IN THE SUPREME COURT OF FLORIDA

NO._____



BRETT A. BOGLE,

Petitioner,

v.

KENNETH S. TUCKER,
Secretary, Florida Department of Corrections,

Respondent.

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# PETITION FOR WRIT OF HABEAS CORPUS

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## PRELIMINARY STATEMENT

This is Petitioner's first habeas corpus petition in this Court. Article 1, 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 being filed to address substantial claims of error, which demonstrate Mr. Bogle was deprived of fair and reliable trial proceedings.

Citations shall be as follows: The record on appeal is referred to as "R." followed by the appropriate page number. The transcripts from trial are referred to as "T." followed by the appropriate page number. All other references will be self-explanatory or otherwise explained herein.

## INTRODUCTION

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

Appellate counsel's failure to present the meritorious issues discussed in this petition demonstrates that his representation of Mr. Bogle involved "serious and substantial" deficiencies. Fitzgerald v. Wainwright, 490 So. 2d 938, 940 (Fla. 1986). The issues which appellate counsel neglected to raise demonstrate that his performance was deficient and the deficiencies prejudiced Mr. Bogle. "[E]xtant legal principle[s]... provided a clear basis for... compelling appellate argument[s]," which should have been raised in Mr.

Bogle's appeal. Fitzpatrick, 490 So. 2d at 940. Neglecting to raise such fundamental issues, as those discussed herein, "is far below the range of acceptable appellate performance and must undermine confidence in the fairness and correctness of the outcome." Wilson v. Wainwright, 474 So. 2d 1162, 1164 (Fla. 1985).

Had counsel presented these issues, Mr. Bogle would have received a new trial, or, at a minimum, a new penalty phase. Individually and "cumulatively," Barclay v. Wainwright, 444 So. 2d 956, 969 (Fla. 1984), the claims omitted by appellate counsel establish that "confidence in the correctness and fairness of the result has been undermined." Wilson, 474 So. 2d at 1165 (emphasis in original).

Mr. Bogle is entitled to relief.

## REQUEST FOR ORAL ARGUMENT

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

## 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. 9.030(a)(3) and Article V, sec. 3(b)(9), Fla. Const. The petition presents issues which directly concern the constitutionality of Mr. Bogle's conviction and sentence of death.

Jurisdiction in this action lies in the Court, see, e.g.,

Smith v. State, 400 So. 2d 956, 960 (Fla. 1981), for the fundamental constitutional errors challenged herein arise in the context of a capital case in which this Court heard and denied Mr. Bogle's direct appeal. See Wilson, 474 So. 2d at 1163; Baggett v. Wainwright, 229 So. 2d 239, 243 (Fla. 1969). The Court's exercise of its habeas corpus jurisdiction, and of its authority to correct constitutional errors such as those herein pled, is warranted in this action.

**GROUNDS FOR HABEAS CORPUS RELIEF**

By his petition for a writ of habeas corpus, Mr. Bogle asserts that his capital conviction and sentence of death were obtained and then affirmed, by this Court, in violation of his rights guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the Florida Constitution.

**CLAIM I**

**THE TRIAL COURT VIOLATED MR. BOGLE'S RIGHT TO DUE PROCESS WHEN IT INSTRUCTED THE JURY ON FELONY MURDER WITH THE UNDERLYING FELONY BEING SEXUAL BATTERY IN MR. BOGLE'S CASE WHERE THE STATE DID NOT CHARGE MR. BOGLE WITH SEXUAL BATTERY. THIS VIOLATED MR. BOGLE'S FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS AND VIOLATED ARTICLE I, SECTIONS 2, 9, 12, 16, AND 17 OF THE FLORIDA CONSTITUTION. APPELLATE COUNSEL'S FAILURE TO RAISE THIS CLAIM AS FUNDAMENTAL ERROR CONSTITUTES DEFICIENT PERFORMANCE WHICH DENIED MR. BOGLE EFFECTIVE ASSISTANCE OF COUNSEL ON DIRECT APPEAL.**

The trial court violated Mr. Bogle's right to due process by allowing the State to pursue felony murder pursuant to the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 2, 9, 12, 16 and 17 of the

Florida Constitution where Mr. Bogle was never charged with sexual battery, the underlying felony predicating the felony murder instruction. These Federal and State constitutional provisions require that an indictment or information state the elements of the offense charged with sufficient clarity to apprise the Defendant what he must be prepared to defend against. Russell v. United States, 369 U.S. 749, 763-769 (1962).

The indictment only charges premeditation (R. 24-7). Mr. Bogle was never charged with sexual battery. However, his jury was instructed on felony murder with the underlying felony being sexual battery (T. 594-595).

Defense counsel failed to object to this instruction at trial (T. 507; T. 595), and appellate counsel failed to raise it in Mr. Bogle's direct appeal. See State v. Bogle, 655 So. 2d 1103 (1995).

The prosecutor argued that the homicide was both premeditated and that it occurred during a sexual battery (T. 543-9). The jury was instructed on felony murder and returned a general verdict of guilt (R. 179-80).

This issue involves two aspects: (1) This Court's prior decision in Knight v. State, 338 So. 2d 201, 204 (Fla. 1976) allowing a felony murder prosecution when the indictment only alleges premeditation is improper (see e.g., Givens v. Housewright, 786 F.2d 1379 (9th Cir. 1986)) and; (2) Under the facts of this case, it was improper to allow the State to pursue felony murder. See Shepard v. Rees, 909 F.2d 1234 (9th Cir.

1989).

First, in Givens, the defendant was charged with first degree murder and the prosecution proceeded on a theory of murder by torture. The Court held this was a violation of the sixth amendment because the defendant did not receive adequate notice of the charges against him. Givens at 1380-1381 (concluding that the information did not provide notice adequate to enable Givens to prepare a defense against the charge of murder by torture).

Second, under the facts of this case, it was improper to allow the State to pursue felony murder where the evidence was not sufficient to charge Bogle with sexual battery. There was no physical evidence or any other evidence that Ms. Torres was sexually assaulted. Indeed, the physical and medical evidence, as well as the scene itself make clear that Ms. Torres engaged in consensual sex with someone other than Mr. Bogle behind the Beverage Barn. Ms. Torres clothes had no rips, tears or blood on them (T. 1281-2). Her clothes were not strewn about, but in a pile next to her body (T. 914; 1281-2; State's 18D - trial). There were no injuries to Ms. Torres genitalia that would not have occurred in consensual anal intercourse up to three hours before Ms. Torres' death (T. 1362-2).

Trial counsel's failure to object to the felony murder instruction was ineffective and direct appeal counsel's failure to raise this issue on direct appeal constitutes fundamental error as Mr. Bogle's constitutional rights to due process and

fair notice of the charges against him were denied. Relief is proper.

