IN THE SUPREME COURT OF FLORIDA

JAMES AREN DUCKETT,
Petitioner,

v. CASE NO. SC02-1300

MICHAEL C. MOORE, Secretary,
Florida Department of
Corrections,
Respondent.
_____/

RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

COMES NOW the Respondent, by and through counsel of record, and responds as follows to Duckett's petition for habeas corpus relief from his convictions and sentence of death. For the reasons set out herein, Duckett is not entitled to any relief.

RESPONSE TO INTRODUCTION

The "Introduction" set out of page 1 of the petition is argumentative, and is denied.

RESPONSE TO JURISDICTIONAL STATEMENT

The statement of jurisdiction set out on page 1 of the petition is essentially accurate. The Respondent does not concede that there are any grounds for habeas corpus relief.

RESPONSE TO REQUEST FOR ORAL ARGUMENT

Duckett's request for oral argument is argumentative and is denied. There is no need for oral argument in this case. The assertions of "innocence" contained in Duckett's petition are, at best, based upon an inaccurate and misleading view of the

evidence, which ignores the extensive evidence of Duckett's guilt in favor of elevating a lone witness to "key witness" status -- the record does not support that interpretation, and there is no basis for relief.

RESPONSE TO PROCEDURAL HISTORY

The "Procedural history" set out on pages 3-5 of the petition is essentially accurate, but is unnecessarily argumentative. The Respondent relies on the following summary of the facts as found by this Court on direct appeal:

> The facts in this opinion are set forth in extensive detail since the convictions are based on circumstantial evidence. Duckett, a police officer for the City of Mascotte, was the only officer on patrol from 7:00 p.m., May 11, 1987, to 7:00 a.m., May 12, 1987. Between 10:00 and 10:30 p.m. on May 11, Teresa McAbee, an eleven-year-old girl, walked a short distance from her home to a convenience store to purchase a pencil. Teresa left the store with a sixteen-year-old Mexican boy, who was doing laundry next door. The boy testified that they walked over to the convenience store's dumpster and talked for about twenty minutes before Duckett approached them. A clerk at the convenience store testified that Duckett entered the store and asked her the girl's name and age, at which time she advised him that Teresa was between ten and thirteen years old. After indicating that he was going to check on her, Duckett exited the store and walked toward the dumpster, where he located the two children. Duckett testified that he conversed with the children and subsequently, acting in his capacity as a police officer, instructed Teresa to return home. The sixteen-year-old boy testified that, after speaking with Duckett, he went to the laundromat to wait for his uncle, who arrived soon thereafter; that Duckett and Teresa were standing near the patrol car; and that Duckett asked the uncle the nephew's age. Subsequently, Duckett suggested that the uncle

talk to his nephew while he spoke to Teresa. According to the uncle and the boy, Duckett placed Teresa in the passenger's side of his patrol car and shut the door before proceeding to the driver's side. The uncle also testified that he never saw Teresa touch the hood of Duckett's car.

At approximately 11:00 p.m., Teresa's mother walked to the convenience store, searching for her daughter. Upon arrival, she was told by the store's clerk that Duckett may have taken her daughter to the police station. The mother then left the store and spent about an hour with her sister driving around Mascotte in search of Teresa. During this time, the mother did not see a police car. She next went to the Mascotte police station and, finding no one there, she drove a short distance to the Groveland police station. There, she told an officer that she wanted to report her daughter as missing. The officer told her that he would contact a Mascotte officer to meet her at the Mascotte police station. Teresa's mother returned to the Mascotte police station and waited for fifteen to twenty minutes before Duckett arrived. After arriving, Duckett told her that he had spoken with Teresa at the store; that she had been in his police car; and that he had directed her to return home. Before returning home, the mother also filed a missing person report with Duckett. Subsequently, Duckett went to the mother's residence to get a picture of her daughter, called the police chief to inform him of the missing person report, and advised the police chief that he had made a flyer and did not need any help in the matter. Duckett then returned to the convenience store with a flyer but told the clerk not to post it since it was not a good picture. Although he told the clerk that he would return with a better one, he never did. Duckett did bring flyers to two other convenience stores. The clerk at one of these stores testified that, while the police usually drove by every forty-five minutes to an hour, Duckett came by at 9:30 p.m. but failed to return until he brought the flyer later that evening. A tape of Duckett's radio calls indicated none between 10:50 p.m. and 12:10 a.m. At 1:15 a.m., Duckett went to the uncle's house to question his nephew about Teresa, and Duckett returned to the mother's home around 3:00 a.m.

