IN THE SUPREME COURT OF FLORIDA

Case No. SC11-2055
L.C. Case No. CRC92-17438-CFANO

Capital Case, Death Sentenced Appellant, Execution Set For November 15, 2011, at 4:00 p.m.

OBA CHANDLER,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

_____

INITIAL BRIEF OF APPELLANT

On Direct Appeal from an October 24, 2011, Final Order of the Circuit Court of the Sixth Judicial Circuit, in and for Pinellas County, Florida, Denying Appellant's Successive Motion to Vacate Three Death Sentences filed per Florida Rule of Criminal Procedure 3.851(e)(2).

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PRELIMINARY STATEMENT

Oba Chandler was the defendant in the trial court and is the appellant here. He will be referred to as "Chandler" or "the defendant." The State of Florida was the plaintiff in the trial court and is the appellee here. It will be referred to as "the state."

The record on appeal is in two volumes. The Clerk of the Circuit Court has placed a sequential page number at the bottom right-hand corner of each page. References to particular pages from the record will be by the letter "R" followed by an appropriate volume and page number.

STATEMENT OF THE CASE AND OF THE FACTS

a. Nature of the Case:

This is a direct appeal from a final order of the circuit court of the Sixth Judicial Circuit of Florida that denied Chandler's motion to vacate his three death sentences filed per the provisions of Florida Rule of Criminal Procedure 3.851(e)(2). (R2/pp. 191-210).

b. Jurisdiction:

The Supreme Court of Florida has jurisdiction over the parties and subject matter of this appeal because this is a direct appeal of a final order that denied Chandler's post conviction relief in a capital case. Art. V, Sec. 3(b)(1), Fla. Const. "We have jurisdiction over all death penalty appeals." *Parker v. State*, 873 So. 2d 270, 275, f. 1 (Fla. 2004). This includes jurisdiction of direct appeals from final orders denying post conviction relief in capital cases. *Parker v. State*, 542 So. 2d 356-57 (Fla. 1989); §924.066, Fla. Stat. (1988); Fla. R. Crim. P. 3.850(g).

c. Course of the Proceedings (part one):

On November 10, 1992, Chandler was indicted by a Pinellas County, Florida, grand jury on three counts of first-degree murder for the deaths of Joan Rogers and her daughters, Michelle and Christe Rogers, occurring on or between June 1-4, 1989. Chandler pled not guilty. His

trial was held on September 19-29, 1994. The jury, which was selected in Orange County, Florida, and brought to Pinellas County, Florida, for the trial, returned three verdicts of guilty as charged on September 29, 1994. Following the penalty phase of the trial, on September 30, 1994, the jury unanimously recommended death for each murder. (R2/p. 191.) Judge Schaeffer followed the jury's recommendation and sentenced Chandler to death on November 4, 1994. (R1/pp. 17, 18).

Chandler filed a timely notice of appeal to the Supreme Court of Florida and raised seven points:

1. The trial court violated Chandler's due process right to a fair trial by admitting irrelevant evidence that he sexually battered Judy Blair.

2. Having found that Chandler had the right to remain silent regarding the facts of the pending sexual battery case (wherein Judy Blair was the alleged victim), the trial court violated that right by requiring him to repeatedly invoke his Fifth Amendment privilege before the jury in response to the state's questions about the sexual battery.

3. The trial court erred by allowing the state to present a prior consistent statement by Kristal Mays when her motive to fabricate existed before the statement was made.

4. The prosecutor's improper remarks in closing argument violated Chandler's due process right to a fair trial.

5. The trial court erred by accepting Chandler's waiver of his right to present mitigating testimony to the penalty phase jury because defense counsel did not state for the record what that testimony would be.

6. The trial court violated Amendment Eight to the United States Constitution by finding the mitigating circumstance of childhood trauma was not proven when the state conceded its existence.

7. The trial court erred by giving an unconstitutional jury instruction on the heinous, atrocious, or cruel aggravating circumstance.

(R1/33, 34).

d. Statement of the Facts as found by the Florida Supreme Court on Direct Appeal:

After briefing of the issues and oral argument, the Florida Supreme Court affirmed the convictions, judgments and sentences and summarized the facts of the case as follows:

> The record reflects that the body of Joan Rogers and those of her two daughters, Michelle and Christe, were discovered floating in Tampa Bay on June 4, 1989. Each body was nude from the waist down. Joan's hands were tied behind her back, her ankles were tied together, and the yellow rope around her neck was attached to a concrete block. Christe's hands and ankles were similarly tied, and she had duct tape on her face or head and a rope around her neck. Michelle's left hand was free with only a loop of rope attached, her ankles were bound, she had duct tape on her face or head, and the rope around her neck was attached to a concrete block.
>
> The assistant medical examiner, Dr. Edward Corcoran, performed autopsies that same day. He determined that the cause of death for each victim was either asphyxiation due to strangulation from the ropes tied around their necks or drowning.

The Rogers family was vacationing in Florida and had checked into a Days Inn in Tampa on June 1. One week later, housekeepers notified the general manager that the Rogers' room had not been inhabited for several days. The general manager contacted the police, who secured the room and obtained the hotel's records for the room. The police subsequently found the Rogers' car parked at a boat ramp on the Courtney Campbell Causeway.

Among the items recovered from the car was a handwritten note on Days Inn stationery and a Clearwater Beach brochure. The note read, “Turn right. West W on 60, two and one-half miles before the bridge on the right side at light, blue w/wht.” FBI agent James Mathis determined that the handwriting was that of Joan Rogers. Theresa Stubbs from FDLE determined that some of the handwriting on the Clearwater Beach brochure was Chandler’s, while other writing may have been Joan Rogers’. Samuel McMullin, a fingerprint expert for the Hillsborough County Sheriff's Department, found Chandler’s palm print on the brochure.

Rollins Cooper worked as a subcontractor for Chandler at the time of the murders. He testified at trial that on June 1, Chandler appeared to be in a big hurry after bringing Cooper some screen. When asked why, Chandler told Cooper that he had a date with three women. Cooper met Chandler the next morning at 7:05 a.m.; when asked why he looked grubby, Chandler replied that he had been out on his boat all night.

