IN THE SUPREME COURT OF FLORIDA

THOMAS LEE GUDINAS,
Appellant,
v. **CASE NO. SC03-416**
STATE OF FLORIDA,
Appellee.
_____/

ON APPEAL FROM THE NINTH JUDICIAL CIRCUIT
IN AND FOR ORANGE COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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STATEMENT REGARDING ORAL ARGUMENT[1]

Gudinas has not requested oral argument in this case. The claim contained in Gudinas' brief has previously been decided by this Court **in this case**, and is procedurally barred under settled Florida law. This Court's adjudicative function will not be assisted by oral argument, and there is no justification for the expenditure of such resources. Gudinas is not entitled to relief, and the lower court's denial of relief should be affirmed in all respects.

THE FACTS OF THE CRIMES

On direct appeal, the Florida Supreme Court summarized the facts of Gudinas' crimes in the following way:

> Gudinas and three of his roommates arrived at an Orlando bar, Barbarella's, between approximately 8:30 and 9 p.m. on May 23, 1994. Prior to arriving at the bar, the group drank beer and smoked marijuana at their apartment and in the car on the way to the bar. While drinking throughout the night, Gudinas and his roommates periodically returned to their car to smoke marijuana. However, when the bar closed at 3 a.m, Gudinas could not be located. One of Gudinas' roommates, Todd Gates, testified that he last saw Gudinas in the bar at approximately 1 a.m.
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> Rachelle Smith and her fiance' arrived at the same bar between 11 and 11:30 p.m. They stayed until about 2 a.m. Rachelle left the bar at that time, while her fiance' remained inside saying goodbye to friends. She initially went to the wrong parking lot where she saw a man watching her while crouched behind another car. Realizing she was in the wrong parking lot, Rachelle

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[1]While Gudinas calls his pleading an *Initial Brief/Petition for Writ of Habeas Corpus*, it is purely an appeal from the denial of Rule 3.850 relief. It is not a habeas corpus petition.

walked to the lot where her car was parked. Because she felt she was being followed, she immediately got into her car and locked the door. Looking into her mirror, she saw the same man she had just seen crouched behind a car in the other parking lot. After trying to open Rachelle's passenger side door, the man crouched down, came around to the driver's side and tried to open the door. While screaming at Rachelle, "I want to f___ you," the man covered his hand with his shirt and began smashing the driver's side window. Rachelle blew the horn and the man left. Upon hearing of the murder that occurred nearby that same night, Rachelle contacted police, gave a description of the man, and identified Gudinas from a photographic lineup as the man who tried to attack her. [FN1]. She also identified Gudinas at trial.

The victim, Michelle McGrath, was last seen at Barbarella's at approximately 2:45 a.m. She apparently had left her car in the same parking lot where Rachelle Smith first saw Gudinas crouching behind a car. Between 4 and 5 a.m., Culbert Pressley found Michelle's keys and a bundle of clothes next to her car in the parking lot. [FN2] Her body was discovered at about 7:30 a.m. in an alley next to Pace School. [FN3] Michelle was naked, except for a bra which was pushed up above her breasts.

Jane Brand flagged down Officer Chisari of the Orlando police bicycle patrol. Officer Chisari had been informed by a deputy sheriff on the scene that Pressley had found some keys. Pressley then told Chisari he had just given them to "that guy," referring to a man walking south. As Chisari then rode toward the man, Ms. Brand screamed as she spotted Michelle's body. Chisari returned to where Ms. Brand was. Subsequently, he saw a man he later identified as Gudinas driving a red Geo Metro from the parking lot where Michelle had parked her car. Pressley wrote down the car's license plate and the tag number was traced to Michelle McGrath. The car was later recovered at 7 p.m. that night at the Holiday Club Apartments. [FN4].

During the jury trial, all four [FN5] of Gudinas' roommates testified that he was not at their apartment when they returned from Barbarella's. Frank Wrigley said he next saw Gudinas that afternoon; he had blood on his underwear and scratches on his knuckles, allegedly from a fight with two black men who tried to rob him. Todd Gates testified that Gudinas was at the apartment when he awoke between 8:30 and 9 a.m.,

wearing boxer shorts covered with blood, allegedly from a fight with a black man. Fred Harris offered similar testimony. Fred added that later that day, after being asked if Michelle was "a good f___," Gudinas replied, "Yes, and I f___ed her while she was dead." Dwayne Harris likewise testified that he heard Gudinas say, "I killed her then I f___ed her.".

Dr. Hegert, the medical examiner, testified that the cause of death was a brain hemorrhage resulting from blunt force injuries to the head, probably inflicted by a stomping-type blow from a boot. He found severe cerebral edema and determined that Michelle died thirty to sixty minutes after the fatal injury, the forceful blow to the head. Dr. Hegert also found defensive wounds on one of Michelle's hands and two broken sections of a stick, one inserted two inches into her vagina and the other inserted three inches into the area near her rectum. In addition, Dr. Hegert also determined that Michelle had been vaginally and anally penetrated by something other than the sticks, as indicated by trauma to her cervix. He also found that Michelle had a blood alcohol content of .17% at the time of her death. While Michelle might have lived longer without that amount of alcohol in her system, Dr. Hegert testified that the head injury would have been fatal anyway. He estimated the time of death to be between 3 and 5 a.m

Timothy Petrie, a serologist with the Florida Department of Law Enforcement, testified that he found semen on the vaginal swab as well as on a swab of Michelle's thigh. Amanda Taylor, a latent fingerprint examiner with the Orlando Police Department, identified a latent fingerprint on the alley gate pushbar as Gudinas' right palm and thumbprints on Michelle's car loan payment book as Gudinas'. Taylor acknowledged she had no way of knowing when the prints were made.

After the trial concluded, the jury returned a guilty verdict on all counts. The penalty phase commenced several days later.

FN1 Two other witnesses, Culbert Pressley and Mary Rutherford, also positively identified Gudinas from the same photo lineup. They had each seen Gudinas near the scene of the murder later that morning.

