IN THE SUPREME COURT OF FLORIDA

No. SC03-824

DAVID EUGENE JOHNSTON
Appellant,

v.

STATE OF FLORIDA
Appellee.

APPEAL OF THE NINTH JUDICIAL CIRCUIT TRIAL COURT'S DENIAL OF APPELLANT'S PETITION FOR POST CONVICTION RELIEF

APPELLANT'S INITIAL BRIEF

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STATEMENT OF THE CASE AND FACTS.

On June 11, 2002, Appellant filed his Motion to Vacate Judgments of Conviction And Sentences With Special Request For Leave To Amend, arguing that Appellant is retarded and the death sentence imposed violates the Eight and Fourteenth Amendments, United States Constitution and the corresponding provisions of the Florida Constitution, violates the Equal Protection Clause of the Fourteenth Amendment, United States Constitution and the corresponding provisions of the Florida Constitution. (R. PC. 49-75) Prior to the trial court ruling on the pending Motion, Appellant filed his second Motion to Vacate Judgments and Sentences With Special Request for Leave to Amend arguing that Ring v. Arizona 536 U.S. 584 (2002) requires a finding that the Florida death penalty statute is unconstitutional

because it charges the judge, and not the jury, with the duty of making the findings necessary for imposition of a death sentence; that the Florida death penalty statute does not require the jury to make findings of fact; that the Florida death penalty statute does not require the jury to render a verdict on the elements of capital murder; that the Florida death penalty statute does not require the State to convince the jury that death was a proper sentence beyond a reasonable doubt; and that the Florida death penalty statute does not require the elements necessary to establish capital murder to be charged in the indictment. (R.PC. 95-118) Appellant's second motion also argued that Ring and Atkins v. Virginia, 536 U.S. 304 (2002) require the State to prove to a jury beyond a reasonable doubt that Appellant was not mentally retarded.

On August 29, 2002, the trial court, without conducting an evidentiary hearing, entered its non-final Order finding that based upon the law of the case, Appellant does not meet the threshold requirements of Atkins. (R.PC. 174-175) The trial court's Order also directed the Parties to file additional pleadings addressing the Ring issue.

On February 3, 20 03, the trial court entered it's Order finding that Appellant's second Motion was intended to supercede the original Motion filed June 11, 2003 and denied Appellant's claims under Ring, based upon this Court's ruling in Bottoson v. State, 833 So2d 693 (Fla. 2002). (R.PC. 292-295)

SUMMARY OF ARGUMENT

The trial court erred in denying Appellant's Second Motion to Vacate Judgments of Conviction and Sentences With Special Request for Leave to Amend.

The statue under which Appellant was indicted was unconstitutional because it required the judge, without the aid of the jury, to make the findings necessary for imposition of a death sentence.

Florida's Capital Sentencing Scheme is Unconstitutional under Ring v. Arizona

1. The role of the jury In Florida's capital sentencing scheme neither satisfies the Sixth Amendment, nor renders harmless the failure to satisfy Apprendi and Ring

2. Florida juries do not make findings of fact.

3. Florida juries are not required to render a verdict on elements of capital murder.

4. The State was not required to convince the jury that death was a proper sentence beyond a reasonable doubt

5. The indictment was invalid because the elements of the offense necessary to establish capital murder were not charged in the indictment

6. To avoid imposition of the death sentence, Appellant was required to prove the non-existence of an element necessary to make him eligible for the death penalty.

Appellant has made a prima facia showing of mental retardation and must be afforded an evidentiary hearing to determine if Appellant's mental retardation is sufficient to render execution unconstitutional

1. Atkins is retroactive

2. The rule in Atkins commands full constitutional protections, including the right to a jury trial on the issue of Appellant's mental retardation, the right to appointed, qualified counsel and assistance from independent competent experts and adequate time and resources to prepare and present evidence concerning Appellant's mental retardation.

3. Appellant's mental retardation has never been considered in any appellate proceeding, any postconviction proceeding nor any federal habeas corpus proceeding, therefore, Appellant is entitled to a full evidentiary hearing to determine whether Appellant's mental retardation is sufficient to prevent his execution.

THE TRIAL COURT ERRED IN DENYING APPELLANTS' SECOND MOTION TO VACATE JUDGMENTS OF CONVICTION AND SENTENCES WITH SPECIAL REQUEST FOR LEAVE TO AMEND.

