IN THE SUPREME COURT OF FLORIDA

No. SC04-847

ANTHONY LAMARCA

Petitioner,

versus

JAMES V. CROSBY
Secretary, Florida Department of Corrections

Respondent/Appellee.

ON PETITION FOR WRIT OF HABEAS CORPUS

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I. STATEMENT OF JURISDICTION

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

II. NATURE OF RELIEF SOUGHT

Mr. Lamarca seeks a writ of habeas corpus addressed to Respondent.

III. STATEMENT OF THE CASE

Mr. Lamarca seeks review of this Court's prior precedent holding that this Court is required by United States Supreme Court precedent, as stated in its prior decision of *Bottoson v. Moore*, 833 So.2d 693 (Fla. 2002), to refrain from reevaluating the constitutionality of Florida's capital-sentencing scheme in the light of *Apprendi v. New Jersey*, 530 U.S. 466 (2001), and *Ring v. Arizona*, 122 S. Ct. 2428 (2002). This Court so held on the ground that only the United States Supreme Court is empowered to determine whether *Apprendi* and *Ring* have overruled the Supreme Court's pre-*Apprendi* decisions such as *Hildwin v. Florida*, 490 U.S. 638 (1989) (per curiam), which had "reviewed and upheld Florida's capital sentencing statute over the past

quarter of a century."[1] Further, Mr. Lamarca seeks review of his appellate attorney's failure to raise the issue that Mr. Lamarca's right to a fair trial was violated when he was unable to participate in jury selection.

As stated in Mr. Lamarca's brief from his denial of post-conviction relief, it is clear that at every juncture where his attorneys had to make a decision, they made the decision least favorable or helpful to their client. The case was no different for Mr. Lamarca's appellate attorney who conceded issues to this court that were disputed vigorously by Mr. Lamarca and failed to properly appeal a clear example of fundamental error.

While the facts of the case are best presented to this court in Mr. Lamarca's brief from his denial of post-conviction relief, the facts relevant to this original petition deal exclusively with Mr. Lamarca's sentencing and jury selection.

Mr. Lamarca's sentence of death rests on a single aggravator which caused concern with at least one member of this Court. *Lamarca v. State*, 785 So.2d 1209 (Fla. 2001)(Pariente, J. Concurring). The Florida Supreme Court affirmed the single aggravator based on the prior violent felony of attempted sexual battery, with the use

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[1] The per curiam opinion in *Bottoson*, referred to *Hildwin v. Florida*, 490 U.S. 638 (1989), *Spaziano v. Florida*, 468 U.S. 447 (1984), *Barclay v. Florida*, 463 U.S. 939 (1983), and *Proffitt v. Florida*, 428 U.S. 242 (1976).

of a knife. Prior to trial, Mr. Lamarca's sentence concerning the knife was vacated. *Lamarca v. State*, 515 So.2d 309 (Fla. 3rd DCA 1987). However, the State knowingly presented this conviction as an aggravator. Presentation of this evidence also violated the dictates of *Apprendi* and *Ring*.

Appellate counsel failed to raise the issue of error in the jury selection. It is clear from the record that Mr. Lamarca was precluded from effectively participating in jury selection by the actions of both the court and counsel. Judicially, Mr. Lamarca's mouth was taped shut when he was excluded from the selection of jurors as peremptory strikes where done at the bench without his knowledge or input. Appellate counsel failed to raise this issue of fundamental error.

A. The United States Supreme Court's Decision in *Ring v. Arizona* holds that the federal constitutional right to jury trial is violated by the imposition of a death sentence to which the defendant is exposed solely through findings of fact made by the trial judge that goes beyond any findings reached by the jury in determining guilt.

This Court held Florida's law does not violate the Constitution, even though Florida law, like the Arizona law struck down in *Ring*, expressly conditions a convicted capital defendant's eligibility for a death sentence upon factual findings of aggravating circumstances made by a trial judge, not by a jury. It so held although a majority of the Florida Justices who joined in the *per curiam* opinion in *Bottoson v. Moore* expressed grave doubts about whether the Florida statute could logically be

upheld, in some or all of its applications, consistently with the reasoning of *Ring* and *Ring*'s interpretation of *Apprendi*. The *per curiam* opinion in *Bottoson v. Moore* found that these circumstances presented "a comparable situation" to the one addressed in *Rodriguez De Quijas v. Shearson/American Express*, 490 U.S. 477, 484 (1989), where "the United States Supreme Court held:

> "'If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the [other courts] should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.'"

Bottoson v. Moore, 833 So.2d at 694.

The respect which the Florida Supreme Court has shown the Supreme Court and its *Rodriguez De Quijas* procedure is misguided when the United States Supreme Court has declared that its own outworn precedents have been superseded by the logic of later, more reflective ones. *Ring* having overruled *Hildwin* in all but name, has confused this Court, creating chaos in its judicial system while further impeding the ability of this Court to rectify this situation and guide the lower courts.

In *Bottoson v. Moore*, this Court unanimously denied a petition for habeas relief in a short *per curiam* opinion which held that any Sixth Amendment challenge to Florida's statutory death-sentencing procedure under *Ring* was authoritatively foreclosed by Supreme Court's decision in *Hildwin v. Florida* and *Hildwin*'s

precursors. This decision was reached on the merits; it did not go off on any procedural ground; nor did it hold that, if *Ring* invalidated the Florida procedure used to sentence Bottoson to death, Bottoson could not claim the benefit of such a ruling under Florida's established criteria for determining the retroactive application of constitutional decisions of this Court in Florida capital cases.[2]

In *Bottoson*, each of the seven Justices of the Florida Supreme Court wrote separate concurring opinions, expressing individual views on the *Ring* issue. Three concurred in the *per curiam* decision; four concurred in the result only.

1. The three concurring opinions

Senior Justice Harding's separate opinion was the first and shortest. He wrote that he concurred solely "for the reasons stated in the [*per curiam*] opinion." *Bottoson*, 833 So.2d at 696-97. He declined to elaborate, stating he would "leave the arguments on issues that are not dispositive to the resolution of this case to the lawyers who frame the issues by their briefs and argue for their resolution in a reviewing court."

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[2] Those criteria derive from *Witt v. State*, 387 So.2d 922 (1980). As was discussed in *Bottoson*, each of the seven Justices of the Florida Supreme Court wrote a separate opinion concurring in the *per curiam* decision or in its result. Not one of them suggested that a ruling which invalidated the Florida death-sentencing statute under *Ring* would not be applied to Bottoson's case under *Witt*; and only one of the seven asserted that Bottoson's petition should be denied on *any* procedural ground. This was Justice Quince, who, in addition to finding that the Florida Supreme Court is not free to overrule *Hildwin*, wrote that "[m]oreover, . . . [she] would deny relief to Bottoson specifically because these issues were argued and addressed in prior pleadings before this Court and the United States Supreme Court" and hence were "procedurally barred." Appendix pp. 12-13.

Id.

Justice Wells' concurring opinion agreed with the State that the constitutionality of Florida's capital-sentencing statute was established by *Hildwin* and this Court's other Florida death-penalty decisions. *Id.* at 696. He did not undertake to reconcile those decisions with *Ring* analytically, but insisted that Bottoson's *Ring* claim was foreclosed by "twenty-six years of precedent." *Id.* at pp 697. His opinion expressed "concern about what is occurring in our trial courts while the executions in these cases are stayed," and he disagreed with the "speculative suggestions of Justice Pariente and Justice Shaw for fixing Florida's constitutionally approved capital sentencing procedure." *Id.* at 699. Rather, "it is my belief that what our trial courts are to do is to follow the United States Supreme Court's precedent regarding the Florida statutes, this Court's existing precedent, and the Florida statutes." *Ibid.*

Justice Quince's concurrence began by subscribing to the *per curiam* conclusion that the question whether *Apprendi* and *Ring* have rendered "the Florida capital sentencing scheme unconstitutional . . . must be answered in the negative based on numerous decisions from the Supreme Court that have addressed with approval, under both the Sixth and Eighth Amendments, Florida's death penalty statute." *Bottoson*, 833 So.2d at 700. "Because the Supreme Court [in *Ring*] did not explicitly overrule these decisions holding the Florida capital sentencing scheme constitutional,

I would deny Bottoson relief." *Ibid.*[3]

Justice Quince did acknowledge that *Ring* undermined the specific ground on which the Florida court had upheld its capital-sentencing statute after *Apprendi* – the idea that aggravating circumstances does not increase the maximum punishment for first-degree murder because the maximum punishment for first-degree murder formally prescribed by the statute is death. *Id. at 700. See, Mills v. Moore*, 786 So.2d 532 (Fla. 2001). She continued to believe that this analysis was consistent with *Apprendi* and with what the "term statutory maximum has traditionally referred to," but she saw in *Ring* a suggestion that "the Court has carved out a new meaning for the term 'statutory maximum,'" *id.*, and she was forced to conclude that "[b]y referring to the sentence that a defendant may receive based on the jury verdict only, the [*Ring*] Court seems to have turned the concept of statutory maximum on its head," *id.* at 701.

> "However, even with that being the case, I still believe that the basic premise of *Ring* has been fulfilled under the Florida statute. That is, the trial judge does not make the sentencing decision alone. The jury in Florida is involved not only in making the decision concerning innocence or guilt but is involved also in the decision concerning life or death."

Id. at 701 (footnote omitted).

"In reaching [its] . . . conclusion [in *Ring*] the Court said it was

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[3] Alternatively, Justice Quince found that Mr. Bottoson's *Ring* claim was procedurally barred because it had been previously presented and determined adversely.

> receding from its *Walton*[4] decision 'to the extent that it allows a sentencing judge, sitting without a jury, to find an aggravating circumstance necessary for imposition of the death penalty.' 122 S. Ct. at 2443. This language alone distinguishes the Florida death penalty scheme from the Arizona scheme because the sentencing judge in Florida *does not* sit alone when the decision concerning aggravating circumstances is made. Indeed, the jury hears the evidence presented by the prosecutor, is instructed on the aggravating circumstances, and renders an advisory sentence based on the evidence and the instructions. Thus, that finite holding in *Ring* does not affect the capital sentencing provisions in Florida."

Id. at pp. 700(emphasis in original).

> "In this case, the jury returned a recommendation of death for the first-degree murder of a postmistress in Orange County, Florida. The jury was instructed that in order to recommend a sentence of death it must find that aggravating circumstances exist and that the aggravating circumstances found to exist must outweigh any mitigating circumstances. The jury was also instructed on the aggravating circumstances presented and argued by the prosecutor and the mitigating circumstances presented and argued by the defense. By its recommendation of death, the jury in fact found an aggravating circumstance and moreover found it outweighed mitigation. Based on that recommendation the trial court imposed the recommended sentence and discussed and weighed the same aggravating and mitigating circumstances that had been presented to the jury.
>
> "Thus, based on the precedent from this Court, I would conclude that the decision in *Ring* does not render the Florida death penalty provisions unconstitutional because the Florida judge and the jury jointly make the decision concerning the existence of aggravating circumstances."

Id. at pp. 702-03.

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[4] *Walton v. Arizona*, 497 U.S. 639 (1990).

