IN THE SUPREME COURT OF FLORIDA

CASE NO. SC02-1079

LLOYD CHASE ALLEN,

Petitioner,

vs.

MICHAEL W. MOORE, Secretary,
Department of Corrections, State of Florida,

Respondent.

ON PETITION FOR
WRIT OF HABEAS CORPUS

RESPONSE

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INTRODUCTION

Petitioner will be referred to as Defendant. The prosecution and Respondent will be referred to as the State. The symbols "R." and "T." will refer to the record on appeal and transcript of proceedings from Defendant's direct appeal.

STATEMENT OF THE CASE AND FACTS

In accordance with Fla. R. Crim. P. 3.851(b)(2), this petition is being pursued concurrently with the appeal from the order denying Defendant's motion for post conviction relief. *Allen v. State*, No. SC02-371. The State will therefore rely on its statements of the case and facts contained in its brief in that matter.

ARGUMENT

I.

DEFENDANT'S CLAIM THAT THIS COURT SHOULD REVISIT ITS HOLDING THAT A WAIVER OF MITIGATION DOES NOT PRECLUDE PROPORTIONALITY REVIEW SHOULD BE DENIED.

Defendant first asks that this Court reconsider its determination that it could conduct a proper proportionality review even though Defendant had waived mitigation in light of *Muhammad v. State*, 782 So. 2d 343 (Fla. 2001). However, this claim should be denied as *Muhammad* is inapplicable to this matter, *Muhammad* does not hold that waivers of mitigation preclude proportionality review and the requirements of *Muhammad* were met.

In *Muhammad*, this Court expressly stated that its decision in *Muhammad* only applied prospectively. *Id.* at 365 ("An adoption of a prospective procedure in this case would not call into question those cases that are already final on appeal.") As Defendant's case had been final since certiorari was denied by the United States Supreme Court on March 25, 1996, *Muhammad*, by its own terms, does not apply to this matter. The claim should be denied.

Moreover, this Court did not hold that it would no longer allow waivers of mitigation because it precluded proportionality review. Instead, it held that a trial court, presented with a

defendant who was waiving mitigation, had to order a PSI and consider all of the evidence in the record and from the PSI to determine if any mitigation existed. Here, the trial court did order a PSI, did consider the PSI and all record evidence regarding whether any mitigation existed and, in fact, did find mitigation based on its review of the record and PSI. (R. 239-41) As such, the requirement of *Muhammad* would be met even if it did apply. *See Overton v. State*, 801 So. 2d 877 (Fla. 2001). As such, this claim is meritless and should be denied.

II.

DEFENDANT'S CLAIM UNDER *APPRENDI* AND *RING* SHOULD BE DENIED.

Defendant finally alleges that he is entitled to relief under *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Ring v. Arizona*, 2002 WL 1357257 (2002). He asserts that these cases require that an aggravator be charged in the indictment, submitted to a jury and proven beyond a reasonable doubt. However, this claim should be denied as it is procedurally barred, neither *Ring* nor *Apprendi* apply retroactively, and neither invalidates Florida's capital sentencing law. Moreover, the death sentence in this case is supported by an aggravating factor that even under *Ring* and *Apprendi* did not need to be.

Defendant's claims that an aggravator needs to be charged in the indictment, that the jury must find an aggravator and that that aggravator must be proven beyond a reasonable doubt have been available since before Defendant was tried. As such, these issues could have been raised earlier and are now procedurally barred.

Moreover, neither *Ring* nor *Apprendi* apply retroactively under the principles of *Witt v. State*, 387 So. 2d 922, 929-30 (Fla. 1980). Pursuant to *Witt*, *Ring* and *Apprendi* are only entitled to retroactive application if it is a decision of

fundamental significance, which so drastically alters the underpinnings of King's death sentence that "obvious injustice" exists. *New v. State*, 807 So. 2d 52 (Fla. 2001). In determining whether this standard has been met, this Court must consider three factors: the purpose served by the new case; the extent of reliance on the old law; and the effect on the administration of justice from retroactive application. *Ferguson v. State*, 789 So. 2d 306, 311 (Fla. 2001). Application of these factors to *Ring*, which did not directly or indirectly address Florida law, provides no basis for consideration of *Ring* in this case.[1] Moreover, Defendant has not even attempted to

