IN THE SUPREME COURT OF FLORIDA

AMOS LEE KING,

Petitioner,

v. **Case No. SC02-1457**

MICHAEL W. MOORE,

Respondent.

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RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS AND APPLICATION FOR STAY OF EXECUTION

COMES NOW, Respondent, MICHAEL W. MOORE, by and through the undersigned Assistant Attorneys General, and hereby responds to the Petition for Writ of Habeas Corpus and Application for Stay of Execution filed in the above-styled case. Respondent respectfully submits that all relief should be denied, and states as grounds therefor:

FACTS AND PROCEDURAL HISTORY

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.
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> 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 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 S0. 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 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. 2002), cert. denied, Case No. 01-7804 (U.S. June 28, 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. King's execution has been rescheduled for July 10, 2002.

ARGUMENT IN OPPOSITION TO CLAIM FOR RELIEF

King alleges that the recent decision of Ring v. Arizona, 2002 WL 1357257 (U.S. June 24, 2002), demonstrates that Florida's death penalty statute is unconstitutional, and compels the granting of a stay of execution. In Ring, the United States Supreme Court expressly overruled its prior decision in Walton v. Arizona, 497

U.S. 638 (1990), and held that Arizona's death penalty statute violated the Sixth Amendment right to a jury trial, "to the extent that it allows a sentencing judge, sitting without a jury, to find an aggravating circumstance necessary for imposition of the death penalty." The Ring decision is very narrow and limited in scope (2002 WL 1357257 at *9, n.4), and it has no impact on the sentence imposed in this case. For a number of reasons, King is not entitled to any relief.

PROCEDURAL BAR

First of all, King's challenge to the facial validity of Florida's capital sentencing scheme is procedurally barred. Although the Ring decision is recent, the statutory scheme and argument to present a claim that Florida's death penalty process violates the Sixth Amendment right to a jury trial has been available since King's sentencing, but were never asserted as a basis for relief until after the signing of his death warrant in 2001. Since King did not offer this claim in a timely manner, it is now barred.

In addition, the Ring decision is not subject to retroactive application under the principles of Witt v. State, 387 So. 2d 922, 929-30 (Fla. 1980). Pursuant to Witt, Ring is only entitled to retroactive application if it is a decision of fundamental significance, which so drastically alters the underpinnings of

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 Ring, which did not directly or indirectly address Florida law, provides no basis for consideration of Ring in this case.[1]

King's argument that Ring presents a case of fundamental significance is not persuasive. His claim relies on comments from

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[1]The United States Supreme Court recently held that an Apprendi claim is not plain error. United States v. Cotton, 122 S.Ct. 1781 (May 20, 2002) (holding an indictment's failure to include the quantity of drugs was an Apprendi error but it did not seriously affect fairness, integrity, or public reputation of judicial proceedings, and thus did not rise to level of plain error). If an error is not plain error cognizable on direct appeal, it is not of sufficient magnitude to be a candidate for retroactive application in collateral proceedings. United States v. Sanders, 247 F.3d 139, 150-151 (4th Cir 2002) (emphasizing that finding something to be a structural error would seem to be a necessary predicate for a new rule to apply retroactively and therefore, concluding that Apprendi is not retroactive). Every federal circuit that has addressed the issue had found that Apprendi is not retroactive. See, e.g., McCoy v. United States, 266 F.3d 1245 (11th Cir. 2001). The one state supreme court that has addressed the retroactivity of Apprendi has, likewise, determine that the decision is not retroactive. Whisler v. State, 36 P.3d 290 (Kan. 2001). Moreover, the United States Supreme Court has held that a violation of the right to a jury trial is not retroactive. DeStefano v. Woods, 392 U.S. 631 (1968) (refusing to apply the right to a jury trial retroactively because there were no serious doubts about the fairness or the reliability of the factfinding process being done by the judge rather than the jury).

the amicus brief filed on behalf of Florida and other states in the Ring case; such reliance is misplaced and inappropriate. The fact that the question accepted for review in Ring presented potential far-reaching implications does not mean that the ultimate opinion issued meets the Witt standard of fundamental significance. Since, as will be seen, Ring has little or no impact on capital sentencing in Florida, it is not a case of fundamental significance. Clearly, Ring does not demonstrate that any "obvious injustice" occurred on the facts of this case.

This is the third petition for writ of habeas corpus King has filed in this Court. Any issue which was or could have been raised in his prior petitions is clearly procedurally barred. See Lambrix v. Singletary, 641 So. 2d 847, 848 (Fla. 1994) ("Because ineffective assistance of counsel claims have been considered and rejected in a previous petition, Lambrix is procedurally barred from raising such claims again in a subsequent habeas petition"); Aldridge v. State, 503 So. 2d 1257 (Fla. 1987) (defendant procedurally barred from raising claim when such a claim has been raised previously even though the current claim is based on a different issue).

