IN THE SUPREME COURT OF FLORIDA

CASE NO. SC03-2282____

BOBBY RALEIGH

Petitioner,

v.

JAMES V. CROSBY,

Secretary, Florida Department of Corrections,

Respondent.

PETITION FOR WRIT OF HABEAS CORPUS

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INTRODUCTION

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

JURISDICTION

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

REQUEST FOR ORAL ARGUMENT

Mr. Raleigh requests oral argument on this petition.

PROCEDURAL HISTORY

Mr. Raleigh was indicted for two counts of first degree murder. He pled guilty. He was convicted and sentenced to death. The Florida Supreme Court affirmed the convictions. *Raleigh v. State*, 705 So.2d 1324 (Fla. 1998). His Petition for Writ of Certiorari with the United States Supreme Court was

denied on October 5, 1998. *Raleigh v. Florida*, 1998 WL 28915 (U.S. Fla.).

On March 14, 1996, Defendant filed a Notice of Appeal. On March 23, 1998, the Supreme Court issued its Mandate, affirming Defendant's conviction and Sentence. *See Raleigh v. State*, 705 So. 2d 1324 (Fla. 1998). On November 20, 1998, Capital Collateral Regional Counsel-Middle, filed a Motion to Vacate Judgment of Conviction and Sentence with Special Request to Amend on Mr. Raleigh's behalf. The State filed a response on March 26, 1999. Mr. Raleigh thereafter retained undersigned counsel to represent him. On January 19, 2001, undersigned counsel, filed an Amended Motion to Vacate Plea, Judgment of Conviction and Sentence containing 14 numbered claims for relief. On February 26, 2001, the State filed its Response to Defendant's Amended Motion, and on April 4, 2001, Defendant filed his Reply to the State's Response. On August 2, 2001, a hearing was held, pursuant to *Huff v. State*, 622 So. 2d 982 (Fla. 1993) and Florida Rule of Criminal Procedure 3.851(c), at which Defendant and the State were permitted to present this Court with arguments as to which claims in Defendant's instant Motion would require an evidentiary hearing. At the conclusion of the *Huff* hearing, and based on arguments presented therein, the Court granted Defendant an evidentiary hearing on claims (1), (3), (4), (6), (9), and (11). Subsequently, on August 9, 2001, the Court entered an Order Denying Defendant any relief on claims (5), (7), (8), (10), (12), (13), and (14), but added

claim (2) to the list of claims to be heard at the evidentiary hearing. The evidentiary hearing was held February 24-26, 2003.

Post-Conviction Counsel filed a *Ring* claim on June 20, 2003.

CLAIM I

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

A. Introduction.

In *Ring v. Arizona*, 122 S.Ct. 2428 (2002), the Supreme Court held the Arizona capital sentencing scheme unconstitutional because a death sentence there is contingent upon finding an aggravating circumstance and assigns responsibility for finding that circumstance to the judge. The Arizona scheme was found to violate the constitutional guarantee to a jury determination of guilt in all criminal cases. The Supreme Court based its *Ring* holding on its earlier decision in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), where it held that "[i]t is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed." *Id*. at 490 (quoting *Jones v. United States*, 526 U.S. 227, 252-53 (1999) (Stevens, J., concurring)). Capital sentencing schemes such as those in Florida and Arizona violate the notice and jury trial rights guaranteed by the Sixth and Fourteenth Amendments because they

do not allow the jury to reach a verdict with respect to an aggravating fact that is an element of the aggravated crime punishable by death. *Ring.*

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

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

The Florida Supreme Court has previously held that, "[b]ecause *Apprendi* did not overrule *Walton,* the basic scheme in Florida is not overruled either." *Mills v. Moore*, 786 So.2d 532, 537 (Fla. 2001). *Ring* overruled *Walton v. Arizona*, 497 U.S. 639 (1990), *overruled in part, Ring v. Arizona,* 122 S.Ct. 2428 (2002), and the basic principle of *Hildwin v. Florida*, 490 U.S. 638 (1989), which had upheld the basic scheme in Florida "on grounds that 'the Sixth Amendment does not require that the specific findings authorizing imposition of the sentence of death be made by the jury.'" Additionally, *Ring* undermines the reasoning of *Mills* by establishing: (a) that *Apprendi* applies to capital sentencing schemes; (b) that States may not avoid the Sixth Amendment requirements of *Apprendi* by simply specifying death or life imprisonment as the only sentencing options; and (c) that the relevant and dispositive question is whether under state law death is "authorized by a guilty verdict standing alone."

