IN THE SUPREME COURT OF FLORIDA

JAMES DELANO WINKLES, :

Appellant, :

vs. : Case No.SC03-935

STATE OF FLORIDA, :

Appellee. :

_____:

APPEAL FROM THE CIRCUIT COURT
IN AND FOR PINELLAS COUNTY
STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

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TENTH JUDICIAL CIRCUIT

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STATEMENT OF THE CASE

The Pinellas County Grand Jury indicted the appellant, James Delano Winkles, on March 25, 1999, for Count One, the first-degree premeditated murder of Elizabeth M. Graham between September 9, 1980, and July 3, 1981, and Count Two, the first-degree premeditated murder of Margo C. Delimon between October 3 and October 21, 1981. [V1 3-4][1] The court appointed counsel to represent Winkles. [V1 11, 121]

Defense counsel filed a motion to declare the Florida capital sentencing statute unconstitutional pursuant to *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Ring v. Arizona*, 536 U.S. 584

[1] References to the record on appeal are designated by V and the volume number, followed by the page number(s).

(2002).[2] [V2 264-72] The court heard and denied this motion on April 1, 2002. [V3 489, 498-501]

On April 3, 2002, Winkles pled guilty to both counts of first-degree murder and waived his right to a jury for the penalty phase trial, while preserving for appeal the denial of his motion to declare the Florida capital sentencing statute unconstitutional. [V3 514, 517-33; V2 304-05] The court adjudicated him guilty. [V3 530; V2 306-07]

The penalty phase trial was conducted before Circuit Judge Richard Luce on February 17, 2003. [V4 556-719; V5 720-846] Defense counsel filed a sentencing memorandum on February 18, 2003 [V2 325-32], and a written closing argument on March 13, 2003. [V2 347-50] The State filed a sentencing memorandum on March 14, 2003. [V2 351-72] The court held a *Spencer*[3] hearing on March 31, 2003. [V5 847-52]

On April 14, 2003, the court sentenced Winkles to death for both counts of first-degree murder. [V5 853-88; V2 373-77] The court found that four aggravating circumstances had been proven beyond a reasonable doubt as to each murder: (1) prior convictions

[2] At the time the motion was filed, certiorari had been granted to review the death sentence in *Ring v. Arizona,* 534 U.S. 1103 (2002), but the case had not yet been decided.

[3] *Spencer v. State*, 615 So.2d 688 (Fla. 1993)

of another capital felony (the other first-degree murder in this case) and of other violent felonies (assault with intent to commit robbery and attempted robbery in 1963, kidnapping, armed robbery, and aggravated assault in 1982) (great weight); (2) capital felony committed while engaged in a kidnapping (great weight); (3) capital felony committed to avoid arrest (great weight); and (4) capital felony committed in a cold, calculated, and premeditated manner without pretense of moral or legal justification (great weight). [V2 379-83]

The court found that no evidence of any statutory mitigating circumstance had been presented, and none was found anywhere in the record. [V2 385] Regarding non-statutory mitigating circumstances, the court found: (a) Winkles confessed to the cold-case, unsolved murders and cooperated with the police (considerable weight); (b) consecutive life sentences would result in Winkles dying while incarcerated (little weight);[4] (c) life sentences would save taxpayer money because no direct or collateral appeals would be filed – rejected by the court because Winkles could still file collateral attacks, court would give no weight if this was a valid mitigating factor; (d) Winkles waived several appellate issues by pleading guilty (very little weight);

[4] The court rejected as unproven Winkles' claim that he had cancer and a below average life expectancy. [V2 386]

(e) Winkles pled guilty, saving the victims' families from sitting through a trial and saving the State the expense of a trial – the court found that the families were not spared from learning the horrific acts committed against their loved ones (no weight); (f) Winkles' confessions provided the families with finality and closure, but the court found that they were exposed to the disturbing details of the crimes and the bragging manner in which Winkles gave those details (little weight); (g) good conduct while incarcerated for twenty years, evidenced only by a letter from a former prison chaplain stating that Winkles seemed to be a conscientious worker and tried to do his job well to please his supervisor (no weight); (h) Winkles was raised by relatives because of the untimely death of his mother – not proven; and (i) Winkles served in the Alabama National Guard for eight months of a six-year enlistment and was honorably discharged following a conviction by civil authorities – the court found that a good military record had not been proven and that the honorable discharge was entitled to no weight because of the brevity of service. [V2 385-90]

Defense counsel filed a timely notice of appeal on May 14, 2003.

STATEMENT OF THE FACTS

Nineteen-year-old Elizabeth Graham was an employee of the Pampered Poodle dog grooming business in St. Petersburg. She was abducted from a vacant house for sale in the High Point area of Pinellas County on September 9, 1980. Her van was found parked in the driveway with a flat tire caused by a knife puncture between the treads. [V4 580, 582-90] Her body was never recovered. [V4 590-91] Graham's toothless skull was found in the Steinhatchee River near U.S. 19 in the vicinity of Lafayette and Dixie Counties on July 3, 1981. The skull was identified by DNA analysis in the late 1990s. [V4 592-93]

Thirty-nine-year-old Margo Delimon was a realtor selling log cabins for Oben Realty in Pinellas Park. She disappeared while she was working on October 3, 1981. Her car was found at the company's model home location near U.S. 19. [V4 593-95] Her headless body was found near the Withlacoochee River in Citrus County on October 21, 1981. The body's fingerprints were identified in August 1983. [V4 595-96; V5 763] Delimon's toothless skull was found on the west side of U.S. 19 in Hernando County on May 23, 1982. The skull was identified at a later time. [V4 597; V5 763-64]

