

IN THE SUPREME COURT OF THE STATE OF FLORIDA

MARK JAMES ASAY

Appellant,

v.

CASE NO. SC04-433

STATE OF FLORIDA,

Appellee.

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APPELLANT MARK JAMES ASAY'S REPLY BRIEF

Lower Tribunal: The Circuit Court of the Fourth  
Judicial Circuit, In and For Duval County, Florida

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increases the penalty for a crime must be submitted to a jury and determined with appropriate Constitutional protections. From that logically and inescapably flows the determination that a statutory aggravating factor in Florida's death penalty scheme is an element of the crime of first degree murder and must be found by the jury if a death sentence is to be imposed.

Florida's death penalty scheme clearly contains two tiers: (1) if no aggravating circumstance is established beyond a reasonable doubt there can be no death penalty imposed; (2) if an aggravating circumstance is found, then that circumstance must be weighed against the totality of the mitigation—a conviction does not equate to a death sentence.

The system's frailty is apparent in *how* such findings are made. Aggravating circumstances are submitted to an advisory jury in order that that jury can arrive at a "recommendation" which it then passes along to the judge. The judge can ignore the death recommendation and impose a life sentence; the judge can ignore the life recommendation and impose a death sentence.

It is only the judge who makes the decision. This is Constitutionally prohibited. Despite the fact that the United States Supreme Court has found, when dealing with Arizona's death penalty statute, that its recent elements' holdings do not apply retroactively *under federal law*.

However, Florida's concepts of retroactivity are different from those of the federal courts and require that the Constitutional infirmity spoken of in *Ring* be applied retroactively under the law

## ARGUMENT

I. *Ring v. Arizona* changed the landscape of death penalty prosecution. Florida's capital sentencing scheme does not comport with either federal or state constitutional protections.

In its presentation, the State first raises procedural bar as it did in its initial presentation to the trial court. In that trial court presentation, the State's entire argument in its moving papers on that issue included:

Asay sets out a "Procedural History" and a "Disposition of Prior Claims" which clearly establishes that his present claim is procedurally barred because it could have been and should have been raised, if at all, long before now.

R. 36.

The Court's Order deals with the *Ring* issue on a substantive basis and does not address the issue of bar at all. R. 47-49. It is respectfully submitted that this Court should address the *Ring* issues presented herein substantively.

In raising procedural bar, the State apparently takes the position that the frailty of the death penalty's reliance on a judge's decision rather than that of the jury should have been raised at the trial court, although at the time of Mr. Asay's trial such

effort would have been futile and counsel's attack on a well-settled principle of law may have impacted on his credibility on other important issues.

Although this technical position has support in the law, the equally and logically compelling counterpoint must be considered.

Cases are legion where the State took the position that counsel was *not* ineffective because he or she did not raise this issue of the role of the judge as the ultimate sentencer in Florida. Counsel was *effective* if he omitted this argument *but* this argument of Constitutional dimension is *waived* if not raised. This logical inconsistency has no place in life/death determinations.

Although enforcement of the law against those who violate it is an important component of an ordered society, to place upon the shoulders of trial counsel or appellate counsel the burden of presenting an argument which has been soundly and repeatedly rejected may result in a disservice to the client. That is exactly the position being urged by the State: Mr. Asay's trial counsel should have raised the issue of elements/aggravating factors even though that was a disfavored and legally insufficient position at the time even if this would distract from his overall presentation, the result would be a foregone conclusion, and would unduly burden the courts.

No matter the words written trying to limit the effects of *Apprendi v. New*

*Jersey*,<sup>2</sup> and its progeny *Ring*<sup>3</sup> and *Blakely*<sup>4</sup> and the law as of 2004 is clear: if a factor increases a defendant's period of incarceration, that factor must be found by a jury.<sup>5</sup>

The concept that all elements must be established by the jury is vital and its new respect by the US Supreme Court must cause all jurists and litigators to pause. It no longer suffices for the State to say that a group of people who had the life/death decision imposed by *one judge* are in a position equal to those whose sentences were considered, debated, and unanimously arrived at by a properly instructed deliberative body of twelve citizens carefully selected for their service.

