IN THE SUPREME COURT OF FLORIDA

LYNFORD BLACKWOOD,

Petitioner,

vs. **Case No. SC04-945**

STATE OF FLORIDA,

Respondent.
_____/

STATE'S RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

CHARLES J. CRIST, Jr.
ATTORNEY GENERAL

DEBRA RESCIGNO
ASSISTANT ATTORNEY GENERAL
FLA. BAR NO. 0836907
1515 N. FLAGLER DRIVE
SUITE 900
WEST PALM BEACH, FL. 33401
561-837-5025 (Phone)
561-837-5108 (Facsimile)

COUNSEL FOR APPELLEE

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

MISCELLANEOUS

PRELIMINARY STATEMENT

Appellant, LYNFORD BLACKWOOD, was the defendant in the trial court below and will be referred to herein as "Appellant” or “Blackwood." Appellee, the State of Florida, was the petitioner in the trial court below and will be referred to herein as "the State." Reference to the record in this case will be as follows:

“PCR”- Record in 3.851 appeal

“PCT”- Transcripts in 3.851 appeal

“DA”- Record from direct appeal

Reference to an supplemental pleadings and transcripts will be by the symbols "SPCR", etc. followed by the appropriate page number(s).

STATEMENT OF THE CASE AND FACTS

Blackwood was convicted of the murder of Carolyn Thomas-Tynes on January 23, 1997. The facts surrounding the murder, as found by this Court, are:

> Appellant was arrested in St. Petersburg, Florida, for the 1995 murder of Caroline Thomas Tynes. At trial it was established that appellant and the victim had dated on and off for approximately ten years but the relationship had ended sometime in October 1994; the victim had started dating someone else and, in fact, was six weeks pregnant at the time of her death. Upon his arrest, appellant confessed to choking the victim, but maintained that he did not intend to kill her. According to appellant, he had driven in his brother's truck to the victim's house on the morning of January 6, 1995, to return a set of sheets. After the two talked for a while, appellant and the victim engaged in consensual sexual intercourse. Afterwards, while lying in bed, they started to argue. Appellant claimed the victim told him that she did not want to see him anymore. He also claimed that the victim had told him that she had aborted six of his children. Appellant admitted to the police that he then strangled the victim using one or both of his hands.
>
> Afterward, he left the victim's house and drove away in her car, leaving his brother's truck behind. He later abandoned the victim's car and hitchhiked to St. Petersburg, where he eventually was arrested. Prior to his arrest, appellant admitted to his cousin-in-law, Donovan Robinson, that he had choked the victim after arguing with her. Robinson testified that appellant appeared surprised when he learned the victim was dead. Appellant

claims that he did not intend to kill the victim and that she was still breathing when he left. In addition, he maintained that he loved the victim and that he would have done anything he could to stay with her. According to one of the officers who took appellant's statement, appellant was upset and crying during his statements to the police.

The victim had been discovered on the evening of January 6, lying naked in the bedroom of her home in Fort Lauderdale. The cause of death was asphyxia. During the crime-scene investigation, one of the officers noticed that the house was meticulously kept but observed that objects on the table beside the bed had been tipped over or knocked to the floor. In the officer's opinion, the displaced items indicated signs of a struggle. The police also noted a box of condoms next to the bed and a condom wrapper on the floor in the hallway outside of the bedroom. There were no signs of forced sex. A lock of the victim's hair was found on the mattress and a folded washcloth and bar of soap had been lodged in the back of the victim's mouth blocking her pharynx. White foamy substance in her mouth and nose was later determined to be a combination of lung fluid and soap lather. According to the medical examiner, the fact that the foamy substance was also discovered in the victim's nose indicates the victim was alive when the soap and washcloth were placed in her mouth because she would have been forced to breath through her nose due to occlusion of her pharynx. The medical examiner also testified that indentations and foamy substance on one of the pillows next to the victim suggests that the pillow was placed over the victim's face to stop her from breathing. The defense attempted to rebut this conclusion on cross-examination, wherein the medical

examiner admitted that she was unaware that EMS personnel had inadvertently touched the foamy substance with his hand as he was checking the victim for vital signs and that he wiped his hand on one of the pillows on the bed. Based on this line of questioning, the defense created the possibility that the indentation and foam on the pillow was caused by the EMS personnel, and was not, as the medical examiner had initially surmised, caused by appellant placing the pillow over the victim's mouth. The defense's theory with regard to the pillow is also supported by appellant's confession to the police wherein he admitted to strangling and possibly placing the soap in the victim's mouth but denied moving or placing a pillow on her face.

The victim also had markings on her neck and bruises on the neck muscle indicating both ligature and manual strangulation. The medical examiner testified that the markings on the victim's neck were consistent with a double-stranded speaker wire found on the floor of the victim's bedroom. Small scratches on the victim's neck indicated the victim had tried to remove whatever was binding her neck. The medical examiner also noted petechia hemorrhaging in the whites of the victim's eyes, which she explained is caused by pressure around the victim's neck being released and reapplied. The number of hemorrhages detected suggests that the victim was alive and struggling while being strangled and that it took a while for death to occur. In other words, according to the medical examiner, petechia hemorrhaging does not occur in persons who die suddenly from asphyxia. Rather, it would have taken minutes, as opposed to seconds, for death to occur. Although the medical examiner could not determine the order in which the acts occurred, she

> opined that death could have resulted from any one of the above methods (i.e., manual or ligature strangulation, soap and washcloth in victim's mouth, and suffocation by the pillow).

Blackwood, 777 So.2d at 403-04. At the penalty phase, the State offered two witnesses-- the medical examiner and Bernice Scott, the victim's mother. Id. at 404. Ms. Scott gave victim impact testimony and "[t]he medical examiner repeated much of the same testimony presented during the guilt phase of the trial, but added that based on the manner of death, the victim would have probably been aware of her impending death." Id.

Blackwood's penalty phase presentation included numerous friends, family members, and a detention center officer. This Court described their testimony as follows:

> Collectively, they testified that [Blackwood] was a slow learner,[1] that he was not a violent person and had never been violent or abusive toward the victim, that [Blackwood] was depressed and upset about breaking up with Caroline, that he worked for fifteen years as a cabinet maker, that he had a good relationship with his son, and that he did not smoke, drink, or consume drugs. A detention officer from the Broward County Jail testified that [Blackwood] behaves well in prison and as a result has been placed on trustee status, which means he is given limited responsibilities. The officer also

[1] In contrast, one witness claimed that appellant appeared to have above average intelligence. Blackwood, 777 So.2d at 404, f.n.1.

