

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC04-772

MICHAEL L. ROBINSON

Petitioner,

v.

JAMES V. CROSBY, Secretary,
Florida Department of Corrections

Respondent.

RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

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PRELIMINARY STATEMENT

Petitioner, Michael Robinson, was the defendant at trial and will be referred to as the "Petitioner" or "Robinson". Respondent, the State of Florida, will be referred to as the "State". References to the appellate records will be consistent with those in the Answer Brief filed simultaneously with this Response, i.e. "OR" for the original record on direct appeal from the plea and sentencing; "R" for the direct appeal from re-sentencing; "PCR" for the record on post-conviction relief; "Supp. PCR" for the supplemental record on post-conviction relief; and "T" for the transcript of the evidentiary hearing on the amended motion for post-conviction relief.

STATEMENT OF THE CASE AND FACTS

On January 23, 1995, appellant pled guilty to the first-degree murder of Jane Silvia. The facts found by this Court in *Robinson v. State*, 761 So.2d 269 (Fla. 1999), include: According to Robinson's confession, he and Silvia had been dating, and prior to the murder he had stolen Silvia's television and VCR to pawn for money with which to purchase drugs. Robinson's mother sent Silvia money to buy back her property and she kept this money in her shoes. After their unsuccessful attempts to get back Silvia's property, Robinson and Silvia returned home and Silvia fell asleep on the couch. Robinson then went to his truck to obtain a drywall hammer. He laid the hammer in the bedroom and waited until he was certain Silvia was asleep. He then hit her in the head with the hammer twice, each time piercing her skull. Robinson claimed that Silvia never regained consciousness, although she was still breathing and blood poured from her mouth. Robinson then stuck the claw part of the hammer into the victim's skull. Further, to stop Silvia's breathing and heart beat, Robinson stuck a serrated knife into the soft portion of her neck and down into her chest. After Silvia died, Robinson buried her and took the money that she had hidden in her shoes. During his confession, Robinson also admitted that he had initially lied to the police

by telling them that drug dealers had killed Silvia. During a supplemental interview, Robinson stated that he killed Silvia "because he didn't want to battle her for the money" and because he did not want to return to prison. *Robinson*, 761 So.2d at 271.

In *Robinson v. State*, 684 So.2d 175 (Fla. 1996), this Court outlined events that preceded the plea as follows: Prior to the plea colloquy, appellant's counsel explained that appellant did not wish to proceed to trial, did not wish to present any defense, did not want his attorneys to file any motions on his behalf, and did not want to present any mitigation at the penalty phase. Appellant expressed that he desired to die and was "seeking the death penalty in this case."

On March 30, 1995, appellant waived his right to a penalty phase jury and the cause proceeded to sentencing before the trial court. Relying on *Koon v. Dugger*, 619 So.2d 246 (Fla.1993), the defense proffered mitigating evidence at the penalty phase which it had received from a psychologist, Dr. Berland, and appellant's mother. In addition to the evidence presented at the hearing, the court directed that a presentence investigation be conducted as to the circumstances of the crime and the defendant's background. A presentence report was subsequently completed and filed with the court.

On April 12, 1995, the trial court sentenced appellant to death. Because the trial court failed to consider and weigh evidence of substantial mitigation found in the record, this Court vacated the death sentence. *Robinson v. State*, 684 So.2d 175 (Fla. 1996). This Court remanded the case "to the trial court to conduct a new penalty-phase hearing before the judge alone in accordance with *Farr* and within sixty days hereof." *Robinson*, 684 So. 2d at 180.

After the second penalty phase, the trial judge again imposed the death penalty and Robinson appealed. *Robinson v. State*, 761 So.2d 269 (Fla. 1999). In re-imposing the death penalty, the trial court found three aggravating factors:

- (1) the murder was committed for pecuniary gain;
- (2) the murder was committed to avoid arrest; and
- (3) the murder was cold, calculated and premeditated.

The trial court also found two statutory mitigating factors:

- (1) Robinson suffered from extreme emotional distress (some weight); and
- (2) Robinson's ability to conform his conduct to the requirements of the law was substantially impaired due to history of excessive drug use (great weight).

