IN THE SUPREME COURT OF FLORIDA

DENNIS SOCHOR,

Petitioner,

vs. Case No. 02-1797

MICHAEL W. MOORE,

Respondent.
______________________________/

STATE'S RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

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PROCEDURAL HISTORY

The state would make the following additions to the procedural history. This Court recounted the facts of the case as follows:

> Testimony at trial established that, on December 31, 1981, the victim, an eighteen-year-old female, and a friend went to a lounge located in Broward county to celebrate New Year's Eve. During the course of the evening the friend became ill. Sochor and his brother, Gary, helped the victim escort her friend outside to her car. Promising her that she would return soon, the victim returned to the lounge.
>
> Early the next morning the friend awoke in the car, discovered the victim missing, and called the police. The police obtained a photograph taken that night which showed an unidentified man sitting at the bar near the victim. The photograph was shown on television, and, several days later, that man was identified as Sochor. The police talked with Sochor's roommates who said that he had left suddenly when he saw his picture on television. They also told police that Sochor's brother, Gary, had been visiting him and had recently returned to Michigan. The police interviewed Gary who implicated his brother in the victim's disappearance and voluntarily returned to Florida to attempt to locate her body. In May 1986 authorities arrested Sochor in Georgia on an unrelated offense and extradited him to Florida where a grand jury indicted him on charges of first-degree murder and kidnapping. The victim's body has never been recovered.
>
> At trial Gary gave the following testimony. He went to the lounge on New Year's Eve with his brother who spent the evening talking with the victim and her friend. When it

came time to leave, the victim and his brother were kissing in the lounge parking lot while Gary waited in the truck. Several minutes later, she agreed to go to breakfast with them. They left the parking lot with Sochor driving his employer's truck, Gary in the passenger seat, and the victim seated between them. Sochor drove to a secluded spot nearby and stopped the truck. Gary remembered the victim screaming for help and seeing Sochor on top of her with her hands pinned down on the ground. He yelled at him and threw a rock over his head. In response Sochor stopped assaulting the victim, turned and looked at Gary like a man "possessed," angrily told him to get back in the truck, and resumed his assault. A while later Sochor got in the truck with Gary and drove home. The next morning Gary found a woman's shoe and sweater and a set of keys in the truck. He hid the keys. Later he noticed that the truck had been cleaned and the articles removed. When told about the keys, Sochor became upset and demanded their return, which Gary did. A few days later Gary returned to Michigan.

The state also introduced Sochor's three taped confessions which it played to the jury. In these statements Sochor said that he met the victim that night at the bar and spent the evening talking with her. He remembered kissing her in the lounge parking lot and wanting to have sex. When she refused, they argued and he grabbed her. When she hit him, he became angry and choked her. He thought that he killed her and drove to a secluded area where he disposed of the body. He said that Gary was not with him when this happened. When he awoke the next morning, he remembered feeling that something terrible had happened. He thought he had raped "another girl." He also stated that he found several woman's articles in the truck which he put in the trash. When he saw his picture on television, he took his employer's truck and drove to Tampa. From there he went to New

> Orleans where he stayed for some time before moving to Atlanta where he was arrested.

Sochor v. State, 619 So.2d 285, 287-288 (Fla. 1993) (footnote omitted). The trial court found that four aggravators were proven. Sochor had previously pled guilty to kidnapping and sexual battery and therefore the trial court found the existence of the prior violent felony[1] aggravator; the murder of Patricia Gifford was "heinous, atrocious and cruel"[2]; the murder was "cold, calculated and premeditated"[3]: the murder was committed during the commission of a sexual battery[4]. (ROA 1231-1236). By a vote of ten to two the jury recommended death. (ROA 1190).

On appeal Sochor raised the following issues:

1. There was insufficient evidence to sustain his conviction for first degree murder, and kidnaping.

2. There was insufficient evidence to prove corpus delicti.

3. There was insufficient evidence to prove venue.

4. There was insufficient evidence to prove that Sochor was sane.

5. There were improper comments made by the prosecutor and state witnesses.

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[1] 921.141 (5)(b)

[2] 921.141 (5)(h)

[3] 921.141 (5)(i)

[4] 921.141 (5)(d)

6. There was impermissible good character evidence of the victim Patricia Gifford.

7. The state introduced perjured testimony.

8. The jury was not instructed that voluntary intoxication was a defense to felony-murder.

9. The jury was not properly instructed on kidnapping.

10. The jury was not instructed on the statute of limitations as an absolute defense to kidnapping and felony murder.

11. The jury instruction on excusable and justifiable homicide was incomplete.

12. The state did not charge felony murder in the indictment.

13. The state presented non-statutory aggravating factors of victim impact and lack of remorse.

14. The jury instructions regarding the aggravating factors of "heinous, atrocious and cruel," "cold, calculated, and cruel," the murder was committed during the course of a felony," were constitutionally deficient.

