IN THE SUPREME COURT OF FLORIDA

DAVID EUGENE JOHNSTON,

Case No. SC03-824

Appellant,

v.

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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TABLE OF CONTENTS

TABLE OF AUTHORITIES
CASES

MISCELLANEOUS

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ANSWER BRIEF

STATEMENT OF THE CASE AND FACTS

THE HISTORY OF THE CASE

In Johnston's last appearance before this Court, the history of this case was summarized in the following way:

> Johnston was convicted and sentenced to death for the 1983 murder of eighty-four-year-old Mary Hammond. The facts in this case are set forth in greater detail in *Johnston v. State,* 497 So. 2d 863 (Fla. 1986). The relevant facts are as follows:
>
> > At approximately 3:30 a.m. on November 5, 1983, David Eugene Johnston called the Orlando Police Department, identified himself as Martin White, and told the police "somebody killed my grandma" at 406 E. Ridgewood Avenue. Upon their arrival, the officers found the dead body of 84 year old Mary Hammond. The victim's body revealed numerous stab wounds as well as evidence of manual strangulation. The police arrested Johnston after noticing that his clothes were blood-stained, his face was scratched and his conversations with the various officers at the scene of the crime revealed several discrepancies as to his account of the evening's events.

Id. at 865. The jury convicted Johnston of first-

degree murder and recommended death by a vote of eight to four. The trial court followed the jury's recommendation and sentenced Johnston to death. [FN1] We affirmed Johnston's conviction and sentence on direct appeal. *See id.* at 872.

After the Governor signed his death warrant in 1988, Johnston filed a motion for postconviction relief pursuant to Florida Rule of Criminal Procedure 3.850. Upon granting a stay and conducting an evidentiary hearing, the trial court denied Johnston's motion for postconviction relief. We affirmed the trial court's denial of postconviction relief and also denied Johnston's petition for writ of habeas corpus. *See Johnston v. Dugger,* 583 So. 2d 657 (Fla. 1991). In so doing, this Court rejected Johnston's claim that trial counsel was ineffective for failing to investigate and present mitigating evidence of Johnston's mental health problems and abusive childhood. In particular, this Court stated:

> Johnston also contends that counsel failed to investigate and present mitigating evidence of his mental health problems and his abused childhood in the penalty phase of trial. This claim is without merit. At the outset, it should be noted that Johnston's trial attorney testified at the rule 3.850 hearing that Johnston's family was unwilling to assist Johnston at the time of the trial. Notwithstanding, Johnston's stepmother testified during the penalty phase about Johnston's history of mental problems and his low intellectual functioning and that he was the product of a broken home; that his mother neglected, rejected, and abused him; and that his father physically abused him. She also testified that his father's death when Johnston was eighteen greatly affected him. In addition, Ken Cotter, Johnston's former attorney, testified that Johnston had tremendous mood swings, would say things that did not make sense, and received a social security disability check which Cotter distributed to him from an escrow

> account because Johnston was unable to administer the money. The court charged the jury on the two statutory mental health mitigating factors and trial counsel argued them to the jury. Defense counsel obtained the appointment of a third mental health expert, whom they hoped to use in the penalty phase, but Johnston refused to cooperate with the expert. Counsel did not introduce Johnston's Louisiana hospital records in the penalty phase. However, we find that decision to be reasonable trial strategy given the negative aspect of the records. They contain numerous references to Johnston's arrests and convictions; his suicidal, homicidal, and abnormal sexual tendencies; his combative, threatening, and antisocial acts; past drug and alcohol abuse; and his dangerousness. Given these facts, counsel's performance was reasonable and not ineffective.

Id. at 662.

Johnston next filed a petition for writ of habeas corpus in federal district court. The district court determined that the heinous, atrocious, or cruel (HAC) jury instruction given in Johnston's case was unconstitutionally vague under *Espinosa v. Florida,* 505 U.S. 1079, 112 S.Ct. 2926, 120 L.Ed.2d 854 (1992). The district court also concluded that it could not determine whether the rejection by this Court of Johnston's HAC claim was based on the independent state ground that it was not preserved for appeal. Thus, the district court ruled:

> Accordingly, because only the Florida courts can determine the proper approach to [Johnston's] sentencing, the writ of habeas corpus will be conditionally granted, within sixty (60) days from the date of this Order, unless the State of Florida initiates appropriate proceedings in state court. Because a new sentencing hearing before a jury is not constitutionally required, the

> State of Florida may initiate whatever state court proceedings it finds appropriate, including seeking a life sentence or the performance of a reweighing or harmless error analysis by the Florida Supreme Court.

