IN THE SUPREME COURT OF THE STATE OF FLORIDA

MATTHEW MARSHALL,

Appellant,

v. **Case No. SC 02-420**

STATE OF FLORIDA,

Appellee.

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RESPONSE IN OPPOSITION TO MARSHALL'S SUPPLEMENTAL MEMORANDUM OF LAW IN LIGHT OF BOTTOSON v. MOORE AND KING v. MOORE

MARSHALL'S CONSTITUTIONAL CHALLENGE TO FLORIDA'S CAPITAL SENTENCING STATUTE BASED UPON RING V. ARIZONA IS PROCEDURALLY BARRED AND MERITLESS

Marshall asserts that Florida's capital sentencing scheme and in particular, its override provision, is unconstitutional in light of Ring v. Arizona, 122 S.Ct. 2443 (2002) and Apprendi v. New Jersey, 530 U.S. 466 (2000). According to Marshall, there are three "elements" to capital murder which must be found by the jury before a defendant can be deemed "death eligible": (1) the finding of an aggravator, (2) the finding that the aggravator is of sufficient weight to justify a death sentence, and (3) the finding that the mitigation does not outweigh the aggravation. Consequently, Marshall asserts, "death eligibility" does **not** occur at guilt-phase when there is a conviction for first-degree murder, but rather, at sentencing,

after the three “elements” have been found by a jury. Marshall contends that judicial overrides of life recommendations run afoul of the Sixth Amendment because the jury did not find the requirements for “death eligibility.”

Even if “death eligibility” occurs at guilt-phase, Marshall continues, “no such determination of eligibility was made by [his] jury” because he was convicted of first-degree murder only and the jury recommended life. As such, he contends, his jury made “no ‘findings’ with respect to any facts which would make [him] eligible for the death penalty.” (Pet. Supp. Memo 4-5). Finally, Marshall argues that Florida’s override provision is no longer viable in light of Ring and that Ring is retroactive.

PROCEDURAL BAR

At the outset, the State notes that Marshall’s claim is procedurally barred and should not be addressed by this Court on the merits. Habeas corpus petitions properly address claims of ineffective assistance of appellate counsel. Rutherford v. Moore, 774 So. 2d 637, 643 (Fla. 2000); Groover v. Singletary, 656 So. 2d 424, 425 (Fla. 1995). This Court has rejected claims of error where the petitioner “does not argue appellate counsel was ineffective for failing to raise this issue." Freeman v. State, 761 So. 2d 1055, 1072 (Fla. 2000). Further, this Court has repeatedly recognized that a petition for "habeas corpus is

not a vehicle for obtaining additional appeals of issues which were raised, or should have been raised, on direct appeal or which were waived at trial or which could have, should have, or have been, raised in rule 3.850 proceedings," White v. Dugger, 511 So. 2d 554, 555 (Fla. 1987), Blanco v. Wainwright, 507 So. 2d 1377 (Fla. 1987). Nor is a habeas petition the proper vehicle within which to argue a variant to an issue already decided. Jones v. Moore, 794 So. 2d 579, 583 n.6 (Fla. 2001).

Here, while Marshall challenged the constitutionality of section 921.141, Florida Statutes, on direct appeal, he failed to raise the precise arguments claimed herein or to challenge the statute in Sixth Amendment terms. Further, he failed to raise the issue in his post-conviction proceedings and appeal. Although Apprendi and Ring were not decided until after Marshall's appeals, the basic argument that the Sixth Amendment requires jury sentencing in capital cases is not new or novel and in fact, was available prior to Proffitt v. Florida, 428 U.S. 242, 252 (1976) (holding Constitution does not require jury sentencing). See Hildwin v. Florida, 490 U.S. 638 (1989)(noting case "presents us once again with the question whether the Sixth Amendment requires a jury to specify the aggravating factors that permit the imposition of capital punishment in Florida" and

determining it does not); Spaziano v. Florida, 468 U.S. 447 (1984); Chandler v. State, 442 So. 2d 171, 173, n. 1 (Fla. 1983). Thus, the instant challenge to the constitutionality of the death penalty statute could have and should have been raised in the trial court, on direct appeal or in the post-conviction proceedings. Consequently, Marshall is procedurally barred from raising the claim for the first time in this habeas petition. Eutzy v. State, 458 So. 2d 755 (Fla. 1984). Cf. Parker v. Dugger, 550 So. 2d 459, 460 (Fla. 1989)(finding defendant not entitled to refinement in law on collateral review as issue never preserved); Hunter v. State, 660 So. 2d 244, 253 (Fla. 1995)(finding constitutional challenge to Florida's death penalty statute to be procedurally barred for failing to preserve it); Fotopolous v. State, 608 So. 2d 784, 794 (Fla. 1992)(same).

