IN THE SUPREME COURT OF FLORIDA

CASE NO.03-1858

Anthony John Ponticelli,

Petitioner,

v.

JAMES V. Crosby,

Secretary, Florida Department of Corrections,

Respondent.

CORRECTED PETITION FOR WRIT OF HABEAS CORPUS

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PRELIMINARY STATEMENT

This is Mr. Ponticelli's first habeas corpus petition in this Court.

Art. 1, Sec. 13 of the Florida Constitution provides: "The writ of habeas corpus shall be grantable of right, freely and without cost."

This petition for habeas corpus relief is being filed in order to address substantial claims of error under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, claims demonstrating that Mr. Ponticelli was deprived of the right to a fair, reliable, and individualized sentencing proceeding and that the proceedings resulting in his convictions and death sentences violated fundamental constitutional imperatives.

Citations shall be as follows:
"R. ___." The record on direct appeal.
"PP-R. ___." The transcript of the penalty phase proceedings.
"PC-R. ___." The post-conviction record on appeal.

All other references will be self-explanatory or otherwise explained herein.

INTRODUCTION

Significant errors occurred at Mr. Ponticelli's's capital trial and sentencing but which were not presented to this Court on direct appeal due to the ineffective assistance of appellate counsel.

Further, the capital sentencing scheme under which Mr. Ponticelli was sentenced unconstitutionally denied Mr. Ponticelli the right to a trial by jury of the essential elements of the crime of capital murder. As a result, the trial judge, and not the jury, made the findings of fact necessary to sentence Mr. Ponticelli to death.

Also constitutionally defective, the indictment, which the trial judge read to the jury panel in Mr. Ponticelli's case, violated Mr. Ponticelli's constitutional rights in that it failed to specify the elements of the offense and define the aggravating factors necessary for application of the death penalty under the Florida statutory scheme. (R. 12-13) The issues and arguments not presented to this Court on direct appeal due to the ineffective assistance of appellate counsel constitute fundamental error, thereby prejudicing Mr. Ponticelli and vitiating his convictions and death sentences.

The prejudicial defiency of appellate counsel's performance and the constitutional deficiencies of the statutory scheme and procedures under which Mr. Ponticelli was concvicted and sentenced violate Mr. Ponticelli's fundamental right to a proper indictment, to a fair trial, with an adequately instructed jury of his peers making the requisite

findings of fact necessary to support and sustain the murder convictions and the sentences of death, and to an individualized sentencing.

In this Petition, Mr. Ponticelli contends that he is entitled to habeas relief and prays that this Court grant him said relief from his convictions and sentences of death.

REQUEST FOR ORAL ARGUMENT

Due to the seriousness of the issues involved, Petitioner respectfully requests oral argument.

PROCEDURAL HISTORY

Mr. Ponticelli was charged with two counts of first-degree murder and one count of robbery with a deadly weapon. Ponticelli v. State, 593 So. 2d 483, 486 (Fla. 1992) The indictment, which was read to the jury panel by the trial judge, failed to define the applicable aggravating circumstances under Florida Statute 921.141, pursuant to which the state is seeking to convict and execute Mr. Ponticelli for the November 27, 1987 killings of Ralph and Nick Grandinetti. (R. 12-13)

The trial court entered a judgment of acquittal on the robbery count at the close of the state's case-in-chief. Ponticelli v. State, 593 So. 2d at 486. However, the jury found Mr. Ponticelli guilty on both counts of first-degree murder and, after a single witness penalty phase, recommended, by a 9-3 vote, that he be sentenced to death for each

shooting. Id.

Finding the statutory aggravators of pecuniary gain and of cold, calculated, and premeditated (CCP)applicable to both murders and the heinous, atrocious, or cruel statutory aggravator applicable to the murder of Nick Grandinetti and finding two mitigating factors, that Mr. Ponticelli had no significant prior criminal activity and that Mr. Ponticelli was twenty years old at the time of the offense, applicable to both murders, the trila judge sentenced Mr. Ponticelli to death in connection with both convictions. Id.

Importantly, the trial judge rejected the testimony of Mr. Ponticelli's sole penalty-phase witness, Dr. Mills, regarding the applicability of the statutory mental-health mitigating factors on the ground that, as this Court stated, "there was no evidence of drug use on the evening of the murders." Ponticelli v. State, 593 So. 2d at 491.

On direct appeal, appellate counsel raised twelve issues, seven of which this Court considered meritorious enough to discuss, but this Court affirmed Mr. Ponticelli's convictions and sentences. Ponticelli v. State, 593 So. 2d 483 (Fla. 1991). Subsequently, the United States Supreme Court granted Certiorari on Mr. Ponticelli's Petition therefor on the issue of the constitutional adequacy of the jury instructions for the CCP and HAC aggravating factors and remanded to the Florida Supreme Court for reconsideration in light of Espinosa v. Florida, 112 S.Ct. 2926 (1992). Ponticelli v. Florida, 113 S. Ct. 32 (1992) On

remand, this Court, although finding the HAC instruction "even less detailed" than the instruction found deficient in Espinosa, held that the challenge to the sufficiency of the instructions was procedurally barred because trial counsel did not request specific instructions or object to the instructionsm, and, thus, this Court re-affirmed Mr Ponticelli's convictions and sentences. Ponticelli v. State, 618 So. 2d 154 (1993), cert. denied, 114 S. Ct. 352(1993).

Mr. Ponticelli thereafter filed a Rule 3.850 motion on April 10, 1995, amended it several times during document production disputes, and subsequently filed his final, amended 3.850 motion on July 30,1998.

The circuit court conducted a "Huff" hearing on the claims of the 3.850 motion on September 23, 1998 and issued its "Huff Hearing Order," dated November 3, 1998. Pursuant to its Order, the circuit court then presided over a quadricated evidentiary hearing, taking testimony on July 10-13, 2000, on October 16 and 17, 2000, on January 29 and 30, 2001, and on May 24, 2001.