Johnston v. Singletary, No. 91-797-CIV-ORL-22, slip op. at 28 (M.D. Fla. Sept. 16, 1993). In response to the federal district court's order, the State requested this Court to clarify its prior rejection of Johnston's HAC claim. We did so in *Johnston v. Singletary,* 640 So. 2d 1102 (Fla. 1994), concluding that (1) Johnston's HAC claim was procedurally barred and (2) even if the issue was not procedurally barred, the erroneous instruction would not have affected the jury's recommendation or the trial court's sentence. *See id.* at 1104. The federal district court subsequently evaluated this Court's decision and denied federal habeas relief as to all claims.

In the interim, Johnston filed another motion for postconviction relief in the trial court. The trial court denied the postconviction motion without an evidentiary hearing on the basis that it was time-barred because it had been filed more than two years from the date of this Court's opinion in *Johnston v. State,* 497 So. 2d 863 (Fla. 1986). Alternatively, the trial court held that even if the motion was not time-barred, the claims contained therein should be denied as an abuse of process because they were or should have been raised on direct appeal or in previous collateral proceedings. We affirmed the trial court's denial of postconviction relief and also denied Johnston's habeas petition. *See Johnston v. State,* 708 So. 2d 590 (Fla. 1998).

In December 1998, the Eleventh Circuit Court of Appeals affirmed the federal district court's order denying Johnston's habeas petition. *See Johnston v. Singletary,* 162 F.3d 630 (11th Cir. 1998). The court specifically analyzed and rejected Johnston's claim alleging that trial counsel was ineffective at the penalty phase for failing to present available evidence in support of statutory and nonstatutory mitigating circumstances. In so doing, the court

addressed Johnston's contention that trial counsel failed to call as witnesses or obtain affidavits from Johnston's family members, who would have testified as to the abuse that characterized his childhood. The court recognized that trial counsel did elicit testimony from Johnston's stepmother, Corinne Johnston, who testified in some detail about the abuse suffered by Johnston while growing up and the lasting effects of this mistreatment. *See id.*at 639. The court noted that even assuming other family members had been available and willing to testify, their testimony would have confirmed and reiterated the testimony already offered by Johnston's stepmother. *See id.* Thus, the court stated, "Although we do not discount the value of cumulative testimony in the penalty phase of a capital trial, we cannot say that counsel's decision to present some, but not all, available mitigating evidence with respect to Johnston's family history – - particularly when it appears that those individuals who were not called to testify would have testified to essentially the same events Corrine [sic] Johnston described in her testimony –- constituted ineffective or deficient performance." *Id.*

The court also addressed Johnston's assertion that trial counsel knew Johnston was mentally impaired and yet, for no strategic reason, failed to conduct further necessary investigation, obtain expert testimony regarding his mental state, or object to aspects of the State's expert psychiatric testimony. The court noted that Kenneth Cotter, an attorney who previously represented Johnston in various matters, testified that Johnston suffered severe mood swings. *See id.* at 639-40. Cotter also testified Johnston regularly received a social security disability check that he dispersed to Johnston from an escrow account because Johnston was unable to administer his money. *See id.* The court also reiterated that Johnston's stepmother testified as to the circumstances surrounding Johnston's upbringing and to the effect it had on Johnston. *See id.* at 640. Moreover, the court determined that under the particular facts of the case Johnston's attorneys were not ineffective for failing to obtain or present mental health expert testimony at the penalty phase since counsel did attempt to retain

> a mental health expert to perform an evaluation that would reflect Johnston's mental instability, but Johnston refused to cooperate; the record did not show that trial counsel could have obtained favorable testimony even in the absence of Johnston's cooperation; and Johnston's medical records contained a substantial amount of damaging information relating to Johnston's criminal history that trial counsel expressly sought to avoid introducing. *See id.* at 639-42. The United States Supreme Court denied Johnston's petition for writ of certiorari on October 4, 1999. *See Johnston v. Moore,* 528 U.S. 883, 120 S.Ct. 198, 145 L.Ed.2d 167 (1999).
>
> > FN1. The trial court found no mitigating circumstances and three aggravating factors: (1) prior violent felony; (2) offense committed during the course of a felony; and (3) heinous, atrocious, or cruel. *See id.* at 871.

