SUPREME COURT OF THE STATE OF FLORIDA

J.B. PARKER,	:	
Appellant,	:	CASE NO.: SC01-172
v.	:	
STATE OF FLORIDA,	:	
Appellee.	:	

SUPPLEMENTAL REPLY BRIEF OF APPELLANT

On Appeal from the Nineteenth Judicial Circuit of Florida, in and for Martin County Florida

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PRELIMINARY STATEMENT

Appellant J.B. Parker submits this Supplemental Reply Brief, under authority of this Court's Order dated July 16, 2002 and in further support of his appeal from the death sentence imposed by the trial court on December 13, 2000, seeking this Court's reversal and vacature of that sentence on the ground that Florida's death penalty is unconstitutional under the Sixth Amendment in accordance with the Supreme Court of the United States' recent decision in *Ring v. Arizona*, 122 S. Ct. 2428 (2002).

Parker has properly raised the constitutionality of the Florida death penalty statute in his Supplemental Brief. As explained more fully in his Supplemental Brief, Parker was not required to first raise the *Ring* issue in the trial court because the denial of Parker's sixth amendment rights constituted fundamental error. Even if Parker were required to have raised the sixth amendment issue below he should be excused from doing so because the argument would have been futile in light of the Supreme Court's decision in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), which made clear that that decision did not serve to invalidate state death penalty statutes. In any event, the sixth amendment arguments Parker raised below preserved the issue. Lastly, because this is a direct appeal from a resentencing, the State's argument that *Ring* should not be applied retroactively is inapposite.

The State attempts to distinguish *Ring* by first arguing that this Court, after

the *Apprendi* decision, reaffirmed the constitutionality of the Florida statute in cases such as *Mills v. Moore*, 786 So. 2d 532 (Fla.), *cert. denied, stay denied*, 532 U.S. 1015 (2001). This Court, however, did not have the benefit of *Ring* when it decided *Mills*. In *Ring*, the Supreme Court resoundingly rejected the argument accepted in *Mills* and proffered here by the State that distinctions between "sentencing factors" and "elements of an offense" are a meaningful part of the sixth amendment analysis in determining whether the judge can decide the existence of aggravating factors. After *Ring*, such formalistic distinctions have no place in the determination of whether the Florida death penalty complies with sixth amendment standards. The State's additional argument that *Ring* requires a jury to determine the existence of only one aggravating factor (which the state erroneously contends occurred here) has no support in the text of the decision, and if accepted, would violate *Zant v. Stephens*, 462 U.S. 862 (1983). The State's remaining arguments against the applicability of *Ring* — two of which were not even raised by Parker — are without merit and should be rejected.

This Court should apply *Ring* to the Florida death penalty, declare the statute unconstitutional under the Sixth Amendment and vacate Parker's death sentence.

ARGUMENT

THE FLORIDA DEATH PENALTY VIOLATES THE SIXTH AMENDMENT AS INTERPRETED BY THE SUPREME COURT OF THE UNITED STATES IN *RING V. ARIZONA*

A. The *Ring* Issue Is Properly Before this Court

In its Supplemental Answer Brief, the State first presents the flawed argument that this Court should reject Parker's challenge to the Florida death penalty on sixth amendment grounds because Parker did not raise the precise issue in the trial court. State Supp. Br. at 3. As more fully explained in his Supplemental Brief, Parker was not required to have preserved the issue in the trial court because the denial of Parker's sixth amendment rights constituted fundamental error. Parker Supp. Br. at 4-6. Moreover, any attempt by Parker to argue in the lower court that *Apprendi* invalidated the Florida death penalty would have been entirely futile because the *Apprendi* court expressly excluded state death penalty statutes from the ambit of that decision. *See Apprendi v. New Jersey*, 530 U.S. 466, 496-97 (2000). Consistent with this express preservation of state death penalty statutes in *Apprendi*, until *Ring v. Arizona*, 122 S. Ct. 2428 (2002), no court ever doubted that the Supreme Court of the United States meant exactly what it said when it noted that "this Court has previously considered and rejected the argument that the principles guiding our decision today render invalid state capital sentencing schemes requiring judges, after a jury verdict holding a defendant guilty of a capital

