IN THE FLORIDA SUPREME COURT
CASE NO. SC03-558

GROVER REED, *Petitioner*

v.

JAMES V. CROSBY, *Respondent.*

RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

COMES NOW, Respondent, James V. Crosby, by and through undersigned counsel and responds as follows to the petition for writ of habeas corpus. For the reasons discussed, the petition should be denied.

FACTS AND PROCEDURAL HISTORY

The facts of the case and its procedural history are recited in the accompanying answer brief.

INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL

In *Rutherford v. Moore*, 774 So.2d 637 (Fla. 2000), this Court explained that the standard for proving ineffective assistance of appellate counsel mirrors the ineffectiveness assistance of trial counsel standard established in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The *Rutherford* Court explained that to show prejudice petitioner must show that the appellate process was comprised to such a degree as to undermine confidence in the correctness of the result. *Rutherford*, 774 So.2d at 643. Appellate counsel's performance will not be deficient if the legal issue that appellate counsel failed to raise was meritless. This Court noted that a habeas petition is the proper vehicle to assert ineffective assistance of appellate counsel. *See also Freeman v. State*, 761 So.2d 1055 (Fla. 2000). Additionally, in the appellate context, the prejudice prong of *Strickland* requires a showing that the appellate court would have afforded relief on appeal. *United States v. Phillips*, 210 F.3d 345, 350 (5th Cir. 2000). A habeas petitioner cannot establish prejudice unless the issue was a "dead bang winner". *Moore v. Gibson*, 195 F.3d 1152, 1180 (10th Cir. 1999)(explaining that appellate counsel's performance is only deficient and prejudicial if counsel fails to argue a "dead-bang winner"). Petitioner must show that he would have won a reversal from this Court had the issue been raised.

ISSUE I

DOES *RING V. ARIZONA*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002) INVALIDATE THIS COURT DIRECT APPEAL OPINION?

Reed contends that his death sentence violates *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002) and that *Ring* overrules the direct appeal opinion in which this Court upheld his death after invalidating two aggravating circumstances. *Reed*, 560 So.2d at 207 (stating: "[t]he elimination of the two aggravating circumstances would not have affected Reed's sentence. There remain four aggravating circumstances balanced against a total absence of mitigating circumstances.")(citation omitted).

To the extent that Reed is raising an ineffective assistance of appellate counsel claim for failing to raise a *Ring* claim in the direct appeal, Reed's ineffectiveness claim must fail. Appellate counsel was not ineffective for failing to raise a Sixth Amendment right to jury trial challenge to judge-based capital sentencing because there was United States Supreme Court precedent directly contrary to that position. *Spaziano v. Florida*, 468 U.S. 447, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984); *Hildwin v. Florida*, 490 U.S. 638, 109 S.Ct. 2055, 104 L.Ed.2d 728 (1989); *Walton v. Arizona*, 497 U.S. 639, 110 S.Ct. 3047, 111 L.Ed.2d 511 (1990). Indeed, the United States Supreme Court reaffirmed *Walton* in 2000 in *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct.

2348, 147 L.Ed.2d 435 (2000). It was not until 2002 in *Ring* that the United States Supreme Court overruled *Walton*. Appellate counsel is not ineffective for failing to raise an issue with controlling precedent directly against the claim. Nor is appellate counsel ineffective for failing to anticipate a change in law. *State v. Lewis*, 838 So.2d 1102, 1122 (Fla. 2002)(rejecting a ineffective assistance of appellate counsel claim for failing to raise an *Apprendi* challenge citing *Nelms v. State*, 596 So.2d 441, 442 (Fla. 1992)(stating defense counsel cannot be held ineffective for failing to anticipate the change in the law)). This Court has rejected similar ineffective assistance of appellate counsel claims in the wake of *Ring*. *Coney v. State*, 28 Fla. Law. Weekly S201 (Fla. March 6, 2003)(rejecting an ineffective assistance of appellate counsel claim for failing to raise a *Ring* challenge to Florida's death penalty statute); *Cole v. State*, 841 So.2d 409, 429-430 (Fla. 2003)(rejecting an ineffectiveness of appellate counsel claim for failing to raise a constitutional challenge to Florida's death penalty statute base on *Apprendi*).

To the extent that Reed is asserting that *Ring* overruled *Clemons v. Mississippi*, 494 U.S. 738, 745, 110 S.Ct. 1441, 108 L.Ed.2d 725 (1990), the United States Supreme Court specifically noted that it was not addressing this issue in *Ring*. *Ring*, 122 S.Ct. 2437 at n.4 (noting that Ring does not question the Arizona Supreme Court's authority to reweigh the aggravating and mitigating circumstances after that

court struck one aggravator citing *Clemons v. Mississippi*, 494 U.S. 738, 745, 110 S.Ct. 1441, 108 L.Ed.2d 725 (1990)). It was *Cabana v. Bullock*, 474 U.S. 376, 106 S.Ct. 689, 88 L.Ed.2d 704 (1986) that the *Ring* Court questioned, not *Clemons*. *Ring* may not be used to reopen Reed's direct appeal. It is improper to argue in a habeas petition a variant of a claim previously decided. *Damren v. State*, 838 So.2d 512,520 (Fla. 2003)(rejecting an attack on aggravators in a habeas petition because the issue had already been rejected in a prior decision citing *Porter v. Crosby*, 840 So.2d 981 (Fla. 2002));*Jones v. Moore*, 794 So.2d 579, 586 (Fla. 2001)(observing habeas is not proper to argue a variant to an already decided issue); *Thompson v. State*, 759 So. 2d 650, 657 n.6 (Fla. 2000)(declining petitioner's "invitation to utilize the writ of habeas as a vehicle for the reargument of issues which have been raised and ruled on by this Court" quoting *Routly v. Wainwright*, 502 So.2d 901, 903 (Fla.1987)). Petitioner is improperly attempting to relitigate this Court's harmless error analysis regarding the stricken aggravators via his habeas petition.

To the extent that Reed is raising a straight *Ring* claim, *Ring* is not retroactive.

