IN THE FLORIDA SUPREME COURT
CASE NO. SC03-1955

FRANK WALLS, *Petitioner*

v.

JAMES V. CROSBY, *Respondent*.

RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

COMES NOW, Respondent, James V. Crosby, by and through undersigned counsel and responds as follows to the petition for writ of habeas corpus. For the reasons discussed, the petition should be denied.

FACTS AND PROCEDURAL HISTORY

The facts of the case and its procedural history are recited in the accompanying answer brief.

ISSUE I

IS *RING V. ARIZONA*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002) RETROACTIVE?

Walls contends that his death sentence violates *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002). The State respectfully disagrees. First, *Ring* is not retroactive. The Eleventh Circuit and five state supreme courts have held *Ring* is not retroactive. Moreover, numerous courts, including federal circuit courts, state supreme courts and Florida district courts, have held that *Apprendi*, which was the precursor to *Ring*, is not retroactive. *Ring* involves only half of an *Apprendi* error. So, if *Apprendi* does not warrant retroactive application, *Ring* cannot. Furthermore, this Court has repeatedly rejected *Ring* challenges to Florida's death penalty statute in both direct appeals and collateral review.[1]

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[1] To the extent that Walls is raising an ineffective assistance of appellate counsel claim for failing to raise a *Ring* claim in the direct appeal, the ineffectiveness claim must fail. Appellate counsel was not ineffective for failing to raise a Sixth Amendment right to jury trial challenge to judge-based capital sentencing because there was United States Supreme Court precedent directly contrary to that position. *Spaziano v. Florida*, 468 U.S. 447, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984); *Hildwin v. Florida*, 490 U.S. 638, 109 S.Ct. 2055, 104 L.Ed.2d 728 (1989); *Walton v. Arizona*, 497 U.S. 639, 110 S.Ct. 3047, 111 L.Ed.2d 511 (1990). Indeed, the United States Supreme Court reaffirmed *Walton* in 2000, in *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). It was not until 2002 in *Ring* that the United States Supreme Court overruled *Walton*. Appellate counsel is not ineffective for failing to

RETROACTIVITY

Walls asserts that *Ring* is retroactive relying on *Summerlin v. Stewart*, 341 F.3d 1082 (9th Cir. 2003), *cert. granted*, (December 1, 2003)(No. 03-526). Pet. at 8. However, neither *Ring*, nor *Apprendi v. New Jersey*, 530 U.S. 466 (2000), upon which it was based, are retroactive. Both *Apprendi* and *Ring* are rules of procedure, not substantive law. They both concern who decides a fact, *i.e.,* the jury or the judge, which is procedural. *Curtis v. United States*, 294 F.3d 841, 843 (7th Cir. 2002), *cert. denied*, 123 S.Ct 541 (2002)(holding *Apprendi* is not retroactive because it is not a substantive change in the law; rather, it "is about nothing but procedure" - who decides a given question (judge versus jury) and under what standard

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raise an issue with controlling precedent directly against the claim. Nor is appellate counsel ineffective for failing to anticipate a change in law. *State v. Lewis*, 838 So.2d 1102, 1122 (Fla. 2002)(rejecting an ineffective assistance of appellate counsel claim for failing to raise an *Apprendi* challenge citing *Nelms v. State*, 596 So.2d 441, 442 (Fla. 1992)(stating defense counsel cannot be held ineffective for failing to anticipate the change in the law)). This Court has rejected similar ineffective assistance of appellate counsel claims in the wake of *Ring*. *Cole v. State*, 841 So.2d 409, 429-430 (Fla. 2003)(rejecting an ineffectiveness of appellate counsel claim for failing to raise a constitutional challenge to Florida's death penalty statute based on *Apprendi*). However, Walls seems to be raising a straight *Ring* claim, which is not proper in a state habeas petition.

(preponderance versus reasonable doubt) and explaining that *Apprendi* did not alter which facts have what legal significance). New procedural rules are not applied retroactively.[2]

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[2] Florida uses the old constitutional test for retroactivity rather that the new *Teague* test. *Teague v. Lane*, 489 U.S. 288, 299-310 (1989); *Witt v. State*, 387 So.2d 922 (Fla. 1980). Florida courts should also adopt the *Teague* test for retroactivity. The *Witt* test of retroactivity was based on two United States Supreme Court cases dealing with retroactivity, *Linkletter v. Walker*, 381 U.S. 618 (1965), *and Stovall v. Denno*, 388 U.S. 293 (1967). The United States Supreme Court no longer uses these tests for determining retroactivity on collateral review because, as the *Teague* Court observed, the old *Linkletter/Stovall* test led to inconsistent results and disparate treatment of similarly situated defendants. *Teague*, 489 U.S. at 302-303. Both the Arizona and New Hampshire Supreme Court have adopted *Teague* for the pragmatic reason that the law regarding retroactivity is complex enough without requiring counsel and trial judges to apply different retroactivity tests. *State v. Tallard*, 816 A.2d 977, 980 (N.H. 2003); *State v. Slemmer*, 823 P.2d 41, 49 (Ariz. 1991). Moreover, *Witt* raises serious due process concerns. One of the prongs of *Witt* is that the new rule is constitutional in nature, implying that changes in the interpretation of a statute are automatically not retroactive, but it is changes in the meaning of the statute that raise actual innocence problems. *Bousley v. United States*, 523 U.S. 614 (1998)(noting that *Teague* applies to procedural rules, not when courts decide the meaning of a criminal statute and explaining that decisions involving a substantive federal criminal statute which hold that the statute does not reach certain conduct "necessarily carry a significant risk that a defendant stands convicted of an act that the law does not make criminal" citing *Davis v. United States*, 417 U.S. 333 (1974)). Any state with a retroactivity test which lacks a substantive/procedural distinction runs the risk of violating due process, just as the Pennsylvania Supreme Court did in *Fiore v. White*, 528 U.S. 23 (1999)(applying, in a habeas petition from a state conviction, a due process insufficiency of the evidence analysis when the element of the crime changed); *see also*

According to the federal test of retroactivity, *Teague v. Lane*, 489 U.S. 288 (1989), only "watershed" rules of criminal procedure which (1) greatly affect the accuracy and (2) alter understanding of the bedrock procedural elements essential to the fairness of a proceeding are applied retroactively. *Sawyer v. Smith*, 497 U.S. 227, 242 (1990)).[3]

Ring does not enhance the accuracy of the conviction or involve a bedrock procedural element essential to the fundamental fairness of a proceeding. Only those rules that seriously enhance accuracy are applied retroactively. *Graham v.*

Bunkley v. Florida, 538 U.S. 835 (2003)(remanding for reconsideration of a retroactivity issue where this Court employed the *Witt* test). Despite the canard about states being free to adopt any test of retroactivity, states without the equivalent of a substantive retroactivity test will encounter due process problems. Florida should adopt *Teague* to avoid these concerns.

[3] Under *Teague*, there are two exceptions to the general rule of non-retroactivity. The first exception, relating to substantive rules, requires retroactive application if the new rule places private conduct beyond the power of the State to proscribe or addresses a substantive categorical guarantee accorded by the Constitution, such as a rule prohibiting a certain category of punishment for a class of defendants because of their status or offense. *Saffle v. Parks*, 494 U.S. 484, 494, 108 L. Ed. 2d 415, 110 S. Ct. 1257 (1990). The second exception is for watershed rules of criminal procedure which implicate the fundamental fairness and accuracy of the criminal proceeding. *Ring* and *Apprendi*, because they are both new procedural rules, not substantive, involve only second exception, not the first.

Collins, 506 U.S. 461, 478 (1993)(explaining that the exception is limited to a small core of rules which seriously enhance accuracy). Jury involvement in capital sentencing does not enhance accuracy. Indeed, the *Ring* Court did not require jury involvement because juries were more rational or fair; rather, it was required regardless of fairness. The *Ring* Court explained that even if judicial factfinding were more efficient or fairer, the Sixth Amendment requires juries. *Ring*, 536 U.S. at 607 (observing that the Sixth Amendment jury trial right, however, does not turn on the relative rationality, fairness, or efficiency of potential factfinders). Jury sentencing does not increase accuracy. A jury is comprised of people who have never made a sentencing decision before. Furthermore, even if one views jury sentencing as equally accurate to judicial sentencing, jury involvement does not "seriously" enhance accuracy. Judicial sentencing is at least as accurate.