> indicated that Blackwood had been placed on suicide watch while in prison after attempting to commit suicide.

Blackwood, 777 So.2d at 404. The jury recommended a death sentence by a vote of 9-3 (DA Vol. 14 p. 1538). Thereafter, a Spencer hearing[2] was held at which Blackwood presented additional testimony about his background and mental health mitigation from Dr. Trudy Block-Garfield. Dr. Block-Garfield testified at the Spencer hearing that she was appointed, in April, 1995, to evaluate Blackwood for competency and sanity (DA Vol. 11, p. 1165). She completed a psycho-social evaluation of Blackwood (DA Vol. 11 pp. 1165-1168). Dr. Garfield found that Blackwood was extremely depressed and he indicated that he was taking an antidepressant, Sinequan (DA Vol. 11 p. 1172). Blackwood told her that he had thought about suicide for a long time (DA Vol. 11 p. 1174). At the post-conviction evidentiary hearing, Dr. Garfield testified that she could not make a determination regarding competency at that time because of Blackwood's severe depression (PCT 49).[3]

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[2] Spencer v. State, 615 So. 2d 688 (Fla. 1993).

[3] At the Spencer hearing, Dr. Block-Garfield mistakenly stated that she had found Blackwood competent to proceed to trial at that point (DA Vol. 11 p. 1180), but that is contradicted by her testimony at the post-conviction evidentiary hearing, which is supported by her report.

Dr. Garfield further testified, at the Spencer hearing, that she next evaluated Blackwood for competency in December, 1995. Blackwood told her during this interview that he had never had any drug or alcohol problems, that he had lived in Florida for twenty years, and that he had maintained employment (DA Vol. 11 p. 1182-1185). Blackwood was no longer suicidal but he was still depressed (DA Vol. 11 p. 1185). Dr. Garfield administered the verbal portion of the Wechsler Adult Intelligence Scale (DA Vol. 11 p. 1188). Blackwood scored a verbal IQ of 70 which Dr. Garfield attributed to his depression, noting that people don't perform well on tests when they are depressed (DA Vol. 11 p. 1189). Dr. Garfield testified that Blackwood functions in the low average range (DA Vol. 11 p. 1190). Dr. Garfield also administered the Bender Visual Retention test to screen for neurological deficits and although Blackwood scored in the impaired range, Dr. Block-Garfield could not say that he was indeed neurologically impaired because of the depression and the lack of any other indicators of neurological impairment (DA Vol. 11 p. 1192). Based on her evaluation, Dr. Garfield found that Blackwood was competent to proceed to trial, and that he intellectually performed in the low average range (DA Vol. 11 p. 1204-1205).

Dr. Garfield's third evaluation of Blackwood occurred in March, 1997 and it was for the purpose of evaluating possible mitigation in order to testify at the Spencer hearing (DA Vol. 11 p. 1205-1207). Dr. Garfield read Blackwood's confession, the incident reports, and police reports (DA Vol. 11 p. 1207). Regarding mitigation, Dr. Garfield found that Blackwood had the statutory mitigator of "no prior significant criminal history," and several non-statutory mitigators. While she found that Blackwood was under the influence of a mental or emotional disturbance at the time of the crime, she denied that he was under the influence of an extreme mental or emotional disturbance, as required for the statutory mitigator (DA Vol. 11 p. 1220, 1280).

The trial court sentenced Blackwood to death, finding one aggravator, HAC. Regarding mitigation, the trial court gave great deference to Dr. Garfield's conclusions- finding the only statutory mitigator she had given–"no significant history of prior criminal conduct" and accorded that factor "significant weight." (DA Vol XIV 1584). The trial court agreed with Dr. Garfield's finding that Blackwood was **not** under the influence of an "extreme mental or emotional disturbance," but considered it as a non-statutory mitigator because she testified that he was under the influence of an

emotional disturbance. (DA Vol. XIV 1584).

As far as other non-statutory mitigating factors, the trial court found seven factors:

1. Blackwood's capacity for rehabilitation. The trial court specifically indicated that its only reason for finding this mitigator was because Dr. Block-Garfield testified that the defendant had the capacity for rehabilitation. On cross-examination, however, Dr. Garfield admitted that she was not confident any murderer could be rehabilitated and that there is no protocol for rehabilitating a murderer. (DA Vol. XI 1233, 1235). Thus, although the court found that Blackwood's capacity for rehabilitation existed, it gave this mitigator "very little weight." (DA Vol. XIV 1584).

2. Blackwood's cooperation with police. The trial court gave this mitigator "only moderate weight," in light of the contents of Blackwood's confession and the circumstances which preceded it.

3. Murder was the result of lover's quarrel. The trial court considered this non-statutory mitigating factor to the extent that the killing was borne out of a prior relationship and thus, fueled by passion, but assigned no specific weight to it, (DA Vol. XIV, 1585-1586), noting that the relationship had ended in October, 1994, that Blackwood was aware that

Carolyn had a new boyfriend and was six weeks pregnant with her new boyfriend's baby.

4. Defendant's remorse. The trial court strained to find some basis for this mitigator, as is evident from its order:

> It is difficult for the court to determine whether this non-statutory mitigator exists. The defendant did tell police that he was sorry for what happened. He also told the defense mental health expert that he regretted what happened.

(RXIV 1586). The court gave the factor some weight.

5. Defendant is a good parent. The trial court afforded "some weight" to this mitigator, noting that the son testified at the penalty phase that he and Blackwood were "best friends," that Blackwood visited him several times a week and that Blackwood provided financial support. (DA Vol. XIV 1586).

6. Defendant's employment record. Blackwood was a cabinet builder who was dedicated to his work. The trial court gave this mitigator "some weight." (DA Vol. XIV 1587).

7. Defendant's intelligence level. The trial court again relied upon Dr. Garfield's testimony, noting that she testified that Blackwood scored 70 on the Weschler Adult Intelligence Scale, but she did not believe that he functioned in the retarded range. In fact, Dr. Garfield did not believe

that Blackwood's score "reflected his true intellectual capability," she believed it was lower because of his depression and that he "function[ed] in the low average range." (DA Vol. XI 1205). The trial court accorded this factor "some weight." (DA Vol. XIV 1587).

