

IN THE SUPREME COURT OF FLORIDA

GUY RICHARD GAMBLE,

Petitioner,

Case No.SC02-1948

v.

MICHAEL W. MOORE,

**Secretary, Florida Department
of Corrections,
Respondent.**

_____ /

RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

COMES NOW the Respondent, by and through the undersigned counsel, and responds as follows to Gamble’s petition for writ of habeas corpus. For the reasons set out herein, the petition should be denied in all respects.

RESPONSE TO INTRODUCTION

The “Introduction” set out on page 1 of the petition is argumentative and is denied. Gamble did not receive ineffective assistance of counsel during his direct appeal, nor are any claims or issues contained in the petition based upon case law that is retroactively applicable to Gamble.

RESPONSE TO JURISDICTIONAL STATEMENT

To the extent that the jurisdictional statement set out on pages 2-3 of the petition asserts that this Court has jurisdiction to entertain first-time habeas petitions, that assertion is correct. To the extent that the jurisdictional statement asserts that each claim contained in the habeas petition is properly brought in such a proceeding, or that the claims present matters of “fundamental error,” such assertions are denied. To the extent that the jurisdictional statement asserts that relief should be granted in this case, that assertion has nothing to do with the Court’s jurisdiction to entertain the petition. There is no constitutional error, and no relief is warranted.

RESPONSE TO GROUNDS FOR RELIEF

The “Grounds for Habeas Corpus Relief” set out on page 3 of the petition is argumentative and is denied. Gamble is not entitled to any relief.

RESPONSE TO PROCEDURAL HISTORY

The “Procedural History” set out on pages 3-5 of the petition is abbreviated and argumentative, and is denied. The State relies upon the following statement of the case and facts, which is taken from this Court’s direct appeal decision:

Guy R. Gamble appeals his sentence of death for the first-degree murder of Helmut Kuehl. We have jurisdiction. Art. V, § 3(b)(1), *Fla. Const.* We affirm Gamble's conviction and sentence.

On December 10, 1991, Guy R. Gamble and Michael Love murdered their landlord, Helmut Kuehl, by striking him several times in the head with a claw hammer and choking him with a cord. (FN1) Gamble and

Love also stole their victim's car and wallet. Within the wallet was a blank check which Gamble forged and cashed in the amount of \$8,544. After cashing the check the men, accompanied by their girlfriends, drove to Mississippi in the stolen car. Gamble subsequently abandoned the group, but was later arrested.

The jury found Gamble guilty of conspiracy to commit armed robbery, armed robbery, and murder in the first degree and recommended the death sentence by a ten-to-two vote. The trial court found in aggravation that the murder was cold, calculated, and premeditated and committed for pecuniary gain. Gamble's age (20) was a statutory mitigating factor. In non-statutory mitigation, the court gave substantial weight to Gamble's abused and neglected childhood and severe emotional problems; and some weight to his drug and alcohol use, remorsefulness and voluntary confessions, and Love's life sentence. (FN2) The court gave little weight to his status as a single parent, his family's testimony, and a desire for rehabilitation. Based upon its findings, the trial court sentenced Gamble to death. Gamble appeals this sentence and raises the following issues: (1) the trial court erroneously found that the crime was cold, calculated, and premeditated; (2) his death sentence is disproportionate, excessive, inappropriate, and imposed upon him cruel and unusual punishment; (3) the trial court erred in denying his special requested penalty phase jury instructions; and (4) the death penalty is unconstitutional. The State's cross-appeal asserts that the trial court erred in prohibiting the State from introducing in the penalty phase: (1) victim-impact evidence; (2) Donna Yenger's testimony; (FN3) and (3) redacted portions of Gamble's police statement. Issues raised in the State's cross-appeal are rendered moot by our affirmance of Gamble's death sentence.

(FN1.) The official cause of death was blunt head injury due to multiple blows to the head, with a neck injury as a contributing factor.

(FN2.) Love plead guilty to conspiracy to commit armed robbery, armed robbery, and first-degree murder. He was sentenced to fifteen years for the conspiracy and life for the armed robbery and murder.

(FN3.) The State asserts that Donna Yenger's proffered testimony is admissible penalty phase hearsay. Yenger, Love's girlfriend, would have testified that during a conversation between Gamble, Love and herself, Love stated that "Well, Guy hit the victim over the head. He didn't go down and so he hit him again and he hit him again.... [A] pulse was still detected, at which point Guy got a rope and then choked the man to make sure he was dead."

Gamble v. State, 659 So. 2d 242, 243-44(Fla. 1995). Gamble filed his initial brief on appeal from the denial of his *Florida Rule of Criminal Procedure* 3.850 motion at the same time as the habeas corpus petition.

THE INDIVIDUAL CLAIMS

I. THE “NELSON/FARETTA” CLAIM IS BASED UPON AN INVALID LEGAL PREMISE, AND, FOR THAT REASON, IS NOT A BASIS FOR RELIEF.

On pages 5-12 of the petition, Gamble argues that “the trial court failed to conduct a proper *Nelson/Faretta* hearing” when the issue of a potential conflict of interest on the part of defense counsel was addressed. The “defect” is apparently that the trial court did not advise Gamble that he had the right to represent himself, even though Gamble never expressed **any** desire to exercise his right to self-representation. Instead, the most that Gamble asked for (and that request was somewhat equivocal) was the appointment of substitute counsel based upon the “conflict” (which the trial court found not to exist). Despite the total absence of a request for self-representation,

Gamble now claims that appellate counsel was ineffective for not raising the “*Faretta* error” as an issue on direct appeal.

INEFFECTIVE ASSISTANCE OF COUNSEL - THE LEGAL STANDARD

The *Strickland v. Washington* standard applies to claims of ineffectiveness on the part of appellate counsel:

Claims of ineffective assistance of appellate counsel are cognizable in a habeas petition. *See Rutherford v. Moore*, 774 So. 2d 637, 643 (Fla. 2000). The standard of review applicable to claims of ineffective assistance of appellate counsel raised in a habeas petition mirrors the *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), standard for trial counsel ineffectiveness. *See Jones v. Moore*, 794 So. 2d 579, 583 (Fla. 2001). However, claims raised in a habeas petition which petitioner has raised in prior proceedings and which have been previously decided on the merits in those proceedings are procedurally barred in the habeas petition. *See Mann v. Moore*, 794 So. 2d 595, 600-01 (Fla. 2001); *see also Parker v. Dugger*, 550 So. 2d 459, 460 (Fla. 1989) (“[H]abeas corpus petitions are not to be used for additional appeals on questions which ... were raised on appeal or in a rule 3.850 motion”). Moreover, it is improper to argue in a habeas petition a variant to a claim previously decided. *See Jones*, 794 So. 2d at 586 (finding procedural bar to habeas claim which was variant to claim previously addressed).

Porter v. Moore, 27 Fla. L. Weekly S606 (Fla. 2002). Appellate counsel cannot be ineffective for “failing” to raise issues that were not properly preserved in the trial court, nor can counsel be ineffective for not raising meritless issues. *Rutherford v. Moore*, 774 So. 2d 637 (Fla. 2000).

THE *FARETTA* CLAIM¹

Florida law regarding self-representation is clear: “This Court has repeatedly held that only an **unequivocal** assertion of the right to self-representation will trigger the need for a *Faretta* inquiry.” *State v. Craft*, 685 So. 2d 1292, 1295 (Fla. 1996); *see, Owen v. State*, 773 So. 2d 510, 515 (Fla. 2000) (*Faretta* is applicable only when the defendant seeks to waive counsel and proceed **unrepresented.**); *Trease v. State*, 768 So. 2d 1050, 1053 (Fla. 2000); *Brooks v. State*, 762 So. 2d 879, 889 (Fla. 2000); *Teffeteller v. Dugger*, 734 So. 2d 1009, 1028 (Fla. 1999) (holding that because Teffeteller never requested to represent himself, he was not entitled to a hearing under *Faretta*, and that appellate counsel was not ineffective for not raising the issue on appeal.); *Howell v. State*, 707 So. 2d 674, 680 (Fla. 1998) (“Because Howell never requested to represent himself, he was not entitled to an inquiry on the subject of self-representation under *Faretta.*”). Gamble **never** asserted the right to self-representation in **any** fashion, and, because that is so, *Faretta* never came into play. Because there was no such request, appellate counsel cannot be faulted for not raising an issue which had no legal or factual basis. Of course, the foundation of appellate practice is the selection of issues to be raised on appeal. Appellate counsel, who has

¹Gamble did nothing that would have triggered the *Florida Rule of Criminal Procedure* 3.111(d) provisions, either.

his credibility before this Court to consider, cannot be faulted for not raising a *Faretta* claim in the absence of any support for it. *See, Teffeteller, supra; see also, Jones v. Barnes*, 463 U.S. 745 (1983); *Heath v. Jones*, 941 F.2d 1126 (11th Cir. 1991). This claim has no legal or factual basis, and there is no basis for relief.²

To the extent that any further discussion is necessary, the testimony below demonstrates that there was **no** request for self-representation, nor was there a complaint about counsel after trial court heard testimony concerning the “conflict” issue.³ Because that is so, there is no basis for an appellate issue, and appellate counsel cannot be faulted for not raising an issue that did not exist. *Teffeteller, supra*.