15. The jury instruction regarding non-statutory mitigating evidence was insufficient.

16. The jury instruction on standard of proof for proving mitigation was incorrect.

17. The penalty phase jury instructions shifted the burden of proof to the defendant.

18. The jury's role is minimized in violation of <u>Caldwell v.</u>

Mississippi.

19. There was insufficient evidence to sustain the aggravating factor of "felony murder."

20. There was insufficient evidence to sustain the aggravating factor of "heinous, atrocious, and cruel."

21. There was insufficient evidence to sustain the aggravating factor of "cold, calculated, and premeditated."

22. The trial court erred in not finding the existence of the mental health mitigating circumstances.

23. Sochor was limited in his ability to present non-statutory mitigation.

24. Sochor's sentence of death is not proportional.

25. Florida's death penalty statute is unconstitutional. See initial brief in Sochor v. State, case no. 71407.

All of Sochor's claims were rejected with the exception of his challenge to the "CCP' aggravating factor. This Court found insufficient evidence to sustain the aggravator and therefore it was stricken. Sochor, 619 So. 2d at 292. However, given the strength of remaining aggravators as well as the weakness of the mitigation, the error was considered harmless. Id. at 293.

In this pleading Sochor will be referred to as either "petitioner" or by name and the state will be referred to as "the state." The following symbols will be used: ROA denotes record on direct appeal; SROA denotes supplemental record on

direct appeal.

REASONS FOR DENYING THE WRIT

ISSUE I

APPELLATE COUNSEL DID NOT FAIL TO RAISE ANY MERITORIOUS CLAIMS ON DIRECT APPEAL

Sochor alleges that appellate counsel should have presented various issues on appeal which would have entitled him to relief. The state asserts that the following legal principles are germane to resolution of this claim.

> 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. In evaluating an ineffectiveness claim, the court must determine whether the alleged omissions are of such magnitude as to constitute a serious error or substantial deficiency falling measurably outside the range of professionally acceptable performance and, second, whether the deficiency in performance compromised the appellate process to such a degree as to undermine confidence in the correctness of the result. Pope v. Wainwright, 496 So.2d 798, 800 (Fla.1986). See also Haliburton, 691 So.2d at 470; Hardwick, 648 So.2d at 104. The defendant has the burden of alleging a specific, serious omission or overt act upon which the claim of ineffective assistance of counsel can be based. See Knight v. State, 394 So.2d 997 (Fla.1981). "In the case of appellate counsel, this means the deficiency must concern an issue which is error affecting the outcome, not simply harmless error." Id. at 1001. In addition, ineffective assistance of counsel cannot be argued where the issue was not preserved for appeal or where the appellate attorney chose not to

> argue the issue as a matter of strategy. See Medina v. Dugger, 586 So.2d 317 (Fla.1991); Atkins v. Dugger, 541 So.2d 1165, 1167 (Fla.1989) ("Most successful appellate counsel agree that from a tactical standpoint it is more advantageous to raise only the strongest points on appeal and that the assertion of every conceivable argument often has the effect of diluting the impact of the stronger points.").

Freeman v. State, 761 So. 2d 1055, 1070 (Fla. 2000); See also Rutherford v. Moore 774 So.2d 637, 643 (Fla. 2000). Additionally appellate counsel required to raise every preserved or nonfrivolous issue. Jones v. Barnes, 463 U.S. 745, 751-753 (1983); see also Provenzano v. Dugger, 561 So. 2d 541, 549 (Fla. 1990). Based on these stringent legal principles, it will become clear that Sochor will not be able to meet his burden of establishing that appellate counsel was ineffective. All relief must be denied.

