IN THE SUPREME COURT OF FLORIDA

PATRICK C. HANNON,

Petitioner,

v.

CASE NO. SC04-1662
L.T. No. CRC 91-1927

JAMES V. CROSBY, JR.,
Secretary, Department of Corrections,
State of Florida

Respondent.
_____/

RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

COMES NOW the Respondent, James V. Crosby, Jr., Secretary, Department of Corrections, State of Florida, by and through the undersigned counsel and hereby files its response in opposition to the Petition for Writ of Habeas Corpus and states:

STATEMENT OF THE CASE

On February 13, 1991, the defendant, Patrick Hannon, was charged by indictment with two counts of premeditated murder. (R1672-1674). A superseding indictment was filed on March 27, 1991, charging both Hannon and a co-defendant, Ronald I. Richardson, with the premeditated murder of the two victims, Brandon Snider (Count One) and Robert Carter (Count Two). (R1683-1685). Richardson requested a continuance of trial; however, Hannon declined to waive speedy trial and, therefore,

their cases were ultimately severed for trial. Hannon's jury trial began on July 15, 1991 and concluded on July 24, 1991. (R1634; 1657-1658; 1783-1784; 1792). On July 23, 1991, the jury returned guilty verdicts on both counts of murder in the first degree. (R1781-1782). On July 24, 1991, the jury recommended a sentence of death on both counts, by a unanimous vote of 12 - 0. (R1587-1634; 1783-1784; 1792).

On August 5, 1991, the trial court imposed the death sentence on each count. The trial court's written sentencing order set forth the following findings with respect to the aggravating and mitigating circumstances on each count:

> FINDINGS IN SUPPORT OF DEATH SENTENCE UNDER COUNT ONE
>
> The following Aggravating Circumstances and Mitigating Circumstances were properly established:
>
> AGGRAVATING CIRCUMSTANCES
>
> 1. The defendant was previously convicted of another capital felony as evidenced by his conviction of Murder in the First Degree under Count Two.
>
> 2. The capital felony was committed while the defendant was engaged in the commission of the crime of burglary as evidenced by the defendant and his accomplices having entered or remained in the victim's dwelling with intent to commit an offense therein against the victim.
>
> 3. The capital felony was especially wicked, evil, atrocious or cruel as evidenced by the victim being stabbed several times by an accomplice of the defendant and, after

calling out to his roommate, “Call 911--my guts are hanging out,” having had his throat slashed from ear to ear by the defendant.

MITIGATING CIRCUMSTANCES

Any aspect of the defendant’s character or background and any other circumstance of the offense as evidenced by:

1. Testimony of the defendant’s mother, father and friend to the effect that the defendant has never been a violent person, has never tried to harm anyone and has never hurt anybody in his whole life.

2. Codefendant Ronald I. Richardson, having agreed with the State to testify in the case and then plead guilty to Accessory After the Fact, is no longer facing murder charges as an initial accomplice when he also entered the dwelling of both victims with the intent to commit an offense against the victim Brandon Snider.

The residual or lingering doubt argument of defense counsel to the jury that a life rather than a death sentence would give the defendant more time within which to attempt to prove his innocence does not constitute a Mitigating Circumstance.

The aforesaid Aggravating Circumstances outweigh the aforesaid Mitigating Circumstances to such an extent that the defendant deserves the death penalty for the first degree murder of Brandon Snider as unanimously recommended by the jury.

FINDINGS IN SUPPORT OF DEATH SENTENCE UNDER COUNT TWO

The following Aggravating Circumstances and Mitigating Circumstances were properly established:

AGGRAVATING CIRCUMSTANCES

1. The defendant was previously convicted of

another capital felony as evidenced by his conviction of Murder in the First Degree under Count One.

2. The capital felony was committed while the defendant was engaged in the commission of the crime of burglary as evidenced by the defendant and his accomplices having entered or remained in the victim's dwelling with intent to commit an offense therein against the victim's roommate.

3. The capital felony was committed for the purpose of avoiding or preventing a lawful arrest as evidenced by the fact that the defendant and the victim knew each other; the defendant murdered the victim for the dominant or sole purpose of eliminating him as an eyewitness to the murder of his roommate; and the defendant told a cellmate that he "should have never left any witnesses" after the cellmate told the defendant he was in jail because someone had testified against him.

4. The capital felony was especially wicked, evil, atrocious or cruel as evidenced by the defendant shooting at the victim after he witnesses his roommate's murder and the defendant then pursuing the victim into an upstairs bedroom where the defendant shot the victim six times as he lay helpless and defenseless under a bed.

MITIGATING CIRCUMSTANCES

Any aspect of the defendant's character or background and any other circumstance of the offense as evidenced by:

1. Testimony of the defendant's mother, father and friend to the effect that the defendant has never been a violent person, has never tried to harm anyone and has never hurt anybody in his whole life.

2. Codefendant Ronald I. Richardson, having agreed with the State to testify in the case and then plead guilty to Accessory After the Fact, is no longer facing murder charges as an initial accomplice when he also entered the dwelling of both victims with the intent to commit an offense against the victim Robert Carter.

The residual or lingering doubt argument of defense counsel to the jury that a life rather than a death sentence would give the defendant more time within which to attempt to prove his innocence does not constitute a Mitigating Circumstance.

The aforesaid Aggravating Circumstances outweigh the aforesaid Mitigating Circumstances to such an extent that the defendant deserves the death penalty for the first degree murder of Robert Carter as unanimously recommended by the jury.

(R1806-1809)

Direct Appeal

Hannon raised ten issues on direct appeal in Hannon v. State, Case No. 78,678. The ten issues, as framed in Hannon's initial brief on direct appeal, are:

ISSUE I - THE TRIAL COURT ERRED BY STRIKING PROSPECTIVE JURORS LING AND TROXLER FOR CAUSE IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS, UNITED STATES CONSTITUTION.

ISSUE II - THE STATE WAS IMPROPERLY PERMITTED TO INVADE THE PROVINCE OF THE JURY ON THE ULTIMATE ISSUE IN THIS CASE BY SUGGESTING THAT STATE WITNESS TONI ACKER BELIEVED THAT APPELLANT MIGHT HAVE BEEN INVOLVED IN THE INSTANT HOMICIDES.

ISSUE III - THE COURT BELOW ERRED IN PERMITTING THE STATE TO INTRODUCE INTO EVIDENCE AT APPELLANT'S TRIAL PHYSICAL EVIDENCE AND TESTIMONY THAT WAS IRRELEVANT,

PREJUDICIAL, AND CUMULATIVE.

ISSUE IV - APPELLANT'S DEATH SENTENCES VIOLATE THE EIGHTH AND FOURTEENTH AMENDMENTS BECAUSE THE ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL AGGRAVATING CIRCUMSTANCE IS VAGUE, IS APPLIED ARBITRARILY AND CAPRICIOUSLY, AND DOES NOT GENERALLY NARROW THE CLASS OF PERSONS ELIGIBLE FOR THE DEATH PENALTY.

ISSUE V - APPELLANT'S SENTENCES OF DEATH CANNOT STAND, BECAUSE THEY ARE PREDICATED, AT LEAST IN PART, ON TAINTED JURY RECOMMENDATIONS, AS APPELLANT'S JURY WAS GIVEN AN UNCONSTITUTIONALLY VAGUE INSTRUCTION ON THE ESPECIALLY HEINOUS, ATROCIOUS, OR CRUEL AGGRAVATING CIRCUMSTANCE.

