IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC03-558
Lower Tribunal No.: 86-6123-CF

GROVER REED,

Petitioner

v.

JAMES B. CROSBY, JR., SECRETARY
DEPARTMENT OF CORRECTIONS, STATE OF FLORIDA

Respondent.

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

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CLAIM 1: RING v. ARIZONA, 536 U.S. 584 (2002) DOES APPLY RETROACTIVELY TO INVALIDATE PETITIONER'S CONVICTION

The Respondent argues that habeas corpus relief does not lie because the Petitioner is improperly attempting to relitigate this Court's harmless error analysis via his habeas petition. Petitioner respectfully disagrees. Where a petitioner has exhausted all other available remedies, particularly a motion for postconviction relief and a direct appeal, a denial to the petitioner, during the course of the prosecution, of a substantial personal right to which the petitioner was entitled is a ground for relief in habeas corpus following the conviction. Sneed v. Mayo, 69 So.2d 653 (Fla. 1954); State Ex Rel Whited v. Mayo, 65 So.2d 50 (Fla. 1953);

Lightfoot v. Wainwright, 369 So.2d 110 (Fla. 1st DCA 1979). Furthermore, Rule 3.850 (h), Fla. R. Crim. P. explicitly allows an application for writ of habeas corpus where it appears that the remedy by post-conviction relief motion is inadequate or ineffective to test the legality of the applicant's detention.

The question which Ring v. Arizona, 122 S. Ct. 2428 (2002), decided was what facts constitute "elements" in capital sentencing proceedings. Following the Supreme Court's decision in Apprendi v. New Jersey, 530 U.S. 466 (2000), Mr. Ring raised an Apprendi challenge to his death sentence. In addressing that challenge, the Arizona Supreme Court stated that the United States Supreme Court's description of Arizona's capital sentencing scheme contained in Walton v. Arizona, 497 U.S. 639 (1990), was incorrect and provided the correct construction of the scheme. Ring, 122 S. Ct. at 2436. Based upon this correct construction, the United States Supreme Court then determined that Walton "cannot survive the reasoning of Apprendi." Ring, 122 S. Ct. at 2440.

The bulk of the Ring opinion addresses how to determine whether a fact is an "element" of a crime. *See Ring*, 122 S. Ct. at 2437-43. The question in Ring was not whether the Sixth Amendment requires a jury to decide elements. That has been a given since the Bill of Rights was adopted. The question was what facts are elements. Justice Thomas explained this in his concurring opinion in Apprendi:

> This case turns on the seemingly simple question of what constitutes a "crime." Under the Federal Constitution, "the accused" has the right (1) "to be informed of the nature and cause of the accusation" (that is, the basis on which he is accused of a crime), (2) to be "held to answer for a capital, or otherwise infamous crime" only on an indictment or presentment of a grand jury, and (3) to be tried by "an impartial jury of the State and district wherein the crime shall have been committed." Amdts. 5 and 6. See also Art. III, [Sec.] 2, cl. 3 ("The Trial of all Crimes . . . shall be by Jury"). With the exception of the Grand Jury Clause, see Hurtado v. California, 110 U.S. 516, 538 . . . (1884), the Court has held that these protections apply in state prosecutions. Herring v. New York, 422 U.S. 853, 857, and n.7 . . . (1975). Further, the Court has held that due process requires that the jury find beyond a reasonable doubt every fact necessary to constitute the crime. In re Winship, 397 U.S. 358, 364 . . . (1970).
>
> *All of these constitutional protections turn on determining which facts constitute the "crime"--that is, which facts are the "elements" or "ingredients" of a crime.* In order for an accusation of a crime (whether by indictment or some other form) to be proper under the common law, and thus proper under the codification of the common-law rights in the Fifth and Sixth Amendments, it must allege all elements of that crime; likewise, in order for a jury trial of a crime to be proper, all elements of the crime must be proved to the jury (and, under Winship, proved beyond a reasonable doubt).

Apprendi, 120 S. Ct. at 2367-68 (Thomas, J., concurring) (emphasis added). Justice Thomas explained that courts have "long had to consider which facts are elements," but that once that question is answered, "it is then a simple matter to apply that answer to whatever constitutional right may be at issue in a case--here, Winship and the right to trial by jury." Id. at 2368.