Later that morning, a man saw what he believed to be a body in a lake and went to find the police chief, who determined that it was Teresa's body. The lake is less than one mile from the convenience store where Teresa was last seen.

A medical examiner testified that the perpetrator had sexually assaulted the victim while she was alive, strangled her, and then drowned her, causing her death. Prior to this incident, the victim had not engaged in any sexual activity. Blood was found on her underpants but not in or about Duckett's patrol car. Semen was discovered on her jeans.

A technician for the sheriff's department examined the tire tracks at the murder scene and indicated that they were very unusual. While leaving the crime scene, he observed that the tracks of a Mascotte police car appeared to be similar. He stopped his vehicle, examined the tracks, and determined that they were consistent with the tracks at the crime scene. An expert at trial corroborated this evaluation. The tracks were made by Goodyear Eagle mud and snow tires, which are designed for northern driving. While the local tire center had not sold any of those particular tires during its nine years of existence, it had received two sets by mistake and placed them on the two Mascotte police cars.

Evidence revealed that the vehicle which left the impressions had driven through a mudhole. However, no evidence was presented that Duckett cleaned his vehicle, and no debris from the scene was found in or on his vehicle. Evidence was also presented that Duckett was neat and clean later that night, as if he had just come on duty.

Both Duckett's and Teresa's fingerprints were discovered on the hood of Duckett's patrol car. Duckett's prints were commingled with the victim's, whose prints indicated that she had been sitting backwards on the hood and had scooted up the car.

A pubic hair was found in the victim's underpants. While other experts could not reach a conclusion by comparing that hair with Duckett's pubic hair, Michael

Malone, an FBI special agent who had been qualified as an expert in hairs and fibers in forty-two states, examined the hair sample, concluding that there was a high degree of probability that the pubic hair found in her underpants was Duckett's pubic hair. Malone also testified that the pubic hair did not match the hairs of the sixteen-year-old boy, the uncle, or the others who were in contact with the victim that evening.

On June 15, 1987, before his arrest, Duckett gave a statement in which he denied driving his vehicle to the lake that evening. He further stated that the victim had not been on the hood of his patrol car and that he had stopped at the Jiffy store for coffee after the girl went home.

The state presented testimony of three young women who allegedly had sexual encounters with Duckett. Prior to the introduction of this testimony, the trial judge instructed the jury that the testimony was for the limited purpose of showing motive, opportunity, plan, and identification. The first woman, a petite nineteen-year-old, testified that, in either January or February, 1987, she ran into Duckett while she was attempting to find her boyfriend. After indicating that he, too, was searching for her boyfriend, he drove her in his patrol car in search of her boyfriend. While in the car, Duckett placed his hand on her shoulder and attempted to kiss her. After she refused to kiss him, he desisted and she got out of the car. The second woman, a petite eighteen-year-old, stated that, on May 1, 1987, Duckett picked her up while she was walking along the highway. After Duckett drove her to a remote area in an orange grove, he parked the car, placed his hand on her breast, and attempted to kiss her. When she refused to kiss him, he desisted and drove her to where she requested. The third woman, a petite seventeen-year-old, testified that on two occasions, once in February or March, 1987, and again in April or May, 1987, she voluntarily met Duckett at a remote area while he was on patrol and performed oral sex on him.

At trial, Duckett testified that, on the night of the murder, while running stationary radar near the

convenience store, he noticed a girl talking to three Mexicans at a laundromat. After he saw the girl and one of the boys walk over to an ice machine, he went into the store to ask the clerk some questions about the girl. He then left the store, asked the children their ages, requested that they walk to his car, and questioned the boy further. At this time, the boy's uncle arrived at the scene with some other men. Subsequently, Duckett placed the girl in his car while he spoke with the uncle about his nephew. After the boy's uncle left with the other men, Duckett obtained more information from Teresa and told her to go home. He did not see her again after she got out of the car and walked in front of the store.

