**IN THE SUPREME COURT OF FLORIDA**

**MELVIN TROTTER,**

**Petitioner,**

**v.** **Case No. SC03-1967**

**JAMES V. CROSBY, JR.,**

**Respondent.**

_____/

**RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS**

COMES NOW, Respondent, JAMES V. CROSBY, JR., by and through the undersigned Assistant Attorney General, and hereby responds to the Petition for Writ of Habeas Corpus filed in the above-styled case. Respondent respectfully submits that the petition should be denied, and states as grounds therefor:

**ISSUE I**

**WHETHER THE FLORIDA DEATH SENTENCING STATUTES AS APPLIED ARE UNCONSTITUTIONAL UNDER APPRENDI V. NEW JERSEY, 530 U.S. 466 (2000) AND RING V. ARIZONA, 536 U.S. 584 (2002).**

Petitioner contends that following Apprendi, *supra*, and Ring, *supra*, the death sentencing statutes are unconstitutional. He complains that the aggravating circumstances elevate the crime of murder punishable by a life sentence to punishable by death and that such aggravating circumstances must be charged in

the indictment, submitted to a jury and proved beyond a reasonable doubt. Petitioner acknowledges at page 12 of his petition that this Court has rejected similar claims. For the reasons that follow habeas corpus relief must be denied.

(A) Procedural History:

Mr. Trotter was found guilty following jury trial of first degree murder and robbery with a deadly weapon.[1] The jury recommended death by a nine to three vote and the trial court found four aggravating circumstances. On direct appeal this Court affirmed the convictions but remanded for resentencing. Trotter v. State, 576 So. 2d 691 (Fla. 1990). At resentencing the trial court followed the eleven to one death recommendation and imposed a death sentence after finding four aggravating circumstances: (1) defendant was on community control at the time of the murder; (2) prior violent felony conviction; (3) crime occurred while defendant was engaged in a robbery and for pecuniary gain; and (4) the homicide was especially heinous, atrocious or cruel. The Court affirmed the sentence of death and the United States Supreme Court denied certiorari. Trotter

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[1]Petitioner was charged by indictment with first degree murder of Virgie E. Langford (R2621-22 in FSC Appeal No. 70,714). He was charged in a separate document in circuit case number 86-1240 with robbery with a deadly weapon and the jury returned guilty verdicts on both offenses April 7, 1987 (FSC Appeal No. 70,714, R1870-1872).

v. State, 690 So. 2d 1234 (Fla. 1996); cert. den., 522 U.S. 876 (1997).

In his initial direct appeal, Trotter raised the following eight issues: (1) error in excusing prospective jurors for cause; (2) failure of trial court to investigate extraneous influences on the jury; (3) error to not disqualify the prosecutor; (4) error in the removal of juror Burse for cause; (5) error to consider community control as an aggravator; (6) error in refusing to admit drawings into evidence in mitigation; (7) the instruction on the HAC aggravator was vague; (8) error to find HAC as an aggravator.

In his resentencing appeal, Trotter raised the following ten issues: (1) use of community control as an aggravator; (2) victim impact evidence; (3) admission of victim evidence was improper in this case; (4) trial court's error in its ruling on Trotter's untimely challenge to validity of his prior robbery conviction; (5) court's failure to investigate claim of racial bias in seeking the death penalty; (6) error in denying jury challenges for cause; (7) error in denying a particular challenge for cause; (8) error to allow evidence of a nonstatutory aggravating circumstance; (9) improper prosecutorial argument; (10) the sentencing order is deficient.

Trotter is now contemporaneously appealing the denial of a

motion for postconviction relief after an evidentiary hearing with this habeas corpus petition.