Johnston v. Moore, 789 So. 2d 262, 263-66 (Fla. 2001).

THE CURRENT PROCEEDINGS

On or about June 11, 2002, Johnston filed a motion to vacate his conviction and sentence in the Orange County Circuit Court. (R49-75). That motion argued that Johnston's death sentence was invalid because he is "mentally retarded." (R61 *et seq*). The State filed an answer to that motion on June 25, 2002. (R76-89). On August 9, 2002, Johnston filed another postconviction motion (which was treated as an amendment to the June 11, 2002 motion) claimed that his death sentence is unconstitutional based on *Ring v. Arizona*, 536 U.S. 584 (2002). (R95-118). A case management conference was held on August 19, 2002. (R171). On

August 27, 2002, the Circuit Court entered an order finding that Johnston is not entitled to relief under *Atkins v. Virginia,* 536 U.S. 304 (2002), because, as this Court has already found, Johnston is of **low average intelligence**. (R174-75). On September 17, 2002, the State duly filed an answer to the successive motion to vacate. (R178-216). A second case management conference was conducted on November 12, 2002, (on the *Ring* claim) (R232), and, on February 3, 2003, the Court issued its order denying all relief. (R292-95).[1]

Johnston's motion for rehearing was denied, and notice of appeal was given on April 15, 2003. (R372, 374). The record was certified and transmitted on July 21, 2003. (R386). Johnston filed his *Initial Brief* on December 15, 2003.

SUMMARY OF THE ARGUMENT

Johnston's claim based upon *Apprendi v. New Jersey* and *Ring v. Arizona* is procedurally barred because it could have been but was not raised at trial, on direct appeal, or in Johnston's prior collateral attack proceedings. Alternatively and secondarily, this Court has repeatedly rejected claims that *Apprendi/Ring* invalidates Florida's capital sentencing statute.

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[1]This order is the final order in this proceeding, and incorporated the August 29, 2002, order, which addressed only the *Atkins* issue. (R292).

Johnston has demonstrated no reason that this Court should not follow its own precedent and reject his claim, as well. Moreover, Johnston's death sentence is supported by the prior violent felony aggravator and the during the course of a burglary aggravator. Both of those aggravating factors fall outside any interpretation of *Apprendi/Ring*, and, because that is so, *Apprendi* and *Ring* are inapplicable to this case.

Johnston's "mental retardation as a bar to execution" claim has no factual basis because, as the Circuit Court found, this Court has previously determined that Johnston functions in the low average range of intelligence. That determination was made based upon the Rule 3.850 testimony of a mental state expert selected by Johnston, and it makes no sense to argue, as Johnston does, that he is entitled to relitigate matters that were decided long ago, and are *res judicata* for all purposes.

ARGUMENT

I. JOHNSTON'S *RING V. ARIZONA* CLAIM IS PROCEDURALLY BARRED, AND, IN THE ALTERNATIVE, IS WITHOUT MERIT BECAUSE *RING* HAD NO IMPACT ON FLORIDA'S CAPITAL SENTENCING STATUTE.

On pages 6-27 of his *Initial Brief*, Johnston presents the

same *Apprendi/Ring* argument that has been repeatedly rejected by this Court. This claim has no more merit in this case than it had in any of the other numerous cases in which this Court has denied relief on the same claim. The *Apprendi/Ring* claim is procedurally barred because it was not raised at trial, on direct appeal, or in any of Johnston's prior collateral attack proceedings. The procedural bar is an adequate and independent basis for denial of relief, and should be this Court's primary basis for affirming the denial of relief. Alternatively and secondarily, Johnston has previously been convicted of two violent felonies, and the aggravator predicated upon those prior convictions falls outside any interpretation of *Apprendi* and *Ring.* Moreover, Johnston committed the murder for which he was sentenced to death during the course of an enumerated felony (burglary) -- that aggravator likewise falls outside of *Apprend* and *Ring*. In addition to being procedurally barred, the *Apprendi/Ring* claim has no legal basis, and relief should be denied on that alternative basis, as well.

