IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CASE NO. 11-14498-P

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PAUL H. EVANS,

*Petitioner-Appellee,*

v.

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,

*Respondent-Appellant.*

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# AMENDED *AMICUS CURIAE* BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, FLORIDA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, AND FLORIDA CAPITAL RESOURCE CENTER SUPPORTING PETITIONER-APPELLEE AND AFFIRMANCE

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

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***EVANS V. SECRETARY, ETC.***

**CASE NO. 11-14498-P**

## CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

*Amici curiae* submit this list, which includes the trial judge, and all attorneys, persons, associations of persons, firms, partnerships or corporations that have an interest in the outcome of this review.

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2. Campbell, Leslie, Assistant Attorney General
3. Capital Collateral Regional Counsel – South
4. Evans, Paul H., Petitioner, Appellee-Petitioner
5. Florida Association of Criminal Defense Lawyers, *Amicus Curiae*
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7. Gottlieb, Karen, M., Counsel for *Amicus Curiae*
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10. Hawley, Robert A., The Honorable, Circuit Judge
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12. Martinez, Jose, The Honorable, District Judge, Southern District of Florida
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***EVANS V. SECRETARY, ETC.***

**CASE NO. 11-14498-P**

**CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT**
(Continued)

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22. Vaughn, Dan L., The Honorable, Circuit Judge

Karen M. Gottlieb

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## STATEMENT OF INTEREST OF *AMICUS CURIAE*[1]

The National Association of Criminal Defense Lawyers (NACDL) has more than 12,500 members nationwide, including both public and private defenders, active U.S. military defense counsel, law professors, and judges. With 90 state, local and international affiliate organizations, NACDL speaks for a total membership of some 35,000 in all 50 states. The American Bar Association recognizes NACDL as an affiliate organization and accords it full representation in its House of Delegates. Founded in 1958, NACDL promotes study and research in the field of criminal law and procedure, disseminates and advances legal knowledge in the area of criminal justice and practice, and encourages the integrity, independence and expertise of criminal 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 criminal justice system, NACDL files approximately 35 *amicus* briefs a year in state and federal appeals courts, including this Court, on a variety of criminal justice issues affecting the vital interests of its members and their clients.

The Florida Association of Criminal Defense Lawyers (FACDL) is a statewide organization representing 1,700 members, all of whom are criminal defense practitioners. FACDL is a not-for-profit corporation whose goal is to

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[1] Pursuant to Federal Rule of Appellate Procedure 29(c)(5), no person other than the *amici curiae*, their members, or their counsel authored this brief in whole or in part, or contributed money intended to fund its preparation or submission. Counsel for the parties have consented to the filing of this brief.

assist in the reasoned development of the Florida criminal justice system. Its founding purposes are: promoting study and research in criminal law and related disciplines; ensuring the fair administration of criminal justice in the Florida courts; fostering and maintaining the independence and expertise of criminal defense lawyers; 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), founded in 2009, is a nonprofit organization whose mission is to protect the constitutional rights of capital defendants in the State of Florida by working to ensure that they received the most effective representation possible. To that end, FCRC provides free consultation, research, advocacy, and other necessary resources to capital defendants statewide. The substantive issue presented in this case is a matter of tremendous importance to FCRC because it implicates the Sixth Amendment right to a jury trial, which right must be fiercely guarded for those facing the ultimate sentence.

## STATEMENT OF THE ISSUE

Whether the Sixth Amendment requirement of *Ring v. Arizona* – that a capital jury find at least one statutory aggravating circumstance that renders a defendant eligible for a death sentence – applies in every death-penalty jurisdiction.

## SUMMARY OF ARGUMENT

*Ring v. Arizona* requires that every death sentence be supported by a jury finding of a statutory aggravating circumstance. The statutory aggravating circumstance serves to ensure compliance with the Eighth Amendment guarantee against arbitrariness by genuinely narrowing the class of homicide defendants who are eligible for a death sentence.

Alabama, Delaware, and Indiana – the three States other than Florida that had "hybrid" death-penalty statutes at the time *Ring* was decided – have understood that *Ring* requires that, before a homicide defendant is sentenced to death, the jury must unanimously find one aggravating circumstance. All three States have implemented procedures, whether through statutory amendments or judicial scrutiny of the charges, instructions, and jury verdicts, that ensure that no defendant is sentenced to death in violation of *Ring*.

