

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC02-1788

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MICHAEL T. RIVERA,

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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## INTRODUCTION

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, claims demonstrating that Mr. Rivera was deprived of the effective assistance of counsel on direct appeal and that the proceedings that resulted in his convictions, death sentence and other sentences, as well as the affirmance of those convictions and sentences, violated fundamental constitutional guarantees. This petition challenges Mr. Rivera's 1987 trial and sentencing. Citations to the direct appeal record shall be cited as (R. page number). Citations to the postconviction record on appeal shall be cited as (PC-R. Page number). All other citations shall be self-explanatory.

## JURISDICTION

A writ of habeas corpus is an original proceeding in this Court governed by Fla. R. App. P. 9.100. This Court has original jurisdiction under Fla. R. App. P. 9.030(a)(3) and Article V, §3(b)(9), Fla. Const. The Constitution of the State of Florida guarantees that "[t]he writ of habeas corpus shall be grantable of right, freely and without cost." Art. I, ' 13, Fla. Const.



**REQUEST FOR ORAL ARGUMENT**

Mr. Rivera requests oral argument on this petition.

**PROCEDURAL HISTORY**

Mr. Rivera was charged by indictment dated August 6, 1986, with first degree murder. Mr. Rivera was adjudicated guilty on April 16, 1987, and on April 17, 1987, the jury recommended a death sentence (R. 2296, 2307). On May 1, 1987, the trial court imposed a sentence of death (R. 2308-13). On direct appeal, this Court affirmed Mr. Rivera's conviction and sentence but vacated the finding of one aggravating circumstance, i.e. that the offense was committed in a cold, calculated and premeditated manner. Rivera v. State, 561 So. 2d 536 (Fla. 1990).

Mr. Rivera filed a motion under Fla. R. Crim. P. 3.850 on October 31, 1991 and subsequently filed two amended Rule 3.850 motions. The circuit court conducted an evidentiary hearing on limited claims, and summarily denied the remainder of the claims (PC-R. 190-99). On appeal, this Court remanded for an evidentiary hearing regarding Mr. Rivera's claim of ineffective assistance of counsel at the penalty phase of his trial. Rivera v. State, 717 So 2d 477 (Fla. 1998).

On remand, the circuit court conducted an evidentiary hearing in 1999 and subsequently denied relief. Mr. Rivera

timely filed an appeal which is currently pending before this Court.

## CLAIMS FOR RELIEF

### CLAIM I

#### MR. RIVERA'S DEATH SENTENCE OF DEATH STANDS IN VIOLATION OF RING V. ARIZONA AND THE SIXTH FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

##### A. Factual Backdrop.

On August 6, 1986, the grand jury for Broward County, Florida, returned an indictment charging that Michael T. Rivera:

did then and there unlawfully and feloniously and from a premeditated design to effect the death of a human being, STACI LYNN JAZVAC, did kill and murder the said STACI LYNN JAZVAC, by asphyxiation, against the form of the statute in such case pursuant to Section 782.04 of the Florida Statutes, made and provided to the evil example of all others in the like case offending, and against the peace and dignity of the State of Florida.

(R. 2164).

The indictment did not indicate whether the State would seek the death penalty or upon what factual basis. Although the indictment only charged premeditated murder, the State presented evidence of a sexual battery and kidnapping. The jury was instructed on premeditated and felony-murder (R. 1871-73). The Judge instructed the jury on the elements necessary to prove kidnapping and sexual battery (R. 1873-75).

On April 16, 1987, the jury returned a verdict finding Mr. Rivera guilty of first degree murder as charged in the indictment (R. 1899).

Before sending the jury out, the trial court had instructed the jury about the possible penalties, but then told the jury to disregard those penalties:

I will now inform you of the maximum and minimum possible penalties in this case. The penalties, however, are for the Court to decide. You are not responsible for the penalties in any way because of your verdict. The possible penalties of this case are to be disregarded by you as you discuss your verdict. Your duty is to discuss only the question of whether the State has proved the guilt of the defendant in accordance with these instructions. The maximum possible penalty for the crime of first-degree murder as is death. The minimum penalty for the crime of murder in the first degree is life imprisonment with a mandatory 25 years without the possibility for parole.

(R. 1885).

The penalty phase began on April 17, 1987. Following the presentation of evidence and arguments by counsel, the judge instructed the jury. In accordance with Florida law, the judge told the jurors:

Ladies and gentlemen of the jury, it is now your duty to advise the Court as to what punishment should be imposed upon the defendant for this crime of murder in the first degree.

As you have been told, **the final decision as to what punishment shall be imposed is the responsibility of the Judge;** however, it is your duty to follow the law that will now be given you by

the Court and render to the Court an advisory sentence based upon your determination as to whether sufficient aggravating circumstances exist to justify the imposition of the death penalty and whether sufficient mitigating circumstances exist to outweigh any aggravating circumstances found to exist.

Your advisory sentence should be based upon the evidence that you've heard while trying the guilt or innocence of the defendant and on the evidence that has been presented to you in these proceedings.

(R. 2132-33)(emphasis added). The judge then listed four aggravating circumstances and five mitigating circumstances

(R. 2133-34). As to the proof of the aggravating factors, the judge charged:

Each aggravating circumstance must be established beyond a reasonable doubt before it may be considered by you in arriving at your decision. If one or more aggravating circumstances are established, you should consider all the evidence tending to establish one or more mitigating circumstances and give that evidence such weight as you feel it should receive in reaching your conclusion as to the sentence that should be imposed.

(R. 2135). The jury returned a verdict of 12-0 in favor of death (R. 2139).

On May 1, 1987, the trial court orally and in writing entered his Sentencing Order to justify the death sentence (R. 2146-54; 2309-13). The judge's order made factual determinations as to each of the aggravating and mitigating circumstances at issue. An example of this follows:

Third 921.141(5)(h) The capital felony was especially heinous, atrocious and cruel. Dr. Wright testified that the cause of death was asphyxiation. He testified that there was a bruise on her forehead caused while she was alive. A witness testified during the trial that you told him she started to scream and resisted you and it got out of hand and you choked her to death. It has been previously been held that the fear and emotional strain preceding a victim's death may be considered as contributing to the heinous nature of the capital felony. See Adams v. State 412 So. 2d 850.

(R. 2310).

**B. Florida's capital sentencing scheme is unconstitutional under Ring v. Arizona.**

Ring v. Arizona, 536 U.S. \_\_\_\_\_, (2002), found the Arizona capital sentencing scheme unconstitutional because it made a death sentence contingent upon the finding of the presence of additional facts, but assigned responsibility for finding those facts to the judge in violation of the Sixth Amendment right to a jury trial. The United States Supreme Court based this holding and analysis in Ring on its earlier decision in Apprendi v. New Jersey, 530 U.S. 466 (2000). There the Supreme Court had held that "[i]t is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed." Id. at 490 (quoting Jones v. United States, 526 U.S. 227, 252-253 (1999) (Stevens, J., concurring)). Accordingly, capital sentencing schemes such as

those in Florida and Arizona, violate the notice and jury trial rights contained in the Sixth and Fourteenth Amendments. Such capital sentencing schemes do not provide for the jury to render a verdict with respect to the "fact [that] is an element of the aggravated crime" punishable by death. Ring, slip op. at 19 (quoting Apprendi, 530 U.S. at 501 (Thomas., J., concurring)).