**CLAIM II**

**THE TRIAL COURT'S REFUSAL TO GIVE MR. BOGLE'S REQUESTED JURY INSTRUCTIONS IN REGARDS TO HAIR ANALYSIS VIOLATED MR. BOGLE'S RIGHTS TO DUE PROCESS PURSUANT TO THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 2, 9, 16, AND 17 OF THE FLORIDA CONSTITUTION. APPELLATE COUNSEL'S FAILURE TO RAISE THIS ISSUE WAS DEFICIENT PERFORMANCE WHICH DENIED MR. BOGLE EFFECTIVE ASSISTANCE OF COUNSEL ON DIRECT APPEAL.**

**Background as to hair evidence introduced at trial:**

The State presented evidence at Mr. Bogle's trial concerning a pubic hair found on a pair of white pants that police collected from a bathtub at a trailer where Mr. Bogle was arrested on September 13, 1991 (T. 346-7).

FBI Agent Michael Malone testified about the microscopic hair examination he conducted. Malone testified that he examined and compared the contents of State's Exhibit 13, which was the debris from Mr. Bogle's pants, with the known head hair and pubic hair from Ms. Torres (T. 317). There was a single "Caucasian pubic hair which matched the pubic hairs of Margaret Torres. In other words it was microscopically indistinguishable from her's and, therefore, I concluded this one pubic hair from the pants was consistent with coming from Margaret Torres." (T. 317-8).

Malone also testified that he identified a Caucasian characteristic head hair, which exhibited mixed race characteristics that did not match Mr. Bogle or the victim and was identified as coming from "debris of the victim." (T. 328).

**Defense requested jury instructions:**

Defense counsel requested the following two instructions:

> (1) Hair evidence must meet the following requirement: the circumstances must be such that the hair could not have been transferred between the victim and defendant only at the time that the crime was committed; and
>
> (2) Hair analysis and comparison are not absolutely certain and reliable. Although hair comparison and analysis may be persuasive, it does not result in identifications of absolute certainty.

See R. 140-68; R. 169-8; T. 531.

In support of the requested instructions, defense counsel argued:

> ... [T]hese requested jury instructions are being asked because of the single pubic hair that was allegedly transferred at the time of the crime, according to the State's theory, I would think from the victim's body to the defendant's body and so I think it's appropriate that the jury be instructed that it's only relevant as far as the determinations if the state proves that it was only transferred at that time and that's why I ask for that instruction. And similarly the testimony of Mr. Malone, Special Agent Malone who testified that the hair fibers were similar. I'm asking for an instruction as to the quality of that comparison under the case law that I've previously cited.

(T. 533).

The Court denied the requested instructions (T. 533-4). The trial court's refusal to give the requested instructions constituted reversible error.

The trial court erred in refusing to give the two jury instructions requested by the defense that pertained to the jury's consideration of hair evidence. Defense counsel's first requested instruction is modeled after a well-established principle governing fingerprint evidence: "[F]ingerprint evidence

must meet the requirement that the circumstances must be such that the print could have been made only at the time the crime was committed." Ivey v. State, 176 So. 2d 611 (Fla. 3rd DCA 1965), citing to Tirko v. State, 138 So. 2d 388 (Fla. App. 1962). Given that hair comparison is considerably less precise, conclusive or effective at establishing identification than are fingerprints, coupled with the circumstances of this case, due process required that Mr. Bogle's jury receive the requested instruction.

The evidence at trial was that Mr. Bogle had lived with Katie Alfonso, the victim's sister in a trailer that was frequented by the victim on a daily basis (T. 264). In fact, less than two weeks before Ms. Torres' murder, Bogle, Torres, Alfonso spent a day together and, according to a prosecution witness, Mr. Bogle and Ms. Torres conversed on the evening of the homicide (T. 270-1).

The second instruction is based on clearly established caselaw overturning convictions where it was deemed that the jury put too much emphasis on hair comparisons which are scientifically inconclusive. Florida courts have held repeatedly that "... hair comparisons do not constitute a basis for positive personal identification." Scott v. State, 581 So. 2d 887, 892 (1991).

In Horstman v. State, 530 So. 2d 368 (Fla. 2nd DCA 1988), the evidence linking the defendant to the victim included unsuccessful sexual advances in a bar, pubic hair on the corpse

which was indistinguishable from the defendant's, inconclusive blood analysis and a fingerprint not matching the defendant on a cigarette lighter near the victim (the victim's public hair had been singed). The Second District Court found this evidence was insufficient circumstantial evidence to support a finding of guilt. In Horstman, the Second District Court specifically considered the nature and weight to be given to hair sample evidence, stating: "...In a somewhat similar case (citation omitted), this court discussed the problem of basing a conviction on hair comparison evidence. While admissible, hair comparison testimony does not establish certain identification as do fingerprints." Id. at 370. In reversing Horstman's conviction, the court specifically called into question Agent Malone's testimony as to the accuracy of hair comparisons, stating: "We do not share Mr. Malone's conviction in the infallibility of hair comparison evidence. Thus, we cannot uphold a conviction dependent on such evidence. Moreover, as we explained in Jackson, even if the hair evidence were as positive as a fingerprint, the state failed to show that the hair could only have been placed on the victim during the commission of the crime." Id. at 370.

Horstman recognized that hair comparison testimony, while admissible, does not establish certain identification as do fingerprints. Horstman, supra. The decision also recognizes the fact that even though Horstman was in the vicinity of the crime and with the victim, this coupled with hair identification is

nonetheless insufficient to establish beyond a reasonable doubt that he was the perpetrator of the homicide. See also Jackson v. State, 511 So. 2d. 1047, 1049 (Fla. 2nd DCA 1987) (overturning conviction stating that "hair comparison testimony, while admissible, does not result in identification of absolute certainty").

The cases and principles cited herein are the same cases and principles relied on by trial counsel in arguing for the requested jury instructions.

Appellate counsel was ineffective in failing to raise this issue on appeal. Had appellate counsel presented this issue on direct appeal, Mr. Bogle would have received a new trial. Relief is proper.

**CLAIM III**

**THE TRIAL COURT ERRED IN INSTRUCTING THE JURY AND IMPROPERLY CONSIDERING INAPPLICABLE AGGRAVATING CIRCUMSTANCES, IN VIOLATION OF SECTION 921.141, FLORIDA STATUTES, ARTICLE I, SECTION 17 OF THE FLORIDA CONSTITUTION, AND AMENDMENTS VIII AND XIV TO THE UNITED STATES CONSTITUTION. APPELLATE COUNSEL'S FAILURE TO RAISE THIS CLAIM ON DIRECT APPEAL WAS DEFICIENT PERFORMANCE WHICH DENIED MR. BOGLE EFFECTIVE ASSISTANCE OF COUNSEL ON DIRECT APPEAL.**

**A. Prior Violent Felony Aggravator**

In imposing the death sentence, the State argued to the jury that the prior violent felony aggravator applied to this case based on the September 1, 1991, burglary that the jury convicted Bogle of when rendering its first degree murder verdict (T. 1574). The trial court's order likewise found this aggravator to be proven beyond a reasonable doubt because the burglary did not

happen on the same date as the murder and included a victim (Katie Alphonso) that was not the homicide victim (R. 261-7).

Consideration of this aggravator, over defense objection, constituted reversible error.