RETROACTIVITY

Neither *Ring*, nor *Apprendi v. New Jersey*, 530 U.S. 466 (2000), upon which it was based, are retroactive. Both *Apprendi* and *Ring* are rules of procedure, not

substantive law. They both concern who decides a fact, *i.e.,* the jury or the judge, which is procedural. *Curtis v. United States*, 294 F.3d 841, 843 (7th Cir. 2002), *cert. denied*, 123 S.Ct 541 (2002)(holding *Apprendi* is not retroactive because it is not a substantive change in the law; rather, it "is about nothing but procedure" - who decides a given question (judge versus jury) and under what standard (preponderance versus reasonable doubt) and explaining that *Apprendi* did not alter which facts have what legal significance). *Ring,* like *Apprendi,* is a new rule of procedure, not a substantive change in a criminal statute.[1] According to *Teague v. Lane*, 489 U.S.

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[1] Florida uses the old constitutional test for retroactivity rather that the new *Teague* test. *Teague v. Lane*, 489 U.S. 288, 299-310, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989); *Witt v. State*, 387 So.2d 922 (Fla.1980). The *Witt* test of retroactivity was based on two United States Supreme Court cases dealing with retroactivity, *Stovall v. Denno*, 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed.2d 1199 (1967) and *Linkletter v. Walker*, 381 U.S. 618, 85 S.Ct. 1731, 14 L.Ed.2d 601 (1965). The United States Supreme Court no longer uses these tests for determining retroactivity on collateral review, but rather has adopted a new test. *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989). Florida Courts should also adopt the *Teague* test for retroactivity.

Some state courts think the *Teague* test is too stringent; however, they are ignoring the second wing of United States Supreme Court's retroactivity jurisprudence. *Figarola v. State*, 841 So.2d 576 (Fla. 4th DCA 2003)(noting that state courts are not required to follow the federal test of retroactivity and characterizing the *Teague* test as a "narrow" standard of retroactivity). *Teague* only applies to new rules of procedure. New rules of substantive criminal law, by contrast, are retroactive. *Bousley v. United States*, 523 U.S. 614, 118 S.Ct. 1604, 140 L.Ed.2d 828 (1998)(limiting the *Teague* retroactivity standard to changes in procedural rules and establishing substantive retroactivity for changes in the definition of an

288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989), only "watershed" rules of criminal procedure which (1) greatly affect the accuracy and (2) alter understanding of the bedrock procedural elements essential to the fairness of a proceeding are applied retroactively. As the United States Supreme Court noted in *Tyler v. Cain*, 533 U.S. 656, 121 S.Ct. 2478, 150 L.Ed.2d 632 (2001), it is unlikely that any of these watershed rules has yet to emerge. *Id.* at 2484 n. 7.

None of the exceptions in *Teague* apply. *Ring* did not make certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe, nor does *Ring* involve the accuracy of the conviction or a bedrock procedural element essential to the fundamental fairness of a proceeding. Only those rules that seriously enhance accuracy are applied retroactively. *Graham*

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element of the crime). States without a substantive retroactivity component to their retroactivity tests mistakenly think their retroactivity tests are more liberal than the federal test when, in fact, their tests are more conservative. Despite the canard about states being free to adopt any test of retroactivity, states without the equivalent of a substantive retroactivity test will encounter due process problems, just as the Pennsylvania Supreme Court did in *Fiore v. White*, 528 U.S. 23, 120 S.Ct. 469, 145 L.Ed.2d 353 (1999)(applying, in a habeas petition from a state conviction, a due process insufficiency of the evidence analysis when the element of the crime changed). Adopting the federal substantive/procedural retroactivity test will also prevent this Court from being overruled by the United States Supreme Court in the future. *Bunkley v. Florida*, 2003 WL 21210417 (May 27,2003)(remanding for reconsideration of a retroactivity issue).

v. Collins, 506 U.S. 461, 478, 113 S.Ct. 892, 122 L.Ed.2d 260 (1993) (explaining that the exception is limited to a small core of rules which seriously enhance accuracy). Jury involvement in capital sentencing does not enhance accuracy. Indeed, the *Ring* Court did not require jury involvement because juries were more rational or fair; rather, it was required regardless of fairness. The *Ring* Court explained that even if judicial factfinding were more efficient or fairer, the Sixth Amendment requires juries. Jury sentencing does not increase accuracy. A jury is comprised of people who have never made a sentencing decision before. Furthermore, even if one views jury sentencing as equally accurate to judicial sentencing, jury involvement does not "seriously" enhance accuracy. Judicial sentencing is at least as accurate.

In *Colwell v. State*, 59 P.3d 463 (Nev. 2002), the Nevada Supreme Court held that *Ring* was not retroactive. In his state post-conviction petition, Colwell contended that his sentencing by a three-judge panel violated his Sixth Amendment right to a jury trial established in *Ring*. The *Colwell* Court explained, that in *Ring*, the United States Supreme Court, held that it was impermissible for a sentencing judge, sitting without a jury, to find an aggravating circumstance necessary for imposition of the death penalty. However, the Court declined to apply *Ring* retroactively on collateral review.

Colwell, 59 P.3d at 469-472.[2] The *Colwell* Court reasoned that *Ring* does effect the accuracy of the sentence. The *Colwell* Court explained that the United States Supreme Court in *Ring* did not determine that factfinding by the jury was superior to factfinding by a judge; rather, the United States Supreme Court stated that "the superiority of judicial factfinding in capital cases is far from evident". The *Colwell* Court explained that *Ring* was based simply on the Sixth Amendment right to a jury trial, not on enhanced accuracy in capital sentencings, and does not throw into doubt the accuracy of death sentences decided by three-judge panels. They concluded that the likelihood of an accurate sentence was not seriously diminished simply because a three-judge panel, rather than a jury, found the aggravating circumstances that supported Colwell's death sentence. *Colwell*, 59 P.3d at 473.

