IN THE SUPREME COURT OF FLORIDA

OBA CHANDLER,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

_____/

CASE NO. SC11-2055
L.T. No. CRC 92-17438 CFANO

DEATH WARRANT SIGNED
EXECUTION SCHEDULED
November 15, 2011, 4:00 p.m.

ON APPEAL FROM THE CIRCUIT COURT
OF THE SIXTH JUDICIAL CIRCUIT,
IN AND FOR PINELLAS COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

Citations to the record in this brief will be designated as follows: The direct appeal record will be cited as "TR" with the appropriate volume and page numbers [TR V#/page#] and the original postconviction record will be cited as "PCR" with the appropriate volume and page numbers [PCR V#/page#]. The record from this successive rule 3.851 appeal will be cited as "SPCR" with the appropriate volume and page numbers [SPCR V#/page#].

STATEMENT ON ORAL ARGUMENT

Appellee submits that oral argument is not necessary for appellate review of the instant cause. The decisional process will not be significantly aided by oral argument as the only issues presented in the instant brief are procedurally barred successive postconviction claims and this case can be decided on the record, briefs, and the case law presented therein.

STATEMENT OF THE CASE AND FACTS

(i) Course of the Proceedings and Disposition Below

On November 10, 1992, Oba Chandler was indicted for the first degree murders of Joan, Michelle and Christe Rogers. He pled not guilty, and his trial was held on September 19-29, 1994, more than five years after the murders occurred, before the Honorable Susan Schaeffer, Circuit Court Judge. The jury, which was selected in Orange County, Florida, and brought to and sequestered in Pinellas County, Florida for the trial, returned three verdicts of guilty as charged on September 29, 1994. (TR V101/T2710)

At the penalty phase Chandler waived the presentation of any mitigating evidence. Defense counsel put on the record that he would have called a mental health expert, as well as family members. Chandler confirmed that he did not wish to present any mitigating evidence. (TR V102/T2741-49) The State presented the judgment and sentences for two prior armed robberies. (TR V102/T2765-66) The State also presented the armed robbery victims, Peggy Harrington and Robert Plemmons, who testified as to the underlying facts of the prior armed robberies. Peggy Harrington testified that while she was at a jeweler's remount show Chandler robbed her and a partner at gunpoint of $750,000 in jewelry. (TR V102/T2667-75) FDLE agent John Halliday

testified that the gun, as well as some of the jewelry, was recovered during the search of Chandler's house on September 25, 1992. (TR V102/T2781)

Robert Plemmons testified that Chandler and another man kicked in the front door of his home in Holly Hill. Chandler hit him in the head with a pistol. Chandler took Plemmons' girlfriend in the bedroom where she was tied up on the bed and stripped from the waist down. (TR V102/T2792) Chandler presented some documentary evidence as mitigating evidence, including college credits. On September 30, 1994, the jury recommended death for each murder by a vote of 12-0. (TR V102/T2827-28) The court followed the recommendation and entered an extensive sentencing order. In addition to the mitigation, which was largely rejected, the Court found the following in aggravation:

> A. AGGRAVATING FACTORS
>
> 1. The Defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.
>
> On January 12, 1977, the Defendant was convicted of the crime of robbery. The robbery was committed with a firearm.
>
> On July 23, 1993, the Defendant was convicted of the crime of robbery. The robbery was committed with a firearm.
>
> On September 29, 1994, the Defendant was convicted of Three Counts of Murder in the First Degree.

Judgments and sentences were introduced as to each robbery. This Court personally adjudicated the defendant of each first degree murder on September 29, 1994.

The judgments and sentences, coupled with the testimony of the robbery victims, and the testimony in the murder trial proves beyond any doubt that as to each victim, the defendant has two prior convictions for crimes involving the use of violence -- the two previous robbery convictions, and two simultaneous convictions for first degree murder, which are capital felonies.

This aggravating factor has been proven beyond all reasonable doubt.

2. The capital felony was committed while the Defendant was engaged in the commission of, or attempting to commit, or escape after committing the crime of kidnapping.

The facts of this case suggest that each victim originally agreed to accompany the defendant on his boat. At some point the Defendant bound the hands of each victim, bound the feet of each victim, put tape around the mouth of each victim, put a rope around the neck of each victim, and tied the rope to a concrete block or other weighty object. Further the clothes of each victim were removed from the waist down.

Accordingly, while there may originally have been consent to be with the Defendant on his boat, to suggest this consent continued throughout the above acts would be preposterous. Clearly, at some point during the victims' ordeal, each was confined or imprisoned on the Defendant's boat against her will, without lawful authority. Further, the Defendant's acts of confinement or imprisonment were with the intent to either inflict bodily harm upon or to terrorize each victim.

The State has proved this aggravating factor beyond a reasonable doubt. See *Schwab v. State*, 636 So.2d 3 (Fla. 1994); *Sochor v. State*, 619 So. 2d 285 (Fla. 1993): *Bedford v. State*, 589 So.2d 245 (Fla. 1991).

3. The capital felony was committed for the purpose of avoiding or preventing a lawful arrest.

This Court is well aware of the Florida Supreme Court's admonition that where the victim is not a law enforcement officer, the supporting evidence must be very strong to show that "the sole or dominant motive for the murder was the elimination of the witness." *Preston v. State*, 607 So.2d 404 (Fla. 1992). However, The Supreme Court has upheld this circumstance when either the Defendant said it was his motive or when the circumstances surrounding the crime clearly show it was the motive.

There are several things in this case which suggest this was indeed the Defendant's motive:

a) The Defendant told a cell mate, when pictures of the murder victims being retrieved from the water were re-played on TV, that they couldn't pin this crime (the three murders) on him because "dead people can't talk." See *Kokal v. State*, 492 So.2d 1317 (Fla. 1986); *Bottoson v. State*, 443 So.2d 963 (Fla. 1983); *Johnson v. State*, 442 So.2d 185 (Fla. 1983).

b) These victims got in Chandler's boat at a boat ramp on the Courtney Campbell Causeway before dark, presumably to take pictures of the sunset. They were thrown or placed into the water from the boat a long way (a few miles off the St. Petersburg Pier) from where they got into the boat. There is little doubt that the Defendant's motive in luring these tourists aboard his boat was sexual in nature. Whatever sexual activity occurred with these three victims was easily accomplished once their hands were tied, their mouths taped, their clothes removed, and their feet tied together (then or later). Once the Defendant's sexual motives were realized, there was no reason not to take them back to the Causeway and drop them off, except for his fear of detection. Instead, he either strangled them with a rope and threw them overboard dead, or threw them over alive, still taped and bound at their hands and feet and with a concrete block or other heavy object tied to a rope around each neck. There was absolutely no reason to kill any of these women except he knew his sexual activities, his child abuse, and his kidnapping, would be reported, and under the circumstances -- three tourists, a mother and her two daughters -- he would be pursued until caught. If caught and convicted, he knew he would probably be sent to prison for life.

