IN THE SUPREME COURT OF FLORIDA

ERNEST SUGGS

Petitioner,

v. CASE NO. SC04-224

JAMES CROSBY, Secretary,
Department of Corrections
State of Florida
Respondent.
_____/

RESPONSE TO THE PETITION FOR WRIT OF HABEAS CORPUS

Preliminary Statement

Petitioner, Ernest Suggs, raises one claim in this petition for writ of habeas corpus. The gravamen of Suggs' claim is that Florida's capital sentencing scheme is unconstitutional under Ring v. Arizona, 536 U.S. 584 (2002).

References to petitioner will be to "Suggs" or "Petitioner," and references to respondent will be to "the State" or "Respondent." The record on direct appeal in the instant case will be referenced as (TR) followed by the appropriate volume number and page number. Citations to the record in Petitioner's pending post-conviction appeal will be referred to as (PCR) followed by the appropriate volume and page number. References to Suggs' instant habeas petition will be referred to as (Pet.) followed by the appropriate page number.

Statement of the Case and Procedural History

Suggs was charged, by indictment, on August 22, 1990, with one count of first degree murder, one count of robbery and one count of kidnapping.[1] The relevant facts concerning the August 6, 1990, murder of Pauline Casey are recited in this Court's opinion on direct appeal:

> . . . Pauline Casey, the victim, worked at the Teddy Bear Bar in Walton County. On the evening of August 6, 1990, the bar was found abandoned, the door to the bar was ajar, cash was missing from the bar, and the victim's car, purse, and keys were found at the bar. The victim was missing. Ray Hamilton, the victim's neighbor, told police that he last saw the victim shooting pool with an unidentified customer when he left the bar earlier that night. Based on Hamilton's description of the customer and the customer's vehicle, police issued a BOLO for the customer. Subsequently, a police officer stopped a vehicle after determining that it matched the BOLO description.
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> The driver of the vehicle was identified as the appellant, Ernest Suggs. Although he was not then under arrest, Suggs allowed the police to search his vehicle and his home. While searching Suggs' home, the police found, in a bathroom sink, approximately $ 170 cash in wet bills, consisting of a few twenty-, ten-, and five-dollar bills and fifty-five one-dollar bills.
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> Meanwhile, police obtained an imprint of the tires on Suggs' vehicle and began looking for similar tire tracks on local dirt roads. Similar tire tracks were found on a dirt road located four to five miles from the Teddy Bear Bar. The tracks turned near a power line, and the victim's body was found about twenty to

[1] Suggs was also charged with possession of a firearm by a convicted felon but that charge was severed from the remaining charges.

twenty-five feet from the road. The victim had been stabbed twice in the neck and once in the back; the cause of death was loss of blood caused by these stab wounds. After the victim was found, Suggs was arrested for her murder.

In addition to the cash and tire tracks, police obtained the following evidence connecting Suggs to the murder: one of the three known keys to the bar and a beer glass similar to those used at the bar were found in the bay behind Suggs' home; the victim's palm and fingerprints were found in Suggs' vehicle; and a serologist found a bloodstain on Suggs' shirt that matched the victim's blood. Additionally, after his arrest, Suggs told two cellmates that he killed the victim.

In his defense, Suggs contended that he was framed and made the following claims: that he had small bills because his parents had paid him in cash for working on their dock; that the money was wet because he fell in the water while working on the dock; that other vehicles have tires similar to the tires on his vehicle; that the tires on his vehicle leave a specific overlap pattern because of the wear on them and that no such overlap pattern was found at the scene; that the underbrush on his vehicle did not match any brush from the area of the crime scene; that no fibers or hairs from the victim were found in his vehicle; that the fingerprints in his vehicle could have been left at any time before the day of the murder; that the enzyme from the blood stain on his shirt matches not only the victim but also 90% of the population; that the shirt from which the blood was taken was not properly stored and that the stain could come from any bodily fluid; that the tests performed on the blood stain produced inconclusive results, including the fact that the stain could have been a mixed stain of saliva and hamburger; that a news conference was held regarding his arrest twenty-four hours before the bay behind his house was searched, which provided ample time for someone to deposit the key and glass there; and that his two cellmates lied, gave inconsistent testimony, and received reduced sentences because of their testimony. Additionally, Suggs contended that both Ray Hamilton and Steve Casey, the victim's husband, could have committed the

> murder (with Casey having life insurance as a motive), and that those individuals were being pursued as suspects until his arrest, but as soon as he was arrested, police dropped their investigation of those suspects.
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> The State countered this defense by showing that the dock on which Suggs was purportedly working contained no new wood; that the tire tracks did in fact match Suggs' vehicle; and that the enzyme from the blood did not come from Suggs. Suggs was convicted of first-degree murder, kidnapping, and robbery.
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> At the penalty-phase proceeding, one of Suggs' cellmates testified that Suggs told him he murdered the victim because he did not want to leave a witness. Additionally, the State entered into evidence a book entitled Deal the First Deadly Blow, which they had taken from Suggs' house. The State used this evidence to show that Suggs planned how he would kill the victim. The State also introduced evidence that Suggs was convicted of first-degree murder and attempted murder in 1979 and that he was on parole at the time of the murder in this case. Suggs produced evidence showing that he came from a good family; that he was a normal, happy child; and that he was a very hard worker.

Suggs v. State, 644 So.2d 64, 65-67 (Fla. 1994)

After the penalty proceeding, the jury recommended, by a seven-to-five vote, Suggs be sentenced to death. The trial court found the State had proven seven aggravating circumstances beyond a reasonable doubt: (1) The capital felony was committed by Suggs while under sentence of imprisonment; (2) Suggs was previously convicted of another capital felony and a felony involving the use or threat of violence to the person; (3) the crime for which Suggs is to be sentenced was committed while he was engaged in the commission of the crime of kidnapping; (4)

the capital felony was committed for the purpose of avoiding or preventing a lawful arrest; (5) the capital felony was committed for pecuniary gain; (6) the capital felony was especially heinous, atrocious, or cruel; (7) the capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

The trial judge also found one statutory mitigator and two non-statutory mitigators: (1) The capacity of Suggs to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired (he had been drinking at the time of the incident); (2) Suggs' family background (he came from a good family); and (3) Suggs' employment background (he was a hard worker). In her sentencing order, the trial judge concluded the aggravating factors outweighed the mitigating factors, followed the jury recommendation, and sentenced Suggs to death.

