IN THE SUPREME COURT OF FLORIDA

Case No. SC02-1457

AMOS LEE KING, JR.,

Petitioner,

v.

MICHAEL MOORE,
Secretary, Florida
Department of Corrections,

Respondent.

CAPITAL CASE: DEATH WARRANT SIGNED EXECUTION SET FOR JULY 10, 2002 at 6:00 P.M.

REPLY TO RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS AND APPLICATION FOR STAY OF EXECUTION

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I. ARGUMENTS IN REPLY

A. RESPONDENT'S PROCEDURAL BAR ARGUMENTS HAVE BEEN REJECTED ALREADY AND HIS RETROACTIVITY ARGUMENT ONLY BEGS THE QUESTION OF *RING*'S IMPACT

This Court previously addressed Petitioner's Sixth Amendment claim on the merits, *King v. State*, 808 So.2d 1237 (Fla. 2002), as well as the claims of all others who sought relief under *Apprendi v. New Jersey*, 530 U.S. 466 (2000). *See Porter v. State*, 2002 Fla. LEXIS 1337, *11 (Fla. June 20, 2002) (citing decision in successive habeas case of *Mills v. Moore*, 786 So.2d 532 (Fla. 2001) for proposition that claim is "meritless"). In doing so this Court rejected Respondent's argument that such claims may be procedurally barred.[1]

Respondent does not and could not dispute that until the Supreme Court's decision in *Ring v. Arizona*, 536 U.S. ___ (2002), decided some 10 days before Petitioner filed the present petition, this Court's cases foreclosed relief on Petitioner's claim. Therefore, any suggestion that Petitioner's claims are time-barred or barred as successive is without merit. This Court's cases applying *Hitchcock v. Dugger*, 481 U.S. 393 (1987), to cases in which it had previously denied relief based on a conflict between Florida's standard jury instruction and *Lockett v. Ohio*, 438 U.S. 586 (1978), are controlling under these circumstances, and Respondent makes no attempt to

[1] Respondent unashamedly asks this Court to reverse itself now that *Ring* has undermined *Mills*. As Justice Harding wrote in *Mills*, "it is not the function of this Court to make new law on a case-by-case basis in order to reach a desired result. Once the law has been established by this Court, it is our responsibility to apply that law uniformly in all cases, regardless of the status of the players or the stakes of the game." *Mills v. Moore*, 786 So.2d 532, 540 (Fla. 2001) (Harding, J., concurring).

distinguish them. *See*, *e.g.*, *Delap v. Dugger*, 513 So.2d 659, 660 (Fla. 1987) ("Because *Hitchcock* represents a substantial change in the law occurring since we first affirmed Delap's sentence, we are constrained to readdress his *Lockett* claim on its merits"); *Downs v. Dugger*, 514 So.2d 1069, 1070 (Fla. 1987) (*Hitchcock* constitutes "a substantial change in the law . . . that requires us to reconsider issues first raised on direct appeal and then in Downs' prior collateral challenges").

Respondent's assertion that *Ring* may not be applied retroactively under *Witt v. State*, 387 So.2d 922 (Fla. 1980), because it "has little or no impact on Florida's capital sentencing structure" (Resp. at 7) only begs the questions presented by the petition and underscores the need for a stay of execution. If Respondent's confusing welter of arguments demonstrates anything, it is that careful thought is needed to assess the full range of *Ring*'s implications in this State. Even the cases Respondent cites as support for the proposition that *Apprendi* need not apply retroactively because, for example, it "is about nothing but procedure," raise more issues than they resolve. In *McCoy v. United States*, 266 F.2d 1245 (11th Cir. 2001), one of the cases cited by Respondent (Resp. at 6 n.2), Circuit Judge Barkett reasoned that *Apprendi*'s "addition of an element to an offense is obviously a change in substantive criminal law," and not procedural. *McCoy*, 266 F.3d at 1272 (Barkett, J., concurring). Under the federal law being applied in that case, which is *not* the law of this State,[2] that difficult distinction made a huge difference.

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[2] It should be noted that the cases relied upon by Respondent are based on the federal habeas corpus doctrine of *Teague v. Lane*, 498 U.S. 288 (1989), which (continued...)

