IN THE SUPREME COURT OF FLORIDA

NO. SC01-338

GREGORY MILLS,

Petitioner,

v.

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

Respondent.

REPLY TO RESPONSE TO CONSOLIDATED PETITION FOR A WRIT OF HABEAS CORPUS, PETITION FOR EXTRAORDINARY RELIEF, AND MOTION TO REOPEN DIRECT APPEAL

TODD G. SCHER
Litigation Director

Florida Bar No. 0899641
CAPITAL COLLATERAL
REGIONAL COUNSEL
101 NE 3d Avenue, Suite 400
Ft. Lauderdale, Florida 33301
(954) 713-1284
Counsel for Petitioner

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

REPLY TO TIMELINESS ARGUMENT 1

REPLY TO RESPONSE TO ARGUMENT I 2

1. Preservation. 2

2. Apprendi is New Law. 5

3. Relief is Warranted. 9

REPLY TO RESPONSE TO ARGUMENT II 12

TABLE OF AUTHORITIES

Almendarez-Torres v. United States,
523 U.S. 224, 257 n.2 (1998) 10

Cannady v. State,
620 So. 2d 165, 170 (Fla. 1993) 5

Cochran v. State,
547 So. 2d 928 (Fla. 1988) 14

Darity v. United States,
124 F. Supp.2d 355, 360 (W.D.N.C. 2000) 8

Delap v. Dugger,
513 So. 2d 659, 662 (Fla. 1987) 5

Enmund v. Florida,
458 U.S. 782 (1982) 9

Fiore v. White,
121 S.Ct. 712, 714 (2001) 14

Ford v. Georgia,
498 U.S. 411 (1991) 2

Heggs v. State,
759 So. 2d 620 (Fla. 2000) 7

Hoffman v. Arave,
236 F. 3d 523, 546-48 (9th Cir. 2001) 8

In Re Joshua,
224 F. 3d 1281 (11th Cir. 2000) 6

Jones v. State,
26 Fla. L. Weekly D563 (Fla. 2d DCA 2001) 6

Keen v. State,
775 So. 2d 263 (Fla. 2000) 12

Lambrix v. Singletary,
641 So. 2d 847, 848 (Fla. 1994) 6

McCray v. State,
699 So. 2d 1366 (Fla. 1997) 2

Mills v. Singletary,
161 F.3d 1273, 1282 (11th Cir. 1998) 14

Mills v. Singletary,
606 So. 2d 622 (Fla. 1992) 2

Mills v. State,
476 So. 2d 172, 177 (Fla. 1985) 5

Parker v. Dugger,
876 F. 2d 1470, 1474 (11th Cir. 1989),
rev'd on other grounds, 498 U.S. 308 (1991) . . . 14

