

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC03-_____

GEORGE JAMES TREPAL

Petitioner,

v.

**JAMES V. CROSBY,
Secretary, Florida Department of Corrections,**

Respondent.

PETITION FOR WRIT OF HABEAS CORPUS

**TODD G. SCHER
Special Assistant CCRC
Florida Bar No. 0899641
Law Office of Todd G. Scher, P.L.
555 NE 34th Street, #1510
Miami, Florida 33137
(305) 576-3221**

**OFFICE OF THE CAPITAL
COLLATERAL REGIONAL COUNSEL
101 N.E. 3RD AVE., SUITE 400
Ft. Lauderdale, FL 33301
(954) 713-1284**

COUNSEL FOR PETITIONER

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INTRODUCTION

This petition for habeas corpus relief is being filed in order to address the effect on Mr. Trepal's case of the decision in *Ring v. Arizona*, 122 S. Ct. 2428 (2002). Based on *Ring* and the following arguments, Mr. Trepal submits that habeas relief should issue.

JURISDICTION

A writ of habeas corpus is an original proceeding in this Court governed by Fla. R. App. P. 9.100. This Court has original jurisdiction under Fla. R. App. P. 9.030(a) (3) and Article V, § 3(b) (9), Fla. Const. The Constitution of the State of Florida guarantees that "[t]he writ of habeas corpus shall be grantable of right, freely and without cost." Art. I, § 13, Fla. Const.

This Court's jurisdiction over an appeal also necessarily includes the "authority to change the law of the case previously set forth." *Jones v. State*, 559 So. 2d 204, 206 (Fla. 1990). *Accord Brunner Enterprises v. Dep't. of Revenue*, 452 So. 2d 550 (Fla. 1984). This Court has not hesitated to apply intervening changes in law or intervening legislation whether they inure to the benefit of the State, *see State v. Owen*, 696 So. 2d 715 (Fla. 1997); *Trotter v. State*, 690 So. 2d 1234 (Fla. 1996), or to a criminal defendant. *See, e.g. Thompson v. Dugger*, 515 So. 2d 173 (Fla. 1987); *Riley v. Wainwright*, 517 So. 2d 656 (Fla. 1987).

Moreover, when the Supreme Court has issued intervening decisions affecting this Court's prior determination of that very issue, the Court has accepted jurisdiction in order to assess the impact of the new case on the Court's prior decision. *See Downs v. Dugger*, 514 So. 2d 1069, 1070 (Fla. 1987) ("We now find that a substantial change in the law has occurred that requires us to reconsider issues first raised on direct appeal and then in Downs' prior collateral challenges").

REQUEST FOR ORAL ARGUMENT

Mr. Trepal requests oral argument on this petition.

PROCEDURAL HISTORY

On April 5, 1990, Mr. Trepal was indicted by a grand jury in the Tenth Judicial Circuit for one count of first-degree murder, several counts of attempted first-degree murder, poisoning food or water, and tampering with a consumer product. At a jury trial, Mr. Trepal was convicted on all counts, and a penalty phase jury recommended the death penalty by a vote of 9-3. On appeal, this Court affirmed Mr. Trepal's convictions and sentences, including his sentence of death. *Trepal v. State*, 621 So. 2d 1361 (Fla. 1993), *cert. denied*, 114 S. Ct. 892 (1994). Mr. Trepal thereafter sought postconviction relief, and relief was eventually denied by the circuit court and that denial affirmed by this Court. *Trepal v. State*,

2003 Fla. LEXIS 275 (Fla. Mar. 6, 2003).¹

¹During the course of the postconviction proceedings, two interlocutory decisions were issued by this Court in Mr. Trepal's case. *See Trepal v. State*, 704 So. 2d 498 (Fla. 1997); *Trepal v. State*, 754 So. 2d 702 (Fla. 2000).

CLAIM I

THE FLORIDA CAPITAL SENTENCING PROCEDURES AS EMPLOYED IN MR. TREPAL'S CASE VIOLATED HIS SIXTH AMENDMENT RIGHT TO HAVE A UNANIMOUS JURY RETURN A VERDICT ADDRESSING HIS GUILT OF ALL THE ELEMENTS NECESSARY FOR THE CRIME OF CAPITAL FIRST DEGREE MURDER, IN VIOLATION OF *RING V. ARIZONA*.

I. INTRODUCTION.

In *Ring v. Arizona*, 122 S.Ct. 2428 (2002), the Supreme Court held the Arizona capital sentencing scheme unconstitutional because a death sentence there is contingent upon finding an aggravating circumstance and assigns responsibility for finding that circumstance to the judge. The Arizona scheme was found to violate the constitutional guarantee to a jury determination of guilt in all criminal cases. The Supreme Court based its *Ring* holding on its earlier decision in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), where it held that “[i]t is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed.” *Id.* at 490 (quoting *Jones v. United States*, 526 U.S. 227, 252-53 (1999) (Stevens, J., concurring)). Capital sentencing schemes such as those in Florida and Arizona violate the notice and jury trial rights guaranteed by the Sixth and Fourteenth Amendments because they do not allow the jury to reach a verdict with

respect to an aggravating fact that is an element of the aggravated crime punishable by death. *Ring*.

II. RING APPLIES TO THE FLORIDA CAPITAL SCHEME.

A. The basis of *Mills v. Moore* is no longer valid.

This Court has previously held that, “[b]ecause *Apprendi* did not overrule *Walton*, the basic scheme in Florida is not overruled either.” *Mills v. Moore*, 786 So.2d 532, 537 (Fla. 2001). *Ring* overruled *Walton v Arizona*, 497 U.S. 639 (1990), *overruled in part, Ring v. Arizona*, 122 S.Ct. 2428 (2002), and the basic principle of *Hildwin v. Florida*, 490 U.S. 638 (1989), which had upheld the basic scheme in Florida “on grounds that ‘the Sixth Amendment does not require that the specific findings authorizing imposition of the sentence of death be made by the jury.’” Additionally, *Ring* undermines the reasoning of this Court in *Mills* by establishing: (a) that *Apprendi* applies to capital sentencing schemes; (b) that States may not avoid the Sixth Amendment requirements of *Apprendi* by simply specifying death or life imprisonment as the only sentencing options; and (c) that the relevant and dispositive question is whether under state law death is “authorized by a guilty verdict standing alone.”