This Court has consistently and repeatedly stated that the habeas vehicle does not constitute a second appeal. Issues that were or could have been raised on direct appeal or in prior collateral proceedings may not be litigated anew. See 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); Johnson v. Singletary, 695 So. 2d 263, 265 (Fla. 1996); Medina v. State, 573 So. 2d 293 (Fla. 1990)(stating that it is inappropriate to use a different argument to relitigate the same issue).

The only issue raised in the instant petition -- a claim that Florida's capital sentencing scheme is facially unconstitutional because it violates the Sixth Amendment right to a jury -- could have been presented in an earlier petition. In fact, this same claim, premised on Apprendi v. New Jersey, 530 U.S. 466 (2000), was presented and rejected in a prior habeas petition and postconviction appeal before this Court, King v. State, 808 So. 2d 1237 (Fla. 2002), cert. denied, Case No. 01-7804 (U.S. June 28, 2002). Additionally, it was the only claim raised in the Petition for Writ of Certiorari before the United States Supreme Court, which was denied after the Court's decision in Ring. King. v. Florida, Case No. 01-7804 (U.S. June 28, 2002). Therefore, as Ring does not offer any basis to reconsider King's challenge to Florida's death penalty statute, facially or as applied, this Court should expressly reject the instant petition as procedurally barred. See Johnson v. Singletary, 647 So. 2d 106, 109 (Fla. 1994) ("Successive habeas corpus petitions seeking the same relief are

not permitted").

This point is further exemplified by this Court's express statement upon the denial of this identical claim presented by King in January 2002. This Court denied relief, stating:

> 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 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.
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> King v. State, 808 So. 2d 1237, 1245-1246 (Fla. 2002). (emphasis added)

Because this Court has determined that King is not entitled to relief on this issue, his petition should be denied. He is seeking a ruling on the possible implications of Ring to the prior rejection of his claim, but this Court denied relief with full knowledge of the possible implications of Ring. Any request for further review should be directed to the United States Supreme

Court. This Court has rejected the issue, and review of that decision has been denied. Thus, this Court's role has been satisified and the instant petition should be denied.

FLORIDA'S DEATH PENALTY STATUTE IS NOT UNCONSTITUTIONAL

Even if King's argument is considered, he has not demonstrated that he is entitled to any relief. It is important to recognize that, contrary to King's assertions, Ring does not require jury sentencing in capital cases. The case does not involve the jury's role in imposing sentence, but only the requirement that the jury find a defendant death-eligible. See Ring, at *18 ("What today's decision says is that the jury must find the existence of the *fact* that an aggravating factor existed") (Scalia, J., concurring). This is a critical distinction. The Court studied Arizona law and concluded that, because additional findings by a judge alone are required in order for the death penalty to be imposed, the "statutory maximum" for practical purposes is life, until such time as a judge has found an aggravating circumstance to be present. In other words, under the Arizona law examined in Ring, the jury plays no role in "narrowing" the class of defendants eligible for the death penalty upon conviction of first degree murder. This conclusion is consistent with the Arizona Supreme Court's description of state law, which recognized the statutory maximum permitted by the jury's conviction alone to be life. See Ring, at

*8; Ring v. State, 25 P.3d 1139, 1150 (Ariz. 2001).

King repeatedly asserts that Ring proves this Court "erred" in previously stating that Apprendi did not apply to capital sentencing procedures. See Mills v. Moore, 786 So. 2d 532 (Fla.), cert. denied, 121 S. Ct. 1752 (2001). To the contrary, Ring proves only that this Court was correct -- in fact, Apprendi is not a case about sentencing, and more importantly, neither is Ring. This point is made obvious by the bulk of King's petition, which suggests that aggravating circumstances are elements of the offense of capital murder rather than traditional sentencing factors. Apprendi and Ring both involve the jury's role in convicting a defendant of a qualifying offense, subject to the death penalty.

