SUPREME COURT OF THE STATE OF FLORIDA

J.B. PARKER,	:	
Appellant,	:	CASE NO.: SC01-172
v.	:	
STATE OF FLORIDA,	:	
Appellee.	:	

SUPPLEMENTAL BRIEF OF APPELLANT

On Appeal from the Nineteenth Judicial Circuit of Florida, in and for Martin County Florida

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PRELIMINARY STATEMENT

Appellant J.B. Parker submits this Supplemental Brief, under authority of this Court's Order dated July 16, 2002 and in further support of his appeal from the death sentence imposed by the trial court on December 13, 2000, requesting that this Court declare Florida's death penalty unconstitutional under the Sixth Amendment in accordance with the Supreme Court of the United States' recent decision in *Ring v. Arizona*, 122 S. Ct. 2428 (2002) and vacate his death sentence.

In *Ring*, the Supreme Court struck down Arizona's death penalty statute because trial judges, not juries, make the necessary findings of fact on aggravating circumstances sufficient to support the death penalty. Because Florida trial judges make the same factual findings – aided by only non-binding recommendations of non-unanimous juries – Florida's death penalty must also be struck down. Parker has properly raised this issue in this Court because *Ring* represents a new rule for the conduct of criminal prosecutions that must be applied to all non-final cases pending on direct review, such as this one. Parker is not required to have raised the *Ring* issue below in the trial court because his sentencing in violation of *Ring* amounts to fundamental error and because doing so at the time would have been futile. In any event, Parker preserved this claim when he challenged in the court below certain aspects of the Florida death penalty on the ground that it violated his sixth amendment rights.

Ring is a landmark decision of the Supreme Court and recognizes a strong commitment to the right to a trial by jury. That both this Court and the Supreme Court of the United States previously upheld the Florida death penalty on sixth amendment grounds is of no moment because those decisions were rendered at a time when it was deemed consistent with the Sixth Amendment for a judge to make the necessary findings of fact sufficient to support the death penalty. Under *Ring*, that premise is no longer valid. Because trial judges in Florida make the final factual findings with regard to aggravating factors, Florida's death penalty cannot survive *Ring*. Accordingly, the Florida death penalty should be declared unconstitutional under the Sixth Amendment, and Parker's death penalty should be vacated.

ARGUMENT

THE FLORIDA DEATH PENALTY VIOLATES THE SIXTH AMENDMENT AS INTERPRETED BY THE SUPREME COURT OF THE UNITED STATES IN *RING V. ARIZONA*

A. The *Ring* Issue Is Properly Before this Court

The Supreme Court's decision in *Ring* is applicable to Parker's case because his death sentence is currently pending in this Court on direct appeal from his resentencing, and the death sentence, therefore, is not final. *See Griffith v. Kentucky*, 479 U.S. 314, 321 n.6 & 328 (1987) (holding, *inter alia*, that new rules

for the conduct of criminal prosecutions are to be applied to all non-final cases pending on direct review); *see also Richardson v. Gramley*, 998 F.2d 463, 465 (7th Cir. 1993) (Posner, J.) (a criminal case is not final if the case has been remanded for a resentencing), *cert. denied*, 510 U.S. 1119 (1994); *People v. Lyles*, 567 N.E.2d 396, 399 (Ill. App. Ct. 1990), *appeal denied*, 571 N.E.2d 153 (1991). This Court subsequently approved the rule in *Griffith* under Florida law. *Smith v. State*, 598 So. 2d 1063, 1066 (Fla. 1992); *see also Mitchell v. Moore*, 786 So. 2d 521, 529 (Fla. 2001). Thus, the only question is whether Parker was required to, or did, raise the issue below. Because the trial court sentenced Parker in violation of *Ring* and the Sixth Amendment, the trial court committed fundamental error, and Parker was not required to have raised the issue below. Moreover, any attempt by Parker to have raised the issue below would have been futile because of the then existing state of the law. In any event, Parker properly and adequately preserved his claim now arising under *Ring* when he challenged in the court below certain aspects of the Florida death penalty on sixth amendment grounds.

1. *Ring* Must Be Applied to Parker's Case Because To Uphold a Death Sentence Obtained Under a Statute That On its Face Violates the Sixth Amendment Would be Fundamental Error

