IN THE SUPREME COURT OF FLORIDA

_____

No. SC03-824

_____

DAVID EUGENE JOHNSTON
Appellant,

v.

STATE OF FLORIDA
Appellee.

_____

APPEAL OF THE NINTH JUDICIAL CIRCUIT TRIAL COURT'S DENIAL OF APPELLANT'S PETITION FOR POST CONVICTION RELIEF

_____

APPELLANT'S REPLY BRIEF

_____

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The State's Answer Brief argues that Mr. Johnston is not entitled to relief because Mr. Johnston's claims are procedurally barred because Ring v. Arizona, 536 U.S. 584 (2002) does not apply retroactively; because Mr. Johnstons Ring claim lacks merit due to Mr. Johnston's prior violent felony aggravator; because the Arizona and Florida capital sentencing laws are different; and because Ring does not require a jury to impose a death sentence.

The State further argues that Mr. Johnston's claim of mental retardation has no factual basis and was properly rejected by the trial court.

MR. JOHNSON'S RING CLAIMS ARE

NOT PROCEDURALLY BARRED.

The State first argues that Mr. Johnston's Ring claims are procedurally barred because those claims were not raised in previous proceedings and that the issue in Ring is not new or novel. (Answer Brief at 9). The State cites no authority from this Court applying a procedural bar to a Ring claim.

This Court has consistently addressed the merits of claims under Ring and Apprendi v. New Jersey, 530 U.S. 466 (2000), without mentioning whether or not the claim was raised in prior proceedings. This has been true whether the Ring claim was presented on direct appea1 or in post-conviction proceedings. See: Owen v. State, 862 So2d 687 (Fla.2003); Davis v. State, 859 So2d 465 (Fla.2003); and Robinson v. State, 29 Fla. L. Weekly S50 (Fla. Jan 29, 2004); and Zakrzewski v. State, 28 Fla. L. Weekly S826 (Fla. Nov 13, 2003).

The State also argues that Mr. Johnston=s Ring claims are procedurally barred because issues under Ring are not "new or novel (Answer Brief at 9). According to the State, a Ring claim "has been known since before the United States Supreme Court issued its decision in Proffitt v. Florida, 428 U.S. 242, 252 (1976), holding that jury sentencing is not constitutionally required. Thus, the basis for any Sixth Amendment attack on Florida's capital sentencing procedures has always been available to Mr. Johnston. (Answer Brief at 9) Although recognizing that the Supreme Court rejected a Ring-like claim in Proffitt, the State contends that Mr. Johnston should have raised the claim previously. Elsewhere in the Answer Brief, the State cites previous Supreme Court

cases "upholding Florida's capital sentencing.@ (Answer Brief at 21, citing, *inter alia*, Proffitt, supra; Hildwin v. Florida, 490 U.S. 638 (1989); Spaziano v. Florida, 468 U.S. 447 (1984) and Dobbert v. Florida, 432 U.S. 282 (1977)). The State's argument is really an attempt to envelop Mr. Johnston in a catch-22. Prior to Ring, the United States Supreme Court had determined that the Ring claim was meritless. The United States Supreme Court has now recognized that its prior decisions were erroneous. This is precisely the situation that Witt v. State, 387 So2d 922 (Fla. 1980), was meant to address - a sharp change law that no one should be held to have anticipated.

Several members of this Court have noted that Ring is a decision of fundamental significance. Justice Shaw, concurring in result only, wrote in Bottison v. Moore, 833 So2d 693 (Fla. 2002), that Ring A...goes to the very heart of the constitutional right to a trial by jury.@ Bottison, at 717. Justice Lewis, concurring in result only, wrote that Ring A...set forth a new constitutional framework... Id. At 725. Justice Quince, concurring, wrote A...[b]y referring to the sentence that a defendant may receive based upon the jury verdict only, the Court seems to have turned that concept of statutory maximum on its head. Bottoson, at 701. In King v. Moore, 831 So2d 143 (Fla. 2002), Justice Parente noted that the Sixth Amendment right to a jury trial in the penalty phase was unanticipated by prior law and that Apprendi, upon

which Ring is based, ...inescapably changed the landscape of Sixth Amendment jurisprudence. King at 149.

