IN THE SUPREME COURT OF FLORIDA

CASE NO.03-1955

Frank A. Walls,

Petitioner,

v.

James V. Crosby,
Secretary, Florida Department of Corrections,

Respondent.

PETITION FOR WRIT OF HABEAS CORPUS

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PRELIMINARY STATEMENT

This is Mr. Walls' 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. Walls 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.

"PR. ___." The transcript of the first trial.

"PCR. ___." The post-conviction record on appeal.

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

INTRODUCTION

Significant errors occurred at Mr. Walls' 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. Walls was sentenced unconstitutionally denied Mr. Walls 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. Walls to death.

Also constitutionally defective, the indictment violated Mr. Walls' 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. (PR. 2)

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. Walls 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. Walls was concvicted and sentenced violate Mr. Walls' 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. Walls 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. Walls was charged with two counts of first-degree murder and related offenses. (PR. 2) The indictment failed to define the applicable aggravating circumstances under Florida Statute 921.141, pursuant to which the state is seeking to convict and execute Mr. Walls for the killing of Ms. Petersen. Id.

After a jury trial, the jury found Mr. Walls guilty of first-degree felony-murder of Ed Alger and of first-degree felony and premeditated murder of Ms. Petersen. (PR. 1391-1393) After a penalty phase, the jury recommended a life sentence for the killing of Mr.Alger and, by a 7-5 vote, that he be sentenced to death for the killing of Ann Petersen. (PR. 1572-1574)

The judge sentenced Mr. Walls to death in connection with the killing of Ms. Petersen. (PR. 2116-2119)

On direct appeal, this Court vacated Mr. Walls' death sentence and remanded the case for a new trial. Walls v. State, 580 So. 2d 131 (Fla. 1991)

The state re-tried Mr. Walls on seven counts of the indictment. Upon re-rial, venue was changed to Jackson county because of pretrial publicity concerns.

On June 18, 1992, the jury sitting in Jackson County found Mr. Walls guilty of first degree felony murder for the

death of Mr. Alger and of first-degree felony and premeditated murder for the death of Ms. Petersen. (R. 1127-1129) Mr. Walls was sentenced to life for the death of Mr. Alger and, consistent with the jury's recommendation to death for the death of Ms. Petersen. (R. 1120)

On July 7, 1994, this Court affirmed the trial court's sentences. Walls v. State, 641 So. 2d 381 (Fla. 1994)

Subsequently, the United States Supreme Court denied Mr. Walls' Petition for Writ of Certiorari. Walls v. Florida, 513 U.S. 1130, 115 S, Ct. 943, 139 L. Ed. 2d 87 (1995)

Mr. Walls thereafter filed a Rule 3.850 motion on March 17, 1997, amended it on April 21, 1997, and subsequently filed his final, second amended 3.850 motion on March 19, 2001.

The circuit court conducted a "Huff" hearing on the claims of the 3.850 motion on May 20, 2002 (PCR.312) and issued its Order on that hearing on June 22,2002. (PCR. 312) dated November 3, 1998. Pursuant to its Order, the circuit court then presided over an evidentiary hearing on Jannuary 9, 2003, after which the court denied relief. (PCR. 448-459.)

Pursuant to Notice filed by Mr. Walls, 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. Walls filed a Rule 3.850 and 3.851 Motion wherein he raised issues related to Ring v. Arizona, 122 S. Ct. 2428 (2002). The state objected, and no further hearing have been held.

Mr. Walls 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. Walls' representation during the appellate process and regarding the questionable continuing constitutional viability of sustaining Mr. Walls 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. Walls' 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. Walls 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. Walls 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. Walls' claims.

