IN THE SUPREME COURT OF FLORIDA

CASE NO. SC03-1045

DWAYNE IRWIN PARKER

Petitioner,

v.

JAMES V. CROSBY,

Secretary, Florida Department of Corrections,

Respondent.

PETITIONER'S REPLY TO RESPONDENT'S RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

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Claim I

Respondent first argues that the claim is not cognizable to the extent the claim constitutes a challenge to the lower court's post-conviction order (State's Response at 7)[1]. However, Respondent acknowledges that Mr. Parker in the instant claim "challenges the court's sentencing analysis as it relates to mitigation . . ." and "alleges the court 'did not view the mitigation asserted by Mr. Parker (both at trial and in the Amended [postconviction] Motion) in its proper constitutionally required context . . . .'"(State's Response at 8 *quoting* Petition at 5)(emphasis added). Mr. Parker has asserted unequivocally that, because of the judge's erroneous understanding of the constitutionally required purpose and application of mitigation evidence, "[t]he court [in sentencing Mr. Parker] did not consider the proffered mitigation as reflecting on Mr. Parker's character, but merely considered whether or not it absolved him of responsibility for committing the crime." (Petition at 8).

Respondent misses the critical point that the instant claim is based on the revelation that occurred as a result of the judge's written order and comments at the *Huff* hearing that the

[1]Mr. Parker indeed has challenged the lower court's postconviction order on this ground.(*See* Initial Brief at 32-40).

judge's understanding of the law regarding the purpose and legal effect of mitigation in a capital case is fundamentally incorrect. Up until these post-conviction proceedings, Mr. Parker had no basis to know this fact (that the judge harbored an erroneous understanding of the law). Once this fact became known and was made part of the record in the form of the written postconviction order and the judge's comments, it became clear that not only did the judge's error of law detrimentally affect his analysis of Mr. Parker's penalty phase ineffectiveness claim (as argued in the Initial Brief at 32-40), but also detrimentally affected his original decision imposing the death penalty. If the judge did not know the law with respect to mitigation in 2002 when he issued the postconviction order, common sense dictates he did not know the law in 1990 when he sentenced Mr. Parker to death. The instant claim is not procedurally barred because the fact that the judge did not understand of the law of mitigation was unknown until 2002.

As to the merits of the instant claim, Respondent argues that because the judge made the statements at issue in the context of the order denying the postconviction claim of ineffective penalty phase counsel, the judge's statements cannot be used to attack his original sentencing decision. Respondent notes the obvious fact that the legal analysis required at

sentencing with respect to mitigation evidence presented by the defendant is different from the legal issues that must be addressed to decide a penalty phase ineffective assistance claim (State's Response at 9-11). Mr. Parker responds that, while this is certainly true, Respondent's point ignores the real issue. In denying the IAC claim in the written order, the court pronounces what in effect is the court's assessment of how the mitigation presented at trial (and in the IAC claim) impacted the sentencing equation. The court stated that mitigation evidence was presented "**at trial** . . . in an attempt to cast the defendant as a victim in this case, rather than the perpetrator" (PCR. 1494)(emphasis added). Thus, in the postconviction order, the trial court's comments went not only to the mitigation alleged in the IAC claim, but also specifically included the court's assessment of the evidence presented at trial. Respondent seemingly admits this when Respondent agrees that, in the postconviction order, the court "reiterated its assessment of the value of the trial mitigation previously rejected and affirmed on appeal" (State's Response at 13). This is the exactly the point. The postconviction order evidences on the part of the court the court's fundamentally erroneous view of the law that adversely affected the court's "assessment of the value of the trial mitigation".

Claims III and Claim IV

Respondent first argues that, because Mr. Parker did not raise any issue relating to *Ring* on direct appeal despite the "availability" of the claim, the issue is procedurally barred at this time (Response at 29).[2] Respondent asserts that the issues raised by Mr. Parker, or "variations" of them, were "known" prior to *Proffitt v. Florida*, 428 U.S. 242 (1976).

