IN THE SUPREME COURT OF FLORIDA

THOMAS DEWEY POPE,

Petitioner,

vs. Case No. SC 02-1833

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

Respondent.
_____/

STATE'S RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

LESLIE T. CAMPBELL
ASSISTANT ATTORNEY GENERAL
FLA. BAR NO. 0066631
1515 NORTH FLAGLER DRIVE
9TH FLOOR
WEST PALM BEACH, FL. 33401
OFFICE: (561) 837-5000
FACSIMILE: 9561) 837-5108

ATTORNEY FOR RESPONDENT

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## PROCEDURAL HISTORY

On March 25, 1981, a grand jury indicted Pope for the first-degree murders of Al Doranz ("Doranz"), Caesar DiRusso ("DiRusso"), and Kristine Walters ("Walters"). Following his jury trial, Pope was found guilty of all charges. After the penalty phase, the jury recommended, and the trial judge imposed life sentences for the murders of Doranz and DiRusso, and a death sentence for Walters' murder. On appeal, the Florida Supreme Court found the following facts and affirmed the judgments and sentences in all respects.

> On January 19, 1981, the bodies of Al Doranz and Caesar DiRusso were discovered in an apartment rented to Kristine Walters. Both had been dead several days but DiRusso's body was in a more advanced state of decomposition than Doranz's. Both victims had been shot, Doranz three times and DiRusso five times. A spent .22 caliber shell casing was found under DiRusso's body. Three days later, the body of Kristine Walters was found floating in a canal. She had been shot six times with exploding ammunition, her skull was fractured and she had been thrown into the canal while still breathing.
>
> All three victims had been shot with exploding ammunition, so ballistics comparison was impossible. However, parts of an AR-7 rifle were found in the canal near Walter's body and the spent shell casing under DiRusso's body had been fired from an AR-7 weapon.
>
> Investigation led to appellant's

girlfriend, Susan Eckard [sic],[1] and ultimately police were able to show that Doranz purchased an AR-7 rifle for Pope shortly before the murder. Eckard [sic] and Pope admitted being with Doranz and Walters at Walter's apartment on Friday night, the night Doranz and DiRusso were killed. Eckard [sic] later testified that Pope had arranged a drug deal with Doranz and DiRusso. She stated that she and Pope left Walter's apartment to visit Clarence "Buddy" Lagle and to pick up some hamburgers. They then returned to the apartment where Pope and Doranz convinced Walters to go with Eckard [sic] to the apartment where Pope had been staying.

Later that same night, Pope arrived at his apartment and told the women there had been trouble and that Doranz had been injured but that it was best for Walters to stay away from him for awhile. Eckard [sic] said she knew that DiRusso and Doranz were dead, and that she had known Pope intended to kill them at this point. The next day, Walters checked into a nearby motel, where Pope supplied her with quaaludes and cocaine. On Sunday, Pope told Walters he would take her to see Doranz. Eckard [sic] testified that Pope had told her he knew he had to get rid of Walters but that he regretted it because he had become fond of her. According to Eckard [sic], Pope described Walter's murder when he returned and said the gun had broken when he beat Walters over the head with it. The next day Eckard [sic] went with Pope to the scene of the crime to collect fragments of the broken stock and to look for the missing trigger

[1] Susan Eckhart's name has been spelled in different ways throughout Pope's case. She was not asked to spell her name during her testimony at trial, so the court reporter spelled it "Eckerd." This Court identified her as "Eckard." Initially, Pope spelled her name "Eckhart" in his Rule 3.850 motion and has generally maintained this spelling throughout his postconviction process. The State herein adopts that spelling.

assembly and receiver.

> Buddy Lagle told the police he had made a silencer for the AR-7 rifle at Pope's request. Because Lagle planned to leave the jurisdiction to take a job on a ship in the Virgin Islands, he was deposed on videotape pursuant to an order granting the state's motion to perpetuate testimony. When the state was unable to produce him at trial, the videotape was admitted into evidence.

Pope v. State, 441 So. 2d 1073, 1074-75 (Fla. 1983).

On August 5, 1985, Pope amended his petition for writ of habeas corpus filed with this Court. In such petition, Pope raised the following issues: (1) improper remarks were made by the prosecutor and trial judge, (2) the trial court's failure to provide Pope with a presentence investigation report was error, (3) the sentencing process improperly encouraged the jury to weigh the circumstances surrounding the death of the three victims, and (4) the jury's sentencing role was trivialized. Pope v. Wainwright, 496 So. 2d 798, 801, 803, 804 (Fla. 1986). In denying state habeas relief, this Court found that all of the foregoing points were not objected to at trial, and thus, appellate counsel could not be deemed ineffective unless the errors were fundamental. The Court determined that if the trial court's and prosecutor's challenged comments were erroneous they were not so fundamental as to require a new trial. Pope, 496 So. 2d at 801-03. It was also determined that because the pre-sentence investigation report contained no surprises, the

admittedly abbreviated review did not constitute fundamental error, and appellate counsel, therefore, was not ineffective. Id. at 804. Also rejected was Pope's challenge to the constitutionality of the death penalty. The Court held that the record confirmed the death sentence was imposed in a fundamentally fair manner. Id. at 804-05.

Pope' January 14, 1987 petition for certiorari to the United States Supreme Court, raised two claims related to Florida's capital sentencing: (1) the failure to apply Caldwell v. Mississippi, 472 U.S. 320 (1985) and (2) the improper remarks from the trial court and prosecutor. The Supreme Court denied certiorari without comment. Pope v. Florida, 480 U.S. 951 (1987).

Prior to filing his state habeas petition, on September 17, 1984, Pope had earlier filed a motion pursuant to Florida Rule of Criminal Procedure 3.850[2], in the state trial court, but it was never ruled upon. On December 30, 1986, Pope amended his Rule 3.850 motion, raising claims of ineffective assistance of guilt and penalty phase counsel. (Amended Motion at 289-308, 336-37). After the State responded, the trial court held that, except for two claims, the allegations set forth in the motion were either insufficiently pled to state a claim for relief, or were specifically refuted by the record. The trial court

[2] The motion was entitled "Motion for New Trial".

ordered an evidentiary hearing to determine whether trial counsel was ineffective (1) for failing to prevent the introduction of the Lagle videotape, and (2) for presenting the Vietnam Syndrome Defense against Pope's wishes.

Following the evidentiary hearing on the first claim, the trial court held that defense counsel was not ineffective in his actions regarding the admission of the Lagle videotape.[3] Relief was also denied with respect to trial defense counsel's presentation of the Vietnam Syndrome Defense. The trial court found Pope knew, understood, and concurred with his counsel that mental health expert, Dr. Weitz, should be utilized during the guilt phase of the trial. The court also determined Pope was an active participant in his own trial and his will had not been overborne by trial counsel. The Florida Supreme Court affirmed the denial of postconviction relief. Pope v. State, 569 So. 2d 1241 (Fla. 1990).

