**IN THE SUPREME COURT OF FLORIDA**

**CASE NO. SC02-2158**

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**ROBERT PATTON,**

**Petitioner,**

**v.**

**JAMES V. CROSBY,**
**Secretary, Florida Department of Corrections,**

**Respondent.**

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# REPLY TO RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

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**TODD G. SCHER**
**Special Assistant CCRC**
**Florida Bar No. 0899641**
**Law Office of Todd G. Scher, P.L.**
**555 NE 34th Street, #1510**
**Miami, Florida 33137**
**(305) 576-3221**

**SUZANNE MYERS**
**Assistant CCRC**
**Florida Bar No. 0150177**
**OFFICE OF THE CAPITAL**
**COLLATERAL REGIONAL COUNSEL**
**101 N.E. 3RD AVE., SUITE 400**
**Ft. Lauderdale, FL 33301**
**(954) 713-1284**

**COUNSEL FOR PETITIONER**

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**CLAIM I**

The first—and primary—argument advanced by the Respondent is that, in its view, the Court's decisions in *Bottoson v. Moore*, 833 So. 2d 693 (Fla. 2002), and *King v. Moore*, 831 So. 2d 143 (Fla. 2002), "rejected the claim that *Ring* [*v. Arizona,* 122 S. Ct. 2428 (2002] applies to Florida's capital sentencing scheme" (Response at 2). Of course, this Court held no such thing in either *Bottoson* or *King*.[1] Rather, the per curiam opinion of the

[1]Respondent also suggests that *Ring* is not retroactive, relying on selected state and federal cases (Response at 3-5). Respondent does not point out, however, that the federal cases relied on by Respondent apply the federal retroactivity analysis of *Teague v. Lane*, 489 U.S. 288 (1989). Likewise, the states which issued the decisions cited by Respondent (Response at 4), have also adopted the federal *Teague* analysis for retroactivity, as is clear from a reading of those decisions. Florida, however, does not use the *Teague* analysis but rather the test set forth in *Witt v. State*, 387 So. 2d 922 (Fla. 1980). As noted in his petition, Mr. Patton submits that *Ring* is retroactive under *Witt*. The State's arguments otherwise are effectively foreclosed by the *Bottoson* and *King* decisions, wherein the majority of the justices denied relief without any discussion of the non-retroactivity of *Ring*. Certainly, if there was any validity to the State's retroactivity argument, it would have been discussed or addressed in *Bottoson* and/or *King*. In any event, Mr. Patton submits that *Ring* clearly meets all the criteria of *Witt*. As discussed by Justice Shaw in his opinion in *Bottoson*, *Ring* is a decision that emanated from the United States Supreme Court, its holding is constitutional in nature as it as it "goes to the very heart of the constitutional right to trial by jury," and it is of fundamental significance. *Bottoson,* 833 So. 2d at 717. Justice Lewis' opinion in *Bottoson* also classifies the decision in *Ring* as setting forth a "new constitutional framework." *Id*. at 725. In *King*, Justice Pariente also observed that the application of the Sixth Amendment right to jury trial to capital sentencing was "unanticipated" by prior case law upholding Florida's death penalty statute, and that *Apprendi*, the case which was extended by *Ring* to capital sentencing, "inescapably changed the landscape

Court in those cases held that the Florida death penalty scheme is not, in and of itself, invalid under *Ring* because the United States Supreme Court did not remand Mr. Bottoson's and Mr. King's cases in light of Ring, and that the Supreme Court had not overruled a number of its other precedent. *Bottoson*, 833 So. 2d at 694-95; *King*, 831 So. 2d at 144. As the various concurring opinions in *Bottoson* and *King* make clear, however, this is a far cry from saying that the Court found that *Ring* has no applicability to Florida. Every Justice on the Court at the time concurred separately in *Bottoson* and, with the possible exception of Justice Harding, seemingly recognized that *Ring* does have application for certain death sentences under Florida's scheme.[2]

Moreover, in *Bottoson*, several members of the Court implicitly and explicitly raised serious questions about the continuing validity of Florida's scheme allowing a trial judge to override a jury's recommendation of life imprisonment.[3] In his

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of Sixth Amendment jurisprudence." *King*, 831 So. 2d at 149.