Ultimately, the circuit court denied relief on the 3.850 motion by Order dated November 1, 2003 and denied a duly filed Motion for Rehearing on that Order after oral argument on the Re-Hearing Motion in December, 2003.

Pursuant to Notice filed by Mr. Ponticelli, the Order denying relief on the 3.850 motion is on appeal to this Court for contemporaneous consideration with the instant Petition.

Finally, in June, 2003, Mr. Ponticelli filed a Rule 3.850

and 3.851 Motion wherein he raised issues related to Ring v. Arizona, 122 S. Ct. 2428 (2002). The "Ring Motion" was denied after oral argument on or about August 25, 2003, and Notice of Appeal has been filed in this Court on that Order as well.

Mr. Ponticelli now prosecutes the instant Petition For Writ Of Habeas Corpus based upon the facts and arguments subsequently set out herein.

JURISDICTION TO ENTERTAIN PETITION AND GRANT HABEAS CORPUS RELIEF

This is an original action under Fla. R. App. P. 9.100(a). See Art. 1, Sec. 13, Fla. Const.

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 instant petition presents constitutional issues which directly concern the judgment of this Court regarding the adequacy of Mr. Ponticelli's representation during the appellate process and regarding the questionable continuing constitutional viability of sustaining Mr. Ponticelli's convictions and sentences of death in the wake of Ring.

Jurisdiction in this action lies in this Court. See, e.g., Smith v. State, 400 So. 2d 956, 960 (Fla. 1981). The fundamental constitutional errors challenged herein arise in the context of a capital case in which this Court heard and denied Mr. Ponticelli's direct appeal. See Wilson, 474 So. 2d at 1163; cf. Brown v. Wainwright, 392 So. 2d 1327 (Fla. 1981).

A petition for a writ of habeas corpus is the proper means for Mr. Ponticelli to raise the claims presented herein. See, e.g., Way v. Dugger, 568 So. 2d 1263 (Fla. 1990); Downs v. Dugger, 514 So. 2d 1069 (Fla. 1987); Riley v. Wainwright, 517 So. 2d 656 (Fla. 1987); and Wilson, 474 So. 2d at 1162.

Further, this Court has the inherent power to do justice. Now, the ends of justice call on the Court to grant the relief sought by Mr. Ponticelli in this case, as the Court has done in similar cases in the past.

The petition invokes, *inter alia,* claims involving fundamental constitutional error. *See, eg.,* Dallas v. Wainwright, 175 So. 2d 785 (Fla. 1965); and Palmes v. Wainwright, 460 So. 2d 362 (Fla. 1984).

Accordingly, this Court's exercise of its habeas corpus jurisdiction, and of the authority that adheres to it to exercize that jurisdiction, including its authority to correct constitutional errors such as those herein pled, is warranted in this action. As the Petition establishes, habeas corpus relief would be proper on the basis of Mr. Ponticelli's claims.

GROUNDS FOR HABEAS CORPUS RELIEF

By his Petition For A Writ Of Habeas Corpus, Mr. Ponticelli asserts that his capital convictions and sentences of death were obtained in violation of his rights as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and by the

corresponding provisions of the Florida Constitution.

CLAIM I

FLORIDA'S CAPITAL SENTENCING SCHEME IS UNCONSTITUTIONAL UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION RENDERING MR. PONTICELLI'S DEATH SENTENCES ILLEGAL AND HE IS ENTITLED TO A NEW TRIAL. MR. PONTICELLI HAS BEEN DENIED HIS RIGHT TO TRIAL BY JURY OF THE ESSENTIAL ELEMENTS OF THE CRIME OF CAPITAL FIRST DEGREE MURDER. AT A MINIMUM, MR. PONTICELLI IS ENTITLED TO A JURY TRIAL AND JURY VERDICT ON THE ESSENTIAL ELEMENTS OF CAPITAL FIRST DEGREE MURDER.[1]

The statute under which Mr. Ponticelli was sentenced to death is unconstitutional because it requires the judge–without the aid of the jury – to make other findings necessary for the imposition of a death sentence.[2] See Ring

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[1] In order to ensure that Mr. Ponticelli has properly pled this claim, he includes it in this petition for writ of habeas corpus. This Court has addressed similar claims in several petitions for writ of habeas corpus: Mills v. Moore, 786 So. 2d 532 (Fla. 2001); Mann v. Moore, 794 So. 2d 595 (Fla. 2001); Brown v. Moore, 800 So. 2d 223 (Fla. 2001). However, Mr. Ponticelli recognizes that claims of fundamental changes in the law are generally raised in motions for postconviction relief under Florida Rule of Criminal Procedure 3.850. See Adams v.State, 543 So. 2d 1244 (Fla. 1989); Dixon v. State, 730 So. 2d 265 (Fla. 1999). Mr. Ponticelli acknowledges that he is currently appealing the circuit court's denial of his motion for postconviction relief and the denial of the "Ring" Motion, but, as Mr. Ponticelli is aware of at least one challenge to the circuit court's jurisdiction to rule on "Ring" claims, he is raising the claim herein as well to protect both his state and federal rights should further review be necessary.

[2] In support of each death sentence, the trial judge found the following two aggravating factors: 1) the murders were committed forpecuniary gain and 2) the crime was cold, calculated and premeditated. See Ponticelli v. State, 593 So.

v. Arizona, 122 S. Ct. 2428 (June 24, 2002). 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.[3]

This Court previously held that, "[b]ecause Apprendi did not overrule Walton, the basic scheme in Florida is not overruled either." See Mills v. Moore, 786 So. 2d 532, 537 (Fla. 2001). Ring overruled Walton, and the basic principle of Hildwin v. Florida, 490 U.S. 638 (1989) (per curium), which had upheld the capital sentencing scheme in Florida "on grounds that 'the Sixth Amendment does not require that the specific findings authorizing imposition of the sentence of death be made by the jury.'" Ring, 122 S. Ct. at 2437 (quoting Walton, 497 U.S. at 648 (quoting Hildwin, 490 U.S. at 640-641)).

