IN THE SUPREME COURT OF FLORIDA

CASE NO. SC02-1455

LINROY BOTTOSON
Petitioner,
vs.
MICHAEL MOORE,
Secretary, Florida Department of Corrections
Respondent.

ORIGINAL PROCEEDING

AMICUS CURIAE BRIEF OF THE FLORIDA PUBLIC DEFENDER ASSOCIATION, INC. ON BEHALF OF LINROY BOTTOSON

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STATEMENT OF INTEREST OF AMICUS CURIAE

Amicus Curiae, The Florida Public Defender Association, Inc., (hereafter, "the Association"), is a state-wide organization consisting of Florida's elected public defenders, and other public defender staff, who are charged by Florida's constitution and general laws with representing indigent criminal defendants at both the trial and appellate level, including cases in which the death penalty is being sought or has already been imposed.

The issues presented in the King and Bottoson petitions have implications for a large number of public defender clients at both the trial and appellate levels and are also of acute public interest. The Association hopes that the accompanying brief will assist the Court by addressing the state constitutional and common law requirements that are triggered by the *Ring* decision.

SUMMARY OF ARGUMENT

Aggravating circumstances are the functional equivalent of elements of the offense of capital murder and actually define the offenses to which the death penalty may apply under Florida law. The finding of aggravating circumstances must therefore be subject to the same requirements that apply under the Florida Constitution and common law to proof of elements of guilt, including that they be charged in the indictment and found by the jury unanimously and beyond a reasonable doubt. In the noncapital context, the proof of aggravating facts that result in an increase in punishment, such as imposition of a mandatory minimum sentence or reclassification of the offense to a more serious degree, are already subject to these requirements. The

current procedures for imposing a death sentence do not require notice of aggravating circumstances; do not require that the jury unanimously agree on the existence of any aggravating circumstance or on the ultimate question whether there are "sufficient" aggravating circumstances to warrant imposition of the death penalty; do not require that a finding of "sufficient" aggravating circumstances be made beyond a reasonable doubt; and are not subject to the rules of evidence.

The current sentencing scheme therefore violates Florida law, independent of federal constitutional law, and impermissibly affords capital defendants ***fewer* rights** than those facing a three year minimum mandatory sentence for possessing a firearm during commission of an offense. The tolerance of less rigorous standards for the factfinding necessary to impose a sentence of death stands the axiom that "death is different" on its head.

ARGUMENT

I.

AGGRAVATING CIRCUMSTANCES ARE ELEMENTS OF THE OFFENSE OF CAPITAL MURDER AND, LIKE ANY OTHER ELEMENT OF A CRIMINAL OFFENSE, MUST BE CHARGED IN THE INDICTMENT AND DETERMINED BY A UNANIMOUS JURY BEYOND A REASONABLE DOUBT AS REQUIRED BY THE FLORIDA CONSTITUTION AND COMMON LAW.

In Ring v. Arizona, ___ U.S. ___, 122 S.Ct. 2428 (2002), the Supreme Court held that the aggravating circumstances that must be found in order for the death penalty to be imposed "operate as 'the functional equivalent of an element of a greater offense'" and must be found by a jury in accordance with the Sixth Amendment. Ring, 122 S.Ct. at 2442-43 (quoting Apprendi v. New Jersey, 530 U.S. 466, 494 n.19 (2000)).

Aggravating circumstances in Florida's capital sentencing scheme, as in Arizona, operate as elements of the "greater offense" of capital murder. As this Court recognized long before Ring, aggravating circumstances under Florida law "actually define those crimes ... to which the death penalty is applicable in the absence of mitigating circumstances." State v. Dixon, 283 So. 2d 1, 9 (Fla. 1973). Relying on Dixon, this Court has correctly held that for purposes of *ex post facto* clause analysis, the addition of an entirely new aggravating circumstance is like the addition of a new element of an offense that "alter[s] the definition of the criminal conduct that may subject [the defendant] to the death penalty and increas[es] the punishment of a crime.

. . .” See Hootman v. State, 709 So. 2d 1357, 1360 (Fla. 1998), abrogated on jurisdictional grounds, State v. Matute-Chirinos, 713 So. 2d 1006 (Fla. 1998).[1]

Thus, even though death is the maximum sentence authorized for first degree murder under Florida law, a defendant cannot be sentenced to death solely upon conviction for first degree murder. Rather, the trial court *must* impose a life sentence unless “the procedure set forth in s 921.141 results in findings by the court that such person shall be punished by death.” Fla. Stat. § 775.082(1) (2001). Section 921.141(3), Florida Statutes, provides in turn that a sentence of death may not be imposed unless and until the trial court makes a written finding “[t]hat sufficient aggravating circumstances exist as enumerated in subsection (5),” to warrant imposition of the death penalty.