Judy Blair and her friend, Barbara Mottram, both Canadian tourists, testified regarding Chandler's rape of Blair several weeks prior to the Rogers' murders. After meeting the women at a convenience store, Chandler, who identified himself as “Dave,” arranged to take them out on his boat the next day. The following morning, May 15, 1989, Mottram decided not to go out on Chandler's boat, so Blair met Chandler alone. Blair testified that Chandler seemed disappointed when told Mottram would not be joining them. After boating for several hours, Blair and Chandler returned to the

dock. Chandler asked Blair to get Mottram to join them for an after-dinner boat trip.

Again, Blair could not convince Mottram to join them. Blair testified that Chandler seemed “ticked off” when she told him Mottram would not be joining them. Subsequently, Chandler began making advances to Blair after the boat entered the Gulf of Mexico. Despite Blair's refusals and attempts to resist him, Chandler raped her. Chandler and Blair then returned to shore. The next day, Blair told Mottram what happened and reported the rape to the police. At trial, she identified the clothing Chandler had been wearing that night. Mottram picked Chandler's photograph out of a photo pack and identified him in a lineup and in court.

Chandler visited his daughter, Kristal Mays, and her husband Rick in Cincinnati in November 1989. Kristal later testified that Chandler told her he could not go back to Florida because the police were looking for him for killing some women. While Chandler never admitted to the killings, Kristal testified that he likewise never claimed innocence. Similarly, Rick Mays thought Chandler had committed the murders from the way he described how the police were looking for him as a murder suspect.

During another visit to Cincinnati in October 1990, Chandler had Rick Mays set up a drug deal. Before absconding with some of the drug dealers' money, Chandler put a gun to Rick's head and said, “Family don’t mean s___ to me.” After Chandler fled, Rick was badly beaten up and almost killed. The Mays’ house was also damaged by the drug dealers. This series of incidents forced Kristal Mays to drop out of nursing school. She was upset and told Rick to call the police and report that Chandler “put a gun on him.”

After Chandler was arrested in September 1992, Kristal was contacted and cooperated with the police and she began to tape their conversations. She gave a sworn statement to the state

attorney’s office on October 6, 1992. Kristal had been convicted of a crime involving dishonesty and appeared on the television show *Hard Copy* in 1994 to discuss her father’s alleged role in the murders in return for a $1000 fee.

Robert Carlton testified that he bought a blue and white boat from Chandler in July or August 1989. Carlton recalled seeing concrete blocks at the Chandler house and that some of the concrete blocks had three holes and some had two.

Arthur Wayne Stephenson shared a cell with Chandler for ten days in late October 1992. He testified at trial that after viewing television reports about the recovery of the victims' bodies from Tampa Bay, Chandler said that he had met the three women and given them directions to a boat ramp on the Courtney Campbell Causeway. Chandler told Stephenson that one of the girls was very attractive.

Blake Leslie, an inmate at the Pinellas County Jail with Chandler in the fall of 1992, testified that Chandler told him that he took a young lady from another country for a ride in his boat. Her friend did not want to go. Once he got out twenty to thirty miles, Chandler told her to have sex with him or swim for it. Chandler allegedly said that the only reason that woman was still around is because somebody was waiting for her at the boat dock. Leslie, who had been convicted of nine felonies, never heard Chandler speak of murders, only rapes.

Several marine operators for G.T. testified to collect calls made from a caller identifying himself as Oba, Obey, Obie, or no personal name and his boat as Gypsy or Gypsy One, from March 17 to June 2, 1989. The calls were placed to a number registered to Debra Chandler, Chandler's wife. One of the operators, Elizabeth Beiro, testified that she received three collect calls for Debra Chandler's telephone number, at 1:12 and 1:30 a.m. on June 2, 1989. The caller did not give a first name, although he identified his boat as Gypsy One. Later that same morning, at

9:52 a.m., Frances Watkins received a collect call from Gypsy One; the caller identified himself as Obie.

Chandler testified that he met Michelle Rogers when he stopped at a gas station. He testified that he had a very brief conversation with Michelle, giving her directions to the Days Inn on Highway 60. Chandler maintained that he never saw any of the Rogers family again after this short encounter and adamantly denied killing them. He also testified that he never told Rollins Cooper that he had a date with three women. Chandler claimed that he was out on his boat all night because his engine died after a hose burst, spilling all of his fuel. He testified that two men in a boat gave him a tow to Gandy Bridge Marina, where he put some fuel in his boat. In rebuttal, James Hensley, a certified boat mechanic, testified that Chandler's fuel line was possibly still the original, was in good shape, and showed no signs of repair. Hensley stated that even if there had been a hole in the fuel line, it would not have leaked because of the anti-siphoning valve.

When asked about details surrounding the rape of Judy Blair, Chandler invoked his Fifth Amendment right to remain silent twenty-one times, although he did answer some questions regarding his perception of the link between the rape and the murders.

After the jury trial concluded, Chandler was found guilty of all three counts of murder on September 29, 1994. The jury reconvened for the penalty phase the next day. During the penalty phase, Chandler waived the presentation of any testimonial mitigating evidence. However, he did present some documentary evidence, including records showing that he obtained his high school equivalency diploma and earned college credits while in prison. The State presented the judgments and sentences of Chandler’s prior armed robberies. The robbery victims also testified about the details of those crimes.

Chandler v. State, 702 So. 2d 186, 189-91 (Fla. 1997).

f. Course of the Proceedings (part two):

A motion for rehearing was denied.

Chandler filed a timely petition for writ of certiorari in the United States Supreme Court. He raised the following question:

> Where the defendant had answered certain questions about a related offense and defense counsel informed the jury that the State could prove the related offense, did the state trial court violate the Fifth and Fourteenth Amendments by allowing the prosecutor to cross-examine the petitioner about the facts of his capital murder trial, resulting in the defendant repeatedly invoking his Fifth Amendment privilege before the jury?

(R1/p. 34).

The petition for certiorari was denied by the United States Supreme Court on April 20, 1998. *Chandler v. Florida*, 523 U.S. 1083, 118 S. Ct. 1535 (1998).

To toll the one-year limitation period applicable to petitions for federal habeas relief, *see* 28 U.S.C. § 2244(d), Chandler filed a "shell" motion to vacate in state court pursuant to Fla. R. Crim. P. 3.850 on June 17, 1998, setting forth 32 claims for relief. Discovery and public records litigation ensued. On May 5, 1999, the trial court granted a defense request for an extension of time to amend the Rule 3.850 motion.