The essence of criminal law is the definition of the offense. Jones v. United

States, 526 U.S. 227 (1999), clarified that facts which increase the maximum punishment for an offense are elements of the offense. Apprendi applied to that definition the well-established rule that elements must be found by a jury. Ring merely clarified the rule in the death penalty context.

Ring's requirement that juries, not judges, find the elements of the charge is derived from ancient principles of law: "The principle that the jury were the judges of fact and the judges the deciders of law was stated as an established principle as early as 1628 by Coke. See 1 E. Coke, Institutes of the Laws of England 155b (1628)." Jones, 526 U.S. at 247. Walton did not contravene those principles but simply misread the Arizona statute. The Ring decision merely rejuvenated the longstanding rule which Walton temporarily rejected.

The Framers of the Bill of Rights included the Sixth Amendment's guarantee of a right to jury trial as an essential protection against government oppression. "Fear of unchecked power, so typical of our State and Federal Governments in other respects, found expression in the criminal law in this insistence upon community participation in the determination of guilt or innocence." Duncan v. Louisiana, 391 U.S. 145, 156 (1968). Only by maintaining the integrity of the factfinding function does the jury "stand between the accused and a potentially arbitrary or abusive Government that is in command of the criminal sanction."

United States v. Martin Linen Supply Co., 430 U.S. 564, 572 (1977). Thus, the adoption of the jury trial right in the Bill of Rights establishes the Founders' recognition that a jury trial is more reliable than a bench trial.

Just as Justice Thomas explained in Apprendi, there was no question in Ring that the jury trial right applies to elements. The dispute in Ring involved what was an element. Thus, the question in Ring is akin to a statutory construction issue, and "retroactivity is not at issue." Fiore v. White, 531 U.S. 225, 226 (2001); Bunkley v. Florida, 123 S. Ct. 2020, 2023 (2003). That is, the Sixth Amendment right to have a jury decide elements is a bedrock, indisputable right. Mr. Reed was entitled to this Sixth Amendment protection at the time of his trial. Ring simply clarified that facts rendering a defendant eligible for a death sentence are elements of capital murder and therefore subject to this Sixth Amendment right.

The ruling in Ring concerns an issue of substantive criminal law. In concluding that the Sixth Amendment requires that the jury, rather than the judge, determine the existence of aggravating factors, the Supreme Court described aggravating factors as "the functional equivalent of an element of a greater offense." Ring, 122 S.Ct. at 2243 (citing Apprendi v. New Jersey, 530 U.S. 466, 494, n. 19 (2000)). Ring clarified the elements of the "greater" offense of capital murder. As explained above, Ring did not decide a procedural question (i.e., whether the Sixth

Amendment requires that juries decide elements), but a substantive question (what is an element). Thus, retroactive application is required under Bousley v. United States, 523 U.S. 614 (1998), because the ruling addresses a matter of substantive criminal law, not a procedural rule.

Alternatively, Mr. Reed argues that Ring meets the criteria for retroactive application set forth in Witt v. State, 387 So. 2d 922 (Fla. 1980). Ring issued from the United States Supreme Court. Witt, 387 So. 2d at 930. Ring's Sixth Amendment rule unquestionably "is constitutional in nature." Witt, 387 So. 2d at 931. Ring "constitutes a development of fundamental significance." Witt, 387 So. 2d at 931.

As to what Constitutes a development of fundamental significance," Witt explains that this category includes "changes of law which are of sufficient magnitude to necessitate retroactive application as ascertained by the three-fold test of Stovall v. Denno, 388 U.S. 293 (1967), and Linkletter v. Walker, 381 U.S. 618 (1965)," adding that Gideon v. Wainwright . . . is the prime example of a law change included within this category." 387 So. 2d at 929. The Missouri Supreme Court has recently held that Ring is retroactive under the Stovall/Linkletter test. State v. Whitfield, ___ S.W.3d ___, 2003 WL 21386276 (Mo. June 17, 2003).

The rule of Ring is the kind of "sweeping change of law" described in Witt.