crime, to find specific aggravating factors before imposing a sentence of death." *Apprendi*, 530 U.S. at 496 (citing *Walton v. Arizona*, 497 U.S. 639, 647-49 (1990)). Simply put, contrary to the State's argument here, because *Ring* was not decided until well after Parker's October 2000 death penalty sentencing proceeding, the sixth amendment claim that Parker now makes under *Ring* was not available at the time of his sentencing.

Even if this Court's jurisprudence requires Parker to have raised the *Ring* issue below, Parker did raise sixth amendment issues in the trial court that have a direct bearing upon the applicability of *Ring* to the Florida death penalty and that should be considered to constitute preservation. As more fully discussed in his Supplemental Brief, Parker unsuccessfully moved in the trial court to have Fla. Stat. § 921.141 declared unconstitutional based upon the inadequate instructions regarding sentencing circumstances, including aggravating factors. *See* Parker Supp. Br. at 9-10 (citing R2-211-221; R5-780-81; R18-300). The lack of guidance to the advisory jury on issues such as how to determine whether an aggravating factor exists, how to weigh those factors, and whether the factors must be found unanimously, all of which were presented in that motion in the court below, are fundamental to the issues this Court must now address in assessing the impact of *Ring* on the constitutionality of the procedures under Florida's death penalty

statute. For example, *Ring* requires that a jury determine the existence *vel non* of the aggravating factors proffered by the State. *Ring*, 122 S. Ct. at 2443. In determining whether *Ring* invalidates Florida's death penalty scheme, this Court will be required to consider whether Florida's capital jury procedures, especially with regard to the failure to instruct regarding unanimity, are sufficient to constitute a finding by the jury on the existence of the aggravating factors. Based upon this direct overlap of issues between the applicability of *Ring* and the inadequacies of the Florida death penalty that Parker raised in the court below, if Parker is required to have preserved the argument below, he has done so.

The State's alternate threshold argument — *Ring* should not be applied retroactively — is equally unavailing. In support of this argument, the State cites a series of decisions that are simply not applicable to the procedural posture of this case. *See* State Supp. Br. at 4 (citing *New v. State*, 807 So. 2d 52 (Fla. 2001), *cert. denied*, 122 S. Ct. 2626 (2002); *Ferguson v. State*, 789 So. 2d 306, 311 (Fla. 2001); *Witt v. State*, 387 So. 2d 922, 929-30 (Fla.), *cert. denied*, 449 U.S. 1067 (1980)). Each of the decisions cited by the State concerns the applicability of an intervening decision of either the Supreme Court of Florida or the Supreme Court of the United States to cases pending on state collateral review under Rule 3.850 of the Florida Rules of Criminal Procedure.

The standard set forth in *Witt*, and applied in *Ferguson* and *New*, are inapplicable here because Parker's death sentence is pending on direct review to this Court and his death sentence is, therefore, not yet final. *See Griffith v. Kentucky*, 479 U.S. 314, 321 n.6 & 328 (1987) (holding, *inter alia*, that new rules for the conduct of criminal prosecutions are to be applied to all non-final cases pending on direct review); *see also Richardson v. Gramley*, 998 F.2d 463, 465 (7th Cir. 1993) (Posner, J.) (a criminal case is not final if the case has been remanded for a resentencing), *cert. denied*, 510 U.S. 1119 (1994). The rule in *Griffith* has been adopted in Florida. *Smith v. State*, 598 So. 2d 1063, 1066 (Fla. 1992); *see also Mitchell v. Moore*, 786 So. 2d 521, 529 (Fla. 2001).[1] Thus, it is fundamentally incorrect for the State to argue that the application of *Ring* to this case would amount to the retroactive application of an intervening Supreme Court decision. Rather, the only threshold argument, addressed and disposed of above, is whether there is a preservation requirement, and if so, whether the issue has been preserved.

