IN THE SUPREME COURT OF FLORIDA

No. SC04-708

MERYL MCDONALD

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. McDonald seeks a writ of habeas corpus addressed to Respondent.

III. STATEMENT OF THE CASE

Mr. McDonald 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. McDonald seeks review of the right to a full and fair evidentiary and the limitations of Fl.R.Crim.P. 3.111(d).

I. 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 go 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:

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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).

> "'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 has 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." *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

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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.

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

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

which the Florida court had upheld its capital-sentencing statute after *Apprendi* – the idea that aggravating circumstances do 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 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

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

> *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.

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.
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> "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 a death sentence.

> "Because a finding of at least one aggravating circumstance is necessary to render a defendant 'death qualified,' that particular aggravator is

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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.]

> 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 postconviction 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

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.

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

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 *Schriro v. Summerlin*, Case No. 03-526, 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

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

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 developed 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 this Court's own independent analysis. *Id*. The Missouri Supreme Court then when on to analyze this 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 this Court. Again, the Missouri Supreme Court analyzed this 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 did recognize that this Court's jurisprudence allowed the question of executing the mentally retarded would be open for further review. Id. at 403-04.

Finally, the Missouri Supreme Court reviewed this Court's decision in *Atkins v. Virginia*, 536 U.S 304 (2002). It proceeding 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 this Court's independent analysis. Id. at 404-06.

The Missouri, 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 Supreme Court. Taken to its logical conclusion, the 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 way in striking down the death penalty, see *Furman v. Georgia*, 408 U.S. 238 (1972) nor did it operate this way when it cleared the path for its eventual revival.

In *Gregg*, *Jurek*, *Proffitt*, and *Woodson*, the Supreme Court undertook a catagorical 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.[8] "Having reviewed the statutes

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[8] Sentences imposed under Florida's death penalty statute were reversed in *bAnderson 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.

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 did 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*.

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.

III. 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 in own statute and departing 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. McDonald'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.[9] 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

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[9] 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.

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).[10]

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 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

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[10] *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).

"the distinction relied upon in *Walton* between elements of an offense and sentencing factors,"[11] *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 *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*.

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[11] "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.

As *Ring* and *Walton* alike recognize, 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.[12] The statute provides that the findings of aggravating circumstances 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[13] – a procedure

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[12] 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."

[13] 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:

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.*[14] By contrast, the jury's role in the capital-sentencing 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).[15] The jury does this by "render[ing] an advisory sentence to the court," Fla.

> "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).

[14] 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).

[15] 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).

Stat. § 921.141(2),[16] which does not have to set forth any specific findings of fact, *ibid.*; *Jones v. State*, 569 So.2d 1234, 1238 (Fla. 1990),[17] and is not required to be 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.

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[16] "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.

[17] "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 . . . ." *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).

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);[18] *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 67 county 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 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

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

sooner or later; and the sooner this is done, the more efficiently a constitutional capital-sentencing regime will be restored in Florida.

IV. Mr. McDonald's Case Does Not Raise the Problem of a Prior Violent Conviction

The argument that *Almendarez-Torres v. United States*, 523 U.S. 224 (1998) creates an exception to *Ring* is inapplicable to Mr. McDonald because he does not have a prior violent felony. As noted in the direct appeal decision, this Court found that Mr. McDonald had four aggravators: 1) The murder was committed during the course of a burglary/robbery; 2) the murder was committed for pecuniary gain; 3) the murder was heinous, atrocious, or cruel; and, 4) the murder was cold, calculated and premeditated. *McDonald v. State*, 743 So.2d 501 (Fla. 1999).

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

A. *Faretta*

Mr. McDonald was represented by the Office of the Capital Collateral Regional Counsel for the Middle Region of Florida (hereinafter "CCRC-M"). This office investigated Mr. McDonald's case and subsequently filed an appropriate motion for postconviction relief. Mr. McDonald, however, did not verify the motion. His reluctance was not based on any allegation that the facts contained in the motion were invalid but rather because "that he do not trust or has confidence

in CCRC ability to represent the defendant."[19] In his motion, Mr. McDonald alleges that CCRC-M failed to challenge the collection of evidence in violation of the Fourth Amendment, failure to challenge the DNA evidence presented at trial, failure to challenge Susan Shore's testimony, failure to challenge the violation of Defendant's right to a speedy trial, failure to find the alibi witnesses and failure to challenge jurors.