On July 28, 1999, the undersigned was appointed registry counsel to represent Chandler regarding his post-conviction claims. On May 30, 2000, Chandler filed a complete, amended 3.850 motion raising seven claims alleging generally that he was denied effective assistance of counsel at trial for:

1. Failure to prevent the prosecutor from making improper, prejudicial arguments to the jury.

2. Ineffective assistance in dealing with the matter of venue.

3. Failure to protect Chandler regarding the admission of evidence of a similar crime that was admitted pursuant to *Williams v. State*, 110 So. 2d 654 (Fla. 1959).

4. Failure to protect the defendant from cross-examination regarding the similar crime evidence.

5. Failure to investigate and present the defense that someone else had committed the homicides.

6. Failure to investigate and present an expert witness to rebut the state's expert witness on boat fuel lines.

7. Causing prejudicial statements regarding Chandler to be entered at trial.

(R1/pp. 35). The state filed a response with exhibits on August 11, 2000. Following a *Huff*[1] hearing held on September 15, 2000, the post-conviction court ruled that an evidentiary hearing was necessary only on Chandler's claim regarding ineffective assistance of counsel as it related

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

to certain *Williams*[2] Rule evidence. An evidentiary hearing was held on November 20, 2000, and the post-conviction court entered an order denying Chandler's 3.850 motion, with appendix, on June 28, 2001. (R1/p. 35).

Chandler timely appealed the post-conviction court's decision to the Florida Supreme Court on July 2, 2001. He raised the following issues (R.1/ pp. 35, 36):

> 1. Did the trial court err by denying Chandler an evidentiary hearing regarding his claim that defense counsel was ineffective for failing to seek a venue change from Orange County?
>
> 2. Did the trial court err by not finding that defense counsel was ineffective for admitting that Chandler was guilty of the Blair sexual battery and in instructing his client to assert his Fifth Amendment privilege against self- incrimination regarding same?
>
> 3. Did the trial court err in not finding that defense counsel was ineffective for failing to object to the prosecutor's improper closing argument?

He also cited the holding in *Ring v. Arizona*, 534 U.S. 1103 (2002), as supplemental authority. This Court specifically considered the *Ring* claim (Chandler, infra 848 So. 2d at 1034; see also R2/173, 174)) but on April 17, 2003, rejected all of these post conviction claims. *Chandler v. State*, 848 So. 2d 1031, (Fla. 2003). Rehearing was denied.

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[2] *Williams v. State*, 110 So. 2d 654 (Fla.), *cert. denied*, 361 U.S. 847 (1959).

On June 27, 2003, Chandler filed a petition for writ of habeas corpus pursuant to 28 U.S.C. §2254 in the United States District Court, Middle District, Florida in Case No. 8:03-cv-1347-T-30TGW. The grounds raised were that defense counsel:

1. Failed to move for change of venue for jury selection.

2. Was ineffective for conceding the Blair sexual battery.

3. Was ineffective for advising Chandler to assert his Fifth Amendment privilege regarding the Medeira Beach sexual battery.

4. Was ineffective for not objecting to statements made by the prosecutor during closing arguments.

(R.1/p. 36).

The state filed its response on November 6, 2003. Chandler filed a reply thereto on December 5, 2003. On February 8, 2006, the Hon. James S. Moody, United States District Judge, entered an order denying Chandler's request for an evidentiary hearing and summarily denying the habeas petition. *Chandler v. Crosby*, 454 F.Supp. 2d 1137 (Fla. M.D. 2006). Judgment was entered on February 9, 2006.

On February 13, 2006, Chandler filed a timely notice of appeal to the United States Court of Appeals for the Eleventh Circuit (Case No. 06-11190-P), and an application for certificate of appealability with the United States

District Court, Middle District, Florida, on March 6, 2006. He raised one issue: Whether he was denied the effective assistance of counsel when trial counsel failed to move for a second change of venue. (R1/p. 37). Chandler's application was denied on May 16, 2006, and on May 26, 2006, he filed his renewed application for certificate of appealability to the United States Court of Appeals for the Eleventh Circuit. On June 21, 2006, a certificate of appealability was granted as to the one issue: the alleged ineffective assistance of trial counsel in failing to file a second motion for change of venue. The Eleventh Circuit rejected this claim and affirmed the denial of habeas corpus relief on December 18, 2006. *Chandler v. McDonough*, 471 F.3d 1360 (11th Cir. 2006).

Chandler sought certiorari review of the Eleventh Circuit's denial of habeas corpus relief in the United States Supreme Court on March 15, 2007 (Case No. 06-10141). The petition was denied on May 14, 2007. *Chandler v. McDonough*, 550 U.S. 943, 127 S. Ct. 2269 (2007).

On October 10, 2011, the Hon. Rick Scott, Governor of Florida, signed Chandler's death warrant. (R1/p. 2.) The execution date has been set for November 15, 2011, at 4:00 p.m. (R1/p. 2).

On October 17, 2011, Chandler filed a successive motion to vacate his three death sentences per the provisions of Florida Rule of Criminal Procedure 3.851(e)(2) and the appropriate subsections of Rule 3.851(e)(1), with a request for a stay of execution. (R1/pp. 75-99). He did not request an evidentiary hearing under Rule 3.851(e)(1(D). Instead he sought relief under subsection (e)(1)(E) regarding a "purely legal or constitutional claim upon which an evidentiary hearing is not required." (R1/p. 104). On October 18, 2011, the state filed a response. (R2/pp. 166-189.) On October 21, 2011, a hearing on the motion was held before the Hon. Philip J. Federico, Circuit Judge in Clearwater, Florida. (R2/pp. 256 -280). Chandler specifically asked not to attend the hearing in person but to appear by telephone. (R1/pp. 150-153.) After making certain that Chandler understood that he could attend the hearing in person if he chose, his request was granted by Judge Federico. (R2/p. 192).

g. <u>Disposition in the Lower Tribunal:</u>

On October 24, 2011, Judge Federico rendered a written final order denying the Rule 3.851(e)(2) motion as well as the request for a stay. (R2/pp. 191-210). On that same day, Chandler filed a notice of appeal of Judge Federico's final order to this Court. (R2/pp. 211, 212).

