IN THE SUPREME COURT OF FLORIDA

AMOS LEE KING,

Petitioner,

vs. **CASE NO. SC02-1457**

MICHAEL W. MOORE,

Respondent.

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RESPONDENT'S ANSWER BRIEF IN SUPPORT OF RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

CAROL M. DITTMAR
Senior Assistant Attorney General
Florida Bar No. 0503843

STEPHEN D. AKE
Assistant Attorney General
Florida Bar No. 0014087

2002 North Lois Avenue, Suite 700
Tampa, Florida 33607-2366
Phone: (813) 801-0600
Fax: (813) 356-1292

COUNSEL FOR RESPONDENT

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STATEMENT OF THE CASE AND FACTS

The facts of this case are outlined in this Court's opinion on direct appeal, King v. State, 390 So. 2d 315, 316-17 (Fla. 1980), cert. denied, 450 U.S. 989 (1981):

> On March 18, 1976 [sic], the appellant was an inmate at the Tarpon Springs Community Correctional Center, a work release facility, serving a sentence for larceny of a firearm. On this date a routine bed check was made by James McDonough, a prison counselor, at about 3:40 a. m. The appellant King was absent from his room. The counselor began a search of the building grounds and found the appellant outside the building. Appellant was wearing light-colored pants which had the crotch portion covered with blood. The counselor directed King back to the office control room inside the building. When the counselor turned to get handcuffs, King attacked him with a knife. A struggle ensued, and the counselor received several cuts and stab wounds. King left the office, then returned and found the counselor talking to his superior on the phone. He stabbed the counselor again and cut the telephone cord.
>
> At approximately 4:05 a. m., the police and fire personnel arrived at the scene of a fire at a house approximately 1500 feet from the correctional center. The police officers discovered the body of Natalie Brady. She had received two stab wounds, bruises over the chin, and burns on the leg. An autopsy revealed other injuries, which included bruises on the back of the head, hemorrhaging of the brain, hemorrhaging of the neck, and broken cartilage in the neck. There was a ragged tear of the vagina, apparently caused by the wooden bloodstained knitting needles which were found at the scene, as well as evidence of forcible intercourse. Appellant's blood type was found in Brady's vaginal washings. The medical examiner attributed Mrs. Brady's death to multiple causes and

> established the time of death as 3:00 a.m. Arson investigators concluded that the fire was intentionally set at approximately 3:00 to 3:30 a.m.

Petitioner King was charged by an indictment filed on April 7, 1977, with first degree murder, sexual battery, burglary, and arson. These charges were ultimately consolidated with charges of attempted first degree murder and escape that had been previously filed based on King's actions at Tarpon Springs Correctional Center. Following a jury trial before the Honorable John S. Andrews, Circuit Court Judge, King was convicted as charged on all counts and sentenced to death.

This Court affirmed King's convictions and sentences and upheld them against postconviction challenges, but King was granted a new sentencing proceeding from the Eleventh Circuit Court of Appeals, based on a finding that penalty phase counsel had provided ineffective assistance. King v. State, 407 So. 2d 904 (Fla. 1981); King v. Strickland, 748 F.2d 1462 (11th Cir. 1984), cert. denied, 471 U.S. 1016 (1985), previous history, 714 F.2d 1481 (11th Cir. 1983).

The resentencing proceeding commenced on November 4, 1985, before the Honorable Philip J. Federico, Circuit Court Judge. At the conclusion of the resentencing, a twelve person jury unanimously recommended the death penalty. On November 7, 1985, Judge Federico imposed a sentence of death, finding that five

aggravating circumstances (murder committed by a defendant under sentence of imprisonment; murder committed by a defendant with prior violent felony convictions; defendant knowingly created a great risk of death to many persons; murder committed during a burglary and sexual battery; and murder committed in an especially heinous, atrocious, or cruel manner), and no mitigating circumstances applied. This Court struck reliance on the aggravating factor of great risk of death to many persons, but affirmed the death sentence. King v. State, 514 So. 2d 354 (Fla. 1987), cert. denied, 487 U.S. 1241 (1988).

King's subsequent appeals were denied in state and federal court. King v. State, 597 So. 2d 780 (Fla. 1992); King v. Dugger, 555 So. 2d 355 (Fla. 1990); King v. Moore, 196 F.3d 1327 (11th Cir. 1999), cert. denied, 531 U.S. 1039 (2000). On November 19, 2001, Governor Jeb Bush signed a death warrant, and King's execution was scheduled for January 24, 2002. This Court and the Eleventh Circuit Court of Appeals denied King's requests for relief, but the United States Supreme Court granted a stay of execution pending resolution of King's certiorari petition. King v. State, 808 So. 2d 1237 (Fla.), cert. denied, 122 S. Ct. 932 (2002); King v. Moore, Case No. 02-10317-P (11th Cir. Jan. 22, 2002), reh. denied, Jan. 24, 2002. The stay was vacated when certiorari review of this Court's denial of relief was denied on June 28, 2002.

Governor Bush thereafter designated the week of July 8, 2002, through July 15, 2002, for King's execution, and the execution was rescheduled for July 10, 2002. On July 5, 2002, King filed the instant petition for writ of habeas corpus. A response was filed on July 7, and King filed a reply on July 8. This Court thereafter entered an indefinite stay of execution, and ordered a briefing schedule and oral argument. The instant brief is offered pursuant to an amended briefing schedule issued on July 11, 2002.

SUMMARY OF THE ARGUMENT

This Court should not reach the merits of King's claim, as his substantive argument is not properly before this Court. His successive challenge to the facial validity of the death penalty statute is procedurally barred, and longstanding principles of appellate review mandate that this Court reject King's plea for relief. Furthermore, Ring v. Arizona, 122 S. Ct. 2428 (2002) is not retroactive; criminal procedural changes are to be applied prospectively only. Accordingly, even if this Court should conclude that Ring demands changes in our sentencing procedures, there is no basis to apply those changes on collateral review.

Notwithstanding the procedural bar, there is no reasonable basis to conclude that Florida's capital sentencing statute is constitutionally infirm as inconsistent with the Sixth Amendment right to a jury trial. King's reliance on Ring offers no basis for a contrary result on this issue. The extension of Apprendi in Ring is based solely on Arizona law. Florida law does not suffer the same infirmities and affords King no basis for relief. Unlike Arizona, in Florida the statutory maximum sentence for first degree murder is death and Florida juries make all constitutionally required factual findings for the determination of death eligibility.