The Eleventh Circuit recently held that a defendant was procedurally barred from raising a Ring claim for the first time in a section 2254 habeas petition because he had failed to raise the claim in state court. See Turner v. Crosby, 2003 WL 21739734 (11th Cir. Jul. 29, 2003). Moreover, this Court has applied the procedural bar doctrine to claims brought under Apprendi. See McGregor v. State 789 So.2d 976, 977 (Fla. 2001)(holding that an Apprendi claim was procedurally barred for

failure to raise it in the trial court); Barnes v. State, 794 So.2d 590 (Fla. 2001) (holding that Apprendi error was not preserved for appellate review).

RING IS NOT RETROACTIVE

In addition to the procedural bar, Ring is not subject to retroactive application. Marshall's claim that Ring is retroactive is not supported by either Apprendi, Ring, or the cases decided since their issuance. Ring is an application of Apprendi, which has been held to not be retroactive; consequently, neither is Ring. Further, the Eleventh Circuit has recently held that Ring **is not** retroactive, see Turner v. Crosby, 2003 WL 21739734 (11th Cir. Jul. 29, 2003). And finally, the Supreme Court has not announced that Ring is retroactive and no new law was announced.[1] U.S. v. Cotton, 535 U.S. 625, 631-33 (2002) (holding indictment's failure to include quantity of

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[1] See, Whitfield v. Bowersox, 324 F.3d 1009, 1012 n.1 (8th Cir. 2003); Cannon v. Mullin, 297 F.3d 989 (10th Cir. 2002), cert. denied, 153 L.Ed.2d 865 (2002); McCoy v. United States, 266 F.3d 1245 (11th Cir. 2001);Forbes v. United States, 262 F.3d 143, 145-146 (2d Cir. 2001);In re Clemmons 259 F.3d 489, 493 (6th Cir. 2001);United States v. Sanders, 247 F.3d 139, 150-151 (4th Cir 2002);Browning v. United States, 241 F.3d 1262, 1264 (10th Cir. 2001);Rodgers v. United States, 229 F.3d 704, 706 (8th Cir. 2000);Talbott v. Indiana, 226 F.3d 866, 868-870 (7th Cir. 2000); In re Tatum, 233 F.3d 857, 859 (5th Cir. 2000);In re Joshua, 224 F.3d 1281, 1283 (11th Cir. 2000); Sustache-Rivers v. United States, 221 F.3d 8 (1st Cir. 2000).

drugs was Apprendi error, but did not affect fairness of proceedings, thus, it was not plain error); Ring, 536 U.S. at 620-21 (noting Ring's impact would be lessened by the non-retroactivity principle of Teague v. Lane, 489 U.S. 288 (1989))(O'Connor, J. dissenting); In re Johnson, 2003 U.S. App. Lexis 11514 (5th Cir. 2003)(finding because Apprendi is not retroactive, it logically follows Ring is not retroactive); Moore v. Kinney, 320 F.3d 767, n3 (8th Cir. 2003) (finding Ring not retroactive); Trueblood v. Davis, 301 F.3d 784, 788 (7th Cir. 2002) (rejecting retroactive application of Ring); Arizona v. Towery, 64 P.3d 828 (Ariz. 2003); Colwell v. State, 59 P.3d 463 (Nev. 2002).[2]

Marshall's reference to State v. Whitfield, 2003 WL 21386276 (Mo. June 17, 2003), Stovall v. Denno, 388 U.S. 293 (1967) and Linkletter v. Walker, 381 U.S. 618 (1965) do not further his position. While Missouri's Supreme Court in State v. Whitfield[3]

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

[3] State v. Whitfield, 2003 WL 21386276 (Mo. June 17, 2003) is also wrong in its analysis based upon its own precedent as in one case, State v. Cole, 71 S.W.3d 163, 171 (Mo. 2002), the court found Apprendi v. New Jersey not retroactive, but in Whitfield, Ring was held to be retroactive even though Ring was merely and application of Apprendi.

found Ring retroactive, no other federal or state court has so held. In fact, the Eighth Circuit Court of Appeals, which encompasses Missouri, found that in the absence of the Supreme Court's express pronouncement on retroactivity, Ring is not retroactive. Whitfield v. Bowersox, 324 F.3d 1009, 1012 n.1 (8th Cir. 2003); Moore v. Kinney, 320 F.3d 767, n3 (8th Cir. 2003).