Executing Petitioner for a crime he has never been convicted of because the elements were not submitted to the jury or proved beyond a reasonable doubt would be an "obvious injustice." As Justice Scalia's opinion in *Sullivan v. Louisiana*, 508 U.S. 275 (1993), makes clear, a conviction imposed without requiring the jury to find each element beyond a reasonable doubt is a structural error in the most radical sense of the term because it has to do with the identity of the ultimate decisionmaker. Even in the non-capital context, this Court has held that allowing a judge to find facts subjecting a defendant to a higher degree of punishment "would be an invasion of the jury's historical function and could lead to a miscarriage of justice." *State v. Overfelt*, 457 So.2d 1385, 1387 (Fla. 1984).

In *Brown v. Louisiana*, 447 U.S. 323 (1980), the Supreme Court concluded that its earlier decision in *Burch v. Louisiana*, 441 U.S. 130 (1979), should be applied retroactively.[3] *Burch*, involved a far less serious issue than the one presented here, to wit, whether a defendant's conviction of a non-petty offense by a jury verdict of 5-to-1 violated the Sixth Amendment. If *Ring* stands for anything it is that the Sixth Amendment will not tolerate higher standards in non-capital cases than those required before a death sentence may be imposed. *Ring*, slip op. at 23

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[2](...continued)
is distinct, and in some respects contrary to, this Court's *Witt* rule. For example, while *Teague* bars retroactive application of some decisions on procedural law but not new decisions establishing substantive law, *Witt* does not recognize this distinction. Additionally, newness cuts against retroactive application under *Teague*, but in favor of retroactive application under *Witt*.

[3] *Brown* rejected precisely the suggestion made by Respondent's reliance upon *DeStefano v. Woods*, 392 U.S. 631 (1968). Resp. at 6. n.2.

("The right to trial by jury would be senselessly diminished if it encompassed the factfinding necessary to increase a defendant's sentence by two years, but not the factfinding necessary to put him to death.").

B. FLORIDA'S DEATH PENALTY STATUTE FAILS TO SATISFY THE SIXTH AMENDMENT BECAUSE THE JUDGE AND NOT THE JURY HAS SOLE RESPONSIBILITY FOR FINDING THE FACTS NECESSARY TO SUBJECT PETITIONER TO THE DEATH PENALTY

1. The jury must have responsibility for finding the facts that make a defendant eligible for the death penalty. *Ring v. Arizona*, slip op. at 2, 16, 19, 23.

Under *Ring*, the procedural rights guaranteed by *Apprendi* – the rights to demand (a) a factual finding by (b) a unanimous jury, (c) beyond a reasonable doubt–apply to capital sentencing. Petitioner was sentenced to death under the F**lorida** statute that is unconstitutional because it makes imposition of a death sentence contingent upon the finding of sufficient aggravating circumstances and insufficient mitigating circumstances *yet* ***assigns to the judge, sitting without a jury, responsibility for finding those facts***. *See Ring v. Arizona*, 536 U.S. ___ (2002), slip op. at 22 (Arizona's capital sentencing scheme is unconstitutional "to the extent it allows a sentencing judge, sitting without a jury, to find an aggravating circumstance necessary for imposition of the death penalty"). That is how Florida's statute works, and Respondent cannot dispute it. In fact, Respondent, like the Supreme Court in

Walton v. Arizona, 497 U.S. 639 (1990),[4] agrees that the jury can play no role in the judge's factfinding because "**the jury** vote only represents the final jury determination as to the appropriateness of the death sentence in the case, *and* ***does not dictate what the jury found with regard to particular aggravating factors***." Resp. at 16 (emphasis added).[5]

Ring overruled *Walton* because the "Sixth Amendment would be senselessly diminished if it encompassed the factfinding necessary to increase a defendant's sentence by two years, but not the factfinding necessary to put him to death." *Ring*, slip op. at 23. Florida law senselessly diminishes the Sixth Amendment. For it requires that specific findings be made in non-capital felony cases, for example, where the legislature has increased the punishment for burglary if it occurred in a dwelling rather than a structure,[6] but not in capital cases,[7] even though different aggravating circumstances carry different weight depending on the

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[4] "A Florida trial court no more has the assistance of a jury's findings of fact with respect to sentencing issues than does a trial judge in Arizona." *Walton*, 497 U.S. at 648.