> FN2 Several hours later, shortly after 7 a.m., a man whom Pressley subsequently identified as Gudinas came walking down the sidewalk. When the man saw Pressley holding the car keys, he said, "Those look like my keys. I've been looking for them all morning." Pressley gave him the keys in exchange for a promised $ 50 reward. The man then walked away.
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> FN3 Pace School employee Jane Brand discovered the victim in the alley. In the preceding half hour before seeing Michelle's body, Ms. Brand had arrived at school and encountered a young man inside the gated area on the steps leading to the school's front door. The man, whose back was to Ms. Brand, remained seated and did not look at her. She described him as about eighteen years old with short brown hair and wearing dark, loose-fitting shorts and a loose shirt. After being told to leave the school grounds, the man jumped the fence and ended up in the alley. About ten minutes later, Ms. Brand heard a loud crash in the alley. She looked outside and saw Michelle's body. She later identified Gudinas as the same man she saw in the courtyard that morning after seeing him in a television report.
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> FN4 Gudinas' apartment was less than a half mile from where Michelle's car was found.
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> FN5 These were Frank Wrigley, Todd Gates, and brothers Fred and Dwayne Harris. The Harris brothers are Gudinas' first cousins.

Gudinas v. State, 693 So. 2d 953 (Fla. 1997).

In affirming Gudinas' sentence of death, this Court held:

> The jury recommended a death sentence by a vote of ten to two. The trial court conducted a sentencing hearing on May 19, 1995, and imposed Gudinas' sentence in a separate proceeding on June 16, 1995. After adjudicating Gudinas guilty on all counts, the court sentenced him to death for the first-degree murder of Michelle McGrath. [FN7] The court also sentenced

Gudinas to thirty years for attempted burglary with an assault, thirty years for attempted sexual battery, and life imprisonment for each count of sexual battery.

> FN7 The trial court found the following statutory aggravators: (1) the defendant had been convicted of a prior violent felony, section 921.141(5)(b) *Fla. Stat.* (1995); (2) the murder was committed during the commission of a sexual battery, section 921.141(5)(d); and (3) the murder was especially heinous, atrocious, or cruel, section 921.141(5)(h). The court found one statutory mitigator: the defendant committed the murder while under the influence of an extreme mental or emotional disturbance, section 921.141(6)(b). The court found the following nonstatutory mitigating factors and accorded them very little weight: (1) defendant had consumed cannabis and alcohol the evening of the homicide; (2) defendant had the capacity to be rehabilitated; (3) defendant's behavior at trial was acceptable; (4) defendant had an IQ of 85; (5) defendant was religious and believed in God; (6) defendant's father dressed as a transvestite; (7) defendant suffered from personality disorders; (8) defendant was developmentally impaired as a child; (9) defendant was a caring son to his mother; (10) defendant was an abused child; (11) defendant suffered from attention deficit disorder as a child; and (12) defendant was diagnosed as sexually disturbed as a child.

Gudinas, supra. This Court affirmed the convictions and sentences.

THE FIRST COLLATERAL PROCEEDINGS

In June of 1998, Gudinas filed his first *Florida Rule of Criminal Procedure* 3.850 motion, the denial of which was

ultimately affirmed by this Court. *Gudinas v. State,* 816 So. 2d 1095 (Fla. 2002). Contemporaneous with the appeal from the denial of Rule 3.850 relief, Gudinas filed a petition for writ of habeas corpus which alleged, *inter alia*, that he was entitled to relief based upon the United States Supreme Court's *Apprendi v. New Jersey*, 530 U.S. 466 (2000), decision. This Court rejected that claim. *Gudinas, supra.*

THE SUCCESSIVE COLLATERAL PROCEEDINGS

Well after this Court denied Gudinas' claim based upon *Apprendi v. New Jersey,* Gudinas filed a successive Rule 3.851 motion which sought relief under *Ring v. Arizona*, 536 U.S. 584 (2002), based on the theory that the *Apprendi* claim could not have been raised prior to the release of the United States Supreme Court's *Ring* decision. (R42). The State duly answered the successive motion asserting that the *Apprendi/Ring* claim was not only procedurally barred, but also meritless. (R120-145). Gudinas conceded that no hearing was necessary on the *Apprendi/Ring* claim (R17), and, on January 16, 2003, Judge Belvin Perry entered an order denying the successive Rule 3.851 motion in light of this Court's decisions in *Bottoson v. Moore,* 833 So. 2d 693 (Fla. 2002), and *King v. Moore,* 831 So. 2d 143 (Fla. 2002). Gudinas filed notice of appeal on February 14,

2003.

In his brief, Gudinas states that his sole purpose in pressing this appeal is "to preclude any future arguments of waiver, abandonment, or procedural bar by the State of Florida and to perfect claims for future federal review...". *Initial Brief*, at 4.

SUMMARY OF ARGUMENT

Gudinas' claim based upon *Apprendi v. New Jersey* and *Ring v. Arizona* is procedurally barred because it was raised and decided in Gudinas' prior state post-conviction proceedings which were concluded some seven months prior to the filing of this Rule 3.851 motion. This Court should deny relief based upon procedural bar grounds in order to protect the independence and adequacy of Florida's well-settled State procedural rules. In addition to being procedurally barred under settled Florida law, the *Apprendi/Ring* claim is meritless under the decisions of this Court.

ARGUMENT

I. THE *RING V. ARIZONA* DECISION DOES NOT AFFECT FLORIDA DEATH PENALTY LAW[2]

[2] **Even though the Florida Supreme Court has already decided this claim against him, Gudinas makes this claim despite the complete dissimilarity of the Florida and Arizona statutes, and despite the fact that no decisions of the United States Supreme Court upholding the constitutionality of the Florida death penalty statutes were invalidated, criticized, or otherwise**

PRELIMINARY MATTERS

Gudinas claims that the United States Supreme Court's *Ring v. Arizona*, 536 U.S. 584 (2002), decision invalidates Florida's long-upheld capital sentencing structure. There are three fundamental reasons why the *Apprendi/Ring* argument fails: that claim is procedurally barred; Gudinas' death sentence is supported by aggravators that fall outside any interpretation of *Apprendi/Ring*; and, the statute under which Gudinas was sentenced to death provides that, upon **conviction** for capital murder, the maximum possible sentence is **death**, unlike the statute at issue in *Ring. Ring* clarified that *Apprendi* applied to capital cases, and partially overruled *Walton v. Arizona,* 497 U.S. 639 (1990), which had been decided based on a misunderstanding of Arizona death penalty law.[3] The fundamental issue in *Ring,* and the rationale behind the result, rests on the United States Supreme Court's **misinterpretation** of **Arizona's** capital sentencing statute. *Ring* at 603-5. However, *Ring* has no

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called into question in *Ring*.