Of the nonstatutory mitigation presented, the trial court found:

- (1) Robinson had suffered brain damage to his frontal lobe (given little weight because of insufficient evidence that brain damage caused Robinson's conduct);

- (2) Robinson was under the influence of cocaine at the time of murder (discounted as duplicative because cocaine abuse was considered in statutory mitigators);
- (3) Robinson felt remorse (little weight);
- (4) Robinson believed in God (given little weight);
- (5) Robinson's father was an alcoholic (given some weight);
- (6) Robinson's father verbally abused family members (given slight weight);
- (7) Robinson suffered from personality disorders (given between some and great weight);
- (8) Robinson was an emotionally disturbed child, who was diagnosed with ADD, placed on high doses of Ritalin, and placed in special education classes, changed schools five times in five years, and had difficulty making friends (given considerable weight);
- (9) Robinson's family had a history of mental health problems (given some weight);
- (10) Robinson obtained a G.E.D. while in a juvenile facility (given minuscule weight);
- (11) Robinson was a model inmate (given very little weight);
- (12) Robinson suffered extreme duress based on fear of returning to prison where he was previously raped and beaten (given some weight);
- (13) Robinson confessed to the murder and assisted police (given little weight);
- (14) Robinson admitted several times to having a drug problem and sought counseling (given no additional weight to that already given for history of drug abuse);
- (15) the justice system failed to provide requisite intervention (given no additional weight to that

already given for history of drug abuse);

(16) Robinson successfully completed a sentence and parole in Missouri (given minuscule weight);

(17) Robinson had the ability to adjust to prison life (given very little weight); and

(18) Robinson had people who loved him (given extremely little weight).

Robinson, 761 So.2d at 272-273.

The claims raised on appeal from re-sentencing included:

(1) the trial court erred in denying Robinson's motion to withdraw his guilty plea;

(2) the trial court erred in denying Robinson's motion for neurological testing;

(3) the trial judge made prejudicial comments on the record and denied Robinson additional funds with which to investigate mitigating evidence;

(4) the sentence of death is disproportionate;

(5) the trial court erred in finding the murder was committed for pecuniary gain;

(6) the trial court erred in finding the murder was committed to avoid arrest; and

(7) the trial court erred in finding the murder was cold, calculated and premeditated (CCP)

This Court affirmed the death sentence on August 19, 1999.

Robinson v. State, 761 So.2d 269 (Fla. 1999).

The United States Supreme Court denied Robinson's petition for writ of certiorari on April 3, 2000. *Robinson v. Florida*, 529 U.S. 1057, 120 S.Ct. 1563 (2000).

Robinson filed a "shell" motion to vacate on February 21, 2001 (PCR104-137) He filed an amended motion on October 3, 2001 (PCR192-259) The amended motion raised the following claims:

1. MR. ROBINSON IS BEING DENIED HIS RIGHT TO EFFECTIVE REPRESENTATION BY THE SHORT TIME PERIOD AND LACK OF FUNDING AVAILABLE TO FULLY INVESTIGATE AND PREPARE HIS POST-CONVICTION PLEADING, IN VIOLATION OF HIS SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS UNDER THE UNITED STATES CONSTITUTION AND IN VIOLATION OF *SPALDING V. DUGGER*.

2. MR. ROBINSON IS BEING DENIED HIS RIGHTS TO DUE PROCESS AND EQUAL PROTECTION AS GUARANTEED BY THE EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION, BECAUSE ACCESS TO THE FILES AND RECORDS PERTAINING TO MR. ROBINSON'S CASE IN THE POSSESSION OF CERTAIN STATE AGENCIES HAVE BEEN WITHHELD IN VIOLATION OF CHAPTER 119, FLA.STAT. MR. ROBINSON CANNOT PREPARE AN ADEQUATE 3.850 MOTION UNTIL HE HAD RECEIVED PUBLIC RECORDS MATERIALS AND HAS BEEN AFFORDED DUE TIME TO REVIEW THOSE MATERIALS AND AMEND.

