

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC02-2131

JAMES GUZMAN,

Petitioner,

v.

STATE OF FLORIDA,

Respondent,

PETITION FOR A WRIT OF HABEAS CORPUS

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PRELIMINARY STATEMENT

This is James Guzman’s first habeas corpus petition in this Court. Art. 1, Sec. 13 of the Florida Constitution provides: “The writ of habeas corpus shall be grantable of right, freely and without cost.” This petition is filed to address substantial claims of error under the Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

References to the record from the postconviction hearing include a page number and are of the form, e.g., (PC-R. 123). References to the record of Mr. Guzman’s retrial include a page number and are of the form, e.g., (R. 123). All other references are self explanatory or explained herein.

REQUEST FOR ORAL ARGUMENT

Mr. Guzman has been sentenced to death. The resolution of the issues involved in this action will therefore determine whether he lives or dies. This Court has not hesitated to allow oral argument in other capital cases in a similar procedural posture. 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. Guzman, through counsel, accordingly urges that the Court permit oral argument.

PROCEDURAL HISTORY

The judgment and sentence considered by this Petition for a Writ of Habeas Corpus were entered by the Circuit Court of the Seventh Judicial Circuit, in and for, Volusia County.

On January 7, 1992, the Volusia County Grand Jury indicted Mr. Guzman for first degree murder and robbery. (R. 1992 277). The jury convicted Mr. Guzman of first-degree murder and robbery with a deadly weapon on September 24, 1992. (R. 1992 577). On September 29, 1992, the advisory panel recommended a sentence of death by a vote of 10-2 (R. 1992 600).

On Mr. Guzman's direct appeal of this conviction and sentences, including Mr. Guzman's death sentence, this Court reversed Mr. Guzman's convictions and sentence. *Guzman v. State*, 644 So. 2d 996, 1000 (Fla. 1994). This Court found that the trial court's failure to allow Mr. Guzman's trial counsel to withdraw despite a conflict of interest denied Mr. Guzman the "right to conflict-free counsel as required by the Sixth Amendment of the United States Constitution." *Id.* at 999.

In 1996, Mr. Guzman proceeded to a non-jury retrial. (R. 1246-47). The trial judge sentenced Mr. Guzman to death for the first-degree murder conviction without a recommendation from an advisory panel. (R. 2368). On direct appeal, this Court affirmed both the conviction and sentence. *Guzman v. State*, 721 So. 2d 1155 (Fla. 1998). The United States Supreme Court denied certiorari on May 3, 1999. *Guzman v. Florida*, 119 S. Ct 1583 (1999).

Following the United States Supreme Court's denial of certiorari, Mr. Guzman sought postconviction relief in the circuit court. Mr. Guzman filed a motion for postconviction relief under Rule 3.850.

The circuit court held an evidentiary hearing on this motion in October of 2001 and denied Mr. Guzman all relief. This Petition for a Writ of Habeas Corpus follows and is filed contemporaneously with Mr. Guzman's direct appeal.

**JURISDICTION TO ENTERTAIN PETITION
AND GRANT HABEAS CORPUS RELIEF**

This is an original action under Fla.R.App.P. 9.100(a). See Art. 1, Sec. 13, Fla. Const. This Court has original jurisdiction pursuant to Fla.R.App.P. 9.030 (a)(3) and Art. V, Sec. 3(b)(9), Fla. Const. This petition presents constitutional issues which directly concern the judgment of this Court during the appellate process and the legality of Mr. Guzman's death sentence.

Jurisdiction for this petition lies with this Court because the fundamental constitutional errors raised occurred in a capital case in which this Court heard and denied Mr. Guzman's direct appeal. See, e.g., *Smith v. State*, 400 So.2d 956, 960 (Fla. 1981) See *Wilson*, 474 So.2d at 1163 (Fla. 1985); *Baggett v. Wainwright*, 229 So.2d 239, 243 (Fla. 1969); cf. *Brown v. Wainwright*, 392 So.2d 1327 (Fla. 1981). A petition for a writ of habeas corpus is the proper means for Mr. Guzman to raise the claims presented herein. See, e.g., *Way v. Dugger*, 568 So.2d 1263 (Fla. 1990); *Downs v. Dugger*, 514 So.2d 1069 (Fla. 1987); *Riley v. Wainwright*, 517 So.2d 656 (Fla. 1987); *Wilson*, 474 So.2d at 1162.

This Court has the inherent power to do justice. Justice requires this Court to grant the relief sought in this petition, as this Court has done in the past. This petition pleads claims involving fundamental constitutional error. See *Dallas v. Wainwright*, 175 So. 2d 785 (Fla. 1984). This Court's exercise of its habeas corpus relief jurisdiction, and of its authority to correct constitutional errors such as those herein pled, is warranted in this action. As the petition shows, habeas corpus relief would be more than proper on the basis of Mr. Guzman's claims.

GROUND FOR HABEAS CORPUS

This is Mr. Guzman's first petition for habeas corpus in this Court. Mr. Guzman asserts in this petition that his capital conviction and death sentence were

obtained and then affirmed by this Court in violation of Mr. Guzman's rights guaranteed by the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the Florida Constitution.

CLAIM I

MR. GUZMAN'S WAIVER OF AN ADVISORY PANEL WAS INVALID. ACCORDINGLY, MR. GUZMAN IS ENTITLED TO RELIEF UNDER *RING V. ARIZONA*.

Mr. Guzman was denied his rights under *Ring v. Arizona*, 2002 WL 1357257 (U.S., June 24, 2002), to a jury determination of the facts that enhanced his sentence to death and to notice of these alleged facts in the grand jury's indictment. Although these rights have always existed, Mr. Guzman, his trial attorney, the court and the prosecution, lacked the understanding of the nature of these rights. Accordingly, until the United States Supreme Court's decision in *Ring v. Arizona*, or even *Apprendi v. New Jersey*, 530 U. S. 466, (2000), due to a prevalent and common misunderstanding of the nature of these rights, James Guzman's waiver was invalid and he is entitled to *Ring* relief.

This claim is divided into two sections. In section A it is argued that Mr. Guzman's waiver was unknowing as a precursor to reaching the issues of section B; the applicability of *Ring* to all death sentenced individuals including Mr.

Guzman. Ultimately, the conclusion is inescapable - - James Guzman was denied his rights under the constitutions of the United States and Florida and his death sentence must not stand.

FACTS UPON WHICH CLAIM ONE IS BASED

On January 7, 1992, the Volusia County Grand Jury indicted Mr. Guzman for first degree murder and robbery. (R. 1992 277). The indictment did not find specify any aggravators that would have established the death penalty. (R. 1992 277). This Court reversed Mr. Guzman's case and he was remanded for retrial. *Guzman v. State*, 644 So. 2d 996, 1000 (Fla. 1994).

Prior to the retrial Mr. Guzman entered a waiver to both his right to a jury trial and to a jury recommendation at the penalty phase. (R. 403.). Prior to finding the waiver, the trial court conducted a colloquy through Mr. Guzman's trial counsel. (R. 1235-1248). Mr. Guzman never was explained nor did he waive the right to have the jury specifically determine the facts which led to his death sentence. (R. 1235-1248)

Mr. Guzman proceeded to a non-jury trial and a non-jury penalty phase which resulted in the trial court sentencing him to death. (R. 2368).