ISSUE VI - THE TRIAL COURT ERRED IN INSTRUCTING THE JURY ON AND FINDING IN AGGRAVATION THAT THE INSTANT HOMICIDES WERE ESPECIALLY WICKED, EVIL, ATROCIOUS, OR CRUEL.

ISSUE VII - THE TRIAL COURT ERRED IN INSTRUCTING APPELLANT'S JURY AT PENALTY PHASE ON, AND FINDING THE EXISTENCE OF, THE AGGRAVATING CIRCUMSTANCE THAT THE HOMICIDE OF ROBBIE CARTER WAS COMMITTED FOR THE PURPOSE OF AVOIDING OR PREVENTING A LAWFUL ARREST.

ISSUE VIII - THE TRIAL COURT ERRED IN INSTRUCTING THE JURY ON AND FINDING IN AGGRAVATION THAT APPELLANT WAS PREVIOUSLY CONVICTED OF ANOTHER CAPITAL FELONY BASED UPON HIS CONTEMPORANEOUS CONVICTIONS FOR THE OTHER HOMICIDES.

ISSUE IX - THE TRIAL COURT'S SENTENCING ORDER CONTAINS INSUFFICIENT FACTUAL BASIS AND ANALYSIS TO SUPPORT APPELLANT'S SENTENCES OF DEATH.

ISSUE X - APPELLANT'S SENTENCES OF DEATH DENY HIM EQUAL JUSTICE UNDER THE LAW, AS NEITHER OF THE OTHER PARTICIPANTS IN THE EVENTS AT THE CAMBRIDGE WOODS APARTMENTS WAS SENTENCED TO DEATH.

Hannon's convictions and sentences were affirmed by this Court on June 2, 1994 and rehearing was denied on September 9,

1994. Hannon v. State, 638 So. 2d 39 (Fla. 1994). Hannon then filed a petition for writ of certiorari in United States Supreme Court and review was denied. Hannon v. Florida, 513 U.S. 1158 (1995).

On March 17, 1997, Hannon filed an initial 3.850 motion in the Circuit Court, after receiving an extension of time from this Court. An amended 3.850 motion was filed on April 22, 1997, and a final amended motion was filed on April 20, 2000. An evidentiary hearing was held on February 18-20, 2002, and on June 21, 2002. The trial court entered a final order denying Hannon's motion for postconviction relief on February 4, 2003. Rehearing was denied March 18, 2003; and, on April 15, 2003, Hannon filed his notice of appeal. Hannon's habeas corpus petition was submitted with his initial brief in his related postconviction appeal, Hannon v. State, Case No. SC03-893.

STATEMENT OF THE FACTS

In Hannon's direct appeal, Hannon v. State, 638 So. 2d 39 (Fla. 1994), this Court set forth the pertinent facts as follows:

> Around Christmas 1990, Brandon Snider, a resident of Tampa, went to Indiana to visit relatives. While there, he went to the home of Toni Acker, a former girlfriend, and vandalized her bedroom. On January 9, 1991, Snider returned to Tampa.
>
> On January 10, 1991, Hannon, Ron Richardson, and Jim Acker went to the apartment where Snider and

> Robert Carter lived. Snider opened the door and was immediately attacked by Acker, who is Toni Acker's brother. Acker stabbed Snider multiple times. When Acker was finished, Hannon cut Snider's throat. During the attack, Snider's screams drew the attention of his neighbors. They also drew the attention of Carter, who was upstairs. Hearing the screams, Carter came downstairs and saw what was happening. He then went back upstairs and hid under his bed. Hannon and Acker followed Carter upstairs. Then Hannon shot Carter six times, killing him.
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> In July 1991, Hannon was brought to trial for the murders of Snider and Carter. During the trial, Richardson reached an agreement with the State. He pled guilty to being an accessory after the fact and testified against Hannon. Hannon was found guilty of both murders. After a penalty proceeding, the jury unanimously recommended death. The trial court found the following aggravating circumstances applicable to both murders: (1) previous conviction of a violent felony (the contemporaneous killings); (2) the murders were committed during the commission of a burglary; and (3) the murders were heinous, atrocious, or cruel. Sec. 921.141(5)(a), (d), and (h), Fla. Stat. (1991). As to Carter, the court found the additional aggravating factor that the murder was committed to avoid or prevent a lawful arrest. Sec. 921.141(5)(e), Fla. Stat. (1991). In mitigation, the court considered testimony from Hannon's mother and father that Hannon was not a violent person. Also, the court considered the fact that Hannon's original co-defendant, Richardson, was no longer facing the death penalty. The trial court found that the aggravating factors outweighed the mitigating factors and followed the jury's recommendation, imposing separate death sentences on Hannon for the murders of Snider and Carter.
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> Hannon, 638 So. 2d at 41 (footnotes omitted)

On direct appeal, Hannon challenged three of the aggravating factors: HAC, prior violent felony, and avoid arrest. This Court upheld each aggravator, finding Hannon's challenge to the

prior violent felony aggravating factor "without merit." Id. at 44, n.4.

In upholding the HAC aggravator on both murders, this Court noted that the "record reflects that Brandon Snider was brutally stabbed numerous times by Hannon and Jim Acker. At one point during the attack, Snider called to his roommate, "Call 911--my guts are hanging out." At that point, Hannon grabbed Snider from behind and slit his throat. Snider's screams and cries for help could be heard throughout the apartment complex." Hannon, 638 So. 2d at 43. The second victim, Robert Carter, "witnessed his friend and roommate being savagely stabbed. When the attackers turned on Carter, he pled for his life as he retreated to an upstairs bedroom. There, he hid under a bed until Hannon entered the room and fired six shots into the huddled, defenseless Carter." Id. at 43. Consequently, this Court concluded that "where the victim undoubtedly suffered great fear and terror prior to being murdered," Carter's murder was heinous, atrocious, or cruel.

In upholding the avoid arrest aggravator, this Court found that "the record reflects that Hannon, Acker, and Richardson went to the home of Snider and Carter to kill Snider. The motive was the conflict between Snider and Jim Acker's sister. Carter was not a party to this conflict. Carter, however, lived

with Snider, and witnessed Snider's murder. Carter knew, and could identify, Hannon and the others. After his arrest and incarceration, Hannon told a cellmate that one of the victims was a "real jerk," but that the other was a "pretty nice guy" who was just in the wrong place at the wrong time. In the course of discussing another cellmate's crime, Hannon told him that he should not have left any witnesses. Clearly, the murder of Carter was ancillary to the primary purpose of obtaining revenge against Brandon Snider . . . The finding that Carter was murdered for the purpose of avoiding or preventing lawful arrest is fully supported by the record." Id. at 44.

Finally, this Court found Hannon's death sentence was not disproportionate inasmuch as "Hannon delivered the fatal blow to Snider, slashing Snider's throat after Acker had stopped stabbing him. Also, it was Hannon who shot Carter. Clearly, Hannon is the most culpable of the three accomplices in this case, and the two death sentences are justified." Id., at 44.

STATEMENT REGARDING PROCEDURAL BARS

This Court has consistently and repeatedly stated that a state habeas proceeding cannot be used as a second appeal. Issues that were or could have been raised on direct appeal or in prior collateral proceedings may not be litigated anew, even if couched in ineffective assistance of counsel language. See

Teffeteller v. Dugger, 734 So. 2d 1009, 1025 (Fla. 1999) (holding that habeas petition claims were procedurally barred because the claims were raised on direct appeal and rejected by this Court or could have been raised on direct appeal); Johnson v. Singletary, 695 So. 2d 263, 265 (Fla. 1996) ("All of Johnson's twenty-three claims are procedurally barred -- because they were either already examined on the merits by this Court on direct appeal or in Johnson's 3.850 proceeding, or because they could have been but were not raised in any earlier proceeding -- or meritless."). Thus, this Court should expressly reject the claims raised in the instant petition as procedurally barred.