[5] The jury's participation at sentencing in Florida has never encompassed fact-findings.

[6] *See* Florida Standard Jury Instructions at 1508-1509.

[7] *Randolf v. State*, 562 So.2d 331, 339 (Fla. 1990) (citing *Hildwin v. Florida*, 648 U.S. 638 (1989) (*per curiam*) as authority for not requiring special verdicts on aggravating circumstances).

facts of the case,[8] and the same set of aggravating circumstances may be "sufficient" to sustain a death sentence in one case but not in another. Although Florida law requires that all jurors agree on each element of every non-capital offense – including those elements that establish an aggravated crime – a fact that Respondent ignores, **Florida law does not require that any number of jurors agree that the fact of an aggravating circumstance has been proved**. The rules of evidence apply to non-capital proceedings where an aggravating circumstance must be proved, but not in capital sentencing proceedings. Fla. Stat. § 921.141(1).[9] Most importantly, as discussed in more detail *infra*, Florida law make a death sentence contingent not on the finding of a single aggravating circumstance, as Respondent claims, but on a fact finding that there are "sufficient aggravating circumstance***s***."[10] Fla. Stat. § 921.141(3) (emphasis added). Yet the penalty phase jury is not instructed that the State must prove the existence of sufficient aggravating circumstances beyond a reasonable

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[8] *See Barclay v. Florida*, 463 U.S. 939 (1983).

[9] This is contrary to *Ring*'s requirement that capital proceedings embody the same jury trial protections as non-capital proceedings.

[10] Respondent simply skips over this step in the Florida capital sentencing process and argues that "the determination that the aggravating factors outweigh any mitigating factors" is not an element of capital murder in Florida. Resp. at 17. Petitioner disagrees, and so do Justices of the Supreme Court. *See infra* discussion of *Barclay v. Florida*, 463 U.S. 939 (1983). But regardless of whether the balance of aggravating and mitigating circumstances (the third step in Florida's tri-fold sentencing analysis) is a fact or not, Respondent does not and could not dispute that **the existence of sufficient aggravating circumstances to establish death-eligibility is a fact which the judge and only the judge must decide** in Florida.

doubt, or even by a preponderance of the evidence. That is a structural error for which the only possible cure is the vacating of the death sentence. *Sullivan*, *supra*.

Petitioner's challenge is to the judge's exclusive and independent role in make death-eligibility factfindings under Florida law; it is not a petition for jury sentencing. Because Respondent has no answer for the challenge Petitioner is actually making, he presents this Court with a straw horse argument on a point not raised, and then fails to knock even that down. Florida statute sections 775.082 and 921.141(3) parallel the Arizona statute struck down in *Ring* almost exactly. In both States it is the judge – sitting after the jury has been discharged, without a verdict or specific findings from them, and evaluating the evidence "[n]otwithstanding the recommendation of a majority of the jury" – who *must* find the existence of aggravating circumstances sufficient to form the basis of a death sentence before such a sentence may be imposed. Fla. Stat. §§ 775.082, 921.141(3) (maximum sentence for first-degree murder is life imprisonment unless the judge, notwithstanding the recommendation of a majority of the jury finds sufficient aggravating circumstances and insufficient mitigating circumstances). Respondent simply ignores sections 775.082 and 921.141(3) and the role of the judge under the plain language of the Florida statute,[11]

[11] Respondent never mentions that sections 775.082 and 921.141(3) expressly direct that no death sentence may be imposed unless the judge "notwithstanding the recommendation of a majority of the jury" finds the defendant eligible for the death penalty. That omission screams out for attention.

and invites this Court to alter 30 years of its death penalty jurisprudence.

