

IN THE SUPREME COURT OF FLORIDA

Case No. SC02-1457

AMOS LEE KING,
Petitioner,

versus,

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

On Habeas Corpus

PETITIONER'S REPLY BRIEF

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ARGUMENT

I. RING V. ARIZONA REQUIRES RELIEF

A. The bulk of respondent Moore’s Answer Brief is devoted to arguing that Florida’s death-sentencing scheme differs from Arizona’s. The asserted differences boil down to two:

1. Respondent says that “in Florida the statutory maximum sentence for first degree murder is death.” Answer Brief, p. 5.¹ But the Attorney General of Arizona said exactly the same thing about the Arizona statute invalidated in *Ring v. Arizona*, 122 S. Ct. 2428 (2002). The United States Supreme Court dispatched that argument as follows:

“In an effort to reconcile its capital sentencing system with the Sixth Amendment as interpreted by *Apprendi*, Arizona first restates the *Apprendi* majority’s portrayal of Arizona’s system: Ring was convicted of first-degree murder, for which Arizona law specifies ‘death or life imprisonment’ as the only sentencing options, *see* Ariz.Rev.Stat. Ann. § 13-1105(C) (West 2001); Ring was therefore sentenced within the range of punishment authorized by the jury verdict. *See* Brief for Respondent 9-19. This argument overlooks *Apprendi*’s instruction that ‘the relevant inquiry is one not of form, but of effect.’ 530 U.S., at 494, In effect, ‘the required finding [of an aggravated circumstance] expose[d] [Ring] to a greater punishment than that authorized by the jury’s guilty verdict.’ *Ibid.*; *see* 200 Ariz., at 279, 25 P.3d, at 1151. The Arizona first-degree murder statute ‘authorizes a maximum penalty of death only in a formal sense,’ *Apprendi*, 530 U.S., at 541 . . .

¹ Respondent’s contention that “[i]n Florida, the determination of death-eligibility is made upon conviction of first degree murder or felony murder, at the guilt phase,” Answer Brief, p. 21, subtitle III.A, is simply another way of stating the same exact point.

(O’CONNOR, J., dissenting), *for it explicitly cross-references the statutory provision requiring the finding of an aggravating circumstance before imposition of the death penalty.* See § 13-1105(C) (‘First degree murder is a class 1 felony and is punishable by death or life imprisonment as provided by § 13-703.’ (emphasis added)). If Arizona prevailed on its opening argument, *Apprendi* would be reduced to a ‘meaningless and formalistic’ rule of statutory drafting. See 530 U.S., at 541 . . . (O’CONNOR, J., dissenting).”

Ring, 122 S. Ct. at 2440-2441 (emphasis added).

From the standpoint “not of form, but of effect,” there is no rational way to distinguish either Florida’s statutory structure or its actual functioning from Arizona’s. Identically to Ariz. Rev. Stat. Ann. § 13- 1105(C) and even more explicitly, if possible, Fla. Stat. § 775.082 “cross-references the statutory provision” of Fla. Stat. § 921.141, requiring additional findings *by a judge, not by a jury* as the precondition for imposition of the death penalty (*Ring*, 122 S. Ct. at 2440):

“A person who has been convicted of a capital felony shall be punished by life imprisonment and shall be required to serve no less than 25 years before becoming eligible for parole *unless the proceedings held to determine sentence according to the procedure set forth in § 921.141 result in a finding by the court* that such person shall be punished by death, and *in the latter event* such person shall be punished by death.”

Fla. Stat. § 775.082 (1979) (emphasis added).

2. Respondent’s second attempted distinction of the Arizona procedure invalidated in *Ring* says that “[t]he jury’s role in Florida’s sentencing process is significant,” Answer Brief, p. 23, because juries render an advisory verdict

as to whether the defendant should live or die. This argument blithely ignores the explicit holding and rationale of both *Apprendi v. New Jersey*, 530 U.S. 466, 483 (2000), and *Ring*. The unmistakable teaching of those two cases is that every fact which must be found as the necessary precondition for enhancing a defendant’s maximum possible sentence from imprisonment to death *is required by the Sixth Amendment to be found by a jury in the same way, and for the same reasons, that the Sixth Amendment requires a jury to find every fact which is the necessary precondition for conviction of a crime.*² As *Ring* puts it in plain English: “*Apprendi* repeatedly instructs . . . that the characterization of a fact or circumstance as an ‘element’ [of a crime] or a ‘sentencing factor’ is not determinative of the question ‘who decides,’ judge or jury.” *Ring*, 122 S. Ct. at 2441.

