IN THE SUPREME COURT OF FLORIDA

PAUL AUGUSTUS HOWELL,

Appellant,

v. CASE NO. SC03-103

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE SECOND JUDICIAL CIRCUIT
JEFFERSON COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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TABLE OF CONTENTS

TABLE OF CITATIONS

FLORIDA STATUTES

OTHER

PRELIMINARY STATEMENT

Appellant, PAUL HOWELL, the defendant in the trial court, will be referred to as appellant or by his proper name. Appellee, the State of Florida, will be referred to as the State. The postconviction record on appeal consists of three volumes and will be referred to as PC followed by a volume number and the appropriate page number. (PC Vol. pg.). The symbol "IB" will refer to appellant's initial brief and will be followed by any appropriate page number. All double underlined emphasis is supplied.

STATEMENT OF THE CASE AND FACTS

This is an appeal from a trial court's denial of postconviction relief, following an evidentiary hearing, in a capital case. The facts of this case, as stated in the Florida Supreme Court direct appeal opinion, are:

> In January of 1992, Howell constructed a bomb for the specific purpose of killing Tammie Bailey at her home in Marianna, Florida. Bailey, Howell, and Howell's brother, Patrick, were part of a drug ring involving a number of other individuals in which drugs were obtained in Fort Lauderdale and then sold in Marianna, Florida. Howell intended to eliminate Bailey as a witness because she had knowledge that could link Howell and his brother to a prior murder. The bomb was placed inside a microwave oven and then the oven was gift-wrapped. Howell paid Lester Watson to drive and deliver the microwave to Bailey. Although he knew that Howell had often made pipe bombs, Watson testified that he thought the microwave contained drugs. Howell rented a car for Watson to use for the trip. Watson was accompanied on the trip by Curtis Williams.
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> While traveling on I-10 toward Marianna, Watson was stopped by Trooper Jimmy Fulford for speeding. Fulford ran a registration check on the car and a license check on Watson, who gave the trooper a false name and birth date because he did not have a valid driver's license. The radio dispatcher contacted the car rental company and was informed that Howell had rented the car. The dispatcher contacted Howell at his home in Fort Lauderdale, Florida, to determine whether the rental car had been stolen from him. Howell told the dispatcher that he had loaned the car to Watson but did not know that Watson would be traveling so far with the vehicle. Howell was informed by the dispatcher that Watson was going to be taken to the Jefferson County Jail. Howell did not give any warning to the dispatcher regarding the bomb.
>
> Deputies Harrell and Blount of the Jefferson County Sheriff's Department arrived at the scene and Watson gave them permission to search the vehicle. Trooper Fulford and the deputies observed the gift-wrapped microwave in the trunk of the car. Watson was arrested for speeding and driving without a valid driver's license and was transported, along with Williams, to the jail by Deputy Blount. Deputy Harrell also proceeded to the jail, leaving Trooper Fulford alone with the rental car. Shortly

thereafter, a massive explosion took place at the scene. Testimony presented at Howell's trial by the State's explosives expert indicated that Trooper Fulford had been holding the microwave in his hands when the bomb went off. Trooper Fulford died instantly due to the massive trauma caused by the explosion.

Howell was arrested and charged with Trooper Fulford's murder. Frank Sheffield, a private attorney, was appointed to represent Howell due to a conflict of interest asserted by the Public Defender's Office for the Second Judicial Circuit. Venue of the trial was transferred from Jefferson County to Escambia County.

The jury found Howell guilty of first-degree murder and of making, possessing, placing, or discharging a destructive device or bomb. The jury also returned a special verdict finding that the charge of first-degree murder was established by both proof of premeditated design and felony murder. At the penalty phase, the jury recommended death by a vote of ten to two. The trial court found that the following aggravators applied to the murder: (1) Howell knowingly created a great risk of death to many persons; (2) the murder was committed while Howell was engaged in the unlawful making, possessing, placing, or discharging of a destructive device or bomb; (3) the murder was committed for the purpose of avoiding or preventing a lawful arrest; (4) the victim was a law enforcement officer engaged in the performance of his official duties; and (5) the murder was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification (CCP). The trial court also found that the following statutory and nonstatutory mitigators applied: (1) Howell had no significant history of prior criminal activity; (2) the murder was committed while Howell was under the influence of extreme mental or emotional disturbance (given little weight); (3) Howell had served in the military and received an honorable discharge (given little weight); (4) Howell displayed good behavior as a pretrial detainee; and (5) Howell was a good family man (deemed inconsequential). The trial court found that the enormity of the proved aggravating circumstances far outweighed the mitigating circumstances and imposed the death penalty in conformance with the jury's recommendation that Howell be sentenced to death. The trial court declined to impose a sentence on Howell's conviction for constructing the bomb because this charge and the murder charge both arose from a single underlying offense.

Howell v. State, 707 So.2d 674, 676-677 (Fla. 1998).

On appeal to the Florida Supreme Court, Howell raised one guilt-phase issue and eight penalty-phase issues on appeal. The guilt-phase issue was the trial court's denial of the State's motion to disqualify Howell's trial counsel due to a "conflict of interest". The conflict was based on threats that trial counsel had received in which an unidentified caller had stated: "if Paul Howell goes down, Mr. Sheffield is going down too." The Florida Supreme Court found that the trial court's inquiry into Howell's complaints of ineffectiveness to be adequate. *Howell*, 707 So.2d at 680. One of the penalty-phase issues was that the avoid arrest aggravator could not be premised on a transferred intent theory. The Florida Supreme Court held that the avoid arrest aggravator could be premised on a transferred intent theory, citing *Sweet v. State*, 624 So. 2d 1138 (Fla. 1993). *Howell*, 707 So.2d at 681. Howell also asserted that the CCP aggravator could not be premised on a transferred intent theory. The Florida Supreme Court rejected this challenge to the CCP aggravator reasoning that the heightened premeditation necessary for CCP does not have to be directed toward the specific victim, citing *Provenzano v. State*, 497 So. 2d 1177

(Fla. 1986). *Howell*, 707 So.2d at 682.[1] The Florida Supreme Court affirmed the conviction and sentence.

Howell then filed a petition for writ of certiorari in the United States Supreme Court arguing that his Sixth Amendment right to conflict free counsel was violated. The United States Supreme Court denied certiorari on June 26, 1998. *Howell v. Florida*, 524 U.S. 958, 118 S. Ct. 2381, 141 L. Ed. 2d 747 (1998).

Howell filed an initial motion for postconviction relief on August 30, 1999. Howell filed an amended motion for postconviction relief raising eighteen claims on October 15, 2002. (PC. Vol. I 1-108;115-122).[2] The State filed a reply on

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[1] Of the remaining six penalty-phase issues, the Florida Supreme Court addresses three of these issues in its opinion. These issues were: (1) the great risk to many persons aggravators should not apply where only one person was present;(2) the law enforcement officer engaged in the performance of his official duties aggravator did not apply where the defendant does not specifically intend to kill an officer, and (3) the proportionality of his death sentence. The Florida Supreme Court rejected all three of these challenges to these aggravators. The Florida Supreme Court also rejected, without discussion, the other three penalty phase issues: (1) failure to give special requested penalty-phase instructions was error; (2) felony-murder aggravating circumstance is unconstitutional; and (3) sentencing order failed to properly evaluate mitigating circumstances and to properly weigh aggravating circumstances against mitigating circumstances. *Howell*, 707 So.2d at 682 n.1.

[2] The amended motion incorporated by reference all the claims in the original motion and presented two additional claims. Claim XVII was a *Ring v. Arizona* 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002) claim. Claim XVIII was an ineffectiveness for failing to present an intervening cause

November 7, 2002 (PC Vol. I 123-139). The trial court held an evidentiary hearing on claims 3, 8, 9 and 18 on November 27, 2002. (PC Vol. II 1-60). At the evidentiary hearing, collateral counsel conceded that claims 1, 4, 5, 6, 11, 12, 13, 14, 15 were moot. (PC Vol. II 11-16). Collateral counsel also stated that he did not intend to present any evidence relating to claims 2, 7, 10, 16 and 17 but would rely upon the pleadings for these issues. (PC Vol. II 11-16). The main issue explored at the evidentiary hearing was trial counsel's failure to present an intervening cause defense as a defense and as a non-statutory mitigator, which were claims 9 and 18. Collateral counsel filed a written closing argument after the evidentiary hearing. (PC Vol. I 140-180). The trial court denied that motion for postconviction relief on January 2, 2003. (PC Vol. I 181-186).

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defense which was the main issue explored at the evidentiary hearing.

