IN THE SUPREME COURT OF FLORIDA

ANTHONY WASHINGTON,

Appellant,

v. CASE NO. SC04-15

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE SIXTH JUDICIAL CIRCUIT,
IN AND FOR PINELLAS COUNTY, STATE OF FLORIDA

_____

ANSWER BRIEF OF APPELLEE

_____

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STATEMENT OF THE CASE AND FACTS

Procedural History:

(A) Trial and Direct Appeal:

Appellant Anthony Washington was tried and convicted of first degree murder of ninety-three-year-old Alice Berdat, burglary with a battery, and sexual battery. The judge, the Honorable Susan F. Schaeffer, overrode the jury life recommendation and imposed a sentence of death. This Court summarized the facts in its opinion, Washington v. State, 653 So. 2d 362, 363-364 (Fla. 1994), as follows:

> On August 17, 1989, Ms. Alice Berdat, a 102-pound, 93-year-old woman, was found murdered in her bedroom, having been badly beaten about her face and head. Her body was badly bruised. There were signs that she had been vaginally and anally raped, and she suffered seventeen rib fractures. Death occurred between the hours of 5:51 a.m. and 10:00 a.m.
>
> Michael Darroch, the detective assigned to the case, learned that Anthony Washington was imprisoned at the Largo Community Correctional Work Release Center, located approximately 2.1 miles from Ms. Berdat's home. The Center's records indicated that on the day of the murder, Washington left the Center at 6:00 a.m., returned at 9:17 a.m., and did not work at his job at Cocoa Masonry. On August 31, 1989, Darroch visited Cocoa Masonry where he spoke with several of Washington's co-workers. The co-workers informed Darroch that Washington sold a gold-colored watch to fellow co-worker Robert Leacock. Darroch visited Leacock at his home, recovered the watch, and showed Leacock a single photo of Washington. Leacock identified Washington

as the person who sold him the watch, which was later identified as belonging to Ms. Berdat.

On September 5, 1989, Darroch and two police officers interviewed Washington at the Zephyrhills Correctional Center. Washington did not know, nor did the detective tell him, that he was suspected of murdering Ms. Berdat. The interview dealt with an unrelated sexual battery that occurred on August 25, 1989. Darroch read the defendant his rights and obtained hair and blood samples which he said could prove or disprove Washington's guilt in the sexual battery case. When the state sought to use the samples in the Berdat murder case, Washington moved for suppression. His motion was denied by the trial court and on July 16, 1992, a jury convicted him of first-degree murder, burglary with a battery, and sexual battery. The judge overrode the jury's life recommendation and imposed the death sentence.n1 Washington appeals his convictions and sentences.n2

n1. The court found aggravating circumstances of: (1) a capital felony committed by a person under sentence of imprisonment, (2) previous conviction of another felony involving the use or threat of violence, (3) a capital felony committed while engaged in the crimes of burglary and sexual battery, and (4) heinous, atrocious or cruel. The court found no statutory mitigating circumstances, and found the non-statutory mitigating circumstances of defendant's love for his mother, his high school diploma, and his sports activities during high school.

n2. The issues raised on appeal are: (1) the state improperly peremptorily excused an African-American prospective juror; (2) the trial court should have suppressed the blood sample; (3) Leacock's identification should have been suppressed; (4) the DNA evidence was improperly

> admitted; (5) there was insufficient evidence to support Washington's guilt; (6) the heinous, atrocious, or cruel aggravating circumstance was vague; (7) the death sentence was improperly imposed; (8) Washington should not have been sentenced as a habitual violent felony offender; and (9) one of the two written judgments filed is extraneous and must be stricken.

This Court affirmed the judgments and sentences imposed in a unanimous opinion, finding, inter alia, no merit in "Washington's claim that the trial court improperly imposed the death sentence over the jury's recommendation of life imprisonment." Id. at 366. The Court added, "Since we are unable to find a reasonable basis for the jury's recommendation of life imprisonment, Washington's death sentence is affirmed." Id. at 366-367. This Court denied rehearing on April 27, 1995 and the United States Supreme Court denied certiorari on October 30, 1995. Washington v. Florida, 516 U.S. 946 (1995).

(B) Postconviction Motion and Appeal Following Evidentiary Hearing:

Thereafter, Washington sought postconviction relief and after a two-day evidentiary hearing on the issue of ineffective assistance of penalty phase counsel, the trial court denied relief. Washington appealed the adverse ruling, raising seven issues: (1) ineffective assistance of penalty phase counsel; (2) ineffective assistance of guilt phase counsel; (3) the jury override was unwarranted; (4) the jury instructions were invalid; (5) the death sentence rests on an automatic

aggravating circumstance; (6) the trial proceedings were fraught with error; (7) Florida's capital scheme is invalid.

Additionally, Washington filed a habeas corpus petition in this Court urging two issues: (1) appellate counsel should have requested a hearing on the admissibility of the DNA evidence under Frye v. United States, 293 F. 1013 (D.C. Cir. 1923); (2) Washington may be incompetent at the time of execution. Again, this Court unanimously affirmed the denial of postconviction relief and denied habeas corpus relief.[1] Washington v. State, 835 So. 2d 1083 (Fla. 2002).

This Court quoted from Judge Schaeffer's order and opined:

> After hearing the testimony of the witnesses at the evidentiary hearing, the circuit court below denied this claim. The court explained:
>
> > This one aspect of defendant's life—his serious drug addiction that provides these disorders, carries baggage that a sentencing jury would have to hear that his trial lawyer didn't want them to hear. [Trial counsel] didn't want the jury to know the defendant was a drug addict. He didn't want them to know the defendant sold drugs, sometimes making $3,000 per week, robbed his girlfriend and others, and stole from his mother, his brother, and many others, to support his drug habit. He didn't want the Pinellas County jury to know he committed a burglary, or sold drugs. The totality of all this may not have been considered mitigating by Mr.

[1] Six justices joined in the denial of relief. Justice Quince was recused.

> Washington's jury. Had they known all this, they may well have recommended a death sentence. Counsel cannot be deemed ineffective for not explaining a background of drug addiction and presenting it to Dr. Merin and thus to the jury when he knew this may not produce a good result for his client. *He knew about the defendant's drug use—he simply elected not to explore and exploit it because he didn't want to go there.* Knowing what juries will accept as mitigating and what they won't is not ineffectiveness. To the contrary, omitting all this from the jury's knowledge proved to be effective. It got the defendant a life recommendation in a very aggravated case.

The court concluded that even if the additional evidence would have precluded the override, omission of the evidence still would not have constituted ineffectiveness:

> In other words, if the defendant could convince this court, which he could not, that the additional evidence presented at the evidentiary hearing would have precluded this court's override, the defendant is not entitled to relief. If the defendant can convince the Florida Supreme Court that the additional evidence presented at the evidentiary hearing would have resulted in that Court's reversal of this court's override, the defendant is not entitled to relief. The reason is that before the defendant is entitled to any relief, BOTH prongs of the Strickland[7] test must be met. The defendant has not been able to establish either prong, but he clearly has failed to establish the first prong, that trial counsel's performance was deficient. To do this, he must have established that counsel made "errors so serious that counsel was not

> functioning as the counsel guaranteed the defendant by the Sixth Amendment." This he has been unable to do. The defendant had effective counsel at the penalty phase of his trial.
>
> Our review of the record shows that the circuit court's findings of fact on this claim are supported by competent substantial evidence and its ultimate conclusions on the deficiency and prejudice prongs comport with the law. Penalty phase counsel made a strategic decision not to pursue drug addiction as a mitigating circumstance and in fact won a life recommendation from the jury. We find no merit to this claim.
>
> (835 So. 2d at 1085-1086)

This Court also affirmed the trial court's denial of relief on a claim of ineffective assistance of counsel at the guilt phase. Id. at 1087. The Court determined that a claim of trial counsel ineffectiveness for failing to request a Frye hearing on the DNA evidence was procedurally barred (not raised in the Rule 3.850 motion) and the remaining claims of trial court error were also procedurally barred (not cognizable in a Rule 3.850 motion). 835 So. 2d at 108-1088 and n. 8 & 9. The Court determined that the postconviction claims and habeas petition claims were without merit or barred. Id. at 1091. In footnote 21 of the opinion, this Court recited that Washington did not raise Ring v. Arizona, 536 U.S. 584 (2002), as an issue in the present proceeding and the Court did not decide whether it was applicable. Id. at 1091.