3. MR. ROBINSON'S CONVICTIONS ARE MATERIALLY UNRELIABLE BECAUSE NO ADVERSARIAL TESTING OCCURRED DUE TO THE CUMULATIVE EFFECTS OF INEFFECTIVE ASSISTANCE OF COUNSEL, THE WITHHOLDING OF EXCULPATORY OR IMPEACHMENT MATERIAL, NEWLY DISCOVERED EVIDENCE, AND/OR IMPROPER RULINGS OF THE TRIAL COURT, IN VIOLATION OF MR. ROBINSON'S RIGHTS AS GUARANTEED BY THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

4. MR. ROBINSON WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE SENTENCING PHASE IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS. COUNSEL FAILED TO ADEQUATELY INVESTIGATE AND PREPARE THE DEFENSE CASE AND CHALLENGE THE STATE'S CASE. THE COURT AND STATE RENDERED COUNSEL INEFFECTIVE. COUNSEL'S PERFORMANCE WAS DEFICIENT AND AS A RESULT MR. ROBINSON 'S CONVICTIONS ARE UNRELIABLE.

5. MR. ROBINSON WAS DENIED HIS RIGHTS UNDER *AKE V.*

OKLAHOMA AT THE GUILT AND PENALTY PHASES OF HIS CAPITAL PLEA WHEN COUNSEL FAILED TO OBTAIN AN ADEQUATE MENTAL HEALTH EVALUATION AND FAILED TO PROVIDE THE NECESSARY BACKGROUND INFORMATION TO THE MENTAL HEALTH CONSULTANT IN VIOLATION OF MR. ROBINSON'S RIGHTS TO DUE PROCESS AND EQUAL PROTECTION UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION, AS WELL AS HIS RIGHTS UNDER THE FIFTH, SIXTH, AND EIGHTH AMENDMENTS.

6. MR. ROBINSON IS INNOCENT OF FIRST DEGREE MURDER AND WAS DENIED AN ADVERSARIAL TESTING.

7. MR. ROBINSON'S SENTENCE OF DEATH VIOLATES THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS BECAUSE FLORIDA LAW SHIFTS THE BURDEN TO MR. ROBINSON TO PROVE THAT DEATH WAS INAPPROPRIATE AND BECAUSE THE TRIAL COURT EMPLOYED A PRESUMPTION OF DEATH IN SENTENCING MR. ROBINSON. TRIAL COUNSEL WAS INEFFECTIVE FOR NOT OBJECTING TO THESE ERRORS.

8. MR. ROBINSON'S SENTENCE OF DEATH IS PREMISED UPON FUNDAMENTAL ERROR BECAUSE FLORIDA'S STATUTE SETTING FORTH THE AGGRAVATING CIRCUMSTANCES TO BE CONSIDERED IN A CAPITAL CASE IS FACIALLY VAGUE AND OVERBROAD IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

9. FLORIDA'S CAPITAL SENTENCING STATUTE IS UNCONSTITUTIONAL ON ITS FACE AND AS APPLIED IN THIS CASE, BECAUSE IT FAILS TO PREVENT THE ARBITRARY AND CAPRICIOUS IMPOSITION OF THE DEATH PENALTY.

10. MR. ROBINSON IS INSANE TO BE EXECUTED.

11. MR. ROBINSON DID NOT VOLUNTARILY, KNOWINGLY, AND INTELLIGENTLY WAIVE HIS RIGHT TO A CAPITAL SENTENCING JURY, AND THE TRIAL COURT'S INQUIRY ON THE PURPORTED WAIVER WAS CONSTITUTIONALLY INADEQUATE, IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.¹

¹This claim is also raised in the instant Petition for Writ of Habeas Corpus.

