IN THE SUPREME COURT OF FLORIDA

JOHN BLACKWELDER,

Appellant,

CASE NO. SC01-2058

v.

STATE OF FLORIDA,

Appellee.

_______________________/

ON APPEAL FROM THE CIRCUIT COURT
OF THE THIRD JUDICIAL CIRCUIT
IN AND FOR COLUMBIA COUNTY, FLORIDA

ANSWER BRIEF

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PRELIMINARY STATEMENT

Appellant, JOHN BLACKWELDER, the defendant in the trial court, will be referred to as appellant or by his proper name. Appellee, the State of Florida, will be referred to as the State.

Pursuant to Rule 9.210(b), Fla. R. App. P. (1997), this brief will refer to a volume according to its respective designation within the Index to the Record on Appeal. A citation to a volume will be followed by any appropriate page number within the volume. The symbol "IB" will refer to appellant's initial brief and will be followed by any appropriate page number. All double underlined emphasis is supplied.

STATEMENT OF THE CASE AND FACTS

Blackwelder was indicted for premeditated murder by grand jury for the May 6, 2000 murder of fellow inmate Raymond Wigley. (R. I 1).[1]

Blackwelder signed a written plea agreement. (R. IV 646). The plea agreement notes that the State intends to seek death. On March 15, 2001, Blackwelder entered a plea. (R. IV 736-760). During the plea colloquy, Blackwelder admitted killing the victim. (R. IV 739). He also stated his intention to kill again. (R. IV 740). The State established a factual basis for the plea. (R. IV 746). Blackwelder agreed that the State could establish a prima facie case of first degree murder. (R. IV 747). The trial court explained the rights the defendant would be waiving by entering a plea. (R. IV 754-756). The trial court then accepted the plea as voluntarily, knowingly and intelligently entered. (R. IV 757).

On June 11,12 and 13, 2001, a penalty phase was conducted in front of a jury. (X, XI, XII, XIII, XIV). The State presented numerous witnesses including Inspector Schenck of the Department of Corrections Inspector General's Office. (XII 441-584) Inspector Schenck interviewed Blackwelder four times regarding the murder. (XII 442). The interviews were taped. (XII 443,474-475)[2]. The tapes of these confessions were played for the jury. (XII 446-474, 478-500, 503-517, 522-526). Blackwelder

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[1] Blackwelder was in prison serving a life sentence for capital sexual battery.

[2] The defendant refused to allow the Inspector to taped the fourth and final interview. (XII 519,525).

repeatedly confessed to the murder during these taped recorded interviews. The record also contains transcripts of Blackwelder’s taped confessions. (R. VI 1122-1149; VII 1195-1233). The first and second interviews were conducted on May 6, 2000, the day of the murder. Inspector Schenck read Blackwelder his *Miranda* rights. (R. VI 1123). Blackwelder and the victim had had a prior homosexual encounter. (VI 1126,1129). Blackwelder admitted that he tied the victim’s hands and feet with a ripped sheet. (R. VI 1123,1203). He also placed a washrag on the victim’s mouth to stop him from yelling out. (VI 1134, VII 1204). He then “yoked him out”. (R. VI 1123). Blackwelder explained that his meant he choked him. (R. VI 1123). Blackwelder admitted his intention was to kill the victim. (VI 1124, VII 1206). Blackwelder had hidden the string that he used to strangle the victim under his mattress on the previous Thursday, two days prior to the murder. (VI 1134-1135, VII 1212,1213). Blackwelder admitted that the victim had pleaded with him to stop because it was hurting. (VI 1140). Blackwelder responded “ain’t that a bitch”. He admitted that he continued to strangle the victim after seeing blood coming out of the victim’s nose and ears. (VI 1140, VII 1206). When he saw the blood, Blackwelder thought “I’m getting this sucker”. (1141). Blackwelder recounted how the victim’s face turned “pure blackish” yet he continued to yank tighter. (1141). Blackwelder estimated that it took 10 minutes to strangle the victim. (1141). Blackwelder reported the murder to two sergeants at the captain’s office saying that there was a “dead

faggot" in his cell. (1143). The third interview was conducted on May 9, 2000. (XII 501). The fourth interview was conducted on May 31, 2000. (XII 523). The defendant's prior convictions, which were stipulated to, were introduced. (XII 548). The defendant's plea colloquy was read to the jury. (XII 560-584).

The defense presented the testimony of five witnesses. Dr. Hamilton, a psychological specialist with D.O.C. at Columbia Correctional Institution, who had been treating Blackwelder, testified. (XIII 612-657).[3] Dr. Hamilton testified that Blackwelder had been diagnosed with impulse control disorder and pedophilia. (XIII 615,631). Blackwelder also had been diagnosed with anti-social personality disorder. (XIII 633). Blackwelder was on Prozac and Mellaril. (XIII 616). Dr. Hamilton testified that Blackwelder's I.Q. was 117. (XIII 625). Mr. John, a classification officer with D.O.C., testified. (XIII 658). Dr. Lamangcolob, a psychiatrist at Columbia Correctional Institution, who had been treating Blackwelder, testified. (XIII 664-689). Dr. Lamangcolob testified that Blackwelder went off his medication shortly prior to the murder on March 27. (XIII 669). Dr. Lamangcolob working diagnosis of Blackwelder was impulse control disorder, pedophilia and anti-social personality disorder. (XIII 675). He also testified based on documents that Dr. Franks at Florida State Prison abandoned the diagnosis of impulse control disorder in favor of anti-social personality disorder after the murder. (XIII 680). A friend of

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[3] Dr. Hamilton had a Ph.D. in human development and family studies. (XIII 613)

Blackwelder's, Mr. Guero, testified. (XIII 699). Blackwelder's sister, Jean Gardner, testified regarding his childhood. (XIII 704-715). Blackwelder also testified in his own behalf. (XIII 715-XIV 785). Defense counsel had advised Blackwelder against testifying. (XIII 693-694).

The jury recommended death unanimously. (R. VII 1240; XIV 831). The prosecutor submitted a sentencing memorandum. (R. VII 1284-1302; 1306-1324). Defense counsel also submitted a sentencing memorandum. (VII 1326-1336). The State filed a reply. (VII 1367-1369; VIII 1377-1403).

The trial court held a *Spencer* hearing[4] on July 30, 2001. (XVII). Blackwelder, against advise of counsel, introduced two mental evaluations - one from Dr. McMahon[5] and the other from Dr. Mharte. (XVII 3-7).[6] Defense counsel argued that anti-social personality disorder was mitigating. (XVII 7-8). Blackwelder addressed the court. (XVII 9-29). He complained about the

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

[5] Dr. McMahon, who examined Blackwelder, filed a written report. (VII 1338). Dr. McMahon described Blackwelder as narcissistic, selfish and self-indulgent. She noted that Blackwelder had a "poorly developed conscience" and "marked disregard for social standards and values". (VII 1339). She also stated that there were no non-statutory mitigating circumstances. (VII 1339). Blackwelder's I.Q. is average to above average. (VII 1338).

[6] Dr. Mharte, who also examined Blackwelder, also filed a written report. (VII 1340-1345). Blackwelder admitted the crime to him. (VII 1343). Dr. Mharte wrote this murder was a well calculated attempt to get what he wants. (VII 1344). Dr. Mharte described Blackwelder as manipulative and concluded that he was not depressed. (VII 1344). Dr. Mharte diagnosed him with pedophilia, anti-social personality disorder and depression that was in complete remission. (VII 1345).

prosecutor lying in the State's sentencing memorandum. Blackwelder also argued in favor of the death penalty. (XVII 18,22-24,27). He threatened to kill again unless sentenced to death. (XVII 29).

The trial court held a final sentencing hearing on August 6, 2001 (XVI). The trial court, in its sentencing order, found four aggravating circumstances: (1) under sentence of imprisonment because Blackwelder was currently serving a life sentence; (2) prior violent felony based on numerous conviction including capital sexual battery; (3) HAC and (4) CCP. (R. VIII 1410-1425). The trial court accorded each of these four aggravators great weight. (R. VIII 1423-1424). The trial court also found two statutory mental mitigators: (1) extreme mental or emotional disturbance and (2) capacity to appreciate the criminality of his conduct or conform his conduct to the requirements of the law was substantially impaired. (R. VIII 1415-1419). Both statutory mitigators were based on the diagnosis of anti-social personality. (R. VIII 1415-1419). The trial court accorded both little weight. (1417,1419). The trial court also found two non-statutory mitigators: (1) defendant's relationship with his parents which it accorded little weight and (2) sexual abuse at military school which it accorded little weight. (R. VIII 1419-1422).

SUMMARY OF ARGUMENT

ISSUE I

Blackwelder asserts that his trial was unreliable because he prevented his counsel from striking two jurors with pro-death penalty attitudes. The State respectfully disagrees. First, this issue is waived. Blackwelder did not challenge either juror for cause. Blackwelder affirmatively instructed his counsel not to challenge the jurors knowing their respective views. Nor did he peremptorily strike either juror. Even if these two jurors should have been removed for cause, Blackwelder, who had several peremptory challenges remaining, should have removed them peremptorily. Thus, this issue is waived twice over. Moreover, these two jurors were not subject to challenge for cause. Neither juror was unfair or biased. One juror expressed his view that cold, calculated, premeditated murders deserve the death penalty. This is a perfectly legitimate view in line with a recognized statutory aggravator. The other juror, due to her past experience, expressed discomfort with domestic violence murders. However, this was not a domestic violence murder; rather, it was a fellow inmate murder. Blackwelder received a fair penalty phase in front of fair jurors. Thus, the trial court properly did not *sua sponte* strike these jurors.

ISSUE II

Blackwelder asserts that the trial court improperly incorporated part of the State's sentencing memorandum into its

sentencing order The State respectfully disagrees. The differences between the trial court's order and the State's sentencing memorandum, while small in number, were extremely significant in content. The trial court's order found two mental mitigators that the State's sentencing memorandum urged the trial court not to find. The findings of two mental mitigators establishes that the trial court independently engaged in the statutorily mandated fact finding and weighing process. Thus, the trial court properly incorporated part of the State's sentencing memorandum into its sentencing order.

ISSUE III

Blackwelder contends that the trial court erred in finding the prior violent felony aggravator. Specifically, he asserts that neither his conviction for a lewd act upon a child nor his federal conviction for threatening the life of the vice-president are *per se* crimes of violence for purposes of this aggravator. First, this issue is not preserved. While defense counsel objected to the use of the lewd convictions, he withdrew the objection. Moreover, Blackwelder had other convictions that were crimes of violence regardless of the challenged convictions. Blackwelder's prior convictions included capital sexual battery and attempted capital sexual battery. Capital sexual battery is another capital felony. Furthermore, it is a crime of violence. This Court has held that the Legislature intended sexual battery be treated as a crime involving a threat of violence. This aggravator is still valid based solely on the

capital sexual battery. Moreover, any error is harmless. Even if this aggravator is stricken, three valid, unchallenged aggravators remain. Thus, the trial court properly found the prior violent aggravator.

ISSUE IV

Blackwelder asserts that his death sentence violates the holding of *Ring v. Arizona*, 122 S.Ct. 2428 (2002). The requirements of *Ring* were met in this case. The jury, by recommending death, necessarily engaged in the required fact-finding, as the United States Supreme Court has explained. Blackwelder cannot present a valid *Ring* challenge to Florida's death penalty statutes. He had a jury at sentencing. A jury was present during the penalty phase; heard the evidence of aggravators and mitigators; was instructed on aggravating circumstances and the requirement that they be proven beyond a reasonable doubt. Blackwelder's jury then unanimously recommended death. In Florida, only a defendant in a jury override case has any basis to raise a *Ring* challenge to Florida's death penalty statute. A capital defendant, who has had a jury recommend death, simply cannot claim that his right to a jury trial was violated. Thus, Balckwelder's death sentence does not violate the Sixth Amendment.

ARGUMENT

ISSUE I

DID THE TRIAL COURT ERR BY NOT *SUA SPONTE* STRIKING TWO JURORS FOR CAUSE? (Restated)

Blackwelder asserts that his trial was unreliable because he prevented his counsel from striking two jurors with pro-death penalty attitudes. The State respectfully disagrees. First, this issue is waived. Blackwelder did not challenge either juror for cause. Blackwelder affirmatively instructed his counsel not to challenge the jurors knowing their respective views. Nor did he peremptorily strike either juror. Even if these two jurors should have been removed for cause, Blackwelder, who had several peremptory challenges remaining, should have removed them peremptorily. Thus, this issue is waived twice over. Moreover, these two jurors were not subject to challenge for cause. Neither juror was unfair or biased. One juror expressed his view that cold, calculated, premeditated murders deserve the death penalty. This is a perfectly legitimate view in line with a recognized statutory aggravator. The other juror, due to her past experience, expressed discomfort with domestic violence murders. However, this was not a domestic violence murder; rather, it was a fellow inmate murder. Blackwelder received a fair penalty phase in front of fair jurors. Thus, the trial court properly did not *sua sponte* strike these jurors.

