IN THE SUPREME COURT OF FLORIDA

CASE NO. SC _____

ALEX PAGAN,
Petitioner,

v.

JAMES R. MCDONOUGH,
Secretary, Department of Corrections,

Respondent.

PETITION FOR A WRIT OF HABEAS CORPUS

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BASIS FOR INVOKING THE JURISDICTION OF THIS COURT

This is Mr. Pagan's first habeas corpus petition in this Court. Article l, Section 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 filed to address substantial claims of error under the Sixth, Eighth and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the Florida Constitution. These claims demonstrate that Mr. Pagan was deprived of the rights to a fair, reliable, and individualized trial and sentencing proceeding, and that the proceedings resulting in his conviction and death sentence violated fundamental constitutional imperatives.

PRELIMINARY STATEMENT

References to the record on direct appeal are in the form, e.g., Tr. [page] and/or R. [page]. All other references will be self explanatory or otherwise explained herein.

REQUEST FOR ORAL ARGUMENT

Mr. Pagan has been sentenced to death. The resolution of the issues involved in this action will therefore determine whether he lives or dies. This Court has not hesitated to allow oral argument in other capital cases in a similar procedural posture. A full opportunity to air the issues through oral

argument would be more than appropriate in this case, given the seriousness of the claims involved and the stakes at issue. Mr. Pagan, through counsel, urges the Court to permit oral argument.

FACTS UPON WHICH THE PETITIONER RELIES

Alex Pagan was indicted by the Grand Jury for the 17th Judicial Circuit, Broward County Florida, on March 25, 1993, for two counts of first-degree premeditated murder, two counts of attempted first-degree premeditated murder, armed burglary and armed robbery (R. 5-7). Pagan was tried by jury on November 4, 1996 through December 17, 1996, before the Honorable Susan Lebow in Broward County, Florida.

During the jury selection, the court and counsel for the state and defense inquired into the backgrounds of the jury. During the selection, Mr. Julio Cruz and Eugenio Olariaga indicated that they did not speak or understand English too well. (T. 866, 1013) Neither the court nor counsel inquired much further into Mr. Cruz's or Mr. Olariaga's ability to speak and comprehend English. These jurors were excused by the Court for Cause. (T. 866, 1014)[1]

On December 20, 1996, the jury found Pagan guilty as charged on all counts (T. 3394-5, R. 912-17). On February 26, 1997, the jury reconvened

[1] *See*, *infra*, Issue 1.

for the penalty phase proceedings. Florida's standard penalty phase jury instructions were read to the jury.[2] On March 5, 1997, the jury recommended by a vote of seven to five that Pagan be sentenced to death as to counts one and two (T. 3656, R. 1058-1061). On June 30, 1997 and July 31, 1997, the Court conducted a Spencer hearing. Pagan was sentenced by the Court on October 15, 1998. Reading from a prepared Order (T. 3831-46, R. 1114-1126), the Court found the following aggravating circumstances: The defendant was previously convicted of another capital felony or a felony involving the use and/or threat of violence (great weight); The capital felonies were committed during the course of/or attempt to commit armed burglary and armed robbery (significant weight); The capital felony was committed for the purpose of avoiding or preventing a lawful arrest. The Court declined to find the existence of this aggravating circumstance; the murder was cold, calculated, and premeditated (great weight).

The Court considered the following statutory mitigating circumstances: The defendant's age at the time of the crime. The Court declined to find the existence of this mitigating circumstance.

The Court considered the following non-statutory mitigators and accorded them some to little weight: Childhood deprivation (some weight);

[2] *See*, *infra*, Issue 2.

the Defendant suffers from attention deficit disorder (little weight); the Defendant has a borderline personality disorder (some weight); the Defendant was emotionally abused as a child. The Court declined to find the existence of this mitigating circumstance; the Defendant has a history of emotional problems including suicide attempts. The Court did not find this mitigating circumstance to vary from the finding that the Defendant suffered from borderline personality disorder (some weight); the Defendant is a loving brother (little weight); the Defendant is a loving son, grandson, and great grandson (little weight); the Defendant engaged in good conduct while in custody awaiting trial (some weight); and the Defendant is a loving friend (little weight).