Duckett also stated that he then returned to the station for a short period of time, went to one of the convenience stores for coffee, and went on patrol. He subsequently responded to a call by a Groveland police officer and returned to the station in Mascotte, where he met the girl's mother. After visiting the uncle's home to ask some questions concerning the girl, he drove to the mother's home to get a picture. He then returned to city hall, called the police chief, and told him he was going to make a poster and contact all the stores.

With regard to Teresa's fingerprints on the hood of his car, he explained that it was possible that she sat on the hood when he was at the convenience store. Duckett denied any involvement with the three women.

The jury found Duckett guilty of sexual battery and first-degree murder. In the penalty phase, the state presented no additional testimony and Duckett presented the testimony of four witnesses. By an eight-to-four vote, the jury recommended a death sentence. The trial judge found two aggravating circumstances, specifically, that the murder was committed during the commission of or immediately after a sexual battery and that the murder was especially heinous, atrocious, or cruel. The trial judge found the existence of one statutory mitigating circumstance, namely, that Duckett had no significant history of prior criminal activity. The trial judge also determined that Duckett's family background and

> education gave rise to nonstatutory mitigating evidence. After making these findings, the trial judge imposed the death sentence, concluding that the aggravating circumstances outweighed the mitigating circumstances, and sentenced Duckett to life imprisonment for the mandatory minimum of twenty-five years for the sexual battery conviction.

Duckett v. State, 568 So. 2d 891, 892-94 (Fla. 1990). This Court framed the issues raised by Duckett in the following way:

> (1) whether the trial court erred in denying his motion for a judgment of acquittal based on his claim that the circumstantial evidence did not exclude all reasonable hypotheses of innocence; (2) whether the trial court erred in admitting the testimony of the three female witnesses under the ***Williams*** rule; [footnote omitted] (3) whether the trial court erred in qualifying Michael Malone as an expert in the field of hair analysis; and (4) whether the trial court erred in imposing the death penalty.

Id.

Duckett collaterally challenged his convictions and sentence beginning on May 1, 1992, when he filed his *Florida Rule of Criminal Procedure* 3.850 motion in the Circuit Court. The trial court conducted some nine days of evidentiary proceedings spaced over approximately two years, and, on August 13, 2001, entered an order denying all relief.[1] Duckett appealed the denial of post-conviction relief, and filed his *Initial Brief* on or about May 31, 2002. The instant habeas petition was filed on June 6,

[1]This order was entered about two-and-one-half years after the last evidentiary proceeding.

2002.

DUCKETT'S PETITION IS UNTIMELY

In *Mann v. Moore,* this Court stated, in clear terms, that habeas petitions must be filed simultaneously with the filing of the *Initial Brief* on appeal from the denial of Rule 3.850 relief:

> Thus, we do not bar Mann's petition under rule 9.140(b)(6)(E), **BUT WE DO ANNOUNCE THAT IN CAPITAL POSTCONVICTION LITIGATION, EFFECTIVE JANUARY 1, 2002**, all petitions for extraordinary relief, including habeas corpus petitions, must be filed simultaneously with the initial brief appealing the denial of a rule 3.850 motion. *See Fla. R. App. P*. 9.140(b)(6)(E). We hold that the simultaneous filing requirement in rule 9.140(b)(6)(E) and 3.851(b)(2) does apply to defendants whose convictions and sentences were finalized prior to January 1, 1994, notwithstanding the provision of rule 3.851(b)(6). By this holding, we recede on this sole point from our contrary holding in *Robinson v. Moore*, 773 So. 2d 1, 2 n. 1 (Fla. 2000).

Mann v. Moore, 794 So. 2d 595, 598 (Fla. 2001). [emphasis in original]. Rule 3.851 provides that:

> (3) All petitions for extraordinary relief in which the Supreme Court of Florida has original jurisdiction, including petitions for writ of habeas corpus, shall be filed simultaneously with the initial brief filed on behalf of the death-sentenced prisoner in the appeal of the circuit court's order on the initial motion for postconviction relief filed under this rule.