In the first sub-issue, Sochor alleges that, "[d]ue process was deprived because of the sheer number and types of errors involved in his trial..." **Petition at 5**. Sochor makes reference to alleged errors that have been identified throughout the direct appeal process and this petition. However, in this argument Sochor fails to detail the error or provide any harmful error analysis. Summary denial is warranted as this claim is procedurally barred as it was or could have been raised on direct appeal. See Zeigler v. State, 452 So.2d 537, 539 (Fla. 1984) ("In spite of Zeigler's novel, though not convincing,

argument that all nineteen points should be viewed as a pattern which could not have been seen until after the trial, we hold that all but two of the points raised either were, or could have been, presented at trial or on direct appeal. Therefore, they are not cognizable under rule 3.850."), sentence vacated on other grounds, 524 So.2d 419 (Fla. 1988); Chandler v. Dugger, 634 So. 2d 1066, 1068 (Fla. 1994)(same); Rivera v. State, 717 So. 2d 477, 480 n.1 (Fla. 1998)(same); Occchicone v. State, 768 So. 2d 1037 (Fla. 2000).

Additionally given petitioner's inability to establish that an error occurred and more importantly that such an error was prejudicial summary denial is warranted. Melendez v. State, 718 So. 2d 746, 749 (Fla. 1998)(finding all claims to be either without merit or procedurally barred and therefore there is no cumulative error effect to consider); Sireci v. State, 27 Fla. L. Weekly S183, S185 (Fla. February 28, 2002).

In sub-issue C,[5] Sochor alleges that appellate counsel failed to ensure that the record on appeal was complete because two bench conferences were not reported. Based on that conclusory statement, Sochor alleges that appellate counsel was ineffective and therefore he is entitled to relief. This Court

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[5] This identical issue is also raised as a separate claim in issue IV. **Petition at 13-15**. The state would rely on the argument advanced above in response to the separate yet identical argument presented in issue IV.

has repeatedly rejected this argument as it is nothing more than a bare allegation which is legally insufficient. See Thompson v. Singletary, 759 So. 2d 650 (Fla. 2000)(rejecting claim of ineffective assistance of appellate counsel based on incomplete record as petitioner cannot point to any errors that occurred in untranscribed portion) Ferguson v. Singletary, 632 So. 2d 53, 58 (Fla. 1993)(same); Johnson v. Moore, Case No. 01-2182 (Fla. September 26, 2002)(same); Turner v. Dugger, 614 So. 2d 1075 (Fla. 1992)(finding no prejudice in failure to transcribe charge conference). Sochor has not demonstrated that appellate counsel was ineffective.

ISSUE II

PETITIONER'S CHALLENGE TO THIS COURT'S HARMLESS ERROR ANALYSIS IS PROCEDURALLY BARRED AND WITHOUT MERIT

Sochor claims that this Court's harmless error analysis on direct appeal after remand from the United States Supreme court was deficient. On direct appeal, this Court struck the aggravating factor of "cold, calculated, and premeditated" due to insufficient evidence.[6] Sochor v. State, 580 So. 2d 595, 603 (Fla. 1989). However any error was harmless given that there still remained three valid aggravators. Sochor, 580 So. 2d at 603. Sochor successfully sought certiorari review of this Court's harmless error analysis in the United States Supreme Court. Sochor v. Florida, 504 U.S. 527 (1992). The Court remanded the case for clarification or confirmation that a harmless error analysis was in fact conducted. Sochor, 504 U.S. at 540. Upon remand this Court confirmed that a harmless analysis had in fact been undertaken and explained:

> The court carefully weighed the aggravating factors against the lack of mitigating factors in concluding that death was warranted. Even after removing the aggravating factor of cold, calculated, and premeditated, three valid aggravating factors remain to be weighed against no mitigating circumstances. Striking one aggravating factor when there are no mitigating circumstances does not necessarily require re-sentencing because, "[i]f there is no likelihood of a different

[6] 921.141 (5)(i)

> sentence, the error must be deemed harmless." Rogers v. State, 511 So.2d 526, 535 (Fla.1987), cert. denied,484 U.S. 1020, 108 S.Ct. 733, 98 L.Ed.2d 681 (1988); see Robinson v. State, 574 So.2d 108 (Fla.), cert. denied, 502 U.S. 841, 112 S.Ct. 131, 116 L.Ed.2d 99 (1991); Holton v. State, 573 So.2d 284 (Fla.1990), cert. denied,500 U.S. 960, 111 S.Ct. 2275, 114 L.Ed.2d 726 (1991); James v. State, 453 So.2d 786 (Fla.), cert. denied,469 U.S. 1098, 105 S.Ct. 608, 83 L.Ed.2d 717 (1984); Francois v. State, 407 So.2d 885 (Fla.1981), cert. denied, 458 U.S. 1122, 102 S.Ct. 3511, 73 L.Ed.2d 1384 (1982). Here, beyond a reasonable doubt, eliminating the invalid factor would have made no difference in Sochor's sentence. The trial court's reliance on the unsupported aggravator, therefore, was harmless error.[11]
>
> ______________________________
>
> [11] On remand from the United States Supreme Court in Sochor v. Florida, 504 U.S. 527, 112 S.Ct. 2114, 119 L.Ed.2d 326 (1992), we have revised the opinion in this case to reflect that we performed a harmless error analysis in deciding that eliminating an invalid aggravating circumstance had no effect on the validity of Sochor's death sentence.