In *Mills*, this Court observed that the “the plain language of *Apprendi* indicates that the case is not intended to apply to capital [sentencing] schemes.”

Mills, 786 So.2d at 537. Such statements appear at least four times in *Mills*. *Mills* reasoned that because first-degree murder is a “capital felony,” and the dictionary defines such a felony as “punishable by death,” the finding of an aggravating circumstance did not expose the petitioner to punishment in excess of the statutory maximum. *Mills*, 786 So.2d at 538. The logic of *Mills* simply did not survive *Ring*. That *Mills* can no longer survive constitutional scrutiny is further demonstrated by the recent decision by the United States Supreme Court in *Sattahzan v. Pennsylvania*, 2003 WL 10481 (Jan. 14, 2003). *Accord Butler v. State*, 842 So. 2d 817 (Fla. 2003) (Pariente, J., concurring in part and dissenting in part).

B. In Florida, Eighth Amendment narrowing occurs at sentencing.

With the premise of *Ring* and *Sattahzan* in mind, it becomes clear that Florida’s statute is unconstitutional, and that the basis of *Mills* can no longer survive. Section Fla. Stat. 921.141 provides:

(3) FINDINGS IN SUPPORT OF SENTENCE OF DEATH--Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set for in writing its findings upon which the sentence is based as to the facts:

(a) The sufficient aggravating circumstances exist as enumerated in subsection (5), and

(b) That there are insufficient mitigating circumstances to outweigh the aggravating circumstances.

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 (5) and (6) and upon the records of the trial and the sentencing proceedings.

If the court does not make the findings requiring the death sentence, the court shall impose sentence of life imprisonment in accordance with S. 775.082.

(Fla. Stat. 921.141(3))(emphasis added).

In *Stringer v. Black*, 503 U.S. 222 (1992), the United States Supreme Court was called upon to discuss and contrast capital sentencing schemes and their use of aggravating circumstances. According to the United States Supreme Court:

In Louisiana, a person is not eligible for the death penalty unless found guilty of first-degree homicide, a category more narrow than the general category of homicide. [Citation]. A defendant is guilty of first-degree homicide if the Louisiana jury finds that the killing fits one of five statutory criteria. [Citation]. After determining that a defendant is guilty of first-degree murder, a Louisiana jury next must decide whether there is at least one statutory aggravating circumstance and, after considering any mitigating circumstances, determine whether the death penalty is appropriate. [Citation]. Unlike the Mississippi process, in Louisiana the jury is not required to weigh aggravating against mitigating factors.

In *Lowenfield [v. Phelps]*, 484 U.S. 231 (1988), the petitioner argued that his death sentence was invalid because the aggravating factor found by the jury

duplicated the elements it already had found in determining there was a first-degree homicide. We rejected the argument that, as a consequence, the Louisiana sentencing procedures had failed to narrow the class of death-eligible defendants in a predictable manner. We observed that “[t]he use of ‘aggravating circumstances’ is not an end in itself, but a means of genuinely narrowing the class of death-eligible persons and thereby channeling the jury’s discretion. We see no reason why this narrowing function may not be performed by jury findings at either the sentencing phase of the trial or the guilt phase.” [Citation]. **We went on to compare the Louisiana scheme with the Texas scheme, under which the required narrowing occurs at the guilt phase. [Citation]. We also contrasted the Louisiana scheme with the Georgia and Florida schemes. [Citation].**

The State’s premise that the Mississippi sentencing scheme is comparable to Louisiana’s is in error. The Mississippi Supreme Court itself has stated in no uncertain terms that, with the exception of one distinction not relevant here, its sentencing system operates in the same manner as the Florida system; and Florida, of course, is subject to the rule forbidding automatic affirmance by the state appellate court in an invalid aggravating factor is relied upon. In considering a *Godfrey* claim based on the same factor at issue here, the Mississippi Supreme Court considered decisions of the Florida Supreme Court to be the most appropriate source of guidance.

Stringer, 503 U.S. at 233-34 (emphasis added).

In fact, the Louisiana statute defined first degree murder as fitting within one of five circumstances, in contrast to Florida’s provision that first degree murder is

either premeditated or felony murder. *Lowenfield*, 484 U.S. at 242. The Supreme Court in *Lowenfield* found that the Louisiana capital scheme operated similar to the Texas scheme that provided for death eligibility to be determined at the guilt phase of the trial as had been explained in *Jurek v. Texas*, 428 U.S. 262 (1976):

But the opinion [*Jurek*] announcing the judgment noted the difference between the Texas scheme, on the one hand, and the Georgia and Florida schemes discussed in the cases of *Gregg [v. Georgia]*, 428 U.S. 153 (1976), and *Proffitt [v. Florida]*, 428 U.S. 242 (1976):

“While Texas has not adopted a list of statutory aggravating circumstances the existence of which can justify the imposition of the death penalty as have Georgia and Florida, its action in narrowing the categories of murders for which a death sentence may ever be imposed serves much the same purpose In fact, each of the five classes of murders made capital by the Texas statute is encompassed in Georgia and Florida by one or more of their statutory aggravating circumstances Thus, in essence, the Texas statute requires that the jury find the existence of a statutory aggravating circumstance before the death penalty may be imposed. So far as consideration of aggravating circumstances is concerned, therefore, the principal difference between Texas and the other two States is that the death penalty is an available sentencing option - - even potentially - - for a smaller class of murders in Texas.” 428 U.S. at 270-71 (citations omitted).

It seems clear to us from this discussion that the narrowing function required for a regime of capital punishment may be provided in either of these two ways:
The legislature may itself narrow the definition of

capital offenses, as Texas and Louisiana have done, so that the jury finding of guilt responds to this concern, or the legislature may more broadly define capital offenses and provide for narrowing by jury findings of aggravating circumstances at the penalty phase. See also *Zant v. Stephens*, 462 U.S. 862, 876 n.13 (1983)] discussing *Jurek* and concluding: “[I]n Texas, aggravating and mitigating circumstances were not considered at the same stage of the criminal prosecution.”