**1. Evidence presented at trial on the prior burglary.**

Evidence was presented at trial that Mr. Bogle got into an argument to Ms. Torres on September 1, 1991, at Katie Alphonso's trailer (T. 272). There was testimony that Mr. Bogle busted the screens, threw Ms. Alfonso out of the way to enter the trailer, grabbed the phone from Ms. Torres and twisted her arm (T. 274). Then, he took $54.00 from Ms. Alfonso's pocket and told Ms. Torres that "if she called the cops and pressed charges on him ... that she wouldn't live to tell about it." (T. 275).

Within a few days, Mr. Bogle called and threatened Ms. Torres if she pressed charges (T. 277). Ms. Alfonso told Mr. Bogle that they were not pressing charges and after Ms. Torres had yelled out that she was pressing charges, Mr. Bogle stated that "she ain't going to live to tell about it." (T. 277). Mr. Bogle called again and Ms. Alfonso told him not to worry about it that they were not going to press charges (T. 278).

On the evening of September 12, 1991, according to a State witness, Mr. Bogle approached Ms. Torres at Club 41 and they had a conversation (T. 377). A few minutes later, Mr. Bogle told Jeff Trapp that Torres was "real trash." (T. 377). Mr. Bogle called Ms. Alfonso that night around 11:00 p.m. and asked if he could come over to her trailer. She refused and Mr. Bogle told

her that he loved her, but she "can be a real bitch sometimes." (T. 281).

**2. The prosecutor's arguments to the judge as to the application of the prior violent felony aggravator.**

The trial judge initially expressed concern that the prior violent felony aggravator was not applicable (T. 635-6). The prosecutor argued that relying on the prior burglary as an aggravator was acceptable based on her argument that the September 1st burglary was a "separate episode" from the September 13th homicide because it occurred on a different date from the homicide (T. 636). Defense counsel objected to the prior violent felony aggravator, arguing that the felonies were "contemporaneous" under the law (T. 739). Defense counsel renewed his objection to the instruction at Mr. Bogle's second penalty phase (T. 1547).

The prosecutor's argument that the two crimes are separate episodes because they occurred on separate dates does not comport with her arguments to the jury or with controlling case law.

In penalty phase closing arguments, the prosecutor relied on the prior burglary as establishing a motive for Brett Bogle to murder Ms. Torres, stating:

> September 1st, thirteen days before this murder, Brett Bogle wasn't getting what he wanted. They had been to Manatee County. They had some beers. They were coming back. He wanted inside that trailer, but they wouldn't let him in. So, Brett Bogle got mad. He was going to get in that trailer. Brett Bogle was going to do anything to get in that trailer, ripping doors, ripping screens, ripping the handle off a door. And by God, if Margaret Torres is going to call the police, we're going to get inside. We're going to rip the phones out of the wall; we're going to take her arm and

> twist Margaret Torres' arm to the point she cries, and then smash that phone, too. I mean, this is the character of Brett Bogle.
>
> And then when Margaret Torres was calling the cops, he told her, 'If you press charges, you won't live to tell about it.'

(T. 1574-5).

Likewise, the prosecutor argued at the close of the guilt phase that Mr. Bogle's hatred of Ms. Torres, and his rage towards her for calling the police on September 1st and threats to pursue charges against him for the September 1st incident formed his motive for killing her:

> What happened to Margaret Torres was no random act of violence. This wasn't a killing by a stranger. This was a killing by someone who knew her, someone who despised her. She was killed by Brett Bogle because he hated her. And Brett Bogle didn't just want her to die, he wanted her to suffer and he wanted the last moments of her life to be excruciatingly painful.

(T. 550-2).

**3. The trial court's error.**

It was error for the trial court to submit the prior violent felony of burglary as an aggravator to the jury and to consider this aggravator at Mr. Bogle's sentencing irrespective of the fact that the two events happened on different dates and that the burglary involved an additional victim. The prior burglary was substantially related to Ms. Torres' killing, under the State's own theory. It was the prior burglary that made Mr. Bogle law enforcement's chief suspect. The State relied on the burglary to establish Mr. Bogle's motive to kill Torres.

Where the prior felony is substantially related to the

murder, the crimes are part of one lengthy criminal activity. For example, in Craig v. State, the defendant murdered his employer and another who was supposed to replace him as the cattle ranch manager in an effort to keep his cattle thefts from being reported to the police and to gain control of the ranch's assets. 510 So. 2d 857 (Fla. 1987)(Craig I), cert. denied, 484 U.S. 1020 (1988); see also Craig v. State, 685 So. 2d 1224, 1231 (1996). The present case is like Craig v. State.

According to the State, the prior burglary was substantially related to the murder, and accordingly could not be used as a basis for application of the statutory aggravator. Craig v. State, 685 So. 2d at 1231. Contemporaneous criminal conduct cannot be considered as prior criminal activity. Scull v. State, 533 So. 2d 1137 (Fla. 1988).

Here, as in Craig, the purpose of introducing the collateral crime evidence was to show the defendant's motive for committing the murder, and the context out of which it arose. According to the prosecutor, the collateral crimes showed that the motive for the murder was the defendant's anger and dislike towards Ms. Torres.

Because the collateral criminal conduct was substantially related to the murders, and an integral part of the factual context out of which the murders arose, it was error to consider it as prior criminal history. Instructing the jury on this aggravator, over defense objection, constituted reversible error and appellate counsel's failure to raise it on appeal constituted

ineffective assistance of counsel. Relief is proper.

**B. Avoiding Lawful Arrest Aggravator**

The trial court improperly instructed Mr. Bogle's jury to consider that the crime was committed for the purpose of avoiding or preventing a lawful arrest, over defense objection. Defense counsel objected to this instruction arguing that there was a lack of evidence (T. 740). Trial counsel renewed his objections to the instruction at Mr. Bogle's second penalty phase (T. 1547).

This Court has been careful to restrict the avoid arrest/effect escape aggravator to very specific scenarios: "We have consistently held that where the victim is not a law enforcement officer, the state must prove beyond a reasonable doubt that the **dominant motive** for the murder was the elimination of witnesses, and that the proof must be very strong. Melendez v. State, 368 So. 2d 1278 (Fla. 1979); Riley v. State, 366 So. 2d 19 (Fla. 1978), cert. denied, 459 U.S. 981 (1982).

According to the trial court's sentencing order, the court found this aggravator based on testimony that Mr. Bogle threatened Ms. Torres that "she would not live to tell about it" if she reported the September 1st incident giving rise to the burglary conviction (T. 263). However, the State was required to prove beyond a reasonable doubt that witness elimination was the **"dominant motive** for killing." Bruno v. State, 574 So. 2d 76, 81 (1991)(victim robbed, savagely beaten with a crow bar until incapacitated, then shot twice in the head at point blank range through a pillow by defendant who was known to him); Doyle v.

Doyle, 460 So. 2d 353, 358 (1984)(stating: "It is a tragic reality that the murder of a rape victim is all to frequently the culmination of the same hostile-aggressive impulses which triggered the initial attack and not a reasoned act motivated primarily by the desire to avoid detection).