(C) Successive Motion to Vacate:

Washington next filed an Amended Motion to Vacate in the circuit court seeking relief pursuant to Ring v. Arizona, 536 U.S. 584 (2002)(RI, 1-25). The state filed a Response to Successive Motion to Vacate Judgments of Conviction and Sentence (RI, 147-153). On November 18, 2003 Judge Schaeffer entered an Order Denying Amended Motion to Vacate Judgments of Convictions and Sentences, concluding (A) that United States Supreme Court and Florida Supreme Court precedent upholds Florida's sentencing scheme, (B) that Ring has not been held to apply retroactively, (C) that the maximum penalty for first degree murder in Florida is death, (D) that neither Ring nor Apprendi v. New Jersey, 530 U.S. 466 (2000), is violated in Washington's case, and (E) that Washington is procedurally barred from raising Ring. (RII, 262-285). The Court denied rehearing on December 15, 2003. (RII, 293).

Washington now appeals.

SUMMARY OF THE ARGUMENT

Issue I: Appellant impermissibly attempts to engage in repeatedly relitigating an issue not presented below and therefore not appropriate for initial presentation on appeal, to wit: whether this Court appropriately and correctly approved the override sentence of death on direct appeal in 1994 and correctly affirmed the lower court's order denying postconviction relief in 2002. Since there is no ruling below by the lower court for this Court to review on this now-presented argument, the Court should decline to revisit its prior rulings. See Thomas v. State, 838 So. 2d 535, 539 (Fla. 2003); Doyle v. State, 526 So. 2d 909, 911 (Fla. 1988) (improper to raise a claim on appeal not urged in the postconviction motion); Griffin v. State, 866 So. 2d 1, n.5 and n.7 (Fla. 2003). As explained in this Court's prior appeals, the judgment and sentence of death were properly imposed and the denial of postconviction relief was similarly correct.

Issue II: As to the only argument properly presented on this appeal -- whether appellant may obtain relief in this successive motion for postconviction relief pursuant to Ring v. Arizona, 536 U.S. 584 (2002) -- the lower court correctly denied relief for several reasons. Washington failed to satisfy the requirement of Florida Rule of Criminal Procedure 3.851(e)(2)(B) to provide legitimate reasons why this claim was not raised

previously. Additionally, the instant claim is procedurally barred for failure to present the claim in earlier proceedings, on direct appeal and in the previous collateral challenge. Relief must also be denied since Ring is not retroactively applicable to cases that became final prior to that decision. Ring is inapplicable in Florida since death is the maximum sentence for first degree murder under state law. Finally, even if Ring were applicable, relief would have to be denied since the rule of Apprendi v. New Jersey, 530 U.S. 466 (2000) is satisfied. The jury in the instant case unanimously concluded beyond a reasonable doubt that Washington was guilty contemporaneously of burglary and sexual battery to qualify for death eligibility and his prior violent felony convictions also satisfied Ring/Apprendi. The life recommendation was constitutionally irrelevant.

ARGUMENT

ISSUE I

WHETHER SUBSEQUENT DEVELOPMENTS DEMONSTRATE THAT WASHINGTON IS ENTITLED TO RELIEF.

Under this point appellant at length improperly argues apparently that the lower court erroneously denied relief to Washington on his prior motion for postconviction relief -- and does not even acknowledge this Court's affirmance without dissent of the lower court's denial of the prior motion for postconviction relief. Washington v. State, 835 So. 2d 1083 (Fla. 2002). Washington did not seek certiorari review in the United States Supreme Court following this Court's ruling and denial of his rehearing petition on January 10, 2003, and he is not entitled now to a belated and successive rehearing petition.

Since the order being appealed now relates only to Judge Schaeffer's determination that appellant was not entitled to relief under Ring v. Arizona, 536 U.S. 584 (2002) (R II, 262-285), appellant may not properly present an argument not even presented to the lower court that the jury override was improper under Tedder v. State, 322 So. 2d 908 (Fla. 1975) and its progeny. See, e.g., Washington v. State, 835 So. 2d 1083, 1087 (Fla. 2002):

> As for Washington's claim that trial counsel was ineffective for failing to request a Frye hearing on the DNA evidence, this issue is procedurally barred; it was not raised below in his rule 3.850 motion.

n8
(emphasis supplied)

> n8. See Steinhorst v. State, 412 So. 2d 332, 338 (Fla. 1982) ("Except in cases of fundamental error, an appellate court will not consider an issue unless it was presented to the lower court."); see also Bertolotti v. Dugger, 514 So. 2d 1095, 1096 (Fla. 1987) ("In order to preserve an issue for appellate review, the specific legal argument or ground upon which it is based must be presented to the trial court.").

See also Thomas v. State, 838 So. 2d 535, 539 (Fla. 2003)("A claim of ineffectiveness of trial counsel must be raised in circuit court, not this Court, for--above all--it is this Court's job to *review* a circuit court's ruling on a rule 3.850 claim, not to *decide* the merits of that claim.").

Consequently, appellant may not permissibly initiate here (yet another) challenge that the trial court erroneously overrode the jury's life recommendation and imposed a sentence of death. This Court previously decided on appellant's direct appeal in 1994 (rehearing was denied April 27, 1995) that the trial court's override of the jury life recommendation was proper under Tedder, *supra*. Washington v. State, 653 So. 2d 362, 366-367 (Fla. 1994). Moreover, appellant previously argued in Issue I of his previous postconviction appeal that trial counsel was ineffective and that the trial court had misapplied Tedder, citing Keen v. State, 775 So. 2d 263 (Fla. 2000). Following this Court's affirmance of the denial of

postconviction relief in Washington v. State, 835 So. 2d 1083 (Fla. 2002), appellant filed a Motion for Rehearing and again argued that the jury override was improper under Keen (Motion for Rehearing, pp. 4-7).

Since the subsequent successive motion sought to be reviewed here presented only the issue of whether Ring mandates the granting of postconviction relief, appellant's attempt to initiate the previously-rejected contention that the override by the sentencing judge was erroneous need not be entertained in this improper, unauthorized argument.

Since there is no ruling by the lower court pertaining to appellant's argument on this point, there is no basis to predicate review by the court or reversal of the lower court's order. See Washington, *supra*, 835 So. 2d at 1087; Thomas, *supra*; Doyle v. State, 526 So. 2d 909, 911 (Fla. 1988)(improper to raise a claim on appeal not urged in the postconviction motion); Griffin v. State, 866 So. 2d 1, n.5 (Fla. 2003)("On appeal, Griffin alleges a new basis for his claim of judicial bias. He contends that the trial judge was a friend of the victim's father and that defense counsel was aware of this fact. However, this new claim is not properly before this Court. [citation omitted]. Thus, we only consider the two grounds for recusal that Griffin raised in the circuit court.") and n.7 ("The trial court's instruction on the penalty phase voting was

not raised in Griffin's postconviction motion below. Thus, this claim is not properly before this Court."). To the extent that appellant's argument in Issue I is intended as an essay to lobby the legislature to alter the current statute for what appellant deems should become the law, appellee is confident that the legislature will give the suggestions the considerations that are appropriately due them. However, to the extent appellant seeks to have this Court legislate a new and different statute, the request is improper and should be denied.[2]

Appellant first asserts in subsection (A)(1) in Issue I that Keen establishes that Tedder was not properly applied to Washington's case. The short answer to this is that on appellant's last appeal -- from the denial of postconviction relief and the denial of habeas corpus relief -- Washington sought relief relying on Keen v. State, 775 So. 2d 263 (Fla. 2000). This Court's unanimous ruling denying relief obviates the need to revisit Keen.

Washington's repeated attempt to relitigate his prior appeals by reliance on Keen v. State, 775 So. 2d 263 (Fla. 2000) is unavailing. As stated by this Court in Mills v. Moore, 786

[2] Appellee notes that subsection (C) in Issue I of appellant's brief, comprising over fifteen pages, seems an almost identical duplication of Washington's Motion for Rehearing following this Court's prior rejection of his arguments on the last postconviction appeal. Since the Court unanimously denied the Motion for Rehearing as well, little purpose would be served in addressing now what this Court has already rejected.

So. 2d 532, 539-540 (Fla. 2001):

> While conceding that Keen is not new law, Mills nonetheless argues that Keen's application of Tedder constitutes a new standard by which jury override cases are reviewed. Keen is not a major constitutional change or jurisprudential upheaval of the law as it was espoused in Tedder. Keen offers no new or different standard for considering jury overrides on appeal. Thus, we disagree with Mills' contention that Keen offers a new standard of law and we reject the contention that Keen was anything more than an application of our long-standing Tedder analysis.
>
> Tedder is the seminal case in Florida on jury overrides and remains so after Keen. Tedder was applied to this case. Keen provides no basis for our reconsideration of this issue. For these reasons, we deny Mills' petition for writ of habeas corpus.

Similarly, here, too, this Court has correctly applied Tedder previously and there is no basis to revisit it.