A. THE STATUTE UNDER WHICH APPELLANT WAS INDICTED IS UNCONSTITUTIONAL BECAUSE IT REQUIRES THE JUDGE - WITHOUT THE AID OF THE JURY - TO MAKE THE FINDINGS NECESSARY FOR IMPOSITION OF A DEATH SENTENCE

1. Florida's Capital Sentencing Scheme is Unconstitutional under Ring v. Arizona

a. The Holding of Ring

Ring v. Arizona, 536 U.S. 304 (2002), held unconstitutional a capital sentencing scheme that makes imposition of a death sentence contingent upon the finding of an aggravating circumstance and assigns responsibility for finding that circumstance to the judge. The Supreme Court based its holding and analysis in Ring 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 (1999), at 252-253 (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., at 605 (quoting Apprendi, 530 U.S. at 501 (Thomas, J., concurring).

In applying the Apprendi test in Ring, the Court said "[t]he dispositive question . . . 'is not one of form but of effect."' Ring, at 602, quoting Apprendi, 530 U.S. at 494. The question is not whether death is an authorized punishment in first-degree murder cases, [1] but whether the "... facts increasing punishment beyond the maximum authorized by a guilty verdict standing alone..." Ring, at 605, are found by the judge or jury. "If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact must be found by a jury beyond a reasonable doubt." Ring, at 602. "All the facts which

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[1] See Ring, at 604 (rejecting argument that finding of aggravating circumstance did not increase statutory maximum because "Arizona first-degree murder statute 'authorizes a maximum penalty of death only in a formal sense"') (quoting Apprendi, 530 U.S. at 541 (O'Connor, J., concurring)). Both the Florida and Arizona statutes provide for a range of punishments, the most severe of which is death. Compare Fla. Stat. § 775.082(1) (1979) with Ariz. Rev. Stat. Ann. § 13-1105(C).

must exist in order to subject the defendant to a legally prescribed punishment must be found by the jury." Ibid. (quoting Apprendi, 530 U.S. at 499 (Scalia, J., concurring)).

The Court in Ring held that Arizona's sentencing statute could not survive Apprendi because "…[a] defendant convicted of first-degree murder in Arizona cannot receive a death sentence unless a judge makes the factual determination that a statutory aggravating factor exists. Without that critical finding, the maximum sentence to which the defendant is exposed is life imprisonment, and not the death penalty." Ring, at 595 (Quoting Justice O'Conner's Apprendi dissent) In so holding, the Court overruled Walton v. Arizona, 497 U.S. 639 (1990), "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." Ring, at 609.

2. Application of Ring to Florida's Sentencing Scheme

Ring overruled Walton, and the basic principle of Hildwin v. Florida, 490 U.S. 638 (1989) (per curiam), which had upheld the capital sentencing scheme in Florida "on grounds that 'the Sixth Amendment does not require that the specific findings authorizing imposition of the sentence of death be made by the jury."' Ring, at 598 (quoting Walton, 497 U.S. at 648, in turn quoting Hildwin, 490 U.S. at 640-641)). Additionally, Ring undermines the reasoning of the Florida Supreme Court's decision

in Mills v. Moore, 786 So2d 532 (Fla. 2001) by recognizing (a) that Apprendi applies to capital sentencing schemes,[2] Ring, at 589 ("Capital defendants, no less than non-capital defendants ... are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment"); Ring, at 602; (b) that States may not avoid the Sixth Amendment requirements of Apprendi by simply "specif[ying] 'death or life imprisonment' as the only sentencing options," [3] Ring, at 604-605; and (c) that the relevant and dispositive question is whether under state law death is "authorized by a guilty verdict standing alone." Ring, at 604.

Florida's 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 — not the jury. 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 (emphasis added) that such person shall be punished by death, and in the latter event such person shall be punished by death." For nearly 30 years the Florida Supreme Court has held that sections 775.082 and

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[2]2 In Mills, this Court said that "…the plain language of Apprendi indicates that the case is not intended to apply to capital[sentencing] schemes."

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.

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[3] Mills at 786 So2d 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 punishment in excess of the statutory maximum. Mills, at 538.

Dixon v. State, 283 So.2d 1 (Fla. 1973) at 7 ("question of punishment is reserved for a post-conviction hearing").

The Florida statutory provision requiring the finding of an aggravating circumstance before imposition of the death penalty, requires the judge — after the jury has been discharged and "[n]otwithstanding the recommendation of a majority of the jury" — to make three 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."*(emphasis added) First, the trial judge must find the existence of at least one aggravating circumstance. Second, the judge must find that "... sufficient aggravating circumstances exist" to justify imposition of the death penalty. [4] (emphasis added). Third, the judge must find in writing that "there are insufficient mitigating

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[4]4 The jurors need only find sufficient aggravating circumstances to "recommend" an "advisory sentence" of death. Fla. Stat. § 921.141(2).

circumstances to outweigh the aggravating circumstances." "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."

Because Florida's death penalty statute makes imposition of a death sentence 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.