A. THE *APPRENDI/RING* CLAIM IS PROCEDURALLY BARRED.

The *Ring* claim could have been, but was not, raised at trial, on direct appeal, in one of Johnston's prior *Florida Rule of Criminal Procedure* 3.851 motions, or in his State petition

for a writ of habeas corpus. Because that is so, the *Apprendi/Ring* claim is foreclosed by multiple procedural bars, and could have properly been dismissed by the Circuit Court on that basis.

It is undisputed that Johnston did not raise a direct appeal claim which can in any fashion be construed as a challenge to the constitutionality of Florida's capital sentencing scheme sufficient to preserve the *Apprendi/Ring* claim at issue in this proceeding. This is so despite the fact that claims similar in substance to the claim now raised by Johnston have been raised in numerous Florida cases dating back to the 1970s. The *Apprendi/Ring* claim is procedurally barred because it could have been but was not raised at trial or 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); *Spaziano v. Florida*, 468 U.S. 447, 464 (1984).[2] The basis for a claim that the sentence imposed in this case

[2]Numerous Florida inmates raised the issue contained in Johnston's petition after *Apprendi* was decided, but before *Ring* was decided. *See, Mills, infra.*

violated Johnston's right to a jury trial has been available since he was sentenced to death. There is nothing magical about an *Apprendi* claim, and, despite the pretensions of Johnston'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).[3] The *Apprendi* claim is procedurally barred, and all relief should be denied on that basis. *See, e.g., Bundy v. State,* 538 So. 2d 445 (Fla. 1985). This Court should apply settled law and deny the petition on procedural bar grounds because the *Apprendi/Ring* claim is untimely under *Florida Rule of Criminal Procedure* 3.851(d)(2).[4]

To the extent that further discussion of the procedural bar is necessary, Johnston did not raise this claim in any of his collateral attack proceedings. Because this claim could have been, but was not, raised in any of the previous collateral

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[3]In *F.B.*, this Court was explicit in holding that the only exception to the contemporaneous objection rule (which Johnston clearly did not follow) is when the error is fundamental. 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.

[4]*Apprendi* was decided on June 26, 2000, and, in order to be timely under the provisions of Rule 3.851(d)(2), Johnston had a year from that date to raise an *Apprendi* claim.

proceedings, this proceeding is a successive motion which is an abuse of process. That is yet another procedural bar to consideration of the *Apprendi/Ring* claim contained in Johnston's present case.

Moreover, the claim contained in Johnston's brief is the same claim that was raised and rejected in *Mills v. Moore*, 786 So. 2d 532, 537-8 (Fla. 2001), where this Court held (in a decision that has been repeatedly affirmed **since** *Ring*) that the maximum sentence exposure following conviction for first-degree murder is death. *Mills,* 786 So. 2d at 536-37; *see also, Porter v. Crosby*, 840 So. 2d 981 (Fla. 2003); *Sweet v. Moore*, 822 So. 2d 1269 (Fla. 2002). Under any view of the law, Johnston should have raised this claim within a year after *Apprendi v. New Jersey* was decided on June 26, 2000. In other words, Johnston should have done what *Mills* did -- because he failed to raise the *Apprendi* claim in a timely Rule 3.850 motion, he is foreclosed from raising it in this successive motion by the successive motion provisions of Rule 3.850(f). The circuit court could properly have found that the *Apprendi/Ring* claim was successive, and denied relief on that basis. Johnston's failure to raise this claim in any prior motion is an abuse of process, and this Court should enforce the State procedural rules and

deny relief on that basis.

II. THE *APPRENDI/RING* CLAIM IS MERITLESS, IN ADDITION TO BEING PROCEDURALLY BARRED.

A. *RING* IS NOT APPLICABLE TO JOHNSTON'S CASE.

In addition to being procedurally barred and factually inapplicable, no court to consider the issue has held ***Apprendi*** to be retroactive.[5] *Ring* is "simply an extension of *Apprendi* to the death penalty context,"[6] and, if *Apprendi* is not retroactive, *Ring* should not be retroactive, either.[7] *In re Johnson,* 334 F.

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[5]*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).

[6]*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)

[7]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

3d 403 (5th Cir. 2003) ("Since the rule in *Ring* is essentially an application of *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.[8] *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).[9] Likewise,

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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.'"

[8]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. Crim. App. 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 Nebraska Supreme Court has held that *Ring* is not retroactively applicable. *State v. Lotter*, 664 N.W. 2d 892 (Neb. 2003). The Missouri Supreme Court 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 9th Ciruit has also found *Ring* retroactive, *Summerlin v. Stewart*, 341 F. 3d 1082 (9th Cir. 2003), but the United States Supreme Court has granted certiorari on that issue. See *Schriro v. Summerlin, infra,* 124 S.Ct. 833 (2003).

