IN THE SUPREME COURT OF FLORIDA

CASE NO. SC03-1045

DWAYNE IRWIN PARKER

Petitioner,

v.

JAMES V. CROSBY,

Secretary, Florida Department of Corrections,

Respondent.

PETITION FOR WRIT OF HABEAS CORPUS

DAN D. HALLENBERG
Assistant CCRC
Florida Bar No. 0940615

NEAL A. DUPREE CAPITAL
CAPITAL COLLATERAL REGIONAL
COUNSEL - SOUTHERN REGION

101 N.E. 3RD AVE., SUITE 400
Ft. Lauderdale, FL 33301
(954) 713-1284; FAX (954) 713-1299

COUNSEL FOR PETITIONER

TABLE OF CONTENTS

Page No.

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

INTRODUCTION 1

JURISDICTION 1

REQUEST FOR ORAL ARGUMENT 1

PROCEDURAL HISTORY 1

CLAIM I

THE CIRCUIT COURT FAILED TO PROPERLY CONSIDER THE MITIGATION PRESENTED BY MR. PARKER DUE TO THE COURT'S FUNDAMENTAL MISUNDERSTANDING OF THE CONSTITUTIONALLY REQUIRED FUNCTION AND PURPOSE OF MITIGATION 2

CLAIM II

APPELLATE COUNSEL FAILED TO RAISE ON APPEAL NUMEROUS MERITORIOUS ISSUES WHICH WARRANT REVERSAL OF EITHER OR BOTH THE CONVICTION AND SENTENCE OF DEATH. . . . 9

A. Introduction. 9

B. Failure to Raise Trial Court's Denial of Motion to Recuse the Prosecutor 9

C. Failure To Raise State's Presentation of Irrelevant, Non-Statutory Aggravating Evidence Regarding Origin Of Fatal Bullet 18

D. Failure To Raise Mr. Parker's Absence From Critical Stages Of The Trial 20

E. Failure To Raise Constitutional Violations Resulting From Prosecuting Mr. Parker For Both Premeditated And Felony First-Degree Murder 25

TABLE OF CONTENTS (cont.)

CLAIM III

THE FLORIDA CAPITAL SENTENCING PROCEDURES AS EMPLOYED IN MR. PARKER'S CASE VIOLATED HIS SIXTH AMENDMENT RIGHT TO HAVE A UNANIMOUS JURY RETURN A VERDICT ADDRESSING HIS GUILT OF ALL THE ELEMENTS NECESSARY FOR THE CRIME OF CAPITAL FIRST DEGREE MURDER 26

A. Introduction 26

B. *Ring* Applies to the Florida Capital Scheme 27

1. The basis of *Mills v. Moore* is no longer valid 27

2. In Florida, Eighth Amendment narrowing occurs at sentencing 30

3. In Florida, the eligibility determination is not made in conformity with the right to trial by jury 38

a. *No unanimous determination of eligibility* 39

b. *No verdict in compliance with the Sixth Amendment* 42

c. *The recommendation has been merely advisory* 44

CLAIM IV

MR. PARKER WAS DEPRIVED OF HIS SIXTH AMENDMENT RIGHTS 45

A. The Indictment Against Mr. Parker Failed to Include All of the Elements of the Offense of Capital Murder 45

B. Mr. Parker's Penalty Phase Jury was Told that It's Recommendation was Merely Advisory in Nature 48

TABLE OF CONTENTS (cont.)

CONCLUSION 50

CERTIFICATE OF SERVICE 50

CERTIFICATE OF COMPLIANCE 50

TABLE OF AUTHORITIES

Page No.

Allen v. United States
122 S.Ct. 2653 (2002) 46

Amazon v. State
487 So. 2d 8 (Fla. 1986) 24, 25

Amendarez-Torres v. United States
523 U.S. 224 (1998) 36

Apodaca v. Oregon
406 U.S. 404 (1972) 40

Apprendi v. New Jersey
530 U.S. 466 (2000) 26,37,40,46

Blanco v. State
706 So. 2d 7 (Fla. 1998) 35

Bullington v. Missouri
451 U.S. 430 (1981) 30

Caldwell v. Mississippi
472 U.S. 320 (1985) 49

California v. Brown
479 U.S. 538 (1987) 6

Campbell v. Louisiana
523 U.S. 392 (1998) 48

Campbell v. State
571 So. 2d 415 (Fla. 1990) 4,7

Chaky v. State
651 So. 2d 1169 (Fla. 1995) 36

Chicone v. State
684 So. 2d 736 (Fla. 1996) 47

Cheshire v. State
568 So. 2d 908 (Fla. 1990) 68

Davis v. State
703 So.2d 1055 (Fla. 1998) 44

Combs v. State
525 So. 2d 858 (Fla. 1988) 42

TABLE OF AUTHORITIES (cont.)

Coney v. State
653 So. 2d 1009 (Fla. 1995) 23

Drope v. Missouri
420 U.S. 162 (1975) 23

Eddings v. Oklahoma
455 U.S. 104 (1982) 6,7

Evitts v. Lucey
469 U.S. 387 (1985) 9

Faretta v. California
422 U.S. 806 (1975) 23

Flanning v. State
597 So.2d 864 (Fla. 3rd DCA 1992) 41

Francis v. State
413 So. 2d 1175 (Fla. 1982) 23,25

Garcia v. State
492 So. 2d 360 (Fla. 1986) 23

Grossman v. State
525 So.2d 833 (Fla. 1988) 44

Harris v. United States
122 S.Ct. 2406 (2002) 29,39

Hildwin v. Florida
490 U.S. 638 (1989) 27

Illinois v. Allen
397 U.S. 337 (1970) 23

Kormondy v. State
___ So. 2d ___ (Fla. Feb. 13, 2003) (slip op.) 34

Johnson v. Louisiana
406 U.S. 356 (1972) 40

Johnson v. State
750 So. 2d 22 (Fla. 1999) 23,24

Jones v. State
92 So.2d 261 (Fla. 1956) 41

TABLE OF AUTHORITIES (cont.)

Jones v. United States
526 U.S. 227 (1999) 26,45

Jorgenson v. State
714 So. 2d 423 (Fla. 1998) 36

Jurek v. Texas
428 U.S. 262 (1976) 32

Lockett v. Ohio
438 U.S. 586 (1978) 5

Lowenfield v. Phelps
484 U.S. 231 (1988) 32,33

Maynard v. Cartwright
108 S. Ct. 1853 (1988) 19

Meggs v. McClure
538 So. 2d 518 (Fla. 1st DCA 1989) 16

Mills v. Moore
786 So.2d 532 (Fla. 2001) 27

Morton v. State
789 So.2d 324 (Fla. 2001) 44

Orazio v. Dugger
876 F. 2d 1508 (11th Cir. 1989) 9

Parker v. State
641 So.2d 369 (Fla. 1994),
cert. denied, 115 S.Ct. 944 (1995) 1,2,49

Porter v. State
564 So.2d 1060 (Fla. 1990) 33

Proffitt v. Wainwright
685 F.2d 1227 (11th Cir. 1982) 23

Ring v. Arizona
122 S.Ct. 2428 (2002) 26,27,45

Roberts (Harry) v. Louisiana
431 U.S. 633 (1977) 6

Roberts (Stanislaus) v. Louisiana
428 U.S. 325 (1976) 6

TABLE OF AUTHORITIES (cont.)

Rogers v. State
511 So. 2d 526 (Fla. 1987) 4,7

Ross v. State
386 So.2d 1191 (Fla. 1980) 42

Santos v. State
591 So. 2d 160 (Fla. 1991) 4,7

Sattahzan v. Pennsylvania
2003 WL 10481 (Jan. 14, 2003) 28,29,30,40

State v. Clauswell
474 So. 2d 1189 (Fla. 1985) 11,16

State v. Dixon
283 So.2d 1 (Fla. 1973) 39

State v. Dye
346 So. 2d 538 (Fla. 1977) 47

State v. Gray
435 So. 2d 816 (Fla. 1983) 47

State v. Overfelt
457 So.2d 1385 (Fla. 1984) 41

State v. Sigerson
282 So. 2d 649 (Fla. 2d DCA 1973) 24

Strickland v. Washington
466 U.S. 668 (1984) 9

Stringer v. Black
112 S. Ct. 1130 (1192) 19,31,32

Sullivan v. Louisiana
508 US. 275 (1993) 42,43

Trease v. State
768 So. 2d 1050 (Fla. 2000) 4,7

Untied States v. Allen
247 F.3d 741 (8th Cir. 2001) 46

United States v. Dionisio
410 U.S. 19 (1973) 47,48

United States v. Hodge
19 F.3d 51 (D.C. Cir. 1994) 24

United States v. Hosford
782 F.2d 936, 938 (11th Cir. 1986),
cert. denied, 476 U.S. 1118 (1986) 11,12,18

United States v. Johnson
2003 WL 43363 (N.D. Iowa, Jan. 7, 2003) 29

Walton v. Arizona
490 U.S. 639 (1990) 27

Williams v. State
438 So.2d 781 (Fla. 1983) 41

Wood v. Georgia
370 U.S. 375 (1962) 47

Woodson v. North Carolina
428 U.S. 280 (1976) 6

Zant v. Stephens
462 U.S. 862 (1983) 34

OTHER AUTHORITIES CITED:

18 U.S.C. § 3591 47
18 U.S.C. § 3592(c) 47

Fla. Const. Art. I, Sect. 15 46

Fla. Stat. § 775.082 37,39
Fla. Stat. § 921.141(2) 41,49
Fla. Stat. § 921.141(3) 30,31,37,42,43,44,47

Fla. R. Crim. P. 3.180(a) 23
Fla. R. Crim. P. 3.180(b) 24
Fla. R. Crim. P. 3.440 40,42

INTRODUCTION

This petition for habeas corpus relief is being filed in order to address substantial claims of error under the fourth, fifth, sixth, eighth and fourteenth amendments to the United States Constitution and claims demonstrating that Mr. Parker was deprived of the effective assistance of counsel on direct appeal.

