IN THE SUPREME COURT OF FLORIDA

CASE NO. SC04-1662

PATRICK C. HANNON,

Petitioner,

v.

JAMES V. CROSBY Jr.,
Secretary, Florida Department of Corrections,

Respondent.

PETITION FOR WRIT OF HABEAS CORPUS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

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, claims demonstrating that Mr. Hannon was deprived of the effective assistance of counsel on direct appeal and that the proceedings that resulted in his conviction and death sentence violated fundamental constitutional guarantees.

Citations to the Record on the Direct Appeal shall be as (R. ___). All other citations shall be self-explanatory.

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. Hannon requests oral argument on this petition.

PROCEDURAL HISTORY

Mr. Hannon was charged by indictment on February 13, 1991, with two counts of first degree murder in the Thirteenth Judicial Circuit, Hillsborough County (R. 1672-1674). A superseding indictment was filed on March 27, 1991, charging Mr. Hannon and co-defendant, Ronald Richardson, with the same pre-meditated murders

(R. 1683-1685). By executive order, the governor assigned the State Attorney for the Sixth Judicial Circuit to prosecute the case in place of the State Attorney for the Thirteenth Judicial Circuit because of a conflict of interest (R. 1678-1680). The change of State Attorney was granted because one of the State's witnesses, who was also the sister of co-defendant James Acker, was employed by the Hillsborough County State Attorney's Office (R. 1046, 1678-80, 1686-87, 1831-1832).

Mr. Hannon's trial began on July 15, 1991. On July 23, 1991, the jury found Mr. Hannon guilty of two counts of first-degree premeditated murder (R. 1577, 1781-82). The entire penalty phase was held on July 24, 2991 and lasted less than thirty (30) minutes. The jury recommended death sentences for both murder counts (R. 1587-1634, 1783-84, 1792). On August 5, 1991, the circuit court sentenced Mr. Hannon to death for both counts of murder (R. 1642, 1806-16).

On direct appeal, this Court affirmed the conviction and sentences. *Hannon v. State*, 638 So. 2d 39 (Fla. 1994). Mr. Hannon timely petitioned the United States Supreme Court for writ of certiorari. The petition was denied on February 21, 1995. *Hannon v. Florida*, 115 S. Ct. 1118 (1995).

On March 17, 1997, Mr. Hannon filed his initial Fla. R. Crim. P. 3.850 motion. On April 22, 1997, Mr. Hannon filed an amended Rule 3.850 motion. Mr. Hannon filed his first amended Rule 3.850 motion on April 10, 2000.

On July 3, 2000, the State filed its response. After the circuit court held a Huff[1] hearing on July 10, 2000, the court entered an order granting an evidentiary hearing on

[1]*Huff v. State*, 622 So.2d 982 (Fla. 1993).

claims IV (in part), V (in part), IX, X (in part) and XXI, and summarily denied the remainder of Mr. Hannon's claims. The court held an evidentiary hearing on February 18, 2002 and June 21, 2002. In an order entered on February 3, 2003, the court denied those claims for which an evidentiary hearing had been granted. Mr. Hannon timely filed a notice of appeal.

CLAIM I

PETITIONER IS ENTITLED TO A NEW TRIAL DUE TO FUNDAMENTAL ERROR. PETITIONER'S FIFTH, SIXTH, AND FOURTEENTH AMENDMENT RIGHTS WERE VIOLATED BECAUSE HE WAS CONVICTED OF A CRIME NOT CHARGED IN THE INDICTMENT.

A. INTRODUCTION

The Grand Jurors of the County of Hillsborough, State of Florida indicted Mr. Hannon charging him with two counts of murder from a premeditated design for the deaths of Brandon Snider and robert Carter[2]. (R. 1683-84). The indictment did not charge Mr. Hannon with burglary or any other felony. During the guilt phase closing argument, the prosecutor argued to the jury that the State had proven Mr. Hannon guilty of premeditated First Degree Murder as well as

[2] Mr. Hannon was indicted for murder from a premeditated design under Florida Statute 782.04(1) (R. 1683-84). He was not charged under paragraph two (2), which is murder during the course of a felony.

Felony Murder arguing that Mr. Hannon was guilty of Burglary. (R. 1461). Following closing arguments, the trial judge instructed the jury on both premeditated First Degree Murder as well as Felony Murder and defined the crime of Burglary[3]. (R. 1564-66) Following trial, a jury returned a verdict, via a general verdict form, of "Murder in the First Degree" on both counts. (R. 1781-82).