Moreover, Florida's statute passes Sixth and Eighth Amendment

constitutional muster because it also includes jury participation in the sentencing process, and the jury's role is in no way compromised by the fact that a judge has made additional findings which not only authorize a death sentence but determine the sentence to be proper on the facts presented, or by the requirement of additional written findings from the judge.

King is asking this Court to invalidate Florida's capital sentencing statute because the jury does not make the ultimate sentencing determination, yet no authority for doing so exists. Florida's statutory scheme has been repeatedly upheld by the United States Supreme Court and this Court has no authority to overrule, on federal constitutional grounds, the many cases upholding the validity of the Florida statute. As no relief is warranted, the petition should be denied and the Stay of Execution should be lifted.

ARGUMENT

PRELIMINARY STATEMENT

This Court's stay of King's execution was put in place after the United States Supreme Court issued its decision in Ring v. Arizona, and lifted the stay of execution it had previously imposed. However, in light of Cannon v. Mullin, 2002 WL 1587921 (10th Cir. July 19, 2002) (copy attached), cert. and stay of execution denied, 2002 WL 1633127 (U.S. July 23, 2002), the stay should be lifted because it is now clear that Ring has no retroactive application. And, because Florida and Arizona have radically different capital sentencing schemes, as is discussed at length herein, Florida's death penalty statute is unencumbered by Ring. King's petition should be denied.

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

Petitioner King is before this Court seeking a determination that Florida's capital sentencing statute is facially unconstitutional. His argument relies primarily on the Sixth Amendment principle in Apprendi v. New Jersey, 530 U.S. 466, 490 (2000), holding that "[o]ther 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 the jury, and proved beyond a reasonable doubt." King's argument is that,

because our sentencing statute requires independent factual findings by a trial judge beyond the facts found by the jury's verdict, the statute is facially invalid. While relief was denied on this very basis earlier this year, King now resurrects the same claim under the guise Ring v. Arizona, supra, clarifies the Apprendi application by urging Ring has changed the Florida death penalty dynamic. King is wrong.

King's brief fails to properly describe or address the jury's actual role in Florida; his argument focuses exclusively on the fact that the trial judge is required, by statute, to make additional findings beyond the jury's actions. However, it is the actions of the jury itself, rather than additional procedures for reliability which have been implemented to comply with Eighth Amendment principles, which are at issue in Ring. Additional Eighth Amendment procedures above and beyond the jury's fulfillment of its death-qualifying role do not interfere with the Sixth Amendment rights discussed in Ring and Apprendi.

As will be seen, King is not entitled to any relief. King's concern with a lack of jury findings is not implicated in this case. King's sentence is premised on a prior violent felony conviction; in addition, his jury specifically and unanimously found necessary facts to permit the imposition of the death penalty. King was convicted of sexual battery, arson, and

burglary, as well as escape, which necessarily included a finding that King was under a sentence of imprisonment. Therefore, multiple aggravating factors were properly found by the jury and trial judge, and King has no credible Sixth Amendment argument before this Court.[1] His petition must be denied.

I. King's claim based upon Ring v. Arizona is procedurally barred, because King did not present this issue in a timely manner and because this Court has previously denied relief on King's Apprendi claim.

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[1]As of July 30, 2002, there are 371 inmates on Florida's death row based on the Department of Corrections' website. Of the 371 inmates, approximately 53 are on direct appeal. A review of the transcripts of those cases on direct appeal and the latest opinions affirming the judgment and sentence reveals that of the 371 inmates, **271 have as an aggravating factor a prior violent felony.** The scope of what a prior violent felony encompasses has had a torturous evolution in a series of cases, such as Meeks v. State, 339 So. 2d 186 (Fla. 1976) (contemporaneous convictions do not qualify as an aggravating circumstance under Sec. 921.141(5)); to Amos Lee King v. State, 390 So. 2d 315 (Fla. 1980) (citing Elledge v. State, 346 So. 2d 998 (Fla. 1977), that the legislative intent is clear that any violent crime for which there is a conviction at the time of sentencing should be considered as an aggravating factor); to Hardwick v. State, 461 So. 2d 79 (Fla. 1984) (recognizing that prior violent felony could include contemporaneous felony to victim); to Wasko v. State, 505 So. 2d 1314 (Fla. 1987) (change in law where contemporaneous felony on murder victim not prior felony aggravator); to Craig v. State, 510 So. 2d 857, 868 (Fla. 1987) (contemporaneous prior convictions involving another victim may be used as aggravation).

In spite of the fact that the prior violent felony aggravator was not applied consistently until **1987**, approximately **75% of the current cases fall outside of Apprendi/Ring, because of "just" the prior violent felony aggravator.** Add to the prior violent felony, under sentence of imprisonment and the number increases to 276; add to that an underlying felony conviction and the number goes to 289; add to that felony murders and **the number tops 348, or 90.33% of the cases meet the exception to Apprendi/Ring.**

Preliminarily, this Court must consider whether King's claim can be addressed on the merits. His challenge to the statute should have been presented to the trial court and on direct appeal, and is procedurally barred at this time. Eutzy v. State, 458 So. 2d 755 (Fla. 1984). This Court has repeatedly recognized that habeas petitions are not to be used as successive appeals, and that issues which could and should have been presented earlier will not be considered. Rutherford v. Moore, 774 So. 2d 637, 643 (Fla. 2000); White v. Dugger, 511 So. 2d 554 (Fla. 1987). Although Apprendi and Ring were not decided until after King's appeals, the basic argument that the Sixth Amendment required jury sentencing in capital cases was available and, in fact, routinely advanced around the time of King's trial and resentencing. See Hildwin v. Florida, 490 U.S. 638 (1989); Spaziano v. Florida, 468 U.S. 447, 472 (1984); Chandler v. State, 442 So. 2d 171, 173, n. 1 (Fla. 1983). King's failure to present this claim at the proper time procedurally bars this Court from consideration of this issue in his petition.

In addition, his Apprendi claim was rejected by this Court in the warrant proceedings litigated in January, 2002. King v. State, 808 So. 2d 1237 (Fla.), cert. denied, 122 S. Ct. 932 (2002). His current habeas cannot be used as a vehicle for reconsideration of that decision. Teffeteller v. Dugger, 734 So. 2d 1009, 1025 (Fla. 1999) (holding that habeas petition claims were procedurally barred

because the claims were raised on direct appeal and rejected by this Court or could have been raised on direct appeal); Medina v. State, 573 So. 2d 293 (Fla. 1990) (stating that it is inappropriate to use a different argument to relitigate the same issue).