A. Mr. Guzman's waiver of a jury for the penalty phase determination of his trial was invalid in light of the United States Supreme

Court's holding in *Ring v. Arizona*.

As with all of the attorneys and courts throughout this State, at the time of Mr. Guzman's trial, Mr. Guzman did not know that the United States Supreme Court would eventually depart from prior decisions which validated Florida's death penalty scheme. As discussed below, the United States Supreme Court's decision in *Ring v. Arizona*, righted the wrongs of prior cases and has effectively ended this State's imposition of the death penalty through the path of least resistance.

Mr. Guzman never validly waived his rights under *Ring* because his attorney and the court could not have explained his rights due to the common understanding of the law at the time of Mr. Guzman's waiver of a penalty phase. While Mr. Guzman submits that he always had a right to a jury determination of each and every aggravator at the time of sentencing, there simply was no way for Mr. Guzman to know this before he invalidly waived his right to a jury penalty phase recommendation.

At the time of Mr. Guzman's invalid waiver, *Walton v. Arizona*, 497 U. S. 639 (1990), and similar decisions were the law of the land. Before *Ring* Mr. Guzman did not have the choice of having the jury return a binding verdict on whether the state proved the facts that enhanced his sentence to death. In other words, Mr. Guzman did not know what he was waiving, and based on the common understanding of the

courts, defense attorneys and the actual record, neither did Mr. Guzman's attorney and the trial court that accepted Mr. Guzman's invalid waiver.

This Court held in *State v. Carr*, that a defendant facing the death penalty may waive a jury advisory recommendation. *See State v. Carr*, 336 So. 2d 358, 359 (Fla. 1976). A trial court, however, must find that the waiver was voluntary and intelligent and has the discretion to either require an advisory recommendation or to sentence the defendant without an advisory recommendation. *Id.*

In *Pangburn v. State*, this Court reiterated that it had "clearly determined that a defendant may waive the right to a jury trial in the sentencing phase of a capital crime provided the waiver was voluntarily, intelligently, and knowingly made." 661 So. 2d 1182, 1188(Fla. 1995). (citations omitted). Without the knowledge of the right to a jury determination of the facts supporting a death sentence, as opposed to a mere jury recommendation, and the right to have the aggravators charged by indictment, Mr. Guzman's waiver was not knowing. Mr. Guzman never waived the requirements of a jury finding of fact on the aggravators presented by the state and to notice of the same by way of indictment.

Mr. Guzman's case differs both factually and legally from *Griffin v. State*, 820 So. 2d 906 (Fla. 2002). In *Griffin*, the appellant faced the death penalty and waived an advisory jury. *Id.* at 909. The trial court sentenced the appellant to death after

hearing testimonial evidence. *Id.* On appeal, the appellant challenged the voluntariness of his waiver of his right to a jury in the penalty phase. *Id.* at 912. Specifically at issue was the trial court's failure to state that the appellant would have had an equal opportunity to present mitigation. *Id.*

In denying the appellant relief on this claim, this Court again stated that the standard that it evaluates "the voluntariness of a waiver is similar to that of determining the validity of a pleas." *Id.* Thus, this Court denied relief to the appellant on this issue because the appellant's "failure to first challenge the waiver at the trial court. . . restricted [appellant] to collaterally attack[ing] the waiver through a postconviction motion." *Id.* at 913.

Unlike in *Griffin*, Mr. Guzman is both entitled to relief and entitled to raise this issue here. Mr. Guzman's plea was not simply involuntary in that he waived his right to a jury when he did not want to waive this important right. Nor, in this forum, at this time, is he claiming that he was pressured or coerced into waiving such rights. Rather, Mr. Guzman simply did not have the option of selecting the course of events that *Ring* mandates and simply did not know what *Ring* would demand because that case had not yet been decided. The process of jury fact finding that *Ring* mandates could not have been known by Mr. Guzman at the time he invalidly waived his rights.

Moreover, unlike in *Griffin*, denying Mr. Guzman relief now, only for him to

later raise this issue in a postconviction motion, is unwarranted because this Court can grant relief without the need for further fact finding. In *Griffin*, unlike here, trial counsel may have advised the appellant that he “would have an equal opportunity to present evidence of mitigation.” *See Id.* at 912. Here, it is beyond even argument that trial counsel would not have advised Mr. Guzman that he had the right to a binding jury fact finding on the aggravators the state sought to prove and to a grand jury indictment alleging the same before *Ring* was decided.

Even if Mr. Guzman’s trial counsel, the court, or Mr. Guzman himself, believed that contrary to the existing state of the law at the time of Mr. Guzman’s waiver, that Mr. Guzman was entitled to the protections of *Ring*, the trial court simply had no authority to provide them to Mr. Guzman. Section 921.141, Florida Statutes simply did not provide for a procedural mechanism which would have allowed Mr. Guzman to exercise his rights under *Ring* since this statute only allowed for the trial court to find the facts necessary to sentence Mr. Guzman to death. While the appellant in *Griffin* could have chosen a procedure that allowed “an equal opportunity to present evidence of mitigation,” Mr. Guzman could not have chosen to have the jury determine the facts that led to his death sentence because this State did not recognize these rights as enunciated in *Ring*.

Mr. Guzman’s case also differs legally and factually from a case like *Brady v.*

United States, 397 U.S. 742 (1970); 90 S.Ct. 1463. Unlike Mr. Guzman’s case, the petitioner in *Brady* pled guilty under a federal kidnaping statute. *Id.* at 744. By doing so, the petitioner avoided the death penalty because only the jury could impose the death penalty. *Id.* After the plea, the Court found in *United States v. Jackson* that the enhanced punishment of death under the statute petitioner was convicted was unconstitutional because it only penalized individuals who exercised their right to trial. *Id.* at 745; (citing *United States v. Jackson*, 390 U.S. 570, 88 S.Ct 1209). Following *Jackson*, the petitioner in *Brady* sought postconviction relief which culminated with the Court denying relief. *Id.* at 758.

At issue in *Brady* was whether the petitioner’s plea was not voluntary given because the operation of the statute coerced the petitioner’s plea. *Id.* at 745. The Court held that the petitioner’s plea was voluntarily and intelligently made with “no reason to doubt that his solemn admission of guilt was truthful.” *Id.* at 758.

The Court found that *Jackson* had not held that the kidnaping statute was inherently coercive or that the statute’s operation rendered all pleas under the statute involuntary. *Id.* at 746-47 (citations omitted). Important for the Court was that the petitioner pled and in doing so the petitioner “was aware of precisely what he was doing when admitted that he had kidnaped the victim and had not released her unharmed.” *Id.* at 756.

