IN THE SUPREME COURT OF FLORIDA

CASE NO. SC02-2538

RICHARD HENYARD,

Petitioner,

v.

MICHAEL W. MOORE,
Secretary, Florida Department of Corrections,

Respondent.

PETITION FOR WRIT OF HABEAS CORPUS

ROBERT T. STRAIN
ASSISTANT CCRC
FLORIDA BAR NO. 325961

CAPITAL COLLATERAL REGIONAL
COUNSEL - MIDDLE
3801 CORPOREX PARK DRIVE
SUITE 210
TAMPA, FL 33619-1136
(813) 740-3544

COUNSEL FOR PETITIONER

PRELIMINARY STATEMENT

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 being filed in order to address substantial claims of error under the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. These claims demonstrate that Mr. Henyard was deprived of the right to a fair, reliable trial and individualized sentencing proceeding and that the proceedings resulting in his conviction and death sentence violated fundamental constitutional imperatives.

Citations shall be as follows: The record on appeal concerning the original court proceedings shall be referred to as "R.___" followed by the appropriate page numbers. The postconviction record on appeal will be referred to as “PC-R. ___” followed by the appropriate page numbers. All other references will be self-explanatory or otherwise explained herein.

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INTRODUCTION

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

The issues, which appellate counsel neglected, demonstrate that counsel's performance was deficient and that the deficiencies prejudiced Mr. Henyard. "[E]xtant legal principles . . . provided a clear basis for . . . compelling appellate argument[s]." *Fitzpatrick v. Wainwright*, 490 So.2d 938, 940 (Fla. 1986). Neglecting to raise fundamental issues such 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). Individually and "cumulatively," *Barclay v. Wainwright*, 444 So.2d 956, 959 (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).

Additionally, this petition presents questions that were ruled on at trial or on direct appeal but should now be revisited in light of subsequent case law or in order to correct error in the appeal process that denied fundamental

constitutional rights. As this petition will demonstrate, Mr. Henyard is entitled to habeas relief.

JURISDICTION TO ENTERTAIN PETITION AND GRANT HABEAS CORPUS RELIEF

This is an original action under Fla.R.App.P. 9.100(a). *See* Art. 1, Sec. 13, Fla. Const. This Court has original jurisdiction pursuant to Fla.R.App.P. 9.030(a)(3) and Art. V, Sec. 3(b)(9), Fla. Const. The Petition presents constitutional issues which directly concern the judgment of this Court during the appellate process and the legality of Mr. Henyard's sentence of death.

Jurisdiction in this action lies in this 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. Henyard's direct appeal. *See Wilson*, 474 So.2d at 1163 (Fla. 1985); *Baggett v. Wainwright*, 392 So.2d 1327 (Fla. 1981). A petition for a writ of habeas corpus is the proper means for Mr. Henyard to raise the claims presented herein. *See*, *e.g.*, *Way v. Dugger*, 568 So.2d 1263 (Fla. 1990); *Downs v. Dugger*, 514 So.2d 1069 (Fla. 1987); *Riley v. Wainwright*, 517 So.2d 656 (Fla. 1987); *Wilson*, 474 So.2d at 1162.

This Court has the inherent power to do justice. The ends

of justice call on the Court to grant the relief sought in this case, as the Court has done in similar cases in the past. The petition pleads claims involving fundamental constitutional error. *See Dallas v. Wainwright*, 175 So.2d 785 (Fla. 1965); *Palmes v. Wainwright*, 460 So.2d 362 (Fla. 1984). 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. As the petition shows, habeas corpus relief would be more than proper on the basis of Mr. Henyard's claims.

GROUNDS FOR HABEAS CORPUS RELIEF

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

PROCEDURAL HISTORY

Trial

On February 16, 1993, Mr. Henyard was charged by indictment with two counts of first degree murder, three counts of armed kidnaping, one count of sexual battery with the use of a

firearm, one count of attempted first degree murder, and one count of robbery with a firearm. On June 1, 1994, the jury found Mr. Henyard guilty as charged. On June 3, 1994, the jury recommended that the court impose the death penalty on each count of first degree murder. On August 19, 1994, the court followed the jury's recommendations and imposed two death sentences on Mr. Henyard.

Direct Appeal

On December 19, 1996, this Court affirmed Mr. Henyard's convictions and the imposition of the sentences of death. *Henyard v. State*, 689 So. 2d 239 (Fla. 1996). On October 6, 1997, the United States Supreme Court denied Mr. Henyard's petition for certiorari review. *Henyard v. Florida*, 522 U.S. 846, 118 S.Ct 130, 139 L.Ed.2d 80 (1997).

State Postconviction Proceedings

On August 5, 1998, Mr. Henyard filed his first 3.850 motion. On May 11, 1999, Mr. Henyard filed his amended 3.850 motion which presented nine claims for relief. On June 22, 1999, a *Huff* hearing was held pursuant to *Huff v. State*, 622 So. 2d 982 (Fla. 1993). On June 28, 1999, the court denied an evidentiary hearing on Claims II-IX and Claim I, Paragraphs 1, 2, 9, 12, 16,

18, 19, 20, 25, and 26. The court made a preliminary ruling denying an evidentiary hearing on Claim I, Paragraphs 22-24, without prejudice. The court granted an evidentiary hearing on the ineffective assistance of counsel matters raised in Claim I, Paragraphs 3, 4, 5, 6, 7, 8, 10, 11, 13, 14, 15, 17 and 21: specifically, (1) failure of trial counsel to adequately investigate mitigating evidence; and (2) failure of trial counsel to adequately prepare and present mental health mitigating evidence. On October 14, 1999, the court held an evidentiary hearing and denied relief on all claims on April 11, 2002. This petition is being filed simultaneously with the appeal of the denial of the Rule 3.850 motion.