Patton v. State,
25 Fla. L. Weekly S749 (Fla. 2000) 15

People v. Beachem,
740 N.E.2d 389, 397 (Ill. Ct. App. 2000) 8

Phillips v. State,
623 So. 2d 621 (Fla. 4th DCA 1992) 6

Shere v. State,
742 So. 2d 215, 216-18 n. 6 (Fla. 1999) 3

Sireci v. State,
773 So. 2d 34 (Fla. 2000) 3

Sochor v. Florida,
504 U.S. 527 (1992) 1

Spaziano v. Florida,
468 U.S. 447 (1984) 9, 15

Stephens v. State,
2001 WL 252160 (Fla. 2001) 9

Stringer v. Black,
503 U.S. 222 (1992) 1

Swafford v. State,
679 So. 2d 736, 740 (Fla. 1996) 15

Teague v. Lane,
489 U.S. 288 (1989) 6

Tedder v. State,
322 So. 2d 908 (Fla. 1975) 12

Thompson v. Dugger,
515 So. 2d 173, 175 (Fla. 1987) 7

Tison v. Arizona,
481 U.S. 137 (1987) 9

United States v. Murphy,
109 F.Supp.2d 1059, 1063-64 (D. Minn. 2000) 8

Walton v. Arizona,
497 U.S. 639 (1990) 10

Weeks v. State,
761 A.D.2d 804 (Del. 2000) 11

White v. State,
664 So. 2d 242, 247 (Fla. 1995) 15

Witt v. State,
387 So. 2d 922 (Fla. 1980) 1

REPLY TO TIMELINESS ARGUMENT

Respondent alleges that the petition is "unconscionable," "dilatory," "abusive," and "vexatious" because it was filed more than one year after *certiorari* was denied from Mr. Mills' federal habeas proceedings (Response at 8). Respondent cites to nothing that stands for the proposition that a defendant is barred from raising issues of new law if such are raised outside 1-year rule from *certiorari* denial from federal habeas. To the contrary, the time for raising issues alleging new law runs from when the new law is announced, not from some arbitrary date that Respondent picks out of the air in order to latch onto an illusory procedural bar. Witt v. State, 387 So. 2d 922 (Fla. 1980); Fla. R. Crim. P. 3.850 (b). The cases on which Mr. Mills is relying were all decided well within a year of the filing of his petition, and thus the petition is timely.

Respondent next asserts that Mr. Mills' arguments are "similar" to those raised in Mr. Mills' second habeas corpus petition. Respondent does not explain the purported "similarity." In his second habeas petition, Mr. Mills argued that the then-recent decisions in Sochor v. Florida, 504 U.S. 527 (1992), and Stringer v. Black, 503 U.S. 222 (1992), required re-visitation of two issues: (1) that Sochor and Stringer established that the Court's "harmless error" analysis on direct appeal after striking three aggravating factors was fundamentally flawed, and (2) that Stringer established that the

Court's rejection on direct appeal of the argument that the "during the course of a felony" aggravating factor constituted an "automatic aggravator" was fundamentally flawed. This Court rejected Mr. Mills' arguments. Mills v. Singletary, 606 So. 2d 622 (Fla. 1992). The claims at issue in the 1992 proceedings are not the claims that are presented in the instant petition, which are premised on new case law.

Respondent next argues that Fla. R. App. P. 9.140 (j)(3)(B), and McCray v. State, 699 So. 2d 1366 (Fla. 1997), are "clearly applicable" (Response at 9). Other than faithfully reproducing the text of the rule and the holding in McCray, Respondent never divulges how either of these principles apply herein, much less "clearly" so. Fla. R. App. P. 9.140 and McCray only address out-of-time petitions alleging ineffective assistance of appellate counsel. Yet in classic double-speak, Respondent *concedes* that Mr. Mills' petition does not allege ineffective assistance of appellate counsel (Response at 10). Even if McCray could somehow be held to apply in these circumstances,[1] there can be no comparison between the "inordinate delay" addressed in McCray (habeas petition filed 15 years after finality of conviction), to Mr. Mills' case, where he filed his claims, premised on cases decided in the past several months, well in advance of the 1-year time limit.

[1]Such an application would be unprecedented and could not be constitutionally applied to Mr. Mills, as he had no notice of such application. See Ford v. Georgia, 498 U.S. 411 (1991).

Respondent's timeliness argument is meritless.

REPLY TO RESPONSE TO ARGUMENT I

1. Preservation. Respondent first argues that the Apprendi claim is not "available" to Mr. Mills because "it is not preserved" (Response at 11).[2] Respondent concedes that constitutional grounds were contained in Mr. Mills' direct appeal brief, but in a "footnote" and thus "insufficient to preserve, or even present, the constitutional claims" (Response at 11) (citing Shere v. State, 742 So. 2d 215, 216-18 n. 6 (Fla. 1999)). Respondent is wrong on the manner in which the issue was presented on direct appeal, and, as explained below, fails to cite contrary authority on the preservation issue. See Sireci v. State, 773 So. 2d 34 (Fla. 2000).

