No. 12-1134

IN THE

Supreme Court of the United States

PAUL H. EVANS,

Petitioner,

v.

MICHAEL D. CREWS, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF *AMICI CURIAE* THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, THE FLORIDA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND FLORIDA CAPITAL RESOURCE CENTER IN SUPPORT OF PETITIONER

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INTERESTS OF *AMICI CURIAE*[1]

The National Association of Criminal Defense Lawyers (NACDL) has more than 12,500 members nationwide, including public and private defenders, active U.S. Military defense counsel, law professors, and judges. The American Bar Association recognizes NACDL as an affiliate organization and accords it representation in its House of Delegates. NACDL promotes study and research in the field of criminal law, disseminates and advances legal knowledge in the area of criminal justice, and encourages the integrity and expertise of defense lawyers in the state and federal courts. To promote the proper administration of justice and appropriate measures to safeguard the rights of all persons involved in the justice system, NACDL files approximately 35 *amicus* briefs a year on issues such as this that affect the vital interests of its members and their clients.

The Florida Association of Criminal Defense Lawyers (FACDL) is a state-wide organization representing 1,700 members, all of whom are criminal-defense practitioners. FACDL's founding purposes are: promoting study and research in criminal law; ensuring the fair administration of criminal justice in the Florida courts; fostering the independence and expertise of criminal-defense lawyers;

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1. Pursuant to Supreme Court Rules 37.2(a) and 37.6, *Amici Curiae* certify that no counsel for a party authored this brief in whole or part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of the brief, that the parties have consented to the filing of this brief in letters on file with the Clerk's office, and that counsel of record for all parties received notice at least 10 days prior to the filing date of *Amici Curiae's* intention to file this brief.

and furthering the education of the criminal-defense community. As an association of criminal-defense lawyers, FACDL is keenly interested in the outcome of this matter.

Florida Capital Resource Center (FCRC) is a non-profit organization whose mission is to protect the constitutional rights of Florida capital defendants by assisting counsel in providing effective representation. To that end, FCRC provides free consultation, research, training, advocacy, and other resources to capital defendants and their counsel. The issue presented in this case is a matter of great importance to FCRC because it implicates the Sixth Amendment right to jury trial, which right must be fiercely guarded for those facing the ultimate sentence.

SUMMARY OF ARGUMENT

The State of Florida is the only jurisdiction in the country that refuses to acknowledge the unequivocal holding of this Court in *Ring v. Arizona*, 536 U.S. 584 (2002), and that continues to cling to the holding in *Hildwin v. Florida*, 490 U.S. 638 (1989) (*per curiam*). The conflict between the Florida Supreme Court's decisions and those of all other jurisdictions is manifest, and Florida's continued denigration of the Sixth Amendment right to jury trial raises an important federal question, particularly in the context of defendants sentenced to death.

This Court made clear in *Ring* that where the finding of an aggravating factor has the effect of exposing a defendant to a greater punishment than that authorized by the jury verdict alone, that finding must be made by

a jury. In Florida, it is the factual finding of statutory aggravating circumstances that actually exposes the defendant to a sentence of death. But in Florida, it is the trial judge who serves as the aggravating-circumstance factfinder, independent from any factfinding input from the jury, in direct violation of the holding in *Ring.* Indeed, so removed is the judge from the jury's considerations, that the Florida Supreme Court has ordered that the advisory jury not reveal any opinion on the existence of the aggravating circumstances so as to avoid any "undu[e] influence" on the sentencing judge. *State v. Steele*, 921 So. 2d 538, 546 (Fla. 2005).

The only possible distinction that can be drawn between the flawed Arizona statute that this Court struck down in *Ring* and the Florida statute is Florida's provision for an advisory jury. But that distinction is devoid of any constitutional significance. For the point is not whether an advisory jury is sitting in the jury box, but whether that jury is performing the essential factfinding. No matter how the sentencing structure is labeled or formulated, advisory or not, the dispositive question is the same: whether the jury has factually found the aggravating circumstances on which the sentence of death is based.

Amici will show that, with the exception of Florida, all jurisdictions that *Ring* noted as hybrid – as providing for a jury advisory verdict but judge sentencing – have scrutinized their sentencing schemes for possible Sixth Amendment deficiencies and taken the necessary steps to ensure compliance with *Ring*. Indeed, every jurisdiction in the nation has adopted a capital regime that is consistent with the dictates of the Sixth Amendment, as proclaimed by this Court in *Ring* – except the State of Florida.

Mr. Evans's Petition for Writ of Certiorari should be granted to resolve the conflict and to ensure that Florida's capital defendants, no less than any other defendant, are afforded the jury-trial right that the Constitution prescribes for all who are accused in a criminal prosecution.