The standard of review

The standard of review for a challenge for cause of a juror is abuse of discretion. A trial court has great discretion when deciding whether to grant or deny a challenge for cause based on juror incompetency. *Kearse v. State*, 770 So.2d 1119, 1128 (Fla. 2000)(citing *Pentecost v. State*, 545 So.2d 861 (Fla. 1989)). The trial court's determination of juror competency will not be overturned absent manifest error. *Overton v. State*, 801 So.2d 877,890 (Fla. 2001)(citing *Van Poyck v. Singletary*, 715 So.2d 930, 931 (Fla. 1998)); *Fernandez v. State*, 730 So.2d 277, 281 (Fla. 1999)(citing *Mendoza v. State*, 700 So.2d 670, 675 (Fla. 1997)). A trial court has a unique vantage point regarding juror bias claims because the trial court is able to see and hear the actual prospective juror. Such matters simply cannot be determined from an appellate record. *Kearse v. State*, 770 So.2d 1119, 1127 (Fla. 2000)(citing *Smith v. State*, 699 So.2d 629, 635-636 (Fla. 1997) and *Taylor v. State*, 638 So.2d 30, 32 (Fla. 1994)); *Mendoza*, 700 So.2d at 675 (stating that a trial court has latitude in ruling upon a challenge for cause because the court has a better vantage point from which to evaluate prospective jurors' answers than does this Court in our review of the cold record). For example, the statement "I think I can" may sound equivocal on the record, but may be stated in such a forceful manner and determined tone by the juror in the trial court that it is actually a positive statement leaving the trial court no doubt of the prospective juror's ability to do so. The

standard of review for preserved for cause challenges is abuse of discretion.[7]

The trial court's ruling

During jury selection, defense counsel moved to strike prospective Juror Keene for cause because he considered a life sentence a waste of time and money and there was no amount of mitigation that could be presented that would cause him to vote for life because the people he murdered "didn't have a chance". (IX 65-66). The prosecutor did not object. The trial court excused him. (IX 66). Defense counsel also challenged prospective juror Feagle because she was close personal friends with the prosecutor's intern. (X 220). The prosecutor did not oppose the challenge for cause.[8] Defense counsel exercised several peremptory challenges as well as these challenges for cause. Defense counsel peremptorily challenged prospective

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[7] It is not clear what the standard of review for an unpreserved for cause challenge claim is. Most fundamental error claims are reviewed *de novo*. However, it seems incongruous for the standard of review to become less deferential to the trial court when the defendant failed to make a challenge compared to the standard of review when a defendant made the appropriate challenge.

[8] Other prospective jurors were stricken for cause by the prosecutor. The prosecutor challenged prospective juror Steele for cause because he thought that death should be imposed in every case of murder and would not follow the instructions. (T. IX 38-40). The prosecutor challenged prospective juror Gartner for cause because he thought that if he admitted to it, he was guilty and should die for it and that while it was his duty to recommend life if mitigators outweighed aggravators, he could not do it. (T. IX 257-258). Several prospective jurors were challenged by the prosecutor because they were opposed to the death penalty.

juror Doan. (X 318). Defense counsel also peremptorily challenged prospective juror Dr. Radke. (X 319). Defense counsel also peremptorily challenged prospective juror Ms. Osborn. (X 320).

Juror No. 23, Curtis McCallister and Juror No. 82, Deborah Tilleman, were questioned by both counsel during individual voir dire. (IX 7,12, 83-96,101-111). Juror McCallister stated that he was not a person who felt so strongly about the death penalty that he would vote to recommend death in every case and he could set aside any personal feelings and base his vote on the law. (IX 87). While he was strongly in favor of the death penalty, he limited that response to murders with no motive. (IX 89). Juror McCallister stated that he believed that where there is premeditation, thought and planning, that the death penalty should be imposed. (IX 90). He stated that in all cases of premeditation, the death penalty absolutely should be imposed. (IX 91). While it would be "really difficult", he probably could still look at the aggravating and mitigating evidence. His first thoughts were that if a person killed someone for no reason and he seeks the death penalty, he did not see a problem with honoring that request. (IX 93). "We should give him what he wants." (IX 94). Defense counsel informed the trial court that he was not challenging Juror McCallister based on instructions from Blackwelder. (IX 96).

Juror Tilleman had a friend who was murdered by her husband. (IX 105). This experience would predispose her to recommend death. (IX 106). She probably could not set those feelings

aside. (IX 106). The prosecutor informed her that this was not a husband/wife situation but, rather, was an inmate murder. (107). She then stated that she could set her feelings aside and could recommend life. (107). She repeatedly assured defense counsel that she could recommend life. (109). She also assured defense counsel that she would weigh the aggravators with the mitigators, regardless of the defendant's wishes for the death penalty. (110)

Both were on the final jury panel. (X 321-322; R. VII 1235). Blackwelder did not challenge either juror for cause. Nor did he peremptorily strike either juror. Blackwelder had numerous peremptory challenges remaining. He also expressed his personal approval of the final jury. (X 319).

Waiver

This issue is waived. Blackwelder explicitly instructed his attorney not to challenge these two jurors. This constituted a waiver, not merely a forfeiture. A waiver is an intentional relinquishment or abandonment of a known right; whereas, a forfeiture is failure to assert a right. *Platt v. State*, 697 So.2d 989, 990 (Fla. 4th DCA 1997)(Pariente, J.,)(contrasting an affirmatively agreement to an incomplete instruction with a mere failure to object). Nor does it matter if a biased juror is viewed as fundamental error. While a forfeiture does not preclude appellate review for fundamental error, a waiver bars all appellate review. *United States v. Olano*, 507 U.S. 725, 733, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993)(explaining that

while forfeiture does not preclude appellate review, waiver necessarily extinguishes the claim altogether); *Armstrong v. State*, 579 So.2d 734, 735 (Fla. 1991)(noting, in a case of fundamental error, that by affirmatively requesting the instruction, Armstrong waived any claim of error and observing any other holding would allow a defendant to intentionally inject error into the trial and then await the outcome with the expectation that if he is found guilty the conviction will be automatically reversed). Blackwelder expressly agreed to the sitting of these two jurors knowing full well their respective views. He may not now change his mind on appeal.

Moreover, Blackwelder also failed to strike these two jurors by using his remaining peremptory challenges. Having failed to use two peremptory challenges to remove them, he may not raise this claim on appeal. Even if the trial court should have excused them for cause, these two jurors would not have been on the jury if Blackwelder had stricken them peremptorily. Blackwelder had seven peremptory challenges remaining. (X 318-321,VII 1239).[9] He could have removed these two jurors. A defendant may not complain on appeal about a biased juror when he has peremptory challenges remaining. Florida law requires a

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[9] Blackwelder was entitled to ten peremptory challenges. § 913.08(1)(a). At one point in the trial, there seemed to be the mistaken notion that each side only got six peremptory challenges. (IX 40). While the record is somewhat unclear as to who struck which jurors and whether any of those were for cause, Blackwelder seems to have only used three peremptory challenges. Regardless of whether he struck more than three or he thought he was only entitled to six, the point remains - Blackwelder had remaining peremptory challenges.

defendant to exhaust all peremptory challenges to raise as error the trial court's ruling on a "for cause" challenge. *Mendoza v. State*,700 So.2d 670, 674-675 (Fla. 1997)(stating that for there to be reversible error based upon the denial of a challenge for cause, an appellant must have exhausted all peremptory challenges and identified an objectionable juror who had to be accepted and who sat on the jury); *Trotter v. State*, 576 So.2d 691, 692-93 (Fla. 1990)(observing that a defendant cannot stand by silently while an objectionable juror is seated and then, if the verdict is adverse, obtain a new trial); *Pentecost v. State,* 545 So.2d 861, 863 n. 1 (Fla. 1989))(explaining that when the court denied these challenges for cause, the defendant had numerous peremptory challenges remaining, but chose not to exercise any on these two people and concluding that to show reversible error, a defendant must show that all peremptories had been exhausted and that an objectionable juror had to be accepted citing *Rollins v. State*, 148 So.2d 274 (Fla. 1963)); *See also Ross v. Oklahoma*, 487 U.S. 81, 88, 108 S.Ct. 2273, 2278, 101 L.Ed.2d 80 (1988)(noting peremptory challenges are not of constitutional dimension and observing that it is a long settled principle of Oklahoma law that a defendant who disagrees with the trial court's ruling on a for-cause challenge must, in order to preserve the claim that the ruling deprived him of a fair trial, exercise a peremptory challenge to remove the juror and even then, the error is grounds for reversal only if the defendant exhausts all peremptory challenges and an incompetent juror is forced upon him and holding the Sixth Amendment was not

violated because the defendant had to use a peremptory challenge to achieve the result of an impartial jury).[10]

Peremptory challenges are a fail safe. The criminal justice system has built in a secondary method of obtaining a fair jury by curing any error that the trial court commits in failing to excuse jurors for cause that should be excused. Peremptory challenges are the cure for "for cause" errors. Blackwelder failed to use this fail safe system. It is only a defendant who uses all of his peremptory challenges, who may complain about the trial court's denial of a "for cause" challenge, because it is only in this situation that he is harmed beyond his ability to cure the harm. *United States v. Martinez-Salazar*, 528 U.S. 304, 318-319, 120 S.Ct. 774, 783, 145 L.Ed.2d 792 (2000)(Scalia, J., concurring)(explaining that normal principles of waiver disable a defendant from objecting on appeal to the seating of a juror he was entirely able to prevent by the use of peremptory challenges and if a defendant had plenty of peremptories left, but chose instead to allow a biased juror to sit on the panel, he has waived any claim of error because one of the purposes of peremptory challenges is to enable the defendant to correct judicial error in relation to "for cause" challenges). A

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[10] The constitution does not require peremptory challenges. *Stilson v. United States*, 250 U.S. 583, 586, 40 S.Ct. 28, 29-30, 63 L.Ed. 1154 (1919)(noting that "[t]here is nothing in the Constitution of the United States which requires the Congress to grant peremptory challenges."). While all fifty states and the federal court provide for peremptory challenges, England, where the practice was originally developed, abolished peremptory challenges by an act of Parliament. Criminal Justice Act, 1988, ch 33 § 118(1) (Eng)(effective date January 5, 1989).

defendant's failure to exercise all of his peremptory challenges constitutes a waiver of his right to challenge the impartiality of the jury. Blackwelder waived this issue twice over - first by affirmatively choosing not to challenge these jurors "for cause" and secondly, by not peremptorily striking them. Thus, this issue is waived.[11]

Merits

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[11] If this court views a claim of biased jurors as unwaivable, there is nothing to prevent Blackwelder from injecting the same potential error into any new sentencing phase. He could again instruct his trial counsel to not challenge any jurors for cause regardless of their statements in any retrial. Indeed, Blackwelder would be able to inject this same error ad infinitum into a series of retrials because prospective jurors in death penalty cases often make statements about the death penalty that raise some concerns. It is quite easy for the defense to elicit strong responses regarding the death penalty from prospective jurors. *Johnson v. State*, 660 So.2d 637, 644 (Fla. 1995). Jurors make such statements, not because they are biased, but because they are layman not familiar with death penalty jurisprudence. These layman are being ask about a byzantine area of law, so it is not surprising that they get it wrong. *Overton v. State*, 801 So.2d 877,893 (Fla. 2001)(observing that the average juror summoned for prospective service in a case where the State is seeking the death penalty enters the courtroom without any true insight whatsoever into the elements or factors involved in capital sentencing proceedings); *Castro v. State*, 644 So.2d 987, 990 (Fla. 1994)(rejecting a for cause challenge regarding jurors' views of the death penalty because "[n]ot surprisingly, the prospective jurors had no grounding in the intricacies of capital sentencing" and some of these jurors has the "reasonable misunderstanding that the presumed sentence for first-degree murder was death."). However, when they are told that they must follow the law and the law does not allow something, most are willing to put aside their personal views and follow the law. Blackwelder could literally stop the State from ever obtaining an affirmable conviction or sentence by this conduct if this issue is viewed as unwaivable.

The test for determining juror competency is whether the juror can lay aside any bias or prejudice and render a verdict solely on the evidence presented and the jury instructions. *Kearse v. State*, 770 So.2d 1119, 1127 (Fla. 2000)(citing *Lusk v. State*, 446 So.2d 1038, 1041 (Fla. 1984)). A prospective juror may be excused for cause because of his or her views of the death penalty. The test is whether the prospective juror's views would prevent or substantially impair the performance of his duties as a juror. *Wainwright v. Witt*, 469 U.S. 412, 424, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985)(quoting *Adams v. Texas*, 448 U.S. 38, 45, 100 S.Ct. 2521, 65 L.Ed.2d 581 (1980)). Jurors who have expressed strong feelings about the death penalty nevertheless may serve if they indicate an ability to abide by the trial court's instructions. *Johnson v. State*, 660 So.2d 637, 644 (Fla. 1995)(citing *Penn v. State*, 574 So.2d 1079 (Fla. 1991).