Since aggravating circumstances are elements of the offense of capital murder, they must be proved in accordance with Florida law, which requires that elements of an offense be alleged in the indictment or information and found by the jury unanimously and beyond a reasonable doubt. These requirements have long been applied to aggravating facts that are used to increase punishments in the noncapital context. The penalty phase jury proceedings under section 921.141, however, do not satisfy ***any*** of these requirements.

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[1]Hootman’s reasoning remains good law and continues to be relied on by this Court. See, e.g., Lukehart v. State, 776 So.2d 906, 925 (Fla. 2000).

A.

FLORIDA LAW REQUIRES THAT ELEMENTS OF GUILT BE CHARGED IN THE INDICTMENT OR INFORMATION AND BE FOUND BY THE JURY UNANIMOUSLY AND BEYOND A REASONABLE DOUBT.

The Florida Constitution's Declaration of Rights and Florida law protected the rights of Floridians accused of crimes before many of the provisions of the federal constitution were even applied to the states. For example, Florida required the suppression of illegally obtained evidence long before Mapp v. Ohio, 367 U.S. 643 (1961) applied the exclusionary rule to the states. See Hart v. State, 89 Fla. 202, 206-207, 103 So. 633 634 (1925). Florida also required the exclusion of involuntary confessions long before the the Fifth Amendment's right against self-incrimination was applied to the states through the Fourteenth Amendment; indeed, it applied this rule of exclusion before the Fourteenth Amendment was even enacted.[2] See Simon

[2]Until the ratification of the Fourteenth Amendment to the United States Constitution in 1868, the Bill of Rights did not apply to the States, which were free to protect, or not to protect, rights of criminal defendants. Indeed, even with ratification, it took a century for the Supreme Court to "incorporate" the Bill of Rights. See e.g. Duncan v. Louisiana, 391 U.S. 145, 155 (1968)(right to jury trial); Benton v. Maryland, 395 U.S. 784 (1969) (right against double jeopardy); Klopfer v. North Carolina, 386 U.S. 213 (1967) (right to speedy trial); Washington v. Texas, 388 U.S. 14 (1967) (right to compulsory process to obtain witnesses subpoenaed by defendants); Pointer v. Texas, 380 U.S. 400 (1965) (right to confront witnesses who testify for the prosecution); Malloy v. Hogan, 378 U.S. 1 (1964) (privilege against compelled self incrimination); Gideon v. Wainwright, 372 U.S. 335 (1963) (right to counsel for indigent defendants charged with felonies); Robinson v. California, 370 U.S. 660 (1962) (right against cruel and unusual punishments); Mapp v. Ohio, 367 U.S. 643 (1961) (right to exclude evidence found in violation of the Fourth Amendment); In re Oliver, 333 U.S. 257

v. State, 5 Fla. 285, 296 (1853).

In Traylor v. State, this Court, recognizing that the state constitution is an independent guarantor of individual rights, embraced an approach to constitutional questions that places primary emphasis on the state constitution:

> When called upon to decide matters of fundamental rights, Florida's state courts are bound under federalist principles to give primacy to our state Constitution and to give independent legal import to every phrase and clause contained therein. [Florida courts] are similarly bound under our Declaration of Rights to construe each provision freely in order to achieve the primary goal of individual freedom and autonomy.

596 So. 2d 957, 962-63 (Fla. 1992) (footnote omitted). Traylor's "primacy" doctrine promotes the development of a state constitutional jurisprudence, informed by but independent of federal constitutional jurisprudence.

Consistent with Traylor, this Court has held "the right to jury trial an indispensable component of our system of justice" and emphasized its independent roots in the state constitution:

> In addition to the federal constitutional mandate . . . our state constitution's Declaration of Rights expressly provides that the "right of trial by jury shall be secure to all and remain inviolate." Art. I, § 22, Fla. Const. Similarly, this Court has acknowledged that "a defendant's right to a jury trial is indisputably one of the most basic rights guaranteed by our constitution." State v. Griffith, 561 So.2d 528, 530 (Fla.1990); see also Floyd v. State, 90 So.2d 105, 106 (Fla.1956) (stating that "right of an accused to trial by jury is one of the most fundamental rights guaranteed by our system of government").

(1948) (right to public trial). As discussed, infra, this Court relied upon the Florida Constitution and common law to protect the rights of its citizens charged with crimes. Those rights are no less important today after incorporation of the Bill of Rights.

Blair v. State, 698 So. 2d 1210, 1213 (Fla. 1997). In addressing the ability of a criminal defendant to waive the right to a full jury, this Court quoted with approval the United States Supreme Court's warning that, "***the maintenance of the jury as a fact-finding body in criminal cases is of such importance and has such a place in our traditions"*** that waivers should be sparingly allowed. Id. (quoting Patton v. United States, 281 U.S. 276, 312-13(1930)) (e.s.).