Is respondent Moore seriously arguing that this Court would or constitutionally could sustain a first-degree murder conviction based solely on a *judge*’s written finding of premeditation, simply because a jury sat through the guilt trial and, at the end of the trial – before the judge retired to make his or her findings

² This is what *Apprendi* held; it is what *Ring* held; it is what our petition to this Court for a writ of habeas corpus asserted that *Apprendi* and *Ring* held; it is what our opening brief asserted that *Apprendi* and *Ring* held. “To the extent that” the respondent’s brief asserts that King “is clearly seeking to establish a right to jury ‘sentencing’” (Answer Brief, p. 29), respondent misrepresents our position. Petitioner asserts that juries must make any and all findings on which a death sentence is contingent under state law.

and convict the defendant – the jury rendered an advisory verdict saying that “the defendant should be found guilty” –

- **without** the jury’s making any finding of premeditation (or of any other *fact*), and
- **without** the jury’s being charged that it needs to make any specific finding of *fact* in order to recommend conviction, and
- **although** the jury has been specifically charged that its verdict is only advisory and will not result in the defendant’s conviction, and
- **although** there is no evidence the jury was able to achieve unanimity with respect any single basis for its fact-free advisory verdict?

That proposition cannot survive thirty seconds’ scrutiny; and almost all of Moore’s Answer Brief self-destructs along with it.

B. We accordingly confine the balance of petitioner’s reply brief to the few collateral arguments advanced by respondent which do not involve this fundamental absurdity. They are, for the most part, defenses in confession-and-avoidance. None has any merit.

1. Respondent argues that petitioner’s *Apprendi-Ring* claim is procedurally defaulted. But this Court entertained the identical claim in petitioner’s

previous proceedings, filed after the grant of *certiorari* but before the merits decision in *Ring*. See *King v. State*, 808 So.2d 1237 (Fla. 2002).³ Since that time, petitioner and respondent have been occupied virtually full-time litigating precisely the same claim, so when can the alleged procedural default have occurred? Manifestly, there has been no such default.

2. Alternatively, respondent argues that this Court’s ruling on the merits in the interim between the grant of *certiorari* and the merits decision in *Ring* remains controlling. Respondent fails to call this argument by its real name – a law-of-the-case argument – because, if it did, the baselessness of the argument would be patent. See *State v. Owen*, 696 So.2d 715, 720 (Fla. 1997); and *Brunner Enterprises, Inc. v. Department of Revenue*, 452 So.2d 550, 552-553 (Fla. 1984), both holding that the law of the case yields to a subsequent, controlling change of law by the United States Supreme Court. Accord: *Strazzulla v. Hendrick*, 177 So.2d 1, 4 (Fla. 1965). Respondent’s argument is no less baseless for being misnamed.

3. Respondent then argues that *Ring* is not retroactive, citing federal

³ In so doing, the Court acted consistently with precedent. See, e.g., *Thompson v. Dugger*, 515 So.2d 173, 175 (Fla. 1987), holding that the Supreme Court’s decision in *Hitchcock v. Dugger*, 481 U.S. 393 (1987), “represent[ed] a sufficient change in the law that potentially affect[ed] a class of petitioners . . . to defeat the claim of a procedural default.” *Apprendi* and *Ring* cannot conceivably be regarded as less drastic, fundamental, or sweeping changes of law than *Hitchcock*.

cases like *Cannon v. Mullin*, 2002 WL 1587921 (10th Cir. 2002). Of course, these cases do not involve retroactivity in the sense in which this court has used that term and developed rules for determining when it will give retroactive effect to “fundamental and constitutional law changes which cast serious doubt on the veracity or integrity of the original trial proceeding.” *Witt v. State*, 387 So.2d 922, 929 (1980). Respondent’s federal citations are, instead, cases applying the unique federal habeas corpus doctrine of *Teague v. Lane*, 489 U.S. 288 (1989). The *Teague* doctrine is a tortuous and tricky one, of unpredictable application, as exemplified by the very *Cannon* case that is respondent’s lead-off citation. (There the Oklahoma Court of Criminal Appeals disagreed with the United States Court of Appeals for the Tenth Circuit and held that *Ring* claims **are** cognizable in state postconviction proceedings in the first instance, despite *Teague*.⁴) Fortunately for coherence, retroactivity in this Court is governed by *Witt*, not *Teague*. See, e.g., *House v. State*, 696 So.2d 515, 518 n.8 (Fla. 4th DCA) (by Pariente, J.); *Gantorius v. State*, 693 So.2d 1040, 1042 n.2 (Fla. 3d DCA 1997), approved in *State v. Gantorius*, 708 So.2d 276 (Fla. 1998). And, as we have shown at pages 29-34 of our opening brief, *Ring* is retroactive under the *Witt* criteria.