There is nothing magical about an Apprendi claim, and there is no justification for a departure by this Court from the routine application of the well-settled state procedural bar rules. The Apprendi claim is procedurally barred under settled Florida law, and this Court should enforce that procedural bar in this case. Failure to apply the procedural bar will result in continuing uncertainty in the law, and, moreover, may well have unpredictable influences on cases which are currently pending.[2] That sort of destabilization in the law is unnecessarily burdensome, and will undoubtedly create unnecessary delay. Neither the legal issue presented, nor the facts of this particular case, provide justification for any exception to established Florida procedural law.[3]

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[2]While all potential ramifications cannot be predicted, unnecessary delay is inevitable. For example, pending federal habeas corpus cases have been "administratively closed" by the Middle District of Florida pending this Court's resolution of this issue. Rose v. Moore, 8:93-1169-Civ-T-23EAJ; Puiatti v. Moore, 8:92-CV-539-T-17EAJ; Brown v. Moore, 8:01-CV-2374-T-23TGW; Grossman v. Moore, 8:98-CV-1929-T-17MSS; Byrd v. Moore, 8:96-CV-771-T-23TGW.

[3]Notably, a person to whom a statute may be constitutionally applied may not typically challenge the statute on the ground that it may conceivably be applied unconstitutionally to others. See New York v. Ferber, 458 U.S. 747, 768 (1982); Grant v. State, 745

For these reasons, this Court should decline to address the merits of King's statutory challenge in this proceeding.

II. The Supreme Court's 2002 decision in Ring v. Arizona is not retroactively applicable to King's 1985 death sentence.

Another preliminary consideration involves whether this Court may apply Ring retroactively. It is clear that Ring is "simply an extension of Apprendi to the death penalty context." Cannon v. Mullin, 2002 WL 1587921, at *4.[4] Since Apprendi involves the

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So. 2d 519, 521 (Fla. 2d DCA 1999), quashed in part on other grounds, 770 So. 2d 655 (Fla. 2000). Although this proposition is traditionally cited to preclude facial challenges on grounds of vagueness, the underlying principles -- recognition of the personal nature of constitutional rights, and prudential limitations on constitutional adjudications -- apply equally in the instant case. See Ferber, 458 U.S. at 768. Thus, King's argument that the statute may be unconstitutionally applied in other scenarios not presently before the Court does not provide a basis for review of this issue.

This Court has acknowledged its obligation to construe enactments, where necessary, to provide judicial limitations in order to constitutionally uphold the statute. State v. Globe Communications Corp., 648 So. 2d 110 (Fla. 1994); Sandlin v. Criminal Justice Standards and Training Com., 531 So. 2d 1344 (Fla. 1988); Miami Dolphins, Ltd. v. Metropolitan Dade County, 394 So. 2d 981 (Fla. 1981). Since no such limitations are necessary in the instant case, where no Sixth Amendment violation has been credibly pled, the resolution of the issue is best left for consideration in a case where Sixth Amendment concerns are reasonably implicated.

[4]The Cannon court held, post-Ring, that under Tyler v. Cain, 533 U.S. 656, 661 (2001), "'the Supreme Court is the only entity that can 'ma[k]e' a new rule retroactive. The new rule becomes retroactive, not by the decisions of the lower courts or by the combined action of the Supreme Court and the lower courts, but simply by the action of the Supreme Court.'"

construction of a federal constitutional right, any question of possible retroactive application is governed by the federal principles. See Teague v. Lane, 489 U.S. 288 (1989).

The United States Supreme Court has directed that it is the only entity that can "make" a new constitutional rule retroactive, by expressly holding to that effect at the time the rule is announced. Tyler v. Cain, 533 U.S. 656, 663 (2001). The Court did not express any intention for Apprendi to be applied retroactively; to the contrary, the Court has indicated just the opposite.[5] Further, every court to address the issue has rejected the claim that Apprendi is retroactive. See United States v. Sanders, 247 F.3d 139, 150, 151 (4th Cir. 2002) (Apprendi is not retroactive under Teague v. Lane, 489 U.S. 288 (1989); Curtis v. United States, 294 F.3d 841 (7th Cir. 2002) (holding Apprendi is not retroactive because it is not a substantive change in the law; rather, it "is about nothing but procedure"); United States v. Moss, 252 F.3d 993 (8th Cir. 2001); Jones v. Smith, 231 F.3d 1227 (9th Cir. 2001);

[5]On the same day that Ring was released, Justice Thomas filed a dissenting opinion in a different case that was joined by Justices Stevens, Souter, and Ginsburg, in which he stated that "[n]o Court of Appeals, let alone this Court, has held that Apprendi has retroactive effect." Harris v. United States, 122 S. Ct. 2406, 2427 (U.S. June 24, 2002). In her dissent in Ring itself, moreover, Justice O'Connor, joined by the Chief Justice, stated that Ring is not retroactive. 122 S. Ct. at 2449. Because Ring is premised upon Apprendi, clearly six Justices on the United States Supreme Court have indicated their opinion that Ring is not retroactive.

United States v. Sanchez-Cervantes, 282 F.3d 664, 668 (9th Cir. 2002); McCoy v. United States, 266 F.3d 1245 (11th Cir. 2001); Whisler v. State, 36 P.3d 290 (Kan. 2001) (State Supreme Court determined Apprendi is not retroactive); Poole v. State, 2001 WL 996300 (Ala. Aug. 31, 2001) (same).

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 factfinding process being done by the judge rather than the jury). If the very right to a jury trial is not retroactively applicable, it stands reason on its head to suggest that a wholly procedural ruling like Ring should be retroactive.

The United States Supreme Court has also 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). No retroactive application is available under federal principles, *sub silentio*. See Cannon v. Mullin, supra, (affirming same); Puryear v. State, 810 So. 2d 901, 905 (Fla. 2002).

Even if considered under the principles of Witt v. State, 387 So. 2d 922, 929-30 (Fla. 1980), retroactive application is not appropriate. Pursuant to Witt, Apprendi is only entitled to retroactive application if it is a decision of fundamental significance, which so drastically alters the underpinnings of King'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 Apprendi, which did not directly or indirectly address Florida law, provides no basis for consideration of the relevant issue in this case.

