IN THE SUPREME COURT OF FLORIDA

NORBERTO PIETRI,

Appellant,

vs. Case No. 03-1044

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE JUDICIAL CIRCUIT,
IN AND FOR COUNTY, FLORIDA

RESPONSE TO WRIT OF HABEAS CORPUS

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PRELIMINARY STATEMENT

NORBERTO PIETRI, is the petitioner and will be referred to as such in this pleading. The State of Florida, is the respondent and will be referred to as such as or as "the State." Reference to the record on appeal will be by the symbol "ROA," followed by the appropriate page number(s).

PROCEDURAL HISTORY

Respondent would add the following relevant information:

> On August 18, 1988, Pietri walked away from the Lantana Community Correctional Work Release Center. At the time, he was restricted to the center's grounds while he awaited transfer to a more secure facility. After his escape, Pietri began a four-day binge of using cocaine. He testified that during this time he committed burglaries to support his drug use. On August 22, he ran out of drugs.
>
> Driving a pickup truck he had stolen the day before, Pietri went to a house, broke in, and stole items including a 9-mm semiautomatic firearm and a .38-caliber revolver. After the burglary, a witness saw Officer Chappell sitting on his motorcycle, apparently watching for speeding motorists. The witness saw a man driving a silver pickup truck speed by Chappell, and the officer gave chase. The driver stopped after about a mile. Chappell motioned for the driver to move forward to avoid blocking traffic, and the driver complied.
>
> Witnesses testified that as Chappell approached the truck, his gun was in its holster. When the officer was within two to four feet of the truck the driver shot him once in the chest. A forensics firearm examiner testified that Chappell was shot from a distance of three to eight feet. He testified that the casing of the bullet that killed Chappell matched the casings of 9-mm bullets provided by the burglary victim. Thus, the firearms examiner concluded, the bullets had been fired from a weapon taken in the burglary.
>
> After firing the gun, the driver sped off, and Chappell radioed that he had been shot. The first officer who arrived at the scene testified that Chappell's gun was still in

the holster. The holster had been unsnapped, however, indicating that Chappell may have tried to remove his weapon.

After leaving the scene of the shooting, the driver went to his nephew's house for help disposing of the truck. He dumped the truck in a canal off the Florida Turnpike, and a fingerprint found inside the driver's side window was later identified as Pietri's. Officer Chappell's death prompted an intense search, with Pietri identified as the prime suspect. Pietri stole another car on August 24 and was spotted by police officers near his sister's apartment and later by an off-duty officer at a church. Pietri threatened to shoot the officer, who was not in uniform, and escaped.

Later that same evening, a couple and their five-year-old son were in their car in the driveway of their home. As they prepared to leave, the husband realized he had left something in the house. When he returned to the house, Pietri got in the car and told the wife, "We're leaving, we're leaving." He told the woman, who was in the driver's seat, "Drive, or I'll shoot you." When she hesitated, Pietri pushed her out of the car and began to drive away. He slowed down, however, and let the husband, who had emerged from the house, take their son from the back seat.

Another police officer spotted the couple's car. The driver stopped and waved the officer toward the car. As the officer approached the car with his gun drawn, the driver sped off. Two other officers picked up the chase, which proceeded at speeds of more than 100 miles per hour. Pietri eventually lost control of the car, then jumped out of the car and began running. As Pietri ran, he reached into his pants, pulled out a bag of cocaine, and put it into his mouth. Delray Beach officer Michael Swigert caught Pietri and arrested him.

Pietri testified in his own defense that he is blind in his right eye and that he developed a cocaine addiction which he financed with burglaries. He testified that Chappell stopped him while he was planning to sell stolen goods. Pietri admitted shooting Chappell, but said he had not planned to kill the officer and did not aim for his heart.