On direct appeal, this Court conducted its statutorily mandated proportionality review, noting that its role was "to ensure that the sentence imposed in a particular case [was] not too great compared to other capital cases." Id. at 412. In upholding the death sentence in this case, this Court concluded:

> The record here shows that the appellant manually strangled the victim, strangled her with wire, lodged a bar of soap and washcloth in the back of her throat, and smothered her with a pillow. Extensive petechia hemorrhaging in the victim's eyes indicates that the appellant applied pressure to her neck, released it, and then reapplied it. There is also evidence that the victim struggled for her life during this attack: hair was ripped from her scalp; there were bruises on her head, neck and body; and objects on a bedside table were knocked to the floor. In light of this evidence, we cannot conclude that the trial court abused its discretion in determining that the HAC aggravator outweighed the mitigators. Thus, we uphold the imposition of the death sentence in this case.

Id. at 413.

After his request for certiorari review was denied by the

U.S. Supreme Court, Blackwood filed the instant post-conviction motion. By order, dated April 11, 2003, the trial court granted Blackwood an evidentiary hearing on Claims II and III of his post-conviction motion. The remaining claims were summarily denied. Four witnesses testified at the evidentiary hearing: Dr. Trudy Block-Garfield, Dr. Martha Jacobson, Dr. Hyman Eisenstein, and defense counsel, Robert Ullman.

Dr. Garfield, a licensed psychologist, testified that she had met with Blackwood three times over the course of the trial. The first two visits were court-ordered to evaluate Blackwood's competency to proceed to trial. Dr. Garfield first evaluated Blackwood in April, 1995 and at that time she completed a psycho-social evaluation (PCT Vol. 4, 10-13). Mr. Trachman was defense counsel at that time (PCT Vol. 4, 9). Dr. Garfield spent about an hour with Blackwood, and an additional hour and a half preparing a report (PCT Vol. 4, 11). Dr. Garfield found that Blackwood was extremely depressed and was taking an antidepressant, Sinequan (PCT Vol. 4, 11). Dr. Garfield could not make a determination regarding competency because of Blackwood's depression (PCT Vol. 4, 49). Blackwood told Dr. Garfield that he did not use drugs, drank some beer, wine and rum, had been hospitalized for a cut above

his eye, and had no mental hospitalizations. Dr. Garfield had not learned anything since that was contrary to that information. Blackwood further told Dr. Garfield that he was born in Jamaica, that his parents came to the United States, that they are now divorced and he does not recall when they were divorced. Blackwood also reported that he is the oldest of four brothers and three sisters. He told Dr. Garfield that he graduated from Fort Lauderdale High School sometime in the seventies and he has one son. Blackwood also reported that he had never been arrested. Dr. Garfield has not learned anything to the contrary since the evaluation (PCT Vol. 4, 45-47). At that time, Dr. Garfield also pressed Blackwood for information about the facts of the crime. Blackwood told her that he was not sure, but he had killed someone, and his cousin told him that he was accused of murder (PCT Vol. 4, 48). He told Dr. Garfield that he recalled having a fight with his girlfriend Carolyn, but he did not think she was dead (Pct Vol. 4, 48). Blackwood also said that on April 28, 1995, he still did not think Carolyn was dead because sometimes she was there in the night talking to him (PCT Vol. 4 48-49).

Dr. Garfield evaluated Blackwood for competency again on December 15, 1995 (PCT Vol. 4, 14, 49). Blackwood again told her that he had never had any drug or alcohol problems, that

he had lived in Florida for twenty years, and had maintained employment. At the time of this evaluation, Blackwood was still depressed (PCT Vol. 4, 15, 50). Dr. Garfield testified that since competency was the issue, she administered the verbal portion of the Wechsler Adult Intelligence Scale, and the Benton Visual Retention Test (PCT Vol. 4, 17, 51). Blackwood scored a verbal IQ of 70 (PCT Vol.4, 17). Dr. Garfield testified that although such a score was in the borderline range, she was not inclined to believe that Blackwood was retarded in any fashion and attributed his lower score to his depression, noting that people don't perform well on tests when they are depressed (PCT Vol. 4, 17)[3]. Dr. Garfield also administered the Benton Visual Retention test to screen for neurological deficits, but she did not feel that there was anything neurologically wrong with Blackwood (PCT Vol. 4, 59)

Blackwood further told Dr. Garfield that he had lived in Florida for twenty years, that his parents divorced two years after they came to the United States, and that he graduated

[3] Notably, Dr. Garfield's score of 70 is depressed when viewed in comparison to Blackwood's score from the test administered in September of 2002 by Dr. Eisenstein. On that test, Blackwood scored a 77 on the verbal portion of the WAIS (T. 185). Hence, Dr. Garfield competently analyzed Blackwood's IQ in December of 1995.

from high school in 1976 or 1977 (PCT Vol. 4, 51-52). He had a son, who was 11 or 12 years old, was a cabinet maker, repaired small engines, sold tools at the flea market, and reiterated that he did not use drugs but drank a lot of beer (PCT Vol. 4, 52). Dr. Garfield testified that the information Blackwood provided was consistent with what he stated during the first interview, but was now in greater detail (PCT Vol. 4, 53). Blackwood also confirmed that his only hospitalization was for stitches above his eye (PCT Vol. 4, 53). He also gave more details about the murder (PCT Vol. 4, 54). Blackwood stated that Carolyn was trying to see someone else, and he did not like that (PCT Vol. 4, 54). He had gone to Carolyn's to return some sheets and when he left she was unconscious and coughing (PCT Vol. 4, 54). He got scared and ran out (PCT Vol. 4, 55). Blackwood admitted that they had been arguing about the relationship and he was just scared and frightened (PCT Vol. 4, 55). Blackwood thought there was something wrong with Carolyn because she laid there coughing and spitting something (PCT Vol. 4, 55). Blackwood also detailed his relationship with Carolyn telling Dr. Garfield that he was always buying Carolyn things and that Carolyn complained about him giving her father money to buy a water heater (PCT Vol. 4, 56). Blackwood told Dr. Garfield that

Carolyn complained that he did not give her enough money (PCT Vol. 4, 56). Dr. Garfield found that Blackwood was competent after this evaluation (PCT Vol. 4, 59).

