IN THE SUPREME COURT OF FLORIDA

DARIUS MARK KIMBROUGH,

Petitioner,

v. **CASE NO. SCO3-228**

JAMES V. CROSBY, JR.
Secretary, Department of Corrections,
State of Florida,

Respondent.

_____/

RESPONSE TO PETITION FOR HABEAS CORPUS

AND

MEMORANDUM OF LAW

COMES NOW, Respondent, James V. Crosby, Jr., Secretary of the Department of Corrections for the State of Florida, by and through the Attorney General of the State of Florida and the undersigned counsel, who answers the petition, and states:

I.

PRELIMINARY STATEMENT

Respondent denies petitioner is being illegally restrained and denies each and every allegation in the instant petition indicating in any manner that petitioner is entitled to relief from this Court.

II.

RELEVANT PROCEDURAL HISTORY AND FACTS

The State generally accepts the procedural history set forth in Kimbrough's Habeas Petition. A detailed statement of the facts is contained in the Respondent's Answer Brief on appeal from the denial of Petitioner's Motion for Post-Conviction Relief filed on the same date as this Response.

ARGUMENT

I.

WHETHER FLORIDA'S CAPITAL SENTENCING SCHEME IS CONSTITUTIONAL IN LIGHT OF APPRENDI V. NEW JERSEY AND RING V. ARIZONA? (STATED BY RESPONDENT).

The decision in Apprendi v. New Jersey, 530 U.S. 466 (2000) and the recently decided case of Ring v. Arizona, 122 S. Ct. 2428 (2002) do not provide any basis for questioning Petitioner's convictions or resulting death sentence.

In order to preserve this issue for review, trial counsel must have lodged the specific constitutional objections in the trial court below and the issue must have been raised on direct appeal. The challenge to Florida's capital sentencing scheme is procedurally barred. While Apprendi was not decided until after Petitioner's trial and direct appeal, this fact does not excuse him from raising the legal tenets and factual basis for

his argument below.[1] This Court has applied the procedural bar doctrine to claims brought under the predecessor decision of Apprendi v. New Jersey, 530 U.S. 466 (2000). See McGregor v. State, 789 So. 2d 976, 977 (Fla. 2001); Barnes v. State, 794 So. 2d 590 (Fla. 2001).

Moreover, this Court has consistently upheld Florida's death penalty statute in response to challenges under Ring, holding that unlike the situation in Arizona, the maximum sentence for first degree murder in Florida is death. Porter v. Crosby, 840 So. 2d 981, 986 (Fla. 2003) (stating that "we have repeatedly held that the maximum penalty under the statute is death and have rejected the other Apprendi arguments" [that aggravators need to be charged in the indictment, submitted to jury and individually found by unanimous jury]); see also Anderson v. State, 28 Fla. L. Weekly S51 (Fla. Jan. 16, 2003); Cole v. State/Crosby, 28 Fla. L. Weekly S58, 64 (Fla. Jan. 16, 2003); Conahan v. State, 28 Fla. L. Weekly S70, 57 n.9 (Fla. Jan. 16, 2003); Lucas v. State/Moore, 28 Fla. L. Weekly S29, 32 (Fla. Jan. 9, 2003); Spencer v. State/Crosby, 28 Fla. L. Weekly S35, 41 (Fla. Jan. 9, 2003); Fotopoulos v. State, 838 So. 2d 1122

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[1]No claim of ineffective assistance of appellate counsel has been presented as to this issue. Even if such a claim had been presented it is without merit as ineffective assistance cannot be used to circumvent the procedural bar.

(Fla. 2002); Bruno v. Moore, 838 So. 2d 485 (Fla. 2002); Marquard v. State/Moore, 27 Fla. L. Weekly S973, 978 n. 12 (Fla. Nov. 21, 2002); Chavez v. State, 832 So. 2d 730 (Fla. 2002); King v. Moore, 831 So. 2d 143 (Fla. 2002); Bottoson v. Moore, 833 So. 2d 693 (Fla. 2002). Since Florida's death penalty statute does not suffer from the constitutional infirmities that resulted in the remand to Arizona in Ring, Petitioner is not entitled to relief.

In addition, the Ring decision is not subject to retroactive application under the principles of Witt v. State, 387 So. 2d 922, 929-30 (Fla. 1980). Pursuant to Witt, Ring is only entitled to retroactive application if it is a decision of fundamental significance, which so drastically alters the underpinnings of Petitioner's death sentence that "obvious injustice" exists. New v. State, 807 So. 2d 52 (Fla. 2001). In determining whether this standard has been met, this Court must consider three factors: the purpose served by the new case; the extent of reliance on the old law; and the effect on the administration of justice from retroactive application. Ferguson v. State, 789 So. 2d 306, 311 (Fla. 2001). Application of these factors to Ring, which did not directly or indirectly address Florida law, offers no basis for consideration of Ring in this case. See Cannon v. Mullin, 297 F.3d 989 (10th Cir.

2002) (rejecting the claim that Ring is retroactive in federal courts); Whisler v. State, 36 P.3d 290 (Kan. 2001)(state supreme court rejecting retroactivity of Apprendi).

Finally, even assuming *arguendo*, that Ring has some impact upon this case, any error must be regarded as harmless. The record establishes that Petitioner was indicted and a jury found him guilty as charged of first-degree murder, sexual battery and burglary (qualifying felony aggravators). Assuming *arguendo*, Petitioner's argument regarding aggravating circumstances based upon Ring is well taken, no relief is warranted in this case. See United States v. Cotton, 122 S.Ct. 1781 (2002)(finding Apprendi error harmless).

II.

WHETHER MR. KIMBROUGH'S EIGHTH AMENDMENT RIGHT AGAINST CRUEL AND UNUSUAL PUNISHMENT WILL BE VIOLATED AS HE MIGHT BE INCOMPETENT AT THE TIME OF EXECUTION? (STATED BY RESPONDENT).

As Petitioner recognizes, this claim is premature under the procedural posture of his case. Florida law is clear that the issue of competency for execution is not properly raised until such time as the Governor has issued a death warrant. Hunter v. State, 817 So. 2d 786, 799 (Fla. 2002); Brown v. Moore, 800 So. 2d 223, 224 (Fla. 2001). In any case, Petitioner has offered no facts to suggest that he is incompetent now. Moreover, during

the evidentiary hearing below, he failed to establish that he suffers from any mental condition or defect which might render him incompetent in the future.

WHEREFORE, based on the foregoing arguments and authorities, the instant Petition for Writ of Habeas Corpus should be summarily denied on the merits.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U. S. Mail to Robert T. Strain, Assistant Capital Collateral Regional Counsel - Middle Region, 3801 Corporex Park Dr., Suite 210, Tampa, Florida 33619-1136, on this ___ day of May, 2003.

CERTIFICATE OF FONT COMPLIANCE

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

Respectfully submitted,

CHARLES J. CRIST, JR.
ATTORNEY GENERAL

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