IN THE SUPREME COURT OF FLORIDA

CASE NO. SC04-772

MICHAEL ROBINSON,

Petitioner,

v.

JAMES V. CROSBY, Secretary,
Florida Department of Corrections,

Respondent.

PETITION FOR WRIT OF HABEAS CORPUS

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INTRODUCTION

This petition for habeas corpus relief is being filed in order to address substantial claims of error under the Fifth, Sixth, Eighth and Fourteenth amendments to the United States Constitution, claims demonstrating that Mr. Robinson was deprived of the effective assistance of counsel on direct appeal and that the proceedings that resulted in his convictions, death sentence and other sentences, as well as the affirmance of those convictions and sentences, violated fundamental constitutional guarantees.

Citations to the Record on the first Direct Appeal shall be as (R.page number). Citations to the Record on the pending postconviction appeal shall be as (PCR.page number). All other citations shall be self-explanatory.

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. Robinson requests oral argument on this petition.

PROCEDURAL HISTORY

On January 23, 1995, Mr. Robinson pled guilty to first-degree murder and, after waiving a penalty phase jury, the trial court imposed the death penalty on April 12, 1995. Mr. Robinson requested the death penalty and asked that no mitigating factors be considered. This Court in *Robinson v. State*, 684, So.2d 175 (Fla. 1996), vacated the sentence and remanded, finding that the trial judge (this Court did not permit a jury to consider mitigation) was required to weigh and consider mitigating evidence. Upon remand, Mr. Robinson attempted to withdraw his plea, but counsel's oral motion to withdraw Mr. Robinson's previously entered plea was denied. After a penalty phase hearing, the trial court again imposed the death penalty on August 15, 1997. This Court affirmed in *Robinson v. State*, 761 So.2d 269 (Fla. 1999), *cert. denied*, 529 U.S. 1057 (2000).

On February 21, 2001, Mr. Robinson filed his original Motion to Vacate Judgment of Conviction and Sentence with Request for Leave to Amend (PCR104-137),[1] and the State thereafter moved to strike the motion without prejudice

[1]After being informed by the Capital Collateral Regional Counsel–Middle Region office that it could not accept Mr. Robinson's case, the trial court, on Februrary 14, 2000, appointed attorney Christopher L. Smith from the capital attorney registry (PCR6). On February 22, 2000, attorney Smith filed a Notice of Appearance, Waiver of Arraignment, Written Plea of Not Guilty, Demand for Discovery, and Request for Jury Trial (PCR11). On September 6, 2000, Mr. Robinson filed a *pro se* request for the removal of Smith and for the appointment

(PCR140). The court denied the State's motion to strike, but granted Mr. Robinson up to and including October 4, 2001, to file a complete amended Rule 3.850 motion (PCR174). On October 3, 2001, Mr. Robinson filed his final amended Rule 3.850 motion, which raised twenty-seven (27) claims (PCR182-261). On November 8, 2001, the State filed its response, objecting to an evidentiary hearing (PCR262-289). After the circuit court held a *Huff*[2] hearing on June 7, 2002 (T437-469), the court ordered an evidentiary hearing on Claim III of Mr. Robinson's amended motion involving allegations of ineffective assistance of counsel at the penalty phase by failing to accurately and properly withdraw Mr. Robinson's previously entered guilty plea (PCR485).

The evidentiary hearing was conducted on January 29-30, 2003 (T1-377). In support of his allegations, Mr. Robinson presented testimony from a neuro-

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of other counsel, alerting the court to the fact that Smith, despite having been appointed over six (6) months earlier, had yet to personally meet with Mr. Robinson or communicate with him in any fashion (PCR68). By order dated September 12, 2000, the lower court entered an order requiring Smith to personally visit with Mr. Robinson on death row (PCR75). Following a telephonic hearing after Smith had visited with Mr. Robinson, the court, after considering Mr. Robinson's continued dissatisfaction with a lawyer who had not done anything on his case in some six (6) months, appointed attorney James Lewis off of the registry (T379-393). Mr. Lewis thereupon entered his appearance on behalf of Mr. Robinson (PCR77). Mr. Lewis continued to represent Mr. Robinson without incident.

