IN THE SUPREME COURT OF FLORIDA

CASE NO. SC04-224

ERNEST D. SUGGS,

Petitioner,

v.

JAMES CROSBY, Secretary,
Department of Corrections,
State of Florida,

Respondent.

PETITION FOR A WRIT OF HABEAS CORPUS

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INTRODUCTION

This petition for habeas corpus relief is being filed to present Mr. Suggs' claims arising under the decision from the United States Supreme Court in Ring v. Arizona, 122 S. Ct. 2428 (2002).

The following citations will be used in this petition:

"R." -- record on direct appeal;

"PC-R."-- record on 3.850 appeal to this Court.

All other citations shall be self-explanatory.

JURISDICTION

This is an original proceeding under Fla. R. App. P. 9.100. This Court has original jurisdiction pursuant to Fla. R. App. P. 9.030(a)(3) and Article V, sec. 3(b)(9), Fla. Const. The 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. This petition presents constitutional issues that directly challenge the judgments and sentences of death imposed upon Mr. Suggs and this Court review of his convictions and sentences of death during the appellate and post-conviction processes.

This Court has consistently maintained an especially

vigilant control over capital cases, exercising a special scope of review, see Elledge v. State, 346 So. 2d 998, 1002 (Fla. 1977); Wilson v. Wainwright, 474 So. 2d 1163, 1165 (Fla. 1985), and has not hesitated in exercising its inherent jurisdiction to remedy errors which undermine confidence in the fairness and correctness of capital trial and sentencing proceedings. This Court has the inherent power to do justice.

REQUEST FOR ORAL ARGUMENT

Mr. Suggs requests oral argument on this petition.

STATEMENT OF THE CASE AND FACTS

On August 22, 1990, Ernest Suggs was indicted by the grand jury in Walton County, Florida, and charged with first-degree murder, kidnapping, robbery, and possession of a firearm by a convicted felon, with the latter charge being severed for trial purposes (R-11). The indictment did not indicate whether the State would seek the death penalty or upon what factual basis it intended to proceed (R. 11).

The indictment for murder simply read that:

> Ernest Donald Suggs, did unlawfully from a premeditated design to effect the death of a human being, to it: Pauline Denise Casey, or while engaged in the perpetration of or in an attempt to perpetrate a felony, to-wit: Kidnapping and/or Robbery, did kill and murder Pauline Denise Casey, by stabbing said Pauline Denise Casey, in violation of Section 782.04, Florida Statutes.

(R. 11).

Before his capital trial, the public defender initially filed 19 separate capital motions (R. 33-104), including three motions to vacate the death penalty; two motions to dismiss or strike the aggravating circumstances; a motion to dismiss the indictment or declare the death penalty unconstitutional and a motion for statement of particulars regarding the aggravating and mitigating circumstances. Subsequent counsel, Mr. Kimmel, filed none.

Specifically, in Motion to Vacate Death Penalty (2), the

public defender argued that Mr. Suggs was charged with felony murder or in the alternative, premeditated murder, but said that the standards that purported to establish guidelines for what punishment should be imposed are “so vague, indefinite and open to reasonably different subjective interpretations and understandings that they violate the due process and equal protections provisions of the United States and Florida Constitution” (R. 47-48).

In another Motion to Dismiss Indictment or to Declare That Death is Not a Possible Penalty (R. 55-57), the public defender argued that since aggravating factors are essential to a capital offense, they must be alleged in the indictment in order to confer jurisdiction on the Court to impose death (R. 56). The motion noted that “No aggravating circumstances are alleged in the indictment” (R. 56).

The Public Defender also filed a Motion for Statement of Particulars Regarding Aggravating and Mitigating Circumstances (R. 73-78), seeking details about the what aggravating circumstances the State intended to rely on at trial.

In its last death penalty motion, the defense filed a Motion to Declare Section 921.141, Florida Statutes, Unconstitutional (R. 90-104). In that motion, the defense argued that the aggravating circumstances are vague and

arbitrary (R. 90-94). The motion argued that the trial judge's role in capital cases is ambiguous because the judge is bound by the jury's penalty verdict, but also is the ultimate sentencer (R. 95). The motion argued that since the law forbids special verdicts as to theories of homicides and aggravating and mitigating circumstances (R. 96), the judge's role becomes problematic in deciding whether to override the jury's penalty vote. The motion also specifically argued that the lack of special verdicts provides uncertainty (R. 101-102).

