

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC02-605

VICTOR TONY JONES,

Petitioner,

v.

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

Respondent.

REPLY TO RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

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CLAIM I

Mr. Jones will rely on the arguments in his petition.

CLAIM II

The State's response takes the position that this claim should be procedurally barred because neither Ring v. Arizona, 2002 WL 1357257 nor Apprendi v. New Jersey, 530 U.S. 466 (2000) apply retroactively and that neither invalidates Florida's capital sentencing law. The State's Response also takes the position that pursuant to Witt v. State, 387 So. 2d 922, 929-30 (Fla. 1980), retroactivity is not at issue. Mr. Jones submits that the change in law resulting from the intersection of Apprendi and Ring is the kind of change anticipated by Witt: "(a) emanat[ing] from this Court or the United States Supreme Court, (b) is constitutional in nature, and (c) constitutes a development of fundamental significance" Witt at 931.

Mr. Jones also would note that in 2002 in the post Ring era, retroactivity in state court is of far more consequence to the vindication of a death row inmate's right to life than was the case in the 1980 world of Johnny Paul Witt. The punitive nature of federal habeas jurisprudence since the advent of the Anti-Terrorism and

Effective Death Penalty Act and new U.S.C. §2244 stands in stark contrast to what this Court identified as the rationale for limits on retroactivity concerning "changes in law" circa 1980:

We start by noting that we are not obligated to construe our rule concerning post-conviction relief in the same manner as its federal counterpart, at least where fundamental federal constitutional rights are not involved. First, the concept of federalism clearly dictates that we retain the authority to determine which "changes of law" will be cognizable under this state's post-conviction relief machinery. Second, we know of no constitutional requirement that the scope of Rule 3.850 be fully congruent with that of the analogous federal statute. A limited role for the rule in no way abridges the federal due process right to be heard, **since state prisoners will still be free to seek collateral relief in the federal courts under that system's seemingly more relaxed standards.**

Witt at 928. (emphasis added).

Ring held that a death penalty statute's "aggravating factors operate as 'the functional equivalent of an element or a greater offense.'" Ring, 2002 U.S. LEXIS 4651 at *44 (quoting Apprendi, 530 U.S. at 494, n. 19). In Jones v. United States, 526 U.S. 227 (1999), the Supreme Court noted that "[m]uch turns on the determination that

a fact is an element of an offense, rather than a sentencing consideration," in significant part because "elements must be charged in the indictment." Jones, 526 U.S. at 2321.

Florida law clearly requires every "element of the offense" to be alleged in the information or the indictment. In State v. Dye, 346 So. 2d 538 (Fla. 1977), this Court said "[a]n information must allege each of the essential elements of a crime to be valid. No essential element should be left to inference." In State v. Gray, 435 So. 2d 816, 818 (Fla. 1983), this Court said "[w]here an indictment or information wholly omits to allege one or more of the essential elements of the crime, it fails to charge a crime under the laws of the state." An indictment in violation of this rule cannot support a conviction; the conviction can be attacked at any stage, including "by habeas corpus." Gray, 435 So. at 818. Finally, in Chicone v. State, 684 So. 2d 736, 744 (Fla. 1996), this Court said "[a]s a general rule, an information must allege each of the essential elements of a crime to be valid."

On January 11, 1991, a grand jury returned an indictment charging Mr. Jones with two (2) counts of first-degree murder, two (2) counts of

armed robbery, and possession of a firearm by a convicted felon (R. 13-16). The grand jury alleged:

Victor Tony Jones...did unlawfully and feloniously kill a human being, to wit: Matilda Nestor, from a premeditated design to effect the death of Matilda Nestor, or while engages in the perpetration of, or in an attempt to perpetrate a robbery, by stabbing Matilda Nestor with a weapon, to wit: a knife, in violation of 782.04(1) and 775.087 Florida Statutes.

Victor Tony Jones...did unlawfully and feloniously kill a human being, to wit: Jacob Nestor, from a premeditated design to effect the death of Jacob Nestor, or while engages in the perpetration of, or in an attempt to perpetrate a robbery, by stabbing Jacob Nestor with a weapon, to wit: a knife, in violation of 782.04(1) and 775.087 Florida Statutes.

(R. 13-14).

The indictment failed to indicate whether the State would seek the death penalty, or upon what factual basis it would do so.

