

IN THE SUPREME COURT OF FLORIDA

NO. SC02-949

GEORGE MICHAEL HODGES,

Petitioner,

v.

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

Respondent.

PETITION FOR WRIT OF HABEAS CORPUS

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PRELIMINARY STATEMENT

This is Mr. Hodges's first habeas corpus petition in this Court. Art. 1, Sec. 13 of the Florida Constitution provides: "The writ of habeas corpus shall be grantable of right, freely and without cost." This petition for habeas corpus relief is being filed in order to address substantial claims of error under the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, claims demonstrating that Mr. Hodges was deprived of the right to a fair, reliable, and individualized sentencing proceeding and that the proceedings resulting in his conviction and death sentences violated fundamental constitutional imperatives.

Citations shall be as follows: The record on appeal concerning the original jury trial proceedings shall be referred to as "R." followed by the appropriate page number(s). The Supplemental Transcript of Record will be referred to as "Supp. R." followed by the appropriate page number(s). The postconviction record on appeal will be referred to as "PC-R." followed by the appropriate page number(s).

All other references will be self-explanatory or otherwise explained herein.

INTRODUCTION

Significant errors which occurred at Mr. Hodges's capital trial and sentencing were not presented to this Court on direct appeal due to the ineffective assistance of appellate counsel. Appellate counsel failed to challenge constitutionally flawed penalty phase jury instructions. In addition, trial

counsel preserved numerous issues by objection and which were not raised on appeal.

The issues which appellate counsel neglected demonstrate that counsel's performance was deficient and that the deficiencies prejudiced Mr. Hodges. "[E]xtant legal principles...provided a clear basis for ... compelling appellate arguments[s]." Fitzpatrick, 490 So. 2d at 940. 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). As this petition will demonstrate, Mr. Hodges is entitled to habeas relief.

PROCEDURAL HISTORY

The Circuit Court for the Thirteenth Judicial Circuit, in and for Bay County, Florida, entered the judgment of convictions and death sentence at issue. Mr. Hodges was charged by indictment dated February 22, 1989, with one count of first degree murder in the death of Betty Ricks. He pled not guilty.

Mr. Hodges' case proceeded to jury trial on July 10, 1989. The jury found Mr. Hodges guilty of first degree murder and recommended a death sentence. The trial court imposed the sentence of death and on direct appeal, the Florida Supreme Court affirmed both the conviction and the death sentence.

Hodges v. State, 595 So. 2d 929 (Fla. 1992).

Thereafter, the United States Supreme Court granted certiorari, vacated and remanded the case again in light of the Court's decision in Espinosa v. Florida. See Hodges v. Florida, 113 S. Ct. 33,

121 L.Ed.2d 6 (1992). On remand from the United States Supreme Court, the Florida Supreme Court affirmed the death sentence. Hodges v. State, 619 So. 2d 272 (Fla. 1993).

On February 28, 1997, Mr. Hodges filed an amended motion for postconviction relief under Florida Rule of Criminal Procedure 3.850. On October 29, 1999, the circuit court issued an order, directing that an evidentiary hearing be held on several claims: failure to adequately investigate and prepare Mr. Hodges' case in challenge to the state's case and failure to zealously advocate on behalf of Mr. Hodges; failure to investigate and present mitigating evidence of Mr. Hodges's mental health and difficult childhood; failure to object or argue to the court that the standard employed by the sentencing judge improperly shifted the burden to Mr. Hodges to prove that death was inappropriate. (PC-R. 210-230)

The evidentiary hearing was conducted on November 2 and 3, 2000 and January 29, 2001. On June 6, 2001, the circuit court entered an order that denied Mr. Hodges relief.

Mr. Hodges now files this petition seeking habeas corpus relief. With this petition, Mr. Hodges simultaneously files an appeal from the circuit court's denial of postconviction relief.

**JURISDICTION TO ENTERTAIN PETITION
AND GRANT HABEAS CORPUS RELIEF**

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

Jurisdiction in this action lies in this Court, see, e.g., Smith v. State, 400 So. 2d 956, 960 (Fla. 1981), for the fundamental constitutional errors challenged herein arise in the context of a capital case in which this Court heard and denied Mr. Hodges's direct appeal. See Wilson, 474 So. 2d at 1163; 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. Hodges to raise the claims presented herein. See, e.g., Way v. Dugger, 568 So. 2d 1263 (Fla. 1990); Downs v. Dugger, 514 So. 2d 1069 (Fla. 1987); Riley v. Wainwright, 517 So. 2d 656 (Fla. 1987); Wilson, 474 So. 2d at 1162.