In the State's case against Mr. Bogle, the State's arguments as to Mr. Bogle's motives for the killing shifted from it's theory that Mr. Bogle despised Ms. Torres for interfering in his relationship with Katie Alfonso (T. 542-4, 550-1). The prosecutor pointed out how savagely Ms. Torres was beaten and sexually assaulted as proof of Mr. Bogle's hatred towards her, not as proof that he wanted to eliminate her as a witness (T. 545-9, 558). In fact, the prosecutor focused on Mr. Bogle's hatred of Ms. Torres during closing arguments for the guilt and penalty phases (Id.; T. 1578; T. 1582).

The State failed to demonstrate that avoiding arrest was the "dominant motive" for the killing beyond a reasonable doubt. Further, the jury was never instructed that the state carried the burden of proving that the "primary motive" element of this aggravating circumstance existed beyond a reasonable doubt. Such instruction violates Espinosa v. Florida, 112 S. Ct. 2926 (1992); Stringer v. Black, 112 S. Ct. 1130 (1992); Sochor v. Florida, 112 S. Ct. 2114 (1992); Maynard v. Cartwright, 108 S. Ct. 1853 (1988), and the Eighth and Fourteenth Amendments to the United States Constitution.

Instructing the jury on this aggravator, over defense

objection, constituted reversible error and appellate counsel's failure to raise it on appeal constituted ineffective assistance of counsel. Relief is proper.

**C. Consideration of invalid aggravators deprived Mr. Bogle of a meaningful, individualized sentencing.**

This Court has repeatedly held that in order for aggravators to be applicable, they must be proven beyond a reasonable doubt. Scull v. State, 533 So. 2d 1137, 1142 (Fla. 1988)); Rogers v. State, 511 So. 2d 526, 534 (Fla. 1987). Since neither the prior violent felony or the avoid arrest aggravating circumstance applied as a matter of law, it was error for these aggravating circumstances to be submitted for the jury's consideration over objection. Omelus v. State, 584 So. 2d 563 (Fla. 1991); see Archer v. State, 613 So. 2d 446, 448 (Fla. 1993). The jury's consideration of invalid aggravators in its sentencing calculus deprived Mr. Bogle of a meaningful individualized sentencing.

In Florida, neither the judge nor the jury is permitted to weigh invalid aggravating factors. Espinosa, 112 S. Ct. at 2929. As the Supreme Court has explained, the jury is unlikely to disregard a flawed legal theory and therefore instructing the jury to consider an invalid aggravating circumstance is not harmless error. Sochor, 112 S. Ct. at 2122.

Instructing the jury on these aggravators was not harmless error where the State presented insufficient evidence to support the aggravators. Without having any idea as to how much weight the jury attributed to the aggravators, this Court cannot say

beyond a reasonable doubt that it played no part in its death recommendation.

Mr. Bogle was denied a reliable and individualized capital sentencing determination, in violation of the Sixth, Eighth, and Fourteenth Amendments. Appellate counsel's failure to present this issue of preserved error demonstrates that his representation of Mr. Bogle involved "serious and substantial" deficiencies. Fitzgerald v. Wainwright, 490 So. 2d 938, 940 (Fla. 1986). Neglecting to raise such fundamental issues "is far below the range of acceptable appellate performance and must undermine confidence in the fairness and correctness of the outcome." Wilson v. Wainwright, 474 So. 2d 1162, 1164 (Fla. 1985). Had counsel presented this issue on direct appeal, Mr. Bogle would have received a new penalty phase. Habeas relief is proper.

**CLAIM IV**

**THE ADMISSION OF GRUESOME PHOTOGRAPHS VIOLATED MR. BOGLE'S FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS UNDER THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 9, 16, AND 17 OF THE FLORIDA CONSTITUTION. APPELLATE COUNSEL WAS INEFFECTIVE FOR RAISING THIS ISSUE ON DIRECT APPEAL.**

At trial, the prosecutor was allowed to introduce gruesome photographs into evidence over defense objection (T. 233). Exhibit 21B depicted the "pattern of injury to the rear left shoulder" (T. 228); 21D shows a "laceration on the top of [the victims's] head and also goes to show the flattening" described by the medical examiner (T. 229); 21E was of "bruising and the injuries to the left side of her skull" (T. 230); and 21F showed

the "pattern injury on the underside of [the victim's] right chin" (T. 230). The medical examiner testified that the injuries depicted in the photographs were consistent with being hit by the several pieces of concrete found adjacent to Ms. Torres' body. (T. 215; T. 220; T. 239).

Defense counsel argued that the photographs were more prejudicial than probative given both the gruesome nature of the pictures and also that they were not relevant to any disputed issue (T. 227-33).

The prejudice of the photographs to Mr. Bogle greatly outweighed their probative value. Photographs should be excluded when the risk of prejudice outweighs relevancy. Alford v. State, 307 So. 2d 433, 441-2 (Fla. 1975), cert. denied, 428 U.S. 912 (1976). And, while relevancy is the key to admissibility of photographs, this Court has indicated that courts must also consider the shocking nature of the photos and whether jurors are thereby distracted from their factfinding. Czubak v. State, 570 So. 2d 925, 928 (1990). Under Adams v. State, 412 So. 2d 850 (Fla. 1982), limits must be placed on "admission of photographs which prove, or show, nothing more, than a gory scene."

The photographs were not necessary to prove any point as to the killing aside from evoking horror from the jury. The prejudice substantially outweighed any probative value. Mr. Bogle was denied a fair trial in violation of the Sixth, Eighth and Fourteenth Amendments to the United States Constitution. Duest v. State, 462 So. 2d 466 (Fla. 1985).

The State's use of the photographs distorted the actual evidence against Mr. Bogle at the guilt phase and unfairly skewed the weight of aggravating circumstances at the penalty phase. Appellate counsel failed to raise this issue despite objections by trial counsel. Habeas relief is proper.

CLAIM V

THE TRIAL COURT VIOLATED THE PRINCIPLES OF LOCKETT V. OHIO,438 U.S. 586 91978) AND HITCHCOCK V. DUGGER, 438 U.S. 393 (1987), WHEN IT PREVENTED MR. BOGLE FROM PRESENTING, AND THE JURY FROM CONSIDERING, EVIDENCE OF MITIGATING FACTORS, IN DEROGATION OF MR. BOGLE'S RIGHTS TO AN INDIVIDUALIZED AND RELIABLE CAPITAL SENTENCING DETERMINATION, AND TO EFFECTIVE ASSISTANCE OF COUNSEL, AND AS A RESULT, THE DEATH SENTENCE IS UNRELIABLE. APPELLATE COUNSEL'S FAILURE TO RAISE THIS CLAIM WAS DEFICIENT PERFORMANCE WHICH DENIED MR. BOGLE EFFECTIVE ASSISTANCE OF COUNSEL ON DIRECT APPEAL.

The trial court prohibited defense counsel from presenting testimony from Dr. Arturo Gonzalez, Mr. Bogle's mental health expert, detailing information that Gonzalez obtained from Mr. Bogle's family about Mr. Bogle's drug use. This was error.

Gonzalez testified that Mr. Bogle was raised in a "very very dysfunctional family" (T. 1397). Gonzalez told the jury about Mr. Bogle's father forcing his kids to use marijuana at a young age and that the children were physically and psychologically abused (T. 1399-400).