Justice Quince reserved the question of the implications of her reading of *Ring* for the constitutionality of "jury overrides" – that is, death sentences imposed by Florida trial judges against a majority recommendation of the advisory jury:

> "Whether there is an inescapable conflict between *Ring* and the Supreme Court's prior decision in *Spaziano v. Florida*, 468 U.S. 447 (1984), cannot be resolved on this record. . . . Whether we may fundamentally agree that jury overrides may not be allowed under a full *Ring* analysis is not the issue here. What we must focus on at this point are the issues presented by the parties to this particular action."

Id. at 702.

2. The four opinions concurring in the result only

In *Bottoson*, four other Justices wrote separate opinions concurring in the result only. Chief Justice Anstead's concurrence said that he was writing "separately to underscore both the concerns of my colleagues, as well as my own, as to the impact of the U.S. Supreme Court's decision in *Ring v. Arizona*, . . . on Florida's death penalty scheme." *Bottoson*, 833 So.2d at 703. The Chief Justice proceeded to detail the specific bases for his "concerns that Florida's scheme may not comply with the Sixth Amendment as now construed in *Ring*," *id.* at 704:

> "1. Florida's scheme requires a finding of the existence of aggravating circumstances before a death penalty may be imposed. That scheme relies upon finding of facts determining the existence of statutory aggravators that have been made by a judge and not by a jury. Perhaps most importantly, it is the findings of fact made by the trial judge that are actually relied upon by the same trial judge in determining the capital

defendant's sentence, and it is these same findings of fact that are actually reviewed and relied upon by this Court in determining whether the trial court's sentence should be upheld.

"2. A Florida trial judge not only independently determines the existence of aggravators, but in doing so is not limited to the aggravation that may have been submitted to the jury. Further, in some instances, the trial judge is vested with the authority to override the jury's advisory recommendation as to penalty.

"3. In Florida, neither the jury nor any individual juror makes any findings of fact or any actual determination of the existence of any aggravating circumstances. Hence, no jury findings of fact are considered by the trial court in making its own findings of fact and in determining a sentence, and no jury findings of fact are considered by this Court on review of the trial judge's sentence. Rather, the trial court is limited to a consideration of the jury's advisory recommendation.

"4. In Florida, the jury renders only an advisory recommendation as to penalty.

"5. A Florida jury's advisory recommendation is not required to be unanimous."

Id. at 704-05. In the light of these concerns, Chief Justice Anstead observed that:

"If the holdings of *Ring* and *Apprendi* are to be applied as written, it is apparent that Florida's sentencing scheme is at risk because of the scheme's express reliance upon findings of fact made by the trial judge rather than findings of fact made by a jury in determining the existence of aggravating circumstances which must be established and utilized as a basis for imposing the penalty of death."

Id. at 705 (footnote omitted).

"That Florida's sentencing scheme relies exclusively upon the findings of fact made by the trial judge is perhaps best evidenced by the

> hundreds of opinions this Court has rendered interpreting Florida's current death penalty scheme since the death penalty was reenacted into Florida law a quarter century ago. In those opinions this Court has consistently reviewed and relied upon the factual findings of judges, rather than juries, to determine whether the death penalty was properly imposed."

Id. at 707.

> "In sum, in Florida, the responsibility for determining whether and which aggravating circumstances apply to a particular defendant falls squarely upon the trial judge, and it is those findings by the judge that are actually utilized to decide whether the death sentence is imposed, and that are reviewed by this Court on appeal. Like Arizona, Florida permits a judge to determine the existence of the aggravating factors which must be found to subject a defendant to a sentence of death, and it is the judge's factual findings that are then considered and reviewed by this Court in determining whether a particular defendant's death sentence is appropriate. Thus, we appear to be left with a judicial fact-finding process that is directly contrary to the U.S. Supreme Court's holding in *Ring*."

Id. at 710. Chief Justice Anstead ended his opinion by noting that:

> ". . . the plurality opinion has chosen to retreat to the 'safe harbor' of prior United States Supreme Court decisions upholding Florida's death penalty scheme. That may well be the 'safe' option since it will require the Supreme Court to act affirmatively to explain its prior holdings in light of *Apprendi* and *Ring*. However, when one examines the holdings of *Ring* and *Apprendi* and applies them in a straightforward manner to a Florida scheme that requires findings of fact by a judge and not a jury, it is apparent that the harbor may not be all that safe.
>
> "The U.S. Supreme Court in *Ring* was prompt to acknowledge its prior mistake in not applying the holding of *Apprendi* to capital sentencing. Further, and perhaps critical to a determination of the effect of *Ring* in Florida, the Court in *Walton* has observed, '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. We will simply have to wait and see whether the U.S. Supreme Court will also concede a prior mistake in its failure to apply *Apprendi* to Florida's sentencing scheme, or whether it will somehow distinguish the Florida scheme as exempt from its recent holdings.[5]

Id. at 710.

Justice Shaw's concurring opinion took the view that the Florida Supreme Court, as "this State's highest Court has an obligation to evaluate the validity of Florida's capital sentencing statute in light of *Ring*." *Id.* at 711.

> "In my opinion, when the dictates of *Ring* . . . are imposed on Florida's capital sentencing statute, the statute violates settled principles of *state* law. The rule of law that I glean from *Ring* is that an aggravating circumstance that 'death qualifies' a defendant is the functional equivalent of an element of the offense. If this is a correct reading of *Ring*, then that aggravator must be treated like any other element of the charged offense and, under longstanding Florida law, must be found unanimously by a jury. Florida's capital sentencing statute, however, currently contains no unanimity requirement for a 'death qualifying' aggravator."

Ibid. (emphasis in original).

In Justice Shaw's view, the Florida statute cannot be distinguished from the Arizona statute involved in *Ring* with respect to the necessity for finding one or more aggravating circumstances – above and beyond the facts found by the jury's verdict of guilty of first-degree murder – in order to make a convicted defendant eligible for

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[5] "For example, Justice Quince has posited a possible distinction the Supreme Court could rely on in her separate opinion." [Chief Justice Anstead's footnote 22, renumbered.]

a death sentence.

> "Because a finding of at least one aggravating circumstance is necessary to render a defendant 'death qualified,' that particular aggravator is indeed, under *Ring*, the 'functional equivalent of an element of a greater offense than the one covered by the jury's guilty verdict.' In the lexicon of *Ring*, for sentencing purposes, first-degree murder *with* at least one aggravating circumstance is 'a greater offense' than first-degree murder *without* an aggravating circumstance."

Id. at 715-716 (emphasis in original). It follows that "*Ring* is applicable to Florida's capital sentencing statute," that a Florida "'death qualifying' aggravator . . . is subject to the same rigors of proof as . . . other elements [of an offense]," *id*. at 717 and that this application of "the dictates of *Ring* . . . to Florida's capital sentencing statute [demonstrates that] . . . our statute is . . . flawed because it lacks a unanimity requirement for the 'death qualifying' aggravator." *Id*.

To cure the constitutional defect, Justice Shaw recommended a prospective change in the Florida Standard Jury Instructions in Criminal Cases to be given at the penalty stage. *Id*. at 718-19. No such instruction having been given in Mr. Bottoson's case – and Mr. Bottoson's jury having in fact failed to achieve unanimity at the penalty stage – Justice Shaw took up the question "whether *Ring* should be applied retroactively in the present case." *Id*. at 717. He concluded that it should be, under "Florida's criteria for determining whether a change in decisional law must be applied retroactively in post-conviction proceedings," *ibid*., but he nonetheless found that Mr.

Bottoson was not entitled to relief because:

> "[th]e record shows that Bottoson's death sentence was based on at least one 'death qualifying' aggravating circumstance [– that Mr. Bottoson] . . . had previously been convicted of a crime involving the threat of violence [– which, under] *Apprendi*, . . . is excluded from *Ring*'s purview and, standing by itself, can serve as a basis to 'death qualify' a defendant."

Id. at 718-19 (footnotes omitted).

Justice Pariente in *Bottoson* endorsed this last point, writing that "although the jury recommended death by a vote of 10-2, one of Bottoson's aggravators included a prior violent felony," *id.* at 719, and that "[i]n extending *Apprendi* to capital sentencing, the Court in *Ring* did not eliminate the 'prior conviction' exception arising from *Almendarez-Torres* [*v. United States*, 523 U.S. 224 (1998)]," *id.* at 723 (footnote omitted). Justice Pariente also endorsed the basic rationale of the *per curiam* decision:

> "Because the United States Supreme Court in *Ring* neither overruled its prior precedent, other than *Walton v. Arizona* . . . , nor explicitly addressed Florida's sentencing statute, I would not disturb the finality of Bottoson's death sentence."

Id. at 719 (footnote omitted). However, she went on to say that:

> "based on the reasoning of the majority of the United States Supreme Court in *Ring* and Justice Scalia's separate concurrence in *Ring*, I agree with Chief Justice Anstead that *Ring* does raise serious concerns as to potential infirmities in our present capital sentencing scheme."

Id.

Justice Pariente explained, "[a]s a threshold matter," *id.*, that:

> "I believe the Supreme Court's decision in *Ring* requires this Court to recede from its previous holding in *Mills v Moore*, 786 So.2d 532, 537-38 (Fla. 2001), that death is the maximum penalty for first-degree murder in Florida. Although the sentencing schemes in Florida and Arizona differ in that an Arizona jury has no role in the penalty phase of a death penalty proceeding, the statutes are otherwise identical regarding the prerequisites to the imposition of the maximum penalty."

Id.

> "*Just like the Arizona sentencing scheme* at issue in *Ring*, Florida's sentencing scheme requires additional findings by the judge before the death penalty can be imposed. *See* § 775.082. . . . In Florida, *just as in Arizona*, the death penalty cannot be imposed unless and until *a trial court* makes the additional findings of fact both that the aggravating circumstances exist and that the aggravators outweigh the mitigators."

Id. at 721 (emphasis in original). Therefore, Justice Pariente felt compelled by *Ring* to "conclude that the maximum penalty after a finding of guilt in Florida is life imprisonment. . . . The statement in *Mills* as to the maximum penalty [being death] may be true in form, but through the lens of *Ring* the statement is not true in effect." *Id*. at 722.

This conclusion led Justice Pariente both to "share the concerns expressed by Justice Shaw . . . that *Ring* may render our sentencing statute invalid under state constitutional law to the extent that there is no requirement that the jury find the existence of aggravators by unanimous verdict," *id*. at 719, and to "agree with Justice Lewis that there are deficiencies in our current death penalty sentencing instructions," *Id*. at 723:

> "Because our present standard penalty phase jury instructions emphasize the jury's advisory role and minimize the jury's duty under *Ring* to find the aggravating factors, Florida's penalty phase instructions should be immediately reevaluated so that at a minimum the jurors are told that they are the finders of fact as to the aggravating circumstances. I thus would also concur with Justice Shaw's recommendation for an amended jury instruction [requiring unanimity in the jury's finding of a "death qualifying" aggravating circumstance] to be used prospectively."