c) The Defendant's actions of tying a rope around each victim's neck to a concrete block or other heavy object before he threw her off the boat clearly showed he wanted each victim to sink, perhaps never to be found. This action alone is sufficient to show his motive was to eliminate these women period. As further proof that he expected them to sink, perhaps never to be found, was his going back out on the water the following morning. The Defendant denied this when he testified, but the evidence clearly proves the contrary. One can only assume he went back near the scene of his crime in the daylight to see if any bodies had surfaced. All Defendant's actions show he murdered these women to eliminate them as witnesses to whatever sexual acts, child abuse, and kidnapping had taken place.

d) In the "Williams Rule" rape case, the Defendant made various comments to a cell mate, his daughter, and his son-in-law, that suggested if Judy Blaire's roommate had come along, the victim(s) would not have survived to tell about the rape committed against her on the Defendant's boat. Defendant's comment to Blake Leslie that the only reason Judy Blaire was left alive was the fact that someone was waiting for her on the dock is particularly telling.

e) The totality of the matters raised in Paragraphs a - d above shows the Defendant's motive for the murder was to eliminate the witnesses to his kidnappings, his aggravated child abuse, and to whatever sexual conduct took place aboard his boat.

The State has proved this aggravating factor beyond a reasonable doubt.

4. The capital felony was especially heinous, atrocious, or cruel.

Was the murder of each victim a conscienceless or pitiless crime and unnecessarily torturous to the victim? If so, it clearly meets all constitutional standards -- those of the Florida Supreme Court and those of the United States Supreme Court. Both Courts agree that "strangulation when perpetrated upon a conscious victim involves foreknowledge of death, extreme anxiety and fear, and that this method of killing is one to which the factor of heinousness is applicable." *Sochor v. State*, 580 So.2d 595, 603 (Fla.

1991), *rev'd on other grounds*, *Sochor v. State*, 112 S.Ct. 2114 (1992).

Strangulation with a rope on board the Defendant's boat before each victim was thrown into the dark waters of Tampa Bay is the absolute best we can hope for for each victim. Imagine the fear and anxiety of each victim with her hands and feet tied, her mouth bound by tape and a rope around her neck being pulled tight until blessed unconsciousness takes over. That would be heinous, atrocious or cruel.

The medical examiner says each victim died of asphyxia, either from ligature strangulation or drowning, or a combination of the two. If you consider the concrete block tied to the rope around two victims' necks, and a concrete block or something heavier tied to a rope around the third victim's neck, consider that each victim was bound with ropes around her hands and feet, consider that each victim had her mouth well covered with duct tape and that each victim was nude from the waist down, the probable scenario is that this mother and her two daughters were lured aboard the Defendant's boat for a sunset cruise and picture-taking. But after sunset, they were taken against their will into the dark night on the then dark water aboard Chandler's boat. He tied their hands behind their backs to gain control. He taped their mouths to quiet their screams of terror. He removed their clothes and some form of sexual assault occurred to one or all of the victims. (It is ludicrous to think any of these women would voluntarily remove her clothes from the waist down.) After the sexual act was over, or perhaps before, he tied each victim's feet together to totally immobilize each victim. Then, Chandler put a rope put around each victim's neck, and tied the rope to a concrete block and then Chandler threw each victim, Joan, Michelle and Christe Rogers, overboard, alive, one by one, into the waters of Tampa Bay where each died from drowning or from the block causing the rope to tighten around her neck, or from a combination of drowning and strangulation. One victim was first; two watched. Imagine the fear. One victim was second; one watched. Imagine the horror. Finally the last victim, who had seen the other two disappear over the side was lifted up and thrown overboard. Imagine the terror. Chandler's torture of these three

> women was over. Their panic and fear in the water before their merciful deaths is unfathomable.
>
> There can be no doubt that whatever the scenario, the murder of each victim was especially heinous, atrocious, or cruel. Each murder was indeed consciousless, and pitiless, and was undoubtedly unnecessarily torturous to the victim. (NOTE: If anyone believes that no sexual activity occurred, or that it can't be considered, this is simply immaterial to the determination that each murder was conscienceless and pitiless and unnecessarily torturous to the victim. Take all reference to sexual activity out of the above scenario and it makes absolutely no difference to the finding of this factor having been proved beyond all reasonable doubt.)
>
> This aggravating factor has been proved beyond all reasonable doubt.

(TR V68/R11520-24) Based on the three 12-0 jury recommendations and the foregoing, Chandler was sentenced to death on November 4, 1994.

On direct appeal following his convictions and entry of death sentences, Chandler raised seven issues: 1) collateral crime evidence, 2) right to remain silent, 3) prior consistent statements, 4) prosecutor comments, 5) mitigation waiver, 6) rejection of childhood trauma and 7) HAC jury instruction. This Court affirmed the judgments and sentences of death in 1997, *Chandler v. State*, 702 So. 2d 186 (Fla. 1997) (*Chandler I*). Chandler filed a timely petition for certiorari review which was denied on April 20, 1998. *Chandler v. Florida*, 523 U.S. 1083 (1998).

Chandler then returned to state court filing a "shell" motion to vacate, with leave to amend, on June 18, 1998. (PCR V1/1-27) Thereafter, on May 30, 2000, Chandler filed a Sworn Amended Post Conviction Motion to Vacate and Set Aside Convictions, Judgments and Sentences raising seven (7) claims of ineffective assistance of counsel which the trial court denied after an evidentiary hearing. (PCR V3/415-75) An evidentiary hearing was held on November 2, 2000 before Judge Schaeffer and relief was denied in an order filed June 28, 2001. (PCR V11/2054-89).

Chandler appealed the circuit court's ruling denying postconviction relief. On March 13, 2002, during the pendency of the postconviction appeal, after Chandler filed his initial brief and before the State filed its answer brief, Chandler filed a Notice of Supplemental Authority, asking this Court to take judicial notice of *Apprendi v. New Jersey*, 530 U.S. 466 (2000), *Arizona v. Ring*, 200 P.3d 1139 (Ariz. 2001) and *Ring v. Arizona*, 534 U.S. 1103 (2002) asserting they "may be relevant to this case." No motion for supplemental briefing was filed. This Court affirmed the trial court's denial of relief on the Rule 3.850 Motion on April 17, 2003 and addressed the Notice of Supplemental Authority in a footnote. *Chandler v. State*, 848 So. 2d 1031 (Fla. 2003) (*Chandler II*). Rehearing was later denied on

June 24, 2003 and the mandate issued on July 24, 2003. Certiorari review was not sought on this decision.