STATEMENT REGARDING APPLICABLE LEGAL STANDARDS

Habeas corpus petitions are the proper vehicle to advance claims of ineffective assistance of appellate counsel, but such claims may not be used to camouflage issues that should have been raised on direct appeal or in a postconviction motion. Rutherford v. Moore, 774 So. 2d 637, 643 (Fla. 2000); Thompson v. State, 759 So. 2d 650, 660 n.6 (Fla. 2000).

Fundamental error is error that "reaches down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error." Appellate counsel cannot be deemed ineffective for failing to raise issues that are procedurally

barred because they were not properly raised during the trial court proceedings; nor can appellate counsel be deemed ineffective for failing to raise non-meritorious claims on appeal, or claims that do not amount to fundamental error. Happ v. Moore, 784 So. 2d 1091 (Fla. 2001). Habeas corpus may not be used to reargue issues raised and ruled upon because petitioner is dissatisfied with the outcome on direct appeal. Moreover, a petitioner may not reargue the same issue, under the guise of ineffective assistance of appellate counsel, a similar contention urged in the appeal from the denial of a 3.850 motion that trial counsel was ineffective on that issue. See Jones v. Moore, 794 So. 2d 579, 587 (Fla. 2001)(appellate counsel not deemed ineffective for failing to argue a variant to an issue argued and decided on direct appeal; nor is appellate counsel ineffective for failing to raise unpreserved claims); Freeman v. State, 761 So. 2d 1055, 1069 (Fla. 2000) (ineffective assistance of counsel cannot be argued where the issue was not preserved for appeal or where the appellate attorney chose not to argue the issue as a matter of strategy).

ARGUMENT IN OPPOSITION TO HABEAS CLAIMS

ISSUE I

THE PETITIONER/DEFENDANT, PATRICK HANNON, HAS NOT DEMONSTRATED ANY ENTITLEMENT TO EXTRAORDINARY HABEAS CORPUS RELIEF BASED ON THE 1991 INDICTMENT WHICH CHARGED HANNON WITH TWO COUNTS OF PREMEDITATED MURDER.

The defendant/petitioner, Patrick Hannon, now challenges his dual murder convictions and death sentences, imposed in 1991, because the indictment, which charged Hannon with two counts of premeditated murder under § 782.04, Florida Statutes, did not also assert a separate theory of felony murder under § 782.04, Florida Statutes (1989). For the following reasons, Hannon's current habeas complaints, raised for the first time in 2004, are procedurally barred and, alternatively, without merit.

Hannon's challenge to the procedure of indicting a defendant for first-degree murder and proceeding to trial on theories of both premeditated and felony murder is procedurally barred. This claim is one which was cognizable at trial and on direct appeal; and, therefore, the failure raise this issue at trial and on direct appeal constitutes a procedural default. "'[H]abeas corpus petitions are not to be used for additional appeals on questions which could have been . . . or were raised on appeal or in a rule 3.850 motion, or on matters that were not objected to at trial.'" Teffeteller v. Dugger, 734 So. 2d 1009, 1025 (Fla. 1999), quoting Parker v. Dugger, 550 So. 2d 459, 460

(Fla. 1989).

Furthermore, Hannon's procedurally-barred challenge to his 1991 indictment also is without merit. This Court repeatedly has held that there is no error in permitting the State to proceed on a theory of felony murder when the indictment charges the defendant with first-degree premeditated murder. See Anderson v. State, 841 So. 2d 390, 404 (Fla. 2003), citing Knight v. State, 338 So. 2d 201, 204 (Fla. 1976); Kearse v. State, 662 So. 2d 677, 682 (Fla. 1995). Hannon's current complaint has been "repeatedly rejected" by this Court. See Gudinas v. State, 693 So. 2d 953, 964 (Fla.), cert. denied, 522 U.S. 936, 118 S.Ct. 345, 139 L.Ed.2d 267 (1997).

In 1991, Hannon was charged with two counts of premeditated murder and the State proceeded at trial on dual theories of both premeditated murder and felony murder of the two victims, Brandon Snider and Robert Carter. The State's case included both direct and circumstantial evidence against Patrick Hannon. Four of the neighbors/college students who witnessed the trio leaving the scene described the distinctive suspect that they especially noticed that night: the "big" man[1] with a beard and

[1]The arrest affidavit and warrant, issued and executed on February 6, 1991, described Hannon's height and weight as 6'2" and 230 pounds. (R1661; 1663). At his trial in July of 1991,

long brown hair, who was bent over and had his arms crossed over his stomach. (R296-297; 317-320; 344-345; 353; 352-353). Mike Egan saw the "big-boned" man put something metallic in the front of his pants, which Egan suspected was a "slim-jim." (R296-297). At trial, Shane Cohn positively identified Hannon as the "husky" man he saw leaving the scene; Hannon was the one man that Cohn got the best look at that night. (R345). In addition to Hannon's incriminating admissions to fellow inmates, two of Hannon's latent prints were recovered from the victims' apartment. Hannon's left palmprint was located on stairwell and a fingerprint, which was located on the inside of the front door, matched Hannon's left ring finger. (R627, 650-654; 659). Both of the defendant's prints appeared to be in blood. (R646-648; 650-651; 653-654).

Hannon used two lethal weapons in his attacks on the unarmed, defenseless victims on the evening of January 10, 1991. Shortly before Hannon, Richardson, and Acker drove to Brandon Snider's apartment, Hannon first obtained a .380 caliber, semi-automatic handgun from a dresser drawer located in Richardson's bedroom. The ammunition clip, which was stored separately, was loaded into the gun and Hannon concealed the gun in the front of

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Hannon testified that he was 26 years old, 6'3" tall and weighed about 305 pounds, which, according to Hannon, was about what he weighed on January 10, 1991. (R1366-1367).

his pants, beneath his t-shirt. (R1176-1177). When the trio arrived at the victims' apartment complex, Acker parked their car approximately one and one-half blocks away from Snider's apartment. (R1212). Acker deliberately concealed his presence by standing "off to the side" while Hannon knocked on the front door of Snider's apartment. (R1179). After Snider answered the front door and headed back toward the living room couch, Acker then stepped up, walked in between Hannon and Richardson, and Acker started stabbing Snider repeatedly. (R1179-1180). Snider slammed into the window, stumbled to the bottom of the stairs, and called out to his roommate, Robert Carter, "Call 911. My guts are hanging out." (R1181). After Acker finished stabbing Snider so deeply that his "guts" were "hanging out," Acker then went into the kitchen. At that point, Hannon grabbed Snider from behind and slit Snider's throat from ear to ear. (PCR11/2170-2171; R497-498; 1181). "Snider's screams and cries for help could be heard throughout the apartment complex." Hannon v. State, 638 So. 2d 39, 43 (Fla. 1994). Snider's throat was not cut before Hannon grabbed him. However, this final knife thrust penetrated four (4) inches deeply into Snider's throat; Snider's throat was severed "all the way to the backbone." (R494-498; 1183-1184).

