IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC03-1045

DWAYNE IRWIN PARKER,

Petitioner,

VS.

JAMES V. CROSBY, JR.,

Respondent.

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STATE'S RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

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PRELIMINARY STATEMENT

Petitioner, Dwayne Irwin Parker, was the defendant at trial and will be referred to as "Petitioner" or "Parker". Respondent, the State of Florida, the prosecution below will be referred to as the "State". References to the records will be as follows: the direct appeal as "TR", postconviction as "PCR", and to any supplementals of these as "STR" or "SPCR" followed by the appropriate page number(s).

STATEMENT OF THE CASE AND FACTS

On May 11, 1989, Parker was indicted for the April 22, 1989 first degree murder of William Nicholson, attempted first degree murder of Robert Killen and Keith Mallow, and nine counts of armed robbery. Parker v. State, 641 So.2d 369, 372 (Fla. 1994). Trial commenced on April 30, 1990 and the jury returned its verdict on May 10, 1990, convicting Parker of the murder, nine counts of armed robbery, and two counts of aggravated battery with a firearm. Id., 641 So.2d at 373 (TR 2026-29). Parker's jury recommended death by a vote of eight to four (TR 2325, 2862). The court imposed a death sentence for first-degree murder finding no mitigation, but four aggravators: prior violent felony, felony murder, great risk, and avoid arrest (TR 2383-92, 2887-95).

On direct appeal, Parker presented 12 issues:

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(PCR 621-98). On appeal, this Court found the following facts:

> Shortly after 11 p.m. on April 22, 1989, Ladson Marvin Preston and Dwayne Parker entered a Pizza Hut in Pompano Beach. Preston was unarmed, but Parker was armed with both a small pistol and a semi-automatic machine pistol. They forced the manager to open the safe at gunpoint, and then Parker returned to the dining room and robbed the customers of money and jewelry. Sixteen customers and employees were in the restaurant, and Parker fired six shots from the machine pistol during the robberies, wounding two customers.
>
> While Parker was in the dining room, an employee escaped from the restaurant and telephoned 911 from a nearby business. Broward County deputies arrived shortly, and first Preston and then Parker left the

restaurant. Deputy Killen confronted Parker in the parking lot, and Parker fired five shots at him with the machine pistol. Parker then ran into the street and tried to commandeer a car occupied by Keith Mallow, his wife, and three children. Parker fired the machine pistol once into the car and then fled.

When someone entered a nearby bar and told the patrons that the Pizza Hut was being robbed, several of those patrons, including William Nicholson, the homicide victim, left the bar and went out into the street. Tammy Duncan left her house when she heard shots and saw Parker, carrying a gun, running down the street with Nicholson running after him. She heard another shot and saw Nicholson clutch his midsection and then fall to the ground.

Eventually deputies Baker, Killen, and McNesby cornered Parker between two houses. McNesby's police dog subdued Parker, and he was taken to the sheriff's station. The machine pistol and some of the stolen jewelry were found on the ground when Parker was taken into custody. At the station money and more of the stolen jewelry were found on Parker.

The state charged Parker with one count of first-degree murder, two counts of attempted murder, and nine counts of armed robbery. Six shell casings were found inside the restaurant, five in the parking lot, and one in the street near where Nicholson fell. The state's firearms expert testified that all twelve shell casings, as well as the bullet recovered from Nicholson's body, had been fired from Parker's machine pistol. The theory of defense, however, was that the bullet was misidentified and that a deputy shot Nicholson. The jury convicted Parker as charged on the murder and armed robbery

> charges and of aggravated battery with a firearm on the two counts of attempted murder. The trial court agreed with the jury's recommendation and sentenced Parker to death.

Parker, 641 So. 2d at 372-73 (footnote omitted). Parker's conviction and sentence were affirmed. Parker, 641 So. 2d at 378 and his rehearing (PCR 819-48) was denied. (PCR 859).

Parker's petition for writ of certiorari to the United States Supreme Court raised four issues:

> 1. Whether the trial court's denial of cause challenges to potential jurors violated the Due Process Clause or the Cruel and Unusual Punishment Clause?
>
> 2. Whether the death sentence violates the Eighth amendment in that the sentencer relied on an illegal aggravating circumstance?
>
> 3. Whether the death sentence violates the Eighth Amendment because the trial court gave no weight to unrebutted mitigation?
>
> 4. Whether the penalty-phase jury instructions violated the Eight Amendment?

(PCR 861-907). On January 23, 1995, certiorari review was denied. Parker v. Florida, 513 U.S. 1131 (1995) (PCR 942).

A shell motion for postconviction relief was filed on March 24, 1997 (PCR 1-112) with the amended motion, served on June 5, 2000, raising challenges to the public records disclosure, ineffective assistance of trial and penalty phase counsel, and various trial court errors (PCR 299-426). The State responded

and included an appendix of relevant documents (PCR 469-1147) and on April 18, 2001 a Huff v. State, 622 So. 2d 982 (Fla. 1983) hearing was held (PCR 1388-1443). At the hearing, Parker limited his argument to the claims of ineffective assistance during the guilt and penalty phases, including a challenge to the mental health (PCR 1402, 1439). On February 12, 2002 relief was denied summarily as was Parker's subsequent rehearing. (PCR 1484-1511-32, 1537-39, 1559-80). His postconviction appeal is pending before this Court in case number SC02-1471.

SUMMARY OF THE ARGUMENT

Claim I - The claim is not cognizable and is procedurally barred as Parker is challenging the sentencing order which was challenged and affirmed on direct appeal. Likewise, the order, which outlined the court's reasons for imposing death at the trial, may not be challenged on the basis of comments and rulings made in postconviction litigation where the review entailed a different standard. Nonetheless, the claim is meritless as the court fully considered the mitigation offered and explained the basis for its rejection.

Claim II - Appellate counsel was not ineffective as the issues he did not raise on appeal were either nonmeritorious or would not have resulted in a different appellate result.

Claims III and IV - The challenge to Florida's capital sentencing is procedurally barred. Further, the challenges raised have been rejected numerous times and Parker has given no basis for this Court to alter its prior decisions.

ARGUMENT

CLAIM I

THE CLAIM OF TRIAL COURT ERROR IN THE ORIGINAL SENTENCING BASED UPON POSTCONVICTION COMMENTS AND RULINGS IS NOT COGNIZABLE IN HABEAS CORPUS LITIGATION (restated)

Parker claims his death sentence is unconstitutional based upon comments the court made during the Huff hearing and in its order denying postconviction relief (Petition at 2). From this, Parker extrapolates the court must not have considered the mitigation presented in the penalty phase properly, thus, his sentence is unconstitutional. This claim is not cognizable for two reasons. First, it is in part a challenge to the court's postconviction order and as such should be raised in the appeal from that order. Second, the direct challenge to the sentencing order was raised on direct appeal and is not a proper issue for habeas review. Further, having raised the issue on appeal, Parker is procedurally barred from re-litigating the same issue here. Nonetheless, the claim is meritless.

Habeas corpus petitions properly address claims of ineffective assistance of appellate counsel. Rutherford v. Moore, 774 So. 2d 637, 643 (Fla. 2000); Groover v. Singletary, 656 So. 2d 424, 425 (Fla. 1995). "However, ineffective assistance of appellate counsel may not be used as a disguise to

raise issues which should have been raised on direct appeal or in a postconviction motion." Freeman v. State, 761 So. 2d 1055, 1069 (Fla. 2000). A petition for "habeas corpus is not a vehicle for obtaining additional appeals of issues which were raised, or should have been raised, on direct appeal or which were waived at trial or which could have, should have, or have been, raised in rule 3.850 proceedings" White v. Dugger, 511 So. 2d 554, 555 (Fla. 1987); Blanco v. Wainwright, 507 So. 2d 1377 (Fla. 1987), or to argue a variant to an already decided issue. Jones v. Moore, 794 So. 2d 579, 583 n.6 (Fla. 2001). This Court has rejected claims of error where the petitioner "does not argue appellate counsel was ineffective for failing to raise this issue." Freeman, 761 So. 2d at 1072.