On February 25, 1997 Dr. Garfield received a letter from defense counsel Ullman asking her to evaluate Blackwood for mitigation for the Spencer hearing which was approximately six weeks away (PCT Vol. 4, 60). Dr. Garfield's third evaluation occurred on March 12, 1997, and was for the purpose of evaluating possible mitigation (PCT Vol. 4, 67). During this evaluation, Blackwood gave her more information about his family background (PCT Vol. 4, 67). In her report dated March 18, 1997, Dr. Garfield stated that with respect to a mental and emotional disturbance, there are indications that Mr. Blackwood has a lengthy history of difficulties (PCT Vol. 4, 67). Blackwood told her that his mother had abandoned him and his siblings at an early age, leaving his father, who had health problems, to struggle to raise them (PCT Vol. 4, 68). Dr. Garfield opined that issues pertaining to abandonment resurfaced when Carolyn wanted to break up with him (PCT Vol. 4, 68). Blackwood's grandmother had taken care of him for a while, in Jamaica and at times there wasn't enough food (PCT Vol. 4, 68). After his family came to the United States, his mother abandoned him again, and his father took care of him

(PCT Vol. 4, 68). Blackwood grew up in poverty while he was in Jamaica (PCT Vol. 4, 69). Blackwood told Dr. Garfield that he cooperated with the police (PCT Vol. 4, 69). Dr. Garfield opined that Blackwood was a good parent and amenable to rehabilitation (PCT Vol. 4, 69).

Dr. Garfield did not find that Blackwood has an anti-social personality, and the additional tests that had been done by the new experts confirmed that (PCT Vol. 4, 69). Dr. Garfield did not perform any additional tests because Blackwood was depressed, potentially affecting his performance (PCT Vol. 4, 73). Dr. Garfield testified at the evidentiary hearing that she read the trial transcripts, reviewed the work of the other doctors, including their depositions, and that their findings were no different from hers, except that they gave Blackwood the statutory mitigator of "under the influence of extreme mental or emotional disturbance." Dr. Garfield gave a non-statutory mitigator of "under a mental or emotional disturbance," but did not find it to be extreme. She noted that her definition of extreme mental distress differed from that of the other doctors (PCT Vol. 4, 78). Importantly, Dr. Garfield testified that even after reviewing the additional information her opinion **had not changed, she does not believe the mental or emotional disturbance was "extreme"** (PCT Vol. 4,

81).

Dr. Martha Jacobson, a clinical psychologist, testified at the evidentiary hearing that she administered a comprehensive series of personality tests to Mr. Blackwood, conducted an extensive clinical interview and reviewed extensive materials (PCR 317-18). Dr. Jacobson agreed that Blackwood had not been in trouble with the law in the 28 years he had been in the United States and that he had been a cabinet maker for 15 years. (PCT Vol. 5, 151). She also agreed that Blackwood does not have an anti-social personality disorder or any other major personality disorder (PCT Vol. 4, 105-06). Additionally, she agreed with Dr. Garfield that Blackwood was suffering from major depression (PCT Vol. 4, 133). Dr. Jacobson found that Blackwood has characteristics or traits of "avoidant personality disorder" wherein a person avoids individuals and social interactions to avoid being hurt; they anticipate being hurt or rejected (PCT Vol. 4, 104-05). She noted that these individuals have a psychological/developmental history of problems in consistent nuturing or have suffered emotional or economic deprivation (PCT Vol. 4, 105). She further found masochistic traits, which are self-defeating behavior, setting oneself up for failure (PCT Vol. 4, 106).

The only real difference between Dr. Garfield's and Dr. Jacobson's testimony was that Dr. Jacobson opined that Blackwood was acting under an **extreme** emotional disturbance at the time of the crime; this, giving him the statutory mitigator (PCT Vol. 5, 139). Dr. Jacobson testified that Blackwood's state of mind became extreme once Carolyn began to denigrate him, after they had made love (PCT Vol. 5, 171). According to Dr. Jacobson, Carolyn made Blackwood angry and he was out-of-control with rage when he stuffed the washcloth into Carolyn's mouth and began to choke her (PCT Vol. 5, 172-174). However, Dr. Jacobson admitted that Blackwood's mood and actions at the time of the murder were consistent with those of a normal person suffering the loss of a relationship (PCT Vol. 5, 164). Moreover, she agreed that another psychologist could come to a different conclusion and that, Dr. Garfield had, in fact, already arrived at a different conclusion (PCT Vol. 5, 177-178).

A review of Dr. Jacobson's testimony further reveals that while she opined that Blackwood suffered a number of head injuries (falling out of trees and off a truck), she failed to determine whether Blackwood had ever been rendered unconscious by the head injuries, or if they had required hospitalization (PCT Vol. 5, 148-149). Dr. Jacobson was told that Blackwood

nearly drowned as a child, but she never determined if CPR was necessary (PCT Vol. 5, 149-150). Further, Dr. Jacobson was not sure whether Blackwood lived with his father or mother when he came to the United States (PCT Vol. 4, 152-153). Finally, the statement that she had Blackwood write about the incident is inconsistent with the one he had given the police on January 10, 1995 (PCT Vol. 5, 166). Blackwood told Dr. Jacobson that he and Carolyn started arguing, during which she told him that he was not good enough for her anymore and that she had aborted his babies, but he did not tell this to the police (PCT Vol. 5, 166-67). During their argument, he told Carolyn that he should wash her mouth out with soap, but he did not tell this to the police (PCT Vol. 5, 167, 176). Blackwood stated that he tried to choke Carolyn, but he told the police that she was unconscious so he must have choked her (PCT Vol. 5, 168). Finally, he told Dr. Jacobson that he was scared and started to call 911; but he did not tell this to the police (T. 171).

The second expert presented by Blackwood at the evidentiary hearing was Dr. Hyman Eisenstein, a neuro-psychologist, who also gave Blackwood the statutory mitigator of “under **extreme** mental or emotional disturbance” at the time of the crime as well as opining that Blackwood suffered from

neurological deficits (PCT Vol. 5, 212-213). However, Dr. Eisenstein knew none of the facts or circumstances of this murder. He did not know how the victim was murdered, what instrumentalities were used, the degree of torture inflicted upon the victim, nor how long it took for her to die. Blackwood did not tell Dr. Eisenstein the details of the murder, the doctor had not read any of the trial testimony, nor had he read the medical examiner's report.