Sochor v. State, 619 So. 2d 285, 293 (Fla. 1993), cert denied 114 S.Ct. 638 (1993). Sochor now alleges that this Court's analysis was flawed because no federal cases were cited and had a proper analysis been conducted, the error would have been found to be harmful.

The state asserts that Sochor is simply seeking an additional review of an issue already disposed of on direct appeal. Summary denial is warranted as the issue is

procedurally barred. See Bottonson v. State, 813 So. 2d 31(Fla. 2002)(finding procedurally barred defendant's challenge to Court's previous standard f review); Thompson v. State, 759 So. 2d 650, 657 n. 6 (Fla. 2000)(same); Parker v. Dugger, 550 So. 2d 459, 460 (Fla. 1989)(finding it improper to use habeas review as a vehicle to re-litigate an issue already disposed of direct appeal.

And finally, Sochor has failed to justify why further review is required as this Court has explicitly stated that a harmless error analysis was conducted. See Martin v. Singletary, 599 So. 2d 119, 121 (Fla. 1992)(explaining that a harmless error analysis was conducted in Sochor irrespective of fact that the analysis was not detailed in the opinion). Summary denial is warranted.

ISSUE III

SOCHOR'S CONSTITUTIONAL CHALLENGE TO HIS PENALTY PHASE JURY INSTRUCTION IS PROCEDURALLY BARRED

Sochor alleges that the jury was given a constitutionally inadequate jury instruction applicable to the "heinous, atrocious and cruel" aggravating factor.[7] Relying on Espinosa v. Florida, 504 U.S. (1992) and Manard v. Cartwright, 486 U.S. 356 (1988), Sochor alleges that the jury was not properly informed about the limiting construction of the aggravating factor. Appellate counsel was ineffective for failing to raise this issue on appeal. Summary denial is warranted as this issue is procedurally barred and without merit.

Contrary to assertions otherwise, appellate counsel did raise this issue on appeal. However it was rejected because the issue had not been preserved for review at trial. This Court explicitly held:

> Sochor's next claim, regarding alleged errors in the penalty jury instructions, likewise must fail. None of the complained-of jury instructions were objected to at trial, and, thus, they are not preserved for appeal. Vaught v. State, 410 So.2d 147 (Fla.1982). In any event, Sochor's claims here have no merit. [10]
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>
> [10]Sochor contends that the felony-murder instruction was inadequate because it did

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[7] 921.141 (5)(h)

> not define the underlying felony and did not inform the jury that this aggravating circumstance was only applicable to premeditated murder. We reject this claim because the court instructed the jury on the underlying felonies during the guilt phase and because this aggravating circumstance is applicable to both felony murder and premeditated murder. White v. State, 403 So.2d 331 (Fla. 1981), cert. denied,463 U.S. 1229, 103 S.Ct. 3571, 77 L.Ed.2d 1412 (1983). We reject without discussion Sochor's other claims: that the instructions as to the aggravating factors of heinous, atrocious, or cruel and cold, calculated, and premeditated were improper; that the instructions as to statutory and nonstatutory mitigating evidence were improper; that the jury was improperly instructed as to the burden and standard of proof with regard to mitigating circumstances; and that Florida's sentencing scheme carries a presumption of death upon the finding of a single aggravating factor.

Sochor, 619 So. 2d at 291 n. 10.

Given that the issue was already raised and rejected by this Court, relitigation is not proper. Rutherford v. Moore, 774 So. 2d 637, 645 (Fla. 2000) (refusing to consider additional argument regarding issue that was already raised on direct appeal). Implicit in the Court's refusal to consider the issue is the fact that if error it was not fundamental and therefore review was not warranted. Rutherford, 774 So. 2d at 646; Johnson v. Moore, 27 Fla. L. Weekly S798, 790 (Fla. September 26, 2002)(same).