[2]Justice Harding's views on cases going beyond the per curiam holding of *Bottoson* and its progeny are not known. As he explained in *Bottoson*, he would "leave the arguments on issues that are not dispositive to the resolution of this case to the lawyers who frame the issues by their briefs and argue for their resolution in a reviewing court," *Bottoson*, 833 So. 2d at 695-96 (Harding, J., concurring).

[3]Even prior to the October *Bottoson* and *King* decisions, members of the Court have expressed some doubt as to the continuing validity of the override in light of both *Ring* and *Apprendi*. *See Mills v. Moore*, 786 So. 2d 532, 545 n.8 (Fla.

opinion concurring in result only, Justice Lewis provided the most explicit discussion as to his concerns of the ongoing vitality of the jury override in Florida in light of *Ring*:

> 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 *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*, 833 So. 2d at 725. 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

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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*, 824 So. 2d 115, 121 (Fla. 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 aggavators. Although a life recommendation is not involved in this case, we needed to determine if that aspect of the statute can be addressed without rendering the entire scheme unconstitutional").

Justice Lewis' view, "a logical reading and comparison of the texts of *Spaziano* and *Ring* opinions produces an inescapable conflict." *Id*.

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 though 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.

The underlying concern in Justice Lewis' opinion about the lack of requisite fact-findings made by Florida penalty phase juries is also reflected in the opinions of several other members

of the Court.[4] Indeed, a majority of the justices concurring 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. *See Bottoson*, 833 So. 2d at 704-10 (Anstead, C.J., concurring in result only); *id*. at 711-18 (Shaw, J., concurring in result only); *id*. at 719-25 (Pariente, J., concurring in result only). While this failure in the statute applies to jury recommendations of life or death, the problem is simply 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.

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[4]Justice Harding's opinion 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 697. 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. *Id*. at 701-02. Mr. Patton would note that, as to *Harris v. Alabama*, the *Ring* decision indicates that at least one member of the *Harris* Court would change his vote. In his opinion concurring in the judgment in *Ring*, Justice Breyer wrote that "[a]lthough I joined the majority in *Harris v. Alabama*, I have come to agree with the dissenting view, and with the related views of others upon which it in part relies." *Ring*, 122 S. Ct. at 2446 (Breyer, J., concurring in the judgment).

It is 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. Patton's trial, a judge to expressly reject the recommendation of life by the jury.[5] In Mr. Patton's case, no one has any idea what, if any, aggravators were "found" by the jury, whether the jury "found" that "sufficient aggravating circumstances exist" to justify the imposition of death, and whether the jury "found" that there are insufficient mitigating circumstances to outweigh the aggravating circumstances. These are the three requisite factual findings that must be made under Florida' statute in order to make Mr.

[5]As noted in ***Ring***, four states—Florida, Alabama, Delaware, and Indiana—have so-called "hybrid systems" in which a jury renders an advisory recommendation but the judge makes the ultimate sentencing determination. ***Ring***, 122 S. Ct. at 2442 n.6. According to information set forth in the Death Penalty Information Center website (www.deathpenaltyinfo.org), as a result of the grant of ***certiorari*** in ***Ring***, the Indiana legislature passed new law effective July 1, 2002, providing that unanimous jury votes for death or life without parole are binding on the judge. Following the decision in ***Ring,*** Delaware's legislature also changed its statute to now give jurors sole authority to unanimously decide death eligibility. While Mr. Patton is presently unaware of any pending legislation in Alabama, he would note that in the recent decision of ***Ex Parte Carroll***, 2002 Ala. LEXIS 285 (Ala. Sept. 20, 2002), at least one member of the Alabama Supreme Court indicated that an override death sentence should be vacated in light of ***Ring***. Id. at *10-*11 (Moore, C.J., concurring in the result) ("In light of the United States Supreme Court's recent decision in ***Ring*** . . . I concur in the result").

Patton death eligible (Petition at 14-15). However, under Florida's scheme, a Florida jury's advisory recommendation "is not supported by findings of fact . . . Florida's statute is unlike those in states where the jury is the sentencer and is required to render special verdicts with specific findings of fact." *Combs v. State*, 525 So. 2d 853, 859 (Fla. 1988) (Shaw, J., concurring). Under Florida practice, "both this Court and the sentencing judge can only speculate as to what factors the jury found in making its recommendation." Id. The United States Supreme Court too has recognized that "the jury in Florida does not reveal the aggravating circumstances on which it relies." *Sochor v. Florida*, 504 U.S. 527 (1992).