Gonzalez testified that Mr. Bogle used drugs at an early age and became addicted to pot and cocaine (T.1400-1). Gonzalez explained that acute substance abuse affects one's capacity to think and reason so there would be "diminished capacity" (T. 1401). On the night of the crime, Mr. Bogle drank approximately

twelve beers (T. 1403). Gonzalez opined that Mr. Bogle "was under ... some type of influence of emotional disturbance" (T. 1403). He also told the jury that Mr. Bogle's upbringing is an aspect to consider in determining his state of mind on the night of the crime (T. 1404). Gonzalez testified that because of the alcohol and his upbringing, Mr. Bogle's ability to conform his conduct to the requirements of the law was impaired to some extent (T. 1427). Defense counsel attempted to elicit more information from Gonzalez about Mr. Bogle's history of drug use prior to the homicide, however, the trial court prevented Gonalez from sharing this information with the jury:

> Q. Were you able to substantiate his drug use from his won family members prior to September the 12th of 1991?
>
> MS. COX: Your, Honor, I am going to object. That's irrelevant.
>
> THE COURT: Sustained.

The trial court's erroneous ruling prohibited Gonzalez from sharing the information that he had learned about Mr. Bogle's drug use from the Bogle family.

The Eighth and Fourteenth Amendments require that the sentencer not be precluded from considering any aspect of a defendant's character or record and any of the circumstances of the offense that is proffered as a basis for a sentence less than death. Lockett v. Ohio, 438 U.S. 586, 604 (1978); Hitchcock v. Dugger, 481 U.S. 393, 399 (1987). "The importance of the jury's ability to consider all properly submitted, relevant mitigation cannot be underestimated. *See e.g., Lockett*, 438 U.S. at 604, 98

S.Ct. 2954 (holding that the sentencing judge or jury may not be precluded from considering any evidence regarding a mitigating circumstance that is proffered by a defendant in order to receive a sentence less than death); see also *Hitchcock v. Dugger,* 481 U.S. 393, 399, citatation omitted (1987)." Merck v. State, 975 So. 2d 1054 (2007).

A mitigating circumstance for purposes of sentencing in capital cases is any aspect of a defendant's character or record and any of the circumstances of the offense that reasonably may serve as a basis for imposing a sentence less than death. Campbell v. State, 571 So. 2d 415, 419-20 (Fla. 1990). A trial court is obligated to find and weigh all valid mitigating evidence available in the record at the conclusion of the penalty phase. Cheshire v. State, 568 so. 2d 908, 911 (Fla. 1990). It is well-established that a history of and current substance use and abuse is a mitigating circumstance. See e.g., Parker v. State, 643 So. 2d 1032 (Fla. 1994).

The testimony that Mr. Bogle was prevented from presenting to the jury during his penalty phase concerned the second statutory mitigator and the non statutory mitigator of "defendant's alcohol and drug abuse." (T. 265).

In its sentencing order, the trial court specifically stated:

> Statutory Mitigators
>
> 2. The capacity of the defendant to appreciate the criminality of his conduct and to conform his conduct to the requirements of law was substantially impaired.

> Dr. Arturo Gonzalez testified that according to the defendant, he used alcohol and drugs regularly and that he had drunk four to six beers or six to twelve beers on the night of the murder. Dr. Gonzalez testified that in his opinion the beer resulted in an impairment of his ability to recognize the criminality of his conduct. Dr. Gonzalez further testified that even one beer could result in some impairment. There were other witnesses, (Tammy Alphonso, Phillip Alphonso and Jeff Trapp) however, who testified that Brett Bogle did not appear intoxicated on the night of the murder. Because Dr. Gonzalez's opinion was, as previously stated, this court gave some, but not a great deal of weight to this mitigating factor. Although perhaps impaired to some degree, the court does not believe the evidence established substantial impairment.
>
> Nonstatutory Mitigators
>
> 2. Defendant's alcohol and drug abuse
>
> The defendant stated to Dr. Gonzalez that he used drugs and alcohol and there was evidence that he used drugs, both marijuana and cocaine, with his father at an early age. However, there was little evidence of alcohol or drug dependency at the time of the murder. The court gives this factor little weight.

(R. 264).

The trial court could not have a rational basis for its weighing of the above two mitigators where the court prohibited Mr. Bogle from presenting evidence of his drug use leading up to the time of the crime through his mental health expert. Gonzalez relied on this information in rendering an opinion as to Mr. Bogle's impairment within the context of the second statutory mitigator and also as to how drugs and alcohol affected Mr. Bogle's development and functioning as a non-statutory mitigator. Even worse, the trial judge actually gave these mitigators little weight because they were not proven where it was the trial court who limited Mr. Bogle's ability to present valid evidence through

his mental health expert on these mitigators.

The trial court's findings as to these mitigators and subsequent weighing of the aggravators and mitigators are not entitled to deference due to the trial court's impermissibly limiting Mr. Bogle's presentation of evidence as to the mitigators. See Pardo v. State, 563 So. 2d 77, 80 (Fla. 1990). It cannot be said that the trial court had broad discretion in rejecting Mr. Pardo's expert testimony because the trial court cannot have a rational basis for rejecting the testimony where the court refused to permit Mr. Bogle's presentation of evidence. See Coday v. State, 946 So. 2d 988, 1005 (Fla. 2006)(stating that trial judges have broad discretion in considering unrebutted expert testimony; however, the rejection of the expert testimony must have a rational basis, such as conflict with other evidence, credibility or impeachment of the witness, or other reasons).

There can be no doubt that the jury was precluded from hearing and considering mitigating evidence at Mr. Bogle's penalty phase. Without having any idea as to how much weight the jury attributed to the aggravator, this Court cannot say beyond a reasonable doubt that it played no part in its death recommendation.

Mr. Bogle was denied a reliable and individualized capital sentencing determination, in violation of the Sixth, Eighth, and Fourteenth Amendments. Appellate counsel's failure to present this issue demonstrates that his representation of Mr. Bogle involved "serious and substantial" deficiencies. Fitzgerald v.

Wainwright, 490 So. 2d 938, 940 (Fla. 1986). Had counsel presented this issue on direct appeal, Mr. Bogle would have received a new penalty phase. Habeas relief is proper.

**CLAIM VI**

**FLORIDA'S CAPITAL SENTENCING SCHEME IS UNCONSTITUTIONAL UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION (RING V. ARIZONA) RENDERING MR. BOGLE'S DEATH SENTENCE ILLEGAL AND HE IS ENTITLED TO A LIFE SENTENCE. MR. BOGLE 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. BOGLE IS ENTITLED TO A JURY TRIAL AND JURY VERDICT ON THE ESSENTIAL ELEMENTS OF CAPITAL FIRST DEGREE MURDER.**

The role of the jury provided for in Florida's capital sentencing scheme, and in Mr. Bogle's capital trial, fails to provide the necessary Sixth Amendment protections as mandated by Apprendi v. New Jersey, 530 U.S. 466 (2000) and Ring v. Arizona, 536 U.S. 584 (2002). Ring extended the holding of Apprendi to capital sentencing schemes by overruling Walton v. Arizona, 497 U.S. 639 (1990). The Ring Court held Arizona's capital sentencing scheme unconstitutional "to the extent that it allows a sentencing judge sitting without a jury, to find an aggravating circumstance necessary for imposition of the death penalty." Ring, 497 U.S. at 2443.

