IN THE SUPREME COURT OF FLORIDA

No. SC02-1457

AMOS LEE KING,
Petitioner

versus,

MICHAEL W. MOORE, ETC.
Respondent/Appellee.

ON PETITION FOR WRIT OF HABEAS CORPUS

PETITIONER'S INITIAL BRIEF

Mark E. Olive
Fla. Bar No. 0578533
Law Offices of Mark E. Olive, P.A.
320 West Jefferson Street
Tallahassee, Florida 32301
850-224-0004
850-224-3331 (facsimile)

Kevin T. Beck
Capital Collateral Counsel
Fla. Bar No. 0802719
Office of the Capital Collateral
Regional Counsel - Middle Region
3801 Corporex Park Drive, Suite 201
Tampa, Florida 33619
813-740-3544
813-740-3554 (facsimile)

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STATEMENT OF THE CASE

Petitioner's discussion of the course of the proceedings and the relevant facts is contained in the Argument section of this brief.

ARGUMENT

I. Petitioner's Death Sentence Must Be Vacated Under *Ring v. Arizona*

To understand the implications of *Ring v. Arizona*, 2002 WL 1357257 (U.S., June 24, 2002), for petitioner King's death sentence, it is necessary to consider (A) the design of Florida's capital-sentencing procedure, (B) the way in which that procedure operates with respect to the all-important findings of fact that expose a defendant to a death sentence, (C) how the procedure worked in Amos King's case, (D) what *Ring* subsequently held about the constitutional necessity for jury fact-finding with respect to facts that expose a defendant to a death sentence; and (E) the nature of the constitutional rule announced in *Ring*, as bearing on *Ring*'s retroactivity. We take up these subjects in order:

A. The Florida capital-sentencing statute was designed to deny the jury a role in making the findings of fact on which eligibility for a death sentence depends.

Furman v. Georgia, 408 U.S. 238 (1972), was a confusing decision that led many legislatures and courts astray. *See Lockett v. Ohio*, 438 U.S. 586, 599-600 & nn. 7 & 8 (1978) (plurality opinion). The Florida Legislature believed that *Furman* had been aimed primarily at ending death-sentencing regimes in which "the

inflamed emotions of jurors can . . . sentence a man to die." *State v. Dixon*, 283 So.2d 1, 8 (Fla. 1974). Thus, the statute which it enacted in 1973 "in response to *Furman*"[1] severely limited the jury's role in the capital sentencing process. The Legislature relied on Florida's trial judges not only to make the ultimate sentencing decision,[2] but also to make the specific factual findings that brought the "issue of life or death within the framework of rules provided by the statute." *Ibid*. The statutory aggravating circumstances necessary to support a death sentence were required to be found by the trial judge and set forth in writing, *see* Fla. Stat. § 921.141(3), on the theory that, when "the trial judge justifies his sentence of death in writing, . . . [that will] provide the opportunity for meaningful review by this Court. Discrimination or capriciousness cannot stand where reason is required . . .." *Dixon*, 283 So.2d at 8.[3] As the Court has frequently described the "procedure [to] be used in sentencing phase proceedings":

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[1] *Proffitt v. Florida*, 428 U.S. 242, 247 (1976).

[2] "The Florida procedure does not empower the jury with the final sentencing decision; rather, the trial judge imposes the sentence." *Combs v. State*, 525 So.2d 853, 856 (Fla. 1988). Accord: *e.g.*, *Spencer v. State*, 615 So.2d 688, 691 (1993) ("It is the circuit judge who has the principal responsibility for determining whether a death sentence should be imposed.").

[3] *Morton v. State*, 789 So.2d 324, 333 (Fla. 2001): "The sentencing order is the foundation for this Court's proportionality review, which may ultimately determine if a person lives or dies." Accord: *e.g.*, *Patton v. State*, 784 So.2d 380, 388 (Fla. 2000).

> "First, the trial judge should hold a hearing to: a) give the defendant, his counsel, and the State, an opportunity to be heard; b) afford, if appropriate, both the State and the defendant an opportunity to present additional evidence; c) allow both sides to comment on or rebut information in any presentence or medical report; and d) afford the defendant an opportunity to be heard in person. Second, after hearing the evidence and argument, the trial judge should then recess the proceeding to consider the appropriate sentence. If the judge determines that the death sentence should be imposed, then, in accordance with section 921.141, Florida Statutes (1983), the judge must set forth in writing the reasons for imposing the death sentence. Third, the trial judge should set a hearing to impose the sentence and contemporaneously file the sentencing order."[4]

Conversely, the jury's role in capital sentencing was restricted to informing the court of "the judgment of the community as to whether the death penalty is appropriate." *Odom v. State*, 403 So.2d 936, 942 (Fla. 1981).[5] The jury was to do this by "render[ing] an advisory sentence to the court," Fla. Stat. § 921.141(2), which did *not* have to set forth any specific findings of fact, *ibid*.,[6] which was *not*

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[4] *Spencer v. State*, 615 So.2d 688, 690-691 (1993).

[5] See also, *e.g.*, *Richardson v. State*, 437 So.2d 1091, 1095 (Fla. 1983); *Quince v. State*, 414 So.2 185, 187 (Fla. 1982); *McCaskill v. State*, 344 So.2 1276, 1280 (Fla. 1977).

[6] Compare Fla. Stat. § 921.141(3)(b): "In each case in which the court imposes the death sentence, *the determination of the court shall be supported by specific written findings of fact* based upon the circumstances in subsections (6) and (7) and based upon the records of the trial and the sentencing proceedings." (Emphasis added.) To support a death sentence, specific findings with respect to aggravating and mitigating circumstances are required; it is "insufficient to state

required to be unanimous, Fla. Stat. § 921.141(3), and which the trial judge did *not* have to follow, *ibid*.[7]

This basic statutory framework and its allocation of responsibilities between judge and jury have been uniformly understood and implemented by the Court since *Dixon* first interpreted the statute. "The function of the jury in the sentencing phase . . . is not the same as the function of the jury in the guilt phase." *Johnson v. State*, 393 So.2d 1069, 1074 (Fla. 1981). The jury does not make specific findings of fact, *Cannady v. State*, 427 So.2d 723, 729 (Fla. 1983), because, this Court has held, *Hildwin v. Florida*, 490 U.S. 638 (1989) (per curiam), did not require such findings, *Hunter v. State*, 660 So.2d 244, 252 & n.13 (Fla. 1995),[8] and the jury

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generally that the aggravating circumstances that occurred in the course of the trial outweigh the mitigating circumstances that were presented to the jury." *Patterson v. State*, 513 So. 2d 1257, 1263-1264 (Fla. 1987). Accord: *Bouie v. State*, 559 So.2d 1113, 1115 (Fla. 1990). Yet *all* that a jury's advisory verdict can be read as doing is to "state generally that the aggravating circumstances . . . outweigh the mitigating circumstances." This is doubtless why the Court in *Spaziano v. State*, 433 U.S. 508, 512 (Fla. 1983), concluded that "allowing the jury's recommendation to be binding would violate *Furman v. Georgia.*"

[7] Even in the rare case where it is possible to guess that a jury at the penalty stage must have found particular facts to be true or untrue, the judge is authorized to find the contrary. *See*, *e.g.*, *McCrae v. State*, 395 So.2d 1145, 1154-1155 (1980).