On September 4, 1991, Pope filed his first federal habeas petition. In its response, the State argued, *inter alia*, that the petition should be denied because it contained both exhausted and unexhausted claims in that several claims either had never been raised in state court, included evidence and

[3] Pope appealed the denial of his motion, but the Florida Supreme Court dismissed the appeal upon the State's motion because the trial court had indicated in its order that it wanted to hear additional evidence on another claim for relief.

legal arguments not previously presented in state court, or included additional allegations of ineffective assistance of counsel which had never been alleged in state court. In dismissing Pope's petition without prejudice, the federal district court agreed that Pope could not raise instances of ineffective assistance of counsel that he had not raised in the state court previously. A year after the federal habeas corpus petition was dismissed, Pope filed a second motion for postconviction relief in state court raising claims of ineffective assistance of guilt and penalty phase counsel, as well as challenging the jury instructions given at the penalty phase.

Prior to the State's response, Pope filed a pro se "Motion for Hearing to Determine Competency of Appointed Collateral Counsel and Consolidated Motion for the Appointment of Capital Collateral Representatives." Simultaneously, Pope sought to hold the proceedings in abeyance pending said motion, and filed his own amended motion for postconviction relief. As a result of Pope's motions, pro bono counsel moved to withdraw. The Office of Capital Collateral Representatives ("CCR") moved to hold the proceedings in abeyance, because it was unable to designate counsel to represent Pope, should pro bono counsel withdraw. After a hearing, the trial court ruled it would grant pro bono counsel's motion to withdraw once it had ruled on

Pope's Rule 3.850 motion, thereby, denying both motions to hold the proceedings in abeyance.

In its response to Pope's second postconviction motion, which pro bono counsel had filed, the State argued Pope's claims were procedurally barred, and he had failed to overcome the bar. Following the State's response, Pope filed another pro se motion for conflict-free counsel. Ultimately, on May 29, 1996, the trial court summarily denied Pope's original Rule 3.850 motion filed by pro bono counsel and Pope's own pro se amended Rule 3.850 motion as procedurally barred.

Following the trial court's order, CCR sought to clarify the status of counsel and to hold the proceedings in abeyance. It believed that, because the trial court allowed pro bono counsel to withdraw immediately following the resolution of the Rule 3.850 motion, Pope was unrepresented for purposes of filing a motion for rehearing. The trial court acknowledged pro bono counsel had withdrawn and CCR "would be the appropriate counsel" to represent Pope in any further proceedings before the trial court. However, it ultimately found "no reason to reconsider its dismissal" of the postconviction relief motions, "as they were both successive." Hence, the trial court declined to hold the proceedings in abeyance, and Pope appealed to this Court.

On appeal, he raised the following issues for review:

ARGUMENT I - MR. POPE WAS DENIED HIS RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL AND

> TO A RELIABLE ADVERSARIAL TESTING AT THE GUILT PHASE OF HIS CAPITAL TRIAL, IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.
>
> ARGUMENT II - MR. POPE'S SENTENCING JURY RECEIVED UNCONSTITUTIONALLY VAGUE JURY INSTRUCTIONS ON AGGRAVATING CIRCUMSTANCES, IN VIOLATION OF ESPINOSA V. FLORIDA AND JACKSON V. STATE. MR. POPE RECEIVED CONSTITUTIONALLY INEFFECTIVE ASSISTANCE OF COUNSEL BECAUSE TRIAL COUNSEL FAILED TO KNOW THE LAW AND ADEQUATELY OBJECT TO IMPROPER INSTRUCTIONS.
>
> ARGUMENT III - THE LOWER COURT ERRED IN DENYING MR. POPE'S MOTION TO APPOINT CONFLICT-FREE COUNSEL AND HIS AMENDED MOTION FOR POSTCONVICTION RELIEF.

This Court affirmed the summary denial of Pope's ineffectiveness claim and confirmed that Pope was procedurally barred from raising allegations of ineffective assistance of counsel that he could have, and should have, raised in his original Rule 3.850 motion. Pope v. State, 702 So.2d 221, 222-23 (Fla. 1997). Similarly, the Court affirmed the denial of Claim II, wherein Pope challenged the constitutionality of the HAC and CCP aggravating factor instructions, and trial counsel's ineffectiveness for failing to challenge them. The Court found these claims procedurally barred as well. Id. at 223-24. Finally, as to Pope's third issue, the Court found no error in the trial court's denial of Pope's pro se motion for conflict-free counsel or the dismissal of Pope's pro se Rule 3.850 motion. Id. at 224.

In February 1999, Pope returned to federal court and on August 31, 1999, the State responded to the habeas petition maintaining that procedural and exhaustion bars existed. On March 19, 2000, the federal district court found some matters barred and ordered the State to respond to others. On June 30, 2000, the State responded to Pope's latest petition. However, the matter was stayed and the case administratively closed based upon Pope's filing of a third postconviction relief motion.

On February 4, 2002, and before the federal court could rule on the habeas petition, Pope filed his third postconviction relief motion with the state trial court. Simultaneously, Pope requested that his federal habeas litigation be held in abeyance. Over the State's objection, such was granted on March 19, 2002 and the federal case was administratively closed.

The State, on February 28, 2002, responded to Pope's third Motion to Vacate Judgment and Sentence and Request for Evidentiary Hearing (3PCR 625-758). In that motion, Pope raised two claims. The first asserted that Lambrix v. State, 698 So. 2d 247 (Fla. 1996) had been overruled, thus, he could raise a claim of ineffective assistance of postconviction counsel and obtain review of procedurally barred claims. The second point was a challenge to the constitutionality of Florida's death penalty statute based upon Apprendi v. New Jersey, 530 U.S. 466

(2000) (3PCR 36-61). Following a Huff[4] hearing on the matter, the trial court denied relief summarily (3PCR Vol. 2 ; Vol. VI 620-24).

With respect to the claim of ineffective assistance of collateral counsel, the trial court concluded that the prevailing law as well as legislative and judicial directives did not support Pope's request for an evidentiary hearing on his claim of ineffectiveness of collateral counsel nor did it excuse the "procedural default in this case." (3PCR 622). Turning to the Apprendi claim, the trial court recognized it was constrained by Mills v. Moore, 786 So. 2d 532 (Fla.), cert. denied, 523 U.S. 1015 (2001) and relief was denied as a matter of law. (3PCR 621, 623). An appeal of that ruling is pending before this Court in case number SC02-1141. Simultaneously, Pope seeks relief through the instant petition for writ of habeas corpus and reproduces his postconviction appellate arguments almost verbatim.

[4] Huff v. State, 622 So. 2d 982 (Fla. 1983).

## REASONS FOR DENYING THE WRIT

### ISSUE I

POPE CLAIM OF INEFFECTIVE ASSISTANCE OF COLLATERAL COUNSEL IS LEGALLY INSUFFICIENT AND PROCEDURALLY BARRED (Restated).

As noted above, almost verbatim Pope reproduces the argument he presented in Claim II of his appeal of the denial of postconviction relief, case number SC02-1141. As such, the State will respond in like fashion.

While Pope recognizes that this claim was raised and rejected in the appeal of his second postconviction motion on the basis of Lambrix v. State, 698 So. 2d 247 (Fla. 1996); Pope v. State, 702 So. 2d 221, 223 (Fla. 1997), he suggests that Lambrix has been "effectively overruled" by Williams v. State, 777 So. 2d 947 (Fla. 2000) and DeMaria v. State, 777 So. 2d 975 (Fla. 2001), thus, the issue should be revisited (Petition at 13). Not only has Pope failed to state a valid claim for relief, but the issue has been decided advesely to him in prior postconviction litigation. Pope's reading of Williams and DeMaria is without merit as the narrow exceptions recognized,[5] do not alter the rule announced in Lambrix and reaffirmed in Vining v. State, 27 Fla. L. Weekly S654, 658 (Fla., Jul 03,

[5] See Florida Rule of Criminal Procedure 3.851(d)(2)(C) in which the missed deadline may be excused where "postconviction counsel, through neglect, **failed to file the motion**." (emphasis supplied).

