IN THE SUPREME COURT OF FLORIDA

LINROY BOTTOSON,
Petitioner,

v. **CASE NO.SC02-1455**

MICHAEL W. MOORE, Secretary,
Florida Department of Corrections,
Respondent.
_____/

ANSWER BRIEF

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

KENNETH S. NUNNELLEY
SENIOR ASSISTANT ATTORNEY GENERAL
Fla. Bar #998818
and DOUGLAS T. SQUIRE
Fla. Bar # 0088730
ASSISTANT ATTORNEY GENERAL
444 Seabreeze Blvd. 5th FL
Daytona Beach, FL 32118
(386) 238-4990
Fax # (386) 226-0457
COUNSEL FOR APPELLEE

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STATEMENT OF THE CASE AND FACTS

This case comes before this Court following the July 8, 2002, stay of execution entered by this Court. The Respondent relies on the Statement of the Case and Facts set out in the response to the petition for writ of habeas corpus.

SUMMARY OF THE ARGUMENT

This Court should not reach the merits of Bottoson's *Apprendi/Ring* claim. His challenge to the facial validity of the death penalty statute is procedurally barred, and many of his assertions are not even potentially implicated on the facts of this case. Longstanding principles of appellate review and statutory construction mandate that this Court decline to reach the merits of the *Apprendi/Ring* claim.

Alternatively and secondarily, there is no support for the claim that Florida's capital sentencing statute is constitutionally infirm as inconsistent with the Sixth Amendment right to a jury trial. *Ring v. Arizona*, 122 S.Ct. 2428 (2002), provides no basis for reconsideration of this issue because, contrary to Bottoson's assertions, he is not "just like Timothy Ring." This Court (unlike the Arizona Supreme Court) has previously recognized that the statutory maximum sentence for first degree murder is death. Even if this Court reconsiders that conclusion, a different

determination would not be subject to retroactive application. And, even if retroactively applied, there is no Sixth Amendment violation where a jury has made the necessary findings to subject a capital defendant to an ultimate sentence of death. Even if this Court were to recede from all of its prior Sixth and Eighth Amendment decisions, any error is harmless in a case such as this one where the jury has recommended death and the aggravators fall outside the scope of *Apprendi/Ring*.

Florida's statute passes constitutional muster under the 6th and 8th Amendments because it requires jury participation in the sentencing process. Bottoson has repeatedly acknowledged that jury sentencing is not required; yet he suggests that it is necessary for the co-sentencer jury to weigh the aggravating and mitigating factors and determine the appropriate penalty; he also attacks the statute for permitting judicial participation in the imposition of a capital sentence. Thus, he is asking this Court to invalidate the statute because the jury does not make the ultimate sentencing determination. **That argument confuses the Sixth Amendment with the Eighth.** Florida's statutory scheme has been repeatedly upheld by the United States Supreme Court and this Court has no authority to overrule, on federal constitutional grounds, the many cases upholding the validity of our statute. No relief is warranted.

The mental retardation as bar to execution claim is not only procedurally barred, but also meritless because Bottoson is not mentally retarded, as this Court has already found.

PRELIMINARY STATEMENT

This Court's stay of Bottoson's execution was put in place after the United States Supreme Court issued its decision in *Ring v. Arizona,* and lifted the stay of execution it had previously imposed. However, in light of *Cannon v. Mullin,* the stay should be lifted because it is now clear that *Ring* has no retroactive application. And, because Florida and Arizona have radically different capital sentencing schemes, as is discussed at length herein, Florida's death penalty statute is unencumbered by *Ring*. Bottoson's petition should be denied.

ARGUMENT

I. THE *RING V. ARIZONA* DECISION DOES NOT AFFECT FLORIDA DEATH PENALTY LAW

The principal issue Bottoson has briefed is his continuing claim that the United States Supreme Court's *Ring v. Arizona*, 122 S.Ct. 2428 (2002), decision invalidates Florida's long-upheld capital sentencing structure.[1] **Bottoson makes this claim despite**

[1] As of July 30, 2002, there are 371 inmates on Florida's death row based on the Department of Corrections' website. Of the 371 inmates, approximately 53 are on direct appeal. A review of the

the complete dissimilarity of the Florida and Arizona statutes, and despite the fact that no decisions of the United States Supreme Court upholding the constitutionality of the Florida death penalty statutes were invalidated, criticized, or otherwise called into question in *Ring*.[2] There are three fundamental reasons why the

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transcripts of those cases on direct appeal and the latest opinions affirming the judgment and sentence reveals that of the 371 inmates, **271 have as an aggravating factor a prior violent felony.** The scope of what a prior violent felony encompasses has had a torturous evolution in a series of cases, such as *Meeks v. State*, 339 So. 2d 186 (Fla. 1976)(contemporaneous convictions do not qualify as an aggravating circumstance under Sec. 921.141(5)); to *Amos Lee King v. State*, 390 So. 2d 315 (Fla. 1980)(citing *Elledge v. State*, 346 So. 2d 998 (Fla. 1977) that the Legislative intent is clear that any violent crime for which there is a conviction at the time of sentencing should be considered as an aggravating factor.); to *Hardwick v. State* 461 So. 2d 79 (Fla. 1984)(recognizing that prior violent felony could include contemporaneous felony to victim); to *Wasko v.State*, 505 So. 2d 1314 (Fla. 1987)(change in law where contemporaneous felony on murder victim not prior felony aggravator); to *Craig v. State*, 510 So. 2d 857, 868 (Fla. 1987)(contemporaneous prior convictions involving another victim may be used as aggravation.)

In spite of the fact that the prior violent aggravator was not applied consistently until **1987**, approximately **75% of the cases fall outside of *Apprendi/Ring*, because of "just" the prior violent felony aggravator.** Add to the prior violent felony, under sentence of imprisonment and the number increases to 276; add to that an underlying felony conviction and the number goes to 289; add to that felony murders and **the number tops 348, or 90.33% of the cases meet the exception. The exception swallows the rule.**

[2] The Florida Association of Criminal Defense Lawyers and the Florida Public Defender Association have both filed briefs in support of Bottoson that are inappropriate. *Ciba-Geigy Ltd. v. Fish Peddler, Inc.*, 683 So. 2d 522 (4th DCA 1996); *Acton v. Fort Lauderdale Hosp.*, 418 So. 2d 1099 (1st DCA 1982), *approved*, 440 So. 2d 1282 (Fla. 1983). The *amici* have abandoned the "death is

Apprendi/Ring argument fails: that claim is procedurally barred; Bottoson's death sentence is supported by aggravators that fall outside any interpretation of *Apprendi/Ring*; and, the statute under which Bottoson (and every other Florida death row inmate) was sentenced to death provides that, upon **conviction** for capital murder, the maximum possible sentence is **death**, unlike the statute at issue in *Ring. Ring* clarified that *Apprendi* applied to capital cases, and that *Apprendi* applied to Arizona's death penalty statute.[3] However, *Ring* has no application to Florida's death sentencing scheme because the Court did **not** misinterpret **Florida** law. Even if the first two matters are ignored, the basic difference between Arizona and Florida law is dispositive of Bottoson's claims.[4]

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different" argument, preferring to treat death cases like any other criminal prosecution. *Ring* makes clear that, for 6th Amendment purposes, death is **not** different. The 8th Amendment has been interpreted to require various procedures, but those procedural mechanisms do not conflict with the 6th Amendment.

[3] The *Ring* Court determined that *Apprendi* and its impact on the prior decision in *Walton* required clarification of the role of the jury in **Arizona** capital sentencing. Nothing in that decision changed the dynamic of Florida's capital sentencing scheme under *Apprendi* and *Ring.*

[4] Throughout his brief, Bottoson refers to the "*Ring* issue," and treats it as if it is a decision of unsurpassed importance. In fact, *Ring* involves no more than the narrow issue of the application of *Apprendi v. New Jersey* to the specific facts of the Arizona capital sentencing statute. What Bottoson refers to as a "*Ring*" claim is actually an *Apprendi* claim; this Court has already decided that issue adversely to Bottoson.

A. THE *RING* CLAIM IS NOT AVAILABLE TO BOTTOSON BECAUSE IT IS PROCEDURALLY BARRED, BECAUSE IT IS A SUCCESSIVE CLAIM, AND BECAUSE IT IS NOT RETROACTIVE TO THIS 1984 CASE

1. The *Ring* claim is procedurally barred because it was not timely raised.

Bottoson's reliance on *Ring* to support a Sixth Amendment claim is procedurally barred.[5] 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's 1976 decision in *Proffitt v. Florida,* 428 U.S. 242, 252 (1976) (holding that the Constitution does not require jury sentencing). The basis for a claim that the sentence imposed in this case violated Bottoson's right to a jury trial has been available since Bottoson was sentenced to death, but was never asserted as a basis for relief until after his death warrant was signed in 2001. Bottoson did not raise this claim in a timely manner, and it is now barred. This Court should deny relief on that basis.

There is nothing magical about an *Apprendi* claim, and there is no justification for a departure by this Court from application of the well-settled State procedural bar rules. The *Apprendi* claim is procedurally barred under settled Florida law. Failure to enforce

[5] Bottoson addresses the procedural bar/retroactivity issues at pages 29-34 of his brief. Analytically, those matters must be resolved first -- in this case, they are dispositive.

the procedural bar can only result in continuing uncertainty in the law, and, moreover, may well have unpredictable influences on cases which are pending on federal habeas corpus review.[6] That sort of destabilization in the law is uncalled for, and will undoubtedly create unnecessary delay.

