IN THE SUPREME COURT OF FLORIDA

MATTHEW MARSHALL,

Petitioner,

vs. **No. SC02-420**

JAMES V. CROSBY,

Respondent.

_____/

PETITIONER'S SUPPLEMENTAL MEMORANDUM OF LAW

COMES NOW THE PETITIONER, MATTHEW MARSHALL, and, pursuant to this Court's Order dated June 19, 2003, herein submits his Supplemental Memorandum of Law in the above-captioned case.

I. INTRODUCTION

Mr. Marshall's pending habeas corpus case presents this Court with the first opportunity to address the impact of *Ring v. Arizona*, 536 U.S. 584 (2002), on a case where a jury has recommended a sentence of life imprisonment and the trial court, notwithstanding the jury recommendation, engages in the requisite statutory fact-finding process to determine the eligibility of a defendant to be sentenced to death. Mr. Marshall's case presents an even more compelling case due to the fact that he was never indicted for or convicted of a contemporaneous felony in

addition to the murder charge. Thus, as of the rendering of the guilt phase verdict, Mr. Marshall had been convicted by a jury of only first-degree murder.

Although the murder charge included both premediated and felony murder theories of prosecution, the State never elected between premeditated and felony murder, and both were argued to the jury. The State never charged Mr. Marhsall with, nor did the jury convict him of, a separately-charged or underlying felony. The jury returned a general verdict finding Mr. Marshall guilty of murder as charged. At the penalty phase, the jury returned with a recommendation of life imprisonment without the possibility of parole for twenty-five (25) years.

Before returning its life recommendation, Mr. Marshall's jury was instructed in conformity with Florida's capital sentencing statute that it (1) must find the existence of at least one aggravating circumstance, (2) must find that "sufficient aggravating circumstances exist" to justify imposition of death, and (3) must find that "there are insufficient mitigating circumstances to outweigh the aggravating circumstances." Section 921.141(2), (3), Fla. Stat. The jury was instructed that after making these factfindings, it was to determine, "[b]ased on these considerations, whether the defendant should be sentenced to life imprisonment or death." Section 921.141(2)(c), Fla. Stat. The jury returned a general recommendation of life, so it is unknown at what step of this process the jury

found the case for death lacking.

What is known, however, is that the jury did not convict Mr. Marshall of *capital* first-degree murder. At the guilt phase, the jury convicted Mr. Marshall only of first-degree murder, since no other felony was charged. At the penalty phase, the jury recommended life. "[T]he jury verdict required by the Sixth Amendment is a jury verdict of guilty beyond a reasonable doubt." *Sullivan v. Louisiana*, 508 U.S. 275, 278 (1993). Under the circumstances presented in Mr. Marshall's case, "there has been no jury verdict within the meaning of the Sixth Amendment." *Id*. at 280.

In a document entitled "Findings of Fact by the Court," the trial court, pursuant to Florida's statutory procedure, engaged in the three-step process required in order to determine Mr. Marshall's eligibility to be sentenced to death. First, the trial court made factual findings that four (4) statutory aggravating circumstances had been established beyond a reasonable doubt (R4084-85).[1]

---

[1]The court found the following aggravating circumstances: that Mr. Marshall was under a sentence of imprisonment (the murder in the instant case occurred while Mr. Marshall was serving that sentence); that Mr. Marshall had been previously convicted of nine (9) prior crimes involving the use of or threat of violence to the person (the felonies for which Mr. Marshall was sentenced and was serving prison time when the killing occurred); the capital felony was committed while Mr. Marshall was engaged in the commission of or an attempt to commit a burglary (the burglary being the entry by Mr. Marshall into the prison cell of the victim); and that the crime was especially heinous, atrocious, and cruel (R4084-85).

Next, the trial court addressed the mitigating evidence presented, finding that some nonstatutory mitigation had been established (R4085).[2] Pursuant to the next step in determining death eligibility under Florida law, the trial court next made findings with respect to whether "sufficient aggravating circumstances" existed to justify the imposition of the death penalty, concluding that sufficient aggravating circumstances did in fact exist in Mr. Marshall's case (R4086). The trial court then engaged in the final step of fact-finding under Florida's capital sentencing scheme, which requires the fact-finder to determine whether insufficient mitigating circumstances exist to outweigh the aggravating circumstances. After making the factual finding that there are "insufficient mitigating circumstances to outweigh the aggravating circumstances" (R4086), the trial court, having concluded the requisite fact-finding, determined that Mr. Marshall should be sentenced to death notwithstanding the recommended sentence of the jury.

Because Mr. Marshall's jury was in no manner involved in the fact-finding process required under the Sixth Amendment to make Mr. Marshall eligible for the death penalty, *see Ring v. Arizona*, 536 U.S. 584 (2002); *Apprendi v. New Jersey*,

---

[2]The trial court first addressed the evidence that Mr. Marshall's older brother influenced him and led him astray, and that his mother also failed to adequately discipline him, finding that these facts were "not mitigating circumstances" (R4086). The court did find as mitigating that Mr. Marshall's behavior at trial was acceptable, and that Mr. Marshall entered prison at a young age (*Id*.).