After considering all aggravating and mitigating circumstances, the Court concluded that death, as recommended by the jury, was the appropriate sentence for the first degree murder of Michael Lynn and Freddie Lafayette Jones. Pagan was sentenced to life on counts 3, 4, 5, and 6.

On direct appeal Pagan raised the following arguments: (A) the evidence was insufficient to support Alex Pagan's convictions; (B) the trial court reversibly erred in allowing Williams Rule evidence concerning a January 23, 1993 burglary that was dissimilar factually and temporally; (C)

the trial court erred in denying the defendant's motion to suppress physical evidence; (D) the trial court reversibly erred by refusing to grant a new trial and refusing to declare a mistrial when the prosecutor impermissibly bolstered the credibility of a state witness; (E) the trial court reversibly erred by allowing a surreptitiously recorded hearsay conversation in violation of Alex Pagan's state and federal constitutional rights; (F) the trial court reversibly erred by denying Alex Pagan's motion for a new trial and upholding the state's Batson challenge to a juror; (G) the trial court reversibly erred in refusing to order a new trial; (H) the trial court reversibly erred in refusing to grant one or more of Alex Pagan's motions for mistrial; (I) the trial court reversibly erred in permitting prejudicial inflammatory photographs of the deceased to be shown to the jury; (J) the trial court reversibly erred by denying a motion for new trial upon a Richardson violation when testimony concerning a voice line-up was permitted; (K) the trial court reversibly erred by denying the defendant's motion for mistrial when the prosecutor in closing argument made references to the "Golden Rule" with respect to improper inflammatory references preventing the defendant from committing crimes again; (L) the trial court reversibly erred in denying the defendant's motion for mistrial when the prosecutor in closing argument made references to a camouflage jacket from the Desert

Storm War which was not in evidence, and which was highly prejudice to the defense; (M) the trial court reversibly erred by permitting over defense objections testimony of Keith Jackson concerning the death of a six (6) year old child; (N) the trial court reversibly erred in overruling objections and permitting the medical examiner to express expert opinions on glass without any predicate when the medical examiner lacked the qualifications to give expert opinions on the characteristics of the glass manufacturer, its composition, and whether someone would be injured breaking through glass; (O) the trial court reversibly erred in granting the State's motion for a voice line-up and in allowing testimony relating to the voice line-up; (P) cumulative errors require reversal and remand; and (Q) reversal is required as Alex Pagan's death sentence is disproportionate.

The Florida Supreme Court affirmed Pagan's convictions and sentences in Pagan v. State, 830 So.2d 792 (Fla. 2002), cert. denied, 539 U.S. 919, 123 S.Ct. 2278, 156 L.Ed.2d 137, 71 USLW 3758 (2003). The Office of Capital Collateral Regional Counsel-Southern Region was appointed on November 7, 2002 to represent Pagan in post-conviction proceedings. On January 10, 2003, the Office of Capital Collateral Regional Counsel-Southern Region filed a Motion to Withdraw based upon a conflict of interest, which was granted by this Court on January 14, 2003. The

Office of Capital Collateral Regional Counsel-Middle Region accepted appointment of counsel and filed a Notice of Appearance on March 4, 2003.

On June 8, 2004, Mr. Pagan filed a motion for post-conviction relief. On January 18, 2005, the lower court entered an order addressing the 21 claims for relief. An evidentiary hearing was held on February 7th, 8th, and 9th in 2005. A year later on February 7, 2006, the lower court entered an order denying relief. Mr. Pagan timely filed his appeal. This petition follows.