After a change of venue and a mistrial, Mr. Suggs' jury trial began on May 26, 1992 (R. 1894). The jury found Mr. Suggs guilty of first-degree murder, kidnapping, and robbery (R. 1719). After a short penalty phase, in which defense counsel provided three mitigation witnesses who testified to knowing the Suggs family, and Loretta Suggs, the mother of Ernie Suggs, (R. 4661-4684), the jury returned a verdict of death by a vote of seven to five (R. 4728). On July 15, 1992, the trial court sentenced Mr. Suggs to death.

On direct appeal, this Court affirmed Mr. Suggs' convictions and sentence. Suggs v. State, 644 So.2d 64 (Fla. 1994). The United States Supreme Court denied certiorari on April 24, 1995. Suggs v. State of Florida, 131 L. Ed. 2d 722 (1995).

Because Mr. Suggs' conviction and sentences became final after January 1, 1994, he was required to file his post-conviction motion within one (1) year, pursuant to newly-enacted Rule 3.851, Fla. R. Crim. P. This Court granted Mr. Suggs an extension of time in which to file his Rule 3.850 motion.

In March, 1998, an Amended Motion to Vacate was filed, raising 15 claims. A hearing pursuant to Huff v. State, 622 So. 2d 982 (Fla. 1993) was held on October 22, 1999. On March 13, 2000, Circuit Court Judge Laura Melvin granted an evidentiary hearing in part and denied in part Mr. Suggs' claims. The trial court dismissed several claims without prejudice to file amended pleadings and short brief summaries of facts. The State conceded an evidentiary hearing on grounds of ineffective assistance of counsel (PC-R. at .

An evidentiary hearing was held before Circuit Court Judge Thomas Remington on January 23-24, 2003. On June 11, 2003, the trial court denied all of Mr. Suggs' claims (PC-R. 334-347).

On June 24, 2002, the United States Supreme Court issued Ring v. Arizona, 122 S. Ct. 2428 (2002). As a result of the decision in Ring, Mr. Suggs now files his Petition for Writ of Habeas Corpus to give this Court an opportunity to address his claims in the context of this new law.

GROUNDS FOR HABEAS CORPUS RELIEF

FLORIDA'S CAPITAL SENTENCING PROCEDURE DENIED MR.SUGGS HIS SIXTH AMENDMENT RIGHTS TO NOTICE AND TO A JURY TRIAL AND OF HIS RIGHT TO DUE PROCESS.

In Ring v. Arizona, 122 S. Ct. 2428 (2002), the United States Supreme Court held that Apprendi v. New Jersey, 530 U.S. 466 (2000), applies to capital sentencing proceedings. Ring 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. Under Ring, "[b]ecause Arizona's enumerated aggravating factors operate as 'the functional equivalent of an element of a greater offense,' Apprendi, 530 U.S., at 494, n. 19, the Sixth Amendment requires that they be found by a jury." 122 S. Ct. at 2443. Since Arizona's capital sentencing scheme is unconstitutional, so is Florida's. "A Florida trial court no more has the assistance of a jury's finding of fact with regard to sentencing issues that does a trial judge in Arizona." Walton, 497 U.S. at 647-48.

A. MR. SUGGS' DEATH SENTENCE IS INVALID BECAUSE A FLORIDA JURY'S ROLE IN CAPITAL SENTENCING DOES NOT SATISFY THE SIXTH AMENDMENT.

Florida's capital sentencing scheme violates the jury trial guarantees of the Sixth and Fourteenth Amendments because it does not allow the jury to reach a verdict with

respect to an "aggravating fact [which] is an element of the aggravated crime" punishable by death. Ring, 120 S. Ct. at 2441 (quoting Apprendi, 530 U.S. at 501 (Thomas, J., concurring)). Under Ring, the question is not whether death is an authorized punishment in a first-degree murder case, but whether the "facts increasing punishment beyond the maximum authorized by a guilty verdict standing alone," 122 S. Ct. at 2441, are found by the judge or jury. "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. A State may not avoid the Sixth Amendment by "specif[ying] 'death or life imprisonment' as the only sentencing options" because "the relevant inquiry is one not of form, but of effect." Id. at 2440 (quoting Apprendi, 530 U.S. at 494). If the effect of finding an aggravating circumstance "expose[s] the defendant to a greater punishment than that authorized by the jury's guilty verdict," Apprendi, 530 U.S. at 494, the circumstance is an element which must be found by a jury beyond a reasonable doubt. Ring, 122 S. Ct. at 2440-41.

