

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC02-1079

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LLOYD CHASE ALLEN,

Petitioner,

v.

MICHAEL W. MOORE,

Secretary, Florida Department of Corrections,

Respondent.

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PETITIONER'S AMENDED REPLY TO RESPONSE TO  
PETITION FOR WRIT OF HABEAS CORPUS

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CLAIM II  
THE COURT'S DECISION TO AFFIRM THE  
SENTENCE OF DEATH MUST BE REVISITED IN  
LIGHT OF APPRENDI V. NEW JERSEY.

**A. Florida's capital sentencing scheme is unconstitutional under Ring v. Arizona**

Subsequent to Mr. Allen's filing of the instant petition, and before Respondent filed its response, the United States Supreme Court issued its opinion in Ring v. Arizona, 122 S.Ct. 2428 (2002). Ring held unconstitutional a capital sentencing scheme that makes imposing a death sentence contingent upon the finding of aggravating circumstances and that assigns responsibility for finding those circumstances to the judge. The United States Supreme Court based its holding and analysis in Ring on its earlier decision in Apprendi v. New Jersey, 530 U.S. 466 (2000), which held that "[i]t is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed." Id. at 490 (quoting Jones v. United States, 526 U.S. 227, 252-253 (1999) (Stevens, J., concurring)). Capital sentencing schemes such as Florida's and Arizona's violate the notice and jury trial rights guaranteed by the Sixth and Fourteenth Amendments because they do not allow the jury to reach a verdict with respect to an "aggravating fact [that] is an element of the aggravated crime" punishable by death. Ring, 122 S.Ct. at 2441 (quoting Apprendi, 530 U.S. at 501 (Thomas., J., concurring)).

Applying the Apprendi test in Ring, the Court said "[t]he dispositive question....'is not one of form but of effect.'" Ring, 122 S.Ct. at 2439 (quoting Apprendi, 530 U.S. at 494). The question is not whether death is an authorized punishment in first-degree murder cases, but whether the "facts increasing punishment beyond the maximum authorized by a guilty verdict standing alone," Ring at 2441, are found by the judge or jury. "If a state makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact . . . must be found by a jury beyond a reasonable doubt." Ring at 2439. "All the facts which must exist in order to subject the defendant to a legally prescribed punishment must be found by the jury." Ring at 2440 (quoting Apprendi, 530 U.S. at 499 (Scalia, J., concurring)).

The Court in Ring held that Arizona’s sentencing statute could not survive Apprendi because “[a] defendant convicted of first-degree murder in Arizona cannot receive a death sentence unless a judge makes the factual determination that a statutory aggravating factor exists. Without that critical finding, the maximum sentence to which the defendant is exposed is life imprisonment, and not the death penalty.” Ring at 2436 (internal quotation marks and citations omitted). In so holding, the Court overruled Walton v. Arizona, 497 U.S. 639 (1990), “to the extent that it allows a sentencing judge sitting without a jury, to find an aggravating circumstance necessary for imposition of the death penalty.” Ring at 2443.

### **B. Applying Ring to Florida’s sentencing scheme**

The Florida Supreme Court 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 overruled the basic principle of Hildwin v. Florida, 490 U.S. 638 (1989) (per curiam), which upheld the capital sentencing scheme in Florida “on grounds that ‘the Sixth Amendment does not require that the specific findings authorizing imposition of the sentence of death be made by the jury.’” Ring at 2437 (quoting Walton, 497 U.S. at 648, in turn quoting Hildwin, 490 U.S. at 640-641). Ring undermines the Florida Supreme Court’s decision in Mills by recognizing (a) that Apprendi applies to capital sentencing schemes, Ring at 2432 (“Capital defendants, no less than non-capital defendants...are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment”); Id. at 2443; (b) that States may not avoid the Sixth Amendment requirements of Apprendi by simply “specif[ying] ‘death or life imprisonment’ as the only sentencing options,” Ring at 2440; and (c) that the relevant and dispositive question is whether under state law death is “authorized by a guilty verdict standing alone,” Ring at 2441.