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[1] The United States Supreme Court recently held that an *Apprendi* claim is not plain error. *United States v. Cotton*, 122 S.Ct. 1781 (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). If an error is not plain error cognizable on direct appeal, it is not of sufficient magnitude to be a candidate for retroactive application in collateral proceedings. *United States v. Sanders*, 247 F.3d 139, 150-151 (4th Cir 2002) (emphasizing that finding something to be a structural error would seem to be a necessary predicate for a new rule to apply retroactively and therefore, concluding that *Apprendi* is not retroactive). Every federal circuit that has addressed the issue had found that *Apprendi* is not retroactive. *See, e.g., McCoy v. United States*, 266 F.3d 1245 (11th Cir. 2001). The one state supreme court that has addressed the retroactivity of *Apprendi* has, likewise, determine that the decision is not retroactive. *Whisler v. State*, 36 P.3d 290 (Kan. 2001). Moreover, the United States Supreme Court has held that a violation of the right to a jury trial is not retroactive. *DeStefano v. Woods*, 392 U.S. 631 (1968) (refusing to apply the

assert how *Ring* and *Apprendi* does satisfy these requirements. As such, the claim should be denied.

Moreover, Defendant has not demonstrated that he is entitled to any relief. It is important to recognize that, contrary to Defendant's assertions, *Ring* does not require jury sentencing in capital cases. The case does not involve the jury's role in imposing sentence, but only the requirement that the jury find a defendant death-eligible. *See Ring*, at *18 ("What today's decision says is that the jury must find the existence of the *fact* that an aggravating factor existed") (Scalia, J., concurring). This is a critical distinction. The Court studied Arizona law and concluded that, because additional findings by a judge alone are required in order for the death penalty to be imposed, the "statutory maximum" for practical purposes is life, until such time as a judge has found an aggravating circumstance to be present. In other words, under the Arizona law examined in *Ring*, the jury plays no role in "narrowing" the class of defendants eligible for the death penalty upon conviction of first degree murder. This conclusion is consistent with the Arizona Supreme Court's description of state law, which

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right to a jury trial retroactively because there were no serious doubts about the fairness or the reliability of the factfinding process being done by the judge rather than the jury).

recognized the statutory maximum permitted by the jury's conviction alone to be life. See *Ring*, at *8; *Ring v. State*, 25 P.3d 1139, 1150 (Ariz. 2001).

To the extent that Defendant may assert that *Ring* proves this Court "erred" in previously stating that *Apprendi* did not apply to capital sentencing procedures, *see Mills v. Moore*, 786 So. 2d 532 (Fla.), *cert. denied*, 121 S. Ct. 1752 (2001), he is incorrect. To the contrary, *Ring* proves only that this Court was correct -- in fact, *Apprendi* is not a case about sentencing, and more importantly, neither is *Ring*. *Apprendi* and *Ring* both involve the jury's role in convicting a defendant of a qualifying offense, subject to the death penalty.

A clear understanding of what *Ring* does and does not say is essential to analyze any possible *Ring* implications to Florida's capital sentencing procedures. Notably, the *Ring* decision left intact all prior opinions upholding the constitutionality of Florida's death penalty scheme, including *Spaziano v. Florida*, 468 U.S. 447 (1984), and *Hildwin v. Florida*, 490 U.S. 638 (1989). It quotes *Proffitt v. Florida*, 428 U.S. 242, 252 (1976), acknowledging that ("[i]t has never [been] suggested that jury sentencing is constitutionally required."). *Ring*, at *9 n.4. In Florida, any death sentence that was imposed

following a jury recommendation of death necessarily satisfies the Sixth Amendment as construed in *Ring*, because the jury necessarily found beyond a reasonable doubt that at least one aggravating factor existed. Since the finding of an aggravating factor authorizes the imposition of a death sentence, the requirement that a jury determine the conviction to have been a capital offense has been fulfilled in any case in which the jury recommended a death sentence.

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*, at *18 (Scalia, J., concurring) (explaining that the factfinding necessary for the jury to make in a capital case is limited to "an aggravating factor" and does not extend to mitigation); *Ring*, at *19 (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, to be eligible for the death penalty, 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."). Once a jury has found one aggravator, the Constitution is satisfied, the judge may do the rest.[2]

Ring does not directly or indirectly preclude a judge from serving in the role of sentencer. There is no language in *Ring* that suggests that, once a defendant has been convicted of a capital offense, a judge may not hear evidence or make findings in addition to any findings a jury may have made. Justice Scalia commented that, "[t]hose States that leave the ultimate life-or-death decision to the judge may continue to do so." *Ring*, at *18 (Scalia, J., concurring). The fact that Florida provides an additional level of judicial consideration to enhance the reliability of the sentence before a death sentence is imposed does not render our capital sentencing statute unconstitutional. To the extent that Defendant criticizes state law for requiring judicial participation in capital sentencing, he does not identify how judicial findings after a jury

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[2] We know this is true because the Court in *Apprendi* held, and reaffirmed in *Ring*, that a prior violent felony aggravator satisfied the Sixth Amendment; therefore, no further jury consideration is necessary once a qualifying aggravator is found.

recommendation can interfere with the right to a jury trial. Any suggestion that *Ring* has removed the judge from the sentencing process is not well taken. The judicial role in Florida alleviates Eighth Amendment concerns as well, and in fact provides defendants with another "bite at the apple" in securing a life sentence; it also enhances appellate review and provides a reasoned basis for a proportionality analysis.