ARGUMENT

This Court long ago recognized that the jury-trial guarantee of our Constitution "reflect[s] a profound judgment about the way in which law should be enforced and justice administered." *Duncan v. Louisiana*, 391 U.S. 145, 155 (1968). Viewed as a necessary protection from government oppression and arbitrary action, *id.* at 155-56, the right to trial by a jury of one's peers provides "an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge." *Id.* at 156. Our nation's commitment to "community participation" and its basic "[f]ear of unchecked power," *id.*, found expression in the Framers' codification of the Sixth Amendment guarantee to trial by an impartial jury, a right deemed "fundamental to the American scheme of justice." *Id.* at 149.

This Court gave meaning to this Sixth Amendment safeguard in *Apprendi v. New Jersey*, 530 U.S. 466, 478 (2000), by declaring that a state cannot avoid the jury-trial entitlement by changing the label given to a fact essential for an increased sentence from "element" to "sentencing factor." Noting that such a distinction was "unknown . . . during the years surrounding our nation's founding," *id.*, and that any such demarcation was "constitutionally novel and elusive," *id.* at 494, this Court held that "the relevant

inquiry is one not of form, but of effect – does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?" *Id.* (footnote omitted). When it does, the finding is an element that must be found by a jury, for any other procedure would be "an unacceptable departure from the jury tradition that is an indispensable part of our criminal justice system." *Id.* at 497.

But *Apprendi*'s holding could not be reconciled with this Court's prior decisions in *Walton v. Arizona*, 497 U.S. 639 (1990), and *Hildwin v. Florida*, 490 U.S. 638 (1989) (*per curiam*), both of which relied on the illusory distinction between an element and a sentencing factor.[2] And this Court explicitly so acknowledged in revisiting Arizona's statute in *Ring*, 536 U.S. at 598, in a holding that equally controls in Florida: Because Arizona's and Florida's "enumerated aggravating factors operate as the functional equivalent of an element of a greater offense, the Sixth Amendment requires that they be found by a jury." *Id.* at 609 (internal quotation marks and citation omitted).

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2. In *Hildwin*, the Court expressly held that the existence of an aggravating circumstance is a sentencing factor, not an element, and thus the Sixth Amendment does not require specific jury findings on those circumstances when the jury unanimously recommends a death sentence. 490 U.S. at 640-41. In *Walton*, the Court rejected the petitioner's attempt to distinguish Florida's statutory scheme and reaffirmed that a state is not required to "denominate aggravating circumstances 'elements' of the offense or permit only a jury to determine the existence of such circumstances." 497 U.S. at 648-49.

A. Florida's Capital Scheme.

When this Court first considered Florida's death-penalty statute, the Court recognized that it is the judge, not the jury, that makes the requisite factual sentencing findings. *Proffitt v. Florida*, 428 U.S. 242, 250-52 (1976). The "more experienced" trial judge must "consider" and "also determine" whether the statutory aggravators apply, questions not unlike those considered by the sentencing jury in Georgia. *Id.* at 251-52. In fact, the "basic difference between the Florida system and the Georgia system," the Court observed, is that "in Florida the sentence is determined by the trial judge rather than by the jury," 428 U.S. at 252 (footnote omitted), and the judge, who is "the sentencing authority articulates in writing the statutory reasons that led to its decision." *Id.* at 259.

This Court again examined the contours of the Florida statute in *Barclay v. Florida*, 463 U.S. 939 (1983), in which the Court upheld the death sentence despite the trial judge's erroneous reliance on a non-statutory aggravating factor. The Court noted that the statute "requires the sentencer to find at least one valid statutory aggravating circumstance before the death penalty may even be considered." *Id.* at 954 (footnote omitted). Since the sentencer, the trial judge, had found no mitigating circumstances and other proper statutory aggravating circumstances, the death sentence did not violate the Constitution.

The Florida Supreme Court has similarly made clear that it is the statutory aggravating circumstances that expose the capital defendant to a possible death sentence, and the judge who makes the necessary findings on those

factors. In its first decision examining the present Florida capital scheme, the court explained that the aggravating circumstances "actually define those crimes" for which the death penalty may be imposed, in the absence of mitigating circumstances. *State v. Dixon*, 283 So. 2d 1, 9 (Fla. 1973). And the trial judge, who determines the sentence, is required to justify the sentence with written findings on those circumstances. *Id.* at 8-9.