The Sixth Amendment requires that "[i]n all criminal prosecutions, the accused shall...be informed of the nature and cause of the accusation...." A conviction on a charge not made by the indictment is a denial of due process of law. State v. Gray, supra, citing Thornhill v. Alabama, 310 U.S. 88 (1984), and DeJonge v. Oregon, 299 U.S. 353 (1937).

Because the State did not submit to the grand jury, and the indictment did not state the essential elements of the aggravated crime of capital murder, Mr. Jones' right under Article I, section 15 of the Florida Constitution and the Sixth Amendment to the federal constitution were violated. It is impossible to know whether the grand

jury in this case would have returned an indictment alleging the presence of aggravating factors, sufficient aggravating circumstances, and insufficient mitigating circumstances and thus charging Mr. Jones with a crime punishable by death. By omitting any reference to the aggravating circumstance that would be relied upon by the State in seeking a death sentence, the indictment prejudicially hindered Mr. Jones "in the preparation of a defense," to a sentence of death. Fla. R. Crim. P. 3.140(o).

Ring v. Arizona, 122 S.Ct. 2428, 2002 U.S. LEXIS 4651 (June 24, 2002), held unconstitutional a capital sentencing scheme that makes imposing a death sentence contingent upon the finding of aggravating circumstances and that assigns responsibility for finding that circumstance to the judge. The United States Supreme Court based its holding and analysis in Ring on its earlier decision in Apprendi v. New Jersey, 530 U.S. 466 (2000), in which it held that "[i]t is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed." Id. at 490 (quoting Jones v. United States, 526 U.S. 227, 252-253 (1999) (Stevens, J., concurring)). The Supreme Court overruled Walton v. Arizona, 497 U.S. 639 (1990), "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, 2002 U.S. LEXIS 4651 at *44.

This Court previously held that "[b]ecause Apprendi did not overrule Walton, the basic scheme in Florida is not overruled either." Mills v. Moore, 786 So. 2d 532, 537 (Fla. 2001). Ring overruled

Walton, and in doing so, also overruled the basic principle of Hildwin v. Florida, 490 U.S. 638 (1989) (per curiam). Hildwin v. Florida originally upheld the capital sentencing scheme in Florida "on grounds that 'the Sixth Amendment does not require that the specific findings authorizing imposition of the sentence of death be made by the jury.'" Ring, 2002 U.S. LEXIS 4651 at *27 (quoting Walton, 497 U.S. at 648, in turn quoting Hildwin, 490 U.S. at 640-641). Ring undermines this Court's decision in Mills (and thus Hildwin) by recognizing three things. The first is that Apprendi applies to capital sentencing schemes,¹ Ring, 2002 U.S. LEXIS 4651 at *12 ("Capital defendants, no less than non-capital defendants...are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment"); Id. at *45. Second, Ring holds that States may not avoid the Sixth Amendment requirements of Apprendi by simply "specif[ying] 'death or life imprisonment' as the only sentencing

¹In Mills, this Court said that "the plain language of Apprendi indicates that the case is not intended to apply to capital [sentencing] schemes." Mills, 786 So. 2d at 537. In Bottoson v. Moore, Case No. SC02-1455, Order Granting Stay of Execution and Setting Oral Argument, (July 8, 2002) Justice Pariente in her concurring opinion conceded that this Court's opinion in Mills was wrong. "In other words, we were mistaken as a matter of law in our previous opinion in Bottoson in holding that Apprendi did not apply to capital proceedings." She continued to say that based on the opinion in Ring, "we now know that we were wrong." See, Order at 7. Justice Pariente acknowledged that "Ring has raised questions concerning the Supreme Court's longstanding precedent in death penalty case." Order at 4.

options," Id. at *37. Third, Ring establishes that the relevant and dispositive question is whether death is "authorized by a guilty verdict standing alone" under state law Id. at *40.

Florida's capital sentencing statute, like the Arizona statute struck down in Ring, makes imposing the death penalty contingent on the factual findings of the judge, not the jury. Section 775.082, Fla. Stat. (1991) of the Florida Statutes provides that a person convicted of first-degree murder must be sentenced to life in prison "**unless** the proceeding held to determine sentence according to the procedure set forth in § 921.141 result in findings by the **court** that such person shall be punished by death, and in the latter event such person shall be punished by death." (emphasis added). For nearly 30 years, this Court has held that § 775.082 and § 921.141 do not allow imposing a death sentence upon a jury's verdict of guilt, but only upon a finding of sufficient aggravating circumstances. Dixon v. State, 283 So. 2d 1, 7 (Fla.1973) ("question of punishment is reserved for a post-conviction hearing").