Mr. Asay submits that there cannot be a four-tiered grouping of those accused of a capital felony: (1) Those convicted pre-*Apprendi* who will have their lives taken by the vote of a *single jurist*; (2) those convicted under an infirm process but whose cases are on direct appeal and will receive the benefit of *Apprendi/Ring*; (3) those convicted post-*Apprendi* with *appropriate* charging documents and appropriate jury verdicts on all elements who have committed crimes of such a magnitude that twelve jurors unanimously decided which aggravating factors exist and

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<sup>2</sup>

530 U.S. 466 (2000).

<sup>3</sup>

*Ring v. Arizona*, 536 U.S. 584 (2002).

<sup>4</sup>

*Blakely v. Washington*, 124 S.Ct. 2531 (2004).

<sup>5</sup>

*Schriro v. Summerlin*, 124 S.Ct. 2519 (2004).

that that or those aggravating factors outweighed—in all twelve minds—the totality of the mitigation presented; and (4) those who were convicted of a capital felony, based upon a proper and complete Indictment and evidentiary findings, but upon whom the death penalty was not imposed.

The citizenry of our State deserve better than such a flawed system. Since the US Supreme Court has clearly and unequivocally ruled that elements must be established to and by a jury, no man or woman should remain on Death Row whose prosecution does not comply with such *Constitutional requirements*.

The State urges several alternative and shifting bases for ‘getting around’ the principles of *Apprendi*. The State disagrees with Mr. Asay’s position that the judge is the sentencer in Florida, a concept which is established clearly and convincingly in both statutory and decisional Florida law. The State argues that this Court has not as yet held that *Ring* is applicable to Florida. And it argues that neither *Blakely* nor *Ring* interpret Florida law. With regard to the latter, although literally true and accurate, fine parsing such as this is best left to philosophers rather than mere lawyers trying to do justice. With regard to the former, Mr. Asay asks this Court to make such a determination on the applicability of *Ring*.

The State also argues that because there were two separate murders alleged, a death sentence is virtually automatic. This Court’s cases post-*Apprendi* also attempt

to draw this conclusion when there are two simultaneous convictions. It is an easy logical trap: the jury found each murder beyond a reasonable doubt; one murder is used as the aggravating factor in the sentencing on the companion count, therefore there is at least one good aggravating factor which can support a lawful death sentence *can rather than must* be imposed.

There are problems with this syllogism.<sup>6</sup> This construct presumes that if there is an aggravating circumstance established, however established, death is the appropriate sentence. Of course, we know that that is not the standard at all. The establishment of one aggravating factor is but a *mere threshold* to the imposition of a death penalty. It does not *mandate* death, rather it *permits* death to be considered.

Wherefore, Mr. Asay asks that this Court:

- (1) Recognize the impact of the recent United States Supreme Court's jurisprudence on the Florida Death Penalty and declare that *Ring applies* to that scheme.
- (2) Find that the entirety of Mr. Asay's *trial* was tainted because the jury was unaware of the elements of the crime or the consequences of its

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<sup>6</sup>

Mr. Asay does not know if the logical conclusion of such a State argument or a court holding based on this reasoning accepts the fact that “beyond a reasonable doubt” is the required standard of proof. Mr. Asay suggests that any finding on any element must meet this standard.

decisions and that for that reason Mr. Asay should be granted a new guilt phase trial, or in the lesser alternative Mr. Asay should be granted a new sentencing trial with all appropriate due process safeguards.

- II. Florida law independently requires that a watershed change in law which requires that application of the principle that all elements of any crime must be decided by a jury not a judge be applied retroactively.

The State suggests that this Court abandon nearly twenty-five years of Florida law and overrule *Witt v. State*.<sup>7</sup>

...the State believes that continued reliance upon *Witt* in analyzing whether a new constitutional rule should be given retroactive effect no longer properly effectuates the goals inherent in retroactivity analysis, i.e. ‘Finality of decisions and ensuring finality and uniformity in individual cases [citation omitted].