This brief will not attempt to address all of the requisites of a valid jury determination of an element of a criminal offense under Florida law, but will endeavor to address below those that are most important to preserve "inviolate" the right to trial by jury.

1. So Say We All: Jury Unanimity

Jury unanimity is a necessary ingredient of Florida's right to trial by jury. The statement in Article 1, section 22, that the right to trial by jury shall "remain inviolate" dates back to article 1, section 6 of the Constitution of 1838, which provided that the right to trial by jury "shall for ever remain inviolate." This provision means that the jury trial right as it existed at common law must remain intact.[3] As this Court explained in Buckman v. State, 34 Fla. 48, 55, 15 So. 697, 699 (1894):

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[3]Section 775.01, Florida Statutes, also incorporates the English common law. Antecedents to this statute date back to the first session of the Territorial Legislature. Acts of the Legislative Council of the Territory of Florida Passed at Their First Session 1822, p. 53. Florida Rule of Criminal Procedure 3.440 explicitly codifies the jury unanimity requirement.

> When the right of trial by jury is secured by constitutional provision in general terms like ours, and without any qualification or restriction, it must be understood as retained in all those cases that were triable by jury according to the course of the common law.

The jury's verdict at common law had to be unanimous. See Motion to Call Circuit Judge to Bench, 8 Fla. 459 (1859) ("The common law wisely requires the verdict of a petit jury to be unanimous"). The requirement of jury unanimity is one of the most ancient incidents of the common law jury, having been established in 1367. See People ex rel. Swanson v. Fisher, 172 N.E. 722, 723 (Ill. 1930); L. LEVY, ORIGINS OF THE BILL OF RIGHTS 216 (1999) ("The rule itself derived from a case of 1367 in which a court ruled that a verdict agreed to by eleven of twelve jurors was unacceptable."). The requirement of jury unanimity is therefore a necessary part of our right to trial by jury.

Accordingly, Brown v. State, 661 So. 2d 309, 311 (Fla. 1st DCA 1995), held that the defendant was denied his right to trial by jury on the element of using a firearm during the commission of the offense when the jury "having convicted the defendant of manslaughter" failed to check the relevant box on the verdict form, and only five of the six jurors subsequently agreed that the defendant had indeed used a firearm. "In a jury trial," the court emphasized "'the truth of every accusation ... should ... be confirmed by the unanimous suffrage ... of [the defendant's] equals and neighbors....'" Id. (quoting 4 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 343 (1769)). In so holding, the court relied specifically on Article I, section

16(a) of the Florida Constitution (1968) and section 775.01, Florida Statutes (1991), which incorporates "[t]he common law of England in relation to crimes, except so far as the same relates to the modes and degrees of punishment . . . where there is no existing provision by statute on the subject." Brown , 661 So. 2d at 311.

2. A Rule "To Which Every Virtuous Man Will Assent": the Reasonable Doubt Standard.

The origin of the common law reasonable doubt standard is unclear, although Professor Levy associates it with the development of the unanimity requirement: "Possibly the rule of unanimity originated and prevailed because it was consistent with the obligation of the prosecution to prove guilt beyond a reasonable doubt." LEVY, supra, at 216.

By the end of the common law period the reasonable doubt standard was an accepted element of the jury trial, especially in capital cases. In State v. Wilson, 1 N.J.L. 439, 1793 WL 469, *4 (N.J. 1793), the court instructed the jury: "It is, however, a good rule, and it is also a humane rule, to which every virtuous man will assent, that where reasonable doubts exist, the jury, particularly in capital cases, should incline to acquit rather than condemn." Florida law has applied the rule since at least 1867. Cf. Holland v. State, 12 Fla. 117, 1867 WL 1453, *10 (Fla.1867) ("On this point they were properly charged by the court as to the law, and we presume, from the facts of the case, they entertained no reasonable doubt of guilt.").

In Russell v. State, 71 Fla. 236, 246, 71 So. 27, 30 (1916), Justice Whitfield

noted in a concurring opinion that the reasonable doubt standard serves the Due Process Clause of Florida's Declaration of Rights: "The requirement that the evidence shall show guilt beyond a reasonable doubt is a rule of judicial procedure, designed to secure the organic right to personal life and liberty where that right has not been by due process of law clearly and indubitably shown to have been forfeited by the commission of the crime charged."

Going further back, this Court, in Wooten v. State, 24 Fla. 335, 5 So. 39 (1888), held constitutional a law that provided that the possession in a house or structure of equipment "commonly used in games of chance usually played in gambling-houses, or by gamblers" was prima facie evidence that the house or structure was kept for the purpose of gambling. This Court held that the law did not violate due process, reasoning that it merely provided that possession of such equipment was prima facie evidence "if there is nothing in the attendant circumstances, or in any of the evidence in the case, raising a reasonable doubt to the contrary in the minds of the jury". Id., 24 Fla. at 344, 5 So. at 43. Further, the judge instructed the jury that every person is presumed innocent and that the jury should acquit if it had any reasonable doubt as to guilt.