JURISDICTION

A writ of habeas corpus is an original proceeding in this Court governed by Fla. R. App. P. 9.100. This Court has original jurisdiction under Fla. R. App. P. 9.030(a)(3) and Article V, § 3(b)(9), Fla. Const. The Constitution of the State of Florida guarantees that "[t]he writ of habeas corpus shall be grantable of right, freely and without cost." Art. I, § 13, Fla. Const.

REQUEST FOR ORAL ARGUMENT

Mr. Parker requests oral argument on this petition.

PROCEDURAL HISTORY

A Broward County grand jury indicted Mr. Parker on one count of first-degree murder, two counts of attempted first-degree murder and nine counts of armed robbery. *See Parker v. State*, 641 So. 2d 369, 372 (Fla. 1994). Mr. Parker's trial was held in Broward County from April 30 to May 9, 1990. On May 10, 1990, the jury returned a verdict finding him guilty on the murder and armed robbery charges and of the lesser offense of aggravated battery with a firearm on the two counts of attempted murder.

See Parker at 373; (R. 2026). At the conclusion of the May 25, 1990, penalty phase, the jury recommended a sentence of death by a vote of eight (8) to four (4) (R. 2326). On June 14, 1990, the trial court sentenced Mr. Parker to death (R. 2332). On direct appeal, the Florida Supreme Court affirmed Mr. Parker's convictions and sentences. *See Parker* v. *State*, 641 So.2d 369 (Fla. 1994), *cert. denied*, 115 S.Ct. 944 (1995). Mr. Parker thereafter filed a motion for post-conviction relief pursuant to rules 3.850 and 3.851 of the Florida Rules of Criminal Procedure. The circuit court summarily denied the motion. Mr. Parker now files the instant petition for writ of habeas corpus contemporaneously with his appeal from the summary denial.

CLAIM I

THE CIRCUIT COURT FAILED TO PROPERLY CONSIDER THE MITIGATION PRESENTED BY MR. PARKER DUE TO THE COURT'S FUNDAMENTAL MISUNDERSTANDING OF THE CONSTITUTIONALLY REQUIRED FUNCTION AND PURPOSE OF MITIGATION.

The death sentence imposed on Mr. Parker violates the Eighth Amendment because the circuit court maintained a fundamental misunderstanding of both the function and purpose of the mitigation evidence presented by Mr. Parker at his capital trial. The circuit court revealed its lack of understanding in its written order summarily denying Mr. Parker's rule 3.850 motion for post-conviction relief and in remarks made by the court during the *Huff* hearing. Due to the court's erroneous understanding of the purpose and effect of the mitigation presented by Mr. Parker, the court misapplied the law and was

necessarily precluded from conducting the constitutionally required consideration of the mitigation. Mr. Parker's death sentence should be vacated and his case remanded for re-sentencing.

In the order summarily denying Mr. Parker's post-conviction claim that trial counsel failed to effectively discover and present mitigating evidence (Claim VII), the court[1] concluded:

> This claim, in some seventy-three numbered paragraphs, reviews the defendant's childhood, his relationship with his parents, anecdotal history of alleged mental illness in the family, an unstable home life, a dysfunctional family and possible sexual abuse committed on the defendant.
>
> The inference to be drawn from the allegations in this claim **is that everyone in the defendant's life is to blame and is responsible for the defendant's actions in this murder** . . . .
>
> * * * *
>
> . . . The transcript of the trial in this case shows that page after page of testimony was presented to the jury in mitigation of the defendant **in an attempt to cast the defendant as a victim in this case, rather than the perpetrator**.

(PCR. 1493-94, 1495)(emphasis added). As evident from the circuit court's order, the court viewed the purpose of the mitigation evidence presented by Mr. Parker as "an attempt" by Mr. Parker to "blame" others for being "responsible for the defendant's actions in this murder" and to "cast the defendant as a victim in this case, rather than the perpetrator". In addition to these remarks contained on the court's written

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[1]The same circuit court judge, Judge Leroy H. Moe, presided over both Mr. Parker's capital trial and the post-conviction proceedings below.

order, the court during the *Huff* hearing the characterized Mr. Parker's argument in mitigation evidence as the "abuse-excuse" (PCR. Vol.9, 1432). The circuit court's understanding of the purpose of mitigation is contrary to, and erroneous application of, the fundamental principles of capital case sentencing guaranteed by the Eighth Amendment. As a result, the court could not have properly considered the mitigation evidence presented at Mr. Parker's capital trial. Therefore, the court imposed the death sentence in violation of the Eighth and Fourteenth Amendments.

In considering proffered mitigation by the defendant in a capital trial, the trial court must follow the three-step process enumerated in *Rogers v. State*, 511 So. 2d 526, 534 (Fla. 1987): First, the court must determine "whether the facts alleged in mitigation are supported by the evidence"; second, if the court finds the facts established, the court "must determine whether the established facts are of a kind capable of mitigating the defendant's punishment, *i.e.*, factors that, in fairness or in the totality of the defendant's life or character may be considered as extenuating or reducing the degree of moral culpability for the crime committed"; and third, the court must then determine whether the factors found to exist "are of sufficient weight to counterbalance the aggravating factors." *See also Santos v. State*, 591 So. 2d 160, 164 (Fla. 1991). The question of whether the established facts are "truly of a mitigating in nature" (the second step in the process) is a

question of law. *See Campbell v. State*, 571 So. 2d 415, 419, n.4 (Fla. 1990), *receded from in part, Trease v. State*, 768 So. 2d 1050 (Fla. 2000).

According to the circuit court, the facts alleged by Mr. Parker in the Amended Motion concerning his "childhood, his relationship with his parents, anecdotal history of alleged mental illness in the family, [ ] unstable home life,[ ] dysfunctional family and possible sexual abuse committed on the defendant" amounted to nothing but "an attempt" by Mr. Parker to "blame" others for being "responsible for the defendant's actions in this murder" and to "cast the defendant as a victim in this case, rather than the perpetrator" (PCR. 1493-94, 1495). This constitutes an erroneous legal determination by the court of the mitigating nature of the alleged facts. The court clearly did not view the mitigation asserted by Mr. Parker (both at trial and in the Amended Motion) in its proper constitutionally required context but, instead, treated Mr. Parker's mitigation as an attempt to show that he was not "responsible for [his] actions in this murder". As discussed below, the court's analysis is contrary to the established principles of capital case sentencing.

In *Lockett v. Ohio*, 438 U.S. 586, 604 (1978), the Court held that the Eighth and Fourteenth Amendments require that the sentencer in a capital case "not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any circumstances of the offense that the defendant

proffers as a basis for a sentence less than death." *Lockett* found this rule mandated by Eighth Amendment:

> "[I]n capital cases the fundamental respect for humanity underlying the Eighth Amendment . . . requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death."

Lockett, 438 U.S. 604 *quoting Woodson v. North Carolina*, 428 U.S. 280, 304 (1976); *see also Roberts (Harry) v. Louisiana*, 431 U.S. 633 (1977); *Roberts (Stanislaus) v. Louisiana*, 428 U.S. 325 (1976). Accordingly, this Court has made it emphatically clear that "events that result in a person succumbing to the passions or frailties inherent in the human condition necessarily constitute valid mitigation under the Constitution and must be considered by the sentencing court." *Cheshire v. State*, 568 So. 2d 908, 912 (Fla. 1990) (citing *Lockett v. Ohio*, 438 U.S. 586 (1978)). Only through a process which requires the sentencer to "consider, in fixing the ultimate punishment of death[,] the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind," *Woodson* at 304, can capital defendants be treated "as uniquely individual human beings." *Id.* The *Lockett* principle "is the product of a considerable history reflecting[] the law's effort to develop a system of capital punishment at once consistent and principled but also humane and sensible to the uniqueness of the individual. *California v. Brown*, 479 U.S. 538, 562 (1987)(Blackman, J. dissenting) *quoting*

Eddings v. Oklahoma, 455 U.S. 104, 110 (1982). As explained in *Eddings*:

> [T]he rule in *Lockett* followed from the earlier decisions of the Court and from the Court's insistence that capital punishment be imposed fairly, and with reasonable consistency, or not at all. By requiring that the sentencer be permitted to focus "on the characteristics of the person who committed the crime" *Gregg v. Georgia* [, 428 U.S. 153] at 197 [(1976)] the rule in *Lockett* recognizes that "justice . . . requires . . . that there be taken into account the circumstances of the offense together with the character and propensities of the offender." *Pennsylvania v. Ashe*, 302 U.S. 51, 55 (1937). By holding that the sentencer in capital cases must be permitted to consider any relevant mitigating factor, the rule in *Lockett* recognizes that a consistency produced by ignoring individual differences is a false consistency.

Eddings, 455 U.S. at 112; *see also Trease v. State*, 768 So. 2d 1050, 1055 (Fla. 2000)("The United States Supreme Court has held that a sentencing jury or judge may not preclude from consideration any evidence regarding a mitigating circumstance that is proffered by a defendant in order to receive a sentence of less than death." (citations omitted)); *Campbell v. State*, 571 So. 2d 415, 419 (Fla. 1990). "'[J]ust as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, *as a matter of law*, any relevant mitigating evidence . . . .'" *Rogers v. State*, 511 So. 2d 526 (Fla. 1987) *quoting Eddings*, 455 U.S. at 114-15.