[8] That is the precise premise upon which this Court sustained a trial judge's power to override the jury's recommendation of a life sentence as consistent with *Bullington v. Missouri*, 451 U.S. 430 (1981). See, *e.g.*, *Lusk v. State*, 446 So.2d 1038, 1042 (Fla. 1984). It is also why the defendant has no right "to have the existence and validity of aggravating circumstances determined as they were placed before his jury." *Engle v. State*, 438 So.2d 803, 813 (Fla. 1983), *explained*

does not bear "the same degree of responsibility as that borne by a 'true sentencing jury,'" *Pope v. Wainwright*, 496 So. 2d 798, 805 (Fla. 1986).[9] The jury's role is simply – though importantly – to reflect community judgment "as to whether the death sentence is appropriate," *McCampbell v. State*, 421 So.2d 1072, 1975 (Fla. 1982).[10] The "specific findings of fact" that are the "mandatory statutory requirement" for a death sentence are the responsibility of the presiding judge and no one else. *Van Royal v. State*, 497 So.2d 625, 628 (Fla. 1986). See, *e.g.*, *Patterson v. State*, 513 So. 2d 1257, 1261-1263 (Fla. 1987); *Grossman v. State*, 525 So.2d 833, 839-840 (Fla. 1988);[11] *Hernandez v. State*, 621 So.2d 1353, 1357

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in Davis v. State, 703 So.2d 1055, 1061 (Fla. 1997). As Justice Shaw has noted, a Florida "jury's advisory recommendation is not supported by findings of fact. . . . Florida's statute is unlike those in states where the jury is the sentencer and is required to render special verdicts with specific findings of fact." *Combs*, 525 So.2d at 859 (concurring opinion). Under Florida practice, "both this Court and the sentencing judge can only speculate as to what factors the jury found in making its recommendation . . . ." *Ibid*. The United States Supreme Court, too, has recognized that "the jury in Florida does not reveal the aggravating circumstances on which it relies," *Sochor v. Florida*, 504 U.S. 527 (1992).

[9] Accord: *Combs*, 525 So.2d at 855-858; *Burns v. State*, 699 So.2d 646, 654 (Fla. 1997), and cases cited.

[10] *See*, *e.g.*, *Cox v. State*, 2002 WL 1027308 (Fla. May 23, 2002), pp. *7-*8: "Florida statutory law details the role of a penalty phase jury, which directs the jury panel to determine the proper sentence without precise direction regarding the weighing of aggravating and mitigating factors in the process."

[11] Holding on other grounds receded from in *Franqui v. State*, 699 So.2d 1312, 1319-1320 (Fla. 1997).

(Fla. 1993); *Layman v. State*, 652 So.2d 373, 375-376 (Fla. 1995); *Gibson v. State*, 661 So.2d 288, 292-293 (Fla. 1995); *State v. Riechman*, 777 So.2d 342, 351-353 (Fla. 2000).

B. The statute makes eligibility for a death sentence depend upon findings of fact by the trial judge that go beyond any findings reached by the jury in determining guilt.

The actual operation of the Florida capital-sentencing statute must be viewed against the backdrop of the State's general procedures for prosecuting homicide cases, including potentially capital homicide cases. Although this Court is familiar with those general procedures, we summarize them briefly in order to analyze how the statutory death-sentencing process fits into them. The aim of the analysis is to demonstrate that the statutory death-sentencing process, in context, exposes Florida capital defendants "'to a penalty *exceeding* the maximum . . . [they] would receive if punished according to the facts reflected in the jury verdict alone.'" *Ring v. Arizona,* 2002 WL 1357257 (U.S., June 24, 2002) at *8, quoting *Apprendi v. New Jersey*, 530 U. S. 466, 483 (2000).

All capital crimes in this State must be charged by presentment or indictment of a grand jury. Fla. Const. Art. I, § 15(a) (1980). However, indictments may be open-ended with respect to the prosecution's theory of liability, or may plead alternative theories. For example, an indictment needs not specify in separate counts that a person charged with first-degree murder acted with a premeditated

design and that s/he caused the victim's death in the course of an enumerated felony if the prosecution wishes to submit these two factually diverse theories to the jury as alternative bases for a first-degree murder conviction under Fla. Stat. § 782.04 (1979). Some charging instruments do list multiple theories of first-degree murder liability, others list only one. In no event does the instrument have to state the aggravating circumstance or circumstances on which the State will later rely to establish that the defendant is eligible for the death penalty if convicted of first-degree murder. *State v. Sireci*, 399 So.2d 964, 970 (Fla. 1981).

Under standard Florida practice, the jury instructions at a trial upon an indictment charging first-degree murder will allow a conviction on any theory of first-degree liability that has sufficient evidentiary support to sustain a verdict. Verdict forms may or may not specify the theory of liability that the jury found proved beyond a reasonable doubt. It is not common to require juries to return special verdicts making specific findings of fact.

Early in the history of the State's post-1972 death penalty law, this Court explained what constitutes a capital crime, and where the definition comes from:

> "The aggravating circumstances of Fla. Stat. § 921.141(6), F.S.A., actually define those crimes – when read in conjunction with Fla. Stat. § § 782.04(1) and 794.01(1), F.S.A.– to which the death penalty is applicable in the absence of mitigating circumstances."

Dixon, 283 So.2d at 9. Accord: *Alford v. State*, 307 So.2d 433, 444 (Fla. 1975).

Section 782.04, Florida Statutes, defines first degree murder as

> "(1)(a) The unlawful killing of a human being:
>
> > "1. When perpetrated from a premeditated design to effect the death of the person killed or any human being;
> >
> > "2. When committed by a person engaged in the perpetration of, or in the attempt to perpetrate, any . . . [of several enumerated felonies]."

The same section provides that "murder in the first degree . . . constitutes a capital felony, punishable as provided in § 775.082." Fla. Stat. § 782.04(1) (1979).

The sentence for first-degree murder is specified in section 775.082, Florida Statutes:

> "A person who has been convicted of a capital felony ***shall*** **be punished by life imprisonment** and shall be required to serve no less than 25 years before becoming eligible for parole ***unless*** **the proceedings held to determine sentence** according to the procedure set forth in § 921.141 **result in *a finding by the court*** **that such person shall be punished by death**, and in the latter event such person shall be punished by death."

Fla. Stat. § 775.082 (1979) (emphasis added).

