IN THE SUPREME COURT OF THE STATE OF FLORIDA

THOMAS THIBAULT,	*	
	*	
Appellant,	*	
	*	
vs.	*	CASE NO. SC01-2508
	*	
STATE OF FLORIDA,	*	
	*	
Appellee.	*	
	*	

* * * * * * * * * * * * * * * * * * *

APPELLANT'S INITIAL BRIEF

On Appeal from the Circuit Court of the Fifteenth Judicial Circuit, In and For Palm Beach County, Florida (Criminal Division)

MARK WILENSKY, ESQ.
Florida Bar No. 290221

DUBINER & WILENSKY, P.A.
Attorneys for Thomas Thibault
Northbridge Centre, Suite 325
515 North Flagler Drive
West Palm Beach, Florida 33401-4349
(561) 655-0150

TABLE OF CONTENTS

TABLE OF AUTHORITIES

OTHER AUTHORITIES

Florida Statutes

Florida Constitution

United States Constitution

PRELIMINARY STATEMENT

Appellant was the Defendant and Appellee was the prosecution in the lower tribunal. In this Brief, the parties will be referred to as they appear before this Court.

The following symbols will be used:

(R) denotes the Record on Appeal.

(T) denotes Transcript of Testimony.

(SR) denotes Supplemental Record on Appeal.

In accord with the Florida Supreme Court Administrative Order, issued on July 13, 1998, and modeled after Rule 28-2(d), Rules of the United States Court of Appeals for the Eleventh Circuit, counsel for Appellant hereby certifies that the instant brief has been prepared with 14 point Times New Roman type, a font that is spaced proportionately.

STATEMENT OF THE CASE

Appellant was indicted on December 8, 1998, for three counts of First Degree Murder With a Firearm, one count of Burglary With Assault or Battery While Armed, and one count of Armed Robbery With a Firearm. (R 43-45). The indictment was refiled on January 5, 1999. (R 49-51). The State filed its Notice of Intent to Seek Death Penalty on January 15, 1999. (R 53). A second refiled Indictment was filed on January 19, 1999, which included the same charges previously filed. (R 54-56). On May 16, 2000, Appellant filed a Motion to Elect and Justify Aggravating Circumstances. (R 388-389). Appellant filed a Motion for Statement of Particulars as to Aggravating Circumstances on that same date. (R 367-378). Mr. Thibault filed a Motion for Findings of Fact by the jury which contained a specific objection that the jury does not make findings of aggravating circumstances in Florida death penalty cases on May 16, 2000. (R 331-332).

On May 18, 2000, Mr. Thibault gave a recorded statement to the Office of the State Attorney regarding the case and his role in it. (T 5). On August 23, 2000, Mr. Thibault entered his plea of guilty as charged. (T 29-55).

The Appellant renewed the Motion to Elect and Justify Aggravating Circumstances, the Motion for Statement of Particulars as to Aggravating Circumstances, and the Motion for Findings of Fact by the jury which contained a

specific objection that the jury does not make findings of aggravating circumstances. (R 613-614, T 71-72). Prior to the Phase II hearing, the Court allowed the Appellant to withdraw his plea of guilty as to Count IV, in which he was charged with burglary, and the State entered a nolle prosse with regard to that count. (T 60, 67-70).

On May 30, 2001, a Phase Two hearing was held before the Honorable Marvin U. Mounts, Judge of the Circuit Court of the Fifteenth Judicial Circuit in and for Palm Beach County, Florida. (T 62-215). On August 31, 2001, judgment was entered pursuant to the plea with regard to three counts of First Degree Murder With a Firearm and one count of Robbery With a Firearm. (R 720). On each of the three counts of First Degree Murder With a Firearm, the Defendant was sentenced to death. (R 723-766, 721). On the charge of Robbery With a Firearm, the Defendant was sentenced to life in prison, consecutive to the other sentences imposed. (R 722). A Notice of Appeal was timely filed. (R 769). This Appeal follows.

STATEMENT OF THE FACTS

On May 19, 2000, the Appellant appeared before the Court for a scheduled plea conference. (T 1-27). At that time, the Appellant testified that he had given a statement to the prosecutors and the police the previous day. (T 9). A plea offer had been discussed which would necessitate the Appellant's serving life imprisonment in the Department of Corrections. (T 10). The Appellant testified that he was aware that the plea offer to life was available for that day only. (T 11). The Appellant explained that he was unprepared to take a plea at that time as he felt that his lawyers had not properly investigated the case. (T 12). The Appellant sought to have both of his lawyers withdrawn from representing him. (T 15). Appellant's Phase One counsel was privately retained. (T 15). The lower tribunal allowed the Appellant additional time to think about his situation and took no action on the case at that time. (T 25-27).

