IN THE SUPREME COURT
STATE OF FLORIDA

DOUGLAS BLAINE MATTHEWS,

Appellant,

vs. CASE NO. SC10-1771

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE SEVENTH JUDICIAL CIRCUIT
IN AND FOR VOLUSIA COUNTY, FLORIDA

AMENDED INITIAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE AND FACTS

On February 28, 2008, Appellant DOUGLAS BLAINE MATTHEWS was charged by Indictment with the first-degree murder of Kirk Zoeller in violation of section 782.04(1)(a) and/or (2), Florida Statutes (Count I), the first-degree murder of Donna Trujillo in violation of 782.04(1)(a) and/or (2), Florida Statutes (Count II), and the burglary of Trujillo's residence while armed in violation of section 810.02(1) and (2)(b), Florida Statutes (Count III) (V 3, 418-419). All offenses were alleged to have occurred on February 20, 2008 (V3, 418-419).[1] The prosecution elected to seek the death penalty for both homicides (V 3, 431).

Among many other pre-trial motions, Appellant filed a Motion to Declare Section 921.141 and/or 921.141(5)(h), Florida Statutes and/or the Standard (5)(h) Instruction Unconstitutional Facially and as Applied (V 3, 456-467); Motion to Declare Section 921.141 and/or 921.141(5)(d) Florida Statutes and/or the (5)(d) Standard Instruction Unconstitutional Facially and as Applied and to Preclude Their Application at Bar (V 3, 468-472); an Objection to Death Qualification of Jury Based on Ring v. Arizona, 536 U.S. 589 (2002); and a Motion to Declare Florida's Death Penalty Unconstitutional Under Ring v. Arizona (V 4, 571-596). During a hearing held on September 15, 2009, these motions were denied (V 1, 76-120).

[1] (V -, -) refers to the record on appeal by appropriate volume(s) and page number(s).

Appellant proceeded to trial before the Honorable R. Michael Hutcheson with jury selection commencing on May 17, 2010. According to the evidence adduced at trial, at approximately 7:30 p.m. on February 20, 2008, Daytona Beach Police Officers Penny Dane and Abisai Roman responded to 139 South Halifax, Apartment One in Daytona Beach (V 15, 1148-1150, 1175). Upon arrival, they discovered a white male later identified as Kirk Zoeller sitting upright, Indian-style outside the multi-unit complex (V 15, 1150-1154, 1197-1198, 1207-1208). The man was unresponsive and covered in blood (V 15, 1151, 1155, 1198).

While clearing the tiny apartment, the officers discovered blood throughout and a bicycle inside the residence (V 15, 1156, 1160-1163, 1199-1200). The kitchen stove was on and a pair of glasses was discovered on the kitchen floor (V 15, 1164). A short time after the body of a deceased female later identified as Donna Trujillo was found on a bed in the bedroom, the male was also pronounced dead at the scene (V 15, 1166-1169, 1173, 1202, 1215; V 18, 1709).

Justin Wagner, a teenaged dealer in crack, coke, pills, and weed, testified that he used Trujillo's house to ply his trade (V 16, 1246-1248, 1257). Wagner was acquainted with the Appellant from the streets (V 16, 1247). On the day of the murders, Wagner and the Appellant used the Appellant's knife to cut up some crack (V 16, 1249-1251).

Later, Wagner went to Trujillo's house to sell drugs (V 16, 1257-1259). Trujillo, Zoeller (whom he knew as "Rooster"), the Appellant (whom he knew as "D"), and an unidentified couple were present (V 16, 1260). After the couple left, Trujillo and the Appellant went into the bedroom (V 16, 1260-1261, 1264-1265, 1268). Zoeller obtained some drugs from Wagner and joined Trujillo and the Appellant in the bedroom (V 16, 1268-1269). After a while, Wagner heard a ruckus and observed Zoeller running out of the bedroom with the Appellant right behind Zoeller, stabbing him (V 16, 1270-1273, 1309). Wagner ran out the door and down the road to Teresa Teague's house (V 16, 1272, 1274, 1277-1278, 1282-1284).