SUMMARY OF THE ARGUMENT

The trial court erred in denying Chandler's October 17, 2011, successive motion to vacate his three death sentences(R1/pp. 75-99)filed per the provisions of Florida Rule of Criminal Procedure 3.851(e)(2). Insodoing, the trial court failed to acknowledge that Chandler was sentenced under a law, Section 921.141, Florida Statutes (1988), that is constitutionally flawed because it is contrary to the rights of an accused to a jury trial per the provisions of Amendments Six and Fourteen, United States Constitution, and Article I, Section 22, Florida Constitution, in a case where the state is seeking the ultimate punishment of death.

Chandler got only one-half a jury trial. Once the jurors decided his guilt of the crimes charged in the indictment, their role was unconstitutionally relegated to that of advisors to the only person who actually directly decided the facts upon which he was sentenced to death –- the trial judge, Hon. Susan F. Schaeffer.

In Apprendi v. New Jersey, 530 U.S. 466 (2000), the court clarified what a true trial by jury means in terms of the extent to which the jurors must make findings of fact upon which a death sentence can be based: "If a State makes an increase in the defendant's authorized punishment

contingent on the finding of a fact, *that fact -- no matter how the state labels it, must be found by a jury beyond a reasonable doubt*." *Apprendi*, supra, 530 U.S. at 482-83. In *Ring v. Arizona*, 536 U.S. 584 (2002) the *Apprendi* holding was applied to that state's death penalty scheme. The *Ring* court said that "(t)he dispositive question . . . is one not of form but of effect," citing *Apprendi*, 530 U.S. at 495. That is to say, at the point that Ring was convicted of murder, he could not be sentenced to death under Arizona's capital punishment scheme since additional facts had to be determined in order to do so. Those additional factual findings were made by the judge. That, the *Ring* court held, violated the Sixth and Fourteenth Amendments.

This is exactly the case in Florida. On June 20, 2011, the Hon. Jose Martinez, United States District Court Judge, Southern District of Florida, decided *Evans v. McNeil*, Case No. 08:14402-CIV. That decision holds that §921.141, Fla. Stat. (1988) cannot be reconciled with Chandler's Sixth Amendment right to trial by jury and Fourteenth Amendment right to due process of law in the manner described above.

The circuit court erred in ruling that Chandler's claim was procedurally barred. The fact that the United States Supreme Court and this Court determined that *Ring* is

not to be applied retroactively does not bar Chandler from relief here, nor does the fact that Chandler has a prior violent felony conviction. *Evans* represents the long overdue recognition of the fact that the advisory sentencing scheme in §921.141 is not equivalent to jury factfinding and is an unconstitutional abridgement of the right to trial by jury. *Evans* provides a new factual basis for Chandler's claim that his sentence violates long standing and historical principles on the role of the jury enshrined in Art. I, §22 of the Florida Constitution. Chandler's claim is therefore timely.

The right to trial by jury in Florida is broader than the Sixth Amendment right, and extends to the fact of a prior conviction when that fact increases the punishment for a Florida offense. Under Florida law, any fact that results in an increase in sentence, even when that fact is not an element of the crime defined by the legislature or does not increase the statutory maximum penalty for the crime, must be found by the jury. This right existed under Florida law long before the United States Supreme Court interpreted the Sixth Amendment in *Ring*, and was established prior to Chandler's death sentences becoming final. Therefore, Chandler's claim is also not barred by the non-retroactivity doctrine.

ARGUMENT

Point I On Appeal: Did the lower tribunal err in finding that Chandler was not denied a jury trial when the presiding judge, not the jury, made the findings of fact as to whether the death penalty could be imposed?

Standard of Appellate Review

This is a collateral appeal in a capital case to this Court from a final order of the circuit court that denied Chandler's Florida Rule of Criminal Procedure 3.851(e)(2) successive motion to vacate his three death sentences. There were no disputed issues of fact raised in the motion. Per the provisions of Florida Rule of Criminal Procedure 3.851(e)(1)(E), Chandler based his claim solely upon (and the trial court strictly ruled on) legal or constitutional grounds. Therefore, review by this Court is *de novo*. *Davis v. State*, 990 So. 2d 459 (Fla. 2008).

Merits

The attorney general did not mince words in her stinging response to Chandler's October 21, 2011, Rule 3.851(e)(2) motion, arguing that it was "untimely, successive, procedurally barred facially insufficient and unauthorized . . ." (R2/p. 168.) And those were the nice things the state had to say about it. The trial court, while affording the defendant every consideration and opportunity to be heard, held that the successive motion

was legally insufficient to authorize Chandler relief and otherwise procedurally barred. (R2/p. 194.) The trial court then went on to determine that Chandler was also not entitled to relief on the merits. (R2/pp. 195-199).

Chandler admits that he must overcome several significant procedural hurdles in order to overcome the findings of the lower tribunal. However, he asserts that if this Court will take a moment to consider his claim without the technicalities muddying the constitutional waters, it is obvious that Section 921.141, Florida Statute (1988) provided him with nothing more than the illusion of a jury trial.

Amendment Six, U.S. Constitution, succinctly provides that, even as to the most egregious offenders, "in all criminal prosecutions, the accused *shall* enjoy the right to . . . a public trial, by an impartial jury of the State and district wherein the crime shall have been committed." (Emphasis added.) The right to jury trial is applied to the states, including Florida, by virtue of Amendment Fourteen of the federal constitution. Florida is even more emphatic: "The right to jury trial shall be secure to all and remain inviolate." Art I, §22, Fla. Const.

These constitutional provisions do not mince words either: In the United States and Florida trial courts,

jurors and jurors only -- not judges -- decide the disputed facts in a criminal case. It is as simple as that.

Unfortunately, many states including Florida over the years have drifted far from the shore regarding the scope and extent of this right. This observation comes strongest most recently, not from some anti-death penalty focus group, but from the Supreme Court of the United States.

In *Apprendi v. New Jersey*, 530 U.S. 466 (2000), the defendant pled guilty to firing several gunshots into the residence of an African American family. Once Apprendi's plea was accepted as voluntary, the presiding judge -- not the jury -- following New Jersey's "hate crime" statute, commenced the second phase of the proceedings by making factual findings as to whether Apprendi's actions were based on animus toward the victims due to their race. Upon the factual finding that Apprendi's actions were hate based, the judge -- not the jury -- enhanced Apprendi's punishment by sentencing him to more time in prison than he could have been sentenced to had the hate legislation not been a part of New Jersey law.