II. THE APPRENDI/RING CLAIM

A. On pages 12-32 of the petition, Gamble argues that he is entitled to relief based under the United States Supreme Court decisions in *Apprendi v. New Jersey* and *Ring v. Arizona*. This claim is not available to Gamble for the following reasons: this claim was rejected by this Court in *Bottoson v. Moore* and *King v. Moore*; it is procedurally barred because it was not raised at trial or on direct appeal; it is not

²*Hardwick v. State*, 521 So. 2d 1071 (Fla. 1988), upon which Gamble relies, does not support his position, either. *Hardwick*, like the other *Faretta* decisions, stands for the proposition that there must be an unequivocal request for self-representation before *Faretta* comes into play.

³The pertinent pages of the trial transcript are attached as Appendix A for the convenience of the Court.

retroactively available to Gamble; and, because the claim lacks merit under the facts of Gamble's case.

1. This Court has declined to apply *Ring* to Florida's death sentencing system.

In *Bottoson v. Moore*, 27 Fla. L. Weekly S891 (Fla. Oct. 24, 2002) and *King v. Moore*, 27 Fla. L. Weekly S906 (Fla. Oct. 24, 2002), this Court rejected the petitioners' claims that *Ring v. Arizona* applied to Florida and supplied a basis for relief from their sentences of death. This Court stated:

Linroy Bottoson, a prisoner under sentence of death and an active death warrant, petitions this Court for a writ of habeas corpus. [footnote omitted] He seeks relief pursuant to *Ring v. Arizona*, --- U.S. ----, ----, 122 S.Ct. 2428, 2443, 153 L.Ed.2d 556 (2002), wherein the United States Supreme Court held unconstitutional the Arizona capital sentencing statute "to the extent that it allows a sentencing judge, sitting without a jury, to find an aggravating circumstance necessary for imposition of the death penalty."

Although Bottoson contends that he is entitled to relief under *Ring*, we decline to so hold. The United States Supreme Court in February 2002 stayed Bottoson's execution and placed the present case in abeyance while it decided *Ring*. [footnote omitted] That Court then in June 2002 issued its decision in *Ring*, summarily denied Bottoson's petition for certiorari, and lifted the stay without mentioning *Ring* in the *Bottoson* order. [footnote omitted] The Court did not direct the Florida Supreme Court to reconsider *Bottoson* in light of *Ring*.

Significantly, the United States Supreme Court repeatedly has reviewed and upheld Florida's capital sentencing statute over the past quarter of a century, [footnote omitted] and although Bottoson contends that there now are areas of "irreconcilable conflict" in that precedent, the Court in

Ring did not address this issue. In a comparable situation, the United States Supreme Court held:

If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the [other courts] should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.

Rodriguez de Quijas v. Shearson/American Express, 490 U.S. 477, 484, 109 S.Ct. 1917, 104 L.Ed.2d 526 (1989).

Bottoson v. Moore, 27 Fla. L. Weekly S891 (Fla., Oct. 24, 2002). The opinion in *Bottoson* denying relief is the law in Florida, and is dispositive of the claim contained in Gamble's petition.

2. The *Ring* claim is procedurally barred because it was not timely raised.

Gamble's reliance on *Ring* to support a Sixth Amendment claim is also procedurally barred.⁴ The issue addressed in *Ring* is by no means new or novel -- that claim, or a variation of it, has been known since before the United States Supreme Court's 1976 decision in *Proffitt v. Florida*, 428 U.S. 242, 252 (1976) (holding that the Constitution does not require jury sentencing). The basis for a claim that the sentence imposed in this case violated Gamble's right to a jury trial has been available since Gamble was sentenced to death, but was never asserted as a basis for relief.

⁴Gamble does not address the procedural bar/retroactivity issues in his petition.

Gamble did not raise this claim in a timely manner, and it is now barred. This Court should deny relief on that basis.

There is nothing magical about an *Apprendi* claim, and there is no justification for a departure by this Court from application of the well-settled State procedural bar rules. The *Apprendi* claim is procedurally barred under settled Florida law. Failure to enforce the procedural bar can only result in continuing uncertainty in the law, and, moreover, may well have unpredictable influences on cases which are pending on federal habeas corpus review. That sort of destabilization in the law is uncalled for, and will undoubtedly create unnecessary delay.

No Sixth Amendment issue exists because Gamble's death sentence rests on the "pecuniary gain" aggravator, which was established by the guilt phase evidence.⁵ *See, Gamble v. State*, 659 So. 2d at 244. That circumstance does not fall under the *Apprendi/Ring* rationale, and, because that is so, Gamble has no constitutional claim to plead⁶ (or, in other words, no standing to raise the claim). *See, New York v. Ferber*,

⁵Gamble did not challenge the applicability of the pecuniary gain aggravator, thereby conceding its existence. Further, Gamble was convicted of armed robbery in connection with this offense. The record does not indicate why the "during the course of an enumerated felony" aggravator was not also applied. Clearly, it was available.

⁶Likewise, any error would be harmless beyond a reasonable doubt based upon the presence of non-*Apprendi* aggravators. *United States v. Cotton*, 122 S.Ct. 1781 (2002) (failure to recite amount of drugs in indictment as required by *Apprendi* was

458 U.S. 747, 768 (1982); *Grant v. State*, 745 So. 2d 519, 521 (Fla. 2nd DCA 1999), *quashed in unrelated part*, 770 So. 2d 655 (Fla. 2000). No Sixth Amendment issue exists in this case, and this Court should leave resolution of the issue for a case where it does exist. *See, e.g., State v. Globe Communications Corp.*, 648 So. 2d 110 (Fla. 1994).

3. *Ring* is not retroactive to *Gamble*'s case because it is not a "watershed" rule of law.

No court to consider the issue has held *Apprendi* to be retroactive,⁷ and it is clear that *Ring* is "simply an extension of *Apprendi* to the death penalty context." *Cannon v. Mullin*, 297 F. 3d 989 (10th Cir. 2002), *cert. and stay of execution denied*, 123 S.Ct. 1 (2002)⁸; *United States v. Sanders*, 247 F.3d 139, 150, 151 (4th Cir. 2002)(*Apprendi* is not retroactive under *Teague v. Lane*, 489 U.S. 288 (1989));

harmless due to overwhelming evidence); *Ring*, at 2443, n.7 (remanding for a harmless error analysis).

⁷In *Hughes v. State*, 27 Fla. L. Weekly D2169 (1st DCA, Oct. 2, 2002), the First District Court of Appeals held that *Apprendi* is not retroactive, and certified that question to this Court.

⁸The *Cannon* Court held, post-*Ring*, that under *Tyler v. Cain*, 533 U.S. 656, 661 (2001) "'under this provision, the Supreme Court is the only entity that can 'ma[k]e' a new rule retroactive. The new rule becomes retroactive, not by the decisions of the lower courts or by the combined action of the Supreme Court and the lower courts, but simply by the action of the Supreme Court.'"

United States v. Sanders, 247 F.3d 139 (4th Cir. 2001); *Curtis v. United States*, 294 F.3d 841 (7th Cir. 2002)(holding *Apprendi* is not retroactive because it “is about nothing but procedure”); *United States v. Moss*, 252 F.3d 993 (8th Cir. 2001); *Jones v. Smith*, 231 F.3d 1227 (9th Cir. 2000); *United States v. Sanchez-Cervantes*, 282 F.3d 664, 668 (9th Cir. 2002); *McCoy v. United States*, 266 F.3d 1245 (11th Cir. 2001); *Sustache-Rivera v. United States*, 221 F.3d 8, 15 n.12 (1st Cir. 2000); *Forbes v. United States*, 262 F.3d 143, 144 (2nd Cir. 2001); *In re Turner*, 267 F.3d 225, 227 (3rd Cir. 2001); *In re Tatum*, 233 F.3d 857, 859 (5th Cir. 2000); *Hines v. United States*, 282 F.3d 1002 (8th Cir. 2002); *United States v. Dowdy*, 2002 WL 1352467 (9th Cir., June 20, 2002); *United States v. Wiseman*, 297 F.3d 975 (10th Cir. 2002); *U.S. v. Brown*, 305 F. 3d 304 (5th Cir. 2002); *Goode v. U.S.*, 305 F. 3d 378 (6th Cir. 2002); *U.S. v. Mora*, 293 F. 3d (10th Cir. 2002). Since *Apprendi* involves the construction of a federal constitutional right, the question of possible retroactive application should be governed by the federal principles. *Teague v. Lane*, 489 U.S. 288 (1989).