The last witness to testify at the evidentiary hearing was defense counsel, Robert Ullman. Ullman detailed the efforts he undertook in preparing for the penalty phase and the reasoning behind the tactical decisions employed. Ullman was appointed on June 19, 1996 nunc pro tunc to June 18, 1996 (T. 262)). The case went to trial six (6) months later, in December, 1996 (PCT Vol. 6, 232). Prior defense counsel was Robert Trachman (PCT Vol. 6, 232). During Mr. Trachman's representation, Blackwood had been evaluated for competency/insanity by Dr. Trudy Block Garfield, Dr. Macaluso, and Dr. Spencer (PCT Vol. 6, 262-265). Ullman reviewed all of the competency evaluations (PCT Vol. 6, 266). Dr. Macaluso was the only doctor who had found that Blackwood was not competent to proceed to trial; thus, Ullman hoped to rely upon Dr. Macaluso for statutory mitigators because he was the

most favorable expert for Blackwood (PCT Vol. 6, 267, 275). Ullman's time records indicate that he prepared a mitigation packet and spoke with Dr. Macaluso on October 8, 1996, almost two months **prior to** the guilt phase (PCT Vol. 6, 269). Although Ullman did not have an independent recollection of the conversation at the evidentiary hearing and couldn't specifically recall asking Dr. Macaluso to be an mitigation expert on October 8, 1996, he believed that the doctor indicated he would be a mitigation expert at that time (PCT Vol. 6, 269, 299). Ullman's time records also show that he sent a follow-up letter to Dr. Macaluso on October 28, 1996, but Ullman could not remember what the letter was about (PCT Vol. 6, 270).

Ullman's time records also show that on November 4, 1996, about one month prior to the guilt phase, Dr. Trudy Block-Garfield telephoned Ullman (PCT Vol. 6, 271). Ullman stated, at the evidentiary hearing, that Dr. Block-Garfield was the second most favorable expert because, although she found Blackwood competent, she also found that he was severely depressed and his functioning was low-average impaired cognitive functioning (PCT Vol. 6, 267). Blackwood's guilt phase began on December 2, 1996, and he was convicted on December 5, 1996 (T. 271). After the guilt phase, on December

12, 1996, Ullman re-contacted Dr. Macaluso by letter and requested that he testify at the penalty phase regarding statutory mitigators. Although Ullman agreed on direct examination that this was the first time he had asked Macaluso to be a mitigation witness for penalty phase, his time records refute that showing that he contacted Macaluso earlier, in October (PCT Vol. 6, 234). On December 17, 1996, Ullman wrote a letter to Dr. Macaluso indicating that the penalty phase was to begin on January 23, 1997, and included copies of all the psychological reports, a copy of Blackwood's confession, the detective's report, and a copy of the medical examiner's report (PCT Vol. 6, 235-237, 275). Mr. Ullman federal expressed the packet to Dr. Macaluso on December 21, 1996.

Dr. Macaluso replied by letter on January 7, 1997 that he "would not be able to testify with reasonable medical certainty that any of the **statutory** mitigating circumstances are present" (emphasis added)(PCT Vol. 6, 276). On January 9, 1997, after receiving the letter, Ullman contacted Dr. Macaluso by telephone and they spoke for thirty (30) minutes (PCT Vol. 6, 277). The penalty phase trial was held on January 23, 1997 and Ullman did not present any mental health mitigation; however, as he noted at the evidentiary hearing, there was virtually no mental health mitigation here, no

history of any psychological problems (PCT Vol. 6, 286). Ullman put on ten (10) witnesses at the penalty phase, including friends, family members and a jail deputy (PCT Vol. 6, 286). As already noted, the jury recommended death by a vote of 9-3. After the penalty phase, Ullman asked Garfield to be a mitigation witness for the Spencer hearing (PCT Vol. 6, 250). Although his time records do not indicate any meeting or conversations with Block-Garfield, he noted that he saw her frequently at the courthouse and spoke with her about the case then (PCT Vol. 6, 252, 255). His recollection was that she did not find the statutory mitigator of "extreme mental/emotional disturbance," because she found that Blackwood was under the influence of a "mental or emotional disturbance," but it was not extreme (PCT Vol. 6, 256). Thus, Dr. Block-Garfield gave Blackwood the non-statutory mitigator of a mental/emotional disturbance. Further, as already noted, Dr. Block-Garfield testified at the Spencer hearing, finding one (1) statutory mitigator "no significant prior criminal history," and several non-statutory mitigators.

In a written order, dated July 23, 2003, the trial court vacated Blackwood's death sentence finding that trial counsel's penalty phase preparation and presentation was deficient and resulted in prejudice to Blackwood (PCR 311-21).

Blackwood filed an appeal arguing that the trial court was correct in granting a new penalty phase but incorrect in summarily denying Claim I. The State filed a Notice of cross-appeal. That appeal is currently pending. Thereafter, Blackwood filed this Petition for Writ of Habeas Corpus.

CLAIMS I and II

THE SIXTH AMENDMENT CHALLENGE TO BLACKWOOD'S CAPITAL SENTENCE BASED UPON RING V. ARIZONA AND APPRENDI V. NEW JERSEY IS WITHOUT MERIT (restated)

Blackwood asserts that Ring v. Arizona, 122 S.Ct. 2428 (2002) applies to Florida's capital sentencing scheme, that it overruled the basic principle announced in Hildwin v. Florida, 490 U.S. 638 (1989), and invalidated Mills v. Moore, 786 So. 2d 532 (Fla.), cert. denied, 523 U.S. 1015 (2001). Blackwood also claims that his sentence is unconstitutional under Ring because, in Florida, the Eighth Amendment narrowing and death eligibility occurs at sentencing, when the aggravators and mitigators are found and weighted against each other. He further offers that Almendarez-Torres v. U.S., 523 U.S. 224 (1998) did not survive Apprendi v. New Jersey, 530 U.S. 466 (2000), thus, the existence of a prior violent felony conviction is insufficient to support the death sentence. Finally, Blackwood alleges that Florida's capital sentencing scheme violates his Sixth Amendment rights because the jury's

role is merely advisory and therefore doesn't satisfy the requirements of Ring; because a unanimous jury verdict is not required; because specific findings on the aggravating factors are not required; and because the aggravating circumstances are not required to be pled in the Indictment.