In subsection (A)(2) in Issue I, Washington purports to provide an overview of the jury override in Florida; he apparently is noting that a number of override cases have not been sustained on direct appeal and further that some that have been approved by this Court on direct appeal have subsequently been set aside either in the state or federal postconviction courts, either primarily because of perceived violations of Hitchcock v. Dugger, 481 U.S. 393 (1987), a determination of trial counsel ineffectiveness, or due to the subsequent granting of relief to a codefendant. Since none of these conditions

apply here -- appellant acted alone, no Hitchcock error and trial counsel has been held not to have violated the Strickland[3] standard -- citation to these cases is irrelevant. To the extent that appellant mentions any of these cases to suggest that the imposition of a death sentence following a life recommendation is somehow improper or illegal, that view is mistaken. Indeed, Mr. Dobbert and Mr. White were executed although they had received life recommendations from the jury.[4] Appellant concludes his suggestion for improvement by advocating that trial judges should only override death recommendations, not life recommendations, citing Justice Stevens' dissent in Spaziano v. Florida, 468 U.S. 447 (1984). The majority decided in Spaziano, however, that:

> In light of the facts that the Sixth Amendment does not require jury sentencing, that the demands of fairness and reliability

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[3] Strickland v. Washington, 466 U.S. 668 (1984).

[4] While it is perhaps correct that State v. Dixon, 283 So. 2d 1, 8 (Fla. 1973) has noted that the legislature chose to have the trial judge determine the sentence to be imposed because the judge has "the requisite knowledge to balance the facts of the case against the standard criminal activity which can only be developed by involvement with the trials of numerous defendants," there is no validity to appellant's charge (Brief, p. 16) that the use of the override is "overwhelmingly" to impose death over life recommendations. Appellant's own citation to the paucity of cases involving jury overrides as well as the fact that this Court never sees and therefore cannot know that trial courts most frequently impose life sentences where there has been a life recommendation belies the assertion that the override is "overwhelmingly" used to impose death over life recommendations.

> 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.

The legislature has not chosen to alter Florida's scheme in the two decades since Spaziano despite the opportunity to consider appellant's suggestion.

In subsection (B) in Issue I, appellant merely repeats his disagreement with Judge Schaeffer's rejection of his arguments in the prior postconviction motion. Judge Schaeffer's rejection of course was affirmed by this Court's denial of relief. Appellant repeats that the trial court erred in rejecting the jury life recommendation under Tedder v. State, 322 So. 2d 908 (Fla. 1975) and its progeny but no persuasive reason is advanced which would warrant reconsideration of this Court's prior adverse disposition of his claim. While the caption of his argument alludes to "subsequent developments," he continues to rely on Keen v. State, 775 So. 2d 263 (Fla. 2000), a case he repeatedly cited in his Initial Brief and his Motion for Rehearing. Since this Court unanimously denied relief in the decision affirming Judge Schaeffer's order and the Motion for Rehearing, no valid purpose would be served by repeated reconsideration of the rejected argument.

In subsection (C) in Issue I, as stated above, appellant

repeats the previously-rejected argument that the lower court had erred in affirming the jury override in this case and to some extent re-asserts the argument he advanced in his prior Motion for Rehearing. As noted above, appellee submits that this Court's jurisprudence is clear that postconviction relief is unavailable simply by arguing in a second, third or fourth postconviction pleading the same contentions previously heard, considered and rejected by the Court on direct appeal and the initial postconviction challenge. See Allen v. State, 854 So. 2d 1255, 1258 n.4 (Fla. 2003)(finding procedural bar, "claims 8, 9 and 10 were raised on direct appeal."); Jones v. State, 845 So. 2d 55, 72 n.38 (Fla. 2003)(trial court correctly found issues procedurally barred because they should have been or were raised on direct appeal); Spencer v. State, 842 So. 2d 52 (Fla. 2003)(substantive claims of prosecutorial misconduct and juror bias procedurally barred since not raised on appeal); Griffin v. State, 866 So. 2d 1, 35 (Fla. 2003) (repeatedly stating that issues are procedurally barred because they could have and should have been raised on direct appeal, citing Valle v. State, 705 So. 2d 1331, 1335 (Fla. 1997) and Harvey v. Dugger, 656 So. 2d 1253, 1256 (Fla. 1995)); Shere v. State, 742 So. 2d 215, 217-218 n.7 (Fla. 1999); Parker v. Dugger, 550 So. 2d 459 (Fla. 1989).

ISSUE II

WHETHER RING V. ARIZONA, 536 U.S. 584 (2002) REQUIRES APPELLANT'S SENTENCE BE REDUCED TO LIFE IMPRISONMENT.

Judge Schaeffer correctly denied appellant's successive motion for postconviction relief on the claim presented below that Ring required vacation of the sentence of death that had been imposed. Initially, appellee would note that relief should have been denied below for Washington's failure to comply with the requirement of Rule 3.851(e)(2)(B), Fla.R.Crim.P., to provide "the reason or reasons the claim or claims raised in the present motion were not raised" previously. It does not suffice that Ring was recently decided since the Sixth Amendment and the operation of the Florida statute have been known for years.

Appellee respectfully submits that relief must be denied and the lower court order affirmed because the Ring/Apprendi claim is (a) procedurally barred for the failure to present the claim in earlier proceedings; (b) unavailable in this successive postconviction motion because Ring is not retroactively applicable; (c) inapplicable since under Florida law, death is the maximum penalty for first degree murder; (d) unavailable since the jury unanimously found in the guilt phase that appellant was guilty beyond a reasonable doubt of felonies of burglary and sexual battery, thus satisfying the exception of Apprendi v. New Jersey, 530 U.S. 466 (2000). As explained

below, appellant is mistaken in the belief that the Constitution requires that the jury concur in the court's sentencing for the valid imposition of a death sentence.

(A) THE INSTANT CLAIM IS PROCEDURALLY BARRED:

The lower court correctly determined that Washington's Ring claim was procedurally barred (R II, 279-280):

> **E. Washington Is Procedurally Barred from Raising Ring**
>
> Simply put, Washington's claim is procedurally barred. There can be no question that Washington did not raise a Sixth Amendment right to a jury determination of the aggravating circumstances claim at trial, at his sentencing proceeding, on appeal from his conviction and sentence, or in his first 3.851 Motion. Certainly he could have raised this at trial or in his first motion. This court has seen many motions and listened to many arguments where the attorney conceded that he or she was preserving an issue for federal review or because he or she thought the existing state or federal law should be changed. The Public Defender in the Sixth Circuit has a packet of motions he files in every death penalty case to preserve issues, even though the present law is contrary to his position. As the state argued in their Response, the Florida Supreme Court has applied the procedural bar doctrine to claims brought under Apprendi. *See e.g.* McGregor v. State, 789 So. 2d [976] (Fla. 2001) (Apprendi claim procedurally barred for failure to raise in trial court.); Barnes v. State, 794 So. 2d 590 (Fla. 2001) (Apprendi error not preserved for appellate review.) Additionally, the Eleventh Circuit found the Ring claim to be procedurally barred where it wasn't raised in the state courts, and did a good analysis of why they believed

> that Florida's case law would cause the Ring claim to likewise be procedurally barred in Florida's state courts. Turner v. Crosby, 339 F.3d 1247, 1280-1282 (11th Cir. 2003).

While appellant might contend that Ring v. Arizona had not been decided at the time of trial, that fact does not suffice to avoid the procedural default. What is important is not the existence of a particular decision but whether the tools were available to construct the argument. Engle v. Isaac, 456 U.S. 107, 133 (1982); Pitts v. Cook, 923 F.2d 1568, 1571-1572 (11th Cir. 1991). The Sixth Amendment right to jury trial has always been known and the tools have been available for the defense to construct the argument. See Proffitt v. Florida, 428 U.S. 242, 252 (1976)(holding Constitution does not require jury sentencing); Hildwin v. Florida, 490 U.S. 638 (1989)("This case presents us once again with the question whether the Sixth Amendment requires a jury to specify the aggravating factors that permit the imposition of capital punishment in Florida."); Spaziano v. Florida, 468 U.S. 447 (1984). See also Turner v. Crosby, 339 F.3d 1247, 1281-82 (11th Cir. 2003)("Indeed, despite their apparent futility, there have been numerous unsuccessful Sixth Amendment challenges to Florida's capital sentencing structure in the last twenty years." citing Hildwin v. State, 531 So. 2d 124, 129 (Fla. 1988); Spaziano v. State, 433 So. 2d 508, 511 (Fla. 1983); and Barclay v. Florida, 463 U.S. 939 (1983)). Obviously, the decision in Ring was not required as a

predicate for counsel for Ring to assert his Sixth Amendment claim in a timely and appropriate fashion in the Arizona trial court.