12. THE SENTENCING COURT PRECLUDED MR. ROBINSON FROM PRESENTING AND THE SENTENCING COURT FROM CONSIDERING EVIDENCE OF MITIGATION, IN DEROGATION OF MR. ROBINSON RIGHTS TO AN INDIVIDUALIZED AND RELIABLE CAPITAL SENTENCING DETERMINATION AND TO THE EFFECTIVE ASSISTANCE OF COUNSEL, IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

13. MR. ROBINSON IS DENIED HIS RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION, THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION AND UNDER INTERNATIONAL LAW BECAUSE EXECUTION BY ELECTROCUTION AND/OR LETHAL INJECTION IS CRUEL AND UNUSUAL PUNISHMENT.

14. MR. ROBINSON'S PLEA AND SENTENCING WAS FRAUGHT WITH PROCEDURAL AND SUBSTANTIVE ERRORS WHICH CANNOT BE HARMLESS WHEN VIEWED AS A WHOLE, SINCE THE COMBINATION OF ERRORS DEPRIVED HIM OF THE FUNDAMENTALLY FAIR TRIAL GUARANTEED UNDER THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

15. THE EIGHTH AMENDMENT AND MR. ROBINSON'S DUE PROCESS RIGHTS WERE VIOLATED BY THE SENTENCING COURT'S REFUSAL TO FIND AND/OR CONSIDER THE MITIGATING CIRCUMSTANCES CLEARLY SET OUT IN THE RECORD. TO THE EXTENT TRIAL COUNSEL FAILED TO KNOW THE LAW, FAILED TO ARGUE EFFECTIVELY, AND/OR FAILED TO OBJECT, TRIAL COUNSEL WAS INEFFECTIVE.

16. MR. ROBINSON WAS DENIED HIS RIGHT TO A FAIR PLEA AND SENTENCING BEFORE AN IMPARTIAL JUDGE IN VIOLATION OF HIS FIFTH, SIXTH AND FOURTEENTH AMENDMENT RIGHTS, BY THE IMPROPER CONDUCT OF THE TRIAL COURT WHICH CREATED A BIAS IN FAVOR OF THE STATE. THE IMPROPER CONDUCT OF THE TRIAL COURT REPRESENTS HER PREDISPOSITION TO GIVING MR. ROBINSON THE DEATH PENALTY. COUNSEL WAS INEFFECTIVE FOR NOT OBJECTING AND NOT MOVING TO RECUSE THE JUDGE.

17. THE TRIAL COURT'S DENIAL OF MR. ROBINSON'S REQUEST FOR A P.E.T. SCAN VIOLATES HIS FIFTH, SIXTH AND FOURTEENTH AMENDMENT RIGHTS.

(PCR 192-200; PCR 201-259)

The trial judge granted an evidentiary hearing on Claim 3 only. (PCR 485) The evidentiary hearing took place January 29-30, 2003. The trial judge denied relief on May 19, 2003. (PCR 540-560) Robinson appealed, raising three issues:

1. THE LOWER COURT ERRED IN DENYING AN EVIDENTIARY HEARING ON NUMEROUS ISSUES INVOLVING ALLEGATIONS OF INEFFECTIVE ASSISTANCE OF COUNSEL.

(a) Failure to adequately investigate and present available evidence of mitigation and to secure competent expert mental health assistance.

(b) Failure to object or advise the court of Mr. Robinson's entitlement to a jury determination of his sentence following the remand by this Court and to investigate Mr. Robinson's ability to knowingly waive that right in his earlier proceeding.

(c) Failure to move to recuse trial court upon remand.

(d) Failure to object to constitutional error.

2. THE LOWER COURT ERRED IN DENYING MR. ROBINSON'S CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL DUE TO COUNSEL'S FAILURE TO INVESTIGATE AND ACCURATELY AND PROPERLY WITHDRAW HIS PLEA.

3. VARIOUS CLAIMS RAISED BY MR. ROBINSON MUST BE RAISED HEREIN IN ORDER TO PRESERVE THEM AND TO PROTECT MR. ROBINSON'S RIGHTS.

This appeal is pending before this Court: *Robinson v. State*, Case No. SC 03-1229.