James Winkles was arrested for the abduction of Donna Maltby, a realtor, in Seminole County in 1983. Winkles then became a suspect in the abductions of Graham and Delimon. [V4 590-91, 597-98] Winkles had been arrested in Pinellas County for land fraud involving the property where Delimon's body was found. Winkles' wife, Mary Thomas, told detectives that she and Winkles had camped on the property. She also told them about some jewelry and a driver's license with Delimon's photo. [V4 596-98]

In February 1998, Sergeant Ring received a call from the Superintendent at Hardy Correctional Institution stating that James Winkles wanted to speak with officers from the Pinellas County Sheriff's Office. [V4 581, 599] Ring, Lieutenant Hart, and Detective Madden went to the prison on March 2, 1998, and spoke to Winkles. He wanted a waiver of the death penalty in exchange for information about the Graham and Delimon cases. [V4 599-600] The detectives returned to Pinellas County and spoke to the State Attorney, who refused to waive the death penalty. The detectives informed Winkles of the refusal. Later in March, Winkles decided to talk to the detectives without the waiver. [V4 600] Beginning on March 27, 1998, Winkles spoke to the detectives for a total of forty to sixty hours over the course of a year. The most important conversations were recorded. The detectives

took him places to try to locate Graham's body. [V4 601-02] After two months of excavation at one site, Winkles said she was not there. [V4 602-03] During the course of the conversations, Winkles provided detailed information about both Graham and Delimon that he could have known only by being with them. [V4 604-05]

On March 27, 1998, Winkles said he had been suffering remorse for the death of Elizabeth Graham for several years. [V4 612-14] Winkles said he met another young woman driving a Pampered Poodle van at a convenience store in Clearwater. The woman excited him, so he decided to make an appointment to abduct her. A couple of weeks later, he called Pampered Poodle and asked them to send the woman to a house on Bradford Drive. She was several hours late, so Winkles called several times. When the van finally arrived, Elizabeth Graham was driving. [V4 614-16, 618] Winkles decided she was as good as the other woman. When Graham opened the van's side doors, Winkles pushed her down, put a pistol to her head, handcuffed her, gagged her, and put her in the back of his station wagon. He used a knife to puncture the right front tire of the van. [V4 617, 619-21] He took $20 from a purse in the van. [V4 627-28]

Winkles said he took Graham to his grandmother's house at 14896 63rd Street North in Clearwater. His grandmother and aunt lived there and were present while he kept Graham there for four days and nights. [V4 618, 621-23] He used two sets of handcuffs to shackle her legs. He instilled fear in her by firing a couple of rounds from a .25 caliber automatic pistol into the floor. [V4 623-24] Winkles told her there would be no problems as long as she did what he said and had sex with him. [V4 624-25] Winkles engaged in several sex acts with Graham. [V4 623, 625, 633-36] After two or three days of confinement, Winkles saw Graham reading the addresses on his grandmother's magazines, so he decided to kill her. [V4 633] The next day, he sent his grandmother and aunt to the grocery store. He gave Graham four Flexeril muscle relaxant pills to put her to sleep. He then put an umbrella over her head and shot her three times in the top of her head. [V4 625-26, 631] He cut her clothing off and burned it along with the sheets from the bed. [V4 627, 632] Winkles said he buried Graham's body in Pinellas County. He later took the skull to the Steinhatchee River, pulled out the lower mandible and teeth, and discarded them. The mandible and teeth were not recovered. There were two holes in the top of the skull caused by the gunshots. [V4 641-43]

In January 1999, Winkles changed his story and said he took Graham to his property in Suwannee County when he abducted her. He often camped there in a motor home. [V4 643-44] One of the neighbors said a photo of Graham looked like a woman who was there with Winkles in September 1980. [V4 645]

Channel 8 reporter Marcia Crawley videotaped an interview with Winkles at Polk Correctional in November 1998. [V4 646-48] Winkles admitted that he abducted Elizabeth Graham, took her to his grandmother's house, repeatedly sexually assaulted her during the next four days, then gave her sleeping pills and shot her three times in the head. [V4 653-54, 656-60, 665] He killed her because she saw a magazine label with his grandmother's address. [V4 669] Winkles said he and Graham saw her parents on television asking her abductor to release her unharmed, but he was not moved by their appeal because he has always been a loner described as cold, unfeeling, and uncaring. [V4 672-74] Winkles buried Graham. Sixteen days later, he dug up her head, took it to Lafayette County, removed the teeth and lower mandible, and dumped the head in the river. [V4 661, 674-75]

Winkles felt satisfaction in outwitting the police. [V4 675, 713] Although the abduction murders took place spontaneously, there was always a plan. Whenever he drove around he was always

hunting for attractive, vulnerable victims. He had sleeping pills in a cooler in his car. He enjoyed the planning. [V4 676, 713] He said he confessed because he was in poor health, was having nightmares about Graham and another victim, and felt guilt and remorse. [V4 654]

Winkles also admitted to Crawley that he abducted Margo Delimon, took her to a vacant house next door to his grandmother's house, told her he would let her go if she cooperated, sexually assaulted her several times, then killed her with an overdose of sleeping pills four days later. He decided to kill her because he had driven her around, and she knew where the house was. [V4 683-97] Winkles buried Delimon in Pinellas County. Sixteen days later he moved the body to Citrus County near the Withlacoochee River. A week later he recovered the head, pulled out the teeth, then dropped the head in a wooded area in Hernando County in an area where his family camped. [V4 697-700]

