

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC03-1655

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ANTHONY PONTICELLI,  
APPELLANT,

v.

STATE OF FLORIDA,  
APPELLEE.

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ON APPEAL FROM THE CIRCUIT COURT  
OF THE FIFTH JUDICIAL CIRCUIT  
IN AND FOR MARION COUNTY, FLORIDA

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AMENDED INITIAL BRIEF OF APPELLANT

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**PRELIMINARY STATEMENT**

Appellant appeals the lower court's denial of his Motion for Postconviction Relief prosecuted pursuant to Rule 3.850/3.851, Florida Rules of Criminal Procedure. Record references to the previous proceedings will be referred to as follows:

"R\_\_\_"- trial record from original trial; and

"PCR. \_\_\_"- record of instant postconviction proceeding



**REQUEST FOR ORAL ARGUMENT**

Due to the seriousness of the issues involved, Appellant respectfully requests oral argument.

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## STATEMENT OF THE CASE AND FACTS

Mr. Ponticelli was charged with two counts of first-degree murder and one count of robbery with a deadly weapon. Ponticelli v. State, 593 So. 2d 483, 486 (Fla. 1992) The indictment, which was read to the jury panel by the trial judge, failed to define the applicable aggravating circumstances under Florida Statute 921.141, pursuant to which the state is seeking to convict and execute Mr. Ponticelli for the November 27, 1987 killings of Ralph and Nick Grandinetti. (R. 12-13)

The trial court entered a judgment of acquittal on the robbery count at the close of the state's case-in-chief. Ponticelli v. State, 593 So. 2d at 486. However, the jury found Mr. Ponticelli guilty on both counts of first-degree murder and, after a single witness penalty phase, **recommended**, by a non-unanimous 9-3 vote, that he be sentenced to death for each shooting. Id.

Finding the statutory aggravators of pecuniary gain and of cold, calculated, and premeditated (CCP) applicable to both murders and the heinous, atrocious, or cruel statutory aggravator applicable to the murder of Nick Grandinetti and finding two mitigating factors, that Mr. Ponticelli had no significant prior criminal activity and that Mr. Ponticelli

was twenty years old at the time of the offense, applicable to both murders, **the trial judge sentenced Mr. Ponticelli to death** in connection with both convictions. Id.

On direct appeal, appellate counsel raised twelve issues, seven of which this Court considered meritorious enough to discuss, but this Court affirmed Mr. Ponticelli's convictions and sentences. Ponticelli v. State, 593 So. 2d 483 (Fla. 1991). Subsequently, the United States Supreme Court granted Certiorari on Mr. Ponticelli's Petition as to the issue of the constitutional adequacy of the jury instructions for the CCP and HAC aggravating factors and remanded to the Florida Supreme Court for reconsideration in light of Espinosa v. Florida, 112 S.Ct. 2926 (1992). Ponticelli v. Florida, 113 S. Ct. 32 (1992).

On remand, this Court, although finding the HAC instruction "even less detailed" than the instruction found deficient in Espinosa, held that the challenge to the sufficiency of the instructions was procedurally barred because trial counsel did not request specific instructions or object to the instructions, and, thus, this Court re-affirmed Mr Ponticelli's convictions and sentences. Ponticelli v. State, 618 So. 2d 154 (1993), cert. denied, 114 S. Ct. 352(1993).

Mr. Ponticelli thereafter filed a Rule 3.850 motion on April 10, 1995, amended it several times during document production

disputes, and subsequently filed his final, amended 3.850 motion on July 30, 1998.

The circuit court conducted a "Huff" hearing on the claims of the 3.850 motion on September 23, 1998 and issued its "Huff Hearing Order," dated November 3, 1998. Pursuant to its Order, the circuit court then presided over a multi-phase evidentiary hearing, taking testimony on July 10-13, 2000, on October 16 and 17, 2000, on January 29 and 30, 2001, and on May 24, 2001.

Ultimately, the circuit court denied relief on the 3.850 motion by Order dated November 1, 2003 and denied a duly filed Motion for Rehearing on that Order after oral argument on the Re-Hearing Motion in December, 2003.

Pursuant to Notice filed by Mr. Ponticelli, the Order denying relief on the 3.850 motion is on appeal to this Court for contemporaneous consideration with a Habeas Petition filed the same day as the appeal of the 3.850.

Finally, in June, 2003, Mr. Ponticelli filed a Rule 3.850 and 3.851 Motion wherein he raised issues related to Ring v. Arizona, 122 S. Ct. 2428 (2002). The "Ring Motion" was denied after oral argument on or about August 25, 2003, and the instant appeal is the subject of that denial.