Under Witt v. State, 387 So. 2d 922, 929-30 (Fla. 1980), Marshall has not proven that Ring is retroactive.[4] A new decision is entitled to retroactive application only where it is of fundamental significance, which so drastically alters the underpinnings of the sentence that "obvious injustice" exists. Witt, 387 So. 2d at 929-30; New v. State, 807 So. 2d 52 (Fla. 2001). As already noted, the Supreme Court rejected retroactive application of Apprendi in U.S. v. Cotton, 535 U.S. 625, 631-33 (2002) (holding indictment's failure to include quantity of drugs was Apprendi error, but did not affect fairness of proceedings, thus, it was not plain error) and other federal court have reached the same conclusion. See United States v. Sanders, 247 F.3d 139, 150-151 (4th Cir 2002) (emphasizing

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

finding something to be structural error would seem to be necessary predicate for new rule to apply retroactively, thus, concluding Apprendi is not retroactive); McCoy v. United States, 266 F.3d 1245 (11th Cir. 2001)(holding Apprendi not retroactive). The Eleventh Circuit and other federal courts have rejected retroactive application of Ring, see Turner v. Crosby, 2003 WL 21739734 (11th Cir. Jul. 29, 2003), concluding that Ring is not retroactive because it is merely an application of Apprendi, and there was no announcement of retroactivity. See Ring, 536 U.S. at 620-21 (noting Ring's impact would be lessened by the non-retroactivity principle of Teague v. Lane, 489 U.S. 2888 (1989))(O'Connor, J. dissenting); In re Johnson, 2003 U.S. App. Lexis 11514 (5th Cir. 2003)(finding because Apprendi is not retroactive, it logically follows Ring is not retroactive); Trueblood v. Davis, 301 F.3d 784, 788 (7th Cir. 2002);[5] Arizona v. Towery, 64 P.3d 828 (Ariz. 2003); Colwell v. State, 59 P.3d 463 (Nev. 2002).

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[5] See Cannon v. Mullin, 297 F.3d 989 (10th Cir. 2002), cert. denied, 153 L.Ed.2d 865 (2002); Sustache-Rivers v. U.S., 221 F.3d 8 (1st Cir. 2000); Forbes v. United States, 262 F.3d 143, 145-146 (2d Cir. 2001); In re Turner, No. 00-2660, 2001 WL 1110349 (3d Cir. 2001); In re Tatum, 233 F.3d 857, 859 (5th Cir. 2000); In re Clemmons 259 F.3d 489, 493 (6th Cir. 2001); Talbott v. Indiana, 226 F.3d 866, 868-870 (7th Cir. 2000); Rodgers v. U.S., 229 F.3d 704, 706 (8th Cir. 2000); Browning v. U.S., 241 F.3d 1262, 1264 (10th Cir. 2001); In re Joshua, 224 F.3d 1281, 1283 (11th Cir. 2000).

FLORIDA'S DEATH PENALTY STATUTE IS CONSTITUTIONAL

This Court has repeatedly rejected the argument that Ring implicitly overruled its earlier opinions upholding Florida's sentencing scheme. See e.g. Mills v. Moore, 786 So.2d 532, 537 (Fla. 2001). In Bottoson v. Moore, 833 So. 2d 693, 695 (Fla. 2002), this Court stated:

> 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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> Significantly, the United States Supreme Court repeatedly has reviewed and upheld Florida's capital sentencing statute over the past quarter of a century, and . . . has specifically directed lower courts to leav[e] to [the United States Supreme] Court the prerogative of overruling its own decisions.

See also King v. Moore, 831 So. 2d 143 (Fla. 2002).

