IN THE SUPREME COURT OF FLORIDA

GREGORY MILLS,

Petitioner,

v. CASE NO. SC01-338

MICHAEL W. MOORE, Secretary,
Florida Department of Corrections,

Respondent.

______________________/

RESPONSE TO CONSOLIDATED PETITION FOR WRIT OF HABEAS CORPUS, PETITION FOR EXTRAORDINARY RELIEF, AND MOTION TO REOPEN DIRECT APPEAL

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

KENNETH S. NUNNELLEY
ASSISTANT ATTORNEY GENERAL
Fla. Bar #0998818
444 Seabreeze Blvd. 5th FL
Daytona Beach, FL 32118
(904) 238-4990
Fax # (904) 226-0457
COUNSEL FOR RESPONDENT

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RESPONSE TO PETITION FOR HABEAS CORPUS

The procedural history set out on pages 1-3 of Mills’ petition is argumentative, incomplete, and is denied. The State relies on the following statement of the facts of the case and procedural history.

On direct appeal, the Florida Supreme Court summarized the facts of this case in the following way:

> The evidence at the trial showed that Gregory Mills and his accomplice Vincent Ashley broke into the home of James and Margaret Wright in Sanford between two and three o'clock in the morning, intending to find something to steal. When James Wright woke up and left his bedroom to investigate, Mills shot him with a shotgun. Margaret Wright awakened in time to see one of the intruders run across her front yard to a bicycle lying under a tree. Mr. Wright died from loss of blood caused by multiple shotgun pellet wounds.
>
> Ashley, seen riding his bicycle a few blocks from the Wright home, was stopped and detained by an officer on his way to the crime scene. Another officer saw a bicycle at the entrance to a nearby hospital emergency room, found Mills inside, and arrested him. At police headquarters officers questioned both men and conducted gunshot residue tests on them. Then they were released.
>
> At trial Mills' roommate [Sylvester Davis] testified that he and his girlfriend [Viola May Stafford] hid some shotgun shells that Mills had given them, that Mills had been carrying a firearm when he left the house the night of the murder, and that Mills had said he had shot someone. He also stated that Mills told him that a city worker had found a shotgun later shown to have fired an expended shell found near the victim's home.
>
> After the murder, Ashley was arrested on some unrelated charges. He then learned that Mills had told his roommate and his girlfriend about the murder and that they in turn had told the police, so he decided to tell the police about the incident. Ashley testified that Mills entered the house (through a window) first, that he, Ashley, then

> handed the shotgun to him, and that he then entered the house himself. Ashley saw the man in the house had awakened and was getting up, so he exited the house and ran to his bicycle. Then he heard the shot and ran back to the house, where he saw Mills. They both departed the scene on their bicycles, taking separate routes. Ashley was granted immunity from prosecution for these crimes and also for several unrelated charges pending against him at the time he decided to confess and cooperate.
>
> Mills testified in his defense. He said that he arrived home from work on May 24 at around 9:30 p.m. Then he went out, first to one bar, then another, playing pool and socializing. He went home afterwards but could not sleep, he said, because of a toothache and a headache, so he went to the hospital emergency room. There police officers took him into custody.

Mills v. State, 476 So.2d 172, 174-75 (Fla. 1985), *cert. denied*, 475 U.S. 1031, 106 S.Ct. 1241, 89 L.Ed.2d 349 (1986).