SUMMARY OF ARGUMENT

ISSUE I

Howell asserts that his trial counsel was ineffective for not presenting an intervening cause defense. The State respectfully disagrees. First, a contributory negligence defense is not a viable defense as a matter of law. Florida law does not recognize contributory negligence of the victim as a defense. Counsel cannot be ineffective for failing to present a defense that is precluded as a matter of law. Furthermore, even if the trial court ignored the law and allowed such a defense to be presented, such a defense would be perceived as blaming the victim. This defense would be particularly offensive to a jury when applied to an officer acting in the line of duty. Basically, defense counsel would be blaming the officer for doing his duty. As trial counsel testified at the evidentiary hearing, such a defense would inflame the jury. Counsel's decision to not present such defense was a reasonable, sound, trial strategy. Thus, the trial court properly denied this ineffective assistance of counsel claim.

ISSUE II

Howell argues that Florida's death penalty statute violates *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002). Specifically, Howell contends the statute is unconstitutional because it does not require that the jury find each aggravator; (2) does not require that the jury weigh the

aggravators against the mitigators; (3) provides for only an advisory recommendation and (4) does not require a unanimous recommendation. The State respectfully disagrees. First, *Ring* is not retroactive. Three state Supreme Courts have held *Ring* is not retroactive. Moreover, numerous courts, including federal circuit courts, state supreme courts and two Florida district courts have held that *Apprendi*, which was the precursor to *Ring*, is not retroactive. *Ring* involves only half of an *Apprendi* error. So, if *Apprendi* does not warrant retroactive application, *Ring* cannot. Furthermore, this Court has repeatedly rejected *Ring* challenges to Florida's death penalty statute in both direct appeals and collateral review. The trial court denied the *Ring* claim based on this Court's holding in *Bottoson v. Moore*, 833 So. 2d 693 (Fla.), *cert denied*, 154 L. Ed. 2d 564, 123 S. Ct. 662 (2002), and *King v. Moore*, 831 So. 2d 143 (Fla.), *cert. denied*, 154 L. Ed. 2d 556, 123 S. Ct. 657 (2002).(PC Vol. I 183). Additionally, while the prior violent felony aggravator was not at issue in this case, the jury unanimously found the felony murder aggravator during the guilt phase by convicting Howell of making, possessing, placing, or discharging a destructive device or bomb. The jury also found the felony murder aggravator by special verdict. Thus, the trial court properly denied this claim.

ARGUMENT

ISSUE I

DID THE TRIAL COURT ERR IN FINDING THAT TRIAL COUNSEL WAS NOT INEFFECTIVE FOR DECIDING NOT TO PURSUE AN INTERVENING CAUSE DEFENSE? (Restated)

Howell asserts that his trial counsel was ineffective for not presenting an intervening cause defense. The State respectfully disagrees.[3] First, a contributory negligence defense is not a viable defense as a matter of law. Florida law does not recognize contributory negligence of the victim as a defense. Counsel cannot be ineffective for failing to present a defense that is precluded as a matter of law. Furthermore, even if the trial court ignored the law and allowed such a defense to be presented, such a defense would be perceived as blaming the victim. This defense would be particularly offensive to a jury when applied to an officer acting in the line of duty. Basically, defense counsel would be blaming the officer for doing his duty. As trial counsel testified at the evidentiary hearing, such a defense would inflame the jury. Counsel's decision to not present such defense was a reasonable, sound,

[3] Collateral counsel refers to this as an intervening cause defense. This probably is not truly an intervening cause defense. An intervening cause usually involves conduct occurring after the crime. Rather, this defense probably actually is a contributory negligence by the victim defense. The murder here occurred when the officer opened the gift wrapped package which caused the bomb in the microwave to explode. However, regardless of the label, Florida law does not recognize either as a defense.

trial strategy. Thus, the trial court properly denied this ineffective assistance of counsel claim.

Standard of review

An ineffectiveness claim is reviewed *de novo* but the trial court's factual findings are to be given deference. *Stephens v. State*, 748 So.2d 1028, 1034 (Fla.1999); *Porter v. State*, 788 So.2d 917, 923 (Fla. 2001)(recognizing and honoring the trial court's superior vantage point in assessing the credibility of witnesses and in making findings of fact in the context of an ineffectiveness claim). Thus, the standard of review is *de novo*.

The trial court's ruling

The defendant filed a amended motion for postconviction relief raising eighteen claims. (PC. Vol. I 1-108;115-122).[4] Claim XVIII was an ineffectiveness for failing to present an intervening cause defense. (PC. Vol. I 118-1192). Collateral counsel argued that Trooper Fulford, the victim, opening the wrapped package, which violated standard Florida Highway Patrol policies, was a contributing factor in his own death.

[4] The amended motion incorporated by reference all the claims in the original motion and presented two additional claims. Claim XVII was a *Ring v. Arizona* 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002) claim. Claim XVIII was an ineffectiveness for failing to present an intervening cause defense which was the main issue explored at the evidentiary hearing.

Collateral counsel also argued that this evidence should have been presented as non-statutory mitigation. The trial court held an evidentiary hearing on claims 3, 8, 9 and 18 on November 27, 2002. (PC Vol. II 1-60). The main issue explored at the evidentiary hearing was trial counsel's failure to present an intervening cause defense as a defense and as a non-statutory mitigator. At the evidentiary hearing, collateral counsel presented two witnesses: (1) William Pfeiffer, who had represented the defendant at the related federal drug trial and (2) Frank Sheffield, who had represented the defendant in the state murder trial.

William Pfeiffer, who had represented the defendant at the related federal drug trial, testified that the issue of the search of the car came up in the federal case. (PC Vol. II 7). He subpoenaed the Florida Highway Patrol Manual and read it. (PC Vol. II 7). He explained that pursuant to the Manual, FHP officers are not permitted to search closed wrapped containers. (PC Vol. II 8).[5] He filed a motion to suppress to keep the

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[5] Collateral counsel also introduced the Florida Highway Patrol Policy Manual at the evidentiary hearing as Defense Exhibit #1. (PC Vol. II 8-9, Vol. III). The Impound Vehicle Inventories section of the Florida Highway Patrol Policy Manual § 11.04.04, provides:

> In order to secure the owner's property and to protect the Department from claims, it is necessary to inventory the contents of all vehicles being towed and/or stored. The contents of the vehicle include, but are not limited to, all the packages and containers located within the passenger compartment, the trunk or any other secured area of the vehicle.

evidence out of the federal case. (PC Vol. II 8). The federal district judge, Judge Stafford, denied the motion ruling that the defendant had no standing to contest the search. (PC Vol. II 8). Howell requested that Mr. Pfeiffer also represent him in the state murder trial but the state judge denied the request. (PC Vol. II 10). Mr. Pfeiffer, had only limited capital experience (he had been peripherally involved in two capital cases). (PC Vol. II 10). He noted that the evidence in the federal trial established that the victim had unwrapped and opened the package. (PC Vol. II 10). He noted that § 11.04.04 of the FHP Manual prohibits securely wrapped luggage, packages or containers from being opened except as authorized by law or if the owner consents. (PC Vol. II 10). He did not discuss the FHP Manual with Mr. Sheffield. (PC Vol. II 11).

Frank Sheffield, who had represented the defendant in the state murder trial, testified. (PC Vol. 11 16-57). He has been an attorney for 31 years. (PC Vol. 11 17). His practice was 50-65% criminal defense work. He had handled between 15 and 20

> Unless locked or otherwise securely wrapped, all luggage, packages and containers, whether open or closed, shall be opened and their contents inventoried. Locked or securely wrapped luggage, packages and containers shall not be opened except as otherwise authorized by law or by owner consent, but shall be indicted on the inventory list as locked or securely wrapped items. All vehicle inventories shall be in accordance with Chapter 16 of the Forms and Procedures Manual.

(PC Vol. III 11-3).

capital cases. He is certified to handle capital cases. (PC Vol. 11 18). At one point, he had been representing Mr. Howell in both the federal drug case and the state murder case. (PC Vol. 11 18-19). He had an experienced investigator, Paul Williams, working with him on the case. (PC Vol. 11 18). He explored presenting an insanity defense which did not "materialize". (PC Vol. II 19). He also developed a defense that Mr. Howell was not the one who made the bomb which was their defense at trial. (PC Vol. II 19). Part of the defense was also that the only witness who testified that he saw Paul Howell making the bomb was a state witness who had made a deal for a lesser sentence. (PC Vol. II 47). Mr. Sheffield felt that Lester Watson was the most guilty because he knew what was in the package, was the one standing looking at the Trooper and did not saying anything to the Trooper which was the theme of his defense. (PC Vol. II 55). Trial counsel Sheffield did not agree with collateral counsel's estimation of value of the defense he actually presented. (PC Vol. II 48). He was "hard pressed" to come up with a defense because the evidence "was overwhelming and mind boggling" (PC Vol. II 46). He explained that 98 officers went to the crime scene, got down on their hands and knees and managed to find that one little piece of the switch with the serial number on it. (PC Vol. II 46).

