IN THE SUPREME COURT OF FLORIDA

CASE NO. SC05-1312

ETHERIA JACKSON,

Appellant,

v.

STATE OF FLORIDA

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTH JUDICIAL CIRCUIT,
IN AND FOR DUVAL COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

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REQUEST FOR ORAL ARGUMENT

Mr. Jackson has been sentenced to death. A full opportunity to air the issues through oral argument is appropriate in this case, given the seriousness of the claims involved and the gravity of the penalty. Mr. Jackson, through counsel, accordingly urges that the Court permit oral argument.

STATEMENT OF THE CASE AND FACTS

Statement of the Case

Mr. Jackson has never had an evidentiary hearing in state or federal court after his conviction and sentence to death. The jury recommendation was the barest minimum necessary to recommend death, seven to five.

Mr. Jackson was tried, convicted, and sentenced to death in Jacksonville, Florida, sentence entered August 8, 1986. Despite the presentation of unrebutted mitigating evidence, the trial judge found no mitigating circumstances. The judge found five aggravating circumstances. This Court affirmed despite holding that one of the aggravating circumstances was unsupported by the evidence. *Jackson v. State*, 530 So.2d 269 (Fla. 1988). The United States Supreme Court denied certiorari. *Jackson v. Florida*, 488 U.S. 1050 (1989).

Governor Martinez included Mr. Jackson's death warrant among five signed March 29, 1990, a year when at least 38 warrants were signed. The Capital Collateral Representative was responsible for most of the cases in which warrants were signed, and was overwhelmed. Counsel responsible for Mr. Jackson's post-conviction pleadings at that time overlooked ineffective appellate counsel claims due to the untenable case load imposed by the Governor's actions. The claims which were raised in Mr. Jackson's Florida Rule of Criminal Procedure 3.850 motion for post-conviction relief were summarily denied without an evidentiary

hearing. This Court denied the appeal therefrom and also denied state habeas corpus relief. *Jackson v. State*, 633 So. 2d 1051 (Fla. 1993).

Mr. Jackson timely filed a Petition for Writ of Habeas Corpus in the Federal District court, Northern District of Florida. The case remains pending in the Eleventh Circuit.

Mr. Jackson filed the instant motion pro se in the circuit court July 8, 2003. R1. Capital Collateral Regional Counsel - Middle filed a notice adopting the pro se motion August 18, 2003. R18. The claims made did not require an evidentiary hearing, and the parties filed closing arguments. R38, R90. The trial court denied the motion June 23, 2005. R122. This appeal followed.

Statement of the Facts [1]

The victim in this case, Linton Moody, was the part owner of a furniture business who collected monthly payment from customers. Mr. Jackson's girlfriend, Linda Riley, told police Mr. Jackson did the killing. Ms. Riley admitted in her testimony at trial that she tied the victim's hand with a belt, Trial Transcript at 526, rifled his pockets for money, Trial Transcript at 536, gagged him, Trial

[1] The record from the prior proceedings is referenced throughout this brief. The prior proceedings were all appealed to this Court, and counsel understands that the records from those prior proceedings remain available to this Court. The defendant respectfully urges the Court to take judicial notice of its own records to the extent the prior records below are necessary to support any claim herein.

Transcript at 528, helped roll him into a carpet, Trial Transcript at 538, retrieved the victim's gun from his car and hid it, drove the victim's car to her back door, dragged the body to the back door, Trial Transcript at 539-41, disposed of evidence, Trial Transcript at 525, helped spend the money and concealed the crime for two days, Trial Transcript at 553-62. She avoided prosecution by testifying against Mr. Jackson, although she testified there was no deal or immunity.

Florida's juvenile protection agency, H.R.S., took Ms. Riley's children during the pendency of the trial and she testified she hoped to get the children back. Mr. Jackson raised claims in the Second Amended Petition for Writ of Habeas Corpus that constitutional violations occurred when counsel was barred from obtaining the H.R.S. records which could potentially support a claim that Ms. Riley was motivated to fabricate testimony to get her children back. The defense was also prevented from cross-examining Ms. Riley to show, inter alia, she had shifted her loyalties to a new boyfriend after she had Mr. Jackson arrested.

There was evidence tending to establish that Mr. Jackson was intoxicated at the time of the offense. Mr. Jackson had a long-standing addiction to drugs and alcohol which caused blackouts and violent behavior. A friend saw him the night before the killing and could have testified that Mr. Jackson was intoxicated and intended to use drugs throughout the night.

A report from Dr. Gary M. Ainsworth, a psychiatrist who interviewed Mr. Jackson during the post-conviction period, showed Mr. Jackson was using drugs daily at the time of the offense and would have been impaired when the offense occurred. He developed nonstatutory mitigators including a dysfunctional family during his childhood when his father became an invalid and his mother abandoned him to use drugs and live with other men. He also determined that Mr. Jackson's psychiatric disorders, including drug abuse and serious mental deficiencies such as many symptoms of schizophrenia, rendered him "under the influence of extreme mental or emotional disturbance" and that "the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired," two of the statutory mitigators.

Medical records discovered after trial showed Mr. Jackson had been treated for mental illness in the late 1970's, had been diagnosed as suffering from schizophrenia, chronic undifferentiated type, possible psychosis with epilepsy, and had been medicated at one time for the problems. Mr. Jackson had also been beaten in 1979 about the head so severely he was hospitalized thirty days and required facial reconstruction.

In his Second Amended Petition for Writ of Habeas Corpus in the federal district court, Mr. Jackson claimed counsel had been ineffective for failing to develop the evidence of intoxication and mental illness, mitigators which would

have tipped the scales for a jury which voted by the barest margin, seven to five, for the death penalty.

Mr. Jackson also complained at trial and in post-conviction that there was a serious conflict of interest with his defense team. The defense investigator had a continuing relationship with one of the assistant state attorney prosecuting his case. While the couple swore they had not and would not communicate about the case, Mr. Jackson complained that he did not feel confident he could confide in his defense team when the relationship threw a cloud over the representation. An example of the fatally flawed attorney/client relationship was when defense counsel told Mr. Jackson's mother to talk to another lawyer working on the case. Only after the interview did someone tell her the other lawyer was the assistant state attorney involved with the defense investigator. Neither Mr. Jackson nor his mother trusted the defense after that, and any hope of communication of critical information was lost.

SUMMARY OF THE ARGUMENT

Although *Ring v. Arizona*, 536 U.S. 584 (2002), and *Apprendi v. New Jersey,* 530 U.S. 466 (2000), have been held to not be retroactive, the development of the law in this area has been limited to the direct holdings of the cases, i.e. that the *Ring* holding as to the penalty phase of a capital trial is not retroactive. The issue raised here is that the principles of *Ring* and *Apprendi* require a re-evaluation of the rationale for allowing an indictment alleging only first degree premeditated murder to be sufficient to allow a general verdict for premeditated or felony murder

Mr. Jackson also urges the settled law rejecting retroactive application of *Ring* to capital sentencing be re-examined and corrected to offer relief to all capital defendants sentenced under Florida's capital sentencing scheme.

ARGUMENT

STANDARD OF REVIEW

This is a question of law which is subject to de novo review. To the extent that any matters can be considered to be questions of fact, under the principles set forth by this Court in *Stephens v. State*, 748 So.2d 1028 (Fla. 1999), a mixed question of law and fact requires de-novo review.

DISCUSSION

MR. JACKSON WAS DEPRIVED OF ADEQUATE NOTICE OF FELONY MURDER AND DEPRIVED OF A UNANIMOUS VERDICT WITH REGARD TO BOTH THE DETERMINATION OF GUILT/INNOCENCE AND THE SENTENCE BY VIRTUE OF THE TRIAL COURT'S INSTRUCTIONS AND THE VERDICT FORMS WHICH ALLOWED THE JURY TO ARRIVE AT A NON-UNANIMOUS VERDICT AS TO THE COUNT OF MURDER ON WHICH THE CONVICTION WAS BASED IN VIOLATION OF THE 5th, 6th, 8TH, AND 14TH AMENDMENTS OF THE UNITED STATES CONSTITUTION.

Florida's first degree murder statute establishes the crime of homicide when a human being is killed from a premeditated design. If found guilty of this crime, the wrongdoer is subject only to a sentence of life. Florida's statutes also create the separate crime of "aggravated homicide," which is a premeditated murder with aggravating circumstances. A jury may arguably find aggravated homicide in a bifurcated trial, but even if the aggravators may be deemed to have been found

beyond a reasonable doubt, the simple fact remains that the defendant in this case was never indicted for "aggravated homicide." No indictment was entered which alleged not only premeditation but the fact of aggravation. The indictment does not even cite the statute which creates the separate and unique crime of aggravated homicide, section 921.141.

Florida's first degree murder statute also establishes the crime of felony murder when a human being is killed by a person engaged in certain felonies. If found guilty of this crime, the wrongdoer is subject only to a sentence of life. Florida's statutes also create the separate crime of "aggravated felony murder," which is a felony murder with aggravating circumstances. A jury may arguably find aggravated felony murder in a bifurcated trial, but even if the aggravators may be deemed to have been found beyond a reasonable doubt, the simple fact remains that the defendant was never indicted for felony murder or "aggravated felony murder."

Trial counsel raised these matters as to both the guilt and penalty phases of trial. Subsequent to the trial, appeal, and initial collateral motion proceeding, the United States Supreme Court issued its opinion in *Ring v. Arizona*, 536 U.S. 584 (2002), extending the principles of *Apprendi v. New Jersey*, 530 U.S. 466 (2000), to capital cases. Mr. Jackson's initial collateral counsel could not have argued the

principles of *Ring* because *Ring* was decided years after the initial motion for collateral relief.

This Court recently addressed some of the issues raised herein, in *Mansfield v. State***,** 911 So.2d 1160 (Fla. 2005). The Court rejected a claim that the jury must be instructed that it must reach a unanimous verdict on premeditated or felony murder, or both. The Court also rejected a claim that *Ring* and *Apprendi* "changed the constitutional requirements for a death penalty jury," finding that the defendant "fails to demonstrate *how* the holdings in *Ring* and *Apprendi* overruled the decision in *Schad [v. Arizona*, 501 U.S. 624 (1991)*]*." *Id*. at 1179. Mr. Jackson respectfully urges that the issues raised in *Mansfield* and the instant case go beyond the jury instruction issue – the indictment is faulty in failing to charge both premeditated and felony murder, and faulty in failing to enumerate the felony supporting the felony murder charge. As a result, the trial was fundamentally flawed when evidence of felony murder was permitted when the offense was not charged.

Ring and *Apprendi* overruled *Schad v. Arizona*, 501 U.S. 624 (1991), when they recognized that only a jury may decide whether every element of an offense has been proven beyond a reasonable doubt, and that the state cannot avoid this constitutional imperative by attempting to characterize essential elements of an offense in some other manner. In the case of felony murder, the state has

characterized the essential element of premeditation as a presumption arising from the felony offense. Presumptions do not pass constitutional muster under the principles of *Ring* and *Apprendi.* Another indicator that *Schad* does not reflect the current thinking of the Court is the lineup of supporters for the *Schad* decision who dissented to *Apprendi* – Rehnquist, Kennedy and O'Connor, inter alia, supported the *Schad* rationale which expressly allowed juries to render a general verdict of first degree murder, and dissented to the *Apprendi* ruling. *Schad* observed that felony and premeditated murder required different mental states, but that tradition allowed a state to merge the two crimes into a single charge and verdict.

