U.S. 242 (1976); Gregg v. Georgia, 428 U.S. 153 (1976); Furman v. Georgia, 408 U.S. 238 (1972).

Full appellate review of proceedings resulting in a sentence of death is required in order to assure that the punishment accorded to the capital defendant comports with the eighth amendment. See Proffitt v. Florida; Johnson v. State, 442 So. 2d 193 (Fla. 1983)(Shaw, J. dissenting); Ferguson v. State, 417 So. 2d 639 (Fla. 1982); Swann v. State, 322 So. 2d 485 (1975); Art. V, 3(b)(1) Fla. Const.; 921.141(4) Fla. Stat. (1985). Indeed, Florida law insists upon review by the Supreme Court "of the entire record." Fla. Stat. 921.141(4) (1985) (emphasis added). In Florida capital cases, the chief circuit judge is required "to monitor

the preparation of the complete record for timely filing in the Supreme Court." Fla. R. App. P. 9.140(b)(4) (emphasis added). Then Chief Justice Raymond Ehrlich so directed the chief circuit judge of the Seventeenth Judicial Circuit by letter dated December 15, 1989.

Critical exhibits, depositions, trial transcripts, the jury questionnaires, and pages from the record on appeal were omitted from Mr. Henry's record. Several of these documents are material to Mr. Henry's claims. Counsel cannot accurately determine the number of pages missing or if some may have been altered.

Appellate counsel could not be effective without a complete record. Moreover this Court's review could not be constitutionally complete. See Parker v. Dugger, 111 S. Ct. 731 (1991).

The trial judge was required to certify the record on appeal in capital cases. 921.141(4) Fla. Stat. (1985). This was not done. When errors or omissions appear, as here, re-examination of the complete record in the lower tribunal is required. Delap v. State, 350 So. 2d 462 (Fla. 1977). In addition, Mr. Henry's former counsel rendered ineffective assistance in failing to

assure that a proper record was provided to the court.

B. CHANGE OF VENUE

To the extent appellate counsel failed to properly preserve and carry forward this issue on direct appeal, appellate counsel rendered prejudicially deficient assistance.

Gary Caldwell, as appellate counsel, failed to carry this issue forward on direct appeal although it was preserved below. Mr. Henry was denied effective assistance of counsel. Mr. Henry's sentence of death is the resulting prejudice. Harris v. Dugger, 874 F.2d 756 (11th Cir. 1989).

CLAIM III

THE CONSTITUTIONALITY OF THE FIRST-DEGREE MURDER INDICTMENT MUST BE REVISITED IN LIGHT OF RING V. ARIZONA & APPRENDI V. NEW JERSEY[4]

[4]**Counsel is including this Argument in light of the lower court's ruling on the merits and in light of the opinion of the United States Supreme Court in** Schriro v. Summerlin, No. 03-526, issued on June 24, 2004.

Ring v. Arizona, 536 U.S. 584, 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.

sect 921.141(3). In contrast, "[n]o 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. Henry'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 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 Justice Shaw 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.

Henry's case in which this Court on direct appeal struck the aggravating circumstance of cold, calculated and premeditated. There is simply 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. Henry'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.[5]

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, No. 01-7310, 2002 U.S. LEXIS 4893 (June 28, 2002).

[5]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.

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 rejected Allen's argument because, in its 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.

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 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 Supreme Court explained that function of the grand jury in Dionisio:

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

Id., 410 U.S. at 35. The shielding function of the grand jury is uniquely important in capital cases. See Campbell v. Louisiana, 523 U.S. 392, 399 (1998)(recognizing that the grand jury "acts as a vital check against the wrongful exercise of power by the 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. Henry 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. Henry's rights 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. Henry "in the preparation of a defense," to a sentence of death. Fla. R. Crim. P. 3.140(o).

Mr. Henry'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 penalty phase commenced on October 6, 1988, at the commencement of the penalty phase, the trial court gave the following instruction to the jury:

> Ladies and gentlemen of the jury, you have found the defendant, Robert Lavern Henry, guilty of murder in the first degree as charged in Count I and II of the indictment. The punishment for this crime is either death or life imprisonment without possibility of parole for twenty five years. The final decision as to what punishment shall be imposed rests solely with the Judge of this Court. However, the law requires that you, the jury render to the Court an advisory sentence as to what punishment should be imposed upon the defendant.

(R. 2625). Following the penalty phase, during which trial counsel presented no statutory or non statutory mental health mitigation and minimal other non statutory mitigation, the trial court further instructed the jury:

> Ladies and gentlemen of the jury, it is now your duty to advise this

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

Your advisory sentence should be based upon the evidence that you have heard while trying the guilt or innocence of the defendant

The aggravating circumstances that you may consider are limited to any of the following that were established by the evidence and the State has the burden of proving the evidence of such circumstances and that they outweigh any mitigating factors beyond a reasonable doubt:

1. The defendant has been previously convicted of another capital offense or of a felony involving the use or threat of violence to some person; the crimes of murder in the first degree is a capital felony.