On appeal, Apprendi claimed that his sentence was illegal because he was denied a jury trial on all of the factual issues that went into determining his punishment.

The Supreme Court ultimately agreed, noting with obvious alarm:

> At stake in this case are constitutional protections of surpassing importance: the proscription of any deprivation of liberty without "due process of law," Amdt. 14, and the guarantee that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury," Amdt. 6. Taken together, these rights indisputably entitle a criminal defendant to "a jury determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt." United States v. Gaudin , 515 U. S. 506, 510 (1995) ; see also Sullivan v. Louisiana, 508 U. S. 275, 278 (1993); Winship , 397 U. S., at 364 ("[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged").

The Court then made it clear that the *Apprendi* decision was not rendered to establish some new, evolving, expanded constitutional definition of the scope of a jury trial. Instead, it was a wake up call to the state courts of this nation to get back to the original, true meaning of the right to trial by jury as intended by the framers of the Sixth Amendment. The *Apprendi* court explained:

> As we have, unanimously, explained, Gaudin , 515 U. S., at 510–511, the historical foundation for our recognition of these principles extends down centuries into the common law. "[T]o guard against a spirit of oppression and tyranny on the part of rulers," and "as the great bulwark of [our] civil and political liberties," 2 J. Story,

> Commentaries on the Constitution of the United States 540–541 (4th ed. 1873), trial by jury has been understood to require that " the truth of every accusation, whether preferred in the shape of indictment, information, or appeal, should afterwards be confirmed by the unanimous suffrage of twelve of [the defendant's] equals and neighbors " 4 W. Blackstone, Commentaries on the Laws of England 343 (1769) (hereinafter Blackstone) (emphasis added). See also Duncan v. Louisiana, 391 U. S. 145, 151–154 (1968) .

The prosecution in *Apprendi* made the same argument that Florida continues to make in the case at bar to justify this state's death penalty scheme -- that traditionally there is a distinction between the elements of a crime which the jury decides and "sentencing factors" which are the province of the judge. The *Apprendi* court rejected that argument, finding:

> Any possible distinction between an "element" of a felony offense and a "sentencing factor" was unknown to the practice of criminal indictment, trial by jury, and judgment by court as it existed during the years surrounding our Nation's founding. As a general rule, criminal proceedings were submitted to a jury after being initiated by an indictment containing "all the facts and circumstances which constitute the offence, … stated with such certainty and precision, that the defendant … may be enabled to determine the species of offence they constitute, in order that he may prepare his defense accordingly … and that there may be no doubt as to the judgment which should be given, if the defendant be convicted." J. Archbold, Pleading and Evidence in Criminal Cases 44 (15th ed. 1862) (emphasis added). The defendant's ability to predict with certainty the judgment from the face of the felony indictment flowed from the invariable linkage of punishment

> with crime. See 4 Blackstone 369–370 (after verdict, and barring a defect in the indictment, pardon or benefit of clergy, "the court must pronounce that judgment, which the law hath annexed to the crime. "

Apprendi, supra, 530 U.S. 466, 478-79 (2000). Thus, when it comes to who is responsible for fact finding in a criminal case -- and the scope of those findings, as a practical matter:

> . . . our reexamination of our cases in this area, and of the history upon which they rely, confirms the opinion that we expressed in *Jones*. *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*. With that exception, we endorse the statement of the rule set forth in the concurring opinions in that case: *"[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. It is equally clear that such facts must be established by proof beyond a reasonable doubt*." 526 U. S., at 252–253 (opinion of Stevens, J.); see also id., at 253 (opinion of Scalia, J .).

Apprendi, supra, 530 U.S. at 490.

The *Apprendi* court cleared away any further confusion in the premises by noting that New Jersey "threatened *Apprendi* with certain pains if he unlawfully possessed a weapon *and with additional pains if he selected his victims with a purpose to intimidate them because of their race*." *Apprendi*, 530 U.S. at 476. The court added: "If a State

makes an increase in the defendant's authorized punishment contingent on the finding of a fact, ***that fact -- no matter how the state labels it, must be found by a jury beyond a reasonable doubt***." *Apprendi*, supra, 530 U.S. at 482-83. (Emphasis added.)

In *Ring v. Arizona*, 536 U.S. 584 (2002) the *Apprendi* holding was applied to that state's death penalty scheme. The Arizona law under attack was quite similar to Florida's. Once it was determined by an Arizona jury that the defendant was guilty of a capital offense, the judge made the factual findings sufficient to establish whether the death penalty could be imposed.

Arizona tried every excuse in the book to mask the fact that its statute violated *Apprendi*, including the flawed assertion that there was really no need to prove additional facts once a first-degree murder verdict was returned because the first-degree murder statute already called for either life or death as a possible sentence. In particular, Arizona argued that its first-degree murder statute specifies death or life in prison as the only sentencing options. Therefore, according to Arizona, Ring was "sentenced within the range of punishment authorized by the jury verdict." *Ring v. Arizona*, 536 U.S. at 603. But the *Ring* court saw through that smokescreen, returning

again and again to the fact that the jury was not making all of the factual findings that are conditions precedent to the imposition of the death penalty. The *Ring* court said that "(t)he dispositive question . . . is one not of form but of effect," citing *Apprendi*, 530 U.S. at 495. The Supreme Court added that "based solely on the jury's verdict finding Ring guilty of first-degree felony murder, the maximum punishment he could have received was life imprisonment." *Ring v. Arizona*, 536 U.S. 584 (2002). But then the Court said: "If a state makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact -- no matter how the state labels it -- must be found by a jury beyond a reasonable doubt." *Ring v. Arizona*, 536 U.S. at 602. (Emphasis added.)

It is abundantly obvious that Chandler did not have a meaningful jury trial as defined by *Ring* and *Apprendi*. It wasn't even close. He had at best half a jury trial.

Per the provisions of §921.141 (1988), the authority to have a jury decide the facts in Chandler's 1992 trial beyond a reasonable doubt was strictly limited to the determination of whether he was guilty of murder in the first-degree based upon whether he either,

(1) acted with premeditation as provided for in § 782.04(1)(a)1, Florida Statutes (1988) -- or

(2) committed felony murder per subsection 2 of that statute.