More recently, the Florida Supreme Court, in a remarkable decision noting that *Ring*'s "effect" on "Florida's capital sentencing scheme remains unclear," disapproved a trial court's decision to provide special sentencing interrogatories to reveal the advisory jury's findings on the aggravating circumstances. *Steele*, 921 So. 2d at 540, 544-46. The trial court had ruled that a verdict form on which the jurors disclosed which aggravating circumstances they found and by what vote, was appropriate to avoid a reversal under *Ring*, to provide guidance when the court exercised its independent duty to find the aggravating circumstances, and to facilitate appellate review. *Id.* at 544. But the Florida Supreme Court, pointing out that the death-penalty statute "does not require jury findings on the aggravating circumstances," *id.*, concluded that such findings would compromise the trial court's independence and might "unduly influence" the judge's own sentencing determination. *Id.* at 546. Because the Florida scheme contemplates that the trial court alone must make the detailed findings on the aggravating circumstances with no jury findings as a guide, *id.* at 544-46, the court held that the use of a special verdict form "violates a clearly established principle of law resulting in a miscarriage of justice." *Id.* at 544.

Thus, Florida continues to adhere to its pre-*Ring* regime, in which the trial judge – unaided by the jury – makes the factual findings on the aggravating circumstances that justify a death sentence. And it is these findings that expose the capital defendant to a sentence greater than that authorized by the jury's guilty verdict alone. Accordingly, in Florida, as it impermissibly was in Arizona, a "[d]efendant's death sentence require[s] the judge's factual findings." *Ring,* 536 U.S. at 603 (quoting *State v. Ring*, 200 Ariz. 267, 279, 25 P.3d 1139, 1151 (2001)). The only pertinent dissimilarity between Arizona's system disapproved in *Ring* and that of Florida's is the so-called "advisory" jury. But for purposes of the Sixth Amendment, this is a distinction without any constitutionally significant difference.

B. Florida's Advisory Jury Does Not Satisfy the Sixth Amendment Jury-Trial Guarantee.

It is important to point out what is not at issue here and to focus on the narrow jury argument presented by Mr. Evans. This case does not concern the constitutionality of judicial sentencing or judicial overrides of life recommendations. Nor does it necessitate resolving the need for unanimous verdicts. And the requisite of special verdicts reflecting jury findings is not the issue either. The sole question is whether, given that a death sentence in Florida requires the factual finding of at least one statutory aggravating circumstance, the Sixth Amendment requires that this essential finding be made by the jury, not by the trial judge.

At the time *Ring* was decided, the Court observed that four of the then 38 states with capital punishment

– Alabama, Delaware, Indiana, and Florida – had "hybrid" schemes, in which the jury returned an advisory recommendation but the trial judge determined the actual sentence. 536 U.S. at 608 n.6. But this observation cannot mean that hybrid jurisdictions are somehow immune from *Ring* or its Sixth Amendment holding. For the real question under *Ring* is not whether a death-penalty structure includes an advisory-jury verdict or to what extent that verdict might be binding on the judge. The Sixth Amendment issue is whether the advisory jury has found aggravating circumstances proved beyond a reasonable doubt, "the factfinding necessary to put [the capital defendant] to death." *Id.* at 609.

A Florida advisory jury that hears some but not all of the sentencing evidence and discloses no findings at all on the aggravating circumstances, in no way complies with *Ring's* jury-factfinding decree.[3] Indeed, in Florida, claims under *Ring* are repeatedly rejected in cases where the record lacks any indication that even a majority of the jury has agreed on an aggravating factor. *See Altersberger v. State*, 103 So. 3d 122, 125-26 & n.4 (Fla. 2012) (jury recommended death by a nine-to-three vote and neither of two aggravating factors found by judge inhered in jury's verdict); *Peterson v. State*, 94 So. 3d 514, 523, 537-38 (Fla. 2012) (jury recommended death by a seven-to-five vote and none of the three aggravating factors found by judge inhered in verdict); *Abdool v. State*, 53 So. 3d 208, 215, 228 (Fla. 2010) (jury recommended death by a ten-to-two vote

3. At the second — and real — sentencing proceeding before the trial judge, the court is not limited in any way to what the jury heard or might have considered regarding the aggravating circumstances. *See Spencer v. State*, 615 So. 2d 688, 691 (Fla. 1993); *see also Williams v. State*, 967 So. 2d 735, 751 (Fla. 2007).

and verdict did not include finding of either the especially heinous or cold, calculated, and premeditated aggravators used by judge to justify death sentence).[4]

Mr. Evans's case – with no prior conviction, a guilty verdict that did not encompass any aggravating circumstance, and a nine-to-three death recommendation lacking any evidence of even a majority consensus on any aggravating circumstance – exemplifies Florida's continued defiance of *Ring*. No other jurisdiction condones such flagrant *Ring* violations.

