IN THE SUPREME COURT OF FLORIDA

CHARLES ANDERSON,	)	
	)	
Appellant,	)	
	)	
vs.	)	Case No. 95,773
	)	
STATE OF FLORIDA,	)	
	)	
Appellee.	)	
	)	

SUPPLEMENTAL BRIEF OF APPELLANT

On Appeal from the Circuit Court of the
Seventeenth Judicial Circuit of Florida,
In and For Broward County (Criminal Division)

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PRELIMINARY STATEMENT

Appellant will rely on his Initial Brief herein.

STATEMENT OF THE CASE

Appellant will rely on his Initial Brief herein with the following addition. Appellant previously raised an issue that the death sentence in this case violates Apprendi v. New Jersey, ___ U.S. _____, 120 S.Ct. 2348 (2000). See Point XII of the Initial and Reply Briefs. Appellant renews the arguments made in those briefs and would add the following arguments contained herein.

STATEMENT OF THE FACTS

Appellant will rely on his Initial Brief herein.

SUMMARY OF THE ARGUMENT

1. The death sentence violates the United States and Florida Constitutions pursuant to Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348 (2000) and Ring v. Arizona, _____ U.S._____, 2002 WL1357257 (June 24, 2002). The jury's recommendation was only 8 to 4. Thus, even if the jury's recommendation could somehow be taken as a finding of death eligibility, it was not by a sufficient number to constitute a lawful verdict under the Federal Constitution or Florida law. Johnson v. Louisiana, 406 U.S. 356 (1972); Williams v. State, 438 So.2d 781 (Fla. 1983); Jones v.

State, 92 So. 2d 261 (Fla. 1956); Brown v. State, 661 So. 2d 309 (Fla. 1st DCA 19950; Flanning v. State, 597 So. 2d 864 9Fla. 3d DCA 1992); Fla.R.Crim.P. 3.440.

ARGUMENT

THE DEATH SENTENCE VIOLATES THE UNITED STATES AND FLORIDA CONSTITUTIONS PURSUANT TO APPRENDI V. NEW JERSEY, 530 U.S. 466, 120 S. CT. 2348 (2000) AND RING V. ARIZONA, _____ U.S. _____, 120 S. CT. 2348, 20002 WL1357257 (JUNE 24, 2002).

This issue involves the facial unconstitutionality of Florida Statute 921.141 as well as specific errors which were made in Mr. Anderson's case. Appellant contends that there has been a violation of the Due Process Clauses of the state and federal constitutions because the jury did not find the necessary death-qualifying fact of "sufficient aggravation" beyond a reasonable doubt. The fact that the jury made no such unanimous finding also violates the Jury Clauses of the State and Federal Constitutions. The fact that the state failed to allege sufficient aggravation in the indictment and that the defense was refused a statement of particulars violated the Notice Clauses of the state and federal constitutions. Appellant's conviction and sentence without a jury finding of sufficient aggravation is a bar under the Double Jeopardy Clauses to the state and federal constitutions to the death sentence at bar. For the courts to make an ad hoc rewrite of the statute to avoid these fatal constitutional flaws would violate the Separation of Powers Clause of the state constitution. These constitutional flaws, separately and together, render any death penalty proceedings unconstitutional as violative of the heightened

requirements of due process in death penalty cases under article 1, section 17 of our constitution and the eighth amendment to the federal constitution. The issues raised in this case are all preserved. Mr. Anderson filed a Motion for Statement of Aggravating Circumstances. IR134-138. He filed a Motion to declare Fla. Stat. 921.141 due to the fact that the jury's penalty recommendation is only by a bare majority. IR188-9. He filed a Motion for Statement of Particulars as to aggravating circumstances. IIT202-3. Mr. Anderson filed a Motion to Declare 921.141 unconstitutional which contained a specific objection that the jury does not make findings of aggravating circumstances. IT146-7. Oral argument was held on these motions and the trial court denied them. VIT26-30, 35-41, 46, 48, 61-63.

The issues involved in Apprendi and Ring constitute fundamental error which would require reversal even in the absence of an objection. Apprendi and Ring are grounded in the right to a jury trial. The right to a jury trial can only be waived by a personal waiver on the record by the defendant. State v. Upton, 658 So. 2d 86 (Fla. 1995). No such waiver took place in the current case.