[2]*Huff v. State*, 622 So. 2d 982 (Fla. 1993).

psychologist, Dr. Wiley Mittenberg, Dr. Jonathan Lippman, a neuropharmacologist, Dr. John Spencer, forensic psychologist, Robert Swift, prison ministry volunteer, Barbara Judy, Mr. Robinson's mother, and lead trial counsel Mark Bender. The State presented Harry McLaren, forensic psychologist.[3] After both the State and Mr. Robinson submitted post-hearing memoranda (PCR521; 533), the circuit court issued an order on May 15, 2003, denying relief (PCR540). Mr. Robinson timely appealed (PCR561), and that appeal remains pending in this Court in Case No. SC03-1229.

[3]Following the granting of the evidentiary hearing, the State had moved for the appointment of Dr. McClaren to conduct an evaluation of Mr. Robinson (PCR500). The court granted the motion for the State to have access to Mr. Robinson for purposes of conducting a mental health examination (PCR504).

ARGUMENT I

THIS COURT'S DECISION ON DIRECT APPEAL PRECLUDING MR. ROBINSON FROM SEEKING A JURY PENALTY PHASE WAS ERROR, AND APPELLATE COUNSEL UNREASONABLY FAILED TO BRING THIS MATTER TO THE COURT'S ATTENTION, THEREBY RENDERING INEFFECTIVE ASSISTANCE OF COUNSEL.

Mr. Robinson had the constitutional right to the effective assistance of 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). As the Court observed:

> In bringing an appeal as of right from his conviction, a criminal defendant is attempting to demonstrate that the conviction, with its consequent drastic loss of liberty, is unlawful. To prosecute the appeal, a criminal appellant must face an adversary proceeding that -- like a trial -- is governed by intricate rules that to a layperson would be hopelessly forbidding. An unrepresented appellant -- like an unrepresented defendant at trial -- is unable to protect the vital interests at stake. To be sure, respondent did have nominal representation when he brought this appeal. But nominal representation on an appeal as of right -- like nominal representation at trial -- does not suffice to render the proceedings constitutionally adequate; a party whose counsel is unable to provide effective representation is in

no better position than one who has no counsel at all.

Id. at 396. 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).

In *Eagle v. Linaham*, 268 F.3d 1306 (11th Cir. 2001), the Eleventh Circuit ordered habeas relief on a claim of ineffective assistance of appellate counsel. In *Eagle*, the state trial court had held an evidentiary hearing regarding the claim of ineffective assistance of appellate counsel. Although the state trial court did not specifically find that appellate counsel had made a tactical decision not to present the omitted claim, the Eleventh Circuit assumed appellate counsel had made such a tactical decision. *Id*. at 1318. Nevertheless, the court emphasized that "[w]hether the tactic was reasonable . . . is a question of law and is reviewed *de novo*." *Id*. (quoting *Collier v. Turpin*, 177 F.3d 1184, 1199 (11th Cir. 1999)).

In finding deficient performance in *Eagle*, the court first examined the reasonableness of counsel's decision not to raise the omitted claim. The court looked at how well established the legal principles supporting the omitted claim were at the time of the direct appeal. *Eagle*, 268 F.3d at 1319-20. The court also relied upon the fact that the error was "apparent on the face of the transcript." *Id*. at 1322. The court found deficient performance where "appellate counsel fails to

raise a claim on appeal that is so obviously valid that any competent lawyer would have raised it." *Id*.

As to prejudice, the *Eagle* court stated, "To determine whether the failure to raise a claim on appeal resulted in prejudice, we review the merits of the omitted claim. . . . If we conclude that the omitted claim would have had a reasonable probability of success, then counsel's performance was necessarily prejudicial because it affected the outcome of the appeal." 268 F.3d at 1322 (citation omitted). The court found that omission of the claim undermined confidence in the outcome of the direct appeal sufficient to establish prejudice, and relief was granted. *Id. See Clemmons v. Delo*, 124 F.3d 944 (8th Cir 1997), *cert. denied*, 120 S.Ct. 512 (1998); *Northrop v. Trippett*, 265 F.3d 372 (6th Cir. 2001). Mr. Robinson was similarly prejudiced in his direct appeal.

