IN THE SUPREME COURT OF FLORIDA

BOBBY RALEIGH,

Petitioner,

v. **Case No. SC03-2282**

JAMES V. CROSBY,

Secretary, Florida Department of Corrections,
Respondent.
____________________________________/

RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

COMES NOW the Respondent, and responds as follows to Raleigh's petition for writ of habeas corpus. For the reasons set out below, the petition is a misleading attempt to circumvent this Court's long-settled procedural rules concerning the serial presentation of claims in petitions for writs of habeas corpus and in motions for post-conviction relief brought under *Florida Rule of Criminal Procedure* 3.850/3.851. The petition is unworthy of this Court's consideration, and should be either summarily denied or stricken.

RESPONSE TO INTRODUCTION

Raleigh asserts that there are "substantial claims of error under" the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the Constitution of the United States, and that

those errors “demonstrate[] that Mr. Raleigh was deprived of the effective assistance of counsel on direct appeal.” *Petition*, at 1. The true facts are that the only claim contained in the petition is a claim of error based on *Ring v. Arizona*, 536 U.S. 584 (2002), and that there is no claim contained in the body of the pleading which asserts an ineffective assistance of counsel claim. *Ring* is based solely on the Sixth Amendment, and Raleigh’s assertion that other Constitutional Amendments are implicated is legally erroneous.

RESPONSE TO JURISDICTIONAL STATEMENT

Respondent agrees that this Court has jurisdiction over an original proceeding for habeas corpus relief. However, Raleigh is not entitled to relief because his claim is procedurally barred.

RESPONSE TO REQUEST FOR ORAL ARGUMENT

Oral argument is unnecessary in this case. The petition is procedurally barred, and is an abuse of process.

THE PROCEDURAL HISTORY OF THE CASE

The Respondent relies on the procedural history of this case that is set out below.

1. The trial proceedings.

On June 21, 1994, Raleigh was indicted by the Volusia County Grand Jury for two counts of First Degree Murder, one count of

Armed Burglary, and one count of Shooting into a Building. Raleigh entered into a plea agreement on June 6, 1995, in which he pleaded guilty to the murder charges and the State agreed to *nol prosse* the other two counts. A jury was impaneled for the penalty phase, and the jury unanimously recommended death on both counts. Raleigh was sentenced to death on February 16, 1996, and an appeal was taken. This Court affirmed the convictions and sentences on November 13, 1997, and denied rehearing on February 19, 1998. *Raleigh v. State*, 705 So. 2d 1324 (Fla. 1997).

2. The first post-conviction proceeding.

Raleigh filed his first motion to vacate on November 20, 1998. Raleigh secured new counsel and filed an amended motion to vacate on January 19, 2001. An evidentiary hearing was conducted on various claims contained in the amended motion, and, on March 24, 2003, the Circuit Court denied relief. Raleigh's appeal from that decision is pending before this Court in case number SC03-710, which was filed contemporaneously with this habeas petition.

3. The successive motion to vacate.

The Circuit Court summarized the history of Raleigh's successive motion to vacate in the following way:

On June 23, 2003, Defendant filed a successive 3.850

> motion setting forth two claims: (1) **his convictions and sentences are unconstitutional under *Ring v. Arizona*, 536 U.S. 584 (2002)**; and (2) newly discovered evidence establishes that execution by lethal injection is cruel and/or unusual punishment and violates his rights under the Eighth and Fourteenth Amendments of the United States Constitution and of the Florida Constitution. On August 4, 2003, pursuant to *Florida Rule of Criminal Procedure* 3.851(f)(5)(B), the Court held a case management conference and heard argument from counsel regarding the two claims. Defendant waived his presence.