B. A CONVICTION CANNOT REST ON A CHARGE NOT MADE IN THE INDICTMENT

Mr. Hannon was never indicted for the crime of burglary. It is well established that a conviction of a charge not made in the indictment is a denial of due process. *State v. Gray*, 435 So.2d 816 (Fla. 1983). *See also Thorhill v. Alabama*, 310 U.S. 88 (1940); *DeJonge v. Oregon*, 299 U.S. 353 (1937). In Gray, this Court held that if

> the charging instrument completely fails to charge a crime, therefore, a conviction thereon violates due process. Where 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. Since a conviction cannot rest upon such an indictment of information, the complete failure of an accusatory instrument to charge a crime is a defect that can be raised at any time – before trial, after trial, on appeal, or by habeas corpus.

State v. Gray, 435 So.2d 816 (Fla. 1983), See *State v. Black*, 385 So.2d 1372 (Fla.

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[3] Trial counsel failed to object despite the fact that Mr. Hannon was never charged with burglary

1980); *State v. Dye*, 346 So.2d 538 (Fla. 1977); *Russa v. State*, 196 So. 302 (1940).

While Mr. Hannon's jury may very well have found Mr. Hannon guilty of premeditated first degree murder, not felony murder, this would be pure speculation since the verdict form returned by the jury simply found Mr. Hannon guilty of "Murder in the First Degree." (R. 1781-82). Because the State argued felony murder during closing arguments, and the judge instructed the jury on felony murder and defined the felony of burglary, it is just as likely that Mr. Hannon's jury found him guilty of felony murder as opposed to premeditated murder. Based upon the trial record, it is simply impossible to discern which theory of first degree murder the jury found Mr. Hannon guilty of beyond a reasonable doubt.

This Court recently confronted a similar question in *Fitzpatrick v. Florida*, 859 So.2d 486 (Fla. 2003). In *Fitzpatrick*, this Court reversed the defendant's conviction holding that where a defendant's jury was instructed on both felony murder and premeditated murder, the conviction cannot stand where the prosecution's theories are inadequate and due to the general verdict, it was impossible to discern on what grounds the jury found the defendant guilty. Fitzpatrick was indicted on the underlying burglary charge, however, that prosecution's theory of burglary was inadequate. Mr. Hannon's case is more egregious since he was never charged with burglary yet the jury may have convicted him of felony murder with burglary being the underlying felony.

This Court's analysis in *Fitzpatrick* makes it clear that Mr. Hannon is entitled to a new trial. Citing to the recent decision in *Delgado v. State*, 776 So.2d 233 (Fla. 2000), this Court concluded that "it is well established that a general jury verdict cannot stand where one of the theories of prosecution is legally inadequate." *Id*. At 241. This court granted relief in *Delgado* and *Mackerley v. State*, 777 So.2d 969 (Fla. 2001), based upon the U.S. Supreme Court's decision in *Yates v. United States*, 354 U.S. 298 (1957). The *Yates* decision held that the "proper rule to be applied is that which requires the verdict to be set aside in cases where the verdict is supportable on one ground, but not on another, and it is impossible to tell which ground the jury selected." *Yates* at 312.

The analysis by the U.S. Supreme Court in *Yates* and this Court's decisions in *Fitzpatrrick, Delgado,* and *Mackerley* make it clear that Mr. Hannon's due process rights were violated and a new trial is warranted. Unlike the above cited cases where there was a defect in the charging of the underlying felony which supported the felony murder charge, in Mr. Hannon's case, he was simply never charged with burglary or any other underlying felony. It is axiomatic that a conviction of a crime for which Mr. Hannon was never charged violates his Fifth and Fourteenth Amendment rights to due process. Because it is impossible to discern whether Mr. Hannon's jury convicted him on the theory of premeditated first degree murder or of the uncharged felony murder, a reversal of his conviction is warranted.

Petitioner asserts that relief is warranted due to fundamental error.

