IN THE SUPREME COURT OF FLORIDA

TERRELL M. JOHNSON,

Appellant,

v.

CASE NO. SC03-1042

STATE OF FLORIDA,

Appellee.

_____/

ON APPEAL FROM THE NINTH JUDICIAL CIRCUIT
IN AND FOR ORANGE COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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ANSWER BRIEF

RESPONSE TO REQUEST FOR ORAL ARGUMENT

Despite the seeming complexity of Johnson's claims, the issues before this Court are straight-forward, fact-bound claims. Oral argument will not facilitate this Court's decision-making process, and the judicial resources necessary to conduct oral argument would be better utilized in another case. Oral argument is unnecessary, and should not be permitted in this case.

STATEMENT OF THE CASE

The history of this case.

In his last appearance before this Court, the facts and procedural history of this case were summarized in the following way:

> Johnson was convicted of first-degree murder for the shooting death of an Orange County bar owner and of second-degree murder for the shooting of a bar customer during the same incident in 1979. The pertinent facts of the crime are described in detail in this Court's opinion on Johnson's direct appeal. See *Johnson v. State*, 442 So. 2d 193 (Fla. 1983).

The decision was first appealed to this Court in 1980, but when the transcript of the proceedings was discovered to be incomprehensible we relinquished jurisdiction to the circuit court in order to reconstruct the record and to hold an evidentiary hearing as to the accuracy of the reconstructed record. The supplemental transcript was submitted to this Court, and was examined on direct appeal. On appeal, we affirmed both the conviction and the sentence. *See id.*

Johnson originally filed a motion for postconviction relief in June 1985. Pursuant to a legislative act passed in June 1985, the circuit court appointed the Office of the Capital Collateral Representative (CCR) to represent Johnson and ordered CCR to re-plead all of the issues in Johnson's 3.850 motion. CCR refiled Johnson's motion for postconviction relief with the trial court in October 1986. An evidentiary hearing was held in December 1986 and the trial court denied the motion in June 1989. On appeal, this Court affirmed the denial of relief. *See Johnson v. State*, 593 So. 2d 206 (Fla. 1992).

In January 1995, Johnson filed a petition for a writ of habeas corpus with this Court and filed a supplemental habeas petition in February. This Court found the twenty-three issues raised in Johnson's habeas petition either to be procedurally barred because they had been raised and rejected on direct appeal or in his previous 3.850 proceeding or to be meritless. *See Johnson v. Singletary*, 695 So. 2d 263 (Fla. 1996).

In February 1997, Johnson filed a second 3.850 motion with the circuit court, alleging newly discovered evidence and evidence of a previously unknown *Brady* [FN1] violation. The circuit court tolled the time limits in rules 3.851 and 3.852 to permit Johnson to pursue his public records requests. A status hearing was held on December 28, 1998, and Johnson filed his consolidated motion on January 28, 1999. A *Huff* [FN2] hearing was held on May 3, 1999, and the circuit court entered an order on June 15, 1999, denying Johnson all relief without an evidentiary hearing.

Johnson appeals that summary denial to this Court and raises five issues. Johnson claims that (1) summary denial was improper; (2) he was denied access to public records relating to the jurors; (3)

> he was denied effective assistance of counsel because his postconviction attorneys were prohibited by rule from interviewing the jurors to determine if constitutional error occurred; (4) the method of execution in Florida is unconstitutional; and (5) he is incompetent to be executed.
>
> > FN1. *Brady v. Maryland*, 373 U.S. 83, 10 L. Ed. 2d 215, 83 S. Ct. 1194 (1963).
> >
> > FN2. *Huff v. State*, 622 So. 2d 982 (Fla. 1993). The Huff hearing requirement was incorporated in Florida Rule of Criminal Procedure 3.851(c). Under this rule, a trial court must conduct a hearing to determine whether an evidentiary hearing is required before ruling on any rule 3.850 motion filed by a death-sentenced prisoner.

Johnson v. State, 804 So. 2d 1218 (Fla. 2001).

The facts relevant to this proceeding.

In its order denying Johnson's successive postconviction motion, the Orange County Circuit Court summarized the posture of this case in the following way:

> THIS MATTER came before the Court for consideration of Defendant Terrell M. Johnson's Consolidated Amended Motion to Vacate Judgment and Sentence and Request for Evidentiary Hearing, filed August 5, 2002, pursuant to Florida Rule of Criminal Procedure 3.851. The State filed its Response on October 2, 2002. Having reviewed the Motion, Response, file and record of this case, the Court concludes that summary denial without hearing is warranted.
>
> Defendant's allegations in Claim I are based on documents received by Defendant in May, 2001, from the Florida Department of Law Enforcement ("FDLE"), and additional documents deposited by FDLE with the repository for which it claims exemptions. As of the date of the instant motion, any claims based on the contents of documents in Defendant's possession since May, 2001, are untimely. Further, Defendant's claims are merely conclusory based on the alleged contents of these documents. Defendant previously requested that this Court conduct an in-camera

> inspection of the exempted documents. The Court has reviewed the documents and finds that all documents not yet disclosed to Defendant are either exempt from disclosure or not relevant. Accordingly, all allegations in this Claim are either untimely or facially insufficient.
>
> . . .
>
> Next, in Claim III, Defendant contends that Florida's capital sentencing statute is unconstitutional in light of the United States Supreme Court's holding in *Ring v. Arizona*, 122 S.Ct. 2428 (2002). Very recently, the Florida Supreme Court held that the *Ring* decision did not invalidate Florida's capital sentencing scheme. *See Bottoson v. State,* 2002 WL31386790 (Fla. October 24, 2002). Thus, this claim does not merit relief.
>
> Finally, in Claim IV, Defendant alleges that newly discovered evidence establishes that execution by lethal injection is cruel and/or unusual punishment. Defendant concedes that he has already sought review from the Florida Supreme Court on this basis and relief was denied. Affirming this Court's denial of Defendant's prior postconviction motion, the Florida Supreme Court stated that "this Court has also rejected claims that lethal injection is unconstitutional." *Johnson v. State*, 804 So. 2d 1218, 1225 (Fla. 2001). Accordingly, this claim is now procedurally barred.

(R201-202).

Johnson sought rehearing of the Circuit Court's November 4, 2002, order (R227-250), and, on March 26, 2003, the Court entered an order granting in part and denying in part the motion for rehearing. In pertinent part, that order reads as follows:

> . . . On March 17, 2003, the Court held a case management conference at which the parties were given an opportunity to present argument on the motion for rehearing. After considering, the motion, the file, the arguments of counsel, and the applicable law, the Court grants the motion in part and denies the motion in part.

The Court grants rehearing only as to Defendant's request for the release of certain public records for which the Florida Department of Law Enforcement had claimed exemptions. Defendant argues that the Court used an erroneous standard when it denied his request. In its earlier order, the Court stated that it "reviewed the documents and finds that all documents not yet disclosed to Defendant are either exempt from disclosure or not relevant." Defendant argues that the determination of a document's relevancy is the responsibility of Defendant and his counsel, and is not within the purview of the Court. The Court disagrees. Rule 3.852(l)(1), Florida Rules of Criminal Procedure, states that "the scope of production ... shall be that the public records sought are not privileged or immune from production *amd are either relevant to the subject matter of the proceeding under rule 3.851 or are reasonably calculated to lead to the discovery of admissible evidence."* [emphasis in original]. Accordingly, it is appropriate for a court to consider the relevancy of the documents even when no statutory exemption applies.