No Sixth Amendment issue exists because Bottoson's death sentence rests on the prior violent felony aggravator and the during the course of an enumerated felony aggravator. Neither circumstance falls under the *Apprendi/Ring* rationale, and, because that is so, Bottoson has no constitutional claim to plead[7] (or, in other words, no standing to raise the claim). *See, New York v. Ferber*, 458 U.S. 747, 768 (1982); *Grant v. State*, 745 So. 2d 519, 521 (Fla. 2DCA 1999), *quashed in unrelated part,* 770 So. 2d 655 (Fla. 2000). No Sixth Amendment issue exists in this case, and this Court should leave resolution of the issue for a case where it does

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[6] While all potential ramifications cannot be predicted, unnecessary delay is inevitable. At least four pending federal habeas corpus cases have been "administratively closed" by the Middle District of Florida pending this Court's decision in this case. *Rose v. Moore*, 8:93-1169-Civ-T023EAJ; *Puiatti v. Moore*,8:92-CV-539-T-17EAJ; *Brown v. Moore,* 8:01-CV-2374-T-23TGW; *Grossman v. Moore,*8:98-CV-1929-T-17MSS.

[7] Likewise, any error would be harmless beyond a reasonable doubt based upon the presence of non-*Apprendi* aggravators. *United States v. Cotton*, 122 S.Ct. 1781 (2002) (failure to recite amount of drugs in indictment as required by *Apprendi* was harmless due to overwhelming evidence); *Ring*, at 22443, n.7 (remanding for a harmless error analysis).

exist. *See, e.g., State v. Globe Communications Corp.*, 648 So. 2d 110 (Fla. 1994).

2. The *Apprendi* claim has already been decided by this Court in this case, and it is therefore a successive petition.

The claim contained in Bottoson's petition is also procedurally barred because it has already been considered and rejected by this Court. Bottoson is not entitled to have this claim considered again in a successive habeas corpus petition. *King v. State*, 808 So. 2d 1237, 1246 (Fla. 2002), *cert. denied*, 122 S.Ct. 2670 (2002); *Porter v. State*, 653 So. 2d 374, 380 (Fla. 1995); *Johnson v. Singletary*, 647 So. 2d 106, 109 (Fla. 1994) ("Successive habeas corpus petitions seeking the same relief are not permitted nor can new claims be raised in a second petition when the circumstances upon which they are based were known or should have been known at the time the prior petition was filed."); *Francis v. Barton*, 581 So. 2d 583, 584 (Fla. 1991) ("Habeas corpus is not to be used to relitigate issues considered in prior proceedings."); *Card v. Dugger*, 512 So. 2d 829 (Fla. 1987) (same); *Francois v. Wainwright*, 470 So. 2d 685, 686 (Fla. 1985) ("In collateral proceedings by habeas corpus, as in post-conviction proceedings under *Florida Rule*

of Criminal Procedure 3.850, successive petitions for the same relief are not cognizable and may be summarily denied.").[8]

While it is true that the United States Supreme Court subsequently decided *Ring*, it is also true, that Court denied Bottoson review after deciding *Ring*, and, as discussed below, that *Ring* is simply the application of *Apprendi*'s procedural rule (and the long-settled law on which it is based) to the particular facts presented by **Arizona's** capital sentencing process. This Court has

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[8] In denying relief on this claim, this Court stated:

> In Bottoson's third and final habeas claim, he alleges that the U.S. Supreme Court's holding in *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), applies to **Florida's** capital sentencing statute. We have consistently rejected similar claims and have decided this issue adversely to Bottoson's position. *See King v. State,* 27 Fla. L. Weekly S65, 808 So. 2d 1237, 2002 WL 54414 (Fla. Jan. 16, 2002), *stay granted*, --- U.S. ----, 122 S.Ct. 932, 151 L.Ed.2d 894 (2002); *Mills v. Moore,* 786 So. 2d 532, 536-537 (Fla. 2001), *cert. denied,* 532 U.S. 1015, 121 S.Ct. 1752, 149 L.Ed.2d 673 (2001); *see also Brown v. Moore*, 800 So. 2d 223 (Fla. 2001) (rejecting claims that aggravating circumstances are required to be charged in indictment, submitted to jury during guilt phase, and found by unanimous jury verdict); *Mann v. Moore*, 794 So. 2d 595, 599 (Fla. 2001). Thus, we conclude that Bottoson is not entitled to relief on this claim.

Although we recognize that the United States Supreme Court recently granted certiorari review in *State v. Ring*, 200 Ariz. 267, 25 P.3d 1139 (2001),*cert. granted*, --- U.S. ----, 122 S.Ct. 865, 151 L.Ed.2d 738 (2002), we decline to grant a stay of execution or other relief, in accordance with our precedent on this issue in *King*.

Bottoson v. State, 813 So. 2d 31 (Fla. 2002).

already applied the correct law and correctly decided the *Apprendi* claim in the context of Florida capital sentencing. Bottoson's petition is successive, and should be denied on that basis.

3. *Ring* is not retroactive to Bottoson's case because it is not a "watershed" rule of law.

No court to consider the issue has held *Apprendi* to be retroactive, and it is clear that *Ring* is "simply an extension of *Apprendi* to the death penalty context." *Cannon v. Mullin*, 2002 WL 1587921 (10th Cir. 2002), *cert. and stay of execution denied,* 2002 WL 1633127 (U.S. 2002)[9]; *United States v. Sanders*, 247 F.3d 139, 150, 151 (4th Cir. 2002)(*Apprendi* is not retroactive under *Teague v. Lane,* 489 U.S. 288 (1989)); *United States v. Sanders*, 247 F.3d 139 (4th Cir. 2001); *Curtis v. United States*, 294 F3d. 841 (7th Cir. 2002)(holding *Apprendi* is not retroactive because it "is about nothing but procedure"); *United States v. Moss*, 252 F.3d 993 (8th Cir. 2001); *Jones v. Smith*, 231 F.3d 1227 (9th Cir. 2001); *United States v. Sanchez-Cervantes*, 282 F.3d 664, 668 (9th Cir. 2002); *McCoy v. United States*, 266 F.3d 1245 (11th Cir. 2001); *Sustache-Rivera v. United States*, 221 F.3d 8, 15 n.12 (1st Cir. 2000);

[9] The *Cannon* Court held, post-*Ring*, that under *Tyler v. Cain*, 533 U.S. 656, 661 (2001) "'under this provision, the Supreme Court is the only entity that can 'ma[k]e' a new rule retroactive. The new rule becomes retroactive, not by the decisions of the lower courts or by the combined action of the Supreme Court and the lower courts, but simply by the action of the Supreme Court.'"

Forbes v. United States, 262 F.3d 143, 144 (2nd Cir. 2001); *In re Turner*, 267 F.3d 225, 227 (3rd Cir. 2001); *In re Tatum*, 233 F.3d 857, 859 (5th Cir. 2000); *Goode v. United States*, 2002 WL 987905 (6th Cir., May 10, 2002); *Hines v. United States*, 282 F.3d 1002 (8th Cir. 2002); *United States v. Dowdy*, 2002 WL 1352467 (9th Cir., June 20, 2002); *United States v. Wiseman*, 2002 WL 1584302 (10th Cir., July 18, 2002). Since *Apprendi* involves the construction of a federal constitutional right, the question of possible retroactive application should be governed by the federal principles. *Teague v. Lane*, 489 U.S. 288 (1989).

The one State Supreme Court that has addressed the retroactivity of *Apprendi* has, likewise, determined that the decision is not retroactive.[10] *Whisler v. State*, 36 P.3d 290 (Kan. 2001).[11] The United States Supreme Court has previously held that a violation of the right to a jury trial is not retroactive. *DeStefano v. Woods*, 392 U.S. 631, 88 S.Ct. 2093, 20 L.Ed.2d 1308

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[10] The Alabama Court of Criminal Appeals has held that *Apprendi* is not retroactive to collateral review cases. *See, Poole v. State*, 2001 WL 996300 (Ala. Crim. App. 2001); *Calloway v. State*, 2002 WL 1144647 (Ala. Crim. App. 2002).

[11] An *Apprendi* claim is not "plain error,"either. *United States v. Cotton*, 122 S.Ct. 1781 (2002)(indictment's failure to include the quantity of drugs was an *Apprendi* error but did not seriously affect fairness, integrity, or public reputation of judicial proceedings, and thus did not rise to level of plain error). If an error is not plain error for direct appeal purposes, it is not of sufficient importance to be retroactively applicable to collateral proceedings.

(1968)(refusing to apply the right to a jury trial retroactively because there were no serious doubts about the fairness or the reliability of the factfinding process being done by the judge rather than the jury). If the very right to a jury trial is not retroactively applicable, it stands reason on its head to suggest that a wholly procedural ruling like *Ring* should be retroactive. As the Tenth Circuit pointed out in *Cannon*, it is the prerogative of the United States Supreme Court to make the retroactivity determination -- that Court has not held *Apprendi/Ring* retroactive, and has refused to review cases declining to apply those decisions in that fashion. *Cannon, supra. Ring* is merely a procedural ruling which falls far short of being of "fundamental significance." This Court should not reach a conclusion contrary to every other court to consider the issue, and should decline to apply *Apprendi/Ring* retroactively.

Moreover, the *Ring* decision is not retroactively applicable under *Witt v. State*, 387 So. 2d 922, 929-30 (Fla. 1980). Under *Witt*, *Ring* is not retroactively applicable **unless** it is a decision of fundamental significance, which so drastically alters the underpinnings of Bottoson's death sentence that "obvious injustice" exists. *New v. State,* 807 So. 2d 52 (Fla. 2001), *cert. denied,* 122 S.Ct. 2626 (2002). In determining whether this standard has been met, this Court must consider three factors: the purpose served by

the new case; the extent of reliance on the old law; and the effect on the administration of justice from retroactive application. *Ferguson v. State*, 789 So. 2d 306, 311 (Fla. 2001). Application of these factors to *Ring*, which did not directly or indirectly address Florida law, offers no basis for consideration of *Ring* in this case. *Bolender v. Dugger,* 564 So. 2d 1057, 1059 (Fla. 1990) ("*Maynard v. Cartwright*, 486 U.S. 356, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988), and *Adamson v. Ricketts*, 865 F.2d 1011 (9th Cir. 1988), had not been decided at the time of direct appeal and are not such changes in the law under *Witt v. State*, 387 So. 2d 922 (Fla.), *cert. denied*, 449 U.S. 1067, 101 S.Ct. 796, 66 L.Ed.2d 612 (1980), that the procedural bar should be lifted."). Any application of *Apprendi/Ring*, and the State does not concede such, must be prospective only in nature.