> Whether or not everyone would agree that the mental state that precipitates death in the course of robbery is the moral equivalent of premeditation, it is clear that such equivalence could reasonably be found, which is enough to rule out the argument that this moral disparity bars treating them as alternative means to satisfy the mental element of a single offense.
>
> We would not warrant that these considerations exhaust the universe of those potentially relevant to judgments about the legitimacy of defining certain facts as mere means to the commission of one offense. But they do suffice to persuade us that the jury's options in this case did not fall beyond the constitutional bounds of fundamental fairness and rationality. **We do not, of course, suggest that jury instructions requiring increased verdict specificity are not desirable, and in fact the Supreme Court of Arizona has itself recognized that separate verdict forms are useful in cases submitted to a jury on alternative theories of premeditated and felony murder.** *State v. Smith*, 160 Ariz. 507, 513, 774 P. 2d 811, 817 (1989). **We hold only that the Constitution did not command such a practice on the facts of this case.**

Schad, 501 U.S. at 643-44 (plurality opinion by Souter, J.) (footnote omitted).

Ring shook out the *Schad* plurality supporters even more – only O'Connor and Rehnquist dissented to *Ring.* Thus, *Schad's* tepid support for the continuation of the archaic general homicide verdict in the face of the admitted preference for specific verdicts would appear to have lost any claim to moral authority with the renewed vigor in *Apprendi* and *Ring* of the principle that jurors must find every element of an offense beyond a reasonable doubt

Also, *Ring* and *Apprendi* force a re-evaluation of the policies and rationales this state has relied upon to adopt and sustain the rule that a limited charge of premeditated murder is sufficient to charge felony murder. Regardless of the future of *Schad*, which permitted but did not require a general verdict, this state's reasons for permitting the inadequate indictment have been fatally undercut by *Ring* and *Apprendi.*

PRECLUSION OF FELONY MURDER THEORY DURING TRIAL

The indictment did not allege that the death occurred during the perpetration or attempt to perpetrate any of the enumerated felonies constituting felony murder. R 1 (citations throughout are to the pages of the 1986 Record on Appeal to this Court). The state only charged premeditated murder pursuant to section 782.04(1)(a)(1), the premeditated murder statute. The felony murder statute,

782.04(1)(a)(2), was not expressly named in the indictment, although the entire homicide statute, section 782.04, was generally alleged. Further, no facts were alleged in the indictment which would support a felony murder conviction, i.e. no allegation was made that the death occurred during the commission or the attempted commission of a felony, and none of the felonies which serve as an element of felony murder were listed.

Defense counsel filed a Motion to Require the State to Elect, or, In the Alternative, for More Definite Statement of Particulars, R20, seeking to require the state to elect whether it was proceeding on a premeditated or felony murder theory, and, if felony murder, to elect the predicate felony. A Motion to Dismiss Indictment or to Declare Death is Not a Possible Penalty attacked the indictment on the ground that it failed to include aggravating circumstances and thereby failed to meet the requirement of an indictment for a death case. R22. A separate Motion to Dismiss Indictment attacked the indictment on the grounds, inter alia, that it was vague as to the allegation of premeditated murder, and that failed to allege which section of section 782.04 Mr. Jackson violated (i.e. premeditated or felony murder). R25. A Motion for Statement of Aggravating Circumstances attacked the state's failure to enumerate aggravating factors in the indictment or give notice before trial of aggravating circumstances and argued aggravating factors could not be found if not in the indictment or noticed before trial. R28.

The trial court denied all said motions. R392 et. seq. The defendant also filed a proposed verdict form which required the jury to elect between premeditated or felony murder, or one of the lesser offenses. R 645. The court rejected the form and used one which only permitted a verdict of first degree murder or the lessers thereby depriving the jury of the opportunity to specify upon which theory of first degree murder it based is verdict. R646.

Defense counsel moved at the close of the state's guilt phase case for judgment of acquittal on the homicide charge. T964 et. seq. The defense argued that the evidence failed to prove premeditation and failed to prove Mr. Jackson killed the victim. T964. The motion was denied. T967. The motion was renewed and denied at the close of the evidentiary phase, T 1041.

The Sixth and Fourteenth Amendments of the United States Constitution require a charging document enumerate the elements sufficiently to apprise the defendant of what he must defend against. *Russell v. United States*, 369 U.S. 749 (1962). *See also* Art. I, § 16, Fla. Const. (same protection offered in state constitution). Due process requires specification of the theory of prosecution to prevent the jury from being instructed on an uncharged offense. *Tarpley v. Estelle*, 703 F.2d 157 (5th Cir. 1983). Due process also prevents the state and courts from relying on one theory at trial and another on appeal. *See Cole v. Arkansas*, 333 U.S. 196 (1948).

The Constitution requires the state to allege all the elements of the specific type of first degree murder with which it is charging the defendant, and failure to allege the specific elements fails to adequately apprise the defendant and will not permit a verdict for the unalleged theory. *Givens v. Housewright,* 786 F.2d 1378 (9th Cir. 1986) (charge of "willful" murder insufficient to allow prosecution or conviction for alternative method of murder by torture).

In Florida, felony murder, even though it is included within a single statutory section, is a separate offense defined in a separate subsection from premeditated murder. A defendant can be charged with both offenses separately and convicted and sentenced on each charge separately. *State v. Ferguson* 195 N.E.2d 794 (Ohio 1964) (Ohio statute, in a single section, defined two offenses: "No person shall purposely, and either of deliberate and premeditated malice, or by means of poison, or in perpetrating or attempting to perpetrate rape, arson, robbery, or burglary, kill another." *Id*. at 796). The Ohio courts concluded two offenses were defined through application of the *Blockburger*[2] test. *State v. McCullough*, 605 N.E.2d 962 (Ohio Ct. App. 1992).

While this Court has rejected applying the *Blockburger* test in the context of various homicide statutes, *see, e.g. Houser v. State*, 474 So.2d 1193, 1196 (Fla.1985) (vehicular homicide and DUI manslaughter), there does not appear to

[2]*Blockburger v. United States,* 284 U.S. 299 (1932).

be a case where this Court has squarely rejected application of the *Blockburger* test to prevent separate convictions and sentences for premeditated and felony murder under the separate statutory provisions of sections 782.04(1)(a)(1) and 782.04(1)(a)(2). *See, e.g., Gordon v. State*, 780 So.2d 17 (Fla. 2001):

> In a similar argument, Gordon highlights the principle that convictions for both premeditated murder and felony murder are impermissible when only one death occurred. *See Goss v. State,* 398 So.2d 998, 999 (Fla. 5th DCA 1981). We have held repeatedly that section 775.021 did not abrogate our previous pronouncements concerning punishments for singular homicides. *See Goodwin v. State,* 634 So.2d at 157-58 (Grimes, J. concurring) ("I believe that the Legislature could not have intended that a defendant could be convicted of two crimes of homicide for killing a single person."); *State v. Chapman,* 625 So.2d 838, 839 (Fla.1993); *Houser v. State,* 474 So.2d 1193, 1196 (Fla.1985) (noting that "only one homicide conviction and sentence may be imposed for a single death"); *Campbell-Eley,* 718 So.2d at 329; *Laines v. State,* 662 So.2d at 1250; *Goss v. State,* 398 So.2d at 999. **Indeed, this principle is based on notions of fundamental fairness which recognize the inequity that inheres in multiple punishments for a singular killing.** As Justice Shaw noted in his *Carawan* dissent, "physical injury and physical injury causing death, merge into one and it is rationally defensible to conclude that **the legislature did not intend to impose cumulative punishments**." *Carawan,* 515 So.2d at 173 (Shaw, J., dissenting).

780 So.2d at 25 (emphasis added).

Goss v. State, 398 So.2d 998 (Fla. 5th DCA 1981), cited in the quote from *Gordon*, above, reversed a felony murder conviction on two grounds – the defendant already was subject to both a premeditated murder conviction for the same victim and a conviction for the underlying felony which supported the felony

murder conviction. No underlying felony conviction exists in this case. And, of course, *Goss* was a Fifth District decision, not a decision from this Court.

It is undeniable that premeditated and felony murder meet the requirements of *Blockburger* - the mutually exclusive elements are, for premeditated murder a requirement of premeditation, for felony murder a requirement of commission of one of the underlying felonies. To date, however, even though the two homicide statutes are separate offenses under the *Blockburger* test, the "one death/one sentence" principle has overridden the *Blockburger* test, even after the statutory *Blockburger* rule, section 775.021(4), was amended to limit application of the rule of lenity in *Blockburger* analysis. *State v. Chapman*, 625 So.2d 838 (Fla. 1993) (reaffirming *Houser* and "one death/one sentence" principle after 1988 amendment).

Ironically, the reason for adhering to the "one death/one sentence" principle has always been to ensure the defendant was treated fairly – in other words, this Court has always applied judicial lenity to the homicide statutes to guarantee the defendant a fair and equitable outcome. *Gordon*.

Thus, this Court recognizes that a policy reason exists to prohibit dual homicide convictions – fundamental fairness to protect against the inequity of "cumulative punishments," *Gordon*, for a singular killing. Unfortunately, the inequity is prevented only when the defendant is convicted of noncapital homicide

offenses such as attempted first degree murder, i.e. when the defendant is not subject to a sentence of life without parole or death. A defendant would suffer "cumulative punishments" if the court stacked the sentences in a noncapital homicide case.

However, when a defendant is convicted for a capital homicide, the need for protection from cumulative punishments simply does not exist. The defendant will be sentenced either to life without parole, or to death. In such a case, the legislature could define a dozen capital offenses, the defendant could be sentenced to a dozen life sentences, or a dozen deaths, and he would suffer absolutely no inequity, no unfair multiple punishments, because he has only one life to serve, one life to be taken.

No policy reason prohibits dual conviction for a capital murder – double life sentences without parole or double death sentences simply do not affect the defendant in any material manner. There is no need for application of the rule of lenity to capital homicide convictions to protect against "cumulative punishments."

Even if dual capital convictions and sentences are not permitted, there is no prohibition to dual indictment, prosecution, and verdicts. In fact, as this Court is well aware, the state often charges capital homicide in two counts, premeditated and felony murder, and frequently obtains specific verdicts finding the defendant

guilty of a dual finding of premeditated and felony murder, or by separate convictions for premeditated and felony murder, or both. The double jeopardy clause is not offended because the offenses truly are separate offenses under the *Blockburger* test. The legislature is not offended by cumulative punishments because only a single conviction and sentence is entered, regardless of how many homicide convictions are obtained for a single victim.

SEPARATE INDICTMENTS ARE REQUIRED TO CHARGE PREMEDITATED AND FELONY MURDER

Fundamental fairness and the avoidance of inequity have always guided this Court in its interpretation of the state's homicide statutes. *Gordon*. If *stare decisis* in the past allowed a single indictment for premeditated murder to open the door to prosecution for the second discrete crime of felony murder, the constitutional landscape has now changed. Fundamental fairness and avoidance of inequity now compel the state to separately charge and prove the two crimes of premeditated and felony murder.

The question before this Court is whether separate charges and convictions are required if the state pursues both theories, rather than to allow dual prosecutions at the mere discretion of the state attorney or the court upon a single indictment for premeditated murder. The answer is "yes," in light of the recent

United States Supreme Court decisions in *Ring v. Arizona*, 536 U.S. 584 (2002), and *Apprendi v. New Jersey,* 530 U.S. 466 (2000). These landmark cases invigorate the fundamental principle that the jury find every element for which a defendant is convicted and sentenced.

The *Ring* Court noted that *Apprendi* essentially declares there is no distinction between an element of a crime and a sentence enhancer. A "sentence enhancer" is not a sentencing consideration, **it is the functional equivalent of an element of a crime.** A sentence enhancer does not amplify on a lower level offense, it actually creates a greater offense which is defined by the elements of the underlying offense plus the additional elements which had been designated "enhancers" but which are in truth elements of the greater crime, or, as *Ring/Apprendi* call it, the "aggravated crime."