Florida's capital sentencing statute makes imposition of the death penalty contingent upon factual findings made after a verdict finding the defendant guilty of first-degree murder.

Section 775.082 of the Florida Statutes provides that a person convicted of first-degree murder "shall" be sentenced to life imprisonment "unless the proceedings held to determine sentence according to the procedure set forth in [sec.] 921.141 result in findings by the court that such person shall be punished by death" (emphasis added).

Section 921.141, Fla. Stat., requires the trial judge to make three factual determinations before a death sentence may be imposed. The trial judge (1) must find the existence of at least one aggravating circumstance, (2) must find that "sufficient aggravating circumstances exist" to justify imposition of death, and (3) must find that "there are insufficient mitigating circumstances to outweigh the aggravating circumstances." Section 921.141(3), Fla. Stat. (emphasis added). If the judge does not make these findings, "the court shall impose sentence of life imprisonment in accordance with [sec.]775.082." Id. (emphasis added). Because Florida's death penalty statute makes imposition of a death sentence contingent upon these findings and gives sole responsibility for making these findings to the judge, it violates the Sixth Amendment.

Florida law does provide for the jury to hear evidence and "render an advisory sentence." Sec. 921.141(2), Fla. Stat. However, the jury's role does not satisfy the Sixth

Amendment under Ring. Section 921.141(2) does not require a jury verdict, but an "advisory sentence." A Florida penalty phase jury does not make factfindings. A Florida penalty phase jury is not required to reach a verdict on any one of the three factual determinations required before a death sentence may be imposed.

Neither the sentencing statute, this Court's cases, nor the jury instructions in Mr. Suggs' case required the jurors to find that the State had proven any one aggravating circumstance, or had established "sufficient" aggravating circumstances, or had shown that "there are insufficient mitigating circumstances to outweigh the aggravating circumstances." "[U]nder 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).

Florida law requires that the trial judge's findings be made independently of the jury's recommendation. Grossman v. State, 525 So. 2d 833, 840 (Fla. 1988). This Court's review of a death sentence is based and dependent upon only the judge's written findings. Morton v. State, 789 So. 2d 324, 333 (Fla. 2001); Grossman, 525 So. 2d at 839; State v. Dixon, 283 So. 2d 1, 8 (Fla. 1973).

Under Ring, aggravating factors are elements of capital

murder. Under the Florida capital sentencing statute, the elements of capital murder are the three factual determinations the statute requires before a death sentence may be imposed. However, the Florida statute does not require the jury's vote to be unanimous regarding the existence of an aggravating circumstance, regarding whether "sufficient" aggravating circumstances exist, or regarding whether mitigating circumstances exist which outweigh the aggravating circumstances. The statute requires only a majority vote of the jury in support of its advisory sentence. Sec. 921.141(2), Fla. Stat.

As to elements of an offense, this Court has recognized that a judge may not make factfindings "on matters associated with the criminal episode" because that "would be an invasion of the jury's historical function." State v. Overfelt, 457 So. 2d 1385, 1387 (Fla. 1984). Under Fla. R. Crim. P. 3.440, a jury verdict on the elements of a criminal charge must be unanimous. Since jury unanimity has long been the practice in Florida, "It is therefore settled that '[i]n this state, the verdict of the jury must be unanimous' and that any interference with this right denies the defendant a fair trial." Flanning v. State, 597 So. 2d 864, 867 (Fla. 3d DCA 1992), quoting Jones v. State, 92 So. 2d 261 (Fla. 1956). However, this Court has approved allowing the jury to

recommend a death sentence based upon a simple majority vote. See, e.g., Thompson v. State, 648 So. 2d 692, 698 (Fla. 1994). The Court has also not required jury unanimity as to the existence of specific aggravating factors. Jones v. State, 569 So. 2d 1234, 1238 (Fla. 1990). Taken together, Ring and Florida law, establish that the penalty phase jury's vote on the three factual determinations set forth in the statute is required to be unanimous.

Two of the elements required to be established in order for Mr. Suggs to be sentenced to death were that "sufficient aggravating circumstances exist" to allow consideration of a death sentence and that mitigating circumstances sufficient to outweigh the aggravating circumstances did not exist. Sec. 921.141(3), Fla. Stat. Mr. Suggs' jury was not instructed that these elements must be proved beyond a reasonable doubt. Such an error can never be harmless: "[T]he jury verdict required by the Sixth Amendment is a jury verdict of guilty beyond a reasonable doubt." Sullivan v. Louisiana, 508 U.S. 275, 278 (1993). When the jury has not been instructed on the reasonable doubt standard, "there has been no jury verdict within the meaning of the Sixth Amendment," and therefore, "[t]here is no object, so to speak, upon which harmless-error scrutiny can operate." Id. at 280.