ARGUMENT I

UNDER *APPRENDI AND RING* THE FLORIDA DEATH SENTENCING STATUTES AS APPLIED ARE UNCONSTITUTI0NAL UNDER THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

In *Jones v. United States*, the United States Supreme Court held "under the Due Process Clause of the Fifth Amendment and the notice and jury guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." *Jones v. United*

States, 526 U.S. 227, 243, n.6 (1999). Subsequently, in *Apprendi v. New Jersey*, the Court held that the Fourteenth Amendment affords citizens the same protections under state law. *Apprendi*, 120 S.Ct. 2348, 2355 (2000).

In *Apprendi*, the issue was whether a New Jersey hate crime sentencing enhancement, which increased the punishment beyond the statutory maximum, operated as an element of an offense so as to require a jury determination beyond a reasonable doubt. *Apprendi*, 120 S.Ct. at 2365. "[T]he relevant inquiry here is not one of form, but of effect-does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?" *Apprendi*, 120 S.Ct. at 2365. Applying this test, it is clear that aggravators under the Florida death penalty sentencing scheme are elements of the offense which must be charged in an indictment, submitted to a jury during guilt phase, and proven beyond a reasonable doubt by a unanimous verdict.

At the time of Mr. Henyard's sentencing, Fla. Stat. § 775.082 provided:

> A person who has been convicted of a capital felony **shall be punished by life imprisonment** and shall be required to serve no less than 25 years before becoming eligible for parole **unless the proceeding held to determine sentence according to the procedure set forth in s. 921.141 results in**

> **findings by the court that such person shall be punished by death, and in the latter event such person shall be punished by death.**

Fla. Stat. § 775.082 (1987) (emphasis added).

Under this statute, the state must prove at least one aggravating factor in the separate penalty phase proceeding before a person convicted of first degree murder is eligible for the death penalty. *State v. Dixon*, 283 So.2d 1, 9 (Fla. 1973); Fla. Stat. § 775.082 (1994), § 921.141(2)(a), and § 921.141(3)(a)(1994). Thus, Florida capital defendants are not eligible for the death sentence simply upon conviction of first degree murder. If a court sentenced a defendant immediately after conviction, the court could only impose a life sentence. Fla. Stat. § 775.082 (1994). Therefore, under Florida law, the death sentence is not within the statutory maximum sentence, as analyzed in *Apprendi*, because it increased the penalty for first degree murder beyond the life sentence a defendant is eligible for based solely upon the jury's guilty verdict.

Under the Florida death penalty scheme there are essentially two levels of first degree murder. The first, conviction for first degree premeditated murder or felony murder permits a life sentence. The second, if aggravating circumstances are proved beyond a reasonable doubt, the person so convicted can be

sentenced to death. Thus, the Florida death penalty system divides murders into two categories, analogous to felony battery and aggravated battery. Felony battery, which is punished as a third degree felony, becomes aggravated battery, punished as a second degree felony, upon proof of certain aggravating circumstances. Fla. Stat. §§ 784.041, 784.045 (1999). These circumstances which increase felony battery from a third degree felony to a second degree felony of aggravated battery are elements of the crime which must be charged in the indictment, submitted to the jury, and must be proved beyond a reasonable doubt by a unanimous verdict.

Likewise, the Florida death penalty aggravating circumstances, which elevate a murder punishable by a life sentence to a murder punishable by death, must be charged in the indictment, submitted to the jury, and must be proved beyond a reasonable doubt. No other crimes in Florida allow increased punishments based on additional findings (other than prior conviction) made by a judge; *Apprendi* disallows this practice.

In *Apprendi*, the hate crime sentencing enhancement was applied after the defendant was found guilty and increased the statutory maximum penalty by up to ten years. *Apprendi*, 120 S.Ct. at 2351. The *Apprendi* court clearly dispensed with the fiction that such an enhancement was not an element which

received Sixth Amendment protections. The Court wrote "[b]ut it can hardly be said that the potential doubling of one's sentence from 10 years to 20 has no more that a nominal effect. Both in terms of absolute years behind bars, and because of the severe stigma attached, the differential here is unquestionably of constitutional significance." *Apprendi*, 120 S.Ct. at 2365. As in *Apprendi*, in Mr. Henyard's case, the aggravators were applied only after he was found guilty. The aggravators increased the statutory maximum penalty based on the guilty verdict from life imprisonment to death. Certainly, the difference between life and death has more than nominal effect and is of constitutional significance. "[T]he penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two." *Woodson v. North Carolina*, 428 U.S. 280, 305 (1975). *See Gardner v. Florida*, 430 U.S. 349, 357 (1976).

Though *Apprendi* involved two separate statutes and the Florida death penalty involves only one, the issue is substance over form. *Apprendi* 120 S.Ct. at 2350, 2365; Fla. Stat. § 921.141 (1999). The effect of the Florida death penalty statute is similar to the effect of the federal car jacking statute the United States Supreme Court addressed in *Jones v. United States*,

526 U.S. 227, 243, n.6 (1999). Three subsections of the *Jones* statute appeared, superficially, to be sentencing factors. However, the superficial impression lost clarity when the Court examined the effects of the sentencing factors.