> *Apprendi* repeatedly instructs **. . .** that 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. See, *e.g.*, 530 U.S., at 492, 120 S.Ct. 2348 (noting New Jersey's contention that "[t]he required finding of biased purpose is not an 'element' of a distinct hate crime offense, but rather the traditional 'sentencing factor' of motive," and calling this argument "nothing more than a disagreement with the rule we apply today"); *id.*, at 494, n. 19, 120 S.Ct. 2348 (**"[W]hen the term 'sentence enhancement' is used to describe an increase beyond the maximum authorized statutory sentence, it is the functional equivalent of an element of a greater offense than the one covered by the jury's guilty verdict.")**; *id.*, at 495, 120 S.Ct. 2348 ("[M]erely because the state legislature placed its hate crime sentence enhancer within the sentencing provisions of the criminal code does not mean that the finding of a biased purpose to

> intimidate is not an essential element of the offense." (internal quotation marks omitted)); see also *id.*, at 501, 120 S.Ct. 2348 (THOMAS, J., concurring) ("**[I]f the legislature defines some core crime and then provides for increasing the punishment of that crime upon a finding of some aggravating fact[,] ... the core crime and the aggravating fact together constitute an aggravated crime, just as much as grand larceny is an aggravated form of petit larceny. The aggravating fact is an element of the aggravated crime.**").

Ring, 536 U.S. at 605 (emphasis added).

Justice Scalia, in his concurrence in *Ring* (joined by Justice Thomas), states the principle even more firmly:

> **[A]ll facts essential to imposition of the level of punishment that the defendant receives--whether the statute calls them elements of the offense, sentencing factors, or Mary Jane--must be found by the jury beyond a reasonable doubt.**

Ring, 536 U.S. at 610 (emphasis added).

In the context of Florida's first degree murder statute, this Court has found essentially that the legislature has called the distinguishing elements of premeditated and felony murder "Mary Jane."

> Counsel for appellant contends that the evidence adduced by the State is legally insufficient to support a verdict and judgment of murder in the first degree because: (1) it fails to show premeditation; (2) or that the appellant shot Applebaum in the perpetration of the crime of robbery. The answer to the contention is that **the motive of the crime was robbery and evidence going to the point of premeditation is as a matter of law presumed.**

Leiby v. State, 50 So.2d 529, 531-32 (Fla. 1951) (emphasis added). In other words, by the *Leiby* reasoning, Florida has only a single crime, first degree premeditated murder, and the definition of felony murder merely creates a statutory presumption of premeditation. This analysis is antiquated and incorrect, for, as discussed above, premeditated murder and felony murder are unarguably separate offenses under the *Blockburger* test.

The fact that felony murder equates to premeditated murder only because the underlying felony creates a presumption runs afoul of the *Apprendi* Court's rejection of any presumption utilized to sustain a conviction.

> [In] *Mullaney v. Wilbur*, 421 U.S. 684(1975) . . . we invalidated a Maine statute that **presumed** that a defendant who acted with an intent to kill possessed the "malice aforethought" necessary to constitute the State's murder offense (and therefore, was subject to that crime's associated punishment of life imprisonment).

Apprendi, 530 U.S. at 484. The *Apprendi* Court distinguished the *Mullaney v. Wilbur*, 421 U.S. 684(1975), presumption from a New York statute which allowed an affirmative defense of extreme emotional distress:

> [T]he state law still required the State to prove every element of that State's offense of murder and its accompanying punishment. "No further facts are either **presumed or inferred** in order to constitute the crime." 432 U.S., at 205-206, 97 S.Ct. 2319. New York, unlike Maine, had not made malice aforethought, or any described *mens rea*, part of its statutory definition of second-degree murder; one could tell from the face of the statute that if one intended to cause the death of another person and did cause that death, one could be subject to sentence for a second-degree offense.

530 U.S. at 485 n.12.

Leiby makes it clear that the rationale for allowing a conviction for felony murder when only premeditated murder has been charged is because the underlying felony creates a presumption of premeditation, just as in *Mullaney*. A defendant charged with premeditated murder in a case where no premeditation can be shown is charged with the necessity of defending against the uncharged underlying felony to avoid operation of the presumption. One cannot tell from the face of the premeditated murder statute, section 782.04(1)(a)(1), that if one kills another during commission of one of certain felonies (which are not noticed in section 782.04(1)(a)(1)), a presumption of premeditation arises.

The evil is in allowing a charge of premeditated murder to open the door to a second charge of felony murder without any notice or specification. No presumption is required to substitute for premeditation when felony murder is overtly charged.

Historically, the originating rationale for allowing the state to pursue a felony murder theory when only premeditated murder is charged is found in *Sloan v. State*, 69 So. 871 (Fla. 1915). This Court allowed a general charge of premeditated murder to include felony murder. After noting that Arkansas was at the time the only state requiring felony murder be plead with specificity (well

before the Ohio decision in *State v. Ferguson* 195 N.E.2d 794 (Ohio 1964)), this Court looked to other states for the contrary view:

> In *State v. Meyers*, 99 Mo. 107, 12 S. W. 516, it is held that:
>
> > 'An indictment in the usual form, charging murder to have been done deliberately and premeditatedly, is sufficient under the statute to charge murder in the first degree, regardless of whether the murder was committed in the perpetration of a felony or otherwise. **The perpetration or attempt to perpetrate any of the felonies mentioned in the statute, * * * during which perpetration or attempt a homicide is committed, <u>stands in lieu of</u> and is the legal equivalent of that premeditation and deliberation which otherwise are the necessary attributes of murder in the first degree.** In such case it is only necessary to make the charge in the ordinary way for murder in the first degree, and show the facts in evidence, and, if they establish that the homicide was committed in the perpetration or attempt to perpetrate any of the felonies mentioned in the statute, this will be sufficient.'
>
> In the case of *State v. McGinnis*, 158 Mo. 105, 59 S. W. 83, it was held that:
>
> > 'It is proper, in a trial under an indictment which only charges murder, to instruct the jury that, if the homicide was committed in an attempt to commit robbery, the defendant was guilty of murder in the first degree. * * * And it is not error to give such instruction because the indictment tendered no such issue as robbery.'
>
> In the case of *State v. Johnson*, 72 Iowa, 393, 34 N. W. 177, it is held that:
>
> > 'A defendant may be found guilty of murder in the first degree upon the finding that he killed the decedent in the perpetration of robbery, without the allegation of that fact in the indictment.' State v. Foster, 136 Mo. 653, 38 S. W. 721; Commonwealth v. Flanagan, 7 Watts & S. (Pa.) 415; State v. Weems, 96 Iowa, 426, 65 N. W. 387: Cox v. People, 80 N. Y. 500; People v. Giblin, 115 N. Y.

> 196, 21 N. E. 1062, 4 L. R. A. 757; People v. Flanigan, 174 N. Y. 356, 66 N. E. 988; Reyes v. State, 10 Tex. App. 1; Roach v. State, 8 Tex. App. 478.
>
> See the authorities cited in the copious notes to the case of *People v. Sullivan*, 173 N. Y. 122, 65 N. E. 989, as reported in 63 L. R. A. 353, 93 Am. St. Rep. 582; Wharton on Homicide (3d Ed.) § 574, p. 875 et seq., and authorities cited.
>
> **We cannot agree with the Arkansas court upon this question, but are of the opinion that the better reasoning is on the side of the majority of the courts cited above that hold to the contrary. There was therefore no error in giving the charge complained of.**

Sloan v. State, 69 So. 871, 872 (Fla. 1915).

Reading this opinion, it is clear the *Sloan* Court conducted no independent analysis of what was fair and free from inequity – it merely adopted the majority position which, from reading the cases quoted in *Sloan*, was not based on any reasoned analysis of what was fair and free from inequity. Again, the rationale is ground on a presumption, as explained in the *State v. Meyers*, 99 Mo. 107, 12 S. W. 516 (1889), case, that the intent to commit the felony stands in lieu of premeditation.

When the requirement of fairness and equity is brought to bear on the regulation of homicide, it prevents "cumulative punishments" for a single death. *Gordon*. But this analysis fails to account for what is fair and equitable when the punishment is the ultimate - absolute life or death. Cumulative punishment is logically impossible in such a situation.

With the avoidance of cumulative punishment simply not a factor when the conviction is for capital homicide, the balancing which compelled rejection of the *Blockburger* distinction to prevent cumulative punishment is destroyed. This Court is free to look to other factors which affect the fairness and freedom from inequity of the process. In this light, it is clear that law grounded in the principles of *Ring* and *Apprendi* cannot abide a reading of Florida's homicide statute which relieves the state from proving an essential element of an offense, premeditation, whether it is relieved by presumption or by substitution.

Ring and *Apprendi* rejected attempts to avoid the requirement that a jury find all elements of an offense by labeling the aggravating elements as "sentencing factors." "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." 536 U.S. at 602 (emphasis added).

NECESSITY OF SPECIFIC VERDICT DISTINGUISHING PREMEDITATED AND FELONY MURDER

" \l 4

Mr. Jackson had a fundamental constitutional right under the 5th, 6th, 8th, and 14th Amendments of the United States Constitution to require the jury to reach a unanimous verdict as to whether he committed premeditated murder. He had the

additional fundamental right to not be convicted for felony murder, an offense which was not charged in the indictment. These violations of constitutional rights were clearly embodied and preserved in the record, and were not raised or addressed by appellate counsel. *Ring*, which brought *Apprendi* into the capital arena,[3] now compels relief.

Mr. Jackson was charged with a single count of first degree premeditated murder. The trial court instructed the jury on two theories, premeditated and felony murder. There was no indication of a unanimous verdict on either theory. The evidence for both theories was insubstantial. *Jackson v. Virginia*, 443 U.S. 307 (1979).

Mr. Jackson acknowledges the Supreme Court's pronouncement in *Schad v. Arizona*, 501 U.S. 624 (1991), which held a similar nonunanimous verdict did not violate the Constitution. Even though it is true the Supreme Court has approved some species of alternate *mens rea* requirements, this case is an extreme example

[3] The *Ring* Court noted that it brought the case up in part because there had been "uncertainty in the lower courts caused by the manifest tension between *Walton* and the reasoning of *Apprendi.* See, *e.g.*, ... *People v. Kaczmarek*, 318 Ill.App.3d 340, 351-352, 251 Ill.Dec. 953, 741 N.E.2d 1131, 1142 (2000) ("[W]hile it appears *Apprendi* extends greater constitutional protections to noncapital, rather than capital, defendants, the Court has endorsed this precise principle, and we are in no position to second-guess that decision here.")."

that is not covered by *Schad.*[4] As urged earlier in this brief, *Schad* was a plurality opinion which begrudgingly found that Arizona's practice of obtaining a general homicide verdict when premeditated and felony murder theories were pursued at trial. The Court found the Constitution did not forbid a general verdict on the facts of that case, but that specific verdicts were the more desirable practice. Three of the Justices who were on the plurality panel in *Schad* later dissented to the majority opinion in *Apprendi.* This certainly suggests that the decision in *Apprendi* is antithetical to the weak acquiescence to general homicide verdicts in *Schad*.

Moreover, it is difficult to square nonunanimous verdicts with the Supreme Court's requirement of jury findings for all elements of a crime in *Ring* and *Apprendi,* and even with the Court's long standing emphasis on proof beyond a reasonable doubt espoused in *In re Winship,* 397 U.S. 358 (1970).

Furthermore, the Arizona first degree murder statute addressed in *Schad* is different from Florida's statute. The Arizona statute merely sets forth circumstances which constitute "murder in the first degree". *Schad,* 501 U.S. 629,

[4] The Court in *Schad* specifically stated that the considerations in *Schad* do not "exhaust the universe of those potentially relevant to judgments about the legitimacy of defining certain facts as mere means to the commission of one offense", but that the "jury's options *in this case* did not fall beyond the constitutional bounds of fundamental fairness and rationality." 501 U.S. at 645 (emphasis added).