In *Mills*, the Court observed that the "the plain language of *Apprendi* indicates that the case is not intended to apply to capital [sentencing] schemes." *Mills*, 786 So.2d at 537. Such statements appear at least four times in *Mills*. *Mills* reasoned that because first-degree murder is a "capital felony," and the dictionary defines such a felony as "punishable by death," the finding of an aggravating circumstance did not expose the petitioner to punishment in excess of the statutory maximum. *Mills*, 786 So.2d at 538. The logic of *Mills* simply did not survive *Ring*.

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

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

Sattahzan, 2003 WL 10481 at *7 (emphasis added). The plurality then referenced the "functional equivalent" language

of *Ring*, and immediately thereafter stated that "for purposes of the Sixth Amendment jury-trial guarantee, the underlying offense of 'murder' is a distinct, lesser included offense of 'murder plus one or more aggravating circumstances . . . . " *Id*. Moreover, the plurality stated later in the opinion that "`murder plus one or more aggravating circumstances' is a separate offense from `murder' *simpliciter*." *Id*. Applying these principles to the case before it, the Court stated that the death eligible offense for which Sattahzan was sentenced "is properly understood to be a *lesser included offense* of `first degree murder plus aggravating circumstances." *Id*. at *8 (emphasis added).

While this portion of the *Sattahzan* opinion was specifically adopted by only three of the Justices, one of whom, the Chief Justice, had dissented in *Ring*, none of the others who had been in the *Ring* majority took issue with it. Justice Kennedy, who joined the remainder of Justice Scalia's opinion in *Sattahzan*, did not discuss the *Ring/Apprendi* issue at all. One would think that, had he taken issue with this interpretation of a decision which he had signed onto, he would have at least noted his disagreement with it. Moreover, there is clearly no reason for Justice Kennedy to have noted his agreement with the plurality opinion, since he previously had written that, "read together, *McMillan [v. Pennsylvania*, 477 U.S. 79 (1986)] and *Apprendi* mean that those facts setting

the outer limits of a sentence, and of the judicial power to impose it, *are the elements of the crime* for purposes of the constitutional analysis." *Harris v. United States*, 122 S.Ct. 2406, 2419 (2002) (plurality opinion). *See United States v. Johnson*, 2003 WL 43363 (N.D. Iowa, Jan. 7, 2003) (noting that *Harris* plurality consisting of Justices Kennedy, O'Connor, Scalia, and Chief Justice Rehnquist, agreed with this proposition).

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

the clear statement of the *Sattahzan* plurality that aggravating factors are actual elements of the greater offense has the support of *at least* six members of the Court.

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

With the premise of *Ring* and *Sattahzan* in mind, it becomes clear that Florida's statute is unconstitutional, and that the basis of *Mills* can no longer survive. Section Fla. Stat. 921.141 provides:

> (3) FINDINGS IN SUPPORT OF SENTENCE OF DEATH-- Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set for in writing its findings upon which the sentence is based as to the facts:
>
> (a) The sufficient aggravating circumstances exist as enumerated in subsection (5), and
> (b) That there are insufficient mitigating circumstances to outweigh the aggravating circumstances.
>
> In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsections (5) and (6) and upon the records of the trial and the sentencing proceedings. **If the court does not make the findings requiring the death sentence, the court shall impose sentence of life imprisonment in accordance with S. 775.082.**

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

to the United States Supreme Court:

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

> Supreme Court to be the most appropriate source of guidance.

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

In fact, the Louisiana statute defined first degree murder as fitting within one of five circumstances, in contrast to Florida's provision that first degree murder is either premeditated or felony murder. *Lowenfield*, 484 U.S. at 242. The Supreme Court in *Lowenfield* found that the Louisiana capital scheme operated similar to the Texas scheme that provided for death eligibility to be determined at the guilt phase of the trial as had been explained in *Jurek v. Texas*, 428 U.S. 262 (1976):