The Court discussed the constitutional requirements for a waiver rights: “Waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences. “ *Id.* at 748 (Footnotes omitted). Applying the standards to the particular facts of the petitioner’s case in *Brady*, the Court found that “[o]n neither score was [the petitioner’s] plea of guilty invalid.” *Id.*

Applying this very standard to Mr. Guzman’s case requires a different result. Unlike the petitioner in *Brady*, Mr. Guzman never admitted guilt or the applicability of the death penalty to him by waiving the constitutionally flawed procedure of a mere jury recommendation. When the petitioner in *Brady* pled guilty there was no further need for a factual determination of his guilt. When Mr. Guzman tendered the invalid waiver, with or without a jury, a factual determination of the applicability of the death penalty and whether the state could prove aggravating factors beyond a reasonable doubt was still required. Unlike the waiver that occurs when a defendant pleads guilty, Mr. Guzman did not admit under oath the truth of the facts that the trial court based Mr. Guzman’s death sentence. Accordingly, Mr. Guzman’s invalid waiver differs both legally and factually from the waiver at issue in *Brady*.

Moreover, unlike in *Brady*, Mr. Guzman never received any benefit by waiving his right to the full requirements of *Ring*. Where the petitioner in *Brady* avoided a trial,

and arguably received a reduced sentence, no similar benefit inured to Mr. Guzman. Mr. Guzman merely avoided a jury's recommendation which, under *Ring*, would have in essence been a constitutional nullity.

Unlike in *Brady*, what Mr. Guzman invalidly waived was an unfair and unconstitutional process. In *Brady*, there was no claim that the process that the jury would have used to determine the imposition of the death penalty was flawed. Under *Jackson* it was that the kidnaping statute needlessly penalized "those defendants who plead not guilty and elect a jury trial. . . ." *Id.* (citing *Jackson* at 583). Here, in Mr. Guzman's case, the choice was to elect the procedure he chose or proceed under a flawed process that denied him his rights. This again distinguishes Mr. Guzman's case from *Brady*, both factually and legally.

Under *Brady*'s requirement that a waiver of a constitutional right must be knowing, it is obvious that Mr. Guzman's was not. No attorney or judge, let alone Mr. Guzman, knew at the time of Mr. Guzman's waiver of a jury at penalty phase that *Ring* would correct prior decisions of the Court and again provide individuals with the rights inherent in the United States Constitution. As discussed below *Ring* is both applicable and retroactive. For this reason this Court should grant Mr. Guzman all relief warranted.

B. Mr. Guzman was denied his right to a jury trial for all of the

aggravator elements that purportedly supported the lower court's sentence of death.

To understand the implications of *Ring v. Arizona*, 2002 WL 1357257 (U.S., June 24, 2002), for Mr. Guzman's death sentence, it is necessary to consider (1) the design of Florida's capital-sentencing procedure, (2) the way in which that procedure operates with respect to the all-important findings of fact that expose a defendant to a death sentence, (3) how the procedure could have worked in Mr. Guzman's case, (4) what *Ring* subsequently held about the constitutional necessity for jury fact-finding with respect to facts that expose a defendant to a death sentence; and (5) the nature of the constitutional rule announced in *Ring*, as bearing on *Ring*'s retroactivity. These subjects are taken up in order:

- 1. The Florida capital-sentencing statute was designed to deny the jury a role in making the findings of fact on which eligibility for a death sentence depends.**

Furman v. Georgia, 408 U.S. 238 (1972), was a confusing decision that led many legislatures and courts astray. See *Lockett v. Ohio*, 438 U.S. 586, 599-600 & nn. 7 & 8 (1978) (plurality opinion). The Florida Legislature believed that *Furman* had been aimed primarily at ending death-sentencing regimes in which "the inflamed emotions of jurors can . . . sentence a man to die." *State v. Dixon*, 283 So.2d 1, 8

(Fla. 1973). Thus, the statute which it enacted in 1972 “in response to *Furman*”¹ severely limited the jury’s role in the capital sentencing process. The Legislature relied on Florida’s trial judges not only to make the ultimate sentencing decision,² but also to make the specific factual findings that brought the “issue of life or death within the framework of rules provided by the statute.” *Id.* The statutory aggravating circumstances necessary to support a death sentence were required to be found by the trial judge and set forth in writing, see Fla. Stat. § 921.141(3), on the theory that, when “the trial judge justifies his sentence of death in writing, . . . [that will] provide the opportunity for meaningful review by this Court. Discrimination or capriciousness cannot stand where reason is required . . .” *Dixon*, 283 So.2d at 8.³ As the Court has frequently described the “procedure [to] be used in sentencing phase proceedings”:

“First, the trial judge should hold a hearing to: a) give the defendant, his counsel, and the State, an opportunity to be heard; b) afford, if

¹ *Proffitt v. Florida*, 428 U.S. 242, 247 (1976).

² “The Florida procedure does not empower the jury with the final sentencing decision; rather, the trial judge imposes the sentence.” *Combs v. State*, 525 So.2d 853, 856 (Fla. 1988). Accord: *e.g.*, *Spencer v. State*, 615 So.2d 688, 691 (1993) (“It is the circuit judge who has the principal responsibility for determining whether a death sentence should be imposed.”).

³ *Morton v. State*, 789 So.2d 324, 333 (Fla. 2001): “The sentencing order is the foundation for this Court’s proportionality review, which may ultimately determine if a person lives or dies.” Accord: *e.g.*, *Patton v. State*, 784 So.2d 380, 388 (Fla. 2000).

appropriate, both the State and the defendant an opportunity to present additional evidence; c) allow both sides to comment on or rebut information in any presentence or medical report; and d) afford the defendant an opportunity to be heard in person. Second, after hearing the evidence and argument, the trial judge should then recess the proceeding to consider the appropriate sentence. If the judge determines that the death sentence should be imposed, then, in accordance with section 921.141, Florida Statutes (1983), the judge must set forth in writing the reasons for imposing the death sentence. Third, the trial judge should set a hearing to impose the sentence and contemporaneously file the sentencing order.”⁴

Conversely, the jury’s role in capital sentencing was restricted to informing the court of “the judgment of the community as to whether the death penalty is appropriate.” *Odom v. State*, 403 So.2d 936, 942 (Fla. 1981).⁵ The jury was to do this by “render[ing] an advisory sentence to the court,” Fla. Stat. § 921.141(2), which did *not* have to set forth any specific findings of fact, *id.*,⁶ which was *not* required to be

⁴ *Spencer v. State*, 615 So.2d 688, 690-691 (1993).

⁵ See also, *e.g.*, *Richardson v. State*, 437 So.2d 1091, 1095 (Fla. 1983); *Quince v. State*, 414 So.2d 185, 187 (Fla. 1982); *McCaskill v. State*, 344 So.2 1276, 1280 (Fla. 1977).