APPRENDI AND RING APPLY RETROACTIVELY.

The State argues that no court to consider the issue has held that Apprendi is retroactive. (Answer Brief at 12) The State urges that since Ring is simply an extension of Apprendi, Ring should not be retroactive either. (Answer Brief at 12). The State concedes that the United States Supreme Court has not addressed Ring's retroactivity but erroneously relies on In Re: Johnson, 334 F. 3d 403 (5th Cir. 2003) for the proposition that Ring is not retroactive (Answer Brief at 12).

This Court's established practice of addressing Ring claims on the merits establishes that, under Florida law, Ring is retroactive.

The State argues that cases finding Apprendi not to be retroactive are persuasive because Ring serves as an application of Apprendi to death penalty cases" (Answer Brief at 12). Since the rule in Ring vindicates the jury trial in capital sentencing procedures, the State is wrong to rely on cases addressing Apprendi's retroactivity in federal proceedings. Apprendi is not a capital case and does not involve the often-acknowledged fact that finality of death is qualitatively different from a sentence of imprisonment. See: Woodson v. North Carolina, 428 U.S. 280, 305 (1976) (plurality opinion). Also see: Gardner v. Florida, 430 U.S. 349, 357 (1977) (death is different from other punishments). Because of this difference, "... there is a

corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case. Woodson, 428 U.S. at 305. Any retroactivity analysis of Ring must take this fact into account.

The State relies upon cases from the federal circuit of appeal and from other state courts to argue that Ring does not apply retroactively (Answer Brief at 13, 14). All of these cases rely upon the federal habeas retroactivity standard of Teague v. Lane, 489 U.S. 288 (1989) or upon Tyler v. Cain, 533 U.S. 656 (2001) Teague addresses retroactivity in federal post-conviction proceedings. Tyler involves the question of what federal court had the power to declare a rule retroactive in federal post-conviction proceedings. This is not a federal collateral proceeding, but a state collateral proceeding, and these cases have nothing to do with state post-conviction or with state standards of retroactivity. The State's core argument is simply an abandonment of the independence of the judiciary of the State of Florida.

> **We start by noting that we are not to construe our rule concerning post-conviction relief in the same manner as its federal counterpart... . [T]he concept of federalism clearly dictates that we retain the authority to determine which changes of law" will be cognizable under this state's post conviction relief machinery.**

Witt v. State, 387 So. 2d 922, 928 (Fla. 1980). Even after the United States Supreme Court decided Teague, Florida courts have continued to follow the retroactivity standards set forth in Witt. See: House v. State, 696 So. 2d 515, 518 n. 8 (Fla. 4th DCA1997); Gantorius v. State, 693 So. 2d 1040 (3d DCA 1997), approved in State v. Gantorius, 708 So2d 2876 (Fla. 1998).

Further, the State's argument that Ring is not retroactive under rests

upon the argument that it was not a decision of fundamental significance that so drastically alters the underpinnings of ... [a] death sentence that obvious injustice exists. (Answer Brief at 14). It is difficult to imagine a decision that is of a more fundamental significance than a decision that drastically alters that way a capital defendant is sentenced to death.

THE FLORIDA AND ARIZONA CAPITAL SENTENCING LAWS ARE DIFFERENT.

Any differences in the Arizona and Florida capital sentencing scheme are irrelevant.

