IN THE SUPREME COURT OF FLORIDA

Case No. SC02-1457

AMOS LEE KING, JR.,

Petitioner,

v.

MICHAEL MOORE,
Secretary, Florida
Department of Corrections,

Respondent.

_____/

AMENDED BRIEF OF AMICI CURIAE JEB BUSH, GOVERNOR OF THE STATE OF FLORIDA, AND FLORIDA PROSECUTING ATTORNEYS ASSOCIATION, INC.

Charles T. Canady
Wendy W. Berger
Exec. Office of the Governor
Room 209, The Capitol
Tallahassee, Florida 32399
Telephone: (850) 488-3494
Telecopier: (850) 488-9810

Attorneys for Jeb Bush as
Governor of the State
of Florida

Arthur I. Jacobs
General Counsel
Florida Prosecuting Attorneys
Association, Inc.
Post Office Box 1110
Fernandina Beach, FL 32035-1110
Telephone: (904) 261-3693
Telecopier: (904) 261-7879
Raymond L. Marky
Assistant State Attorney, 2d Cir.
Leon County Courthouse
301 S. Monroe Street
Tallahassee, Florida 32301
Telephone: (850) 488-6701

Attorneys for Florida Prosecuting

Attorneys Association, Inc.

TABLE OF CONTENTS

TABLE OF AUTHORITIES
FLORIDA CASES

FLORIDA RULES OF PROCEDURE

FLORIDA CONSTITUTION

INTEREST OF AMICUS CURIAE GOVERNOR JEB BUSH

The interest of the Governor in this proceeding is to vindicate the enforcement of our state?s death penalty law. See Art. IV, sec. 1(a), Fla. Const. (?Governor shall take care that the laws be faithfully executed?). Over three hundred individuals currently sit on death row, their convictions and death sentences final. Each was sentenced under a statutory regime that, over the past 25 years, has been repeatedly validated by the U.S. Supreme Court. Each had the benefit of procedures that are designed to ?assure that the death penalty will not be imposed in an arbitrary or capricious manner.? Proffitt v. Florida, 428 U.S. 242, 253 (1976). And each had his sentence reviewed and affirmed by this Court, which, ?because of its statewide jurisdiction, can assure consistency, fairness, and rationality in the even-handed application of state law.? Id. at 259-60.

By definition, these death sentences have been imposed in only the most egregious cases. Yet it is these very sentences that could be imperiled if this Court grants petitioner the relief he seeks. As explained herein, applicable law in fact requires that this Court reject petitioner?s claims. A contrary result would be to the severe detriment of the efficient working of our state?s criminal justice system, to the families of the victims involved, and to the people of Florida.

IDENTITY AND INTEREST OF AMICUS CURIAE FPAA

The Florida Prosecuting Attorneys Association, Inc. (hereinafter, FPAA) was formed in 1963 to provide a statewide organization to represent the State Attorneys and their assistants in all aspects of their official public business. The FPAA?s membership includes all State Attorneys and their assistants. This case involves the administration of justice in homicide cases. The members of the FPAA are vitally interested in the outcome of this case.

STATEMENT OF THE CASE AND FACTS

The Governor adopts the statement of the case and facts set forth in this Court?s opinion on direct appeal, See King v. State, 390 So. 2d 315 (Fla. 1980), cert. denied, 450 U.S. 989 (1981), and in the Response to Petition for Writ of Habeas Corpus and Application for Stay of Execution filed by the Attorney General on behalf of the Respondent, Michael Moore.

SUMMARY OF THE ARGUMENT

This case offers the Court no legal basis to engage in a far-ranging inquiry into ?the impact of Ring in Florida.? Instead, several threshold considerations

demand that the Court dismiss the instant petition without addressing the merits of King?s claims.

First, the Court must dismiss King?s habeas petition on the ground that it is improperly filed. King?s petition blatantly circumvents the strict requirements of Florida Rule of Criminal Procedure 3.850, in violation of this Court?s holding in White v. Dugger, 511 So. 2d 554 (Fla. 1987). Rule 3.850 demands that King establish at the outset that his asserted right has already been held to apply retroactively. That he cannot do. Indeed, the only court to have addressed the issue has ruled that Ring is not to be applied retroactively in collateral proceedings. See Cannon v. Mullin, 2002 WL 1587921 (10th Cir. 2002), cert. denied, No. SC02-5376 (U.S. July 23, 2002). In any event, King?s Ring claim is procedurally barred. That claim is simply an extension of the Apprendi claim that King already litigated unsuccessfully before this Court. King?s only recourse was to seek review by the U.S. Supreme Court. That court?s denial of King?s certiorari petition ? issued after it decided Ring ? should have put an end to King?s challenges to his death sentence.