⁶ Compare Fla. Stat. § 921.141(3)(b): “In each case in which the court imposes the death sentence, *the determination of the court shall be supported by specific written findings of fact* based upon the circumstances in subsections (6) and (7) and based upon the records of the trial and the sentencing proceedings.” (Emphasis added.) To support a death sentence, specific findings with respect to aggravating and mitigating circumstances are required; it is “insufficient to state generally that the aggravating circumstances that occurred in the course of the trial outweigh the mitigating circumstances that were presented to the jury.” *Patterson v. State*, 513 So. 2d 1257, 1263-1264 (Fla. 1987). Accord: *Bouie v. State*, 559 So.2d 1113, 1115

unanimous, Fla. Stat. § 921.141(3), and which the trial judge did *not* have to follow.
*Id.*⁷

This basic statutory framework and its allocation of responsibilities between judge and jury have been uniformly understood and implemented by the Court since *Dixon* first interpreted the statute. “The function of the jury in the sentencing phase . . . is not the same as the function of the jury in the guilt phase.” *Johnson v. State*, 393 So.2d 1069, 1074 (Fla. 1981). The jury does not make specific findings of fact, *Cannady v. State*, 427 So.2d 723, 729 (Fla. 1983), because, this Court has held, *Hildwin v. Florida*, 490 U.S. 638 (1989) (per curiam), did not require such findings, *Hunter v. State*, 660 So.2d 244, 252 & n.13 (Fla. 1995),⁸ and the jury does not bear

(Fla. 1990). Yet *all* that a jury’s advisory verdict can be read as doing is to “state generally that the aggravating circumstances . . . outweigh the mitigating circumstances.” This is doubtless why the Court in *Spaziano v. State*, 433 So.2d 508, 512 (Fla. 1983), concluded that “allowing the jury’s recommendation to be binding would violate *Furman v. Georgia*.”

⁷ Even in the rare case where it is possible to guess that a jury at the penalty stage must have found particular facts to be true or untrue, the judge is authorized to find the contrary. *See, e.g., McCrae v. State*, 395 So.2d 1145, 1154-1155 (1980).

⁸ That is the precise premise upon which this Court sustained a trial judge’s power to override the jury’s recommendation of a life sentence as consistent with *Bullington v. Missouri*, 451 U.S. 430 (1981). *See, e.g., Lusk v. State*, 446 So.2d 1038, 1042 (Fla. 1984). It is also why the defendant has no 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). As Justice Shaw has noted, a

“the same degree of responsibility as that borne by a ‘true sentencing jury,’” *Pope v. Wainwright*, 496 So. 2d 798, 805 (Fla. 1986).⁹ The jury’s role is simply – though importantly – to reflect community judgment “as to whether the death sentence is appropriate,” *McCampbell v. State*, 421 So.2d 1072, 1975 (Fla. 1982).¹⁰ The “specific findings of fact” that are the “mandatory statutory requirement” for a death sentence are the responsibility of the presiding judge and no one else. *Van Royal v. State*, 497 So.2d 625, 628 (Fla. 1986). See, e.g., *Patterson v. State*, 513 So. 2d 1257, 1261-1263 (Fla. 1987); *Grossman v. State*, 525 So.2d 833, 839-840 (Fla. 1988);¹¹ *Hernandez v. State*, 621 So.2d 1353, 1357 (Fla. 1993); *Layman v. State*, 652 So.2d

Florida “jury's advisory recommendation is not supported by findings of fact. . . . Florida's statute is unlike those in states where the jury is the sentencer and is required to render special verdicts with specific findings of fact.” *Combs*, 525 So.2d at 859 (concurring opinion). Under Florida practice, “both this Court and the sentencing judge can only speculate as to what factors the jury found in making its recommendation” *Ibid.* The United States Supreme Court, too, has recognized that “the jury in Florida does not reveal the aggravating circumstances on which it relies,” *Sochor v. Florida*, 504 U.S. 527 (1992).

⁹ Accord: *Combs*, 525 So.2d at 855-858; *Burns v. State*, 699 So.2d 646, 654 (Fla. 1997), and cases cited.

¹⁰ *See, e.g., Cox v. State*, 2002 WL 1027308, pp. *7-*8: (Fla. May 23, 2002) “Florida statutory law details the role of a penalty phase jury, which directs the jury panel to determine the proper sentence without precise direction regarding the weighing of aggravating and mitigating factors in the process.”

¹¹ Holding on other grounds receded from in *Franqui v. State*, 699 So.2d 1312, 1319-1320 (Fla. 1997).

373, 375-376 (Fla. 1995); *Gibson v. State*, 661 So.2d 288, 292-293 (Fla. 1995); *State v. Riechman*, 777 So.2d 342, 351-353 (Fla. 2000).

2. The statute makes eligibility for a death sentence depend upon findings of fact by the trial judge that go beyond any findings reached by the jury in determining guilt.

The actual operation of the Florida capital-sentencing statute must be viewed against the backdrop of the State's general procedures for prosecuting homicide cases, including potentially capital homicide cases. Although this Court is familiar with those general procedures, they are summarized briefly in order to analyze how the statutory death-sentencing process fits into them. The aim of the analysis is to demonstrate that the statutory death-sentencing process, in context, exposes Florida capital defendants "to a penalty *exceeding* the maximum . . . [they] would receive if punished according to the facts reflected in the jury verdict alone." *Ring v. Arizona*, 2002 WL 1357257 (U.S., June 24, 2002) at *8, quoting *Apprendi v. New Jersey*, 530 U. S. 466, 483 (2000).

All capital crimes in this State must be charged by presentment or indictment of a grand jury. Fla. Const. Art. I, § 15(a) (1980). However, indictments may be opened with respect to the prosecution's theory of liability, or may plead alternative theories. For example, an indictment need not specify in separate counts that a person

charged with first-degree murder acted with a premeditated design and that s/he caused the victim's death in the course of an enumerated felony if the prosecution wishes to submit these two factually diverse theories to the jury as alternative bases for a first-degree murder conviction under Fla. Stat. § 782.04 (1979). Some charging instruments do list multiple theories of first-degree murder liability, others list only one. In no event does the instrument have to state the aggravating circumstance or circumstances on which the State will later rely to establish that the defendant is eligible for the death penalty if convicted of first-degree murder. *State v. Sireci*, 399 So.2d 964, 970 (Fla. 1981).

Under standard Florida practice, the jury instructions at a trial upon an indictment charging first-degree murder will allow a conviction on any theory of first-degree liability that has sufficient evidentiary support to sustain a verdict. Verdict forms may or may not specify the theory of liability that the jury found proved beyond a reasonable doubt. It is not common to require juries to return special verdicts making specific findings of fact.

Early in the history of the State's post-1972 death penalty law, this Court explained what constitutes a capital crime, and where the definition comes from:

“The aggravating circumstances of Fla. Stat. § 921.141(6), F.S.A., actually define those crimes – when read in conjunction with Fla. Stat. § 782.04(1) and 794.01(1), F.S.A.– to which the death penalty is

applicable in the absence of mitigating circumstances.”

Dixon, 283 So.2d at 9. Accord: *Alford v. State*, 307 So.2d 433, 444 (Fla. 1975).

Section 782.04, Florida Statutes, defines first degree murder as

“(1)(a) The unlawful killing of a human being:

“1. When perpetrated from a premeditated design to effect the death of the person killed or any human being;

“2. When committed by a person engaged in the perpetration of, or in the attempt to perpetrate, any . . . [of several enumerated felonies].”

The same section provides that “murder in the first degree . . . constitutes a capital felony, punishable as provided in § 775.082.” Fla. Stat. § 782.04(1) (1979).

The sentence for first-degree murder is specified in section 775.082, Florida Statutes:

“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 proceedings held to determine sentence** according to the procedure set forth in § 921.141 **result in a finding by the court that such person shall be punished by death**, and in the latter event such person shall be punished by death.”

Fla. Stat. § 775.082 (1979) (emphasis added).

