IN THE SUPREME COURT OF FLORIDA

Case No. _____

AMOS LEE KING, Petitioner, v. MICHAEL MOORE, Secretary, Florida Department of Corrections, Respondent.	**CAPITAL CASE: DEATH WARRANT SIGNED EXECUTION SET FOR JULY 10, 2002 AT 6:00 P.M.**

PETITION FOR WRIT OF HABEAS CORPUS AND APPLICATION FOR STAY OF EXECUTION

WILLIAM JENNINGS
Capital Collateral Regional Counsel
Middle Region

KEVIN T. BECK
Assistant CCRC
Fla. Bar No. 0802719

Assistant CCRC
Fla. Bar No. 651443
Office of the Capital Collateral
Regional Counsel
3801 Corporex Park Drive, Suite 201
Tampa, Florida 33619
813-740-3544
(Facsimile) 813-740-3554

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

Counsel for Petitioner

I. INTRODUCTION

Petitioner seeks a stay of execution, full briefing and oral argument, and, ultimately, an order vacating his sentence of death and imposing a life sentence, on the following grounds:

1. *Ring v. Arizona*, 536 U.S. ___, 2002 WL 1357257 (June 25, 2002), has unsettled all this Court's expectations about the constitutionality of the Florida, judge, capital sentencing scheme. The United States Supreme Court in *Ring* held that *Apprendi v. New Jersey*, 530 U.S. 466 (2000), applies to capital sentencing proceedings, and thus: "All the facts which must exist in order to subject the defendant to a legally prescribed punishment must be found by the jury." *Ring*, slip op. at 16 (quoting *Apprendi*, 530 U.S. at 499 (Scalia, J., concurring)).[1] Because the Arizona capital sentencing statute at issue in *Ring* did not require such findings by jurors, the Supreme Court held that it was unconstitutional. *Ring* reveals that this Court's earlier holdings that *Apprendi* does not apply in a capital sentencing context were in error, **and** that the Florida, capital, judge sentencing scheme is moribund. Given that the Arizona scheme is unconstitutional, so is the Florida scheme.[2]

---

[1]The proposition that *Apprendi* controlled capital proceedings was so axiomatic that *every* Justice–even the two dissenters (who would have overruled *Apprendi*) –conceded the point. Given the unanimity on this point, this Court simply was mistaken as a matter of law in its previous holding that *Apprendi* did not apply to capital sentencing proceedings. *See Bottoson v. State*, 813 S.2d 31 (Fla 2002).

[2]*Ring* expressly overruled *Walton v. Arizona*, 497 U.S. 639 (1990). *Walton* had held that judge findings were constitutional, and that holding expressly and singularly rested on Supreme Court decisions upholding judge findings in the

"**A Florida trial court no more has the assistance of a jury's findings of fact with regard to sentencing issues than does a trial judge in Arizona**." *Walton v. Arizona*, 497 U.S. 639, 647-48 (1990).[3]

Florida capital sentencing scheme, i.e., *Hildwin v. Florida*, 648 U.S. 638 (1989), *Spaziano v. Florida*, 468 U.S. 447 (1984), and *Proffitt v. Florida*, 428 U.S. 242 (1976). *Walton*, *supra*, 497 U.S. at 647. Just as *Walton* was overruled, so must *Hildwin*, *Spaziano*, and *Proffitt* be. Indeed, the majority opinion in *Ring,* in describing the (now overruled) holding in *Walton,* made it clear that *Walton* was a *Hildwin* offspring: "'the Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury.'" ... (**quoting Hildwin v. Florida**)." *Ring*, slip op. at 8 (quoting *Walton* quoting *Hildwin*). And Justice Breyer's concurring opinion in *Ring* quotes and cites Justice Stevens' *dissenting* opinion in *Spaziano* as support for overruling *Walton*. *Ring*, slip op. at 16.

[3] The parallelism between the Arizona statute and the Florida statute was the major *Walton* theme:

> 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 curium); *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 answer 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 the Arizona schemes are not persuasive. It is true that in Florida the jury recommends a sentence, but it does not make factual findings with

3. *Ring* overruled a 12 year old Supreme Court case, and Petitioner has a foot in the constitutional rock slide. Justice and fairness would not be served by a

---

> regard to the existence of mitigating and aggravating circumstances and its recommendation is not binding on the trial judge.

Walton, supra, 497 U.S. at 647. In *Ring,* the State and its *amici* agreed that overruling *Walton* necessarily meant Florida's statute falls:

> "*Walton* was not an aberration. *Proffitt*, *Spaziano*, *Cabana*, *Poland* and *Clemons* each rejected Ring's basic premise. *Hildwin v. Florida*, 490 U.S. 638 (1989), made a similar finding, holding that although Florida state law required that a jury return an advisory sentencing verdict, the Sixth Amendment did not require the jury to specify the aggravating factors permitting imposition of a death sentence." Brief of Respondent in *Ring* at 31.
>
> MS. NAPOLITANO: . . . it's not just the cases you listed, Your Honor, that I think would be implicitly overruled, but let me give you a list: Proffitt v. Florida, Spaziano, Cabana v. Bullock, which does allow the -
>
> QUESTION: But do you think it's perfectly clear - you cite a couple of Florida cases - that if the Florida advisory jury made the findings of fact that would be - make them - the defendants eligible for the death penalty, that that case would be covered by the decision in this case?
>
> MS. NAPOLITANO: Yes . . .
>
> Tr. of Oral Arg. at 36.
>
> "If defendant's argument is accepted, it means a new sentencing trial for every capital case not yet final in Arizona, Alabama, Colorado, Delaware, Florida, Idaho, Indiana, Montana, and Nebraska . . . ." Brief Amicus Curiae of Criminal Justice Legal Foundation at 21-22.

precipitous treatment of Petitioner's substantial claims for relief. Thus, Petitioner seeks a stay of execution, full briefing and argument, and the imposition of a life sentence.

II. THIS COURT SHOULD STAY PETITIONER'S EXECUTION TO ALLOW FOR MEANINGFUL MERITS CONSIDERATION OF HIS CLAIMS UNDER *RING v. ARIZONA*

A. Petitioner's Claims Arising from *Ring v. Arizona* Present Issues of Surpassing Importance and are Entitled to Full Merits Consideration

In *King v. State*, 808 So.2d 1237 (Fla. 2002), this Court addressed Petitioner's claim under *Apprendi* and held that *Apprendi* did not apply to capital sentencing schemes. As all the United States Supreme Court Justices recognized in *Ring*, this was error committed by this Court. Habeas is available to correct such errors committed in this Court, and the Court should correct its error now by applying *Apprendi* as *Ring* demands.[4]

Furthermore, *Ring v. Arizona*, 536 U.S. ___ (2002), meets the three criteria for retroactive application set forth in *Witt v. State*, 387 So.2d 922 (Fla. 1980).

---

[4] This Court has consistently reached the merits of *Apprendi* claims in capital cases, including this one. *See King*, 808 So.2d at 1245-46; *Porter v. Moore*, No. SC01-2707 (Fla. June 20, 2002); *Sweet v. Moore*, SC01-2867 (Fla. June 13, 2002); *Cox v. State*, 27 Fla. L. Weekly S505 (Fla. May 23, 2002); *Spencer v. State*, 27 Fla. L. Weekly S373 (Fla. April 11, 2002); *Sireci v. Moore*, 27 Fla. L. Weekly S183 (Fla. Feb. 28, 2002); *King v. State*, 808 So.2d 1237, 1245-46 (Fla. 2002); *Brown v. Moore*, 800 So.2d 223 (Fla. 2001); *Mann v. Moore*, 794 So.2d 505 (Fla. 2001); *Mills v. Moore*, 786 So.2d 532 (Fla. 2001).