The one State Supreme Court that has addressed the retroactivity of *Apprendi* has, likewise, determined that the decision is not retroactive.⁹ *Whisler v. State*, 36 P.3d

⁹The Alabama Court of Criminal Appeals has held that *Apprendi* is not retroactive to collateral review cases. See, *Poole v. State*, 2001 WL 996300 (Ala. Crim. App. 2001); *Calloway*

290 (Kan. 2001).¹⁰ The United States Supreme Court has previously held that a violation of the right to a jury trial is not retroactive. *DeStefano v. Woods*, 392 U.S. 631, 88 S.Ct. 2093, 20 L.Ed.2d 1308 (1968)(refusing to apply the 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). If the very right to a jury trial is not retroactively applicable, it stands reason on its head to suggest that a wholly procedural ruling like *Ring* should be retroactive. As the Tenth Circuit pointed out in *Cannon*, it is the prerogative of the United States Supreme Court to make the retroactivity determination -- that Court has not held *Apprendi/Ring* retroactive, and has refused to review cases declining to apply those decisions in that fashion. *Cannon, supra*. *Ring* is merely a procedural ruling which falls far short of being of "fundamental significance." This Court should not reach a conclusion contrary to every other court to consider the issue, and should decline to apply *Apprendi/Ring* retroactively.

v. *State*, 2002 WL 1144647 (Ala. Crim. App. 2002).

¹⁰An *Apprendi* claim is not "plain error," either. *United States v. Cotton*, 122 S.Ct. 1781 (2002)(indictment's failure to include the quantity of drugs was an *Apprendi* error but did not seriously affect fairness, integrity, or public reputation of judicial proceedings, and thus did not rise to level of plain error). If an error is not plain error for direct appeal purposes, it is not of sufficient importance to be retroactively applicable to collateral proceedings.

Moreover, the *Ring* decision is not retroactively applicable under *Witt v. State*, 387 So. 2d 922, 929-30 (Fla. 1980). Under *Witt*, *Ring* is not retroactively applicable **unless** it is a decision of fundamental significance, which so drastically alters the underpinnings of Gamble’s death sentence that “obvious injustice” exists. *New v. State*, 807 So. 2d 52 (Fla. 2001), *cert. denied*, 122 S.Ct. 2626 (2002). In determining whether this standard has been met, this Court must consider three factors: the purpose served by the new case; the extent of reliance on the old law; and the effect on the administration of justice from retroactive application. *Ferguson v. State*, 789 So. 2d 306, 311 (Fla. 2001). Application of these factors to *Ring*, which did not directly or indirectly address Florida law, offers no basis for consideration of *Ring* in this case. *Bolender v. Dugger*, 564 So. 2d 1057, 1059 (Fla. 1990) (“*Maynard v. Cartwright*, 486 U.S. 356, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988), and *Adamson v. Ricketts*, 865 F.2d 1011 (9th Cir. 1988), had not been decided at the time of direct appeal and are not such changes in the law under *Witt v. State*, 387 So. 2d 922 (Fla. 1980), *cert. denied*, 449 U.S. 1067, 101 S.Ct. 796, 66 L.Ed.2d 612 (1980), that the procedural bar should be lifted.”). Any application of *Apprendi/Ring*, and the State does not concede such, must be prospective only in nature.

B. THE AGGRAVATORS PRESENT IN GAMBLE’S CASE ARE OUTSIDE THE SCOPE OF APPRENDI/RING, AND RELIANCE ON THOSE DECISIONS IS MISPLACED. FOR

THAT REASON, THOSE DECISIONS DO NOT AFFECT GAMBLE.

In addition to being procedurally barred, *Apprendi/Ring* does not provide a basis for relief in this case because the rule of law set out in those cases is inapplicable to the facts of Gamble's case. The record reveals that the pecuniary gain aggravator is outside the reach of the *Apprendi/Ring* decisions because the presence of that aggravator is implicit in the jury's verdict of guilt as to the underlying offenses. This Court should not consider the *Ring* issue beyond the four corners of this case.¹¹

On direct appeal, Gamble did not challenge the applicability of the pecuniary gain aggravator -- that concession that that aggravator exists is, standing alone, dispositive of this claim. To the extent that further discussion is necessary, the fact that the murder at issue here was committed for pecuniary gain was well-established at the guilt phase of Gamble's trial, and establishes Gamble's "death eligibility" beyond a reasonable doubt.

C. ARIZONA CAPITAL SENTENCING LAW IS DIFFERENT

¹¹Of course, under Florida law, death is the maximum possible sentence for the crime of first degree murder, and that is the defendant's sentence exposure upon conviction. See Section C, *infra*. The "higher than authorized by the jury" component of *Apprendi* is not applicable to the capital sentencing process in Florida, but that distinction does not affect the basic premise that a prior felony conviction is a fact that has **already** been found by a jury beyond a reasonable doubt, and does not need to be (and as a policy matter should not be) "re-proven."

FROM FLORIDA’S, AS THIS COURT HAS HELD.¹² FOR THAT REASON, GAMBLE IS NOT “JUST LIKE TIMOTHY RING.”

The Arizona statute at issue in *Ring* is different from Florida’s death sentencing statutes:

Based solely on the jury's verdict finding Ring guilty of first-degree felony murder, the maximum punishment he could have received was life imprisonment. See 200 Ariz., at 279, 25 P.3d, at 1151 (citing Ariz. Rev. Stat. § 13-703). This was so because, in Arizona, a "death sentence may not legally be imposed ... unless at least one aggravating factor is found to exist beyond a reasonable doubt." 200 Ariz., at 279, 25 P.3d, at 1151 (citing § 13-703). The question presented is whether **that** aggravating factor may be found by the judge, as Arizona law specifies, or whether the Sixth Amendment's jury trial guarantee, [FN3] made applicable to the States by the Fourteenth Amendment, requires that the aggravating factor determination be entrusted to the jury. [FN4]

FN3. "In all criminal prosecutions, the accused shall enjoy the right to a ... trial, by an impartial jury"

FN4. Ring's claim is tightly delineated: He contends only that the Sixth Amendment required jury findings on the aggravating circumstances asserted against him. No aggravating circumstance related to past

¹²In *Mills v. Moore*, *infra*, this Court discussed the operation of the Florida death sentencing statute, and explained how our statute is unlike Arizona’s. Gamble mentions *Mills* only to criticize this Court for following *Apprendi*’s admonition that it is inapplicable to capital cases.

convictions in his case; Ring therefore does not challenge *Almendarez-Torres v. United States*, 523 U.S. 224, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998), which held that the fact of prior conviction may be found by the judge even if it increases the statutory maximum sentence. He makes no Sixth Amendment claim with respect to mitigating circumstances. *See Apprendi v. New Jersey*, 530 U.S. 466, 490-491, n. 16, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000) (noting "the distinction the Court has often recognized between facts in aggravation of punishment and facts in mitigation" (citation omitted)). Nor does he argue that the Sixth Amendment required the jury to make the ultimate determination whether to impose the death penalty. *See Proffitt v. Florida*, 428 U.S. 242, 252, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976) (plurality opinion) ("[I]t has never [been] suggested that jury sentencing is constitutionally required."). He does not question the Arizona Supreme Court's authority to reweigh the aggravating and mitigating circumstances after that court struck one aggravator. *See Clemons v. Mississippi*, 494 U.S. 738, 745, 110 S.Ct. 1441, 108 L.Ed.2d 725 (1990). Finally, Ring does not contend that his indictment was constitutionally defective. *See Apprendi*, 530 U.S., at 477, n. 3, 120 S.Ct. 2348 (Fourteenth Amendment "has not ... been construed to include the Fifth Amendment right to 'presentment or indictment of a Grand Jury' ").

