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IN THE CIRCUIT COURT OF THE
EIGHTEENTH JUDICIAL CIRCUIT
IN AND FOR BREVARD COUNTY,
FLORIDA

CASE NO. 2012-CF-35337-A

STATE OF FLORIDA,

Plaintiff,

vs.

BRANDON LEE BRADLEY,

Defendant.
_____/

OBJECTION TO DEATH QUALIFICATION OF JURY, MOTION TO BAR IMPOSITION OF DEATH SENTENCE AND MEMORANDUM OF LAW RE UNCONSTITUTIONALITY OF FLORIDA'S CAPITAL SENTENCING PROCEDURE

The Defendant, BRANDON LEE BRADLEY, objects to Florida's death penalty and death qualification of the jury because Florida's capital sentencing procedure is unconstitutional and a violation of the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, their individual clauses and subparts, and article I, sections 2, 9, 15(a), 16(a), 17 and 22 of the Florida Constitution. Florida's capital sentencing procedure is unconstitutional under the holding and reasoning of ***Ring v. Arizona***, 536 U.S. 584 (2002) and ***Brown v. Sanders***, 546 U.S. 212 (2006) to the extent that it denies the fundamental rights to notice, Due Process and fundamentally fair proceedings and proof beyond a reasonable doubt under the Fifth and Fourteenth Amendments to the United States Constitution, the right to a jury trial guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution, and the rights to Due Process and a reliable capital sentence determination under the Eighth and Fourteenth Amendments to the United States Constitution. Further, the denial under Florida law of those

same respective rights guaranteed by article I, sections 2, 9, 16, 17 and 22 of the Florida Constitution, and additionally the right to have capital crimes charged by Indictment pursuant to article I, section 15(a), Florida Constitution, and a unanimous 12 person verdict in a capital case denies due process under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution.

MEMORANDUM OF LAW

Specifically, the Defendant objects to the prosecution of this case as a capital case and to death qualification of the jury. This Court should enter an order precluding imposition of the death penalty in this case because, in the event Defendant is convicted, a life sentence without the possibility of parole is the only sentence that may lawfully be imposed under Florida's current capital sentencing statute under the Sixth, Eighth and Fourteenth Amendments to the U.S. Constitution, their individual clauses and subparts, and article I, sections 2, 9, 15(a), 16(a), 17 and 22 of the Florida Constitution. By forcing the Defendant to undergo a jury selection procedure infected with irrelevant issues concerning imposition of the death penalty, a sanction that is not a legal possibility in this case due to the unconstitutionality of Florida's statute, the Defendant will be denied Due Process and a fair jury trial by citizens who are qualified to be on the jury but for their views on capital punishment. A conviction of guilt returned by a jury needlessly composed of "death qualified" jurors over timely and proper objection is fundamentally unfair and a denial of due process under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

The Florida Supreme Court implied that ***Ring*** will be applied someday in Florida when it ruled that ***Ring*** will *not* be applied retroactively. ***Johnson (Terrell) v. State***, 904 So.2d 400, 412 (Fla. 2005). The Florida Supreme Court has not yet ruled expressly on that ***Ring*** applies in

Florida, yet Defendants raising the ***Ring*** issue on the direct appeal of their death sentences are being denied relief if one statutory aggravating factor has been proved to exist beyond a reasonable doubt:

> The final issue Seibert raises is that Florida's capital sentencing scheme violates *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), because it permits the imposition of the death penalty without requiring that the jury unanimously find the existence of aggravating factors beyond a reasonable doubt and because a unanimous jury verdict is not required. Specifically, he asserts that his sentence was unconstitutional because there was no jury finding on the aggravating factors and because the vote for the death sentence was nine to three. *As Seibert admits, the presence of a prior violent felony among the aggravating factors fulfills the mandate of Ring. Doorbal v. State, 837 So.2d 940, 963 (Fla. 2003)*. Seibert pled guilty to attempted murder, kidnapping, and burglary charges in 1986. Because of the presence of the prior violent felony aggravator and because we continue to find that the necessary requirements of *Ring* have been met in such circumstances, *see, e.g., Monlyn v. State*, 894 So.2d 832, 839 (Fla. 2004), we affirm the trial court's denial of Seibert's motion to declare Florida's sentencing statute unconstitutional.

Seibert v. State, 31 FLW S125 (slip opinion at 11) (Fla. Feb. 6, 2006) (Emphasis added)[1]. Defendants attempting to raise ***Ring*** issues in post conviction are also being denied relief by the Florida Supreme Court. ***Walls v. State***, 31 FLW S101 (Fla. Feb. 9, 2006). A viable legal issue is not being meaningfully addressed by the Florida Supreme Court, and Defendant submits that the avoidance by the Florida Supreme Court to directly rule on the applicability of ***Ring*** in Florida for six years results in a denial of access to the courts and is thus a denial of Due Process under

[1] The Appellant in ***Seibert*** admitted that the requirements of the Sixth Amendment pursuant to ***Ring*** were fulfilled by the presence of a prior violent felony. The instant Defendant does NOT concede that the presence of one aggravating factor satisfies the Fifth, Sixth, Eighth and Fourteenth Amendments, because Florida's statute requires that "sufficient aggravating circumstances" exist before a defendant is eligible for the death penalty. In that regard, each statutory aggravating factor is an "eligibility" factor entitled o full constitutional protections. Cf., ***Brown v. Sanders***, 546 U.S. ___, slip opinion at 7, fn. 5 (January 11, 2006).

the Fourteenth Amendment to the United States Constitution and article I, section 21 of the Florida Constitution.

The Florida Supreme Court is requiring that this issue be properly raised and that a timely and specific objection be lodged with the trial judge in order to preserve the issue for appellate review:

> Johnson argues that counsel was ineffective for failing to object to the CCP jury instruction which was found by this Court to be unconstitutionally vague in Jackson v. State, 648 So.2d 85 (Fla. 1994). This claim was specifically addressed in Walton v. State, 847 So.2d 438, 445 (Fla. 2003). In disposing of Walton's claim that his counsel was ineffective for failing to anticipate Jackson and the underlying United States Supreme Court decision in Espinosa v. Florida, 505 U.S. 1079 (1992), the Court stated:
>
> > Because the Espinosa decision was delivered by the United States Supreme Court in 1992, and refinement of Florida's jury instructions by this Court began thereafter, trial and appellate counsel cannot be faulted for failing to assert claims that did not exist at the time they represented Walton. This Court has consistently held that trial and appellate counsel cannot be held ineffective for failing to anticipate changes in the law. See e.g., Nelms v. State, 596 So.2d 441, 442 (Fla. 1992); Stevens v. State, 552 So.2d 1082, 1085 (Fla. 1989).
>
> Walton, 847 So.2d at 445. This Court has never held the giving of the standard CCP jury instruction to be fundamental error. See Jackson, 648 So.2d at 90 (holding that claims that the instruction on the CCP aggravator is unconstitutionally vague are procedurally barred unless a specific objection is made at trial and pursued on appeal.) The circuit court did not error in summarily denying the claim.

Johnson v. State, 903 So.2d 888, 899 (Fla. 2005) (Emphasis added). The only rational purpose of requiring that an objection be timely presented to the trial court is to provide the trial court with the opportunity to correct the error.

This is exactly the explanation given by the Florida Supreme Court for requiring that timely objections be made:

> [Section 924.051(1)(b), Fla. Stat. (2000) and Section 924.051(3), Florida Statutes (2000)] are consistent with our holdings requiring preservation of error. Moreover, we consistently have stated that proper preservation entails three components. First, a litigant must make a timely, contemporaneous objection. Second, the party must state a legal ground for that objection. Third, "[i]n order for an argument to be cognizable on appeal, *it must be the specific contention asserted as legal ground* for the objection, exception, or motion below." Steinhorst v. State, 412 So.2d 332, 338 (Fla. 1982) (emphasis added); *accord* Rodriguez v. State, *609 So.2d 493, 499 Fla. 1992)* (stating that "the specific legal ground upon which a claim is based must be raised at trial and a claim different than that will not be heard on appeal"). The purpose of this rule is to "place[ ] the trial judge on notice that error may have been committed, and provide[ ] him an opportunity to correct it at an early stage of the proceedings." Castor v. State, 365 So.2d 701, 703 (Fla. 1978). The sole exception to the rule is for fundamental error, which we discuss later.