This Court has the inherent power to do justice. The ends of justice call on the Court to grant the relief sought in this case, as the Court has done in similar cases in the past. This petition pleads claims involving fundamental constitutional error. See Dallas v. Wainwright, 175 So. 2d 785 (Fla. 1965); Palmes v. Wainwright, 460 So. 2d 362 (Fla. 1984). The Court's exercise of its habeas corpus jurisdiction, and of its authority to correct constitutional errors such as those herein pled, is warranted in this action. As the petition shows, habeas corpus relief would be proper on the basis of Mr. Hodges's claims.

GROUND FOR HABEAS CORPUS RELIEF

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

CLAIM I

EVIDENCE OF A COLLATERAL CRIME WAS ADMITTED AT MR. HODGES' TRIAL CONTRARY TO A PRETRIAL STIPULATION AND IN VIOLATION OF MR. HODGES' CONSTITUTIONAL RIGHTS UNDER THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS. APPELLANT COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE THIS ISSUE ON DIRECT APPEAL.

In order to be admissible, evidence must be relevant. See § 90.402 Fla. Stat. (1989). However, Section 90.403 Florida Statutes (1989) restricts this general proposition, providing as follows:

"Relevant evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative evidence."

90.403 Fla. Stat. (1989) The statute directs the trial court to engage in a balancing test. See Steverson v. State, 695 So. 2d 687, 688 (Fla. 1997).

Prior to Mr. Hodges' trial, the state filed a notice of

intent to rely on Williams rule evidence. (R. 853) In response, the defense filed a Motion in Limine objecting to any statements regarding the indecent exposure incident involving George Hodges and the victim, Betty Ricks. (R. 842) The defense argued in its motion that "any evidence of this alleged indecent exposure charged [sic] committed by the defendant is relevant solely to prove bad character or propensity on behalf of the defendant and is therefore inadmissible." Id. Subsequently, the state and the defense agreed to stipulate to the fact that George Hodges had been charged with a crime and that Betty Ricks was adamant about prosecution. (R.236-237)

At trial, however, the state brought up the specifics of the indecent exposure incident on two separate occasions. The first time occurred during the opening statement:

MR. BENITO: In November, two months earlier, she had charged the defendant with indecent exposure for an incident occurring at the Beverage Barn in November of '86. Detective Orzechowski from the Plant City Police department investigated that incident in November. He gave her a report, a request to prosecute. She advised Detective Orzechowski she wanted to prosecute. Detective Orzechowski questioned the defendant regarding that incident in November of '86. And he told Detective Orzechowski-

MR. CONRAD: Judge, if I may, I object at

this point and would like to approach the bench.

THE COURT: All right, sir.

MR. CONRAD: Judge, if Mr. Benito is going to get anything the defendant said in relation to the actual charge of indecent exposure, I would object to those statements as irrelevant. And the thing I was concerned about was that he in some way was going to try the indecent exposure charge as a way of proving Mr. Hodges guilty of the murder.

In other words, if he proved the indecent exposure, he must be guilty of the murder. That is certainly not probative of that. I think it's irrelevant to try to prove that. I think except for the stipulation we had agreed upon, he was in fact charged, and then she was adamant about the prosecution. Anything relating to the particular facts of this case or that case are irrelevant to proving or not proving Mr. Hodges committed first degree murder. The only reason I object at this point was for him to present any information to the jury which would not be presented during trial. That is what the basis of my objection is.

THE COURT: Mr. Benito?

MR. BENITO: The state's evidence is going to show that this defendant felt he had not done this. And that it angered him that she wanted to continue with the prosecution. He felt that it was an accident. She wanted to charge him. That is what led to the murder. If I leave that up in the air, I don't want the jury-he said it was an accident. It's very important for the jury to know.

MR. CONRAD: Judge there is not any evidence

that I am aware of that he was angered over it. There is no testimony that is going to be presented that he was angered at anyone. The only thing that ever came out that he said it was an accident, he is just going to infer again, it's Mr. Benito's argument that he is guilty of the charge. He must be guilty of the first degree murder charge.

MR. BENITO: I am not-

MR. CONRAD: I want to try and ward it off.