In its first opinion addressing Mr. Robinson's case, this Court vacated Mr. Robinson's death sentence and remanded the case "to the trial court to conduct a new penalty-phase hearing before the judge alone . . . " *Robinson v. State*, 684 So. 2d 175, 180 (Fla. 1999).[4] This conclusion was premised on the fact that, during

[4]It is important to note that this Court did *not* remand for a mere reweighing under *Campbell v. State*, 571 So. 2d 415 (Fla. 1990). Such reweighings do not afford defendants to the same panoply of rights as do plenary sentencing proceedings. Rather, the Court remanded for a new, plenary, penalty phase hearing.

his initial proceedings, Mr. Robinson had waived his right to a jury at the penalty phase. *Id*. at 176. Mr. Robinson submits that the Court's limitation of the resentencing proceeding to a bench hearing was error, and appellate counsel failed to argue to the Court this error. Had this error been raised, Mr. Robinson sumbits that there is more than a reasonable probability that the outcome of the appeal proceedings would have been different. Because confidence in the the appellate proceedings is undermined due to appellate counsel's prejudicially deficient omission, relief is warranted.

When this Court vacates a sentence of death and remands for a resentencing proceeding, the proceedings are *de novo* proceedings.[5] *See Phillips v. State*, 705 So. 2d 1320, 1322 (Fla. 1997) (a resentencing is a "completely new proceeding"). Hence, notwithstanding Mr. Robinson's earlier waiver of his right to a jury trial at the penalty phase, the Court's remand for a *de novo* penalty phase afforded him the right to decide anew whether or not he wished to have a penalty phase jury or to validly waive that right. Here, Mr. Robinson was given no such choice, despite the fact that, as this Court noted in the appeal from the resentencing, Mr. Robinson had "changed his mind and no longer wish[ed] to die." *Robinson v. State*, 761 So. 2d

[5]Again, as noted above, this case did not involve a reversal for the trial court to confirm a sentencing order to the requirements of *Campbell*.

269, 275 n.5 (Fla. 1999).

For example, by way of analogy, when the Court on direct appeal vacates a guilty plea and remands for a new trial, a defendant still has the choice upon retrial to either go to trial or again plead guilty; the Court's decision vacating the plea and remanding for a new trial does not obligate the defendant to have a jury trial on remand. *Compare Thompson v. State*, 351 So. 2d 701 (Fla. 1997), *with Thompson v. State*, 389 So. 2d 197 (Fla. 1980). When this Court remands for a new penalty phase, the State is not precluded from presenting an aggravating circumstance at the resentencing that had been found inapplicable in the prior proceeding. *See Phillips*, 705 So. 2d at 13; *King v. Dugger*, 555 So. 2d 355, 358-59 (Fla. 1990). Mr. Robinson's case is no different in the sense that, when this Court reversed and remanded for a new penalty phase proceeding, Mr. Robinson was not and should not have been bound by his prior waiver of a jury. A defendant has a right to "change his mind" when afforded a second chance at a resentencing proceeding.

The significance of this issue must be assessed in the context of the "fundamental and cherished right of trial by jury" that vests with all criminal defendants. *See Floyd v. State*, 90 So. 2d 105, 106 (Fla. 1956). In *Pangburn v. State*, 661 So. 2d 1182 (Fla. 1995), this Court addressed a situation where a trial

court failed to provide the jury with separate verdict forms for each victim. After the error had been discovered in the trial court, the parties entered into a stipulation providing that the jury's recommendation would be accepted as one for the death of one victim and one of life for the other. Before the defendant was sentenced, however, he moved to withdraw his consent to the stipulation. On appeal, this Court found error in the verdict form issue and reversed for a new penalty proceeding. The State, however, urged that no new penalty phase was warranted because the trial court denied the defendant's withdrawal request. This Court held that the trial court should have granted the withdrawal request and thus the "stipulation" could not be enforced. Noting that the discretion vested with trial courts in determining a waiver of a jury by a capital defendant at the penalty phase "is to be exercised liberally in favor of granting a defendant's request to withdraw," *id*. at 1189, the Court wrote:

> In this case, the trial judge rejected appellant's withdrawal request because he found "no legal basis . . . that would warrant the right to withdraw." Although the trial judge is to be commended for attempting to resolve an obviously untenable situation, we find that he applied the wrong standard in determining whether to grant appellant's request. As we noted in *Floyd*,
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> > It would appear to us that the fundamental and cherished right of trial by jury will be best protected and be cause to

> 'remain inviolate' if the withdrawal of the waiver to such a trial is refused by a court only when it is not seasonably made in good faith, or is made to obtain a delay, or it appears that some real harm will be done to the public.
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> 90 So. 2d at 106. Applying that liberal standard to the facts of this case, we find that the trial judge should have granted appellant's request to withdraw. The record reflects that the withdrawal request was made before appellant was sentenced, that it was not made to obtain a delay, and that no substantial harm would have been done by the granting of this request. In fact, a new penalty phase proceeding was one of the options initially presented to appellant. Given that the right to a jury in the penalty phase proceeding is such a substantial right, we conclude that a new penalty phase proceeding is required under these circumstances.