The question that Ring decided was what facts constitute elements in capital sentencing proceedings. Following the Supreme Court=s decision in Apprendi, Mr. Ring raised an Apprendi challenge to his death sentence. In addressing that challenge, the Arizona Supreme Court stated that the United States Supreme Court's description of Arizona's capital sentencing scheme contained in Walton v. Arizona, 497 U.S. 6 (1990), was incorrect and provided the correct construction of the scheme. Ring, 122 S. Ct. at 2436. Based upon this correct construction, the United States Supreme Court then found that Walton "cannot survive the reasoning of Apprendi. Ring, 122 S. Ct. at 2440. The bulk of the Ring opinion addressed how to determine whether a fact is an "element" of a crime. See Ring, 122 S. Ct. at 2437-43. The question in Ring was not whether the Sixth Amendment requires a jury to decide elements. That has been a given since the Bill of Rights was adopted. Justice Thomas explained this in his concurring opinion in Apprendi:

> **This case turns on the seemingly simple question of what constitutes a "crime. Under the Federal Constitution, "the accused" has the right (1) "to be informed of the nature and cause of the accusation' (that is, the basis on which he is accused of a crime), (2) to be "held to answer for a capital, or otherwise infamous crime**

only on an indictment or presentment of a grand jury, and (3) to be tried by "an impartial jury of the State and district where the crime shall have been committed." Amdts. 5 and 6. See also Art. III, [Sec.] 2, cl. 3 ("The Trial of all Crimes. . . shall be by Jury"). With the exception of the Grand Jury Clause, see Hurtado v. California, 110 U.S. 516, 538 . (1884), the Court has held that these protections apply in state prosecutions. Herring v. New York, 422 U.S. 853, 857, and n.7 . . . (1975). Further, the Court has held that due process requires that the jury find beyond a reasonable doubt every fact necessary to constitute the crime. In re Winship, 397 U.S. 358, 364 . . . (1970).

All of these constitutional protections turn on determining which facts constitute the "crime"--that is, which facts are the "elements" or "ingredients" of a crime. In order for an accusation of a crime (whether by indictment or some other form) to be proper under the common law, and thus proper under the codification of the common-law rights in the Fifth and Sixth Amendments, it must allege all elements of that crime; likewise, in order for a jury trial of a crime to be proper, all elements of the crime must be proved to the jury (and, under Winship, proved beyond a reasonable doubt). Apprendi, 120 S. Ct. at 2367-68 (Thomas, J., concurring) Justice Thomas explained that courts have "long had to consider which facts are elements," but that once that question is answered, "it is then a simple matter to apply that answer to whatever constitutional right may be at issue in a case--here, Winship and the right to trial by jury."

The Framers of the Bill of Rights included the Sixth Amendment's guarantee of a right to jury trial as an essential protection against government oppression. "Fear of unchecked power, so typical of our State and Federal Governments in other respects, found expression in the criminal law in this insistence upon community participation in the determination of guilt or innocence." Duncan v. Louisiana, 391 U. S. 145, 168 (1968). Only by maintaining the integrity of the fact-finding function does the jury "stand between the accused and a potentially arbitrary or abusive government that is in command of the criminal sanction." United States v. Martin Linen Supply, 430 U.S. 564, 572 (1977). Thus, the adoption of the jury trial right in the Bill of Rights Establishes the Founders' recognition that a jury trial is more reliable than a bench trial.

As Justice Thomas explained in Apprendi, there was no question in Ring that the jury trial right applies to elements. The dispute in Ring involved what was an element. Thus, the question in Ring is akin to a statutory construction issue. That is the Sixth Amendment right to have a jury decide elements is a bedrock, indisputable right that is designed to produce a more reliable result.

The ruling in Ring concerns an issue of substantive criminal law. In concluding that the Sixth Amendment requires that the jury, rather than the judge, determine the existence of aggravating factors, the Supreme Court described aggravating factors as "the functional equivalent of an element of a greater offense." Ring, 122 S.Ct. at 2243 (citing Apprendi v. New Jersey, 530 U.S. 466, 494, n. 19 (2000)). Ring clarified the elements of the "greater" offense of capital murder applied retroactively.