In Apprendi, Justice O'Connor's dissenting opinion described the rule of that case as "a watershed change in constitutional law." Apprendi, 120 S. Ct. at 2380 (O'Connor, J., dissenting). Extending Apprendi's rule to capital cases, as the Supreme Court did in Ring, is no less of a "watershed change." In this Court, Chief Justice Anstead has said that Ring "is clearly the most significant death penalty decision of the U.S. Supreme Court since the decision in Furman v. Georgia." Bottoson v. Moore, 833 So. 2d 693, 703 (Fla. 2002) (Anstead, C.J., concurring in result only). Justice Pariente has described Ring as a "landmark case." Bottoson v. Moore, 824 So. 2d 115, 116 (Fla. 2002) (Pariente, J., concurring). Justice Shaw has concluded that Ring applies retroactively under Witt and meets the test of Stovall v. Denno for retroactive application. Bottoson, 833 So. 2d at 717 & n.49 (Shaw, J., concurring in result only).

The three-fold Stovall-Linkletter test considers: "(a) the purpose to be served by the new rule; (b) the extent of reliance on the old rule; and (c) the effect on the administration of justice of a retroactive application of the new rule." 387 So. 2d at 926. Resolution of the issue ordinarily depends most upon the first prong--the purpose to be served by the new rule--and whether an analysis of that purpose reflects that the new rule is a Fundamental and constitutional law change which casts serious doubt on the veracity or integrity of the original trial proceeding." 387

So. 2d at 929.

In Witt, this Court explained that the doctrine of finality must give way when fairness requires retroactive application:

> The doctrine of finality should be abridged only when a more compelling objective appears, such as ensuring fairness and uniformity in individual adjudications. Thus, society recognizes that a sweeping change of law can so drastically alter the substantive or procedural underpinnings of a final conviction and sentence that the machinery of post-conviction relief is necessary to avoid individual instances of obvious injustice. Considerations of fairness and uniformity make it very "difficult to justify depriving a person of his liberty or his life, under process no longer considered acceptable and no longer applied to indistinguishable cases."

Witt, 387 So.2d at 925 (footnote omitted). The Court has reaffirmed the Witt fairness test in State v. Callaway, 658 So.2d 983, 987 (Fla. 1995).

This fairness test is in keeping with the United States Supreme Court's interpretation of the Stovall v. Denno test. The Court has said that the first prong of this test--the purpose to be served by the new rule--is the most important prong:

> [O]ur decisions establish that "[f]oremost among these factors is the purpose to be served by the new constitutional rule," Desist v. United States, 394 U.S. 244, 249 . . . (1969), and that we will give controlling significance to the measure of reliance and the impact on the administration of justice "only when the purpose of the rule in question [does] not clearly favor either retroactivity or prospectivity." *Id.*, at 251. . . . [citations omitted]. "Where the major purpose of new constitutional doctrine is to overcome an aspect of the criminal trial that substantially impairs its truth-finding function and so raises serious questions about the accuracy of guilty verdicts in past trials, the new rule has been given complete retroactive effect. Neither good-faith

> reliance by state or federal authorities on prior constitutional law or accepted practice, nor severe impact on the administration of justice has sufficed to require prospective application in these circumstances." Williams v. United States, 401 U.S. 646, 653 . . . (1971) (plurality opinion of WHITE, J.).

Brown v. Louisiana, 447 U.S. 323, 328 (1980) (plurality opinion). "The right to jury trial guaranteed by the Sixth and Fourteenth Amendments 'is a fundamental right, essential for preventing miscarriages of justice and for assuring that fair trials are provided for all defendants.'" Id. at 330, quoting Duncan v. Louisiana, 391 U.S. 145, 158 (1968). This right is so fundamental that its deprivation constitutes a structural defect in a trial. Sullivan v. Louisiana, 508 U.S. 275, 281 (1993).