111 S.Ct. at 2495. There is no reference to "felony murder". The Florida statutes, on the other hand, specifically set out first degree premeditated murder in section 782.04(1)(a)(1) and specifically set out felony murder in section 782.04(1)(a)(2). In Florida, the statute provides for specific elements for each of these two types of murder. In other words, in Florida, as urged above, the statute creates separate crimes.

The criminal indictment filed in Mr. Jackson's case contained only one count, alleging premeditated murder. Mr. Jackson was not charged with any underlying felony. There is no basis to conclude that the jury unanimously found beyond a reasonable doubt that Mr. Jackson committed robbery during the killing. There is no proof that all twelve jurors found premeditation beyond a reasonable doubt. If less than twelve jurors found premeditation, then all twelve jurors would have had to find the commission of a robbery, an uncharged, unindicted offense. No one knows what these jurors found.

First and foremost, there is no basis for believing the jury was unanimously united beyond a reasonable doubt as to either theory. With *Ring* and *Apprendi* now requiring the jury find every element of the crime of conviction, a general verdict of first degree murder when the state seeks conviction for two different kinds fo first degree murder cannot meet the requirement that the process be fair and free of inequity. There was no charge or verdict for the alleged

robbery, so there is no way to ascertain whether the jury unanimously agreed there had been a felony murder. Similarly, there is no indication the jury found premeditation. Further, the robbery which would serve as the substitute for premeditation was never alleged in the indictment, impermissibly allowing the state to convict Mr. Jackson for a crime based on an uncharged element.

If ever a case cried out for fundamental fairness and equity, surely this is one of the most compelling situations that can exist in the capital homicide arena. This unjust, unfair, inequitable situation is apparent to at least one Florida appellate judge, even without the clear light of *Ring* and *Apprendi* illuminating yet one more embarrassing injustice in Florida's capital homicide house of cards.

> HARRIS, J., concurring specially:
> I concur because this case appears to be controlled by the plurality decision in *Schad v. Arizona*, 501 U.S. 624, 637, 111 S.Ct. 2491, 115 L.Ed.2d 555 (1991). However, I do so with some reservation and **suggest that our supreme court further consider the issue.** Admittedly **section 782.04, Florida Statutes, *may* establish first degree murder as a single crime which can be established if the jury finds that the unlawful killing occurs either as a result of premeditation or during the commission of a felony**, as did the Arizona statute at issue in *Schad*. And the *Schad* plurality unquestionably held that even though the jury must unanimously agree that first degree murder was committed, it is free to mix and match the bases justifying its determination. [FN1]
>
> FN1. Unfortunately, my suggestion to the contrary in a concurring/dissenting opinion in *State v. Reardon*, 763 So.2d 418 (Fla. 5th DCA 2000), was made in ignorance of *Schad* and **without contemplating that the Supreme Court would actually approve the mix and match concept when life is at stake.**

The reason given by the *Schad* court's plurality ruling was that since Arizona considered its first degree murder statute as creating a single offense subject to alternative proof, the United States Supreme Court should not second guess that decision. **But what if Florida considers premeditated murder and felony murder as separate and distinct crimes each constituting "first degree murder"? The further review I recommend relates to the conflict between reading the statute establishing the crime as creating a single offense subject to "either/or" proof and the jury instruction relating to first degree murder which sets forth "first degree premeditated murder" and "first degree felony murder" and establishes separate "elements" for each.**

In interpreting our first degree murder law, the Florida Supreme Court adopted a jury instruction which informs the jury that there are two ways in which the jury may convict for first degree murder, premeditated murder and felony murder. The instruction then informs the jury that to convict for "First Degree Premeditated Murder" *it must find* ***the "element" of premeditation***. The instruction further informs the jury that to convict for "First Degree Felony Murder" *it must find* ***the "element" that the death occurred as a consequence of the commission or attempted commission of a felony***. In our case, the jury responded to an interrogatory verdict with the following finding: "We the jury unanimously found the defendant guilty of murder in the first degree but could not reach a unanimous agreement as to which, premeditated or felony murder, was proven." No specific vote was given and it is therefore possible that not even a majority of the jurors found either theory of guilt to have been proved. Nowhere in the instruction is the jury advised that even though it fails to find either first degree premeditated murder or first degree felony murder, a finding of guilt to a generic first degree murder offense may nevertheless result.

This dichotomy between the statute if read as creating a single crime and the jury instruction takes on additional significance when you consider that portion of the *Schad* plurality which states:

> We do not, of course, suggest that jury instructions requiring increased verdict specificity are not desirable, and in fact the Supreme Court of Arizona has itself recognized that separate verdict forms are useful in cases

> submitted to a jury on alternative theories of premeditated and felony murder. [FN2]
>
> FN2. In *State v. Smith*, 160 Ariz. 507, 774 P.2d 811, 817 (1989), the court held:
> Thus, as a matter of sound administrative justice and efficiency in processing murder cases in the future, we urge trial courts, when a case is submitted to the jury on alternative theories of premeditated and felony murder, to give alternate forms of verdict so the jury may clearly indicate whether neither, one, or both theories apply. Why separate verdict forms to answer these questions unless it makes a difference? In our case, the jury was asked these exact questions and answered that neither theory applied.

> **It is troubling that in a situation in which the death penalty might be applicable that even though the jury determines that neither First Degree Premeditated Murder nor First Degree Felony murder was proved, the defendant can nevertheless be found guilty of the crime of First Degree Hybrid Murder, a possibility not included within the jury instructions, merely because all the jurors agreed that the killing occurred either by premeditation or during the commission of a felony.**
>
> **I suggest that the current jury instruction may suggest that, like Arizona, Florida wishes to require specificity when during a capital murder prosecution the jury is called upon to decide whether a killing occurred based on premeditation or during the commission of a felony. Obviously if mix and match proof is acceptable then the questions should not even be asked because specificity is irrelevant.**

St. Nattis v. State, 827 So.2d 320, 320-21 (Fla. 5th DCA 2002) (Harris, J., concurring specially) (bold and underlined emphasis added, italics in original).

Even without looking to the compulsion of *Ring* and *Apprendi*, Judge Harris recognized Florida's first degree murder scheme is fundamentally flawed. The

ancient arbitrary dogma of *Sloan v. State*, 69 So. 871 (Fla. 1915), and its progeny befouls Florida's capital homicide law, committing defendants to death or life without parole without requiring a jury to find they committed any particular offense by unanimously finding all of the elements of at least one of Florida's capital homicide statutes.

FLORIDA'S DEATH SENTENCING STATUTE IS UNCONSTITUTIONAL UNDER *RING V. ARIZONA*, 536 U.S. 584 (2002).

The appellant recognizes the weight of the case law clearly is against the remainder of the argument in this brief. The arguments are made to preserve the issues.

In *Ring v. Arizona,* 536 U.S. 584 (2002), the Court held that the Arizona capital sentencing statute violates the Sixth Amendment right to a jury trial in capital prosecutions, receding from *Walton v. Arizona,* 497 U.S. 639 (1990). A defendant may not be exposed to a penalty *exceeding* the maximum he would receive if punished according to the facts reflected in the jury verdict alone. *Apprendi v. New Jersey*, 520 U.S. 466 (2000). *Ring* extended this principle to capital cases. The Court noted that 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 noncapital defendant's sentence by a term of years, as was the case in *Apprendi,* but not the fact-finding necessary to put him to death.

Florida's Death Penalty Statutory Scheme Violates the Federal Constitution.

In Florida, death is not the maximum penalty for a conviction of first degree murder. Florida Statute 775.082 (1984) provided:

> A person who has been convicted of a capital felony shall be punished by life imprisonment and shall be required to serve no less than 25 years before becoming eligible for parole unless 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, and in the latter event such person shall be punished by death.

The statutory scheme does not permit a sentence greater than life predicated on the jury verdict alone. A penalty phase must then be conducted under 921.141. While the jury gives a recommendation, it is the judge who makes the findings and imposes the sentence.

In *Walton v. Arizona*, 497 U.S. 639 (1990), the United States Supreme Court recognized that for purposes of the Sixth Amendment, Florida's death penalty statute is indistinguishable from the statute invalidated in *Ring*:

> We repeatedly have rejected constitutional challenges to Florida's death sentencing scheme, which provides for sentencing by the judge, not the jury. *Hildwin v. Florida,* 490 U.S. 638, 109 S.Ct. 2055, 104 L.Ed.2d 728 (1989) (*per curiam*); *Spaziano v. Florida,* 468 U.S. 447, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984); *Proffitt v. Florida,* 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976). In *Hildwin,* for example, we stated that "[t]his case presents us once again with the question whether the Sixth Amendment requires a jury to specify the aggravating factors that permit the imposition of capital punishment in Florida," 490 U.S., at 638, 109 S.Ct., at 2056, and we ultimately concluded that "the Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury." *Id.,* at 640-641, 109 S.Ct., at 2057. The distinctions Walton attempts to draw between the Florida and Arizona statutory schemes are not persuasive. It is true that in Florida the jury recommends a sentence, but it does not make specific factual findings with regard to the existence of mitigating or aggravating

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

Id. at 647-48. The Court reiterated this Sixth Amendment link between the Florida and Arizona capital sentencing schemes in *Ring*:

> In *Walton v. Arizona*, 497 U.S. 639, 110 S.Ct. 3047, 111 L.Ed.2d 511 (1990), we upheld Arizona's scheme against a charge that it violated the Sixth Amendment. The Court had previously denied a Sixth Amendment challenge to Florida's capital sentencing system, in which the jury recommends a sentence but makes no explicit findings on aggravating circumstances; we so ruled, *Walton* noted, on the ground that "the Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury." *Id.*, at 648, 110 S.Ct. 3047 (*quoting Hildwin v. Florida*, 490 U.S. 638, 640-641, 109 S.Ct. 2055, 104 L.Ed.2d 728 (1989) *(per curiam)*). *Walton* found unavailing the attempts by the defendant-petitioner in that case to distinguish Florida's capital sentencing system from Arizona's. In neither State, according to *Walton*, were the aggravating factors "elements of the offense"; in both States, they ranked as "sentencing considerations" guiding the choice between life and death. 497 U.S., at 648, 110 S.Ct. 3047 (internal quotation marks omitted).

Ring v. Arizona, 536 U.S. 584, 598.

The parallelism between the Arizona statute and the Florida statute was the major *Walton* theme:

> We repeatedly have rejected constitutional challenges to Florida's death-sentencing scheme, which provides for sentencing by the judge, not the jury. *Hildwin v. Florida*, 490 U.S. 638 (1989 (per curium); *Spaziano v. Florida*, 468 U.S. 447 (1984); *Proffitt v. Florida*, 428 U.S. 242 (1976). In *Hildwin*, for example, we stated that "[t]his case presents us once again with the question whether the Sixth Amendment requires a jury to answer the question whether the Sixth

> Amendment requires a jury to specify the aggravating factors that permit the imposition of capital punishment in Florida," 490 U.S. at 638, and we ultimately concluded that 'the Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury."

Walton v. Arizona, 497 U.S. at 640-641.

> The distinctions Walton attempts to draw between the Florida and the Arizona schemes are not persuasive. It is true that in Florida the jury recommends a sentence, but it does not make factual findings with regard to the existence of mitigating and aggravating circumstances and its recommendation is not binding on the trial judge.

497 U.S. at 647. In *Ring*, the State and its *amici* agreed that overruling *Walton* necessarily meant Florida's statute falls:

> "*Walton* was not an aberration. *Proffitt*, *Spaziano*, *Cabana*, *Poland* and *Clemons* each rejected Ring's basic premise. *Hildwin v. Florida*, 490 U.S. 638 (1989), made a similar finding, holding that although Florida state law required that a jury return an advisory sentencing verdict, the Sixth Amendment did not require the jury to specify the aggravating factors permitting imposition of a death sentence."

Brief of Respondent in *Ring* at 31.