B. THE AGGRAVATORS PRESENT IN BOTTOSON'S CASE ARE OUTSIDE THE SCOPE OF *APPRENDI/RING,* AND RELIANCE ON THOSE DECISIONS IS MISPLACED. FOR THAT REASON, THOSE DECISIONS DO NOT AFFECT BOTTOSON.

In addition to being procedurally barred, *Apprendi/Ring* does not provide a basis for relief in this case because the rule of law set out in those cases is inapplicable to the facts of Bottoson's case. Despite the failure to discuss the actual facts of Bottoson's case, the record reveals that two of the three aggravators applied to Bottoson are outside the reach of the *Apprendi/Ring* decisions.

This Court should not consider the *Ring* issue beyond the four corners of this case.

One of the aggravating circumstances is Bottoson's prior violent felony conviction. Under the plain language of *Apprendi*, a prior violent felony conviction is a fact which may be a basis to impose a sentence **higher than that authorized by the jury's verdict** without the need for additional jury findings.[12] There is no constitutional violation (nor can there be) because the prior conviction constitutes a jury finding which the judge may rely upon, without additional jury findings, in imposing sentence. *See Almendarez-Torrez v. United States*, 523 U.S. 224 (1998); *Apprendi v. New Jersey*, 530 U.S. 466 (2000). Under any view of the law, and even after *Ring*, the jury is not required to make a determination of the prior violent felony aggravator, and that aggravating circumstance can be found by the judge alone. In affirming Bottoson's death sentence, the Florida Supreme Court stated:

> As aggravating circumstances, the trial judge found that appellant had previously been convicted of a crime

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[12] Of course, under Florida law, death is the maximum possible sentence for the crime of first degree murder, and that is the defendant's sentence exposure upon conviction. See Section C, *infra.* The "higher than authorized by the jury" component of *Apprendi* is not applicable to the capital sentencing process in Florida, but that distinction does not affect the basic premise that a prior felony conviction is a fact that has **already** been found by a jury beyond a reasonable doubt, and does not need to be (and as a policy matter should not be) "re-proven."

> involving the threat of violence; that the crime was committed during the commission of a felony; that it was committed for the purpose of avoiding arrest; and that it was especially heinous, atrocious, or cruel. He found no mitigating circumstances.
>
> All of these aggravating circumstances were proven beyond a reasonable doubt. **Appellant had previously been convicted of a bank robbery which inherently involves the use or threat of use of violence against another person**. *See Antone v. State*, 382 So. 2d 1205 (Fla.), *cert. denied,* 449 U.S. 913, 101 S.Ct. 287, 66 L.Ed.2d 141 (1980). **Appellant concedes that the crime was committed during the commission of a robbery**. ... These aggravating circumstances, considered in light of the nonexistence of any mitigating factors, clearly justified the trial court's determination that a sentence of death is proper.

Bottoson v. State, 443 So. 2d 962, 966 (Fla. 1983) (emphasis added). Under any interpretation of the facts, the prior violent felony conviction and the concession to the presence of the "during the commission of a felony" aggravating circumstance obviate any possible Sixth Amendment error -- there is no basis for any relief.[13] These two aggravating circumstances are outside of the *Apprendi/Ring* holding,[14] and, because that is so, those decisions

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[13] The concession that the murder took place during the commission of a robbery is proof beyond a reasonable doubt of that aggravator.

[14] The *Apprendi* Court cited to *Jones v. United States,* 526 U.S. 227, 243 n.6 (1999), for the proposition that under the Fifth and Sixth Amendments, "any fact (**other than prior conviction**) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." *Apprendi v. New Jersey,* 530 U.S. 466, 476 (2000). [emphasis added]. This Court has already determined that death is the maximum penalty for first degree murder, so that component of the statement has no application to Florida law. In any event, Bottoson's prior

are of no help to Bottoson. In the absence of any legal support, Bottoson's claim collapses. *Apprendi* and *Ring* do not factor into the facts of this case, and no relief is justified.

C. ARIZONA CAPITAL SENTENCING LAW IS DIFFERENT FROM FLORIDA'S, AS THIS COURT HAS HELD.[15] FOR THAT REASON, BOTTOSON IS NOT "JUST LIKE TIMOTHY RING."

The Arizona statute at issue in *Ring* is different from Florida's death sentencing statutes:

> **Based solely on the jury's verdict finding Ring guilty of first-degree felony murder, the maximum punishment he could have received was life imprisonment.** *See* 200 Ariz., at 279, 25 P.3d, at 1151 (*citing Ariz. Rev. Stat.* § 13-703). This was so because, in Arizona, a "death sentence may not legally be imposed ... unless at least one aggravating factor is found to exist beyond a reasonable doubt." 200 Ariz., at 279, 25 P.3d, at 1151 (citing § 13-703). The question presented is whether **that** aggravating factor may be found by the judge, as Arizona law specifies, or whether the Sixth Amendment's jury trial guarantee, [FN3] made applicable to the States by the Fourteenth Amendment, requires that the aggravating factor determination be entrusted to the jury. [FN4]
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> FN3. "In all criminal prosecutions, the accused shall enjoy the right to a ... trial, by an impartial jury ...."

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violent felony conviction, and the aggravator to which he stipulated, are outside any possible (or reasonable) interpretation of *Apprendi* and *Ring*.

[15] In *Mills v. Moore, infra,* this Court discussed the operation of the Florida death sentencing statute, and explained how our statute is unlike Arizona's. Bottoson mentions *Mills* only to criticize this Court for following *Apprendi's* admonition that it is inapplicable to capital cases. The *amici* do not mention *Mills* at all, apparently preferring to ignore it in the hope that it will go away.

> FN4. Ring's claim is tightly delineated: He contends only that the Sixth Amendment required jury findings on the aggravating circumstances asserted against him. No aggravating circumstance related to past convictions in his case; Ring therefore does not challenge *Almendarez-Torres v. United States*, 523 U.S. 224, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998), which held that the fact of prior conviction may be found by the judge even if it increases the statutory maximum sentence. He makes no Sixth Amendment claim with respect to mitigating circumstances. *See Apprendi v. New Jersey*, 530 U.S. 466, 490-491, n. 16, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000) (noting "the distinction the Court has often recognized between facts in aggravation of punishment and facts in mitigation" (citation omitted)). Nor does he argue that the Sixth Amendment required the jury to make the ultimate determination whether to impose the death penalty. *See Proffitt v. Florida*, 428 U.S. 242, 252, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976) (plurality opinion) ("[I]t has never [been] suggested that jury sentencing is constitutionally required."). He does not question the Arizona Supreme Court's authority to reweigh the aggravating and mitigating circumstances after that court struck one aggravator. *See Clemons v. Mississippi*, 494 U.S. 738, 745, 110 S.Ct. 1441, 108 L.Ed.2d 725 (1990). Finally, Ring does not contend that his indictment was constitutionally defective. *See Apprendi*, 530 U.S., at 477, n. 3, 120 S.Ct. 2348 (Fourteenth Amendment "has not ... been construed to include the Fifth Amendment right to 'presentment or indictment of a Grand Jury' ").

Ring v. Arizona, 122 S.Ct. at 2437. [emphasis added]. Under Arizona law, the determination of death **eligibility** takes place during the **penalty phase** proceedings, and requires the determination that an aggravating factor exists. Florida law is different.[16]

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[16] The Public Defender's claim that Florida law requires that the indictment contain the aggravators and that the jury must find them unanimously has been repeatedly rejected by this Court. *See, Vining v. State,* 637 So. 2d 921, 927 (Fla. 1994); *Fotopoulos v. State,* 608 So. 2d 784, 794 n.7 (Fla. 1992); *Lightbourne v. State,*

1. In Florida, death is the maximum sentence for capital murder.[17]

"[T]he legislature, and not the judiciary, determines maximum and minimum penalties for violations of the law." *State v. Benitez*, 395 So. 2d 514, 518 (Fla. 1981). This Court, long before *Apprendi*, concluded that the maximum sentence to which a Florida capital defendant is subject following conviction for capital murder is death. *See, e.g., Lightbourne v. State,* 438 So. 2d 380, 385 (Fla. 1983); *Sireci v. State,* 399 So. 2d 964 (Fla. 1981). *Apprendi* led to no change of any sort, by either the Legislature or this Court. This Court has previously concluded that the maximum sentence to which a Florida capital defendant is subject following conviction for capital murder is death.[18] *Mills v. Moore*, 786 So. 2d 532, 537-8

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438 So. 2d 380 (Fla. 1983). Florida law **already** requires that aggravators be proven beyond a reasonable doubt. This claim is improper, because Bottoson has not raised it in his brief.

[17] On page 25 of his brief, Bottoson repeats the "maximum sentence" argument which this Court rejected in *Mills.* That claim deserves no additional response.

[18] **Mills argues that this statute makes life imprisonment the maximum penalty available.** Mills argues that the statute allowing the judge to override the jury's recommendation makes it clear that the maximum possible penalty is life imprisonment unless and until the judge holds a separate hearing and finds that the defendant is death eligible.

The plain language of section 775.082(1) is clear that the maximum penalty available for a person convicted of a capital felony is death.