However, recently, this Court granted a stay of execution in Bottoson v. State, in which Justice Pariente stated in her concurring opinion:

> . . . in the United States Supreme Court's opinion in Ring, the Court clearly and unequivocally held that Apprendi did apply to capital cases, thus proving our opinion in Mills

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2d 483, 486 (Fla 1991). Further, the trial court found HAC applicable to the Nick Grandinetti killing. Id.

[3] Recently, in Bostick v. State, an enhanced sentence of life without parole was thrown out because the judge, without the jury, found the qualifying aggravating circumstance that each victim was under the age of twelve. See Bostick v. State, No. 33S00-9911-CR-651, 2002 WL 1897898, at *5 (Ind. 2002).

> wrong. In other words, we were mistaken as a matter of law in our previous opinion in Bottoson in holding that Apprendi did not apply to capital proceedings.

Bottoson v. Moore, SC 02-1455 (July 8, 2002), Order Granting Stay of Execution and Setting Oral Argument at 7. (emphasis in original).

Additionally, Ring undermines the reasoning of this Court's decision in Mills by recognizing:

a) that Apprendi applies to capital sentencing schemes, Ring, 122 S. Ct. at 2432 ("Capital defendants, no less than non-capital defendants . . . are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment");

b) that States may not avoid the Sixth Amendment requirements of Apprendi by simply "specif[ying]'death or life imprisonment' as the only sentencing options," Ring, 122 S. Ct. at 2240;

and c) that the relevant and dispositive question is whether under state law death is "authorized by a guilty verdict standing alone." Id.

Florida's capital sentencing statute, like the Arizona statute struck down in Ring, makes imposition of the death penalty contingent upon the factual findings of the judge – not the jury.

Section 775.082 of the Florida Statutes provides that a person convicted of first-degree murder must be sentenced to life imprisonment "unless the proceedings held to determine

sentence according to the procedure set forth in section 921.141 result in finding by the court that such person shall be punished by death, and in the latter event such person shall be punished by death."[4]

This Court has long held that sections 775.082 and 921.141 do not allow imposition of a death sentence upon a jury's verdict of guilt, but only upon the finding of sufficient aggravating circumstances. See Dixon v. State, 283 So. 2d 1, 7 (Fla. 1973). The "explicitly cross-reference[d] . . .statutory provision requiring the finding of an aggravating circumstance before imposition of the death penalty," Ring, 122 S. Ct. at 2240, requires the judge – after the jury has been discharged and "[n]otwithstanding the recommendation of a majority of the jury"– to make three factual determinations. See Fla. Stat. § 921.141 (3).

Section 921.141 (3) provides that "if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts." Id. First, the trial judge must find the existence of at least one aggravating circumstance. See id.

Second, the judge must find that "sufficient aggravating circumstances exist" to justify imposition of the death penalty.[5] Id.

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[4] Cf. Ring, 122 S. Ct. at 2240-41 (describing and quoting Arizona death penalty statute).

[5] The jurors need only find sufficient aggravating circumstances to "recommend" an "advisory sentence" of death. See Fla. Stat. § 921.141 (2). They are not required to find

Third, the judge must find in writing that "there are insufficient mitigating circumstances to outweigh the aggravating circumstances." See id. "If the court does not make the findings requiring the death sentence, the court shall impose sentence of life imprisonment in accordance with Section 775.082." Id.

Because Florida's death penalty statute makes imposition of a death sentence contingent upon findings of "sufficient aggravating circumstances" and "insufficient mitigating circumstances," and gives sole responsibility for making those findings to the judge, it violates the Sixth Amendment.

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

First, Florida juries do not make findings of fact. Florida's death penalty statute differs from Arizona's in that it provides for the jury to hear evidence and "render an advisory sentence to the court." See Fla. Stat. § 921.141(2). A Florida jury's role in the capital sentencing process is insignificant under Apprendi and Ring, however.

Therefore, whether one looks to the plain meaning of Florida's death penalty statute, or the cases interpreting it, "under section 921.141, the jury's advisory recommendation is not supported by findings of fact." See Combs v. State, 525

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this fact beyond a reasonable doubt.

So. 2d 853, 859 (Fla. 1988) (Shaw, J., concurring). This is the central requirement of Ring.

This Court has rejected the idea that a defendant convicted of first degree murder has the right "to have the existence and validity of aggravating circumstances determined as they were placed before his jury." See Engle v. State, 438 So. 2d 803, 813 (Fla. 1983), explained in Davis v. State, 703 So. 2d 1055, 1061 (Fla. 1997). The statute specifically requires the judge to "set forth . . . findings upon which the sentence of death is based as to the facts," but asks the jury generally to "render an advisory sentence . . . based upon the following matters" referring to the sufficiency of the aggravating and mitigating circumstances. See Fla. Stat. §§ 921.141(2), (3) (emphasis added).

Because Florida law does not require that any number of jurors agree that the State has proven the existence of a given aggravating circumstance before it may be deemed "found," it is impossible to say that the "jury" found proof beyond a reasonable doubt of a particular aggravating circumstance.

Thus, "the sentencing order is a ‘statutorily required personal evaluation by the trial judge of the aggravating and mitigating factors’ that forms the basis of a sentence of life or death." Morton v. State, 789 So. 2d 333 (Fla. 2001) (quoting Patton v. State, 784 So. 2d 380 (Fla. 2000)).