Chandler then filed a petition for writ of habeas corpus in the United States Middle District Court on June 27, 2003, raising three issues. The State filed a response on November 6, 2003 and Chandler filed a reply to the State's response on December 5, 2003. The Honorable James S. Moody entered an order denying Chandler's request for an evidentiary hearing and summarily denying the habeas petition on February 8, 2006; judgment was entered on February 9, 2006. *Chandler v. Crosby*, 454 F. Supp. 2d 1137 (M.D. Fla. 2006). A certificate of appealability was granted solely with regard to Chandler's venue claim. *Chandler v. Crosby*, 2006 WL 1360922 (M.D. Fla. May 16, 2006). Review was sought in the Eleventh Circuit Court of Appeals. After briefing and oral argument, the denial of habeas relief was affirmed. *Chandler v. McDonough*, 471 F.3d 1360 (11th Cir. 2006). The United States Supreme Court denied Chandler's petition for writ of certiorari on May 14, 2007. *Chandler v. McDonough*, 550 U.S. 943 (2007).

On October 10, 2011, a death warrant was signed, scheduling Appellant's execution for November 15, 2011 at 4:00 p.m. Appellant filed his motion to vacate on October 17 (SPCR V1/50-74) and the State filed its response on October 18. (SPCR

V2/166-89) On October 24, 2011, the lower court entered an order summarily denying all relief. The court found the successive motion procedurally barred, untimely and meritless. (SPCR V2/191-210)

(ii) Statement of the Facts

(a) Trial

In the opinion affirming Chandler's convictions and sentences, this Court set forth the salient facts. *Chandler I*, at 189-191.

(b) Evidentiary Hearing

An evidentiary hearing was held November 2, 2000 in state court on the initial motion to vacate. (PCR V9/1646-1736; V10/1737-1893) The state trial court entered an exhaustive order making extensive factual findings and rejecting Chandler's claims. (PCR V11/2054-2072) These findings were affirmed on appeal by this Court. *Chandler II*, at 1035-46.

SUMMARY OF THE ARGUMENT

The court below properly denied Chandler's successive motion as untimely, procedurally barred, facially insufficient, and meritless. Chandler's argument relies extensively on the holdings in *Ring v. Arizona*, *infra.*, and *Evans v. McNeil*, *infra.*, yet he claims that he is only seeking to vindicate his right to a jury trial as it existed at the time of his trial and sentencing. His purported reliance on the law as it allegedly existed at the time of his trial in 1994 can only be construed as an admission that his current claim is procedurally barred, since he never pursued any claim based on that law at that time. Similarly, his attempt to avoid the application of retroactivity principles must be rejected, as he repeatedly relies on evolutionary refinements to the Sixth Amendment since the time his judgments and sentences became final.

Chandler was convicted of three counts of first degree murder, as well as having two prior convictions for robbery and the jury recommended death in each of the three murders by a vote of 12-0. *Ring* does not require a jury finding of an aggravating factor based on a prior conviction. Further, Florida's death penalty statute is constitutional. Relief was properly denied and no stay is warranted.

ARGUMENT

THE LOWER COURT PROPERLY SUMMARILY DENIED APPELLANT'S SIXTH AMENDMENT CLAIM BASED ON *RING V. ARIZONA* RAISED IN A SUCCESSIVE MOTION TO VACATE AS IT IS UNTIMELY, PROCEDURALLY BARRED, FACIALLY INSUFFICIENT AND UNAUTHORIZED UNDER RULES 3.851(D)(1), 3.851(D)(2) AND 3.851(E)(2), OF THE FLORIDA RULES OF CRIMINAL PROCEDURE. ADDITIONALLY, IT IS MERITLESS UNDER THIS COURT'S CONTROLLING PRECEDENT.

Appellant seeks review of the denial of his successive motion to vacate wherein he argued that Florida's capital sentencing statute is unconstitutional under *Ring v. Arizona*, 536 U.S. 584 (2002). In support of his position he relies upon the recent ruling of the United States District Court Judge, Jose E. Martinez, in *Evans v. McNeil*, case no. 08-14402-civ-Martinez (S.D. Fla. June 20, 2011) and this Court's holding in *State v. Harbaugh*, 754 So. 2d 691 (Fla. 2000). Additionally, recognizing the considerable procedural hurdles that he cannot overcome, Chandler asks this Court to disregard the "technicalities" that preclude consideration of this issue at this late date.

Chandler's plea to this Court to ignore the law should be disregarded. As this Court has observed "[t]he credibility of the criminal justice system depends upon both fairness and finality." *Johnson v. State*, 536 So. 2d 1009, 1011 (Fla. 1988). The United States Supreme Court has never suggested that procedural bars must yield to the interests of justice, except

perhaps in the most compelling case of actual innocence. See, *House v. Bell*, 547 U.S. 518, 522 (2006) Chandler makes no attempt to assert that he is innocent of these three heinous murders or the death penalties that were imposed. See, *Sochor v. State*, 883 So. 2d 766, 788 (Fla. 2004) (rejecting a claim of death penalty innocence because this Court had rejected the defendant's attacks on the aggravators on direct appeal); *Allen v. State*, 854 So. 2d 1255, 1258 n. 5 (Fla. 2003) (holding that innocence of death penalty claim lacks merit because defendant did not allege that all the aggravating circumstances supporting his death sentence were invalid, and because this Court had already conducted a proportionality review on direct appeal).

Notably, in *Schriro v. Summerlin*, 542 U.S. 348, 358 (2004), the Supreme Court emphasized the importance of applying procedural bars to defendants who urge they are entitled to resentencing under *Ring*:

> The right to jury trial is fundamental to our system of criminal procedure, and States are bound to enforce the Sixth Amendment's guarantees as we interpret them. But it does not follow that, when a criminal defendant has had a full trial and one round of appeals in which the State faithfully applied the Constitution as we understood it at the time, he may nevertheless continue to litigate his claims indefinitely in hopes that we will one day have a change of heart. *Ring* announced a new procedural rule that does not apply retroactively to cases already final on direct review.

Id. at 358.

The lower court properly followed the law and denied the claim. This Court must also decline Appellant's invitation to ignore the law and affirm the summary denial of the instant successive motion to vacate as procedurally barred, untimely, unauthorized under the rule and meritless.[1] The expressed finding by this Court of a procedural bar is important so that the federal courts who will surely be asked to consider Chandler's claims prior to the scheduled execution will be able to discern the parameters of their federal habeas review. See, *Cullen v. Pinholster*, 131 S. Ct. 1388, 1401 (2011) (finding that §2254(d)(1) limits review to claims adjudicated on the merits in State court proceedings to ensure that federal courts sitting in habeas are not an alternative forum for trying facts and issues which a prisoner made insufficient effort to pursue in state proceedings.) The State urges this Court to make it clear that denial of Chandler's Sixth Amendment claims rests upon the adequate and independent state grounds of a state procedural bar. *Spencer v. Secretary, Dept. of Corrections*, 609 F.3d 1170,

[1] This claim presents a purely legal ruling which this Court reviews *de novo*. *Henyard v. State*, 992 So. 2d 120, 125 (Fla. 2008) (postconviction motion denied solely on the pleadings presents a legal issue, reviewed *de novo*); *State v. Coney*, 845 So. 2d 120, 137 (Fla. 2003) (holding pure questions of law discernible from the record to be subject to *de novo* review); *State v. Rubio*, 967 So. 2d 768, 771 (Fla. 2007) (constitutionality of a statute is a legal question, subject to *de novo* review).