Respondent's arguments are meritless. Mr. Parker filed the instant petition based on the decision of the Supreme Court in *Ring v. Arizona*, 536 U.S. 584 (2002), and this Court's decisions in *Bottoson v. Moore*, 833 So. 2d 693 (Fla. 2002), and *King v. Moore*, 831 So. 2d 143 (2002). None of these cases had been decided at the time of Mr. Parker's direct appeal. Most importantly, this Court has addressed the merits of each claim asserting a *Ring* challenge brought by capital defendants, despite repeated attempts by the State to assert procedural bars and procedural defaults in each of those cases. These merits

[2]Respondent never acknowledges that Mr. Parker moved to dismiss the indictment on constitutional notice grounds because the indictment "does not properly charge a capital offense in that Statutory aggravating circumstances the State will rely on in order to obtain the death penalty are not alleged in the Indictment" (R. 2530).

rulings have been issued in cases arising on direct appeal[3], in motions for rehearing[4], in post-conviction settings[5], in successive state habeas petitions[6], and even merely in motions for supplemental authority[7]. Hence, it is clear that this Court

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[3]*See Lawrence v. State*, 2003 WL 1339010 at *8 (Fla. Mar. 20, 2003); *Lugo v. State*, 2003 WL 359291 at *28 n.79 (Fla. Feb. 20, 2003); *Kormondy v. State*, 2003 WL 297027 at *10 (Fla. Feb. 13, 2003); *Anderson v. State*, 841 So. 2d 390, 408-09 (Fla. 2003); *Cox v. State*, 819 So. 2d 705, 724-25 (Fla. 2002); *Hurst v. State*, 819 So. 2d 689, 702-03 (Fla. 2002).

[4]*See Butler v. State*, 2003 WL 1786712 (Fla. Apr. 3, 2003); *Grim v. State*, 841 So. 2d 455, 465 (Fla. 2003); *Doorbal v. State*, 837 So. 2d 940, 963 (Fla. 2003); *Chavez v. State*, 832 So. 2d 730, 767 (Fla. 2002).

[5]*See Jones v. State*, 2003 WL 21025816 at *5 (Fla. May 8, 2003); *Chandler v. State*, 2003 WL 1883682 at n.4 (Fla. Apr. 17, 2003); *Banks v. State*, 2003 WL 1339041 at *4 (Fla. Mar. 20, 2003); *Jones v. State*, 2003 WL 297074 at *9 (Fla. Feb. 13, 2003); *Spencer v. State*, 842 So. 2d 52, 72 (Fla. 2003); *Lucas v. State*, 841 So. 2d 380, 389 (Fla. 2003); *Porter v. Crosby*, 840 So. 2d 981, 986 (Fla. 2003); *Fotopoulos v. State*, 838 So. 2d 1122, 1136 (Fla. 2002); *Bruno v. Moore*, 838 So. 2d 485, 492 (Fla. 2002); *King v. Moore*, 831 So. 2d 143 (Fla. 2002); *Bottoson v. Moore*, 833 So. 2d 693 (Fla. 2002); *Sweet v. Moore*, 822 So. 2d 1269, 1275 (Fla. 2002); *Sireci v. Moore*, 825 So. 2d 882, 888 (Fla. 2002).

[6]*See also Van Poyck v. Crosby*, No. SC02-2661 (Aug. 20, 2003) (denying successive petition for habeas corpus raising *Ring* and *Ring*-related claims on the merits); *Chandler v. Crosby*, No. SC02-1901 (Jul. 7, 2003) (same); *Valle v. Crosby*, No. SC03-298 (Jun. 24, 2003) (same).

[7]*See Marquard v. State*, 2002 WL 31600017 at *10 (Fla. Nov. 21, 2002).

has repeatedly rejected procedural arguments raised by the State of Florida to *Ring* and *Ring*-based claims, and Respondent has not pointed to one case establishing otherwise. Any application of a procedural bar or default to Mr. Parker would not be the application of a regular and consistent rule of this Court applying a procedural bar. *See Johnson v. Mississippi*, 486 U.S. 578, 587 (1988).

Next, Respondent argues that, based on *Mills v. Moore*, 786 So. 2d 532 (Fla. 2002), the statutory maximum sentence for first-degree murder in Florida is death (Response at 31-32). Respondent takes issue with the application of the Supreme Court's post-*Ring* decision in *Sattazahn v. Pennsylvania*, 123 S.Ct. 732 (2003), where the Supreme Court "clarified what constitutes an "element" of an offense for purposes of the Sixth Amendment's jury-trial guarantee." *United States v. Acosta-Martinez*, 2003 U.S. Dist. LEXIS 9161 at *6 (D. C. Puerto Rico May 23, 2003). In *Sattazahn*, the Supreme Court explained: "Put simply, if the existence of any fact (other than a prior conviction) increases the maximum punishment that may be imposed on a defendant, that fact – no matter how the State labels it – constitutes an element, and must be found by a jury beyond a

reasonable doubt." *Sattazahn*, 123 S. Ct. at 739.[8] Even a cursory reading of *Sattazahn*, together with the Court's reasoning in *Mills*, establishes that *Mills* was erroneously decided.