The Eleventh Circuit Court of Appeals summarized the procedural history of Mills' case in the following way:

> The State of Florida charged Mills through an indictment dated June 29, 1979, with four counts relating to the May 25, 1979 shooting of Wright: (1) first degree felony murder (Count I); (2) burglary (Count II); (3) aggravated battery (Count III); and (4) possessing a firearm despite a prior felony conviction (Count IV). On August 16, 1979, a jury trial commenced. After the trial judge denied Mills's motion for judgment of acquittal, the jury returned verdicts of guilty on the charges of first degree felony murder, burglary and aggravated battery. (FN2) At the penalty phase of the proceedings on the first degree murder conviction, the jury recommended that Mills receive a life sentence. On April 18, 1980, the trial judge overrode the jury's recommendation after finding that the aggravating factors surrounding Mills's crime outweighed the absence of statutory mitigating factors pursuant to Florida Statute § 921.141, and sentenced Mills to death. (FN3)
>
> On direct appeal to the Florida Supreme Court, Mills raised the following issues: (1) whether sufficient evidence supported his felony murder conviction; (2)

whether he received ineffective assistance of counsel because of a conflict of interest in the public defender's office; (3) whether the trial court violated his confrontation rights in abridging cross-examination of Ashley; (4) whether the trial court erred in admitting gunshot residue tests; (5) whether his conviction for aggravated battery was improper; (6) whether his convictions for both felony murder and burglary were improper; and (7) **whether the trial judge's override of the jury's recommendation was improper**. *See Mills*, 476 So.2d at 175, 179.

The Florida Supreme Court affirmed Mills's convictions and sentences for felony murder and burglary, but vacated the sentence and conviction for aggravated battery. *See Mills*, 476 So.2d at 175, 177. The Florida Supreme Court held that Mills's contentions concerning ineffective assistance and gunshot residue tests were meritless, and that the trial court did not abridge Mills's right to confront the witnesses against him. *See Mills*, 476 So.2d at 175-77. **The Florida Supreme Court then analyzed the trial judge's override of the jury's recommendation at Mills's sentencing**. It found that the trial judge had found the existence of no mitigating factors and the following six aggravating factors pursuant to Florida Statute § 921.141: (1) under sentence of imprisonment; (2) previous conviction of violent felony; (3) great risk of death to many persons; (4) felony murder; (5) pecuniary gain; and (6) heinous, atrocious or cruel. The Florida Supreme Court held that the following aggravating factors were improper: (1) great risk of death to many persons; (2) pecuniary gain; and (3) heinous, atrocious or cruel. It affirmed the remainder of the aggravating factors, as well as the trial court's finding that no mitigating factors existed. *See Mills*, 476 So.2d at 177-79. The Florida Supreme Court affirmed the trial judge's imposition of the death sentence, holding that the override complied with *Tedder v. State*, 322 So.2d 908 (Fla. 1975). (FN4) The United States Supreme Court denied Mills's petition for writ of certiorari. *Mills v. Florida*, 475 U.S. 1031, 106 S.Ct. 1241, 89 L.Ed.2d 349 (1986).

The Governor of Florida signed Mills's death warrant, and Mills thereafter moved for post-conviction relief pursuant to *Florida Rule of Criminal Procedure* 3.850. The trial court denied all requested relief. Mills appealed the trial court's denial to the Florida Supreme

Court, petitioned for a writ of habeas corpus and requested a stay of execution. The Florida Supreme Court denied Mills's petition for habeas corpus, but reversed the trial court's summary denial of his 3.850 motion and directed the trial court to hold an evidentiary hearing on Mills's 3.850 claim of ineffective assistance relating to his lawyer's failure to develop and present evidence that would tend to establish statutory or nonstatutory mental mitigating circumstances. *See Mills v. Dugger*, 559 So.2d 578, 579 (Fla. 1990). (FN5)

The trial court held an evidentiary hearing pursuant to the Florida Supreme Court's remand. Mills called numerous witnesses at the evidentiary hearing, including: his trial attorneys, one of whom testified that "with the benefit of hindsight" she would have looked at mental health evidence; two psychologists who testified that Mills had some brain damage and satisfied the criteria for two statutory mental mitigators; and his sister and one of his brothers, who recounted Mills's difficult upbringing. The trial court held that Mills failed to show that his lawyer's performance was deficient under *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

The Florida Supreme Court affirmed, holding that Mills's lawyer's admission that "with the benefit of hindsight" he would have investigated mental health evidence "illustrates the Supreme Court's concern [in ineffective assistance claims] 'that every effort be made to eliminate the distorting effects of hindsight.'" *Mills v. State,* 603 So.2d 482, 485 (Fla. 1992) (*quoting Strickland,* 466 U.S. at 689, 104 S.Ct. 2052). The Florida Supreme Court found that Mills also failed to satisfy the prejudice prong of *Strickland*, holding that "Mills has not demonstrated a reasonable probability that the currently tendered evidence would have produced a reversal of the judge's override of the jury's recommendation." *Mills*, 603 So.2d at 486.