THE COURT: I understand your objection. Objection is overruled at this point. I have already instructed the jury and will instruct them again later on that what the lawyers say is not evidence. They must listen to the evidence and make their decision from that evidence.

(R. 236-239) Later, during Detective Orzechowski's testimony, the state again sought to elicit information regarding the indecent exposure incident. Defense counsel again stated his objection and his belief that the testimony was irrelevant:

MR. CONRAD: I would like to again impose the same objection I made during opening. Whether Mr. Hodges made statements in reference to indecent exposure charges is not relevant to this case. He is attempting to have that case tried in front of the jury, which I think is improper. The only thing we talked about in the motion in limine was that the simple fact that he was charged and she was adamant about prosecution. Anything after that, Judge, I think, is irrelevant.

(R. 298). The judge once again overruled the objection and

Detective Orzechowski was permitted to testify regarding the indecent exposure charge and Mr. Hodges' comments to him regarding the incident.

In Mr. Hodges' case the prosecutor was permitted to try the indecent exposure charge before the jury, just as defense counsel feared. It was an abuse of discretion on the part of the trial judge to admit the evidence, given that it was clearly "unnecessary and inflammatory" information designed to prejudice the jury. See Steverson v. State, 695 So.2d 687, 690 (Fla. 1997)(finding that twelve photographs of the victims injuries alone were so unnecessary and inflammatory they could have unfairly prejudiced the jury). No evidence was ever presented that Mr. Hodges was angry about the charge, despite what the state suggested was its basis for permitting the evidence. The purpose of the pre-trial stipulation was to ensure that the specifics of the incident and Mr. Hodges conversation with the Detective would not be admitted. The stipulation included an agreement that Ms. Ricks was adamant about pressing charges, Mr. Benito's other stated basis for wanting the testimony presented. In truth, what the state wanted was for the jury to view Mr. Hodges as a man of bad character and questionable morals. The state wanted the jury to convict Mr. Hodges of the indecent exposure charge in their

minds and presume from there that he must have killed Betty Ricks as well. In this case it is clear that the probative value was far outweighed by its prejudicial effect on the jury and that the trial judge erred in admitting the testimony. Further, it is well settled that "The admission of improper collateral crime evidence is presumed harmful error because of the danger that a jury will take bad character or propensity to crime thus demonstrated as evidence of guilt of the crime charged." Peek v. State, 488 So. 2d. 52, 56 (Fla. 1986), quoting Straight v. State, 397 So. 2d. 903, 908 (Fla.) cert. denied, 454 U.S. 1022, 102 S.Ct. 556, 70 L.Ed.2d 418 (1981). In Mr. Hodges' case, the trial judge did not issue any instruction to the contrary. The jury was permitted to consider this information however they saw fit. Consequently, Mr. Hodges was greatly prejudiced.

The presentation of this prejudicial evidence resulted in constitutional error which goes to the heart of the fundamental fairness and reliability of the trial verdict. Appellate counsel was ineffective for failing to raise this issue on direct appeal. Habeas relief is warranted.

CLAIM II

THE TRIAL COURT ERRONEOUSLY EXCLUDED JUROR ALVAREZ-GIL FOR CAUSE BASED ON HER GENERAL CONCERNS REGARDING THE DEATH PENALTY IN VIOLATION OF MR. HODGES' CONSTITUTIONAL RIGHTS TO A FAIR TRIAL AND DUE PROCESS OF LAW UNDER THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS. APPELLATE COUNSEL WAS

**INEFFECTIVE FOR FAILING TO RAISE THIS ISSUE
ON DIRECT APPEAL.**

"[A] sentence of death cannot be imposed or recommended if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction." Witherspoon v. Illinois, 391 U.S. 510, 522 (1968). A potential juror may be excluded from jury service if the "juror's views [on the death penalty] would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" Wainwright v. Witt, 469 U.S. 412, 420 (1985). A violation of Witherspoon requires automatic reversal of the death sentence. Gray v. Mississippi, 481 U.S. 648 (1987); Davis v. Georgia, 429 U.S. 122 (1976).