He considered and rejected presenting an intervening cause defense. (PC Vol. II 19,34). He explained this defense which would be a claim that the trooper should not have opened the

package. (PC Vol. II 20). He discussed Florida Highway Patrol procedures concerning wrapped packages informally with some troopers. (PC Vol. II 29). He did not think that the intervening cause defense was a viable defense. (PC Vol. II 21,28,45). He explained that "blaming Trooper Fulford for his own death would not be a viable defense." (PC Vol. II 21). He thought that pointing the finger of blame at Trooper Fulford was "not a very good idea." (PC Vol. II 46). He thought that such a defense would be "more harm than help." (PC Vol. II 21,22). He did not think that such a defense would be successful. Trial counsel Sheffield testified that the jurors would be inflamed if he were to blame the trooper for his own death. (PC Vol. II 24,27,35,43). Such a defense would reflect badly on the defendant. (PC Vol. II 26). It was not, in fact, a defense and he would not present such a defense if he were trying the case again today. (PC Vol. II 53,56). On cross, he testified that the concepts of intervening cause and comparative negligence do not have much usefulness in criminal law. (PC Vol. II 39).

Trial counsel Sheffield testified that he was familiar with the concept of non-statutory mitigators. (PC Vol. II 24). He explained that normally anything could be presented as non-statutory mitigation. (PC Vol. II 24,41-42). But, in this particular case, presenting a violation of the department's policies would not work as non-statutory mitigation. (PC Vol. II 24). He felt that presenting a violation of FHP rules as a non-statutory mitigator would inflame the jury and diminish his

chances of obtaining a life recommendation. (PC Vol. II 26). His opinion was that if such evidence was presented, the jury would have come back with a death recommendation of "12-zip" (PC Vol. II 56). His theme in penalty phase was the lack of specific intent to kill the Trooper and that transferred intent should not be used to support aggravators. (PC Vol. II 55). He noted that he established two mental mitigators and that he was able to convince two jurors to vote for life. (PC Vol. II 53).

Another attorney, Dean Morphonios, was representing the co-perpetrator, Lester Williams. (PC Vol. II 20-21). Mr. Sheffield adopted co-counsel's motion to suppress the evidence based on the Fourth Amendment violation of opening a closed container. (PC Vol. II 2036). He knew that Lester Watson, the driver of the rental car, had given consent to search the trunk of the rental car. (PC Vol. II 25). The motion to suppress was denied. (PC Vol. II 37). The transferred intent issue was that there was no intent to kill this particular trooper. (PC Vol. II 20). The intent was to kill Tammie Bailey, not Trooper Fulford. (PC Vol. II 33). He discussed the transferred intent issue with the defendant. (PC Vol. II 33). Trial counsel noted that there was no question that the State would be able to establish transferred intent in the guilt phase. (PC Vol. II 40). However, trial counsel explained that he used the lack of intent to kill the Trooper in the penalty phase. (PC Vol. II 40).

He was questioned regarding his decision not to have Howell testify at the penalty phase. (PC Vol. II 54). He thought that

calling Howell to testify would have been “disastrous” based on his prior conduct in court. (PC Vol. II 54). He noted that Howell inflamed the family when he spoke at the sentencing. His opinion was that no reasonable lawyer would have ever considered putting Mr. Howell on the stand. (PC Vol. II 54).

Trial counsel was questioned regarding the threat he received during his representation of Howell in the federal case. (PC Vol. II 48). He did not think Paul Howell was personally involved in the threat. (PC Vol. II 49). The U.S. Marshals wanted to put him and his family in protective custody. (PC Vol. II 50). It was their reaction that scared him. (PC Vol. II 50). He had informed the federal judge that he and Howell were antagonistic. (PC Vol. II 50). He could not concentrate on the federal case. (PC Vol. II 51). He was no longer worried by the time of the State murder trial. (PC Vol. II 51). The security in Jefferson County where the State murder trial started was “like Mayberry with Barney Fife” which calmed him down. (PC Vol. II 50). He takes death penalty work very seriously and he would never take a capital case that he could not give “100% efforts to” (PC Vol. II 52). He did not think that Mr. Pfeiffer had the experience or the capability to handle the case and he did. (PC Vol. II 52).

Collateral counsel filed a written closing argument after the evidentiary hearing. (PC Vol. I 140-180). The trial court rejected this claim of ineffectiveness ruling that the claim was procedurally barred. Alternatively, the trial court ruled that

because the search was consensual, the Florida Highway Patrol Manual did not apply and reasoned that Howell's asserting standing as to the package would undermine Howell's lack of knowledge defense. (PC Vol. I 184).

Merits

First, the defense of contributory negligence of the victim is not viable as a matter of law. Florida courts do not recognize such a defense. ***Parker v. State***, 570 So.2d 1048, 1052 (Fla. 1st DCA 1990)(affirming trial court's exclusion of evidence of contributory negligence of the victim, who was a deputy involved in the high speed chase of the defendants, regarding the manner in which he set up the roadblock because the negligence of the police did not constitute a legally recognizable defense). Florida courts have rejected intervening cause defenses on much more compelling facts. In ***Klinger v. State***, 816 So.2d 697, 698 (Fla. 2d DCA 2002), the Second District affirmed a DUI manslaughter conviction rejecting an intervening cause defense as a matter of law. The defendant, who had a blood alcohol level of between .10 and .18, collided with the victim's vehicle, causing severe injuries to the victim. The victim, conscious and alert, was taken to the hospital. The victim, who was a Jehovah's Witness, refused a blood transfusion. The victim did not receive the transfusion and died due to loss of blood. A doctor testified the victim's chance of survival, had he accepted a blood transfusion, was

between eighty-five and ninety percent. The defendant argued, on appeal, that he did not "cause" the victim's death because the victim would have lived if he had accepted the blood transfusion. The Second District found that the victim's refusal to accept the medical treatment was not an intervening cause of death. The Second District observed that "Florida courts have consistently rejected this argument."

Other States agree. In *People v. Schmies*, 44 Cal. App. 4th 38, 51 Cal. Rptr. 2d 185 (Cal. App 1996), a California appellate court affirmed a conviction for vehicular manslaughter. The defendant, who had a revoked driver's license, engaged in a high speed chase with two highway patrol officers. One of the pursuing officer's patrol car struck another car, killing the driver. Defendant sought to introduce the Highway Patrol's pursuit policies to establish that the pursuing officer's conduct was not in compliance with the policies. The Court found no error in the exclusion of the pursuit policies because whether the officers violated the CHP pursuit policies was immaterial. The Court reasoned that it was the defendant's illegal and dangerous act that caused the officers to pursue him and ultimately caused the fatal accident. The Court observed: "It adds not one whit to say that the officers violated the CHP pursuit guidelines" and "it is no defense to prove a rule violation." The Court explained that contributory negligence was not available as a defense. See also *State v. Loveless*, 738 N.E.2d 418 (Ohio App. 1999)(finding officer's failure to comply

with departmental pursuit policy was not relevant, in an involuntary manslaughter prosecution, where defendant, who was driving a stolen car, led officers on a high speed chase, during which one officer ran a stop sign and killed the driver of a car).

Not strictly following FHP policy is not contributory negligence or an intervening cause. This type of argument is akin to an argument if the victim had not physically been there, they would not have gotten killed. While logically true, it is morally irrelevant. *State v. Redden*, 269 So.2d 415, 417 (Fla. 2d DCA 1972)(holding, in a manslaughter case, that contributory negligence is no defense and characterizing as fallacious an argument that if the child had not run into the road the accident would not have occurred,), *overruled on different grounds, State v. Fulkerson*, 300 So. 2d 275 (Fla. 2d DCA 1973). Criminal law simply does not recognize this type of defense. Nor should it. Wayne R. LaFave & Austin W. Scott, Jr, Criminal Law § 5.11(c) (2d ed. 1986)(stating that a contributory negligence defense has no place in criminal law).

Obviously, trial counsel cannot be ineffective for failing to present a defense that is not legally a defense. If trial counsel had attempted to present such a defense, the prosecutor would have objected on the grounds that it is not a defense and the trial court would have prohibited trial counsel from presenting any such defense. There is no deficient performance nor prejudice.

Howell's reliance on *Eversley v. State*, 748 So. 2d 963, 966-67 (Fla. 1999), is misplaced. IB at 22. *Eversley* was a manslaughter by neglect and felony child abuse prosecution. The infant contracted pneumonia and the mother did not take the infant to the hospital as instructed by the doctor. The *Eversley* Court affirmed the felony child abuse but reversed the manslaughter conviction. The *Eversley* Court would have affirmed the manslaughter conviction also under the current version of the manslaughter statute. This Court explained that the State must prove "but for" causation. This Court noted that the defendant can rebut this showing by demonstrating that the harm would have occurred in any event, regardless of the defendant's conduct. This helps Howell not one whit. Howell cannot show that Trooper Fulford would have died regardless of his conduct. Howell made the bomb that killed the trooper. Moreover, *Eversley* is an act of omission case, not, as here, an act of commission case. Criminal law often struggles with the former but criminal liability for acts of commission is standard.