Mills then filed a petition for extraordinary relief and for writ of habeas corpus with the Florida Supreme Court. He raised two issues in the petition: (1) the Florida Supreme Court performed an inadequate harmless error analysis in affirming the death sentence; and (2) **the felony-murder aggravator is an unconstitutional automatic aggravating circumstance in felony murders**. The Florida Supreme Court found both issues to be procedurally

barred. *Mills v. Singletary*, 606 So.2d 622, 623 (Fla. 1992).

After exhausting state remedies, Mills filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 in the United States District Court for the Middle District of Florida. He claimed that: (1) he received ineffective assistance of counsel at the penalty and sentencing phase; (2) the trial court and the Florida Supreme Court failed to evaluate adequately mitigation evidence in contravention of *Parker v. Dugger*, 498 U.S. 308, 111 S.Ct. 731, 112 L.Ed.2d 812 (1991); (3) **the Florida Supreme Court erred in upholding the jury override despite its invalidating three aggravating factors**; (4) **his sentence rested upon an unconstitutional automatic aggravating factor (felony murder)**; (5) **the jury override resulted in an arbitrary, capricious and unreliably-imposed death sentence**; (6) the trial court violated his confrontation rights when it precluded certain impeachment and cross-examination of witness Ashley; (7) he received ineffective assistance of counsel because of a conflict of interest in the public defender's office; (8) the trial judge erroneously considered nonstatutory aggravating factors in overriding the jury's recommendation of a life sentence, and his lawyer rendered ineffective assistance in failing to object; (9) the trial judge erred in failing to find mitigating factors; (10) the trial court erred in admitting testimony and evidence of gunshot residue tests; (11) he received ineffective assistance of counsel at the guilt phase of his trial; (12) the trial court erred in admitting as rebuttal evidence results from the gunshot residue test; (13) the government engaged in prosecutorial misconduct at the sentencing hearing; and (14) the failure to transcribe the bench conferences resulted in trial error and ineffective assistance of counsel. The district court found that all of Mills's claims were either meritless or procedurally barred, and therefore denied Mills's section 2254 petition in a 51-page order. *See Mills v. Singletary*, No. 92-1184-CIV-ORL-19 (M.D.Fla. Aug. 19, 1996).

FN2. Florida later filed a *nolle prosequi* as to Count IV.

FN3. The trial court found that the following statutory aggravating factors supported Mills's death sentence: (1) under sentence of

imprisonment when he committed the murder; (2) previously convicted of a felony involving the use or threat of violence; (3) knowingly creating a great risk of death to many persons; (4) murder committed while Mills was engaged in the commission of or an attempt to commit or flight after committing the robberies; (5) pecuniary gain; (6) heinous, atrocious or cruel. The trial court additionally found that the following statutory mitigating factors were not present: (1) no significant history of prior criminal activity; (2) murder committed while Mills was under the influence of extreme mental or emotional disturbance; (3) the victims were participants or consented to Mills's acts or conduct; (4) Mills was an accomplice in the murder that another committed, or Mills's participation in the murder was minor; (5) Mills acted under extreme duress or under the substantial domination of another; (6) Mills's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired; (7) Mills's age at the time of the crime. *See Fla. Stat.* § 921.141 (1979). The trial court also sentenced Mills to ten years of imprisonment on Count II (burglary) and five years of imprisonment on Count III (aggravated battery), with the sentences running concurrently.