2. The crime for which the defendant is to be sentenced was committed while he was engaged in the commission of the crime of arson.

3. The crime for which the defendant is to be sentenced was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody

4. The crime of which the defendant is to be sentenced is for financial gain.

5. The crime for which the defendant is to be sentenced was especially wicked, evil atrocious or cruel.

In order that you might better understand and be guided concerning the meaning of aggravating circumstance (5) the Court hereby instructs you that what is intended to be included in the category heinous, atrocious and cruel are those crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime outside the norm of capital felonies.

The conscienceless or pitiless crime which is unnecessarily tortuous to the victim. Heinous means extremely wicked or shockingly evil. Atrocious means outrageously wicked and evil. Cruel means designed to inflict a high degree of pain with utter indifference to or even enjoyment of the suffering of others.

6. The crime for which the defendant is about to be sentenced was committed in a cold, calculated and premeditated manner without any pretense of legal or moral

justification.

> In order that you might better understand and be guided concerning the manner you should consider the enumerated aggravating circumstances, this Court hereby instructs you that the aggravating circumstances specified in these instructions are exclusive.
>
> * * *
>
> Should you find sufficient aggravating circumstances do exist it would be your duty to determine whether mitigating circumstances exist that outweigh the aggravating circumstances.

(R. 558-2660). The Court then stated that:

> Each aggravating circumstance must be established beyond a reasonable doubt before it may be considered by you in arriving at your decision.
>
> If one or more aggravating circumstances are established, you should consider all the evidence tending to establish one or more mitigating circumstances and give that evidence such weight as you feel it should receive in reaching your conclusion as to the sentence that you feel should be imposed.

(R. 2662).

The jury returned an advisory verdict recommending a death sentence by a vote of 8-4 on Count I and 9-3 on

Count II. Despite the complete absence of any evidence supporting statutory or non statutory mental health mitigating circumstances, and minimal evidence presented supporting other mitigating circumstances three jurors voted against the death sentence on Count II and four jurors on Count I. It is thus entirely plausible that the jurors who voted for life 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 both. In any event, the jury's 8-4 and 9-3 votes establish beyond reasonable doubt that no unanimous jury finding was ever made in Mr. Henry's penalty phase of the facts that rendered him eligible for a death sentence under Florida law.

The sentencing hearing was held on November 7, 1988. On that day, this Court entered its sentencing order which reads in pertinent part:

> **The Court has carefully and conscientiously complied with the provisions of section 921.941 sub 3 and finds from the evidence of the trial**

> **and sentencing procedures that the following aggravating circumstances have been proven beyond a reasonable doubt.**

(R. 2696)(emphasis added). The Court then listed the aggravating circumstances it found, namely, during the course of a robbery; avoiding or preventing lawful arrest; pecuniary gain; heinous, atrocious, or cruel ; cold, calculated and premeditated. Only after entering its findings into the record did this Court impose the death sentence (R. 2703).

On direct appeal this Court noted that

> . . .the trial court found as aggravating factors that the murders had been committed during the course of robbery and arson, to avoid or prevent arrest, for pecuniary gain, and in a cold, calculated and premeditated manner and that they were heinous, atrocious, or cruel

Henry v. State, 586 So. 2d 1033, 1037 (Fla. 1991)

The opinion did not refer to the fact that each of the jury recommendations was less than unanimous.

Thus this Court's analysis was predicated solely on the judge's finding rather than any finding by the jury.

Relief is warranted.

Mr. Henry acknowledges that this Court has issued opinions in Bottoson v. Moore, 833 So. 2d 693 (Fla. 2002) and King v. Moore, 831 So. 2d 143(Fla. 2002), both of which addressed the applicability of Ring to the Florida sentencing statute. In both Bottoson and King, 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 announces 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.

Nevertheless, the applicability of Ring to the Florida death penalty statute is plain. Furthermore, the prior conviction of a crime of violence aggravating circumstances played a pivotal role in both Bottoson v.

Moore and King v. Moore. Three of this Court's justices concurring in the result only indicated that the existence of the aggravating circumstance served as a basis for denying relief in both of those cases. Given that this was not an aggravating circumstances found in Mr. Henry's case, it is further distinguishable from Bottoson and King.

As Justice Shaw explained in his opinion concurring in the denial of habeas relief in Bottoson, "this particular factor is excluded from Ring's purview and standing by itself, can serve as a basis to 'death qualify' a defendant. Accordingly, I agree that Bottoson's petition for writ of habeas corpus must be denied." Bottoson v. Moore, 833 SO. 2d at 719 (Shaw, J., concurring in result only)(footnote omitted). The circumstances present in Bottoson and King which caused Chief Justice Anstead to vote to deny those petitioners relief are not present in Mr. Henry's case. Mr. Henry is thus 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. Henry 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 25, 2004.

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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