Thus, the reasonable doubt standard has also been a necessary ingredient of the jury trial in criminal cases since the earliest times in Florida law.

3. As Charged in the Indictment: Formal Allegation of the Elements of the Offense.

The requirement of indictment in criminal cases is even more ancient than the jury trial itself. The process of bringing charges by a 16-man jury of presentment was established in 1176, and affirmed in Magna Carta. LEVY, *supra,* at 211-12. A fundamental requirement of common law pleading was that the indictment allege all of the ingredients (or, in present-day terminology, elements) of the offense. Comm. v. Maxwell, 2 Pick. 139, 1824 WL 1878, *3 (Ma. 1824), states:

> Lord Chief Justice De Grey, in Rex v. Horne, Cowp. 682, lays down the rule very well in regard to this matter. The charge must contain such a description of the crime, that the defendant may know what crime it is which he is called upon to answer; that the jury may appear to be warranted in their conclusion of guilty or not guilty upon the premises delivered to them; and that the court may see such a definite crime, that they may apply the punishment which the law prescribes.

Florida law incorporated these requirements from its earliest days. The Territorial Legislature in its first session provided for indictment by the grand jury and giving a copy of the indictment to the accused in felony cases. Acts of the Legislative Council of the Territory of Florida Passed at Their First Session 1822, pp. 153, 154. Article 1, section 10 of the Constitution of 1838 required prosecution by indictment or presentment with notice to the accused on demand of the nature and cause of the accusation, and article 1, section 16 provided that no person be made to answer a criminal charge "but by presentment, indictment, or impeachment." Florida adopted the common law rule that every ingredient of the offense must be pled and that a verdict could not cure a defect in the indictment. See Groner v. State, 6 Fla. 39, 1855 WL 1375, *2 (1855) ("if any of these ingredients of the offence be omitted, the

defendant may demur, move in arrest of judgment, or bring a writ of error, and the defect will not be aided by verdict. 2 East 333; Arch'd. cr. Law, 1 Ed., page 23.").

Thus, the state constitution imposes a requirement, independent of federal law, that the charging document allege all the essential elements of an offense. In State v. Rodriguez, 575 So.2d 1262, 1265 (Fla.1991), receded from on other grounds Harbaugh v. State. 754 So.2d 691 (Fla.2000), this Court held that, to sustain a prosecution for felony DUI and felony DWLS, prior predicate convictions must be noticed and proved beyond a reasonable doubt, as required by Florida law:

> A charging document must provide adequate notice of the alleged essential facts the defendant must defend against. Art. I, §§ 9, 16, Fla. Const. In recognition of this concern, Florida Rule of Criminal Procedure 3.140(b) provides that an "indictment or information upon which the defendant is to be tried shall be a plain, concise and definite written statement of the ***essential facts constituting the offense charged***." (Emphasis supplied); see also Fla.R.Crim.P. 3.140(d)(1) (Each count of an indictment or information upon which the defendant is to be tried ***shall allege the essential facts constituting the offense charged***.").

Id. at 1264 (emphasis supplied).

"Where an indictment or information wholly omits to allege one or more of the essential elements of the crime, it fails to charge a crime under the laws of the state." State v. Gray, 435 So. 2d 816, 818 (Fla. 1983). Moreover, "[s]ince a conviction cannot rest upon such an indictment or information, the complete failure of an accusatory instrument to charge a crime is a defect that can be raised at any time--before trial, after trial, on appeal, or by habeas corpus." Id. Taking from the jury its obligation to determine any element of an offense is a denial of due process.

Henderson v. State, 155 Fla. 487, 490, 20 So. 2d 649 (1945) ("It is elementary that every element of a criminal offense must be proved sufficiently to satisfy the jury (not the court) of its existence.")

A jury can only find elements alleged in the information. For instance, in a burglary case the "[t]he ownership of the building must be alleged, and without variance proved as laid." Addison v. State, 95 Fla. 737, 740, 116 So. 629, 630 (1928); see also Pell v. State, 20 Fla. 774, 1884 WL 2097 (1884). Likewise, a court cannot reclassify an armed burglary charge from a first-degree felony punishable by life to a life felony for burglary with assault without an allegation in the charging document of an actual assault. See Wright v. State, 617 So.2d 837, 841-42 (Fla. 4th DCA 1993). In Bryant v. State, 744 So.2d 1225 (Fla. 4th DCA 1999), the court held that a defendant's sentence for attempted murder could not be enhanced for use of a firearm where the information did not allege use of a firearm, notwithstanding that the jury actually found that uncharged element.