Ring v. Arizona, 122 S.Ct. at 2437. [emphasis added]. Under Arizona law, the determination of death **eligibility** takes place during the **penalty phase** proceedings,

and requires the determination that an aggravating factor exists. Florida law is different.

1. In Florida, death is the maximum sentence for capital murder.

“[T]he legislature, and not the judiciary, determines maximum and minimum penalties for violations of the law.” *State v. Benitez*, 395 So. 2d 514, 518 (Fla. 1981). This Court, long before *Apprendi*, concluded that the maximum sentence to which a Florida capital defendant is subject following conviction for capital murder is death. *See, e.g., Lightbourne v. State*, 438 So. 2d 380, 385 (Fla. 1983); *Sireci v. State*, 399 So. 2d 964 (Fla. 1981). *Apprendi* led to no change of any sort, by either the Legislature or this Court. This Court has previously concluded that the maximum sentence to which a Florida capital defendant is subject following conviction for capital murder is death. *Mills v. Moore*, 786 So. 2d 532, 537-8 (Fla. 2001).¹³

¹³This Court summarized the New Jersey statute at issue in *Apprendi* as follows:

Apprendi involved a New Jersey statute that authorized an enhanced penalty for a crime proven to be a "hate crime" if the judge found by a preponderance of the evidence that the crime was motivated by a purpose to intimidate an individual or group because of race, color, gender, handicap, religion, sexual orientation or ethnicity. **The defendant in *Apprendi* was not charged with a "hate crime" in the indictment. He pled guilty on three counts, and the judge enhanced the penalty on one of the counts beyond the statutory maximum, in accord with the "hate crime" enhancement statute, after he held a hearing to determine the "purpose" of the crime.**

[emphasis added, footnote omitted]. This Court has consistently followed that interpretation of Florida's capital sentencing statute.¹⁴ *Porter v. Moore*, 27 Fla. L. Weekly S606 (Fla. June 20, 2002) ("Contrary to Porter's claims, we have repeatedly held that the maximum penalty under the statute is death."); *Sweet v. Moore*, 822 So. 2d 1269 (Fla. 2002); *Cox v. State*, 819 So. 2d 705 (Fla. 2002); *Hurst v. State*, 819 So. 2d 689 (Fla. 2002) ("... this Court finds no reason to revisit the *Mills* decision..."); *Spencer v. State*, 27 Fla. L. Weekly S323 (Fla. April 11, 2002); *Gudinas v. State*, 816 So. 2d 1095, 1111 (Fla. 2002) ("This Court rejected the same issue ... in *Mills v. Moore*."); *Sireci v. Moore*, 825 So. 2d 882 (Fla. 2002); *King v. Moore*, 808 So. 2d 1237, 1246 (Fla. 2002); *Brown v. Moore*, 800 So. 2d 223 (Fla. 2001); *Mann v. Moore*, 794 So. 2d 595, 599 (Fla. 2001); *Evans v. State*, 808 So.2d 92, 110 (Fla. 2002) *Hertz v. State*, 803 So. 2d 629, 648 (Fla. 2001); *Looney v. State*, 803 So. 2d 656, 675 (Fla.

Mills v. Moore, 786 So.2d at 536 n.2. [emphasis added].

¹⁴This Court's interpretation of Florida law is consistent with the description of Florida's capital sentencing scheme set out in *Proffitt v. Florida*, and echoed in *Barclay v. Florida*, 463 U.S. 939, 952 (1983) ("[I]f a defendant is found guilty of a **capital** offense, a separate evidentiary hearing is held before the trial judge and jury to determine his sentence."). **If the defendant were not eligible for a death sentence, there would be no second proceeding.**

2001).¹⁵

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

In Florida, as this Court has repeatedly held, the determination of “**death-eligibility**” is made at the **guilt** phase of a capital trial, **not** at the penalty phase, as is the Arizona practice. This Court has unequivocally said what Florida’s law is, just as the Arizona Supreme Court did. The difference between the two states’ capital murder statutes is clear, and controls the resolution of the claim. Because death is the maximum penalty for first-degree murder in Florida (**and because it is not in Arizona**), Gamble’s *Apprendi/Ring* claim collapses because nothing triggers the *Apprendi* protections in the first place. *See, Barnes v. State*, 794 So. 2d 590 (Fla. 2001) (*Apprendi* not applicable when judicial findings did not increase maximum allowable sentence).

Nothing that takes place at the penalty phase of a Florida capital trial **increases** the authorized punishment for the offense of capital murder -- eligibility for death is

¹⁵Whatever criticisms Gamble may direct against the *Mills* decision cannot change the fundamental fact that this Court’s explanation of Florida’s capital sentencing statutes is unchanged. By merely stating that *Apprendi* excluded capital cases, this Court did not ignore its responsibility in applying what the Court believed were the applicable cases under Florida law as they applied to the statute.

determined at the guilt phase under settled State law; the penalty phase proceeding (which notably **includes** the jury) is the **selection** phase, which **follows** the eligibility determination, and which does not implicate the *Apprendi/Ring* issue. The state law issue which led to the constitutional violation in Arizona's capital sentencing statute has already been decided differently by this Court, and that decision (in *Mills* and the cases relying on it) differentiates and distinguishes Arizona's system from Florida's constitutional capital sentencing statute.

Section 782.04 of the *Florida Statutes* defines capital murder, and Section 775.082 clearly and unequivocally states that the maximum penalty for capital murder is death, in clear contrast to the Arizona statute, which does not. **Arizona, unlike Florida, does not define any offenses as “capital” in its criminal statutes.** There is no constitutional defect with Florida's statute.¹⁶

3. *Ring* has no impact in Florida, and the decisions upholding the constitutionality of Florida law remain undisturbed.

Ring left intact all prior opinions upholding the constitutionality of Florida's

¹⁶The “eligibility for death” determination takes place at the guilt phase of a capital trial, and that the sentence stage is the “selection” phase. Florida's statute is analytically no different from the Texas statute, which was upheld in *Jurek v. Texas*, 428 U.S. 262 (1976). The *Ring* Court noted that the question is one of “effect” -- the effect of Florida's statute is full compliance with the Sixth and Eighth Amendments.

death penalty scheme, including *Proffitt, supra, Spaziano v. Florida*, 468 U.S. 447 (1984), *Hildwin v. Florida*, 490 U.S. 638 (1989), *Barclay v. Florida*, 463 U.S. 939 (1983), and *Dobbert v. Florida*, 432 U.S. 282 (1977). As this Court has recognized, “[t]he Supreme Court has specifically directed lower courts to ‘leav[e] to this Court the prerogative of overruling its own decisions.’ *Agostini v. Felton*, 521 U.S. 203, 237, 117 S.Ct. 1997, 138 L.Ed.2d 391 (1997) (quoting *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484, 109 S.Ct. 1917, 104 L.Ed.2d 526 (1989)).” *Mills v. Moore*, 786 So. 2d 532, 537(Fla. 2001).¹⁷

The United States Supreme Court did not disturb its prior decisions upholding the constitutionality of Florida’s capital sentencing process, and that result is dispositive of Gamble’s claims.¹⁸ The Court had every opportunity to directly address *Apprendi/Ring* in the context of Florida’s capital sentencing scheme, and expressly declined to do so. *Cf. Hodges v. Florida*, 506 U.S. 803 (1992), wherein the United

¹⁷To rule in Gamble’s favor, this Court would have to overrule the five cases cited above, as well as *Clemons, infra, Cabana v. Bullock, infra, Blystone v. California*, 494 U.S. 299, 306-7 (1990), *Harris v. Alabama, infra*, and *Gardner v. Florida*, 430 U.S. 349 (1977).

¹⁸ Gamble’s petition goes to great lengths to convince this Court that the United States Supreme Court’s recent denial of certiorari review on this issue, **after Ring was released**, is meaningless. Recognizing that the denial of certiorari has no precedential value, it is clear under the circumstances of this case that Gamble’s Sixth Amendment claim is without merit.

States Supreme Court vacated this Court’s opinion for further consideration in light of *Espinosa v. Florida*, 505 U.S. 1079 (1992). This Court has already correctly decided the issue, and should not disturb those decisions.