B. Florida's Death Penalty Violates the Sixth Amendment, as Interpreted by the Supreme Court in *Ring v. Arizona*

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[1] As noted by the State, retroactive application of a new decision is permitted in cases of plain error. *See* State Supp. Br. at 4-5. However, in light of the fact that applying *Ring* to Parker's case would not result in its retroactive application, the cases cited by the State on this point are entirely irrelevant.

Turning to the substance of the Supreme Court of the United States' decision in *Ring*, the State first relies upon the decision in *Mills v. Moore*, 786 So. 2d 532 (Fla. 2001), in arguing that this Court has already rejected Parker's claim that the rule announced in *Apprendi* invalidates Florida's death penalty under the Sixth Amendment. State Supp. Br. at 6. The State, however, conveniently overlooks the fact that, when this Court decided *Mills*, it did not have the benefit of the *Ring* decision.

In rejecting *Apprendi*'s applicability to the Florida death penalty in *Mills*, this Court relied heavily upon the Supreme Court's disavowal in *Apprendi* of the applicability of its decision to state death penalty statutes. *Mills*, 786 So. 2d at 536 (citing *Apprendi*, 530 U.S. at 496-97). In *Apprendi*, the Court reasoned that death penalty statutes did not implicate the rule that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt" because the Court's previous decisions had made clear that all that the Sixth Amendment requires is that "'a jury has found the defendant guilty of all the elements of an offense which carries as its maximum penalty the sentence of death.'" *Apprendi*, 530 U.S. at 490, 496-97 (quoting *Almendarez-Torres v. United States*, 523 U.S. 224, 257 n.2 (1998) (Scalia, J., dissenting) and citing *Walton v. Arizona*, 497 U.S. 639, 647-49 (1990)). In other

words, it was the view of the majority in *Apprendi* that, under the Arizona statute at issue in *Walton*, the maximum authorized penalty was death, and therefore the Arizona death penalty should survive sixth amendment scrutiny. Mindful of the controversy created in *Apprendi* over the continued viability of *Walton*, this Court, noting that the four dissenting justices in *Apprendi* considered *Walton* overruled and that one justice considered it an issue for another day, refused to decide that *Apprendi* overruled *Walton*. *Mills*, 786 So. 2d at 537 (noting that the "Supreme Court has specifically directed lower courts to 'leave to this Court the prerogative of overruling its own decisions'") (quoting *Agostini v. Felton* 521 U.S. 203, 237 (1997)).

The very premise underlying this Court's decision in *Mills* — the *Apprendi* court's refusal to overrule *Walton* — is no longer viable because the Supreme Court of the United States has, in *Ring*, overruled *Walton*. *Ring*, 122 S. Ct. at 2443. Thus, *Mills* is no longer good law and must not be followed. What should instead guide this Court now is the decision in *Ring*.

The State attempts to avoid *Ring* by arguing that a decision striking down the Florida death penalty based upon *Ring* would amount to this Court overruling the Supreme Court of the United States' previous decisions upholding the Florida statute. *See Hildwin v. Florida*, 490 U.S. 638 (1989); *Spaziano v Florida*, 468

U.S. 447 (1984); *Proffitt v. Florida*, 428 U.S. 242 (1976). This argument is tantamount to a claim that, once the Supreme Court of the United States has rejected a constitutional challenge, this Court can never thereafter re-evaluate the constitutionality of Florida statutes in light of more recent authority of the Supreme Court of the United States. Such a claim is preposterous.