2002); Spencer v. State, 27 Fla. L. Weekly S323, 328 (Fla., Apr 11, 2002); King v. State, 808 So. 2d 1237 (Fla. 2002). Because this was the second time Pope raised ineffective assistance of postconviction counsel and Lambrix remains the law in Florida, habeas relief must be denied.

Recently, in Valle v. Moore, 27 Fla. L. Weekly S713 (Fla. Aug. 29, 2002), this Court noted:

> Habeas petitions are the proper vehicle to raise claims of ineffective assistance of appellate counsel. *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 claims of trial counsel ineffectiveness. *See Jones v. Moore*, 794 So. 2d 579, 586 (Fla. 2001). However, appellate counsel cannot be considered ineffective under this standard for failing to raise issues that were not properly raised during the trial court proceedings and do not present a question of fundamental error. *See Rutherford*, 774 So. 2d at 643. The same is true for claims without merit because appellate counsel cannot be deemed ineffective for failing to raise nonmeritorious claims on appeal. *See id.* In fact, appellate counsel is not necessarily ineffective for failing to raise a claim that might have had some possibility of success; effective appellate counsel need not raise every conceivable nonfrivolous issue. *See Jones v. Barnes*, 463 U.S. 745, 751-53, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983) (appellate counsel not required to argue all nonfrivolous issues, even at request of client); *Provenzano v. Dugger*, 561 So. 2d 541, 549 (Fla. 1990) (noting that "it is well established that counsel need

> not raise every nonfrivolous issue revealed by the record"). Finally, a claim that has been resolved in a previous review of the case is barred as "the law of the case." *See Mills v. State*, 603 So. 2d 482, 486 (Fla. 1992).

Valle, 27 Fla. L. Weekly at S713. A petition for "habeas corpus is not a vehicle for obtaining additional appeals of issues which were raised, or should have been raised, on direct appeal or which were waived at trial or which could have, should have, or have been, raised in rule 3.850 proceedings." White v. Dugger, 511 So. 2d 554, 555 (Fla. 1987). See, Blanco v. Wainwright, 507 So. 2d 1377 (Fla. 1987); Copeland v. Wainwright, 505 So. 2d 425 (Fla. 1987). The Court "has made clear that habeas is not proper to argue a variant to an already decided issue." Jones v. Moore, 794 So. 2d 579, 583 n.6 (Fla. 2001). Likewise, while petitions for writ of habeas corpus properly address claims of ineffective assistance of appellate counsel; Rutherford v. Moore, 774 So. 2d 637, 643 (Fla. 2000), such "may not be used as a disguise to raise issues which should have been raised on direct appeal or in a postconviction motion." Freeman v. State, 761 So. 2d 1055, 1069 (Fla. 2000). Routly v. Wainwright, 502 So. 2d 901, 903 (Fla. 1987) (declining petitioner's invitation to utilize the writ of habeas as a vehicle for the re-argument of issues which have been raised and ruled on by this Court) (quoting Steinhorst v. Wainwright, 477 So. 2d 537, 540 (Fla. 1985)).

This Court has rejected claims of error where such were not raised as claims of ineffective assistance of appellate counsel stating: "Freeman does not argue appellate counsel was ineffective for failing to raise this issue. The propriety of jury instructions is a direct appeal issue, and will not be considered on its merits in a habeas petition." Freeman, 761 So. 2d at 1072. Moreover, where an issue was presented on appeal and decided adversely to petitioner, habeas relief is not appropriate, because "[a]ppellate counsel cannot be ineffective for failing to convince the Court. Id.; See Swafford v. Dugger, 569 So. 2d 1264, 1266 (Fla. 1990) (noting that "[a]fter appellate counsel raises an issue, failing to convince this Court to rule in an appellant's favor is not ineffective performance.").

The propriety of collateral counsel's effectiveness was raised in Pope's second postconvction relief litigation (2PCR Initial Brief case number 89084 at 38-41). In resolving Pope's claim that trial counsel was ineffective as well as rejecting the issue of conflict-free collateral counsel, this Court stated:

> We have clearly held that successive postconviction relief motions that were filed after the expiration of the time limit must be based on newly discovered evidence. *See, e.g., Porter v. State*, 653 So.2d 374 (Fla.), *cert. denied* 514 U.S. 1092, 115 S.Ct. 1816, 131 L.Ed.2d 739, (1995); *see also Parker v. Dugger*, 550 So. 2d 459 (1989)

(defendant convicted of murder who had taken direct appeal to the Florida Supreme Court and later brought petition for postconviction relief which was denied by Court was barred from bringing second motion for postconviction relief). Here, Pope has not alleged new or previously unknown evidence. Neither has he alleged that a fundamental constitutional right has been established which should apply retroactively to his case. His motion alleges ineffective assistance of counsel, which he has raised before.

A defendant may not raise claims of ineffective assistance of counsel on a piecemeal basis by filing successive motions. *Jones v. State*, 591 So. 2d 911 (Fla. 1991). Where a previous motion for postconviction relief raised a claim of ineffective assistance of counsel, a trial court may summarily deny a successive motion which raises an additional ground for ineffective assistance of counsel. *Card v. Dugger*, 512 So. 2d 829 (Fla. 1987). Accordingly, it was proper for the trial court to summarily dismiss the claims here: they had already been raised in previous motions.

...

Additionally, there was no error in the trial court's denying Pope's motion to appoint conflict-free counsel and dismissing his amended motion for postconviction relief. In so ruling on the motions, the court wrote:

> Defendant's Motion for Postconviction Relief is successive; therefore, it is procedurally barred and may be dismissed.... Moreover, Defendant's Motion to Appoint Conflict-Free Counsel merely reiterates a previous request that was denied by this Court in its

> Order of February 5, 1996.... Thus, the current Motion must be summarily denied.
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> On February 5, 1996, the court issued an Order on Volunteer Counsel's Motion to Withdraw, stating that when the court ruled on the pending rule 3.850 motions, volunteer counsel's motion to withdraw would be granted. The court did not find a conflict of interest; it allowed counsel to withdraw at his own request. Moreover, the court appointed the Capital Collateral Representative to represent Pope in any further proceedings. There was no error in denying Pope's motions.
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> Because we find that Pope's claims are procedurally barred, we affirm the trial court's dismissal of his rule 3.850 motion.

Pope v. State, 702 So. 2d 221, 223-24 (Fla. 1997). Because the issue was raised and rejected previously, it should be found barred in this litigation. White v. Dugger, 511 So. 2d 554, 555 (Fla. 1987) (opining that "habeas corpus is not a vehicle for obtaining additional appeals of issues which were raised, or should have been raised, on direct appeal or which were waived at trial or which could have, should have, or have been, raised in rule 3.850 proceedings."); Blanco v. Wainwright, 507 So. 2d 1377 (Fla. 1987). See Aldridge v. State, 503 So. 2d 1257 (Fla. 1987) (finding defendant procedurally barred from raising claim when it was raised previously even though current claim based upon different issue).