In his next subsection under this point (Appellant's Brief, pp. 51-57), Washington apparently argues that in the entire year of 1994 this Court applied the Tedder standard in an arbitrary manner. This claim must be rejected for several reasons. First and foremost, this argument has nothing to do with the claim for relief under Ring that appellant presented below and upon which Judge Schaeffer ruled. Since this claim was not presented below it cannot be asserted ab initio on appeal. See, e.g., Washington v. State, 835 So. 2d 1083, 1087 (Fla. 2002)("As for Washington's claim that trial counsel was ineffective for failing to request a Frye hearing on the DNA evidence, this issue is procedurally barred; it was not raised below in his rule 3.850 motion."); Thomas v. State, 838 So. 2d 535, 539 (Fla. 2003)("A claim of ineffectiveness of trial counsel must be raised in circuit court, not this Court, for--above all--it is this Court's job to *review* a circuit court's ruling on a rule 3.850 claim, not to *decide* the merits of that claim."). See also Doyle v. State, 526 So. 2d 909, 911 (Fla. 1988)(finding postconviction claim raised for the first time on appeal was procedurally barred); Griffin v. State, 866 So. 2d 1, n.5 (Fla. 2003)("On appeal, Griffin alleges a new basis for his claim of

judicial bias. He contends that the trial judge was a friend of the victim's father and that defense counsel was aware of this fact. However, this new claim is not properly before this Court. [citation omitted]. Thus, we only consider the two grounds for recusal that Griffin raised in the circuit court.") and n.7 ("The trial court's instruction on the penalty phase voting was not raised in Griffin's postconviction motion below. Thus, this claim is not properly before this Court.").

Moreover, appellant does not explain on what authority the lower court would have to pronounce this Court's 1994 rulings to be arbitrary, unworthy of respect and subject to being overruled in the Sixth Judicial Circuit.

Appellant apparently is continuing in a belated fashion to disagree with this Court's affirmance of the direct appeal and the denial of his rehearing motion which he had filed in December of 1994.[5] Rather than reflecting arbitrariness, this Court's affirmance noted that the instant case was more appropriately comparable to cases like Coleman v. State, 610 So. 2d 1283 (Fla. 1992). Washington v. State, 653 So. 2d at 366. See also this Court's approval of judicial override of jury

[5] In that rehearing motion appellant relied on Turner v. State, 645 So. 2d 444 (Fla. 1994), Barrett v. State, 649 So. 2d 219 (Fla. 1994), and Caruso v. State, 645 So. 2d 389 (Fla. 1994). This Court's opinion affirming the judgments and sentences also cited Esty v. State, 642 So. 2d 1074 (Fla. 1994) and Parker v. State, 643 So. 2d 1032 (Fla. 1994). There is no sound basis to revisit at this time a decade later appellant's mere disagreement with this Court's decision.

recommendations in Robinson v. State, 610 So. 2d 1288, 1292 (Fla. 1992)(potential mitigating evidence presented in the case including maintaining close family ties and being supportive of mother does not provide a reasonable basis for the jury's recommendation); Marshall v. State, 604 So. 2d 799, 806 (Fla. 1992)(stipulated testimony that older brother influenced him to break the law, that mother did not discipline him and allowed him to believe there would be no consequences for his behavior, and that his father loved him along with defense counsel's negative characterization of the victim in argument did not provide a reasonable basis for the jury's life recommendation).[6]

(B) RING IS NOT RETROACTIVE:

In Teague v. Lane, 489 U.S. 288 (1989), the United States Supreme Court announced that new constitutional rules of criminal procedure will not be applicable to cases which have become final before the new rules are announced, unless they fall within an exception to the general rule. 489 U.S. at 310. A case announces a new rule when it breaks new ground or imposes

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[6] Not that it should matter at this late date, but unlike the instant case in Parker, *supra*, there was no evidence the defendant shot the victims; Esty involved a lack of a criminal history and acting in an emotional rage; Turner involved a mentally ill defendant (suffering from paranoid schizophrenia); Caruso included evidence that the murders may have been committed in an irrational drug-induced frenzy; Barrett involved reversible error in the guilt phase, as well as evidence that the defendant was not the actual person who committed the murders. All are clearly distinguishable from appellant's case.

a new obligation on the state or the federal government. To put it differently, a case announces a new rule if the result was not *dictated* by precedent existing at the time the defendant's conviction became final. Id. at 301. A case is final when the judgment of conviction has been rendered, the availability of appeal exhausted and the time for petition for certiorari has elapsed. Washington's case became final with this Court's affirmance of the judgment and sentence on direct appeal and the denial of certiorari on October 30, 1995. Washington v. State, 653 So. 2d 362 (Fla. 1994), cert. den., 516 U.S. 946 (1995). The Teague Court announced two exceptions to the general rule on non-retroactivity. First, a new rule should be applied retroactively if it places a certain kind of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe. Id. at 311. The second exception, derived from an earlier view by Justice Harlan, requires that the new rule must "alter our understanding of the *bedrock procedural elements* that must be found to vitiate the fairness of a particular conviction." Thus, this exception is limited in scope to "those new procedures without which the likelihood of an accurate conviction is seriously diminished." 489 U.S. at 311-313.[7] Subsequent Supreme Court decisions have reinforced

[7]In Teague itself the court determined that the petitioner could not receive the benefit of Batson v. Kentucky, 476 U.S. 79 (1986), decided subsequently to petitioner's conviction

this standard. In Sawyer v. Smith, 497 U.S. 227 (1990), the Court rejected a defense argument that the second Teague exception should be read only to include new rules of capital sentencing that "preserve the accuracy and fairness of capital sentencing judgments":

> It is thus not enough under Teague to say that a new rule is aimed at improving the accuracy of trial. More is required. A rule that qualifies under this exception must not only improve accuracy, but also "'alter our understanding of the *bedrock procedural elements*'" essential to the fairness of a proceeding. (497 U.S. at 242.)

The Sawyer Court echoed Teague that the second exception is directed only at new rules essential to the accuracy and fairness of the trial and it is "unlikely that many such components of basic due process have yet to emerge. 489 U.S. at 313." 497 U.S. at 243. Consequently, the petitioner was not entitled to habeas relief by reliance on Caldwell v. Mississippi, 472 U.S. 320 (1985), decided subsequently to when his murder conviction became final. While Caldwell announced a new rule, it did not come within the Teague exception for "watershed rules fundamental to the integrity of the criminal proceeding." 497 U.S. at 229. In Graham v. Collins, 506 U.S.

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since the absence of a fair cross section on the jury venire does not undermine the fundamental fairness that must underlie a conviction or seriously diminish the likelihood of obtaining an accurate conviction. The rule requiring petit juries be composed of a fair cross section of the community was not a bedrock procedural element. Id. at 315.

461 (1993), the Court held that a claim that the Texas capital sentencing procedures barred the jury from giving effect to particular mitigating evidence was held to propose a new rule. Prior case law did not "dictate" the result requested. The new rule sought by Graham did not decriminalize a class of conduct nor did Graham's special jury instructions concerning his mitigating evidence of youth, family background and positive character traits seriously diminish the likelihood of obtaining an accurate determination in his sentencing proceeding. 506 U.S. at 477-478.

In Tyler v. Cain, 533 U.S. 656, 150 L.Ed.2d 632 (2001), a petitioner argued in a second federal habeas petition that he was entitled to the retroactive benefit of the jury instruction rule in Cage v. Louisiana, 498 U.S. 39 (1990), that a jury instruction is unconstitutional if there is a reasonable likelihood that the jury understood the instruction to allow conviction without proof beyond a reasonable doubt. The Court denied relief noting that it had not made Cage retroactive. Moreover, in footnote 7 of the opinion, the Court explained that the second Teague exception is available only if the new rule "alters our understanding of the bedrock procedural elements" essential to the fairness of a proceeding. Even classifying an error as structural does not necessarily alter our understanding of these bedrock procedural elements. Nor can it be said that

all new rules relating to due process alter such understanding. The second Teague exception is reserved only for truly "watershed" rules, a small core of rules which not only seriously enhance accuracy but also require observance of those procedures that are implicit in the concept of ordered liberty. See also Butler v. McKellar, 494 U.S. 407 (1990)(rejecting collateral attack under the Teague retroactivity standard and holding that Arizona v. Roberson, 486 U.S. 675 (1988) announced a new rule even though the Court had said Roberson was directly controlled by Edwards v. Arizona, 451 U.S. 477 (1981)):

> But the fact that a court says that its decision is within the "logical compass" of an earlier decision, or indeed that it is "controlled" by a prior decision, is not conclusive for purposes of deciding whether the current decision is a "new rule" under Teague. Courts frequently view their decisions as being "controlled" or "governed" by prior opinions even when aware of reasonable contrary conclusions reached by other courts. . . That the outcome in Roberson was susceptible to debate among reasonable minds is evidenced further by the differing positions taken by the judges of the Courts of Appeals for the Fourth and Seventh Circuits noted previously. It would not have been an illogical or even a grudging application of Edwards to decide that it did not extend to the facts of Roberson. (Id. at 415.)