Wagner had been using cocaine and marijuana and drinking alcohol (V 16, 1278-1279). Shortly after he heard the Appellant pull up, Wagner left Teague's residence, jumped a fence, and hid (V 16, 1284-1285). After a white male met the Appellant in Teague's yard, Wagner saw Appellant remove his shirt and put it in a clear plastic bag (V 16, 1285-1286).

Wagner initially lied in his statements to the police, denying that he was even at the scene of the crime (V 16, 1263, 1299, 1319, 1320). In his original statement, in contrast to his trial testimony, he told the authorities that he actually witnessed the Appellant wiping off the knife as Appellant approached Teague's house (V 16, 1286-1288).

At the time of the homicides, Teresa Teague lived in a little apartment on South Wild Olive (V 16, 1326-1327). Several people, including Wagner, stayed with her (V 16, 1328). Teague had recently befriended the Appellant (V 16, 1329). A couple of days before the homicide, Teague saw the Appellant wearing a Sean John shirt (V 16, 1339). Teague testified that she also gave the Appellant a knife (V 16, 1340).

On the night of the homicides, Teague left her house around dusk to take a short walk (V 16, 1330). Appellant had been by the apartment earlier but had only stayed a few minutes (V 16, 1334, 1343). When she saw him later, he was shirtless and wearing dungarees (V 16, 1334, 1338-1339). After Teague realized that the authorities were apparently looking for someone, Appellant advised her that the police were looking for him, that he had run into a couple of people that probably wished they had never run into him, and that he had just eliminated a couple of "problems" (V 16, 1344-1349).

When the police knocked on Teague's door later that evening, Appellant abruptly got up, stripped down to his boxer shorts and socks, and went into the bedroom where Shelly Hackett was sleeping (V 16, 1328, 1353-1354). Teague admitted the detectives and gave them consent to search her apartment (V 16, 1357-1358). She later gave a statement at the police station (V 16, 1361).

Teague was residing outside the State of Florida at the time of the Appellant's trial for her own safety unrelated in any way to the Appellant's situation (V 16, 1362-1368). She was an occasional user of illegal drugs and also took several prescribed narcotics (V 16, 1368-1372). The State Attorney's office was instrumental in having a warrant for Teague's arrest for a trespass recalled and the charge dismissed (V 16, 1387-1391).

Daytona Beach Police Officer Joseph Miller and two other officers responded to Teague's residence based on an anonymous tip (V 16, 1401-1403, 1419). In addition to Teague and Hackett, two men were also at the residence (V 16, 1404-1405). While Teague was being interviewed, Wagner showed up, requested some toilet paper from Teague, and quickly left the apartment (V 16, 1405, 1420).

After Teague consented to a search, blood-spattered tennis shoes were discovered in the living room and blood-spattered jeans on the bedroom floor (V 16, 1407-1408, 1412-1413, 1416). A traffic citation issued to the Appellant by Daytona Beach Police Officer Matthew Gilson in 2007 was found in one of the pants pockets (V 17, 1476-1477, 1503-1505). Appellant, clad only in boxer shorts and socks, was discovered hiding under a pile of clothes in the bedroom where Hackett was sleeping (V 17, 1408-1417).

During the subsequent execution of a search warrant at Teague's residence, Daytona Beach Police Lieutenant William Walden seized a wallet containing Zoeller's identification and a bloody white shirt found inside a plastic bag, both of which were found inside a Dr. Seuss bag located on some shelving (V 17, 1433-1442, 1479-1480). DNA analysis revealed the presence of Zoeller's blood on the seized shirt, shoes, and pants (V 18, 1581, 1587-1588, 1592-1594, 1610-1612). The Appellant's wearer DNA was also found on the shirt and shoes (V 18, 1583-1585, 1589, 1611-1612). Both Zoeller and Trujillo were possible contributors to traces of blood found on the Appellant's fingers (V 18, 1597-1605, 1613-1615).

Through autopsy, Volusia County Chief Medical Examiner Marie Herrmann determined that the manner and cause of death for both victims was homicide by stabbing (V 18, 1664, 1682). Trujillo had been stabbed eight times; Zoeller twenty-four times (V 18, 1665, 1682). A metal knife tip was found embedded in Zoeller's skull (V 18, 1501, 1696-1697). The presence of cocaine was found in both victims (V 18, 1709-1710, 1714). Injuries would have caused loss of consciousness in both victims prior to their deaths (V 18, 1679, 1702-1704).