Pangburn, 661 So. 2d at 1189.

Applying the "liberal standards" discussed in *Floyd* and *Pangburn*, Mr. Robinson submits that the Court, when it vacated Mr. Robinson's sentence and remanded for a new penalty phase, should not have limited it to a judge-only hearing. Rather, the Court's opinion should not have placed any restriction on Mr. Robinson's ability, at the resentencing, to invoke his right, or waive his right, to a jury resentencing. As noted above and in the following additional examples, in no other context would a defendant be held to decisions made at an initial proceeding when a plenary trial or resentencing is ordered, and the law is no different in the

context of Mr. Robinson's case. If Mr. Robinson had "waived" opening or closing arguments at his proceedings, and those proceedings were later vacated and remanded for a new proceeding, there certainly can be no suggestion that that "waiver" could be enforced at the new proceeding. If Mr. Robinson had "waived" his right to testify at his proceedings, and those proceedings were later vacated and remanded for a new proceeding, there certainly can be no suggestion that that "waiver" could be enforced at the new proceeding. If Mr. Robinson had "waived" his reliance on the statutory mitigating circumstance of no prior criminal activity at his proceedings, and those proceedings were later vacated and remanded for a new proceedings, there certainly can be no suggestion that that "waiver" could be enforced at a new proceeding. Similarly, in Mr. Robinson's case, when this Court vacated and remanded for a new penalty phase proceeding, the restriction on those proceedings to judge-only proceedings was in error, and appellate counsel failed to vindicate Mr. Robinson's rights by seeking rehearing and noting this Court's error.

The right to have his resentencing proceeding conducted before a jury and not a judge is, of course, one of the most fundamental rights afforded a criminal defendant under the Sixth Amendment. *See, e.g. Ring v. Arizona*, 536 U.S. 584 (2002). "The jury trial provisions in the Federal and State Constitutions reflect a fundamental decision about the exercise of official power–a reluctance to entrust

plenary powers over the life and liberty of the citizen to one judge or to a group of judges." *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968). Thus, the Sixth Amendment reflects "[t]he deep commitment of the Nation to the right of jury trial in serious criminal cases as a defense against arbitrary law enforcement." *Id*. As the Supreme Court emphasized in *Sullivan v. Louisiana*, 508 U.S. 275 (1993), the "most important element" of the Sixth Amendment is "the right to have a jury, rather than a judge, reach the requisite finding of guilty." *Id*. at 277 (citation omitted).

Because this Court's decision on appeal unduly restricted Mr. Robinson's ability to seek a jury determination at the penalty phase, and because of appellate counsel's prejudicially deficient performance in failing to argue such on appeal, Mr. Robinson submits that habeas corpus relief is warranted.

ARGUMENT II

FLORIDA'S CAPITAL SENTENCING STATUTE VIOLATES THE SIXTH AND FOURTEENTH AMENDMENTS.

A. In Florida, Death Is Not Authorized By A Verdict Of Guilt Of First-Degree Murder.

In Florida, § 921.141, Fla. Stat., requires both the jury and the trial judge to make factual determinations before a death sentence may be imposed. They (1) must find that "*sufficient* aggravating circumstances exist" to justify imposition of death, and (2) must find that "there are insufficient mitigating circumstances to outweigh the aggravating circumstances." § 921.141(3), Fla. Stat. (emphasis added). If these findings are not made, "the court *shall* impose sentence of life imprisonment in accordance with [§]775.082." *Id.* (emphasis added).

The steps in Florida, like the steps in Missouri, "require factual findings that are prerequisites to the trier of fact's determination that a defendant is death-eligible." *See State v. Whitfield*, 107 S.W.3d 253, 258-61 (Mo. 2003) . Step 1 in Florida required determining whether "sufficient" aggravating circumstances existed to justify imposition of death. Missouri's Step 2 is indistinguishable, requiring a determination of whether the evidence of all aggravating circumstances "warrants imposing the death sentence." Step 2 in Florida required determining whether "there [we]re insufficient mitigating circumstances to outweigh the aggravating

circumstances." Missouri's Step 3, as well as Nevada's Step 2, are identical, requiring a determination of whether mitigating circumstances outweigh aggravating circumstances. *See Johnson v. State*, 59 P.3d 450 (Nev. 2002).