Section 921.141, Florida Statutes, describes the procedure to be followed by the court in making the findings which are the necessary precondition for a death sentence and in determining that a death sentence will actually be imposed. See *Dixon*, 283 So.2d at 7 ("[a]fter his adjudication, this defendant is provided with

five steps between conviction and imposition of the death penalty"). Section 921.141 is titled "Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence" and provides the following:

> "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 § 775.082."

In the penalty-phase proceeding, the jury may or may not hear additional evidence beyond what was adduced prior to the verdict of guilty. *See Dixon*, 283 So.2d at 7; Fla. Stat. § 921.141(1) (1979). Each side is permitted to make a closing argument to the jury. Fla.R.Crim.Pro. 3.780. The jury is then instructed to consider all the evidence and reach an advisory recommendation regarding the appropriate sentence. The recommendation is to be based on whether sufficient aggravating circumstances exist to justify imposition of the death penalty and whether sufficient mitigating circumstances exist to outweigh these aggravating circumstances. Fla. Stat. § 921.141(2) (1979). Aggravators may be considered if proved beyond a reasonable doubt, and mitigators if supported by a preponderance of the evidence.

The aggravating circumstances enumerated by Fla. Stat. § 921.141(5), F.S.A. are:

> "(a) The capital felony was committed by a person under

sentence of imprisonment;

"(b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person;

"(c) The defendant knowingly created a great risk of death to many persons;

"(d) The capital felony was committed while the defendant was engaged or was an accomplice in the commission of, or an attempt to commit, or flight after committing or attempting to commit any robbery, rape, arson, burglary, kidnaping, aircraft piracy, or the unlawful throwing, placing or discharging of a destructive-device or bomb;

"(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody;

"(f) The capital felony was committed for pecuniary gain;

"(g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws;

"(h) The capital felony was especially heinous, atrocious or cruel."

The jury's advisory recommendation does not specify what, if any, aggravating circumstances the jurors found to have been proved. Neither the consideration of an aggravating circumstance nor the return of the jury's advisory recommendation requires a unanimous vote of the jurors.

"The trial judge . . . is not bound by the jury's recommendation, and is given

final authority to determine the appropriate sentence." *Engle v. State*, 438 So.2d 803, 813 (Fla. 1983), *explained in Davis v. State*, 703 So.2d 1055, 1061 (Fla. 1997). After the jury has made its advisory recommendation, it is discharged. A separate sentencing hearing is then conducted before the court alone. In some cases tried around the time of petitioner's case, and in all cases after 1993, this judge-only sentencing hearing involves the presentation of additional evidence and/or argument to support the aggravating and mitigating circumstances. *See generally Spencer v. State*, 615 So.2d 688 (Fla. 1993).

Section 921.141(3), Florida Statutes, provides that

> "Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death . . .
>
> "If the court does not make the finding requiring the death sentence, the court shall impose sentence of life imprisonment in accordance with § 775.082."

The judge is required to issue written findings in support of his or her decision to impose a death sentence. Fla. Stat. § 921.141(3); *Grossman v. State*, 525 So.2d 833 (Fla. 1988).[12] This means that the judge must make specific factual findings with respect to the existence *vel non* of the facts constituting the statutory aggravating circumstances that are a necessary precondition for the imposition of a

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[12] Holding on other grounds receded from in *Franqui v. State*, 699 So.2d 1312, 1319-1320 (Fla. 1997).

sentence of death. Not being bound by the jury's sentencing recommendation, the judge may consider and rely upon evidence not submitted to the jury (provided the defendant receives adequate prior notice of the evidence). *Porter v. State*, 400 So.2d 5 (Fla. 1981). The judge is also permitted to consider and rely upon aggravating circumstances that were not submitted to the jury. *Davis v. State*, 703 So.2d 1055 (Fla. 1997), citing *Hoffman v. State*, 474 So.2d 1178 (Fla. 1985) (court's finding of the "heinous, atrocious, or cruel" aggravating circumstance was proper even though the jury was not instructed on it); *Fitzpatrick v. State*, 437 So.2d 1072, 1078 (Fla. 1983) (finding of previous conviction of a violent felony was proper even though the jury was not instructed on it); *Engle*, 438 So.2d at 813.

Because the jury's role is merely advisory, this Court's review of a death sentence is based and dependent upon the judge's written findings. *E.g.*, *Morton v. State*, 789 So.2 324, 333 (Fla. 2001); *Grossman*, 525 So.2d at 839; *Dixon*, 283 So.2d at 8. The Court has repeatedly emphasized that the trial judge's findings must be made independently of the jury's recommendation. *See Grossman*, 525 So.2d at 840 (collecting cases).

C. Petitioner's eligibility for a death sentence was in fact established solely through findings of fact made by the trial judge that went beyond any findings reached by the jury in determining guilt.

Now, here are the proceedings through which Amos King was determined to be eligible for a death sentence and condemned to die:

On April 7, 1977, the grand jury for Pinellas County, Florida returned an indictment charging that:

> Amos Lee King, Jr. of the County of Pinellas and State of Florida, on the 18th day of March in the year of our Lord, one thousand nine hundred seventy-seven in the County and State aforesaid unlawfully, while engaged in the perpetration of, or in an attempt to perpetrate the crime of involuntary sexual battery, did beat and stab Natalie A. Brady, a human being, with a knife, thereby inflicting upon the said Natalie A. Brady mortal wounds of which said mortal wounds, and by the means aforesaid and as a direct result thereof, the said Natalie A. Brady died; contrary to Chapter 782.04(1)(a), Florida Statutes, and against the peace and dignity of the State of Florida.

The indictment did not indicate whether the State would seek the death penalty, or upon what factual basis. The Petitioner was also indicted for involuntary sexual battery; arson in the first degree; and burglary.

The evidence adduced at trial is summarized in the opinion of the Florida Supreme Court affirming Petitioner's conviction and sentence. *King v. State,* 390 So.2d 315, 316-317 (Fla. 1980). The jurors were instructed that the first-degree murder indictment would support a conviction of first-degree murder under either a premeditated *or* felony murder theory: "Murder in the first degree is the unlawful killing of a human being when perpetrated from a premeditated design to effect the death of the person killed or any human being **or** when committed by a person engaged in the perpetration of or in the attempt to perpetrate, in this case,

involuntary sexual battery." Tr. 1974. The verdict form at guilt innocence merely read "We, the Jury, find the defendant, Amos Lee King, Jr., Guilty of Murder in the First Degree, as charged in Count I of the Indictment filed herein." Mr. King was also found guilty of the other counts as charged in the indictment and in a separate information that was joined the morning of trial. The jury returned a non-specific penalty phase recommendation that simply stated that "a majority" of the jurors recommended death.