Howell's reliance on *Velazquez v. State*, 561 So. 2d 347, 350 (Fla. 3d DCA 1990), is equally misplaced. IB at 22. *Velazquez* was a conviction for vehicular homicide based on a drag race. The victim, who was driving his car 123 m.p.h. during the drag race, not wearing a seat belt and had a blood alcohol level between .11 and .12, crashed through a guardrail and died instantly. The Third District held that the victim killed himself by his voluntary and reckless driving. *Velazquez* is

factually distinguishable. Trooper Fulford was doing his duty, not engaging in drag racing or any other bad conduct. Moreover, the basic logic does not apply. The Third District *quoted State v. Petersen*, 522 P.2d 912, 920 (Ore. App. 1974), which observed people frequently join together in reckless conduct and as long as all participants do so knowingly and voluntarily, there is no point in holding the survivors guilty of manslaughter. The Third District also quoted 1 W. LaFave and A. Scott, Substantive Criminal Law § 3.12, at 418 (1986), which observed that A should not, in all justice, be held liable for the death of B who was an equally willing and foolhardy participant in the bad conduct which caused his death." Trooper Fulford did not knowingly or willingly open a package containing a bomb. Additionally, he was doing his duty, not engaging in foolhardy conduct. There is every point, as well as justice, in holding Howell guilty of murder.

There is also no deficient performance nor prejudice from trial counsel's failure to present a contributory negligence defense as a mitigator in the penalty phase. Collateral counsel attempts to characterize this as non-statutory mitigation; however, it is actually a version of residual doubt. Residual doubt testimony may not be introduced at the penalty phase. *Duest v. State*, 2003 Fla. LEXIS 1069 (Fla. June 26, 2003)(citing *Way v. State*, 760 So. 2d 903, 916 (Fla. 2000) and *Waterhouse v. State*, 596 So. 2d 1008, 1015 (Fla. 1992)). While some traditional defenses may also be presented as mitigation, it is

because they focus on the defendant's conduct. For example, the defense of duress is also a statutory mitigator. But contributory negligence focuses on the victim's conduct, not the defendant's conduct, background or character. Mitigating evidence relates to the defendant's conduct, background or character and therefore, this evidence is not mitigating evidence. Thus, presenting this "mitigating" evidence is also precluded as a matter of law.

Furthermore, even if such a defense was legally viable, trial counsel made a reasonable strategic decision not to present the defense because the jury likely would perceive such a defense as blaming the victim. In *Spencer v. State*, 28 Fla. L. Weekly S35 (Fla. 2003), this Court held that it was a reasonable strategic decision to not present the defendant's stormy and antagonistic relationship with his wife, the victim, as a defense. The attorney feared the jury would perceive this defense as blaming the victim. This Court concluded that counsel did not render ineffective assistance.

Here, as in *Spencer*, the decision not to present this defense was a reasonable strategic decision. Here, as in *Spencer*, trial counsel testified that blaming Trooper Fulford for his own death would not be a viable defense and would hurt Mr. Howell's chances. (PC Vol. II 21,24). As trial counsel testified, such a defense would inflame the jury. This defense would be particularly offensive to a jury when applied to an officer acting in the line of duty. Basically, defense counsel would be

blaming the officer for doing his duty. Moreover, the prosecutor would have had a field day with any such defense. One can hear the prosecutor now asking: What would defense counsel have him do - walk away leaving a bomb where another person could have been killed? If the jury was not offended at first when defense counsel presented such a defense, they certainly would be by the time the prosecutor was finished responding to this defense. Counsel's decision was a reasonable, sound, trial strategy.

Collateral counsel argues that the purpose of the policy prohibiting troopers from opening closed containers was officer safety. IB at 21 & n. 9. That is not the stated purpose of the policy in the manual. The stated purpose of the policy in the manual is "to secure the owner's property and to protect the Department from claims." (PC Vol. III 11-3). The purposes of this policy is to keep evidence from being suppressed for a Fourth Amendment violation and to protect the department from § 1983 liability.[6] The personal safety of the officer is not the

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[6] The law regarding whether consent to search includes closed containers, especially a gift-wrapped package, is unclear. *Florida v. Wells*, 495 U.S. 1, 109 L. Ed. 2d 1, 110 S. Ct. 1632 (1990)(holding search of locked suitcase in the trunk of a car violated the Fourth Amendment and explaining that if the police wish to search a car without a warrant to inventory its contents they must act in accordance with established procedures); *Florida v. Jimeno*, 500 U.S. 248, 249, 114 L. Ed. 2d 297, 111 S. Ct. 1801 (1991)(finding the scope of consent to search a car extended to paper bag on the floor); *But see State v. Wells*, 539 So. 2d 464 (Fla. 1989)(finding the scope of consent to search a trunk of a car did not extend to a locked

purpose of the policy. Troopers do not routinely encounter gift-wrapped packages for a new baby that are actually bombs. There is no standard policy on this situation because it is not standard.

Collateral counsel argues that transferred intent does not apply and therefore, the State's premeditated theory of murder is invalid. IB at 24. This, of course, is a direct appeal issue and therefore, is procedurally barred. *Cherry v. Dugger*, 659 So. 2d 1069, 1072 (Fla. 1995)(explaining that a defendant may not raise the same arguments which were made, or should have been made, on direct appeal, in the guise of ineffective assistance of trial counsel). To the extent it is properly part of his ineffectiveness claim, any violation of FHP policy does not negate transferred intent. Collateral counsel is confusing causation with intent. They are two separate concepts. Contributory negligence is a defense that focuses on the victim's actions. Transferred intent, by contrast, is used by the prosecutor to establish the requisite intent and involves the mental state of the defendant, not the victim's actions. *Lee v. State*, 141 So.2d 257, 259 (Fla. 1962)(explaining that under the doctrine of transferred intent a defendant who kills a person through mistaken identity or accident, with a premeditated design to kill another, is guilty of murder in the

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suitcase inside the trunk); *Jacobs v. State,* 733 So.2d 552 (Fla. 2d DCA 1999)(limiting any consent to search to unlocked containers within plain view). The lack of clarity in the law is part of the basis for this policy.

first-degree because the law transfers the felonious intent in such a case to the actual object of his assault). Regardless of the Trooper's actions, Howell had the requisite intent.

Howell asserts that he is not guilty of felony murder because he made a bomb and the felony murder statute does not encompass making a bomb as one of the underlying felonies. IB at 16,25. Of course, this issue should have been raised on direct appeal, and therefore, is procedurally barred in collateral litigation. Howell cannot raise substantive challenges to his conviction under the rubric of an ineffectiveness claim. *Cherry v. Dugger*, 659 So. 2d 1069, 1072 (Fla. 1995)(explaining that a defendant may not raise the same arguments which were made, or should have been made, on direct appeal, in the guise of ineffective assistance of trial counsel). Furthermore, collateral counsel's argument is based on a misreading of the relevant statute. The relevant statute is not the felony murder statute; rather, it is the making a destructive device statute. While the murder statute may omit the "making" from its language, the making, possessing, throwing, projecting, placing or discharging any destructive device statute does not. § 790.161(4), Fla. Stat. (1991).[7] If a person dies as a result of making a destructive device, it is a capital felony pursuant to this statute. Howell

[7] Howell was charged in Count II of the indictment with a violation of subsection (4) of this statute. The indictment gave notice that a violation of this subsection was also a capital crime. (R. Vol. I 15)

was guilty of capital murder because he made the bomb and a person died as a result.

Moreover, because the jury found Howell guilty of both premeditated and felony murder by special verdict, any flaw in the felony murder theory does not matter. The line of cases reversing first degree murder convictions when one of the theories is legally invalid involve general verdicts. *Yates v. United States*, 354 U.S. 298, 1 L. Ed. 2d 1356, 77 S. Ct. 1064 (1957)(holding a conviction under a general verdict is improper when it rests on multiple theories, one of which is legally invalid). Where, as here, there is a special verdict, any flaw in one theory does not undermine the validity of the other theory. *United States v. Najjar*, 300 F.3d 466, 480 n.3 (4th Cir. 2002)(explaining that a special verdict obviate any *Yates* problem). The premeditated theory is sufficient to sustain the first degree murder conviction, regardless of the felony murder theory.

Collateral counsel weaves strains of ineffectiveness and conflict of interest in this claim. IB at n.7. The conflict of interest issue was raised in the direct appeal and decided adversely to Howell. Therefore, the conflict of interest claim is procedurally barred. Jones v. Moore, 794 So. 2d 579, 583 n.6 (Fla. 2001)(finding several claims to be procedurally barred because they were decided adversely to the petitioner on direct appeal). Furthermore, the United States Supreme Court has recently clarified the concept of "conflict of interest".