The "explicitly cross reference[d]...statutory provision requiring the finding of an aggravating circumstance before imposition of the death penalty," Ring, 2002 U.S. LEXIS 4651 at *38, requires the judge - after the jury has been discharged and "[n]otwithstanding the recommendation of a majority of the jury" to make three factual determinations. Fla. Stat. §921.141 (3).

Section 921.141 (3) provides that "if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts." Ibid. First, the trial

judge must find the existence of at least one aggravating circumstance. Ibid. Second, the judge must find that "sufficient aggravating circumstances exist" to justify imposition of the death penalty. Ibid. Third, the judge must find in writing that "there are insufficient mitigating circumstances to outweigh the aggravating circumstances." Ibid. "**If the court** does not make the findings requiring the death sentence, the court shall impose sentence of life imprisonment in accordance with sec. 775.082." Ibid (emphasis added).

In Mr. Jones' case, the sentencing jury recommended the death penalty by a majority of twelve (12) to (0) as to the murder of Mr. Nestor and by a majority of ten (10) to (2) as to the murder of Mrs. Nestor (R. 354, 353, T. 2274). The judge then forever excused the jury.

At the judge sentencing hearings held on February 22, 1993 and on March 1, 1993, the judge received additional evidence and the testimony of five witnesses not heard by the jury (R. 2848-2872). The judge then stated his findings on the record and sentenced Mr. Jones to death on March 1, 1993 (R. 2859-2872).

The judge's written justification is a classic example of conclusory findings of fact and conclusions of law. (R. 467-477). In both cases the trial court found four aggravating circumstances, Fla. Stat. 921.141 (5)(a), 921.141 (5)(b), 921.141 (5)(d) and 921.141 (5)(f), merging the pecuniary gain and felony murder aggravators in both cases. The trial court found no non-statutory or statutory mitigating circumstances (R. 471-475).

Because Florida's death penalty statute makes imposing a death

sentence contingent upon findings of "sufficient aggravating circumstances," and "insufficient mitigating circumstances," and gives sole responsibility for those findings to the judge, it violates the Sixth Amendment. As the Supreme Court said in Walton, "[a] Florida trial court no more has the assistance of a jury's findings of fact with respect to sentencing issues than does a trial judge in Arizona." Walton, 497 U.S. at 648.

Mr. Jones' jury was repeatedly and unconstitutionally instructed by the Court that its role was merely "advisory." (see e.g. R. 472-73, 435, 2511, 2766, 2769, 2770, 2771). This diminution of the jury's sense of responsibility violated the eighth amendment. Caldwell v. Mississippi, 472 U.S. 320 (1985).

Trial counsel filed a motion in limine pursuant to Caldwell to prohibit minimizing the role of the jury during Mr. Jones' trial (R. 114-115). The motion asked that the trial court "prohibit the state from lecturing the jury, in voir dire as well as argument, that their sentencing recommendation is not the final decision, that their sentencing recommendation is reviewable, that their recommendation is merely advisory and in any other manner minimize the jury's role and diminish its sense of responsibility with respect to its sentencing function" (R. 114).

Florida law only requires the judge to consider "the recommendation of a majority of the jury." Fla. Stat. § 921.141 (3). Following the presentation of evidence in Mr. Jones' case, the judge instructed the jury that their vote did not have to be unanimous (R. 2766-70).

In contrast, "[n]o verdict may be rendered unless all of the trial jurors concur in it." Fla. R. Crim. P. 3.440. Neither the sentencing statute, this Court's cases, nor the jury instructions in Mr. Jones' case required that all jurors concur in finding any particular aggravating circumstances, or "[w]hether sufficient aggravating circumstances exist," or "[w]hether sufficient aggravating circumstances exist which outweigh the aggravating circumstances." Fla. Stat. § 921.141(2). In Mr. Jones' case, two (2) jurors recommended against a death sentence in the murder of Mrs. Nestor (R. 353-354). One may infer from these facts that one-sixth of the jurors agreed that sufficient aggravating circumstances did not exist to warrant death.

Because Florida law does not require any ten, much less twelve, jurors to agree that the State has proved an aggravating circumstance beyond a reasonable doubt, or to agree on the same aggravating circumstances beyond a reasonable doubt, or to agree on the same aggravating circumstances when advising that "sufficient aggravating circumstances exist" to recommend a death sentence, there is no way to say that "the jury" rendered a verdict as to an aggravating circumstance or the sufficiency of them. As Justice Shaw observed in Combs v. State, 525 So. 2d 853 (1988), Florida law leaves these matters to speculation. Combs, 525 So. 2d at 859 (Shaw, J., concurring).