In Florida, as in Missouri and Nevada, the sentencer does not consider the ultimate question of whether or not to impose death until the eligibility steps are completed. After the two steps outlined in Florida's statute, the Florida statute directs that the factfinder determine, "[b]ased on these considerations, whether the defendant should be sentenced to life imprisonment or death." § 921.141(2)(c), Fla. Stat. The structure of the statute clearly establishes that the steps which occur before this final determination are necessary to make the defendant eligible for this ultimate determination, that is, to render the defendant death-eligible.

Florida's capital sentencing scheme violates the jury trial guarantees of the Sixth and Fourteenth Amendments because it does not provide for a binding unanimous jury verdict with respect to an "aggravating fact [which] is an element of the aggravated crime" punishable by death. *Ring v. Arizona*, 536 U.S. 584 (2002). Under *Ring*, the question is not whether death is an authorized punishment in a first-degree murder case, but whether the "facts increasing punishment beyond the maximum authorized by a guilty verdict standing alone" 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--no matter how the State labels it--must be found by a jury beyond a reasonable doubt." *Ring, supra*. A State may not avoid the Sixth Amendment by "specif[ying] 'death or life imprisonment' as the only sentencing options" because "the relevant inquiry is one not of form, but of effect." *Id.* If the effect of finding an aggravating circumstance exposes the defendant to a greater punishment than that authorized by the jury's guilty verdict, the circumstance is an element which must be found by a jury beyond a reasonable doubt. *Id.*

The Florida statute does not require a special verdict on each of the eligibility steps or require the jury's vote to be unanimous or beyond a reasonable doubt as to the existence of "sufficient" aggravating circumstances, or as to mitigating circumstances exist which outweigh the aggravating circumstances. The statute requires only a majority vote of the jury in support of its advisory sentence. § 921.141(2), Fla. Stat. As such, the advisory recommendation does not satisfy the Sixth Amendment mandates.

As to elements of an offense, this Court has recognized that a judge may not make factfindings "on matters associated with the criminal episode" because that "would be an invasion of the jury's historical function." *State v. Overfelt*, 457 So. 2d 1385, 1387 (Fla. 1984). Under Fla. R. Crim. P. 3.440, a jury verdict on the

elements of a criminal charge must be unanimous. Since jury unanimity has long been the practice in Florida, "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). Taken together, *Ring* and Florida law establish that the penalty phase jury's vote on the two factual determinations set forth in the statute and the jury instruction must be unanimous.

The elements required to be established in order for consideration of a death sentence were that "sufficient aggravating circumstances exist[ed]" to allow consideration of a death sentence and that mitigating circumstances sufficient to outweigh the aggravating circumstances did not exist. § 921.141(3), Fla. Stat. 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 v. Louisiana*, 508 U.S. 275, 278 (1993). When 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 therefore, "[t]here is no object, so to speak, upon which harmless-error scrutiny can operate." *Id.* at 280.

The language of Florida's capital sentencing statute, this Court's case law, and the Florida Rules of Criminal Procedure establish that the limited role of a

Florida penalty phase jury does not satisfy the Sixth Amendment. The jury does not return binding factual findings, the jury does not return a verdict on the two factual prerequisites required by the statute before a death sentence may be considered, the jury vote is not required to be unanimous, and the jury is not instructed on the reasonable doubt standard as to two of the three factual determinations required by the statute. Mr. Robinson's death sentence violates the Sixth Amendment.

B. Under *Ring,* Mr. Robinson's Death Sentence Is Unconstitutional.

Even if this Court were to attempt to save Mr. Robinson's sentence of death from the scope of *Ring* by redefining the jury's role under the Florida capital sentencing statute, Mr. Robinson's death sentence would violate the Sixth Amendment.

Mr. Robinson's death sentence violates the Sixth Amendment because the judge, not the jury, made the factfindings which rendered Mr. Robinson eligible for a death sentence. Although Mr. Robinson acknowledges that, at his original trial proceedings, he waived a penalty phase jury, this Court on appeal vacated that proceeding and remanded "to the trial court to conduct a new penalty-phase hearing before the judge alone . . . " *Robinson v. State*, 684 So. 2d 175, 180 (Fla. 1999). As urged in Argument I, *supra,* this Court refused to permit Mr. Robinson

to have a jury determination as to his death eligibility at the new penalty phase. Thus, Mr. Robinson submits that not only should his judge-only imposed death sentence be vacated for the reasons set forth in Argument I, his judge-only death sentence also violates the Sixth Amendment and *Ring*.