4. Autrefois Acquit or Autrefois Convict: the Effect of the Verdict.

By the end of the common law period, the courts had firmly established the principle that a prior acquittal or conviction for a crime involving the same act barred a subsequent prosecution. Professor Levy writes:

> Since the time of Coke, the concept of double jeopardy has been associated in England primarily if not exclusively with criminal cases, and it took the form of allowing a defendant to plead that because he had been tried previously for some offense, he could not be tried for it again. It did not matter whether he pleaded autrefois acquit (acquitted

> previously) or autrefois convict (convicted previously) because in either case, retrial was illegal. The King's Bench, England's highest criminal court, endorsed a spacious concept of double jeopardy in a case of 1696. After defendants were acquitted on a charge of breaking and entering, they were accused again for the same conduct but on the charge of larceny, a different crime. Nevertheless, their previous acquittal formed the basis for the court's ruling that they could not be indicted for larceny or on any charge Afor the same fact" or deed.

LEVY, supra, at 204. Professor Levy also notes various colonial cases in which a prior conviction constituted a bar to another prosecution for "the same fact" or "virtually the same offense". Id. 205-206.

As already noted, the Territorial Legislature incorporated the English common law into the law of the Territory of Florida. Likewise, article 1, section 13 of the Constitution of 1838 provided that no person could be twice put in jeopardy for the same offence.

In Ray v. State, 231 So.2d 813 (Fla.1969), after Jetson Ray plead guilty to burglary in a 1945 case, a "short recess" occurred after which, for reasons which were not clear, the plea was set aside on motion by the prosecutor, who then filed a new information with a new case number charging Ray "with burglary and assault arising out of the identical transaction which formed the predicate for the charge set forth in the first information." Ray again plead guilty and was sentenced. Years later, the convictions in the burglary and assault case were set aside because Ray had not been afforded counsel. Upon retrial, Ray contended that his plea to the burglary charge in the first case constituted a double jeopardy bar to the prosecution of the burglary and

assault case. He relied on the Double Jeopardy Clauses of the state and federal constitutions. This Court ruled that the prior guilty plea barred to burglary barred the new prosecution for burglary and assault.

The Legislature has codified this rule in section 775.021(4)(b)3, Florida Statutes, which forbids dual convictions for offenses "which are lesser offenses the statutory elements of which are subsumed by the greater offense".

5. <u>The Trial-informing Jury: the Necessity of Uniform Rules of Evidence</u>.

"With the full advent of the jury, in the 1200s, the general surroundings of the modern system [of evidence] were prepared, for then the tribunal was to determine by its own conscious persuasion of the facts, and not merely by supervising external tests." 1 WIGMORE, EVIDENCE § 8 (Tillers rev. 1983). Innovations during the first three hundred years of the jury system include the "practice for attesting witnesses, oaths, and documentary originals." <u>Id</u>. As the jury system developed, the jury was gradually converted from a panel composed of witnesses to a panel selected to hear the testimony of others as developed through rules of evidence.[4] Innovations through 1700 include rules regarding the competency of witnesses, privilege and privileged communication, compulsory attendance of witnesses, the privilege against self-

[4]Another writer has referred to this as "the transition over ... two hundred and fifty years or so from the self-informing medieval jury to the trial-informing modern jury." N. CANTOR, IMAGINING THE LAW: COMMON LAW AND THE FOUNDATIONS OF THE AMERICAN LEGAL SYSTEM, 125 (1997).

incrimination, the parole evidence rule, the rule for two witnesses in treason, and the rule regarding character. Id. In the 1700s came the full right of cross-examination which produced detailed rules of evidence: "A notable consequence of the establishment of the right of cross-examination was that, by the multiplication of oral interrogation at trials, the rules of evidence were developed in detail upon such topics as naturally came into prominence." Id. The period leading up to 1790 saw the development of the rules of impeachment and corroboration of witnesses, rules for confessions, leading questions and the order of testimony, and principles regarding the admission of documents.[5] Id.

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[5] By contrast, the chancery court, which did not involve jury trials, was not bound by the rules of evidence. Cf. Sterrett's Appeal, 2 Pen. & W. 419, 1831 WL 3348 (Pa. 1831). State v. Lyon, 1 N.J.L. 403, 1789 WL 183, Coxe 403 (N.J. 1789) demonstrates how it was understood at the end of the common law period that the rules of evidence were intended to govern jury trials:

> It has been the constant practice of the court in cases of this kind to hear viva voce testimony when offered. The general principle in the admission of evidence is, not that courts are restricted by narrower rules in receiving testimony than juries are, but that they being able to discriminate between that which ought to be listened to, and that which should be disregarded, are not prohibited from hearing any evidence which they may think calculated to illustrate the subject before them. [FN(a)] The objections that have been urged apply wholly to the convenience of the judges, and when we find it necessary to adopt another course, that we may be enabled to get through the business before us, we shall give previous notice, that no inconveniences may result from an alteration of the practice. At present, however, no such necessity exists, and, as it has been customary, in all cases of this kind, to receive parol testimony, we do not think proper, at this time, to introduce a new rule.