530 U.S. 466 (2000), Mr. Marshall is entitled to habeas corpus relief. Even if Florida were a state which determines eligibility at the guilt phase,[3] no such determination of eligibility was made by the jury at the guilt phase; Mr. Marshall was indicted for and convicted of only first-degree murder. At the penalty phase, the jury, making no "findings" with respect to any facts which would make Mr. Marshall eligible for the death penalty, returned a recommendation of life imprisonment. It is not known what, if any, aggravating circumstances were found by the jury to have been established beyond a reasonable doubt. It is not known if or whether the jury ever reached the additional factual determination of the sufficiency of the aggravators to make Mr. Marshall eligible for the death penalty. It is also not known if or whether the jury ever reached the factual determination which requires a weighing of the aggravation and mitigation. Instead, the trial court made the factual findings rendering Mr. Marshall eligible for the death penalty, a procedure which is anathema to the Sixth Amendment.

As recently explained by Justice Lewis:

> Blind adherence to prior authority, which is inconsistent with *Ring*, does not, in my view, adequately respond to, or resolve the challenges presented by, the new constitutional framework announced in *Ring*. For example, we should acknowledge that although decisions such as

---

[3]Florida is *not* a state which determines eligibility at the guilt phase. *See Section II, infra.*

> *Spaziano v. Florida*, 468 U.S. 447 (1984), have not been expressly overruled, at least that portion of *Spaziano* which would allow trial judges to override jury recommendations of life imprisonment in the face of Sixth Amendment challenges must certainly now be of questionable continuing vitality.

Bottoson v. Moore, 833 So. 2d 693, 725 (Fla. 2002) (Lewis, J., concurring in result only). Although *Bottoson* did not involve a jury recommendation of life and thus "we are not required to face this issue directly today," Justice Lewis unequivocally concluded that "we should not suggest the continuing validity of the concept of trial courts overriding jury recommendations of life imprisonment in these cases." *Id.* at 726. This is so because, in Justice Lewis' view, "a logical reading and comparison of the texts of *Spaziano* and *Ring* opinions produces an inescapable conflict." *Id.* at 726.

The fundamental reason underlying Justice Lewis' concern about the validity of the override in light of *Ring* is the language in *Ring* which "counsels that this Court cannot allow a sentencing judicial officer to find aggravating factors contrary to the specific findings of a jury on those aggravating factors and override jury recommendations of life imprisonment." *Id*. at 726. In other words, in Justice Lewis' view, if *Ring* stands for the proposition that penalty phase juries must make findings of the aggravating factors, "a trial judge may not simply dismiss the jury's recommendation based upon these findings and do precisely what *Ring* prohibits."

Id. at 728. "A trial court simply cannot sentence a defendant to death through findings of fact rendered completely without, and in the case of a jury override, directly contrary to, a jury's advice and input . . . [U]nder *Ring*, [a jury's] life recommendation must be respected." *Id*. at 728.[4]

The underlying concern in Justice Lewis' opinion about the lack of requisite factfindings made by Florida penalty phase juries is also reflected in the opinions of several other members of the Court.[5] Indeed, a majority of the justices concurring

---

[4]In her opinion concurring in result in *King v. Moore*, 831 So. 2d 152 (Fla. 2002, Justice Pariente observed that "the reasoning relied on by the [Supreme] Court in *Spaziano* may be suspect in light of *Ring*." *King v. Moore*, 831 So. 2d 143, 152 (Fla. 2002). However, in her view, "the ultimate holding [in *Spaziano*] remains valid" because the issue presented in *Spaziano* was not precisely the same issue addressed in *Ring*. *Id.* In Section II of this memorandum, Mr. Marshall details the reasons why *Spaziano* did in fact address a discrete issue from that decided in *Ring* and thus presents no barrier to this Court's application of *Ring* to the override issue presented in Mr. Marshall's case.

[5]Only three (3) justices concurred with the *per curiam* decision in *Bottoson*: Justices Wells, Quince, and Harding. Justice Harding's separate concurring opinion in *Bottoson* did not discuss the override issue at all. Justice Wells' opinion did not squarely address the issue of the override, except to note that in *Ring*, the Supreme Court did not overrule cases such as *Spaziano* and *Harris v. Alabama*, 513 U.S. 504 (1995), both of which addressed override issues. *Bottoson*, 833 So.2d at 693 (Wells, J., concurring specially). Justice Quince explicitly refused to engage in a discussion about the continuing validity of the override because the issue was not before the Court in the *Bottoson* case: "Whether we may fundamentally agree that jury overrides may not be allowed under a full *Ring* analysis is not the issue here. What we must focus on at this point are the issues presented by the parties to this particular action." *Bottoson*, 833 So.2d at 702 (Quince, J., concurring specially with an opinion).