As the Supreme Court stated in Walton, "[a] Florida trial court no more has the assistance of a jury’s findings of fact

with respect to sentencing issues than does a trial judge in Arizona." Walton, 497 U.S. at 648.

The Florida Supreme Court has repeatedly emphasized that the trial judge's findings must be made independently of the jury's recommendation. See Grossman v. State, 525 So. 2d 833, 840 (Fla. 1988).

Because the judge must find that "sufficient aggravating circumstances exist" "notwithstanding the recommendation of a majority of the jury," Fla. Stat. § 921.141(3), he may consider and rely upon evidence not submitted to the jury. See Porter v. State, 400 So. 2d 5 (Fla. 1981); Davis v. State, 703 So. 2d 1055, 1061 (Fla. 1997). The judge is also permitted to consider and rely upon aggravating circumstances that were not submitted to the jury. See Davis, 703 So. 2d at 1061 (citing Hoffman v. State, 474 So. 2d 1178 (Fla. 1985)); Fitzpatrick v. State, 437 So. 2d 1972, 1078 (Fla. 1983); Engle, 438 So. 2d at 813.

Because the jury's role is merely advisory and contains no findings upon which to judge the proportionality of the sentences, this Court has recognized that its review of a death sentence is based upon, and dependent upon, the judge's written findings. See Morton, 789 So. 2d at 333 ("The sentencing order is the foundation for this Court's proportionality review, which may ultimately determine if a person lives or dies."); Grossman, 525 So. 2d at 839; Dixon, 283 So. 2d at 8.

Additionally, Florida juries are not required to render a

verdict on elements of capital murder. Even though "[Florida's] enumerated aggravating factors operate as 'the functional equivalent of an element of a greater offense,'" and therefore must be found by a jury like any other element of an offense, see Ring, 122 S. Ct. at 2243 (quoting Apprendi, 530 U.S. at 494),

Florida law does not require the jury to reach a verdict on any of the factual determinations required before a death sentence could be imposed. Section 921.141(2) does not call for a jury verdict, but rather an "advisory sentence."

The Florida Supreme Court has made it clear that "the jury's sentencing recommendation in a capital case is only advisory.

The trial court is to conduct its own weighing of the aggravating and mitigating circumstances . . .." Combs, 525 So. 2d at 858 (quoting Spaziano v. Florida, 468 U.S. 447, 451 (1984)) (emphasis in original). "The trial judge . . . is not bound by the jury's recommendation, and is given final authority to determine the appropriate sentence." Engle, 438 So. 2d at 813.

It is reversible error for a trial judge to consider himself bound to follow a jury's recommendation and thus "not make an independent [determination] whether the death sentence should be imposed." Ross v. State, 386 So. 2d 1191, 1198 (Fla. 1980).

Florida law only requires the judge to consider "the recommendation of a majority of the jury." See Fla. Stat. §

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. Ponticelli's case required that all jurors concur in finding any particular aggravating circumstance, or "whether sufficient aggravating circumstances exist," or "whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances." Fla. Stat. § 921.141 (2).

Further, the HAC and CCP instructions in Mr. Ponticelli's case were constitutionally inadequate under Espinosa, although this Court subsequently held that the issue had not been preserved the trial counsel and was, thus, procedurally barred, although the HAC instruction given in Mr. Ponticelli's case "was even less detailed" than the one given in Espinosa. Ponticelli v. State, 618 So. 2d 154. (Fla. 1993)

Because Florida law does not require any number of, much less twelve, jurors to agree that the government has proved an aggravating circumstance 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 determine that "the jury" rendered a verdict as to an aggravating circumstance or the sufficiency of evidence supporting the finding of that circumstance.

As Justice Shaw observed in Combs, Florida law leaves these matters to speculation. See Combs, 525 So. 2d at 859

(Shaw., J., concurring).

Further, it would be impermissible and unconstitutional to rely on the jury's advisory sentence as the basis for the specific fact-findings required for imposition of a death sentence, because the statute requires only a majority vote of the jury in support of that advisory sentence.

In Harris v. United States, 122 S. Ct. 2406 (June 24, 2002), rendered on the same day as Ring, the United States Supreme Court held that under the Apprendi test "those facts setting the outer limits of a sentence, and of the judicial power to impose it, are the elements of the crime for the purposes of the constitutional analysis." Harris, 122 S. Ct. at 2419.

And, in Ring, the Court held that the aggravating factors enumerated under Arizona law operated as "the functional equivalent of an element of a greater offense" and thus had to be found by a jury. See Ring, 122 S. Ct. at 2243.

In other words, pursuant to the reasoning set forth in Apprendi, Jones, and Ring, aggravating factors are equivalent to elements of the capital crime itself and must be treated as such.

One of the elements that had to be established for Mr. Ponticelli to be sentenced to death was that "sufficient aggravating circumstances exist" to call for a death sentence.

See Fla. Stat. § 921.141 (3).[6]

The jury was not instructed that it had to find this element proved beyond a reasonable doubt. In fact, it was not instructed on any standard by which to make this essential determination.

Such an error can never be harmless. See Sullivan v. Louisiana, 508 U.S. 275, 278 (1993) ("[T]he jury verdict required by the Sixth Amendment is a jury verdict of guilty beyond a reasonable doubt).

Where 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] the entire premise of Chapman[7] review is simply absent. There being no jury verdict of guilty-beyond-a-reasonable-doubt, the question whether the same verdict of guilty-beyond-a-reasonable-doubt would have been rendered absent the constitutional error is utterly meaningless. There is no object, so to speak, upon which harmless-error scrutiny can operate.

Sullivan, 508 U.S. at 280.