King's argument that Ring presents a case of fundamental significance is not persuasive. He does not cite any cases which

provide any meaningful retroactivity analysis. Since, as will be seen, Ring has no impact on capital sentencing in Florida, it is not a case of fundamental significance. Clearly, neither Apprendi nor Ring demonstrate that any "obvious injustice" has occurred.[6] **All applicable case law establishes that any Apprendi/Ring application in Florida must be prospective only.**

III. Ring v. Arizona did not render Florida's capital sentencing statute unconstitutional.

Even if King's substantive claim is considered, however, he has failed to demonstrate any constitutional infirmity in Florida's capital sentencing scheme. King claims that the recently-decided Ring v. Arizona, 122 S. Ct. 2428 (2002), compels further consideration of Apprendi's rule on Florida's death penalty scheme. Ring, however, adds nothing to what this Court already knew from Apprendi, and therefore provides no basis for reconsideration of King's previously-rejected Apprendi claim. Apprendi clearly limits its application to 1) factual findings, other than prior convictions, 2) which increase the statutory maximum for a charged offense. In Ring, no prior conviction existed, and the Arizona Supreme Court determined that Arizona law prescribed only a life

[6]King has not even attempted to identify any possible prejudice resulting from alleged deficits in Florida's capital sentencing procedures in his case, obviating his argument that retroactive application is necessary in the interests of justice.

sentence upon Ring's conviction for murder. See Ring, at 2436; Ring v. State, 25 P.3d 1139, 1150 (Ariz. 2001). Thus, the Ring case fit squarely within the holding of Apprendi, and the Ring decision does not extend or expand the Sixth Amendment right discussed in Apprendi.

A. In Florida, unlike in Arizona, the jury finds the defendant eligible for death in the guilt phase of a capital trial.

Florida law, as this Court has recognized, is different than that in Arizona. In Mills v. Moore, 786 So. 2d 532, 538 (Fla. 2001), this Court expressly held that Apprendi was not implicated in Florida's death penalty statute because the statutory maximum for first degree murder was death. This Court did so with full knowledge of Apprendi's admonitions that statutory labels are not dispositive and that the relevant inquiry is not one of form, but of effect. Apprendi, 530 U.S. at 494. As posited in Apprendi, the question is "[d]oes the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?" Id.

A criminal defendant in Florida is clearly "exposed" to the death penalty upon conviction for first degree murder. King's brief only mentions Mills once, asserting that Mills was wrong in holding that Apprendi did not apply to capital sentencing. King

makes no attempt to analyze the Mills decision and he provides no basis for reconsideration of this Court's prior determination that death is the maximum sentence for first degree murder. Although Ring applied Apprendi to Arizona's capital sentence law, which the United States Supreme Court had previously misinterpreted under Walton v. Arizona, 497 U.S. 639 (1990), it did not cast any doubt on this Court's prior conclusion that Apprendi is not implicated under Florida's capital sentencing statute.

King does not even attempt to identify at what point a criminal defendant in Florida may be "exposed" to a proper death sentence, but he repeatedly asserts that the jury must make all of the necessary factual findings to support a death sentence; presumably, "exposure" in King's eyes does not occur until after the ultimate sentencing decision has been made. This ignores the plain language of Apprendi and Ring, which are only implicated when a defendant is exposed to a penalty exceeding the maximum sentence authorized by the jury's verdict. King fails to acknowledge that there is a difference between facing a potential sentence and actually having the sentence imposed. Apprendi, and by extension Ring, only address what potential sentence may be implicated by the jury's verdict; not the actual jury findings which King argues are necessary to impose the sentence.

This Court's holding in Mills demonstrates that the death

penalty in Florida is **authorized** as a potential sentence upon the jury's conviction for first degree murder. Mills is consistent with State v. Dixon, 283 So. 2d 1, 7 (Fla. 1972), where this Court noted:

> **It is necessary at the outset to bear in mind that all defendants who will face the issue of life imprisonment or death will already have been found guilty of a most serious crime, one which the Legislature has chosen to classify as capital.** After his adjudication, this defendant is nevertheless provided with five steps between conviction and imposition of the death penalty--each step providing concrete safeguards beyond those of the trial system to protect him from death where a less harsh punishment might be sufficient.

(Emphasis added). King has mistaken the five steps between conviction and imposition of the death penalty to each require jury findings in order to comply with Ring. However, these steps clearly involved the sentencing decision rather than the eligibility decision, and therefore Ring is inapplicable. In Florida, the determination of **death-eligibility** is made upon conviction of first degree murder or felony murder, at the guilt phase, and not at the penalty phase as in Arizona. Florida's sentencing procedures govern the **selection** determination, resolving whether the defendant will be selected for an already-authorized sentence of death under proscribed procedures ensuring individualized sentencing. Because death is the maximum sentence for first degree murder in Florida, even if not in Arizona, King's

claim collapses because nothing triggers the Apprendi protections. See Barnes v. State, 794 So. 2d 590 (Fla. 2001) (Apprendi claim not applicable where additional judicial finding did not increase statutory maximum).

King's sole attack on Florida's capital scheme is the requirement that a judge makes independent findings, specified in a written order. According to King, permitting a judge to hear additional facts and memorialize formal findings of fact and conclusions of law renders the entire scheme unconstitutional. King emphasizes that his constitutional right to a jury is a long-standing, well-respected ideal to protect him from the unchecked power of eccentric judges. However, he does not explain how this important constitutional right was denied on the facts of his case, or for that matter any Florida case. His complaint about the additional procedures under Florida law for judicial participation beyond the jury's non-binding recommendation is ironic; the very mechanisms built into the system to protect the reliability and integrity of the sentencing process are being used to assert that he was denied his right to jury fact-finding when he actually had not just a judge, or just a jury, but both.[7]

[7]To the extent that this Court has fashioned, in the past, perceived, necessary, additional procedures (such as Spencer hearings, the preference for individualized voir dire, the Tedder standard, the Campbell/Neibert sentencing order requirements, and limitations on aggravators) not found in the capital statute, recent discussions calling for special jury forms or clarification

The statutory maximum is properly determined by assessing the permissible range of punishment for a particular classification of criminal offenses. Under Florida law, as this Court held in Mills, first degree murder is a capital felony; as such, it may be punished by death or life in prison. The fact that a separate statute exists which requires procedures above and beyond the jury's verdict of guilt does not affect the statutory maximum for first degree murder. The concern that a jury's verdict *alone* "does not authorize" a death sentence is immaterial; the verdict obviously authorizes the additional procedures required for the imposition of a death sentence. Of course, this Court has not overruled Mills in any respect.