In Farina v. State, 680 So. 2d 392 (1996) this Court vacated Anthony Farina's death sentence after finding that the trial court impermissibly excused a prospective juror for cause based on her views of the death penalty. As in Farina, in Mr. Hodges' case, the trial court erroneously excused venireperson Alvarez-Gil for cause. Though Ms. Alvarez-Gil indicated to the state during her initial questioning that she

could not impose the death penalty, when questioned by defense counsel Ms. Alvarez-Gil indicated that she could follow the law:

MR. PERRY: You understand that it's important that Mr. Hodges have a jury that is a cross-section of the community, that he has a cross-section of the community judging him in this particular offense. You will take an oath later if you were selected as a juror, just like the Judge has taken an oath, the attorneys have taken an oath, to uphold the law.

Could you by taking the oath put aside your personal feelings and render an objective decision based on the aggravating and mitigating circumstances that are presented to you?

MS. ALVAREZ-GIL: I don't believe that I can give an opinion to do something I don't believe in. In other words, when it got to that point, I don't know. Are you allowed to abstain, since there are twelve others?

MR. PERRY: Let me ask you this: You are aware that as Mr. Benito has indicated, that your verdict will be an advisory verdict. The ultimate decision is up to the judge.

MS. ALVAREZ-GIL: I understand.

MR. PERRY: He will give great weight to the decision. The ultimate decision is up to him. Looking at it from that angle, you believe you could make an advisory decision one way or the other, if you felt the facts warranted it, to vote for the death penalty, if you felt the facts didn't warrant the death penalty, vote against it?

MS. ALVAREZ-GIL: I can advise that particular sentence.

(R. 131)

In Farina, this Court stated, "A review of Hudson's voir dire questioning reveals that while Hudson may have equivocated about her support for the death penalty, her views on the death penalty did not prevent or substantially impair her from performing her duties as a juror in accordance with her instructions and oath." Farina, 680 So. 2d at 398. Similarly, in this case, Ms. Alvarez-Gil indicated that though she held views generally against the death penalty, she would be able to render a verdict recommending death if the facts warranted it. Thus, Ms. Alvarez-Gil was qualified to serve under the *Witherspoon-Witt* standard.

This Court has stated that deference must be given to the trial judge's determination of whether a prospective juror is qualified, unless the Court finds an abuse of discretion. See Farina, citing Johnson v. State, 608 So. 2d 4, 8 (Fla. 1992) *cert. denied*, 508 U.S. 919, 113 S. Ct. 2366, 124 L.Ed.2d 273 (1993). The facts in this case support a finding that the trial judge abused his discretion. Ms. Alvarez-Gil was the very first juror to be struck:

THE COURT: Beginning with the state, first challenge for cause.

MR. BENITO: Number 2.

THE COURT: Reason?

MR. BENITO: Views on the death penalty.

THE COURT: Defense? Any response?

MR. PERRY: Judge, I believe her answers indicated that she vacillated on that particular point.

THE COURT: She will be excused for cause.

(R. 138)

After this initial strike, the state challenged a second prospective juror on the same basis. In response, Mr. Hodge's trial counsel objected, stating, "Judge, the only comment would be that we are in a position where Mr. Benito-I think cause allows it-is striking everyone who has reservations about the death penalty. I think its going to invalidate our defendant's right to a fair cross-section of the community."

(R. 139) Despite defense counsel's continuing objection, the trial judge went on to grant the state's strikes for cause on each of the prospective jurors who indicated reservations about the death penalty. As such, Mr. Hodges did not receive a fair cross-section of the community on his jury, violating his rights to due process and a fair trial.

The erroneous exclusion of Ms. Alvarez-Gil is a violation of a fundamental right. "The right to an impartial jury is so basic to a fair trial that its infraction cannot be considered harmless." Farina at

398, citing Gray v. Mississippi, 481 U.S. at 668, 107 S.Ct. At 2056. The failure of appellate counsel to raise this issue denied Mr. Hodges the effective assistance of counsel. Habeas relief is warranted.

CLAIM III

**THE FLORIDA DEATH PENALTY SENTENCING
STATUTE AS APPLIED IS UNCONSTITUTIONAL
UNDER THE SIXTH, EIGHTH, AND FOURTEENTH
AMENDMENTS OF THE UNITED STATES
CONSTITUTION AND CORRESPONDING PROVISIONS
OF THE FLORIDA CONSTITUTION.¹**

In Jones v. United States, the United States Supreme Court held that "under the Due Process Clause of the Fifth 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

¹ In order to ensure that Mr. Hodges has properly pled this claim, he brings it in this petition for writ of habeas corpus as well as his appeal from the circuit court's denial of postconviction relief. This Court has addressed Apprendi claims in several petitions for writ of habeas corpus: Mills v. Moore, 786 So. 2d 532 (Fla. 2001); Mann v. Moore, 794 So. 2d 595 (Fla. 2001); Brown v. Moore, 800 So. 2d 223 (Fla. 2001).

