IN THE SUPREME COURT OF FLORIDA

CASE NO. SC03-416

THOMAS GUDINAS,

Appellant/Petitioner,

v.

STATE OF FLORIDA
and
JAMES CROSBY, Secretary, Florida Department of Corrections,

Appellees/Respondents,

INITIAL BRIEF OF THE APPELLANT/PETITION FOR WRIT OF HABEAS CORPUS

ON APPEAL FROM THE CIRCUIT COURT
OF THE NINTH JUDICIAL CIRCUIT,
IN AND FOR ORANGE COUNTY, STATE OF FLORIDA

LESLIE ANNE SCALLEY
Florida Bar No. 0174981
Assistant CCC
CAPITAL COLLATERAL REGIONAL
COUNSEL-MIDDLE
3801 Corporex Park Drive, Suite 210
Tampa, Florida 33619
813-740-3544
COUNSEL FOR APPELLANT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

PRELIMINARY STATEMENT

This proceeding involves an appeal of the circuit court's denial of Rule 3.851 relief to Thomas Gudinas' sentence of death. The following symbols will be used to designate references to the record in this appeal:

"R"-- the instant record on appeal to this Court

"Tr"-- the first record on direct appeal to this Court

"Pcr"-- the first postconviction record on appeal to this Court

All other references will be self-explanatory or otherwise explained herein.

STATEMENT OF THE CASE

On July 15, 1994, Mr. Gudinas was indicted by a grand jury for one count of premeditated first degree murder, two counts of sexual battery, attempted sexual battery, and attempted burglary with an assault. He plead not guilty to all counts.

On October 5, 1994, Mr. Gudinas filed a Motion To Dismiss Indictment Or To Declare That Death Is Not A Possible Penalty, premised upon the indictment's failure to allege the presence of aggravating circumstances essential to the charge of a capital offense (Tr. 291-92). Mr. Gudinas also filed Motion For Statement Of Aggravating Circumstances, wherein he sought notification of the aggravating circumstances upon which the state intended to rely in order to sustain a request for a sentence of death and (Tr. 318-21, 455). The court denied the motions (Tr. 454-55).

Mr. Gudinas was tried by a jury May 1-4, 1995, and found guilty of all counts, including "murder in the first degree, as charged in the indictment." (Tr. 542). After a penalty phase conducted on May 8-10, 1995, the jury recommended death by a vote of ten to two (Tr. V5, 562). On June 16, 1995, the circuit court sentenced Mr. Gudinas to death. This Court affirmed the convictions and sentences. *Gudinas v. State*, 693 So. 2d 953 (Fla. 1997). The United States Supreme Court denied certiorari. *Gudinas v. Florida*, 522 U.S. 936 (1997).

Mr. Gudinas filed a 3.850 motion for postconviction relief on June 5, 1998. The circuit court granted it in part and granted leave to amend. After two amendments and an evidentiary hearing on a claim of ineffective assistance of penalty phase counsel, the court denied relief (PCRV7, 132). Mr. Gudinas appealed the denial to this Court and filed a petition for writ of habeas corpus. This Court affirmed the circuit court and denied habeas relief. *Gudinas v. State*, 816 So.2d 1095 (Fla.2002).

STATEMENT OF FACTS

On March 28, 2002, this Court issued its opinion in *Gudinas v. Moore*, 816 So.2d 1095 (Fla.2002), in which this Court denied Mr. Gudinas habeas relief. This Court upheld its opinion in *Mills v. Moore*, 786 So.2d532, 536-39 (Fla.2001), that *Apprendi v. New Jersey*, 530 U.S. 466 (2000), does not apply to the Florida capital sentencing scheme. In *Mills*, this Court held "[b]ecause Apprendi did not overrule

Walton, the basic scheme in Florida is not overruled either." *Id.* at 536. To support this opinion, this Court relied on the language in *Apprendi* which states:

> Finally, this Court has considered and rejected the argument that the principles guiding our decision today render invalid state capital sentencing schemes requiring judges, after a jury verdict holding a defendant guilty of a capital crime, to find specific aggravating factors before imposing a sentence of death.

Id. at 537, *citing Apprendi*, 530 U.S. at 496.

On June 24, 2002, the United States Supreme Court issued the opinion in *Ring v. Arizona*, overruling *Walton v. Arizona*, 497 U.S. 639 (1990):

> *Walton* and *Apprendi* are irreconcilable; our Sixth Amendment jurisprudence cannot be home to both. Accordingly, we overrule *Walton* to the extent that it allows a judge, sitting without a jury, to find an aggravating circumstance necessary for imposition of the death penalty. See 497 U.S., at 647-649. Because Arizona's enumerated aggravating factors operate as 'the functional equivalent of an element of a greater offense,' *Apprendi*, 530 U.S. at 494, n. 19, the Sixth Amendment requires that they be found by a jury.