On May 23, 2000, the Appellant agreed to continue with his lead counsel (SR 4-5), but he asked that his Phase Two counsel be discharged. (SR 5).

On August 23, 2000, the Appellant appeared before the Court to enter a plea to the Court. (T 29-60). At the same time the Appellant was entering his plea, the Court inquired as to whether the Appellant wished to proceed "to a full Phase Two trial with or without a jury." (T 37). The following colloquy took place:

THE COURT: All right.

And also with both lawyers, I want your response to this: He is, I am sure, legally entitled to a full phase two trial with or without a jury. And is he waiving that day or does he want that? Has that been discussed by the lawyers; and have you discussed it with the client? That is a whole bunch of questions, I realize.

MR. GARCIA: Your Honor, if I could answer first.

THE COURT: Yes.

MR. GARCIA: I have had quite a few conversations with Mr. Thibault over the course of the last two weeks. We have discussed many issues, one being obviously if we were to go forward with just entering a plea of guilty to the Court, we would have the right to either have a phase two with or without a jury; and it was my understanding that we would be requesting a phase two hearing with just Your Honor.

And we have been over this and discussed this. Mr. Massa is relatively new to this case, as far as the preparations he would need to make to be prepared for phase two. I believe he has been on vacation probably no more than a month. I think a month is probably even stretching it.

So this would be a decision that the three of us would make at some

point in time, but I have had preliminary discussions with Mr. Thibault. This is something we had already decided we will go forward and do, if it comes down to that.

THE COURT: All right.

The State presented a factual basis that on November 26, 1998, at approximately three or four o'clock in the morning, Daniel Ketchum, Brian Harrison, and Charlotte Kenyon were shot to death. (T 45). During the course of investigation, it was revealed that Mr. Thibault, along with John Chamberlain and Jason Dascott, went to the victims' home in the early morning hours of that day. (T 45). At some point in time, an agreement was reached that the three visitors would rob those present in the house of some property which Mr. Ketchum had for sale. (T 46). The Appellant got a gun from Chamberlain, and put Ketchum in the bathroom. (T 46). A scuffle ensued and Ketchum was fatally shot once in the head. (T 46). At one point someone else in the house told the Appellant, "No witnesses." (T 46). At that time, Brian Harrison and Charlotte Kenyon were escorted into the bathroom and Mr. Harrison was shot approximately five times and Ms. Kenyon was shot approximately four times. (T 46).

During the course of the shooting, Chamberlain and Dascott assisted the Appellant in removing miscellaneous items of property, including televisions, VCRs,

other electronic equipment, and wallets. (T 46-47). The firearm used in the case belonged to Chamberlain's father. (T 47). The Appellant attempted to leave the residence in Mr. Ketchum's pickup truck, but was unable to get it started. (T 47). Later during the day of Thanksgiving, Mr. Thibault made numerous statements to numerous individuals confessing his role as the shooter and as the actual person who killed the three decedents. (T 47).

The Appellant was later arrested and after first declining to make a statement, he reinitiated contact with the police and a conversation between the Appellant and his mother was tape recorded. In that conversation, Mr. Thibault confessed that he was the shooter. (T 47-48). The Court incorporated into the plea the statement given by the Appellant to the State on May 18, 2000. (T 52-53). The Court accepted Mr. Thibault's change of plea from not guilty to guilty to all charges before the Court. (T 55).

The Phase Two proceedings took place before the Court, without a jury, on May 30, 2001. (T 62-216). The Appellant's mother, Lisa Temple, explained that when she was pregnant with Mr. Thibault, she was thrown out of school. (T 75-77). She was 14 years old when she gave birth to Mr. Thibault. (T 78). She married Mr. Thibault's father in what she described as a shotgun wedding. (T 78). At that time she was 16. (T 78). Mr. Thibault was born into a family of drugs and violence. (T

80). His grandfather, with whom he lived, brought bales of marijuana over on his boat. (T 80). His grandfather on his father's side scammed insurance companies. (T 81). At the age of 16, when Mr. Thibault was a year old, his mother became pregnant with his sister. (T 82). The father of Mr. Thibault's sister drank often and Mr. Thibault's mother, who had begun smoking marijuana at the age of 11, began smoking it again between the age of 17 and 18, when Mr. Thibault was approximately three years old. (T 84).