Pietri raises twenty issues on this direct appeal. [6]

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[6] Whether (1) the jury selection process deprived Pietri of a fair trial; (2) the trial court erred when it denied Pietri's challenges for cause; (3) the trial court's comment on the evidence deprived Pietri of a fair trial; (4) the trial court erred in admitting prejudicial similar fact evidence that had no probative value; (5) the trial court erred in admitting a portrait photograph of the victim; (6) the trial court erred in denying Pietri's motion for judgment of acquittal to first-degree murder and to reduce the charge to second-degree murder; (7) the trial court erred in denying Pietri's requested jury instruction on circumstantial evidence; (8) the trial court committed fundamental error by giving an inaccurate jury instruction on premeditation; (9) the trial court erred in denying Pietri's motion to preclude the State from seeking the death penalty; (10) the trial court erred in denying Pietri's challenge for cause of a juror who would automatically vote for death if someone was convicted of the first-degree murder of a police officer; (11) the trial court improperly found the aggravating circumstance that Pietri was engaged in flight after committing a burglary; (12) the trial court improperly found that the murder was cold, calculated, and premeditated; (13) the trial court erred in instructing the jury on three aggravating circumstances that could only be treated as a single aggravating circumstance; (14) the aggravating circumstance of section 921.141(5)(j) is unconstitutional because it establishes victim status as a factor for imposing the death penalty; (15) the trial court erred in refusing to instruct the jury adequately on mitigating circumstances; (16) Pietri's death sentence is invalid because it is based on a less-than-unanimous jury recommendation; (17) the trial court erred in refusing to instruct the jury that it could recommend a life sentence despite the existence of aggravating circumstances; (18) Pietri's death sentence is disproportionate; (19) the trial court erred in failing to prepare a guidelines scoresheet for

the noncapital offenses; and (20) the trial court erred in giving a flight instruction. (Issue 20 was raised in a supplemental brief.)

Pietri v. State, 644 So. 2d 1347, 1350 (Fla. 1994).

ARGUMENT

ISSUE I

APPELLATE COUNSEL DID NOT RENDER INEFFECTIVE ASSISTANCE OF COUNSEL AS COUNSEL DID RAISE THE ISSUES NOW PRESENTED IN THIS PETITION.

Pietri claims that his appellate counsel failed to raise three meritorious issues on appeal. Those issues are as follows: (1) counsel did not properly pursue the denial of his change of venue; (2) appellate counsel failed to challenge the trial court's denial of his motion to dismiss the indictment, or in the alternative the denial of his motion for continuance; (3) appellate counsel failed to pursue on appeal a claim that the state withheld exculpatory evidence in violation of Brady v. Maryland, 373 U.S. 83 (1963).

The state asserts that the following legal principles are germane to resolution of this claim.

> The issue of appellate counsel's effectiveness is appropriately raised in a petition for writ of habeas corpus. 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. In evaluating an ineffectiveness claim, the court must determine whether the alleged omissions are of such magnitude as to constitute a serious error or substantial deficiency falling measurably outside the range of professionally acceptable performance and, second, whether the deficiency in performance compromised the appellate process to such a degree as to undermine confidence in the correctness of the result. Pope v. Wainwright, 496 So.2d

> 798, 800 (Fla.1986). See also Haliburton, 691 So.2d at 470; Hardwick, 648 So.2d at 104. The defendant has the burden of alleging a specific, serious omission or overt act upon which the claim of ineffective assistance of counsel can be based. See Knight v. State, 394 So.2d 997 (Fla.1981). "In the case of appellate counsel, this means the deficiency must concern an issue which is error affecting the outcome, not simply harmless error." Id. at 1001. In addition, ineffective assistance of counsel cannot be argued where the issue was not preserved for appeal or where the appellate attorney chose not to argue the issue as a matter of strategy. See Medina v. Dugger, 586 So.2d 317 (Fla.1991); Atkins v. Dugger, 541 So.2d 1165, 1167 (Fla.1989) ("Most successful appellate counsel agree that from a tactical standpoint it is more advantageous to raise only the strongest points on appeal and that the assertion of every conceivable argument often has the effect of diluting the impact of the stronger points.").

Freeman v. State, 761 So. 2d 1055, 1070 (Fla. 2000); See also Rutherford v. Moore 774 So.2d 637, 643 (Fla. 2000). Additionally appellate counsel is not required to raise every preserved or nonfrivolous issue. Jones v. Barnes, 463 U.S. 745, 751-753 (1983); see also Provenzano v. Dugger, 561 So. 2d 541, 549 (Fla. 1990). Based on these stringent legal principles, it will become clear that Pietri will not be able to meet his burden of establishing that appellate counsel was ineffective. All relief must be denied.