Lowenfield, 484 U.S. 245-47 (emphasis added).

This Court has recognized that the aggravating circumstances at issue in the penalty phase performed the Eighth Amendment narrowing function in conformity with *Zant v. Stephens*:

To avoid arbitrary and capricious punishment, this aggravating circumstance “must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder.” *Zant v. Stephens*, 462 U.S. 862 (1983)(footnote omitted). Since premeditation is already an element of capital murder in Florida, section 921.141 (5)(I) must have a different meaning; otherwise, it would apply to every premeditated murder.

Porter v. State, 564 So.2d 1060, 1064 (Fla. 1990).

Thus, it is clear that the factual determination of “sufficient aggravating circumstances” at the sentencing is the finding of those additional facts that are necessary under the Eighth Amendment requirement that death eligibility be

narrowed beyond the traditional definition of first degree murder. *Zant*, 462 U.S. at 878 (“[S]tatutory aggravating circumstances play a constitutionally necessary function at the stage of legislative definition: they circumscribe the class of persons eligible for the death penalty”). Clearly in Florida, the narrowing of the death eligible occurs in the sentencing phase.

The factual determination that “sufficient aggravating circumstances exist” has not been made during the guilt phase of a capital trial under Florida law as it has operated during the past 25 years. Mr. Trepal is aware of the opinions of various members of this Court which have concluded that *Ring* has no significance to Florida’s capital sentencing scheme because, in the case of a defendant who has been found guilty of either a contemporaneous felony or who has a prior violent felony conviction, “the sentence of death . . . could be imposed based on these convictions by the same jury.” *Kormondy v. State*, 2003 WL 297027 at n.3 (Fla. Feb. 13, 2003).² See *Almendarez-Torres v. United States*, 523 U.S. 224 (1998). This view of Florida’s sentencing statute, however, is not in accord with the reality of Florida’s system, as demonstrated above. Unlike states such as Louisiana and Texas, Florida is a *weighing* state. This means that, in order to determine death

²Mr. Trepal had no prior violent felonies in terms of previous conduct, but did have several convictions contemporaneous to the murder conviction.

eligibility, Florida penalty phase jurors *weigh* aggravation and mitigation and determine if there are sufficient aggravating circumstances when *weighed* against the mitigation to warrant a “recommendation” that the defendant be sentenced to death. Nowhere in this Court’s nearly three (3) decades of death penalty jurisprudence has this Court—or the Supreme Court of the United States, for that matter—classified Florida as a state where death eligibility is determined at the guilt phase.

Mr. Trepal contends that relying upon the existence of the prior violent felony aggravator or upon contemporaneous felony convictions to deny him the benefit of *Ring* is unconstitutional under the particulars of Florida’s capital sentencing scheme. Rather, reliance upon the prior violent felony aggravator or upon contemporaneous felony convictions to establish eligibility rewrites the Florida statute. As explained above, the Florida statute requires three findings before a defendant is eligible for a death sentence: the sentencer (1) must find the existence of at least one aggravating circumstance, (2) must find that “*sufficient* aggravating circumstances exist” to justify imposition of death, and (3) must find that “there are insufficient mitigating circumstances to outweigh the aggravating circumstances.” Section 921.141(3), Fla. Stat. Under this three-stage process of establishing eligibility, the existence of a prior violent felony conviction or upon

contemporaneous felony convictions does not satisfy *Ring*.

The flaw in relying upon a prior violent felony conviction or upon contemporaneous felony convictions to establish eligibility is revealed by the view that the jury override does not survive *Ring*. For example, Justice Lewis acknowledged that after *Ring*, a jury's "life recommendation must be respected." *Bottoson v. Moore*, 833 So. 2d 693, 728 (Fla.) (Lewis, J., concurring in result only), *cert. denied*, 123 S. Ct. 662 (2002). He concluded that as to jury overrides in favor of death, Florida law and *Ring* are in "irreconcilable conflict." *Id.* However, in many cases in which this Court has reversed an override and ordered imposition of a life sentence, the trial court had found the prior violent felony aggravator or the contemporaneous felony conviction aggravator. *See, e.g., Mahn v. State*, 714 So. 2d 391 (Fla. 1998); *Jenkins v. State*, 692 So. 2d 893 (Fla. 1997); *Fead v. State*, 512 So. 2d 176 (Fla. 1987); *Brown v. State*, 526 So. 2d 903 (Fla. 1988); *Ferry v. State*, 507 So. 2d 1373 (Fla. 1987); *Amazon v. State*, 487 So. 2d 8 (Fla. 1986); *Norris v. State*, 429 So. 2d 688 (Fla. 1983).

If the jury override does not survive *Ring*, it is not logical that the prior violent felony aggravator or the contemporaneous felony conviction aggravator satisfies *Ring* under the particulars of Florida's statute. In *Jenkins*, this Court stated that the jury's life recommendation should not have been overridden because the

jury could have given little weight to the prior violent felony aggravator. 692 So. 2d at 895. This reasoning is correct under the Florida statute: the *Jenkins* jury could have determined that the prior violent felony aggravator did not pass the second step in the sentencing process, *i.e.*, it was not “sufficient” to render Mr. Jenkins eligible for a death sentence. A jury which ultimately recommends death could also decide that the prior violent felony aggravator or the contemporaneous felony conviction aggravator were not “sufficient” to render the defendant death eligible, but that some other factor rendered the defendant death eligible. There is no way to know this, however, because Florida juries do not return specific findings. Thus, reliance upon these two aggravators as establishing eligibility is reliance upon a fiction under the particulars of Florida’s statute and does not satisfy *Ring*.

Third, reliance upon contemporaneous felony convictions as establishing eligibility for death constitutes automatic aggravation. Such a procedure allows one fact--committed during a felony--to be used both as an element of first-degree murder and as an element of capital first-degree murder. However, capital first-degree murder requires something more than first-degree murder. Even when a defendant is convicted of contemporaneous felonies, a death sentence cannot be considered based upon that verdict alone. Use of the felony murder aggravator constitutes automatic aggravation which does not “genuinely narrow the class of

persons eligible for the death penalty” and which does not “reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder.” *Lowenfield v. Phelps*, 484 U.S. 231, 244 (1988) (quoting *Zant v. Stephens*, 462 U.S. 862, 877 (1983)).