1178 (11th Cir. 2010), quoting *Parker v. Sec'y, Dep't of Corr.*, 331 F.3d 764, 771 (11th Cir. 2003) (recognizing that federal courts cannot consider a claim where "the last state court rendering a judgment in the case clearly and expressly state[d] that its judgment rests on a state procedural bar.")

A. The Successive Motion Is Untimely As *Ring* Is Not Retroactive

This is a successive Rule 3.851 proceeding in light of the previous denial of Chandler's Rule 3.850 motion to vacate and affirmance on appeal. See, *Chandler v. State*, 848 So. 2d 1031 (Fla. 2003) (affirming order denying Chandler's Rule 3.850 motion). As a successive motion it is untimely unless it satisfies the requirements of Rule 3.851(d)(2). The lower court correctly found that Chandler's *Ring* claim failed to satisfy the requirements of Rule 3.851(d)(2), because the motion was not based on any newly discovered evidence nor on a newly established fundamental constitutional right that has been held to apply retroactively as required by Rule 3.851(d)(2)(B). (SPCR V2/194) It was properly summarily denied.

As Chandler conceded below, this Court has agreed with the United States Supreme Court's decision in *Schriro v. Summerlin*, 542 U.S. 348, 358 (2004), that the holding in *Ring* is not to be applied retroactively to cases which were final before *Ring* was

decided. *Johnson v. State*, 904 So. 2d 400, 405 (Fla. 2005). (SPCR V1/113) Chandler's case became final on April 20, 1998, when the United States Supreme Court denied certiorari review of this Court's opinion affirming his convictions and sentences on direct appeal. *Chandler v. Florida*, 523 U.S. 1083 (1998). *Ring* was decided on June 24, 2002. Accordingly, even if *Ring* could potentially impact the imposition of the death penalty in Florida, the lower court correctly found that Chandler is not entitled to secure any relief from that decision. (SPCR V2/195-96)

Any suggestion that the decision in *Evans v. McNeil* would provide Chandler with an opportunity to have the issue considered is also without merit as the holding of a federal district court does not establish "fundamental constitutional rights" within the meaning of the rule. This Court in *Witt v. State*, 387 So. 2d 922, 931 (Fla. 1980) expressly held that a change in law can be raised in postconviction only if it "(a) emanates from this Court or the United States Supreme Court, (b) is constitutional in nature, and (c) constitutes a development of fundamental significance." Accord, *Chandler v. Crosby*, 916 So. 2d 728, at 729 (Fla. 2005). Obviously, the decision of a federal district court is not a decision from either court. Even if *Evans* was a decision of this Court or the United States

Supreme Court, it has clearly not been held to apply retroactively. Combined with the express holding of both this Court and United States Supreme Court that *Ring* does not apply retroactively, it is clear that the lower court correctly found that Chandler has failed to satisfy the filing requirement for his successive motion of a newly established fundamental constitutional right that "has been held to apply retroactively." See, Rule 3.851(d)(2)(B).

Chandler asserts, however, that he can rely upon *Evans* because "[r]ather than creating a new constitutional right, this decision recognizes an existing right" and "it constitutes a new factual basis." Initial Brief at pg. 39. If, as he asserts, it merely recognized an existing right, then Chandler's claim would be barred because he should have raised it at trial and on direct appeal, not on the eve of his execution nineteen years later.

Moreover, this Court has clearly rejected the argument that a decisional change of law could constitute "a newly discovered fact" for purposes of filing a successive untimely postconviction motion. *Coppola v. State*, 938 So. 2d 507, 511 (Fla. 2006). In *Coppola* this Court reiterated that a litigant must satisfy the standards set forth in *Witt* when arguing the

application of a new decision allows for the filing of a new motion to vacate.

B. The Sixth Amendment Claim Is Procedurally Barred

Chandler's successive motion was also properly denied as procedurally barred. The Sixth Amendment right to a jury trial claim now being presented to this Court has never been briefed and/or argued to any court on behalf of Chandler prior to the filing of this successive motion. None of the objections presented at trial, in Chandler's seven (7) claims raised on direct appeal, seven (7) claims raised in the Rule 3.850 or three (3) claims raised in the postconviction appeal mention, much less substantively address, a violation of his Sixth Amendment right to a jury trial. It is well settled that claims that could have been and should have been raised in a prior proceeding cannot be relitigated in a successive postconviction motion unless the movant can demonstrate that the grounds for relief were not known and could not have been known at the time of the earlier proceeding. See, *Darling v. State*, 45 So. 3d 444, 448 (Fla. 2010) (finding claim procedurally barred where defendant failed to assert in prior postconviction proceedings); *Downs v. State*, 740 So. 2d 506, 513 n. 10 (Fla. 1999) (stating that claim raised in earlier postconviction motion is barred in subsequent postconviction motion even if based on different

facts); *Atkins v. State*, 663 So. 2d 624, 626 (Fla. 1995) (explaining that issues that were or could have been presented in a postconviction motion cannot be relitigated in a subsequent postconviction motion).

While Appellant conceded below that "the issue raised herein was not raised on direct appeal or on collateral review," he appears to rest his argument here solely on the contention that these cases should afford him resentencing because the "right asserted in this case is not a new right, but one of the most fundamental and long-standing of our constitutional principles." Initial brief at pg. 41. It is exactly this reason that this claim is procedurally barred. Both this Court and the Eleventh Circuit have found this claim procedurally barred because it was available to be raised and was not.[2] See, *Evans v. State*, 946 So. 2d 1, 15-16 (Fla. 2006) (finding *Ring* claim

[2] Moreover, the law in effect at the time of his trial is of no benefit to him on this issue. See, *Walton v. Arizona*, 497 U.S. 639, 649 (1990) (upholding judge-imposed death sentences because the additional facts found by the judge qualified as sentencing considerations, not as "element[s] of the offense of capital murder"); *Proffitt v. Florida*, 428 U.S. 242, 252 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ) (noting Court has never suggested that jury sentencing in a capital case is constitutionally required); *Spaziano v. Florida*, 468 U.S. 447 (1984) (Sixth Amendment not offended by judge imposing sentence of death where jury has recommended sentence of life imprisonment); *Hildwin v. Florida*, 490 U.S. 638 (1989) (Sixth Amendment does not forbid judge to make written findings that authorize imposition of death sentence when jury unanimously recommends death sentence).

barred for failure to raise at trial and on direct appeal while *Ring* in "pipeline.") See, also, *Turner v. Crosby*, 339 F.3d 1247, 1282 (11th Cir. 2003) (rejecting argument that claim was not barred because settled law pre-*Ring* did not provide a legal basis for the claim.) He does not explain why he made no attempt to raise the claim until the eve of his execution.