Id. at 725. In addition, Justice Pariente "recommend[ed] that each capital sentencing jury utilize a special verdict form to make a finding beyond a reasonable doubt as to each aggravator submitted." *Id*. at p. 725. Her opinion concluded as follows:

> "The crucial question after *Ring* is 'one not of form, but of effect.' 122 S. Ct. at 2439. *In effect*, the maximum penalty of death [under the Florida statute] can be imposed only with the additional factual finding that aggravating factors outweigh mitigating factors. *In effect*, Florida juries in capital cases *do not do* what *Ring* mandates – that is, make specific findings of fact regarding the aggravators necessary for imposition of the death penalty. *In effect*, Florida juries *advise* the judge on the sentence and the judge finds the specific aggravators that support the sentence imposed. Indeed, under both the Florida and Arizona schemes, it is the judge who *independently* finds the aggravators necessary to impose the death sentence. Whether the non-unanimous advisory role of Florida's penalty phase juries is of sufficient constitutional significance under the Sixth Amendment to distinguish Florida's sentencing statute from the Arizona statute invalidated in *Ring* is a question for the United States Supreme Court to decide. Thus, while we should leave the decision on the validity of Florida's sentencing scheme under the Sixth Amendment to the United States Supreme Court, we can take steps now to ensure future sentencing proceedings in this State do not run afoul of the spirit, intent, and reasoning of *Ring*.

Id. at 725 (emphasis in original).

Justice Lewis gave different reasons for his decision to write separately:

> "While I concur with the result voiced by the majority and the respect and recognition that the United States Supreme Court did not expressly overrule its prior precedent addressing Florida law in this area in the *Ring* opinion, we fail as a court to acknowledge that we also perceive a number of irreconcilable conflicts even though there are crucial differences between the Florida and Arizona death penalty statutes. Although there are statutory differences, it is unmistakable that a death penalty cannot be imposed in Florida without a prior finding with regard to aggravating factors, and I write separately to delineate several concerns which I believe have been generated . . . . Blind adherence to prior authority, which is inconsistent with *Ring*, does not, in my view, adequately respond to, or resolve the challenges presented by, the new constitutional framework announced in *Ring*. For example, we should acknowledge that although decisions such as *Spaziano v. Florida*, 468 U.S. 447 (1984), have not been expressly overruled, at least that portion of *Spaziano* which would allow trial judges to override jury recommendations of life imprisonment in the face of Sixth Amendment challenges must certainly now be of questionable continuing validity."

Id. at 726.[6] Justice Lewis also concluded that *Ring* has cast doubt upon the propriety of those provisions of Florida's standard jury instructions that inform the jurors that their role in the penalty phase of a capital trial is merely advisory, see *id*. at 726-27,[7]

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[6] Justice Lewis' point here is that *Ring* calls the result in *Spaziano* into question by eroding the major premise of *Spaziano*'s reasoning – the assumption "that jury involvement is not required in the sentencing proceedings of capital cases," *id*. at p. 75; see also *id*. at pp. 73-74, quoting *Spaziano*, 468 U.S. at 464-465.

[7] "In this case, there was a tendency to minimize the role of the jury, not only in the standard jury instructions, but also in the trial court's added explanation of Florida's death penalty scheme. I question whether a jury in situations such as this can have the proper sense of responsibility with regard to finding aggravating factors or the true importance of such findings as now emphasized by *Ring*. In my view, although the standard jury instructions may not be flawed to the extent that they are invalid or require a reversal in this case, such instructions should now receive a detailed review and analysis to

but that *Ring* has not eroded either the holding of *Hildwin* that jurors are not required "'to specify the aggravating factors that permit the imposition of capital punishment in Florida,'" or the reasoning in *Mills v Moore*, 786 So.2d 532, 537-538 (Fla. 2001), that "because the [text of Fla. Stat. § 775.082(1)] . . . described the punishment for 'capital felonies' and because 'capital' crimes are by definition punishable by death, the 'maximum possible penalty described in the capital sentencing scheme is clearly death'" *Bottoson*, 833 So.2d at 729.

Additionally Mr. Lamarca's death sentence was imposed in an unconstitutional manner because he was required to prove the non-existence of an element necessary to make him eligible for the death penalty. Under Florida law, a death sentence may not be imposed unless the judge finds the fact that"sufficient aggravating circumstances" exist to justify imposition of the death penalty. Fla. Sat. Sec 921.141 (3). Because imposition of a death sentence is contingent upon this fact being found, and the maximum sentence that could be imposed in the absence of that finding is life imprisonment, the Sixth Amendment required that the State bear the burden of proving it beyond a reasonable doubt. *Ring*, 122 S. Ct. at2432("Capital defendants. . .are entitled to a jury determination of any fact the legislature conditions an increase in their maximum punishment."). Prior to the closing statements, the judge gave the following

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reflect the factors which inherently flow from *Ring*." *Id*. at pp. 90-91.

preliminary instructions:

> You have found the defendant guilty of murder in the first degree. The punishment for this crime is either death or life imprisonment without the possibility of parole. **The final decision as to what punishment shall be rests solely with me.** However, the law requires that you, the jury, render to the court an advisory sentence as to what punishment should be imposed on Mr. Lamarca. (R. 1365).

After argument, the judge gave the following final instructions:

> Ladies and gentlemen, it is now your duty to advise the court as to what punishment should be imposed on the defendant for his crime of murder in the first degree. Your advisory sentence is entitled by law and will be given great weight in determining what sentence I impose....**As you have been told, however, the final decision of what punishment should be imposed is my responsibility.** (R. 1422).

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

Fourteenth and Sixth Amendment right to trial by jury because it relieved the State of its' burden to prove beyond a reasonable doubt the element that "sufficient aggravating circumstances exist" which outweigh mitigating circumstances by shifting the burden of proof to Mr. Lamarca to prove that the mitigating circumstances outweigh sufficient aggravating circumstances. *Mullaney v. Wilbur*, 421 U.S. 684, 698 (1975).

Mr. Lamarca's death sentence is also invalid and must be vacated because the elements of the offense necessary to establish capital murder were not charged in the indictment in violation of the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and the Florida Constitution. Mr. Lamarca was indicted on one count of premeditated first degree murder (R. 1947-8). The indictment failed to charge the necessary elements of capital first degree murder (R. 1947-8). *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" 526 U.S. at 243, n. 6. *Apprendi v. New Jersey*, 530 U.S. 466,475-76 (2000), held that the Fourteenth Amendment affords citizens the same protections when they are prosecuted under state law. *Ring v.*

Arizona, 122 S.Ct. 2428, 2441(2002)(quoting *Apprendi*, 530 U.S. at 494, n. 19), held that a death penalty statute's aggravating factors "operate as 'the functional equivalent of an element of a greater offense.'"

On June 28, 2002, after the Court's decision in *Ring*, the death sentence imposed in *United States v. Allen*, 247 F. 3d741 (8th Cir. 2001), was overturned when the Supreme Court granted the writ of certiorari, vacated the judgement of the United States Court of Appeals for the Eighth Circuit upholding the death sentence, and remanded the case for reconsideration in light of *Ring's* holding that aggravating factors that are prerequisites of a death sentence must be treated as elements of the offense. *Allen v. United States*,122 S.Ct. 2653 (2002). Like the Fifth Amendment to the United States Constitution, Article I, Section 15 of the Florida Constitution provides that "[n]o person shall be tried for a capital crime without presentment or indictment by a grand jury". Like 18 U.S.C. Sections 3591 and 3592(c), Florida's death penalty statute, Florida Stats. §§ 775.082 and 921.141, makes imposition of the death penalty contingent upon the state 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." Further, in *State v. Gray*, 435 So. 2d 816, 818 (Fla. 1983), this Court stated "[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. It is impossible to know whether the grand jury in this case would have returned an indictment alleging the presence of aggravating factors, sufficient aggravating circumstances, and insufficient mitigating circumstances, and thus charging Mr. Lamarca with a crime punishable by death. The State's authority to decide whether to seek the execution of an individual charged with a crime hardly overrides the constitutional requirement of neutral review of prosecutorial intentions. *See e.g., United States v. Dionisio,* 410 U.S. 19,33 (1973); *Wood v. Georgia,* 370 U.S. 375, 390 (1962). The Sixth Amendment requires that "[i]n all criminal prosecutions, the accused shall . . . be informed of the nature and cause of the accusation . . ." A conviction on a charge not made by the indictment is a denial of due process of law. *State v. Gray*, *supra*, citing *Thornhill v. Alabama*, 310U.S. 88 (1940), and *De Jonge v. Oregon*, 299 U.S. 353

(1937). Based on the foregoing, Mr. Lamarca respectfully requests that his sentence of death, as well as the advisory sentence, be vacated in light of *Ring v. Arizona* and a life sentence imposed. At the very least, a re-sentencing proceeding that comports with the Sixth Amendment as explained by *Ring v. Arizona* is required.

IV. Developments Since This Court's Decision in *Bottoson*

A. Florida's Problem With *Ring*

Recently this Court issued the decision in *Windom v. State,* Nos. SC01-2706 & SC02-2142 (Fla. May 6, 2004) in which one justice in a lengthy concurrence addressed the problem of *Ring*. Justice Cantero, joined by two other members of this Court, addressed the history of Ring and its development in Florida as well as around the country.

Justice Cantero begins by succinctly stating that "In this Court, no majority view has emerged." *Windom*, *Slip Op.* at 38. This small statement is of large importance for this Court has yet to interpret and define its own law for review by the United States Supreme Court. As stated below, this Court has not hesitated to do so in the past. In denying the Ring claim in each case in Florida, this Court has done so because the United States Supreme Court has not specifically overruled its own precedent upholding Florida's death penalty. *See, Bottoson v. Moore*, 833

So.2d 693 (Fla.), *cert denied*, 537 U.S. 1070 (2002); *King v. Moore*, 831 So.2d 143 (Fla.), *cert. denied*, 537 U.S. 1067 (2002); *Porter v. Crosby*, 840 So.2d 981 (Fla. 2003).[8]

It is clear that the United States Supreme Court must defer to a state court's interpretation of its' own state law when reviewing state court decisions. *See, Ring v. Arizona*, 122 S.Ct. 2428 (2002). Specifically, the United States Supreme Court applied the interpretation of Arizona's law done by the Arizona Supreme Court:

> Reviewing the death sentence, the Arizona Supreme Court made two preliminary observations. *Apprendi* and *Jones*, the Arizona high court said, "raise some question about the continued viability of *Walton*." 200 Ariz., at 278, 25 P.3d, at 1150. The court then examined the *Apprendi* majority's interpretation of Arizona law and found it wanting. *Apprendi*, the Arizona court noted, described Arizona's sentencing system as one that " 'require[s] judges, after a jury verdict holding a defendant guilty of a capital crime, to find specific aggravating factors before imposing a sentence of death,' and not as a system that 'permits a judge to determine the existence of a factor which makes a crime a capital offense.' " 200 Ariz., at 279, 25 P.3d, at 1151 (quoting *Apprendi*, 530 U.S., at 496-497, 120 S.Ct. 2348). Justice O'CONNOR's *Apprendi* dissent, the Arizona court noted, squarely rejected the *Apprendi* majority's characterization of the Arizona sentencing scheme: "A defendant convicted of first-degree murder in Arizona cannot receive a death sentence unless a judge makes the factual determination that a statutory aggravating factor exists. Without that critical finding, the maximum sentence to which the defendant is exposed is life imprisonment, and not the death penalty." 200 Ariz., at 279, 25 P.3d, at 1151 (quoting *Apprendi*, 530 U.S., at 538, 120 S.Ct. 2348).