Reliance upon the contemporaneous felony conviction as establishing eligibility overlooks the structure of Florida’s capital sentencing procedure, which requires that in order for a defendant to be eligible for a death sentence, the sentencer must find not only that an aggravating circumstance exists, but also that “sufficient” aggravating circumstances exist. In conformity with the statutory language, Mr. Trepal’ jury was instructed to determine whether “sufficient aggravating circumstances” were present that justified considering a sentence of death. Use of the felony murder aggravator may not permissibly be used as a substitute for a jury determination that sufficient aggravating circumstances existed in Mr. Trepal’s case.

For these reasons, the “exception” that this Court has relied on to deny relief under *Ring* should be reconsidered. Moreover, Mr. Trepal submits that the holding of *Almendarez-Torres* did not survive *Apprendi* and *Ring*. In *Apprendi*, Justice Thomas, whose vote was decisive of the five-to-four decision in *Almendarez-*

Torres, announced that he was receding from his support of *Almendarez-Torres*.³

The *Apprendi* majority found it unnecessary to overrule *Almendarez-Torres* explicitly in order to decide the issues before it, but acknowledged that “it is arguable that *Almendarez-Torres* was incorrectly decided.” *Apprendi*, 530 U.S. at 489. It then went on in a footnote to add to “the reasons set forth in Justice SCALIA’s [*Almendarez-Torres*] dissent, 523 U.S. at 248-60,” the observation that “the [*Almendarez-Torres*] Court’s extensive discussion of the term ‘sentencing factor’ virtually ignored the pedigree of the pleading requirement at issue,” which

³The five-Justice majority in *Almendarez-Torres* was comprised of Justices Breyer, Rehnquist, O’Connor, Kennedy, and Thomas. The first four of these were the dissenters in *Apprendi*. The dissenters in *Almendarez-Torres* were Justices Stevens, Souter, Scalia, and Ginsburg, all of whom are in the *Apprendi* majority. Between 1998 and 2000, Justice Thomas changed his thinking about the appropriate analysis to determine what an “element” of a crime is and accordingly disavowed his vote in *Almendarez-Torres*. In his *Apprendi* concurrence, Justice Thomas described his change of mind:

“[O]ne of the chief errors of *Almendarez-Torres* – an error to which I succumbed – was to attempt to discern whether a particular fact is traditionally (or typically) a basis for a sentencing court to increase an offender’s sentence . . . For the reasons I have given [here], it should be clear that this approach just defines away the real issue. What matters is the way by which a fact enters into the sentence. If a fact is by law the basis for imposing or increasing punishment – for establishing or increasing the prosecution’s entitlement – it is an element.

Apprendi, 530 U.S. at 520-21.

drive the Sixth Amendment ruling in *Apprendi*. *Apprendi*, 530 U.S. at 489 n.15.⁴

At the same time, the *Apprendi* majority did explicitly restrict whatever precedential force *Almendarez-Torres* ever had to the status of a “narrow exception to the general rule” that every fact which is necessary to enhance a criminal defendant’s maximum sentencing exposure must be found by a jury – an exception limited to the “unique facts” in *Almendarez-Torres*. The unique facts of *Almendarez-Torres* were that the defendant **pleaded guilty** to an indictment charging that he had returned to the United States after having been deported and, in addition, **admitted** that he had been deported because he was previously convicted of three aggravated felonies. He thus elected to forgo a trial and accept an uncontested adjudication of his guilt for a crime by definition included the felony convictions later used to enhance his sentence. Nothing about the priors—any more than anything else about the elements of the crime of reentry after deportation—remained for a jury to try in light of the defendant’s guilt plea. This should be contrasted to Florida, where a capital jury is to *weigh* the felony

⁴The majority opinion in *Almendarez-Torres* notably relied on *McMillan v. Pennsylvania*, 477 U.S. 79 (1986), and, in so doing, refused to distinguish between a “sentencing factor . . . [that] triggered a mandatory minimum sentence” in *McMillan* and a “sentencing factor . . . [that] triggers an increase in the maximum permissive sentence” in *Almendarez-Torres*. 523 U.S. at 224. That aspect of *Almendarez-Torres* has, of course, now been explicitly repudiated. See *Haris v. United States*, 122 S. Ct. 2406, 2419 (2002) (decided together with *Ring*).

conviction to determine its sufficiency together with other aggravation and mitigation.

C. In Florida, the eligibility determination is not made in conformity with the right to trial by jury.

The Florida capital sentencing statute, like the Arizona statute struck down in *Ring*, makes imposition of the death penalty contingent upon the factual findings of the judge at the sentencing - not upon a jury determination made in conformity with the Sixth Amendment. Section 775.082 of the Florida Statutes provides that a person convicted of first-degree murder must be sentenced to life imprisonment “unless the proceedings held to determine sentence according to the procedure set forth in § 921.141 result in finding by the court that such person shall be punished by death.” This Court has long held that §§ 775.082 and 921.141 do not allow imposition of a death sentence upon a jury’s verdict of guilt, but only upon the finding of sufficient aggravating circumstances. *State v. Dixon*, 283 So.2d 1, 7 (Fla. 1973).

In *Harris v. United States*, 122 S.Ct. 2406 (2002), the Supreme Court held that under *Apprendi* “those facts setting the outer limits of a sentence, and of the judicial power to impose it, are the elements of the crime for the purposes of the constitutional analysis.” *Id.* And in *Ring*, the Court held that the aggravating factors

enumerated under Arizona law operated as “the functional equivalent of an element of a greater offense” and thus had to be found by a jury. Pursuant to the reasoning set forth in *Apprendi* and *Ring*, aggravating factors are equivalent to elements of the capital crime itself and must be treated as such. The full panoply of rights associated with trial by jury must therefore attach to the finding of “sufficient aggravating circumstances.”