Under sections 775.082 and 921.141, and this Court's cases interpreting them, the majority jury recommendation is neither a necessary nor sufficient condition for the imposition of a death sentence in Florida. A defendant in Florida cannot be sentenced to death based on a jury recommendation alone, *Ross v. State*, 386 So.2d 1191, 1198 (Fla. 1980), and a defendant can be sentenced to death even if all twelve jurors recommend against it. *See*, *e.g.*, *Marshall v. State*, 604 So.2d 799 (Fla. 1992) (upholding sentence of death although jury unanimously recommended sentence of life imprisonment). Against this background, no reasonable person would say that "Florida juries routinely 'authorize' the imposition of the death penalty by recommending that a death sentence be imposed."[12] Resp. at 19. It is absurd to say that a recommendation authorizes imposition of the death penalty in the face of a statute that requires the judge to find the circumstances that form the basis of the death sentence "notwithstanding the recommendation of a majority of the jury," and that prohibits imposition of the death penalty without those judicial findings.

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[12] To authorize means "to establish by or as if by authority"; "to invest especially with legal authority." Mirriam-Webster's Collegiate Dictionary OnLine. To recommend means "to present as worthy of acceptance or trial; to endorse as fit, worthy, competent"; "to advise." *Id.* The plain wording of section 921.141 subdivisions (2) and (3), and this Court's cases requiring that independent judicial factfindings form the basis of a death sentence conclusively establish that under any ordinary understanding of the words Florida juries do not "authorize" death sentences, they recommend them.

Petitioner's position after the jury rendered its advisory sentencing recommendation was no different from that of a defendant convicted of first-degree murder in Arizona because "[u]nder [Florida] law, [Petitioner] could not have been sentenced to death, the statutory maximum penalty for first-degree murder, unless further findings were made," *Ring*, slip op. at 5, and under Florida law those findings had to be made by the judge. Fla. Stat. §§ 775.082, 921.141(3).

Under the three decades old understanding of Florida's death penalty statute, it is the judge and not the jury who performs the task of narrowing by finding "sufficient aggravating circumstances." Respondent's citation to *Mills v. Moore*, 786 So.2d 532 (Fla. 2001), as support for the proposition that Florida's sentencing statute is different from Arizona's in this respect is perplexing because *Mills* says nothing about that. *Mills* recognized what the Supreme Court recognized and restated in *Ring*: that with respect to the requirements of the Sixth Amendment the Florida and Arizona death penalty schemes are indistinguishable. *Ring*, slip op. at 12 ("*Walton* found unavailing the attempts by the defendant-petitioner in that case to distinguish Florida's capital sentencing system from Arizona's"); *Mills*, 786 So.2d at 537 ("Because *Apprendi* did not overrule *Walton*, the basic scheme in Florida is not overruled either."). To argue in the face of *Ring*'s discussion of *Hildwin v. Florida*, 490 U.S. 638 (1989) (*per curiam*), the *only* Sixth Amendment case relied upon in *Walton*, *Ring*, slip op. at 11, that the Supreme Court has "left intact all prior opinions upholding the

constitutionality of Florida's death penalty scheme" (Resp. at 11), is to bathe in denial.

As this Court has said, "Florida statutory law details the role of a penalty phase jury, which directs the jury panel to determine the proper sentence without precise direction regarding the weighing of aggravating and mitigating factors in the process." *Cox v. State*, 27 Fla. L. Weekly S505 (Fla. 2002). Florida provides for jury co-sentencing in the sense that the majority vote of the jurors becomes a sentencing factor[13] considered by the judge *after the judge has made the findings that are a prerequisite for imposing the death penalty.*[14] Fla. Stat. § 921.141(3). Respondent is

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[13] Respondent's reliance upon the argument that "*Ring* affirms the distinction between 'sentencing factors' and 'elements' or an offense recognized under prior case law" (Resp. at 19), shows more than anything that this Court's scheduling order does not allow for meaningful briefing. *Ring* directly rejected the same argument when it was advanced by the State of Arizona:

> "[Respondent] Arizona also supports the distinction relied upon in *Walton* between elements of an offense and sentencing factors. See *supra*, at 11-12; Tr. of Oral Arg. 28-29. As to elevation of the maximum punishment, however, *Apprendi* renders the argument untenable; *Apprendi* repeatedly instructs in that context that the characterization of a fact or circumstance as an 'element' or a 'sentencing factor' is not determinative of the question 'who decides,' judge or jury."