In *Overton v. State*, 801 So.2d 877, 893 (Fla. 2001), this Court concluded that the trial court did not abuse its discretion in denying a cause challenge as to a juror based on his views towards the death penalty. The juror noted that he favored the death penalty in cases where the defendant is found guilty of first-degree murder. However, after defense counsel, the State, and the trial court all explained the capital sentencing scheme and its balancing process to the juror, the juror expressed great deference to the trial court's instructions; stated that he would follow the law, abide by the sentencing scheme and could entertain the possibility of a life

recommendation. See also *Kearse v. State*, 770 So.2d 1119, 1129 (Fla. 2000)(finding no abuse of discretion in refusing to excuse a juror for cause where the juror expressed his belief in the death penalty and his frustrations with the criminal justice system but, when the capital sentencing process was explained to him, juror unequivocally stated that he would follow the law); *Bryant v. State*, 656 So.2d 426, 428 (Fla. 1995)(concluding that the trial court did not err in denying cause challenges where five jurors who expressed a predisposition to impose the death penalty if the defendant was convicted of first-degree murder later stated that they would follow the court's instructions and weigh the aggravating and mitigating factors to determine whether death was the appropriate sentence); *Johnson v. State*, 660 So.2d 637, 644 (Fla. 1995)(affirming a refusal to excuse for cause a juror who had expressed favor toward the death penalty but who later noted that she thought she could follow the court's instruction with respect to sentencing); *Reaves v. State*, 639 So.2d 1, 4 n.6 (Fla. 1994)(finding no abuse of discretion on denying cause challenges in relation to two jurors who initially expressed a willingness to automatically impose the death penalty but who, after hearing an explanation as to the process of weighing aggravating and mitigating circumstances, acknowledged that they were capable of reviewing all of the evidence and following the court's instructions in considering a proper punishment); *Castro v. State*, 644 So.2d 987, 990 (Fla. 1994)(finding no error in the trial court's refusal to strike the prospective jurors for cause because of

their views on the death penalty which included the "reasonable misunderstanding" that the presumed sentence for first-degree murder was death but when advised that they were responsible for weighing aggravating and mitigating factors, they indicated they would be able to follow the law).

Neither of these jurors was subject to a "for cause" challenge.

Blackwelder asserts that Juror McCallister should have been stricken for cause because he thought that death was the appropriate penalty for all premeditated murders. This is a misunderstanding of the juror's views. Juror McCallister was not using the concept of premeditation as the law defines it; rather, he was using the common meaning of premeditation. Laymen do not think of the concept of premeditated murder as including instantaneous premeditation.[12] Juror McCallister, who stated he did not know what first degree murder was, also, no doubt, did not know the legal definition of premeditation. This juror referred to a plan to kill and to thinking about it for a length of time. This is the equivalent of the concept of heightened premeditation. Basically, this juror was saying that

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[12] *DeAngelo v. State*, 616 So.2d 440, 441 (Fla.1993) explaining that premeditation may be formed in a moment and need only exist for such a time as will allow the accused to be conscious of the nature of the act he is about to commit and the probable result of that act.); *Asay v. State*, 580 So.2d 610, 612 (Fla.1991)(giving same definition of premeditation); *Norton v. State*, 709 So.2d 87, 92 (Fla.1997)(same); *Coolen v. State*, 696 So.2d 738, 741 (Fla.1997)(same); *Sireci v. State*, 399 So.2d 964, 967 (Fla.1981)(noting premeditation does not have to be contemplated for any particular period of time before the act, and may occur a moment before the act).

all cold, calculated and premeditated murders which involve heightened premeditation deserve the death penalty. This is a permissible view based on a valid statutory aggravator. Furthermore, the prosecutor explained that simple premeditated murder was not an aggravator. (IX 94). Juror McCallister stated that he would try to follow the law in this regard. (IX 95)

Blackwelder also asserts that the trial court should have *sua sponte* excused Juror McCallister based on his statements that he saw no problem with putting a defendant to death based on his request. However, after this first statement, this juror agreed that we cannot execute people simply because they want to be executed. (IX 95). When the prosecutor explained that, regardless of the defendant's wishes, the jurors would have to weigh the aggravation and mitigation and if the mitigation outweighed the aggravation, it was his duty to return a life sentence, the juror responded: "yes, sir." (IX 95). It is natural for a juror to presume that if a murderer wants the death penalty, there is no problem with imposing it because jurors would not naturally consider the system as a whole. The prosecutor explained to the juror that imposing death based solely on the defendant's wishes would undermine the fairness and uniformity we seek in death penalty cases. (IX 95). This juror was given a reasonable explanation of why his original views were mistaken from the prosecutor which would have caused him to reconsider his position. Indeed, the juror, himself, referred to his original position as his "first thoughts" on the issue. Here, as in *Overton*, *Kearse*, *Bryant*, *Johnson*, *Reaves* and

Castro, the juror, following his initial response, agreed to weigh the aggravation and mitigation and if the mitigation outweighed the aggravation, to return a life sentence. Juror McCallister was not biased and therefore, not the proper subject for a cause challenge.

Blackwelder also asserts that Juror Tilleman should have been *sua sponte* stricken for cause because she was predisposed to recommend death due to a friend being murdered by her husband in a domestic violence situation. Juror Tilleman affirmatively stated that, because the case did not involve husband and wife, she could set aside her feelings and recommend life. (IX 107). Juror Tilleman was not a biased juror in this particular case. This was not a domestic violence murder. This was an inmate murder. While the defendant and the victim had a homosexual relationship, a lover's quarrel was not the motive for this murder. The defendant's motive was anger at the system and that his life sentence gave him a license to kill. This was not a crime of passion - either heterosexual or homosexual. This was a premeditated murder that the defendant planned for two days. Juror Tilleman was not a biased juror in this particular case and therefore, not the proper subject for a cause challenge.

Blackwelder's reliance on *Muhammad v. State*, 782 So.2d 343 (Fla. 2001) is misplaced. In *Muhammad*, this Court held that the trial court's decision to give great weight to jury's recommendation of death was error where the defendant refused to present mitigating evidence to the jury. Muhammad refused to present any mitigating evidence to the jury. The jury heard

only aggravating evidence. This Court concluded that Muhammad's failure to present any mitigating evidence hindered the jury's ability to fulfill its statutory role in sentencing in any meaningful way. The *Muhammad* Court found that the trial court has a duty to lessen its reliance on the jury's verdict in these circumstances. The *Muhammad* Court observed that when a defendant fails to present mitigating evidence, it makes proportionality review, which involves comparing aggravating with mitigating circumstances, "difficult, if not impossible". *Muhammad*, 782 So.2d at 362-365.

This case is distinguishable from *Muhammad*. Here, by contrast, the jury heard mitigating evidence. Blackwelder presented mitigating evidence to the jury. The jury's role in sentencing was not hindered by being presented only one side of the case. Moreover, this Court's proportionality review is not affected. This Court has both the aggravating and mitigating evidence necessary for its proportionality review. Hence, there was no error in the trial court's giving weight to the jury's recommendation of death in this case.

<u>Harmless Error</u>

Biased juror claims are not subject to harmless error analysis. *Cf. Gray v. Mississippi*, 481 U.S. 648, 668, 107 S.Ct. 2045, 2057, 95 L.Ed.2d 622 (1987)(holding that the erroneous exclusion of a juror for cause, in a capital case, was reversible constitutional error not be subject to harmless error because the right to an impartial adjudicator, be it judge or

jury, is so basic to a fair trial, its infraction can never be treated as harmless error.). However, biased jurors claims are subject to waiver.

Sufficiency of the evidence & Proportionality

While the appellant does not argue the sufficiency of the evidence to support the convictions or the proportionality of the death sentence, this Court has stated that it has an independent duty to review both issues even if they are not raised. *Overton v. State*, 801 So.2d 877,905 (Fla. 2001)(finding evidence sufficient and the death sentence proportionate although not raised by the capital defendant because of the Court's "independent obligation to review the record") *Jennings v. State*, 718 So.2d 144, 154 (Fla. 1998)(noting the Court was required to independently review the sufficiency of the evidence as well as the proportionality although not raised on appeal by a capital defendant). Therefore, the State will address both issues.

The issue of the sufficiency of the evidence is waived by Blackwelder's entering a guilty plea. Appellant entered a plea of guilty. *Muhammad v. State*, 782 So.2d 343, 369 (Fla. 2001)(noting that a conviction for murder properly may be based on the defendant's guilty plea). He did not enter an *Alford* plea. *North Carolina v. Alford*, 400 U.S. 25, 37, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970)(holding that an individual accused of crime may voluntarily, knowingly, and understandingly consent to the imposition of a prison sentence even if he is unwilling or unable to admit his participation in the acts constituting the crime). Blackwelder did not assert his innocence during the plea colloquy or at any other time in the trial court. Nor did Blackwelder enter a no contest plea. Entering a guilty plea

waives any appellate review of the sufficiency of the evidence.[13]

The only proper issue on appeal from a guilty plea is the voluntariness of the plea. *Koenig v. State*, 597 So.2d 256, 257-58 (Fla. 1992)(holding record failed to establish an intelligent and voluntary no contest plea where the trial court did not explain the rights he was waiving to the defendant during the colloquy and failed to inquire into the factual basis for the plea.). Here, the trial court explained the rights the defendant would be waiving by entering a plea. (R. IV 754-756). The trial court explained that he was waiving a jury trial and the standard of proof, the right to assistance of counsel during

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[13] *United States v. Mason*, 15 Fed.Appx. 177, 178 (4th Cir. 2001)(noting that, by pleading guilty, Mason relinquished his right to challenge the sufficiency of the evidence); *United States v. Willis*, 992 F.2d 489, 490-91 (4th Cir. 1993)(holding a guilty plea constitutes a waiver of all nonjurisdictional defects including the right to contest the factual merits of the charges); *United States v. Hawkins*, 8 Fed.Appx. 332, 334 (6th Cir 2001)(concluding that Hawkins has waived his sufficiency challenge by entering a constitutionally valid and unconditional guilty plea); *United States v. Maher*, 108 F.3d 1513, 1528-1529 (2nd Cir. 1997)(holding that by pleading guilty to money laundering, defendant waived right on appeal to challenge sufficiency of evidence and observing that questions that a defendant might raise as to which of competing inferences should or might be drawn, or whether there are innocent explanations for behavior that could be viewed as culpable, do not survive his plea of guilty); *United States v. Broce*, 488 U.S. 563, 569, 109 S.Ct. 757, 762, 102 L.Ed.2d 927 (1989)(explaining that a plea of guilty and the ensuing conviction comprehend all of the factual and legal elements necessary to sustain a binding, final judgment of guilt and a lawful sentence and accordingly, when the judgment of conviction upon a guilty plea has become final and the offender seeks to reopen the proceeding, the inquiry is ordinarily confined to whether the underlying plea was both counseled and voluntary).

trial, the right to subpoena witnesses and testify in his own behalf. Moreover, the written plea agreement included a list of trial rights he was giving up by entering a guilty plea. The list included a jury trial, the right to remain silent, the right to confront witnesses, the right to call witnesses on his behalf. (R. IV 646). The prosecutor established a factual basis for the plea. (R. IV 746). Thus, the plea was voluntary.

Furthermore, even if the issue were not waived, the evidence is sufficient to support the convictions. This case involves a confession. Indeed, there are a series of confessions. These are taped confession made to law enforcement officials. These confession are, by themselves, sufficient evidence of guilt. *State v. Billiot*, 672 So.2d 361, 374 (La. App. Ct 1996)(rejecting a sufficiency of the evidence claim based on slight conflict in the evidence where the defendant gave detailed, taped confessions to two different law enforcement agencies and admitted shooting the victim in a letter to his former girlfriend); *Sullivan v. State*, 636 A.2d 931, 949 (Del. 1994)(holding that a guilty plea, together with taped confessions, established, as matter of law, the two statutory aggravating circumstances). Blackwelder, without prompting, during the plea colloquy, stated "I killed Wigley". (R. IV 739). He admits he committed the murder on appeal, as he did in the trial court. Moreover, because this is an inmate murder there are only a limited number of possible perpetrators. The victim was found in Blackwelder's cell. Blackwelder knew details of the murder that only the perpetrator would know, such as where

the binding came from and what the victim said. Thus, the evidence is sufficient to sustain the conviction.

Death is the appropriate sentence. There are four aggravators including both HAC and CCP. This Court has stated that CCP and HAC "are two of the most serious aggravators set out in the statutory sentencing scheme." *Larkins v. State*, 739 So.2d 90, 95 (Fla. 1999).