Federal Decisions

The Eleventh Circuit has held that *Ring* is not retroactive. In *Turner v. Crosby*, 339 F.3d 1247 (11th Cir. 2003), the Eleventh Circuit, using a *Teague* framework, determined that *Ring* was a new procedural rule, not a new substantive rule because "*Ring* altered only who decides . . ." The *Turner* Court concluded that

Ring did not alter the facts necessary to establish the aggravating circumstances or the standard of proof. The Court reasoned that because *Apprendi* was a procedural rule, it axiomatically follows that *Ring* is also a procedural rule. They concluded that the retroactivity analysis of *Apprendi* applies equally to *Ring*. The Eleventh Circuit also concluded that *Ring* does not warrant retroactive application under *Teague* because it does not enhance accuracy or fairness. The Court noted that pre-*Ring* sentencing procedure did not diminish the likelihood of a fair sentencing hearing. Rather, *Ring's* new rule, at most, would shift the fact-finding duties during Turner's penalty phase from an impartial judge to an impartial jury alone. The Eleventh Court explained that *Ring* was based on the Sixth Amendment right to a jury trial and not on a perceived, much less documented, need to enhance accuracy or fairness of the fact-finding in a capital sentencing context. The Eleventh Circuit relied on two state supreme court decisions holding that *Ring* was not retroactive as well as their own prior decision holding that *Apprendi* was not retroactive. *Colwell v. State*, 59 P.3d 463 (Nev. 2002); *State v. Towery*, 64 P.2d 828 (Ariz. 2003); *McCoy v. United States*, 266 F.3d 1245, 1258 (11th Cir. 2001), *cert. denied*, 536 U.S. 906 (2002). The *Turner* Court also relied

on United State Supreme Court precedent finding that *Apprendi* was not plain error. *United States v. Cotton*, 535 U.S. 625, 632-33, 122 S.Ct. 1781, 1786, 152 L.Ed.2d 860 (2002) (holding an indictment's failure to include the quantity of drugs was an *Apprendi* error but it did not seriously affect fairness, integrity, or public reputation of judicial proceedings and thus did not rise to the level of plain error).

The Ninth Circuit, however, in *Summerlin v. Stewart*, 341 F.3d 1082 (9th Cir. 2003), *cert. granted*, (December 1, 2003)(No. 03-526), held that *Ring* was retroactive. The Ninth Circuit reasoned that *Ring* is substantive and changes in substantive law are automatically retroactive under *Bousley v. United States*, 523 U.S. 614 (1998). Alternatively, the Ninth Circuit held that even if *Ring* is procedural, it is still retroactive under *Teague*. The Ninth Circuit reasoned that the second exception to *Teague* applied because jury factfinding seriously enhances the accuracy of capital sentencing proceedings and the right to a jury trial is a bedrock procedural element. The Ninth Circuit also held that *Ring* errors are not subject to harmless error analysis.

However, contrary to the Ninth Circuit's reasoning, *Ring* is not substantive. While *Bousley* did limit *Teague* to procedural

rules, it did so because of the danger present when courts decide the meaning of a criminal statute. Decisions, involving a substantive federal criminal statute, which hold that the statute does not reach certain conduct "necessarily carry a significant risk that a defendant stands convicted of an act that the law does not make criminal" *Bousley* citing *Davis v. United States*, 417 U.S. 333 (1974). Changes in substantive law are applied retroactively because they raise the possibility of legal innocence. When the definition of an element of a crime is changed, it raises the possibility that a defendant has been convicted of conduct that is not criminal under the correct definition. *Ring* does not involve any possibility of legal innocence or legally innocent of the death penalty. *Ring* did not decide the scope of a criminal statute. Statutory interpretation was not at issue in either *Ring* or *Summerlin*.[4]

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[4] The Ninth Circuit seems to imply that the meaning of a criminal statute was at issue because the prosecution was based on a criminal statute. This is true of all Arizona prosecutions because Arizona, like many states, has abolished common law crimes. *State v. Cotton*, 5 P.3d 918, 920-921 (Ariz. App. Ct. 2000)(explaining that "[w]hen the Arizona Legislature revised the criminal code in 1978, the drafters abolished all common law crimes and provided that '[n]o conduct or omission constitutes an offense unless it is an offense under this title or under another statute or ordinance.' citing A.R.S. § 13-103 (1989)). The great majority of prosecutions are bottomed on statutes. *Cf. United States v. Hudson & Goodwin*, 11 U.S. (7 Cranch) 32 (1812)(prohibiting federal common law crimes). Under this logic, nearly all prosecutions are substantive and therefore, nearly

Nor did *Ring* create the concept of narrowers. Arizona required narrowers, *i.e.*, aggravators, by statute, prior to *Ring*. The substantive law regarding aggravators in Arizona did not change in the wake of *Ring* and was not at issue in *Summerlin*. Therefore, *Ring* is not substantive and *Bousley* does not apply.

The *Summerlin* majority gave five reasons for its belief that juries seriously enhance the accuracy of capital sentencing proceedings compared to judges: (1) presentation of inadmissible evidence to judges; (2) truncated and informal presentation of evidence and argument; (3) judge's decision did not reflect the "the conscience of the community"; (4) judges' view of the capital sentencing process as being "routine"; and (5) the political pressure on judges facing election. The first and second observations are *non sequiturs*. They concern alleged flaws in penalty phase proceedings, not the accuracy of judge versus jury sentencing. Garbage in, garbage out is true regardless of who hears the garbage. Juries, like judges, are also exposed to victim impact statements and inadmissible

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all cases are automatically retroactive. However, it is not the mere presence of a criminal statute that gives rise to *Bousley* concerns; rather, it is defining a crime in a manner that excluded certain conduct from its reach that raises *Bousley* concerns. *Ring* raises no such concerns.

hearsay during penalty phase.[5] Unlike juries, however, judges are trained to think about the accuracy of hearsay. The third and fifth observations are contradictory. Either judges live in ivory towers far from the maddening crowd or they respond to the community's desires due to the political pressures of elections. Judges are either out of touch with the community OR they are in touch with the community; they cannot be both. The fourth observation is just plain silly. The Ninth Circuit uses descriptions such as "acclimation" to the capital sentencing process, "routine", "habituation" brought about by imposing

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[5] § 921.141(7), Fla. Stat. (2002)(providing that the prosecution may introduce, and subsequently argue, victim impact evidence, once it has provided evidence of one aggravating circumstance); *Windom v. State*, 656 So. 2d 432, 438 (Fla. 1995)(rejecting an argument that victim impact evidence amounts to nonstatutory aggravation);§ 921.141(1), Fla. Stat. (2002)(providing any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements); *Rodriguez v. State*, 753 So. 2d 29, 47 (Fla. 2000)(noting that under § 921.141, the appropriate test for determining whether hearsay evidence is admissible is whether the evidence is relevant and probative of the defendant's guilt and explaining as the prejudicial nature of the hearsay does not outweigh its probative value and the defendant has an opportunity to rebut the hearsay, it is admissible); 21 U.S.C. § 848(j)(providing "information relevant to such mitigating or aggravating factors may be presented by either the Government or the defendant, regardless of its admissibility under the rules governing admission of evidence at criminal trials, except that information may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury,").

capital punishment under "near rote conditions" and "just another criminal sentence" to describe judges' view of capital sentencing. Translated, this means that judges are experienced in capital sentencing and juries are not. Experience increases accuracy. Judges have extensive prior experience with factfinding and are legally trained. The *Ring* Court, itself, explained that while judge fact-finding may be more efficient, the Sixth Amendment requires juries. Regardless of the superiority of judicial factfinding, the Sixth Amendment requires juries. The *Ring* Court also noted that the superiority of judicial factfinding in capital cases was far from evident. *Ring*, 536 U.S. at 607. However, the *Ring* Court did not take the position that jury factfinding was superior to judicial factfinding as the Ninth Circuit did. Judges are actually more accurate than juries due to their experience and legal training. Because judges are at least as accurate as juries in their fact-finding, *Ring* does not seriously enhance accuracy in capital sentencing and therefore, does not meet this prong of *Teague*.