Nonetheless, given the gravity of the sentence imposed upon Defendant, the Court recognizes the importance of resolving any doubts about the release of public records in the favor of Defendant. In response to the instant motion for rehearing, the Court conducted a second *in camera* inspection of the allegedly exempt documents. The Court's analysis of each document was two-tiered. The first question was whether a valid exemption applied. The second question was whether the document would either be relevant to a Rule 3.851 proceeding, or could be reasonably calculated to lead to the discovery of admissible evidence.

The Court finds that a valid exemption exists for each of the allegedly exempt documents. Moreover, for all but one document, the contents are clearly irrelevant to any possible Rule 3.851 proceeding. The sole exception is the document designated MI-57-656, a FDLE investigative report. The report refers to a fugitive with a criminal history who uses as an alias the name of one of the jurors in Defendant's trial. While the Court notes that any connection between the fugitive and the actual juror is purely speculative, that investigative report is the only exempt document which the Court cannot definitively find to be irrelevant. Therefore, in an abundance of

> caution, the Court shall release copies of that single document to the parties. Those copies shall be served with the instant order.

(R281-282).[1]

SUMMARY OF THE ARGUMENT

The trial court did not abuse its discretion in denying Johnson's successive Rule 3.851 motion without an evidentiary hearing. The Circuit Court conducted two *in camera* reviews of the documents at issue, and found that, but for one document **which was released to Johnson**, the remaining documents were not only exempt from disclosure, but also irrelevant. Johnson has not raised any issue concerning the documents that were found exempt, and has not raised any issue based on the document that was disclosed. The Circuit court did not abuse its discretion in denying Johnson's motion, and that result should not be disturbed.

Johnson's *Ring v. Arizona* claim is procedurally barred, is not retroactively applicable to this case, is without merit. Alternatively, *Ring* is inapplicable to the facts of this case because the prior violent felony aggravator and the during the course of a robbery aggravator are clearly applicable to the murder for which Johnson was convicted and sentenced to death.

ARGUMENT

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[1]Johnson makes only two passing references to the order on rehearing. He has not acknowledged the extensive review of the exempt documents that the Circuit Court undertook.

I. THE CIRCUIT COURT'S SUMMARY DENIAL OF JOHNSON'S SUCCESSIVE MOTION FOR POSTCONVICTION RELIEF, WITHOUT A HEARING ON THE PUBLIC RECORDS CLAIM, SHOULD BE AFFIRMED.

On pages 8-31 of his brief, Johnson argues that the Circuit Court erroneously denied his successive *Florida Rule of Criminal Procedure* 3.851 motion without an evidentiary hearing, and that that denial was an abuse of discretion.[2] There is no basis for relief.

Johnson's position is that the Circuit Court should have conducted an evidentiary hearing to "help him establish what the FDLE documents meant in the overall context of the case." *Initial Brief*, at 10. He goes on to frame the question as "Why was there production by the FDLE in 2001? Mr. Johnson has never been afforded the opportunity to explore the nature and the extent of FDLE's apparent records search concerning the jurors in Mr. Johnson's case." *Initial Brief*, at 22, n.9. However, despite the histrionics of Johnson's brief, the true facts are that the Circuit Court conducted **two** *in camera* reviews of the documents at issue, and found that, but for one document which was released to Johnson, all of the documents were not only exempt from disclosure, but also irrelevant. See pages 3-5, above. **Johnson has raised no claim based upon the disclosed document, nor has he claimed in this appeal that the**

[2]The determination that various documents were exempt from disclosure is reviewed under the abuse of discretion standard. *Campus Communs., Inc. v. Earnhardt*, 821 So. 2d 388, 402 (5th DCA 2002).

Circuit Court erroneously found the documents exempt from disclosure and irrelevant. Regardless of how interesting it might be to Johnson to determine why FDLE sent various documents to the records repository at a time that Johnson labels as late in the proceedings, there is no authority for the proposition that a presumptively valid conviction and sentence should be delayed to allow Johnson to examine members of FDLE concerning their shipment of records to the records repository. And, despite the shrill complaints contained in Johnson's brief, the true facts are that the Circuit Court conducted an *in camera* review of the documents at issue, and found them exempt from disclosure. (R282)[3]. Because Johnson does not challenge that holding, and because he does not allege that the alternative lack of relevance holding was error, there is simply no appealable issue before this Court.

To the extent that further discussion of this issue is necessary, Johnson concedes that the Circuit Court followed Rule 3.852 in dealing with this claim (*Initial Brief* at 22), but then asserts that there were other public records requests which remain unidentified. The purpose of an appellate brief is to present legal argument in support of the party's

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[3]The Circuit Court conducted two *in camera* reviews of the documents at issue, even though the second review was unnecessary. Given that Johnson has pressed the issue on appeal anyway, the axiom that "No good deed goes unpunished" comes to mind. *Bonfiglio v. Nugent*, 986 F. 2d 1391, 1392 (11th Cir. 1993).

position, not to compel the opposing party and the Court to speculate about the claims contained therein, as the claim about "other public records" does. This claim is insufficiently briefed, and should not be considered for any purpose.

To the extent that Johnson complains that he did not receive a case management conference, the record demonstrates that such a conference was conducted on March 17, 2003. (R35-55). To the extent that Johnson raises a passing complaint about the disposition of his motion to interview jurors, that motion was filed on April 21, 2003. (R296). Johnson filed notice of appeal on April 25, 2003, (R305) thereby divesting the Circuit Court of jurisdiction to rule on that motion.[4]

In the final analysis, the issue before the Circuit Court, and the issue that is before this Court in turn, is whether the FDLE records at issue were exempt from disclosure (as well as irrelevant). That is the determination the Circuit Court is required to make under *Florida Rule of Criminal Procedure* 3.852(f), and the Court did not abuse its discretion in doing so.[5] The Circuit Court should be affirmed in all

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[4]The Circuit Court directed Johnson to file a written motion to interview jurors during the March 17, 2003 hearing. (R 54). Johnson did not file that motion until a month later, and should not be heard to complain about his own lack of diligence.

[5]To the extent that Johnson asserts that he is entitled to a hearing because he attached FDLE documents "that indicated

respects.

II. THE *RING V. ARIZONA* CLAIM IS PROCEDURALLY BARRED, IS NOT RETROACTIVELY APPLICABLE TO THIS CASE, IS MERITLESS, AND, ALTERNATIVELY, IS INAPPLICABLE TO THE FACTS OF THIS CASE.[6]

On pages 31-39 of his brief, Johnson argues that *Ring v. Arizona*, 536 U.S. 584 (2002), invalidates Florida's capital sentencing structure. This argument is not a basis for relief for the following, independently adequate, reasons.

PRELIMINARY MATTERS

Johnson claims that the United States Supreme Court's *Ring v. Arizona*, 536 U.S. 584 (2002), decision invalidates Florida's long-upheld capital sentencing structure. There are three fundamental reasons why the *Apprendi/Ring* argument fails: that claim is procedurally barred; Johnson's death sentence is supported by aggravators that fall outside any interpretation of *Apprendi/Ring*; and, the statute under which Johnson was sentenced to death provides that, upon **conviction** for capital murder, the maximum possible sentence is **death**,

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potential criminal activity by jurors," that claim is simply inaccurate. The only attachment to his postconviction motion relates to execution by lethal injection. (R105-124). The only juror information appended to any pleading consists of juror questionnaires. (R237-250; 261-274). Those two appendices appear to be identical.