Here, Parker challenges the court's sentencing analysis as it relates to mitigation. He 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 but, instead, treated Mr. Parker's mitigation as an attempt to show that he was not 'responsible for [his] actions in this murder'" (Petition at 5). Except for this lone reference to an "error" at the original sentencing, Parker limits his factual proof to the postconviction Huff hearing and subsequent order (Petition at 2-4, 7-9). The claim is not

cognizable and procedurally barred.

To the extent he challenges the judge's treatment of the mitigation in resolving the postconviction issue, the claim is not cognizable here, as it is more appropriate to raise it in the postconviction appeal presently pending before this Court. Apart from the obvious fact this is an impermissible direct challenge to the judge's 1990 ruling based upon comments he made more than ten years later, Freeman, 761 So. 2d at 1072, Parker does not attempt to explain how he can challenge a postconviction ruling on habeas corpus review. Habeas corpus review is reserved for claims of appellate counsel ineffectiveness, Rutherford, 774 So. 2d at 643, not postconviction review. Freeman v. State, 761 So. 2d at 1069.

Further, on direct appeal, appellate counsel argued the court failed to consider or weigh the penalty phase mitigation presented (PCR 684). This Court concluded:

> Contrary to Parker's contention, the court gave ample consideration to all of the evidence Parker submitted in mitigation. "A trial court must consider the proposed mitigators to decide if they have been established and if they are of a truly mitigating nature in each individual case." [c.o.] The court did this, but found that the facts alleged in mitigation were not supported by the evidence. It is the court's responsibility to resolve conflicts in the evidence, and its determination will not be reversed if supported by the record. [c.o] The record supports the trial court's

> conclusion that no mitigators had been established.

Parker, 641 So. 2d at 377 (citations omitted). Based upon this Court's prior consideration of the issue, Parker is not entitled to a second appeal. Jones, 794 So. 2d at 583 n.6 (noting habeas petitioner is not permitted "to argue a variant to an already decided issue"). As such the claim is barred.

Should the merits be reached, it must be pointed out the analysis under Strickland v. Washington, 466 U.S. 668 (1984) for penalty phase counsel's performance is different than a direct challenge to the court's evaluation of aggravation and mitigation at the original sentencing under Campbell v. State, 571 So. 2d 415 (Fla. 1990) and Trease v. State, 768 So. 2d 1050, 1055 (Fla. 2000). Such difference is evident from the analysis this Court conducted in Occhicone v. State, 768 So.2d 1037 (Fla. 2000). There, this Court held that in order to prove ineffective assistance of penalty phase counsel for his failure to present additional mitigation, the defendant must establish "both (1) that the identified acts or omissions of counsel were deficient, or outside the wide range of professionally competent assistance, and (2) that the deficient performance prejudiced the defense such that, without the errors, there is a reasonable probability that the balance of aggravating and mitigating circumstances would have been different." Occhicone v. State,

768 So.2d 1037 (Fla. 2000). However, merely because additional mitigation was available does not establish ineffective assistance. See Gudinas v. State, 816 So.2d 1095, 1106 (Fla. 2002) (finding counsel not ineffective for failing to present mitigation evidence which was cumulative to evidence presented at trial); Cherry v. State, 781 So.2d 1040, 1051 (Fla. 2000) (opining "even if trial counsel should have presented witnesses to testify about Cherry's abusive background, most of the testimony now offered by Cherry is cumulative.... Although witnesses provided specific instances of abuse, such evidence merely would have lent further support to the conclusion that Cherry was abused by his father, a fact already known to the jury."). These cases do not ask whether the trial court complied with Campbell and Trease in denying postconviction relief.[1]

Parker's reliance upon statements made on postconviction respecting deficient performance, prejudice, and observations

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[1] Likewise, Parker's reliance upon Lockett v. Ohio, 438 U.S. 586 (1978); California v. Brown, 479 U.S. 538 (1987); Roberts v. Louisiana, 428 U.S. 325 (1976); Santos v. State, 591 So. 2d 160 (Fla. 1991); Chesire v. State, 568 So. 2d 908 (Fla. 1990); Rogers v. State, 511 So. 2d 526 (Fla. 1987) do not further his position as these cases are discussing the evaluation for the initial sentencing. Here, the trial judge's challenged comments were in response to postconviction litigation and must be viewed in light of Strickland v. Washington, 466 U.S. 668 (1984).

of Parker's tactics should not be the determinative factor of whether the dictates of Campbell and Trease were met twelve years earlier. This is especially true where this Court affirmed the sentencing court's analysis in rejecting the trial mitigation and imposing a death sentence.[2] (TR 2892-94). Parker, 641 So. 2d at 377.

Because of the affirmance of the trial court's analysis on direct appeal and the fact Parker does not identify any trial court errors occurring at sentencing, but limits his proof to the events of the postconviction litigation, the State submits that Parker has failed to show any sentencing error. The pith of Parker's claim is that the original 1990 sentencing must be erroneous because of a decision made in the 2002 postconviction ruling.

In the postconviction litigation, he asserted penalty phase counsel was ineffective for not presenting additional mitigation involving Parker's childhood, family life, and mental health. The State responded noting the allegations were either refuted

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[2] To the extent Parker's claim may be read to challenge the original sentencing, as noted above, in the sentencing order, each statutory mitigating factor was discussed and the court considered the evidence offered for non-statutory mitigation along with searching the record for other mitigation. (TR 2892-94). As this Court found, the sentencing order comported with the law. Decade later comments do not undermine the conclusions drawn in the original sentencing order or on direct appeal.

from the record or cumulative to that presented at the penalty phase where in Parker's childhood abuse, family background, and mental health status, were presented (TR 2184-88, 2190, 2202-06, 2208-09, 2238-47, 2248-50, 2262-63, 2270-71 2278-81, 2283) along with proof that Parker was not impaired by alcohol/substances (TR 996-98, 1012, 1017, 1020-23, 1086, 1091, 1097-98, 1109-16, 1222-34, 1152-56, 1181-87, 1192, 1205-06, 1212, 1241-42, 1246-47, 1249-51, 1332-33, 1336-40). The State offered that the residual doubt evidence, in the form of Bret Kissenger or others to say Parker did not fire the fatal shot, was not a proper subject for the penalty phase as it was not mitigating. Bates v. State, 750 So.2d 6, 9 n.2 (Fla. 1999); Sims v. State, 681 So. 2d 1112, 1117 (Fla. 1986). (PCR 545-60).

In ruling on the postconviction claim, the trial court cited the law to be applied:

> In order to be entitled to relief on a claim of ineffective assistance of penalty phase counsel, a capital defendant "must demonstrate that but for counsel's errors, he would have probably received a life sentence." Hildwin v. Dugger, 654 So. 2d 107, 109 (Fla. 1995). Additionally, it is well settled that a counsel does not render ineffective assistance by not placing before the jury cumulative evidence. Rutherford v. State, 727 So. 2d 216, 225 (Fla. 1998). "More [testimony] is not necessarily better." Card v. State, 531 So. 2d 79, 82 (Fla. 1988). Again, the record in this case conclusively refutes the claim that [the defendant] had ineffective assistance of

counsel at the penalty phase of his trial.