The only nod to the Sixth Amendment challenge presented herein ever made by Chandler was a Notice of Supplemental Authority provided to this Court during the postconviction appeal, shortly after he filed his initial brief. This Court addressed the Notice in a footnote stating:

> FN4. In a notice of supplemental authority, Chandler asks this Court to take judicial notice of three cases: *Ring v. Arizona*, 534 U.S. 1103, 122 S.Ct. 865, 151 L.Ed.2d 738 (2002), *State v. Ring*, 200 Ariz. 267, 25 P.3d 1139 (2001), and *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). Aside from filing the notice, Chandler provides no argument other than that the cases "may be relevant to the issues raised in this cause." Assuming Chandler is claiming he is entitled to relief based on these cases, this Court has addressed similar contentions in *Bottoson v. Moore*, 833 So.2d 693 (Fla. 2002), *cert. denied*, 537 U.S. 1070, 123 S.Ct. 662, 154 L.Ed.2d 564 (2002), and *King v. Moore*, 831 So.2d 143 (Fla. 2002), *cert. denied*, 537 U.S. 1067, 123 S.Ct. 657, 154 L.Ed.2d 556 (2002), and denied relief. We find that Chandler is likewise not entitled to relief.

Chandler v. State, 848 So. 2d 1031, 1034 n.4 (Fla. 2003).

Although this Court noted that it consistently denied relief on the claim and that Chandler is "likewise not entitled

to relief," it is the State's position that since the claim was not properly before the Court this statement does not constitute an actual ruling on the merits for purpose of federal review and this Court should make that clear for the federal courts whose review will follow. Clearly, under Florida law filing a Notice of Supplemental Authority concerning an issue that was not and had never been raised was not sufficient to put the claim before the court. In *Doorbal v. State*, 983 So. 2d 464, 482 (Fla. 2008), this Court explained that "to merely refer to arguments presented during the postconviction proceedings without further elucidation is not sufficient to preserve issues, and these claims are deemed to have been waived." Chandler did not even go that far. The Notice of Supplemental Authority referred to issues that had never been raised in any court on Chandler's behalf. If Appellant had wanted to raise the issue, he could have requested the opportunity to file supplemental briefing which would have allowed for full briefing by both the defense and the State.

If Chandler had done so, the State would have been able to defend with the fact that it had not been raised in the postconviction motion and was not properly before the Court. Additionally, the claim would also have been barred in Chandler's initial motion to vacate as postconviction

proceedings are not second appeals and this is an issue that could have been and should have been raised on direct appeal, and Chandler did not preserve this claim by challenging the constitutionality of Florida's sentencing scheme at trial or on direct appeal. See, *Evans*, *946 So. 2d at 15-16* (finding *Ring* claim barred for failure to raise at trial and on direct appeal while *Ring* in "pipeline."); *Zommer v. State*, 31 So. 3d 733, 752 (Fla. 2010) ("Given the absence from the record of any motion or argument that presented the [*Ring*] claims raised here to the trial court, we conclude that this issue has not been preserved for review"); *Israel v. State*, 985 So. 2d 510, 519 (Fla. 2008) (*Ring* claim procedurally barred in postconviction proceedings.) Chandler was required to present his Sixth Amendment claim to the trial court and on direct appeal just as Mr. Walton[3] and Mr. Ring did even though the law was not in their favor. If, as Chandler now claims, the rights he asserts he was denied have always existed, then the issue should have been raised at trial and on direct appeal. Because he did not do so, this claim would have been, and remains, procedurally barred.

Whether the *Ring* claim was presented to this Court in the initial postconviction appeal, and the Court's discussion of the

[3] In *Walton v. Arizona*, 497 U.S. 639 (1990) the United States Supreme Court rejected some of the very claims it later partially overturned in *Ring*.

Notice of Supplemental Authority in the footnote constituted a ruling on the merits or not, the claim is barred in this successive motion. *Grim v. State*, 971 So. 2d 85, 103 (Fla. 2007) ("Because we rejected a similar *Ring* claim on direct appeal, Grim's present *Ring* claim is procedurally barred.") Further, even if this were an initial motion, and if the Sixth Amendment claim had been raised at trial and it was properly raised in a postconviction proceeding, it would also be untimely as it is not within a year of the judgment and sentence becoming final.

Accordingly, the lower court properly denied the successive motion as untimely.

C. Chandler's Prior Violent Felony Convictions Make *Ring* Inapplicable

Even absent the considerable procedural hurdles that Chandler cannot overcome to obtain consideration of the merits of his argument, he is still not entitled to relief. Chandler was convicted of three counts of first degree murder, as well as having two prior convictions for robbery committed with a firearm. (TR V68/R11521) Additionally, the jury recommended death in each of the three murders by a vote of 12-0. (TR V102/T2827-28)

The Sixth Amendment challenge at issue in *Ring* does not apply where one of the aggravating circumstances is a prior

violent felony conviction as *Ring* does not require a jury finding of an aggravating factor based on a prior conviction. See, *Ring*, 536 U.S. at 597, n.4; *Almendarez–Torres v. United States*, 523 U.S. 224 (1998).[4] As this Court noted in *Rigterink v. State*, 66 So. 3d 866, 895-896 (Fla. 2011), quoting, *Frances v. State*, 970 So. 2d 806, 822 (Fla. 2007), "*Ring* did not alter the express exemption in *Apprendi v. New Jersey,* 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), that prior convictions are exempt from the Sixth Amendment requirements announced in the cases."

Chandler's argument concerning the consideration of the prior violent felony aggravators suggests that even the fact of a prior conviction must be found by the jury because *Ring* requires that juries make all of the findings necessary to support a death sentence. To the contrary, *Ring* does not require jury sentencing, only that a jury convict the defendant of a death-eligible offense. *Ring*, 536 U.S. at 597 n.4. This Court has held that, in Florida, a defendant is eligible for the death penalty upon a conviction for first degree murder. *Shere v. Moore*, 830 So. 2d 56, 62 (Fla. 2002); *Mann v. Moore*, 794 So. 2d 595, 599 (Fla. 2001); *Mills v. Moore*, 786 So. 2d 532, 536-37

[4] Under Florida law, contemporaneous murders qualify as prior violent felonies. *Knight v. State*, 746 So. 2d 423, 434 (Fla. 1998) (finding each of the contemporaneous murders qualifies as prior violent felony conviction.)

