

IN THE SUPREME COURT OF FLORIDA

LINROY BOTTOSON,  
Petitioner,

E.

CASE NO. SC02-1455

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

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ON APPEAL FROM THE NINTH JUDICIAL CIRCUIT  
IN AND FOR ORANGE COUNTY, FLORIDA

RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS  
AND APPLICATION FOR STAY OF EXECUTION

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RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS AND  
APPLICATION FOR STAY OF EXECUTION

COMES NOW the Respondent, and files this response to Petitioner Bottoson's Petition for Writ of Habeas Corpus and Application for Stay of Execution. Petitioner Bottoson is an inmate in custody under a sentence of death, currently scheduled to be executed on July 8, 2002. The state and federal courts have previously denied his appeals. See *Bottoson v. State*, 443 So. 2d 962, 964 (Fla. 1983), *cert. denied*, 469 U.S. 873 (1984); *Bottoson v. State*, 674 So. 2d 621 (Fla. 1996), *cert. denied*, 519 U.S. 967 (1996); *Bottoson v. Singletary*, 685 So. 2d 1302, 1304 (Fla. 1997); *Bottoson v. Moore*, 234 F. 3d 526, 530 (11<sup>th</sup> Cir. 2000); *Bottoson v. Moore*, 251 F. 3d 165 (11<sup>th</sup> Cir. 2001), *cert. denied*, 122 S. Ct. 357 (2001); *Bottoson v. State*, 805 So. 2d 804

(Fla. 2002); *Bottoson v. Moore*, 814 So. 2d 437 (Fla. 2002); *Bottoson v. State*, 813 So. 2d 31 (Fla. 2002), *cert. denied*, 2002 WL 205397 (June 28, 2002). The Respondent respectfully submits that Bottoson's request for a stay of execution should be denied, as no stay is warranted in this case.

#### PROCEDURAL HISTORY

In this Court's January 31, 2002, opinion, this Court summarized the background of this case in the following way:

The facts of this case are set forth in our initial opinion on direct appeal, wherein we affirmed Bottoson's first-degree murder conviction and death sentence. See *Bottoson v. State*, 443 So. 2d 962, 963-64 (Fla. 1983), *cert. denied*, 469 U.S. 873, 105 S.Ct. 223, 83 L.Ed.2d 153 (1984). Bottoson filed his initial rule 3.850 motion for postconviction relief in 1985. Subsequently, a death warrant was issued while postconviction proceedings were still pending. The trial court entered an order granting an indefinite stay of execution, and Bottoson subsequently filed several amendments to his 3.850 motion. On November 14, 1991, the trial court held an evidentiary hearing and thereafter denied the motion. This Court affirmed the trial court's denial of postconviction relief, and denied rehearing on May 9, 1996. See *Bottoson v. State*, 674 So. 2d 621 (Fla. 1996), *cert. denied*, 519 U.S. 967, 117 S.Ct. 393, 136 L.Ed.2d 309 (1996). Bottoson also filed a petition for writ of habeas corpus, which this Court denied on January 9, 1997. See *Bottoson v. Singletary*, 685 So.2d 1302 (Fla.1997).

On June 2, 1998, Bottoson sought habeas corpus relief in the United States District Court for the Middle District of Florida, which was denied in an unpublished opinion, and the Eleventh Circuit affirmed the denial. See *Bottoson v. Moore*, 234 F.3d 526 (11th Cir. 2000), *cert. denied*, --- U.S. ----, 122 S.Ct. 357, 151 L.Ed.2d 270 (2001). The Eleventh Circuit

denied Bottoson's motion for rehearing on February 28, 2001. See *Bottoson v. Moore*, 251 F.3d 165 (11th Cir.2001).

#### DEATH WARRANT PROCEEDINGS

On November 19, 2001, the Governor issued a second death warrant, and Bottoson's execution was set for February 5, 2002, at 6 p.m. On January 11, 2002, Bottoson filed a successive postconviction motion, entitled a "Motion to Vacate Judgement and Sentence, and Request for Evidentiary Hearing and Stay of Execution." The trial court held a preliminary *Huff* [footnote omitted] hearing on January 15, 2002. On the same day the trial court entered an order granting an evidentiary hearing only on the issue of Bottoson's claim that he should not be executed because he is mentally retarded. On January 17, the trial court held the evidentiary hearing and on January 18, the trial court entered an order denying all claims.