After nearly decapitating Brandon Snider, Hannon then pulled

out the loaded gun and chased Snider's roommate, Robert Carter, as Carter ran up the stairs. (R1185) Richardson heard several shots being fired and "some hollering." (R1185-1186). Thus, the second victim, Carter, "witnessed his friend and roommate being savagely stabbed. When the attackers turned on Carter, he pled for his life as he retreated to an upstairs bedroom. There, he hid under a bed until Hannon entered the room and fired six shots into the huddled, defenseless Carter." Hannon, 638 So. 2d at 43. The six gunshot wounds extended in a straight line beneath Carter's armpit and along his left side. Four of the wounds were "contact" wounds, two were at a "very close range," and three of the bullets passed entirely through Carter's body. (R502; 514).

In support of his procedurally barred challenge to his 1991 indictment, Hannon now relies primarily on this Court's direct appeal decision in Delgado v. State, 776 So. 2d 233 (Fla. 2000), and the post-Delgado, direct appeal cases of Fitzpatrick v. State, 859 So. 2d 486 (Fla. 2003) and Mackerley v. State, 777 So. 2d 969 (Fla. 2001). In Delgado, this Court addressed the 1989 version of the burglary statute which provided: "'Burglary' means entering or remaining in a structure or a conveyance with the intent to commit an offense therein, unless the premises are at the time open to the public or the defendant is licensed or

invited to enter or remain." § 810.02(1), Fla. Stat. (1989). On direct appeal in Delgado, this Court held that the phrase "remaining in" as found in Florida's burglary statute, § 810.02(1), Florida Statutes (1989), applied "only in situations where the remaining in was done surreptitiously." Delgado, 776 So. 2d at 240.

Hannon impermissibly now attempts to utilize this extraordinary writ proceeding as a means to circumvent Florida's well-settled procedural requirements. For the following reasons, Hannon's claims, based on this Court's decision in Delgado, are procedurally barred, not retroactive, and also without merit.

Procedural Bar

Hannon's trial was held in 1991 and Hannon did not assert, at trial or direct appeal, any challenge to the State's theory of felony murder based on burglary. Likewise, Hannon did not raise any challenge to the trial court's finding of the aggravating factor that "[t]he capital felony was committed while the defendant was engaged in the commission of the crime of burglary as evidenced by the defendant and his accomplices having entered or remained in the victim's dwelling with intent to commit an offense therein against the victim." In fact, on direct appeal, this Court, in addressing the "avoid arrest"

aggravator involving victim Carter, specifically found that "the record reflects that Hannon, Acker, and Richardson *went to the home of Snider and Carter to kill Snider*. The motive was the conflict between Snider and Jim Acker's sister. . ." Hannon, 638 So. 2d at 44. (e.s.).

Hannon's current challenges to the State's theory of felony murder, with burglary as the underlying felony, were not raised at trial, were not raised on direct appeal, and are now procedurally barred. See Breedlove v. Singletary, 595 So. 2d 8, 10 (Fla. 1992) ("Habeas corpus is not a second appeal and cannot be used to litigate or relitigate issues which could have been . . . or were raised on direct appeal."); Mills v. Dugger, 574 So. 2d 63, 65 (Fla. 1990) ("Habeas corpus is not to be used 'for obtaining additional appeals of issues which were raised, or should have been raised, on direct appeal or which were waived at trial or which could have been . . . raised in' prior postconviction filings.")

Retroactivity

Hannon's double homicide convictions were final several years before this Court issued the Delgado decision in 2000. This Court has already determined that Delgado is not retroactive. See Delgado v. State, 776 So. 2d 233, 241, 241 n.7 (Fla. 2000) (concluding that this Court's interpretation of the

burglary statute did not meet the second or third prongs of the analysis in Witt v. State, 387 So. 2d 922 (Fla. 1980)). In Jimenez v. State, 810 So. 2d 511, 512-513 (Fla. 2001), this Court squarely denied another capital defendant's request for postconviction relief, based on Delgado, and reiterated that Delgado was not retroactive.[2] As this Court explained in Jimenez,

> At the time of the murder, section 810.02(1), Florida Statutes (1991), defined burglary as "entering or remaining in a structure or a conveyance with the intent to commit an offense therein, unless the premises are at the time open to the public or the defendant is licensed or invited to enter or remain." On direct appeal Jimenez argued that the burglary was not proven because there was no proof of forced entry or that Minas refused entry or that she demanded that he leave the apartment. We held that "neither forced entry nor entry without consent are requisite elements of the burglary statute" and that circumstantial proof could establish that the occupant withdrew his or her consent. Jimenez, 703 So. 2d at 441. In affirming Jimenez's convictions and sentences, we concluded that the trier of fact could reasonably have found beyond a reasonable doubt that Minas withdrew consent for

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[2]In response to Delgado, the Legislature declared that Delgado was decided contrary to legislative intent and that this Court's prior interpretations of the burglary statute were in harmony with the legislative intent. See Ch. 2001-58, §1, 2001 Fla. Sess. Law. Serv. 282, 283 (West). Thus, Delgado was not in effect at the time of Hannon's convictions, was not in effect at the time of Hannon's direct appeal, and was promptly repudiated at the Legislature. The State is not unmindful of State v. Ruiz, 863 So. 2d 1205, 1212 (Fla. 2003), in which this Court held that section 1 of chapter 2001-58, which is codified at § 810.015, Florida Statutes (2002), is not applicable to conduct that occurred prior to February 1, 2000. However, in Ruiz, a direct appeal/pipeline case, this Court addressed, and did not alter, the clearly dispositive retroactivity holding in Jimenez.

Jimenez to remain in her home when he brutally beat and stabbed her numerous times. Id.

In Delgado v. State, 776 So. 2d 233, 240 (Fla. 2000), this Court receded from Jimenez and held:

> In section 775.021(1), Florida Statutes (1997), the Legislature mandated that courts use the following rule of construction:
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> The provisions of this [criminal] code and offenses defined by other statutes shall be strictly construed; when the language is susceptible of differing constructions, it shall be construed most favorably to the accused.

Applying this principle to the present case, the most favorable interpretation of Florida's burglary statute is to hold that the "remaining in" language applies only in situations where the remaining in was done surreptitiously. This interpretation is consistent with the original intention of the burglary statute. In the context of an occupied dwelling, burglary was not intended to cover the situation where an invited guest turns criminal or violent. Rather, burglary was intended to criminalize the conduct of a suspect who terrorizes, shocks, or surprises the unknowing occupant.

Immediately after the release of this Court's opinion in Delgado, Jimenez filed an amended 3.850 motion for postconviction relief, presenting the issue of whether Delgado should apply retroactively. The circuit court denied 3.850 relief and Jimenez appealed.

We determine that Jimenez is not entitled to relief. His convictions were final prior to the release of our opinion in Delgado. Retroactivity is therefore determined by the criteria set forth in Witt v. State, 387 So. 2d 922 (Fla. 1980). In order for Delgado to have retroactive application, it must: (1) emanate either from this Court or the United States Supreme Court; (2) be constitutional in nature; and

> (3) have fundamental significance. Id. at 929-30. We have determined that Delgado does not meet the second or third prongs of the Witt test; hence it is not subject to retroactive application. See Delgado, 776 So. 2d at 241. Moreover, in its most recent session, the Legislature declared that Delgado was decided contrary to legislative intent and that this Court's interpretation of the burglary statute in Jimenez's direct appeal was in harmony with legislative intent. Ch. 2001-58, § 1, 2001 Fla. Sess. Law Serv. 282, 283 (West). Based on the foregoing, we affirm the decision of the circuit court denying Jimenez's rule 3.850 motion.
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> Jimenez, 810 So. 2d at 512-513.