> But the opinion [*Jurek*] announcing the judgment noted the difference between the Texas scheme, on the one hand, and the Georgia and Florida schemes discussed in the cases of *Gregg_[v. Georgia*, 428 U.S. 153 (1976)], and *Proffitt [v. Florida*, 428 U.S. 242 (1976)]:
>
> > "While Texas has not adopted a list of statutory aggravating circumstances the existence of which can justify the imposition of the death penalty as have Georgia and Florida, its action in narrowing the categories of murders for which a death sentence may ever be imposed serves much the same purpose . . . . In fact, each of the five classes of murders made capital by the Texas statute is encompassed in Georgia and Florida by one or more of their statutory aggravating circumstances . . . . Thus, in essence, the Texas statute requires that the jury find the existence of a statutory aggravating circumstance before the death penalty may be imposed. So far as consideration of aggravating circumstances is concerned, therefore, the principal difference between Texas and the other two

> States is that the death penalty is an available sentencing option - - even potentially - - for a smaller class of murders in Texas." 428 U.S. at 270-71 (citations omitted).
>
> It seems clear to us from this discussion that the narrowing function required for a regime of capital punishment may be provided in either of these two ways: **The legislature may itself narrow the definition of capital offenses, as Texas and Louisiana have done, so that the jury finding of guilt responds to this concern, or the legislature may more broadly define capital offenses and provide for narrowing by jury findings of aggravating circumstances at the penalty phase**. See also *Zant [v. Stephens*, 462 U.S. 862, 876 n.13 (1983)] discussing *Jurek* and concluding: "[I]n Texas, aggravating and mitigating circumstances were not considered at the same stage of the criminal prosecution."

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

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

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

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

Thus, it is clear that the factual determination of "sufficient aggravating circumstances" at the sentencing is

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

The factual determination that "sufficient aggravating circumstances exist" has not been made during the guilt phase of a capital trial under Florida law as it has operated during the past 25 years. Mr. Raleigh is aware of the opinions of various members of the Florida Supreme Court which have concluded that *Ring* has no significance to Florida's capital sentencing scheme because, in the case of a defendant who has been found guilty of either a contemporaneous felony or who has a prior violent felony conviction, "the sentence of death . . . could be imposed based on these convictions by the same jury." *Kormondy v. State*, ___ So. 2d ___ (Fla. Feb. 13, 2003) (slip op. at 23 n.3). This view of Florida's sentencing statute, however, is not in accord with the reality of Florida's system, as demonstrated above. Unlike states such as Louisiana and Texas, Florida is a *weighing* state. This means that, in order to determine death eligibility, Florida penalty phase jurors *weigh* aggravation and mitigation and

determine if there are sufficient aggravating circumstances when *weighed* against the mitigation to warrant a "recommendation" that the defendant be sentenced to death. Nowhere in the Florida Supreme Court's nearly three (3) decades of death penalty jurisprudence has it—or the Supreme Court of the United States, for that matter—classified Florida as a state where death eligibility is determined at the guilt phase.

For example, in rejecting a claim that the "during the course of a felony" aggravating circumstance constituted an impermissible "automatic aggravator," a majority of this Court observed that "[e]ligibility for this aggravating circumstance *is not automatic*" and thus Florida's scheme adequately "narrows the class of death-eligible defendant" at the penalty phase by selecting only certain enumerated felonies that would qualify to establish the felony murder aggravating circumstance. *Blanco v. State*, 706 So. 2d 7, 11 (Fla. 1998)(emphasis added).

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

Moreover, as to a defendant's conviction of a prior crime of violence, this too, under Florida's capital sentencing scheme, does not make a defendant "eligible" for the death penalty in light of the fact that Florida is a ***weighing*** state. For example, on several occasions, the Florida Supreme Court has determined that the ***weight*** of a defendant's prior crime of violence mitigates against that defendant's eligibility to be sentenced to death. ***See Jorgenson v. State***, 714 So. 2d 423, 428 (Fla. 1998) ("The State presented and the trial court only found one aggravating factor in this case—Jorgenson's 1967 prior conviction for second-degree murder. The facts of the prior conviction mitigate the weight that a prior violent felony would normally carry"); ***Chaky v. State***, 651 So. 2d 1169, 1173 (Fla. 1995) (death penalty disproportionate when the lone aggravator based on a prior violent felony was mitigated by the facts surrounding the previous crime). Hence, a defendant's prior violent felony is also a matter to be ***weighed*** by the jury in a Florida death penalty sentencing phase, and is equally subject to the stringent weighing process that Florida's sentencing scheme requires in order for a defendant to be found eligible for the death penalty.