Saffle v. Parks, 494 U.S. 484 (1990)(rejecting defense claim that rule should be announced as to how the jury must consider the mitigating evidence and even if declared such a new rule would not be a watershed rule of criminal procedure implicating

the fundamental fairness and accuracy of the criminal proceeding); Lambrix v. Singletary, 520 U.S. 518, 539-40 (1997)(holding that Espinosa v. Florida, 505 U.S. 1079 (1992) announced a new rule under Teague but that neither of the two exceptions were applicable: neither a class of private conduct was placed beyond the power of the state to proscribe nor was it a watershed rule implicating the fundamental fairness and accuracy of the criminal proceeding).

Ring arises from application of Apprendi v. New Jersey, 530 U.S. 466 (2000) to Arizona's capital scheme. Every federal circuit court to address the issue has found that Apprendi is not retroactive. E.g., United States v. Sanders, 247 F.3d 139, 146-51 (4th Cir. 2001)(finding that Apprendi's requirements of jury finding beyond a reasonable doubt of fact that increases statutory maximum for an offense "are not the types of watershed rules implicating fundamental fairness that require retroactive application."); United States v. Brown, 305 F.3d 304 (5th Cir. 2002); Goode v. United States, 305 F.3d 378 (6th Cir. 2002) ("Apprendi does not create a new 'watershed rule.'"); Curtis v. United States, 294 F.3d 841 (7th Cir. 2002); United States v. Moss, 252 F.3d 993, 996-1001 (8th Cir. 2001)("Apprendi is not of watershed magnitude."); United States v. Sanchez-Cervantes, 282 F.3d 664 (9th Cir. 2002); United States v. Mora, 293 F.3d 1213 (10th Cir. 2002); McCoy v. United States, 266 F.3d 1245 (11th

Cir. 2001); Coleman v. United States, 329 F.3d 77 (2d Cir. 2003); Sepulveda v. United States, 330 F.3d 55 (1st Cir. 2003). Several state courts have similarly held that Apprendi (and therefore Ring) does not apply retroactively. E.g., Sanders v. State, 815 So. 2d 590 (Ala. Crim. App. 2001); Whisler v. State, 36 P.3d 290 (Kan. 2001); State v. Sprick, 59 S.W.3d 515 (Mo. 2001); State v. Tallard, 816 A.2d 977 (NH 2003)(applying Teague test to deny Apprendi claim collaterally in New Hampshire); People v. De La Paz, 791 N.E.2d 489 (Ill. 2003). In fact, the United States Supreme Court is clearly not of the opinion that its holding in Apprendi is retroactive. It has itself procedurally barred an Apprendi claim. See United States v. Cotton, 535 U.S. 625 (2002)(finding that Apprendi error did not qualify as plain error, the federal equivalent of fundamental error). See also In Re Johnson, 334 F.3d 403 n.1 (5th Cir. 2003)(noting that while the Court need not reach the issue, "since the rule in Ring is essentially an application of Apprendi, logical consistency suggests that the rule announced in Ring is not retroactively available"); Moore v. Kinney, 320 F.3d 767, 771 n.3 (8th Cir. 2003)("Absent an express pronouncement on retroactivity from the Supreme Court, the rule from Ring is not retroactive"); Turner v. Crosby, 339 F.3d 1247, 1282 (11th Cir. 2003)(Turner is procedurally barred from bring a Ring claim . . . and alternatively, Ring does not apply

retroactively to Turner); Colwell v. State, 59 P.3d 463 (Nev. 2002)(retroactive application of Ring on collateral review is not warranted); State v. Towery, 64 P.3d 828 (Ariz. 2003)(Ring does not apply retroactively); Cannon v. Mullin, 297 F.3d 989 (10th Cir. 2002)(Cannon has failed to make a prima facie showing that the Supreme Court has made Ring retroactively applicable to cases on collateral review); Sibley v. Culliver, 243 F.Supp.2d 1278 (U.S.D.C., M.D. Ala., N.D. 2003)("...the Court concludes that Ring may not be applied retroactively to Sibley's case which is on collateral review"); State v. Lotter, 664 N.W.2d 892 (Neb. 2003)(holding that Ring announced a new rule of criminal procedure which does not fall within either Teague exception to rule of nonretroactivity, and thus denying relief on collateral challenge to conviction); contra, State v. Whitfield, 107 S.W.3d 253 (Mo. 2003); Summerlin v. Stewart, 341 F.3d 1082 (9th Cir. 2003).

As explained in Turner v. Crosby, *supra*:

> The constitutionality of judge-imposed death sentences was accepted in state and federal courts. Thus, under Teague, because Ring's new rule had not been announced at the time Turner's convictions and sentences became final, Ring does not apply retroactively to his § 2254 petition unless it meets one of the two narrow exceptions in Teague. (339 F.3d at 1285)

The Court further explained that the first exception was inapplicable since it did not decriminalize any class of conduct

or prohibit a certain category of punishment for a class of defendants. Additionally,

> To fall under this second Teague exception, a new rule "must meet two requirements: Infringement of the rule must seriously diminish the likelihood of obtaining an accurate conviction, and the rule must alter our understanding of the *bedrock procedural elements* essential to the fairness of a proceeding." Tyler v. Cain, 533 U.S. 656, 665, 121 S.Ct. 2478, 2484, 150 L.Ed.2d 632 (2001) (quotation marks and citations omitted); *see* United States v. Swindall, 107 F.3d 831, 835 (11th Cir. 1997) (noting that a new rule must "not only improve accuracy [of trial], but also alter our understanding of the *bedrock procedural elements* essential to the fairness of a proceeding" to meet Teague's second exception) (quotation marks and citation omitted). The United States Supreme Court repeatedly has emphasized the narrowness of Teague's second exception. Sawyer v. Smith, 497 U.S. 227, 243, 110 S.Ct. 2822, 2832, 111 L.Ed.2d 193 (1990) ("[I]t is 'unlikely that many such components of basic due process have yet to emerge.'") (quoting Teague, 489 U.S. at 313, 109 S. Ct. at 1077); *see also* McCoy, 266 F.3d at 1257 (stating that the "Supreme Court has underscored the narrowness of this second [Teague] exception"); Spaziano v. Singletary, 36 F.3d 1028, 1042-43 (11th Cir. 1994) (stating that a new rule fitting the second exception "must be so fundamentally important that its announcement is a 'groundbreaking occurrence'") (citation omitted).
>
> We conclude that Ring, like Apprendi, "is not sufficiently fundamental to fall within Teague's second exception." McCoy, 266 F.3d at 1257 (listing other circuits concluding Apprendi does not fall under Teague's second exception); Towery, 64 P.3d at 835 (concluding that Ring is not a watershed rule that implicates the

> fundamental fairness of the trial and that Ring "does not meet either of the exceptions" in Teague); Colwell, 59 P.3d at 473 (concluding "the likelihood of an accurate sentence was not seriously diminished simply because a three-judge panel, rather than a jury, found the aggravating circumstances that supported Colwell's death sentence").[33] Pre-Ring sentencing procedure does not diminish the likelihood of a fair sentencing hearing; instead, Ring's new rule, at most, would shift the fact-finding duties during Turner's penalty phase from (a) an impartial judge after an advisory verdict by a jury to (b) an impartial jury alone.[34] Ring is 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. Ring simply does not fall within the ambit of the second Teague exception.
>
> Accordingly, the new constitutional rule announced by the United States Supreme Court in Ring does not fall within either exception to Teague's non-retroactivity standard. Therefore, Ring, like Apprendi, does not apply retroactively on collateral review in federal court in Turner's case because his convictions and sentences became final before the Supreme Court announced Ring. Thus, Turner cannot collaterally challenge his convictions and sentences on the basis of a claimed Ring error.[35] (footnotes omitted)(Id. at 1285-86)

Appellant cannot prevail on his claim for entitlement to relief by retroactive application of Ring in this postconviction challenge. Ring announced a change in procedural law. In Apprendi v. New Jersey, 530 U.S. 466 (2000), the Court held that a fact, other than a prior conviction, that increases the

statutory maximum for a crime must be presented to the jury and proven beyond a reasonable doubt. Ring applied Apprendi to Arizona's sentencing scheme. As explained below, the maximum sentence for first degree murder is death in Florida, unlike the situation in Arizona. In any event, Ring only involves a procedural question -- who decides a given question, the judge or jury. The courts have recognized that jury involvement in capital sentencing does not enhance accuracy. Not only is the requirement of improving the accuracy of a trial unsatisfied by application of Ring to the instant case, but also it is not a bedrock procedural element essential to the fairness of a proceeding, i.e., one that is implicit in the concept of ordered liberty as explained in Teague, *supra*, Sawyer, *supra*, and Tyler, *supra*. It goes without saying that the first exception of Teague is inapplicable since prosecution for first degree murder is not proscribed due to primary, private, individual conduct beyond the power of the criminal law-making authority to proscribe.