On direct appeal, Suggs raised eight issues. He alleged: (1) a new trial is warranted because the trial judge erred in permitting a judge to testify on behalf of the State without first conducting a Richardson hearing; (2) the trial judge erred by denying Suggs' motion to suppress the evidence found at his home. Suggs claimed his initial detention by police was illegal and that the consent form he signed agreeing to allow the law

enforcement officers to search his home was improperly obtained; (3) the trial judge erroneously denied his motion for mistrial when the prosecutor, during opening statement, implied Suggs had been in prison before the murder; (4) the prosecutor's arguments and tactics deprived Suggs of a fair trial; (5) the evidence was insufficient to support Suggs' conviction for kidnapping because no evidence exists to support the charge he forcibly required the victim to leave the bar; (6) the trial judge erred in denying Suggs' motion to preclude the in-court identification of Suggs by the victims's neighbor (Ray Hamilton); (7) the trial judge erred in admitting into evidence the book entitled "Deal the First Deadly Blow"; (8) the trial judge erred in a number of areas by allowing the jury to consider certain evidence in aggravation and in instructing the jury on certain aggravating factors.[2] Suggs 644 So.2d at 67-70.

[2] Suggs alleged the prosecutor improperly elicited testimony during the penalty phase regarding witness elimination and nonviolent, uncharged offenses that Suggs had either committed or planned to commit, insufficient evidence existed to establish that Suggs set out to kill the victim to eliminate a witness; the jury instruction on heinous, atrocious, or cruel is invalid under Espinosa v. Florida, 112 S.Ct. 2926, 120 L.Ed.2d 854 (1992); the murder was not heinous, atrocious, or cruel because the victim had only two knife wounds of any significance and because it is uncertain whether the victim was in any pain or how long she lived after the attack; the murder was not cold, calculated, and premeditated; and the trial court improperly doubled aggravators by finding that Suggs committed the murder "to avoid detection" and "to avoid arrest."

On September 1, 1994, this Court rejected Petitioner's claims on direct appeal and affirmed his convictions and sentences for the first-degree murder of Pauline Casey, kidnapping, and robbery. Id at 70. Suggs filed a Petition for Writ of Certiorari with the United States Supreme Court. The United States Supreme Court denied review on April 25, 1995, in Suggs v. Florida, 514 U.S. 1083 (1995).

On January 24, 1997, Suggs filed a motion for post-conviction relief raising twelve claims. On February 27, 1998, Suggs filed an amended motion to vacate his convictions and sentence. Suggs raised fifteen claims in his amended motion for post-conviction relief. On August 28, 2001, Suggs filed a second amended motion for post-conviction relief raising seventeen claims.[3]

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[3] Between the time Suggs filed his first amended motion for post-conviction relief and his second amended motion for post-conviction relief, the trial judge (Judge Melvin) retired. Prior to her retirement, Judge Melvin held a Huff hearing on Suggs' first amended motion for post-conviction relief. On March 14, 2000, Judge Melvin issued an order granting Suggs an evidentiary hearing on four of his claims and summarily denying nine others. Two claims she dismissed without prejudice.

Because Judge Melvin retired shortly after the Huff order was issued, a successor judge, Judge Lewis Lindsey, was assigned to the case. Shortly thereafter, however, Judge Lindsey granted a motion for his disqualification because he had testified as a witness during Suggs' trial. Additionally, Suggs' collateral counsel moved to withdraw from the case and new collateral counsel was appointed. Collateral counsel filed Suggs' second amended motion for post-conviction relief and subsequent Huff and evidentiary hearings were held by Judge Remington.

On January 14, 2002, the trial court held a Huff[4] hearing on Suggs' second amended post-conviction motion. On May 14, 2002, the court summarily denied most of Suggs' claims and denied two others without prejudice to amend the motion to sufficiently plead these claims. The court granted an evidentiary hearing, however, on seven of Suggs' claims. After an evidentiary hearing conducted on January 23-24, 2003, the trial court entered an order on June 11, 2003, denying Suggs' motion for post-conviction relief. Suggs appealed the orders to this Court, Case No. SC 03-1330, in a Notice of Appeal docketed in this Court on July 18, 2003. Simultaneously with the filing of the brief in that case, Suggs filed the instant Petition for Writ of Habeas Corpus. Suggs' raises a Ring claim for the first time in the instant petition. [5]

Argument

WHETHER FLORIDA'S CAPITAL SENTENCING SCHEME IS UNCONSTITUTIONAL IN LIGHT OF THE UNITED STATES SUPREME COURT'S DECISION IN RING V. ARIZONA.

Suggs claims that, pursuant to the United States Supreme Court's decision in Ring v. Arizona, Florida's capital

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[4] Huff v. State, 622 So.2d 982 (Fla. 1993).

[5] Suggs did not seek to amend his Rule 3.851 motion prior to the evidentiary hearing held in January 2003 in order to raise a Ring claim. This claim could of, and should have, been raised in Sugg's motion for post-conviction relief.

sentencing structure is unconstitutional. Suggs' argument seems to turn on four essential premises: (1) Florida's capital sentencing scheme is unconstitutional after Ring because it does not require a unanimous jury to find beyond a reasonable doubt that at least one statutory aggravating factor exists, that sufficient aggravating circumstances exist to justify imposition of the death penalty, and that there are insufficient mitigating circumstances to outweigh the aggravating factors; (2) the penalty phase instructions impermissibly shift the burden to the defendant to prove that mitigating circumstances outweigh the aggravating factors found to exist and to prove that life is an appropriate sentence; (3) Florida's murder in the course of an enumerated felony is an impermissible automatic aggravator; and (4) Ring requires the State to charge the aggravating factors, it intends to argue in support of the death penalty, in the indictment so the defendant is not hindered in the preparation of his defense.

In his petition, Suggs claims that additional findings are required, after a verdict finding the defendant guilty of first degree murder, in order to make the defendant eligible for a death sentence. (Pet. 14) Suggs also avers this Court's decision in Bottoson and King do not dispose of his claim because neither Bottoson nor King was a majority opinion. Suggs' claims are not supported by the jurisprudence of this

State nor required by the United States Supreme Court's decision in Ring.

A. Suggs' claims are procedurally barred

Suggs' Ring claim is procedurally barred. Suggs does not couch his claim in terms of ineffective assistance of appellate counsel. Rather, he presents each part of his claim as a substantive constitutional issue.