(Fla. 2001). [emphasis added, footnote omitted].[19] This Court has consistently followed that interpretation of Florida's capital

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> When section 775.082(1) is read *in pari materia* with section 921.141, *Florida Statutes,* there can be no doubt that a person convicted of a capital felony faces a maximum possible penalty of death. Both sections 775.082 and 921.141 clearly refer to a "capital felony." *Black's Law Dictionary* defines "capital" as "punishable by execution; involving the death penalty." *Black's Law Dictionary* 200 (7th ed.1999). *Merriam Webster's Collegiate Dictionary* defines "capital" as "punishable by death ... involving execution." *Merriam Webster's Collegiate Dictionary* 169 (10th ed. 1998). Therefore, a "capital felony" is by definition a felony that may be punishable by death. **The maximum possible penalty described in the capital sentencing scheme is clearly death.**

Mills, supra.

[19] This Court summarized the New Jersey statute at issue in *Apprendi* as follows:

> *Apprendi* involved a New Jersey statute that authorized an enhanced penalty for a crime proven to be a "hate crime" if the judge found by a preponderance of the evidence that the crime was motivated by a purpose to intimidate an individual or group because of race, color, gender, handicap, religion, sexual orientation or ethnicity. **The defendant in *Apprendi* was not charged with a "hate crime" in the indictment. He pled guilty on three counts, and the judge enhanced the penalty on one of the counts beyond the statutory maximum, in accord with the "hate crime" enhancement statute, after he held a hearing to determine the "purpose" of the crime.**

Mills v. Moore, 786 So.2d at 536 n.2. [emphasis added].

sentencing statute.[20] *Porter v. Moore*, 27 Fla. L. Weekly 606 (Fla. June 20, 2002) ("Contrary to Porter's claims, we have repeatedly held that the maximum penalty under the statute is death."); *Sweet v. Moore,* 27 Fla. L. Weekly S585 (Fla. June 13, 2002); *Cox v. State,* 27 Fla. L.Weekly S505; *Hurst v. State*, 27 Fla. L. Weekly S341 (Fla. April 18, 2002) ("... this Court finds no reason to revisit the *Mills* decision...."); *Spencer v. State,* 27 Fla. L. Weekly S323 (Fla. April 11, 2002); *Gudinas v. State,* 816 So. 2d 1095, 1111 (Fla. 2002) ("This Court rejected the same issue ... in *Mills v. Moore*."); *Sireci v. Moore,* 27 Fla. L. Weekly S183 (Fla. Feb. 28, 2002); *King v. Moore,* 808 So. 2d 1237, 1246 (Fla. 2002); *Brown v. Moore*, 800 So. 2d 223 (Fla. 2001); *Mann v. Moore*, 794 So. 2d 595, 599 (Fla. 2001); *Evans v. State,* 808 So.2d 92, 110 (Fla. 2002) *Hertz v. State,* 803 So. 2d 629, 648 (Fla. 2001); *Looney v. State,* 803 So. 2d 656, 675 (Fla. 2001).[21]

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[20] This Court's interpretation of Florida law is consistent with the description of Florida's capital sentencing scheme set out in *Proffitt v. Florida,* and echoed in *Barclay v. Florida,* 463 U.S. 939, 952 (1983) ("[I]f a defendant is found guilty of a **capital** offense, a separate evidentiary hearing is held before the trial judge and jury to determine his sentence."). **If the defendant were not eligible for a death sentence, there would be no second proceeding.**

[21] Whatever criticisms Bottoson may direct against the *Mills* decision cannot change the fundamental fact that this Court's explanation of Florida's capital sentencing statutes is unchanged. By merely stating that *Apprendi* excluded capital cases, this Court did not ignore its responsibility in applying what the Court believed were the applicable cases under Florida law as they

2. Death eligibility in Florida is determined at the guilt stage.

In Florida, as this Court has repeatedly held, the determination of "**death-eligibility**" is made at the **guilt** phase of a capital trial, **not** at the penalty phase, as is the Arizona practice. This Court has unequivocally said what Florida's law is, just as the Arizona Supreme Court did. The difference between the two states' capital murder statutes is clear, and controls the resolution of the claim. Because death is the maximum penalty for first-degree murder in Florida (**and because it is not in Arizona**), Bottoson's *Apprendi/Ring* claim collapses because nothing triggers the *Apprendi* protections in the first place. *See, Barnes v. State,* 794 So. 2d 590 (Fla. 2001) (*Apprendi* not applicable when judicial findings did not increase maximum allowable sentence).

Nothing that takes place at the penalty phase of a Florida capital trial **increases** the authorized punishment for the offense of capital murder -- eligibility for death is determined at the guilt phase under settled State law; the penalty phase proceeding (which notably **includes** the jury) is the **selection** phase, which **follows** the eligibility determination, and which does not implicate the *Apprendi/Ring* issue. The state law issue which led to the constitutional violation in Arizona's capital sentencing statute

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applied to the statute.

has already been decided differently by this Court, and that decision (in *Mills* and the cases relying on it) differentiates and distinguishes Arizona's system from Florida's constitutional capital sentencing statute.

Section 782.04 of the *Florida Statutes* defines capital murder, and Section 775.082 clearly and unequivocally states that the maximum penalty for capital murder is death, in clear contrast to the Arizona statute, which does not. **Arizona, unlike Florida, does not define any offenses as "capital" in its criminal statutes.** There is no constitutional defect with Florida's statute.[22]

3. *Ring* has no impact in Florida, and the decisions upholding the constitutionality of Florida law remain undisturbed.

Ring left intact all prior opinions upholding the constitutionality of Florida's death penalty scheme, including *Proffitt, supra, Spaziano v. Florida*, 468 U.S. 447 (1984), *Hildwin v. Florida*, 490 U.S. 638 (1989), *Barclay v. Florida,* 463 U.S. 939 (1983), and *Dobbert v. Florida,* 432 U.S. 282 (1977). As this Court has recognized, "[t]he Supreme Court has specifically directed

[22] The "eligibility for death" determination takes place at the guilt phase of a capital trial, and that the sentence stage is the "selection" phase. Florida's statute is analytically no different from the Texas statute, which was upheld in *Jurek v. Texas*, 428 U.S. 262 (1976). The *Ring* Court noted that the question is one of "effect" -- the effect of Florida's statute is full compliance with the Sixth and Eighth Amendments.

lower courts to 'leav[e] to this Court the prerogative of overruling its own decisions.' *Agostini v. Felton*, 521 U.S. 203, 237, 117 S.Ct. 1997, 138 L.Ed.2d 391 (1997) (*quoting Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484, 109 S.Ct. 1917, 104 L.Ed.2d 526 (1989))." *Mills v. Moore*, 786 So. 2d 532, 537(Fla. 2001).[23]

The United States Supreme Court did not disturb its prior decisions upholding the constitutionality of Florida's capital sentencing process, and that result is dispositive of Bottoson's claims.[24] The Court had every opportunity to directly address *Apprendi/Ring* in the context of Florida's capital sentencing scheme, and expressly declined to do so. *Cf. Hodges v. Florida*, 506 U.S. 803 (1992), wherein the United States Supreme Court vacated

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[23] To rule in Bottoson's favor, this Court would have to overrule the five cases cited above, as well as *Clemons, infra, Cabana v. Bullock, infra, Blystone v. California*, 494 U.S. 299, 306-7 (1990), *Harris v. Alabama, infra,* and *Gardner v. Florida*, 430 U.S. 349 (1977). While Bottoson's "one plus one" example demonstrates that he can add and subtract, it does not supply a basis upon which this Court should assume that the United States Supreme Court overruled nearly a dozen cases by implication. Neither *Hildwin*, nor any other United States Supreme Court case affirming the constitutionality of Florida's death penalty scheme, "bit the constitutional dust." *Opening Brief*, at 21.

[24] Bottoson's petition goes to great lengths to convince this Court that the United States Supreme Court's recent denial of certiorari review on this issue, **after *Ring* was released**, is meaningless. Recognizing that the denial of certiorari has no precedential value, it is clear under the circumstances of this case that Bottoson's Sixth Amendment claim is without merit.

this Court's opinion for further consideration in light of *Espinosa v. Florida,* 509 U.S. 1079 (1992). This Court has already correctly decided the issue, and should not disturb those decisions.

On June 28, 2002, the Court remanded four cases in light of *Ring*: *Harrod v. Arizona,* 122 S.Ct. 2653 (2002); *Pandeli v. Arizona,* 122 S. Ct. 2654 (2002); *Sansing v. Arizona,* 122 S.Ct. 2654 (2002); and *Allen v. United States*, 122 S.Ct. 2653 (2002). None of those remands is surprising given that three are Arizona cases and the other is a Federal Court of Appeals decision based on *Walton v. Arizona*. However, the Court **denied** certiorari in seven cases raising the "*Ring*" issue: *Gary Leon Brown v. Alabama*, 01-9454; *Mann v. Florida,* 01-7092; *King v. Florida*, 01-7804; *Bottoson v. Florida*, 01-8099; *Card v. Florida*, 01-9152; *Hertz v. Florida*, 01-9154; and *Looney v. Florida,* 01-9932.[25] Obviously, if the Court had intended to apply *Ring* to Florida capital sentencing, it had every opportunity to do so. The fact that it did not speaks for itself. By virtue of the denial of the petition for writ of certiorari, Bottoson's case is final for all purposes. *See, e.g., Teague v. Lane,* 489 U.S. 288 (1989). Further, and of even greater significance, the United States Supreme Court denied a stay of

[25] *Card, Hertz,* and *Looney* were petitions for writs of certiorari following affirmance on direct appeal. The *Ring* issue was preserved to the extent that the state argued for a procedural bar, and this Court addressed the merits of the claims.

execution in an Oklahoma case which presented an issue predicated on *Ring* on July 23, 2002. *See, Cannon v. Oklahoma,* Case No. 2002 WL 1633127 (2002). This Court should not accept Bottoson's attempt to disrupt the orderly administration of capital punishment in Florida by undertaking to "review" the decisions of the United States Supreme Court. Bottoson is entitled to no relief.