3. The Role Of The Jury In Florida's Capital Sentencing Scheme Neither Satisfies The Sixth Amendment, Nor Renders Harmless The Failure To Satisfy Apprendi and Ring

a. Florida Juries Do Not Make Findings Of Fact.

Florida's death penalty statute differs from Arizona's in that it provides for the jury to hear evidence and "render an advisory sentence to the court." Fla. Stat. § 921.141(2). A Florida jury's role in the capital sentencing process is insignificant under Apprendi and Ring, however. First, whether one looks to the plain meaning of Florida's death penalty statute, or this court's cases interpreting it, "under section 921.141, the jury's advisory recommendation is not supported by findings of fact," Combs v. State, 525 So.2d 853, (Fla. 1988) at 859 (Shaw, J., concurring), which is the central requirement of Ring.

The Florida Supreme Court has rejected the idea that a defendant convicted of

first degree murder has the right "to have the existence and validity of aggravating circumstances determined as they were placed before his jury." Engle v. State, 438 So.2d 803 (Fla. 1983) at 813, explained in Davis v. State, 703 So.2d 1055 (Fla. 1997) at 1061. The statute specifically requires the judge to "set forth . . . findings upon which the sentence of death is based as to the facts," but asks the jury generally to "render an advisory sentence ... based upon the following matters ...", referring to the

sufficiency of the aggravating and mitigating circumstances. Fla. Stat. § 921.141(2) & (3) (emphasis added). Because Florida law does not require that any number jurors agreethat the State has proven the existence of a given aggravating circumstance before it may be deemed "found," it is impossible to say that "the jury" found proof beyond a reasonable doubt of a particular aggravating circumstance. Thus, "the sentencing order is 'a statutorily required personal evaluation by the trial judge of the aggravating and mitigating factors that forms the basis of a sentence of life or death." Morton v. State, 789 So.2d 324, (Fla. 2001) at 333 (quoting Patton v. State, 784 So.2d 380 (Fla. 2000)).

As the Supreme Court said in Walton, "[a] Florida trial court no more has the assistance of a jury's findings of fact with respect to sentencing issues than does a trial judge in Arizona." Walton, at 648. The Florida Supreme Court has made the point

even more strongly by repeatedly emphasizing that the trial judge's findings must be made independently of the jury's recommendation. See Grossman v. State, 525 So.2d 833, (Fla. 1988) at 840. Because the judge must find that "sufficient aggravating circumstances exist" "notwithstanding the recommendation of a majority of the jury,"(Fla. Stat. § 921.141(3)), she may consider and rely upon evidence not submitted to the jury. Porter v. State, 400 So.2d 5 (Fla. 1981); Davis at 1061. The judge is also permitted to consider and rely upon aggravating circumstances that were

not submitted to the jury. Davis, at 1061, citing Hoffman v. State, 474 So.2d 1178 (Fla. 1985) (court's finding of "heinous, atrocious, or cruel" aggravating circumstance proper though jury was not

instructed on it); Fitzpatrick v. State, 437 So.2d 1072 (Fla. 1983) at 1078 (finding of previous conviction of violent felony was proper even though jury was not instructed on it); Engle, at 813.

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

b. Florida Juries are not Required to Render a Verdict on Elements of Capital Murder

Second, although "[Florida's] enumerated aggravating factors operate as 'the functional equivalent of an element of a greater offense,"' and therefore must be found by a jury like any other element of an offense, Ring, at 608 (quoting Apprendi at 494), Florida law does not require the jury to reach a verdict on any of the factual determinations required before a death sentence could be imposed. Section 921.141(2) does not call for a jury verdict, but rather an "advisory sentence." The Florida Supreme Court has made it clear that "'the jury's sentencing recommendation in a capital case is only advisory. The trial court is to conduct its own weighing of the aggravating and mitigating circumstances . . .". Combs, at 858 (quoting Spaziano v. Florida, 468 U.S. 447(1984) at 451) "The trial judge… is not bound by the jury's recommendation, and is given final authority to determine the appropriate sentence." Engle, at 813. It is reversible error for a trial judge to consider herself bound to follow a jury's recommendation and thus "not make an independent determination of whether the death sentence should be imposed." Ross v. State, 386 So.2d 1191 (Fla. 1980) at 1198.

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. P. 3.440. Neither the

sentencing statute, the Florida Supreme Court's cases, nor the jury instructions in Appellant's case required that all jurors concur in finding any particular aggravating circumstance, or "[w]hether sufficient aggravating circumstances exist," or "[w]hether sufficient aggravating circumstances

exist which outweigh the aggravating circumstances." Fla. Stat. § 921.141(2).