Thereafter, the prosecution rested its case-in-chief (V 18, 1716). A motion for judgment of acquittal on all counts made by the Appellant was denied (V 18, 1720-1722, 1724-1729).

During the defense case-in-chief, Appellant testified that on the date of the incident he went to Trujillo's house with Wagner to purchase morphine (V 19, 1748-1749). After Zoeller arrived and Appellant had traded his cocaine for morphine, Zoeller and Trujillo got into an argument over the transaction (V 19, 1749-1752). Zoeller wanted more dope from the Appellant in exchange for his pills (V 19, 1752-1753, 1768).

According to the Appellant, Zoeller had a knife and started the altercation (V 19, 1753). After Appellant had Zoeller pinned against the wall, he saw Trujillo in the bed with a pillow over her head and realized that something bad had happened to her (V 19, 1753-1754, 1756-1757). He was eventually able to pry the knife from Zoeller's hand; however, as Zoeller was regaining control over the knife Appellant "snapped" (V 19, 1754-1755). Appellant blacked out and could not even recall how many times he cut Zoeller with the knife (V 19, 1758-1759).

Afterwards, Appellant dropped the knife inside the front door of the residence and went to Teague's house (V 19, 1760-1761). However, he did not take the wallet or hide the wallet and shirt in the bag (V 19, 1761). Right before the police arrived, a guy came by the house and warned Appellant that the police were looking for him (V 19, 1762). After the police found the Appellant, he told them he had killed Zoeller in self-defense (V 19, 1762-1765).

After the Appellant had been taken into custody, Daytona Beach Police Detective James Brodick and his partner interviewed the Appellant outside the Teague residence (V 19, 1849-1850). An audio recording of this interview was admitted into evidence and published to the jury (V 19, 1851-1852, 1854-1896).

During the State's case-in-rebuttal, Zoeller's brother Ken testified that Zoeller was on Social Security disability as a result of prior injuries to his ankles and shoulder (V 20, 1920-1922). Thereafter, Appellant's renewed motion for judgment of acquittal as to all counts was denied (V 20, 1925-1927).

On May 25, 2010, the jury found the Appellant guilty of the first degree murder of Zoeller as charged in Count I, guilty of the lesser-included offense of manslaughter in Count II with respect to the death of Trujillo and guilty of burglary while armed as charged in Count III (V 6, 1087-1088; V 21, 2132-2134).

A penalty phase was conducted on May 27-28, 2010. The prosecution presented the testimony of three victim impact witnesses (V 22, 2198-2216), a probation officer who testified that the Appellant was on probation for the offense of possession of cocaine at the time of the murder (V 22, 2219-2221), a police detective who testified regarding Appellant's conviction for the offense of common law robbery in the State of North Carolina in 2000 (V 22, 2222-2231), as well as the victim of a second robbery for which Appellant was convicted in 2002 (V 22, 2232-2247).

The Appellant called four lay witnesses (three family members and a childhood friend of the Appellant) (V 22, 2252-2305), as well as two mental health experts: Dr. Jeffrey Danziger, a physician and psychiatrist and Dr. Charles Golden, a professor of psychology and clinical neuropsychologist (V 23, 2324-2431).

Appellant's jury recommended a sentence of death for the murder of Zoeller by a margin of 10 to 2 (V 6, 1097; V 24, 2512-2513). After conducting a hearing pursuant to Spencer v. State, 615 So. 2d 688 (Fla. 1993), and considering post-trial motions (V 3, 367-402), the trial judge followed the jury's recommendation and sentenced the Appellant to death (V 3, 403-413; V 6, 1148-1156).

In the Sentencing Order, the trial judge found and assigned weight to four aggravating factors,[2] two statutory mitigating factors,[3] and 38 nonstatutory factors, two of which were assigned great weight[4], one of which was assigned significant weight,[5] seven of which were assigned some weight,[6] and 28 of which were

[2] The aggravating factors were : 1) the murder was especially heinous, atrocious, or cruel (assigned extremely great weight); 2) the defendant was previously convicted of a violent felony (assigned great weight); 3) the murder was committed while the defendant was engaged in the commission of a burglary and for pecuniary gain (assigned significant combined weight); and 4) the murder was committed while the defendant was on probation (assigned little weight).