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[8] See also the concurrence by Justice Wells in *Windom v. State*, Slip. Op. at 29.

> After reciting this Court's divergent constructions of Arizona law in *Apprendi*, the Arizona Supreme Court described how capital sentencing in fact works in the State. The Arizona high court concluded that "the present case is precisely as described in Justice O'Connor's dissent [in *Apprendi*]-- Defendant's death sentence required the judge's factual findings." 200 Ariz., at 279, 25 P.3d, at 1151. Although it agreed with the *Apprendi* dissent's reading of Arizona law, the Arizona court understood that it was bound by the Supremacy Clause to apply *Walton*, which this Court had not overruled. It therefore rejected *Ring's* constitutional attack on the State's capital murder judicial sentencing system. 200 Ariz., at 280, 25 P.3d, at 1152.

Ring, 122 S. Ct. at 2436.

Here, this Court has failed to give the United States Supreme Court the opportunity to review the *Ring* issue because "In this Court, no majority view has emerged." *Windom, Slip Op.* at 38.

B. Federal Courts and Other State Court Decisions

Of particular interest to this Court and many other courts around the nation are two federal circuit court decisions and one state supreme court decision. In *Turner v. Crosby*, 339 F.3d 1247 (11th Cir. 2003), the Eleventh Circuit Court of Appeals held that the petitioner's *Ring* claim was procedurally barred and not applicable retroactively to cases on collateral review. Recently the United States Supreme Court accepted for review the case of *Summerlin v. Stewart, 341 F.3d 1082 (9th Cir.), cert granted in part sub nom. Schriro v. Summerlin*, 124 S.Ct. 833 (2003), a Ninth Circuit case, to resolve the issue of whether *Ring* is retroactive.

For Florida, the case dealing directly with one of the issues raised by *Bottoson* is the case recently accepted for review, *Roper v. Simmons*, Case No. 03-633. In *Simmons v. Roper*, 112 S.W. 3d 397 (Mo. 2003), the Missouri Supreme Court revisited the issue of the juvenile death penalty as it applied to a seventeen year old defendant. In holding that the Constitution forbids the execution of juvenile defendants, the Missouri Supreme Court departed from the precedent established by *Stanford v. Kentucky*, 492 U.S. 361 (1989), which held that there was no national consensus against execution of those who were 16 or 17 years old at the time of their crimes.

The Missouri Supreme Court analyzed the development of two distinct areas of law in four cases. First, the Missouri Supreme Court analyzed the decisions of *Thompson v. Oklahoma*, 487 U.S. 815 (1988) and *Stanford*. The Missouri Supreme Court recognized that the *Thompson* Court was "guided by the 'evolving standards of decency that mark the progress of a maturing society.'" *Simmons*, 112 S.W. 3d at 401 (citing to both *Thompson* and *Trop v. Dulles*, 356 U.S. 86 (1958). The *Thompson* Court, as recognized by the Missouri Supreme Court, looked at legislative enactments, frequency of the imposition of the death penalty, national and international views, and then the United States Supreme Court's independent analysis. *Id*. The Missouri Supreme Court then when on to analyze

the United States Supreme Court's decision in *Stanford*. In *Stanford*, as the Missouri Supreme Court stated, there was no clear evidence of a consensus against the death penalty for 16 and 17 year olds that emerged as there was in *Thompson*. Id. at 402-03.

Next, the Missouri Supreme Court analyzed the development of the national consensus against the execution of the mentally retarded. Beginning with *Penry v. Lynaugh*, 492 U.S. 302 (1989), the Missouri Supreme Court looked at the same evidence as the United States Supreme Court. Again, the Missouri Supreme Court analyzed the Court's recognition that legal "standards cannot remain static, but must "acquire meaning as public opinion becomes enlightened by humane justice.'" *Simmons*, 112 S.W. 3d at 401, *quoting Thompson*, at 821 n.4. While *Penry* did not categorically bar the imposition of the death penalty, the Missouri Supreme Court recognized that the United States Supreme Court's jurisprudence allowed the question of executing the mentally retarded to be open for further review. *Id*. at 403-04.

Finally, the Missouri Supreme Court reviewed the United States Supreme Court's decision in *Atkins v. Virginia*, 536 U.S 304 (2002). This Court proceeded step by step in conducting the same review of the other cases, namely looking at legislative enactments, frequency of imposing the death penalty, national and

international opinion and the Court's independent analysis. *Id.* at 404-06.

The Missouri Supreme Court, using the framework of *Thompson*, *Stanford*, *Penry* and *Atkins* then embarked on its own independent analysis of the juvenile death penalty. *Id*. at 406. The Missouri Supreme Court rejected the notion that it did not have the capacity or authority to apply current standards of decency to the question of the juvenile death penalty. "This Court clearly has the authority and the obligation to determine the case before it based on current -- 2003 -- standards of decency." *Id.* at 407. In its analysis, the Missouri Supreme Court held that current standards do not allow for the execution of juveniles. *Simmons*, 112 S.W. 3d at 413.

The Florida Supreme Court failed in its obligation to do what the Missouri Supreme Court did in *Simmons* in fulfilling its role as a state's highest court of review. To hold otherwise would be to emasculate all state supreme courts or state courts of final review and hold them hostage to the discretionary review of the United States Supreme Court. Taken to its logical conclusion, the United States Supreme Court would be required to issue fifty separate opinions on every single issue of law. The jurisprudence of the United States Supreme Court has never operated in this manner in striking down the death penalty, *see*, *Furman v. Georgia*, 408 U.S. 238 (1972), nor did it operate in this manner when it cleared the

path for its eventual revival.

In *Gregg*, *Jurek*, *Proffitt*, and *Woodson*, the Supreme Court undertook a categorical review of four basic death penalty statutory "procedures." This initial analysis sufficed for those states which wanted to impose the death penalty. However, even Florida, the first state to legislatively revive the death penalty, undertook its own analysis of its new death penalty law. *State v. Dixon*, 283 So.2d 1 (1973). There was no hesitation, no deference, no "respect" to the United State's Supreme Court's decision in *Furman*. This very Court announced on its own that the United States Supreme Court in "the nine separate opinions constituting *Furman v. Georgia* .... does not abolish capital punishment, as only two justices--Mr. Justice Brennan and Mr. Justice Marshall--adopted that extreme position", *Dixon*, 283 So.2d at 6., and that "Capital punishment is not, *Per se*, violative of the Constitution of the United States." *Id.* It was not until three years later that this Court announced in *Proffitt v. Florida*, 428 U.S. 242 (1976) that Florida's death penalty scheme was constitutional.

The *Dixon* court did not have the benefit of the *Bottoson* court: namely a set of standards established by the Court to follow. While it can be argued that the nine separate opinions did provide some guidance to the various legislatures, the Florida Supreme Court encountered no judicial roadblock in determining that

Florida's new death penalty was void of any constitutional infirmities.[9] "Having reviewed the statutes under consideration, it is the opinion of this Court that Fla.Stat. §§ 775.082, 782.04 and 921.141, F.S.A., are constitutional as measured by the controlling law of this State and under the constitutional test provided by *Furman v. Georgia*." *Id.* at 11.

This Court in *Bottoson* had better guidance than the court in *Dixon*, yet it chose not act. In Arizona, however, the Arizona Supreme Court did act in interpreting its statute, as did the Florida Supreme Court in *Dixon* nearly 30 years earlier. In *Ring*, this Court characterized Arizona's action:

> The Arizona Supreme Court, as we earlier recounted, see supra, at 2435- 2436, found the *Apprendi* majority's portrayal of Arizona's capital sentencing law incorrect, and the description in Justice O'CONNOR's dissent precisely right: "Defendant's death sentence required the judge's factual findings." 200 Ariz., at 279, 25 P.3d, at 1151. Recognizing that the Arizona court's construction of the State's own law is authoritative, *see Mullaney v. Wilbur*, 421 U.S. 684, 691, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975), we are persuaded that *Walton*, in relevant part, cannot survive the reasoning of *Apprendi*.

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[9] Sentences imposed under Florida's death penalty statute were reversed in *Anderson v. Florida*, 408 U.S. 938, 92 S.Ct. 2868, 33 L.Ed.2d 758 (1972); *Thomas v. Florida*, 408 U.S. 935, 92 S.Ct. 2855, 33 L.Ed.2d 750 (1972); *Johnson v. Florida*, 408 U.S. 939, 92 S.Ct. 2875, 33 L.Ed.2d 762 (1972); *Boykin v. Florida*, 408 U.S. 940, 92 S.Ct. 2876, 33 L.Ed.2d 763 (1972); *Brown v. Florida*, 408 U.S. 938, 92 S.Ct. 2870, 33 L.Ed.2d 759 (1972); *Paramore v. Florida*, 408 U.S. 935, 92 S.Ct. 2857, 33 L.Ed.2d 751 (1972); *Pitts v. Wainwright*, 408 U.S. 941, 92 S.Ct. 2856, 33 L.Ed.2d 765 (1972), and *Williams v. Wainwright*, 408 U.S. 941, 92 S.Ct. 2864, 33 L.Ed.2d 765 (1972). Thus, the Florida Supreme Court was faced with a similar situation as the court did in *Bottoson*: this Court's controlling precedent.

Ring, 122 S.Ct. at 2440.

And further stated that "Although " 'the doctrine of stare decisis is of fundamental importance to the rule of law[,]' ... [o]ur precedents are not sacrosanct." *Patterson v. McLean Credit Union*, 491 U.S. 164, 172, 109 S.Ct. 2363, 105 L.Ed.2d 132 (1989) (quoting *Welch v. Texas Dept. of Highways and Public Transp*., 483 U.S. 468, 494, 107 S.Ct. 2941, 97 L.Ed.2d 389 (1987)). *Id.* at 2443.

V. The Current Status of Supreme Court Precedent

As is discussed below, the analytical underpinnings of both *Hildwin* and *Proffit* have been eviscerated by the Supreme Court's opinion in *Ring*. Having done so, there is no reason for Florida to not act in defining its' own statute and depart from the United States Supreme Court's now defunct precedent. By its inaction, Florida trial courts are in a state of disarray. This nonconformity in the application of Florida's death penalty violates the Eighth Amendment leaving this Court to save it from itself.