(PCR 1495). The court summarized Parker's claim as: "[t]he inference to be drawn from the allegations in this claim is that everyone in the defendant's life is to blame and is responsible for the defendant's actions in this murder, and that the jury did not hear this mitigating evidence." (PCR 1493). After recounting the proffered evidence and that which was presented at trial, the judge reiterated its assessment of the value of the trial mitigation previously rejected and affirmed on appeal. The court noted there was no other "testimony that could or should have been presented that would not be cumulative in nature." When these findings are read in context, it is clear the focus of the ruling was that the proffered mitigation was cumulative to that which was presented at trial (PCR 1494-96). Clearly, the trial court, in determining the proffered mitigation was cumulative, was considering it in light of ineffective assistance of counsel, not as an initial presentation for sentencing. See Rutherford v. State, 727 So. 2d 216, 224-25 (Fla. 1998) (finding no ineffective assistance arising from counsel's failure to present mitigation because proffered mitigation was essentially cumulative to prior trial testimony); Routly v. State, 590 So. 2d 397, 401-02 (Fla. 1991) (denying postconviction relief because most of postconviction

evidence had been presented previously to jury although in different form); Lusk v. State, 498 So. 2d 902, 906 (Fla. 1986) (same). As is evident from the entire postconviction ruling here, the court was merely noting the proffered evidence was the same as that presented at trial and rejected previously as not mitigating. The focus was on what impact the proffered evidence would have had on the jury under Strickland. Given that it was cumulative to the previously rejected evidence, Parker did not carry his burden under Strickland. Nothing more can be read into the judge's order, nor can it be used to reopen an issue resolved against Parker on direct appeal. Relief must be denied.

CLAIM II

APPELLATE COUNSEL WAS NOT INEFFECTIVE IN DECLINING TO RAISE THE ISSUES OF THE PROSECUTOR'S RECUSAL, ADMISSION OF STATE'S PENALTY PHASE EVIDENCE, PARKER'S ABSENCE DURING A PORTION OF THE SUPPRESSION HEARING, AND PROSECUTION UNDER BOTH THE PREMEDITATION AND FELONY MURDER THEORIES (restated)

Parker complains his appellate counsel was ineffective for not challenging on appeal: (1) denial of his motion to recuse the prosecutor, (2) the State's alleged use of non-statutory aggravating evidence related to the origin of the fatal bullet, (3) Parker's absence from a critical stage of the trial, and (4) the prosecution under both the premeditated and felony murder

theories. The State submits the claim is meritless as counsel was not deficient nor were his actions prejudicial.

Valle v. Moore, 837 So. 2d 905 (Fla. 2002) provides:

> Habeas petitions are the proper vehicle to raise claims of ineffective assistance of appellate counsel. [c.o.] The standard of review applicable to claims of ineffective assistance of appellate counsel raised in a habeas petition mirrors the *Strickland v. Washington* ..., standard for claims of trial counsel ineffectiveness. [c.o.] However, appellate counsel cannot be considered ineffective under this standard for failing to raise issues that were not properly raised during the trial court proceedings and do not present a question of fundamental error [c.o.] The same is true for claims without merit because appellate counsel cannot be deemed ineffective for failing to raise nonmeritorious claims on appeal. ... In fact, appellate counsel is not necessarily ineffective for failing to raise a claim that might have had some possibility of success; effective appellate counsel need not raise every conceivable nonfrivolous issue. [c.o.] Finally, a claim that has been resolved in a previous review of the case is barred as "the law of the case."

Valle, 837 So. 2d at 907-08 (citations omitted).

1. Motion to Recuse Prosecutor - On the first day of trial, the defense sought: (1) dismissal of the case, (2) suppression of the medical examiner's testimony based on his change in testimony regarding the color of the bullet, or (3) recusal of the prosecutor. The prosecutor advised the court that there was a photograph taken by Detective Cerat at the time the bullet was

removed from the victim which indicated its color was copper and this was confirmed by slides taken by the medical examiner at the same time. As the prosecutor explained:

> ... I called Dr. Bell (medical examiner) and I said, Dr. Bell, do you remember what color the bullet was and what it looks like, and he says, I will have to look at my report. I said fine, look at your report, and do me a favor, project your slide that you took and then give me a call back. He called me back and indicated the bullet was copper in color.

Both motions were denied after a hearing (TR 375-78, 2667-71).

At trial, Dr. Bell explained the victim, William Nicholson ("Nicholson"), suffered a single gunshot wound to the abdomen fired from approximately two to twenty-four inches away. After removing the bullet, Dr. Bell washed it, photographed it, placed the bullet in an evidence envelope, and initialed the envelope. He made an in court identification of the bullet and envelope, explaining the slide evidence was taken by him, was overexposed, but reflected the bullet extracted from Nicholson which was copper in color with a small cut (TR 1623-24, 1631-32, 1635-38, 1640-43). Although Dr. Bell admitted he described the bullet in his autopsy report and in an initial deposition, as silver in color with very little deformation. However, after being asked by the prosecutor to review the slide negative, Dr. Bell concluded the bullet was copper in color with a cut which was

caused when removing it from the victim (TR 1645-46). Also present at the autopsy was Detective Cerat who testified he photographed the copper colored bullet once it was removed from the victim's body (TR 1560-64).

In order to prevail on direct appeal, Parker's counsel would have had to establish that the denial of the motion to recuse was an abuse of discretion. Rogers v. State, 783 So.2d 980, 992 (Fla. 2001). To disqualify the State Attorney, a defendant must show actual prejudice resulting from the prosecution. Downs v. Moore, 801 So. 2d 906, 914 (Fla. 2001); Rogers, 783 So. 2d at 991; Farina v. State, 679 So. 2d 1151, 1157 (Fla. 1996), receded from on other grounds, Franqui v. State, 699 So. 2d 1312 (Fla. 1997); Bogle v. State, 655 So. 2d 1103, 1106 (Fla. 1995). "Actual prejudice is something more than the mere appearance of impropriety." Meggs v. McClure, 538 So.2d 518, 519 (Fla. 1st DCA 1989). Disqualification "must be done only to prevent the accused from suffering prejudice that he otherwise would not bear." Id. See Kearse v. State, 770 So.2d 1119, 1129 (Fla. 2000) (stating disqualification of prosecutor "proper only when specific prejudice demonstrated").

Florida courts disapprove of a prosecutor being both witness and advocate "and should be indulged in only under exceptional circumstances." Shargaa v. State, 102 So.2d 809, 813 (Fla.),

cert. denied, 358 U.S. 873 (1958). Here, the record is clear, the prosecutor did not testify at trial, thus, he was not a witness. Nonetheless, the circumstances leading up to Dr. Bell's changed testimony were fully explored. The record shows the prosecutor did not force, suggest, or compel the change in Dr. Bell's testimony. Instead, during the prosecutor's trial preparation, he merely asked Dr. Bell to review the evidence collected during the autopsy and, in that review, Dr. Bell realized his error.

Parker points to U.S. v. Hosford, 782 F.2d 936 (11th Cir. 1986) and claims that by virtue of asking Dr. Bell to review his evidence, the prosecutor became a *de facto* witness and should have been recused. However, even in Hosford, the prosecuting attorney was not disqualified when he was the party who generated the immunity agreement upon which Hosford relied to prove he did not violate that agreement and did not commit the underlying crimes with which he was charged. In Hosford, the fact the prosecutor prepared the immunity agreement was presented to the jury, just as the jury here was told the prosecutor's questions prompted Dr. Bell to realized his mistake. Yet, the Circuit Court concluded the prosecutor's conduct did not violate the defendant's rights.