[3] The statutory mitigating factors were: 1) the murder was committed while the defendant was under the influence of extreme mental or emotional disturbance (assigned little weight); 2) the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired (assigned little weight).

[4] These factors were: 1) The Defendant had a long history of mental health problems; 2) The Defendant had been treated for mental health issues from 1994 through 2005.

[5] This factor was: The Defendant was high on hallucinogenics, cocaine, and pot on the night of the murder.

[6] These factors were: 1) The Defendant suffered a head injury from a bicycle fall; 2) The Defendant was severely beaten with a brick in 2002 and was hospitalized; 3) The Defendant went to counseling at Catholic Services starting at age nine; 4) The Defendant was put in a residential group home as a child; 5) The Defendant witnessed violent behavior in the home while growing up; 6) The Defendant has a long history of prior drug abuse; 7) The Defendant is receiving medication for a Bi-Polar Disorder.

assigned slight weight (V 6, 1148-1156).[7] In addition to the sentence of death, sentences on the manslaughter and burglary convictions were 15 years in the Department of Corrections and life imprisonment, respectively (V 3, 409-410; V 6, 1157-1168). At the same time, Appellant was sentenced to five years in the Department of Corrections on his pending violation of probation in Case No. 07-34396, with all sentences on all counts in both cases to run consecutively (V 3, 408-410).

A timely appeal followed (V 6, 1172). This Amended Initial Brief of Appellant is filed pursuant to the Order of this Court dated November 23, 2011.

[7] These factors were: l) The Defendant grew up without a true father figure; 2) The Defendant is loved by his mother; 3) The Defendant is loved by his brothers and sister; 4) The Defendant has the capacity to maintain loving relationships with family members before and during incarceration; 5) The Defendant has a young daughter; 6) The Defendant has the capacity to have long lasting relationships with friends; 7) The Defendant exhibited good behavior during trial; 8) The Defendant received a G.E.D.; 9) The Defendant has a long history of abusing multiple types of illegal drugs; 10) The Defendant has drawn multiple pictures of his niece and daughter; 11) The Defendant was remorseful and apologized in court; 12) The Defendant had a traumatic birth that included a head injury; 13) The Defendant had to be medicated with Ritalin and Prozac as a child; 14) The Defendant was physically abused by his step dad as a young child; 15) The Defendant received a certification of recognition for an art exhibit; 16) The Defendant has a graduation certificate from the South Fork school; 17) The Defendant was bullied by others because of a stuttering problem; 18) The Defendant was diagnosed with Attention Deficit Hyper Activity Disorder as a child; 19) The Defendant was put in Camp Eckert Wilderness Program as a child; 20) The Defendant was in R.O.T.C. while in school; 21) The Defendant received a certificate of award from the Paisley Middle School; 22) The Defendant received the Young Citizen Award/Officer Friendly Program; 23) The Defendant received a certificate of completion from the D.A.R.E. program; 24) The Defendant made the honor roll in 1997 twice; 25) The Defendant assisted a friend with finding a lost pet; 26) The Defendant is known as a good hearted person by a long time friend; 27) The Defendant was raised in a single parent home with little adult supervision; 28) The Defendant assisted his brother by stopping someone from hurting his brother.

SUMMARY OF ARGUMENT

The trial court erred by denying Appellant's pre-trial motions seeking a judicial declaration that two of Florida's statutory aggravating factors ("heinous, atrocious or cruel" and "felony murder") are unconstitutional. The trial court also erred by refusing to declare Florida's death penalty scheme unconstitutional in its entirety in contravention of the requirements enunciated in Ring v. Arizona, infra, and Apprendi v. New Jersey, infra. For these reasons, a retrial before a new jury that is not death qualified or, alternatively, the imposition of a life sentence, is warranted.