in result only expressed concern that because Florida's statute fails to provide that the jury make the requisite findings of aggravation under *Ring* and *Apprendi,* Florida's statute runs afoul of the Sixth Amendment. While this failure in the statute applies to jury recommendations of life or death, the problem is highlighted in the context of a jury recommendation of life, where there is no indication that the jury found any aggravating circumstance to exist, much less the additional requirements for death eligibility under Florida's sentencing scheme. Based on the various opinions in *Bottoson* and *King,* it is thus clear that a majority of the Court has expressed doubts about the continuing validity of Florida's statute which permits, and permitted at the time of Mr. Marshall's trial, a judge to expressly reject the recommendation of life by the jury.[6]

---

[6]*Accord Mills v. Moore,* 786 So. 2d 532, 545 n.8 (Fla. 2001) (Pariente, J., dissenting) ("a jury's recommendation of life might, under a logical extension of the reasoning in *Apprendi,* preclude a trial court from overriding a jury's life recommendation"); *Bottoson v. Moore*, 2002 Fla. LEXIS 1474 at *17 (Fla. July 8, 2002) (Pariente, J., concurring) ("*Ring* casts substantial doubt on the constitutionality of our scheme to the extent that it permits a judge to override a jury recommendation of a life sentence. When a jury recommends a life sentence, the trial court and this Court have no way of knowing whether or not the jury has found the existence of any aggravators or has found that the mitigating circumstances outweigh the aggravators. Although a life recommendation is not involved in this case, we need to determine if that aspect of the statute can be addressed without rendering the entire scheme unconstitutional"). Mr. Marshall also notes that the State of Florida, in a case not involving a life recommendation, has conceded that "[i]n Florida, only a defendant in a jury override case has any basis to raise an *Apprendi* challenge to Florida's death penalty statute." *See* Answer Brief of

II. IN MR. MARSHALL'S CASE, DEATH ELIGIBILITY WAS NOT DETERMINED AT THE GUILT PHASE.

Mr. Marshall is aware of the numerous post-*Ring* decisions of members of this Court which have noted that *Ring* afforded no basis for relief because the defendant had been indicted for and convicted of a contemporaneous felony involving the use or threat of violence. While he in no way concedes that Florida is a state which has ever been classified as one which determines death-eligibility at the guilt phase, Mr. Marshall submits that, under the facts of his case, the Court need not even reach that issue.[7] As noted in his habeas petition, the relevant

---

Appellee, *Ault v. State*, No. SC00-863, at 63. Commentators, too, have counseled that Florida's override scheme has been jeapordized by *Ring*. *See* Cantareno, NOTES AND COMMENTS: WHO MAKES THE CALL ON CAPITAL PUNISHMENT? HOW RING V. ARIZONA CLARIFIES THE APPRENDI RULE AND THE IMPLICATIONS ON CAPITAL SENTENCING, 17 B.Y.U. J. Pub. 323, 340 (2003) ("Under the Florida sentencing scheme, for example, the jury renders an advisory verdict regarding punishment and the sentencing judge retains discretionary power to make the ultimate determination. In light of *Ring*, however, such a sentencing scheme would be considered unconstitutional"); Batey, SENTENCING: TAKING FLORIDA FURTHER INTO "APPRENDI-LAND," 77 Fla. Bar. J. 26, 27 (February, 2003) ("at a minimum, *Ring* requires amendment of § 921.141 to remove the language allowing the judge to override the decision of the jury").

[7]Since the decision in *Mills v. Moore*, 786 So. 2d 532 (Fla. 2001), which was decided prior to *Ring*, this Court has not fully addressed the continuing validity of *Mills* in light of *Ring* and *Sattazahn v. Pennsylvania*, 123 S. Ct. 732 (2003). *Ring* and *Sattazahn* make clear that *any* fact, no matter how the State labels it, which increases the punishment authorized by a guilty verdict, constitutes an element of the offense and must be found by a jury beyond a reasonable doubt. *Sattazahn*, 123 S. Ct. at 739. The plurality opinion in *Sattazahn* also expanded *Ring*'s

statutory provisions in place at the time of Mr. Marshall's trial leave no doubt that, as of the rendering of the verdict at the guilt phase, the only possible punishment authorized by the guilty verdict was life imprisonment without the possibility of parole for twenty-five (25) years. *See Petition for Writ of Habeas Corpus* at 13-15. There is no doubt as to this conclusion because in this case, the indictment charged only first-degree murder, and Mr. Marshall was convicted of only first-degree murder. Thus, as of the time that the jury returned a unanimous verdict of guilt for first-degree murder, there was no "aggravating circumstance" also found by the jury in the form of a contemporaneous felony involving the threat or use of violence. Under these circumstances, and pursuant to the statutory scheme in place at the time, Mr. Marshall was required to be sentenced to life unless and until a separate penalty phase proceeding was conducted and the requisite findings of fact

