IN THE SUPREME COURT OF FLORIDA

CASE NO. SC05-733
Lower Tribunal Case No.: 83-361-CF

DAVID ALAN GORE,
Petitioner/Appellant

vs.

STATE OF FLORIDA,
Respondent/Appellee
_____/

PETITION FOR WRIT OF HABEAS CORPUS

Petitioner, DAVID ALAN GORE, is an inmate under sentence of death. This Court upheld his sentence of death in *Gore v. State*, 706 So.2d 1328 (Fla.1997), and Gore thereafter timely filed his Motion for Post Conviction Relief pursuant to Rule 3.850, Fla. R. Crim. Pro., which was denied following an evidentiary hearing. Gore has filed his Notice of Appeal of that ruling to this Court, but in order properly to raise, preserve and dispose of the issue set forth infra, Gore petitions this Court for a Writ of Habeas Corpus and states:

1. Gore's appellate counsel in the appeal of his sentence which resulted in this Court's Opinion in *Gore v. State*, 706 So.2d 1328 (Fla.1997), was deficient for failing to raise the constitutionality of Section 921.141, Florida Statutes, in that said statute deprives the Defendant (Gore) of his full rights to a jury trial under the Sixth and Fourteenth Amendments to the Constitution of the United States.

2. In June of 2002, relying on *Apprendi v. New Jersey*, 530 U.S. 466 (2002), the Supreme Court of the United States decided *Ring v. Arizona*, 536 U.S. 584 (2002), which now requires those states with a death penalty to provide a death sentencing scheme which provides several elements:

A. the jury, not the judge, must find aggravating factors which, beyond a reasonable doubt, permit imposition of the death penalty.

B. The jury must be unanimous in its findings.

C. The jury's finding of life as an appropriate sentence cannot be overridden by a judge to impose the death penalty.

D. The jury must be properly instructed in order to illuminate the Defendant's Sixth Amendment right to a jury trial.

E. Evidence admitted to the jury should comport with the rules of evidence.

3. Section 921.141, Florida Statutes, contains the following provisions which cannot be reconciled with *Ring, supra*:

A. Evidence may be received regardless of its admissibility under the exclusionary rules of evidence. Section 921.141(1), Florida Statutes.

B. The sentence is advisory. Section 921.141(2), Florida Statutes.

C. The trial court, not the jury, determines which aggravating circumstances justify death. Section 921.141(3), Florida Statutes.

D. The statute does not require unanimity of jurors, only a majority. Section 921.141(3), Florida Statutes.

E. The trial court imposes the sentence and may override a recommendation of life. Section 921.141(3), Florida Statutes.

See also, Florida Standard Jury Instructions (Criminal) 7 -11.

Finally, absent proper jury instructions which follow the *Ring* ruling, the sentencing court and the Supreme Court of Florida cannot properly discharge their constitutional obligations to ensure that there is proportionality in imposition of the death sentence.

4. This Court interpreted *Ring* to not apply to stay the executions of Linroy Bottoson and Amos King, SC02-1455 and SC02-1457 (Oct. 24, 2002), in a very narrow holding based upon the records in those two cases. However, in a plethora of opinions reminiscent of *Furman* itself, this Court repeatedly reiterated the unreconcilable inconsistencies between *Ring, supra; Apprendi, supra*; and the

Florida death sentencing procedure. Justice Scalia's hyperbolized concurring opinion in *Ring*:

> I believe that the fundamental meaning of the jury-trial guarantee of the Sixth Amendment is that all facts essential to imposition of the level of punishment that the defendant receives--whether the statute calls them elements of the offense, sentencing factors, or Mary Jane-- must be found by the jury beyond a reasonable doubt.
>
> [M]y observing over the past 12 years the accelerating propensity of both state and federal legislatures to adopt 'sentencing factors' determined by judges that increase punishment beyond what is authorized by the jury's verdict, and my witnessing the belief of a near majority of my colleagues that this novel practice is perfectly OK,... cause me to believe that our people's traditional belief in the right of a trial by jury is in perilous decline. That decline is bound to be confirmed, and indeed accelerated, by the repeated spectacle of a man's going to his death because a *judge* found that an aggravating factor existed. We cannot preserve our veneration for the protection of the jury in criminal cases if we render ourselves callous to the need for that protection by regularly imposing the death penalty without it.
>
> Accordingly, *whether or not* the States have been erroneously coerced into the adoption of 'aggravating factors,' wherever those factors exist they must be subject to the usual requirements of the common law, and to the requirement enshrined in our Constitution, in criminal cases: they must be found by the jury beyond a reasonable doubt.

> ... What today's decision says is that the jury must find the existence of the fact that an aggravating factor existed. Those States that leave the ultimate life-or-death decision to the judge may continue to do so-- by requiring a prior jury finding of aggravating factor in the sentencing phase or, more simply, by placing the aggravating-factor determination (where it logically belongs anyway) in the guilt phase.'

Ring, *supra*, at 611-612, *Scalia concurring* [first emphasis supplied, citation omitted]

5. Despite the Florida Supreme Court's figleaf of reliance on the failure of the Supreme Court of the United States to specifically overrule *Hildwin v. Florida*, 490 U.S. 638 (1989) *Ring* simply cannot be squared with Florida's death sentencing scheme. Section 921.141, Florida Statutes, must be stricken as violative of the Sixth and Fourteenth Amendments to the Constitution of the United States.

6. Further, in this case, the Gore resentencing jury was instructed that its sentence was advisory, R5692-5696; that it need not be unanimous, R5692-5696; and that although it must find aggravating factors to render an advisory opinion of death, the jury need not specifically advise the trial court which aggravating factors were found, R5692-5696. The jury below, although unanimous in its recommendation of death, was tainted by the issues raised in the main body of Petitioner's 3.850 Motion. Such jury taint problems only serve to illustrate Justice

Scalia's point that the Sixth Amendment right to a jury trial today is a pale shadow of the jury of the 1770s and 1780s.

7. Therefore, appellate counsel was ineffective for failing to assert the fundamental error now defined by *Ring*, *supra*. Appellate counsel's...

> omissions are of such magnitude as to constitute a serious error or substantial deficiency falling measurably outside the range of professionally acceptable performance and, second, whether the deficiency in performance compromised the appellate process to such a degree as to undermine confidence in the correctness of the result.

Pope v. Wainwright, 496 So.2d 798, 800 (Fla. 1986).

Petitioner acknowledges that the Supreme Court of the United States has held *Ring* to not be subject to retroactive application. *Summerlin v. Arizona*, 494 U.S. 1039 (1990). Nevertheless, when Florida's death penalty scheme is stricken down or amended to comport with the constitutional requirements of *Ring*, some death sentenced defendants will already have been executed and yet others will continue to be subject to the death penalty imposed under a law held unconstitutional after finality of the conviction. This is morally and legally wrong.

WHEREFORE, Petitioner requests this Court to grant this Petition and to vacate his sentence of death.

I HEREBY CERTIFY that a true and correct copy of the above and foregoing was mailed this ____ day of _____, 2005 to Consiglia Terenzio, Esquire, Office of the Attorney General, 1515 N Flagler Drive, West Palm Beach, FL 33401-3428; Lawrence M. Mirman, Esquire, Office of the State Attorney 411 South 2nd Street, Fort Pierce, FL 34950-1594.

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