IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. SC01-2508

THOMAS THIBAULT,

Appellant,

- vs. -

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT, IN AND FOR PALM BEACH COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

Appellant, defendant in the trial court below, will be referred to as "Appellant", "Defendant" or "Thibault". Appellee, the State of Florida, will be referred to as the "State". References to the record will be by the symbol "R", to the transcript will be by the symbol "T", to any supplemental record or transcript will be by the symbols "SR" or "ST", and to Thibault's brief will be by the symbol "IB", followed by the appropriate page numbers.

STATEMENT OF THE CASE AND FACTS

The State accepts Thibault's Statement of the Case and Facts subject to the following additions, deletions and corrections below and in the Argument section.

The facts surrounding the murders of Bryan Harrison, Charlotte Kenyan and Daniel Ketchum are found in Thibault's statement, given to the police on May 18, 2000 (SR 1-238).[1] Thibault explained that his friend, Amanda Ingman, had been out of town for a month and when she returned told mutual friends to

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[1] Thibault originally had a plea deal with the State for three consecutive life sentences in exchange for his guilty pleas to the three murders. The deal also required him to testify truthfully at any trials against Chamberlain, Dascott, and/or Amanda (SR 34-35). Thibault's deal was not affected by his statement, he was not getting anything less by giving it or more by not giving it (SR 26-29). At the last minute, Thibault decided to not go through with the statement and pled "straight up" to the court (T 1-27, 29-60).

have Thibault call her (SR 7-8). He called her sometime before Thanksgiving and she told him that her new boyfriend, with whom she was living/staying, sold weed and his roommate sold Xanax (SR 7-9). Amanda told Thibault that she was getting "f–-king high," and that she had Xanax bars and weed (SR 7-9). Thibault did not know Amanda's boyfriend or his roommate (SR 9-10).

Thibault asked if he could come over, but Amanda said not right then, to call back later (SR 8-9). Thibault called back later and a male answered who said that Amanda was sleeping (SR 8-9). Thibault later spoke with Amanda and she asked if he wanted to make some money, but they never hooked up (SR 8-9). The next time Thibault called Amanda, her boyfriend became angry and told him to stop calling or else (SR 9-11). The boyfriend said he was coming to get him, but never did (SR 9-11). Thibault called them back to antagonize them- it went back and forth- finally Amanda asked him to come over and "f--k these guys up." (SR 12-13). She gave him the address (SR 12-13).

Thibault and his friends never made it over because they didn't have a ride (SR 12-17). Over the next several days, they had a few more conversations, Brian and Daniel were questioning him, asking why he hadn't come over (SR 16-17). Amanda then called asking for cocaine and Thibault said he would bring her some if he could get over there (SR 16-17). That night his

friend John Chamberlain came over; Thibault was getting high (smoking crack, snorting powder, smoking weed, drinking beer) with some people (SR 17-18). Chamberlain showed off his father's gun, a .45 (gold/tan Lincoln)(Sr 17-18).

Chamberlain agreed to give Thibault a ride to Amanda's house and Jason Dascott went along with them (SR 19-20). It was the night before Thanksgiving, around 9:00-10:30 (SR 45-46). Chamberlain said there wouldn't be a problem because he had a gun (SR 19-20). According to Thibault, their intent was to go over and kick ass a little, make them know they didn't want to "f--k with them." (SR 21-22). Thibault never thought to ask Amanda why she wanted them to "kick their ass" (SR 21-22). The three men snorted powder in the car on the way over (SR 22-23). They pulled up across the street from the house and Thibault told Chamberlain to leave his gun in the car because he and Dascott could handle these two guys, didn't think they would need it (SR 24-25). Chamberlain said he would take it because they didn't know what those guys had inside (SR 24-25). Thibault did not realize that Chamberlain took the gun inside until later (SR 42-43).

Thibault went to the front door alone and Bryan answered it (SR 25-26). Amanda came walking up behind him, and asked Thibault if he "brought it," referring to the cocaine (SR 43-

44). Thibault said he had but first wanted to know what was going on with the two guys (SR 43-44). Amanda said that there was no problem, that Bryan and Daniel wanted to get to know him and party with him (SR 44-45). Thibault asked Bryan if that was true, and he said "yeah, I got no beef with that, you guys are welcome in our house, come on in." (SR 44-45). The three men entered the house; Daniel wasn't there at that point (SR 45-46). Thibault sold ½ gram of cocaine to Bryan and ½ gram to Amanda (SR 45-47). They were in Amanda's room, snorting cocaine when Daniel barged in, but then said it was okay for them to be there and that he, too, wanted to be friends (SR 48-49). Bryan and Daniel then left and went to their rooms (SR 48-49). Thibault stayed in Amanda's room snorting coke and told the others to not get too comfortable, that something was fishy (SR 48-49).