There is no evidence that a simple majority of Mr. Evans' jury agreed on any aggravating circumstance. Florida is the outlier State. It does not require that a unanimous jury, or even a majority of the jurors, agree on an aggravating circumstance, and it still equivocates on whether *Ring* applies to hybrid death-sentencing structures. Indeed, Florida specifically precludes special verdicts that might reveal the jurors' votes. Because it is impossible to ascertain how the jurors voted on any aggravating circumstance in Mr. Evans' case, the district court correctly granted habeas corpus relief.

## ARGUMENT

### *RING V. ARIZONA*'S SIXTH AMENDMENT REQUIREMENT, THAT A CAPITAL JURY FIND AT LEAST ONE STATUTORY AGGRAVATING CIRCUMSTANCE BEFORE A DEATH SENTENCE MAY BE IMPOSED, APPLIES IN EVERY DEATH-PENALTY JURISDICTION, AND, WITH THE EXCEPTION OF FLORIDA, EVERY STATE WITH A "HYBRID" STRUCTURE HAS SO RECOGNIZED BY EITHER AMENDING ITS PENALTY STATUTE OR SCRUTINIZING EACH CASE TO ENSURE THAT A UNANIMOUS JURY FOUND AT LEAST ONE STATUTORY AGGRAVATING CIRCUMSTANCE.

The Supreme Court's decision in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), recognized the Sixth Amendment right to jury trial on every fact that increases the maximum penalty for a criminal offense. The Court held that a defendant may not be exposed to a penalty exceeding the maximum that could be imposed based on the facts reflected in the jury verdict alone, and that a State's characterization of an additional fact as a sentencing factor, not an element, is not determinative. *Id.* at 483, 492. The decision in *Ring v. Arizona*, 536 U.S. 584, 589 (2002), made clear that this Sixth Amendment right to jury factual findings is equally guaranteed to the defendant accused of a capital crime.

The focus of the Sixth Amendment analysis is on the factual findings on which the legislature conditions an enhanced sentence. *Apprendi*, 530 U.S. at 482-483. In the capital context, the essential factual component of a valid sentence is the finding of at least one statutory aggravating factor that channels discretion and reduces the risk of arbitrariness by narrowing the class of homicide defendants that are eligible for a death sentence. *See, e.g., Maynard v. Cartwright*, 486 U.S. 356,

361-62 (1988); *Godfrey v. Georgia*, 446 U.S. 420, 427-28 (1980). This "narrowing" process can occur as part of the initial phase of a capital trial or as a component of a second phase of a bifurcated trial but, to satisfy Eighth Amendment requisites, every death-penalty scheme must require the finding of an aggravating factor that genuinely narrows the class of homicide defendants warranting imposition of the ultimate penalty. *See Tuilaepa v. California*, 512 U.S. 967, 971-72 (1994); *Lowenfield v. Phelps*, 484 U.S. 231, 244-46 (1988); *Zant v. Stephens*, 462 U.S. 862, 877-78 (1983).

At the time *Ring v. Arizona* was decided, four of the 38 States with capital punishment had "hybrid" systems, in which the jury returned an advisory recommendation but the trial judge determined the actual sentence. *Ring*, 536 U.S. at 608 n.6. This brief will establish that *Ring's* Sixth Amendment jurisprudence equally applies to these hybrid structures, for no matter how the structure is labeled or formulated, the dispositive question is the same: whether a jury has unanimously made the factual finding of a statutory aggravating factor that renders a defendant eligible for imposition of a death sentence. The brief will then demonstrate that each of the four hybrid States – except Florida – has put in place restrictions and revisions that *Ring* requires to satisfy the Sixth Amendment.

### A. The Clear and Unequivocal Holding of *Ring v. Arizona.*

The Supreme Court granted certiorari in *Ring* to allay the uncertainty caused by the manifest tension between *Walton v. Arizona*, 497 U.S. 639 (1990), and the reasoning in *Apprendi*. *Ring*, 536 U.S. at 596. *Walton* had held that the Sixth

Amendment did not require that a State denominate aggravating circumstances as "elements" of a capital offense that must be factually found by the jury. 497 U.S. at 649.