(B) Petitioner's claim for relief under Ring v. Arizona is procedurally barred:

Initially, Respondent would submit that the instant claim is procedurally barred since Trotter did not raise any assertion contemporaneously before or at trial, or on direct appeal, pertaining to a claim about the Sixth Amendment and the jury's participation in regard to aggravating factors at penalty phase. See McGregor v. State, 789 So. 2d 976, 977 (Fla. 2001)(Apprendi claim procedurally barred for failure to raise in trial court); Barnes v. State, 794 So. 2d 590 (Fla. 2001)(Apprendi error not preserved for appellate review). It is clear that Trotter did not at the time of trial or direct appeal assert a claim that the Sixth Amendment right to jury trial required the jury to find aggravating factors. While petitioner might contend that Ring v. Arizona had not been decided at the time of trial, that fact does not suffice to avoid the procedural default. What is important is not the existence of a particular decision but whether the tools were available to construct the argument. Engle v. Isaac, 456 U.S. 107, 133 (1982); Pitts v. Cook, 923 F.2d 1568, 1571-1572 (11th Cir. 1991). The Sixth Amendment right to jury trial has always been known and the tools have

been available for the defense to construct the argument. See Proffitt v. Florida, 428 U.S. 242, 252 (1976)(holding Constitution does not require jury sentencing); Hildwin v. Florida, 490 U.S. 638 (1989)("This case presents us once again with the question whether the Sixth Amendment requires a jury to specify the aggravating factors that permit the imposition of capital punishment in Florida."); Spaziano v. Florida, 468 U.S. 447 (1984). See also Turner v. Crosby, 339 F.3d 1247, 1281-82 (11th Cir. 2003)("Indeed, despite their apparent futility, there have been numerous unsuccessful Sixth Amendment challenges to Florida's capital sentencing structure in the last twenty years." citing Hildwin v. State, 531 So. 2d 124, 129 (Fla. 1988); Spaziano v. State, 433 So. 2d 508, 511 (Fla. 1983); and Barclay v. Florida, 463 U.S. 939 (1983)). The decision in Ring was not required as a predicate for counsel for Ring to assert his Sixth Amendment claim in a timely and appropriate fashion in the Arizona trial court.

(C) This Court has consistently and persistently rejected petitioner's claims and variants thereof. See King v. Moore, 831 So. 2d 143 (Fla. 2002); Bottoson v. Moore, 833 So. 2d 693 (Fla. 2002); Marquard v. State/Moore, 850 So. 2d 417, 431 n 12 (Fla. 2002); Chavez v. State, 832 So. 2d 730, 767 (Fla. 2002); Bruno v. Moore, 838 So. 2d 485 (Fla. 2002); Fotopoulos v. State,

838 So. 2d 1122 (Fla. 2002); 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."); Spencer v. State, 842 So. 2d 52 (Fla. 2003); Conahan v. State, 844 So. 2d 629 (Fla. 2003); Anderson v. State, 841 So. 2d 390 (Fla. 2003); Cole v. State, 841 So. 2d 409 (Fla. 2003); Doorbal v. State, 837 So. 2d 940 (Fla. 2003); Kormondy v. State, 845 So. 2d 41 (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."); R. S. Jones v. State/Crosby, 845 So. 2d 55 (Fla. 2003); Lugo v. State, 845 So. 2d 74 (Fla. 2003); Lawrence v. State, 846 So. 2d 440 (Fla. 2003); Banks v. State/Crosby, 842 So. 2d 788 (Fla. 2003); Grim v. State, 841 So. 2d 455 (Fla. 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); Chandler v. State, 848 So. 2d 1031, 1034 n 4 (Fla. 2003); Pace v. State/Crosby, 854 So. 2d 167 (Fla. 2003); Cooper v. State/Crosby, 856 So. 2d 969 (Fla. 2003); Duest v. State, 855 So. 2d 33 (Fla. 2003); Blackwelder v. State, 851 So. 2d 650 (Fla. 2003); Wright v. State/Crosby, 857