Appendix B, at 2. [emphasis added]. **Raleigh did not appeal that ruling.**

4. The State habeas corpus petition.

On December 29, 2003, Raleigh filed a petition for writ of habeas corpus. The only claim contained in that petition is a claim that Raleigh's death sentences were imposed in violation of *Ring v. Arizona.* That petition contains the cryptic statement that "[p]ost-conviction counsel filed a *Ring* claim on June 20, 2003." *Petition,* at 2. While an apparent reference to the successive motion to vacate, no further information about that proceeding is revealed to this Court.

THE CLAIM CONTAINED IN THE HABEAS PETITION IS PROCEDURALLY BARRED BECAUSE IT HAS ALREADY BEEN LITIGATED IN A MOTION FOR POST-CONVICTION RELIEF.

Florida law is long-settled that habeas relief will be denied when a claim has been properly raised in a rule 3.850

motion. *Scott v. Dugger*, 604 So. 2d 465 (Fla. 1992); *Parker v. Dugger*, 550 So. 2d 459 (Fla. 1989). In this case, Raleigh raised his *Ring v. Arizona* claim in a successive Rule 3.850 motion (*Appendix B*) which was resolved adversely to him. He did not appeal from the trial court's denial of relief, which was principally on procedural bar grounds. Settled Florida law precludes Raleigh from duplicitous litigation of the same claim in different forums, and the habeas petition should be denied on procedural bar ground based upon Raleigh's flagrant disregard for long-settled procedural rules.[1] Raleigh's tactic of repetitive litigation of the same claim has done nothing but unnecessarily burden the Courts with redundant, procedurally barred, claims. *Thompson v. State*, 759 So. 2d 650, 656 n.5 (Fla. 2000); *Demps v. Dugger*, 714 So. 2d 365, 368 (Fla. 1998); *Blanco v. Wainwright*, 507 So. 2d 1377, 1384 (Fla. 1987). The habeas petition is an abuse of process which should be denied on procedural bar grounds.

To the extent that discussion of the Circuit Court's order

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[1]In *Johnson v. Singletary*, 647 So. 2d 106, 109 (Fla. 1994), this Court imposed a procedural bar to state relitigation of a claim which had been raised in Johnson's federal habeas petition and abandoned on appeal from the denial of relief. While Raleigh's claim was raised and abandoned in State court rather than federal court, the rationale of *Johnson* still applies to procedurally bar the *Ring* claim contained in the habeas petition.

denying relief on the *Ring* claim is appropriate, that order is noteworthy for its disposition of the claim on procedural bar grounds. The Court held:

> . . . this first claim [the *Ring* claim] is procedurally barred because Defendant failed to raise the claim in his prior Rule 3.851 motion, even though *Ring* was decided well before the prior Rule 3.851 motion was denied by the Court. [FN]. Additionally, this first claim could have been but was not raised at trial and on direct appeal; thus, it is procedurally barred.
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> > FN. Motion was denied on March 24, 2003 (see Appendix A) and *Ring* was decided on June 24, 2002 (see *Ring v. Arizona*, 536 U.S. 584 (2002)).

Appendix B, at 3. The habeas petition is no more than an attempt to evade the clear procedural bars which were properly found by the Circuit Court when it denied the successive motion to vacate. In addition to the bar to review of the habeas petition, there are three other independently adequate procedural bars to review of the *Ring* claim. The petition is an abuse of process which should be denied in all respects.

BECAUSE RALEIGH PLEADED GUILTY TO TWO COUNTS OF FIRST-DEGREE MURDER, *RING* IS INAPPLICABLE TO HIS CASE.