For these reasons, the "exception" to the rule announced in ***Apprendi*** does not apply to a weighing state such as Florida. ***See Amendarez-Torres v. United States***, 523 U.S. 224 (1998). Three of the justices on the Florida Supreme Court

have indicated that the existence of a contemporaneous felony conviction and/or a prior crime of violence serves as a basis for denying relief under *Ring* and *Apprendi*. However, as noted above, under Florida law, the mere existence of an aggravating circumstance does not make a defendant eligible for the death penalty. Rather, Florida Statute Section 921.141 (3) requires the trial judge to make three factual determinations before a death sentence may be imposed. The trial judge (1) must find the existence of at least one aggravating circumstance, (2) must find that "*sufficient* aggravating *circumstances* exist" to justify imposition of death, and (3) must find that "there are insufficient mitigating circumstances to outweigh the aggravating circumstances." If the judge does not make these findings, "the court *shall* impose a sentence of life imprisonment in accordance with [Section] 775.082." *Id*. (emphasis added). Hence, under a plain reading of the statute, it is not sufficient that an aggravating circumstance is merely present because Florida is a *weighing* state.

Mr. Raleigh also submits that the holding of *Almendarez-Torres* did not survive *Apprendi* and *Ring*. In *Apprendi,* Justice Thomas, whose vote was decisive of the five-to-four decision in *Almendarez-Torres*, announced that he was receding from his support of *Almendarez-Torres*. The *Apprendi* majority found it unnecessary to overrule *Almendarez-Torres* explicitly in order to decide the issues before it, but acknowledged that

"it is arguable that *Almendarez-Torres* was incorrectly decided." *Apprendi*, 530 U.S. at 489. It then went on in a footnote to add to "the reasons set forth in Justice SCALIA's [*Almendarez-Torres*] dissent, 523 U.S. at 248-60," the observation that "the [*Almendarez-Torres*] Court's extensive discussion of the term 'sentencing factor' virtually ignored the pedigree of the pleading requirement at issue," which drive the Sixth Amendment ruling in *Apprendi*. *Apprendi*, 530 U.S. at 489 n.15.

At the same time, the *Apprendi* majority did explicitly restrict whatever precedential force *Almendarez-Torres* ever had to the status of a "narrow exception to the general rule" that every fact which is necessary to enhance a criminal defendant's maximum sentencing exposure must be found by a jury – an exception limited to the "unique facts" in *Almendarez-Torres*. The unique facts of *Almendarez-Torres* were that the defendant **pleaded guilty** to an indictment charging that he had returned to the United States after having been deported and, in addition, **admitted** that he had been deported because he was previously convicted of three aggravated felonies. He thus elected to forgo a trial and accept an uncontested adjudication of his guilt for a crime by definition included the felony convictions later used to enhance his sentence. Nothing about the priors—any more than anything else about the elements of the crime of reentry after

deportation—remained for a jury to try in light of the defendant's guilt plea. This should be contrasted to Florida, where a capital jury is to *weigh* the felony conviction to determine its sufficiency together with other aggravation and mitigation.

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

The Florida capital sentencing statute, like the Arizona statute struck down in *Ring*, makes imposition of the death penalty contingent upon the factual findings of the judge at the sentencing - not upon a jury determination made in conformity with the Sixth Amendment. Section 775.082 of the Florida Statutes provides that a person convicted of first-degree murder must be sentenced to life imprisonment "unless the proceedings held to determine sentence according to the procedure set forth in § 921.141 result in finding by the court that such person shall be punished by death." This Court has long held that §§ 775.082 and 921.141 do not allow imposition of a death sentence upon a jury's verdict of guilt, but only upon the finding of sufficient aggravating circumstances. *State v. Dixon*, 283 So.2d 1, 7 (Fla. 1973).

In *Harris v. United States*, 122 S.Ct. 2406 (2002), the Supreme Court held that under *Apprendi* "those facts setting the outer limits of a sentence, and of the judicial power to impose it, are the elements of the crime for the purposes of the constitutional analysis." *Id*. And in *Ring*, the Court

held that the aggravating factors enumerated under Arizona law operated as "the functional equivalent of an element of a greater offense" and thus had to be found by a jury. Pursuant to the reasoning set forth in *Apprendi* and *Ring,* aggravating factors are equivalent to elements of the capital crime itself and must be treated as such. The full panoply of rights associated with trial by jury must therefore attach to the finding of "sufficient aggravating circumstances."

