IN THE SUPREME COURT OF FLORIDA

CASE NO. SC03-416

THOMAS GUDINAS,

Appellant,

v.

STATE OF FLORIDA
and
JAMES CROSBY, Secretary, Florida Department of Corrections,

Appellees,

REPLY BRIEF OF THE APPELLANT

ON APPEAL FROM THE CIRCUIT COURT
OF THE NINTH JUDICIAL CIRCUIT,
IN AND FOR ORANGE COUNTY, STATE OF FLORIDA

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ISSUE I
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1. This claim is not procedurally barred.

Appellee argues that this claim is procedurally barred because "this Court has already decided this claim adversely to Gudinas in the decision denying relief in his first collateral attack proceedings. Gudinas is not entitled to a second bite at the apple" (Answer at 9).[1] In fact, this issue was not decided in the first collateral proceedings. The issues raised in the current postconviction proceedings concern Ring v. Arizona, 122 S.Ct. 2428 (2002), which overruled this Court's reasoning for holding that Apprendi v. New Jersey, 530 U.S. 466 (2000), did not affect Florida's death penalty scheme; the very same reasoning this Court used to deny relief in Mr. Gudinas' initial postconviction procedure. Gudinas v. State, 816 So.2d 1095, 1111

[1]Throughout its brief, Appellee refers to an "Apprendi/Ring" claim (see e.g. 9, Answer Brief at 7, 8, 9, 10, 11, etc.). In fact, as the 3.851 and the subsequent appeal state, the claims are based on Ring v. Arizona,122 S.Ct. 2428 (2002), which was new United States Supreme Court law decided after the disposition of Mr. Gudinas' initial postconviction proceedings.

(Fla.2002) citing Mills v. Moore, 786 So.2d 532, 536-39 (Fla.2001)("[b]ecause Apprendi did not overrule Walton, the basic scheme in Florida is not overruled either."). As Ring did not exist at the time this Court resolved the initial proceedings, Ring issues were not decided.

Appellee also argues the "claim is barred because it could have but was not raised on trial and direct appeal". This claim is spurious because Ring is clearly new law.

2. Mr. Gudinas' case does not fall outside the scope of Ring v. Arizona

Appellee argues that, if Ring were to apply retroactively in Florida, it would not affect Mr. Gudinas' case because his death sentence rests on a prior violent felony aggravator. It is clear however, that any recidivist exception that might have once existed under federal law did not survive Apprendi and Ring. In Almendarez-Torres v. United States, 523 U.S. 224 (1998), the United States Supreme Court held, in a 5-4 decision, that recidivism was an exception to the constitutional rule that any fact that increases the maximum punishment from that authorized by the jury's verdict is an element of an offense which must be charged in an indictment. Id. The narrow majority based this decision on what it termed a "tradition" of treating recidivism as a sentencing factor rather than an element of an offense. Id.

Four Justices dissented, noting that the majority opinion was inconsistent with the Court's jurisprudence emanating from In re Winship, 397 U.S. 358 (1970) and Mullaney v. Wilbur, 421 U.S. 684, 698 (1975). Id. at 249-260. They noted that because the fact of recidivism substantially increased the maximum permissible punishment, it was an element of the crime. Id. The dissent further contended that recidivism was not traditionally a sentencing factor because, at common law, "the fact of prior convictions *had* to be charged in the same indictment charging the underlying crime, and submitted to the jury for determination along with that crime. Id. at 261 (internal citations omitted).

The next term, in Jones v. United States, 526 U.S. 227 (1999), the Court held, "under the Due Process Clause of the Fifth Amendment and the notice and jury guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." Jones v. United States, 526 U.S. 227, 243, n.6 (1999). The Court noted that several features of the statute at issue in Jones distinguished that case from Almendarez-Torres. Jones, 526 U.S. at 232. The Court noted that Almendarez-Torres was not conclusive of the question presented in Jones for two reasons. First, Almendarez-Torres involved only the rights to indictment and notice, while Jones also implicated the

Sixth Amendment right to jury trial. Jones, 526 U.S. at 248-49. Second, the Court noted, "the distinctive significance of recidivism leaves no question that the Court regarded that fact as potentially distinguishable for constitutional purposes from other facts that might extend the range of possible sentencing." Id. at 249. The Court did not address the issue of whether the holding of Almendarez-Torres could survive a Sixth Amendment challenge.