Thus, by the time of Florida's statehood it was well understood that there was a body of decisional law constituting uniform rules of evidence that governed jury trials in criminal cases. In Cotten v. Williams, 1 Fla. 37, 1846 WL 999, *6 (1846), this Court explained:

> There is no difference, as to the rules of evidence, between criminal and civil cases; what may be received in one, may be received in the other: and what is rejected in the one, ought to be rejected in the other. 2 Russell on Crimes, 588. The King vs. Watson, by Abbott Justice, 2 Starkie's Reports, 155.

During this period it was accepted that a necessary predicate to the jury's fact-finding role was that it be based on the rules of evidence:

> But after the Court have aided the jury by full and precise instructions, as to the principles of law applicable to the case, informed them in regard to the burden of proof, the presumptions to be drawn from particular facts and circumstances, and the nature and application of the rules of evidence, and the question is one of fact, about which different minds may honestly differ, it is the province of the jury ultimately and definitively to decide. Upon them the constitution and the laws have placed the responsibility, and upon them it must rest.

Coffin v. Phenix Ins. Co., 15 Pick. 291, 1834 WL 2643, *3 (Mass. 1834).

> FN(a). In the case of the State v. McDonald and Armstrong, 1 N.J.L. 332, the court proceeded upon the same principle, which has also received the sanction of Chief Justice Tilghman in Shortz v. Quigley, 1 Binn. 222, 224, who says, "This is an appeal to the court to exercise a summary jurisdiction on principles of equity. In hearing these motions courts are not tied down to those strict rules of evidence which govern them in trials by jury, because it is presumed that their knowledge of the law prevents their being carried away by the weight of testimony not strictly legal."

The rights to trial by jury and to due process of law are greatly diminished if the rules of evidence vary from courtroom to courtroom. In Jack v. Martin, 14 Wend. 507, 1835 WL 2938 (N.Y. 1835), counsel for a slave-holder seeking replevin unwittingly revealed how dispensation of the rules of evidence and strict procedure are inimical to liberty:

> The citizens of the slave-holding states would never have consented to subject themselves to the necessity of establishing their claims to their fugitive slaves before juries composed of the inhabitants of non-slave-holding states. Indeed the difficulty of establishing the identity by proof, that would satisfy the strict common law rules of evidence on jury trials, and the great delay and expense of successive appeals, would render even the successful prosecution of a claim to service in the state in which the arrest is made in the ordinary mode by trial and judgment, vexatious and unprofitable to the claimant.
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> * * *

From the foregoing, at least the following are necessary parts of a trial for the finding of a statutory element of guilt under Florida law: (1) trial by a jury whose verdict is unanimous; (2) the jury may only find elements alleged in the charging document; (3) the rules of evidence must apply; (4) a prior conviction or acquittal of a lesser included offense involving the same conduct bars new proceedings; and (5) the state must establish the fact beyond reasonable doubt.

B.

THE PROTECTIONS OF FLORIDA CONSTITUTIONAL AND COMMON LAW MUST APPLY WITH EQUAL FORCE TO THE FINDING OF THE AGGRAVATING CIRCUMSTANCES NECESSARY TO IMPOSE A DEATH SENTENCE

Ring is premised in part on the principle that "[c]apital defendants, no less than non-capital defendants," are entitled to the due process and jury trial rights that apply to "the determination of any fact on which the legislature conditions an increase in their maximum punishment." Id. at 2432; accord id. at 2443 ("The right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the factfinding necessary to increase a defendant's sentence by two years, but not the factfinding necessary to put him to death.") This reasoning applies with equal force to the state law protections, both constitutional and common law, that apply to the determination of essential elements of an offense.

In the noncapital context, this Court, and other Florida courts, have consistently treated aggravating factors that cause an offense to be reclassified to a more serious level or trigger the application of a minimum mandatory sentence as elements of an offense that must be charged in the indictment and specifically found by the jury, unanimously and beyond a reasonable doubt.

In State v. Rodriguez, supra, this Court held that the prior convictions necessary to establish felony DUI must be charged in the information. Later, this Court also held that the defendant has the right to demand that the jury decide in a bifurcated

proceeding "whether the defendant had been convicted of DUI on three or more prior occasions." State v. Harbaugh, 754 So. 2d 691, 693 (Fla. 2000).

Similarly, when a "trial court may enhance a defendant's sentence or apply the mandatory minimum sentence for use of a firearm, the jury must make a finding that the defendant committed the crime while using a firearm." State v. Overfelt, 457 So.2d 1385, 1387 (Fla.1984). Overfelt is grounded specifically in "the jury's function [as] . . . the finder of fact" and this Court's concern that "allow[ing] a judge" to make such a factual finding in order to apply [an] . . . enhancement or mandatory sentencing provision . . . would be an invasion of the jury's historical function and could lead to a miscarriage of justice . . . ." Id.