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

On October 14, 2003, Mr. Gudinas filed the Rule 3.851 motion at issue, challenging his death sentence in light of *Ring v. Arizona*. Subsequently, on October 24, 2002, this Court rendered opinions in *Bottoson v. Moore*, 833 So.2d 693 (Fla.2002), and *King v. Moore*, 831 So.2d 143 (Fla.2002). The circuit court

held a hearing on the motion on January 7, 2003, (R15-38). In an order rendered on January 16, 2003, the circuit court denied relief (R247-48). **Though this Court has rejected similar challenges in and since *Bottoson v. Moore*, 833 So.2d 693 (Fla.2002), and *King v. Moore*, 831 So.2d 143 (Fla.2002), to preclude any future arguments of waiver, abandonment, or procedural bar by the State of Florida and to perfect claims for future federal review, Mr. Gudinas filed a notice of appeal, and these proceedings follow.**

SUMMARY OF ARGUMENT

The process under which Mr. Gudinas was sentenced to death violated the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and corresponding Florida law because it did not allow the jury to reach a verdict with respect to an aggravating fact that is an element of the aggravated crime punishable by death, and Mr. Gudinas did not have notice of the crimes for which he was being tried.

ISSUE I

WHETHER THE CIRCUIT COURT ERRED IN HOLDING THAT MR. GUDINAS' DEATH SENTENCE DOES NOT

VIOLATE THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

A. Standard of Review

This is a legal question of constitutional magnitude so the appropriate standard of review is de novo. *See e.g. Stephens v. State*, 748 So.2d 1028, 1032-33 (Fla.2000).

B. Introduction

The United States Supreme Court decided *Ring v. Arizona,* 122 S.Ct. 2428, on June 24, 2002. The Court held that the Arizona statute pursuant to which, following a jury adjudication of a defendant's guilt of first-degree murder, the trial judge, sitting alone, determines the presence or absence of the aggravating factors required by Arizona law for imposition of the death penalty, violates the Sixth Amendment right to a jury trial in capital prosecutions; receding from *Walton v. Arizona*, 497 U.S. 639, 110 S.Ct. 3047, 111 L.Ed.2d 511(1000). If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact--no matter how the State labels it--must be found by a jury beyond a reasonable doubt. A defendant may not be exposed to a penalty *exceeding* the maximum he would receive if punished according to the facts reflected in the jury verdict alone. The Court noted that the "right to trial by jury guaranteed by the

Sixth Amendment would be senselessly diminished" if it encompassed the fact-finding necessary to increase a noncapital defendant's sentence by a term of years, as was the case in *Apprendi*, but not the fact-finding necessary to put him to death. *Ring*, 122 S.Ct. at 2243.

C. Florida's Death Penalty Statutory Scheme Violates the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and the Corresponding Provisions of the Florida Constitution.

In Florida, death is not within the maximum penalty for a conviction of first degree murder. Florida Statute 775.082 (1994) provided:

> 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 s. 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.

Fla. Stat. § 775.082 (1984). The statutory scheme does not permit a sentence greater than life predicated on the jury verdict alone. A penalty phase must then be conducted under 921.141. While the jury gives a recommendation, it is the judge who makes the findings and imposes the sentence.

In *Walton v. Arizona,* 497 U.S. 639, 110 S.Ct. 3047, 111 L.Ed.2d 511 (1990), the United States Supreme Court recognized that for purposes of the Sixth

Amendment, Florida's death penalty statute is indistinguishable from the statute invalidated in Ring:

> We repeatedly have rejected constitutional challenges to Florida's death sentencing scheme, which provides for sentencing by the judge, not the jury. *Hildwin v. Florida*, 490 U.S. 638, 109 S.Ct. 2055, 104 L.Ed.2d 728 (1989) (*per curiam*); *Spaziano v. Florida*, 468 U.S. 447, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984); *Proffitt v. Florida*, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976). In *Hildwin*, for example, we stated that "[t]his case presents us once again with the question whether the Sixth Amendment requires a jury to specify the aggravating factors that permit the imposition of capital punishment in Florida," 490 U.S., at 638, 109 S.Ct., at 2056, and we ultimately concluded that "the Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury."

Id., at 640-641, 109 S.Ct., at 2057.

> The distinctions Walton attempts to draw between the Florida and Arizona statutory schemes are not persuasive. It is true that in Florida the jury recommends a sentence, but it does not make specific factual findings with regard to the existence of mitigating or aggravating circumstances and its recommendation is not binding on the trial judge. A Florida trial court no more has the assistance of a jury's findings of fact with respect to sentencing issues than does a trial judge in Arizona.