Florida’s capital sentencing statute, like the Arizona statute struck down in Ring, makes imposing the death penalty contingent on the factual findings of the judge, not the jury. Section 775.082, Fla. Stat. (1991) of the Florida Statutes provides that a person convicted of first-degree murder must be sentenced to life in prison “**unless** the proceeding held to determine sentence

according to the procedure set forth in Sec. 921.141 result 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.” (emphasis added). For nearly 30 years, the Florida Supreme Court has held that sections 775.082 and 921.141 do not allow imposing a death sentence upon a jury’s verdict of guilt, but only upon a finding of sufficient aggravating circumstances. See State v. Dixon, 283 So. 2d 1, 7 (Fla.1973) (“question of punishment is reserved for a post-conviction hearing”).

The “explicitly cross reference[d]...statutory provision requiring the finding of an aggravating circumstance before imposition of the death penalty,” Ring at 2440, requires the judge – after the jury has been discharged and “[n]otwithstanding the recommendation of a majority of the jury” - to make three factual determinations. Fla. Stat. sec. 921.141 (3). Section 921.141 (3) provides that “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.” Id. First, the trial judge must find the existence of at least one aggravating circumstance. Id. Second, the judge must find that “sufficient aggravating circumstances exist” to justify imposition of the death penalty.<sup>1</sup> Id. Third, the judge must find in writing that “there are insufficient mitigating circumstances to outweigh the aggravating circumstances.” Id. “**If the court** does not make the findings requiring the death sentence, the court shall impose sentence of life imprisonment in accordance with sec. 775.082.” Id. (emphasis added). Because Florida’s death penalty statute makes imposing a death sentence contingent upon findings of “sufficient aggravating circumstances,” and “insufficient mitigating circumstances,” and gives sole responsibility for those findings to the judge, the statute violates the Sixth Amendment.

Respondent argues that “death was the maximum sentence that could be imposed on Defendant by virtue of his conviction of the offense of first degree murder”. Response at 13-14. But the Attorney

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<sup>1</sup>The jurors need only find sufficient aggravating circumstances to “recommend” an “advisory sentence” of death. Fla. Stat. sec. 921.141 (2).

General of Arizona said exactly the same thing about the Arizona statute invalidated in Ring. The United States Supreme Court squarely rejected that argument. See Ring, 122 S.Ct. at 2440-2441.

From the standpoint “not of form, but of effect,” there is no rational way to distinguish either Florida’s statutory structure or its actual functioning from Arizona’s. See id. Identically to Ariz. Rev. Stat. Ann. § 13-1105(C) and even more explicitly, if possible, Florida Statute section 775.082 “cross-references the statutory provision” of Florida Statute section 921.141, requiring additional findings ***by a judge, not by a jury*** as the precondition for imposition of the death penalty (*Ring*, 122 S.Ct. at 2440). See § 775.082, Fla. Stat. (1993).

**C. 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**

Florida’s death penalty statute differs from Arizona’s in that it provides for the jury to hear evidence and “render an advisory sentence to the court.” § 921.141 (2), Fla. Stat. (1993). Despite Respondent’s argument that the Florida capital sentencing process “preserves significant jury participation” (Response at 10), a Florida jury’s role in the capital sentencing process is in fact insignificant under Apprendi and Ring. First, whether one looks to the plain meaning of Florida’s death penalty statute, or the Florida Supreme Court’s cases interpreting it, “under section 921.141, the jury’s advisory recommendation is not supported by findings of fact,” Combs v. State, 525 So. 2d 853, 859 (Fla. 1988)(Shaw, J. concurring), which is the central requirement of Ring.

Respondent argues that the Florida capital sentencing process “preserves significant jury participation” because juries render an advisory verdict as to whether the defendant should live or die. This argument blithely ignores the explicit holding and rationale of both Apprendi and Ring. The unmistakable teaching of those two cases is that every fact which must be found as the necessary precondition for enhancing a defendant’s maximum possible sentence from imprisonment to death *is required by the Sixth Amendment to be found by a jury in the same way, and for the same reasons, that the Sixth Amendment requires a jury to find every fact which is the necessary*

*precondition for conviction of a crime.* To the extent Respondent asserts that Mr. Allen argues that Ring requires jury sentencing (see Response at 6, 8-9), Respondent misrepresents Mr. Allen's position. As Ring puts it in plain English: "Apprendi repeatedly instructs . . . that the characterization of a fact or circumstances as an 'element' [of a crime] or a 'sentencing factor' is not determinative of the question 'who decides,' judge or jury." Ring, 122 S.Ct. at 2441.