> MS. NAPOLITANO: . . . it's not just the cases you listed, Your Honor, that I think would be implicitly overruled, but let me give you a list: Proffitt v. Florida, Spaziano, Cabana v. Bullock, which does allow the -
>
> QUESTION: But do you think it's perfectly clear - you cite a couple of Florida cases - that if the Florida advisory jury made the findings of fact that would be - make them - the defendants eligible for the death penalty, that that case would be covered by the decision in this case?
>
> MS. NAPOLITANO: Yes . . .

Tr. of Oral Arg. at 36.

> "If defendant's argument is accepted, it means a new sentencing trial for every capital case not yet final in Arizona, Alabama, Colorado, Delaware, Florida, Idaho, Indiana, Montana, and Nebraska . . . ."

Brief Amicus Curiae of Criminal Justice Legal Foundation at 21-22.

Application of *Ring* to Florida's Sentencing Scheme

This Court has previously held that, "[b]ecause *Apprendi* did not overrule *Walton*, the basic scheme in Florida is not overruled either." *Mills v. Moore*, 786 So.2d 532, 537 (Fla. 2001). *Ring* overruled *Walton* and the basic principle of *Hildwin v. Florida*, 490 U.S. 638 (1989) (*per curiam*).

> In *Walton v. Arizona*, 497 U.S. 639, 110 S.Ct. 3047, 111 L.Ed.2d 511 (1990), this Court held that Arizona's sentencing scheme was compatible with the Sixth Amendment because the additional facts found by the judge qualified as sentencing considerations, not as "element[s] of the offense of capital murder." *Id.*, at 649, 110 S.Ct. 3047. Ten years later, however, we decided *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), which held that the Sixth Amendment does not permit a defendant to be "expose[d] ... to a penalty *exceeding* the maximum he would receive if punished according to the facts reflected in the jury verdict alone." *Id.*, at 483, 120 S.Ct. 2348. This prescription governs, *Apprendi* determined, even if the State characterizes the additional findings made by the judge as "sentencing factor[s]." *Id.*, at 492, 120 S.Ct. 2348.
>
> ***Apprendi*'s reasoning is irreconcilable with *Walton*'s holding in this regard, and today we overrule *Walton* in relevant part.**

Ring,536 U.S. at 588-89.

Ring undermines the reasoning of this Court's decision in *Mills* by recognizing: (a) that *Apprendi* applies to capital sentencing schemes;[5] (b) that States may not avoid the Sixth Amendment requirements of *Apprendi* by simply "specifying] 'death or life imprisonment' as the only sentencing options,"[6] *Ring*, 536 U.S. at 603-04; and ©) that the relevant and dispositive question is whether under state law death is authorized by a guilty verdict standing alone.

Under Arizona law, the judge at that stage must determine the existence or nonexistence of statutorily enumerated "aggravating circumstances" and any "mitigating circumstances." The death sentence may be imposed only if the judge finds at least one aggravating circumstance and no mitigating circumstances sufficiently substantial to call for leniency. Ariz.Rev.Stat. Ann. § 13- 703©) (West 2001). Under Florida law, the court conducts a separate sentencing proceeding after which the jury renders an advisory verdict. Section 921.141, Fla. Stat. The ultimate decision to impose a sentence of death, however, is made by the court after the judge finds at least one aggravating circumstance. The jury recommends a

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[5] In *Mills*, This Court said that "the plain language of *Apprendi* indicates that the case is not intended to apply to capital [sentencing] schemes." *Mills*, 786 So.2d at 537. Such statements appear at least four times in *Mills.*

[6] *Mills* reasoned that because first-degree murder is a "capital felony," and the dictionary defines such a felony as "punishable by death," the finding of an aggravating circumstance did not expose the petitioner punishment in excess of the statutory maximum. *Mills*, 786 So.2d at 538.

sentence but makes no explicit findings on aggravating circumstances. Section 921.141(3) provides that:

> (3) Findings in support of sentence of death.--Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:
> (a) That sufficient aggravating circumstances exist as enumerated in subsection (5), and
> (b) That there are insufficient mitigating circumstances to outweigh the aggravating circumstances.

Thus, section 921.141(3) requires that the trial judge, not the jury, make two separate findings of fact before a death sentence can be imposed: the judge must find as a fact that (1) "sufficient aggravating circumstances exist" and (2) "there are insufficient mitigating circumstances to outweigh the aggravating circumstances." A defendant thus may be sentenced to death only if the sentencing proceeding "results in findings by the court that such person shall be punished by death." Section 775.082(1).

The statute is explicit that, without these required findings of fact by the trial judge, the defendant must be sentenced to life imprisonment: "If the court does not make the findings requiring the death sentence within 30 days after the rendition of the judgment and sentence, the court shall impose [a] sentence of life imprisonment."

This Court has held that the trial court must "independently weigh the evidence in aggravation and mitigation," and that "[u]nder no combination of circumstances can th[e] [jury's] recommendation usurp the judge's role by limiting his discretion." *Eutzy v. State,* 458 So.2d 755, 759 (Fla.1984), *cert. denied*, 471 U.S. 1045 (1985).

In one case, this Court vacated a sentence because the trial court had given "undue weight to the jury's recommendation of death and did not make an *independent* judgment of whether or not the death penalty should be imposed." *Ross v. State,* 386 So.2d 1191, 1197 (Fla. 1980) (emphasis added). Further, for purposes of sentencing, the jury's guilt-phase findings cannot be conclusive as to the existence of any aggravating factor, and the judge is required by the statute to make separate findings at sentencing to support any such factor.

Because the Florida death penalty statutory scheme thus requires fact-finding by the trial judge before a death sentence may be imposed, it is unconstitutional under the holding and rationale of *Ring.* Just as with the Arizona statute, the Florida statute is directly contrary to the rule enunciated in *Ring* and *Apprendi* that "[i]f a state makes an increase in a defendant's authorized punishment contingent on a finding of a fact, that fact . . . . must be found by a jury beyond a reasonable doubt." Just as with the Arizona statute, the Florida statute is explicit that a defendant "cannot receive a death sentence unless a judge makes the

factual determination that a statutory aggravating circumstance exists. Without that critical finding, the maximum sentence to which the defendant is exposed is life imprisonment, and not the death penalty." Because the judge – and not the jury – must make specific findings of fact before a death sentence under Florida law, *Ring* holds squarely that the statute is unconstitutional under the Sixth and Fourteenth Amendments.

The Role of the Jury in Florida's Capital Sentencing Scheme Neither Satisfies the Sixth Amendment Nor Renders Harmless the Failure to Satisfy *Apprendi* and *Ring*.

It is true that the Florida statutory scheme, unlike that of Arizona, provides for an advisory jury verdict, but that has no bearing on the analysis set out above. Such a conclusion would turn a blind eye toward the US Supreme Court cases which previously upheld both schemes by pointing out their similarities. *E.g.* *Walton*. The trial judge is directed by Section 921.141(3) to make the fact findings necessary to support a death sentence "notwithstanding the recommendation of the majority of the jury." And unless the judge makes the "finding requiring the death sentence," the defendant must be sentenced to life.

The jury's role thus does not alter the essential point – the controlling point under *Ring* – that the Florida statute is unconstitutional because a death sentence cannot be imposed without fact findings by the trial judge. *Ring* requires that

"[a]ll the facts which must exist in order to subject the defendant to a legally prescribed punishment must be found by the jury." There is no statutory authority under Florida law that would allow the imposition of a death sentence based on the jury's findings of fact. To the contrary, Florida law provides that the jury's role is merely advisory and that the trial court must undertake the requisite fact-finding. It would be a violation of the statute to base a death sentence upon the jury's verdict when 921.141(3) explicitly requires the court to "set forth its findings . . . .as to the facts" supporting a death sentence.

The more recent case of *Blakely v. Washington*, 542 US 296 (2004), clarifies the powerlessness of the trial court to impose any sentence not grounded on facts found by a jury. The state in *Blakely* argued that the judge had not sentenced outside the maximum allowed because felonies of the level involved carried a maximum sentence of ten years. However, Washington's sentencing scheme established a "standard" sentence maximum of 53 months, but provided for judicial upward departure if the judge found aggravating factors beyond the elements of the offense. The Supreme Court looked beyond the ten-year maximum and instead found the controlling maximum to be the "standard" 53 months. The Court held:

> Our precedents make clear, however, 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.*** **See *Ring, supra,* at 602, 122 S.Ct. 2428**

> **(" 'the maximum he would receive if punished according to the facts reflected in the jury verdict alone' "** (quoting *Apprendi*, *supra,* at 483, 120 S.Ct. 2348)); *Harris v. United States*, 536 U.S. 545, 563, 122 S.Ct. 2406, 153 L.Ed.2d 524 (2002) (plurality opinion) (same); cf. *Apprendi, supra*, at 488, 120 S.Ct. 2348 (facts admitted by the defendant). In other words, the relevant "statutory maximum" is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings. **When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts "which the law makes essential to the punishment," Bishop, *supra,* § 87, at 55, and the judge exceeds his proper authority.**

Blakely, slip op. at 4 (emphasis added).

Florida Juries Do Not Make Findings of Fact

This Court has rejected the idea that a defendant convicted of first degree murder has the right "to have the existence and validity of aggravating circumstances determined as they were placed before his jury." *Engle v. State*, 438 So.2d 803, 813 (Fla. 1983), *explained in Davis v. State*, 703 So.2d 1055, 1061 (Fla. 1997). The statute specifically requires the judge to "set forth . . . findings upon which the sentence of death is based as to the *facts*," but asks the jury generally to "render an advisory sentence . . . based upon the following *matters*" referring to the sufficiency of the aggravating and mitigating circumstances. Section 921.141(2) & (3) (emphasis added). Because Florida law does not require that any number of jurors agree that the State has proven the existence of a given aggravating circumstance before it may be deemed "found," it is impossible to say

that "the jury" found proof beyond a reasonable doubt of a particular aggravating circumstance. Thus, "the sentencing order is 'a statutorily required personal evaluation by the trial judge of the aggravating and mitigating factors' *that forms the basis of a sentence of life or death*." *Morton v. State*, 789 So.2d 324, 333 (Fla. 2001) (quoting *Patton v. State*, 784 So.2d 380 (Fla. 2000)).

As the Supreme Court said in *Walton*, "[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*, 497 U.S. at 648. This Court has made the point even more strongly by repeatedly emphasizing that the trial judge's findings must be made independently of the jury's recommendation. *See Grossman v. State*, 525 So.2d 833, 840 (Fla. 1988) (collecting cases). Because the judge must find that "sufficient aggravating circumstances exist" "notwithstanding the recommendation of a majority of the jury," Fla. Stat. § 921.141(3), she may consider and rely upon evidence not submitted to the jury. *Porter v. State*, 400 So.2d 5 (Fla. 1981); *Davis v. State*, 703 So.2d 1055, 1061 (Fla. 1997). The judge is also permitted to consider and rely upon aggravating circumstances that were not submitted to the jury. *Davis*, 703 So.2d at 1061, citing *Hoffman v. State*, 474 So.2d 1178 (Fla. 1985) (court's finding of "heinous, atrocious, or cruel" aggravating circumstance proper though jury was not instructed on it); *Fitzpatrick v. State*, 437 So.2d 1072, 1078 (Fla. 1983) (finding of previous conviction of

violent felony was proper even though jury was not instructed on it); *Engle*, *supra*, 438 So.2d at 813.

Because the jury's role is merely advisory and contains no findings upon which to judge the proportionality of the sentence, this Court has recognized that its review of a death sentence is based and dependent upon the judge's written findings. *Morton*, 789 So.2d at 333 ("The sentencing order is the foundation for this Court's proportionality review, which may ultimately determine if a person lives or dies"); *Grossman*, 525 So.2d at 839.