Mr. Lamarca's *Apprendi-Ring* claim does not raise any issue of the retroactivity of *Ring* under *Teague v. Lane*, 489 U.S. 288 (1989). Florida does not use the *Teague* rule to determine whether constitutional decisions of this Court apply retroactively to Florida capital cases, but has its own rule – the rule of *Witt v.*

State, 387 So.2d 922 (1980) – designed for that specific purpose.[10] The only member of the Florida Supreme Court in *Bottoson* who dealt explicitly with the issue of retroactivity below, Justice Shaw, concluded that "*Ring* must be applied retroactively in the present case" under *Witt*, *Bottoson*, 833 So.2d at 717. Under these circumstances, where the state court has "decided th[e] . . . federal constitutional question," there is "no reason why [this Court] . . . should not do so as well." *Benton v. Maryland*, 395 U.S. 784, 792-793 (1969).[11]

Logically, *Ring* plainly did overrule *Hildwin*. *Ring* described the Court's intervening decision in *Walton v. Arizona*, 497 U.S. 639 (1990), as follows:

> "[T]his is not the first time we have considered the constitutionality of Arizona's capital sentencing system. In *Walton v. Arizona*, . . . we upheld Arizona's scheme against a charge that it violated the Sixth Amendment. The Court had previously denied a Sixth Amendment challenge to Florida's capital sentencing system, in which the jury recommends a sentence but makes no explicit findings on aggravating

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[10] See, *e.g.*, *Thompson v. Dugger*, 515 So.2d 173, 175 (Fla. 1987), giving retroactive application to *Hitchcock v. Dugger*, 481 U.S. 393 (1987); *Jackson v. Dugger*, 547 So.2d 1197, 1198-1199 (Fla. 1989), giving retroactive application to *Booth v. Maryland*, 482 U.S. 496 (1987). The *Witt* standard has since been applied by the Florida courts in noncapital cases as well, see, *e.g.*, *State v. Gantorius*, 708 So.2d 276 (Fla. 1998), approving *Gantorius v. State*, 693 So.2d 1040 (Fla. App., 3d CA 1997), which declined to apply *Teague*'s "more stringent standard for the determination of retroactivity for collateral appeals," *id.* at 1042 n.2.

[11] *Benton* reflects the consistent practice of this Court to review important decisions of federal constitutional questions by state courts which passed over grounds on which they might possibly have relied to refuse the constitutional claimant the benefit of his or her claim even if it was valid and which elected instead to entertain and resolve the claim on the merits. See, *e.g.*, *Wilson v. Arkansas*, 514 U.S. 927, 937 n.4 (1995); *Shafer v. South Carolina*, 532 U.S. 36, 54-55 (2001).

> circumstances; we so ruled, *Walton* noted, on the ground that 'the Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury.' *Id.*, at 648 . . . (quoting *Hildwin v. Florida*, 490 U.S. 638, 640-641 . . . (1989) *(per curiam)*). *Walton* found unavailing the attempts by the defendant-petitioner in that case to distinguish Florida's capital sentencing system from Arizona's. In neither State, according to *Walton*, were the aggravating factors 'elements of the offense'; in both States, they ranked as 'sentencing considerations' guiding the choice between life and death. 497 U.S., at 648 . . . ."

Ring, 122 S. Ct. at 2437. In explicitly overruling *Walton* and specifically rejecting "the distinction relied upon in *Walton* between elements of an offense and sentencing factors,"[12] *Ring* necessarily left *Hildwin* without a place to stand. As Justice Shaw pointed out in *Bottoson*:

"The United States Supreme Court in *Ring v. Arizona*, 122 S. Ct. 2428 (2002), held that 'an aggravating circumstance necessary for imposition of the death penalty' operates as 'the functional equivalent of an element of a greater offense than the one covered by the jury's guilty verdict.'" Appendix p. 48, quoting 122 S. Ct. at 2241; *see also, Ring* at 2243.

This holding in *Ring* appears to conflict with the following language in

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[12] "Arizona . . . supports the distinction relied upon in *Walton* between elements of an offense and sentencing factors. See *supra*, at 2437-2438 [referring to *Ring*'s analysis of *Walton* as deriving this distinction from *Hildwin*] . . . . As to elevation of the maximum punishment, however, *Apprendi* renders the argument untenable; *Apprendi* repeatedly instructs in that context that the characterization of a fact or circumstance as an 'element' or a 'sentencing factor' is not determinative of the question 'who decides,' judge or jury." *Ring*, 122 S. Ct. at 2441.

Hildwin v. Florida, 490 U.S. 638, 640 (1989): '[T]he existence of an aggravating factor here is not an element of the offense but instead is a 'sentencing factor that comes into play only after the defendant has been found guilty.'" *Bottoson*. "I assume, however, that the United States Supreme Court was aware of this language in *Hildwin* . . . ." *Id*. Therefore, the holding in *Ring* can only have been "intended to supersede" *Hildwin*'s analytic mainstay. *Id*.

As *Ring* and *Walton* alike recognized, Florida's capital-sentencing procedure, no less than Arizona's, makes eligibility for a death sentence dependent on the finding of an aggravating circumstance *by a judge, not the jury*. The Florida statutory section prescribing the penalty for first-degree murder, exactly like Arizona's, "explicitly cross-references" a second section "requiring the finding of an aggravating circumstance before imposition of the death penalty," *Ring*, 122 S. Ct. at 2440-2441; and *both* sections assign this fact finding function exclusively to the judge.[13] The statute provides that the finding of aggravating circumstances

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[13] Fla. Stat. § 775.082 (1994) provides that "A person who has been convicted of a capital felony *shall be punished by life imprisonment* and shall be required to serve no less than 25 years before becoming eligible for parole *unless the proceeding held to determine sentence according to the procedure set forth in § 921.141 results in findings* ***by the court*** that such person shall be punished by death, and *in the latter event* such person shall be punished by death." (Emphasis added.)

Fla. Stat. § 921.141(3) (1979) provides that ". . . If the court does not make the finding requiring the death sentence, the court shall impose sentence of life imprisonment in accordance with § 775.082."

necessary to authorize a death sentence and to bring the "issue of life or death within the framework of rules provided by the statute" (*State v. Dixon*, 283 So.2d 1, 8 (Fla. 1974)) must be made in writing by the trial judge[14] – a procedure designed to assure that, after "the trial judge justifies his sentence of death in writing, . . . [that will] provide the opportunity for meaningful review by [the Florida Supreme] . . . Court," *ibid.*[15] By contrast, the jury's role in the capital-sentencing

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[14] Fla. Stat. § 921.141(3)(b): "In each case in which the court imposes the death sentence, *the determination of the court shall be supported by specific written findings of fact* based upon the circumstances in subsections (6) and (7) and based upon the records of the trial and the sentencing proceedings." (emphasis added.) The "procedure [to] be used in sentencing phase proceedings" has been described by the Florida Supreme Court as follows:

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

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

[15] To support a death sentence, specific findings with respect to aggravating and mitigating circumstances are required; it is "insufficient to state generally that the aggravating circumstances that occurred in the course of the trial outweigh the mitigating circumstances that were presented to the jury." *Patterson v. State*, 513 So. 2d 1257, 1263-1264 (Fla. 1987). Accord: *Bouie v. State*, 559 So.2d 1113, 1115 (Fla. 1990). "The sentencing order is the foundation for this Court's proportionality review, which may ultimately determine if a person lives or dies." *Morton v. State*, 789 So.2d 324, 333 (Fla. 2001). Accord: *e.g., Patton v. State*, 784 So.2d 380, 388 (Fla. 2000).

process is merely to inform the court of "the judgment of the community as to whether the death penalty is appropriate." *Odom v. State*, 403 So.2d 936, 942 (Fla. 1981).[16] The jury does this by "render[ing] an advisory sentence to the court," Fla. Stat. § 921.141(2),[17] which does not have to set forth any specific findings of fact, *ibid.*; *Jones v. State*, 569 So.2d 1234, 1238 (Fla. 1990),[18] and is not required to be

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[16] See also, *e.g.*, *Richardson v. State*, 437 So.2d 1091, 1095 (Fla. 1983); *McCampbell v. State*, 421 So.2d 1072, 1975 (Fla. 1982); *Quince v. State*, 414 So.2 185, 187 (Fla. 1982); *McCaskill v. State*, 344 So.2 1276, 1280 (Fla. 1977). "Florida statutory law details the role of a penalty phase jury, which directs the jury panel to determine the proper sentence without precise direction regarding the weighing of aggravating and mitigating factors in the process." *Cox v. State*, 819 So.2d 705, 717 (Fla. 2002).

[17] "The function of the jury in the sentencing phase . . . is not the same as the function of the jury in the guilt phase." *Johnson v. State*, 393 So.2d 1069, 1074 (Fla. 1981). Nor does a Florida jury bear "the same degree of responsibility as that borne by a 'true sentencing jury,'" *Pope v. Wainwright*, 496 So. 2d 798, 805 (Fla. 1986). Accord: *Combs v. State*, 525 So.2d 853, 855-858 (Fla. 1988); *Burns v. State*, 699 So.2d 646, 654 (Fla. 1997), and cases cited.

[18] "The judge's written findings are of the utmost importance, of course, for the very reason that the jury makes no findings of fact, but rather provides only an advisory recommendation to the sentencing judge by a simple majority, . . . as to whether a particular defendant should be put to death." Chief Justice Anstead, concurring in result only in *Bottoson*. As Justice Shaw had earlier noted, a Florida "jury's advisory recommendation is not supported by findings of fact. . . . Florida's statute is unlike those in states where the jury is the sentencer and is required to render special verdicts with specific findings of fact." *Combs*, 525 So.2d at 859 (concurring opinion). Accord: *Ring*, 122 S. Ct. at 2437 (describing *Hildwin* as denying "a Sixth Amendment challenge to Florida's capital sentencing system, in which the jury recommends a sentence but makes no explicit findings on aggravating circumstances"). This is the premise upon which this Court has consistently sustained a trial judge's power to override the jury's recommendation of a life sentence as consistent with *Bullington v. Missouri*, 451 U.S. 430 (1981). See, *e.g.*, *Lusk v. State*, 446 So.2d 1038, 1042 (Fla. 1984); *Cannady v. State*, 427 So.2d 723, 729-730 (Fla. 1983). It is also why the defendant has no right "to have the existence and validity of aggravating circumstances determined as they were placed before his jury." *Engle v. State*, 438 So.2d 803, 813 (Fla. 1983), *explained in Davis v. State*, 703 So.2d 1055, 1061 (Fla. 1997). Under Florida practice, "both [the Florida Supreme] . . . Court and the sentencing judge can only speculate as to what factors the jury found in making its recommendation . . .

unanimous. Fla. Stat. § 921.141(3). Time and again, the Florida Supreme Court has insisted that the "specific findings of fact" that are the "mandatory statutory requirement" for a death sentence are the responsibility of the presiding judge alone. *Van Royal v. State*, 497 So.2d 625, 628 (Fla. 1986). *See*, *e.g.*, *Patterson v. State*, 513 So. 2d 1257, 1261-1263 (Fla. 1987); *Grossman v. State*, 525 So.2d 833, 839-840 (Fla. 1988);[19] *Hernandez v. State*, 621 So.2d 1353, 1357 (Fla. 1993); *Layman v. State*, 652 So.2d 373, 375-376 (Fla. 1995); *Gibson v. State*, 661 So.2d 288, 292-293 (Fla. 1995); *State v. Reichmann*, 777 So.2d 342, 351-353 (Fla. 2000).