The *Mills* Court determined, based on dictionary definitions, that the maximum penalty for first-degree murder in Florida was death. *See Mills*, 786 So. 2d at 538. This analysis is legally insufficient. A sentencing scheme is not analyzed by resort to dictionary definitions; simply because the statute is labeled with the term "capital felony" does not in any way mean that the label defines the statutory maximum punishment, as *Sattazahn* makes explicit. Other than citations to *Mills* and subsequent decisions from this Court relying on *Mills*, no case has yet to be cited by Respondent which indicates that, upon conviction of first-degree murder, a defendant in Florida is "eligible" for the death penalty. Under the reasoning of *Ring* and *Sattazahn*, Mr. Parker was convicted of murder *simplicter*, which "is properly understood to be a *lesser included offense* of `first degree murder plus aggravating circumstances." *Sattazahn*, 123 S. Ct. at 740. Under the proper analysis as indicated in *Ring* and *Sattazahn*, Mr. Parker submits that *Mills* is no longer good law.

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[8]Nor has this Court addressed *Sattazahn*.

In response to *Ring*, the Delaware legislature adopted legislation that defines first degree murder on the basis of the presence of six alternative aggravating circumstances and determined that a finding by the jury of the presence of one these circumstances constituted capital first degree murder subject to the death penalty. Accordingly, the Delaware Supreme Court found that the provisions complied with *Ring*. *See Brice v. State*, 815 A.2d 314,322-23 (Del. 2003).

In Alabama, another "hybrid" state, the Alabama Supreme Court has also analyzed its capital sentencing provisions in light of *Ring.* The Alabama Supreme Court has explained that under Alabama's statutory definition of capital first degree murder, the jury must find an aggravating circumstance at the guilt phase of a capital trial to render a defendant death-eligible. *Ex parte Waldrop*, 2002 Ala. LEXIS 336, *13 (Ala. November 22, 2002)("'Unless at least one aggravating circumstance as defined in Section 13A- 5-49 exists, the sentence shall be life imprisonment without parole.'"); *Martin v. State*, – So.2d – , 2003 Ala. Crim. App. LEXIS 136, *55 (Ala. App. May 30, 2003)("the jury in the guilt phase entered a verdict finding Martin guilty of capital murder because it was committed for pecuniary gain. Murder committed for pecuniary gain is also an aggravating circumstance"). Thus, like

Delaware, Alabama provides that unless there is a finding of an aggravating circumstance at the guilt phase proceeding, the sentence is life imprisonment. This clearly distinguishes Alabama law from Florida law in a critical fashion.

Recently, the Nevada Supreme Court found that its capital scheme was a "hybrid" scheme because if the jury failed to return a unanimous verdict, the judge made the sentencing findings. *See Johnson v. State*, 59 P.3d 450, 460 (Nev. 2002). Nevada law "requires two distinct findings to render a defendant death-eligible." There must be at least one aggravating circumstance and no mitigation sufficient to outweigh the aggravating circumstances. Because in *Johnson* the jury had been unable to return a unanimous verdict, the Nevada Supreme Court concluded that the error was not harmless, and it vacated the death sentence.

The Missouri Supreme Court also found that its death sentencing scheme was a "hybrid" scheme because the judge imposed the sentence whenever the jury could not return a unanimous verdict. That Court explained that in those circumstances *Ring* was violated because the first three steps of the Missouri procedure for determining death-eligibility had not been decided beyond a reasonable doubt by a jury. *See State v. Whitfield*, 2003 WL 21386276 (Mo. June 17, 2003). The three steps