⁴ The opinion of the Oklahoma Court of Criminal Appeals is appended to this brief. It rejects the argument that *Teague* bars Cannon’s *Ring* claim (see footnote 14), although it then decides the claim against Cannon on the merits.

4. Respondent also argues that because one of the aggravating circumstances on which the trial judge relied to impose petitioner’s death sentence was a prior conviction, petitioner’s case is taken out of the rule of *Apprendi* and *Ring*. See Answer Brief, note 1, and accompanying text; and p. 37-38. There are two short answers to this contention:

- While it is correct that the Supreme Court has said that a judge may rely on a prior conviction for sentencing purposes, see *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), it is plain that *Almendarez-Torres* does not survive *Apprendi* and *Ring* but rather fell along with *Hildwin v. Florida*, 490 U.S. 638 (1989) (*per curiam*), and *Walton v. Arizona*, 497 U.S. 639 (1990). In *Apprendi*, Justice Thomas – whose vote was decisive of the five-to-four decision in *Almendarez-Torres* – announced that he was receding from his support of *Almendarez-Torres*.⁵ The *Apprendi* majority found it unnecessary to

⁵ The five-Justice majority in *Almendarez-Torres* was comprised of Justices Breyer, Rehnquist, O’Connor, Kennedy, and Thomas. The first four of these were the dissenters in *Apprendi*. The dissenters in *Almendarez-Torres* were Justices Stevens, Souter, Scalia, and Ginsburg, all of whom are in the *Apprendi* majority. Between 1998 and 2000, Justice Thomas changed his thinking about the appropriate analysis to determine what an “element” of a crime is and accordingly disavowed his vote in *Almendarez-Torres*. In his *Apprendi* concurrence, Justice Thomas describes this change of mind as follows:

(continued...)

overrule *Almendarez-Torres* explicitly in order to decide the issues before it, but acknowledged that “it is arguable that *Almendarez-Torres* was incorrectly decided.” 530 U.S. at 489. It then went on in footnote to *add* to “the reasons set forth in Justice SCALIA’s [*Almendarez-Torres*] dissent, 523 U.S., at 248-260,” the observation that “the [*Almendarez-Torres*] Court’s extensive discussion of the term ‘sentencing factor’ virtually ignored the pedigree of the pleading requirement at issue,” which drove the Sixth Amendment ruling in *Apprendi*. *Id.* at 489 n. 15.⁶

⁵(...continued)

“[O]ne of the chief errors of *Almendarez-Torres* – an error to which I succumbed – was to attempt to discern whether a particular fact is traditionally (or typically) a basis for a sentencing court to increase an offender’s sentence. . . . For the reasons I have given [here], it should be clear that this approach just defines away the real issue. What matters is the way by which a fact enters into the sentence. If a fact is by law the basis for imposing or increasing punishment – for establishing or increasing the prosecution’s entitlement – it is an element.”

530 U.S. at 520-521 .

⁶ The majority opinion in *Almendarez-Torres* notably relied upon *McMillan v. Pennsylvania*, 477 U.S. 79 (1986), and, in so doing, refused to distinguish between a “sentencing factor . . . [that] triggered a mandatory minimum sentence” in *McMillan* and a “sentencing factor . . . [that] triggers an increase in the maximum permissive sentence” in *Almendarez-Torres*, 523 U.S. at 244; *see*

(continued...)