The Arizona Supreme Court's conclusion in Ring that "[t]he range of punishment allowed by law on the basis of the verdict alone is life imprisonment with the possibility of parole or imprisonment for 'natural life' without the possibility of parole," see Ring, 25 P.3d at 1151, is not binding on this Court with regard to Florida's capital sentencing procedures. Similarly, the United States Supreme Court Ring decision does not offer a basis for reconsideration of this Court's prior determination as to the statutory maximum for first degree murder; the Court accepted

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as to the capital jury instructions are issues that may arise, at some point, in an appropriate case. However, neither Ring nor Apprendi **require** such additional modifications.

Arizona's characterization of state law, recognizing it to be authoritative on the point. Ring, at 2440.

In Apprendi, the Court had described Arizona law: "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." Apprendi, 530 U.S. at 497. But in Ring, the Arizona Supreme Court disagreed with that characterization, and determined that the law operated as described by Apprendi's dissenters. The United States Supreme Court has properly described Florida law. See Proffitt v. Florida, 428 U.S. 242 (1976); Barclay v. Florida, 463 U.S. 939, 952 (1983) ("[I]f a defendant is found guilty of a capital offense, a separate evidentiary hearing is held before the trial judge and jury to determine his sentence."). If the defendant were not eligible for a death sentence, there would be no second proceeding.

The fact that Florida places the death-eligibility decision in the guilt phase does not render our statute unconstitutional. The United States Supreme Court has repeatedly acknowledged that there is no single, constitutional scheme that a state must employ in implementing the death penalty. Loving v. United States, 517 U.S. 748, 755 (1986); Lowenfield v. Phelps, 484 U.S. 231, 244 (1988); Spaziano v. Florida, 468 U.S. 447, 464 (1984).

King's entire argument is without merit. He claims that Florida's statute cannot be harmonized with the constitutional principles addressed in Apprendi and Ring because our statute imposes procedures requiring reliable, discernable judicial findings above and beyond the role of the jury. He has seriously confused the additional procedures which our legislature provided to avoid arbitrary jury sentencing with the determination of death-eligibility which is the narrow focus of Ring. The Ring decision offers no support for his position, and he has failed to demonstrate that Florida's statute is facially unconstitutional.

B. Even if death-eligibility requires the finding of an aggravating circumstance, Florida's sentencing scheme provides for sufficient jury factfinding with regard to eligibility.

Even if this Court were to determine that Ring compels a finding that a capital defendant is not constitutionally "exposed" to a death sentence as a possible punishment until such time as an aggravating factor is found to exist by a jury, Florida's capital sentencing statute remains valid. King's brief repeatedly asserts that the jury's role in sentencing is limited to providing an advisory opinion as to the appropriateness of the death penalty, without making any factual findings at all. This assertion is without merit. The jury's role in Florida's sentencing process is significant. Section 921.141, Florida Statutes, states:

> **(1) Separate proceedings on issue of penalty.**--Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by s. 775.082. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable. If, through impossibility or inability, the trial jury is unable to reconvene for a hearing on the issue of penalty, having determined the guilt of the accused, the trial judge may summon a special juror or jurors as provided in chapter 913 to determine the issue of the imposition of the penalty. If the trial jury has been waived, or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose, unless waived by the defendant. ...
>
> **(2) Advisory sentence by the jury.**--After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court, based upon the following matters:
>
> (a) Whether sufficient aggravating circumstances exist as enumerated in subsection (5);
>
> (b) Whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist; and
>
> (c) Based on these considerations, whether the defendant should be sentenced to life imprisonment or death.

This statute clearly refutes King's allegation that Florida's scheme was "designed" to "deny" any jury role in sentencing. To the contrary, the statute secures and preserves significant jury participation in further narrowing the class of individuals eligible to be sentenced to death. A jury recommendation of death

necessarily establishes that the jury fulfilled any constitutional role of determining the existence of an aggravating factor so as to authorize a subsequent, judicially-imposed death sentence.[8]

The importance of the jury's role was emphasized and discussed in Dixon, 283 So. 2d at 7-8:

> The second step of the sentencing procedure is that the jury--the trial jury if there was one, or a specially called jury if jury trial was waived--must hear the new evidence presented at the post-conviction hearing and make a recommendation as to penalty, that is, life or death. With the issue of guilt or innocence disposed of, the jury can then view the question of penalty as a separate and distinct issue. The fact that the defendant has committed the crime no longer determines automatically that he must die in the absence of a mercy recommendation. They must consider from the facts presented to them--facts in addition to those necessary to

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[8]To the extent that the Court has noted that jury overrides jeopardize the Florida capital sentencing scheme in light of Ring, that issue is not present in this case. However, when an override has been affirmed by this Court on appeal, this Court has always set out a constitutionally sound basis to support the trial court's rejection of the life recommendation. That the Court has done so in affirming reflects a finding by the Court that the jury's recommendation is flawed as to its' weighing responsibilities, not as to whether an aggravator has not been proven. In Florida, where the eligibility determination is made at the end of the guilt phase, a flawed life recommendation implicates neither the Sixth nor the Eighth Amendments. In light of the Court's application of the Tedder standard, acknowledged in Proffitt, supra, today only **ten** cases exist which involve an override. A prior violent felony aggravator was found in **nine** of those cases. See Coleman v. State, 610 So. 2d 1283 (Fla. 1992); Garcia v. State, 644 So. 2d 59 (Fla. 1994); Marshall v. State, 604 So. 2d 799 (Fla. 1992); Robinson v. State, 610 So. 2d 1288 (Fla. 1992); Washington v. State, 653 So. 2d 362 (Fla. 1994); Weaver v. State, Florida Supreme Court Case No. SC00-247 (appeal pending); Williams v. State, 622 So. 2d 456 (Fla. 1993); Zakrzewski v. State, 717 So. 2d 488 (Fla. 1998); Ziegler v. State, 580 So. 2d 127 (Fla. 1991).