Amanda informed them that Bryan and Daniel had drugs, money, and other items in the house that could be stolen and offered to show them where they kept the safe (SR 50-52). She told them that Bryan and Daniel had robbed the place next door for some power tools (SR 52-53). This was the first time that they discussed robbing them (SR 52-53).

Thibault saw a lot of power tools in the safe, and saw something sitting on top of the pool table, he thinks a concrete saw (SR 52-54). While they were discussing robbing them,

Chamberlain pulled out his gun and said this was going to make the robbery so much easier (SR 56-57, 58-59). Thibault didn't know that Chamberlain had brought the gun into the house until that point (SR 58-57).

Amanda told them that she would take care of Bryan but they had to figure out a way to distract Daniel– his girlfriend was sleeping in his room (SR 58-59). Thibault did not know that Charlotte was in the house until then (SR 51-52). Daniel had earlier asked them if they wanted to purchase a TV, so they decided they would distract him by asking him about that (SR 59-60). They were in the middle of discussing this when Bryan knocked on the door, wanting to buy more cocaine (SR 60-62). Thibault, Chamberlain, Dascott, Amanda and Bryan then drove to Thibault's friend Simp's house to get more coke (SR 63-64). When they returned, Thibault got the gun from Chamberlain before they went back into the house (SR 73-74).

They asked Daniel to see the stuff he was selling and he came out with a cable box and a Sega (SR 71-75). While he was down on the ground hooking them up, Thibault pulled out the gun, told Daniel to get up and go into the bathroom (SR 74-75). They had decided to lock the men in the bathroom until the safe was emptied (SR 74-75). Daniel asked what was going on and Chamberlain hit him in the knee with an asp, making Daniel

crumble to the ground (SR 75-77). They put Daniel in the bathroom and then rounded up Bryan and Charlotte and put them in (SR 76-78).

Thibault told them to take off their clothes and get in the shower (SR 82-83). Daniel then rushed him and Thibault hit him with the gun about 3 times (SR 83-84). It didn't stop Daniel, he picked Thibault up and slammed him against the wall (SR 83-84). Thibault feared that Daniel was going to overpower him, so he took off the safety clip off the gun and pulled the trigger (SR 84-85). Amanda and Chamberlain told him that he had to kill Bryan and Charlotte to get rid of the witnesses. He closed his eyes and emptied the gun, Bryan was still alive and he didn't want him to suffer so he re-loaded and shot him (SR 107-09). He pulled the trigger again with his eyes closed (SR 108-109). He pulled the trigger until he emptied the clip (SR 108-109).

They had loaded the televisions, vcr, and other items into Chamberlain's car and the white pick-up truck. Thibault told Chamberlain to wait until the truck started, but Chamberlain took off immediately. The truck did not start so Thibault hid the items in surrounding bushes and walked to Simp's house (SR 110-27). He later retrieved the items and he and Chamberlain transported all the items to a friend, Hugo Pherman's house (SR 126-52). He, Dascott and Chamberlain were arrested before they

could dispose of the items.

SUMMARY OF THE ARGUMENT

Point I: The United States Supreme Court's decision in Ring v. Arizona, 122 S.Ct. 2445 (2002), does not require vacating Thibault's death sentence. The Ring issue is not properly before this Court as it has not been preserved and in fact, was waived by Thibault. Further, Ring does not apply retroactively. Finally and most importantly, this Court has already rejected the argument that Ring applies to Florida's capital sentencing scheme and even if it did apply, it would not apply here because the aggravating factors of prior violent felony and felony-murder were found in this case.

Point II: Appellant's claim that the trial court failed to conduct an adequate colloquy regarding Thibault's waiver of the advisory jury for the penalty phase is without merit as it was not preserved below and is being raised for the first time on appeal. Regarding the merits, the record reflects that Appellant's counsel expressly waived the advisory jury in Thibault's presence, which is sufficient.