Inasmuch as Delgado is not retroactive in a postconviction proceeding, as Jimenez clearly held, then Hannon's Delgado claim cannot be deemed to now constitute "fundamental error" in this habeas proceeding. "Habeas corpus petitions are not to be used for additional appeals on questions which could have been, should have been, or were raised on appeal or in a rule 3.850 motion, or on matters that were not objected to at trial." Hardwick v. Dugger, 648 So. 2d 100, 105 (Fla. 1994). Hannon's current challenges to his 1991 indictment were not raised at trial, were not raised on direct appeal, and were not raised in his postconviction motion. Hannon's current habeas claims, based on the indictment which charged premeditated murder and this Court's decision in Delgado, are procedurally barred, not retroactive, and without merit.

Merits

On direct appeal, this Court found that "Hannon, Acker, and Richardson went to the home of Snider and Carter to kill Snider." Hannon, 638 So. 2d at 44. As noted in Delgado, "'burglary' means *entering or remaining in* a structure or a conveyance with the intent to commit an offense therein . . ." Thus, even if Delgado arguably applied, which the State does not concede and specifically disputes,[3] the actions of Hannon and his confederates on January 10, 1991, would not qualify for any relief under Delgado, especially in light of the following factors. First, as this Court recognized on direct appeal, Hannon and his cohorts "went to the home of Snider and Carter to kill Snider." Hannon, 638 So. 2d at 44. Thus, the fact that Hannon and his cohorts entered the victims' apartment "with the intent to commit an offense therein" is beyond dispute. Second, when Hannon knocked on the front door, Acker stood "off to the side," thus, using a deliberate ruse to gain entry into the victims' apartment. And, finally, Hannon deliberately concealed

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[3]At the time of the defendant's crimes and direct appeal, the "remaining in" portion of the burglary statute could be proved by showing commission of a crime following consensual entry because the victim, upon learning of the crime, "implicitly withdraws consent to the perpetrator's remaining in the premises." See Ray v. State, 522 So. 2d 963, 966 (Fla. 3d DCA 1988); Routly v. State, 440 So. 2d 1257 (Fla. 1983); see also, Jimenez v. State, 703 So. 2d 437, 438 (Fla. 1997).

his deadly weapons from Snider's view in gaining entry into the apartment. Even in those direct appeal cases which fell within the Delgado window period, defendants who gained entry into the victims' home based on subterfuge were not entitled to any relief under Delgado. See Alvarez v. State, 768 So. 2d 1224, 1225 (Fla. 3d DCA 2000) (collecting cases). Thus, even if the burglary statute, as interpreted in Delgado in 2000, arguably was intended to criminalize *only* "the conduct of a suspect who terrorizes, shocks, or surprises the unknowing occupant," and even if this criteria applied retroactively, which it does not, the victims in this case were unquestionably "terrorized, shocked, or surprised" when Brandon Snider opened the front door in response to Hannon's knock and Jim Acker, who had been standing outside the doorway and "off to the side," stepped to the forefront, entered the apartment and stabbed Snider repeatedly so that Snider's "guts" were "hanging out," and Hannon slit Snider's throat from ear to ear. Moreover, Hannon does not remotely suggest that Robert Carter consented to any entry into his apartment or bedroom, where the unarmed Carter tried, in vain, to hide as he was mercilessly gunned down by Hannon, who fired six bullets at point blank range directly into Carter's torso. Thus, Petitioner's current claims are procedurally barred, not retroactive, and meritless.

Lastly, Hannon alleges that his appellate counsel was ineffective for failing to argue that the indictment failed to charge felony murder as well as premeditated murder. First, Hannon does not claim that this issue was properly preserved. Thus, appellate counsel cannot be ineffective for failing to raise an unpreserved claim. See Rutherford v. Moore, 774 So. 2d 637, 648 (Fla. 2000). In the absence of fundamental error, appellate counsel cannot be deemed ineffective for failing to raise an unpreserved claim. Hamilton v. State, 875 So. 2d 586 (Fla. 2004); Thomas v. Wainwright, 486 So. 2d 574, 575 (Fla. 1986)("Habeas corpus is not available for the purpose of reviewing arguments that could have been raised but were not raised by timely objection at trial and argument on appeal.") Furthermore, appellate counsel cannot be deemed ineffective in failing to anticipate this Court's decision in Delgado, a decision which is not retroactive and does not apply to this case. See, State v. Lewis, 838 So. 2d 1102, 1122 (Fla. 2002) (Appellate counsel is not considered ineffective for failing to anticipate a change in law.)

Moreover, Hannon's underlying complaint has no merit. Appellate counsel cannot be deemed ineffective for failing to raise a meritless claim. Kokal v. Dugger, 718 So. 2d 138, 142 (Fla. 1998). Thus, where this Court has repeatedly rejected

similar claims, no relief is warranted. In fact, in Freeman v. State, 761 So. 2d 1055, 1071 (Fla. 2000), this Court rejected a capital defendant's similar claim of ineffective assistance of appellate counsel and explained:

> Next, Freeman contends appellate counsel was ineffective for failing to argue that the trial court erred in denying the pretrial motion to dismiss the indictment because it did not specifically charge felony murder and erred in denying motions requesting special jury instructions. Appellate counsel cannot be ineffective for failing to raise these issues because the claims are without merit. First, Freeman argues the indictment should have been dropped because it only charged him with premeditated murder, not felony murder. This argument was rejected by this Court in Gudinas v. State, 693 So. 2d 953, 964 (Fla. 1997) ("We have repeatedly rejected claims that it is error for a trial court to allow the State to pursue a felony murder theory when the indictment gave no notice of the theory.")...

Freeman, 761 So. 2d at 1071.

Because appellate counsel "cannot be deemed ineffective for failing to raise non-meritorious claims on appeal, or claims that do not amount to fundamental error," Happ v. Moore, 784 So. 2d 1091, 1095 (Fla. 2001), Hannon's subsidiary claim of ineffective assistance of appellate counsel must fail.

CLAIM II

THE PETITIONER/DEFENDANT, PATRICK HANNON, HAS NOT DEMONSTRATED ANY ENTITLEMENT TO EXTRAORDINARY HABEAS CORPUS RELIEF BASED ON APPRENDI AND RING.

The purpose of a writ of habeas corpus is to inquire into the legality of a prisoner's present detention. Wright v. State, 857 So. 2d 861, 874 (Fla. 2003), citing McCrae v. Wainwright, 439 So. 2d 868 (Fla. 1983). Habeas corpus should not be used as a vehicle for presenting issues which should have been raised at trial and on direct appeal or in postconviction proceedings. Id.

Hannon's next habeas claim is based primarily on the United States Supreme Court's decision in Ring v. Arizona, 536 U.S. 584 (2002). Hannon does not assert his claim in terms of ineffective assistance of appellate counsel. Rather, he presents a substantive constitutional claim based on Ring. Hannon's request for habeas relief must be denied inasmuch as his current claim is not properly raised in the instant petition, does not apply retroactively, is procedurally barred, without merit and is inapplicable to Hannon's dual death sentences.

Jurisdiction

Petitioner is seeking relief from the trial court's jury

instructions and rulings. The exercise of habeas jurisdiction is very limited, and does not encompass Petitioner's request for review of this claim. Limiting the scope of this Court's original jurisdiction has become necessary due to the practical difficulties experienced by this Court when it has decided to expand such jurisdiction in the past. See Hall v. State, 541 So. 2d 1125 (Fla. 1989) (directing that, in the future, claims under the then recently decided case of Hitchcock v. Dugger, 481 U.S. 393 (1987), would not be cognizable in habeas proceedings, and should be presented in a Rule 3.850 motion); see also Harvard v. Singletary, 733 So. 2d 1020 (Fla. 1999) (recognizing that expansion of original jurisdiction to alleviate burden on trial courts has been "neither time-saving or efficient."). The right to habeas relief, "like any other constitutional right, is subject to certain reasonable limitations consistent with the full and fair exercise of the right." Haag v. State, 591 So. 2d 614, 616 (Fla. 1992). Habeas corpus is *not* a substitute for an appropriate motion for postconviction relief in the trial court, and is not "a means to circumvent the limitations provided in the rule for seeking collateral postconviction relief" in the original trial court.