However, should the Court find that the matter is not barred, Pope has not presented a valid claim for relief.

Ineffective assistance of collateral counsel is not a valid claim for relief in Florida. Lambrix, 698 So. 2d at 248 (announcing that "claims of ineffective assistance of postconviction counsel do not present a valid basis for relief"). See Vining, 27 Fla. L. Weekly at S658 (reaffirming that ineffective assistance of collateral counsel in not a valid claim); Spencer, 27 Fla. L. Weekly at S328 (same); King, 808 So. 2d at 1245 (same); Waterhouse v. State, 792 So. 2d 1176, 1193 (Fla. 2001). Although Williams, 777 So. 2d at 947 found that Lambrix did not foreclose **permitting belated appeal**[6] where postconviction counsel failed to timely file a notice of appeal, it did not overturn the Lambrix holding that ineffective assistance of postconviction counsel is not a claim in Florida.

Additionally, Pope has not shown any change in the law to support recognition of a substantive claim of ineffective

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[6] While Williams v. State, 777 So. 2d 947 (Fla. 2000); Medrano v. State, 748 So. 2d 986 (Fla. 1999); and Steele v. Kehoe, 747 So. 2d 931 (Fla. 1999) contemplate a hearing on a motion challenging the actions of collateral counsel, such hearing is limited to those situations where the claim stems from counsel's failure to file a postconviction motion or an appeal from the denial of that motion. See Florida Rule of Criminal Procedure 3.850 (b)(3) and 3.851(d)(2)(C) in which the missed deadline may be excused where "postconviction counsel, through neglect, **failed to file the motion**." (emphasis supplied). The **hearing is limited** to determining the propriety of granting a request to file a belated action, not for determining whether counsel failed to present meritorious claims for relief. Pope has not claimed he was precluded from filing a postconviction relief motion or an appeal therefore. He has not presented a recognized claim for review, much less, relief.

assistance of postconviction counsel. In fact, recently this Court reaffirmed that claims of ineffective assistance of postconviction counsel are not valid claims in Florida. In doing so, this Court cited Lambrix as supporting authority. See Vining, 27 Fla. L. Weekly at S658 (agreeing that "claims of ineffective assistance of postconviction counsel do not present a valid basis for relief."); Spencer, 27 Fla. L. Weekly at S328 (same); King, 808 So. 2d at 1245 (same); Waterhouse, 792 So. 2d at 1193 (same).

In an attempt to gain review, Pope asserts that there has been a change in the law with respect to claims of ineffective assistance of postconviction counsel. As support he cites to Williams; DeMaria; Medrano; and Steele. However, none further his position as each addressed the limited circumstance where counsel was hired to file a postconviction motion and/or appeal, but failed to do so. Under such circumstance, the Florida Supreme Court determined that "due process entitles a prisoner to a hearing on a claim that he or she missed the deadline to file a rule 3.850 motion because his or her attorney had agreed to file the motion but failed to do so in a timely manner." Steele, 747 So. 2d at 934 (emphasis supplied); Williams, 777 So. 2d at 948-49 (finding Lambrix does not foreclose provision permitting belated appeal where postconviction counsel has failed to timely file a notice of appeal); DeMaria, 777 So. 2d

at 975 (same). It is Pope's position that Williams is "directly on point" and he analogizes a missed filing deadline to missing a meritorious argument in postconviction litigation. Excusal of a missed deadline where counsel was hired for that express purpose is vastly different from recognition of a new constitutional claim. Such claim is not recognized in Florida and the basis for that decision rests with well settled Florida decisional law in addition to the analysis of the United States Supreme Court.

In State v. Weeks, 166 So. 2d 892, 896 (Fla. 1964) and Graham v. State, 372 So. 2d 1363 (Fla. 1979), this Court noted that the flexibility in the due process standards of the Fifth Amendment to the United States Constitution permitted granting a postconviction litigant limited assistance even though he was not entitled to postconviction counsel. The Court in Weeks rejected the contention that collateral counsel was required as a matter of right and reasoned:

> The Supreme Court of the United States has itself announced that post-conviction habeas corpus and motions under Section 2255, are independent original civil proceedings. *Heflin v. United States*, 358 U.S. 415, 79 S.Ct. 451, 3 L.Ed.2d 407; *Townsend v. Sain*, 372 U.S. 293, 83 S.Ct. 745, 9 L.Ed.2d 770.
>
> Of further persuasion was the action of the Judicial Conference of the United States which classified in forma pauperis motions under Section 2255, as being civil in nature for purposes of docketing on the civil dockets of the federal courts. Proceedings

of the Judicial Conference of the United States, 1962 p. 76. See also, Right to Counsel in Criminal Post Conviction Review Proceedings, Cal.Law Review, December 1963, Vol. 51, p. 970, pp. 978-984; Boskey, The Right to Counsel in Appellate Proceedings, Minn.Law Review, Vol. 45, p. 783.

The sum of the authorities is that post-conviction remedies of the type under consideration are civil in nature and do not constitute steps in a criminal prosecution within the contemplation of the Sixth Amendment, supra. They do not require the application of the standard of absolutism announced by that amendment. Such remedies are subject to the more flexible standards of due process announced in the Fifth Amendment, Constitution of the United States. This means that in these collateral proceedings there is no absolute right to assistance of a lawyer. Nevertheless, Fifth Amendment due process would require such assistance if the post-conviction motion presents apparently substantial meritorious claims for relief and if the allowed hearing is potentially so complex as to suggest the need.

...

... Our analysis of the precedents, therefore, leads us to the following conclusions:

1. A proceeding under Rule 1, is civil in nature and analogous to post-conviction habeas corpus.

2. The due process requirements applicable to a Rule 1 proceeding are those suggested by Section 12, Declaration of Rights, Florida Constitution and the Fifth Amendment, United States Constitution, rather than the provisions of Section 11, Florida Declaration of Rights and the Sixth Amendment, United States Constitution.

Weeks, 166 So. 2d at 896. This flexibility was again recognized in Steele, 747 So. 2d at 934 where a belated filing of a postconviction relief motion was permitted.

Now, Pope asks this Court to find that failure to file a sufficient motion or failure to file a particular claim equates to negligence on the part of collateral counsel, thereby allowing a defendant to overcome any procedural bars.[7] Pope goes too far and confuses the "flexibility" of the Fifth Amendment with a right to effective assistance of counsel recognized under the Sixth Amendment to the United States Constitution. This Court should decline Pope's invitation as it would abrogate completely the distinction between the two amendments, overturn the well settled determination that a claim of ineffective assistance of collateral counsel is not a valid basis for relief in Florida, and undermine the principle of finality in criminal litigation.