Applying the Apprendi test in Ring, the Court said "[t]he dispositive question.... 'is not one of form but of effect.'" Ring, slip op. at 16 (quoting Apprendi, 530 U.S. at 494). The question is not whether death is an authorized punishment in first-degree murder cases,<sup>1</sup> but whether the "facts increasing punishment beyond the maximum authorized by a guilty verdict standing alone," Ring, slip op. at 19, are found by the judge or jury. "If a state makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact... must be found by a jury beyond a reasonable

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<sup>1</sup>See Ring, slip op. At 17-18 (rejecting argument that finding of aggravating circumstances did not increase statutory maximum because "Arizona first-degree murder statute 'authorizes a maximum penalty of death only in a formal sense'" (quoting Apprendi, 530 U.S. at 541 (O'Connor, J., concurring))). Both the Florida and Arizona statutes provide for a range of punishments, the most severe of which is death. Compare Fla. Stat. sec. 775.082(1)(1979) with Arizona Rev. stat. Ann. Sec. 13-1105(C).

doubt.” Ring, slip op. at 16. “All the facts which must exist in order to subject the defendant to a legally prescribed punishment must be found by the jury.” Ibid. (quoting Apprendi, 530 U.S. at 499 (Scalia, J., concurring)).

The Court in Ring held that Arizona’s sentencing statute could not survive Apprendi because “[a] defendant convicted of first-degree murder in Arizona cannot receive a death sentence unless a judge makes the factual determination that a statutory aggravating factor exists. Without that critical finding, the maximum sentence to which the defendant is exposed is life imprisonment, and not the death penalty.” Ring, slip op. at 9 (internal quotation marks and citations omitted). In so holding, the Court overruled Walton v. Arizona, 497 U.S. 639 (1990), “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, slip op. at 22.

### **C. Applying Ring to Florida’s sentencing scheme**

This Court 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). However, the United States Supreme Court has now spoken and announced in Ring that Walton was overruled. Since

the underlying basis for Walton was the ruling in Hildwin v. Florida, 490 U.S. 638 (1989) (per curiam), which 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), logically Hildwin has been overruled as well. Certainly at a minimum, Ring undermines the Florida Supreme Court's decision in Mills by recognizing: (a) that Apprendi applies to capital sentencing schemes,<sup>2</sup> 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," Ring, slip op. at 17; and (c) that the relevant and dispositive question is whether under state law death is "authorized by a guilty verdict standing

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<sup>2</sup>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

alone," Ring, slip op. at 19.<sup>3</sup>

Florida's capital sentencing statute, like the Arizona statute struck down in Ring, makes imposing the death penalty contingent on the factual findings of a judge, not the jury. Section 775.082 of the Florida Statutes provides that a person convicted of first-degree murder must be sentenced to life in prison "unless the proceedings held to determine sentence according to the procedure set forth in Sec. 921.141 result in finding by the court that such person shall be punished by death, and in the latter event such person shall be punished by death." For nearly 30 years, this Court has held that sections 775.082 and 921.141 do not allow imposing a death sentence upon a jury's verdict of guilt, but only upon a finding of sufficient aggravating circumstances. Dixon v. State, 283 So. 2d 1, 7 (Fla.1973) ("question of punishment is reserved for a post-conviction hearing").

The "explicitly cross reference[d]...statutory provision requiring the finding of an aggravating circumstance before

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<sup>3</sup>Indeed, as Justice Pariente observed in her concurring opinion in Bottoson v. Moore, Case No. SC02-1455, Order Granting Stay of Execution and Setting Oral Argument (July 8, 2002), "Until now our jurisprudence has only ever discussed Apprendi - it has never discussed Ring. Thus, it is this Court's responsibility to explain Florida's sentencing scheme through the lens of Ring and not through the lens of Apprendi." Order at 11.

imposition of the death penalty," Ring, slip op. at 18, requires the judge - after the jury has been discharged and "[n]otwithstanding the recommendation of a majority of the jury" to make two factual determinations. Fla. Stat. sec. 921.141 (3). Section 921.141 (3) provides that "if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts." Ibid. First, the judge must find that "sufficient aggravating circumstances exist" to justify imposition of the death penalty. Ibid. Second, the judge must find in writing that "there are insufficient mitigating circumstances to outweigh the aggravating circumstances." Ibid. "If the court does not make the findings requiring the death sentence, the court shall impose sentence of life imprisonment in accordance with sec. 775.082." Ibid.

Because Florida's death penalty statute makes imposing a death sentence contingent upon findings of "sufficient aggravating circumstances," and "insufficient mitigating circumstances," and gives sole responsibility for those findings to the judge, it violates the Sixth Amendment, as explained in Ring v. Arizona.

**D. The Role of the Jury in Florida's Capital Sentencing Scheme Neither Satisfies the Sixth Amendment nor Renders Harmless the Failure to Satisfy Apprendi and Ring.**

Florida's death penalty statute differs from Arizona in that it provides for the jury to hear evidence and "render an advisory sentence to the court." Fla. Stat. sec. 921.141 (2). A Florida jury's role in the capital sentencing process is insignificant under Apprendi and Ring, however. First, whether one looks to the plain meaning of Florida's death penalty statute, or this Court's cases interpreting it, "under section 921.141, the jury's advisory recommendation is not supported by findings of fact," Combs v. State, 525 So. 2d 853, 859 (Fla. 1988)(Shaw, J. concurring), which is the central requirement of Ring.

This Court has 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 this 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) and (3). Because Florida law does not require

that any number 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, let alone "sufficient aggravating circumstances." 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 United States 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). Because the judge must determine that "sufficient aggravating circumstances exist" "notwithstanding the recommendation of a majority of the jury," Fla. Stat. § 921.141(3), he may consider and rely on 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 also is permitted to consider and rely upon aggravating circumstances that were not considered by 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 that the aggravating circumstance of a previous conviction of a violent felony was proper even though jury was not instructed to consider it; Engle, supra, 438 So. 2d at 813.

Because in Florida, the jury's role is merely advisory and contains no findings upon which to judge the proportionality of the sentence, this Court has recognized that its review of a death sentence is based and dependent on the judge's written findings. Morton, 789 So. 2d at 333 ("The sentencing order is the foundation for this Court's proportionality review, which may ultimately determine if a person lives or dies"); Grossman, 525 So. 2d at 839; Dixon, 283 So. 2d at 8. Thus, the jury's recommendation does not inform this Court's proportionality review.

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. "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 herself bound to follow a jury's recommendation and thus "not make an independent ruling whether the death sentence should be imposed." Ross v. State, 386 So. 2d 1191, 1198 (Fla. 1980). Florida law only requires that the judge consider "the recommendation of a majority of the jury." Fla. Stat. § 921.141(3).