Given these facts, Parker's appellate counsel was not

deficient in failing to challenge the denial of the motion to recuse. Parker can point to no "actual prejudice", let alone even any impropriety. Similarly, Parker has pointed to nothing he would not have faced had the prosecutor been removed. As such, the claim was meritless and counsel cannot be deemed deficient for not having raised it on appeal. Freeman, 761 So.2d at 1070-71 (noting appellate counsel cannot be ineffective for failing to raise a nonmeritorious claim). Likewise, no prejudice can be shown as the evidence was explored fully and would have been revealed whether the instant prosecutor or another office tried the case. Not only had Dr. Bell taken a contemporaneous slide photo of the bullet at the time it was removed from th victim which showed the color and condition of the projectile, but Detective Cerat was another witness to the autopsy and also took contemporaneous photographs and collected the projectile which proved it came from Parker's gun. The claim is meritless and does not establish ineffectiveness of appellate counsel.

2. Presentation of Penalty Phase Evidence Proving Origin of Fatal Bullet - Parker contends the State's presentation of Agent Jerry Richards and Dr. Besant-Mathews during the penalty phase was to permit the State to re-litigate guilt phase matters and his objection should have been sustained. It is Parker's

position these witnesses did not give testimony toward the "great risk to others" aggravator and constituted a non-statutory aggravator in violation of the Eighth Amendment which appellate counsel should have challenged on direct appeal. Because there is no merit to Parker's assertion appellate counsel cannot be found ineffective.

Pursuant to section 921.141(1), Florida Statutes, provides in pertinent part "[i]n the [penalty phase] proceeding, evidence may be presented as to any matter that the court deems relevant to the nature of the crime and the character of the defendant and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (5) and (6)." Here, the State was giving additional evidence of the origin of the bullet that killed the victim. This evidence combined with the guilt phase testimony that Parker fired numerous rounds at 23 or more people as he committed the armed robbery, escaped the scene, and attempted to evade capture. Clearly, the fact that it was Parker's bullet which killed the victim is relevant to the crime charged and admissible. Cf. Harich v. State, 437 So. 2d 1082, 1085-86 (Fla. 1983) (agreeing confession evidence, even though previously suppressed, may be admissible in penalty phase). Because the testimony was admissible and relevant evidence confirming the identity of the person who created a

great risk to others, there was no violation of Stringer v. Black, 503 U.S. 222 (1992) or Maynard v. Cartwright, 486 U.S. 356 (1988) both of which dealt with the impact on the death sentence when the jury was instructed on a vague, unconstitutional aggravating factor. Parker's jury was not instructed improperly. He merely complains that evidence of his crime was presented during the penalty phase. Because such evidence is admissible, appellate counsel was not deficient in failing to raise this issue. Freeman, 761 So.2d at 1070-71.

With respect to the prejudice prong, Parker not only failed to address prejudice, but he is unable to show any. Even if it were improper for the witnesses to testify, the trial evidence also established the basis for the "great risk to others" aggravator, thus, the aggravator would have been found and any other testimony establishing the origin of the bullets would have been harmless. Hence, the result of the trial would have been the same. Moreover, this Court reviewed the evidence and agreed it established the "great risk to other" aggravator. Parker, 641 So. 2d at 377. Parker is not entitled to relief under Strickland.

3. Alleged Absence for Critical Stage (Portion of Suppression Hearing) - Parker contends he was absent from a critical stage of the proceeding when he was not present during

a portion of the first witness' suppression hearing testimony. However, the record reveals that the initial hearing pertained to the co-defendant, Ladson Marvin Preston, Jr. ("Preston") alone and that Parker was given the opportunity to review the transcript and determine whether he wished to have the State recall its first witness which Parker's counsel, in Parker's presence, thoroughly cross-examined. Given these facts, appellate counsel was not ineffective for declining to challenge this issue on direct appeal.

Pre-trial, Preston, filed a motion to suppress the vehicle and its contents seized by the police on the day of the homicide (PCR 1446-47). On October 3, 1989, Parker filed a motion to adopt Preston's Motion to Suppress (TR 9, 14, 2455). However, on October 12, 1989, prior to the commencement of the hearing on that motion, Parker was returned to the jail, and counsel refused to waive his presence (TR 9, 14). In order to solve the logistics problem, the court agreed to hear the suppression motion as it **pertained to Preston alone**, and consented to re-set the matter on Parker's suppression motion if Parker so chose (TR 14-15). Even though Parker's motion was not being heard, his counsel remained for the October 12, 1989 suppression hearing where one witness, Deputy Presley testified regarding his actions following the Pizza Hut robbery and homicide including

finding Preston's car (TR 14-51, 60, STR 82-132).

When the hearing recommenced on October 30, 1989, Parker was present and counsel agreed to waive Parker's presence "retrospectively" and to adopt Deputy Presley's October 12, 1989 suppression hearing testimony (TR 55-56). Nonetheless, the court ordered a transcript be supplied to Parker, and counsel agreed to report back to the court with Parker's waiver (TR 57). The court also inquired of Parker directly and he responded: "I accept whatever procedure is going on and I would give, you know, my opinion after viewing what I read." (TR 57-59). Noting defense counsel had been present at the first hearing, the State offered: "If at some time in the future Mr. Hitchcock (defense counsel), for any reason whatsoever on behalf of his client, would wish to renew his motion to suppress so Detective Presley can testify in front of Mr. Parker, I have no objection. I would have also no objection to bringing out in front of Mr. Parker today his previous testimony (TR 60). During the balance of the suppression hearing, Preston's counsel examined Deputy Presley further, Parker's counsel cross-examined Deputy Presley and participated fully in the examination of the other witnesses presented (TR 62-176, 184-348; STR 142-265). At trial, Parker was given an opportunity to revisit Deputy Presley's testimony and counsel declined (TR 1285-87). Counsel renewed his

objection to the evidence collected from Preston's car by Detective Kammerer (TR 1418).

Under the facts of this case, appellate counsel was not ineffective. First of all, the suppression hearing is not a "critical stage" of the trial. Second, the court heard only Preston's suppression motion on October 12, 1989, thus, Parker's presence was not required as it did not pertain to him and could not be a "critical stage" for him. Furthermore, Parker's counsel was present for the hearing, thus, able to cross-examine the witness after having viewed his live testimony. Third, when the hearing resumed on October 30, 1989, Parker was present with counsel and was permitted to adopt the co-defendant's motion. He was given an opportunity to agree with counsel's "retroactive" adoption of the prior testimony, was supplied a copy of the transcript for his review, and informed he should advise the court if he objected to the procedure suggested, or if he wished to have the sole witness testify again on direct. Fourth, counsel cross-examined the witness from the prior hearing as well as all others witnesses, thus, Parker was able to confront the witness. Fifth, prior to the admission of Deputy Presley's testimony at trial, Parker was again given the opportunity to re-examine the witness or advise the court if he had an objection, yet, Parker declined. Not only was there no

error for an appellate claim, but to the extent some argument could be made, Parker waived any error by his acceptance of the procedure counsel followed, even when two offers were made to make the deputy available.

The suppression hearing is not a "critical stage" of the proceedings, Muehleman v. State, 503 So. 2d 310, 315 (Fla. 1987) (finding suppression hearing is not a crucial stage of the trial). Herzog v. State, 439 So.2d 1372, 1375-76 (Fla. 1983) (recognizing, suppression hearing is not a crucial stage of trial as defined by Rule 3.180 or constitutional principles "where fundamental fairness might be thwarted by his absence") (citing Snyder v. Massachusetts, 291 U.S. 97 (1934)). As such, Parker's presence was not required for "fundamental fairness." Furthermore, the October 12, 1989 suppression hearing did not address Parker's motion, thus, his presence was not required and could not be considered a "critical stage." Hence, appellate counsel may not be deemed deficient for not having raised the issue on appeal because it was not meritorious. Rutherford, 774 So. 2d at 643 (finding appellate counsel is not ineffective when eliminating nonmeritorious claims).