On direct appeal, this Court affirmed the conviction and sentence of death. *King v. State*, 390 So.2d 315 (Fla. 1980). Mr. King sought post-conviction relief, but this was denied by the circuit court. On appeal, this Court affirmed the denial of post-conviction relief. *King v. State*, 407 So.2d 904 (Fla. 1981). In 1981, Mr. King filed a Petition for Writ of Habeas Corpus in the United States District Court, Middle District of Florida. The district court denied relief. On appeal, Mr. King's sentence of death was vacated by the Eleventh Circuit Court of Appeals. *King v. Strickland*, 748 F.2d 162 (11th Cir. 1984); *previous history, King v. Strickland*, 714 F.2d 1481 (11th Cir. 1983). The Eleventh Circuit found trial counsel's performance at the penalty phase constitutionally deficient. Noting that Mr. King's was not a case of "clear guilt," and that "[c]ircumstantial evidence cases are always better candidates for penalty leniency than direct evidence convictions," the court found that

> King was convicted on circumstantial evidence which however strong **leaves room for doubt** that a skilled attorney might raise to a sufficient level that, though not enough to defeat conviction, might convince a jury and a court that the ultimate penalty should not be exacted, lest a mistake may have been made.

King v. Strickland, 748 F.2d 1462, 1464 (11th Cir. 1984), *cert*. *denied*, 471 U.S. 1016 (1985)(emphasis added).

A re-sentencing proceeding occurred in the trial court. **A new jury was selected**.[13] These jurors were advised that the Petitioner had been charged with

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[13]At this resentencing, counsel attempted to present evidence that conflicted with the state's circumstantial evidence of guilt. *King v. State*, 514 So.2d 354, 357 (Fla. 1989). The circuit court denied Mr. King the opportunity to present this evidence, and this Court affirmed. In dissent, Justice Barkett wrote that the evidence challenging the circumstantial evidence upon which the conviction and aggravators were based was proper mitigation.

> While I agree with all other portions of the majority opinion, I must dissent from its conclusion on the issue of lingering-doubt evidence. The decision in *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), in my opinion, casts grave doubt upon the majority's statement that lingering-doubt evidence is "irrelevant to King's sentence." *Lockett* announced that a capital sentencer may not be precluded from considering in mitigation
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> > any aspect of the defendant's character or record and *any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death*. . . . The need for treating each defendant in a capital case with that degree of respect due the uniqueness of the individual is far more important than is noncapital cases.

As the majority notes, the Eleventh Circuit found that:

and convicted of first-degree murder, burglary, and sexual battery. Tr. 1675. Evidence was presented with respect to prior convictions, the petitioner's imprisonment, and the alleged circumstances of the offense.[14] Following arguments by counsel, the judge instructed the jury. In accordance with Florida law, the judge began by telling the jury

> it is now your duty to advise the Court as to what punishment should be imposed upon the Defendant for his crime of murder in the first degree. As you have been told, **the final decision as to what punishment shall be imposed is the responsibility of the Judge**; however, it is your duty to follow the law which will now be given you by the Court and render to the Court an advisory sentence based upon your determination as to whether sufficient aggravating circumstances exist to justify the imposition of the death penalty and whether sufficient
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> King was convicted on circumstantial evidence which however strong leaves room for doubt that a skilled attorney might raise to a sufficient level that, though not enough to defeat conviction, might convince a jury and a court that the ultimate penalty should not be exacted, lest a mistake may have been made.
>
> The defendant should not lose the advantage of this argument merely because a new jury has been empaneled.

Id. at 360-361 (internal citations omitted).

[14]While Petitioner was not allowed to show the new jurors evidence that he was innocent of burglary, sexual battery, and murder, the state was allowed to introduce testimonial evidence about the circumstances of the crime and the state's theory of why Petitioner was guilty. As the state argued in its brief before this court on direct appeal: "[T]he state's evidence went to establish the aggravating circumstances they sought to prove." Brief of Appellee, p. 15.

> mitigating circumstances exist to outweigh any aggravating circumstances found to exist * * * The aggravating circumstances which you may consider are limited to such of the following as are established by the evidence. TR 1719-1720 (emphasis added).

The judge then listed six statutory aggravating circumstances. TR 1720-1721. He continued:

> If you find the aggravating circumstances do not justify the death penalty, your advisory sentence should be one of life imprisonment without possibility of parole for 25 years. [¶] Should you find sufficient of these aggravating circumstances do exist, it will then be your duty to determine whether mitigating circumstances exist that outweigh the aggravating circumstances. Among the mitigating circumstances which you may consider, if established by the evidence, are: one, age of Defendant at the time of the crime; two, any aspect of Defendant's character or record, and any other circumstances of the offense.

TR 1721. Regarding the proof of aggravating circumstances, the judge charged:

> Each aggravating circumstance must be established beyond a reasonable doubt before it may be considered by you in arriving at your decision. Whenever the words reasonable doubt are used, you must consider the following: A reasonable doubt is not a possible doubt, a speculative, imaginary, or forced doubt. Such a doubt must not influence you to decide that an aggravating factor does not exist if you have an abiding conviction that the aggravating factor exists. On the other hand, if, after carefully considering, comparing and weighing all evidence, there is not an abiding conviction that the aggravating factor exists, or if, having a conviction, it is one which is not stable but one which waivers and vacillates, then the doubt is reasonable. TR 1722.

The jury returned an advisory sentence recommending a sentence of death by a vote of 12 to 0. The jurors did not indicate whether they had unanimously found *any* statutory aggravating circumstance. TR 1728, 1732. The court recessed and then reconvened and announced a finding of five aggravators and no mitigation. Mr. King was sentenced to death. TR 1728-34. The judge's written justification is a classic example of bench-trial findings of fact and conclusions of law. For each of the aggravators, the judge stated or paraphrased the statutory text of the aggravator, recited facts in support of the aggravator, and then "found" the aggravator. R. 477.

On direct appeal, this Court noted the jury's recommendation only in passing and then relied on the trial court's sentencing order. This Court's consideration of whether the death sentence was properly imposed depended entirely upon the trial court's findings:

> As noted before, however, the jury unanimously recommended that he be sentenced to death which the trial court did, finding five aggravating circumstances and nothing in mitigation. Our review of this record shows ample support for **the trial court's findings** except for finding that King knowingly created a great risk of death to many persons by setting fire to the murder victim's house. . . . After striking this factor, however, we are left with four valid aggravating circumstances and no mitigating circumstances. **We therefore affirm King's sentence of death**.

King, 514 So.2d at 359-360 (emphasis added).

D. *Ring v. Arizona* holds that the federal constitutional right to jury trial is violated by the imposition of a death sentence to which the defendant is exposed solely through findings of fact made by the trial judge that go beyond any findings reached by the jury in determining guilt.