However, Mr. Hodges recognizes that claims of fundamental changes in the law are generally raised in motions for postconviction relief under Florida Rule of Criminal Procedure 3.850. See Adams v. State, 543 So. 2d 1244 (Fla. 1989); Dixon v. State, 730 So. 2d 265 (Fla. 1999). Because Mr. Hodges is currently appealing the circuit court's denial of his motion for postconviction relief, he does not have an opportunity to raise this claim in such a motion. If this claim must be brought in a motion for postconviction relief, Mr. Hodges requests that this Court relinquish jurisdiction, so that he may file such a motion in circuit court.

n.6 (1999). Subsequently, in Apprendi v. New Jersey, the Court held that the Fourteenth Amendment affords citizens the same protections under state law. See Apprendi v. New Jersey, 530 U.S. 466 (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 Florida’s 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.

As in Apprendi, in Mr. Hodges’s case, the aggravating sentencing factors came into play only after he was found guilty and the maximum statutory penalty, based upon the guilty verdict, was increased from life imprisonment to death. At the time of Mr. Hodges’s penalty phase, Florida Statutes, Section 775.082(1) (1989), 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 §§ 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) (1989).

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. See State v. Dixon, 283 So. 2d 1, 9 (Fla. 1973); Fla. Stat. § 775.082(1) (2001); Fla. Stat. §§ 921.141(2)(a), (3)(a) (2001). Thus, Florida capital defendants are not eligible for a 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. See 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, a hate crime sentencing enhancement was

applied after the defendant was found guilty by the jury and the judge increased the sentenced the statutory maximum penalty by up to ten years. Apprendi, 120 S. Ct. at 2351. The Apprendi Court clearly dispensed with the fiction that the sentencing enhancement was not an element which received Sixth Amendment protections. “[I]t can hardly be said that the potential doubling of one’s sentence from 10 to 20 years 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. Similarly, in Mr. Hodges’s case, the aggravators were applied only after he was found guilty, yet it was these aggravators that increased the statutory maximum penalty to which he could be sentenced based on the jury’s guilty verdict from life imprisonment to death. Certainly, the difference between life and death has more than a 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).

Under Apprendi's reasoning, aggravating factors in the Florida death penalty scheme are elements of a capital crime which must be decided by a unanimous jury. Florida Rule of Criminal Procedure 3.440, requires unanimous jury verdicts on criminal charges. However, in capital cases, this Court permits jury recommendations of death based upon a simple majority vote. See Fla. Stat. §§ 921.141(1), (2) (1981); Walton v. Arizona, 497 U.S. 639, 648 (1990). The trial judge instructed Mr. Hodges' jury of this: "In these proceedings, it is not necessary that the advisory sentence of the jury be unanimous." (R. 728) Consequently, Mr. Hodges was sentenced to death by only ten jurors. (R. 742)

Moreover, this Court does not require jury unanimity as to the existence of specific aggravating factors. In Florida, it is the judge and not the jury who finds the specific aggravating factors that make a person death-eligible. See Fla. Stat. §§ 921.141(1), (2) (1981); Walton v. Arizona, 497 U.S. 639, 648 (1990). For Sixth Amendment purposes, these aggravators are elements of a death penalty offense. Consequently, the procedure followed in the sentencing phase should receive the protections guaranteed by Apprendi. The trial court's weighing of the jury's recommendation does not change that. See Walton, 497 U.S. at 648. Although this Court

has said that Apprendi did not overrule Walton, see Mills v. Moore, 786 So. 2d 532, 537 (Fla. 2001), and Mr. Hodges contends that the Florida death penalty scheme is unconstitutional as applied, the United States Supreme Court has granted certiorari in Ring v. Arizona to decide precisely that question. See State v. Ring, 25 P.3d 1139 (Ariz. 2001), cert. granted, Ring v. Arizona, 122 S. Ct. 865 (2001).²

In fact, Mr. Hodges' jury recommended a death sentence by a vote of ten to two. (R. 742) Despite a lack of mitigating factors, two jurors either did not find the aggravators had been proven beyond a reasonable doubt or did not find that Mr.