However, should this Court find that the claim was not frivolous, appellate counsel should not be deemed deficient under the circumstances of this case. The initial hearing date

did not pertain to Parker and only became relevant when trial counsel decided to adopt the prior testimony. Parker was given the opportunity to have the State recall the witness, and was afforded a copy of the witness' transcript. He was ordered to advise the court if he did not wish to adopt the testimony. At no time did Parker object, even when the issue arose during the trial (TR 1285-87). Clearly, Parker waived any objection and should not be permitted to complain. However, to the extent that this Court finds error, such should be considered invited[3] and appellate counsel should not be deemed deficient for not raising the claim on appeal. In fact, appellate counsel is not necessarily ineffective for failing to raise a claim that might have had some possibility of success; effective appellate counsel need not raise every conceivable nonfrivolous issue. See, Valle, 837 So. 2d at 907-08 (noting not every nonfrivolous claim need be presented by appellate counsel); Jones v. Barnes, 463 U.S. 745, 751-53 (1983) (finding appellate counsel need not raise all nonfrivolous issues, even at client's request); Provenzano v. Dugger, 561 So. 2d 541, 549 (Fla. 1990) (opining

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[3] See, Knight v. State, 746 So.2d 423, 432 (Fla. 1998) (rejecting appellate claim finding the error created below to be invited); San Martin v. State, 705 So. 2d 1337, 1347 (Fla. 1997) (prohibiting party from inviting error and then complaining on appeal).

"counsel need not raise every nonfrivolous issue revealed by the record").

Furthermore, even if some argument could be made that the procedure employed by defense counsel was error, Parker's subsequent action waived any taint. Armstrong v. State, 642 So. 2d 730, 740 (Fla. 1994) (finding claim procedurally barred where trial court reserved ruling on the matter, but then never ruled). The record reveals that Parker, having been given the opportunity to review the prior testimony and inform the court of any objection upon his decision to accept that testimony or have the State conduct another direct examination, never advised the court of his review of the suppression hearing transcript. In fact, when questioned during the trial, Parker declined the offer. Parker has not identified where in the record he objected to or challenged what transpired during the October 12, 1989 hearing after he had an opportunity to read the transcript. These events support finding appellate counsel was not deficient when declining to present this issue on appeal.

However, when considering an ineffective assistance claim, a court "… need not make a specific ruling on the performance component of the test when it is clear that the prejudice component is not satisfied." Maxwell v. Wainwright, 490 So.2d 927, 932 (Fla. 1986). Here, Parker has not shown prejudice

arose from his absence during part of one officer's testimony. Deputy Presley's testimony focused upon his knowledge of what had transpired during and following the Pizza Hut robbery. He also explained the seizure of a car with its motor still running, found abandoned in the gas station adjacent to the Pizza Hut (TR 16-47). Most important, defense counsel was present during the deputy's direct testimony and was afforded the opportunity to cross-examine Deputy Presley or elect to have the deputy re-testify to all that he stated during Parker's absence (TR 14, 59-60, 70-73, 82-84, 1285-87). Additionally, when Parker was present and represented by counsel, Deputy Robshaw testified at the suppression hearing and his testimony corroborated Deputy Presley's account and essentially followed that which was described by Deputy Presley (TR 85-125). As such, even if Deputy Presley's testimony was improper, there was sufficient evidence to support the court's denial of the motion to suppress the physical evidence. Parker has not established that the result of his appeal would have been different had this issue been raised. He has failed to carry his burden under Strickland. This claim should be rejected.

4. Prosecution Under Both Premeditated and Felony Murder - Here, Parker asserts appellate counsel was ineffective for failing to challenge the lack of adequate notice of the charges

against him. He claims it was error to permit the State to prosecute him under the premeditated and felony murder theories. This issue has been rejected repeatedly, thus, counsel was not ineffective.

It is well established; an indictment which charges premeditated murder permits the State to prosecute under both the premeditated or felony murder theories. See, Anderson v. State, 841 So.2d 390, 404 (Fla. 2003); Kearse v. State, 662 So. 2d 677, 682 (Fla.1995); Knight v. State, 338 So. 2d 201 (Fla. 1976); Everett v. State, 97 So. 2d 241 (Fla. 1957), cert. denied., 355 U.S. 941 (1958). Where an issue has been rejected by the reviewing courts repeatedly, appellate counsel is not ineffective in declining to raise the same issue. Floyd v. State, 808 So. 2d 175, 185 (Fla. 2002) (recognizing appellate counsel not ineffective for failing to raise issue repeatedly rejected by reviewing court); Groover v. Singletary, 656 So.2d 424, 425 (Fla.1995) (same).

CLAIMS III AND IV

PARKER'S CHALLENGE TO THE CONSTITUTIONALITY OF FLORIDA'S DEATH PENALTY SCHEME IS PROCEDURALLY BARRED AND MERITLESS (restated)

In **Claim III** Parker asserts that after Ring v. Arizona, 122 S.Ct. 2428 (2002) and Apprendi v. New Jersey, 530 U.S. 466 (2000) Florida's capital sentencing statute is no longer

constitutional and Mills v. Moore, 786 So. 2d 532 (Fla. 2001) cannot survive Ring. He also takes issue with when death eligibility occurs, suggesting it does not take place upon conviction for first-degree murder, but at sentencing after there has been a finding: (1) of an aggravator, (2) of sufficient weight to warrant the death penalty, and (3) the mitigation does not outweigh the aggravation (hereinafter "three factors"). He points to these "three factors" as "essential elements" of the crime. Parker asserts further that depriving him of jury findings of these "three factors" deprives him of jury trial. In **Claim IV**, he continues to argue Ring applies to Florida's capital sentencing statute, thus, establishing his sentence is unconstitutional because the indictment did not include the "three factors" and his jury was told its recommendation was merely advisory. Parker is procedurally barred from raising these challenge. Furthermore, these claims have been rejected repeatedly. Relief must be denied.

At the outset, Parker's claim is procedurally barred and this Court should not address it on the merits. Parker challenged the constitutionality of section 921.141, Florida Statutes on direct appeal, but not in Sixth Amendment terms (PCR 670-97). The instant challenge should have been presented to the trial court and on direct appeal as it is neither novel nor

new. Instead, the claim, or a variation of it, has been known prior to Proffitt v. Florida, 428 U.S. 242, 252 (1976) (holding Constitution does not require jury sentencing). See Hildwin v. Florida, 490 U.S. 638 (1989); Chandler v. State, 442 So. 2d 171, 173, n. 1 (Fla. 1983). Hence, Parker is procedurally barred at this juncture. Eutzy v. State, 458 So. 2d 755 (Fla. 1984). This Court has repeatedly recognized habeas petitions are not to be used as second appeals, and those issues which could and/or were 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). The failure to raise this claim at the proper time bars it from consideration here. Cf. Parker v. Dugger, 550 So. 2d 459, 460 (Fla. 1989)(finding defendant not entitled to refinement in law on collateral review as issue never preserved).