On April 23, 1998, in a tape-recorded interview with Lt. Hart, Sgt. Ring, and Det. Madden at the Pinellas County Jail [V4 716-18; V5 722], Winkles said he abducted Margo Delimon on a Saturday morning sometime between October 1980 and March 1981. [V5 722-23] Five or six weeks before the abduction Winkles and his wife visited a log cabin model home being constructed near

U.S. 19. They returned in three weeks to see the completed cabin. [V5 723-25] A week later, Winkles returned and met Delimon, who was one of the sales women. [V5 725] The day before the abduction, Winkles called Delimon and asked her to meet him for a drink. She refused. [V5 725-26] On Saturday, Winkles went to the model home around 8:15 a.m. Delimon arrived at 8:45 and agreed to have breakfast with him. [V5 726-27] After breakfast, Delimon agreed to go see some property in which Winkles was interested. When they arrived, Winkles told her he was abducting her. [V5 729-30] He handcuffed her and put her in the back of his Bronco. [V5 731] Winkles drove to a vacant house next door to his grandmother's house. [V5 732-35] He handcuffed Delimon to a bed and brought his supplies into the house. [V5 736] He told her he had no intention of hurting her and would let her go. [V5 740, 749] He spent three and a half days having "sexual escapades" with her. [V5 739, 742-43, 753, 756] He also drove around talking with her and taking her to restaurants and the beach. [V5 744-46, 749-56] Winkles began to worry about letting her go because she knew where the house was. [V5 756-59] He gave Delimon two sleeping pills, waited until she went to sleep, then gave her fifteen more pills and waited until she died. [V5 759-60] He buried her in a wooded area near the Clearwater Airport

and Tampa Bay. [V5 760-61] He burned her clothing, gave her watch and earrings to his aunt, and pawned her diamond ring for $400. [V5 761-62]

Detective Madden testified that Winkles took him to the location where Delimon's body had been recovered in Citrus County. [V5 763] Both the Graham and the Delimon disappearances were considered cold cases in February 1998. It is likely that the cases would have remained unsolved if Winkles had not confessed. [V5 766-67]

In January 1982, Donna Maltby was a sales person for Zigler Realty in Seminole County. She was twenty-eight years old and married. On January 6, Winkles came to the office, identified himself as David Longstreet, and asked to see some remote, secluded property. Maltby and Robert Zigler showed him some property, but Winkles wanted something more remote. They arranged to meet again the next day. On January 7, Winkles called Maltby at home and asked her to come to his hotel to help him start his car. [V5 768-74] When Maltby arrived, Winkles' car was running. [V5 775] He asked her to get in to go see some property down the street. [V5 776] While driving down the street, he said he missed the property and made a U-turn. Winkles stopped the car, took out a knife, and stuck it in her side, cutting her hand. He

told her to do what he said, or he would kill her. [V5 777] Winkles tied her up and threw her in the back seat of the car. [V5 778-79] He made another U-turn and appeared to get lost while driving in fog. He said he was going to take her money and rape her. He said he would not kill her if she did exactly what he said. He said he was taking her to a safe house in Tampa. [V5 779-81, 785, 790] Winkles complied with Maltby's request to untie her and allow her to ride in the front seat. He told her he would kill her if she tried to escape. [V5 783-85] He took her money and credit cards. [V5 786] Winkles stopped at a gas station. [V5 789-90, 793] Maltby saw a deputy. When Winkles opened the driver's door, she jumped out, pushed Winkles aside, and screamed for help. Winkles saw the deputy and tried to run away, but the officers caught him. [V5 794-95]

In a videotaped interview by Channel 8 reporters, Winkles said that he met Maltby and her manager at the real estate office, they showed him some property, and he arranged to meet them the next day. While they were at the office, Winkles overheard the manager tell Maltby to pick up $8,900 in cash the next morning. Winkles called the next morning and asked Maltby to come to his hotel because he had a dead battery. When she arrived, he told her he got his car started and asked her to go with him to see a

piece of property. [V5 797-800] Maltby got her purse, but left her briefcase in her car. Winkles drove several miles, pulled off on a dirt road, then took out a knife and told Maltby she was being kidnapped. She grabbed the knife and cut her hand. Winkles tied her hands behind her back and put her in the back seat. He drove back to her car to retrieve the briefcase because he thought the money was in it. He also took a portfolio and some clothes from her car. [V5 800-802] Winkles drove past the interstate, pulled off the road, and searched the briefcase and portfolio, but there was no money. Maltby told him she hadn't picked it up yet. Winkles told her he was going to take her to Tampa and leave her there. [V5 802-03] He stopped at a gas station. She talked him into untying her hands and putting the knife in the trunk. [V5 804-05] Winkles needed to move his car to another pump, but it would not start. He got out to talk to the attendant. Maltby got out of the car and ran screaming into the gas station. Winkles tried to grab her, but her blouse tore. Winkles ran away, heard a siren, and tried to hide in an old stove, but the police found and arrested him. [V5 805-09]

Winkles also told the reporters that he kept cork bobbers with glass or razor blades attached for possible use as gags for his victims, but he never actually used them on a woman. [V5 833-

35] His abduction kit also contained drugs, handcuffs, rope, duct tape, and small bottles of liquor. He kept an overnight case containing women's undergarments in his car trunk so he would have something sexy for his victims to wear. [V5 835-36]