On direct appeal, Suggs did not claim that Florida's capital sentencing structure violated his Sixth Amendment right to a jury trial or his right to due process under the Fourteenth Amendment. Suggs also failed to raise, on direct appeal, any claim concerning the State's alleged failure to include all of the elements of capital murder in the indictment. Suggs did not claim error in the State's failure to submit these "extra elements" to a jury and prove them beyond a reasonable doubt. Finally, Suggs did not argue, on direct appeal, that the penalty phase instructions impermissibly shifted the burden to the defendant to prove that mitigating circumstances outweigh the aggravating factors or that Florida's murder in the course of an enumerated felony is an impermissible automatic aggravator.

In addressing constitutional challenges to Florida's capital sentencing statute directly, this Court has repeatedly ruled that constitutional challenges to Florida's capital sentencing statute must be raised on direct appeal. Finney v. State, 831

So.2d 651, 657 (Fla. 2002) (ruling that because Finney could have raised a claim that Florida's capital sentencing statute was unconstitutional on direct appeal, this claim was procedurally barred on postconviction motion); Floyd v. State, 808 So.2d 175 (Fla. 2002) (claim that Florida's death penalty statute is unconstitutional is procedurally barred in appeal of the post conviction motion proceedings because it should have been raised on direct appeal); Arbelaez v. State, 775 So.2d 909, 919 (Fla. 2000) (challenges to the constitutionality of Florida's death penalty scheme should be raised on direct appeal).

This Court has also consistently ruled that a petition for writ of habeas corpus cannot be used as a second or substitute appeal. McCrae v. Wainwright, 439 So.2d 868, 870 (Fla. 1983). *See also* Baker v. State, 29 Fla. L. Weekly S 105 (Fla. Mar. 11, 2004); Swafford v. State, 828 So.2d 966 (Fla. 2002) (observing that habeas proceedings cannot be used for second appeals); Brooks v. McGlothlin 819 So.2d 133 (Fla. 2002) (ruling, in dismissing the petition, that a petition for writ of habeas corpus cannot be used as a second or substitute appeal). Suggs now seeks to use these habeas proceedings to raise claims that could have been, and should have been, raised on direct appeal.

Suggs failed to proffer any legally sufficient excuse for his failure to seek resolution of these issues on direct appeal.

The fact that Ring had not yet been decided at the time Suggs pursued his direct appeal does not preclude this Court from finding a procedural bar. This Court has applied procedural bar to dispose of claims brought under the predecessor decision rendered in Apprendi v. New Jersey, 530 U.S. 466 (2000), even in cases tried before the opinion in Apprendi was issued. Barnes v. State, 794 So.2d 590, 591 (Fla. 2001); McGregor v. State, 789 So.2d 976, 977 (Fla. 2001).

The issue addressed in Ring is by no means new or novel. This claim or a variation of it has been known since before the United States Supreme Court issued its decision in Proffitt v. Florida, 428 U.S. 252 (1976), in which it held that jury sentencing is not constitutionally required. In fact, the very existence of earlier decisions addressing judge versus jury sentencing demonstrates that the issue is not novel; it has been raised and addressed repeatedly. See e.g. Hildwin v. State, 531 So.2d 124, 129 (Fla. 1988) (rejecting as without merit petitioner's claim that "the death penalty was unconstitutionally imposed because the jury did not consider the elements that statutorily define the crimes for which the death penalty may be imposed"); Spaziano v. State, 433 So.2d 508, 511 (Fla. 1983) (concluding that a judge's consideration of evidence that was not before the jury in deciding to sentence convicted murderer to death over jury's recommendation of life in prison

was not improper); See also Barclay v. Florida, 463 U.S. 939 (1983) (upholding Florida's capital sentencing structure). Thus, the basis for any Sixth Amendment attack on Florida's capital sentencing procedures has always been available to Suggs.

Suggs was clearly aware of some of the issues he brings to this Court now in the guise of a habeas petition. Prior to trial, Suggs filed a motion, on constitutional grounds, to dismiss the indictment or to declare that death is not a possible penalty. Among the arguments he raised in support of his motion was that, as essential facts constituting a capital felony, aggravating circumstances must be alleged in the indictment. (TR. I 56). Suggs also claimed that a failure to require a unanimous jury verdict as to any one aggravating circumstance violated his Fifth, Sixth, Eighth and Fourteenth Amendment rights. (TR. I 101). Suggs argued, as well, that a general verdict of guilty to first degree murder automatically established at least one aggravator and unconstitutionally created a presumption of death. (TR. I 52, 102). Yet, Suggs failed to pursue the denial of these motions on direct appeal.

In Turner v. Crosby, 339 F.3d 1247, 1281-1282 (11th Cir. 2003), the Eleventh Circuit ruled that Turner's Ring claim was procedurally barred. In doing so, the Court rejected any notion

that claims, like the one raised by Suggs here, could not have been raised before the Supreme Court handed down the decision in Ring. The Court held that Turner could not excuse his failure to raise the issue in Florida's courts because Turner's Ring claim was not so new and novel that its legal basis was not reasonably available to counsel. Because Suggs failed to seek resolution of his Sixth Amendment challenges on direct appeal, his claim here is procedurally barred.

Like his Ring claim, Suggs failed to raise, on direct appeal, any due process claim concerning the State's alleged failure to include all of the elements of capital murder in the indictment. Accordingly, this claim is also procedurally barred. Smith v. State, 445 So.2d 323, 325 (Fla. 1983) (holding that Smith's claim he deprived of due process by the state's failure to provide notice of the aggravating circumstances upon which it intended to rely in violation of the eighth and fourteenth amendments should have been raised on direct appeal). This Court should find Suggs' Ring and due process claim procedurally barred.

B. Ring Is Not Applicable Retroactively To Suggs' Case

This court has consistently rejected the proposition that Ring applies to invalidate Florida's capital sentencing structure when the jury has recommended a sentence of death. Assuming, *arguendo*, that Ring has any effect on Florida's

capital sentencing statute, Ring is not applicable retroactively to Suggs' case.

On June 26, 2000, the United States Supreme Court decided the case of Apprendi v. New Jersey, 530 U.S. 466 (2000). In Apprendi, the Court held that a criminal defendant is entitled to a jury determination of any fact, other than the existence of a prior conviction, that increases the penalty for a crime beyond the statutory maximum.

