IN THE SUPREME COURT OF FLORIDA

RAYMOND LEON KOON,

Petitioner,

v. CASE NO. SC03-1139

JAMES V. CROSBY, JR., ETC.,

Respondent.
_____/

**RESPONSE TO PETITION FOR HABEAS CORPUS**

COMES NOW, Respondent, JAMES V. CROSBY, JR., Secretary, Florida Department of Corrections, by and through the undersigned Assistant Attorney General, and hereby responds to the Petition for Writ of Habeas Corpus filed in the above-styled case. Respondent respectfully submits that the petition should be denied, and states as grounds therefor:

**I.**

**STATEMENT OF THE CASE**

Raymond Koon was charged by indictment filed on February 16, 1982, with the first degree murder of Joseph Dino. (R1 I/1)[1] At arraignment, Koon pleaded not guilty. Koon was found guilty

[1] References to the records relating to this case will be as follows: (R1 volume #/page # ) designates the record on appeal from the first trial, (R2 volume #/page # ) designates the record on appeal from the re-trial, and (PCR volume #/page # ) designates the Florida Rule 3.850 appeal record.

as charged in the indictment and was sentenced to death on January 28, 1983. (R1 I/138-146) The conviction was reversed and remanded for a new trial based upon an evidentiary error. Koon v. State, 463 So. 2d 201 (Fla. 1985)

A second jury trial commenced on December 3, 1985. Koon was again found guilty. Koon waived the presentation of any mitigating evidence and the jury recommended death by a vote of 7-5. (R2 8/1396) On December 23, 1985, Judge Hayes followed the jury's recommendation and imposed a sentence of death. In his written sentencing order, Judge Hayes found four aggravating circumstances: (1) prior violent felony; (2) disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws; (3) heinous, atrocious or cruel; and (4) cold, calculated and premeditated. The trial court found no mitigating circumstances. (R2 8/1399-1420)

On August 20, 1987, this Court affirmed the judgment and sentence of death. Koon v. State, 513 So. 2d 1253 (Fla. 1987) The issues raised by Koon in his direct appeal were as follows:

> ISSUE I. THE COURT BELOW FAILED TO CONDUCT AN ADEQUATE INQUIRY AND MAKE APPROPRIATE FINDINGS CONCERNING RAY KOON'S REQUEST TO DISCHARGE HIS APPOINTED COUNSEL.
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> ISSUE II. THE COURT BELOW ERRED IN ADMITTING INTO EVIDENCE AT RAY KOON'S TRIAL PREJUDICIAL HEARSAY TESTIMONY REGARDING WHAT A FEDERAL MAGISTRATE SAID DURING A HEARING ON THE FEDERAL COUNTERFEITING

INDICTMENT THAT HAD BEEN LODGED AGAINST KOON.

ISSUE III. THE COURT BELOW ERRED IN ALLOWING THE STATE TO ASK QUESTIONS OF DEFENSE WITNESS EDWARD PETER ROBERTSON WHICH EXCEEDED THE SCOPE OF DIRECT EXAMINATION AND PLACED BEFORE THE JURY IMPROPER EVIDENCE OF THREATS ALLEGEDLY MADE BY PEOPLE OTHER THAN RAY KOON.

ISSUE IV. THE COURT BELOW ERRED IN ALLOWING THE PROSECUTOR TO ASK DEFENSE WITNESS RALPH KOON, RAY KOON'S BROTHER, WHETHER THE WITNESS HAD CALLED THE UNITED STATES ATTORNEY A "SMART-ASS BASTARD."

ISSUE V. THE COURT BELOW ERRED IN REQUIRING RAY KOON TO TESTIFY AT HIS TRIAL BEFORE HE WAS FULLY PREPARED TO DO SO.

ISSUE VI. THE COURT BELOW ERRED IN FAILING TO REQUIRE THE STATE TO PROVE MATTERS IN RAY KOON'S PRESENTENCE INVESTIGATION REPORT WHICH HE CONTESTED, AND ERRED IN FAILING TO CONTINUE KOON'S SENTENCING HEARING SO THAT HE COULD SUBPOENA WITNESSES TO DISPUTE INFORMATION APPEARING IN THE PSI.