Interestingly, Walton was premised upon a Florida case, Hildwin v. Florida, 490 U.S. 638 (1989), that held Florida's capital sentencing system constitutional. Indeed, this Court has previously relied upon Walton while erroneously rejecting the application of the holding in Apprendi to Florida's capital

sentencing procedure. In Mills v. Moore, 786 So. 2d 532, 537 (Fla. 2001), this Court held that "because Apprendi did not overrule Walton, the basic scheme in Florida is not overruled either." However, the subsequent overruling of Walton in Ring thus renders Florida's capital sentencing scheme, and Mr. Bogle's death sentence, constitutionally infirm.

Ring found Walton and Hildwin inextricably intertwined when the United States Supreme Court stated:

> The Court had previously denied a Sixth Amendment challenge to Florida's capital sentencing system, in which the jury recommends a sentence but makes no explicit findings on aggravating circumstances; we so ruled, Walton noted, on the ground that 'the Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury.' Id., at 648, 110 S.Ct.3047 (quoting Hildwin v. Florida, 490 U.S. 638, 640-641, 109 S.Ct. 2055, 104 L.Ed.2d 728 (1989)(per curiam)). Walton found unavailing the attempts by the defendant-petitioner in that case to distinguish Florida's capital sentencing system from Arizona's. In neither State, according to Walton, were the aggravating factors 'elements of the offense'; in both States, they ranked as 'sentencing considerations' guiding the choice between life and death. 497 U.S., at 648, 110 S.Ct. 3047 (internal quotation marks omitted).

Ring 497 U.S. at 2437. The subsequent overruling of Walton in Ring gutted the premise of Mills, and therefore Mills is no longer a viable precedent.

On October 24, 2002, in Bottoson v. Moore, 833 So. 2d 693 (Fla. 2002) and King v. Moore, 831 So. 2d 143 (Fla. 2002), this Court revisited the Mills holding and addressed the concerns raised by Ring and its impact upon Florida's capital sentencing structure. The Bottoson and Moore decisions resulted in each justice rendering a separate opinion. In both cases, a per

curiam opinion announced the result denying relief in those cases. In each of the cases, four separate justices wrote separate opinions specifically declining to join the per curiam opinion, but "concur[ring] in result only," Bottoson, 833 So. 2d at 695; King, 831 So. 2d at 145, based upon key facts present in those cases. However, many of those key facts utilized by the Court to deny relief in Bottoson and King are not present in Mr. Bogle's case. A careful reading of those four separate opinions and the facts in Mr. Bogle's case reveal that he is entitled to relief.

In October 1992, Mr. Bogle was convicted of first degree murder, burglary with assault or battery and retaliation against a witness.[1] After a penalty phase, the jury recommended a sentence of death by a vote of seven (7) to five (5). Thus, it is absolutely clear that the jury was not unanimous in finding that the aggravating circumstances were sufficient to outweigh the mitigating circumstances.

The trial judge, however, granted a new penalty phase proceeding due to the fact that improper rebuttal evidence had been offered by the State. Bogle v. State, 655 So. 2d 1103, 1105 (Fla. 1995). In February 1993, a new jury was empaneled for Mr. Bogle's penalty phase. The jury recommended that Mr. Bogle be

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[1]Mr. Bogle challenges his current sentence of death and additionally points out that Ring also affects his sentencing proceedings in 1992. Therefore, throughout his argument, Mr. Bogle refers to his 1992 sentencing proceeding and the result therefrom as well as the challenge to his current sentence.

sentenced to death by a vote of ten (10) to two (2). The trial court found four aggravating circumstances: 1) previous conviction of a violent felony, 2) the murder was committed while engaged in the commission of a sexual battery, 3) the murder was committed for the purpose of avoiding arrest, and 4) the murder was heinous, atrocious, or cruel. As to mitigating circumstances, this Court gave some weight to impaired capacity, good conduct during trial and kindness to others, substantial weight to family background, little weight to alcohol and drug abuse, and no weight to his involvement in an automobile accident. Bogle v. State, 655 So. 2d 1103, 1105-1106 (Fla. 1995). The trial court followed the jury's recommendation and sentenced Mr. Bogle to death.

During Mr. Bogle's trial and both penalty phases, the jury heard numerous times that their decision was "advisory", a "recommendation", and/or the trial judge was the "ultimate sentencer".[2] These repeated references made it clear to the jury they were not sentencing Mr. Bogle, but rather that the judge was sentencing him.

The issue of juror instructions in the penalty phase was of particular concern to Justices Lewis and Pariente in Bottoson. Justice Lewis expressed his concern by stating, "the validity of jury instructions given in [Bottoson's] case should be addressed in light of [Bottoson's] facial attack upon Florida's death

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[2](T. 35, 36, 37, 39, 127, 833, 995, 996, 1071, 1074, 1081, 1144).

penalty scheme on the basis of the holding in Ring v. Arizona." Bottoson, 833 So. 2d at 733.[3] According to Justice Lewis:

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

Id. at 28. Pursuant to this view, Justice Lewis proceeded in his opinion to carefully review the *voir dire* proceedings and the jury instructions, thereby suggesting that a case-by-case analysis is warranted in determining whether any death-sentenced individuals are entitled to post-conviction relief in light of Ring v. Arizona. In his opinion, Justice Lewis concluded, "there was a tendency to minimize the role of the jury, not only in the standard jury instructions, but also in the trial court's added explanation of Florida's death penalty scheme." Id. at 30. However, he found the standard jury instructions and judicial commentary were not so flawed in Mr. Bottoson's case as to warrant reversal. Nevertheless, Justice Lewis explained, "although the standard jury instructions may not be flawed to the extent that they are invalid or require a reversal in this case, such instructions should now receive a detailed review and analysis to reflect the factors which inherently flow from Ring."

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[3]Justice Lewis acknowledged that Ring v. Arizona has application to Florida's death penalty statute when he wrote, after Ring, a jury's "life recommendation must be respected." Bottoson, 833 So. 2d at 729. He concluded that as to jury overrides in favor of death, Florida law and Ring are in "irreconcilable conflict." Id.

Id. Clearly, Justice Lewis' position carries with it the unstated inference that a reversal will be required in some cases where the proper analysis is conducted and it is determined that the minimization of the jury's role exceeded that occurring in Bottoson.

The minimization of the jury's role in Mr. Bogle's case clearly exceeded that occurring in Bottoson. Mr. Bogle's jury heard their role minimized at least a dozen times. Mr. Bogle's jury was told their sentence was only a recommendation. They were told their sentence was only advisory and that the judge was the ultimate sentencer. On over a dozen separate occasions Mr. Bogle's jury was made aware that their decision was not binding upon the trial judge. In voir dire, the judge specifically instructed the jury that while the guilt determination was theirs alone to make, the "ultimate decision is really with me, the judge" regarding the sentence (T. 37). This diminution of the jury's role occurred primarily during jury instructions, voir dire and closing statements.