a. *No unanimous determination of eligibility.*

In conformity with Florida law for the past 25 years, the guilt phase verdicts returned by the unanimous jury have not included a finding of "sufficient aggravating circumstances" necessary to render a defendant death eligible. The penalty phase jury is instructed that its recommendation is advisory and need not be unanimous; in Mr. Raleigh's case, the resentencing jury returned a recommendation by little more than a simple majority: eight (8) to four (4). Findings of the elements of a capital crime by a mere simple majority, or anything less than by a unanimous verdict, is unconstitutional under the Sixth and Fourteenth Amendments. In the same way that the Sixth Amendment guarantees a baseline level of certainty before a jury can convict a defendant, it also constrains the *number* of jurors who can render a guilty verdict. *See Apodaca v. Oregon*, 406 U.S. 404 (1972) (the Sixth and Fourteenth Amendments require that a criminal verdict must be supported by at least a "substantial majority"

of the jurors). Clearly, a mere numerical majority -- which is all that is required under Section 921.141(3) for the jury's advisory sentence -- would not satisfy the "substantial majority" requirement of *Apodaca*. *See, e.g., Johnson v. Louisiana*, 406 U.S. 356, 366 (1972) (Blackmun, J., concurring) (a state statute authorizing a 7-5 verdict would violate Due Process Clause of Fourteenth Amendment).

Because Florida's enumerated aggravating factors operate as 'the functional equivalent of an element of a greater offense," that element must be found by a jury like any other element of an offense. *Apprendi*, 530 U.S. at 494. *See Sattazahn v. Pennsylvania*, 2003 U.S. LEXIS 748 at *20 (2003). As to the determination of the presence of other elements of a crime, Florida law provides, "No verdict may be rendered unless all of the trial jurors concur in it." Fla. R. Crim. P. 3.440. Florida courts have held that unanimity is required at the guilt phase of a capital case. *Williams v. State*, 438 So.2d 781, 784 (Fla. 1983*). See Flanning v. State*, 597 So.2d 864, 866 (Fla. 3rd DCA 1992)("It is therefore settled that '[i]n this state, the verdict of the jury must be unanimous' and that any interference with this right denied the defendant a fair trial. *Jones v. State,* 92 So.2d 261 (Fla. 1956)"). The right to a unanimous jury verdict must extend to each necessary element of the charged crime. As to an element of the offense, this Court has recognized that a judge may not

make fact finding "on matters associated with the criminal episode" that "would be an invasion of the jury's historical function." *State v. Overfelt*, 457 So.2d 1385, 1387 (Fla. 1984). Neither the sentencing statute, case law from the Florida Supreme Court, nor the standard jury instructions used the past 25 years required that the jurors participating in a penalty phase to concur in finding whether any particular aggravating circumstances had been proved, or "[w]hether sufficient aggravating circumstances exist[ed]," or "[w]hether sufficient aggravating circumstances exist[ed] which outweigh[ed] the mitigating circumstances." Fla. Stat. § 921.141(2). Because Florida law does not require that twelve jurors agree that the State has proven an aggravating circumstance beyond a reasonable doubt, or to agree on the same aggravating circumstances beyond a reasonable doubt, or to agree on the same aggravating circumstances when advising that "sufficient aggravating circumstances exist" to warrant a death sentence, there is no way to say that "the jury" rendered a verdict as to an aggravating circumstance or the sufficiency of them. As Justice Shaw has observed, Florida law leaves theses matters to speculation. *Combs v. State*, 525 So. 2d 858, 859 (Fla. 1988) (Shaw, J., concurring).

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

Florida law does not require the jury to reach a verdict on any of the factual determinations required for death. Section 921.141(2) does not call for a jury verdict, but

rather an "advisory sentence." The Florida Supreme Court has held that "the jury's sentencing recommendation in a capital case is *only advisory*. The trial court is to conduct its own weighing of the aggravating and mitigating circumstances . . . ." *Combs*, 525 So.2d at 858 (quoting *Spaziano v. Florida*, 468 U.S. 447, 451 (1984)) (emphasis original in *Combs)*. It is reversible error for a trial judge to consider himself bound to follow a jury's recommendation. *Ross v. State*, 386 So.2d 1191, 1198 (Fla. 1980). Florida law only requires the judge to consider "the recommendation of a majority of the jury." Fla. Stat. § 921.141(3). In contrast, "[n]o verdict may be rendered unless all of the trial jurors concur in it." Fla. R. Crim. Pro. 3.440. No authority of Florida law requires that all jurors concur in finding the requisite aggravating circumstances.