Pietri claims that trial counsel had sufficiently preserved for appeal the denial of his motion for change of venue. In

this petition, Pietri alleges: "[t]o the extent appellate counsel failed to properly preserve and carry forward this issue on direct appeal, appellate counsel rendered prejudicially deficient assistance." **Petition at 5.** Pietri is not entitled to relief as this claim is legally insufficient as pled as he does not specifically point out in what way appellate counsel was deficient. Pietri simply alleges in an extremely conclusory fashion that counsel did not do enough. This does not establish a claim for relief, the issue must be dismissed. Owen v. Crosby, 28 Fla. L. Weekly S615, 618 (Fla. July 11, 2003)(affirming denial of claim that counsel had conflict of interest where petitioner fails to identify specific evidence in the record to support his claim).

Second, Pietri ignores the fact that this claim was raised on direct appeal. In rejecting this issue on appeal, this Court stated the following:

> Pietri also claims that the trial judge erred when he denied his motion for a change of venue. We disagree. A trial court's ruling on a motion for change of venue will not be reversed absent an abuse of discretion. Davis, 461 So.2d at 69. Pretrial publicity alone does not warrant a change of venue. See, e.g., Provenzano v. State, 497 So.2d 1177, 1182 (Fla.1986), cert. denied, 481 U.S. 1024, 107 S.Ct. 1912, 95 L.Ed.2d 518 (1987). The test is whether the general state of mind of the inhabitants of a community

> is so infected by knowledge of the incident and accompanying prejudice, bias, and preconceived opinions that jurors could not possibly put these matters out of their minds and try the case solely upon the evidence presented in the courtroom. McCaskill v. State, 344 So.2d 1276, 1278 (Fla.1977) (quoting Kelley v. State, 212 So.2d 27, 28 (Fla. 2d DCA 1968)). If a juror has knowledge about a case, "[i]t is sufficient if the juror can lay aside his [or her] impression or opinion and render a verdict based on the evidence presented in court." Irvin v. Dowd, 366 U.S. 717, 723, 81 S.Ct. 1639, 1642, 6 L.Ed.2d 751 (1961). The defendant has the burden to show prejudice. Manning v. State, 378 So.2d 274, 276 (Fla.1979).
>
> As mentioned, the trial judge excused members of the venire who said they were biased. The jurors who recalled reading about the case and were ultimately chosen to serve all said they could set aside any prior knowledge and decide the case based on evidence presented at trial. Thus, the pretrial knowledge of the jurors who served did not preclude a fair and impartial jury, and the trial judge did not abuse his discretion in denying the motion for a change of venue.

Pietri, 644 So. 2d at 1352. Pietri's attempt to relitigate this claim under the guise of ineffective assistance of appellate counsel is precluded. Rutherford v. Moore, 774 So. 2d 637, 645 (Fla. 2000(refusing to consider additional argument regarding

issue that was already raised on direct appeal); Parker v. Dugger, 550 So. 2d 459, 460 (Fla. 1990)(same); Hardwick v. Dugger, 648 So. 2d 100, 105 (Fla. 1994)(same) See also Rivera v. State, 717 So.2d 477, 480 n.2 (Fla. 1998)(finding claim to be procedurally barred as it is merely using a different argument to raise prior claim); Marajah v. State;684 So. 2d 726, 728 (Fla. 1996)(finding it inappropriate to use collateral attack to relitigate previous issue); See Medina v. Dugger, 573 So. 2d 293 (Fla. 1990)(recasting claim as one of ineffective assistance of counsel cannot circumvent rule that postconviction proceedings cannot serve as second appeal). Harvey v. Dugger, 656 So.2d 1253, 1256 (Fla. 1995)(same). Therefore, this claim should be summarily denied.

Next petitioner claims that appellate counsel failed to pursue on appeal the issue regarding the improper release of documents generated by Pietri's investigator. Pietri was prejudiced by the release because his guilt phase testimony was somehow compromised. Because the issue had been fully litigated pre-trial and therefore the preserved issue, it should have been raised on appeal. Specifically, Pietri alleges the following, "[a]ppellate counsel was rendered ineffective by both his failure to properly investigate and litigate the issues concerning the purloined documents and by the State's action in obtaining them from his investigator." **Petition at 9.** The

state asserts that this claim is legally insufficient as pled as Piertri does not state what other action appellate counsel could have undertaken in order to make this a viable issue for appeal. Owen, supra.