*Walton* explicitly noted that the Court had rejected constitutional challenges to Florida's death sentencing scheme that provided for ultimate sentencing, not by the jury, but by the trial judge. *Id.* at 647-48. And the Court rejected Walton's contention that Arizona's capital scheme was somehow meaningfully distinct from Florida's. *Id.* Indeed, the petitioner's contention, that in Florida aggravating circumstances are only sentencing considerations, while in Arizona they are elements of the crime, was flatly rejected. *Id.* at 648. And the notion that a Florida capital jury has a meaningfully more expansive role in making sentencing findings, thus satisfying the Sixth Amendment, while Arizona's "judge-only" role at sentencing did not, was equally rebuffed:

> It is true that in Florida the jury recommends a sentence, but it does not make specific factual findings with regard to the existence of mitigating or aggravating circumstances and its recommendation is not binding on the trial judge. A Florida trial court no more has the assistance of a jury's findings of fact with respect to sentencing issues than does a trial judge in Arizona.

*Id.*

In *Ring,* the Court noted that Walton had found unavailing his attempt to distinguish Florida's capital structure from Arizona's, since the Court had held that in both States, aggravating factors were sentencing considerations, not elements. 536 U.S. at 598. But the Court then rejected its earlier *Walton* holding as irreconcilable with *Apprendi.* 536 U.S. at 609. Noting that the *Apprendi* focus is

not on form, but on effect, the Court explained that, in effect, the required finding of an aggravated factor exposed the capital defendant to a greater punishment than that which would be authorized by the jury's guilty verdict. *Id.* at 604. The Court concluded that, because Arizona's enumerated aggravating circumstances operate as "the functional equivalent of an element of a greater offense, the Sixth Amendment requires that they be found by a jury." 536 U.S. at 609 (citation and internal quotations omitted).[2]

### B. Alabama's Hybrid System and its Response to *Ring*.

The Respondent-Appellant uses Alabama as its only example of a hybrid system whose courts have agreed "that *Ring* did not render Alabama's similar

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[2] The identification of four "hybrid" state death penalty systems that appears in a footnote in *Ring*, 536 U.S. at 608 n.6, should not be taken out of context to suggest that the Court was somehow excluding those States from *Ring*'s Sixth Amendment ruling. See Brief of Respondent-Appellant at 10, 25-26, 28-29, 31, 37, 40-41. The decisional text to which the footnote is directed contains the Court's response to Arizona's argument that judicial factfinding – as opposed to jury factfinding – of aggravating factors better guards against arbitrariness. 536 U.S. at 607. In this text, the Court underscores the significance and historical underpinnings of the Sixth Amendment right to jury trial, before noting that "[i]n any event, the superiority of judicial factfinding in capital cases is far from evident." *Id.* It is in this context that the Court then explains that, "[u]nlike Arizona, the great majority of States responded to this Court's Eighth Amendment decisions requiring the presence of aggravating circumstances in capital cases by entrusting those determinations to the jury." *Id.* at 607-08. Footnote 6 is to this last sentence, and merely supports this observation by listing the 29 of the 38 States that commit the sentencing decision to juries, while noting that five commit the decision entirely to judges, and four have hybrid systems. *Id.* at n.6. It is plain that this footnote does not suggest in any way that hybrid States are somehow immune from *Ring*'s Sixth Amendment jurisprudence.

death penalty unconstitutional" and notes that Alabama's statute, "like Florida's death penalty statute, permits overrides and allows a judge to make factual findings in addition to those of the jury." (Respondent-Appellant Brief at 28). This surface-level justification for its argument that fair-minded Alabama judges agree with the Florida courts that hybrid statutes do not violate the Sixth Amendment misses its mark.

For, as will be demonstrated, in the aftermath of *Ring*, the Alabama courts have consistently scrutinized the indictments, verdicts, or jury instructions to ensure that the jury's verdict was predicated on a unanimous finding of at least one aggravating circumstance. The flaw in a hybrid system is not in its hybrid nature. The system is flawed – as each hybrid State, save Florida, has concluded – when a death sentence cannot be reliably shown to have been the result of a jury's unanimous finding of at least one statutory aggravating factor that rendered the defendant eligible for a sentence of death.