ISSUE VII. THE COURT BELOW ERRED IN GIVING THE JURY'S DEATH RECOMMENDATION CONTROLLING WEIGHT, THUS FAILING TO EXERCISE HIS INDEPENDENT JUDGMENT CONCERNING THE SENTENCE TO BE IMPOSED, AND ABROGATING FLORIDA'S DEATH PENALTY SENTENCING SCHEME, RESULTING IN A DEATH SENTENCE VIOLATIVE OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

ISSUE VIII. THE TRIAL COURT ERRED IN SENTENCING RAY KOON TO DEATH BECAUSE THE SENTENCING WEIGHING PROCESS INCLUDED IMPROPER AGGRAVATING CIRCUMSTANCES AND EXCLUDED EXISTING MITIGATING CIRCUMSTANCES, RENDERING THE DEATH SENTENCE UNCONSTITUTIONAL UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

ISSUE IX. RAY KOON SHOULD NOT BE DENIED GAIN TIME BECAUSE OF HIS ALLEGED NONPAYMENT OF COURT COSTS IMPOSED PURSUANT TO SECTION 27.3455 (10) OF THE FLORIDA STATUTES.

ISSUE X. THE COURT BELOW ERRED IN ASSESSING COSTS AND ATTORNEY'S FEES AGAINST RAY KOON WITHOUT GIVING HIM PRIOR NOTICE AND AN OPPORTUNITY TO BE HEARD AND TO OBJECT TO THESE ASSESSMENTS.

A request by Koon for clemency was apparently denied when Governor Bob Martinez signed a death warrant in Koon's case on May 1, 1989. (PCR 10/1668) On or about May 31, 1989, Petitioner filed an Emergency Motion to Vacate Judgment and Sentence, and Consolidated Emergency Application for Stay of Execution, with Special Request for Leave to Amend and Supplement. (PCR 10/1671-1862)

A stay was entered and an evidentiary hearing was held in the circuit court on December 5 and 6, 1989.[2] At the close of the hearing, the trial court denied the motion for postconviction relief. Koon then appealed the denial of his motion for postconviction relief and petitioned this Court for a writ of habeas corpus. Koon v. Dugger, 619 So. 2d 246 (Fla. 1993)

Koon raised eleven claims in his habeas petition.

CLAIM I. MR. KOON'S SENTENCE OF DEATH VIOLATES THE EIGHTH AMENDMENT BECAUSE THE PENALTY PHASE JURY INSTRUCTIONS SHIFTED THE BURDEN TO MR. KOON TO PROVE THAT DEATH WS INAPPROPRIATE CONTRARY TO MULLANEY V. WILBUR, 421 U.S. 684 (1975), LOCKETT V. OHIO, 438 U.S.

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[2] Although the hearing was limited to the merits of certain claims, the court heard evidence on all of the claims as it related to the ineffective assistance of counsel claim.

586 (1978), AND MILLS V. MARYLAND, 108 S. CT. 1860 (1988).

CLAIM II. MR. KOON'S SENTENCE OF DEATH, RESTING ON THE "HEINOUS, ATROCIOUS, AND CRUEL" AGGRAVATING FACTOR, IS IN DIRECT AND IRRECONCILABLE CONFLICT WITH AND CONTRARY TO MAYNARD V. CARTWRIGHT, 108 S. CT. 1853 (1988), IS IN CONFLICT WITH THE NINTH CIRCUIT COURT OF APPEALS DECISION IN ADAMSON V. RICKETTS, 865 F.2D 1011, (9TH CIR. 1988)(EN BANC), AND VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS.

CLAIM III. THE COLD, CALCULATED, AND PREMEDITATED AGGRAVATING CIRCUMSTANCE WAS APPLIED TO MR. KOON'S CASE IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS. THE JURY WAS NOT ADEQUATELY INSTRUCTED ON THE ELEMENTS OF THIS AGGRAVATING CIRCUMSTANCE, AND COUNSEL RENDERED INEFFECTIVE ASSISTANCE IN FAILING TO ADEQUATELY LITIGATE THIS ISSUE.

CLAIM IV. THE TRIAL COURT IMPROPERLY APPLIED THE AGGRAVATING CIRCUMSTANCE OF HINDERING THE ROLE OF LAW ENFORCEMENT, AND THE JURY WAS NEVER INSTRUCTED AS TO THE REQUISITE ELEMENTS.

CLAIM V. THE EIGHTH AMENDMENT WAS VIOLATED BY THE SENTENCING COURT'S REFUSAL TO FIND THE MITIGATING CIRCUMSTANCES CLEARLY SET OUT IN THE RECORD.