Section 921.141, Florida Statutes, describes the procedure to be followed by the court in making the findings which are the necessary precondition for a death sentence and in determining that a death sentence will actually be imposed. See *Dixon*,

283 So.2d at 7 (“[a]fter his adjudication, this defendant is provided with five steps between conviction and imposition of the death penalty”). Section 921.141 is titled “Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence” and provides the following:

“Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by § 775.082.”

In the penalty-phase proceeding, the jury may or may not hear additional evidence beyond what was adduced prior to the verdict of guilty. *See Dixon*, 283 So.2d at 7; Fla. Stat. § 921.141(1) (1979). Each side is permitted to make a closing argument to the jury. Fla.R.Crim.Pro. 3.780. The jury is then instructed to consider all the evidence and reach an advisory recommendation regarding the appropriate sentence. The recommendation is to be based on whether sufficient aggravating circumstances exist to justify imposition of the death penalty and whether sufficient mitigating circumstances exist to outweigh these aggravating circumstances. Fla. Stat. § 921.141(2) (1979). Aggravators may be considered if proved beyond a reasonable doubt, and mitigators if supported by a preponderance of the evidence.

The aggravating circumstances enumerated by Fla. Stat. § 921.141(5), are:

“(a) The capital felony was committed by a person under sentence of imprisonment;

“(b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person;

“(c) The defendant knowingly created a great risk of death to many persons;

“(d) The capital felony was committed while the defendant was engaged or was an accomplice in the commission of, or an attempt to commit, or flight after committing or attempting to commit any robbery, rape, arson, burglary, kidnaping, aircraft piracy, or the unlawful throwing, placing or discharging of a destructive-device or bomb;

“(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody;

“(f) The capital felony was committed for pecuniary gain;

“(g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws;

“(h) The capital felony was especially heinous, atrocious or cruel.”

The jury’s advisory recommendation does not specify what, if any, aggravating circumstances the jurors found to have been proved. Neither the consideration of an aggravating circumstance nor the return of the jury’s advisory recommendation requires a unanimous vote of the jurors.

“The trial judge . . . is not bound by the jury’s recommendation, and is given final authority to determine the appropriate sentence.” *Engle v. State*, 438 So.2d 803, 813 (Fla. 1983), *explained in Davis v. State*, 703 So.2d 1055, 1061 (Fla. 1997). After the jury has made its advisory recommendation, it is discharged. A separate

sentencing hearing is then conducted before the court alone. In all cases after 1993, this judge-only sentencing hearing involves the presentation of additional evidence and/or argument to support the aggravating and mitigating circumstances. *See generally Spencer v. State*, 615 So.2d 688 (Fla. 1993).

Section 921.141(3), Florida Statutes, provides that

“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 . . .

“If the court does not make the finding requiring the death sentence, the court shall impose sentence of life imprisonment in accordance with § 775.082.”

The judge is required to issue written findings in support of his or her decision to impose a death sentence. Fla. Stat. § 921.141(3); *Grossman v. State*, 525 So.2d 833 (Fla. 1988).¹² This means that the judge must make specific factual findings with respect to the existence *vel non* of the facts constituting the statutory aggravating circumstances that are a necessary precondition for the imposition of a sentence of death. Not being bound by the jury’s sentencing recommendation, the judge may consider and rely upon evidence not submitted to the jury (provided the defendant receives adequate prior notice of the evidence). *Porter v. State*, 400 So.2d 5 (Fla.

¹² Holding on other grounds receded from in *Franqui v. State*, 699 So.2d 1312, 1319-1320 (Fla. 1997).

1981). The judge is also permitted to consider and rely upon aggravating circumstances that were not submitted to the jury. *Davis v. State*, 703 So.2d 1055 (Fla. 1997), citing *Hoffman v. State*, 474 So.2d 1178 (Fla. 1985) (court’s finding of the “heinous, atrocious, or cruel” aggravating circumstance was proper even though the jury was not instructed on it); *Fitzpatrick v. State*, 437 So.2d 1072, 1078 (Fla. 1983) (finding of previous conviction of a violent felony was proper even though the jury was not instructed on it); *Engle*, 438 So.2d at 813.

Because the jury’s role is merely advisory, this Court’s review of a death sentence is based and dependent upon the judge’s written findings. *E.g.*, *Morton v. State*, 789 So.2 324, 333 (Fla. 2001); *Grossman*, 525 So.2d at 839; *Dixon*, 283 So.2d at 8. The Court has repeatedly emphasized that the trial judge’s findings must be made independently of the jury’s recommendation. *See Grossman*, 525 So.2d at 840 (collecting cases).

3. Petitioner’s eligibility for a death sentence was in fact established solely through findings of fact made by the trial judge after Mr. Guzman was forced to chose between waiving a jury in the penalty phase and the constitutionally flawed procedure of an advisory panel.

Mr. Guzman was forced to decide between two schemes to decide the applicability of the death penalty; the procedure Mr. Guzman chose and the

unconstitutional sentencing scheme in place at the time that Mr. Guzman received the death sentence.

Mr. Guzman was never advised by the trial court or counsel that he had the right to have the jury decide whether each aggravating element was proven beyond and to the exclusion of every reasonable doubt. This right was beyond the common understanding of defense counsel in general and the courts of this State.

In other words, Mr. Guzman's only choice was to waive a jury determination of the aggravating elements of Florida Statute 921.141, or have only the appearance of a jury verdict. This was unconstitutional. Certainly, Mr. Guzman should not be denied relief under *Ring* because he refused to proceed under the constitutionally infirm scheme this State had in place at the time. As argued above, Mr. Guzman invalidly waived a penalty phase jury.

- 4. *Ring v. Arizona* holds that the federal constitutional right to jury trial is violated by the imposition of a death sentence to which the defendant is exposed solely through findings of fact made by the trial judge that go beyond any findings reached by the jury in determining guilt.**

In *Ring v. Arizona*, 2002 WL 1357257 (U.S., June 24, 2002), the Supreme Court overruled *Walton v. Arizona*, 497 U. S. 639 (1990), "to the extent that . . .

[*Walton*] allows a sentencing judge, sitting without a jury, to find an aggravating circumstance necessary for imposition of the death penalty.” 2002 WL 1357257 at *10. Quite simply, *Ring* subjected capital sentencing to the Sixth and Fourteenth Amendment rule of *Apprendi v. New Jersey*, 530 U.S. 466 (2000), “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.”” *Ring*, 2002 WL 1357257 at *3, quoting *Apprendi*, 530 U.S. at 483. “Capital defendants, no less than non-capital defendants,” the Court in *Ring* declared, “are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment.” *Id.*

That rule squarely and indisputably outlaws the Florida sentencing procedure used to impose petitioner Guzman’s death sentence. No other conclusion can plausibly be reached, for several reasons:

First, in overruling *Walton* (which had upheld Arizona’s capital sentencing procedure against the challenge that it violated capital defendants’ Sixth Amendment right to jury trial), *Ring* necessarily also overruled *Hildwin v. Florida*, 490 U.S. 638 (1989) (per curiam), and its precursors (which had upheld Florida’s capital sentencing procedure against the identical challenge). The *Walton* decision had treated these Florida precedents as controlling and had regarded the Florida and Arizona capital-

sentencing procedures as indistinguishable. Thus, *Walton* said:

“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 curiam*); *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 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.’ *Id.*, at 640-641 . . .