It is clear from the ROA that CCRC-M's original Motion to Vacate included these claims, and more. The trial court conducted a hearing on January 30, 2001 to address the claims contained in Mr. McDonald's motion to discharge. The trial court denied the motion. Another motion was filed by Mr. McDonald on March 2, 2001 in which he raised the same allegations. Again, the trial court conducted a hearing on April 18, 2001 and found no conflict. At that point, the trial court conducted a *Faretta* hearing pursuant to *Faretta v. California*, 422, U.S. U.S. 806 (1975) and Fl.R.Crim.P. 3.111(d).[20] The trial court found that Mr. McDonald had voluntarily, intelligently and knowingly waived his right to counsel and discharged

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[19] This allegation was made in the Defendant's pro se motion to discharge CCRC filed on March 5, 2001.

[20] The trial court's order does not specifically mention Rule 3.111(d) but this Court promulgated the Rule to comport with Faretta.

CCRC-M.[21]

Mr. McDonald filed an amended Motion to Vacate on July 10, 2001 which was substantially the same as the original one he filed in December of 2000. Neither motion filed by the Defendant *pro se* adequately addressed in any manner the ineffectiveness of counsel in failing to adequately investigate and present mitigation evidence.

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

[21] The trial court appointed CCRC-M standby counsel which, under the law, has no legal bearing since a defendant does not have the right to hybrid representation.

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.

When a motion to discharge counsel is based on “ineffectiveness”, the proper procedure is to conduct a Nelson inquiry first to determine whether counsel is adequately representing the defendant. If the trial court finds that counsel is not effective in representing the defendant, then new counsel should be appointed

rather than allowing the defendant to proceed *pro se*. *Malone v. State*, 852 So.2d 412 (Fla. 5th DCA 2003); *see McKinney v. State*, 850 So.2d 680 (Fla. 4th DCA 2003).

There is no transcript of the proceedings contained in the ROA for this case regarding the Faretta hearing. This Court has no evidence to determine whether Mr. McDonald made a knowing, intelligent and voluntary waiver of his right to counsel because there is no record of the proceedings from the January 30, 2001 or the April 18, 2001 hearings. Worse yet there is no transcript from the July 25, 2001 *Huff* hearing in which Mr. McDonald made many legal and tactical errors. The only transcript from the postconviction proceedings is of the evidentiary hearing in which the trial did not conduct another *Faretta* hearing.

B. Minimum Standards

This Court and the United States Supreme Court have long recognized that "death is different".[22] In so recognizing, this Court has promulgated Minimum

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

Standards for Attorneys in Capital Cases under Fl.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 postconviction proceeding is any postconviction 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.
>
> (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 cocounsel; 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 cocounsel 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 cocounsel from attorneys on the lead counsel or cocounsel 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 cocounsel.
(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 cocounsel 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 seperated 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 Chpater 27, there are higher standards for

representation of capital postconviction cases than regular postconviction cases.[23] 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 postconviction 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 2537. Guideline 5.1 establishes the minimum qualifications of trial, appellate and

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[23] 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.

postconviction attorneys. Those standards are high and requiring large amounts of training and experience.

While there is no transcript of any Faretta hearing before this court at this time, it is clear that, based on Mr. McDonald's performance, that he does not posses any of the skills envisioned by any of the aforementioned standards.

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

From the very beginning, the trial court should have been aware of Mr. McDonald's inability to knowingly, intelligently and voluntarily waive his right to counsel when he filed his first pro se Motion to Vacate. As stated above, there is no attack on the investigation and presentation of mitigation evidence by his trial attorneys. Wiggins is very clear as to the minimum standards an attorney must meet with regards to this very important issue. In the motion filed by CCRC-M, it is alleged that the attorneys presented no meaningful mitigation evidence and clearly did not do the minimum required by the Constitution. Rather, the post-hoc rationalization of the attorneys was allowed to stand as to why a lot of investigation was not done. As such, the trial court abused it discretion in allowing Mr. McDonald to proceed pro se and waive his mitigation.