Under Florida law, "[a] judgment or sentence may be reversed on appeal only when an appellate court determines after a review of the complete record that

prejudicial error occurred and was properly preserved in the trial court or, if not properly preserved, would constitute fundamental error." Fla. Stat. § 924.051(3). "'Preserved' means that an issue, legal argument, or objection to evidence was timely raised before, and ruled on by, the trial court, and that the issue, legal argument or objection to evidence was sufficiently precise that it fairly apprised the trial court of the relief sought and the grounds therefor." Fla. Stat. § 924.051(1)(b). This Court has "concluded that, for an error to be so fundamental that it can be raised for the first time on appeal, the error must be basic to the judicial decision under review and equivalent to a denial of due process." *State v. Johnson*, 616 So. 2d 1, 3 (Fla. 1993) (citing *D'Oleo-Valdez v. State*, 531 So. 2d 1347 (Fla. 1988); *Ray v. State*, 403 So. 2d 956 (Fla. 1981)); *see also Card v. State*, 803 So. 2d 613, 622 (Fla. 2001) (defining fundamental error as "error that reaches down into the validity of the trial itself to the extent that a verdict of guilt or jury recommendation of death could not have been obtained without the assistance of the alleged error"), *cert. denied*, ___U.S.___, ___S. Ct.___, 70 U.S.L.W. 3799, 2002 WL 463180 (Jun. 28, 2002); *Sanford v. Rubin*, 237 So. 2d 134, 137 (Fla. 1970) (defining fundamental error as "error which goes to the foundation of the case or goes to the merits of the cause of action").

In *Johnson*, this Court considered defendant's challenge to Florida's

habitual violent felony offender statute, which was enacted as part of a statute that also concerned the unrelated subject of the repossession of personal property, on grounds that the statute violated the single subject rule of article III, section 6, of the Florida Constitution. The trial court sentenced Johnson, who was convicted of a drug violation carrying a maximum penalty of three and one-half years, to a maximum punishment of twenty-five years imprisonment under the habitual violent felony offender statute. This Court concluded that defendant's attack on the habitual violent felony offender provision involved "fundamental 'liberty' due process interests" and that the issue in the case, therefore, concerned a question of fundamental error. *Johnson*, 616 So. 2d at 3.[1] Similar to *Johnson*, because the constitutionality of the death penalty raises fundamental liberty due process interests, this case concerns a question of fundamental error.

Even under the alternative definitions for fundamental error cited above in *Card* and *Sanford*, the error in sentencing Parker to death under an unconstitutional statute is fundamental. Applying the definition provided in *Card*, it is simply not

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[1] This Court in *Johnson*, however, noted that "'[t]he constitutional application of a statute to a particular set of facts is another matter and must be raised at the trial level.'" *Johnson*, 616 So. 2d at 3 (quoting *Trushin v. State*, 425 So. 2d 1126, 1129-30 (Fla. 1982)). As the applicability of *Ring* to the constitutionality of the Florida death penalty is a pure question of law, this exception is not at issue in this case.

possible to say, given the disputes concerning the establishment of the aggravating factors, *see* Reply Br. at 24-29, and the inadequate instructions to the jury, that Parker would have been sentenced to death. And, under the *Sanford* definition, the establishment beyond a reasonable doubt of the aggravating factors necessary to impose the death penalty plainly goes to the very foundation of the State's assertion that Parker should be executed, and, as such, constitutes fundamental error.

For all these reasons, Parker was not required to first raise in the trial court the applicability of *Ring* to the Florida death penalty statute.

2. Parker Is Not Required to Have Raised the *Ring* Issue before the Trial Court Because that Claim Would Have Been Outright Rejected Given the then Existing State of the Law and Because Parker's Claim Did Not Arise Until the Supreme Court, During the Pendency of this Appeal, Decided *Ring*

At the time of Parker's resentencing proceeding in December 2000, the then existing state of the law would have rendered futile any claim by Parker that Florida's death penalty violated the Sixth Amendment because a judge, rather than a jury, makes the final determination of the existence of aggravating factors necessary to impose the death penalty. As of the time of the resentencing proceeding, the exact argument made available by the Supreme Court's decision in *Ring* was hopelessly foreclosed by the Court's earlier decisions in *Spaziano v. Florida*, 468 U.S. 447 (1984) and *Hildwin v. Florida* 490 U.S. 638 (1989) (*per*

curiam), where the Court made clear, based upon its then interpretation of the law, that Florida's death penalty sentencing procedure did not violate the Sixth Amendment. *See Tillman v. State*, 471 So. 2d 32, 35 (Fla. 1985) (implying that, where a criminal defendant bases his claim for relief upon a decision that amounts to a fundamental change in the law, defendant's failure to raise the issue below may be excused). Thus, because there was no basis for Parker to object in the trial court — a basis that would not exist until the Supreme Court decided *Ring* — Parker should be excused from the preservation requirement. *Cf. Grossman v. State*, 525 So. 2d 833, 842 (Fla. 1988) (holding that defendant failed to object in the trial court to the introduction of victim impact evidence on grounds that such evidence did not constitute a statutory aggravating factor and that defendant, therefore, would not receive the benefit of an intervening Supreme Court decision holding that the introduction of such victim impact evidence violates the Eighth Amendment), *cert. denied*, 489 U.S. 1071 (1989).