So. 2d 861 (Fla. 2003). See also Nelson v. State, 850 So. 2d 514 (Fla. 2003); Caballero v. State, 851 So. 2d 655 (Fla. 2003); Belcher v. State, 851 So. 2d 678 (Fla. 2003); Allen v. State/Crosby, 854 So. 2d 1255 (Fla. 2003); Fennie v. State/Crosby, 855 So. 2d 597 n 10 (Fla. 2003); Owen v. Crosby/State, 854 So. 2d 182 (Fla. 2003); McCoy v. State, 853 So. 2d 396 (Fla. 2003); Conde v. State, 860 So. 2d 930 (Fla. 2003); Stewart v. State, ___ So. 2d ___, 28 Fla. L. Weekly S700 (Fla., Sept. 11, 2003); Jones v. State/Crosby, 855 So. 2d 611 (Fla. 2003); Rivera v. State/Crosby, 859 So. 2d 495 (Fla. 2003); Davis v. State, 859 So. 2d 465 (Fla. 2003); F. Anderson v. State, 863 So. 2d 169 (Fla. 2003); J. Henry v. State, 862 So. 2d 679 (Fla. 2003); Cummings-El v. State, 863 So. 2d 246 (Fla. 2003); R. L. Johnston v. State, 863 So. 2d 271, 286 (Fla. 2003); Owen v. State, 862 So. 2d 687, 703-704 (Fla. 2003); Zakrzewski v. State, ___ So. 2d ___, 28 Fla. L. Weekly S826 (Fla., Nov. 13, 2003); Guzman v. State, ___ So. 2d ___, 28 Fla. L. Weekly S829 (Fla., Nov. 20, 2003); E. W. Davis v. State, ___ So. 2d ___, 28 Fla. L. Weekly S835 (Fla., Nov. 20, 2003).

Additionally, Trotter would be exempt from application of Ring since Trotter was contemporaneously in his initial trial found guilty by a unanimous jury verdict of robbery with a deadly weapon and thus at least two of the aggravators --

homicide while engaged in a robbery and prior violent felony conviction had been supported by unanimous jury verdicts. The jury's participation was adequate. See Hildwin v. Florida, 490 U.S. 638 (1989).

(D) Ring is not retroactive:

In Teague v. Lane, 489 U.S. 288 (1989), the United States Supreme Court announced that new constitutional rules of criminal procedure will not be applicable to cases which have become final before the new rules are announced, unless they fall within an exception to the general rule. 489 U.S. at 310. A case announces a new rule when it breaks new ground or imposes a new obligation on the state or the federal government. To put it differently, a case announces a new rule if the result was not *dictated* by precedent existing at the time the defendant's conviction became final. Id. at 301. A case is final when the judgment of conviction has been rendered, the availability of appeal exhausted and the time for petition for certiorari has elapsed. Trotter's case became final with this Court's affirmance of the judgment and sentence on direct appeal and the denial of certiorari on October 6, 1997. Trotter v. State, 690 So. 2d 1234 (Fla. 1996), cert. den., 522 U.S. 876 (1997). The Teague Court announced two exceptions to the general rule on non-retroactivity. First, a new rule should be applied

retroactively if it places a certain kind of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe. Id. at 311. The second exception, derived from an earlier view by Justice Harlan, requires that the new rule must "alter our understanding of the *bedrock procedural elements* that must be found to vitiate the fairness of a particular conviction." Thus, this exception is limited in scope to "those new procedures without which the likelihood of an accurate conviction is seriously diminished." 489 U.S. at 311-313.[2] Subsequent Supreme Court decisions have reinforced this standard. In Sawyer v. Smith, 497 U.S. 227 (1990), the Court rejected a defense argument that the second Teague exception should be read only to include new rules of capital sentencing that "preserve the accuracy and fairness of capital sentencing judgments":

> It is thus not enough under Teague to say that a new rule is aimed at improving the accuracy of trial. More is required. A rule that qualifies under this exception must not only improve accuracy, but also

[2]In Teague itself the court determined that the petitioner could not receive the benefit of Batson v. Kentucky, 476 U.S. 79 (1986), decided subsequently to petitioner's conviction since the absence of a fair cross section on the jury venire does not undermine the fundamental fairness that must underlie a conviction or seriously diminish the likelihood of obtaining an accurate conviction. The rule requiring petit juries be composed of a fair cross section of the community was not a bedrock procedural element. Id. at 315.