When Mr. Thibault was between the age of four and six, he became aware that his mother was smoking marijuana and he began to smoke himself at the age of 14. (T 85-86). His mother knew he was smoking marijuana in the house, and did not stop him. (T 86). Mr. Thibault began using cocaine when he was approximately 16 or 17 years old. (T 87). His mother was aware that he was using cocaine and tried to dissuade him from it, but got him no treatment. (T 87-88). At the age of approximately 17, Mr. Thibault had a girlfriend who was dealing in drugs and had been living with him in his mother's home. (T 88-89). He left home at the age of 17. (T 90-91). At the age of 19, he moved back home and was still smoking and selling marijuana. (T 93).

When Mr. Thibault was approximately eight years old, he was fondled by his mother's stepsister, who was babysitting for him. (T 94-95). He received no

counseling and there was no report made to any authority. (T 95). Mr. Thibault was never violent as a child, and was a happy child. (T 96). By the time Mr. Thibault was 14 or 15 years old, he was quite popular and had a good self-image. (T 97). He was quite talented in art and won an art scholarship. (T 97). Mr. Thibault had a daughter of his own when he moved back with his mother at age 19, and he parented the baby himself. (T 98-99). He always showed good parenting skills. (T 100). He lived with his daughter the first two years of her life and was always a good parent (T 100-101). His mother testified that Mr. Thibault was a generous man, always willing to help others, and was a good person. (T 101-102). She was shocked that he was involved in the instant case and felt that drugs were the cause of his problems. (T 102). He had changed some two or three months before the incident, and started spending more time with his friends and less with his family. (T 103).

Mr. Thibault was remorseful from the very start with regard to this incident. (T 125). He showed consistent sorrow and remorse from the time of the incident through the time of his sentencing. (T 125-126).

Dr. William Weitz, a licensed psychologist, testified before the Court, which accepted his testimony, although it was not under oath. (T 105-106). Weitz reviewed the testimony that Mr. Thibault gave in the trial of his co-defendant, as well as his deposition, and did an in-depth interview with him at the Palm Beach County Jail. (T

106-107). He felt that Mr. Thibault's intellect was above average and that he had special talent and abilities educationally, in the creative artistic areas. (T 109). He noted that Mr. Thibault's mother had three men in the family from the time she was age 15 to 20, and gave birth to the Appellant at age 15. (T 110). Mr. Thibault was sexually assaulted by his aunt at the age of 8. (T 110). He was also the subject of verbal abuse and emotional abuse by two of his stepfathers. (T 110). There were no parent role models and Mr. Thibault was essentially self-supporting (T 110). He began using drugs at the age of 8 or 9, and by 10 or 11 years of age he was a chronic user of drugs and actually got involved in drug sales. (T 111). By the age of 17, he had a child out of wedlock.

Dr. Weitz testified that Mr. Thibault's drug use and especially that use just before the incident had a negative impact on him, psychologically. (T 114-115). Dr. Weitz's testimony was that the Appellant acted under duress or the influence of another in that the general plan and the manner in which the incident was carried out were at the direct and specific input of others. (T 115-116). Although he took responsibility for his actions, Weitz felt that Mr. Thibault didn't actually perpetrate or come up with the plan or ideas which caused the criminal episode. (T 116-117). On cross examination, Dr. Weitz indicated that Mr. Thibault was aware that there was a plan to rob and take things from the victims and that Mr. Thibault did not have a major

psychiatric disorder. (T 121-122). However, Dr. Weitz testified that Mr. Thibault was sincerely remorseful for that which had taken place. (T 122-123).

Robert Scott Temple testified that Mr. Thibault was a hard worker (T 128, 129). He started out with no knowledge of the painting profession, and became a crew leader. (T 128-129). He felt that Mr. Thibault was strong minded and had a good heart. (T 131). When Mr. Thibault set his mind to something, he liked to finish it and he always put his daughter first when he was raising her. (T 131). He was true to his word, was helpful to others, and was a generally good and honest person, who had no prior history of violence. (T 131-132). He testified that the last months before the incident, Mr. Thibault's life had turned. (T 133). He was aware that Mr. Thibault smoked marijuana and that he dabbled in cocaine, but up until a number of months before the incident did not know that Mr. Thibault was using drugs to the extent that he was. (T 134).