in Florida's statute, like the steps in Missouri, also "require factual findings that are prerequisites to the trier of fact's determination that a defendant is death-eligible." Step 1 in the Florida procedure requires determining whether at least one aggravating circumstance exists. As in Missouri, Colorado, Indiana, Delaware, Arizona, and Nevada, this step involves a factual determination which is a prerequisite to rendering the defendant death-eligible. Step 2 in the Florida procedure requires determining whether "sufficient" aggravating circumstances exist to justify imposition of death. Missouri's Step 2 is indistinguishable, requiring a determination of whether the evidence of all aggravating circumstances "warrants imposing the death sentence." This step is obviously not the ultimate step of determining whether death will or not be imposed because other steps remain. Rather, in Florida as well as Missouri, this step involves a factual determination which is a prerequisite to rendering a defendant death-eligible. Step 3 in the Florida procedure requires determining whether "there are insufficient mitigating circumstances to outweigh the aggravating circumstances." Missouri's and Colorado's Step 3, as well as Nevada's and Arizona's Step 2, are identical, requiring a determination of whether mitigating circumstances outweigh aggravating circumstances. Again, this step is not the

ultimate determination of whether or not to impose death because an additional step remains. Rather, in Florida as well as these other states, this step involves a factual determination which is a prerequisite to rendering a defendant death-eligible. In Florida, as in Missouri and the other states discussed in *Whitfield*, the sentencer does not consider the ultimate question of whether or not to impose death until the eligibility steps are completed. After the first three steps, the Florida statute directs the jury to determine, "[b]ased on these considerations, whether the defendant should be sentenced to life imprisonment or death." Section 921.141(2)(c), Fla. Stat. The structure of the statute clearly establishes that the steps which occur before this determination are necessary to make the defendant eligible for this ultimate determination, that is, to render the defendant death-eligible. *See Bottoson*, 813 So. 2d at — (Pariente, J., concurring in result only) ("The death penalty for first-degree murder cannot be imposed unless and until additional factual findings are made as to the existence of aggravators that outweigh the mitigators–just as in Arizona").

Respondent argues that *Ring* is not retroactive (Response at 30-31). However, Mr. Parker submits that, first, this argument has already been decided adversely to the State. As previously noted (*see*, *supra*, pp.6-7), in each and every case where this

Court had addressed the impact of *Ring*, the Court has addressed the merits of the arguments and concluded that *Ring* did not warrant relief because the defendant had either a prior violent felony, a unanimous jury recommendation, or a contemporaneous conviction (or a combination of all of these factors).

In any event, *Ring* clearly meets the retroactivity analysis in *Witt v. State*, 387 So. 2d 922 (Fla. 1980). As to what constitutes a development of fundamental significance, *Witt* explains that this category includes "changes of law which are of sufficient magnitude to necessitate retroactive application as ascertained by the three-fold test of *Stovall [v. Denno*, 388 U.S. 293 (1967),] and *Linkletter [v. Walker*, 381 U.S. 618 (1965)],@ adding that A*Gideon v. Wainwright* . . . is the prime example of a law change included within this category.@ 387 So. 2d at 929. The three-fold *Stovall-Linkletter* test considers: A(a) the purpose to be served by the new rule; (b) the extent of reliance on the old rule; and (c) the effect on the administration of justice of a retroactive application of the new rule.@ 387 So. 2d at 926. Resolution of the issue ordinarily depends most upon the first prong--the purpose to be served by the new rule--and whether an analysis of that purpose reflects that the new rule is a Afundamental and constitutional

law change[] which cast[s] serious doubt on the veracity or integrity of the original trial proceeding.@ 387 So. 2d at 929. *Ring* is such a fundamental constitutional change for two reasons. First, the purpose of the rule is to change the very *identity* of the decisionmaker with respect to critical issues of fact that are decisive of life or death. This change remedies a Astructural defect[] in the constitution of the trial mechanism,=@ by vindicating Athe jury guarantee . . . [as] a ›basic protectio[n]= whose precise effects are unmeasurable, but without which a criminal trial cannot reliably serve its function.@ *Sullivan v. Louisiana*, 508 U.S. 275, 281 (1993). When a capital defendant has been subjected to a sentencing proceeding in which the jury has not participated in the life-or-death factfinding role required by the Sixth Amendment and *Ring*, the constitutionally required tribunal was simply not all there, a radical defect which necessarily Acast[s] serious doubt on the veracity or integrity of the . . . trial proceeding.” *Witt*, 387 So. 2d at 929.