A decision applying *Ring* to the Florida statute would not constitute an improper refusal to follow binding authority of the Supreme Court of the United States, but would simply amount to a determination in the first instance of whether the Supreme Court itself overruled the earlier Florida decisions when it decided *Ring*. That the Supreme Court itself did not expressly overrule *Hildwin, Spaziano* and *Proffitt* in *Ring* is irrelevant. The Supreme Court had no reason to overrule those decisions for the simple reason that the Court was applying its *Apprendi* decision to the Arizona statute, not the Florida one.[2]

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[2] In addition, any argument by the State that the Florida death penalty should survive scrutiny because the Supreme Court did not grant certiorari in the *King* and *Bottoson* cases in light of *Apprendi* should be rejected out of hand. *See Bottoson v. Florida*, 122 S. Ct. 2670 (2002) (mem.); *King v. Florida*, 122 S. Ct. 2670 (2002) (mem.). The Supreme Court has repeatedly cautioned that no significance whatsoever should be given to the denial of certiorari because the Supreme Court regularly denies certiorari for reasons completely unrelated to the merits of a particular case. *See, e.g.*, *Knight v. Florida*, 528 U.S. 990, 990 (1999) (opinion of Stevens, J., respecting denial of petitions for writs of certiorari) (noting that "[i]t seems appropriate to emphasize that the denial of these petitions for

The State also seeks to avoid the holding of *Ring* by arguing that, in Florida, the maximum authorized penalty for first degree murder is the death penalty. The Court in *Ring*, however, rejected this same argument under the Arizona statute. *Id*. at 2440-41. "The Arizona first-degree murder statute 'authorizes a maximum penalty of death only in a formal sense, for it explicitly cross-references the statutory provision requiring the finding of an aggravating circumstance before imposition of the death penalty.'" *Id*. at 2440 (quoting *Apprendi*, 530 U.S. at 541 and citing Ariz. Rev. Stat. § 13-1105(C)). Just as Arizona could not prevail in its argument, which would render Apprendi a "'meaningless and formalistic' rule of statutory drafting[,]" *id*. at 2441 (quoting *Apprendi*, 530 U.S. at 541 (O'Connor, J., dissenting)), neither can the State here plausibly argue that the maximum authorized penalty under the Florida statute is death, where as here the statute authorizes the imposition of the death penalty only where the trial judge has made specific factual findings regarding the existence of aggravating factors in order to impose a sentence of death.

The *Ring* court also rejected the notion that by classifying aggravating factors as merely sentencing factors, rather than as elements of an offense, a State

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certiorari does not constitute a ruling on the merits").

may avoid scrutiny under the Sixth Amendment. *Ring*, 122 S. Ct. at 2441. "*Apprendi* repeatedly instructs in that context that the characterization of a fact or circumstance as an 'element' or a 'sentencing factor' is not determinative of the question 'who decides,' judge or jury." *Id.*

The State here impermissibly seeks to retain this formalistic distinction by arguing that the Florida procedure is different from the procedure in place in Arizona because, in Arizona, death eligibility and death selection occur in the penalty phase, and, in Florida, eligibility is resolved in the guilt phase with selection only reserved for the penalty phase. State Supp. Br. at 6-7. The State's only support for this proposition is a series of post-*Apprendi*, pre-*Ring* decisions of this Court holding that, in Florida, death is the authorized statutory maximum. The State's argument, however, obfuscates the issue by confusing the Supreme Court of the United States' eighth amendment jurisprudence with its now evolving sixth amendment jurisprudence. Only by asserting that in Florida death eligibility is determined at the guilt phase can the State argue that a jury has determined the existence of aggravating factors beyond a reasonable doubt. However, the existence of aggravating factors have nothing to do with the guilt phase of a capital trial in Florida. Rather, the only time when aggravating and mitigating factors are considered under the Florida death penalty statute is at the separate penalty phase

where the judge, not the jury, is the final fact finder. *See* Fla. Stat. §§ 921.141(2)(a), (5).