Bobbie Dutton testified that she was the family's babysitter from the time he was approximately 13 years old. (T 135-136). Mr. Thibault helped her with the care of Mr. Thibault's little sister, and was very close to her as a little boy. (T 137). Mr. Thibault was very good with his daughter, attentive, watched over her, and took care of her. (T 139).

Thomas Daniel Thibault, Sr., the father of the Appellant, testified that he

divorced Mr. Thibault's mother when Mr. Thibault was approximately one year old. (T 145). He never acted as a father for Appellant. (T 145-146).

Edward Maldonado testified that he knew Mr. Thibault since high school. (T 147). They both had grown up without a father, both liked art, and had much in common. (T 147). During the time he knew him, he never knew Mr. Thibault to be a violent person. (T 148). He always appeared to be a leader. (T 148). He was an easy person to talk to, and was kind and generous to others. (T 148-149). As he grew older, there was a progression in his drug use. (T 149). Mr. Thibault explained to Maldonado that it was hard for him to live with himself because of what he had done and that he woke up every morning with visions of what had happened. (T 150).

Mr. Thibault's sister, Michele Shimele, testified that she grew up with the Appellant who was very protective of her and acted as a parent to her. (T 152-153). She testified that her brother had always been the man in the house and always provided emotional support. (T 153). The drugs he used later in his life affected him substantially. (T 154). She testified that Mr. Thibault remained extremely concerned about his daughter and did what he can to take care of her, even while incarcerated. (T 154-155). Ms. Shimele felt that it was the drugs that caused the incident which resulted in the murder. (T 155). Her brother had never been violent and she was shocked to know that her brother had committed these crimes. (T 155-156).

Annette Yoder, the mother of the Appellant's daughter, testified that she was aware that the Appellant was extremely remorseful for both the incident and how it affected their daughte, his family and the families of those that were killed. (T 158). She stated that the Appellant was a great father, planned with her for family events, took her daughter places, was involved in her schooling, and was loved sincerely by his daughter. (T 159).

At the allocution hearing, the State advised the Court that all of the victim families felt that Mr. Thibault had been cooperative, truthful, had testified in the trial of his co-defendant Chamberlain, and had indicated a willingness to testify against any other person who may in the future face criminal responsibility for the homicides. (T 194). The family members further indicated that they wanted the Court to know that because Mr. Thibault told the truth from the beginning and testified against the co-defendant that it was acceptable to them if the Court decided to sentence Mr. Thibault to life imprisonment. (T 195).

Thomas Thibault testified that he gave statements to the State and police authorities that were damaging to his legal position in this case because he felt that he had a responsibility to the families of the victims to let it be known what had actually happened. (T 200). He had an opportunity to enter a plea to receive a life sentence and turned it down, because he didn't want to be bound by the State, but rather

wanted to do the right thing for the families of the victims, for himself, for his family, and for God. (T 201). He read a poem to the Court to explain that he realized that he had taken the wrong path in life. (T 203). He indicated that while he was not rejecting responsibility for what he had done, he wanted the opportunity to do something different with the rest of his life. (T 203-204). Mr. Thibault further read a letter to the victims' families, which again accepted complete responsibility for his actions and his remorse for their grief, pain and loss. (T 204-205).

After the Phase Two testimony was completed, the State Attorney clarified for the Court that the victims' families continued to affirmatively agree with a sentence of life imprisonment. (T 207).

Sentencing hearing took place before the lower tribunal on August 31, 2001. (T 217-258). The Court read its sentencing order at that time. (T 200-257). The Court found that the capital felonies were committed while the Appellant was on felony probation, and that he was convicted of three capital felonies and of the felony of robbery, a crime involving the use of violence against three persons in their own home. (T 255). The Court found that the capital felonies were committed while the Appellant was engaged in the commission of a violent extended robbery, for the purpose of preventing or avoiding a lawful arrest, for pecuniary gain, and in a cold, calculated and premeditated manner without any pretense of any moral or legal justification. (T 255-

255). The Court found six aggravators proven beyond a reasonable doubt. (T 256). The Court found only one mitigating circumstance, which it was felt was established beyond a reasonable doubt; to wit: the Appellant accepted responsibility for his crimes and testified against an equally culpable co-defendant. (T 256).