The mitigation presented by Mr. Parker regarding his traumatic childhood and upbringing constituted classic capital

case mitigation. *See e.g. Rogers*, 511 So. 2d at 535 ("The effects produced by childhood traumas . . . indeed would have mitigating weight if relevant to the defendant's character, record, or the circumstances of the offense."). In sentencing Mr. Parker, the court was required to "'determine whether the established facts are of a kind capable of mitigating the defendant's punishment, *i.e.*, factors that, in fairness or in the totality of the defendant's life or character may be considered as extenuating or reducing the degree of moral culpability for the crime committed.'" *Santos v. State*, 591 So. 2d 160, 164 (Fla. 1991) *quoting Rogers*, 511 So. 2d at 534. Mr. Parker's presentation of this evidence to the court should have been viewed by the court as an attempt to establish circumstances and events that shaped Mr. Parker's character and " result[ed] in [Mr. Parker] succumbing to the passions [and] frailties inherent in the human condition" *Cheshire*, 568 So. 2d at 912 *citing Lockett*. Instead, the court's written order and comment at the *Huff* hearing establish that the court did not consider this evidence in the constitutionally required manner but instead viewed it as "an attempt" by Mr. Parker to show that other persons were "responsible for the defendant's actions in this murder" and to "cast [himself] as a victim in this case, rather than the perpetrator" (PCR. 1493-94). While the circumstances of the offense is a valid issue for mitigation if the circumstances act to lessen the defendant's culpability

(*i.e.* "responsibility") for the crime, mitigation establishing childhood trauma and abuse - contrary to the circuit court's belief - is not mitigating because it shows that the defendant is not "responsible" for the crime, rather, it is mitigating because it is relevant to the defendant's character. The court here did not consider the proffered mitigation as reflecting on Mr. Parker's character, but merely considered whether or not it absolved him of responsibility for committing the crime. This is an erroneous application of the fundamental principles of capital case mitigation.

Because the court misapplied the law governing the function and purpose of Mr. Parker's presentation of evidence in mitigation, the court's legal determination of whether or not the facts asserted were of a truly mitigating nature was necessarily erroneous. The court in effect precluded itself from a proper consideration of the mitigation evidence presented by Mr. Parker in violation of the Eighth Amendment. The order sentencing Mr. Parker to death should be reversed and Mr. Parker's case remanded for a new sentencing hearing.

CLAIM II

APPELLATE COUNSEL FAILED TO RAISE ON APPEAL MERITORIOUS ISSUES WHICH WARRANT REVERSAL OF EITHER OR BOTH THE CONVICTIONS AND SENTENCE OF DEATH.

A. Introduction.

Mr. Parker had the constitutional right to the effective assistance of appellate counsel for purposes of presenting his direct appeal to this Court. *Strickland v. Washington*, 466 U.S.

668 (1984). "A first appeal as of right [] is not adjudicated in accord with due process of law if the appellant does not have the effective assistance of an attorney." *Evitts v. Lucey*, 469 U.S. 387, 396 (1985). The *Strickland* test applies equally to ineffectiveness allegations of trial counsel and appellate counsel. *See Orazio v. Dugger*, 876 F. 2d 1508 (11th Cir. 1989).

B. Failure to Raise Trial Court's Denial of Motion to Recuse the Prosecutor.

Appellate counsel was ineffective for failing to raise on direct appeal the trial court's denial of Mr. Parker's motion to recuse the prosecutor when the prosecutor was a witness to the medical examiner's alleged realization that he had made a mistake regarding the appearance of the bullet removed from the victim. Because Mr. Parker was prejudiced by Mr. Satz acting as both advocate and witness, the trial court abused its discretion in denying the motion to recuse Mr. Satz. Appellate counsel was ineffective for failing to raise this issue on direct appeal.

The penultimate issue at the guilt-innocence phase of the trial was whether the bullet that killed the victim was fired from Mr. Parker's gun or from the gun of one of the various deputies who, at the time the victim was shot, were closing in on the area near Mr. Parker and the victim. The defense argued at trial that a deputy, and not Mr. Parker, actually fired the fatal bullet. The defense's case was bolstered by the very compelling fact that the medical examiner, Dr. Michael Bell,

represented in his notes from the autopsy, in the autopsy report itself, and in his initial sworn deposition that the fatal bullet he removed from the victim was silver in color, had little deformations, and had not been cut during its removal. These facts exonerated Mr. Parker from being the shooter and implicated a deputy because it was undisputed that the bullets in Mr. Parker's gun were copper color, not silver, and that the standard issue bullets for Broward County Sheriff deputies at the time were silver in color. However, after discussions on the telephone with the prosecutor, Mr. Satz, Dr. Bell made known his intention to testify that he had been mistaken as to the color and condition of the bullet and that the bullet he removed from the victim was actually copper color and had a large cut on it - a description which exactly matched the bullet the State presented at trial and argued was the bullet that killed the victim.

Mr. Parker thereafter filed a motion to recuse Mr. Satz on the grounds that Mr. Satz had become a witness in the case due to his direct involvement surrounding the circumstances of Dr. Bell's changed testimony (R. 2670-71). The trial court denied the motion (R. 375-79). Mr. Parker's rights to due process and equal protection were violated by Mr. Satz's personal involvement in the disputed issue of appearance of the fatal bullet.

A prosecutor who is a potential witness in a criminal case should be disqualified from prosecuting the matter. *Cf. State v.*

Clauswell, 474 So. 2d 1189 (Fla. 1985)(disqualification of entire State Attorneys Office not required when prosecutors who were witnesses were not involved in the prosecution of the defendant). The "advocate-witness" rule, as it is known, is the rule that a prosecutor must not act as both prosecutor and witness. *See United States v. Hosford*, 782 F.2d 936, 938 (11th Cir. 1986), *cert. denied*, 476 U.S. 1118 (1986). Under the "advocate witness" rule, "counsel should avoid ***appearing*** as both advocate and witness except under extraordinary circumstances." *Id.* (emphasis added). However, "mere first-hand knowledge of facts that will be proved at trial is not a per se bar to representation." *Id.* The court in *Hosford* explained:

> The policy concerns that preclude a prosecutor from also appearing as a witness were well stated by the United States Court of Appeals for the Seventh Circuit:
>
> > First, the rule eliminates the risk that a testifying prosecutor will not be a fully objective witness given his position as an advocate for the government. Second, there is fear that the prestige or prominence of a government prosecutor's office will artificially enhance his credibility as a witness. Third, the performance of dual roles by a prosecutor might create confusion on the part of the trier of fact as to whether the prosecutor is speaking in the capacity of an advocate or of a witness, thus raising the possibility of the trier according testimonial credit to the prosecutor's closing argument. Fourth, the rule reflects a broader concern for public confidence in the administration of justice, and implements the maxim that "justice must satisfy the appearance of justice." This concern is especially significant where the testifying attorney represents the

prosecuting arm of the federal government. (footnote omitted).

> *United States v. Johnston,* 690 F.2d 638, 643 (7th Cir. 1982).
>
> These considerations apply equally when a prosecutor implicitly testifies to personal knowledge or otherwise attains "witness verity" in a case in which he appears as an advocate for the government. Thus, it would be improper for a government attorney who has independent personal knowledge about facts that will be controverted at the trial to act as prosecutor (1) if he uses that inside information to testify indirectly by implying to the jury that he has special knowledge or insight, or (2) if he is selected as prosecutor when it is obvious he is the sole witness whose testimony is necessary to establish essential facts otherwise not ascertainable. [footnote omitted] *See, e.g., id.* at 642-43.

Hosford, 782 F.2d at 938-39.

As a result of the trial court's denial of Mr. Parker's motion to recuse Mr. Satz, Mr. Satz violated the "witness-advocate" rule by acting as the prosecutor when Dr. Bell testified that Mr. Satz prompted him to realize that he had looked at the bullet at the autopsy and mistakenly reported the bullet was silver with no deformations instead of copper with a large cut. As a result, Mr. Satz "attain[ed] 'witness verity'" *(Hosford* at 939) because it was made absolutely clear to the jury that Mr. Satz had independent personal knowledge of Dr. Bell's alleged revelation, a revelation that cut to the core of Mr. Parker's defense.

The jury's assessment of the credibility of Dr. Bell's testimony that he simply made a mistake was critical to Mr. Parker's defense. Dr. Bell testified that he did not realize

his mistake until Mr. Satz called him on the telephone and asked him to look at a slide photograph of the bullet. Mr. Parker's defense was that the evidence – namely, Dr. Bell's own observation and description of the bullet at the time of the autopsy - established that the true fatal bullet was silver and had been switched with a copper bullet found at the scene. The prosecution's counter theory was that Dr. Bell simply made a mistake when he examined the bullet during the autopsy and described it as silver with no deformations. The mistake theory argued by the prosecution was necessarily grounded on Dr. Bell's testimony regarding the telephone calls to him from Mr. Satz:

> Q [Mr. Satz]. Okay. Dr. Bell, did you write up an autopsy report in this case?
>
> A [Dr. Bell]. Yes, I did.
>
> Q. Did you describe the bullet in the autopsy report?
>
> A. Yes, I did.
>
> Q. How did you describe it?
>
> A. A large caliber silver-colored bullet is recovered with very little deformation.
>
> Q. Why did you write silver-colored bullet with very little deformation?
>
> * * * *
>
> A. Okay. I don't know. I mean, I made – It's obvious I made a mistake. I didn't look at the bullet properly.
>
> Q. [ ] When didn't you look at the bullet properly?
>
> A. At the time that I took it out of the body.