Viewed differently, in a case such as this where the error is not requiring a jury verdict on the essential elements of capital murder, but rather the delegation of that responsibility to a court, “no matter how inescapable the

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[6] It is important to note that although Florida law requires the judge to find that sufficient aggravating circumstances exist to form the basis for a death sentence, Fla. Stat. § 921.141 (3), only asks the jury to say whether sufficient aggravating circumstances exist to “recommend’ a death sentence. Fla. Stat. § 921.141(2).

[7] Chapman v. California, 386 U.S. 18 (1967).

findings to support the verdict might be, for a court to hypothesize a guilty verdict that was never rendered . . . would violate the jury-trial right." Id., 508 U.S. at 279. The review would perpetuate the error, not cure it.

Permitting any such findings of the elements of a capital crime by a mere simple majority is unconstitutional under the Sixth and Fourteenth Amendment.

In the same way that the Constitution guarantees a baseline level of certainty before a jury can convict a defendant, it also constrains the number of jurors who can render a guilty verdict. See Apodaca v. Oregon, 406 U.S. 404 (1972) (the Sixth and Fourteenth Amendment require that a criminal verdict must be supported by at least a "substantial majority" of the jurors).

The standards for imposition of a death sentence may be even more exacting than the Apodaca standard (which was not a death case) – but they cannot be constitutionally less.

Clearly, a mere numerical majority – which is all that is required under section 921.141(3) for the jury's advisory sentence – would not satisfy the "substantial majority" requirement of Apodaca. See, e.g., Johnson v. Louisiana, 406 U.S. 356, 366 (1972) (Blackmun, J., concurring) (explaining that a state statute authorizing a 7-5 verdict would violate Due Process Clause of the Fourteenth Amendment).

Ultimately, the State was not required to convince the jury that death was a proper sentence beyond a reasonable doubt as required by the Sixth Amendment. "If a State makes

an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt." Ring, 122 S. Ct. at 2439.

Florida law makes a death sentence contingent not upon the existence of any individual aggravating circumstances, but on a judicial finding "[t]hat sufficient aggravating circumstances exist." See Fla. Stat. § 921.141(3) (emphasis added).

Although Mr. Ponticelli's jury was told that individual jurors could consider only those aggravating circumstances that had been proved beyond a reasonable doubt, it was not required to find beyond a reasonable doubt "whether sufficient aggravating circumstances exist to justify the imposition of the death penalty."

In light of the plain language of Florida's death penalty statute, the Rules of Criminal Procedure, and this Court's death penalty jurisprudence, it is clear that the limited role of the jury in Florida's capital sentencing scheme fails to satisfy the requirements of the Sixth Amendment.

Even if the jury's role were redefined under Florida law, it would not make Mr. Ponmticelli's death sentence valid.

Mr. Ponticelli's jury was told repeatedly during the penalty phase that the final decision as to sentencing rested with the judge. (R.43, 238)

As the United States Supreme court held:

> [I]t is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere.

Caldwell v. Mississippi, 472 U.S. 320, 328-329 (1985).

Were this Court to conclude now that Mr. Ponticelli's's death sentences rest on findings made by the jury after they were told, and Florida law clearly provided, that the death sentence would not rest upon their recommendation, it would establish that Mr. Ponticelli's death sentences were imposed in violation of Caldwell.

Caldwell embodies the principle stated in Justice Breyer's concurring opinion in Ring: "[T]he Eighth Amendment requires individual jurors to make, and to take responsibility for, a decision to sentence a person to death." See Ring, 122 S. Ct. at 2448 (Breyer, J., concurring).

Mr. Ponticelli's death sentences were also imposed in an unconstitutional manner because he was required to prove the non-existence of an element necessary to make him eligible for the death penalty.

Under Florida law, a death sentence may not be imposed unless the judge finds the fact that "sufficient aggravating circumstances" exist to justify imposition of the death penalty. See Fla. Stat. § 921.141(3).

Because imposition of a death sentence is contingent upon this fact being found, and the maximum sentence that could be imposed in the absence of that finding is life imprisonment,

the Sixth Amendment required that the State bear the burden of proving it beyond a reasonable doubt. See Ring, 122 S. Ct. at 2432 ("Capital defendants . . . are entitled to a jury determination of any fact the legislature conditions an increase in their maximum punishment."). Nevertheless, Florida juries, like Mr. Ponticelli's, are routinely instructed that it is their duty to render an opinion on life or death by deciding "whether sufficient mitigating circumstances exist to outweigh any aggravating circumstances found to exist." (R.1314-1317)

The Due Process Clause of the Fourteenth Amendment requires the State to prove beyond a reasonable doubt every fact necessary to constitute a crime. In re Winship, 397 U.S. 358 (1970).

The existence of "sufficient aggravating circumstances" that outweigh the mitigating circumstances is an essential element of death-penalty-eligible first-degree murder because it is the sole element that distinguishes it from the crime of first-degree murder, for which life is the only possible punishment. See Fla. Stat. §§ 775.082, 921.141.

For that reason, Winship requires the prosecution to prove the existence of that element beyond a reasonable doubt.

Mr. Ponticelli's jury was told by the judge that the mitigating circumstances had to outweigh the aggravating ones.

The State exacerbated this error by telling the jury that

they need only decide if the mitigation produced was sufficient to outweigh the aggravating factors.

This violated Mr. Ponticelli's constitutional rights to due process and trial by jury, under the Fourteenth and Sixth Amendments to the U.S. Constitution, because they relieved the State of its burden to prove beyond a reasonable doubt the element that "sufficient aggravating circumstances" exist which outweigh mitigating circumstances by shifting the burden of proof to the defendant to prove that the mitigating circumstances outweigh sufficient aggravating circumstances. See Mullaney v. Wilbur, 421 U.S. 684, 698 (1975).

To comply with the Eighth Amendment's requirement that the death penalty be applied only to the worst offenders, Florida adopted § 921.141 as a means of distinguishing between death-penalty eligible and non-death-penalty eligible murder. See State v. Dixon, 283 So. 2d 1, 10 (Fla. 1973).