Answer Brief of Appellee at 20-21.<sup>8</sup>

The State argued that the decision in *Witt*<sup>9</sup> because this Court had looked to

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387 So.2d 922 (Fla. 1980), *cert. denied*, 449 U.S. 1067 (1980).

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This position omits reference to justice, due process, the import of *Apprendi/Ring* and just plain fairness. If “finality” is society’s goal, we are indeed a society which should engage in profound self-reflection.

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As Mr. Asay urged in his initial presentation, since *Ring* has not been made retroactive by this Court to the Florida Death Scheme, and since Mr. Asay must Mr. Asay must have this Court’s analysis of this impact before he can completely argue the retroactivity issue, he asks this Court to hold this matter in abeyance until such

then-federal analysis, should change *because* federal law has changed. “[t]his Court should abandon *Witt* in favor of the standard adopted in *Teague*.”<sup>10</sup> Answer Brief of Appellee at 22.

Florida law is enunciated in *Witt*. Well after *the federal standard was changed in Teague*, this Court has followed its *own precedent, Witt*. Although the State would utilize the very restrictive analysis of *Teague*, it recognizes the vitality of *Witt*, by its citation to *Ferguson v. State*,<sup>11</sup> and *Windom v. State*.

*Ferguson* did not question the *Witt* standard but rather followed it requiring the retroactive application of *Carter*.<sup>12</sup> *Carter* established a new procedure for interlocutory appeals in competency matters when defendants were in the post-conviction phase of their litigation This Court rejected the State’s two positions: that because this was a *civil rather than criminal* matter, competency was not a required threshold finding; and that since this Court did not *specifically* mention constitutional grounds when it decided *Carter*, there could be no retroactivity determination. Those

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determination of *Ring’s* applicability in order that he may make an appropriate presentation.

<sup>10</sup>

*Teague v. Lane*, 489 U.S. 288 (1989).

<sup>11</sup>

789 So.2d 306 (Fla. 2001).

<sup>12</sup>

706 So.2d 873 (Fla. 1997).

positions were rejected

*Ferguson* found that *Carter* was not the usual case, in that the finality at issue was not that of a conviction but rather of a post conviction proceeding. Fairness dictates that Mr. Asay recognize that his reading of *Ferguson* might lead to the conclusion that this Court might have decided *Carter* differently had its retroactive application been more wide ranging.

Relief was granted in the complicated area of competency for post conviction proceedings. Although an important component of due process, the changes wrought by *Ring* are of greater dimension.

To say, as has been suggested, that because something found to be of Constitutional dimension which will change the face of death penalty accusation and truth finding, is not retroactive under *Witt*, is to acknowledge that the three hundred-plus men and women on Florida's Death Row should be killed in order that the State not be burdened by retrials, *retrials mandated by a profound change in the law*. That result is not one of which civilized societies should approve.

Recent discussions by Jurists on this Court speak to the federal model for retroactivity being the preferred model. However for more than two decades Florida's citizens have relied on the retroactivity standard enunciated in *Witt* and Mr. Asay submits that it is and should remain the law.

This Court, although informing its decisions from other jurisdictions, decide questions of retroactivity under Florida’s standards not federal standards.<sup>13</sup> The State’s position suggests that Florida abandon its own jurisprudence and change to the federal standard *merely because it is the federal standard*. Mr. Asay respectfully disagrees. As this Court has stated, and as Mr. Asay included in his initial presentation:

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 . . . . [T]he 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.

*Witt*, at 928.

The State would have us abandon this bedrock premise and rather defer to the federal courts. That does not correctly define the concept of federalism.