Second, even if it chooses to consider King?s habeas petition, this Court must nonetheless conclude that the Ring rule is not retroactive. As noted above, the Tenth Circuit Court of Appeals has already held that Ring is not to be given retroactive effect. And every court to have addressed the issue has held that Apprendi, the wellspring of the rule announced in Ring, also does not apply retroactively. The conclusion that Ring is not retroactive is dictated by the standards of both Witt v State, 387 So. 2d 922 (Fla. 1980) and Teague v. Lane, 489 U.S. 288 (1989). The rule announced in Ring is merely an evolutionary refinement of the Sixth Amendment right to a jury trial. It is not a watershed rule necessary to ensure the veracity or integrity of all trial and sentencing proceedings. Moreover, Florida has long relied on the U.S. Supreme Court?s repeated validation of our state?s existing death penalty procedures. To retroactively invalidate those procedures would impose an intolerable burden on our criminal justice system. Whatever its merits, the Ring rule does not afford a legitimate basis to call into question the validity of every finally-adjudicated death sentence in Florida.

Third, even if it were applied retroactively, Ring would not benefit King. Ring did not affect the U.S. Supreme Court?s decision in Almendarez-Torres v. United States, 523 U.S. 224 (1998). The Court there held that, unlike other aggravating factors that would expose a defendant to a greater sentence, the fact of a prior conviction need not be submitted to the jury. Before he committed the crime that led to his death sentence, King had already been convicted of a

violent felony. This in itself rendered him ?death eligible? under Florida law and, therefore, outside the protection afforded by Ring.

Finally, the U.S. Supreme Court has repeatedly upheld the validity of Florida?s death penalty statute. In Ring, the Court disturbed none of its earlier Florida-specific rulings. For this reason and for those argued above, this Court has no occasion to broadly consider the impact of Ring in Florida. A ruling of that nature would be an unwarranted advisory opinion.

ARGUMENT

A. KING'S PETITION FOR WRIT OF HABEAS CORPUS SHOULD BE DISMISSED.

This Court need not reach the merits of King?s claim because, as a threshold matter, King?s petition is not properly before the Court.

1. King may not use a habeas petition to circumvent the requirements of Rule 3.850(b), Florida Rules of Criminal Procedure.

King?s Petition was filed in an impermissible effort to use the Writ of Habeas Corpus as a substitute for a motion to vacate pursuant to Rule 3.850, Florida Rules of Criminal Procedure. Such action violates the holding of this Court in White v. Dugger, 511 So.2d 554 (Fla. 1987), because the petition is being used, for obvious reasons, to avoid the rule?s strict requirements.

Rule 3.850, Florida Rules of Criminal Procedure, provides in relevant part, that ?no other motion shall be filed or considered pursuant to this rule?more than 1 year after the judgment and sentence become final in a capital case in which a death sentence has been imposed unless it alleges that:?(2) the fundamental constitutional right asserted was not established within the period provided for herein and has been held to apply retroactively?? (emphasis added).

In White v. Dugger, supra, this Court was presented with a case wherein the defendant, who was convicted and sentenced to death, initiated an original writ of habeas corpus following unsuccessful efforts to have his judgment and sentence vacated. King has filed a consecutive habeas petition, and this Court is now confronted with precisely the same issue as in White. This Court?s decision in White dictates that King?s petition must be denied.

In the unanimous decision denying White's petition, Justice Shaw wrote:

??We note that although the petition is labeled as a petition for writ of habeas corpus, the issues raised are of the type which should properly be raised under Florida Rule of Criminal Procedure 3.850, which by its terms procedurally bars an application for writ of habeas corpus. We note also that by its terms, rule 3.850 procedurally bars motions for relief where the judgment and sentence, as here, have been final for more than two years or were final prior to 1 January 1985. Moreover, the primary issue raised here is the application of *Enmund v. Florida,* 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982), to White's case. This issue was previously raised in post-conviction proceedings and disposed of in *State v. White.* Again, the issue raised is procedurally barred by the terms of rule 3.850.

It is clear from the above that this eleventh hour petition is an abuse of process. We point out again to the office of collateral counsel that habeas corpus is not a vehicle for obtaining additional appeals of issues which were raised, or should have been raised, on direct appeal or which were waived at trial or which could have, should have, or have been, raised in rule 3.850 proceedings**.** *Blanco v. Wainwright,* 507 So.2d 1377 (Fla.1987); *Copeland v. Wainwright,* 505 So.2d 425 (Fla.1987).

Accordingly, we deny the petition."

511 So. 2d 554,555. (emphasis added).

King is using the exact same method White used in an effort to evade the one-year time constraint of this Court?s rule. Just as important, King is also using the Writ of Habeas Corpus to circumvent the Rule 3.850(b)2, requirement that, in the absence of a timely filing, he must show that the rule announced in Ring v. Arizona, 122 S.Ct. 2428 (June 24, 2002), has been held retroactive. As will be discussed later in this brief, no court has held that Ring applies retroactively to cases, like King?s, on collateral review. Indeed, the only court to have considered the issue held that Ring should not be applied retroactively in collateral proceedings. See Cannon v. Mullin, 2002 WL 1587921 (10th Cir. July 19, 2002), cert. denied, No. SC02-5376 (U.S. July 23, 2002). King simply cannot meet the burden imposed by Rule 3.850, Florida Rules of Criminal Procedure. As in White, it is clear that King?s improperly filed eleventh hour petition is nothing short of an abuse of process. As such, the petition should be denied.