In *Ring v. Arizona*, 2002 WL 1357257 (U.S., June 24, 2002), the Supreme Court overruled *Walton v. Arizona,* 497 U. S. 639 (1990), "to the extent that . . . [*Walton*] allows a sentencing judge, sitting without a jury, to find an aggravating circumstance necessary for imposition of the death penalty." 2002 WL 1357257 at *10. Quite simply, *Ring* subjected capital sentencing to the Sixth and Fourteenth Amendment rule of *Apprendi v. New Jersey*, 530 U.S. 466 (2000), "that the Sixth Amendment does not permit a defendant to be 'expose[d] ... to a penalty *exceeding* the maximum he would receive if punished according to the facts reflected in the jury verdict alone.'" *Ring*, 2002 WL 1357257 at *3, quoting *Apprendi*, 530 U.S. at 483. "Capital defendants, no less than non-capital defendants," the Court in *Ring* declared, "are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment." *Ibid*.

That rule squarely and indisputably outlaws the Florida sentencing procedure used to impose petitioner King's's death sentence. No other conclusion can plausibly be reached, for several reasons:

First, in overruling *Walton* (which had upheld Arizona's capital sentencing

procedure against the challenge that it violated capital defendants' Sixth Amendment right to jury trial), *Ring* necessarily also overruled *Hildwin v. Florida,* 490 U. S. 638 (1989) (per curiam), and its precursors (which had upheld Florida's capital sentencing procedure against the identical challenge). The *Walton* decision had treated these Florida precedents as controlling and had regarded the Florida and Arizona capital-sentencing procedures as indistinguishable. Thus, *Walton* said:

> "We repeatedly have rejected constitutional challenges to Florida's death sentencing scheme, which provides for sentencing by the judge, not the jury. *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). In *Hildwin,* for example, we stated that '[t]his 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,' 490 U.S., at 638 . . . 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.' *Id.,* at 640-641 . . . .
>
> "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 647-648. *Ring*, too, explicitly recognized the indissolubility of the

Walton-Hildwin linkage:

> "In *Walton v. Arizona,* 497 U. S. 639 (1990), we upheld Arizona's scheme against a charge that it violated the Sixth Amendment. The Court had previously denied a Sixth Amendment challenge to Florida's capital sentencing system, in which the jury recommends a sentence but makes no explicit findings on aggravating circumstances; we so ruled, *Walton* noted, on the ground that 'the Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury.' *Id.,* at 648 (quoting *Hildwin v. Florida,* 490 U. S. 638, 640-641 (1989) (per curiam)). ***Walton*** **found unavailing the attempts by the defendant-petitioner in that case to distinguish Florida's capital sentencing system from Arizona's**. In neither State, according to *Walton*, were the aggravating factors 'elements of the offense'; in both States, they ranked as 'sentencing considerations' guiding the choice between life and death. 497 U. S., at 648 (internal quotation marks omitted)."

Ring, 2002 WL 1357257 at *6 (emphasis added). Sure as one plus one equals two, and sure as two minus two equals zero, *Hildwin* bit the constitutional dust alongside *Walton*.

Second, *Ring*'s recognition that the "right to trial by jury guaranteed by the Sixth Amendment . . . encompasse[s] the factfinding . . . necessary to put . . . [a capital defendant] to death" (*Ring*, 2002 WL 1357257 at *10) upsets the fundamental premise on which Florida's capital-sentencing process was constructed. As we have seen at Section I (A) above, the very essence of the Florida process was the *relegation of the jury to a subordinate, advisory, non-*

factfinding role in death sentencing, together with *reliance on written findings of fact by the trial judge* to establish (and to make reviewable by this Court) the factual bases on which a death sentence is authorized and appropriate for each capital defendant's crime. *E.g.*, *Porter v. State*, 723 So.2d 191, 195-196 (Fla. 1998).[15] Reacting to its early impression of *Furman*'s demands, the 1973 Florida Legislature vested in judges, not juries, the full factfinding responsibility necessary to keep capital sentencing disciplined by "rules" and by "reason" (*Dixon*, 283 So.2d at 8) so as to eliminate "[d]iscrimination or capriciousness" (*ibid*.).[16] With the benefit of the hindsight furnished by *Apprendi* and belatedly by *Ring*, it becomes apparent that this was an overreaction to *Furman*. And like the overreactions to *Furman* which produced mandatory-death-sentence schemes and restricted-mitigation-consideration schemes – it bent over backwards into a

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[15] See also *Walker v. State*, 707 So.2d 300, 318-319 (Fla. 1997); the cases cited in text before and after note 11 *supra*; and the cases in notes 2, 3, and 6 *supra*. As the Court pointed out in *Dixon*, it is the written findings of the trial judge that ensure that capital sentencing will proceed "within the framework of rules provided by the statute" (283 So.2d at 8); and as the Court has since repeatedly recognized, "[t]he statute itself requires the imposition of a life sentence if the written findings are not made," *Christopher v. State*, 583 So.2d 642, 646 (Fla. 1991).

[16] "As we have repeatedly stressed, a trial judge's weighing of statutory aggravating factors and statutory and nonstatutory mitigating circumstances is the essential ingredient in the constitutionality of our death penalty statute. . . . It is for this very reason that we have found it essential for trial judges to adequately set forth their weighing analyses in detailed written orders." *Porter*, 723 So.2d at 196.

different form of federal unconstitutionality.[17]

Third, petitioner King's death sentence, exactly like Timothy Ring's in *Ring v. Arizona*, was imposed without a "jury determination of any fact on which the legislature condition[ed] an increase in their maximum punishment" from imprisonment to death (*Ring*, 2002 WL 1357257 at *3). Under the plain terms of Fla. Stat. § 775.082, a person convicted of first-degree murder "*shall* be punished by life imprisonment . . . [without parole before 25 years] *unless* the proceedings held to determine sentence according to the procedure set forth in [Fla. Stat.] § 921.141 result in *a finding by the court* that such person shall be punished by death." (Emphasis added.)[18] Therefore, petitioner was "'expose[d] ... to a penalty

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[17] See, *e.g.*, *Woodson v. North Carolina*, 428 U.S. 280 (1976) [Stanislaus]; *Roberts v. Louisiana*, 428 U.S. 325 (1976); *Lockett v. Ohio*, 438 U.S. 586 (1978); *Hitchcock v. Dugger*, 481 U.S. 393 (1987); and see *Beck v. Alabama*, 447 U.S. 625 (1980), for still another legislature's unconstitutional overreaction to *Furman*.