> prove the commission of the crime--whether the crime was accompanied by aggravating circumstances sufficient to require death, or whether there were mitigating circumstances which require a lesser penalty.
>
> The third step added to the process of prosecution for capital crimes is that the trial judge actually determines the sentence to be imposed--guided by, but not bound by, the findings of the jury. To a layman, no capital crime might appear to be less than heinous, but a trial judge with experience in the facts of criminality possesses the requisite knowledge to balance the facts of the case against the standard criminal activity which can only be developed by involvement with the trials of numerous defendants. Thus the inflamed emotions of jurors can no longer sentence a man to die; the sentence is viewed in the light of judicial experience.

King criticizes our capital statute for permitting judicial findings beyond the findings which are made by the jury, but a fair review of the statutory procedures establishes that the judicial findings are complimentary to, and not in place of, any necessary jury findings at this stage. His entire claim is premised on the fallacy that Florida's law is just like Arizona's; he concludes that, if Arizona's law is unconstitutional, Florida's must be as well. Obviously, there are substantial differences between the two statutory schemes.

Arizona does not classify any offense as "capital". In its criminal statutes, the most serious category of homicide under Arizona law is first degree murder, which is a "class 1 felony." Ariz.Rev.Stat. Ann. § 13-1105 (West 2001). After the jury convicts

a defendant of a class 1 felony in Arizona, the judge, sitting alone, conducts a separate sentencing hearing and makes all factual findings with regard to the existence or nonexistence of aggravating factors, mitigating factors, or any other factual determinations required for the imposition of a death sentence. Ariz.Rev.Stat. Ann. § 13-703 (West 2001). The radical differences between the statutory procedures soundly defeats King's claim.

Although King relies heavily on the parallels between the Florida and Arizona schemes noted in Walton, he fails to acknowledge subsequent decisions establishing that Florida's law is quite different. For example, the United States Supreme Court has recognized that the jury in Florida is a "co-sentencer." Espinosa v. Florida, 509 U.S. 1079 (1992). The Espinosa Court did not retreat from the premise of Spaziano:

> We have often recognized that there are many constitutionally permissible ways in which States may choose to allocate capital sentencing authority. See id., at 389, 105 S.Ct., at 2736; Spaziano v. Florida, 468 U.S. 447, 464, 104 S.Ct. 3154, 3164, 82 L.Ed. 340 (1984). Today's decision in now way signals a retreat from that position. We merely hold that, if a weighing State decides to place capital sentencing authority in two actors rather than one, neither actor must be permitted to weigh invalid aggravating circumstances.

505 U.S. at 1082. Espinosa clearly demonstrates that the United States Supreme Court does not equate Florida law with the Arizona statute at issue in Ring, and King has offered no basis for this

Court to do so.

Florida uniquely chose to provide defendants with additional protections against improper death sentences by affording double checks against both the jury and judge findings; these added safeguards guarantee compliance with the Eighth Amendment without sacrificing any Sixth Amendment rights. Prior to penalty phase deliberations, a jury is instructed that it must "follow the law" and determine, first, whether sufficient aggravating circumstances exist to support the imposition of the death penalty. The jury is specifically told:

> If you have a reasonable doubt as to the existence of an aggravating circumstance, you should **find** that it does not exist. However, if you have no reasonable doubt, you should **find** that the aggravating circumstance does exist and give it whatever weight you feel it should receive.

Std. Jury Inst. in Crim. Cases, Homicide, 921.141 (emphasis added). King's jury was specifically instructed that, if it "found" that aggravating factors did not justify the death penalty, the recommendation should be for life; however, if sufficient aggravating circumstances were "found," there was a duty to determine whether mitigating circumstances existed which outweighed the aggravating circumstances (RS. T1721). Obviously, a jury's recommendation is not simply based on a collective community hunch as to the proper sentence, it is a reasoned, guided, decision which necessarily requires the jury to make particular factual findings.

King's claim that penalty phase jury recommendations do not involve fact-finding ignores the actual application of Florida law. Since our juries consider the evidence and make any constitutionally necessary factual findings, Florida's statute is fully consistent with the constitutional principles discussed in Ring.

C. Ring does not require the jury to make all findings of fact that affect the decision whether to impose the death penalty.

To the extent that King suggests a jury must do more, finding not only one but "sufficient" aggravating circumstances and weighing any aggravators against the applicable mitigating circumstances, he is clearly seeking to establish a right to jury "sentencing" which does not currently exist under any relevant authority. Notably, Ring does not require jury sentencing or prohibit judicial sentencing; it only interprets the jury's role in finding a defendant death-eligible. See Ring, at 2445 ("What today's decision says is that the jury must find the existence of the *fact* that an aggravating factor existed. Those States that leave the ultimate life-or-death decision to the judge may continue to do so.") (Scalia, J., concurring). As Justice Pariente has acknowledged, Ring left judicial sentencing permitted by Proffitt "undisturbed." Bottoson v. Moore, 27 Fla. L. Weekly S647, S652 (Fla. July 8, 2002) (Pariente, J., concurring).

Ring, at most, involves the requirement that a jury find an

aggravator when the factor of prior violent felony conviction is not present; it does not implicate any jury role in finding additional aggravators, nor mitigation, nor any weighing. Ring, at 2445 (Scalia, J., concurring) (explaining that the factfinding necessary for the jury to make in a capital case is limited to "an aggravating factor" and does not extend to mitigation); Ring, at 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 under the Arizona scheme). To be constitutionally eligible for the death penalty under the Eighth Amendment, 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."). Once a jury has found one aggravator, the Constitution is satisfied, the judge may do the rest. Since Florida's capital sentencing statute affords jury consideration on the existence of an aggravating factor, it comports with the Constitution as construed in Ring. King's presumptions that the jury must find all necessary facts, and that the judge is prohibited from fact-finding beyond what the jury expressly determined, are not supported by any

language in Ring or any other decision.[9]

In order for this Court to accept King's argument, it must overrule a number of United States Supreme Court decisions