Q. Yet you took a slide of it, is that right?

A. Yes, because in the event that, you know, I should describe it incorrectly, I would always have that slide to fall back on, kind of, you know, as a safety net.

Q. All right. Did you give - How many depositions did you give in this case?

A. Two.

Q. Okay. And the first time that you gave the deposition to [trial counsel], how did you describe the bullet?

A. The same, silver colored bullet with no deformation.

Q. How about the second time?

A. Let's see. Can we talk about that? I don't recall.

Q. Well, did you give two depositions?

A. Yes.

* * * *

Q. . . . Did there come a time where you realized you had made a mistake?

A. Yes.

Q. When was that?

A. Oh, okay Just before the second deposition.

Q. All right.

A. And you called me up, and you said, Mike, why don't you project your slide of the bullet, and kind of hemmed and hawed and, Mike kept saying project the bullet, and so I did, and at that point, as we just saw, I realized that I had made a mistake, that I had incorrectly described it in my protocol, and continued to make the same mistake in that first deposition.

Q. Did anybody tell you you had made a mistake?

A. No.

Q. Okay. Go ahead. Then what happened?

A. Well, first I recognized that there was a cut in the bullet, and I went back, I - and Mike was still on the phone. I said, you know, I see a cut in the bullet, and then he asked me, well, what color is the bullet, and again I went back to the photograph, and while for the most part, again, you know, I saw the white portion of the overexposed photo, but around the edge of it, it was gold, and again I realized, you know, it wasn't silver colored, it was actually gold. So, I went back, told Mike, and at that point then, I think a couple of weeks later we had a second deposition.

(R. 1643-46)(emphasis added). As testified to by Dr. Bell, he allegedly realized his mistake directly due to prompting by Mr. Satz after Mr. Satz indicated ("hemmed and hawed") that Bells' original observations of the bullet were incorrect. The defense of course argued that Dr. Bell's testimony that this was all just a mistake was not believable (R. 1869-71).

Because Dr. Bell pointedly testified that his "revelation" regarding the appearance of the bullet was reached due to the prompting of Mr. Satz, the jury became aware that Mr. Satz supposedly had independent personal knowledge of highly contested and significant factual issue (Dr. Bell's revelation). Dr. Bell's testimony effectively elevated Mr. Satz from advocate to witness. By eliciting this testimony from Dr. Bell, Mr. Satz "testifie[d] indirectly by implying to the jury that he [Mr. Satz] ha[d] special knowledge or insight". *Hosford*, 782 F.2d at 939. Again, the defense's theory was that the evidence strongly suggested the possibility that Dr. Bell had <u>not</u> made a mistake

and that the true bullet that killed the victim was silver with no deformations, unlike the bullet the state produced at trial. Defense counsel argued:

> What does Dr. Bell say? He wasn't looking at a picture when he wrote down silver projectile. He was looking at the projectile. And he wasn't looking at a picture when he wrote down very little deformation. He was looking at the projectile as he removed it from the bone, plain and simple. And he had it in his handwritten notes, he had it in his typewritten notes, he swore to it under oath in a deposition when I questioned him about it, silver projectile, very little deformation . . . .
>
> One year later, one long year later, [Dr. Bell] changes his mind. And why does he change his mind? Because of a phone call from Mr. Satz . . . .

(R. 1869-70).

Because the trial court denied Mr. Parker's motion to recuse Mr. Satz, Mr. Parker was prejudiced. *See Clauswell*, 474 So. 2d at 1191 (noting that a motion for disqualification should be granted when actual prejudice is shown); *Meggs v. McClure*, 538 So. 2d 518 (Fl. 1st DCA 1989)(disqualification required in order to "prevent the accused from suffering prejudice that he otherwise would not bear"). If the jury believed Dr. Bell's testimony that he examined the bullet at the autopsy and mistakenly thought it was silver with no cuts - when the bullet was actually copper with a large cut - the jury necessarily would have rejected the defense's bullet switch theory. Critical to the jury's assessment of Dr. Bell's credibility on this question of fact would have been the whether or not the jury believed Dr. Bell's testimony surrounding his "discovery" of his "mistake". In other words, the defense was that this

could not have been a simple mistake by Dr. Bell. Therefore, Dr. Bell's testimony that he realized his "mistake" upon the telephone calls and prompting by Mr. Satz was a disputed issue of fact.

Mr. Parker was prejudiced by Mr. Satz acting as the prosecutor at trial because Dr. Bell testified that Mr. Satz was instrumental in Dr. Bell's realization that he had made an enormous error in describing the color and condition of the fatal bullet. Thus, <u>Mr. Satz's</u> credibility was introduced as a factor in the jury's determination of whether or not Dr. Bell truly made a mistake. Dr. Bell's testimony that it was an honest mistake was effectively and improperly bolstered by his testimony that Mr. Satz was a witness to and in fact prompted his discovery of the mistake. In other words, in order for the jury to reject Dr. Bell's testimony that it was an honest mistake - the key to Mr. Parker's defense - the jury very likely had to believe that Mr. Satz was a party to Dr. Bell's falsehood. This direct relationship between the credibility of Dr. Bell and the credibility of Mr. Satz created undue prejudice to Mr. Parker. To believe that Dr. Bell was not credible required the jury to believe that Mr. Satz was not credible. On the other hand, Dr. Bell's credibility was bolstered if the jury believed Mr. Satz to be credible.

The prejudice to Mr. Parker is clear given the gravity of the factual issue involved (whether Dr. Bell truly made a mistake or whether, as the defense argued, Mr. Parker was the

victim of a sinister law enforcement cover-up and evidence tampering) and in light of the serious risk of damage to the reliability of the fact-finding function of the jury caused by Mr. Satz violation of the "witness-advocate" rule. *See Hosford*, 782 F.2d at 938-39. The fact that Mr. Satz did not actually testify at the trial does not lessen these risks. Here, Mr. Satz "implicitly" testified by advocating for the truth of Dr. Bell's "discovery" of the mistake because the jury was told by Dr. Bell that Mr. Satz himself had first-hand, personal knowledge of this discovery and that, in fact, Mr. Satz was responsible for the discovery due to his telephone call and prompting of Dr. Bell. Most obvious was the very likely risk that "the prestige or prominence of [the] government prosecutor's office . . . artificially enhance[d Dr. Bell's] credibility as a witness" *Hosford* at 938. Of equal concern also was the risk that Mr. Satz's duel role as an advocate and a witness on this critical factual issue "create[d] confusion on the part of the trier of fact as to whether the prosecutor [was] speaking in the capacity of an advocate or of a witness, thus raising the possibility of the trier according testimonial credit to the prosecutor's closing argument." *Id.* at 938-39. Because the record establishes that the trial court abused its discretion in denying the motion to recuse to the detriment and prejudice to Mr. Parker, appellate counsel was ineffective in failing to raise this issue on direct appeal. Had appellate

counsel raised the issue, the outcome of the direct appeal would have been different.

C. Failure To Raise State's Presentation of Irrelevant, Non-Statutory Aggravating Evidence Regarding Origin Of Fatal Bullet

During the penalty phase, the State presented to the jury the testimony of Deputy Robert Cerat, Agent Jerry Richards (FBI), and Dr. Besant-Mathews allegedly for the purpose of showing that Mr. Parker caused great risk of death to others. The State maintained that:

> Your Honor, we are not putting this on to re-litigate the guilt phase. We are introducing this under the aggravating circumstances of creating great risk to others. We can re-present all the evidence about the projectiles to show where they were and that they all came from the defendant's gun.

(R. 2112). Trial counsel objected to this evidence on the grounds that it was cumulative to the guilt phase evidence regarding the bullet issue and on the grounds that the evidence was not relevant to the great risk of death to others aggravator (R. 2111-13). The trial court overruled the objection (R. 2112-13). Contrary to State's representation, the testimony of the aforementioned persons did in fact result in re-litigating the guilt phase issues and in no manner was the testimony relevant to the issue of the great risk to others aggravator. The testimony dealt only with whether Mr. Parker fired the single bullet that killed Mr. Nicholson. None of the witnesses called by the State talked about any other projectiles or any persons in danger other than the deceased victim. As a result, the

evidence was entirely irrelevant to the great risk to many aggravator and constituted unconstitutional non-statutory aggravating factors which starkly violated the Eighth Amendment and prevented the constitutionally required narrowing of the sentencer's discretion. *See Stringer v. Black*, 112 S. Ct. 1130 (1192); *Maynard v. Cartwright*, 108 S. Ct. 1853 (1988). Appellate counsel was ineffective for failing to raise this issue on direct appeal.

D. Failure To Raise Mr. Parker’s Absence From Critical Stages Of The Trial.

Appellate counsel was ineffective for failing raise opn direct appeal the fact that Mr. Parker was denied his right to due process of law, to confront the witnesses against him, and to the effective assistance of counsel when he was involuntarily absent from critical stages of his trial proceedings. His absence during these proceedings also violated the Eighth Amendment and rendered his trial proceedings rendered fundamentally unfair.