Retroactivity

The State's first argument is that Blackwood is barred from raising this claim as the United States Supreme Court has recently held in Schriro v. Summerlin, 124 S. Ct. 2519 (2004) that its prior decision in Ring does not apply retroactively. Blackwood's conviction and sentence were final before the Supreme Court issued its opinion in Ring in June, 2002. Therefore, Blackwood is not entitled to relief based on the prior decision in Ring. The Eleventh Circuit Court of Appeals had previously rejected the retroactivity of Ring. Turner v. Crosby, 339 F.3d 1247, 1283-86 (11th Cir. 2003) (rejecting retroactive application of Ring); Trueblood v. Davis, 301 F.3d 784, 788 (7th Cir. 2002); Arizona v. Towery, 64 P.3d 828 (Ariz. 2003) (finding Ring is not retroactive); Colwell v. State, 59 P.3d 463 (Nev. 2002) (same).[5] Ring is also not

[5] The Supreme Court has also held that a violation of an Apprendi v. New Jersey, 530 U.S. 466 (2000) claim is not plain error. United States v. Cotton, 122 S.Ct. 1781 (May 20, 2002) (holding indictment's failure to include quantity of drugs was Apprendi error but did not seriously affect fairness, integrity, or public reputation of judicial proceedings, and thus did not

retroactive under the principles established in Witt v. State, 387 So. 2d 922, 929-30 (Fla. 1980).

Procedural Bar

The claim that Florida's death penalty sentencing statute violates the Sixth Amendment right to a jury trial has been available since Blackwood's sentencing, but was never asserted as a basis for relief. Since Blackwood did not offer this claim in a timely manner, it is now barred. See Parker v. State, 790 So. 2d 1033, 1034-35 (Fla. 2001) (denying claim under Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000) as not properly preserved for appellate review). Although Blackwood filed a Motion to Dismiss the Indictment for failing to list the aggravators (DA Vol. XIII 1401-03), he failed to raise the precise arguments claimed herein or to challenge the statute in Sixth Amendment terms. The instant claim has been known since Proffitt v. Florida, 428 U.S. 242, 252 (1976) (holding Constitution does not require jury sentencing). See Hildwin v. Florida, 490 U.S.

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rise to level of plain error). If an error is not plain error cognizable on direct appeal, it is not of sufficient magnitude to be a candidate for retroactive application in collateral proceedings. United States v. Sanders, 247 F.3d 139, 150-151 (4th Cir 2002) (emphasizing that finding something to be structural error would seem to be necessary predicate for new rule to apply retroactively and thus, concluding Apprendi not retroactive). Because Ring is predicated solely on Apprendi, Ring is likewise not entitled to retroactive application.

638 (1989); Spaziano v. Florida, 468 U.S. 447, 472 (1984); Chandler v. State, 423 So. 2d 171, 173 n.1 (Fla. 1983) Hence, Blackwood is procedurally barred from raising these challenges at this juncture.

Merits

Since this Court decided Bottoson v. Moore, 833 So. 2d 693 (Fla. 2002), and King v. Moore, 831 So. 2d 143 (Fla. 2002), it has repeatedly and consistently denied relief requested under Ring, both on direct review cases and on collateral challenges. See, e.g., Marquard v. State/Moore, 850 So. 2d 417, 431 n.12 (Fla. 2002); Chavez v. State, 832 So. 2d 730, 767 (Fla. 2002); Bruno v. Moore, 838 So. 2d 485 (Fla. 2002); Fotopoulos v. State, 838 So. 2d 1122 (Fla. 2002); Lucas v. State/Moore, 841 So. 2d 380 (Fla. 2003); Porter v. Crosby, 840 So. 2d 981 (Fla. 2003); Spencer v. State, 842 So. 2d 52 (Fla. 2003); Sochor v. State, 2004 Fla. LEXIS 985 (Fla. 2004).

Ring is not applicable to Florida's capital sentencing scheme as the statutory maximum, in Florida, is death upon conviction for first-degree murder. The Florida Supreme Court has expressly and repeatedly held that the statutory maximum for first-degree murder is death, and that determination is made at the guilt phase of trial upon conviction for first-degree murder. Mills, 786 So. 2d at 536-38. Recently, that

Court stated:

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

Shere v. Moore, 830 So. 2d 56 (Fla. 2002). See Porter v. Crosby, 840 So. 2d 981, 986 (Fla. 2003) (opining, "we have repeatedly held that maximum penalty under the statute is death and have rejected the other Apprendi arguments" that aggravators need to be charged in the indictment, submitted to jury and individually found by unanimous jury). Blackwood asserts that Mills is no longer good law in light of Ring. Yet, neither Ring nor Apprendi called into question Florida's capital sentencing scheme and the Supreme Court has not overruled its prior decisions upholding Florida's capital sentencing statute against constitutional challenges.[6] See, Hildwin, 490 U.S. at 640-41; Spaziano, 468 U.S. at 447; Proffitt, 428 U.S. at 253.

Subsequent to Ring, the Florida Supreme Court rendered

[6] Rodriquez De Quijas v. Shearson/American Express, 490 U.S. 477 (1989) (noting only Supreme Court can overrule its precedent - other courts must follow case which directly controls issue).

Bottoson v. Moore, 833 So. 2d 693 (Fla. 2002). Therein three justices expressly reiterate the fact that death is the statutory maximum in Florida. Bottoson, at 696 n.6 (Wells, J., concurring); Id. at 893 (Quince, J., concurring); Id. at 699 (Lewis, J., concurring). Justice Harding's concurring opinion did not call into question any prior holdings of the Florida Supreme Court, which would necessarily include its prior determination that death was the statutory maximum for first degree murder in Florida. Id. at 695. As such, the determination that death is the statutory maximum remains good law and recent decisions bear out this conclusion. See Conahan v. State, 844 So. 2d 629, 642 n.9 (Fla. 2003); Spencer v. Crosby, 842 So. 2d 52, 72 (Fla. 2003)(rejecting claim Florida's capital sentencing statute is unconstitutional); Cole v. State, 841 So. 2d 409, 429-30 (Fla. 2003); Anderson v. State, 841 So. 2d 390, 408-09 (Fla. 2003); Lucas v. Crosby, 841 So. 2d 380, 389-90 (Fla. 2003)(same); Bruno v. Moore, 838 So. 2d 485, 492 (Fla. 2002); King v. Moore, 831 So. 2d 143 (Fla. 2002); Marquard v. Moore, 850 So. 2d 417, 431 n.12 (Fla. 2002); Chavez v. State, 832 So. 2d 730, 766-67 (Fla. 2002); Mills v. State, 786 So. 2d 532, 537 (Fla. 2001); Brown v. State, 803 So. 2d 223 (Fla. 2001); Mann v. Moore, 794 So. 2d 595, 599 (Fla. 2001); Looney v. State, 803 So. 2d 656 (Fla.