---

definition of "functional equivalent of the offense" by stating that, "for purposes of the Sixth Amendment jury-trial guarantee, the underlying offense of 'murder' is a distinct, lesser-included offense of 'murder plus one or more aggravating circumstances. . ." *Id.* *Accord Butler v. State*, 842 So. 2d 817, 836 (Pariente, J., concurring in part and dissenting in part). Under the reasoning of *Ring* and *Sattazahn*, Mr. Marshall was convicted of murder *simplicter*, which "is properly understood to be a *lesser included offense* of `first degree murder plus aggravating circumstances." *Sattazahn*, 123 S. Ct. at 740. The reasoning of *Ring* and *Sattazahn* clearly undermine, if not eviscerate, the Court's attempt in *Mills* to define capital murder in Florida by resorting to dictionary definitions.

were made by the trial court.[8]

Even assuming the continued validity of cases such as *Hildwin v. Florida*, 490 U.S. 638 (1989), and *Spaziano v. Florida*, 468 U.S. 447 (1984),[9] the unique

---

[8]Mr. Marshall's case in particular, as well as Florida's capital sentencing scheme in general, are distinguishable from the system in Alabama, which allows judges to override jury verdicts of life. An Alabama override sentence was addressed in the context of Ring in Lee v. State, 2003 WL 21480428 (Ala.Crim.App. June 27, 2003). Lee was convicted of two counts of capital murder. The murders were made capital because they were committed during a robbery or an attempted robbery. *See* § 13A-5-40(a)(2), Ala.Code 1975. Lee was also convicted of an additional count of capital murder, under § 13A- 5-40(a)(10), Ala.Code 1975, because he killed by one act or pursuant to one scheme or course of conduct. Finally, he was convicted of attempting to murder Helen King. *See* § § 13A-6-2 and 13A-4-2, Ala.Code 1975. By a vote of 7 to 5, the jury recommended life imprisonment without parole for the capital offenses. The trial court overrode the jury's recommendation and imposed death. The Alabama court denied a Ring challenge to the override sentences because the jury had convicted Lee of robbery-murder at the guilt phase and therefore had determined the existence of the aggravating circumstance necessary to impose death. Unlike Florida, Alabama requires a jury finding during the guilt phase of an aggravating circumstance or that a capital offense was committed. The system in Florida does not make findings of aggravators until the penalty phase and sentencing phase when the judge makes the final determination. In Mr. Marshall's case, he was convicted only of first-degree murder during the guilt phase, and Alabama cases are inapposite. There are, obviously, significant differences between Alabama's capital sentencing scheme and Florida's. Thus, the Alabama Supreme Court's analysis is significant for this Court only to the extent that it requires this Court to review *Ring* though the lens of Florida's statute, and not simply determine that because the Alabama Supreme Court has determined that *Ring* does not affect Alabama override cases, the inquiry is at an end for Florida.

[9]Mr. Marshall in no way concedes that *Ring* can be reconciled with these cases, particularly *Hildwin.* However, Mr. Marshall suggests that the overruling of *Hildwin* and *Spaziano* is not a prerequisite to the application of *Ring* to his

circumstances of this case nonetheless mandate relief under *Ring*. Implicit in this Court's previous rejection of *Ring* claims is the notion that when a jury which returns a recommendation of death is the same jury which has also found the defendant guilty of murder as well as a contemporaneous violent felony or has been presented with prior violent felonies at the penalty phase, the jury has implicitly[10] "found" at least one aggravating circumstance. This is consistent with language in *Hildwin* which addressed a situation where a jury recommended death, thus "necessarily engaging in the factfinding required for imposition of a higher sentence, that is, that at least one aggravating factor had been proved." *Jones v. United States*, 526 U.S. 227, 250-51 (1999) (citing *Hildwin*). Here, of course, Mr. Marshall's jury recommended a life sentence and also did not convict him of a contemporaneous violent felony, as none had been charged. Thus, the notion that a jury recommending a death sentence implicitly or "necessarily finds" an

---

override case. While this Court clearly has no authority to overrule a case decided by the Supreme Court, it does have the authority and obligation to determine *Ring*'s application to this state's capital sentencing scheme.

[10]Mr. Marshall emphasizes the term "implicit" because, as the Court is well aware, Florida juries make no "findings" with respect to what aggravating circumstances they have found, nor do they make any "findings" with respect to the sufficiency of the aggravators and the weighing process they engage in, both of which are "facts" which, under *Ring*, must be found unanimously by the jury. *See State v. Whitfield*, 2003 WL 21386276 (Mo. June 17, 2003).

aggravating circumstance is not one which can be applied to the situation in Mr. Marshall's case.