Harrell v. State, 894 So.2d 935 (Fla. 2005) (underlining added).

The fundamental changes brought about by ***Ring***, supra, cannot be overstated. Except for Alabama, which has a different statutory scheme than Florida, every other State affected by ***Ring*** has taken legislative and/or judicial steps to comport with the holding of ***Ring***, whereby aggravating circumstances are recognized to be statutory elements of the offense of capital murder that must be treated accordingly. See, e.g., ***Woldt v. Colorado***, 64 P.3d 256 (Colorado 2003); ***Missouri v. Whitfield***, 107 S.W.3d 253 (Missouri 2003). To the extent that the rights implicated under ***Ring***, supra, may not be applied retroactively, see ***Summerlin v. Schriro***, 542 U.S. 348; 124 S.Ct. 2519 (2004), ***Johnson v. State***, 904 So.2d 400, 412 (Fla. 2005) and ***Windom v. State***, 886 So.2d 915, 935-951 (Fla. 2004) (Cantero, concurring), they nonetheless exist now, and this Defendant is entitled to them. The purpose of this objection is to articulate with specificity the constitutional infirmities of Florida's capital sentencing procedure, to present it to the Court "and provide him an opportunity to correct it at an early stage of the proceedings." ***Harrell***, Id. The Florida Supreme Court has deferred long enough to the Florida Legislature to

correct the deficiencies in Florida's death penalty statute. The Court has expressly acknowledged the problem and asked the Florida Legislature to fix it:

> **C. The Need for Legislative Action**
>
> Finally, we express our considered view, as the court of last resort charged with implementing Florida's capital sentencing scheme, that in light of developments in other states and at the federal level, the Legislature should revisit the statute to require some unanimity in the jury's recommendations. Florida is now the only state in the country that allows a jury to decide that aggravators exist *and* to recommend a sentence of death by a mere majority vote. Of the 38 states that retain the death penalty, 35 require, *at least,* a unanimous jury finding of aggravators. Of these, 24 states require by statute *both* that the jury unanimously agree on the existence of aggravators *and* that it unanimously recommend the death penalty. Three states require by statute unanimity only as to the jury's finding of aggravators. Seven more states have judicially imposed a requirement *at least* that the aggravators be determined unanimously. Of these seven states, five (all except Alabama and Kentucky) require that *both* the aggravators *and* the recommendation of death be unanimous. Alabama and Kentucky require only that the aggravators be determined unanimously. Although Missouri law is less clear, it appears that a jury at least must unanimously find the aggravators. *See*Parker v. Bowersox, 188 F.3d 923, 929 (8th Cir. 1999); State v. Thompson, 134 S.W.3d 32, 32-33 (Mo.2004); Mo.R.Crim.P. 29.01(1).
>
> That leaves Utah and Virginia. In those states, the jury need not find each aggravator unanimously, but the jury must unanimously recommend the death penalty. *See* Utah Code Ann. § 76-3-207(5)(b) (2003); State v. Carter, 888 P.2d 629, 655 (Utah 1995) (concluding there is no requirement that the jury find separately and unanimously each aggravator relied on in imposing the death penalty); Va.Code Ann. § 19.2-264.4D (2004); Clark v. Commonwealth, 220 Va. 201, 257 S.E.2d 784, 791-92 (1979) (concluding it is not necessary for jurors to specify that they found an aggravator or aggravators unanimously). Finally, the federal government, when imposing the death penalty, also requires a unanimous jury. *See* 18 U.S.C. § 3593(d) (2000).
>
> Many courts and scholars have recognized the value of unanimous verdicts. For example, the Connecticut Supreme Court has stated:
>
> > [W]e perceive a special need for jury unanimity in capital sentencing. Under ordinary circumstances, the requirement of unanimity induces a jury to deliberate thoroughly and helps to assure the

> reliability of the ultimate verdict. The "heightened reliability demanded by the Eighth Amendment in the determination whether the death penalty is appropriate"; *Sumner v. Shuman*, 483 U.S. 66, 107 S.Ct. 2716, 2720, 97 L.Ed.2d 56 (1987); convinces us that jury unanimity is an especially important safeguard at a capital sentencing hearing. In its death penalty decisions since the mid-1970s, the United States Supreme Court has emphasized the importance of ensuring reliable and informed judgments. These cases stand for the general proposition that the "reliability" of death sentences depends on adhering to guided procedures that promote a reasoned judgment by the trier of fact. The requirement of a unanimous verdict can only assist the capital sentencing jury in reaching such a reasoned decision.
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> *State v. Daniels*, 207 Conn. 374, 542 A.2d 306, 315 (1988) (citations omitted); *see also Andres v. United States*, 333 U.S. 740, 749, 68 S.Ct. 880, 92 L.Ed.1055 (1948) (upholding lower court's interpretation of a federal statute to require jury unanimity as to both guilt and punishment and reasoning that such a requirement "is more consonant with the general humanitarian purpose of the statute and the history of the Anglo-American jury system"); Elizabeth F. Loftus & Edith Greene, *Twelve Angry People: The Collective Mind of the Jury*, 84 Colum.L.Rev. 1425, 1428 (1984) (reviewing Reid Hastie et al., *Inside the Jury* (1983)) (review of an empirical study indicating that "behavior in juries asked to reach a unanimous verdict is more thorough and grave than in majority-rule juries, and that the former were more likely than the latter jurors to agree on the issues underlying their verdict").
>
> The bottom line is that Florida is now the *only* state in the country that allows the death penalty to be imposed even though the penalty-phase jury may determine by a mere majority vote *both* whether aggravators exist and whether to recommend the death penalty. **Assuming that our system continues to withstand constitutional scrutiny, we ask the Legislature to revisit it to decide whether it wants Florida to remain the outlier state**.

State v. Steele, 921 So.2d 538 (Fla. 2006) (Emphasis added).

These and the following authorities support Defendant's position that Florida's current death penalty statute, standard jury instructions and capital sentencing procedures are

unconstitutional, as now tacitly acknowledged by the Florida Supreme Court. The statutory defects, unconstitutional under both the state and federal constitutions, cannot be corrected by the judicial system with violating the separation of powers proscription set forth in article II, section 3 of the Florida Constitution. Such a violation of the State's constitutional requirement of separation of powers in turn denies Due Process under section 1 of the Fourteenth Amendment to the United States Constitution. The only option available to this Court is preclude prosecution of this as a capital case because the death penalty statute is invalid and death is not a possible sentence. The jurors should not be "death qualified" because a sentence of death cannot lawfully be imposed. Life imprisonment without possibility of parole is the only valid sentence for first-degree murder in Florida, and any conviction that occurs here over timely objection will be invalid due to the unnecessary and fundamentally unfair exclusion of citizens who are otherwise qualified to be jurors but for their views on capital punishment. The voir dire procedure whereby potential jurors are "death qualified" unfairly taints the jury and creates a jury that is sympathetic to the State and otherwise prone to convict. This case should therefore be treated like any first-degree murder case where death is not a possible sentence. The specific bases for this objection and motion are as follows:

I

THE FLORIDA STATUTE IS UNCONSTITUTIONAL UNDER *RING* BECAUSE IT REQUIRES THE TRIAL JUDGE TO MAKE THE FINDINGS OF FACT NECESSARY TO IMPOSE A DEATH SENTENCE

1. In ***Ring v. Arizona***, 536 U.S. 584 (2002), the Supreme Court held that Arizona's capital sentencing statute violated the Sixth Amendment, as construed in ***Apprendi v. New Jersey***, 530 U.S. 466 (2000), because directed the judge rather than the jury to make the findings of fact necessary to impose a sentence of death. In so holding, the Court overruled ***Walton v.***