Second, “the jury trial provisions in the Federal and State Constitutions reflect a fundamental decision about the exercise of official power. *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968). Inadvertently but nonetheless harmfully, the United States Supreme Court lapsed for a time and enfeebled the

institution of the jury through its rulings in *Hildwin v. Florida*, 490 U.S. 638 (1989), and *Walton v. Arizona*. The Court=s retraction of these rulings in *Ring* restores a right to jury trial which is a "fundamental" guarantee of the Federal and Florida Constitutions.

As discussed by Justice Shaw in his opinion in *Bottoson*, *Ring* is a decision that emanated from the United States Supreme Court, its holding is constitutional in nature as it Agoes to the very heart of the constitutional right to trial by jury,@ and is of fundamental significance. *Bottoson*, 833 So. 2d at 717. Justice Lewis= opinion in *Bottoson* also classifies the decision in *Ring* as setting forth a Anew constitutional framework.@ *Id*. at 725. In *King v. Moore*, 831 So. 2d 143 (Fla. 2002), Justice Pariente also observed that the application of the Sixth Amendment right to jury trial to capital sentencing was Aunanticipated@ by prior case law upholding Florida=s death penalty statute, and that *Apprendi*, the case which was extended by *Ring* to capital sentencing, Ainescapably changed the landscape of Sixth Amendment jurisprudence.@ *Id*. at 149. Clearly, *Ring* meets the *Witt* test.

Respondent cites cases only applying the federal standard for retroactivity under *Teague v. Lane*, 489 U.S. 288 (1989)

(Response at 30-31); *see also* Respondent's Notice of Supplemental Authority citing *Tuner v. Crosby*, Case No. 02-14941 (11th Cir. July 29, 2003). To that extent, Mr. Parker contends that *Turner* is incorrect and that *Ring* is retroactive under *Teague* as recently held in *Summerlin v. Stewart*, 2003 U.S. App. LEXIS 18111 (9th Cir. Sept. 2, 2003).

In addition to the reasons set forth above as to how *Ring* meets the criteria under the appropriate state law test for retroactivity, Mr. Parker further submits that the question which *Ring* decided was: What facts constitute "elements" in capital sentencing proceedings? The bulk of the *Ring* opinion addresses how to determine whether a fact is an "element" of a crime. *See Ring*, 122 S. Ct. at 2437-43. The question in *Ring* was not whether the Sixth Amendment requires a jury to decide elements. That has been a given since the Bill of Rights was adopted. The question was what facts are elements, as Justice Thomas explained this in his concurring opinion in *Apprendi*, 120 S. Ct. at 2367-68. Thus, the question in *Ring* is akin to a statutory construction issue, and "retroactivity is not at issue." *Fiore v. White*, 531 U.S. 225, 226 (2001); *Bunkley v. Florida*, 123 S. Ct. 2020, 2023 (2003). That is, the Sixth Amendment right to have a jury decide elements is a bedrock,

indisputable right. Mr. Parker was entitled to this Sixth Amendment protection at the time of his trial. *Ring* simply clarified that facts rendering a defendant eligible for a death sentence are elements of capital murder and therefore subject to this Sixth Amendment right.

The ruling in *Ring* concerns an issue of substantive criminal law. In concluding that the Sixth Amendment requires that the jury, rather than the judge, determine the existence of aggravating factors, the Supreme Court described aggravating factors as "the functional equivalent of an element of a greater offense." *Ring,* 122 S.Ct. at 2243 (citing *Apprendi v. New Jersey*, 530 U.S. 466, 494, n. 19 (2000)). *Ring* clarified the elements of the "greater" offense of capital murder. As explained above, *Ring* decided did a substantive question (What are the elements of capital murder?). Thus, retroactive application is required under *Bousley v. United States*, 523 U.S. 614 (1998). *See Summerlin v. Stewart*, 2003 U.S. App. LEXIS 18111 (9th Cir. Sept. 2, 2003)(holding *Ring* to apply retroactively under *Teague* because *Ring* announced both a "substantive" change in criminal law and a change in procedural law that falls under *Teague*'s exception for a new "watershed rule of criminal procedure").

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by United States Mail, first-class postage prepaid, to Leslie T. Campbell, Office of Attorney General, 1515 N. Flagler Dr., Fl. 9, West Palm Beach, FL, 33401-3428, on Sept. 8, 2003.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the font requirements of rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

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