ISSUE 1

MR. PAGAN WAS DENIED THE EQUAL PROTECTION OF THE LAWS DURING HIS 1999 TRIAL UNDER THE UNITED STATES CONSTITUTION AND THE FLORIDA CONSTITUTION AND WHEN JURORS WERE STRUCK BASED ONLY ON THE FACT THAT ENGLISH WAS NOT THEIR PRIMARY LANGUAGE. AS A RESULT, MR. PAGAN'S TRIAL WAS DONE IN VIOLATION OF THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

During the jury selection, the court and counsel for the state and defense inquired into the backgrounds of the jury. During the selection, Mr. Julio Cruz and Eugenio Olariaga indicated that they did not speak or understand English too well. (T. 866, 1013) Neither the court nor counsel inquired much further into Mr. Cruz's or Olariaga's ability to speak and

comprehend English. These jurors were excused by the Court for Cause.[3] (T. 866, 1014)

Section 913.03, F.S. lists only those grounds for which a venire person may be struck for cause.[4] It reads:

> A challenge for cause to an individual juror may be made only on the following grounds: (1) the juror does not have the qualifications required by law; (2) the juror is of unsound mind or has a bodily defect that renders him or her incapable of performing the duties of a juror, except that, in a civil action, deafness or hearing impairment shall not be the sole basis of a challenge for cause of an individual juror; (3) the juror has conscientious beliefs that would preclude him or her from finding the defendant guilty; (4) the juror served on the grand jury that found the indictment or on a coroner's jury that inquired into the death of a person whose death is the subject of the indictment or information; (5) the juror served on a jury formerly sworn to try the defendant for the same offense; (6) the juror served on a jury that tried another person for the offense charged in the indictment, information, or affidavit; (7) the juror served as a juror in a civil action brought against the defendant for the act charged as an offense; (8) the juror is an adverse party to the defendant in a civil action, or has complained against or been accused by the defendant in a criminal prosecution; (9) the juror is related by blood or marriage within the third degree to the defendant, the attorneys of either party, the person alleged to be injured by the offense charged, or the person on whose complaint the prosecution was instituted; (10) the juror has a state of mind regarding the defendant, the case, the person alleged to have been injured by the offense charged, or the person on whose complaint the

[3] It should be noted that since this a cause challenge to a juror, the *Batson* standard should not apply. Rather, a higher standard should apply in this case due to the specific delineation of the grounds for cause.

[4] Section 913.12 lists the qualifications for criminal petit juries as being the same as in civil cases.

> prosecution as instituted that will prevent the juror from acting with impartiality, but the formation of an opinion or impression regarding the guilt or innocence of the defendant shall not be a sufficient ground for challenge to a juror if he or she declares and the court determines that he or she can render an impartial verdict according to the evidence; (11) the juror was a witness for the state or the defendant at the preliminary hearing or before the grand jury or is to be a witness for either party at the trial; and (12) the juror is a surety on defendant's bail bond in the case.

913.03, F.S. (1996)

This list is both exhaustive and exclusive of the grounds for which a cause challenge may be granted. See *Boykins v. State*, 783 So.2d 317 (Fla. 5th DCA 2001); See, *Alen v. State*, 596 So.2d 1083 (3rd DCA 1992)fn 10. Mr. Olariaga's ability to speak or understand English is not one of the ten grounds for which a cause challenge may be granted by the court.

In addition, section 40.01, F.S. (1996) lists the qualifications of jurors. It reads:

> Jurors shall be taken from the male and female persons at least 18 years of age who are citizens of the United States and legal residents of this state and their respective counties and who possess a driver's license or identification card issued by the Department of Highway Safety and Motor Vehicles pursuant to chapter 322 or who have executed the affidavit prescribed in s. 40.011.

Further, Chapter 40 lists those reasons for which a juror may be excused or disqualified from service. Section 40.013, F.S. (1996) reads:

> No person who is under prosecution for any crime, or who has been convicted in this state, any federal court, or any other