² On January 11, 2002, the United States Supreme Court granted Timothy Stuart Ring's petition for Writ of Certiorari. The petition raised, as its sole issue, the question of whether Walton v. Arizona, 479 U.S. 639 (1990), should be overruled in light of the Court's subsequent holding in Apprendi that "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" violates the defendant's Sixth Amendment right to a jury trial. Apprendi, 530 U.S. at 490. The Florida capital sentencing scheme is in significant part subject to the same constitutional inadequacies as Arizona's capital sentencing scheme, and the Ring petition identified Florida as one of nine states whose capital sentencing schemes have questionable constitutional underpinnings pursuant to the language of Apprendi. As a result of the implications Ring could have on Florida's death penalty scheme, the United States Supreme Court recently stayed the executions of two Florida inmates until an opinion is reached in Ring. See King v. Florida, 122 S. Ct. 932 (2002); Bottoson v. Florida, 2002 WL 181142 (2002).

Hodges' situation required the imposition of death.³ In either event, it is undisputed that the aggravating factors which made Mr. Hodges eligible for a death sentence were not found by a unanimous jury to be proven beyond a reasonable doubt. As such, his sentence was unconstitutionally imposed and must be vacated.

In addition to not requiring jury unanimity of a sentence nor jury unanimity of each aggravator, this Court does not require that the prosecution inform the defendant in the indictment which aggravating factors will be presented. The indictment against Mr. Hodges alleged the following:

GEORGE MICHAEL HODGES, on the 8th day of January, 1997, in the county and state aforesaid, from a premeditated design to effect the death of BETTY RICKS, a human being, did unlawfully injure or wound the said BETTY RICKS by shooting her with a firearm, and as a result thereof the said BETTY RICKS did languish and die on the 9th day of January 1997, contrary to the form of the statute in such cases made and provided, to-wit: Florida Statute 782.04.

(R. 815)

In response to this indictment, Mr. Hodges's trial counsel filed a motion for statement of particulars, alleging that "[T]he Information fails to inform the defendant of the particulars of the offense sufficiently to enable him to

³ Likewise, on Mr. Hodges' direct appeal to the Court, Justices Overton, Barkett, and Kogan found a death sentence to be inappropriate and unwarranted. See Hodges, 596 So. 2d at 1036.

prepare his defense..." (R. 811) The court denied this motion.

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. See Apprendi, 530 U.S. at 494-95. This did not occur in Mr. Hodges's case, thus, the death sentence against him is unconstitutional and habeas relief is warranted.

CLAIM IV

MR. HODGES' SENTENCE OF DEATH VIOLATES THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS BECAUSE THE PENALTY PHASE JURY INSTRUCTIONS SHIFTED THE BURDEN TO MR. HODGES TO PROVE THAT DEATH WAS INAPPROPRIATE AND BECAUSE THE SENTENCING JUDGE HIMSELF EMPLOYED IMPROPER STANDARDS IN SENTENCING MR. HODGES TO DEATH. APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE THIS ISSUE ON APPEAL.

Under Florida law:

[T]he state must establish the existence of one or more aggravating circumstances before the death penalty could be imposed
...

[S]uch a sentence could be given if the state showed the aggravating circumstances outweighed the mitigating circumstances.

State v. Dixon, 283 So. 2d 1 (Fla. 1973)(emphasis added). This straightforward standard was never applied at the penalty phase of Mr. Hodges' capital proceedings. To the contrary, the court shifted to

Mr. Hodges the burden of proving whether he should live or die.

In Hamblen v. Dugger, 546 So. 2d 1039 (Fla. 1989), a capital post-conviction action, the Florida Supreme Court addressed the question of whether the standard employed shifted to the defendant the burden on the question of whether he should live or die. The Hamblen opinion reflects that these claims should be addressed on a case-by-case basis in capital post-conviction actions.

Shifting the burden to the defendant to establish that mitigating circumstances outweigh aggravating circumstances conflicts with the principles of Mullaney v. Wilbur, 421 U.S. 684 (1975), and Dixon, for such instructions unconstitutionally shift to the defendant the burden with regard to the ultimate question of whether he should live or die. In so instructing a capital sentencing jury, a court injects misleading and irrelevant factors into the sentencing determination, thus violating Caldwell v. Mississippi, 472 U.S. 320 (1985), Hitchcock v. Dugger, 107 S. Ct. 1821 (1987), and Maynard v. Cartwright, 108 S. Ct. 1853 (1988).