The remedy of habeas corpus relief is in all events available only "in those limited circumstances where the

petitioner is not seeking to collaterally attack a final criminal judgment of conviction and sentence," or where the original sentencing court would not have jurisdiction to grant the collateral relief requested. Petitioner cannot meet those requirements. Further, Petitioner cannot "repackage" this petition and file it in the circuit court as a properly filed successive motion for postconviction relief. See Rule 3.851 (d)(2)(B). Consequently, Petitioner's request to expand this Court's original jurisdiction further is not proper and his claim must be dismissed.

Procedural Bar

None of the petitioner's current complaints were raised at trial and direct appeal. Therefore, they are procedurally barred. The claim that Florida's death penalty sentencing statute violates the Sixth Amendment right to a jury trial has been available since Petitioner's trial and sentencing, but was never asserted as a basis for relief. Since Hannon did not raise this claim at trial and on direct appeal, it is now procedurally barred. See Parker v. State, 790 So. 2d 1033, 1034-35 (Fla. 2001) (denying claim under Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000) as not properly preserved for appellate review); Finney v. State, 831 So. 2d 651, 657 (Fla. 2002) (ruling that because Finney could

have asserted that Florida's capital sentencing statute was unconstitutional on direct appeal his claim was procedurally barred on post-conviction motion); Floyd v. State, 808 So. 2d 175 (Fla. 2002) (claim that Florida's death penalty statute is unconstitutional is procedurally barred because it should have been raised on direct appeal); Arbelaez v. State, 775 So. 2d 909, 919 (Fla. 2000) (challenges to the constitutionality of Florida's death penalty scheme should be raised on direct appeal); Swafford v. State, 828 So. 2d 966 (Fla. 2002) (observing that habeas proceedings cannot be used for second appeals).

Hannon cannot excuse his failure to raise his claim on direct appeal on the fact Ring was not decided until several years after his conviction and sentence became final. The issue addressed in Ring is by no means new or novel. That claim, or a variation of it, has been known since before the United States Supreme Court issued its decision in Proffitt v. Florida, 428 U.S. 242 (1976), holding that jury sentencing is not constitutionally required. Hannon certainly could have pursued a Sixth Amendment challenge to Florida's capital sentencing structure on direct appeal. Yet, he failed to do so.

In Turner v. Crosby, 339 F.3d 1247 (11th Cir. 2003), the Eleventh Circuit ruled that Turner's Ring claim was procedurally

barred because Turner never claimed, in state court, that Florida's capital sentencing structure violated his Sixth Amendment right to a trial by jury. The Court rejected any notion that claims, like the one raised by Hannon here, could not have been raised before the Supreme Court handed down the decision in Ring.

The Court observed that Florida's capital sentencing structure has been under repeated constitutional attack in the twenty years before the Court adjudicated Turner's appeal. Accordingly, the Court ruled that, though Ring was not decided until several years subsequent to the conclusion of Turner's state postconviction proceedings, the issue was not so new and novel that the legal basis for such a claim could not have been raised in prior state court proceedings. Turner at 1282. The basis for any Sixth Amendment attack on Florida's capital sentencing procedures has always been available to Hannon. As Hannon failed to raise this claim at trial and on appeal, he is procedurally barred from raising this claim now.

Like his Ring claim, Hannon did not previously assert, at trial and direct appeal, any claim that his indictment allegedly failed to include all of the elements of capital murder. Accordingly, this claim is also procedurally barred. See Smith v. State, 445 So. 2d 323, 325 (Fla. 1983) (holding that Smith's

claim that he was deprived of due process by the state's failure to provide notice of the aggravating circumstances upon which it intended to rely was procedurally barred in postconviction proceeding).

Retroactivity

This Court has consistently rejected the proposition that Ring applies to invalidate Florida's capital sentencing structure when the jury has recommended a sentence of death. Assuming, *arguendo*, that Ring has any effect on Florida's capital sentencing structure, Ring is not applicable retroactively to Hannon's case. In Schriro v. Summerlin, 124 S.Ct. 2519 (2004), the United States Supreme Court recently held that its prior decision in Ring does not apply retroactively. Therefore, Hannon is not entitled to collateral relief based on the decision in Ring. See also, Witt v. State, 387 So. 2d 922, 929-30 (Fla. 1980).

On June 26, 2000, the United States Supreme Court decided the case of Apprendi v. New Jersey, 530 U.S. 466 (2000). In Apprendi, the court held that a criminal defendant is entitled to a jury determination of any fact, other than the existence of a prior conviction, that increases the penalty for a crime beyond the statutory maximum. In June of 2002, the United States Supreme Court issued its decision in Ring v. Arizona, 536

U.S. 584 (2002). In Ring, the Court ruled that its decision in Apprendi required a jury, rather than a judge, to find the existence of an aggravating factor necessary, under Arizona's capital sentencing scheme, to make a defendant eligible for the death penalty.

Two years to the day after it decided Ring, the United States Supreme Court ruled directly upon the issue of whether Ring was to be applied retroactively to affect sentences already final at the time Ring was decided. In Schriro v. Summerlin, 124 S.Ct. 2519 (2004), the United States Supreme Court ruled that Ring announced a new procedural rule that does not apply retroactively to cases already final on direct review.

Prior to its decision in Summerlin, the United States Supreme Court, subordinate federal appellate courts, and many state courts analyzed retroactivity of new rules of criminal procedure in accord with a test outlined by the United States Supreme Court in Teague v. Lane, 489 U.S. 288, 301 (1989). In Teague, the Court announced that new constitutional rules of procedure will not be applicable to cases which have become final before the new rules are announced, unless they fall within one of two exceptions to the general rule of non-retroactivity.

First, a new rule may 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. Second, new rules should be applied retroactively if they constitute "watershed rules of criminal procedure." Watershed rules are those in which (1) a failure to adopt the new rule creates an impermissibly large risk that the innocent will be convicted, and (2) the procedure at issue implicates the fundamental fairness of the trial. This second exception to the general rule of non-retroactivity is limited in scope to "those new procedures without which the likelihood of an accurate conviction is seriously diminished." Teague at 311-313.

In Summerlin, the Court clarified the distinction between new substantive rules of law and new rules of criminal procedure. The Court observed that substantive rules include decisions that narrow the scope of a criminal statute, as well as constitutional determinations that "place particular conduct or persons covered by the statute beyond the State's power to punish." Summerlin, 124 S.Ct. at 2522. These substantive rules are applied retroactively because they "necessarily carry a significant risk that a defendant stands convicted of an act that the law does not make criminal or faces an punishment the law cannot impose []." Id. at 2522-2523 quoting from Bousley v. United States, 523 U.S. 614, 620 (1998), and Davis v. United

States, 417 U.S. 333, 346 (1974).

On the other hand, procedural rules regulate only the manner of determining a defendant's culpability or, in this case, the permissible manner in which a defendant's eligibility for the death penalty is determined. Summerlin at 2253. In contrast to substantive rules, procedural rules are not applied retroactively unless they constitute "watershed rules of criminal procedure" implicating the fundamental fairness and accuracy of criminal proceedings. Teague v. Lane, 489 U.S. 288, 311 (Fla. 1989); Saffle v. Parks, 494 U.S. 484, 495 (1990).