ARGUMENT

POINT I

THIBAULT'S DEATH SENTENCE DOES NOT VIOLATE THE UNITED STATES AND FLORIDA CONSTITUTIONS, AND APPRENDI V. NEW JERSEY, 530 U.S. 466(2000), AND RING V. ARIZONA, 120 S. CT. 2348 (2002), DO NOT APPLY TO FLORIDA'S CAPITAL SENTENCING SCHEME. (RESTATED).

Relying upon the United States Supreme Court's decision in Ring v. Arizona, 122 S.Ct. 2445 (2002), Thibault argues that Florida's capital sentencing scheme is facially unconstitutional warranting vacation of his death sentence. Specifically, Thibault challenges the failure to allege the aggravating factors in the indictment, the lack of unaniminity of the jury's penalty phase recommendation, and the lack of specific findings by the jury regarding aggravating factors.

A. The Ring Issue is not properly before this Court.

Thibault's challenge to the facial validity of Florida's capital sentencing scheme is not properly preserved for appellate review. It is well established that for an issue to be preserved for appeal, it must be presented to the lower court and "the specific legal argument or ground to be argued on appeal must be part of that presentation if it is to be considered preserved." Archer v. State, 613 So. 2d 446 (Fla. 1993), quoting Tillman v. State, 471 So. 2d 32, 35 (Fla. 1985);

See also Steinhorst v. State, 412 So. 2d 332, 338 (Fla. 1982). Here, Thibault never challenged the constitutionality of Florida's death penalty statute based on the arguments presented on appeal. While Thibault asked for a advance notice of which aggravators the State would rely upon at the penalty phase (R 367-78, 388-89), and requested that the jury make findings of fact regarding the aggravating circumstances, he never argued that his Sixth Amendment right to a jury trial was violated by the jury's failure to make the findings. Hence, the claim has not been preserved and is barred from review. Additionally, Thibault has waived the argument because he waived the advisory jury for the penalty phase.

Moreover, even if Ring was applicable in Florida and the issue had been preserved/not waived, Ring, is not subject to retroactive application under the principles of Witt v. State, 387 So. 2d 922, 929-30 (Fla. 1980). Pursuant to Witt, Ring is only entitled to retroactive application if it is a decision of fundamental significance, which so drastically alters the underpinnings of Anderson's death sentence that "obvious injustice" exists. New v. State, 807 So. 2d 52 (Fla. 2001). In determining whether this standard has been met, this Court must consider three factors: the purpose served by the new case; the extent of reliance on the old law; and the effect on the

administration of justice from retroactive application. Ferguson v. State, 789 So. 2d 306, 311 (Fla. 2001). Application of these factors to Ring, which did not directly or indirectly address Florida law, provides no basis for consideration of Ring in this case. The United States Supreme Court recently held that an Apprendi claim is not plain error. United States v. Cotton, 122 S.Ct. 1781 (May 20, 2002) (holding an indictment's failure to include the quantity of drugs was an Apprendi error but it did not seriously affect fairness, integrity, or public reputation of judicial proceedings, and thus did not rise to level of plain error). If an error is not plain error cognizable on direct appeal, it is not of sufficient magnitude to be a candidate for retroactive application in collateral proceedings. United States v. Sanders, 247 F.3d 139, 150-151 (4th Cir 2002) (emphasizing that finding something to be a structural error would seem to be a necessary predicate for a new rule to apply retroactively and therefore, concluding that Apprendi is not retroactive). Every federal circuit that has addressed the issue had found that Apprendi is not retroactive. See, e.g., McCoy v. United States, 266 F.3d 1245 (11th Cir. 2001). The one state supreme court that has addressed the retroactivity of Apprendi has, likewise, determine that the decision is not retroactive. Whisler v. State, 36 P.3d 290

(Kan. 2001). Moreover, the United States Supreme Court has held that a violation of the right to a jury trial is not retroactive. DeStefano v. Woods, 392 U.S. 631 (1968) (refusing to apply the right to a jury trial retroactively because there were no serious doubts about the fairness or the reliability of the fact-finding process being done by the judge rather than the jury).

B. The Ring decision does not apply to Florida.

This Court has clearly rejected the argument that Ring implicitly overruled its earlier opinions upholding Florida's sentencing scheme. See e.g. Mills v. Moore, 786 So.2d 532, 537 (Fla. 2001). In Bottoson v. Moore, 27 Fla. L. Weekly S891 (Fla. October 24, 2002) this Court stated:

> Although Bottoson contends that he is entitled to relief under Ring, we decline to so hold. The United States Supreme Court in February 2002 stayed Bottoson's execution and placed the present case in abeyance while it decided Ring. That Court then in June 2002 issued its decision in Ring, summarily denied Bottonson's petition for certiorari, and lifted the stay without mentioning Ring in the Bottonson order. The Court did not direct the Florida Supreme Court to reconsider Bottoson in light of Ring.