2. King?s Ring claim is procedurally barred.

Even if this Court disagrees with the argument that the habeas petition was improperly filed, and allows King to sidestep its own procedural rule - in effect opening the habeas floodgates - it should immediately deny the petition on the ground that the issue is procedurally barred. Ring is nothing more than an extension of Apprendi v. New Jersey, 530 U.S. 466 (2000), to death penalty cases. King?s argument in this proceeding, that the recent United States Supreme Court decision in Ring requires this Court to vacate his death sentence, is neither new or novel. Instead, it is merely a variant of his original Apprendi claim, which was previously raised and decided adversely to him in King v. Moore, 808 So. 2d 1237 (Fla. 2002), cert. denied, 122 S.Ct. 2670(June 28, 2002). In declining to grant relief, this Court held:

King's sixth contention, that *Apprendi* applies to Florida's capital sentencing statute and the maximum sentence under the statute is death, has been decided adversely to King's position. *See Mills v. Moore, 786 So.2d 532, 537-38 (Fla.2001), cert. denied, 532 U.S. 1015, 121 S.Ct. 1752, 149 *1246 L.Ed.2d 673 (2001); see also Brown v. Moore, 800 So.2d 223 (Fla.2001) (rejecting claims that aggravating circumstances are required to be charged in indictment, submitted to jury during guilt phase, and found by unanimous jury verdict); Mann v. Moore, 794 So.2d 595, 599 (Fla.2001) (same).* We are aware that the United States Supreme Court very recently granted certiorari in *State v. Ring, 200 Ariz. 267, 25 P.3d 1139 (2001), cert. granted, --- U.S. ----, 122 S.Ct. 865, 151 L.Ed.2d 738 (2002)*; however, we decline to grant a stay of execution following our precedent on this issue, on which the Supreme Court has denied certiorari**.** Thus, King is not entitled to relief on this issue.

Id. at 1245-46) (emphasis added).

As recently as June 20, 2002, this Court held that ?claims raised in a habeas petition which petitioner has raised in prior proceedings and which have been previously decided on the merits?are procedurally barred?? Porter v. Moore, 27 Fla. L. Weekly S606 (Fla. 2002)(held Porter was procedurally barred from raising claim that death sentence was disproportionate where claims or variants to claims were previously addressed on appeal or on motion for post-conviction relief); see also Mann v. Moore, 794 So. 2d 595, 600-01 (Fla. 2001); Parker v. Dugger, 550 So. 2d 459, 460 (Fla. 1989)(held habeas corpus petitions are not to be used for additional appeals on questions which ... were raised on appeal or in a rule 3.850 motion). King is simply using a different argument in

this habeas petition to re-litigate the same issue previously before this Court. As a result, this claim is procedurally barred.

Having been denied relief by this Court, King?s only recourse was to pursue an appeal to the United States Supreme Court. Of course, that Court denied King?s petition for writ of certiorari. See King v. Moore, 122 S.Ct. 2670 (June 28, 2002). We recognize that a denial of a writ of certiorari by the United States Supreme Court does not constitute a ruling on the merits of a particular case. See Knight v. Florida, 528 U.S. 990 (1999); Barber v. Tennessee, 513 U.S. 1184 (1995); United States v. Carver, 260 U.S. 482, 490 (1923). However, King?s case involves much more than a mere denial of certiorari.

King was under an active death warrant at the time he filed his petition for certiorari. In the Supreme Court's order staying King?s execution (issued the day before he was scheduled to be executed), the Court provided, "Should the petition for writ of certiorari be denied, this stay shall terminate automatically. In the event the petition for writ of certiorari is granted, the stay shall terminate upon the issuance of the mandate of this Court." King v. Florida, 122 S.Ct. 932 (January 23, 2002)(emphasis added). The United States Supreme Court denied certiorari and dissolved the previously entered stay of execution four days after it issued its opinion in Ring, with full knowledge of the possible consequences of its actions. King v. Moore, 808 So. 2d 1237 (Fla. 2002), cert. denied, 122 S.Ct. 2670(June 28, 2002).

If the United States Supreme Court had intended this Court to reevaluate the validity of King?s judgment and sentence in light of Ring, the Supreme Court would have granted certiorari, vacated this Court's decision and remanded the case for consideration in light of Ring, just as it did in Ring. See Ring v. Arizona, 122 S.Ct. 2428 (June 24, 2002). Thus, the United States Supreme Court's ruling in King should now be considered the law of the case. 808 So. 2d 1237 (Fla. 2002), cert. denied, 122 S.Ct.2670 (June 28, 2002). Justice Wells was correct when he stated, ?[w]e have finally adjudicated this case?[and]?the Supreme Court has removed any obstacle for this execution to occur.? King v. Moore, No. SC02-1457, at 18 (Fla. July 8, 2002), Wells, J. dissenting. Therefore, King?s petition should be denied.