[6] **Johnson makes this claim despite the complete dissimilarity of the Florida and Arizona statutes, and despite the fact that no decisions of the United States Supreme Court upholding the constitutionality of the Florida death penalty statutes were invalidated, criticized, or otherwise called into question in *Ring*.**

unlike the statute at issue in *Ring.* It is true that *Ring* clarified the applicability of *Apprendi* to capital cases and partially overruled *Walton v. Arizona,* 497 U.S. 639 (1990). However, *Walton* had been decided based on a misunderstanding by the United States Supreme Court of Arizona death penalty law, a pivotal fact that is conspicuously absent from Johnson's habeas petition.[7] The fundamental issue in *Ring,* and the rationale behind the result, clearly rests on the United States Supreme Court's **misinterpretation** of **Arizona's** capital sentencing statute. *Ring* at 603-5. However, *Ring* has no application to Florida's death sentencing scheme because the Court did **not** misinterpret **Florida** law. Johnson's claim that Florida's statute fails because *Walton* has been overruled is predicated upon the false (and demonstrably incorrect) assertion that Florida and Arizona have functionally identical capital sentencing statutes. A cursory reading of *Ring* demonstrates that that is simply not true. Even ignoring the clear procedural bars and the total legal inapplicability of *Ring* to the facts of this case, the basic difference between Arizona and Florida law is dispositive of Johnson's claims.

A. THE *RING* CLAIM IS NOT AVAILABLE TO JOHNSON BECAUSE IT IS PROCEDURALLY BARRED

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[7] The *Ring* Court determined that *Apprendi* and its impact on the prior decision in *Walton* required clarification (or correction of the Court's understanding) of the role of the jury in **Arizona** capital sentencing. Nothing in that decision changed the dynamic of Florida's capital sentencing scheme under *Apprendi* and *Ring.*

AND BECAUSE IT IS NOT RETROACTIVE TO HIS CASE

1. The *Apprendi/Ring* claim is procedurally barred.[8]

Johnson's reliance on *Ring* to support a Sixth Amendment claim is procedurally barred because it could have been but was not raised at trial and on direct appeal. The issue in *Ring* (which is merely an extension of *Apprendi*, anyway) is by no means new or novel -- that claim, or a variation of it, has been known since before the United States Supreme Court's 1976 decision in *Proffitt v. Florida,* 428 U.S. 242, 252 (1976) (holding that the Constitution does not require jury sentencing). The "basis" for a claim that the sentence imposed in this case violated Johnson's right to a jury trial has been available since he was sentenced to death -- he raised this claim after *Apprendi*[9] was decided, as did other Florida death row inmates, who have been raising the same claim since well prior to *Ring. See, Mills, infra.* There is nothing magical about an *Apprendi* claim, and, despite the pretensions of

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[8]The Circuit Court found that this Court had rejected the *Apprendi /Ring* claim in *Bottoson v. Moore,* 833 So. 2d 693 (Fla. 2002), and that, therefore, this claim did not merit relief. (R202). The State had pled that the claim was procedurally barred, time barred, and inapplicable to the facts of this case. (R146, *et seq.*) None of those defenses were waived below, and the State reasserts each available defense here.

[9]*Apprendi v. New Jersey,* 530 U.S. 466 (2000), was released on June 26, 2000. Any claims based on that case are untimely because they were not raised until more than two years after *Apprendi* was released. Rule 3.851(d), *Fla. R. Crim. P.*

Johnson's brief, *Ring* is nothing more than the application of *Apprendi* to capital cases. There is no justification for a departure by this Court from application of the well-settled State procedural bar rules, which this Court reaffirmed in *F.B. v. State*, 852 So. 2d 226 (Fla. 2003).[10] The fact that the Circuit Court did not specifically address the procedural bar defense raised by the State (R146) does not preclude this Court from ruling on the procedural bar, and, by so doing, protecting the validity and integrity of Florida's well-settled procedural bar rules. The *Apprendi* claim was not raised at trial, on direct appeal, or in any of Johnson's prior postconviction proceedings, and is procedurally barred -- all relief should be denied on that basis. *See, e.g., Bundy v. State,* 538 So. 2d 445 (Fla. 1985).

2. The aggravators in Johnson's case fall outside the scope of *Apprendi/Ring*, and reliance on those decisions is misplaced.

In addition to being procedurally barred, *Apprendi/Ring* does not provide a basis for relief in this case because the rule of law set out in those cases is inapplicable to the facts of Johnson's case. The prior violent felony aggravator

[10] In *F.B. v. State*, this Court was explicit in holding that the only exception to the contemporaneous objection rule (which Johnson clearly did not follow) is when the error is fundamental, which an *Apprendi/Ring* claim is not. In this case, there is no error at all under *Apprendi/Ring*, and, because that is so, the contemporaneous objection rule applies and should be enforced by this Court.

and the during the course of a robbery aggravator, both of which are clearly applicable, fall outside of any conceivable interpretation of *Apprendi/Ring.*[11]

Under the plain language of *Apprendi*, a prior violent felony conviction (which in this case was attempted robbery and attempted murder) is a fact which may be a basis to impose a sentence **higher than that authorized by the jury's verdict** without the need for additional jury findings.[12] There is no constitutional violation (nor can there be) because the prior convictions constitute a jury finding which the judge may rely upon, without additional jury findings, in imposing sentence. *See Almendarez-Torres v. United States*, 523 U.S. 224 (1998); *Apprendi v. New Jersey*, 530 U.S. 466 (2000). Under any view of the law, and even after *Ring*, the jury is not required to make

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[11]Johnson admitted that the murder for which he was sentenced to death was committed during a robbery and for pecuniary gain, and the sentencing court merged those two aggravators into one. *Johnson v. State*, 442 So. 2d at 197. Johnson had also been previously convicted of attempted robbery and attempted murder, both of which are violent felonies as a matter of law. *Id.* These aggravators fall outside any conceivable interpretation of *Apprendi/Ring*, and render the arguments contained in Johnson's brief legally inapplicable to this case.

[12] Of course, under Florida law, death is the maximum possible sentence for the crime of first degree murder, and that is the defendant's sentence exposure upon conviction. See Section B, *infra.* The "higher than authorized by the jury" component of *Apprendi* is not applicable to the capital sentencing process in Florida, but that distinction does not affect the basic premise that a prior felony conviction is a fact that has **already** been found by a jury beyond a reasonable doubt, and does not need to be (and as a policy matter should not be) "re-proven."

a determination of the prior violent felony aggravator, and that aggravating circumstance can be found by the judge alone.

Under any interpretation of the facts, the "prior violent felony conviction" aggravator and the “during the commission of a felony” aggravator obviate any possible Sixth Amendment error. These aggravating circumstances are outside of the *Apprendi/Ring* holding,[13] and, because that is so, those decisions are of no help to Johnson. Johnson’s claim has no legal basis because *Apprendi/Ring* is inapplicable to the facts of this case as well as because a Florida **conviction** for murder made capital establishes that defendant’s **eligibility** for a death sentence. Johnson’s attempt to bring his case under the *Apprendi/Ring* umbrella is an attempt to force the square peg of Florida’s death penalty statute into the round hole of *Ring.* No relief is justified.