Id. at 647-48. The Court reiterated this Sixth Amendment link between the Florida and Arizona capital sentencing schemes in *Ring*:

> In *Walton v. Arizona*, 497 U.S. 639 (1990), we upheld Arizona's scheme against a charge that it violated the Sixth Amendment. The Court had previously denied a Sixth

> Amendment challenge to Florida's capital sentencing system, in which the jury recommends a sentence but makes no explicit findings on aggravating circumstances; we so ruled, *Walton* noted, on the ground that 'the Sixth Amendment does not require that 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 curium*). *Walton* found unavailing attempts by the defendant-petitioner in that case to distinguish Florida's capital sentencing system from Arizona's. In neither State, according to *Walton*, were the aggravating factors 'elements of the offense'; in both States, they ranked as 'sentencing considerations' guiding the choice between life and death. 497 U.S. at 648 (internal quotation marks omitted).

Ring v. Arizona, 122 S.Ct. at 2433.

1. **Application of *Ring* to Florida's Sentencing Scheme**

This Court has previously held that, "[b]ecause *Apprendi* did not overrule *Walton*, the basic scheme in Florida is not overruled either." *Mills v. Moore*, 786 So.2d 532, 537 (Fla. 2001). *Ring* overruled *Walton*, and the basic principle of *Hildwin v. Florida*, 490 U.S. 638 (1989) (*per curiam*), which had upheld the capital sentencing scheme in Florida "on grounds that 'the Sixth Amendment does not require that the specific findings authorizing imposition of the sentence of death be made by the jury.'" *Ring*, 122 S.Ct. at 2437(*quoting Walton*, 497 U.S. at 648, *in turn quoting Hildwin*, 490 U.S. at 640-641)). Additionally, *Ring* undermines the reasoning of this Court's decision in *Mills* by recognizing (a)

that *Apprendi* applies to capital sentencing schemes,[1] *Ring*, 122 S.Ct. at 2432 ("Capital defendants, no less than non-capital defendants . . . are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment"); (b) that States may not avoid the Sixth Amendment requirements of *Apprendi* by simply "specif[ying] 'death or life imprisonment' as the only sentencing options,"[2] *Ring*, 122 S.Ct. at 2441-41, and (c) that the relevant and dispositive question is whether under state law death is "authorized by a guilty verdict standing alone." *Ring*, 122 S.Ct. at 2441.

Under Arizona law, after the jury's guilty verdict, the judge determined the existence or nonexistence of statutorily enumerated "aggravating circumstances" and any "mitigating circumstances." The death sentence could be imposed only if the judge finds at least one aggravating circumstance and no mitigating circumstances sufficiently substantial to call for leniency. A.R.S. §§ 13-703(C). Under Florida law, the trial judge conducts a separate sentencing proceeding after which the jury renders an advisory verdict. Fla.Stat. §§ 921.141. The ultimate

---

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

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

decision to impose a sentence of death, however, is made by the court after finding at least one aggravating circumstance. The jury recommends a sentence but makes no explicit findings on aggravating circumstances. Fla. Stat. § 921.141(3) provides that:

> (3) Findings in support of sentence of death.--Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:
> (a) That sufficient aggravating circumstances exist as enumerated in subsection (5), and
> (b) That there are insufficient mitigating circumstances to outweigh the aggravating circumstances.
> it must "set forth in writing its findings upon which the sentence of death is based."

Ibid. Thus, 921.141(3) requires that the trial judge make two separate findings of fact before a death sentence can be imposed: the judge must find as a fact that (1) "sufficient aggravating circumstances exist" and (2) "there are insufficient mitigating circumstances to outweigh the aggravating circumstances." *Id*. A defendant thus may be sentenced to death only if the sentencing proceeding "results in findings by the court that such person shall be punished by death." Fla. Stat. §775.082(1).

The statute is explicit that, without these required findings of fact by the trial judge, the defendant must be sentenced to life imprisonment: "If the court does not

make the findings requiring the death sentence within 30 days after the rendition of the judgment and sentence, the court shall impose [a] sentence of life imprisonment." Fla. Stat. §921.141(5).

This Court has held that the trial court must "independently weigh the evidence in aggravation and mitigation," and that "[u]nder no combination of circumstances can th[e] [jury's] recommendation usurp the judge's role by limiting his discretion." *Eutzy v. State*, 458 So.2d 755, 759 (Fla.1984), *cert. denied*, 471 U.S. 1045, 105 S.Ct. 2062, 85 L.Ed.2d 336 (1985). In one case, this Court vacated a sentence because the trial court had given "undue weight to the jury's recommendation of death and did not make an *independent* judgment of whether or not the death penalty should be imposed." *Ross v. State*, 386 So.2d 1191, 1197 (1980) (emphasis added). Further, for purposes of sentencing, the jury's guilt-phase findings cannot be conclusive as to the existence of any aggravating factor, and the judge is required by the statute to make separate findings at sentencing to support any such factor. Fla. Stat. § 921.141(3).