Rule 3.851, *Fla. R. Crim. P.* Duckett did not comply with the clearly-expressed filing requirements contained in the Rules of Criminal Procedure which were stated, in unequivocal terms, in

this Court's *Mann* opinion. Duckett can have no excuse for failing to timely file his petition for habeas corpus relief, and it should be dismissed as untimely in accord with this Court's clear ruling in *Mann*.[2]

RESPONSE TO CLAIMS FOR RELIEF

I. THE ACTUAL INNOCENCE CLAIM

On pages 5-13 of the petition, Duckett argues that he is "innocent and his execution would be a miscarriage of justice." When the histrionics of this claim are stripped away, what remains is an argument that presents an interesting history of opposition to capital punishment, but wholly fails to explain (or, indeed, do anything other than speculate) why Duckett is supposed to be entitled to some sort of relief. This claim makes only the bare assertion that "the key witness against" Duckett lied at trial, identifies no record support for any of the few factual assertions that are contained in the petition, and offers no explanation of what the evidence is or how it supports

[2]Duckett's clear failure to file his habeas petition in a timely manner is a procedural bar that this Court should enforce, and is a bar that will be respected by the Federal courts. *See, Coleman v. Thompson,* 504 U.S. 188, (1992) (Enforcing a state procedural bar ruling holding untimely a proceeding that was instituted three days after expiration of the filing deadline.)

this claim.[3] Because this claim wholly fails to identify any basis for granting relief, it is insufficiently pleaded, and does not constitute a basis for relief.

To the extent that this claim is based upon the "recantation" that is the subject of the previously-filed Rule 3.850 appeal, that claim is properly addressed in that proceeding, and, because that is so, is not properly brought in a petition for habeas relief. F.R.Crim.P.3.850(h); *Ventura v. State*, 794 So. 2d 553 (Fla. 2001); *Atwater v. State*, 788 So.2d 233 (Fla. 2001); *Scott v. Dugger*, 604 So. 2d 465 (Fla. 1992); *Parker v. Dugger*, 550 So.2d 459 (Fla. 1989). In any event, the collateral proceeding trial court rejected the "recantation" as incredible, and that credibility choice should not be disturbed.[4]

Finally, the evidence of Duckett's guilt which is set out above makes **no** reference to witness Gurley (who allegedly recanted), and, despite Duckett's claim to the contrary, has not been called into question in any way by any matter that is

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[3]Of course, assertions by counsel are not evidence to support a claim for relief.

[4]The evidence, independent of the "recanting" witness, is more than enough to sustain a sufficiency of the evidence challenge even under the higher standard applied to circumstantial evidence cases. This Court's direct appeal opinion did not even mention the "recanting" witness's testimony -- even without that witness, there is more than enough to convict.

before this Court. This Court found that the evidence was sufficient to exclude all reasonable hypotheses of innocence, and none of that evidence has been undermined in any fashion. In light of that finding, Duckett's claim of "innocence" fails because the evidence does not support it. What Duckett has tried to present as a claim of "actual innocence" is, when stripped of its constitutional pretensions, nothing more than his continuing dissatisfaction over being convicted of murder and sentenced to death. This claim has no colorable basis, and all relief should be denied.

II. THE "*BRADY*" CLAIM

On pages 13-17 of his brief, Duckett argues that the State committed a *Brady* violation on direct appeal by "failing" to disclose (during the 1990 direct appeal) the contents of the April **1997** Department of Justice report concerning the FBI laboratory. This claim is improperly pleaded in this habeas proceeding because it is properly presented in a Rule 3.850 proceeding. *Mills v. Dugger,* 574 So.2d 63 (Fla. 1990), *White v. Dugger*, 511 So.2d 554 (Fla. 1987).[5] In addition to being improperly raised in this proceeding, the fundamental defect

[5]In footnote 11 on page 17 of the petition, Duckett admits that these issues are also raised in the appeal from the denial of his Rule 3.850 motion. That admission highlights the improper nature of these claims.

with this claim is its factual impossibility. The State simply cannot have "disclosed" the 1997 report, which obviously did not exist at the time of the trial and direct appeal -- it is disingenuous to suggest to the contrary. The "*Brady*" claim is a legal impossibility under these particular facts, and would not supply a basis for relief even if it were properly contained in this habeas petition.