In *State v. Towery*, 64 P.2d 828 (Ariz. 2003), the Arizona Supreme Court also held that *Ring* is not retroactive. Following a *Teague* analysis, the Arizona Supreme Court first determined that *Ring* was a new rule but that the new rule was procedural, not substantive. The *Towery* Court reasoned that *Ring* did not determine the meaning of a statute, nor address the criminal significance of certain facts, nor the underlying prohibited conduct; rather, *Ring* set forth a fact-finding procedure designed to ensure

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[2] The Nevada Supreme Court used an expanded *Teague* test to determine retroactivity.

a fair trial. *Ring* altered <u>who</u> decided whether aggravating circumstances existed. The *Towery* Court noted that the *Apprendi* Court itself described the issue as procedural. *Apprendi*, 530 U.S. at 475, 120 S.Ct. 2348 (stating that: "[t]he substantive basis for New Jersey's enhancement is thus not at issue; the adequacy of New Jersey's procedure is."). Because *Ring* was merely an extension of *Apprendi*, logic dictates that if *Apprendi* announced a new procedural rule, then so did *Ring*. Therefore, *Ring* was procedural. Nor did *Ring* announce a watershed rule because it did not seriously enhance accuracy nor alter bedrock principles necessary to fairness. It did not seriously enhance accuracy because *Ring* merely shifted the duty from an impartial judge to an impartial jury. Nor is allowing an impartial jury to determine aggravating circumstances, rather than an impartial judge, implicit in the concept of ordered liberty. The *Towery* Court found *DeStefano v. Woods*, 392 U.S. 631, 88 S.Ct. 2093, 20 L.Ed.2d 1308 (1968), which held that the right to a jury trial was not to be applied retroactively, "particularly persuasive".[3]

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[3] The Arizona Supreme Court analyzed the retroactivity of *Ring* using a *Teague* test but also analyzed the issue using the test of *Allen v. Hardy*, 478 U.S. 255, 106 S.Ct. 2878, 92 L.Ed.2d 199 (1986). Under the *Allen* framework, the court weighed three factors:(a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards. The Arizona Supreme Court concluded that *Ring* was not retroactive under *Allen* either. Arizona's *Allen* test is similar to

One state supreme court has held that *Ring* is retroactive. In *State v. Whitfield*, SC77067 (June 17, 2003), the Missouri Supreme Court reopened a direct appeal by recalling the mandate. The *Whitfiled* Court held that all four steps in the penalty phase, including any factual findings related to mitigation and any balancing of aggravation versus mitigation, not just the finding of one aggravator, must be made by the jury. The *Whitfield* Court declined to adopt the federal test of retroactivity for cases on collateral review announced in *Teague v. Lane*, 489 U.S. 288, 308, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989). The *Whitfield* Court held that *Ring* was retroactive under the old *Linkletter/Stovall* test.[4] The *Whitfield* Court determined that the remedy was imposition of a life sentence, not a remand for a new penalty phase with a jury.

The United States Supreme Court has disapproved the practice of using motions to recall the mandate to reopen cases that are final minus "extraordinary circumstances" involving "grave, unforeseen contingencies" *Calderon v. Thompson*, 523 U.S. 538,118 S.Ct. 1489, 140 L.Ed.2d 728 (1998)(finding a "grave" abuse of discretion in a federal appellate court granting a motion to recall the mandate in a habeas case because of the "profound interests in repose attaching to the mandate"

Florida's *Witt* test.

[4] *Linkletter v. Walker*, 381 U.S. 618, 85 S.Ct. 1731, 14 L.Ed.2d 601 (1965); *Stovall v. Denno*, 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed.2d 1199 (1967).

and the State's interest in finality which is "all but paramount"). A change in law is not an "extraordinary circumstances" involving "grave, unforeseen contingencies." Indeed, the *Calderon* Court suggested that only a strong showing of actual innocence would outweigh the State's interests in finality and thus, justify the recalling of a mandate. No appellate court, state or federal, should recall a mandate six years after it is issued merely because of a subsequent development in the law.

However, having done so, Missouri Supreme Court does not recognize the consequence of its action. Because the Missouri Supreme Court recalled the mandate of the direct appeal, the result was to render the case still pending on direct appeal. The recalling of the mandate made the case unfinal. *Whitfield* is now a direct appeal case. Retroactivity in collateral review is not an issue in a case pending on direct review that is not yet final. Any new rule applies to a case on direct review regardless of whether the rule existed at the time of the trial. *Griffith v. Kentucky*, 479 U.S. 314, 328, 107 S.Ct. 708, 93 L.Ed.2d 649 (1987)(holding that a new rule for the conduct of criminal prosecutions is to be applied to all cases, state or federal, pending on direct review or not yet final). The *Whitfield* Court's entire discussion of *Teague* and the retroactivity of *Ring* is rendered dicta by the recalling of the direct appeal mandate.

Bizarrely, the Missouri Supreme Court had previously held that *Apprendi*, upon which *Ring* was based, was not retroactive. *Whitfield* at n.13. So, according to

Missouri Supreme Court, *Apprendi* is not retroactive but *Ring* is. The Missouri Supreme Court provides no explanation for these incongruous holdings. *Apprendi* involved both the right to a jury trial AND the due process standard of proof. *Ring* involves only the right to a jury trial because most, if not all states, including Missouri, determined the existence of aggravators at the higher, beyond a reasonable doubt, standard of proof prior to *Ring*. So, *Ring* is only half of *Apprendi*. If *Apprendi* is not retroactive, then half of *Apprendi* cannot be. Furthermore, the Missouri Supreme Court seems to be deciding retroactivity on a case-by-case basis but retroactivity should be determined based on the stage of litigation. *Teague*, 489 U.S. at 303-05 (deploring the "unequal treatment of those who were similarly situated" under the retroactivity rules applied by the Court prior to *Teague* and noting that the "selective application of new rules violates the principle of treating similarly situated defendants the same."). Additionally, the holding that all steps must be made by the jury is tantamount to a holding that the jury, not the judge, must be the ultimate sentencer in a capital case, which is a conclusion specifically rejected by Justice Scalia in his *Ring* concurrence. *Ring*, 122 S.Ct. at 2445 (Scalia, J., concurring)(stating that "today's judgment has nothing to do with jury sentencing" and "[t]hose States that leave the ultimate life-or-death decision to the judge may continue to do so . . .").