Florida chose to distinguish those for whom "sufficient aggravating circumstances" outweigh mitigating circumstances from those for whom "sufficient aggravating circumstances" do not outweigh the mitigating circumstances. See id., at 8.

Because the former are more culpable, they are subjected to the most severe punishment: death.

"By drawing this distinction, while refusing to require the prosecution to establish beyond a reasonable doubt the fact upon which it turns, [Florida] denigrates the interests found critical in Winship." Mullaney, 421 U.S. at 698.

Compounding the Ring error is the fact that one of the

aggravators the jury was instructed on was later stricken by this Court.

At Mr. Ponticelli's trial, the jury recommended death sentences for the murders of the Grandinettis. In her sentencing order, the trial judge found that the aggravators od pecuniary gain and cold, calculated and premeditated (CCP) applied to both murders and HAC was also applicable in the Nick Grandinetti shooting.

However, it is impossible to know what the jury based its death reccomendations on and whether any aggravator was established beyond a reasonable doubt. This unavoidable ambiguity is compounded by the fact that the jury received admittedly inadequate guidance concerning the CCP and HAC aggravators.

Like HAC, this Court specifically held that the CCP instruction is unconstitutionally vague and likely to cause jurors to automatically characterize first-degree murder as involving the CCP aggravator. Jackson v. State, 648 So. 2d 85 (Fla. 1994).

Consequently Mr. Ponticelli is entitled to relief. This Court should vacate Mr. Ponticelli's sentence and order a trial by jury regarding the aggravating and mitigating circumstances in accordance with the mandate of Ring.

CLAIM II

MR. PONTICELLI'S DEATH SENTENCES ARE INVALID AND MUST BE VACATED BECAUSE THE ELEMENTS OF THE OFFENSE NECESSARY TO

ESTABLISH CAPITAL MURDER WERE NOT CHARGED IN THE INDICTMENT IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, THE FLORIDA CONSTITUTION, AND DUE PROCESS.

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." Jones, at 243, n.6. Apprendi v. New Jersey, 530 U.S. 466 (2000), held that the Fourteenth Amendment affords citizens the same protections when they are prosecuted under state law. Apprendi, 530 U.S. at 475-476. [8]

Ring v. Arizona, 122 S. Ct. 2428 (June 24, 2002), held that a death penalty statute's "aggravating factors operate as 'the functional equivalent of an element of a greater offense.'" Id. at 2243 (quoting Apprendi, 530 U.S. at 494, n.19).

In Jones, the United States Supreme Court noted that "much turns on the determination 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." See Jones, 526 U.S. at 232.

On June 28, 2002, after the Court's decision in Ring, the

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

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 judgement of the United States Court of Appeals of 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. See Allen v. United States, 122 S. Ct. 2653 (June 28, 2002).

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

Like the Fifth Amendment to the United States Constitution, Article I, Section 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, 3592), Florida's death penalty statute, Fla. Stat. §§ 775.082 and 921.141, 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 that the mitigating circumstances are insufficient to outweigh the aggravating circumstances. See Fla. Stat. § 921.141(3).

Florida law clearly requires every "element of the offense" to be alleged in the information or indictment. In State v. Dye, 346 So. 2d 538, 541 (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), the Florida Supreme Court stated "[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 stage, including "by habeas corpus." See id. 435 So. 2d at 818.

Finally, in Chicone v. State, 684 So. 2d 736 (Fla. 1996), this Court stated "[a]s a general rule, an information must allege each of the essential elements of a crime to be valid." See id. at 744.

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. Ponticelli with a crime punishable by death.

The State's authority to decide whether to seek the execution of an individual charged with a crime hardly overrides the constitutional requirement of neutral review of prosecutorial intentions; the State's authority to seek death

is in fact an archetypical reason for this constitutional requirement. See e.g., United States v. Dionisie, 410 U.S. 19, 33 (1973); Wood v. Georgia, 370 U.S. 375, 390 (1962); Campbell v. Louisiana, 523 U.S. 393, 399 (1998).

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. See Gray, 435 So. 2d at 818 (citing Thornhill v. Alabama, 310 U.S 88 (1940) and DeJonge v. Oregon, 299 U.S. 353 (1937)).

By wholly omitting any reference to the aggravating circumstances that would be relied upon by the State in seeking a death sentence, the indictment prejudicially hindered Mr. Ponticelli "in the preparation of a defense" to a sentence of death. See Fla. R. Crim. P. 3.140(o).

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. Ponticelli's rights under Article I, Section 15 of the Florida Constitution, and the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution were violated. Mr. Ponticelli's death sentences should be vacated.

CLAIM III

MR. PONTICELLI WAS DENIED THE EFFECTIVE

ASSISTANCE OF APPELLATE COUNSEL WHERE COUNSEL FAILED TO ASSERT FUNDAMENTAL ERROR WHERE THE JURY WAS ALLOWED TO HEAR ARGUMENT AT THE GUILT/INNOCENCE AND PENALTY PHASES THAT PRESENTED IMPERMISSIBLE CONSIDERATIONS, MIS-STATED THE LAW AND FACTS, AND WERE INFLAMMATORY AND IMPROPER. THIS ERROR RENDERED MR. PONTICELLI'S TRIAL AND SENTENCING FUNDAMENTALLY UNFAIR AND UNRELIABLE IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

At several points during the guilt and penalty phases, the prosecutor mis-quoted testimony, mis-stated the facts of the case, and made erroneous statements of law. Trial counsel failed to object to many of these remarks.