Even the Supreme Court's decisions in *Jones v. United States*, 526 U.S. 227 (1999) and *Apprendi v. New Jersey*, 530 U.S. 466 (2000) — both decided before the resentencing — would not have helped Parker because both of these decisions distinguished capital sentencing from the ambit of their decisions. In *Jones*, the Court reasoned that its decision, which construed a federal carjacking statute so as

to avoid a Sixth Amendment violation, did not implicate capital sentencing statutes because "the finding of aggravating facts falling within the traditional scope of capital sentencing" is "a choice between a greater and lesser penalty, not . . . a process of raising the ceiling of the sentencing range available." *Jones*, 526 U.S. at 251. And in *Apprendi*, in which the Court held that it was a violation of the Sixth Amendment for a New Jersey defendant to be sentenced to a greater punishment (authorized by a hate crimes statute) than permitted under the weapons crime for which the defendant was convicted, the Court again reiterated its belief that the sixth amendment violation avoided by the *Jones* Court and found by the *Apprendi* court did not implicate the Court's capital jurisprudence. *Apprendi*, 530 U.S. at 496-97.

Finally, following the Supreme Court's decision in *Apprendi*, no state appellate court held that *Apprendi* applied to capital sentencing. *See Mills v. Moore*, 786 So. 2d 532, 537 (Fla.) (rejecting the applicability of *Apprendi* to capital sentencing and noting "[n]o court has extended *Apprendi* to capital sentencing schemes, and the plain language of *Apprendi* indicates that the case is not intended to apply to capital schemes") (citing *State v. Hoskins*, 14 P.3d 997, 1016 (Ariz. 2000); *Weeks v. State*, 761 A.2d 804, 806 (Del. 2000) (en banc); *State v. Golphin*, 533 S.E.2d 168, 193-94 (N.C. 2000), *cert. denied*, 532 U.S. 931 (2001)), *cert. and*

stay denied, 532 U.S. 1015 (2001); *see also Saylor v.* State, 765 N.E.2d 535, 562-64 (Ind. 2002); *Floyd v. State*, 42 P.3d 249, 256 (Nev. 2002); *Hodges v. State*, No. CR-98-1988, 2001 WL 306937 (Ala. Ct. Crim. App. Oct. 26, 2001). Not until the *Ring* decision itself did any court determine that, despite the Supreme Court's express statements to the contrary in *Jones* and *Apprendi*, in fact the Sixth Amendment requires the jury, not the judge, determine the facts necessary to support imposition of a death sentence.

Parker's claim, therefore, that his death sentence violates the Sixth Amendment because a judge rather than a jury made the final determination that at least one aggravating factor existed sufficient to support the death penalty, did not arise until the Supreme Court decided *Ring* on June 24, 2002.

3. Parker Did Raise Sixth Amendment Concerns Before the Trial Court

Notwithstanding that Parker is not required to have raised in the trial court in December 2000 the then futile argument that the Florida death penalty violates the rule in *Apprendi*, Parker, nevertheless, did raise certain Sixth Amendment concerns that have a direct bearing upon the applicability of *Ring* to the Florida death sentence provision. In a pre-trial motion denominated a Motion to Declare Section 921.141, Florida Statutes, Unconstitutional for Failure to Provide Jury Adequate

Guidance in the Finding of Sentencing Circumstances, dated September 29, 1999,[2] Parker argued that the statute does not provide any guidance in how to determine the existence of sentencing factors (aggravating and mitigating), how to weigh the factors, and whether the jurors are required to find the factors unanimously (or by majority, plurality, or even individually). *See* R2-211-221. The State opposed, *see* R5-780-81, and the trial court denied, *see* R18-300, Parker's motion. Indeed, the lack of unanimity in forming its death sentence recommendation, a defect expressly raised by Parker in the trial court, is central to why Florida's death penalty statute, although different from Arizona's, nevertheless violates the principles established in *Ring*. This defect illustrates the shortfalls of Florida's advisory verdict procedure and establishes that these procedures hardly can be said to amount to "a jury determination of any fact on which the legislature conditions an increase in [a capital defendant's] maximum punishment." *Ring*, 122 S. Ct. at 2432. Parker thus expressly raised in the trial court the precise sixth amendment issue central to the analysis this Court must now undertake to determine whether Florida's death penalty survives *Ring*.

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[2] Parker made the motion before the Supreme Court's decision in *Apprendi*, which the Court issued on June 26, 2000, but after the decision in *Jones*, which the Court issued on March 24, 1999.

B. Florida's Death Penalty Violates the Sixth Amendment, as Interpreted by the Supreme Court in *Ring v. Arizona*

In *Ring v. Arizona*, 122 S. Ct. 2428 (2002), the Supreme Court held, consistent with its earlier decision in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), that "[c]apital 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." 122 S. Ct. at 2432. The Supreme Court in *Ring* struck down Arizona's death penalty as unconstitutional under the Sixth Amendment because a trial judge, sitting alone, determines the existence of aggravating factors required for the imposition of the death penalty. *Id.*