Even when the jury has convicted the defendant of other contemporaneous offenses involving use of a firearm, the trial court may not impose a minimum mandatory sentence without a specific finding that a firearm was used in the commission of the offense to which the minimum mandatory would apply. Valentine v. State, 577 So. 2d 714 (Fla. 5th DCA 1991) (Trial court erroneously imposed three year minimum mandatory sentence for attempted second degree murder conviction where defendant was convicted of possession of a firearm by convicted felon and use of a firearm in commission of a felony but "there was no finding by the jury that a firearm was used in the commission of" the attempted murder); see also State v. Hargrove, 694 So. 2d 729, 730 (Fla. 1997) ("Even where the use of a firearm is uncontested, the overriding concern of Overfelt still applies: the jury is the fact finder,

and use of a firearm is a finding of fact," requiring a "specific finding by the jury"); State v. Tripp, 642 So. 2d 728, 730 (Fla.1994) ("Although the information alleged that Tripp used a weapon during the commission of attempted first- degree murder, we find that the jury did not make a sufficient finding that Tripp used a weapon because there was no special verdict form reflecting a separate finding to this effect."); Boswell v. State, 544 So. 2d 243, 244 (Fla. 1989) ("[c]onviction on one count of the indictment cannot be used to lengthen the sentence on another count")

This Court has similarly held that the jury must make a specific finding as to the quantity of drugs in a trafficking case -- even if the amount is undisputed. State v. Estevez, 753 So. 2d 1, 4 (Fla. 1999). The reason for requiring a specific finding is the "inherent power" of a jury under Florida law "to pardon a defendant by convicting the defendant of a lesser offense." Id. (collecting cases). Trial judges may not, this Court reasoned, "direct a verdict as to the amount of cocaine involved in a trafficking offense, even where the evidence presented by the State as to the amount is not controverted." Id.

Two district courts of appeal have held that the defendant's age is an essential element of the crime of capital sexual battery. Baker v. State, 604 So. 2d 1239, 1240 (Fla. 3d DCA 1992); accord Glover v. State, 815 So. 2d 698, 699 (Fla. 5th DCA 2002); D'Ambrosio v. State, 736 So. 2d 44 (Fla. 5th DCA 1999).[6]

[6]The Second District Court of Appeal has "decline[d] to enter the debate on whether the defendant's age is an element of an offense or a sentencing factor." Pena v. State, 2002 WL 1430349 (Fla. 2d DCA 2002). The Fourth District Court of Appeal

The facts of Baker closely parallel those of most death penalty cases. The defendant's age -- an essential element distinguishing "capital" sexual battery from other sexual batteries, was not alleged in the indictment. Baker, 604 So. 2d at 1240. "Although the jury was instructed that it had to find that the defendant was age of eighteen or over in order to find him guilty of a capital felony, . . . the verdict form contained no provision for a finding as to the defendant's age. Instead the jury was permitted to, and found the defendant 'Guilty' only of 'Sexual Battery as charged in the Information.'" Id. This, the Court found, was not sufficient to allow the defendant to be convicted of *capital* sexual battery: "We hold that in the absence of either a specific allegation in the charging document, or a finding by the jury that the defendant is eighteen years of age or over, . . . a conviction for capital sexual battery cannot stand." Id. (footnote omitted).

In Brown v. State, 763 So.2d 1190, 1193 (Fla. 4th DCA 2000), a sentencing guidelines case, the court concluded that the trial judge had impermissibly increased the defendant's sentence in finding the existence of three aggravating circumstances that were based on facts the jury had apparently rejected:[7]

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has distinguished Baker in a case in which the indictment was amended during trial to include an allegation that the defendant was over 18, Toussant v. State, 755 So. 2d 170, 172 (Fla. 4th DCA 2000), but held in an earlier case that the defendant's age was *not* an element of the offense. Jesus v. State, 565 So. 2d 1361, 1363 (Fla. 4th DCA 1990).

[7] A[x] Offense was one of violence and was committed in a manner that was especially heinous, atrocious and cruel;
...
[x] Victim suffered extraordinary physical or emotional

> ***We cannot avoid the conclusion that the trial judge based this aggravator on the judge's individual perception of the trial evidence.*** Yet the jury resolved that same evidence in favor of a verdict of acquittal on the relevant charges. It was error to base the aggravator on the judge's personal perception of the evidence because, as we indicated earlier, a trial judge may not base sentencing aggravators on evidence that the jury has clearly resolved in favor of an acquittal. [State v.] McCall, 524 So.2d 663 [(Fla.1988)]; Hendrix [v. State,] 475 So.2d 1218 [(Fla.1985)].

