

IN THE SUPREME COURT OF FLORIDA

NO. SC01-2424

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RANDALL SCOTT JONES

Petitioner,

v.

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

Respondent.

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PETITION FOR WRIT OF HABEAS CORPUS

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**PRELIMINARY STATEMENT**

Article 1, Sec. 13 of the Florida Constitution provides: "The writ of habeas corpus shall be grantable of right, freely and without cost." These claims demonstrate that Mr. Jones was deprived of the right to a fair, reliable, and individualized sentencing proceeding and that the proceedings resulting in his conviction and death sentence violated fundamental constitutional imperatives.

The proceedings in his case will be cited to as follows:

"R." - record on direct appeal from initial trial court proceedings;

"R2." - record on direct appeal from resentencing;

"PC-R." - record of post-conviction proceedings.

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### INTRODUCTION

The following claims are being filed in order to preserve the issues therein for further review to address substantial claims of error under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.<sup>1</sup>

Significant errors which occurred at Mr. Jones' 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. Jones. "[E]xtant legal principles

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<sup>1</sup>Pursuant to the suggestion by this Court in Sireci v. State, 773 So.2d 34, 41 n.14 (Fla. 2000), this introductory statement is included to alert the Court of the necessity of presenting those issues in this manner.

. . . 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 in 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 Mr. Jones his constitutional rights. As this petition will demonstrate, Mr. Jones 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 Fla. Const. art. I, § 13. This Court has original jurisdiction pursuant to Fla.R.App.P. 9.030(a)(3) and Fla. Const. art. V, §

3(b)(9). The petition presents constitutional issues which directly concern the judgment of this court during the appellate process and the legality of Mr. Jones' sentence of death. Jurisdiction in this action lies in this court for the fundamental constitutional errors challenged herein arise in the context of a capital case in which this Court heard and denied Mr. Jones' direct appeal. See Smith v. State, 400 So.2d 956, 960 (Fla. 1981); Wilson v. Wainwright, 474 So.2d 1162, 1163 (Fla. 1985); Baggett v. Wainwright, 229 So.2d 239, 243 (Fla. 1969); cf. Brown v. Wainwright, 392 So.2d 1327 (Fla. 1981). A petition for a writ of habeas corpus is the proper means for Mr. Jones 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 v. Wainwright, 474 So.2d 1162 (Fla. 1985).

#### **GROUND FOR HABEAS CORPUS RELIEF**

By his petition for a writ of habeas corpus, Mr. Jones 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 Fifth, Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States and the corresponding provisions of the Florida Constitution.

### PROCEDURAL HISTORY

Mr. Jones was charged by indictment with two first-degree murders, armed robbery, burglary of a conveyance while armed and/or with an assault, shooting or throwing a deadly missile into an occupied vehicle, second-degree grand theft, and sexual battery. (R. 5-6). The case was tried before the Honorable Robert R. Perry. Mr. Jones was represented by Howard Pearl of the Public Defender's Office.

The jury found Mr. Jones guilty on all counts except for the second-degree grand theft, which was dismissed. (R. 1650-51). At the penalty phase, the jury recommended death sentences by a vote of 11-1. (R. 1830). The trial court followed the recommendation. (R. 685-692).

On direct appeal, this court reversed the conviction for sexual battery, affirmed the remaining convictions, and remanded the case for a new sentencing hearing because of cumulative error at the penalty phase. Jones v. State, 569 So.2d 1234 (Fla. 1990).

Mr. Jones' re-sentencing hearing was held in March, 1991, again before Judge Perry. Mr. Jones was again represented by Howard Pearl. Prior to the penalty phase, defense counsel Howard Pearl filed a motion for use of special verdict form which requested the circuit court require the jury to

unanimously determine aggravating factors. (R2. 129-133). This request was denied. (R2. 140). The jury recommended death sentences by a vote of 10-2. (R2. 984-985). The trial court followed the recommendation. (R2. 1020-34). On direct appeal, this Court affirmed the death sentences. Jones v. State, 612 So.2d 1370 (Fla. 1992).

Mr. Jones filed an amended 3.850 motion on November 10, 1997. (PC-R. 292-431). A "Huff"<sup>2</sup> hearing was held on January 23, 1998. (PC-R. 626-95). On November 9, 1999, the lower court issued an order granting an evidentiary hearing on Claim XXIX of Mr. Jones 3.850 motion. (PC-R. 505-07). The evidentiary was held on February 1, 2000. (PC-R. 535-95). Thereafter, on June 8, 2000, the lower court denied Mr. Jones 3.850 motion in its entirety. (PC-R. 605-07). Mr. Jones filed his notice of appeal of the denial of his 3.850 motion on July 6, 2000. (PC-R. 608-09). Mr. Jones filed his initial brief on April 5, 2001, and it is pending before this court. In addition, Mr. Jones now files this petition for habeas corpus relief.

#### CLAIM I

MR. JONES' COUNSEL CONCEDED GUILT WITHOUT SUBSTANTIALLY CHALLENGING THE STATE'S CASE IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION. APPELLATE COUNSEL WAS

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<sup>2</sup>Huff v. State, 622 So.2d 982 (Fla. 1993).

**INEFFECTIVE FOR NOT RAISING THIS ERROR ON  
DIRECT APPEAL.**

The Sixth Amendment to the United States Constitution requires that an accused be given the assistance of counsel. Gideon v. Wainwright, 372 U.S. 335 (1963). "An accused's right to be represented by counsel is a fundamental component of our criminal justice system." United States v. Cronin, 466 U.S. 648, 653 (1984). "If counsel entirely fails to subject the prosecution's case to a meaningful adversarial testing, there has been a denial of Sixth Amendment Rights that makes the adversary process itself presumptively unreliable." Cronin, 466 U.S. at 659. "Although statements made by attorneys in closing arguments are not evidence, nevertheless, for all practical purposes counsel's admission of guilt on behalf of his client denied to petitioner his constitutional right to have the issue of his guilt or innocence decided by the jury." Nixon v. Singletary, 748 So.2d 618, 623 (Fla. 2000)(quoting Wiley v. Sowders, 647 F.2d 642, 650 (6<sup>th</sup> Cir. 1981).