As for *Spaziano*, Mr. Marshall submits that that decision did not even address the precise issue decided in *Ring*. As Justice Pariente noted in her opinion in *King v. Moore*, the defendant in *Spaziano* raised a challenge to Florida's override provisions; while referencing the Sixth Amendment as part of the overall challenge, the defendant's Sixth Amendment argument was grounded on the notion that the capital sentencing decision was one that should be made in all cases by the jury. *King*, 831 So. 2d at 152. Nowhere in *Spaziano* did the defendant urge the Sixth Amendment argument that was the basis of the holding in *Walton* and the basis of the overturning of that part of *Walton* by the Supreme Court in *Ring*. *Accord Jones*, 526 U.S. at 250 (noting that *Spaziano* "contains no discussion of the sort of factfinding before us in this case. It addressed the argument that capital sentencing must be a jury task and rejected that position on the ground that capital sentencing is like sentencing in other cases, being a choice of the appropriate disposition, as against an alternative or a range of alternatives"). Thus, *Spaziano* presents no hindrance to this Court's application of *Ring* to Mr. Marshall.[11]

[11]The notion that this Court is somehow precluded from applying *Ring* to Florida's capital sentencing scheme because the Supreme Court has not overruled cases such as *Hildwin*, *Spaziano*, and *Proffitt v. Florida*, 428 U.S. 242 (1976),

III. MR. MARSHALL IS ENTITLED TO THE BENEFIT OF *RING*.

A. SINCE *RING* DECIDED A SUBSTANTIVE, NOT PROCEDURAL, ISSUE, A RETROACTIVITY ANALYSIS IS NOT NECESSARY.

The question which *Ring v. Arizona*, 122 S. Ct. 2428 (2002), decided was what facts constitute "elements" in capital sentencing proceedings. Following the Supreme Court's decision in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), Mr. Ring raised an *Apprendi* challenge to his death sentence. In addressing that

---

has been embraced by some members of this Court. However, as noted above, neither *Hildwin* nor *Spaziano* pertains to Mr. Marshall's case. Nor, for that matter, does *Proffitt*. *Proffitt* addressed a facial attack on Florida's capital sentencing scheme on Eighth and Fourteenth Amendment grounds. *Proffitt*, 428 U.S. at 244 ("The issue presented by this case is whether the imposition of the sentence of death for the crime of murder under Florida law violates the Eighth and Fourteenth Amendments"). In any event, the notion that *Ring* cannot be applied to Florida because *Proffitt*, *Hildwin*, and *Spaziano* have not been overturned overlooks history. For example, in *Proffitt*, the Supreme Court upheld on Eighth and Fourteenth Amendment grounds Florida's statute which did not provide for the jury's consideration of non-statutory mitigating circumstances. Yet, in *Lockett v. Ohio*, 428 U.S. 586 (1978), the Supreme Court invalidated Ohio's capital scheme which also precluded the consideration by the jury of non-statutory mitigating evidence. When this Court was faced with claims challenging Florida's statute under the reasoning of *Lockett*, however, *Lockett* was applied to Florida notwithstanding the fact that *Lockett* had not overruled *Proffitt*. *See Harvard v. State*, 486 So. 2d 537 (Fla. 1986). The Eleventh Circuit likewise applied *Lockett* to Florida despite the fact that *Proffitt* had not been overturned. *See Songer v. Wainwright*, 769 F. 2d 1488 (11th Cir.) (en banc), *cert. denied*, 472 U.S. 1012 (1985). The lesson to be learned from this is that just because *Ring* did not address Florida and did not overturn other cases which have addressed Florida does not mean that its holding may not be applied to Florida.

challenge, the Arizona Supreme Court stated that the United States Supreme Court's description of Arizona's capital sentencing scheme contained in *Walton v. Arizona*, 497 U.S. 639 (1990), was incorrect and provided the correct construction of the scheme. *Ring*, 122 S. Ct. at 2436. Based upon this correct construction, the United States Supreme Court then determined that *Walton* "cannot survive the reasoning of *Apprendi*." *Ring*, 122 S. Ct. at 2440.

The bulk of the *Ring* opinion addresses how to determine whether a fact is an "element" of a crime. *See Ring*, 122 S. Ct. at 2437-43. The question in *Ring* was not whether the Sixth Amendment requires a jury to decide elements. That has been a given since the Bill of Rights was adopted. The question was what facts are elements. Justice Thomas explained this in his concurring opinion in *Apprendi*:

> This case turns on the seemingly simple question of what constitutes a "crime." Under the Federal Constitution, "the accused" has the right (1) "to be informed of the nature and cause of the accusation" (that is, the basis on which he is accused of a crime), (2) to be "held to answer for a capital, or otherwise infamous crime" only on an indictment or presentment of a grand jury, and (3) to be tried by "an impartial jury of the State and district wherein the crime shall have been committed." Amdts. 5 and 6. See also Art. III, [Sec.] 2, cl. 3 ("The Trial of all Crimes . . . shall be by Jury"). With the exception of the Grand Jury Clause, see Hurtado v. California, 110 U.S. 516, 538 . . . (1884), the Court has held that these protections apply in state prosecutions. Herring v. New York, 422 U.S. 853, 857, and n.7 . . . (1975). Further, the Court has held that due process requires that the jury find beyond a reasonable doubt every fact necessary to constitute the crime. In re Winship, 397 U.S. 358, 364 . . . (1970).

> *All of these constitutional protections turn on determining which facts constitute the "crime"--that is, which facts are the "elements" or "ingredients" of a crime.* In order for an accusation of a crime (whether by indictment or some other form) to be proper under the common law, and thus proper under the codification of the common-law rights in the Fifth and Sixth Amendments, it must allege all elements of that crime; likewise, in order for a jury trial of a crime to be proper, all elements of the crime must be proved to the jury (and, under Winship, proved beyond a reasonable doubt).