The jury's role in Florida's sentencing process is also significant. Section 921.141, Florida Statutes, states:

> **(1) Separate proceedings on issue of penalty.**--Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by s. 775.082. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable. If, through impossibility or inability, the trial jury is unable to reconvene for a hearing on the issue of penalty, having determined the guilt of the accused, the trial judge may summon a special juror or jurors as provided in chapter 913 to determine the issue of the imposition of the penalty. If the trial jury has been waived, or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose, unless waived by the defendant. ...
>
> **(2) Advisory sentence by the jury.**--After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court, based upon the

> following matters:
>
> (a) Whether sufficient aggravating circumstances exist as enumerated in subsection (5);
>
> (b) Whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist; and
>
> (c) Based on these considerations, whether the defendant should be sentenced to life imprisonment or death.

This statute clearly secures and preserves significant jury participation in narrowing the class of individuals eligible to be sentenced to death. The jury's role is so vital to the sentencing process that the jury has been characterized as a "co-sentencer" in Florida. *Espinosa v. Florida*, 509 U.S. 1079 (1992).

In the instant case, Defendant's sentence was recommended by 11 to 1 vote; a jury that had been instructed that aggravating factors had to be proven beyond a reasonable doubt. However, to the extent that he claims the death penalty statute is unconstitutional for failing to require juror unanimity, or the charging of the aggravating factors in the indictment, or special jury verdicts, *Ring* provides no support for his claims. These issues are expressly not addressed in *Ring*, and in the absence of any United States Supreme Court ruling to the

contrary, there is no need to reconsider this Court's well established rejection of these claims. *Sweet v. Moore*, 27 Fla. L. Weekly S585 (Fla. June 13, 2002); *Cox v. State*, 27 Fla. L. Weekly S505, n.17 (Fla. May 23, 2002) (noting that prior decisions on these issues need not be revisited "unless and until" the United States Supreme Court recedes from *Proffitt v. Florida*, 428 U.S. 242 (1976)).

As this Court has recognized, "[t]he Supreme Court has specifically directed lower courts to 'leav[e] to this Court the prerogative of overruling its own decisions.' *Agostini v. Felton*, 521 U.S. 203, 237, 117 S. Ct. 1997, 138 L. Ed. 2d 391 (1997) (quoting *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484, 109 S. Ct. 1917, 104 L. Ed. 2d 526 (1989))." *Mills*, 786 So. 2d at 537. The United States Supreme Court has declined to disturb its prior decisions upholding the constitutionality of Florida's capital sentencing process, and that result is dispositive of these claims.

In addition, *Ring* affirms the distinction between "sentencing factors" and "elements" of an offense recognized in prior case law. *See Ring* at *14; *Harris v. United States*, 2002 WL 1357277 (U.S. June 24, 2002). Defendant's argument, suggesting that the jury's role in Florida's capital sentencing

process is insufficient, improperly assumes the jury recommendation itself to be a jury vote as to the existence of aggravating factors. However, the jury vote only represents the final jury determination as to appropriateness of the death sentence in the case, and does not dictate what the jury found with regard to particular aggravating factors. When the jury recommends death, it necessarily finds an aggravating factor to exist beyond a reasonable doubt and satisfies the Sixth Amendment as construed in *Ring*. To the extent that *Ring* suggests that capital murder may have an additional "element" that must be found by a jury to authorize the imposition of the death penalty, that "element" would be the existence of any aggravating factor, and would not be the determination that the aggravating factors outweighed any mitigating factors established. Defendant appears to assert that the jury must determine death to the appropriate sentence, but nothing in *Ring* supports Defendant's speculation that the ultimate sentencing determination is an additional "element" which must be proven beyond a reasonable doubt.

Moreover, to the extent that Defendant claims that *Ring* requires that the aggravating circumstances be charged in the indictment and presented to a grand jury, that argument is based upon an invalid comparison of federal cases, which have wholly

different procedural requirements, to Florida's capital sentencing scheme.[3] For example, in *United States v. Allen*, 247 F.3d 741, 764 (8th Cir. 2001), the Court of Appeals based its decision that the statutory aggravating factors under the Federal Death Penalty Act do not have to be contained in the indictment exclusively on *Walton v. Arizona*, which, of course, *Ring* overruled. It is hardly surprising that the United States Supreme Court remanded *Allen* for reconsideration in light of *Ring.*

The United States Supreme Court elaborated on *Apprendi* in *Harris v. United States*, which was released on the same day as *Ring.* In *Harris*, the Court described the holding in *Apprendi* in the following way:

> *Apprendi* said that any fact extending the defendant's sentence beyond the maximum authorized by the jury's verdict would have been considered an element of an aggravated crime -- and thus the domain of the jury -- by those who framed the Bill of Rights.