On June 28, 2002, the Court remanded four cases in light of *Ring*: *Harrod v. Arizona*, 122 S.Ct. 2653 (2002); *Pandeli v. Arizona*, 122 S. Ct. 2654 (2002); *Sansing v. Arizona*, 122 S.Ct. 2654 (2002); and *Allen v. United States*, 122 S.Ct. 2653 (2002). None of those remands is surprising given that three are Arizona cases and the other is a Federal Court of Appeals decision based on *Walton v. Arizona*. However, the Court **denied** certiorari in seven cases raising the “*Ring*” issue: *Gary Leon Brown v. Alabama*, 122 S.Ct. 2675 (2002); *Mann v. Florida*, 122 S.Ct. 2669; *King v. Florida*, 122 S.Ct. 2670 (2002); *Bottoson v. Florida*, 122 S.Ct. 2670 (2002); *Card v. Florida*, 122 S.Ct. 2673 (2002); *Hertz v. Florida*, 122 S.Ct. 2673 (2002) and *Looney v. Florida*, 122 S.Ct. 2678 (2002).¹⁹ 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. By virtue of the denial of the petition for writ of certiorari, Bottoson’s case is final for all purposes. *See, e.g., Teague v. Lane*, 489 U.S. 288 (1989). Further,

¹⁹*Card*, *Hertz*, and *Looney* were petitions for writs of certiorari following affirmance on direct appeal. The *Ring* issue was preserved to the extent that the state argued for a procedural bar, and this Court addressed the merits of the claims.

and of even greater significance, the United States Supreme Court denied a stay of execution in an Oklahoma case which presented an issue predicated on *Ring* on July 23, 2002. *See, Cannon v. Oklahoma*, 123 S.Ct. 1 (2002). This Court should not accept Gamble's attempt to disrupt the orderly administration of capital punishment in Florida by undertaking to "review" the decisions of the United States Supreme Court. Gamble is entitled to no relief.

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

To the extent that Gamble argues that *Ring* requires jury sentencing, that argument is incorrect. That is an Eighth Amendment argument, not a Sixth Amendment one, which confuses the additional procedures the Florida legislature provided to avoid arbitrary jury sentencing (which is the Eighth Amendment component) with the death-eligibility determination, which is the Sixth Amendment component, and which is the focus of *Apprendi/Ring*.²⁰ In upholding the constitutionality of Florida's death sentencing scheme, the United States Supreme Court said:

In light of the facts that the Sixth Amendment does not

²⁰The Judge's sentencing order does not implicate the 6th Amendment. That is an 8th Amendment matter, which is viewed through the lens of this Court's decisions in *Campbell v. State*, 571 So. 2d 415, 419-20 (Fla. 1990) and *Nibert v. State*, 574 So. 2d 1059, 1061 (Fla. 1990).

require jury sentencing, that the demands of fairness and reliability in capital cases do not require it, and that neither the nature of, nor the purpose behind, the death penalty requires jury sentencing, we cannot conclude that placing responsibility on the trial judge to impose the sentence in a capital case is unconstitutional.

Spaziano v. Florida, 468 U.S. 447, 464 (1984). *Apprendi/Ring* did not affect that pronouncement because it does not involve the jury's role in **imposing sentence** -- it only requires that the jury find the defendant death-eligible.

1. The death-eligibility determination is made at the guilt phase of a capital trial.

Florida law (as this Court has clearly held) places the death-eligibility determination at the guilt phase of a capital trial, and, in so doing, necessarily satisfies the *Ring* "death eligibility" component. Even in the wake of *Ring*, the jury only has to make the determination of **death eligibility**, and then the judge may make the remaining findings. *Ring* speaks only to the finding of death eligibility; not aggravators, mitigators, or the weighing of them. *Ring, supra*, ("What today's decision says is that the jury must find the existence of the fact that an aggravating factor existed.")²¹

²¹When this statement by Justice Scalia is read in the context of Arizona's capital sentencing law, "aggravating factor" means the same thing as "death-eligibility factor", because Arizona makes the "eligibility for death" determination, as well as the selection determination, at the penalty phase. Florida law does not function in that fashion, and that fundamental structural difference between the statutes

(Scalia, J., concurring). 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.²² *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.”).²³ *See also, Zant v. Stephens*, 462 U.S. 862, 874-78 (1983). Once the jury has made the death-eligibility determination at the guilt phase, the constitution is satisfied, and the judge may do the rest.

2. Florida law is different from Arizona’s -- why Gamble is not “Just like Timothy Ring.”

Ring did not eliminate the trial judge from the sentencing equation or in any

highlights the difficulty inherent in comparing them.

²²The United States Supreme Court has repeatedly acknowledged that there is no single, constitutional, scheme that a state must employ in implementing the death penalty. *Lowenfield v. Phelps*, 484 U.S. 231, 244 (1988); *Spaziano v. Florida*, 468 U.S. 447, 464 (1984)(“The Eighth Amendment is not violated every time a State reaches a conclusion different from a majority of its sisters over how best to administer its criminal laws.”).

²³California law places the eligibility determination at the guilt phase by requiring that the jury find one or more statutorily defined special circumstances. *Tuilaepa, supra*, at 969; *People v. Ochoa*, 26 Cal. 4th 398, 453-54, 28 P.3d 78 110 Cal. Rptr. 2d 324 (2001) (rejecting *Apprendi*-claim).

fashion imply that Florida should do so. This distinction demonstrates the difference between what *Ring* held and what *Gamble* would have this Court read into that decision. The United States Supreme Court concluded that, under Arizona law (as explained by the Arizona Supreme Court), additional findings, which are made by a judge alone, are required in order for the defendant to be **eligible** for the death penalty. Under that capital sentencing statute, the “statutory maximum” for practical purposes is **life** until such time as a **judge** has found an aggravating circumstance to be present. In other words, the Arizona jury played 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 Arizona law, which recognized the statutory maximum sentence permitted **by the jury’s conviction alone** to be life. *Ring v. State*, 25 P.3d 1139, 1150 (Ariz. 2001)²⁴. Florida law is not like Arizona’s. *Mills v. State*, 786 So. 2d 532 (Fla. 2001).

The distinction between a “sentencing factor” (*i.e.*: “selection factor,” under

²⁴This Arizona statute is the one that the United States Supreme Court misinterpreted in *Walton*. *Ring*, *supra*. Because the United States Supreme Court’s description of Arizona law was incorrect in *Walton* and *Apprendi*, *Gamble*’s efforts to argue that Florida law is “like the Arizona statute in *Walton*” are, at best, disingenuous because the Court was mistaken about the operation of Arizona law. Any comparison of the *Walton* statute to Florida is therefore based upon an incorrect premise, as is the claim that *Hildwin* falls with *Walton*.

Florida's statutory scheme) and an element is sharply made in *Apprendi*, where the Court stated: "One need only look to the kind, degree, or range of punishment to which the prosecution is entitled for a given set of facts. **Each fact necessary for that entitlement is an element.**" *Apprendi v. New Jersey*, 120 S.Ct. at 2369. [emphasis added]. A Florida defendant is eligible for a death sentence on conviction for capital murder, and a death sentence, under Florida's scheme, is not a "sentence enhancement," nor is it an "element" of the underlying offense. *Almendarez-Torres v. United States*, 523 U.S. 224 (1998); *McMillan v. Pennsylvania*, 477 U.S. 79 (1986).

In discussing Florida's sentencing scheme, the United States Supreme Court stated:

Nothing in our opinion in *McMillan v. Pennsylvania*, 477 U.S. 79, 106 S.Ct. 2411, 91 L.Ed.2d 67 (1986), suggests otherwise. We upheld a Pennsylvania statute that required the sentencing judge to impose a mandatory minimum sentence if the judge found by a preponderance of the evidence that the defendant visibly possessed a firearm. We noted that the finding under Pennsylvania law "neither alters the maximum penalty for the crime committed nor creates a separate offense calling for a separate penalty; **it operates solely to limit the sentencing court's discretion in selecting a penalty within the range already available to it.**" *Id.*, at 87-88, 106 S.Ct., at 2417-2418. Thus we concluded that the requirement that the findings be made by a judge rather than the jury did not violate the Sixth Amendment because "there is no Sixth Amendment right to jury sentencing, even where the sentence turns on specific findings of fact." *Id.*, at 93, 106 S.Ct., at 2420. Like the visible possession of a firearm in *McMillan*, **the existence of an aggravating factor here is not an element of the**

offense but instead is "a sentencing factor that comes into play only after the defendant has been found guilty." *Id.*, at 86, 106 S.Ct., at 2417. Accordingly, the Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury.