The State relies upon Mills v. Moore, 786 So2d 532 (Fla. 2001) in support of its argument that the significant difference between the Arizona and Florida capital sentencing scheme is that under Florida law, death eligibility occurs at the guilt phase of the case. (Answer Brief at 17, 18). The United States Supreme Court, in Sattazahn v. Pennsylvania, 123 S.Ct. 832 (2003), clarified what constitutes an element of an offense for purposes of the Sixth Amendment jury trial guarantee. In Sattazahn, the Court explained A... simply, if the existence of any fact (other than a prior conviction) increases the maximum punishment that may be imposed upon a defendant, that fact-no matter how the state labels it-constitutes and element and must be found by a jury beyond a reasonable doubt. Sattazahn, 123 S.Ct, at 739 The State concludes, without citing any authority, that Sattazahn does not undermine Mills. (Answer Brief at fn.11, p. 17).

Regardless of any differences in the Arizona and Florida capitol sentencing scheme, Apprendi and Ring require that the charging instrument set forth all of the elements of the offense charged and that a jury determine the existence of those elements charged.

THE PRIOR VIOLENT FELONY AGGRAVATOR DOES NOT SATISFY RING.

The State argues that Mr. Johnston's case falls outside the scope of Ring because one of the aggravating factors found by the judge involved a prior conviction for a violent felony (Answer Brief at 16). The State's argument presupposes that the presence of one aggravating circumstance is an element of the crime of capital first degree murder, and that element is present where the State introduces a conviction for a prior violent felony.

The State's argument overlooks the statutory language requiring a finding of "sufficient aggravating circumstances exist to justify the imposition of the death penalty." See: Florida Statute 921.141 (2). It also overlooks the jury instruction given to Mr. Johnston's jury directing it to first determine whether sufficient aggravating circumstances exist to justify the imposition of the death penalty.

The State's argument that the prior violent felony aggravating circumstance protects Mr. Johnston's sentence of death from attack under Ring ignores the broader implications of Ring and does not withstand scrutiny.

THE ISSUE OF MR. JOHNSTON'S MENTAL RETARDATION HAS NOT BEEN LITIGATED.

The State argues that Mr. Johnston's claim of mental retardation has been litigated in Johnston v. Dugger, 583 So2d 657 (Fla. 1991). (Answer Brief at 32) The State correctly points out that that Mr. Johnston's intellectual capacity has been assessed by this Court and found to be in the low average range of intelligence. (Answer Brief at 32 and fn, 23, p 32) The State incorrectly argues that there has been a determination that Mr. Johnston is not mentally retarded. (Answer Brief fn. 23, p.32). The State also argues that Johnston's direct appeal did not assess Mr. Johnston's intelligence. (Answer Brief at fn.23, p. 33) This argument is totally without merit and is not support by the opinion of this Court. This Court, in Johnston v. State, 497 So2d 863 (Fla. 1986), while addressing Johnston's claim of error by the trial court for failing to allow Johnston to represent himself wrote:

> **... Florida Rule of Criminal Procedure 3.111(d)(3) contemplates that a criminal defendant will not be allowed to waive assistance of counsel if he is unable to make an intelligent and understanding choice because of, inter alia, his mental condition.**
>
> **In determining whether a defendant has knowingly And intelligently waived his right to counsel, a trial Court should inquire into, among other things: defendant's Age, mental status and lack of knowledge and experience in criminal proceedings. The trial judge made the proper inquiry in this case and correctly concluded that the desired waiver of counsel was neither knowing nor intelligent, in part, because of Johnston's mental condition. (emphasis added) In fact the court's order denying Johnston's motion for self-representation and counsel's motion to withdraw specifically cited Johnston's age, education, and reports of psychiatrists**

and past admissions to mental hospitals.

Johnston v, State, 497 So2d 863 (Fla. 1986) at 868. Clearly, Mr. Johnston's intelligence was considered by the Court.