A comparison of the Arizona and Florida statutes reveals that the death penalty procedures in the two states are strikingly similar. In both Florida and Arizona, certain homicides are considered murder in the first degree and constitute a capital crime punishable by death. *Compare* Fla. Stat. § 782.04(1)(a) (defining capital crimes) *with* Ariz. Rev. Stat. § 13-1105(A) (defining first degree murder, which is punishable by death); and *compare* Fla. Stat. § 775.082(1) (authorizing death penalty for capital crimes) *with* Ariz. Rev. Stat § 13-1105(C) (authorizing death penalty for first degree murder). Neither state includes the existence of aggravating factors as an element of the offense of murder in the first degree. And, both states specify procedures for the conduct of penalty phase proceedings. *Compare* Fla. Stat. § 921.141(1) *with* Ariz. Rev. Stat. § 13-703. The only relevant difference is that, in Arizona, a judge acting without a jury, determines whether the State has proven the existence of aggravating factors beyond a reasonable doubt, and, in Florida, an advisory jury hears evidence regarding aggravating factors and makes a death sentence recommendation. The Florida trial judge then does everything that his Arizona counterpart is now prohibited from doing under *Ring* — namely, determining whether the State has proven the existence of aggravating

factors beyond a reasonable doubt.

Thus, the real issue here is whether the Florida jury, by hearing the relevant evidence and making a death sentence recommendation, can be said to be determining the existence *vel non* of the relevant aggravating factors. The State does not even attempt to make this argument here. As Parker established in his Supplemental Brief, the State's silence on this point is dictated by the plain fact that in Florida, the judge, and not the jury, is the final arbiter of the aggravating factors, a procedure that cannot survive in light of *Ring*. *See* Parker Supp Br. at 18-23.

The State next argues that the Florida death penalty comports with the requirements of *Ring* because a recommendation of death necessarily encompasses a finding that at least one aggravating factor exists. State Supp. Br. at 7-8. That Parker's jury recommended death, however, says nothing about the Florida death penalty procedure's compliance with *Ring*. As explained above, and more fully in Parker's Supplemental Brief, *Ring* requires that any fact that increases the maximum punishment beyond that authorized by the statute be found to exist by a jury beyond a reasonable doubt. *Ring*, 122 St. Ct. at 2443. Given the lack of any instructions regarding unanimity and agreement by the jurors on the specific aggravating factors alleged by the State, it is simply not possible to say that a death sentence recommendation necessarily encompasses a finding that any particular

aggravating factor was found by the jury to exist beyond a reasonable doubt.

The State also makes the astounding argument that "*Ring* is limited to the finding of an aggravator, not any additional aggravators, nor mitigation, nor any weighing." State Supp. Br. at 8 (citing *Ring*, 122 S. Ct. at 2445 (Scalia, J., concurring); *id*. (Kennedy, J., concurring)). Neither Justice Scalia nor Justice Kennedy ever explicitly limited *Ring*'s holding to a jury determination of a single aggravating factor. For example, Justice Scalia stated:

> Accordingly, *whether or not* the States have been erroneously coerced into the adoption of "aggravating factor**s**," wherever those factor**s** exist **they** must be subject to the usual requirements of the common law, and to the requirement enshrined in our Constitution, in criminal cases: **they** must be found by the jury beyond a reasonable doubt.

Ring, 122 S. Ct. at 2445 (emphasis in italics in original, emphasis in bold added). Although Justice Kennedy was less explicit than Justice Scalia — perhaps leading to the State's specious argument here because he refers to aggravating factors in the singular — a principled reading of Justice Kennedy's short concurrence leads to the inexorable conclusion that the finding of a single aggravating factor by the jury is only the minimum requirement under *Apprendi* and *Ring*, rather than the maximum requirement as the State suggests.