Because the Florida death penalty statutory scheme requires fact-finding by the trial judge before a death sentence may be imposed, it is unconstitutional under the principles announced in *Ring*. Like the Arizona statute, the Florida statute violates the rule enunciated in *Ring* and *Apprendi* that "[i]f a state makes an increase in a defendant's authorized punishment contingent on a finding of a fact,

that fact . . . . must be found by a jury beyond a reasonable doubt." Just as the Arizona statute, the Florida statute mandates that a defendant "cannot receive a death sentence unless a judge makes the factual determination that a statutory aggravating circumstance exists. Without that critical finding, the maximum sentence to which the defendant is exposed is life imprisonment, and not the death penalty." Because the judge – and not the jury – must make specific findings of fact before a death sentence under Florida law, *Ring* holds squarely that the statute is unconstitutional under the Sixth and Fourteenth Amendments.

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

The fact that the Florida statutory scheme, unlike that of Arizona, provides for an advisory jury verdict has no bearing on the analysis set out above. Such a conclusion is refuted by United States Supreme Court cases which inescapably link the schemes. E.g. *Walton* at 648*; Ring* at 2437. The trial judge is directed by Section 921.141(3) to make the fact findings necessary to support a death sentence "notwithstanding the recommendation of the majority of the jury." Unless the judge makes the "finding requiring the death sentence," the defendant must be sentenced to life. The jury's advisory verdict does not alter the controlling point under *Ring;* the Florida statute is unconstitutional because a death sentence cannot be imposed without fact findings by the trial judge. Ring requires that: "All the facts which

must exist in order to subject the defendant to a legally prescribed punishment must be found by the jury." 122 S.Ct. at 2240. Nothing in Florida law permits the imposition of a death sentence based on the jury's findings of fact. To the contrary, Florida law provides that the jury's role is merely advisory and that the trial court must undertake the requisite fact-finding. Section 921.141(3) explicitly requires the court to "set forth its findings . . . .as to the facts" supporting a death sentence.

3. Florida Juries Do Not Make Findings of Fact

This Court has rejected the idea that a defendant convicted of first degree murder has the right "to have the existence and validity of aggravating circumstances determined as they were placed before his jury." *Engle v. State*, 438 So.2d 803, 813 (Fla. 1983), *explained in Davis v. State*, 703 So.2d 1055, 1061 (Fla. 1997). The statute specifically requires the judge to "set forth . . . findings upon which the sentence of death is based as to the *facts*," but asks the jury generally to "render an advisory sentence . . . based upon the following *matters*" referring to the sufficiency of the aggravating and mitigating circumstances. Fla. Stat. § § 921.141(2) & (3) (emphasis added). Because Florida law does not require that any number of jurors must agree that the State has proven the existence of a given aggravating circumstance before it may be deemed "found," it is impossible to say that "the jury" found proof beyond a reasonable doubt of a particular

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

As the Supreme Court said in *Walton*, "[a] Florida trial court no more has the assistance of a jury's findings of fact with respect to sentencing issues than does a trial judge in Arizona." *Walton*, 497 U.S. at 648. This Court has made the point even more strongly by repeatedly emphasizing that the trial judge's findings must be independent of the jury's recommendation. *See Grossman v. State*, 525 So.2d 833, 840 (Fla. 1988) (collecting cases). Because the judge must find that "sufficient aggravating circumstances exist" "notwithstanding the recommendation of a majority of the jury," Fla. Stat. § 921.141(3), she may consider and rely upon evidence not submitted to the jury. *Porter v. State*, 400 So.2d 5 (Fla. 1981); *Davis v. State*, 703 So.2d 1055, 1061 (Fla. 1997). The judge is also permitted to consider and rely upon aggravating circumstances that were not submitted to the jury. *Davis*, 703 So.2d at 1061, *citing Hoffman v. State*, 474 So.2d 1178 (Fla. 1985) (court's finding of "heinous, atrocious, or cruel" aggravating circumstance proper though jury was not instructed on it); *Fitzpatrick v. State*, 437 So.2d 1072, 1078 (Fla. 1983) (finding of previous conviction of violent felony was proper even though jury was not instructed on it); *Engle*, *supra*, 438 So.2d at 813.

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

4. Florida Juries Do Not Render a Verdict on Elements of Capital Murder

Although "[Florida's] enumerated aggravating factors operate as 'the functional equivalent of an element of a greater offense,'" and therefore must be found by a jury like any other element of an offense, *Ring*, 122 S.Ct. at 2443 (quoting *Apprendi*, 530 U.S. at 494), Florida law does not require the jury to reach a verdict on any of the factual determinations required before a death sentence could be imposed. Section 921.141(2) does not call for a jury verdict, but rather an "advisory sentence." This Court has made it clear that "'the jury's sentencing recommendation in a capital case is *only advisory*. The trial court is to conduct its own weighing of the aggravating and mitigating circumstances . . . .'" *Combs*, 525 So.2d at 858 (*quoting Spaziano v. Florida*, 468 U.S. 447, 451) (emphasis original in *Combs*). "The trial judge . . . is not bound by the jury's recommendation, and is given final authority to determine the appropriate sentence." *Engle*, 438 So.2d at

813. It is reversible error for a trial judge to consider herself bound to follow a jury's recommendation and thus "not make an independent judgment whether the death sentence should be imposed." *Ross v. State*, 386 So.2d 1191, 1198 (Fla. 1980).