Arizona, 497 U.S. 639 (1990), "to the extent that it allows a sentencing judge, sitting without a jury, to find an aggravating circumstance necessary for imposition of the death penalty." ***Ring***, 122 S.Ct. at 2443. The constitutional right to a jury verdict on all facts upon which a punishment is based has been applied to the federal sentencing guidelines and is now firmly recognized as a fundamental part of due process and the right to a jury trial under the Sixth and Fourteenth Amendments to the United States Constitution. The United States Supreme Court has elaborated as follows:

> It has been settled throughout our history that the Constitution protects every criminal defendant "against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). It is equally clear that the "Constitution gives a criminal defendant the right to demand that a jury find him guilty of all the elements of the crime with which he is charged." *United States v. Gaudin*, 515 U.S. 506, 511, 115 S.Ct. 2310, 132 L.Ed.2d 444 (1995). These basic precepts, firmly rooted in the common law, have provided the basis for recent decisions interpreting modern criminal statutes and sentencing procedures.
>
> In *Jones v. United States*, 526 U.S. 227, 230, 119 S.Ct. 1215, 143 L.Ed.2d 311 (1999), we considered the federal carjacking statute, which provides three different maximum sentences depending on the extent of harm to the victim: 15 years in jail if there was no serious injury to a victim, 25 years if there was "serious bodily injury," and life in prison if death resulted. 18 U.S.C. § 2119)1088 ed., Supp. V). In spite of the fact that the statute "at first glance has a look to it suggesting [that the provisions relating to the extent of harm to the victim] are only sentencing provisions," 526 U.S., at 232, 119 S.Ct. 1215, we concluded that the harm to the victim was an element of the crime. That conclusion was supported by the statutory text and structure, and was influenced by our desire to avoid the constitutional issues implicated by a contrary holding, which would have reduced the jury's role "to the relative importance of low-level gatekeeping." *Id.*, at 244, 119 S.Ct. 1215. Foreshadowing the result we reach today, we noted that our holding was consistent with a "rule requiring jury determination of facts that raise a sentencing ceiling" in state and federal sentencing guidelines systems. *Id.*, at 251, n.11, 119 S.Ct. 1215.

In *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 4348, 147 L.Ed.2d 435 (2000), the defendant pleaded guilty to second-degree possession of a firearm for an unlawful purpose, which carried a prison term of 5-to-10 years. Thereafter, the trial court found that his conduct had violated New Jersey' "hate crime" law because it was racially motivated, and imposed a 12-year sentence. This Court set aside the enhanced sentence. We held: "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Id.*, at 490, 120 S.Ct. 2348. The fact that New Jersey labeled the hate crime a "sentence enhancement" rather than a separate criminal act was irrelevant for constitutional purposes. *Id.*, at 478, 120 S.Ct. 2348. As a matter of simple justice, it seemed obvious that the procedural safeguards designed to protect Apprendi from punishment for the possession of a firearm should apply equally to his violation of the hate crime statute. Merely using the label "sentence enhancement" to describe the latter did not provide a principled basis for treating the two crimes differently. *Id.*, at 476, 120 S.Ct. 2348.

In *Ring v. Aricona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), we reaffirmed our conclusion that the characterization of critical facts is constitutionally irrelevant. There, we held that it was impermissible for "the trial judge, sitting alone" to determine the presence or absence of the aggravating factors required by Arizona law for imposition of the death penalty. *Id.*, at 588-589, 122 S.Ct. 2428. "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." *Id.*, at 602, 122 S.Ct. 2428. Our opinion made it clear that ultimately, while the procedural error in Ring's case might have been harmless because the necessary finding was implicit in the jury's guilty verdict, *id.*, at 609, n.7, 122 S.Ct. 2428, "the characterization of a fact or circumstance as an 'element' or a 'sentencing factor' is not determinative of the question 'who decides,' judge or jury," *Id.*, at 605, 122 S.Ct. 2428.

In *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531 (2004), we dealt with a determinate sentencing scheme similar to the Federal Sentencing Guidelines. There the defendant pleaded guilty to kidnaping, a class B felony punishable by a term of not more than 10 years. Other provisions of Washington law, comparable to the Federal Sentencing Guidelines, mandated a "standard" sentence of 49-to-53 months, unless the judge found aggravating facts justifying an exceptional sentence. Although the prosecutor recommended a sentence in the standard range, the

> judge found that the defendant had acted with "'deliberate cruelty'" and sentenced him to 90 months. *Id.*, at ___, 124 S.Ct. at 2534. For reasons explained in *Jones*, *Apprendi*, and *Ring*, the requirements of the Sixth Amendment were clear. The application of Washington's sentencing scheme violated the defendant's right to have the jury find the existence of " 'any particular fact' " that the law makes essential to his punishment. 542 U.S., at ___, 124 S.Ct., at 2536. That right is implicated whenever a judge seeks to impose a sentence that is not solely based on "facts reflected in the jury verdict or admitted by the defendant." *Id.*, at ___, 124 S.Ct., at 3537. (emphasis deleted). We rejected the State's argument that the jury verdict was sufficient to authorize a sentence within the general 10-year sentence for Class B felonies, noting that under Washington law, the judge was *required* to find additional facts in order to impose the greater 90-month sentence. Our precedents, we explained, make clear "that the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*" *Ibid*, at ___, 124 S.Ct., at 2537 (emphasis in original). The determination that the defendant acted with deliberate cruelty, like the determination in *Apprendi* that the defendant acted with racial malice, increased the sentence that the defendant could have otherwise received. Since this fact was found by a judge using a preponderance of the evidence standard, the sentence violated Blakely's Sixth Amendment rights.

United State v. Booker, 543 U.S 220, 230-232 (2005).

2. ***Ring*** eliminated the premise of the Florida Supreme Court's decision in ***Mills v. Moore***, 786 So.2d 532, 537 (Fla. 2001), which reasoned "because ***Apprendi*** did not overrule ***Walton [v. Arizona***, 497 U.S. 639 (1990)], the basic scheme in Florida is not overruled either." In ***Ring***, the Supreme Court *expressly* overruled ***Walton***, which relied in turn on opinions upholding the constitutionality of Florida's death penalty scheme, e.g., ***Hildwin v. Florida***, 490 U.S. 638 (1989) (per curiam); ***Spaziano v. Florida***, 468 U.S. 447 (1984); and ***Proffitt v. Florida***, 428 U.S. 242 (1976). In light of ***Blakely***, 542 U.S. 246 (2005) and ***Booker***, there can be no doubt but that ***Ring*** applies to Florida because in Florida the trial judge cannot sentence a

defendant to death without finding that sufficient aggravating circumstances exist pursuant to §921.141(3), Fla.Stat.

3. The Florida Supreme Court initially concluded that it must uphold the constitutionality of Florida's statute unless and until the United States Supreme Court overrules ***Hildwin*** and expressly applies ***Ring*** to Florida under the rational that the United States Supreme Court has preserved the prerogative of overruling its own cases. See ***Bottoson v. Moore***, 833 So.2d 693 (Fla. 2002); ***King v. Moore***, 831 So.2d 143 (Fla. 2002). While concurring in the decision to defer to the United States Supreme Court, four justices wrote separately to express their opinion that Florida's statute is problematic under ***Ring***. ***Bottoson***, 833 So.2d at 703-710 (Anstead, C.J., concurring); id. at 710-719 (Shaw, J., concurring); id. at 719-725 (Pariente, J., concurring); id. at 725-734 (Lewis, J., concurring). The Florida Supreme Court has yet to expressly hold that the constitutional rights identified in ***Ring*** and continuously reaffirmed and analyzed in ***Blakely*** and ***Booker*** extend to Florida's death penalty. The Florida Supreme Court has, in ***Steele***, supra, warned that Florida's death penalty may no longer withstand constitutional scrutiny.

4. In initially rejecting the application of the Sixth Amendment to Florida's death penalty procedure, as explained in ***Apprendi*** and expanded in ***Ring***, three justices adhered to ***Mills'*** rationale that ***Apprendi*** is inapplicable to Florida's statute because aggravating circumstances do not increase the maximum punishment authorized for first degree murder under Florida law, which is death. ***Bottoson***, at 696 n.6 (Wells, J., concurring); id. at 700-702 fn. 11 & 13 (Quince, J., concurring); id. at 728-729 (Lewis, J., concurring); see also, ***Butler v. State***, 842 So.2d 817 (Fla. 2003) (Pariente, J., dissenting) (unanimity required for jury fact findings, including ultimate decision for life or death). This reasoning is contrary to the analysis found in

Booker and contrary to the fact that each aggravating factor in Florida is a factor upon which eligibility of a defendant to a sentence of death depends.