(Fla.), *cert. denied*, 532 U.S. 1015 (2001). Since death is the statutory maximum for first degree murder in Florida and prior convictions are exempt from the Sixth Amendment requirements announced in *Ring/Apprendi*, Chandler's argument that his sentence is invalid absent a jury finding on the prior 1976 and 1992 robbery convictions is simply baseless. (TR V68/R11521)

Even the district court judge in *Evans v. McNeil*, upon which Appellant places so much reliance, recognized that *Ring* "in certain respects, has a limited holding." ([D.E. 21] at 89) *Evans* clearly recognized that *Ring* presented a narrow claim; that *Ring* was not challenging *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), which held that the fact of a prior conviction may be found by the judge even if it increases the statutory maximum sentence. ([D.E. 21] at 86) Therefore, even though *Evans* determined that the Florida capital sentencing statute violates *Ring*, it did not attempt to expand *Ring* to make it applicable to cases where a prior violent felony has been established.

Chandler also asserts that Florida's constitutional right to a jury trial is "broader" than the Sixth Amendment and "extends to the finding of a prior conviction." (Initial Brief at pg. 41). Chandler submits that *State v. Harbaugh*, 754 So. 2d 691 (Fla. 2000), requires a jury finding of a prior conviction

whenever a prior conviction "results in a reclassification of an offense to a higher degree and higher punishment." *Harbaugh* concerned the role of the jury in convicting a defendant of felony DUI, which necessarily required, as an element of the offense, the existence of prior DUI convictions. *Harbaugh* did not address any offense reclassification or enhanced punishment, only the essential elements of felony DUI.

Chandler's basic argument, that *Harbaugh* expanded the right to a jury trial under Florida law to include determination of the fact of a prior conviction, still fails to explain why he did not present this claim previously. He asserts that the district court decision in *Harbaugh* was released before his sentences were final on direct appeal, but offers no reason why he did not present a jury trial claim under *Harbaugh* at that time, or even in his postconviction proceedings, by which time this Court had reviewed and decided the case. Accordingly, his current claim was properly denied as untimely and procedurally barred. Further, as the lower court found, it has never been held to apply retroactively and provides no suggestion that its reasoning should be applied to cases that have been final for many years. (SPCR V2/198) Additionally, it is without merit.

Harbaugh did not extend Florida's jury trial right beyond the scope of the Sixth Amendment. Rather, *Harbaugh* is grounded

squarely in the right to a jury trial as required by the federal constitution. This Court deemed the holding in *Harbaugh* to be required by *United States v. Gaudin*, 515 U.S. 506 (1995). The conviction at issue in *Gaudin* arose when the defendant was charged with making material, false statements to a federal agency. The materiality of the statements was unquestionably an element of the offense and had nothing to do with the sentence to be imposed. The entire analysis in *Gaudin* turns on whether the Sixth Amendment required jury findings on mixed questions of law and fact, as opposed to those elements of an offense which were purely factual in nature. Consequently, this Court applied *Gaudin* in *Harbaugh* to require jury findings on every essential element of every offense, even when the element was a seemingly legal question as to the existence of a prior conviction. However, neither *Gaudin* nor *Harbaugh* preclude the use of prior convictions for sentencing purposes. See, *Almendarez-Torres,* 523 U.S. at 228.

The lower court rejected this claim explaining, in pertinent part:

> Additionally, unlike the cases relied upon by Chandler, a prior conviction is not an element of the crime committed. Here, Chandler was charged and convicted of three counts of first degree murder, which requires the jury to find beyond a reasonable doubt that the killing of the victim was unlawful and was perpetrated from a premeditated design. § 782.04(1), Fla. Stat. (1988). Thus, the jury was not

> required to prove that Chandler had a prior conviction in order to convict him of first degree murder. Even if the jury was required to do so, as discussed above, by convicting Chandler of all three murders, the jury would have unanimously found for each death sentence imposed the existence of the prior capital felony aggravator through the contemporaneous murders And while Chandler argues that these cases are similar in concept to the death penalty scheme that requires aggravating factors in order to impose the death penalty, these cases concern reclassifying an offense, while Chandler's concern is with the imposition of the death penalty instead of a life sentence.

(SPCR V2/197-98)

Further, as the lower court noted, even if the procedures outlined in *Harbaugh* were in any way applicable, Chandler's jury was presented with these convictions and made 12-0 death recommendations. (TR V102/T2765-66, 2767-2778, 2786-2794) Thus, he was given the consideration that he now claims he was denied.

Moreover, this Court in *Harbaugh* expressly found that the failure to present the prior convictions to the jury could be harmless. *Harbaugh*, 754 So. 2d at 694. See, also, *Johnson v. State*, 994 So. 2d 960, 965-66 (Fla. 2008), (finding error to be harmless in light of record of prior DUIs, "The jury would have likely found the existence of the three previous DUI convictions.") Just as Johnson "did not (and seemingly could not) produce any facts to contest the accuracy of the driving record," i*d.,* Chandler has not offered any facts contesting the accuracy of the convictions for the prior violent felonies.

Thus, error, if any, would be harmless. See, also, *Galindez v. State,* 955 So. 2d 517, 523 (Fla. 2007) (finding errors under *State v. Hargrove*, 694 So. 2d 729, 730 (Fla. 1997) and *State v. Overfelt*, 457 So. 2d 1385, 1387 (Fla. 1984), subject to harmless error review.)

Even if this claim were properly before this Court and the Constitution required Chandler's jury to make findings – Florida juries do make such findings; they are clearly instructed that before they can recommend death they have to find the existence of an aggravating factor. Nowhere does the law require that these findings be set out or even that the jury agrees on which factor(s) they have found. See, *Ault v. State*, 53 So. 3d 175, 206 (Fla. 2010) (affirming that it is not unconstitutional for a jury to be allowed to recommend death on a simple majority vote") and *Steele,* 921 So. 2d at 545 (noting that law only requires a majority to conclude that at least one aggravating circumstance exists before it may recommend a sentence)

Further, even if it did, Chandler's argument that his jury did not make those findings would still be without merit. Chandler's argument rests on the erroneous contention that the only "prior violent felonies" upon which his sentences rested were those based on Chandler's previous robbery convictions. This argument ignores his convictions for the contemporaneous

murders. Chandler's jury unanimously found at least two aggravators to exist for each of the three murders in the guilt phase of his trial by its unanimous verdict of first degree murder for each of the three homicides. See, *Miller v. State*, 42 So. 3d 204, 218 (Fla. 2010) Thus, even without the prior robbery convictions, the contemporaneous murder convictions establish that the jury made the findings Chandler now claims should have been made.

Accordingly, while it is well settled that the existence of a prior conviction for a violent felony makes *Ring* inapplicable, the existence of the contemporaneous murder convictions completely undermines Chandler's argument. This claim was properly denied and the denial should be affirmed on appeal.