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

Because Florida law does not require any two, much less twelve, jurors to agree that the government has proved an aggravating circumstance beyond a reasonable doubt, or to agree on the same aggravating circumstances when advising that "sufficient aggravating circumstances exist" to recommend a death sentence, there is no way to say that "the jury" rendered a verdict as to an aggravating circumstance or the sufficiency of them. As Justice Shaw observed in *Combs*, Florida law leaves these matters to speculation. *Combs*, 525 So.2d at 859 (Shaw, J., concurring).

5. The Advisory Verdict Is Not Based on Proof Beyond a Reasonable Doubt

"If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt." *Ring*, 122 S.Ct. at 2439. One of the elements that had to be established for Mr. Gudinas to be sentenced to death was that "sufficient aggravating circumstances exist" to call for a death sentence. Fla. Stat. § 921.141(3).[3] The jury was not instructed that it had to find this element proved beyond a reasonable doubt. In fact, it was not instructed on *any* standard by which to make this essential determination. Although Mr. Gudinas' jury was told that individual jurors could consider only those aggravating circumstances that had been proved beyond a reasonable doubt, it was not required to find beyond a reasonable doubt "whether sufficient aggravating circumstances exist to justify the imposition of the death penalty."

6. A Unanimous Twelve Member Jury Verdict Is Required in Capital Cases under United States Constitutional Common Law.[4] Florida's Capital Sentencing Statute Is Therefore

---

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

[4] In *Cabberiza v. Moore*, 217 F.3d 1329 (11th Cir. 2000), the court noted that the United States Supreme Court "has not had occasion to decide how many

Unconstitutional on its Face and as Applied.[5]

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

It would be impermissible and unconstitutional to rely on the jury's advisory sentence as the basis for the fact-findings required for a death sentence, because the statute requires only a majority vote of the jury in support of that advisory sentence. In *Harris v. United States*, 122 S.Ct. 2406 (2002), rendered on the same day as *Ring*, the U.S. Supreme Court held that under the *Apprendi* test "those facts setting the outer limits of a sentence, and of the judicial power to

---

jurors, and what degree of unanimity, the Sixth and Fourteenth Amendments require in capital cases." *Id*. n.15. *Duncan v. Louisiana,* 391 U.S. 145 (1968), and *Apodaca v. Oregon,* 406 U.S. 404 (1972) were noncapital cases. Both cases cite in their first footnotes the applicable state constitutional provisions, which require twelve person unanimous juries in capital cases. The Florida constitution likewise requires twelve person unanimous juries in capital cases.

[5]The sentencing recommendation in this case was not unanimous.

impose it, are the elements of the crime for the purposes of the constitutional analysis." *Id*. at 2419. And in *Ring*, the Court held that the aggravating factors enumerated under Arizona law operated as "the functional equivalent of an element of a greater offense" and thus had to be found by a jury. In other words, pursuant to the reasoning set forth in *Apprendi*, *Jones*, and *Ring*, aggravating factors are equivalent to elements of the capital crime itself and must be treated as such.

In *Williams v. Florida*, 399 U.S. 78, at 103 (1970), the United States Supreme Court noted that: "In capital cases, for example, it appears that no state provides for less than 12 jurors–a fact that suggests implicit recognition of the value of the larger body as a means of legitimizing society's decision to impose the death penalty." In its 1979 decision reversing a non-unanimous six person jury verdict in a non-capital case, the United States Supreme Court held that "We think this near-uniform judgement of the Nation provides a useful guide in delimiting the line between those jury practices that are constitutionally permissible and those that are not." *Burch v. Louisiana*, 441 U.S. 130, 138 (1979). The federal government requires unanimous twelve person jury verdicts. "[T]he jury's decision upon both guilt and whether the punishment of death should be imposed must be unanimous. This construction is more consonant with the general humanitarian purpose of the Anglo-American jury system." *Andres v. United States*, 333 U.S. 740, 749 (1948). *See generally Richard A. Primus, When Democracy Is Not Self-Government:*

Toward a Defense of The Unanimity Rule For Criminal Juries, 18 Cardozo L. Rev. 1417 (1997).

7. Juror Unanimity is Required by Florida Constitutional Law

Ring held that the existence of at least one statutory aggravating circumstance must be proven to a jury beyond a reasonable doubt. In essence, the aggravating circumstance is an essential element of a new crime that might be called “aggravated” or “death-eligible” first degree murder. The death recommendation in this case was not unanimous.