Similarly, Ring is not retroactive for two reasons. First, Ring is an application of Apprendi, and because Apprendi is not retroactive, neither is Ring, and second, the Supreme Court has not announced that Ring is retroactive.[4] U.S. v. Cotton, 535

[4] See, Whitfield v. Bowersox, 324 F.3d 1009, 1012 n.1 (8th Cir. 2003); Cannon v. Mullin, 297 F.3d 989 (10th Cir. 2002), cert. denied, 153 L.Ed.2d 865 (2002); McCoy v. United States, 266 F.3d 1245 (11th Cir. 2001); Forbes v. United States, 262 F.3d 143, 145-146 (2d Cir. 2001); In re Clemmons 259 F.3d 489, 493 (6th Cir. 2001); United States v. Sanders, 247 F.3d 139,

U.S. 625, 631-33 (2002) (holding indictment's failure to include quantity of drugs was Apprendi error, but did not affect fairness of proceedings, thus, it was not plain error); Ring, 536 U.S. at 620-21 (noting Ring's impact would be lessened by the non-retroactivity principle of Teague v. Lane, 489 U.S. 288 (1989))(O'Connor, J. dissenting); In re Johnson, 2003 U.S. App. Lexis 11514 *4 (5th Cir. 2003)(finding because Apprendi is not retroactive, it logically follows Ring is not retroactive); Moore v. Kinney, 320 F.3d 767, n3 (8th Cir. 2003) (finding Ring not retroactive); Trueblood v. Davis, 301 F.3d 784, 788 (7th Cir. 2002) (rejecting retroactive application of Ring); State v. Lotter, 266 Neb. 245 (Neb. 2003); Arizona v. Towery, 64 P.3d 828 (Ariz. 2003); Colwell v. State, 59 P.3d 463 (Nev. 2002).[5]

Parker's contention that Mills is no longer valid is not a supportable position. In Mills, this Court found the rule announced in Apprendi, requiring any fact increasing the penalty

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150-151 (4th Cir 2002); Browning v. United States, 241 F.3d 1262, 1264 (10th Cir. 2001); Rodgers v. United States, 229 F.3d 704, 706 (8th Cir. 2000); Talbott v. Indiana, 226 F.3d 866, 868-870 (7th Cir. 2000); In re Tatum, 233 F.3d 857, 859 (5th Cir. 2000); In re Joshua, 224 F.3d 1281, 1283 (11th Cir. 2000); Sustache-Rivers v. United States, 221 F.3d 8 (1st Cir. 2000).

[5] In DeStefano v. Woods, 392 U.S. 631 (1968), the Supreme Court held a violation of the right to a jury trial is not to be applied retroactively. See Proffitt v. Florida, 428 U.S. 242, 252 (1976) (holding Constitution does not require jury sentencing)

for a crime beyond the prescribed statutory maximum to be submitted to a jury and proven beyond reasonable doubt, does not apply to Florida's capital sentencing as the statutory maximum sentence upon conviction of first-degree murder is death. See, Wright v. State, 2003 WL 21511313 (Fla. July 3, 2003); Porter v. Crosby, 840 So.2d 981, 986 (Fla. 2003) (stating "we have repeatedly held that maximum penalty under the statute is death"); Spencer v. State, 842 So. 2d 52, 72(Fla. 2002), Bottoson v. State, 813 So. 2d 31(Fla. Jan 31, 2002), King v. State, 808 So. 2d 1237 (Fla. 2002), Card v. State, 803 So. 2d 613 (Fla. 2001). Florida's capital sentencing statute was upheld in Proffitt v. Florida, 428 U.S. 242 (1976) and has not been overruled by the Supreme Court.[6] Contrary to Parker's position, Mills remains valid, and this Court has properly ruled death to be the statutory maximum for first-degree murder.

Reliance upon Sattazahn v. Pennsylvania,537 U.S. 101 (2003), for the proposition Mills is invalid is misplaced. As

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[6] See, Bottoson v. Moore, 833 So. 2d 693, 694-95 (Fla. 2002) (noting Supreme Court has not overruled Florida's capital sentencing) citing Rodriquez De Quijas v. Shearson/American Express, 490 U.S. 477 (1989) (holding only Supreme Court can overrule its precedent and others should follow case which directly controls issue). Lambrix v. Singletary, 520 U.S. 518 (1997); Hildwin v. Florida, 490 U.S. 638 (1989); Spaziano v. Florida, 468 U.S. 447 (1984); Barclay v. Florida, 463 U.S. 939 (1983) and Proffitt v. Florida, 428 U.S. 242 (1976) are thus, intact.

explained by Justice Scalia in Sattazahn, (joined by Rehnquist, C.J., and Thomas, J.):

> In Ring v. Arizona, 536 U.S. 584 (2002), we held that aggravating circumstances that make a defendant eligible for the death penalty "operate as 'the functional equivalent of an element of a greater offense.'" 122 S. Ct. at 2443 (emphasis added). That is to say, for purposes of the Sixth Amendment's jury-trial guarantee, the underlying offense of "murder" is a distinct, lesser included offense of "murder plus one or more aggravating circumstances": Whereas the former exposes a defendant to a maximum penalty of life imprisonment, the latter increases the maximum permissible sentence to death.

This is merely an analysis of the application of the Arizona statute which provides life is the statutory maximum upon conviction. However, this Court has determined the statutory maximum in Florida is death, meaning that once the jury convicted Parker of first-degree murder, he was eligible for a death sentence, not merely life imprisonment. Moreover, the judicial role in Florida alleviates Eighth Amendment concerns as well, and in fact provides defendants with another opportunity to secure a life sentence; it also enhances appellate review and provides a reasoned basis for a proportionality analysis. Likewise, Parker's citation to Harris v. United States, 122 S.Ct. 2406 (2002), does not necessitate a finding that Mills is no longer valid. In fact, as the Supreme Court explained in

Harris, "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 aggravated crime -- and thus the domain of the jury -- by those who framed the Bill of Rights." In light of this statement, which also explains Ring, no action taken following the jury verdict in Florida first-degree murder case increases the penalty faced, as the statutory maximum is death.

Relying upon Ring and Sattazahn, and citing to Stringer v. Black, 503 U.S. 222 (1992), Parker argues there are elements for capital murder, i.e., "three factors" of (1) an aggravator, (2) of sufficient weight to warrant the death penalty, and (3) mitigation not outweighing the aggravation. He points to Stringer and its interpretation of the treatment aggravators receive in weighing and non-weighing states. Parker's reliance is misplaced for two reasons. First, Stringer is addressed to how an invalid/vague aggravator should be resolved in "weighing states" under the Eighth Amendment and second, the fact the Supreme Court has characterized Florida's capital sentencing in a certain way is not controlling where this Court subsequently announced its interpretation of the state statute. Because Stringer was an Eighth Amendment issue attempting to answer how best to define and apply aggravating factors, it is

distinguishable from the instant case which is attempting to resolve Sixth Amendment issues.

Further, a state supreme court's interpretation of its statute is the controlling factor. As the Supreme Court affirmed in Mullaney v. Wilbur, 421 U.S. 684, 691 (1975) "[t]his Court, however, repeatedly has held that state courts are the ultimate expositors of state law ... and that we are bound by their constructions except in extreme circumstances." (citing Murdock v. City of Memphis, 20 Wall. 590, 22 L.Ed. 429 (1875); Winters v. New York, 333 U.S. 507 (1948)). The mere fact the Supreme Court indicated Florida's narrowing for capital cases occurs during the penalty phase does not foreclose this Court from announcing death eligibility occurs upon conviction.[7] See Mills, 786 So. 2d at 538. Similarly, death eligibility and sentencing selection do not have to happen at the same time. Section 921.141 clearly secures and preserves significant jury participation in narrowing the class of individuals eligible to be sentenced to death. In fact, the jury's role is so vital to

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[7] In fact, the same situation arose when the Supreme Court characterized Walton v. Arizona, 497 U.S. 639 (1990) in Apprendi v. New Jersey, 530 U.S. 466 (2000). Subsequently, the Arizona Supreme Court announced when death eligibility takes place under Arizona's capital sentencing statute. Ring v. State, 25 P.3d 1139, 1150 (Ariz. 2001). This new interpretation had to be accepted by the Supreme resulting in the Ring v. Arizona, 122 S.Ct. 2428 decision and the overruling of Walton.

the sentencing process in Florida that it has been characterized as a "co-sentencer." Espinosa v. Florida, 509 U.S. 1079 (1992). Merely because narrowing may take place during the penalty phase does not raise the sentencing selection factors to elements of the crime or detract from the announcement death eligibility occurs at conviction. For these same reasons, Jurek v. Texas, 428 U.S. 262 (1976) and Lowenfield v. Phelps, 484 U.S. 231 (1998) do not further Parker's position.