Once guilt or innocence of the crime charged was made, the proceedings were bifurcated and the jury was relegated -- demoted -- subjugated -- downgraded -- reduced -- to at best an "advisory" role. §921.141(2), Fla. Stat. (1988). It was Judge Schaeffer who not only ultimately sentenced the defendant -- but more importantly who made the factual findings as to whether the death penalty would be imposed. *See* Judge Schaeffer's detailed sentencing order, (R2/pp. 200-210.) ("Upon conviction or adjudication of guilt of a defendant in a capital case, *the court* shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment . . ." §921.141(1), Fla. Stat. (1988). (Emphasis added.) "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 forth in writing its findings upon which the sentence of death is based . . ." Sec. 921.141(3), Fla. Stat. (1988).

So that there is no doubt about this: Upon a conviction for first-degree murder, as the Supreme Court

noted in *Ring*, Judge Schaeffer did not have the authority to sentence Chandler to death. This is because *additional facts* had to be considered and resolved by the fact finder (Judge Schaeffer) as to:

1. whether "aggravating circumstances" as set forth in §921.141(5), Fla. Stat. (1988) had been proven beyond a reasonable doubt;

2. whether mitigating circumstances had been established per the provisions of Section 921.141(6); and

3. whether the mitigating factors outweighed the aggravating factors. § 921.141(3).

Pursuant to Florida law, Judge Schaeffer made all these necessary factual findings regarding aggravating and mitigating factors, not the jury. §921.141(3), Fla. Stat. (1988). *See* also Judge Schaeffer's sentencing order (R2/pp. 200-209) where she discusses each aggravating factor[3] and sets forth the factual basis for deciding that

[3] Judge Schaeffer wrote in detail regarding her factual findings that she alone determined that it had been proven beyond a reasonable doubt (1) that Chandler had previously been convicted of a violent felony, (2) that the murders were committed while he was engaged in the commission of multiple kidnappings, (3) that the purpose of the murders was witness elimination, and (4)that the murders were especially heinous, atrocious or cruel. (R2/pp. 200-205.) Nothing in her order suggests that the jurors made any such factual findings. By the same token, her order is clear that she alone made the factual findings as to mitigation

each factor had been proven beyond a reasonable doubt. (R2/pp. 200-205.) In fact, Judge Schaeffer was prohibited by Florida law from using a special verdict form in order to have the jurors make unanimous findings as to whether the state had proven even one of the statutory aggravators beyond a reasonable doubt. *See State v. Steele*, 921. So. 2d 538, 545-48 (Fla. 2005).[4]

Lest there be any doubt about Florida's and Judge Schaeffer's non-compliance with what it means to have a jury trial as expressed by the Ring/Apprendi decisions, on June 20, 2011, the United States District Court for the Southern District of Florida held in *Evans v. McNeil*, Case No. 2:08-cv-14402, that the Florida capital sentencing scheme does not comply with constitutional jury trial requirement and violates *Ring.*[5] The court ruled that the advisory sentencing scheme in §921.141 is unconstitutional because it is the judge rather than the jury who makes the

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that was offered on Mr. Chandler's behalf during the penalty phase. (R2/p. 209.)

[4] "In *Steele*, the Florida Supreme Court ***implored*** the Florida Legislature to amend the death penalty statute to allow for unanimous jury findings of aggravators and the use of special verdict forms." *Evans v. McNeil*, U.S. Dist. Ct., So. Dist. of Fla. (June 20, 2011) at p. 84, decision of Martinez, J., emphasis added.

[5] Evans was entitled to relief under *Ring* because his sentence became final after *Ring* was decided and did not involve a prior conviction aggravator.

factual findings with respect to aggravating circumstances necessary for imposition of the death penalty. The court concluded that the jury's advisory sentence is not a factual finding sufficient to satisfy the jury finding requirement because it is "simply a sentencing recommendation made without a clear factual finding. In effect, the only meaningful findings regarding aggravating factors are made by the judge."[6]

As the court in *Evans* correctly noted, there are many other reasons why the jury's advisory recommendation is insufficient to satisfy the jury trial right. The jury makes no specific findings of fact. A reviewing court has no way of knowing what aggravating or mitigating factors the jury found and relied upon, or if a majority of the jurors found any one aggravator proven beyond a reasonable doubt and not outweighed by the mitigating factors presented by the defense. In addition, after the jury makes its recommendation, a separate proceeding is held before the judge only, where additional evidence and argument may be presented. The judge then makes specific findings on aggravating circumstances that may be based on evidence not presented to the jury. Rather than merely

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[6] This decision is currently pending appeal in the Eleventh Circuit Court of Appeals in Case No. 11-14498.

reviewing the findings of the jury, the judge makes independent findings that may differ from those of the jury. The judge then relies on those independent findings in imposing the death penalty, "notwithstanding the recommendation of a majority of the jury." §921.141(4), Fla. Stat. (1988).

Judge Martinez, at opinion, p. 87, concluded by noting that, "(c)apital defendants, no less than non-capital defendants . . . are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment" quoting *Ring*, 536 U.S. at 589. *Evans*, supra, opinion, p. 88. But Chandler was denied this jury determination because, according to Judge Martinez at page 90 of his opinion in *Evans*:

> In Florida, a separate sentencing hearing is conducted in front of a jury. The jury returns its recommendation as to life imprisonment or death based on the existence of an aggravating circumstance, which then outweighs any mitigating circumstances. There are no specific findings of fact made by the jury. Indeed, the reviewing courts never know what aggravating or mitigating factors the jury found (*Steele* citation omitted.) It is conceivable that some of the jurors did not find the existence of an aggravating circumstance, or that each juror found a different aggravating circumstance, or perhaps all jurors found the existence of an aggravating circumstance but some thought that the mitigating circumstances outweighed them.

In sum, Judge Martinez determined that Florida's "death penalty is an 'enhanced' sentence under Florida law and the Sixth Amendment requires that the enumerated aggravating factors necessary to enhance the sentence be found by a jury." *Evans*, supra, p. 90.