Additionally, the state would note that this Court found

that there was sufficient evidence to find that the strangulation murder of Patricia Gifford was "heinous, atrocious, and cruel." Sochor, 619 So. 2d at 292. Consequently even if the issue had been preserved for direct appeal, Sochor would not have been entitled to relief. Chandler v. State, 634 So. 2d 1066, 1069 (Fla. 1994).

ISSUE IV

SOCHOR'S CHALLENGE TO FLORIDA'S DEATH PENALTY STATUTE IN LIGHT OF APPRENDI V. NEW JERSEY[8] AND RING V. ARIZONA IS PROCEDURALLY BARRED

Sochor claims that he is entitled to relief based on the United States Supreme Court's decision in Ring v. Arizona, 122 S. Ct. 2445 (2002). This Court's decision in Mills v. Moore, 786 So. 2d 532, 537 (Fla. 2001) which was premised in part on Walton v. Arizona, 497 U.S. 639 (1990), is no longer viable because Ring explicitly overruled Walton. Based on the assumption that Ring applies to Florida's sentencing scheme, Sochor alleges that the (1) the jury's role in Florida's sentencing scheme is insignificant, and (2) aggravating factors must now be pled in the indictment as they are to be considered elements of the offense of capital murder. Sochor makes an additional argument not premised on Ring and that is that Florida's sentencing scheme is unconstitutional because it shifts the burden of proof to the defendant to prove that death is not the appropriate penalty. Sochor's claims must be summarily denied for the following reasons.

Irrespective of whether Ring is applicable to Florida's capital scheme, Sochor's claim is not properly preserved for collateral review. It is well established that for an issue to be preserved for appeal, it must be presented to the lower court

[8] Apprendi v. New Jersey, 530 U.S. 466 (2000).

and "the specific legal argument or ground to be argued on appeal must be part of that presentation if it is to be considered preserved." Archer v. State, 613 So. 2d 446 (Fla. 1993), quoting Tillman v. State, 471 So. 2d 32, 35 (Fla. 1985); See also Steinhorst v. State, 412 So. 2d 332, 338 (Fla. 1982). In the instant case, petitioner never challenged the constitutionality of the death penalty statute based on the arguments presented here. At no time did Sochor argue that the jury's "advisory role" was constitutionally deficient or that the state was required to place the aggravating factors in the indictment. Since the claim was never preserved for appeal, he is not allowed to raise the claim in this collateral proceeding. See Parker v. State, 550 So. 2d 449 (Fla. 1989)(finding collateral challenge to Florida's capital sentencing scheme based on Booth v. Maryland, is procedurally barred for failure to preserve the issue at trial or on direct appeal).

Notwithstanding the procedural default, this Court has clearly rejected the argument that Ring has implicitly overruled its earlier opinions upholding Florida's sentencing scheme. In Bottoson v. Moore, 27 Fla. L. Weekly S891 (Fla. October 24, 2002) this Court stated:

> Although Bottoson contends that he is entitled to relief under Ring, we decline to so hold. The United States Supreme Court in February 2002 stayed Bottoson's execution and placed the present case in abeyance while it decided Ring. That Court then in

> June 2002 issued its decision in Ring, summarily denied Bottonson's petition for certiorari, and lifted the stay without mentioning Ring in the Bottonson order. The Court did not direct the Florida Supreme Court to reconsider Bottoson in light of Ring.

Consequently Sochor is not entitled to relief based on Ring.

Moreover, even if Ring was applicable in Florida and the issue had been preserved for review, Ring, 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 Anderson's death sentence that "obvious injustice" exists. New v. State, 807 So. 2d 52 (Fla. 2001). In determining whether this standard has been met, this Court must consider three factors: the purpose served by the new case; the extent of reliance on the old law; and the effect on the administration of justice from retroactive application. Ferguson v. State, 789 So. 2d 306, 311 (Fla. 2001). Application of these factors to Ring, which did not directly or indirectly address Florida law, provides no basis for consideration of Ring in this case. The United States Supreme Court recently held that an Apprendi claim is not plain error. United States v. Cotton, 122 S.Ct. 1781 (May 20, 2002) (holding an indictment's failure to include the quantity of drugs was an Apprendi error

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

As for the merits, the state further asserts that Ring does not apply to Florida's death penalty scheme. The Arizona

statute at issue in Ring is different from Florida's death sentencing statute:

> Based solely on the jury's verdict finding Ring guilty of first-degree felony murder, the maximum penalty he could have received was life imprisonment.