[3] The *Ring* Court determined that *Apprendi* and its impact on the prior decision in *Walton* required clarification (or correction of the Court's understanding) of the role of the jury in **Arizona** capital sentencing. Nothing in that decision changed the dynamic of Florida's capital sentencing scheme under *Apprendi* and *Ring.*

application to Florida's death sentencing scheme because the Court did **not** misinterpret **Florida** law -- Gudinas' claim that Florida's statute fails because *Walton* has been overruled is predicated upon the false (and demonstrably incorrect) assertion that Florida and Arizona have functionally identical capital sentencing statutes. That is simply not true, and, even ignoring the clear procedural bars and the total legal inapplicability of *Ring* to the facts of this case, the basic difference between Arizona and Florida law is dispositive of Gudinas' claims.

A. THE *RING* CLAIM IS NOT AVAILABLE TO GUDINAS BECAUSE IT IS PROCEDURALLY BARRED, BECAUSE IT IS A SUCCESSIVE CLAIM, AND BECAUSE IT IS NOT RETROACTIVE TO HIS CASE

1. The *Apprendi/Ring* claim is procedurally barred.

Gudinas' reliance on *Ring* to support a Sixth Amendment claim is procedurally barred because this Court has already decided this claim adversely to Gudinas in the decision denying relief in his first collateral attack proceedings. Gudinas is not entitled to a second bite at the apple on a claim that has already been resolved against him. The *Apprendi/Ring* claim is *res judicata*, and this Court should expressly deny relief on that basis in order to protect the integrity of Florida's well-settled procedural rules, which have not been, and should not be, suspended for Gudinas' benefit.

In addition to being barred as *res judicata*, the *Apprendi/Ring* claim is procedurally barred because it could have been but was not raised at trial and on direct appeal. The issue in *Ring* (which is merely an extension of *Apprendi*, anyway) is by no means new or novel -- that claim, or a variation of it, has been known since before the United States Supreme Court's 1976 decision in *Proffitt v. Florida,* 428 U.S. 242, 252 (1976) (holding that the Constitution does not require jury sentencing). The basis for a claim that the sentence imposed in this case violated Gudinas' right to a jury trial has been available since he was sentenced to death -- he raised this claim after *Apprendi*[4] was decided, as did other Florida death row inmates, who have been raising the same claim since well prior to *Ring. See, Mills, infra.* There is nothing magical about an *Apprendi* claim (which Gudinas has already litigated), and, despite the pretensions of Gudinas' brief, *Ring* is nothing more than the application of *Apprendi* to capital cases. There is no justification for a departure by this Court from application of the well-settled State procedural bar rules, which this Court

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[4] *Apprendi v. New Jersey,* 530 U.S. 466 (2000), was released on June 26, 2000. Any claims based on that case which are related to Gudinas' **non-capital** convictions are clearly untimely because they were not raised until more than two years after *Apprendi* was released. Rule 3.851(d), *Fla. R. Crim. P.*

reaffirmed in *F.B. v. State*, SC02-1156 (Fla., July 11, 2003).[5] The *Apprendi* claim is procedurally barred, and all relief should be denied on that basis. *See, e.g., Bundy v. State,* 538 So. 2d 445 (Fla. 1985).

2. The aggravators in Gudinas' case fall outside the scope of *Apprendi/Ri*ng, and reliance on those decisions is misplaced.

In addition to being procedurally barred, *Apprendi/Ring* does not provide a basis for relief in this case because the rule of law set out in those cases is inapplicable to the facts of Gudinas' case.[6] Two of the three aggravators applicable in this case fall outside of any conceivable interpretation of *Apprendi/Ring.*

One of the aggravating circumstances is Gudinas' prior violent felony conviction. Under the plain language of *Apprendi*, a prior violent felony conviction is a fact which may be a basis to impose a sentence **higher than that authorized by the jury's**

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[5] In *F.B. v. State*, this Court was explicit in holding that the only exception to the contemporaneous objection rule (which Gudinas clearly did not follow) is when the error is fundamental. In this case, there is no error at all under *Apprendi/Ring*, and, because that is so, the contemporaneous objection rule applies and should be enforced by this Court.

[6] The aggravators found in this case were murder during a sexual battery, prior violent felony conviction, and HAC. *Gudinas v. State,* 693 So. 2d at 968 n.18.

verdict without the need for additional jury findings.[7] There is no constitutional violation (nor can there be) because the prior conviction constitutes a jury finding which the judge may rely upon, without additional jury findings, in imposing sentence. *See Almendarez-Torres v. United States*, 523 U.S. 224 (1998); *Apprendi v. New Jersey*, 530 U.S. 466 (2000). Under any view of the law, and even after *Ring*, the jury is not required to make a determination of the prior violent felony aggravator, and that aggravating circumstance can be found by the judge alone.

Under any interpretation of the facts, the prior violent felony conviction and the "during the commission of a felony" aggravating circumstance (which is supported by two sexual battery convictions) obviate any possible Sixth Amendment error. These two aggravating circumstances are outside of the *Apprendi/Ring* holding,[8] and, because that is so, those decisions

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[7] Of course, under Florida law, death is the maximum possible sentence for the crime of first degree murder, and that is the defendant's sentence exposure upon conviction. See Section B, *infra.* The "higher than authorized by the jury" component of *Apprendi* is not applicable to the capital sentencing process in Florida, but that distinction does not affect the basic premise that a prior felony conviction is a fact that has **already** been found by a jury beyond a reasonable doubt, and does not need to be (and as a policy matter should not be) "re-proven."

[8] The *Apprendi* Court cited to *Jones v. United States,* 526 U.S. 227, 243 n.6 (1999), for the proposition that under the Fifth and Sixth Amendments, "any fact (**other than prior**

are of no help to Gudinas. Gudinas' claim collapses because *Apprendi/Ring* is inapplicable to the facts of this case. No relief is justified.

3. *Ring* is not retroactive to Gudinas' case.