The Ninth Circuit holding that *Ring* is retroactive is contrary to its prior holding that *Apprendi* is not retroactive. *United States v. Sanchez-Cervantes*, 282 F.3d 664, 667 (9th Cir. 2002), *cert. denied*, 537 U.S. 939 (2002)(holding *Apprendi* does

not meet either prong of *Teague* because it does not decriminalize conduct and does not involve the accuracy of the conviction and therefore, *Apprendi* is not to be retroactively applied). *Ring* was an extension of *Apprendi* to capital cases. Logically, if *Apprendi* is not retroactive, then neither is *Ring*. *In re Johnson*, 334 F.3d 403, 405 n.1 (5th Cir. 2003)(declining to reach the issue of the retroactivity of *Ring* but questioning whether *Ring* can be retroactive because *Apprendi* is not retroactive in the circuit and noting that "logical consistency" suggests that *Ring* is not retroactive since *Ring* is essentially an application of *Apprendi*). As to the Ninth Circuit's finding that because the issue involved the Sixth Amendment right to a jury trial, the matter involved a bedrock procedural element essential to fairness, the United States Supreme Court's precedent does not support the view that cases involving the Sixth Amendment right to a jury trial are automatically bedrock. The United States Supreme Court has previously declined to apply cases retroactively that involve the right to a jury trial. *DeStefano v. Woods*, 392 U.S. 631, 633 (1968)(holding that the right to jury trial in state prosecutions was not retroactive and "should receive only prospective application."). As to the Ninth Circuit's holding

that *Ring* errors are not subject to harmless error analysis, the United States Supreme Court's precedent does not support that view either. While the Court has not directly addressed whether *Ring* errors are subject to harmless error analysis, it has held that *Apprendi* errors are not plain error. *United States v. Cotton*, 535 U.S. 625 (2002)(holding an *Apprendi* claim is not plain error where the indictment failed to include the quantity of drugs because the *Apprendi* error did not seriously affect fairness, integrity, or public reputation of judicial proceedings). Moreover, the United States Supreme Court has held that the omission of an element of a crime can be harmless in *Neder v. United States*, 527 U.S. 1 (1999). While the Ninth Circuit attempts to distinguish *Neder*, the only difference is that *Neder* was a non-capital case. *Summerlin* at n.20. But death is not different for purpose of harmless error analysis or retroactivity analysis. *Mitchell v. Esparza,* 124 S.Ct. 7 (2003)(noting that harmless error has been applied to capital cases); *Penry v. Lynaugh*, 492 U.S. 302, 313-314 (1989)(holding that *Teague* principles apply to capital sentencing). Thus, the *Summerlin* Court's conclusion that *Ring* was a bedrock procedural element merely because it involved the Sixth Amendment is contrary to United States Supreme Court precedent. *Ring* does

not meet this prong of *Teague* either.

State Decisions

Five state supreme courts have held that *Ring* is not retroactive. In *State v. Lotter*, 664 N.W.2d 892 (Neb. 2003), the Nebraska Supreme Court, using the *Teague* test, held that *Ring* was not retroactive. In 1996, a three-judge panel sentenced Lotter to death. Lotter contended *Ring* is substantive, not procedural, and therefore, *Teague* did not apply. The *Lotter* Court concluded that *Ring* was procedural. The Nebraska Supreme Court explained that a substantive rule is one which determines the meaning of a criminal statute or addresses the criminal significance of certain facts; whereas, a procedural rule is one which determines fact-finding procedures to ensure a fair trial. They observed that *Ring* altered *who* decides whether any aggravating circumstances exist, thereby altering fact-finding procedures. They explained that there are two exceptions to the general rule of nonretroactivity announced in *Teague*. *Ring* did not fall within the first *Teague* exception because *Ring* "clearly does not place any type of primary, private individual conduct beyond the power of the criminal lawmaking authority to proscribe." Nor did *Ring* fall

within the second *Teague* exception because *Ring* could not be viewed as enhancing the accuracy of the sentence. The *Lotter* Court discussed the Arizona Supreme Court's decision in *State v. Towery*, 64 P.3d 828 (Ariz. 2003), and the Nevada Supreme Court's decision in *Colwell v. State*, 59 P.3d 463 (Nev. 2002), both of which had held that *Ring* was not retroactive. The *Lotter* court found the numerous decisions from state and federal courts finding *Apprendi* not to be retroactive highly persuasive because *Ring* was based on *Apprendi*. The *Lotter* court also found guidance in the United States Supreme Court's recent decision in *United States v. Cotton*, 535 U.S. 625 (2002), which held that an *Apprendi* error is not plain error. The Nebraska Supreme Court concluded that *Ring* announced a new constitutional rule of criminal procedure which does not fall within either of the *Teague* exceptions and thus, does not apply retroactively.[6]

In *Colwell v. State*, 59 P.3d 463 (Nev. 2002), the Nevada Supreme Court held that *Ring* was not retroactive. In his state post-conviction petition, Colwell contended that his sentencing by a three-judge panel violated his Sixth Amendment right to a

[6] The Nebraska Supreme Court had previously granted relief based on *Ring* in a direct appeal. *State v. Gales*, 658 N.W.2d 604 (Neb. 2003)(remanding for a new penalty phase). Nebraska was judge only sentencing, unlike Florida which is a hybrid state. *Ring*, 536 U.S. 584 at n.6; Neb. Rev. Stat. § 29-2520 (1995).

jury trial established in *Ring*. The *Colwell* Court explained that in *Ring*, the United States Supreme Court held that it was impermissible for a sentencing judge, sitting without a jury, to find an aggravating circumstance necessary for imposition of the death penalty. However, the Court declined to apply *Ring* retroactively on collateral review. *Colwell*, 59 P.3d at 469-472. The Nevada Supreme Court used an expanded *Teague* test to determine retroactivity. The *Colwell* Court reasoned that *Ring* does effect the accuracy of the sentence. The *Colwell* Court explained that the United States Supreme Court, in *Ring,* did not determine that factfinding by the jury was superior to factfinding by a judge; rather, the United States Supreme Court stated that "the superiority of judicial factfinding in capital cases is far from evident". The *Colwell* Court explained that *Ring* was based simply on the Sixth Amendment right to a jury trial, not on enhanced accuracy in capital sentencings, and does not throw into doubt the accuracy of death sentences decided by three-judge panels. They concluded that the likelihood of an accurate sentence was not seriously diminished simply because a three-judge panel, rather than a jury, found the aggravating circumstances. *Colwell*, 59 P.3d at 473.

In *State v. Towery*, 64 P.2d 828 (Ariz. 2003), the Arizona

Supreme Court also held that *Ring* is not retroactive. Following a *Teague* analysis, the Arizona Supreme Court first determined that *Ring* was a new rule but that the new rule was procedural, not substantive. The *Towery* Court reasoned that *Ring* did not determine the meaning of a statute, nor address the criminal significance of certain facts, nor the underlying prohibited conduct; rather, *Ring* set forth a fact-finding procedure designed to ensure a fair trial. *Ring* altered who decided whether aggravating circumstances existed. The *Towery* Court noted that the *Apprendi* Court itself described the issue as procedural. *Apprendi*, 530 U.S. at 475, 120 S.Ct. 2348 (stating that: "[t]he substantive basis for New Jersey's enhancement is thus not at issue; the adequacy of New Jersey's procedure is."). Because *Ring* was merely an extension of *Apprendi*, logic dictates that if *Apprendi* announced a new procedural rule, then so did *Ring*. Therefore, *Ring* was procedural. Nor did *Ring* announce a watershed rule because it did not seriously enhance accuracy nor alter bedrock principles necessary to fairness. It did not seriously enhance accuracy because *Ring* merely shifted the duty from an impartial judge to an impartial jury. Nor is allowing an impartial jury to determine aggravating circumstances, rather than an impartial judge, implicit in the

concept of ordered liberty. The *Towery* Court found *DeStefano v. Woods*, 392 U.S. 631, 88 S.Ct. 2093, 20 L.Ed.2d 1308 (1968), which held that the right to a jury trial was not to be applied retroactively, "particularly persuasive".[7]

The Georgia Supreme Court, using federal retroactivity principles, has also held that *Ring* was not retroactive. *Head v. Hill*, 587 S.E.2d 613 (Ga. 2003)(rejecting a claim that *Ring* required any finding of mental retardation be made by the jury rather than a judge). The Mississippi Supreme Court has decline to apply *Ring* retroactively. *Stevens v. State*, 2003 Miss. LEXIS 822 (Miss. December 11, 2003)(noting the conflict between Ninth Circuit in *Summerlin v. Stewart*, 341 F.3d 1082, 1121 (9th Cir. 2003), *cert. granted sub nom. Schriro v. Summerlin*, 2003 U.S. LEXIS 8574, 72 U.S.L.W. 3370 (U.S. Dec. 1, 2003) (No. 03-526) and the Eleventh Circuit in *Turner v. Crosby*, 339 F.3d 1247, 1279-86 (11th Cir. 2003) but declining to apply *Ring*

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[7] The Arizona Supreme Court analyzed the retroactivity of *Ring* using a *Teague* test but also analyzed the issue using the test of *Allen v. Hardy*, 478 U.S. 255 (1986). Under the *Allen* framework, the court weighed three factors:(a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards. The Arizona Supreme Court concluded that *Ring* was not retroactive under *Allen* either. The *Allen* test is similar to Florida's *Witt* test. So, *Ring* is not retroactive under *Witt* either.

retroactively "until instructed otherwise by the Supreme Court.").