On direct appeal, Mr. Mills first alleged the due process and the right to trial by jury issue in footnote 5 of the Initial Brief; following the discussion, appellate counsel explicitly noted that the Court had previously rejected the claim and thus counsel "will not further develop this point" (Initial Brief of Appellant, Mills v. State, No. 59,140 at 45 n.5 (App. 1). He also raised the Sixth and Fourteenth Amendment issue on pp. 46-47 of the brief in light of the trial court's consideration of aggravation that was not considered by

---

[2]This assertion flies in the face of Respondent's repeated complaints that Mr. Mills' petition is "abusive" and "vexatious" because it raised claims which have been "repeatedly litigated" by Mr. Mills (Response at 10).

the jury (Id.). The manner in which appellate counsel preserved this claims on appeal was entirely appropriate in light of this Court's previous rejection of them.[3] As this Court stated in Sireci, supra:

> Defense counsel indicated during oral arguments that many of these issues needed to be raised for purposes of preserving the claim in the event that there is a change in the law which would afford a capital defendant relief. We understand and certainly appreciate defense counsel's valid concern. Notwithstanding, there is no need to unnecessarily burden any court with issues which simply detract focus from arguably meritorious claims. Accordingly, we take this opportunity to suggest that issues which are being raised solely for purposes of preserving an error should be so designated. We will consider the issues preserved for review in the event of a change in the law if counsel so indicates by grouping these claims under an appropriately titled heading and providing a description of the substance.

Sireci, 773 So. 2d at 41 n.14.[4] Clearly, appellate counsel did what

---

[3]In fact, Claim II of Mr. Mills' first state habeas petition argued that the death sentence violated the Sixth, Eighth, and Fourteenth Amendments on a number of grounds and reincorporated the direct appeal arguments. For example, Mr. Mills reasserted "the derogation of a defendant's right to a jury recommendation of punishment," the impropriety of "the trial judge [] consider[ing] and [find]ing aggravating circumstances not submitted or argued to the jury by the prosecution," and that it was unconstitutional "to deny the jury, even though its recommendation is only advisory, of the ability to comprehensively consider all the relevant aggravating and mitigating factors" (Petition for Extraordinary Relief, Etc., Mills v. Dugger, No. 75,037, at 8-9) (App. 2). In response, the State argued that the issues were "thoroughly addressed in Mills' direct appeal. . . . A review of the brief submitted by appellate counsel demonstrates that this point was thoroughly argued, covering twenty pages of the brief" (Response to Petition, Mills v. Dugger, No. 75,037 at 11-12 (App. 3).

[4]Respondent's reliance on Shere is misplaced. There, Shere's brief raised numerous claims alleging an improper summary denial but "for most of these claims, Shere did not present any argument or allege on what grounds the trial court erred in denying these

needed to be done to preserve a previously-rejected claim, as evidenced by the State's response on direct appeal (Answer Brief of Appellee at 52) (App. 4), as well as this Court's opinion on direct appeal. Mills v. State, 476 So. 2d 172, 177 (Fla. 1985) (noting appellate counsel "dutifully challenges the constitutionality of Florida's capital felony sentencing statute, but the arguments raised have been previously resolved against Mills").

If appellate counsel's briefing of the issue was not clear enough, he again raised the issue on pp. 5-6 in a motion for rehearing (App. 5). In response, the State argued that all the points raised were "nothing more than reargument" and "merely reiterate[s] the identical arguments already presented to and rejected by this tribunal" (App. 6).

Thus, at no time in the history of this case, until now, has the State of Florida asserted that Mr. Mills' right to jury trial and due process argument was not or was insufficiently preserved. Respondent's preservation argument is defaulted and meritless. Cannady v. State, 620 So. 2d 165, 170 (Fla. 1993).

2. Apprendi is New Law. *Assuming arguendo* the Court agrees with

---

claims." Shere, 742 So. 2d at 217 n.6. Thus, the Court held that these claims were "insufficiently presented for review." Id. Even a cursory review of Mr. Mills' Initial and Reply Brief, as well as the Motion for Rehearing, establishes that the issues were more than sufficiently presented for the Court's review.

Respondent that Mr. Mills did not or inadequately presented on appeal the issue now being presented, Respondent's arguments remain meritless in light of its argument that "it has never been suggested that a death sentence can only be imposed by a jury" (Response at 11). Of course, this is the basis of Mr. Mills' petition; he is asserting that Apprendi is new law which does not require prior preservation. See Delap v. Dugger, 513 So. 2d 659, 662 (Fla. 1987) (Hitchcock applied retroactively despite lack of preservation at trial).