> But the superficial impression loses clarity when one looks at the penalty subsections (2) and (3). These not only provide for steeply higher penalties, but they condition them on further acts (injury, death) that seem quite as important as the elements in the principle paragraph (e.g. force and violence, intimidation). It is at best questionable whether the specification of facts sufficient to increase a penalty range from 15 years to life, was meant to carry none of the process safeguards that elements of the offense bring with them for a defendant's benefit.

Jones, 526 U.S. at 233. Because the car jacking sentencing factors increased the maximum penalty for the crime from 15 years to 25 years or life imprisonment, the Court interpreted them as elements of the crime which receive Sixth Amendment protection. *Jones*, 526 U.S. at 230, 242-43.

Although the majority of the Court stated in dicta that *Apprendi* did not overrule *Walton v. Arizona*, 497 U.S. 639 (1990), the *Apprendi* court was not addressing a death case in which constitutional protections are more rigorously applied, and *Apprendi* did not specifically address the Florida sentencing scheme. *Apprendi*, 120 S.Ct. at 2366. Moreover, the majority

dicta did not carry the force of an opinion of the full court. See *Apprendi*, 120 S.Ct. at 2380 (Thomas J., concurring) ("Whether this distinction between capital crimes and all others, or some other distinction, is sufficient to put the former outside the rule that I have stated is a question for another day."); *Apprendi*, 120 S.Ct. at 2387-88 (O'Connor, J., dissenting) ("If the Court does not intend to overrule *Walton*, one would be hard pressed to tell from the opinion it issues today.") *Apprendi*, 120 S.Ct. 2388.

Because the effect of finding an aggravator exposes the defendant to a greater punishment than that authorized by the jury's guilty verdict, the aggravator must be charged in the indictment, submitted to a jury, and proven beyond a reasonable doubt. *Apprendi*, at 2365. This did not occur in Mr. Henyard's case. Thus, the Florida death penalty scheme is unconstitutional as applied.

Mr. Henyard recognizes that this Court has consistently rejected similar claims within the past year. *See King v. State*, 27 Fla.L.Weekly S65 (Fla. Jan. 16, 2002), *stay granted*, No. 01-7804 (U.S. Jan. 23, 2002); *Mills v. Moore*, 786 So.2d 532, 536-537 (Fla. 2001), *cert. denied* 121 S.Ct. 1752 (2001); *Brown v. Moore*, 26 Fla.L.Weekly S742 (Fla. Nov. 1, 2001); and *Mann v.*

State, 794 So.2d 596, 599 (Fla. 2001). On January 31, 2002, this Court denied the petitioner *Apprendi* relief in *Bottoson v. Moore*, ___ So.2d ___ (Fla. Jan. 31, 2002), in accordance with the ruling in *King*.

However, on June 24, 2002, the United States Supreme Court decided *Ring v. Arizona,* 122 S.Ct. 2428, ----, 2002 WL 1357257.

In *Ring*, the United States Supreme Court held that the Arizona statute violates the Sixth Amendment right to a jury trial in capital prosecutions because the trial judge, sitting alone and following a jury adjudication of a defendant's guilt of first-degree murder, determines the presence or absence of the aggravating factors required by Arizona law for imposition of the death penalty; receding from *Walton v. Arizona,* 497 U.S. 639, 110 S.Ct. 3047, 111 L.Ed.2d 511. 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. A defendant may not be exposed to a penalty *exceeding* the maximum he would receive if punished according to the facts reflected in the jury verdict alone. The court noted that the "right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished" if it encompassed the fact-finding necessary to increase a noncapital defendant's sentence by a

term of years, as was the case in *Apprendi*, but not the fact-finding necessary to put him to death. *Ring v. Arizona*, 2002 WL 1357257 *10.

Florida's death penalty statutory scheme facially violates the federal Constitution. In Florida, death is not within the maximum penalty for a conviction of first degree murder:

> A person who has been convicted of a capital felony shall be punished by life imprisonment and shall be required to serve no less than 25 years before becoming eligible for parole unless the proceeding held to determine sentence according to the procedure set forth in s. 921.141 results in findings by the court that such person shall be punished by death, and in the latter event such person shall be punished by death.

Fla. Stat. § 775.082 (1984). The statutory scheme does not permit a sentence greater than life predicated on the jury verdict alone. A penalty phase must then be conducted under § 921.141. While the jury gives a recommendation, it is the judge who makes the findings and imposes the sentence.

In *Walton v. Arizona*, 497 U.S. 639, 110 S.Ct. 3047, 111 L.Ed.2d 511 (1990), the United States Supreme Court recognized that for purposes of the Sixth Amendment, Florida's death penalty statute is indistinguishable from the statute invalidated in *Ring*:

> We repeatedly have rejected constitutional

> challenges to Florida's death sentencing scheme, which provides for sentencing by the judge, not the jury. *Hildwin v. Florida,* 490 U.S. 638, 109 S.Ct. 2055, 104 L.Ed.2d 728 (1989) (*per curiam*); *Spaziano v. Florida,* 468 U.S. 447, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984); *Proffitt v. Florida,* 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976). In *Hildwin,* for example, we stated that "[t]his case presents us once again with the question whether the Sixth Amendment requires a jury to specify the aggravating factors that permit the imposition of capital punishment in Florida," 490 U.S., at 638, 109 S.Ct., at 2056, and we ultimately concluded 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 640-641, 109 S.Ct., at 2057.
>
> The distinctions Walton attempts to draw between the Florida and Arizona statutory schemes are not persuasive. It is true that in Florida the jury recommends a sentence, but it does not make specific factual findings with regard to the existence of mitigating or aggravating circumstances and its recommendation is not binding on the trial judge. A Florida trial court no more has the assistance of a jury's findings of fact with respect to sentencing issues than does a trial judge in Arizona.