5. This same type reasoning, however, was also expressly rejected in ***Ring*** on the ground that it would reduce ***Apprendi*** "to a 'meaningless and formalistic' rule of statutory drafting.'" ***Bottoson***, at 712 (Pariente, J., concurring), quoting ***Ring***, 122 S. Ct. at 2441; accord id. at 711 (Shaw, J., concurring). The Court explained in ***Ring*** that "[t]he Arizona first-degree murder statute 'authorizes a maximum penalty of death only in a formal sense.'" ***Ring***, 122 S.Ct. at 2440, quoting ***Apprendi***, 530 U.S. at 538 (O'Connor, J., dissenting)). In reality, "[a] defendant convicted of first-degree murder in Arizona cannot receive a death sentence unless a judge makes the factual determination that a statutory aggravating factor exists. Without that critical finding, the maximum sentence to which the defendant is exposed is life imprisonment, and not the death penalty." ***Ring***, at 2440, quoting ***Apprendi***, 530 U.S. at 538 (O'Connor, J., dissenting)). Thus, under Arizona law, "Defendant's death sentence required the judge's factual findings." ***Ring***, 122 S.Ct. at 2440. Under Florida law, a defendant cannot be sentenced to death unless the judge finds that there are "sufficient aggravating circumstances" to justify imposition of capital punishment.

6. There can be no doubt after ***Booker*** and ***Blakely*** that Florida's capital sentencing statute suffers from the identical flaw that led the Court in ***Ring*** to declare the Arizona statute unconstitutional. Florida law, like Arizona law, makes imposition of the death penalty contingent on a *judge's* factual findings not passed upon by the jury when a verdict of guilty is rendered. Section 775.082(1), Florida Statutes, which prescribes the punishment for a "capital felony," states specifically that a defendant may be sentenced to death only if "the proceeding held to determine sentence according to the procedure set forth in § 921.141 results in findings

by the court that such person shall be punished by death, otherwise, such person shall be punished by life imprisonment." § 775.082(1), Fla. Stat. (1995) (Emphasis added). Section 921.141(3), Florida Statutes, provides in turn that "[n]otwithstanding 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." To enter a sentence of death, *the judge* must make "specific written *findings of fact* based upon the circumstances in subsections (5) [aggravating circumstances] and (6) [mitigating circumstances] and upon the records of the trial and the sentencing proceedings." *Id.* (Emphasis added.). If the judge fails to "make the findings requiring the death sentence" within a specified period of time "the court shall impose a sentence of life." Id. The findings of fact made by the judge are not contained within the findings made by the jury when the defendant is found guilty of first-degree murder because Florida's statutory aggravating circumstances are used to genuinely narrow the class of first-degree murderers who receive capital punishment. In that regard, §921.141(3)(a), Florida Statute, mandates that a trial judge must find "sufficient aggravating circumstances" before a defendant is eligible for the death penalty.

7. Thus, in Florida, as in Arizona, although the maximum sentence for first-degree murder is death, 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 law, by a judge and not a jury. See ***Bottoson***, 833 So.2d at 705-706 (Anstead, C.J., concurring); id. at 711-712 (Shaw, J., concurring); id. at 719 (Pariente, J., concurring). Because the Florida statute requires that a factual determination be made that there are "sufficient" aggravating circumstances to justify imposition of the death penalty and that there are "insufficient" mitigating circumstances to outweigh the aggravating circumstances, the presence of one statutory aggravating

circumstance may not be sufficient to render a defendant eligible for imposition of the death penalty. Thus, the Sixth and Fourteenth Amendments require that the jury unanimously determine beyond a reasonable doubt the existence of ALL factors that render a defendant eligible to receive a death sentence in Florida.

II.

THE NONUNANIMOUS AND NON-SPECIFIC JURY SENTENCING RECOMMENDATION IN FLORIDA DOES NOT SATISFY THE SIXTH AND FOURTEENTH AMENDMENTS.

8. Florida, unlike Arizona, is a so-called "hybrid" state in which a jury renders a non-unanimous advisory recommendation as to the appropriate sentence. See ***Ring***, 122 S.Ct. at 2442 n.6. As the Supreme Court explained in ***Walton***, however, this distinction is legally irrelevant:

> 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 than does a trial judge in Arizona.*

Walton v. Arizona, 497 U.S. 639, 648 (1990) (emphasis added), quoted in ***Bottoson***, 833 So.2d at 705 (Anstead, C.J., concurring); See also ***Espinosa v. Florida***, 505 U.S. 1079, 1080 (1992) (observing that under Section 921.141(2), Fla. Stat., the penalty phase jury's determination "does not include specific findings of aggravating and mitigating circumstances, but states only the jury's sentencing recommendation").

9. Moreover, for several reasons, a Florida jury's advisory sentencing recommendation cannot be equated with a verdict for Sixth Amendment purposes. *First*, an advisory jury in Florida does *not* make findings of fact. See, e.g., ***Hunter v. State***, 660 So.2d 244, 252 & n.13 (Fla. 1995) (citing ***Hildwin v. State***, 531 So.2d 124, 128 (Fla.1988), aff'd, 490

U.S. 638 (1989)); see also ***Combs v. State***, 525 So.2d 853, 859 (Fla. 1988) ("unlike . . . states where the jury is the sentencer," a Florida "jury's advisory recommendation is not supported by findings of fact. . . . [B]oth [the Florida Supreme Court] and the sentencing judge can only speculate as to what factors the jury found in making its recommendation . . . .") (Shaw, J., concurring); accord ***Bottoson***, at 708-709 (Anstead, J., concurring); id. at 720-721 (Pariente, J., concurring). The recommendation is generic, with no capability of meaningful appellate review.

10. *Second*, the jury's advisory recommendation need not be unanimous, as to existence of any aggravating factor or the actual recommendation itself. See ***Bottoson***, 833 So.2d at 711 (Anstead, J., concurring); id. at 713-714 (Shaw, J., concurring); id. at 720-721, & 723 n. 63 (Pariente, J., concurring). The Sixth and Fourteenth Amendment right to jury trial recognized in ***Apprendi*** and ***Ring*** stands upon the

> historical foundation . . . [that] 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 neighbours....' 4 W. Blackstone, Commentaries on the Laws of England 343 (1769) . . . (emphasis added).

Apprendi, 530 U.S. at 477 (emphasis added).[2] This history is reflected in the fact that ***every*** jury sentencing jurisdiction in the United States requires the jury's verdict at the penalty phase to be

[2] Neither ***Johnson v. Louisiana***, 406 U.S. 356 (1972), nor ***Apodaca v. Oregon***, 406 U.S. 404(1972), holds that a non-unanimous verdict is acceptable in a *capital* case. The Louisiana statute at issue in Johnson required jury unanimity in capital cases; it authorized non-unanimity only in non-capital cases punishable by imprisonment at hard labor. The latter provision was all that was at issue in Johnson and was all that the Court addressed. Similarly, the Oregon statute at issue in ***Apodaca*** authorized conviction by a non-unanimous jury for all crimes except first-degree murder – the sole capital crime in Oregon. Again, the single issue presented and decided in ***Apodaca*** was whether the defendants' non-capital convictions by non-unanimous juries were constitutional. And of course since ***Reid v. Covert***, 354 U.S. 1 (1957), it has been clear that the Sixth Amendment's guarantee of the right to jury trial has special force and special significance in capital cases. As Justice Harlan put it in ***Reid*** – in respect to "a question analogous . . . to

unanimous.[3] The Florida Supreme Court has now recognized this in ***State v. Steele***, 921 So.2d 538 (Fla. 2006).