Florida Statute 921.141 is in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, Section 2, 9, 15, 16, 17, and 22 of the Florida Constitution. Ring v. Arizona, ___ U.S. ___, ___ S.Ct. ___, 2002

WL1357257 (June 24, 2002); Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348 (2000); State v. Overfelt, 457 So. 2d 1385 (Fla. 1984).

In Ring, the United States Supreme Court struck down Arizona's capital sentencing statute, holding that it violated the Sixth and Fourteenth Amendments for a judge rather than jury to find the aggravating factors necessary to impose a death sentence. The Court based its holding and analysis in Ring on its earlier decision in Apprendi v. New Jersey, 530 U.S. 466 (2000), where it 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, 252-53 (1999) (Stevens, J., concurring)).

Applying that Apprendi test, in Ring the Court noted that "[t]he dispositive question ... 'is not one of form but of effect.'" Ring, 2002 WL at ___ (quoting Apprendi, 530 U.S. at 494). "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 doubt." Ring, 2002 WL at _____. "All the facts which must exist in order to subject the defendant to a legally prescribed punishment must be found by the jury." Id. (quoting Apprendi, 530 U.S. at 499 (Scalia, J., concurring)).

The Court in Ring agreed with the dissenters in Apprendi that the Arizona death penalty statute could not survive this test: "[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, 2002 WL at _____ (quoting Apprendi, 530 U.S. at 538 (O'Connor, J., dissenting)). The Court noted that, under Arizona law, "Defendant's death sentence required the judge's factual findings." Ring, 2002 WL at ____ (quotation omitted).

The Florida capital sentencing statute suffers from the identical flaw that led the Court in Ring to declare the Arizona statute unconstitutional. Under Florida law, a defendant cannot be sentenced to death unless the judge -- not the jury -- makes specific findings of fact. In particular, before a sentence of death may be imposed, under Fla. Stat. Section 921.141(3), the court "shall set forth in writing its findings upon which the sentence of death is based as to the facts . . . [t]hat sufficient aggravating circumstances exist ... and ... [t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances." (Emphases added.) Thus, Section 921.141 explicitly requires two separate findings of fact by the trial judge before a death sentence can be imposed: the judge must find

as a fact that (1) "sufficient aggravating circumstances exist" and (2) "there are insufficient mitigating circumstances to outweigh the aggravating circumstances." Id. A defendant thus may be sentenced to death only if the sentencing proceeding "results in findings by the court that such person shall be punished by death." Fla. Stat. § 775.082(1).

The statute is explicit that, without these required findings of fact by the trial judge, the defendant must be sentenced to life imprisonment: "If the court does not make the findings requiring the death sentence within 30 days after the rendition of the judgment and sentence, the court shall impose [a] sentence of life imprisonment." Id. Further, the statute requires the trial court to make a determination independent of the jury -- the jury renders merely an "advisory sentence" and the trial court must impose a sentence of life or death "[n]otwithstanding the recommendation of a majority of the jury." Id. §§ 921.141(2), 921.141(3). See Ross v. State, 386 So. 2d 1191, 1197-98 (Fla. 1980) (vacating death sentence because the trial judge treated the jury's recommendation as binding and failed to make independent findings in support of the sentence). Further, for purposes of sentencing, the jury's guilt-phase findings cannot be conclusive as to the existence of any aggravating factor, and the judge is required by the statute to make separate findings at sentencing to support any such factor.

Because Florida law thus requires fact findings by the trial judge before a death sentence may be imposed, it is unconstitutional under the holding and rationale of Ring. Just as with the Arizona statute, the Florida statute is directly contrary to the rule of law enunciated in Ring and Apprendi that "[i]f 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 doubt." 2002 WL at _____. Just as with the Arizona statute, the Florida statute is explicit that a defendant "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." Id. at _____. Because the trial judge -- and not the jury -- must make specific findings of fact before a death sentence can be imposed under Florida law, Ring holds squarely that the statute is unconstitutional under the Sixth and Fourteenth Amendments.