Because Florida law does not require any two, much less twelve, jurors to agree that the government has proved an aggravating circumstance beyond a reasonable

doubt, or to agree on the same aggravating circumstances when advising that "sufficient aggravating circumstances exist" to recommend a death sentence, there is no way to say that "the jury" rendered a verdict as to an aggravating circumstance or the sufficiency of them. As Justice Shaw observed in Combs, Florida law leaves these matters to speculation. Combs at 859 (Shaw, J., concurring).

Further, it is impermissible and unconstitutional to rely on the jury's advisory sentence as the basis for the fact-findings required for a death sentence, because the statute requires only a majority vote of the jury in support of that advisory sentence. Combs, supra.. ("recommendation of a majority of the jury"). In Harris v. United States, 536 U.S. 545 (2002), rendered on the same day as Ring, the U.S. Supreme Court held that under the Apprendi test "those facts setting the outer limits of a sentence, and of the judicial power to impose it, are the elements of the crime for the purposes of the

constitutional analysis." See:; Harris, supra.. Further, 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. Ring, at 609. In other words, pursuant to the reasoning set forth in Apprendi, Jones, and Ring, aggravating factors are equivalent to elements of the capital crime itself and must be treated as such.

One of the elements that must be established for Appellant to be sentenced to death is that "sufficient aggravating circumstances exist" to call for a death sentence. Fla. Stat. § 921.141(3). [5] The Florida Standard Jury Instructions do not require this element proved beyond a reasonable doubt. As Justice Scalia explained in his opinion for the unanimous Court in Sullivan v. Louisiana, 508 U.S. 275 (1993), such an error can never be harmless. "[T]he jury verdict required by the Sixth Amendment is a jury verdict of guilty beyond a reasonable doubt." Sullivan, at 278. Where the jury has not been instructed on the reasonable doubt standard there has been no jury verdict within

[5]5 It is important to note that although Florida law requires the judge to find that sufficient aggravating circumstances exist to form the basis for a death sentence, Fla. Stat. § 921.141(3), it only asks the jury to say whether sufficient aggravating circumstances exist to "recommend" a death sentence. Fla. Stat. § 921.141(2).

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

which harmless-error scrutiny can operate. Sullivan, at 280.

Viewed differently, in a case such as this where the error is not requiring a jury verdict on the essential elements of capital murder, but delegating that responsibility to a court, "no matter how inescapable the findings to support the verdict might be," for a court "to hypothesize a guilty verdict that was never rendered would violate the jury-trial right." Sullivan, at 279. The review would perpetuate the error, not cure it.

Permitting any such findings of the elements of a capital crime by a mere simple majority is unconstitutional under the Sixth and Fourteenth Amendments. In the same way that the Constitution 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

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

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). And the standards for imposition of a death sentence may be even more exacting than the Apodaca standard (which was not a death case) -- but they cannot constitutionally be less. 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 (1972) at 366 (Blackmun, J., concurring) (a state statute authorizing a 7-5 verdict would violate Due Process Clause of Fourteenth Amendment).

c. The State Was Not Be Required To Convince The Jury That Death Was A Proper Sentence Beyond A Reasonable Doubt.

The jury in Appellant's case was not required to make findings beyond a reasonable doubt as required by the Sixth Amendment. "If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact — no matter how the State labels it — must be found by a jury beyond a reasonable doubt." Ring, at 602. Florida law makes a death sentence contingent not upon the existence of any individual aggravating circumstance, but on a judicial finding "that

sufficient aggravating circumstances exist." Fla. Stat. §921.141(3) (emphasis added). Although Appellant's jury was told that individual jurors could consider only those aggravating circumstances that had been proved beyond a reasonable doubt, it was not be required to find beyond a reasonable doubt "whether sufficient aggravating circumstances exist to justify the imposition of the death penalty."

In summary, in light of the plain language of Florida's death penalty statute, the Rules of Criminal Procedure, and nearly 30 years of this court's death penalty jurisprudence, it is clear that the limited role of the jury in Florida's capital sentencing scheme fails to satisfy the requirements of the Sixth Amendment. Even if this court

were to redefine the jury's role under Florida law, it would not make Appellant's death sentence valid. Appellant's jury was be repeatedly told that their recommendation was one of a number of factors that the trial court would consider in deciding on a sentence, that "the penalty is for the court to decide and that the jury is not responsible for the penalty in any way because of your verdict (guilt phase instruction) and that they were only to "advise the court," and that "the final decision as to what punishment shall be imposed is the responsibility of the Judge (penalty-phase instructions).

As the Supreme Court held in Caldwell v. Mississippi, 472 U.S. 320 (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. Caldwell, 472 U.S. at 328 -329.