*Bottoson v. State*, 813 So. 2d 31 (Fla. 2002). The United States Supreme Court issued a stay of Bottoson's execution on February 5, 2002. That stay was lifted on June 28, 2002, and, on July 1, 2002, Bottoson's execution was rescheduled for July 8, 2002.

Following the scheduling of his execution for July 8, 2002, Bottoson informed the Circuit Court of Orange County, Florida, that he would file a *Florida Rule of Criminal Procedure* 3.850 motion no later than noon on July 4, 2002. The Circuit Court scheduled a *Huff* hearing for 10:00 AM on July 5, 2002. Shortly before noon on July 4, 2002, Bottoson informed the Circuit Court that he would **not** be filing a Rule 3.850 motion. The Circuit Court issued an order allowing Bottoson until 4:30 PM on July 4,

2002, to file any pleadings in that Court, after which time no such filings would be allowed absent extraordinary circumstances. No pleadings were filed, and the Circuit Court issued an order cancelling the hearing.<sup>1</sup>

#### **THE RING V. ARIZONA CLAIM**

Bottoson alleges that the United States Supreme Court's recent decision in *Ring v. Arizona*, 2002 WL 1357257 (June 24, 2002), demonstrates that Florida's death penalty scheme is unconstitutional, and compels the granting of a stay of execution. In *Ring*, the United States Supreme Court expressly overruled its prior decision in *Walton v. Arizona*, 497 U.S. 639 (1990), and held that **Arizona's** death penalty statute violated the Sixth Amendment right to a jury trial "to the extent that it allows a sentencing judge, sitting without a jury, to find an aggravating circumstance necessary for imposition of the death penalty." *Ring* is very narrow and limited in scope, and it has no impact on the sentence imposed in this case for the reasons set out below.

#### **THE "RING" CLAIM IS PROCEDURALLY BARRED**

Bottoson's reliance on *Ring* to support a claimed Sixth Amendment violation in his case is procedurally barred. Although

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<sup>1</sup>Copies of these orders have been lodged with this Court previously.

*Ring* was recently decided, 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 the signing of his warrant in 2001. Since Bottoson did not offer this claim in a timely manner, it is now barred. This Court should deny relief on that basis.

Moreover, the *Ring* decision is not subject to retroactive application under the principles of *Witt v. State*, 387 So. 2d 922, 929-30 (Fla. 1980). Under the *Witt* rationale, *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*, 2002 WL 496487 (June 24, 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." ).<sup>2</sup>

In his petition, Bottoson relies on citations to the amicus brief and the transcript of the *Ring* oral argument in an effort to push Florida's sentencing statute under the *Ring* umbrella.

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<sup>2</sup>The United States Supreme Court recently held that an *Apprendi* claim is not plain error. *United States v. Cotton*, 122 S.Ct. 1781 (May 20, 2002)(holding an indictment's failure to include the quantity of drugs was an *Apprendi* error but it 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 cognizable on direct appeal, it is not of sufficient magnitude to be a candidate for retroactive application in collateral proceedings. *United States v. Sanders*, 247 F.3d 139, 150, 151 (4th Cir. 2002)(emphasizing that finding something to be a structural error would seem to be a necessary predicate for a new rule to apply retroactively and therefore, concluding that *Apprendi* is not retroactive). Every Federal Circuit that has addressed the issue had found that *Apprendi* is not retroactive. *United States v. Sanders*, 247 F.3d 139 (4th Cir. 2001); *Curtis v. United States*, 2002 WL 1332817 (7th Cir. June 19, 2002)(holding *Apprendi* is not retroactive because it is not a substantive change in the law; rather, it "is about nothing but procedure" and it is not so fundamental because it is not even applied in direct appeal without preservation relying on *United States v. Cotton*, 122 S.Ct. 1781 (May 20, 2002)); *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). The one State Supreme Court that has addressed the retroactivity of *Apprendi* has, likewise, determined that the decision is not retroactive. *Whisler v. State*, 36 P.3d 290 (Kan. 2001). Moreover, 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 (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).

The fact that the question accepted for review in *Ring* **potentially** had far-reaching implications does not mean that the opinion that was ultimately issued meets the fundamental significance standard of *Witt*. Bottoson is bound by the written opinion, and, for the reasons set out herein, *Ring* has little or no impact on Florida's capital sentencing structure. *Ring* does not demonstrate that an "obvious injustice" occurred in this case.