There is simply no way to square a procedure of this sort with the Sixth Amendment rule of *Ring*. And to delay declaring the procedure unconstitutional is in nobody's interest. With every week that passes, additional capital cases are being tried to judgment in Florida's 67county Circuit Courts, and additional capital appeals are being briefed, argued, taken under submission, and deliberated upon in the Florida Supreme Court. These are all so many exercises in futility if, as seems apparent, the basic Florida capital-sentencing procedure violates the Sixth

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." *Combs*, 525 So.2d at 859 (concurring opinion of Justice Shaw). Accord: *Sochor v. Florida*, 504 U.S. 527 (1992) ("the jury in Florida does not reveal the aggravating circumstances on which it relies"). And even in the rare case where it is possible to guess that a Florida jury at the penalty stage must have found particular facts to be true or untrue, the judge is authorized to find the contrary. *See*, *e.g.*, *McCrae v. State*, 395 So.2d 1145, 1154-1155 (1980).

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

Amendment commands of *Apprendi* and *Ring*. It is inconceivable that this Court will be content to leave the derelict of *Hildwin* standing as a permanent obstacle between Florida and the Sixth Amendment rules that govern capital and noncapital sentencing-enhancement everywhere else in the United States, especially in light of the Florida Supreme Court's inability to act. *Hildwin* is bound to be laid to rest sooner or later; and the sooner this is done, the more efficiently a constitutional capital-sentencing regime will be restored in Florida.

VI. Mr. Lamarca's Case Illustrates the Problem of the Prior Violent Felony Exception

The argument that *Almendarez-Torres v. United States*, 523 U.S. 224 (1998) creates an exception to *Ring* and creates a problem in Mr. Lamarca's case. During the penalty phase, the state introduced the testimony of witnesses and a certified copy of conviction for a prior violent felony. (R. 1372-73). During the closing argument by the prosecution, a reference to a knife was made several times. (R. 1367, 1368, 1413). However, the record is clear that the certified copy of conviction, which was reversed in Lamarca v. State, clearly states "unarmed" as opposed to armed. (R.1373). Using the prior violent felony aggravator, as an exception to Ring, contravenes well settled law that there are no automatic aggravators. All aggravators must be proven beyond and to the exclusion of all

reasonable doubt.

In *Jackson v. State*, 648 So.2d 85 (Fla.1994), this Court struck down the "cold, calculated, and premeditated" (CCP) jury instruction, which gave content to the underlying CCP aggravator, because the instruction essentially encompassed every premeditated murder. This Court explained:

> Because the challenge to the CCP instruction has been properly preserved in this case and because *Brown* and its progeny can no longer serve as authority for summarily rejecting this claim, we must reconsider the constitutionality of the standard CCP instruction. As noted above, the jury in this case was instructed that it could consider, if established by the evidence, that "the crime for which the defendant is to be sentenced was committed in a cold, calculated and premeditated manner without a[ny] pretense of moral or legal justification." This standard instruction simply mirrors the words of the statute. Yet, this Court has found it necessary to explain that the CCP statutory aggravator applies to "murders more cold-blooded, more ruthless, and more plotting than the ordinarily reprehensible crime of premeditated first-degree murder," *Porter v. State*, 564 So.2d 1060, 1064 (Fla.1990), cert. denied, 498 U.S. 1110, 111 S.Ct. 1024, 112 L.Ed.2d 1106 (1991), and where the killing involves "calm and cool reflection." *Richardson v. State*, 604 So.2d 1107, 1109 (Fla.1992). The Court has adopted the phrase "heightened premeditation" to distinguish this aggravating circumstance from the premeditation element of first-degree murder. *Id.*; *Rogers v. State*, 511 So.2d 526, 533 (Fla.1987), cert. denied, 484 U.S. 1020, 108 S.Ct. 733, 98 L.Ed.2d 681 (1988). The Court has also explained that "calculation" constitutes a careful plan or a prearranged design. *Rogers*, 511 So.2d at 533. These explications by the Court make it clear that CCP encompasses something more than premeditated first-degree murder.

Applying the prior violent felony exception of *Ring* in each case violates the provisions of *Jackson* in that every individual with a prior violent felony would

automatically be eligible for the death penalty. As noted by the opinions in *Windom*, the prior violent felony has been the one consistent theme in upholding death sentences against attack on *Ring* claims. *See, Johnston v. State*, 863 So.2d 271 (Fla. 2003); *Anderson v. State*, 863 So.2d 169 (Fla. 2003); *Belcher v. State*, 851 So.2d 678 (Fla. 2003); *Davis v. State*, 28 Fla.L.Weekly S835 (Fla. Nov. 20 2003); *Duest v. State*, 855 So.2d 33 (Fla. 2003).

VII. Inadequate Inquiry Under *Faretta v. California*.

A. *Faretta*

The Sixth Amendment of the U.S. Constitution guarantees the right of self-representation. *Faretta*, 422 U.S. at 821, 95 S.Ct. 2525; *see also,* Art. I, § 16, Fla. Const. In *Faretta*, the United States Supreme Court held that the defendant's unequivocal request to represent himself should have been granted where the record affirmatively showed he was "literate, competent, and understanding, and that he was voluntarily exercising his informed free will." *Id.* at 835, 95 S.Ct. 2525. Thus, "a criminal defendant who is competent to choose self-representation may not be denied that choice, even though the decision for self-representation will most certainly result in incompetent trial counsel." *Eggleston v. State*, 812 So.2d 524, 525 (Fla. 2d DCA 2002). There are no "magic words" in a *Faretta* inquiry. Rather, courts look to the defendant's general understanding of rights as codified in

Rule 3.111(d), Florida Rules of Criminal Procedure.

When a defendant who is entitled to counsel elects to waive that right and self-represent, the judge must inform the defendant of the risks inherent to self-representation and make an inquiry sufficient to determine whether the defendant's waiver of counsel is being made knowingly and intelligently. *See, Faretta v. California*, 422 U.S. 806, 835, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975); *Traylor v. State*, 596 So.2d 957, 968 (Fla.1992); *Wilson v. State*, 724 So.2d 144, 145 (Fla. 1st DCA 1998); see also Fla. R.Crim. P. 3.111. When a defendant waives the right to counsel, the trial court's failure to perform an adequate *Faretta* inquiry is per se reversible error. *See, State v. Young*, 626 So.2d 655, 657 (Fla.1993). The trial court should conduct a *Faretta* inquiry at every critical stage of a case. *Traylor v. State*, 596 So.2d 957 (1992); *Brown v. State*, 830 So.2d 203 (2002). However, "The right of self-representation is not a license to abuse the dignity of the courtroom. Neither is it a license not to comply with relevant rules of procedural and substantive law." *Faretta*, 422 U.S. at 834.

B. Minimum Standards

This Court and the United States Supreme Court have long recognized that "death is different".[20] In so recognizing, this Court has promulgated Minimum

[20] "As the United States Supreme Court first stated more than twenty-five years ago, "death is

Standards for Attorneys in Capital Cases under Fla.R.Crim.P. 3.112. This rules reads, in pertinent part:

> a) Statement of Purpose. The purpose of these rules is to set minimum standards for attorneys in capital cases to help ensure that competent representation will be provided to capital defendants in all cases. Minimum standards that have been promulgated concerning representation for defendants in criminal cases generally and the level of adherence to such standards required for noncapital cases should not be adopted as sufficient for death penalty cases. Counsel in death penalty cases should be required to perform at the level of an attorney reasonably skilled in the specialized practice of capital representation, zealously committed to the capital case, who has had adequate time and resources for preparation. These minimum standards for capital cases are not intended to preclude any circuit from adopting or maintaining standards having greater requirements.
>
> (b) Definitions. A capital trial is defined as any first-degree murder case in which the State has not formally waived the death penalty on the record. A capital appeal is any appeal in which the death penalty has been imposed. A capital post-conviction proceeding is any post-conviction proceeding where the defendant is still under a sentence of death.
>
> (c) Applicability. This rule applies to all lawyers handling capital trials and capital appeals, who are appointed or retained on or after July 1, 2002. Subject to more specific provisions in the rule, the standards established by the rule apply to Public Defenders and their assistants.

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different in kind from any other punishment imposed under our system of criminal justice." *Gregg v. Georgia*, 428 U.S. 153, 188, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976); *see also State v. Dixon*, 283 So.2d 1, 7 (Fla.1973) (stating that because "[d]eath is a unique punishment in its finality and in its total rejection of the possibility of rehabilitation ..., the Legislature has chosen to reserve its application to only the most aggravated and unmitigated of most serious crimes"). We have acknowledged that "death is different" in recognizing the need for effective counsel in capital proceedings "from the perspective of both the sovereign state and the defending citizen." *Sheppard & White, P.A. v. City of Jacksonville*, 827 So.2d 925, 932 (Fla.2002)." *State v. Davis*, 29 Fla. L. Weekly S82 (Fla.. February 19, 2004).

(d) List of Qualified Conflict Counsel.
(1) Every circuit shall maintain a list of conflict counsel qualified for appointment in capital cases in each of three categories:
(A) lead trial counsel;
(B) trial co-counsel; and
(C) appellate counsel.
No attorney may be appointed to handle a capital trial or appeal unless duly qualified on the appropriate list.

(2) The conflict committee for each circuit is responsible for approving and removing attorneys from the list pursuant to section 925.037, Florida Statutes. Each circuit committee is encouraged to obtain additional input from experienced capital defense counsel.
(e) Appointment of Counsel. A court must appoint lead counsel and, upon written application and a showing of need by lead counsel, should appoint co-counsel to handle every capital trial in which the defendant is not represented by retained counsel or the Public Defender. Lead counsel shall have the right to select co-counsel from attorneys on the lead counsel or co-counsel list. Both attorneys shall be reasonably compensated for the trial and sentencing phase. Except under extraordinary circumstances, only one attorney may be compensated for other proceedings. In capital cases in which the Public Defender is appointed, the Public Defender shall designate lead and co-counsel.
(f) Lead Counsel. Lead trial counsel assignments should be given to attorneys who:
(1) are members of the bar admitted to practice in the jurisdiction or admitted to practice pro hac vice; and
(2) are experienced and active trial practitioners with at least five years of litigation experience in the field of criminal law; and
(3) have prior experience as lead counsel in no fewer than nine state or federal jury trials of serious and complex cases which were tried to completion, as well as prior experience as lead defense counsel or co-counsel in at least two state or federal cases tried to completion in which the death penalty was sought. In addition, of the nine jury trials which were tried to completion, the attorney should have been lead counsel in at least three cases in which the charge was murder; or alternatively, of the nine jury trials, at least one was a murder trial and an additional five

were felony jury trials; and
(4) are familiar with the practice and procedure of the criminal courts of the jurisdiction; and
(5) are familiar with and experienced in the utilization of expert witnesses and evidence, including but not limited to psychiatric and forensic evidence; and
(6) have demonstrated the necessary proficiency and commitment which exemplify the quality of representation appropriate to capital cases, including but not limited to the investigation and presentation of evidence in mitigation of the death penalty; and
(7) have attended within the last two years a continuing legal education program of at least twelve hours' duration devoted specifically to the defense of capital cases. Attorneys who do not meet the continuing legal education requirement on July 1, 2002, shall have until March 1, 2003, in which to satisfy the continuing legal education requirement.
(g) Co-counsel. Trial co-counsel assignments should be given to attorneys who:
(1) are members of the bar admitted to practice in the jurisdiction or admitted to practice pro hac vice; and
(2) qualify as lead counsel under paragraph (f) of these standards or meet the following requirements:
(A) are experienced and active trial practitioners with at least three years of litigation experience in the field of criminal law; and
(B) have prior experience as lead counsel or co-counsel in no fewer than three state or federal jury trials of serious and complex cases which were tried to completion, at least two of which were trials in which the charge was murder; or alternatively, of the three jury trials, at least one was a murder trial and one was a felony jury trial; and
(C) are familiar with the practice and procedure of the criminal courts of the jurisdiction; and
(D) have demonstrated the necessary proficiency and commitment which exemplify the quality of representation appropriate to capital cases, and
(E) have attended within the last two years a continuing legal education program of at least twelve hours' duration devoted specifically to the defense of capital cases. Attorneys who do not meet the continuing legal education requirement on July 1, 2002, shall have until March 1, 2003, in which to satisfy the requirement.