B. THE UNITED STATES SUPREME COURT DECISION IN RING V. ARIZONA IS NOT SUBJECT TO RETROACTIVE APPLICATION ON COLLATERAL REVIEW.

It is clear that under applicable law, Ring should not be given retroactive

effect in federal collateral proceedings. And under the principles of Witt v. State, 387 So. 2d 922 (Fla. 1980), the result is the same. We emphasize at the outset that, ?because of the strong concern for decisional finality, this Court rarely finds a change in decisional law to require retroactive application.? State v. Glenn, 558 So. 2d 4, 7 (Fla. 1990).

The Supreme Court of the United States has not held that Ring is retroactive, although it clearly had an opportunity to do so when it decided Ring and when it was presented with a writ of certiorari in Cannon v. Mullin on July 23, 2002. 2002 WL 1587921, (10th Cir. 2002), cert. denied, Cannon v. Oklahoma, No. SC02-5376 (U.S. July 23, 2002). Moreover, the United States Supreme Court has unambiguously reserved to itself the power to give its rulings retroactive effect. In Tyler v. Cain, 533 U.S. 656 (2001) the Court stated:

?The only way the Supreme Court can, by itself, ?lay out and construct? a rule?s retroactive effect, or ?cause? that effect ?to exist, occur, or appear,? is through a holding. The Supreme Court does not make a rule retroactive when it merely establishes principles of retroactivity and leaves the application of those principles to the lower courts. In such an event, any legal conclusion that is derived from the principles is developed by the lower court (or perhaps a combination of courts) not the Supreme Court. We thus conclude that a new rule is not retroactive to cases on collateral review unless the Supreme Court holds it to be retroactive.?

533 U.S. at 663, (emphasis added). In Tyler, the Court refused to retroactively apply the Cage rule, which held a jury instruction is unconstitutional if there is a reasonable likelihood that the jury understood it to allow conviction without proof beyond a reasonable doubt. Id.; Cage v. Louisiana, 111 S.Ct. 328, (1990).

Every United States Court of Appeals that has taken up the issue, as well as several state courts, has held that Apprendi is not retroactive. McCoy v. United States, 266 F.3d 1245 (11th Cir. 2001); Curtis v. United States, 2002 WL 1332817 (7th Cir. June 19, 2002); United States v. Sanchez-Cervantes, 282 F.3d 664, 668 (9th Cir. 2002); United States v. Sanders, 247 F.3d 139 (4th Cir. 2001); United States v. Moss, 252 F.3d 993 (8th Cir. 2001); Jones v. Smith, 231 F.3d 1227 (9th Cir. 2001); Jackson v. State, 2002 WL 766609 (Minn.App. 2002); Toole v. State, 2001 WL 996300 (Ala.Crim.App. 2001); and Whisler v. State, 36 P.3d 290 (Kan. 2001). As the Tenth Circuit Court of Appeals has held, ?Ring is simply an extension of Apprendi to the death penalty context.? Cannon v. Mullin, 2002 WL 1587921, *4 (10th Cir. July 19, 2002). If Apprendi, which

is the legal basis for the rule announced in Ring, is not retroactive, it is evident that Ring itself would not be retroactive.

The Tenth Circuit Court of Appeals is the only court to have addressed whether Ring should be retroactively applied to cases on collateral review. See Cannon v. Mullin, 2002 WL 1587921 (10th Cir. July 19, 2002), cert. denied, Cannon v. Oklahoma, No. SC02-5376 (U.S. July 23, 2002). In Cannon, the petitioner, who was scheduled to be executed on July 23, 2002, sought permission from the Court of Appeals to file a second habeas petition for the purpose of raising a claim that Oklahoma's capital sentencing statute and the jury instructions given during the penalty phase of his trial violated the Supreme Court's holdings in Apprendi and Ring.

Among other things, Cannon argued that the Supreme Court had made Ring retroactive to cases on collateral review through the combination of Teague v. Lane, 489 U.S. 288 (1989), Ring, and cases preceding Ring in the Apprendi line.