In addition to being procedurally barred and factually inapplicable, no court to consider the issue[9] has held *Apprendi* to be retroactive and *Ring* is "simply an extension of *Apprendi* to the death penalty context." *Cannon v. Mullin*, 297 F. 3d 989

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conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." *Apprendi v. New Jersey,* 530 U.S. 466, 476 (2000). [emphasis added]. The Court has already clearly said that death is the maximum penalty for first degree murder, so that component of the statement has no application to Florida law. In any event, Gudinas' prior violent felony conviction, and the murder during a sexual battery aggravator, are outside any possible (or reasonable) interpretation of *Apprendi* and *Ring.*

[9]*Coleman v. United States,* 329 F.3d 77 (2nd Cir. 2003); *Goode v. United States,* 305 F.3d 378, 382-85 (6th Cir. 2002); *United States v. Brown,* 305 F.3d 304, 307-10 (5th. Cir. 2002); *United States v. Wiseman,* 297 F.3d 975, (10th Cir. 2002); *United States v. Dowdy,* 2002 U.S. App. LEXIS 12559 (9th Cir. June 20, 2002); *Curtis v. United States*, 294 F.3d 841, 843-44 (7th Cir. 2002); *United States v. Mora,* 293 F.3d 1213, 1218-19 (10th Cir. 2002); *Hines v. United States,* 282 F.3d 1002 (8th Cir. 2002); *United States v. Sanchez-Cervantes*, 282 F.3d 664, 668 (9th Cir. 2002); *In re Turner*, 267 F.3d 225, 227 (3rd Cir. 2001); *McCoy v. United States*, 266 F.3d 1245 (11th Cir. 2001); *Forbes v. United States,* 262 F.3d 143, 144 (2nd Cir. 2001); *United States v. Moss*, 252 F.3d 993 (8th Cir. 2001); *Sanders v. United States,* 247 F.3d 139, 151 (4th Cir. 2001); *In re Tatum*, 233 F.3d 857, 859 (5th Cir. 2000); *Jones v. Smith*, 231 F.3d 1227 (9th Cir. 2001); *Sustache-Rivera v. United States*, 221 F.3d 8, 15 n.12 (1st Cir. 2000).

(10th Cir. 2002), *cert. and stay of execution denied,* 536 U.S. 974 (U.S. July 23, 2002)[10]; *In re Johnson,* 2003 U.S. App. LEXIS 11514 (5th Cir., June 10, 2003) ("Since the rule in *Ring* is essentially an application of *Apprendi*, logical consistency suggests that the rule announced in *Ring* is not retroactively available."). The First and Fourth District Courts of Appeal have held that *Apprendi* is not retroactive, as has the Kansas Supreme Court.[11] *Figarola v.* State, 841 So. 2d 576 (Fla. 4th DCA

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[10] The *Cannon* Court held, post-*Ring*, that under *Tyler v. Cain*, 533 U.S. 656, 661 (2001) "'under this provision, the Supreme Court is the only entity that can 'ma[k]e' a new rule retroactive. The new rule becomes retroactive, not by the decisions of the lower courts or by the combined action of the Supreme Court and the lower courts, but simply by the action of the Supreme Court.'"

[11] The Alabama Court of Criminal Appeals has held that *Apprendi* is not retroactive to collateral review cases. *See, Poole v. State*, 2001 WL 996300 (Ala. Crim. App. 2001). The Minnesota Court of Appeals refused to apply *Apprendi* retroactively, holding that it was not a watershed rule of criminal procedure, and that the rule did nothing to enhance the accuracy of a criminal conviction. *Meemken v. State*, 2003 Minn. App. LEXIS 661 (June 3, 2003). The Missouri Supreme Court seems to be the only court that has held that *Ring* is retroactively applicable. *State v. Whitfield*, 2003 Mo. LEXIS 105 (Mo. S.Ct. June 17, 2003). The retroactive application of *Ring* is inconsistent and irreconcilable with the same Court's holding that *Apprendi* is **not** retroactive. *State ex. rel. Nixon v. Sprick*, 59 S.W. 3d 515 (Mo. 2001). The conflicting results reached by the Missouri Supreme Court suggest that reliance on *Whitfield* would be ill-advised. The Nebraska Supreme Court has held that *Ring* is not retroactively applicable. *State v. Lotter*, 2003 Neb. LEXIS 111 (July 11, 2003).

2003); *Hughes v. State*, 826 So. 2d 1070 (Fla. 1st DCA 2002) (certifying question); *Whisler v. State*, 36 P.3d 290 (Kan. 2001).[12] The United States Supreme Court has previously held that a violation of the right to a jury trial is not retroactive, *DeStefano v. Woods*, 392 U.S. 631, 88 S.Ct. 2093, 20 L.Ed.2d 1308 (1968), and, because that is the law, neither is a wholly procedural ruling like *Apprendi* or *Ring*. It is the prerogative of the United States Supreme Court to make the retroactivity determination -- that Court has not held *Apprendi/Ring* retroactive, and has refused to review cases declining to apply those decisions in that fashion. *Cannon, supra. Ring*, like *Apprendi*, is merely a procedural ruling which falls far short of being of "fundamental significance."

Moreover, the *Ring* decision is not retroactively applicable under *Witt v. State*, 387 So. 2d 922, 929-30 (Fla. 1980). Under *Witt*, *Ring* is not retroactively applicable **unless** it is a decision of fundamental significance, which so drastically alters the underpinnings of Gudinas' death sentence that

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[12] An *Apprendi* claim is not "plain error,"either. *United States v. Cotton*, 535 U.S. 625 (2002)(indictment's failure to include the quantity of drugs was an *Apprendi* error but did not seriously affect fairness, integrity, or public reputation of judicial proceedings, and thus did not rise to level of plain error). If an error is not plain error for direct appeal purposes, it is not of sufficient importance to be retroactively applicable to collateral proceedings.

"obvious injustice" exists. *New v. State,* 807 So. 2d 52 (Fla. 2001), *cert. denied,* 536 U.S. 942 (2002). In determining whether this standard has been met, this Court must consider three factors: the purpose served by the new case; the extent of reliance on the old law; and the effect on the administration of justice from retroactive application. *Ferguson v. State*, 789 So. 2d 306, 311 (Fla. 2001). Neither *Apprendi* nor *Ring* meet that standard, either.

4. *The Apprendi/Ring* claim is meritless.

Finally, without waiving the foregoing, the claim raised by Gudinas has been expressly rejected. *See Lugo v. State*, 845 So. 2d 74, 119 (Fla. 2003); *Kormondy v. State*, 845 So. 2d 41, 54 (Fla. 2003)("*Ring* does not require either notice of the aggravating factors that the State will present at sentencing or a special verdict form indicating the aggravating factors found by the jury."); *Conahan v. State*, 844 So. 2d 629 (Fla. 2003); *Butler v. State*, 842 So. 2d 817 (Fla. 2003)(relying on *Bottoson v. Moore*, 833 So. 2d 693 and *King v. Moore*, 831 So. 2d 143 to a *Ring* claim in a single aggravator (HAC) case); *Banks v. State*, 842 So. 2d 788 (Fla. 2003); *Spencer v. State*, 842 So. 2d 52 (Fla. 2003); *Grim v. State*, 841 So. 2d 455 (Fla. 2003); *Cole v. State*, 841 So. 2d 409 (Fla. 2003); *Anderson v. State*, 841 So. 2d