As set out above, Raleigh pleaded guilty to two counts of First-Degree Murder. Those guilty pleas render *Apprendi/Ring* inapplicable to this case. This Court has expressly rejected *Apprendi/Ring* claims in guilty-plea cases:

> In addition, Zakrzewski's guilty pleas in this case are equivalent to convictions on three counts of first-degree murder. See *Boykin v. Alabama,* 395 U.S. 238, 242, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969) ("A plea of guilty is more than a confession which admits that the accused did various acts; it is itself a conviction; nothing remains but to give judgment and determine punishment."). Thus, the prior violent felony or capital felony conviction aggravator exempts this case from the requirement of jury findings on any fact necessary to render a defendant eligible for the death penalty. *See Duest v. State,* 855 So. 2d 33, 52 (Fla. 2003); *see also Doorbal v. State,* 837 So. 2d 940, 963 (Fla.) (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. ----, 123 S.Ct. 2647, 156 L.Ed.2d 663 (2003).

Zakrzewski v. State, 28 Fla. L. Weekly S826 (Fla. Nov.13, 2003). *Zakrzewski* controls this case, and is dispositive of Raleigh's claim based on *Apprendi/Ring.*

THE *APPRENDI/RING* CLAIM IS MERITLESS, IN ADDITION TO BEING PROCEDURALLY BARRED.

The *Apprendi/Ring* claim is not available to Raleigh for the foregoing reasons. The procedural bar is a sufficient reason, standing alone, to deny relief on this claim. Likewise, the factual inapplicability of *Apprendi/Ring* based upon Raleigh's guilty pleas is a sufficient reason to deny relief. **The Respondent waives neither of those defenses.** The following discussion of *Apprendi/Ring* is in addition to the foregoing grounds for the denial of relief, and does not waive the procedural bar defense.

A. *RING* IS NOT APPLICABLE TO RALEIGH'S CASE.

In addition to being procedurally barred and factually inapplicable, no court to consider the issue has held ***Apprendi*** to be retroactive.[2] *Ring* is "simply an extension of *Apprendi* to the death penalty context,"[3] and, if *Apprendi* is not retroactive, *Ring* should not be retroactive, either.[4] *In re Johnson,* 334 F. 3d 403 (5th Cir. 2003) ("Since the rule in *Ring* is essentially an application of *Apprendi*, logical consistency suggests that

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[2]*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).

[3]*Cannon v. Mullin*, 297 F. 3d 989 (10th Cir. 2002), *cert. and stay of execution denied,* 536 U.S. 974 (U.S. July 23, 2002)

[4]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.'"

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.[5] *Figarola v.* State, 841 So. 2d 576 (Fla. 4th DCA 2003); *Hughes v. State*, 826 So. 2d 1070 (Fla. 1st DCA 2002) (certifying question); *Whisler v. State*, 36 P.3d 290 (Kan. 2001).[6] Likewise, the Eleventh Circuit Court of Appeals has explicitly held that

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[5]The Alabama Court of Criminal Appeals has held that *Apprendi* is not retroactive to collateral review cases. *See, Poole v. State*, 846 So. 2d 370 (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*, 662 N.W. 2d 146 (Minn. 2003). The Missouri Supreme Court seems to be the only court that has held that *Ring* is retroactively applicable. *State v. Whitfield*, 107 S.W. 3d 253 (Mo. 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*, 664 N.W. 2d 892 (Neb. 2003).

[6]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. *Apprendi/Ring* claims certainly do not present a “fundamental error,” and for that additional reason should not be applied retroactively.

Ring is **not** retroactively applicable to a Florida defendant. *Turner v. Crosby,* 339 F.3d 1247 (11th Cir. 2003).

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 (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 retroactively. *Cannon, supra.* *Ring*, like *Apprendi*, is merely a procedural ruling which falls far short of being of "fundamental significance."[7]

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

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[7]Recently the United States Supreme Court accepted for review the case of *Schriro v. Summerlin*, 124 S.Ct. 833 (2003), to resolve the issue of whether *Ring* is retroactive. Raleigh has made no such retroactivity assertion herein, and any relief in a determination of retroactivity in *Schriro*, would not apply to Raleigh because the issues regarding *Ring* have never been preserved by Raleigh and he is procedurally barred from presenting them in this successive motion. *United States v. Ardley*, 273 F.3d. 991 (11th Cir. 2001) (Procedural default and retroactivity are two different doctrines that cannot be conflated; regardless of the retroactivity doctrine, issues must be timely raised and preserved.)

decision of fundamental significance, which so drastically alters the underpinnings of Raleigh's death sentence that "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.