First, *Ring* issued from the United States Supreme Court. *Witt*, 387 So.2d at 930. Second, *Ring*'s Sixth Amendment rule unquestionably "is constitutional in nature." *Witt*, 387 So.2d. at 931. Third, it is beyond dispute that *Ring* "constitutes a development of fundamental significance." *Ibid*. Its holding and rationale lead inescapably to the conclusion that Florida's death penalty statute is unconstitutional. This Court's decision in *Mills v. Moore*, in which it was said at least four times that *Apprendi* did not apply to capital sentencing procedures, establishes beyond a doubt that *Ring* constitutes a change in what this Court believed was the law.

The State of Florida can hardly claim that *Ring* lacks fundamental significance. Florida appeared before the Supreme Court as an *amicus curiae* in *Ring* and argued it had a "strong interest in seeing that th[e Supreme] Court's capital jurisprudence, ensuring the validity of judicial capital sentencing, remains intact." *Ring v. Arizona*, No. 01-488, Brief for Amici Curiae Alabama, Colorado, Delaware, Florida, *et al.*, available through Lexis at 2002 U.S. Briefs 488 at *1. The *amici* advised the Court that Florida had 385 persons under sentence of death. *Id.* at 10, n. 7. Referring to these sentences and those in other States, the *amici* argued that "[o]verruling *Walton* would cast doubt on the validity of a great number of these sentences." *Id.*, at *10. Recognizing that *Ring* "raises a claim confronted and rejected by the Court directly in *Walton* and indirectly on numerous other occasions under both the Sixth and Eighth Amendments," Florida and the other States cited as examples of

cases implicated by *Ring* the following: *Proffitt v. Florida*, 428 U.S. 252 (1976); *Spaziano v. Florida*, 468 U.S. 447 (1984); and *Hildwin v. Florida*, 490 U.S. 638 (1989). *Id*. at *8-*9 and n. 6.

This Court held that the Supreme Court's decision in *Hitchcock v. Dugger*, 481 U.S. 393 (1987), "represent[ed] a sufficient change in the law that potentially affect[ed] a class of petitioners . . . to defeat the claim of a procedural default." *Thompson v. Dugger*, 515 So.2d 173, 175 (Fla. 1987). In *Riley v. Wainwright*, 517 So.2d. 656 (Fla. 1987), this Court, in light of *Hitchcock* "reject[ed] the State's argument that Riley's claim [was] procedurally barred," adding that it would have done so "[e]ven if the precise issue had been squarely and adequately presented to this Court" before. *Riley*, 517 So.2d at 659. After Riley had been through one full round of state and federal post-conviction review, this Court "granted Riley's application for stay of execution and requested supplemental briefing on the issue of 'whether or not this Court can give retroactive application to *Lockett v. Ohio*, 438 U.S. 586 (1978),' as it affects a jury's recommendation of sentence." *Riley*, 517 So.2d at 656 (parallel citations omitted). This Court should do the same here.

B. Because the Supreme Court's Denial of Certiorari Says Nothing about the Merits of the Questions Presented, the Merits of Petitioner's Claims have Never been Decided

In *State v. White*, 470 So.2d 1377 (Fla. 1985), this Court continued a stay of execution so that it could decide whether the petitioner could prevail on his claim

brought under *Enmund v. Florida*, 458 U.S. 782 (1982). *White*, 470 So.2d at 1378. White had previously raised his claim on direct appeal. This Court rejected it, and the Supreme Court denied certiorari. *Id.*, at 1379. Given this history, the State argued White "should not be permitted to relitigate the issue in a collateral proceeding." *Ibid.* Like Petitioner, White argued to this Court a position that only became the law of the land after this Court ruled and the Supreme Court denied certiorari. *Ibid.* Under these circumstances, this Court said the following:

> We have no doubt that *Enmund* . . . represents a major change in constitutional law and that we are obligated to revisit this case in order to determine if *Enmund* prohibits the imposition of the death penalty under the facts and circumstances of this case. We also realize that the United States Supreme Court's denial of appellee's petition for writ of certiorari in 1983, grounded on *Enmund* more than a year after *Enmund* issued, would seem to suggest that the Court saw no *Enmund* implications in the case. Nevertheless, the rule is that "the 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 before." *United States v. Carver*, 260 U.S. 482, 490 (1923) [op. of Holmes, J.].

White, 470 So.2d. at 1379 (emphasis added). The same rule governs here.[5]

It is improper to deduce any legal significance from the United States Supreme Court's denial of a petition for writ of certiorari. *See Maryland v. Baltimore Radio*

---

[5] *See Atlantic Coast Line Railroad Co. v. Powe*, 283 U.S. 401 403-04 (1931) (same); *Hamilton-Brown Shoe Co. v. Wolf Brothers & Co.*, 240 U.S. 251, 258 (1915) (same); *House v. Mayo*, 324 U.S. 42, 48 (1945) (same), *overruled on other grounds in Hohn v. United States*, 524 U.S. 236, 251 (1998); *Sunal v. Large*, 332 U.S. 174, 181 (1947) (same); *Brown v. Allen*, 344 U.S. 443, 456 (1953) (same); *Teague v. Lane*, 498 U.S. 288, 296 (1989) (same); *Wisconsin Dep't of Revenue v. William Wrigley, Jr., Co.*, 505 U.S. 214, 221 (1992) (same).

Show, Inc., 338 U.S. 912, 912-920 (1950) (Frankfurter, J., respecting denial of certiorari) (emphasis added). *See also Brown v. Allen*, 344 U.S. 443, 491-92, 496 (1953) (Frankfurter, J., concurring) ("We have repeatedly indicated that a denial of certiorari means only that, for one reason or another which is seldom disclosed, and not infrequently for conflicting reasons which may have nothing to do with the merits and certainly may have nothing to do with any view of the merits taken by a majority of the Court, there were not four members of the Court who thought the case should be heard . . . . We must not invite the exercise of judicial impressionism"); *Agoston v. Pennsylvania*, 340 U.S. 844, 844 (1950) (Frankfurter, J., concurring in denial of certiorari) ("[B]y denying leave for review here of a lower court decision this Court lends no support to the decision of the lower court. Obviously it does not imply approval of anything that may have been said by the lower court in support of its decision").

Justice Stevens has noted that the Court may deny certiorari "to allow the various States to serve as laboratories in which the issue receives further study before it is addressed" by the United States Supreme Court. *McCray v. New York*, 461 U.S. 961, 962 (1983) (Stevens, J., opinion respecting denial of certiorari). The issue in *McCray*, whether the Constitution prohibits the use of peremptory challenges to exclude members of a particular group from the jury based on the prosecutor's assumptions regarding how they would vote based on their race or ethnicity, did

percolate in the laboratories of the state courts before being ruled on three years later by the United States Supreme Court in *Batson v. Kentucky*, 476 U.S. 79 (1986). *See also Riggs v. California*, 119 S. Ct. 890, 892 (1999) (Stevens, J., opinion respecting denial of certiorari) (denying certiorari in direct appeal challenge to California's Three Strikes Law to "await review by other courts" before addressing the constitutional issue). Three years later, the United States Supreme Court granted certiorari to review California's Three Strikes law, after decisions by the state courts and lower federal courts regarding the constitutionality of the law. *Lockyer v. Andrade*, 122 S. Ct. 1434 (2002); *Ewing v. California*, 122 S. Ct. 1535 (2002).