If Appellant's death sentence rested on findings made by the jury after they were told, and Florida law clearly provided, that a death sentence would not rest upon their recommendation, it would establish that Appellant'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." Ring, at 619 (Breyer, J., concurring)

B. THE INDICTMENT WAS INVALID BECAUSE THE ELEMENTS OF THE OFFENSE NECESSARY TO ESTABLISH CAPITAL MURDER WERE NOT CHARGED IN THE INDICTMENT

Jones v. United States, 526 U.S. 227 (1999), held that "under the Due Process Clause of the Fifth Amendment and the notice and jury guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." Jones, at 243, n.6. Apprendi v. New Jersey, 530 U.S. 466 (2000), held that the Fourteenth Amendment affords citizens the same protections

when they are prosecuted under state law. Apprendi, 530 U.S. at 475-476.[7] Ring v. Arizona, 536 U.S.584 (2002), held that a death penalty statute's "... aggravating factors operate as 'the functional equivalent of an element or a greater offense." Ring, at 609 (quoting Apprendi, at 494, n. 19).

In Jones, the Supreme Court noted that "[m]uch turns on the determination that a fact is an element of an offense, rather than a sentencing consideration," in significant part because "elements must be charged in the indictment." Jones, 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 tjudgment of United States Court of Appeals for the Eighth Circuit upholding the death sentence, and remanded the case for reconsideration in light of Ring's holding that aggravating factors that are prerequisites of a death sentence must be treated as elements of the offense. Allen v. United States, 536 U.S. 953 (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 the Due Process and Grand Jury clauses of the Fifth Amendment.

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[7]7 The grand jury clause of the Fifth Amendment has not been held to apply to the States. Apprendi, at 477, n.3

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

Like the Fifth Amendment to the United States Constitution, Article I, section 15 of the Florida Constitution provides that "No person shall be tried for a capital crime without presentment or indictment by a grand jury." Like 18 U.S.C. sections 3591 and 3592(c), Florida's death penalty statute, Florida Statutes section 775.082 and 921.141, 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 circumstance. 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 (Fla. 1977) at 541, the Florida Supreme Court said "... an 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 (Fla. 1983) at 818, the court said "...where an indictment or information wholly omits to alleged 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, at 818. Finally, in Chicone v. State, 684 So. 2d 736 (Fla. 1996) at 744, the court said "…[a]s a general rule, an information must allege each of the essential elements of a crime to be valid."

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

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

Dionisio, at 35. The shielding function of the grand jury is uniquely important in capital cases. See Campbell v. Louisiana, 523 U.S. 392, (1998) at 399 (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").

It is impossible to know whether the grand jury in Appellant's case would have returned an indictment alleging the presence of aggravating factors, sufficient aggravating circumstances, and insufficient mitigating circumstances, and thus charging

Appellant with a crime punishable by death. Nor can one have confidence that the grand jury intended to charge Appellant with crimes to subject him and his petit jurors to the crucible of the capital sentencing process. 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.

The Sixth Amendment requires that "...in all criminal prosecutions, the accused shall. . . be informed of the nature and cause of the accusation . . .". A conviction on a charge not made by the indictment is a denial of due process of law. State v. Gray, supra, citing Thornhill v. Alabama, 310 U.S. 88 (1940), and De Jonge v. Oregon, 299 U.S. 353 (1937).

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

C. TO AVOID THE IMPOSITION OF THE DEATH SENTENCE, APPELLANT WAS REQUIRED TO PROVE THE NON-EXISTENCE OF AN ELEMENT NECESSARY TO MAKE HIM ELIGIBLE FOR THE

DEATH PENALTY, IN VIOLATION OF PETITIONER'S RIGHTS SECURED BY THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT AND THE JURY TRIAL RIGHT GUARANTEED BY THE SIXTH AMENDMENT.

Under Florida law, a death sentence may not be imposed unless the judge finds the fact that "sufficient aggravating circumstances" exist to justify imposition of the death penalty. Fla. Stat. § 921.141(3). Because imposition of a death sentence is contingent upon this fact being found, and the maximum sentence that could be imposed in the absence of that finding is life imprisonment, the Sixth Amendment required that the State bear the burden of proving it beyond a reasonable doubt. Ring. at 589 ("Capital defendants.., are entitled to a jury determination of any fact upon which the legislature conditions an increase in their maximum punishment."). Nevertheless, Florida juries are routinely instructed, "Should you find sufficient aggravating circumstances "to exist, it will then be your duty to determine whether

or not sufficient mitigating circumstances exist to outweigh the aggravating circumstances found to exist."