Finally, the claim contained in Bottoson's petition is procedurally barred because it has already been considered and rejected by this Court. Because that is so, Bottoson is not entitled to have this claim considered yet again in a successive habeas corpus petition. *King v. State*, 808 So. 2d 1237, 1246 (Fla. 2002), *cert. denied*, 2002 WL 87064 (June 28, 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.").

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). Bottoson's

petition for writ of habeas corpus is successive, and should be denied on that basis, in addition to the other, independently adequate, grounds for the denial of relief.

RING IS NOT APPLICABLE TO FLORIDA  
CAPITAL SENTENCING

Even if Bottoson's argument is considered, he has not demonstrated that he is entitled to any relief. *Ring* does not require jury sentencing in capital cases, and expressly rejected any suggestion to the contrary:

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 circumstances related to past convictions in his case; Ring therefore does not challenge *Almendarez-Torres v. United States*, 523 U.S. 224 (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, 490-91, n. 16 (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 (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 (1990). Finally, Ring does not contend that his indictment was constitutionally defective. See *Apprendi*, 530 U.S., at 477, n. 3 (Fourteenth Amendment "has not ... been construed to include the Fifth Amendment right to

'presentment or indictment of a Grand Jury'").

*Ring v. Arizona, supra*, at n. 4. *Ring* does not involve the jury's role in imposing sentence -- it involves only the requirement that the jury find the defendant death-eligible. Even in the wake of *Ring*, a jury only has to make a finding of one aggravator and then the judge may make the remaining findings. *Ring* is limited to the finding of an aggravator, not additional aggravators, mitigation, or weighing. *Ring, supra*, ("What today's decision says is that the jury must find the existence of the fact that an aggravating factor existed.") (Scalia, J., concurring). Constitutionally, to be eligible for the death penalty, all the sentencer must find is one "narrower," *i.e.*, one aggravator, at either the guilt or penalty phase. *Tuilaepa v. California*, 512 U.S. 967, 972, 114 S.Ct. 2630, 2634, 129 L.Ed.2d 750 (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."). Once a jury has found one aggravator at the guilt phase, the constitution is satisfied, and the judge may do the rest.

*Ring* did not eliminate the trial judge from the sentencing equation or in any fashion imply that Florida should do so. This

is a critical distinction which demonstrates the difference between what *Ring* held and what *Bottoson* would have this Court read into that decision. The United States Supreme Court studied Arizona law and concluded that, because additional findings, which are made by a judge alone, are required in order for the death penalty to be imposed, 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, under the Arizona law examined in *Ring*, the jury plays 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. Arizona, supra; Ring v. State*, 25 P.3d 1139, 1150 (Ariz. 2001). However, Florida law, as this Court has held, is not like Arizona's. *Mills v. State*, 786 So. 2d 532 (Fla. 2001).

A clear understanding of what *Ring* does and does not say is essential to analyze any possible *Ring* implications to Florida's capital sentencing procedures. Most significantly, and in the component of that decision that reveals its inapplicability to Florida, the *Ring* decision 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), and *Hildwin v. Florida*, 490 U.S. 638 (1989). As this Court has recognized, "[t]he Supreme Court has specifically directed lower courts to 'leav[e] to this Court the prerogative of overruling its own decisions.'" *Agostini v. Felton*, 521 U.S. 203, 237, 117 S.Ct. 1997, 138 L.Ed.2d 391 (1997) (quoting *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484, 109 S.Ct. 1917, 104 L.Ed.2d 526 (1989))." *Mills v. Moore*, 786 So. 2d 532, 537(Fla. 2001).

The United States Supreme Court declined to disturb its prior decisions upholding the constitutionality of Florida's capital sentencing process, and that result is dispositive of Bottoson's claims. 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. The Court had every opportunity to directly address *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 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*, 01-6821; *Pandelt v. Arizona*, 01-7743; *Sansing v. Arizona*, 01-7837; and *Allen v. United States*, 01-7310. 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: *Holladay v. Alabama*, 00-10728; *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.<sup>3</sup> 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).

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<sup>3</sup>*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.