The Supreme Court of Alabama first addressed *Ring's* impact on Alabama's hybrid statute in *Ex Parte Waldrop*, 859 So. 2d 1181 (Ala. 2002). The Court first noted that, under Alabama's 1975 capital statute, at least one statutory aggravating circumstance must exist before a defendant convicted of a capital offense may be sentenced to death. *Id.* at 1187-88. The court also noted that many of the capital offenses listed in its statute include conduct that corresponds to statutory aggravating circumstances, and that its statute provides that, when a defendant is found guilty of a capital offense, any aggravating circumstance that the jury verdict

establishes as proven beyond a reasonable doubt shall be considered as proven beyond a reasonable doubt for sentencing purposes. *Id.* at 1188.

Turning to the jury's verdict, the court observed that the jury had convicted Waldrop of two counts of murder during a robbery in the first degree, and thus had found the statutory aggravator of committing a capital offense while engaged in the commission of a robbery. *Id.* Because only one aggravator is required in order to impose a death sentence, the jury, not the trial judge, had determined the existence of the aggravator essential to the imposition of the death sentence. *Id.* The "findings reflected in the jury's verdict alone exposed Waldrop to a range of punishment that had as its maximum the death penalty[,]" *id.*, thus satisfying *Ring* and *Apprendi*. *Id.*

In the later case of *Ex parte McNabb*, 887 So. 2d 998 (Ala. 2004), the Supreme Court of Alabama reviewed another *Ring* argument, this time the contention that the jury was not instructed that a finding of any single aggravating circumstance must be unanimous. McNabb had been charged with two counts of capital murder of a police officer. *Id.* at 999-1000. After the jury found McNabb guilty on both counts, an advisory sentencing hearing was held, during which the jury was instructed on three statutory aggravating circumstances. *Id.* at 1001. The jury recommended a death sentence by a vote of 10 to 2, and the trial court imposed a death sentence, finding the three aggravating circumstances on which the jury had been instructed. *Id.* at 1000.

McNabb contended that the trial court committed plain error because the sentencing instructions did not require that the jury unanimously find the same

aggravating circumstance before recommending a death sentence. *Id.* at 1005. He conceded that the jury was instructed to make a unanimous finding whether any of the three aggravators existed and also conceded that each juror must have found the existence of at least one of the three aggravators, but he argued that it was unclear whether all jurors agreed on the same aggravating circumstance. *Id.*

The court agreed that McNabb, despite his capital conviction, could not have been sentenced to death unless at least one of the statutory aggravating circumstances was found by the jury beyond a reasonable doubt. *Id.* But the court held that the instructions were sufficient because the jury was charged that it could not consider a death recommendation unless it first found the existence of at least one statutory aggravating circumstance, and also instructed that, although the findings on the mitigating circumstances could be made by each individual juror, the jury must unanimously find the aggravating circumstances. *Id.* at 1005-06. Accordingly, "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 (original emphasis). The jury's unanimous finding of one aggravating circumstance satisfied *Ring*. *Id.*

The Supreme Court of Alabama revisited *Ring's* requisites in *Ex parte McGriff*, 908 So. 2d 1024 (Ala. 2004), recognizing the need to "explain the effect of *Ring* upon [Alabama's statutory] scheme." *Id.* at 1037. Citing to its decision in *Waldrop,* in which the statutory aggravating circumstance was subsumed within the capital offense charged in the indictment and found by the jury, the court elucidated that a guilty verdict on such a charge in the first phase of the trial

"satisfies the requirement of *Ring,* as applied to the Alabama statutory scheme, for a unanimous jury finding beyond a reasonable doubt of the existence of at least one aggravating circumstance to support a death sentence." *Id.* Citing to *McNabb,* in which no statutory aggravating circumstance was included within the definition of the capital offense, the court explained that in those cases, *Ring* forecloses the trial court from imposing a death sentence "unless, in the sentencing phase of the trial, the jury has unanimously found beyond a reasonable doubt the existence of at least one aggravating circumstance." *Id.*