As the record clearly shows, Mr. Parker was involuntarily absent for the initial portion of the hearing on his motion to suppress evidence because he was mistakenly removed from the courtroom by a bailiff (R. 9, 14-51, 55-56). Although Mr. Parker’s trial counsel was present, counsel declined the court’s request for counsel to waive Mr. Parker’s appearance (R. 14). During this portion of the hearing for which Mr. Parker was not present, Deputy Presley testified regarding his

observations upon arriving on the crime scene (R. 16-51). After direct examination, the co-defendant's attorney began cross-examination (R. 34). Before co-defendant's counsel completed his cross-examination, the court stopped the hearing (R. 50-51).

The hearing resumed several weeks later at which time Mr. Parker was present (R. 55). Before testimony resumed, trial counsel moved "to adopt the testimony thus far elicited . . . and adopt and proceed as though the proceedings preceding were for Mr. Parker if that makes any sense" (R. 56). When the court suggested that trial counsel could "waive [Mr. Parker's] appearance at the beginning of the hearing", the following discussion occurred:

> MR. HITCHCOCK [trial counsel]:I don't waive them, but, no, I can say that retrospectively I would waive them because the testimony I think we can adopt and he is present and we can clarify as though he were present. I don't think there is any problem with that proceeding [sic] in this matter.
>
> THE COURT: As a safeguard, I'm going to order the transcript typed up as soon as the hearing is over and order you to furnish him with a copy of the testimony that he missed by not being here.
>
> MR. HITCHCOCK: Very well <u>and then</u> I will report back to the Court that he acknowledged that was a proceeding <u>and then</u> waive his presence for that testimony that he, we have a transcript.

(R. 56-57)(emphasis added). The State then urged the court to go ahead and inquire of Mr. Parker (R. 50). The court proceeded to do so, although obviously, at that time, Mr. Parker had not

had the opportunity to read any transcript (R. 57). The court inquired:

> THE COURT: Mr. Parker, did you understand the conversation we just had?
>
> THE DEFENDANT: No, sir.

(R. 57). The court attempted to convince Mr. Parker to retroactively waive his appearance during the earlier testimony (R. 58-59). Mr. Parker responded by explicitly asserting his right to be present for all proceedings and his desire not to waive his appearance, retroactively or otherwise:

> THE COURT: We started a motion [sic] on a motion to suppress the evidence . . .
>
> * * * *
>
> You weren't here for some of the testimony and you have a right to be here. So what I will do is order the Court Reporter to type up the transcript of what happened at that hearing and show it to you so you can get the benefit of the testimony that was presented. Do you understand what I mean by that?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: Do you have any questions about that?
>
> THE DEFENDANT: Not question, **<u>but I'd like to bring to the Court's attention that I would like to be present on anything concerning my case</u>**.

(R. 58)(emphasis added). The court then tried to minimize the significance of the proceedings that Mr. Parker missed in an effort to convince Mr. Parker to accept a review of a transcript of the hearing as a substitute for his actual presence. However, Mr. Parker did not agree but instead asked the court to allow him the opportunity to read the transcript <u>before</u> making

a decision on whether to retroactively waive his appearance. The court agreed:

> THE COURT: I agree, I agree. for what it's worth, too, I'm sure the testimony that was presented that you missed by not being here is going to be gone over again during Cross-examination and maybe some Direct Examination. So you are not going to miss anything.
>
> You wouldn't have missed anything important. It's just a matter of you acknowledging the fact that you weren't here, but the proceeding whereby you are going to read the transcript is okay with you and okay with your lawyer. Now, your lawyer doesn't have any objection to it. Your lawyer said in effect it is fine. I want to make sure you understand what is going on.
>
> Do you have comments or questions on that, Mr. Parker?
>
> THE DEFENDANT: No, sir. I accept whatever procedure is going on **and I would give, you know, my opinion *after viewing what I read.***
>
> ***Is that acceptable?***
>
> THE COURT: **That's all right.**

(R. 58-59)(emphasis added). The court therefore intended to allow Mr. Parker the chance to review the transcript of the hearing before he decided whether to retroactively waive his appearance. However, Mr. Parker never thereafter waived his appearance.

The accused has a right to be present at all stages of the trial where his absence might frustrate the fairness of the proceedings. *Faretta v. California*, 422 U.S. 806, 819, n.15 (1975). A capital defendant is absolutely guaranteed the right to be present at all critical stages of judicial proceedings. This right is guaranteed by the federal constitution, *see, e.g., Drope v. Missouri*, 420 U.S. 162 (1975); *Illinois v. Allen*, 397

U.S. 337 (1970); and *Proffitt v. Wainwright*, 685 F.2d 1227 (11th Cir. 1982), by Florida constitutional and statutory standards, *Francis v. State*, 413 So. 2d 1175 (Fla. 1982), and by Rule 3.180 of the Florida Rules of Criminal Procedure. *See also, Coney v. State*, 653 So. 2d 1009 (Fla. 1995).

A defendant "has a constitutional right to be present at all stages of his trial where his absence might frustrate the fairness of the proceeding." *Johnson v. State*, 750 So. 2d 22, 27 (Fla. 1999) *quoting Garcia v. State*, 492 So. 2d 360, 363 (Fla. 1986); *see also Francis*, 413 So. 2d at 1177 (same). This right derives in part from the confrontation clause of the Sixth amendment and the due process clause of the Fourteenth amendment. *Proffitt*, 685 F.2d at 1256. A hearing on a motion to suppress evidence is a critical stage of the proceedings at which a defendant has the right to be present. *See* Fla. R. Crim. P. 3.180(a)("In all prosecutions for crime the defendant shall be present: . . . (3) at any pretrial conference, unless waived by the defendant in writing; . . . (6) when evidence is addressed to the court out of the presence of the jury for the purpose of laying the foundation for the introduction of evidence before the jury."); *see also United States v. Hodge*, 19 F.3d 51 (D.C. Cir. 1994)(suppression hearing is a critical stage affecting the substantial rights of the accused); *State v. Sigerson*, 282 So. 2d 649 (Fla. 2d DCA 1973). Furthermore:

> A defendant is present for purposes of this rule <u>if</u> the defendant is <u>physically in attendance for the</u>

> courtroom proceeding, and has a meaningful opportunity to be heard through counsel on the issues being discussed.

Fla. R. Crim. P. 3.180(b)(emphasis added). Therefore, absent a valid waiver, Mr. Parker's was denied his constitutional right to be present during a critical stage of the prosecution.

Mr. Parker did not waive his appearance at the suppression hearing. An on-the-record waiver is required. *See Johnson v. State*, 750 So. 2d 22, 27-28 (Fla. 1999). Mr. Parker never made the a knowing, intelligent, and voluntary on-the-record personal waiver of his right to be present during the suppression hearing. *See id.* Counsel may waive a client's presence at a crucial stage on behalf of the client, only if, subsequent to the waiver the client ratifies the waiver "either by examination of the trial judge, or by acquiescence to the waiver with actual or constructive knowledge of the waiver. *Amazon v. State*, 487 So. 2d 8, 11 (Fla. 1986).

Here, there was simply never a waiver made either by Mr. Parker himself or on his behalf by trial counsel. At this initial hearing where Mr. Parker was not present, trial counsel declined to waive Mr. Parker's presence (R. 14). When the hearing reconvened several weeks later, Mr. Parker was present (R. 55). While counsel indicated that trial counsel was inclined agree to Mr. Parker retroactively waiving his appearance, counsel would "report back to the Court . . . and then waive his presence" after Mr. Parker read the transcript (R. 56-57)(emphasis added). It was at this point that the court

conducted the colloquy with Mr. Parker, who, without the benefit of the transcript, asked, and was granted leave by the court, to decide whether to retroactively waive his appearance after he had the opportunity to read the transcript (R. 58-59). There was never a waiver entered by trial counsel on behalf of Mr. Parker for Mr. Parker to ratify, either by examination of the trial judge, or by acquiescence to the waiver with actual or constructive knowledge of the waiver. *Amazon v. State*, 487 So. 2d at 11. Because there was also no personal waiver ever made by Mr. Parker himself, he was denied his constitutional right to be present during a critical stage of the prosecution. The error is not harmless beyond a reasonable doubt. *See Francis* at 1178-79. Appellate counsel was ineffective for not rasing this issue on direct appeal.

E. Failure To Raise Constitutional Violations Resulting From Prosecuting Mr. Parker For Both Premeditated And Felony First-Degree Murder.

Appellate counsel was ineffective for failing to challenge on direct appeal the fact that Mr. Parker was denied adequate notice of the charges against him when the State was permitted to charge and prosecute him for both premeditated murder and first-degree felony murder. This issue was preserved for review (R. 364-7, 2533). The lack of notice violated Mr. Parker's rights under the Sixth, Eighth and Fourteenth Amendment to the United States Constitution.

CLAIM III

THE FLORIDA CAPITAL SENTENCING PROCEDURES AS EMPLOYED IN MR. PARKER'S CASE VIOLATED HIS SIXTH AMENDMENT RIGHT TO HAVE A UNANIMOUS JURY RETURN A VERDICT ADDRESSING HIS GUILT OF ALL THE ELEMENTS NECESSARY FOR THE CRIME OF CAPITAL FIRST DEGREE MURDER.