Ring also reveals that Mr. Robinson's death sentence is invalid because the elements of the offense necessary to establish capital murder were not charged in the indictment. *Ring* held that a death penalty statute's "aggravating factors operate as 'the functional equivalent of an element of a greater offense." *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*, 526 U.S. at 243, n.6. *Apprendi* held that the Fourteenth Amendment affords citizens the same protections when they are prosecuted under state law. *Apprendi*, 530 U.S. at 475-76. Florida law requires every "element of an offense" to be alleged in the information or indictment. *State v. Dye*, 346 So. 2d 538, 541 (Fla. 1977); *State v. Gray*, 435 So. 2d 816, 818 (Fla. 1983); *Chicone v. State*, 684 So. 2d 736, 744 (Fla. 1996). Because the State did not submit to the grand jury and the indictment did not state the essential elements of capital murder,

Mr. Robinson's rights under Article I, section 15 of the Florida Constitution and the Sixth Amendment to the federal Constitution were violated.

C. *Ring* Addresses An Issue Of Statutory Construction, And Therefore "Retroactivity Is Not At Issue."

The question which *Ring* decided was what facts constitute "elements" in capital sentencing proceedings. The bulk of the *Ring* opinion addresses how to determine whether a fact is an "element" of a crime. The question in *Ring* was not whether the Sixth Amendment requires a jury to decide elements. That has been a given since the Bill of Rights was adopted. Justice Thomas has explained:

> This case turns on the seemingly simple question of what constitutes a "crime." Under the Federal Constitution, "the accused" has the right (1) "to be informed of the nature and cause of the accusation" (that is, the basis on which he is accused of a crime), (2) to be "held to answer for a capital, or otherwise infamous crime" only on an indictment or presentment of a grand jury, and (3) to be tried by "an impartial jury of the State and district wherein the crime shall have been committed." Amdts. 5 and 6. See also Art. III, [Sec.] 2, cl. 3 ("The Trial of all Crimes . . . shall be by Jury"). With the exception of the Grand Jury Clause, *see Hurtado v. California*, 110 U.S. 516, 538 . . . (1884), the Court has held that these protections apply in state prosecutions. *Herring v. New York*, 422 U.S. 853, 857, and n.7 . . . (1975). Further, the Court has held that due process requires that the jury find beyond a reasonable doubt every fact necessary to constitute the crime. *In re Winship*, 397 U.S. 358, 364 . . . (1970).
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> *All of these constitutional protections turn on determining which facts constitute the "crime"--that is, which facts are the "elements" or "ingredients" of a crime.* In order for an accusation of a crime (whether by indictment or some other form) to be proper

> under the common law, and thus proper under the codification of the common-law rights in the Fifth and Sixth Amendments, it must allege all elements of that crime; likewise, in order for a jury trial of a crime to be proper, all elements of the crime must be proved to the jury (and, under *Winship*, proved beyond a reasonable doubt).

Apprendi v. New Jersey, 120 S. Ct. at 2367-68 (Thomas, J., concurring) (emphasis added). Justice Thomas explained that courts have "long had to consider which facts are elements," but that once that question is answered, "it is then a simple matter to apply that answer to whatever constitutional right may be at issue in a case--here, *Winship* and the right to trial by jury." *Id*. at 2368.

Just as Justice Thomas explained in *Apprendi*, there was no question in *Ring* that the jury trial right applies to elements. The dispute in *Ring* involved what constituted an element. Thus, the question in *Ring* is akin to a statutory construction issue, and "retroactivity is not at issue." *Fiore v. White*, 531 U.S. 225, 226 (2001); *Bunkley v. Florida*, 123 S. Ct. 2020, 2023 (2003). That is, the Sixth Amendment right to have a jury decide elements is a bedrock, indisputable right. Mr. Robinson was entitled to this Sixth Amendment protection at the time of his trial. Thus, retroactive application is required under *Bousley v. United States*, 523 U.S. 614 (1998), because the ruling addresses a matter of substantive criminal law, not a procedural rule.