3. *Ring* is not retroactive to Johnson’s case.

In addition to being procedurally barred as well as legally and factually inapplicable, no court to consider the

[13] The *Apprendi* Court cited to *Jones v. United States,* 526 U.S. 227, 243 n.6 (1999), for the proposition that under the Fifth and Sixth Amendments, “any fact (**other than prior conviction**) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt.” *Apprendi v. New Jersey,* 530 U.S. 466, 476 (2000). [emphasis added]. The Court has already clearly said that death is the maximum penalty for first degree murder, so that component of the statement has no application to Florida law. In any event, Johnson’s prior violent felony conviction, and the murder during a robbery aggravator, are outside any possible (or reasonable) interpretation of *Apprendi* and *Ring.*

issue[14] has held ***Apprendi*** to be retroactive,[15] and *Ring* is "simply an extension of *Apprendi* to the death penalty context." *Cannon v. Mullin*, 297 F. 3d 989 (10th Cir. 2002), *cert. and stay of execution denied,* 536 U.S. 974 (U.S. July 23, 2002)[16]; *In re Johnson,* 334 F. 3d 403 (5th Cir. 2003) ("Since the rule in *Ring* is essentially an application of

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[14]*Zeigler v. Crosby,* 345 F.3d 1300, 1312 n.12 (11th Cir. 2003); *Turner v.* Crosby, 339 F.3d 1247, 1283, (11th Cir. 2003); Coleman *v. United States,* 329 F.3d 77 (2nd Cir. 2003); *Goode v. United States,* 305 F.3d 378, 382-85 (6th Cir. 2002); *United States v. Brown,* 305 F.3d 304, 307-10 (5th. Cir. 2002); *United States v. Wiseman,* 297 F.3d 975, (10th Cir. 2002); *United States v. Dowdy,* 2002 U.S. App. LEXIS 12559 (9th Cir. June 20, 2002); *Curtis v. United States*, 294 F.3d 841, 843-44 (7th Cir. 2002); *United States v. Mora,* 293 F.3d 1213, 1218-19 (10th Cir. 2002); *Hines v. United States,* 282 F.3d 1002 (8th Cir. 2002); *United States v. Sanchez-Cervantes*, 282 F.3d 664, 668 (9th Cir. 2002); *In re Turner*, 267 F.3d 225, 227 (3rd Cir. 2001); *McCoy v. United States*, 266 F.3d 1245 (11th Cir. 2001); *Forbes v. United States,* 262 F.3d 143, 144 (2nd Cir. 2001); *United States v. Moss*, 252 F.3d 993 (8th Cir. 2001); *Sanders v. United States,* 247 F.3d 139, 151 (4th Cir. 2001); *In re Tatum*, 233 F.3d 857, 859 (5th Cir. 2000); *Jones v. Smith*, 231 F.3d 1227 (9th Cir. 2001); *Sustache-Rivera v. United States*, 221 F.3d 8, 15 n.12 (1st Cir. 2000).

[15]In *Summerlin v. Stewart*, 341 F.3d 1082 (9th Cir. 2003), the Ninth Circuit disagreed with *Turner v. Crosby*, 339 F.3d 1247, 1283 (11th Circ. 2003). The United States Supreme Court granted in part a petition for Certiorari on December 1, 2003, 124 S.Ct. 833 (2003).

[16] The *Cannon* Court held, post-*Ring*, that under *Tyler v. Cain*, 533 U.S. 656, 661 (2001) "'under this provision, the Supreme Court is the only entity that can 'ma[k]e' a new rule retroactive. The new rule becomes retroactive, not by the decisions of the lower courts or by the combined action of the Supreme Court and the lower courts, but simply by the action of the Supreme Court.'"

Apprendi, logical consistency suggests that the rule announced in *Ring* is not retroactively available."). The First and Fourth District Courts of Appeal have held that *Apprendi* is not retroactive, as has the Kansas Supreme Court.[17] *Figarola v. State*, 841 So. 2d 576 (Fla. 4th DCA 2003); *Hughes v. State*, 826 So. 2d 1070 (Fla. 1st DCA 2002) (certifying question); *Whisler v. State*, 36 P.3d 290 (Kan. 2001), *cert. denied*, 535 U.S. 1066 (2002).[18] The United States Supreme Court has previously held that a violation of the right to a jury trial is not retroactive, *DeStefano v. Woods*, 392 U.S. 631, 88 S.Ct.

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[17] The Alabama Court of Criminal Appeals has held that *Apprendi* is not retroactive to collateral review cases. *See, Poole v. State*, 846 So. 2d 370 (Ala. 2001). The Minnesota Court of Appeals refused to apply *Apprendi* retroactively, holding that it was not a watershed rule of criminal procedure, and that the rule did nothing to enhance the accuracy of a criminal conviction. *Meemken v. State*, 662 N.W. 2d 146 (Minn. 2003). The Missouri Supreme Court seems to be the only court that has held that *Ring* is retroactively applicable. *State v. Whitfield*, 107 S.W. 3d 253 (Mo. 2003). The retroactive application of *Ring* is inconsistent and irreconcilable with the same Court's holding that *Apprendi* is **not** retroactive. *State ex. rel. Nixon v. Sprick*, 59 S.W. 3d 515 (Mo. 2001). The conflicting results reached by the Missouri Supreme Court suggest that reliance on *Whitfield* would be ill-advised. The Nebraska Supreme Court has held that *Ring* is not retroactively applicable. *State v. Lotter*, 664 N.W. 2d 892(2003).

[18] An *Apprendi* claim is not "plain error," either. *United States v. Cotton*, 535 U.S. 625 (2002)(indictment's failure to include the quantity of drugs was an *Apprendi* error but did not seriously affect fairness, integrity, or public reputation of judicial proceedings, and thus did not rise to level of plain error). If an error is not plain error for direct appeal purposes, it is not of sufficient importance to be retroactively applicable to collateral proceedings.

2093, 20 L.Ed.2d 1308 (1968), and, because that is the law, it is wholly illogical to claim that a wholly procedural ruling like *Apprendi* or *Ring* would be treated differently. It is the prerogative of the United States Supreme Court to make the retroactivity determination -- that Court has not held *Apprendi* or *Ring* retroactive, and has refused to review cases declining to apply those decisions in that fashion. *Cannon, supra. Ring*, like *Apprendi*, is merely a procedural ruling which falls far short of being of "fundamental significance." Finally, the Eleventh Circuit Court of Appeals has expressly held, in a Florida death penalty case, that *Ring* is **not** retroactively applicable. *Turner v. Crosby*, 339 F.3d 1247 (11th Cir. 203). This Court should not hold otherwise.

Moreover, the *Ring* decision is not retroactively applicable under *Witt v. State*, 387 So. 2d 922, 929-30 (Fla. 1980). Under *Witt*, *Ring* is not retroactively applicable **unless** it is a decision of fundamental significance, which so drastically alters the underpinnings of Johnson's death sentence that "obvious injustice" exists. *New v. State,* 807 So. 2d 52 (Fla. 2001), *cert. denied,* 536 U.S. 942 (2002). In determining whether this standard has been met, this Court must consider three factors: the purpose served by the new case; the extent of reliance on the old law; and the effect on the administration of justice from retroactive application. *Ferguson v. State*, 789 So. 2d 306, 311 (Fla. 2001). Neither *Apprendi* nor *Ring* meet that standard, either.