SUMMARY OF THE ARGUMENT

Issue I -When this Court remanded Robinson's case for re-sentencing, it ordered "the trial court to conduct a new penalty-phase hearing before the judge alone in accordance with *Farr* and within sixty days hereof." *Robinson* 684 So. 2d at 180. Robinson argues appellate counsel was ineffective for failing to raise as an issue that Robinson was entitled to a penalty phase jury because the re-sentencing hearing was a *de novo* proceeding. Robinson recognizes that this substantive issue was not raised below, and has raised the issue as ineffective assistance of trial counsel in his Rule 3.850 Motion for Post-conviction relief as Claim 2. Robinson has failed to prove ineffective assistance of appellate counsel. Appellate counsel is not ineffective for failing to raise an issue which was not raised at the trial level. Further, deficient performance and prejudice cannot be shown because even if the issue had been raised, it was meritless.

Issue II -Robinson waived his penalty phase jury and opted to present his mitigation to the trial judge. Hence, Robinson cannot now complain that he was not sentenced by a jury in violation of *Ring v. Arizona*, 536 U.S. 584 (2002).

ARGUMENT

ISSUE I

**APPELLATE COUNSEL'S ASSISTANCE WAS EFFECTIVE;
APPELLATE COUNSEL IS NOT REQUIRED TO RAISE AN ISSUE
WHICH WAS NOT RAISED IN THE LOWER COURT AND HAS NO
MERIT (Restated).**

When this court remanded Robinson's sentence for re-sentencing, it ordered "the trial court to conduct a new penalty-phase hearing before the judge alone in accordance with *Farr* and within sixty days hereof." *Robinson* 684 So. 2d at 180. Robinson argues appellant counsel was ineffective for failing to raise as an issue that Robinson was entitled to a penalty phase jury because the re-sentencing hearing was a *de novo* proceeding. Robinson recognizes this issue was not raised at the trial level and has raised the issue as ineffective assistance of trial counsel in his Rule 3.850 Motion for Post-conviction relief as Claim 2. Robinson has failed to prove ineffective assistance of appellate counsel. Appellant counsel is not ineffective for failing to raise an issue which was not raised at the trial level. Further, prejudice cannot be shown because even if the issue had been raised, the issue has no merit.

Appellate counsel may not be deemed ineffective for not challenging an unpreserved issue on direct appeal. See *Owen v. Crosby*, 854 So.2d 182, 191 (Fla. 2003) (affirming that "counsel

cannot be considered ineffective for failing to raise issues that were unpreserved and do not constitute fundamental error); *Downs v. Moore*, 801 So. 2d 906, 910 (Fla. 2001) (same); *Johnson v. Singletary*, 695 So. 2d 263, 266 (Fla. 1996) (same).

Furthermore, the claim is without merit. This Court specifically stated that the trial judge should conduct a new penalty-phase hearing before the judge alone. *Robinson* 684 So. 2d at 180. The trial judge followed this order and there was no reason for appellate counsel to raise a meritless issue. See *State v. Budina*, 29 Fla.L.Weekly D1062 (Fla. 2d DCA April 30, 2004) (appellate court ruling is law of the case which trial court cannot revisit).

Robinson has not satisfied the standard announced in *Strickland v. Washington*, 466 U.S. 668 (1984). *Robinson* must demonstrate (1) counsel's representation fell below an objective standard of reasonableness, and (2) but for the deficiency in representation, there is a reasonable probability the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 688-89, 694 (1984).

In *Valle v. Moore*, 837 So. 2d 905 (Fla. 2002), this Court noted:

The standard of review applicable to claims of ineffective assistance of appellate counsel raised in a habeas petition mirrors the *Strickland v.*

Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), standard for claims of trial counsel ineffectiveness. See *Jones v. Moore*, 794 So. 2d 579, 586 (Fla. 2001). However, appellate counsel cannot be considered ineffective under this standard for failing to raise ... claims without merit because appellate counsel cannot be deemed ineffective for failing to raise nonmeritorious claims on appeal. See [*Rutherford v. Moore*, 774 So. 2d 637, 643 (Fla. 2000)]. In fact, appellate counsel is not necessarily ineffective for failing to raise a claim that might have had some possibility of success; effective appellate counsel need not raise every conceivable nonfrivolous issue. See *Jones v. Barnes*, 463 U.S. 745, 751-53, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983) (appellate counsel not required to argue all nonfrivolous issues, even at request of client); *Provenzano v. Dugger*, 561 So. 2d 541, 549 (Fla. 1990) (noting that "it is well established that counsel need not raise every nonfrivolous issue revealed by the record").