Mickens v. Taylor, 535 U.S. 162, 152 L. Ed. 2d 291, 122 S. Ct. 1237 (2002). The *Mickens* Court limited conflict of interest claims to situations involving multiple clients. Conflict of interest claims may not be premised on personal interests or personal fears. Counsel being afraid of his client is not a conflict of interest. Such a situation is analyzed under *Strickland*, not *Cronic*.[8] Howell must show both deficient performance and prejudice. He may not just cry conflict. Howell does not identify any deficiency or prejudice.

[8] *United States v. Cronic*, 466 U.S. 648 (1984).

ISSUE II

IS *RING V. ARIZONA*, 536 U.S. 584, 122 S.CT. 2428, 153 L.ED.2D 556 (2002) RETROACTIVE? (Restated)

Howell argues that Florida's death penalty statute violates *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002). Specifically, Howell contends the statute is unconstitutional because it does not require that the jury find each aggravator; (2) does not require that the jury weigh the aggravators against the mitigator; (3) provides for only an advisory recommendation and (4) does not require a unanimous recommendation. The State respectfully disagrees. First, *Ring* is not retroactive. Three state supreme courts have held *Ring* is not retroactive. Moreover, numerous courts, including federal circuit courts, state supreme courts and two Florida district courts have held that *Apprendi*, which was the precursor to *Ring*, is not retroactive. *Ring* involves only half of an *Apprendi* error. So, if *Apprendi* does not warrant retroactive application, *Ring* cannot. Furthermore, this Court has repeatedly rejected *Ring* challenges to Florida's death penalty statute in both direct appeals and collateral review. Additionally, while the prior violent felony aggravator was not at issue in this case, the jury unanimously found the felony murder aggravator during the guilt phase by convicting Howell of making, possessing, placing, or discharging a destructive device or bomb. The jury also found the felony murder aggravator by

special verdict. Thus, the trial court properly denied this claim.

Standard of Review

Whether a case is retroactive is reviewed *de novo*. *Ross v. United States*, 289 F.3d 677, 680 (11th Cir. 2002)(noting that retroactivity is an issue of law to be examined *de novo*). Likewise, whether the defendant's right to a jury trial has been violated is reviewed *de novo*. *United States v. Samuels*, 308 F.3d 662, 671 (6th Cir. 2002)(noting an appellate court reviews an *Apprendi* challenge *de novo*); *United States v. Trennell*, 290 F.3d 881, 889 (7th Cir. (2002)(observing that the applicability of *Apprendi* is a question of law reviewed *de novo*); *United States v. Arellano-Rivera,* 244 F.3d 1119, 1127 (9th Cir. 2001)(concluding that whether the district court violated the constitutional rule expressed in *Apprendi* is a question of law reviewed *de novo*); *United States v. Thompson*, 237 F.3d 1258, 1261 (10th Cir.), *cert. denied*, 532 U.S. 987, 121 S.Ct. 1637, 149 L.Ed.2d 497 (2001)(noting that the question of whether *Apprendi* was violated is a legal one); *United States v. Harris*, 244 F.3d 828, 829 (11th Cir. 2001)(holding that the applicability of *Apprendi* is a pure question of law reviewed *de novo*). Hence, the standard of review is *de novo*.

The trial court's ruling

Collateral counsel raised the *Ring* claim in his first amended postconviction motion. (PC Vol. I 115-121). The State's reply noted that a *Ring* challenge to Florida's death penalty scheme had been denied by the Florida Supreme Court in *Bottoson v. Moore*, 833 So. 2d 693 (Fla.), *cert denied*, 154 L. Ed. 2d 564, 123 S. Ct. 662 (2002), and *King v. Moore*, 831 So. 2d 143 (Fla.), *cert. denied*, 154 L. Ed. 2d 556, 123 S. Ct. 657 (2002). (PC Vol. I 138). Collateral counsel filed a written closing after the evidentiary hearing arguing his *Ring* claim at length. (PC Vol. I 140-180). The trial court denied the *Ring* claim based on this Court's holding in *Bottoson v. Moore*, 833 So. 2d 693 (Fla.), *cert denied*, 154 L. Ed. 2d 564, 123 S. Ct. 662 (2002), and *King v. Moore*, 831 So. 2d 143 (Fla.), *cert. denied*, 154 L. Ed. 2d 556, 123 S. Ct. 657 (2002).(PC Vol. I 183).

RETROACTIVITY

Neither *Ring*, nor *Apprendi v. New Jersey*, 530 U.S. 466 (2000), upon which it was based, are retroactive. Both *Apprendi* and *Ring* are rules of procedure, not substantive law. They both concern who decides a fact, *i.e.,* the jury or the judge, which is procedural. *Curtis v. United States*, 294 F.3d 841, 843 (7th Cir. 2002), *cert. denied*, 123 S.Ct 541 (2002)(holding *Apprendi* is not retroactive because it is not a substantive change in the law; rather, it "is about nothing but procedure" - who decides a given question (judge versus jury) and under what standard (preponderance versus reasonable doubt) and explaining that

Apprendi did not alter which facts have what legal significance). New procedural rules are not applied retroactively.[9]

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[9] Florida uses the old constitutional test for retroactivity rather that the new *Teague* test. *Teague v. Lane*, 489 U.S. 288, 299-310, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989); *Witt v. State*, 387 So.2d 922 (Fla.1980). Florida courts should also adopt the *Teague* test for retroactivity. The *Witt* test of retroactivity was based on two United States Supreme Court cases dealing with retroactivity, *Linkletter v. Walker*, 381 U.S. 618, 85 S.Ct. 1731, 14 L.Ed.2d 601 (1965) *and Stovall v. Denno*, 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed.2d 1199 (1967). The United States Supreme Court no longer uses these tests for determining retroactivity on collateral review because, as the *Teague* Court observed, the old *Linkletter/Stovall* test led to inconsistent results and disparate treatment of similarly situated defendants. *Teague*, 489 U.S. at 302-303. Both the Arizona and New Hampshire Supreme Court have adopted *Teague* for the pragmatic reason that the law regarding retroactivity is complex enough without requiring counsel and trial judges to apply different retroactivity tests. *State v. Tallard*, 816 A.2d 977,980 (N.H. 2003); *State v. Slemmer*, 823 P.2d 41, 49 (Ariz. 1991) Morever, *Witt* raises serious due process concerns. *Witt,* like *Linkletter/Stovall,* improperly focuses on the past reliance on the old rule and the effects on the administration of justice. Any state with a retroactivity test which lacks a substantive/procedural distinction runs the risk of violating due process, just as the Pennsylvania Supreme Court did in *Fiore v. White*, 528 U.S. 23, 120 S.Ct. 469, 145 L.Ed.2d 353 (1999)(applying, in a habeas petition from a state conviction, a due process insufficiency of the evidence analysis when the element of the crime changed); *see also Bunkley v. Florida*, 2003 WL 21210417 (May 27,2003)(remanding for reconsideration of a retroactivity issue where this Court employed the *Witt* test). Despite the canard about states being free to adopt any test of retroactivity, states without the equivalent of a substantive retroactivity test will encounter due process problems. Florida should adopt *Teague* to avoid these concerns.

According to the federal test of retroactivity, *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989), only "watershed" rules of criminal procedure which (1) greatly affect the accuracy and (2) alter understanding of the bedrock procedural elements essential to the fairness of a proceeding are applied retroactively. *Sawyer v. Smith*, 497 U.S. 227, 242, 111 L. Ed. 2d 193, 110 S. Ct. 2822 (1990)).[10]

Ring does not enhance the accuracy of the conviction or involve a bedrock procedural element essential to the fundamental fairness of a proceeding. Only those rules that seriously enhance accuracy are applied retroactively. *Graham v. Collins*, 506 U.S. 461, 478, 113 S.Ct. 892, 122 L.Ed.2d 260 (1993) (explaining that the exception is limited to a small core of rules which seriously enhance accuracy). Jury involvement in capital sentencing does not enhance accuracy. Indeed, the *Ring* Court did not require jury involvement because juries were more rational or fair; rather, it was required regardless of

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[10] Under *Teague*, there are two exceptions to general rule of non-retroactivity. The first exception, relating to substantive rules, requires retroactive application if the new rule places private conduct beyond the power of the State to proscribe or addresses a substantive categorical guarantee accorded by the Constitution, such as a rule prohibiting a certain category of punishment for a class of defendants because of their status or offense. *Saffle v. Parks*, 494 U.S. 484, 494, 108 L. Ed. 2d 415, 110 S. Ct. 1257 (1990). The second exception is for watershed rules of criminal procedure which implicate the fundamental fairness and accuracy of the criminal proceeding. *Ring* and *Apprendi*, because they are both new procedural rules, not substantive, involve only second exception, not the first.

fairness. The *Ring* Court explained that even if judicial factfinding were more efficient or fairer, the Sixth Amendment requires juries. *Ring*, 536 U.S. at 607 (observing that the Sixth Amendment jury trial right, however, does not turn on the relative rationality, fairness, or efficiency of potential factfinders). Jury sentencing does not increase accuracy. A jury is comprised of people who have never made a sentencing decision before. Furthermore, even if one views jury sentencing as equally accurate to judicial sentencing, jury involvement does not "seriously" enhance accuracy. Judicial sentencing is at least as accurate.