Additionally, the mitigation was based on a diagnosis of anti-social personality. Anti-social personality disorder is weak mitigation. *People v. Bittaker*, 774 P.2d 659, 697 (Cal. 1989)(classifying mitigation of antisocial personality disorder as "particularly weak")[14]

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[14] This Court's view of antisocial personality disorder is contradictory. *Morton v. State*, 789 So.2d 324 (Fla. 2001)(holding that the trial court's failure to discuss its rejection of antisocial personality disorder as mitigating circumstance was harmless error but implying that the presence of antisocial personality disorder is mitigating); *but see Ford v. State*, 802 So.2d 1121, 1135-1136 (Fla. 2001)(viewing lack or absence of sociopathic or psychopathic tendencies as mitigating in nature). If both the presence of a condition and it absence are mitigating, then all murders are automatically mitigated. This Court has previously held that such evidence is not mitigating. *Elledge v. State*, 706 So.2d 1340,1347 (Fla. 1997)(describing anti-social personality disorder as a "history of making bad choices which were conscious and volitional," and therefore finding no error in the trial court's failure to consider such evidence as mitigating); *Carter v. State*, 576 So.2d 1291, 1292-1293(Fla. 1989)(stating that being a sociopathic is not a condition that cannot be considered in mitigation);*Clisby v. Alabama*, 26 F.3d 1054, 1056 & n. 2 (11th Cir.1994)(noting reasons why antisocial personality disorder diagnoses are not mitigating). The United States Supreme Court has also made contradictory statement regarding anti-social personality disorder. *Eddings v. Oklahoma*, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982)(finding error in court refused to consider as a mitigating circumstance the defendant's childhood and his anti-social personality but Justice O'Connor's

Death is the appropriate punishment for an inmate murder. The Model Penal Code made under a sentence of imprisonment an aggravator to cover exactly this type of murder. MODEL PENAL CODE § 210.6(3)(a)(1980)(providing for aggravating circumstances including that the murder was committed by a convict under sentence of imprisonment). Florida's death penalty statute was originally modeled on the Model penal Code including the statutory list of aggravators. Thus, Florida death penalty statute clears envisions the death penalty for inmate murders. Moreover, this Court has repeatedly affirmed death sentence for the murder of a fellow inmate. *Coney v. State*, 653 So.2d 1009, 1010 (Fla. 1995)(finding death sentence proportionate for the burning murder of fellow inmate where there were four valid aggravators, under sentence of imprisonment; prior violent felony; murder committed during the course of an arson and HAC and no mitigating circumstances); *Marshall v. State*, 604 So.2d 799, 806 (Fla. 1992)(finding death sentence proportionate for bludgeoning murder of fellow inmate who was found with his hands

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concurring opinion which is the opinion of the court does not specifically mention the condition); *Graham v. Collins*, 506 U.S. 461, 500, 113 S.Ct. 892, 915, 122 L.Ed.2d 260 (1993)(Thomas, J., concurring)(observing that classifying antisocial personality disorder as mitigating evidence "makes a mockery of the concerns about racial discrimination that inspired our decision in *Furman.*").

Anti-social personality disorder should not be viewed as mitigating because the definition is circular in the criminal context. One of the diagnostic criteria is criminal conduct. DSM-III. As one court observed, a diagnosis of antisocial personality merely is "fancy language for being a murderer." *Lear v. Cowan*, 220 F.3d 825, 829 (7th Cir. 2000) (characterizing "antisocial personality disorder" or "asocial type," as "fancy language for being a murderer").

bound behind his back and his sweat pants pulled down around his ankles to restrain his legs where there were four strong aggravating circumstances, including under sentence of imprisonment, prior violent felony conviction, and murder during commission of burglary and HAC, and weak mitigation); *Williamson v. State*, 511 So.2d 289 (Fla. 1987)(finding death sentence proportionate for stabbing murder of fellow inmate where there were three aggravators including under a sentence of imprisonment; prior violent felony; and CCP); *Lusk v. State*, 446 So.2d 1038 (Fla. 1984)(finding death sentence proportionate for stabbing murder of fellow inmate where there were three aggravating circumstances and nothing in mitigation); *Demps v. State*, 395 So.2d 501, 506 (Fla. 1981)(finding death sentence proportionate for stabbing murder of fellow inmate where there were two valid aggravating circumstances, under sentence of imprisonment and previously convicted of another capital felony, and no mitigating circumstances). Death is the appropriate punishment for the strangulation murder of a fellow inmate where there are four aggravating circumstances and weak mitigating circumstances.[15] Hence, the death penalty is proportionate.

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[15] Blackwelder is only challenging one of the aggravators on appeal. Even if the prior violent felony aggravator is stricken, there are three valid aggravators remaining and the death penalty is still proportionate.

ISSUE II

THE TRIAL COURT ERRED BY USING THE STATE’S SENTENCING MEMORANDUM AS THE BASIS OF ITS WRITTEN SENTENCING ORDER? (Restated)

Blackwelder asserts that the trial court improperly incorporated part of the State’s sentencing memorandum into its sentencing order The State respectfully disagrees. The differences between the trial court’s order and the State’s sentencing memorandum, while small in number, were extremely significant in content. The trial court’s order found two mental mitigators that the State’s sentencing memorandum urged the trial court not to find. The findings of two mental mitigators establishes that the trial court independently engaged in the statutorily mandated fact finding and weighing process. Thus, the trial court properly incorporated part of the State’s sentencing memorandum into its sentencing order.

The trial court's ruling

After the jury returned its unanimous recommendation of death, the trial court requested that both sides submit proposed orders. (T XIV 836). The prosecutor wrote a letter to the trial court informing him that proposed orders were “a bad idea”. (R. VII 1346). The prosecutor suggested sentencing memorandum instead and informed the trial court that defense counsel agreed.

The prosecutor submitted a sentencing memorandum. (R. VII 1284-1302; 1306-1324). Defense counsel also submitted a

sentencing memorandum. (VII 1326-1336). The State filed a reply. (VII 1367-1369; VIII 1377-1403).

In defense counsel's memorandum in support of a life sentence, he argued that the evidence of extreme mental or emotional disturbance was "clear and undisputed." (1331-1334). He noted that Dr. Lomangcolob, the staff psychiatrist at Columbia Correctional Institute, diagnosed Blackwelder as suffering from anti-social personality disorder and impulse control disorder. Dr. Lomangcolob testified that Blackwelder had stopped taking his medication to help control his impulses two months prior to the murder. Dr. Hamilton diagnosed Blackwelder as suffering from impulse control disorder, depression, pedophilia and anti-social personality disorder. Defense counsel noted that the State conceded that Blackwelder had anti-social personality disorder. Defense counsel then cited a number of cases finding anti-social personality disorder to be a valid mitigating circumstance. (R. VII 1332, citing *Morton v. State*, 789 So.2d 324 (Fla. 2001) and *Eddings v. Oklahoma*, 455 U.S. 104, 113-15, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982)).

In the State's reply, the prosecutor responded to the claim that he had denigrated anti-social personality disorder as mitigating. (VII 1368). He noted *Morton v. State*, 789 So.2d 324 (Fla. 2001)(implying that antisocial personality disorder is mitigating), was not decided at the time of the trial and noted that Dr. McMahon's report expressed her opinion that the defendant did not suffer from extreme mental or emotional disturbance.

The trial court's sentencing order tracked the State's sentencing memorandum nearly verbatim on the aggravating circumstances except the trial court found seven prior violent felony convictions in addition to the capital felony rather than the ten urged by the State. (R. VIII 1411). However, the trial court's sentencing order differed from the State's sentencing memorandum regarding mitigating circumstances. First, the trial court's order included two paragraphs discussing both Dr. McMahon's and Dr. Mhatre's findings that the State's sentencing memorandum did not. (R. VIII 1416). Dr. McMahon's opinion was that neither statutory nor non-statutory mental mitigation was present and Dr. Mhatre's opinion was that Blackwelder's behavior was calculated behavior which did not stem from depression. The trial court found both statutory mental mitigators based on its findings that the defendant suffered from anti-social personality disorder. The trial court found that Blackwelder was under the influence of extreme mental or emotional disturbance and the defendant's capacity to appreciate the criminality of his conduct was substantially impaired. The State had urged that neither statutory mental mitigator be found. The State's position was that while Blackwelder suffers from anti-social personality disorder, anti-social personality disorder was not mitigating. The trial court also found that the non-statutory mitigator of the defendant's relationship with his parents where the State had urged that this not be considered mitigating.

Preservation

Blackwelder did not object to the similarities between the trial court's sentencing order and the State's sentencing memorandum in the trial court. In *Ray v. State*, 755 So.2d 604 (Fla. 2000), this Court held that a similar issue was not preserved for appellate review and therefore, was procedurally barred where the trial court's sentencing order, with a few minor exceptions, was taken verbatim from the State's proposed order. *Ray*, 755 So.2d at 611. As in *Ray*, this issue is not preserved.

Standard of Review

An improper delegation claim is probably reviewed *de novo*. *United States v. Reyna-Tapia*, 294 F.3d 1192, 1198 (9th Cir. 2002)(stating that the delegation of authority from a district judge to a magistrate judge to conduct a plea colloquy is reviewed *de novo*).

Merits

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

> Findings in support of sentence of death.--Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:
>
> (a) That sufficient aggravating circumstances exist as enumerated in subsection (5), and

> (b) That there are insufficient mitigating circumstances to outweigh the aggravating circumstances.
>
> In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsections (5) and (6) and upon the records of the trial and the sentencing proceedings. If the court does not make the findings requiring the death sentence within 30 days after the rendition of the judgment and sentence, the court shall impose sentence of life imprisonment in accordance with s. 775.082.

This Court has concluded a sentencing order is a statutorily required personal evaluation by the trial judge of aggravating and mitigating factors. The sentencing order is the foundation for this Court's proportionality review which may ultimately determine if a person lives or dies. If the trial judge does not prepare his or her own sentencing order, then it becomes difficult for the Court to determine if the trial judge in fact independently engaged in the statutorily mandated weighing process. *Morton v. State*, 789 So.2d 324, 333 (Fla. 2001)(quoting *Patton v. State*, 784 So.2d 380, 388 (Fla. 2000)).[16]

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

In *Morton v. State*, 789 So.2d 324 (Fla. 2001), this Court affirmed a sentencing order although the resentencing judge used substantial portions of the original judge's sentencing order. The resentencing judge adopted a majority of the findings from the original sentencing judge's sentencing order. Both the resentencing judge's order and the original judge's order found the same aggravators and mitigators. The *Morton* Court reasoned that, because there were significant differences between the two orders, this demonstrated that the resentencing judge performed an independent weighing and personal evaluation of the evidence. The Court explained the reason for the requirement is to ensure that the trial judge has carefully considered the contentions of both sides and has taken seriously his or her solemn obligation to independently evaluate the aggravating and mitigating circumstances in making this life or death decision. The *Morton* Court noted that the evidence presented in the resentencing proceeding largely mirrored the evidence presented by the State

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adopting the findings in whole or in part and once the trial court signs the order, it has adopted that party's findings as its own).

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

during the first penalty phase. However, the Court cautioned resentencing judges against adopting a prior sentencing order or substantial parts thereof from the original sentencing judge. *Morton*, 789 So.2d at 333-335.

There is a significant difference between the State's sentencing memorandum and the trial court's sentencing order. The State's sentencing memorandum asserted that anti-social personality disorder was not mitigating and recommended that the disorder not be found as mitigating; whereas, the trial court's sentencing order found the disorder to be mitigating and gave it weight. Indeed, the trial court used the diagnosis of anti-social personality disorder to support its finding of two statutory mitigators. The trial court's findings of two statutory mitigators where the State's position was that neither mitigator should be found establishes that the trial court properly independently evaluated the aggravating and mitigating circumstances. Furthermore, the trial court found seven prior violent felony convictions rather than the ten urged by the State. (R. VIII 1411). The trial court also found that the non-statutory mitigator of the defendant's relationship with his parents where the State had urged that this not be considered mitigating. These differences establish that the trial court did not simply "rubber-stamp" the State's sentencing memorandum. *Valle v. State*, 778 So.2d 960, 965 (Fla. 2001)(finding, in the post-conviction context, that although the differences between the State's proposed order and the trial court's final order were not substantial, because the trial court made changes to

the proposed order this reveals that the trial court reviewed both orders and did not simply "rubber-stamp" the State's order).