390 (Fla. 2003); *Lucas v. State/Moore*, 841 So. 2d 380 (Fla. 2003); *Porter v. Crosby*, 840 So. 2d 981 (Fla. 2003)("Contrary to Porter's claims, we have repeatedly held that the maximum penalty under the statute is death and have rejected the other *Apprendi* arguments."); *Fotopoulos v. State/Moore*, 838 So. 2d 1122 (Fla. 2003); *Bruno v. Moore*, 838 So. 2d 485 (Fla. 2002), *petition for cert. filed*, May 9, 2003, No. 02-10848; *Doorbal v. State*, 837 So. 2d 940 (Fla. 2003), *petition for cert. filed*, April 24, 2003, No. 02-10379; *Bottoson v. Moore*, 833 So. 2d 693 (Fla. 2002), *cert. denied*, 123 S.Ct. 662 (2002); *Chavez v. State*, 832 So. 2d 730, 767 (Fla. 2002), *cert. denied*, 2003 WL 2012625 (Fla. Jun. 23, 2003); *King v. Moore*, 831 So. 2d 143 (Fla. 2002), *cert. denied*, 123 S.Ct. 657 (2002); *Pace v. State/Crosby*, 28 Fla. L. Weekly S415 (Fla. May 22, 2003); *Jones v. State/Crosby,* 28 Fla. L. Weekly S395 (Fla. May 8, 2003); *Marquard v. State/Moore*, 28 Fla. L. Weekly S389, 27 Fla. L. Weekly S973, 978, n. 12 (Fla. Nov. 21, 2002); *Chandler v. State*, 28 Fla. L. Weekly S329, 333 n. 4 (Fla. Apr. 17, 2003); *Lawrence v. State*, 28 Fla. L. Weekly S241, 243-244 (Fla. Mar. 20, 2003).

B. ARIZONA CAPITAL SENTENCING LAW IS DIFFERENT

FROM FLORIDA'S, AS THIS COURT HAS HELD.[13]

The Arizona statute at issue in *Ring* is different from Florida's death sentencing statutes. That distinction, which is central to *Ring*, was not recognized by the United States Supreme Court in *Walton.* Because *Walton* was based on an incorrect interpretation of Arizona law, the suggestion that Florida's statute is invalid because *Walton* has been overruled is spurious. After *Ring*, no good faith argument can be made that Florida's statute is anything like Arizona's, especially in light of this Court's clear interpretation of Florida law (which is clearly not like Arizona law). The *Ring* Court stated:

> **Based solely on the jury's verdict finding Ring guilty of first-degree felony murder, the maximum punishment he could have received was life imprisonment.** *See* 200 Ariz., at 279, 25 P.3d, at 1151 (*citing Ariz. Rev. Stat*. § 13- 703). This was so because, in Arizona, a "death sentence may not legally be imposed ... unless at least one aggravating factor is found to exist beyond a reasonable doubt." 200 Ariz., at 279, 25 P.3d, at 1151 (citing § 13- 703). The question presented is whether **that** aggravating factor may be found by the judge, as Arizona law specifies, or whether the Sixth Amendment's jury trial guarantee, [FN3] made applicable to the States by the Fourteenth Amendment, requires that the aggravating factor determination be entrusted to the jury. [FN4]
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> FN3. "In all criminal prosecutions, the accused shall enjoy the right to a ...

[13] In *Mills v. Moore, infra,* the Florida Supreme Court discussed the operation of the Florida death sentencing statute, and explained how our statute is unlike Arizona's.

> trial, by an impartial jury ...."
>
> FN4. Ring's claim is tightly delineated: He contends only that the Sixth Amendment required jury findings on the aggravating circumstances asserted against him. No aggravating circumstance related to past convictions in his case; Ring therefore does not challenge *Almendarez-Torres v. United States*, 523 U.S. 224, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998), which held that the fact of prior conviction may be found by the judge even if it increases the statutory maximum sentence. He makes no Sixth Amendment claim with respect to mitigating circumstances. *See Apprendi v. New Jersey*, 530 U.S. 466, 490-491, n. 16, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000) (noting "the distinction the Court has often recognized between facts in aggravation of punishment and facts in mitigation" (citation omitted)). Nor does he argue that the Sixth Amendment required the jury to make the ultimate determination whether to impose the death penalty. *See Proffitt v. Florida*, 428 U.S. 242, 252, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976) (plurality opinion) ("[I]t has never [been] suggested that jury sentencing is constitutionally required."). He does not question the Arizona Supreme Court's authority to reweigh the aggravating and mitigating circumstances after that court struck one aggravator. *See Clemons v. Mississippi*, 494 U.S. 738, 745, 110 S.Ct. 1441, 108 L.Ed.2d 725 (1990). Finally, Ring does not contend that his indictment was constitutionally defective. *See Apprendi*, 530 U.S., at 477, n. 3, 120 S.Ct. 2348 (Fourteenth Amendment "has not ... been construed to include the Fifth Amendment right to 'presentment or indictment of a Grand Jury' ").

Ring v. Arizona, 536 U.S. at 597. [emphasis added]. Under

Arizona law, the determination of death **eligibility** takes place during the **penalty phase** proceedings, and requires the determination that an aggravating factor exists. Florida law is different.[14]

1. In Florida, death is the maximum sentence for capital murder.

"[T]he legislature, and not the judiciary, determines maximum and minimum penalties for violations of the law." *State v. Benitez*, 395 So. 2d 514, 518 (Fla. 1981). This Court, long before *Apprendi*,[15] concluded that the maximum sentence to which a Florida capital defendant is subject following conviction for capital murder is death.[16] *Apprendi* led to no change of any sort,

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[14] The claim that the indictment must contain the aggravators and that the jury must find them unanimously has been repeatedly rejected by this Court. *See, Vining v. State,* 637 So. 2d 921, 927 (Fla. 1994); *Fotopoulos v. State,* 608 So. 2d 784, 794 n.7 (Fla. 1992); *Lightbourne v. State,* 438 So. 2d 380 (Fla. 1983). Aggravators must, of course, be proven beyond a reasonable doubt.