In contrast to the majority vote provision governing the jury's capital sentencing recommendation, Florida law treats guilt verdicts differently. "No verdict may be rendered

unless all of the trial jurors concur in it." Fla. R. Crim. P. 3.440. Florida courts have held that unanimity is required at the guilt phase of a capital case. Williams v. State, 438 So.2d 781, 784 (Fla. 1983). See Flanning v. State, 597 So.2d 864, 866 (Fla. 3<sup>rd</sup> DCA 1992)("It is therefore settled that '[i]n this state, the verdict of the jury must be unanimous' and that any interference with this right denied the defendant a fair trial. Jones v. State, 92 So.2d 261 (Fla. 1956)").

The right to a unanimous jury verdict must extend to each necessary element of the charged crime. As to an element of the offense, this Court has recognized that a judge may not make fact finding "on matters associated with the criminal episode" that "would be an invasion of the jury's historical function". State v. Overfelt, 457 So.2d 1385, 1387 (Fla. 1984). Neither the sentencing statute, case law from this Court, nor the jury instructions in Mr. Rivera's case required that the jurors participating in his penalty phase to concur in finding whether any particular aggravating circumstances had been proved, or "[w]hether sufficient aggravating circumstances exist[ed]," or "[w]hether sufficient aggravating circumstances exist[ed] which outweigh[ed] the mitigating circumstances." Fla. Stat. § 921.141(2).

Because Florida law does not require that twelve jurors

agree that the State has proven an aggravating circumstance beyond a reasonable doubt, or to agree on the same aggravating circumstances beyond a reasonable doubt, or to agree on the same aggravating circumstances when advising that "sufficient aggravating circumstances exist" to warrant 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).

Moreover, it would be impermissible and unconstitutional to retroactively attach greater significance to the jury's advisory sentence than the jury was told at the time. The advisory cannot now be used as the basis for the fact findings required for a death sentence because the statutes requires only a majority vote of the jury in support of that advisory sentence. See id. ('recommendation of a majority of the jury'). In Harris v. United States 2002 WL 1357277, No. 00-10666 (U.S. June 24, 2002), decided 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. In Ring, the Supreme 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. 2002 WL 1357257 at 16. Based on the reasoning 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 in order to authorize a death sentence for Mr. Rivera, death was the presence of “sufficient aggravating circumstances” to warrant the imposition of a death sentence. Fla. Stat. § 921.141(3).<sup>4</sup> However, the jury was not instructed on any standard by which to make this essential determination. As Justice Scalia explained in his opinion for a unanimous Supreme Court in Sullivan v. Louisiana, 508 US. 275 (1993), such an error can never be harmless. “[T]he jury verdict required by the Sixth

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<sup>4</sup>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. sec. 921.141(2). As Justice Pariente observed in her concurring opinion in Bottoson v. Moore, Order Granting Stay of Execution and Setting Oral Argument, Case No. SC02-1455, (July 8, 2002), “In short, what is of concern about Florida’s death penalty scheme in light of Ring is that our statute appears to reverse the traditional roles of the judge and jury in sentencing.” Order at 16.

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:

there has been no jury verdict within the meaning of the Sixth Amendment, [and] the entire premise of Chapman<sup>5</sup> 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 be 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. In a case such as this, where the error is not requiring a jury verdict on the essential elements of a 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., 508 U.S. 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 Amendments. In the same way that the Constitution guarantees a 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

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<sup>5</sup>Chapman v. California, 386 U.S. 18 (1967).

U.S. 404 (1972)(the Sixth and Fourteenth Amendments requires that a criminal verdict must be supported by at least a "substantial majority" of the jurors). And the standards for imposing a death sentence may be even more exacting than the Apodaca standard (which was not a death case) -- but they cannot constitutionally be 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 Johnson v. Louisiana, 406 U.S. 356, 366 (1972)(Blackmun, J., concurring)(a state statute authorizing a 7-5 verdict would violate Due Process Clause of Fourteenth Amendment).

The State was not required to convince the jury that death was a proper sentence beyond a reasonable doubt. The jury in Mr. Rivera's case was not required to make findings 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, slip op. at 16. Florida law makes a death sentence contingent not upon the existence of any individual aggravating circumstance, but on a finding "[t]hat sufficient aggravating circumstances exist." Fla. Stat. §

921.141(3).

In light of the plain language of Florida's death penalty statute, the rules of criminal procedure and 30 years of this Court's 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 that were set forth in Ring v. Arizona. Even if this Court were to redefine the jury's role under Florida law, it would not cure the error leading to Mr. Rivera's death sentence. Mr. Rivera's jury was repeatedly told that its decision was merely "advisory" (R. 148, 1921, 2132) and that "the final decision as to what punishment shall be imposed is the responsibility of the Judge" (R. 1921, 2132). The jury was told that its job was to "render to the Court an advisory sentence" (Id.).

As the United States Supreme Court held in Caldwell v. Mississippi, 472 U.S. 320, 328-29 (1985):

[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.

Were this Court to now conclude that Mr. Rivera's death sentence rests on findings made by the jury after they had been told at the time in conformity with the then controlling

Florida law that a death sentence would not rest upon their recommendation, it would create a retroactive violation of Caldwell.

The decision in Caldwell embodied the principle stated in Justice Breyer's concurring opinion in Ring: "the Eighth Amendment requires that individual jurors to make, and to take responsibility, for, a decision to sentence a person to death." Ring, slip op. at 6 (Breyer, J.). Certainly, Mr. Rivera's jury was not advised that it was the finder of fact in regard to Mr. Rivera's sentence of death.

**E. Mr. Rivera's Death Sentence is Invalid Because the Elements of the Offense Necessary to Establish Capital Murder Were Not Charged in the Indictment.**

In Jones v. United States, 526 U.S. 227 (1999), the United States Supreme Court 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 the indictment, submitted to a jury, and proven beyond a reasonable doubt." Jones, at 243, n. 6. The Supreme Court held in Apprendi v. New Jersey, 530 U.S. 466 (1999), that the Fourteenth Amendment affords citizens the same protections when they are prosecuted under state law.

Apprendi, 530 U.S. at 475-476.<sup>6</sup> Ring v. Arizona, 536 U.S. \_\_\_\_\_, (2002) held that a death penalty statute's "aggravating factors operate as 'the functional equivalent of an element or a greater offense.'" Ring, slip op. at 23 (quoting Apprendi, 530 U.S. 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," in significant part because "elements must be charged in the indictment." Jones, 526 U.S. at 2321.

On June 28, 2002, after the Supreme Court's decision in Ring, the death sentence imposed in United States v. Allen, 247 F. 3d 741 (8<sup>th</sup> Cir. 2001) was vacated when the Supreme Court granted a writ of certiorari, vacated the judgment of the Eighth Circuit upholding the death sentence, and remanded the case for reconsideration in light of Ring's determination that aggravating factors that are prerequisites of a death sentence must be treated as elements of the offense. Allen v. United States, No. 01-7310, 2002 U.S. LEXIS 4893 (June 28, 2002). The question presented to the United States Supreme Court the petition for certiorari review in Allen was:

Whether aggravating factors required for a sentence of death under the Federal Death Penalty Act of

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<sup>6</sup>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.