In Summerlin, the Court reiterated that such rules do not include rules that are "fundamental" in some abstract sense. Rather, watershed rules of criminal procedure are only those "without which the likelihood of an accurate conviction is seriously diminished." The Court noted that this "class of rules is extremely narrow" and it is "unlikely any has yet to emerge." Summerlin at 2523, Tyler v. Cain, 533 U.S. 656, 667, n.7 (2001), quoting Sawyer v. Smith, 497 U.S. 227, 243 (1990).

Applying Teague, the Court determined, first, that Ring did not announce a new rule of substantive law because it did not alter the range of conduct that subjected an Arizona defendant to the death penalty nor did it alter the elements of the

offense for which both Ring and Summerlin were convicted. Rather, the Court concluded Ring announced a new rule of criminal procedure because it altered only the range of permissible methods for determining whether a defendant's conduct is punishable by death. The Court noted that rules that "allocate decisionmaking authority in this fashion are prototypical procedural rules..." Summerlin at 2523. The Court then rejected Summerlin's argument that Ring's new rule of criminal procedure fit into the small set of rules that constitute "watershed rules of criminal procedure". The Court ruled that because it could not conclude that judicial factfinding seriously diminishes accuracy or creates an impermissibly large risk of injustice, Ring's new rule of procedure would not be applied retroactively to cases already final when Ring was decided. Summerlin, 124 S.Ct. at 2525-2526.

This Court has not yet adopted the test outlined in Teague v. Lane, *supra*, to examine the retroactive application of changes in federal constitutional rules of criminal procedure. The State respectfully submits that this Court should formally adopt Teague in examining the retroactive application of new rules of constitutional procedure. Given the similarity of purpose behind federal habeas review and state collateral proceedings, application of Teague promotes consistency and

uniformity during collateral review while still protecting the finality of those convictions arising from proceedings that comported with constitutional norms at the time of trial. See Teague, 489 U.S. 309-311. See also, Windom v. State, 2004 Fla. LEXIS 664 (Fla. 2004), Cantero, J. (specially concurring) (urging this Court to answer questions about the retroactivity of decisions of the United States Supreme Court based on that Court's own standards, as articulated in Teague).

Currently, retroactivity in Florida is determined by subjecting a change in the law to the three part test outlined in Witt v. State, 387 So. 2d 922 (Fla. 1980). The Florida Supreme Court held in Witt that a change in decisional law will not be applied retroactively unless the change (1) emanates from the state supreme court or the United States Supreme Court, (2) is constitutional in nature, and (3) constitutes a development of fundamental significance. Even if this Court adheres to the dictates of Witt v. State, 387 So. 2d 922 (Fla. 1980), Hannon is entitled to no relief.

Because the new rule at issue here, undisputedly, satisfies the first two retroactivity factors of Witt, it is the third factor upon which this Court's decision must rest. This Court must look only to whether the rule of criminal procedure outlined in Ring constitutes a development of fundamental

significance.

In New v. State, 807 So. 2d 52 (Fla. 2001), this Court held that retroactive application is warranted only if it "so drastically alters the substantive or procedural underpinnings of a final conviction and sentence that individual instances of obvious injustice would otherwise exist." Id. at 53. This Court has consistently refused to apply Ring to invalidate Florida's capital sentencing scheme, and logic dictates that Ring did not drastically alter the capital sentencing landscape in Florida, especially where a jury has recommended death. Even so, the "obvious injustice" language in New supports a conclusion that, like the Court in Summerlin, this Court must consider retroactivity in terms of whether the new development affects the fundamental fairness of the proceedings or casts serious doubt on the veracity or integrity of the defendant's trial.

Apart from the clear resolution in Summerlin, the decision in Ring does neither. Hannon offers no support for the conclusion that a jury sitting alone, without the considered judgment of an impartial trial judge sitting as a co-sentencer, would increase the likelihood of a fairer or more accurate sentencing proceeding. Indeed, the judicial role in Florida provides defendants with a second opportunity to secure a life

sentence, enhances appellate review, and provides a reasoned basis for a proportionality analysis. Hannon has failed to demonstrate that Ring should be applied retroactively to invalidate his sentence.

Merits

Hannon was convicted of two counts of first-degree murder and the jury unanimously recommended a death sentence on each count. Following the jury's 12-0 recommendations, the trial court imposed the death penalty on each murder conviction. The trial court found the following aggravating circumstances applicable to both murders: (1) previous conviction of a violent felony (the contemporaneous killings); (2) the murders were committed during the commission of a burglary; and (3) the murders were heinous, atrocious, or cruel. §921.141 (5)(a), (d), and (h), Fla. Stat. (1991). As to the second victim, Robert Carter, the trial court found the additional aggravating factor that the murder was committed to avoid or prevent a lawful arrest. §921.141 (5)(e), Fla. Stat. (1991). Hannon v. State, 638 So. 2d 39, 41 (Fla. 1994). On direct appeal, Hannon challenged three of the aggravating factors (HAC, avoid arrest and prior violent felony), and this Court upheld all of these aggravating factors. Hannon, 638 So. 2d at 43-44.

Since this Court decided Bottoson v. Moore, 833 So. 2d 693

(Fla. 2002), and King v. Moore, 831 So. 2d 143 (Fla. 2002), it has repeatedly and consistently denied relief requested under Ring, both on direct review cases and on collateral challenges. See e.g. 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); Spencer v. State, 842 So. 2d 52 (Fla. 2003); Sochor v. State, 883 So. 2d 766 (Fla. 2004); Butler v. State, 842 So. 2d 817 (Fla. 2003); Lawrence v. State, 846 So. 2d 440 (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.")

The jury in this case unanimously recommended a sentence of death on each count and the Petitioner's aggravating circumstances take this case outside of Ring. See e.g. Doorbal v. State, 837 So. 2d 940, 963 (Fla.) (stating that prior violent felony aggravator based on contemporaneous crimes charged by indictment and on which defendant was found guilty by unanimous jury "clearly satisfies the mandates of the United States and Florida Constitutions"), cert. denied, 539 U.S. 962, 156 L.Ed.2d

663, 123 S.Ct. 2647 (2003); Duest v. State, 855 So. 2d 33 (Fla. 2003); Belcher v. State, 851 So. 2d 678, 685 (Fla. 2003) (rejecting Ring claim where two of the aggravating circumstances found by the trial judge were defendant's prior violent felony and that the murder was committed in the course of a felony); Jones v. State, 855 So. 2d 611 (Fla. 2003) (rejecting Jones' Ring claim on the ground that "one of the aggravators found was that Jones had a prior violent felony conviction, a factor which under Apprendi and Ring need not be found by the jury."); Lugo v. State, 845 So. 2d 74 (Fla. 2003) (noting rejection of Ring claims in cases involving the existence of prior violent felonies); Blackwelder v. State, 851 So. 2d 650 (Fla. 2003) (rejecting Ring challenge when Blackwelder had been found by the court to have been previously convicted of a violent felony); Johnston v. State, 863 So. 2d 271, 286 (Fla. 2003) (holding that "prior violent conviction [aggravator] alone" satisfies the mandate of Ring), cert. denied, 158 L.Ed.2d 372, 72 U.S.L.W. 3598(2004); Anderson v. State, 863 So. 2d 169, 189 (Fla. 2003) (relying in part on unanimous death recommendation and prior violent felony conviction to reject Ring claim), cert. denied, 158 L.Ed.2d 363, 72 U.S.L.W. 3598 (2004); Douglas v. State, 878 So. 2d 1246, 1264 (Fla. 2004).