FN4. Specifically, the Florida Supreme Court held that

the facts suggesting a sentence of death are so clear and convincing that virtually no reasonable person could differ. There are three valid statutory aggravating circumstances, and the trial judge has found that there are no valid mitigating circumstances. The purported mitigating circumstances claimed by Mills, but not found by the trial judge, are not sufficient to outweigh the aggravating circumstances nor do they establish a reasonable basis for the jury's recommendation.

> *Mills*, 476 So.2d at 179 (*construing Tedder*, 322 So.2d at 910).
>
> FN5. Mills included seven claims in his petition for writ of habeas corpus: (1) the Florida Supreme Court decided wrongly on appeal the issue of Mills not being allowed to impeach his codefendant; (2) the trial judge's override of the jury's recommendation was improper; (3) appellate counsel was ineffective because Mills should have been resentenced pursuant to *Elledge v. State*, 346 So.2d 998 (Fla.1977); (4) the trial court erred in finding an automatic aggravating factor (felony murder); (5) the trial court erred in allowing gunshot residue test evidence; (6) the trial court impermissibly shifted to Mills the burden of proving life to be the proper penalty; and (7) consideration of victim impact evidence violated *Booth v. Maryland*, 482 U.S. 496, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987). The Florida Supreme Court held that "Mills raised most of these issues on direct appeal or in his 3.850 motion; others should have been raised, if at all, on appeal.... Claims 1, 2, and 4 through 7 are ... procedurally barred." *Mills*, 559 So.2d at 579 (citations omitted). The Florida Supreme Court also held that Mills's lawyer did not render ineffective assistance on appeal. *See Mills*, 559 So.2d at 579.

Mills v. Singletary, 161 F.3d 1273, 1278-80 (11th Cir. 1998). (emphasis added). The Eleventh Circuit Court of Appeals affirmed the District Court's denial of habeas corpus relief. *Mills v. Singletary, supra.* The United States Supreme Court denied certiorari review. *Mills v. Moore,* 528 U.S. 1082 (2000).[1]

[1]The United States Supreme Court denied review on January 10, 2000. The habeas petition now before this Court is dated February 12, 2001, and is the first action in this case since the denial of certiorari.

RESPONSE TO JURISDICTIONAL STATEMENT

On page 4 of the petition, Mills sets out a jurisdictional statement in which he asserts that this Court has jurisdiction to "reopen" his "previous habeas and appeal proceedings". Respondent agrees that this is a habeas petition, albeit a successive one. Respondent does not concede that the petition is properly filed.

THE PETITION IS UNTIMELY

Mills is before this Court seeking habeas corpus relief more than 15 yeas after his conviction and sentence of death became final for all purposes. *Mills v. State*, 476 So.2d 172 (Fla. 1985), *cert. denied*, 475 U.S. 1031 (1986). Mills' first state habeas corpus petition was denied on March 1, 1990. *Mills v. Dugger*, 559 So.2d 578 (Fla. 1990). Mills filed a second state habeas corpus petition which was denied, on procedural bar grounds, on October 22, 1992. *Mills v. Singletary,* 606 So.2d 622 (Fla. 1992). The petition before this Court is Mills' third habeas petition, and it was filed more than one year after the United States Supreme Court denied Mills' petition for certiorari to the Eleventh Circuit Court of Appeals, which was the last action of any sort taken in this case. *Mills v. Moore,* 120 S.Ct. 804 (2000).

This delay is unconscionable, dilatory, and, in fact, the claims contained in the present petition are similar to the claims contained in Mills' second habeas petition, which was denied on procedural grounds. These claims are repititious of the claims

already presented to this Court, and, consequently, should be denied as vexatious and abusive.

Florida Rule of Appellate Procedure 9.140(j)(3)(B) provides that:

> A petition alleging ineffective assistance of appellate counsel shall not be filed more than two years after the conviction becomes final on direct review unless it alleges under oath with a specific factual basis that the petitioner was affirmatively misled about the results of the appeal by counsel.