1994, 18 U.S.C. Section 3591 et seq., are elements of a capital crime and thus must be alleged in the indictment in order to comply with Due Process and Grand Jury clauses of the Fifth Amendment.

The Eighth Circuit had previously rejected Allen's argument because in its view, aggravating factors are not elements of federal capital murder but rather "sentencing protections that shield a defendant from automatically receiving the statutorily authorized death sentence." United States v. Allen, 247 F. 3d at 763.

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 statutes, Fla. Stat. §§ 775.082 and 921.141, make imposing the death penalty contingent upon the government establishing "sufficient aggravating circumstances" to justifying a death sentence, and that the mitigating circumstances are insufficient to outweigh the aggravating circumstance. Fla. Stat. § 921.141(3).

Florida law clearly requires every "element of the offense" to be alleged in the information or the indictment. In State v. Dye, 346 So. 2d 538 (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. at 818. 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 "celebrated purpose" of the grand jury "is to stand between the government and the citizen" and protect individuals from the abuse of arbitrary prosecution. United States v. Dionisio, 410 U.S. 19, 33 (1973); see also Wood v. Georgia, 370 U.S. 375, 390 (1962). The Supreme Court explained that function of the grand jury in Dionisio:

Properly functioning, the grand jury is to be the servant of neither the Government nor the courts, but of the people...As such, we assume that it comes to its task without bias or self-interest. Unlike the prosecutor or policeman, it has no election to win or executive appointment to keep.

Id., 410 U.S. at 35. The shielding function of the grand jury is uniquely important in capital cases. See Campbell v. Louisiana, 523 U.S. 392, 399 (1998)(recognizing that the grand

jury "acts as a vital check against the wrongful exercise of power by the States and its prosecutors" with respect to "significant decisions such as how many counts to charge and...the important decision to charge a capital crime."). At this juncture, 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. Rivera with a crime punishable by death.

The Sixth Amendment requires that "[i]n all criminal prosecutions, the accused shall...be informed of the nature and cause of the accusation...." Under Florida law, a conviction on a capital charge not made by the indictment is a denial of due process of law. State v. Gray, citing Thornhill v. Alabama, 310 U.S. 88 (1984), and DeJonge 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. Rivera's right under Article I, section 15 of the Florida Constitution and the Sixth Amendment to the federal constitution were violated. By omitting any reference to the aggravating circumstance that would be relied upon by the State in seeking a death sentence, the indictment

prejudicially hindered Mr. Rivera "in the preparation of a defense," to a sentence of death. Fla. R. Crim. P. 3.140(o). Habeas relief is warranted.

**E. Mr. Rivera's Death Sentence was Imposed in Violation of the Due Process Clause of the Fifth Amendment and the Jury Trial Right Guaranteed by the Sixth Amendment Because he was Required to Prove the Non-Existence of an Element Necessary to Make him Eligible for the Death Penalty.**

Under Florida law, a death sentence may not be imposed unless the judge finds the fact that "sufficient aggravating circumstances" exist to justify imposing the death penalty. Fla. Stat. § 921.141(3). Because imposing a death sentence is contingent on this fact being found, and the maximum sentence that could be imposed in the absence of that finding is life in prison, the Sixth Amendment requires that the State bear the burden of proving it beyond a reasonable doubt. "Capital defendants ...are entitled to a jury determination of any fact on the legislature conditions an increase in their maximum punishment." Ring., slip op. at 2. Nevertheless, Mr. Rivera's jury was, "Should you find sufficient aggravating circumstances do exist, it will then be your duty to determine whether mitigating circumstances do exist that outweigh the aggravating circumstances." (R. 2134).

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 an 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. For that reason, Winship requires the prosecution to prove the existence of that element beyond a reasonable doubt.

The instruction given Mr. Rivera's jury violated the Due Process Clause of the Fourteenth Amendment of the United States Constitution and the Sixth Amendment's right to trial by jury because it relieved the State of its burden to prove beyond a reasonable doubt the element that sufficient aggravating circumstances existed that outweigh mitigating circumstances. This instruction shifted the burden of proof to the defendant to prove that the mitigating circumstances outweighed sufficient aggravating circumstances. Mullaney v. Wilbur, 421 U.S. 684, 698 (1975).

In Mullaney, the United States Supreme Court held that Maine statutory scheme delineating the crimes of murder and manslaughter violated the Due Process Clause of the Fourteenth Amendment. The Maine law at issue required a defendant to

establish, by a preponderance of the evidence, that he acted in the heat of passion on sudden provocation, in order to reduce a charge of murder to manslaughter. Id., 421 U.S. at 691-692. Like the Florida statute at issue here, "the potential difference in [punishment] attendant to each conviction....may be of greater importance than the difference between guilt or innocence for many lesser crimes." Id. 421 U.S. at 698. The Supreme Court held that the statutory scheme unconstitutionally relieved the state of its burden to prove the element of intent. Id. 421 U.S. at 701-702. The Florida instruction produces the same fatal flaw.

To comply with the Eighth Amendment's requirement that the death penalty be applied only to the worse offenders, Florida adopted Fla. Stat. § 921.141 as a means of distinguishing between death-penalty eligible and non-death penalty eligible murder. State v. Dixon, 283 So. 2d 1, 10 (Fla. 1973). Florida chose to distinguish those for whom sufficient aggravating circumstances outweigh mitigating circumstance from those for whom sufficient aggravating circumstances do not outweigh the mitigating circumstances. Id., 283 So. 2d at 8. Because the former are more culpable, they are subjected to the most severe punishment, death. "By drawing the distinctions, while refusing to require the

prosecution to establish beyond a reasonable doubt the fact upon which it turns, [Florida] denigrates the interests found critical in Winship." Mullaney, 421 U.S. at 698.

**G. The Failure to Require the Jury to Make the Necessary Fact Findings Was Structural Error.**

The United States Supreme Court has determined that not all constitutional error is subject to harmless error analysis. In doing so the Supreme Court split constitutional error into two categories. Those errors that may be reviewed case-by-case to determine if the error was harmless upon the facts of the individual case have been described as "trial error." Arizona v. Fulminante, 499 U.S. 279, 308 (1991). As the Supreme Court has explained:

Trial error "occur[s] during the presentation of the case to the jury," and is amenable to harmless-error analysis because it "may . . . be quantitatively assessed in the context of other evidence presented in order to determine [the effect it had on the trial]."

Brecht v. Abrahamson, 507 U.S. 619, 629 (1993). For these errors, an appellate court may evaluate the course of the trial the basis of the court record to determine whether their effect of the fact finding process at trial was harmless beyond a reasonable doubt. Delaware v. Van Arsdall, 475 U.S. 673, 681 (1986).

The second category of constitutional error has been

defined as including "structural defects in the constitution of the trial mechanism, which defy analysis by 'harmless error' standards." Fulminante, 499 U.S. at 309. Structural defects, subject to automatic reversal have been found where there has been a "complete denial of counsel," a "biased trial judge," "racial discrimination in [the] selection of [the] grand jury," the "denial of self-representation at trial," the "denial of a public trial," and a "defective reasonable-doubt instruction." Neder v. United States, 119 S.Ct. 1827, 1833 (1999).