1. No unanimous determination of eligibility.

In conformity with Florida law for the past 25 years, the guilt phase verdicts returned by the unanimous jury have not included a finding of “sufficient aggravating circumstances” necessary to render a defendant death eligible. The penalty phase jury is instructed that its recommendation is advisory and need not be unanimous; in Mr. Trepal’s case, the advisory jury was so instructed (R4403; 4406), and returned a recommendation only a vote of 9-3. Findings of the elements of a capital crime by a mere simple majority, or anything less than by a unanimous verdict, is unconstitutional under the Sixth and Fourteenth Amendments. In the same way that the Sixth Amendment guarantees a baseline level of certainty before a jury can convict a defendant, it also constrains the *number* of jurors who can render a guilty verdict. *See Apodaca v. Oregon*, 406 U.S. 404 (1972) (the Sixth and Fourteenth Amendments require that a criminal verdict must be supported by at least

a “substantial majority” of the jurors). Clearly, a mere numerical majority -- which is all that is required under Section 921.141(3) for the jury’s advisory sentence -- would not satisfy the “substantial majority” requirement of *Apodaca*. See, e.g., *Johnson v. Louisiana*, 406 U.S. 356, 366 (1972) (Blackmun, J., concurring) (a state statute authorizing a 7-5 verdict would violate Due Process Clause of Fourteenth Amendment).

Because Florida’s enumerated aggravating factors operate as ‘the functional equivalent of an element of a greater offense,’ that element must be found by a jury like any other element of an offense. *Apprendi*, 530 U.S. at 494. See *Sattazahn v. Pennsylvania*, 2003 U.S. LEXIS 748 at *20 (2003). As to the determination of the presence of other elements of a crime, Florida law provides, “No verdict may be rendered unless all of the trial jurors concur in it.” Fla. R. Crim. P. 3.440. Florida courts have held that unanimity is required at the guilt phase of a capital case. *Williams v. State*, 438 So.2d 781, 784 (Fla. 1983). See *Flanning v. State*, 597 So.2d 864, 866 (Fla. 3rd DCA 1992)(“It is therefore settled that ‘[i]n this state, the verdict of the jury must be unanimous’ and that any interference with this right denied the

defendant a fair trial. *Jones v. State*, 92 So.2d 261 (Fla. 1956)”). The right to a unanimous jury verdict must extend to each necessary element of the charged crime. As to an element of the offense, this Court has recognized that a judge may not make fact finding “on matters associated with the criminal episode” that “would be an invasion of the jury’s historical function.” *State v. Overfelt*, 457 So.2d 1385, 1387 (Fla. 1984). Neither the sentencing statute, case law from this Court, nor the standard jury instructions used the past 25 years required that the jurors participating in a penalty phase to concur in finding whether any particular aggravating circumstances had been proved, or “[w]hether sufficient aggravating circumstances exist[ed],” or “[w]hether sufficient aggravating circumstances exist[ed] which outweigh[ed] the mitigating circumstances.” Fla. Stat. § 921.141(2). Because Florida law does not require that twelve jurors agree that the State has proven an aggravating circumstance beyond a reasonable doubt, or to agree on the same aggravating circumstances beyond a reasonable doubt, or to agree on the same aggravating circumstances when advising that “sufficient aggravating circumstances exist” to warrant a death sentence, there is no way to say that “the jury” rendered a

verdict as to an aggravating circumstance or the sufficiency of them. As Justice Shaw has observed, Florida law leaves these matters to speculation. *Combs v. State*, 525 So. 2d 858, 859 (Fla. 1988) (Shaw, J., concurring).

2. No verdict in compliance with the Sixth Amendment.

Florida law does not require the jury to reach a verdict on any of the factual determinations required for death. Section 921.141(2) does not call for a jury verdict, but rather an “advisory sentence.” This Court has held that “the jury’s sentencing recommendation in a capital case is *only advisory*. The trial court is to conduct its own weighing of the aggravating and mitigating circumstances” *Combs*, 525 So.2d at 858 (quoting *Spaziano v. Florida*, 468 U.S. 447, 451 (1984)) (emphasis original in *Combs*). It is reversible error for a trial judge to consider himself bound to follow a jury’s recommendation. *Ross v. State*, 386 So.2d 1191, 1198 (Fla. 1980). Florida law only requires the judge to consider “the recommendation of a majority of the jury.” Fla. Stat. § 921.141(3). In contrast, “[n]o verdict may be rendered unless all of the trial jurors concur in it.” Fla. R. Crim. Pro. 3.440. No authority of Florida law requires that all jurors concur in

finding the requisite aggravating circumstances.

In *Sullivan v. Louisiana*, 508 U.S. 275 (1993), the Supreme Court said, “the jury verdict required by the Sixth Amendment is a jury verdict of guilty beyond a reasonable doubt.” *Sullivan*, 508 U.S. at 278. The Court explained that there must be a verdict that decides the factual issues in order to comply with the Sixth Amendment. In doing so, the Court explained:

It would not satisfy the Sixth Amendment to have a jury determine that the defendant is *probably* guilty, and then leave it up to the judge to determine (as [*In re*] *Winship*[, 397 U.S. 358 (1970)] requires) whether he is guilty beyond a reasonable doubt. In other words the jury verdict required by the Sixth Amendment is a jury verdict of guilty beyond a reasonable doubt.

Sullivan, 508 U.S. at 278.

In a case such as this, where the error is that a jury did not return a verdict on the essential elements of a capital murder, but instead the responsibility was delegated by state law to a court, “no matter how inescapable the findings to support the verdict might be,” for a court “to hypothesize a guilty verdict that was never rendered ...would violate the jury trial right.” *Sullivan.*, 508 U.S. at 279.