C. The Hybrid Jurisdictions Ensure Compliance with *Ring*.

Since *Ring* was announced, all states except Florida – including the "hybrid" jurisdictions noted in *Ring* – have understood *Ring* to require a jury determination of the aggravating factors that are the precondition of a proper death sentence. Where necessary, the hybrid states have modified their regimes to make certain that they comply with *Ring*. All now require that, before a death sentence may be imposed, the record must establish that a unanimous jury has found one or more of the specific aggravating circumstances on which the sentence of death is based. We review the hybrid states in turn.

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4. *Amici* acknowledge that in some Florida cases the jury's guilty verdict in the first phase includes a finding of an aggravating factor or there exists a prior violent conviction, and the Supreme Court of Florida has held that the verdict or conviction satisfies *Ring*. *See*, *e.g.*, *Belcher v. State*, 851 So. 2d 678, 685 (Fla. 2003) (where unanimous jury found defendant guilty of murder and sexual battery, aggravating factor of murder in the course of a sexual battery unanimously found by jury). This is not such a case.

1. Alabama's Compliance with *Ring*.

Alabama's statute, like that of Florida, requires at least one statutory aggravating circumstance before a death sentence may be considered. Ala. Code § 13A-5-45(f) (2005). But unlike in Florida, many of Alabama's 18 capital-murder offenses, as defined in Title 13A-5-40, Criminal Code of Alabama, include an aggravating circumstance as an element so that a verdict of guilt necessarily includes a unanimous finding of the corresponding aggravating circumstance. *See Ex parte Waldrop*, 859 So. 2d 1181, 1188 (Ala. 2002). Thus, in *Waldrop,* the jury's guilty verdicts on two counts of murder during a robbery included a finding on the statutory aggravating circumstance of commission of a capital offense while committing a robbery. *Id.* Since the jury's verdict alone exposed Waldrop to a death sentence, the holdings of *Ring* and *Apprendi* were satisfied. *Id.*

When the capital offense does not correspond to a statutory aggravating factor, the Alabama courts will analyze the jury instructions, or the special verdict forms, to ensure that there has been a unanimous finding of an aggravating circumstance. For example, in *Ex parte McNabb,* 887 So. 2d 998 (Ala. 2004), the court examined the jury instructions as a whole in rejecting the defendant's argument that the jury was not adequately instructed that it must unanimously find the existence of one and the same aggravating factor before considering a death recommendation. The court noted that the jury was advised that it could not even consider recommending a death sentence unless each and every juror found an aggravating circumstance, and "the jury was informed that it must – as a unit – *unanimously* find the existence of

any aggravating circumstance it considered in arriving at a recommended sentence." *Id.* at 1006. While the jury was made to understand that the mitigating circumstances could be found individually, the jury was instructed that a unanimous finding was required for the consideration of any individual aggravating factor. *Id.* at 1005-06.

In a subsequent case where the offense charged likewise did not correspond to an aggravating factor, the court, in reversing on other grounds, made clear that the jury should be instructed that, unless it unanimously finds a statutory aggravator, it must return a life verdict that would be binding on the judge. *Ex parte McGriff,* 908 So. 2d 1024, 1038 (Ala. 2004). If, and only if, the jury unanimously found the aggravating circumstance alleged by the state, could it proceed to weigh the aggravating and mitigating factors. *Id.* And the court also issued a prospective directive that a special verdict form be used reflecting the jurors' vote on the specific aggravating factor alleged, and ordered that the jury never be told that its decision on the aggravating circumstance was advisory. *Id.* at 1038-39.

Since these early post-*Ring* decisions, the Alabama courts have consistently reviewed capital cases for compliance with *Ring.* In some cases, the charged offense corresponds to a statutory aggravating circumstance, and the jurors' unanimous aggravating findings exposing the defendant to death are subsumed within the jurors' first-phase guilty verdicts. *See, e.g.*, *Mitchell v. State*, 84 So. 3d 968, 988-89 (Ala. Crim. App. 2010) (jury's guilty verdict of two capital offenses that corresponded to two aggravating circumstances established that jury "unanimously found" those circumstances), *cert. quashed as improvidently*

granted sub nom. Ex parte Mitchell, 84 So. 3d 1013 (Ala. 2011), *cert. denied sub nom. Mitchell v. Alabama*, 133 S. Ct. 111 (2012); *Newton v. State*, 78 So. 3d 458, 469-71 (Ala. Crim. App. 2009) (because jury convicted defendant of robbery-murder, that aggravating circumstance was found by the jury beyond a reasonable doubt), *cert. denied,* 132 S. Ct. 1545 (2012); *Brown v. State*, 11 So. 3d 866, 926 (Ala. Crim. App. 2007) (jury's guilty verdict on robbery-murder established that jury unanimously found the corresponding aggravating circumstance).