[18] These statutory terms make even clearer than Arizona's that factfinding by a judge, going beyond any factual findings made by the jury in returning a verdict of guilty of first-degree murder, is required as the precondition for a death sentence. The Arizona statute is described and quoted in *Ring* (2002 WL 1357257 at *3) as follows:

> "The State's first-degree murder statute prescribes that the offense 'is punishable by death or life imprisonment as provided by §13-703.' Ariz. Rev. Stat. Ann. §13-1105(C) (West 2001). The cross-referenced section, §13-703, directs the judge who presided at trial to 'conduct a separate sentencing hearing to determine the existence or nonexistence of [certain enumerated] circumstances . . . for the purpose of determining the sentence to be imposed.' §13-703(C) (West Supp. 2001). The statute further instructs: 'The hearing shall be conducted before the court alone. The court alone shall

exceeding'" life imprisonment (*Ring*, 2002 WL 1357257 at *3) – he was subjected to "an increase in . . . [his] maximum punishment" (*ibid.*) – only upon the legislatively specified condition that certain factual findings were made going beyond "'the facts reflected in the jury verdict alone'"(*ibid*). And those findings, "necessary for imposition of the death penalty" (*id*. at *10), were made by a sentencing judge, not by a jury.

The jury's verdict of "guilty as charged" at the guilt phase of petitioner's trial "reflected" no more than a finding of guilt of first degree murder, but not under what theory.[19] Under the plain terms of § 775.082, such first-degree murder was punishable by life imprisonment (without parole before 25 years) "*unless*"

> make all factual determinations required by this section or the constitution of the United States or this state.' *Ibid.*"

Thus, the basic penalty-setting section of the Arizona statute contains a cross-reference to a procedure-prescribing section – much like Fla. Stat. § 775.082's cross-reference to Fla. Stat. § 921.141 – but is less explicit than Fla. Stat. § 775.082 in saying that the maximum penalty for first degree murder is imprisonment "*unless* the proceedings held to determine sentence according to the" cross-referenced procedure section result in a prescribed "finding by the court." And Arizona's cross-referenced procedure section prescribes a process of judicial sentencing which is a virtual carbon copy of the one which this Court has found to be required by Fla. Stat. § 921.141. *See* text at note 3 *supra*.

[19] As we have noted, the written verdict returned by the jury specified that petitioner was guilty of first-degree murder "as charged" in an indictment. The guilt-phase jury instructions permitted a first-degree murder conviction on *either* a premeditation theory *or* a felony-murder theory *in the alternative* (see pages **12-13** *supra*); so there is no possible way to read the jury's guilty verdict as reflecting any finding *in addition to* premeditation.

some further factual "finding" was made "by the court." This further court finding occurred at resentencing when a judge made the findings necessary for imposition of the death penalty and this Court upheld petitioner's death sentence solely by reference to those findings. No jurors made further findings of fact at any penalty stage so as to satisfy the requirements of *Ring*, *Apprendi*, and the Sixth Amendment. It did not and it could not make such findings for three separately sufficient reasons:

One: Florida juries do not make factual findings at the penalty stage of a capital trial. See Section I (A) above. And petitioner's jury in particular was not instructed to make any factual findings. See pages **14-15** above.[20]

Two: petitioner's jury did not have to find the existence of any fact unanimously, and did report that it had done so. The Sixth and Fourteenth Amendment right to jury trial recognized in *Apprendi* and *Ring* stands upon an

> "historical foundation . . . [that] extends down centuries

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[20]As stated *supra* and in the Petition for Writ of Habeas Corpus, the consequences of Florida law's diminution of the jury's role in capital sentencing proceedings also lead to violations of petitioner King's state-law right to have notice in the indictment of all the elements on which the State would seek to impose a death sentence, Art. I, § 15(a), Fla. Const. (1980); *State v. Rodriguez*, 575 So.2d 1262, 1265 (Fla. 1991) (receded from on other grounds, *Harbaugh v. State*, 754 So.2d 691 (Fla. 2000), the right to a unanimous verdict on each such element, Art. I, § 16, Fla. Const. (1980); *Jones v. State*, 92 So.2d 262 (Fla. 1957) (on reh'g); *Brown v. State*, 690 So.2d 309 (Fla. 1st DCA 1995); and the right to proof beyond a reasonable doubt to the satisfaction of a unanimous jury. Art. I, § 16, Fla. Const. (1980); *Russell v. State*, 71 Fla. 236, 71 So. 27 (1916).

> into the common law. '[T]o guard against a spirit of oppression and tyranny on the part of rulers,'and 'as the great bulwark of [our] civil and political liberties,' 2 J. Story, Commentaries on the Constitution of the United States 540-541 (4th ed. 1873), trial by jury has been understood to require that '*the truth of every accusation,* whether preferred in the shape of indictment, information, or appeal, should afterwards be confirmed by the unanimous suffrage of twelve of [the defendant's] equals and neighbours....' 4 W. Blackstone, Commentaries on the Laws of England 343 (1769) . . . (emphasis added)."

Apprendi, 530 U.S. at 477.[21]

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[21] In its Response to the present habeas petition and in its motion to the U.S. Supreme Court to vacate this Court's stay order, respondent Moore argued that *Johnson v. Louisiana,* 406 U.S. 356 (1972), and *Apodaca v. Oregon*, 406 U.S. 404(1972), cut off this limb of *Ring* because they establish that the Sixth Amendment as incorporated into the Fourteenth does not require jury unanimity. The argument is specious. Neither *Johnson* nor *Apodaca* holds non-unanimity acceptable in a **capital** case. The Louisiana statute at issue in *Johnson* required jury unanimity in capital cases; it authorized nonunanimity only in *noncapital* cases punishable by imprisonment at hard labor. The latter provision was all that was at issue in *Johnson* and was all that the U.S.Supreme Court addressed. Similarly, the Oregon statute at issue in *Apodaca* authorized conviction by a nonunanimous jury for all crimes *except* first-degree murder – the sole capital crime in Oregon. Again, the single issue presented and decided in *Apodaca* was whether the defendants' *noncapital* convictions by nonunanimous juries were constitutional. And of course since *Reid v. Covert*, 354 U.S. 1 (1957), it has been clear that the Sixth Amendment's guarantee of the right to jury trial has special force and special significance in capital cases. As Justice Harlan put it in *Reid* – in respect to "a question analogous . . . to issues of due process . . . [specifically,] the question of which specific safeguards of the Constitution are appropriately to be applied in a particular context," *id*. at 75 – "capital cases . . . stand on quite a different footing than other offenses. . . . I do not concede that whatever process is 'due' an offender faced with a fine or a prison sentence necessarily satisfies the requirements of the Constitution in a capital case. The distinction is by no means novel, . . . nor is it negligible, being literally that between life and death." *Id*. at 77.

And *three*: the jury's penalty-stage verdict *was* merely advisory [22] – as the court had told the jurors it would be (see page **14** above). The jury factfinding requirement of *Apprendi*, *Ring*, and the Sixth and Fourteenth Amendments is based on recognition of the importance of interposing independent jurors between a criminal defendant and punishment at the hands of a "compliant, biased, or eccentric judge,"[23] and cannot be satisfied by a jury which is told that "the final decision as

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The reason for the distinction is equally clear: "The taking of life is irrevocable. It is in capital cases especially that the balance of conflicting interests must be weighed most heavily in favor of the procedural safeguards of the Bill of Rights." *Id*. at 45-46 (concurring opinion of Justice Frankfurter). And see, *e.g.*, *Beck v. Alabama*, 447 U.S. 625, 637-638 (1980), and cases cited.