4. *The Apprendi/Ring* claim is meritless.

Finally, without waiving the foregoing procedural defenses, the claim raised by Johnson has been expressly rejected by this Court. *See McCoy v. State*, 853 So. 2d 391 (2003); *Lugo v. State*, 845 So. 2d 74, 119 (Fla. 2003), *cert. denied*, 124 S.Ct. 320 (2003); (U.S. Oct. 6, 2003)*; Kormondy v. State*, 845 So. 2d 41, 54 (Fla. 2003)("*Ring* does not require either notice of the aggravating factors that the State will present at sentencing or a special verdict form indicating the aggravating factors found by the jury."), *cert. denied,* 124 S.Ct. 392 (2003); *Conahan v. State*, 844 So. 2d 629 (Fla. 2003), *cert. denied*, 124 S.Ct. 240 (2003); *Butler v. State*, 842 So. 2d 817 (Fla. 2003)(relying on *Bottoson v. Moore*, 833 So. 2d 693 and *King v. Moore*, 831 So. 2d 143 to a *Ring* claim in a single aggravator (HAC) case); *Banks v. State*, 842 So. 2d 788 (Fla. 2003); *Spencer v. State*, 842 So. 2d 52 (Fla. 2003); *Grim v. State*, 841 So. 2d 455 (Fla. 2003), *cert. denied*, 124 S.Ct. 230 (2003); *Cole v. State*, 841 So. 2d 409 (Fla. 2003); *Anderson v. State*, 841 So. 2d 390 (Fla. 2003), *cert. denied,* 124 S.Ct. 408 (2003); *Lucas v. State/Moore*, 841 So. 2d 380 (Fla. 2003); *Porter v. Crosby*, 840 So. 2d 981 (Fla. 2003)("Contrary to Porter's claims, we have repeatedly held that the maximum penalty under the statute is death and have rejected the other *Apprendi* arguments."); *Fotopoulos v. State/Moore*, 838 So. 2d 1122 (Fla. 2003); *Bruno v. Moore*, 838

So. 2d 485 (Fla. 2002), *cert. denied*, 124 S.Ct. 100 (2003); *Doorbal v. State*, 837 So. 2d 940 (Fla. 2003), *cert. denied*, 123 S.Ct. 2647 (2003); *Bottoson v. Moore*, 833 So. 2d 693 (Fla. 2002), *cert. denied*, 537 U.S. 1070 (2002); *Chavez v. State*, 832 So. 2d 730, 767 (Fla. 2002), *cert. denied*, 123 S.Ct. 2617 (2003); *King v. Moore*, 831 So. 2d 143 (Fla. 2002), *cert. denied*, 537 U.S. 1067 (2002); *Pace v. State/Crosby*, 854 So. 2d 167 (Fla. 2003); *Jones v. State/Crosby,* 855 So. 2d 611 (Fla. 2003); *Marquard v. State/Moore*, 850 So. 2d 417 (Fla. 2002); *Chandler v. State*, 848 So. 2d 1031, 1034 n.4 (Fla. 2003); *Lawrence v. State*, 846 So. 2d 440 (Fla. 2003), *cert. denied*, 124 S.Ct. 394 (2003). This Court should, in addition to denying relief on procedural grounds, continue to follow this unbroken line of authority by denying relief on the merits as an alternative and secondary basis for the denial of relief.

B. ARIZONA CAPITAL SENTENCING LAW IS DIFFERENT FROM FLORIDA'S, AS THIS COURT HAS HELD.[19]

The Arizona statute at issue in *Ring* is different from Florida's death sentencing statutes. The United States Supreme Court failed to recognize that distinction in *Walton*, but recognized and corrected its misinterpretation of Arizona law in *Ring*. Because *Walton* was based on an incorrect interpretation of Arizona law, the suggestion that Florida's

[19] In *Mills v. Moore, infra,* the Florida Supreme Court discussed the operation of the Florida death sentencing statute, and explained how our statute is unlike Arizona's.

statute is invalid because *Walton* has been overruled is spurious. Since *Ring* corrected the Court's error as to Arizona law, no good faith argument can be made that Florida's statute is anything like Arizona's, especially in light of **this** Court's clear interpretation of Florida law (which is clearly not like Arizona law). The *Ring* Court stated:

> **Based solely on the jury's verdict finding Ring guilty of first-degree felony murder, the maximum punishment he could have received was life imprisonment.** *See* 200 Ariz., at 279, 25 P.3d, at 1151 (*citing Ariz. Rev. Stat*. § 13- 703). This was so because, in Arizona, a "death sentence may not legally be imposed ... unless at least one aggravating factor is found to exist beyond a reasonable doubt." 200 Ariz., at 279, 25 P.3d, at 1151 (citing § 13- 703). The question presented is whether **that** aggravating factor may be found by the judge, as Arizona law specifies, or whether the Sixth Amendment's jury trial guarantee, [FN3] made applicable to the States by the Fourteenth Amendment, requires that the aggravating factor determination be entrusted to the jury. [FN4]
>
> > FN3. "In all criminal prosecutions, the accused shall enjoy the right to a ... trial, by an impartial jury ...."
> >
> > FN4. Ring's claim is tightly delineated: He contends only that the Sixth Amendment required jury findings on the aggravating circumstances asserted against him. No aggravating circumstance related to past convictions in his case; Ring therefore does not challenge *Almendarez-Torres v. United States*, 523 U.S. 224, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998), which held that the fact of prior conviction may be found by the judge even if it increases the statutory maximum sentence. He makes no Sixth Amendment claim with respect to mitigating circumstances. *See Apprendi v. New Jersey*, 530 U.S. 466, 490-491, n. 16, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000) (noting "the distinction the Court has often recognized between facts in

> aggravation of punishment and facts in mitigation" (citation omitted)). Nor does he argue that the Sixth Amendment required the jury to make the ultimate determination whether to impose the death penalty. *See Proffitt v. Florida*, 428 U.S. 242, 252, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976) (plurality opinion) ("[I]t has never [been] suggested that jury sentencing is constitutionally required."). He does not question the Arizona Supreme Court's authority to reweigh the aggravating and mitigating circumstances after that court struck one aggravator. *See Clemons v. Mississippi*, 494 U.S. 738, 745, 110 S.Ct. 1441, 108 L.Ed.2d 725 (1990). Finally, Ring does not contend that his indictment was constitutionally defective. *See Apprendi*, 530 U.S., at 477, n. 3, 120 S.Ct. 2348 (Fourteenth Amendment "has not ... been construed to include the Fifth Amendment right to 'presentment or indictment of a Grand Jury' ").

Ring v. Arizona, 536 U.S. at 597. [emphasis added]. Under Arizona law, the determination of death **eligibility** takes place during the **penalty phase** proceedings, and requires the determination that an aggravating factor exists. Florida law is different.[20]

1. In Florida, death is the maximum sentence for capital murder.

"[T]he legislature, and not the judiciary, determines maximum and minimum penalties for violations of the law."