One state supreme court had held that *Ring* is retroactive. In *State v. Whitfield*, 107 S.W.3d 253 (Mo. 2003), the Missouri Supreme Court reopened a direct appeal by recalling the mandate. The *Whitfield* Court held that all four steps in the penalty phase including any factual findings related to mitigation and any balancing of aggravation versus mitigation, not just the finding of one aggravator, must be made by the jury. The *Whitfield* Court declined to adopt the federal test of retroactivity announced in *Teague*. The *Whitfield* Court held that *Ring* was retroactive under the old *Linkletter/Stovall* test.[8] The *Whitfield* Court determined that the remedy was imposition of a life sentence, not a remand for a new jury to determine the penalty.

The United States Supreme Court has disapproved the practice of using motions to recall the mandate to reopen cases that are final minus "extraordinary circumstances" involving "grave, unforeseen contingencies." *Calderon v. Thompson*, 523 U.S. 538 (1998)(finding a "grave" abuse of discretion in a federal appellate court granting a motion to recall the mandate in a

[8] *Linkletter v. Walker*, 381 U.S. 618 (1965); *Stovall v. Denno*, 388 U.S. 293 (1967).

habeas case because of the "profound interests in repose attaching to the mandate" and the State's interest in finality which is "all but paramount"). A change in law is not an "extraordinary circumstance" involving "grave, unforeseen contingencies." Indeed, the *Calderon* Court suggested that only a strong showing of actual innocence would outweigh the State's interests in finality and thus, justify the recalling of a mandate. No appellate court, state or federal, should recall a mandate six years after it was issued merely because of a subsequent development in the law.

However, having done so, the Missouri Supreme Court does not recognize the consequence of its actions. Because the Missouri Supreme Court recalled the mandate of the direct appeal, the result was to render the case still pending on direct appeal. The recalling of the mandate made the case unfinal. *Whitfield* is now a direct appeal case. Retroactivity in collateral review is not an issue in a case pending on direct review. Any new rule applies to a case on direct review regardless of whether the rule existed at the time of the trial. *Griffith v. Kentucky*, 479 U.S. 314, 328 (1987)(holding that a new rule for the conduct of criminal prosecutions is to be applied to all cases, state or federal, pending on direct review or not yet final). The *Whitfield* Court's entire discussion of *Teague* and the

retroactivity of *Ring* is rendered dicta by the recalling of the direct appeal mandate.

The Missouri Supreme Court had previously held that *Apprendi*, upon which *Ring* was based, was not retroactive. *Whitfield*, 107 S.W.3d at 267 at n.13. So, according to the Missouri Supreme Court, *Apprendi* is not retroactive, but *Ring* is. The Missouri Supreme Court provides no explanation for these incongruous holdings. *Apprendi* involved both the right to a jury trial and the due process standard of proof. *Ring* involves only the right to a jury trial, not the standard of proof, because most, if not all states, including Missouri, determined the existence of aggravators at the higher, beyond a reasonable doubt, standard of proof prior to *Ring*.[9] Aggravators were already decided at the higher standard of proof before *Apprendi* or *Ring*. The standard of proof wing is probably the more critical part of *Apprendi* in terms of accuracy and that wing is not at issue in a capital case. The "who" wing of *Apprendi* is the only part at issue in a *Ring* claim. So, *Ring*

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[9] In Florida, aggravators are found beyond a reasonable doubt. *Geralds v. State*, 601 So.2d 1157, 1163 (Fla. 1992)(stating it is axiomatic that the State is required to establish the existence of an aggravating circumstance beyond a reasonable doubt). Florida has always required the higher standard of proof in this area. *State v. Dixon*, 283 So.2d 1, 9 (Fla. 1973).

actually is only half of *Apprendi* and the least important half at that. If *Apprendi* is not retroactive, then half of *Apprendi* cannot be.

The holding that all steps must be made by the jury is tantamount to a holding that the jury, not the judge, must be the ultimate sentencer in a capital case which is a conclusion specifically rejected by Justice Scalia in his *Ring* concurrence. *Ring*, 122 S.Ct. at 2445 (Scalia, J., concurring)(stating that "today's judgment has nothing to do with jury sentencing" and "[t]hose States that leave the ultimate life-or-death decision to the judge may continue to do so . . ."). Furthermore, the *Whitfield* Court's remedy of an automatic life sentence is based on a misreading of *Sattazahn v. Pennsylania*, 537 U.S. 101 (2003). *Whitfield*, 107 S.W.3d at n.20. The *Sattazahn* Court concluded that there was no double jeopardy bar to a new penalty phase after the first jury hung on the penalty and, pursuant to a state statute, the judge imposed a life sentence because there were no factual findings in favor of acquittal by either the jury or judge. The Court explained that it is not the mere imposition of a life sentence that raises a double-jeopardy bar. Rather, an "acquittal" of the death penalty is required and that means that the jury found that no aggravating circumstances existed. As the *Sattazahn* Court characterized it, the jury

deadlocking at 9 to 3 was a "non-result". And the judge's determination was not an acquittal either, because the judge had no discretion pursuant to the statute but to impose a life sentence. The judge made no findings and resolved no factual matters. As the *Sattazahn* Court characterized it, the judge's decision was a "default judgment" required by statute. In *Whitfield*, the penalty phase jury also hung but, unlike *Sattazahn*, the judge imposed death. In *Whitfield*, the jury made no decision and the judge imposed death, not life. The *Whitfield* Court improperly reasoned that as a matter of law that the judge was required to enter a life sentence when the death sentence is unconstitutional. However, this was the exact reasoning the *Sattazahn* Court rejected when it rejected any "statutory entitlement to life" argument. An acquittal, for double jeopardy purposes, is determined as a matter of fact by a fact finder, not as a matter of law. Contrary to the reasoning of the *Whitfield* Court, there is nothing "hollow" about a defendant having his penalty determined by a jury in a new penalty phase. The correct remedy for a violation of the Sixth Amendment right to a jury trial is to provide the defendant with a jury. A determination by appellate court fiat is not the correct remedy.

While only a few courts have addressed the retroactivity of

Ring, numerous court have addressed the related issue of whether *Apprendi* is retroactive. Three Florida District Courts have held that *Apprendi* is not retroactive. *Figarola v. State*, 841 So.2d 576 (Fla. 4th DCA 2003)(concluding that *Apprendi* would not be retroactive under either *Witt* or *Teague* but certifying the question as one of great public importance); *Hughes v. State*, 826 So.2d 1070 (Fla. 1st DCA 2002)(holding that *Apprendi* did not apply retroactively to a claim being raised under rule 3.800 based on a *Witt* analysis), *rev. granted*, 837 So.2d 410 (Fla. 2003); *Gisi v. State,* 848 So.2d 1278, 1282 (Fla. 2d DCA 2003)(stating, in dicta, *Apprendi* does not apply retroactively to sentences that were final prior to its issuance).[10] All eleven federal circuits that have addressed the issue have held that *Apprendi* is not retroactive.[11] Recently, the Second Circuit

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[10] Briefing is complete and the oral argument has been held in *Hughes*. *Hughes*, SC02-2247. This Court issued an order to stay the proceedings pending resolution of *Hughes* in *Figarola*, SC03-586.