2001); Card v. State, 803 So. 2d 613 n. 13 (Fla. 2001). The law is clear, Ring is inapplicable to Florida's capital sentencing scheme and Blackwood's argument to the contrary is meritless.

The Florida Supreme Court has determined the statutory maximum in Florida is death, meaning that once the jury convicted Blackwood of first-degree murder, he was eligible for a death sentence, not merely life imprisonment, as in Arizona. Moreover, the judicial role in Florida alleviates Eighth Amendment concerns as well, and in fact provides defendants with another opportunity to secure a life sentence; it also enhances appellate review and provides a reasoned basis for a proportionality analysis. Likewise, Blackwood's citation to Harris v. United States, 122 S.Ct. 2406 (2002), does not necessitate a finding that section 921.141 violates the Sixth Amendment right to a jury trial. In fact, as the Supreme Court explained in Harris, "Apprendi said that any fact extending the defendant's sentence beyond the maximum authorized by the jury's verdict would have been considered an element of an aggravated crime -- and thus the domain of the jury -- by those who framed the Bill of Rights." In light of this statement, which also explains Ring, no action taken following the jury verdict in Florida first-degree murder case

increases the penalty faced as the statutory maximum is death.

Relying upon Zant v. Stephens, 462 U.S. 862 (1983) and Porter v. State, 564 So. 2d 1060 (Fla. 1990), Blackwood argues that death eligibility is determined during the penalty phase where there are three elements for capital murder (1) at least one aggravator; (2) "sufficient aggravating circumstances exist" to justify the death penalty; and (3) "there are insufficient mitigating circumstances to outweigh the aggravating circumstances". He points to the fact that Florida is a "weighing state," thus, the jury must make the factual findings necessary to narrow the class of persons eligible for the death penalty. Blackwood's reference to Stephens and its analysis in Porter v. State confuses sentencing selection factors under the Eighth Amendment with the elements of the crime and the determination of with death eligibility under the Sixth Amendment. Stephens and Porter v. State are not dispositive. As such, Stephens is distinguishable from the instant claim which is attempting to resolve Sixth Amendment issues.

Although the death penalty cannot be imposed in the absence of an aggravator proven beyond a reasonable doubt, the aggravators and weighing of the mitigation and aggravation narrows the class of defendants subject to the death penalty.

It does not increase the punishment. In fact, it is the absence of aggravation that narrows the sentence to life. While the statutory maximum is death, and remains so regardless of the sentence found appropriate, it is the aggravators in light of the mitigators which determine whether the maximum or some lesser sentence will be imposed. As reasoned in Tuilaepa v. California, 512 U.S. 967, 979-80 (1994):

> ... In sum, "discretion to evaluate and weigh the circumstances relevant to the particular defendant and the crime he committed" is not impermissible in the capital sentencing process.... "Once the jury finds that the defendant falls within the legislatively defined category of persons eligible for the death penalty, ... the jury then is free to consider a myriad of factors to determine whether death is the appropriate punishment."... Indeed, the sentencer may be given "unbridled discretion in determining whether the death penalty should be imposed after it has found that the defendant is a member of the class made eligible for that penalty." ....

Tuilaepa, 512 U.S. at 979-80 (citations omitted). Florida's sentencing scheme comports with the constitution.

A state supreme court's interpretation of its statute is the controlling factor. As reaffirmed in Mullaney v. Wilbur, 421 U.S. 684, 691 (1975), "state courts are the ultimate expositors of state law ... and that [the Supreme Court is] bound by their constructions except in extreme circumstances."

See Winters v. New York, 333 U.S. 507 (1948)). The mere fact the Supreme Court indicated Florida's narrowing for capital cases occurs during the penalty phase does not foreclose the Florida Supreme Court from announcing death eligibility occurs upon conviction.[7]

Similarly, death eligibility and sentencing selection do not have to happen simultaneously. Section 921.141 clearly secures and preserves significant jury participation in narrowing the class of individuals selected to be sentenced to death. In fact, the jury's role is so vital to the sentencing process in Florida that it has been characterized as a "co-sentencer." Espinosa v. Florida, 509 U.S. 1079 (1992). Merely because narrowing may take place during the penalty phase does not raise the sentencing selection factors to elements of the crime or detract from the announcement death eligibility occurs at conviction.

Ring proves only that Apprendi, and more importantly

[7] In fact, the same situation arose when the Supreme Court characterized Walton v. Arizona, 497 U.S. 639 (1990) in Apprendi v. New Jersey, 530 U.S. 466 (2000). Subsequently, the Arizona Supreme Court announced when death eligibility takes place under Arizona's capital sentencing statute. Ring v. State, 25 P.3d 1139, 1150 (Ariz. 2001). This new interpretation had to be accepted by the Supreme resulting in the Ring v. Arizona, 122 S.Ct. 2428 decision and the overruling of Walton.

Ring, are not sentencing cases.[8] Apprendi and Ring involve the jury's role in convicting a defendant of a qualifying offense, subject to the death penalty. Quoting Proffitt, 428 U.S. at 252, Ring acknowledged that "[i]t has never [been] suggested that jury sentencing is constitutionally required",[9] rather Ring involves only the requirement the jury find the defendant death-eligible. Ring, 122 S.Ct. at 2447, n.4. The jury determination is for the guilt phase, while sentencing rests with the trial judge. See Spaziano, 468 U.S. at 459 (finding Sixth Amendment has no guarantee of right to jury trial on sentence).