Furthermore, in Pennsylvania v. Finley, 481 U.S. 551 (1987), the United States Supreme Court refused to extend a due process requirement for effective assistance of collateral counsel

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[7] It should be noted that not only was Pope's collateral counsel obtaining assistance from the "Volunteer Lawyer's Resource Center", but Pope did obtain an evidentiary hearing on two of the claims that were raised in his first postconviction relief litigation (2PCR 170-75; 3PCR 420-39, 450-61). Pope v. State, 569 So. 2d 1241 (Fla. 1990). Thus, the record establishes that collateral counsel filed a timely pleading - one which merited an evidentiary hearing.

claims to situations where a state has chosen to provide collateral counsel to indigent inmates. See Murray v. Giarratano, 492 U.S. 1 (1989). This announcement was embraced by this Court in Lambrix, 698 So. 2d at 248, where, it too, found a claim of ineffective assistance of collateral counsel did not present a valid basis for relief. In spite of the intervening case law of Steele, Williams, and DeMaria, which provide for the limited relief of a belated postconviction motion and/or appeal, as recently as July 3, 2002, the Florida Supreme Court has reaffirmed that claims of ineffective assistance of collateral counsel are not recognized claims here. See Vining, 27 Fla. L. Weekly at 658 (reaffirming that claim of ineffective assistance of postconviction counsel is not valid basis relief); Spencer, 27 Fla. L. Weekly at S328 (rejecting as not valid claim that collateral counsel was rendered ineffective based upon rule prohibiting juror interviews); Foster v. State, 810 So. 2d 910 (Fla. 2002) (refusing to consider claim that postconviction counsel rendered ineffective assistance by not arguing issue in collateral litigation). As such, Williams, and DeMaria do not overrule Lambrix and its holding that ineffective assistance of postconviction counsel does not exist as a constitutional claim.

This Court, in Waterhouse, has reasoned:

> **Even assuming that defense counsel was ineffective** in failing to move for recusal,

> this Court has repeatedly held that ineffective assistance of postconviction counsel is not a cognizable claim. See, e.g., *State ex rel. Butterworth v. Kenny*, 714 So. 2d 404, 408 (Fla. 1998) (*citing Hill v. Jones*, 81 F.3d 1015, 1025 (11th Cir. 1996) (**noting that there is no constitutional right to postconviction relief counsel and therefore ineffective assistance of postconviction relief counsel is not a cognizable claim**)); *Lambrix v. State*, 698 So.2d 247, 248 (Fla. 1996) (finding that claims of ineffective assistance of postconviction counsel do not present a valid basis for relief).

Waterhouse, 792 So. 2d at 1193 (emphasis supplied). See, King, 808 So. 2d at 1245 (Fla. 2002) (affirming ineffectiveness of collateral counsel does not state valid basis of relief); State v. Riechmann, 777 So. 2d 342, 366 (Fla. 2000) (noting Florida has not recognized ineffective assistance of collateral counsel claims).[8]

Pope also cites to a footnote in Peede v. State, 748 So. 2d 253, 256, n.5 (Fla. 1999) (IB 17) which chides a Capital Collateral Counsel for having prepared a conclusory brief on appeal. While the Court referenced a need for effective representation, it did not suggest that an ineffectiveness claim would be entertained even though the defendant himself had complained about his representation. As such, Peede does not

[8] It would appear that should claims of ineffective assistance of collateral counsel be recognized, such claims would be nothing more than avenues to present successive claims for relief and to extend ad infinitum collateral litigation. There would be no finality in criminal cases.

further Pope's position.

Likewise, reliance upon an unpublished order in Fotopoulous v. State, 741 So. 2d 1135 (Fla. 1999) (IB at 23) or the decision in Remeta v. State, 559 So. 2d 1132 (Fla. 1990) do not assist Pope. In no respect does this Court indicate that it is recognizing an ineffective assistance of collateral counsel claim in the Fotopoulous order or in the action related to compensation for clemency counsel. The Court's recognition that arguments were raised for the first time in the Fotopoulous oral argument and that the defendant would be given the opportunity to amend his postconviction motion when the case returned to the trial court does not establish a fundamental constitutional change in the law. Similarly, the need to compensate counsel properly in clemency proceedings in Remeta does not equate to the recognition of a constitutional claim of effective representation of collateral counsel. Neither Fotopoulous or Remeta establish a basis for overcoming Pope's procedurally barred, successive motion.

Clearly, there has been no change in the law permitting Pope to challenge the effectiveness of his collateral counsel and Pope has not established a basis for the rejection of this well settled law. Pope has not set out a valid claim for habeas corpus relief. Moreover, to permit wholesale claims of ineffective assistance of postconviction counsel would permit

defendants to disregard procedural bars under the guise that collateral counsel was ineffective for not having raised the claim earlier. Such would undermine completely the principle of finality and would permit piecemeal litigation where it would be the defendant controlling the judicial system, not the Court. The well settled law should be reaffirmed, namely, that a substantive claim of ineffective assistant of postconviction counsel does not exist in Florida. Waterhouse, 792 So. 2d at 1193; Williams, 777 So. 2d at 948-49. From the foregoing, Pope has not established that he presented a valid claim and habeas corpus relief must be denied.

## ISSUE II

FLORIDA'S DEATH PENALTY STATUTE IS NOT UNCONSTITUTIONAL UNDER RING v. ARIZONA, 122 S.Ct. 2428 (2002) (Restated).

In his habeas petition, Pope challenges the constitutionality of the Florida's capital sentencing statute, section 921.141, Florida Statutes. It is the same claim, word-for-word, as presented in case number SC02-1141 currently before this Court for review of the denial of a successive postconviction relief motion. Because Pope's claim is identical, the State will utilize its analysis presented in the related appeal.

Pope asserts that Florida's capital sentencing statute is unconstitutional based upon the following grounds: (1) the aggravating factors were not charged in the indictment; (2) in Florida, the sentencing decision rests with the trial judge, and not the jury, in violation of Ring v. Arizona, 122 S.Ct. 2428 (2002) and Apprendi v. New Jersey, 530 U.S. 466 (2000); and (3) the State was not required to proved beyond a reasonable doubt that "sufficient aggravating circumstances" outweighed the mitigating circumstances before a death sentence was imposed. This Court should find that habeas corpus litigation is not the proper method for obtaining review of this claim. However, should the Court reach the merits, it will find that there is no constitutional infirmity based upon the recent announcement in

Ring or Apprendi. Relief should be denied.

"Habeas petitions are the proper vehicle to advance claims of ineffective assistance of appellate counsel." Rutherford, 774 So. 2d at 643. See, Downs v. Moore, 801 So. 2d 906, 909 (Fla. 2001) In Freeman, 761 So. 2d at 1069, this Court reiterated:

> The issue of appellate counsel's effectiveness is appropriately raised in a petition for writ of habeas corpus. However, ineffective assistance of appellate counsel may not be used as a disguise to raise issues which should have been raised on direct appeal or in a postconviction motion.

Freeman, 761 So. 2d at 1069 (emphasis supplied). See, Bryan v. Dugger, 641 So. 2d 61, 65 (Fla. 1994); Ferguson v. Singletary, 632 So. 2d 53, 58 (Fla. 1993); Pope v. Wainwright, 496 So. 2d 798, 800 (Fla. 1986).

Here, Pope does not even raise a claim of ineffective assistance of appellate counsel. The constitutionality of Florida's sentencing scheme and/or the imposition of the death penalty in this case was raised on direct appeal, state habeas litigation, and in the motions for postconviction relief. However, the instant matter was not presented, although it could have been. Pope v. State, 441 So. 2d 1073, 1074-75 (Fla. 1983); Pope v. Wainwright, 496 So. 2d 798, 804-05 (Fla. 1986); Pope v. State, 702 So.2d 221, 223-24 (Fla. 1997). Pope attempts to re-challenge the constitutionality of section 921.141, Florida Statutes. His petition should be denied as as

attempt to gain a second appeal.