**SUMMARY OF THE ARGUMENT**

In the proceeding below, the trial court ruled that Florida's death penalty scheme as set out in 921.141 and applied in Mr. Ponticelli's case is not unconstitutional. That ruling is erroneous. Ring v. Arizona, 536 U.S. 584 (2002) held that the facts which must be proven in order to increase a capital defendant's sentence from life to death must be found beyond a reasonable doubt by a jury, consistent with the United States Supreme Court's prior opinion in Apprendi v. New Jersey, 530 U.S. 466 (2000). Such a finding by the jury is not contemplated by current Florida law and never occurred in Mr. Ponticelli's case. Thus, a facial violation of Ring exists in Mr. Ponticelli's case. Further, the violation emanating as a result of Ring in this case calls for retroactive application, consistent with Florida and federal law.

## ARGUMENT

THE LOWER COURT ERRED IN DENYING MR. PONTICELLI'S CLAIM THAT FLORIDA'S CAPITAL SENTENCING SCHEME VIOLATES THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AS EVIDENCED BY RING v. ARIZONA, RENDERING MR. PONTICELLI'S DEATH SENTENCE ILLEGAL AND ENTITLING HIM TO A LIFE SENTENCE.

In the circuit court, Mr. Ponticelli raised a claim pursuant to the United States Supreme Court decision in Ring v. Arizona, 536 U.S. 584 (2002). In Ring, the Supreme Court held that the Sixth Amendment to the United States Constitution requires that when aggravating factors are statutorily necessary for imposition of the death penalty, they must be found beyond a reasonable doubt by a jury:

[W]e overrule *Walton* [*v. Arizona*, 497 U.S. 639 (1990)], to the extent that it allows a sentencing judge, sitting without a jury, to find an aggravating circumstance necessary for imposition of the death penalty. . . . Because Arizona's enumerated aggravating factors operate as 'the functional equivalent of an element of a greater offense,' . . . the Sixth Amendment requires that they be found by a jury.

Ring, 536 U.S. at 609 (citations omitted). The Court's ruling was in conformity with its earlier ruling in Apprendi v. New Jersey, where the Supreme Court held, "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." 530 U.S. at 482-83. Ring applied Apprendi to the category of capital murder cases and concluded any fact rendering a person eligible for a death sentence is an element of the offense. 536 U.S. at 604, quoting Apprendi, 530 U.S. at 494 ("In effect, 'the required finding [of an aggravating circumstance] expose[d] [Ring] to a greater punishment than that authorized by the jury's guilty verdict'"). The Supreme Court has even more recently elaborated upon the meaning of Ring. In Sattazahn v. Pennsylvania, 123 S.Ct. 732, 739 (2003), the Supreme Court explained:

Put simply, if the existence of any fact (other than a prior conviction) increases the maximum punishment that may be imposed on a defendant, that fact--no matter how the State labels it--constitutes an element, and must be found by a jury beyond a reasonable doubt.

In Ring, the Supreme Court noted that Arizona was one of five states that committed sentencing factfinding and the ultimate sentencing decision to judges. Ring, 536 U.S. at 609 n. 6 (the other four were identified as Colorado, Idaho, Montana, and Nebraska). The Supreme Court further noted that four additional states had hybrid capital sentencing schemes. Id. (Alabama, Delaware, Florida, and Indiana). Subsequently, it has been recognized that additional hybrid states were overlooked by

the United States Supreme Court. Johnson v. State, 59 P.3d 450, 460 (Nev. 2002)(under Nevada law, the judge determines the sentence in a capital case if the jury is unable to return a unanimous verdict imposing either a death or a life sentence); State v. Whitfield, 107 S.W.3d 253 (Mo. 2003)(under Missouri law, the judge determines the sentence in a capital case if the jury is unable to return a unanimous verdict imposing either a death or a life sentence).<sup>1</sup> In Summerlin v. Stewart, 341 F.3d 1082 (9<sup>th</sup> Cir. 2003)(in banc), the en banc Ninth Circuit concluded that Ring announced substantive criminal law which by definition applied retroactively. Further, the en banc Ninth Circuit concluded that Ring error was structural error not subject to harmless error analysis.

In Mr. Ponticelli's case, the circuit court denied Mr. Ponticelli's claim and found that his claim was procedurally barred and, ostensibly, because that the current precedent from this Court rendered Mr. Ponticelli's claim meritless (PC-R 138-39).

The circuit court erred in its holdings. First, in Botoson

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<sup>1</sup>Even though the United States Supreme Court in its opinion did not suggest that Ring had any implications for the capital sentencing schemes in Nevada or Missouri, the courts in those states took the logic of the decision in Ring, analyzed their state law, and reached the conclusion that under the principles enunciated in Ring that Sixth Amendment error was present in individual cases.



v. Moore and King v. Moore, the Florida Supreme Court's decisions were reached on the merits; the decisions did not go off on any procedural ground; nor did it hold that, if Ring invalidated the Florida procedure used to sentence Bottoson and King to death, that the petitioners could not claim the benefit of such a ruling under Florida's established criteria for determining the retroactive

application of constitutional decisions of the United States Supreme Court in Florida capital cases.