GROUNDS FOR HABEAS CORPUS RELIEF

By his Petition For A Writ Of Habeas Corpus, Mr. Walls asserts that his capital conviction and sentence 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. WALLS' DEATH SENTENCES ILLEGAL AND HE IS ENTITLED TO A NEW TRIAL. MR. WALLS 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. WALLS IS ENTITLED TO A JURY TRIAL AND JURY VERDICT ON THE ESSENTIAL ELEMENTS OF CAPITAL FIRST DEGREE MURDER.[1]

The statute under which Mr. Walls 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. See Ring 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

[1] In order to ensure that Mr. Walls 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. Walls 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. Walls acknowledges that a similar motion is currently pending in the circuit court which the state has moved to dismiss on jurisdictional grounds, but, as Mr. Walls 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.

sentencing judge sitting without a jury, to find an aggravating circumstance necessary for imposition of the death penalty." Ring, 122 S. Ct. at 2443.[2]

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 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

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[2] 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).

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."[3]

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.[4] Id.

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

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

[4] 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 this fact beyond a reasonable doubt.

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 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. Walls' 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. Walls' case were constitutionally inadequate under Espinosa, although this Court subsequently disposed of the issue in a harmless error analysis.

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. Walls to be sentenced to death was that "sufficient aggravating circumstances exist" to call for a death sentence. See Fla. Stat. § 921.141 (3).[5]

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

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[5] 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).

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[6] 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 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

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

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. Walls 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. Walls' death sentence valid.

Mr. Walls' jury was told repeatedly during the penalty phase that the final decision as to sentencing rested with the judge.

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. Walls' death sentence rests 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. Walls' death sentence was 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. Walls' death sentence was 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. Walls', 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."

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. Walls' 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. Walls 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. Walls' trial, the jury recommended a death sentence for the murder of Ms. Petersen.

However, it is impossible to know what aggravators 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. Walls is entitled to relief. This Court should vacate Mr. Walls' sentence and order a trial by jury regarding the aggravating and mitigating circumstances in accordance with the mandate of Ring.

CLAIM II

MR. WALLS' DEATH SENTENCE IS 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. [7]

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

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 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

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477, n.3.

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. Walls 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. Walls "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. Walls' 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. Walls' death sentences should be vacated.

CLAIM III

MR. WALLS 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. WALLS' 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.

1. Prosecutorial Misconduct

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 initially introduced evidence of an uncharged sexual battery which his predecessor had agreed should not be part of Mr. Walls' trial. (PCR. ex 1) The prosecutor knew or should have known that presenting evidence from uncharded sexual battery would be highly prejudicial and should have known to keep such evidence out. (See, R. 407;668-669)

Further, in Mr. Walls' case the prosecutor knowingly used speculative and improper testimony to argue to the guilt phase jury that Mr. Walls would have killed witness Amy Touchton had she known he was there because he would kill all witnesses. (R. 731-732)

The prosecutor added with a pithy remmark of lack-of-remorse: "Did you hear him say anything about Ann Petersen or Ed Alger?... He did not care about those victims. He did what he had to do, and he never once said he was sorry about them. (R. 734)

Such arguments are blantantly improper. But no objection. No appeal.

Similarly in the penalty-phase argument, the prosecutor argued that Mr. Walls would be a future danger to society (R. 989), that the defense didn't put on proper mitigation because the defense didn't prove that Mr. Walls went to church

((R.991), that because this was a double murder the jury would "have to" find that the prior violent felony aggravator should be applied. No Objection. No Appeal. (R. 992)

The prosecutor misled the jury to believe that bipolar diorder is not a genuine psychiatric disorder but merely constitutes "moond swings" (R. 989) No objection. No appeal.

When the prosecutor argued that Mr. Walls should be executed because he alledgedly lacks the will to be a good person to have values and live by them, there was no objection and no appeal. (R.989)

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.

The non-statutory aggravation presented to this jury rendered Mr. Walls trial fundamentally unfair. The prosecution even argued that Mr. Walls' should be executed because of his mental illness and because he's just a bad person...(R. 989) To this, there was no objection and no appeal.

2. Mr. Walls was denied a fair trial by this Court's ruling that he could not present certain evidence because the state had tainted one of his expert witnesses.