Like this Court in *White*, other state courts and lower federal courts have repeatedly recognized that the United States Supreme Court action in denying certiorari has no legal significance.[6] This is also the view unanimously expressed by

---

[6] *See, e.g., State v. Amaya-Ruiz*, 166 Ariz. 152, 176 (1990) ("Denial of the writ of certiorari by the Supreme Court 'imports no expression of opinion by it upon the merits of the decision . . . .'"); *State v. Kelly*, 218 Minn. 247, 255 (1944) (same); *Breckline v. Metropolitan Life Insurance Co.*, 406 Pa. 573, 579 (1962) (same); *Beezer v. City of Seattle*, 383 P.2d 895, 897-98 (Wash. 1963) (same), *reversed on other grounds*, 376 U.S. 224 (1964); *Fernos-Lopez v. Lopez*, 929 F.2d 20, 22 (1st Cir.) (same), *cert. denied*, 502 U.S. 886 (1991); *Triestman v. United States*, 124 F.3d 361, 365 n.2 (2d Cir. 1997) (same); *State of Maryland ex. rel. Levin v. United States*, 329 F.2d 722, 723 (3d Cir. 1964) (same), *aff'd*, 381 U.S. 41 (1965); *Felton v. Barnett*, 912 F.2d 92, 94 (4th Cir. 1990) (same), *cert. denied*, 498 U.S. 1032 (1991); *Holt v. Kentucky*, 284 F.2d 395, 396 (6th Cir. 1960) (same); *Guaranty Trust Co. of New York v. Henwood*, 98 F.2d 160, 163 (8th Cir. 1938) (same), *aff'd*, 307 U.S. 247 (1939); *Sunray Dx Oil Co. v. Federal Power Comm'n*, 370 F.2d 181, 193 n.44 (10th Cir. 1966) (same), *aff'd in part, rev'd in part*, 391 U.S. 9 (1968).

the authors of the leading treatises on Supreme Court and federal courts practice.[7] Thus, the State courts and lower federal courts have rejected arguments that the Supreme Court's action denying certiorari in a particular case has any legal significance.[8]

---

[7] Robert L. Stern, Eugene Gressman, *et al.*, *Supreme Court Practice; Seventh Edition* § 5.7 (1994); ___ Moore's Federal Practice 3d § 510.02[2] (1997); 10 Wright, Miller & Cooper, *Federal Practice and Procedure* § 4004.1 (1997).

[8] *Steele v. Collagen Corp.*, 54 Cal. App. 4th 1474, 1485 (3d Dist. Ct. App. 1997) ("Asserting the Supreme Court granted certiorari and vacated one MDA preemption case from the court of appeals while leaving another such opinion . . . intact by denying certiorari, Steele suggests we should attempt to discern from those actions the Supreme Court's intent . . . . 'The 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.' *United States v. Carver*, 260 U.S. 482, 490 (1923). Accordingly, we will not speculate concerning the intent of the Supreme Court based on its grant or denial of certiorari . . . "); *Martin v. Kenesson*, 274 Ky. 581, 585 (Ky. Ct. App. 1938) ("Appellants also rely on the case of *Parker v. Mississippi State Tax Commission*, [cit. om.] . . . and especially so because the Supreme Court of the United States denied a writ of certiorari. . . . The ground upon which the writ was denied does not appear but that is immaterial since a denial of a writ of certiorari by the Supreme Court is not equivalent to an affirmance of the judgment and imports no expression of opinion upon the merits of the case"); *State Bar of Michigan v. Brotherhood of Railroad Trainmen*, 383 Mich. 201, 208 (1970) ("[W]hen the [United States] Supreme Court denied certiorari to review 1964 *Brotherhood* that act made no precedent. Neither did it import an 'expression of opinion upon the merits of the case, as the bar has been told many times' [cit. om.]"), *reversed on other grounds sub nom. United Transportation Union v. State Bar of Michigan*, 401 U.S. 576 (1971); *DTH Publishing Corp. v. The University of North Carolina at Chapel Hill*, 128 N.C. App. 534, 540-41 (N.C. Ct. App. 1998) ("Plaintiff argues . . . that the United States Supreme Court's recent denial of certiorari in an Ohio Supreme Court case . . . should influence our opinion in the case before us. A review of numerous United States Supreme Court opinions shows that a denial of writ of certiorari by the Supreme Court 'imports no expression upon the merits of the case.' [cit. om.]"); *Laborers' Int'l Union of North America, Local 107 v.*

Just as the Supreme Court's decision in *Ring* shows that this Court was incorrect when it said that the denial of certiorari in a capital case with an imminent execution date "indicate[d] that the Court meant what it said when it held that *Apprendi* was not intended to affect capital sentencing schemes," *Mills*, 786 So.2d at 537, this Court's decision in *White*, the statements of the Supreme Court, and lower courts all show that a denial of certiorari means nothing with respect to the merits of the claim raised.

III. STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked pursuant to Rule 9.030(a)(3), Florida Rules of Appellate Procedure, and article V of the Florida Constitution, sections b(1), b(7), and b(9). This petition is properly filed under Rule 9.100(a).

IV. NATURE OF RELIEF SOUGHT

Mr. King seeks a stay of execution and writ of habeas corpus addressed to Respondent.

Kunco, Inc., 472 F.2d 456, 458 n.2 (8th Cir. 1973) ("The district court was of the opinion that, because the Supreme Court denied certiorari in *[Kaiser v.] Price-Fretwell*[, 235 Ark. 295 (Ark. 1962)] subsequent to deciding *[Local 357, Int'l Bhd.] Teamsters [v. NLRB*, 365 U.S. 667 (1961)], the denial of certiorari 'in effect held there was no preemption . . . .' That view, of course, is patently incorrect") (citations omitted); *Greenawalt v. Ricketts*, 784 F.2d 1453, 1457 (9th Cir.) (in capital case, where Greenawalt's petition for writ of certiorari was denied, court held that denial of certiorari indicated nothing with respect to whether Greenawalt's claims had merit), *cert. denied*, 479 U.S. 890 (1986); *Chaney v. Brown*, 712 F.2d 441, 442 n.1 (10th Cir. 1983) (granting stay of execution, noting that prior denials of certiorari on petitioner's claims were not rulings on the merits).

V. STATEMENT OF THE CASE

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 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 indictment charged only felony murder and was silent as to premeditation. The Petitioner was also indicted for Involuntary Sexual Battery; Arson in the First Degree; and Burglary.

The verdict form 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 a separate Information that was joined the morning of

trial. The jury returned a non-specific guilt 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 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 in 1981. The district court denied relief, however 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).

At the subsequent federally mandated penalty phase, counsel attempted to, in accord with the Eleventh Circuit's opinion, present evidence that conflicted with the state's theory of the circumstantial evidence upon which Mr. King was convicted. *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, over the dissent of two justices. In dissent, Justice Barkett wrote held that the evidence challenging the circumstantial evidence of his conviction 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
>
> > 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:
>
> 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 empanneled.