> "'alter our understanding of the *bedrock procedural elements'*" essential to the fairness of a proceeding. (497 U.S. at 242.)

The Sawyer Court echoed Teague that the second exception is directed only at new rules essential to the accuracy and fairness of the trial and it is "unlikely that many such components of basic due process have yet to emerge. 489 U.S. at 313." 497 U.S. at 243. Consequently, the petitioner was not entitled to habeas relief by reliance on Caldwell v. Mississippi, 472 U.S. 320 (1985), decided subsequently to when his murder conviction became final. While Caldwell announced a new rule, it did not come within the Teague exception for "watershed rules fundamental to the integrity of the criminal proceeding." 497 U.S. at 229. In Graham v. Collins, 506 U.S. 461 (1993), the Court held that a claim that the Texas capital sentencing procedures barred the jury from giving effect to particular mitigating evidence was held to propose a new rule. Prior case law did not "dictate" the result requested. The new rule sought by Graham did not decriminalize a class of conduct nor did Graham's special jury instructions concerning his mitigating evidence of youth, family background and positive character traits seriously diminish the likelihood of obtaining an accurate determination in his sentencing proceeding. 506

U.S. at 477-478.

In Tyler v. Cain, 533 U.S. 656, 150 L.Ed.2d 632 (2001), a petitioner argued in a second federal habeas petition that he was entitled to the retroactive benefit of the jury instruction rule in Cage v. Louisiana, 498 U.S. 39 (1990), that a jury instruction is unconstitutional if there is a reasonable likelihood that the jury understood the instruction to allow conviction without proof beyond a reasonable doubt. The Court denied relief noting that it had not made Cage retroactive. Moreover, in footnote 7 of the opinion, the Court explained that the second Teague exception is available only if the new rule "alters our understanding of the bedrock procedural elements" essential to the fairness of a proceeding. Even classifying an error as structural does not necessarily alter our understanding of these bedrock procedural elements. Nor can it be said that all new rules relating to due process alter such understanding. The second Teague exception is reserved only for truly "watershed" rules, a small core of rules which not only seriously enhance accuracy but also require observance of those procedures that are implicit in the concept of ordered liberty. See also Butler v. McKellar, 494 U.S. 407 (1990)(rejecting collateral attack under the Teague retroactivity standard and holding that Arizona v. Roberson, 486 U.S. 675 (1988) announced

a new rule even though the Court had said Roberson was directly controlled by Edwards v. Arizona, 451 U.S. 477 (1981)):

> But the fact that a court says that its decision is within the "logical compass" of an earlier decision, or indeed that it is "controlled" by a prior decision, is not conclusive for purposes of deciding whether the current decision is a "new rule" under Teague. Courts frequently view their decisions as being "controlled" or "governed" by prior opinions even when aware of reasonable contrary conclusions reached by other courts. . . That the outcome in Roberson was susceptible to debate among reasonable minds is evidenced further by the differing positions taken by the judges of the Courts of Appeals for the Fourth and Seventh Circuits noted previously. It would not have been an illogical or even a grudging application of Edwards to decide that it did not extend to the facts of Roberson. (Id. at 415.)

Saffle v. Parks, 494 U.S. 484 (1990)(rejecting defense claim that rule should be announced as to how the jury must consider the mitigating evidence and even if declared such a new rule would not be a watershed rule of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding); Lambrix v. Singletary, 520 U.S. 518, 539-40 (1997)(holding that Espinosa v. Florida, 505 U.S. 1079 (1992) announced a new rule under Teague but that neither of the two exceptions were applicable: neither a class of private conduct was placed beyond the power of the state to proscribe nor was it a watershed rule implicating the fundamental fairness and

accuracy of the criminal proceeding).