Almost two years to the day after the Court's decision in Apprendi, on June 24, 2002, the United States Supreme Court issued its decision in Ring v. Arizona, 536 U.S.584 (2002). Neither the United States Supreme Court nor the Florida Supreme Court has directly ruled upon the retroactivity of either Ring[6] or Apprendi[7]. However, all eleven federal circuit courts, as

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[6] Justice O'Connor in her dissent in Ring apparently concluded that Ring was not retroactive as she noted that capital defendants will be barred from taking advantage of the court's holding on federal collateral review. Ring, 122 S.Ct. 2428, 2449-2450. Justices Cantero, Wells and Bell have concluded that Ring should be decided as a threshold issue in post-conviction proceedings and have also determined Ring is not retroactive under either Teague v. Lane, 489 U.S. 288 (1989) or Witt v. State, 387 So.2d 922, 925 (1987). The issue of Ring's retroactivity is now pending before the United States Supreme Court in Summerlin v. Stewart, 341 F.3d 1082 (9th Cir. 2003), *cert granted*, Schriro v. Summerlin, 124 S.Ct. 833 (2003).

[7] The United States Supreme Court held, however, that an Apprendi error is not plain error because failing to include the quantity of drugs in an indictment, while an Apprendi violation, did not affect the fairness, integrity or public reputation of judicial proceedings. United States v. Cotton, 122 S.Ct. 1781

well as several state courts, have addressed the issue of whether Apprendi should be applied retroactively.[8] These cases are instructive because Ring served to extend the dictates of Apprendi to death penalty cases. *See* Cannon v. Mullin, 297 F.3d 989 (10th Cir. 2002)(noting that Ring is simply an extension of Apprendi to the death penalty context).

As a result of its more recent arrival on the landscape of American jurisprudence, fewer courts have been called upon to address Ring's application to cases already final at the time Ring was decided. A majority of both federal and state courts to consider this issue have determined that Ring should not be applied retroactively.

In Turner v. Crosby, 339 F.3d 1247 (11th Cir. 2003), the Eleventh Circuit Court of Appeals, in considering a challenge to

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(2002). Certainly, if a found error is not of such magnitude as to constitute plain (fundamental) error, it is not of such fundamental significance as to warrant retroactive application.

[8] Three Florida courts of appeal have determined that Apprendi is not retroactive on collateral attack. Hughes v. State, 826 So.2d 1070 (Fla. 1st DCA, 2002)(holding that the decision announced in Apprendi is not of sufficient magnitude to be fundamentally significant, and thus, does not warrant retroactive status), *rev. granted*, Hughes v. State, 837 So.2d 410 (Fla. 2003), Figarola v. State, 841 So.2d 576 (Fla. 4th DCA 2003); Gisi v. State 848 So.2d 1278, 1282 (Fla. 2d DCA 2003). All eleven federal circuits have determined Apprendi is not to be applied retroactively. Windom v. State, 29 Fla. L. Weekly S191, n. 32 (Fla. May 6, 2004) (Cantero, J. specially concurring) (listing all eleven federal circuit courts which have held that Apprendi is not retroactive)

Florida's capital murder statute, ruled that Ring outlined a procedural rule, rather than a substantive rule, "because it dictates what fact finding procedure must be employed in a capital sentencing hearing." Turner, 338 F.3d at 1284. Specifically, the court noted that Ring changed neither the underlying conduct the state must prove to establish a defendant's crime warrants death nor the state's burden of proof. The court went on to observe that "Ring affected neither the facts necessary to establish Florida's aggravating factors nor the State's burden to establish those factors beyond a reasonable doubt. Instead, Ring altered only who decides whether any aggravating circumstances exist and, thus, altered only the fact-finding procedure." Id. The Eleventh Circuit ruled that Turner could not collaterally attack his convictions and sentences on the basis of a Ring error because Ring did not apply retroactively.[9] Shortly after the Turner decision issued, a different panel of the Eleventh Circuit ruled in Ziegler v. Crosby, 345 F.3d 1300 (11th Cir. 2003), that Zeigler's challenge to his Florida death sentence fails because neither Apprendi nor Ring applies retroactively.

Other federal courts have also ruled that Ring is not to be retroactively applied. Just recently in Lambert v. McBride, 365

[9] The court declined to address the merits of Turner's Ring challenge.

F.3d 557 (7th Cir. 2004), the Seventh Circuit Court of Appeals ruled that Ring is not retroactive to cases on collateral review.[10] Likewise, in In Re Johnson, 334 F.3d 403 (5th Cir. 2003), the Fifth Circuit Court of Appeals observed that because Ring is essentially an application of Apprendi, "logical consistency" suggests the rule announced in Ring is not to be applied retroactively to convictions that became final before the Ring decision was announced. [11]

In Shelton v. Snyder, 2004 U.S. Dist. LEXIS 55 (Dist. Del., March 31, 2004), a federal district court recently ruled that

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[10] The Lambert court considered Ring's retroactive application on collateral review in accordance with the retroactivity analysis outlined by the United States Supreme Court in Teague v. Lane, 489 U.S. 288 (1989). In Teague, the United States Supreme Court announced that new constitutional rules of criminal procedure will not be applicable to cases which have become final before the new rules are announced, unless they fall within one of two exceptions to this general rule of non-retroactivity. First, a new rule should be applied retroactively if it places a certain kind of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe. Id. at 311. The second exception is reserved for "watershed rules of criminal procedure." Teague, 489 U.S. at 311, derived from an earlier view by Justice Harlan. Such rules are those in which (1) a failure to adopt the new rule creates an impermissibly large risk that the innocent will be convicted and (2) the procedure at issue implicates the fundamental fairness of the trial. This second exception is limited in scope to "those new procedures without which the likelihood of an accurate conviction is seriously diminished." Teague at 311-313.

[11] In United States v. Brown, 305 F.3d 304, 309 (5th Cir. 2002), the court ruled that Apprendi is not retroactively applicable to final convictions. The court in Johnson, was not called upon directly to rule on the issue of Ring's retroactivity.