Furthermore, the *Whitfield* Court's remedy of an automatic life sentence is

based on a misreading of *Sattazahn v. Pennsylania*, 537 U.S. 101 123 S. Ct. 732, 154 L. Ed. 2d 588 (2003). *Whitfield* at n.20. The *Sattazahn* Court concluded that there was no double jeopardy bar to a new penalty phase after the first jury hung on the penalty and, pursuant to a state statute, the judge imposed a life sentence, as a matter of law, because there were no factual findings in favor of acquittal by either the jury or judge. The Court explained that it is not the mere imposition of a life sentence that raises a double-jeopardy bar. Rather, an "acquittal" of the death penalty is required and that means that the jury found that no aggravating circumstances existed. As the *Sattazahn* Court characterized it, the jury deadlocking at 9 to 3 was a "non-result". And the judge's determination was not a acquittal either because the judge had no discretion pursuant to the statute but to impose a life sentence. The judge made no findings and resolved no factual matters. As the *Sattazahn* Court characterized it, the judge's decision was a "default judgment" required by statute. In *Whitfield*, the penalty phase jury also hung but, unlike *Sattazahn*, the judge imposed death. No fact finder found in favor of life in Whitfield - the jury made no decision and the judge imposed death. The *Whitfield* Court improperly reasoned that as a matter of law that the judge was required to enter a life sentence when the death sentence is unconstitutional. However, this was the exact reasoning the *Sattazahn* Court rejected when it rejected any "statutory entitlement" to life argument. An acquittal, for double

jeopardy purposes, is determined as a matter of fact by a fact finder, not as a matter of law. Contrary to the reasoning of the *Whitfield* Court, there is nothing "hollow" about a defendant having his penalty determined by a jury in a new penalty phase. The correct remedy for a violation of the Sixth Amendment right to a jury trial is to provide the defendant with a jury. A determination by appellate court fiat is not the correct remedy.

While only a few courts have addressed the retroactivity of *Ring*, numerous court have addressed the related issue if whether *Apprendi* is retroactive. Two Florida District Courts have held that *Apprendi* is not retroactive. *Figarola v. State*, 841 So.2d 576 (Fla. 4th DCA 2003)(concluding that *Apprendi* would not be retroactive under either *Witt* or *Teague* but certifying the question as one of great public importance); *Hughes v. State*, 826 So.2d 1070 (Fla. 1st DCA 2002)(holding that *Apprendi* did not apply retroactively to a claim being raised under rule 3.800 using a *Witt* analysis), *rev granted*, 837 So.2d 410 (Fla. 2003).[5] Every federal circuit court that has addressed the issue has held that *Apprendi* is not retroactive.[6] Recently, the

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[5] A notice to invoke jurisdiction has been filed in *Figarola*. *Figarola*, SC03-586. Briefing is complete and the oral argument had been held in *Hughes*. *Hughes*, SC02-2247.

[6] *United States v. Sanders*, 247 F.3d 139, 146-51 (4th Cir. 2001), *cert. denied*, 535 U.S. 1032, 122 S.Ct. 573, 151 L.Ed.2d 445 (2001)(explaining that because *Apprendi* is not retroactive in its effect, it may not be used as a basis to collaterally

Second Circuit joined "this chorus". *United States v. Coleman*, 329 F.3d 77 (2d Cir. 2003). The *Coleman* Court reasoned that, while *Apprendi* was a "new" rule of law, it was a procedural rule, not a substantive rule. New substantive rules change the definition of a crime and therefore create a risk that the defendant was convicted of an act that it no longer criminal. To mitigate such a risk, new rules of substantive law are applied retroactively. Because new procedural rules create no such risk, they are not

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challenge a conviction); *United States v. Brown*, 305 F. 3d 304 (5th Cir. 2002)(holding *Apprendi* is not retroactive because it is a new rule of criminal procedure, not a new substantive rule and is not a "watershed" rule that improved the accuracy of determining the guilt or innocence of a defendant); *Goode v. United States*, 305 F. 3d 378 (6th Cir. 2002), *cert. denied*, 123 S.Ct. 711 (2002)(holding *Apprendi* is not a watershed rule citing *Neder v. United States*, 527 U.S. 1, 15 (1999)); *Curtis v. United States*, 294 F.3d 841 (7th Cir. 2002), *cert. denied*, 123 S.Ct 541 (2002)(holding *Apprendi* is not retroactive because it is not a substantive change in the law; rather, it "is about nothing but procedure" and it is not fundamental because it is not even applied on direct appeal unless preserved); *United States v. Moss*, 252 F.3d 993, 1000-1001 (8th Cir. 2001), *cert. denied*, 122 S.Ct. 848 (2002)(holding that *Apprendi* is not of watershed magnitude and that *Teague* bars petitioners from raising *Apprendi* claims on collateral review); *United States v. Sanchez-Cervantes*, 282 F.3d 664, 667 (9th Cir. 2002)(holding *Apprendi* does not meet either prong of *Teague* because it does not criminalize conduct and does not involve the accuracy of the conviction and therefore, *Apprendi* is not to be retroactively applied);*United States v. Mora*, 293 F.3d 1213, 1219 (10th Cir. 2002), *cert. denied*, 123 S.Ct. 388 (2002)(concluding *Apprendi* is not a watershed decision and hence is not retroactively applicable to initial habeas petitions); *McCoy v. United States*, 266 F.3d 1245, 1258 (11th Cir. 2001), *cert. denied*, 122 S.Ct. 2362 (2002)(holding that the new constitutional rule of procedure announced in *Apprendi* does not apply retroactively on collateral review).

applied retroactively. The Second Circuit noted that *Apprendi* itself said that the substantive basis of New Jersey's enhancement was not at issue; rather, it was the adequacy of its procedures. *Coleman* citing *Apprendi*, 530 U.S. at 475 and *McCoy*, 266 F.3d at 1257 n.16. The *Coleman* Court rejected the argument that *Apprendi* was substantive because it turned a sentencing factor into an element. The fact of drug quantity was a fact in dispute that had to be proven before *Apprendi*. *Apprendi* merely change who decided the fact and at what standard of proof. Drug quantity was always an element in the sense that it was something that the government had to prove to someone at some standard. The fact was not "new" in this sense and therefore, was not truly a new element.