The “explicitly cross-reference[d] . . . statutory provision requiring the finding of an aggravating circumstance before imposition of the death penalty,” *Ring*, requires the judge - after the jury has been discharged and “[n]otwithstanding the recommendation of a majority of the jury_” - to make two factual determinations. Fla. Stat. § 921.141(3). Section 921.141(3) provides that “if the court imposes a sentence of death, it shall set forth in writing its findings *upon which the sentence of death is based as to the facts.*” *Id.* First, the judge must find that “sufficient aggravating circumstances exist” to justify death. *Id.* Second, the judge must find in writing that “there are insufficient mitigating circumstances to outweigh the aggravating circumstances.” *Id.* “If the court does not make the findings requiring the death sentence, the court shall impose sentence of life imprisonment in accordance with § 775.082.” *Id.* Because the Florida death penalty statute makes imposition of a death contingent upon findings of “sufficient aggravating circumstances” and “insufficient mitigating circumstances,” and gives sole responsibility for making those findings to the judge, it violates the Sixth Amendment under *Ring*.

As the United States Supreme Court said in *Walton*, “[a] Florida trial court

no more has the assistance of a jury's findings of fact with respect to sentencing issues than does a trial judge in Arizona." *Walton*, 497 U.S. at 648. This Court has repeatedly emphasized that a judge's findings must be made independently of the jury's recommendation. *See Grossman v. State*, 525 So.2d 833, 840 (Fla. 1988). Because the judge must find that "sufficient aggravating circumstances exist" "notwithstanding the recommendation of a majority of the jury," Fla. Stat. § 921.141(3), he may consider and rely upon evidence not submitted to the jury. The judge is also permitted to consider and rely upon aggravating circumstances that were not submitted to the jury. *See Davis v. State*, 703 So.2d 1055, 1061 (Fla. 1998). Because the jury's role is merely advisory and contains no findings upon which to judge the proportionality of the sentence, this Court has recognized that its review of a death sentence is based and dependent upon the judge's written findings. *Morton v. State*, 789 So.2d 324, 333 (Fla. 2001). The Florida capital scheme violates the constitutional principles recognized in *Ring*.

3. The recommendation has been merely advisory.

Moreover, it would be impermissible and unconstitutional to retroactively attach greater significance to the jury's advisory sentence than the jury was told at

the time. The advisory recommendation cannot now be used as the basis for the fact-findings required for a death sentence because the statutes requires only a majority vote of the jury in support of that advisory sentence.

III. MR. TREPAL WAS DEPRIVED HIS SIXTH AMENDMENT RIGHTS.

By virtue of *Ring* and its application to Florida law, various constitutional errors that occurred in the proceedings against Mr. Trepal are now revealed.

A. The indictment against Mr. Trepal failed to include all of the elements of the offense of capital murder.

Prior to trial, Mr. Trepal moved to dismiss the Indictment against him as violative of the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, as well as Article I, Section 15 of the Florida Constitution and Fla. R. Crim. P. 3.140(b):

1. The Indictment in this cause does not contain allegations of essential facts sufficient to confer jurisdiction on this court to impose a sentence of death, in that the Indictment does not contain allegations of aggravating circumstances.

2. The Florida Supreme Court has held that statutory aggravating circumstances enumerated in Section 921.141, Florida Statutes, defines those crimes

for which a defendant is eligible for a sentence of death. *State v. Dixon*, 283 So. 2d 1, 9 (Fla. 1973). A sentence of death may be imposed only when aggravating circumstances are found to outweigh mitigating circumstances.

3. The Fla. R. Crim P. 3.140(b) requires that the Indictment be a “plain, concise, and definite written statements of the essential facts constituting the offense charged.”

4. Aggravating circumstances must be alleged in an indictment to notice the Defendant that death is a possible penalty and to provide notice of essential allegations such that a Defendant has an opportunity to adequately prepare his defense; this violates the Sixth, Eighth, and Fourteenth Amendments to the Constitution of the United States and Article I, Sections, 2, 9, 16, and 17, of the Constitution of the State of Florida.

5. Aggravating circumstances must be alleged in an indictment to confer jurisdiction upon the Court to impose a sentence of death.

6. The Indictment in this cause does not, therefore, charge an offense punishable by death.

(R4957-59). The defense also moved pretrial for a statement of particulars, including a statement of disclosure by the State of the aggravating circumstances it intended to rely upon should the case proceed to a penalty phase (R4950-52).

The United States Supreme Court in *Jones v. United States*, 526 U.S. 227 (1999), held that “under the Due Process Clause of the Fifth Amendment and the notice and jury guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt.” *Id.* at 243 n. 6. In *Ring*, the Supreme Court held that a death penalty statute’s aggravating circumstances operate as “the functional equivalent of an element or a greater offense.”

In *Jones*, the Supreme Court noted that “[m]uch turns on the determination that a fact is an element of an offense, rather than a sentencing consideration,” in significant part because “elements must be charged in the indictment.” *Jones*, 526 U.S. at 232. On June 28, 2002, after the Court’s decision in *Ring*, the death sentence imposed in *United States v. Allen*, 247 F.3d 741 (8th Cir. 2001), was overturned when the Supreme Court granted the writ of certiorari, vacated the judgment of the United States Court of Appeals for the Eighth Circuit upholding the death sentence, and remanded the case for reconsideration in light of the holding in *Ring* that aggravating factors that are prerequisites of a death sentence

must be treated as elements of the offense. *Allen v. United States*, 122 S.Ct. 2653

(2002). The question presented in *Allen* was this:

Whether aggravating factors required for a sentence of death under the Federal Death Penalty Act of 1994, 18 U.S.C. § 3591 et seq., are elements of a capital crime and thus must be alleged in the indictment in order to comply with the Due Process and Grand Jury clauses of the Fifth Amendment.

The Eighth Circuit had previously rejected Allen’s argument because in its view that aggravators are not elements of federal capital murder but rather “sentencing protections that shield a defendant from automatically receiving the statutorily authorized death sentence.” *United States v. Allen*, 247 F.3d at 763.

The Supreme Court held in *Apprendi* held that the Fourteenth Amendment affords citizens the same protections when they are prosecuted under state law, although the Court noted that the Grand Jury Clause of the Fifth Amendment has not been held to apply to the States. *Apprendi*, 530 U.S. at 477 n. 3. However, similar to Grand Jury Clause of the Fifth Amendment to the United States Constitution, Article I, section 15 of the Florida Constitution provides that, “No person shall be tried for a capital crime without presentment or indictment by a grand jury.”