Hildwin v. Florida, 490 U.S. 638, 640-41 (1989). [emphasis added].²⁵

As Justice Scalia's concurrence emphasizes, ***Ring* is not about jury sentencing at**

all:

What today's decision says is that the jury must find the existence of the fact that an aggravating factor existed. Those States that leave the ultimate life-or-death decision to the judge may continue to do so -- by requiring a prior jury finding of aggravating factor in the sentencing phase or, more simply, by placing the aggravating-factor determination (where it logically belongs anyway) in the guilt phase."²⁶

²⁵Alabama's capital sentencing scheme is very similar to Florida's. The United States Supreme Court has upheld that system:

"The Constitution permits the trial judge, acting alone, to impose a capital sentence. It is thus not offended when a State further requires the sentencing judge to consider a jury's recommendation and trusts the judge to give it the proper weight." *Harris v. Alabama*, 513 U.S. 504, 515 (1995). Like Florida, Alabama law places the eligibility-for-death determination at the guilt phase. § 13A-5-40, *Ala. Stat.* The Alabama Supreme Court has expressly rejected the claim that *Ring* invalidated that State's capital sentencing scheme. *Waldrop v. State*, 2002 WL31630710 (Ala., Nov. 22, 2002).

²⁶In context, "aggravating factor," as used by Justice Scalia, means "death eligibility factor."

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

3. Florida provides additional Eighth Amendment protection at the selection (or sentencing) phase through the jury's channeled discretion in arriving at a recommended sentence.

The Florida capital sentencing statute provides for the jury's participation:

(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 § 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.

§ 921.141, *Florida Statutes*.²⁷

This statute secures and preserves significant jury participation in narrowing the class of individuals eligible to be sentenced to death under both the Sixth and Eighth Amendments. In *Spaziano, supra*, the United States Supreme Court stated:

As the Court several times has made clear, we are unwilling to say that there is any one right way for a State to set up its capital sentencing scheme. *See Pulley v. Harris*, 465 U.S. 37, 104 S.Ct. 871, 79 L.Ed.2d 29 (1984); *Zant v. Stephens*, 462 U.S., at 884, 103 S.Ct., at 2747; *Gregg v. Georgia*, 428 U.S., at 195, 96 S.Ct., at 2935 (joint opinion). The Court twice has concluded that Florida has struck a reasonable balance between sensitivity to the individual and his circumstances and ensuring that the penalty is not imposed arbitrarily or discriminatorily. *Barclay v. Florida*, 463 U.S. 939, 103 S.Ct. 3418, 77 L.Ed.2d 1134 (1983); *Proffitt v. Florida*, 428 U.S. 242, 252, 96 S.Ct. 2960, 2966, 49 L.Ed.2d 913 (1976) (joint opinion of Stewart, POWELL, and STEVENS, JJ.). We are not persuaded that placing the responsibility on a trial judge to impose the sentence in a capital case is so fundamentally at odds with contemporary

²⁷By the terms of the statute, the jury **must** find the existence of one or more aggravators **before** reaching the sub-section C recommendation stage. In other words, the penalty phase jury must conduct the sub-section A and B analysis before sub-section C comes into play.

standards of fairness and decency that Florida must be required to alter its scheme and give final authority to the jury to make the life-or-death decision.

Spaziano v. Florida, 468 U.S. at 464-5. The Court later emphasized that the jury's role is so vital to the sentencing process that the jury is a "co-sentencer" in Florida.

Espinosa v. Florida, 505 U.S. 1079 (1992). However, the *Espinosa* Court did not retreat from the premise of *Spaziano*:

We have often recognized that there are many constitutionally permissible ways in which States may choose to allocate capital sentencing authority. *See id.*, at 389, 105 S.Ct., at 2736; *Spaziano v. Florida*, 468 U.S. 447, 464, 104 S.Ct. 3154, 3164, 82 L.Ed.2d 340 (1984). Today's decision in no way signals a retreat from that position. We merely hold that, **if a weighing State decides to place capital sentencing authority in two actors rather than one**, neither actor must be permitted to weigh invalid aggravating circumstances.

Espinosa v. Florida, 505 U.S. at 1082. [emphasis added].²⁸

4. The sentence stage (or selection stage) jury need not be unanimous in the recommended sentence.

²⁸It is ironic that the "co-sentencer" jury, which was embraced by so many post-*Espinosa* defendants, has apparently "ceased" to exist in the brief time that has passed since *Ring* was decided. If *Espinosa* is right, that the jury is a "co-sentencer," then *Apprendi* and *Ring* cannot apply to Florida based upon the United States Supreme Court's analysis of Florida law. When that analysis is coupled with the *Mills* analysis by this Court, the inapplicability of *Apprendi* and *Ring* in Florida is established beyond doubt.

To the extent that Gamble claims a death sentence requires juror unanimity, or the charging of the aggravating factors in the Indictment, or special jury verdicts, *Ring* provides no support for his claims.²⁹ 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. State*, 822 So. 2d 1269 (Fla., 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)); *Cox v. State*, 819 So. 2s 705, 724 at n. 17 (Fla., 2002) (same).

Gamble's argument that a unanimous jury recommendation is constitutionally required has been repeatedly rejected by this Court.³⁰ *See, e.g., Looney v. State*, 803 So. 2d 656, 674 (Fla. 2001), *cert. denied, Looney v. Florida*, 122 S.Ct. 2678 (2002). Florida's death sentencing statute, § 921.141(3), provides:

Findings in support of sentence of death.--Notwithstanding the

²⁹Gamble reads more findings into *Ring* than exist. Florida's capital sentencing statute has not been disturbed, and there is no decision from any court that compels additional scrutiny of it.

³⁰The weighing process that must be performed by the jury is based upon whether mitigation outweighs the aggravation proven beyond a reasonable doubt. In cases like Gamble's, where it can be inferred from the jury's verdict (in the case of underlying enumerated felonies), the "first" step in the determination of whether an aggravator exists is removed.

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 . . .

See, Way v. State, 760 So. 2d 903, 924 (Fla. 2000)(Pariante, J., concurring)(noting that it is a statute that allows the jury to recommend the imposition of the death penalty based on a non-unanimous vote). This Court, prior to *Apprendi*, has consistently held that a jury may recommend a death sentence on simple majority vote, *Thompson v. State*, 648 So. 2d 692, 698 (Fla. 1994)(holding that it is constitutional for a jury to recommend death based on a simple majority and reaffirming *Brown v. State*, 565 So. 2d 304, 308 (Fla. 1990)); *Alvord v. State*, 322 So. 2d 533 (Fla. 1975)(holding jury's advisory recommendation as the sentence in a capital case need not be unanimous). And, after *Apprendi*, this Court has consistently rejected claims that *Apprendi* requires a unanimous jury sentencing recommendation. *Card v. State*, 803 So. 2d 613, 628 & n. 13 (Fla. 2001)(rejecting an argument that *Apprendi* requires a unanimous jury verdict because "this Court consistently had held that a capital jury may recommend a death sentence by a bare majority vote."); *Hertz v. State*, 803 So. 2d 629, 648 (Fla. 2001)(rejecting claim that, in light of *Apprendi*, the trial court erred in denying a motion to require unanimity in the jury's sentencing recommendation); *Brown v. Moore*, 800 So.2d 223 (Fla. 2001)(rejecting claim that aggravating circumstances are required to be found by unanimous jury verdict).

Further, the United States Supreme Court has held that a finding of guilt does not need to be unanimous.³¹ *Cf. Johnson v. Louisiana*, 406 U.S. 356, 92 S.Ct. 1620, 32 L.Ed.2d 152 (1972)(holding a conviction based on plurality of nine out of twelve jurors did not deprive defendant of due process and did not deny equal protection); *Apodaca v. Oregon*, 406 U.S. 404, 92 S.Ct. 1628, 32 L.Ed.2d 184 (1972)(holding a conviction by less than unanimous jury does not violate right to trial by jury and explaining that the Sixth Amendment's implicit guarantee of a unanimous jury verdict is not applicable to the states)³². Nor do jurors have to agree on the particular aggravators just as they are not required to agree on the particular theory of liability, *Schad v. Arizona*, 501 U.S. 624, 631, 111 S.Ct. 2491, 2497, 115 L.Ed.2d 555 (1991)(plurality opinion)(holding that due process does not require jurors to unanimously agree on alternative theories of criminal liability but declining to address whether the constitution requires a unanimous jury verdict as to guilt in state capital

³¹See also, *People v. Fairbank*, 16 Cal.4th 1223, 1255, 947 P.2d 1321, 69 Cal. Rptr.2d 784 (1997) (unanimity not required as existence of aggravators, weight given to them, or appropriateness of a sentence of death).