Second, had this issue been raised on appeal, Pietri would not have been entitled to relief. A review of the record on appeal reveals that the issue unfolded as follows. During the initial stages of Pietri's pre-trial preparation, it came to light that certain confidential information had been removed from the files of Pietri's defense team. Upon learning of this, trial counsel filed a "Motion to Compel Return of the Documents" and a "Motion to Obtain Names of those Persons Who Have Access to the Documents." (ROA 3482-3483, 3484-86). As a remedy, trial counsel requested that the charges against Pietri be dismissed or in the alternative that the proceedings be delayed. (ROA 146).

Two separate hearings were held regarding the motions. (ROA 96-107, 144-200). The relevant facts adduced at the hearings were as follows. Nancy Adams, a volunteer worker, whose father worked for the Delray Police Department, obtained access to confidential information related to Petri's case. The information had been in the possession of Virginia Snyder, investigator for Pietri's defense team.

Adams was investigating the potential wrong doing between police officer Sylivester of the Delray Police Department and Snyder regarding the impermissible access to FCIC information. (ROA 159-160, 164-165). During Adams' investigation she obtained numerous files from Snyder's office. Pietri's file was among those files. (ROA 161, 164-165). The Pietri file contained an interview between Snyder and Pietri. The contents of the interview including the facts of the crime as well as the entire defense strategy. (ROA 149-150). The file was returned to Snyder, a sealed copy was placed in the court file. (ROA 149, 163). Pietri's file was viewed by three police officer, however the content of the file was not disclosed to the Palm Beach State Attorney's Office. (ROA 162). Adams testified at a deposition that she was not acting as an agent of the police in obtaining the information. Nor was she paid for this information. To the contrary, Pietri's file was obtained by mistake. (ROA 163-164).

Snyder's testified that Adams did not have access to Pietri's file, nor did she permission to take it from Snyder. (ROA 166-167). She further stated that Pietri's file was not among the numerous other documents that Adams took. (ROA 193-195).

At the conclusion of the hearing, trial counsel requested a delay in the proceedings until an investigation by the Dade

State's Attorney's Office had been completed regarding the potential wrong doing of the police department or until Ms. Snyder would talk to defense counsel under a grant of immunity. (ROA 149, 151-157 ,177, 182). The trial court denied both motions. (ROA 200).

The state asserts that because the record reveals that the Palm Beach State Attorney's Office did not have access to the confidential file, there was no basis to support a claim of prejudice to Pietri's defense. Consequently, no viable issue existed for appeal. (ROA 162). Additionally, although the Delray Beach Police Department had access to the documents, their involvement in Pietri's case was very minimal. (ROA 178). Indeed the only involvement and subsequent testimony offered at trial by the department related solely to Pietri's arrest. Finally Pietri cannot establish any connection between the substance of his own trial testimony and the alleged "infiltration of the defense team by Nancy Adams." **Petition at 9-10.** This claim is meritless. Downs v. Moore, 801 So. 2d 906, 910 (Fla. 2001)(rejecting claim that appellate counsel was ineffective for failing to raise meritless claim).

Lastly, Pietri alleges that the state failed to disclose to the defense favorable evidence in violation of Brady. However no where does Pietri identify the suppressed information let alone demonstrate that it was material and could not have been

uncovered by due diligence. As such this claim is legally insufficient as pled. Walton v. Crosby, 28 Fla. Law Weekly S425, 430 (Fla. May 29, 2003)(holding that to obtain relief on Brady claim, a defendant must establish that evidence was material and could not have been discovered with due diligence); Owen supra.

ISSUE II

PETITIONER'S CLAIM THAT APPELLATE COUNSEL RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL WHEN HE FAILED TO RAISE OTHER PRESERVED ISSUES IS WITHOUT MERIT

Pietri claims that the jury was not properly instructed regarding what was necessary to establish an aggravating factor. Had they been properly instructed, there would have only been a finding of one aggravator. The harm caused by the inadequate guidance was further exacerbated by the fact that the jury was instructed on the aggravating factor of "CCP."[1] Because this Court struck that aggravator, the jury's consideration of same was improper.

This issue is legally insufficient, Pietri does not state which instructions were inadequate, nor how could they have been improved. Owen v. Crosby, 28 Fla. L. Weekly S615, 618 (Fla. July 11, 2003)(affirming denial of claim that counsel had conflict of interest where petitioner fails to identify specific evidence in the record in support of claim).