Ring arises from application of Apprendi v. New Jersey, 530 U.S. 466 (2000) to Arizona's capital scheme. Every federal circuit court to address the issue has found that Apprendi is not retroactive. E.g., United States v. Sanders, 247 F.3d 139, 146-51 (4th Cir. 2001)(finding that Apprendi's requirements of jury finding beyond a reasonable doubt of fact that increases statutory maximum for an offense "are not the types of watershed rules implicating fundamental fairness that require retroactive application."); United States v. Brown, 305 F.3d 304 (5th Cir. 2002); Goode v. United States, 305 F.3d 378 (6th Cir. 2002) ("Apprendi does not create a new 'watershed rule.'"); Curtis v. United States, 294 F.3d 841 (7th Cir. 2002); United States v. Moss, 252 F.3d 993, 996-1001 (8th Cir. 2001)("Apprendi is not of watershed magnitude."); United States v. Sanchez-Cervantes, 282 F.3d 664 (9th Cir. 2002); United States v. Mora, 293 F.3d 1213 (10th Cir. 2002); McCoy v. United States, 266 F.3d 1245 (11th Cir. 2001); Coleman v. United States, 329 F.3d 77 (2d Cir. 2003); Sepulveda v. United States, 330 F.3d 55 (1st Cir. 2003). Several state courts have similarly held that Apprendi (and therefore Ring) does not apply retroactively. E.g., Sanders v. State, 815 So. 2d 590 (Ala. Crim. App. 2001); Whisler v. State, 36 P.3d 290 (Kan. 2001); State v. Sprick, 59 S.W.3d 515 (Mo.

2001); State v. Tallard, 816 A.2d 977 (NH 2003)(applying Teague test to deny Apprendi claim collaterally in New Hampshire); People v. DeLaPaz, 791 N.E.2d 489 (Ill. 2003). In fact, the United States Supreme Court is clearly not of the opinion that its holding in Apprendi is retroactive. It has itself procedurally barred an Apprendi claim. See United States v. Cotton, 122 S. Ct. 1781 (2002)(finding that Apprendi error did not qualify as plain error, the federal equivalent of fundamental error). See also In Re Johnson, 334 F.3d 403 n 1 (5th Cir. 2003)(noting that while the Court need not reach the issue, "since the rule in Ring is essentially an application of Apprendi, logical consistency suggests that the rule announced in Ring is not retroactively available"); Moore v. Kinney, 320 F.3d 767, 771 n 3 (8th Cir. 2003)("Absent an express pronouncement on retroactivity from the Supreme Court, the rule from Ring is not retroactive"); Turner v. Crosby, 339 F.3d 1247, 1282 (11th Cir. 2003)(Turner is procedurally barred from bring a Ring claim . . . and alternatively, Ring does not apply retroactively to Turner); Colwell v. State, 59 P.3d 463 (Nev. 2002)(retroactive application of Ring on collateral review is not warranted); State v. Towery, 64 P.3d 828 (Ariz. 2003)(Ring does not apply retroactively); Cannon v. Mullin, 297 F.3d 989 (10th Cir. 2002)(Cannon has failed to make a prima facie showing

that the Supreme Court has made Ring retroactively applicable to cases on collateral review); Sibley v. Culliver, 243 F.Supp.2d 1278 (U.S.D.C., M.D. Ala., N.D. 2003)("...the Court concludes that Ring may not be applied retroactively to Sibley's case which is on collateral review"); State v. Lotter, 664 N.W.2d 892 (Neb. 2003)(holding that Ring announced a new rule of criminal procedure which does not fall within either Teague exception to rule of nonretroactivity, and thus denying relief on collateral challenge to conviction); contra, State v. Whitfield, 107 S.W.3d 253 (Mo. 2003); Summerlin v. Stewart, 341 F.3d 1082 (9th Cir. 2003).