The Florida Supreme 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 this 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. § 921.141 (2) and (3), Fla. Stat. (1991). Because Florida law does not require that any number jurors agree that the State has proven the existence of a given aggravating circumstance before it may be deemed "found," contrary to Respondent's argument (Response at 7), 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. The Florida Supreme 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), the judge may consider and rely on evidence not submitted to the

jury. See Porter v. State, 400 So. 2d 5 (Fla. 1981); Davis v. State, 703 So. 2d 1055, 1061 (Fla. 1997). This is exactly what the judge did in Mr. Allen's case. The judge also is 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 in Florida the jury's role is merely advisory and contains no findings upon which to judge the proportionality of the sentence, the Florida Supreme Court has recognized that its review of a death sentence is based and dependent on the judge's written findings. See 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; Dixon, 283 So. 2d at 8.

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 at 2443 (quoting Apprendi, 530 U.S. at 494), Florida law does not require the jury to reach a verdict on any of the required factual determinations before a death sentence can be imposed. Section 921.141(2) does not call for a jury verdict, but rather an "advisory sentence." Respondent even admits that "the jury vote only represents the final jury determination as to appropriateness of the death sentence in the case, and does not dictate what the jury found with regard to particular aggravating factors." Response at 12. The Florida Supreme 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 ruling 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. sec. 921.141 (3). In contrast, "[n]o verdict may be rendered unless all of the trial jurors concur in it." Fla. R. Crim. P. 3.440. Neither the sentencing statute, the Florida Supreme Court cases, nor the jury instructions in Mr. Allen's case required that all jurors concur in finding any particular aggravating circumstances, or "[w]hether sufficient aggravating circumstances exist," or "[w]hether sufficient aggravating circumstances exist which outweigh the aggravating circumstances." Fla. Stat. sec. 921.141(2).

Because Florida law does not require all twelve jurors to agree that the State has proved an aggravating circumstance beyond a reasonable doubt, or to agree on the same aggravating circumstances 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. See Combs, 525 So. 2d at 859 (Shaw, J., concurring).

Moreover, 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 merely a majority vote of the jury to support an advisory sentence. See id. ("recommendation of a majority of the jury"). In Harris v. United States, 122 S.Ct. 2406, 153 L.Ed.2d 5473, 2002 U.S. LEXIS 4652 (U.S. June 24, 2002), decided on the same day as Ring, the United States 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." Harris, 2002 U.S. LEXIS at \*41. 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. Ring, 122 S.Ct. 2443. Based on the reasoning in Apprendi, Jones and Ring, aggravating factors are equivalent to elements of the capital crime itself and must be treated as such.

Permitting any such findings of the elements of a capital crime by a mere simple majority is unconstitutional under the Sixth and Fourteenth Amendments. In the same way that the Constitution guarantees a level of certainty before a jury can convict a defendant, it also constrains the number of jurors who can render a guilty verdict. See Apodaca v. Oregon, 406 U.S. 404 (1972). And the standards for imposing a death sentence may be even more exacting than the Apodaca standard (which was not a death case) -- but they cannot constitutionally be less. Clearly, a mere numerical majority, which is all that is required under Section 921.141(3) for the jury's advisory sentence, would not satisfy the "substantial majority" requirement of Apodaca. See, e.g. Johnson v. Louisiana, 406 U.S. 356, 366 (1972)(Blackmun, J., concurring)(a state statute authorizing a 7-5 verdict would violate Due Process Clause of Fourteenth Amendment). In Mr. Allen's case, the vote on the advisory sentence was 7 to 5.

Even if the Florida Supreme Court were to redefine the jury's role under Florida law, it would not make Mr. Allen's death sentence valid. The trial court instructed the jury that it was their "duty to advise the Court as to what punishment should be imposed," that "the final decision . . . is the responsibility of the judge," and that the jury must "render . . . an advisory sentence" (TRT. 760)(emphasis added). Were the Florida Supreme Court to now conclude that Mr. Allen's death sentence rests on findings made by the jury after they were told, and Florida law clearly provided, that a death sentence would not rest upon their recommendation, it would establish that Mr. Allen's death sentence was imposed in violation of Caldwell v. Mississippi, 472 U.S. 320 (1985).