Admittedly, unlike the Arizona statute, the Florida statute provides for an advisory jury verdict. But that has no bearing on the analysis set out above. Indeed in Walton v. Arizona, 497 U.S. 639 (1990), the United States Supreme Court specifically rejected a purported distinction between the Arizona and Florida statutes based on Florida's advisory verdict:

> The distinctions Walton attempts to draw between the Florida and Arizona statutory schemes are not persuasive. It is true that in Florida the jury recommends a sentence, but it does not make specific factual findings with regard to the existence of mitigating or aggravating circumstances and its recommendation is not binding on the trial judge. A Florida trial court no more has the assistance of a jury's findings of fact with respect to sentencing issues than does a trial judge in Arizona.

497 U.S. at 648.

The trial judge is directed by Section 921.141(3) to make the fact findings necessary to support a death sentence "notwithstanding the recommendation of a majority of the jury." And unless the court makes the "findings requiring the death sentence," id., the defendant must be sentenced to life. The jury's role thus does not alter the essential point -- the controlling point under Ring -- that the Florida statute is unconstitutional because a death sentence cannot be imposed without fact findings by the trial judge. See Ring, 2002 WL at _____ ("All the facts which must exist in order to subject the defendant to a legally prescribed punishment must be found by the jury.") (quotation omitted).

The State perhaps may argue that this Court can avoid the Ring issues raised by the Florida statute simply by relying on the jury's advisory verdict as the basis for imposing a sentence of

death. In this way, the State might argue, this Court could avoid making the findings of fact that would run afoul of Ring.

Any such argument is foreclosed, first of all, by the explicit language of the statute. Section 921.141 requires separate findings by the court "notwithstanding the recommendation of a majority of the jury." There is no statutory authority under Florida law that would allow the imposition of a death sentence based on the jury's findings of fact. To the contrary, Florida law provides that the jury's role is merely "advisory" and that the trial court must undertake its own separate findings. The trial court is required by Section 921.141(3) to make "specific written findings of fact." And the trial court is required to engage in a separate Spencer hearing. It would be a violation of the statutory requirements to base a death sentence upon the jury's verdict when Section 921.141(3) explicitly requires the court to "set forth in writing its findings ... as to the facts" supporting a death sentence.

Further, it would be impermissible and unconstitutional to rely on the jury's advisory sentence as the basis for the fact-findings required for a death sentence, because the statute requires only a majority vote of the jury in support of that advisory sentence. See id. ("recommendation of a majority of the jury"). In Harris v. United States, ___ U.S. ___, ___ S.Ct. ___, 2002 WL 1357277, No. 00-10666 (U.S. June 24, 2002), rendered on the

same day as Ring, the U.S. 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. (U.S. June 24, 2002). And in Ring, the Court held that the aggravating factors enumerated under Arizona law operated as "the functional equivalent of an element of a greater offense" and thus had to be found by a jury. 2002 WL at _____. In other words, pursuant to the reasoning set forth in Apprendi, Jones, and Ring, aggravating factors are equivalent to elements of the capital crime itself and must be treated as such.

Permitting any such findings of the elements of a capital crime by a mere simple majority is improper under the United States Constitution and Florida law. In the same way that the Constitution guarantees a baseline level of certainty before a jury can convict a defendant, it also constrains the number of jurors who can render a guilty verdict. See Apodaca v. Oregon, 406 U.S. 404 (1972) (the Sixth and Fourteenth Amendments require that a criminal verdict must be supported by at least a "substantial majority" of the jurors). Clearly, a mere numerical majority -- which is all that is required under Section 921.141(3) for the jury's advisory sentence -- would not satisfy the "substantial majority" requirement of Apodaca. See, e.g., Johnson v. Louisiana, 406 U.S. 366, ____ (1972) (Blackmun, J., concurring) (a state

statute authorizing a 7-5 verdict would violate Due Process Clause of Fourteenth Amendment). Relying on a mere numerical majority for the fact findings supporting a death sentence would also be directly inconsistent with the requirement of Florida law that a guilty verdict must be unanimous in all criminal cases. Williams v. State, 438 So. 2d 781,784 (Fla. 1983); Jones v. State, 92 So. 2d 261 (Fla. 1956); Brown v. State, 661 So. 2d 309 (Fla. 1st DCA 1995); Flanning v. State, 597 So. 2d 864 (Fla. 3d DCA 1992); Fla.R.Crim.P. 3.440.