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

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 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 jury retired to deliberate at 11:20 am, returned with the recommendation, was polled by the court, which then informed the jury that it would impose the sentence at 2:00 o'clock that afternoon. TR 1728, 1732. The court reconvened, announced its findings of five aggravators and no mitigation, and sentenced Mr. King to death. TR

1728-34.

On direct appeal, this Court noted the jury's recommendation only in passing, but relied on the court's findings. 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 recordshows 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).

VI. REASONS FOR GRANTING RELIEF

I. THE STATUTE UNDER WHICH PETITIONER WAS SENTENCED TO DEATH IS UNCONSTITUTIONAL BECAUSE IT REQUIRES THE JUDGE – WITHOUT THE AID OF THE JURY – TO MAKE THE FINDINGS NECESSARY FOR IMPOSITION OF A DEATH SENTENCE

A. Florida's Capital Sentencing Scheme is Unconstitutional under *Ring v. Arizona*

1. The holding of *Ring*

Ring v. Arizona, 536 U.S. ___ (2002), held unconstitutional a capital sentencing scheme that makes imposition of a death sentence contingent upon the finding of an aggravating circumstance and assigns responsibility for finding that circumstance to the judge. The Supreme 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)). Capital sentencing schemes such as Florida's and Arizona's violate the notice and jury trial rights guaranteed by the Sixth and Fourteenth Amendments

because they do not allow the jury to reach a verdict with respect to an "aggravating fact [that] is an element of the aggravated crime" punishable by death. *Ring*, slip op. at 19 (quoting *Apprendi*, 530 U.S. at 501 (Thomas, J., concurring)).

Applying the *Apprendi* test in *Ring*, the Court said "[t]he dispositive question . . . 'is not one of form but of effect.'" *Ring*, slip op. at 16 (quoting *Apprendi*, 530 U.S. at 494). The question is not whether death is an authorized punishment in first-degree murder cases,[9] but whether the "facts increasing punishment beyond the maximum authorized by a guilty verdict standing alone," *Ring*, slip op. at 19, are found by the judge or jury. "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*, slip op. at 16. "All the facts which must exist in order to subject the defendant to a legally prescribed punishment *must* be found by the jury." *Ibid*. (quoting *Apprendi*, 530 U.S. at 499 (Scalia, J., concurring)).

---

[9] *See Ring*, slip op. at 17-18 (rejecting argument that finding of aggravating circumstance did not increase statutory maximum because "Arizona first-degree murder statute 'authorizes a maximum penalty of death only in a formal sense'") (quoting *Apprendi*, 530 U.S. at 541 (O'Connor, J., concurring)). Both the Florida and Arizona statutes provide for a range of punishments, the most severe of which is death. *Compare* Fla. Stat. § 775.082(1) (1979) *with* Ariz. Rev. Stat. Ann. § 13-1105(C).

The Court in *Ring* held that Arizona's sentencing statute could not survive *Apprendi* because "[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*, slip op. at 9 (internal quotation marks and citations omitted). In so holding, the Court overruled *Walton v. Arizona*, 497 U.S. 639 (1990), "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." *Ring*, slip op. at 22.

2. Application of *Ring* to Florida's sentencing scheme

This Court has previously held that, "[b]ecause *Apprendi* did not overrule *Walton*, the basic scheme in Florida is not overruled either." *Mills v. Moore*, 786 So.2d 532, 537 (Fla. 2001). *Ring* overruled *Walton*, and the basic principle of *Hildwin v. Florida*, 490 U.S. 638 (1989) (*per curiam*), which had upheld the capital sentencing scheme in Florida "on grounds that 'the Sixth Amendment does not require that the specific findings authorizing imposition of the sentence of death be made

by the jury.'" *Ring*, slip op. at 11 (quoting *Walton*, 497 U.S. at 648, in turn quoting *Hildwin*, 490 U.S. at 640-641)). Additionally, *Ring* undermines the reasoning of this Court's decision in *Mills* by recognizing (a) that *Apprendi* applies to capital sentencing schemes,[10] *Ring*, slip op. at 2 ("Capital defendants, no less than non-capital defendants . . . are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment"); *id.* at 23, (b) that States may not avoid the Sixth Amendment requirements of *Apprendi* by simply "specif[ying] 'death or life imprisonment' as the only sentencing options,"[11] *Ring*, slip op. at 17, and (c) that the relevant and dispositive question is whether under state law death is "authorized by a guilty verdict standing alone." *Ring*, slip op. at 19.

Florida's capital sentencing statute, like the Arizona statute struck down in *Ring*, makes imposition of the death penalty contingent upon the factual findings of the judge – not the jury. Section 775.082 of

---

[10] In *Mills*, this Court said that "the plain language of *Apprendi* indicates that the case is not intended to apply to capital [sentencing] schemes." *Mills*, 786 So.2d at 537. Such statements appear at least four times in *Mills*.

[11] *Mills* reasoned that because first-degree murder is a "capital felony," and the dictionary defines such a felony as "punishable by death," the finding of an aggravating circumstance did not expose the petitioner punishment in excess of the statutory maximum. *Mills*, 786 So.2d at 538.

the Florida Statutes provides that a person convicted of first-degree murder must be sentenced to life imprisonment "*unless* the proceedings held to determine sentence according to the procedure set forth in § 921.141 result in *finding by the court* that such person shall be punished by death, and in the latter event such person shall be punished by death."[12] For nearly 30 years this Court has held that sections 775.082 and 921.141 do not allow imposition of a death sentence upon a jury's verdict of guilt, but only upon the finding of sufficient aggravating circumstances. *Dixon v. State*, 283 So.2d 1, 7 (Fla. 1973) ("question of punishment is reserved for a post-conviction hearing").

The "explicitly cross-reference[d] . . . statutory provision requiring the finding of an aggravating circumstance before imposition of the death penalty," *Ring*, slip op. at 18, requires the judge – after the jury has been discharged and "[n]otwithstanding the recommendation of a majority of the jury" – to make three factual determinations. Fla. Stat. § 921.141(3). Section 921.141(3) provides that "if the court imposes a sentence of death, it shall set forth in writing its findings *upon which the sentence of death is based as to the facts*." *Ibid.* First, the trial judge must find the existence of at least one aggravating circumstance. *Ibid.*

[12] *Cf. Ring*, slip op. at 5-6 (describing and quoting Arizona death penalty statute).

Second, the judge must find that "*sufficient* aggravating circumstances exist" to justify imposition of the death penalty.[13] *Ibid*. (emphasis added). Third, the judge must find in writing that "there are insufficient mitigating circumstances to outweigh the aggravating circumstances." *Ibid*. "If the court does not make the findings requiring the death sentence, the court shall impose sentence of life imprisonment in accordance with § 775.082." *Ibid*.

Because Florida's death penalty statute makes imposition of a death sentence contingent upon findings of "sufficient aggravating circumstances" and "insufficient mitigating circumstances," and gives sole responsibility for making those findings to the judge, it violates the Sixth Amendment.