SUMMARY OF 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. _____, 2002 WL 1357257 (June 24, 2002). The Florida statutory scheme is facially unconstitutional and no lawful death sentence could have been entered pursuant to the procedure set forth in the Florida law. Although Mr. Thibault waived the jury advisory verdict, that waiver has no effect on the validity of the statute or the procedure followed in this case. An advisory verdict cannot breathe life into the Florida statutory scheme condemned by Apprendi and Ring. In light of the invalidity of the provisions for imposition of the death sentence, Mr. Thibault must be sentenced to life in prison.

The Florida statute provided for an advisory jury verdict. The statute further contemplates that a defendant may waive that advisory verdict, and this Court has allowed such waiver, provided that the waiver is voluntary and intelligent. The waiver in this case was not voluntary, intelligent, or direct. The record does not show that the Appellant affirmatively, voluntarily, and intelligently waived the right to have a sentencing jury render its opinion on the appropriateness of the death penalty. Appellant's counsel advised the Court that he had discussed the matter with the Appellant, that he had an understanding that the Phase Two hearing would be without

a jury, but that the decision would eventually be made by Mr. Thibault, his lead counsel, and his Phase Two counsel. Colloquy with the Court fell far short of a knowing and intelligent waiver. Where the record contains an express waiver of counsel in the presence of the Appellant, that waiver would be termed valid. However, the statement in this case is not an express waiver.

ARGUMENT

POINT ONE

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. Thibault's case. Appellant contends that there has been a violation of the Due Process Clauses of the state and federal constitutions because a jury did not find the necessary death-qualifying fact of "sufficient aggravation" beyond a reasonable doubt. The fact that the Florida Statute in effect at the time of the imposition of the death sentence did not provide for the jury to make such a 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, which is precluded under the Florida statutory scheme, 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. Thibault filed a Motion To Elect and Justify Aggravating Circumstances. R388-389. He filed a Motion for Statement of Particulars As to Aggravating Circumstances. R 367-378. Mr. Thibault filed a Motion For Findings Of Fact By The Jury which contained a specific objection that the jury does not make findings of aggravating circumstances. R 331-332. The trial court denied the motions. T 72.

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). In Tucker v. State, 559 So.2d 218 (Fla.1990), it was held that a defendant may orally waive the right to jury trial if the defendant is represented by counsel and receives full explanation of the consequences of the waiver by the trial judge. Tucker, 559 So.2d at 220. In Tucker, this Court held that an oral waiver of jury trial was valid

where the lower tribunal appropriately questioned the defendant about his choice to proceed without a jury on the record. No such waiver took place in the current case. At no time did the lower tribunal advise the Appellant that his waiver of an advisory jury verdict constituted a waiver of his 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 right to have a jury rather than judge to find the aggravating factors necessary to impose a death sentence. This Appellant unquestionably did not receive the Tucker mandated full explanation of the consequences of the waiver by the trial judge.

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, and admittedly that advisory jury verdict was waived in the instant case. However, the statutory provision for an advisory jury verdict 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 may perhaps argue that this Court can avoid the Ring issues raised by the Florida statute simply by somehow substituting the statutory provision for a jury's advisory verdict for the right to a jury finding the basis for imposing a sentence of death. The State may argue that the waiver of that jury advisory verdict removes this case from those affected by the Apprendi and Ring announced right to a jury trial. In this way, the State might argue, this Court could avoid making the findings of fact that would run afoul of Apprendi and 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. Accordingly, Mr. Thibault's waiver of that advisory verdict cannot be equated to a

waiver of the Appellant's 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 right to have a jury rather than judge to find the aggravating factors necessary to impose a death sentence. The trial court, not the jury, 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. Since, for all the reasons set forth above, the advisory verdict cannot breathe life into the Florida statutory scheme condemned by Apprendi and Ring, analysis of the Florida statute is unaffected by Mr. Thibault's waiver of the jury advisory opinion.

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, thus eliminating any issue stemming from Mr. Thibault's waiver of that advisory jury verdict. 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 § 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, and in this case were not 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 is an additional error in this case rendering the death sentence unconstitutional pursuant to the Florida and United States Constitutions. In this case, 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, 497 U.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. The indictment in this case contains no mention of any aggravating factors or 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. The District Courts of Appeal have consistently held that a three year mandatory minimum sentence 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. Thibault 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. Thibault was convicted of ordinary first degree murder. He was not convicted of capital murder. Upon his guilt phase plea of guilty to first degree murder, without allegation 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 could not be cured under the existing statutory scheme, which provided no point in the proceedings where the jury could have made 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. Thibault 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.