The Court of Appeals rejected Cannon's arguments stating:

> ??It is clear, however, that *Ring* is simply an extension of *Apprendi* to the death penalty context**.** *See Ring,* 122 S.Ct. at 2432. Accordingly, this court's recent conclusion in *United States v. Mora, --- F.3d ----, 2002 WL 1317126, at *4 (10th Cir. June 18, 2002)*, that *Apprendi* announced a rule of criminal procedure forecloses Cannon's argument that *Ring* announced a substantive rule.
>
> Cannon's attempt to distinguish *Ring* from *Apprendi,* and therefore avoid *Mora,* on the basis that the decision in *Apprendi* is grounded in the Sixth Amendment and the decision in *Ring* is grounded in the Eighth Amendment is unavailing. The concluding paragraph of the majority opinion in *Ring* unequivocally establishes that the decision is based solely on the Sixth Amendment. *122 S.Ct. at 2443* ("The right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the factfinding necessary to increase a defendant's sentence by two years, but not the factfinding necessary to put him to death. We hold that the Sixth Amendment applies to both.")?Accordingly, Cannon's attempt to distinguish *Ring* from *Apprendi* is unconvincing, and this panel is bound by the determination in *Mora* that *Apprendi* established a new rule of criminal procedure.
>
> For the reasons set out above, Cannon has failed to make a prima

> facie showing that the Supreme Court has made *Ring* retroactively applicable to cases on collateral review. Accordingly, this court DENIES both his application for permission to file a second habeas petition and his accompanying emergency request for a stay??

2000 WL 1587921,*3-*4 (10th Cir. 2002). Four days after this decision was rendered, the United States Supreme Court denied Cannon's request for certiorari review. Cannon v. Oklahoma, No. SC02-5376 (U.S. July 23, 2002). He was executed several hours later.

Like Mr. Cannon, King?s reliance on Ring is misplaced, because the federal court holdings are altogether consistent with this Court's precedent on the issue of retroactivity. See Witt v. State, 387 So. 2d 922 (Fla. 1980).

Ring is not subject to retroactive application under the principles established by this Court in Witt. According to Witt, ?a change of law will not be considered in a capital case under Rule 3.850 unless it: (a) emanates from this court or the United States Supreme Court; (b) is constitutional in nature; and (c) constitutes a development of fundamental significance.? Id., 387 So. 2d at 930. Admittedly, the first and second prongs of the Witt test have been met. However, to satisfy the third, King must show that Ring is a decision of such fundamental significance that it "cast[s] serious doubt on the veracity or integrity of the original trial proceeding." 387 So. 2d at 928.

Pursuant to Witt, whether Ring is, a new law of sufficient magnitude to warrant a finding of fundamental significance requires that it be evaluated under the ?three-fold test? of Stovall v. Denno, 388 U.S. 293 (1967) and Linkletter v. Walker, 381 U.S. 618 (1965). This test involves weighing: (a) the purpose to be served by the new rule; (b) the extent of reliance on the old rule; and (c) the effect on the administration of justice of a retroactive application of the new rule.? Witt, 387 So. 2d at 928. Reliance on a test established by the United States Supreme Court is particularly appropriate when evaluating cases such as Ring, which involve Supreme Court decisions on federal constitutional law.

The new rule announced in Ring does not cast doubt on the accuracy or integrity of the proceedings that led to the imposition of a death sentence in King?s case. King was sentenced to death only after both a judge and the jury had considered the presence of aggravating factors. In fact, the United States Supreme Court, in Proffitt v. Florida, 428 U.S. 242 (1976), held that, in the wake of Furman v. Georgia, 408 U.S. 238 (1972), Florida had enacted systems that served to assure ?consistency, fairness, and rationality in the evenhanded

operation of state law.? 428 U.S. at 260(emphasis added). Therefore, no serious argument can be made that the dual system in place when King was tried and sentenced lacked reliability, veracity, or fairness. Evaluating Ring under the Stovall/Linkletter test underscores this point.

The purpose to be served by Ring is the same as its predecessor Apprendi - to include as an ?element of a crime? any fact that would increase a criminal defendant?s penalty beyond the statutory maximum. This ruling, while significant, is not groundbreaking or earthshaking and the extension of the rule to aggravating factors in capital cases does not make it so. It is, as has been decided in a number of jurisdictions, a procedural change unworthy of retroactive application. See Kaufmann v. United States, 282 F. 3d 1336 (11th Cir. 2002); Hamm v. United States, 269 F.3d 1247 (11th Cir. 2001); McCoy v. United States, 266 F.3d 1245 (11th Cir. 2001); Curtis v. United States, 2002 WL 1332817 (7th Cir. June 19, 2002); United States v. Sanders, 247 F.3d 139 (4th Cir. 2002); and Whisler v. State, 36 P.3d 290 (Kan. 2001). As the Seventh Circuit Court of Appeals noted in holding that Ring is not retroactive, ?no bedrock rule of procedure has been broken. Findings by federal district judges are adequate to make reliable decisions about punishment.? Curtis v. United States, 2002 WL 1332817, *3 (7th Cir. June 19, 2002). It can be assumed that, no less than federal judges, Florida?s trial judges have rendered their findings with due regard for the rights of the accused.