“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.”

497 U.S. at 647-648. *Ring*, too, explicitly recognized the indissolubility of the *Walton-*

Hildwin linkage:

“In *Walton v. Arizona*, 497 U.S. 639 (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 (quoting *Hildwin v. Florida*, 490 U.S. 638, 640-641 (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 (internal quotation marks omitted)."

Ring, 2002 WL 1357257 at *6 (emphasis added). Sure as one plus one equals two, and sure as two minus two equals zero, *Hildwin* bit the constitutional dust alongside *Walton*.

Second, *Ring*'s recognition that the "right to trial by jury guaranteed by the Sixth Amendment . . . encompass[e]s the factfinding . . . necessary to put . . . [a capital defendant] to death" (*Ring*, 2002 WL 1357257 at *10) upsets the fundamental premise on which Florida's capital-sentencing process was constructed. As seen in § 1 above, the very essence of the Florida process was the *relegation of the jury to a subordinate, advisory, non-factfinding role* in death sentencing, together with *reliance on written findings of fact by the trial judge* to establish (and to make reviewable by this Court) the factual bases on which a death sentence is authorized and appropriate for each capital defendant's crime. *E.g.*, *Porter v. State*, 723 So.2d 191, 195-196 (Fla. 1998).¹³ Reacting to its early impression of *Furman*'s demands, the

¹³ See also *Walker v. State*, 707 So.2d 300, 318-319 (Fla. 1997); the cases cited in text before and after note 11 *supra*; and the cases in notes 2, 3, and 6 *supra*. As the Court pointed out in *Dixon*, it is the written findings of the trial judge that ensure

1972 Florida Legislature vested in judges, not juries, the full factfinding responsibility necessary to keep capital sentencing disciplined by “rules” and by “reason” (*Dixon*, 283 So.2d at 8) so as to eliminate “[d]iscrimination or capriciousness” (*id.*).¹⁴ With the benefit of the hindsight furnished by *Apprendi* and belatedly by *Ring*, it becomes apparent that this was an overreaction to *Furman*. And like the overreactions to *Furman* which produced mandatory-death-sentence schemes and restricted-mitigation-consideration schemes – it bent over backwards into a different form of federal unconstitutionality.¹⁵

Third, Mr. Guzman’s death sentence, exactly like Timothy Ring’s in *Ring v. Arizona*, was imposed without the option of a “jury determination of any fact on which the legislature condition[ed] an increase in their maximum punishment” from

that capital sentencing will proceed “within the framework of rules provided by the statute” (283 So.2d at 8); and as the Court has since repeatedly recognized, “[t]he statute itself requires the imposition of a life sentence if the written findings are not made,” *Christopher v. State*, 583 So.2d 642, 646 (Fla. 1991).

¹⁴ “As we have repeatedly stressed, a trial judge's weighing of statutory aggravating factors and statutory and nonstatutory mitigating circumstances is the essential ingredient in the constitutionality of our death penalty statute. . . . It is for this very reason that we have found it essential for trial judges to adequately set forth their weighing analyses in detailed written orders.” *Porter*, 723 So.2d at 196.

¹⁵ See, e.g., *Woodson v. North Carolina*, 428 U.S. 280 (1976); [*Stanislaus*] *Roberts v. Louisiana*, 428 U.S. 325 (1976); *Lockett v. Ohio*, 438 U.S. 586 (1978); *Hitchcock v. Dugger*, 481 U.S. 393 (1987); and see *Beck v. Alabama*, 447 U.S. 625 (1980), for still another legislature’s unconstitutional overreaction to *Furman*.

imprisonment to death (*Ring*, 2002 WL 1357257 at *3). Under the plain terms of Fla. Stat. § 775.082, a person convicted of first-degree murder “*shall* be punished by life imprisonment . . . [without parole before 25 years] *unless* the proceedings held to determine sentence according to the procedure set forth in [Fla. Stat.] § 921.141 result in a *finding by the court* that such person shall be punished by death.” (Emphasis added.)¹⁶ Therefore, Mr. Guzman was ““expose[d] ... to a penalty *exceeding*” life

¹⁶ These statutory terms make even clearer than Arizona’s that fact finding by a judge, going beyond any factual findings made by the jury in returning a verdict of guilty of first-degree murder, is required as the precondition for a death sentence. The Arizona statute is described and quoted in *Ring* (2002 WL 1357257 at *3) as follows:

“The State's first-degree murder statute prescribes that the offense ‘is punishable by death or life imprisonment as provided by §13-703.’ Ariz. Rev. Stat. Ann. §13-1105(C) (West 2001). The cross-referenced section, §13-703, directs the judge who presided at trial to ‘conduct a separate sentencing hearing to determine the existence or nonexistence of [certain enumerated] circumstances . . . for the purpose of determining the sentence to be imposed.’ §13-703(C) (West Supp. 2001). The statute further instructs: ‘The hearing shall be conducted before the court alone. The court alone shall make all factual determinations required by this section or the constitution of the United States or this state.’ *Ibid.*”

Thus, the basic penalty-setting section of the Arizona statute contains a cross-reference to a procedure-prescribing section – much like Fla. Stat. § 775.082’s cross-reference to Fla. Stat. § 921.141 – but is less explicit than Fla. Stat. § 775.082 in saying that the maximum penalty for first degree murder is imprisonment “*unless* the proceedings held to determine sentence according to the” cross-referenced procedure section result in a prescribed “*finding by the court.*” And Arizona’s cross-referenced procedure section prescribes a process of judicial sentencing which is a virtual carbon copy of the one which this Court has found to

imprisonment (*Ring*, 2002 WL 1357257 at *3) – he was subjected to “an increase in . . . [his] maximum punishment” (*ibid.*) – only upon the legislatively specified condition that certain factual findings were made going beyond “the facts reflected in the jury verdict alone” (*id.*). And those findings, “necessary for imposition of the death penalty” (*id.* at *10), were made by a sentencing judge, not by a jury.

Had Mr. Guzman not invalidly waived a penalty phase jury, the judge or a jury’s verdict of “guilty as charged” at the guilt phase of Mr. Guzman’s trial would have “reflected” no more than a finding of premeditated first-degree murder. Under the plain terms of § 775.082, such first-degree murder was punishable by life imprisonment (without parole before 25 years) “*unless*” some further factual “finding” was made “by the court.” Had Mr. Guzman not invalidly waived his right to a penalty phase jury, such a *jury* would have made no further findings of fact at the penalty stage to satisfy the requirements of *Ring*, *Apprendi*, and the Sixth Amendment. It could not have made such findings for three separately sufficient reasons:

One: Florida juries do not make factual findings at the penalty stage of a capital trial. See § 1. *supra*. If Mr. Guzman did not waive a penalty phase jury such a jury would not have been instructed to make any factual findings.¹⁷

be required by Fla. Stat. § 921.141. See text at note 3 *supra*.