Beyond this specific laundry list of constitutional errors found to be structural defects, the Supreme Court has on occasion used examples to illustrate what other errors would qualify. In Rose v. Clark, 478 U.S. 570, 578 (1986), the Supreme Court stated:

Similarly, harmless-error analysis presumably would not apply if a court directed a verdict for the prosecution in a criminal trial by jury. We have stated that "a trial judge is prohibited from entering a judgment of conviction or directing the jury to come forward with such a verdict . . . regardless of how overwhelmingly the evidence may point in that direction." United States v. Martin Linen Supply Co., 430 U.S. (1977)(citations omitted). Accord, Carpenters v. United States, 330 U.S. 395 (1947). This rule stems from the Sixth Amendment's clear command to afford jury trials in serious criminal cases. See Duncan v. Louisiana, 391 U.S. 145 (1968). Where the right is altogether denied, the State cannot contend that the deprivation was harmless because the evidence

established the defendant's guilt: the error in such a case is that the wrong entity judge the defendant guilty.

In Sullivan v. Louisiana, 508 U.S. 275, 281

(1993)(quoting Rose v. Clark, 478 U.S. at 577), the Court held that the

[d]enial of the right to a jury verdict of guilt beyond a reasonable doubt is certainly an error of the former sort [structural], the jury guarantee being a "basic protectio[n]" whose precise effects are immeasurable, but without which a criminal trial cannot reliably serve its function.

In Sullivan, the Court found that the failure to provide a jury with a constitutional "reasonable doubt" instruction was a structural defect. In doing so, the Court explained:

It would not satisfy the Sixth Amendment to have a jury determine that the defendant is *probably* guilty, and then leave it up to the judge to determine (as [In re] Winship[, 397 U.S. 358 (1970)] requires) whether he is guilty beyond a reasonable doubt. In other words the jury verdict required by the Sixth Amendment is a jury verdict of guilty beyond a reasonable doubt.

508 U.S. at 278.

The Sixth Amendment error recognized in Ring v. Arizona fits into the category described as structural error. Certainly, there was no verdict finding Mr. Rivera guilty of capital first degree murder (i.e. first degree murder with "sufficient aggravating circumstances"). Unlike the situation in Neder, the element that the jury did not hear separate the lesser included offense from the greater offense.

Moreover as a result of the Ring error, an element ("sufficient aggravating circumstances") was removed from the guilt phase of the trial and was placed in the sentencing portion. With this transfer of an element from one portion of the capital proceeding to another, the structure of the trial changed. Since "sufficient aggravating circumstances" were not treated as an element, the grand jury indictment did include a finding of the element. As a result, Florida law held that the State was under no obligation to give notice of what aggravating circumstances were asserted as present and sufficient to warrant a death sentence. Menendez v. State, 368 So.2d 1278, 1282 n.21 (Fla. 1979). Further, Florida law provided that since the list aggravating circumstances were not elements of the crime, but merely sentencing factors, the list could be expanded without ex post facto consequences. Combs v. State, 403 So.2d 418, 421 (Fla. 1981). And because the aggravating factors were merely sentencing factors, Florida law permitted an element of first degree murder to be repeated as an aggravating circumstance. Johnson v. Singletary, 991 F.2d 663, 669 (11<sup>th</sup> Cir. 1993)("We reject Johnson's argument holding that the fact that an element of the underlying conviction and one of the aggravating factors was duplicative did not invalidate that aggravating factor"}.

Moreover, a failure to find an aggravating circumstance at a defendant's first trial did not constitute an acquittal of that aggravating factor at a retrial or a resentencing. Poland v. Arizona, 476 U.S. 147, 155 (1986) ("under Arizona's capital scheme, the judge's finding of any particular aggravating circumstance does not of itself 'convict' a defendant . . . and the failure to find any particular aggravating circumstance does not 'acquit' a defendant"). And certainly, the jury was not advised of the burden it bore when it considering at the penalty phase whether a majority of them believed "sufficient aggravating circumstances" were present. Caldwell v. Mississippi, 472 U.S. 320 (1985); Combs v. State, 525 So.2d at 857 ("We believe the instructions, in their entirety, properly explain the jury's role under the Florida statute"). Finally, the actual finding of what aggravating circumstances are present and whether they are sufficient to warrant consideration of a death sentence has been made independently by the judge, not the jury. Patterson v. State, 513 So. 2d 1257, 1261 (Fla. 1987)

Under the circumstances presented in Mr. Rivera's case, the Ring error can only be described as structural. Mr Rivera is entitled to habeas relief.

## CLAIM II

APPELLATE COUNSEL FAILED TO RAISE ON APPEAL  
NUMEROUS MERITORIOUS ISSUES WHICH WARRANT  
REVERSAL OF EITHER OR BOTH THE CONVICTIONS  
AND SENTENCES.

### A. INTRODUCTION.

Mr. Rivera had the constitutional right to the effective assistance of counsel for purposes of presenting his direct appeals to this Court. Strickland v. Washington, 466 U.S. 668 (1984). "A first appeal as of right [] is not adjudicated in accord with due process of law if the appellant does not have the effective assistance of an attorney." Evitts v. Lucey, 469 U.S. 387, 396 (1985). The Strickland test applies equally to ineffectiveness allegations of trial counsel and appellate counsel. See Orazio v. Dugger, 876 F. 2d 1508 (11th Cir. 1989).

Because the constitutional violations which occurred during Mr. Rivera's trial were "obvious on the record" and "leaped out upon even a casual reading of transcript," it cannot be said that the "adversarial testing process worked in [Mr. Rivera's] direct appeal[s]." Matire v. Wainwright, 811 F. 2d 1430, 1438 (11th Cir. 1987). The lack of appellate advocacy on Mr. Rivera's behalf is identical to the lack of advocacy present in other cases in which this Court has

granted habeas corpus relief. Wilson v. Wainwright, 474 So.2d 1162 (Fla. 1985). Appellate counsel's failures to present the meritorious issues discussed in this petition demonstrates that their representation of Mr. Rivera involved "serious and substantial deficiencies." Fitzpatrick v. Wainwright, 490 So.2d 938, 940 (Fla. 1986). 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). In light of the serious reversible errors that appellate counsel never raised, there is more than a reasonable probability that the outcome of the appeals would have been different, and a new direct appeal must be ordered.

**B. FAILURE TO RAISE ON APPEAL THE TRIAL COURT'S DENIAL OF MR. RIVERA'S MOTION TO SUPPRESS STATEMENTS AND PHYSICAL EVIDENCE.**

Direct appeal counsel detailed the facts and testimony taken with regard to the motion to suppress. (Appellant's Initial Brief at 1-7). However, no legal argument was made regarding the circuit court's denial of Mr. Rivera's motion.