Moreover, Mr. Mills would point out that Respondent has conceded in another case before this Court that Apprendi in fact is new law which could not have been previously anticipated:

> it is **obvious** that although Mann asserts that this claim could have been presented in his appeal[,] . . . Mann never explains how his appellate counsel could have foreseen the Apprendi ruling. . . . As this Court has recognized, **attorneys will not be deemed to have been ineffective for failing to anticipate changes in the law . . .**"

(Response to Petition for Writ of Habeas Corpus, Mann v. Moore, No. SC00-2602, at 21-22) (emphasis added) (App. 7). See also Lambrix v. Singletary, 641 So. 2d 847, 848 (Fla. 1994) (appellate counsel cannot be faulted for failing to anticipate changes in law).

Respondent argues that the Eleventh Circuit in In Re Joshua, 224 F. 3d 1281 (11th Cir. 2000), and the Second DCA in Jones v. State, 26 Fla. L. Weekly D563 (Fla. 2d DCA 2001), have not applied Apprendi to cases on collateral review. Respondent is mixing apples and oranges.

The Joshua court addressed whether a federal habeas petitioner could raise an Apprendi issue pursuant to the successor provisions of 28 U.S.C. §§ 2255 and 2244 (b)(2)(A). Under those provisions, federal courts are prohibited from entertaining a second or successive habeas petition unless, *inter alia*, it raises a claim involving "a new rule of constitutional law, made retroactive to cases on collateral review, by the Supreme Court, that was previously unavailable."[5] How the Eleventh Circuit has analyzed the issue under the AEDPA has nothing to do with this Court's jurisprudence under Witt, as Witt itself makes perfectly clear. Witt, 387 So. 2d at 928 ("the concept of federalism clearly dictates that we retain the authority to determine which `changes of law' will be cognizable under this state's post-conviction machinery. . . [W]e know of no constitutional requirement that the scope of Rule 3.850 be fully congruent with that of the analogous federal statute"). This Court is not required to be told by the Supreme Court that a decision can be retroactively applied before doing so on its own. See, e.g. Thompson v. Dugger, 515 So. 2d 173, 175 (Fla. 1987) (determining that Hitchcock v. Dugger "represents a sufficient change in the law" to

---

[5]In Teague v. Lane, 489 U.S. 288 (1989), the Supreme Court announced that federal habeas corpus petitioners would not be entitled to the benefit of a "new rule" unless certain narrow exceptions were met. The Teague doctrine is not applicable to this Court's determination of retroactivity; Witt is. See, e.g. Phillips v. State, 623 So. 2d 621 (Fla. 4th DCA 1992) (noting differences between Teague and Witt).

be retroactively applied).

As for the Jones decision from the Second District, at issue there was whether Apprendi impacted Jones's claim under Heggs v. State, 759 So. 2d 620 (Fla. 2000), and the Jones court noted that Apprendi "specifically excepted from this ruling prior convictions." Jones, 26 Fla. L. Weekly at D563. Thus the attack in Jones was vastly different than what Mr. Mills is raising. Moreover, the Second District conducted no Witt analysis. To the extent that the Second District relied on Joshua, its analysis is flawed for the reasons set forth above and should be abrogated. The district courts of Florida are not bound by the Eleventh Circuit's application of federal habeas corpus statutes.[6]

In addition to the Apprendi dissenters, a number of state and federal judges have found Apprendi to be a "watershed" change in the law requiring it to be applicable retroactively. See, e.g. People v. Beachem, 740 N.E.2d 389, 397 (Ill. Ct. App. 2000) ("We understand the implications of extending Apprendi to collateral review. But we do what we believe the law requires. Our constitutional history teaches

---

[6]This Court has not yet addressed Apprendi's effect on Florida's sentencing scheme, particularly its override scheme. Mr. Mills would note that in the Robert Patton case, Mr. Patton, in his motion for rehearing, argued that Apprendi implicated his argument that the 6-6 tie vote by the sentencing jury required relief. The rehearing was denied over Justice Anstead's dissent, and with Justice Pariente indicating that supplemental briefing on the Apprendi issue should have been ordered (App. 8).