Florida requires that verdicts be unanimous. Although Florida's constitutional guarantee of a jury trial [Art. I, §§§§ 16, 22, Fla. Const.] has never been interpreted to require a unanimous jury verdict, it has long been the legal practice of this state to require such unanimity in all criminal jury trials; Florida Rule of Criminal Procedure 3.440 memorializes this long-standing practice: "[n]o [jury] verdict may be rendered unless all of the trial jurors concur in it." No statute or rule of procedure in Florida has ever expressly abolished this unanimity requirement for any criminal jury trial in this state. *See In re Florida Rules of Criminal Procedure,* 272 So.2d 65, 66-69 (Fla.1972) (Roberts, J., dissenting). It is therefore settled that "[i]n this state, the verdict of the jury must be unanimous" and that any interference with this right denies the defendant a fair trial. *Jones v. State,* 92 So.2d 261 (Fla.1956).

8. The Harmless Error Doctrine Cannot be Applied to Deny Relief

As Justice Scalia explained in *Sullivan v. Louisiana*, 508 U.S. 275 (1993): "[T]he jury verdict required by the Sixth Amendment is a jury verdict of guilty beyond a reasonable doubt." *Sullivan*, 508 U.S. at 278. Where the jury has not been instructed on the reasonable doubt standard,

> there has been no jury verdict within the meaning of the Sixth Amendment, [and] the entire premise of *Chapman*[6] review is simply absent. There being no jury verdict of guilty-beyond-a-reasonable-doubt, the question whether the *same* verdict of guilty-beyond-a-reasonable-doubt would been rendered absent the constitutional error is utterly meaningless. There is no *object*, so to speak, upon which harmless-error scrutiny can operate.

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

---

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

In *State v. Overfelt*, 457 So.2d 1385 (1984), this Court held "that before a trial court may enhance a defendant's sentence or apply the mandatory minimum sentence for use of a firearm, the jury must make a finding that the defendant committed the crime while using a firearm either by finding him guilty of a crime which involves a firearm or by answering a specific question of a special verdict form so indicating.. . . To allow a judge to find that an accused actually possessed a firearm when committing a felony in order to apply the enhancement or mandatory sentencing provisions of section 775.087 would be an invasion of the jury''s historical function. . . "

In *State v. Hargrove*, 694 So.2d 729 (1997), Justice Harding, writing for the majority, answered the following certified question:

> When a defendant charged with committing a crime with the use of a firearm does not contest its use and instead defends on the ground that he was insane when he used the firearm, and the record is clear beyond any doubt that defendant did actually use the firearm, may the sentencing judge impose the mandatory minimum sentence for use of a firearm without a specific finding of that fact by the jury?

The court held that, despite clear and uncontested evidence that Hargrove used a firearm, his sentence could not be enhanced absent a jury verdict which specifically referred to the use of a firearm by special verdict form, interrogatory, or by reference "to the information where the information contained a charge of a crime

committed with the use of a firearm." *Id.* at 731. *See also Tucker v. State,* 726 So.2d 768 (Fla.1999); *State v. Tripp,* 642 So.2d 728 (Fla.1994). In *State v. Estevez,* 753 So.2d 1 (Fla.1999), this Court held that jury must expressly determine amount of cocaine involved before relevant mandatory minimum sentence under cocaine trafficking statute can be imposed, even in cases where evidence is uncontroverted.[7] In none of these cases does the court employ a harmless error analysis. Instead, the court's concern was that such judicial fact-finding invaded the province of the jury. "Even where the use of a firearm is uncontested, the overriding concern of *Overfelt* still applies: the jury is the fact finder, and use of a firearm is a finding of fact." *Hargrove* at 730-31. Such fact-finding by the judge "would be an invasion of the jury's historical function". *Overfelt* at 1387.

9. Mr. Gudinas' Death Sentence Violates the State and Federal Constitutions Because the Elements of the Offense Necessary to Establish Capital Murder Were Not Charged in the Indictment

Jones v. United States, 526 U.S. 227 (1999), held that "under the Due Process Clause of the Fifth Amendment and the notice and jury guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury,

---

[7]In *Estevez*, the court relied on *Jones v. United States,* 526 U.S. 227 (1999), one of *Ring's* progenitors.

and proven beyond a reasonable doubt." *Jones* at 243, n.6. *Apprendi v. New Jersey*, 530 U.S. 466 (2000), held that the Fourteenth Amendment affords citizens the same protections when they are prosecuted under state law. *Apprendi*, 530 U.S. at 475-476.[8] *Ring* held that a death penalty statute's "aggravating factors operate as 'the functional equivalent of an element or a greater offense.'" *Ring*, 122 S.Ct. at 2443, *quoting Apprendi* at 494, n. 19. In *Jones*, the Supreme Court noted that "[m]uch turns on the determination that a fact is an element of an offense, rather than a sentencing consideration," because "elements must be charged in the indictment." *Jones,* 526 U.S. at 232.