Bottoson's death sentence was recommended by a vote of 10-2. To the extent that he 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.<sup>4</sup> 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 (1976)); *Cox v. State*, 27 Fla. L. Weekly S505 at n. 17 (Fla., May 23, 2002) (same). 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).

While Bottoson styles this component of his argument as being that *Ring* requires juror unanimity at the sentence stage, he tips his hand at page 27 of the petition when he attempts to

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<sup>4</sup>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.

argue sentence proportionality in Federal constitutional terms. Despite the pretensions of the petition, this Court's proportionality review is a state law issue that does not implicate the Constitution. *Pulley v. Harris*, 465 U.S. 37, 104 S.Ct. 871, 79 L.Ed.2d 29 (1984); *Bush v. Singletary*, 99 F.3d 373, 375 (11th Cir. 1996).

Moreover, 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.

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

**(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*.

This statute clearly secures and preserves significant jury participation in narrowing the class of individuals eligible to be sentenced to death. The jury's role is so vital to the sentencing process that the jury has been characterized as a

"co-sentencer" in Florida. *Espinosa v. Florida*, 509 U.S. 1079 (1992).

*Ring* does not directly or indirectly preclude a judge from serving in the role of sentencer. There is no language in *Ring* which suggests that, once a defendant has been convicted of a capital offense, 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.

In addition, *Ring* affirms the distinction between "sentencing factors" and "elements" of an offense recognized in prior case law. See *Ring* at \*14; *Harris v. United States*, 2002 WL 1357277 (U.S. June 24, 2002). Bottoson's argument, suggesting that the jury's role in Florida's capital sentencing process is insufficient, improperly assumes the jury recommendation itself to be a jury vote as to the existence of aggravating factors. However, the jury vote only represents the final jury determination as to the appropriateness of the death sentence in the case, and does not dictate what the jury found with regard to particular aggravating factors. When the jury recommends death, it necessarily found an aggravating factor to exist beyond a reasonable doubt and satisfies the Sixth Amendment as construed in *Ring*. To the extent that *Ring* suggests that capital murder may have an additional "element" that must be found by a jury to authorize the imposition of the death penalty, that "element" would be the existence of any aggravating factor, and would not be the determination that the aggravating factors outweighed any mitigating factors established. Bottoson asserts that the jury must determine death to be the appropriate sentence, but nothing in *Ring* supports Bottoson's speculation that the ultimate sentencing determination is an additional "element" which must be proven beyond a reasonable doubt.

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.<sup>5</sup> 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. It is hardly surprising that the United States Supreme Court remanded *Allen* for reconsideration in light of *Ring*.

Moreover, the United States Supreme Court elaborated on *Apprendi* in *Harris v. United States*, which was released on the same day as *Ring*. In *Harris*, the Court described the holding in *Apprendi* in the following way:

*Apprendi* said that any fact extending the defendant's sentence beyond the maximum authorized by the jury's verdict would have been considered an element of an aggravated crime -- and thus the domain of the jury --

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<sup>5</sup>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.

by those who framed the Bill of Rights.

*Harris v. United States*, 2002 WL 1357277 (2002). In light of that plain statement by the United States Supreme Court, which speaks volumes in the interpretation of *Ring*, there is no basis for relief of any sort. This Court has clearly held that death was the maximum sentence which could be imposed on Bottoson by virtue of his conviction for the offense of first degree murder, and that is the end of the inquiry. *Bottoson v. State*, 813 So.2d 31, 36 (Fla. 2002). While Bottoson repeatedly asserts that this Court was wrong in *Mills v. Moore*, 786 So. 2d, 532 (Fla. 2002), *cert. denied*, 121 S.Ct. 1752 (2002), when it held that *Apprendi* did not apply to Florida's capital sentencing procedure, *Ring* establishes that this Court was correct -- neither *Apprendi* nor *Ring* are sentencing cases; they are cases involving the jury's role in determining the defendant's guilt of a qualifying offense which, in the capital case context, would subject the defendant to the death penalty.<sup>6</sup>

This Court has previously recognized that the statutory maximum for first degree murder is death, and has repeatedly

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<sup>6</sup>Bottoson devotes much energy to arguing that Florida's aggravating circumstances are "elements" of the offense of capital murder rather than "traditional sentencing factors." This argument highlights why *Ring* and *Apprendi* are not about sentencing, but rather speak to the jury's role in convicting the defendant for the substantive offense.