Just like the requirements of 18 U.S.C. §§ 3591 and 3592(c), Florida's death penalty statute makes imposition of the death penalty contingent upon the government proving the existence of aggravating circumstances, establishing "sufficient aggravating circumstances" to call for a death sentence, and that the mitigating circumstances are insufficient to outweigh the aggravating circumstance. Fla. Stat. § 921.141(3). Florida law clearly requires every "element of the offense" to be alleged in the information or indictment. In *State v. Dye*, 346 So. 2d 538, 541 (Fla. 1977), this Court said "[a]n information must allege each of the essential elements of a crime to be valid. No essential element should be left to inference." In *State v. Gray*, 435 So.2d 816, 818 (Fla. 1983), this Court held "[w]here an indictment or information wholly omits to alleged one or more of the essential elements of the crime, it fails to charge a crime under the laws of the state." An indictment in violation of this rule cannot support a conviction; the conviction can be attacked at any stage, including "by habeas corpus." *Gray*, 435 So. 2d at 818. In *Chicone v. State*, 684 So.2d 736, 744 (Fla. 1996), this Court held "[a]s a general rule, an information must allege each of the essential elements of a crime to be valid."

The most “celebrated purpose” of the grand jury “is to stand between the government and the citizen” and protect individuals from the abuse of arbitrary prosecution. *United States v. Dionisio*, 410 U.S. 19, 33 (1973); *see also Wood v. Georgia*, 370 U.S. 375, 390 (1962). The Supreme Court explained that function of the grand jury in *Dionisio*:

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

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

The State’s authority to decide whether to seek the execution of an individual charged with crime hardly overrides—in fact is an archetypical reason for—the constitutional requirement of neutral review of prosecutorial intentions. Because the State did not submit to the grand jury, and the indictment did not state,

the essential elements of the aggravated crime of capital murder, Mr. Trepal's right under Article I, section 15 of the Florida Constitution, and the Sixth Amendment to the federal Constitution were violated.

B. Mr. Trepal's jury was told that its recommendation was merely advisory in nature.

The Florida death statute differs from the Arizona statute in that it provides for the jury to hear evidence and "render an advisory sentence to the court." Fla. Stat. § 921.141(2). Mr. Trepal's jury was instructed in conformity with the statute and this Court's precedent that its role was advisory only in returning a recommendation (R4403).

As the Supreme Court held in *Caldwell v. Mississippi*, 472 U.S. 320, 328-29 (1985):

[I]t is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere.

Were this Court to conclude now that Mr. Trepal's death sentence rests on findings made by the jury after it was told, and Florida law clearly provided, that a death sentence would not rest upon the jury's recommendation alone, it would mean that

Mr. Trepal's death sentence was imposed in violation of *Caldwell*. *Caldwell* embodies the principle stated in Justice Breyer's concurring opinion in *Ring*: "the Eighth Amendment requires individual jurors to make, and to take responsibility for, a decision to sentence a person to death." The fact that Mr. Trepal's jury was instructed that its role was merely advisory presents "additional concerns in light of *Ring*." *Butler v. State*, 842 So. 2d 817 (Fla. 2003) (Pariente, J., concurring in part and dissenting in part). *See also Bottoson v. Moore*, 833 So. 2d 693, 731-34 (Fla.) (Lewis, J., concurring in result only), *cert. denied*, 123 S. Ct. 662 (2002).

IV. APPLICABILITY OF *RING* TO MR. TREPAL..

The State will, no doubt, argue that *Ring* is not retroactive. However, Mr. Trepal submits that, first, this argument had already been decided adversely to the State. In each and every case where this Court had addressed the impact of *Ring*,

whether the *Ring* issue was raised on direct appeal,⁵ in a postconviction setting,⁶ or even in a motion for rehearing⁷ or notice of supplemental authority.⁸ the Court has addressed the merits of the arguments and concluded that *Ring* did not warrant relief because the defendant had either a prior violent felony, a unanimous jury recommendation, or a contemporaneous conviction (or a combination of all of these

⁵See *Lawrence v. State*, 2003 WL 1339010 at *8 (Fla. Mar. 20, 2003); *Lugo v. State*, 2003 WL 359291 at *28 n.79 (Fla. Feb. 20, 2003); *Kormondy v. State*, 2003 WL 297027 at *10 (Fla. Feb. 13, 2003); *Anderson v. State*, 841 So. 2d 390, 408-09 (Fla. 2003); *Cox v. State*, 819 So. 2d 705, 724-25 (Fla. 2002); *Hurst v. State*, 819 So. 2d 689, 702-03 (Fla. 2002).

⁶See *Jones v. State*, 2003 WL 21025816 at *5 (Fla. May 8, 2003); *Chandler v. State*, 2003 WL 1883682 at n.4 (Fla. Apr. 17, 2003); *Banks v. State*, 2003 WL 1339041 at *4 (Fla. Mar. 20, 2003); *Jones v. State*, 2003 WL 297074 at *9 (Fla. Feb. 13, 2003); *Spencer v. State*, 842 So. 2d 52, 72 (Fla. 2003); *Lucas v. State*, 841 So. 2d 380, 389 (Fla. 2003); *Porter v. Crosby*, 840 So. 2d 981, 986 (Fla. 2003); *Fotopoulos v. State*, 838 So. 2d 1122, 1136 (Fla. 2002); *Bruno v. Moore*, 838 So. 2d 485, 492 (Fla. 2002); *King v. Moore*, 831 So. 2d 143 (Fla. 2002); *Bottoson v. Moore*, 833 So. 2d 693 (Fla. 2002); *Sweet v. Moore*, 822 So. 2d 1269, 1275 (Fla. 2002); *Sireci v. Moore*, 825 So. 2d 882, 888 (Fla. 2002).

⁷See *Butler v. State*, 2003 WL 1786712 (Fla. Apr. 3, 2003); *Grim v. State*, 841 So. 2d 455, 465 (Fla. 2003); *Doorbal v. State*, 837 So. 2d 940, 963 (Fla. 2003); *Chavez v. State*, 832 So. 2d 730, 767 (Fla. 2002).

