IN THE SUPREME COURT OF FLORIDA

JOE ELTON NIXON,

Petitioner,

v. CASE NO. SC93912

MICHAEL W. MOORE,
Secretary, Fla. Dept of Corrections

Respondent.
_____/

RESPONSE TO AMENDED
PETITION FOR WRIT OF HABEAS CORPUS

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PRELIMINARY STATEMENT

The State accepts Nixon's Introduction and Procedural History as a sufficient explanation of the status of this habeas proceeding. Like Nixon, the State will not repeat the detailed history of this case which is set out in its brief on appeal from the denial of relief on Nixon's claim that he failed to assent to trial counsel's strategy at the guilt phase of his capital trial. As to the grounds raised in Nixon's original habeas petition, the State will rely on its response filed previously. In this response, the State will address the two new grounds for relief raised in Nixon's Amended Petition.

CLAIM I

THE APPRENDI/RING ISSUE

Nixon contends here that various of Florida's sentencing procedures are invalid under Apprendi v. New Jersey, 530 U.S. 466 (2000) and Jones v. United States, 526 U.S. 227 (1999). He notes that the United States Supreme Court granted certiorari in Ring v. Arizona to review Arizona's judge-sentencing procedures in capital cases, and states that it would be inappropriate to brief the issue now, before Ring "clarifies this area of constitutional law." Amended Petition at 7. Since Nixon filed his amended petition, the United States Supreme Court has issued a decision in Ring, holding that Arizona's

death penalty statute violates the Sixth Amendment right to a jury trial "to the extent that it allows a sentencing judge, sitting without a jury, to find an aggravating circumstance necessary for imposition of the death penalty." Ring v. Arizona, 122 S.Ct. 2428 (2002). The question of the effect, if any, of this decision on Florida capital sentencing procedures is presently before this Court in the Amos Lee King and Linroy Bottoson cases, and in fact oral arguments are scheduled for August 21 - the day after the State is filing this response. See Case No. SC02-1457 (King) and SC02-1455 (Bottoson).

Nixon has declined to argue his Apprendi claim, stating that it would be inappropriate to do so until the law in this area is clarified by a decision in Ring. He has stated that he will request leave of this Court to brief his Apprendi claim "if that course appears appropriate after Ring v. Arizona is decided by the United States Supreme Court." Ring has now been decided but, to the State's knowledge, Nixon has not requested leave of this Court to brief and argue his Apprendi claim. Claims that are unsupported by argument are not properly presented for decision. Branch v. State, 790 So.2d 437, 439 (Fla. 1st DCA 2000); Greenwood v. State, 754 So.2d 158, 160 (Fla. 1st DCA 2000); State v. Mitchell, 710 So.2d 1245, 1247 (Fla. 1st DCA

1998).[1] Thus, there appears to be nothing for the State to respond to at this juncture. The State would request leave to respond to any argument Nixon files on this issue, if he does so file. At this juncture, the State would just state its position that Nixon's claim is procedurally barred and/or Teague barred[2] and meritless, as this Court will ultimately conclude in the King and Bottoson cases.

CLAIM II

THE MENTAL RETARDATION ISSUE

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[1] Federal decisions are similar. E.g., U.S. v. Harvey, 959 F.2d 1371, 1376 (7th Cir. 1992) (argument which is nothing more than an assertion of claim does not warrant appellate review).

[2] Although the Ring and Apprendi decisions are recent decisions, the statutory scheme and argument to present a claim that Florida's death penalty process violates the Sixth Amendment right to a jury trial has been available since Nixon's sentencing, but were never asserted as a basis for relief until after he was denied relief by the circuit court on postconviction. This Court has consistently and repeatedly stated that the habeas vehicle 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). Since Nixon did not offer this claim in a timely manner, it is now barred. To the extent that Ring is sufficiently a "new rule" to excuse the default, Nixon is barred under the non-retroactivity doctrine of Teague v. Lane, 489 U.S. 288 (1989).

Nixon argues that the record shows that he is mentally retarded and his execution would be unconstitutional. Since he filed his amended petition, the United States Supreme Court issued its decision in Atkins v. Virginia, 122 S.Ct. 2242 (2002). However, neither Atkins nor the Florida Statute offers any benefit to Nixon, because the record does not show that he is mentally retarded as that term is defined generally or under Florida law; on the contrary, the record conclusively shows that he is not mentally retarded. One is "mental retarded" only if one has "significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the period from conception to age 18." Section 921.137, Fla. Stat. (2001). Significantly subaverage intellectual functioning means, in essence, an IQ below 70 (two or more standard deviations below the mean score of 100). Diagnostic and Statistical Manual of Mental Disorders, 4th Edition (DSM IV). Nixon's IQ is above 70, and it was above 70 when he murdered Jeanne Bickner. Furthermore, it is undisputed that Nixon's IQ was 88 when he was a teenager (5TR 836-37), and was still as high as 83 in 1981, when he was 19 or 20 years old. Defense Trial Exhibit 39. These IQ scores clearly do not indicate mental retardation; in fact, they are only slightly out of the average range (50% of the population

has an IQ between 90 and 110). Absent manifestation of mental retardation before age 18, Nixon cannot be deemed mentally retarded so as to qualify for the statutory prohibition against the death penalty contained in Section 921.137, or the constitutional prohibition of Atkins, even assuming that Nixon's IQ and/or adaptive skills have diminished since he has been on death row. Thus, he is entitled to no relief on this claim.

CONCLUSION

Nixon has failed to demonstrate any entitlement to relief, and his Petition for Writ of Habeas Corpus should be denied in its totality.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Jonathan Lang, 305 West 103rd Street, New York, New York 10025, this 20th day of August, 2002.

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CURTIS M. FRENCH
Senior Assistant Attorney General

CERTIFICATE OF FONT AND TYPE SIZE

Counsel certifies that this pleading was typed using 12 point Courier New.

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CURTIS M. FRENCH
Senior Assistant Attorney General