Clearly then, but for the procedural and technical issues that must be addressed below, Chandler deserves relief because he was not afforded a jury trial in his 1992 state court trial.

Point II on appeal: Did the lower tribunal err in determining that Chandler was procedurally barred from attacking the extent to which he was denied a jury trial at this stage of the proceedings and otherwise unable to rely upon other authority for relief?

Standard of Appellate Review

Application of a procedural bar is reviewed *de novo* on appeal. *State v. McBride*, 848 So. 2d 287 (Fla. 2003).

Merits

The circuit court erred in ruling that Chandler's challenge to his sentence as violative of the right to trial by jury was untimely and procedurally barred. (R2/p. 194.) The trial court also erred (see R2/pp. 198) in determining that Chandler could not rely upon *Evans, Ring, Apprendi* and other court decisions cited herein.

The U.S. District Court's decision in *Evans* represents the first time that any court of competent jurisdiction has held that the Florida capital sentencing scheme as set forth in § 921.141, Fla. Stat., violates the right to trial by jury. Rather than creating a new constitutional right, this decision recognizes an existing right and finds that the advisory jury recommendation of death is not the functional equivalent of a jury finding with respect to the aggravating circumstances necessary to support imposition of the death penalty.

The determination that the advisory sentence is not equivalent to the jury verdict to which a defendant is entitled constitutes a new factual basis for Chandler to raise a claim that his sentence was imposed in violation of his right to trial by jury as it existed at the time of his trial. Chandler's claim is therefore timely to the extent it relies on the *Evans* decision for the factual basis of the claim.

At least one justice of this Court has previously stated that the capital sentencing scheme in §921.141 violates the right to trial by jury under Art. I, § 22 of the Florida Constitution for the reasons stated in *Apprendi* and *Ring*. *Coday v. State*, 946 So. 2d 988, 1021 (Fla. 2006)(Pariente, J., concurring in part and dissenting in

part). Justice Pariente quoted this Court's decision in *State v. Hargrove*, 694 So. 2d 729 (Fla. 1997), which held that a court cannot enhance a defendant's sentence based on a fact not found by the jury. *Coday*, 946 So. 2d at 1023 (Pariente, J., concurring in part and dissenting in part). *Hargrove*, which recognizes a defendant's jury trial right in Florida with respect to any finding that increases the maximum punishment for an offense, was decided prior to Mr. Chandler's conviction and sentence becoming final.

Members of this Court have repeatedly recognized that the requirement of a unanimous jury finding on any fact that increases the maximum punishment for an offense "has always been a part of Florida's common law" and "scrupulously honored." *Butler v. State*, 842 So. 2d 817, 837 (Fla. 2003)(Pariente, J., concurring); see also *Id.* at 838 n.11 (citing *State v. Overfelt*, 457 So. 2d 1385 (Fla. 1984) for recognition of jury trial right on sentence enhancing factors). The requirement of a trial by jury under Art. I § 22 "has been enshrined in every Florida Constitution since 1838." *Bottoson v. Moore*, 833 So. 2d 693, 714 (Fla. 2001), cert. denied, 537 U.S. 1067, 123 S. Ct. 657 (2002)(Shaw, J., concurring in result only). The right asserted in this case is not a new right, but one of

the most fundamental and long-standing of our constitutional principles.

Unlike the Sixth Amendment jury trial right interpreted by the Supreme Court in *Apprendi* and *Ring*, the Florida jury trial right is broader and extends to the finding of a prior conviction. In *State v. Harbaugh*, 754 So. 2d 691 (Fla. 2000), this Court held that a criminal defendant is entitled to have a jury find the existence of any prior conviction that results in the reclassification of an offense to a higher degree and higher punishment.

Harbaugh adopted the reasoning of the Fourth District and answered a certified question in *Harbaugh v. State*, 711 So. 2d 77 (Fla. 4th DCA 1998)(Harbaugh I). The issue in Harbaugh I concerned the continued viability of the bifurcated jury proceeding in felony DUI cases announced in *State v. Rodriguez*, 575 So. 2d 1262 (Fla. 1991), in light of the U.S. Supreme Court's decision in *United States v. Gaudin*, 515 U.S. 506, 115 S. Ct. 2310 (1995). Under *Rodriguez,* after the jury found the defendant guilty of misdemeanor DUI, the judge then determined whether the State had proven the three prior convictions necessary to reclassify the offense as a felony and increase the maximum punishment from one year to five years.

In *Gaudin*, the U.S. Supreme Court held that a defendant charged with fraud was entitled to have the jury decide whether the defendant's false statements were material because materiality was an element of the offense. *Gaudin*, 515 U.S. at 522-523, 115 S. Ct. 2310. The Fourth District expressed the belief that the bifurcated jury proceeding in *Rodriguez* violated a defendant's right to trial by jury with respect to the second phase where the judge determined the prior convictions. This Court agreed with the Fourth District and modified the bifurcated proceeding to require a jury rather than the judge to find the existence of the prior convictions. *Harbaugh*, 754 So. 2d 691. *Harbaugh I* was decided five days before Appellant's sentence became final.[7]

The jury trial right announced in *Harbaugh* has since been applied in other contexts. See e.g. *Jackson v. State*, 881 So. 2d 711 (Fla. 3rd DCA 2004)(holding that defendant charged with possession of a firearm by convicted felon entitled to jury finding that he was previously convicted of a felony); *Smith v. State*, 771 So. 2d 1189 (Fla. 5th DCA

[7] A decision of this Court that adopts a ruling of a district court of appeal will apply to cases still pending when the district court issued its opinion. See *Rozzelle v. State*, 29 So. 3d 1141 (Fla. 1st DCA 2009)(holding that First District's decision in *Montgomery v. State*, later upheld by this Court, applies only to cases still pending review when district court case was decided).

2000)(applying right to bifurcated proceeding and jury finding of prior theft conviction necessary to increase petit theft to third degree felony and penalty from six months or one year to five years)[8]. This remains the law in Florida today, and Florida courts still adhere to *Gaudin* notwithstanding later decisions narrowing the Sixth Amendment jury trial right when prior convictions are at issue. *Gaudin* was also decided prior to Appellant's sentence becoming final.