That rule took effect on January 1, 1997, and is clearly applicable to Mills' case. *See, Amendment to Florida Rules of Appellate Procedure*, 685 So.2d 773 (Fla. 1996). Further, in *McCray v. State,* this Court stated:

> Generally, laches is a doctrine asserted as a defense, which "requires proof of (1) lack of diligence by the party against whom the defense is asserted, and (2) prejudice to the party asserting the defense." *Costello v. United States*, 365 U.S. 265, 282, 81 S.Ct. 534, 543, 5 L.Ed.2d 551 (1961). This doctrine is properly applied to habeas corpus petitions "when the delay in bringing a claim for collateral relief has been unreasonable and the state has been prejudiced in responding to the claim." *Anderson v. Singletary*, 688 So.2d 462, 463 (Fla. 4th DCA 1997). *See also Xiques v. Dugger*, 571 So.2d 3 (Fla. 2d DCA 1990); *Smith v. Wainwright,* 425 So.2d 618 (Fla. 2d DCA 1982); *Remp v. State*, 248 So.2d 677 (Fla. 1st DCA 1970). Moreover, the doctrine of laches has been applied to bar a collateral relief proceeding when, from the face of the petition, it is obvious that the state has been manifestly prejudiced and no reason for an extraordinary delay has been provided. *Anderson* (petition filed fifteen years after appeal was decided and saying nothing to justify delay barred by laches where trial transcripts and appellate records had been destroyed). This Court has implemented time restrictions in the filing of collateral relief petitions because inmates must not be allowed to engage in inordinate delays in bringing their claims for relief before the courts without justification and

> because convictions must eventually become final. As time goes by, records are destroyed, essential evidence may become tainted or disappear, memories of witnesses fade, and witnesses may die or be otherwise unavailable.
>
> This case represents a perfect example of why the doctrine of laches should be applied to bar some collateral claims for relief. McCray has waited fifteen years to bring this proceeding and has made no representation as to the reason for the delay. Moreover, his claim is based on a brief reference to a collateral crime in his trial, which occurred seventeen years ago. This claim could and should have been raised many years ago. The unwarranted filings of such delayed claims unnecessarily clog the court dockets and represent an abuse of the judicial process.

McCray v. State, 699 So.2d 1366, 1368 (Fla. 1997). While this habeas petition does not specifically allege ineffective assistance of appellate counsel, it is nonetheless untimely and abusive. The claims contained in the petition have been repeatedly litigated by Mills, and the "basis" set out in this petition is no more than an attempt to prevent this case from becoming final by attempting to force a square peg into a round hole in an effort to maintain a proceeding, however devoid of legal support it may be. That is an abuse of process, and the petition should be dismissed as untimely.

RESPONSE TO GROUNDS FOR RELIEF

I. THE "*APPRENDI*" CLAIM

On pages 6-20 of the petition, Mills argues that *Apprendi v. New Jersey*, 120 S. Ct. 2348 (2000), stands for the proposition that "the jury must determine death eligibility". *Petition*, at 12. Because that is so, or so the argument goes, Florida's death sentencing scheme which allows the sentencing judge to reject the

jury's recommended sentence must therefore be invalid. This claim is not a basis for relief for the following independently adequate reasons.

The first reason that the *Apprendi*-based claim is not available to Mills is that it is not preserved. Despite Mills' claim to the contrary, the due process/right to jury trial basis of the *Apprendi* decision was not raised on direct appeal -- his primary issue in that appeal was that the rejection of the jury's advisory was erroneous under *Tedder v. State.* While it is true that Mills used the phrase "right to trial by jury and due process" in a footnote to his *Initial Brief,* it is also true that that is insufficient to preserve, or even present, the constitutional claim. *See, e.g., Shere v. State*, 742 So.2d 215, 216-18 n. 6 (Fla. 1999). The claim now made by Mills, which is that jury sentencing is constitutionally required in a death penalty case, was not presented to this Court on direct appeal, and, consequently, is not preserved for any purpose. This claim is procedurally barred.