us we best survive when we hew to the line drawn by the rule of law"); Darity v. United States, 124 F. Supp.2d 355, 360 (W.D.N.C. 2000) ("the undersigned concludes that Apprendi is also a substantive decision to which Teague's retroactivity rules do not apply"); United States v. Murphy, 109 F.Supp.2d 1059, 1063-64 (D. Minn. 2000) ("the Apprendi decision does implicate the second exception [to Teague], which applies to those `watershed rules of criminal procedure' which `alter our understanding of the bedrock procedural elements essential to the fairness of a proceeding` and `without which the likelihood of an accurate conviction is seriously diminished'"); Hoffman v. Arave, 236 F. 3d 523, 546-48 (9th Cir. 2001) (Pregerson, J., concurring) ("the issue at stake in this case--the right to have a jury determine facts that increase the potential penalty from life imprisonment to death--is the kind of fundamental rule of criminal procedure that should be applied retroactively under the second Teague exception").

3. Relief is Warranted. Respondent argues that Apprendi is "inapplicable" to capital sentencing schemes, including Florida's, citing a number of cases upholding such sentencing schemes (Response at 11-12). Curiously, Respondent does not address Apprendi's impact on override cases such as Spaziano v. Florida, 468 U.S. 447 (1984), nor does Respondent discuss, much less explain, the peculiarities of the 1980 statute under which Mr. Mills was charged. That "[d]eath is the maximum penalty for first-degree murder in the State of Florida"

(Response at 14), is not an accurate statement of Florida's statute, which unmistakably provided that "a person convicted of a capital felony **shall be punished by life imprisonment**" unless and until additional proceedings are conducted. § 775.082 (1) (1980) (emphasis added). Thus, a death sentence under Florida's unique sentencing scheme clearly "describe[s] an increase beyond the maximum authorized statutory sentence," Apprendi, 120 S.Ct. at 2365 n.19, and death-eligibility elements[7] must therefore be submitted to and found by a jury under the Sixth and Fourteenth Amendments.[8]

In arguing that Apprendi is "inapplicable to capital sentencing" (Response at 6), Respondent points to the quotation, repeated in Apprendi, from Justice Scalia's dissent in Almendarez-Torres v. United

---

[7]This would include specific findings of eligibility under Enmund v. Florida, 458 U.S. 782 (1982), and Tison v. Arizona, 481 U.S. 137 (1987). Cf. Stephens v. State, 2001 WL 252160 (Fla. 2001) (Anstead, J., dissenting).

[8]Respondent refers to Justice Thomas' concurring opinion in Apprendi as supportive of its argument (Response at 13 n.3) ("In effect, the United States Supreme Court held that `death is different,' as Justice Thomas suggested in his concurring opinion"). Of course, Justice Thomas wrote that, in his view, he need not address Apprendi's implications on Walton v. Arizona, 497 U.S. 639 (1990), leaving that question "for another day." Apprendi, 120 S.Ct. 2380-81 (Thomas, J., concurring). If Respondent is gleaning from Justice Thomas that Apprendi's reach to Florida's override scheme would be unavailing because "death is different," this argument would further establish an equal protection violation. The Sixth Amendment's protections cannot be constitutionally lower in death penalty cases. Justice O'Connor's dissent in Apprendi pointed out that Justice Thomas' suggestion "is without precedent in our constitutional jurisprudence." Apprendi, 120 S.Ct. at 2388 (O'Connor, J., dissenting).

States, 523 U.S. 224, 257 n.2 (1998) (Scalia, J., dissenting). While the majority decision found Apprendi not inconsistent with Walton, the quotation from Justice Scalia's dissent in Almendarez-Torres clearly indicates that it is, at least so far as the Florida scheme is concerned and how it was applied in Mr. Mills' case. What this quotation says is that a judge is not permitted "to determine the existence of a factor which makes a crime a capital offense"; instead, a judge can determine the penalty "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." One of the constitutional flaws in Mr. Mills' case is that the judge found aggravating factors that were in fact never presented or argued to the jury. This violates Apprendi and Justice Scalia's observation in Almendarez-Torres.