More importantly, the right to a bifurcated jury proceeding in capital cases was also recognized in Florida prior to Appellant's sentence becoming final, even when the aggravating circumstance concerns a prior conviction. *See Melton v. State*, 638 So. 2d 927 (Fla. 1994)(holding that same jury could be used for both phases of trial). The question is not whether Appellant had the right to a bifurcated jury proceeding during the penalty phase of his capital trial, as he clearly did, but whether instructing the jury to weigh the aggravating and mitigating circumstances and render an advisory sentence as provided in § 921.141 satisfied that jury trial right. The *Evans*

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[8] As the Supreme Court stated in *Ring*, the right to trial by jury "would be senselessly diminished if it encompassed the factfinding necessary to increase a defendant's sentence by two years, but not the fact finding necessary to put him to death." *Ring*, 536 U.S. at 609.

decision establishes that it did not and is the basis for the instant claim.

Thus, while the circuit court is correct that *Melton* does not announce a new rule of law concerning the right to trial by jury during capital sentencing, it recognizes the existence of a right that both pre-dates and is broader in scope than the Sixth Amendment right established under federal law in *Apprendi* and *Ring.* Because the right to a jury finding on any fact that increases the punishment for an offense under Florida law was in existence before Appellant's finality date, he is entitled to avail himself of that right and is not barred by the non-retroactivity doctrine.

The circuit court rejected Chandler's argument that the aggravating circumstances that must be found before the court may impose the death penalty are an offense element to which the *Harbaugh* rule would apply. See e.g. *Mills v. Moore*, 786 So. 2d 532 (Fla. 2001)(rejecting statutory construction argument that maximum penalty for murder without aggravating circumstances is life imprisonment because § 775.082 clearly states that the statutory maximum sentence for capital murder is death). However, the issue is not one of statutory construction but one of constitutional limitations on sentence enhancement.

Notwithstanding the fact that the U.S. Supreme Court abolished the distinction between offense elements and sentencing factors for Sixth Amendment purposes in *Apprendi*, Florida law recognized a defendant's jury trial right with respect to such factors long before *Apprendi* was decided. See *Overfelt*, 434 So. 2d at 948 (applying jury trial right to finding of firearm possession that results in minimum mandatory sentence even where firearm was not an element of third degree murder); *Hargrove,* 694 So. 2d 729 (applying right to minimum mandatory sentence imposed following conviction for second degree murder). Even where the issue was a minimum mandatory sentence within the statutory maximum for the offense at conviction as provided in § 775.082, this Court still held that the right to trial by jury applied. That has been the law in Florida since 1984.

As this Court stated in *Overfelt* in 1984, to allow the judge to make a finding that results in an increase in punishment even within the statutory maximum "would be an invasion of the jury's historical function and could lead to a miscarriage of justice…." *Overfelt,* 434 So. 2d at 1387. That function was embodied in the jury trial right in Art. I, § 22 of the Florida Constitution long before Appellant was sentenced in this case. It is incongruous

and unconscionable to grant a non-capital defendant the right to a jury finding on a sentencing factor that does not increase the statutory maximum penalty for his offense and then deny such a right to a capital defendant facing execution.

Irrespective of the statutory maximum sentence provided in § 775.082 for first-degree murder, the court cannot impose the death penalty based solely on the jury's verdict of guilt for that offense. Absent additional findings with respect to aggravating circumstances, the maximum sentence that can lawfully be imposed for capital murder is life imprisonment. Imposition of the death penalty without such additional findings violates the Eighth Amendment. See *Brown v. Sanders*, 546 U.S. 212, 126 S. Ct. 884 (2006). The bifurcated jury proceeding in § 921.141 was established in recognition of this fact. Thus, the statutory maximum established by the legislature for the crime of first-degree murder is not dispositive of the constitutional question. The Eighth Amendment requires additional findings by the trier of fact, which both Florida law and the Sixth Amendment as construed in *Ring* require a jury to make.

If Chandler was being sentenced today, he would be entitled to a specific jury finding that the State proved

the existence of at least one aggravating circumstance beyond a reasonable doubt, and which, when weighed against the mitigating circumstances, supports the imposition of the death penalty. Chandler was denied that right during his bifurcated jury proceeding in this case, and only through application of procedural bars does the State avoid the issue.

This Court has said that rules of procedure and the ban on successive or untimely claims were never intended to be used to avoid resolution of constitutional issues, and that procedural bars would not be applied where it would defeat the ends of justice or result in a manifest injustice. *Chandler v. Crosby*, 916 So. 728 (Fla. 2005); *State v. McBride*, 848 So. 2d 287, 291-292 (Fla. 2003). As stated above, the Court has previously acknowledged that denial of the right to trial by jury can result in a miscarriage of justice. As a result, Chandler's claim that his sentence was imposed in violation of that right should not be barred on procedural grounds.

As Justice Scalia stated in his concurring opinion in *Ring*:

> [I] believe that our people's traditional belief in the right of trial by jury is in perilous decline. That decline is bound to be confirmed, and indeed accelerated, by the repeated

> spectacle of a man's going to his death because a *judge* found that an aggravating factor existed.

Ring v. Arizona, 536 U.S. at 612; 122 S. Ct. 2428 (Scalia, J., concurring)(emphasis in original). Chandler's sentence was imposed in violation of longstanding and historical principles concerning the role of the jury and should be vacated.

Conclusion

Wherefore, the Court is asked to provide Chandler with the following relief:

1. A stay of Governor Scott's execution order/warrant of October 10, 2011.

2. A decision reversing the October 24, 2011, final order rendered by the Circuit Court that denied Chandler's Florida Rule of Criminal Procedure 3.851(e)(2) motion to vacate his three death sentences based upon purely legal or constitutional grounds.

3. An order declaring Section 921.141, Florida Statutes (1988) a violation of the Sixth and Fourteenth Amendments to the United States Constitution and a violation of Article I, Section 22, Florida Constitution, as applied to Chandler in his state court trial because the statute and the court denied him the right to a jury trial as to the penalty phase of that trial.

4. The vacature of all three death sentences.

5. A new sentencing phase trial where the jury would have to make all findings of fact regarding what sentence, either life in prison or death, should be imposed as to each first-degree murder count.

6. Such other relief as is deemed appropriate in the premises.

Respectfully Submitted,

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I certify that this initial brief of appellant was prepared using a Courier New font, 12 point, in compliance with the Florida Rules of Appellate Procedure.

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