Ring does not apply because Florida's death sentencing statute is very different from the Arizona statute at issue in Ring. The statutory maximum sentence under Arizona law for first-degree felony murder was life imprisonment. See Ring v. Arizona, 122 S.Ct. at 2437. In contrast, this Court has previously recognized that the statutory maximum sentence for first-degree murder in Florida is death, Mills v. State, 786

So.2d 532 (Fla. 2001), and has repeatedly denied relief requested under Ring. See Duest v. State, SC00-2366 (June 26, 2003); Pace v. State, 28 Fla. L. Weekly s415 (Fla. May 22, 2003); Jones v. State, 28 Fla. L. Weekly s395 (Fla. May 8, 2003); Chandler v. State, 28 Fla. L. Weekly, s329 (Fla. April 17, 2003); Butler v. State, 842 So. 2d 817, 834 (Fla. 2003); Grim v. State, 841 So. 2d 455, 465 (Fla. 2003); Anderson v. State,841 So. 2d 390 (Fla. 2003); Cox v. State, 819 So.2d 705 (Fla. 2002); Conahan v. State, 28 Fla. L. Weekly S70a (Fla. January 16, 2003); Spencer v. State, 842 So. 2d 52, 72 (Fla. 2002); Fotopoulos v. State, 838 So. 2d 1122 (Fla. 2002); Doorbal v. State, 837 So.2d 940 (Fla. 2003); Bruno v. Moore, 838 So. 2d 485 (Fla. 2002); Bottoson v. State, 813 So. 2d 31, 36 (Fla. 2002), cert. denied, 122 S. Ct. 2670 (2002); Hertz v. State, 803 So. 2d 629, 648 (Fla. 2001), cert. denied, 122 S. Ct. 2673 (2002); Looney v. State, 803 So. 2d 656, 675 (Fla. Shere v. Moore, 830 So.2d 56 (Fla. 2002); Mills v. State, 786 So.2d 532 (Fla. 2001), cert. denied, 532 U.S. 1015 (2001); Brown v. Moore, 800 So. 2d 223, 224-225 (Fla. 2001); Mann v. Moore, 794 So. 2d 595, 599 (Fla. 2001).

Marshall argues that there are three “elements” to capital murder in Florida which must be found by the jury before a defendant can be deemed “death eligible”: (1) an aggravator, (2)

of sufficient weight to warrant the death penalty, and (3) mitigation not outweighing the aggravation. Thus, according to Marshall, death is not the statutory maximum in Florida because a defendant is not "death eligible" until sentencing. Marshall's argument lacks merit because a Florida capital defendant is "death eligible" based upon the jury's verdict of guilty of the capital felony (*i.e.,* first-degree murder). Unlike the statutory schemes in some states, Florida's statute determines the eligibility of a defendant to receive a death sentence at the guilt-innocence stage of the capital trial, not during the penalty (or selection) phase. See Proffitt v. Florida, 428 U.S. 242 (1976). Moreover, a state supreme court's interpretation of its statute is the controlling factor. As the Supreme Court affirmed in Mullaney v. Wilbur, 421 U.S. 684, 691 (1975) "[t]his Court, however, repeatedly has held that state courts are the ultimate expositors of state law ... and that we are bound by their constructions except in extreme circumstances." (citing Murdock v. City of Memphis, 20 Wall. 590, 22 L.Ed. 429 (1875); Winters v. New York, 333 U.S. 507 (1948)).

Marshall's "three factors" are not elements of the crime, but are sentencing components used to determine the appropriate punishment. His argument is an improper attempt to elevate

"sentencing selection factors" to elements of the crime. However, aggravating factors are not elements of the offense, instead they are capital sentencing guidelines. Poland v. Arizona, 476 U.S. 147, 156 (1986) (explaining aggravators are not separate penalties or offenses - they are standards to guide sentencer in choosing between alternatives of death or life imprisonment). Florida's capital sentencing scheme, found in section 921.141, affords the sentencer the guidelines to follow in determining the various sentencing selection factors related to the offense and the offender by providing accepted statutory aggravating factors and mitigating circumstances to be considered. Given the fact a convicted defendant faces the statutory maximum sentence of death upon conviction, Mills, 786 So. 2d at 538, the employment of further proceedings to examine the assorted "sentencing selection factors", including aggravators, mitigators, and the sufficiency of those, does not violate due process. In fact, a sentencer may be given discretion in determining the appropriate sentence selection, so long as the jury has decided the defendant is eligible for the death penalty.