Id. 647-48. The Court reiterated this Sixth Amendment link between the Florida and Arizona capital sentencing schemes in *Ring*:

> In *Walton v. Arizona*, 497 U.S. 639 (1990), we upheld Arizona's scheme against a charge that it violated the Sixth Amendment. 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 specific findings authorizing the imposition of the sentence of death be made by the jury' *Id.* at 648 (quoting *Hildwin v. Florida*, 490 U.S. 638, 640-641 (1989)(*per curium*). *Walton* found unavailing 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 (internal quotation marks omitted).

Ring v. Arizona, 2002 WL 1357257 *9 (U.S.). The parallelism between the Arizona statute and the Florida statute was the major *Walton* theme. *Walton, supra*, 497 U.S. at 640-641, 647.

In *Ring,* the State and its *amici* agreed that overruling *Walton* necessarily meant Florida's statute falls. *See* Brief of Respondent in *Ring* at 31, Tr. of Oral Arg. at 36, and Brief *Amicus Curiae* of Criminal Justice Legal Foundation at 21-22.

Notably, this Court has previously held that, "[b]ecause *Apprendi* did not overrule *Walton*, the basic scheme in Florida is not overruled either." *Mills v. Moore*, 786 So.2d 532, 537 (Fla. 2001). *Ring* overruled *Walton* and the basic principle of *Hildwin v. Florida*, 490 U.S. 638 (1989) (*per curiam*), which had upheld

the capital sentencing scheme in Florida "on grounds that 'the Sixth Amendment does not require that the specific findings authorizing imposition of the sentence of death be made by the jury.'" *Ring*, slip op. at 11 (quoting *Walton*, 497 U.S. at 648, in turn quoting *Hildwin*, 490 U.S. at 640-641)).

Additionally, *Ring* undermines the reasoning of this Court's decision in *Mills* by recognizing (a) that *Apprendi* applies to capital sentencing schemes,[1] *Ring*, slip op. at 2 ("Capital defendants, no less than non-capital defendants . . . are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment"); *id.* at 23, (b) that States may not avoid the Sixth Amendment requirements of *Apprendi* by simply "specif[ying] 'death or life imprisonment' as the only sentencing options,"[2] *Ring*, slip op. at 17, and (c) that the relevant and dispositive question is whether under state law death is "authorized by a

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[1] In *Mills*, The Florida Supreme Court said that "the plain language of *Apprendi* indicates that the case is not intended to apply to capital [sentencing] schemes." *Mills*, 786 So.2d at 537. Such statements appear at least four times in *Mills*.

[2] *Mills* reasoned that because first-degree murder is a "capital felony," and the dictionary defines such a felony as "punishable by death," the finding of an aggravating circumstance did not expose the petitioner to punishment in excess of the statutory maximum. *Mills*, 786 So.2d at 538.

guilty verdict standing alone." *Ring*, slip op. at 19.

Under Florida law, the court conducts a separate sentencing proceeding after which the jury renders an advisory verdict. Fla. Stat. § 921.141. The ultimate decision to impose a sentence of death, however, is made by the court after finding at least one aggravating circumstance. The jury recommends a sentence but makes no explicit findings on aggravating circumstances. The statute is explicit that, without these required findings of fact by the trial judge, the defendant must be sentenced to life imprisonment: "If the court does not make the findings requiring the death sentence within 30 days after the rendition of the judgment and sentence, the court shall impose [a] sentence of life imprisonment."

Because the Florida death penalty statutory scheme thus requires fact-finding by the trial judge before a death sentence may be imposed, it is unconstitutional under the holding and rationale of *Ring*.

This Court has previously rejected the idea that a defendant convicted of first degree murder has the right "to have the existence and validity of aggravating circumstances determined as they were placed before his jury." *Engle v. State*, 438 So.2d 803, 813 (Fla. 1983), *explained in Davis v. State*, 703 So.2d 1055, 1061 (Fla. 1997). The statute specifically requires the

judge to "set forth . . . findings upon which the sentence of death is based as to the *facts*," but asks the jury generally to "render an advisory sentence . . . based upon the following *matters*" referring to the sufficiency of the aggravating and mitigating circumstances. Fla. Stat. §§ 921.141(2) & (3) (emphasis added). Because Florida law does not require that any number of jurors agree that the State has proven the existence of a given aggravating circumstance before it may be deemed "found," it is impossible to say that "the jury" found proof beyond a reasonable doubt of a particular aggravating circumstance. Thus, "the sentencing order is 'a statutorily required personal evaluation by the trial judge of the aggravating and mitigating factors' *that forms the basis of a sentence of life or death*." *Morton v. State*, 789 So.2d 324, 333 (Fla. 2001) [quoting *Patton v. State*, 784 So.2d 380 (Fla. 2000)].

As the Supreme Court said in *Walton*, "[a] Florida trial court no more has the assistance of a jury's findings of fact with respect to sentencing issues than does a trial judge in Arizona." *Walton*, 497 U.S. at 648. This Court has made the point even more strongly by repeatedly emphasizing that the trial judge's findings must be made independently of the jury's recommendation. *See Grossman v. State*, 525 So.2d 833, 840 (Fla.