Apprendi, 120 S. Ct. at 2367-68 (Thomas, J., concurring) (emphasis added). Justice Thomas explained that courts have "long had to consider which facts are elements," but that once that question is answered, "it is then a simple matter to apply that answer to whatever constitutional right may be at issue in a case--here, *Winship* and the right to trial by jury." Id. at 2368.

The essence of criminal law is the definition of the offense. *Jones v. United States*, 526 U.S. 227 (1999), clarified that facts which increase the maximum punishment for an offense are elements of the offense. *Apprendi* applied to that definition the well-established rule that elements must be found by a jury. *Ring* merely clarified the rule in the death penalty context.

Ring's requirement that juries, not judges, find the elements of the charge is derived from ancient principles of law: "The principle that the jury were the judges of fact and the judges the deciders of law was stated as an established principle as early as 1628 by Coke. See 1 E. Coke, Institutes of the Laws of England 155b

(1628).” *Jones*, 526 U.S. at 247. *Walton* did not contravene those principles but simply misread the Arizona statute. The *Ring* decision merely rejuvenated the longstanding rule which *Walton* temporarily rejected.

The Framers of the Bill of Rights included the Sixth Amendment's guarantee of a right to jury trial as an essential protection against government oppression. "Fear of unchecked power, so typical of our State and Federal Governments in other respects, found expression in the criminal law in this insistence upon community participation in the determination of guilt or innocence." *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968). Only by maintaining the integrity of the factfinding function does the jury "stand between the accused and a potentially arbitrary or abusive Government that is in command of the criminal sanction." *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 572 (1977). Thus, the adoption of the jury trial right in the Bill of Rights establishes the Founders’ recognition that a jury trial is more reliable than a bench trial.

Just as Justice Thomas explained in *Apprendi*, there was no question in *Ring* that the jury trial right applies to elements. The dispute in *Ring* involved what was an element. Thus, the question in *Ring* is akin to a statutory construction issue, and “retroactivity is not at issue.” *Fiore v. White*, 531 U.S. 225, 226 (2001); *Bunkley v. Florida*, 123 S. Ct. 2020, 2023 (2003). That is, the Sixth Amendment

right to have a jury decide elements is a bedrock, indisputable right. Mr. Marshall was entitled to this Sixth Amendment protection at the time of his trial. *Ring* simply clarified that facts rendering a defendant eligible for a death sentence are elements of capital murder and therefore subject to this Sixth Amendment right.

The ruling in *Ring* concerns an issue of substantive criminal law. In concluding that the Sixth Amendment requires that the jury, rather than the judge, determine the existence of aggravating factors, the Supreme Court described aggravating factors as "the functional equivalent of an element of a greater offense." *Ring*, 122 S.Ct. at 2243 (citing *Apprendi v. New Jersey*, 530 U.S. 466, 494, n. 19 (2000)). Ring clarified the elements of the "greater" offense of capital murder. As explained above, *Ring* did not decide a procedural question (i.e., whether the Sixth Amendment requires that juries decide elements), but a substantive question (what is an element). Thus, retroactive application is required under *Bousley v. United States*, 523 U.S. 614 (1998), because the ruling addresses a matter of substantive criminal law, not a procedural rule.

B. *RING* APPLIES RETROACTIVELY UNDER *WITT V. STATE*.

Alternatively, Mr. Marshall argues that *Ring* meets the criteria for retroactive application set forth in *Witt v. State*, 387 So. 2d 922 (Fla. 1980). *Ring* issued from the United States Supreme Court. *Witt*, 387 So. 2d at 930. *Ring*=s Sixth

Amendment rule unquestionably Ais constitutional in nature.@ *Witt*, 387 So. 2d at 931. *Ring* Aconstitutes a development of fundamental significance.@ *Witt*, 387 So. 2d at 931.

As to what Aconstitutes a development of fundamental significance,@ *Witt* explains that this category includes Achanges of law which are of sufficient magnitude to necessitate retroactive application as ascertained by the three-fold test of *Stovall [v. Denno*, 388 U.S. 293 (1967),] and *Linkletter [v. Walker*, 381 U.S. 618 (1965)],@ adding that **"***Gideon v. Wainwright* . . . is the prime example of a law change included within this category.@ 387 So. 2d at 929. The Missouri Supreme Court has recently held that *Ring* is retroactive under the *Stovall*/*Linkletter* test. *State v. Whitfield*, ___ S.W.3d ___, 2003 WL 21386276 (Mo. June 17, 2003).