Ring would not be applied retroactively to overturn Shelton's conviction and sentence to death. The Court noted, in applying a Teague analysis, that Ring neither improves accuracy of trial nor alters our understanding of the bedrock procedural elements essential to the fairness of a proceeding. According to the court, Ring merely shifted the ultimate fact-finding responsibility as to existence of aggravating circumstances in the capital crime context from the judge to the jury. The court ruled that "[t]his shift does not enhance the likelihood of an accurate sentencing result", at least in part, because the United States Supreme Court has "recognized that judges are unbiased and honest"(citing to Withrow v. Larkin, 421 U.S. 35, 47, (1975). Based on these conclusions, the court held that the new rule of criminal procedure embodied in Ring does not apply retroactively on collateral review. *See also* Outten v. Snyder, 2004 U.S. Dist. LEXIS 5546 (Dist. Del., March 31, 2004)(same); Sibley v. Culliver, 243 F.Supp.2d 1278 (M.D. Ala. 2003) (ruling that Ring would not be applied retroactively to disturb Sibley's 1993 murder conviction); Lessley v. Bruce, 2003 U.S. Dist. LEXIS 10224 (Dist. Kan., June 16, 2003) (ruling in light of the Tenth Circuit's decision in Cannon v. Mullin, 297 F.3d 989 (10th Cir. 2002), that Ring would not be retroactively applied to cases already final at the time Ring was decided); McNair v. Campbell, 2004 U.S. Dist. LEXIS 4051 (M.D. Ala., March 12,

2004)(ruling that Ring may not be retroactively applied to affect McNair's federal habeas corpus petition).[12]

Several state courts have also determined Ring should not be applied to disturb convictions already final by the time Ring was decided. In Ex Parte Briseno, 2004 Tex. Crim. App. LEXIS 199 (Tex. Crim. App., Feb 11, 2004), the Texas Court of Criminal Appeals determined that Ring does not have retroactive effect on a post-conviction petition for writ of habeas corpus. In Head v. Hill, 587 S.E.2d 613 (Ga. 2003), the Georgia Supreme Court ruled that Ring would not be applied retroactively because Ring's new rule does not serve to increase the fundamental fairness and accuracy of the fact finding process.[13] In Stevens v. State, 867 So.2d 219 (Miss. 2003), the Mississippi Supreme Court declined Stevens' invitation to hold Ring retroactive to his case on collateral review. Aligning itself with the Eleventh Circuit's decision in Turner v. Crosby, *supra,* the

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[12] ***But see*** Summerlin v. Stewart, 341 F.3d 1082 (9th Cir. 2003), a case in which the Ninth Circuit ruled that Ring is a substantive rule of criminal law that should be applied retroactively to cases on collateral review. In Schriro v. Summerlin, 157 L.Ed.2d 692, 124 S.Ct. 833 (2003), the United States Supreme Court granted the State's petition for a writ of certiorari to address (1) whether the rule announced in Ring is substantive, rather than procedural, and therefore exempt from Teague's retroactivity analysis, and (2) if the rule is procedural, whether it fits within the "watershed" exception to the general rule of non-retroactivity.

[13] In Head, the defendant claimed that Ring required the jury, rather than the trial judge to determine the question of mental retardation.

court ruled that Ring would not operate retroactively to overturn Stevens' sentence to death.

In State v. Lotter, 664 N.W.2d 892 (Neb. 2003), the Nebraska Supreme Court determined that Ring established a rule of criminal procedure applicable in capital cases and not, as Lotter urged, a substantive rule of criminal law. The court ruled Ring would not be applied retroactively. Likewise, in State v. Towrey, 64 P.3d 828 (Ariz. 2003), the Arizona Supreme Court described the distinction between substantive rules, which "determine the meaning of a criminal statute" and "address the criminal significance of certain facts or the underlying prohibited conduct," and procedural rules which "set forth fact-finding procedures to ensure a fair trial." Towrey at 832). [14] The Towrey court found that Ring did not announce a new substantive rule because it was simply an extension of the procedural rule announced in Apprendi. Like the Nebraska Supreme Court in Lotter, the Towrey court ruled that Ring is not to be retroactively applied. *See also* Boyd v. State, 2003 Ala. Crim. App. LEXIS 265 (Ala. Crim. App., Sep 26, 2003) (ruling that Boyd's suggestion that Ring applies retroactively to his death sentence on collateral review is without merit).

In examining the issue of retroactivity, federal courts, as do a growing number of state courts, apply the test outlined by

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[14] The Nebraska Supreme Court relied heavily on the reasoning of the Arizona Supreme Court in Towrey when it decided in Lotter that Ring had no retroactive application.

the United States Supreme Court in Teague v. Lane, 489 U.S. 288 (1989).

This Court has not yet adopted Teague when examining the retroactive application of changes in federal constitutional rules of criminal procedure. Instead, retroactivity in Florida is determined by subjecting a change in the law to the three part test outlined in Witt v.State, 387 So.2d 922 (Fla. 1980). The Florida Supreme Court held in Witt that a change in decisional law will not be applied retroactively unless the change (1) emanates from the state supreme court or the United States Supreme Court, (2) is constitutional in nature, and (3) constitutes a development of fundamental significance.[15]

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[15] In analyzing whether a new rule constitutes a development of fundamental significance, this Court explained that major constitutional changes in the law can be grouped into two categories. The first are those "jurisdictional upheavals" that warrant retroactive application. These are changes of law which (1) place beyond the authority of the state the power to regulate certain conduct or impose certain penalties, or (2) which are of sufficient magnitude to necessitate retroactive application.

The second type of change, identified by this court as "evolutionary refinements" do not warrant retroactive application on collateral attack. According to this court in Witt, evolutionary refinements would include such things as changes "affording new or different standards for the admissibility of evidence, for procedural fairness,[and] for proportionality review of capital cases..." (Witt at 929). The court, in observing that these "evolutionary refinements" do not compel retroactive application, noted that"[e]mergent rights in these categories..., do not compel an abridgement of the finality of judgments. To allow them that impact would, we are convinced, destroy the stability of the law, render punishments uncertain and therefore ineffectual, and burden the judicial machinery of our state, fiscally and intellectually, beyond any tolerable limit." Witt at 929-930.

This Court should formally adopt Teague in examining the retroactive application of new rules of constitutional procedure. Given the similarity of purpose behind federal habeas review and state collateral proceedings, application of the Teague test promotes consistency and uniformity during collateral review while still protecting the finality of those convictions arising from proceedings that comported with constitutional norms at the time of trial. *See* Teague, 489 U.S. 309-311; Daniels v. State, 561 N.E.2d 487, 489 (Ind. 1990). Additionally, it is makes perfect sense that this Court should not apply a different standard to determine retroactivity of a United States Supreme Court decision than the U.S. Supreme Court applies to its own decisions.