See also King v. Moore, 27 Fla.L.Weekly S906 (Fla. Oct. 24, 2002). Ring does not apply because Florida's death sentencing statute is very different from the Arizona statute at issue in

Ring. Under Arizona law, the determination of death eligibility takes place during the penalty phase proceedings, and requires that an aggravating factor exists. Thus, based solely on the jury's verdict finding Ring guilty of first-degree felony murder, the maximum penalty he could have received was life imprisonment. Ring v. Arizona, 122 S.Ct. at 2437. In contrast, this Court has previously recognized that the statutory maximum for first degree murder in Florida is death, and has repeatedly rejected claims similar to those raised herein. Cox v. State, 27 Fla. L. Weekly S585 (Fla. May 23, 2002); Bottoson v. State, 813 So. 2d 31, 36 (Fla. 2002), cert. denied, Case No. 01-8099 (U.S. June 28, 2002); Hertz v. State, 803 So. 2d 629, 648 (Fla. 2001), cert. denied, Case No. 01-9154 (U.S. June 28, 2002); Looney v. State, 803 So. 2d 656, 675 (Fla. 2001), cert. denied, Case No. 01-9932 (U.S. June 28, 2002); Brown v. Moore, 800 So. 2d 223, 224-225 (Fla. 2001); Mann v. Moore, 794 So. 2d 595, 599 (Fla. 2001), cert. denied, Case No. 01-7092 (U.S. June 28, 2002); Mills, 786 So. 2d at 536-38. This is a pivotal distinction between Florida and Arizona. Ring, at *13; Mullaney v. Wilbur, 421 U.S. 684 (1975).

Moreover, contrary to Appellant's claim, Ring does not require jury sentencing in capital cases, rather it involves only the requirement that the jury find the defendant death-

eligible. Id. at n.4. A clear understanding of what Ring says is essential to understanding why it doesn't apply to Florida's capital sentencing procedures. As already recognized by this Court, the Ring decision left intact all prior opinions upholding the constitutionality of Florida's death penalty scheme, including Spaziano v. Florida, 468 U.S. 447 (1984), and Hildwin v. Florida, 490 U.S. 638 (1989). It quotes Proffitt v. Florida, 428 U.S. 242, 252 (1976), acknowledging that ("[i]t has never [been] suggested that jury sentencing is constitutionally required."). Ring, at *9, n.4. In Florida, any death sentence which was imposed following a jury recommendation of death necessarily satisfies the Sixth Amendment as construed in Ring, because the jury necessarily found beyond a reasonable doubt that at least one aggravating factor existed. Since the finding of an aggravating factor authorizes the imposition of a death sentence, the requirement that a jury determine the conviction to have been a capital offense has been fulfilled in any case in which the jury recommended a death sentence.

Even in the wake of Ring, a jury only has to make a finding of one aggravator and then the judge may make the remaining findings. Ring is limited to the finding of an aggravator, not any additional aggravators, nor mitigation, nor any weighing. Ring, 122 S.Ct. 2445 (Scalia, J., concurring)(explaining that

the fact finding necessary for the jury to make in a capital case is limited to "an aggravating factor" and does not extend to mitigation or to the ultimate life-or-death decision which may continue to be made by the judge); Ring, 122 S.Ct. 2445 (Kennedy, J., concurring)(noting that it is the finding of "an aggravating circumstance" that exposes the defendant to a greater punishment than that authorized by the jury's verdict). Constitutionally, to be eligible for the death penalty, all the sentencer must find is one narrower, *i.e.*, one aggravator, at either the guilt or penalty phase. Tuilaepa v. California, 512 U.S. 967, 972 (1994)(observing "[t]o render a defendant eligible for the death penalty in a homicide case, we have indicated that the trier of fact must convict the defendant of murder and find one 'aggravating circumstance' (or its equivalent) at either the guilt or penalty phase."). So, once a jury has found one aggravator, the constitution is satisfied, the judge may do the rest. We know this is true because the Court in Apprendi held, and reaffirmed in Ring, that a prior violent felony aggravator satisfied the Sixth Amendment; therefore, no further jury consideration is necessary once a qualifying aggravator is found.