A clear understanding of what Ring does and does not say is essential to analyze any possible Ring implications to Florida's capital sentencing procedures. Notably, the Ring decision left intact all prior opinions upholding the constitutionality of Florida's death penalty scheme, including Spaziano v. Florida, 468 U.S. 447 (1984), and Hildwin v. Florida, 490 U.S. 638 (1989). It quotes Proffitt v. Florida, 428 U.S. 242, 252 (1976), acknowledging that ("[i]t has never [been] suggested that jury sentencing is constitutionally required."). Ring, at *9, n.4. In Florida, any death sentence which was imposed following a jury recommendation of death necessarily satisfies the Sixth Amendment as construed in Ring, because the jury necessarily found beyond a reasonable doubt

that at least one aggravating factor existed. Since the finding of an aggravating factor authorizes the imposition of a death sentence, the requirement that a jury determine the conviction to have been a capital offense has been fulfilled in any case in which the jury recommended a death sentence.

Even in the wake of Ring, a jury only has to make a finding of one aggravator and then the judge may make the remaining findings. Ring is limited to the finding of an aggravator, not any additional aggravators, nor mitigation, nor any weighing. Ring, at *18 (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 *19 (Kennedy, J., concurring) (noting that it is the finding of "an aggravating circumstance" that exposes the defendant to a greater punishment than that authorized by the jury's verdict). Constitutionally, to be eligible for the death penalty, all the sentencer must find is one narrower, i.e., one aggravator, at either the guilt or penalty phase. Tuilaepa v. California, 512 U.S. 967, 972 (1994) (observing "[t]o render a defendant eligible for the death penalty in a homicide case, we have indicated that the trier of fact must convict the defendant of murder and find one 'aggravating circumstance' (or its equivalent) at either the guilt or penalty phase."). Once a jury has found one aggravator, the

Constitution is satisfied, the judge may do the rest.[2]

Ring does not directly or indirectly preclude a judge from serving in the role of sentencer. There is no language in Ring which suggests that, once a defendant has been convicted of a capital offense, a judge may not hear evidence or make findings in addition to any findings a jury may have made. Justice Scalia commented that, "[t]hose States that leave the ultimate life-or-death decision to the judge may continue to do so." Ring, at *18 (Scalia, J., concurring). The fact that Florida provides an additional level of judicial consideration to enhance the reliability of the sentence before a death sentence is imposed does not render our capital sentencing statute unconstitutional. King unfairly criticizes state law for requiring judicial participation in capital sentencing, but does not identify how judicial findings after a jury recommendation can interfere with the right to a jury trial. Any suggestion that Ring has removed the judge from the sentencing process is not well taken. The judicial role in Florida alleviates Eighth Amendment concerns as well, and in fact provides defendants with another "bite at the apple" in securing a life sentence; it also enhances appellate review and provides a reasoned basis for a proportionality analysis.

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[2] We know this is true because the Court in Apprendi held, and reaffirmed in Ring, that a prior violent felony aggravator satisfied the Sixth Amendment; therefore, no further jury consideration is necessary once a qualifying aggravator is found.

The jury's role in Florida's sentencing process is also 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. ...
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> **(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:
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> (a) Whether sufficient aggravating circumstances exist as enumerated in subsection (5);
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> (b) Whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist; and
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> (c) Based on these considerations, whether the defendant should be sentenced to life imprisonment or death.

This statute clearly secures and preserves significant jury participation in narrowing the class of individuals eligible to be

sentenced to death. The jury's role is so vital to the sentencing process that the jury has been characterized as a "co-sentencer" in Florida. Espinosa v. Florida, 509 U.S. 1079 (1992).

In the instant case, King's sentence was recommended by a unanimous jury; a jury that had been instructed that aggravating factors had to be proven beyond a reasonable doubt. However, to the extent that he claims the death penalty statute is unconstitutional for failing to require juror unanimity, or the charging of the aggravating factors in the indictment, or special jury verdicts, Ring provides no support for his claims. These issues are expressly not addressed in Ring, and in the absence of any United States Supreme Court ruling to the contrary, there is no need to reconsider this Court's well established rejection of these claims. Sweet v. Moore, 27 Fla. L. Weekly S585 (Fla. June 13, 2002); Cox v. State, 27 Fla. L. Weekly S505, n.17 (Fla. May 23, 2002) (noting that prior decisions on these issues need not be revisited "unless and until" the United States Supreme Court recedes from Proffitt v. Florida, 428 U.S. 242 (1976)).

As this Court has recognized, "[t]he Supreme Court has specifically directed lower courts to 'leav[e] to this Court the prerogative of overruling its own decisions.' Agostini v. Felton, 521 U.S. 203, 237, 117 S.Ct. 1997, 138 L.Ed.2d 391 (1997) (quoting Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 484, 109 S.Ct. 1917, 104 L.Ed.2d 526 (1989))." Mills, 786 So.

2d at 537. The United States Supreme Court has declined to disturb its prior decisions upholding the constitutionality of Florida's capital sentencing process, and that result is dispositive of King's claims.