Ring v. Arizona, 122 S.Ct. at 2437. Under Arizona law, the determination of death eligibility takes place during the penalty phase proceedings, and requires that an aggravating factor exists. This Court has previously recognized that the statutory maximum for first degree murder in Florida 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. This interpretation of state law demands respect, and offers a pivotal distinction between Florida and Arizona. Ring, at *13; Mullaney v. Wilbur, 421 U.S. 684 (1975).

Moreover, contrary to petitioner's claim, Ring does not require jury sentencing in capital cases, rather it involves

only the requirement that the jury find the defendant death-eligible. Id. at n.4. A clear understanding of what Ring does and does not say is essential to analyze any possible Ring implications to Florida's capital sentencing procedures. As already recognized by this Court, the Ring decision left intact all prior opinions upholding the constitutionality of Florida's death penalty scheme, including Spaziano v. Florida, 468 U.S. 447 (1984), and Hildwin v. Florida, 490 U.S. 638 (1989). Indeed the opinion quotes Proffitt v. Florida, 428 U.S. 242, 252 (1976), acknowledging that ("[i]t has never [been] suggested that jury sentencing is constitutionally required."). Ring, at *9, n.4. In Florida, any death sentence which was imposed following a jury recommendation of death necessarily satisfies the Sixth Amendment as construed in Ring, because the jury necessarily found beyond a reasonable doubt that at least one aggravating factor existed. Since the finding of an aggravating factor authorizes the imposition of a death sentence, the requirement that a jury determine the conviction to have been a capital offense has been fulfilled in any case in which the jury recommended a death sentence.

And finally, to the extent Ring would be applicable to petitioner the requirements of same have been met. The trial court found the existence of the aggravating factor that the murder was committed during the course of a felony. Sochor, 619

So. 2d at 292. The jury convicted Sochor of kidnapping (ROA 1190). Consequently, the underlying factual premise for the finding of this aggravator was made by the jury at the guilt phase.

Additionally, the trial court found the existence of the aggararavator factor that petitioner had been convicted of another prior violent felony.[9] (ROA 1231. The judge's finding of the prior violent felony aggravator is exempted from the holding in Apprendi. Apprendi explicitly exempted recidivist factual findings from its holding. Apprendi, 530 U.S. at 490 (holding, other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt). Thus, a trial court may make factual findings regarding recidivism. Walker v. State, 790 So.2d 1200, 1201 (Fla. 5th DCA 2001)(noting that Florida courts, consistent with Apprendi's language excluding recidivism from its holding, have uniformly held that an habitual offender sentence is not subject to an Apprendi). Because this is a recidivist aggravator, the prior violent felony aggravator may be found by the judge even in the wake of Ring. Ring, 122 S.Ct. 2445 at n.4 (noting that none of the aggravators at issue related to past

[9] Indeed on appeal Sochor conceded the existence of this factor. Sochor, 619 So.2d at 292.

convictions and that therefore the holding in Almendarez-Torres v. United States, 523 U.S. 224 (1998), which allowed the judge to find the fact of prior conviction even if it increases the sentence beyond the statutory maximum was not being challenged).

In summary, this claim is procedurally barred, Ring is not subject to retroactive application, Ring does not apply to Florida's sentencing scheme; and Florida's sentencing scheme is constitutional even in light of Ring. Consequently, for the reasons state above, Sochor is not entitled to relief based on Ring.

As for Sochor's claim that the sentencing scheme improperly shifted the burden of proof, this claim is procedurally barred as it was raised and rejected on direct appeal. Sochor, 619 So.2d at 292. Summary denial is warranted as Sochor is precluded from relitigation the substance of a claim under a different legal argument in an attempt to avoid the bar. See Rivera v. State, 717 So. 2d 477, 480 n.2 (Fla. 1998)(finding claim to be procedurally barred as it is merely using a different argument to raise prior claim); Marajah v. State, 684 So. 2d 726, 728 (Fla. 1996)(finding it inappropriate to use collateral attack to relitigate previous issue). Harvey v. Dugger, 656 So.2d 1253, 1256 (Fla. 1995)(same).

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 relief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was sent by United States mail, postage prepaid, to Rachel Day, Paul Kalil, Kenneth Malnik, Office of the Capital Collateral Regional Counsel, 101 N.E. 3rd St. Suite 400, Fort Lauderdale, Florida 33301, this ____ day of November, 2002.

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Assistant Attorney General

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the instant brief has been prepared with 12 point Courier New type, a font that is not spaced proportionately on November 12, 2002.

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