rejected claims similar to those raised herein. *Porter v. Moore*, 27 Fla. L. Weekly S606 (Fla., June 20, 2002); *Cox v. State*, 27 Fla. L. Weekly S505, S511 (Fla. May 23, 2002); *Bottoson v. State*, 813 So. 2d 31, 36 (Fla. 2002), *cert. denied*, Case No. 01-8099 (U.S. June 28, 2002); *Hertz v. State*, 803 So. 2d 629, 648 (Fla. 2001), *cert. denied*, Case No. 01-9154 (U.S. June 28, 2002); *Looney v. State*, 803 So. 2d 656, 675 (Fla. 2001), *cert. denied*, Case No. 01-9932 (June 28, 2002); *Brown v. Moore*, 800 So. 2d 223, 224-225 (Fla. 2001); *Mann v. Moore*, 794 So. 2d 595, 599 (Fla. 2001), *cert. denied*, Case No. 01-7092 (U.S. June 28, 2002); *Mills v. Moore*, 786 So. 2d 532, 536-38 (Fla.), *cert. denied*, 532 U.S. 1015 (2001). This interpretation of state law demands respect, and offers a pivotal distinction between Florida and Arizona. *Ring*, at \*13; *Mullaney v. Wilbur*, 421 U.S. 684 (1975). However, should there be any question about the correctness of this conclusion, Florida juries routinely "authorize" the imposition of the death penalty by recommending that a death sentence be imposed, as in the instant case.

In Florida, any 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 reasonable doubt, citing *Geralds v. State*, 601 So. 2d 1157, 1163 (Fla. 1992)). 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 death by a vote of 10-2, the requirement that a jury determine the conviction to have been a capital offense has been fulfilled. Since Bottoson's penalty phase jury recommended death by a vote of 10-2 after weighing the aggravating and mitigating factors under the statute, there is no constitutional error.

Bottoson's death sentence is also supported by a prior violent felony conviction, which may be a basis to impose a sentence higher than authorized by the jury without any additional jury findings. There is no constitutional violation (nor can there be) because the prior conviction constitutes a jury finding which the judge may rely upon to impose an aggravated sentence. See *Almendarez-Torrez v. United States*, 523 U.S. 224 (1998); *Apprendi v. New Jersey*, 530 U.S. 466 (2000). 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 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.** That it was committed for the purpose of avoiding arrest was proven by appellant's own statement to Kuniara that "dead witnesses are the best witnesses." Finally that the victim was held captive for at least three days before being stabbed about fifteen times and then run over with a car renders this crime especially, heinous, atrocious, or cruel. 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. Because of the nature of the aggravating circumstances discussed above, *Ring* is not implicated, and there is no basis for relief.

On pages 38-41 of the petition, Bottoson argues that the burden shifted to him to prove that death was not the proper punishment in his case. While Bottoson attempts to present this claim in the guise of a *Ring*-based issue, when stripped of its pretensions this claim is nothing more than a procedurally barred jury instruction claim. The burden-shifting jury instruction claim could have been but was not raised in any of Bottoson's prior proceedings, and is procedurally barred at this late date. *Demps v. Dugger*, 714 So. 2d 365, 367 (Fla. 1998).

Petitioner's argument that a unanimous jury recommendation is constitutionally required, (Petition at p. 31), has been repeatedly denied by this Court. 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 (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 an unanimous jury sentencing recommendation. *Card v. State*, 803 So. 2d 613, 628 & n. 13 (Fla. 2001)(rejecting an argument that *Apprendi* requires an 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); *Hertz v. State*, 803 So. 2d at 636; *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. *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. 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)<sup>7</sup>. 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'

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<sup>7</sup>The Court did not set a standard "that a criminal verdict must be supported by at least a 'substantial majority' of the jurors." (Petition at p. 31). 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).

consideration of mitigating evidence in violation of the Eighth Amendment); *Mills v. Maryland*, 486 U.S. 367 (1988)(stating that it would be the "height of arbitrariness" to require jury unanimity in finding mitigating circumstances).

*Ring* concerned who was going to determine a fact, *i.e.* the judge or the jury, not the required composition of the jury. *Ring* involved what facts a jury must decide, not the question of what constitutes a "jury".