Further, it has never been suggested that a death sentence can only be imposed by a jury. That was a central issue in *Proffitt v. Florida,* and the United States Supreme Court rejected such a claim, stating:

> This Court has pointed out that jury sentencing in a capital case can perform an important societal function, *Witherspoon v. Illinois,* 391 U.S. 510, 519 n. 15, 88 S.Ct. 1770, 1775, 20 L.Ed.2d 776 (1968), but it has never suggested that jury sentencing is constitutionally

> required. **And it would appear that judicial sentencing should lead, if anything, to even greater consistency in the imposition at the trial court level of capital punishment, since a trial judge is more experienced in sentencing than a jury, and therefore is better able to impose sentences similar to those imposed in analogous cases.**

Proffitt v. Florida, 428 U.S. 242, 252 (1976). (emphasis added). Subsequently, the same claim was rejected in *Walton v. Arizona*, 497 U.S. 639 (1990), and *Clemons v. Mississippi*, 494 U.S. 738 (1990), where the United States Supreme Court specifically rejected any argument that the Constitution requires that a jury impose a sentence of death or make the findings that are a prerequisite to such a sentence. Likewise, in *Harris v. Alabama*, the United States Supreme Court stated:

> **The Constitution permits the trial judge, acting alone, to impose a capital sentence.** It is thus not offended when a State further requires the sentencing judge to consider a jury's recommendation and trusts the judge to give it the proper weight.

Harris v. Alabama, 513 U.S. 504, 515 (1995). (emphasis added).

In *Apprendi*, the United States Supreme Court held that any fact, other than a prior conviction, that increases the penalty for a crime beyond the statutory maximum must be submitted to a jury and proven beyond a reasonable doubt. *Apprendi v. New Jersey*, 120 S.Ct. at 2362-63.[2] That holding is inapplicable to capital

[2]*Apprendi* was concerned with the New Jersey "hate crime enhancement" provisions, which provided for increased penalties for specified "hate crimes" -- an enhanced sentence could be imposed if the sentencing judge found, by a preponderance of the evidence,

sentencing, as the *Apprendi* Court expressly stated:

> Finally, 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. *Walton v. Arizona*, 497 U.S. 639, 647-649, 110 S.Ct. 3047, 111 L.Ed.2d 511 (1990); *id.*, at 709-714, 110 S.Ct. 3047 (STEVENS, J., dissenting). For reasons we have explained, the capital cases are not controlling:
>
> > "Neither the cases cited, nor any other case, permits a judge to determine the existence of a factor which makes a crime a capital offense. What the cited cases hold is that, **once a jury has found the defendant guilty of all the elements of an offense which carries as its maximum penalty the sentence of death, it may be left to the judge to decide whether that maximum penalty, rather than a lesser one, ought to be imposed**.... The person who is charged with actions that expose him to the death penalty has an absolute entitlement to jury trial on all the elements of the charge." *Almendarez-Torres*, 523 U.S., at 257, n. 2, 118 S.Ct. 1219 (SCALIA, J., dissenting) (emphasis deleted).

Apprendi v. New Jersey, 120 S.Ct. at 2366. (emphasis added).[3] Mills' argument is simply not supported by the *Apprendi* decision, and, in fact, is squarely foreclosed by it. Death is the maximum penalty for first-degree murder in the State of Florida, and, once the defendant has been convicted of an offense for which death is

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that the purpose of the crime was to intimidate based upon, *inter alia,* race. *Apprendi v. New Jersey*, 120 S.Ct. at 2364.