The First Circuit has also recently held that *Apprendi* is not retroactive. *Sepulveda v. United States*, 2003 WL 212366 (1st Cir. May 29, 2003). The *Sepulveda* Court held that *Apprendi* is not retroactive because it does not seriously enhance the accuracy of convictions. While an *Apprendi* error may raise questions as to the length of his sentence, inaccuracies of this nature, occurring after a defendant has been duly convicted by a jury beyond a reasonable doubt are matters of degree and do not trump the general rule of nonretroactivity. The First Circuit explained that the length of the sentence was "not plucked out of thin air, but, rather, was determined by a federal judge based upon discrete findings of fact established by a fair preponderance of the

evidence." The First Circuit agreed with the Seventh Circuit's observation that findings by federal judges, though now rendered insufficient in certain instances by *Apprendi*, are adequate to make reliable decisions about punishment because "[a]fter all, even in the post-*Apprendi* era, findings of fact made by the sentencing judge, under a preponderance standard, remain an important part of the sentencing regimen." The First Circuit noted that watershed rules of criminal procedure are "hen's-teeth" rare. They noted the Supreme Court is reluctant to establish rules that enjoy the venerated status of watershed. A decision by a judge (on the preponderance standard) rather than a jury (on the reasonable-doubt standard) is not the sort of error that undermines the fairness of judicial proceedings. The First Circuit also noted that applying *Apprendi* retroactively would create an unacceptably high risk that those found guilty of criminal conduct might escape suitable punishment. They observed that although the *Apprendi* rule is important as a means of clarifying the proper factfinding roles of judge and jury, it affords an innocent defendant no additional shield from wrongful conviction. They rejected any reliance upon Justice O'Connor characterization, in her dissent, of *Apprendi* as "a watershed change in constitutional law" because her concern was a practical one regarding the "flood of petitions by convicted felons seeking to invalidate their sentences" that the decision would cause. Several state

supreme courts have held that *Apprendi* is not retroactive either.[7]

Ring was an extension of *Apprendi* to capital cases.[8] If *Apprendi* is not retroactive, then neither is *Ring*. *Cf. Cannon v. Mullin*, 297 F.3d 989, 994 (10th Cir.2002)(holding that existing precedent that *Apprendi* announced rule of criminal

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[7] *People v. De La Paz*, 2003 WL 21027911 (Ill. Jan 3, 2003)(holding *Apprendi* is not retroactive); *State v. Tallard*, 816 A.2d 977 (N.H. 2003)(reasoning that *Apprendi* is not retroactive because it is not a watershed rule of criminal procedure that increases the reliability of the conviction and using a *Teague* analysis because retroactivity is complex enough without requiring counsel and trial judges to apply different retroactivity rules); *Whisler v. State*, 36 P.3d 290 (Kan. 2001)(holding that *Apprendi* is not retroactive because it is procedural rather than substantive and is not a watershed rule of criminal procedure that implicates the fundamental fairness of trial), *cert. denied*, 122 S.Ct. 1936 (2002); *State ex rel. Nixon v. Sprick*, 59 S.W.3d 515, 520 (Mo. 2001)(holding in *Apprendi* is not applied retrospectively to cases on collateral review relying on *Dukes v. United States*, 255 F.3d 912, 913 (8th Cir. 2001)).

[8] Actually, there is a major difference between *Apprendi* and *Ring*. *Apprendi* concerned both who was going to decide a fact, *i.e.* judge versus jury AND at what standard of proof, *i.e.* preponderance versus beyond a reasonable doubt. In Florida, as in most, if not all states, aggravators are found beyond a reasonable doubt. *Geralds v. State*, 601 So.2d 1157, 1163 (Fla.1992)(stating it is axiomatic that the State is required to establish the existence of an aggravating circumstance beyond a reasonable doubt citing *State v. Dixon*, 283 So.2d 1, 9 (Fla.1973)). Florida has always required the higher standard of proof in this area. Aggravators were already decided at the higher standard of proof before *Apprendi* or *Ring*. The standard of proof wing is probably the more critical part of *Apprendi* in terms of accuracy and that wing is not at issue in a capital case. The "who" wing of *Apprendi* is the only part at issue in a *Ring* claim. So, Ring actually is only half of *Apprendi*.

procedure forecloses argument that subsequent case of *Ring* announced rule of substantive criminal law because "*Ring* is simply an extension of *Apprendi* to the death penalty context" in a successive habeas case);*Ring v. Arizona*, 122 S.Ct. 2428, 2449-2450 (2002)(O'Connor, J., dissenting)(noting that capital defendants will be barred from taking advantage of the holding on federal collateral review citing 28 U.S.C. §§ 2244(b)(2)(A), 2254(d)(1) and *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989)).

Moreover, the United States Supreme Court has refused to apply right to jury trial cases retroactively in prior cases. *DeStefano v. Woods*, 392 U.S. 631, 633, 88 S.Ct. 2093, 2095, 20 L.Ed.2d 1308 (1968)(holding that the right to jury trial in state prosecutions was not retroactive and "should receive only prospective application."). The United States Supreme Court recently held that an *Apprendi* claim is not plain error. *United States v. Cotton*, 122 S.Ct. 1781 (2002)(holding an indictment's failure to include the quantity of drugs was an *Apprendi* error but it did not seriously affect fairness, integrity, or public reputation of judicial proceedings, and thus did not rise to the level of plain error). If an error is not plain error, the United States Supreme Court will not find the error of sufficient magnitude to allow retroactive application of such a claim in collateral litigation. *United States v. Sanders*, 247 F.3d 139, 150-151 (4th Cir. 2001)(emphasizing that finding something to be a structural error would seem

to be a necessary predicate for a new rule to apply retroactively under *Teague* and because *Apprendi* claims have been found to be subject to harmless error, a necessary corollary is that *Apprendi* is not retroactive). *Ring* is not retroactive.