The prosecutor introduced judgments and sentences showing that Winkles was convicted of assault with intent to commit robbery and attempted robbery under the name Jimmy Delano Hawk in Hamilton County, Florida, on September 3, 1963, and kidnapping, armed robbery, and aggravated assault in Seminole County, Florida, on May 27, 1982. [V5 812-13; V2 352-51]

The prosecutor presented victim impact testimony by Elizabeth Graham's father, Ian Graham, who also read a statement by her sister, Catherine Hansen. [V5 813-18] A victim advocate read a statement by Elizabeth's mother, Margaret Graham. [V5 818-21] Gary Muchmore, Elizabeth's boyfriend, testified about the impact of her death. [V5 821-22] Margo Delimon's husband Robert, her sister, Marsha Cruz, and her daughter, Darlene Willis, testified about the impact of her death. [V5 823-30] The prosecutor read a statement by Margo's mother, Charlene Trigg. [V5 831-32]

James Winkles read a prepared statement in which he acknowledged that he deserved punishment for his crimes. Winkles said he had grown morally and intellectually since the commission

of the crimes, having been imprisoned for the past twenty-three years among “animals and monsters,” and subjected to constant tension and stress. Life in prison was “a living death.” He was sixty-two years old, had a severely enlarged heart, a damaged left ventricle, and “malignant spiking blood pressure.” He had endured two heart catheterizations and had developed symptoms of colon cancer. He will probably die of natural causes before he can be executed. He is “truly sorry” for his crimes and wishes he could undo them. [V5 839-42]

SUMMARY OF THE ARGUMENT

ISSUE I The trial court erred by denying appellant's motion to declare the Florida death penalty statute, section 921.141, Florida Statutes, unconstitutional. In *Ring v. Arizona*, 536 U.S. 584 (2002), the Supreme Court held that the Sixth Amendment requires a jury to find aggravating circumstances necessary for the imposition of the death penalty. Section 921.141 violates the Sixth Amendment because it requires aggravating circumstances necessary for imposition of the death penalty to be found by the judge instead of the jury. While *Ring* allows an exception for aggravating circumstances based on prior criminal convictions, and one of the four aggravating circumstances found by the judge in this case was prior convictions for a capital felony and other violent felonies, one valid aggravating circumstance is not sufficient to sustain a death sentence where, as here, there is mitigation to which the judge gave considerable weight. Violation of appellant's right to a jury trial to determine the existence of aggravating circumstances is structural error that cannot be held harmless. Even under harmless error analysis, finding three invalid aggravating circumstances and only one valid circumstance

must have affected the judge's decision to sentence appellant to death, so the error was not harmless.

ISSUE II The denial of appellant's motion to declare the Florida death penalty statute unconstitutional was also error because the statute does not require aggravating circumstances to be alleged in the indictment. The question of whether aggravating circumstances must be alleged in the indictment was not decided in *Ring v. Arizona* because the grand jury clause of the Fifth Amendment has not been held applicable to the states. However, Article I, section 15(a), Florida Constitution requires an indictment for a capital crime. Moreover, the accused is entitled to notice of the nature and cause of the accusations against him under the Sixth and Fourteenth Amendments and Article I, sections 9 and 16(a), Florida Constitution. Failure to allege the aggravating circumstances in the indictment violated appellant's constitutional rights and rendered the judge's findings of aggravating circumstances which were not charged constitutionally invalid. The judge's reliance on invalid aggravating circumstances to impose the death sentence was not harmless.

For these reasons, the death sentences must be vacated, and this case must be remanded for the imposition of life sentences,

or for a new penalty trial with a jury and proper notice of the aggravating circumstances upon which the State will rely.

ARGUMENT

ISSUE I

THE FLORIDA DEATH PENALTY STATUTE VIOLATES THE SIXTH AMENDMENT RIGHT TO HAVE AGGRAVATING CIRCUMSTANCES FOUND BY A JURY.

Defense counsel filed a motion to declare the Florida capital sentencing statute unconstitutional pursuant to *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Ring v. Arizona*, 536 U.S. 584 (2002), on the ground, *inter alia,* that the statute does not require jury findings of aggravating circumstances.[5] [V2 264-72] The court heard and denied this motion on April 1, 2002. [V3 489, 498-501] Winkles preserved the denial of this motion as an issue for appeal [V3 532-33] when he pled guilty and waived the penalty phase jury. [V3 517-30] The trial judge sentenced Winkles to death upon finding that four statutory aggravating circumstances[6]

[5] At the time the motion was filed, certiorari had been granted to review the death sentence in *Ring v. Arizona*, 534 U.S. 1103 (2002), but the case had not yet been decided.

[6] Prior convictions of capital and violent felonies (great weight); commission while engaged in a kidnapping (great weight); commission to avoid arrest (great weight); and cold, calculated, and premeditated (great weight). [V2 379-83]

were proven beyond a reasonable doubt and outweighed the mitigating circumstances. [V2 378-391]

The question presented by this appeal is whether the Florida death penalty statute, section 921.141, Florida Statutes, is unconstitutional because it violates the Sixth Amendment as interpreted by the United States Supreme Court in *Ring v. Arizona,* 536 U.S. at 609, to require aggravating circumstances which are necessary for the imposition of a death sentence to be found by a jury.[7] This is a pure question of law, so the standard of review is *de novo*. *State v. Glatzmayer,* 789 So.2d 297, 301 n.7 (Fla. 2001); *Armstrong v. Harris,* 773 So.2d 7, 11 (Fla. 2000).