At the end of the penalty phase proceedings,[4] the Court instructed the jury:

> [I]t is now your duty to advise the Court as to what punishment should be imposed upon the defendant, Brett Bogle, for the crime of the first degree murder of Margaret Torres. As you have been told, the final decision as to;what punishment shall be imposed is the responsibility of the judge, my responsibility.

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[4]Similar inaccurate comments which diluted the jury's role in sentencing were made by the Court and the prosecutor at Mr. Bogle's first penalty phase.

(T. 1613-4). The diminution of the juror's role in Mr. Bogle's case far exceeded what Justice Lewis noted was present in Bottoson. Under the analysis of jury instructions that Justice Lewis requires, Mr. Bogle is entitled to relief.

Similarly, an analysis of Justice Pariente's opinion reveals she is in accord with Justice Lewis' analysis regarding the problematic jury instructions. Justice Pariente clearly noted her agreement when she stated: "I agree with Justice Lewis that there are deficiencies in our current death penalty sentencing instructions." Bottoson, 833 So. 2d at 723.

In light of the plain language of Florida's death penalty statute, the Rules of Criminal Procedure, and longstanding Florida Supreme Court 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. Bogle's death sentence valid. Mr. Bogle's jury was repeatedly told that their recommendation was not final. The United States Supreme Court has 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. Bogle's death sentence rests on findings made by the jury after they were told, and Florida law clearly provided, that death sentence would not rest upon their

recommendation, it would establish that Mr. Bogle's death sentence was imposed in violation of Caldwell. Caldwell embodies the principle stated in Justice Breyer's concurring opinion in Ring: "the Eighth Amendment requires that a jury, not a judge, make the decision to sentence a person to death". Ring, at 614 (Breyer, J., concurring).

Also, 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, Ring, 122 S.Ct. at 2443 (quoting Apprendi, 530 U.S. at 494, n.19), 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." This Court has made it clear that "the jury's sentencing recommendation in a capital case is only advisory.[5] 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) (emphasis original in Combs). "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

[5]And this is exactly what Mr. Bogle's jury was told.

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

Because Florida law does not require any number of jurors, much less twelve, 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 say that "the jury" rendered a verdict as to an aggravating circumstance or the sufficiency of them. As Justice Shaw observed in Combs, Florida law leaves these matters to speculation. 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 fact-findings required for 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 (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." Id. at 2409. 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. Ring, 122 S.Ct. at 2430. 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. Bogle to be sentenced to death was that "sufficient aggravating circumstances exist" to call for a death sentence. Fla. Stat. Sec. 921.141 (3).[6] The jury was not instructed that it had to find this element proved beyond a reasonable doubt. In fact, it was not instructed on any standard by which to make this essential determination. Such an error can never be harmless. Sullivan v. Louisiana, 508 U.S. 275, 278 (1993) ("[T]he jury verdict required by the Sixth Amendment is a jury verdict of

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

guilty beyond a reasonable doubt"). Where the jury has not been instructed on the reasonable doubt standard:

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

Sullivan, 508 U.S. at 280. Viewed differently, in a case such as this where the error is not requiring a jury verdict on the essential elements of capital murder, but delegating 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. 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 of the U.S. Constitution. In the same way that the Constitution guarantees a baseline level of certainty before a jury can convict a defendant, it also constrains the number of jurors who can render a guilty verdict. See Apodaca v. Oregon, 406 U.S. 404 (1972) (the Sixth and Fourteenth Amendment require that a criminal verdict must be supported by at least a "substantial majority" of the jurors). The standards for imposition of a death sentence may be even more exacting than the Apodaca standard (which was not a

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

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)(a state statute authorizing a 7-5 verdict would violate the 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 at 2441. 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." Fla. Stat. Sec. 921.141(3). Although Mr. Bogle's jury was told that individual jurors could consider only those aggravating circumstances that had been proved beyond a reasonable doubt, it was not required to find beyond a reasonable doubt "whether sufficient aggravating circumstances exist to justify the imposition of the death penalty." Id.

In his opinion in Bottoson, Chief Justice Anstead noted that he concurred in that portion of Justice Pariente's opinion discussing "a finding of the existence of aggravating circumstances before a death penalty may be imposed." Bottoson v.

Moore, 833 So. 2d 693, 701.

In otherwise explaining his view of Ring and its application to the Florida death penalty statute, Chief Justice Anstead stated:

> Thus, Ring requires that the aggravating circumstances necessary to enhance a particular defendant's sentence to death must be found by a jury beyond a reasonable doubt in the same manner that a jury must find that the government has proven all the elements of the crime of murder in the guilt phase. It appears that the provision for judicial findings of fact and the purely advisory role of the jury in capital sentencing in Florida falls short of the mandates announced in Ring and Apprendi for jury fact-finding.

Bottoson v. Moore, 833 So. 2d at 703.

At Mr. Bogle's resentencing, the trial court allowed the introduction of hearsay testimony to prove aggravating circumstances upon which the State argued that Mr. Bogle should receive a death sentence. The introduction of hearsay evidence violated the Confrontation Clause of the Florida and United States Constitutions. The hearsay evidence was used to support the aggravating circumstances.

At the commencement of the penalty phase, the jury was instructed:

> Ladies and Gentleman of the Jury, the defendant, Brett Bogle, has previously been found guilty of first degree murder. Consequently you will not concern yourselves with the question of his guilt. It is your duty to advise the Court as to what punishment should be imposed upon the defendant, Brett Bogle, for the crime of the first degree murder of Margaret Torres.
>
> * * *
>
> It is your duty to follow the law that will now be given to you by me and to render to the Court, or to me, 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.

(T. 1613, 1614). Not only was the advisory nature of the recommendation imparted to the jury, but it was specifically told that the first step was to determine if sufficient aggravating circumstances were present to justify a death sentence. Likewise, the jury was instructed before deliberations that it was their job to determine if the sufficient aggravating circumstances existed to justify the imposition of the death penalty.

Justice Shaw, in his concurring in result, only, opinion stated: "The rule of law that I glean from Ring is that an aggravating circumstance that "death qualifies" a defendant is the functional equivalent of an element of the offense. **If this is a correct reading of Ring, then that aggravator must be treated like any other element of the charged offense . . .**". Bottoson v. Moore 833 So. 2d at 711 (emphasis added). Similarly, Chief Justice Anstead opined: "Ring requires that aggravating circumstances necessary to enhance a particular defendant's sentence to death must be found by a jury beyond a reasonable doubt **in the same manner** that a jury must find that the government has proven all of the elements of the crime of murder in the guilt phase." Bottoson v. Moore 833 So. 2d at 708 (emphasis added).

Therefore, the procedures employed, both the limitation

placed on defense counsel in producing evidence and the State's introduction of inadmissible testimony and evidence, at Mr. Bogle's penalty phase were inadequate and violated his constitutional rights.

Specifically, the introduction of inadmissible hearsay testimony was only permitted because the proceeding was characterized as not a retrial of Mr. Bogle's guilt or innocence. But, the issue did concern Mr. Bogle's guilt of the crime of capital first degree murder.