Ring proves only that Apprendi, and more important Ring, are

not sentencing cases.[6] Apprendi and Ring involve the jury's role in convicting a defendant of a qualifying offense, subject to the death penalty. Quoting Proffitt, 428 U.S. at 252, Ring acknowledged that "[i]t has never [been] suggested that jury sentencing is constitutionally required",[7] rather Ring involves only the requirement the jury find the defendant death-eligible. Ring, 122 S.Ct. at 2447, n.4. The jury determination is for the guilt phase, while sentencing rests with the trial judge. See Spaziano, 468 U.S. at 459 (finding Sixth Amendment has no guarantee of right to jury trial on sentence).

Marshall next argues that even if this Court determines that "death eligibility" occurs at guilt-phase, he is still entitled to relief because he was convicted of first-degree murder only

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

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

[7] See Harris v. Alabama, 513 U.S. 504, 515 (1995) (holding that "[t]he Constitution permits the trial judge, acting alone, to impose a capital sentence. It is thus not offended when a State further requires the sentencing judge to consider a jury's recommendation and trusts the judge to give it the proper weight.)

and no contemporaneous felony was found. That fact, Marshall argues, coupled with the jury's life recommendation, shows that the jury made absolutely no findings in his case regarding death eligibility. Marshall's argument completely ignores the fact that two of his four aggravators were due to prior convictions: (1) that the murder was committed by a person under sentence of imprisonment; and (2) that the defendant was previously convicted of nine (9) violent felonies. Ring did not alter the express exemption in Apprendi for the fact of a prior conviction ("other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt."). Thus, it is of no consequence that Marshall's jury did not find a contemporaneous felony; **a jury** found him guilty of the 9 prior violent felonies for which he was serving a prison sentence at the time he committed this murder, which established two aggravators.

Marshall's last argument is that this Court does not need to even reach the issue of when "death eligibility" occurs in order to provide him relief because the statute in effect at the time of his trial, section 775.082(1), Florida Statutes (1989), made life the maximum sentence. This Court rejected the identical assertion in Mills at 537-38. Marshall's contention

that Mills is no longer valid, in light of Ring and Sattazahn v. Pennsylvania,537 U.S. 101 (2003) is also without merit. In Mills, this Court found the rule announced in Apprendi, requiring any fact increasing the penalty for a crime beyond the prescribed statutory maximum to be submitted to jury and proven beyond reasonable doubt, does not apply to Florida's capital sentencing as the statutory maximum sentence upon conviction of first-degree murder is death. Nothing in Ring or Apprendi calls into question the fact that a defendant is "death eligible" upon conviction for first-degree murder. The fact that death is the statutory maximum has been reaffirmed since Mills. See Wright v. State, 2003 WL 21511313 (Fla. July 3, 2003); Porter v. Crosby, 840 So.2d 981, 986 (Fla. 2003) (stating "we have repeatedly held that maximum penalty under the statute is death"); Spencer v. State, 842 So. 2d 52, 72(Fla. 2002), Bottoson v. State, 813 So. 2d 31(Fla. Jan 31, 2002), King v. State, 808 So. 2d 1237 (Fla. 2002), Card v. State, 803 So. 2d 613 (Fla. 2001). Florida's capital sentencing statute was upheld in Proffitt v. Florida, 428 U.S. 242 (1976) and has not been overruled by the Supreme Court.[8] Thus, contrary to

[8] See, Bottoson v. Moore, 833 So. 2d 693, 694-95 (Fla. 2002) (noting Supreme Court has not overruled Florida's capital sentencing) citing Rodriquez De Quijas v. Shearson/American Express, 490 U.S. 477 (1989) (holding only Supreme Court can

Marshall's position, Mills remains valid, and this Court has properly ruled death to be the statutory maximum for first-degree murder.

Reliance upon Sattazahn v. Pennsylvania, 537 U.S. 101 (2003), for the proposition that Mills is invalid is also misplaced. As explained by Justice Scalia in Sattazahn, (joined by Rehnquist, C.J., and Thomas, J.):

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

This is merely an analysis of the application of the Arizona statute which provides life is the statutory maximum upon conviction. However, this Court has determined the statutory maximum in Florida is death, meaning that once the jury convicted Marshall of first-degree murder, he was eligible for

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overrule its precedent and others should follow case which directly controls issue). Lambrix v. Singletary, 520 U.S. 518 (1997); Hildwin v. Florida, 490 U.S. 638 (1989); Spaziano v. Florida, 468 U.S. 447 (1984); Barclay v. Florida, 463 U.S. 939 (1983) and Proffitt v. Florida, 428 U.S. 242 (1976) are thus, intact.

a death sentence, not merely life imprisonment. Moreover, the judicial role in Florida alleviates Eighth Amendment concerns as well, and in fact provides defendants with another opportunity to secure a life sentence; it also enhances appellate review and provides a reasoned basis for a proportionality analysis.