Based upon this, Blackwood's "three factors" are not elements of the crime, but are sentencing components used to determine the appropriate punishment. Aggravating factors are not elements of the offense, but are capital sentencing guidelines. Poland v. Arizona, 476 U.S. 147, 156 (1986) (explaining aggravators are not separate penalties or offenses

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

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

[9] See Harris v. Alabama, 513 U.S. 504, 515 (1995).

- they are standards to guide sentencer in choosing between alternatives of death or life imprisonment). Florida's capital sentencing scheme, found in section 921.141, affords the sentencer the guidelines to follow in determining the various sentencing selection factors related to the offense and the offender by providing accepted statutory aggravating factors and mitigating circumstances to be considered. Given the fact a convicted defendant faces the statutory maximum sentence of death upon conviction, Mills, 786 So. 2d at 538, the employment of further proceedings to examine the assorted "sentencing selection factors", including aggravators, mitigators, and the sufficiency of those, does not violate due process. In fact, a sentencer may be given discretion in determining the appropriate sentence selection, as long as the jury has decided the defendant is eligible for the death penalty. Moreover, in Harris v. United States, 513 U.S. 504, 515 (2002), the Court explained: "Apprendi said that any fact extending the defendant's sentence beyond the maximum authorized by the jury's verdict would have been considered an element of an aggravated crime -- and thus the domain of the jury -- by those who framed the Bill of Rights." In light of this statement, which likewise explains Ring, no action taken following a Florida jury verdict increases the penalty faced,

as the statutory maximum is death.

The argument that Almendarez-Torres, did not survive Apprendi and Ring is not well taken. As the Supreme Court reiterated in Rodriquez De Quijas v. Shearson/American Express, 490 U.S. 477 (1989), lower courts are to leave to the Supreme Court the task of overruling its precedent and follow those cases which directly control the issue. In this situation, all of the Supreme Court cases finding Florida's capital sentencing statute constitutional control. Hildwin, 490 U.S. at 638; Spaziano, 468 U.S. at 447; Barclay v. Florida, 463 U.S. 939 (1983); Proffitt, 428 U.S. at 242.

The claim of unconstitutionality because the jury's sentencing determination was merely advisory and not unanimous has been rejected repeatedly. Because the sentencing selection conducted during the penalty phase does not increase the punishment for first-degree murder special verdicts and unanimity[10] are not required. See Blackwelder v. State, 851 So.

[10] Even in the context of guilt, jury unanimity is not required. Cf. 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). As such, Blackwood's reference to Sullivan v. Louisiana, 508 U.S. 275 (1993) does not call into question Florida's capital sentencing. Here, there has been a unanimous jury finding of guilt for first-degree murder beyond a

2d 650, 653-54 (Fla. 2003) (rejecting contention aggravators "must be alleged in the indictment, submitted to the jury, and individually found by a unanimous jury verdict"); Porter v. Crosby, 840 So. 2d 981, 986 (Fla. 2003); Doorbal v. State, 837 So. 2d 940 (Fla. 2003); Sweet v. Moore, 822 So. 2d 1269, 1275 (Fla. 2002); Cox v. State, 819 So. 2d 705, 724-25 n.17 (Fla. 2002); Way v. State, 760 So. 2d 903, 924 (Fla. 2000) (Pariente, J., concurring) (noting jury's recommendation need not be unanimous); Thomson v. State, 648 So. 2d 692, 698 (Fla. 1984) (holding simple majority vote constitutional); Alvord v. State, 322 So. 2d 533 (Fla. 1975), receded from on other grounds, Caso v. State, 524 So. 2d 422 (Fla. 1988). Apprendi has not altered this position. Card v. State, 803 So. 2d 613, 628 n. 13 (Fla. 2001) (rejecting claim Apprendi invalidates ruling "capital jury may recommend a death sentence by a bare majority vote"); Hertz v. State, 803 So. 2d 629, 648 (Fla. 2001); Looney v. State, 803 So. 2d 656, 675 (Fla. 2001); Brown v. Moore, 800 So. 2d 223 (Fla. 2001) (rejecting argument aggravators must be found by unanimous jury).[11] The instant

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reasonable doubt which rendered Blackwood eligible for the death penalty as death is the statutory maximum.

[11] Likewise, unanimity with respect to mitigation has been rejected. McKoy v. North Carolina, 494 U.S. 433 (1990) (determining requirement of unanimous findings of mitigators unconstitutional); Mills v. Maryland, 486 U.S. 367 (1988).

challenges are meritless.

The claim that the death penalty statute is unconstitutional for failing to require the charging of the aggravators and the alleged "element" of "sufficient aggravating circumstances" in the indictment is without merit. This issue was not addressed in Ring, and in the absence of any United States Supreme Court ruling to the contrary, there is no need to reconsider the Florida Supreme Court's well established rejection of these claims. Sweet, 822 So. 2d at 1269; Cox, 819 So. 2d at n.17. Moreover, the Florida Supreme Court has rejected Blackwood's arguments post-Ring. See Porter v. Crosby, 840 So. 2d at 986 (rejecting argument aggravators must be charged in indictment, submitted to jury, and individually found by unanimous verdict); Doorbal, 837 So. 2d at 940.

Finally, the Florida Supreme Court has upheld death sentences in light of Apprendi and Ring challenges even where there was no prior violent or contemporaneous felony conviction. See Davis v. State, 2003 WL 22097428 (Fla. Sept. 11, 2003) (rejecting Ring claim and affirming death sentence upon aggravation of felony probation, heinous atrocious or cruel and cold calculated and premeditated); Butler v. State, 842 So. 2d 817, 834 (Fla. 2003) (rejecting Ring issue and

affirming death penalty upon single aggravator of heinous atrocious or cruel). Based upon the foregoing procedural and substantive arguments, Blackwood is not entitled to relief on this claim.

CONCLUSION

WHEREFORE, based on the foregoing arguments and authorities, the State requests that this Honorable Court DENY the instant petition.

Respectfully submitted,
CHARLES J. CRIST, Jr.
Attorney General

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DEBRA RESCIGNO
Assistant Attorney General
Bar No. 0836907
1515 North Flagler Dr.
West Palm Beach, FL 33401
561-837-5025 (Phone)
561-837-5108 (Facsimile)

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing document was sent by United States mail, postage prepaid, to KENNETH MALNIK, Counsel for Appellant, 1776 N. Pine Island Road, Suite 216, Plantation, Fl. 33322, this 16th day of August, 2004.

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CERTIFICATE OF FONT

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