Despite the fact that Mr. Rivera was not initially read his rights upon arrest at his residence, nor told that the police wanted to talk to him regarding Staci Jazvac, (R. 57-

58), and despite the fact that Mr. Rivera was represented by counsel in another pending case at the time of questioning (R. 34), that he was never advised during the questioning that he was under arrest for the murder of Staci Jazvac, when in fact he was (R. 77), and despite the fact that Mr. Rivera initially interrogated for approximately 14 hours with few breaks, the circuit court orally denied the motion to suppress.

Additionally, Detective Eastwood testified that he did not advise Mr. Rivera of his rights prior to initiating the numerous and never-ending polygraph exams (R. 83). Eastwood only advised him of his rights after he was able to Mr. Rivera to begin hypothesizing information which resembled the Jazvac disappearance (R. 84). Eastwood indicated this occurred after six separate polygraph exams had been administered and after several hours of interrogation (Id.) The circuit court found that Mr. Rivera's statements "were freely and voluntarily made by the defendant after being advised several times of his rights, and the defendant being aware of his rights at no time - not seeking to cut off the interrogation." (R. 97).

Under law established at the time of Mr. Rivera's trial and direct appeal, the trial court erred in denying the motion to suppress Mr. Rivera's statements and the physical evidence seized from his bedroom, and direct appeal counsel was

ineffective in failing to raise this issue. The issue should have been raised on direct appeal to this Court. Mr. Rivera should be provided a direct appeal now in which to raise this obvious issue.

The State cannot establish that the error in denying the motion to suppress had "no effect" on the verdict. State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986). "The harmless error test . . . places the burden on the state, as the beneficiary of the error, to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict or, alternatively stated, that there is no reasonable possibility that the error contributed to the conviction." Id. at 1135. Even though Mr. Rivera's statements were not a confession, they were introduced as inculpatory nonetheless. The state relied upon Mr. Rivera's statements during opening and closing arguments (R. 712 -714; 1798-1804). The State used the statements in conjunction with the argument that pantyhose and women's clothes were found at Mr. Rivera's house and were also found at the scene where the victim's body was found (R. 715). The error was not harmless.

The denial of the motion to suppress statements and physical evidence was preserved at trial and available for appeal. Appellate counsel was ineffective in failing to

present this issue. This Court should grant Mr. Rivera a new direct appeal in which he has an opportunity to fully brief this issue now.

**C. FAILURE TO RAISE ON APPEAL THE STATE'S REPEATED PRESENTATION OF INADMISSIBLE, IRRELEVANT, INFLAMMATORY AND UNFAIRLY PREJUDICIAL EVIDENCE.**

During the trial, the State presented photographs of the victim which were excessive and unnecessarily graphic. Not only did the court allow all of these photographs to go to the jury over defense objection, but the court also permitted the jury to view a graphic and emotional videotape of the crime scene, also over defense objection.

Five photographs of the victim's decomposed body were first shown during the testimony of the medical examiner, Dr. Ronald Wright (R.864-868). In fact, the Judge cautioned the jury regarding the photographs, stating "I warn you ahead of time, members of the jury, they're not very pretty" (R. 864).

During the testimony of Broward Sheriff's Office Detective Haarer, four photographs of the body at the crime scene were shown. Defense counsel objected (R. 923). The objection was overruled (R. 924). Three more close-up photographs of the body were shown to Detective Haarer, to which defense counsel objected and argued that seven photographs depicting the body, in addition to the four shown

to the jury during the medical examiner's testimony, was cumulative (R. 925).

Additionally, Broward Sheriff's Office Detective Scheff testified that a videotape of the scene had been made by the Coral Springs Police Department (R. 1052, 1061). Defense counsel objected to the videotape being played based on the testimony of detectives who stated the videotape was similar to the photographs already shown. Prior to the videotape being played, counsel renewed his previous objection (R. 1080). The trial court overruled the objection and the videotape was played for the jury (R. 1080).

Further prejudicing the jury, the State introduced an extremely prejudicial photograph taken of Mr. Rivera at the time of a separate arrest. The only purpose of this photograph, which pictured Mr. Rivera wearing a woman's bathing suit, was to further inflame the emotions of the jury.

Photographs are admissible into evidence if relevant to any issue to be proven by the state. Bush v. State, 461 So. 2d 936 (Fla. 1984); Gore v. State, 475 So. 2d 1205 (Fla. 1985). In Young v. State, 234 So. 2d 341 (Fla. 1970), the Court explained that photographs were admissible, among other reasons, to establish identification or the cause of death. See State v. Wright, 265 So. 2d 361 (Fla. 1972)(finding

photographs depicting the wounds sustained by the victim admissible).

In Mr. Rivera's case the scene, the process of identifying and the describing the injuries could have been depicted with a fewer number of photographs, and certainly without the videotape. The State introduced, through Detective Haarer, close-up photographs of the victims unbuttoned pants and torn underwear. This was totally irrelevant to any issue in Mr. Rivera's case as he was never charged with sexual battery (R. 2164). Likewise, the photograph which Detective Haarer testified to as depicting the victims detached skull was completely irrelevant to the cause of death, as the medical examiner had already testified that he determined cause of death not by any injuries observed on the decomposed body, but simply through a process of excluding natural causes (R. 869). Additionally, a close-up of the skull had already been presented through the medical examiner for the purpose of dental identification and was therefore duplicitous (R. 864). The remaining photographs introduced through Detective Haarer merely depicted the body from different angles and were wholly cumulative. Finally, the photograph of Mr. Rivera in a women's bathing suit had

absolutely no evidentiary relevance, and was introduced for the sole purpose to inflame the jury.

The trial court's error in admitting irrelevant, inflammatory and unfairly prejudicial photographs was preserved at trial and available for appeal. It was unreasonable for Mr. Rivera's appointed counsel to fail to raise these obvious issues. Appellate counsel was ineffective in failing to present this issues to this Court. This Court should grant Mr. Rivera a new direct appeal in which he has an opportunity to fully brief these issues now.

**D. FAILURE TO RAISE ON DIRECT APPEAL THE TRIAL COURT'S DENIAL OF MR. RIVERA'S MOTION FOR CHANGE OF VENUE.**

The Rivera case generated a massive amount of publicity. This was due to several factors. An intensive police search was conducted for two weeks after the victim disappeared with regular news stories. Mr. Rivera's arrest on February 13, 1986, on other charges resulted in extensive media coverage when he was implicated as a prime suspect in the disappearance of this victim. Despite the fact that the Sun Sentinel on February 17, 1986, reported charges were imminent against Mr. Rivera in the Jazvac case, he was not charged with the case until August 6, 1986, six months later. Sheriff Navarro identified Mr. Rivera by name on February 18, 1986. From that day forth, each time that Mr. Rivera went to court for other

matters more publicity was generated and each time he was identified as the prime suspect in this case.

Finally, he was arrested for the Jazvac case and taken to trial for it after a highly publicized trial in the Jennifer Goetz case. A substantial majority, thirty (30) of the venire members, admitted hearing of Mr. Rivera or the case through the various media. Many venire persons were explicit and candid in what they had heard about the case and how it affected them. At least two jurors who stated that they could not be fair due to adverse publicity were challenged for cause and the challenge was denied. Trial counsel in making his motion expressed concern that the jurors had preformed opinions about the case and could not be impartial. This was totally disregarded by the court. However, the court could hardly render an impartial ruling having already announced his personal belief to the media that "I don't think society should permit him to visit this conduct on anyone else."