Hannon's procedurally barred challenge to the alleged

failure to include all of the "elements" of capital murder within the indictment is likewise without merit. Both before and after the decision in Ring issued, this Court ruled that, in Florida, the statutory maximum upon conviction for first degree murder is death. See e.g. Mills v. Moore, 786 So. 2d 532 (Fla. 2001) (ruling that death is the statutory maximum sentence upon conviction for murder); Porter v. Crosby, 840 So. 2d 981, 986 (Fla. 2003) (observing, in scrutinizing Porter's 1985 murder conviction, that "we have repeatedly held that the maximum penalty under the statute is death"). This Court has specifically addressed the issue of whether, after Ring, the State is required to include within the indictment the aggravating factors it intends to rely on in seeking the death penalty. Additionally, the Court has considered whether these aggravating factors must be submitted to the jury and found unanimously beyond a reasonable doubt. In cases decided well after Ring, this Court has uniformly rejected the procedurally barred claims now raised by Hannon.

In Kormondy v. State, 845 So. 2d 41 (Fla.), cert. denied, 124 S.Ct. 392 (2003), this Court ruled that the absence of notice of the aggravating factors the State will present to the jury and the absence of specific jury findings of any aggravating circumstances does not violate the dictates of Ring.

This Court also held that a special verdict form indicating the aggravating factors found by the jury is also not required by the decision in Ring. Accord, Fennie v. State, 855 So. 2d 597 (Fla. 2003) (rejecting Fennie's claim that Florida's death penalty statute was unconstitutional because it fails to require aggravators to be charged in the indictment, submitted to a jury, and proven beyond a reasonable doubt); Blackwelder v. State, 851 So. 2d 650 (Fla. 2003) (specifically rejecting Blackwelder's argument that aggravating circumstances must be alleged in the indictment, submitted to the jury, and individually found by a unanimous jury verdict).

This Court has consistently rejected the notion that due process requires the State to provide notice as to the aggravating factors it intends to rely upon by alleging them in the indictment. In Vining v. State, 637 So. 2d 362 (Fla. 1994), this Court noted that "[t]he aggravating factors to be considered in determining the propriety of a death sentence are limited to those set out in section 921.141(5), Florida Statutes (1987). Therefore, there is no reason to require the State to notify defendants of the aggravating factors that it intends to prove." Vining, 637 So. 2d at 928. See also Lynch v. State, 841 So. 2d 362 (Fla. 2003) (rejecting Lynch's claim that Florida's death penalty scheme is unconstitutional because it

fails to provide notice as to aggravating circumstances); Kormondy v. State, 845 So. 2d 41 (Fla. 2003) (rejecting Kormondy's claim that the absence of any notice of the aggravating circumstances that the State will present to the jury and the absence of specific jury findings of any aggravating circumstances offends due process and the proscription against cruel and unusual punishment).

Most recently, in Hernandez-Alberto v. State, 29 Fla. L. Weekly S521 (Fla. Sept. 23, 2004), a *direct appeal* case, this Court undeniably confirmed that the multiple Ring-based claims which are now raised by Hannon are not only procedurally barred, but they are also without merit.

In Hernandez-Alberto, this Court set forth the following summary of the defendant's Ring-based challenges on *direct appeal*, and emphasized that the claims were uniformly without merit:

> Lastly, Hernandez-Alberto asserts that Florida's capital sentencing statute is unconstitutional. We have repeatedly rejected such challenges. See, e.g., Bottoson v. Moore, 833 So. 2d 693 (Fla.), cert. denied, 537 U.S. 1070, 154 L. Ed. 2d 564, 123 S. Ct. 662 (2002). Hernandez-Alberto specifically argues that Florida's capital sentencing scheme is unconstitutional because (1) the State is not required to provide notice of the aggravating circumstances it intends to establish at the penalty phase; (2) the jury is not required to make any specific findings regarding the existence of aggravating circumstances,

> or even of a defendant's eligibility for the death penalty; (3) there is no requirement of jury unanimity for finding individual aggravating circumstances or for making a recommendation of death; and (4) the State is not required to prove the appropriateness of the death penalty. We have rejected each of these assertions. See, e.g., Porter v. Crosby, 840 So. 2d 981, 986 (Fla. 2003) (rejecting argument that aggravating circumstances must be alleged in the indictment, submitted to the jury, and individually found by a unanimous jury verdict); Kormondy v. State, 845 So. 2d 41, 54 (Fla.) ("While Ring makes Apprendi applicable to death penalty cases, 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, 157 L. Ed. 2d 283, 124 S. Ct. 392 (2003). Additionally, the assertion that the State does not have to prove the appropriateness of the death penalty is simply without merit. In a criminal prosecution the State always has the burden of proof, and in the sentencing context the State bears that burden by proving the existence of each aggravating circumstance beyond a reasonable doubt. See Clark v. State, 443 So. 2d 973, 976 (Fla. 1983) ("The burden is upon the state in the sentencing portion of a capital felony trial to prove every aggravating circumstance beyond a reasonable doubt."). Therefore, this claim is without merit.
>
> Hernandez-Alberto v. State, 2004 Fla. LEXIS 1537, 30-32 (Fla. 2004).

Finally, in denying relief on another capital defendant's habeas claim that he was ostensibly entitled to relief based on a hybrid claim under Ring and Caldwell v. Mississippi, 472 U.S. 320, 86 L.Ed.2d 231, 105 S.Ct. 2633 (1985), this Court in Robinson v. State, 865 So. 2d 1259, 1266 (Fla. 2004) recently stated:

> Second, we address Robinson's claim that he is

> entitled to relief because Florida's standard jury instructions in capital cases violate Caldwell v. Mississippi, 472 U.S. 320, 86 L. Ed. 2d 231, 105 S. Ct. 2633 (1985). Specifically, Robinson claims that Florida's standard jury instructions in capital cases do not comply with Caldwell, in light of the Ring opinion, because Ring requires the jury to play a vital role in sentencing and the jury instructions currently diminish that role. Caldwell and Ring involve independent concerns. Ring's focus is on jury findings that render a defendant eligible for the death penalty, while Caldwell's focus as applied in this state is on the jury's role in the decision to recommend a sentence for death-eligible defendants. Therefore, Ring does not require that we reconsider the Caldwell issue raised in this case. Notwithstanding the addition of the Ring argument to the Caldwell claim, Robinson has not presented any new law or fact in this habeas petition that warrants a reconsideration of our previous ruling in this case that no Caldwell violations occurred in this case. See Robinson, 574 So. 2d at 113. Therefore, we deny habeas relief on this claim.
>
> Robinson, 865 So. 2d at 1266.

Hannon's current habeas claims are not properly raised in the instant petition, do not apply retroactively, are procedurally barred, and are also without merit. Therefore, the instant petition should be denied.

CONCLUSION

Petitioner's habeas claims are not properly raised in the instant petition, do not apply retroactively, are procedurally barred, and without merit. The instant petition should be denied.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to Suzanne Myers Keffer, Assistant CCRC, Capital Collateral Regional Counsel-South, 101 N.E. 3rd Avenue, Suite 400, Ft. Lauderdale, Florida 33301, and to C. Marie King, Assistant State Attorney, P.O. Box 5028, Clearwater, Florida 33758-5028, this 22nd day of November, 2004.

CERTIFICATE OF FONT COMPLIANCE

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.
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