POINT I: THE TRIAL COURT ERRED BY DENYING APPELLANT'S MOTION TO DECLARE SECTION 921.141(5)(H), FLORIDA STATUTES, AND THE CORRESPONDING STANDARD JURY INSTRUCTION UNCONSTITUTIONAL FACIALLY AND AS APPLIED

Prior to trial, Appellant sought a judicial determination that the "heinous, atrocious or cruel" aggravating factor and its corresponding standard jury instruction were unconstitutional both facially and as applied to the instant case (V 3, 456-467). The trial court denied Appellant's motion with the proviso that under the controlling case law both were constitutional "right now" (V 1, 81-82). The sentencing judge subsequently determined this circumstance to have been established and ascribed "extremely great" weight to it (V 6, 1149-1150).

The "heinous, atrocious or cruel" aggravating factor and its standard jury instruction are unconstitutionally vague and overbroad, are incapable of a constitutionally-adequate narrowing construction, and have been and are being applied in an arbitrary and inconsistent manner. Moreover, inasmuch as this factor has been and continues to be used as a basis for imposing death sentences in Florida, and because its terms are all that is required to be read to sentencing juries, section 921.141, Florida Statutes is unconstitutional in its entirety.

The standards guiding the construction of capital aggravating circumstances are stricter than those governing the interpretation of other criminal statutes. See Maynard v. Cartwright, 108 S.Ct. 1853, 1857-1858 (1988)(eighth amendment

requires greater care in defining aggravating circumstances than does due process). This Court has held that the review of statutes that impair fundamental rights explicitly guaranteed by the federal or state constitutions is to be governed by a strict scrutiny standard on appeal. T.M. v. State, 784 So. 2d 442 (Fla. 2000). Appellant asserts and asserted below that section 921.141(5)(h), Florida Statutes, the standard jury instruction on it, and the death penalty as applied in Florida violate Article I, sections 2 (basic rights), 9 (due process), 16 (rights of accused), 17 (cruel or unusual punishment), and 22 (trial by jury) of the Florida Constitution, and the Fifth (due process), Sixth (jury trial), Eighth (cruel and unusual punishment), and Fourteenth (due process and incorporation) Amendments to the United State Constitution. More specifically, the absence of a consistently-applied standard for an aggravating circumstance violates the eighth amendment if it either: fails to narrow the class of persons eligible for the death penalty, Godfrey v. Georgia, 446 U.S. 420, 422 (1980); fails to guide the discretion of the sentencers, Maynard v. Cartwright, 108 S.Ct. 1853 (1988); or undermines the meaningfulness of appellate review, Godfrey v. Georgia, 446 U.S. at 432-433.

In Maynard v. Cartwright, 108 S.Ct. at 1859, a unanimous United States Supreme Court held that the words “especially heinous, atrocious or cruel”, when standing alone, give no real limits or guides to imposing a death sentence because an ordinary person could honestly believe that every premeditated murder was

"especially heinous." Courts subsequently responded to the admonitions contained in Maynard in a variety of ways.

In Smalley v. State, 546 So. 2d 720, 722 (Fla. 1989), this Court distinguished Maynard on the grounds that Florida's capital sentencing scheme limited the circumstance in State v. Dixon, 283 So. 2d 1 (1973), cert. denied, 416 U.S. 943 (1974), noting that the Supreme had previously upheld a challenge to the facial validity of the statute based up Dixon's construction of it in Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed. 2d 913 (1976)(plurality opinion). However, the force of the dicta found in Smalley is significantly undermined by two later pronouncements of this Court. In Cheshire v. State, 568 So. 2d 908 (Fla. 1990), this Court deferred ruling on the constitutionality of the circumstance. Shortly thereafter, in apparent recognition of the problems associated with its application, this Court revisited the language of the HAC circumstance in Standard Jury Instructions in Criminal Cases – 90-1, 579 So. 2d 75 (Fla. 1990).

Under the current scheme, a trial judge must give "great weight" to a jury's death recommendation without knowing which circumstances were actually found or rejected or the relative weight those circumstances which were actually found to exist were given. The standard instruction utilized in virtually all capital cases maximizes discretion in reaching the penalty verdict, assuring the arbitrary application of this factor.