D. Chandler's Three Unanimous Jury Recommendations Of Death Preclude Relief Under *Ring*

Additionally, Chandler's claim that he was denied a unanimous jury finding also ignores the jury recommendations of death for each murder by a vote of 12-0. Therefore, Chandler had unanimous jury findings of at least two aggravating circumstances for each of the three murders. His contention that he was denied same is undeniably refuted by this record. See, e.g., *Bevel v. State*, 983 So. 2d 505, 526 (Fla. 2008) (denying *Apprendi/Ring* claim where jury voted unanimously to recommend

the death penalty); *Crain v. State*, 894 So. 2d 59, 78 (Fla. 2004), *cert denied*, 546 U.S. 829 (2005) (same); *Anderson v. State*, 863 So. 2d 169, 189 (Fla. 2003), *cert. denied*, 541 U.S. 940 (2004) (same); *Grim v. State*, 841 So. 2d 455, 465 (Fla. 2003), *cert. denied*, 540 U.S. 892 (2003) (same). Thus, even if this claim was not procedurally barred, untimely, and unauthorized under the rule, and even if *Ring* required the jury to make a unanimous finding for death, Chandler's claim still fails and relief must be denied.

E. Florida's Capital Sentencing Scheme Is Constitutional

Finally, even if Chandler was entitled to consideration of the merits of his argument that Florida's sentencing statute is unconstitutional, relief must be denied. As Chandler acknowledges, this Court has consistently rejected challenges to Florida's capital sentencing scheme based on *Ring.* For example, in *Merck v. Sta*te, 975 So. 2d 1054, 1067, (Fla. 2007), *cert. denied*, 555 U.S. 840 (2008), this Court addressed each of the arguments presented here and those raised by the federal district court in *Evans* and found:

> Finally, Merck asserts that Florida's capital sentencing scheme is unconstitutional under *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), and *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). This Court addressed the constitutionality of Florida's capital sentencing scheme in light of those decisions in

> *Bottoson v. Moore*, 833 So.2d 693 (Fla. 2002), and *King v. Moore*, 831 So.2d 143 (Fla. 2002), and denied relief. Moreover, we have previously rejected each of Merck's specific arguments regarding the constitutionality of Florida's capital sentencing scheme. *See State v. Steele*, 921 So.2d 538, 543 (Fla. 2005) (stating State must prove at least one aggravating circumstance beyond reasonable doubt to support death sentence); *Parker v. State*, 904 So.2d 370, 383 (Fla. 2005) (holding jury may recommend death by majority vote); *Lynch v. State*, 841 So.2d 362, 378 (Fla. 2003) (holding defendant not entitled to notice of aggravators in indictment because aggravators are clearly listed in statutes); *Porter v. Crosby*, 840 So.2d 981, 986 (Fla. 2003) (holding jury not required to make specific findings of aggravating circumstances).

Id. at 1067. See, also, *Rigterink,* 66 So. 3d at 895, quoting, *Frances*, wherein the Court noted that "in over fifty cases since *Ring's* release, this Court has rejected similar *Ring* claims."

Additionally, as previously noted, *Ring* does not require jury sentencing, only that a jury convict the defendant of a death-eligible offense and in Florida, a defendant is eligible for the death penalty upon a conviction for first degree murder. *Ring*, 536 U.S. at 597 n.4, 122 S. Ct. at 2437; *Shere*, 830 So. 2d at 62; *Mann*, 794 So. 2d at 599; *Mills*, 786 So. 2d at 536-37. The additional procedures set forth in the penalty phase proceedings govern the issue of whether a defendant will be selected for an already-authorized sentence of death. Since death is the statutory maximum for first degree murder in Florida, *Ring* does not invalidate Chandler's sentence.

In *Bottoson v. Moore*, 833 So. 2d 693 (Fla. 2002), this Court explained, "the United States Supreme Court repeatedly has reviewed and upheld Florida's capital sentencing statute over the past quarter of a century, and . . . has specifically directed lower courts to 'leav[e] to [the United States Supreme] Court the prerogative of overruling its own decisions.'" *Id.* at 695 (quoting *Rodriguez de Quijas v. Shearson/American Express*, 490 U.S. 477, 484 (1989)). The fact the Supreme Court has declined to disturb its prior decisions upholding the constitutionality of Florida's capital sentencing scheme, and that only it may overrule its precedent also shows that Appellant is not entitled to relief based on *Ring*. See, *Cox v. State*, 819 So. 2d 705, 724 n.17 (Fla. 2002) (noting prior decisions on these issues need not be revisited "unless and until" the United States Supreme Court recedes from *Proffitt v. Florida*, 428 U.S. 242 (1976)).

This Court's substantial jurisprudence rejecting *Ring* claims is not undermined by the federal district court's opinion in *Evans.* This Court has long held that "[e]ven though lower federal court rulings may be in some instances persuasive, such rulings are not binding on state courts." *State v. Dwyer*, 332 So. 2d 333, 335 (Fla. 1976). This limitation has also been recognized by the Eleventh Circuit Court of Appeals where it

opined that the "only federal court whose decisions bind state courts is the United States Supreme Court." *Doe v. Pryor*, 344 F.3d 1282, 1286 (11th Cir. 2003). As such, the federal district court's decision in *Evans* is no basis to overrule this Court's repeated rejection of the challenges to Florida's capital sentencing statute based on *Ring*.

Moreover, the district court in *Evans* was simply wrong under both federal and Florida law. Federal courts are bound by a state court's determination of its own laws. *Mullaney v. Wilbur*, 421 U.S. 684, 691 (1975) (recognizing state courts are the "ultimate expositors of state law" and federal courts are "bound by their constructions except in extreme circumstances.") The *Evans* court failed to follow this Court's determination that under Florida law, the statutory maximum for first degree murder is death, that death eligibility occurs at the time of conviction and that the jury makes findings by virtue of its recommendation of death.