Because McGriff's case fell within the "*McNabb*" second category of capital offenses, the court, in reversing for a new trial on other grounds, ordered that the new jury be instructed: 1) that if it determines that the aggravating circumstance alleged by the State does not exist, it must return a life imprisonment verdict, binding on the trial judge; 2) "if and only if it unanimously finds the aggravating circumstance to exist beyond a reasonable doubt," should the jury proceed to weigh the aggravating and mitigating circumstances and return a recommendation, specifying its vote, with a majority required for a life recommendation, but 10 votes required for a death recommendation. *Id.* at 1038. The court further issued "a prospective direction" *id.* at 1039, that "the count of the jurors' votes on the issue of the existence of an aggravating circumstance be expressly recorded on the verdict form." *Id.*

More recently, Alabama cases have continued to adhere to *Ring*, with the cases following either the *Waldrop* or the *McNabb* rationale. In some cases, the indictment sets forth an offense that necessarily corresponds to a statutory

aggravating circumstance, and a guilty verdict necessarily includes a unanimous finding of the statutory aggravator. *See, e.g., Ex parte Martin*, 931 So. 2d 759, 770 (Ala. 2004) (jury's guilty verdict of murder for pecuniary gain corresponded to the statutory aggravating circumstance); *Ex parte Hodges*, 856 So. 2d 936, 943 (Ala. 2003) (jury's guilty verdict of murder made capital because committed during a first-degree robbery established that jury, not trial court, determined existence of at least one statutory aggravating circumstance); *Mitchell v. State*, --- So. 3d --- 2010 WL 3377698, at *13 (Ala.Crim.App. Aug. 27, 2010) (jury's verdict finding defendant guilty first phase of two capital offenses that corresponded to statutory aggravating circumstances established that "jury unanimously found that two aggravating circumstances existed."); *Newton v. State*, 78 So. 3d 458, 471(Ala.Crim.App. 2009) (jury's guilty verdict of robbery-murder corresponded to the statutory aggravating circumstance necessary for imposition of the death penalty); *Brownfield v. State,* 44 So. 3d 1, 38 (Ala.Crim.App. 2007) (jury's guilty verdict of burglary-murder and the murder of two or more people during one act established that the "jury of necessity unanimously found that two statutory aggravating circumstances had been proven beyond a reasonable doubt.").

Where the capital offense charged does not necessarily include a statutory aggravating factor, special verdict forms at sentencing phase have become commonplace. Thus, in *Woodward v. State*, --- So. 3d ---, 2011 WL 6278294 (Ala.Crim.App. Dec. 16, 2011), the death sentence was upheld where the jury returned a specific written verdict, finding two of the three aggravating circumstances argued by the State. *Id.* at *4. Similarly, in *McCray v. State*, --- So.

3d --- , 2010 WL 5130747 (Ala.Crim.App. Dec. 17, 2010), the death sentence was upheld where the jury was given a special verdict at the penalty phase regarding aggravating circumstances, and specifically found three statutory aggravating circumstances. *Id.* at *75 n. 33. And in *Blackmon v. State*, 7 So. 3d 397, 418 (Ala.Crim.App. 2005), a case tried before the *McGriff* decision authorizing special verdict forms, the death sentence was upheld where only one aggravating circumstance was alleged and the jury was instructed that it could not proceed to vote on whether to recommend a death sentence unless it first unanimously determined that the aggravating circumstance existed. The court, after expressly noting that the case was tried before *McGriff*, explained that the jury's 10 to 2 death recommendation, in light of the jury instructions, established that the jury unanimously had found the existence of the aggravating circumstance asserted. *Id.*

**C. Delaware's Hybrid Statute and its Response to *Ring*.**

In 2002, in response to *Ring*, the Delaware General Assembly revised Delaware's death penalty statute. *Brice v. State*, 815 A.2d 314, 320 (Del. 2003). The jury's prior advisory role was transformed at the so-called "narrowing phase," so that a trial court would be barred from imposing a death sentence unless the jury had unanimously found the existence of at least one statutory aggravating circumstance beyond a reasonable doubt, and special verdicts were mandated that would reflect the numerical split on any aggravating finding. *Id.* at 322. 73 *Del. Laws* Ch. 423 (2002), S.B. 449, Section 2(c )(3)b.1., provides in relevant part:

> The jury shall report to the Court its finding on the question of the existence of statutory aggravating circumstance/s. . . . In order to find

> the existence of a statutory aggravating circumstance. . . beyond a reasonable doubt, the jury must be unanimous as to the existence of that statutory aggravating circumstance. As to any statutory aggravating circumstances. . . which were alleged but for which the jury is not unanimous, the jury shall report the number of the affirmative and negative votes on each such circumstance.