Moreover, the trial record indicates that Agent Malone was extensively questioned about his expert qualifications, and, likewise, the Rule 3.850 record indicates that Agent Malone was questioned at length about the Department of Justice report. (R1782-1792, 1799-1800). This "issue" does not amount to a *Brady* violation, and Duckett's claims to the contrary have no basis in law or fact.

Likewise, the *Brady* claim which is predicated on the "prior testing" of the unknown hair by FDLE is not cognizable in this proceeding because it can be (and has been) raised in the Rule 3.850 proceedings. Because that is so, the claim is not properly raised in this proceeding, and should be dismissed on that basis alone. *Mills, supra; White, supra*.

Moreover, in addition to being improperly raised in this proceeding, this claim has no factual basis because it is based upon a strained interpretation of the trial testimony. The trial

record indicates that Agent Malone testified that he was not **initially** aware that the known hair sample had been examined by another crime laboratory (R1028), not that he **never** knew of the prior examination. In any event, the record at the time of trial (R1028-9), and the testimony at the evidentiary hearing makes it clear that when the prior examination is **inconclusive**, as is the case here, the FBI laboratory will undertake an examination of the evidence at issue. (R1771). The claim set out in Duckett's habeas petition is based upon a disingenuous interpretation of the record, and does not provide a basis for relief because it has no basis in fact. There is simply no false testimony, nor is there any non-disclosure of favorable evidence -- even viewed in the light most favorable to Duckett, there is no basis for relief because there is no error. This claim is improperly raised in this proceeding in addition to having no basis in fact. All relief should be denied.[6]

III. THE INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL CLAIM

On pages 18-20 of the petition, Duckett argues that "numerous constitutional deprivations were not raised nor

[6]To the extent that further discussion is necessary, none of these matters are "material" under ***Brady,*** nor is there any possibility of a different result had the facts alleged been placed before the jury (even assuming that that is possible, given that one component of this claim post-dates Duckett's trial by several years).

adequately briefed."[7] This claim is insufficiently briefed, and, for that reason, is unworthy of consideration. It is axiomatic that the purpose of an appellate brief is to present legal argument along with the authority to support that argument -- there is no rational basis upon which a habeas corpus petition should be treated differently. Duckett has done no more that list some five "examples" of issues that "could" have been raised (*Petition* at 18) -- no record citations identify the claimed errors, and Duckett has not favored this Court with citation to authority supporting his claims of error. Duckett has done little more than allege that certain vaguely-identified errors occurred, and suggest that this Court must locate the errors to which Duckett refers and then construct his argument for relief for him. That is not the purpose of an appellate proceeding, and this claim should be stricken as insufficiently pleaded.

To the extent that it is possible to identify what Duckett's claims are[8], and the Respondent does not agree that such is his

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[7]Duckett later asserts, in equally vague fashion, that "several meritorious arguments were available" -- he does not identify those arguments. (*Petition*, at 19).

[8]Respondent will make no attempt to identify the allegedly "improper prosecutorial argument and comments" for Duckett. He is the master of his case, and his failure to fulfill his responsibilities does not require Respondent to do Duckett's job for him.

responsibility, the jury instructions given at the penalty phase of Duckett's trial were the standard jury instructions promulgated by this Court. (TR2028-2029, 2062-2067). There was no error in the giving of those instructions, and, at the time of Duckett's direct appeal, the instructions with respect to the aggravators and mitigators had recently been upheld by this Court. *See, Stewart v. State,* 549 So. 2d 171 (Fla. 1989); *see also*, *Fotopoulos v. State,* 608 So. 2d 784 (Fla. 1992). Duckett's claim that there was no "factual support" for the heinous, atrocious or cruel aggravator is spurious -- the cause of death was drowning and strangulation, both of which are very nearly facts which *per se* establish the heinousness aggravating circumstance. *Hitchcock v. State*, 578 So. 2d 685 (Fla. 1990). With respect to the claim that there was insufficient support for the "in the course of a sexual battery" aggravator, the true facts are that Duckett was convicted of sexual battery, and this Court affirmed that conviction. *Duckett v. State, supra.* Against that backdrop, there could be no possibility of success.

The claims that the jury instructions "minimized the jury's role in the sentencing process" and that the burden was shifted to the defendant have been repeatedly rejected by this Court. *See, Hunter v. State*; *Fotopoulos v. State*; *supra*; *Grossman v. State*, 525 So. 2d 833 (Fla. 1988). Those claims are not

meritorious, and appellate counsel was not ineffective for not raising those claims on appeal.