[15] This Court's interpretation of Florida law is consistent with the description of Florida's capital sentencing scheme set out in *Proffitt v. Florida,* and echoed in *Barclay v. Florida,* 463 U.S. 939, 952 (1983) ("[I]f a defendant is found guilty of a **capital** offense, a separate evidentiary hearing is held before the trial judge and jury to determine his sentence."). **If the defendant were not eligible for a death sentence, there would be no second proceeding.**

[16] "**The maximum possible penalty described in the capital sentencing scheme is clearly death.**" *Mills, supra. See, e.g., Lightbourne v. State,* 438 So. 2d 380, 385 (Fla. 1983); *Sireci v. State,* 399 So. 2d 964 (Fla. 1981); *Mills v. Moore*, 786 So. 2d

by either the Legislature or this Court.[17]

2. Death eligibility in Florida is determined at the guilt stage.

In Florida, the determination of "**death-eligibility**" is made at the **guilt** phase of a capital trial, **not** at the penalty phase, as is the Arizona practice. This Court has unequivocally said what Florida's law is, just as the Arizona Supreme Court did. The difference between the two states' capital murder statutes is clear, and controls the resolution of the claim. Because death is the maximum penalty for first-degree murder in Florida (**and because it is not in Arizona**), Gudinas' *Apprendi/Ring* claim collapses because nothing triggers the *Apprendi* protections in the first place. *See, Barnes v. State,* 794 So. 2d 590 (Fla. 2001) (*Apprendi* not applicable when judicial findings did not increase maximum allowable sentence).

Nothing that takes place at the penalty phase of a Florida capital trial **increases** the authorized punishment for the

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532, 537-8 (Fla. 2001); *Porter v. Moore*, 28 Fla. L. Weekly S33 (Fla. June 20, 2002); *Sweet v. Moore,* 822 So. 2d 1269 (Fla. 2002).

[17] Whatever criticisms Gudinas may direct against the *Mills* decision cannot alter the fundamental fact that this Court's explanation of Florida's capital sentencing statutes has not changed. By correctly stating that *Apprendi* excluded capital cases, this Court did not ignore its responsibility in applying the applicable cases under Florida law as they applied to the statute.

offense of capital murder -- the penalty phase proceeding (which **includes** the jury) is the **selection** phase, which **follows** the eligibility determination, and which does not implicate the *Apprendi/Ring* issue. The state law issue which led to the constitutional violation in Arizona's capital sentencing statute has already been decided differently by this Court, and that decision (in *Mills* and the cases relying on it) differentiates and distinguishes Arizona's system from Florida's constitutional capital sentencing statute.

Section 782.04 of the *Florida Statutes* defines capital murder,

and Section 775.082 establishes that the maximum penalty for capital murder is death, in clear contrast to the Arizona statute, which does not. **Arizona, unlike Florida, does not define any offenses as "capital" in its criminal statutes.** There is no constitutional defect with Florida's statute.

3. *Ring* has no impact in Florida, and the decisions upholding the constitutionality of Florida law remain undisturbed.

Ring left intact all prior opinions upholding the constitutionality of Florida's death penalty scheme, including *Proffitt, supra, Spaziano v. Florida*, 468 U.S. 447 (1984), *Hildwin v. Florida*, 490 U.S. 638 (1989), *Barclay v. Florida,* 463

U.S. 939 (1983), and *Dobbert v. Florida,* 432 U.S. 282 (1977). As this Court has recognized, "[t]he Supreme Court has specifically directed lower courts to 'leav[e] to this Court the prerogative of overruling its own decisions.' *Agostini v. Felton*, 521 U.S. 203, 237, 117 S.Ct. 1997, 138 L.Ed.2d 391 (1997) (*quoting Rodriguez de Quijas v. Shearson/American Express, Inc.,* 490 U.S. 477, 484, 109 S.Ct. 1917, 104 L.Ed.2d 526 (1989))." *Mills v. Moore,* 786 So. 2d 532, 537(Fla. 2001).[18]

The United States Supreme Court did not disturb its prior decisions upholding the constitutionality of Florida's capital sentencing process, and that result is dispositive of Gudinas' claims. The Court had every opportunity to directly address *Apprendi/Ring* in the context of Florida's capital sentencing scheme, and expressly declined to do so. *Cf. Hodges v. Florida*, 506 U.S. 803 (1992), wherein the United States Supreme Court vacated the Florida Supreme Court's opinion for further consideration in light of *Espinosa v. Florida,* 505 U.S. 1079 (1992).

On June 28, 2002, the United States Supreme Court remanded

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[18] To rule in Gudinas' favor, this Court would have to overrule the five cases cited above, as well as *Clemons, infra, Cabana v. Bullock,* 474 U.S. 376 (1986), *Blystone v. California*, 494 U.S. 299, 306-7 (1990), *Harris v. Alabama, infra,* and *Gardner v. Florida,* 430 U.S. 349 (1977).

four cases in light of *Ring*: *Harrod v. Arizona,* 536 U.S. 953 (2002); *Pandeli v. Arizona,* 536 U.S. 953 (2002); *Sansing v. Arizona,* 536 U.S. 954 (2002); and *Allen v. United States*, 536 U.S. 953 (2002). None of those remands is surprising given that three are Arizona cases and the other is a Federal Court of Appeals decision based on *Walton v. Arizona, supra*. However, the Court **denied** certiorari in seven cases raising the "*Ring*" issue: *Brown v. Alabama*, 536 U.S. 964 (2002); *Mann v. Florida,* 536 U.S. 962 (2002); *King v. Florida*, 536 U.S. 962 (2002); *Bottoson v. Florida*, 536 U.S. 962 (2002); *Card v. Florida*, 536 U.S. 963 (2002); *Hertz v. Florida*, 536 U.S. 963 (2002); and *Looney v. Florida,* 536 U.S. 966 (2002). Obviously, if the Court had intended to apply *Ring* to Florida capital sentencing, it had every opportunity to do so. The fact that it did not speaks for itself. Further, and of even greater significance, the United States Supreme Court denied a stay of execution in an Oklahoma case which presented an issue predicated on *Ring* on July 23, 2002. *See, Cannon v. Oklahoma,* 536 U.S. 974 (2002). This Court should not accept Gudinas' invitation to "review" the decisions of the United States Supreme Court.

C. *RING* DOES NOT REQUIRE JURY SENTENCING, AND THIS COURT SHOULD NOT ACCEPT GUDINAS' INVITATION TO EXTEND *RING.*

Gudinas' argument that *Ring* requires jury sentencing is incorrect -- that is an Eighth Amendment argument, not a Sixth Amendment one, which confuses the additional procedures the Florida legislature provided to avoid arbitrary jury sentencing (which is the Eighth Amendment component) with the death-eligibility determination, which is the Sixth Amendment component, and which is the focus of *Apprendi/Ring.* In upholding the constitutionality of Florida's death sentencing scheme, the United States Supreme Court said:

> In light of the facts that the Sixth Amendment does not require jury sentencing, that the demands of fairness and reliability in capital cases do not require it, and that neither the nature of, nor the purpose behind, the death penalty requires jury sentencing, we cannot conclude that placing responsibility on the trial judge to impose the sentence in a capital case is unconstitutional.