Florida Juries Are Not Required to Render a Verdict on Elements of Capital Murder

Although "[Florida's] enumerated aggravating factors operate as 'the functional equivalent of an element of a greater offense,'" and therefore must be found by a jury like any other element of an offense, *Ring*, slip op. at 23 (quoting *Apprendi*, 530 U.S. at 494), Florida law does not require the jury to reach a verdict on any of the factual determinations required before a death sentence could be imposed. Section 921.141(2) does not call for a jury verdict, but rather an "advisory sentence." This Court has made it clear that "'the jury's sentencing recommendation in a capital case is *only advisory*. The trial court is to conduct its own weighing of the aggravating and mitigating circumstances . . . .'" *Combs*, 525 So.2d at 858 (quoting *Spaziano v. Florida*, 468 U.S. 447, 451) (emphasis original in *Combs*). "The trial judge . . . is not bound by the jury's recommendation, and is

given final authority to determine the appropriate sentence." *Engle*, 438 So.2d at 813. It is reversible error for a trial judge to consider herself bound to follow a jury's recommendation and thus "not make an independent whether the death sentence should be imposed." *Ross v. State*, 386 So.2d 1191, 1198 (Fla. 1980).

Florida law only requires the judge to *consider* "the recommendation of a majority of the jury." Fla. Stat. § 921.141(3). In contrast, "[n]o verdict may be rendered *unless* all of the trial jurors concur in it." Fla. R. Crim. Pro. 3.440. Neither the sentencing statute, This Court's cases, nor the jury instructions in Jones' case required that all jurors concur in finding any particular aggravating circumstance, or "[w]hether sufficient aggravating circumstances exist," or "[w]hether sufficient aggravating circumstances exist which outweigh the aggravating circumstances." Fla. Stat. § 921.141(2).

Because Florida law does not require any two, much less twelve, jurors to agree that the government has proved an aggravating circumstance beyond a reasonable doubt, or to agree on the same aggravating circumstances when advising that "sufficient aggravating circumstances exist" to recommend a death sentence, there is no way to say that "the jury" rendered a verdict as to an aggravating circumstance or the sufficiency of them. As Justice Shaw observed in *Combs*, Florida law leaves these matters to speculation. *Combs*, 525 So.2d at 859 (Shaw, J., concurring).

The Advisory Verdict Is Not Based on Proof Beyond a Reasonable Doubt

"If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt." *Ring*, 536 U.S. at 602; *Blakely*. One of the elements that had to be established for Mr. Jackson to be sentenced to death was that "sufficient aggravating circumstances exist" to call for a death sentence. Section 921.141(3).[7] The jury was not instructed that it had to find this element proved beyond a reasonable doubt. In fact, it was not instructed on *any* standard by which to make this essential determination. Although the jury was told that individual jurors could consider only those aggravating circumstances that had been proved beyond a reasonable doubt, it was not required to find beyond a reasonable doubt "whether sufficient aggravating circumstances exist to justify the imposition of the death penalty." *Id.*

[7] It is important to note that although Florida law requires the judge to find that sufficient aggravating circumstances exist to form the basis for a death sentence, § 921.141(3), it only asks the jury to say whether sufficient aggravating circumstances exist to "recommend" a death sentence. § 921.141(2).

A Unanimous Twelve Member Jury Verdict Is Required in Capital Cases under United States Constitutional Common Law.[8] Florida's Capital Sentencing Statute Is Therefore Unconstitutional on its Face and as Applied.

"[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) (cited in *Apprendi* (by its terms a noncapital case)).

It would be impermissible and unconstitutional to rely on the jury's advisory sentence as the basis for the fact-findings required for a death sentence because the statute requires only a majority vote of the jury in support of that advisory sentence. In *Harris v. United States*, 536 U.S. 545 (2002), rendered on

[8]In *Cabberiza v. Moore*, 217 F.3d 1329 (C.A.11 Fla.,2000) the court noted that the United States Supreme Court "has not had occasion to decide how many jurors, and what degree of unanimity, the Sixth and Fourteenth Amendments require in capital cases." *Id*. n.15. *Duncan v. Louisiana,* 391 U.S. 145 (1968), and *Apodaca v. Oregon,* 406 U.S. 404 (1972) were noncapital cases. Both cases cite in their first footnotes the applicable state constitutional provisions, which require twelve person unanimous juries in capital cases. The Florida constitution likewise requires twelve person unanimous juries in capital cases.

the same day as *Ring*, the Supreme Court held that under the *Apprendi* test "those facts setting the outer limits of a sentence, and of the judicial power to impose it, are the elements of the crime for the purposes of the constitutional analysis." And in *Ring*, the Court held that the aggravating factors enumerated under Arizona law operated as "the functional equivalent of an element of a greater offense" and thus had to be found by a jury. In other words, pursuant to the reasoning set forth in *Apprendi*, *Jones*, and *Ring*, aggravating factors are equivalent to elements of the capital crime itself and must be treated as such.

In *Williams v. Florida*, 399 U.S. 78, at 103 (1970), the United States Supreme Court noted that: "In capital cases, for example, it appears that no state provides for less than 12 jurors–a fact that suggests implicit recognition of the value of the larger body as a means of legitimizing society's decision to impose the death penalty." Each of the thirty-eight states that use the death penalty require unanimous twelve person jury convictions.[9] In its 1979 decision reversing

[9]Ala.R.Cr.P 18.1; Ariz. Const. Art 2, s.23; Ark. Code Ann. §16-32-202; Cal. Const. Art. 1, §16; Colo. Const. Art 2, §23; Conn. St. 54-82(c), Conn.R.Super.Ct.C.R. §42-29; Del. Const. Art. 1, §4; Fla. Stat. Ann. § 913.10(1); Ga. Const. Art. 1, §1, P XI; Idaho. Const. Art. 1, §7; Ill. Const. Art. 1, §13; Ind. Const. Art. 1, §13; Kan. Const. Bill of Rights §5; Ky. Const. §7, Admin.Pro.Ct.Jus. A.P. 11 §27; La. C.Cr.P. Art. 782; Md. Const. Declaration Of Rights, Art. 5 ; Miss. Const. Art. 3, §31; Mo. Const. Art. 1, §22a; Mont. Const. Art. 2, §26; Neb. Rev. St. Const. Art. 1, §6; Nev. Rev. Stat. Const. Art. 1, §3; N.H. Const. PH, Art. 16; N.J. Stat. Ann. Const. Art. 1, p. 9; N.M. Const. Art. 1 §12; N.Y. Const. Art. 1, §2; N.C. Gen. Stat. Ann. §15A-1201; Ohio Const. Art. 1, §5; Okla. Const. Art. 2, §19; Or. Const. Art. 1, §11, Or. Rev. Stat. §136.210; Pa. Stat.

a non-unanimous six person jury verdict in a non-capital case, the United States Supreme Court held that "We think this near-uniform judgement of the Nation provides a useful guide in delimiting the line between those jury practices that are constitutionally permissible and those that are not." *Burch v. Louisiana*, 441 U.S. 130, 138 (1979). The federal government requires unanimous twelve person jury verdicts. "[T]he jury's decision upon both guilt and whether the punishment of death should be imposed must be unanimous. This construction is more consonant with the general humanitarian purpose of the Anglo-American jury system." *Andres v. United States*, 333 U.S. 740, 749 (1948). See generally *Richard A. Primus, When Democracy Is Not Self-Government: Toward a Defense of The Unanimity Rule For Criminal Juries*, 18 Cardozo L. Rev. 1417 (1997).

Juror Unanimity is Required by Florida Constitutional Law

Ring held that the existence of at least one statutory aggravating circumstance must be proven to a jury beyond a reasonable doubt. In essence, the aggravating circumstance is an essential element of a new crime that might be called "aggravated" or "death-eligible" first degree murder. The death recommendation in this case was not unanimous.

Ann. 42 Pa.C.S.A. §5104; S.C. Const. Art. V, §22; S.D. ST §23A-267; Tenn. Const. Art.1, §6; Tex. Const. Art.1, §5; Utah Const. Art. 1 §10; Va. Const. Art. 1, §8; Wash. Const. Art. 1, §21; Wyo. Const. Art. 1, §9.

Florida requires that verdicts be unanimous.[10] Although Florida's constitutional guarantee of a jury trial (Art. I, §§ 16, 22, Fla. Const.) has never been interpreted to require a unanimous jury verdict, Fla.R.Crim.P. 3.440 memorializes the long-standing practice in Florida of requiring a unanimous verdict: "[n]o [jury] verdict may be rendered unless all of the trial jurors concur in it." No statute or rule of procedure in Florida has ever abolished this unanimity requirement for any criminal jury trial in this state. *See In re Florida Rules of Criminal Procedure,* 272 So.2d 65, 66-69 (Fla.1972) (Roberts, J., dissenting). It is therefore settled that "[i]n this state, the verdict of the jury must be unanimous" and that any interference with this right denies the defendant a fair trial. *Jones v. State,* 92 So.2d 261 (Fla.1956).

The Harmless Error Doctrine Cannot be Applied to Deny Relief

As Justice Scalia explained in *Sullivan v. Louisiana*, 508 U.S. 275 (1993): "[T]he jury verdict required by the Sixth Amendment is a jury verdict of guilty beyond a reasonable doubt." *Sullivan,* 508 U.S. at 278.

> Where the jury has not been instructed on the reasonable doubt standard, there has been no jury verdict within the meaning of the

[10]At least absent a waiver initiated by the defendant. *Flanning v. State,* 597 So.2d 864 (Fla. 3d DCA 1992). See *Nobles v. State,* 786 So.2d 56, Fla.App. 4 Dist., 2001, certifying question. *Flanning* is flatly inconsistent with *Jones.*

> Sixth Amendment, [and] the entire premise of *Chapman*[11] review is simply absent. There being no jury verdict of guilty-beyond-a-reasonable-doubt, the question whether the *same* verdict of guilty-beyond-a-reasonable-doubt would been rendered absent the constitutional error is utterly meaningless. There is no *object*, so to speak, upon which harmless-error scrutiny can operate.

Sullivan, 508 U.S. at 280. The same reasoning applies to lack of unanimity, failure to instruct the jury properly, and importantly, the lack of an actual verdict. Viewed differently, in a case such as this where the error is not requiring a jury verdict on the essential elements of aggravated capital murder, but delegating that responsibility to a court, "no matter how inescapable the findings to support the verdict might be," for a court "to hypothesize a guilty verdict that was never rendered . . . would violate the jury-trial right." *Id.* at 279. The review would perpetuate the error, not cure it.

In *State v. Overfelt*, 457 So.2d 1385 (1984), this Court held "that before a trial court may enhance a defendant's sentence or apply the mandatory minimum sentence for use of a firearm, the jury must make a finding that the defendant committed the crime while using a firearm either by finding him guilty of a crime which involves a firearm or by answering a specific question of a special verdict form so indicating.. . . To allow a judge to find that an accused actually possessed a firearm when committing a felony in order to apply the enhancement or

[11] *Chapman v. California*, 386 U.S. 18 (1967).

mandatory sentencing provisions of section 775.087 would be an invasion of the jury''s historical function. . . "

In *State v. Hargrove*, 694 So.2d 729 (1997), Justice Harding, writing for the majority, answered the following certified question:

> When a defendant charged with committing a crime with the use of a firearm does not contest its use and instead defends on the ground that he was insane when he used the firearm, and the record is clear beyond any doubt that defendant did actually use the firearm, may the sentencing judge impose the mandatory minimum sentence for use of a firearm without a specific finding of that fact by the jury?