Florida's advisory verdict procedure is no different in principle from the Arizona procedure found wanting in *Ring*. Under Florida's death penalty, the jury renders only an advisory verdict recommending to the trial court what the proper sentence ought to be. *See* Fla. Stat. § 921.141(1), (2). Following the jury's advisory verdict and "[n]otwithstanding the recommendation of a majority of the jury," the trial court then determines the existence of aggravating and mitigating circumstances and determines the proper sentence in a written report. *See* Fla. Stat. § 921.141(3). Although this Court has held that the trial court may only override the jury's verdict, when the facts are "so clear and convincing that virtually

no reasonable person could differ," *Tedder v. State*, 322 So. 2d 908, 910 (Fla. 1975), it has also stated that, under Florida's death penalty, "the [trial] court is the final decision-maker and the sentencer — not the jury." *Combs v. State*, 525 So. 2d 853, 857 (Fla. 1988). There is thus no difference in principle between the death penalties in Arizona and Florida on the crucial issue of whether a jury makes the final determination of the existence of aggravating factors sufficient to support the imposition of the death penalty. Accordingly, under the authority of the Supreme Court's decision in *Ring*, this Court should declare the Florida death penalty unconstitutional and vacate Parker's death sentence.

1. *Ring*, Which Flowed from *Jones* and *Apprendi*, Overruled *Walton* Explicitly and *Hildwin* Implicitly and Should Be Applied Here to Strike Down the Florida Death Penalty as Violative of the Sixth Amendment

In *Ring*, the Supreme Court expressly overruled *Walton v. Arizona*, 497 U.S. 639 (1990), which had held that Arizona's death penalty did not violate the Sixth Amendment even though aggravating factors were found by the court without a jury. To understand the Court's decision in *Ring* and its applicability to the Florida statute, it is necessary first to understand what the Court held in *Jones* and *Apprendi*, as well as *Walton* and the Court's earlier decision upholding Florida's death penalty on Sixth Amendment grounds, *see Hildwin v. Florida*, 490 U.S. 638

(1989) (*per curiam*).

In *Jones*, the Court considered whether the federal carjacking statute, which contained a range of three possible punishments (*i.e.*, life imprisonment if death results, a maximum of 25 years imprisonment if serious bodily injury results, else a maximum of 15 years imprisonment), should be considered as three separate offenses (rather than a single offense, in which only the Court determines whether there is serious bodily injury or death necessary to raise the maximum punishment to 25 years or life imprisonment). *See Jones*, 526 U.S. at 230, 251-52 (citing 18 U.S.C. § 2119). The Court held that to avoid a potential violation of the Sixth Amendment (because a judge rather than a jury would be finding the facts necessary to raise the punishment beyond a 15 year sentence of imprisonment), 18 U.S.C. § 2119 had to be construed as three separate offenses "by the specification of distinct elements, each of which must be charged by indictment, proven beyond a reasonable doubt, and submitted to a jury for its verdict." *Jones*, 526 U.S. at 251-52.

In *Apprendi*, the Court answered the question left open in *Jones* — namely, whether it is a violation of the Sixth Amendment for a state to prescribe a punishment in excess of the statutory maximum based upon facts not submitted to the jury and found beyond a reasonable doubt. In *Apprendi*, defendant was

convicted of a weapons offense carrying a maximum statutory penalty of ten years. At sentencing, the prosecution presented evidence that the defendant committed the crime based on racial animus. Under New Jersey's hate crimes law, if the judge finds that the defendant in committing the crime acted with a purpose to intimidate because of, *inter alia*, race, the statute provides for a maximum punishment of twenty years imprisonment. The trial court sentenced the defendant to a term of twelve years imprisonment, a term in excess of that authorized by the weapons statute, based upon the court's finding of racial animus. The Supreme Court vacated and remanded, reaffirming its position in *Jones*, and holding that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi*, 530 U.S. at 490.

This set the stage for the Supreme Court's decision in *Ring*. In *Ring*, the Supreme Court considered whether the Court's previous holdings in *Jones* and *Apprendi* extended to the Arizona death penalty statute. The Court concluded, notwithstanding its earlier attempts in *Jones* and *Apprendi* to distinguish capital cases, that "*Apprendi*'s reasoning is irreconcilable with *Walton*'s holding" and that "[c]apital 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." *Ring*, 122 S. Ct. at 2432.

In assessing the continued viability of *Walton* in light of *Apprendi*, the Court in *Ring* noted that the *Walton* Court had rejected the Arizona petitioner's attempt to distinguish the Florida death penalty, holding instead that neither state's statute implicated the Sixth Amendment because the aggravating factors were not elements of the crime, but rather were "'sentencing considerations' guiding the choice between life and death." *Ring*, 122 S. Ct. 2437 (quoting *Walton*, 497 U.S. at 648). The Court in *Apprendi*, however, rejected this analysis, where it stated that "the relevant inquiry is one not of form, but of effect." *Apprendi*, 530 U.S. at 494; *see also Ring*, 122 S. Ct. at 2441 (noting that, in *Apprendi*, the Court rejected the notion that the characterization of a fact as a sentencing factor, rather than as an element of an offense, is not dispositive of the question of whether it is appropriate for a judge, rather than a jury, to make the final determination as to the existence of the fact). The effect in Arizona, according to the *Ring* court, is that the defendant was only exposed to the death penalty if the court, and not the jury, makes the required finding of at least one aggravating factor. *Id.* at 2440-41. Concluding that *Walton* could not survive *Apprendi*, the Court struck down the Arizona death penalty as violative of the Sixth Amendment. *Id.* at 2443.