In Johnson, 583 So2d 657, at 660, this Court ruled that Johnston's claim that he was incompetent to stand trial was procedurally barred because it was not raised on direct appeal. This Court then discussed the adequacy of the pretrial examinations and concluded that the examinations were not inadequate. This Court observed that Dr. Wilder had examined Mr. Johnston on March 18, 1982, had access to his Louisiana mental health records but was not aware that Johnston's IQ had been measured at 57 at the age of seven and one-half years. Dr. Wilder discounted the significance of this IQ score and, further, saw no need for psychological or neurological testing. This Court, while considering Dr. Wilder's testimony and Mr. Johnston's statements to the police, concluded that Johnston was in control of his mental facilities at the time of the statements. Johnston, at 660. This Court noted that Drs. Merikangas and Fleming who examined Mr. Johnston on November 27, 1988 and November 18, 1988, respectively, in connection with a post-conviction proceeding, concluded that Johnston's mental impairment did prevented him from validly waiving his Miranda rights. Johnston, at 661. It is clear from reading the trial court's findings and this Court's ruling on the issue, that the rejection of Drs. Merikangas' and Fleming's expert opinion and the

acceptance of Dr. Wilder's expert opinion that was limited to the issue of either Mr. Johnston's understanding of his Miranda warnings or his competence to stand trial. Johnston, at 660. Dr. Merikangas concluded that Mr. Johnson suffers from brain damage, is psychotic and has a long history of mental illness. (Appendix to Motion to Vacate Judgment and Sentence, Tab 15) Omitted from this Court's consideration was the testimony and opinion of Dr. Robert Pollock who examined Defendant prior to trial on January 17,1984 and opined during a competency hearing on March 2, 1984, that Defendant was competent to stand trial. (RA 1037). On cross-examination, Dr. Pollock admitted that he did not have the Louisiana mental health records when he prepared his report nor did he administer any psychiatric or neurological testing to Mr. Johnston. (RA 1040-1041) Dr. Pollock further testified that he spent less that one hour examining Mr. Johnston. (RA 1041). Dr. Pollock did not testify concerning Mr. Johnston's IQ nor did Dr. Pollock offer any opinion as to Mr. Johnston's mental capacity. (RA 1031-1065).

In considering mental retardation as a mitigating factor for imposing the death penalty, this Court has written:

> **Society's understanding of mental retardation continues to evolve. See generally Lyn Entzeroth, *Putting the mentally retarded criminal Defendant To Death: Charting the Development of a National Consensus to Exempt the Mentally Retarded From The Death Penalty*, 52 Ala. L.Rev 911 (2001). See also John Blume and David Bruck, *Sentencing the Mentally Retarded to Death; An Eighth Amendment Analysis*, 41 Ark. L.Rev. 725 (1988); David A. Davis,**

> ***Executing the Mentally Retarded; The Status of Florida Law,*** **Fla. B.J. Feb. 1991, at 12. Mental retardation is a severe and permanent mental impairment that affects almost every aspect of a mentally retarded person's life. Blume and Bruck, *supra* at 734. A person who is mentally retarded is not just slower or not quite as smart as the average person. *Id.* Rather, it is generally recognized that mental retardation is a permanent learning disability that manifests itself in several ways , including poor communication skills, impaired impulse control, overrating ones own skills, short memory, short attention span and immature or incomplete concepts of blameworthiness and causation. *See:* Blume and Bruck, *supra,* at 732-34; Davis, *supra,* at 13.**

Crook v. State, 813 So2d 68 (Fla. 2002), at 76.

This Court has not established a minimum IQ score below which an execution would violate the Florida Constitution. Crook, at 76. In Jones v. State, 705 So2d 1364 (Fla. 1998), this Court reversed a death sentence based upon a review of the record that included evidence that defendant was borderline mentally retarded based upon defendant's IQ of 76, and the fact that defendant was placed in special education classes, has a first grade reading ability, and had learning disabilities. Jones, at 1366.

The undersigned has not been able to locate any report of any mental health expert that states that Mr. Johnston functions in the low average range of intelligence.

Section 921.137, Fla. Stat., was signed into law by Governor Bush on June 12, 2001. Florida Statute 921.137, provides that "[i]mposition of [a]

death sentence upon a mentally retarded defendant [is] prohibited." This provision extends to mentally retarded individuals a substance right not to be executed. The legislature directed that "[t]his act shall take effect upon becoming a law." However, the legislature further directed that "[t]his section does not apply to a defendant who was sentenced to death prior to the effective date of this act. The Senate Staff Analysis explained that the legislation did not set forth a specific IQ as necessary to establish mental retardation.