While Ring was decided recently, the issue addressed in Ring is neither new nor novel. Instead, the claim, or a variation of it, has been known prior to Proffitt v. Florida, 428 U.S. 242, 252 (1976) (holding that Constitution does not require jury sentencing). As such, the basis for the claim of constitutional error in the imposition of the death penalty has been available since Pope was sentenced to death. Yet, he did not raise the claim until now.[9] Pope has not given an explanation for this failure. Hence, the claim is barred, and relief should be denied.

Furthermore, the Ring decision is not subject to retroactive application under Witt v. State, 387 So. 2d 922, 929-30 (Fla.

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[9] Any issue which was or could have been raised in Pope's prior collateral pleadings is clearly procedurally barred. See Lambrix v. Singletary, 641 So. 2d 847, 848 (Fla. 1994) (opining that "Because ineffective assistance of counsel claims have been considered and rejected in a previous petition, Lambrix is procedurally barred from raising such claims again in a subsequent habeas petition"); Aldridge v. State, 503 So. 2d 1257 (Fla. 1987) (defendant procedurally barred from raising claim when such a claim has been raised previously even though the current claim is based on a different issue). This Court has consistently and repeatedly stated that collateral review does not constitute a second appeal. Issues that were or could have been raised on direct appeal or in prior collateral proceedings may not be litigated anew. See Teffeteller v. Dugger, 734 So. 2d 1009, 1025 (Fla. 1999) (holding that habeas petition claims were procedurally barred because the claims were raised on direct appeal and rejected by this Court or could have been raised on direct appeal); Johnson v. Singletary, 695 So. 2d 263, 265 (Fla. 1996); Medina v. State, 573 So. 2d 293 (Fla. 1990)(stating that it is inappropriate to use a different argument to re-litigate the same issue).

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

The United States Supreme Court recently held that an Apprendi claim is not plain error. United States v. Cotton, 122 S.Ct. 1781 (2002) (holding an indictment's failure to include quantity of drugs was 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 a plain error cognizable on direct appeal, it is not of sufficient magnitude to be a candidate for retroactive application in collateral proceedings. United States v. Sanders, 247 F.3d 139, 150-151 (4th Cir 2002) (emphasizing that finding something to be a structural error would seem to be a necessary predicate for a new rule to apply retroactively, and

therefore, concluding that Apprendi is not retroactive). Every federal circuit that has addressed the issue had found that Apprendi is not retroactive. See, Curtis v. United States, 294 F.3d 841, 842-43 (7th Cir. 2002) (holding Apprendi is not retroactive because it is not even applied in direct appeal without preservation relying upon United States v. Cotton, 122 S.Ct. 1781 (2002)); McCoy v. United States, 266 F.3d 1245 (11th Cir. 2001); United States v. Moss, 252 F.3d 993 (8th Cir. 2001); Jones v. Smith, 231 F.3d 1227 (9th Cir. 2001); United States v. Sanchez-Cervantes, 282 F.3d 664, 668 (9th Cir. 2002). Moreover, the United States Supreme Court has held that a violation of the right to a jury trial is not retroactive. DeStefano v. Woods, 392 U.S. 631 (1968) (refusing to apply the right to a jury trial retroactively because there were no serious doubts about the fairness or the reliability of the fact-finding process being done by the judge rather than the jury). However, should the Court find that the claim is not barred and reach the merits, it will find that Florida's death penalty statute is not unconstitutional.

Pope's assertion that section 921.141 is unconstitutional because the aggravating factors were not charged in the indictment and presented to the grand jury must fail. His argument is based upon an invalid comparison of federal cases, which have wholly different procedural requirements, to

Florida's capital sentencing scheme.[10] For example, in United States v. Allen, 247 F.3d 741, 764 (8th Cir. 2001), the Court of Appeals based its decision that the statutory aggravating factors under the Federal Death Penalty Act do not have to be contained in the indictment exclusively on Walton v. Arizona, 497 U.S. 639 (1990) which, of course, Ring overruled. As such, it was reasonable that the Supreme Court remanded Allen for reconsideration in light of Ring.

Moreover, the issue of whether the aggravating circumstances must be included in the indictment was not addressed expressly in Ring. In the absence of any United States Supreme Court ruling to the contrary, there is no need for this Court to reconsider its well established rejection of this claim. Sweet v. Moore, 822 So. 2d 1269 (Fla. 2002); Cox v. State, 819 So. 2d 705 (Fla. 2002) (noting that prior decision on these issues need not be revisited "unless and until" the United States Supreme Court recedes from Profitt v. Florida, 428 U.S. 242 (1976)).

In Harris v. United States, 122 S.Ct. 2406 (2002), which was released on the same day as Ring, the United States Supreme Court elaborated on its decision in Apprendi. The Supreme Court

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[10] the Fifth Amendment's grand jury clause has not been extended to the States under the Fourteenth Amendment. Apprendi, 530 U.S. 466, 477, n.3 (2000); Hurtado v. California, 110 U.S. 516 (1984) (holding there is no requirement for an indictment in state capital cases). This distinction alone, is dispositive of the claim.

described the holding in Apprendi as follows:

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

Harris, 122 S.Ct. at 2409. In light of that plain statement, which gives insight as to the interpretation of Ring, Pope can establish no basis for relief. Moreover, aggravating factors are not elements of the offense, but are capital sentencing guidelines. Poland v. Arizona, 476 U.S. 147, 156 (1986) (explaining aggravators are not separate penalties or offenses - they are standards to guide sentencer in choosing between alternatives of death or life imprisonment). To the extent that Pope suggests that the jury's role in Florida's capital sentencing process is insufficient, he improperly assumes that the jury recommendation itself is a vote as to the existence of aggravating factors. The jury vote merely represents the final determination as to the appropriateness of the sentence, not the jury's findings on aggravation. Pope's proposition that the jury determination that aggravation outweighs mitigation is an element of the crime is not well founded. There is nothing in Ring which supports Pope's assertion.

This Court in Mills v. Moore, 786 So. 2d 532 (Fla.), cert. denied, 523 U.S. 1015 (2001), held that death is the maximum sentence which could be imposed by virtue of a first-degree

murder conviction. It was reasoned:

> [t]he plain language of section 775.082(1) is clear that the maximum penalty available for a person convicted of a capital felony is death. When section 775.082(1) is read in pari materia with section 921.141, Florida Statutes, there can be no doubt that a person convicted of a capital felony faces a maximum possible penalty of death.

Mills, 786 So. 2d at 538 (Fla. 2001).[11] Nothing in Ring or Apprendi calls that decision into question.