The trial court, as mentioned above, failed to renew the *Faretta* inquiry when it was clear from the record that Mr. McDonald was not prepared for the

evidentiary hearing. At the outset, Mr. McDonald declared that he is not prepared for the hearing and moved for a continuance. (ROA Vol. 20, pg. 3230-31). The trial court observed that Mr. McDonald did not even follow the basic and rudimentary rule of noticing the trial court. (Vol. 20, pgs. 3226, 3227) The trial court denied his motion.

Next, Mr. McDonald moved to have a DNA expert appointed to help him with his case. (ROA Vol. 20, pg. 3252-53). This was denied by the trial. What is worse, rather than protecting Mr. McDonald's rights, the trial court made every attempt to deny him rights when he tried to present evidence. At the previous Huff hearing, the trial court forced Mr. McDonald to waive his right to investigate and present his own DNA evidence. The trial court instead forced Mr. McDonald to rely upon the evidence adduced at Mr. Gordon's evidentiary hearing. (ROA Vol. 20, pg. 3252-55). Mr. McDonald's standby counsel objected to waiving this right. (Id. at 3254) Further on, the trial court even conceded that Mr. McDonald made many errors but proceeded with the hearing regardless of Mr. McDonald's rights.

> I'm prepared to find this man is an intelligent man. He's made some serious errors here. I'm sorry, get on the telephone, do what you need to do to see if can get somebody here. If you can't, it's his fault. I'm going to have a hearing, I'm going to conclude it by tomorrow, and then I'm going to do an order.

(ROA Vol. 20 pg. 3267).

Standby counsel attempted to help Mr. McDonald proceed with his DNA argument and to help clarify his request for a DNA expert. (ROA Vol. 20, pg. 3261-66) When standby counsel attempted to help further, he was quickly rebuked for trying to help:

> Yes, and I want you to stop because that is what the problem is. They don't their cake and eat it too. I've warned him about the dangers of self-representation. He has elected to represent himself. You are standby counsel, not his counsel. **Therefore, you are out of order.**

(Id. at 3266)

Again, instead of protecting Mr. McDonald's rights as a pro se litigant, the trial court used his status as a pro se litigant to his disadvantage by forcing him to call himself as a witness. (ROA Vol 21, pg. 3387) The court made no inquiry as to whether he was waiving his Fifth Amendment Right to remain silent. Rather, the trial court compelled him to be a witness against himself. Id.

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 Fl.R.Crim.P. 3.11(d)[24] 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 *Faretta*. 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 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).

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[24] 719 So.2d 873 (Fla. 1998).

Prior to the amendments to Fl.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 dis-advantages 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.

In the instant case, this Court has no record of the Faretta inquiry and whether the correct colloquy was given. There is no evidence that Mr. McDonald made the decision with his "eyes wide open". Actually, there is evidence to the contrary as he proceeded along the postconvition appeal process. One striking example is that Mr. McDonald even waived those claims that this Court pointed out in it's direct appeal decision that might rise to a level of ineffectivenss of counsel if investigated.

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. When Mr. McDonald

requested resources, such as a DNA expert, he was denied his request by the trial court. When he requested discovery, he was likewise denied by the trial court. (ROA Vol 20, pg. 3250). When Mr. McDonald requested transcripts, transcripts that would be available to CCRC-M defendants, he was denied access. (ROA Vol. 20, pg. 3237-44).

Mr. McDonald was denied a full and fair evidentiary hearing because of the inadequate Faretta hearing and the trial court's inability to protect his rights. As such, this Court, after a review of the appropriate transcripts, should remand this case back to the trial court so it may either conduct a proper inquiry or proceed to a full evidentiary hearing with CCRC-M as counsel.

Conclusion

Mr. McDonald 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 April, 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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