In Turner v. Crosby, *supra*, the court, applying Teague, ruled that Ring's new rule of criminal procedure is not sufficiently fundamental to fall within Teague's second exception to the general rule of non-retroactivity.[16] The court explained that Teague's second exception must be applied only to

[16] Teague's first exception is not at issue because the rule announced in Ring did not purport to decriminalize any conduct or preclude the state from punishing Suggs for murdering Pauline Casey. See Jones v. Smith, 231 F.3d 1227 (9th Cir. 2000) (holding that "the first exception identified in Teague is plainly inapplicable here, where the state's authority to punish Petitioner for attempted murder is beyond question"). The United States Supreme Court in Sawyer v. Smith, 497 U.S. 227 (1990) explained that this first exception is only applicable when the new rules place an entire category of criminal conduct beyond the reach of criminal law or prohibit imposition of a certain type of punishment for a class of defendants because of their status or offense (e.g. prohibiting imposition of the death penalty for rape as violative of the Eighth Amendment).

"watershed" rules of criminal procedure that affect the "fundamental fairness of the trial." Turner at 1285, citing to Teague at page 312). *See also* Sawyer v. Smith, 497 U.S. 227, 242-243 (1990)(explaining this second Teague exception should only be applied to those "watershed rules of criminal procedure" which are "essential to the accuracy and fairness of the criminal process"); Graham v. Collins, 506 U.S. 461, 478 (1993) (explaining the Teague exception is limited to a small core of rules which seriously enhance accuracy).

In deciding Ring was not retroactive, the Turner court observed that "[p]re-Ring procedure does not diminish the likelihood of a fair sentencing hearing." The court went on to note the new rule in Ring, "at most would shift the fact-finding duties during Turner's penalty phase from (a) an impartial judge after an advisory verdict by a jury to (b) an impartial jury alone." Turner at 1286. The Eleventh Circuit's conclusion the new rule of procedural law announced by Ring doe not affect the fundamental fairness of a capital trial nor enhance the likelihood of a fair sentencing proceeding is supported by the United States Supreme Court's view expressed in Ring.

The United States Supreme Court noted the Sixth Amendment right to a jury trial did not "turn on the relative rationality, fairness, or efficiency of potential factfinders." Ring, 536 U.S. at 607. Nothing in Ring suggests this new rule of criminal procedure is essential to the accuracy and fairness of the criminal process or was intended to resolve lingering doubts about the veracity or integrity of Florida's capital sentencing

proceedings. Likewise, simply because Ring involves the Sixth Amendment right to a jury trial, does not mean it must be retroactively applied

This interpretation is logical when one considers that the United States Supreme Court, in directly addressing the Sixth amendment right to a jury trial, has refused to apply the right to a jury trial retroactively when it could not be said that the fact finding process is more fair or reliable when done by a jury rather than by a judge. DeStefano v. Woods, 392 U.S. 631 (1968). By comparison, the United States Supreme Court ruled its decision in Burch v. Lousiana, 441 U.S. 130 (1979)(ruling that conviction of a non-petty criminal offense by a non-unanimous six-person jury violates the accused's constitutional right to a jury trial) would apply retroactively. Brown v. Lousiana, 447 U.S. 323, 328, (1980). The decision in Brown turned almost entirely on the Court's conclusion that conviction by only five members of a six person jury raises substantial doubts as to the reliability of the verdict and the fairness of the proceedings–"the very integrity of the fact-finding process." Brown, 447 U.S. at 334, citing to Linkletter v. Walker, 381 U.S. 618, 85 S.Ct. 1731, 14 L.Ed.2d 601 (1965).

These cases illustrate that retroactivity turns not on whether the Sixth amendment right to a jury trial is implicated, but rather upon whether retroactive application of the new rule is necessary to correct serious flaws in the fact-finding

process and to ensure the fundamental fairness of the proceedings.[17] As outlined by the Eleventh Circuit's decision in Turner, Florida's present capital sentencing procedure does not diminish the likelihood of an accurate and fair sentencing hearing. Nor is the rule announced in Ring necessary to correct flaws in Florida's fact finding process Accordingly, under a Teague analysis, Suggs is not entitled to apply Ring retroactively to disturb his conviction and sentence to death.

Even if this court adheres to the dictates of Witt v. State, 387 So.2d 922 (Fla. 1980), Suggs is entitled to no relief. Because

the new rule at issue here, undisputedly, satisfies the first two retroactivity factors of Witt, it is the third factor upon which this court's decision must rest.[18] This Court must look only to whether the rule of criminal procedure outlined in Ring constitutes a development of fundamental significance.

In New v. State, 807 So.2d 52 (Fla. 2001), this court explained that retroactive application of a new development in the law is warranted only if it "so drastically alters the

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[17] In Brown, the United States Supreme Court observed that "the retroactivity or nonretroactivity of a rule is not automatically determined by the provision of the Constitution on which the dictate is based." quoting Johnson v. New Jersey, 384 U.S. at 728, 86 S.Ct. at 1778. Brown, 447 U.S. 334

[18] Three retroactivity factors of Witt are (1) emanates from the state supreme court or the United States Supreme Court, (2) is constitutional in nature, and (3) constitutes a development of fundamental significance.

substantive or procedural underpinnings of a final conviction and sentence that individual instances of obvious injustice would otherwise exist." New, 807 So.2d at 53. Because the Florida Supreme Court has consistently refused to apply Ring to invalidate Florida's capital sentencing structure, logic dictates that Ring did not drastically alter the capital sentencing landscape in Florida, especially in cases where a jury has recommended death. Even so, this "obvious injustice" language in New supports a conclusion that like the United States Supreme Court in Teague, this Court must consider retroactivity in terms of whether the new development affects the fundamental fairness of the proceedings or casts serious doubt on the veracity or integrity of the defendant's trial. Suggs offers no support for the conclusion that a jury sitting alone, without the considered judgment of an impartial trial judge sitting as a co-sentencer, would increase the likelihood of a fairer or more accurate sentencing proceeding. Indeed, the judicial role in Florida provides defendants in Florida with a second opportunity to secure a life sentence, enhances appellate review, and provides a reasoned basis for a proportionality analysis. Suggs has failed to demonstrate that Ring should be applied retroactively to invalidate his sentence.