Similarly, Washington cannot prevail under this Court's standard of retroactivity under the principles of Witt v. State, 387 So. 2d 922 (Fla. 1980), which requires a decision of fundamental significance which so drastically alters the underpinnings of Washington's death sentence that "obvious injustice" exists. See New v. State, 807 So. 2d 52 (Fla. 2001);

Ferguson v. State, 789 So. 2d 306, 311 (Fla. 2001)(The 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). Appellant cannot show that adoption of Ring satisfies these criteria.

(C) RING IS INAPPLICABLE SINCE IN FLORIDA DEATH IS THE MAXIMUM SENTENCE FOR FIRST DEGREE MURDER:

The lower court recognized that the maximum sentence for first degree murder in Florida is death, unlike the situation in Arizona (R II, 269). See Mills v. Moore, 786 So. 2d 532, 538 (Fla. 2001) ("Mills argues that the statute allowing the judge to override the jury's recommendation makes it clear that the maximum possible penalty is life imprisonment unless and until the judge holds a separate hearing and finds that the defendant is death eligible. . . . The maximum possible penalty described in the capital sentencing scheme is clearly death.")(emphasis supplied); Mann v. Moore, 794 So. 2d 595, 599 (Fla. 2001)(same); Porter v. Crosby, 840 So. 2d 981, 986 (Fla. 2003)("Contrary to Porter's claims, we have repeatedly held that the maximum penalty under the statute is death and have rejected the other Apprendi arguments."); Shere v. Moore, 830 So. 2d 56, 62 (Fla. 2002)("This Court has defined a capital felony to be one where the maximum possible punishment is death. [citation omitted] The only such crime in the State of Florida is first-degree

murder, premeditated or felony.")

Since this Court decided Bottoson v. Moore, 833 So. 2d 693 (Fla. 2002), and King v. Moore, 831 So. 2d 143 (Fla. 2002), it has repeatedly and consistently denied relief requested under Ring, both on direct review cases and on collateral challenges. See, e.g., Marquard v. State/Moore, 850 So. 2d 417, 431 n.12 (Fla. 2002); Chavez v. State, 832 So. 2d 730, 767 (Fla. 2002); Bruno v. Moore, 838 So. 2d 485 (Fla. 2002); Fotopoulos v. State, 838 So. 2d 1122 (Fla. 2002); Lucas v. State/Crosby, 841 So. 2d 380 (Fla. 2003); Porter v. Crosby, 840 So. 2d 981 (Fla. 2003); Spencer v. State, 842 So. 2d 52 (Fla. 2003); Conahan v. State, 844 So. 2d 629 (Fla. 2003); Anderson v. State, 841 So. 2d 390 (Fla. 2003); Cole v. State, 841 So. 2d 409 (Fla. 2003); Doorbal v. State, 837 So. 2d 940 (Fla. 2003); Kormondy v. State, 845 So. 2d 41 (Fla. 2003)("Ring does not require either notice of the aggravating factors that the State will present at sentencing or a special verdict form indicating the aggravating factors found by the jury."); R. S. Jones v. State/Crosby, 845 So. 2d 55 (Fla. 2003); Lugo v. State, 845 So. 2d 74 (Fla. 2003); Lawrence v. State, 846 So. 2d 440 (Fla. 2003); Banks v. State/Crosby, 842 So. 2d 788 (Fla. 2003); Grim v. State, 841 So. 2d 455 (Fla. 2003); Butler v. State, 842 So. 2d 817 (Fla. 2003)(relying on Bottoson v. Moore, 833 So. 2d 693 and King v. Moore, 831 So. 2d 143 to a Ring claim in a single aggravator (HAC) case); Chandler

v. State, 848 So. 2d 1031, 1034 n.4 (Fla. 2003); Pace v. State/Crosby, 854 So. 2d 167 (Fla. 2003); Cooper v. State/Crosby, 856 So. 2d 969 (Fla. 2003); Duest v. State, 855 So. 2d 33 (Fla. 2003); Blackwelder v. State, 851 So. 2d 650 (Fla. 2003); Wright v. State/Crosby, 857 So. 2d 861 (Fla. 2003). See also Nelson v. State, 850 So. 2d 514 (Fla. 2003); Caballero v. State, 851 So. 2d 655 (Fla. 2003); Belcher v. State, 851 So. 2d 678 (Fla. 2003); Allen v. State/Crosby, 854 So. 2d 1255 (Fla. 2003); Fennie v. State/Crosby, 855 So. 2d 597 n.10 (Fla. 2003); Owen v. Crosby/State, 854 So. 2d 182 (Fla. 2003); McCoy v. State, 853 So. 2d 396 (Fla. 2003); Conde v. State, 860 So. 2d 930 (Fla. 2003); Stewart v. State, ___ So. 2d ___, 28 Fla. L. Weekly S700 (Fla., Sept. 11, 2003); Jones v. State/Crosby, 855 So. 2d 611 (Fla. 2003); Rivera v. State/Crosby, 859 So. 2d 495 (Fla. 2003); Davis v. State, 859 So. 2d 465 (Fla. 2003); Anderson v. State, 863 So. 2d 169 (Fla. 2003); Henry v. State, 862 So. 2d 679 (Fla. 2003); Cummings-El v. State, 863 So. 2d 246 (Fla. 2003); Johnston v. State, 863 So. 2d 271, 286 (Fla. 2003); Owen v. State, 862 So. 2d 687, 703-704 (Fla. 2003); Zakrzewski v. State, 866 So. 2d 688 (Fla. 2003); Guzman v. State, ___ So. 2d ___, 28 Fla. L. Weekly S829 (Fla., Nov. 20, 2003); E. W. Davis v. State, ___ So. 2d ___, 28 Fla. L. Weekly S835 (Fla., Nov. 20, 2003); Globe v. State, ___ So. 2d ___, 29 Fla. L. Weekly S119 (Fla., March 18, 2004).

(D) RING RELIEF IS UNAVAILABLE SINCE THE JURY UNANIMOUSLY DETERMINED IN THE GUILT PHASE BEYOND A REASONABLE DOUBT THAT APPELLANT WAS GUILTY OF BURGLARY AND SEXUAL BATTERY, SATISFYING APPRENDI V. NEW JERSEY, 530 U.S. 466 (2000):

Ring v. Arizona:

The United States Supreme Court made it abundantly clear that Ring was asserting a very limited claim. The Court stated, 536 U.S. 584, at 597 n.4:

> n4 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, 140 L. Ed. 2d 350, 118 S. Ct. 1219 (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, 147 L. Ed. 2d 435, 120 S. Ct. 2348 (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, 49 L. Ed. 2d 913, 96 S. Ct. 2960 (1976) (plurality opinion) ("It 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, 108 L. Ed. 2d 725, 110 S. Ct. 1441 (1990). Finally, Ring does not contend that his indictment was constitutionally defective. See

> Apprendi, 530 U.S. at 477, n. 3 (Fourteenth Amendment "has not . . . been construed to include the Fifth Amendment right to 'presentment or indictment of a Grand Jury'").

The Court concluded that "Because Arizona's enumerated aggravating factors operate as 'the functional equivalent of an element of a greater offense,' Apprendi, 530 U.S. at 494, n. 19, the Sixth Amendment requires that they be found by a jury." 536 U.S. at 609.

Concurring Justice Scalia explained that:

> . . . the unfortunate fact is that today's judgment has nothing to do with jury sentencing. What today's decision says is that the jury must find the existence of the *fact* that an aggravating factor existed. 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 the sentencing phase or, more simply, by placing the aggravating-factor determination (where it logically belongs anyway) in the guilt phase. (emphasis supplied)

The thrust of appellant's Ring argument -- almost hidden among his belated and untimely attack on the correctness of prior appellate dispositions of his case -- appears to be the dicta in the concurring opinion of Justice Lewis expressing a concern about jury overrides in Florida. Of course, Justice Lewis's expressed concern in his dicta in Bottoson obviously predated this Court's subsequent and continuing jurisprudence that recognizes that the presence of the prior violent felony

conviction aggravator (such as the prior sexual battery of Mary Beth Weigers and the 1988 burglary conviction) and the contemporaneous determination of guilt beyond a reasonable doubt by this jury of appellant's guilt of burglary and sexual battery of Mrs. Berdat for the during the course of a felony aggravator exempts the case from Ring/Apprendi application. That Justice Lewis has not voiced dissension, indeed he has joined in these holdings, not only supports an inference but also demonstrates that he, too, is in full agreement with this jurisprudence. See, generally Doorbal v. State, 837 So. 2d 940, 963 (Fla. 2003); Lugo v. State, 845 So. 2d 74, 119, n.79 (Fla. 2003); Duest v. State, 855 So. 2d 33 (Fla. 2003); Blackwelder v. State, 851 So. 2d 650 (Fla. 2003); Henry v. State, 862 So. 2d 679, 687 (Fla. 2003); Owen v. State, 862 So. 2d 687, 703-704 (Fla. 2003); Rivera v. State, 859 So. 2d 495 (Fla. 2003); Jones v. State/Crosby, 855 So. 2d 611 (Fla. 2003); Fennie v. State, 855 So. 2d 597, n.10 (Fla. 2003); Owen v. Crosby, 854 So. 2d 182 (Fla. 2003); McCoy v. State, 853 So. 2d 396, 409 (Fla. 2003); Johnston v. State, 863 So. 2d 271, 286 (Fla. 2003); Anderson v. State, 863 So. 2d 169 (Fla. 2003); Zakrzewski v. State, 866 So. 2d 688 (Fla. 2003); Davis v. State, ___ So. 2d ___, 28 Fla. L. Weekly S835, 839 (Fla., Nov. 20, 2003); Globe v. State, ___ So. 2d ___, 29 Fla. L. Weekly S119 (Fla., March 18, 2004); Kormondy v. State, 845 So. 2d 41 (Fla. 2003).