Furthermore, the majority of the justices held that Ring and Apprendi did apply to Florida's capital sentencing procedures.

Mr. Ponticelli's case presents many of the problems identified in Bottoson and King which entitle Mr. Ponticelli to relief. For example, the jurors were told individually that their responsibility was merely to make a recommendation and advise the Court (R. 1365-70). In fact, each prospective juror and all of the ultimate jurors repeatedly heard that they were responsible for providing a recommendation, only, and that the judge was the sentencer (Id.) The court, prosecutor and even defense attorney characterized the jury's role as advisory

The jury was also instructed on two clearly unconstitutional aggravating circumstances, specifically the cold, calculated, and premeditated and heinous, atrocious, and cruel aggravators. The unconstitutionality of these instructions to the jury at penalty phase is an irrefutable legal fact.

The jury was also advised that it was its duty to render to the Court an advisory sentence and that the final decision was with the judge (R. 1365-70). Thereafter, an advisory verdict was returned stating whereby the jury "recommended" to the court by a vote of 9-3 that Mr. Ponticelli by sentenced (by

the court) to death.

The trial court imposed a sentence of death and found the same aggravating circumstances upon which the jury was unconstitutionally instructed.

The errors that occurred at Mr. Ponticelli's penalty phase entitle him to relief.

Finally, the circuit court also failed to look at the jurisprudence that has developed in the wake of Ring. Not surprisingly, the states labeled by the United States Supreme Court as being in the same category as Arizona have generally recognized that Sixth Amendment error pervades their capital sentencing schemes. State v. Fetterly, 52 P.3d 875 (Idaho 2002)(in light of Ring, death sentence vacated and remanded for further proceedings); State v. Gales, 658 N.W.2d 604, 624 (Neb. 2003)("It is clear that the jury made no explicit determination that any of the statutory aggravating circumstance existed in this case. Instead, that determination was made by a judge."); Woldt v. People, 64 P.3d 256 (Colo. 2003)(death sentences vacated in consolidated direct appeal for two of the three individuals sentenced to death under 1995 scheme providing for three-judge panel to conduct capital sentencing factfinding and cases remanded for the imposition of life sentences); State v. Ring, 65 P.3d 915 (Ariz. 2003)(in a consolidated case involving

those on Arizona's death row, Arizona Supreme Court established parameters for evaluating each case for harmless error analysis).<sup>2</sup> Each of these states has found that the necessary facts under Ring to render the defendant death eligible were not made by the jury at the guilt phase of the capital case.

Also, as to the hybrid states, such as Florida, courts have also acknowledged Ring's impact on their capital sentencing statutes. For example, in Indiana, the hybrid sentencing scheme is employed not just in determining whether to impose death, but also in determining what sentence to impose in murder cases not reaching the capital level. In Bostnick v. State, 773 N.E.2d 266 (Ind. 2002), the Indiana Supreme Court was faced with a case in which the judge overrode a jury's recommendation against a sentence of life without parole. The Bostnick court concluded, "[t]he jury during the sentencing phase was unable to reach a unanimous recommendation, and thus there was no jury determination finding the qualifying aggravating circumstances beyond a reasonable doubt." Id. at 273. Under the Indiana sentencing scheme, the judge made the finding of the aggravating circumstances necessary to warrant the imposition of life without parole. "Because of the absence of a jury determination

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<sup>2</sup>These opinions show disparity in application of harmless error analysis to the Sixth Amendment violation defined by Ring.

that qualifying aggravating circumstances were proven beyond a reasonable doubt, we must

therefore vacate the trial court's sentence of life without parole." Id.<sup>3</sup>

Another case further illuminates Indiana law and its interplay with Ring.<sup>4</sup> In Overstreet v. State, 783 N.E.2d 1140, 1160-61 (Ind. 2003), while addressing a capital case, the Indiana Supreme Court explained, "[u]nder the terms of our death penalty statute, before a jury can recommend a sentence of death, it must unanimously find that one or more of the charged aggravating circumstances was proven beyond a reasonable doubt."<sup>5</sup>

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<sup>3</sup>A similar decision was reached in People v. Swift, 781 N.E.2d 292 (Ill. 2002)(non-capital application of Ring in a murder case). There the Illinois Supreme Court stated, "the 'sentencing range' for first degree murder in Illinois is 20 to 60 years imprisonment. This is the only range of sentence permissible based on an ordinary jury verdict of guilt." 781 N.E.2d at 300. Accordingly, a sentence above that range imposed after a judge found one aggravating factor was overturned.

<sup>4</sup>In Wrinkles v. State, 776 N.E.2d 905 (Ind. 2002), the Indiana Supreme Court found it unnecessary to consider the implications of Ring in a successor post-conviction motion because the defendant had been convicted of three murders thereby rendering the defendant death eligible.