As explained in Turner v. Crosby, *supra*:

> The constitutionality of judge-imposed death sentences was accepted in state and federal courts. Thus, under Teague, because Ring's new rule had not been announced at the time Turner's convictions and sentences became final, Ring does not apply retroactively to his § 2254 petition unless it meets one of the two narrow exceptions in Teague. (339 F.3d at 1285)

The Court further explained that the first exception was inapplicable since it did not decriminalize any class of conduct or prohibit a certain category of punishment for a class of defendants. Additionally,

> To fall under this second Teague exception, a new rule "must meet two requirements: Infringement of the rule must

seriously diminish the likelihood of obtaining an accurate conviction, and the rule must alter our understanding of the *bedrock procedural elements* essential to the fairness of a proceeding." Tyler v. Cain, 533 U.S. 656, 665, 121 S.Ct. 2478, 2484, 150 L.Ed.2d 632 (2001) (quotation marks and citations omitted); *see* United States v. Swindall, 107 F.3d 831, 835 (11th Cir. 1997) (noting that a new rule must "not only improve accuracy [of trial], but also alter our understanding of the *bedrock procedural elements* essential to the fairness of a proceeding" to meet Teague's second exception) (quotation marks and citation omitted). The United States Supreme Court repeatedly has emphasized the narrowness of Teague's second exception. Sawyer v. Smith, 497 U.S. 227, 243, 110 S.Ct. 2822, 2832, 111 L.Ed.2d 193 (1990) ("[I]t is 'unlikely that many such components of basic due process have yet to emerge.'") (quoting Teague, 489 U.S. at 313, 109 S. Ct. at 1077); *see also* McCoy, 266 F.3d at 1257 (stating that the "Supreme Court has underscored the narrowness of this second [Teague] exception"); Spaziano v. Singletary, 36 F.3d 1028, 1042-43 (11th Cir. 1994) (stating that a new rule fitting the second exception "must be so fundamentally important that its announcement is a 'groundbreaking occurrence'") (citation omitted).

We conclude that Ring, like Apprendi, "is not sufficiently fundamental to fall within Teague's second exception." McCoy, 266 F.3d at 1257 (listing other circuits concluding Apprendi does not fall under Teague's second exception); Towery, 64 P.3d at 835 (concluding that Ring is not a watershed rule that implicates the fundamental fairness of the trial and that Ring "does not meet either of the exceptions" in Teague); Colwell, 59 P.3d at 473 (concluding "the likelihood of an

> accurate sentence was not seriously diminished simply because a three-judge panel, rather than a jury, found the aggravating circumstances that supported Colwell's death sentence").[33] Pre-Ring sentencing procedure does not diminish the likelihood of a fair sentencing hearing; instead, Ring's new rule, at most, would shift the fact-finding duties during Turner's penalty phase from (a) an impartial judge after an advisory verdict by a jury to (b) an impartial jury alone.[34] Ring is based on the Sixth Amendment right to a jury trial and not on a perceived, much less documented, need to enhance accuracy or fairness of the fact-finding in a capital sentencing context. Ring simply does not fall within the ambit of the second Teague exception.
>
> Accordingly, the new constitutional rule announced by the United States Supreme Court in Ring does not fall within either exception to Teague's non-retroactivity standard. Therefore, Ring, like Apprendi, does not apply retroactively on collateral review in federal court in Turner's case because his convictions and sentences became final before the Supreme Court announced Ring. Thus, Turner cannot collaterally challenge his convictions and sentences on the basis of a claimed Ring error.[35] (footnotes omitted)(Id. at 1285-86)

Trotter cannot prevail on his claim for entitlement to relief by retroactive application of Ring in this postconviction challenge. Ring announced a change in procedural law. In Apprendi v. New Jersey, 530 U.S. 466 (2000), the Court held that a fact, other than a prior conviction, that increases the statutory maximum for a crime must be presented to the jury and

proven beyond a reasonable doubt. Ring applied Apprendi to Arizona's sentencing scheme. As explained above, the maximum sentence for first degree murder is death in Florida, unlike the situation in Arizona. In any event, Ring only involves a procedural question -- who decides a given question, the judge or jury. The courts have recognized that jury involvement in capital sentencing does not enhance accuracy. Not only is the requirement of improving the accuracy of a trial unsatisfied by application of Ring to the instant case, but also it is not a bedrock procedural element essential to the fairness of a proceeding, i.e., one that is implicit in the concept of ordered liberty as explained in Teague, *supra*, Sawyer, *supra*, and Tyler, *supra*. It goes without saying that the first exception of Teague is inapplicable since prosecution for first degree murder is not proscribed due to primary, private, individual conduct beyond the power of the criminal law-making authority to proscribe.