Blackwelder complains because much of the language of the trial court's sentencing order is based on the State's memorandum. Two examples will highlight why this is not the proper focus. Suppose a trial court adopts the part of the State's memorandum regarding aggravation but also adopts the part of defense's memorandum regarding mitigation in its sentencing order. The trial court would be giving weight to both parties' positions and thinking through the sentencing decision. *Ray v. State*, 755 So.2d 604, 611 (Fla. 2000)(adopting the State's sentencing memorandum creates both an appearance of partiality and a failure to carefully consider the contentions of both sides and to take seriously the independent judicial obligation to think through the sentencing decision quoting *Phillips v. State*, 705 So.2d 1320, 1323 (Fla. 1997)(Anstead, J. concurring)). Surely, this would not be error. For another example, suppose a very responsible trial court orders both parties to submit sentencing memorandums but, in an effort to independently arrive at his own conclusions, he does not read either until after he has prepared his own sentencing order. The trial court notices a remarkable similarity between the State's memorandum and his sentencing order. The State's sentencing memorandum quotes the critical trial testimony verbatim and relies on three controlling cases from this Court. The trial court's sentencing order, likewise, quotes the

critical trial testimony verbatim and, likewise, relies on the same three controlling cases from this Court. The sum and substance of the trial court's sentencing order matches that of the State's memorandum even though the trial court never read the State's memorandum. This is likely to occur because the facts are the facts of the case. The order and the memorandum both cite the same three cases because they are the relevant caselaw governing the issue. There is bound to be significant overlap between the State's sentencing memorandum and the trial court's sentencing order in the vast majority of cases.

Furthermore, any rule by this Court prohibiting trial court's from copying any portion of the State's sentencing memorandum would be unworkable as the example highlights. On the other hand, a rule prohibiting the trial court from verbatim copying the State's sentencing memorandum would result in hair-splitting. Is one word difference sufficient not to violate the rule. Two words?

The due process concerns of notice and opportunity to be heard are not present in this case. Neither is the specter of *ex parte* communication. In *Phillips v. State*, 705 So.2d 1320, 1324 (Fla. 1997), this Court rejected a similar claim, concluding that the trial court did not actually abdicate its sentencing responsibility to the State. The trial court's sentencing order was "virtually identical" to the State's sentencing memorandum. The *Phillips* Court noted that both were supported by evidence in the record. *Phillips*, 705 So.2d at 1324, n.3. Furthermore, the *Phillips* Court noted that, unlike *Patterson v. State*, 513 So.2d

1257 (Fla. 1987), there was no claim that the trial court had *ex parte* communications with the State concerning the appropriate sentence for the defendant or that the court directed the State to prepare the sentencing order. *Phillips*, 705 So.2d at 1324, n.4

Each side received opposing counsel's memorandum. The State memorandum was served on opposing counsel on June 27, 2001 (R. 1302). The defense memorandum in support of a life sentence was served on the State on July 9, 2001 (R. 1336). Thus, defense counsel had notice in writing of the State's position and nearly two weeks to respond. The defense was given an equal opportunity to be heard on the issue in writing and an additional opportunity to respond at the *Spencer* hearing. The communication was in writing with a copy sent to defense counsel, and therefore, no *ex parte* communication occurred. There are no due process notice or opportunity to be heard concerns present in this case.

Harmless error

Blackwelder does not point to any factual conclusions that are erroneous. *Phillips v. State*, 705 So.2d 1320, 1324, n.3 (Fla. 1997)(noting that the trial court's sentencing order, which was "virtually identical" to the State's sentencing memorandum, was supported by evidence in the record). Furthermore, remanding for a new sentencing order that merely reworded the old sentencing order would be mere legal churning. *State v. Rucker*, 613 So.2d 460, 462 (Fla. 1993)(commenting that a remand for more

specific findings on an undisputed point "would be mere legal churning."). Here, unlike *Rucker*, this Court would be remanding for entry of a new sentencing order, not to make more specific findings, but merely to reword the sentencing order. In any new sentencing order, the fact-finding, the aggravators, the mitigators and the ultimate conclusion would remain the same.

ISSUE III

DID THE TRIAL COURT ERR IN FINDING THE PRIOR VIOLENT FELONY AGGRAVATOR WHERE THE DEFENDANT HAD BEEN CONVICTED OF CAPITAL SEXUAL BATTERY? (Restated)

Blackwelder contends that the trial court erred in finding the prior violent felony aggravator. Specifically, he asserts that neither his conviction for a lewd act upon a child nor his federal conviction for threatening the life of the vice-president are *per se* crimes of violence for purposes of this aggravator. First, this issue is not preserved. While defense counsel objected to the use of the lewd convictions, he withdrew the objection. Moreover, Blackwelder had other convictions that were crimes of violence regardless of the challenged convictions. Blackwelder's prior convictions included capital sexual battery and attempted capital sexual battery. Capital sexual battery is another capital felony. Furthermore, it is a crime of violence. This Court has held that the Legislature intended sexual battery be treated as a crime involving a threat of violence. This aggravator is still valid based solely on the capital sexual battery. Moreover, any error is harmless. Even if this aggravator is stricken, three valid, unchallenged aggravators remain. Thus, the trial court properly found the prior violent aggravator.

The trial court's ruling

The defendant entered a stipulation, during jury selection, that he had been convicted of capital sexual battery; attempted sexual battery and several counts of lewd and lascivious act.

(T. IX 67-69). The defendant argued that the attempted sexual battery did not involve threats or force and therefore, should not be an aggravating factor. (IX 69). The judgment for these convictions is in the record (R. I 141-157). The trial court in that case found that Blackwelder was a sexual predator. (R. I 157).

During the charge conference, defense counsel objected to the use of attempted sexual battery as a felony involving the use or threat of violence to another person. (XII 587-590). Defense counsel also objected to the use of a lewd act upon a child as a felony involving the use or threat of violence to another person. (XII 587-590). The prosecutor argued that the lewd act conviction was supported by the imposition of sexual contact points on the scoresheet. The prosecutor clarified that he was referring to the Ft. Pierce trial. Defense counsel then withdrew the objection. (XII 590).

The trial court instructed the jury that capital sexual battery was a capital felony. (XIV 813). The trial court also instructed the jury that attempted sexual battery was a felony involving the use or threat of violence to another person and that a lewd act upon a child was a felony involving the use or threat of violence to another person. (XIV 813). The trial court did not instruct the jury on the threat to the vice-president conviction. After the jury was instructed, the trial court asked if there were any corrections to the jury instructions as given, and defense counsel responded: “None by the defense, Your Honor”. (XIV 821)

The trial court's sentencing order found the prior violent felony aggravator based on the capital sexual battery conviction because it was a capital felony. (R. VIII 1411). The trial court also found that the attempted sexual battery supported the prior violent felony aggravator based on the St. Lucie County conviction which the defendant "did not challenge the violent nature" of. The trial court further found that the federal conviction for threats against the vice-president was a felony involving the use or threat of violence to the person. (R. VIII 1411).

Preservation

This issue is not preserved. Defense counsel originally objected to the lewd assault as crime of violence to support the prior violent felony aggravator, during the charge conference, but he withdrew the objections. Moreover, counsel did not object to the jury instructions when the jury was instructed that they were crimes of violence. Thus, this issue is not preserved.

The standard of review

The standard of review is *de novo*. *United States v. Moyer*, 282 F.3d 1311, 1315 (10th Cir. 2002)(concluding that the question of whether felony convictions were crimes of violence is a legal question which this court reviews *de novo*); *United States v. Pierce*, 278 F.3d 282, 286 (4th Cir. 2002)(concluding whether conviction falls within the federal definition of a crime of

violence is a question of law reviewed *de novo*); *United States v. Abernathy*, 277 F.3d 1048,1051 (8th Cir. 2002)(stating we review *de novo* the district court's determination that a prior offense constitutes a crime of violence)).

Merits

The sentence of death or life imprisonment for capital felonies statute, § 921.141(5)(b), provides for the following aggravator:

> The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.

Capital sexual battery qualifies as an another capital felony regardless of the use or threat of violence to the person.[17]

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[17] The rape of a child is a capital crime according to the Legislature. § 794.011(2)(a)(providing that a person 18 years of age or older who commits sexual battery upon, or in an attempt to commit sexual battery injures the sexual organs of, a person less than 12 years of age commits a capital felony). However, it is not actually a capital crime according to the caselaw. *Buford v. State*, 403 So.2d 943 (Fla. 1981)(holding that a sentence of death for capital sexual battery constituted cruel and unusual punishment); *Huffman v. State*, 813 So.2d 10, 12 (Fla. 2000)(explaining that even if a felony is classified in the Florida Statutes as a capital offense, it is not "capital" under case law unless it is subject to the death penalty citing *Rusaw v. State*, 451 So.2d 469, 470 (Fla. 1984)). This caselaw concerns procedures in cases where death was not imposed. It is quite reasonable to distinguish capital from non-capital case in that context. However, as the *Hess* Court found, it is the Legislature's intent that governs what is a capital felony for purposes of this aggravator. *Hess*, 794 So.2d at 1264. The legislature intents that a capital sexual battery be treated as a capital felony for purposes of the prior violent felony

Moreover, capital sexual battery is a *per se* crime of violence.

In *Hess v. State*, 794 So.2d 1249, 1264 (Fla. 2001), this Court held that sexual battery was a felony involving the use or threat of violence to the person for purposes of the prior violent felony aggravator. Hess had been convicted of two counts of sexual activity with a child.[18] Hess argued that because the crimes were nonconsensual as a matter of law does not mean that force was used and pointed out that the charging information alleged no threat or use of violence. *Hess*, 794 So.2d at 1263. Based on the legislative findings, this Court concluded that the Legislature intended a violation of the sexual battery statute to be treated as implicitly involving violence or the threat of violence. *Hess*, 794 So.2d at 1264.

Here, the capital sexual battery and the attempted sexual battery convictions support the finding of the prior violent felony aggravator. As this Court found in *Hess*, the Legislature intended that a violation of the sexual battery statute be treated as a felony involving the use or threat of violence to the person.

The *Hess* Court also held that a lewd assault on a child was not *per se* a crime of violence. *Hess*, 794 So.2d at 1264. This Court explained that the lewd assault on a child statute, §

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aggravator.

[18] The specific part of the sexual battery statute at issue was § 794.011(8)(b), Florida Statutes (1993).

800.04(1), Florida Statutes (1993), states that it is a crime for a person to handle, fondle, or assault any child under the age of sixteen years in a lewd, lascivious, or indecent manner. However, because this crime does not include sexual battery within its definition and because, unlike sexual battery, the language does not indicate any inherent violence or threat of violence, this Court concluded this is not *per se* a crime of violence. Thus, the State had the burden of proving that this crime involved violence or the threat of violence under the actual circumstances in which it was committed. Here, the five prior convictions for a lewd assault on a child included points for sexual contact.

The threats against President and successors to the Presidency statute, 18 U.S.C. § 871(a), provides:

> Whoever knowingly and willfully deposits for conveyance in the mail or for a delivery from any post office or by any letter carrier any letter, paper, writing, print, missive, or document containing any threat to take the life of, to kidnap, or to inflict bodily harm upon the President of the United States, the President-elect, the Vice President or other officer next in the order of succession to the office of President of the United States, or the Vice President-elect, or knowingly and willfully otherwise makes any such threat against the President, President-elect, Vice President or other officer next in the order of succession to the office of President, or Vice President-elect, shall be fined under this title or imprisoned not more than five years, or both.

The Court has stated that a felony involving the use or threat of violence to the person attaches only to life-threatening crimes in which the perpetrator comes in direct contact with a human victim. *Johnson v. State*, 720 So.2d 232, 237 (Fla. 1998)(quoting *Lewis v. State*, 398 So.2d 432, 438(Fla. 1981); *Mahn v. State*, 714 So.2d 391, 399 (Fla. 1998).

Blackwelder's reliance on *United States v. Patillo*, 438 F.2d 13, 15 (4th Cir.1971), is misplaced. *Patillo* does not hold that a violation of the threats against the president statute, 18 U.S.C. § 871(a), is not a crime of violence; rather, the case concerns objective versus subjective intent and even on that issue, "*Patillo* is a distinctly minority view", in the Seventh Circuit words. *United States v. Aman*, 31 F.3d 550, 554 (7th Cir. 1994). Many other federal circuits have held that a violation of the threats against the president statute is a crime of violence.[19] Thus, a violation of the threats against the president statute is a crime of violence according to the federal courts. Thus, the trial court properly found the prior violent felony aggravator based on defendants prior convictions for capital sexual battery and attempted sexual battery.

Harmless error

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[19] *United States v. Santos*, 131 F.3d 16, 21 (1st Cir. 1997)(holding that threatening public officials constituted a crime of violence under Sentencing Guidelines' career offender provision because the offense had, as an element, threatened use of physical force against another person); *United States v. Poff*, 926 F.2d 588, 591-592 (7th Cir. 1991)(holding that threatening public officials constituted a crime of violence under Sentencing Guidelines' career offender provision); *United States v. Batten*, 936 F.2d 580 (9th Cir. 1991)(stating a person convicted of mailing a threat to kill the president under section 871 has been convicted of a "crime of violence" within the meaning the Guidelines); *United States v. McCaleb*, 908 F.2d 176, 177 (7th Cir. 1990)(concluding that offense under section 871 is "crime of violence" under career offender provision); *United States v. Left Hand Bull*, 901 F.2d 647, 649 (8th Cir. 1990)(same).