However, to the extent that appellate counsel failed to raise this issue upon direct appeal, appellate counsel was constitutionally ineffective. "A first appeal as of right [ ] is not adjudicated in accord with due process of law if the appellant does not have the effective assistance of an attorney." *Evitts v. Lucey*, 469 U.S. 387, 396 (1985). The *Strickland* test applies equally to ineffectiveness allegations of trial counsel and appellate counsel. See *Orazio v. Dugger*, 876 F. 2d 1508 (11th Cir. 1989). Under *Strickland v. Washington*, 466 U.S. 668 (1984), the appellant or petitioner must demonstrate unreasonable attorney performance and prejudice to prevail on an ineffective assistance of counsel claim. Because the constitutional violation described above was "obvious on the record" and "leaped out upon even a casual reading of the transcript," it cannot be said that the "adversarial testing process worked in [Mr. Hannon's] direct appeal." *Matire v. Wainwright*, 811 F. 2d 1430, 1438 (11th Cir. 1987). The prejudice to Mr. Hannon is manifest. Had appellate counsel raised upon direct appeal that his client was convicted of a crime for which he was not charged in the indictment, Mr. Hannon's conviction would not have been affirmed upon direct appeal. A new trial is warranted.

CLAIM III

FLORIDA'S CAPITAL SENTENCING STATUTE VIOLATES THE SIXTH AND FOURTEENTH AMENDMENTS UNDER *APPRENDI V. NEW JERSEY* AND *RING V. ARIZONA*.

1. INTRODUCTION.

In *Ring v. Arizona*, 122 S.Ct. 2428 (2002), the U.S. 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. In *Ring*, the Supreme Court held that the Sixth Amendment to the United States Constitution requires that when aggravating factors are statutorily necessary for imposition of the death penalty, they must be found beyond a reasonable doubt by a jury:

> [W]e overrule *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. . . . Because Arizona's enumerated aggravating factors operate as 'the functional equivalent of an element of a greater offense,' . . . the Sixth Amendment requires that they be found by a jury.

Ring, 536 U.S. at 609 (citations omitted). 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*.

2. *RING* APPLIES TO THE FLORIDA CAPITAL SCHEME.

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

This Court has previously held that, "[b]ecause *Apprendi* did not overrule *Walton,* the basic scheme in Florida is not overruled either." *Mills v. Moore*, 786 So.2d 532, 537 (Fla. 2001). *Ring* overruled *Walton* 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 this Court in *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*, this 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 decision by the United States Supreme Court in *Sattahzan v. Pennsylvania*, 123 S.Ct. 732 (2003). *Accord Butler v. State*, 842 So. 2d 817 (Fla. 2003) (Pariente, J., concurring in part and dissenting in part). 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, (emphasis added).

B. 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 omitted]. A defendant is guilty of first-degree homicide if the Louisiana jury finds that the killing fits one of five statutory criteria. [Citation omitted]. 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 omitted]. 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 omitted]. **We went on to compare the Louisiana scheme with the Texas scheme, under which the required narrowing occurs at the guilt phase**. [Citation omitted]. **We also contrasted the Louisiana scheme with the Georgia and Florida schemes**. [Citation omitted].
>
> 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. Hannon is aware of the opinions of various members of this 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*, 845 So.2d 41 (Fla. Feb. 13, 2003). 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 this Court's nearly three (3) decades of death penalty jurisprudence has this Court—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.

C. 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."

1. 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. 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*, 123 S.Ct. 732 (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 this 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). Even in a situation where there is a unanimous jury recommendation for a death sentence, it is still unclear whether there was unanimity as to some or all of the aggravating circumstances. 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).

2. 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." This 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. This 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, this 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*.

3. 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. Indeed, Mr. Hannon's jury was instructed that its role was merely advisory and that the final decision as to the sentence rested with the judge. (R. 1619)

3. MR. HANNON 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. Hannon are now revealed.

A. The indictment against Mr. Hannon failed to include all of the elements of the offense of capital murder.

The United 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 operate as "the functional equivalent of an element or 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*, 526 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 the Due Process and Grand Jury clauses of the Fifth Amendment.

The Eighth Circuit had previously rejected Allen's argument because in its view that 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* held 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 Grand Jury Clause of 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."

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

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

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

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. Hannon's right under Article I, section 15 of the Florida Constitution, and the Sixth Amendment to the federal Constitution were violated.

1. Mr. Hannon's 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." Fla. Stat. § 921.141(2). Mr. Hannon's jury was instructed in conformity with the statute and this Court's precedent that its role was advisory only in returning a recommendation.

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. Hannon's death sentence rests on findings made by the jury after it was told, and Florida law clearly provided, that a death sentence would not rest upon the jury's recommendation alone, it would mean that Mr. Hannon'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." The fact that Mr. Hannon's jury was instructed that its role was merely advisory presents "additional concerns in light of *Ring*." *Butler v. State*, 842 So. 2d 817 (Fla. 2003) (Pariente, J., concurring in part and dissenting in part). *See also Bottoson v. Moore*, 833 So. 2d 693, 731-34 (Fla.) (Lewis, J., concurring in result only), *cert. denied*, 123 S. Ct. 662 (2002).