This Court has rejected arguments that the decision in *Ring v. Arizona* renders the Florida death penalty statute unconstitutional under the mistaken belief that this Court is bound by the United States Supreme Court's decisions in *Hildwin v. Florida,* 490 U.S. 638 (1989), *Spaziano v. Florida,* 468 U.S. 447 (1984), *Barclay v. Florida,* 463 U.S. 939 (1983), and *Proffitt v. Florida,* 428 U.S. (1976), to uphold the statute. *See Bottoson v. Moore,* 833 So.2d 693, 695 n.4 (Fla.), *cert. denied,* 537 U.S. 1070 (2002); *King v. Moore,* 831 So.2d 143, 144 n.4 (Fla.), *cert. denied,* 537 U.S. 657 (2002). In both *Bottoson* and *King*, this Court quoted *Rodriquez de*

[7] There is one exception to this rule. The judge alone may find an aggravating circumstance based on past convictions. *Ring*, at 597 n.4; *Almendarez-Torres v. United States,* 523 U.S. 224 (1998); *Duest v. State,* 855 So.2d 33, 48 (Fla. 2003).

Quijas v. Shearson/American Express, 490 U.S. 477, 484 (1989):

> If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the [other courts] should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.

Bottoson, at 695; *King,* at 144-45. Moreover, this Court continues to rely upon its decisions in *Bottoson* and *King* to reject claims for relief pursuant to *Ring v. Arizona. See, e.g., Duest v. State,* 855 So.2d 33, 48 (Fla. 2003).

The flaw in this Court's reasoning is that *Ring v. Arizona* does not belong to a separate line of decisions apart from those upholding the Florida death penalty statute. Instead, *Ring* is the most recent decision of the United States Supreme Court in a line of cases beginning with *Proffit* in which the Court has addressed the constitutional validity of judicial findings of aggravating circumstances in capital cases. *Ring* is especially significant because it expressly overrules the Court's prior precedent on the precise issue presented by this case.

In *Proffitt v. Florida*, 428 U.S. 242 (1976), the Court did not address the requirements of the Sixth Amendment; instead, the Court was concerned with whether the Florida capital sentencing statute violated the Eighth Amendment by providing for the arbitrary and capricious imposition of the death penalty.

Nonetheless, the Court rejected Proffitt's complaint that the judge, rather than the jury, made the findings of aggravating and mitigating circumstances to support a death sentence: "This Court . . . has never suggested that jury sentencing is constitutionally required." *Id.,* at 252.

Barclay v. Florida, 463 U.S. 939 (1983), approved the trial court's finding of non-statutory aggravating circumstances. The decision did not address the question of whether the judge or jury must be the finder of fact for aggravating circumstances.

In *Spaziano v. Florida,* 468 U.S. 447 (1984), the petitioner argued that to allow a judge to override a jury life recommendation and impose a death sentence violated the Fifth, Sixth, Eighth, and Fourteenth Amendments. The Court rejected each of those arguments. The Court specifically held that the Sixth Amendment does not guarantee the right to a jury determination of the appropriate punishment. *Id.,* at 459.

Hildwin v. Florida, 490 U.S. 638 (1989), is the first of these cases to directly rule on the question presented here, whether the Sixth Amendment requires a jury finding of aggravating circumstances necessary to impose the death penalty. The Court began its analysis by observing that the Sixth Amendment "does not forbid the judge to make the written findings that authorize

imposition of a death sentence *when the jury unanimously recommends the death sentence."*[8] *Id.,* at 640 (emphasis added). The Court then quoted *McMillan v. Pennsylvania,* 477 U.S. 79, 93 (1986), for the proposition that "there is no Sixth Amendment right to jury sentencing, even where the sentence turns on specific findings of fact."[9] *Hildwin,* at 640. The Court concluded that "the Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury." *Id.,* at 640-41.

In *Walton v. Arizona,* 497 U.S. 639, 648 (1990), the Court relied upon and quoted its holding in *Hildwin* to uphold the Arizona capital sentencing statute. The Arizona statute did not provide for any jury participation in the capital sentencing process, and required the trial judge to hear the evidence, make findings of fact regarding the aggravating and mitigating circumstances, and determine the appropriate sentence. The Court explained its understanding of the Florida capital sentencing process upheld in *Hildwin:*

> It is true that in Florida the jury recommends a sentence, but it does not make specific factual findings with regard to the existence of mitigating

[8] This raises the question, which cannot and need not be decided in this case, whether *Hildwin* might have been decided differently if the jury recommendation had not been unanimous.

[9] *McMillan* upheld the Pennsylvania mandatory minimum sentencing statute, which allowed the judge to find by a preponderance of the evidence that the defendant possessed a firearm during the commission of the crime.

> or aggravating circumstances and its recommendation is not binding on the trial judge. A Florida trial court no more has the assistance of a jury's findings of fact with respect to sentencing issues than does a trial judge in Arizona.

Walton, at 648. The Court rejected Walton's claim that aggravating circumstances were elements of the offense which must be found by a jury: "[W]e cannot conclude that a State is required to denominate aggravating circumstances 'elements' of the offense or permit only a jury to determine the existence of such circumstances." *Id.,* at 649.