Furthermore, to the extent that Thibault claims the death penalty statute is unconstitutional for failing to require juror

unanimity, or the charging of the aggravating factors in the indictment, or special jury verdicts, Ring provides no support for his claims. These issues are expressly not addressed in Ring, and in the absence of any United States Supreme Court ruling to the contrary, there is no need to reconsider this Court's well established rejection of these claims. Sweet v. Moore, 27 Fla. L. Weekly S585 (Fla. June 13, 2002); Cox v. State, 27 Fla. L. Weekly S505, n.17 (Fla. May 23, 2002) (noting that prior decisions on these issues need not be revisited "unless and until" the United States Supreme Court recedes from Proffitt v. Florida, 428 U.S. 242 (1976)).

As this Court has recognized, "[t]he Supreme Court has specifically directed lower courts to 'leav[e] to this Court the prerogative of overruling its own decisions.' Agostini v. Felton, 521 U.S. 203, 237, 117 S.Ct. 1997, 138 L.Ed.2d 391 (1997) (quoting Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 484, 109 S.Ct. 1917, 104 L.Ed.2d 526 (1989))." Mills, 786 So. 2d at 537. The United States Supreme Court has declined to disturb its prior decisions upholding the constitutionality of Florida's capital sentencing process, and that result is dispositive of Thibault's claims.

And finally, to the extent Ring would be applicable to Thibault, the requirements of same have been met. In its

sentencing order, the trial court found the existence of the aggravating factor that the murder was committed during the course of a violent extended robbery (R 742). Appellant pled guilty to the robbery (T 55). Consequently, the underlying factual premise for the finding of this aggravator was made by the judge at the guilt phase.

Additionally, the trial court found the existence of the aggravating factor that Thibault had been convicted of another prior violent felony (R 741). The judge's finding of the prior violent felony aggravator is exempted from the holding in Apprendi. Apprendi explicitly exempted recidivist factual findings from its holding. Apprendi, 530 U.S. at 490 (holding, other than the fact of a prior conviction, 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). Thus, a trial court may make factual findings regarding recidivism. Walker v. State, 790 So.2d 1200, 1201 (Fla. 5th DCA 2001)(noting that Florida courts, consistent with Apprendi's language excluding recidivism from its holding, have uniformly held that an habitual offender sentence is not subject to an Apprendi). Because this is a recidivist aggravator, the prior violent felony aggravator may be found by the judge even in the wake of Ring. Ring, 122 S.Ct. 2445 at n.4

(noting that none of the aggravators at issue related to past convictions and that therefore the holding in Almendarez-Torres v. United States, 523 U.S. 224 (1998), which allowed the judge to find the fact of prior conviction even if it increases the sentence beyond the statutory maximum was not being challenged).

In summary, this claim is not properly before this Court because it is unpreserved and has been waived. Further, this Court has already rejected the argument that Ring applies to Florida's sentencing scheme. Consequently, for the reasons state above, Thibault is not entitled to relief based on Ring.

POINT II

THIBAULT KNOWINGLY AND VOLUNTARILY WAIVED THE ADVISORY JURY (RESTATED).

Appellant argues that the trial court failed to conduct an adequate colloquy regarding Thibault's waiver of the advisory jury for the penalty phase. This claim is without merit as it

is being raised for the first time on appeal and as the record reflects that Appellant's counsel expressly waived the advisory jury in Thibault's presence, which is sufficient.

The standard of review is abuse of discretion. State v. Carr, 336 So. 2d 358 (Fla.1976). Under the abuse of discretion standard of review, the appellate court pays substantial deference to the trial court's ruling. A trial court's determination will be upheld by the appellate court "unless the judicial action is arbitrary, fanciful, or unreasonable, which is another way of saying that discretion is abused only where no reasonable man would take the view adopted by the trial court." Canakaris v. Canakaris, 382 So. 2d 1197, 1203 (Fla. 1980).

Thibault has failed to preserve this issue for review. In Griffin v. State, 820 So.2d 906, 913, (Fla. 2002), this Court held that "the failure of a capital defendant to first attack the voluntariness of a waiver of a sentencing jury at the trial court precludes review on direct appeal." Here, Thibault failed to raise the alleged insufficiency of the colloquy before the trial court and therefore, may not raise the issue for the first time on appeal.