(h) Appellate Counsel. Appellate counsel assignments should be given to attorneys who:
(1) are members of the bar admitted to practice in the jurisdiction or admitted to practice pro hac vice; and
(2) are experienced and active trial or appellate practitioners with at least five years of experience in the field of criminal law; and
(3) have prior experience in the appeal of at least one case where a sentence of death was imposed, as well as prior experience as lead counsel in the appeal of no fewer than three felony convictions in federal or state court, at least one of which was an appeal of a murder conviction; or alternatively, have prior experience as lead counsel in the appeal of no fewer than six felony convictions in federal or state court, at least two of which were appeals of a murder conviction; and
(4) are familiar with the practice and procedure of the appellate courts of the jurisdiction; and
(5) have demonstrated the necessary proficiency and commitment which exemplify the quality of representation appropriate to capital cases; and
(6) have attended within the last two years a continuing legal education program of at least twelve hours' duration devoted specifically to the defense of capital cases. Attorneys who do not meet the continuing legal education requirement on July 1, 2002, shall have until March 1, 2003, in which to satisfy the requirement.

It is clear that this Court set very high standards for those attorneys who handle capital cases and separated those standards for those who handle non-capital cases. ("Minimum standards that have been promulgated concerning representation for defendants in criminal cases generally and the level of adherence to such standards required for noncapital cases should not be adopted as sufficient for death penalty cases.")

While this Court declined to adopt these same standards for Collateral

Counsel, it did recognize that under Chapter 27, there are higher standards for representation of capital post-conviction cases than regular post-conviction cases.[21] Those standards are statutorily set out below:

> **27.704. Appointment of assistants and other staff**
>
> Each capital collateral regional counsel may:
>
> > (1) Appoint, employ, and establish, in such numbers as he or she determines, full-time or part-time assistant counsel, investigators, and other clerical and support personnel who shall be paid from funds appropriated for that purpose. A full-time assistant capital collateral counsel must be a member in good standing of The Florida Bar, with not less than 3 years' experience in the practice of criminal law, and, prior to employment, must have participated in at least five felony jury trials, five felony appeals, or five capital post-conviction evidentiary hearings or any combination of at least five of such proceedings. Law school graduates who do not have the qualifications of a full-time assistant capital collateral counsel may be employed as members of the legal staff but may not be designated as sole counsel for any person.

Recently, the United States Supreme Court issued its landmark decision in *Wiggins v. Smith*, 123 S.Ct. 2527 (2003) in which it established constitutional minimum standards for those who represent defendants in capital death cases. Those standards are those contained in the ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases (1989). *Wiggins*, 123 S.Ct. at

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[21] It should be noted that this Court has made a distinction by appointing the CCRC's automatically to postconviction matters whereas non-capital defendants must make a showing for appointment of counsel.

2537. Guideline 5.1 establishes the minimum qualifications of trial, appellate and post-conviction attorneys. Those standards are high and require large amounts of training and experience.

C. Examples of the Failings of the *Faretta* Inquiry

Under *Faretta* a trial judge has to be sensitive both to the right to counsel as well as the right to self- representation; however, judges have little leeway in either direction, since there are two constitutional rights at stake. If a defendant has met the requirements of *Faretta* for self-representation, but the court denies self-representation because of the court's concern that the defendant's ignorance of the law will result in the defendant not receiving a fair trial, it may well violate *Faretta*. *Morris v. State*, 667 So.2d 982, 986 (Fla. 4th DCA 1996).

Morris is still good law in Florida and has not been overruled by the amendments to Fla.R.Crim.P. 3.11(d)[22] or *State v. Bowen*, 698 So.2d 248 (Fla. 1997). *Morris* should not be read as an additional requirement after *Faretta*. Rather, *Morris* should be read as a component of *Faretta* in which the "fair trial factor" is part of a *Faretta* inquiry. Bowen, itself, contemplates such a factor:

> Because the consequences are serious, courts must ensure that the accused is competent to make the choice and that self-representation is undertaken "with eyes open": When an accused manages his own

[22] 719 So.2d 873 (Fla. 1998).

> defense, he relinquishes, as a purely factual matter, many of the traditional benefits associated with the right to counsel. For this reason, in order to represent himself, **the accused must "knowingly and intelligently" forgo those relinquished benefits. Although a defendant need not himself have the skill and experience of a lawyer in order competently and intelligently to choose self-representation, he should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that "he knows what he is doing and his choice is made with eyes open."**

Bowen, 698 at 250, *citing Faretta* at 835, 95 S.Ct. at 2541 (citations omitted) (*quoting Adams v. United States ex rel. McCann*, 317 U.S. 269, 279, 63 S.Ct. 236, 242, 87 L.Ed. 268 (1942))(*emphasis added*).

Prior to the amendments to Fla.R.Crim.P. 3.111(d), a judge could deny self-representation in a regular criminal case if it was "complex" or there were other circumstances. *Morris*, 667 at 986 (citing old version of Rule). It deleted the language in 3.111(d)(3) and added language in section (d)(2) that mandated, as part of the *Faretta* inquiry, that the defendant be apprised of the "dangers and disadvantages of self representation". As its appendix to the Rule, this Court added the necessary colloquy to be given but only as it pertains to trials and pleas. There is no such colloquy for postconvition representation and no such colloquy for capital death cases.

Because "death is different", postconviction death penalty cases can create an "unusual circumstance" by virtue of the knowledge necessary and the resources

necessary to investigate and properly plead a case. In the instant case, Mr. Lamarca was allowed to represent himself so that he may commit suicide.

> But I won't plead for my life. I don't even want you to consider this as a plea for my life. I don't feel any need to do so or any desire to debase myself or lend credence to this travesty....A cretin such as myself can hardly be to know whom to attribute these words for, but someone said, Give me liberty or give me death. I adopt that now and that is what I say. Your prior verdict denies me liberty and clearly demonstrates you believe the scenario that the state has painted, taken that as a given. I now say, don't straddle the fence, impose the death penalty as the rightful sentence for your convictions and I will embrace it with joy....(R.1416, 1419).

Clearly, this is not the purpose of *Faretta* nor does this behavior satisfy the dictates of *Furman* and *Dixon*.

VIII. Right To Participate In Jury Selection

According to this Court, "[t]he exercise of peremptory challenges has been held to be essential to the fairness of a trial by jury and has been described as one of the most important rights secured to a defendant." *Francis v. State*, 413 So.2d 1175, 1178-79 (Fla.1982) (*citing Pointer v. United States*, 151 U.S. 396, 14 S.Ct. 410, 38 L.Ed. 208 (1894), and *Lewis v. United States*, 146 U.S. 370, 13 S.Ct. 136, 36 L.Ed. 1011 (1892)). Clearly, it is because this is considered such a critical stage of the proceedings that the court has undertaken to ensure that a defendant's right to meaningful participation in the decision of how peremptory challenges are to be used is assiduously protected. If a contemporaneous objection were required to

preserve for appeal the issue of deprivation of that right, it seems to us that, as a practical matter, the right would be rendered meaningless. Accordingly, to ensure the viability of the rule laid down (or "clarified") by the Court in *Coney v. State*, 653 So.2d 1009 (Fla. 1995), this court concluded that a violation of that rule **constitutes fundamental error**, which may be raised for the first time on appeal, notwithstanding the lack of a contemporaneous objection. *See, State v. Johnson*, 616 So.2d 1, 3 (Fla.1993) ("for an error to be so fundamental that it can be raised for the first time on appeal, the error must be basic to the judicial decision under review and equivalent to a denial of due process"); *Salcedo v. State*, 497 So.2d 1294, 1295 (Fla. 1st DCA 1986) (allegation that defendant was absent from courtroom during exercise of peremptory challenges "alleged fundamental error which no objection was necessary to preserve"), *review denied*, 506 So.2d 1043 (Fla.1987).

After Coney was decided by this Court, the Florida Rules of Criminal Procedure were amended. Specifically, Fla.R.Crim.P. amended 3.180(b) making reference to the Court's Coney decision. *Amendments To The Florida Rules of Criminal Procedure*, 685 So.2d 1253 (Fla. 1996). Under the new rule, presence of a defendant was defined as:

A defendant is present for purposes of this rule if the defendant is

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

This Court amended the definition by adding the words "through counsel" to the definition. However, as evidence by the record and the law, the addition of the phrase through counsel did not diminish Mr. Lamarca's right to be present and to participate in the selection of jurors.

A careful analysis of the definition reveals that before and after the amendment, there are no changes factually to a situation which may give rise to such a claim. For example, pre-amendment situations involved an attorney for a defendant selecting jurors outside of the defendant's presence, whether it be at sidebar or in chambers. Post-amendment factual scenarios do not differ. The conduct is the same.

As such, the Rules of this Court do nothing to change the conduct of attorneys or judges. The Rule does nothing to advance the constitutional rights of the defendant or enlarge the participation of the defendant in his or her own case. Rather, what the Rule does by operation is to de-constitutionalize a constitutional right announced in *Francis.*[23]

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[23]It is well settled law that a rule of procedure cannot take away constitutional rights of a defendant.

In the instant case, the trial court and Mr. Lamarca's attorneys acted in a manner to effectively exclude Mr. Lamarca from participating in jury selection. The dialogue, in pertinent part, is clear that Mr. Lamarca was not even informed of the procedures that were about to take place:

> Mr. Crane: Okay, thank you very much, ma'am. Want to talk?
> Court: Yes. Counsel approach, court reporter.
> (The following takes place at sidebar)
> The Court: Mr. Lamarca would waive his presence here at the bench, since we are going to be talking with regard to jury review?
> Mr. Eide: Yes

(Tr. Vol. 25, p.229-230)

There is no place on the record that explains to Mr. Lamarca what is happening at the bench. It is the trial court, with a mere acquiescence by trial counsel, that waives Mr. Lamarca's presence during this pivotal proceeding. Further, there is no indication in the record that Mr. Lamarca was knowledgeable and voluntarily agreed to waive his right to be present during this proceeding. A close look at the definition of presence still requires those constitutional principles laid out in *Francis.* Under the new definition a defendant is present for purposes of this rule if :

> 1) the defendant is physically in attendance for the courtroom proceeding,
> 2) and has a meaningful opportunity,
> 3) to be heard,

4) through counsel,
5) on the issues being discussed.

Fla.R.Crim.P. 3.180(b).