CLAIM VI. MR. KOON'S SENTENCING JUDGE USED A NON-RECORD REPORT TO SENTENCE MR. KOON TO DEATH, IN VIOLATION OF GARDNER V. FLORIDA, AND THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS. MR. KOON'S COUNSEL FAILED TO ZEALOUSLY ADVOCATE FOR HIM AND IN FACT TACITLY AGREED DEATH WAS APPROPRIATE.

CLAIM VII. THE SENTENCING COURT ERRED BY FAILING TO INDEPENDENTLY WEIGH AGGRAVATING AND MITIGATING CIRCUMSTANCES, CONTRARY TO MR. KOON'S FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS.

CLAIM VIII. MR. KOON'S SENTENCING JURY WAS REPEATEDLY MISLED BY INSTRUCTIONS AND ARGUMENTS WHICH UNCONSTITUTIONALLY AND INACCURATELY DILUTED THEIR SENSE OF RESPONSIBILITY FOR SENTENCING, CONTRARY TO CALDWELL V. MISSISSIPPI, 105 S. CT. 2633 (1985) AND

> MANN V. DUGGER, 844 F.2D 1446 (11TH CIR. 1988), AND IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS. MR. KOON RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL WHEN COUNSEL FAILED TO ZEALOUSLY ADVOCATE AND LITIGATE THIS ISSUE.
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> CLAIM IX. DURING THE COURSE OF MR. KOON'S TRIAL, THE PROSECUTION AND THE COURT IMPROPERLY ASSERTED THAT SYMPATHY TOWARDS MR. KOON WAS AN IMPROPER CONSIDERATION IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS. THE FAILURE TO LITIGATE THIS CLAIM DEPRIVED MR. KOON OF HIS RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL.
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> CLAIM X. THE ERRONEOUS JURY INSTRUCTION THAT A VERDICT OF LIFE MUST BE MADE BY A MAJORITY OF THE JURY MATERIALLY MISLED THE JURY AS TO ITS ROLE AT SENTENCING AND CREATED THE RISK THAT DEATH WAS IMPOSED DESPITE FACTORS CALLING FOR LIFE, AND MR. KOON'S DEATH SENTENCE WAS THUS OBTAINED IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.
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> CLAIM XI. THE PROSECUTION IN THE COURSE OF THE PROCEEDINGS IMPROPERLY ASSERTED THAT MERCY TOWARDS MR. KOON WAS NOT A PROPER CONSIDERATION AND THAT THE LEGISLATURE INTENDED THAT HE BE EXECUTED.

Because these habeas claims essentially duplicated those raised in the appeal of the 3.850 motion, this Court did not treat the habeas petition separately in the opinion, except to state that the claims of ineffective assistance of appellate counsel were without merit. Koon v. Dugger, at 247 n 2. Upon denying the 3.850 appeal, this Court found the following claims to be procedurally barred: (1) the trial judge relied on a nonrecord report in sentencing (raised on direct appeal); (2) the court improperly applied the aggravating circumstance of

hindering the role of law enforcement (raised on direct appeal); (3) the court refused to find mitigating circumstances established in the record (raised on direct appeal); (4) the court failed to independently weigh aggravating and mitigating circumstances (raised on direct appeal); (5) the participation of federal agents in the state's case after they successfully prosecuted him on federal charges violated double jeopardy (raised on the first direct appeal); (6) Koon was denied the right to be present at a critical stage of the proceeding; (7) security precautions taken at trial prejudiced Koon; (8) the trial court erred in refusing to grant a change of venue; (9) the failure to instruct the jury on the nonstatutory mitigating circumstance of disparate treatment violated Koon's constitutional rights; (10) the jury was misled by instructions and arguments that diluted its responsibility for sentencing in violation of Caldwell v. Mississippi, 472 U.S. 320 (1985); (11) the state introduced nonstatutory aggravating factors; (12) the prosecutor made improper comments regarding mercy and sympathy toward Koon; (13) the jury instructions shifted the burden to Koon to prove that life was the appropriate penalty; (14) the jury was misled by the instruction that a recommendation of life must be made by a majority vote; (15) Koon was denied the right to counsel because his attorney had a conflict of interest; (16)

the Court's interpretation of the aggravating factor of cold, calculated, and premeditated is unconstitutionally overbroad (application of this factor to this case was raised on direct appeal). This Court also found that Koon's claim that the jury was improperly instructed on the aggravating factor of heinous, atrocious, and cruel was procedurally barred. Koon v. Dugger, at 247-48. This Court then considered and rejected his ineffective assistance of counsel and mental health claims on the merits.