In his concurrence in *Ring*, Justice Scalia sought to clarify the Court's

holding by explaining that the Court was only deciding that the jury, not the judge, must make the necessary factual determinations with respect to aggravating factors and that states could give the trial judge some role in the death sentencing process. Although holding to his belief that the Eighth Amendment does not actually require the finding of aggravating factors, Justice Scalia, nevertheless, approved of the outcome of *Apprendi* and *Ring* because of the "perilous decline" of the right to trial by jury. *Ring*, 122 S. Ct. at 2445 (Scalia, J., concurring). Of particular note here, Justice Scalia sought to clarify an issue raised by Justice Breyer's opinion concurring in the judgment, which argued that the Eighth Amendment requires juror sentencing in capital cases. *Ring*, 122 S. Ct. at 2446 (Breyer, J., concurring in the judgment). According to Justice Scalia, however, the decision in *Ring* does not require juror sentencing in capital cases. *Ring*, 122 S. Ct. at 2445 (Scalia, J., concurring). Rather, Justice Scalia noted "[w]hat today's decision says is that the jury must find the existence of the *fact* that an aggravating factor existed." *Id.* (emphasis in original).

Florida's advisory jury procedure, however, does not amount to juror determination of the facts supporting each aggravating circumstance. The jury merely hears the evidence and issues a recommendation on the death sentence based upon a finding that sufficient aggravating factors exist and that insufficient

mitigating factors exist to outweigh the aggravating factors. Aggravating factors may be found to exist by a mere majority, and the jurors need not agree on which aggravating factors are found to exist. Thus, it is not possible to say that Florida's procedure results in a jury finding of the existence of "the fact that an aggravating factor existed" in conformity with the Sixth Amendment.

The Supreme Court of the United States has already taken the position that, in Florida, a judge, not a jury, ultimately is the sentencer. *See Walton*, 497 U.S. at 647-48. As noted above, the Court in *Ring* explicitly overruled *Walton* on the question of whether the Arizona death penalty violates the Sixth Amendment. In *Walton*, petitioner argued that "every finding of fact underlying the sentencing decision must be made by a jury, not by a judge." *Walton*, 497 U.S. 647. In rejecting this argument, the *Walton* Court analogized to its decisions upholding the Florida death penalty:

> We repeatedly have rejected constitutional challenges to Florida's death sentencing scheme, *which provides for sentencing by the judge, not the jury*. . . . In *Hildwin*, for example, we stated that this case presents us once again with the question whether the Sixth Amendment requires a jury to specify the aggravating factors that permit the imposition of capital punishment in Florida, . . . and we ultimately concluded that the Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury.
>
> The distinctions Walton attempts to draw between the Florida and

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

Id. at 647-48 (internal quotations omitted and emphasis added) (citing *Hildwin v. Florida*, 490 U.S. 638 (1989) (*per curiam*); *Spaziano v. Florida*, 468 U.S. 447 (1984); *Proffitt v. Florida*, 428 U.S. 242 (1976)); *see also Hildwin*, 490 U.S. at 639 (noting the advisory verdict procedure in Florida and stating that "[t]he ultimate decision to impose a sentence of death, however, is made by the court after finding at least one aggravating circumstance"). The Court eventually condemned the Arizona procedure in *Ring*, and it should be condemned here.

2. Florida's Death Penalty Constitutes Sentencing by the Trial Court Because the Final Decision Whether to Impose the Death Penalty Rests with the Trial Court

The conclusion that the Florida death penalty violates *Ring* is thus demonstrated by the Supreme Court's reasoning in *Walton* and *Hildwin*, which rendered the Florida and Arizona death penalties inextricably intertwined on the question of who finds the requisite aggravating factors. This conclusion is also supported by: (1) this Court's decisions interpreting and applying the Supreme Court of the United States' decision in *Caldwell v. Mississippi*, 472 U.S. 320

(1985) and its progeny; (2) a Justice of this Court's recent opinion concurring in an order to review the applicability of *Ring* to the Florida death penalty; and (3) the Florida legislature's own view of the jury's advisory role in capital sentencing.

In *Caldwell*, the Court held that it is a violation of the Eighth Amendment for the jury to be led to believe that the "responsibility for determining the appropriateness of a death sentence rests not with the jury but with the appellate court which later reviews the case." *Id.* at 323. Subsequently, the Supreme Court narrowed the holding of *Caldwell* to apply only where comments to the jury mislead it as to its "role in the sentencing process in a way that allows the jury to feel less responsible than it should for the sentencing decision." *Romano v. Oklahoma*, 512 U.S. 1, 9 (1994) (citing *Darden v. Wainwright*, 477 U.S. 168, 184 n.15 (1986)).