<sup>5</sup>The obvious and important distinctions from Florida include: 1) the unanimity requirement on which the jury is instructed, 2) the charging requirement, and 3) the provision under Indiana law specifically requiring the jury to determine whether one or more aggravating circumstances are present.

The Indiana legislature specifically defined the eligibility issue solely upon the presence of one aggravating circumstance. The Florida legislature has defined the issue differently, and has not sought to modify the statute in the wake of Ring. The sentencer is to determine whether "**sufficient** aggravating circumstances exist" to warrant the

In Overstreet, the defense had requested to have a special finding to this effect made by the jury. The Indiana Supreme Court noted that on the basis of Hildwin v. Florida, 490 U.S. 638 (1989), the trial court had denied the requested special verdict. No reversible error was found because the jury had been explicitly instructed that this unanimous finding beyond a reasonable doubt was necessary before it could return a death recommendation.<sup>6</sup>

In another hybrid state, the Delaware legislature enacted legislation following the decision in Ring. In pending capital prosecutions, four questions were certified to the Delaware Supreme Court in light of the new legislation passed in an effort to conform with Ring. The Delaware Supreme Court thereupon undertook a review of Delaware's capital sentencing scheme. Brice v. State, 815 A.2d 314, 322 (Del. 2003). The new statutory language provided that a death sentence could not be imposed unless "a jury (unless waived by the parties) first

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imposition of a death sentence, and if so, whether "there are insufficient mitigating circumstances to outweigh the aggravating circumstances." Fla. Stat. § 921.141(3)(emphasis added).

<sup>6</sup>However, the Indiana legislature had amended the statute after the Ring decision to require that the jury make a special finding that it had unanimously found one or more of the charged aggravating circumstances beyond a reasonable doubt. Both the Indiana Supreme Court and the Indiana legislature implicitly recognized that Hildwin v. Florida did not survive the reasoning of Ring.

determines unanimously and beyond a reasonable doubt that at least one statutory aggravating circumstances exists.”<sup>7</sup> Further under Delaware law, first degree murder was defined by the statute in seven alternative ways. Delaware Code, Title 11, §636(a)(1-7).<sup>8</sup> According to Delaware law, “[i]n any case where the defendant has been convicted of murder in the first degree in violation of any provision of §636(a)(2)-(7) of this title, that conviction shall establish the existence of a statutory aggravating circumstance and the jury, or judge where appropriate, shall be so instructed.” Delaware Code, Title 11, §4209(e)(2). Thus, the Delaware legislature had defined first degree murder on the basis of the presence of six alternative aggravating circumstances and determined that a finding by the jury of the presence of one these circumstances constituted capital first degree murder subject to the death penalty. Accordingly, the Delaware Supreme Court found that the

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<sup>7</sup>This is decidedly different than Florida law which requires 1) the presence of an aggravating circumstance; 2) the determination that sufficient aggravating circumstances are present to justify a death sentence; and 3) the aggravating circumstances are not outweighed by the mitigating circumstances. §921.141, Fla. Stat.

<sup>8</sup>The first definition under the statute is intentional murder. The second through the seventh definitions are premised upon alternative aggravating circumstances.



provisions complied with Ring. Brice, 815 A.2d at 322-23.<sup>9</sup>

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<sup>9</sup>In Duest, Justice Pariente cited Brice for the proposition that the "determination that aggravators outweigh the mitigators is not a factual finding that must be made by jury under Ring." Duest v. State, 855 So. 2d 33, 46 (Fla. 2003). Unfortunately, this overlooks the fact that the Delaware legislation specifically defined the issue differently than the Florida legislature has defined it (under Delaware law, the guilt phase verdict includes aggravating circumstances from the penalty phase). The real lesson of Brice is that the proper Ring analysis must focus on the Florida statute which sets forth three

In Brice, the Delaware Supreme Court indicated that it would review cases in which death had been imposed under the old law case-by-case to determine whether any Ring error was harmless or whether relief was warranted. Subsequently, the court has issued opinions. Garden v. State, 815 A.2d 327, 342 n.4 (Del. 2003)

(death sentence vacated in an override case because judge failed to give life recommendation sufficient weight; therefore the Ring challenge was held to be moot); Reyes v. State, 819 A.2d 305, 316 (Del. 2003)(jury that returned a nine to three death recommendation had first explicitly and unanimously found during the guilt phase a statutory aggravator; therefore relief was denied). In these case, the Sixth Amendment right of confrontation was neither implicated nor discussed.