A. Introduction.

In *Ring v. Arizona*, 122 S.Ct. 2428 (2002), the Supreme Court held the Arizona capital sentencing scheme unconstitutional because a death sentence there is contingent upon finding an aggravating circumstance and assigns responsibility for finding that circumstance to the judge. The Arizona scheme was found to violate the constitutional guarantee to a jury determination of guilt in all criminal cases. The Supreme Court based its *Ring* holding 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 those in Florida and Arizona 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.*

B. *Ring* Applies to the Florida Capital Scheme.

1. The basis of *Mills v. Moore* is no longer valid.

The Florida Supreme 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 v. Arizona*, 497 U.S. 639 (1990), *overruled in part, Ring v. Arizona,* 122 S.Ct. 2428 (2002), and the basic principle of *Hildwin v. Florida*, 490 U.S. 638 (1989), which had upheld the basic 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.'" Additionally, *Ring* undermines the reasoning of *Mills* by establishing: (a) that *Apprendi* applies to capital sentencing schemes; (b) that States may not avoid the Sixth Amendment requirements of *Apprendi* by simply specifying death or life imprisonment as the only sentencing options; and (c) that the relevant and dispositive question is whether under state law death is "authorized by a guilty verdict standing alone."

In *Mills*, the Court observed that the "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*. *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 to punishment in excess of the statutory maximum. *Mills*, 786 So.2d at 538. The logic of *Mills* simply did not survive *Ring*.

That *Mills* can no longer survive constitutional scrutiny is further demonstrated by the recent decision by the United States Supreme Court in *Sattahzan v. Pennsylvania*, 2003 WL 10481 (Jan. 14, 2003). In *Sattahzan*, a plurality of the Supreme Court consisting of Justices Scalia and Thomas, and Chief Justice Rehnquist, made it clear that there was no practical significance to its use of the phrase "functional equivalent of an element" in *Ring* rather than simply "element." The plurality directly stated:

> [o]ur decision in *Apprendi* [] clarified that what constitutes an 'element' of the offense for purposes of the Sixth Amendment's jury trial guarantee. Put simply, if the existence of any fact . . . increases the maximum punishment that may be imposed on a defendant, that fact—no matter how the state labels it, *constitutes an element* . . .

Sattahzan, 2003 WL 10481 at *7 (emphasis added). The plurality then referenced the "functional equivalent" language of *Ring*, and immediately thereafter stated that "for purposes of the Sixth Amendment jury-trial guarantee, the underlying offense of 'murder' is a distinct, lesser included offense of 'murder plus one or more aggravating circumstances . . . . " *Id.* Moreover, the plurality stated later in the opinion that "`murder plus one or more aggravating circumstances' is a separate offense from `murder' *simpliciter*." *Id.* Applying these principles to the

case before it, the Court stated that the death eligible offense for which Sattahzan was sentenced "is properly understood to be a *lesser included offense* of `first degree murder plus aggravating circumstances." *Id.* at *8 (emphasis added).

While this portion of the *Sattahzan* opinion was specifically adopted by only three of the Justices, one of whom, the Chief Justice, had dissented in *Ring*, none of the others who had been in the *Ring* majority took issue with it. Justice Kennedy, who joined the remainder of Justice Scalia's opinion in *Sattahzan*, did not discuss the *Ring/Apprendi* issue at all. One would think that, had he taken issue with this interpretation of a decision which he had signed onto, he would have at least noted his disagreement with it. Moreover, there is clearly no reason for Justice Kennedy to have noted his agreement with the plurality opinion, since he previously had written that, "read together, *McMillan [v. Pennsylvania*, 477 U.S. 79 (1986)] and *Apprendi* mean that those facts setting the outer limits of a sentence, and of the judicial power to impose it, *are the elements of the crime* for purposes of the constitutional analysis." *Harris v. United States*, 122 S.Ct. 2406, 2419 (2002) (plurality opinion). *See United States v. Johnson*, 2003 WL 43363 (N.D. Iowa, Jan. 7, 2003) (noting that *Harris* plurality consisting of Justices Kennedy, O'Connor, Scalia, and Chief Justice Rehnquist, agreed with this proposition).

As for the *Sattahzan* dissenters, it would be unreasonable to believe that they would not have protested an erroneous interpretation of such a key phrase from *Ring* by a plurality of the Court in *Sattahzan*, given the recency and significance of the *Ring* opinion. That is particularly true of Justice Ginsburg, who authored both the Court's opinion in *Ring* and the dissent in *Sattahzan*. However, not only did they not protest that interpretation, joined by Justice Breyer they stated that "for purposes of the Double Jeopardy clause, capital sentencing proceedings involving proof of one or more aggravating factors *are to be treated as trials of offenses*, not merely sentencing proceedings." *Sattahzan*, 2003 WL 10481 at *15 n.6 (emphasis added) (*citing Sattahzan*, 2003 WL 10481 at **4-7, 9-10) (plurality opinion); *Ring,* 122 S. Ct. at 2428; *Bullington v. Missouri*, 451 U.S. 430 (1981)). The portion of the plurality opinion which the dissenters referenced for this proposition includes all of the language cited above. Thus, the clear statement of the *Sattahzan* plurality that aggravating factors are actual elements of the greater offense has the support of *at least* six members of the Court.

2. In Florida, Eighth Amendment narrowing occurs at sentencing.

With the premise of *Ring* and *Sattahzan* in mind, it becomes clear that Florida's statute is unconstitutional, and that the

basis of *Mills* can no longer survive. Section Fla. Stat. 921.141 provides:

> (3) FINDINGS IN SUPPORT OF SENTENCE OF DEATH--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, but if the court imposes a sentence of death, it shall set for in writing its findings upon which the sentence is based as to the facts:
>
> (a) The sufficient aggravating circumstances exist as enumerated in subsection (5), and
> (b) That there are insufficient mitigating circumstances to outweigh the aggravating circumstances.
>
> 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 (5) and (6) and upon the records of the trial and the sentencing proceedings. **If the court does not make the findings requiring the death sentence, the court shall impose sentence of life imprisonment in accordance with S. 775.082.**

(Fla. Stat. 921.141(3))(emphasis added). In *Stringer v. Black*, 503 U.S. 222 (1992), the United States Supreme Court was called upon to discuss and contrast capital sentencing schemes and their use of aggravating circumstances. According to the United States Supreme Court:

> In Louisiana, a person is not eligible for the death penalty unless found guilty of first-degree homicide, a category more narrow than the general category of homicide. [Citation]. A defendant is guilty of first-degree homicide if the Louisiana jury finds that the killing fits one of five statutory criteria. [Citation]. After determining that a defendant is guilty of first-degree murder, a Louisiana jury next must decide whether there is at least one statutory aggravating circumstance and, after considering any mitigating circumstances, determine whether the death penalty is appropriate. [Citation]. Unlike the

> Mississippi process, in Louisiana the jury is not required to weigh aggravating against mitigating factors.
> In *Lowenfield [v. Phelps*, 484 U.S. 231 (1988)], the petitioner argued that his death sentence was invalid because the aggravating factor found by the jury duplicated the elements it already had found in determining there was a first-degree homicide. We rejected the argument that, as a consequence, the Louisiana sentencing procedures had failed to narrow the class of death-eligible defendants in a predictable manner. We observed that "[t]he use of 'aggravating circumstances' is not an end in itself, but a means of genuinely narrowing the class of death-eligible persons and thereby channeling the jury's discretion. We see no reason why this narrowing function may not be performed by jury findings at either the sentencing phase of the trial or the guilt phase." [Citation]. **We went on to compare the Louisiana scheme with the Texas scheme, under which the required narrowing occurs at the guilt phase**. [Citation]. **We also contrasted the Louisiana scheme with the Georgia and Florida schemes**. [Citation].
>
> The State's premise that the Mississippi sentencing scheme is comparable to Louisiana's is in error. The Mississippi Supreme Court itself has stated in no uncertain terms that, with the exception of one distinction not relevant here, its sentencing system operates in the same manner as the Florida system; and Florida, of course, is subject to the rule forbidding automatic affirmance by the state appellate court in an invalid aggravating factor is relied upon. In considering a *Godfrey* claim based on the same factor at issue here, the Mississippi Supreme Court considered decisions of the Florida Supreme Court to be the most appropriate source of guidance.

Stringer, 503 U.S. at 233-34 (emphasis added).

In fact, the Louisiana statute defined first degree murder as fitting within one of five circumstances, in contrast to Florida's provision that first degree murder is either premeditated or felony murder. *Lowenfield*, 484 U.S. at 242. The Supreme Court in *Lowenfield* found that the Louisiana capital

scheme operated similar to the Texas scheme that provided for death eligibility to be determined at the guilt phase of the trial as had been explained in *Jurek v. Texas*, 428 U.S. 262 (1976):

> But the opinion [*Jurek*] announcing the judgment noted the difference between the Texas scheme, on the one hand, and the Georgia and Florida schemes discussed in the cases of *Gregg_[v. Georgia*, 428 U.S. 153 (1976)], and *Proffitt [v. Florida*, 428 U.S. 242 (1976)]:
>
> > "While Texas has not adopted a list of statutory aggravating circumstances the existence of which can justify the imposition of the death penalty as have Georgia and Florida, its action in narrowing the categories of murders for which a death sentence may ever be imposed serves much the same purpose . . . . In fact, each of the five classes of murders made capital by the Texas statute is encompassed in Georgia and Florida by one or more of their statutory aggravating circumstances . . . . Thus, in essence, the Texas statute requires that the jury find the existence of a statutory aggravating circumstance before the death penalty may be imposed. So far as consideration of aggravating circumstances is concerned, therefore, the principal difference between Texas and the other two States is that the death penalty is an available sentencing option - - even potentially - - for a smaller class of murders in Texas." 428 U.S. at 270-71 (citations omitted).
>
> It seems clear to us from this discussion that the narrowing function required for a regime of capital punishment may be provided in either of these two ways: **The legislature may itself narrow the definition of capital offenses, as Texas and Louisiana have done, so that the jury finding of guilt responds to this concern, or the legislature may more broadly define capital offenses and provide for narrowing by jury findings of aggravating circumstances at the penalty phase**. See also *Zant [v. Stephens*, 462 U.S. 862, 876 n.13 (1983)] discussing *Jurek* and concluding: "[I]n Texas, aggravating and mitigating circumstances were

> not considered at the same stage of the criminal prosecution."