Whether Apprendi in fact overruled Walton and other cases remains an open question. At a minimum, Apprendi certainly has not "squarely foreclosed" that possibility, as Respondent suggests (Response at 14). The opinion of the Court was written by Justice Stevens, joined by Justices Ginsburg, Scalia, and Souter. Justice Thomas concurred with the judgment of the Court, but wrote separately not only to endorse a broader rule than adopted by the majority, but also to express his opinion that he "need not in this case" decide whether Walton has been overruled, leaving that as "a question for another day." Apprendi, 120 S.Ct. at 2380. And the dissenters all strongly suggested that Walton

had been overruled. Id. at 2387-89 (O'Connor, J., dissenting, joined by Rehnquist, C.J., Breyer and Kennedy, JJ.).

Respondent's reliance on Weeks v. State, 761 A.D.2d 804 (Del. 2000), a case where the defendant pled guilty, is misplaced.[9] The Delaware capital sentencing scheme is vastly different from Florida's. Unlike Florida, Delaware's statute does not mandate a life sentence unless a separate penalty proceeding is held. See 11 Del.C. § 4209 (a). Unlike Florida, Delaware prosecutors are required to provide notice to the defense of any aggravating circumstances it intends to pursue. See 11 Del.C. §4209 (c)(1). And unlike Florida, Delaware jurors are required to disclose which specific aggravators they have found to exist beyond a reasonable doubt, and make a specific finding that the aggravators outweighed the mitigation on each count. Weeks, 761 A.2d at 805-06 & n.5; 11 Del.C. §§ 4209 (c)(3); (d)(1). Weeks provides no meaningful insight as to how Apprendi impacts Florida's 1980 scheme permitting overrides either in general or as applied to Mr. Mills.

REPLY TO RESPONSE TO ARGUMENT II

Respondent barely addresses this issue and chooses to ignore what the argument is. All Respondent really says is that because this Court on direct appeal cited to Tedder v. State, 322 So. 2d 908 (Fla. 1975),

---

[9]Weeks also involved a second state postconviction action filed in light of Apprendi. Weeks received merits consideration of his Apprendi claims.

then this Court "applied" Tedder (Response at 16). However, nothing about the actual analysis conducted by the Court on direct appeal remotely comports with the Tedder analysis conducted by the Court in Keen v. State, 775 So. 2d 263 (Fla. 2000).

In sentencing Mr. Mills, the trial judge's entire analysis, after discussing the aggravation and mitigation, is as follows:

> IT IS the finding of the Court after weighing the aggravating and mitigating circumstances that there are sufficient aggravating circumstances as specified in 921.141 and insufficient mitigating circumstances therein that a sentence of death is justified.

(R. 642) (App. 9). There is no mention of Tedder whatsoever. Cf. Keen, 775 So. 2d at 284 n.20 ("Indeed, the second page of the sentencing order contains details of the aggravators, the mitigators, and supporting evidence as in a death recommendation case. It was not until the twelfth page of the sentencing order that Tedder is mentioned . . . . In short, the analysis was conducted backwards"). Even the order found lacking in Keen made some attempt to set forth why the judge believed the jury's recommendation to be lacking in a reasonable basis. Id. at 283-84. No such attempt was made by the trial court in Mr. Mills' case. It is clear that Mr. Mills' judge simply "disagreed" with the jury's recommendation "based on his view of the mix of aggravators and mitigators, rather than through the prism of a Tedder analysis." Id. at 284.

On direct appeal, the Court's conclusion that Tedder had been

satisfied was premised on the following factors: (1) there are three valid aggravating factors; (2) that "the trial judge has found that there are no valid mitigating circumstances"; and (3) that the "purported mitigating circumstances claimed by Mills, but not found by the trial judge, are not sufficient to outweigh the aggravating circumstances nor do they establish a reasonable basis for the jury's recommendation." Mills, 476 So. 2d at 179. This is plainly incorrect under Keen, which explicitly held that under Tedder, "[t]he singular focus of a Tedder inquiry is whether there is `a reasonable basis in the record to support the jury's recommendation of life, rather than the weighing process which a judge conducts after a death recommendation." Keen, 775 So. 2d at 283. The mere existence of aggravators does not, under Tedder, exclude the possibility of a reversal in an override: "[R]eversal under Tedder is in no way prevented even assuming the presence of several valid aggravators. Indeed, that has been the rule rather than the exception." Id. at 287 n.24.