B. THE *APPRENDI/RING* CLAIM IS MERITLESS.

Finally, without waiving the foregoing procedural defenses, the claim raised by Raleigh has been expressly rejected by this Court. *See, Robinson v. State & Crosby*, 29 Fla. L. Weekly S50, 52 (Fla. Jan. 29, 2004), *cert. denied*, 124 S.Ct. 1197 (2004); *Parker v. State,* 29 Fla. L. Weekly S27 (Fla. Jan 22, 2004); *Davis v. State,* 28 Fla. L. Weekly S835 (Fla. Nov. 20, 2003); *Guzman v. State,* 28 Fla. L. Weekly S829 (Fla. Nov. 20, 2003); *Zakrzewski v. State*, 28 Fla. L. Weekly S826 (Fla. Nov. 13, 2003); *Johnston v. State,* 863 So. 2d 271 (Fla. 2003), *cert. denied,* 2004 WL 180326 (U.S. Mar. 22, 2004); *Cummings-El v. State/Crosby,* 863 So. 2d 246 (Fla. 2003); *Anderson v. State,* 863

So. 2d 169 (Fla. 2003), *cert. denied,* 2004 WL 547148 (U.S. Mar. 22, 2004); *Owen v. State,* 862 So. 2d 687 (Fla. 2003), *Petition for cert. filed,* Case. No. 03-9345, (U.S. Mar. 4, 2004); *Henry v. State,* 862 So. 2d 679 (Fla. 2003); *Rivera v. State/Crosby,* 859 So. 2d 495 (Fla. 2003); *Davis v. State,* 859 So. 2d 465 (Fla. 2003); *Marquard v. State*, 850 So. 2d 417, 431 n.12 (Fla. 2002)(As in *King* and *Bottoson*, defendant not entitled to relief); *Lugo v. State*, 845 So. 2d 74, 119 (Fla.), *cert. denied,* 124 S.Ct. 320 (2003); *Kormondy v. State*, 845 So. 2d 41 (Fla.), *cert. denied*, 124 S.Ct. 392 (2003); *Spencer v. State/Crosby*, 842 So. 2d 52 (Fla. 2003); *Anderson v. State,* 841 So. 2d 390 (Fla.), *cert. denied*, 124 S.Ct. 408 (2003); *Lucas v. State/Moore*, 841 So. 2d 380 (Fla. 2003); *Fotopoulos v. State*, 838 So. 2d 1122 (Fla. 2002); *Bruno v. Moore*, 838 So. 2d 485 (Fla. 2002), *cert. denied*, 124 S.Ct. 100 (2003); *Doorbal v. State,* 837 So. 2d 940 (Fla.), *cert. denied*, 123 S.Ct 2647 (2003); *Bottoson v. Moore*, 833 So. 2d 693 (Fla.), *cert. denied*, 123 S.Ct. 662 (2002); *Chavez v. State*, 832 So. 2d 730 (Fla. 2002), *cert. denied*, 123 S.Ct. 2617 (2003); *King v. Moore,* 831 So. 2d 143 (Fla.), *cert. denied*, 123 S.Ct. 657 (2002).

To the extent that Raleigh argues that *Apprendi/Ring* somehow provides a basis for relief based upon the aggravators found in

his case, that argument is foreclosed by binding precedent. Raleigh's death sentences are supported by the prior violent felony aggravator and by the during the course of a burglary aggravator. *Raleigh v. State*, 705 So. 2d at 1326-27. Under Florida law, which determines death eligibility at the guilt stage of a capital trial, there is no basis for relief. *See, Hodges v. State*, 28 Fla. L. Weekly S475 (Fla. June 19, 2003) (coldness aggravator in addition to "hindering law enforcement"); *Butler v. State,* 842 So. 2d 817 (Fla. 2002) (heinousness aggravator only).