Where the capital offense does not include an element that corresponds with an aggravating factor, special sentencing interrogatories have become commonplace. *See, e.g.*, *Woodward v. State*, No. CR-08-0145, 2011 WL 6278294, at *4, *59 (Ala. Crim. App. Dec. 16, 2011) (no *Ring* violation where jury returned specific written verdict finding two of the three aggravating circumstances asserted); *Gobble v. State*, 104 So. 3d 920, 976 (Ala. Crim. App. 2010) (jury's penalty-phase interrogatories reflecting that it found the heinous aggravating factor satisfied *Ring*), *cert. denied,* No. 12-8308, 2013 WL 221774 (U.S. Apr. 15, 2013). Indeed, even where the offense charged corresponds to an aggravating factor, special interrogatories reflecting the jury's findings in aggravation are provided. *See McCray v. State*, 88 So. 3d 1, 82 & n.33 (Ala. Crim. App. 2010) (jury returned special verdict indicating it had found three aggravating factors, although burglary-murder guilty verdict established the necessary aggravating finding). And in *Blackmon v. State*, 7 So. 3d 397, 418 (Ala. Crim. App. 2005), the death sentence was upheld because only one aggravating factor was alleged and the jury was instructed that it could not vote on a death recommendation unless it first unanimously found that

factor to exist. The court explained that the jury's ten-to-two death recommendation, in light of the jury instructions, established that the jury had unanimously found the aggravating circumstance alleged. *Id.*

2. Delaware's Compliance with *Ring*.

Delaware's General Assembly took immediate action to resolve the Sixth Amendment deficiencies in its pre-*Ring* statute. Although the prior statute had required a special verdict indicating the jury vote on the aggravating factors, that vote was not binding and unanimity was not required on any single aggravating factor. Del. Code Ann. tit. 11, § 4209(c)(3), (d) (1991). The 2002 revision, 73 Del. Laws Ch. 423 (2002), S.B. 449, 141st Gen. Assem., Reg. Sess. § 2 (Del. 2002), provides that the jury, in order to find a statutory aggravating circumstance beyond a reasonable doubt "must be unanimous as to the existence of that statutory aggravating circumstance" and further requires the jury to provide the numerical split on any aggravating circumstance that was not unanimously found. *Id.* And the trial judge is precluded from imposing a death sentence unless a unanimous jury finds at least one statutory aggravating circumstance. *Id.* at § 3.

The Delaware Supreme Court has noted that the jury's role was transformed at the "narrowing phase" by the 2002 statute from advisory into one that is determinative of the existence of the aggravating factors. *Capano v. State*, 889 A.2d 968, 977 (Del. 2006). In *Capano*, the jury, prior to *Ring*, had found one aggravating circumstance by an eleven-to-one vote, and the judge had imposed a death sentence. *Id.* at 974. On appeal from the denial of a post-conviction motion, the state asserted that *Ring* governs only the Arizona statute and "urges us to apply

only *Hildwin v. Florida*." *Id.* at 978 (citation omitted). But the court expressly rejected the suggestion that *Ring* does not apply to hybrid jurisdictions:

> The State argues that *Ring* does not apply in Delaware because the judge does not sit without a jury, but relies on the jury's recommendation. *Ring*'s holding is not so narrow. Rather, the United States Supreme Court concluded that "[c]apital defendants, no less than non-capital defendants. . . are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment."

Id. (original brackets and ellipsis).

The court noted that Capano's death sentence was the only such sentence imposed prior to *Ring* that lacked either a unanimous jury's finding of an aggravating circumstance or a first-phase guilty verdict that included such a finding. *Id.* at 972-73 & n.8. Because the jury's finding on the aggravating circumstance was eleven-to-one, the court rejected the lower court's ruling that the vote need not be unanimous under the Delaware Constitution and reversed, finding the sentencing procedure unconstitutional as applied. *Id.* at 977-80.

The Delaware Supreme Court thus has consistently reviewed death sentences imposed under the pre-*Ring* statute to ensure that the jury either returned a guilty verdict that necessarily included a unanimous finding on the aggravating factors or returned such a unanimous finding at the penalty phase. *See, e.g.*, *Ortiz v. State*, 869 A.2d 285, 303-05 (Del. 2005) (although jury proceeding

was under the former statute, judge imposed death after statute was amended and specifically noted defendant was death-eligible because jury unanimously found an aggravator); *Norcross v. State*, 816 A.2d 757, 767 (Del. 2003) ("once a jury finds, unanimously and beyond a reasonable doubt, the existence of at least one statutory aggravating circumstance, the defendant becomes death eligible and *Ring*'s constitutional requirement of jury fact-finding is satisfied"; jury's guilty verdict on two counts of felony murder corresponded with statutory aggravator).