B. The Role of the Jury in Florida's Capital Sentencing Scheme Neither Satisfies the Sixth Amendment, nor Renders Harmless the Failure to Satisfy *Apprendi* and *Ring*

1. Florida juries do not make findings of fact

Florida's death penalty statute differs from Arizona's in that it provides for the jury to hear evidence and "render an advisory sentence

[13] The jurors need only find sufficient aggravating circumstances to "recommend" an "advisory sentence" of death. Fla. Stat. § 921.141(2).

to the court." Fla. Stat. § 921.141(2). A Florida jury's role in the capital sentencing process is insignificant under *Apprendi* and *Ring*, however. First, whether one looks to the plain meaning of Florida's death penalty statute, or this Court's cases interpreting it, "under section 921.141, the jury's advisory recommendation is not supported by findings of fact," *Combs v. State*, 525 So.2d 853, 859 (Fla. 1988) (Shaw, J., concurring), which is the central requirement of *Ring*.

This Court has rejected the idea that a defendant convicted of first degree murder has the 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 in Davis v. State*, 703 So.2d 1055, 1061 (Fla. 1997). The statute specifically requires the judge to "set forth . . . findings upon which the sentence of death is based as to the *facts*," but asks the jury generally to "render an advisory sentence . . . based upon the following *matters*" referring to the sufficiency of the aggravating and mitigating circumstances. Fla. Stat. § § 921.141(2) & (3) (emphasis added). Because Florida law does not require that any number jurors agree that the State has proven the existence of a given aggravating circumstance before it may be deemed "found," it is impossible to say that "the jury" found proof beyond a

reasonable doubt of a particular aggravating circumstance. Thus, "the sentencing order is 'a statutorily required personal evaluation by the trial judge of the aggravating and mitigating factors' *that forms the basis of a sentence of life or death*." *Morton v. State*, 789 So.2d 324, 333 (Fla. 2001) (quoting *Patton v. State*, 784 So.2d 380 (Fla. 2000)).

As the Supreme Court said in *Walton*, "[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." *Walton*, 497 U.S. at 648. This Court has made the point even more strongly by repeatedly emphasizing that the trial judge's findings must be made independently of the jury's recommendation. *See Grossman v. State*, 525 So.2d 833, 840 (Fla. 1988) (collecting cases). Because the judge must find that "sufficient aggravating circumstances exist" "notwithstanding the recommendation of a majority of the jury," Fla. Stat. § 921.141(3), she may consider and rely upon evidence not submitted to the jury. *Porter v. State*, 400 So.2d 5 (Fla. 1981); *Davis v. State*, 703 So.2d 1055, 1061 (Fla. 1997). The judge is also permitted to consider and rely upon aggravating circumstances that were not submitted to the jury. *Davis*, 703 So.2d at 1061, citing *Hoffman v. State*, 474 So.2d 1178 (Fla. 1985) (court's finding of "heinous, atrocious, or cruel" aggravating

circumstance proper though jury was not instructed on it); *Fitzpatrick v. State*, 437 So.2d 1072, 1078 (Fla. 1983) (finding of previous conviction of violent felony was proper even though jury was not instructed on it); *Engle*, *supra*, 438 So.2d at 813.

Because the jury's role is merely advisory and contains no findings upon which to judge the proportionality of the sentence, this Court has recognized that its review of a death sentence is based and dependent upon the judge's written findings. *Morton*, 789 So.2d at 333 ("The sentencing order is the foundation for this Court's proportionality review, which may ultimately determine if a person lives or dies"); *Grossman*, 525 So.2d at 839; *Dixon*, 283 So.2d at 8.

2. Florida juries are not required to render a verdict on elements of capital murder

Second, although "[Florida's] enumerated aggravating factors operate as 'the functional equivalent of an element of a greater offense,'" and therefore must be found by a jury like any other element of an offense, *Ring*, slip op. at 23 (quoting *Apprendi*, 530 U.S. at 494), Florida law does not require the jury to reach a verdict on any of the factual determinations required before a death sentence could be imposed. Section 921.141(2) does not call for a jury verdict, but rather

an "advisory sentence." This Court has made it clear that "'the jury's sentencing recommendation in a capital case is *only advisory*. The trial court is to conduct its own weighing of the aggravating and mitigating circumstances . . . .'" *Combs*, 525 So.2d at 858 (quoting *Spaziano v. Florida*, 468 U.S. 447, 451) (emphasis original in *Combs*). "The trial judge . . . is not bound by the jury's recommendation, and is given final authority to determine the appropriate sentence." *Engle*, 438 So.2d at 813. It is reversible error for a trial judge to consider herself bound to follow a jury's recommendation and thus "not make an independent whether the death sentence should be imposed." *Ross v. State*, 386 So.2d 1191, 1198 (Fla. 1980).

Florida law only requires the judge to *consider* "the recommendation of a majority of the jury." Fla. Stat. § 921.141(3). In contrast, "[n]o verdict may be rendered *unless* all of the trial jurors concur in it." Fla. R. Crim. Pro. 3.440. Neither the sentencing statute, this Court's cases, nor the jury instructions in Petitioner's case required that all jurors concur in finding any particular aggravating circumstance, or "[w]hether sufficient aggravating circumstances exist," or "[w]hether sufficient aggravating circumstances exist which outweigh the aggravating circumstances." Fla. Stat. § 921.141(2). In Petitioner's case, the jury

did not get to consider "circumstances of the offense that the [King] proffer[ed] as a basis for a sentence less than death", *King*, 514 So.2d at 360-361, only because his first counsel was found to be constitutionally defective at the penalty phase, resulting in a new jury which did not observe the circumstantial nature of the evidence as it was presented Mr. King's guilty phase trial. *Id*.

Because Florida law does not require twelve, jurors to agree that the government has proved any one aggravating circumstance beyond a reasonable doubt, or to agree on the same aggravating circumstances when advising that "sufficient aggravating circumstances exist" to recommend a death sentence, "the jury" does not render a verdict as to an aggravating circumstance or the sufficiency of them. As Justice Shaw observed in *Combs*, Florida law leaves these matters to speculation. *Combs*, 525 So.2d at 859 (Shaw, J., concurring).

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*, 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*. at *14. 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 1357257, at *16. 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.

One of the elements that had to be established for Petitioner to be sentenced to death was that "sufficient aggravating circumstances exist" to call for a death sentence. Fla. Stat. § 921.141(3).[14] The jury was not instructed that it had to find this element proved beyond a reasonable doubt. In fact, it was not instructed on *any* standard by which to make this essential determination. As Justice Scalia explained in his opinion for the unanimous Court in *Sullivan v. Louisiana*, 508 U.S. 275

[14] It is important to note that although Florida law requires the judge to find that sufficient aggravating circumstances exist to form the basis for a death sentence, Fla. Stat. § 921.141(3), it only asks the jury to say whether sufficient aggravating circumstances exist to "recommend" a death sentence. Fla. Stat. § 921.141(2).

(1993), such an error can never be harmless. "[T]he jury verdict required by the Sixth Amendment is a jury verdict of guilty beyond a reasonable doubt." *Sullivan*, 508 U.S. at 278. Where the jury has not been instructed on the reasonable doubt standard

> there has been no jury verdict within the meaning of the Sixth Amendment, [and] the entire premise of *Chapman*[15] review is simply absent. There being no jury verdict of guilty-beyond-a-reasonable-doubt, the question whether the *same* verdict of guilty-beyond-a-reasonable-doubt would been rendered absent the constitutional error is utterly meaningless. There is no *object*, so to speak, upon which harmless-error scrutiny can operate.

Sullivan, 508 U.S. at 280. Viewed differently, in a case such as this where the error is not requiring a jury verdict on the essential elements of capital murder, but delegating that responsibility to a court, "no matter how inescapable the findings to support the verdict might be," for a court "to hypothesize a guilty verdict that was never rendered . . . would violate the jury-trial right." *Id.*, 508 U.S. at 279. Harmless error review would perpetuate the error, not cure it.