[20] The claim that the indictment must contain the aggravators and that the jury must find them unanimously has been repeatedly rejected by this Court. *See, Vining v. State,* 637 So. 2d 921, 927 (Fla. 1994); *Fotopoulos v. State,* 608 So. 2d 784, 794 n.7 (Fla. 1992); *Lightbourne v. State,* 438 So. 2d 380 (Fla. 1983). Aggravators must, of course, be proven beyond a reasonable doubt.

State v. Benitez, 395 So. 2d 514, 518 (Fla. 1981). This Court, long before *Apprendi*,[21] concluded that the maximum sentence to which a Florida capital defendant is subject following conviction for capital murder is death.[22] *Apprendi* led to no change of any sort, by either the Legislature or this Court.[23]

2. Death eligibility in Florida is determined at the guilt stage.

In Florida, the determination of "**death-eligibility**" is made at the **guilt** phase of a capital trial, **not** at the penalty phase, as is the Arizona practice. This Court has unequivocally said what Florida's law is, just as the Arizona Supreme Court did. The difference between the two states'

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[21] This Court's interpretation of Florida law is consistent with the description of Florida's capital sentencing scheme set out in *Proffitt v. Florida,* and echoed in *Barclay v. Florida,* 463 U.S. 939, 952 (1983) ("[I]f a defendant is found guilty of a **capital** offense, a separate evidentiary hearing is held before the trial judge and jury to determine his sentence."). **If the defendant were not eligible for a death sentence, there would be no second proceeding.**

[22] "**The maximum possible penalty described in the capital sentencing scheme is clearly death.**" *Mills, supra. See, e.g., Lightbourne v. State,* 438 So. 2d 380, 385 (Fla. 1983); *Sireci v. State,* 399 So. 2d 964 (Fla. 1981); *Mills v. Moore*, 786 So. 2d 532, 537-8 (Fla. 2001); *Porter v. Moore*, 28 Fla. L. Weekly S33 (Fla. June 20, 2002); *Sweet v. Moore,* 822 So. 2d 1269 (Fla. 2002).

[23] Whatever criticisms Johnson may direct against the *Mills* decision cannot alter the fundamental fact that this Court's explanation of Florida's capital sentencing statutes has not changed. By correctly stating that *Apprendi* excluded capital cases, this Court did not ignore its responsibility in applying the applicable cases under Florida law as they applied to the statute.

capital murder statutes is clear, and controls the resolution of the claim. Because death is the maximum penalty for first-degree murder in Florida (**and because it is not in Arizona**), Johnson's *Apprendi/Ring* claim collapses because nothing triggers the *Apprendi* protections in the first place. *See, Barnes v. State,* 794 So. 2d 590 (Fla. 2001) (*Apprendi* not applicable when judicial findings did not increase maximum allowable sentence).

Nothing that takes place at the penalty phase of a Florida capital trial **increases** the authorized punishment for the offense of capital murder -- the penalty phase proceeding (which **includes** the jury) is the **selection** phase, which **follows** the eligibility determination, and which does not implicate the *Apprendi/Ring* issue. The state law issue which led to the constitutional violation in Arizona's capital sentencing statute has already been decided differently by this Court, and that decision (in *Mills* and the cases relying on it) differentiates and distinguishes Arizona's system from Florida's constitutional capital sentencing statute.

Section 782.04 of the *Florida Statutes* defines capital murder,

and Section 775.082 establishes that the maximum penalty for capital murder is death, in clear contrast to the Arizona statute, which does not. **Arizona, unlike Florida, does not define any offenses as "capital" in its criminal statutes.** There is no constitutional defect with Florida's statute.

3. *Ring* has no impact in Florida, and the decisions upholding the constitutionality of Florida law remain undisturbed.

Ring did not disturb any prior United States Supreme Court decisions upholding the constitutionality of Florida's death penalty scheme, including *Proffitt, supra, Spaziano v. Florida*, 468 U.S. 447 (1984), *Hildwin v. Florida*, 490 U.S. 638 (1989), *Barclay v. Florida,* 463 U.S. 939 (1983), and *Dobbert v. Florida,* 432 U.S. 282 (1977). And, as **this** Court has recognized, "[t]he Supreme Court has specifically directed lower courts to 'leav[e] to this Court the prerogative of overruling its own decisions.' *Agostini v. Felton*, 521 U.S. 203, 237, 117 S.Ct. 1997, 138 L.Ed.2d 391 (1997) (*quoting Rodriguez de Quijas v. Shearson/American Express, Inc.,* 490 U.S. 477, 484, 109 S.Ct. 1917, 104 L.Ed.2d 526 (1989))." *Mills v. Moore,* 786 So. 2d 532, 537(Fla. 2001).[24]

The United States Supreme Court did not disturb its prior decisions upholding the constitutionality of Florida's capital sentencing process, and that result is dispositive of Johnson's claims. The Court had every opportunity to directly address *Apprendi/Ring* in the context of Florida's capital sentencing scheme, and expressly declined to do so. *Cf. Hodges*

[24] To rule in Johnson's favor, this Court would have to overrule the five cases cited above, as well as *Clemons, infra, Cabana v. Bullock,* 474 U.S. 376 (1986), *Blystone v. California*, 494 U.S. 299, 306-7 (1990), *Harris v. Alabama, infra,* and *Gardner v. Florida,* 430 U.S. 349 (1977).

v. Florida, 506 U.S. 803 (1992), wherein the United States Supreme Court vacated the Florida Supreme Court's opinion for further consideration in light of *Espinosa v. Florida,* 505 U.S. 1079 (1992).

On June 28, 2002, the United States Supreme Court remanded four cases in light of *Ring*: *Harrod v. Arizona,* 536 U.S. 953 (2002); *Pandeli v. Arizona,* 536 U.S. 953 (2002); *Sansing v. Arizona,* 536 U.S. 954 (2002); and *Allen v. United States*, 536 U.S. 953 (2002). None of those remands is surprising given that three are Arizona cases and the other is a Federal Court of Appeals decision based on *Walton v. Arizona, supra*. However, the Court **denied** certiorari in seven cases raising the "*Ring*" issue: *Brown v. Alabama*, 536 U.S. 964 (2002); *Mann v. Florida,* 536 U.S. 962 (2002); *King v. Florida*, 536 U.S. 962 (2002); *Bottoson v. Florida*, 536 U.S. 962 (2002); *Card v. Florida*, 536 U.S. 963 (2002); *Hertz v. Florida*, 536 U.S. 963 (2002); and *Looney v. Florida,* 536 U.S. 966 (2002). Obviously, if the Court had intended to apply *Ring* to Florida capital sentencing, it had every opportunity to do so. The fact that it did not speaks for itself. Further, and of even greater significance, the United States Supreme Court denied a stay of execution July 23, 2002, in an Oklahoma case which raised a *Ring* claim. *See, Cannon v. Oklahoma,* 536 U.S. 974 (2002). This Court should not accept Johnson's invitation to "review" the decisions of the United States Supreme Court.

C. *RING* DOES NOT REQUIRE JURY SENTENCING,

AND THIS COURT SHOULD NOT ACCEPT JOHNSON'S INVITATION TO EXTEND *RING.*

Johnson's argument that *Ring* requires jury sentencing is incorrect -- that is an Eighth Amendment argument, not a Sixth Amendment one, which confuses the additional procedures the Florida legislature provided to avoid arbitrary jury sentencing (which is the Eighth Amendment component) with the death-eligibility determination, which is the Sixth Amendment component, and which is the focus of *Apprendi/Ring.* In upholding the constitutionality of Florida's death sentencing scheme, the United States Supreme Court said:

> In light of the facts that the Sixth Amendment does not require jury sentencing, that the demands of fairness and reliability in capital cases do not require it, and that neither the nature of, nor the purpose behind, the death penalty requires jury sentencing, we cannot conclude that placing responsibility on the trial judge to impose the sentence in a capital case is unconstitutional.