Judicial instructions at Mr. Hodges' capital penalty phase required that the jury impose death unless mitigation was not only produced by Mr. Hodges, but also unless Mr. Hodges proved that the mitigation he provided outweighed and overcame the aggravation. The trial court then employed the same standard in sentencing Mr. Hodges to death. See Zeigler v. Dugger, 524 So. 2d 419 (Fla. 1988)(trial court is presumed to apply the law in accord with manner in which jury was instructed). This standard obviously shifted the burden to Mr. Hodges to establish that life was the appropriate sentence and limited consideration of mitigating evidence to only those factors proven sufficient to outweigh the aggravation. The standard given to the jury and which the trial court followed violated state and federal law. According to this standard, the jury could not "full[y] consider[]" and "give effect

to" mitigating evidence. Penry, 109 S. Ct. 2934, 2951 (1989). This burden-shifting standard thus "interfered with the consideration of mitigating evidence." Boyde v. California, 110 S. Ct. 1190, 1196 (1990). Since "[s]tates cannot limit the sentencer's consideration of any relevant circumstance that could cause it to decline to impose the [death] penalty," McCleskey v. Kemp, 481 U.S. 279, 306 (1987), the argument and instructions provided to Mr. Hodges' sentencing jury, as well as the standard employed by the trial court, violated the Eighth Amendment's "requirement of individualized sentencing in capital cases [which] is satisfied by allowing the jury to consider all relevant mitigating evidence." Blystone v. Pennsylvania, 110 S. Ct. 1078, 1083 (1990). See also Lockett v. Ohio, 438 U.S. 586 (1978); Hitchcock v. Dugger, 481 U.S. 393, 107 S. Ct. 1821 (1987). The instructions gave the jury inaccurate and misleading information regarding who bore the burden of proof as to whether a death recommendation should be returned.

As explained herein, the standard which the judge instructed Mr. Hodges' jury, and upon which the judge relied, is a distinctly egregious abrogation of Florida law and therefore Eighth Amendment principles. See McKoy v. North Carolina, 110 S. Ct. 1227, 1239 (1990)(Kennedy, J., concurring)(a death sentence arising from erroneous instructions "represents imposition of capital punishment through a system that can be described as arbitrary or capricious"). In this case, Mr. Hodges, the capital defendant, was required to prove that life was the appropriate sentence, and the jury's and judge's consideration of mitigating evidence was limited to mitigation "sufficient to outweigh" aggravation.

In his penalty phase instructions to the jury, the judge repeatedly instructed the jury that it was their job to determine if the mitigating circumstances outweighed the aggravating circumstances. Beginning with the court's opening of the penalty phase, the jury was told:

As I have said, ladies and gentlemen, the State and the defendant may now present evidence relative to the nature of the crime and the character of the defendant, Mr. Hodges. You are instructed that this evidence, when considered with the evidence that you have already heard, is presented in order that you might determine, first, whether sufficient aggravating circumstances exist that would justify the imposition of the death penalty as I described to you a moment ago. And, second, whether there are mitigating circumstances sufficient to outweigh the aggravating circumstances, if any.

(R. 680)(emphasis added). This unconstitutional standard was repeated after evidence was presented during the penalty phase.

[I]t 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.

(R. 725) (emphasis added). This erroneous standard was then repeated to the jury by the judge later in his instructions:

Should you find sufficient aggravating circumstances do exist, it will then be your duty to determine whether mitigating circumstances exist that outweigh the aggravating circumstances.

(R. 726)

Finally, the trial court relied on this erroneous standard in its written findings of fact sentencing Mr. Hodges to death.

Having so found, the Court has then attempted to find mitigating circumstances sufficient in weight to offset the above aggravating circumstances so as to prevent imposition of the death penalty.

(R. 907)

After numerous unconstitutional instructions, there can be no doubt that the jury understood that Mr. Hodges had the burden of proving whether he should live or die.

The instructions violated Florida law and the Eighth and Fourteenth Amendments in two ways. First, the instructions shifted the burden of proof to Mr. Hodges on the central sentencing issue of whether he should live or die. Under Mullaney, this unconstitutional burden-shifting violated Mr. Hodges' Due Process and Eighth Amendment rights. See also Sandstrom v. Montana, 442 U.S. 510 (1979); Jackson v. Dugger, 837 F.2d 1469 (11th Cir. 1988). The jury was not instructed in conformity with the standard set forth in Dixon. Since the Jury in Florida is a sentencer it must be properly instructed. Johnson v. Singletary, 612 So. 2d 575 (Fla. 1993).