However, in *Ring v. Arizona,* 536 U.S. 584, 588 (2002), the Court expressly overruled its decision in *Walton.* By overruling *Walton*, the Court necessarily overruled *Hildwin* because the *Hildwin* holding was the principal basis for the *Walton* decision. Thus, appellant is not asking this Court to overrule the United States Supreme Court's decision in *Hildwin*; that Court has already done so. This Court is required to follow the United States Supreme Court's interpretation of the Sixth Amendment. That Court's current interpretation of the Sixth Amendment requires the jury to find the existence of aggravating circumstances necessary for the imposition of the death penalty. *Ring,* at 609.

Under Florida law, there can be no doubt that findings of aggravating circumstances are necessary for the imposition of the

death penalty. As this Court recognized in *State v. Dixon,* 283 So.2d 1, 9 (Fla. 1973), the statutory aggravating circumstances "actually define those crimes . . . to which the death penalty is applicable in the absence of mitigating circumstances." The death penalty is not permitted where no valid aggravating circumstances exist. *Elam v. State,* 636 So.2d 1312, 1314-15 (Fla. 1994); *Banda v. State,* 536 So.2d 221, 225 (Fla. 1988), *cert. denied,* 489 U.S. 1087 (1989).

Because findings of aggravating circumstances are necessary to the imposition of the death penalty under the Florida death penalty statute, the Sixth Amendment, as interpreted in *Ring,* requires those findings to be made by a jury. Yet section 921.141, Florida Statutes, requires the findings of aggravating circumstances to be made by the sentencing judge instead of the jury. As the United States Supreme Court recognized in *Walton,* at 648, "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." Therefore, section 921.141 is just as unconstitutional under the Sixth Amendment as the Arizona capital sentencing statute, and the trial court erred when it denied Winkles' motion to declare the Florida capital sentencing statute unconstitutional pursuant to *Ring*. Because the death penalty

statute is unconstitutional, there is no lawful authority for the imposition of any death sentence in Florida, and the death sentences imposed on Winkles should be vacated. Moreover, the judge's denial of Winkle's motion violated his Sixth Amendment right to a jury trial, which is structural error that can never be found harmless. *Sullivan v. Louisiana,* 508 U.S. 275, 281-82 (1993).

This Court has held that there is no *Ring* violation when one of the aggravating circumstances found by the judge is prior conviction of a capital or violent felony, as in this case. *Duest v. State,* 855 So.2d 33, 48 (2003). However, a single valid aggravating circumstance is not sufficient to sustain a death sentence unless there is little or nothing in mitigation. *White v. State,* 616 So.2d 21, 26 (Fla. 1993); *McKinney v. State,* 579 So. 2d 80, 85 (Fla. 1991). In this case, the judge found and gave some weight to four mitigating circumstances: Winkles confessed to the commission of two unsolved murders and further cooperated with police during their investigation (considerable weight); consecutive life sentences would result in Winkles dying in prison (little weight); Winkles waived several appellate issues by pleading guilty (very little weight); and the confessions provided the families with finality and closure (little weight). [V2 385-

89] Because the judge gave considerable weight to the first of these mitigating circumstances, this is not a case in which there is little or nothing in mitigation, and the death sentence could not be sustained if the prior conviction was the only aggravating circumstance found by the judge.

Moreover, under the United States Supreme Court's analysis of death sentencing systems, Florida is categorized as a "weighing" state. *Parker v. Dugger,* 498 U.S. 308, 318 (1991). In a weighing state,

> when the sentencing body is told to weigh an invalid factor in its decision, a reviewing court may not assume it would have made no difference if the thumb had been removed from death's side of the scale. When the weighing process itself has been skewed, only constitutional harmless-error analysis or reweighing at the trial or appellate level suffices to guarantee that the defendant received an individualized sentence.

Stringer v. Black, 503 U.S. 222, 232 (1992).

In this case, the sentencing judge found four aggravating circumstances, only one of which, prior convictions for capital and violent felonies, he was permitted to find pursuant to *Ring.* Because *Ring* requires a jury to find all aggravating circumstances other than those based upon the defendant's prior conviction record, the judge's findings of commission while the defendant was engaged in a kidnapping, commission to avoid arrest, and cold,

calculated, and premeditated were constitutionally invalid. Thus, the judge placed three thumbs on death's side of the scale together with only one valid aggravating circumstance. This Court cannot assume that the three thumbs made no difference in the judge's weighing process when determining the sentence to be imposed. Instead, this Court must engage in constitutional harmless error analysis.

This Court adopted the United States Supreme Court's harmless error analysis for constitutional error set forth in *Chapman v. California,* 386 U.S. 18, 24 (1967), in *State v. DiGuilio,* 491 So.2d 1129, 1134-35 (Fla. 1986), and recently reaffirmed *DiGuilio* in *Williams v. State*, SC03-139 (Fla. Dec. 11, 2003). This Court explained,

> The test is not a sufficiency-of-the-evidence, a correct result, a not clearly wrong, a substantial evidence, a more probable than not, a clear and convincing, or even an overwhelming evidence test. Harmless error is not a device for the appellate court to substitute itself for the trier-of-fact by simply weighing the evidence. The focus is on the effect of the error on the trier-of-fact. The question is whether there is a reasonable possibility that the error affected the verdict. The burden to show the error was harmless must remain on the state. If the appellate court cannot say beyond a reasonable doubt that the error did not affect the verdict, then the error is by definition harmful.

Id., slip opinion at 2 (quoting *DiGuilio,* at 1139).