The Due Process clause of the Fourteenth Amendment requires the state to prove beyond a reasonable doubt every fact necessary to constitute a crime. In re Winship, 397 U.S. 358 (1970). The existence of "sufficient aggravating circumstances" that outweigh the mitigating circumstances is an essential element of death-penalty-eligible first degree murder because it is the sole element that distinguishes it from the

crime of first degree murder, for which life is the only possible punishment. Fla. Stat. §§ 775.082, 921.141. For that reason, Winship requires the prosecution to prove the existence of that element beyond a reasonable doubt. The instruction given to Appellant's jury violated the Due Process Clause of the Fourteenth Amendment of the United States Constitution and the Sixth Amendment's right to trial by jury because it relieves the state of its burden to prove beyond a reasonable doubt the element that "sufficient aggravating circumstances" exist which outweigh mitigating circumstances by shifting the burden of proof to the defendant to prove that the mitigating circumstances outweigh sufficient aggravating circumstances.

See: Mullaney v. Wilbur, 421 U.S. 684, 698 (1975).

In Mullaney, the United States Supreme Court held that a Maine statutory scheme delineating the crimes of murder and manslaughter violated the Due Process Clause of the Fourteenth Amendment. The Maine law at issue required a defendant to establish, by a preponderance of the evidence, that he acted in the heat of passion on sudden provocation, in order to reduce a charge of murder to manslaughter. Mullaney at 691-692. Like the Florida statute at issue here, "the potential difference in [punishment] attendant to each conviction.. . may be of greater importance than the difference between guilt or innocence for many lesser crimes." Mullaney, at 698. The Supreme Court held that the statutory scheme unconstitutionally relieved the state of

its burden to prove the element of intent. Mullaney, at 701-702. The Florida instruction produces the same fatal flaw.

To comply with the Eighth Amendment's requirement that the death penalty be applied only to the worst offenders, Florida adopted statute 921.141 as a means of distinguishing between death-penalty eligible and non-death-penalty eligible murder. State v. Dixon, 283 So.2d 1 (Fla. 1973) at 10. Florida chose to distinguish those for whom "sufficient aggravating circumstances" outweigh mitigating circumstances from those for whom "sufficient aggravating circumstances" do not outweigh the mitigating circumstances. Dixon, at 8. Because the former are more

culpable, they are subjected to the most severe punishment: death. "By drawing this distinction, while refusing to require the prosecution to establish beyond a reasonable doubt the fact upon which it turns, [Florida] denigrates the interests found critical in Winship." Mullaney, at 698.

D. PETITIONER HAS MADE A PRIMA FACIE SHOWING OF MENTAL RETARDATION AND MUST BE AFFORDED AN EVIDENTIARY HEARING TO DETERMINE IF APPELLANT'S MENTAL RETARDATION IS SUFFICIENT TO RENDER EXECUTION UNCONSTITUTIONAL.

1. Atkins Is Retroactive.

In Atkins v. Virginia, 122 S.Ct. 2242 (2002), the Supreme Court held that the Eight Amendment prohibits the execution of mentally retarded offenders. Atkins overruled the holding Penry v. Lynaugh, 492 U.S. 302 (1989), that the Eighth Amendment permitted mentally retarded offenders to be executed. When the Supreme Court considered the constitutionality of executing mentally retarded offenders in Penry, it addressed the retroactivity of a new rule prohibiting their execution and held that ".. such a rule would fall under the first exception to the general rule of nonretroactivity and would be applicable to defendants on collateral review." Penry at 329. In addition to the Supreme Court's retroactivity holding in Penry, Justice Steven's opinion in Atkins makes it clear that the rule adopted in Atkins is a change in substantive criminal law and

not merely new rule of procedural law:

> Construing and applying the Eighth Amendment in the light of our evolving standards of decency, we ... conclude that such punishment is excessive and that the Constitution places substantive restriction on the State's Power to take the life of a mentally retarded offender.

Atkins, at 321, quoting Ford v. Wainwright, 477 U.S. 399, (1986) at 405. When the Supreme Court announces a new constitutional rule that "...place[s] beyond the authority of the state the power to ... impose certain penalties,..." that rule is retroactive under Witt v. State, 387 So2d 922 (Fla. 1980) at 929. In Witt, this court summarized Florida's criteria for determining whether a change in the decisional law must be applied retroactively in postconviction proceedings:

> To summarize, we today hold that an alleged change of law will not be considered in a capital case under Rule 3.850 unless the change (a) emanates from this Court or the United States Supreme Court, (b) is constitutional in nature, and (c) constitutes a development of fundamental significance.

Witt, at 931.

Applying the Witt criteria to the holding in Atkins, it is clear that Atkins must be applied retroactively. First, Atkins falls within the ambit of Witt, for it emanated from the United States Supreme Court. Second, Atkins is constitutional in nature, for its holding goes to the very heart of the right to protection from cruel and unusual punishment as guaranteed by the Eighth Amendment. And third, Atkins is of fundamental significance for its purpose is

to safeguard the basic protections guaranteed by the Eighth Amendment.