The court held that, despite clear and uncontested evidence that Hargrove used a firearm, his sentence could not be enhanced absent a jury verdict which specifically referred to the use of a firearm by special verdict form, interrogatory, or by reference "to the information where the information contained a charge of a crime committed with the use of a firearm." 694 So.2d at 731. *See also Tucker v. State*, 726 So.2d 768 (Fla.1999); *State v. Tripp*, 642 So.2d 728 (Fla.1994). In *State v. Estevez*, 753 So.2d 1 (Fla.1999), this Court held that the jury must expressly determine amount of cocaine involved before relevant mandatory minimum sentence under cocaine trafficking statute can be imposed, even in cases where evidence is uncontroverted.[12] In none of these cases does the court employ a harmless error analysis. Instead, the court's concern was that such judicial fact-

[12]In *Estevez*, the court relied on *Jones v. United States*, 526 U.S. 227 (1999), one of *Ring*'s progenitors.

finding invaded the province of the jury. "Even where the use of a firearm is uncontested, the overriding concern of *Overfelt* still applies: the jury is the fact finder, and use of a firearm is a finding of fact." *Hargrove* at 730-31. Such fact-finding by the judge "would be an invasion of the jury's historical function". *Overfelt*, 1387.

Mr. Jackson's Death Sentence Violates the State and Federal Constitutions Because the Elements of the Offense Necessary to Establish Capital Murder Were Not Charged in the Indictment

Jones v. United States, 526 U.S. 227 (1999), held that "under the Due Process Clause of the Fifth Amendment and the notice and jury guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." *Jones*, at 243, n.6. *Apprendi v. New Jersey*, 530 U.S. 466 (2000), held that the Fourteenth Amendment affords citizens the same protections when they are prosecuted under state law. *Apprendi*, 530 U.S. at 475-476.[13] *Ring* held that a death penalty statute's "aggravating factors operate as 'the functional equivalent of an element or a greater offense.'" *Ring*, quoting *Apprendi* at 494, n. 19. In *Jones*, the Supreme Court noted that "[m]uch turns on the determination that a fact is an element of an offense, rather than a

[13] The grand jury clause of the Fifth Amendment has not been held to apply to the States. *Apprendi*, 530 U.S. at 477, n.3.

sentencing consideration," because "elements must be charged in the indictment." *Jones,* 526 U.S. at 232.

Like the Fifth Amendment to the United States Constitution, Article I, section 15 of the Florida Constitution provides that "No person shall be tried for a capital crime without presentment or indictment by a grand jury." Florida law clearly requires every "element of the offense" to be alleged in the information or indictment. In *State v. Dye,* 346 So. 2d 538, 541 (Fla. 1977), This Court said "[a]n information must allege each of the essential elements of a crime to be valid. No essential element should be left to inference." In *State v. Gray,* 435 So. 2d 816, 818 (Fla. 1983), this Court said "[w]here an indictment or information wholly omits to allege one or more of the essential elements of the crime, it fails to charge a crime under the laws of the state." An indictment in violation of this rule cannot support a conviction; the conviction can be attacked at any stage, including "by habeas corpus." *Gray,* 435 So.2d at 818. Finally, in *Chicone v. State,* 684 So. 2d 736, 744 (Fla. 1996), this Court said "[a]s a general rule, an information must allege each of the essential elements of a crime to be valid."

The most "celebrated purpose" of the grand jury "is to stand between the government and the citizen" and protect individuals from the abuse of arbitrary prosecution. *United States v. Dionisio,* 410 U.S. 19, 33 (1973); *see also Wood v.*

Georgia, 370 U.S. 375, 390 (1962). The Supreme Court explained that function of the grand jury in *Dionisio:*

> Properly functioning, the grand jury is to be the servant of neither the Government nor the courts, but of the people . . . As such, we assume that it comes to its task without bias or self-interest. Unlike the prosecutor or policeman, it has no election to win or executive appointment to keep.

Id., 410 U.S. at 35. The shielding function of the grand jury is uniquely important in capital cases. *See Campbell v. Louisiana*, 523 U.S. 392, 399 (1998) (recognizing that the grand jury "acts as a vital check against the wrongful exercise of power by the State and its prosecutors" with respect to "significant decisions such as how many counts to charge and . . . the important decision to charge a capital crime").

The Sixth Amendment requires that "[i]n all criminal prosecutions, the accused shall . . . be informed of the nature and cause of the accusation . . . ." A conviction on a charge not made by the indictment is a denial of due process of law. *State v. Gray, supra, citing Thornhill v. Alabama,* 310 U.S. 88 (1940), and *De Jonge v. Oregon,* 299 U.S. 353 (1937).

Because the State did not submit to the grand jury, and the indictment did not state, the essential elements of the aggravated crime of capital murder, Mr. Jackson's rights under Article I, section 15 of the Florida Constitution, and the Sixth Amendment to the federal Constitution were violated. By wholly omitting

any reference to the aggravating circumstances that would be relied upon by the State in seeking a death sentence, the indictment prejudicially hindered Mr. Jackson "in the preparation of a defense" to a sentence of death. Fla. R. Crim. Pro. 3.140(o).

Bottoson/King

In *Bottoson v. Moore,* 833 So.2d 693 (Fla. 2002), and *King v. Moore,* 831 So.2d 143 (Fla. 2002), issued on the same date, the court denied relief under *Ring* in a brief opinion with four Justices concurring in result only.[14] The plurality observed that: "Significantly, the United States Supreme Court has repeatedly reviewed and upheld Florida's capital sentencing statute over the past quarter of a century[*] and although King contends that there now are areas of "irreconcilable conflict" in that precedent, the Court in *Ring* did not address this issue." *Id.* (**See, e.g., Hildwin v. Florida,* 490 U.S. 638, 109 S.Ct. 2055, 104 L.Ed.2d 728 (1989); *Spaziano v. Florida,* 468 U.S. 447, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984); *Barclay v. Florida,* 463 U.S. 939, 103 S.Ct. 3418, 77 L.Ed.2d 1134

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[14]

> n.25. The majority opinion also continues to repeat the erroneous proposition that there was a majority opinion in *Bottoson* and *King* when in fact there were only plurality opinions and a majority of justices (four), wrote separate opinions acknowledging that *Ring* impacted Florida's death penalty scheme in a variety of ways.

Duest v. State, No. SC00-2366 (Fla. June 26, 2003) Anstead, CJ, dissenting in part.

(1983); *Proffitt v. Florida*, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976).). Characterizing it as a "similar situation", the court then cited *Rodriguez de Quijas v. Shearson/American Express,* 490 U.S. 477, 484, 109 S.Ct. 1917, 104 L.Ed.2d 526 (1989) (If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the [other courts] should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions), and noted that the Supreme Court had previously denied certiorari in both *Bottoson* and *King* shortly after *Ring* was decided. 123 S.Ct. 662 (2002). In other words, the narrow holding in *Bottoson/King* was dictated by the law of the case. Certiorari was again taken and denied. *In re Bottoson*, 123 S.Ct. 686 (Mem. Dec 09, 2002); *King v. Moore*, 123 S.Ct. 657 (Mem. Dec. 2, 2002).

This Court in *Duest v. State*, No. SC00-2366 (Fla. June 26, 2003) denied relief due to the prior violent felony aggravator/other conviction exception in *Apprendi v. New Jersey*, 530 U.S. 466 (2000). That exception in turn is based on *Almendarez-Torres v. United States,* 523 U.S. 224, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998). However, Justice Clarence Thomas, the author and swing vote in the *Almendarez-Torres*, conceded in *Apprendi* that his opinion in *Almendarez-Torres* was wrongly decided. Moreover, as commentators have noted, five sitting Justices are now on record as saying that *Almendarez-Torres* was wrongly decided. *See*

Apprendi, 120 S.Ct. at 2379 (Thomas, J., concurring); *Almendarez- Torres,* 523 U.S. at 248, 118 S.Ct. 1219, 140 L.Ed.2d 350 (Scalia, J., joined by Stevens, Souter, and Ginsburg, dissenting). *Wright v. State,* 2003 WL 21511313 Fla.,July 3, 2003.

In *Schriro v. Summerlin*, 542 U.S. _____ (2004), the Court took certiorari to address the question of the retroactivity of *Ring*. However, it also expressly denied certiorari on a claim that *Almendarez-Torres* trumped a *Ring* violation.

> 3. The State also sought certiorari on the ground that there was no *Apprendi* violation because the prior-conviction aggravator, exempt from *Apprendi* under *Almendarez-Torres v. United States*, 523 U. S. 224 (1998), was sufficient standing alone to authorize the death penalty. **We denied certiorari on that issue, 540 U. S. 1045 (2003), and express no opinion on it.**

Summerlin, 542 U.S. at ____, slip op. At 3 n. 3. Thus, the Court's most recent comment on the continuing viability of *Almendarez-Torres* is to "express no opinion on it."

See also *Blackwelder v. State,* 2003 WL 21511317 Fla.,2003: "I do not view the mere existence of a prior violent felony aggravating circumstance as a valid means of rejecting a *Ring* claim, especially where the trial judge found three other aggravating circumstances and assigned them each "great weight" in the decision to impose the death sentence. Under these circumstances, it is apparent that the essential holding of *Ring* that a death sentence cannot be predicated upon findings

made by the trial judge alone, was violated." Anstead, CJ dissenting; *Wright v. State*, 2003 WL 21511313 Fla.,July 3, 2003 Anstead, CJ dissenting.

Ring is a perhaps unprecedented case where the Supreme Court expressly reversed its own decision in *Walton v. Arizona*, 497 U.S. 639 (1990), which in turn was expressly based on *Spaziano v. Florida*, 468 U.S. 447, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984) and *Hildwin v. Florida*, 490 U.S. 638, 109 S.Ct. 2055, 104 L.Ed.2d 728 (1989).

In *Sullivan v. Louisiana*, 508 U.S. 275, 281, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993), the Court addressed the denial of the right to a jury verdict of guilt beyond a reasonable doubt. The Court held that error to be structural, as "the jury guarantee [is] a 'basic protectio[n]' whose precise effects are unmeasurable, but without which a criminal trial cannot reliably serve its function." 508 U.S. at 281, 113 S.Ct. 2078 (citing *Rose*, 478 U.S. at 577, 106 S.Ct. 3101). The Court then observed that the right to trial by jury reflects " 'a profound judgment about the way in which law should be enforced and justice administered.' " Id. (quoting *Duncan*, 391 U.S. at 155, 88 S.Ct. 1444). Finally, it concluded that "[t]he deprivation of *that* right, with consequences that are necessarily unquantifiable and indeterminate, unquestionably qualifies as 'structural error.' " *Id.* at 281-82, 113 S.Ct. 2078 (emphasis added). *See also United States v. Harbin*, 250 F.3d 532, 543 (7th Cir.2001) (noting structural errors are reversible *per se*, such as denial of

right to jury trial) (citation omitted); *McGurk v. Stenberg*, 163 F.3d 470, 474 (8th Cir.1998) (concluding that denial of jury trial is structural error subject to automatic reversal).

In *Booker v. Dugger*, 520 So.2d 246 (Fla. 1988), this Court ruled that "Booker is not barred from raising this claim since *Hitchcock* represented a sufficient change in the law to defeat the suggestion of procedural default." *Id*. 247. In other words, Florida recognizes an exception to its procedural bar rule where there had been a "sufficient change in the law," and such an exception will also operate against federal finding of default. *Booker v. Dugger*, 922 F.2d 633 (11th Cir.) 637 n.2. This Court held that the United States Supreme Court's decision in *Hitchcock v. Dugger*, 481 U.S. 393 (1987), "represent[ed] a sufficient change in the law that potentially affect[ed] a class of petitioners . . . to defeat the claim of a procedural default." *Thompson v. Dugger*, 515 So.2d 173, 175 (Fla. 1987). Significantly, Thompson came to the Florida Supreme Court after the Supreme Court denied his petition for writ of certiorari raising *Hitchcock*, which was filed while *Hitchcock* was pending in the Supreme Court. *See Thompson v. Dugger*, 481 U.S. 1042 (1987) (mem.) [cert. petition on file with Thompson's counsel, Mark E. Olive].