11. When the jury's sentencing recommendation is not unanimous, a factual finding of death eligibility cannot be inferred from a recommendation of death. Florida's statute does not define eligibility for the death penalty by the existence of one aggravator, but rather by the existence of "sufficient" aggravating circumstances to justify imposition of a death sentence. § 921.141(2) & (3), Fla. Stat. (Supp. 1996). One aggravating circumstance is necessary under

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issues of due process . . . [specifically,] the question of which specific safeguards of the Constitution are appropriately to be applied in a particular context," id. at 75 – "capital cases . . . stand on quite a different footing than other offenses. . . . I do not concede that whatever process is 'due' an offender faced with a fine or a prison sentence necessarily satisfies the requirements of the Constitution in a capital case. The distinction is by no means novel, . . . nor is it negligible, being literally that between life and death." Id. at 77. The reason for the distinction is equally clear: "The taking of life is irrevocable. It is in capital cases especially that the balance of conflicting interests must be weighed most heavily in favor of the procedural safeguards of the Bill of Rights." Id. at 45-46 (concurring opinion of Justice Frankfurter). See also, e.g., ***Beck v. Alabama***, 447 U.S. 625, 637-638 (1980), and cases cited therein.

[3] See Ark.Code Ann. § 5-4-602 (1993); Cal.Penal Code Ann. § 190.4(b) (West 1999); Conn. Gen.Stat. § 53a-46a (2001) and ***State v. Daniels***, 542 A.2d 306, 388 (1988) ("A non-unanimous jury therefore cannot render any 'finding' of fact"), abrogated on other grounds, **Cobham v. Commissioner of Correction**, 779 A.2d 80 (Conn. 2001); Ga.Code Ann. § 17-10-31.1(c) (Supp.1996); Ill. Comp. Stat. Ann., ch. 720, § 5/9-1(g) (West 1993); Kan. Stat. Ann. § 21- 4624(e) (1995); Ky.Rev.Stat. Ann. § 532.025(1)(b) (1993), and ***Skaggs v. Com.***, 694 S.W.2d 672, 681 (Ky. 1985) ("when the jury deadlocks during the penalty phase of a capital case . . .[t]he failure of a jury to reach a verdict results in a mistrial . . . "); La.Code Crim. Proc. Ann., Art. § 905.6 (West 1997); Md. Ann.Code, Art. 27, § 413(i) (1996); Miss.Code Ann. § 99-19-101(3) (1973-2000); Mo.Rev.Stat. § 565.030(.4) (1999 and Supp.2002); Nev.Rev.Stat. Ann. § 175.556 (Michie 2001); N.H.Rev.Stat. Ann. § 630:5(IV) (1996); N.J. Stat. Ann. § 2C:11-3(c)(3)(c) (Supp.2001); N.M. Stat. Ann. § 31-20A-3 (2000); N.Y.Crim. Proc. Law § 400.27(11)(a) (McKinney Supp.2001-2002); N.C. Gen.Stat. § 15A-2000(b)(3) (1999); Ohio Rev.Code Ann. § 2929.03(D)(2) (West 1997); Okla. Stat., Tit. 21, § 701.11 (Supp.2001); Ore.Rev.Stat. Ann. § 163.150(1)(c)(B) (1997); 42 Pa. Cons.Stat. § 9711(c)(1)(iv) (Supp.2001); S.C.Code Ann. § 16-3-20(C) (1985); S.D. Codified Laws §§ 23A-26-1, -27A-2 (1998); Tenn.Code Ann. § 39-13-204(g)(1) (Supp.2000); Tex.Code Crim. Proc. Ann., Art. 37.071(d)(2), (f)(2) (Vernon Supp.2001); Utah Code Ann. § 76-3-207(5)(a) (Supp.2001); Va.Code Ann. § 19.2-264.4(D) & (E) (2000); Wash. Rev.Code § 10.95.060(4) (1990); Wyo. Stat. Ann. § 6-2-102(b) & (d)(ii) (2001); 18 U.S.C.A. ¡± 3593(e) (2000). Indiana amended its capital sentencing statute, effective June 30, 2002, to make the jury's verdict binding on the trial court; the verdict must be unanimous. Ind.Code Ann. ¡± 35-50-2-9(e) & (f) (Supp.2002).

Prior to ***Ring***, only Florida, Delaware, and Alabama – all of which are hybrid states – permitted non-unanimous jury recommendations of death. Ala. Code ¡±13A-5-46(f) (2002) (vote of ten jurors required to recommend death); Del. Code Ann, tit. 11, ¡± 4209(c)(3)b.1 & (d)(1) (1995) (bare majority), amended by 2002 Delaware Laws Ch. 423 (S.B. 449) and Ch. 424 (S.B. 450), to require unanimous finding of at least one aggravating circumstance; ¡± 921.141(3), Fla. Stat. (2001) (bare majority).

Florida law,[4] but one is not always "sufficient" to render the defendant eligible for the death penalty.[5] Consequently, even if the jury unanimously finds facts at the first phase of the case that would establish the existence of one aggravating circumstance, such a finding does not as a matter of law establish death eligibility under the Florida statute. Because the jury is not required to make any separate finding on the question of eligibility, it is impossible to tell in the case of a non-unanimous recommendation whether dissenting jurors disagreed as to eligibility, as to the ultimate weighing of aggravating and mitigating circumstances, or both.

12. Third, by its terms, the jury's penalty phase "verdict" *is*, in fact, merely advisory. See ***Bottoson***, 833 So.2d at 705-706 (Anstead, C.J., concurring); id. at 720, 723 (Pareinte, J., concurring); id. at 732-33 (Lewis, J., concurring). The jury is repeatedly told during voir dire, and again at the beginning and end of the penalty phase, that "the final decision as to what punishment shall be imposed rests solely with the judge of this Court," and that the jury renders only "an advisory sentence." Fla. Std. Jury Instr. (Crim.) - Penalty Proceedings–Capital Cases, quoted in ***Bottoson***, 833 So.2d at 731-732 (Lewis, J., concurring). Thus, the advisory jury in Florida does not bear "the same degree of responsibility as that borne by a 'true sentencing jury,'" ***Pope v. Wainwright***, 496 So.2d 798, 805 (Fla. 1986); accord ***Combs***, 525 So.2d at 855-858; ***Burns v. State***, 699 So.2d 646, 654 (Fla. 1997), and cases cited therein.

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[4] See ***Banda v. State***, 536 So.2d 221, 225 (Fla.1998) ("The death penalty is not permissible under the law of Florida where, as here, no valid aggravating factors exist"); accord ***Buckner v. State***, 714 So.2d 384, 390 (Fla.1998); ***Elam v. State***, 636 So.2d 1312, 1314-15 (Fla.1994); ***Thompson v. State***, 565 So.2d 1311 (Fla.1990).

[5] See ***Barclay v. Florida***, 463 U.S. 939, 954 n.12 (1983) (plurality opinion of Rehnquist, J.) (Florida requirement that "'sufficient aggravating circumstances exist,' § 921.141(3)(a), [Fla. Stat.] indicates that any single statutory aggravating circumstance may not be adequate to meet this standard [of death eligibility] if, in the circumstances of a particular case, it is not sufficiently weighty to justify the death penalty.")

13. The jury fact finding requirement of ***Apprendi***, ***Ring***, and the Sixth and Fourteenth Amendments is based on 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), and cannot be satisfied by a jury that is told that "the final decision as to what punishment shall be imposed rests solely with the judge," Fla. Std. Jury Instr. (Crim.), supra.

III.

BECAUSE AGGRAVATING CIRCUMSTANCES ARE ELEMENTS OF THE OFFENSE OF CAPITAL MURDER FLORIDA LAW REQUIRES THAT THEY BE CHARGED IN THE INDICTMENT AND FOUND UNANIMOUSLY BY A TWELVE-PERSON JURY BEYOND A REASONABLE DOUBT.