MERITS

The Florida Supreme Court rejected a *Ring* challenge to Florida's death penalty statute in *Bottoson v. Moore*, 813 So. 2d 27 (Fla. 2002), *cert. denied*, 122 S. Ct. 2670 (2002), reasoning that the United States Supreme Court had not receded from its prior precedent upholding the constitutionality of Florida's death penalty scheme. Furthermore, the Florida Supreme Court has repeatedly rejected *Ring* challenges to Florida's death penalty statute in the wake of *Bottoson* in both direct appeals and collateral cases. *Porter v. Crosby*, 840 So.2d 981, 986 (Fla. 2003)(stating: "we have repeatedly held that maximum penalty under the statute is death and have rejected the other *Apprendi* arguments); *See also Cox v. State*, 819 So. 2d 705 (Fla. 2002); *Conahan v. State*, 28 Fla. L. Weekly S70a (Fla. January 16, 2003); *Spencer v. State*, 28 Fla. L. Weekly S35 (Fla. January 9, 2003); *Fotopoulos v. State*, 27 Fla. L. Weekly S1 (Fla. December 19, 2002); *Bruno v. Moore*, 27 Fla. L. Weekly S1026 (Fla. December 5, 2002).

In *Ex parte Waldrop v. State*, 2002 WL 31630710 (Ala. November 22, 2002),

the Alabama Supreme Court affirmed an override against a *Ring* challenge. Waldrop was convicted of two counts of murder committed during a robbery and one count of murder where two or more persons were murdered. The jury, by a vote of 10-2, recommended life imprisonment but the trial court overrode the jury's recommendation and sentenced Waldrop to death. On appeal, Waldrop claimed that under *Ring* and *Apprendi*, any factual determination required for imposition of the death penalty must be made by the jury, not by the trial court. Waldrop argued that, under Alabama law a defendant cannot be sentenced to death unless there is a determination: (1) that at least one statutory aggravating circumstance exists and (2) that the aggravating circumstances outweigh the mitigating circumstances. Waldrop asserted that both determinations had to be made by the jury. While the Alabama Supreme Court agreed that under Alabama law at least one statutory aggravating circumstance must exist for a defendant convicted of a capital offense to be sentenced to death, they also noted that many capital offenses include conduct that clearly corresponds to certain aggravating circumstances. *Id.* citing Ala.Code 1975, § 13A-5-45(f)("Unless at least one aggravating circumstance as defined in Section 13A-5-49 exists, the sentence shall be life imprisonment without parole.") and *Johnson v. State,* 823 So.2d 1, 52 (Ala.Crim.App.2001). Moreover, Alabama statutes provide that any aggravating circumstance which the verdict establishes was proven beyond a reasonable doubt at

trial shall be considered as proven beyond a reasonable doubt for purposes of the sentencing hearing. *Id*. citing Ala.Code 1975, § 13A-5-45(e). The *Waldrop* Court also noted that the United States Supreme Court upheld a similar procedure in *Lowenfield v. Phelps,* 484 U.S. 231, 244-45 (1988)(observing "[w]e see no reason why this narrowing function may not be performed by jury findings at either the sentencing phase of the trial or the guilt phase."). Because the jury convicted Waldrop of two counts of murder during a robbery, the statutory aggravating circumstance of committing a capital offense while engaged in the commission of a robbery was proven beyond a reasonable doubt. The findings reflected in the jury's verdict alone exposed Waldrop to the maximum penalty of death. Thus, in Waldrop's case, the jury, and not the trial judge, determined the existence of the aggravating circumstance necessary for imposition of the death penalty which is all *Ring* and *Apprendi* require. Waldrop also claimed that *Ring* and *Apprendi* require that the jury, and not the trial court, determine whether the aggravating circumstances outweigh the mitigating circumstances. The Alabama Supreme Court rejected this claim, reasoning that the weighing process is not a factual determination and is not susceptible to any quantum of proof; rather, the weighing process is a moral or legal judgment that takes into account a theoretically limitless set of facts. *Id.* citing *Ford v. Strickland,* 696 F.2d 804, 818 (11th Cir. 1983)(observing that while the existence of an aggravating or

mitigating circumstance is a fact susceptible to proof under a reasonable doubt or preponderance standard ... the relative weight is not). Consequently, *Ring* and *Apprendi* do not require that a jury weigh the aggravating circumstances and the mitigating circumstances.

In *Norcross v. State*, 816 A.2d 757 (Del. 2003), the Delaware Supreme Court held that Delaware's death penalty statute was constitutional as applied to Norcross. The jury found two of the aggravators during the guilt phase. The Delaware Supreme Court reasoned that once a jury finds, unanimously and beyond a reasonable doubt, the existence of at least one statutory aggravating circumstance, whether in the guilt or penalty phase, the defendant becomes death eligible and *Ring's* constitutional requirement of jury fact-finding is satisfied. Because the jury found the equivalent of the statutory aggravators in the guilt phase with their verdict, *Ring* was satisfied.[9] *See also Wrinkles v. State*, 776 N.E.2d 905, 907-08 (Ind. 2002)(holding that the Court need not decide whether some aspects of Indiana's death penalty scheme are affected by *Ring,* because *Ring* is not implicated under any plausible view because one of the

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[9] Delaware is no longer a true hybrid state. The Delaware General Assembly, in response to *Ring*, made a jury's determination of no aggravating circumstances binding on the trial court. *See* Delaware S.B. 449, 73 Del. Laws c. 423 (barring trial court from imposing death unless the jury finds at least one aggravating circumstance); *See also Brice v. State*, 2003 WL 140046, * 3 (Del. Jan 16, 2003)(detailing legislative history of act).

aggravators, *i.e.,* the multiple murder aggravator, was necessarily found by the jury when they found the defendant guilty of the three murders in the guilt phase).