Once one accepts the fact -- as the Court has already done -- that a constitutional challenge under Ring is unavailing in a case where the jury's participation by return of a unanimous guilty verdict to an accompanying felony which supports a statutory aggravator or where a prior conviction is present to support the Apprendi exception, the conclusion is ineluctable that for Ring purposes it is constitutionally irrelevant whether the jury has made a final recommendation of death or life imprisonment. See Ring, *supra*, at 597 n.4 ("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, 49 L. Ed. 2d 913, 96 S. Ct. 2960 (1976) (plurality opinion) ('It has never [been] suggested that jury sentencing is constitutionally required.')."); see also Ring at 613, Scalia J. concurring ("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 the sentencing phase or, more simply, by placing the aggravating-factor determination (where it logically belongs anyway) in the guilt phase.").

The lower court correctly ruled that neither Ring, *supra*, nor Apprendi, *supra*, has been violated in the instant case since at least three of the four aggravating factors determined to exist were found with the jury's participation (R II, 270-279).

(1) The Prior Violent Felony Convictions:

Appellant had been convicted on August 31, 1988, of burglary to an occupied dwelling with an assault or battery and Washington had been convicted on March 20, 1990, of sexual battery to Mary Beth Weigers. These convictions were not challenged at the penalty phase and there is no reason to speculate that any member of the jury did not find that the prior burglary and prior rape were prior crimes of violence for which Washington had previously been convicted. But it does not even matter if the jury found this factor. In Apprendi, the Court specifically exempted "prior convictions" from its decision by stating: "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. at 490 (emphasis supplied).

This Court has repeatedly acknowledged that the presence of the prior violent felony aggravator exempts capital defendants from Ring/Apprendi. See Doorbal v. State, 837 So. 2d 940, 963 (Fla. 2003):

> These arguments must fail because here, one of the aggravating circumstances found by the trial judge to support the sentences of death was that Doorbal had been convicted of a prior violent felony, namely the contemporaneous murders of Griga and Furton, and the kidnaping, robbery, and attempted murder of Schiller. Because these felonies

> were charged by indictment, and a jury unanimously found Doorbal guilty of them, the prior violent felony aggravator alone clearly satisfies the mandates of the United States and Florida Constitutions, and therefore imposition of the death penalty was constitutional.

Accord, Lugo v. State, 845 So. 2d 74, 119 (Fla. 2003)(rejecting Ring/Apprendi arguments, noting that "...Lugo was convicted by a unanimous jury vote of armed robbery and armed kidnaping among other felonies charged. The existence of prior violent felonies was also established."). See also Blackwelder v. State, 851 So. 2d 650, 653-654 (Fla. 2003):

> Finally, Blackwelder argues that Florida's capital sentencing scheme is unconstitutional in light of Ring v. Arizona, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002). This Court, considering the effect of Ring, denied relief in Bottoson v. Moore, 833 So.2d 693 (Fla.), cert. denied, 537 U.S. 1070, 123 S.Ct. 662, 154 L.Ed.2d 564 (2002), and King v. Moore, 831 So.2d 143 (Fla.), cert. denied, 537 U.S. 1067, 123 S.Ct. 657, 154 L.Ed.2d 556 (2002), which, like Blackwelder's case, involved a prior-felony-conviction aggravator. Ring rests on Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), which held that, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Id. at 490. We have previously rejected claims under Apprendi and Ring in cases involving the prior-felony-conviction aggravator. See Lugo v. State, 845 So.2d 74, 119 n. 79 (Fla.2003) (noting rejection of Apprendi/Ring claims in postconviction appeals, unanimous guilty verdict on other felonies, and "existence of

> prior violent felonies"); 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").

Duest v. State, 855 So. 2d 33, 49 (Fla. 2003)(same); Henry v. State, 862 So. 2d 679, 686-687 (Fla. 2003); Kormondy v. State, 845 So. 2d 41, 54 n.3 (Fla. 2003); Globe v. State, ___ So. 2d ___, 29 Fla. L. Weekly S119 (Fla., March 18, 2004)("Additionally, the aggravating factors in this case included Globe's prior violent felony convictions. . . . Because these felonies were charged by indictment and a jury unanimously found Globe guilty of them, the prior violent felony aggravator alone clearly satisfies the mandates of the United States and Florida Constitutions.").

(2) The Felony Murder Aggravator:

Judge Schaeffer also correctly pointed out that the same jury that convicted him of first degree murder also found him guilty of committing the contemporaneous crimes of burglary to an occupied dwelling with a battery and sexual battery -- unanimously and beyond a reasonable doubt. That fact alone suffices to take the case out of the Apprendi/Ring analysis. See Doorbal, *supra*; Lugo, *supra*; Blackwelder, *supra*; Henry, *supra*; Globe, *supra*. See also Jones v. State, 845 So. 2d 55, 74 (Fla. 2003)("Additionally, two of the aggravating circumstances

present here were that Jones had been convicted of a prior violent felony, and that the instant murder was committed while Jones was engaged in the commission of a robbery and burglary, both of which were charged by indictment and found unanimously by a jury.")(emphasis supplied); Ex parte Waldrop, 859 So. 2d 1181, 1188-1189 (Ala. 2002), cert. den., ___ U.S. ___, 157 L.Ed.2d 314, 124 S.Ct. 430 (2003).

As acknowledged by concurring Justice Scalia in Ring, 536 U.S. at 613:

> While I am, as always, pleased to travel in JUSTICE BREYER's company, the unfortunate fact is that today's judgment has nothing to do with jury sentencing. What today's decision says is that the jury must find the existence of the fact that an aggravating factor existed. 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 the sentencing phase or, more simply, by placing the aggravating-factor determination (where it logically belongs anyway) in the guilt phase.

(3) Washington was Under a Sentence of Imprisonment at the Time He Committed the Murder:

As the lower court also found, appellant was also under a sentence of imprisonment, residing at the Largo Work Release Center (R II, 275-276):

> There was no question that at the time of this murder, Washington was residing in prison -- at the Largo Work Release Center, serving a sentence of imprisonment. This fact was clear throughout the trial, it was never contested by Washington, and was an

> inherent part of the facts at the guilt stage of Washington's trial. A defendant is not committed to prison without having been convicted of a felony. Perhaps it can logically be argued that since this aggravating factor would require a prior conviction, Apprendi would not require this aggravating factor to be found by a jury. If this is an illogical extension of the Apprendi "prior conviction" exemption, then there would be no way to tell if the jury found this aggravating factor beyond a reasonable doubt, except by their guilty verdict, they had to have believed the State's facts that Washington left the Largo Work Release Center to go to work and never appeared on the job that day because he broke into Mrs. Berdat's home and raped and murdered her, after which he returned to the Largo Work Release Center. Washington could not have been convicted of any crime if the jury had not believed he was the same Anthony Washington whose address was the Largo Work Release Center, a Florida prison, at the time Berdat was murdered by Washington. Washington did not contest that he was residing at the Largo Work Release Center, serving a sentence of imprisonment, at the time of Berdat's murder in either the guilt or the penalty phase of his trial. What he contested was that he was the person who broke into Berdat's home and raped and murdered her. To suggest that the jury did not find this fact beyond a reasonable doubt when they convicted Washington of burglary, rape and murder, and thus, of necessity, found the aggravating circumstance beyond a reasonable doubt, is ludicrous.

This, too, is a basis for denial of relief. As stated in Allen v. State, 854 So. 2d 1255, 1262 (Fla. 2003):

> Moreover, one of the aggravating factors in this case was that the murder was committed while Allen was under a sentence of imprisonment. Such an aggravator need not be found by the jury.