In *State v. Lotter*, S-01-091 (Neb. July 11, 2003), the Nebraska Supreme Court, using the *Teague* test, held that *Ring* was not retroactive. In 1996, a three-judge panel sentenced Lotter to death. Lotter contended *Ring* is substantive, not procedural, and therefore, *Teague* did not. The *Lotter* Court concluded that *Ring* was procedural. The Nebraska Supreme Court explained that a substantive rule is one which determines the meaning of a criminal statute or addresses the criminal significance of certain facts; whereas, a procedural rule is one which sets forth fact-finding procedures to ensure a fair trial. They observed that *Ring* altered *who* decides whether any aggravating circumstances exist, thereby altering the fact-finding procedures used in capital sentencing hearings. They explained that there are two exceptions to the general rule of nonretroactivity announced in *Teague*. *Ring* did not fall

within the first *Teague* exception because *Ring* "clearly does not place any type of primary, private individual conduct beyond the power of the criminal lawmaking authority to proscribe." Nor did *Ring* fall within the second *Teague* exception because *Ring* could not be viewed as enhancing the accuracy of the sentence. The *Lotter* Court discussed the Arizona Supreme Court's decision in *State v. Towery*, 64 P.3d 828 (Ariz. 2003) and the Nevada Supreme Court's decision in *Colwell v. State*, 59 P.3d 463 (Nev. 2002), both of which had held that *Ring* was not retroactive. The *Lotter* court found the numerous decisions from State and federal courts finding *Apprendi* not to be retroactive highly persuasive because *Ring* was based on *Apprendi*. The *Lotter* court also found guidance in the United States Supreme Court's recent decision in *United States v. Cotton*, 535 U.S. 625 (2002), which held that an *Apprendi* error is not plain error. The Nebraska Supreme Court concluded that *Ring* announced a new constitutional rule of criminal procedure which does not fall within either of the *Teague* exceptions and thus, does not apply retroactively.[11]

In *Colwell v. State*, 59 P.3d 463 (Nev. 2002), the Nevada Supreme Court held that *Ring* was not retroactive. In his state post-conviction petition, Colwell contended that his sentencing by a three-judge panel violated his Sixth Amendment right to a jury trial established in *Ring*. The *Colwell* Court explained,

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[11] The Nebraska Supreme Court had previously granted relief based on *Ring* in a direct appeal. *State v. Gales*, 658 N.W.2d 604 (Neb. 2003)(remanding for a new penalty phase).

that in *Ring*, the United States Supreme Court, held that it was impermissible for a sentencing judge, sitting without a jury, to find an aggravating circumstance necessary for imposition of the death penalty. However, the Court declined to apply *Ring* retroactively on collateral review. *Colwell*, 59 P.3d at 469-472. The Nevada Supreme Court used an expanded *Teague* test to determine retroactivity. The *Colwell* Court reasoned that *Ring* does effect the accuracy of the sentence. The *Colwell* Court explained that the United States Supreme Court in *Ring* did not determine that factfinding by the jury was superior to factfinding by a judge; rather, the United States Supreme Court stated that "the superiority of judicial factfinding in capital cases is far from evident". The *Colwell* Court explained that *Ring* was based simply on the Sixth Amendment right to a jury trial, not on enhanced accuracy in capital sentencings, and does not throw into doubt the accuracy of death sentences decided by three-judge panels. They concluded that the likelihood of an accurate sentence was not seriously diminished simply because a three-judge panel, rather than a jury, found the aggravating circumstances. *Colwell*, 59 P.3d at 473.

In *State v. Towery*, 64 P.2d 828 (Ariz. 2003), the Arizona Supreme Court also held that *Ring* is not retroactive. Following a *Teague* analysis, the Arizona Supreme Court first determined that *Ring* was a new rule but that the new rule was procedural, not substantive. The *Towery* Court reasoned that *Ring* did not determine the meaning of a statute, nor address the criminal

significance of certain facts, nor the underlying prohibited conduct; rather, *Ring* set forth a fact-finding procedure designed to ensure a fair trial. *Ring* altered who decided whether aggravating circumstances existed. The *Towery* Court noted that the *Apprendi* Court itself described the issue as procedural. *Apprendi*, 530 U.S. at 475, 120 S.Ct. 2348 (stating that: "[t]he substantive basis for New Jersey's enhancement is thus not at issue; the adequacy of New Jersey's procedure is."). Because *Ring* was merely an extension of *Apprendi*, logic dictates that if *Apprendi* announced a new procedural rule, then so did *Ring*. Therefore, *Ring* was procedural. Nor did *Ring* announce a watershed rule because it did not seriously enhance accuracy nor alter bedrock principles necessary to fairness. It did not seriously enhance accuracy because *Ring* merely shifted the duty from an impartial judge to an impartial jury. Nor is allowing an impartial jury to determine aggravating circumstances, rather than an impartial judge, implicit in the concept of ordered liberty. The *Towery* Court found *DeStefano v. Woods*, 392 U.S. 631, 88 S.Ct. 2093, 20 L.Ed.2d 1308 (1968), which held that the right to a jury trial was not to be applied retroactively, "particularly persuasive".[12]

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[12] The Arizona Supreme Court analyzed the retroactivity of *Ring* using a *Teague* test but also analyzed the issue using the test of *Allen v. Hardy*, 478 U.S. 255, 106 S.Ct. 2878, 92 L.Ed.2d 199 (1986). Under the *Allen* framework, the court weighed three factors:(a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of

One state supreme court had held that *Ring* is retroactive. In *State v. Whitfield*, 2003 Mo. LEXIS 105 (June 17, 2003), the Missouri Supreme Court reopened a direct appeal by recalling the mandate. The *Whitfield* Court held that all four steps in the penalty phase including any factual findings related to mitigation and any balancing of aggravation versus mitigation, not just the finding of one aggravator, must be made by the jury. The *Whitfield* Court declined to adopt the federal test of retroactivity announced in *Teague v. Lane*, 489 U.S. 288, 308, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989). The *Whitfield* Court held that *Ring* was retroactive under the old *Linkletter/Stovall* test.[13] The *Whitfield* Court determined that the remedy was imposition of a life sentence, not a remand for a new jury to determine the penalty.

The United States Supreme Court has disapproved the practice of using motions to recall the mandate to reopen cases that are final minus "extraordinary circumstances" involving "grave, unforeseen contingencies" *Calderon v. Thompson*, 523 U.S. 538,118 S.Ct. 1489, 140 L.Ed.2d 728 (1998)(finding a "grave" abuse of discretion in a federal appellate court granting a motion to

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justice of a retroactive application of the new standards. The Arizona Supreme Court concluded that *Ring* was not retroactive under *Allen* either. The *Allen* test is similar to Florida's *Witt* test.

[13] *Linkletter v. Walker*, 381 U.S. 618, 85 S.Ct. 1731, 14 L.Ed.2d 601 (1965); *Stovall v. Denno*, 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed.2d 1199 (1967).

recall the mandate in a habeas case because of the "profound interests in repose attaching to the mandate" and the State's interest in finality which is "all but paramount"). A change in law is not an "extraordinary circumstances" involving "grave, unforeseen contingencies." Indeed, the *Calderon* Court suggested that only a strong showing of actual innocence would outweigh the State's interests in finality and thus, justify the recalling of a mandate. No appellate court, state or federal, should recall a mandate six years after it was issued merely because of a subsequent development in the law.

However, having done so, the Missouri Supreme Court does not recognize the consequence of its action. Because the Missouri Supreme Court recalled the mandate of the direct appeal, the result was to render the case still pending on direct appeal. The recalling of the mandate made the case unfinal. *Whitfield* is now a direct appeal case. Retroactivity in collateral review is not an issue in a case pending on direct review. Any new rule applies to a case on direct review regardless of whether the rule existed at the time of the trial. *Griffith v. Kentucky*, 479 U.S. 314, 328, 107 S.Ct. 708, 93 L.Ed.2d 649 (1987)(holding that a new rule for the conduct of criminal prosecutions is to be applied to all cases, state or federal, pending on direct review or not yet final). The *Whitfield* Court's entire discussion of *Teague* and the retroactivity of *Ring* is rendered dicta by the recalling of the direct appeal mandate.