POINT TWO

IMPOSITION OF THE DEATH SENTENCE WITHOUT A VALID WAIVER OF JURY ADVISORY VERDICT VIOLATES 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

Section 921.141 Florida Statutes states, in pertinent part:

> (1) Separate proceedings on issue of penalty.--Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by s. 775.082. The proceeding shall be conducted by the trial judge before the trial jury ...
>
> (2) Advisory sentence by the jury.--After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court, based upon the following matters:
> (a) Whether sufficient aggravating circumstances exist as enumerated in subsection (5);
> (b) Whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist; and
> (c) Based on these considerations, whether the defendant should be sentenced to life imprisonment or death....

The clear language of the Statute provides the Appellant with a right to an advisory jury verdict. However, the statute contemplates that a defendant may waive that advisory jury verdict, and this Court has recognized that where a defendant has been convicted of a capital crime, he may waive his right to a jury in the sentencing phase, provided the waiver is voluntary and intelligent. State v. Hernandez, 645 So.2d 432, 434-435, (Fla. 1994).

This Court cannot presume a waiver where the record is silent, Boykin v. Alabama,385 U.S. 238 (1969); Carnley v. Cochran, 369 U.S. 506, 82 S.Ct. 884, 8 L.Ed.2d 70 (1962), and the failure to either object or request the jury sentencing procedure cannot constitute such a waiver. The record must affirmatively show that the defendant voluntarily and intelligently waived the right to have a sentencing jury render its opinion on the appropriateness of the death penalty, granted him by the express provision of Section 921.141 Florida Statutes. Lamadline v. State, 303 So.2d 17 (Fla.1974). This record reflects no such waiver.

The only colloquy between the Court and the Appellant came during his plea conference, when the following took place:

> THE COURT: All right.
>
> And also with both lawyers, I want your response to this: He is, I am sure, legally entitled to a full phase two trial with or without a jury. And is he waiving that day or does he want that? Has that been discussed by the lawyers; and have you discussed it with the client? That is a whole bunch of questions, I realize.
>
> MR. GARCIA: Your Honor, if I could answer first.
>
> THE COURT: Yes.
>
> MR. GARCIA: I have had quite a few conversations with Mr. Thibault over the course of the last two weeks. We have discussed many issues, one being obviously if we were to go forward with just entering a plea of guilty to the Court, we would have the right to either have a phase two with or without a jury; and it was my understanding that we would be requesting a phase two hearing with just Your Honor.
>
> And we have been over this and discussed this. Mr. Massa is relatively

new to this case, as far as the preparations he would need to make to be prepared for phase two. I believe he has been on vacation probably no more than a month. I think a month is probably even stretching it.
So this would be a decision that the three of us would make at some point in time, but I have had preliminary discussions with Mr. Thibault. This is something we had already decided we will go forward and do, if it comes down to that.
THE COURT: All right.

That colloquy falls far short of a knowing and intelligent waiver. In Holmes v. State, 374 So.2d. 944 (Fla. 1979), it was held that where the record contains an expressed waiver by counsel in the presence of the defendant, that waiver would be termed valid. However, the statement made on the record in this case is not an expressed waiver, and instead reflects that the Appellant and his lawyers were still considering their options with regard to waiving the advisory jury verdict. Imposition of the death sentence without a valid waiver of jury advisory verdict violates 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.

CONCLUSION

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

Respectfully Submitted,

_____

MARK WILENSKY
Attorney for Thomas Thibault
515 North Flagler Drive
Suite 325
West Palm Beach, Florida 33401
(561) 655-0150
Florida Bar No. 290221

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished by hand delivery ail to the Office of the Attorney General, 1655 Palm Beach Lakes Boulevard, Third Floor, West Palm Beach, Florida 33401-2299 this 16th day of July, 2002.

_____

MARK WILENSKY
Counsel for Appellant

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY the instant brief has been prepared with 14 point Times New Roman type, a font that is spaced proportionately this 16th day of July, 2002.

_____

MARK WILENSKY
Counsel for Appellant