1988) (collecting cases). Because the judge must find that "sufficient aggravating circumstances exist" "notwithstanding the recommendation of a majority of the jury," Fla. Stat. § 921.141(3), the judge may consider and rely upon evidence not submitted to the jury. *Porter v. State*, 400 So.2d 5 (Fla. 1981); *Davis v. State*, 703 So.2d 1055, 1061 (Fla. 1997). The judge is also permitted to consider and rely upon aggravating circumstances that were not submitted to the jury. *Davis*, 703 So.2d at 1061, citing *Hoffman v. State*, 474 So.2d 1178 (Fla. 1985) (court's finding of "heinous, atrocious, or cruel" aggravating circumstance proper though jury was not instructed on it); *Fitzpatrick v. State*, 437 So.2d 1072, 1078 (Fla. 1983) (finding of previous conviction of violent felony was proper even though jury was not instructed on it); *Engle*, *supra*, 438 So.2d at 813.

Although "[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*, slip op. at 23 (quoting *Apprendi*, 530 U.S. at 494), Florida law does not require the jury to reach a verdict on any of the factual determinations required before a death sentence could be imposed. Section 921.141(2) does not call for a jury verdict, but rather an "advisory sentence."

This Court has made it clear that "'the jury's sentencing recommendation in a capital case is *only advisory*. The trial court is to conduct its own weighing of the aggravating and mitigating circumstances . . . .'" *Combs*, 525 So.2d at 858 (quoting *Spaziano v. Florida*, 468 U.S. 447, 451) (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.

Because Florida law does not require any two, much less twelve, jurors to agree that the government has proved an aggravating circumstance beyond a reasonable doubt, or to agree on the same aggravating circumstances when advising that "sufficient aggravating circumstances exist" to recommend a death sentence, there is no way to 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. *Combs*, 525 So.2d at 859 (Shaw, J., concurring).

In Florida, additionally, the advisory verdict is not based on proof beyond a reasonable doubt. "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, slip op. at 16. One of the elements that had to be established for Mr. Henyard to be sentenced to death was that "sufficient aggravating circumstances exist" to call for a death sentence. Fla. Stat. § 921.141(3).[3] 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.

Furthermore, a unanimous twelve member jury verdict is required in capital cases under United States Constitutional common law.[4] Florida's capital sentencing statute is, therefore, unconstitutional on its face and as applied.[5]

"[T]o guard against a spirit of oppression and tyranny on

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

[4] In *Cabberiza v. Moore*, 217 F.3d 1329 (C.A.11 Fla.,2000) the court noted that the United States Supreme Court "has not had occasion to decide how many jurors, and what degree of unanimity, the Sixth and Fourteenth Amendments require in capital cases." *Id*. n.15. *Duncan v. Louisiana,* 391 U.S. 145 (1968), and *Apodaca v. Oregon,* 406 U.S. 404 (1972) were noncapital cases. Both cases cite in their first footnotes the applicable state constitutional provisions, which require twelve person unanimous juries in capital cases.

[5] While the sentencing recommendation in this case was 12 - 0 for death, there were no findings of fact issued by the jury.

the part of rulers," and "as the great bulwark of [our] civil and political liberties," 2 J. Story, *Commentaries on the Constitution of the United States* 540-541 (4th ed. 1873), trial by jury has been understood to require that "*the truth of every accusation,* whether preferred in the shape of indictment, information, or appeal, should afterwards be confirmed by the unanimous suffrage of twelve of [the defendant's] equals and neighbours...." 4 W. Blackstone, *Commentaries on the Laws of England* 343 (1769) (cited in Apprendi, by its terms a noncapital case).

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*, 2002 WL 1357277, No. 00-10666 (U.S. June 24, 2002), rendered on the same day as *Ring*, the United States Supreme Court held that under the *Apprendi* test "those facts setting the outer limits of a sentence, and of the judicial power to impose it, are the elements of the crime for the purposes of the constitutional analysis." *Id*. at *14. And in *Ring*, the Court held that the aggravating factors enumerated under Arizona law operated as "the functional

equivalent of an element of a greater offense" and thus had to be found by a jury. 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.

In *Williams v. Florida,* 399 U.S. 78, at 103 (1970), the United States Supreme Court noted that: "In capital cases, for example, it appears that no state provides for less than 12 jurors–a fact that suggests implicit recognition of the value of the larger body as a means of legitimizing society's decision to impose the death penalty." Each of the thirty-eight states that use the death penalty require unanimous twelve person jury convictions.[6] In its 1979 decision reversing a non-unanimous six

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[6] Ala.R.Cr.P 18.1; Ariz. Const. Art 2, s.23; Ark. Code Ann. §16-32-202; Cal. Const. Art. 1, §16; Colo. Const. Art 2, §23; Conn. St. 54-82(c), Conn.R.Super.Ct.C.R. §42-29; Del. Const. Art. 1, §4; Fla. Stat. Ann. § 913.10(1); Ga. Const. Art. 1, §1, P XI; Idaho. Const. Art. 1, §7; Ill. Const. Art. 1, §13; Ind. Const. Art. 1, §13; Kan. Const. Bill of Rights §5; Ky. Const. §7, Admin.Pro.Ct.Jus. A.P. 11 §27; La. C.Cr.P. Art. 782; Md. Const. Declaration Of Rights, Art. 5 ; Miss. Const. Art. 3, §31; Mo. Const. Art. 1, §22a; Mont. Const. Art. 2, §26; Neb. Rev. St. Const. Art. 1, §6; Nev. Rev. Stat. Const. Art. 1, §3; N.H. Const. PH, Art. 16; N.J. Stat. Ann. Const. Art. 1, p. 9; N.M. Const. Art. 1 §12; N.Y. Const. Art. 1, §2; N.C. Gen. Stat. Ann. §15A-1201; Ohio Const. Art. 1, §5; Okla. Const. Art. 2, §19; Or. Const. Art. 1, §11, Or. Rev. Stat. §136.210; Pa. Stat. Ann. 42 Pa.C.S.A. §5104; S.C. Const. Art. V, §22; S.D. ST §23A-267; Tenn. Const. Art.1, §6; Tex. Const. Art.1, §5; Utah Const. Art. 1 §10; Va. Const. Art. 1, §8; Wash. Const. Art. 1, §21; Wyo. Const. Art. 1, §9.