Spaziano v. Florida, 468 U.S. 447, 464 (1984). *Apprendi/Ring* did not affect that pronouncement because it does not involve the jury's role in **imposing sentence** -- it only requires that the jury find the defendant death-eligible, which a Florida jury does at the guilt stage proceedings.

1. The death-eligibility determination is made at the guilt phase of a capital trial.

Florida law places the death-eligibility determination at the guilt phase of a capital trial -- that necessarily

satisfies the *Ring* "death eligibility" component. The jury (under *Ring*) only has to make the determination of **death eligibility** -- the judge may make the remaining findings. *Ring* speaks only to the finding of death eligibility; not aggravators, mitigators, or the weighing of them. *Ring*, *supra ("*What today's decision says is that the jury must find the existence of the fact that an aggravating factor existed.") (Scalia, J., concurring). When this statement by Justice Scalia is read in the context of Arizona's capital sentencing law, "aggravating factor" means the same thing as "death-eligibility factor," because Arizona (unlike Florida) makes the "eligibility for death" determination, as well as the selection determination, at the penalty phase. The United States Supreme Court has repeatedly acknowledged that there is no single, constitutional, scheme that a state must employ in implementing the death penalty. *Lowenfield v. Phelps,* 484 U.S. 231, 244 (1988); *Spaziano v. Florida,* 468 U.S. 447, 464 (1984); *Tuilaepa v. California*, 512 U.S. 967, 972 (1994).[25] *See also, Zant v. Stephens,* 462 U.S. 862, 874-78 (1983). The constitution is satisfied when a Florida defendant is

[25] California law places the eligibility determination at the guilt phase. *Tuilaepa, supra,* at 969 ("[T]o render a defendant eligible for the death penalty in a homicide case, we have indicated that the trier of fact must convict the defendant of murder and find one 'aggravating circumstance' (or its equivalent) at either the guilt or penalty phase."); *People v. Ochoa,* 26 Cal. 4th 398, 453-54, 28 P.3d 78, 110 Cal. Rptr. 2d 324 (2001) (rejecting *Apprendi*-claim).

convicted of an offense for which death is the maximum sentence exposure because the conviction determines the fact of "eligibility for death."

2. Florida law is different from Arizona's.

Ring did not eliminate the trial judge from the sentencing equation or in any fashion imply that Florida should do so. Under the Arizona capital sentencing statute, the "statutory maximum" for practical purposes is **life** until such time as a **judge** has found an aggravating circumstance to be present. An Arizona jury played no role in "narrowing" the class of defendants eligible for the death penalty upon conviction of first degree murder. As the Arizona Supreme Court described Arizona law, the statutory maximum sentence permitted **by the jury's conviction alone** is life. *Ring v. State*, 25 P.3d 1139, 1150 (Ariz. 2001).[26] Florida law is not like Arizona's. *Mills v. State,* 786 So. 2d 532 (Fla. 2001).

The distinction between a "sentencing factor" (*i.e.*: "selection factor," under Florida's statutory scheme) and an element is sharply made in *Apprendi,* where the Court stated: "One need only look to the kind, degree, or range of

[26] This Arizona statute is the one that the United States Supreme Court misinterpreted in *Walton. Ring, supra.* Because the United States Supreme Court's description of Arizona law was incorrect in *Walton* and *Apprendi*, Johnson's efforts to argue that Florida law is "like the Arizona statute in *Walton*" are, at best, disingenuous because the Court was mistaken about the operation of Arizona law. Any comparison of the *Walton* statute to Florida is based upon a false premise.

punishment to which the prosecution is entitled for a given set of facts. **Each fact necessary for that entitlement is an element.**" *Apprendi v. New Jersey,* 530 U.S. at 462. [emphasis added]. A Florida defendant is eligible for a death sentence on conviction for capital murder, and a death sentence, under Florida's scheme, is not a "sentence enhancement," nor is it an "element" of the underlying offense. *Almendarez-Torres v. United States,* 523 U.S. 224 (1998); *McMillan v. Pennsylvania,* 477 U.S. 79 (1986). *See, Hildwin v. Florida,* 490 U.S. 638, 640-41 (1989). [emphasis added].[27] And, as Justice Scalia's concurrence emphasizes, ***Ring* is not about jury sentencing at all**:

> Those States that leave the ultimate life-or-death decision to the judge may continue to do so -- by requiring a prior jury finding of aggravating factor [in context, death-eligibility factor] in the sentencing phase or, more simply, by placing the aggravating-factor determination (where it logically belongs anyway) in the guilt phase."

Ring, supra. Florida's capital sentencing scheme comports with those constitutional requirements.

3. Florida provides additional Eighth Amendment protection at the sentencing phase.

The Florida capital sentencing statue provides for the

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[27]"The Constitution permits the trial judge, acting alone, to impose a capital sentence." *Harris v. Alabama,* 513 U.S. 504, 515 (1995). Like Florida, Alabama law places the eligibility-for-death determination at the guilt phase. § 13A-5-40, *Ala. Stat.*

jury's participation.[28] The statute secures and preserves significant jury participation in narrowing the class of individuals eligible to be sentenced to death under both the Sixth and Eighth Amendments. *See, Spaziano v. Florida,* 468 U.S. at 464-5. Subsequently, the Court emphasized that a Florida jury's role is so vital to the sentencing process that the jury is a "co-sentencer." *Espinosa v. Florida*, 505 U.S. 1079 (1992). However, the *Espinosa* Court did not retreat from the premise of *Spaziano*:

> We have often recognized that there are many constitutionally permissible ways in which States may choose to allocate capital sentencing authority. . . . We merely hold that, **if a weighing State decides to place capital sentencing authority in two actors rather than one**, neither actor must be permitted to weigh invalid aggravating circumstances.

Espinosa v. Florida, 505 U.S. at 1082. [emphasis added].

4. The aggravators need not be set out in the indictment, nor must the sentence stage (selection stage) jury unanimously recommend a sentence.

Johnson's claims that a death sentence requires juror unanimity, the charging of the aggravators in the indictment, or special jury verdicts are unsupported by *Ring*. These issues are **expressly** not addressed in *Ring*, and in the absence of any

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[28]Under the statute, the jury **must** find the existence of one or more aggravators **before** reaching the sub-section C recommendation stage. The penalty phase jury must conduct the sub-section A and B analysis before sub-section C comes into play.

United States Supreme Court ruling to the contrary, there is no need to reconsider the Court's well-established rejection of these claims. *Sweet v. State*, 822 So. 2d 1269 (Fla. 2002) (prior decisions on these issues need not be revisited "unless and until" the United States Supreme Court recedes from *Proffitt v. Florida*, 428 U.S. 242 (1976)); *Cox v. State,* 819 So. 2d 705, 724 at n. 17 (Fla. 2002) (same), *cert. denied,* 537 U.S. 1120 (2003).