The sheer volume of cases in which this factor is used to justify the imposition of a sentence of death demonstrates that it is a catch-all. Despite this Court's best efforts to provide comprehensible, consistently-applied limitations of the vague wording of the statute, the decisional authorities are so riddled with inconsistencies and illogical distinctions that any analysis is a daunting task even for those schooled in capital sentencing jurisprudence.

The tortured evolution of the instantaneous gunshot death rule is just one example of the frustrating confusion in the law, not only from case to case, but sometimes from decision to decision with regard to the same murder. In Raulerson v. State, 358 So. 2d 826, 834 (Fla.), cert. denied, 439 U.S. 959 (1978), this Court held that awareness by the decedent that an armed robbery was in progress justified a finding that the murder was heinous even though death came quickly following a volley of shots. A mere four years later, after Raulerson's death sentence had been vacated by another court and then reinstated upon resentencing, this Court overturned the HAC finding without any mention of the contrary result contained in its previous decision. Raulerson v. State, 420 So. 2d 567, 571-572 (Fla. 1982), cert. denied, 463 U.S. 1229 (1983).

Moreover, even if there were a fathomable explanation for such inconsistent results as the foregoing, a heinousness finding in cases of death by means other than gunshot is only rarely overturned. Still, inexplicable distinctions appear to be

applied and in those instances where such diverse means as stabbing, beating, or strangulation are determined to be non-heinous, the principles utilized remain a secret.

For example, although stabbings are typically determined to be heinous, in Demps v. State, 395 So. 2d 501 (Fla.), cert. denied, 454 U.S. 933 (1981), despite the fact that the murder victim had been stabbed repeatedly, had been left to die, and expired only after being taken to three hospitals, this murder was determined not to be heinous. Whether a quick death limitation was utilized to justify this result is unclear, as no reasoning accompanied this determination. Further, even death from a single stab wound can be heinous, or not. Compare Proffitt v. State, 315 So. 2d 461 (Fla. 1975), aff'd, 428 U.S. 242 (1976), facts at Proffitt v. Wainwright, 685 F. 2d 1227, 1264 (11th Cir. 1982) with Wilson v. State, 436 So. 2d 908, 912 (Fla. 1983).

Appellant raises this issue in the hope that this Court will exercise this opportunity to declare Florida's capital sentencing scheme unconstitutional for failing to provide objective, consistently-followed, limiting standards regarding the correct application of this aggravating circumstance as well as to preserve the issue for continued review.

POINT II: THE TRIAL COURT ERRED BY DENYING APPELLANT'S MOTION TO DECLARE SECTION 921.141(5)(D), FLORIDA STATUTES, AND THE CORRESPONDING STANDARD JURY INSTRUCTION UNCONSTITUTIONAL FACIALLY AND AS APPLIED

Prior to trial, Appellant sought a judicial determination that the "felony murder" aggravating factor and its corresponding standard jury instruction were unconstitutional both facially and as applied to the instant case (V 3, 468-472). The trial court denied Appellant's motion with the proviso that once again the case law on the issue was clear "right now" (V 1, 79-81). The sentencing judge subsequently determined this circumstance to have been established and in conjunction with the pecuniary gain aggravator ascribed "significant" weight to it (V 6, 1149-1150).

Once again, the standards guiding the construction of capital aggravating circumstances are stricter than those governing the interpretation of other criminal statutes. See Maynard v. Cartwright, 108 S.Ct. 1853, 1857-1858 (1988)(eighth amendment requires greater care in defining aggravating circumstances than does due process). This Court has held that the review of statutes that impair fundamental rights explicitly guaranteed by the federal or state constitutions is to be governed by a strict scrutiny standard on appeal. T.M. v. State, 784 So. 2d 442 (Fla. 2000).

Appellant asserts and asserted below that section 921.141(5)(d), Florida Statutes, the standard jury instruction on it, and the death penalty as applied in Florida violate Article I, sections 2 (basic rights), 9 (due process), 16 (rights of accused), 17 (cruel or unusual punishment), and 22 (trial by jury) of the Florida Constitution, and the Fifth (due process), Sixth (notice, right to present defense), Eighth (cruel and unusual punishment), and Fourteenth (due process and incorporation) Amendments to the United State Constitution.