## II.

## STATEMENT OF FACTS

In the opinion affirming Koon's conviction and sentence, this Court set forth the salient facts as follows:

> Pursuant to information supplied by two witnesses, Joseph Dino and Charles Williams, Ray Koon was arrested and indicted on federal counterfeiting charges in 1979. His trial never took place because by the scheduled trial date, Joseph Dino had been murdered and Charles Williams refused to testify. Ray Koon and his nephew, J. L. Koon, were eventually charged with the murder of Dino. The nephew pled guilty to the charge and subsequently testified against his uncle. According to J. L. Koon, he and Ray had stopped at a country store after a day of drinking, working and hunting. Ray dialed Dino's home and had J. L. use a false name to set up a business meeting with Dino for later that evening. They then drove to Ray's home, put a shotgun in the trunk, and met Dino in the parking lot of a lounge. Ray and Dino became involved in a fist fight in which Dino was severely beaten. The Koons then placed Dino in their vehicle and drove out of town. At one point they stopped near a canal where Ray took the shotgun out and ordered Dino into the trunk. When Dino refused to get into the trunk, the three continued driving across the state at high rates of speed. When Dino asked if he was going to be killed, Ray said they might rough him up a bit but would not kill him. On a deserted road near Naples, Ray took the shotgun and walked Dino into the woods. J. L. heard a gunshot. When J. L. accosted his uncle by a small lake in which Dino's body was partially submerged, Ray told him not to worry about Dino because he had "watched his head explode" and that dead men couldn't tell any lies. Two other witnesses also testified that Koon told them he had killed Dino.
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> Koon v. State, 513 So. 2d 1253 (Fla. 1987)

## III.

## ARGUMENT

This is Koon's second state habeas petition. His first state habeas petition was denied by this Court after finding that the eleven claims in his habeas petition were essentially duplicates of those raised in the appeal of the 3.850 motion. To the extent that the first habeas petition raised claims of ineffective assistance of appellate counsel, this Court held that such claims were without merit. Koon v. Dugger, 619 So. 2d 246, 247 n 2 (Fla. 1993)

Petitioner now returns to this Court and asserts that he should be entitled to relief under Ring v. Arizona, 536 U.S. 584 (2002) and Apprendi v. New Jersey, 530 U.S. 466 (2000) because the jury was not required to make factual findings with regard to the aggravators and because the aggravators were not charged in the indictment.[3] Initially, Respondent notes that Ring is not applicable to Koon as he has prior violent felony convictions which put his sentence outside the dictates of Ring. Additionally, the claims presented in the instant petition are both unpreserved and without merit. Finally, even if Ring were held to be applicable to the Florida sentencing scheme, it is

[3] Although Koon presents these arguments as two separate claims, the State has combined them for purposes of this response.

not retroactive and, therefore, not applicable to the instant case. Relief must be denied.

**A. Prior Violent Felony**

Koon was previously convicted of a violent felony. The sentencing order reflects that Koon had 5 prior convictions for aggravated assault. (R2 8/1414-15) This Court has consistently rejected the application of Ring to cases where the defendant was convicted of a prior violent felony. See Lugo v. State, 845 So. 2d 74 (Fla. 2003) (noting rejection of Apprendi/Ring claims in postconviction appeals, unanimous guilty verdict on other felonies, and "existence of prior violent felonies"); Doorbal v. State, 837 So. 2d 940, 963 (Fla. 2003) (stating that prior violent felony aggravator based on contemporaneous crimes charged by indictment and on which defendant was found guilty by unanimous jury "clearly satisfies the mandates of the United States and Florida Constitutions"). Accordingly, this petition should be denied.