2. The Rule In Atkins Commands Full Constitutional Protections.

The Supreme Court has left to each State initially to develop the"... appropriate ways to enforce the constitutional restriction upon its execution of appropriate sentences." Atkins, at 317. Florida constitutional law imposes specific, stringent requirements on the way facts must be found in criminal cases and it is under this umbrella that the facts bearing on Appellant's mental retardation must be determined. See: Traylor v. State, 596 So2d 957 (Fla. 1992).

Furthermore, all the elements of federal due process must be observed in proceedings to determine any precondition for a death sentence. If Appellant suffers from mental retardation, the precondition for his death sentence announced in Atkins is unsatisfied. The Due process Clause is never more exacting that when life is at stake. A procedural rule that may satisfy due process in one context may not necessarily satisfy due process in every case. See: Bell v. Burston, 402 U.S. 535 (1971) at 540; Matthews v. Eldridge, 424 U.S. 319 (1976) at 340-343; Goldberg v. Kelly, 397 U.S. 254 (1970) at 264; and Speiser v. Randall, 357 U.S. 513 (1958) at 520 and so "...whatever due process is 'due' an offender faced with a fine or prison sentence [does not] necessarily satisf[y] the requirements of the Constitution in a capital case. See: Reid v. Covert, 354 U.S. 1 (1957) at 77 (Justice Harlan concurring). The Supreme Court repeatedly cognized a defendant's compelling interest in a fair

adjudication at the sentencing phase of a capital murder case. See: Ake v. Oklahoma, 470 U.S. 68 (1985) at 83. In addition, there is a strong public interest in assuring an accurate determination mental retardation in capital cases in order to avoid wrongful executions. Ake, at 79. The State's interest in prevailing at trial ... is necessarily tempered by its interest in fair and accurate adjudication of criminal cases. When life and death are at issue, the public interest in accuracy and reliability is of paramount importance, Ake, at 83-84. The time invested in ascertaining the truth would surely be well spent if it makes the difference between life and death, See: Gardner v. Florida, 430 U.S. 349 (1978) at 360. Finally, the risk of error inherent in determining mental health issues is great unless the adjudication of such issues is entrusted to a full adversarial trial. See: Ake, at 81-82; Barefoot v. Estelle, 463 U.S. 880 (1983) at 899, 903; and Addington v. Texas, 441 U.S. 418 (1979).

The state and federal constitutional protections to which Appellant is entitled include the following:

A. The Right to a Jury Trial.

The Atkins and Ring opinions, on their face, require that capital defendants be afforded a jury trial on the issue of mental retardation. Ring is explicit that the procedural rights guaranteed by Apprendi – the right to demand(i) a factual finding by (ii) a unanimous jury, (iii) beyond a reasonable doubt, of the factual elements upon which a conviction or eligibility for enhanced punishment depend – attach to elements

that are added by the Supreme Court " ... interpre[tations] of the Constitution to require the addition of an ... element to the definition of a criminal offense in order to narrow its scope." See: Ring at 587. Atkins adds just such an element: "Thus, pursuant to our narrowing jurisprudence which seeks to ensure that only the most deserving of execution are put to death, an exclusion of the mentally retarded is appropriate". See: Atkins, at 319. Death is not a suitable punishment for a mentally retarded offender. See: Atkins, at 321.

B. The Right to Appointed, Qualified, Competent Counsel.

Because the determination of mental retardation is a critical stage of the proceeding, the assistance of counsel is required. Counsel is required during post arrest interviews, including those by mental health examiners, See: Massiah v. New York, 377 U.S. 201 (1964); and Estelle v. Smith, 451 U.S. 454 (1981). "The assistance of counsel is often a requisite to the very existence of a fair trial," Argersinger v. Hamlin, 407 U.S. 31 (1972), and "... it has become apparent that special skills are necessary to assure adequate representation of defendants in capital cases... " See: Amadeo v. Zant, 384 S.E.2d 181 (Ga. 1989), at 182.

Counsel must perform effectively. See: Williams v. Taylor, 529 U.S. 362 (2000) wherein counsel was found to be ineffective for failing to adduce evidence of "mild mental retardation".

C. The Right to Assistance From Independent Competent Experts.

Ake, at 80, mandates the assistance of competent, independent experts when the issue of mental retardation is addressed:

> [A] reality that we recognize today ... [is] that when the defendant's mental condition is relevant to his criminal culpability and to the punishment he might suffer, the assistance of a psychiatrist may well be crucial to the defendant's ability to marshal his defense.

D. Adequate Time and Resources.

Fact findings that are determinative of life and death in a criminal proceeding can not be made in a rush. See: Powell v. Alabama, 287 U.S. 45 (1932) A defendant must be provided the time, resources, and tools necessary to prepare an adequate defense. See: Ake, supra.