[9]An *Apprendi* claim is not "plain error,"either. *United States v. Cotton*, 535 U.S. 625 (2002)(indictment's failure to

the Eleventh Circuit Court of Appeals has explicitly held that *Ring* is **not** retroactively applicable to a Florida defendant. *Zeigler v. Crosby,* 345 F.3d 1300, 1312 n.12 (11th Cir. 2003)*; Turner v. Crosby,* 339 F.3d 1247, 1283 (11th Cir. 2003).

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 (1968), and, because that is the law, neither is a wholly procedural ruling like *Apprendi* or *Ring*. It is the prerogative of the United States Supreme Court to make the retroactivity determination -- that Court has not held *Apprendi/Ring* retroactive, and has refused to review cases declining to apply those decisions retroactively. *Cannon, supra. Ring*, like *Apprendi*, is merely a procedural ruling which falls far short of being of "fundamental significance."[10]

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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. *Apprendi/Ring* claims certainly do not present a "fundamental error," and for that additional reason should not be applied retroactively.

[10]Recently the United States Supreme Court accepted for review the case of *Schriro v. Summerlin*, 124 S.Ct. 833 (2003), to resolve the issue of whether *Ring* is retroactive. Johnston has made no such retroactive assertion herein, and any relief in a determination of retroactivity in *Schriro*, would not apply to Johnston because the issues regarding *Ring* have never been preserved by Johnston and he is procedurally barred from

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 Correll'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.

B. THE *APPRENDI/RING* CLAIM IS MERITLESS.

Finally, without waiving the foregoing procedural defenses, the claim raised by Johnston has been expressly rejected. *See, Robinson v. State/Crosby,* 29 Fla. L. Weekly S50, 52 (Fla. Jan. 29, 2004); *Lugo v. State*, 845 So. 2d 74, 119 (Fla.), *cert.*

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presenting them in this successive motion. *United States v. Ardley*, 273 F.3d. 991 (11th Cir. 2001) (Procedural default and retroactivity are two different doctrines that cannot be conflated; regardless of the retroactivity doctrine, issues must be timely raised and preserved.)

denied, 124 S.Ct. 320 (2003); *Kormondy v. State*, 845 So. 2d 41, 54 (Fla.) ("*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.), *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 deny relief on 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.), *cert. denied,* 124 S.Ct. 230 (2003); *Cole v. State*, 841 So. 2d 409 (Fla. 2003); *Anderson v. State*, 841 So. 2d 390 (Fla.), *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.), *cert. denied*, 123 S.Ct 2647 (2003); *Bottoson v. Moore*, 833 So. 2d 693 (Fla.),

cert. denied, 123 S.Ct. 662 (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.), *cert. denied*, 123 S.Ct. 657 (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 and n.12 (Fla. 2002); *Chandler v. State*, 848 So. 2d 1031, 1034 n.4 (Fla. 2003); *Lawrence v. State*, 846 So. 2d 440 (Fla.), *cert. denied,* 124 S.Ct. 394 (2003).

To the extent that Johnston argues that *Apprendi/Ring* somehow provides a basis for relief based upon the aggravators found in his case, that argument is foreclosed by binding precedent. Johnston's death sentence is supported by the prior violent felony aggravator and by the during the course of a burglary aggravator. *Johnston v. State*, 497 So. 2d at 871. Under Florida law, which determines death eligibility at the guilt stage of a capital trial, there is no basis for relief. *See, Hodges v. State*, 28 Fla. L. Weekly S475 (Fla. June 19, 2003) (coldness aggravator in addition to "hindering law enforcement"); *Butler v. State,* 842 So. 2d 817 (Fla. 2002) (heinousness aggravator only).

C. ARIZONA CAPITAL SENTENCING LAW IS DIFFERENT FROM FLORIDA'S, AS

THIS COURT HAS HELD.[11]

The Arizona statute at issue in *Ring* is different from Florida's death sentencing statute. That distinction, which is central to *Ring*, was not recognized by the United States Supreme Court in *Walton.* **Because *Walton* was based on an incorrect interpretation of Arizona law, the suggestion that Florida's statute is invalid because *Walton* has been overruled is spurious**. After *Ring*'s recognition that *Walton* was based upon a misinterpretation of 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

[11]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. *Sattazahn v. Pennsylvania*, 537 U.S. 101 (2003), does not undermine *Mills*.