state, territory, or country of bribery, forgery, perjury, larceny, or any other offense that is a felony in this state or which if it had been committed in this state would be a felony, unless restored to civil rights, shall be qualified to serve as a juror. (2)(a) Neither the Governor, nor Lieutenant Governor, nor any Cabinet officer, nor clerk of court, or judge shall be qualified to be a juror. (b) Any full-time federal, state, or local law enforcement officer or such entities' investigative personnel shall be excused from jury service unless such persons choose to serve. (3) No person interested in any issue to be tried therein shall be a juror in any cause; but no person shall be disqualified from sitting in the trial of any suit in which the state or any county or municipal corporation is a party by reason of the fact that such person is a resident or taxpayer within the state or such county or municipal corporation. (4) Any expectant mother and any parent who is not employed full time and who has custody of a child under 6 years of age, upon request, shall be excused from jury service. (5) A presiding judge may, in his or her discretion, excuse a practicing attorney, a practicing physician, or a person who is physically infirm from jury service, except that no person shall be excused from service on a civil trial jury solely on the basis that the person is deaf or hearing impaired, if that person wishes to serve, unless the presiding judge makes a finding that consideration of the evidence to be presented requires auditory discrimination or that the timely progression of the trial will be considerably affected thereby. However, nothing in this subsection shall affect a litigant's right to exercise a peremptory challenge. (6) A person may be excused from jury service upon a showing of hardship, extreme inconvenience, or public necessity. (7) A person who was summoned and who reported as a prospective juror in any court in that person's county of residence within 1 year before the first day for which the person is being considered for jury service is exempt from jury service for 1 year from the last day of service. (8) A person 70 years of age or older shall be excused from jury service upon request. A person 70 years of age or older may also be permanently excused from jury service upon written request. A person who is permanently excused from jury service may subsequently request, in writing, to be included in future jury lists provided

> such person meets the qualifications required by this chapter.
> (9) Any person who is responsible for the care of a person who, because of mental illness, mental retardation, senility, or other physical or mental incapacity, is incapable of caring for himself or herself shall be excused from jury service upon request.

Section 40.013, Fla.Stat. (1996).

As evidenced above, nowhere in Chapter 40 is there a requirement that a juror have a minimum English language proficiency.[5] Nor is there the disqualification of a juror because that person does not speak English.

Interpreters, however, are authorized in Florida for the hearing impaired under section 90.6063, F.S. (1996). That section reads, in pertinent part:

> (2) In all judicial proceedings and in sessions of a grand jury wherein a deaf person is a complainant, defendant, witness, or otherwise a party, or wherein a deaf person is a juror or grand juror, the court or presiding officer shall appoint a qualified interpreter to interpret the proceedings or deliberations to the deaf person and to interpret the deaf person's testimony, statements, or deliberations to the court, jury, or grand jury. A qualified interpreter shall be appointed, or other auxiliary aid provided as appropriate, for the duration of the trial or other proceeding in which a deaf juror or grand juror is seated.

Section 90.6063(2), Fla.Stat. (1996).

As such, Florida recognizes, and provides for, the use of interpreters during petit jury deliberations.[6] Because Florida uses sign interpreters, there

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[5] *Compare* 28 U.S.C.§1865(b)(2), (3) (English language ability required for federal jury service).

[6] It should be noted that the creation of 90.6063 was for the express right of deaf individuals as defined by the statute, not for the right of the individual

can be no argument that the use of language interpreters would disrupt the jury deliberation process. Sign interpreters must participate in the exact same manners as language interpreters. Sign interpreters must interpret the cacophony of argument that can occur in a jury room, with multiple jurors speaking at the same time. Any sort of cautionary instruction by the judge to the jury regarding sign interpreters would be the same for language interpreters.

With regards to the grand jury, the appointment of a language interpreter is also allowed. Section 905.15 reads:

> The foreperson shall appoint an interpreter to interpret the testimony of any witness who does not speak the English language well enough to be readily understood. T he interpreter must take an oath not to disclose any information coming to his or her knowledge, except on order of the court.

Section 905.15, Fla.Stat. (2006).

Because of the similar nature of the grand jury, the presence of a language interpreter during petit jury deliberations would pose no additional inconvenience or hardship. Questions are posed to the witnesses who respond back. Grand jury deliberations are secret just as they are for petit juries. Finally, the grand jurors deliberate among themselves. With respect

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defendant to have a deaf juror. The Legislature states specifically in subsection (1): "The Legislature finds that it is an important concern that the rights of deaf citizens be protected. It is the intent of the Legislature to ensure that appropriate and effective interpreter services be made available to Florida's deaf citizens."

to language interpreters, there is no discernable difference in form between the two juries.