Johnson's argument that a unanimous jury recommendation is constitutionally required has been repeatedly rejected by this Court. *See, e.g., Looney v. State*, 803 So. 2d 656, 674 (Fla. 2001), *cert. denied*, 536 U.S. 966 (2002). *See, Way v. State*, 760 So. 2d 903, 924 (Fla. 2000), *cert. denied*, 531 U.S.1155 (2001) (Pariente, J., concurring)(noting that it is a statute that allows the jury to recommend the imposition of the death penalty based on a non-unanimous vote). And, even before *Apprendi*, this Court consistently held that a jury may recommend a death sentence on simple majority vote. *Thompson v. State*, 648 So. 2d 692, 698 (Fla. 1994) (reaffirming *Brown v. State*, 565 So. 2d 304, 308 (Fla. 1990)); *Alvord v. State*, 322 So. 2d 533 (Fla. 1975)(advisory recommendation need not be unanimous). After *Apprendi*, the Court has consistently rejected claims that *Apprendi* requires a unanimous jury sentencing recommendation. *Card v. State*, 803 So. 2d 613, 628 & n.13 (Fla. 2001), *cert. denied*, 536 U.S. 963 (2002); *Hertz v. State*, 803 So. 2d 629, 648 (Fla. 2001), *cert. denied*, 536

U.S. 963 (2002); *Brown v. Moore*, 800 So.2d 223 (Fla. 2001).

The United States Supreme Court has held that a finding of guilt does not need to be unanimous.[29] *Cf. Johnson v. Louisiana,* 406 U.S. 356 (1972); *Apodaca v. Oregon*, 406 U.S. 404 (1972). Jurors do not have to agree on the particular aggravators; are not required to agree on the particular theory of liability, *Schad v. Arizona*, 501 U.S. 624, 631 (1991); and may not be required to unanimously find mitigation. *McKoy v. North Carolina*, 494 U.S. 433 (1990); *Mills v. Maryland*, 486 U.S. 367 (1988). *Ring* simply affirms the distinction between "sentencing factors" and "elements" of an offense which have long been recognized. *See Ring* at 597 n.4.; *Harris v. United States*, 536 U.S. 545 (2002). And, to the extent that Johnson claims that *Ring* requires that the aggravating circumstances be charged in the indictment and presented to a grand jury, that argument is based upon an invalid comparison of Federal cases (with their wholly different procedural requirements) to Florida's capital sentencing scheme.[30]

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[29] *See also, People v. Fairbank*, 16 Cal.4th 1223, 1255, 947 P.2d 1321, 69 Cal. Rptr.2d 784 (1997) (unanimity not required as to existence of aggravators, weight given to them, or appropriateness of a sentence of death).

[30] Of course, the Fifth Amendment's grand jury clause has not been extended to the States under the Fourteenth Amendment. *Ring v. Arizona, supra,* at n.4, *citing*, *Apprendi v. New Jersey*, 530 U.S. 466, 477 n.3 (2000); *Hurtado v. California,* 110 U.S. 516 (1884) (holding that, in capital cases, the States are not

Ring's Sixth Amendment jurisprudence is satisfied by the conviction in Florida and by this Court's pronouncement that death is the maximum sentence available under Florida law for the offense of capital murder. These matters do not change the Eighth Amendment requirement of channeling of the jury's discretion, which is done, and must still be done under Florida law, at the penalty phase of a capital trial.[31] Florida law over-meets the requirements of the Eighth Amendment, and satisfies the Sixth Amendment, as well. *See Pulley v. Harris, supra.*

Ring does not directly or indirectly preclude a judge from serving in the role of sentencer. There is no language in *Ring* which suggests that, once a defendant has been convicted of a capital offense, a judge may not hear evidence or make findings in addition to any findings a jury may have made. And, as Justice Scalia commented, "those States that leave the ultimate life-or-death decision to the judge **may continue to do so**." *Ring, supra.*

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required to obtain a grand jury indictment). This distinction, standing alone, is dispositive of the indictment claim.

[31] The most that can be said for the votes against a death sentence are that they amount to what can be called a "jury pardon." *Dougan v. State*, 595 So. 2d 1, 4 (Fla. 1992). The jury's vote reflects considered weighing of the aggravating and mitigating circumstances, not whether any particular juror rejected some or all of the aggravating circumstances. The only conclusion that can be drawn from the jury's sentencing vote is that those jurors thought that life was a more appropriate sentence.

The United States Supreme Court's holding in *Clemons v. Mississippi* is dispositive:

> **Any argument that the Constitution requires that a jury impose the sentence of death or make the findings prerequisite to imposition of such a sentence has been soundly rejected by prior decisions of this Court**.

Clemons v. Mississippi, 494 U.S. 738, 745-6 (1990).**III. THE "LETHAL INJECTION" CLAIM IS PROCEDURALLY BARRED, AS THE CIRCUIT COURT FOUND.**

On pages 39-40 of his brief, Johnson argues that the Circuit Court erroneously denied the procedurally barred lethal injection claim without an evidentiary hearing. The Circuit Court imposed a procedural bar to consideration of this claim because it had been raised and rejected in Johnson's 2001 *Florida Rule of Criminal Procedure* 3.851 proceedings. *Johnson v. State*, 801 So. 2d 1218, 1225 (Fla. 2001); *See*, R202. The Circuit Court correctly denied relief on procedural bar grounds, and that disposition should not be disturbed.

To the extent that further discussion of this procedurally barred claim is necessary, this Court has repeatedly rejected challenges to lethal injection as a means of execution:

> King's arguments in his seventh contention regarding lethal injection have been repeatedly rejected by this Court and are therefore meritless. *See Provenzano v. State,* 761 So. 2d 1097, 1099 (Fla.2000) (holding execution by lethal injection does not constitute cruel punishment or unusual punishment or both); *Sims v. State,* 754 So. 2d 657, 666-69 (Fla.2000), *cert. denied,* 528 U.S. 1183, 120 S.Ct. 1233, 145 L.Ed.2d 1122 (2000) (Florida

> Department of Corrections procedures for the application of lethal injection do not constitute cruel and unusual punishment).

King v. State, 808 So. 2d 1237, 1246 n.8 (Fla. 2002). *See, Cole v. State,* 841 So.2d 409 (Fla. 2003). Nothing in the attachment to Johnson's Rule 3.850 motion amounts to a valid basis for ignoring the clear procedural bar to litigation of this claim, and, to the extent that that information is described as "newly discovered," a review of the document itself does not bear that assertion out. (R105-124). While the copyright date is 2002, the majority of the authorities cited in the bibliography pre-date Johnson's prior Rule 3.850 proceeding, and could have been relied upon at that time. Finally, the assertions contained in that document (which are supposed to be "newly discovered") are, in reality, the same claims that this Court addressed in *Provenzano v. State*, 761 So. 2d 1097 (Fla. 2000); *Sims v. State*; 754 So. 2d 657 (Fla. 2000)and *Bryan v. State*, 753 So. 2d 1244 (Fla. 2000). This claim was properly denied on procedural bar grounds, and that result should not be disturbed.

CONCLUSION

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: **William M. Hennis, III,** Office of the Capital Collateral Regional Counsel - South, 101 N. E. 3rd Ave., Suite 400, Fort Lauderdale, Florida 33301, on this _____ day of January, 2004.

Of Counsel

CERTIFICATE OF COMPLIANCE

This brief is typed in Courier New 12 point.

KENNETH S. NUNNELLEY
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