Mr. Rivera's statements to the police, including the fact that he was administered sixteen (16) polygraph tests during the lengthy interrogation, were prominently featured in the news articles. The Miami Herald featured a story on June 24, 1986, page 3 B, in which details of the interrogation were released including Detective Thomas Eastwood giving quotes of

statements allegedly made by Mr. Rivera. One of the newspaper accounts to which the jurors were exposed before Mr. Rivera's trial, openly expressed Judge Ferris' bias and opinion:

I believe this man has committed crimes many times in the past, and I believe he has resisted many attempts at rehabilitation, Ferris said. I don't think society should permit him to visit this conduct on anyone else.

Friday, November 21, 1986, the Sun Sentinel, page 8 B.

One venire member believed Mr. Rivera should be convicted based on the media accounts (R. 175-76). According to this juror, the publicity had denigrated the presumption of innocence (R. 177-78). Based on the media reports, the juror believed that Mr. Rivera had been involved in another murder (R. 183-84). Despite these expressions of bias, the court denied the defense challenge for cause (R. 185). Another venire person admitted that she thought Mr. Rivera was guilty, but the court refused to dismiss her for cause (R. 365-66). Another juror honestly admitted that the publicity made it impossible for her to be fair (R. 647-48). A venireman documented the media presence at trial when he noted that "apparently we were filmed or something coming in" to the courthouse (R. 444). In addition to the above persons, at least twenty other members of the venire indicated hearing news or being familiar with the case to some degree. Six of

those persons served on the jury. In response to the massive publicity, once the jury had been selected, the court admonished the jury not to discuss the case or read or listen to news accounts. However, the admonition itself emphasized that it was a "high visibility media case" (R. 691-92).

After the jury was selected, Mr. Rivera asked that the court rule on his motion for change of venue, at which time the court denied it. Prior to the start of testimony, defense counsel again expressed his dissatisfaction with the selected jury, renewing his motion for change of venue (R. 694). The court again denied the renewed motion (R. 699). Additionally, at the start of trial, defense counsel objected to the presence of a group of children, apparently a seventh grade class (R. 699), and asked that they not be permitted to remain in the courtroom (R. 694). The motion was denied (R. 699).

Although it was impossible for Mr. Rivera to get a fair trial under these conditions, his motion for change of venue was denied repeatedly by the trial court (R. 685-86, 694, 698-99). However, Judge Ferris had himself informed the media that in his personal belief, "I don't think society should permit him to visit this conduct on anyone else."

Mr. Rivera was denied his right to a fair and impartial jury and to a jury selected according to the requirements of

due process and equal protection. In Irvin v. Dowd, 366 U.S. 717, 721 (1961), the Supreme Court explained:

In essence, the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, "indifferent" jurors. The failure to accord an accused a fair hearing violates even the minimum standards of due process [citations]. "A fair trial in fair tribunal is a basic requirement of due process.

It simply cannot be said that Mr. Rivera's trial comported with the mandate or spirit of the constitutional guarantee of a "fair tribunal." To assert that Mr. Rivera's jury was "impartial" is to render due process "but a hollow formality." Rideau v. Louisiana, 373 U.S. 723, 726 (1963).

The constitutional standards governing change of venue issues were summarized in Coleman v. Kemp, 778 F.2d 1487 (11th Cir. 1985):

Ultimately, those standards derive from the Fourteenth Amendment's due process clause, which safeguards a defendant's Sixth Amendment right to be tried by "a panel of impartial, `indifferent jurors.'" Irvin v. Dowd, 366 U.S. 717, 722, 81 S. Ct. 1639, 1642, 6 L.Ed.2d 751 (1961). The trial court may be unable to seat an impartial jury because of prejudicial pretrial publicity or an inflamed community atmosphere. In such a case, due process requires the trial court to grant defendant's motion for a change of venue, Rideau v. Louisiana, 373 U.S. 723, 726, 83 S. Ct. 1417, 1419, 10 L.Ed.2d 663 (1963), or a continuance, Sheppard v. Maxwell, 384 U.S. 333, 362-63, 86 S. Ct. 1507, 16 L.Ed.2d 600 (1966). At issue is the fundamental fairness of the defendant's trial, Murphy v. Florida, 421 U.S. 794, 799, 95 S. Ct. 2031, 2035, 44 L.Ed.2d 589 (1975).

Coleman, 778 F.2d at 1489(emphasis added).

In Mr. Rivera's case, the jurors' knowledge of the case and the inflamed community atmosphere deprived Mr. Rivera of a fair trial under both an inherent prejudice and an actual prejudice analysis. See, Heath v. Jones, 941 F.2d 1126, 1134 (11th Cir. 1991). Inherent prejudice occurs when pretrial publicity "is sufficiently prejudicial and inflammatory and the prejudicial pretrial publicity saturated the community where the trials were held." Coleman, 778 F.2d at 1490. Actual prejudice occurs when "the prejudice actually enters the jury box and affects the jurors." Heath, 941 F.2d at 1134. In determining whether a jury was fair and impartial, the reviewing court "must examine the totality of the circumstances surrounding the petitioner's trial." Coleman, 778 F.2d at 1538. "[N]o single fact is dispositive." Id.

An inherent prejudice analysis requires examining whether pretrial publicity was inflammatory and whether that publicity saturated the community. Heath, 941 F.2d at 1134. The facts discussed above demonstrate that Mr. Rivera has met both of those requirements. The inflammatory nature of the pretrial publicity which saturated the community up to and including the time of Mr. Rivera's trial clearly narrated a change of venue. Presumed prejudice has been established here, as in

Coleman, 778 F.2d at 1538.

The prejudice pervading the community "enter[ed] the jury box," Heath, 941 F.2d at 1134, and created actual prejudice. In this context, jurors' statements that they would set aside pretrial knowledge of the case would not have been dispositive. As the Supreme Court explained in Irvin v. Dowd:

No doubt each juror was sincere when he said that he would be fair and impartial to petitioner, but the psychological impact requiring such a declaration before one's fellows is often its father. Where so many, so many times, admitted prejudice, such a statement of impartiality can be given little weight. As one of the jurors put it, 'You can't forget what you hear and see.' With his life at stake, it is not requiring too much that petitioner be tried in an atmosphere undisturbed by so huge a wave of public passion....

Irvin, 366 U.S. at 728. See also, Sheppard v. Maxwell, 384 U.S. 333, 351 (1966) (jurors' statements that they would decide the case only on evidence and that they felt no prejudice toward defendant not dispositive of claim that pretrial publicity deprived defendant of fair trial). In a related context, the Supreme Court has observed:

The actual impact of a particular practice on the judgment of jurors cannot always be fully determined. But this Court has left no doubt that the probability of deleterious effects on fundamental rights calls for close judicial scrutiny. Estes v. Texas, 385 U.S. 532, 85 S. Ct. 1628, 14 L.Ed.2d 543 (1965); In re Murchison, 349 U.S. 133, 75 S. Ct. 623, 99 L.Ed. 942 (1955). Courts must do the best they can to evaluate the likely effects of a particular procedure, based on

reason principle, and common human experience. Estelle v. Williams, 425 U.S. 501, 504 (1976). See also, Holbrook v. Flynn, 475 U.S. 560, 570 (1986).