The Alabama Supreme Court has also analyzed its capital sentencing provisions in light of Ring. The Alabama Supreme Court has explained that under Alabama's statutory definition of capital first degree murder, the jury must find an aggravating circumstance at the guilt phase of a capital trial to render a defendant death-eligible. Ex parte Waldrop, \_\_\_ So.2d \_\_\_, 2002 Ala. LEXIS 336, \*13 (Ala. November 22, 2002)("\`Unless at least

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factual findings that must be made before the defendant is death eligible.

one aggravating circumstance as defined in Section 13A- 5-49 exists, the sentence shall be life imprisonment without parole.'"); Martin v. State, \_\_\_ So.2d \_\_\_, 2003 Ala. Crim. App. LEXIS 136, \*55 (Ala. App. May 30, 2003)("the jury in the guilt phase entered a verdict finding Martin guilty of capital murder because it was committed for pecuniary gain. Murder committed for pecuniary gain is also an aggravating circumstance"). Thus, like Delaware, Alabama provides that unless there is a finding of an aggravating circumstance at the guilt phase proceeding, the sentence is life imprisonment. This clearly distinguishes Alabama law from Florida law in a critical manner.

Recently, the Nevada Supreme Court found that its capital scheme was a "hybrid" scheme because if the jury failed to return a unanimous verdict, the judge made the sentencing findings. Johnson v. State, 59 P.3d 450, 460 (Nev. 2002). Nevada law "requires two distinct findings to render a defendant death-eligible." There must be at least one aggravating circumstance and no mitigation sufficient to outweigh the aggravating circumstances.<sup>10</sup> Because in Johnson, the jury had

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<sup>10</sup>The steps are defined and numbered somewhat differently than they are in Florida's statute. But the Nevada statute is much closer to the Florida statute than either the Alabama or Delaware statutes. According to the Nevada Supreme Court, the legislative definition of capital murder determined what "facts" were subject to the right to trial by jury. Certainly, the right of confrontation would apply to

been unable to return a unanimous verdict, the Nevada Supreme Court concluded that the error was not harmless, and it vacated the death sentence.

The Missouri Supreme Court also found that its death sentencing scheme was a "hybrid" scheme because the judge imposed the sentence whenever the jury could not return a unanimous verdict. That Court explained that in those circumstances Ring was violated because the first three steps of the Missouri procedure for determining death-eligibility had not been decided beyond a reasonable doubt by a jury:

In the second, or "penalty" phase, the jury is required to be instructed to follow the four-step process set out in section 565.030.4:

The trier shall assess and declare the punishment at life imprisonment without eligibility for probation, parole, or release except by act of the governor:

(1) If the trier does not find beyond a reasonable doubt at least one of the statutory aggravating circumstances set out in subsection 2 of section 565.032; or

(2) If the trier does not find that the evidence in aggravation of punishment, including but not limited to evidence supporting the statutory aggravating circumstances listed in subsection 2 of section 565.032, warrants imposing the death sentence; or

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proceedings at which the State was held to prove these elements at a jury trial because both rights arise from the same source, the Sixth Amendment.

(3) If the trier concludes that there is evidence in mitigation of punishment, including but not limited to evidence supporting the statutory mitigating circumstances listed in subsection 3 of section 565.032, which is sufficient to outweigh the evidence in aggravation of punishment found by the trier; or

(4) If the trier decides under all of the circumstances not to assess and declare the punishment at death.

**Id .** Section 565.030.4 on its face requires that steps 1, 2, 3, and 4 be determined against defendant before a death sentence can be imposed. **Id.; see Whitfield, 837 S.W.2d 503, 515 (Mo. banc 1992).**

**Step 1.** Step 1 requires the trier of fact to find the presence of one or more statutory aggravating factors set out in section 565.032.2. Both the State and Mr. Whitfield agree that this is a fact that normally must be found by the jury in order to impose a sentence of death.

The State contends that steps 2, 3, and 4 merely call for the jury to give its subjective opinion as to whether the death penalty is appropriate, however, not to make findings as to whether the factual predicates for imposing the death penalty are present. It urges that the principles set out in **Ring** are not offended even if the judge rather than the jury determines those three steps. This Court disagrees.

**Step 2.** Step 2 requires the trier of fact (whether jury or judge) to find that the evidence in aggravation of punishment, including but not limited to evidence supporting the statutory aggravating factors, warrants imposition of the death penalty. As noted, the State argues that this step merely calls for a subjective opinion by the trier of fact, not a finding. But, the State fails to note that this Court rejected this very argument in its opinion on Mr. Whitfield's appeal of his initial conviction, in which it remanded for the new trial at issue here. In that decision, this Court held that step 2 requires a "finding of fact by the jury, not a discretionary decision." **Whitfield, 837 S.W.2d at 515.** This holding is supported by the plain language of the statute. In order to fulfill its duty, the trier of fact is required to make a case-by-case factual determination based on all the aggravating facts the trier of fact finds are present in the case. This is necessarily a determination to be made on the facts of each case. Accordingly, under **Ring**, it is not permissible for a judge to make this factual determination. The jury is required to determine whether the statutory and other aggravators shown by the evidence warrants the

imposition of death. . . .