C. Suggs's Claims Fail On The Merits

This Court has consistently held that Florida's death penalty statute is constitutional in light of the United States Supreme Court's pronouncement in Ring v. Arizona. This Court has, well after its decision in Bottoson and King, repeatedly

rejected Ring-based challenges to Florida's capital sentencing scheme. *See e.g.* Allen v. State, 854 So.2d 1255 (Fla. 2003)(rejecting Allen's constitutional challenge to Florida's capital sentencing scheme in light of Ring when Allen was under a sentence of imprisonment at the time of the murder); Jones v. State, 845 So.2d 55,74 (rejecting Jones' Ring claim in light of the fact that two of the aggravating circumstances present were that Jones had been convicted of a prior violent felony, and that the instant murder was committed while Jones was engaged in the commission of a robbery and burglary, both of which were charged by indictment and found unanimously by a jury); Banks v. State, 842 So.2d 788 (Fla. 2003) (denying Banks' Ring claim and observing that the trial court found as aggravating factors that Banks had been previously convicted of a violent felony and the murder was committed during the course of a felony, both of which involve circumstances that were submitted to a jury and found to exist beyond a reasonable doubt); Doorbal v. State, 837 So.2d 940 (Fla. 2003)(denying claim for relief on the basis that Florida's death penalty is unconstitutional under the holding of Ring); Butler v. State, 842 So.2d 817 (Fla. 2003) (denying Butler's claim that Florida's capital sentencing scheme violates protections granted by the United States Constitution pursuant to Ring); Lawrence v. State, 846 So.2d 440 (Fla. 2003)(same); Kormondy v. State, 845 So.2d 41 (Fla. 2003) (same).

Here, Suggs' judgment of conviction and sentence satisfy the dictates of Ring on at least three separate and independent grounds: (1) Suggs was under a sentence of imprisonment at the

time he murdered Pauline Casey; (2) Suggs was previously convicted of another capital felony and a felony involving the use or threat of violence to the person; and (3) the crime for which Suggs was to be sentenced was committed while he was engaged in the commission of a kidnapping and Suggs was found guilty of a separate count of kidnapping by a unanimous jury beyond a reasonable doubt.

In Allen v. State, 854 So.2d 1255, 1262 (Fla. 2003), this Court rejected Allen's claim that Florida's capital sentencing scheme is unconstitutional in light of Ring when one of the aggravating factors found was that the murder was committed while Allen was under a sentence of imprisonment. This Court ruled that this aggravator need not be found by the jury. Because Suggs does not dispute he under a sentence of imprisonment as a result of a prior violent felony conviction, Suggs' Ring claim fails.

Next, at the time Suggs murdered Pauline Casey, Suggs had previously been convicted of a prior violent felony, specifically murder and assault to commit murder (TR. XXVIII 4583). In such a case, this Court has denied Ring challenges to Florida death sentences. *See* Jones v. State, 855 So.2d 611 (Fla. 2003) (rejecting Jones' Ring claim on the ground that "one of the aggravators found was that Jones had a prior violent felony conviction, a factor which under Apprendi and Ring need not be found by the jury."); Lugo v. State, 845 So.2d 74 (Fla. 2003)(noting rejection of Ring claims in cases involving the existence of prior violent felonies); Blackwelder v. State, 851

So.2d 650 (Fla. 2003)(rejecting Ring challenge when Blackwelder had been found by the court to have been previously convicted of a violent felony); *Accord* Henry v. State, 28 Fla.L.Weekly S753 (Fla. Oct 9, 2003); Bottoson v. Moore, 833 So.2d 693 (Fla. 2002); King v. Moore, 831 So.2d 143 (Fla. 2002); Anderson v. State, 841 So.2d 390 (Fla. 2003).[19]

Finally, Suggs' Ring claim also fails because one of the aggravating circumstances found to exist in this case was that the crime for which Suggs was to be sentenced was committed while he was engaged in the commission of the crime of kidnapping. In addition to first degree murder, Suggs was also found guilty of a separate count of kidnapping. There can be no real dispute that Suggs' jury found beyond a reasonable doubt at least one statutory aggravator; specifically, that the murder was committed in the course of a kidnapping. This Court has rejected Ring challenges to Florida's capital sentencing statute when one of the aggravators found to exist was the "murder in the course of a felony aggravator". *See e.g.* Robinson v. State,

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[19] In Belcher v. State, 851 So.2d 678, 685 (Fla. 2003) this Court noted, in considering the prior violent felony aggravator that "in Apprendi, the U.S. Supreme Court exempted prior convictions from facts that must be submitted to a jury because they increase the penalty for a crime." The Court went on to observe that the "recent decision of Ring v. Arizona, (citations omitted) did not disturb that particular holding." Excepting a prior violent felony conviction from the dictates of Ring, is logical in view of the fact that like the "murder committed during the course of a felony" aggravator, a prior violent felony conviction involves facts already submitted to a jury and found unanimously beyond a reasonable doubt. Robinson v. State, 865 So.2d 1259 (Fla. 2004).

865 So.2d 1259 (Fla. 2004)(ruling that Ring will not act to disturb a death sentence when one of the aggravators found to exist was that the capital murder was committed in the course of a kidnapping); Belcher v. State 851 So.2d 678, (Fla. 2003) (denying Belcher's Ring claim and observing that because a unanimous jury found Belcher guilty of both murder and sexual battery, the guilt phase verdicts reflect that the jury independently found the aggravator of the murder being committed in the course of a sexual battery); Banks v. State, 842 So.2d 788, 793 (Fla. 2003) (denying Banks' Ring claim, in part, because one of the aggravators found to exist, specifically, the "during the course of a felony" aggravator, justified denying the claim.

Suggs next alleges his death sentence must be vacated because the State failed to include three essential elements of capital murder within the indictment. He also contends that Ring requires these three elements to be submitted to the jury and found to exist by a unanimous verdict beyond a reasonable doubt. In addition to the statutory elements of first degree murder, Suggs claims that after Ring, the State must also allege in the indictment and prove (1) the aggravating factors upon which it intends to rely in seeking the death penalty (2) there are sufficient aggravating factors to justify a death sentence, and (3) the mitigating factors are insufficient to outweigh the aggravating circumstances. Suggs claims that because the jury is not required to make these three findings, Florida's capital sentencing statute violates the Sixth and Fourteenth Amendment

to the United States Constitution. Suggs' argument is not supported in the jurisprudence of this state nor required by the United States Supreme Court's decision in Ring.

In arguing that Ring created three "extra" elements of capital murder, Suggs presupposes the statutory maximum based upon conviction for first degree murder is life in prison. It also assumes that death eligibility does not arise until sentencing. Both of Suggs's assumptions underlying his argument are misplaced. Both before and after the decision in Ring issued, the Florida Supreme Court has ruled that, in Florida, the statutory maximum upon conviction for first degree murder is death. *See e.g.* Mills v. Moore, 786 So.2d 532 (Fla. 2001)(ruling that death is the statutory maximum sentence upon conviction for murder); Porter v. Crosby, 840 So.2d 981, 986 (Fla. 2003), (observing, in scrutinizing Porter's 1985 murder conviction, that "we have repeatedly held that the maximum penalty under the statute is death"). Thus, while Ring holds that any fact which increases the penalty beyond the statutory maximum must be found by the jury; once Suggs was convicted of the first degree murder of Pauline Casey, Suggs stood convicted of capital murder and was death eligible.[20] Neither the number of additional aggravators nor the weighing process increase the penalty beyond the statutory maximum.