In *Hernandez v. New York*, 500 U.S. 352 (1991), the United States Supreme Court upheld a conviction under a Batson[7] challenge where two Latinos were struck from the jury panel due to their inability to follow the court interpreter's version of what was being said by the witnesses.

Hernandez does not hold that jurors may be struck based on their language skills alone. Rather, Hernandez signals an extension of Batson and Powers by stating that it would prohibit exclusion from a petit jury on the basis of national origin, in addition to race. See, *Juan F. Perea, Hernandez v. New York*: Courts, Prosecutors, and the Fear of Spanish, 21 Hoffstra L. Rev. 1, 7 (1992). In discussing language and peremptory strikes, the Hernandez court stated:

> Language permits an individual to express both a personal identity and membership in a community, and those who share a common language may interact in ways more intimate than those without this bond. Bilinguals, in a sense, inhabit two communities, and serve to bring them closer. Indeed, some scholarly comment suggests that people proficient in two languages may not at times think in one language to the exclusion of the other. The analogy is that of a high-hurdler, who combines the ability to sprint and to jump to accomplish a third feat with characteristics of its own, rather than two separate functions. Grosjean, the Bilingual as a Competent but Specific Speaker-Hearer, 6 J. Multilingual & Multicultural

[7] *Batson v. Kentucky*, 476 U.S. 79 (1986)

Development 467 (1985). This is not to say that the cognitive processes and reactions of those who speak two languages are susceptible of easy generalization, for even the term "bilingual" does not describe a uniform category. It is a simple word for a more complex phenomenon with many distinct categories and subdivisions. Sánchez, Our Linguistic and Social Context, in Spanish in the United States 9, 12 (J. Amastae & L. Elías-Olivares eds. 1982); Dodson, Second Language Acquisition and Bilingual Development: A Theoretical Framework, 6 J. Multilingual & Multicultural Development 325, 326-327 (1985). Our decision today does not imply that exclusion of bilinguals from jury service is wise, or even that it is constitutional in all cases. It is a harsh paradox that one may become proficient enough in English to participate in trial, see, e.g., 28 U.S.C. §1865(b)(2), (3) (English-language ability required for federal jury service), only to encounter disqualification because he knows a second language as well. As the Court observed in a somewhat related context: "Mere knowledge of [a foreign] language cannot reasonably be regarded as harmful. Heretofore it has been commonly looked upon as helpful and desirable." *Meyer v. Nebraska*, 262 U.S. 390, 400, 43 S.Ct. 625, 627, 67 L.Ed. 1042 (1923). Just as shared language can serve to foster community, language differences can be a source of division. Language elicits a response from others, ranging from admiration and respect, to distance and alienation, to ridicule and scorn. Reactions of the latter type all too often result from or initiate racial hostility. In holding that a race-neutral reason for a peremptory challenge means a reason other than race, we do not resolve the more difficult question of the breadth with which the concept of race should be defined for equal protection purposes. We would face a quite different case if the prosecutor had justified his peremptory challenges with the explanation that he did not want Spanish-speaking jurors. It may well be, for certain ethnic groups and in some communities, that proficiency in a particular language, like skin color, should be treated as a surrogate for race under an equal protection analysis. Cf., Yu *Cong Eng v. Trinidad*, 271 U.S. 500, 46 S.Ct. 619, 70 L.Ed. 1059 (1926) (law prohibiting keeping business records in other than specified languages violated equal protection rights of

> Chinese businessmen); *Meyer v. Nebraska*, supra (striking down law prohibiting grade schools from teaching languages other than English). And, as we make clear, a policy of striking all who speak a given language, without regard to the particular circumstances of the trial or the individual responses of the jurors, may be found by the trial judge to be a pretext for racial discrimination.

Hernandez v. New York, 500 U.S. 352 (1991).

The Seventeenth Judicial Circuit does provide language interpreters. The Court Interpreters Division is located at 201 S.E. Sixth Street, Fort Lauderdale, Florida and it utilized by the court system.[8] These services, however, are refused to individuals who are not proficient in the English language by operation of law in violation of the Constitution of the United States. Relief should be granted requiring a new trial.