Respondent argues that the jury did not render a life recommendation in Mr. Patton's case (Response at 7-8). However, this is not what the State argued on direct appeal; rather, the State urged the Court to treat the jury's 6-6 tie as a life recommendation. *Patten v. State*, 467 So. 2d 975, 980 (Fla.), *cert. denied*, 474 U.S. 876 (1985) ("We do not find it appropriate to treat the jury recommendation as a life recommendation and the trial judge's sentence as a jury override, as urged by the state"). Respondent asserts that nothing in *Ring* affects the Court's determination on direct appeal, yet, in circular reasoning, asserts that "[w]hen the jury recommends death, it

*necessarily* finds an aggravating factor to exist beyond a reasonable doubt and satisfies the Sixth Amendment as construed in *Ring*" (Response at 13) (emphasis added). If a jury recommending death "necessarily" finds the existence of an aggravating circumstance, the opposite must also be true: if a jury returns with a life recommendation—or a 6-6 vote—it also "necessarily" finds that the State has not proved the existence of an aggravating factor beyond a reasonable doubt (or makes a finding that any aggravators are not sufficiently weighty to warrant the imposition of death, which is one of the factual predicates it must make under Florida's capital sentencing scheme). Respondent's own argument demonstrates that Mr. Patton is entitled to relief.

Moreover, the "exception" to the rule announced in *Apprendi*, relied on by Respondent (Response at 15), does not apply to a weighing state such as Florida. *See Amendarez-Torres v. United States*, 523 U.S. 224 (1998). Three of this Court's Justices have indicated that the existence of a contemporaneous felony conviction and/or a prior crime of violence serves as a basis for denying relief under *Ring* and *Apprendi*. *See Bottoson*, 833 So. 2d at 75 (Shaw, J., concurring in result only); *id*. at 722 (Pariente, J., concurring in result only); *id*. at 704 n.18 (Anstead, C.J., concurring in result only). However, under

Florida law, the mere existence of an aggravating circumstance does not make a defendant eligible for the death penalty. Rather, Florida Statute Section 921.141 (3) requires the trial judge to make three factual determinations before a death sentence may be imposed. The trial judge (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." If the judge does not make these findings, "the court *shall* impose a sentence of life imprisonment in accordance with [Section] 775.082." Id. (emphasis added). Hence, under a plain reading of the statute, it is not sufficient that an aggravating circumstance is merely present because Florida is a *weighing* state.[6]

[6]. For example, on several occasions, this Court has determined that the *weight* of a defendant's prior crime of violence mitigates against that defendant's eligibility to be sentenced to death. *See Jorgenson v. State*, 714 So. 2d 423, 428 (Fla. 1998) ("The State presented and the trial court only found one aggravating factor in this case—Jorgenson's 1967 prior conviction for second-degree murder. The facts of the prior conviction mitigate the weight that a prior violent felony would normally carry"); *Chaky v. State*, 651 So. 2d 1169, 1173 (Fla. 1995) (death penalty disproportionate when the lone aggravator based on a prior violent felony was mitigated by the facts surrounding the previous crime). Thus, a defendant's prior violent felony is also a matter to be *weighed* by the jury in a Florida death penalty sentencing phase, and is equally subject to the stringent weighing process that Florida's sentencing scheme requires in order for a defendant to be found eligible for the

Mr. Patton also submits that the holding of *Almendarez-Torres* did not survive *Apprendi* and *Ring*. In *Apprendi,* Justice Thomas, whose vote was decisive of the five-to-four decision in *Almendarez-Torres*, announced that he was receding from his support of *Almendarez-Torres*.[7] The *Apprendi* majority found it unnecessary to overrule *Almendarez-Torres* explicitly in order to decide the issues before it, but acknowledged that "it is arguable that *Almendarez-Torres* was incorrectly decided." *Apprendi*, 530 U.S. at 489. It then went on in a footnote to add

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death penalty.