A capital sentencing scheme must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sanction on the defendant when compared to others found guilty of murder. Porter v. State, 564 So. 2d 1060, 1063-1064 (Fla. 1990); Lowenfield v. Phelps, 108 S.Ct. 546, 554 (1988). The "felony murder" aggravating factor and its standard jury instruction are unconstitutional because they do not serve the required limiting function. Rather than narrowing the class of persons eligible for the death penalty, the "felony murder" circumstance automatically expends the class of those eligible for the death penalty. This circumstance repeats an element of the offense of felony murder, thereby creating an unlawful presumption that death is an appropriate sentence in the least-aggravated form of first-degree murder.

Because this factor has been and continues to be used as a basis for imposing death sentences in Florida, because its continued use serves to make

proportionality review arbitrary, and because its terms are all that is required to be read to sentencing juries, section 921.141, Florida Statutes is unconstitutional in its entirety. Appellant raises this issue in the hope that this Court will exercise this opportunity to declare Florida's capital sentencing scheme unconstitutional on these grounds as well as to preserve the issue for continued review.

POINT III: THE TRIAL COURT ERRED BY OVERRULING APPELLANT'S OBJECTION TO THE DEATH QUALIFICATION OF HIS JURY

Prior to trial, Appellant filed an objection to the death qualification of his jury (V 4, 562-570). Relief was denied on the basis that the law was "at [that] stage settled" (V 1, 95). In Ring v. Arizona, 536 U.S. 584, 122 S. Ct. 2428 (2002), the United States Supreme Court held that statutory aggravating circumstances authorizing the imposition of the capital punishment are elements of the offense and, as such, must be determined by the jury under the Sixth and Fourteenth Amendments to the United State Constitution. Significantly, the argument made in that case that statutory aggravating circumstances are merely "sentencing considerations" rather than elements of the offense was flatly rejected.

Under long-standing Florida law, the aggravating factors set forth in Section 921.141(5), Florida Statutes, are substantive elements that define the offenses punishable by the death penalty in Florida. See State v. Hootman, 709 So. 2d 1357, 1360 (Fla. 1998)("This Court held in State v. Dixon, 283 So. 2d 1, 9 (Fla. 1973), 'The aggravating circumstances … actually define those crimes … to which the death penalty is applicable.' Indeed, the severity of the death penalty and the role of the judge and jury in considering the prescribed aggravating circumstances make aggravating circumstances a critical part of the substantive law of capital cases."). The death penalty cannot be imposed in the absence of a valid statutory

aggravating circumstance. As Appellant asserted below, inasmuch as statutory aggravating circumstances are actually elements of the offense of first-degree capital murder, the existence of these elements must be determined by the jury in accordance with the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 2, 9, 15, 16, 17 and 22 of the Florida Constitution. As substantive elements of the offense of first-degree capital murder, these statutory determinations are entitled to the full panoply of protections and Due Process guarded by the state and federal constitutions, including specificity, notice, inclusion in the Indictment, and a unanimous jury determination beyond a reasonable doubt.

Because the Indictment in this case failed to allege any of the aggravating considerations contained in Section 921.141(5), Florida Statutes, a capital offense was not adequately alleged. Permitting the case to proceed as if it were a capital case deprived the Appellant of Due Process, fundamental fairness, and the right to a fair trial by an impartial jury, inasmuch as death qualification of Appellant's jury led to a conviction-prone jury without a valid basis to do so in an instance where the death penalty could not lawfully be imposed.

Appellant acknowledges the likely futility of raising this claim but does so to preserve the issue for further review and avoid the subsequent application of a procedural bar.

POINT IV: THE TRIAL COURT ERRED BY DENYING APPELLANT'S MOTION TO DECLARE FLORIDA'S DEATH PENALTY UNCONSTITUTIONAL

Prior to trial, Appellant sought a judicial determination that the imposition of the death penalty in Florida is unconstitutional (V 4, 571-596). Relying solely upon the decision of this Court in Bottoson v. Moore, 833 So. 2d 693 (Fla.), cert. denied, 123 S.Ct. 663, 154 L.Ed. 2d 564 (2002), the State successfully urged the trial court to uphold Florida's capital sentencing scheme "despite" the pronouncements of the United States Supreme Court in Ring v. Arizona, 522 U.S. 584, 122 S.Ct. 2428 (2002) and Apprendi v. New Jersey, 530 U.S. 466 (2000)(V 1, 95-96).