Harris v. United States, 2002 WL 1357277 (U.S. June 24, 2002). In light of that plain statement by the United States Supreme

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[3] Of course, the Fifth Amendment's grand jury clause has not been extended to the States under the Fourteenth Amendment. *Apprendi*, 530 U.S. at 477, n.3 (2000); *Hurtado v. California*, 110 U.S. 516 (1984) (holding there is no requirement for an indictment in state capital cases). This distinction, standing alone, is dispositive of the indictment claim, at least as far as King relies on federal cases.

Court, which speaks volumes in the interpretation of *Ring*, there is no basis for relief of any sort. This Court has clearly held that death was the maximum sentence that could be imposed on Defendant by virtue of his convictions for the offense of first degree murder, and that is the end of the inquiry.

Therefore, *Ring* has no effect on prior decisions upholding Florida's capital sentencing scheme. This Court has previously recognized that the statutory maximum for first degree murder is death, and has repeatedly rejected claims similar to those raised herein. *Cox v. State*, 27 Fla. L. Weekly S585 (Fla. May 23, 2002); *Bottoson v. State*, 813 So. 2d 31, 36 (Fla. 2002), *cert. denied*, Case No. 01-8099 (U.S. June 28, 2002); *Hertz v. State*, 803 So. 2d 629, 648 (Fla. 2001), *cert. denied*, Case No. 01-9154 (U.S. June 28, 2002); *Looney v. State*, 803 So. 2d 656, 675 (Fla. 2001), *cert. denied*, Case No. 01-9932 (U.S. June 28, 2002); *Brown v. Moore*, 800 So. 2d 223, 224-225 (Fla. 2001); *Mann v. Moore*, 794 So. 2d 595, 599 (Fla. 2001), *cert. denied*, Case No. 01-7092 (U.S. June 28, 2002); *Mills*, 786 So. 2d at 536-38. This interpretation of state law demands respect, and offers a pivotal distinction between Florida and Arizona. *Ring*, at *13; *Mullaney v. Wilbur*, 421 U.S. 684 (1975). However, should there be any question about the correctness of this conclusion,

Florida juries routinely "authorize" the imposition of the death penalty by recommending that a death sentence be imposed, as in the instant case.

Moreover, On June 28, 2002, the Court denied certiorari in at least seven cases raising the "Ring" issue: *Holladay v. Alabama*, Case No. 00-10728; *King v. Florida*, Case No. 01-7804 (under warrant); *Bottoson v. Florida*, Case No. 01-8099 (under warrant); *Mann v. Florida*, Case No. 01-7092 (state habeas); *Card v. Florida*, Case No. 01-9152 (direct appeal); *Hertz v. Florida*, Case No. 01-9154 (direct appeal); and *Looney v. Florida*, Case No. 01-9932 (direct appeal). Obviously, if the Court had intended to apply *Ring* to Florida capital sentencing, it had every opportunity to do so. The fact that it did not speaks for itself. To the extent that Defendant may assert that certiorari was denied because the United States Supreme Court wants this issue to "percolate in the laboratories of the state courts," it is obvious that if the United States Supreme Court believed further consideration to be necessary, it could have easily remanded this cause to this Court for that purpose. *See Allen v. United States*, Case No. 01-7310 (U.S. June 28, 2002) (remanding for consideration of *Ring*); *Cf. Hodges v. Florida*, 506 U.S. 803 (1992) (vacating this Court's opinion and remanding

for further consideration in light of *Espinosa v. Florida*, 509 U.S. 1079 (1992)).

Moreover, Defendant's death sentences were also supported by a prior felony conviction in that Defendant was under a sentence of imprisonment, which provides a basis to impose a sentence higher than authorized by the jury without any additional jury findings. *See Almendarez-Torrez v. United States*, 523 U.S. 224 (1998), *Apprendi v. New Jersey*, 530 U.S. 466 (2000). There is no constitutional violation because the prior conviction constitutes a finding by a jury which the judge may rely upon to impose an aggravated sentence. As such, the claim should be denied.

CONCLUSION

For the foregoing reasons, the petition for writ of habeas corpus should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **BRIEF OF APPELLEE** was furnished by U.S. mail to Dan Hallenberg, Assistant CCRC, 101 N.E. 3rd Avenue, Suite 400, Ft. Lauderdale, Florida 33301, this 24th day of July, 2002.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief is type in Courier New 12-point font.

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