This Court has held that when improper conduct by the prosecutor "permeates" a case, relief is proper. Garcia v. State, ___ So. 2d 1325 (Fla. 1993); and Nowitze v. State, 572 So. 2d 1346 (Fla. 1990)

The prosecutor in Mr. Ponticelli's case knowingly used false testimony to establish when Keith Dotson, Brian Burgess, and Ed Brown (the West Virginia boys) first met Mr. Ponticelli. This is crucial because it reveals the prosecution's intent to present the jury with a false premise: that Mr. Ponticelli was not using cocaine and that the state's important witnesses were not using cocaine.

The credibility of the state's witnessesd was thus bolstered and the central role cocaine played in the case and the killings was hidden from the jury with the end result being that the trial judge dismissed the testimony of Dr.

Mills (and the un-rebutted statutory mitigation)and would not allow the testimony of Dr. Branch. Ponticelli v. State, 593 So. 2d at 490-1.

This Court was even led to conclude that there was "no evidence of drug use on the evening of the murders." Ponticelli v. State, 493 So. 2d at 491.

By the state's action and with the collusion of the lead detective and the prosecutor, the jury and court was mis-led regarding the most crucial facts of the case.

As the post-conviction court has now found and, as the appellate attorney, by careful scrutiny of the record, could have determined, despite the trial attorney's failure to test the state's case, it is clear that Mr. Ponticelli was at the Grandinetti's trailer prior to the offence at 7:46 pm on Novemeber 27, 1987. Furthermore, the state knew this, yet presented false testimony to mis-lead the jury.

In Detective Munster's deposition (Munster depo. 68-71), Munster established that Mr. Ponticelli was at the trailer at 7:46 and, thus, could not have been at the Dotson residence when the state elicited the apparently co-ordinated, dis-credited testimony of the the West Virginia boys regarding Mr. Ponticelli allegedly being at the Dotson residence voicing intent regarding the crime. (R. 514; R.547; 557-8)

The prosecution knew from the phone records that detective Munster refers to in the deposition that Mr. Ponticelli was neither at the Dotson's house for the first time on Friday, Novemeber 27, nor was he voicing intent to

commit the offense.

As Munster testified in his deposition on April 14, 1988, he obtained the Grandinetti phone bill which reflect a 7:46pm call from the trailer to Yaphank, New York. (Depo. 67)

Munster then testified that he contacted the person called, a Tony Pemberton, who told Munster that he had been friends with Mr. Ponticelli for a time and that Tony called him on that night.

Thus, the state knew that Mr. Ponticelli was at the Grandinetti trailer when the state elicited the repeated, corrosive testimony of Dotson, Burgess, and Warren and Ed Brown that Ponticelli was at the Dotson residence voicing intent to commit the offense.

The state knew this wasn't true. Dotson testified that Mr. Ponticelli was at the Dotson house the second time, when Burgess and Ed say, according to Dotson, that Mr. Ponticelli was voicing intent to commit the crime. (R. 528)

Mr. Burgess testified that he first met Ponticelli at 6 or 7pm on Friday, the 27th, and that Ponticelli stayed for about 30 minutes, then came back an hour later, and placed Mr. Ponticelli at the Dotson residence voicing intent at 7:30pm. (R. 536; R. 549)

Warren Brown testified that he first met Mr. Ponticelli at the Dotson's on that Friday around 7:30pm. (R. 557-558) Ed Brown testified that he first met Mr. Ponticelli at 7:30 on that Friday as well. (R. 470; 487)

Munster, who sat through the trial with the prosecution,

and the state knew their witness's were lying about the crucial evidence as to when they met Mr. Ponticelli but nevertheless elicited this false testimony and used the testimony as evidence of premeditation and of heightened premeditation.

Had appellate counsel reviewed the record, counsel could and should have presented these facts as evidence of prosecutorial misconduct. Further, in closing, the prosecutor bolstered the credibility of "the West Virginia boys," when she must have known it was not true, in order to establish premeditaion. Ed Brown testified that he had never met Mr. Ponbticelli prior to Friday evening. (R. 469)

Keith Dotson testified that he'd never encountered Ponticelli before Friday and that he didn't know how Ponticelli arrived at the Dotson residence. (R. 511-512)

He also testified that he'd never seen John Turner before Saturday afternoon, Novemebr 28th. (R. 524)

Brian Burgess testified that he had never met Mr. Ponticelli before that Friday, (R. 535) as did Warren Brown. (R. 557-558) However, in Warren Brown's deposition, he states that he encountered Ponticelli on two different days, first on Thursday, Novemebr 26th, when Ponticelli arrived with Keith Dotson and they drank beer and watched the movie, "Scarface." (W. Brown depo pp.12-18)

Brown gioes on to say that, on Thursday night-Friday morning (the night of the offense, prior to the offense) Ponticelli was always looking around in different rooms, going

off by himself, and wouldn't look into a room or look outside the windows (evidence of cocaine intoxication immediately prior to offense). Id.

The state was aware of this testimony but for trial presented a completely sterilized picture of events to remove cocaine from the case.

It was by this intentional sterilization of events through false testimony that the state prevented Mr. Ponticelli from presenting evidence of lack of premeditation and strong statutory mitigation.

In Ed Brown's deposition he says that first encountered Mr. Ponticelli "maybe on a Thursday night..." (E. Brown depo p. 10)

Similarly, in Turner's deposition, he states that he knew Keith Dotson prior to Saturday, the 28th, and that in fact he met the four West Virginia boys After receiving a phonecall from Ponticelli (from the Dotson's on the 26th.) (Turner depo. pp. 50-52)

Turner also testified at his deposition that he consumed cocaine with Ponticelli on the 26th. Id.at 54 Turner goes on to state that he took Ponticelli and the West Virginia boys to the Grandinetti residence to purchase cocaine for them. (Turner depo. pp. 106-107)

The importance of the false testimony elicited from Dotson, Burgess, and the Browns is emphazied by the extent which the prosecution capitalized upon the statements in arguments to the jury.