The error, if any, was harmless. *Jennings v. State*, 782 So.2d 853, 863 n.9 (Fla. 2001)(noting that where an aggravating factor is stricken on appeal, the harmless error test is applied to determine whether there is no reasonable possibility that the error affected the sentence and collecting cases). Even if this aggravator is stricken, three valid, unchallenged aggravators remain. The remaining aggravators include the serious agggravators of HAC and CCP. The trial court would have imposed death for this inmate murder based on the three remaining valid aggravators. Thus, the error was harmless.

ISSUE IV

DOES *RING V. ARIZONA* APPLY TO CAPITAL CASES WHERE THE JURY RECOMMENDS DEATH? (Restated)

Blackwelder asserts that his death sentence violates the holding of *Ring v. Arizona*, 122 S.Ct. 2428 (2002). The requirements of *Ring* were met in this case. The jury, by recommending death, necessarily engaged in the required fact-finding, as the United States Supreme Court has explained. Blackwelder cannot present a valid *Ring* challenge to Florida's death penalty statutes. He had a jury at sentencing. A jury was present during the penalty phase; heard the evidence of aggravators and mitigators; was instructed on aggravating circumstances and the requirement that they be proven beyond a reasonable doubt. Blackwelder's jury then unanimously recommended death. In Florida, only a defendant in a jury override case has any basis to raise a *Ring* challenge to Florida's death penalty statute. A capital defendant, who has had a jury recommend death, simply cannot claim that his right to a jury trial was violated. Thus, Balckwelder's death sentence does not violate the Sixth Amendment.

The standard of review

Whether the defendant's right to a jury trial has been violated is reviewed *de novo*. *United States v. Harris*, 244 F.3d 828, 829 (11th Cir. 2001)(holding that the applicability of *Apprendi* is a pure question of law reviewed *de novo*); *United States v. Arellano-Rivera,* 244 F.3d 1119, 1127 (9th Cir. 2001)(concluding that whether the district court violated the

constitutional rule expressed in *Apprendi* is a question of law reviewed *de novo*). Hence, the standard of review is *de novo*.

The trial court's ruling

Blackwelder filed a motion for a statement of the particular aggravators. (R. IV 714-720). He argued that without this information he could not adequately prepare his defense. (715). He also argued that because he was required to disclose mental mitigation he intended to present, reciprocal disclosure should be required of the prosecution. Blackwelder presented no argument based on the Sixth Amendment right to a jury trial in the motion.

Preservation

This issue is not preserved. *Ring* or *Apprendi* challenges, like other constitutional challenges to statutes, must be preserved. *Cf. McGregor v. State*, 789 So.2d 976, 977 (Fla. 2001)(holding that petitioner did not properly preserve the *Apprendi* issue for appellate review); *Hertz v. State*, 803 So.2d 629, 647 (Fla. 2001)(holding that a constitutional challenge to the victim impact statute in a capital case was not preserved because Hertz did not file any motion concerning the constitutionality of the statute in the trial court). The United States Supreme Court recently held that an *Apprendi* claim is not plain error. *United States v. Cotton*, 122 S.Ct. 1781 (May 20, 2002)(holding an indictment's failure to include the quantity of drugs was an *Apprendi* error but it did not seriously

affect fairness, integrity, or public reputation of judicial proceedings, and thus did not rise to level of plain error). Plain error is akin to fundamental error.[20] If a *Ring* or *Apprendi* error is not plain error, it certainly is not fundamental error. Therefore, the issue is not preserved.

<u>Merits</u>

The Sixth Amendment to the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . ."

In *Ring v. Arizona*, 122 S.Ct. 2428 (2002), the United States Supreme Court held that the right to trial by jury guaranteed by the Sixth Amendment encompasses the factfinding necessary to put a defendant to death. *Ring*, at 2443. The *Ring* Court reasoned, that because aggravating factors operate as the functional

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[20] Actually, fundamental error is closer to structural error. *Arizona v. Fulminante*, 499 U.S. 279, 310, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991). Structural errors are errors that affect the framework within which the trial proceeds and therefore are *per se* reversible error and not subject to harmless error analysis. Structural errors are defects that necessarily render a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence. *Neder v. United States*, 527 U.S. 1, 9, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999). Plain error is a broader concept than Florida's fundamental error. The federal rules of criminal procedure allow federal courts to review unpreserved error. Fed. R. Crim. Pro. 52(b)(providing that plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court). Florida has no such rule. The only unpreserved errors that Florida courts should address are fundamental errors. *Chandler v. State*, 702 So.2d 186, 191, n. 5 (Fla.1997)(describing fundamental error as error so prejudicial that it vitiates the entire trial).

equivalent of an element, the Sixth Amendment requires that they be found by a jury. The *Ring* Court overruled *Walton v. Arizona*, 497 U.S. 639 (1990), because it was irreconcilable with *Apprendi v. New Jersey,* 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). The *Ring* Court limited its holding to states that allow a judge, "sitting without a jury", to impose death.

However, the holding in *Ring* does not extend to all facts or to the ultimate decision. Even in the wake of *Ring*, a jury only has to make a finding of one aggravator and then the judge may make the remaining findings. *Ring* is limited to the finding of an aggravator, not any additional aggravators, nor mitigation, nor any weighing. *Ring*, 122 S.Ct. 2445 (Scalia, J., concurring)(explaining that the fact finding necessary for the jury to make in a capital case is limited to "an aggravating factor" and does not extend to mitigation or to the ultimate life-or-death decision which may continue to be made by the judge). This is because it is the finding of one aggravator that increases the penalty to death. *Ring*, 122 S.Ct. 2445 (Kennedy, J., concurring)(noting that it is the finding of "an aggravating circumstance" that exposes the defendant to a greater punishment than that authorized by the jury's verdict). Constitutionally, all the sentencer must find is one narrower, *i.e.*, one aggravator, at either the guilt or penalty phase. *Tuilaepa v. California*, 512 U.S. 967, 972 (1994)(observing "[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."). *Ring* only requires that the jury make a finding of ONE aggravating circumstance, not all aggravators nor any mitigators nor any weighing. So, once a jury has found a single aggravator, the constitution is satisfied and the judge may do the rest. No further involvement on the part of the jury is required by *Ring*. The trial judge may make additional findings in aggravation or mitigation, perform any weighing and may be the ultimate decision maker.[21] *Ring* did not hold that only a jury may be involved in capital sentencing; rather, its holding was that the jury could not be totally excluded. *Ring* at n.4 (noting that Ring did not argue the jury had to be the ultimate sentencer). Thus, the judge may be the ultimate sentencer.

FLORIDA'S DEATH PENALTY STATUTE COMPLIES WITH RING

Florida's death penalty statute does not violate *Ring*. In Florida, a jury recommends a sentence after hearing evidence during the penalty phase. The United States Supreme Court has

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[21] The *Ring* Court noted in a footnote that Arizona was one of only five states that committed both capital sentencing factfinding and the ultimate sentencing decision entirely to judges. The other four states are Colorado, Idaho, Montana and Nebraska. See Colo.Rev.Stat. § 16-11-103 (2001) (three-judge panel); Idaho Code § 19-2515 (Supp.2001); Mont.Code Ann. § 46-18-301 (1997); Neb.Rev.Stat. § 29-2520 (1995). The court noted that Florida was one of four states that have "hybrid systems, in which the jury renders an advisory verdict but the judge makes the ultimate sentencing determinations." The other three states are Alabama, Delaware and Indiana. See Ala.Code §§ 13A-5-46, 13A-5-47 (1994); Del.Code Ann., Tit. 11, § 4209 (1995); Ind.Code Ann. § 35-50-2-9 (Supp.2001) *Ring*, 122 S.Ct. 2428, 2442, n.5.

expressly explained that Florida's scheme does not violate the Sixth Amendment if there is a jury recommendation of death. The United States Supreme Court in *Jones v. United States*, 526 U.S. 227, 119 S.Ct. 1215, 143 L.Ed.2d 311 (1999), a case that was a precursor to *Apprendi* and *Ring*, explained that if there is a jury recommendation of death, the Sixth Amendment right to a jury trial is not violated. The *Jones* Court explained that in *Hildwin*, a jury made a sentencing recommendation of death, thus necessarily engaging in the factfinding required for imposition of a higher sentence, that is, the determination that at least one aggravating factor had been proved. *Jones*, 526 U.S. at 251, 119 S.Ct. at 1228. The United States Supreme Court has reaffirmed *Hildwin* in light of the reasoning of *Ring*. It is only *Spaziano v. Florida*, 468 U.S. 447, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984), which was an override case, that is in doubt in the wake of *Ring*, not *Hildwin*, where the jury recommended death, as the United States Supreme Court in *Jones* explained.[22]

In Florida, a defendant is provided two chances at life. The first chance is with a jury. If the jury recommends death, the defendant then gets a second chance at the *Spencer* hearing to convince the judge to impose life. Providing a second bite at

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[22] It is also clear that this is the United States Supreme Court's position from the lifting of the stay in *Bottoson* and *King*. The United States Supreme Court entered a stay in both cases pending resolution of *Ring*. Once *Ring* was decided, they lifted the stay. While normally the denial of certiorari means nothing, in the unique circumstances of granting a stay to decide a related case and then lifting the stay in the same week that related case was decided, it means that the United States Supreme Court's view is that a jury recommendation of death does not violate *Ring*.

the life apple does not violate the right to a jury trial. It is only if the jury recommends life and the judge imposes death, that a possible violation of the Sixth Amendment right to a jury trial occurs. A combination of jury plus judge sentencing does not violate *Ring*. Imagine, for example, a state that wanted to combine the virtues of a jury, such as being the voice of the community, with the virtues of a judge, such as his vast legal experience, so they created a rule that no one could be convicted in the state without both the jury and the judge agreeing that the defendant was guilty. In this hypothetical state, first a jury would render an advisory verdict of guilty and then the judge would make written findings which would facilitate appellate review of the conviction. If a defendant claimed that this scheme violated the Sixth Amendment, an appellate court would correctly observe that this scheme provides increased protection to a defendant and such a scheme is a boon to criminal defendants. This is the Sixth Amendment with a cherry on top. Florida's death penalty scheme is very analogous to this hypothetical state. Jury plus judge does not

violate the Sixth Amendment.[23] Thus, Florida's death penalty statute does not violate *Ring.*

Here, the judge did not override the jury's recommendation. The jury recommended death. Blackwelder cannot raise a valid *Ring* claim. Blackwelder had a jury at sentencing. A jury was present during the penalty phase; heard the evidence of aggravators and mitigators; was instructed on aggravating circumstances and the requirement that they be proven beyond a reasonable doubt. Blackwelder had a jury and that jury had to find at least one aggravating circumstance prior to recommending death. There can be no possible violation of the Sixth Amendment in his particular case.

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[23] The petitioner in *Bottoson* asked if Respondent Moore was "seriously" arguing that this Court would affirm a conviction based on a judge's findings of premeditation after a jury rendered an advisory verdict of guilty. This is exactly the State's position. Bottoson asked if the Florida Supreme Court would affirm a conviction without a finding of premeditation. The short answer is yes; the Florida Supreme Court routinely does just that. The Court has repeatedly upheld general verdicts where the verdict form does not specify whether the jury found first degree premeditated murder or first degree felony murder. *Jordan v. State*, 694 So.2d 708, 713 (Fla. 1997)(concluding that there is no merit to the claim that the jury's general verdict is invalid). Moreover, the jury in the hypothetical state is a twelve person jury but, in recognition of the added protection of requiring the judge to agree, the state decided that the jury verdict did not have to be unanimous as it is constitutionally entitled to do. The State is, indeed, seriously arguing that such a scheme would be constitutional. Hyperbole by Bottoson's appellate counsel does not change the fact that capital defendants have a jury at the penalty phase in Florida, unlike Arizona.

Motions for judgment of acquittal and for a new trial function somewhat similarly to the hypothetical state. Neither are thought to violate the Sixth Amendment right to a jury trial.

FINDING OF ADDITIONAL AGGRAVATORS

Justice Pariente expressed concern that *Ring* may have affected the precedent allowing a trial court to consider aggravators that the jury did not consider.[24] *Ring* did not. *Ring* is limited to the finding of one aggravator. *Ring*, 122 S.Ct. 2445 (Kennedy, J., concurring)(noting that it is the finding of "an aggravating circumstance" that exposes the defendant to a greater punishment than that authorized by the jury's verdict). Once a jury finds a single aggravator, a judge may do the rest including finding additional aggravators. Additional aggravators do not act as the functional equivalent of elements; they do not increase the penalty to death. The penalty is already death based on the finding of one aggravator. None of the existing precedent allowing a judge to consider aggravators not present to, or found by, the jury is affected by *Ring*.

Justice Pariente also expressed concern in her concurring opinion granting a stay of execution in *Bottoson* that an entire provision of the death penalty statute may have to be stricken and expressed concern regarding the affect on the remainder of the statute.