[1] Florida Statutes 921.141 (5)(i)

Second, this issue is procedurally barred as a variation of it was raised on direct appeal. On appeal petitioner challenged the sufficiency of the evidence for two aggravators; "CCP" and "the murder was committed during the course of a burglary".[2] Pietri v. State, 644 So. 2d 1347, 1349 (Fla. 1994). This Court struck the aggravating factor of "CCP" however it upheld the remaining three factors and found any error harmless. Pietri, 644 SO. 2d at 1353. Pietri's attempt to relitigate this issue is impermissible. Jones v. Moore, 794 So. 2d 579, 589 (Fla. 2001)(finding claim that jury was improperly instructed on aggravator later struck on appeal is procedurally barred); Rutherford v. Moore, 774 So. 2d 637, 645 (Fla. 2000)(refusing to consider additional argument regarding issue that was already raised on direct appeal); Parker v. Dugger, 550 So. 2d 459, 460 (Fla. 1990)(same); Hardwick v. Dugger, 648 So. 2d 100, 105 (Fla. 1994)(same).

Furthermore, simply because an aggravating factor has been struck does not mean that there was not sufficient evidence for a jury to consider its existence. Nor does it mean that the jury's consideration was improper. Pace v. Crosby, 28 Fla. Law Weekly S415, 419 (Fla. May 22, 2003). Pietri does not offer any argument or evidence that would overcome the procedural bar and

[2] Florida Statute 921.141(5)(d).

call into question the evidence that supports the existence of the factors. Relief must be denied.

ISSUE III

PIETRI'S CLAIM THAT FLORIDA'S CAPITAL SENTENCING STATUTE IS UNCONSTITUTIONAL IN LIGHT OF APPRENDI V. NEW JERSEY, AND RING V. ARIZONA IS PROCEDURALLY BARRED AND WITHOUT MERIT

Pursuant to the United States Supreme Court opinion in Ring v. Arizona, 122 S.Ct. 2428 (June 24, 2002), Pietri claims that he is entitled to be resentenced by a jury. Pierti specifically argues that (1) Mills v. Moore, 786 So. 2d 532, 536-38 (Fla.), cert. denied, 523 U.S. 1015 (2001) is no longer viable in light of Ring; (2) the jury's advisory role at sentencing violates the Sixth Amendment; (3) the aggravating factors as elements should be charged in the indictment; and (4). the sentencing scheme impermissibly shifts the burden of proof to the defendant. The state asserts that Pietri's reliance on Ring is misplaced for the following reasons; (1) Ring is not to be applied retroactively and is therefore procedurally barred; (2) Ring does not apply to Florida's capital sentencing scheme; and (3) to the extent that Ring does impact Florida's capital sentencing scheme, the dictates of same have been satisfied.

Pursuant to Witt v. State, 387 So. 2d 922, 929-930 (Fla. 1980) Ring is only entitled to retroactive application if it is a decision of fundamental significance, which so drastically alters the underpinnings of Pietri's death sentence that "obvious injustice" exists. New v. State, 807 So. 2d 52 (Fla.

2001). In determining whether the standard has been met, the analysis includes a consideration of three factors: the purpose served by the new case; the extent of reliance on the old law; and the effect on the administration of justice from retroactive application. Ferguson v. State, 789 So. 2d 306, 311 (Fla. 2001). Application of these factors to Ring, which did not directly or indirectly address Florida law, provides no basis for consideration of Ring in this case. Indeed, numerous courts, including the Eleventh Circuit Court of Appeals have rejected the retroactivity of Ring. Turner v. Crosby, 16 Fla. L. Weekly Fed. C926, 936 (11th Cir. July 29, 2003)(rejecting retroactive application of Ring); Trueblood v. Davis, 301 F.3d 784, 788 (7th Cir. 2002); Arizona v. Towery, 64 P.3d 828 (Ariz. 2003) (finding Ring is not retroactive); Colwell v. State, 59 P.3d 463 (Nev. 2002) (same).[3] Further, in deciding Ring, the

[3] The correctness of those holdings is underscored by the fact that the United States Supreme Court has already held that a violation of Apprendi v. New Jersey, 530 U.S. 466 (2000) claim is not plain error. United States v. Cotton, 122 S.Ct. 1781 (May 20, 2002) (holding an indictment's failure to include the quantity of drugs was an Apprendi error but it did not seriously affect fairness, integrity, or public reputation of judicial proceedings, and thus did not rise to level of plain error). If an error is not plain error cognizable on direct appeal, it is not of sufficient magnitude to be a candidate for retroactive application in collateral proceedings. United States v. Sanders, 247 F.3d 139, 150-151 (4th Cir 2002) (emphasizing that finding something to be a structural error would seem to be a necessary predicate for a new rule to apply retroactively and therefore, concluding that Apprendi is not retroactive). Because Ring is predicated solely on Apprendi, Ring is also not entitled to retroactive application.