The Missouri Supreme Court had previously held that *Apprendi*, upon which *Ring* was based, was not retroactive. *Whitfield* at n.13. So, according to Missouri Supreme Court, *Apprendi* is not retroactive, but *Ring* is. The Missouri Supreme Court provides no explanation for these incongruous holdings. *Apprendi* involved both the right to a jury trial and the due process standard of proof. *Ring* involves only the right to a jury trial because most, if not all states, including Missouri, determined the existence of aggravators at the higher beyond a reasonable doubt standard of proof prior to *Ring*. So, *Ring* is only half of *Apprendi*. If *Apprendi* is not retroactive, then half of *Apprendi* cannot be.[14] Furthermore, the Missouri Supreme Court seems to be deciding retroactivity on a case-by-case basis but retroactivity should be determined based on the stage of litigation. *Teague*, 489 U.S. at 303-05 (deploring the "unequal treatment of those who were similarly situated" under the retroactivity rules applied by the Court prior to *Teague* and noting that the "selective application of new rules violates the

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[14] In Florida, aggravators are found beyond a reasonable doubt. *Geralds v. State*, 601 So.2d 1157, 1163 (Fla.1992)(stating it is axiomatic that the State is required to establish the existence of an aggravating circumstance beyond a reasonable doubt). Florida has always required the higher standard of proof in this area. *State v. Dixon*, 283 So.2d 1, 9 (Fla. 1973). Aggravators were already decided at the higher standard of proof before *Apprendi* or *Ring*. The standard of proof wing is probably the more critical part of *Apprendi* in terms of accuracy and that wing is not at issue in a capital case. The "who" wing of *Apprendi* is the only part at issue in a *Ring* claim. So, *Ring* actually is only half of *Apprendi*.

principle of treating similarly situated defendants the same."). Additionally, the holding that all steps must be made by the jury is tantamount to a holding that the jury, not the judge, must be the ultimate sentencer in a capital case which is a conclusion specifically rejected by Justice Scalia in his *Ring* concurrence. *Ring*, 122 S.Ct. at 2445 (Scalia, J., concurring)(stating that "today's judgment has nothing to do with jury sentencing" and "[t]hose States that leave the ultimate life-or-death decision to the judge may continue to do so . . ."). Furthermore, the *Whitfield* Court's remedy of an automatic life sentence is based on a misreading of *Sattazahn v. Pennsylania*, 537 U.S. 101 123 S. Ct. 732, 154 L. Ed. 2d 588 (2003). *Whitfield*, at n.20. The *Sattazahn* Court concluded that there was no double jeopardy bar to a new penalty phase after the first jury hung on the penalty and, pursuant to a state statute, the judge imposed a life sentence because there were no factual findings in favor of acquittal by either the jury or judge. The Court explained that it is not the mere imposition of a life sentence that raises a double-jeopardy bar. Rather, an "acquittal" of the death penalty is required and that means that the jury found that no aggravating circumstances existed. As the *Sattazahn* Court characterized it, the jury deadlocking at 9 to 3 was a "non-result". And the judge's determination was not a acquittal either, because the judge had no discretion pursuant to the statute but to impose a life sentence. The judge made no findings and resolved no factual

matters. As the *Sattazahn* Court characterized it, the judge's decision was a "default judgment" required by statute. In *Whitfield*, the penalty phase jury also hung but, unlike *Sattazahn*, the judge imposed death. In *Whitfield*, the jury made no decision and the judge imposed death, not life. The *Whitfield* Court improperly reasoned that as a matter of law that the judge was required to enter a life sentence when the death sentence is unconstitutional. However, this was the exact reasoning the *Sattazahn* Court rejected when it rejected any "statutory entitlement" to life argument. An acquittal, for double jeopardy purposes, is determined as a matter of fact by a fact finder, not as a matter of law. Contrary to the reasoning of the *Whitfield* Court, there is nothing "hollow" about a defendant having his penalty determined by a jury in a new penalty phase. The correct remedy for a violation of the Sixth Amendment right to a jury trial is to provide the defendant with a jury. A determination by appellate court fiat is not the correct remedy.

While only a few courts have addressed the retroactivity of *Ring*, numerous court have addressed the related issue of whether *Apprendi* is retroactive. Two Florida District Courts have held that *Apprendi* is not retroactive. *Figarola v. State*, 841 So.2d 576 (Fla. 4th DCA 2003)(concluding that *Apprendi* would not be retroactive under either *Witt* or *Teague* but certifying the question as one of great public importance); *Hughes v. State*, 826 So.2d 1070 (Fla. 1st DCA 2002)(holding that *Apprendi* did not

apply retroactively to a claim being raised under rule 3.800 based a *Witt* analysis), *rev granted*, 837 So.2d 410 (Fla. 2003).[15] Every federal circuit court that has addressed the issue has held that *Apprendi* is not retroactive.[16] Recently, the Second

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[15] A notice to invoke jurisdiction has been filed in *Figarola*. *Figarola*, SC03-586. Briefing is complete and the oral argument had been held in *Hughes*. *Hughes*, SC02-2247.

[16] *United States v. Sanders*, 247 F.3d 139, 146-51 (4th Cir. 2001), *cert. denied*, 535 U.S. 1032, 122 S.Ct. 573, 151 L.Ed.2d 445 (2001)(explaining that because *Apprendi* is not retroactive in its effect, it may not be used as a basis to collaterally challenge a conviction); *United States v. Brown*, 305 F. 3d 304 (5th Cir. 2002)(holding *Apprendi* is not retroactive because it is a new rule of criminal procedure, not a new substantive rule and is not a "watershed" rule that improved the accuracy of determining the guilt or innocence of a defendant); *Goode v. United States*, 305 F. 3d 378 (6th Cir. 2002), *cert. denied*, 123 S.Ct. 711 (2002)(holding *Apprendi* is not a watershed rule citing *Neder v. United States*, 527 U.S. 1, 15 (1999)); *Curtis v. United States*, 294 F.3d 841 (7th Cir. 2002), *cert. denied*, 123 S.Ct 541 (2002)(holding *Apprendi* is not retroactive because it is not a substantive change in the law; rather, it “is about nothing but procedure” and it is not fundamental because it is not even applied on direct appeal unless preserved); *United States v. Moss*, 252 F.3d 993, 1000-1001 (8th Cir. 2001), *cert. denied*, 122 S.Ct. 848 (2002)(holding that *Apprendi* is not of watershed magnitude and that *Teague* bars petitioners from raising *Apprendi* claims on collateral review); *United States v. Sanchez-Cervantes*, 282 F.3d 664, 667 (9th Cir. 2002)(holding *Apprendi* does not meet either prong of *Teague* because it does not criminalize conduct and does not involve the accuracy of the conviction and therefore, *Apprendi* is not to be retroactively applied);*United States v. Mora*, 293 F.3d 1213, 1219 (10th Cir. 2002), *cert. denied*, 123 S.Ct. 388 (2002)(concluding *Apprendi* is not a watershed decision and hence is not retroactively applicable to initial habeas petitions); *McCoy v. United States*, 266 F.3d 1245, 1258 (11th Cir. 2001), *cert. denied*, 122 S.Ct. 2362 (2002)(holding that the new constitutional rule of procedure announced in *Apprendi* does not apply retroactively on

Circuit joined "this chorus". *United States v. Coleman*, 329 F.3d 77 (2d Cir. 2003). The *Coleman* Court reasoned that, while *Apprendi* was a "new" rule of law, it was a procedural rule, not a substantive rule. New substantive rules change the definition of a crime and therefore create a risk that the defendant was convicted of an act that it no longer criminal. To mitigate such a risk, new rules of substantive law are applied retroactively. Because new procedural rules create no such risk, they are not applied retroactively. The Second Circuit noted that *Apprendi* itself said that the substantive basis of New Jersey's enhancement was not at issue; rather, it was the adequacy of its procedures. *Coleman* citing *Apprendi*, 530 U.S. at 475 and *McCoy*, 266 F.3d at 1257 n.16. The *Coleman* Court rejected the argument that *Apprendi* was substantive because it turned a sentencing factor into an element. The fact of drug quantity was a fact in dispute that had to be proven before *Apprendi* *Apprendi* merely change who decided the fact and at what standard of proof. Drug quantity was always an element in the sense that it was something that the government had to prove to someone at some standard. The fact was not "new" in this sense and therefore, was not truly a new element.