14. Article I, sections 2, 9, 16 and 22, Florida Constitution guarantee due process and the right to a jury trial. The right to grand jury indictment for a capital crime is contained in article I, section 15, Florida Constitution. The Florida Legislature has mandated that a jury in a capital case shall consist of 12 persons. §913.10, Florida Statute. Florida law otherwise requires that a jury verdict be unanimous. ***Jones v. State***, 92 So.2d 261 (Fla. 1956) ("In this state, the verdict of the jury must be unanimous."); ***Motion to Call Circuit Judge to Bench***, 8 Fla. 459, 482 (1859) ("The common law wisely requires the verdict of a petit jury to be unanimous."); Fla.R.Crim.P. 3.440 ("No verdict may be rendered unless all of the trial jurors concur in it."). The Florida Constitution can provide more protection that that afforded by the minimum standard set by the federal constitution. See ***Traylor v. State***, 596 So.2d 957, 961 (Fla. 1992). The denial of a unanimous 12-juror determination as to the presence of "sufficient aggravating circumstances" and the absence of that charge in the grand jury indictment violates the foregoing rights.

Specifically, ***Ring*** is premised in part on the principle that "[c]apital defendants, no less than non-capital defendants," are entitled to the due process and jury trial rights that apply to "the determination of any fact on which the legislature conditions an increase in their maximum punishment." ***Ring***, 122 S.Ct. at 2432; accord id. at 2443 ("The right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the fact finding necessary to increase a defendant's sentence by two years, but not the fact finding necessary to put him to death."). This reasoning applies with equal force to the state law protections, both constitutional and common law, that apply to the determination of essential elements of an offense. See ***Hernandez-Alberto v. State***, 889 So.2d 721. 733 (Fla. 2004) (Pariente, J., concurring) ("As I have previously stated, I believe that the Sixth Amendment dictates of *Ring* and the right to trial by jury in article I, section 22 of the Florida Constitution combine to require that the jury unanimously find an aggravating factor that makes the defendant eligible for the death penalty."); ***Bottoson***, 833 So.2d at 27 at 709-710 (Anstead, C.J., concurring) (noting that Florida state law requires unanimous verdicts); id. at 711, 714-716 (Shaw, J., concurring) (finding that if *Ring's* rationale is applied to Florida's capital sentencing statute, "the statute violates settled principles of *state* law.");

15. As in Arizona, Florida's "enumerated aggravating factors operate as 'the functional equivalent of an element of a greater offense.'" ***Ring***, 122 S.Ct. at 2443 (quoting ***Apprendi***, 530 U.S. at 494 n. 19); see also ***Bottoson***, 833 So.2d at 709-710 (Anstead, C.J., concurring); id. at 711 (Shaw, J., concurring); id. at 719-722 (Pariente, J., concurring). Florida law has long recognized that aggravating circumstances "actually define those crimes ... to which the death penalty is applicable in the absence of mitigating circumstances." ***State v. Dixon***, 283 So.2d 1, 9 (Fla. 1973); see also ***Hootman v. State***, 709 So.2d 1357, 1360 (Fla. 1998) (addition of

new aggravating circumstance "alter[s] the definition of the criminal conduct that may subject [the defendant] to the death penalty and increas[es] the punishment of a crime. . . ."), abrogated on jurisdictional grounds, ***State v. Matute-Chirinos***, 713 So.2d 1006 (Fla. 1998).

16. In the non-capital context, Florida courts have consistently treated aggravating factors that cause an offense to be reclassified to a more serious level or that trigger the application of a minimum mandatory sentence as elements of an offense that must be charged in the indictment and specifically found by the jury, unanimously and beyond a reasonable doubt. ***State v. Overfelt***, 457 So.2d 1385 (Fla. 1984). See ***Bottoson***, 833 So.2d at 709 n.21 (Anstead, C.J., concurring) (noting that Florida law requires jury fact findings for non-capital sentencing enhancements); id. at 724 (Pariente, J., concurring) (same).[6]

17. In contrast, the current procedures for imposing a death sentence in Florida do not require notice of aggravating circumstances; do not require that the jury unanimously agree on the existence of any aggravating circumstance or on the ultimate question whether there are "sufficient" aggravating circumstances to warrant imposition of the death penalty; do not require that a finding of "sufficient" aggravating circumstances be made beyond a reasonable doubt; and are not subject to the rules of evidence. This violates Florida law, independent of federal constitutional law, and impermissibly affords capital defendants *fewer* rights than defendants facing a three-year minimum mandatory sentence for possessing a firearm during commission of a crime. ***State v. Overfelt***, 457 So.2d 1385 (Fla. 1984). See ***Bottoson***, 833 So.2d at 709-710 (Anstead, C.J., concurring).

18. Indictment. In addition to federal due process and notice requirements, state law

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[6] See, e.g., ***State v. Rodriguez***, 575 So.2d 1262, 1264 (Fla.1991) (prior convictions for felony DUI), receded from on other grounds ***Harbaugh v. State***, 754 So.2d 691 (Fla.2000); ***State v. Overfelt***, 457 So. 2d 1385, 1387 (Fla. 1984) (possession of a firearm).

independently requires that:

> A charging document must provide adequate notice of the alleged essential facts the defendant must defend against. Art. I, Sections 9, 16, Fla. Const. In recognition of this concern, Florida Rule of Criminal Procedure 3.140(b) provides that an "indictment or information upon which the defendant is to be tried shall be a plain, concise and definite written statement of the *essential facts constituting the offense charged.*"

Rodriguez, 575 So.2d at 1264 (emphasis added); ***State v. Dye***, 346 So.2d 538, 541 (Fla. 1977) ("An information must allege each of the essential elements of a crime to be valid. No essential element should be left to inference."); see also ***Drain v. State***, 601 So.2d 256, 261-62 (Fla. 5th DCA 1992) (citing art. I, sections 16, Fla. Const. and Fla.R.Crim.P. 3.140(d)(1) and (o)); Fla.R.Crim.P. 3.140(d)(1) ("Each count of an indictment or information upon which the defendant is to be tried *shall allege the essential facts constituting the offense charged.*") (Emphasis added). "Where an indictment or information wholly omits to alleged one or more of the essential elements of the crime, it fails to charge a crime under the laws of the state." ***State v. Gray***, 435 So. 2d 816, 818 (Fla. 1983).

19. Taking from the jury its obligation to determine any element of an offense is a denial of due process and "an invasion of the jury's historical function." ***Overfelt***, 457 So. 2d at 1387; ***Henderson v. State***, 155 Fla. 487, 490, 20 So.2d 649 (1945) ("It is elementary that every element of a criminal offense must be proved sufficiently to satisfy the jury (not the court) of its existence."). Thus, in order to prevent "a miscarriage of justice," a jury and not a judge, must make the finding "that an accused actually possessed a firearm when committing a felony in order to apply the enhancement or mandatory sentencing provisions of section 775.087. . . ." ***Overfelt***, 457 So. 2d at 1387.

20. A jury can only find elements alleged in the information because conviction of an offense not charged violates due process. See ***State v. Gray***, supra, citing ***Thornhill v. Alabama***,

310 U.S. 88 (1940), and ***De Jonge v. Oregon***, 299 U.S. 353 (1937). For example, a defendant's sentence for attempted murder may not be enhanced for use of a firearm where the information did not allege use of a firearm, notwithstanding that the jury actually found the uncharged element. ***Bryant v. State***, 744 So.2d 1225 (Fla. 4th DCA 1999); accord ***Gibbs v. State***, 623 So.2d 551 (Fla. 4th DCA 1993); ***Peck v. State***, 425 So.2d 664 (Fla. 2nd DCA 1983). Similarly, a court cannot reclassify an armed burglary charge from a first-degree felony punishable by life to a life felony for burglary with assault without an allegation in the charging document of an actual assault. See ***Wright v. State***, 617 So.2d 837, 841-42 (Fla. 4th DCA 1993).

21. **Unanimity**. Jury unanimity is a necessary ingredient of Florida's right to trial by jury. ***Bottoson***, 833 So.2d at 714-715 (Shaw, J., concurring); id. at 709-710 (Anstead, C.J., concurring); id. at 723 & n.63 (Pariente, J., concurring). As Justice Shaw noted in ***Bottoson***, the provision in article 1, section 22 of the Declaration of Rights that the right to trial by jury shall "remain inviolate" dates back to article 1, section 6 of the Constitution of 1838, which provided that the right to trial by jury "shall for ever remain inviolate." ***Bottoson***, 833 So.2d at 714-715 (Shaw, J., concurring); id. at 723 (Pariente, J., concurring). This has been interpreted to mean that the jury trial right, as it existed at common law, must remain intact. See id. at 715 (Shaw, J., concurring); see also ***Buckman v. State***, 34 Fla. 48, 55, 15 So. 697, 699 (1894).