RING DOES NOT INVALIDATE FLORIDA'S OVERRIDE PROVISION

Ring does not invalidate Florida's override provision. As already noted, Ring did not overrule those United States Supreme Court cases upholding the constitutionality of Florida's capital sentencing scheme, including its override provision. See Lambrix v. Singletary, 520 U.S. 518, 532 (1997); Hildwin v. Florida, 490 U.S. 638 (1989); Spaziano v. Florida, 468 U.S. 447 (1984); Barclay v. Florida, 463 U.S. 939 (1983); Proffitt v. Florida, 428 U.S. 242, 252 (1976). In Spaziano, the United States Supreme Court rejected the claim that the Sixth Amendment requires a jury trial on the sentencing issue of life or death. The Court expressly upheld, against a Sixth Amendment challenge, the trial judge's ability to impose a sentence of death, even if the jury recommends a sentence of life imprisonment, stating: "[t]he fact that a capital sentencing is like a trial in the respects significant to the Double Jeopardy Clause ... does not mean that it is like a trial in respects significant to the Sixth Amendment's guarantee of a jury trial." Id., at 459. In

so holding, the court noted that Sixth Amendment protections have never been read to include a binding jury decision on sentencing and that denying a jury trial for sentencing does not thwart the goals of "measured, consistent application and fairness to the accused" and having the sentencer consider the special circumstances of a particular defendant. See also Hildwin (reading Spaziano as upholding override in face of Sixth Amendment challenge); Parker v. Dugger, 498 U.S. 308 (1991) (reaffirming Spaziano and the constitutionality of Florida's overrides); Harris v. Alabama, 513 U.S. 504 (1995) (upholding Alabama's override provision). The United States Supreme Court has declined to disturb those prior decisions and as this Court noted in Bottoson, only the United States Supreme Court may overrule its own decisions.

Marshall argues that Spaziano does not operate as a bar to finding overrides invalid under Ring because the defendant in Spaziano never made the precise Sixth Amendment argument raised in Ring, i.e., whether the Sixth Amendment requires a jury finding of the aggravating factors. However, the Court expressly noted that it was addressing whether "given a jury verdict of life, the judge may override that verdict and impose death." Spaziano at 458. Surely, subsumed within that question is whether the jury, alone, must find the aggravating factors

because if it did, the judge could not override a life recommendation. See Hildwin (relying upon Spaziano in rejecting argument that Florida capital sentencing scheme violates the Sixth Amendment because it permits the imposition of death without a specific finding by the jury as to the aggravating circumstance). Spaziano and Hildwin cannot be distinguished from the issue presented here and the fact that the United States Supreme Court has declined to disturb its holding in those case controls the issue, requiring affirmance. Marshall's remaining arguments are likewise unpersuasive. He points to concurring opinions as raising doubts about the continuing validity of Florida's override provision; however, those concurring opinions are dicta and none clearly express that they would agree with Marshall's claim in this case. Further, contrary to Marshall's assertion, the State's position has always been that Ring does not invalidate Florida's override provision.

Because there were two aggravators in this case that were established based upon Marshall's prior convictions, it is clear that the jury's life recommendation here was not based upon the lack of aggravators, but rather, upon their weighing process. Thus, the trial court's rejection of the jury's life recommendation was based upon its determination that the life

recommendation was flawed as to its weighing responsibilities, not as to whether an aggravator was proven. In Florida, where the eligibility determination is made at the end of the guilt phase, a flawed life recommendation implicates neither the Sixth nor the Eighth Amendments. Ring does not invalidate the jury override in this case because the "sentencing judge, sitting without a jury, [did not] find an aggravating circumstance necessary for imposition of the death penalty." Rather, the **prior juries** who convicted Marshall of his prior violent felonies made the requisite findings to establish the two aggravators of: (1) murder committed while under sentence of imprisonment; and (2) prior violent felonies. On direct appeal, this Court upheld the trial court's override, expressly finding that the mitigation in this case was insufficient to support the jury's life recommendation:

> In this case, the record contains insufficient evidence to reasonably support the jury's recommendation of life. Marshall's father was unable to attend the trial, but the defense and prosecution stipulated that he would have testified that Marshall did well in school until his early teens when his older brother influenced him to run the streets and break the law; that Marshall's mother did not discipline Marshall and allowed him to believe there would be no consequences for his behavior; and that Marshall's father loved him and requested a life sentence for his son. The trial court determined these facts were not

mitigating, but did find Marshall's behavior at trial as well as his entering prison at a young age to be mitigating. We find no error in the court's assessment of this mitigation and conclude that it does not provide a reasonable basis for the jury's recommendation of life in this case. Even viewing this mitigation in the light most favorable to Marshall, it pales in significance when weighed against the four statutory aggravating circumstances, including Marshall's record of violent felonies consisting of kidnaping, sexual battery, and seven armed robberies.

Furthermore, defense counsel's argument composed largely of a negative characterization of the victim does not provide a reasonable basis for the jury's life recommendation. Moreover, contrary to Marshall's assertion, the facts surrounding the murder do not suggest that the murder was committed in self defense or in a fit of rage. The witnesses heard muffled screams and moans emanating from the victim's cell and observed Marshall leaving the cell with what appeared to be blood on his chest and arms. Within a few minutes, Marshall reentered the cell and similar noises were again heard. The victim was found lying face down with his hands bound behind his back and his ankles were restrained. The victim received no less than twenty-five separate wounds and blood was sprayed and splattered about the cell. Death was caused by blows to the back of his head. Nothing in these facts supports the notion that Marshall acted in self defense or that he simply killed the victim in the heat of a fight. We thus conclude that the trial court did not abuse its discretion in finding the facts supporting the death sentence to be "so clear and convincing that no reasonable person could differ." See *Tedder*, 322 So.2d at 910.

Finally, we do not find the death

> sentence disproportionate in this case. The facts of this case, including the four strong aggravating circumstances compared to the weak mitigation, render the death sentence appropriate and proportional when compared to other cases. See, e.g., Freeman v. State, 563 So.2d 73 (Fla.1990); Lusk v. State, 446 So.2d 1038 (Fla.1984).
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> Accordingly, we affirm Marshall's conviction for first-degree murder and the resulting death sentence.

Marshall v. State, 604 So.2d 799, 806 (Fla. 1992).

Moreover, in two recent cases, the Alabama courts rejected similar challenges to Alabama's override provision, relying upon Harris v. Alabama, 513 U.S. 504, 115 S. Ct. 1031, 130 L. Ed. 2d 1004 (1995), which upheld Alabama's overrides and was decided before Ring. In Martin v. State, 2003 Ala. Crim. App. LEXIS 136 (Ala. May 30, 2003), an Alabama appellate court recently held, on direct appeal from an override, that Ring does not conflict with Harris v. Alabama, 513 U.S. 504 (1995), which upheld Alabama's judicial-override procedure:

> [We conclude that] the United State Supreme Court's decision in Harris v. Alabama, 513 U.S. 504, 515, 130 L. Ed. 2d 1004, 115 S. Ct. 1031 (1995), upholding Alabama's judicial-override procedure, remains in force. We have carefully reviewed Ring for any impact it has on Harris v. Alabama. Nowhere in Ring do we find any indication that it affects a sentencing procedure that allows the trial judge to reject the jury's advisory verdict. Moreover, the Ring court left intact that portion of Walton v. Arizona, 497 U.S. 639, 111 L. Ed. 2d 511, 110 S. Ct. 3047 (1990), validating judicial

> sentencing in capital cases. The holdings in Ring and Apprendi focus on the fact that the defendant in each case received a sentence exceeding the maximum that he could have received under the facts reflected by the jury's verdict alone. Ring, 536 U.S. at 597-98. Here, the sentence imposed by the trial court was not above the maximum Martin could have received based on the jury's verdict finding him guilty of murder for pecuniary gain. In Harris v. Alabama, the Supreme Court stated, "the Constitution permits the trial judge, acting alone, to impose a capital sentence. It is thus not offended when a State further requires the sentencing judge to consider a jury's recommendation and trusts the judge to give it the proper weight." 513 U.S. at 515. Because the holdings in Ring and Apprendi do not conflict with Harris v. Alabama, the trial court acted within its authority in overriding the jury's advisory verdict of life without parole and sentencing Martin to death.