person jury verdict in a non-capital case, the United States Supreme Court held that "We think this near-uniform judgment of the Nation provides a useful guide in delimiting the line between those jury practices that are constitutionally permissible and those that are not." *Burch v. Louisiana*, 441 U.S. 130, 138 (1979). The federal government requires unanimous twelve person jury verdicts. "[T]he jury's decision upon both guilt and whether the punishment of death should be imposed must be unanimous. This construction is more consonant with the general humanitarian purpose of the Anglo-American jury system." *Andres v. United States*, 333 U.S. 740, 749 (1948). See generally Richard A. Primus, *When Democracy Is Not Self-Government: Toward a Defense of The Unanimity Rule For Criminal Juries*, 18 Cardozo L. Rev. 1417 (1997).

Ring also held that the existence of at least one statutory aggravating circumstance must be proven to a jury beyond a reasonable doubt. In essence, the aggravating circumstance is an essential element of a new crime that might be called "aggravated" or "death-eligible" first degree murder. The death recommendation in this case was not unanimous.

Florida requires that verdicts be unanimous.[7] Although

[7] At least absent a waiver initiated by the defendant. *Flanning v. State,* 597 So.2d 864 (Fla. 3d DCA 1992). See

Florida's constitutional guarantee of a jury trial [Art. I, §§ 16, 22, Fla. Const.] has never been interpreted to require a unanimous jury verdict, it has long been the legal practice of this state to require such unanimity in all criminal jury trials; Fla.R.Crim.P. 3.440 memorializes this long-standing practice: "[n]o [jury] verdict may be rendered unless all of the trial jurors concur in it." It is therefore settled that "[i]n this state, the verdict of the jury must be unanimous" and that any interference with this right denies the defendant a fair trial. *Jones v. State,* 92 So.2d 261 (Fla.1956).

Another point from *Ring* is that the harmless error doctrine cannot be applied to deny relief. As Justice Scalia explained in *Sullivan v. Louisiana*, 508 U.S. 275 (1993): "[T]he jury verdict required by the Sixth Amendment is a jury verdict of guilty beyond a reasonable doubt." *Sullivan*, 508 U.S. at 278. Where the jury has not been instructed on the reasonable doubt standard,

> [t]here has been no jury verdict within the meaning of the Sixth Amendment, [and] the entire premise of *Chapman*[8] review is simply absent. There being no jury verdict of guilty-beyond-a-reasonable-doubt, the

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Nobles v. State, 786 So.2d 56, (Fla. 4th DCA 2001) certifying question. *Flanning* is flatly inconsistent with *Jones*.

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

> question whether the *same* verdict of guilty-beyond-a-reasonable-doubt would 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. The same reasoning applies to lack of unanimity, failure to instruct the jury properly, and importantly, the lack of an actual verdict.

Mr. Henyard's death sentence also violates the State and Federal Constitutions because the elements of the offense necessary to establish capital murder were not charged in the indictment. *Jones v. United States*, 526 U.S. 227 (1999), held that "under the Due Process Clause of the Fifth Amendment and the notice and jury guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." *Jones*, at 243, n.6. *Apprendi v. New Jersey*, 530 U.S. 466 (2000), held that the Fourteenth Amendment affords citizens the same protections when they are prosecuted under state law. *Apprendi*, 530 U.S. at 475-476.[9] *Ring* held that a death penalty statute's "aggravating factors operate as 'the functional equivalent of an element or

[9] 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.

a greater offense.'" *Ring*, quoting *Apprendi* at 494, n. 19. In *Jones*, the Supreme Court noted that "[m]uch turns on the determination that a fact is an element of an offense, rather than a sentencing consideration," because "elements must be charged in the indictment." *Jones,* 526 U.S. at 232.

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." 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 said "[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 said "[a]s a general rule, an information must allege each of the essential elements of a

crime to be valid."

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 *De Jonge v. Oregon,* 299 U.S. 353 (1937).

Because the State did not submit to the grand jury, and the indictment did not state, the essential elements of the aggravated crime of capital murder, Mr. Henyard's right under Article I, section 15 of the Florida Constitution, and the Sixth Amendment to the federal Constitution were violated. 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. Henyard "in the preparation of a defense" to a sentence of death. Fla.R.Crim.P. 3.140(o).

Lastly, the Petitioner, Mr. Henyard, is entitled to the benefit of *Apprendi* and *Ring* under *Witt v. State*, 387 So.2d 922, 929-930 (Fla. 1980).

ARGUMENT II

MR. HENYARD'S EIGHTH AMENDMENT RIGHT AGAINST CRUEL AND UNUSUAL PUNISHMENT WILL BE VIOLATED AS HE MAY BE INCOMPETENT AT TIME OF

EXECUTION.