**B. Procedural Bar**

Although the State recognizes that this Court has not expressly applied the procedural bar to Ring claims, the State maintains that the claim is procedurally barred for the failure to raise below. Koon did not raise any assertion

contemporaneously before or at trial pertaining to a claim that aggravators must be charged in the indictment or that the Sixth Amendment requires the jury's participation in regard to aggravating factors at penalty phase.[4] See McGregor v. State, 789 So. 2d 976, 977 (Fla. 2001) (Apprendi claim procedurally barred for failure to raise in trial court); Barnes v. State, 794 So. 2d 590 (Fla. 2001) (Apprendi error not preserved for appellate review). While Ring had not been decided at the time of trial, that fact does not suffice to avoid the procedural default. What is important is not the existence of a particular decision but whether the tools were available to construct the argument. Engle v. Isaac, 456 U.S. 107, 133 (1982); Pitts v. Cook, 923 F.2d 1568, 1571-1572 (11th Cir. 1991). The Sixth Amendment right to jury trial has always been known and the tools have been available for the defense to construct the argument. See Proffitt v. Florida, 428 U.S. 242, 252 (1976) (holding Constitution does not require jury sentencing); Hildwin v. Florida, 490 U.S. 638 (1989) ("This case presents us once again with the question whether the Sixth Amendment requires a

[4] Notably, Koon does not assert ineffective assistance of counsel for failing to present this claim below. Nevertheless, the State notes that appellate counsel cannot be deemed ineffective for failing to raise a claim that was not preserved below or that is without merit. Johnson v. Moore, 837 So. 2d 343, 347 (Fla. 2002).

jury to specify the aggravating factors that permit the imposition of capital punishment in Florida."); Spaziano v. Florida, 468 U.S. 447 (1984). The decision in Ring was not required as a predicate for counsel for Ring to assert his Sixth Amendment claim in a timely and appropriate fashion in the Arizona trial court. Accordingly, this claim should be denied as procedurally barred.

**C. Merits**

This Court has repeatedly and consistently found that, unlike the situation in Arizona, the statutory maximum sentence for first degree murder in Florida is death. See Mills v. Moore, 786 So. 2d 532, 536-538 (Fla. 2001); Mann v. Moore, 794 So. 2d 595, 599 (Fla. 2001); Porter v. Crosby, 840 So. 2d 981 (Fla. 2003); Shere v. Moore, 830 So. 2d 56, 61 (Fla. 2003)(defining capital felony to be one where the maximum possible punishment is death.) Accordingly, this Court has rejected the notion that Ring applies to Florida's capital sentencing scheme. Kormondy v. State, 845 So. 2d 41, 54 (Fla. 2003) ("Ring does not require either notice of the aggravating factors that the State will present at sentencing or a special verdict form indicating the aggravating factors found by the jury"); Spencer v. State, 842 So. 2d 52, 73 (Fla. 2003) (Finding no merit to habeas claim because Ring and Apprendi do not apply

to Florida's capital sentencing scheme.) Nothing in this successive habeas petition supports a contention that this Court's conclusion that Ring does not apply in Florida should be reversed. Accordingly, Petitioner is not entitled to any relief.

**D. Retroactivity**

Finally, Petitioner is not entitled to collateral relief on this claim because nearly all the courts to have addressed the issue have held that Ring v. Arizona is not retroactive to cases that have become final.[5] See Turner v. Crosby, 339 F.3d 1247 (11th Cir. 2003) (using a Teague framework, determined that Ring was a new procedural rule, not a new substantive rule and relying on prior decision that Apprendi was not retroactive, found Ring was not retroactive); In Re Johnson, 334 F.3d 403, 405 n 1 (5th Cir. 2003) (noting that while the Court need not reach the issue, "since the rule in Ring is essentially an application of Apprendi, logical consistency suggests that the rule announced in Ring is not retroactively available"); Moore v. Kinney, 320 F.3d 767, 771 n 3 (8th Cir.)(en banc) ("Absent an express pronouncement on retroactivity from the Supreme Court,

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[5] This case became final on March 7, 1988 when certiorari was denied after this Court affirmed the judgment and sentence on direct appeal. Koon v. State, 513 So. 2d 1253 (Fla.), cert denied, 485 U.S. 943 (1988).

the rule from Ring is not retroactive"), cert. denied, 123 S. Ct. 2580 (2003). See also Szabo v. Walls, 313 F.3d 392, 398-99 (7th Cir. 2002); Cannon v. Mullin, 297 F.3d 989, 994 (10th Cir. 2002); Sibley v. Culliver, 243 F.Supp. 1278 (M.D. Ala. 2003); State v. Lotter, ___ N.W.2d ___, 266 Neb. 245 (Neb. July 11, 2003); Colwell v. State, 59 P.3d 463 (Nev. 2002); State v. Towery, 64 P.3d 828, 830 (Ariz. 2003); contra Summerlin v. Stewart, No. 98-99002, 2003 U.S. App. LEXIS 18111 (9th Cir. September 2, 2003); State v. Whitfield, 107 S.W.3d 253 (Mo. 2003).