The Delaware General Assembly, with its amended statute requiring special verdicts and a unanimous finding of a single aggravating factor beyond a reasonable doubt before a judge may consider a death sentence, has taken steps to bring its statute in accord with *Ring.* Del. Code Ann. tit. 11, §§ 4209(c)(3), (d)(1) (Supp. 2012). And the Delaware Supreme Court, by ensuring that no previous death sentence will be upheld unless the jury unanimously found one statutory aggravating factor, has made certain that no Delaware death sentence will be imposed in violation of *Ring*'s Sixth Amendment directive.

3. Indiana's Compliance with *Ring.*

Indiana's General Assembly chose to amend its death/life-without-parole statute days before the *Ring* decision, and eliminated the statute's hybrid structure. 2002 Ind. Acts, P.L. 117-2002, § 2, *amending* Ind. Code § 35-50-2-9 (2001).[5] As the statute now provides, the jury's

5. The statute (both before and after *Ring*) prescribes similar requirements for imposing a life sentence or a death sentence. *See Clark v. State*, 808 N.E.2d 1183, 1196 (Ind. 2004).

"recommendation" is binding on the trial judge who must sentence the defendant "accordingly." Ind. Code § 35-50-2-9(e) (Supp. 2012).

The statute further specifies that, before the jury may return a verdict for death or life-without-parole, it must return a special verdict for each aggravating circumstance alleged and find that at least one has been proved beyond a reasonable doubt. Ind. Code § 35-50-2-9(d) (Supp. 2012). If the jury is unable to reach a unanimous verdict for either a death or life sentence, the trial court may impose such sentence only if the jury "unanimously finds one or more aggravating circumstances proven beyond a reasonable doubt." *State v. Barker*, 809 N.E.2d 312, 317-18 (Ind. 2004).

For death or life-without-parole sentences imposed under the former statute's regime, the Indiana Supreme Court has carefully reviewed each case to ascertain whether there is evidence of the essential jury sentencing findings. Although special sentencing verdicts are required under the amended statute, the court has noted that such verdicts are not compelled by *Ring. Overstreet v. State*, 783 N.E.2d 1140, 1160-61 (Ind. 2003). But the court has made clear what *Ring* does in fact mandate: record evidence that establishes that a jury found "beyond a reasonable doubt, each and every material allegation of at least one aggravating circumstance." *Id.* at 1161 (record citation omitted).

The court, accordingly, has taken seriously its duty to examine each case to assure compliance with *Ring. See, e.g.*, *Williams v. State*, 793 N.E.2d 1019, 1028-29 (Ind. 2003) (record establishes unanimous finding of multiple-murder aggravator where jury returned guilty verdicts of

two felony murders; additionally jury returned unanimous death recommendation following instruction that it could do so only after finding one aggravating circumstance); *Brown v. State*, 783 N.E.2d 1121, 1126 (Ind. 2003) (*Ring* satisfied where jury found multiple-murder aggravator by its first-phase guilty verdicts of two murders and returned a unanimous life-without-parole recommendation after instruction that it must find the charged aggravator before it could recommend a death sentence); *Overstreet*, 783 N.E.2d at 1149, 1160-61 (because jury was explicitly instructed that it could only recommend death if it unanimously found each and every material allegation of at least one aggravating circumstance beyond a reasonable doubt, court concludes unanimous finding of aggravator inheres in death recommendation; jury returned guilty verdicts of murder, felony murder, rape, and felony confinement); *Wrinkles v. State*, 776 N.E.2d 905, 907-08 (Ind. 2002) (where jury returned guilty verdicts on three homicides and was instructed that it must find the charged multiple-murder aggravator beyond a reasonable doubt before it could recommend death, unanimous death recommendation necessarily satisfies *Ring*).