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

To the extent that Bottoson argues that *Ring* requires jury sentencing, that argument is incorrect. That is an Eighth Amendment argument, not a Sixth Amendment one, which confuses the additional procedures the Florida legislature provided to avoid arbitrary jury sentencing (which is the Eighth Amendment component)with the death-eligibility determination, which is the Sixth Amendment component, and which is the focus of *Apprendi/Ring.*[26] In upholding the constitutionality of Florida's death sentencing scheme, the United States Supreme Court said:

> In light of the facts that the Sixth Amendment does not require jury sentencing, that the demands of fairness and reliability in capital cases do not require it, and that neither the nature of, nor the purpose behind, the death

[26] The Judge's sentencing order does not implicate the 6th Amendment. That is an 8th Amendment matter, which is viewed through the lens of this Court's decisions in *Campbell v. State,* 571 So. 2d 415, 419-20 (Fla. 1990) and *Nibert v. State*, 574 So. 2d 1059, 1061 (Fla. 1990).

> penalty requires jury sentencing, we cannot conclude that placing responsibility on the trial judge to impose the sentence in a capital case is unconstitutional.

Spaziano v. Florida, 468 U.S. 447, 464 (1984). *Apprendi/Ring* did not affect that pronouncement because it does not involve the jury's role in **imposing sentence** -- it only requires that the jury find the defendant death-eligible.

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

Florida law (as this Court has clearly held) places the death-eligibility determination at the guilt phase of a capital trial, and, in so doing, necessarily satisfies the *Ring* "death eligibility" component. Even in the wake of *Ring*, the jury only has to make the determination of **death eligibility**, and then the judge may make the remaining findings. *Ring* speaks only to the finding of death eligibility; not aggravators, mitigators, or the weighing of them. *Ring*, *supra, (*"What today's decision says is that the jury must find the existence of the fact that an aggravating factor existed.")[27] (Scalia, J., concurring). Constitutionally, to be

[27] When this statement by Justice Scalia is read in the context of Arizona's capital sentencing law, "aggravating factor" means the same thing as "death-eligibility factor", because Arizona makes the "eligibility for death" determination, as well as the selection determination, at the penalty phase. Florida law does not function in that fashion, and that fundamental structural difference between the statutes highlights the difficulty inherent in comparing them.

eligible for the death penalty, all the sentencer must find is one "narrower," *i.e.*, one aggravator, at either the guilt or penalty phase.[28] *Tuilaepa v. California*, 512 U.S. 967, 972 (1994)(observing "[t]o render a defendant eligible for the death penalty in a homicide case, we have indicated that the trier of fact must convict the defendant of murder and find one 'aggravating circumstance' (or its equivalent) at either the guilt or penalty phase.").[29] *See also, Zant v. Stephens,* 462 U.S. 862, 874-78 (1983). Once the jury has made the death-eligibility determination at the guilt phase, the constitution is satisfied, and the judge may do the rest.

2. Florida law is different from Arizona's -- why Bottoson is not "Just like Timothy Ring."

Ring did not eliminate the trial judge from the sentencing equation or in any fashion imply that Florida should do so. This distinction demonstrates the difference between what *Ring* held and

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[28] The United States Supreme Court has repeatedly acknowledged that there is no single, constitutional, scheme that a state must employ in implementing the death penalty. *Lowenfield v. Phelps,* 484 U.S. 231, 244 (1988); *Spaziano v. Florida,* 468 U.S. 447, 464 (1984)("The Eighth Amendment is not violated every time a State reaches a conclusion different from a majority of its sisters over how best to administer its criminal laws.").

[29] California law places the eligibility determination at the guilt phase by requiring that the jury find one or more statutorily defined special circumstances. *Tuilaepa, supra,* at 969; *People v. Ochoa,* 26 Cal. 4th 398, 453-54, 28 P.3d 78 110 Cal. Rptr. 2d 324 (2001) (rejecting *Apprendi*-claim).

what Bottoson would have this Court read into that decision. The United States Supreme Court concluded that, under Arizona law (as explained by the Arizona Supreme Court), additional findings, which are made by a judge alone, are required in order for the defendant to be **eligible** for the death penalty. Under that capital sentencing statute, the "statutory maximum" for practical purposes is **life** until such time as a **judge** has found an aggravating circumstance to be present. In other words, the Arizona jury played no role in "narrowing" the class of defendants eligible for the death penalty upon conviction of first degree murder. This conclusion is consistent with the Arizona Supreme Court's description of Arizona law, which recognized the statutory maximum sentence permitted **by the jury's conviction alone** to be life. *Ring v. State*, 25 P.3d 1139, 1150 (Ariz. 2001)[30]. Florida law is not like Arizona's. *Mills v. State,* 786 So. 2d 532 (Fla. 2001).

The distinction between a "sentencing factor" (*i.e.*: "selection factor," under Florida's statutory scheme) and an

[30] This Arizona statute is the one that the United States Supreme Court misinterpreted in *Walton. Ring, supra.* Because the United States Supreme Court's description of Arizona law was incorrect in *Walton* and *Apprendi*, Bottoson's efforts to argue that Florida law is "like the Arizona statute in *Walton*" are, at best, disingenuous because the Court was mistaken about the operation of Arizona law. Any comparison of the *Walton* statute to Florida is therefore based upon an incorrect premise, as is the claim that *Hildwin* falls with *Walton.*

element is sharply made in *Apprendi,* where the Court stated: "One need only look to the kind, degree, or range of punishment to which the prosecution is entitled for a given set of facts. **Each fact necessary for that entitlement is an element.**" *Apprendi v. New Jersey,* 120 S.Ct. at 2369. [emphasis added]. A Florida defendant is eligible for a death sentence on conviction for capital murder, and a death sentence, under Florida's scheme, is not a "sentence enhancement," nor is it an "element" of the underlying offense. *Alemndarez-Torres v. United States,* 523 U.S. 224 (1998); *McMillan v. Pennsylvania,* 477 U.S. 79 (1986). In discussing Florida's sentencing scheme, the United States Supreme Court stated:

> Nothing in our opinion in *McMillan v. Pennsylvania*, 477 U.S. 79, 106 S.Ct. 2411, 91 L.Ed.2d 67 (1986), suggests otherwise. We upheld a Pennsylvania statute that required the sentencing judge to impose a mandatory minimum sentence if the judge found by a preponderance of the evidence that the defendant visibly possessed a firearm. We noted that the finding under Pennsylvania law "neither alters the maximum penalty for the crime committed nor creates a separate offense calling for a separate penalty; **it operates solely to limit the sentencing court's discretion in selecting a penalty within the range already available to it.**" *Id.*, at 87-88, 106 S.Ct., at 2417-2418. Thus we concluded that the requirement that the findings be made by a judge rather than the jury did not violate the Sixth Amendment because "there is no Sixth Amendment right to jury sentencing, even where the sentence turns on specific findings of fact." *Id.*, at 93, 106 S.Ct., at 2420. Like the visible possession of a firearm in *McMillan,* **the existence of an aggravating factor here is not an element of the offense but instead is "a sentencing factor that comes into play only after the defendant has been found guilty.**" *Id.*, at 86, 106 S.Ct., at 2417. Accordingly, the Sixth Amendment does not

> require that the specific findings authorizing the imposition of the sentence of death be made by the jury.

Hildwin v. Florida, 490 U.S. 638, 640-41 (1989). [emphasis added].[31]

As Justice Scalia's concurrence emphasizes, ***Ring* is not about jury sentencing at all:**

> What today's decision says is that the jury must find the existence of the fact that an aggravating factor existed. Those States that leave the ultimate life-or-death decision to the judge may continue to do so -- by requiring a prior jury finding of aggravating factor in the sentencing phase or, more simply, by placing the aggravating-factor determination (where it logically belongs anyway) in the guilt phase."[32]

Ring, supra. Florida's capital sentencing scheme comports with those constitutional requirements.

3. Florida provides additional Eight Amendment protection at the selection (or sentencing) phase through the jury's channeled discretion in arriving at a recommended sentence.

The Florida capital sentencing statue provides for the jury's participation:

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[31] Alabama's capital sentencing scheme is very similar to Florida's. The United States Supreme Court has upheld that system: "The Constitution permits the trial judge, acting alone, to impose a capital sentence. It is thus not offended when a State further requires the sentencing judge to consider a jury's recommendation and trusts the judge to give it the proper weight." *Harris v. Alabama,* 513 U.S. 504, 515 (1995). Like Florida, Alabama law places the eligibility-for-death determination at the guilt phase. § 13A-5-40, *Ala. Stat.*

[32] In context, "aggravating factor," as used by Justice Scalia, means "death eligibility factor."

> **(1) Separate proceedings on issue of penalty.**-- Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by § 775.082. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable. If, through impossibility or inability, the trial jury is unable to reconvene for a hearing on the issue of penalty, having determined the guilt of the accused, the trial judge may summon a special juror or jurors as provided in chapter 913 to determine the issue of the imposition of the penalty. If the trial jury has been waived, or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose, unless waived by the defendant. ...
>
> **(2) Advisory sentence by the jury.**-- After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court, based upon the following matters:
>
> (a) Whether sufficient aggravating circumstances exist as enumerated in subsection (5);
>
> (b) Whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist; and
>
> (c) Based on these considerations, whether the defendant should be sentenced to life imprisonment or death.