In Ring, the Court held that the aggravating factors enumerated under Arizona law operated as "the functional equivalent of an element of a greater offense" and thus had to be found by a jury. Ring, 2002 U.S. LEXIS 4651 at *44. Based on the reasoning in Apprendi, Jones and

Ring, aggravating factors are equivalent to elements of the capital crime itself and must be treated as such.

One of the elements that had to be established in order for Mr. Jones to be sentenced to death was that "sufficient aggravating circumstances exist" to call for a death sentence. Fla. Stat. sec. 921.141(3). The jury was not instructed on any standard by which to make this essential determination. (R. 2766-2770). As Justice Scalia explained in his opinion for the unanimous Court in Sullivan v. Louisiana, 508 US. 275 (1993), such an error can never be harmless. "[T]he jury verdict required by the Sixth Amendment is a jury verdict of guilty beyond a reasonable doubt." Sullivan, 508 U.S. at 278. Where the jury has not been instructed on the reasonable doubt standard

there has been no jury verdict within the meaning of the Sixth Amendment, [and] the entire premise of Chapman^[2] review is simply absent. There being no jury verdict of guilty-beyond-a-reasonable-doubt, the question whether the same verdict of guilty-beyond-a-reasonable-doubt would be rendered absent the constitutional error is utterly meaningless. There is no object, so to speak, upon which harmless-error scrutiny can operate.

Sullivan, 508 U.S. at 280.

"If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact, no matter how the State labels it, must be found by a jury beyond a reasonable doubt." Ring, 2002 U.S. LEXIS 4651 at *34. Florida law makes a death sentence contingent not upon the existence of any individual

²Chapman v. California, 386 U.S. 18 (1967).

aggravating circumstance, but on a (judicial) finding "[t]hat sufficient aggravating circumstances exist." Fla. Stat. Sec. 921.141(3).

In light of the plain language of Florida's death penalty statute, the rules of criminal procedure and 30 years of this Court's death penalty jurisprudence, it is clear that the limited role of the jury in Florida's capital sentencing scheme fails to satisfy the requirements of the Sixth Amendment. Even if this Court were to redefine the jury's role under Florida law, it would not make Mr. Jones' death sentence valid.

Throughout the trial, starting from voir dire, the jury was repeatedly told that their role at the sentencing phase of the trial was to merely "recommend" a sentence to the judge and that their recommendation was only advisory. This implied that the judge alone had the responsibility to determine the sentence to be imposed for first degree murder. (R. 472-73, 435, 2511, 2766, 2769, 2770, 2771).

Under Florida law, a death sentence may not be imposed unless the judge finds the fact that "sufficient aggravating circumstances" exist to justify imposing the death penalty. Fla. Stat. sect. 921.141(3). Because imposing a death sentence is contingent on this fact being found, and the maximum sentence that could be imposed in the absence of that finding is life in prison, the Sixth Amendment required that the State bear the burden of proving it beyond a reasonable doubt. Ring, 2002 U.S. LEXIS 4651 at *12. ("Capital defendants ...are entitled to a jury determination of any fact on the legislature conditions an increase in their maximum punishment.") Nevertheless, Florida juries,

like that of Mr. Jones' jury, are routinely instructed, "Should you find sufficient aggravating circumstances do exist, it will then be your duty to determine whether mitigating circumstances exist that outweigh the aggravating circumstances" (R. 2768).

Mr. Jones' jury was instructed in accordance with Florida Statute sections 921.141(2) and (3):

[I]t is now your duty to advise the me as to what punishment should be imposed upon the Defendant for crimes of first degree murder.

As you have been told, the final decision as to what punishment shall be imposed is my responsibility. However, it is your duty to follow the law that will now will be given you by me and render to the court a separate advisory sentence as to each count of first degree murder based upon your determination as to whether suffer (sic.) aggravating circumstances exist to justify the imposition of the death penalty and whether sufficient mitigating circumstances exist to outweigh any aggravating circumstance found to exist.

(R. 2766-67). The judge then listed four (4) aggravating circumstances.