**Step 3.** In step 3 the jury is required to determine whether the evidence in mitigation outweighs the evidence in aggravation found in steps 1 and 2. If it does, the defendant is not eligible for death, and the jury must return a sentence of life imprisonment. While the State once more argues that this merely calls for the jury to offer its subjective and discretionary opinion rather than to make a factual finding, this Court again disagrees.

The analysis undertaken in three recent decisions by other state courts of last resort, interpreting similar statutes, is instructive. In *Woldt v. People*, **64 P.3d 256 (Colo. 2003)**, the Supreme Court of Colorado reversed the death sentences of two capital defendants after determining that Colorado's three-judge capital sentencing statute was unconstitutional in light of *Ring*. Colorado's death penalty statute, like Missouri's, requires the fact-finder to complete a four-step process before death may be imposed. First, at least one statutory aggravator must be found. Second, whether mitigating factors exist must be determined. Third, mitigating factors must not outweigh the aggravating factors. Finally, whether death is the appropriate punishment is considered.

The Supreme Court of Colorado described the first three of these four steps as findings of fact that are "prerequisites to a finding by the three-judge panel that a defendant was eligible for death." *Woldt*, **64 P.3d at 265**. It noted that states are sometimes grouped into "weighing states" that require the jury to weigh the aggravating circumstances against those in mitigation in arriving at their determination of punishment, and "non-weighing states." It explained that, while in steps 1, 2, and 3 the jury is permitted to consider and weigh aggravators and mitigators, and to that extent Colorado's process is like that used in weighing states, Colorado is a non-weighing state in that, in step 4, in which the jury decides whether to impose death or to give a life sentence, the jury is permitted to consider all of the evidence without being required to give special significance to the

weight of statutory aggravators or mitigators. *Id.* at 263-64 . This last step thus "affords the sentencing body unlimited discretion to sentence the defendant to life imprisonment instead of death." *Id.* at 265 . Because Colorado's death penalty statute required a three-judge panel to make the first three of these



findings, the statute was declared unconstitutional. *Id.* at 266-67.

Similarly, in *Johnson v. State*, 59 P.3d 450 (Nev. 2002), Nevada's Supreme Court considered the constitutionality of its capital sentencing scheme in light of *Ring*. Its sentencing scheme provides for a three-judge panel to determine punishment if the jury is unable to do so. *Johnson* noted that Nevada "statutory law requires two distinct findings to render a defendant death-eligible: 'the jury or the panel of judges may impose a sentence of death only if it finds at least one aggravating circumstance and further finds that there are no mitigating circumstances sufficient to outweigh the aggravating circumstance or circumstances found.'" *Johnson*, 59 P.3d at 460 (citation omitted).

*Johnson* determined the requisite statutory finding that the mitigating circumstances are not sufficient to outweigh the aggravating circumstances is at least "in part a factual determination, not merely discretionary weighing." *Id.* at 460 . It held that, as a result, the rule announced in *Ring* required a jury rather than a judge to determine the mitigating as well as the aggravating factor issues. *Id.*

Finally, on remand from the United States Supreme Court, the Supreme Court of Arizona rejected the state's contention that the requirement of Arizona law -- that the court weigh mitigating circumstances against aggravating circumstances -- did not require a factual determination, stating:

In both the superseded and current capital sentencing schemes, *the legislature assigned to the same fact-finder responsibility for considering both aggravating and mitigating factors, as well as for determining whether the mitigating factors, when compared with the aggravators, call for leniency.* Neither a judge, under the superseded statutes, nor the jury, under the new statutes, can impose the death penalty unless that entity concludes that the mitigating factors are

not sufficiently substantial to call for leniency. A.R.S. [sections] 13-703.E (Supp.2002) and 13-703.F (Supp.2001). The process involved in determining whether mitigating factors prohibit imposing the death penalty plays an important part in Arizona's capital sentencing scheme.

**Ring II, 65 P.3d at 943** (emphasis added). The Court continued:

We will not speculate about how the State's proposal [to allow the judge to make these findings] would impact this essential process. *Clemons v. Mississippi*, 494 U.S. 738, 754, 110 S.Ct. 1441, 1451, 108 L.Ed.2d 725 (1990) ('In some situations, a state appellate court may conclude that peculiarities in a case make appellate...harmless error analysis extremely speculative or impossible.');

see also *Johnson v. Nevada*, 59 P.3d 450 (Nev. 2002) (as applied to Nevada law, *Ring*... requires [a] jury to weigh mitigating and aggravating factors under Nevada's statute requiring the fact-finder to further find whether mitigating circumstances are sufficient to outweigh the aggravating circumstances).