In accordance with Florida Rules of Criminal Procedure 3.811 and 3.812, a prisoner cannot be executed if "the person lacks the mental capacity to understand the fact of the impending death and the reason for it." This rule was enacted in response to *Ford v. Wainwright*, 477 U.S. 399, 106 S.Ct. 2595 (1986).

The undersigned acknowledges that under Florida law a claim of incompetency to be executed cannot be asserted until a death warrant has been issued. Further, the undersigned acknowledges that before a judicial review may be held in Florida, the defendant must first submit his claim in accordance with Florida Statutes. The only time a prisoner can legally raise the issue of his sanity to be executed is after the Governor issues a death warrant. Until the death warrant is signed, the issue is not ripe. This is established under Florida law pursuant to Fla. Stat. § 922.07 (1985) and *Martin v. Wainwright*, 497 So. 2d 872 (1986)(If Martin's counsel wish to pursue this claim, we direct them to initiate the sanity proceedings set out in section 922.07, Florida Statutes (1985).

The same holding exists under federal law. *Poland v. Stewart*, 41 F.Supp.2d 1037 (D. Ariz. 1999)(such claims truly are not ripe unless a death warrant has been issued and an execution

date is

pending); *Martinez-Villareal v. Stewart*, 118 S.Ct. 1618, 523 U.S. 637, 140 L.Ed.2d 849 (1998)(respondent's Ford claim was dismissed as premature, not because he had not exhausted state remedies, but because his execution was not imminent and therefore his competency to be executed could not be determined at that time); *Herrera v. Collins*, 506 U.S. 390, 113 S.Ct. 853, 122 L.Ed.2d 203 (1993) (the issue of sanity [for *Ford* claim] is properly considered in proximity to the execution).

However, most recently, in *In Re: Provenzano*, No. 00-13193 (11th Cir. June 21, 2000), the 11th Circuit Court of Appeals has stated:

> Realizing that our decision in *In Re: Medina*, 109 F.3d 1556 (11th Cir. 1997), forecloses us from granting him authorization to file such a claim in a second or successive petition, Provenzano asks us to revisit that decision in light of the Supreme Court's subsequent decision in *Stewart v. Martinez-Villareal*, 118 S.Ct. 1618 (1998). Under our prior panel precedent rule, *See United States v. Steele*, 147 F.3d 1316, 1317-18 (11th Cir. 1998) (en banc), we are bound to follow the *Medina* decision. We would, of course, not only be authorized but also required to depart from *Medina* if an intervening Supreme Court decision actually overruled or conflicted with it.[citations omitted].
>
> *Stewart v. Martinez-Villareal* does not conflict with *Medina*'s holding that a competency to be executed claim not raised

> in the initial habeas petition is subject to the strictures of 28 U.S.C. Sec 2244(b)(2), and that such a claim cannot meet either of the exceptions set out in that provision.

Id. at pages 2-3 of opinion.

Federal law requires that, in order to preserve a competency to be executed claim, the claim must be raised in the initial petition for habeas corpus. Hence, the filing of this petition. In order to exhaust state court remedies, the claim is being filed at this time.

Further, Mr. Henyard has been incarcerated since 1993. Statistics have shown that incarceration over a long period of time will diminish an individual's mental capacity. Inasmuch as Petitioner may well be incompetent at the time of execution, his Eighth Amendment right against cruel and unusual punishment will be violated.

ARGUMENT III

APPELLATE COUNSEL FOR MR. HENYARD WAS INEFFECTIVE FOR FAILING TO RAISE ON DIRECT APPEAL THE IMPROPER RULING ON TRIAL COUNSELS' MOTION TO WITHDRAW.

Prior to trial, counsel for Mr. Henyard filed a motion to withdraw. The basis for the motion was that the Office of the Public Defender previously represented a state witness, Annie T. Neal. The motion explained that the facts involving the prior representation placed the office "in the untenable position of

having to cross-examine a former client." (R.560-61). Several weeks later, trial counsel filed an addendum to the motion which listed an additional nine persons that had been listed as witnesses for the State and who were previous clients of the Office. (R.609-11). During a motion hearing the following week, the court, on February 23, 1994, denied the motion, apparently without a separate follow-up order. (R.2744-48).

In considering the motion the court simply made inquiry as to whether any of the witnesses had pending cases. The following exchange took place after the Assistant Public Defender presented the motion and following a brief discussion of some case authority for each side:

> THE COURT: Mr. Gross, what I'm going to do is give you an opportunity to check out the addendum and I'll reserve ruling on the Motion to Withdraw.
>
> Has the defense, if any of those cases are pending, any you're in a position to know more than Mr. Gross, have you filed any Motions to Withdraw on those cases?
>
> MR. JOHNSON: Judge, to my knowledge, just so I might interject, it is to my knowledge, we do not represent anybody presently.
>
> MR. GROSS: So we can resolve the issue then, Judge?
>
> THE COURT: Yes. The motion is denied.
>
> Any other motions?
>
> (R. 2747-48).