"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

---

[15] *Chapman v. California*, 386 U.S. 18 (1967).

factfinding necessary to put him to death. We hold that the Sixth Amendment applies to both." Ring v. Arizona, 2002 WL 1357257 * 16 (U.S.). Consistent with the Sixth Amendment jury trial guarantee, is the principle that aggravating circumstances must be decided by a unanimous twelve-person jury before a death sentence may be imposed. Florida Rule of Criminal Procedure 3.440 requires unanimous jury verdicts on criminal charges. "It is therefore settled that '[i]n this state, the verdict of the jury must be unanimous' and that any interference with this right denies the defendant a fair trial." Flanning v. State, 597 So. 2d 864, 867 (Fla. 3d DCA 1992), quoting Jones v. State, 92 So. 2d 261 (Fla. 1956). Thus, Florida's procedure permitting jury recommendations of death based upon a simple majority vote and not requiring jury unanimity as to the existence of specific aggravating factors violates the Florida law . See, e.g., Thompson v. State, 648 So. 2d 692, 698 (Fla. 1994). Jones v. State, 569 So. 2d 1234, 1238 (Fla. 1990).

A unanimous twelve person jury verdict is also required under United States Constitutional common law. Each of the thirty-eight states that use the death penalty require unanimous twelve person jury

convictions in death penalty cases.[16] "We think this near-uniform judgement of the Nation provides a useful guide in delimiting the line between those jury practices that are constitutionally permissible and those that are not." Burch v. Louisiana, 441 U.S. 130, 138 (1979)(reversing a non-unanimous six person jury verdict in a non-capital case). The federal government requires unanimous twelve person jury verdicts. "[T]he jury's decision upon both guilt and whether the punishment of death should be imposed must be unanimous. This construction is more consonant with the general humanitarian purpose of the Anglo-American jury system." Andres v. United States, 333 U.S. 740, 749 (1948).

Implicit in the states' and federal government's requirements that

---

[16]Ala.R.Cr.P 18.1; Ariz. Const. Art 2, s.23; Ark. Code Ann. §16-32-202; Cal. Const. Art. 1, §16; Colo. Const. Art 2, §23; Conn. St. 54-82(c), Conn.R.Super.Ct.C.R. §42-29; Del. Const. Art. 1, §4; Fla. Stat. Ann. § 913.10(1); Ga. Const. Art. 1, §1, P XI; Idaho. Const. Art. 1, §7; Ill. Const. Art. 1, §13; Ind. Const. Art. 1, §13; Kan. Const. Bill of Rights §5; Ky. Const. §7, Admin.Pro.Ct.Jus. A.P. 11 §27; La. C.Cr.P. Art. 782; Md. Const. Declaration Of Rights, Art. 5 ; Miss. Const. Art. 3, §31; Mo. Const. Art. 1, §22a; Mont. Const. Art. 2, §26; Neb. Rev. St. Const. Art. 1, §6; Nev. Rev. Stat. Const. Art. 1, §3; N.H. Const. PH, Art. 16; N.J. Stat. Ann. Const. Art. 1, p. 9; N.M. Const. Art. 1 §12; N.Y. Const. Art. 1, §2; N.C. Gen. Stat. Ann. §15A-1201; Ohio Const. Art. 1, §5; Okla. Const. Art. 2, §19; Or. Const. Art. 1, §11, Or. Rev. Stat. §136.210; Pa. Stat. Ann. 42 Pa.C.S.A. §5104; S.C. Const. Art. V, §22; S.D. ST §23A-267; Tenn. Const. Art.1, §6; Tex. Const. Art.1, §5; Utah Const. Art. 1 §10; Va. Const. Art. 1, §8; Wash. Const. Art. 1, §21; Wyo. Const. Art. 1, §9.

a capital conviction must be obtained through a unanimous twelve person jury, is the idea that "death is qualitatively different from a sentence of imprisonment, however long". Woodson v. North Carolina, 428 U.S. 280, 304 (1976). The Sixth, Fourteenth, and Eighth Amendments require more protection as the seriousness of the crime and severity of the sentence increase. See Johnson v. Louisiana, 406 U.S. 356, 364 (1972). Only a twelve juror unanimous verdict can support the imposition of the death penalty. "In capital cases, for example, it appears that no state provides for less than 12 jurors–a fact that suggests implicit recognition of the value of the larger body as a means of legitimizing society's decision to impose the death penalty." Williams v. Florida, 399 U.S. at 103. See Cabberiza v. Moore, 217 F.3d 1329, n.15 (11th Cir.2000) ("At least as of 1993, all states that have the death penalty required a unanimous verdict by twelve jurors. *See* U.S. Dep't of Justice, Bureau of Justice Statistics, *State Court Organization 1993* 274-79 (1995)".) See also Ring, 2002 WL1357257 *17 (U.S.)(SCALIA, J., concurring)("I am therefore reluctant to magnify the burdens that our *Furman* jurisprudence imposes on the states. Better for the Court to have invented an evidentiary requirement that a judge can find by a preponderance of the evidence, than to invent one that **a unanimous**

jury must find beyond a reasonable doubt.")(emphasis added).

The non-specific death recommendation violated Mr. King's Sixth, Eighth, and Fourteenth Amendment rights as well as his rights under Florida law because it is impossible to determine whether twelve jurors unanimously found any one aggravating circumstance, let alone "sufficient aggravating circumstances" to warrant imposition of the death penalty. Fla. Stat. 921.141 (1977). The unconstitutionality of the jury's death recommendation is compounded because the jury was instructed on an two elements which were not found by the sentencing court and upheld on appeal: the committed for the purpose of avoiding a lawful arrest aggravator, which the sentencing court did not find, and the knowingly created a great risk of death to many persons aggravator, which the sentencing court found but this Court struck on direct appeal. Fla. Stat. 921.141(5)(c)(e); (R. 1720-1721);King v. State, 514 So.2d 354, 360 (Fla.1987). Given the non-specific recommendation, it is also impossible to know whether any of the jurors relied on the unconstitutional aggravators. As a result, Mr. King's death sentence likely rests on at least one unconstitutional element of a death penalty eligible offense.

Permitting any such findings of the elements of a capital

crime by a mere simple majority is unconstitutional under the Sixth and Fourteenth Amendments. 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). And the standards for imposition of a death sentence may be even more exacting than the *Apodaca* standard (which was not a death case) -- but they cannot constitutionally be less. 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. 356, 366 (1972) (Blackmun, J., concurring) (a state statute authorizing a 7-5 verdict would violate Due Process Clause of Fourteenth Amendment).

3. The State was not required to convince the jury that death was a proper sentence beyond a reasonable doubt

Third, the jury in Petitioner's case was not required to make findings beyond a reasonable doubt as required by the Sixth

Amendment. "If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt." *Ring*, slip op. at 16. Florida law makes a death sentence contingent not upon the existence of any individual aggravating circumstance, but on a (judicial) finding "[t]hat *sufficient* aggravating circumstances exist." Fla. Stat. § 921.141(3) (emphasis added). Although Petitioner's jury was told that individual jurors could consider only those aggravating circumstances that had been proved beyond a reasonable doubt (TR 1722), it was not required to find beyond a reasonable doubt "whether sufficient aggravating circumstances exist to justify the imposition of the death penalty." TR 1721.