Even if this Court accepts King?s claim that Florida?s capital sentencing structure violates the Sixth Amendment right to a jury trial, such violation does not reach down into the integrity of the truth finding process. Although King argues that the right to a jury determination of factual accusations is precisely the type of fundamental law change implicated by Witt, the United States Supreme Court states otherwise. In Duncan v. Louisiana, 391 U.S. 145 (1968)(cited by King in support of his position), the United States Supreme Court held that the States could not deny a defendant?s request for a jury trial in serious criminal cases. Applying the Stovall/Linkletter test in DeStefano v. Woods, 392 U.S. 631 (1968), the Supreme Court held that Duncan v. Louisiana and Bloom v. Illinois, 391 U.S. 194 (1968) (holding the right to jury trial extends to serious criminal contempt cases), ?should receive only prospective application.? DeStefano, 392 U.S. at 633 (emphasis added). Clearly, reliance on the old rule and the effect of retroactive application on the administration of justice weighed heavily in favor of the Supreme Court?s decision. It stated:

> ?All three factors favor only prospective application of the rule stated in *Duncan v. State of Louisiana*. *Duncan* held that the states must respect

> the right to jury trial because in the context of the institutions and practices by which we adopt and apply our criminal laws, the right to jury trial generally tends to prevent arbitrariness and repression. As we stated in *Duncan*, **?**We would not assert, however, that every criminal trial-or any particular trial-held before a judge alone is unfair or that a defendant may never be as fairly treated by a judge as he would by a jury.**?** *391 U.S. at 158, 88 S.Ct. at 1470.* The values implemented by the right to jury trial would not measurably be served by requiring retrial of all persons convicted in the past by procedures not consistent with the Sixth Amendment right to jury trial**.** Second, States undoubtedly relied in good faith upon the past opinions of this Court to the effect that the Sixth Amendment right to jury trial was not applicable to the States. *E.g., Maxwell v. Dow, supra*. Several States denied requests for jury trial in cases where jury trial would have been mandatory had they fallen within the Sixth Amendment guarantee as it had been construed by this Court. See *Duncan v. State of Louisiana, supra, 391 U.S., at 158, 88 S.Ct., at 1452, n. 30.* Third, the effect of a holding of general retroactivity on law enforcement and the administration of justice would be significant, because the denial of jury trial has occurred in a very great number of cases in those States not until now according the Sixth Amendment guarantee.?

Id. at 633-34 (emphasis added). It follows that if a violation of a Sixth Amendment right to a jury trial failed the Stoval/Linkletter test for retroactivity in DeStefano, any violation of that right implicated by Ring must also fail.

Indeed, prosecutors, trial judges, and the justices of this Court both past and present have justifiably relied on Proffitt and its progeny for over twenty-five years. In Florida alone, nearly 400 persons have been convicted and sentenced to death and most of their judgments and sentences have become final. If this Court now determines that Ring applies retroactively, all of those sentences would be called into question and retrial ? if necessary - would be hampered by the same difficulties mentioned by the Supreme Court in Allen v. Hardy, 478 U.S. 255 (1986): "problems of lost evidence, faulty memory, and missing witnesses." Id. at 260. That consequence is precisely why balancing the interests of fairness and uniformity against the interests of decisional finality is, as Witt stated, so important in capital cases. In Witt this Court stated that, "[e]volutionary refinements in the criminal law, affording new and different standards for the admissibility of evidence, for procedural fairness, for

proportionality review of capital cases, and for other like matters," are not retroactively cognizable in postconviction proceedings because "[e]mergent rights in these categories, or the retraction of former rights of this genre, do not compel an abridgement of the finality of judgments." 387 So. 2d 922, 929. This Court was convinced that giving such refinements in the law retroactive effect would "destroy the stability of the law, render punishments uncertain and therefore ineffectual, and burden the judicial machinery of our state, fiscally, and intellectually, beyond any tolerable limit." Id. at 929 (emphasis added).

Rule 3.850, Florida Rules of Criminal Procedure, was modeled after 28 U.S.C. Section 2255. And as this Court has stated, ?constructions of the federal statutes have generally been considered persuasive for questions which arise under the Florida rule.? Witt, 387 So.2d 922, 927. It is, therefore important to note that subsequent to this Court?s holding in Witt, the United States Supreme Court altered its retroactivity jurisprudence in Teague v. Lane, 489 U.S. 288 (1989). In Teague, the Supreme Court adopted a general rule of nonretroactivity when it held that ?new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced.? Id. at 310. (Emphasis added). This rule was adopted in response to criticism that following the standards enumerated in Stovall and Linkletter led to inconsistent results. Underscoring the importance of finality, the Supreme Court noted that, ?applying constitutional rules not in effect at the time a conviction became final seriously undermines the principle of finality which is essential to the operation of our criminal justice system.? Id. at 309. As Justice Harlan noted in his concurring and dissenting opinion in Mackey v. United States, 401 U.S. 667, 691 (1971), ?No one, not criminal defendants, not the judicial system, not society as a whole is benefited by a judgment providing that a man shall tentatively go to jail today, but tomorrow and every other day thereafter, his continued incarceration shall be subject to fresh litigation.?