In any event, the right to a unanimous jury verdict whenever facts are required to be found by a jury has deep roots in Florida law and legal culture. See, *e.g.*, Fla. Rule Crim. Pro. 3.440; *Jones v. State*, 92 So.2d 261 (Fla. 1957) (on rehearing). The measure of the jury-trial right under Article I, §§ 16 and 22 of the Florida Constitution is the common-law tradition as it was known in 1845, *State v. Webb*, 335 So.2 826, 828 (Fla. 1976); and under that tradition, "the practice [of requiring a unanimous verdict] is so ancient and so long sanctioned, that the idea of unanimity becomes inseparably connected in our minds with a verdict." J. Proffatt, A Treatise on Trial By Jury, § 77 at p. 113 (1877). Accord: W. Forsyth, History of Trial by Jury 293 (1876). Hence, if the federal Constitution as interpreted in *Ring* requires jury trial of particular facts, then Florida law requires that the jury's verdict on those facts must be unanimous. *Cf*. *State v. Neil*, 457 So.2d 481 (Fla. 1984).

[22] This Court has frequently upheld such instructions as consistent with *Caldwell v. Mississippi*, 472 U.S. 320 (1985), precisely *because* they accurately state that under Florida law the jury is *not* the ultimate, responsible decisionmaker at the penalty stage. See cases cited in note 9 *supra*.

[23] *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968). The context (*id*. at 155-156) is: "The guarantees of jury trial in the Federal and State Constitutions reflect

to what punishment shall be imposed is the responsibility of the Judge" (TR 2155).

In short, there is no rational way to square the process that produced petitioner's death sentence with *Ring* and *Apprendi*.[24]

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a profound judgment about the way in which law should be enforced and justice administered. A right to jury trial is granted to criminal defendants in order to prevent oppression by the Government. . . . Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge. 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."

[24] In dissenting from this Court's order of July 8 granting a stay of execution in the present case, Justice Wells noted that the United States Supreme Court had denied several petitions for *certiorari* on the *Apprendi*-*Ring* issue in Florida cases "just four days after the Supreme Court announced its decision in *Ring.*" *King v. Moore,* Order of July 8, 2002, p. 19. With respect, the attribution of any significance to the denial of *certiorari* in these cases is doctrinally impermissible and empirically unsound. "Of course, '[t]he denial of a writ of certiorari imports no expression of opinion upon the merits of the case, as the bar has been told many times.'" *Missouri v. Jenkins*, 515 U.S. 70, 85 (1995), quoting *Unite States v. Carver*, 260 U.S. 482, 490 (1923). The authoritative discussion of the subject remains Justice Frankfurter's opinion, expressing a view endorsed by a majority of the Court, in *Brown v. Allen*, 344 U.S. 443, 488 (1953). Thus, the Court has frequently denied *certiorari* in a criminal case, only to grant review and order postconviction relief later on the same issue in the same case. *E.g.*, *Turner v. Murray*, 476 U.S. 28 (1986) [granting postconviction relief on an issue on which *certiorari* was denied in *Turner v. Virginia*, 451 U.S. 1011 (1981)]; *Estelle v. Smith*, 451 U.S. 454 (1981) [granting postconviction relief on an issue on which *certiorari* was denied in *Smith v. Texas*, 430 U.S. 922 (1977)]; *Kruchten v. Eyman*, 408 U.S. 934 (1972) (per curiam) [granting postconviction relief on an issue on which *certiorari* was denied in *Kruchten v. Arizona*, 385 U.S. 1043 (1967)]; *Yates v. Cook*, 408 U.S. 934 (1972) (per curiam) [granting postconviction relief on an issue on which *certiorari* was denied in *Yates v, Mississippi*, 382 U.S. 931(1965)]; *Rogers v. Richmond*, 365 U.S. 534 (1961) [granting postconviction relief on an issue on which *certiorari* was denied in *Rogers v. Connecticut*, 351 U.S. 952

E. Petitioner Amos King should not be put to death in execution of a sentence imposed in disregard of the constitutional rule of *Ring v. Arizona*

In *King v. State*, 808 So.2d 1237 (Fla. 2002), this Court rejected petitioner's *Apprendi-Ring* claim on the merits, on authority of *Mills v. Moore*, 786 So.2d 532 (Fla. 2001). The premise of the *Mills* decision, repeated at least four times in the *Mills* opinion (786 So.2d at 536-538), was that "*Apprendi* does not apply to already challenged capital sentencing schemes that have been deemed constitutional." 786 So.2d at 536.

Ring has since taught us that that premise is no longer tenable, and that *Apprendi* **does** invalidate already-challenged capital-sentencing schemes. The rule of *Apprendi* as applied in *Ring* invalidated the Arizona scheme upheld in *Walton*; and, as we have shown above, the rule of *Apprendi* as applied in *Ring* invalidated the Florida scheme which was used to sentence petitioner to death. The sole remaining question is whether this learning has come too late to save petitioner from execution under a death sentence imposed in disregard of the Sixth and Fourteenth Amendments, *Apprendi* and *Ring*.

(1956)]; *Greene v. Massey*, 437 U.S. 19 (1978) [granting postconviction relief on an issue on which *certiorari* was denied in *Greene v. Florida*, 421 U.S. 932 (1975)]. Claims going to the constitutionality of a state-wide procedure are no exception: for example, in *Jacobs v. Alabama*, 439 U.S. 1122 (1979), the Court denied *certiorari* on the selfsame issue on which it subsequently held Alabama's statutory capital trial procedure unconstitutional in *Beck v. Alabama*, 447 U.S. 625 (1980).

The answer to that question turns on whether the *Apprendi-Ring* rule is retroactive according to the criteria of *Witt v. State*, 387 So.2d 922 (1980). Under *Witt*, a change in law supports postconviction relief in a capital case when "the change: (a) emanates from this Court or the United States Supreme Court, (b) is constitutional in nature, and (c) constitutes a development of fundamental significance." 387 So.2d at 931. The first two criteria are obviously met here; the third presents the crucial inquiry. In elaborating what "constitutes a development of fundamental significance," the *Witt* opinion includes in that category "changes of law which are of sufficient magnitude to necessitate retroactive application as ascertained by the three-fold test of *Stovall* [*v. Denno*, 388 U.S. 293 (1967)] and *Linkletter* [*v. Walker*, 381 U.S. 618 (1965)]," adding that "*Gideon v. Wainwright* . . . is the prime example of a law change included within this category." 387 So.2d at 929.