Pope asserts that this Court's decision in Mills is faulty because it rested upon the discussion of Walton v. Arizona, 497 U.S. 639 (1990) in Apprendi, and now, such has been rejected in Ring. He claims that Mills was decided wrongly and that it is not the law in Florida because a jury must determine those factors which increase a penalty, those factors may not be labeled sentencing conditions to avoid the jury requirement, and death is not an option based upon a conviction alone. However, Mills has not been overturned and a distinction must be drawn between death eligibility and a sentencing selection. As noted

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[11] This Court has previously recognized that the statutory maximum for first degree murder is death, and has repeatedly rejected claims similar to those raised herein. Cox v. State, 819 So. 2d 705 (Fla. 2002); Bottoson v. State, 813 So. 2d 31, 36 (Fla. 2002), cert. denied, Case No. 01-8099 (U.S. June 28, 2002); Hertz v. State, 803 So. 2d 629, 648 (Fla. 2001), cert. denied, Case No. 01-9154 (U.S. June 28, 2002); Looney v. State, 803 So. 2d 656, 675 (Fla. 2001), cert. denied, Case No. 01-9932 (U.S. June 28, 2002); Brown v. Moore, 800 So. 2d 223, 224-225 (Fla. 2001); Mann v. Moore, 794 So. 2d 595, 599 (Fla. 2001), cert. denied, Case No. 01-7092 (U.S. June 28, 2002); Mills, 786 So. 2d at 536-38.

in Mills, the defendant is death eligible in Florida upon conviction. It is during the penalty phase that the sentence selection is made.

Ring,[12] and its overruling of Walton does not establish constitutional infirmity as Ring is merely an application of Apprendi. Clearly, the operation of Apprendi was limited to (1) factual findings, other than prior conviction, (2) which increase the statutory maximum for a charged offense. In Ring, it was recognized that the Arizona Supreme Court interpreted its law as prescribing only a life sentence upon conviction for first-degree murder. Ring, 122 S.Ct. at 2436; Ring v. State, 25 P.3d 1139, 1150 (Ariz. 2001). Ring fits squarely within the Apprendi holding, and thus, the Ring decision does not extend or expand the Sixth Amendment right at issue in Apprendi.

Unlike Arizona, in Florida the jury finds the defendant death eligible upon conviction in a capital trial. Florida law is different than Arizona's death penalty law. See Mills, 786 So. 2d at 538 (noting that the statutory maximum for first-degree murder is death and that the defendant is eligible for such sentence upon conviction). Although Ring applied Apprendi to Arizona's capital sentencing law, and recognized that Walton

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[12] In Ring, the holding was limited to states that allow a judge, "sitting without a jury", to impose death. Further, this Court noted that Ring was not challenging the validity of Clemons v. Mississippi, 494 U.S. 738 (1990). Ring, 122 S.Ct. at 2437, n.4.

had been misinterpreted[13], it did not cast doubt on this Court's conclusion that Apprendi was not implicated under Florida death penalty statute. The plain language of Apprendi and Ring establishes that those cases come into play when a defendant is exposed to a penalty exceeding the maximum allowable under the jury's verdict. Because Pope was death eligible upon conviction, Ring does not make his death sentence or Florida's sentencing scheme unconstitutional.

Contrary to Pope's position, Ring proves only that this Court was correct, as Apprendi, and more important Ring, are not sentencing cases.[14] Apprendi and Ring involve the jury's role in convicting a defendant of a qualifying offense, subject to the death penalty. Quoting Proffitt, 428 U.S. at 252, Ring

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[13] In Apprendi, the Supreme Court had described Arizona law as "once a jury has found the defendant guilty of all the elements of an offense which carries as its maximum penalty the sentence of death, it may be left to the judge to decide whether that maximum penalty, rather than a lesser one, ought to be imposed." Apprendi, 530 U.S. at 497. However, in Ring v. State, the Arizona Supreme Court disagreed with that characterization of Arizona law and determined that the maximum penalty upon conviction was life. Ring v. State, 25 P.3d 1139, 1151 (Ariz. 2001).

[14] We know this is true from the Ring opinion and would further suggest this is clarified by the specially concurring opinion by Justice Breyer, where he points out that he would extend the jury's role under the Eighth Amendment–to sentencing. Justice Breyer in concurring in the judgement held:

> "And I conclude that the Eighth Amendment requires individual jurors to make, and to take responsibility for, a decision to sentence a person to death." Ring v. Arizona, 122 S. Ct. 2428, *2448 (2002).

acknowledged that "[i]t has never [been] suggested that jury sentencing is constitutionally required",[15] rather Ring involves only the requirement that the jury find the defendant death-eligible. Ring, 122 S.Ct. at 2447, n.4. The jury determination is for the guilt phase, while sentencing rests with the trial court. See Spaziano v. Florida, 468 U.S. 447, 459 (1984) (finding Sixth Amendment has no guarantee of right to jury trial on issue of sentence).

Moreover, in Florida, any death sentence which is imposed following a jury recommendation of death, as was done in the instant case, satisfies the Sixth Amendment as construed in Ring, because the jury necessarily found beyond a reasonable doubt that at least one aggravating factor existed.[16] Apprendi merely requires a jury, rather than a judge, make the determination of certain factors and that those factors be established beyond a reasonable doubt. These requirements have been met in this case. Pope had a penalty phase jury which heard evidence related to aggravation and mitigation. The jury

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[15] See Harris v. Alabama, 513 U.S. 504, 515 (1995) (holding that "[t]he 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.)

[16] In fact, Pope's jury determined that he was guilty of two other murders, i.e. for Al Doranz and Caesar Di Russo, thus, establishing the aggravating factor of prior violent felony conviction. Pope v. State, 441 So. 2d 1073 (Fla. 1983).

was instructed that the aggravators had to be proven beyond a reasonable doubt. Following the instructions, the jury recommended life sentences for the Doranz and Di Russo murders, but death for the murder of Kristine Wlaters. Clearly, the aggravation was proven beyond a reasonable doubt. There can be no question but that the jury understood and followed the trial court's instructions. The jury was able to differentiate between the sentencing options for the different murders. See, Hildwin v. Florida, 490 U.S. 638 (1989) (holding that where jury made a sentencing recommendation of death it necessarily engaged in the factfinding required for imposition of a higher sentence, that is, the determination that at least one aggravating factor had been proved.) Because the finding of an aggravating factor authorizes the imposition of a death sentence, the requirement that a jury determine the conviction to have been a capital offense is fulfilled. See Espinosa v. Florida, 505 U.S. 1079 (1992).

Florida's capital sentencing scheme, found in section 921.141, Florida Statutes, affords the sentencer the guidelines to follow in determining the various sentencing selection factors related to the offense and the offender by providing accepted statutory aggravating factors and mitigating circumstances to be considered. Given the fact that a convicted defendant faces the statutory maximum sentence of death upon

conviction, the employment of further proceedings to examine the assorted "sentencing selection factors", does not violate due process. In fact, a sentencer may be given discretion in determining the appropriate sentence, i.e., the selection of a sentence, so long as the jury has decided that the defendant is eligible for the death penalty.

While Apprendi and Ring hold that any fact that increases the penalty beyond the statutory maximum must be determined by the jury, Florida's death eligibility occurs upon conviction, thus, aggravators are not increasing the penalty. Instead, aggravators are constitutionally mandated guidelines created to satisfy the Eight Amendment and protect against capricious and arbitrary sentences. Aggravating factors are limitations on the jury and judge; they are not sentence enhancers. As such, aggravators may not be classified as elements of the crime.