**D. Mr. Allen's Death Sentence is Invalid Because the Elements of the Offense Necessary to Establish Capital Murder Were Not Charged in the Indictment**

In Jones v. United States, 526 U.S. 227 (1999), the United States Supreme Court 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 the indictment, submitted to a jury, and proven beyond a reasonable doubt." Jones, at

243, n. 6. Apprendi v. New Jersey, 530 U.S. 466 (1999), held that the Fourteenth Amendment affords citizens the same protections when they are prosecuted under state law. Apprendi, 530 U.S. at 475-476.<sup>2</sup> Ring held that a death penalty statute’s “aggravating factors operate as ‘the functional equivalent of an element or a greater offense.’” Ring at 2443 (quoting Apprendi, 530 U.S. 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 sentencing consideration,” in significant part because “elements must be charged in the indictment.” Jones, 526 U.S. at 232l. On June 28, 2002, after the Court’s decision in Ring, the death sentence imposed in United States v. Allen, 247 F. 3d 741 (8<sup>th</sup> Cir. 2001) was overturned when the Supreme Court granted the writ of certiorari, vacated the judgment of United States Court of Appeals for the Eighth Circuit upholding the death sentence, and remanded the case for reconsideration in light of Ring’s holding that aggravating factors that are prerequisites of a death sentence must be treated as elements of the offense. See Allen v. United States, No. 01-7310, 2002 U.S. LEXIS 4893 (June 28, 2002).

The question in Allen was whether aggravating factors required for a sentence of death under the Federal Death Penalty Act are elements that must be alleged in the indictment. The Eighth Circuit rejected Allen's argument because, in the court's view, aggravating factors are not elements of federal capital murder but rather “sentencing protections that shield a defendant from automatically receiving the statutorily authorized death sentence.” United States v. Allen, 247 F. 3d at 763.

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.” Like 18 U.S.C. sections 3591 and 3592(c), Florida’s death penalty statute, Florida Statute sections 775.082 and 921.141, makes imposing the death penalty contingent upon the government proving the existence of aggravating circumstances, establishing “sufficient

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<sup>2</sup>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.

aggravating circumstances” to call for a death sentence, and that the mitigating circumstances are insufficient to outweigh the aggravating circumstance. Fla. Stat. sec. 921.141(3). Florida law clearly requires every “element of the offense” to be alleged in the information or the indictment. See State v. Dye, 346 So. 2d 538 (Fla. 1977); State v. Gray, 435 So. 2d 816, 818 (Fla. 1983); Chicone v. State, 684 So. 2d 736, 744 (Fla. 1996). It is impossible to know whether the grand jury in this case would have returned an indictment alleging the presence of aggravating factors, sufficient aggravating circumstances, and insufficient mitigating circumstances and thus charging Mr. Allen with a crime punishable by death.

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 (1984), and DeJonge 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. Allen's right under Article I, section 15 of the Florida Constitution and the Sixth Amendment to the federal constitution were violated. By omitting any reference to the aggravating circumstance that would be relied upon by the State in seeking a death sentence, the indictment prejudicially hindered Mr. Allen “in the preparation of a defense,” to a sentence of death. Fla. R. Crim. P. 3.140(o).

**E. Mr. Allen's Death Sentence was Imposed in Violation of the Due Process Clause of the Fifth Amendment and the Jury Trial Right Guaranteed by the Sixth Amendment Because he was Required to Prove the Non-Existence of an Element Necessary to Make him Eligible for the Death Penalty**

Under Florida law, a death sentence may not be imposed unless the judge finds the fact that “sufficient aggravating circumstances” exist to justify imposing the death penalty. Fla. Stat. sect. 921.141(3). Because imposing a death sentence is contingent on this fact being found, and the maximum sentence that could be imposed in the absence of that finding is life in prison, the Sixth Amendment required that the State bear the burden of proving it beyond a reasonable doubt. Ring at

2432. (“Capital defendants ...are entitled to a jury determination of any fact on the legislature conditions an increase in their maximum punishment.”) Nevertheless, Florida juries, like that of Mr. Allen's jury, are routinely instructed, “Should you find sufficient aggravating circumstances do exist, it will then be your duty to determine whether mitigating circumstances do exist that outweigh the aggravating circumstances.” (TRT. 765-66).