See also Lee v. State, 2003 WL 21480428 (Ala. Crim. App. June 27, 2003). Marshall argues that the Alabama cases are distinguishable because the jury in Lee found one aggravating factor, at guilt-phase, by finding that Lee had committed the capital offenses while he was engaged in the commission of a robbery, thereby convicting him of the capital offense of robbery, which is an aggravator. Because of that fact, the Lee court concluded that Ring was satisfied since the jury, and not the judge, had determined the existence of the "aggravating circumstance necessary for imposition of the death penalty." Lee

at 147-48. Rejecting the override challenge, the court noted that "Ring and Apprendi do not require that a jury weigh the aggravating circumstances and the mitigating circumstances." Id. See also Martin (noting that the override sentence imposed by the trial court in that case was not above the maximum sentence Martin could have received based on the jury's guilt-phase verdict which found him guilty of murder for pecuniary gain, an aggravating factor).

Similarly, here, the judge's override sentence **was not** above the maximum sentence Marshall could have received based on the jury's guilt-phase finding of first-degree murder. The jury's conviction of Marshall for first-degree murder made him "death eligible." Further, as already noted, there are **two** aggravators here that were established upon Marshall's conviction (because they are based upon his prior convictions) and that were found by **a jury**: (1) that the murder was committed by a person under sentence of imprisonment; and (2) that the defendant was previously convicted of nine (9) violent felonies. Thus, it is clear in this case, as it was in Martin and Lee, that the jury's life recommendation was not based upon the lack of aggravators, but rather, upon their weighing process, which the Martin court noted Ring does not require to be done by the jury. Further, Marshall's argument ignores that Martin upheld overrides based

upon the continuing validity of Harris. The Martin court examined the continuing validity of Harris and Alabama overrides in light of Ring and concluded that Ring had not invalidated either.

The Alabama Supreme Court has agreed, in several recent cases, that Ring did not invalidate Alabama's hybrid capital sentencing scheme, which is similar to Florida's, vesting the ultimate sentencing determination in the hands of the judge, not the jury. See; Moody v. State, 2003 WL 1900599 (Ala. April 18, 2003); Duke v. State, 2003 WL 1406536 (Ala. March 21, 2003); Ex parte Hodges, 2003 WL 1145451 (Ala. March 14, 2003); Stallworth v. State, 2003 WL 203463 (Ala. Jan. 31, 2003); Ex parte Waldrop, 2002 WL31630710 (Ala. Nov. 22, 2002). These cases recognize the narrowness of the holding in Ring:

> Ring's claim is tightly delineated: he contends only that the Sixth Amendment required jury findings on the aggravating circumstances asserted against him. No aggravating circumstance related to past convictions in his case; Ring therefore does not challenge Almendarez-Torres v. U.S.. 523 U.S. 224 (1998) which held that the fact of prior conviction may be found by the judge even if it increases the statutory maximum sentence.

Ring, 536 U.S. at ____, n.4, 122 S.Ct. at 2437 n.4. Other states with hybrid capital sentencing schemes, like Florida and Alabama, have upheld a jury override despite a Ring challenge.

Wrinkles v. State, 776 N.E.2d 905, 908 (Ind. Oct. 15, 2002); Garden v. State, 815 A.2d 327 (Del. Jan. 24, 2003) (approving override in theory but remanding to reweigh jury's recommendation). Consequently, it is clear that Ring does not invalidate the jury override in this case because the "sentencing judge, sitting without a jury, [did not] find an aggravating circumstance necessary for imposition of the death penalty." Rather, the **prior juries** who convicted Marshall of his prior violent felonies made the requisite findings to establish two of the aggravators. Based upon the foregoing, affirmance is required.

WHEREFORE, the State respectfully requests this Court deny habeas relief to Marshall.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing "Response in Opposition" was sent via U.S. mail: Leor Veleanu and Melissa Minsk Donoho, CCRC-South, 101 N.E. 3rd Avenue, Suite 400, Ft. Lauderdale, Fl. 33301 this 5th day of August, 2003.

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Of Counsel