³²The Court did not set a standard "that a criminal verdict must be supported by at least a 'substantial majority' of the jurors." Rather, it stated that with both a unanimous jury and with a nonunanimous jury "the interest of the defendant in having the judgment of his peers interposed between himself and the officers of the State who prosecute and judge him is equally well served." *Apodaca v. Oregon*, 92 S.Ct. 1628, 1633 (1972).

cases) and; has specifically rejected any requirement that mitigating circumstances have to be found unanimously. *McKoy v. North Carolina*, 494 U.S. 433 (1990)(allowing a jury to consider only those mitigating circumstances found unanimously impermissibly limited jurors' consideration of mitigating evidence in violation of the Eighth Amendment); *Mills v. Maryland*, 486 U.S. 367 (1988)(stating that it would be the "height of arbitrariness" to require jury unanimity in finding mitigating circumstances).

When the hyperbole of Gamble's argument is stripped away, *Ring* affirms the distinction between "sentencing factors" and "elements" of an offense which has long been recognized. *See Ring* at *14; *Harris v. United States*, 122 S.Ct. 2406 (2002). To the extent that Gamble 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.³³ For example, in *United States v. Allen*, 247 F.3d 741, 764 (8th Cir. 2001), the Court of Appeals based its decision

³³Of course, the Fifth Amendment's grand jury clause has not been extended to the States under the Fourteenth Amendment. *Ring v. Arizona*, *supra*, at n.4, citing, *Apprendi v. New Jersey*, 530 U.S. 466, 477 n.3 (2000); *Hurtado v. California*, 110 U.S. 516 (1884) (holding that, in capital cases, the States are not required to obtain a grand jury indictment). This distinction, standing alone, is dispositive of the indictment claim.

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 in significant part. It is hardly surprising that the United States Supreme Court remanded *Allen* for reconsideration in light of *Ring*.

The fact that two jurors did not recommend that Gamble be sentenced to death does not mean, contrary to Gamble's interpretation, that those jurors found that no aggravators existed. The jury's vote reflects its considered weighing of the aggravating and mitigating circumstances, not whether any particular juror rejected some or all of the aggravating circumstances. Based upon the plain language of the statute, the only conclusion that can be drawn from the jury's sentencing vote is that two jurors thought that life was a more appropriate sentence than death.³⁴

Any Florida death sentence which was imposed following a jury recommendation of death necessarily satisfies the Sixth Amendment as construed in *Ring* -- in such a case, the jury necessarily (and by definition) found beyond a reasonable doubt that at least one aggravating factor existed. *Rogers v. State*, 783 So. 2d 980, 992-3 (Fla. 2001) (stating that aggravator must be proven beyond a reasonable

³⁴The most that can be said for the two votes against a death sentence are that they amount to what can be called a "jury pardon" based upon the mitigation to the effect that Gamble was a "good guy." *Dougan v. State*, 595 So. 2d 1, 4 (Fla. 1992).

doubt, citing *Geralds v. State*, 601 So. 2d 1157, 1163 (Fla. 1992)); *see also*, *Archer v. State*, 673 So. 2d 17, 20-21 (Fla. 1996). Since the finding of an aggravating factor authorizes the imposition of a death sentence under any interpretation of *Ring*, and since Gamble's penalty phase jury recommended that the death penalty was justified by a vote of 10-2³⁵ after weighing the aggravating and mitigating factors under the statute, the requirement that a jury determine the conviction to have been a capital offense has been fulfilled twice -- at the guilt phase (as *Ring* requires under the Sixth Amendment), and at the sentence stage (under the 8th Amendment weighing process upheld in *Proffitt*, and reaffirmed in the cases following it). There is no constitutional error.

Ring's Sixth Amendment jurisprudence is satisfied by the conviction in Florida and by the Florida Supreme Court's pronouncement that death is the maximum sentence available under Florida law for the offense of capital murder. These matters do not change the Eighth Amendment requirement of channeling of the jury's

³⁵To the extent that this Court has fashioned, in the past, perceived, necessary, additional procedures (such as *Spencer* hearings, the preference for individualized *voir dire*, the *Tedder* standard, the *Campbell/Neibert* sentencing order requirements, and limitations on aggravators) not found in the capital statute, recent discussions calling for special jury forms or clarification as to the capital jury instructions are issues that may arise, at some point, in an appropriate case. However, neither *Ring* nor *Apprendi* **require** such additional modifications.

discretion, which is done, and must still be done under Florida law, at the penalty phase of a capital trial. Gamble's discussion of the **weighing** of aggravators and mitigators is an Eighth Amendment issue, not a Sixth Amendment one, and is a matter of Florida, not federal, law.³⁶ Florida law over-meets the requirements of the Eighth Amendment, and satisfies the Sixth Amendment, as well. This case presents the ultimate irony because, despite the fact that Florida has gone far beyond the minimum requirements of the Eighth Amendment, the Sixth Amendment is being used as a wedge to challenge Florida's death sentencing scheme and erode many of the Eighth Amendment provisions included by the statute and this Court, such as proportionality review. *See Pulley v. Harris, supra.*

**5. The co-sentencers utilized in Florida supply
an extra layer of Eighth Amendment protection, but
have nothing to do with the Sixth Amendment,
which is the basis of *Ring*.**

Ring does not directly or indirectly preclude a judge from serving in the role of sentencer. There is no language in *Ring* which suggests that, once a defendant has

³⁶While Florida law limits the consideration of aggravation to the aggravators set out in the *Florida Statutes*, Federal law does not. There is no constitutional requirement that only statutorily-specified matters can be considered as "aggravators" for a death sentencing scheme to be valid. *See, Gregg v. Georgia*, 428 U.S. 153 (1976); *Wainwright v. Goode*, 104 S.Ct. 378 (1983); *see also*, § 26-1101, *Ga. Code*.

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. And, as Justice Scalia commented, “those States that leave the ultimate life-or-death decision to the judge **may continue to do so.**” *Ring, supra*, (Scalia, J., concurring) (emphasis added). The fact that Florida provides an additional level of judicial consideration in the capital sentencing process does not render Florida’s capital sentencing statute unconstitutional. Gamble unfairly criticizes state law for requiring judicial participation in capital sentencing, but does not identify how judicial findings **after a jury recommendation** can interfere with the right to a jury trial. Any suggestion that *Ring* has removed the judge from the sentencing process has no factual basis. 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, in addition to enhancing appellate review and providing a reasoned basis for this Court’s proportionality review. *See, Spencer v. State*, 615 So. 2d 688 (Fla. 1993).

To the extent that further discussion of this claim is necessary, the United States Supreme Court’s holding in *Clemons v. Mississippi* is dispositive:

Any argument that the Constitution requires that a jury impose the sentence of death or make the findings prerequisite to imposition of such a sentence has been soundly rejected by prior decisions of this Court. *Cabana v. Bullock*, 474 U.S. 376, 106 S.Ct. 689, 88 L.Ed.2d 704 (1986), held that an appellate court can make the findings required by

Enmund v. Florida, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982), in the first instance and stated that "[t]he decision whether a particular punishment -- even the death penalty -- is appropriate in any given case is not one that we have ever required to be made by a jury." 474 U.S., at 385, 106 S.Ct., at 696. *Spaziano v. Florida*, 468 U.S. 447, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984), ruled that neither the Sixth Amendment, nor the Eighth Amendment, nor any other constitutional provision provides a defendant with the right to have a jury determine the appropriateness of a capital sentence; neither is there a double jeopardy prohibition on a judge's override of a jury's recommended sentence. Likewise, the Sixth Amendment does not require that a jury specify the aggravating factors that permit the imposition of capital punishment, *Hildwin v. Florida*, 490 U.S. 638, 109 S.Ct. 2055, 104 L.Ed.2d 728 (1989), nor does it require jury sentencing, even where the sentence turns on specific findings of fact. *McMillan v. Pennsylvania*, 477 U.S. 79, 93, 106 S.Ct. 2411, 2420, 91 L.Ed.2d 67 (1986).

Clemons v. Mississippi, 494 U.S. 738, 745-6 (1990). There is no constitutional infirmity with Florida law, and Gamble is not entitled to any relief. Gamble's claim for relief has no legal basis.³⁷

**E. FLORIDA LAW IS NOT INCONSISTENT WITH *APPRENDI*.
RING IS THE APPLICATION OF *APPRENDI* TO ARIZONA LAW,
HOWEVER, ANY APPLICATION OF *RING* TO FLORIDA IS
PROSPECTIVE ONLY.**

In *Ring*, the United States Supreme Court discussed at length the misapprehension of Arizona law which led to the *Walton* and *Apprendi* decisions.