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 **before** death-eligibility is established. Florida law is different.[12]

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." *State v. Benitez*, 395 So. 2d 514, 518 (Fla. 1981). This Court, long before *Apprendi*,[13] concluded that the maximum sentence to which a Florida capital defendant is exposed following **conviction** for

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[12]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.

[13]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.**

capital murder is death.[14] *Apprendi* led to no change of any sort, by either the Legislature or this Court.[15]

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' 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**), Johnston'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

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[14]"**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. Crosby*, 840 So. 2d 981 (Fla. 2003); *Sweet v. Moore,* 822 So. 2d 1269 (Fla. 2002).

[15]Whatever criticisms Johnston 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.

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* did not disturb the decisions upholding the constitutionality of Florida capital sentencing law.

Ring left intact all prior opinions 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). 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).[16]

Because the United States Supreme Court did not disturb its prior decisions upholding the constitutionality of Florida's capital sentencing process, those decisions are dispositive of Johnston's claims. The United States Supreme 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 v. Florida*, 506 U.S. 803 (1992) (vacating the Florida Supreme Court's opinion for further consideration in

[16]To rule in Johnston'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).

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,* 497 U.S. 639 (1990). 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 in an Oklahoma case which presented an issue predicated on *Ring* on July 23, 2002. *See, Cannon v. Oklahoma,* 536 U.S. 974 (2002). This Court should not accept Johnston's invitation to "review" the decisions of the United States

Supreme Court.

D. *RING* DOES NOT REQUIRE JURY SENTENCING, AND THIS COURT SHOULD NOT ACCEPT JOHNSTON'S INVITATION TO EXTEND *RING.*

Johnston'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. The Sixth Amendment is the basis of *Apprendi/Ring,* and, 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**. The Sixth Amendment requires only that the jury find the defendant death-eligible, which, in

Florida, takes place at the guilt stage of a capital trial.

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

As discussed above, 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* is concerned only with the finding of death-eligibility, and does not address 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).[17] *See also, Zant v. Stephens,* 462 U.S. 862, 874-78 (1983). The constitution is satisfied when a Florida defendant is **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, and comparison of the two statutes is inappropriate.

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,

[17]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).

1150 (Ariz. 2001).[18] This Court has clearly held that 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 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).

[18]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*, Johnston'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.

[emphasis added].[19] 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 jury's participation.[20] 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

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[19]"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.*

[20]Under § 921.141, 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.

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.**

Johnston'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 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).

Johnston'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.[21] *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 Johnston 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.[22]

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[21]*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).

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

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. Florida law over-meets the requirements of the Eighth Amendment, and satisfies the Sixth Amendment, as well. *See Pulley v. Harris,* 465 U.S. 37, 104 S.Ct. 871, 79 L.Ed.2d 29 (1984). *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 (and, under Florida's statute, found death eligible) 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.*

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).

Finally, to the extent that Johnston argues that the Florida death penalty act "unconstitutionally" shifts the burden to him to prove that death is not the proper sentence, that claim is meritless, in addition to being procedurally barred. *See Boyde v. California*, 494 U.S. 370 (1990); *Blystone v. Pennsylvania*, 494 U.S. 299 (1990).

The *Apprendi/Ring* claim is procedurally barred, and all relief should be denied on that basis. Alternatively, that claim is without merit, as this Court has repeatedly held.

III. THE "MENTAL RETARDATION AS A BAR TO EXECUTION" CLAIM HAS NO FACTUAL BASIS, AND, FOR THAT REASON, WAS PROPERLY REJECTED BY THE CIRCUIT COURT.