[11] *Sepulveda v. United States*, 333 F.3d 55 (1st Cir. 2003)(discussed *infra*); *United States v. Coleman*, 329 F.3d 77 (2d Cir. 2003)(discussed *infra*); *United States v. Swinton*, 333 F.3d 481 (3d Cir. 2003)(relying on the Supreme Court's own description of *Apprendi* as procedural and holding *Apprendi* is not retroactive); *United States v. Jenkins*, 333 F.3d 151 (3d Cir. 2003)(holding *Apprendi* is procedural and not retroactive); *United States v. Sanders*, 247 F.3d 139, 146-51 (4th Cir. 2001), *cert. denied*, 535 U.S. 1032 (2001)(explaining that because *Apprendi* is not retroactive in its effect, it may not be used as

joined "this chorus". *United States v. Coleman*, 329 F.3d 77 (2d Cir. 2003). The *Coleman* Court reasoned that, while *Apprendi* was a "new" rule of law, it was a procedural rule, not a substantive rule. New substantive rules change the definition of a crime and therefore create a risk that the defendant was convicted of

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a basis to collaterally challenge a conviction); *United States v. Brown*, 305 F. 3d 304 (5th Cir. 2002), *cert. denied*, - U.S. -, 123 S. Ct. 1919, 155 L. Ed. 2d 840 (2003)(holding *Apprendi* is not retroactive because it is a new rule of criminal procedure, not a new substantive rule and is not a "watershed" rule that improved the accuracy of determining the guilt or innocence of a defendant); *Goode v. United States*, 305 F. 3d 378 (6th Cir. 2002), *cert. denied*, - U.S. -, 123 S.Ct. 711, 154 L. Ed. 2d 647 (2002)(holding *Apprendi* is not a watershed rule citing *Neder v. United States*, 527 U.S. 1, 15 (1999)); *Curtis v. United States*, 294 F.3d 841 (7th Cir. 2002), *cert. denied*, - U.S. -, 123 S.Ct 541, 154 L. Ed. 2d 334 (2002)(holding *Apprendi* is not retroactive because it is not a substantive change in the law; rather, it "is about nothing but procedure" and it is not fundamental because it is not even applied on direct appeal unless preserved); *United States v. Moss*, 252 F.3d 993, 1000-1001 (8th Cir. 2001), *cert. denied*, 534 U.S. 1097 (2002)(holding that *Apprendi* is not of watershed magnitude and that *Teague* bars petitioners from raising *Apprendi* claims on collateral review); *United States v. Sanchez-Cervantes*, 282 F.3d 664, 667 (9th Cir. 2002), *cert. denied*, 537 U.S. 939 (2002)(holding *Apprendi* does not meet either prong of *Teague* because it does not criminalize conduct and does not involve the accuracy of the conviction and therefore, *Apprendi* is not to be retroactively applied); *United States v. Mora*, 293 F.3d 1213, 1219 (10th Cir. 2002), *cert. denied*, - U.S. -, 123 S.Ct. 388, 154 L. Ed. 2d 315 (2002)(concluding *Apprendi* is not a watershed decision and hence is not retroactively applicable to initial habeas petitions); *McCoy v. United States*, 266 F.3d 1245, 1258 (11th Cir. 2001), *cert. denied*, 536 U.S. 906 (2002)(holding that the new constitutional rule of procedure announced in *Apprendi* does not apply retroactively on collateral review).

an act that is no longer criminal. To mitigate such a risk, new rules of substantive law are applied retroactively. Because new procedural rules create no such risk, they are not applied retroactively. The Second Circuit noted that *Apprendi* itself said that the substantive basis of New Jersey's enhancement was not at issue; rather, it was the adequacy of its procedures. *Coleman,* citing *Apprendi*, 530 U.S. at 475 and *McCoy*, 266 F.3d at 1257 n.16. The *Coleman* Court rejected the argument that *Apprendi* was substantive because it turned a sentencing factor into an element. The fact of drug quantity was a fact in dispute that had to be proven before *Apprendi*. *Apprendi* merely changed who decided the fact and at what standard of proof. Drug quantity was always an element in the sense that it was something that the government had to prove to someone at some standard. The fact was not "new" in this sense and therefore, was not truly a new element.

The First Circuit has also recently held that *Apprendi* is not retroactive. *Sepulveda v. United States*, 333 F.3d 55 (1st Cir. 2003). The *Sepulveda* Court held that *Apprendi* is not retroactive because it does not seriously enhance the accuracy of convictions. While an *Apprendi* error may raise questions as to the length of his sentence, inaccuracies of this nature,

occurring after a defendant has been duly convicted by a jury beyond a reasonable doubt are matters of degree and do not trump the general rule of nonretroactivity. The First Circuit explained that the length of the sentence was "not plucked out of thin air, but, rather, was determined by a federal judge based upon discrete findings of fact established by a fair preponderance of the evidence." The First Circuit agreed with the Seventh Circuit's observation that findings by federal judges, though now rendered insufficient in certain instances by *Apprendi*, are adequate to make reliable decisions about punishment because "[a]fter all, even in the post-*Apprendi* era, findings of fact made by the sentencing judge, under a preponderance standard, remain an important part of the sentencing regimen." The First Circuit noted that watershed rules of criminal procedure are "hen's-teeth" rare. They noted the Supreme Court is reluctant to establish rules that enjoy the venerated status of watershed. A decision by a judge (on the preponderance standard) rather than a jury (on the reasonable-doubt standard) is not the sort of error that undermines the fairness of judicial proceedings. The First Circuit also noted that applying *Apprendi* retroactively would create an unacceptably high risk that those found guilty of criminal conduct might escape suitable punishment. They observed that

although the *Apprendi* rule is important as a means of clarifying the proper factfinding roles of judge and jury, it affords an innocent defendant no additional shield from wrongful conviction. They rejected any reliance upon Justice O'Connor's characterization, in her dissent, of *Apprendi* as "a watershed change in constitutional law" because her concern was a practical one regarding the "flood of petitions by convicted felons seeking to invalidate their sentences" that the decision would cause. Several state supreme courts have held that *Apprendi* is not retroactive either.[12]

While the *Ring* Court did not address the retroactivity of their new decision, Justice O'Connor, in her dissent stated that *Ring* was not retroactive. *Ring v. Arizona*, 122 S.Ct. 2428, 2449-2450(2002)(O'Connor, J., dissenting)(noting that capital defendants will be barred from taking advantage of the holding

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[12] *People v. De La Paz*, 791 N.E.2d 489 (Ill. 2003)(holding *Apprendi* is not retroactive); *State v. Tallard*, 816 A.2d 977 (N.H. 2003)(reasoning that *Apprendi* is not retroactive because it is not a watershed rule of criminal procedure that increases the reliability of the conviction); *Whisler v. State*, 36 P.3d 290 (Kan. 2001)(holding that *Apprendi* is not retroactive because it is procedural rather than substantive and is not a watershed rule of criminal procedure that implicates the fundamental fairness of trial), *cert. denied*, 122 S.Ct. 1936 (2002); *State ex rel. Nixon v. Sprick*, 59 S.W.3d 515, 520 (Mo. 2001)(holding in *Apprendi* is not applied retrospectively to cases on collateral review relying on *Dukes v. United States*, 255 F.3d 912, 913 (8th Cir. 2001)).

on federal collateral review, citing 28 U.S.C. §§ 2244(b)(2)(A), 2254(d)(1) and *Teague*). The United States Supreme Court has refused to apply right to jury trial cases retroactively in prior cases. *DeStefano v. Woods*, 392 U.S. 631, 633 (1968)(holding that the right to jury trial in state prosecutions was not retroactive and "should receive only prospective application."). The United States Supreme Court recently held that an *Apprendi* claim is not plain error. *United States v. Cotton*, 535 U.S. 625 (2002)(holding an indictment's failure to include the quantity of drugs was an *Apprendi* error but it did not seriously affect fairness, integrity, or public reputation of judicial proceedings, and thus did not rise to the level of plain error). If an error is not plain error, the United States Supreme Court will not find the error of sufficient magnitude to allow retroactive application of such a claim in collateral litigation. *United States v. Sanders*, 247 F.3d 139, 150-151 (4th Cir. 2001)(emphasizing that finding something to be a structural error would seem to be a necessary predicate for a new rule to apply retroactively under *Teague* and because *Apprendi* claims have been found to be subject to harmless error, a necessary corollary is that *Apprendi* is not retroactive). Thus, the United States Supreme Court will not

apply *Ring* retroactively either.

This Court has never addressed the issue of the retroactivity of *Ring*. This Court should address the question, adopt *Teague* and hold that *Ring* is not retroactive.