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[9]In his footnote 20, King asserts that Ring not only changes federal constitutional law in Florida, but results in death sentences which violate state law by denying the right to a unanimous jury verdict on each element and notice in the indictment of all elements of the capital offense (Initial Brief, p. 25). These issues have been repeatedly resolved contrary to King's position, and Ring offers no basis for further consideration of his claims. See Card v. State, 803 So. 2d 613, 629 (Fla. 2001) (capital jury may recommend sentence by bare majority vote; standard jury instructions fully advise jury of proper role), cert. denied, 122 S. Ct. 2673 (2002); Larzelere v. State, 676 So. 2d 394, 407 (Fla. 1996) (rejecting claims that jury recommendation must be unanimous, that jury is improperly told its role is advisory, and that special verdict as to sentencing was required); Fotopoulos v. State, 608 So. 2d 784, 794 n.7 (Fla. 1992), cert. denied, 508 U.S. 924 (1993); Jones v. State, 569 So. 2d 1234 (Fla. 1990) (federal constitution does not require jurors to use a special verdict form and to unanimously agree on the existence of aggravating factors applicable); Hildwin v. State, 531 So. 2d 124, 128 (Fla. 1988) (rejecting claim that Florida law makes aggravating factors into elements of the offense so as to make the defendant death-eligible), aff'd., 490 U.S. 638 (1989); James v. State, 453 So. 2d 786 (Fla. 1984) (jury finding of culpability required by Enmund v. Florida, 458 U.S. 782 (1982), not required to be unanimous); Lightbourne v. State, 438 So. 2d 380 (Fla. 1983) (aggravating circumstances do not need to be charged in indictment; Alvord v. State, 322 So. 2d 533 (Fla. 1975) (jury recommendation need not be unanimous), cert. denied, 428 U.S. 923 (1976).

Ring did not address these issues, and although Ring, in part, overruled Walton v. Arizona, 497 U.S. 639 (1990), these claims had been rejected prior to Walton even being decided and do not, in any way, rely on Walton for support. Thus, Ring does not compel further consideration of these issues. In addition, there is no United States Supreme Court precedent which supports King's claims on these issues. See Schad v. Arizona, 501 U.S. 624 (1991) (jury need not agree on alternative theories of prosecution); Hurtado v. California, 110 U.S. 516 (1984) (holding there is no requirement for an indictment in state capital cases); Johnson v. Louisiana, 406 U.S. 356 (1972) (jury unanimity not required for twelve-person jury); Apodaca v. Oregon, 406 U.S. 404 (1972) (same); Williams v. Florida, 399 U.S. 78, 86 (1970) (Constitution does not require States to provide a jury of twelve persons).

interpreting federal constitutional law. Proffitt v. Florida, 428 U. S. 242, 252 (1976)(joint opinion of Stewart, Powell, and Stevens, JJ)(Court has never suggested that jury sentencing in a capital case is constitutionally required, and it would appear that judicial sentencing should lead, if anything to 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); Spaziano v. Florida, 468 U.S. 447 (1984)(Sixth Amendment not offended by judge imposing sentence of death where jury has recommended sentence of life imprisonment); Hildwin v. Florida 490 U.S. 638 (1989) (Sixth Amendment does not forbid judge to make written findings that authorize imposition of death sentence when jury unanimously recommends death sentence); Clemons v. Mississippi, 494 U.S. 738 (1990) (Neither Sixth nor Eighth Amendments preclude appellate court from upholding a death sentence based in part on an invalid or improperly defined aggravating circumstance either by reweighing of aggravating and mitigating evidence or by harmless error review); Cabana v. Bullock, 474 U.S. 376 (1985) (Constitution permits appellate court-rather than requires jury or trial court-to determine if the intent element required by Enmund v. Florida 458 U.S. 782 (1982) has been satisfied); Blystone v. California, 494 U.S. 299, 306-307 (1990) (Constitution does not require a State to ascribe any specific

weight to particular factors either in aggravation or mitigation to be considered by the sentencer); Harris v. Alabama, 513 U. S. 504 (1995) (Eighth Amendment not violated by trial judge overriding jury life recommendation without according "great weight" to that jury recommendation as required by the state law of Alabama's sister state, Florida); see also Barclay v. Florida, 463 U.S. 939 (1983); Dobbert v. Florida, 432 U.S. 282 (1977); Gardner v. Florida, 430 U.S. 349 (1977).

King now claims that Ring necessarily, implicitly overruled all of these cases, "[s]ure as one plus one equals two, and sure as two minus two equals zero" (Initial Brief, p. 21). While this assertion demonstrates a good grasp of simple math, it reflects a poor understanding of legal precedent. Respectfully, this Court has no authority to presume that the United States Supreme Court has implicitly overruled a dozen prior cases. 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, despite the obvious opportunity to do so in this very

case, and that result is dispositive of King's claim.

D. Florida law is not inconsistent with Apprendi. Ring is the application of Apprendi to Arizona law, however, any application of Ring to Florida is prospective only.

In Ring, the United States Supreme Court discussed at length the misapprehension of Arizona law which led to the Walton and Apprendi decisions. Ultimately the Court concluded:

> The Arizona Supreme Court, as we earlier recounted, see supra, at 2435- 2436, found the *Apprendi* majority's portrayal of Arizona's capital sentencing law incorrect, and the description in Justice O'CONNOR's dissent precisely right: "**Defendant's death sentence required the judge's factual findings.**" 200 Ariz., at 279, 25 P.3d, at 1151. Recognizing that the Arizona court's construction of the State's own law is authoritative, *see Mullaney v. Wilbur*, 421 U.S. 684, 691, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975), we are persuaded that *Walton*, in relevant part, cannot survive the reasoning of *Apprendi*.

Ring, supra. [italics in original; emphasis added]. The true facts are that Walton, and, in turn, Apprendi, were based upon an error about Arizona capital sentencing. Those cases turned on the opinion, which proved to be erroneous.[10] However, the United States

[10]Had the Apprendi Court been **correct** in believing that Arizona's statute provided for a maximum sentence of death based upon conviction for a capital offense, Ring would have been decided differently. The fact remains that the United States Supreme Court **believed** the Arizona statute was like Florida's statute when that Court upheld it. That the Court was mistaken about Arizona law does not affect Florida's statute -- the United States Supreme Court struck Arizona's statute upon discovering that that statute was **not** like Florida's, and did not question the continuing validity of the Florida system. King, in his eagerness to inject confusion into this proceeding in order to capitalize on Ring,

Supreme Court in remaining completely silent, rendered the application of Apprendi/Ring, prospective only. This Court has "expressly stat[ed] that this Court does not intentionally overrule itself *sub silentio.*" Puryear v. State, 810 So. 2d 901, 905 (Fla. 2002). This Court should not presume that the United States Supreme Court does not follow the same practice. Likewise, in Florida,[11] upon a determination that potential Apprendi/Ring violations occur under the present statute, modifications[12] such as special jury forms and detailed capital jury instructions **can only be applied**

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continues the fallacious argument that "Arizona is just like Florida." The United States Supreme Court has implicitly rejected that argument, and it is palpably false.