2. *Ring* meets Florida's retroactivity standard.

The State will, no doubt, argue that *Ring* is not retroactive[4]. However, *Ring* clearly meets the retroactivity analysis in *Witt v. State*, 387 So. 2d 922 (Fla. 1980). As to what Aconstitutes a development of fundamental significance,@ *Witt* explains that this category includes Achanges of law which are of sufficient magnitude to necessitate retroactive application as ascertained by the three-fold test of *Stovall [v. Denno*, 388 U.S. 293 (1967),] and *Linkletter [v. Walker*, 381 U.S. 618 (1965)],@ adding that A*Gideon v. Wainwright* . . . is the prime example of a law change included within this category.@ 387 So. 2d at 929. The three-fold *Stovall-Linkletter* test considers: A(a) the purpose to be served by the new rule; (b) the extent of reliance on the old rule; and (c) the effect on the administration of justice of a retroactive application of the new rule.@ 387 So. 2d at 926. Resolution of the issue ordinarily depends most upon the first prong--the purpose to be served by the new rule--and whether an analysis of that purpose reflects that the new rule is a Afundamental and constitutional law change[] which cast[s] serious doubt on the veracity or integrity of the original trial proceeding.@ 387 So. 2d at 929. *Ring* is

[4]The U.S. Supreme Court has recently held that *Ring* is not retroactive in Federal court cases pursuant to the retroactivity test set forth in *Teague v. Lane*, 489 US 288 (1989). *Schiaro v. Summerlin*, 124 S.Ct. 2519 (2004). However, *Teague* is inapplicable to Florida where the retroactivity standard is based upon the holding in *Witt*.

such a fundamental constitutional change for two reasons. First, the purpose of the rule is to change the very *identity* of the decision maker with respect to critical issues of fact that are decisive of life or death. This change remedies a A>structural defect[] in the constitution of the trial mechanism,=@ by vindicating Athe jury guarantee . . . [as] a >basic protectio[n]= whose precise effects are unmeasurable, but without which a criminal trial cannot reliably serve its function.@ *Sullivan v. Louisiana*, 508 U.S. 275, 281 (1993). When a capital defendant has been subjected to a sentencing proceeding in which the jury has not participated in the life-or-death factfinding role required by the Sixth Amendment and *Ring*, the constitutionally required tribunal was simply not all there, a radical defect which necessarily Acast[s] serious doubt on the veracity or integrity of the . . . trial proceeding.@ *Witt*, 387 So. 2d at 929.

Second, Athe jury trial provisions in the Federal and State Constitutions reflect a fundamental decision about the exercise of official power.@ *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968). Inadvertently but nonetheless harmfully, the United States Supreme Court lapsed for a time and enfeebled the institution of the jury through its rulings in *Hildwin v. Florida*, 490 U.S. 638 (1989), and *Walton v. Arizona*. The Court=s retraction of these rulings in *Ring* restores a right to jury trial which is a Afundamental@ guarantee of the Federal and Florida Constitutions.

As discussed by Justice Shaw in his opinion in *Bottoson*, *Ring* is a decision that emanated from the United States Supreme Court, its holding is constitutional in

nature as it Agoes to the very heart of the constitutional right to trial by jury,@ and is of fundamental significance. *Bottoson*, 833 So. 2d at 717. Justice Lewis= opinion in *Bottoson* also classifies the decision in *Ring* as setting forth a Anew constitutional framework.@ *Id*. at 725. In *King v. Moore*, 831 So. 2d 143 (Fla. 2002), Justice Pariente also observed that the application of the Sixth Amendment right to jury trial to capital sentencing was Aunanticipated@ by prior case law upholding Florida=s death penalty statute, and that *Apprendi*, the case which was extended by *Ring* to capital sentencing, Ainescapably changed the landscape of Sixth Amendment jurisprudence.@ *Id*. at 149. Clearly, *Ring* meets the *Witt* test.

CONCLUSION

For all of the arguments discussed above, Mr. Hannon respectfully urges this Court to grant habeas corpus relief.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by United States Mail, first class postage prepaid, to Candance Sabella, Assistant Attorney General, 2002 N. Lois Avenue, Ste. 700, Tampa, FL 33607 on August 20, 2004.

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CERTIFICATE OF COMPLIANCE

The undersigned counsel certifies that this petition is typed using Times New Roman 14 font.

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