The bill does not contain a set IQ level, but rather provides that low intellectual functioning "means performance that is two or more standard deviations from the mean score on a standardized intelligence test specified in the rules of the Department of Children and Family Services." Although the department does not currently have a rule specifying the intelligence test, it is anticipated that the department will adopt the nationally recognized test. Two standard deviations from these tests is approximately a 70 IQ, although it can be extended up to 75. The effect in practical terms will be that a person that has an IQ of around 70 or less will likely establish an exemption from the death penalty.

Given the long history demonstrating that Mr. Johnston falls within the

class of persons covered by the statute as being mentally retarded, he must receive the benefit of the statute. When Mr. Johnston entered public school in 1967 at age 7, he attended regular classes for only three months before he was transferred to Northeast Special Education where he was diagnosed as mentally retarded:

> **On the Stanford-Binet Intelligence Scale, and results on the Peabody Picture Vocabulary Test, highly indicate intellectual functioning within the Retarded Educable range. This youngster obtained I.Q.s of 57 and 58 on the Binet and Peabody Test, respectively. His mental ages respectively to the Binet and Peabody Test, were Mental Ages of 4-8 and 4-0. These scores consistently reflect current intellectual functioning within the Retarded Educable range. Mr. Johnston's severest deficiencies on the Binet Test were dealing with concept formation, verbal facility, and those subjests dealing with visual-motor coordination and organization.**

(Motion to Vacate, Exh. 3; R-63). The examiner concluded that Mr. Johnston suffered from "moderate to severe levels of perceptual problems and/or organic brain damage" and that "this youngster is definitely experiencing some level of brain damage." (Id.)

Five years later, when he was twelve years old, Mr. Johnston was again evaluated by the Northeast Special Education Center. This report also documents Mr. Johnston's mental retardation, noting that he "performed within the retarded educable range" with an I.Q. of65. (Id.) At the age of twelve, Mr. Johnston was performing at the first grade level in math and could not understand simple subtraction and addition problems. (Id.) He was reading at a third grade level. (Id.)

However, Mr. Johnston was not receiving the mental health treatment that he required. A 1973 report from the Monroe Regional Mental Health Center confirms the diagnosis that David was mentally retarded and had

exhibited almost uncontrollable behavior at home and at school. (Motion to Vacate, Exh. 5; R-63)

During an evidentiary hearing held in 1988, Dr. Fleming, a psychologist, testified regarding the intelligence tests she administered to Mr. Johnston in 1988 and what she observed during her seven hour evaluation. Dr. Fleming stated that Mr. Johnston tested in the "significantly low range" with a verbal I.Q. score of 75 and a score of 66 on the Wechsler Memory Scale. (T. 243-246)

Mr. Johnston's aunt, Charlene Benoit, also testified at the evidentiary hearing. Mrs. Benoit further described the difficulties David had in school and how he was eventually sent to a school for the retarded. (PC-R. 1286)

The Senate Staff Analysis makes clear, Mr. Johnston's IQ does in fact fall within the group of individuals contemplated by the statute to be exempt from the death penalty in the State of Florida.

In Fleming v. Zant, 386 S.E. 2d 339 (Ga. 1989), the Georgia Supreme Court was presented with a similar enactment precluding the execution of one found to be mentally retarded. However, the statute was only to apply to capital proceedings that began after July 1, 1988. The Georgia Supreme Court held that "although there may be no 'national consensus' against executing the mentally retarded, this state's consensus is clear." 386 S.E. 2d at 342. Thus, the execution

of the mentally retarded sentenced to death before the statute's effective date

violated the Georgia Constitution's prohibition against cruel and unusual

punishments. In the past, members of the Florida Supreme Court have indicated

that even without legislative action prohibiting the execution of the mental

retarded, the Florida Constitution's prohibition against "cruel or unusual"

punishment should be construed to ban the execution of a mentally retarded

individual. Woods v. State, 531 So. 2d 79, 83 (Fla. 1988) (Barkett, J. dissenting,

joined by Shaw and Kogan, JJ.); Hall v. State, 742 So. 2d 225,231 (Fla. 1999)

(Anstead, J. dissenting, joined by Pariente, J.).