Ring is such a fundamental constitutional change for two reasons. First, the purpose of the rule is to change the very identity of the decisionmaker with respect to critical issues of fact that are decisive of life or death. This change remedies a "'structural defect in the constitution of the trial mechanism,'" by vindicating "the jury guarantee . . . [as] a 'basic protection' whose precise effects are unmeasurable, but without which a criminal trial cannot reliably serve its function." Sullivan v. Louisiana, 508 U.S. 275, 281 (1993). When a capital defendant has been subjected to a sentencing proceeding in which the jury has not participated in the life-or-death factfinding role required by the Sixth Amendment and Ring, the constitutionally required tribunal was simply not all there, a radical defect which necessarily "cast[s]

serious doubt on the veracity or integrity of the . . . trial proceeding." Witt, 387 So. 2d at 929. The jury trial right was included in the Bill of Rights to insure accuracy and reliability.

Second, "the jury trial provisions in the Federal and State Constitutions reflect a fundamental decision about the exercise of official power." Duncan v. Louisiana, 391 U.S. 145, 156 (1968). Inadvertently but nonetheless harmfully, the United States Supreme Court lapsed for a time and enfeebled the institution of the jury through its rulings in Hildwin v. Florida, 490 U.S. 638 (1989), and Walton v. Arizona. The Court's retraction of these rulings in Ring restores a right to jury trial which is a "fundamental" guarantee of the Federal and Florida Constitutions.

This Court has consistently addressed Sixth Amendment claims premised upon Apprendi and Ring on the merits in post-conviction cases. *See* Hodges v. State, 2003 WL 21402484 at *13 nn.8, 9 (Fla. June 19, 2003); Pace v. State, 2003 WL 21191876 at *13 (Fla. May 22, 2003); Jones v. State, 2003 WL 21025816 at *5 (Fla. May 8, 2003); Chandler v. State, 2003 WL 1883682 at n.4 (Fla. Apr. 17, 2003); Banks v. State, 2003 WL 1339041 at *4 (Fla. Mar. 20, 2003); Jones v. State, 845 So. 2d 55, 2003 WL 297074 at *9 (Fla. 2003); Spencer v. State, 842 So. 2d 52, 72 (Fla. 2003); Lucas v. State, 841 So. 2d 380, 389 (Fla. 2003); Porter v. Crosby, 840 So. 2d 981, 986 (Fla. 2003); Fotopoulos v. State, 838 So. 2d 1122,

1136 (Fla. 2002); Bruno v. Moore, 838 So. 2d 485, 492 (Fla. 2002); Marquard v. State, 2003 WL 31600017 at *10 n.12 (Fla. Nov. 21, 2002); King v. Moore, 831 So. 2d 143 (Fla. 2002); Bottoson v. Moore, 833 So. 2d 693 (Fla. 2002); Sweet v. Moore, 822 So. 2d 1269, 1275 (Fla. 2002); Sireci v. Moore, 825 So. 2d 882, 888 (Fla. 2002); Bottoson v. State, 813 So. 2d 31, 36 (Fla. 2002); King v. State, 808 So. 2d 1237 (Fla. 2002); Mills v. Moore, 786 So. 2d 532, 536-37 (Fla. 2001). In Porter v. Moore, 27 Fla. L. Weekly S606 (Fla. June 20, 2002), the Court cited the decision in the successive habeas case of Mills v. Moore for the proposition that the claim was "meritless." In these rulings, the Court has rejected the State's arguments that such claims may be procedurally barred.

Further, this Court's consideration of the merits of such claims is consistent with precedent. For example, in Thompson v. Dugger, 515 So. 2d 173, 175 (Fla. 1987), the Court held that the United States 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." *See also* Delap v. Dugger, 513 So. 2d 659, 660 (Fla. 1987) ("Because Hitchcock represents a substantial change in the law occurring since we first affirmed Delap's sentence, we are constrained to readdress his Lockett claim on its merits"); Downs v. Dugger, 514 So. 2d 1069, 1070 (Fla. 1987) (Hitchcock

constitutes "a substantial change in the law . . . that requires us to reconsider issues first raised on direct appeal and then in Downs' prior collateral challenges"). Apprendi and Ring cannot conceivably be regarded as less drastic, fundamental, or sweeping changes of law than Hitchcock.