Regardless of the view this Court takes of *Ring* and its requirements, *Ring* does not invalidate this death sentence. Reed's guilt phase jury unanimously convicted him of first-degree murder, sexual battery, and robbery. Two of the aggravators, *i.e.* during the commission of sexual battery and pecuniary gain, were found unanimously by the jury during the guilt phase. Thus, Reed's death sentence does not violate *Ring*.

ISSUE II

WHETHER APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE THE ISSUE OF THE PROSECUTOR'S COMMENTS ON DIRECT APPEAL?

Reed argues that his appellate counsel was ineffective for failing to raise several of the prosecutor's comments as error in the direct appeal. First, Reed contends that appellate counsel was ineffective for failing to raise the prosecutor referring to the victim's husband as Reverend as fundamental error in the direct appeal. There is nothing improper about a prosecutor referring to a witness by his proper title. There was no objection. Indeed, trial counsel himself referred to the witness as a minister. (T. XII 411). Moreover, in this particular case, the jury would have known that the victim was a minister's wife because the defendant met the victim through Traveler's Aid. It was through this organization that Reed was given shelter in the home of Reverend Oermann, a Lutheran minister and his wife, Betty. So, in this particular case, his profession was relevant to establish how the victim came to know the defendant and why the defendant had been living in their home. The prosecutor referring to the Reverend as a reverend is not error and certainly is not fundamental error. Appellate counsel is not ineffective for failing to raise this meritless issue on appeal.

Second, Reed asserts that appellate counsel was ineffective for failing raise as fundamental error the prosecutor's argument that the jury should show the defendant

the same mercy that the defendant showed the victim. In penalty phase, the prosecutor commented: “please do not be swayed by any pity or sympathy for the defendant. What pity or sympathy or mercy did he show Betty Oermann?” (T. 878). There was no objection. While this Court has held that the prosecutor should not argue that the jury should show the same mercy to the defendant as he showed to the victim, this Court has not found such a comment standing alone to be fundamental error. *Cole v. State*, 841 So.2d 409, 430 (Fla. 2003)(holding that prosecutor’s "same mercy" argument does not rise to the level of fundamental error); *Kearse v. State*, 770 So. 2d 1119, 1129-1130 (Fla. 2000)(determining single comment by prosecutor that jury should show the same mercy he showed to Officer Parrish was harmless error). Rather, this Court has found such comments to be harmless error in certain cases. *Richardson v. State*, 604 So.2d 1107, 1109 (Fla.1992)(finding that the prosecutor committed error in asking the jury to show the defendant as much pity as he showed his victim but finding error harmless beyond any reasonable doubt); *Rhodes v. State*, 547 So.2d 1201, 1206 (Fla.1989)(remanding for a new penalty phase proceeding based on several errors including the prosecutor’s closing argument which was “riddled with improper comments” one of which was that jury show defendant same mercy shown to the victim on the day of her death). Appellate counsel was not ineffective for failing to raise these prosecutorial comments as an issue in the direct appeal.

ISSUE III

WHETHER APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE THE ISSUE OF THE VALIDITY OF THE JURY INSTRUCTIONS?

Reed asserts that his appellate counsel was ineffective for failing to argue that the jury instructions on were unconstitutionally vague. As this Court noted in the post-conviction appeal opinion, this issue was not preserved because trial counsel did not object to the instructions at trial. *Reed v. State*, 640 So.2d 1094, 1096 (Fla. 1994)(rejecting a claim that the jury instructions concerning all of the aggravating circumstances were unconstitutionally vague as procedurally barred because Reed did not object to the instructions at trial). Appellate counsel is not ineffective for failing to raise an issue that was not properly preserved in the trial court. *Pace v. State*, 28 Fla. L. Weekly S415 (Fla. May 22, 2003)(rejecting an ineffective assistance of counsel claim for failing to raise the unconstitutionality of the CCP instruction which had been found unconstitutionally vague because an appellate attorney has no obligation to raise an issue that was not preserved for review); *Valle v. Moore*, (Fla. 2002)(noting that appellate counsel cannot be considered ineffective for failing to raise issues that were not properly raised during the trial court proceedings and do not present a question of fundamental error); *Rutherford v. Moore*, 774 So.2d 637, 644 (Fla. 2000)(rejecting an ineffective assistance of appellate counsel claim for failing to argue the jury

instruction relating to the HAC and CCP aggravating circumstances were unconstitutionally vague where trial counsel did not object to the instructions on the basis that they were unconstitutionally vague). There is no deficient performance.

Furthermore, this Court has upheld the constitutionality of the standard jury instruction for the avoid arrest aggravator. *Davis v. State*, 698 So.2d 1182, 1192 (Fla.1997)(rejecting argument that this Court's construction of avoid arrest aggravator be incorporated into jury instruction because standard jury instruction was legally adequate); *Whitton v. State*, 649 So.2d 861, 867 n. 10 (Fla.1994)(concluding that standard jury instruction for avoid arrest aggravator was not vague and did not require a limiting instruction in order to make this aggravator constitutionally sound)). This Court has also rejecting claims that appellate counsel was ineffective for failing to challenge the avoid arrest aggravator. *Sweet v. Moore*, 822 So.2d 1269, 1275 (Fla. 2002)(rejecting an ineffective assistance of appellate counsel claim for failing to challenge the constitutionality of the avoid arrest aggravator). This Court has also rejected vagueness challenges to the pecuniary gain aggravator. *Kelley v. Dugger*, 597 So.2d 262, 265 (Fla.1992)(rejecting claim that pecuniary gain aggravator is unconstitutionally vague). Moreover, this Court has also rejecting the claim that the prior violent felony aggravator is unconstitutionally vague. *Hudson v. State*, 708 So.2d 256, 261 (Fla.1998)(rejecting claim that prior violent felony aggravator is

unconstitutionally vague).[10] There is no merit to the claim that these aggravating jury instruction are unconstitutionally vague and appellate counsel is not ineffective for failing to raise meritless claims.