In short, nothing in the existing statute establishes procedures that would allow this Court to avoid or bypass its unconstitutionality under Ring. The statute requires findings by the Court and does not permit a death sentence based on findings by the advisory jury. Further, the advisory jury's majority-based recommendation would itself be unconstitutional as a basis for imposing a sentence of death. The statute as it exists does not allow for the constitutional imposition of a death sentence in Florida.

In 1972, the Supreme Court invalidated all then-existing state capital punishment laws, holding that they presented an undue risk that the death penalty would be imposed in an arbitrary and capricious manner. See Furman v. Georgia, 408 U.S. 238 (1972). This holding had the effect of rendering Florida's capital sentencing procedures unconstitutional. See Donaldson v. Sack, 265

So.2d 499, 502 (Fla. 1972) (holding that Furman abolished the death penalty "as heretofore imposed in this state").

In light of Furman, the Florida Supreme Court held that Fla. Stat. § 775.082(1) mandated life imprisonment upon conviction for capital murder. See Donaldson, 265 So.2d at 503. Section 775.082(1) provides that a "person who has been convicted of a capital felony shall be punished by death if the proceeding held to determine sentence according to the procedure set forth in s. 921.141 results in findings by the court that such person shall be punished by death, otherwise such person shall be punished by life in prison." In Donaldson, the Florida Supreme Court held that this statutory provision provided for a sentence -- life imprisonment -- where the provisions for imposition of a death sentence had been rendered unconstitutional. The Court reasoned that "eliminating the death penalty from the statute does not of course destroy the entire statute," observing, "we have steadfastly ruled that the remaining consistent portions of statutes shall be held constitutional if there is any reasonable basis for doing so and of course this clearly exists in these circumstances." Id.

That same reasoning applies here. The findings required by Section 921.141 cannot be made, consistent with the requirements of the Sixth and Fourteenth Amendment as established in Ring. In this circumstance, just as in Donaldson, the appropriate outcome under Section 775.082(1) is the entry of a life sentence, because as a

matter of federal and state constitutional law a judge cannot make the findings "according to the procedure set forth in s. 921.141." As Section 775.082(1) states, without those findings "otherwise such person shall be punished by life in prison." The same conclusion is reflected in Section 921.141(3) -- the court "shall impose sentence of life imprisonment" if it does not make the "findings requiring the death sentence" -- and Ring establishes that it would be unconstitutional and prohibited by the Sixth and Fourteenth Amendments for a trial judge to make those findings.

If further confirmation of this conclusion is needed, it is provided by Section 775.082(2), a severability clause, which confirms that if portions of the statute are rendered unconstitutional the balance of the statute is to remain in place. See Waldrup v. Dugger, 562 So. 2d 687, 693 (Fla. 1990) ("When a part of a statute is declared unconstitutional the remainder of the act will be permitted to stand provided ... [that] the unconstitutional provisions can be separated from the remaining valid provision ... [and] the legislative purpose expressed in the valid provisions can be accomplished independently of those which are void"). Thus, as Donaldson establishes, the fact that the death penalty procedures of Section 921.141 are now unconstitutional does not preclude the entry of sentence but rather requires the entry of the only remaining sentence available if the death penalty cannot be imposed -- namely, a life sentence.

The Supreme Court in Ring did not explicitly address how states like Arizona (and Florida) with facially unconstitutional death penalty statutes should apply the Court's ruling to pending cases. In Florida, that issue is controlled by this Court's holding in Donaldson, which interpreted Section 775.082(1) to require the imposition of a life sentence following the determination that the statutory scheme was unconstitutional. Under Donaldson and the specific language of Section 775.082(1), it is not appropriate to engage in a case-by-case inquiry as to whether current law could somehow be lawfully applied in a given case notwithstanding the constitutional defects in the structure of the law.