In interpreting and applying the *Caldwell* line of cases, this Court has had several occasions to address the role of Florida's advisory jury. In *Brown v. State*, 721 So. 2d 274, 283 (1998), *cert. denied*, 526 U.S. 1102 (1999), this Court rejected defendant's claim that the standard jury instruction concerning the jury's advisory function violated *Caldwell*. In doing so, this Court cited a long line of precedents including *Combs v. State*, 525 So. 2d 853 (Fla. 1988) and *Grossman v. State*, 525 So. 2d 833 (Fla. 1988), *cert. denied*, 489 U.S. 1071 (1989). In both *Combs* and

Grossman, this Court held that the Florida death penalty sentencing procedure is not unconstitutional under *Caldwell* because, unlike the system in Mississippi, where the jury makes the final determination of whether to impose a death sentence, "[t]he Florida procedure does not empower the jury with the final sentencing decision; rather, the trial judge imposes the sentence." *Combs*, 525 So. 2d at 856; *Grossman*, 525 So. 2d at 839 (holding that *Caldwell* only applies where the jury is the sentencer, which is not the case in Florida where the jury is merely advisory, and the trial court makes the written findings of fact sufficient to support the death penalty); *see also Foster v. State*, 518 So. 2d 901, 901-02 (Fla. 1987), *cert. denied*, 487 U.S. 1240 (1988). If jury instructions in a Florida death penalty case cannot violate *Caldwell* and its progeny because it is the trial court, and not the jury, that makes the necessary factual findings to support a death sentence, then this Court has already effectively said that, under Florida's death penalty, the judge is the factfinder on aggravating circumstances. Such a system cannot stand in light of *Ring*.

Moreover, as a result of the Supreme Court's decision in *Ring*, a question now exists whether Florida's jury instructions violate *Caldwell* and its progeny. This Court has previously rejected the argument that the instructions, which inform the jury of its advisory role and which make it clear that the final sentencing

decision rests with the trial court, violate *Caldwell* because the trial judge's role in the process is over-emphasized. *See Combs*, 525 So. 2d at 857. This Court reasoned that the instructions could not amount to a violation of *Caldwell* because, under Florida's death sentence procedure, the jury's role is advisory and the Supreme Court of the United States has accepted this procedure as constitutional. *Id.* (citing *Spaziano v. Florida*, 468 U.S. 447 (1984)). *Ring*, however, makes clear that the trial court cannot, consistent with the Sixth Amendment, make the final determination on the existence of aggravating factors. Florida's jury instructions therefore cannot be said to describe properly "the role assigned to the jury by local law," *Romano*, 512 U.S. at 9, where such instructions indicate that the trial judge makes the final determination of the existence of aggravating factors.

Further support for invalidating the Florida death penalty statute under *Ring* is found in Justice Pariente's opinion concurring in this Court's order granting a stay of execution to Linroy Bottoson. Justice Pariente noted that the Court's decision in *Ring* raised sufficient concerns about Florida's death penalty to warrant further study. Justice Pariente indicated that a "substantial question" exists regarding whether Florida's advisory jury procedure – which does not require the jury to say what, if any, aggravators it found – comports with *Ring*. *Bottoson v. Moore*, Case No.: SC02-1455, 2002 WL 1472231, at *5 (Fla. July 8, 2002)

(Pariente, J., concurring); *see also King v. Moore*, Case No.: SC02-1457, 2002 WL 1472232, at *1 (Fla. July 8, 2002) (Pariente, J., concurring) (same). As succinctly put by Justice Pariente,

> [U]nder Florida's sentencing scheme the jury's role is to advise the judge on the sentence, and it can make a recommendation of death based on a bare majority. The jury does not find specific aggravating factors. Thus, it is the jury that recommends a sentence and the judge who finds the specific aggravators.

Bottoson, 2002 WL 1472231, at *6 (emphasis in original).

Finally, support for the proposition that Florida's death penalty is tantamount to judge based findings of aggravating factors sufficient to support the death penalty may be found by reference to the statutory scheme. In the statute setting forth the authorized sentences under the criminal law, the legislature specifically provided that a convicted capital defendant "be punished by death if 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*." Fla. Stat. § 775.082(1) (emphasis added). Of course, the findings by the court referred to in Section 775.082 include the existence of aggravating and mitigating factors. *See* Fla. Stat. § 921.141(3). As the Florida legislature has thereby acknowledged, it is the trial court, and not the jury, that makes the requisite findings of fact to support the death penalty. There thus is little doubt that the

statutory scheme violates *Ring*.