[11]Comparison of the Florida and Arizona schemes requires caution because they are completely different in operation and in terminology. Unlike the Arizona statute, aggravating factors in Florida are not the "functional equivalent of an element of a greater offense" because a Florida defendant who has been convicted of first degree murder enters the penalty phase with his eligibility for a death sentence established by virtue of the jury's verdict of guilt. This must be so, because capital defendants often argue that the "during the course of an enumerated felony" aggravator is an "automatic" aggravator that is established at the guilt phase. See, e.g., Francis v. State, 808 So. 2d 110 (Fla. 2001); Hudson v. State, 708 So. 2d 256, 262 (Fla. 1998); Blanco v. State, 706 So. 2d 7, 11 (Fla. 1997); Banks v. State, 700 So. 2d 363 (Fla. 1997); Mills v. State, 476 So. 2d 172, 178 (Fla. 1985).

[12]To the extent King, early on, argued that the entire sentencing structure is flawed, he is in error. This Court can and has fashioned workable solutions to enhancing the application of Florida's sentencing procedure. Any call for a wholesale revamping by the Florida Legislature because of Ring, is unwarranted. This Court may craft procedures and rules or instructions that will address concepts discussed in Ring.

prospectively.[13]

The aggravating circumstances contained in Florida law are not, unlike their Arizona counterparts, equal to "elements of a greater offense" -- Florida determines death eligibility at the **guilt** stage, and Arizona did not. That distinction is the end of the issue.[14]

E. King's death sentence was not imposed in violation of Apprendi or Ring, and any possible Ring error on the facts of this case would clearly be harmless beyond any reasonable doubt.

King asserts that his sentence was "exactly like" that of Ring's (Initial Brief, p. 23); this assertion demonstrates his ignorance of the facts underlying the Ring decision. Timothy Ring was convicted by a jury on a charge of felony murder during the course of an armed robbery; the jury deadlocked on premeditation. Following his conviction, the jury was dismissed and his judge

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[13]Likewise, the fact that the Apprendi rationale has been extended to apply to the sentencing phase of capital cases does not mean that this Court committed some error in Mills by following the plain language of Apprendi and declining to extend it beyond the limitations set out in the opinion itself. That does not change the analysis of Florida law contained in Mills, nor does it somehow invalidate this Court's opinion.

[14]This Court correctly followed binding precedent in Mills when it declined to extend Apprendi to capital cases in light of the explicit language of that opinion. The fact that the Ring Court did so apply Apprendi does not mean that **this** Court misinterpreted **Florida** law -- those components of the Mills decision are independent of each other, **and nothing has called this Court's plain statement about the functioning of Florida law into question.** That portion of Mills is undisturbed by Ring, and, if for no other reason than *stare decisis*, should not be reconsidered in this case.

entertained the testimony of a co-defendant, who stated that Ring was the leader of the group and had fired the fatal shot. Based on that testimony, the judge concluded that Ring was eligible for the death penalty under Enmund v. Florida, 458 U.S. 782 (1982). The judge also applied the aggravating factors of "heinous, cruel or depraved," based on Ring's subsequent statements bragging about his marksmanship, and "pecuniary gain." On direct appeal, the Arizona Supreme Court struck the depravity factor, reweighed pecuniary gain against the mitigating factor of lack of a serious criminal record, and affirmed the death sentence. The court also addressed an Apprendi claim, and held that the United States Supreme Court had previously misconstrued the Arizona capital sentencing law; but the court acknowledged that, under the Supremacy Clause, it was bound by Walton since Walton had not been overruled.

The differences between King's sentencing and that of Timothy Ring are major: King was convicted of first degree murder punishable by a maximum penalty of death; King's sentence was permitted by the judicial finding of a prior conviction, whereas Ring's was not. King's sentence was recommended by a unanimous jury, after being properly instructed about how to make the necessary factual findings to return its advisory verdict, whereas Ring's sentence was imposed solely by the judge after hearing the only evidence about the defendant's death-eligibility.

Although there is no need to address the issue, King's

conclusion that a finding of error under Apprendi or Ring compels the imposition of a life sentence in his case deserves comment. The proper analysis, should any constitutional infirmity be identified, would be to determine whether any harmful error occurred on the facts of a particular case; furthermore, even if harmful error could be found to exist, the proper remedy would be a remand for a new penalty phase with constitutionally acceptable procedures. There is no basis for the life sentence which King requests.

King makes no attempt to identify any actual harm or even potential prejudice on the facts of his case. He emphasizes the importance of his right to a jury as necessary to protect him from the unchecked power of rogue judges, but cannot seriously suggest that his sentence is the result of a wildly unpredictable judge following a non-binding jury recommendation. It is clearly established that any possible Apprendi error can be rendered harmless by the facts of a particular case. See United States v. Cotton, 122 S. Ct. 1781 (2002) (failure to recite amount of drugs in indictment as required by Apprendi was harmless due to overwhelming evidence); Ring, at 2443, n.7 (remanding for a harmless error analysis). A unanimous jury recommended the death penalty, after King had been convicted of several offenses which independently established the existence of aggravating factors; his sentence is also supported by his prior violent felony conviction.

The fact that a judge made additional findings did not invalidate or diminish the jury's role in sentencing King to death. Clearly, no possible prejudice exists on the facts of his case, and no harmful error can be demonstrated.

CONCLUSION

King is not entitled to any relief. His petition for writ of habeas corpus must be denied, and the stay of execution must be vacated.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

_____
CAROL M. DITTMAR
Senior Assistant Attorney General
Florida Bar No. 0503843

_____
STEPHEN D. AKE
Assistant Attorney General
Florida Bar No. 0014087
2002 N. Lois Avenue, Suite 700
Tampa, Florida 33607-2366
(813) 801-0600
(813) 356-1292 (Fax)

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by facsimile/U.S. Mail to Kevin Beck, Assistant CCRC-M, 3801 Corporex Park Drive, Suite 210, Tampa, Florida 33619, and Robert Augustus Harper, Esq., 325 West Park Avenue, Tallahassee, Florida 32301-1413 this _____ day of July, 2002.

CERTIFICATE OF TYPE SIZE AND STYLE

This response is presented in 12 point Courier New, a font that is not proportionately spaced.

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COUNSEL FOR THE STATE