Supreme Court did not announce that Ring was to be made retroactive. See Tyler v. Cain, 533 U.S. 656, 663, 121 S.Ct. 2478, 150 L.Ed.2d 632 (2001) (holding that "a new rule is not 'made retroactive to cases on collateral review' unless the Supreme Court holds it to be retroactive"). Given that Ring is not retroactive, Pietri is not entitled to collateral relief. Consequently this claim must be dismissed.

Second, Pietri is not entitled to application of Ring because its legal underpinning is not premised on new law. Although Apprendi and Ring were not decided until after Pietri's direct appeal in was final in 1994, the basic argument that the Sixth Amendment required jury sentencing in capital cases was available and in fact, routinely advanced before that time.[4] See Hildwin v. Florida, 490 U.S. 638 (1989); Spaziano v. Florida, 468 U.S. 447, 472 (1984); Chandler v. State, 423 So. 2d 171, 173 n.1 (Fla. 1983). Consequently, Pietri cannot overcome the procedural bar attached to this untimely claim. Francis v. Barton, 581 So.2d 583 (Fla. 1991)(finding that claim not previously raised on direct appeal or in prior postconviction motions is procedurally procedural bar in successive motion); Cf. Parker v. State, 550 So. 2d 449 (Fla. 1989)(finding collateral challenge to Florida's capital sentencing scheme

[4] On direct appeal, Pietri did argue that the lack of a unanimous jury recommendation was a violation of the Eighth Amendment. No Sixth Amendment challenge was ever raised.

based on Booth v. Maryland, is procedurally barred for failure to preserve the issue at trial or on direct appeal).

Irrespective of the procedural bar, this Court has expressly and repeatedly held that the statutory maximum for first degree murder in Florida is death, and that determination is made at the guilt phase of trial when a person is convicted of first degree murder. Mills, 786 So. 2d at 536-38. This Court has specifically stated:

> Under section 921.141, Florida Statutes (1987), a defendant is eligible for a sentence of death if he or she is convicted of a capital felony. This Court has defined a capital felony to be one where the maximum possible punishment is death. See Rushaw v. State, 451 So. 2d 469 (Fla. 1984). The only such crime in the State of Florida is first-degree murder, premeditated or felony. See State v. Boatwright, 559 So. 2d 210 (Fla. 1990); Rowe v. State, 417 So. 2d 981 (Fla. 1985).

Shere v. Moore, 830 So. 2d 56 (Fla. 2002) See also G. Porter v. Crosby,27 Fla. L. Weekly S33, 34 ((Fla. January 9, 2003) 2003) ("we have repeatedly held that maximum penalty under the statute is death and have rejected the other Apprendi arguments [that aggravators read to be charged in the indictment, submitted to jury and individually found by unanimous jury]).[5] Pietri's

[5] Subsequent to Mills, Shere, and Ring this Court rendered Bottoson v. Moore, 833 So. 2d 693 (Fla. 2002). Therein three justices expressly reiterate the fact that death is the statutory maximum in Florida. Bottoson, at 696 n.6 (Wells, J., concurring); *id.* at 893 (Quince, J., concurring); *id.* at 699 (Lewis, J., concurring). Justice Harding's concurring opinion did not call into question any prior holdings of the Florida Supreme Court, which would necessarily include its prior

assertions that Mills is no longer good law in light of Ring is erroneous. Mills has not been called into question by Ring or Apprendi as neither case has overruled prior decisions by the Florida Supreme Court rejecting constitutional challenges to Florida's capital sentencing procedures. See, e.g., Hildwin v. Florida, 490 U.S. 638, 640-41 (1989); Spaziano v. Florida, 468 U.S. 447 (1984); Proffitt v. Florida, 428 U.S. 242, 253 (1976). The law is clear, Ring is inapplicable to Florida's capital sentencing scheme.