Similarly, Trotter cannot prevail under this Court's standard of retroactivity under the principles of Witt v. State, 387 So. 2d 922 (Fla. 1980), which requires a decision of fundamental significance which so drastically alters the underpinnings of Trotter's death sentence that "obvious injustice" exists. See New v. State, 807 So. 2d 52 (Fla. 2001);

Ferguson v. State, 789 So. 2d 306, 311 (Fla. 2001)(The 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). Trotter cannot show that adoption of Ring satisfies these criteria.

Lastly, relief must be denied as procedurally barred for yet another reason. Appellant urged his Ring argument in the written closing argument following the evidentiary hearing in claim VI at length (R1242-1259) and the state responded in its closing argument that Ring did require vacation of Trotter's sentence of death (R1305-1310). If appellant wanted to challenge the lower court's adverse disposition to his claim VI, it was incumbent upon him to assert that in the appellate brief challenging the denial of his postconviction motion. He has not done so and thus his claim has been abandoned. Trotter may not permissibly attempt to utilize the habeas corpus vehicle to raise claims that appropriately should be asserted in the appeal from denial of postconviction relief. See Rutherford v. Moore, 774 So. 2d 637, 643 (Fla. 2000); Gilliam v. State, 817 So. 2d 768, 781 n.20 (Fla. 2002); Randolph v. State, 853 So. 2d 1051, 1068 (Fla. 2003) ("to the extent Randolph is attempting to use this habeas petition as a substitute or an additional appeal of

his postconviction motion, Randolph's claim is denied."); Hardwick v. Dugger, 648 So. 2d 100, 105 (Fla.1994); Fotopoulos v. State, 838 So. 2d 1122 (Fla. 2002); King v. State, 808 So. 2d 1237, 1246 (Fla. 2002)(claims procedurally barred as they were raised in King's most recent 3.850 motion and are not properly relitigated in this habeas petition); Parker v. Dugger, 550 So. 2d 459, 460 (Fla. 1989).

Petitioner's claim for relief must be denied.

## ISSUE II

**WHETHER THE EIGHTH AMENDMENT WILL BE VIOLATED AS PETITIONER MAY BECOME INCOMPETENT AT THE TIME OF EXECUTION.**

As petitioner acknowledges, the claim that Trotter may become incompetent to be executed at some future time is premature. See Brown v. Moore, 800 So. 2d 223, 224 (Fla. 2001) ("We agree with his concession that this issue is not yet ripe, and we therefore find it to be without merit. *See* Hall v. Moore, 792 So. 2d 447, 450 (Fla. 2001); Mann v. Moore, 794 So. 2d 595, 600 (Fla. 2001)."); Hunter v. State/Moore, 817 So. 2d 786, 799 (Fla. 2002); Fla. R. Crim. P. 3.811(c); Porter v. Crosby, 840 So. 2d 981, 986 (Fla. 2003); Cole v. State/Crosby, 841 So. 2d 409, 430 (Fla. 2003).

This claim must be denied.

## CONCLUSION

**WHEREFORE**, Respondent respectfully requests that this Honorable Court DENY Trotter's Petition for Writ of Habeas Corpus.

## CERTIFICATE OF SERVICE

**I HEREBY CERTIFY** that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to Carol C. Rodriguez, Assistant CCRC, Office of the Capital Collateral Regional Counsel - Middle Region, 3801 Corporex Park Drive, Suite 210, Tampa, FL 33619-1136, this _____ day of March, 2004.

## CERTIFICATE OF TYPE SIZE AND STYLE

**I HEREBY CERTIFY** that the size and style of type used in this response is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

Respectfully submitted,

**CHARLES J. CRIST, JR.**
**ATTORNEY GENERAL**

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