ISSUE 2

MR. PAGAN WAS DENIED A RELIABLE SENTENCE AND VERDICT IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION WHEN THE JURY'S ROLE WAS DIMINISHED IN VIOLATION OF *CALDWELL v. MISSISSIPPI*.

[8] A representative from the Court Interpreters Office did verify to counsel that non-English speaking people are struck from juries and that they do not provide interpreters for jurors. Counsel attempted to present this information to the lower court through testimony but this claim was summarily denied.

In light of *Ring v. Arizona*, it necessarily follows that Florida's standard penalty phase jury instructions are no longer valid under the United States Supreme Court's *Caldwell v. Mississippi*, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985), holding. In *Caldwell*, the Supreme Court concluded "it 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." *Id*. at 328-29, 105 S.Ct. 2633. There, the Court deemed prosecutorial statements to a jury unconstitutional because the State "sought to minimize the jury's sense of responsibility for determining the appropriateness of death." *Id.* at 341, 105 S.Ct. 2633.

Following the decision in *Caldwell*, this Court evaluated the constitutionality of Florida's standard jury instructions. See, *Combs v. State*, 525 So.2d 853 (Fla.1988) (rejecting the petitioner's argument that the standard jury instruction was unconstitutional); see also, *Cook v. State*, 792 So.2d 1197, 1201 (Fla.2001).

Florida's standard penalty phase jury instructions provide in relevant part:

> Ladies and gentlemen of the jury, you have found the defendant guilty of Murder in the First Degree. The punishment for this crime is either death or life imprisonment without the possibility of parole. Final decision as to what punishment shall

be imposed rests solely with the judge of this court; however, the law requires that you, the jury, render to the court an advisory sentence as to what punishment should be imposed upon the defendant. * * * Ladies and gentlemen of the jury, it is now your duty to advise the court as to what punishment should be imposed upon the defendant for [his][her] crime of Murder in the First Degree. As you have been told, the final decision as to what punishment shall be imposed is the responsibility of the judge; however, it is your duty to follow the law that will now be given you by the court and render to the court an advisory sentence based upon your determination as to whether sufficient aggravating circumstances exist to justify the imposition of the death penalty and whether sufficient mitigating circumstances exist to outweigh any aggravating circumstances found to exist. Your advisory sentences should be based upon the evidence [that you have heard while trying the guilt or innocence of the defendant and evidence that has been presented to you in these proceedings] [that has been presented to you in these proceedings]. * * * If you find the aggravating circumstances do not justify the death penalty, your advisory sentence should be one of life imprisonment without possibility of parole. Should you find sufficient aggravating circumstances do exist, it will then be your duty to determine whether mitigating circumstances exist that outweigh the aggravating circumstances * * * Each aggravating circumstance must be established beyond a reasonable doubt before it may be considered by you in arriving at your decision. * * * If one or more aggravating circumstances are established, you should consider all the evidence tending to establish one or more mitigating circumstances and give that evidence such weight as you feel it should receive in reaching your conclusion as to the sentence that should be imposed. A mitigating circumstance need not be proved beyond a reasonable doubt by the defendant. If you are reasonably convinced that a mitigating circumstance exists, you may consider it as established. The sentence that you recommend to the court must be based upon the facts as you find them from the evidence and the law. You should weigh the aggravating circumstances against the mitigating circumstances, and your advisory sentence must be

> based on these considerations. In these proceedings it is not necessary that the advisory sentence of the jury be unanimous. The fact that the determination of whether you recommend a sentence of death or sentence of life imprisonment in this case can be reached by a single ballot should not influence you to act hastily or without due regard to the gravity of these proceedings. Before you ballot you should carefully weigh, sift and consider the evidence, and all of it, realizing that human life is at stake, and bring to bear your best judgment in reaching your advisory sentence. If a majority of the jury determine that (defendant) should be sentenced to death, your advisory sentence will be: A majority of the jury, by a vote of _____, advise and recommend to the court that it impose the death penalty upon (defendant). On the other hand, if by six or more votes the jury determines that (defendant) should not be sentenced to death, your advisory sentence will be: "The jury advises and recommends to the court that it impose a sentence of life imprisonment upon (defendant) without possibility of parole." You will now retire to consider your recommendation. When you have reached an advisory sentence in conformity with these instructions, that form of recommendation should be signed by your foreman and returned to the court.