³⁷Florida's capital sentencing scheme is replete with safeguards, which inure to the benefit of the defendant, and which, under any view of the State and Federal Constitutions, more than satisfy all requirements.

Ultimately the Court concluded:

The Arizona Supreme Court, as we earlier recounted, see *supra*, at 2435-2436, found the *Apprendi* majority's portrayal of Arizona's capital sentencing law incorrect, and the description in Justice O'CONNOR's dissent precisely right: "**Defendant's death sentence required the judge's factual findings.**" 200 Ariz., at 279, 25 P.3d, at 1151. Recognizing that the Arizona court's construction of the State's own law is authoritative, see *Mullaney v. Wilbur*, 421 U.S. 684, 691, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975), we are persuaded that *Walton*, in relevant part, cannot survive the reasoning of *Apprendi*.

Ring, supra. [italics in original; emphasis added]. The true facts are that *Walton*, and, in turn, *Apprendi*, were based upon an error about Arizona capital sentencing. Those cases turned on that opinion, which proved to be erroneous.³⁸ However, the United States Supreme Court in remaining completely silent, rendered the application of *Apprendi/Ring*, prospective only. This Court has "expressly stat[ed] that this Court

³⁸Had the *Apprendi* Court been **correct** in believing that Arizona's statute provided for a maximum sentence of death based upon conviction for a capital offense, *Ring* would have been decided differently. The fact remains that the United States Supreme Court **believed** the Arizona statute was like Florida's statute when that Court upheld it. That the Court was mistaken about Arizona law does not affect Florida's statute -- the United States Supreme Court struck Arizona's statute upon discovering that that statute was **not** like Florida's, and did not question the continuing validity of the Florida system. Gamble, in his eagerness to inject confusion into this proceeding in order to capitalize on *Ring*, continues the fallacious argument that "Arizona is just like Florida." The United States Supreme Court has implicitly rejected that argument, and it is palpably false.

does not intentionally overrule itself *sub silentio*.” *Puryear v. State*, 810 So. 2d 901, 905 (Fla. 2002). This Court should not presume that the United States Supreme Court does not follow the same practice. Likewise, in Florida,³⁹ upon a determination that potential *Apprendi/Ring* violations occur under the present statute, modifications⁴⁰ such as special jury forms and detailed capital jury instructions **can only be applied prospectively**.⁴¹

³⁹Comparison of the Florida and Arizona schemes requires caution because they are completely different in operation and in terminology. Unlike the Arizona statute, aggravating factors in Florida are not the “functional equivalent of an element of a greater offense” because a Florida defendant who has been convicted of first degree murder enters the penalty phase with his eligibility for a death sentence established by virtue of the jury’s verdict of guilt. This must be so, because capital defendants often argue that the “during the course of an enumerated felony” aggravator is an “automatic” aggravator that is established at the guilt phase. See, e.g., *Francis v. State*, 808 So. 2d 110 (Fla. 2001); *Hudson v. State*, 708 So. 2d 256, 262 (Fla. 1998); *Blanco v. State*, 706 So. 2d 7, 11 (Fla. 1997); *Banks v. State*, 700 So. 2d 363 (Fla. 1997); *Mills v. State*, 476 So. 2d 172, 178 (Fla. 1985).

⁴⁰ To the extent Gamble argues that the entire sentencing structure is flawed, he is in error. This Court can and has fashioned workable solutions to enhancing the application of Florida’s sentencing procedure. Any call for a wholesale revamping by the Florida Legislature because of *Ring*, is unwarranted. This Court may craft procedures and rules or instructions that will address concepts discussed in *Ring*.

⁴¹Likewise, the fact that the *Apprendi* rationale has been extended to apply to the sentencing phase of capital cases does not mean that this Court committed some error in *Mills* by following the plain language of *Apprendi* and declining to extend it beyond the limitations set out in the opinion itself. That

The aggravating circumstances contained in Florida law are not, unlike their Arizona counterparts, equal to “elements of a greater offense” -- Florida determines death eligibility at the **guilt** stage, and Arizona did not. That distinction is the end of the issue.⁴²

III. THE “INEFFECTIVENESS IN REGARD TO THE SEVERANCE” CLAIM

On pages 33-35 of the petition, Gamble argues that his appellate counsel was ineffective for not presenting the co-defendant’s “criminal background” and for not raising an issue relating to trial counsel’s motion for severance of the defendants. To the extent that Gamble’s claim is that appellate counsel should have raised an ineffective assistance of counsel claim with respect to the severance,⁴³ that claim is

does not change the analysis of Florida law contained in *Mills*, nor does it somehow invalidate this Court’s opinion.

⁴²This Court correctly followed binding precedent in *Mills* when it declined to extend *Apprendi* to capital cases in light of the explicit language of that opinion. The fact that the *Ring* Court did so apply *Apprendi* does not mean that **this** Court misinterpreted **Florida** law -- those components of the *Mills* decision are independent of each other, **and nothing has called this Court’s plain statement about the functioning of Florida law into question.** That portion of *Mills* is undisturbed by *Ring*, and, if for no other reason than *stare decisis*, should not be reconsidered in this case.

⁴³The claimed “ineffectiveness” is **trial** counsel’s seeking to have Gamble’s trial several from that of his co-defendant, and in appellate counsel’s “failure to present” facts about the co-defendant. The first component is procedurally barred, and the second if frivolous.

procedurally barred -- it is inappropriately presented in a petition for habeas corpus relief because it is properly brought in a Rule 3.850 proceeding.⁴⁴

In denying relief on Gamble's "proportionality" claim, this Court stated:

One of the non-statutory mitigating factors given "some" weight was Love's sentence of life. Gamble asserts that his jury would have also recommended a life sentence if it had been informed of Love's sentence. Gamble proffers that this factor singlehandedly requires a sentence reduction. We disagree. Love's sentence was based on a guilty plea entered after Gamble's penalty phase proceedings. Clearly the Gamble trial judge was not required to postpone Gamble's sentencing and await Love's plea and sentence. We refuse to speculate as to what may have occurred had the Gamble jury been made aware of the posture of Love's case. We find no error relative to the issue. We have also reviewed the sentencing order and find that the trial court properly considered and weighed the aggravating and mitigating factors. *See Ferrell v. State*, 653 So. 2d 367 (Fla. 1995). We find Gamble's sentence of death proportionate in light of our previous opinions, our review of the sentencing order, and the instant facts.

Gamble v. State, 659 So.2d at 245. This claim has already been decided, at least in large part, by this Court -- for that reason, it is procedurally barred at this point in the proceedings. In any event, Gamble has raised this claim merely to preserve it rather than arguing for reversal based upon it. *See, Petition*, at 33, where Gamble states that this claim is raised merely to preserve it for possible later review in accord with this

⁴⁴The spurious nature of this claim is apparent on its face -- **direct appeal** counsel cannot be ineffective for not raising a claim of **ineffectiveness** on the part of trial counsel. That sort of claim belongs in a Rule 3.850 motion, not as a frivolous claim in a habeas petition.

Court's comments in *Sireci v. State*, 773 So. 2d 34, 41 n.14 (Fla. 2000). Under any view of the circumstances, this claim is unworthy of review, and deserves no attention from this Court.

IV. THE COMPETENCY FOR EXECUTION CLAIM

On pages 35-38 of the petition, Gamble argues that he “may be” incompetent for execution at some point in time in the future, and acknowledges that this claim is not ripe for review because no death warrant is pending at this time. Florida law, as Gamble concedes, is clear that the issue of sanity for execution is not properly raised until such time as the Governor has issued a death warrant. *Petition*, at 43. *Hunter v. State*, 817 So. 2d 786, 799 (Fla. 2002); *Brown v. Moore*, 800 So. 2d 223, 224 (Fla. 2001); *Mann v. Moore*, 794 So. 2d 595, 600 (Fla. 2001); *Hall v. Moore*, 792 So. 2d 447, 450 (Fla. 2001); *see also*, *Fla. R. Crim. P.* 3.811(c). This claim is not yet ripe for review.

CONCLUSION

Wherefore, based upon the foregoing arguments and authorities, the Respondent submits that the petition for writ of habeas corpus should be denied in all respects.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above has been furnished by U.S. Mail to: **Robert T. Strain**, Assistant CCRC - Middle, **Elizabeth A. Williams**, Staff Attorney, 3801 Corporex Park Dr., Suite 210, Tampa, Florida 33619-1136, on this ____ day of December, 2002.

Of Counsel

CERTIFICATE OF COMPLIANCE

This brief is typed in Courier New 12 point.

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GENERAL