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[24] *Davis v. State*, 703 So.2d 1055,1061 (Fla. 1997)(hold that it was not error for a judge to consider and find an aggravator that was not presented to or found by the jury citing *Hoffman v. State*, 474 So.2d 1178 (Fla. 1985)(holding that the trial court's finding of HAC was not error even though jury was not instructed on it); *Fitzpatrick v. State*, 437 So.2d 1072, 1078 (Fla. 1983)(holding finding of prior violent felony aggravator was proper even though jury was not instructed on it); *Engle v. State*, 438 So.2d 803, 813 (Fla. 1983).

The sentence of death or life imprisonment for capital felonies statute, § 921.141(3), Florida Statutes (2001), provides:

> Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts.

Florida death penalty statute does not actually have an override provision. A *Ring* challenge in Florida, given the wording of Florida's statute and Florida's requirement of jury involvement in the penalty phase, is an as-applied challenge, not a facial challenge. As applied to the vast majority of capital defendants, *i.e.,* those with a death recommendation from the jury, the statute is unquestionably constitutional. It is only in the very rare case of a jury override that a *Ring* challenge is possible. *Ring* is an as-applied challenge and therefore, no part of the statute must be stricken.

RECIDIVIST AGGRAVATORS

Certain aggravators are exempt from the holding in *Ring*. All recidivist aggravators may be found solely by the judge. *Ring* was an expansion of the holding in *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). However, *Apprendi* explicitly exempted recidivist factual findings from its holding. *Apprendi*, 530 at 490, 120 S.Ct. at 2362-63 (holding, 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). Any aggravator that depends on the fact of

a prior conviction is exempted from *Ring*. A trial court, sitting alone, may make factual findings regarding recidivism.[25] The prior violent felony aggravator (and the under sentence of imprisonment aggravator), are recidivist aggravators. Recidivist aggravators may be found by the judge alone even in the wake of *Ring*. *Ring*, at n.4 (noting that none of the aggravators at issue related to past convictions and that, therefore, the holding in *Almendarez-Torres v. United States*, 523 U.S. 224, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998), which allowed the judge to find the fact of prior conviction even if it increases the sentence beyond the statutory maximum was not being challenged). Therefore, recidivist aggravators may be found by the judge sitting alone even in the wake of *Ring*. Here, one of the aggravators found was prior violent felony. Blackwelder had previously been convicted of capital sexual battery and attempted sexual battery. The constitutionally permissible penalty was death based on the finding of this one aggravator, which the judge was entitled to determine sitting alone, and therefore, no jury was required constitutionally in this particular case.

ALMENDAREZ-TORRES

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[25] *Walker v. State*, 790 So.2d 1200, 1201 (Fla. 5th DCA 2001)(noting that Florida courts, consistent with *Apprendi's* language excluding recidivism from its holding, have uniformly held that an habitual offender sentence is not subject to *Apprendi*); *McGregor v. State*, 789 So.2d 976, 978 (Fla. 2001)(rejecting a claim that the jury must find certain facts relating to the prison releasee reoffender statute because it is a recidivist statute to which *Apprendi* does not apply).

There is some tension between *Apprendi* and *Almendarez-Torres v. United States*, 523 U.S. 224, 235, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998). In *Almendarez-Torres*, the Court held that 8 U.S.C. § 1326(b) which increases the maximum sentence for an alien who illegally reentered the United States after having been deported following his conviction for an aggravated felony, was a sentencing factor, not a separate criminal offense. *Almendarez-Torres*, 523 U.S. at 235. Subsection (a) of that statute prohibited an alien from returning to the United States after having been deported and authorized a maximum prison term of two years but subsection (b) authorized a prison term of up to 20 years for any alien who returned after a conviction for an aggravated felony. *Almendarez-Torres*, 523 U.S. at 226. Almendarez-Torres argued that because the fact of recidivism increased the maximum penalty, recidivism was an element that must be charged in the indictment and proven beyond a reasonable doubt. *Almendarez-Torres*, 523 U.S. at 239. The Court rejected that argument, reasoning in part that recidivism is a traditional, if not the most traditional, basis for increasing a sentence. *Almendarez-Torres*, 523 U.S. at 243. The Court also noted that informing the jury of the defendant’s prior felonies created the risk of “significant prejudice.” *Almendarez-Torres*, 523 U.S. at 235. The Court held, after examining the statute’s title which referred to penalties and the legislative history, that it was Congress’ intent to treat recidivism as a sentencing factor.

Almendarez-Torres was a five to four decision. Justice Rehniquist, O'Connor, Breyer, Kennedy, and Thomas were in the majority. Justice Scalia, joined by Justices Stevens, Souter and Ginsburg, dissented. Justice Thomas, who cast the fifth and deciding vote in *Almendarez-Torres*, explained in *Apprendi* that *Almendarez-Torre*s was wrongly decided. *Apprendi*, 530 U.S. at 521, 120 S.Ct. at 2379 (Thomas, J. concurring)(observing that a prior conviction is an element under a recidivism statute). Justice Thomas has changed his mind regarding recidivism being an element.[26] However, Justice Stevens' position is not clear.

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[26] Justice Thomas based his change of mind on common law precedent. He discussed recidivism at common law at length in his concurring opinion in *Apprendi*. However, common-law practice does not support Justice Thomas' view. Stephanos Bibas, *Judicial Fact-finding and Sentence Enhancements in a World of Guilty Pleas*, 110 YALE L.J. 1097, 1128-1129 (2001)(noting the cases Justice Thomas cited in *Apprendi* dated mostly from the 1840s through the 1890s which were decided well after the Constitution which suggests that the common law had no fixed rule on the subject). Cases decided earlier than those cited by Justice Thomas are to the contrary.

In *State v. Smith*, 42 S.C.L. (8 Rich.) 460, 460 (S.C. Ct. App. 1832), a South Carolina appellate court, in one of the earliest cases discussing charging prior convictions in the indictment, stated it was unaware of any precedent requiring the prior conviction be alleged in the indictment. The Court noted that the reason prior convictions are omitted is the principle that the record of the first conviction is conclusive evidence of the first offense and evidence cannot be admitted to contradict it. The Court explained that it would be useless to aver in an indictment a fact which was ascertained of record, and which the accused was incapable of contradicting. The Court concluded the fact of prior conviction was to be determined by the judge, not the jury. The Court noted this practice of omitting prior convictions was "in conformity with the practice here and every where else."

Recidivism at common law was a matter for the court, not the jury.

Justice Scalia, in his dissent in *Almendarez-Torres*, which Stevens joined, wrote that he would not reach the difficult constitutional issue because he adopted a reasonable interpretation of the statute at issue that avoided the constitutional issue. It may well have been this position that Justice Stevens was joining rather than the view that recidivism should be treated as an element. Justice Stevens, in his concurring opinion in *Jones*, stated his view that a proper understanding of the right to a jury trial encompasses facts that increase the minimum permissible sentence and also facts that must be established before a defendant may be put to death. He stated that both *McMillan v. Pennsylvania*, 477 U.S. 79, 106 S.Ct. 2411, 91 L.Ed.2d 67 (1986), and *Walton v. Arizona*, 497 U.S. 639, 647-649, 110 S.Ct. 3047, 111 L.Ed.2d 511 (1990), departed from that principle and should be reconsidered. *Jones v. United States*, 526 U.S. 227, 252-53, 119 S.Ct. 1215, 1228-1229, 143 L.Ed.2d 311 (1999) (Stevens, J., concurring). However, notably absent from this list was recidivist fact finding and *Almendarez-Torres*. Unless one believes that Justice Stevens forgot about *Almendarez-Torres*, which is highly unlikely especially in view of the fact that Justice Scalia's concurring opinion in the same case starts with a discussion of *Almendarez-Torres*, Justice Stevens does not seem to think that *Almendarez-Torres* should be reconsidered.[27]

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[27] Justices Ginsburg and Souter have joined opinions where *Almendarez-Torres* was criticized. *Monge v. California*, 524 U.S. 721, 741, 118 S.Ct. 2246, 141 L.Ed.2d 615 (1998) (Scalia, J., with whom Souter and Ginsburg, JJ., joined, dissenting) (explaining that the holding of Almendarez-Torres was "in my

Almendarez-Torres has not been overruled. Courts must apply precedent as it stands and may not assume that a decision has been overruled *sub silentio*. *Agostini v. Felton*, 521 U.S. 203, 237, 117 S.Ct. 1997, 138 L.Ed.2d 391 (1997)(explaining that even if a case rests on logic that was questioned in other cases, courts should follow the case and leave to the Supreme Court the prerogative of overruling its own decisions). Every federal circuit has addressed the issue of whether *Almendarez-Torres* has

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view a grave constitutional error affecting the most fundamental of rights"),

been overruled *sub silentio* has decided that *Almendarez-Torres* is still the law of the land.[28]

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[28] *United States v. Gomez-Estrada*, 273 F.3d 400, 401 (1st Cir. 2001)(finding that courts are bound to follow the holding in *Almendarez-Torres* unless and until the Supreme Court abrogates that decision); *United States v. Anglin*, 284 F.3d 407, 409 (2d Cir. 2002)(noting that *Almendarez-Torres* survives *Apprendi*); *United States v. Sterling*, 283 F.3d 216, 220 (4th Cir.), *cert. denied*, 122 S.Ct. 2606 (2002)(finding that *Almendarez-Torres* was not overruled by *Apprendi*);*United States v. Dabeit*, 231 F.3d 979, 984 (5th Cir. 2000)(finding that *Apprendi* did not overrule *Almendarez-Torres*); *United States v. Gatewood*, 230 F.3d 186, 192 (6th Cir.2000)(en banc)(finding that despite *Apprendi*, *Almendarez-Torres* remains the law);*United States v. Morris,* 293 F.3d 1010, 1012 (7th Cir. 2001)(explaining that unless and until the Court chooses to overrule *Almendarez-Torres*, we are bound by it citing *United States v. Skidmore*, 254 F.3d 635 (7th Cir. 2001)); *United States v. Kempis-Bonola*, 287 F.3d 699, 702 (8th Cir. 2002)(explaining that regardless of what the future may hold, the legal landscape today is clear: *Almendarez-Torres* has not been overruled citing *United States v. Raya-Ramirez*, 244 F.3d 976, 977 (8th Cir. 2001) and *United States v. Peltier*, 276 F.3d 1003, 1006 (8th Cir. 2002)); *United States v. Pacheco-Zepeda*, 234 F.3d 411, 414-15 (9th Cir. 2000), *cert. denied*, 532 U.S. 966, 121 S.Ct. 1503, 149 L.Ed.2d 388 (2001)(same);*United States v. Martinez-Villalva*, 232 F.3d 1329, 1332 (10th Cir. 2000)(noting that court are bound by *Almendarez-Torres'* conclusion that a prior felony conviction is not an element of the offense, but is, instead, a sentencing factor);*United States v. Dorris*, 236 F.3d 582, 587 (10th Cir. 2000), *cert. denied*, 532 U.S. 986, 121 S.Ct. 1635, 149 L.Ed.2d 495 (2001)(regardless of the language in other cases, *Almendarez-Torres* has not been overruled and directly controls); *United States v. Guadamuz-Solis*, 232 F.3d 1363, 1363 (11th Cir. 2000)(explaining *Almendarez-Torres* remains the law until the Supreme Court determines that *Almendarez-Torres* is not controlling precedent); *United States v. Webb*, 255 F.3d 890, 897(D.C. 2001)(rejecting argument based on the skepticism expressed in *Apprendi*, to disregard *Almendarez-Torres* because he counts five Justices as no longer supporting its holding because "[t]hat, of course, we may not do.").

The *Apprendi* majority noted that it is arguable that *Almendarez-Torres* was "incorrectly decided and that a logical application of our reasoning today should apply if the recidivist issue were contested." *Apprendi*, 530 at 489, 120 S.Ct. at 2362. However, contrary to this observation, exempting recidivism from the holding in *Apprendi* is logical. The Sixth Amendment guarantees the right to a jury trial, not two. Any defendant, who is a recidivist, has already had a jury find the underlying facts of conviction at the higher standard of proof. The judge, in a recidivist sentencing situation, is merely taking judicial notice of a jury's verdict. A defendant is entitled to one jury trial, not two. Frank R. Herrmann, *30=20: "Understanding" Maximum Sentence Enhancements*, 46 Buff. L. Rev. 175 (1998)(explaining that recidivism should be exempt from the element rule because the defendant has already received a full trial and due process for the prior conviction and observing that the prior convictions received "the totality of constitutional protections" which distinguishes the use of prior convictions from other sentence enhancers and concluding that requiring full trial rights for the prior convictions would be "redundant".)[29]

Furthermore, the vast majority of criminal defendants pled. This means these defendants waived the right to a jury trial. If *Almendarez-Torres* is overruled, a defendant will have resurrected his right to a jury trial by the act of committing

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[29] This seems to be the law review where the United States Supreme Court got the test announced in *Apprendi*.

a second offense. Basically, a defendant who pleads to a prior offense, because he commits a second crime, has regained the right to a jury trial regarding the prior offense. Overruling *Almendarez-Torres* would create the odd result of unwaiver by criminal conduct. There is no such thing as unwaiver and certainly not unwaiver by criminal conduct. Moreover, the prosecution agreed to the plea to the prior conviction to avoid the time and trouble of a trial. For the prosecution, to have to prove a crime, years after it was committed, with all the attendant problems of lost evidence, missing witnesses and foggy memories, because the defendant committed another crime, seems to be a breach of the original plea agreement.