Fla. Std. Jury Instr. (Crim.) 7.11.

The Florida Supreme Court has held that Florida's standard jury instructions are constitutional under *Caldwell*. See, *Combs*, 525 So.2d 853. However, in light of the decision in *Ring v. Arizona*, it is necessary to reevaluate both the validity, and, if valid, the wording of these jury instructions. The United States Supreme Court has defined the reach of *Caldwell* by stating that "*Caldwell* is relevant only to certain types of comment--those that mislead the jury as to its role in the sentencing process in a way that allows the jury to feel less responsible than it should for the

sentencing decision." *Darden v. Wainwright*, 477 U.S. 168, 183 n. 15, 106 S.Ct. 2464, 91 L.Ed.2d 144 (1986). In *Ring*, the Supreme Court made the jury's role in capital sentencing absolutely clear--the jury must find the aggravating factors. See Ring, 122 S.Ct. at 2443. As the Court in *Ring* stated, "[T]he right to trial by jury ... would be senselessly diminished if it encompassed the fact finding necessary to increase a defendant's sentence by two years, but not the fact finding necessary to put him to death." Id.

Clearly, under *Ring*, the jury plays a vital role in the determination of a capital defendant's sentence through the determination of aggravating factors. However, under Florida's standard penalty phase jury instructions, the role of the jury is minimized, rather than emphasized, as is the necessary implication to be drawn from *Ring.*

Under Florida's standard penalty phase jury instructions, the jury is told, even before evidence is presented in the penalty phase, that its sentence is only advisory and the judge is the final decision maker. See Fla. Std. Jury Instr. (Crim.) 7.11. The words "advise" and "advisory" are used more than ten times in the instructions, while the members of the jury are only told once that they must find the aggravating factors beyond a reasonable doubt. See id. The jury is also instructed several times that its sentence is simply a recommendation. See id. By highlighting the jury's advisory role, and

minimizing its duty under *Ring* to find the aggravating factors, Florida's standard penalty phase jury instructions must certainly be reevaluated under the Supreme Court's *Caldwell v. Mississippi* decision.

Just as the high Court stated in *Caldwell*, Florida's standard jury instructions "minimize the jury's sense of responsibility for determining the appropriateness of death." *Caldwell*, 472 U.S. at 341, 105 S.Ct. 2633. Ring clearly requires that the jury play a vital role in determining the factors upon which the sentencing will depend, and Florida's jury instructions tend to diminish that role and could lead the jury members to believe they are less responsible for a death sentence than they actually are. Ring has now emphasized the jury's role in this process and may compel Florida's standard penalty phase jury instructions to do the same.

In *Caldwell*, the Court reversed because, as the Court wrote:

> [T]he State sought to minimize the jury's sense of responsibility for determining the appropriateness of death. Because we cannot say that this effort had no effect on the sentencing decision, that decision does not meet the standard of reliability that the Eighth Amendment requires. The sentence of death must therefore be vacated.

472 U.S. at 341, 105 S.Ct. 2633.

In this case, there was a tendency to minimize the role of the jury in violation of *Caldwell* if *Ring* does not apply to Florida's sentencing scheme. Relief should be granted requiring a new trial.

CONCLUSION

For the above mentioned reasons and argument, this petition for a writ of habeas corpus should be granted.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Petition for Writ of Habeas Corpus was furnished by U.S. Mail, first-class postage prepaid, to Leslie T. Campbell, Assistant Attorney General, 1515 North Flagler Drive, 9th Floor, West Palm Beach, Florida, 33401 and to Alex Pagan, DOC# 668630; Union Correctional Institution, 7819 N.W. 228th Street, Raiford, Florida, 32026 on this ____ day of July, 2007.

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CERTIFICATE OF COMPLIANCE

Pursuant to Fl.R.App.P. 9.210, I hereby certify that this brief is prepared in Times New Roman 14 point font and complies with the requirement of Rule 9.210.

_____

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