On pages 27-35 of his *Initial Brief*, Johnston argues that he has "made a *prima facie* showing that he is mentally retarded," and, therefore, is entitled to an evidentiary hearing on that issue. In a remarkably misleading bit of appellate advocacy, Johnston claims that the State argued that this Court's direct appeal decision found that Johnston is not mentally retarded (*Initial Brief* at 33), and accuses the State of affirmatively misleading the trial court as to the scope of this Court's direct appeal decision. *Id.* A review of the cited pages of the record (R14 and R83) demonstrates the falsity of

Johnston's claim -- had Johnston read the response to the successive motion to vacate, he would know that the State cited to this Court's 1991 decision, where this Court affirmed the trial court's finding (which was made after an evidentiary hearing) that Johnston functions in the **low average range of intelligence**. *Johnston v. Dugger*, 583 So. 2d 657, 661 (Fla. 1991).[23] That finding is *res judicata* as to Johnston's intellectual capacity, and, despite Johnston's protestations to the contrary, is the end of the issue.[24]

In *Bottoson v. State*, 813 So. 2d 31 (Fla. 2002), this Court addressed the situation of a capital defendant who raised "mental retardation" as a bar to execution of his death sentence

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[23]The finding that Johnston is of low average intelligence was in the context of a collateral attack claim that he was not "competent" to make a knowing, voluntary, and intelligent waiver of his *Miranda* rights because of his "mental status," and that counsel was ineffective in litigating the suppression issue. *Johnston v. Dugger, supra.* This Court affirmed the trial court's denial of relief, which included a finding that Johnston is not mentally retarded. *Id*. On direct appeal, Johnston had assigned error to the denial of his motion to discharge trial counsel. This Court found no error, and, whatever the discharge of counsel issue may have to do with the claim now before this Court, it did **not** assess Johnston's intelligence, **unlike the *Miranda* issue raised on collateral attack, which settled the question of Johnston's intellectual capacity.** *Johnston v. State*, 497 So. 2d at 867.

[24]In its 1998 decision affirming the denial of federal habeas corpus relief, the Eleventh Circuit Court of Appeals noted that Johnston is of "average" intelligence. *Johnston v. Singletary*, 162 F.3d 630, 638 (11th Cir. 1998).

for the first time **after** *Atkins v. Virginia* was decided. In that case, there had been no prior judicial determination of the defendant's intellectual functioning, but, in affirming the denial of relief following a hearing, this Court stated:

> We do not reach the merits of whether Bottoson's execution would violate the Eighth Amendment or whether section 921.137, *Florida Statutes* (2001), dealing with the execution of the mentally retarded is unconstitutional as applied, because we conclude that the trial court's finding of no mental retardation is supported by the record and evidence presented at the evidentiary hearing. *See Watts v. State,* 593 So. 2d 198, 204 (Fla. 1992) (stating that even if the defendant's premise was correct that it was cruel and unusual to execute mentally retarded persons, he would not be entitled to its benefits because two out of three mental health experts found that he was not mentally retarded and the defense psychologist found him to be only mildly retarded); *Carter v. State,* 576 So. 2d 1291, 1294 (Fla. 1989) (stating that the evidence that the defendant was mentally retarded was "so minimal as to render the *Penry* issue irrelevant").

Bottoson v. State, 813 So. 2d at 33. In this case, the trial court, this Court, and the Eleventh Circuit have already found, as a fact, that Johnston is **not** mentally retarded. Because that is so, no constitutional issue based upon *Atkins* exists in this case, and the Circuit Court properly denied relief on this claim. (R174-75).

To the extent that further discussion of this factually unsupported claim is necessary, the fact that the factual determination that Johnston is not mentally retarded was not made in connection with a claim that mental retardation bars execution of a death sentence makes no difference. The factual finding that Johnston functions in the low average range of

intelligence is a matter of historical fact that cannot be changed. The very suggestion that Johnston could now present testimony that he is mentally retarded is, at least, highly suspicious, given that the testimony upon which this Court based its finding that Johnston is of low average intelligence was presented by an expert hand-picked by Johnston. The suggestion that Johnston might now be able to present different testimony (now that the law has changed since *Atkins*), suggests expert-shopping at the very least, and evidences a willingness to avoid facts which interfere with a "good claim." Through testimony that he presented, Johnston has already established that his intellectual functioning is in the average range, and he is not now entitled to re-open that factual determination. The trial court properly regarded this claim as having been decided long ago, and quite properly refused to allow Johnston to further delay execution of his lawful sentence by relitigating matters that were decided in 1991.

CONCLUSION

WHEREFORE, based upon the foregoing arguments and authorities, the Appellee respectfully requests that all requested relief be denied.

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: **J. Edwin Mills**, P. O. Box 3044, Orlando, Florida 32802-3044, on this _____ day of March, 2004.

_____
Of Counsel

CERTIFICATE OF COMPLIANCE

This brief is typed in Courier New 12 point.

_____
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