[3]In effect, the United States Supreme Court held that "death is different", as Justice Thomas suggested in his concurring opinion. *Apprendi v. New* Jersey, 120 S.Ct. at 2380.

a possible penalty, it is constitutionally permissible to remove the jury from the sentencing equation. *See, e.g., Apprendi, supra; Walton, supra; Proffitt, supra.*[4]

To the extent that further discussion of this claim is necessary, the Delaware Supreme Court has rejected an *Apprendi*-based challenge to that state's capital sentencing statute. The Delaware Court expressly held that it was "not persuaded that *Apprendi's* reach extends to state capital sentencing schemes in which judges are required to find specific aggravating factors before imposing a sentence of death." *State v. Weeks*, 2000 WL 1694002 (Del. Nov. 9, 2000). The aggravating factors contained in the Delaware statute do not constitute additional elements of capital murder, and the finding of such aggravators did not "expose the defendant to a greater punishment than that authorized by the jury's guilty verdict." *Apprendi, supra.* In other words, reliance on *Apprendi* in the capital sentencing context is an attempt to force a square peg into a round hole.

Because *Apprendi* has no effect on capital sentencing (because it expressly does not apply to such proceedings), it is not a "change in the law". However, to the extent that Mills' "change in the law" argument deserves elaboration, it is clear that, even if

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[4]*Walton* noted that constitutional challenges to Florida's sentencing scheme have been repeatedly rejected, noting *Proffitt v. Florida, supra, Hildwin v. Florida*, 490 U.S. 638 (1989), and *Spaziano v. Florida*, 468 U.S. 447 (1984).

Apprendi had some effect on capital sentencing, it would not be available to Mills. As this Court has held:

> In *Witt*, we reiterated our adherence to the very limited role for post-conviction proceedings even in death penalty cases. We emphasized that only major constitutional changes of law which constitute a development of fundamental significance, such as in *Coker v. Georgia*, 433 U.S. 584, 97 S.Ct. 2861, 53 L.Ed.2d 982 (1977), and *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963), may be raised for the first time under rule 3.850. We held that evolutionary refinements in the criminal law, affording new or different standards for admissibility of evidence, for procedural fairness, for proportionality review of capital cases and other like matters do not compel abridgment of the finality of judgments and are not cognizable under rule 3.850.

State v. Washington, 453 So.2d 389, 392 (Fla. 1984). *Apprendi* is inapplicable to this case, and, even if that decision did somehow apply, it would not provide a basis for relief.[5]

II. THE *TEDDER* CLAIM

On pages 21-47 of the petition, Mills argues, yet again, that this Court violated *Tedder* when it affirmed the death sentence imposed on him following the sentencing court's rejection of the jury's advisory sentence. This claim has been repeatedly litigated by Mills, and, in its most recent form, is based on his claim that *Keen v. State* "conclusively establishes that the standard announced

[5]The Eleventh Circuit Court of Appeals has held that *Apprendi* does not apply to cases on collateral review. *In re Joshua*, 224 F.3d 1281 (11th Cir. 2000). The Second District Court of Appels has followed that rationale. *Jones v. Florida*, 2001 WL 166496 (Fla. 2 DCA 2001).

in [*Tedder*] was arbitrarily not applied to Mr. Mills' case on direct appeal." *Petition*, at 21. Mills goes on to argue that the "failure to consistently apply *Tedder* is a violation of [Federal] due process." *Id.*

On direct review of Mills' death sentence, this Court held:

> Mills contends that the court erred in sentencing him to death after receiving the jury's recommendation that he be sentenced to life imprisonment. A jury's recommendation of life should be accorded great weight, and should be followed unless the facts suggesting a sentence of death are so clear and convincing that virtually no reasonable person could differ. *See Tedder v. State*, 322 So.2d 908 (Fla. 1975).
>
> We hold that the trial judge's findings in support of the sentence of death even without the finding of especially heinous, atrocious and cruel, meet the *Tedder* standard. **We find that the facts suggesting a sentence of death are so clear and convincing that virtually no reasonable person could differ.** There are three valid statutory aggravating circumstances, and the trial judge has found that there are no valid mitigating circumstances. **The purported mitigating circumstances claimed by Mills, but not found by the trial judge, are not sufficient to outweigh the aggravating circumstances nor do they establish a reasonable basis for the jury's recommendation.** We conclude that the imposition of a sentence of death after a jury recommendation of life was proper in this case.