**Id.** Accordingly, the Court held that, even were the presence of a statutory aggravator conceded or not contested, resentencing would be required unless the court found that the failure of the jury to make these factual findings was harmless on the particular facts of the case. **Id.** This was a necessary result of applying **Ring's** holding that "[c]apital defendants...are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment." **Ring, 536 U.S. at 589.**

Missouri's steps 1, 2, and 3 are the equivalent of the first three factual determinations required under Colorado's death penalty statute, so that, as in

Colorado, the jury is told to find whether there are mitigating and aggravating circumstances and to weigh them to decide whether the defendant is eligible for the death penalty. These three steps are also similar to the aggravating and mitigating circumstance findings required under Nevada and Arizona law. As in those states, these three steps require factual findings that are

prerequisites to the trier of fact's determination that a defendant is death-eligible.

State v. Whitfield, 107 S.W.3d 253, 258-61 (Mo. 2003) (footnote omitted).

The three steps in Florida's statute, like the steps in Missouri, also "require factual findings that are prerequisites to the trier of fact's determination that a defendant is death-eligible." Step 1 in the Florida procedure requires determining whether at least one aggravating circumstance exists. As in Missouri, Colorado, Indiana, Delaware, Arizona, and Nevada, this step involves a factual determination which is a prerequisite to rendering the defendant death-eligible.

Step 2 in the Florida procedure requires determining whether "sufficient" aggravating circumstances exist to justify imposition of death.<sup>11</sup> Missouri's Step 2 is indistinguishable, requiring a determination of whether the evidence of all aggravating circumstances "warrants imposing the death sentence." This step is obviously not the ultimate step of determining whether death will or not be imposed because other steps remain. Rather, in Florida as well as Missouri, this step involves a factual determination which is a prerequisite to

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<sup>11</sup>Significantly, a second step is missing in the capital schemes in Indiana, Alabama and Delaware as construed by the state supreme courts in those states.

rendering a defendant death-eligible.

Step 3 in the Florida procedure requires determining whether "there are insufficient mitigating circumstances to outweigh the aggravating circumstances." Missouri's and Colorado's Step 3, as well as Nevada's and Arizona's Step 2, are identical, requiring a determination of whether mitigating circumstances outweigh aggravating circumstances. Again, this step is not the ultimate determination of whether or not to impose death because an additional step remains. Rather, in Florida as well as these other states, this step involves a factual determination which is a prerequisite to rendering a defendant death-eligible.

In Florida, as in Missouri and the other states discussed in Whitfield, the sentencer does not consider the ultimate question of whether or not to impose death until the eligibility steps are completed. After the first three steps, the Florida statute directs the jury to determine, "[b]ased on these considerations, whether the defendant should be sentenced to life imprisonment or death." Section 921.141(2)(c), Fla. Stat. The structure of the statute clearly establishes that the steps which occur before this determination are necessary to make the defendant eligible for this ultimate determination, that is, to render the defendant death-eligible.

The question which Ring v. Arizona decided was what facts

constitute "elements" in capital sentencing proceedings. Following the Supreme Court's decision in Apprendi v. New Jersey, 530 U.S. 466 (2000), Mr. Ring raised an Apprendi challenge to his death sentence. In addressing that challenge, the Arizona Supreme Court stated that the United States Supreme Court's description of Arizona's capital sentencing scheme contained in Walton v. Arizona, 497 U.S. 639 (1990), was incorrect and provided the correct construction of the scheme. Ring, 122 S. Ct. at 2436. Based upon this correct construction, the United States Supreme Court then determined that Walton "cannot survive the reasoning of Apprendi." Ring, 122 S. Ct. at 2440.

The bulk of the Ring opinion addresses how to determine whether a fact is an "element" of a crime. See Ring, 122 S. Ct. at 2437-43. The question in Ring was not whether the Sixth Amendment requires a jury to decide elements. That has been a given since the Bill of Rights was adopted. The question was what facts are elements. Justice Thomas explained this in his concurring opinion in Apprendi:

This case turns on the seemingly simple question of what constitutes a "crime." Under the Federal Constitution, "the accused" has the right (1) "to be informed of the nature and cause of the accusation" (that is, the basis on which he is accused of a crime), (2) to be "held to answer for a capital, or otherwise infamous crime" only

on an indictment or presentment of a grand jury, and (3) to be tried by "an impartial jury of the State and district wherein the crime shall have been committed." Amdts. 5 and 6. See also Art. III, [Sec.] 2, cl. 3 ("The Trial of all Crimes . . . shall be by Jury"). With the exception of the Grand Jury Clause, see Hurtado v. California, 110 U.S. 516, 538 . . . (1884), the Court has held that these protections apply in state prosecutions. Herring v. New York, 422 U.S. 853, 857, and n.7 . . . (1975). Further, the Court has held that due process requires that the jury find beyond a reasonable doubt every fact necessary to constitute the crime. In re Winship, 397 U.S. 358, 364 . . . (1970).