In addition, Ring affirms the distinction between "sentencing factors" and "elements" of an offense recognized in prior case law. See Ring at *14; Harris v. United States, 2002 WL 1357277 (U.S. June 24, 2002). King's argument, suggesting that the jury role in Florida's capital sentencing process is insufficient, improperly assumes the jury recommendation itself to be a jury vote as to the existence of aggravating factors. However, the jury vote only represents the final jury determination as to appropriateness of the death sentence in the case, and does not dictate what the jury found with regard to particular aggravating factors. When the jury recommends death, it necessarily finds an aggravating factor to exist beyond a reasonable doubt and satisfies the Sixth Amendment as construed in Ring. To the extent that Ring suggests that capital murder may have an additional "element" that must be found by a jury to authorize the imposition of the death penalty, that "element" would be the existence of any aggravating factor, and would not be the determination that the aggravating factors outweighed any mitigating factors established. King asserts that the jury must determine death to the appropriate sentence, but nothing in Ring supports King's speculation that the ultimate

sentencing determination is an additional "element" which must be proven beyond a reasonable doubt.

Moreover, to the extent that King claims that Ring requires that the aggravating circumstances be charged in the indictment and presented to a grand jury, that argument is based upon an invalid comparison of federal cases, which have wholly different procedural requirements, to Florida's capital sentencing scheme.[3] For example, in United States v. Allen, 247 F.3d 741, 764 (8th Cir. 2001), the Court of Appeals based its decision that the statutory aggravating factors under the Federal Death Penalty Act do not have to be contained in the indictment exclusively on Walton v. Arizona, which, of course, Ring overruled. It is hardly surprising that the United States Supreme Court remanded Allen for reconsideration in light of Ring.

The United States Supreme Court elaborated on Apprendi in Harris v. United States, which was released on the same day as Ring. In Harris, the Court described the holding in Apprendi in the following way:

> Apprendi said that any fact extending the defendant's sentence beyond the maximum authorized by the jury's verdict would have been considered an element of an

[3]Of course, the Fifth Amendment's grand jury clause has not been extended to the States under the Fourteenth Amendment. Apprendi, 530 U.S. at 477, n.3 (2000); Hurtado v. California, 110 U.S. 516 (1984) (holding there is no requirement for an indictment in state capital cases). This distinction, standing alone, is dispositive of the indictment claim, at least as far as King relies on federal cases.

> aggravated crime -- and thus the domain of the jury -- by those who framed the Bill of Rights.

Harris v. United States, 2002 WL 1357277 (U.S. June 24, 2002). In light of that plain statement by the United States Supreme Court, which speaks volumes in the interpretation of Ring, there is no basis for relief of any sort. This Court has clearly held that death was the maximum sentence which could be imposed on King by virtue of his conviction for the offense of first degree murder, and that is the end of the inquiry.

Therefore, Ring has no effect on prior decisions upholding Florida's capital sentencing scheme. This Court has previously recognized that the statutory maximum for first degree murder is death, and has repeatedly rejected claims similar to those raised herein. Cox v. State, 27 Fla. L. Weekly S585 (Fla. May 23, 2002); Bottoson v. State, 813 So. 2d 31, 36 (Fla. 2002), cert. denied, Case No. 01-8099 (U.S. June 28, 2002); Hertz v. State, 803 So. 2d 629, 648 (Fla. 2001), cert. denied, Case No. 01-9154 (U.S. June 28, 2002); Looney v. State, 803 So. 2d 656, 675 (Fla. 2001), cert. denied, Case No. 01-9932 (U.S. June 28, 2002); Brown v. Moore, 800 So. 2d 223, 224-225 (Fla. 2001); Mann v. Moore, 794 So. 2d 595, 599 (Fla. 2001), cert. denied, Case No. 01-7092 (U.S. June 28, 2002); Mills, 786 So. 2d at 536-38. This interpretation of state law demands respect, and offers a pivotal distinction between Florida and Arizona. Ring, at *13; Mullaney v. Wilbur, 421 U.S. 684 (1975). However, should there be any question about the

correctness of this conclusion, Florida juries routinely "authorize" the imposition of the death penalty by recommending that a death sentence be imposed, as in the instant case.