In the guilt-phase opening argument, the prosecutor stated:

> You'll hear that Keith had just, that day, as a matter of fact, ran into the defendant at a Kwick King Jiffy Store in the neighborhood where a lot of young people hung out, and he had met the defendant and said, "I've got some guys visiting from out of state, if you have a chance, why don't you stop by? This is where I live." And he had given the defendant his address.

(R. 285)

The prosecutor knew that this was not true, but she had managed to sanitize the meeting of any implications related to cocaine.

Subsequently, regarding the first meeting between the Browns and Brian Burgess and Ponticelli, the prosecutor told the jury:

Now the guys that were visiting from West Virginia had never seen the defendant before. (R. 286)

Also, in the guilt-phase closing argument, regarding Burgess and Ed Brown and Ponticelli, stated that, "These fellows didn't know the defendant." (R. 1054) Then, regarding Keith Dotson and Ponticelli, she continues,

> ...and while they drove around in Silver Spring Shores that evening they stopped by the home of Keith Dotson, the young man you saw testify, a young man who had only known the defendant for a short period of time, had, in fact, only met him that day.

(R. 1057)

The prosecutor then repeats the theme again in order to bolster the credibilty of her witnesses in order

to distinguish them from Ponticelli and emphasize the fact that they didn't know "this guy." (R. 1064-65)

The state prevented the jury from hearing credible, relevant evidence on the issue of premeditation in the guilt phase and on the issues of the pecuniary gain and CCP aggravators by eliciting mis-leading testimony regarding cocaine use by Mr. Ponticelli, the victims, and the state's crucial witnesses, thereby enabling the prosecution to argue in guilt-phase closing argument that Mr. Ponticelli had voiced an intent to kill at the Dotson's, when he was in fact at the Grandinetti's trailer and to contend that Mr. Ponticelli was motivated by a desire to kill the victims for cocaine and cash.

Appellate counsel, who did not challenge the sufficiency of the evidence presented in obtaining Mr. Ponticelli's convictions, failed to thoroughly review the record as such a review would have revealed that the state had knowledge that the facts it was presenting were not accurate.

The prejudice from this deficiency is that, had the jury heard evidence of what really happened during the cocaine party and the "run" that Mr. Ponticelli was on and of the amounts and timing of cocaine use by Mr. Ponticelli, the important witnesses, and the victims, particularly use in close proximity to the occurence of the

crime, there would have been little credible of evidence of premeditation.

Mr. Freeman's testimony, standing alone and not being biolstered as corroboration of the testimony of Dotson, Burgess, and the Browns would have carried no probative value.

Further, the jury, had it understood and been presented with evidence of the effects of long-term as well as short-term cocaine addiction and the resultant psychosis and paranoia which gripped Mr. Ponticelli, would not have recommended death, nor would or could the trial court have imposed the death penalty.

A prosecutor may not suggest personal knowledge of evidence not admitted at trial. United States v. McAllister, 77 F.3d 387 (11th Cir. 1996). Nor may a prosecutor present a factual scenario which she knows is not true. This flies in the face of the prosecutor's strictest duty:

> [The prosecutor's] duty is not to obtain convictions but to seek justice, and he must exercise that responsibility with the circumspection and dignity the occasion calls for. His case must rest on evidence, not innuendo. If his case is not a sound one, his evidence is enough. [If] it is not sound, he should not resort to innuendo to give it a false appearance of strength.

This claim has been preserved for state habeas purposes. Defense counsel raised a proper objection at trial by moving for a mistrial. (R. 331) This claim was also not raised on

direct appeal. Appellate counsel was ineffective for not raising this claim.

It is the duty of a prosecutor to refrain from making damaging remarks that could affect the fairness and impartiality to which a defendant is entitled. Peterson v. State, 376 So. 2d 1230, 1235 (4th DCA 1979).

Conclusion

The prosecutor's errors can be considered cumulatively. See Kyles v. Whitley, 514 U.S. 419 (1995); Lightbourne v. State, 742 So. 2d 238 (Fla. 1999); Cook v. State, 792 So. 2d 1197(Fla. 2001); see also Peterson v. State, 376 So. 2d 1230, 1234 (4th DCA 1979)("contents of the [prosecutorial] final argument, taken as a whole, were such as utterly to destroy the defendant's most important right under our system.") Taken in their entirety, these errors are fundamental because they reach into the very heart of the case. Peterson, 376 So. 2d at 1234; see also Travers v. State, 578 So. 2d 793, 797 (1st DCA 1991). In Peterson v. State, the prosecutor made a number of improper remarks throughout the trial. The court held that his errors when considered cumulatively were fundamental, and mandated a new trial. Peterson, 376 So. 2d at 1234.

Appellate counsel was ineffective for failing to raise this claim on direct appeal, because the combination of these errors "reaches down into the validity of the trial itself" to the extent that the death sentence would not have been

obtained without the assistance of errors. See Kilgore v. State, 688 So. 2d 895, 898 (Fla. 1996).

Mr. Ponticelli's's trial attorney's failure to properly object at trial does not preclude raising this claim on direct appeal. See Urbin v. State, 714 So. 2d 411 (Fla. 1988).

In the interests of justice, this Court must grant habeas relief.

CONCLUSION AND RELIEF SOUGHT

For all the reasons discussed herein, Mr. Ponticelli respectfully urges this Court to grant habeas corpus relief in the form of a new trial and/or penalty phase.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Petition for Writ of Habeas Corpus, has been furnished by first class mail, postage prepaid to Kenneth Nunnelly, 444 Seabreeze Blvd. Fl.5, Office of the Attorney General, Daytona Beach, FL 32118-3958 on this ___ day of October, 2003.

CERTIFICATION OF TYPE SIZE AND STYLE

This is to certify that the Petition for Writ of Habeas Corpus has been reproduced in a 12-point Courier type, a font that is not proportionately spaced.

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