Assuming arguendo that this Honorable Court does not find that the statute is facially unconstitutional, there were a series of specific errors in this case rendering the death sentence unconstitutional pursuant to the Florida and United States Constitutions. These errors include: (1) The jury made no finding of aggravating circumstances. (2) The jury made no finding that the aggravating circumstances are of sufficient weight to call for the death penalty. (3) The failure to instruct the jury that this finding must be beyond a reasonable doubt. (4) The jury's recommendation of death was only by a vote of 8 to 4. (5) The indictment contains no notice of aggravating circumstances.

Apprendi and Ring require a rethinking of the role of the jury in Florida. The Court in Apprendi described its prior holding in Jones v. United States, 526 U.S. 227 (1999):

> The question whether Apprendi had a constitutional right to have a jury find such bias on the basis of proof beyond a reasonable doubt is starkly presented.
>
> Our answer to that question was foreshadowed by our opinion in Jones v. United States, 526 U.S. 227, 119 S.Ct. 1215, 143 L.Ed.2d 311 (1999), construing a federal statute. We there noted that "under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." Id., at 243, n.6, 119 S.Ct. 1215. The Fourteenth Amendment commands the same answer in this case involving a state statute.

530 U.S. at 476.

In Ring, the United States Supreme Court overruled, in part, its prior opinion in Walton v. Arizona, 497U.S. 639 (1990). The Court stated:

> For the reasons stated, we hold that Walton and Apprendi are irreconcilable; our Sixth Amendment jurisprudence cannot be home to both. Accordingly, we overrule Walton 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. See 497 U.S., at 647-649. Because Arizona's enumerated aggravating factors operate as `the functional equivalent of an element of a greater offense,' Apprendi, 530 U.S. at 497, n. 19, the Sixth Amendment requires that they be found by a jury.
>
> * * *

> `The guarantees of jury trial in the Federal and State Constitutions reflect a profound judgment about the way in which law should be enforced and administered.... If the defendant preferred the common-sense judgment of a jury to the more tutored but perhaps less sympathetic reaction of the single judge, he was to have it.' Duncan v. Louisiana, 391 U.S. 145, 155-156 (1968).
>
> The right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the factfinding necessary to increase a defendant's sentence by two years, but not the factfinding necessary to put him to death. We hold that the Sixth Amendment applies to both. The judgment of the Arizona Supreme Court is therefore reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

Ring, supra, at _____.

It is clear that in Florida, as in Arizona, the aggravating circumstances actually define those crimes which are eligible for the death penalty.

> With the issue of guilt or innocence disposed of, the jury can then view the question of penalty as a separate and distinct issue. The fact that the defendant has committed the crime no longer determines automatically that he must die in the absence of a mercy recommendation. They must consider from the facts presented to them – facts in addition to those necessary to prove the commission of the crime – whether the crime was accompanied by aggravating circumstances sufficient to require death or whether there were mitigating circumstances which require a lesser penalty.

State v. Dixon, 283 So. 2d 1, 8 (Fla. 1973).

It is clear that under Florida law the conviction of first degree murder alone does not make a person eligible for the death penalty. The jury must also find aggravating circumstances. It is only upon proving aggravating circumstances that the defendant becomes eligible for the death penalty. Thus, in Florida, as in Arizona, the jury must find aggravating circumstances. There was a clear violation of this rule.

It must be noted that four out of five aggravators at issue here directly relate to the offense itself. (6)(e) Avoid arrest. (6)(f) CCP. (6)(h) Especially heinous, atrocious, or cruel. (6)(d) During an enumerated felony (kidnapping). The Court relied on this factor in Apprendi in explaining why the exception it had previously approved in Almendarez-Torres v. United States, 523 U.S. 224 (1998) should not be extended.

> New Jersey's reliance on Almendarez-Torres is also unavailing. The reasons supporting an exception from the general rule for the statute construed in that case do not apply to the New Jersey statute. Whereas recidivism "does not relate to the commission of the offense" itself, 523 U.S. at 230, 244, 118 S.Ct. 1219, New Jersey's biased purpose inquiry goes precisely to what happened in the "commission of the offense." Moreover, there is a vast difference between accepting the validity of a prior judgment of conviction entered in a proceeding in which the defendant had the right to a jury trial and the right to require the prosecutor to prove guilty beyond a reasonable doubt, and allowing the judge to find the required fact under a lesser standard of proof.