As noted by Justice Kennedy, "It is beyond question that during the penalty phase of a first-degree murder prosecution in Arizona, the finding of an aggravating

circumstance exposes 'the defendant to a greater punishment than that authorized by the jury's guilty verdict.'" *See Ring*, 122 S. Ct. at 2445 (Kennedy, J., concurring) (quoting *Apprendi*, 530 U.S. at 494). Thus, it was Justice Kennedy's conclusion that a single aggravating factor triggered the requirement that such a fact must be found by a jury beyond a reasonable doubt. Of course this says absolutely nothing about any additional aggravating factors, which, under the majority opinion in *Ring*, all must be found by a jury beyond a reasonable doubt: "Because Arizona's enumerated aggravating factor**s** operate as 'the functional equivalent of an element of a greater offense,' the Sixth Amendment requires that **they** be found by a jury." *Ring*, 122 S. Ct. at 2443 (quoting *Apprendi*, 530 U.S. at 494 n.19) (emphasis added).

The State next presents two arguments that may be disposed of quickly because Parker did not raise these arguments in his Supplemental Brief and they should have no bearing on the outcome of this case. First, contrary to the State's suggestion, Parker did not argue that *Ring* precludes any role for the trial judge in the sentencing process. *See* State Supp. Br. at 8-10. Whether or not the trial judge can be the "sentencer" in compliance with *Ring* is a question for another day because that was not the issue before the Supreme Court. *Ring* requires that the jury perform the role of fact finder with respect to aggravating factors, which is not

the case in Florida. Because this fact alone establishes the unconstitutionality under *Ring* of the present statutory scheme, it is simply unnecessary for this Court to reach out to address any issue concerning whether the trial judge, based on a proper jury verdict that complies with *Ring*, can perform the requisite weighing of aggravating and mitigating factors and determine the appropriate penalty.

Second, the State suggests that Parker argued that "*Ring* requires that the aggravating circumstances be charged in the indictment and presented to a grand jury[.]" State Supp. Br. at 13-14. As that argument would appear to be foreclosed by the Supreme Court's recent decision, albeit in the case of a federal indictment, in *United States v. Cotton*, 122 S. Ct. 1781 (2002), Parker did not suggest that the failure to include the aggravating factors in the indictment precluded a death sentence in this case. The State's inapposite argument should be rejected.

The State's final argument — that the Florida procedures comply with *Ring* because one of the aggravating factors was found to exist by the jury in the guilt phase of the trial — is equally unavailing. *See* State Supp. Br. at 15. First, as explained above, even if the State were correct that the guilt phase jury found the existence of the felony murder aggravator, *Ring* requires that **all** aggravating factors proffered by the State be found by the jury beyond a reasonable doubt.

Second, this argument should be rejected because it presumes that a

conviction for felony murder equates to the finding of the existence of the felony murder aggravator. Under the Supreme Court's eighth amendment jurisprudence, an aggravating factor "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, 877 (1983). If, as the State argues, a finding by the guilt phase jury that Parker was guilty of first degree murder is sufficient to constitute a finding that the felony murder aggravator exists — even where the jury did not specify in its verdict under what theory of first degree murder it was convicting Parker, then the felony murder aggravator fails to comply with *Zant*. Under the State's interpretation of the law, every person convicted of felony murder would qualify for this aggravator without any narrowing of the class of persons subject to the death penalty in direct contravention of *Zant*.

CONCLUSION

For the foregoing reasons, the Florida death penalty should be declared unconstitutional under the Sixth Amendment as interpreted by the Supreme Court in *Ring v. Arizona*, and Parker's death sentence should be vacated.

Dated: September 6, 2002 Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to the Office of the Attorney General, Suite 300, 1655 Palm Beach Lakes Boulevard, West Palm Beach, Florida 343401-2299, by U.S. mail, this 6th day of September 2002.

_____
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CERTIFICATION OF FONT

I HEREBY CERTIFY that Appellant's Reply Brief is typed in Times New Roman 14 point type.

_____
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