3. In Light of *Ring*'s Condemnation of Judges Determining the Existence of Aggravating Factors Sufficient to Support the Death Penalty, Florida's Sentencing Procedure, Which Permits a Simple Majority to Find that a Given Aggravating Factor Has Been Found and Does Not Require Agreement by the Jurors on Which Aggravating Factors Are Found, Violates the Sixth Amendment

Although the flaws in Florida's death penalty procedure — which permits a simple majority to find a given aggravating factor and does not require agreement by the jurors on which aggravating factors are found — may survive constitutional scrutiny in a world where judges can, consistent with the Sixth Amendment, make the requisite findings with regard to aggravating factors, such is no longer the case in light of the Supreme Court's holding in *Ring*. In his pre-sentencing motion to declare Fla. Stat. § 921.141 unconstitutional, Parker argued that the death penalty statute does not provide any guidance in how to determine the existence of sentencing factors (aggravating and mitigating), how to weigh the factors, and whether the jurors are required to find the factors unanimously (or by majority, plurality, or even individually). *See* R2-211-221. As Parker initially argued, because there are no instructions as to how jurors are to evaluate multiple aggravating circumstances, "it is quite possible for a jury to return a death verdict without even a majority of the jurors finding any one aggravating circumstance."

R2-219. Parker also argued that the possibility of a death sentence grounded on aggravating factors not necessarily found by a substantial majority of a 12-member jury is so unreliable as to violate due process. *Id.* (citing *Burch v. Louisiana*, 441 U.S. 130 (1979); *Johnson v. Louisiana*, 406 U.S. 356 (1972)).

In light of *Ring*'s holding that the sixth amendment's right to a trial by jury requires a jury, not a judge, to determine the existence of aggravating factors necessary to support the imposition of the death penalty, it naturally follows that the jury that makes the factual determination must do so consistent with all of the requirements implicit in the right to a trial by jury. For example, the Supreme Court has held that the Fifth, Sixth and Fourteenth Amendments, taken together, require state "criminal convictions to rest upon a jury determination that the defendant is guilty of every element of the crime with which he is charged, beyond a reasonable doubt." *United States v. Gaudin*, 515 U.S. 506, 510 (1995) (citing *Sullivan v. Louisiana*, 508 U.S. 275, 277-78 (1993)). In addition, although the Sixth Amendment has been interpreted not to require a unanimous verdict, the Court has never approved a nonunanimous verdict of less than 9-3. *See Johnson v. Louisiana*, 406 U.S. 356 (1972); *see also Burch v. Louisiana*, 441 U.S. 130 (1979) (reviewing the Supreme Court's unanimity and size requirements).

The trial court, however, instructed Parker's advisory jury, consistent with

Florida law, that it need not be unanimous in its findings with respect to the aggravating factors, but rather it could find an aggravating factor exists based upon a simple majority. *See* R34-2818-19. Also, the jury was never instructed that they must agree which aggravating factors were established to impose the death penalty. Thus, even with the 11-1 verdict that Parker received, it is impossible to say that the jury agreed, at least by a substantial majority, that each of the aggravating factors found by the trial court were also found by the jury. For example, it is possible that 5 of the jurors found that 3 aggravating factors were proven beyond a reasonable doubt and sufficiently outweighed the mitigating factors, that 6 of the jurors found the 2 other aggravating factors were proven beyond a reasonable doubt and sufficiently outweighed the mitigating factors, and that 1 juror found that no aggravating factors were proven beyond a reasonable doubt. Whatever such a result indicates, it certainly does not indicate that a substantial majority of the jurors found beyond a reasonable doubt that specific aggravating factors existed and were not outweighed by the mitigating factors. *See Bottoson*, 2002 WL 1472231, at *5 (Pariente, J., concurring) (questioning whether "the jury has actually found proof beyond a reasonable doubt of a particular aggravator" in light of the fact that "Florida law does not require that any number of jurors agree that the State has proven the existence of an aggravator before that aggravator may be deemed to be

found"). Yet, the Sixth Amendment requires the jury, by at least a substantial majority, to find that the prosecution has established "every element of the crime" (*i.e.*, every aggravating factor) beyond a reasonable doubt. Accordingly, even if Florida's advisory sentencing procedure is deemed to amount to the final determination of the existence of aggravating factors by the jury sufficient to impose the death penalty, the peculiarities of the system, which were permissible when a judge could make the final determination on aggravating factors, simply are improper when it is a jury that must make the final determination.

4. The Violation of *Ring* Is not Subject to Harmless Error Analysis, but, in any Event, Was Not Harmless

The deprivation of the right to trial by jury, "with consequences that are necessarily unquantifiable and indeterminate, unquestionably qualifies as structural error" and thus is not subject to harmless error analysis, but rather is *per se* reversible. *See Sullivan v. Louisiana*, 508 U.S. 275, 281-82 (1993). In *Sullivan*, the Court held that a constitutionally deficient reasonable doubt instruction was a violation of the sixth amendment right to trial by jury. *Id.* at 278. Just as the Court in *Sullivan* was unable to apply the harmless error standard to a failed reasonable doubt instruction — because "there has been no jury verdict within the meaning of the Sixth Amendment" and thus "the entire premise of *Chapman* review is simply

absent," *Id*. at 280 — so too here where, under *Ring*, court imposed findings with respect to aggravating factors violate the right to trial by jury, and there simply is no jury determination of the fact necessary to support the death sentence. Therefore, "the question whether the *same* verdict . . . would have been rendered absent the constitutional error is utterly meaningless." *Id*. (emphasis in original). *See State v. Jones*, No. CR-99-0536-AP, 2002 WL 1472233 at *10 n.13 (Ariz. Jul. 10, 2002) (noting that there can be no claim of harmless error in death penalty case involving two aggravating factors, one of which was contested: "It is, of course, impossible to find harmless error when, under *Ring*, Defendant was denied a jury trial on one of the two bases for the sentence").