Furthermore, contrary to Parker's suggestion, Ring proves only that Apprendi, and more important Ring, are not sentencing cases.[8] Apprendi and Ring involve the jury's role in convicting a defendant of a qualifying offense, subject to the death penalty. Quoting Proffitt, 428 U.S. at 252, Ring acknowledged that "[i]t has never [been] suggested that jury sentencing is constitutionally required",[9] rather Ring involves only the

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[8] We know this is true from the Ring opinion and would further suggest this is clarified by the specially concurring opinion by Justice Breyer, where he points out that he would extend the jury's role under the Eighth Amendment to sentencing. Justice Breyer in concurring in the judgement held:

> "And I conclude that the Eighth Amendment requires individual jurors to make, and to take responsibility for, a decision to sentence a person to death." Ring v. Arizona, 122 S. Ct. 2428, 2448 (2002).

[9] See Harris v. Alabama, 513 U.S. 504, 515 (1995) (holding that "[t]he Constitution permits the trial judge, acting alone, to impose a capital sentence. It is thus not offended when a

requirement the jury find the defendant death-eligible. Ring, 122 S.Ct. at 2447, n.4. The jury determination is for the guilt phase, while sentencing rests with the trial judge. See Spaziano, 468 U.S. at 459 (finding Sixth Amendment has no guarantee of right to jury trial on sentence).

Based upon this, Parker's "three factors" are not elements of the crime, but are sentencing components used to determine the appropriate punishment. Aggravating factors are not elements of the offense, but are capital sentencing guidelines. Poland v. Arizona, 476 U.S. 147, 156 (1986) (explaining aggravators are not separate penalties or offenses - they are standards to guide sentencer in choosing between alternatives of death or life imprisonment). Florida's capital sentencing scheme, found in section 921.141, affords the sentencer the guidelines to follow in determining the various sentencing selection factors related to the offense and the offender by providing accepted statutory aggravating factors and mitigating circumstances to be considered. Given the fact a convicted defendant faces the statutory maximum sentence of death upon conviction, Mills, 786 So. 2d at 538, the employment of further proceedings to examine the assorted "sentencing selection

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State further requires the sentencing judge to consider a jury's recommendation and trusts the judge to give it the proper weight.)

factors", including aggravators, mitigators, and the sufficiency of those, does not violate due process. In fact, a sentencer may be given discretion in determining the appropriate sentence selection, as long as the jury has decided the defendant is eligible for the death penalty.

Parker's reference to Zant v. Stephens, 462 U.S. 862 (1983) and its analysis in Porter v. State, 564 So. 2d 1060, 1064 (Fla. 1990) again confuses sentencing selection factors under the Eighth Amendment with the elements of the crime under the Sixth Amendment, and thus, are not dispositive. Although the death penalty cannot be imposed in the absence of an aggravator proven beyond a reasonable doubt, the aggravators and weighing of the mitigation and aggravation narrows the class of defendants subject to the death penalty. It does not increase the punishment. In fact, it is the absence of aggravation that narrows the sentence to life. While the statutory maximum is death, and remains so regardless of the sentence found appropriate, it is the aggravators in light of the mitigators which determine whether the maximum or some lesser sentence will be imposed. As reasoned in Tuilaepa v. California, 512 U.S. 967, 979-80 (1994):

> ... In sum, "discretion to evaluate and weigh the circumstances relevant to the particular defendant and the crime he committed" is not impermissible in the

> capital sentencing process.... "Once the jury finds that the defendant falls within the legislatively defined category of persons eligible for the death penalty, ... the jury then is free to consider a myriad of factors to determine whether death is the appropriate punishment."... Indeed, the sentencer may be given "unbridled discretion in determining whether the death penalty should be imposed after it has found that the defendant is a member of the class made eligible for that penalty." ....

Tuilaepa, 512 U.S. at 979-80 (citations omitted). Florida's sentencing scheme comports with the constitution.

The assertion that a "prior violent felony" or "felony murder" aggravator does not make a defendant death eligible is not well taken as Parker again confuses death eligibility with sentence selection. Merely because the "felony murder aggravator is not an "automatic aggravator" as reasoned in Blanco v. State, 706 So.2d 7, 11 (Fla. 1998) or that the circumstances of a "prior violent felony" may be weighed in such a manner as to mitigate a sentence, Jorgenson v. State, 714 So. 2d 423, 428 (Fla. 1998) does not make these factors elements of the crime of first-degree murder. They do not increase the punishment available at the time of conviction.

Apprendi explicitly exempted recidivist findings from its holding. Apprendi, 530 U.S. at 490 (holding, other than fact of prior conviction, any fact increasing the penalty beyond

statutory maximum must be submitted to jury, and proven beyond reasonable doubt). A court may make factual findings regarding recidivism. Walker v. State, 790 So.2d 1200, 1201 (Fla. 5th DCA 2001) (noting Florida courts, consistent with Apprendi's language excluding recidivism from its holding, have uniformly held habitual offender sentence is not subject to Apprendi). Because the prior violent felony aggravator is a recidivist factor, it may be found by the judge even in the wake of Ring. Ring, 122 S.Ct. 2445 at n.4 (noting none of aggravators at issue related to past convictions, and thus, holding in Almendarez-Torres v. United States, 523 U.S. 224 (1998) which allowed judge alone to find fact of prior conviction even if it increased sentence beyond statutory maximum was not being challenged).[10] A contemporaneous felony conviction is a unanimous jury finding supporting the aggravator. Hence, the requirements of Ring were satisfied here as two of the aggravators found were a "prior violent felony" for a 1979 conviction of aggravated battery and aggravated assault and

[10] Because the Supreme Court has not overruled Almendarez-Torres v. United States, 523 U.S. 224 (1998), it remains a valid basis for permitting judicial sentencing even in light of Ring. See, Rodriquez De Quijas v. Shearson/American Express, 490 U.S. 477 (1989) (noting only Supreme Court can overrule its precedent and other court should follow case which directly controls issue).

"felony murder" based upon contemporaneous armed robbery convictions (TR 2888, 2891). Parker, 641 So. 2d 377. This Court has rejected repeatedly Ring claims in cases where a prior violent felony or felony murder aggravating circumstances was found. See Duest State, 28 Fla. L. Weekly at S506 (Fla. 2003); Jones v. State, 28 Fla. L. Weekly s395 (Fla. May 8, 2003); Lugo v. State, 845 So. 2d 74, 119 n.79 (Fla. 2003); Kormondy v. State, 28 Fla. L. Weekly S135 (Fla. Feb. 13, 2003); Anderson, 841 So. 2d at 408-09; Doorbal v. State, 837 So.2d 940 (Fla. 2003); Israel v. State, 837 So. 2d 381, (Fla. 2002); Bottoson, 833 So. 2d at 695-96; King v. Moore, 831 So. 2d 143 (Fla. 2002).