Lowenfield, 484 U.S. 245-47 (emphasis added).

This Court has recognized that the aggravating circumstances at issue in the penalty phase performed the Eighth Amendment narrowing function in conformity with *Zant v. Stephens*:

> To avoid arbitrary and capricious punishment, this aggravating circumstance "must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." *Zant v. Stephens*, 462 U.S. 862 (1983)(footnote omitted). Since premeditation is already an element of capital murder in Florida, section 921.141 (5)(I) must have a different meaning; otherwise, it would apply to every premeditated murder.

Porter v. State, 564 So.2d 1060, 1064 (Fla. 1990).

Thus, it is clear that the factual determination of "sufficient aggravating circumstances" at the sentencing is the finding of those additional facts that are necessary under the Eighth Amendment requirement that death eligibility be narrowed beyond the traditional definition of first degree murder. *Zant*, 462 U.S. at 878 ("[S]tatutory aggravating circumstances play a constitutionally necessary function at the stage of legislative definition: they circumscribe the class of persons eligible for the death penalty"). Clearly in Florida, the narrowing of the death eligible occurs in the sentencing phase.

The factual determination that "sufficient aggravating circumstances exist" has not been made during the guilt phase of a capital trial under Florida law as it has operated during the

past 25 years. Mr. Parker is aware of the opinions of various members of the Florida Supreme Court which have concluded that *Ring* has no significance to Florida's capital sentencing scheme because, in the case of a defendant who has been found guilty of either a contemporaneous felony or who has a prior violent felony conviction, "the sentence of death . . . could be imposed based on these convictions by the same jury." *Kormondy v. State*, ___ So. 2d ___ (Fla. Feb. 13, 2003) (slip op. at 23 n.3). This view of Florida's sentencing statute, however, is not in accord with the reality of Florida's system, as demonstrated above. Unlike states such as Louisiana and Texas, Florida is a *weighing* state. This means that, in order to determine death eligibility, Florida penalty phase jurors *weigh* aggravation and mitigation and determine if there are sufficient aggravating circumstances when *weighed* against the mitigation to warrant a "recommendation" that the defendant be sentenced to death. Nowhere in the Florida Supreme Court's nearly three (3) decades of death penalty jurisprudence has it—or the Supreme Court of the United States, for that matter—classified Florida as a state where death eligibility is determined at the guilt phase.

For example, in rejecting a claim that the "during the course of a felony" aggravating circumstance constituted an impermissible "automatic aggravator," a majority of this Court observed that "[e]ligibility for this aggravating circumstance

is not automatic" and thus Florida's scheme adequately "narrows the class of death-eligible defendant" at the penalty phase by selecting only certain enumerated felonies that would qualify to establish the felony murder aggravating circumstance. *Blanco v. State*, 706 So. 2d 7, 11 (Fla. 1998)(emphasis added).

Hence, it is clear that Florida does not determine death eligibility at the guilt phase, but rather, after conducting the requisite *weighing* of aggravation and mitigation, determines death eligibility at the penalty phase. Thus, that a jury has convicted a defendant of a felony at the same time as the first-degree murder conviction does not, under Florida law, establish death eligibility, for, as described above, Florida is a *weighing* state.

Moreover, as to a defendant's conviction of a prior crime of violence, this too, under Florida's capital sentencing scheme, does not make a defendant "eligible" for the death penalty in light of the fact that Florida is a *weighing* state. For example, on several occasions, the Florida Supreme Court has determined that the *weight* of a defendant's prior crime of violence mitigates against that defendant's eligibility to be sentenced to death. *See Jorgenson v. State*, 714 So. 2d 423, 428 (Fla. 1998) ("The State presented and the trial court only found one aggravating factor in this case—Jorgenson's 1967 prior conviction for second-degree murder. The facts of the prior conviction mitigate the weight that a prior violent felony would

normally carry"); *Chaky v. State*, 651 So. 2d 1169, 1173 (Fla. 1995) (death penalty disproportionate when the lone aggravator based on a prior violent felony was mitigated by the facts surrounding the previous crime). Hence, a defendant's prior violent felony is also a matter to be *weighed* by the jury in a Florida death penalty sentencing phase, and is equally subject to the stringent weighing process that Florida's sentencing scheme requires in order for a defendant to be found eligible for the death penalty.

For these reasons, the "exception" to the rule announced in *Apprendi* does not apply to a weighing state such as Florida. *See Amendarez-Torres v. United States*, 523 U.S. 224 (1998). Three of the justices on the Florida Supreme Court have indicated that the existence of a contemporaneous felony conviction and/or a prior crime of violence serves as a basis for denying relief under *Ring* and *Apprendi*. However, as noted above, under Florida law, the mere existence of an aggravating circumstance does not make a defendant eligible for the death penalty. Rather, Florida Statute Section 921.141 (3) requires the trial judge to make three factual determinations before a death sentence may be imposed. The trial judge (1) must find the existence of at least one aggravating circumstance, (2) must find that "*sufficient* aggravating *circumstances* exist" to justify imposition of death, and (3) must find that "there are insufficient mitigating circumstances to outweigh the aggravating circumstances." If the judge does not make these

findings, "the court *shall* impose a sentence of life imprisonment in accordance with [Section] 775.082." *Id.* (emphasis added). Hence, under a plain reading of the statute, it is not sufficient that an aggravating circumstance is merely present because Florida is a *weighing* state.

Mr. Parker also submits that the holding of *Almendarez-Torres* did not survive *Apprendi* and *Ring*. In *Apprendi,* Justice Thomas, whose vote was decisive of the five-to-four decision in *Almendarez-Torres*, announced that he was receding from his support of *Almendarez-Torres*. The *Apprendi* majority found it unnecessary to overrule *Almendarez-Torres* explicitly in order to decide the issues before it, but acknowledged that "it is arguable that *Almendarez-Torres* was incorrectly decided." *Apprendi*, 530 U.S. at 489. It then went on in a footnote to add to "the reasons set forth in Justice SCALIA's [*Almendarez-Torres*] dissent, 523 U.S. at 248-60," the observation that "the [*Almendarez-Torres*] Court's extensive discussion of the term 'sentencing factor' virtually ignored the pedigree of the pleading requirement at issue," which drive the Sixth Amendment ruling in *Apprendi*. *Apprendi*, 530 U.S. at 489 n.15.

At the same time, the *Apprendi* majority did explicitly restrict whatever precedential force *Almendarez-Torres* ever had to the status of a "narrow exception to the general rule" that every fact which is necessary to enhance a criminal defendant's maximum sentencing exposure must be found by a jury – an

exception limited to the "unique facts" in *Almendarez-Torres*. The unique facts of *Almendarez-Torres* were that the defendant **pleaded guilty** to an indictment charging that he had returned to the United States after having been deported and, in addition, **admitted** that he had been deported because he was previously convicted of three aggravated felonies. He thus elected to forgo a trial and accept an uncontested adjudication of his guilt for a crime by definition included the felony convictions later used to enhance his sentence. Nothing about the priors—any more than anything else about the elements of the crime of reentry after deportation—remained for a jury to try in light of the defendant's guilt plea. This should be contrasted to Florida, where a capital jury is to *weigh* the felony conviction to determine its sufficiency together with other aggravation and mitigation.

3. In Florida, the eligibility determination is not made in conformity with the right to trial by jury.

The Florida 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 at the sentencing - not upon a jury determination made in conformity with the Sixth Amendment. Section 775.082 of 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." This Court has long held that §§ 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. *State v. Dixon*, 283 So.2d 1, 7 (Fla. 1973).

In *Harris v. United States*, 122 S.Ct. 2406 (2002), the Supreme Court held that under *Apprendi* "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*. 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. Pursuant to the reasoning set forth in *Apprendi* and *Ring,* aggravating factors are equivalent to elements of the capital crime itself and must be treated as such. The full panoply of rights associated with trial by jury must therefore attach to the finding of "sufficient aggravating circumstances."

a. *No unanimous determination of eligibility.*

In conformity with Florida law for the past 25 years, the guilt phase verdicts returned by the unanimous jury have not included a finding of "sufficient aggravating circumstances" necessary to render a defendant death eligible. The penalty phase jury is instructed that its recommendation is advisory and need not be unanimous; in Mr. Parker's case, the resentencing jury returned a recommendation by little more than a simple

majority: eight (8) to four (4). Findings of the elements of a capital crime by a mere simple majority, or anything less than by a unanimous verdict, is unconstitutional under the Sixth and Fourteenth Amendments. In the same way that the Sixth Amendment guarantees a baseline level of certainty before a jury can convict a defendant, it also constrains the *number* of jurors who can render a guilty verdict. *See Apodaca v. Oregon*, 406 U.S. 404 (1972) (the Sixth and Fourteenth Amendments require that a criminal verdict must be supported by at least a "substantial majority" of the jurors). Clearly, a mere numerical majority -- which is all that is required under Section 921.141(3) for the jury's advisory sentence -- would not satisfy the "substantial majority" requirement of *Apodaca. See, e.g., Johnson v. Louisiana*, 406 U.S. 356, 366 (1972) (Blackmun, J., concurring) (a state statute authorizing a 7-5 verdict would violate Due Process Clause of Fourteenth Amendment).