Brown, 763 So. 2d at 1193. The court concluded that A[t]o permit a trial judge to reweigh trial evidence after a jury exoneration for purposes of imposing an aggravated departure sentence is to undermine the jury verdict, thereby creating intolerable implications under the Due Process and Double Jeopardy Clauses of the Florida Constitution." Id. The court specifically grounded its holding in Article I, section 9, the due process clause of the state constitution. Id. at 1193 n.6 & 1194 n.7.

> trauma or permanent physical injury, or was treated with particular cruelty;
> ...
> [x] Offense was committed in order to prevent or avoid arrest, to impede or prevent prosecution for the conduct underlying the arrest, or to effect an escape from custody."

Brown, 763 So. 2d at 1192.

C.

THE PENALTY PHASE JURY PROCEEDING UNDER SECTION 921.141, FLORIDA STATUTES, DOES NOT COMPLY WITH FLORIDA LAW REQUIREMENTS FOR A STATUTORY ELEMENT OF AN OFFENSE.

This Court has recognized that "the qualitative difference of death from all other punishments," requires "a correspondingly greater degree of scrutiny" to "ensure[], as much as is humanly possible, that only those who are legally subject to execution are executed. . . . [T]he concept of finality must sometimes yield to the fact that 'execution is the most irremediable and unfathomable of penalties.'" Swafford v. State, 679 So.2d 736, 740 (Fla. 1996) (Harding, J., specially concurring) (quoting Ford v. Wainwright, 477 U.S. 399, 411 (1986) (Marshall, J., plurality opinion)). It is therefore perverse, as Ring observes, to afford greater jury trial rights to a criminal defendant who faces a three minimum mandatory sentence for possessing a firearm in the commission of an offense, than to a defendant facing the death penalty based on the presence of statutorily enumerated aggravating circumstances.

Florida's current procedures for imposing a death sentence, in contrast to the cases discussed above, fail to comply with any of the essential incidents of the jury trial right under Florida constitutional and common law:

A. Section 921.141 (3), Florida Statutes provides that the jury's penalty recommendation is to be made by a "majority of the jury," and the jury is not instructed that it must agree unanimously on the existence of any aggravating

circumstance. Hence, the proceeding does not provide for jury unanimity. See Pooler v. State, 704 So.2d 1375, 1381 (Fla. 1997) (finding no requirement for specific findings on aggravating circumstances); Fotopolous v. State, 608 So.2d 784, 794 n.7 (Fla. 1992) (same).

B. The statute does not require that the jury find the existence of the ultimate fact, "sufficient aggravating circumstances," beyond a reasonable doubt.

C. The jury is charged with finding elements not alleged in the indictment. The state need not allege aggravating circumstances or that there are sufficient aggravating circumstances to make the defendant death-eligible. See Medina v. State, 466 So.2d 1046, 1048 n. 2 (Fla.1985). Because the state is not required to provide notice of the aggravating circumstances on which it intends to rely in seeking the death penalty, the defendant is prejudiced in his ability to prepare to rebut the aggravating evidence the prosecution may offer at the penalty phase.

D. Notwithstanding that the jury's verdict convicting the defendant of first degree murder under an indictment which does not allege aggravation and notwithstanding that this verdict of guilt makes no finding of aggravation, so that the defendant has been convicted only of first degree murder without aggravation, the state is allowed to go forward with further proceedings for trial of a new element not alleged in the indictment.

E. The rules of evidence do not apply under section 921.141(1), which states: "Any such evidence which the court deems to have probative value may be received,

regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or the Constitution of the State of Florida." See also Alvord v. State, 322 So.2d 533, 538-39 (Fla.1975), receded from on other grounds, Caso v. State, 524 So.2d 422 (Fla.1988) ("There should not be a narrow application or interpretation of the rules of evidence in the penalty hearing, whether in regard to relevance or to any other matter except illegally seized evidence."); Elledge v. State, 346 So.2d 998, 1001 (Fla.1977) (following Alvord); Perry v. State, 801 So.2d 78, 89-90 (Fla. 2001) (following Elledge). Further, only a very limited form of the Confrontation Clause applies to these proceedings. See Spencer v. State, 645 So. 2d 377, 383-84 (Fla. 1994) (officer could testify to hearsay statements of decedent even though such testimony would have been inadmissible at trial under Evidence Code).

CONCLUSION

If, as Ring holds, aggravating circumstance in the capital context are the functional equivalent of elements of the offense of capital murder, then they are entitled to the full panoply of due process and jury trial rights afforded the proof of elements of guilt. The foregoing authorities plainly establish that *Florida* law – constitutional law and common law – requires that aggravating circumstances in a capital case must be charged in the indictment (to even allege a "capital" case) and

found by a jury unanimously and beyond a reasonable doubt. Section 921.141 does not satisfy any of these requirements.

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Undersigned counsel certifies that the type used in this brief is 14 point proportionately spaced Times New Roman.

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