

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC03-228

DARIUS MARK KIMBROUGH,

Petitioner,

v.

JAMES V. CROSBY, JR.,

Secretary, Florida Department of Corrections,

Respondent.

PETITIONER'S REPLY TO RESPONSE REGARDING
PETITION FOR WRIT OF HABEAS CORPUS

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PRELIMINARY STATEMENT

This reply is to the response of James V. Crosby, Jr., to Darius Mark Kimbrough's petition for habeas corpus relief regarding Argument I. The Petitioner, Darius Mark Kimbrough, does not reply to the Response regarding Argument II.

Citations shall be as follows: The record on appeal concerning the original trial court proceedings shall be referred to as "R.____" followed by the appropriate page numbers. The initial brief on direct appeal shall be referred to as "IB ____" followed by the appropriate page numbers. The postconviction record on appeal will be referred to as "PC-R. ____" followed by the appropriate page numbers. The Petition will be referred to as "P. ____" followed by the appropriate page numbers. The Response will be referred to as "Resp. ____" followed by the appropriate page numbers. All other references will be self-explanatory or otherwise explained herein.

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ARGUMENT I

UNDER *APPRENDI* AND *RING* THE FLORIDA DEATH SENTENCING STATUTES AS APPLIED ARE UNCONSTITUTIONAL UNDER THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

In the Response to Petitioner's request for habeas corpus relief, Respondent states that "[I]n order to preserve this issue for review [the claim under *Apprendi v. New Jersey*, 530 U.S. 466 [2000] and *Ring v. Arizona*, 122 S.Ct. 2428 (2002)], trial counsel must have lodged the specific constitutional objections in the trial court below and the issue must have been raised on direct appeal." (Resp. 2). For the purposes of this reply, Petitioner concedes that the Respondent is correct.

However, the Respondent goes further and states that "[W]hile *Apprendi* was not decided until after Petitioner's trial and direct appeal, this fact does not excuse him from raising the legal tenets and factual basis for his argument below." (Resp. 2, 3). To suggest that issues in the claim involving *Apprendi* and *Ring* were not raised below is in error because the record in this case shows the following.

First, at least two pre-trial motions directly addressing *Apprendi* and *Ring* issues were filed by trial counsel and denied by the trial court. On July 26, 1993, trial counsel filed a Motion to Dismiss Indictment or to Declare That Death is Not a Possible Penalty which specifically argued that "[A]ggravating circumstances ... are the essential facts constituting any charged capital offense and must be alleged in the Indictment..." (R. 294-96 at 295). A Motion for Statement of Aggravating Circumstances was also filed on July 26, 1993 (arguing a violation of the Sixth Amendment with the "[U]tilization of aggravating circumstances not contained in the Indictment or in any subsequent form of notice..."). (R. 309-313 at 310). A third motion filed on the same date as the others mentioned above challenged the constitutionality of the Florida death penalty scheme under the Eighth and Fourteenth Amendments (Motion to Declare Florida Statute Section 921.141 Unconstitutional). (R. 339-44).

Secondly, on direct appeal, numerous factors were challenged by Petitioner regarding the constitutionality of Florida's death penalty statutory scheme (as to the lack of special jury verdicts, "... [t]he trial court is in no position to know what aggravating and mitigating circumstances the jury found, because the law does not provide for special verdicts;" "[I]n effect,

our law makes the aggravating circumstances into elements of the crime so as to make the defendant death-eligible. Hence, the lack of a unanimous jury verdict as to any aggravating circumstance [violates the Florida and United States constitutions]." (IB 87-88). This Court rejected these direct appeal constitutional challenges without discussion. *Kimbrough v. State*, 700 So.2d 634, 639 (Fla. 1997).

Nevertheless, the Petitioner accepts the Respondent's outline of case authority from this Court regarding *Ring* challenges (Resp. 3, 4). However, the Petitioner again notes that the U.S. Supreme Court has yet to address a direct Florida challenge under *Ring*. See *Duest v. State*, — So.2d —, 2003 WL 21467248 at 15-18 (Fla. June 26, 2003)(Anstead, C.J., concurring in part and dissenting in part). Petitioner presents a case, at minimum, in which the prior violent felony aggravator involving the Heather Claypool charges was not included in the indictment (R. 254-55), was not subject to a specific jury finding, was a factor in the ineffective assistant of counsel claim and evidentiary hearing (PC-R. 13-14; 23-24), and was found by the trial judge alone rather than by the jury (R. 595-601).

In view of the above discussion and because it is impossible to determine any relative weight given by the sentencing judge

to the several aggravators, Petitioner again notes that because Florida law does not require any two, much less twelve, jurors to agree that the government has proved an aggravating circumstance 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 any of them.

CONCLUSION AND RELIEF SOUGHT

For the reasons discussed herein, Darius Mark Kimbrough respectfully urges this Honorable Court to grant habeas relief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true copy of the foregoing Petitioner's Reply to Response Regarding Petition for Writ of Habeas Corpus has been furnished by U.S. Mail, first class postage prepaid, to Scott A. Browne, Assistant Attorney General, Office of the Attorney General, Concourse Center 4, 3507 E. Frontage Rd., Suite 200, Tampa, Florida 33607-7013 and Darius Mark Kimbrough, DOC#374123; P2109S; Union Correctional Institution, 7819 NW 228th Street, Raiford, Florida 32026 on this 11th day of July, 2003.

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CERTIFICATE OF COMPLIANCE

I hereby certify, pursuant to Fla.R.App.P. 9.210, that the foregoing Petitioner's Reply to Response Regarding Petition for Writ of Habeas Corpus was generated in Courier New 12-point font.

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