The Missouri Supreme Court in State v. Whitfield, 2003 WL 21386276 (Mo. June 17, 2003), also found that Ring was retroactive under the test employed in Missouri. Importantly, Missouri follows the Stovall-Linkletter test for determining retroactivity, the same test used by Florida courts. *See* Witt v. State, 387 So. 2d 922 (Fla. 1980). The jurisdictions which have found Ring not to be retroactive have employed the federal habeas corpus retroactivity analysis of Teague v. Lane, 489 U.S. 288 (1989). Until Whitfield, no state court employing a test other than the federal Teague standard had addressed Ring. Now one has. But in any event, this Court has, by denying relief on the merits in every case addressing Ring, at least implicitly held that Ring is retroactive in Florida.[1]

The Petitioner also submits that Article 1, §22 of the Florida Constitution provides that the right of trial by jury shall be secure to all and remain inviolate. This constitutional right to trial by jury guarantees the right to trial by jury in those

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[1]Petitioner acknowledges that the preceding Ring retroactivity analysis has been previously submitted to this Court by Petitioner's counsel in Marshall v. Crosby, SC02-420.

cases in which the right to trial by jury was recognized at the time of the adoption of the State's first Constitution; It dos not extend to those cases where the right or remedy with it were unknown at the time of the adoption of the first constitution. State v. Webb, 335 So.2d 826 (Fla. 1976). *See also* Dudley v. Harrison, McCready & Co., 173 So. 820 (Fla. 1937). As noted by Michael Mello and Ruthann Robson in Judge Over Jury: Florida's Practice of Imposing Death Over Life in Capital Cases, Florida State University Law Review, Vol 13, p. 31 (1985), "At the time of Furman [Furman v. Georgia, 408 U.S. 238 (1976)], Florida was in the process of amending its 1872 capital punishment law which for the previous century had entrusted juries to make the determination whether not to impose the death sentence." In other words, Ring is consistent with the Florida State Constitution requirement that juries make the death decision.

CLAIM II: INEFFECTIVENESS OF APPELLATE COUNSEL FOR FAILING TO RAISE THE ISSUE OF THE PROSECUTOR'S IMPROPER COMMENTS TO THE JURY

As Petitioner's argument as to why trial counsel's comments to the jury were improper and prejudicial, the Petitioner will rely on the argument he set forth beneath the heading ISSUE XII of the Florida Supreme Court appeal Reply Brief which Petitioner is concurrently serving and filing.

With regard to the Respondent's argument that appellate counsel was not

ineffective because trial counsel failed to object or otherwise preserve the issue of the prosecutor's improper remarks for appeal, the Petitioner submits that the prosecutor's inflammatory comments to the jury in the present case were so egregious and so prejudicial that the "fundamental error" doctrine would have allowed appellate counsel to raise the issue on appeal, even without objection. Ray v State, 403 So.2d 956 (Fla. 1981).

In Barnes v. State, 743 So.2d 1105 (Fla. 4th DCA 1999) the court held that a prosecutor's improper remarks can warrant reversal even where the defendant fails to move for a mistrial. *See also* Bennett v. State, 173 So. 817 (Fla. 1937) and State v. Abeles, 483 So.2d 460 (Fla. 4th DCA 1986). Finally, in the interests of justice, the appellate court may grant any relief to which any party is entitled. Rule 9.140(f), Fla. R. App. P.

The Petitioner submits that prosecutor's remarks to the jury in the subject case were so inflammatory that they deprived the Petitioner of his 6th Amendment right to a jury trial. They amounted to fundamental error and appellate counsel was ineffective in failing to raise the issue of inflammatory remarks on appeal.

CLAIMS III AND IV

For Claims III and IV, the Petitioner will rely on the arguments set forth in the original Petition.

CONCLUSION

All of the errors in Mr. Reed's Petition, singularly or cumulatively, demonstrate that Mr. Reed should receive habeas corpus relief from this Honorable court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of this Reply has been served by U.S. Mail addressed to (1) Charmaine M. Millsaps, Assistant Attorney General, Office of the Attorney General, The Capitol, Tallahassee, FL 32399-1050, and to (2) Grover Reed, DC# 105661, P6201 A1, Union Correctional Institution, P.O. Box 221, Raiford, FL 32083-0221 on this the 28th day of August, 2003.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this Reply has been printed in Times New Roman 14-point font using WordPerfect® 8 word-processing software, in compliance with Rule 9.210, Fla. R. App. P.

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