D. *Ring* Applies Retroactively Under *Witt v. State*.

Alternatively, *Ring* meets the criteria for retroactive application set forth in *Witt v. State*, 387 So. 2d 922 (Fla. 1980). *Ring* issued from the United States Supreme Court. *Witt*, 387 So. 2d at 930. *Ring's* Sixth Amendment rule unquestionably "is constitutional in nature." *Witt*, 387 So. 2d at 931. *Ring* "constitutes a development of fundamental significance." *Witt*, 387 So. 2d at 931.

As to what "constitutes a development of fundamental significance," *Witt* explains that this category includes "changes of law which are of sufficient magnitude to necessitate retroactive application as ascertained by the three-fold test of *Stovall [v. Denno*, 388 U.S. 293 (1967),] and *Linkletter [v. Walker*, 381 U.S. 618 (1965)]," adding that "*Gideon v. Wainwright* . . . is the prime example of a law change included within this category." 387 So. 2d at 929. The Missouri Supreme Court has held that *Ring* is retroactive under *the Stovall/Linkletter* test. *State v. Whitfield*, 107 S.W.3d 253 (Mo. 2003).

The rule of *Ring* is the kind of "sweeping change of law" described in *Witt*. Chief Justice Anstead opined that *Ring* "is clearly the most significant death penalty decision of the U.S. Supreme Court since the decision in *Furman v. Georgia*," *Bottoson v. Moore*, 833 So. 2d 693, 703 (Fla. 2002) (Anstead, C.J., concurring in result only), and Justice Pariente described Ring as a "landmark case." *Bottoson v. Moore*, 824 So. 2d 115, 116 (Fla. 2002) (Pariente, J., concurring). Justice Shaw

concluded that *Ring* applies retroactively under *Witt* and meets the test of *Stovall v. Denno* for retroactive application. *Bottoson*, 833 So. 2d at 717 & n.49 (Shaw, J., concurring in result only).

In *Witt*, this Court explained that the doctrine of finality must give way when fairness requires retroactive application:

> The doctrine of finality should be abridged only when a more compelling objective appears, such as ensuring fairness and uniformity in individual adjudications. Thus, society recognizes that a sweeping change of law can so drastically alter the substantive or procedural underpinnings of a final conviction and sentence that the machinery of post-conviction relief is necessary to avoid individual instances of obvious injustice. Considerations of fairness and uniformity make it very "difficult to justify depriving a person of his liberty or his life, under process no longer considered acceptable and no longer applied to indistinguishable cases."

Witt, 387 So. 2d at 925 (footnote omitted).

Ring meets the *Witt* test. First, the purpose of the rule is to change the very *identity* of the decisionmaker with respect to critical issues of fact that are decisive of life or death. This change remedies a "'structural defect[] in the constitution of the trial mechanism,'" by vindicating "the jury guarantee . . . [as] a 'basic protectio[n]' whose precise effects are unmeasurable, but without which a criminal trial cannot reliably serve its function." *Sullivan v. Louisiana*, 508 U.S. 275, 281 (1993). When a capital defendant has been subjected to a sentencing proceeding in

which the jury has not participated in the life-or-death factfinding role required by the Sixth Amendment and *Ring*, the constitutionally required tribunal was simply not all there, a radical defect which necessarily "cast[s] serious doubt on the veracity or integrity of the . . . trial proceeding." *Witt*, 387 So. 2d at 929.

Second, "the jury trial provisions in the Federal and State Constitutions reflect a fundamental decision about the exercise of official power." *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968). Inadvertently but nonetheless harmfully, the United States Supreme Court lapsed for a time and enfeebled the institution of the jury through its rulings in *Hildwin v. Florida*, 490 U.S. 638 (1989), and *Walton v. Arizona*. The Court's retrenchment restored the right to jury trial as a "fundamental" guarantee of the Federal and Florida Constitutions.

CONCLUSION

Based upon the record and the arguments presented herein, Mr. Robinson respectfully urges the Court to grant habeas corpus relief, and/or vacate his unconstitutional convictions and death sentence.

Respectfully submitted,

_____

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_____

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Petition was furnished by U.S. Mail to Douglas Squire, Assistant Attorney General, 444 Seabreeze Boulevard, 5th Floor, Daytona Beach, Florida, 32118, this 30th day of April, 2004.

_____
Melissa Minsk Donoho
Attorney for Defendant

CERTIFICATE OF TYPE SIZE AND FONT

Counsel certifies that this petition is typed in Times New Roman 14-point font, a font that is not proportionately spaced.

_____
Melissa Minsk Donoho
Attorney for Defendant