The trial court's inquiry as to status of representation,

however, did not constitute a proper inquiry under Florida law. The law was most recently and succinctly described by the district court in *Toneatti v. State*, 805 So.2d 112 (Fla. 4th DCA 2002):

> A criminal defendant's Sixth Amendment right to the effective assistance of counsel encompasses the right to counsel free of ethical conflicts. *See Thomas v. State*, 85 So.2d 626, 628 (Fla. 2d DCA 2001)(defense counsel's prior representation of a key prosecution witness deprived defendant of the right to counsel free of ethical conflicts.) This guarantee of the assistance of counsel includes the right to counsel whose loyalty is not divided between clients with conflicting interests. See *Turner v. State*, 340 So.2d 132, 133 (Fla. 2d DCA 1976)(*citing Glasser v. United States*, 315 U.S. 60, 62, 62 S.Ct. 457, 86 L.Ed. 680 (1942). When defense counsel makes a pretrial disclosure of a possible conflict of interest with the defendant, the trial court must either conduct an inquiry to determine whether the asserted conflict of interest will impair the defendant's right to effective assistance of counsel or appoint separate counsel. *See Thomas* So.2d at 628 (emphasis added; additional citations omitted).
>
> *Toneatti*, 805 So.2d at 114.

Another recent case specifically addressed a conflict of interest that was brought to the trial court's attention by the State:

> Just prior to trial, the state moved the court to determine if petitioner's lawyer, who was representing Semper [a state witness against the lawyer's current client] on unrelated criminal charges, had a conflict requiring disqualification.
>
> In *Kolker v. State*, 649 So.2d 250, 251 (Fla. 3d DCA 1994), the court explained:

> Although a criminal defendant has a presumptive right under the Sixth Amendment to the United States Constitution to counsel of his own choosing, "that presumption may be overcome not only by a demonstration of actual conflict but by a showing of a serious potential for conflict." *Wheat v. United States*, 486 U.S. 153, 164, 108 S.Ct. 1692, 1700, 100 L.Ed. 140, 152 (1988). In applying *Wheat* to a case similar to this one, the Eleventh Circuit held that "[t]he need for fair, efficient, and orderly administration of justice overcomes the right to counsel of choice where an attorney has an actual conflict of interest, such as when he has previously represented a person who will be called as a witness against a current client at a criminal trial." *United State v. Ross*, 33 F.3d 1507, 1523 (11th Circuit 1994). An attorney's previous relationship with a client who has become a witness for the government and plans to testify against the attorney's current client presents a dilemma of divided loyalty. It would be improper for the attorney to use privileged communication from the former client in cross-examination of that former client; the conflict could also "deter the defense attorney from intense probing of the witness on cross-examination to protect privileged communications with the former client" *Ross*, 33 F.3d at 1523 (citations omitted in original).

Cotto v. State, 2002 WL 31421955 at 1 (Fla. 4th DCA Oct. 30, 2002).

Because the trial court did not grant the motion to withdraw and appoint other counsel, the court was obligated to conduct a proper inquiry to determine any impairment of Mr. Henyard's rights.

The court did not do so. Its reasoning is unknown because no determination of the asserted conflict appears on the record either from the hearing or in any subsequent written order.

By this failure, the court was also unable to address whether the conflict situation involved Rule 4-1.9, Rules Regulating the Florida Bar, which states that "[a] lawyer who has formerly represented a client in a matter shall not thereafter . . . use information relating to the representation to the disadvantage of the former client [except as rule 4-1.6 regarding approved disclosures would permit or when the information has become generally known]."

Because appellate counsel failed to address this matter on direct appeal, appellate counsel was ineffective. This conclusion is inescapable because the omission was of "such magnitude as to constitute a serious error or substantial deficiency falling measurably outside the range of professionally acceptable performance" and, secondly, because the deficiency in performance compromised the appellate process to such a degree as to undermine confidence in the correctness of the result." *Groover v. Singletary*, 656 So. 2d 424, 425 (Fla. 1995) (quoting *Pope v. Wainwright*, 496 So. 2d 798, 800 (Fla. 1986); *see*, *e.g.*, *Teffeteller v. Dugger*, 734 So. 2d 1009, 1027 (Fla. 1999). Because no determination regarding the facts

of the asserted conflict appears on the record, either from the hearing or in any subsequent written order, this Court cannot make a proper review. Habeas relief should therefore be granted.

CONCLUSION AND RELIEF SOUGHT

For all the reasons discussed herein, Richard Henyard respectfully urges this Honorable Court to grant habeas relief.

Respectfully submitted,

_____
Robert T. Strain
Florida Bar No. 325961
Assistant CCRC

CAPITAL COLLATERAL REGIONAL
COUNSEL-MIDDLE
3801 Corporex Park Drive
Suite 210
Tampa, Florida 33619
telephone 813-740-3544

Counsel for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Petition for Writ of Habeas Corpus has been furnished by U.S. Mail, first class postage prepaid, to Stephen D. Ake, Assistant Attorney General, Office of the Attorney General, 2002 N. Lois Avenue, Suite 700, Tampa, Florida 33607 and Richard Henyard, DOC#225727; P1220S; Union Correctional Institution, 7819 NW 228th Street, Raiford, Florida 32026 on this _____ day of December, 2002.

_____
Robert T. Strain
Florida Bar No. 325961
Assistant CCRC
CAPITAL COLLATERAL REGIONAL
COUNSEL-MIDDLE

3801 Corporex Park Drive
Suite 210
Tampa, Florida 33619
telephone 813-740-3544

Counsel for Appellant

CERTIFICATE OF COMPLIANCE

I hereby certify, pursuant to Fla.R.App.P. 9.210, that the foregoing Petition for Writ of Habeas Corpus was generated in Courier New 12-point font.

_____
Robert T. Strain
Florida Bar No. 325961
Assistant CCRC
CAPITAL COLLATERAL REGIONAL
COUNSEL-MIDDLE
3801 Corporex Park Drive
Suite 210
Tampa, Florida 33619
telephone 813-740-3544

Counsel for Appellant