Moreover, Petitioner's argument offers no basis for a finding that the ten jurors who voted for his execution failed to follow their instructions concerning the need for at least one aggravator to have been proven beyond a reasonable doubt. "[T]herefore, as to the [ten] jurors who voted to [execute], the State satisfied its burden of proving [at least one aggravator] beyond any reasonable doubt." *Johnson v. Louisiana*, 92 S.Ct. 1620, 1624 (1972).

To the extent that further discussion of the *Ring* issue is necessary, this Court again rejected arguments similar to those raised by Bottoson less than two weeks ago in *Porter v. Moore*:

In claim three, Porter argues that his death sentence is unconstitutional as applied to him in light of *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). Porter contends that under Florida law, a life sentence is the maximum penalty under section 775.082, *Florida Statutes* (1985), and therefore aggravating circumstances necessary for an

enhancement to a death sentence are elements of the crime. Moreover, he contends that *Apprendi* requires that the aggravating circumstances needed to have been charged in the indictment, submitted to the jury, and individually found by a unanimous jury verdict. Contrary to Porter's claims, **we have repeatedly held that the maximum penalty under the statute is death and have rejected** the other *Apprendi* arguments. See *Mills v. Moore*, 786 So. 2d 532, 536-37 (Fla. 2001); see also *Mann*, 794 So.2d at 599. Thus, this issue is meritless. [FN6]

FN6. We are aware that the United States Supreme Court granted certiorari in *State v. Ring*, 200 Ariz. 267, 25 P.3d 1139 (Ariz. 2001). See *Ring v. Arizona*, --- U.S. ----, 122 S.Ct. 865, 151 L.Ed.2d 738 (2002). As we did in *King v. State*, 808 So. 2d 1237 (Fla. 2002), *stay granted*, --- U.S. ----, 122 S.Ct. 932, 151 L.Ed.2d 894 (2002), however, we adhere to our precedent in *Mills*. See *King*, 808 So. 2d 1246.

*Porter v. Moore*, 27 Fla. L. Weekly S606 (Fla. 2002). (emphasis added). This Court has correctly, and consistently, decided the *Apprendi/Ring* issue, and there is no reason to recede from or reconsider that consistent line of authority. Bottoson is not entitled to a stay of execution, or any other relief, based upon this claim.<sup>8</sup>

#### **THE ATKINS V. VIRGINIA CLAIM**

Despite this Court's prior finding that Bottoson is not

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<sup>8</sup>It should be further, and finally, noted that harmless error applies to the principle announced in *Ring*, so that decision is plainly not a cataclysmic change in the law. *Ring*, *supra*, at n. 7; *United States v. Cotton*, 122 S.Ct. 1781 (2002).

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). While it is true, as Bottoson asserts, that *Atkins* found execution of mentally retarded murderers violative of the Eighth Amendment, it is also true that nothing alleged in Bottoson's petition calls the prior factual determinations about his mental state into question. Because that is so, and because there has already been a factual determination that Bottoson is not mentally retarded, there is no basis for revisiting the prior disposition of the mental retardation issue. This claim is procedurally barred. See, *Johnson v. Singletary*, 647 So. 2d 106, 109 (Fla. 1994); *Francois v. Wainwright*, 470 So. 2d 685, 686 (Fla. 1985).

To the extent that this successive and abusive claim deserves further response, the Florida Supreme Court's January 31, 2002, decision is dispositive:

On appeal, Bottoson first claims that he is mentally retarded and that his execution would violate the Eighth Amendment. (FN2) After hearing the testimony of three mental health experts who evaluated Bottoson's mental condition, the trial court found that Bottoson was not mentally retarded.

We do not reach the merits of whether Bottoson's execution would violate the Eighth Amendment or

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

The trial court determined that there was essentially a three-part test for determining mental retardation and that Bottoson failed to prove retardation under that test. While the trial court found that Bottoson did not meet the first prong of the test for evaluating mental retardation based on the fact that his IQ tests consistently indicated that he was not mentally retarded, the court also evaluated the evidence as to whether Bottoson had significant deficiencies in adaptive behavior, another requirement for a finding of retardation. In the order denying relief, the trial court discussed Dr. Greg Pritchard's use of the Vineland test to evaluate adaptive behavior and noted that the test took into account the fact that Bottoson was institutionalized. Dr. Pritchard concluded that Bottoson did not have significant deficiencies in adaptive behavior. The court stated: "The court finds Dr. Pritchard's testimony credible and accepts this explanation." (FN3) Hence, the trial court found that Bottoson was not mentally retarded because the evidence demonstrated that he failed to meet two out of the three requirements of the test for evaluating mental retardation. Since the evidence supports the trial court's findings we find no error and affirm this determination.