In his dissent in *Duest*, Chief Justice Anstead wrote that: "I continue to view *Ring* as the most significant death penalty decision from the U.S. Supreme Court

in the past thirty years and believe we, like the Arizona Supreme Court, are honor bound to apply *Ring's* interpretation of the requirements of the Sixth Amendment to Florida's death penalty scheme." *Id*. slip op.18. If that view prevails in some form, then *Ring* would clearly qualify as a "sufficient change in the law," as did *Hitchcock* in *Booker*.

Retroactive Application

The leading Florida case on retroactivity in criminal cases is *Witt v. State*, 387 So.2d 922, 931 (Fla.1980). According to *Witt*, for a change of law to be applied retroactively it must: (1) originate in the Florida Supreme Court or the United States Supreme Court; (2) be constitutional in nature; and (3) represent a development of fundamental significance. That *Ring* satisfies the first two requirements needs no further discussion.

Ring constitutes a development of fundamental significance under any definition. The dissenting opinion in *Apprendi*, authored by Justice O''Connor and joined by Chief Justice Rehnquist and Justices Breyer and Kennedy, wrote that the majority decision cast ""serious doubt . . . on sentencing systems employed by the Federal Government and States alike,"" and concluded that the decision was ""a watershed change in constitutional law."" *Apprendi*, 120 S.Ct. at 2380 (O''Connor, J., dissenting).

The State of Florida can hardly claim that *Ring* lacks fundamental significance. Florida appeared before the Supreme Court as an *amicus curiae* in *Ring* and argued it had a "strong interest in seeing that th[e Supreme] Court's capital jurisprudence, ensuring the validity of judicial capital sentencing, remains intact." *Ring v. Arizona*, No. 01-488, Brief for Amici Curiae Alabama, Colorado, Delaware, Florida, *et al.*, available through Lexis at 2002 U.S. Briefs 488 at *1. The *amici* advised the Court that Florida had 385 persons under sentence of death. *Id.* at 10, n. 7. Referring to these sentences and those in other States, the *amici* argued that "[o]verruling *Walton* would cast doubt on the validity of a great number of these sentences." *Id.*, at *10. Recognizing that *Ring* "raises a claim confronted and rejected by the Court directly in *Walton* and indirectly on numerous other occasions under both the Sixth and Eighth Amendments," Florida and the other States cited as examples of cases implicated by *Ring* the following: *Proffitt v. Florida*, 428 U.S. 252 (1976); *Spaziano v. Florida*, 468 U.S. 447 (1984); and *Hildwin v. Florida*, 490 U.S. 638 (1989). *Id*. at *8-*9 and n. 6.

As it is usually put: changes of law which constitute a development of fundamental significance will ordinarily fall into one of two categories: (a) changes of law which remove from the state the authority or power to regulate certain conduct or impose certain penalties, or (b) changes of law which are of sufficient magnitude to require retroactive application as ascertained by the three-

part test of *Stovall v. Denno,* 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed.2d 1199 (1967), and *Linkletter v. Walker,* 381 U.S. 618, 85 S.Ct. 1731, 14 L.Ed.2d 601 (1965).[15] *Witt* 387 So.2d at 929. This test requires consideration to be given to: (I) the purpose to be served by the new rule; (ii) the extent of reliance on the old rule; and (iii) the effect that retroactive application of the rule will have on the administration of justice. *Ferguson v. State*, 789 So.2d 306 (Fla. 2001) *See State v. Callaway,* 658 So.2d 983, 987 (Fla.1995). "Foremost among these factors is the purpose to be served by the new constitutional rule." *Desist v. United States*, 394 U.S. 244, 249, 89 S.Ct. 1030, 1033, 22 L.Ed.2d 248, 255 (1969) (footnote omitted). Indeed, the other two factors are determinative "only when the purpose of the rule in question (does) not clearly favor either retroactivity or prospectivity." *Brown v. Louisiana,*447 U.S. 323 (1980)(1980).

"Where the major purpose of new constitutional doctrine is to overcome an aspect of the criminal trial that substantially impairs its truth-finding function and so raises serious questions about the accuracy of guilty verdicts in past trials, the

[15] "We note, as did the Fourth District Court of Appeal in *Logan v. State*, 666 So.2d 260, 262 (Fla. 4th DCA 1996), that the United States Supreme Court no longer applies the *Stovall* test to determine retroactivity on collateral review. In *Teague v. Lane,* 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989) the Court announced a more stringent standard for the determination of retroactivity for collateral appeals. Because the Florida Supreme Court applied the *Stovall* test to decide *Callaway* we do the same here." *Gantorius v. State,* 693 So.2d 1040, 1042 n.2 (Fla. 3d DCA 1997).

new rule has been given complete retroactive effect. Neither good-faith reliance by state or federal authorities on prior constitutional law or accepted practice, nor severe impact on the administration of justice has sufficed to require prospective application in these circumstances." *Id*. (*quoting Williams v. United States*, 401 U.S. 646, 653, 91 S.Ct. 1148, 1152, 28 L.Ed.2d 388, 395 (1971) (plurality opinion)). *Thomas v. Blackburn*, 623 F.2d 383, 386 (5th Cir. 1980) (Supreme Court decision invalidating five-member criminal juries under the Sixth Amendment is retroactive) . Where the new rule seeks to avoid a fundamentally unfair trial or serious flaws in fact-finding procedure, retroactivity has been favored. *Roberts v. Russell*, 392 U.S. 293 (holding *Bruton* decision to be retroactive).

Retroactive application is dictated by state precedent. In *Riley v. Wainwright*, 517 So.2d. 656 (Fla. 1987), this Court, in light of *Hitchcock*, "reject[ed] the State's argument that Riley's claim [was] procedurally barred," adding that it would have done so "[e]ven if the precise issue had been squarely and adequately presented to this Court" before. *Riley*, 517 So.2d at 659. After Riley had been through one full round of state and federal post-conviction review, the court "granted Riley's application for stay of execution and requested supplemental briefing on the issue of 'whether or not this Court can give retroactive application to *Lockett v. Ohio*, 438 U.S. 586 (1978),' as it affects a

jury's recommendation of sentence." *Riley*, 517 So.2d at 656 (parallel citations omitted).

On the other hand, taking the long view, *Ring* may be – instead of new law – a "clarification" of very old law.

"As scholars have noted, the general infrastructure of the criminal jury as a twelve-member body rendering unanimous verdicts was clearly established by the time of Edward III in 1377. This infrastructure remained largely unchanged for the next six hundred years, until the Williams [v. Florida, 399 U.S. 78 (1970)] Court declared the entire nine-hundred-year evolutionary process of the twelve-person jury a "historical accident."" *Miller, Six of One Is Not a Dozen of the Other: a Reexamination of Williams v. Florida and the Size of State Criminal Juries,* 146 U. Pa. L. Rev. 621 (1998).

In his concurring opinion in *Ring*, joined by Justice Thomas, Justice Scalia wrote:

> "[M]y observing over the past 12 years the accelerating propensity of both state and federal legislatures to adopt "sentencing factors" determined by judges that increase punishment beyond what is authorized by the jury's verdict . . . cause me to believe that our people's traditional belief in the right of trial by jury is in perilous decline." In his concurring opinion in *Apprendi*, joined by Justice Scalia, Justice Thomas wrote: "[I]t is fair to say that *McMillan* [16]

[16] "*McMillan v. Pennsylvania,* 477 U.S. 79, 106 S.Ct. 2411, 91 L.Ed.2d 67 (1986), which spawned a special sort of fact known as a sentencing enhancement." Apprendi, Thomas J. concurring.

began a revolution in the law regarding the definition of "crime." Today's decision, far from being a sharp break with the past, marks nothing more than a return to the *status quo ante*--the status quo that reflected the original meaning of the Fifth and Sixth Amendments." If this is true, then nonretroactivity doctrines, whether state or federal, would simply have no application to a claim for relief under *Ring*. The United States Supreme Court in *Fiore v. White,* 531 U.S. 225, 121 S.Ct. 712, 148 L.Ed.2d 629 (2001), held that whereas a *change* in the law may be analyzed in terms of retroactivity, a *clarification* in the law does not implicate the issue of retroactivity. *Cf. State v. Klayman,* 835 So.2d 248 (Fla.2002) (If a decision of a state's highest court is a clarification in the law, due process considerations dictate that the decision be applied in all cases, whether pending or final, that were decided under the same version, i.e., the clarified version, of the applicable law; otherwise, courts may be imposing criminal sanctions for conduct that was not proscribed by the state legislature. U.S.C.A. Const.Amend. 14.):

> "It thus is clear under *Fiore* that, if a decision of a state's highest court is a clarification in the law, due process considerations dictate that the decision be applied in all cases, whether pending or final, that were decided under the same version (i.e., the clarified version) of the applicable law.
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> ****
>
> Although Florida courts have not previously recognized the *Fiore* distinction between a "clarification" and "change," we conclude that this distinction is beneficial to our analysis of Florida law. Previously, this Court analyzed such cases strictly under *Witt v. State,* 387 So.2d 922 (Fla.1980), and used the term "change" broadly to include what in fact were both clarifications and true changes. As explained in *Fiore,* however, a simple clarification in the law does not present an issue of retroactivity and thus does not lend itself to a *Witt* analysis. Whereas *Witt* remains applicable to "changes" in the law, *Fiore* is applicable to "clarifications" in the law."

Klayman, 252-53 (footnotes omitted).

Although the United States Supreme Court recently decided *Schriro v. Summerlin*, 124 S.Ct., 2519 (U.S. 2004), that decision was based upon a *Teague* analysis. *Teague v. Lane*, 489 U.S. 288 (1989). No analysis has been done by this Court based on the standard for retroactivity as dictated by the Florida retroactivity standard under *Witt v. State*, 387 So.2d 922 (Fla. 1980). *Cf. Windom v. State*, 2004 WL 1057640 *16 et seq. (Fla. May 6, 2004) (Cantero, J. Specially concurring) (Justice Cantero recognizes retroactivity is not settled, nor is applicability of *Ring*, when he argues for finding *Ring* nonretroactive and inapplicable to Florida's sentencing scheme).

Also, *Summerlin* rejected application of *Ring* retroactively to deficiencies in the sentencing process. *Summerlin* did not address whether the principles of *Ring* and *Apprendi*, which applied the constitutional protections to sentencing issues, while not retroactive under a *Teague* standard, should be retroactive when applied to the guilt phase of trial. The indictment is the fundamental requirement for prosecuting first degree murder. When the indictment fails to allege the separate crime of felony murder or the felony necessary to support a conviction for felony murder, the fundamental requirements of state and federal law and constitutional protections have not been met. Recognition that the Constitution requires separate indictment for premeditated and felony murder is far more than a procedural shift in the law – it goes to the heart of the prosecutorial process and reveals the

fundamental flaw of a system which has allowed juries to find guilt for first degree murder without a unanimous verdict specifying which of two separate crime the defendant committed. Dozens if not hundreds of Florida's death row inhabitants await execution by the State of Florida for a crime no one has specifically identified. Not the prosecutor who failed to seek separate counts in the indictment and who opposed a verdict form requiring separate verdict for premeditated and felony murder. Not the grand jury, which was never asked to make the distinction. Not the courts, which rejected all defense efforts to compel specification. And not jury, which was never asked or given the opportunity to so specify.

CONCLUSION

For the multiple reasons explained herein, this Court should order the trial court to vacate the original judgment and order a new trial or dispense any other legal or equitable relief necessary to correct the errors addressed.

CERTIFICATE OF FONT SIZE AND SERVICE

I HEREBY CERTIFY that a true copy of the foregoing INITIAL BRIEF OF APPELLANT which has been typed in Font Times New Roman , size 14, has been furnished by U.S. Mail to counsel Richard Mullary and Meredith Charbula on this December 28, 2005.

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