Because the sentencing judge in this case found three aggravating circumstances he was not permitted to find under *Ring's* interpretation of the Sixth Amendment and gave great weight to those circumstances, the constitutionally invalid findings must have affected his decision to sentence Winkles to death, especially since the cold, calculated, and premeditated factor is one of the most serious aggravating factors. *See Cox v. State,* 819 So.2d 705, 723 (Fla. 2002). The death sentences must be vacated, and this case must be remanded for entry of life sentences or a new penalty trial in which Winkles is accorded his Sixth Amendment right to have the jury determine whether the prosecution proves the existence of aggravating circumstances beyond a reasonable doubt.

ISSUE II

APPELLANT'S RIGHT TO NOTICE OF THE NATURE AND CAUSE OF THE ACCUSATION WAS VIOLATED BY FAILURE TO ALLEGE THE AGGRAVATING CIRCUMSTANCES IN THE INDICTMENT.

Winkles was indicted for two counts of first-degree premeditated murder. The indictment did not allege any of the

aggravating circumstances set forth in section 921.141(5), Florida Statutes. [V1 3-4] Defense counsel filed a motion to declare the Florida capital sentencing statute unconstitutional on the ground, *inter alia,* that it does not require aggravating circumstances to be charged in the indictment. [V2 264-72] The trial court heard and denied the motion. [V3 498-501] Winkles preserved the denial of this motion for appeal [V3 532-33] when he pled guilty. [V3 517-30]

Pursuant to section 921.141(3), Florida Statutes, the sentencing judge cannot impose a death sentence unless he finds the existence of sufficient aggravating circumstances as enumerated in section 921.141(5), Florida Statutes. No death sentence can be imposed unless the sentencing judge finds at least one valid statutory aggravating circumstance. *Hamilton v. State,* 678 So.2d 1228, 1232 (Fla. 1996); *Elam v. State,* 636 So.2d 1312, 1314 (Fla. 1994).

The question presented by this case is whether the aggravating circumstances must be alleged in the indictment because the accused is entitled to notice of the nature and cause of the accusation against him. This is a pure question of law, so the standard of review is *de novo. State v. Glatzmayer,* 789 So.2d 297, 301 n.7 (Fla. 2001); *Armstrong v. Harris,* 773 So.2d 7, 11

(Fla. 2000).

This Court has ruled that aggravating circumstances need not be alleged in the indictment. *Blackwelder v. State,* 851 So.2d 650, 654 (Fla. 2003); *Porter v. Crosby,* 840 So.2d 981, 986 (Fla. 2003). This court has also ruled that the accused is not entitled to notice of the aggravating circumstances. *Kormandy v. State,* 845 So.2d 41, 54 (Fla. 2003). Appellant respectfully requests this Court to reconsider those rulings in light of the following argument.

In *Jones v. United States,* 526 U.S. 227, 243 n.6 (1999), the United States Supreme Court ruled:

> [U]nder the Due Process Clause of the Fifth Amendment and the notice and jury trial 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.

In *Apprendi v. New Jersey,* 530 U.S. 466, 476 (2000), the Court quoted the *Jones* rule and said, "The Fourteenth Amendment commands the same answer in this case involving a state statute." The Court held, "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Id.,* at 490. In a footnote, the Court explained,

> Apprendi has not here asserted a constitutional claim based on the omission of any reference to sentence enhancement or racial bias in the indictment. He relies entirely on the fact that the "due process of law" that the Fourteenth Amendment requires the States to provide to persons accused of crime encompasses the right to a trial by jury.

> *Duncan v. Louisiana,* 391 U.S. 145 . . . (1986), and the right to have every element of the offense proved beyond a reasonable doubt, *In re Winship,* 397 U.S. 358 . . . (1970). That Amendment has not, however, been construed to include the Fifth Amendment right to "presentment or indictment of a Grand Jury" . . . . We thus do not address the indictment question separately today.

Apprendi, at 477 n.3. Thus, the Court left open the question of whether a State is required to allege a fact that would increase the maximum penalty for a crime in the charging document.

In *Ring v. Arizona,* 536 U.S. 584, 609 (2002), the Court applied the *Apprendi* rule to capital cases and held that when aggravating circumstances are necessary for imposition of the death penalty, the Sixth Amendment requires them to be found by a jury and not by the sentencing judge. The Court again left open the question of whether the aggravating circumstances must be alleged in an indictment:

> Ring's claim is tightly delineated: He contends only that the Sixth Amendment required jury findings on the aggravating circumstances asserted against him. . . . Finally, Ring does not contend that his indictment was constitutionally defective. See *Apprendi,* 530 U.S., at 477, n.3 . . . (Fourteenth Amendment "has not . . . been construed to include the Fifth Amendment right to 'present-ment or indictment of a Grand jury'").

Ring, at 597 n.4.

While the Court has made clear that it has not applied the

Fifth Amendment right to a grand jury indictment to the States through the Fourteenth Amendment, the Florida Constitution requires capital crimes to be charged in an indictment: "No person shall be tried for capital crime without presentment or indictment by a grand jury[.]" Art. I, § 15(a), Fla. Const.

Moreover, the right to be informed of the nature and cause of the accusation is guaranteed by both the Sixth Amendment and the Florida Constitution: "In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation[.]" U.S. Const. amend. VI. "In all criminal prosecutions the accused shall, upon demand, be informed of the nature and cause of the accusation, and shall be furnished a copy of the charges[.]" Art. I, § 16(a), Fla. Const.