The language of Florida's capital sentencing statute,

this Court's case law, and the Florida Rules of Criminal Procedure establish that the limited role of a Florida penalty phase jury does not satisfy the Sixth Amendment. The jury does not make fact findings, the jury does not return a verdict on the three factual determinations required by the statute before a death sentence may be considered, the jury vote is not required to be unanimous, and the jury is not instructed on the reasonable doubt standard as to two of the three factual determinations required by the statute. Mr. Suggs' death sentence violates the Sixth Amendment.

B. MR. SUGGS' DEATH SENTENCE IS INVALID BECAUSE THE PROCEEDINGS BEFORE HIS JURY DO NOT SATISFY THE SIXTH AMENDMENT.

In addition to the structural infirmity of the statute discussed above, errors which occurred at Mr. Suggs' penalty phase vitiate any possible Sixth Amendment validity to the jury's advisory sentence in his case. Mr. Suggs raised these errors at trial and on direct appeal, and Ring requires that they now be reconsidered.

Mr. Suggs correctly argued in motions before trial and on direct appeal that the penalty phase jury instruction of heinous, atrocious or cruel were unconstitutionally vague and overbroad (R. 47-48; Initial Brief at 92). As a result, penalty phase jurors should have been required to make unanimous, specific findings as to aggravating circumstances.

Additionally, the capital sentencing statute in Florida fails to provide any standard of proof for determining that aggravating circumstances 'outweigh' the mitigating factors, Mullaney v. Wilbur, 421 U.S. 684 (1975, and does not define sufficient aggravating circumstances.

Mr. Suggs' jury was told:

> Should you find sufficient aggravating circumstances do exist, it will then be your duty to determine whether mitigating circumstances exist that outweigh the aggravating circumstances

(R. 4723).

This instruction violated due process and the right to a jury trial because it relieved the State of its burden to prove beyond a reasonable doubt the element of capital first-degree murder that "sufficient aggravating circumstances" exist which outweigh mitigating circumstances. In re Winship, 397 U.S. 358 (1970). Instead, the instruction shifted the burden of proof to the defendant to prove that the mitigating circumstances outweigh sufficient aggravating circumstances. Mullaney v. Wilbur, 421 U.S. 684, 698 (1975). Because Mr. Suggs' jury was never required to find the element of sufficient aggravating circumstances beyond a reasonable doubt, the error cannot be subjected to harmless error analysis. Sullivan v. Louisiana, 508 U.S. 275, 279-80 (1993).

Further, Mr. Suggs' jury was unconstitutionally

instructed to consider an automatic aggravating factor: "committed while he was engaged in the commission of the crime of kidnapping" (R. 4721). Mr. Suggs' jury was permitted to consider as an aggravating factor that the murder occurred during the course of a kidnapping. However, Mr. Suggs may have been convicted of felony murder.[1] Ring makes clear that a capital sentencing statute such as Florida's requires additional findings after a verdict finding the defendant guilty of first-degree murder in order to render the defendant eligible for a death sentence. Here, Mr. Suggs may have been convicted of felony murder based upon the same underlying felonies that the jury was told could support the felony murder aggravating factor. This aggravator, in turn, is one of the elements which could render Mr. Suggs eligible for the death sentence. This one fact--committed during a felony--was therefore used both as an element of first-degree murder and as an element of capital first-degree murder. However, capital first-degree murder requires something more than first-degree murder. Use of the felony murder aggravator thus constituted automatic aggravation which did not "genuinely narrow the class of persons eligible for the death penalty"

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[1]The jury was instructed on both premeditated and felony first-degree murder (R. 1725) and returned interrogatory verdicts in which the jury checked both premeditated and felony murder (R. 1719).

and which did not "reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." Lowenfield v. Phelps, 484 U.S. 231, 244 (1988) (quoting Zant v. Stephens, 462 U.S. 862, 877 (1983)).

C. MR. SUGGS' DEATH SENTENCE IS INVALID BECAUSE THE ELEMENTS OF THE OFFENSE NECESSARY TO ESTABLISH CAPITAL MURDER WERE NOT CHARGED IN THE INDICTMENT.