Ring, slip op. at 18 (footnote omitted).

[14] This is the only sense in which the jury has recently been called a "co-sentencer" for *Eighth* – not Sixth – Amendment purposes. *Espinosa v. Florida*, 505 U.S. 1079, 1082 (1992) ("jury weighs aggravating and mitigating circumstances, and the result of that weighing process is then in turn weighed within the trial court's process of weighing aggravating and mitigating circumstances"). As Justice Scalia acerbically reminded Justice Breyer in *Ring*, the (continued...)

correct that *Ring* does not require jury sentencing – Petitioner never said it did. But that argument, not Petitioner's, proves too much. Respondent merely establishes that Florida law assigns to the jury a role that *Ring* considers insignificant.

> 2. Each and every fact that state law makes essential to imposing a death sentence must be submitted to the jury and proved beyond a reasonable doubt "whether the statute calls them elements of the offense, sentencing factors, or Mary Jane." *Ring*, slip op. at 2 (opn. of Scalia, J., concurring).

Ring holds that "[c]apital defendants . . . are entitled to a jury determination of *any* fact on which the legislature conditions an increase in their maximum punishment." *Ring*, slip op. at 2 (emphasis added). Where state law makes an increase in the maximum allowable punishment contingent upon the finding of more than one fact, "*[a]ll* the facts which must exist in order to subject the defendant to a legally prescribed punishment *must* be found by the jury." *Id.*, slip op. at 16 (quoting *Apprendi*, 530 U.S. at 499 (Scalia, J., concurring). The Florida legislature, unlike the Arizona legislature, did not condition imposition of the death penalty on the finding of a single aggravating circumstance. Although Florida law requires a judicial finding of *at least* one aggravating circumstance,[15] section 921.141(3) requires that the

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[14](...continued)
Court's Eighth Amendment death penalty cases do not come from "*Apprendi*-land." *Ring*, slip op. at 4 (opn. of Scalia, J., conc.). *Ring* does.

[15] *Banda v. State*, 536 So.2d 221, 225 (Fla. 1988) ("death penalty is not
(continued...)

judge must also find "sufficient aggravating circumstances," and "insufficient mitigating circumstances." Thus, *Ring* directly contradicts Respondent's claim that "in the wake of *Ring*, a jury only has to make a finding of one aggravator." Resp. at 12.

Moreover, because this Court has never said that in every case the existence of a single aggravating circumstance is "sufficient," accepting Respondent's argument would simply move Florida's death penalty statute out of the *Ring*/*Apprendi* frying pan and into to a fire of uncertainty equally damaging to its constitutionality.[16] In *Bertolotti v. Dugger*, 883 F. 2d 1503, 1527-28 (11th Cir. 1989), for example the Eleventh Circuit understood that under Florida's sentencing scheme conviction of felony murder did not equate with a finding of death-eligibility under the felony-murder aggravating circumstance because "the jury could have found Bertolotti guilty of felony murder and yet still not have concluded that the parallel aggravating circumstance justified the imposition of capital punishment; nor need the sentencing

[15](...continued)
permissible under the law of Florida where . . . no valid aggravating factors exist"); *Elam v. State*, 636 So.2d 1312, 1314 (Fla. 1994) (same).

[16] The Supreme Court upheld Florida's death penalty statute based in part on this Court's "'guarantee that the aggravating and mitigating reasons present in one case will reach a similar result to that reached under similar circumstances in another case.'" *Proffitt v. Florida*, 428 U.S. 242, 251 (1978) (quoting *State v. Dixon*, 283 So.2d 1, 10 (Fla. 1973); *id.*, at 253. To hold now that a single aggravating circumstance is in every case sufficient to justify imposition of the death penalty would remove the degree of consistency provided by this Court's case-by-case review.

judge have agreed with the jury's determination that felony murder had been proven beyond a reasonable doubt." *See also Rembert v. State*, 445 So.2d 337 (Fla. 1984) (single aggravator of murder in course of felony insufficient to sustain death sentence); *Menendez v. State*, 419 So.2d 312 (Fla. 1982) (same); *Terry v. State*, 668 So.2d 954 (Fla. 1996) (same).