For the reasons set out above, the claims which Duckett claims should have been raised on direct appeal are meritless, and, as such, could not have led to a reversal of his convictions and sentences. Because that is so, Duckett can demonstrate neither deficient performance nor prejudice on the part of appellate counsel. Because that is so, he cannot make the showing required of him under *Strickland v. Washington*, and is not entitled to relief of any sort. *Teffeteller v. Dugger,* 734 So. 2d 1009, 1027 (Fla. 1999); *Scott v. Dugger,* 604 So. 2d 465, 469 (Fla. 1992); *Johnson v. Dugger*, 523 So. 2d 161 (Fla. 1988); *Herring v. Dugger,* 528 So. 2d 1176 (Fla. 1988); *Suarez v. Dugger*, 527 So. 2d 190 (Fla. 1988). Even if the appellate ineffective assistance of counsel claim was sufficiently pled, it would not be a basis for relief.

IV. THE *APPRENDI V. NEW JERSEY* CLAIM

On pages 20-22 of his petition, Duckett argues that *Apprendi v. New Jersey,* 530 U.S. 466 (2001) and [*Ring v. Arizona,* 122 S.Ct. 2428 (2002)] invalidates Florida's capital sentencing scheme because a Florida jury is not required to specify which aggravators it found, and is not required to render its advisory

verdict by unanimous vote.[9] This claim is procedurally barred from review.

Alternatively and secondarily, the *Apprendi/Ring*-based claims are not grounds for relief because *Apprendi* does not affect Florida capital sentencing proceedings, because of the fashion in which the Florida death sentencing statute functions. In *Mills v. Moore,* this Court stated:

> The majority opinion in *Apprendi* forecloses Mills' claim because *Apprendi* preserves the constitutionality of capital sentencing schemes like Florida's. Therefore, on its face, *Apprendi* is inapplicable to this case.

Mills v. Moore, 786 So. 2d 532, 537 (Fla. 2001). *See*, *Mann v. Moore*, 794 So. 2d 595 (Fla. 2001). *Card v. State,* 803 So. 2d 613, 628 (Fla. 2001); *Hertz v. State,* 803 So. 2d 629 (Fla. 2001); *Looney v. State,* 803 So. 2d 656 (Fla. 2001). The *Apprendi* and *Ring* decisions are inapplicable, and there is no basis for relief.

To the extent that additional discussion of this claim is required, this Court, in *Mills*, explained the statutory maximum sentence to which a defendant convicted of first degree murder

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[9]Duckett did not raise this claim, or any variant of it, at trial, on direct appeal, or in his Rule 3.850 proceeding. This claim is barred by a triple layer of procedural bar, and this Court should enforce Florida’s well-settled procedural rules and decline to review this claim.

was subject:

> [Mills] argues that the statute in effect at the time of the initial trial made the maximum penalty for his crime life imprisonment. Only after the jury verdict and further sentencing proceedings, Mills argues, could death be a possible sentence. This particular scheme, Mills argues, puts the sentence of death outside of the maximum penalty available and triggers *Apprendi* protection.
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> With regard to the statute in effect at the time of trial, Mills cites section 775.082(1), *Florida Statutes* (1979), which provided:
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> > A person who has been convicted of a capital felony shall be punished by life imprisonment and shall be required to serve no less than 25 years before becoming eligible for parole unless the proceeding held to determine sentence according to the procedure set forth in § 921.141 results in finding by the court that such person shall be punished by death, and in the latter event such person shall be punished by death.
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> § 775.082(1) *Fla. Stat*. (1979). Mills argues that this statute makes life imprisonment the maximum penalty available. Mills argues that the statute allowing the judge to override the jury's recommendation makes it clear that the maximum possible penalty is life imprisonment unless and until the judge holds a separate hearing and finds that the defendant is death eligible.
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> The 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**. (FN4) Both sections 775.082 and 921.141 clearly refer to a "capital felony." *Black's Law Dictionary* defines "capital" as "punishable by

> execution; involving the death penalty." *Black's Law Dictionary* 200 (7th ed.1999). *Merriam Webster's Collegiate Dictionary* defines "capital" as "punishable by death ... involving execution." *Merriam Webster's Collegiate Dictionary* 169 (10th ed. 1998). Therefore, a "capital felony" is by definition a felony that may be punishable by death. The maximum possible penalty described in the capital sentencing scheme is clearly death.
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> (FN4.) Section 921.141, *Florida Statutes* (1979), provides:
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> > Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by § 775.082.
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> > ....
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> > (3) ... Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death....