Further, his claim is without merit. Regarding the waiver of the advisory jury, the record must affirmatively show that the defendant voluntarily and intelligently waived the right to

have a sentencing jury render its opinion on the appropriateness of the death penalty. Lamadline v. State, 303 So. 2d 17, 20(Fla. 1974). The trial judge, upon a finding of a voluntary and intelligent waiver, may in his or her discretion either require an advisory jury recommendation, or may proceed to sentence the defendant without such advisory jury recommendation. Carr at 359; See also Palmes v. State, 397 So. 2d 648, 656 (Fla.1981), Sireci v. State, 587 So. 2d 450 (Fla. 1991), Muhammad v. State, 782 So. 2d 343, 361(Fla. 2001).

In Holmes v. State, 374 So.2d 944, 949 (Fla. 1979), this Court held that defense counsel's express waiver, on the record, in front of the defendant, of the advisory jury was sufficient to satisfy the requirement of a voluntary and intelligent waiver. See also Carr 336 So. 2d at 359 (Fla.1976)(holding that a written waiver entered by a defendant satisfied the freely and voluntary waiver). That is exactly what happened here. At the plea colloquy on Thibault's guilt, the trial court inquired of both the state and defnese counsel:

> THE COURT: And also with both lawyers, I want your response to this: He is,I am sure, legally entitled to a full phase two trial with or without a jury. And is he waiving that day or does he want that? Has that been discussed by the lawyers; and have you discussed it with the client? That is a whole bunch of questions, I realize.

DEFENSE COUNSEL: Your Honor, if I could answer first.

THE COURT: Yes.

DEFENSE COUNSEL: I have had quite a few conversations with Mr. Thibault over the course of the last two weeks. We have discussed many issues, one being obviously if we were to go forward with just entering a plea of guilty to the Court, we would have the right to either have a phase two with or without a jury; and it was my understanding that we would be requesting a phase two hearing with just Your Honor.

And we have been over this and discussed this. Mr. Massa is relatively new to this case, as far as the preparations he would need to make to be prepared for phase two. I believe he has been on vacation probably no more than a month. I think a month is probably even stretching it.

So this would be a decision that the three of us would make at some point in time, but I have had preliminary discussions with Mr. Thibault. This is something we had already decided we will go forward and do, if it comes down to that.

THE COURT: All right. has the State made any concessions, or does the State make any concessions regarding a sentencing recommendation?

THE STATE: Not at this time, Judge.

THE COURT: So the State is neither prohibited or restrained in any way from seeking the death penalty, if that is the State’s inclination at the phase two hearing.

THE STATE: That’s correct, Judge.

> THE COURT: Does the State agree that the State has no choice in the waiver of a jury in a phase two sentencing in a capital case?
>
> THE STATE: Yes. I believe if the defendant wants to go without a jury and present it just to Your Honor, I believe that is their legal right.

(T 37-39). The foregoing clearly reflects an express waiver of the advisory jury by defense counsel in the defendant's presence. Defense counsel unequivocally told the judge that he and his client had "quite a few conversations" about the matter over the preceding two-week period and that he was waiving the advisory jury (T 37-38). Defense counsel did reserve the right to have the advisory jury if discussions with newly appointed phase two counsel led Appellant to feel otherwise, but ended his statement by repeating that the waiver was "something we had already decided we will go forward and do, if it comes down to that." (R 38). Thus, read in totality, defense counsel's statement was an express waiver of the right to an advisory jury. In an abundance of caution, he reserved the defendant's right to change his mind if discussions with newly appointed phase two counsel led him to feel that he wanted an advisory jury. Based on the foregoing, this claim should be denied.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the decision of the trial court should be affirmed.

Respectfully submitted,

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Certificate Of Service

I HEREBY CERTIFY that a true and correct copy of the foregoing "Answer Brief" has been furnished to Mark Wilensky, DUBINER & WILENSKY, 515 North Flagler Drive, West Palm Beach, Fl. 33401-4349 this 26th day of December, 2002.

_____
Debra Rescigno
Assistant Attorney General

CERTIFICATE OF TYPE SIZE AND STYLE

In accordance with the Florida Supreme Court Administrative Order, issued on July 13, 1998, and modeled after Rule 28-2(d), Rules of the United States Court of Appeals for the Eleventh Circuit, counsel for the State of Florida, Appellee herein, hereby certifies that the instant brief has been prepared with 12 point Courier New type, a font that is not spaced proportionately.

_____

DEBRA RESCIGNO
Assistant Attorney General