[7]The five-Justice majority in *Almendarez-Torres* was comprised of Justices Breyer, Rehnquist, O'Connor, Kennedy, and Thomas. The first four of these were the dissenters in *Apprendi*. The dissenters in *Almendarez-Torres* were Justices Stevens, Souter, Scalia, and Ginsburg, all of whom are in the *Apprendi* majority. Between 1998 and 2000, Justice Thomas changed his thinking about the appropriate analysis to determine what an "element" of a crime is and accordingly disavowed his vote in *Almendarez-Torres*. In his *Apprendi* concurrence, Justice Thomas described his change of mind:

> "[O]ne of the chief errors of *Almendarez-Torres* – an error to which I succumbed – was to attempt to discern whether a particular fact is traditionally (or typically) a basis for a sentencing court to increase an offender's sentence . . . For the reasons I have given [here], it should be clear that this approach just defines away the real issue. What matters is the way by which a fact enters into the sentence. If a fact is by law the basis for imposing or increasing punishment – for establishing or increasing the prosecution's entitlement – it is an element.

*Apprendi*, 530 U.S. at 520-21.

to "the reasons set forth in Justice SCALIA's [*Almendarez-Torres*] dissent, 523 U.S. at 248-60," the observation that "the [*Almendarez-Torres*] Court's extensive discussion of the term 'sentencing factor' virtually ignored the pedigree of the pleading requirement at issue," which drives the Sixth Amendment ruling in *Apprendi*. *Apprendi*, 530 U.S. at 489 n.15.[8]

At the same time, the *Apprendi* majority did explicitly restrict whatever precedential force *Almendarez-Torres* ever had to the status of a "narrow exception to the general rule" that every fact which is necessary to enhance a criminal defendant's maximum sentencing exposure must be found by a jury–an exception limited to the "unique facts" in *Almendarez-Torres*. The unique facts of *Almendarez-Torres* were that the defendant **pleaded guilty** to an indictment charging that he had returned to the United States after having been deported and, in addition, **admitted** that he had been deported because he was previously convicted of three aggravated felonies. He thus elected to forgo a trial and accept an uncontested adjudication of his guilt for a crime by

[8]The majority opinion in *Almendarez-Torres* notably relied on *McMillan v. Pennsylvania*, 477 U.S. 79 (1986), and, in so doing, refused to distinguish between a "sentencing factor . . . [that] triggered a mandatory minimum sentence" in *McMillan* and a "sentencing factor . . . [that] triggers an increase in the maximum permissive sentence" in *Almendarez-Torres*. 523 U.S. at 224. That aspect of *Almendarez-Torres* has, of course, now been explicitly repudiated. *See Haris v. United States*, 122 S. Ct. 2406, 2419 (2002) (decided together with *Ring*).

definition included the felony convictions later used to enhance his sentence. Nothing about the priors—any more than anything else about the elements of the crime of reentry after deportation—remained for a jury to try in light of the defendant's guilt plea. This should be contrasted to Florida, where a capital jury is to *weigh* the felony conviction to determine its sufficiency together with other aggravation and mitigation.

Respondent does not discuss Mr. Patton's other arguments. For example, it does not discuss *Ring*'s implications on the jury instructions as to the "advisory" role of the jury during a capital sentencing phase (Petition at 26-28), the erroneous jury instruction which impermissibly shifted the burden of proof (Petition at 28-31), and the doubling argument (Petition at 31-36). The lack of any response must be taken as a concession that Mr. Patton's arguments have merit, and thus relief is warranted.

**CLAIM II**

As to Mr. Patton's argument that appellate counsel failed to point out to the Court that his counsel had indeed requested a doubling instruction (Petition at 36-37), Respondent argues that appellate counsel was not ineffective because *Castro v. State*, 597 So. 2d 259 (Fla. 1992), did not come out until after Mr. Patton's 1989 resentencing and that in *Wuornos v. State*, 644 So.

2d 1000, 1007-08 (Fla. 1994), the Court announced that *Castro* would be applied prospectively only (Response at 19).