⁸See *Marquard v. State*, 2002 WL 31600017 at *10 (Fla. Nov. 21, 2002).

factors).

In any event, *Ring* clearly meets the retroactivity analysis in *Witt v. State*, 387 So. 2d 922 (Fla. 1980). As to what constitutes a development of fundamental significance, *Witt* explains that this category includes 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. Resolution of the issue ordinarily depends most upon the first prong--the purpose to be served by the new rule--and whether an 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. *Ring* is such a fundamental constitutional change for two reasons. 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. This change remedies a structural defect in the constitution of the trial mechanism, by vindicating the jury guarantee . . . [as] a basic protection whose precise effects are unmeasurable, but without which a criminal trial cannot reliably serve its function. *Sullivan v. Louisiana*, 508 U.S. 275, 281 (1993). When a capital defendant has been subjected to a sentencing proceeding in which the jury has not participated in the life-or-death factfinding role required by the Sixth Amendment and *Ring*, the constitutionally required tribunal was simply not all there, a radical defect which necessarily casts 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. *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968). 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*, 490 U.S. 638 (1989), and *Walton v. Arizona*. The Court's retraction of these rulings in *Ring* restores a right to jury trial which is a fundamental guarantee of the Federal and Florida Constitutions.

As discussed by Justice Shaw in his opinion in *Bottoson*, *Ring* is a decision that emanated from the United States Supreme Court, its holding is constitutional in nature as it goes to the very heart of the constitutional right to trial by jury, and is of fundamental significance. *Bottoson*, 833 So. 2d at 717. Justice Lewis' opinion in *Bottoson* also classifies the decision in *Ring* as setting forth a new constitutional framework. *Id.* at 725. In *King v. Moore*, 831 So. 2d 143 (Fla. 2002), Justice Pariente also observed that the application of the Sixth Amendment right to jury trial to capital sentencing was anticipated by prior case law upholding Florida's death penalty statute, and that *Apprendi*, the case which was extended by *Ring* to capital sentencing, inescapably changed the landscape of Sixth Amendment jurisprudence. *Id.* at 149. Clearly, *Ring* meets the *Witt* test.

V. CONCLUSION.

Certain constitutional error constituting "structural defects in the constitution of the trial mechanism," have been found to "defy analysis by 'harmless error' standards." *Arizona v. Fulminante*, 499 U.S. 279, 309 (1991). Structural defects, subject to automatic reversal have been found where there has been a "complete denial of counsel," a "biased trial judge," "racial discrimination in [the] selection of

[the] grand jury,” the “denial of self-representation at trial,” the “denial of a public trial,” and a “defective reasonable-doubt instruction.” *Neder v. United States*, 119 S.Ct. 1827, 1833 (1999).

In *Rose v. Clark*, 478 U.S. 570, 578 (1986), the Supreme Court stated:

Similarly, harmless-error analysis presumably would not apply if a court directed a verdict for the prosecution in a criminal trial by jury. We have stated that "a trial judge is prohibited from entering a judgment of conviction or directing the jury to come forward with such a verdict . . . regardless of how overwhelmingly the evidence may point in that direction." *United States v. Martin Linen Supply Co.*, 430 U.S. (1977)(citations omitted). *Accord, Carpenters v. United States*, 330 U.S. 395 (1947). This rule stems from the Sixth Amendment's clear command to afford jury trials in serious criminal cases. *See Duncan v. Louisiana*, 391 U.S. 145 (1968). Where the right is altogether denied, the State cannot contend that the deprivation was harmless because the evidence established the defendant's guilt: the error in such a case is that the wrong entity judge the defendant guilty.

The Sixth Amendment error recognized in *Ring v. Arizona* fits into the category described as structural error. Certainly, there was no verdict finding Trepal guilty of capital first degree murder (i.e. first degree murder with “sufficient aggravating circumstances”). Moreover as a result of the *Ring* error, an element (“sufficient aggravating circumstances”) was removed from the guilt phase of the

trial and was placed in the sentencing portion, with sentencing rules of procedure governing. With this transfer of an element from one portion of the capital proceeding to another, the structure of the trial changed. Since “sufficient aggravating circumstances” were not treated as an element, the grand jury indictment did include a finding of the element. As a result, Florida law held that the State was under no obligation to give notice of what aggravating circumstances were asserted as present and sufficient to warrant a death sentence. *Menendez v. State*, 368 So.2d 1278, 1282 n.21 (Fla. 1979). Because the aggravating factors were merely sentencing factors, Florida law permitted an element of first degree murder to be repeated as an aggravating circumstance. *Johnson v. Singletary*, 991 F.2d 663, 669 (11th Cir. 1993)(“We reject Johnson’s argument holding that the fact that an element of the underlying conviction and one of the aggravating factors was duplicative did not invalidate that aggravating factor”).

The proceedings conducted at Mr. Trepal’s penalty phase were not conducted in conformity with the Sixth Amendment guarantees. Under the circumstances presented in Mr. Trepal’s case, the *Ring* error can only be described as structural. Mr. Trepal is entitled to habeas relief.

CONCLUSION

Based on the foregoing arguments, Mr. Trepal respectfully requests that the Court issue the writ of habeas corpus in his case, or any other relief as deemed just and proper.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Carol Dittmar, Assistant Attorney General, Concourse Center #4, 3507 Frontage Road, No. 200, Tampa, FL, 33607, on this 19th day of June, 2003.

TODD G. SCHER
Special Assistant CCRC
Florida Bar No. 0899641
Law Office of Todd G. Scher, P.L.
555 NE 34th Street, #1510
Miami, Florida 33137
(305) 576-3221

OFFICE OF THE CAPITAL
COLLATERAL REGIONAL COUNSEL
101 N.E. 3RD AVE., SUITE 400
Ft. Lauderdale, FL 33301
(954) 713-1284

COUNSEL FOR PETITIONER

CERTIFICATE OF COMPLIANCE

The undersigned counsel certifies that this petition is typed using New Times 14 point font.

TODD G. SCHER
COUNSEL FOR PETITIONER