Where the record does not supply proof of a jury's unanimous determination that a particular aggravating circumstance exists beyond a reasonable doubt, the court has declined to engage in speculation and instead has reversed the sentences. Thus, in *Bostick v. State*, 773 N.E.2d 266, 273 (Ind. 2002), where a mother was found guilty of murdering her three young children, the court vacated her life sentences because the jury was unable to reach a unanimous sentencing recommendation, and accordingly, there was no jury finding of the qualifying

aggravating circumstance – that each victim was under twelve years old – although the trial judge had so found in imposing sentence. The court found that this "relief [was] required by the recent intervening decision" in *Ring*. *Id.*

And in *Kiplinger v. State*, 922 N.E.2d 1261 (Ind. 2010), the court refused to infer that the jury had found the aggravating circumstance of "intentionally killing while committing or attempting to commit rape" despite compelling evidence that it had. There, the jury returned a guilty verdict of "knowing or intentional" murder and "felony murder where rape or attempted rape was the predicate felony." *Id.* at 1264-65. At the sentencing phase, the jury returned a special verdict finding that the state had proved that the charged aggravating circumstance outweighed the mitigation, but was unable to reach a unanimous sentencing recommendation and did not return a special verdict finding the charged aggravator. *Id.* The court concluded that, because the murder charge was in the disjunctive – "knowing 'or' intentionally" killing – and the aggravating factor required an intentional killing, this factor was not necessarily included in the guilt-phase verdict. *Id.* at 1264-65.

The court acknowledged that it had found compliance with the Sixth Amendment in past cases that lacked an explicit jury finding on the charged aggravating circumstance. But in those cases, the jury had made a unanimous sentencing recommendation and the jury's guilt-phase verdicts necessarily established that the required aggravating circumstance had been found. *Id.* *Kiplinger* was not such a case. *Id.*

D. All Other Jurisdictions Ensure Compliance with *Ring*.

All states that *Ring* identified as hybrid, save Florida, have thus recognized that *Ring* and its Sixth Amendment jurisprudence govern their sentencing regimes. Only the State of Florida has not "forged a majority view about whether *Ring* applies." *Steele*, 921 So. 2d at 540. But Florida, in its refusal to follow *Ring*, is not only alone among those hybrid jurisdictions, it is alone among every other jurisdiction in the country.

Two states identified in *Ring* as committing both the sentencing factfinding and the sentencing decision to the judge alone, Montana and Nebraska, *Ring*, 536 U.S. at 608 n.6, have chosen a new hybrid scheme in *Ring*'s aftermath. Notably, in both, the jurors are required to make binding and unanimous findings on the aggravating circumstances. Montana requires that the jury make unanimous written findings on the aggravating factors and restricts the judge to consideration of only those factors unanimously found by the jury. Mont. Code Ann. §§ 46-1-401(1)(b), (3); 46-18-302(1)(b) (2003). Nebraska similarly requires that the jury return a verdict as to the existence or nonexistence of each alleged aggravating circumstance and permits only those aggravating circumstances unanimously found to be considered by the three-judge sentencing panel; if no aggravating circumstance is unanimously found, the court "shall" enter a life sentence. Neb. Rev. Stat. §§ 29-2520(4)(f), (4)(h) (2011).

Arizona, Colorado, and Idaho, the other three states that formerly committed the sentencing factfinding and the ultimate sentencing to the judge, *Ring*, 536 U.S. at

608 n.6, now require a unanimous jury finding on the aggravating circumstances and on the decision to impose a death sentence. Ariz. Rev. Stat. §§ 13-752(b), (d), (e), (h) (2012); Colo. Rev. Stat. § 18-1.3-1201(2)(b)(II) (2012); Idaho Code §§ 19-2515(3)(b), (8)(a) (Supp. 2012). The remaining 24 states that currently retain the death penalty require the jury to make a unanimous finding that one or more specific aggravating circumstances exist.[6] The federal