(FN2.) Bottoson points out that the U.S. Supreme Court has granted certiorari in

*Atkins v. Virginia*, 533 U.S. 976, 122 S.Ct. 24, 150 L.Ed.2d 805 (2001), to decide whether the execution of mentally retarded individuals convicted of capital crimes violates the Eighth Amendment. In *Penry v. Lynaugh*, 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989), the Court rejected a similar claim.

(FN3.) The trial court also pointed out that Dr. Henry Dee was the only expert to opine that Bottoson was mentally retarded. The court found Dr. Dee's testimony not credible because Dr. Dee's opinion was "unacceptably vague in light of the objective evidence." We give deference to the trial court's credibility evaluation of Dr. Pritchard's and Dr. Dee's opinions. See *Porter v. State*, 788 So. 2d 917, 923 (Fla. 2001) (giving deference to the trial court's acceptance of one mental health expert's opinion over another expert's opinion and stating "[w]e recognize and honor the trial court's superior vantage point in assessing the credibility of witnesses and in making findings of fact"). See also *Stephens v. State*, 748 So. 2d 1028, 1034-35 (Fla. 1999).

*Bottoson v. State*, 813 So. 2d 31 (Fla. 2002). This Court has already ruled directly on this claim, and Bottoson 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. Bottoson was not mentally retarded in January, and does not claim to be mentally retarded now. This claim was disposed of on the merits in the prior Rule 3.850 proceeding, and the claim contained in the most recent petition is clearly successive. Bottoson is not entitled to any relief.

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 habeas petition, and is procedurally barred from consideration in this successive petition.

Alternatively and secondarily, the claim has no merit. Nothing in *Ring* or *Atkins* supports the conclusion, despite Bottoson's assertion, on page 47 of the petition, 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). 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.<sup>9</sup> 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, and 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*.

This Court stated:

The trial court determined that there was essentially a three-part test for determining mental retardation and that Bottoson failed to prove retardation under that test. While the trial court found that Bottoson did not meet the first prong of the test for evaluating mental retardation based on the fact that his IQ tests consistently indicated that he was not mentally retarded, the court also evaluated the

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<sup>9</sup>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*.

evidence as to whether Bottoson had significant deficiencies in adaptive behavior, another requirement for a finding of retardation. In the order denying relief, the trial court discussed Dr. Greg Pritchard's use of the Vineland test to evaluate adaptive behavior and noted that the test took into account the fact that Bottoson was institutionalized. Dr. Pritchard concluded that Bottoson did not have significant deficiencies in adaptive behavior. The court stated: "The court finds Dr. Pritchard's testimony credible and accepts this explanation." [FN3] Hence, the trial court found that Bottoson was not mentally retarded because the evidence demonstrated that he failed to meet two out of the three requirements of the test for evaluating mental retardation. Since the evidence supports the trial court's findings we find no error and affirm this determination.

FN3. The trial court also pointed out that Dr. Henry Dee was the only expert to opine that Bottoson was mentally retarded. The court found Dr. Dee's testimony not credible because Dr. Dee's opinion was "unacceptably vague in light of the objective evidence." We give deference to the trial court's credibility evaluation of Dr. Pritchard's and Dr. Dee's opinions. See *Porter v. State*, 788 So. 2d 917, 923 (Fla. 2001) (giving deference to the trial court's acceptance of one mental health expert's opinion over another expert's opinion and stating "[w]e recognize and honor the trial court's superior vantage point in assessing the credibility of witnesses and in making findings of fact"). See also *Stephens v. State*, 748 So. 2d 1028, 1034-35 (Fla. 1999).