Additionally, the "fact" of a prior conviction is not a seriously disputed fact. The *Apprendi* Court's discussion of *Almendarez-Torres* noted that Almendarez-Torres had admitted the earlier convictions and therefore, *Almendarez-Torres* did not involve a contested issue of fact. This is true of all pleas and therefore, most, prior convictions. Indeed, the "fact" of a prior conviction is not a seriously disputed fact whether a defendant pleas or not. As the *Almendarez-Torres* Court observed, recidivist facts "are almost never contested." *Almendarez-Torres*, 523 U.S. at 235, 118 S.Ct. at 1226. When a defendant is convicted, an infallible means of identification is taken - his fingerprints. There is no serious factual dispute regarding the identity of the person convicted of a crime.

If *Almendarez-Torres* is overruled, trials will have to be bifurcated. As the majority in *Almendarez-Torres* explained, if

recidivism is made an element of the crime, then the jury will know the defendant's prior criminal history. The *Almendarez-Torres* Court noted that the introduction of evidence of a defendant's prior crimes risks significant and unfair prejudice to the defendant. *Almendarez-Torres*, 523 U.S. at 235, 118 S.Ct. at 1226. While Justice Scalia, in his dissent, doubted whether infection of the jury with knowledge of the prior crime was a serious problem, he is probably a minority of one in this view. *Almendarez-Torres* 523 U.S. at 269. For example, the Florida Supreme Court's view is, that absent a bifurcated trial, the jury is directly confronted with evidence of defendant's prior criminal activity and the presumption of innocence is destroyed. *State v. Harbaugh*, 754 So.2d 691, 693 (Fla. 2000). Bifurcated trial will be required in non-capital cases if *Almendarez-Torres* is overruled. First, the jury will have to find the defendant guilty of the simple version of the offense and then after that verdict is rendered, the case will be reopened and State will have to prove the prior conviction and a second verdict regarding the prior offenses will made by the jury. Any trial of an enhanced offense, including habitual offender and prison releasee offender classifications, will be bifurcated trials. Thus, there are numerous logical reasons to exempt recidivism from the holding in *Apprendi* and allowing the judge alone to determine the fact of a prior conviction.

SPECIFIC WRITTEN FINDINGS

No written findings are necessary. The holding in *Ring* was because aggravators operate as elements, they must be found by a jury. However, no element is required to be accompanied by specific written findings. For example, when a defendant is charged with robbery, the jury is not asked to make specific written findings regarding each element. The jury form does not require that the jury check that there was a "taking" and then check of "money or goods" and then check "from a person or in his presence" and then check "by force". A general verdict of guilt is sufficient.

Moreover, *Apprendi* itself did not require such written findings. While *Apprendi* required the jury to be instructed on biased purpose, it did not require written findings of biased purpose. Neither *Ring* nor *Apprendi* have anything to say regarding written findings from a jury.

Florida law does not require written findings from the jury in either the guilt or penalty phase. *Cox v. State*, 2002 WL 1027308 (Fla. 2002)(rejecting claim that pursuant to *Apprendi* the jury constitutionally must make specific written findings); *Fotopoulos v. State*, 608 So.2d 784, 794 n.7 (Fla. 1992)(finding claim that the lack of a special verdict from the jury on aggravating and mitigating circumstances violates the Eighth Amendment lacking in merit); *Steverson v. State*, 787 So.2d 165, 167 (Fla. 2d DCA 2001)(noting that a general verdict of guilt of first-degree murder arising from an alternative theory of premeditation or felony murder is valid citing *Kearse v. State*, 662 So.2d 677, 682 (Fla. 1995) and *O'Callaghan v. State*, 429

So.2d 691, 695 (Fla. 1983). It is only if a trial court wishes to override a jury's recommendation of life, that a trial court will be required to obtain specific findings regarding aggravation from the jury.

OVERRIDES

A judge in Florida may still override a jury's recommendation of life in the wake of *Ring*. It is only a jury's finding that no aggravating circumstances exist that a judge may not override. If a jury recommends life this is not necessarily a finding that no aggravating circumstance exists. Rather, the jury may have recommended life because they found certain mitigation outweighs the aggravation. While a judge is not free to disagree with a jury's findings that no aggravating circumstances exist in the wake of *Ring*, he is free to disagree with the jury's finding of mitigation and their weighing. A judge who wants to override a jury recommendation of life will have to have the jury make specific findings regarding aggravation. If the jury finds no aggravator, the judge is bound by that decision and may not override the jury's life recommendation. However, if the jury finds one aggravator, the judge may override their decision regarding mitigation and weighing. Thus, overrides are still possible in the wake of *Ring* depending on the jury's findings regarding aggravation.

UNANIMITY

Unanimity is not required. The United States Supreme Court first applied the Sixth Amendment right to a jury trial to the States in *Duncan v. Louisiana*, 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968). However, the United States Supreme Court has declined to constitutionalize a "jury" to mean twelve persons or unanimous verdicts. In *Williams v. Florida*, 399 U.S. 78, 103, 90 S.Ct. 1893, 26 L.Ed.2d 446 (1970), the Court held that a six member jury in a felony case did not violate the Sixth Amendment right to a jury trial. The *Williams* Court referred to the twelve person requirement as a "historical accident" that was "unrelated to the great purposes which gave rise to the jury in the first place." *Williams*, 399 U.S. at 89-90, 90 S.Ct. at 1900. Two years later, in *Apodaca v. Oregon*, 406 U.S. 404, 92 S.Ct. 1628, 32 L.Ed.2d 184 (1972), and *Johnson v. Louisiana*, 406 U.S. 356, 92 S.Ct. 1620, 32 L.Ed.2d 152 (1972), the United States Supreme Court held that conviction by less than unanimous verdicts did not violate the right to a jury trial. However, in *Burch v. Louisiana*, 441 U.S. 130, 99 S.Ct. 1623, 60 L.Ed.2d 96 (1979), the United States Supreme Court, while agreeing with the Louisiana Supreme Court that the question was a "close" one, required unanimity in a jury of six. Hence, the only constitutional requirement of unanimity is that a jury of six must be unanimous. Nor does Florida's constitution require unanimity. *Flanning v. State*, 597 So.2d 864 (Fla. 3d DCA 1992)(noting that the Florida Constitution has never been interpreted to require a unanimous verdict). Here,

all twelve jurors agreed that death was the appropriate sentence.

Additionally, in those states that require an unanimous jury decision, the jury's decision is the final decision. Florida, by contrast, has two decision makers. Florida, while only requiring a simple majority vote by the jury, also requires the judge to agree with the jury's recommendation. We have two separate actors that must agree on death. If the jury recommends life, the judge, under *Tedder*,[30] must give great deference to the jury's life recommendation and under *Ring* may be completely bound by that life recommendation in certain situations. However, if the jury recommends death, the judge is completely free to ignore that death recommendation and impose life instead.

The requirement of unanimity is a procedural device to insure reliability and certainty, but the judge, as a second decision maker, fulfills this exact same function in Florida. To be sentenced to death in Florida, seven laymen and a judge with vast criminal experience must agree. Simple majority vote is quite reasonable when there is a second actor involved that must independently agree with the first actor and perfectly constitutional. Hence, unanimity is not required.

NOTICE OF THE AGGRAVATORS IN THE INDICTMENT

Blackwelder asserts that *Apprendi* and *Ring* require that a capital defendant be given notice of the particular aggravating

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[30] *Tedder v. State*, 322 So.2d 908 (Fla. 1975).

circumstances that the State intends to prove at the penalty phase. However, the particular aggravators do not have to be pled in the indictment. The *Apprendi* Court specifically declined to address the omission in the indictment of biased purpose because it was not asserted. *Apprendi*, 530 U.S. at 477, n.3, 120 S.Ct. at 2355, n.3. More importantly, the Grand Jury Clause of the Fifth Amendment does not apply to the States. *Hurtado v. California*, 110 U.S. 516, 4 S.Ct. 111, 28 L.Ed. 232 (1884)(holding, in a capital case, that States are not required to indict). States do not have to charge by indictment. They may be charged by information even in a capital case. The federal Constitution is silent on what must be in an indictment because the federal Constitution does not require any indictment in a state prosecution. Only the Due Process Clause's notice requirements apply to the States. *Lankford v. Idaho*, 500 U.S. 110,111 S.Ct. 1723, 114 L.Ed.2d 173 (1991)(holding that due process was violated where, at the time of the sentencing hearing, defendant and his counsel did not have adequate notice that judge might sentence defendant to death).

A defendant in a capital case has notice that the State is seeking the death penalty, and that is all the due process clause requires. Charging documents were critical at common law because they were the sole limit on trial by surprise. The charging document was the sole notice of, or information about, the case a criminal defendant had. In modern times, charging documents are of marginal importance. With modern discovery practices, it is impossible for a criminal defendant to lack the

notice required by due process. A defendant has extensive notice of the prosecution's case. Defendants know the name of every witness the State will call to testify and may depose those witnesses. A defendant knows every piece of evidence the State intends to use at trial. Florida has the most extensive criminal discovery in the nation. *O'Callaghan v. State,* 429 So.2d 691, 695 (Fla. 1983)(holding defendant is not prejudiced from State proceeding under felony murder theory where indictment charged only premeditated murder because of the reciprocal discovery rules, the defendant had full knowledge of both the charges and the evidence that the state would submit at trial and noting that this "is much more information than he would have received in almost any other jurisdiction, federal or state"). Florida, and most states with modern discovery practices, more than comply with the due process notice requirement. Due process notice is simply not an issue in a state with our type of discovery.

Moreover, because aggravators are akin to alternative theories of liability, notice of particular aggravators is not required. Just as charging first degree murder in the indictment is sufficient notice of a felony murder theory, that the State is seeking death is sufficient notice of aggravators. *Gudinas v. State*, 693 So.2d 953, 964 (Fla. 1997)(rejecting the claim that the State may not pursue a felony murder theory when the indictment charged premeditated murder citing *Bush v. State*, 461 So.2d 936, 940 (Fla. 1984)(explaining that the defendant was not prejudiced by not knowing the specific theory upon which the

state would proceed). The Florida Supreme Court has previously rejected a claim that *Apprendi* requires aggravating circumstances be pled in the indictment. *Brown v. Moore*, 800 So.2d 223 (Fla. 2001)(rejecting claims that aggravating circumstances are required to be charged in indictment); *Mann v. Moore*, 794 So.2d 595, 599 (Fla. 2001)(rejecting an ineffective assistance of appellate counsel for failing to argue that aggravating circumstances must be pled in the indictment citing *Medina v. State*, 466 So.2d 1046, 1048 n. 2 (Fla. 1985)(concluding that the State need not provide notice concerning aggravators)); *Tafero v. State*, 403 So.2d 355 (Fla. 1981)(holding that the State is not required to inform the defendant, prior to trial, as to the specific aggravating circumstances which the State intends to prove, citing *Menendez v. State*, 368 So.2d 1278 (Fla. 1979) and *Spinkellink v. Wainwright*, 578 F.2d 582 (5th Cir. 1978)). The North Carolina Supreme Court also has rejected a similar claim. *State v. Golphin*, 533 S.E.2d 168, 193-94 (N.C. 2000)(concluding that *Apprendi* does not affect prior holdings that an indictment need not contain the aggravating circumstances the State will use), *cert. denied*, 523 U.S. 931, 121 S.Ct. 1379, 149 L.Ed.2d 305 (2001). Thus, *Apprendi* has no import for State's charging practices in capital cases and States need only give notice through some document that it intends to seek the death penalty to satisfy due process, not which particular aggravators it intends to rely on.

Because Blackwelder's jury recommended death, his death sentence did not violate *Ring*. As the United States Supreme Court has observed, in an *Apprendi* related case, when a jury recommends death, they necessarily engaged in the constitutionally required fact finding. Furthermore, because a judge, sitting alone, may make the findings of a prior violent aggravator, this entire case was exempted from *Ring*. Blackwelder's death sentence does not violate the Sixth Amendment.

CONCLUSION

The State respectfully requests that this Honorable Court affirm appellant's conviction and death sentence.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing ANSWER BRIEF has been furnished by U.S. Mail to W.C. McLain, Esq., Leon County Courthouse, Suite 401, 301 South Monroe Street, Tallahassee, FL 32301 this 17th day of September, 2002.

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CERTIFICATE OF FONT AND TYPE SIZE

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

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