Each word contained in this definition has meaning and the importance of the words used still carry constitutional meaning. Upon analysis, it would appear that only elements 1) and 4) are met. Regarding whether Mr. Lamarca had a meaningful opportunity to be heard, it is clear that he could not have been heard since there was no indication on the record that jury peremptory challenges were about to take place. Further, the fact that this court placed the word "meaningful" before the term "opportunity" expressly implies a higher standard. Mr. Lamarca had no opportunity to be heard. Finally, the last element is missing because Mr. Lamarca was not informed "on the issues being discussed."

It is clear that this Court promulgated the amendment to the Rule in order to avoid the results of *Coney* which could be caused by inattention of the court reporter rather than actions of the court or attorney. For example, while a defendant may be present during an entire proceeding, unless the court or his attorney makes a statement to that fact on the record, there is no indication on appellate review whether he was in fact there. In the current case, we have an affirmative recognition of Mr. Lamarca's presence by the court. In this case, we

have the purposeful exclusion of the defendant, a protection that the Rule was promulgated to protect.

This Court has decided this issue in a post-amendment case. In *Muhammed v. State*, 782 So.2d 343 (Fla. 2001), the appellant challenged, among other things, his absence from the courtroom. This Court then analyzed the constitutional right of being present and the definition of present. This Court began by stating, once again, the constitutional right to be present:

> Criminal defendants have a due process right to be physically present in all critical stages of trial, including the examination of prospective jurors. See *Snyder v. Massachusetts*, 291 U.S. 97, 106, 54 S.Ct. 330, 78 L.Ed. 674 (1934), overruled in part on other grounds by *Malloy v. Hogan*, 378 U.S. 1, 84 S.Ct. 1489, 12 L.Ed.2d 653 (1964). In *Francis v. State*, 413 So.2d 1175, 1178 (Fla.1982), we recognized that the process of exercising challenges to members of the jury constitutes a critical stage of the proceedings where a defendant has a right to be present. We found reversible error in Francis because the defendant did not have an opportunity to consult with his counsel while peremptory challenges were being exercised and the defendant did not subsequently waive the right to be present or ratify the procedure. See *id*.

Muhammad, 782 So.2d at 351.

The Court continued by describing the nature of the peremptory strike and its importance to a defendant:

> We explained in *Francis* that the exercise of peremptory challenges "permits rejection [of jurors] for real or imagined partiality and is often exercised on the basis of sudden impressions and unaccountable prejudices based only on the bare looks and gestures of another or upon

> a juror's habits and associations." *Francis*, 413 So.2d at 1179. As correctly observed in *Matthews v. State*, 687 So.2d 908, 910 (Fla. 4th DCA 1997), "[l]ogic mandates that for a defendant to intelligently participate in jury challenges, the defendant must be present for the questioning of the jurors." A defendant is entitled to more than "second hand descriptions of the prospective jurors' responses to questions during voir dire," and thus "a defendant who requests the court to permit him to participate should be allowed to obtain as much first hand information as feasible to facilitate his ability to participate in the selection of a jury." *United States v. Washington*, 705 F.2d 489, 497 (D.C.Cir.1983).

Id. at 352.

The Court then went on to distinguish the various factual scenarios that occurred in the several cases discussed.

> In *State v. Melendez*, 244 So.2d 137, 139 (Fla.1971), defense counsel consented to the continued examination, challenging, and empaneling of the jury even though the defendant was physically absent from the courtroom. This Court held that no error occurs when the defendant is represented by counsel who waives the presence of the defendant and the defendant later ratifies the action of counsel. See id. at 139-40. Similarly, in *Goney v. State*, 691 So.2d 1133, 1135 (Fla. 5th DCA 1997), the defendant was not physically present at the sidebar conference where the questioning of jurors took place. However, the Fifth District found that the defendant had ratified the actions of counsel in selecting the jury when the trial court asked for the record whether he had talked with counsel and was satisfied with the jury. [FN5] See id. In contrast to these cases, this Court in *Francis* held that fundamental error occurred when the defendant was not voluntarily absent from the proceedings where peremptory challenges were exercised, and neither knowingly and intelligently waived his right to be present, nor subsequently ratified the selection of the jury. 413 So.2d at 1178.

Id. at 352-53.

In *Muhammed*, this Court found no error because the appellant was not physically absent from the courtroom and he later ratified the actions of his attorney. *Id.* In the instant case, Mr. Lamarca was absent from the sidebar proceedings. He was not allowed to participate in the strikes and did not ratify the actions of his counsel by his absence from the bench, since we was purposefully excluded by the court and counsel in participating in the proceedings at sidebar.

IX. Invalid Cause Challenges

Further, because Mr. Lamarca was not present, Mr. Lamarca was not heard to complain or ratify many of the strikes which were not legally sufficient, and thus tantamount to peremptory strikes. Section 913.03, F.S. lists only those grounds for which a venire person may be struck for cause. It reads:

> A challenge for cause to an individual juror may be made only on the following grounds:
>
> (1) The juror does not have the qualifications required by law;
> (2) The juror is of unsound mind or has a bodily defect that renders him or her incapable of performing the duties of a juror, except that, in a civil action, deafness or hearing impairment shall not be the sole basis of a challenge for cause of an individual juror;
> (3) The juror has conscientious beliefs that would preclude him or her from finding the defendant guilty;
> (4) The juror served on the grand jury that found the indictment or on a coroner's jury that inquired into the death of a person whose death is the subject of the indictment or information;
> (5) The juror served on a jury formerly sworn to try the defendant for the same offense;

(6) The juror served on a jury that tried another person for the offense charged in the indictment, information, or affidavit;
(7) The juror served as a juror in a civil action brought against the defendant for the act charged as an offense;
(8) The juror is an adverse party to the defendant in a civil action, or has complained against or been accused by the defendant in a criminal prosecution;
(9) The juror is related by blood or marriage within the third degree to the defendant, the attorneys of either party, the person alleged to be injured by the offense charged, or the person on whose complaint the prosecution was instituted;
(10) The juror has a state of mind regarding the defendant, the case, the person alleged to have been injured by the offense charged, or the person on whose complaint the prosecution was instituted that will prevent the juror from acting with impartiality, but the formation of an opinion or impression regarding the guilt or innocence of the defendant shall not be a sufficient ground for challenge to a juror if he or she declares and the court determines that he or she can render an impartial verdict according to the evidence;
(11) The juror was a witness for the state or the defendant at the preliminary hearing or before the grand jury or is to be a witness for either party at the trial;
(12) The juror is a surety on defendant's bail bond in the case.

913.03, F.S. (1999 Supp.)

This list is both exhaustive and exclusive of the grounds for which a cause challenge may be granted. *See Boykins v. State*, 783 So.2d 317 (Fla. 5th DCA 2001); *See, Alen v. State*, 596 So.2d 1083 (3rd DCA 1992) fn 10. Section 40.01, F.S. (1999 Supp.) lists the qualifications of jurors.[24] It reads:

Jurors shall be taken from the male and female persons at least 18 years

[24] Section 913.12 lists the qualifications for criminal petit juries as being the same as in civil cases.

> of age who are citizens of the United States and legal residents of this state and their respective counties and who possess a driver's license or identification card issued by the Department of Highway Safety and Motor Vehicles pursuant to Chapter 322 or who have executed the affidavit prescribed in §40.011.

Further, Chapter 40 lists those reasons for which a juror may be excused or disqualified from service. Section 40.013, F.S. (1999 Supp.) reads:

> (1) No person who is under prosecution for any crime, or who has been convicted in this state, any federal court, or any other state, territory, or country of bribery, forgery, perjury, larceny, or any other offense that is a felony in this state or which if it had been committed in this state would be a felony, unless restored to civil rights, shall be qualified to serve as a juror.
> (2)(a) Neither the Governor, nor Lieutenant Governor, nor any Cabinet officer, nor clerk of court, or judge shall be qualified to be a juror.
> (b) Any full-time federal, state, or local law enforcement officer or such entities' investigative personnel shall be excused from jury service unless such persons choose to serve.
> (3) No person interested in any issue to be tried therein shall be a juror in any cause; but no person shall be disqualified from sitting in the trial of any suit in which the state or any county or municipal corporation is a party by reason of the fact that such person is a resident or taxpayer within the state or such county or municipal corporation.
> (4) Any expectant mother and any parent who is not employed full time and who has custody of a child under 6 years of age, upon request, shall be excused from jury service.
> (5) A presiding judge may, in his or her discretion, excuse a practicing attorney, a practicing physician, or a person who is physically infirm from jury service, except that no person shall be excused from service on a civil trial jury solely on the basis that the person is deaf or hearing impaired, if that person wishes to serve, unless the presiding judge makes a finding that consideration of the evidence to be presented requires auditory discrimination or that the timely progression of the trial will be considerably affected thereby. However, nothing in this subsection shall

affect a litigant's right to exercise a peremptory challenge.
(6) A person may be excused from jury service upon a showing of hardship, extreme inconvenience, or public necessity.
(7) A person who was summoned and who reported as a prospective juror in any court in that person's county of residence within 1 year before the first day for which the person is being considered for jury service is exempt from jury service for 1 year from the last day of service.
(8) A person 70 years of age or older shall be excused from jury service upon request. A person 70 years of age or older may also be permanently excused from jury service upon written request. A person who is permanently excused from jury service may subsequently request, in writing, to be included in future jury lists provided such person meets the qualifications required by this chapter.
(9) Any person who is responsible for the care of a person who, because of mental illness, mental retardation, senility, or other physical or mental incapacity, is incapable of caring for himself or herself shall be excused from jury service upon request.

At the side bar conference, jurors 9, 18, 40, 42, 47, and 59 did not have valid cause challenges. Further, one witness was skeptical of law enforcement. (R. Vol. 25, p.228-29) However, the court found it appropriate to strike these jurors for cause. Appellate counsel was ineffective for not raising this fundamental issue on appeal.

To demonstrate ineffectiveness of appellate counsel, a petitioner must show: (1) that there were specific errors or omissions of such magnitude that it can be said that they deviated from the norm or fell outside of the range of professionally acceptable performance; and (2) that the failure or deficiency had a prejudicial impact on the petitioner by compromising the appellate process to such a degree as

to undermine confidence in the fairness and correctness of the outcome. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *Johnson v. Wainwright*, 463 So.2d 207 (Fla.1985); *Meyer v. Singletary*, 610 So.2d 1329, 1331 (Fla. 4th DCA 1992).

In the instant case, appellate counsel was ineffective for not raising the issue of the defendant not being present and the issue of the improper for cause strikes. Mr. Lamarca was prejudiced because these jurors who were struck, could be fair and impartial in determining Mr. Lamarca's guilt or innocence.

CONCLUSION

Mr. Lamarca requests that, for the aforementioned reasons stated above, that the writ be granted in this cause.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Petitioner's Writ of Habeas Corpus has been furnished by electronic mail, facsimile and U. S. Mail, first-class, to all counsel of record on this ____ day of May, 2004.

_____

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CERTIFICATE OF COMPLIANCE

I hereby certify that a true copy of the foregoing Petitioner's Writ of Habeas Corpus was generated in a Times New Roman, 14 point font, pursuant to Florida Rule of Appellate Procedure 9.210.

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