Before trial, and on direct appeal, Mr. Suggs argued that the State's failure to provide notice of the aggravators which made the offense a capital crime and on which the state sought the death penalty deprived him of due process of law (R.73-78). Jones v. United States, 526 U.S. 227 (1999), held that "under the Due Process Clause of the Fifth Amendment and the notice and jury guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." 526 U.S. at 243 n.6. Apprendi held that the Fourteenth Amendment affords citizens the same protections when they are prosecuted under state law. Apprendi, 530 U.S. at 475-76.[2] Ring held that a death penalty statute's "aggravating factors operate as 'the functional equivalent of an element of a greater offense." Ring, 122 S. Ct. at 2443 (quoting Apprendi,

[2]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.

530 U.S. at 494 n.19).

In Jones, the Supreme Court noted that "[m]uch turns on the determination that a fact is an element of an offense, rather than a sentencing consideration," in particular because "elements must be charged in the indictment." Jones, 526 U.S. at 232. After the decision in Ring, the Supreme Court overturned the death sentence imposed in United States v. Allen, 247 F.3d 741 (8th Cir. 2001), granted certiorari, vacated the judgment 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,536 U.S. 953; 122 S. Ct. 2653 (2002).

The question presented in Allen was whether aggravating factors under the federal death penalty statute "are elements of a capital crime and thus must be alleged in the indictment." The Eighth Circuit rejected Allen's argument because it believed aggravating factors are not elements of federal capital murder but are "sentencing protections that shield a defendant from automatically receiving the statutorily authorized death sentence." Allen, 247 F.3d at 763.

Like the Fifth Amendment to the United States Constitution, Article I, section 15 of the Florida

Constitution provides, “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(c), Florida’s death penalty statute makes imposition of the death penalty contingent upon the government proving the existence of aggravating circumstances, establishing “sufficient aggravating circumstances” to call for a death sentence, and establishing that the mitigating circumstances are insufficient to outweigh the aggravating circumstances. Sections 775.082 and 921.141, Fla. Stat.

Florida law requires every “element of the offense” to be alleged in the information or indictment. State v. Gray, 435 So. 2d 816, 818 (Fla. 1983); State v. Dye, 346 So. 2d 538, 541 (Fla. 1977). An indictment in violation of this rule cannot support a conviction; the conviction can be attacked at any stage, including “by habeas corpus.” Gray, 435 So. 2d at 818.

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. State v. Gray, 435 So. 2d at 818, citing Thornhill v. Alabama, 310 U.S. 88 (1940), 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 capital

first-degree murder, Mr. Suggs' rights under Article I, section 15 of the Florida Constitution and the Sixth Amendment to the federal Constitution were violated. By wholly omitting any reference to the aggravating circumstances that the State would rely upon to seek a death sentence, the indictment prejudicially hindered Mr. Suggs "in the preparation of a defense" to a sentence of death. Fla. R. Cram. P. 3.140(o).

D. MR. SUGGS IS ENTITLED TO RELY UPON JONES, APPRENDI AND RING.

Before trial and on direct appeal, Mr. Suggs raised the issues discussed above. In similar circumstances, this Court has held that "it would not be fair" to deprive a capital petitioner of the benefit of recent decisions of the United States Supreme Court. James v. State, 615 So. 2d 668, 669 (Fla. 1993).

Further, Ring meets the three criteria for retroactive application set forth in Witt v. State, 387 So. 2d 922 (Fla. 1980). First, Ring issued from the United States Supreme Court. Witt, 387 So. 2d at 930. Second, Ring's Sixth Amendment rule unquestionably "is constitutional in nature." Witt, 387 So. 2d at 931. Third, it is beyond dispute that Ring "constitutes a development of fundamental significance." Id. Its holding and rationale lead inescapably to the conclusion that Florida's death penalty statute is

unconstitutional. This Court's decision in Mills v. Moore, 786 So. 2d 532 (Fla. 2001), in which the Court said at least four times that Apprendi did not apply to capital sentencing procedures, establishes beyond a doubt that Ring constitutes a change in what this Court believed was the law. This Court applied Hitchcock v. Dugger, 481 U.S. 393 (1987), retroactively, ruling that Hitchcock "represent[ed] a sufficient change in the law that potentially affect[ed] a class of petitioners . . . to defeat the claim of a procedural default." Thompson v. Dugger, 515 So. 2d 173, 175 (Fla. 1987); Riley v. Wainwright, 517 So. 2d 656, 659 (Fla. 1987). The Court should do the same here.