22. At common law, the jury's verdict had to be unanimous. ***Bottoson***, 833 So.2d at 714-715 (Shaw, J., concurring); see Motion to Call Circuit Judge to Bench, 8 Fla. 459 (1859) ("The common law wisely requires the verdict of a petit jury to be unanimous"). Accordingly, ***Brown v. State***, 661 So.2d 309, 311 (Fla. 1st DCA 1995), held that the defendant was denied his right to trial by jury on the element of using a firearm during the commission of the offense when the jury "having convicted the defendant of manslaughter" failed to check the relevant box on

the verdict form, and only five of the six jurors subsequently agreed that the defendant had indeed used a firearm. "In a jury trial," the court emphasized "'the truth of every accusation ... should ... be confirmed *by the unanimous suffrage* ... of [the defendant's] equals and neighbors....'" *Id.* (quoting 4 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 343 (1769)) (e.s.).[7] In so holding, the court relied specifically on Article I, section 16(a) of the Florida Constitution (1968) and section 775.01, Florida Statutes (1991), which incorporates "[t]he common law of England in relation to crimes, except so far as the same relates to the modes and degrees of punishment . . . where there is no existing provision by statute on the subject." ***Brown***, 661 So.2d at 311.

23. **Standard of Beyond a Reasonable Doubt**. While the jury is instructed that "[e]ach aggravating circumstance must be established beyond a reasonable doubt before it may be considered by you in arriving at your decision," nothing in the statute or standard jury instructions requires the jury to agree unanimously on the existence of any aggravating circumstance; nor is the jury instructed that it must agree unanimously *or* beyond a reasonable doubt that there are "sufficient aggravating circumstances" to warrant moving on to the next stage of weighing the mitigating circumstances against the aggravating circumstances. Fla. Std. Jury Instr. (Crim.) - Penalty Proceedings–Capital Cases. However, under Section 921.141, Florida Statute, a defendant is only eligible for imposition of capital punishment when there are "sufficient aggravating circumstances." A defendant is not eligible for the death penalty unless "sufficient aggravating circumstances" exist.

[7] While not squarely addressing the issue of jury unanimity as a matter of Sixth Amendment law, the majority in ***Apprendi***, 530 U.S. at 477, cited this same passage from Blackstone.

24. The reasonable doubt standard is an essential component of the Due Process Clause of Florida's Declaration of Rights: "The requirement that the evidence shall show guilt beyond a reasonable doubt is a rule of judicial procedure, designed to secure the organic right to personal life and liberty where that right has not been by due process of law clearly and indubitably shown to have been forfeited by the commission of the crime charged." ***Russell v. State***, 71 Fla. 236, 246, 71 So. 27, 30 (1916) (Whitfield, J., concurring).

IV.

A COURT CANNOT CURE THE CONSTITUTIONAL INFIRMITIES IN FLORIDA'S DEATH PENALTY SCHEME BY REVISING THE STANDARD JURY INSTRUCTIONS TO REWRITE THE DEATH PENALTY STATUTE

25. Proposals have been made to dramatically rewrite Florida's standard jury instructions to accommodate the requirements of ***Ring***. See ***In re Standard Jury Instructions in Criminal Cases – Penalty Phase of Capital Trials***, SC05-1890. However, the constitutional infirmities in the Florida statute cannot be remedied by altering the standard jury instructions that effectively rewrite the statute. First, section 921.141(3), expressly allocates the fact finding function to the trial judge, requiring written findings of fact *by the judge* "notwithstanding the recommendation of a majority of the jury." If the judge does not make the requisite findings, the statute unambiguously directs that the trial court "*shall impose* sentence of life imprisonment." *Id. The statute therefore expressly forbids a trial judge from imposing a sentence of death based solely on the jury's recommendation.* See ***Bottoson***, 833 So.2d at 706-707 & n.20 (Anstead, C.J., concurring). Section 921.141, Florida Statutes, is not ambiguous. It is clear in its requirement that the jurors do not make the findings of fact necessary to impose the death

sentence. For that reason, courts are not free to contradict the express language rewrite the statute through rules of statutory construction.

26. As explained in section II, *supra*, it is also impermissible and unconstitutional to treat the jury's recommendation as a verdict, because (1) the jury is repeatedly instructed that its verdict is merely "advisory" and a "recommendation" and that the "the final decision as to what punishment shall be imposed is the responsibility of the judge" and (2) the statute does not require the jury's recommendation to be unanimous. § 921.141(3), Fla. Stat.; Fla. Std. Jury Instr. (Crim.) – Penalty Proceedings–Capital Cases.[8] As discussed above, a jury's advisory, non-unanimous, recommendation of death is plainly insufficient to constitute a valid verdict under Florida law and under the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

27. Individual trial judges are not empowered to craft different or alternative procedures for imposing a death sentence that are not authorized by statute. The Florida Supreme Court has held that it is a departure from the essential requirements of law for trial courts to utilize special verdict forms that reflect the jury's determination of the existence of

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[8] As of the date of this objection, oral arguments have not yet occurred on the proposed changes to the standard jury instructions now pending in the Florida Supreme Court. See ***In re Standard Jury Instructions in Criminal Cases – Penalty Phase of Capital Trials***, Sup.Ct. Case 05-1890. The proposals signify that many of the standard jury instructions in Florida are invalid in light of ***Ring***, ***Apprendi***, ***Caldwell v. Mississippi***, 472 U.S. 320 (1984), and the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, their individual clauses and subparts, and the corresponding provisions of the Florida Constitution. Defendant does not waive any objections to those or any other jury instructions; rather, Defendant reserves the right to make specific objections at a later time in light of this Court's ruling on this motion. Further, Defendant does not waive the objections to the erroneous standard of proof, where Section 921.141(2) and (3) require that the mitigating circumstances must outweigh aggravating circumstances in order for a sentence of life imprisonment to be imposed.

10 To the extent Florida's death penalty statute is substantive, it can be amended only by the legislature. See ***Morgan v. State***, 415 So.2d 6 (Fla. 1982) (rejecting argument that death penalty statute violates separation of powers because it is procedural). To the extent the statute is procedural, it has been adopted by the Florida Supreme Court in Florida Rule of Criminal Procedure 3.780. Id. Trial courts cannot create new rules of criminal procedure; only the supreme court has the authority to promulgate rules of procedure.

sufficient aggravating factors. ***State v. Steele***, 921 So.2d 538 (Fla. 2006). In fact, just two weeks before ***Bottoson*** was decided, the Florida Supreme Court reiterated that a trial court may not modify the standard jury instructions on the statutory mental mitigators to omit the adjectives "extreme" and "substantial" because to do so would "in effect . . . rewrite the statutory description of mental mitigators, which is a violation of the separation of powers doctrine, art. II, § 3, Fla. Const." ***Barnhill v. State***, 834 So.2d 836 (Fla. 2002); accord ***Johnson v. State***, 660 So.2d 637, 647 (Fla. 1995); see also ***State v. Elder***, 382 So.2d 687 (Fla. 1980) ("The court is responsible to resolve all doubts as to the validity of a statute in favor of its constitutionality, provided the statute may be given a fair construction that is consistent with the federal and state constitutions as well as with the legislative intent. The court will not, however, abandon judicial restraint and invade the province of the legislature by rewriting its terms."); ***Brown v. State***, 358 So. 2d 16, 20 (Fla. 1978) ("When the subject statute in no way suggests a saving construction, we will not abandon judicial restraint and effectively rewrite the enactment"); ***Kunz v. New York***, 340 U.S. 290 (1951) (Frankfurter, J., concurring). ("The judicial body might question with justification whether its interpretation is workable or whether it is consistent with legislative policy which is, as yet, undetermined.") Florida constitutional principles of separation of powers and statutory construction thus preclude this Court from ignoring the plain and unambiguous language of section 921.141, Florida Statutes. In other words, the intent of the Florida legislature is clear from the statute, and the judiciary is not free to rewrite it.[9] The statute is unconstitutional and objections are made on the foregoing legal grounds.