This Court should decide the retroactivity issue before reaching King?s claim on the merits. Indeed, to the extent this Court is guided by Teague, it must decide the issue of retroactivity prior to reaching the merits. According to Teague, when issues of both retroactivity and application of constitutional doctrine are raised, the retroactivity issue should be decided first.? 489 U.S. at 300. That being said, re-examination of Witt in light of Teague is unnecessary because under either Witt or Teague the outcome is the same - Ring fails the test of retroactivity.

If, however, this Court, applying Witt, decides that Ring is retroactive, it

would then be confronted with Teague?s prohibition against retroactive application of United States Supreme Court decisions in collateral proceedings. In that event, Teague would control.

While this Court is free to determine whether its own decisions interpreting the Florida Constitution should be retroactively applied in collateral proceedings, it is not free to determine the retroactive application in collateral proceedings of Supreme Court decisions regarding federal questions. Only the United States Supreme Court is empowered to do that. If state courts were allowed to do so, all fifty states could reach contradictory results leading to the complete lack of uniformity Teague was designed to prohibit. As a result, the convicted person?s right to the benefits of the ?new law? would depend solely upon the whim of the jurisdiction where the crime was committed. That, of course, would constitute an unacceptable denial of equal protection under the law.

For the reasons set forth above, Ring should not be given retroactive application to cases on collateral review. As such, King?s petition should be denied without reaching the merits of his claim.

C. RING V. ARIZONA PROVIDES NO BASIS FOR RELIEF IN THE PETITIONER?S CASE.

In Apprendi, the United States Supreme Court held that ?the Constitution requires that any fact that increases the penalty for a crime beyond the prescribed statutory maximum, other than the fact of a prior conviction, must be submitted to a jury and proved beyond a reasonable doubt.? 530 U.S. 466 (2000)(emphasis added). At the time Apprendi was decided, however, the Court refused to overrule Walton v. Arizona, 487 U.S. 639 (1990). Thus, the rule announced in Apprendi did not initially extend to state capital sentencing schemes requiring a judge, sitting without a jury, to find specific aggravating factors prior to imposing a death sentence. See 530 U.S. at 496. Only when it was ultimately confronted with the issue in Ring, 122 S.Ct. 2428 (June 24, 2002), did the Court decide to extend the Apprendi rule to capital cases.

Ring's claim, however, was ?tightly delineated.? Id. at 2437, n.4. Unlike King, no aggravating circumstances involving past convictions were presented in Ring's case. Thus, Ring did not challenge the Court's holding in Almendarez-Torres v. United States, 523 U.S. 224 (1998). The issue in Almendarez-Torres was whether the federal statutory subsection authorizing a sentence of up to 20 years for any alien who illegally returned to the United States, after having

previously been convicted of an aggravated felony, was merely a penalty provision, or whether the provision served to define a separate immigration-related offense. Id. at 226. Ultimately, the Court rejected the petitioner's claim that his prior conviction must be treated as an element and charged in the indictment, when it held that the statutory subsection was a "penalty provision, which simply authorize[d] a court to increase the sentence for a recidivist." Id.

The rule announced in Ring may be significant in the context of capital sentencing when the factor of a prior violent felony conviction is not involved. However, it is relatively insignificant in cases, like King's, where a prior violent felony conviction exists. Under any view of the law, the jury is not required to make a factual determination that a prior violent felony exists in a particular case. The judge can find that aggravating circumstance alone. Logic dictates that King's robbery conviction/aggravator precludes reliance on Ring, for under the plain language of Almendarez-Torres and Apprendi, King's sentence survives.

In affirming King's death sentence, this Court made the following findings regarding the aggravating circumstances:

> "At the federally mandated resentencing proceeding the trial court empanelled a new jury, both sides presented evidence and argument, and the jury unanimously recommended that King be sentenced to death. The trial court imposed a death sentence, finding five aggravating circumstances (committed while under sentence of imprisonment, previous conviction of violent felony, great risk of death to many persons, committed during burglary and sexual battery, and wicked, evil, atrocious, or cruel) and no mitigating factors?
>
> King presented several family members, friends, and people involved with prison ministries who testified as to King's childhood, his life in general, and his conduct while in prison. As noted before, however, the jury unanimously recommended that he be sentenced to death which the trial court did, finding five aggravating circumstances and nothing in mitigation. Our review of this record shows ample support for the trial court's findings except for finding that King knowingly created a great risk of death to many persons by setting fire to the murder victim's house.
>
> ?Upon reconsideration we find that this aggravating factor should be

> invalidated?After striking this factor, however, we are left with four valid aggravating circumstances and no mitigating circumstances. We therefore affirm King's sentence of death."

King v. State, 514 So. 2d 354, 359-360 (Fla. 1987)(emphasis added).