*Bottoson v. State*, 813 So.2d 31, 33-34 (Fla. 2002).<sup>10</sup> The

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<sup>10</sup>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

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. The United States Supreme Court stated:

FN3. The American Association of Mental Retardation (AAMR) defines mental retardation as follows: "Mental retardation refers to substantial limitations in present functioning. It is characterized by significantly subaverage intellectual functioning, existing concurrently with related limitations in two or more of the following applicable adaptive skill areas: communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure, and work. Mental retardation manifests before age 18." *Mental Retardation: Definition, Classification, and Systems of Supports* 5 (9th ed.1992). The American Psychiatric Association's definition is similar: "The essential feature of Mental Retardation is significantly subaverage general intellectual functioning (Criterion A) that is accompanied by significant limitations in adaptive functioning in at least two of the following skill areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety (Criterion B). The onset must occur before age 18 years (Criterion C). Mental Retardation has many different etiologies and may be seen as a final common pathway of various pathological processes that affect the functioning of the central nervous system." *American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders* 41 (4th ed.2000). "Mild" mental retardation is typically used to describe people with

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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).

an IQ level of 50-55 to approximately 70. *Id.*, at 42-43.

*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.

This Court found no error:

At the time of sentencing in the present case, *Nibert* had been decided, thus obligating the State to either rebut the defendant's mitigating evidence or run the risk of having the court accept that evidence as establishing one or more mitigating circumstances. We note that *Dillbeck* planned to, and ultimately did, present extensive mitigating evidence in the penalty phase through defense mental health experts who had interviewed him. Under these circumstances, we cannot say that the trial court abused its discretion in striving to level the playing field by ordering *Dillbeck* to submit to a prepenalty phase interview with the State's expert. See *Burns*. No truly objective tribunal can compel one side in a legal bout to abide by the Marquis of Queensberry's rules, while the other fights ungloved.

*Dillbeck v. State*, 643 So. 2d 1027, 1030 (Fla. 1994). This Court adopted an interim rule 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 *Atkins* sets out a definition of mental retardation that is easier to satisfy, but, 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. As this Court has already held, Bottoson is not mentally retarded under any definition of that term -- he is not entitled to any relief based upon this claim.

**BOTTOSON IS NOT ENTITLED TO A  
STAY OF EXECUTION**

For all of these reasons, neither *Ring* nor *Atkins* provide a colorable basis for granting relief, and no stay of execution is justified in this case. See *Delo v. Stokes*, 495 U.S. 320 (1990); *Antone v. Dugger*, 465 U.S. 200 (1984); *Buenoano v. State*, 708 So. 2d 941, 951 (Fla. 1998), citing *Bowersox v. Williams*, 517 U.S. 345 (1996) (recognizing that stay of execution on second or third petition for postconviction relief is warranted only where there are substantial grounds upon which relief might be granted). Bottoson's request must be denied. See *Booker v. Wainwright*, 675 F.2d 1150 (11th Cir. 1982) (proper to grant a stay only if the petitioner has presented colorable, non-frivolous issues); *Barefoot v. Estelle*, 463 U.S. 880 (1983)

(stay only justified when the petitioner presents claims which are debatable among jurists of reason).

The arguments pressed by Bottoson are neither new nor complex, and have been presented to this Court on numerous prior occasions. To the extent that the Florida Public Defender Association and the Florida Association of Criminal Defense Lawyers ask that a stay of execution be entered because 1) *Ring* rendered Florida's death sentencing statute unconstitutional; 2) the trial courts cannot enter a sentence under an invalid statute; and 3) the only available sentence is life until the statute is amended, those arguments fail for the reasons set out herein. Florida law is valid, there is no support for the argument that the trial judge is removed from the sentencing equation, and death is clearly an available sentence in the State of Florida.

To the extent that these third parties suggest that these "thorny issues" cannot be resolved without a stay of execution, the true facts are that these arguments were made in January, and Bottoson has merely substituted "*Ring*" for "*Apprendi*." This Court has already denied these claims **in this case**, and the United States Supreme Court has denied certiorari. This case is final for all purposes and it is time for Bottoson's sentence to be carried out.

**CONCLUSION**

Bottoson is not entitled to a stay of execution, and therefore his application for stay must be denied.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the above has been furnished by **Facsimile and U.S. Mail** to: **Bill Jennings, Peter Cannon and Eric Pinkard**, CCRC - Middle, 3801 Corporex Park Drive, Suite 210, Tampa, Florida 33619, **Mark Olive**, 320 West Jefferson St., Tallahassee, FL 32301 on this \_  
\_ day of July, 2002.

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Of Counsel

**CERTIFICATE OF COMPLIANCE**

This brief is typed in Courier New 12 point.

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