120 S.Ct. 2366. Here, only the prior violent felony aggravator (6)(b) could conceivably fit in this exception. It should be noted

that Apprendi specifically notes that Almendarez-Torres may have been incorrectly decided. Id. at 2362. In the concurring opinion of Justice Thomas, he specifically states that Almendarez-Torres was incorrectly decided. Id. at 2378-80. Justice Thomas provided the fifth vote in Almendarez-Torres. It is very likely that Almendarez-Torres will be overruled. The limited exception to Apprendi is of questionable validity.

An additional constitutional error is that the jury made no finding that the aggravators were sufficiently weighty to call for the death penalty. Florida law requires not only the presence of aggravators, but that they are sufficiently weighty to warrant the death penalty. State v. Dixon, 283 So. 2d 1, 8 (Fla. 1973). There was no jury finding that the aggravating circumstances are sufficiently weighty to call for the death penalty.

Apprendi and Ring were also violated in that the jury was not instructed that it had to find, beyond a reasonable doubt, that the aggravating circumstances must be sufficiently weighty to call for the death penalty or that it must find, beyond a reasonable doubt, that the aggravating circumstances outweigh the mitigating circumstances. As to the first aspect the jury was told:

> It is your duty to follow the law that will now be given to 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.

XXXII3266-7. The jury was given no guidance as to by what standard it would have to find the aggravators sufficiently weighty to call for the death penalty.

The jury was also given no guidance as to what standard it would use to determine whether aggravating circumstances outweigh mitigating circumstances.

> If you find the aggravating circumstances do not justify the death penalty, your advisory sentence should be one of life imprisonment with a minimum term of 25 years before possibility of parole.
>
> Should you find sufficient aggravating circumstances do exist, you will – it will then be your duty to determine whether mitigating circumstances exist that outweigh the aggravating circumstances.

XXXII3270. Not only does this instruction fail to tell the jury that it must find beyond a reasonable doubt that aggravating circumstances must outweigh mitigating circumstances, it affirmatively tells them that mitigating circumstances must outweigh aggravating circumstances. This violates Apprendi's and Ring's requirement that any fact which increases the punishment, with the possible exception of recidivism, must be proven beyond a reasonable doubt.

An additional violation of Apprendi and Ring is the fact that the jury's verdict in support of death was only by a vote of eight to four (assuming that the jury's recommendation can be taken as satisfying Ring, which appellant disputes). In Johnson v. Louisiana, 406 U.S. 356 (1972), the Court upheld a system whereby verdicts in serious felonies must be by at least nine votes out of

twelve and verdicts in capital cases must be unanimous. In Apodaca v. Oregon, 406 U.S. 404 (1972), the Court upheld verdicts of 10-2 and 11-1 in non-capital felonies. In Burch v. Louisiana, 441 U.S. 130 (1979), the Court held that a six person jury must be unanimous. The Court took pains to note that Apodaca was a non-capital case. 441 U.S. at 136. The U.S. Supreme Court has not specifically reached the issue of whether a unanimous verdict is required in a capital case. However, it has never upheld a verdict of less than nine to three, even in a non-capital case. Under either test, a verdict of eight to four violates the Federal Constitution after Apprendi and Ring.

Florida law requires a unanimous verdict. Williams v. State, 438 So. 2d 781, 784 (Fla. 1983); Jones v. State, 92 So. 2d 261 (Fla. 1956); Brown v. State, 661 So. 2d 309 (Fla. 1st DCA 1995); Flanning v. State, 597 So. 2d 864 (Fla. 3rd DCA 1992); Fla.R.Crim.P. 3.440. The eight to four verdict is in violation of this rule.

The indictment in this case is also defective pursuant to Apprendi. The indictment contains no mention of any aggravating factors or of any allegation that the aggravating factors are sufficiently weighty to call for the death penalty. IR1-2. Thus, appellant was never charged with a capital offense.