Mills v. Moore, 786 So. 2d 532, 537-38 (Fla. 2001). [emphasis added]. Under Florida law, as announced by this Court, a defendant convicted of a capital felony enters the penalty phase (or, in the phraseology of the United States Supreme Court, the selection phase) **eligible** for the death penalty. Because that is so, a death sentence is not an “enhancement” of the sentence -- it is a sentence that a defendant convicted of a capital felony is eligible to receive, and which can be imposed after the

required penalty phase proceedings are conducted, the advisory verdict is rendered, and the sentencing court considers that advisory sentence in accordance with Florida law.

Ring v. Arizona did nothing to change Florida law, and, in fact, was brought about by the United States Supreme Court's misunderstanding of Arizona law in reaching its decision in *Walton v. Arizona*. A mistake as to **Arizona** law does not equate to a mistake about the fashion in which **Florida** law operates, especially when this Court has explicitly answered that question in *Mills* and the cases following it. *Ring* does not require jury sentencing -- it **only** requires that the jury make the determination of death eligibility which is exactly what the jury does in Florida. *Ring v. Arizona,* 122 S.Ct. 2428, 2445 (2002).

The decisions of the United States Supreme Court interpreting Florida's death penalty act are in accord with the foregoing discussion -- a Florida capital defendant is "death eligible" based upon the jury's verdict of guilty of the capital felony (*i.e.,* first-degree murder). Unlike the statutory schemes in some states, Florida's statute determines the eligibility of a defendant to receive a death sentence at the guilt-innocence stage of the capital trial, not during the penalty (or selection) phase. *See, Proffitt v. Florida,* 428 U.S. 242 (1976).

In distinguishing between the eligibility and selection phases of a capital prosecution, the United States Supreme Court has stated:

> **The eligibility decision fits the crime within a defined classification.** Eligibility factors almost of necessity require an answer to a question with a factual nexus to the crime or the defendant so as to "make rationally reviewable the process for imposing a sentence of death." *Arave, supra*, 507 U.S., at 471, 113 S.Ct., at 1540 (internal quotation marks omitted). **The selection decision, on the other hand, requires individualized sentencing and must be expansive enough to accommodate relevant mitigating evidence so as to assure an assessment of the defendant's culpability.** The objectives of these two inquiries can be in some tension, at least when the inquiries occur at the same time. *See Romano v. Oklahoma*, 512 U.S., at 6, 114 S.Ct., at 2009 (referring to "two somewhat contradictory tasks").

Tuilaepa v. California, 512 U.S. 967, 973 (1994). [emphasis added]. The distinction between the analytical basis of the two stages of a capital prosecution is significant, and, under Florida law, no argument can be made that a capital defendant does not enter the “selection” phase eligible for a death sentence.[10] Even if *Apprendi* is somehow applicable to Florida capital sentencing, and even if the procedurally barred claim is available to Duckett, there is no basis for relief because of

[10]That the capital sentencing statutes in other states may not function in this way is not the issue, and is of no moment here -- Florida’s statute answers the “eligibility” question at the **guilt** phase of a capital trial.

the manner in which Florida's death penalty statute operates.[11]

Moreover, even if *Apprendi* is somehow applicable to Florida's capital sentencing scheme, that result would not help Duckett. The during an enumerated felony aggravating circumstance found by the sentencing court falls within the "prior conviction" class of aggravating circumstances, and, as such, is outside any possible reach of the *Apprendi* decision. In other words, no matter how *Apprendi* might at some point be interpreted, an aggravator that is not affected in any fashion by that decision is present (and was found beyond a reasonable doubt by the jury) -- under the facts of this case, that aggravator is sufficient to support a sentence of death even if the heinousness aggravator is not considered.[12]