With respect to Parker's declaration he was deprived of a jury trial because his jurors did not determine the three factors of (1) an aggravator, (2) of sufficient weight to warrant death, and (3) the proven mitigation did not outweigh the aggravation, this Court has resolved the issue against Parker. His contention stems from his rewriting of Florida's capital sentencing to place death eligibility at the time of sentencing and to include "three factors" as elements of the crime. The statute's constitutionality flows from the well settled fact a defendant is death eligible upon conviction for first-degree murder. Mills, 786 So. 2d at 538. See, Porter, 840 So.2d at 986; Spencer, 842 So. 2d at 72.

A unanimous verdict is not necessary, nor is the jury required to make factual determinations in its sentencing recommendation. See, Blackwelder v. State, 2003 WL 21511317 (Fla. July 3, 2003) (rejecting contention "aggravating circumstances must be alleged in the indictment, submitted to the jury, and individually found by a unanimous jury verdict"); Porter, 840 So.2d at 986; Doorbal, 837 So.2d at 940. Sweet v. Moore, 822 So. 2d 1269, 1275 (Fla. 2002); Cox v. State, 819 So. 2d 705, n.17 (Fla. 2002) (noting prior decisions on these issues need not be revisited "unless and until" Supreme Court recedes from Proffitt v. Florida).

Sullivan v. Louisiana, 508 U.S. 275 (1993) does not further Parker's claim as Sullivan is addressed to the need for unainimity at the guilt phase and that the decision must be "beyond a reasonable doubt." Neither is in question here, as the jury verdict rendering Parker death eligible was unanimous and beyond a reasonable doubt. Again Parker's argument is premised on the incorrect assumption the sentencing selection considerations are elements of the crime. Even under Ring, the jury is not required, as Parker suggests, to find not only one aggravator, but "sufficient" aggravation and weigh the aggravators against the proven mitigation. This is an attempt to procure jury sentencing which does not exist currently under

any case law. Of import is the fact 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, 122 S.Ct. at 2445 (stating "[w]hat 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 , 824 So. 2d 115, 122 (Fla. 2002) (Pariente, J., concurring); Barnes v. State, 794 So. 2d 590 (Fla. 2001) (finding Apprendi claim not applicable where additional judicial finding did not increase statutory maximum). Because these additional sentencing selection factors are not elements of the crime, Sullivan is not a bar to further jury or judicial sentencing considerations. Nothing in Sullivan or Ring calls into question the constitutionality of Florida's statute.

In **Claim IV**, Parker continues with his assertion the "three factors" are "essential elements" of capital murder. While he correctly identifies this Court's cases requiring the elements of a crime must be included in the indictment, as noted above, Parker's "three factors" are not elements of the crime as death eligibility occurred at time of conviction for first-degree

murder. See, Mills, 786 So. 2d at 538. Hence, there is no constitutional requirement to include them in the indictment. In fact, this Court has rejected the suggestion aggravators must be included in the indictment. Blackwelder, 2003 WL 21511317 (rejecting contention "aggravating circumstances must be alleged in the indictment, submitted to the jury, and individually found by a unanimous jury verdict"); Porter, 840 So.2d at 986; Doorbal, 837 So.2d at 940. Sweet, 822 So. 2d at 1275; Cox, 819 So. 2d at 705 n.17 (noting prior decisions on these issues need not be revisited "unless and until" Supreme Court recedes from Proffitt v. Florida, 428 U.S. 242 (1976)). For the same reasons addressed in those cases, there is not basis for including the sentencing selection factors of "sufficient aggravation" and "the mitigation does not outweigh the aggravation" in the indictment.

Parker's reliance upon Allen v. United States, 122 S.Ct. 2653 (2002) for support of his contention aggravators are elements to be included in the indictment is misplaced.[11] In

[11] Without question, the Fifth Amendment's grand jury clause has not been extended to the states under the Fourteenth Amendment. Apprendi v. New Jersey, 530 U.S. 466, 477 n.3 (2000); Hurtado v. California, 110 U.S. 516 (1984) (holding there is no requirement for indictment in state cases). This distinction, standing alone, is dispositive, at least as far as Parker relies on federal cases.

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, 497 U.S. 639 (1990), which, of course, Ring overruled. As such, it was proper for the Supreme Court to remand Allen for further consideration in light of Ring. However, such does not establish that aggravation is something which must be included in the indictment. Although denial of certiorari does not have any precedential value, Teague v. Lane, 489 U.S. 288, 296 (1989); United States v. Carver, 260 U.S. 482, 490 (1923) (Holmes, J.), it is significant that at the same time the Supreme Court decided Ring it denied certiorari on six Florida cases[12] where Ring/Apprendi issues were raised. Clearly, had the Supreme Court intended to apply Ring to Florida capital sentencing, it had every opportunity to do so. See Bottoson v. Moore, 833 So. 2d 693, 695 (Fla. 2002) (noting only U.S. Supreme Court may overrule its own decision); King v. Moore, 831 So. 2d 143 (Fla. 2002) (recognizing Supreme Court had opportunity to apply Ring to Florida's sentencing, but instead lifted the stay

[12] Mann v. Moore, 536 U.S. 962 (2002); King v. Florida, 536 U.S. 962 (2002); Bottoson v. Florida, 536 U.S. 962 (2002); Card v. Florida, 536 U.S. 963 (2002); Hertz v. Florida, 536 U.S. 963 (2002); and Looney v. Florida, 536 U.S. 966 (2002).

and denied certiorari). Based upon this, Allen should not give this Court pause.

Parker maintains his jury was instructed its role was merely advisory and that this Court rejected the complaint on direct appeal. See, Parker, 641 So. 2d at 376-77. However, his position is that should this Court conclude the sentence rests upon findings made by the sentencing jury, such would be in violation of Caldwell v. Mississippi, 472 U.S. 320, 328 (1985) and Justice Bryer's concurring opinion in Ring. Parker's reliance upon Caldwell, 472 U.S. 320 is misplaced. A Caldwell error is committed when a jury is misled regarding its sentencing duty so as to diminish its sense of responsibility for the decision. However, "[t]o establish a Caldwell violation, a defendant necessarily must show that the remarks to the jury improperly described the role assigned to the jury by local law." Dugger v. Adams, 489 U.S. 401, 407 (1989). This Court has recognized the jury's sentencing role is merely advisory, and the standard instructions adequately and constitutionally advise the jury of its responsibility; "the standard jury instruction fully advises the jury of the importance of its role, correctly states the law, [] and does not denigrate the role of the jury." Brown v. State, 721 So. 2d 274, 283 (Fla. 1998)(citation omitted). See Burns v. State, 699

So. 2d 646, 654 (Fla. 1997)(holding instruction correctly states law and advises jury of importance of its sentencing role), cert. denied, 522 U.S. 1121 (1998); Turner v. Dugger, 614 So. 2d 1075, 1079 (Fla.1992) (finding Caldwell does not control Florida law on capital sentencing); Combs v. State, 525 So. 2d 853, 855-58 (Fla. 1988) (rejecting claim standard jury instruction is unconstitutional under Caldwell or applicable to Florida death cases). There is no question the jury was instructed adequately. This is in compliance with constitutional dictates and is not implicated by Ring. As such, Florida's statute is constitutional and habeas corpus relief must be denied.

CONCLUSION

Based upon the foregoing, the State requests respectfully that this Court deny habeas corpus relief.

Respectfully submitted,

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COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Response has been furnished by U.S. Mail to Dan D. Hallenberg, Esq., Capital Collateral Regional Counsel - South, 101 N.E. 3rd Avenue, Suite 400, Fort Lauderdale, FL 33301 on August 12, 2003.

_____
LESLIE T. CAMPBELL

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the instant brief has been prepared with 12 point Courier New type, a font that is not spaced

proportionately on August 12, 2003.

_____
LESLIE T. CAMPBELL