The judge continued:

If you find the aggravating circumstances do not justify the death penalty, your advisory sentence must be one of life imprisonment without the possibility of parole for twenty-five years on each count. Should you find sufficient aggravating circumstances do exist, it will then be your duty to determine whether mitigating circumstances exist that outweigh the aggravating factors.

(R. 2767-68) (emphasis added). The judge then listed two (2) mitigating circumstances, extreme mental or emotional disturbance and the catch-all (R. 2768).

Because Mr. Jones' jury was never required to find the element of

sufficient aggravating circumstances beyond a reasonable doubt, the error here cannot be subjected to a harmless error analysis. Sullivan v. Louisiana, 508 U.S. 275, 279-280 (1993). Mr. Jones is entitled to relief.

The United States Supreme Court has determined that not all constitutional error is subject to harmless error analysis. In doing so the Supreme Court split constitutional error into two categories. Those errors that may be reviewed case-by-case to determine if the error was harmless upon the facts of the individual case have been described as "trial error." Arizona v. Fulminante, 499 U.S. 279, 308 (1991). As the Supreme Court has explained:

Trial error "occur[s] during the presentation of the case to the jury," and is amenable to harmless-error analysis because it "may . . . be quantitatively assessed in the context of other evidence presented in order to determine [the effect it had on the trial]."

Brecht v. Abrahamson, 507 U.S. 619, 629 (1993). For these errors, an appellate court may evaluate the course of the trial the basis of the court record to determine whether their effect of the factfinding process at trial was harmless beyond a reasonable doubt. Delaware v. Van Arsdall, 475 U.S. 673, 681 (1986).

The second category of constitutional error has been defined as including "structural defects in the constitution of the trial mechanism, which defy analysis by 'harmless error' standards." Fulminante, 499 U.S. at 309. Structural defects, subject to automatic reversal have been found where there has been a "complete denial of counsel," a "biased trial judge," "racial discrimination in [the] selection of [the] grand jury," the "denial of self-representation at

trial," the "denial of a public trial," and a "defective reasonable-doubt instruction." Neder v. United States, 119 S.Ct. 1827, 1833 (1999).

The Sixth Amendment error recognized in Ring v. Arizona fits into the category described as structural error. Certainly, there was no verdict finding Petitioner guilty of capital first degree murder (i.e. first degree murder with "sufficient aggravating circumstances"). Unlike the situation in Neder, the element that the jury did not hear separate the lesser included offense from the greater offense. Moreover as a result of the Ring error, an element ("sufficient aggravating circumstances") was removed from the guilt phase of the trial and was placed in the sentencing portion. With this transfer of an element from one portion of the capital proceeding to another, the structure of the trial changed. Since "sufficient aggravating circumstances" were not treated as an element, the grand jury indictment did include a finding of the element. As a result, Florida law held that the State was under no obligation to give notice of what aggravating circumstances were asserted as present and sufficient to warrant a death sentence. Menendez v. State, 368 So.2d 1278, 1282 n.21 (Fla. 1979). Further, Florida law provided that since the list aggravating circumstances were not elements of the crime, but merely sentencing factors, the list could be expanded without ex post facto consequences. Combs v. State, 403 So.2d 418, 421 (Fla. 1981). And because the aggravating factors were merely sentencing factors, Florida law permitted an element of first degree murder to be repeated as an aggravating circumstance. Johnson v. Singletary, 991 F.2d 663, 669

(11th Cir. 1993) ("We reject Johnson's argument holding that the fact that an element of the underlying conviction and one of the aggravating factors was duplicative did not invalidate that aggravating factor"). And certainly, the jury was not advised of the burden it bore when it considering at the penalty phase whether a majority of them believed "sufficient aggravating circumstances" were present. Caldwell v. Mississippi, 472 U.S. 320 (1985); Combs v. State, 525 So. 2d 853, 857 (Fla. 1988) ("We believe the instructions, in their entirety, properly explain the jury's role under the Florida statute"). The actual finding of what aggravating circumstances are present and whether they are sufficient to warrant consideration of a death sentence has been made independently by the judge, not the jury. Patterson v. State, 513 So. 2d 1257, 1261 (Fla. 1987). Under the circumstances, Ring error can only be described as structural.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Reply to Response to Petition for Writ of Habeas Corpus has been furnished by United States Mail, first class postage prepaid, to Sandra Jaggard, Rivergate Plaza, Suite 950, 444 Brickell Avenue, Miami, FL 33131, on September 17, 2002.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this reply complies with the font requirements of rule 9.100(1) of the Florida Rules of Appellate Procedure.

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