E. BOTTOSON V. MOORE AND KING V. MOORE DO NOT DISPOSE OF MR. SUGGS' CLAIM.

On October 24, 2002, this Court issued its decisions in Bottoson v. Moore, 833 So.2d 693 (Fla. 2002), and King v. Moore, 831 So.2d 143 (Fla. 2002). In both cases, each justice wrote a separate opinion explaining his or her reasoning for denying relief. While a *per curiam* opinion announced the result in both cases, in neither case did a majority join the *per curiam* opinion or its reasoning. In both cases, four justices wrote separate opinions explaining that they did not join the per curiam opinion, but "concur[red] in result only." Bottoson v. Moore, 833 So. 2d at 695; King v. Moore, 831 So. 2d at 145. The four opinions concurring in result only raised

substantial concerns about the constitutionality of Florida's capital sentencing statute in light of Ring v. Arizona, 122 S. Ct. 2428 (2002). Although denying relief under Ring, these opinions do not dispose of Mr. Suggs' claim.

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 same 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, 833 So. 2d at 717. Justice Shaw concluded that Florida's statute was "flawed because it lacks a unanimity

requirement for the 'death qualifying' aggravator." Bottoson v. Moore, 833 So. 2d at 718.

In her opinion in Bottoson, Justice Pariente said, "I believe that we must confront the fact that the implications of Ring are inescapable." Bottoson v. Moore, 833 So. 2d at 723. She noted:

> 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, 833 So. 2d at 725 (italics in original).

Chief Justice Anstead explained his view of Ring and its application to the Florida death penalty statute:

> 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, 833 So. 2d at 706.

Justice Lewis explained in his view that "the validity of jury instructions given in [Bottoson's] case should be addressed in light of [Bottoson's] facial attack upon Florida's death penalty scheme on the basis of the holding in Ring v. Arizona." Bottoson v. Moore, 833 So. 2d at 733.[3]

[3]Justice Lewis acknowledged that Ring has application to Florida's death penalty statute when he wrote that after Ring, a jury's "life recommendation must be respected." Bottoson v. Moore, 2002 WL 31386790 at 26. He concluded that as to jury

According to Justice Lewis:

> [I]n light of the dictates of Ring v. Arizona, it necessarily follows that Florida's standard penalty phase jury instructions may no longer be valid and are certainly subject to further analysis under the United States Supreme Court's Caldwell v. Mississippi, 472 U.S. 320 (1985), holding.

Bottoson v. Moore, 833 So. 2d at 731. Justice Pariente agreed with Justice Lewis on this issue: "I agree with Justice Lewis that there are deficiencies in our current death penalty sentencing instructions." Bottoson v. Moore, 833 So. 2d at 723.

Some members of the Court in Bottoson and King relied upon the existence of the prior violent felony aggravator to deny relief. See, e.g., Bottoson, 833 So. 2d at 718-19 (Shaw, J., concurring in result only); Bottoson, 833 So. 2d at 722 (Pariente, J., concurring in result only). However, the analysis should not end there.

Significant errors such as the prosecutor improperly eliciting testimony about witness elimination and nonviolent uncharged offenses that Mr. Suggs had planned to commit; insufficient evidence to prove that Mr. Suggs killed the victim to eliminate a witness; vague jury instructions and

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overrides in favor of death, Florida law and Ring are in "irreconcilable conflict." Id.

doubling aggravators should be taken into account when analyzing Ring claims.

In addition, Mr. Suggs raised these constitutional issues before trial, on direct appeal and in post-conviction proceedings.

Thus, the opinions in Bottoson and King do not dispose of the issues in Mr. Suggs' case. It is clear from the opinions of four Justices that Florida's capital sentencing statute is contrary to Ring. Therefore, Mr. Suggs is entitled to relief.

CONCLUSION AND RELIEF REQUESTED

WHEREFORE, Mr. Suggs, through counsel, respectfully urges that the Court issue its Writ of habeas corpus and vacate his unconstitutional capital conviction.

I HEREBY CERTIFY that a true copy of the foregoing Petition for Habeas Corpus has been furnished by United States Mail, first class postage prepaid, to Charmaine Millsaps, Assistant Attorney General, The Capitol, 400 S. Monroe Street, Tallahassee, FL 32399-1050 this 13th day of February, 2004.

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CERTIFICATE OF COMPLIANCE

The undersigned counsel certifies that this petition is typed using Courier 12 font.

HILLIARD MOLDOF