The rule of *Ring* is the kind of Asweeping change of law@ described in *Witt*. In *Apprendi*, Justice O=Connor=s dissenting opinion described the rule of that case as Aa watershed change in constitutional law.@ *Apprendi*, 120 S. Ct. at 2380 (O=Connor, J., dissenting). Extending *Apprendi=*s rule to capital cases, as the Supreme Court did in *Ring*, is no less of a Awatershed change.@ In this Court, Chief Justice Anstead has said that *Ring* Ais clearly the most significant death penalty decision of the U.S. Supreme Court since the decision in *Furman v.*

Georgia,@ Bottoson v. Moore, 833 So. 2d 693, 703 (Fla. 2002) (Anstead, C.J., concurring in result only), and Justice Pariente has described *Ring* as a Alandmark case.@ *Bottoson v. Moore*, 824 So. 2d 115, 116 (Fla. 2002) (Pariente, J., concurring). Justice Shaw has concluded that *Ring* applies retroactively under *Witt* and meets the test of *Stovall v. Denno* for retroactive application. *Bottoson*, 833 So. 2d at 717 & n.49 (Shaw, J., concurring in result only).

The three-fold *Stovall-Linkletter* test considers: A(a) the purpose to be served by the new rule; (b) the extent of reliance on the old rule; and (c) the effect on the administration of justice of a retroactive application of the new rule.@ 387 So. 2d at 926. Resolution of the issue ordinarily depends most upon the first prong--the purpose to be served by the new rule--and whether an analysis of that purpose reflects that the new rule is a Afundamental and constitutional law change[] which cast[s] serious doubt on the veracity or integrity of the original trial proceeding.@ 387 So. 2d at 929.

In *Witt*, this Court explained that the doctrine of finality must give way when fairness requires retroactive application:

> The doctrine of finality should be abridged only when a more compelling objective appears, such as ensuring fairness and uniformity in individual adjudications. Thus, society recognizes that a sweeping change of law can so drastically alter the substantive or procedural underpinnings of a final conviction and sentence that the machinery of post-conviction relief is necessary to avoid individual instances of

> obvious injustice. Considerations of fairness and uniformity make it very Adifficult to justify depriving a person of his liberty or his life, under process no longer considered acceptable and no longer applied to indistinguishable cases.@

Witt, 387 So. 2d at 925 (footnote omitted). The Court has reaffirmed the *Witt* fairness test in *State v. Callaway*, 658 So. 2d 983, 987 (Fla. 1995).

This fairness test is in keeping with the United States Supreme Court=s interpretation of the *Stovall v. Denno* test. The Court has said that the first prong of this test--the purpose to be served by the new rule--is the most important prong:

> [O]ur decisions establish that A[f]oremost among these factors is the purpose to be served by the new constitutional rule,@ *Desist v. United States*, 394 U.S. 244, 249 . . . (1969), and that we will give controlling significance to the measure of reliance and the impact on the administration of justice Aonly when the purpose of the rule in question [does] not clearly favor either retroactivity or prospectivity.@ *Id.*, at 251. . . . [citations omitted]. AWhere the major purpose of new constitutional doctrine is to overcome an aspect of the criminal trial that substantially impairs its truth-finding function and so raises serious questions about the accuracy of guilty verdicts in past trials, the new rule has been given complete retroactive effect. Neither good-faith reliance by state or federal authorities on prior constitutional law or accepted practice, nor severe impact on the administration of justice has sufficed to require prospective application in these circumstances.@ *Williams v. United States*, 401 U.S. 646, 653 . . . (1971) (plurality opinion of WHITE, J.).

Brown v. Louisiana, 447 U.S. 323, 328 (1980) (plurality opinion). AThe right to jury trial guaranteed by the Sixth and Fourteenth Amendments >is a fundamental right, essential for preventing miscarriages of justice and for assuring that fair trials

are provided for all defendants.=@ Id. at 330, quoting *Duncan v. Louisiana*, 391 U.S. 145, 158 (1968). This right is so fundamental that its deprivation constitutes a structural defect in a trial. *Sullivan v. Louisiana*, 508 U.S. 275, 281 (1993).

Ring is such a fundamental constitutional change for two reasons. First, the purpose of the rule is to change the very *identity* of the decisionmaker with respect to critical issues of fact that are decisive of life or death. This change remedies a A>structural defect[] in the constitution of the trial mechanism,=@ by vindicating Athe jury guarantee . . . [as] a >basic protectio[n]= whose precise effects are unmeasurable, but without which a criminal trial cannot reliably serve its function.@ *Sullivan v. Louisiana*, 508 U.S. 275, 281 (1993). When a capital defendant has been subjected to a sentencing proceeding in which the jury has not participated in the life-or-death factfinding role required by the Sixth Amendment and *Ring*, the constitutionally required tribunal was simply not all there, a radical defect which necessarily Acast[s] serious doubt on the veracity or integrity of the . . . trial proceeding.@ *Witt*, 387 So. 2d at 929. As discussed above in Section IIIA, the jury trial right was included in the Bill of Rights to insure accuracy and reliability.