In summary, in light of the plain language of Florida's death penalty statute, the Rules of Criminal Procedure, and nearly 30 years of this Court's death penalty jurisprudence, it is clear that the limited role of the jury in Florida's capital sentencing scheme fails to satisfy the requirements of the Sixth Amendment. Even if this Court were to redefine the jury's role under Florida law, it would not make Petitioner's death sentence valid. Petitioner's jury was repeatedly told "the final decision as to what punishment shall be imposed is the responsibility of

the judge" (TR 1720); **"**But do every one of you understand no one in this courtroom has the power to sentence Mr. King except Judge Frederico? That is not your responsibility." (TR 873 (voir dire)); "But do you understand that the responsibility does not lie on your shoulders except to make a recommendation, that the responsibility to sentence Mr. King lies squarely on that man's shoulders and that you should not feel responsible for sentencing Mr. King" (TR 914 (voir dire)); *See also* TR 916, 1056-57, 1712, 1720.[17] As the Supreme Court held in *Caldwell v. Mississippi*, 472 U.S. 320 (1985):

> [I]t is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has

---

17

"**As I said earlier, that is not to minimize the importance of what we are doing by all my questions I ask about your feelings here. It is important, but as the Judge told you in the instructions, the sole purpose of what your doing is to make a recommendation**. (TR 916 (voir dire))(emphasis added).

The jury clearly understood that their recommendation did not carry much weight with the court. Sitting juror Skane, in response to state during voir dire, stated: "**I know you said the Judge is going to make the final decision, but his decision I would assume will be based on what the jury has to say**." The state confirmed her understanding: "**He will certainly take that into consideration, yes**. The law gives the Judge certain parameters he has to follow with the jury's recommendation. **He does have the ultimate responsibility to do what he feels appropriate according to the law. Also, your recommendation obviously will have an effect. But, it is a recommendation**." (emphasis added) 1056-1057.

> been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere. *Caldwell*, 472 U.S. at 328 -329.

Were this Court to conclude now that Petitioner's death sentence rests on findings made by the jury after they were told, and Florida law clearly provided, that a death sentence would not rest upon their recommendation, it would establish that Petitioner's death sentence was imposed in violation of *Caldwell*.

Caldwell embodies the principle stated in Justice Breyer's concurring opinion in *Ring*: "the Eighth Amendment requires individual jurors to make, and to take responsibility for, a decision to sentence a person to death." *Ring*, slip op. at 6 (Breyer, J.,)

II. PETITIONER'S DEATH SENTENCE IS INVALID BECAUSE THE ELEMENTS OF THE OFFENSE NECESSARY TO ESTABLISH CAPITAL MURDER WERE NOT CHARGED IN THE INDICTMENT

Jones v. United States, 526 U.S. 227 (1999), held that "under the Due Process Clause of the Fifth Amendment and the notice and jury 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." *Jones*, at 243, n.6. *Apprendi v. New Jersey*, 530 U.S. 466 (2000), held that the Fourteenth Amendment affords citizens the same protections when they are prosecuted under state law. *Apprendi*, 530 U.S. at 475-476.[18] *Ring v. Arizona*, 536 U.S. ___ (2002), held that a death penalty statute's "aggravating factors operate as 'the functional equivalent of an element or a greater offense.'" *Ring*, slip op. at 23 (quoting *Apprendi*, 530 U.S. at 494, n. 19).

In *Jones*, the Supreme Court noted that "[m]uch turns on the determination that a fact is an element of an offense, rather than a sentencing consideration," in significant part because "elements must be charged in the indictment." *Jones,* 526 U.S. at 232. On June 28, 2002,

---

[18] The grand jury clause of the Fifth Amendment has not been held to apply to the States. *Apprendi*, 530 U.S. at 477, n.3.

after the Court's decision in *Ring*, the death sentence imposed in *United States v. Allen*, 247 F.3d 741 (8th Cir. 2001), was overturned when the Supreme Court granted the writ of certiorari, vacated the judgement of United States Court of Appeals for the Eighth Circuit upholding the death sentence, and remanded the case for reconsideration in light of *Ring*'s holding that aggravating factors that are prerequisites of a death sentence must be treated as elements of the offense. *Allen v. United States*, No. 01-7310, 2002 U.S. LEXIS 4893 (June 28, 2002).

The question presented in *Allen* was this:

> Whether aggravating factors required for a sentence of death under the Federal Death Penalty Act of 1994, 18 U.S.C. § 3591 et seq., are elements of a capital crime and thus must be alleged in the indictment in order to comply with the Due Process and Grand Jury clauses of the Fifth Amendment.

The Eighth Circuit rejected Allen's argument because in its view aggravating factors are not elements of federal capital murder but rather "sentencing protections that shield a defendant from automatically receiving the statutorily authorized death sentence." *United States v. Allen,* 247 F.3d at 763.

Like the Fifth Amendment to the United States Constitution, Article I, section 15 of the Florida Constitution provides that "No person shall be tried for a capital crime without presentment or indictment by a

grand jury." Like 18 U.S.C. sections 3591 and 3592(c), Florida's death penalty statute, Florida Statutes sections 775.082 and 921.141, makes imposition of the death penalty contingent upon the government proving the existence of aggravating circumstances, establishing "sufficient aggravating circumstances" to call for a death sentence, and that the mitigating circumstances are insufficient to outweigh the aggravating circumstance. Fla. Stat. § 921.141(3).

Florida law clearly requires every "element of the offense" to be alleged in the information or indictment. In *State v. Dye,* 346 So. 2d 538, 541 (Fla. 1977), this Court said "[a]n information must allege each of the essential elements of a crime to be valid. No essential element should be left to inference." In *State v. Gray,* 435 So. 2d 816, 818 (Fla. 1983), this Court said "[w]here an indictment or information wholly omits to alleged one or more of the essential elements of the crime, it fails to charge a crime under the laws of the state." An indictment in violation of this rule cannot support a conviction; the conviction can be attacked at any stage, including "by habeas corpus." *Gray*, 435 So.2d at 818. Finally, in *Chicone v. State,* 684 So. 2d 736, 744 (Fla. 1996), this Court said, "[a]s a general rule, an information must allege each of the essential elements of a crime to be valid."

The most "celebrated purpose" of the grand jury "is to stand between the government and the citizen" and protect individuals from the abuse of arbitrary prosecution. *United States v. Dionisio,* 410 U.S. 19, 33 (1973); *see also Wood v. Georgia,* 370 U.S. 375, 390) (1962). The Supreme Court explained that function of the grand jury in *Dionisio:*

> Properly functioning, the grand jury is to be the servant of neither the Government nor the courts, but of the people . . . As such, we assume that it comes to its task without bias or self-interest. Unlike the prosecutor or policeman, it has no election to win or executive appointment to keep.

Id., 410 U.S. at 35. The shielding function of the grand jury is uniquely important in capital cases. *See Campbell v. Louisiana*, 523 U.S. 392, 399 (1998) (recognizing that the grand jury "acts as a vital check against the wrongful exercise of power by the State and its prosecutors" with respect to "significant decisions such as how many counts to charge and . . . the important decision to charge a capital crime").