Because Florida's enumerated aggravating factors operate as 'the functional equivalent of an element of a greater offense," that element must be found by a jury like any other element of an offense. *Apprendi*, 530 U.S. at 494. *See Sattazahn v. Pennsylvania*, 2003 U.S. LEXIS 748 at *20 (2003). As to the determination of the presence of other elements of a crime, Florida law provides, "No verdict may be rendered unless all of the trial jurors concur in it." Fla. R. Crim. P. 3.440. Florida courts have held that unanimity is required at the guilt

phase of a capital case. *Williams v. State*, 438 So.2d 781, 784 (Fla. 1983*). See Flanning v. State*, 597 So.2d 864, 866 (Fla. 3rd DCA 1992)("It is therefore settled that '[i]n this state, the verdict of the jury must be unanimous' and that any interference with this right denied the defendant a fair trial. *Jones v. State,* 92 So.2d 261 (Fla. 1956)"). The right to a unanimous jury verdict must extend to each necessary element of the charged crime. As to an element of the offense, this Court has recognized that a judge may not make fact finding "on matters associated with the criminal episode" that "would be an invasion of the jury's historical function." *State v. Overfelt*, 457 So.2d 1385, 1387 (Fla. 1984). Neither the sentencing statute, case law from the Florida Supreme Court, nor the standard jury instructions used the past 25 years required that the jurors participating in a penalty phase to concur in finding whether any particular aggravating circumstances had been proved, or "[w]hether sufficient aggravating circumstances exist[ed]," or "[w]hether sufficient aggravating circumstances exist[ed] which outweigh[ed] the mitigating circumstances." Fla. Stat. § 921.141(2). Because Florida law does not require that twelve jurors agree that the State has proven an aggravating circumstance beyond a reasonable doubt, or to agree on the same aggravating circumstances beyond a reasonable doubt, or to agree on the same aggravating circumstances when advising that "sufficient aggravating circumstances exist" to warrant a death sentence, there is no way to say that "the jury" rendered a

verdict as to an aggravating circumstance or the sufficiency of them. As Justice Shaw has observed, Florida law leaves theses matters to speculation. *Combs v. State*, 525 So. 2d 858, 859 (Fla. 1988) (Shaw, J., concurring).

b. *No verdict in compliance with the Sixth Amendment.*

Florida law does not require the jury to reach a verdict on any of the factual determinations required for death. Section 921.141(2) does not call for a jury verdict, but rather an "advisory sentence." The Florida Supreme Court has held 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 (1984)) (emphasis original in *Combs)*. It is reversible error for a trial judge to consider himself bound to follow a jury's recommendation. *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. No authority of Florida law requires that all jurors concur in finding the requisite aggravating circumstances.

In *Sullivan v. Louisiana*, 508 US. 275 (1993), the Supreme Court said, "the jury verdict required by the Sixth Amendment is a jury verdict of guilty beyond a reasonable doubt." *Sullivan*,

508 U.S. at 278. The Court explained that there must be a verdict that decides the factual issues in order to comply with the Sixth Amendment. In doing so, the Court explained:

> It would not satisfy the Sixth Amendment to have a jury determine that the defendant is *probably* guilty, and then leave it up to the judge to determine (as [*In re] Winship*[, 397 U.S. 358 (1970)] requires) whether he is guilty beyond a reasonable doubt. In other words the jury verdict required by the Sixth Amendment is a jury verdict of guilty beyond a reasonable doubt.

Sullivan, 508 U.S. at 278.

In a case such as this, where the error is that a jury did not return a verdict on the essential elements of a capital murder, but instead the responsibility was delegated by state law 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." *Sullivan.*, 508 U.S. at 279. The "explicitly cross-reference[d] . . . statutory provision requiring the finding of an aggravating circumstance before imposition of the death penalty," *Ring*, requires the judge - after the jury has been discharged and "[n]otwithstanding the recommendation of a majority of the jury_" - to make two 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.*" *Id.* First, the judge must find that "sufficient aggravating circumstances exist" to justify death.

Id. Second, the judge must find in writing that "there are insufficient mitigating circumstances to outweigh the aggravating circumstances." *Id.* "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." *Id.* Because the Florida death penalty statute makes imposition of a death 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 under *Ring.*

As the United States 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. The Florida Supreme Court has repeatedly emphasized that a judge's findings must be made independently of the jury's recommendation. *See Grossman v. State*, 525 So.2d 833, 840 (Fla. 1988). Because the judge must find that "sufficient aggravating circumstances exist" "notwithstanding the recommendation of a majority of the jury," Fla. Stat. § 921.141(3), he may consider and rely upon evidence not submitted to the jury. The judge is also permitted to consider and rely upon aggravating circumstances that were not submitted to the jury. *See Davis v. State*, 703 So.2d 1055, 1061 (Fla. 1998). Because the jury's role is merely advisory

and contains no findings upon which to judge the proportionality of the sentence, the Court has recognized that its review of a death sentence is based and dependent upon the judge's written findings. *Morton v. State*, 789 So.2d 324, 333 (Fla. 2001). The Florida capital scheme violates the constitutional principles recognized in *Ring.*

c. *The recommendation has been merely advisory.*

Moreover, it would be impermissible and unconstitutional to retroactively attach greater significance to the jury's advisory sentence than the jury was told at the time. The advisory recommendation cannot now be used as the basis for the fact-findings required for a death sentence because the statutes requires only a majority vote of the jury in support of that advisory sentence.

CLAIM IV

MR. PARKER WAS DEPRIVED OF HIS SIXTH AMENDMENT RIGHTS.

By virtue of *Ring* and its application to Florida law, various constitutional errors that occurred in the proceedings against Mr. Parker are now revealed.

A. The Indictment Against Mr. Parker Failed to Include All of the Elements of the Offense of Capital Murder.

The Unites States Supreme Court in *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." *Id.* at 243 n.6. In *Ring,* the Supreme Court held that a death penalty statute's aggravating circumstances operates as "functional equivalent of an element of a greater offense."

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*, 529 U.S. at 232. On June 28, 2002, after the Court's decision in *Ring*, the death sentence imposed in *Untied States v. Allen*, 247 F.3d 741 (8th Cir. 2001), was overturned when the Supreme Court granted the writ of certiorari, vacated the judgment of the United States Court of Appeals for the Eighth Circuit upholding the death sentence, and remanded the case for reconsideration in light of the holding in *Ring* that aggravating factors that are prerequisites of a death sentence must be treated as elements of the offense. *Allen v. United States*, 122 S.Ct. 2653 (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 Due Process and Grand Jury clauses of the Fifth Amendment.

The Eighth Circuit had previously rejected Allen's argument because in its view aggravators 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.

The Supreme Court held in *Apprendi* that the Fourteenth Amendment affords citizens the same protections when they are prosecuted under state law. Although the Court noted that 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. However, similar to the Grand Jury Clause of the Fifth amendment, 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."

Just like the requirements of 18 U.S.C. §§ 3591 and 3592(c), Florida's death penalty statute 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 circumstances. 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 held "[w]here an indictment or information wholly omits to allege 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. In *Chicone v. State*, 684 So. 2d 736, 744 (Fla. 1996), the Florida Supreme Court held "[a]s a general rule, an information must allege each of the essential elements of a crime top 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 a 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). 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. 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, Mr. Parker's right under Article I, section 15 of the Florida Constitution and the Sixth Amendment to the federal Constitution were violated.

B. Mr. Parker's Penalty Phase Jury Was Told That Its Recommendation Was Merely Advisory In Nature.

The Florida death statute differs from the Arizona statute in that it provides for the jury to hear evidence and "render an advisory sentence to the court." § 921.141(2). Mr. Parker's jury was instructed in conformity with the statute and this Court's precedent that its role was advisory only in returning a recommendation. However, the role of the jury in the capital sentencing process was insignificant under *Ring*.

Throughout the trial proceedings, the jury was repeatedly told that its role was merely advisory (R. 407, 2292, 2317, 2318, 2320, 2321, 2322). Trial counsel objected to the penalty phase jury instructions that instructed the jury of its mere "advisory" role (R. 2096-97). The trial court overruled the objection and Mr. Parker raised it on direct appeal (*See* Mr. Parker's initial brief on direct appeal p.54). This Court affirmed the instructions on direct appeal. *See Parker v. State*, 641 So. 2d 369, 376, 377 (Fla. 1994).

As the Supreme Court held in *Caldwell v. Mississippi*, 472 U.S. 320, 328-29 (1985):

> [I]t is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere.

Were this Court to conclude now that Mr. Parker's death sentence rests on findings made by the sentencing jury after the jury was instructed, and Florida law clearly provided, that a death sentence would not rest upon the jury's recommendation alone, it would mean that Mr. Parker'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." Here, Mr. Parker's sentencing jury was not advised that its determination that "sufficient aggravating circumstances" existed to warrant the imposition of a death sentence was binding upon the judge. Habeas relief is warranted.

CONCLUSION

For the reasons set forth above, Mr. Parker respectfully requests this Court to grant him a new direct appeal and, thereafter, remand for a new trial, or, in the alternative, a new sentencing proceeding.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been

furnished by United States Mail, first-class postage prepaid, to Leslie T. Campbell, Office of Attorney General, 1515 N. Flagler Dr., Fl. 9, West Palm Beach, FL, 33401-3428, on June 11, 2003.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the font requirements of rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

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DAN D. HALLENBERG
Florida Bar No. 940615
Assistant CCRC-South
101 N.E. 3rd Ave., Ste. 400
Fort Lauderdale, FL 33301
(954) 713-1284
Attorney for Mr. Mendoza