Although the death penalty cannot be imposed in the absence of an aggravating circumstance proven beyond a reasonable doubt, the aggravator's purpose is to narrow the class of defendants subject to the death penalty, not to increase the punishment of those convicted. In fact, it is the absence of aggravation that narrows the sentence to life. While the statutory maximum is death, and remains so regardless of the sentence found to be appropriate, it is the aggravating factors which determine whether the maximum or some lesser sentence will be imposed. As

reasoned in Tuilaepa v. California, 512 U.S. 967, 979-80 (1994):

> Likewise, in *Proffitt v. Florida*, we upheld the Florida capital sentencing scheme even though "the various factors to be considered by the sentencing authorities [did] not have numerical weights assigned to them."....
>
> ... In sum, "discretion to evaluate and weigh the circumstances relevant to the particular defendant and the crime he committed" is not impermissible in the capital sentencing process.... "Once the jury finds that the defendant falls within the legislatively defined category of persons eligible for the death penalty, ... the jury then is free to consider a myriad of factors to determine whether death is the appropriate punishment."... Indeed, the sentencer may be given "unbridled discretion in determining whether the death penalty should be imposed after it has found that the defendant is a member of the class made eligible for that penalty." ....

Tuilaepa, 512 U.S. at 979-80 (citations omitted). Thus, Florida's sentencing scheme comports with the constitution.

Pope's assertion that this Court's prior rejection of his claim based upon Caldwell v. Mississippi, 472 U.S. 320 (1985) in some manner precludes this Court from assessing the jury's sentencing role in this case is not well founded. A Caldwell error is committed when a jury is mislead regarding its responsibility for a sentencing decision so as to diminish its sense of responsibility for that decision. However, "[t]o establish a Caldwell violation, a defendant necessarily must show that the remarks to the jury improperly described the role assigned to the jury by local law." Dugger v. Adams, 489 U.S.

401, 407 (1989). This Court has recognized that the jury's penalty phase decision is merely advisory and that the judge does make the final sentencing decision. Combs v. State, 525 So. 2d 853, 855-58 (Fla. 1988). Nonetheless, there is no question that the jury made a determination that at least one aggravating factor was proven beyond a reasonable doubt and that death was the appropriate sentence. This decision is in compliance with constitutional dictates and is not implicated by Ring or Apprendi.

Additionally, this Court has held consistently that a jury's advisory sentence need not be unanimous.[17] See Way v. State, 760 So. 2d 903, 924 (Fla. 2000) (Pariente, J., concurring) (noting jury's death recommendation need not be unanimous); Thomson v. State, 648 So. 2d 692, 698 (Fla. 1984) (holding simple majority vote of death is constitutional); Alvord v. State, 322 So. 2d 533 (Fla. 1975), receded from on other grounds, Caso v. State, 524 So. 2d 422 (Fla. 1988) (same). The issuance of Apprendi has not altered this position. Card v. State, 803 So. 2d 613, 628 n. 13 (Fla. 2001) (rejecting claim Apprendi requires unanimous jury

[17] Even in the context of guilt, jury unanimity is not required. Cf. Johnson v. Louisiana, 406 U.S. 356 (1972) (finding nine to three verdict for guilt was not denial of due process or equal protection); Apodaca v. Oregon, 406 U.S. 404 (1972) (holding conviction by non-unanimous jury did not violate Sixth Amendment). Schad v. Arizona, 501 U.S. 624, 631 (1991) (plurality opinion) (addressing felony murder and holding that due process does not require unanimous determination on theories of liability).

recommendation; "capital jury may recommend a death sentence by a bare majority vote"); Hertz v. State, 803 So. 2d 629, 648 (Fla. 2001) (same); Looney v. State, 803 So. 2d 656, 675 (Fla. 2001) (same); Brown v. Moore, 800 So. 2d 223 (Fla. 2001) (rejecting argument aggravators must be found by unanimous jury). However, unanimity with respect to mitigation has been rejected. McKoy v. North Carolina, 494 U.S. 433 (1990) (determining requirement of unanimous findings of mitigators unconstitutional); Mills v. Maryland, 486 U.S. 367 (1988) (same).

Furthermore, Ring did not overrule the numerous cases where Florida's capital sentencing statute has been upheld against constitutional challenges. See Hildwin, 490 U.S. at 640-641 (stating case "presents us once again with the question whether the Sixth Amendment requires a jury to specify the aggravating factors that permit the imposition of capital punishment in Florida and concluding that the Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury"); Proffitt, 428 U.S. at 252 (holding Constitution does not require jury sentencing); Spaziano, 468 U.S. at 459 (same). Thus, it may not be implied that either Apprendi or Ring has overruled implicitly the above cases. As the United States Supreme Court has announced: "We reaffirm that '[i]f 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 Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." Agostini v. Felton, 521 U.S. 203, 237 (1997) (quoting Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 484 (1989)).

Given the fact that Mills[18] is not in conflict with Ring, and that neither Hildwin, Proffitt, or Spaziano have been overruled, Pope received his constitutionally required jury review. The jury determined he was death eligible upon conviction and that the appropriate sentence was death upon consideration of sentencing selection factors. Pope has failed to show that section 921.141 or Florida decisional law is unconstitutional.

Furthermore, as noted above, Pope has two prior violent felony convictions for the murders of Al Doranz and Caesar Di Russo. Such provides a basis to impose a sentence higher than authorized by the jury without any additional jury findings. See Almendarez-Torrez v. United States, 523 U.S. 224 (1998), Apprendi v. New Jersey, 530 U.S. 466 (2000). Hence, there is no

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[18] While this Court has stayed active warrants in Linroy Bottoson v. Michael W. Moore, case no. SC02-1455 and Amos Lee King v. Michael W. Moore, case no. SC02-1457, purportedly to assess the impact of Ring to its Mills opinion, to date, no determination or modification of Mills because of Ring has been forthcoming, and Mills remains the decisional law in Florida.

constitutional violation because the prior conviction constitutes a finding by a jury which the judge may rely upon to impose an aggravated sentence. Ring is not such a cataclysmic change in the law that any Sixth Amendment violation premised on that decision must be deemed harmful. See Ring, 122 S.Ct. at 2443 n.7 (remanding case for harmless error analysis by state court); United States v. Cotton, 122 S. Ct. 1781 (2002) (failure to recite amount of drugs in indictment was harmless due to overwhelming evidence). On the facts of this case, no harmful error can be shown.

## CONCLUSION

Wherefore, based on the foregoing arguments and authorities, Respondent respectfully requests that this Honorable Court deny Petitioner's request for writ of habeas corpus.

Respectfully submitted,

ROBERT A. BUTTERWORTH
Attorney General

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LESLIE T. CAMPBELL
Assistant Attorney General
Fla. Bar No. 0066631
1515 North Flagler Drive, 9th Floor
West Palm Beach, FL 33401
Office: (561) 837-5000
Facsimile: (561) 837-5108

## CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was sent by United States mail, postage prepaid, to Patricia A. Hogan, Esq., Office of the Capital Collateral Regional Counsel - South, 101 N.E. 3rd Avenue, Suite 400, Fort Lauderdale, FL 33301, this ____ day of October, 2002.

_____
LESLIE T. CAMPBELL
Assistant Attorney General

## CERTIFICATE OF FONT SIZE

I HEREBY CERTIFY the size and style of type used in this brief is 12 point Courier New, a font that is not proportionally spaced.

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LESLIE T. CAMPBELL