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[9] To the extent Florida's death penalty statute is substantive, it can be amended only by the legislature. See ***Morgan v. State***, 415 So.2d 6 (Fla. 1982) (rejecting argument that death penalty statute violates separation of powers because it is procedural). To the extent the statute is procedural, it has been adopted by the Florida Supreme Court in Florida Rule of Criminal Procedure 3.780. Id. Trial courts cannot create new rules of criminal procedure; only the supreme court has the authority to promulgate rules of procedure.

28. The Florida Supreme Court's ***Steele*** opinion does not give trial courts coherent guidance as to whether the standard instructions can be revised to accommodate ***Ring*** and in what manner those corrections should be made. The proposed jury instructions vary so drastically from the standard jury instructions that it is evident Florida's death penalty statute must be amended by the Legislature if it is to be constitutionally imposed.

29. As individual trial judges attempt to improvise their own remedies for the constitutional infirmities in the statute, capital defendants throughout the state are being sentenced to death under procedures that literally vary from judge to judge, ***Steele*** notwithstanding. This is the epitome of arbitrary and capricious imposition of the death penalty and a clear violation of the Eighth and Fourteenth Amendments to the U.S. Constitution as well as Article I, Sections 9 and 17 of the Florida Constitution. See ***Furman***, 408 U.S. at 248-49 ("'A penalty . . . should be considered 'unusually' imposed if it is administered arbitrarily. . .") (Douglas, J., concurring) (citations omitted); accord id. at 310 (Stewart, J., concurring). Only the Florida legislature can mend the constitutional defects in the statute. Until it acts on the invitation by the Florida Supreme Court in ***Steele***, there is no constitutionally valid means of imposing a death sentence in Florida.

V.

A LIFE SENTENCE IS THE MAXIMUM PENALTY THAT CAN BE IMPOSED FOR FIRST DEGREE MURDER. THUS, THIS CASE SHOULD BE TREATED AS FIRST DEGREE MURDER CASE WHERE DEATH IS NOT A POSSIBLE PENALTY.

30. In 1972, the U.S. Supreme Court invalidated all then-existing state capital punishment laws, holding that they presented an undue risk that the death penalty would be imposed in an arbitrary and capricious manner. See ***Furman v. Georgia***, 408 U.S. 238 (1972).

This holding had the effect of rendering Florida's capital sentencing procedures unconstitutional. See ***Donaldson v. Sack***, 265 So.2d 499, 502 (Fla. 1972) (holding that ***Furman*** abolished the death penalty "as heretofore imposed in this state"); accord ***State v. Whalen***, 296 So.2d 678, 679 (Fla. 1972)(held "at the present time that the trial judge does not have the power to impose the death sentence" after ***Furman***, but before new statute enacted; "If there is no capital offense, there can be no capital penalty"); ***Anderson v. State***, 267 So.2d 8 (Fla. 1972) (death sentences imposed under statute in existence at time of Furman were illegal and required imposition of life sentence).

31. In light of ***Furman***, the Florida Supreme Court held that Fla. Stat. § 775.082(1) mandated life imprisonment upon conviction for capital murder. See ***Donaldson***, 265 So.2d at 503; ***State v. Whalen***, supra, at 678. Section 775.082(1) provides that a "person who has been convicted of a capital felony shall be punished by death if the proceeding held to determine sentence according to the procedure set forth in s. 921.141 results in findings by the court that such person shall be punished by death, otherwise such person shall be punished by life in prison." In ***Donaldson***, the Florida Supreme Court held that this statutory provision provided for a sentence -- life imprisonment -- where the provisions for imposition of a death sentence had been rendered unconstitutional. The Court reasoned that, "eliminating the death penalty from the statute does not of course destroy the entire statute" because "we have steadfastly ruled that the remaining consistent portions of statutes shall be held constitutional if there is any reasonable basis for doing so and of course this clearly exists in these circumstances." Id.

32. That same reasoning applies here. The findings required by Section 921.141 cannot be made, consistent with the requirements of the Sixth and Fourteenth Amendments as established in ***Ring***. In this circumstance, just as in ***Donaldson*** and ***Whalen***, the appropriate

outcome under Section 775.082(1) is the entry of a life sentence if the defendant is convicted of first-degree murder, because as a matter of federal constitutional law the court cannot make the findings "according to the procedure set forth in s. 921.141." As Section 775.082(1) states, without those findings "such person shall be punished by life in prison." The same conclusion is reflected in Section 921.141(3) -- the court "shall impose sentence of life imprisonment" if it does not make the "findings requiring the death sentence" -- and ***Ring*** establishes that it would be unconstitutional and prohibited by the Sixth and Fourteenth Amendment for this Court to make those findings.

33. Section 775.082(2), Florida Statutes, contains a severability clause mandating that if portions of the statute are rendered unconstitutional the balance of the statute is to remain in place. See ***Waldrup v. Dugger***, 562 So.2d 687, 693 (Fla. 1990) ("When a part of a statute is declared unconstitutional the remainder of the act will be permitted to stand provided . . . [that] the unconstitutional provisions can be separated from the remaining valid provision . . . [and] the legislative purpose expressed in the valid provisions can be accomplished independently of those which are void."). Thus, as ***Donaldson*** and ***Whalen*** establish, the fact that the death penalty procedures of Section 921.141 are now unconstitutional does not preclude the entry of any sentence but rather requires the entry of the only remaining sentence available if the death penalty cannot be imposed, which is a life sentence for defendants convicted of first-degree murder.

34. The Supreme Court in ***Ring*** did not explicitly address how states like Arizona (and Florida) with facially unconstitutional death penalty statutes should apply the Court's ruling to pending cases. In Florida, that issue is decided by the Florida Supreme Court's holding in ***Donaldson*** and ***Whalen***, which interpreted Section 775.082(1) to require the imposition of a life

sentence following the determination that the statutory scheme was unconstitutional. Under ***Donaldson*** and ***Whalen*** and the specific language of Section 775.082(1), it is not appropriate to engage in a case-by-case inquiry as to whether current law could somehow be lawfully applied in a given case notwithstanding the constitutional defects in the structure of the law. While the Supreme Court in ***Ring*** suggested the possibility of harmless error analysis, that point applies only to death sentences that have already been imposed. No authority would permit the prospective application of a statute that suffers from an unconstitutional structure, whatever the facts of a given case.

35. Death is not a constitutionally possible penalty here and this case should be treated accordingly. The jury should receive the standard jury instructions applicable to capital cases. They are irrelevant, misleading, and prejudicial since death is not a possible penalty. Second, the jury must not be death qualified, as was the case immediately after ***Furman***. See ***Donaldson v. Sack***, 265 So.2d 499, 504 (Fla.1972)("It is also interesting to note that *voir dire* examination apparently does not presently need to include inquiry regarding capital punishment and thus the rule in ***Witherspoon v. Illinois***, 391 U.S. 510 (1968) and its progeny will be of no concern unless 'capital cases' are restored by the Legislature."); ***Reed v. State***, 496 So.2d 213 (Fla. 2d DCA 1986) (improper to permit *voir dire* into attitude of jury panel concerning death penalty where there was no basis upon which death penalty could be imposed).

36. The Florida Supreme Court requires that this Court be given an opportunity "at an early stage in the proceedings" to correct such constitutional error. ***Harrell***, supra. Implicit in that requirement is that this Court has the power to grant relief. If not, then the "preservation" requirement is irrational and a denial of Due Process under the Fifth and Fourteenth Amendments to the United States Constitution.

CONCLUSION

Accordingly, because Florida's death penalty is constitutionally invalid as set forth above and has been previously specifically argued, the Defendant objects to Florida's death penalty statute, to the procedures used in the prosecution of this case, to "death qualification" of the jury, and to imposition of any sentence other than life imprisonment with no possibility of parole. All objections based upon ***Ring v. Arizona***, the United States Constitution and the Constitution of Florida previously and hereafter made by counsel for the Defendant are adopted into this objection and memorandum of law.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by e-service to the Office of the State Attorney, Brevard County, Florida, this 8 day of November, 2013.

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