Were this Court to agree with Respondent, it would radically alter the way in which Florida's death penalty statute has been understood. For example, both the plurality opinion in *Barclay v. Florida*, 464 U.S. 939 (1983), and Justice Stevens's concurring opinion[17] did not understand Florida law to allow for a death sentence in any case where there was only one aggravating circumstance. *Barclay*, 464 U.S. at 954 n.12 ("The language of the statute, which provides that the sentencer must determine whether 'sufficient aggravating circumstances exist,' § 921.141(3)(a), indicates that any single statutory aggravating circumstance may not be adequate to meet this standard if, in the circumstances of a particular case, it is not sufficiently weighty to justify the death penalty."); *id.*, 464 U.S. at 961-963 (Stevens, J., concurring). The *Barclay* plurality and Justices Stevens and Powell understood

[17] Because *Barclay* is a plurality opinion, and Justices Stevens and Powell concurred on the narrowest grounds, this is the controlling opinion. *Marks v. United States*, 430 U.S. 188, 193 (1976) ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds") (internal quotation omitted).

Florida's death penalty scheme to operate precisely as Petitioner described it in his petition. Contrasting Florida's sentencing scheme with Georgia's, Justice Stevens observed that in Florida a defendant becomes eligible for the death penalty only after the judge finds two of three criteria have been satisfied: "(1) that at least one statutory aggravating circumstance has been proved beyond a reasonable doubt; (2) that the existing statutory aggravating circumstances are not outweighed by statutory mitigating circumstances." *Id.*, at 961.

Because Florida law requires a finding sufficient aggravating circumstances, Respondent's argument regarding the prior felony and felony-murder aggravators in this case is of no moment. This Court cannot determine whether the consideration of these circumstances renders the other errors harmless because, in the absence of a jury verdict finding beyond a reasonable doubt that the aggravating circumstances were sufficient, no harmless error analysis is possible.[18] *Sullivan v. Louisiana*. 508 U.S. 275, 280 (1993). Moreover, the Petitioner's resentencing jury did not make a finding related to a prior felony.

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[18] Respondent's places his weight on a particularly thin reed when he argues based upon *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), that a prior-violent-felony aggravator may constitutionally be found by the judge. In *Apprendi*, Justice Thomas, one of the five-Member majority in *Almendarez-Torres*, said the case was wrongly decided. *Apprendi*, 530 U.S. at 519-520 (Thomas, J., concurring). But even if *Almendarez-Torres* is still good law, the finding of one aggravator is not the only fact that must be found in Florida under *Ring,* as discussed in the text *supra.*

Petitioner maintains he is entitled to the same protections afforded under Florida law for the finding of an element in any case. That includes the requirement of juror unanimity. Fla. R. Crim. Pro. 3.140. Respondent's argument that *Johnson v. Louisiana*, 406 U.S. 356 (1972), and *Apodaca v. Oregon*, 406 U.S. (1972), held that juror unanimity is not required is disingenuous. Neither case holds that non-unanimity is acceptable in a capital case. In fact, in each case, State law required juror unanimity in capital cases, making the issue moot. The sole issue presented and decided in *Apodaca* was whether the defendants' *noncapital* convictions by non-unanimous juries was constitutional.

This Court must apply *Ring* in the context of Florida law. Respondent's errors only show that this difficult task cannot be accomplished under this Court's briefing schedule. A stay should issue.

CONCLUSION

For the foregoing reasons as well as those raised in Mr. King's petition for writ of habeas corpus this Court should enter a stay of execution, conduct independent, plenary review of Mr. King's claims, and thereafter vacate the sentence of death.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Reply to Response to Petitioner's Consolidated Petition for Writ of Habeas Corpus and Motion to Reopen Rule 3.850 Appeal is being furnished by facsimile transmission to counsel for Respondent, Assistant Attorney General Carol M. Ditmar, Office of the Attorney General, 2002 N. Lois Avenue, Suite 700, Tampa, Florida 33607, this 8th day of July, 2002.

CERTIFICATE OF COMPLIANCE

This motion was prepared using Times New Roman 14 point font.

____
KEVIN T. BECK