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[11]Duckett's argument that aggravators are "elements of the crime" has been expressly rejected by this Court. *Hunter v. State,* 660 So. 2d 244, 254 (Fla. 1995); *Hildwin v. State,* 531 So. 2d 124, 128 (Fla. 1988), *aff'd,* 490 U.S. 638, 109 S.Ct. 2055, 104 L.Ed.2d 728 (1989).Likewise, the argument that a unanimous jury sentence recommendation is required has been rejected. *Evans v. State,* 800 So. 2d 182 (Fla. 2001); *Sexton v. State*, 775 So. 2d 923 (Fla. 2000); *Alvord v. State*, 322 So. 2d 533 (Fla. 1975). These sub-claims are not a basis for relief, and, in any event, are procedurally barred for the same reasons that the *Apprendi* claim is procedurally barred.

[12]*Apprendi* expressly **excluded** prior convictions from the matters that must be found by a jury before "sentence enhancement" is allowable. The State does not concede that a sentence of death, in Florida, is an "enhanced sentence" as that term is used in *Apprendi.*

To the extent that Duckett claims that he is entitled to "notice" of the aggravating circumstances upon which the State intends to rely, that claim has been consistently rejected by this Court, and Duckett has suggested no basis for revisiting settled Florida law. In rejecting this claim years ago, this Court stated:

> The aggravating factors to be considered in determining the propriety of a death sentence are limited to those set out in section 921.141(5), *Florida Statutes* (1987). Therefore, there is no reason to require the State to notify defendants of the aggravating factors that it intends to prove. *Hitchcock v. State*, 413 So. 2d 741, 746 (Fla.), *cert. denied*, 459 U.S. 960, 103 S.Ct. 274, 74 L.Ed.2d 213 (1982). Vining's claim that Florida's death penalty statute is unconstitutional is also without merit and has been consistently rejected by this Court. *See Thompson v. State*, 619 So. 2d 261, 267 (Fla.), *cert. denied*, --- U.S. ----, 114 S.Ct. 445, 126 L.Ed.2d 378 (1993), and cases cited therein.

Vining v. State, 637 So. 2d 921, 927 (Fla. 1994); *see also, Mann v. Moore,* 794 So. 2d 595 (Fla. 2001); *Medina v. State*, 466 So. 2d 1046, 1048 n. 2 (Fla. 1985) (State need not provide notice concerning aggravators). This claim is not a basis for relief, and Duckett's sentence should not be disturbed.

Likewise, Duckett's claim that the jury instruction on the weighing of the aggravating and mitigating circumstances shifted the burden of proof is based upon *Apprendi v. New Jersey*, and is, therefore, procedurally barred and without merit because

Apprendi is inapplicable. Moreover, even discounting the *Apprendi* component of this claim, it has long been rejected by this Court. *Hunter v. State,* 660 So. 2d 244, 253 (Fla. 1995); *Fotopoulos v. State,* 608 So.2d 784, 794 n. 7(Fla. 1992); *Francois v. State,* 423 So. 2d 357, 360 (Fla. 1982); *Arango v. State*, 411 So. 2d 172 (Fla.), *cert. denied*, 457 U.S. 1140, 102 S.Ct. 2973, 73 L.Ed.2d 1360 (1982). There is no basis for relief, and Duckett's conviction should be affirmed in all respects.

Regardless of the applicability of *Apprendi* to capital sentencing in general, and to Florida capital sentencing in particular, that claim is, in the context of this case, procedurally barred for the reasons set out above. This Court should address the procedural bar first, and should only consider the merits of this claim in the alternative, in order to protect the validity and integrity of Florida's long-settled procedural bar rules.[13]

CONCLUSION

Wherefore, based upon the foregoing arguments and authorities, the Respondent respectfully requests that this

[13]The Appendi/Ring issue is pending before this Court in *Bottoson v. Moore*, Case No. 02-1455 and *King v. Moore*, Case No. 02-1457.

Court deny the Petition for Writ of Habeas Corpus.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above has been furnished by U.S. Mail to: **M. Elizabeth Wells**, 376 Milledge Ave., S.E. Atlanta, Georgia 30312-3240, on this ____ day of October, 2002.

Of Counsel

CERTIFICATE OF COMPLIANCE

This brief is typed in Courier New 12 point.

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