It could not be clearer that the interpretation of Tedder employed on Mr. Mills' direct appeal is not the same as applied in Keen. Mr. Mills cannot, consistent with the principles of due process and equal protection, be arbitrarily denied review of his override under Tedder as "properly interpreted" by Keen. Fiore v. White, 121 S.Ct. 712, 714 (2001). See also Parker v. Dugger, 876 F. 2d 1470, 1474

(11th Cir. 1989), rev'd on other grounds, 498 U.S. 308 (1991) ("Procedures that result in the constitutional application of the death penalty if correctly followed may result in the unconstitutional application of the death penalty if followed incorrectly").

Finally, Respondent relies on the fact that Mr. Mills unsuccessfully advanced this claim in federal habeas (Response at 17). Respondent misrepresents what the Eleventh Circuit addressed. The Eleventh Circuit recognized that Mr. Mills was claiming that his override was arbitrarily affirmed in light of this Court's statement in Cochran v. State, 547 So. 2d 928 (Fla. 1988), acknowledging its previous inconsistent application of Tedder. Mills v. Singletary, 161 F.3d 1273, 1282 (11th Cir. 1998). However, the Eleventh Circuit *refused to entertain the claim*, holding that "Mills is actually requesting a proportionality review, which the district court correctly refused to entertain." Id. at 1282. See also id. ("To compare Mills' situation with other Florida capital defendants whose override issues were decided after 1985 would be in contravention of our role as a federal court").[10] Second, Keen was not available as evidence that Mr.

---

[10]This was at the urging of the Respondent, whose brief in the Eleventh Circuit explicitly argued that Mr. Mills' claim was "squarely foreclosed by binding precedent" and that it was not the federal court's responsibility to intervene where "[t]he Florida courts determined that State law had been followed" (Answer Brief of Appellee, Mills v. Singletary, No. 96-3505, at 10-11). That the Respondent would now represent to this Court that Mr. Mills claim was rejected by the federal courts when it (successfully) urged the

Mills could use to persuade the federal courts.

"[A] fundamental injustice [] has occurred in this case and [] should be corrected by this Court without further delay." Patton v. State, 25 Fla. L. Weekly S749 (Fla. 2000) (Anstead, J., concurring in part and dissenting in part). The constitutionality of Florida's override is premised in large part on the presumption that this Court "takes [the Tedder] standard seriously and has not hesitated to reverse a trial court if it derogates the jury's role." Spaziano v. Florida, 468 U.S. 447, 465 (1984). Thus this Court must "step[] up to the plate" and "should not hesitate to acknowledge that our prior review of [Mr. Mills'] case did not measure up to the requirements" of Tedder. White v. State, 664 So. 2d 242, 247 (Fla. 1995) (Anstead, J., dissenting). "The existence of this fundamental flaw in this almost twenty-year-old case is simply another illustration of the need for careful scrutiny in all cases in which the death penalty is imposed." Patton, supra. "Such heightened scrutiny ensures, as much as humanly possible, that only those who are legally subject to execution are executed." Swafford v. State, 679 So. 2d 736, 740 (Fla. 1996) (Harding, J., specially concurring). Based on the foregoing, Mr. Mills is not "legally subject" to being executed when his override is properly scrutinized under Tedder and Keen.

---

federal courts to refuse to entertain this argument demonstrates that, other than a not-so-subtle game of "gotcha," it really has no argument on the merits of this issue.

WHEREFORE, Petitioner Gregory Mills respectfully requests that habeas corpus relief be granted.

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by United States Mail, first class postage prepaid, to all counsel of record on March 26, 2001.

____

TODD G. SCHER
Florida Bar No. 0899641
Litigation Director
CCRC South
101 NE 3d Avenue, Suite 400
Ft. Lauderdale, Florida 33301
(954) 713-1284
Attorney for Defendant

Copies furnished to:

Kenneth Nunnelley, Asst. Attorney General
Office of the Attorney General
444 Seabreeze Boulevard, 5th Floor
Daytona Beach, FL 32118