*Witt* gave us our analytical framework. It reduced the general principles to be gleaned from the various federal analyses to three concepts: (a) the purpose to be served by the new rule; (b) the extent of reliance on the old rule; and ( c ) the effect on

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<sup>13</sup>

In spite of extensive litigation in *Apprendi*, *Ring*, *Blakely*, and *Summerlin*, death penalty law has not changed in Florida because the United States Supreme Court has not *directly and specifically* overruled Florida’s Death Penalty Scheme. This speaks to the independence of the Florida Judiciary when applying results from federal courts. It would be inconsistent for this Court to abandon Florida’s traditional *Witt* analysis and adopt without reference to Florida law, the Federal retroactivity analysis of *Teague*.

the administration of justice of a retroactive application of the new rule.” *Id.*, at 926, citing to *Stovall v. Denno*,<sup>14</sup> *Linkletter v. Walker*<sup>15</sup>, *Brewer v. State*,<sup>16</sup> and *State v. Steinhauer*.<sup>17</sup> However, it did not merely “transfer” these concepts into Florida law. Rather, it analyzed these decisions and used them to inform its own holding that in order to have retroactive applicability, the following “*Witt*” factors must exist:

- The change in law must emanate from the Florida Supreme Court or the United States Supreme Court;
- The change in law must be Constitutional in nature.
- The changes in law must constitute a development of fundamental significance.

The analysis in the concurrence in *Windom* utilizes the distilled factors and does not speak to the factors as restated with clarity and finality by the *Witt* court.

Under *Witt’s own summation of retroactivity requirements*, it is clear that *Ring* meets the first two criteria virtually without question. The US Supreme Court

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<sup>14</sup> 388 U.S. (1967).

<sup>15</sup> 381 U.S. 618 (1965).

<sup>16</sup> 264 So.2d 833 (Fla. 1972).

<sup>17</sup> 216 So.2d 214(Fla. 1968), cert. denied, 389 U.S. 914 (1970).

has announced a rule of Sixth Amendment law applicable to the states through the Fourteenth Amendment.<sup>18</sup>

Then if one is to be faithful to *Witt*, the only remaining question is whether the *Apprendi/Ring/Blakely* rule fits the common sense definition of a development of “fundamental significance.” If it is a development of fundamental significance, then it must be retroactive.

To say that the determination that all aggravating circumstances must be decided by a jury rather than a judge is not “fundamental” is to fly in the face of the dictionary definition of “fundamental:” Pertaining to the foundation or basis; serving for the foundation. “ Hence: essential as an element, principle or law; important, original; elementary: as a fundamental truth.”<sup>19</sup>

The shift from an advisory jury who is not advised of the aggravating factors which might result in the imposition of death with all discretion residing in the sentencer—the judge, to a model where all elements are found beyond a reasonable doubt by the finder of fact is a fundamental change in the law and should be given retroactive effect.

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<sup>18</sup>

Justice Cantero agrees with this analysis in *Windom*. “Clearly the holding in *Ring* meets the first two prongs of *Witt*....” *Witt*, at 29.

<sup>19</sup>

*Webster’s Revised Unabridged Dictionary*, Copyright 1996, Merriam-Webster, Inc.

Wherefore, Mr. Asay asks this Court :

- (1) grant him oral argument,
- (2) find that *Ring* applies to Florida,
- (3) find that *Ring* applies retroactively to the guilt and the penalty phases of Mr. Asay's trial,
- (4) grant Mr. Asay and to grant him a new guilt phase, or, in the lesser alternative a new sentencing.

Also, when this Court establishes that *Ring* affects Florida's Death Scheme, Mr. Asay asks for an additional opportunity to brief the retroactivity issue.

## CONCLUSION

Mr. Asay has established that the United States Supreme Court's reading of Sixth Amendment jurisprudence mandates that this Court declare Florida's Death

Penalty Scheme unconstitutional. He further has established that this change in twenty-plus years of Florida's decisional and statutory law equates to a fundamental change in the way that Florida imposes the death penalty and that, thusly, *Apprendi's* holding, when applied to Florida, requires retroactive application under *Witt* and its progeny resulting in a finding of retroactivity.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been sent via United States mail 17<sup>st</sup> day of September, 2004, to the following:

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Mr. Asay's Reply Brief is submitted in Times New Roman 14 typeface in compliance with the requirements of this Court.

BY: \_\_\_\_\_  
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