¹⁷ As stated *supra*, Florida law’s diminution of the jury’s role in capital sentenc-

Two: Mr. Guzman was denied the opportunity for a jury to return an unanimous verdict of *any* sort at the penalty stage. The Sixth and Fourteenth Amendment right to jury trial recognized in *Apprendi* and *Ring* stands upon an

“historical foundation . . . [that] extends down centuries into the common law. ‘[T]o guard against a spirit of oppression and tyranny on the part of rulers,’ and ‘as the great bulwark of [our] civil and political liberties,’ 2 J. Story, *Commentaries on the Constitution of the United States* 540-541 (4th ed. 1873), trial by jury has been understood to require that ‘*the truth of every accusation*, whether preferred in the shape of indictment, information, or appeal, should afterwards be confirmed by the unanimous suffrage of twelve of [the defendant’s] equals and neighbours....’ 4 W. Blackstone, *Commentaries on the Laws of England* 343 (1769) . . . (emphasis added).”

Apprendi, 530 U.S. at 477.¹⁸

ing proceedings also lead to violations of Mr. Guzman’s state-law right to have notice in the indictment of all the elements on which the State would seek to impose a death sentence, Art. I, § 15(a), Fla. Const. (1980); *State v. Rodriguez*, 575 So.2d 1262, 1265 (Fla. 1991) (receded from on other grounds, *Harbaugh v. State*, 754 So.2d 691 (Fla. 2000)), the right to a unanimous verdict on each such element, Art. I, § 16, Fla. Const. (1980); *Jones v. State*, 92 So.2d 262 (Fla. 1957) (on reh’g); *Brown v. State*, 690 So.2d 309 (Fla. 1st DCA 1995); and the right to proof beyond a reasonable doubt to the satisfaction of a unanimous jury. Art. I, § 16, Fla. Const. (1980); *Russell v. State*, 71 Fla. 236, 71 So. 27 (1916).

¹⁸ *Johnson v. Louisiana*, 406 U.S. 356 (1972), and *Apodaca v. Oregon*, 406 U.S. 404(1972), did not cut off this limb of *Ring* because neither *Johnson* nor *Apodaca* holds non-unanimity acceptable in a **capital** case. The Louisiana statute at issue in *Johnson* required jury unanimity in capital cases; it authorized nonunanimity only in *noncapital* cases punishable by imprisonment at hard labor. The latter provision was all that was at issue in *Johnson* and was all that the U.S. Supreme Court addressed. Similarly, the Oregon statute at issue in *Apodaca* authorized conviction by a nonunanimous jury for all crimes *except* first-degree

And *three*: Had Mr. Guzman not invalidly waived a penalty phase jury, the jury's penalty-stage verdict would have been merely advisory.¹⁹ The jury fact finding

murder – the sole capital crime in Oregon. Again, the single issue presented and decided in *Apodaca* was whether the defendants' *noncapital* convictions by nonunanimous juries were constitutional. And of course since *Reid v. Covert*, 354 U.S. 1 (1957), it has been clear that the Sixth Amendment's guarantee of the right to jury trial has special force and special significance in capital cases. As Justice Harlan put it in *Reid* – in respect to “a question analogous . . . to issues of due process . . . [specifically,] the question of which specific safeguards of the Constitution are appropriately to be applied in a particular context,” *id.* at 75 – “capital cases . . . stand on quite a different footing than other offenses. . . . I do not concede that whatever process is ‘due’ an offender faced with a fine or a prison sentence necessarily satisfies the requirements of the Constitution in a capital case. The distinction is by no means novel, . . . nor is it negligible, being literally that between life and death.” *Id.* at 77. The reason for the distinction is equally clear: “The taking of life is irrevocable. It is in capital cases especially that the balance of conflicting interests must be weighed most heavily in favor of the procedural safeguards of the Bill of Rights.” *Id.* at 45-46 (concurring opinion of Justice Frankfurter). And see, *e.g.*, *Beck v. Alabama*, 447 U.S. 625, 637-638 (1980), and cases cited.

In any event, the right to a unanimous jury verdict whenever facts are required to be found by a jury has deep roots in Florida law and legal culture. See, *e.g.*, Fla. Rule Crim. Pro. 3.440; *Jones v. State*, 92 So.2d 261 (Fla. 1957) (on rehearing). The measure of the jury-trial right under Article I, §§ 16 and 22 of the Florida Constitution is the common-law tradition as it was known in 1845, *State v. Webb*, 335 So.2 826, 828 (Fla. 1976); and under that tradition, “the practice [of requiring a unanimous verdict] is so ancient and so long sanctioned, that the idea of unanimity becomes inseparably connected in our minds with a verdict.” J. Proffatt, *A Treatise on Trial By Jury*, § 77 at p. 113 (1877). Accord: W. Forsyth, *History of Trial by Jury* 293 (1876). Hence, if the federal Constitution as interpreted in *Ring* requires jury trial of particular facts, then Florida law requires that the jury's verdict on those facts must be unanimous. *Cf. State v. Neil*, 457 So.2d 481 (Fla. 1984).

¹⁹ This Court has frequently upheld such instructions as consistent with

requirement of *Apprendi*, *Ring*, and the Sixth and Fourteenth Amendments is based on recognition of the importance of interposing independent jurors between a criminal defendant and punishment at the hands of a “compliant, biased, or eccentric judge,”²⁰ and cannot be satisfied by a jury that would have been told that “the final decision as to what punishment shall be imposed is the responsibility of the Judge.”

In short, there is no rational way to square the process that Mr. Guzman invalidly waived with *Ring* and *Apprendi*.

5. Mr. Guzman should not be put to death in execution of a sentence imposed in disregard of the constitutional rule of *Ring v. Arizona*.

In *Bottoson v. State*, 813 So.2d 31, 36 (Fla. 2002), this Court rejected Bottoson’s *Apprendi-Ring* claim on the merits, on authority the of *Mills v. Moore*, 786 So.2d 532 (Fla. 2001), and of *King v. State*, 808 So.2d 1237 (Fla. 2002), which

Caldwell v. Mississippi, 472 U.S. 320 (1985), precisely *because* they accurately state that under Florida law the jury is *not* the ultimate, responsible decisionmaker at the penalty stage. See cases cited in note 9 *supra*.

²⁰ *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968). The context (*id.* at 155-156) is: “The guarantees of jury trial in the Federal and State Constitutions reflect a profound judgment about the way in which law should be enforced and justice administered. A right to jury trial is granted to criminal defendants in order to prevent oppression by the Government. . . . Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge. If the defendant preferred the common-sense judgment of a jury to the more tutored but perhaps less sympathetic reaction of the single judge, he was to have it.”

had in turn relied on *Mills* (see 808 So.2d at 1245-1246). The premise of the *Mills* decision, repeated at least four times in the *Mills* opinion (786 So.2d at 536-538), was that “*Apprendi* does not apply to already challenged capital sentencing schemes that have been deemed constitutional.” 786 So.2d at 536.

Ring has since taught that premise is no longer tenable, and that *Apprendi* **does** invalidate already-challenged capital-sentencing schemes. The rule of *Apprendi* as applied in *Ring* invalidated the Arizona scheme upheld in *Walton*; and, as shown above, the rule of *Apprendi* as applied in *Ring* invalidated the Florida scheme which was used to sentence Mr. Guzman to death. The sole remaining question is whether this learning has come too late to save Mr. Guzman from execution under a death sentence imposed in disregard of the Sixth and Fourteenth Amendments, *Apprendi* and *Ring*.