Spaziano v. Florida, 468 U.S. 447, 464 (1984). *Apprendi/Ring* did not affect that pronouncement because it does not involve the jury's role in **imposing sentence** -- it only requires that the jury find the defendant death-eligible.

1. The death-eligibility determination is made at the guilt phase of a capital trial.

As discussed above, Florida law places the death-eligibility determination at the guilt phase of a capital trial -- that

necessarily satisfies the *Ring* "death eligibility" component. The jury (under *Ring*) only has to make the determination of **death eligibility** -- the judge may make the remaining findings. *Ring* speaks only to the finding of death eligibility; not aggravators, mitigators, or the weighing of them. *Ring*, *supra* (*"*What today's decision says is that the jury must find the existence of the fact that an aggravating factor existed.") (Scalia, J., concurring). When this statement by Justice Scalia is read in the context of Arizona's capital sentencing law, "aggravating factor" means the same thing as "death-eligibility factor," because Arizona (unlike Florida) makes the "eligibility for death" determination, as well as the selection determination, at the penalty phase. The United States Supreme Court has repeatedly acknowledged that there is no single, constitutional, scheme that a state must employ in implementing the death penalty. *Lowenfield v. Phelps,* 484 U.S. 231, 244 (1988); *Spaziano v. Florida,* 468 U.S. 447, 464 (1984); *Tuilaepa v. California*, 512 U.S. 967, 972 (1994).[19] *See also, Zant v.*

[19] California law places the eligibility determination at the guilt phase. *Tuilaepa, supra,* at 969 ("[T]o render a defendant eligible for the death penalty in a homicide case, we have indicated that the trier of fact must convict the defendant of murder and find one 'aggravating circumstance' (or its equivalent) at either the guilt or penalty phase."); *People v. Ochoa,* 26 Cal. 4th 398, 453-54, 28 P.3d 78 110 Cal. Rptr. 2d 324 (2001) (rejecting *Apprendi*-claim).

Stephens, 462 U.S. 862, 874-78 (1983). The constitution is satisfied when a Florida defendant is **convicted** of an offense for which death is the maximum sentence exposure because the conviction determines the fact of "eligibility for death.".

2. Florida law is different from Arizona's.

Ring did not eliminate the trial judge from the sentencing equation or in any fashion imply that Florida should do so. Under the Arizona capital sentencing statute, the "statutory maximum" for practical purposes is **life** until such time as a **judge** has found an aggravating circumstance to be present. An Arizona jury played no role in "narrowing" the class of defendants eligible for the death penalty upon conviction of first degree murder. As the Arizona Supreme Court described Arizona law, the statutory maximum sentence permitted **by the jury's conviction alone** is life. *Ring v. State*, 25 P.3d 1139, 1150 (Ariz. 2001).[20] Florida law is not like Arizona's. *Mills v. State,* 786 So. 2d 532 (Fla. 2001).

The distinction between a "sentencing factor" (*i.e.*:

[20] This Arizona statute is the one that the United States Supreme Court misinterpreted in *Walton. Ring, supra.* Because the United States Supreme Court's description of Arizona law was incorrect in *Walton* and *Apprendi*, Gudinas' efforts to argue that Florida law is "like the Arizona statute in *Walton*" are, at best, disingenuous because the Court was mistaken about the operation of Arizona law. Any comparison of the *Walton* statute to Florida is based upon a false premise.

"selection factor," under Florida's statutory scheme) and an element is sharply made in *Apprendi,* where the Court stated: "One need only look to the kind, degree, or range of punishment to which the prosecution is entitled for a given set of facts. **Each fact necessary for that entitlement is an element.**" *Apprendi v. New Jersey,* 530 U.S. at 462. [emphasis added]. A Florida defendant is eligible for a death sentence on conviction for capital murder, and a death sentence, under Florida's scheme, is not a "sentence enhancement," nor is it an "element" of the underlying offense. *Almendarez-Torres v. United States,* 523 U.S. 224 (1998); *McMillan v. Pennsylvania,* 477 U.S. 79 (1986). *See, Hildwin v. Florida,* 490 U.S. 638, 640-41 (1989). [emphasis added].[21] And, as Justice Scalia's concurrence emphasizes, ***Ring* is not about jury sentencing at all**:

> Those States that leave the ultimate life-or-death decision to the judge may continue to do so -- by requiring a prior jury finding of aggravating factor [in context, death-eligibility factor] in the sentencing phase or, more simply, by placing the aggravating-factor determination (where it logically belongs anyway) in the guilt phase."

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[21]"The Constitution permits the trial judge, acting alone, to impose a capital sentence." *Harris v. Alabama,* 513 U.S. 504, 515 (1995). Like Florida, Alabama law places the eligibility-for-death determination at the guilt phase. § 13A-5-40, *Ala. Stat.*

Ring, supra. Florida's capital sentencing scheme comports with those constitutional requirements.

3. Florida provides additional Eighth Amendment protection at the sentencing phase.

The Florida capital sentencing statue provides for the jury's participation.[22] The statute secures and preserves significant jury participation in narrowing the class of individuals eligible to be sentenced to death under both the Sixth and Eighth Amendments. *See, Spaziano v. Florida,* 468 U.S. at 464-5. Subsequently, the Court emphasized that a Florida jury's role is so vital to the sentencing process that the jury is a "co-sentencer." *Espinosa v. Florida*, 505 U.S. 1079 (1992). However, the *Espinosa* Court did not retreat from the premise of *Spaziano*:

> We have often recognized that there are many constitutionally permissible ways in which States may choose to allocate capital sentencing authority. . . . We merely hold that, **if a weighing State decides to place capital sentencing authority in two actors rather than one**, neither actor must be permitted to weigh invalid aggravating circumstances.

Espinosa v. Florida, 505 U.S. at 1082. [emphasis added].

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[22] Under the statute, the jury **must** find the existence of one or more aggravators **before** reaching the sub-section C recommendation stage. The penalty phase jury must conduct the sub-section A and B analysis before sub-section C comes into play.

4. The aggravators need not be set out in the indictment, nor must the sentence stage (selection stage) jury unanimously recommend a sentence.