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6. **Arkansas** (Ark. Code Ann. § 5-4-603(a) (West Supp. 2009)); **California** (Cal. Penal Code § 190.4(a)-(b) (West Supp. 2013)); **Georgia** (Ga. Code Ann. §§ 17-10-30(c), 17-10-31(a) (West Supp. 2012); *Ellington v. State*, 735 S.E.2d 736, 748 (Ga. 2012)); **Kansas** (Kan. Stat. Ann. § 21-6617(e) (West Supp. 2012)); **Kentucky** (Ky. Rev. Stat. Ann. §§ 532.025(1)(b), (2)(a), (3) (West Supp. 2012); *St. Clair v. Commonwealth*, 319 S.W.3d 300, 308 (Ky. 2010); *Soto v. Commonwealth*, 139 S.W.3d 827, 871 (Ky. 2004)); **Louisiana** (La. Code Crim. Proc. Ann. art. 905.3, 905.7 (2008); *State v. Weary*, 931 So. 2d 297, 312 (La. 2006); *State v. Sonnier*, 402 So. 2d 650, 657 (La. 1981)); **Maryland** (Md. Code Ann., Crim. Law § 2-303(g), (i)(4)(i) (LexisNexis 2012); *Abeokuto v. State*, 893 A.2d 1018, 1048 (Md. 2006); *Miller v. State*, 843 A.2d 803, 814-15 (Md. 2004); *Baker v. State*, 790 A.2d 629, 635-36 (Md. 2002); *Metheny v. State*, 755 A.2d 1088, 1097 (Md. 2000)); **Mississippi** (Miss. Code Ann. §§ 99-19-103, -101(3) (West Supp. 2012)); **Missouri** (Mo. Ann. Stat. §§ 565.030.4(2), (4), 565.032.1 (1)-(3) (Vernon Supp. 2012); *State v. Johnson*, 207 S.W.3d 24, 47 (Mo. 2006) (en banc); *State v. Williams*, 97 S.W.3d 462, 471 (Mo. 2003) (en banc); *State v. Thompson*, 85 S.W.3d 635, 638 (Mo. 2002) (en banc) (mandate recalled in *State v. Thompson*, 134 S.W.3d 32, 33 (Mo. 2004) (en banc)); **Nevada** (Nev. Rev. Stat. § 175.554(2)-(4) (West Supp. 2011); *Geary v. State*, 952 P.2d 431, 433 (Nev. 1998)); **New Hampshire** (N.H. Rev. Stat. Ann. § 630:5(III)-(IV) (Supp. 2012)); **North Carolina** (N.C. Gen. Stat. § 15A-2000(b)-(c) (West Supp. 2011); *State v. Bell*, 603 S.E.2d 93, 122 (N.C. 2004); *State v. McKoy*, 394 S.E.2d 426, 428, 429-30 (N.C. 1990)); **Ohio** (Ohio Rev. Code Ann. §§ 2929.03(B), (C)(2)(a), 2929.04 (West Supp. 2012)); **Oklahoma** (Okla. Stat. tit. 21, § 701.11 (West

capital regime also provides for a unanimous jury finding of the prerequisite aggravating circumstances. 18 U.S.C. § 3593(d) (2012).

Thus, all jurisdictions, state and federal – except Florida – now preclude a death sentence unless, at a minimum, there has been a unanimous finding by the jury during guilt or sentencing phase on the existence of an identifiable aggravating circumstance. Those jurisdictions whose pre-*Ring* statutes had not so required have unvaryingly revised their sentencing structures. Florida alone remains steadfast in its refusal to require that even a bare majority of the jury find that one or more specific aggravating circumstances exist before a death sentence may be imposed. Only Florida refuses to honor the Sixth Amendment's mandate that "the aggravating factor determination be entrusted to the jury." *Ring*, 536 U.S. at 597.

Supp. 2009)); **Oregon** (Or. Rev. Stat. § 163.095 (West Supp. 2012); *State v. Boots*, 780 P.2d 725, 729 (Or. 1989)); **Pennsylvania** (42 Pa. Cons. Stat. § 9711(c)(iii)-(iv) (Purdon Supp. 2012); *Commonwealth v. Carson*, 913 A.2d 220, 282 (Pa. 2006)); **South Carolina** (S.C. Code Ann. § 16-3-20(C) (Supp. 2012)); **South Dakota** (S.D. Codified Laws §§ 23A-26-1, 23A-27A-4 (2012)); **Tennessee** (Tenn. Code Ann. §§ 39-13-204(g), (i) (2010)); **Texas** (Tex. Code Crim. Proc. Ann. arts. 37.071(2)(b), (c), (d)(2) (Vernon Supp. 2012)); **Utah** (Utah Code Ann. § 76-5-202 (West Supp. 2012); *Archuleta v. Galetka*, 267 P.3d 232, 259 (Utah 2011)); **Virginia** (Va. Code Ann. §§ 19.2-264.2, -264.4(C) (West Supp. 2012); *Prieto v. Commonwealth*, 682 S.E.2d 910, 935 (Va. 2009)); **Washington** (Wash. Rev. Code § 10.95.020 (Supp. 2013); *State v. Yates*, 168 P.3d 359, 383 (Wash. 2007) (en banc)); **Wyoming** (Wyo. Stat. Ann. §§ 6-2-102(d)(i)(A), (d)(ii), (e) (West Supp. 2011)).

CONCLUSION

Mr. Evans's Petition for Writ of Certiorari should be granted to resolve the conflict in Sixth Amendment jurisprudence between the Florida courts and every other court in this country. Florida capital defendants, no less than capital defendants in every other jurisdiction, are entitled to a jury determination of the aggravating facts on which the legislature conditions their sentences to death.

Respectfully submitted,

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