The federal decisions addressing retroactivity apply the rule of Teague v. Lane, 489 U.S. 288 (1989), in consideration of the issue.[6] Although this Court determines retroactivity under

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[6]In Teague, the United States Supreme Court announced that new constitutional rules of criminal procedure will not be applicable to cases which have become final before the new rules are announced, unless they fall within an exception to the general rule. 489 U.S. at 310. A case announces a new rule when it breaks new ground or imposes a new obligation on the state or the federal government. To put it differently, a case announces a new rule if the result was not *dictated* by precedent existing at the time the defendant's conviction became final. Id. at 301.

There are two exceptions to the general rule on non-retroactivity. First, a new rule should be applied retroactively if it places a certain kind of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe. Id. at 311. The second exception, derived from an earlier view by Justice Harlan, requires that the new rule must "alter our understanding of the *bedrock procedural elements* that must be found to vitiate the fairness of a particular conviction." Thus, this exception is limited in

the principles of Witt v. State, 387 So. 2d 922 (Fla. 1980), this Court should apply the Teague test in the instant case. First of all, the question presented concerns the retroactivity of a federal constitutional decision, which is itself a federal question, requiring the application of federal retroactivity principles. See American Trucking Ass'ns., Inc. v. Smith, 496 U.S. 167, 178 (1990); Michigan v. Payne, 412 U.S. 47 (1973); State v. Tallard, 816 A.2d 977, 979 (N.H. 2003); State v. Sepulveda, 32 P.3d 1085, 1086-87 (Ariz. Ct. App. 2001); Meadows v. State, 849 S.W.2d 748, 754 (Tenn. 1993).

Even if not required to do so, this Court should adopt Teague as the proper analysis. Several states have used the question of retroactivity of Ring and Apprendi to reconsider state retroactivity principles; this Court should also take advantage of the opportunity to consider the continued applicability of Witt v. State, 387 So. 2d 922 (Fla. 1980). As several courts have noted, Teague offers several advantages over prior federal analyses, which serve as the basis of this Court's Witt test. The Witt standard has been criticized as leading to inconsistent results and disparate treatment, and unnecessarily intruding on prior convictions where the trials

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scope to "those new procedures without which the likelihood of an accurate conviction is seriously diminished." 489 U.S. at 311-313.

comported with constitutional norms at the time. See Teague, 489 U.S. at 309-311. The Witt analysis is inherently problematic. Teague's foundation is the substantial respect it pays to the finality of state convictions, respect which is no less deserving from the state courts assessing their own convictions. See Teague v. Palmateer, 57 P.3d 176, 183 (Ore. App. 2002) ("It would be a perversion of the comity principles reflected in state post-conviction procedures, not a service to them, to adopt rules of retroactivity for new federal pronouncements that are broader than those adopted by federal courts, therefore according *less* respect to the finality of state court judgments than the federal courts themselves require"). Given the similarity of purpose behind federal habeas review and state collateral proceedings, using the same analysis for retroactivity is both intellectually honest and vastly practical. See Daniels v. State, 561 N.E.2d 487, 489 (Ind. 1990). Because the retroactive application of new procedural rules seriously undermines the principle of finality which is essential to the operation of our criminal justice system, this Court should only permit retroactive application where required in the interests of justice, as outlined in Teague. 489 U.S. at 309-311.

Under Teague, as a number of courts have recognized,

retroactive application of Ring is not appropriate. Ring is clearly a new procedural rule, having overruled Walton v. Arizona, 497 U.S. 639 (1990), as to the procedure to be used in imposing a capital sentence. See Towery, 64 P.3d at 832-833 (rejecting defendant's claim that Ring was substantive rather than procedural). And Ring does not meet the exception as a "watershed" rule necessary for fundamental fairness; it does not enhance the accuracy of a sentence, or diminish the likelihood of an unfair sentence. See Towery, 64 P.3d at 833-834; Colwell, 59 P.3d at 473.