MERITS

The Florida Supreme Court rejected a *Ring* challenge to Florida's death penalty statute in *Bottoson v. Moore*, 813 So. 2d 27 (Fla. 2002), *cert. denied*, 537 U.S. 1070 (2002), reasoning that the United States Supreme Court had not receded from its prior precedent upholding the constitutionality of Florida's death penalty scheme. Furthermore, the Florida Supreme Court has repeatedly rejected *Ring* challenges to Florida's death penalty statute in the wake of *Bottoson* in both direct appeals and collateral cases. *Duest v. State*, 855 So.2d 33, 48-49 (Fla. 2003)(rejecting a *Ring* challenge in a direct appeal).[13]

[13] The *Ring* Court observed in a footnote that, four states have hybrid systems, in which the jury renders an advisory verdict but the judge makes the ultimate sentencing determinations. *Ring*, 536 U.S. at 608 n.6 (citing Ala.Code §§ 13A-5-46, 13A-5-47 (1994); Del.Code Ann., Tit. 11, § 4209 (1995); Fla. Stat. Ann. § 921.141 (West 2001); Ind.Code Ann. § 35-50-2-9 (Supp.2001)). The four states are Alabama, Delaware, Florida and Indiana. There is no *Ring* issue in Alabama because their narrowers are imbedded in their capital murder statute. In Alabama, the jury finds the narrowers in the guilt phase. Delaware is no longer a true hybrid state because the jury's verdict is no longer merely advisory. The Delaware General

Regardless of the view this Court takes of *Ring* and its requirements, *Ring* does not invalidate this death sentence. The death sentence in this case is exempt from the holding in *Ring*. The trial court found the prior violent felony aggravator. The prior violent felony aggravator is a recidivist aggravator. Such aggravators are exempt from the holding in *Ring* and may be found by the judge alone. *Belcher v. State*, 851 So.2d 678, 685 (Fla. 2003)(explaining that the prior violent felony aggravator is exempted from an *Apprendi* analysis); *Davis v. State*, 2003 WL 22722316 (Fla. Nov 20, 2003)(stating: "[w]e have denied relief in direct appeals where there has been a prior violent felony aggravator, citing *Duest v. State*, 855 So.2d 33, 49 (Fla. 2003) and *Doorbal v. State*, 837 So.2d 940, 963 (Fla. 2003)(stating that prior violent felony aggravator based on contemporaneous crimes charged by indictment and on which defendant was found guilty by unanimous jury "clearly satisfies the mandates of the United States and Florida Constitutions"), *cert. denied*, - U.S.

Assembly, in response to *Ring*, made a jury's determination of no aggravating circumstances binding on the trial court. *See* Delaware S.B. 449, 73 Del. Laws c. 423 (barring trial court from imposing death unless the jury finds at least one aggravating circumstance); *See also Brice v. State*, 815 A.2d 314, 320 (Del. 2003)(detailing legislative history of act). Indiana amended its death penalty law after *Ring* to eliminate jury overrides. See 2002 Ind. Acts 117, § 2 (amending Ind.Code § 35-50-2-9 (2002)).

-, 123 S.Ct. 2647, 156 L.Ed.2d 663 (2003)); *Allen v. State*, 854 So.2d 1255, 1262 (Fla. 2003)(rejecting a *Ring* challenge where one of the aggravating factors was under a sentence of imprisonment because "[s]uch an aggravator need not be found by the jury").

Walls also contends that the jury must weigh aggravators against mitigators in the wake of *Ring*. *Ring* applies only to the eligibility phase, not the selection phase. *Oken v. State*, 835 A.2d 1105 (Md. App. Ct. 2003)(holding that *Ring*'s requirement of a jury applied only to the eligibility phase of a capital sentencing proceeding, where the jury decides if a statutorily specified aggravating circumstance exists, which makes the defendant eligible for the death penalty, but does not apply to the selection phase, where the decision maker must decide if the death penalty should be imposed by weighing aggravating circumstances against mitigating circumstances, which the judge made do). This is an argument that the Sixth Amendment entitles a capital defendant to jury sentencing. Justice Scalia, in his concurring opinion, specifically noted that *Ring* did not establish jury sentencing. *Ring*, 122 S.Ct. at 2445 (Scalia, J., concurring)(stating that "today's judgment has nothing to do with jury sentencing" and "[t]hose States that leave the ultimate life-or-death decision to the judge may

continue to do so . . .”). Thus, *Ring* does not require that the jury do the weighing in the selection phase.

Walls asserts that the jury's nonunanimous, nonbinding recommendation violates *Ring*. This Court has routinely rejected such claims. *Belcher v. State*, 851 So.2d 678, 685 (Fla. 2003)(rejecting a claim that the jury's nonunanimous, nonbinding recommendation violated *Apprendi*); *Blackwelder v. State*, 851 So.2d 650, 654 (Fla. 2003)(rejecting an argument that aggravating circumstances must be found by a unanimous jury verdict). Walls provides no rationale for this Court receding from this precedent.

ISSUE II

DOES *RING V. ARIZONA*, 536 U.S. 584 (2002) REQUIRE THAT AGGRAVATORS BE INCLUDED IN THE INDICTMENT?

Walls asserts based on *Ring v. Arizona*, 536 U.S. 584 (2002), *Apprendi v. New Jersey*, 530 U.S. 466 (2000) and *Jones v. United States*, 526 U.S. 227 (1999), that the aggravators must be pled in the indictment.

This Court has repeatedly rejected such claims. *Porter v. Crosby*, 840 So. 2d 981, 986 (Fla. 2003) (finding "meritless" claim that aggravating circumstances must be charged in the indictment, submitted to the jury, and individually found by a unanimous jury verdict). Furthermore, the prior violent felony aggravator based on contemporaneous murder was charged by indictment. *Doorbal v. State*, 837 So. 2d 940, 963 (Fla. 2003) (stating that prior violent felony aggravator based on contemporaneous crimes charged by indictment and on which defendant was found guilty by unanimous jury "clearly satisfies the mandates of the United States and Florida Constitutions).

Walls reliance on *United States v. Allen*, 247 F.3d 741 (8th Cir. 2001), is misplaced. The Eighth Circuit recently held that aggravators must be pled in the indictment and the failure to include the pecuniary gain aggravator in the indictment was not

harmless. *United States v. Allen*, 2004 U.S. App. LEXIS 1474 (8th Cir. February 4, 2004). However, *Allen* was a federal prosecution. The Fifth Amendment right to grand jury indictment does not extend to state prosecutions. *Hurtado v. California*, 110 U.S. 516, 4 S.Ct. 111, 28 L.Ed. 232 (1884). It was a footnote in *Jones* that become the holding in *Apprendi*. The footnote in *Jones* was "under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior 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." *Jones*, 526 U.S. at 243 n. 6. This statement, minus the language about the indictment, became the holding in *Apprendi*. However, deleting the indictment language was not an oversight. The *Apprendi* Court knowingly deleted the indictment phrase because *Apprendi* was a state prosecution and states are not constitutionally required to charge by indictment. Neither *Apprendi* nor *Ring* incorporated the Fifth Amendment indictment clause against the states. There is no federal constitutional requirement that aggravators be in the indictment.

ISSUE III

WHETHER APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE SEVERAL CLAIMS ON APPEAL?

Walls asserts his appellate counsel was ineffective for failing to raise several claims on appeal. Most of the issues he asserts appellate counsel should have raised were not preserved. Appellate counsel is not ineffective for failing to raise unpreserved claims. Nor is appellate counsel ineffective for failing to raise meritless claims.

INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL

In *Rutherford v. Moore*, 774 So.2d 637 (Fla. 2000), this Court explained that the standard for proving ineffective assistance of appellate counsel mirrors the standard for proving ineffective assistance of trial counsel established in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The *Rutherford* Court explained that to show prejudice petitioner must show that the appellate process was compromised to such a degree as to undermine confidence in the correctness of the result. *Rutherford*, 774 So.2d at 643. Appellate counsel's performance will not be deficient if the legal issue that appellate counsel failed to raise was meritless. This Court noted that a habeas petition is the

proper vehicle to assert ineffective assistance of appellate counsel. *See also Freeman v. State*, 761 So.2d 1055 (Fla. 2000). Additionally, in the appellate context, the prejudice prong of *Strickland* requires a showing that the appellate court would have afforded relief on appeal. *United States v. Phillips*, 210 F.3d 345, 350 (5th Cir. 2000). A habeas petitioner cannot establish prejudice unless the issue was a "dead bang winner". *Moore v. Gibson*, 195 F.3d 1152, 1180 (10th Cir. 1999)(explaining that appellate counsel's performance is only deficient and prejudicial if counsel fails to argue a "dead-bang winner"). Petitioner must show that he would have won a reversal from this Court had the issue been raised.

PROSECUTOR'S COMMENTS

Walls asserts his appellate counsel was ineffective for failing to raise the issue of numerous prosecutorial comments. Appellate counsel cannot be deemed ineffective for failing to raise an unpreserved issue on appeal. *Downs v. Moore*, 801 So.2d 906, 916 (Fla.2001); *Rutherford v. Moore*, 774 So.2d 637, 643 (Fla. 2000). Collateral counsel raised the issue of trial counsel's failure to object to the prosecutor's comments in his 3.851 appeal. He acknowledges by such a claim that the issue was not preserved.

Walls also claims that his appellate lawyer should have raised on appeal the prosecutor's implication that the defendant would have killed Amy Touchton if she had become a witness. (T. V 731-732). This comment may have been improper under current caselaw. *Franqui v. State*, 804 So.2d 1185, 1195 (Fla. 2001)(holding that prosecutor's comment, implying that defendant would have murdered victim of their second robbery had police not stopped their vehicle and arrested them, was improper but this single erroneous comment within the lengthy closing argument was not so egregious as to taint the jury's recommendation). The error was harmless. The jury knew that this was hypothetical. Amy Touchton did not go over there and knock on the door. Walls did not murder or attempt to murder her. The jury would not have convicted Walls based on any hypothetical regarding Amy Touchton. Appellate counsel is not ineffective for failing to raise unpreserved comments that have been held to be harmless error.