Second, in being instructed that mitigating circumstances must outweigh aggravating circumstances before the jury could recommend life, the jury was effectively told that once aggravating circumstances were established, it need not consider mitigating circumstances unless those mitigating circumstances were sufficient to outweigh the aggravating circumstances. Cf. Mills v. Maryland, 108 S. Ct. 1860 (1988); Hitchcock v. Dugger, 481 U.S. 393, 107 S. Ct. 1821 (1987). Thus, the jury was precluded from considering mitigating evidence, Hitchcock, and from evaluating the "totality of the circumstances" in considering the appropriate penalty. State v. Dixon, 283 So. 2d at 10.

The jury believed Mr. Hodges carried the burden of proving whether he should live or die. The jury unreasonably believed that only mitigating evidence that rose to the level of "outweighing" aggravation need be considered.

This claim involves fundamental constitutional error which goes to the heart of the fundamental

fairness and reliability of Mr. Hodges's death sentence. Appellate counsel was ineffective for failing to raise this issue. Mr. Hodges is entitled to relief in the form of a new sentencing hearing.

CLAIM VI

FLORIDA'S CAPITAL SENTENCING STATUTE IS UNCONSTITUTIONAL ON ITS FACE AND AS APPLIED IN THIS CASE BECAUSE IT FAILS TO PREVENT THE ARBITRARY AND CAPRICIOUS IMPOSITION OF THE DEATH PENALTY AND IT VIOLATES THE CONSTITUTIONAL GUARANTEES OF DUE PROCESS AND THE PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENT.

Florida's capital sentencing scheme denies Mr. Hodges his right to due process of law and constitutes cruel and unusual punishment on its face and as applied in this case. Florida's death penalty statute is constitutional only to the extent that it prevents the arbitrary imposition of the death penalty and narrows application of the penalty to the worst offenders. See, Proffitt v. Florida, 428 U.S. 242 (1976). The Florida death penalty statute fails to meet these constitutional guarantees in violation of the Eighth Amendment.

Further, execution by electrocution or lethal injection carries with it the unconstitutional risk of physical and psychological torture without justification and violates the Eighth Amendment.

The capital sentencing statute in Florida fails to provide any standard of proof for determining that aggravating circumstances "outweigh" the mitigating factors, Mullaney v. Wilbur, 421 U.S. 684 (1975), and does not define "sufficient aggravating circumstances." Further, the statute does not sufficiently define the aggravating circumstances to be considered by the co-sentencing jury and judge. See, Godfrey v. Georgia, 446 U.S. 420 (1980). These deficiencies lead to the arbitrary and capricious

imposition of the death penalty and violate the Eighth Amendment to the United States Constitution.

Further, Florida's scheme does not have the independent reweighing of aggravating and mitigating circumstances required by Proffitt v. Florida, 428 U.S. 242 (1976). Additionally, the aggravating circumstances have been applied in a vague and inconsistent manner, and juries receive unconstitutionally vague instructions in applying the aggravating circumstances. See, Godfrey, supra; Espinosa v. Florida, 112 S.Ct. 2926 (1992).

Florida law creates a presumption of death as the appropriate sentence if a single aggravating factor is found, creating a presumption of death in every first degree felony murder case and in most premeditated murder cases. Florida requires mitigation to outweigh aggravation once any aggravation is found to exist. This systematic presumption of death does not satisfy the Eighth Amendment's requirement that the death penalty be applied to only the most aggravated and unmitigated of offenses. See, Furman v. Georgia, 408 U.S. 238 (1972); Jackson v. Dugger, 837 F.2d 1469 (11th Cir. 1988); Richmond v. Lewis, 113 S.Ct. 528 (1992).

In the interest of justice, this Court should grant Mr. Hodges habeas relief on this claim.

CONCLUSION AND RELIEF SOUGHT

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing **PETITION FOR WRIT OF HABEAS CORPUS** has been furnished by United States Mail, first-class postage prepaid, to Curtis M. French, Assistant Attorney General, Office of the Attorney General, The Capitol - PL-01, Tallahassee, Florida 32399, on this 22ND day of April, 2002.

CERTIFICATE OF TYPE SIZE AND STYLE

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