Gudinas' claims that a death sentence requires juror unanimity, the charging of the aggravators in the indictment, or special jury verdicts are unsupported by *Ring*. These issues are **expressly** 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 Court's well-established rejection of these claims. *Sweet v. State*, 822 So. 2d 1269 (Fla. 2002) (prior decisions on these issues need not be revisited "unless and until" the United States Supreme Court recedes from *Proffitt v. Florida*, 428 U.S. 242 (1976)); *Cox v. State,* 819 So. 2d 705, 724 at n. 17 (Fla. 2002) (same).

Gudinas' argument that a unanimous jury recommendation is constitutionally required has been repeatedly rejected by this Court. *See, e.g., Looney v. State*, 803 So. 2d 656, 674 (Fla. 2001), *cert. denied*, 536 U.S. 966 (2002). *See, Way v. State*, 760 So. 2d 903, 924 (Fla. 2000), *cert. denied*, 531 U.S.1155 (2001) (Pariente, J., concurring)(noting that it is a statute that allows the jury to recommend the imposition of the death penalty based on a non-unanimous vote). And, even before *Apprendi*, this Court consistently held that a jury may recommend a death sentence on simple majority vote. *Thompson v. State*, 648

So. 2d 692, 698 (Fla. 1994) (reaffirming *Brown v. State*, 565 So. 2d 304, 308 (Fla. 1990)); *Alvord v. State*, 322 So. 2d 533 (Fla. 1975)(advisory recommendation need not be unanimous). After *Apprendi*, the Court has consistently rejected claims that *Apprendi* requires a unanimous jury sentencing recommendation. *Card v. State*, 803 So. 2d 613, 628 & n. 13 (Fla. 2001), *cert. denied*, 536 U.S. 963 (2002); *Hertz v. State*, 803 So. 2d 629, 648 (Fla. 2001), *cert. dneied*, 536 U.S. 963 (2002); *Brown v. Moore*, 800 So.2d 223 (Fla. 2001).

The United States Supreme Court has held that a finding of guilt does not need to be unanimous.[23] *Cf. Johnson v. Louisiana,* 406 U.S. 356 (1972); *Apodaca v. Oregon*, 406 U.S. 404 (1972). Jurors do not have to agree on the particular aggravators; are not required to agree on the particular theory of liability, *Schad v. Arizona*, 501 U.S. 624, 631 (1991); and may not be required to unanimously find mitigation. *McKoy v. North Carolina*, 494 U.S. 433 (1990); *Mills v. Maryland*, 486 U.S. 367 (1988). *Ring* simply affirms the distinction between "sentencing factors" and "elements" of an offense which have long been

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[23] *See also, People v. Fairbank*, 16 Cal.4th 1223, 1255, 947 P.2d 1321, 69 Cal. Rptr.2d 784 (1997) (unanimity not required as to existence of aggravators, weight given to them, or appropriateness of a sentence of death).

recognized. *See Ring* at 597 n.4.; *Harris v. United States*, 536 U.S. 545 (2002). And, to the extent that Gudinas claims, on pages 24-27 of his brief, that *Ring* requires that the aggravating circumstances be charged in the indictment and presented to a grand jury, that argument is based upon an invalid comparison of Federal cases, which have wholly different procedural requirements, to Florida's capital sentencing scheme.[24]

Ring's Sixth Amendment jurisprudence is satisfied by the conviction in Florida and by this Court's pronouncement that death is the maximum sentence available under Florida law for the offense of capital murder. These matters do not change the Eighth Amendment requirement of channeling of the jury's discretion, which is done, and must still be done under Florida law, at the penalty phase of a capital trial.[25] Florida law over-

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[24] Of course, the Fifth Amendment's grand jury clause has not been extended to the States under the Fourteenth Amendment. *Ring v. Arizona, supra,* at n.4, *citing*, *Apprendi v. New Jersey*, 530 U.S. 466, 477 n.3 (2000); *Hurtado v. California,* 110 U.S. 516 (1884) (holding that, in capital cases, the States are not required to obtain a grand jury indictment). This distinction, standing alone, is dispositive of the indictment claim.

[25] The most that can be said for the votes against a death sentence are that they amount to what can be called a "jury pardon". *Dougan v. State*, 595 So. 2d 1, 4 (Fla. 1992). The jury's vote reflects considered weighing of the aggravating and mitigating circumstances, not whether any particular juror rejected some or all of the aggravating circumstances. The only

meets the requirements of the Eighth Amendment, and satisfies the Sixth Amendment, as well. *See Pulley v. Harris, supra.*

Ring does not directly or indirectly preclude a judge from serving in the role of sentencer. There is no language in *Ring* which suggests that, once a defendant has been convicted of a capital offense, a judge may not hear evidence or make findings in addition to any findings a jury may have made. And, as Justice Scalia commented, "those States that leave the ultimate life-or-death decision to the judge **may continue to do so**." *Ring, supra.*

The United States Supreme Court's holding in *Clemons v. Mississippi* is dispositive:

> **Any argument that the Constitution requires that a jury impose the sentence of death or make the findings prerequisite to imposition of such a sentence has been soundly rejected by prior decisions of this Court**.

Clemons v. Mississippi, 494 U.S. 738, 745-6 (1990).

F. THE HABITUAL FELONY OFFENDER ACT CLAIM IS MERITLESS, IN ADDITION TO BEING PROCEDURALLY BARRED.

In addition to the challenge to his death sentence, Gudinas also argues that his sentences for attempted sexual battery and attempted burglary with an assault are invalid under *Apprendi.*

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conclusion that can be drawn from the jury's sentencing vote is that two jurors thought that life was a more appropriate sentence.

In addition to being untimely (for the reasons set out above), this claim is procedurally barred because it could have been but was not raised in Gudinas' prior Rule 3.850 motion.

Alternatively and secondarily, this claim is meritless under prevailing law. *Simmons v. State,* 782 So. 2d 1000 (Fla. 4th DCA 2001); *Wright v. State,* 780 So. 2d 216 (Fla. 5th DCA 2001); *see also, Eutsey v. State,* 383 So. 2d 219 (Fla. 1980) (upholding habitual felony offender statute). This claim is meritless.

CONCLUSION

WHEREFORE, based upon the foregoing, the State respectfully submits that the Circuit Court's order denying relief on Gudinas' successive Rule 3.850 motion should be affirmed in all respects because the *Apprendi/Ring* claim is procedurally barred, and, alternatively, meritless.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above

has been furnished by U.S. Mail to Leslie Anne Scalley, Capital Collateral Regional Counsel-Middle, 3801 Corporex Park Drive, Suite 210, Tampa, Florida 33619-1136, this _____ day of July, 2003.

_____
Of Counsel

CERTIFICATE OF COMPLIANCE

This brief is typed in Courier New 12 point.

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