AKE AND DOUBLE JEOPARDY

Appellate counsel cannot be deemed ineffective for failing to raise an unpreserved issue on appeal. *Downs v. Moore*, 801 So.2d 906, 916 (Fla.2001); *Rutherford v. Moore*, 774 So.2d 637, 643 (Fla. 2000). Collateral counsel raised the issue of trial

counsel's failure to file a motion on this basis in his 3.851 appeal. He acknowledges by such a claim that the issue was not preserved.

Walls had not one but three mental health experts testify in his behalf in the penalty phase. Dr. Chandler, Dr. Valentine and Dr. Hagerott all testified in his behalf. The holding in *Ake* was simply that the failure to provide any evaluation did not comport with the Due Process Clause. Walls' rights under *Ake* were not violated and appellate counsel is not ineffective for recognizing this.

Walls' actual claim is not an *Ake* claim or an ineffectiveness of counsel claim; rather, it is an ineffective assistance of psychiatrist claim. As to the Sixth Amendment claim, there is no Sixth Amendment right to effective assistance of a mental health expert. The Sixth Amendment is a right to counsel guarantee. The basis of *Ake* was the Fifth Amendment due process right. *Wright v. Moore*, 278 F.3d 1245, 1258 (11th Cir. 2002)(noting that an Sixth Amendment right to a mental competency examination is a "non-starter"); *Wilson v. Greene*, 155 F.3d 396, 401 (4th Cir.1998) (rejecting the notion that there is either a procedural or constitutional rule of ineffective assistance of an expert witness); *Thomas v. Taylor*,170 F.3d 466, 472 (4th Cir. 1999)(rejecting, yet again,

the effort to recast a claim concerning the effectiveness of a court-appointed psychological expert as a claim of ineffective assistance of counsel); *Silagy v. Peters*, 905 F.2d 986, 1013 (7th Cir. 1990)(explaining that the ultimate result of recognizing a right to effective assistance of a mental health expert would be a never-ending battle of psychiatrists appointed as experts for the sole purpose of discrediting a prior psychiatrist's diagnosis). The Constitution does not entitle a criminal defendant to the effective assistance of an expert witness. To entertain such claims would immerse judges in an endless battle of the experts to determine whether a particular psychiatric examination was appropriate. *Wilson v. Greene*, 155 F.3d 396, 401 (4th Cir.1998). Although *Ake* refers to an appropriate evaluation, the Due Process Clause does not prescribe a malpractice standard for a court-appointed psychiatrist's performance. *Wilson*, 155 F.3d at 401.

Moreover, for the same reasons asserted in the answer brief in response to the ineffectiveness of trial counsel on this same basis, there is no double jeopardy violation. Appellate counsel is not ineffective for recognizing that *Sattazahn* would prevent this claim from having any success on appeal. *Sattazahn v. Pennsylania*, 537 U.S. 101 (2003)(concluding that there was no double jeopardy bar to a new penalty phase after the first jury

hung on the penalty and, pursuant to a state statute, the judge imposed a life sentence because there were no factual findings in favor of "acquittal of the death penalty" by either the jury or judge). Appellate counsel is not ineffective for failing to raise an issue that has no basis in law.

TRIAL COURT'S SENTENCING ORDER

Walls asserts that sentencing order tracks the language of the State's sentencing memorandum and that the second sentencing order tracks the first sentencing order and appellate counsel was ineffective for not raising these issues on appeal.

The final sentencing hearing was held on July 29, 1992 (VII 1219-1242). After the trial court discussed the aggravating and mitigating circumstances, defense counsel requested that the original trial and the State's sentencing memorandums be included in the record on appeal because "the virtual identity of these proceedings to that." (VII 1238-1239). Defense counsel asserted that "in both cases the Court has read verbatim the State's recommendation into the record" and that the Court has made "no independent findings of its own" (VII 1239). The Court responded that there were "substantial differences" in the Court's original order and the instant sentencing order regarding mitigation. (VII 1240). The Court explained that the

reason the facts of the original order and the instant order were the same was because the facts of the crime were the same and the evidence at trial regarding those fact had not changed and noted that the only real difference in the two trials was in the mitigation. The trial court, while agreeing that the instant sentencing order tracked his original sentencing order stated: "I would like to state for the record that in all instances, both instances, I went over the record with a fine tooth comb" (VII 1240-1241).

The sentence of death or life imprisonment for capital felonies statute, 921.141(3), Florida Statutes, provides:

> Findings in support of sentence of death.--Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:
>
> (a) That sufficient aggravating circumstances exist as enumerated in subsection (5), and
>
> (b) That there are insufficient mitigating circumstances to outweigh the aggravating circumstances.
>
> In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsections (5) and (6) and upon the records of the trial and the sentencing proceedings. If the court does not make the findings requiring the death sentence within 30 days after the rendition of the judgment and sentence, the court

> shall impose sentence of life imprisonment in accordance with s. 775.082.

This Court has concluded a sentencing order is a statutorily required personal evaluation by the trial judge of aggravating and mitigating factors. The sentencing order is the foundation for this Court's proportionality review which may ultimately determine if a person lives or dies. If the trial judge does not prepare his or her own sentencing order, then it becomes difficult for the Court to determine if the trial judge in fact independently engaged in the statutorily mandated weighing process. *Morton v. State*, 789 So.2d 324, 333 (Fla. 2001)(quoting *Patton v. State*, 784 So.2d 380, 388 (Fla. 2000)).[14]

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[14] Of course, the statute does not actually prohibit the trial court from adopting the State's proposed order. It is silent on the issue. There is no constitutional infirmity in a trial court adopting the State's proposed order. *Anderson v. Bessemer City*, 470 U.S. 564, 572, 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985)(holding, that even when the trial court adopts proposed findings verbatim, the findings are those of the court and may be reversed only if clearly erroneous and explaining that the trial court in *Anderson* did not uncritically adopt the proposed findings because the final findings varied considerably in organization and content from those submitted by counsel, and therefore, the findings represent the judge's own considered conclusions and noting that respondent was provided and availed itself of the opportunity to respond at length to the proposed findings); *See also State v. White*, 873 S.W.2d 590 (Mo. banc 1994)(explaining that if the court thoughtfully and carefully considers the parties' proposed findings and agrees with the content, there is no constitutional problem with the court adopting the findings in whole or in part and once the trial court signs the order, it has adopted that party's findings as its own).

Appellate counsel was not ineffective. While the issue was preserved, Walls would not have obtained relief. In *Blackwelder v. State*, 851 So. 2d 650, 652-653 (Fla. 2003), this Court affirmed a sentencing order although the judge used substantial portions of the State's sentencing memorandum. This Court found that the difference between the two established that the trial court "did not simply rubber-stamp the State's sentencing memorandum, but independently weighed the aggravating and mitigating factors and personally evaluated the case." Nor would Walls have obtained relief based on the similarities between the present sentencing order and the prior sentencing order. In *Morton v. State*, 789 So.2d 324 (Fla. 2001), this Court affirmed a sentencing order although the resentencing judge used substantial portions of the original judge's sentencing order. The resentencing judge adopted a majority of

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This Court often incorporates portions of the parties' brief into its opinion. No one suggests this Court has failed in its duty to independently decide the case by doing so. Moreover, appellate court judges routinely rely on their law clerks to draft opinions. Trial judges do not have personal law clerks and, therefore, are forced to rely more upon the parties than appellate judges. *Prowell v. State*, 741 N.E.2d 704, 708 (Ind. 2001)(explaining that trial courts often enter findings that are verbatim reproductions of submissions by the prevailing party because they are "faced with an enormous volume of cases and few have the law clerks and other resources that would be available in a more perfect world to help craft more elegant trial court findings and legal reasoning.").

the findings from the original sentencing judge's sentencing order. Both the resentencing judge's order and the original judge's order found the same aggravators and mitigators. The *Morton* Court reasoned that, because there were significant differences between the two orders, this demonstrated that the resentencing judge performed an independent weighing and personal evaluation of the evidence. The Court explained the reason for the requirement is to ensure that the trial judge has carefully considered the contentions of both sides and has taken seriously his or her solemn obligation to independently evaluate the aggravating and mitigating circumstances in making this life or death decision. The *Morton* Court noted that the evidence presented in the resentencing proceeding largely mirrored the evidence presented by the State during the first penalty phase. However, the Court cautioned resentencing judges against adopting a prior sentencing order or substantial parts thereof from the original sentencing judge. *Morton*, 789 So.2d at 333-335. However, here, unlike *Morton*, the same trial judge, Judge Barron, wrote both sentencing orders. In *Morton*, the first sentencing order was written by the first judge and then copied by a different resentencing judge. A trial judge may copy his own prior sentencing order. Such orders are an independent evaluation by the trial court. Moreover, there were difference

between the two sentencing orders, mainly in the area of mitigation. The judge fulfilled his statutory responsibilities to independently weigh the aggravating and mitigating circumstances and appellate counsel was not ineffective for recognizing this.