It is impossible to know whether the grand jury in this case would have returned an indictment alleging the presence of aggravating factors, sufficient aggravating circumstance, and insufficient mitigating circumstances, and thus charging Petitioner with a crime punishable by death. Nor can one have confidence that the grand jury intended to charge Petitioner with two crimes arising from a single homicide or to

subject him and his petit jurors to the crucible of the capital sentencing process. The State's authority to decide whether to seek the execution of an individual charged with crime hardly overrides – in fact is an archetypical reason for – the constitutional requirement of neutral review of prosecutorial intentions.

The Sixth Amendment requires that "[i]n all criminal prosecutions, the accused shall . . . be informed of the nature and cause of the accusation . . . ." A conviction on a charge not made by the indictment is a denial of due process of law. *State v. Gray, supra, citing Thornhill v. Alabama,* 310 U.S. 88 (1940), and *De Jonge v. Oregon,* 299 U.S. 353 (1937).

Because the State did not submit to the grand jury, and the indictment did not state, the essential elements of the aggravated crime of capital murder, Petitioner's right under Article I, section 15 of the Florida Constitution, and the Sixth Amendment to the federal Constitution were violated. By wholly omitting any reference to the aggravating circumstances that would be relied upon by the State in seeking a death sentence, the indictment prejudicially hindered Petitioner "in the preparation of a defense" to a sentence of death. Fla. R. Crim. Pro. 3.140(o). The writ should issue.

III. PETITIONER'S DEATH SENTENCE WAS IMPOSED IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT AND THE JURY TRIAL RIGHT GUARANTEED BY THE SIXTH AMENDMENT BECAUSE HE WAS REQUIRED TO PROVE THE NON-EXISTENCE OF AN ELEMENT NECESSARY TO MAKE HIM ELIGIBLE FOR THE DEATH PENALTY

Under Florida law, a death sentence may not be imposed unless the judge finds the fact that "sufficient aggravating circumstances" exist to justify imposition of the death penalty. Fla. Stat. § 921.141(3). Because imposition of a death sentence is contingent upon this fact being found, and the maximum sentence that could be imposed in the absence of that finding is life imprisonment, the Sixth Amendment required that the State bear the burden of proving it beyond a reasonable doubt. *Ring*, slip op. at 2 ("Capital defendants . . . are entitled to a jury determination of any fact on the the legislature conditions an increase in their maximum punishment."). Nevertheless, Florida juries, like Petitioner's, are routinely instructed, "Should you find sufficient aggravating circumstances to exist, it will then be your duty to determine **whether or not sufficient mitigating circumstances exist to outweigh the aggravating circumstances found to exist**." TR 1720, 1721, 1217

(emphasis added).[19]

The Due Process clause of the Fourteenth Amendment requires the state to prove beyond a reasonable doubt every fact necessary to constitute a crime. *In re Winship*, 397 U.S. 358 (1970). "Sufficient aggravating circumstances" that outweigh the mitigating circumstances are an essential element of death-penalty-eligible first degree murder because it is the sole element that distinguishes it from the crime of first degree murder, for which life is the only possible punishment. Fla. Stat. §§ 775.082, 921.141. For that reason, *Winship* requires the prosecution to prove the existence of that element beyond a reasonable doubt. The instruction given Petitioner's jury violated the

---

[19] The state also repeatedly told the jury that Mr. King carried the burden of proof that "sufficient mitigating circumstances exist to outweigh the aggravating circumstances found to exist". *See* TR 898, 1667, 1668

"**Ones[sic] a factor – there are sufficient factors, one or more, to justify the imposition of death, then that is the appropriate penalty and appropriate recommendation unless the Defendant can overcome that**." (TR 1668)(emphasis added)

"**Then their burden is higher than that. Not only because they convince you that mitigating circumstance [sic] exists but those mitigating circumstances outweigh, outweigh the aggravating circumstances that exist in this case. That is his burden**."(TR 1668-69)(emphasis added)

"**Mr. Harrison must convince you that the evidence which you heard yesterday not only is mitigating but that mitigation outweighs the aggravating circumstances that you have heard in this case**." (TR 1695)(emphasis added)

Due Process Clause of the Fourteenth Amendment of the United States Constitution because it relieved the state of its burden to prove beyond a reasonable doubt the element that "sufficient aggravating circumstances" exist which outweigh mitigating circumstances by shifting the burden of proof to the defendant to prove that the mitigating circumstances outweigh sufficient aggravating circumstances. *Mullaney v. Wilbur*, 421 U.S. 684, 698 (1975).

In *Mullaney*, the United States Supreme Court held that a Maine statutory scheme delineating the crimes of murder and manslaughter violated the Due Process Clause of the Fourteenth Amendment. The Maine law at issue required a defendant to establish, by a preponderance of the evidence, that he acted in the heat of passion on sudden provocation, in order to reduce a charge of murder to manslaughter. *Id.*, 421 U.S. at 691-692. Like the Florida statute at issue here, "the potential difference in [punishment] attendant to each conviction . . . may be of greater importance than the difference between guilt or innocence for many lesser crimes." *Id.*, 421 U.S. at 698. The Supreme Court held that the statutory scheme unconstitutionally relieved the state of its burden to prove the element of intent. *Id.*, 421 U.S. at 701-702. The Florida instruction produces the same fatal flaw.

To comply with the Eighth Amendment's requirement that the death penalty be applied only to the worst offenders, Florida adopted the statute 921.141 as a means of distinguishing between death-penalty eligible and non-death-penalty eligible murder. *State v. Dixon*, 283 So.2d 1, 10 (Fla.1973). Florida chose to distinguish those for whom "sufficient aggravating circumstances" outweigh mitigating circumstances from those for whom "sufficient aggravating circumstances"do not outweigh the mitigating circumstances. *Id.*, 283 So.2d. at 8. Because the former are more culpable, they are subjected to the most severe punishment: death. "By drawing this distinction, while refusing to require the prosecution to establish beyond a reasonable doubt the fact upon which it turns, [Florida] denigrates the interests found critical in *Winship*." *Mullaney*, 421 U.S. at 698.

Because Petitioner's jury was never required to find the element of sufficient aggravating circumstances beyond a reasonable doubt, the error here cannot be subjected to a harmless error analysis. *Sullivan v. Louisiana*, 508 U.S. 275, 279-280 (1993). Consequently, this Court must issue the writ of habeas corpus and vacate Petitioner's death sentence.

VI. CONCLUSION

For the foregoing reasons, this Court should stay **AMOS LEE KING'S** execution and grant the relief requested.

Respectfully submitted,

WILLIAM JENNINGS
Capital Collateral Regional Counsel
Middle Region

_____
KEVIN T. BECK
Assistant CCRC
Fla. Bar No. 0802719
CAPITAL COLLATERAL REGIONAL COUNSEL-MIDDLE
3801 Corporex Park Drive
Suite 210
Tampa, Florida 33619
813-740-3544
Counsel for Petitioner

MARK E. OLIVE
Fla. Bar No. 0578533
TIMOTHY P. SCHARDL
Fla. Bar No. 0073016
Law Offices of Mark E. Olive, P.A.
320 West Jefferson Street

Tallahassee, Florida 32301
850-224-0004

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Petition for Writ of Habeas Corpus is being furnished by facsimile transmission to counsel for Respondent, Assistant Attorney General Carol M. Dittmar, Assistant Attorney General, Office of the Attorney General, Westwood Building, 7th Floor, 2002 N. Lois Avenue, Tampa, FL 33607, this 5th day of July, 2002.

CERTIFICATE OF COMPLIANCE

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

_____
Kevin T. Beck