Valle, 837 So. 2d at 907-08. As recognized in *Freeman v. State*, 761 So. 2d 1055, 1069 (Fla.,2000), "[t]he defendant has the burden of alleging a specific, serious omission or overt act upon which the claim of ineffective assistance of counsel can be based. See *Knight v. State*, 394 So. 2d 997 (Fla. 1981). 'In the case of appellate counsel, this means the deficiency must concern an issue which is error affecting the outcome, not simply harmless error.' *Id.* at 1001."

Robinson's real complaint becomes obvious in the last paragraph of his Petition where he states this Court's decision on appeal "unduly restricted Mr. Robinson's ability to see a jury determination at the penalty phase." (Petition at page

13). So what Robinson is really complaining about is this court's opinion in *Robinson v. State*, 684 So.2d 175 (Fla. 1996). The record from the 1995 plea hearing shows that Robinson wanted the court to impose the death penalty and was asking for assurances Judge Russell could impose the death penalty:

MR. IRWIN (defense counsel): We would be waiving the jury for penalty phase, judge.

THE COURT: Have you talked to him about that?

MR. IRWIN: Yes, we have.

THE DEFENDANT: I have stated that earlier.

THE COURT: You don't want a jury for the penalty phase?

THE DEFENDANT: I don't feel I need it. I think if you - contingent on - can you return a penalty phase of death by that?

THE COURT: I've done it before.

THE DEFENDANT: That is what I have been advised by my attorneys. So yes, I waive my right to a jury to the sentencing.

(OR 33). The State argued that since this was such an important decision, a jury should make the recommendation (OR 33). As this Court observed in *Robinson v. State*, 761 So.2d 269, 273-275 (Fla. 1999), the fact Robinson "merely changed his mind and no longer wishes to die," does not require the judicial system to rewind the clock and begin over. The trial court followed this

court's mandate and held the second penalty phase judge-alone. Counsel was not ineffective for failing to raise an issue on which this court had ruled.

ISSUE II

ROBINSON'S CLAIM THAT HIS DEATH SENTENCE IS UNCONSTITUTIONAL UNDER RING V. ARIZONA AND APPRENDI V. NEW JERSEY EVEN THOUGH HE WAIVED HIS PENALTY PHASE JURY IS PROCEDURALLY BARRED AND MERITLESS (restated).

Robinson, without challenging appellate counsel's effectiveness, makes a direct challenge to his death sentence on the grounds it violates *Ring v. Arizona*, 536 U.S. 584 (2002) and *Apprendi v. New Jersey*, 530 U.S. 466 (2000) because a jury was not involved in his sentencing. Further, he argues that the aggravating factors are elements of first-degree murder and must be included in the indictment and found by a unanimous jury before a defendant is death eligible.

This claim fails on several levels. Dispositive is the fact that Robinson waived his penalty phase jury, thus, he has not shown that *Ring* could apply to his situation. Further, the Sixth Amendment claim raised in *Apprendi* and *Ring* was not argued below; hence, it was not preserved for appeal and is procedurally barred. Moreover, neither *Apprendi* nor *Ring* are retroactive. Death is the statutory maximum in Florida, and as such, *Ring* does not apply.