The finding of non-retroactivity is consistent with the numerous decisions holding that Apprendi v. New Jersey, 530 U.S. 466 (2002) is not retroactive. Ring arises from application of Apprendi to Arizona's capital scheme. Every federal circuit court to address the issue has found that Apprendi is not retroactive. See United States v. Swinton, 2003 U.S. App. LEXIS 12697 (3d Cir. June 23, 2003); Sepulveda v. United States, 330 F.3d 55 (1st Cir. 2003); Coleman v. United States, 329 F.3d 77 (2d Cir. 2003); Goode v. United States, 305 F.3d 378 (6th Cir. 2002); United States v. Brown, 305 F.3d 304 (5th Cir. 2002); Curtis v. United States, 294 F.3d 841 (7th Cir. 2002); United States v. Mora, 293 F.3d 1213 (10th Cir. 2002); United States v. Sanchez-Cervantes, 282 F.3d 664 (9th Cir. 2002); McCoy v. United

States, 266 F.3d 1245, 1257 (11th Cir. 2001); United States v. Moss, 252 F.3d 993, 996-1001 (8th Cir. 2001); United States v. Sanders, 247 F.3d 139, 146-51 (4th Cir. 2001); Jones v. Smith, 231 F.3d 1227 (9th Cir. 2000). Several state courts have similarly held that Apprendi does not apply retroactively. See People v. De La Paz, 791 N.E.2d 489 (Ill. 2003) (applying Teague); State v. Tallard, 816 A.2d 977 (N.H. 2003) (applying Teague); Teague v. Palmateer, 57 P.3d 176 (Ore. App. 2002) (applying Teague); Greenup v. State, 2002 Tenn. Crim. App. LEXIS 836 (Tenn. App. 2002) (applying Teague); People v. Bradbury, 68 P.3d 494 (Colo. App. 2002) (applying Teague); State v. Sepulveda, 32 P.3d 1085 (Az. App. 2001); Whisler v. State, 36 P.3d 290 (Kan. 2001) (applying Teague), cert. denied, 535 U.S. 1066 (2002); Sanders v. State, 815 So. 2d 590 (Ala. Crim. App. 2001); State v. Sprick, 59 S.W.3d 515 (Mo. 2001).

In addition, at least six of the United States Supreme Court Justices have, in varying individual opinions, made clear their belief that Apprendi is not to be retroactively applied. See Ring, 536 U.S. 620-621 (O'Connor, J., dissenting); Harris v. United States, 536 U.S. 545, 581 (2002) (Thomas, J., dissenting). The United States Supreme Court has indicated that its holding in Apprendi is not worthy of retroactive application. It has itself procedurally barred an Apprendi

claim. United States v. Cotton, 535 U.S. 625 (2002) (finding that Apprendi error did not qualify as plain error, the federal equivalent of fundamental error). It has held that the failure to submit an element to the jury did not constitute structural error. Neder v. United States, 527 U.S. 1, 8-9 (1999). See also DeStefano v. Woods, 392 U.S. 631 (1968) (right to jury trial not to be applied retroactively).

Koon cannot prevail on his claim for entitlement to relief by retroactive application of Ring in this postconviction challenge. Ring announced a change in procedural law which does not fit within either exception to Teague's general rule of non-retroactivity. Similarly, Koon cannot prevail under this Court's current standard of retroactivity under the principles of Witt v. State, 387 So. 2d 922 (Fla. 1980), which requires a decision of fundamental significance which so drastically alters the underpinnings of Koon's death sentence that "obvious injustice" exists. See New v. State, 807 So. 2d 52 (Fla. 2001); Ferguson v. State, 789 So. 2d 306, 311 (Fla. 2001) (court must consider 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). Koon cannot show that adoption of Ring satisfies these criteria. See Towery, 64 P.3d at 835-836 (finding Ring is not subject to retroactive

application under Allen v. Hardy, 478 U.S. 255 (1986)); DeStefano, 392 U.S. at 634-635. Based on all relevant considerations, Petitioner's claim for relief must be denied.

WHEREFORE, based on the foregoing arguments and authorities, the instant Petition for Writ of Habeas Corpus should be denied.

Respectfully submitted,

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COUNSEL FOR RESPONDENT

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to Richard M. Creel, Esquire, Horizon Professional Center, 2272 Airport Road, Suite 205, Naples, Florida 34112, this _____ day of September, 2003.

## CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this response is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

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COUNSEL FOR RESPONDENT