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[20] Even if this were not the case, Suggs's contemporaneous conviction for kidnapping and robbery would make Suggs death eligible in any event.

This Court has never held the jury's consideration of the sufficiency of the aggravating factors or the weighing of the mitigating factors against the aggravating factors constitute elements of capital murder. Certainly Ring does not require such

a conclusion. Ring is limited to the finding of an aggravator.[21] In a concurring opinion, Justice Scalia noted that jury fact finding is limited to the finding of a single aggravating factor. Ring, 122 S.Ct. 2445 (Scalia, J., concurring)(explaining that the fact finding necessary for the jury to make in a capital case is limited to an aggravating factor and does not extend to the ultimate life or death decision which may continue to be made by the judge). Likewise, Justice Kennedy observed in his concurring opinion that it is the finding of "an aggravating

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[21] The sentencing factors to which Suggs points are not elements of the crime. Florida's capital sentencing scheme, found in section 921.141, Florida Statutes, affords the jury guidelines to follow by providing statutory aggravating factors and mitigating circumstances to be considered. Given the fact a convicted defendant faces the statutory maximum sentence of death upon conviction, the employment of further proceedings to examine the assorted "sentencing selection factors," including aggravators, mitigators, and the sufficiency of these factors, does not violate due process. In fact, a sentencer may be given discretion in selecting the appropriate sentence, so long as the jury has decided (by its finding of guilt of first degree murder) that the defendant is eligible for the death penalty. Florida's sentencing considerations are constitutionally mandated guidelines created to satisfy the Eighth Amendment and protect against capricious and arbitrary sentences. These factors are limitations on the jury and judge; they are not sentence enhancers or elements of the crime.

circumstance" that exposes the defendant to a greater punishment than that authorized by the jury's verdict.[22] Ring, 122 S.Ct. at 2445 (Kennedy, J., concurring).

The Florida Supreme Court has directly addressed the issue of whether, after Ring, the State is required to include within the indictment the aggravating factor(s) it intends to rely on in seeking the death penalty. Additionally, the Court has considered whether these aggravating factors must be submitted to the jury and found unanimously beyond a reasonable doubt.[23] In cases decided well after Ring, the Florida Supreme Court has specifically rejected claims identical to Suggs'.[24]

In Kormondy v. State, 845 So.2d 41 (Fla. 2003), *cert. denied*, Kormondy v. Florida, 124 S. Ct. 392 (2003), this Court

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[22] In Arizona, the maximum sentence authorized by the jury's verdict of guilt for first degree murder is life. Of course, in Florida, as discussed above, death is the maximum sentence authorized by jury verdict of guilt for first degree murder

[23] If required, this ordinarily would be accomplished by a special verdict form.

[24] To the extent Suggs argues that a unanimous jury "verdict" is required, the United States Supreme Court has held, even in the guilt phase of a trial, jury unanimity is not required. *See* Johnson v. Louisiana, 406 U.S. 356 (1972) (finding nine to three verdict was not denial of due process or equal protection); Apodaca v. Oregon, 406 U.S. 404 (1972) (holding conviction by non-unanimous jury did not violate Sixth Amendment). Schad v. Arizona, 501 U.S. 624, 631 (1991) (plurality opinion) (addressing felony murder and holding due process does not require unanimous determination on liability theories)

ruled that the absence of notice of the aggravating factors the State will present to the jury and the absence of specific jury findings of any aggravating circumstances does not violate the dictates of Ring.[25] This Court went on to rule that a special verdict form indicating the aggravating factors found by the jury is also not required by the decision in Ring. *Accord* Fennie v. State, 28 Fla.L.Weekly S619 (Fla. July 11, 2003)(rejecting Fennie's claim that Florida's death penalty statute was unconstitutional because it fails to require aggravators to be charged in the indictment, submitted to a jury, and proven beyond a reasonable doubt); Owens v. Crosby, 28 Fla.L.Weekly S615 (Fla. July 11, 2003)(denying Owens' challenge, in light of Ring, to Florida's death penalty statute on constitutional grounds because the jury is not required to make specific factual findings as to aggravation and mitigation); Blackwelder v. State, 851 So.2d 650 (Fla. 2003)(specifically rejecting Blackwelder's argument that aggravating circumstances must be alleged in the indictment, submitted to the jury, and individually found by a unanimous jury verdict).

[25] This Court was not called upon in Kormondy or Fennie to determine whether Ring requires the statutory weighing processes (sufficiency of the aggravating factors or the weighing of the mitigating factors against the aggravating factors) to be included in the indictment and proven to a unanimous jury beyond a reasonable doubt.

This Court has also rejected the notion that due process requires the State to provide notice as to the aggravating factors it intends to rely upon by alleging them in the indictment. In Vining v. State, 637 So.2d 362 (Fla. 1994), the Florida Supreme Court noted that "[t]he aggravating factors to be considered in determining the propriety of a death sentence are limited to those set out in section 921.141(5), Florida Statutes (1987). Therefore, there is no reason to require the State to notify defendants of the aggravating factors that it intends to prove." Vining, 637 So.2d at 928. *See also* Lynch v. State, 841 So.2d 362 (Fla. 2003) (rejecting Lynch's claim that Florida's death penalty scheme is unconstitutional because it fails to provide notice as to aggravating circumstances); Kormondy v. State, 845 So.2d 41 (Fla. 2003 (rejecting Kormondy's claim the absence of any notice of the aggravating circumstances that the State will present to the jury and the absence of specific jury findings of any aggravating circumstances offends due process and the proscription against cruel and unusual punishment).

CONCLUSION

Suggs has failed to demonstrate that Florida's capital sentencing structure is unconstitutional in light of the United States Supreme Court's decision in Ring v. Arizona. The Petition for Writ of Habeas Corpus should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS has been furnished by U.S. Mail to Mr. Hilliard Moldof, 1311 SE Second Avenue, Fort Lauderdale, Florida 33316 this 17th day of June 2004.

_____
Meredith Charbula
Assistant Attorney General

CERTIFICATE OF FONT AND TYPE SIZE

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

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Meredith Charbula