Furthermore, the right to due process of law is guaranteed by both the Fourteenth Amendment and the Florida Constitution: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law[.]" U.S. Const. amend. XIV. "No person shall be deprived of life, liberty or property without due process of law[.]" Art. I, § 9, Fla. Const.

It has long been established that "notice" is a basic component of the right to due process of law:

> For more than a century the central meaning of procedural due process has been clear: "Parties

> whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified." *Baldwin v. Hale,* 1 Wall. 223, 233, 17 L.Ed. 531. . . . It is equally fundamental that the right to notice and an opportunity to be heard "must be granted at a meaningful time and in a meaningful manner." *Armstrong v. Manzo,* 380 U.S. 545, 552[.]

Fuentes v. Shevin, 407 U.S. 67, 80 (1972).

In criminal cases, the due process right to notice requires notice of the specific charge:

> No principle of procedural due process is more clearly established than that notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge, if desired, are among the constitutional rights of every accused in a criminal proceeding in all courts, state or federal.

Cole v. Arkansas, 333 U.S. 196, 201 (1948). To comply with the requirements of due process, notice "must be given sufficiently in advance of scheduled court proceedings so that reasonable opportunity to prepare will be afforded, and it must 'set forth the alleged misconduct with particularity.'" *Application of Gault,* 387 U.S. 1, 33 (1967). "It is the 'law of the land' that no man's life, liberty or property be forfeited as punishment until there has been a charge fairly made and fairly tried in a public tribunal." *In re Oliver,* 333 U.S. 257, 278 (1948).

More recently, the Court has recognized that the Sixth Amendment right "to be informed of the nature and cause of the accusation" is part of the due process of law guaranteed by the Fourteenth Amendment. *Faretta v. California,* 422 U.S. 806, 818 (1975); *Herring v. New York,* 422 U.S. 853, 856-57 (1975). This is a right to "notice" which is "now considered fundamental to the fair administration of American justice[.]" *Faretta,* at 818.

One of the four aggravating circumstances found by the sentencing judge in this case was that Winkles was previously convicted of a capital felony and violent felonies. [V2 379-80] While the United States Supreme Court made an exception allowing the judge, rather than the jury, to find the existence of prior convictions in *Jones, Apprendi,* and *Ring,* there is no logical

reason to exclude a prior conviction aggravating circumstance from the notice requirement of the Sixth and Fourteenth Amendments and the relevant provisions of the Florida Constitution. Regardless of whether the judge or jury has the responsibility of finding an aggravating circumstance in a capital case, the accused has the right to notice of all of the specific aggravating circumstances against which he must defend during the course of the proceedings. When no aggravating circumstances are alleged in an indictment, the accused has not been given the constitutionally required notice that he is facing the possibility that a death sentence may be imposed if he is convicted, nor of the specific alleged circumstances upon which the death sentence would be based.

The Sixth and Fourteenth Amendments and Article I, sections 9 and 16(a), Florida Constitution guarantee Winkles' right to specific and particularized notice of the nature and cause of the accusation against him before he may be deprived of his life. Also, Article I, section 15(a), Florida Constitution requires that capital crimes must be charged in indictments returned by grand juries. Therefore, Winkles had the right to have the aggravating circumstances necessary for imposition of the death penalty charged in the indictment. Because no aggravating circumstances were alleged in the indictment, the judge erred by denying his motion to declare the death penalty procedure unconstitutional. Denial of this motion and the subsequent imposition of the death sentence violated Winkles' constitutional rights.

The unconstitutional imposition of the death sentence in this case was not harmless error. Because the State violated Winkles' constitutional right to notice of the specific aggravating circumstances he had to defend against by failing to have the grand jury allege them in the indictment, there were no aggravating circumstances that the judge could constitutionally consider and find in his sentencing order. In the absence of any valid findings of aggravating circumstances, the only sentence that could legally be imposed was life. ***Hamilton v. State,*** 678 So.2d at 1232; ***Elam v. State,*** 636 So.2d at 1314. Thus, the grand jury's failure to allege aggravating circumstances in the indictment, and the judge's error in denying defense counsel's motion to declare the death sentence procedure unconstitutional necessarily affected the constitutional validity of the death sentence. ***See State v. DiGuilio,*** 491 So. 2d 1129 (Fla. 1986) (error is harmless only if reviewing court finds beyond a reasonable doubt that the error did not affect or contribute to the result).

Even if this Court rejects appellant's argument that the

prior conviction of a capital felony and other violent felonies aggravating circumstance must be alleged in the indictment, a valid finding of that aggravator would not render the invalid findings of the other three aggravating circumstances harmless for the same reasons explained in Issue I, *supra.* The death sentences must be vacated, and this case must be remanded for entry of life sentences, or for further proceedings in which Winkles is accorded his right to notice of the nature and cause of the accusations against him.

CONCLUSION

Appellant respectfully requests this Court to vacate the death sentences and remand this case for the imposition of life sentences, or for a new penalty trial before a jury with specific notice of the alleged aggravating circumstances and jury findings of whether the aggravating circumstances have been proven beyond a reasonable doubt.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Charles J. Crist, Jr., Concourse Center #4, 3507 E. Frontage Rd. - Suite 200, Tampa, FL 33607, (813) 287-7900, on this _____ day of , .

CERTIFICATION OF FONT SIZE

I hereby certify that this document was generated by computer using Microsoft Word with Courier New 12-point font in compliance with Fla. R. App. P. 9.210 (a)(2).

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