Irrespective of Ring's application to Florida, this Court has previously rejected all of petitioner's challenges to Florida's capital sentencing scheme in light of Ring. In Bottoson the issue was disposed of as follows:

> Although Bottoson contends that he is entitled to relief under Ring, we decline to so hold. The United States Supreme Court in February 2002 stayed Bottoson's execution and placed the present case in abeyance while it decided Ring. That Court then in June 2002 issued its decision in Ring, summarily denied Bottoson's petition for certiorari, and lifted the stay without mentioning Ring in the Bottoson order. The Court did not direct the Florida Supreme Court to reconsider Bottoson in light of Ring.

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determination that death was the statutory maximum for first degree murder in Florida. Id. at 695. As such, a majority of the Florida Supreme Court has not receded from their numerous prior holdings that death is the statutory maximum in Florida.

Bottoson v. Moore, 833 So. 2d 693 (Fla. 2002). That determination has repeatedly been upheld. See also King v. Moore, 831 So. 2d 143 (Fla. 2002); Fotopoulos v. Moore, 28 Fla. L. Weekly S1, S5 (Fla. December 19, 2002). Spencer v. Crosby Jr., 28 Fla. L. Weekly S34, S35 (Fla. January 9, 2003)(rejecting claim that Florida's capital sentencing statute is constitutional suspect in a manner similar to that of Arizona's statute); Lucas v. Crosby Jr., 28 Fla. L. Weekly S29, S32 (Fla. January 9, 2003)(same); Anderson v. State, 28 Fla. L. Weekly S51 (Fla. January 16, 2003); Conahan v. State, 28 Fla. L. Weekly S70 (Fla. January 16, 2003); Cole v. State, 28 Fla. L. Weekly S58 (Fla. January 16, 2003) See also, Bruno v. Moore, 27 Fla. L. Weekly S1026, 1028 (Fla. December 5, 2002); King v. Moore, 831 So. 2d 143 (Fla. 2002); Marquard v. Moore, 27 Fla. L. Weekly S973, 976 n.12(Fla. November 12, 2002); Chavez v. State, 27 Fla. L. Weekly S991, 1003 (Fla. November 21, 2002); Mills v. State, 786 So. 2d 532, 537 (Fla. 2001); Brown v. State, 803 So.2d 223 (Fla. 2001); Mann v. Moore, 794 So. 2d 595, 599 (Fla. 2001); Looney v. State, 803 So. 2d 656 (Fla. 2001); Card v. State, 803 So. 2d 613 n. 13 (Fla. 2001). Pietri's claim to the contrary is without merit and dismissal is warranted.

Even if Ring were to call into question, Florida's sentencing scheme, Pietri would not be entitled to relief. This Court upheld the existence of the aggravating factors the "the

murder was committed by someone under sentence of imprisonment"[6] and "the crime was committed during flight from a burglary"[7] Pietri v. State, 644 So. 2d 1347, 1349 (Fla. 1994). Consequently, the dictates of Ring were satisfied as a jury participated in a finding of guilt of Pietri's prior convictions which established the basis for two aggravating factors. Cf. Lugo v. State, 845 So. 2d 74, 119 n. 79 (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)(same); Cf. Kormondy v. State, 28 Fla. L. Weekly S135, 139, n. 3 (Fla. February 13, 2003)(concluding that simultaneous convictions of felonies which then form basis for aggravating factor is sufficient to satisfy requirements of Ring); Jones v. Crosby, 28 Fla. L. Weekly S140, 144 (Fla. February 13, 2003)(same); Duest v. State, 2003 WL 21467248 (Fla. 2003) * 13; Owen v. Crosby, 28 Fla. Law Weekly S615, 618 (July 11, 2003)(same). In conclusion, Pietri is not entitled to relief on this claim based on the procedural and substantive arguments detailed above. This petition must be denied.

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[6] Florida Statute, 921.141 (5)(a).

[7] Florida Statute, 921.141(5)(d)

CONCLUSION

Wherefore, based on the foregoing arguments and authorities, the State requests that this Honorable Court DENY petitioner's request for habeas relief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was sent by United States mail, postage prepaid, to WILLIAM HENNIS III, Assistant CCRC, Law Office of the Capital Collateral Regional Counsel - South, 101 N.E. 3rd Avenue, Suite 400, Fort Lauderdale, FL 33301, this ____ day of October , 2003.

CERTIFICATE OF FONT

I HEREBY CERTIFY that the size and style of the type used in this brief is Courier New, 12 point, a font that is not proportionately spaced.

_____
CELIA A. TERENZIO
Assistant Attorney General