In *Sullivan v. Louisiana*, 508 US. 275 (1993), the Supreme Court said, "the jury verdict required by the Sixth Amendment is a jury verdict of guilty beyond a reasonable doubt." *Sullivan*, 508 U.S. at 278. The Court explained that there must be a verdict that decides the factual issues in order to comply with the Sixth Amendment. In doing so, the Court explained:

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

> the Sixth Amendment is a jury verdict of guilty beyond a reasonable doubt.

Sullivan, 508 U.S. at 278.

In a case such as this, where the error is that a jury did not return a verdict on the essential elements of a capital murder, but instead the responsibility was delegated by state law to a court, "no matter how inescapable the findings to support the verdict might be," for a court "to hypothesize a guilty verdict that was never rendered ...would violate the jury trial right." *Sullivan*., 508 U.S. at 279. The "explicitly cross-reference[d] . . . statutory provision requiring the finding of an aggravating circumstance before imposition of the death penalty," *Ring*, requires the judge - after the jury has been discharged and "[n]otwithstanding the recommendation of a majority of the jury_" - to make two factual determinations. Fla. Stat. § 921.141(3). Section 921.141(3) provides that "if the court imposes a sentence of death, it shall set forth in writing its findings *upon which the sentence of death is based as to the facts*." *Id.* First, the judge must find that "sufficient aggravating circumstances exist" to justify death. *Id.* Second, the judge must find in writing that "there are insufficient mitigating circumstances to outweigh the aggravating circumstances." *Id*. "If the court does not make the findings requiring the death sentence, the court shall impose sentence of life imprisonment in accordance with § 775.082." *Id*. Because the Florida death

penalty statute makes imposition of a death contingent upon findings of "sufficient aggravating circumstances" and "insufficient mitigating circumstances," and gives sole responsibility for making those findings to the judge, it violates the Sixth Amendment under *Ring.*

As the United States Supreme Court said in *Walton*, "[a] Florida trial court no more has the assistance of a jury's findings of fact with respect to sentencing issues than does a trial judge in Arizona." *Walton*, 497 U.S. at 648. The Florida Supreme Court has repeatedly emphasized that a judge's findings must be made independently of the jury's recommendation. *See Grossman v. State*, 525 So.2d 833, 840 (Fla. 1988). Because the judge must find that "sufficient aggravating circumstances exist" "notwithstanding the recommendation of a majority of the jury," Fla. Stat. § 921.141(3), he may consider and rely upon evidence not submitted to the jury. The judge is also permitted to consider and rely upon aggravating circumstances that were not submitted to the jury. *See Davis v. State*, 703 So.2d 1055, 1061 (Fla. 1998). Because the jury's role is merely advisory and contains no findings upon which to judge the proportionality of the sentence, the Court has recognized that its review of a death sentence is based and dependent upon the judge's written findings. *Morton v. State*, 789 So.2d 324, 333 (Fla. 2001). The Florida capital scheme violates the

constitutional principles recognized in *Ring.*

c. *The recommendation has been merely advisory.*

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

CLAIM II

MR. Raleigh WAS DEPRIVED OF HIS SIXTH AMENDMENT RIGHTS.

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

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

The Unites States Supreme Court in *Jones v. United States*, 526 U.S. 227 (1999), held that "under the Due Process Clause of the Fifth Amendment and the notice and jury guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." *Id.* at 243 n.6. In *Ring,* the Supreme Court held that a death penalty statute's aggravating circumstances operates as "functional equivalent

of an element of a greater offense."

In *Jones*, the Supreme Court noted that "[m]uch turns on the determination that a fact is an element of an offense, rather than a sentencing consideration," In significant part because "elements must be charged in the indictment." *Jones*, 529 U.S. at 232. On June 28, 2002, after the Court's decision in *Ring*, the death sentence imposed in *United States v. Allen*, 247 F.3d 741 (8th Cir. 2001), was overturned when the Supreme Court granted the writ of certiorari, vacated the judgment of the United States Court of Appeals for the Eighth Circuit upholding the death sentence, and remanded the case for reconsideration in light of the holding in *Ring* that aggravating factors that are prerequisites of a death sentence must be treated as elements of the offense. *Allen v. United States*, 122 S.Ct. 2653 (2002).