This Court previously rejected King's Sixth Amendment claim, and Ring offers no basis for reconsideration of that ruling. King's petition goes to great lengths to convince this Court that the United States Supreme Court's recent denial of certiorari review on this issue, after the Ring opinion was released, is meaningless. Recognizing that the denial of certiorari has no precedential value, it is clear under the circumstances of this case that King's Sixth Amendment claim is without merit. On June 28, 2002, the Court remanded four cases in light of Ring: Harrod v. Arizona, Case No. 01-6821; Pandelt v. Arizona, Case No. 01-7743; Sansing v. Arizona, Case No. 01-7837; and Allen v. United States, Case No. 01-7310. None of those remands is surprising. However, the Court denied certiorari in at least seven cases raising the "Ring" issue: Holladay v. Alabama, Case No. 00-10728; King v. Florida, Case No. 01-7804 (under warrant); Bottoson v. Florida, Case No. 01-8099 (under warrant); Mann v. Florida, Case No. 01-7092 (state habeas); Card v. Florida, Case No. 01-9152 (direct appeal); Hertz v. Florida, Case No. 01-9154 (direct appeal); and Looney v. Florida, Case No. 01-9932 (direct appeal). King's argument that the denial of certiorari was not a ruling on the merits ignores the fact that this Court's opinion, for which review

was sought, rejected his claim in a ruling on the merits and is now final, putting this issue to rest.

Obviously, if the Court had intended to apply Ring to Florida capital sentencing, it had every opportunity to do so. The fact that it did not speaks for itself. And although King speculates that certiorari was denied because the United States Supreme Court wants this issue to "percolate in the laboratories of the state courts," it is obvious that if the United States Supreme Court believed further consideration to be necessary, it could have easily remanded this cause to this Court for that purpose. See Allen v. United States, Case No. 01-7310 (U.S. June 28, 2002) (remanding for consideration of Ring); Cf. Hodges v. Florida, 506 U.S. 803 (1992) (vacating this Court's opinion and remanding for further consideration in light of Espinosa v. Florida, 509 U.S. 1079 (1992)).

Of course, King's death sentence was also supported by a prior violent felony conviction, which provides a basis to impose a sentence higher than authorized by the jury without any additional jury findings. See Almendarez-Torrez v. United States, 523 U.S. 224 (1998), Apprendi v. New Jersey, 530 U.S. 466 (2000). There is no constitutional violation because the prior conviction constitutes a finding by a jury which the judge may rely upon to impose an aggravated sentence. In addition, King's jury convicted him of burglary and sexual battery (necessarily finding the

aggravating factor of during the course of a felony), as well as escape (supporting the imposition of the under sentence of imprisonment aggravating factor); the Sixth Amendment is satisfied by these jury findings as they are additional facts which authorize the judicially-imposed sentence.[4]

STAY OF EXECUTION

King asserts that a stay of execution is necessary in order to permit meaningful consideration of his claim, an issue he characterizes as one of "surpassing importance." However, the facial constitutionality of Florida's death penalty statute is a settled question. Although the issue is presented for this Court's consideration in several pressing cases, it is the same issue mirrored in the Linroy Bottoson habeas petition and the William Coday extraordinary writ filed with this Court on July 5, 2002. The issue itself is not so complicated as to justify the granting of a stay. The Ring decision is not exceptionally long or legally complex, and this Court can easily determine that the two pending executions, both involving defendants with prior convictions, do not offer any basis to conclude that harmful Sixth Amendment error

[4]Ring is not such a cataclysmic change in the law that any Sixth Amendment violation premised on that decision must be deemed harmful. See Ring, at *16, n.7 (remanding case for harmless error analysis by state court); United States v. Cotton, 122 S. Ct. 1781 (2002) (failure to recite amount of drugs in indictment was harmless due to overwhelming evidence). On the facts of this case, no harmful error can be shown.

has occurred. No court has invalidated Florida's capital sentencing statute, and Ring has no direct application to the cases currently pending for extraordinary relief.

For all of the reasons discussed in this response, the Ring decision does not compel a colorable basis for the granting of relief in this case, and no stay of execution is justified in this case. See Delo v. Stokes, 495 U.S. 320 (1990); Antone v. Dugger, 465 U.S. 200 (1984); Buenoano v. State, 708 So. 2d 941, 951 (Fla. 1998), citing Bowersox v. Williams, 517 U.S. 345 (1996) (recognizing that stay of execution on second or third petition for postconviction relief is warranted only where there are substantial grounds upon which relief might be granted). King's request must be denied. See Booker v. Wainwright, 675 F.2d 1150 (11th Cir. 1982) (proper to grant a stay only if the petitioner has presented colorable, non-frivolous issues); Barefoot v. Estelle, 463 U.S. 880 (1983) (stay only justified when the petitioner presents claims which are debatable among jurists of reason).

CONCLUSION

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

Respectfully submitted,

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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, 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.

_____
COUNSEL FOR THE STATE