Mills v. State, 476 So.2d 172, 179 (Fla. 1985). (emphasis added). The highlighted language from this Court's direct appeal affirmance of Mills' death sentence establishes that, contrary to Mills' claims, this Court applied well-settled law in reaching a decision in this case. In fact, in *Keen*, this Court stated the standard for sustaining a death sentence after an advisory recommendation of

life in the following terms:

> The appropriate standard in analyzing a jury override is well-known: "To sustain a jury override, this Court must conclude that the facts suggesting a sentence of death are 'so clear and convincing that virtually no reasonable person could differ.'" *San Martin v. State*, 717 So.2d 462, 471 (Fla. 1998) (*quoting Tedder v. State*, 322 So.2d 908, 910 (Fla. 1975)). "In other words, we must reverse the override if there is a reasonable basis in the record to support the jury's recommendation of life." *San Martin*, 717 So.2d at 471 (citations omitted).

Keen v. State, 2000 WL 1424523 (Fla., Sept. 28, 2000). *Keen* demonstrates nothing other than the fact that this Court's original decision in this case correctly affirmed Mills' death sentence. This claim is procedurally barred.

To the extent that further discussion of this claim is necessary, Mills advanced this claim unsuccessfully in his Federal petition for habeas corpus relief. In affirming the denial of relief, the Eleventh Circuit Court of Appeals held:

> The Florida Supreme Court's opinion on direct review reveals that the Florida courts did not impose Mills's death sentence in an arbitrary and discriminatory manner. The court reviewed Mills's sentencing and invalidated three of the aggravating factors that the trial court had found. The court also agreed with the trial court's finding that no mitigating factors existed and held that "the facts suggesting a sentence of death are so clear and convincing that virtually no reasonable person could differ." *Mills,* 476 So.2d at 179. The Florida Supreme Court complied with the mandate of *Tedder*, and, as the district court held, Mills's case is similar to *Francis v. Dugger*. *See Francis*, 908 F.2d at 704 (holding that override was not arbitrary and discriminatory where jury's recommendation of life imprisonment may have been the product of defense counsel's highly impassioned closing argument, where defendant had a prior criminal history and where no valid statutory mitigating factors and three statutory aggravating factors existed).

Mills v. Singletary, 161 F.3d 1273, 1283 (11th Cir. 1998). Despite the arguments contained in Mills' petition, there is no basis for disturbing a conviction and sentence that became final more than fifteen years ago. While Mills has attempted to "base" this petition on recently-decided cases, the true facts are that those cases have no effect whatsoever on this case, and, in fact, are inapplicable to this case. Mills' efforts to generate a basis for relief are an abuse of process, and this abusive, untimely petition should be dismissed in all respects.

CONCLUSION

Mills' habeas corpus petition is untimely, and, as such, is an abuse of process. Moreover, the claims contained in the petition are not only procedurally barred, but also meritless. All requested relief should be denied.

Respectfully submitted,

ROBERT A BUTTERWORTH
ATTORNEY GENERAL

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KENNETH S. NUNNELLEY
ASSISTANT ATTORNEY GENERAL
Florida Bar #0998818
444 Seabreeze Blvd. 5th FL
Daytona Beach, FL 32118
(904) 238-4990
Fax (904) 226-0457

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above Response has been furnished by U.S. Mail to U.S. Mail to Todd G. Scher, Litigation Director, Capital Collateral Regional Counsel, 101 N.E. 3rd Avenue, Suite 400, Ft. Lauderdale, FL 33301, on this ________ day of March, 2001.

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Of Counsel

CERTIFICATE OF COMPLIANCE

This response is typed in Courier New 12 Point.

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KENNETH S. NUNNELLEY
ASSISTANT ATTORNEY GENERAL