Part of the reasoning of the *Evans* court was based on Justice Pariente's statement in *Coday v. State,* 946 So. 2d 988, 1023 (Fla. 2006) PARIENTE, J., concurring in part and dissenting in part, that a "majority of this Court has yet to conclude that a death sentence unsupported by a separate-conviction aggravator exempt from *Ring* or a unanimous penalty-phase finding of an

aggravator — implicitly in a death recommendation or explicitly in a special verdict — violates neither the state nor federal constitutional right to trial by jury." This position was later repeated in *Steele.* Since *Steele* was issued in 2005, however, the *Ring* issue has been squarely put before this Court and rejected by a unanimous court in *Abdool v. State,* 53 So. 3d 208, 228 (Fla. 2010). This Court explained:

> *Ring Claim*
>
> Abdool next argues that Florida's capital sentencing scheme is unconstitutional under *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002). But this Court has repeatedly rejected Abdool's argument that the standard jury instructions denigrate the role of the jury in violation of *Caldwell v. Mississippi*, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985). *See, e.g., Chavez v. State*, 12 So.3d 199, 214 (Fla. 2009), *cert. denied*, ––– U.S. ––– –, 130 S.Ct. 501, 175 L.Ed.2d 356 (2009); *Taylor v. State*, 937 So.2d 590, 599 (Fla. 2006); *Card v. State*, 803 So.2d 613, 628 (Fla. 2001). This Court has also repeatedly rejected the argument that the jury must reach a unanimous decision on the aggravating circumstances. *See, e.g., Parker v. State*, 904 So.2d 370, 383 (Fla. 2005); *Hodges v. State*, 885 So.2d 338, 359 (Fla. 2004); *Porter v. Crosby*, 840 So.2d 981, 986 (Fla. 2003). This Court has also rejected Abdool's argument that this Court should revisit its opinions in *Bottoson v. Moore*, 833 So.2d 693 (Fla. 2002), and *King v. Moore*, 831 So.2d 143 (Fla. 2002), and find Florida's sentencing scheme unconstitutional. *See, e.g., Guardado v. State*, 965 So.2d 108, 118 (Fla. 2007). Accordingly, we reject Abdool's *Ring* claims here.

Abdool, 53 So. 3d at 228.

Abdool's jury recommended death by a vote of ten to two, The trial court found two aggravators: the murder was heinous, atrocious or cruel (HAC), and it was committed in a cold, calculated, and premeditated (CCP) manner without any pretense of moral or legal justification. *Id*. at 215. Abdool had no prior violent felony convictions or contemporaneous crimes which would have made *Ring* inapplicable. This Court in *Abdool* also, rejected the position adopted by *Evans* that *Ring* requires the jury specify the aggravators it found and to do so unanimously for Florida's capital sentencing statute to be constitutional.

This Court's analysis in *Abdool* is consistent with United States Supreme Court precedent. In *Schad v. Arizona*, 501 U.S. 624 (1991), the Supreme Court held that jury agreement on the factual basis of a conviction was not required. Instead, so long as the jury as a whole found that there was sufficient evidence to convict a defendant, the Constitution was satisfied. Moreover, in *Johnson v. Louisiana*, 406 U.S. 356 (1972), and *Apodaca v. Oregon*, 406 U.S. 404 (1972), the Supreme Court held that juries did not even have to be unanimous. Finally, in *Griffin v. United States*, 502 U.S. 46 (1991), the Court not only approved of general verdicts, but also held that a general verdict had to be upheld if there was legally sufficient evidence to sustain it on one basis even if the evidence was

insufficient to sustain it on a different basis. In doing so, the Supreme Court recognized that this might result in sustaining a conviction on a theory upon which the jury did not actually rely but found that this possibility did not violate the Constitution. *Id.* at 48-49. Given this body of precedent, it is entirely possible that convictions have been affirmed even though every single member of the jury voted to convict the defendant based on a theory that the State did not prove beyond a reasonable doubt without offending the Constitution. As such, the suggestion that imposition of a death sentence in similar circumstances violates the Constitution is simply incorrect and properly rejected by this Court.

Equally incorrect is the *Evans* court's analysis of the advisory sentencing recommendation. The United States Supreme Court has recognized that the jury plays such a significant role in sentencing in Florida that a sentence may be overturned because of its consideration of an invalid aggravating circumstance even where the trial court's sentencing order did not reflect the same error. *Espinosa v. Florida*, 505 U.S. 1079, 1081-82 (1992). Given this combination of circumstances, the jury's recommendation would constitute a sufficient jury finding that an aggravator existed even if such a finding was required to increase the statutory maximum.

Moreover, this Court's rejection of *Ring* is in accord with the holding in *Jones v. United States*, 526 U.S. 227, 250-51 (1999). In *Jones*, the United States Supreme Court held that a Florida sentencing jury does "necessarily engag[e] in the factfinding required for imposition of a higher sentence, that is, the determination that at least one aggravating factor had been proved." In the face of these binding United States Supreme Court decisions, the suggestion that Florida's capital sentencing statute is unconstitutional because of a lack of "meaningful fact finding" by a jury is properly rejected. This is all the more clear when one considers that *Jones* is the basis for the *Apprendi* line of cases, of which *Ring* is a part. *Apprendi v. New Jersey*, 530 U.S. 466, 476 (2000).

Accordingly, even if this successive motion was not untimely, and the Sixth Amendment claim had been held to apply retroactively, and was properly presented in a successive motion, and it was not barred for failure to present in the prior proceedings, and Chandler's aggravating circumstances did not include the two contemporaneous homicides and the two prior robbery convictions, and he did not have three unanimous death recommendations, Chandler would still not be entitled to relief because Florida's capital sentencing scheme satisfies the dictates of *Ring*.

For this, and all of the foregoing reasons, Chandler's eleventh hour attempt to delay his execution with this Sixth Amendment claim should be rejected. This Court should deny all relief finding Chandler's claim procedurally barred, untimely and without merit.

THERE IS NO BASIS FOR A STAY OF EXECUTION

Chandler's request for a stay of execution should also be denied. As both this Court and the United States Supreme Court have held, a defendant must show that he has presented substantial grounds for relief from his conviction and sentence in order to be entitled to a stay. See*, Buenoano v. State*, 708 So. 2d 941, 951 (Fla. 1998); see also, *Delo v. Sykes*, 495 U.S. 320, 321 (1990); *Barefoot v. Estelle*, 463 U.S. 880, 895 (1983); *Bowersox v. Williams*, 517 U.S. 345 (1996). As argued above, Appellant did not present substantial grounds for relief in either the lower court or this Court.

The issues contained in his brief are not complex, and can be decided by this Court prior to the scheduled November 15, 2011, execution. Writing in the context of a last-minute request for a stay of execution, Justice Rehnquist said: "There must come a time, even when so irreversible a penalty as that of death has been imposed upon a particular defendant, when the

legal issues in the case have been sufficiently litigated and relitigated that the law must be allowed to run its course." *Evans v. Bennett*, 440 U.S. 1301, 1303 (1979) (opinion of Rehnquist, as Circuit Justice) That time has come in this case. As such, the request for stay should be denied.

CONCLUSION

Based on the foregoing arguments and authorities, Appellee, the State of Florida, respectfully urges this Court to affirm the order of the lower court denying Chandler's successive motion for postconviction relief and deny the request for a stay.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by electronic transmission to Baya Harrison, III, Esquire, 310 North Jefferson St., Tallahassee, Florida 32344-2057 (bayalaw@aol.com); to The Honorable Philip J. Federico, Circuit Judge, 14250 49th Street North, Clearwater, Florida 33762 (plee@jud6.org); and to The Honorable J. Thomas McGrady, Chief Judge (hskidmore), on this 3rd day of November, 2011.

CERTIFICATE OF FONT COMPLIANCE

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

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