The prior violent felony aggravating circumstance found beyond a reasonable doubt in King's case was outside the scope of the Apprendi/Ring holdings. Two of the remaining three aggravating factors (the crime was committed while King was under sentence of imprisonment and the crime was committed during a burglary and sexual battery) were proved beyond a reasonable doubt during the guilt phase at trial when, in addition to murder in the first degree, the jury found King guilty of escape, involuntary sexual battery, and burglary. To the extent the other factor was not outside the scope of Ring and Apprendi or implicit in the jury's verdict, reliance on that factor is subject to a harmless error analysis. See Ring,122 S.Ct. 2428, n.7 (June 24, 2002)(remanded for harmless error analysis based on State's assertion that a pecuniary gain finding was implicit in the jury's verdict).

Clearly, no possible prejudice exists on the facts of King's case. Even if this Court strikes three of the four aggravators, King's sentence will stand on the prior violent felony conviction alone. See Ferrell v. State, 680 So. 2d 390, 391-92 (Fla. 1996)(affirming death sentence after proportionality review where defendant had one aggravator consisting of a prior second-degree murder, with several nonstatutory mitigating circumstances). Therefore, no relief is justified.

D. THIS COURT SHOULD NOT ISSUE AN ADVISORY OPINION ON THE IMPACT OF RING IN FLORIDA.

King?s broad challenge to Florida?s death penalty scheme goes beyond the issues presented by the facts of his case. If this court ventures into a dissertation of the possible ramifications of Ring, without regard to the facts of the case before it, it would be doing what it expressly prohibits - entering an impermissible advisory opinion and declaratory judgment.

As Justice Wells aptly points out in his dissent in this Court's Order Granting Stay of Execution and Setting Oral Argument, "[n]o United States constitutional law applicable to the Florida capital sentencing statute has been held by the Supreme Court of the United States to have changed." King v. Moore, No. SC02-1457, at 18 (Fla. July 8, 2002), Wells, J. dissenting. Therefore, since the United States Supreme Court declined to disturb its prior decisions upholding the constitutionality of Florida's capital sentencing structure, this Court cannot and must not look beyond the four corners of King?s case to opine, as Justice Pariente suggests, on the "far-reaching implications of Ring." Id. at 5 n.3 (Fla. July 8, 2002), Pariente, J. concurring. If this Court is to evaluate anything, it must be the validity of King's judgment and sentence, not the impact of Ring in Florida.

The United States Supreme Court does not issue advisory opinions Therefore, its failure to explicitly approve, once again, the validity of Florida's death penalty procedures in Ring is no invitation or command that this Court issue an advisory opinion on the effect of Ring in Florida. In fact, this Court has held that it has no jurisdiction to render general declaratory opinions or advisory opinions. Santa Rosa County v. Administration Commission, Division of Administrative Hearings, et al., 661 So.2d 1190, 1193 (Fla. 1995)(?it is well settled that ?Florida courts will not render, in the form of a declaratory judgment, what amounts to an advisory opinion at the insistence of parties who show merely the possibility of legal injury on the basis of a hypothetical 'state of facts which have not arisen' and are only 'contingent, uncertain, [and] rest in the future.'?).

E. THE COURT SHOULD REJECT PETITIONER?S FACIAL CHALLENGE TO FLORIDA?S DEATH PENALTY LAW.

Based on the foregoing, this Court should dismiss the petition and

dissolve the stay of execution without reaching the merits of King?s claim. However, to the extent this Court disagrees and reaches King?s broader challenge to Florida?s death penalty statute, the Governor relies on the argument advanced by the Attorney General on behalf of the Respondent, Michael Moore.

CONCLUSION

For the reasons set forth above, this court should dismiss King?s Petition for Writ of Habeas Corpus and immediately dissolve the previously entered stay of execution.

Respectfully submitted,

CHARLES T. CANADY
Florida Bar No. 283495
General Counsel
WENDY W. BERGER
Florida Bar No. 974838
Assistant General Counsel
Executive Office of the Governor
209, The Capitol
Tallahassee, FL 32399-0001

ARTHUR I. JACOBS
General Counsel
Florida Bar No. 108249
Florida Prosecuting Attorneys
Association, Inc.
P. O. Box 1110
Fernandina Beach, FL 32035-1110

RAYMOND L. MARKY
Assistant State Attorney, 2d Circuit
Florida Bar No. 0506

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been forwarded via U. S. Mail this 1st day of August, 2002, to those parties listed below.

CHARLES T. CANADY

William Jennings, Esquire
Kevin T. Beck, Esquire
Office of the Capital Collateral
Regional Counsel
3801 Corporex Park Drive, Suite 201
Tampa, Florida 33619

Mark E. Olive, Esquire
Law Offices of Mark E. Olive, P.A.
320 West Jefferson Street
Tallahassee, Florida 32301

Robert A. Butterworth, Esquire
Attorney General
Carol M. Dittmar, Esquire
Senior Assistant Attorney General
Stephen D. Ake, Esquire
Assistant Attorney General
2002 North Lois Avenue, Suite 700
Tampa, Florida 33607-2366

CERTIFICATE OF COMPLIANCE

I CERTIFY that the foregoing Brief complies with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

CHARLES T. CANADY