The reasoning of Apprendi and Ring is consistent with decisions of the Florida courts. In State v. Overfelt, 457 So. 2d 1385 (Fla. 1984), this Court stated:

> The district court held, and we agree, "that before a trial court may enhance a defendant's sentence or apply the mandatory minimum sentence for use of a firearm, the jury must make a finding that the defendant committed

> the crime while using a firearm either by finding him guilty of a crime which involves a firearm or by answering a specific question of a special verdict form so indicating." 434 So. 2d at 948. See also Hough v. State, 448 So. 2d 628 (Fla. 5th DCA 1984); Smith v. State, 445 So. 2d 1050 (Fla. 1st DCA 1984); Streeter v. State, 416 So. 2d 1203 (Fla. 3d DCA 1982); Bell v. State, 394 So. 2d 570 (Fla. 5th DCA 1981). But see Tindall v. State, 443 So.2d 362 (Fla. 5th DCA 1983). The question of whether an accused actually possessed a firearm while committing a felony is a factual matter properly decided by the jury. Although a trial judge may make certain findings on matters not associated with the criminal episode when rendering a sentence, it is the jury's function to be the finder of fact with regard to matters concerning the criminal episode. To allow a judge to find that an accused actually possessed a firearm when committing a felony in order to apply enhancement or mandatory sentencing provisions of section 775.087 would be an invasion of the jury's historical function and could lead to a miscarriage of justice in cases such as this where the defendant was charged with but not convicted of a crime involving a firearm.

457 So. 2d at 1387. The District Courts of Appeal have consistently held that a three year mandatory minimum can not be imposed unless the use of a firearm is alleged in the information. Peck v. State, 425 So. 2d 664 (Fla. 2nd DCA 1983); Gibbs v. State, 623 So. 2d 551 (Fla. 4th DCA 1993); Bryant v. State, 744 So. 2d 1225 (Fla. 4th DCA 1999). The requirements of Apprendi and Ring must apply to the penalty determination in a capital case under the Florida and Federal Constitutions.

The denial of a jury trial is a structural error which can never be harmless. See Sullivan v. Louisiana, 508 U.S. 275, 278 (1993). The proper remedy for this error is the imposition of a

life sentence. The Court in Ring stated that the aggravating factors operate as the functional equivalent of an element of a greater offense. Ring, supra, at _____. Thus, the Court recognized that conviction of first degree murder is not enough to subject a person to the death penalty. It is the presence of sufficiently weighty aggravating circumstances which turns the offense into a death eligible offense, i.e. capital murder. Under Ring, it is only the finding of aggravating circumstances sufficiently weighty to call for the death penalty which turn the offense of first degree murder into a death eligible offense. Thus, first degree murder, without a jury verdict that there are aggravating circumstances sufficiently weighty to call for the death penalty, is a lesser included offense of capital murder. This is analogous to simple battery being a lesser included offense of aggravated battery. Mr. Anderson was only charged with, and convicted of, first degree murder. His indictment did not allege the presence of aggravating circumstances sufficiently weighty to call for the death penalty and his jury did not find such circumstances. Mr. Anderson was convicted of ordinary first degree murder. He was not convicted of capital murder. Upon the jury's guilt phase verdict for first degree murder, without a finding of aggravating circumstances sufficiently weighty to call for the death penalty, life imprisonment is the only available penalty. Assuming arguendo, that this deficiency could be cured by a subsequent jury verdict, it did not occur in this case. At no point in the proceedings did the jury make a finding, beyond a reasonable doubt, of death eligibility. It is well-settled that

the Double Jeopardy Clauses of the Florida and Federal Constitutions bar a subsequent prosecution after conviction of a lesser included offense based on the same conduct. United States v. Dixon, 509 U.S. 688 (1993); Chikitus v. Shands, 373 So. 2d 904 (Fla. 1979); State v. Witcher, 737 So. 2d 584 (Fla. 1st DCA 1999). Here, the indictment, prosecution and conviction of Mr. Anderson for ordinary first degree murder bar any subsequent prosecution seeking the death penalty. Thus, this case must be reversed for the imposition of a life sentence.

CONCLUSION

For the foregoing reasons, Mr. Anderson's sentence must be reversed.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished by courier to Melanie A. Dale, Assistant Attorney General, 1515 North Flagler Drive, 9th floor, West Palm Beach, Florida 33401-3432 this _____ day of July, 2002.

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RICHARD B. GREENE
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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY the instant brief has been prepared with 12 point Courier New type, a font that is not spaced proportionately this _____ day of July, 2002.

_____
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