Certainly, the Florida legislature's adoption of Sect. 921.137 and the

Governor's decision to sign it speaks volumes regarding the development of a

consensus within the State of Florida that mentally retarded individuals should

not be executed. While addressing the constitutionality of the electric chair,

Justice Quince recently stated, "Courts should instead give effect to the

legislative enactment as a reflection of the will and the moral values of the people." Provenzano v. Moore, 744 So. 2d 413, 421 (Fla. 1999). The legislature

and the Governor has now spoken. This Court should address the issue of

whether the Florida Constitution precludes the execution of the mentally

retarded in light of the consensus within the State of Florida that such

individuals should not be executed.

More recently, in Crook v. State, 813 So. 2d 68 (Fla. 2002), the Florida

Supreme Court reversed Mr. Crook's death sentence when the trial court failed

to adequately recognize the weight of mental retardation as mitigation. In

Crook, the defendant had IQ scores ranging from the mid-60s to the low 70s.

The Court found that "Crook had an IQ that fell squarely within the borderline

mentally retarded range." lQ. at 77. Additionally, the Court noted that "the

Legislature had recently passed a bill, which the Governor signed into law, that

sets up a procedure to determine if defendants charged with capital felonies are

mentally retarded, and to prohibit mentally retarded defendants from being

executed. . . . The law by its express terms does not apply to defendants

sentenced to death before the effective

date of the statute. However, the applicability of this new legislation and its

effect, if any, on Crook's case are not before us." Id. at fn. 7 (citations omitted).

Additionally, Mr. Johnston would note that under Florida's new provision,

the date of the sentencing determines whether a mentally retarded person may be executed. For example, assuming Mr. Johnston's death sentence is vacated on

other grounds and a resentencing is ordered, a death sentence will be precluded

under the new provision if it is determined that Mr. Johnston is mentally

retarded. The date of sentencing, not the date of the crime, controls. The distinction is surely arbitrary. Those mentally retarded individuals already sentenced to death who are lucky enough to get a resentencing ordered on other grounds may not be resentenced to death. However, mentally retarded individuals who do not obtain a resentencing on other grounds would not get the benefit of the new provision. The difference in treatment of those death sentenced mentally retarded individuals turns on a factor entirely unrelated to either the circumstances of the crime or the character of the defendant. Thus, such an arbitrary distinction calls into question Florida's capital sentencing process.

Moreover, the Florida Supreme Court has held that "the death penalty is either cruel or unusual if imposed upon one who was under the age of sixteen when committing the crime." Allen v. State, 636 So. 2d 494, 497 (Fla. 1994). This is because the Court could not "countenance a rule that would result in some young juveniles being executed while the vast majority of others were not, even where the crimes were similar." Id. See: Brennan v. State, 754 So. 2d 1 (Fla. 1999). In light of the new legislative enactment there can be no real dispute that it will be unusual for a mentally retarded individual to be executed. Thus, the

Florida Constitution will not "countenance a rule" that would permit a mentally

retarded person to be executed while other mentally retarded persons have a

substantive right to not be executed.

Certificate of Service.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to the Kenneth Nunnelley, Assistant Attorney General, Office of the Attorney General, 444 Seabreeze Boulevard, 5th Floor, Daytona Beach, Florida 32118; and Chris Lerner, Office of the State Attorney, Ninth Judicial Circuit, 425 North Orange Avenue, Orlando, Florida 32801 this _____ day of May, 2004, by United States Mail, postage prepaid.

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Certificate of Compliance.

I HEREBY CERTIFY that the foregoing complies with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

_____

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