*All of these constitutional protections turn on determining which facts constitute the "crime"--that is, which facts are the "elements" or "ingredients" of a crime. In order for an accusation of a crime (whether by indictment or some other form) to be proper under the common law, and thus proper under the codification of the common-law rights in the Fifth and Sixth Amendments, it must allege all elements of that crime; likewise, in order for a jury trial of a crime to be proper, all elements of the crime must be proved to the jury (and, under Winship, proved beyond a reasonable doubt).*

Apprendi, 120 S. Ct. at 2367-68 (Thomas, J., concurring) (emphasis added). Justice Thomas explained that courts have "long had to consider which facts are elements," but that once that question is answered, "it is then a simple matter to apply that answer to whatever constitutional right may be at issue in a case--here, Winship and the right to trial by jury." Id. at

2368.

The essence of criminal law is the definition of the offense. Jones v. United States, 526 U.S. 227 (1999), construed the federal statute at issue in that case, and stated that facts which increase the maximum punishment for an offense are elements of the offense. Apprendi applied the well-established rule that elements must be found by a jury and determined that the sentencing factor identified by the New Jersey legislature was in fact an element. Ring merely held that based upon the clarification of the Arizona statute provided by the Arizona Supreme Court, aggravating circumstances in Arizona were elements subject to the Sixth Amendment right to a jury trial.

Ring's requirement that juries, not judges, find the elements of the charge is derived from ancient principles of law: "The principle that the jury were the judges of fact and the judges the deciders of law was stated as an established principle as early as 1628 by Coke. See 1 E. Coke, Institutes of the Laws of England 155b (1628)." Jones, 526 U.S. at 247. Walton did not contravene those principles but simply misread the Arizona statute. The Ring decision merely rejuvenated the longstanding rule which Walton temporarily rejected.

The Framers of the Bill of Rights included the Sixth Amendment's guarantee of a right to jury trial as an essential



protection against government oppression. "Fear of unchecked power, so typical of our State and Federal Governments in other respects, found expression in the criminal law in this insistence upon community participation in the determination of guilt or innocence." Duncan v. Louisiana, 391 U.S. 145, 156 (1968). Only by maintaining the integrity of the factfinding function does the jury "stand between the accused and a potentially arbitrary or abusive Government that is in command of the criminal sanction." United States v. Martin Linen Supply Co., 430 U.S. 564, 572 (1977). Thus, the adoption of the jury trial right in the Bill of Rights establishes the Founders' recognition that a jury trial is more reliable than a bench trial.

Just as Justice Thomas explained in Apprendi, there was no question in Ring that the jury trial right applies to elements. The dispute in Ring involved what was an element. Thus, the question in Ring is akin to a statutory construction issue, and "retroactivity is not at issue." Fiore v. White, 531 U.S. 225, 226 (2001); Bunkley v. Florida, 123 S. Ct. 2020, 2023 (2003). That is, the Sixth Amendment right to have a jury decide elements is a bedrock, indisputable right. Mr. Ponticelli was entitled to this Sixth Amendment protection at the time of his trial. The Sixth Amendment guarantees not only the right to a

jury trial, but also the right of confrontation. Ring simply clarified that facts rendering a defendant eligible for a death sentence are elements of capital murder and therefore subject to the Sixth Amendment guarantees that are applicable to the states.

The ruling in Ring concerns an issue of substantive criminal law. In concluding that the Sixth Amendment requires that the jury, rather than the judge, determine the existence of aggravating factors, the Supreme Court described aggravating factors as "the functional equivalent of an element of a greater offense." Ring, 122 S.Ct. at 2243 (citing Apprendi v. New Jersey, 530 U.S. 466, 494, n. 19 (2000)). Ring clarified the elements of the "greater" offense of capital murder. As explained above, Ring did not decide a procedural question (i.e., whether the Sixth Amendment requires that juries decide elements), but a substantive question (what is an element?). Thus, retroactive application is required under Bousley v. United States, 523 U.S. 614 (1998), because the ruling addresses a matter of substantive criminal law, not a procedural rule.

The post-Ring jurisprudence from other courts demonstrates that the circuit court has erroneously denied Mr. Ponticelli's arguments that he was deprived of his Sixth Amendment rights at his penalty phase and that his death sentence was

unconstitutionally imposed. Relief is proper.

**CONCLUSION AND RELIEF SOUGHT**

Based on the foregoing, Mr. Ponticelli respectfully prays that this Court reverse the lower court and vacate his sentences and order a new trial, impose a life sentence, or otherwise grant such relief as the Court deems proper.

**CERTIFICATE OF SERVICE**

The below-signed counsel of record hereby certifies that a true copy has been furnished by first class mail to Kenneth Nunnelley, Assistant Attorney General, Office of Attorney General, 444 Seabreeze Blvd., 5<sup>th</sup> Floor, Daytona Beach, Florida on \_\_\_\_\_, 2004.

**CERTIFICATE OF COMPLIANCE WITH TYPE SIZE AND STYLE**

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