Like the Fifth Amendment to the United States Constitution, Article I, section 15 of the Florida Constitution provides that "No person shall be tried for a capital crime without presentment or indictment by a grand jury." Florida law clearly requires every "element of the offense" to be alleged in the information or indictment. In *State v. Dye*, 346 So. 2d 538, 541 (Fla. 1977), this Court said "[a]n information must allege each of the essential elements of a crime to be valid. No essential element should be left to inference." In *State v. Gray,* 435 So. 2d 816, 818 (Fla. 1983), this Court said "[w]here an indictment or information wholly omits to 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

---

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

corpus." *Gray*, 435 So.2d at 818. Finally, in *Chicone v. State*, 684 So. 2d 736, 744 (Fla. 1996), this Court said "[a]s a general rule, an information must allege each of the essential elements of a crime to be valid."

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

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

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

The Sixth Amendment requires that "[i]n all criminal prosecutions, the accused shall . . . be informed of the nature and cause of the accusation . . . ." A conviction on a charge not made by the indictment is a denial of due process of

law. *State v. Gray, supra, citing Thornhill v. Alabama,* 310 U.S. 88 (1940), and *De Jonge v. Oregon*, 299 U.S. 353 (1937).

Because the State did not submit to the grand jury, and the indictment did not state, the essential elements of the aggravated crime of capital murder, Mr. Gudinas' right under Article I, section 15 of the Florida Constitution, and the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution were violated. By omitting any reference to the aggravating circumstances that would be relied upon by the State in seeking a death sentence, the indictment prejudicially hindered Mr. Gudinas "in the preparation of a defense" to a sentence of death. Fla. R. Crim. Pro. 3.140(o).

10. The Habitual Violent Offender Sentences on Counts One and Two Violate the Sixth and Fourteenth Amendments to the United States Constitution.

Mr. Gudinas was convicted of attempted burglary with and assault and attempted sexual battery, both of which are second degree felonies. Fla. Stat. 810.02(2); 794.011(3); 777.04(1). The maximum sentence for each crime was a term of imprisonment not exceeding 15 years. Fla. Stat. 775.082(3)(c). However, this Court adjudged Mr. Gudinas a habitual violent felony offender and sentenced him to 30 years on each count, exceeding the statutory maximum sentence and violating the dictates of *Apprendi*.

In *Apprendi*, the issue was whether a New Jersey hate crime sentencing

enhancement, which increased the punishment beyond the statutory maximum, operated as an element of an offense so as to require a jury determination beyond a reasonable doubt. *Apprendi*, 120 S.Ct. at 2365. "[T]he relevant inquiry here is not one of form, but of effect–does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?" *Apprendi*, 120 S.Ct. at 2365. In *Harris v. United States*, 122 S.Ct. 2428, rendered on the same day as *Ring*, the U.S. Supreme Court held reaffirmed the *Apprendi* test and held "those facts setting the outer limits of a sentence, and of the judicial power to impose it, are the elements of the crime for the purposes of the constitutional analysis." *Id*. Applying this test, it is clear that the habitual violent felony offender status is an element of the offense which must noticed, submitted to a jury, and proven beyond a reasonable doubt. This did not occur in Mr. Gudinas' case, and his increased sentences are therefore unconstitutional.[9]

---

[9]Several Florida District Courts of Appeal have held that the habitual felony offender statute is not unconstitutional under *Apprendi* because habitual offender status falls with in a "recidivism" exception to the constitutional dictates announced in *Apprendi*. *See e.g. Wright v. State*, 780 So.2d 216 (Fla. 5th DCA 2001); *Saldo v. State*, 789 So.2d 1150 (Fla. 3d DCA 2001); *Jones v. State*, 791 So.2d 580 (Fla. 1st DCA 2001); *Gordon v. State*, 797 So.2d 892 (Fla. 4th DCA 2001). However, these Courts have applied a recidivism exception that does not exist as a matter of law.

In *Almendarez-Torres v. United States*, 523 U.S. 224 (1998) , the United States supreme Court held, in a 5-4 decision, that recidivism was an exception to the constitutional rule that any fact that increases the maximum punishment from that authorized by the jury's verdict is an element of an offense which must be

charged in an indictment. *Id.* The narrow majority based this decision on what it termed a "tradition" of treating recidivism as a sentencing factor rather than an element of an offense. *Id*. Four Justices dissented, noting that the majority opinion was inconsistent with the Court's jurisprudence emanating from *In re Winship*, 397 U.S. 358 (1970) and *Mullaney v. Wilbur*, 421 U.S. 684, 698 (1975). *Id*. at 249-260. They noted that because the fact of recidivism substantially increased the maximum permissible punishment, it was an element of the crime. *Id.* They dissent further contended that recidivism was not traditionally a sentencing factor because, at common law, "the fact of prior convictions *had* to be charged in the same indictment charging the underlying crime, and submitted to the jury for determination along with that crime. *Id*. at 261 (internal citations omitted).