Reed fails to assert any prejudice from appellate counsel not raising the vagueness of the jury instructions. He does not argue that the evidence fails to support any of the remaining four aggravators. *Sweet v. Moore*, 822 So.2d 1269, 1275 (Fla. 2002)(explaining that even if appellate counsel was deficient for failing to raise as an issue the adequacy of the avoid arrest instruction, there would be no prejudice under *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), because this Court concluded on direct appeal that the evidence presented at trial clearly established the existence of the avoid arrest aggravator beyond a reasonable doubt). Additionally, because this Court struck the prior violent felony and the CCP

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[10] Nor was trial counsel ineffective for failing to object to the avoid arrest, felony murder or pecuniary gain instructions. *Gaskin v. State*, 737 So.2d 509, 513 n.7 (Fla. 1999)(rejecting an ineffective assistance of trial counsel claim for failing to object to the jury instruction of various aggravators because the jury instruction have been held to be proper citing *Mendyk v. State*, 592 So.2d 1076, 1080 (Fla.1992)(concluding that when jury instructions are proper, the failure to object does not constitute a serious and substantial deficiency that is measurably below the standard of competent counsel)). A habeas petition, however, is limited to ineffective assistance of appellate counsel claims. Ineffective assistance of trial counsel claims are not properly raised in a habeas.

aggravators in the direct appeal, there necessarily is no prejudice to Reed from his appellate counsel failing to raise a constitutional attack on those two aggravators. Appellate counsel was not ineffective.

ISSUE IV

WHETHER APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE THE SUFFICIENCY OF THE EVIDENCE?

Reed asserts that his appellate counsel was ineffective for failing to raise the issue of the sufficiency of the evidence. Even though appellate counsel did not raise a sufficiency of the evidence issue, the Florida Supreme Court independently reviews the record for sufficiency of evidence.[11] Because this Court addresses the sufficiency of the evidence regardless of whether appellate counsel raises the issue, there can be no prejudice from appellate counsel omitting the issue. *Hardwick v. Wainwright*, 496 So.2d 796,798. (Fla. 1986)(rejecting a claim of ineffective assistance of appellate counsel for failing to raise the issue of the sufficiency of the evidence because the

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[11] *Taylor v. State*, 28 Fla. L. Weekly S439 (Fla. June 5, 2003)(explaining that while the defendant did not challenge the sufficiency of the evidence on appeal, this Court has the obligation to independently review the record for sufficiency of the evidence);*Mora v. State*, 814 So.2d 322, 331 (Fla. 2002)(explaining that even if Mora had not raised this issue, we would have still reviewed the record under our independent duty to ensure the sufficiency of the evidence); *Sexton v. State*, 775 So.2d 923, 933 (Fla. 2000)(noting that although the parties did not specifically raise the issue of whether there was sufficient evidence, "it is this Court's independent obligation to review the record for sufficiency of evidence"); *Brown v. State*, 721 So. 2d 274, 277 (Fla. 1998)(citing § 921.141(4), Fla. Stat. (1997)); *Ferguson v. State*, 417 So.2d 639, 642 (Fla. 1982)(noting that although the defendant has not specifically attacked the sufficiency of the evidence supporting the conviction, it is "nonetheless our duty to review the entire record.").

Court independently reviews each conviction and sentence to ensure they are supported by sufficient evidence). Furthermore, appellate counsel is not ineffective for failing to raise an insufficiency issue that has no merit. *Suarez v. Dugger*, 527 So.2d 190,193(Fla. 1988)(rejecting an ineffective assistance of appellate counsel for failing to raise the denial of his motion for judgment of acquittal on direct appeal because the evidence was legally sufficient). There is sufficient evidence of Reed's guilt. The direct appeal opinion summarized the "most significant evidence of Reed's guilt" which included his fingerprint being found on a check in the victim's backyard and his "distinctive" baseball cap being found in the victim's house. *Reed v. State*, 560 So.2d 203, 204 (Fla. 1990).

Reed's reliance upon *Robinson v. State*, 462 So.2d 471 (Fla. 1st DCA 1984) is misplaced. The *Robinson* Court did not hold that failing to raise the insufficiency of the evidence was *per se* ineffective assistance of appellate counsel. Indeed, *Robinson* Court declined to reach the issue of ineffectiveness. *Robinson*, 462 So.2d at 477 (stating that "[a]lthough we are strongly disposed to find that defendant's constitutional right to the effective assistance of counsel has been violated in this case, we need not reach that constitutional issue on this appeal). The *Robinson* Court held that the evidence was legally sufficient to support both the sexual battery and the kidnapping conviction. Robinson concerned the weight of the evidence, not the sufficiency of the

evidence. Trial counsel in *Robinson* moved for a judgment of acquittal and filed a motion for new trial. The trial court granted the motion for new trial finding the weight of the evidence to be "so tenuous as to require a new trial in the interests of justice." The problem was that the motion for a new trial was untimely because it was filed outside the 10 day limit. The State appealed the order granting a new trial and the First District held that the trial court lacked jurisdiction to grant the new trial because the motion for new trial was untimely. The defendant appealed after a remand and the First District then remanded for a new trial in the interest of justice. *Robinson* is a unique case limited to its unusual procedural facts. Moreover, while the *Robinson* Court discussed ineffective assistance of trial counsel, ineffective assistance of appellate counsel was not at issue. Reed's appellate counsel was not ineffective for failing to raise a meritless insufficiency of the evidence claim which merely would have been rejected by this Court.

CONCLUSION

The State respectfully requests that this Honorable Court deny the habeas petition.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing response to petition for writ of habeas corpus has been furnished by U.S. Mail to CHRISTOPHER J. ANDERSON Esq., 645 Mayport Road Atlantic Beach, FL 32233 this _30th__ day of June, 2003.

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CERTIFICATE OF FONT AND TYPE SIZE

Counsel certifies that this brief was typed using Courier New 12 point font.

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