The First Circuit has also recently held that *Apprendi* is not retroactive. *Sepulveda v. United States*, 2003 WL 212366 (1st Cir. May 29, 2003). The *Sepulveda* Court held that *Apprendi* is not

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collateral review).

retroactive because it does not seriously enhance the accuracy of convictions. While an *Apprendi* error may raise questions as to the length of his sentence, inaccuracies of this nature, occurring after a defendant has been duly convicted by a jury beyond a reasonable doubt are matters of degree and do not trump the general rule of nonretroactivity. The First Circuit explained that the length of the sentence was "not plucked out of thin air, but, rather, was determined by a federal judge based upon discrete findings of fact established by a fair preponderance of the evidence." The First Circuit agreed with the Seventh Circuit's observation that findings by federal judges, though now rendered insufficient in certain instances by *Apprendi*, are adequate to make reliable decisions about punishment because "[a]fter all, even in the post-*Apprendi* era, findings of fact made by the sentencing judge, under a preponderance standard, remain an important part of the sentencing regimen." The First Circuit noted that watershed rules of criminal procedure are "hen's-teeth" rare. They noted the Supreme Court is reluctant to establish rules that enjoy the venerated status of watershed. A decision by a judge (on the preponderance standard) rather than a jury (on the reasonable-doubt standard) is not the sort of error that undermines the fairness of judicial proceedings. The First Circuit also noted that applying *Apprendi* retroactively would create an unacceptably high risk that those found guilty of criminal conduct might escape suitable punishment. They observed that

although the *Apprendi* rule is important as a means of clarifying the proper factfinding roles of judge and jury, it affords an innocent defendant no additional shield from wrongful conviction. They rejected any reliance upon Justice O'Connor characterization, in her dissent, of *Apprendi* as "a watershed change in constitutional law" because her concern was a practical one regarding the "flood of petitions by convicted felons seeking to invalidate their sentences" that the decision would cause. Several state supreme courts have held that *Apprendi* is not retroactive either.[17]

While the *Ring* Court did not address the retroactivity of their new decision, Justice O'Connor, in her dissent stated that *Ring* was not retroactive. *Ring v. Arizona*, 122 S.Ct. 2428, 2449-2450 (2002)(O'Connor, J., dissenting)(noting that capital defendants will be barred from taking advantage of the holding on federal collateral review citing 28 U.S.C. §§ 2244(b)(2)(A), 2254(d)(1) and *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060, 103

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[17] *People v. De La Paz*, 2003 WL 21027911 (Ill. Jan 3, 2003)(holding *Apprendi* is not retroactive); *State v. Tallard*, 816 A.2d 977 (N.H. 2003)(reasoning that *Apprendi* is not retroactive because it is not a watershed rule of criminal procedure that increases the reliability of the conviction); *Whisler v. State*, 36 P.3d 290 (Kan. 2001)(holding that *Apprendi* is not retroactive because it is procedural rather than substantive and is not a watershed rule of criminal procedure that implicates the fundamental fairness of trial), *cert. denied*, 122 S.Ct. 1936 (2002); *State ex rel. Nixon v. Sprick*, 59 S.W.3d 515, 520 (Mo. 2001)(holding in *Apprendi* is not applied retrospectively to cases on collateral review relying on *Dukes v. United States*, 255 F.3d 912, 913 (8th Cir. 2001)).

L.Ed.2d 334 (1989)). The United States Supreme Court has refused to apply right to jury trial cases retroactively in prior cases. *DeStefano v. Woods*, 392 U.S. 631, 633, 88 S.Ct. 2093, 2095, 20 L.Ed.2d 1308 (1968)(holding that the right to jury trial in state prosecutions was not retroactive and "should receive only prospective application."). The United States Supreme Court recently held that an *Apprendi* claim is not plain error. *United States v. Cotton*, 122 S.Ct. 1781 (2002)(holding an indictment's failure to include 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 the level of plain error). If an error is not plain error, the United States Supreme Court will not find the error of sufficient magnitude to allow retroactive application of such a claim in collateral litigation. *United States v. Sanders*, 247 F.3d 139, 150-151 (4th Cir. 2001)(emphasizing that finding something to be a structural error would seem to be a necessary predicate for a new rule to apply retroactively under *Teague* and because *Apprendi* claims have been found to be subject to harmless error, a necessary corollary is that *Apprendi* is not retroactive). Thus, the United States Supreme Court will not apply *Ring* retroactively either.

Howell's reliance on cases where there was a prior violent felony aggravator, such as *Bottoson* and *King*, is misplaced. IB at 30-32. This is confusing an exception to the rule announced

in *Ring* with the issue of retroactivity. This Court has never addressed the issue of the retroactivity of *Ring* and therefore, it is still an open question in Florida. This Court should address the question and hold *Ring* is not retroactive.

MERITS

The Florida Supreme Court rejected a *Ring* challenge to Florida's death penalty statute in *Bottoson v. Moore*, 813 So. 2d 27 (Fla. 2002), *cert. denied*, 122 S. Ct. 2670 (2002), reasoning that the United States Supreme Court had not receded from its prior precedent upholding the constitutionality of Florida's death penalty scheme. Furthermore, the Florida Supreme Court has repeatedly rejected *Ring* challenges to Florida's death penalty statute in the wake of *Bottoson* in both direct appeals and collateral cases. *Duest v. State*, SC00-2366, slip op. at 28-29 (Fla. June 26, 2003)(rejecting a *Ring* challenge citing *Bottoson v. Moore*, 833 So. 2d 693 (Fla.), *cert denied*, 154 L. Ed. 2d 564, 123 S. Ct. 662 (2002), and *King v. Moore*, 831 So. 2d 143 (Fla.), *cert. denied*, 154 L. Ed. 2d 556, 123 S. Ct. 657 (2002), in a direct appeal).

Regardless of the view this Court takes of *Ring* and its requirements, *Ring* does not invalidate this death sentence. The jury made a finding of the felony murder aggravator in the guilt phase both by special verdict and by convicting Howell of making a bomb. One of the aggravators was found unanimously by jury in the guilt phase. *Belcher v. State*, SC01-1414, slip op. at 14-15

(Fla. July 10, 2003)(rejecting a *Ring* challenge and explaining that one of the three aggragavators, the prior violent felony aggravator, was exempt from *Ring* and that the other aggravator, the felony murder aggravator was found by the jury during the guilt phase when they unanimously convicted the defendant of sexual battery); *Ex parte Waldrop v. State*, 2002 WL 31630710 (Ala. November 22, 2002)(affirming a jury override death sentence against a *Ring* challenge because the jury found the felony murder aggravator and the multiple victim aggravator during the guilt phase by convicting the defendant of two counts of murder committed during a robbery and one count of murder where two or more persons were murdered relying on *Lowenfield v. Phelps*, 484 U.S. 231, 244-45 (1988) and rejecting an argument that the jury rather than the judge must do the weighing, because the weighing process is not a factual determination and is not susceptible to any quantum of proof; rather, the weighing process is a moral or legal judgment *citing Ford v. Strickland,* 696 F.2d 804, 818 (11th Cir. 1983)); *Norcross v. State*, 816 A.2d 757 (Del. 2003)(rejecting a *Ring* challenge because the jury found two of the aggravators during the guilt phase which satisfies *Ring*);*See also Wrinkles v. State*, 776 N.E.2d 905, 907-08 (Ind. 2002)(holding that the Court need not decide whether some aspects of Indiana's death penalty scheme are affected by *Ring,* because *Ring* is not implicated under any plausible view because one of the aggravators, *i.e.,* the multiple murder aggravator, was necessarily found by the jury when they found

the defendant guilty of the three murders in the guilt phase).[18] Likewise, Howell's death sentence does not violate *Ring*.

[18] The *Ring* Court observed in a footnote that, four states have hybrid systems, in which the jury renders an advisory verdict but the judge makes the ultimate sentencing determinations. *Ring*, 536 U.S. at 608 n.6 (citing Ala.Code §§ 13A-5-46, 13A-5-47 (1994); Del.Code Ann., Tit. 11, § 4209 (1995); Fla. Stat. Ann. § 921.141 (West 2001); Ind.Code Ann. § 35-50-2-9 (Supp.2001)). The four states are Alabama, Delaware, Florida and Indiana. There is no *Ring* issue in Alabama because their narrowers are imbedded in their capital murder statute. A jury in Alabama finds the narrowers in the guilt phase. Delaware is no longer a true hybrid state because the juries verdict is no longer merely advisory. The Delaware General Assembly, in response to *Ring*, made a jury's determination of no aggravating circumstances binding on the trial court. *See* Delaware S.B. 449, 73 Del. Laws c. 423 (barring trial court from imposing death unless the jury finds at least one aggravating circumstance); *See also Brice v. State*, 2003 WL 140046, * 3 (Del. Jan 16, 2003)(detailing legislative history of act).

CONCLUSION

The State respectfully requests this Honorable Court affirm the trial court's denial of post-conviction relief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing ANSWER BRIEF has been furnished by U.S. Mail to CLYDE M. TAYLOR, JR., 211 East Call Street, Tallahassee, Florida 32301, this 14th day of July, 2003.

_____
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CERTIFICATE OF FONT AND TYPE SIZE

Counsel certifies that this brief was typed using Courier New 12.

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