C. ARIZONA CAPITAL SENTENCING LAW IS DIFFERENT FROM FLORIDA'S, AS THIS COURT HAS HELD.[8]

The Arizona statute at issue in *Ring* is different from Florida's death sentencing statute. 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*'s recognition that *Walton* was based upon a misinterpretation of Arizona law, no good faith argument can be

[8]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. *Sattazahn v. Pennsylvania*, 537 U.S. 101 (2003), does not undermine *Mills*.

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 ... trial, by an impartial jury ...."
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> > 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 **before** death-eligibility is established. Florida law is different.[9]

1. In Florida, death is the

[9]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.

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*,[10] concluded that the maximum sentence to which a Florida capital defendant is exposed following **conviction** for capital murder is death.[11] *Apprendi* led to no change of any sort, by either the Legislature or this Court.[12]

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

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[10]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.**

[11]"**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 532, 537-8 (Fla. 2001); *Porter v. Crosby*, 840 So. 2d 981 (Fla. 2003); *Sweet v. Moore,* 822 So. 2d 1269 (Fla. 2002).

[12]Whatever criticisms Raleigh 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.

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**), Raleigh's *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 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* did not disturb the decisions upholding the constitutionality of Florida capital sentencing law.

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).[13]

Because the United States Supreme Court did not disturb its prior decisions upholding the constitutionality of Florida's capital sentencing process, those decisions are dispositive of Raleigh's claims. The United States Supreme 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) (vacating 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 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). Those remands are not 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.*

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[13]To rule in Raleigh's 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).

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 Raleigh's invitation to "review" the decisions of the United States Supreme Court.

D. *RING* DOES NOT REQUIRE JURY SENTENCING, AND THIS COURT SHOULD NOT ACCEPT RALEIGH'S INVITATION TO EXTEND *RING.*

Raleigh's 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. The Sixth Amendment is the basis 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**. The Sixth Amendment requires only that the jury find the defendant death-eligible, which, in Florida, takes place at the guilt stage of a capital trial.

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* is concerned only with the finding of death-eligibility, and does not address 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).[14] *See also, Zant v. 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

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[14]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).

Arizona's, and comparison of the two statutes is inappropriate.

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).[15] This Court has clearly held that Florida law is not like Arizona's. *Mills v. State,* 786 So. 2d 532 (Fla. 2001).

The distinction between a "sentencing factor" (*i.e.*: "selection factor," under Florida's statutory scheme) and an element is sharply made in *Apprendi,* where the Court stated:

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[15]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*, Raleigh's 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.

"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].[16] 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."

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

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[16]"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.*

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

The Florida capital sentencing statue provides for the jury's participation.[17] 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].

4. The aggravators need not be set out in the indictment, nor must the sentence stage (selection

[17]Under § 921.141, 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.

stage) jury unanimously recommend a sentence.

Raleigh's 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, because no United States Supreme Court ruling is 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), *cert. denied,* 537 U.S. 1120 (2003).

Raleigh's 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. denied*, 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.[18] *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

[18]*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 Raleigh claims 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 (with their wholly different procedural requirements) to Florida's capital sentencing scheme.[19]

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. Florida law over-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*

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[19]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.

which suggests that, once a defendant has been convicted of a capital offense (and, under Florida’s statute, found death eligible) 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).

CONCLUSION

Wherefore, based on the foregoing arguments and authorities, the Respondent submits that relief should be denied on procedural bar grounds, and, alternatively, because the claim is 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 **Kenneth M. Malnik**, Esquire, Malnik & Salkin, P.A., 1776 N. Pine Road, Suite 216, Plantation, Florida 33322 this ____ day of April, 2004.

____
Of Counsel