The next term, in *Jones v. United States*, 526 U.S. 227 (1999), the Court held, "under the Due Process Clause of the Fifth Amendment and the notice and jury guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." *Jones v. United States*, 526 U.S. 227, 243, n.6 (1999). The Court noted that several features of the statute at issue in Jones distinguished that case from *Almendarez-Torres*. *Jones*, 526 U.S. at 232. The Court noted that *Almendarez-Torres* was not dispositive of the question presented in *Jones* for two reasons. First, *Almendarez-Torres* involved only the rights to indictment and notice, while *Jones* also implicated the Sixth Amendment right to jury trial. *Jones*, 526 U.S. at 248-49. Second the Court noted, "the distinctive significance of recidivism leaves no question that the Court regarded that fact as potentially distinguishable for constitutional purposes from other facts that might extend the range of possible sentencing." Id. at 249. The Court did not address the issue of whether the holding of *Almendarez-Torres* could survive a Sixth Amendment challenge.

The next term, in *Apprendi v. New Jersey*, the Court held that the Fourteenth Amendment affords citizens the same protections announced in *Jones* under state law. *Apprendi*, 120 S.Ct. 2348, 2355 (2000). Again, the issue of whether the holding of *Almendarez-Torres* could survive a Sixth Amendment challenge was not raised or decided. In his concurrence however, Justice Thomas, one of the *Almendarez-Torres* majority, revisited the issue. Explaining that *Apprendi* was "nothing more than a return to the *status quo ante*–the status quo that reflected the original meaning of the Fifth and Sixth Amendments", Justice Thomas explained that the recidivism exception announced in *Almendarez-Torres* was an error. *Apprendi*, 530 U.S. at 519-20. Justice Thomas affirmed the *Almendarez-Torres*

CONCLUSION AND RELIEF SOUGHT

For all of the reasons stated herein, Mr. Gudinas asks that his convictions and sentences, including his sentence of death, be vacated and that he be sentenced

---

opinion that, at common law, prior convictions which increased the punishment for a crime were elements of a new, aggravated crime. *Id*. Thus, the holding of *Almendarez-Torres* is no longer the view of the majority.

The United States Supreme Court has never addressed the issue of whether *Almendarez-Torres* (which implicated only the Fifth Amendment indictment and notice clause) can survive challenge under the Sixth and Fourteenth Amendments, and the Court specifically did not address the issue in *Ring*. However, the Court's other decisions indicate that *Almendarez-Torres* cannot survive a Sixth Amendment challenge. As discussed above, the *Almendarez-Torres* majority is now a minority. *Jones*, *Apprendi*, and *Ring* mark a return to the common law and the principles announced in *Winship* and *Mullaney*. Consistent and, in fact implicit, in this jurisprudence, is the fact that the majority of the Supreme Court believes that any *fact* that increases the maximum possible punishment for a crime beyond that authorized by the jury verdict is an element of the offense subject to the Sixth Amendment's jury trial guarantees. The existence of a prior conviction is such a *fact* which must be found by a jury. *See Ring*, 122 S.Ct. at 2443 (SCALIA, J., concurring)("[W]herever those factors exist they must be subject to the usual requirements of the commonlaw, and to the requirement enshrined in our Constitution, in criminal cases: they must be found by the jury beyond a reasonable doubt. . . . What today's decision says is that the jury must find the existence of the *fact* that an aggravating factor existed."); *Apprendi*, 530 U.S. at 507-8 (THOMAS, J., concurring)("As Justice SCALIA has explained, there was a tradition of treating recidivism as an element. . . .Courts treated the fact of a prior conviction just as any other fact that increased the punishment by law. . . .the fact of a prior conviction was an element, together with the facts constituting the core crime of which the defendant was charged, of a new, aggravated crime.")(internal citations omitted).

to life imprisonment.

CERTIFICATE OF COMPLIANCE

I hereby certify that a true copy of the foregoing Initial Brief of Appellant/Petition for Habeas Corpus was generated in a Times New Roman, 14 point font, pursuant to Florida Rule of Appellate Procedure 9.210.

_____

Leslie Anne Scalley
Florida Bar No. 0174981
Assistant CCC
CAPITAL COLLATERAL REGIONAL
COUNSEL-MIDDLE
3801 Corporex Park Drive
Suite 210
Tampa, FL 33619

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Initial Brief of Appellant/Petition for Habeas Corpus has been furnished by U. S. Mail to all counsel of record on this _____ day of June, 2003.

_____
_

LESLIE ANNE SCALLEY
Florida Bar No. 0174981
Assistant CCC
CAPITAL COLLATERAL REGIONAL
COUNSEL-MIDDLE
3801 Corporex Park Drive, Suite 210
Tampa, Florida 33619
813-740-3544
Attorney For Defendant

Copies furnished to:

The Honorable Belvin Perry, Jr.
Chief Circuit Court Judge
37 North Orange Avenue, Room 1110
Orlando, FL 32801

Kenneth S. Nunnelley
Assistant Attorney General
Office of the Attorney General
444 Seabreeze Boulevard, Fifth Floor
Daytona Beach, FL 32118-3951

Chris A. Lerner
Assistant State Attorney
Office of the State Attorney
415 North Orange Avenue
Orlando, FL 32801