The Due Process clause of the Fourteenth Amendment requires the State to prove beyond a reasonable doubt every fact necessary to constitute a crime. In re Winship, 397 U.S. 358 (1970). The existence of “sufficient aggravating circumstances” that outweigh the mitigating circumstances is an essential element of death-eligible first-degree murder because it is the sole element that distinguishes it from the crime of first-degree murder, for which life is the only possible punishment. Fla. Stat. secs., 775.082; 921.141. For that reason, Winship requires the prosecution to prove the existence of that element beyond a reasonable doubt. The instruction given Mr. Allen's jury violated the Due Process Clause of the Fourteenth Amendment of the United States Constitution and the Sixth Amendment's right to trial by jury because it relieves the State of its burden to prove beyond a reasonable doubt the element that “sufficient aggravating circumstances” exist that outweigh mitigating circumstances by shifting the burden of proof to the defendant to prove that the mitigating circumstances outweigh sufficient aggravating circumstances. Mullaney v. Wilbur, 421 U.S. 684, 698 (1975).

Because Mr. Allen's jury was never required to find the element of sufficient aggravating circumstances beyond a reasonable doubt, the error here cannot be subjected to a harmless error analysis. Sullivan v. Louisiana, 508 U.S. 275, 279-280 (1993). Mr. Allen is entitled to relief.

**F. Mr. Allen's Claim is not procedurally defaulted**

Respondent argues that Petitioner's Apprendi-Ring claim is procedurally defaulted. However, this Court entertained the identical claim in Bottoson v. State, 813 So. 2d 31, 36 (Fla. 2002) in which Bottoson had filed a habeas corpus petition after the grant of certiorari but before the merits

decision in Ring. This is consistent with this Court's precedent. In Thompson v. Dugger, 515 So. 2d 173, 175 (Fla. 1987), the Court held that the United States Supreme Court 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 procedural default." Apprendi and Ring cannot conceivably be regarded as less drastic, fundamental, or sweeping changes of law than Hitchcock. Manifestly, there has been no such default.

**G. Ring must be retroactively applied**

Alternatively, Respondent next argues that this Ring is not retroactive. The issue is whether the Apprendi-Ring rule is retroactive according to the criteria in Witt v. State, 387 So. 2d 922 (Fla. 1980). Under Witt, a change in law supports postconviction relief in a capital case when "the change: (a) emanates from this Court or the United States Supreme Court, (b) is constitutional in nature, and (c) constitutes a development of fundamental significance." Witt at 931. The first two criteria are obviously met here; the third presents the crucial inquiry. In elaborating what "constitutes a development of fundamental significance," the Witt opinion includes in that category "changes of law which are of sufficient magnitude to necessitate retroactive application as ascertained by the three-fold test of Stovall[v. Denno, 388 U.S. 293 (1967)] and Linkletter[v. Walker, 381 U.S. 618

(1965)], "adding that "Gideon v. Wainwright . . . is the prime example of a law change included within this category." Witt, 387 So. 2d a 929.

Two considerations call for recognizing that the Apprendi-Ring rule is precisely such a fundamental constitutional change: First, the purpose of the rule is to change the very identity of the decisionmaker with respect to critical issues of fact that are decisive of life or death. In the most basic sense, this change remedies a "structural defect[]in the constitution of the trial mechanism," Sullivan v. Louisiana, 508 U.S. 275, 281 (1993): it vindicates the jury guarantee . . . [as] a 'basic protectio[n]' whose precise effects are unmeasurable, but without which a criminal trial cannot reliably serve its function." Id. The constitutionally requisite tribunal was simply **not all there**; and such a radical defect necessarily "cast[s] serious doubt on the veracity or integrity of the . . . trial proceeding." Witt, 387 So. 2d at 929.

Second, "the jury trial provisions in the Federal and state Constitutions reflect a fundamental decision about the exercise of official power - a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges. Fear of unchecked power . . . found expression . . . in this insistence upon community participation in the determination of guilt or innocence," Duncan v. Louisiana, 391 U.S. 145, 156 (1968) - including,

under Apprendi and Ring, guilt or innocence of the factual accusations "necessary for imposition of the death penalty," Ring, 122 S.Ct. at 2443; and see Apprendi, 530 U.S. at 494-95.

CONCLUSION

For the reasons set forth above, Mr. Allen respectfully requests this Court to vacate his sentence of death and order the lower court to impose a life sentence. In the alternative, Mr. Allen requests this Court to remand for a new sentencing proceeding.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by United States Mail, first-class postage prepaid, to Sandra S. Jaggard, Office of Attorney General, Rivergate Plaza, Suite 950, 444 Brickell Avenue, Miami, FL 33131-2407, on September 26, 2002.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the font requirements of rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

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