Furthermore, 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-eligible first degree murder because it is the element that distinguishes it from the crime of first degree murder, for which life is the only possible punishment. Fla. Stat. §§ 775.082, 921.141. Mr. Bogle's capital penalty phase jury was improperly instructed on the burden of proof. The proceeding failed to comply with basic constitutional requirements.

In addition, Mr. Bogle was indicted on one count of premeditated murder. The indictment failed to charge the necessary elements of capital first degree murder. Jones v. United States, 526 U.S. 227, 243 n.6 (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." 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.[8] Ring v. Arizona, 536 U.S. 584 (2002), held that a death penalty statute's "aggravating factors operate as 'the functional equivalent of an element of a greater offense.'" Ring, 536 U.S. at 609 (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." 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. Allen v. United States, 122 S.Ct. 2653 (2002). The question presented in Allen was:

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

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

Like the Fifth Amendment to the United States Constitution, Article I, Section 15 of the Florida Constitution provides that "no person shall be tried for a capital crime without presentment or indictment by a grand jury." Like 18 U.S.C sections 3591 and 3592(c), Florida's death penalty statute, Florida Stats. §§ 775.082 and 921.141, make 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. 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), this 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". Gray, 435 So. 2d at 818. Finally, in Chicone v. State,

684 So. 2d 736, 744 (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." 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. Bogle 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 - and, in fact, is an archetypical reason for - the constitutional requirement of neutral review of prosecutorial intentions. 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. State v. Gray, supra, 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. Bogle "in the preparation of a defense" to a sentence of death. Fla. R. Crim. P. 3.140(o).

Under the analyses employed by Chief Justice Anstead, Justice Shaw, Justice Pariente, and Justice Lewis, Mr. Bogle's

sentence of death stands in violation of the Sixth and Eighth Amendments. Habeas relief is proper.

**CLAIM VII**

**PROSECUTORIAL MISCONDUCT DENIED MR. BOGLE A FAIR TRIAL AND CREATED FUNDAMENTAL ERROR IN VIOLATION OF MR. BOGLE'S FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS. APPELLATE COUNSEL'S FAILURE TO RAISE THESE ISSUES CONSTITUTED INEFFECTIVE ASSISTANCE OF COUNSEL.**

The prosecutor at Mr. Bogle's trial repeatedly made inflammatory, improper and prejudicial comments to bolster the testimony of its witnesses during closing arguments. During the guilt phase, the State vouched for the credibility of its own witnesses:

> MS. COX: Well, you heard that the palm print, the Hillsborough County Sheriff's Office did everything they could in this case. They did a very thorough investigation and followed every lead.

(T. 599). Cox went on to state:

> MS. COX: It was abundantly clear at this point in the investigation who killed Margaret Torres. There was a well-connected chain of events that leads to one conclusion and one conclusion alone, but the Hillsborough County Sheriff's Office continued their investigation and enlisted the help of the greatest crime laboratory in the world, the FBI Crime Laboratory and you've heard from many experienced professional forensic experts and all the investigation that they did didn't contradict what was abundantly clear.

(T. 599). Cox went on to state:

> MS. COX: Mr. Roberts may get up to you and argue well, it doesn't make sense, why would Brett Bogle, if he did this, approach her relatives and ask for a ride. Well, by asking that question he's acting on a faulty assumption. You can't judge this man or expect this man to behave within the confines of the ordinary person. You can't expect a person who is capable of doing what he did to Margaret Torres to act as you would expect an ordinary human being to act. Maybe he was governed by his judgment, was governed, was overcome by a sense of euphoria and glee as he looked down

> and saw the destruction that he had cause of women he despised. More likely, it was just a feeling of invincibility, invincibility, arrogance and total indifference for the evil and vileness of his actions.

(T. 558). Cox concluded the argument by misrepresenting the evidence heard at trial:

> But we have no idea how long that was there. We have no idea. You know, she could have picked it up from a bar stool; she could have picked it up by any manner of transfer. It's not like a public hair in the crotch of the pants he was wearing. That's not something that you just pick up in a casual encounter. That's not something that he picked up in that several minute long conversation with her in the bar.

(T. 559-60).

Cox improperly told the jury that they could trust law enforcement and the FBI Because they were "thorough", "the greatest", "experienced" and "professional". And, then she told them that nothing contradicted the fact that Mr. Bogle committed the crime which was simply not true.

As in Ruiz v. State, 743 So. 2d 1, 9 (Fla. 1999), Cox "attempted to tilt the playing field and obtain a conviction" by "invoking the immense power, prestige, and resources of the State".

Cox disparaged Bogle, characterizing him as abnormal or not an ordinary human being. She also argued that he was euphoric, gleeful, arrogant and felt invincible at having killed Torres. As in Ruiz, Cox "attempted to tilt the playing field and obtain a conviction" by "demeaning and ridiculing the defendant".

Finally, there is no doubt that Cox misrepresented the evidence about the location of the hair that was allegedly found

on Mr. Bogle's pants and "matched" Ms. Torres' pubic hair. Lingo's testimony, was not that he found the hairs in the zipper of Bogle's pants, rather, he simply described the pants as they lay on the table:

> I took a piece of brown wrapping paper out on the counter and opened the pants up on top of this and as they were laying on the paper looking down at the zipper part opened, I found several what appeared to be pubic hairs inside of the pants and also inside of the legs of the pants.

(T. 366). Furthermore, those were not necessarily the hairs that Malone compared. Lingo did not collect or mount the hairs, so there is no evidence that the hair that Malone "matched" to Ms. Torres came from the crotch area of Mr. Bogle's pants.

In Berlotti v. State, 476 So. 2d 130 (Fla. 1985), this Court expressed its disgust with "the continuing violations of prosecutorial duty, propriety and restraint." This Court stated:

> The proper exercise of closing argument is to review the evidence and to explicate those inferences which may reasonably be drawn from the evidence. Conversely, it must not be used to inflame the minds and passions of the jurors so that their verdict reflects an emotional response to the crime or the defendant rather than the logical analysis fo the evidence in light of the applicable law.

476. So. 2d at 134. Here, Cox violated her ethical and professional obligations; trial counsel failed to object; and appellate counsel failed to raise this issue on direct appeal resulting in fundamental error. Habeas relief is proper.

## CONCLUSION AND RELIEF SOUGHT

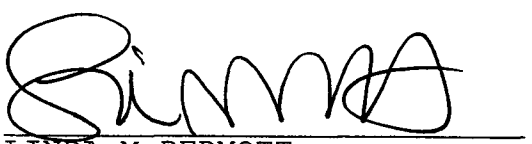
For all the reasons discussed herein, Mr. Bogle respectfully urges this Court to grant habeas corpus relief.

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing PETITION FOR WRIT OF HABEAS CORPUS has been furnished by electronic mail to Candance Sabella, Assistant Attorney General, on this 13th day of November, 2012.

## CERTIFICATE OF FONT

This is to certify that the Petition has been reproduced in 12 point Courier type, a font that is not proportionately spaced.



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