Section 3(d)(1) of the 2002 amendment provides in relevant part that "[a] sentence of death shall not be imposed unless the jury. . . first finds unanimously and beyond a reasonable doubt the existence of at least one statutory aggravating circumstance . . . ."

The Supreme Court of Delaware, in reviewing a death sentence imposed before the statutory amendment, expressly rejected the State's argument that *Ring* does not apply to hybrid statutes:

> 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's determination of any fact on which the legislature conditions an increase in their maximum punishment."

*Capano v. State*, 889 A.2d 968, 978 (Del. 2006)(citation omitted; original ellipses).

Capano's death sentence, based on the former 1991 statute, was unique in Delaware in that it was the only such sentence that was imposed based on a 11 to 1 jury determination that a statutory aggravating circumstance existed; every other death sentence imposed before the statutory amendment involved a unanimous jury determination of an aggravator and/or a unanimous guilty verdict first phase that established the existence of a statutory aggravator. *Id.* at 972 & n.8. The court,

after noting that it had upheld the constitutionality of the amended 2002 statute, proceeded to reject the lower court's ruling that the *Ring* jury determination need not be unanimous under the Delaware Constitution and reversed Capano's death sentence, finding the sentencing procedure unconstitutional as applied. *Id.* at 977-80.

The Delaware Supreme Court has consistently reviewed death sentences imposed under the 1991 statute to ensure that the jury in each case either returned an initial guilty verdict that necessarily included a unanimous finding of an aggravating circumstance or returned a unanimous aggravating finding at the penalty phase. *See, e.g., Ortiz v. State*, 869 A.2d 285, 303-05 (Del. 2005) (defendant became death eligible under *Ring* once jury unanimously found one of the alleged aggravators of a prior violent felony conviction); *Norcross v. State*, 816 A.2d 757, 767 (Del. 2003) (1991 statute constitutional as applied where jury convicted defendant of two counts of felony murder that established the existence of the corresponding statutory aggravator.)

Thus, the Delaware General Assembly, by immediately amending the statute after *Ring* to require special verdicts on aggravating factors and a unanimous finding of a single aggravator beyond a reasonable doubt before a trial judge may impose a death sentence, and the Delaware Supreme Court, by ensuring that no Delaware death sentence is upheld unless there has been a unanimous jury finding of a statutory aggravating factor, have ensured that Delaware's hybrid statute is in conformity with *Ring*. We turn finally to Indiana, the remaining State other than Florida that had a hybrid statute when *Ring* was decided.

### D. Indiana's Hybrid Statute and its Response to *Ring*.

The Indiana General Assembly amended its death/life-without-parole sentencing statute shortly before the June 24, 2002 *Ring* decision, effective July 1, 2002, to provide that its sentencing structure would no longer be "hybrid." Public Law 117-2002 (S.E.A. No. 426) (2002), *amending* Ind. Code S. 35-50-2-9. [3]

The amended statute provides that the jury "recommendation" is binding on the trial judge and the court must sentence the defendant "accordingly." Ind. Code § 35-50-2-9(e); *see State v. Barker*, 768 N.E.2d 425, 426 n.2 (Ind. 2002). And before the jury can return a verdict for a death or life-without-parole sentence, it must find that the State has proved beyond a reasonable doubt at least one statutory aggravating circumstance, and must return a special verdict form for each aggravating circumstance alleged. Ind. Code §§ 35-50-2-9(d), (k). If the jury is unable to reach a unanimous sentencing verdict for either death or life without parole, a trial court may sentence the defendant to either of these sentences, but 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).

The Supreme Court of Indiana, like the courts in Alabama and Delaware, recognized *Ring*'s impact on the Indiana penalty statute:

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[3] The Indiana penalty statute, both before and after *Ring,* has prescribed the same requirements for a sentence of life imprisonment without parole, as for a sentence of death. *See Clark v. State*, 808 N.E.2d 1183, 1194 (Ind. 2004) ("a sentence of life without parole is held to the same standards as a death sentence.") (citation omitted).