The answer to that question turns on whether the *Apprendi-Ring* rule is retroactive according to the criteria of *Witt v. State*, 387 So.2d 922 (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.” 387 So.2d 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.” 387 So.2d at 929.

The three-fold *Stovall-Linkletter* test considers: “(a) the purpose to be served by the new rule; (b) the extent of reliance on the old rule; and (c) the effect on the administration of justice of a retroactive application of the new rule.” 387 So.2d at 926. It is not an easy test to use, either generally or in the present case, because there is a tension at the heart of it. Any *change* of law which “constitutes a development of fundamental significance” is *bound* to have a broadly unsettling “effect on the administration of justice” and to upset a goodly measure of “reliance on the old rule.” The example of *Gideon* – a profoundly unsettling and upsetting change of constitutional law – makes the tension obvious, and the *Witt* Court was aware of it.²¹ How the tension is resolved ordinarily depends mostly on the first prong of the *Stovall-Linkletter* test – the purpose to be served by the new rule – and whether an

²¹ See 387 So.2d at 924-925: “The issue is a thorny one, requiring that we resolve a conflict between two important goals of the criminal justice system ensuring finality of decisions on the one hand, and ensuring fairness and uniformity in individual cases on the other within the context of post-conviction relief from a sentence of death.”

analysis of that purpose reflects that the new rule is a “fundamental and constitutional law change[] which cast[s] serious doubt on the veracity or integrity of the original trial proceeding.” 387 So.2d at 929. *Cf. Thompson v. Dugger*, 515 So.2d 173, 175 (Fla. 1987).

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,” *ibid.* In *Johson v. Zerbst*, 304 U.S. 458 (1938) – which, of course, was the taproot of *Gideon v. Wainwright*, this Court’s model of the case for retroactive application of constitutional change – the Supreme Court held that a denial of the right to counsel could be vindicated in postconviction proceedings because the Sixth Amendment required a lawyer’s participation in a criminal trial to “complete the court” (304 U.S. at 468); and a judgment rendered by an incomplete court was subject to collateral attack. What was a mere imaginative metaphor in *Johnson* is *literally* true of a capital

sentencing proceeding in which the jury has not participated in the life-or-death factfinding role that the Sixth Amendment reserves to a jury under *Apprendi* and *Ring*: 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*, 2002 WL 1357257 at *10; and see *Apprendi*, 530 U.S. at 494-495. The right to a jury determination of factual accusations of this sort has long been the central bastion of the Anglo-American legal system’s defenses against injustice and oppression.²² As former Justice Lewis F. Powell, Jr. wrote: “jury trial has been a

²² See Blackstone’s Commentaries, §§ 349-350 (Lewis ed. 1897): “[T]he founders of the English law have with excellent forecast contrived . . . that the truth of every accusation . . . should afterwards be confirmed by the unanimous suffrage of twelve of his equals and neighbors. . . . So that the liberties of England cannot

principal element in maintaining individual freedom among English speaking peoples for the longest span in the history of man.”²³

Justice Powell also quotes de Tocqueville as observing

“that the jury ‘places the real direction of society in the hands of the governed. . . . and not in . . . the government. . . . He who punishes the criminal . . . is the real master of society. All the sovereigns who have chosen to govern by their own authority, and to direct society, instead of obeying its direction, have destroyed or enfeebled the institution of the jury.’”²⁴

Inadvertently but nonetheless harmfully, the United States Supreme Court lapsed for a time and enfeebled the institution of the jury through its rulings in *Hildwin v. Florida* and *Walton v. Arizona*. Its retraction of those rulings in *Ring* restores a right to jury trial that is neither trivial nor transitory but “the most transcendent privilege which any

but subsist, so long as this *palladium* remains sacred and inviolate; not only from all open attacks, (which none will be so hardy as to make) but also from all secret machinations, which may sap and undermine it. . . .” See also *Rex v. Poole*, Cases Tempore Hardwicke 23, 27 (1734), quoted in *Sparf v. United States*, 156 U.S. 51, 94 (1895): “[I]t is of the greatest consequence to the law of England, and to the subject, that these powers of the judge and the jury are kept distinct; that the judge determines the law, and the jury the fact; and, if ever they come to be confounded, it will prove the confusion and destruction of the law of England.”

²³ Powell, *Jury Trial of Crimes*, 23 Washington & Lee L. Rev. 1, 11 (1966).

²⁴ *Id.* at 5, quoting 1 de Tocqueville, *Democracy in America* 282 (Reeve trans. 1948).

subject can enjoy.”²⁵ Mr. Guzman should not be denied its benefit simply because the Supreme Court temporarily overlooked the point before finally getting it right.

CLAIM II

MR. GUZMAN’S EIGHTH AMENDMENT RIGHT AGAINST CRUEL AND UNUSUAL PUNISHMENT WILL BE VIOLATED BECAUSE MR. GUZMAN MAY BE INCOMPETENT AT THE TIME OF EXECUTION.

In accordance with Florida Rules of Criminal Procedure 3.811 and 3.812, a prisoner cannot be executed if “the person lacks the mental capacity to understand the fact of the impending death and the reason for it.” This rule was enacted in response to *Ford v. Wainwright*, 477 U.S. 399, 106 S.Ct. 2595 (1986). Mr. Guzman acknowledges that under Florida law, a claim of incompetency to be executed cannot be asserted until a death warrant has been issued. Further, Mr. Guzman acknowledges that before a judicial review may be held in Florida, the prisoner must first submit his claim in accordance with Florida Statutes. The only time a prisoner can legally raise the issue of his sanity to be executed is after the Governor issues a death warrant.

²⁵ Blackstone’s Commentaries, quoted in Powell, *supra* note 26 at 3 n.7. See also, *e.g.*, *United States v. Battiste*, 24 Fed Cas. 1042, 1043 (C.C.D. Mass. 1835) (No. 14,545) (Justice Story): “I hold it the most sacred constitutional right of every party accused of a crime, that the jury should respond as to the facts, and the court as to the law.” 2 Sumner 240, 243 (1835).

Until the death warrant is signed, the issue is not ripe. This is established under Florida law pursuant to Section 922.07, Florida Statutes (1985) and *Martin v. Wainwright*, 497 So.2d 872 (1986)(If Martin's counsel wish to pursue this claim, we direct them to initiate the sanity proceedings set out in Section 922.07, Florida Statutes (1985)).

This claim is necessary at this stage because federal law requires that in order to preserve a competency to be executed claim, the claim must be raised in the initial petition for habeas corpus, and federal law requires all issues raised in a federal habeas petition to be exhausted in state court. Accordingly, Mr. Guzman raises this claim now.

CONCLUSION

For the foregoing reasons, this Court should grant James Guzman habeas corpus relief.

CERTIFICATE OF FONT SIZE AND SERVICE

I HEREBY CERTIFY that a true copy of the foregoing PETITION FOR A WRIT OF HABEAS CORPUS which has been typed in Font Times New Roman , size 14, has been furnished by U.S. Mail to all counsel of record on this_1st day of October 2002.

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CERTIFICATE OF COMPLIANCE

I hereby certify that a true copy of the foregoing PETITION FOR A WRIT OF HABEAS CORPUS, was generated in a Times New Roman, 14 point font, pursuant to Fla. R. App. P. 9.210.

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