3. Appellant Has Been Provided With None Of These Constitutional Protections.

In his direct appeal, Appellant raised the issue of whether the trial court had adequately inquired into whether Appellant had knowingly and voluntarily waived his right to counsel at trial. See: Johnston v. State of Florida, 497 So2d 863 (Fla. 1986). Citing Keene v. State, 420 So2d 908 (Fla.1st DCA 1982), the court found that the trial

court properly considered Appellee's age, mental status and lack of knowledge and experience in criminal proceedings. The court further found that the trial court had arrived at the correct conclusion in finding that Appellee's waiver of trial counsel was "... neither knowing or intelligent, in part, **because of Johnston's mental condition.**" (emphasis added) See: Johnston, at 868. In addition, the trial court properly considered the reports of psychiatrists and Appellee past admissions into mental hospitals.

During Appellee's post conviction proceeding, the State argued, among other things, that Appellant has been previously found not to be mentally retarded by the Florida Supreme Court in his direct appeal. (R. PC. 83) The State's position is not supported by the opinion rendered by the Florida Supreme Court. As stated in the preceding paragraph, the sole mental health issued raised on direct appeal addressed whether Appellee's waiver of trial counsel was knowing and intelligent and this court found that said waiver was defective in part, due to Appellent's mental condition. The State misled Judge Wattles by representing that the trial court's determination that Appellant had sufficient mental capacity to waive his Miranda rights was affirmed by this court on direct appeal (R. PC. 14), when, in fact, this court's determination was that Appellee's waiver of trial counsel was not voluntary and intelligent. See: Johnston, 497 So2d 863 (1986) at 868.

Prior to the Atkins decision, Appellant, under death warrant, filed a motion

pursuant to Fla. R. Crim. P. 3.850, raising, among other issues, his competence to stand trial. (R.PC.51) This motion was denied (R.PC. 52) and the denial was affirmed by this court. See: Johnston v. Dugger, 583 So2d 657 (Fla.1991) In his first post conviction proceeding, Appellant did not raise, nor did any court address, any mental retardation issue. The present post conviction proceeding is the first time Appellant has raised the issue of his mental retardation. Prior to this proceeding, there was not any federal constitution right not to be executed if mentally retarded. No constitutional protections of any type were available or provided to him in order to assure the reliability of the factual determination that makes Atkins decisive of life or death because there was no state or federal constitutional entitlement to any particular state post conviction procedure in connection with mental retardation.

There was no jury determination of whether Appellant was mentally retarded, there were no competent qualified counsel to address the issue of Appellant's mental retardation; there was no assistance from independent competent qualified experts; and there was inadequate time and resources to competently prepare Appellant's defense.

4. Because The Trial Court Only Addressed Appellant's Mental Capacity To Waive his Miranda Rights And Waive His Right To Trial Counsel, And No Subsequent Proceeding Has Addressed Appellant's Mental Retardation, A Full Adversarial Hearing Is Required.

In his post conviction proceeding, Appellant presented sufficient evidence to warrant a full adversarial hearing on the mental retardation issue. (R.PC. 62-63) Appellant has tested with an I.Q. of 57, 58 and 67 at various times. (R. PC. 62) Mental health experts have previously concluded that Appellant suffers "... from moderate to severe levels of perceptual problems and/or organic brain damage". (R. PC. 63) Appellant was eventually sent to a school for the mentally retarded. (R. PC. 63.

During the hearing in which Judge Wattles denied Petitioner's Atkins relief, the State simply argued that the "... law of the case..." required the trial court deny a full evidentiary hearing on the Atkins issue. (R.PC. 14, L.1-8) This could not further from the true. Petitioner's mental retardation has not been raised is any proceeding, including the trial, the direct appeal, and the several state and federal post conviction proceedings. The mental retardation issue simply has not been addressed.

CONCLUSION.

Appellant's Judgments and Conviction must be vacated.

Appellant's Sentence must be vacated.

The trial court's Order dated August 29, 2002, deny Appellant's Atkins claim must be reversed and remanded with instruction to the trial court to conduct a full evidentiary hearing on the issue of Appellant's mental retardation.

The trial court's Final Order Denying Second "Motion to Vacate Judgments of Conviction and Sentences With Special Request For Leave To Amend must be reversed.

Certificate of Service.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to the Kenneth Nunnelley, Assistant Attorney General, Office of the Attorney General, 444 Seabreeze Boulevard, 5th Floor, Daytona Beach, Florida 32118; and Chris Lerner, Office of the State Attorney, Ninth Judicial Circuit, 425 North Orange Avenue, Orlando, Florida 32801 this _____ day of December, 2003 by United States Mail, postage prepaid.

_____
J. Edwin Mills
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Certificate of Compliance.

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

_____
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