Respondent misunderstands Mr. Patton's claim. In Mr. Patton's resentencing appeal, the Court determined that *Castro* did not apply to Mr. Patton's case not because it had not been decided at the time of Mr. Patton's resentencing, but rather it did not apply because no doubling instruction had been requested by resentencing counsel. *Patten v. State*, 589 So. 2d 60, 63 n.18 (Fla. 1992), *cert. denied*, 507 U.S. 1019 (1993). As Mr. Patton pointed out in his petition, his resentencing counsel *did* request the proper doubling instruction (Petition at 37); Respondent does not challenge this obvious fact. Rather, Respondent argues that because *Castro* had not been decided at the time of the resentencing, is "does not apply to this matter" (Response at 19). This argument, of course, overlooks that even though *Castro* had not been decided until 1992, resentencing counsel did request the instruction and Mr. Patton's case was in the pipeline when *Castro* was decided. The reason the Court did not find that *Castro* applied was because it harbored the erroneous factual assumption that no instruction had been requested when, in fact, as Respondent concedes, it had. Respondent suggests that even if the Court had determined that the instruction was requested, no relief would be forthcoming because the trial judge himself

merged the aggravating factors at issue (Response at 20). This argument, of course, is contrary to *Ring*. *See* Petition at 31-36.

As to Mr. Patton's argument that appellate counsel was ineffective for failing to raise the issue of Mr. Patton's inculpatory statements (Petition at 37-48), Respondent first argues first that neither *McNeil v. Wisconsin*, 501 U.S. 171 (1991), nor *Minnick v. Mississippi*, 498 U.S. 146 (1990), were decided at the time of the original direct appeal (Response at 21). This is obvious; however, as pointed out in Mr. Patton's petition, the cases relied upon by the trial court in originally denying the motion to suppress—namely *Edwards v. Arizona*, 451 U.S. 477 (1981)—had clearly been decided, as the trial court relied on *Edwards*, as well as *Rhode Island v. Innis*, 441 U.S. 291 (1980), in denying Mr. Patton's motion to suppress (Petition at 47-48). Thus, the legal basis for the argument existed at the time of the original direct appeal. And, at the time of the resentencing appeal, both *McNeal* and *Minnick* had been decided, thus providing appellate counsel with the tools to raise the argument.

Respondent also argues that appellate counsel could not have raised the issue because it had not been properly preserved at either the trial or the resentencing (Response at 21-22). This is a diametrically different position than was advanced by the

State in prior proceedings in this case. In the Rule 3.850 appeal, the State argued that Mr. Patton's suppression issue was procedurally barred because it was not raised in either of his direct appeals; indeed, the State noted that Mr. Patton had not filed a petition for habeas corpus attacking appellate counsel's ineffectiveness for not raising the issue on either the direct or resentencing appeal. *See* Answer Brief of Appellant, *Patton v. State*, No. SC89669, at 89. When addressing this claim in its opinion, this Court found the suppression issue procedurally barred because it was "or should have been raised on direct appeal . . ." *Patton v. State*, 784 So. 2d 380, 386 & n.4 (Fla. 2000). Thus, contrary to Respondent's new procedural argument, there was no procedural impediment existing to preclude the issue from being raised either on the original direct appeal or on the resentencing direct appeal. Should, however, the Court determine that there is such an impediment, Mr. Patton submits that the error was fundamental and appellate counsel should nonetheless have raised it.

## CONCLUSION

Based on the foregoing arguments and those in his petition, Mr. Patton respectfully requests that the Court issue the writ of habeas corpus in his case, or any other relief as deemed just and proper.

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Sandra Jaggard, Assistant Attorney General, Rivergate Plaza, Suite 950, 444 Brickell Avenue, Miami, Florida, 33131, on this 12th day of March, 2003.

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TODD G. SCHER
Special Assistant CCRC-South
Florida Bar No. 0899641
Law Office of Todd G. Scher, P.L.
555 NE 34th Street, #1510
Miami, Florida 33137
Tel: 305-576-3221

Suzanne Myers
Assistant CCRC-South
Florida Bar. No. 0150177
OFFICE OF CAPITAL COLLATERAL
REGIONAL COUNSEL—SOUTH
101 NE 3d Avenue, Suite 400
Ft. Lauderdale, Florida 33301
Tel: 954-713-1284

COUNSEL FOR PETITIONER

## CERTIFICATE OF COMPLIANCE

The undersigned counsel certifies that this petition is typed using Courier 12 font.

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TODD G. SCHER
COUNSEL FOR APPELLANT