Mr. Jones' counsel, Assistant Public Defender Howard Pearl, conceded his client's guilt when he addressed the jury in closing argument:

MR. PEARL: Good morning, Ladies and Gentlemen. This has been a long trial. The evidence has been clear and brief and I

think without much controversy. I don't intend to try to insult your intelligence.

I'm going to talk, of course, about what I want to talk about and Mr. McLeod then will have the opportunity to tell you what he wants to talk about.

It seems clear to me that the evidence proves beyond a reasonable doubt that Randy Scott Jones killed Kelly Lynn Perry and Matthew Paul Brock on the night of July 27th, 1987, and in the course of doing so performed other acts that will, that also constituted lesser crimes.

(R. 1580-1581).

A review of the record shows that the concession of guilt occurred after a failure on behalf of defense counsel to adequately challenge the State's case. Appellate counsel was ineffective when he failed to raise this issue in the direct appeal of Mr. Jones' case. This failure resulted in a denial of Mr. Jones constitutional rights guaranteed by the Sixth and Fourteenth Amendments.

#### CLAIM II

**MR. JONES' EIGHTH AMENDMENT RIGHT AGAINST CRUEL AND UNUSUAL PUNISHMENT WILL BE VIOLATED AS MR. JONES MAY BE INCOMPETENT AT THE TIME OF EXECUTION.**

This claim is necessary at this stage because 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. Federal law requires all issues raised in a

federal habeas petition to be exhausted in state court. Hence, Randall Jones raises this claim now.

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).

Randall Jones acknowledges that under Florida law, a claim of incompetency to be executed cannot be asserted until a death warrant has been issued. Further, Mr. Jones 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 section 922.07, Florida Statutes (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, 523 U.S. 637, 118 S. Ct. 1618, 140 L.Ed.2d 849 (1998)(respondent's 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 is properly considered in proximity to the execution).

However, most recently, in In re: Provenzano, 215 F.3d 1233(11th Cir. 2000), the 11<sup>th</sup> Circuit Court of Appeals stated:

Realizing that our decision in In Re: Medina, 109 F.3d 1556 (11<sup>th</sup> 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 (11<sup>th</sup> 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.

Thus, Mr. Jones, in an abundance of caution, raises this claim in this habeas petition in order to preserve the issue for further review.

### CLAIM III

**THE FLORIDA DEATH SENTENCING STATUTE AS APPLIED IS UNCONSTITUTIONAL UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.**

Notwithstanding this Court's decision in Mills v. Moore, 786 So.2d 532 (Fla. 2001), Mr. Jones respectfully submits that considerations of Due Process require that the jury unanimously find the existence of each statutory aggravating factor before it may be used to impose the death penalty. Mr. Jones raises this argument at this time to ensure the issue is preserved for further review.

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 v. New Jersey, 530 U.S. 466 120 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 Randall Jones' penalty phase, section 775.082(1), Florida Statutes (1991), 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(1)(1991).

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 (2001); Fla. Stat. §921.141(2)(a), (3)(a) (2001). 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 (2001). 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.

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 than 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 Randall Jones' 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).

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 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.

This court's recent decision in Mills v. Moore, 786 So.2d 532, stated that Apprendi did not apply to capital sentencing schemes. Mills, at 537. This court cites Weeks v. State, 761 A.2d 804 (Del. 2000), as important authority in reaching its decision:

"Importantly, in Weeks v. Delaware, a capital defendant brought his second habeas petition on October 27, 2000, alleging an Apprendi violation and seeking a stay of his execution which was set for November 17, 2000. The trial court ruled that Apprendi did not apply to Weeks' case. Weeks appealed and the trial court's ruling was affirmed. On November 16, 2000, just one day before the scheduled execution, the United States Supreme Court denied certiorari. Weeks v. Delaware, \_\_\_U.S. \_\_\_, 121 S.Ct. 476, 148 L.Ed.2d 478 (2000). The Supreme Court's denial of certiorari indicated that the Court meant what it said when it held that Apprendi was

not intended to affect capital sentencing schemes.”

Mills, at 537.

This reasoning does not apply to Mr. Jones due to the substantial differences between Mr. Jones’ case the Weeks case. In Weeks, the defendant waived his right to a trial by jury during the guilt phase and pled guilty to one count of intentional murder and one count of felony murder. Weeks v. State, 761 A.2d 804 (Del. 2000). The plea to two counts of Murder involving two different victims automatically established the existence of two statutory aggravators. Weeks, at 805. Thus, the determination of the existence of those aggravators by a jury was waived by the guilty plea. In Mr. Jones’ case, there was no guilty plea. Thus, Mr. Jones argument regarding the appropriateness of the jury’s unanimous determination of the aggravators is distinguishable from Weeks.

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 Randall Jones’ case. Thus, the Florida death penalty scheme is unconstitutional as applied.

**CONCLUSION AND RELIEF SOUGHT**

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

**CERTIFICATE OF SERVICE**

WE HEREBY CERTIFY that a true copy of the following has been  
has been furnished by United States Mail, first class postage  
prepaid, to all counsel of record on this \_\_\_\_ day of  
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**CERTIFICATE OF COMPLIANCE**

We hereby certify that a true copy of the foregoing Petition for Writ of Habeas Corpus, was generated in a Courier non-proportional, 12 point font, pursuant to Fla.R.App.P. 9.210.

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