§ 921.141, *Florida Statutes.*[33]

This statute secures and preserves significant jury participation in narrowing the class of individuals eligible to be

[33] By the terms of the statute, the jury **must** find the existence of one or more aggravators **before** reaching the sub-section C recommendation stage. In other words, the penalty phase jury must conduct the sub-section A and B analysis before sub-section C comes into play.

sentenced to death under both the Sixth and Eighth Amendments. In *Spaziano, supra,* the United States Supreme Court stated:

> As the Court several times has made clear, we are unwilling to say that there is any one right way for a State to set up its capital sentencing scheme. *See Pulley v. Harris*, 465 U.S. 37, 104 S.Ct. 871, 79 L.Ed.2d 29 (1984); *Zant v. Stephens*, 462 U.S., at 884, 103 S.Ct., at 2747; *Gregg v. Georgia*, 428 U.S., at 195, 96 S.Ct., at 2935 (joint opinion). The Court twice has concluded that Florida has struck a reasonable balance between sensitivity to the individual and his circumstances and ensuring that the penalty is not imposed arbitrarily or discriminatorily. *Barclay v. Florida*, 463 U.S. 939, 103 S.Ct. 3418, 77 L.Ed.2d 1134 (1983); *Proffitt v. Florida*, 428 U.S. 242, 252, 96 S.Ct. 2960, 2966, 49 L.Ed.2d 913 (1976) (joint opinion of Stewart, POWELL, and STEVENS, JJ.). We are not persuaded that placing the responsibility on a trial judge to impose the sentence in a capital case is so fundamentally at odds with contemporary standards of fairness and decency that Florida must be required to alter its scheme and give final authority to the jury to make the life-or-death decision.

Spaziano v. Florida, 468 U.S. at 464-5. The Court later emphasized that the jury's role is so vital to the sentencing process that the jury is a "co-sentencer" in Florida. *Espinosa v. Florida*, 509 U.S. 1079 (1992). However, the *Espinosa* Court did not retreat from the premise of *Spaziano*:

> We have often recognized that there are many constitutionally permissible ways in which States may choose to allocate capital sentencing authority. *See id.*, at 389, 105 S.Ct., at 2736; *Spaziano v. Florida*, 468 U.S. 447, 464, 104 S.Ct. 3154, 3164, 82 L.Ed.2d 340 (1984). Today's decision in no way signals a retreat from that position. We merely hold that, **if a weighing State decides to place capital sentencing authority in two**

> **actors rather than one**, neither actor must be permitted to weigh invalid aggravating circumstances.

Espinosa v. Florida, 505 U.S. at 1082. [emphasis added].[34]

4. The sentence stage (or selection stage) jury need not be unanimous in the recommended sentence.

To the extent that Bottoson claims a death sentence requires juror unanimity, or the charging of the aggravating factors in the Indictment, or special jury verdicts, *Ring* provides no support for his claims.[35] These issues are expressly not addressed in *Ring*, and in the absence of any United States Supreme Court ruling to the contrary, there is no need to reconsider this Court's well established rejection of these claims. *Sweet v. State*, 27 Fla. L. Weekly S585 (Fla., June 13, 2002) (noting that 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

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[34] It is ironic that the "co-sentencer" jury, which was embraced by so many post-*Espinosa* defendants, has apparently "ceased" to exist in the brief time that has passed since *Ring* was decided. If *Espinosa* is right, that the jury is a "co-sentencer," then *Apprendi* and *Ring* cannot apply to Florida based upon the United States Supreme Court's analysis of Florida law. When that analysis is coupled with the *Mills* analysis by this Court, the inapplicability of *Apprendi* and *Ring* in Florida is established beyond doubt.

[35] Bottoson reads more findings into *Ring* than exist. Florida's capital sentencing statute has not been disturbed, and there is no decision from any court that compels additional scrutiny of it. This Court's prior decision in *Bottoson* stands.

(1976)); *Cox v. State*, 27 Fla. L. Weekly S505 at n. 17 (Fla., May 23, 2002) (same).

Bottoson's argument that a unanimous jury recommendation is constitutionally required has been repeatedly rejected by this Court.[36] *See, e.g., Looney v. State*, 803 So. 2d 656, 674 (Fla. 2001), *cert. denied, Looney v. Florida*, 2002 WL 876178 (June 28, 2002). Florida's death sentencing statute, § 921.141(3), provides:

> **Findings in support of sentence of death.**--Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death . . .

See, Way v. State, 760 So. 2d 903, 924 (Fla. 2000)(Pariente, J., concurring)(noting that it is a statute that allows the jury to recommend the imposition of the death penalty based on a non-unanimous vote). This Court, prior to *Apprendi*, has consistently held that a jury may recommend a death sentence on simple majority vote, *Thompson v. State*, 648 So. 2d 692,698 (Fla. 1994)(holding that it is constitutional for a jury to recommend death based on a simple majority and reaffirming *Brown v. State*, 565 So. 2d 304, 308

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[36] The weighing process that must be performed by the jury is based upon whether mitigation outweighs the aggravation proven beyond a reasonable doubt. In cases like Bottoson's, where a prior violent felony exists and/or where it can be inferred from the jury's verdict (in the case of underlying enumerated felonies), the "first" step in the determination of whether an aggravator exists is removed.

(Fla. 1990)); *Alvord v. State*, 322 So. 2d 533 (Fla. 1975)(holding jury's advisory recommendation as the sentence in a capital case need not be unanimous). And, after *Apprendi*, this Court has consistently rejected claims that *Apprendi* requires a unanimous jury sentencing recommendation. *Card v. State*, 803 So. 2d 613, 628 & n. 13 (Fla. 2001)(rejecting an argument that *Apprendi* requires a unanimous jury verdict because "this Court consistently had held that a capital jury may recommend a death sentence by a bare majority vote."); *Hertz v. State*, 803 So. 2d 629, 648 (Fla. 2001)(rejecting claim that, in light of *Apprendi*, the trial court erred in denying a motion to require unanimity in the jury's sentencing recommendation); *Brown v. Moore*, 800 So.2d 223 (Fla. 2001)(rejecting claim that aggravating circumstances are required to be found by unanimous jury verdict).

Further, the United States Supreme Court has held that a finding of guilt does not need to be unanimous.[37] *Cf. Johnson v. Louisiana,* 406 U.S. 356, 92 S.Ct. 1620, 32 L.Ed.2d 152 (1972)(holding a conviction based on plurality of nine out of twelve jurors did not deprive defendant of due process and did not deny equal protection); *Apodaca v. Oregon*, 406 U.S. 404, 92 S.Ct.

[37]*See also, People v. Fairbank*, 16 Cal.4th 1223, 1255, 947 P.2d 1321, 69 Cal. Rptr.2d 784 (1997) (unanimity not required as existence of aggravators, weight given to them, or appropriateness of a sentence of death).

1628, 32 L.Ed.2d 184 (1972)(holding a conviction by less than unanimous jury does not violate right to trial by jury and explaining that the Sixth Amendment's implicit guarantee of a unanimous jury verdict is not applicable to the states)[38]. Nor do jurors have to agree on the particular aggravators just as they are not required to agree on the particular theory of liability, *Schad v. Arizona*, 501 U.S. 624, 631, 111 S.Ct. 2491, 2497, 115 L.Ed.2d 555 (1991)(plurality opinion)(holding that due process does not require jurors to unanimously agree on alternative theories of criminal liability but declining to address whether the constitution requires a unanimous jury verdict as to guilt in state capital cases) and; has specifically rejected any requirement that mitigating circumstances have to be found unanimously. *McKoy v. North Carolina*, 494 U.S. 433 (1990)(allowing a jury to consider only those mitigating circumstances found unanimously impermissibly limited jurors' consideration of mitigating evidence in violation of the Eighth Amendment); *Mills v. Maryland*, 486 U.S. 367

[38]The Court did not set a standard "that a criminal verdict must be supported by at least a 'substantial majority' of the jurors." Rather, it stated that with both a unanimous jury and with a nonunanimous jury "the interest of the defendant in having the judgment of his peers interposed between himself and the officers of the State who prosecute and judge him is equally well served." *Apodaca v. Oregon*, 92 S.Ct. 1628, 1633 (1972).

(1988)(stating that it would be the "height of arbitrariness" to require jury unanimity in finding mitigating circumstances).

When the hyperbole of Bottoson's argument is stripped away, *Ring* affirms the distinction between "sentencing factors" and "elements" of an offense which have long been recognized. *See Ring* at *14; *Harris v. United States*, 2002 WL 1357277 (U.S. June 24, 2002). To the extent that Bottoson claims that *Ring* requires that the aggravating circumstances be charged in the indictment and presented to a grand jury, that argument is based upon an invalid comparison of Federal cases, which have wholly different procedural requirements, to Florida's capital sentencing scheme.[39] For example, in *United States v. Allen*, 247 F.3d 741, 764 (8th Cir. 2001), the Court of Appeals based its decision that the statutory aggravating factors under the Federal Death Penalty Act do not have to be contained in the indictment exclusively on *Walton v. Arizona*, which, of course, *Ring* overruled in significant part. It is hardly surprising that the United States Supreme Court remanded *Allen* for reconsideration in light of *Ring.*

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[39]Of course, the Fifth Amendment's grand jury clause has not been extended to the States under the Fourteenth Amendment. *Ring v. Arizona, supra,* at n.4, *citing*, *Apprendi v. New Jersey*, 530 U.S. 466, 477 n.3 (2000); *Hurtado v. California,* 110 U.S. 516 (1884) (holding that, in capital cases, the States are not required to obtain a grand jury indictment). This distinction, standing alone, is dispositive of the indictment claim.

The fact that two jurors did not recommend that Bottoson be sentenced to death does not mean, contrary to Bottoson's interpretation, that those jurors found that no aggravators existed. Bottoson's argument proves too much -- he had previously been convicted of bank robbery (which is clearly a violent felony), and **stipulated** that the murder occurred during an enumerated felony. Two aggravating circumstances were thus proven beyond a reasonable doubt. The jury's vote reflects its considered weighing of the aggravating and mitigating circumstances, not whether any particular juror rejected some or all of the aggravating circumstances. Based upon the plain language of the statute, the only conclusion that can be drawn from the jury's sentencing vote is that two jurors thought that life was a more appropriate sentence than death.[40]

Any Florida death sentence which was imposed following a jury recommendation of death necessarily satisfies the Sixth Amendment as construed in *Ring* -- in such a case, the jury necessarily (and by definition) found beyond a reasonable doubt that at least one aggravating factor existed. *Rogers v. State*, 783 So. 2d 980, 992-3 (Fla. 2001) (stating that aggravator must be proven beyond a

[40] The most that can be said for the two votes against a death sentence are that they amount to what can be called a "jury pardon" based upon the mitigation to the effect that Bottoson was a "good guy." *Dougan v. State*, 595 So. 2d 1, 4 (Fla. 1992), *supra*.

reasonable doubt, citing *Geralds v. State,* 601 So. 2d 1157, 1163 (Fla. 1992)); *see also, Archer v. State,* 623 So. 2d 17, 20-21 (Fla. 1996). Since the finding of an aggravating factor authorizes the imposition of a death sentence under any interpretation of *Ring*, and since Bottoson's penalty phase jury recommended that the death penalty was justified by a vote of 10-2[41] after weighing the aggravating and mitigating factors under the statute, the requirement that a jury determine the conviction to have been a capital offense has been fulfilled twice -- at the guilt phase (as *Ring* requires under the Sixth Amendment), and at the sentence stage, (under the 8th Amendment weighing process upheld in *Proffitt*, and reaffirmed in the cases following it). There is no constitutional error.