Second, Athe jury trial provisions in the Federal and State Constitutions reflect a fundamental decision about the exercise of official power.@ *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968). Inadvertently but nonetheless harmfully, the

United States Supreme Court lapsed for a time and enfeebled the institution of the jury through its rulings in *Hildwin v. Florida*, 490 U.S. 638 (1989), and *Walton v. Arizona*. The Court=s retraction of these rulings in *Ring* restores a right to jury trial which is a Afundamental@ guarantee of the Federal and Florida Constitutions.

This Court has consistently addressed Sixth Amendment claims premised upon *Apprendi* and *Ring* on the merits in post-conviction cases. *See Hodges v. State*, 2003 WL 21402484 at *13 nn.8, 9 (Fla. June 19, 2003); *Pace v. State*, 2003 WL 21191876 at *13 (Fla. May 22, 2003); *Jones v. State*, 2003 WL 21025816 at *5 (Fla. May 8, 2003); *Chandler v. State*, 2003 WL 1883682 at n.4 (Fla. Apr. 17, 2003); *Banks v. State*, 2003 WL 1339041 at *4 (Fla. Mar. 20, 2003); *Jones v. State*, 845 So. 2d 55, 2003 WL 297074 at *9 (Fla. 2003); *Spencer v. State*, 842 So. 2d 52, 72 (Fla. 2003); *Lucas v. State*, 841 So. 2d 380, 389 (Fla. 2003); *Porter v. Crosby*, 840 So. 2d 981, 986 (Fla. 2003); *Fotopoulos v. State*, 838 So. 2d 1122, 1136 (Fla. 2002); *Bruno v. Moore*, 838 So. 2d 485, 492 (Fla. 2002); *Marquard v. State*, 2003 WL 31600017 at *10 n.12 (Fla. Nov. 21, 2002); *King v. Moore*, 831 So. 2d 143 (Fla. 2002); *Bottoson v. Moore*, 833 So. 2d 693 (Fla. 2002); *Sweet v. Moore*, 822 So. 2d 1269, 1275 (Fla. 2002); *Sireci v. Moore*, 825 So. 2d 882, 888 (Fla. 2002); *Bottoson v. State*, 813 So. 2d 31, 36 (Fla. 2002); *King v. State*, 808 So. 2d 1237 (Fla. 2002); *Mills v. Moore*, 786 So. 2d 532, 536-37 (Fla. 2001). In

Porter v. Moore, 27 Fla. L. Weekly S606 (Fla. June 20, 2002), the Court cited the decision in the successive habeas case of *Mills v. Moore* for the proposition that the claim was Ameritless.@ In these rulings, the Court has rejected the State=s arguments that such claims may be procedurally barred.

Further, this Court=s consideration of the merits of such claims is consistent with precedent. For example, in *Thompson v. Dugger*, 515 So. 2d 173, 175 (Fla. 1987), the Court held that the United States Supreme Court=s decision in *Hitchcock v. Dugger*, 481 U.S. 393 (1987), Arepresent[ed] a sufficient change in the law that potentially affect[ed] a class of petitioners . . . to defeat the claim of a procedural default.@ *See also Delap v. Dugger*, 513 So. 2d 659, 660 (Fla. 1987) (ABecause *Hitchcock* represents a substantial change in the law occurring since we first affirmed Delap=s sentence, we are constrained to readdress his *Lockett* claim on its merits@); *Downs v. Dugger*, 514 So. 2d 1069, 1070 (Fla. 1987) (*Hitchcock* constitutes Aa substantial change in the law . . . that requires us to reconsider issues first raised on direct appeal and then in Downs= prior collateral challenges@). *Apprendi* and *Ring* cannot conceivably be regarded as less drastic, fundamental, or sweeping changes of law than *Hitchcock*.

The Missouri Supreme Court in *State v. Whitfield*, 2003 WL 21386276 (Mo. June 17, 2003), also found that *Ring* was retroactive under the test employed

in Missouri. Importantly, Missouri follows the *Stovall-Linkletter* test for determining retroactivity, the same test used by Florida courts. *See Witt v. State*, 387 So. 2d 922 (Fla. 1980). The jurisdictions which have found *Ring* not to be retroactive have employed the federal habeas corpus retroactivity analysis of *Teague v. Lane*, 489 U.S. 288 (1989). Until *Whitfield*, no state court employing a test other than the federal *Teague* standard had addressed *Ring*. Now one has. But in any event, this Court has, by denying relief on the merits in every case addressing *Ring*, at least implicitly held that *Ring* is retroactive in Florida.

CONCLUSION

Based upon the record and the arguments presented herein, Mr. Marshall respectfully urges the Court to vacate his unconstitutional death sentence.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by US Mail delivery to Debra Resigno, Assistant Attorney General, 1515 N. Flagler Drive, Suite 900, West Palm Beach, Florida 3340, on July 18, 2003.

Respectfully submitted,

_____
Melissa Minsk Donoho
Florida Bar No. 955700
Special Assistant CCRC-South

_____
Leor Veleanu
Florida Bar No. 0139191
Assistant CCRC-South
Capital Collateral Regional Counsel-South
101 N.E. 3rd Avenue, Suite 400
Fort Lauderdale, Florida 33301
(9540 713-1284