The denial of the motion for change of venue was preserved at trial and available for appeal. Appellate counsel was ineffective in failing to present this obvious issue in Mr. Rivera's direct appeal. This Court should grant Mr. Rivera a new direct appeal in which he has an opportunity to fully brief these issues now.

**E. FAILURE TO RAISE ON DIRECT APPEAL THE TRIAL COURT'S DENIAL OF MR. RIVERA'S MOTION FOR MISTRIAL BASED ON THE IMPROPER COMMENTS MADE BY SOME OF THE JURORS DURING WITNESS TESTIMONY.**

During the trial a juror commented "I think he did it" loud enough for Mr. Rivera and the other jurors to overhear. The judge also overheard talking from the jury during testimony:

Good morning, members of the jury. Before we start, I want to mention a matter to you. During yesterday's session I heard certain matters coming from somebody on the jury, and I could not distinguish who it was coming from or even what was said. They were comments pertaining, I think, to at least I assume that they might be pertaining to testimony.

(R. 1076). After the judge instructed the jury that commenting on testimony was improper, defense counsel informed the judge that Mr. Rivera had overheard one of the jurors say

"I think he did this" (R. 1077). Defense counsel then suggested that the jurors be questioned or polled to determine if they had already formed any opinions about the case (Id.). After the Judge refused, stating that his previous admonishment was sufficient, defense counsel moved for a mistrial (R. 1078).

Defense counsel again brought the matter to the attention of the court, indicating Mr. Rivera believed it was juror number ten who made the comment "I think he did it" (R. 1113-14). Based on what Mr. Rivera heard and the judge's own indication that he heard the jurors commenting, counsel moved for a mistrial (R. 1114). The court denied the motion for mistrial and counsel's request to question the jurors (Id.). Defense counsel also learned that the same juror, Robert Thornton, who became the foreman, had close ties with Broward County Sheriff Nick Navarro. Specifically, during trial counsel learned that Juror Thornton was or had been a member of the Sheriff's 100 Club, an organization requiring a payment of \$5,000 to join (R. 1232). Counsel also informed the trial court that he had been informed that Juror Thornton had held numerous free parties for the Broward Sheriff's Office at his restaurant (Id.). Although asked about his connections to law enforcement during voir dire, Juror Thornton only stated he

knew Sheriff Navarro in passing and did not have any other substantial ties with law enforcement (R. 1237-8). The judge declined to question the juror (R. 1238).

When the jury returned a verdict after only one and a half hours of deliberating, defense counsel again expressed his concerns that the jury had "formulated their opinions before they entered that room" (R. 1903), and requested to interview the jurors (Id.). The request was denied (Id.).

The case law is clear that premature jury deliberations are improper. See Amazon v. State, 487 So. 2d 8 (Fla. 1986) (determining that a juror's comments to an alternate juror regarding witness testimony was not only improper, but presumptively prejudicial); Scott v. State, 619 So. 2d 508 (Fla. 5<sup>th</sup> D.C.A. 1993)(finding premature deliberations, in the form of jury comments, to be improper); Brooks v. Herndon Ambulance Service, 510 So. 2d 1220 (Fla. 5<sup>th</sup> D.C.A. 1987)(finding jury discussions about the case prior to deliberations improper). In Amazon v. State, this Court found that a juror's comment that a witness' testimony was "impressive" established a prima facie case of potential prejudice. However, the Court determined that the presumption was rebutted by the circumstances in which the comment was made, and ultimately concluded that "the juror's 'impressive'

comment does not show that the juror had developed a premature opinion about the case." Amazon, 487 So. 2d at 12. Unlike the juror comment in Amazon, in Mr. Rivera's case juror Thornton's comment "I think he did this" demonstrates a premature opinion about the case. Because this comment was presumptively prejudice, the burden rests with the State to rebut the presumption of prejudice. Scott v. State, 619 So. 2d 508 (Fla. 5<sup>th</sup> D.C.A. 1993); Brooks v. Herndon Ambulance Service, 510 So. 2d 1220 (Fla. 5<sup>th</sup> D.C.A. 1987). This procedure was not followed in Mr. Rivera's case (R. 1078, 1114).

Here, where Mr. Rivera presented the trial court with information that Juror Thornton concealed his involvement in the Sheriff's 100 Club and his ties with the Broward Sheriff's Office, it cannot be said that Thornton's premature opinion was based solely on the testimony presented at trial. As in Brooks v. Herndon Ambulance Service, where it is unknown whether the juror was relying on information from outside the trial

an interview is necessary here to determine whether the opinion expressed by the offending juror was merely his own based upon what he heard from the trial or whether he said it came from outside sources. More precisely the question is what impression his statements made upon the other jurors - were they influenced by his comments in the belief the comments were based on extrinsic matters.

510 So. 2d 1220, 1221 (Fla. 5<sup>th</sup> D.C.A. 1987). Likewise, in Scott v. State, the trial court conducted a post evidentiary hearing to address the defendant's claims of premature deliberations. The hearing demonstrated that comments were in fact made regarding the defendant's guilt or innocence, however the comments were terminated quickly and did not contribute to the ultimate verdict. In Mr. Rivera's case the effect of Thornton's comments cannot be determined from the record. The trial court was obligated to question Juror Thornton to determine the basis of his comment, and to question the remaining jurors to determine the effect to which they were influenced by his opinion.

The trial court's denial of Mr. Rivera's motion for mistrial and subsequent request to question the jurors regarding improper comments was preserved at trial and available for appeal. Appellate counsel was ineffective in failing to present this OBVIOUS issue. This Court should grant Mr. Rivera a new direct appeal in which he has an opportunity to fully brief these issues now.

#### **F. CONCLUSION**

Numerous meritorious arguments were available for direct appeal, yet appellate counsel unreasonably failed to present these issues to this Court. Appellate counsel's performance

was deficient. The unraised issues identified here, singularly or cumulatively, demonstrate that Mr. Rivera did not receive that to which he was entitled, the effective assistance of appellate counsel. Accordingly, he should be provided the opportunity to know to present this issues now. This Court should grant Mr. Rivera a new direct appeal in which these issues could be fully briefed and argued to this Court.

**CONCLUSION**

For all of the reasons discussed herein, Mr. Rivera respectfully requests the Court to grant him habeas corpus relief.

I HEREBY CERTIFY that a true copy of the foregoing Petition for Habeas Corpus has been furnished by United States Mail, first class postage prepaid, to all counsel of record on August 12, 2002.

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**CERTIFICATE OF COMPLIANCE**

The undersigned counsel certifies that this petition is  
typed using Courier 12 font.

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MARTIN J. MCCLAIN