Mr. Walls was deprived of the aid of experts becuase of the state's action in violation of Ake v. Oklahoma, 470 U.S. 68 (1985). The prosecution surreptitiously fed information to two psychtriatrists who found Mr. Walls competent and the

Florida Supreme Court reversed. However Mr. Walls was barred by the state's actions from presenting the testimony of three mental-health experts who found him incompetent. Thus, he was deprived of the aid of experts. This was not objected to or raised on appeal, but it seems like a fundammental denial of due process caused by the prosecutions malfeasance. Trial and appellant counsel should have pressed this issue, arguing, as under double jeopardy analysis, the state should be estopped from seeking death against Mr. Walls since the statre's actions have prevented him from using the witnesses of his choice.

3. The sentencing court erred by failing to independently weigh aggravating and mitigating circumstances in violation of Mr. Walls' Fifth, Sixth, Eighth, and Fourteenth amendment rights.

On June 24, 1992, the court directed the state attorney to prepare a memorandum setting forth a suggested sentence and reasons therefor. (R. 1130) On June 29, 1992, the court read the state's sentencing memo into the record, adopting it as the court's own. (R 1161, 1225-1238). The judge did not tell the ptrosecutor what findings were appropriate (R. 1161-1171) The court's unsigned findings (R 1161-1171; 1225-1202) are virtually identical to the state's findings. Further, the sentencing fings made in 1992 are identical to those made in 1988. Compare 1032-1038 with R. 1161-1171. In fact the court adopted verbatim the state's words that: no matter how much mitigation the defense proved it would not "outweigh even a single aggravating circumstance established by the evidence in

this case." (R. 1038, 1170-1171,1237) Thus, on the record, there is evidence that the penalty was predetermined. See See Patterson v. State, 513 So. 2d 1257 (Fla. 1987) Had appellate counsel raised this issue, Mr. Walls' would have recieved a life sentence.

4. The trial court admitted and considered inadmissible victim impact evidence.

The trial court had before it letters sent to the state attorney from the victims' families (R. 1039-1044; 1043-1044). They were not disclosed to trial counsel until the sentencing hearing. They alleged, "Frank Walls will kill again" (R. 1040) One refers to Mr. Walls as a monster and, in one, a parent offers to pull the switch. Another letter requested that death be imposed. Each letter contained inadmissible victim impact evidence in a capital proceeding. Payne v. Tennessee, 501 U.S.808 (1991); Booth v. Maryland, 482 U.S. 496, 506-507) Appellate counsel was ineffective for failing to challenge this prosecutorial conduct, the court's procedure, and the reliance on inadmissible documents and sentencing considerations.

5. Appellate counsel failed to raise unconstitutional jury instructions on appeal.

Mr. Walls' jury was not instructed regarding the elements of certain aggravators or that they had to be proved beyond a reasonable doubt.

Following the standard vague instruction on prior violent

felony the trial court told the jury that “the crime of first degree murder of Edward Alger is a capital felony... The Court did not say it “could be considered... a capital felony. Subsequently, the prosecutor picked up the theme and told the jurors that they “had to” find that aggravator. There was no limiting instruction. Maynard v. Cartwright, 486 U.S.at 1858; Espinosa v. Florida, 505 U.S. 1079 (1992)

Similarly, the instruction on “engaged In the Commission of a Burglary or Kidnapping” is unconstitutionally vague. Sringer v. Black, 503 U.S.222 (1992) The aggravator merely repeats the elements of the offense provides the jury no guidance.

Also, the “avoid lawful arrest” aggravator instruction failed to inform the jury that the state was required to prove each element of the aggravator beyond a reasonale doubt. Also, the HAC and CCP instructions were similarly unconstitutionally vague.

Trial counsel failed to object and appellate counsel failed to preserve these issues on appeal. This constitutes ineffective assistance of counsel.

CONCLUSION

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).

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.

In addition to prosecutorial misconduct, appellate counsel failed to raise the other issues outlined in this claim. Specifically, issues related to Mr. Walls' mental health, the trial court's failure to engage in an independent analysis of sentencing factors, the improper admission of victim impact evidence, and improper instruction to the jury. These errors, in combination wit the other errors raised herein and throughout Mr. Walls' case, demonstrate the unconstitutional nature of both Mr. Walls' conviction and sentence.

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. Walls' trial attorneys 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. Walls 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 Charmaine Millsaps,

Office of the Attorney General, Tallahassee, FL on this ___ day of November, 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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