VICTIM IMPACT EVIDENCE

Walls contends that letters from the victim's family which contained statements regarding Walls' future dangerousness and recommend the death penalty as punishment are improper victim impact evidence under *Payne v. Tennessee*, 501 U.S. 808 (1991). The letters are part of the court file and the record on appeal. (VII 1039-1044). A copy of the 1988 State Attorney letter recommending death was sent to the Office of the Public Defender. (VII 1032- 1038). Appellate counsel was not ineffective for failing to raise an unpreserved error. Furthermore, the error was harmless because only the judge, not the jury, saw this evidence. The jury was not exposed to any improper victim impact evidence. *Card v. State*, 803 So. 2d 613, 628 (Fla. 2001)(finding no fundamental error where improper victim impact evidence was introduced because the testimony came during the *Spencer* hearing, outside the presence of the jury). Appellate counsel is not ineffective for failing to raise

unpreserved issues that are harmless error.

JURY INSTRUCTIONS

Walls asserts that appellate counsel was ineffective for failing to raise various challenges to the jury instruction on the aggravators. As collateral counsel admits, the jury instructions on these aggravators were not objected to on the basis that collateral counsel asserts on appeal as error. IB at 32. Appellate counsel is not ineffective for failing to raise unpreserved jury instruction claims. Two of the jury instruction issues, the avoid arrest and CCP, were already addressed by this Court in the direct appeal. Appellate counsel cannot be ineffective for failing to raise issues that were, in fact, raised. Furthermore, the remaining jury instructions were proper. Thus, appellate counsel was not ineffective.

Prior violent felony

Walls first asserts that the jury instruction regarding a prior violent felony was an inappropriate comment on the evidence prohibited by the summing up and comment by judge statute, § 90.106, Florida Statutes. Jury instructions are jury instructions, not comments on the evidence. Comments on the evidence occur when a judge comments upon the weight of the

evidence, the credibility of the witnesses, or the guilt of the accused. Jury instructions are guidance on the law, not comments on the facts or testimony. Thus, the jury instruction was not a judicial comment on the evidence.

The summing up and comment by judge statute, § 90.106, Florida Statutes, provides:

> A judge may not sum up the evidence or comment to the jury upon the weight of the evidence, the credibility of the witnesses, or the guilt of the accused.

While Florida has a statute forbidding judicial comments, it is not a constitutional issue. *Quercia v. United States*, 289 U.S. 466, 77 L.Ed. 1321, 53 S.Ct. 698 (1933)(noting that in a jury trial a federal judge, as trial judges did at common law, may express his opinion upon the facts, provided he makes it clear to the jury that all matters of fact are for their determination). Some States allow judicial comments on the evidence. Cal. Const. art. VI, § 10 (providing that the court may make such comment on the evidence and the testimony and credibility of any witness as in its opinion is necessary for the proper determination of the cause). Indeed, in a criminal case, while "ill advised", it is not *per se* reversible error for a trial judge to express his personal opinion of defendant's guilt. *United States v. Fuller*, 162 F.3d 256 (4th Cir. 1998)(holding that the trial judge's statement that: "from my

own personal view I do not credit and accept the defendant's testimony . . . that he had no intent to violate the federal drug laws"; rather, "I believe he was acting illegally as a drug dealer." but emphasizing that jury was not required to accept the judge's view; rather, it was "entirely up to you and you alone to make your determination of what the evidence establishes" was not *per se* error because the undisputed facts amounted to the commission of the crime but disapproving the practice *citing United States v. Murdock*, 290 U.S. 389, 394, 54 S.Ct. 223, 78 L.Ed. 381 (1933)). But even a judge commenting on a defendant's guilt is not a constitutional issue. *Davis v. Craven*, 485 F.2d 1138, 1140 (9th Cir.1973)(en banc)(declining to constitutionalize *Murdock*). At common law, and to this day in federal courts, judges were permitted to sum up evidence and comment on weight of the evidence and the credibility of the witnesses.

This is a jury instruction, not a comment on the evidence. A jury instruction is a statement of the law, not a comment on the facts of the case. A comment on the evidence, as the statute explains, involves sum up the evidence or comment to the jury upon the weight of the evidence, the credibility of the witnesses, or the guilt of the accused. Here the judge merely correctly informed the jury that murder of Edward Alger was a

capital felony. Appellate counsel is not ineffective for recognizing that this was a jury instruction, not a comment on the evidence.

Burglary or kidnapping

Walls asserts that the "committed while engaged in the commission of a burglary" jury instruction is unconstitutionally vague and fails to genuinely narrow the class of persons eligible for the death penalty. The Florida Supreme Court has rejected such assertions. ***Blanco v. State***, 706 So.2d 7, 11 (Fla. 1997)(holding that Florida's capital sentencing statute does narrow the class of death-eligible defendants convicted of felony murder because not every person who is convicted of first-degree felony murder automatically qualifies for the aggravating circumstance of commission during the course of an enumerated felony because the list of enumerated felonies defining felony murder is larger than the list defining the aggravating circumstance).

Avoid arrest

Walls also asserts that the Florida Supreme Court's analysis regarding the avoid arrest aggravator was flawed. The ***Walls*** Court rejected the challenge to the sufficiency of the

evidence to support the avoid arrest aggravating factor as "without merit." The Court reasoned that Walls' own confession established that he killed Peterson because he wanted no witnesses. The Court rejected Walls' claim that the motive was based on some mental derangement, not witness elimination. ***Walls v. State***, 641 So.2d 381 (Fla. 1994). Walls' argument here is exactly the same argument he previously presented to Supreme Court. Walls is barred by the law of the case doctrine from relitigating this issues. Additionally, this is not a proper post-conviction claim. ***Sireci v. State***, 773 So.2d 34, 40 n.12 (Fla. 2000)(explaining that challenges the sufficiency of this Court's harmless error analysis on direct appeal, may not be appropriately raised in a motion for postconviction relief citing ***Shere v. State***, 742 So.2d 215, 218 n. 7 (Fla.1999)).

HAC

Walls argues that the HAC aggravating instruction was improper because the trial court failed to instruct the jury that the State was required to prove each element of this aggravator beyond a reasonable doubt. Aggravators do not really have elements. They have simple definitions. When the trial court instructs the jury that the aggravator must be proven beyond a reasonable doubt, the jury understands that the

definition must be proven beyond a reasonable doubt. Here, the jury was proper instructed that they had to find existence of the aggravator beyond a reasonable doubt. That is all that Florida law requires. *Rogers v. State*, 783 So.2d 980, 992-993 (Fla. 2001) (noting that aggravators must be proven beyond a reasonable doubt).

Cold, calculated and premeditated

Walls asserts that the cold, calculated and premeditated jury instruction was unconstitutionally vague. On direct appeal, the Florida Supreme Court held that while the cold calculated premeditation instruction was unconstitutionally vague under *Jackson v. State*, 648 So.2d 85 (Fla. 1994), the error was harmless. *Walls v. State*, 641 So.2d 381 (Fla. 1994). Walls' argument here is exactly the same argument he previously presented to Supreme Court. Walls is barred by the law of the case doctrine from relitigating this issues. Additionally, this is not a proper post-conviction claim. *Sireci v. State*, 773 So.2d 34, 40 n.12 (Fla. 2000)(explaining that challenges the sufficiency of this Court's harmless error analysis on direct appeal, may not be appropriately raised in a motion for postconviction relief citing *Shere v. State*, 742 So.2d 215, 218 n. 7 (Fla.1999)). Thus, appellate counsel was not ineffective

for failing to raise unpreserved and meritless jury instruction issues.

CONCLUSION

The State respectfully requests that this Honorable Court deny the habeas petition.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing response to petition for writ of habeas corpus has been furnished by U.S. Mail to Harry P. Brody, Brody & Hazen, 1804 Miccosukee Commons Drive, P.O. Box 12999 Tallahassee, FL 32317 this 9th day of February, 2004.

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CERTIFICATE OF FONT AND TYPE SIZE

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

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