The question presented in *Allen* was this:

> Whether aggravating factors required for a sentence of death under the Federal Death Penalty Act of 1994, 18 U.S.C. § 3591 et. Seq., are elements of a capital crime and thus must be alleged in the indictment in order to comply with Due Process and Grand Jury clauses of the Fifth Amendment.

The Eighth Circuit had previously rejected Allen's argument because in its view aggravators are not elements of federal capital murder but rather "sentencing protections that shield a defendant from automatically receiving the statutorily authorized death sentence." *United States v. Allen*, 247 F.3d at 763.

The Supreme Court held in *Apprendi* that the Fourteenth Amendment affords citizens the same protections when they are prosecuted under state law. Although the Court noted that the Grand Jury Clause of the fifth Amendment has not been held to apply to the States. *Apprendi*, 530 U.S. at 477 n.3. However, similar to the Grand Jury Clause of the Fifth amendment, Article I, Section 15 of the Florida Constitution provides that, "No person shall be tried for a capital crime without presentment or indictment by a grand jury."

Just like the requirements of 18 U.S.C. §§ 3591 and 3592(c), Florida's death penalty statute makes imposition of the death penalty contingent upon the government proving the existence of aggravating circumstances, establishing "sufficient aggravating circumstances" to call for a death sentence, and that the mitigating circumstances are insufficient to outweigh the aggravating circumstances. Fla. Stat. § 921.141(3). Florida law clearly requires every "element of the offense" to be alleged in the information or indictment. In *State v. Dye*, 346 So. 2d 538, 541 (Fla. 1977), this Court said "[a]n information must allege each of the essential elements of a crime to be valid. No essential element should be left to inference."

In *State v. Gray*, 435 So. 2d 816, 818 (Fla. 1983), this Court held "[w]here an indictment or information wholly omits to allege one or more of the essential elements of the crime, it fails to charge a crime under the laws of the state." An

indictment in violation of this rule cannot support a conviction; the conviction can be attacked at any stage, including "by habeas corpus." *Gray*, 435 So. 2d at 818. In *Chicone v. State*, 684 So. 2d 736, 744 (Fla. 1996), the Florida Supreme Court held "[a]s a general rule, an information must allege each of the essential elements of a crime top be valid."

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

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

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

an archetypical reason for - the constitutional requirement of neutral review of prosecutorial intentions. Because the State did not submit to the grand jury, and the indictment did not state, the essential elements of the aggravated crime of capital murder, Mr. Raleigh's right under Article I, section 15 of the Florida Constitution and the Sixth Amendment to the federal Constitution were violated.

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

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

Throughout the trial proceedings, the jury was repeatedly told that its role was merely advisory (R. 407, 2292, 2317, 2318, 2320, 2321, 2322). Trial counsel objected to the penalty phase jury instructions that instructed the jury of its mere "advisory" role (R. 2096-97). The trial court overruled the objection and Mr. Raleigh raised it on direct appeal (*See* Mr. Raleigh's initial brief on direct appeal p.54). This Court affirmed the instructions on direct appeal. *See Raleigh v. State*, 705 So. 2d 1026 (Fla. 1998).

As the Supreme Court held in *Caldwell v. Mississippi*, 472

U.S. 320, 328-29 (1985):

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

Were this Court to conclude now that Mr. Raleigh's death sentence rests on findings made by the sentencing jury after the jury was instructed, and Florida law clearly provided, that a death sentence would not rest upon the jury's recommendation alone, it would mean that Mr. Raleigh's death sentence was imposed in violation of *Caldwell*. *Caldwell* embodies the principle stated in Justice Breyer's concurring opinion in *Ring*: "the Eighth Amendment requires individual jurors to make, and to take responsibility for, a decision to sentence a person to death." Here, Mr. Raleigh's sentencing jury was not advised that its determination that "sufficient aggravating circumstances" existed to warrant the imposition of a death sentence was binding upon the judge. Habeas relief is warranted.

CONCLUSION

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Petition has been furnished by United States Mail, first-class postage

prepaid, to Kenneth S. Nunnelley, Esq., Senior Assistant Attorney General, Office of the Attorney General, 444 Seabreeze Boulevard, 5th Floor, Daytona Beach, FL 32118-3958 and Rosemary Calhoun, Esq., Assistant State Attorney, Office of the State Attorney, 251 N. Ridgewood Avenue, Daytona Beach, FL 32114-3275 on this 29th day of December, 2003.

CERTIFICATE OF COMPLIANCE

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

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