- At the same time, the *Apprendi* majority did explicitly restrict whatever precedential force *Almendarez-Torres* ever had to the status of “a narrow exception to the general rule” that every fact which is necessary to enhance a criminal defendant’s maximum sentencing exposure must be found by a jury – an exception limited to the “unique facts” in *Almendarez-Torres*. The unique facts of *Almendarez-Torres* were that Almendarez-Torres **pleaded guilty** to an indictment charging that he had returned to the United States after having been deported and, in addition, **admitted** that he had been deported because he was previously convicted of three aggravated felonies. He thus elected to forgo a trial and accept an uncontested adjudication of his guilt for a

⁶(...continued)

generally id. at 242-246. That aspect of *Almendarez-Torres* has, of course, now been explicitly repudiated. See *Harris v. United States*, 122 S. Ct. 2406, 2419 (2002), decided together with *Ring*.

Respondent also argues that it would not violate *Ring* for a judge to find and rely upon convictions which occurred contemporaneously with the conviction for murder, i.e., arson and burglary. Answer Brief at pp. 9, 37. These convictions would not fit the *Almendarez-Torres* prior conviction exception to *Apprendi* even if the *Almendarez-Torres* exception for prior convictions survived *Ring*. Contemporaneous felonies are “prior convictions” **neither** under *Almendarez-Torres* **nor** under Florida law. See, e.g., *Perry v. State*, 522 So.2d 817, 820 (Fla.1988); *Holton v. State*, 573 So.2d 284, 291 (Fla. 1991); *Bruno v. State*, 574 So.2d 76, 81 (Fla. 1991); compare *Bogle v. State*, 655 So.2d 1103, 1108 (Fla. 1995).

crime which *by definition* included the felony convictions later used to enhance his sentence. Nothing about the priors – any more than anything else about the elements of the crime of reentry after deportation remained for a jury to try in the light of Almendarez-Torres’ guilty plea.

5. Finally (apart from arguments which were anticipated and refuted in our opening brief), respondent argues that any error under *Ring* should be analyzed under a harmless error analysis, citing *Ring* at n.7. Answer Brief at 36-38. According to respondent, “the jury” found other felonies at guilt/innocence which could be relied upon by a judge at sentencing. But Petitioner faced *re-sentencing* by a jury and at that resentencing his sentence, under Florida law, was life imprisonment *unless* the new jury *then found* a factor that would increase the sentence. No jury did.

It is true that *Ring* suggests that a failure to have jury findings at the penalty stage could be harmless error, *see Chapman v. California*, 386 U.S. 18 (1967), if the requisite facts were necessarily found by the **same** jury in its guilt-stage verdict, *Ring, supra*, 122 S.Ct at 2443, n. 7, as respondent suggests. But that kind of harmless-error reasoning cannot apply to Petitioner because his guilt trial was held before another jury. Anything which the earlier jury found cannot be used to show that Petitioner’s actual penalty-phase jury would have found the facts necessary to render Petitioner death-eligible if the factual issues had been submitted to this penalty-phase jury. At

most, the findings of the earlier jury show that some jurors – not the actual jury that served at King’s penalty retrial – could have found the requisite facts. *Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993), explains why the latter showing is not enough to bring the harmless-error rule into play:

“Consistent with the jury trial guarantee, the question . . . [*Chapman v. California*] instructs the reviewing court to consider is not what effect the constitutional error might generally be expected to have upon a reasonable jury, but rather what effect it had upon the guilty verdict in the case at hand. *See Chapman, supra*, 386 U.S., at 24, 87 S.Ct., at 828 (analyzing effect of error on “verdict obtained”). Harmless error review looks, we have said, to the basis on which “*the jury actually rested its verdict.*” *Yates v. Evatt*, 500 U.S. 391, 404, 111 S.Ct. 1884, 1893, 114 L.Ed.2d 432 (1991) (emphasis added). The inquiry, in other words, is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error. That must be so, because to hypothesize a guilty verdict that was never in fact rendered no matter how inescapable the findings to support that verdict might be would violate the jury trial guarantee.”

Therefore, no harmless error analysis is available for respondent.

CONCLUSION

Nothing in respondent's brief provides any reason to deny petitioner the relief to which he is entitled under *Ring*.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing reply brief is being furnished by facsimile transmission to counsel for respondent, Assistant Attorney General Carol Dittmar, Office of the Attorney General, Westwood Building, 7th Floor, 2002 N. Lois Avenue, Tampa, Florida 32607, this 5th day of August, 2002.

CERTIFICATE OF COMPLIANCE

This petition was prepared using Times New Roman 14 point font.

Mark E. Olive

APPENDIX A