Appellant asserts and asserted below that section 921.141, Florida Statutes, violates Article I, sections 2 (basic rights), 9 (due process), 16 (rights of accused), 17 (cruel or unusual punishment), and 22 (trial by jury) of the Florida Constitution, and the Sixth (notice, right to present defense), Eighth (cruel and unusual punishment), and Fourteenth (due process and incorporation) Amendments to the United States Constitution. This issue is entitled to de novo review. Miller v. State, 42 So. 3d 204, 215 (Fla. 2010).

In Ring v. Arizona, supra, the United States Supreme Court struck down Arizona's capital sentencing statute because it violated the Sixth Amendment, as construed in Apprendi v. New Jersey, 630 U.S. 466 (2000), for a judge rather than the jury to determine the findings of fact necessary to impose a sentence of death.

The Court predicated its holding in Ring on its earlier decision in Apprendi that "[it] 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." Apprendi v. New Jersey, 630 U.S. at 490, quoting Jones v. United States, 526 U.S. 227, 252-253 (1999)(Stevens, J., concurring). In so holding, the Ring decision overruled Walton v. Arizona, 497 U.S. 639 (1990), "to the extent that it allows a sentencing judge, sitting without a jury, to find an aggravating circumstance necessary for imposition of the death penalty." Ring v. Arizona, 122 S.Ct. at 2443.

In Mills. v. Moore, 786 So. 2d 532, 537 (Fla. 2001), this Court rejected a claim that Section 921.141, Florida Statutes, was unconstitutional under Apprendi because Apprendi did not overrule Walton. However, Appellant maintains that Ring did.

Florida's capital sentencing statute suffers from the identical flaw found to exist in the Arizona statute. A death sentence in Florida is contingent on a judge's factual findings regarding the existence of aggravating circumstances. In Florida, as in Arizona, a defendant convicted of first-degree murder cannot be sentenced to death without additional findings of fact that must be made, by explicit requirement of Florida law, by a judge and not a jury:

> The distinctions Walton attempts to draw between the Florida and Arizona statutory schemes are not persuasive. 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 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 that does a trial judge in Arizona.

Walton v. Arizona, 497 U.S. 639, 648 (1990).

In addition, a Florida jury's advisory sentencing recommendation cannot be equated with a verdict for several reasons. First, an advisory jury in Florida does not make findings of fact. Second, their recommendation need not be unanimous or even a super-majority. Finally, their determination is merely advisory.

The jury fact-finding requirement imposed under Apprendi and Ring is based on the sound recognition of the importance of interposing independent jurors between a criminal defendant and punishment at the hands of a "compliant, biased, or eccentric judge." Duncan v. Louisiana, 391 U.S. 145, 156 (1968). A reliable jury recommendation is necessary to ensure the integrity of the sentencing determination. However, in the absence of the required findings of fact, appellate review of a jury recommendation of death under current Florida law is rendered meaningless because it presupposes that there were no misapplications of the law by laypersons untrained in death penalty jurisprudence. The present procedure in Florida effectively conceals the improper application of invalid aggravating circumstances by a penalty phase jury as well as any improper rejection of valid mitigating considerations.

Appellant acknowledges that these arguments have recently fallen on deaf ears under an analysis wherein this Court considers the points of law "established". See Miller v. State, 42 So. 3d 204, 210 (Fla. 2010). Appellant nevertheless raises the claim to preserve these issues for further review and avoid the subsequent application of a procedural bar.

CONCLUSION

Based upon the arguments presented and authorities cited herein, Appellant respectfully requests that this Honorable Court reverse his sentence of death and remand the case to the trial court with instructions consistent with this Court's decision.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Amended Initial Brief of Appellee has been furnished by U. S. Mail delivery to Office of the Attorney General, 3705 E. Frontage Road, Suite 200, Tampa, Florida 33607-7013 this _____ day of January, 2012.

_____
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CERTIFICATE OF FONT

I HEREBY CERTIFY that the size and style of font used in this brief is 14 point Times New Roman.

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