Thus, for this additional basis, relief must be denied.[8]

Jury sentencing is not required by the Constitution. In Spaziano v. Florida, 468 U.S. 447, 461-464 (1984), the Court addressed and rejected a defense argument that the Sixth Amendment should require the sentence be imposed by a jury in a capital case:

> Petitioner's primary argument is that the laws and practice in most of the States indicate a nearly unanimous recognition that juries, not judges, are better equipped to make reliable capital sentencing decisions and that a jury's decision for life should be inviolate. The reason for that

[8] Our sister state, Alabama, also permits judicial override of jury life recommendations and after Ring has considered and rejected challenges that the Sixth Amendment is violated by a trial court's imposition of a death sentence despite a jury life recommendation. See Ex parte Waldrop, 859 So. 2d 1181, 1188 (Ala. 2002), cert. den., ___ U.S. ___, 157 L.Ed.2d 314 (2003) ("Because the jury convicted Waldrop of two counts of murder during a robbery in the first degree, a violation of [statutory citation omitted], the statutory aggravating circumstance of committing a capital offense while engaged in the commission of a robbery, [statutory citation omitted], was 'proven beyond a reasonable doubt.' . . . Thus, in Waldrop's case, the jury, and not the trial judge, determined the existence of the 'aggravating circumstance necessary for imposition of the death penalty.' Ring, 536 U.S. at 609, 122 S. Ct. at 2443. Therefore, the findings reflected in the jury's verdict alone exposed Waldrop to a range of punishment that had as its maximum the death penalty. This is all Ring and Apprendi require."); Ex parte Hodges, 856 So. 2d 936, 944 (Ala.), cert. den., ___ U.S. ___, 157 L.Ed.2d 379 (2003)("Likewise, Hodges became eligible for the death penalty when the jury found that he committed the murder while he was engaged in a robbery in the first degree, and the trial court's subsequent finding that the murder was 'especially heinous, atrocious or cruel' is implicated only in the process of weighing the aggravating and mitigating circumstances.").

recognition, petitioner urges, is that the nature of the decision whether a defendant should live or die sets capital sentencing apart and requires that a jury have the ultimate word. Noncapital sentences are imposed for various reasons, including rehabilitation, incapacitation, and deterrence. In contrast, the primary justification for the death penalty is retribution. As has been recognized, "the decision that capital punishment may be the appropriate sanction in extreme cases is an expression of the community's belief that certain crimes are themselves so grievous an affront to humanity that the only adequate response may be the penalty of death." Id., at 184, 49 L.Ed.2d 859, 96 S.Ct. 2909. The imposition of the death penalty, in other words, is an expression of community outrage. Since the jury serves as the voice of the community, the jury is in the best position to decide whether a particular crime is so heinous that the community's response must be death. If the answer is no, that decision should be final.

Petitioner's argument obviously has some appeal. But it has two fundamental flaws. First, the distinctions between capital and noncapital sentences are not so clear as petitioner suggests. Petitioner acknowledges, for example, that deterrence may be a justification for capital as well as for noncapital sentences. He suggests only that deterrence is not a proper consideration for particular sentencers who are deciding whether the penalty should be imposed in a given case. The same is true, however, in noncapital cases. Whatever the sentence, its deterrent function is primarily a consideration for the legislature. Gregg v. Georgia, 428 U.S., at 186, 49 L.Ed.2d 859, 96 S.Ct. 2909 (joint opinion). Similar points can be made about the other purposes of capital and noncapital punishment. Although incapacitation has never been embraced as a sufficient justification for the death penalty, it is a

legitimate consideration in a capital sentencing proceeding. Id., at 183, n. 28, 49 L.Ed.2d 859, 96 S.Ct. 2909; Jurek v. Texas, 428 U.S. 262, 49 L.Ed.2d 929, 96 S.Ct. 2950 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.). While retribution clearly plays a more prominent role in a capital case, retribution is an element of all punishments society imposes, and there is no suggestion as to any of these that the sentence may not be imposed by a judge.

Second, even accepting petitioner's premise that the retributive purpose behind the death penalty is the element that sets the penalty apart, it does not follow that the sentence must be imposed by a jury. Imposing the sentence in individual cases is not the sole or even the primary vehicle through which the community's voice can be expressed. This Court's decisions indicate that the discretion of the sentencing authority, whether judge or jury, must be limited and reviewable. See, e.g., Gregg v. Georgia, *supra*; Woodson v. North Carolina, 428 U.S., at 302-303, 49 L.Ed.2d 944, 96 S.Ct. 2978; Zant v. Stephens, 462 U.S., at 879-880, 77 L.Ed.2d 235, 103 S.Ct. 2733. The sentencer is responsible for weighing the specific aggravating and mitigating circumstances the legislature has determined are necessary touchstones in determining whether death is the appropriate penalty. Thus, even if it is a jury that imposes the sentence, the "community's voice" is not given free rein. The community's voice is heard at least as clearly in the legislature when the death penalty is authorized and the particular circumstances in which death is appropriate are defined. See Gregg v. Georgia, 428 U.S., at 183-184, 49 L.Ed.2d 859, 96 S.Ct. 2909 (joint opinion); Furman v. Georgia, 408 U.S., at 394-395, 33 L.Ed.2d 346, 92 S.Ct. 2726 (Burger, C. J., dissenting); id., at 452-454, 33 L.Ed.2d 346, 92 S.Ct. 2726 (Powell, J., dissenting).

We do not denigrate the significance of the jury's role as a link between the community and the penal system and as a bulwark between the accused and the State. See Gregg v. Georgia, 428 U.S., at 181, 49 L.Ed.2d 859, 96 S.Ct. 2909 (joint opinion); Williams v. Florida, 399 U.S. 78, 100, 26 L.Ed.2d 446, 90 S.Ct. 1893, 53 Ohio Ops.2d 55 (1970); Duncan v. Louisiana, 391 U.S., at 156, 20 L.Ed.2d 491, 88 S.Ct. 1444, 45 Ohio Ops.2d 198; Witherspoon v. Illinois, 391 U.S. 510, 519, n. 15, 20 L.Ed.2d 776, 88 S.Ct. 1770, 46 Ohio Ops.2d 368 (1968). The point is simply that the purpose of the death penalty is not frustrated by, or inconsistent with, a scheme in which the imposition of the penalty in individual cases is determined by a judge. n8

n8 Petitioner's efforts to distinguish the considerations relevant to imposition of a capital or a noncapital sentence bear more on the jury's ability to function as the sentencer in a capital case than on the constitutionality of the judge's doing so. We have no particular quarrel with the proposition that juries, perhaps, are more capable of making the life-or-death decision in a capital case than of choosing among the various sentencing options available in a noncapital case. See ABA Standards for Criminal Justice 18-1.1, Commentary, pp. 18.21-18.22 (2d ed. 1980) (reserving capital sentencing from general disapproval of jury involvement in sentencing). Sentencing by the trial judge certainly is not required by Furman v. Georgia, *supra*. See Gregg v. Georgia, 428 U.S., at 188-195, 49 L.Ed.2d 859, 96 S.Ct. 2909 (joint opinion). What we do not accept is that, because juries may sentence, they constitutionally must do so.

* * * *

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.

Ring did not change the law to require jury capital sentencing. As noted by concurring Justice Scalia:

> . . . the unfortunate fact is that today's judgment has nothing to do with jury sentencing. What today's decision says is that the jury must find the existence of the fact that an aggravating factor existed. 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 the sentencing phase or, more simply, by placing the aggravating-factor determination (where it logically belongs anyway) in the guilt phase. (536 U.S. at 612-613)

Additionally, the Ring majority did not decide that reliability or fairness mandated jury capital sentencing. See also Turner v. Crosby, *supra*, at 1286 ("Ring is 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. Ring simply does not fall within the ambit of the second Teague exception.").

In summary, appellee respectfully submits that the lower court order denying relief to the successive motion for postconviction relief must be affirmed. Although appellant

spends an inordinate amount of time and pages devoted to a matter not presented below and improperly advanced here, i.e., the correctness of this Court's prior affirmance of the death sentence, the issue properly presented -- whether relief is available following Ring v. Arizona -- must be denied both procedurally and substantively.

Appellant failed to satisfy the pleading requirements of Rule 3.851 in failing to explain why his claim was not presented in earlier rounds of litigation. The Ring claim is procedurally barred for failing to raise at the time of trial or on direct appeal or in prior rounds of postconviction litigation. Relief under Ring is unavailable in a collateral challenge because it is not retroactively applicable.

Finally, Ring does not mandate jury sentencing. Ring v. Arizona, 536 U.S. 584, 597 n.4 (2002). Since the presence in the instant case of aggravating factors of prior violent felony conviction, homicide committed during the commission of a felony, and while under a sentence of imprisonment exempt the application of Ring and Apprendi, since this jury unanimously convicted Washington of burglary and sexual battery -- used as aggravating factors which would make appellant death-eligible, it is constitutionally irrelevant whether they also recommended death or life imprisonment.

CONCLUSION

Based on the foregoing facts, arguments and citations of authority the decision of the lower court should be affirmed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to James V. Viggiano, Jr., Assistant CCRC, Office of the Capital Collateral Regional Counsel - Middle Region, 3801 Corporex Park Drive, Suite 210, Tampa, FL 33619-1136, this _____ day of April, 2004.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

Respectfully submitted,

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