The three-fold *Stovall-Linkletter* test considers: "(a) the purpose to be served by the new rule; (b) the extent of reliance on the old rule; and (c) the effect on the administration of justice of a retroactive application of the new rule." 387 So.2d at 926. It is not an easy test to use, either generally or in the present case, because there is a tension at the heart of it. Any *change* of law which "constitutes a development of fundamental significance" is *bound* to have a broadly unsettling "effect on the administration of justice" and to upset a goodly measure of "reliance

on the old rule." The example of *Gideon* – a profoundly unsettling and upsetting change of constitutional law – makes the tension obvious, and the *Witt* Court was aware of it.[25] How the tension is resolved ordinarily depends mostly on the first prong of the *Stovall-Linkletter* test – the purpose to be served by the new rule – and whether an analysis of that purpose reflects that the new rule is a "fundamental and constitutional law change[ ] which cast[s] serious doubt on the veracity or integrity of the original trial proceeding." 387 So.2d at 929. *Cf. Thompson v. Dugger*, 515 So.2d 173, 175 (Fla. 1987).

Two considerations call for recognizing that the *Apprendi-Ring* rule is precisely such a fundamental constitutional change:

First, the purpose of the rule is to change the very *identity* of the decisionmaker with respect to critical issues of fact that are decisive of life or death. In the most basic sense, this change remedies a "'structural defect[ ] in the constitution of the trial mechanism,'" *Sullivan v. Louisiana*, 508 U.S. 275, 281 (1993): it vindicates "the jury guarantee . . . [as] a 'basic protectio[n]' whose precise effects are unmeasurable, but without which a criminal trial cannot reliably serve its function," *ibid*. In *Johnson v. Zerbst*, 304 U.S. 458 (1938) – which, of

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[25] See 387 So.2d at 924-925: "The issue is a thorny one, requiring that we resolve a conflict between two important goals of the criminal justice system ensuring finality of decisions on the one hand, and ensuring fairness and uniformity in individual cases on the other within the context of post- conviction relief from a sentence of death."

course, was the taproot of *Gideon v. Wainwright*, this Court's model of the case for retroactive application of constitutional change – the Supreme Court held that a denial of the right to counsel could be vindicated in postconviction proceedings because the Sixth Amendment required a lawyer's participation in a criminal trial to "complete the court" (304 U.S. 468); and a judgment rendered by an incomplete court was subject to collateral attack. What was a mere imaginative metaphor in *Johnson* is ***literally*** true of a capital sentencing proceeding in which the jury has not participated in the life-or-death factfinding role that the Sixth Amendment reserves to a jury under *Apprendi* and *Ring*: the constitutionally requisite tribunal was simply ***not all there***; and such a radical defect necessarily "cast[s] serious doubt on the veracity or integrity of the . . . trial proceeding," *Witt*, 387 So.2d at 929.

Second, "the jury trial provisions in the Federal and State Constitutions reflect a fundamental decision about the exercise of official power – a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges. Fear of unchecked power . . . found expression . . . in this insistence upon community participation in the determination of guilt or innocence," *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968) – including, under *Apprendi* and *Ring*, guilt or innocence of the factual accusations "necessary for imposition of the death penalty," *Ring*, 2002 WL 1357257 at *10; and see

Apprendi, 530 U.S. at 494-495. The right to a jury determination of factual accusations of this sort has long been the central bastion of the Anglo-American legal system's defenses against injustice and oppression.[26] As former Justice Lewis F. Powell, Jr. wrote: "jury trial has been a principal element in maintaining individual freedom among English speaking peoples for the longest span in the history of man."[27]

Justice Powell also quotes de Tocqueville as observing

> "that the jury 'places the real direction of society in the hands of the governed. . . . and not in . . . the government. . . He who punishes the criminal . . . is the real master of society. All the sovereigns who have chosen to govern by their own authority, and to direct society, instead of obeying its direction, have destroyed or enfeebled the institution of the jury.'"[28]

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[26] See Blackstone's Commentaries, §§ 349-350 (Lewis ed. 1897): "[T]he founders of the English law have with excellent forecast contrived . . . that the truth of every accusation . . . should afterwards be confirmed by the unanimous suffrage of twelve of his equals and neighbors. . . . So that the liberties of England cannot but subsist, so long as this *palladium* remains sacred and inviolate; not only from all open attacks, (which none will be so hardy as to make) but also from all secret machinations, which may sap and undermine it. . . ." See also *Rex v. Poole*, Cases Tempore Hardwicke 23, 27 (1734), quoted in *Sparf v. United States*, 156 U.S. 51, 94 (1895): "[I]t is of the greatest consequence to the law of England, and to the subject, that these powers of the judge and the jury are kept distinct; that the judge determines the law, and the jury the fact; and, if ever they come to be confounded, it will prove the confusion and destruction of the law of England."

[27] Powell, *Jury Trial of Crimes*, 23 Washington & Lee L. Rev. 1, 11 (1966).

[28] *Id*. at 5, quoting 1 de Tocqueville, Democracy in America 282 (Reeve trans. 1948).

Inadvertently but nonetheless harmfully, the United States Supreme Court lapsed for a time and enfeebled the institution of the jury through its rulings in *Hildwin v. Florida* and *Walton v. Arizona*. Its retraction of those rulings in *Ring* restores a right to jury trial that is neither trivial nor transitory but "the most transcendent privilege which any subject can enjoy."[29] Petitioner King should not be denied its benefit simply because the Supreme Court temporarily overlooked the point before finally getting it right.

CONCLUSION

For the reasons stated herein, Petitioner requests that his sentence be vacated and that he be sentenced to life imprisonment.

Respectfully submitted,

850-224-3331 (facsimile)

Mark E. Olive
Fla. Bar No. 0578533
Law Offices of Mark E. Olive, P.A.
320 West Jefferson Street
Tallahassee, Florida 32301
850-224-0004

[29] Blackstone's Commentaries, quoted in Powell, *supra* note 26 at 3 n.7. See also, *e.g.*, *United States v. Battiste*, 24 Fed Cas. 1042, 1043 (C.C.D. Mass. 1835) (No. 14,545) (Justice Story): "I hold it the most sacred constitutional right of every party accused of a crime, that the jury should respond as to the facts, and the court as to the law." 2 Sumner 240, 243 (1835).

Kevin T. Beck
Capital Collateral Counsel
Fla. Bar No. 0802719
Office of the Capital Collateral
Regional Counsel - Middle Region
3801 Corporex Park Drive, Suite 201
Tampa, Florida 33619
813-740-3544
813-740-3554 (facsimile)

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Initial Brief is being furnished by facsimile or other electronic transmission to counsel for Respondent, Assistant Attorney General Kenneth Sloane Nunnelley, Office of the Attorney General 444 Seabreeze Boulevard, Suite 500, Daytona Beach, Florida 32818, this 22ND day of July, 2002.

CERTIFICATE OF COMPLIANCE

This petition was prepared using Times New Roman 14 point font.

_____
Mark E. Olive