Parker's sentencing jury never found the aggravating factors in conformity with *Ring* and thus cannot be looked to in an effort to determine the impact of the sixth amendment error. Nor can the court look to the original 1983 jury determination at the guilt/innocence phase to determine whether a reasonable juror could not but have determined that the State had established beyond a reasonable doubt the existence of the required aggravating factors. As this Court has already concluded, Parker's 1983 jury did not hear improperly withheld evidence that was critical to the sentencing determination. *State v. Parker*, 721 So. 2d 1147, 1151 (Fla. 1998). Thus Parker, like the defendant in *Sullivan*, never has had a jury

determination of the requisite factors supporting the imposition of the death penalty. It is therefore impossible to assess, as some courts have done when confronted with an *Apprendi* violation, whether the constitutional error was harmless beyond a reasonable doubt as required by *Chapman*.

Should this Court determine that harmless error analysis is nevertheless appropriate, the imposition of a death sentence against Parker based upon aggravating factors found to exist by the trial court, rather than the jury, in violation of *Ring* was, in any event, not harmless beyond a reasonable doubt. *See State v. DiGuilio*, 491 So. 2d 1129 (Fla. 1986) (applying harmless error analysis to constitutional violations on direct review). Following the Supreme Court's decision in *Apprendi*, a large number of cases applying harmless error analysis to *Apprendi* violations have done so in the context of drug convictions, where the government did not charge the drug quantity in the indictment or seek to establish the quantity before the jury. Rather, in many of these cases, a judge made the necessary factual findings regarding quantity during sentencing. Harmless error in the context of such *Apprendi* violations was detailed by the Eleventh Circuit: "if no reasonable juror could have found the defendant guilty without also finding that the specific quantity of drugs was involved, then the defendant is not entitled to a resentencing." *United States v. Anderson*, 289 F.3d 1321, 1327 (11th Cir. 2002).

Applying this analysis to Parker's case and the violation of *Ring*, it is simply not possible to say whether an appropriately instructed jury would have found each of the aggravating factors found to exist by the trial court beyond a reasonable doubt and that such aggravating factors were not outweighed by the mitigating factors. As noted above, *see supra* Section B.3, given that the trial court instructed the jury that a simple majority was sufficient to establish the existence of an aggravating factor and the lack of any instruction indicating that the jury had to agree on which aggravating factors were established, it would be utter guesswork to surmise whether the jury – especially if they knew that they had the final say – would have found the requisite aggravating factors and would have imposed the death penalty.

Unlike the drug cases involving *Apprendi* violations, where the quantity was often not disputed, *see, e.g.*, *Anderson*, 289 F.3d at 1327-28, whether the facts supported any of the aggravating factors in Parker's case was sharply disputed. As noted in Parker's Reply Brief, for example, the HAC aggravator was not supported by substantial evidence that the murder was unnecessarily torturous. *See* Reply Br. at 24-25. Also, the state supported its assertion that the CCP aggravator applied based upon only the fact that Parker had been in the store two to three hours before the murder. *See* Reply Br. at 26. Moreover, the state supported the

establishment of the avoid arrest aggravator by evidence that Parker's identity was known to the victim. *See* Reply Br. at 27-28. However, this evidence was legally insignificant, and the only other evidence in support of this aggravator should have been suppressed. *See* Reply Br. at 27-28. Finally, with respect to the pecuniary gain aggravator, the evidence established only that a robbery had occurred, and not that the murder was committed for pecuniary gain. Reply Br. at 29. Thus, in addition to the faulty instructions to the jury, the disputes concerning the establishment of the above indicated aggravating factors make it impossible to say, beyond a reasonable doubt, that Parker's sentencing in violation of *Ring* was harmless.

CONCLUSION

For the foregoing reasons, the Florida death penalty should be declared unconstitutional under the Sixth Amendment as interpreted by the Supreme Court in *Ring v. Arizona*, and Parker's death sentence should be vacated.

Dated: July 24, 2002

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to the Office of the Attorney General, Suite 300, 1655 Palm Beach Lakes Boulevard, West Palm Beach, Florida 343401-2299, by U.S. mail, this 24th day of July 2002.

_____
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CERTIFICATION OF FONT

I HEREBY CERTIFY that Appellant's Reply Brief is typed in Times New Roman 14 point type.

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