Ring cannot form the basis for relief here as Robinson knowingly and voluntarily waived his penalty phase jury and, in so doing, waived any sixth Amendment issue under *Apprendi* or

Ring. Robinson cannot complain he did not have a jury sentencing recommendation when he sought and was granted the dismissal of the jury. Robinson's knowing and voluntary waive of the penalty phase jury was based upon defense counsel's statement to the trial judge and the colloquy the court conducted with Robinson. See *State v. Hernandez*, 645 So. 2d 432, 434-35 (Fla. 1994) (finding written waiver of penalty phase jury unnecessary); *Holmes v. State*, 374 So. 2d 944, 949 (Fla. 1979) (finding waiver of penalty phase jury knowing and voluntary pursuant to *State v. Carr*, 336 So. 2d 358 (Fla. 1976) where "[d]efendant was represented by counsel and the record contains an expressed waiver by counsel in the presence of the defendant."). See *Lynch v. State*, 841 So. 2d 362, 366 n.1 (Fla.) (holding "[b]ecause appellant requested and was granted a penalty phase conducted without a jury, he has not and cannot present a claim attacking the constitutionality of Florida's death penalty scheme under the United States Supreme Court's recent holding in *Ring*...."), cert. denied, 124 S.Ct. 189 (2003). There is nothing in *Ring* which deprives a defendant of the option to waive a constitutional right including the right to a jury trial. *Patton v. United States*, 281 U.S. 276 (1930). Quoting *Proffitt v. Florida*, 428 U.S. 242, 252 (1976), *Ring* acknowledged "[i]t has never [been] suggested that jury

sentencing is constitutionally required". Consequently, *Ring* does not further Robinson's position and relief must be denied.

Further, Robinson's claim is procedurally barred. It is well established that for an issue to be preserved for appeal, it must be presented to the lower court and "the specific legal argument or ground to be argued on appeal must be part of that presentation if it is to be considered preserved." *Archer v. State*, 613 So. 2d 446 (Fla. 1993), quoting *Tillman v. State*, 471 So. 2d 32, 35 (Fla. 1985); *Steinhorst v. State*, 412 So. 2d 332, 338 (Fla. 1982). Here, Robinson did not challenge the constitutionality of the death penalty in the same terms he raises here, i.e., that aggravators are elements of the crime of first-degree and that the failure to include them in the indictment and have them proven beyond a reasonable doubt to a unanimous jury is a Sixth Amendment violation. Because the issue was never preserved for appeal, he is not allowed to raise the claim in this collateral proceeding. See *Parker v. State*, 550 So. 2d 449 (Fla. 1989) (finding collateral challenge to Florida's capital sentencing scheme based on *Booth v. Maryland*, is procedurally barred for failure to preserve the issue at trial or on direct appeal). Consequently, given Robinson's waiver of a penalty phase jury and his failure to preserve this

issue for appeal, he is not entitled to application of *Ring* on collateral review.

Robinson's conviction and sentence became final on April 3, 2000, with the denial of certiorari by the United States Supreme Court. *Robinson v. Florida*, 574 U.S. 1057 (2000). *Ring* is not retroactive under the principles of *Witt v. State*, 387 So. 2d 922, 929-30 (Fla. 1980). Pursuant to *Witt*, *Ring* is entitled to retroactive application only if the decision is of fundamental significance, which so drastically alters the underpinnings of the death sentence that "obvious injustice" exists. *New v. State*, 807 So. 2d 52 (Fla. 2001). In determining whether the standard has been met, the analysis includes a consideration of three factors: (1) the purpose served by the new case; (2) the extent of reliance on the old law; and (3) the effect on the administration of justice from retroactive application. *Ferguson v. State*, 789 So. 2d 306, 311 (Fla. 2001). *Ring* does not qualify for retroactive application. See *Turner v. Crosby*, 339 F.3d 1247 (11th Cir. 2003) (rejecting retroactive application of *Ring*); *Trueblood v. Davis*, 301 F.3d 784, 788 (7th Cir. 2002); *Arizona v. Towery*, 64 P.3d 828 (Ariz. 2003) (finding *Ring* is not retroactive); *Colwell v. State*, P.3d 463 (Nev. 2002) (same). While disposition of the retroactivity issue is not

necessary under the facts of this case, the Respondent submits that Justice Cantero's views in *Windom*, are correct and should be adopted as the standard applied in determining the retroactivity of cases. See, Justice Cantero's dissent in *Windom v. State*, 29 Fla. L. Weekly S191, 197-203, in which Justices Wells and Bell concur.