Ring's Sixth Amendment jurisprudence is satisfied by the conviction in Florida and by the Florida Supreme Court's pronouncement that death is the maximum sentence available under Florida law for the offense of capital murder. These matters do not

[41] To the extent that this Court has fashioned, in the past, perceived, necessary, additional procedures (such as *Spencer* hearings, the preference for individualized *voir dire*, the *Tedder* standard, the *Campbell/Neibert* sentencing order requirements, and limitations on aggravators) not found in the capital statute, recent discussions calling for special jury forms or clarification as to the capital jury instructions are issues that may arise, at some point, in an appropriate case. However, neither *Ring* nor *Apprendi* **require** such additional modifications.

change the Eighth Amendment requirement of channeling of the jury's discretion, which is done, and must still be done under Florida law, at the penalty phase of a capital trial. Bottoson's discussion of the **weighing** of aggravators and mitigators is an Eighth Amendment issue, not a Sixth Amendment one, and is a matter of Florida, not federal, law.[42] Florida law over-meets the requirements of the Eighth Amendment, and satisfies the Sixth Amendment, as well. This case presents the ultimate irony because, despite the fact that Florida has gone far beyond the minimum requirements of the Eighth Amendment, the Sixth Amendment is being used as a wedge to challenge Florida's death sentencing scheme and erode many of the Eighth Amendment provisions included by the statute and this Court, such as proportionality review. *See Pulley v. Harris, supra.*

5. The co-sentencers utilized in Florida supply an extra layer of Eighth Amendment protection, but have nothing to do with the Sixth Amendment, which is the basis of *Ring*.

Ring does not directly or indirectly preclude a judge from serving in the role of sentencer. There is no language in *Ring*

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[42] While Florida law limits the consideration of aggravation to the aggravators set out in the *Florida Statutes*, Federal law does not. There is no constitutional requirement that only statutorily-specified matters can be considered as "aggravators" for a death sentencing scheme to be valid. *See, Gregg v. Georgia,* 428 U.S. 153 (1976); *Wainwright v. Goode*, 104 S.Ct. 378 (1983); *see also,* § 26-1101, *Ga. Code*.

which suggests that, once a defendant has been convicted of a capital offense, a judge may not hear evidence or make findings in addition to any findings a jury may have made. And, as Justice Scalia commented, "those States that leave the ultimate life-or-death decision to the judge **may continue to do so**." *Ring, supra,* (Scalia, J., concurring) (emphasis added). The fact that Florida provides an additional level of judicial consideration in the capital sentencing process does not render Florida's capital sentencing statute unconstitutional. Bottoson unfairly criticizes state law for requiring judicial participation in capital sentencing, but does not identify how judicial findings **after a jury recommendation** can interfere with the right to a jury trial. Any suggestion that *Ring* has removed the judge from the sentencing process has no factual basis. The judicial role in Florida alleviates Eighth Amendment concerns as well, and in fact provides defendants with another "bite at the apple" in securing a life sentence, in addition to enhancing appellate review and providing a reasoned basis for this Court's proportionality review. *See, Spencer v. State,* 615 So. 2d 688 (Fla. 1993).

To the extent that further discussion of this claim is necessary, the United States Supreme Court's holding in *Clemons v. Mississippi* is dispositive:

> Any argument that the Constitution requires that a jury impose the sentence of death or make the findings prerequisite to imposition of such a sentence has been soundly rejected by prior decisions of this Court. *Cabana v. Bullock*, 474 U.S. 376, 106 S.Ct. 689, 88 L.Ed.2d 704 (1986), held that an appellate court can make the findings required by *Enmund v. Florida*, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982), in the first instance and stated that "[t]he decision whether a particular punishment -- even the death penalty -- is appropriate in any given case is not one that we have ever required to be made by a jury." 474 U.S., at 385, 106 S.Ct., at 696. *Spaziano v. Florida*, 468 U.S. 447, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984), ruled that neither the Sixth Amendment, nor the Eighth Amendment, nor any other constitutional provision provides a defendant with the right to have a jury determine the appropriateness of a capital sentence; neither is there a double jeopardy prohibition on a judge's override of a jury's recommended sentence. Likewise, the Sixth Amendment does not require that a jury specify the aggravating factors that permit the imposition of capital punishment, *Hildwin v. Florida*, 490 U.S. 638, 109 S.Ct. 2055, 104 L.Ed.2d 728 (1989), nor does it require jury sentencing, even where the sentence turns on specific findings of fact. *McMillan v. Pennsylvania,* 477 U.S. 79, 93, 106 S.Ct. 2411, 2420, 91 L.Ed.2d 67 (1986).

Clemons v. Mississippi, 494 U.S. 738, 745-6 (1990). There is no constitutional infirmity with Florida law,[43] and Bottoson is not

[43] To the extent that the Court has noted that jury overrides jeopardize the Florida capital sentencing scheme in light of *Ring*, that issue is not present in this case. However, when an override has been affirmed by this Court on appeal, this Court has always set out a constitutionally sound basis to support the trial court's rejection of the life recommendation. That the Court has done so in affirming reflects a finding by the Court that the jury's recommendation is flawed as to its' weighing responsibilities, not as to whether an aggravator has not been proven. In Florida, where the eligibility determination is made at the end of the guilt phase, a flawed life recommendation implicates neither the Sixth nor the Eighth Amendments. In light of the Court's application of

entitled to any relief. Bottoson's claim for relief has no legal basis.[44]

E. FLORIDA LAW IS NOT INCONSISTENT WITH *APPRENDI*. *RING* IS THE APPLICATION OF *APPRENDI* TO ARIZONA LAW, HOWEVER, ANY APPLICATION OF *RING* TO FLORIDA IS PROSPECTIVE ONLY.

In *Ring,* the United States Supreme Court discussed at length the misapprehension of Arizona law which led to the *Walton* and *Apprendi* decisions. Ultimately the Court concluded:

> The Arizona Supreme Court, as we earlier recounted, see supra, at 2435- 2436, found the *Apprendi* majority's portrayal of Arizona's capital sentencing law incorrect, and the description in Justice O'CONNOR's dissent precisely right: "**Defendant's death sentence required the judge's factual findings.**" 200 Ariz., at 279, 25 P.3d, at 1151. Recognizing that the Arizona court's construction of the State's own law is authoritative, *see Mullaney v. Wilbur*, 421 U.S. 684, 691, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975), we are persuaded that *Walton*, in relevant part, cannot survive the reasoning of *Apprendi*.

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the *Tedder* standard, acknowledged in *Proffitt*, *supra*, today only **ten** cases exist which involve an override. A prior violent felony aggravator was found in **nine** of those cases. *See Coleman v. State*, 610 So. 2d 1283 (Fla. 1992); *Garcia v. State*, 644 So. 2d 59 (Fla. 1994); *Marshall v. State*, 604 So. 2d 799 (Fla. 1992); *Robinson v. State*, 610 So. 2d 1288 (Fla. 1992); *Washington v. State*, 653 So. 2d 362 (Fla. 1994); *Weaver v. State*, Florida Supreme Court Case No. SC00-247 (appeal pending); *Williams v. State*, 622 So. 2d 456 (Fla. 1993); *Zakrzewski v. State*, 717 So. 2d 488 (Fla. 1998); *Ziegler v. State*, 580 So. 2d 127 (Fla. 1991).

[44] Florida's capital sentencing scheme is replete with safeguards, which inure to the benefit of the defendant, and which, under any view of the State and Federal Constitutions, more than satisfy all requirements.

Ring, supra. [italics in original; emphasis added]. The true facts are that *Walton*, and, in turn, *Apprendi*, were based upon an error about Arizona capital sentencing. Those cases turned on that opinion, which proved to be erroneous.[45] However, the United States Supreme Court in remaining completely silent, rendered the application of *Apprendi/Ring*, prospective only. This Court has "expressly stat[ed] that this Court does not intentionally overrule itself *sub silentio.*" *Puryear v. State,* 810 So. 2d 901, 905 (Fla. 2002). This Court should not presume that the United States Supreme Court does not follow the same practice. Likewise, in Florida,[46]

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[45] Had the *Apprendi* Court been **correct** in believing that Arizona's statute provided for a maximum sentence of death based upon conviction for a capital offense, *Ring* would have been decided differently. The fact remains that the United States Supreme Court **believed** the Arizona statute was like Florida's statute when that Court upheld it. That the Court was mistaken about Arizona law does not affect Florida's statute -- the United States Supreme Court struck Arizona's statute upon discovering that that statute was **not** like Florida's, and did not question the continuing validity of the Florida system. Bottoson, in his eagerness to inject confusion into this proceeding in order to capitalize on *Ring*, continues the fallacious argument that "Arizona is just like Florida." The United States Supreme Court has implicitly rejected that argument, and it is palpably false.

[46] Comparison of the Florida and Arizona schemes requires caution because they are completely different in operation and in terminology. Unlike the Arizona statute, aggravating factors in Florida are not the "functional equivalent of an element of a greater offense" because a Florida defendant who has been convicted of first degree murder enters the penalty phase with his eligibility for a death sentence established by virtue of the jury's verdict of guilt. This must be so, because capital defendants often argue that the "during the course of an enumerated felony" aggravator is an "automatic" aggravator that is established

upon a determination that potential *Apprendi/Ring* violations occur under the present statute, modifications[47] such as special jury forms and detailed capital jury instructions **can only be applied prospectively.**[48]

The aggravating circumstances contained in Florida law are not, unlike their Arizona counterparts, equal to "elements of a greater offense" -- Florida determines death eligibility at the **guilt** stage, and Arizona did not. That distinction is the end of the issue.[49]

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at the guilt phase. *See, e.g., Francis v. State,* 808 So. 2d 110 (Fla. 2001); *Hudson v. State*, 708 So. 2d 256, 262 (Fla. 1998); *Blanco v. State*, 706 So. 2d 7, 11 (Fla. 1997); *Banks v. State,* 700 So. 2d 363 (Fla. 1997); *Mills v. State,* 476 So. 2d 172, 178 (Fla. 1985).

[47] To the extent Bottoson, early on, argued that the entire sentencing structure is flawed, he is in error. This Court can and has fashioned workable solutions to enhancing the application of Florida's sentencing procedure. Any call for a wholesale revamping by the Florida Legislature because of *Ring*, is unwarranted. This Court may craft procedures and rules or instructions that will address concepts discussed in *Ring*.

[48] Likewise, the fact that the *Apprendi* rationale has been extended to apply to the sentencing phase of capital cases does not mean that this Court committed some error in *Mills* by following the plain language of *Apprendi* and declining to extend it beyond the limitations set out in the opinion itself. That does not change the analysis of Florida law contained in *Mills,* nor does it somehow invalidate this Court's opinion.

[49] This Court correctly followed binding precedent in *Mills* when it declined to extend *Apprendi* to capital cases in light of the explicit language of that opinion. The fact that the *Ring* Court did so apply *Apprendi* does not mean that **this** Court misinterpreted

II. *ATKINS V. VIRGINIA* DOES NOT SUPPLY A BASIS FOR RELIEF BECAUSE BOTTOSON IS NOT MENTALLY RETARDED.

Despite this Court's prior finding that Bottoson is not mentally retarded because his IQ is 85 (and because he does not meet the other diagnostic criteria, either), Bottoson argues that the prior decision of this Court should be reopened based upon the United States Supreme Court's decision in *Atkins v. Virginia,* 122 S.Ct 2242 (2002). Nothing alleged in Bottoson's petition calls the prior factual determinations about his mental state into question. There is no basis for revisiting the prior disposition of this procedurally barred issue. *See, Johnson, supra; Francois, supra.*

To the extent that this successive and abusive claim deserves further response, the Florida Supreme Court's January 31, 2002, decision is dispositive. *Bottoson v. State,* 813 So. 2d 31 (Fla. 2002). This Court has already found that Bottoson is not mentally retarded, and he does not suggest that the facts have changed (or that he has obtained additional evidence) in the five months that have passed since that decision. This claim was disposed of on the merits in the prior Rule 3.850 proceeding, and the claim contained

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Florida law -- those components of the *Mills* decision are independent of each other, **and nothing has called this Court's plain statement about the functioning of Florida law into question.** That portion of *Mills* is undisturbed by *Ring*, and, if for no other reason than *stare decisis*, should not be reconsidered in this case.

in the most recent petition is successive -- it should be denied on that basis. Bottoson is not entitled to any relief. See pages 5-10, above.

In the petition, Bottoson raises various peripheral claims which, he says, are based upon *Ring* and *Atkins.* First among these claims is the assertion that he is entitled to a jury determination of whether or not he is mentally retarded. This claim could have been but was not raised in Bottoson's prior collateral proceedings, and is procedurally barred from consideration in this successive petition. In any event, this claim is specious because it does not "increase" the maximum sentence.

Alternatively and secondarily, the claim has no merit. Nothing in *Ring* or *Atkins* supports the conclusion, despite Bottoson's assertion, that a "factual determination of mental retardation is no less a condition for imposition of the death sentence than the aggravating circumstances in the *Ring* case." This argument is based upon a strained interpretation of the cases upon which it is based, and wholly ignores the inescapable fact that the determination of mental retardation (or its absence) is analytically no different than a pretrial determination of competence to proceed under *Florida Rules of Criminal Procedure* 3.210-3.212. The law is well-settled that a determination of competence to proceed is made by the trial judge, and is subject to review on appeal. *See, e.g.,*

Hunter v. State, 660 So. 2d 244 (Fla. 1995).[50] There can be no colorable argument that a defendant claiming incompetence is entitled to a jury resolution of the issue, and, because that is so, there can be no "right" to a jury's determination of mental retardation in the context of a capital trial.[51] The suggestion that a jury must decide the issue of mental retardation is meritless.

Bottoson also claims that no "definition" of mental retardation is in place in Florida. This argument is simply incorrect, and, in fact, has already been rejected by this Court in its January 2002 opinion. Bottoson is not free to obtain another bite at the habeas apple by successive litigation of the same claim. This claim is procedurally barred.

Alternatively, this claim lacks merit because the definition of mental retardation employed in the prior litigation in this case is the functional equivalent of the one found in *Atkins*. *Bottoson*

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[50] Also, this issue is analytically the same as the trial judge making the determination of whether a juror is qualified to serve on a capital jury, or whether the juror should be stricken for cause.

[51] It is axiomatic that the right not to be tried while incompetent is firmly ingrained in the law. *See, Dusky v. United States,* 362 U.S. 402 (1960). The principle announced in *Atkins* is not superior to *Dusky* and its progeny, and it makes no sense to suggest to the contrary. Bottoson is doing nothing more than attempting to force the square peg of *Atkins* into the round hole of *Ring.*

v. State, 813 So.2d at 33-34.[52] The definition of mental retardation set out in *Atkins* is the definition applied in this case, and Bottoson should not be heard to complain when the definition contained in the case upon which he seeks to predicate relief is the one that was applied to him. *Atkins v. Virginia,* 122 S.Ct. 2242, 2245 (2002). Bottoson's claim is unfounded.

In any event, *Atkins* expressly left the implementation of the constitutional restriction to the States. *Atkins v. Virginia, supra,* at 2250. The situation is analogous to that which was present in *Dillbeck*, when the defendant sought to present mental mitigation while opposing any evaluation by the State at a time when there was no rule addressing the issue. *Dillbeck v. State,* 643 So. 2d 1027, 1030 (Fla. 1994). An interim rule was adopted to address the issue, and that situation is analytically no different than the one presented here. The "definition" of mental retardation does not seem to be disputed by anyone other than Bottoson, and his complaints are spurious. Presumably, Bottoson's position is that

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[52] This Court will recall the prior testimony, which was credited by the Court, which was that mental retardation is defined as significantly subaverage intellectual functioning on an individually administered intelligence test, coupled with concurrent deficits in adaptive functioning, having its onset prior to age 18. (R503-04). "Significantly subaverage intellectual functioning" is defined as a full scale IQ score that is two standard deviations below the mean -- which is approximately 70. (R609-11). **Bottoson's full scale IQ score was 85.** (R451 Evidentiary Hearing, Jan. 16, 2002).

Atkins sets out a definition of mental retardation that is easier to satisfy – in fact, that standard is more stringent than the standard now in place in Florida. Bottoson cannot satisfy the definition of mental retardation under *Atkins* or under Florida law. Bottoson is not mentally retarded under any definition.

CONCLUSION

Neither claim raised by Bottoson provides a basis for setting aside his sentence of death, further staying his execution, or providing him with a new penalty phase proceeding.[53] The grounds for relief presented in the habeas petition are successive, and are an abuse of process, because they have previously been litigated before this Court and decided adversely to Bottoson. He is not entitled to an exemption from the application of the State's well-settled procedural bar rules, and those rules compel denial of relief. Alternatively and secondarily, Bottoson's claims fail on both the law and the facts. The *Apprendi/Ring* claim is based upon a misinterpretation of Florida law, and the mental retardation claim is a non-issue because no facts support it. Neither claim is a basis for relief. It is time for Bottoson's sentence to be carried out.

Respectfully submitted,

[53] Bottoson does not seek any guilt stage relief, nor would he be entitled to any.

ROBERT A BUTTERWORTH
ATTORNEY GENERAL

KENNETH S. NUNNELLEY
SENIOR ASSISTANT ATTORNEY GENERAL
Florida Bar #0998818

DOUGLAS T. SQUIRE
ASSISTANT ATTORNEY GENERAL
Florida Bar #0088730
444 Seabreeze Blvd. 5th FL
Daytona Beach, FL 32118
(386) 238-4990
Fax # (386) 226-0457

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above has been furnished by U.S. Mail to:

William Jennings, Peter Cannon, and Eric Pinkard
Capital Collateral Regional Counsel - Middle Region
3801 Corporex Park Dr., Suite 210
Tampa, Florida 33619

Mark E. Olive
320 West Jefferson St.
Tallahassee, Florida 32301

Nancy A. Daniels, Public Defender
Second Judicial Circuit of Florida
Leon County Courthouse, Suite 401
Tallahassee, Florida 32301

Robert Augustus Harper, Esquire
325 West Parker Ave.
Tallahassee, Florida 32301-1413

James T. Miller
The Blackstone Building
233 East Bay Street, Suite 920
Tallahassee, Florida 32202-3456

Arthur I. Jacobs, Esq.
General Counsel for the Florida
Prosecuting Attorneys Association
P. O. Box 1110
Fernandina Beach, Florida 32034

this _____ day of July, 2002.

_____
Of Counsel

CERTIFICATE OF COMPLIANCE

This brief is typed in Courier New 12 point.

_____
KENNETH S. NUNNELLEY
ASSISTANT ATTORNEY GENERAL