The correctness of the opinions that *Ring* is not retroactive is supported by the fact the Supreme Court has already held that a violation of an *Apprendi v. New Jersey*, 530 U.S. 466 (2000) claim is not plain error. *United States v. Cotton*, 535 U.S. 625 (2002) (holding indictment's failure to include quantity of drugs was *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 cognizable on direct appeal, it is not of sufficient magnitude to be a candidate for retroactive application in collateral proceedings. *United States v. Sanders*, 247 F.3d 139, 150-151 (4th Cir. 2002) (emphasizing finding something to be structural error would seem to be necessary predicate for new rule to apply retroactively and thus, concluding *Apprendi* not retroactive). Because *Ring* is predicated solely on *Apprendi*, *Ring* is likewise not entitled to retroactive application. See

also, *Tyler v. Cain*, 533 U.S. 656, 663 (2001) (holding "new rule is not 'made retroactive to cases on collateral review' unless the Supreme Court holds it to be retroactive").

Moreover, this Court has rejected *Ring* challenges to death sentences repeatedly because death is the statutory maximum in Florida under *Mills v. Moore*, 786 So.2d 532 (Fla.), cert. denied, 532 U.S. 1015 (2001) and the United States Supreme Court has not overruled any of its cases finding Florida's capital sentencing scheme constitutional. See *Hildwin v. Florida*, 490 U.S. 638 (1989); *Spaziano v. Florida*, 468 U.S. 447 (1984); *Barclay v. Florida*, 463 U.S. 939 (1983); *Proffitt v. Florida*, 428 U.S. 242, 252 (1976). See *Johnston v. State*, 863 So. 2d 271, 286 (Fla. 2003) (rejecting constitutional challenge based upon *Ring*); *Owen v. State*, 862 So. 2d 687, 703-04 (Fla. 2003) (same); *Kormondy v. State*, 845 So. 2d 41, 54 (Fla. 2003) (*Ring* does not encompass Florida procedures or require either notice of the aggravating factors to be presented at sentencing or a special verdict form indicating the aggravating factors found by the jury); *Jones v. State*, 845 So.2d 55 (Fla. 2003); *Porter v. Crosby*, 840 So. 2d 981, 986 (Fla. 2003) (noting "we have repeatedly held that maximum penalty under the statute is death and have rejected the other *Apprendi* arguments" including that

aggravators read to the jury must be charged in indictment, submitted to jury and individually found by unanimous jury); *Anderson v. State*, 841 So. 2d 390, 408-09 (Fla. 2003); *Cox v. State*, 819 So. 2d 705 (Fla. 2002); *Conahan v. State*, 844 So. 2d 629, 642, n.9 (Fla. 2003); *Spencer v. State*, 842 So. 2d 52, 72-73 (Fla. 2003); *Fotopoulos v. State*, 838 So. 2d 1122 (Fla. 2002); *Doorbal v. State*, 837 So. 2d 940 (Fla.), cert. denied, 123 S.Ct. 2647 (2003); *Bruno v. Moore*, 838 So. 2d 485 (Fla. 2002); *King v. Moore*, 831 So. 2d 143 (Fla.), cert. denied, 123 S.Ct. 657 (2002); *Bottoson v. Moore*, 833 So. 2d 693, 694-95 (Fla.), cert. denied, 123 S.Ct. 662 (2002); *Shere v. Moore*, 830 So. 2d 56, 61 (Fla. 2002) (reaffirming "Court has defined a capital felony to be one where the maximum possible punishment is death").

CONCLUSION

Based upon the foregoing, the State requests respectfully that this Court deny habeas corpus relief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Response has been furnished by U.S. Mail to, **Melissa Minsk Donoho, and James S. Lewis**, 500 S.E. 6th, Suite 100, Fort Lauderdale, FL 33301 this _____ day of June, 2004.

BARBARA C. DAVIS
Assistant Attorney General

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the instant brief has been prepared with 12 point Courier New type, a font that is not spaced proportionately on .

COUNSEL FOR RESPONDENT