The next term, in Apprendi v. New Jersey, the Court held that the Fourteenth Amendment affords citizens the same protections announced in Jones under state law. Apprendi, 120 S.Ct. 2348, 2355 (2000). Again, the issue of whether the holding of Almendarez-Torres could survive a Sixth Amendment challenge was neither raised nor decided. In his concurrence however, Justice Thomas, one of the Almendarez-Torres majority, revisited the issue. Explaining that Apprendi was "nothing more than a return to the *status quo ante*–the status quo that reflected the original meaning of the Fifth and Sixth Amendments", Justice Thomas explained that the recidivism exception announced in Almendarez-Torres was an error. Apprendi, 530 U.S. at 519-20. Justice Thomas affirmed the Almendarez-Torres opinion that, at common law, prior convictions which increased the punishment for a crime were elements of a new, aggravated crime. Id. Thus, the holding of Almendarez-Torres is no longer the view of the majority. See Sattazahn v.

Pennsylvania, 123 S.Ct. 732, 739-40 (2003)(Justice Renquist, who dissented in Ring, joined Justices Scalia and Thomas in extending the principles announced in Ring to the Double Jeopardy Clause of the Fifth Amendment.)

The United States Supreme Court has never addressed the issue of whether Almendarez-Torres, which implicated only the Fifth Amendment indictment and notice clause, can survive challenge under the Sixth and Fourteenth Amendments, and the Court specifically did not address the issue in Ring. However, the Court's other decisions indicate that Almendarez-Torres cannot survive a Sixth Amendment challenge. First, as discussed above, the Almendarez-Torres majority is now a minority. Second, Jones, Apprendi, and Ring mark a return to the common law and the principles announced in Winship and Mullaney. Consistent and, in fact implicit, in this jurisprudence, is the fact that the majority of the Supreme Court believes that any *fact* that increases the maximum possible punishment for a crime beyond that authorized by the jury verdict is an element of the offense subject to the Sixth Amendment's jury trial guarantees. Third, the Eighth Amendment mandates that capital punishment is subject to special protections. "[T]he penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two." Woodson v. North Carolina, 428

U.S. 280, 305 (1975). Justice Breyer, who authored the Almendarez-Torres majority opinion, concurred in Ring because "the Eighth Amendment requires individual jurors to make, and take responsibility for, a decision to sentence a person to death." Ring, 122 S.Ct. at 2446-48. (Breyer, J., concurring). Surely, in light of that opinion, his Almendarez-Torres opinion could not survive Eighth and Sixth Amendment challenges in a capital context.

Further, relying upon a prior violent felony or felony murder "exception" to Ring is unconstitutional under Florida's capital sentencing scheme. Florida Statute 921.141(3) requires three findings before a person is eligible for the death sentence. The sentencer must find: (1) the existence of at least one aggravating circumstance, (2) that "*sufficient* aggravating circumstances exist" to justify imposition of the death penalty, and (3) that "there are insufficient mitigating circumstances to outweigh the aggravating circumstances." Fla. Stat. § 921.141(3). As Justice Lewis and the State of Florida have acknowledged, a jury override cannot survive Ring. See Bottoson, 833 So.2d at 728; Answer Brief of the Appellee in Ault v. State, No.SC00-863 at 63 ("In Florida, only a defendant in a jury override case has any basis to raise an Apprendi challenge to Florida's death penalty Statute."). If the jury override cannot survive Ring, neither can the prior violent felony be an exception to Ring under Florida's death penalty scheme. See Jenkins v. State, 692

So.2d 893, 895 (Fla.1997) (This Court reversed a jury override because the jury could have given little weight to the prior violent felony aggravator; under Florida's scheme the jury could have determined that the prior violent felony aggravator was not "sufficient" to make Mr. Jenkins eligible for the death sentence.) Clearly, a jury would not consider the facts behind Mr. Gudinas' prior violent felony aggravator--banging on a car window and yelling a crude remark (the attempted burglary with and assault and attempted sexual battery of Rachelle Smith), "sufficient" to make Mr. Gudinas eligible for the death sentence.[2]

Appellee also argues that there is an exception under Ring in cases in which the felony murder aggravator is found. Such an exception would simply render Florida's death penalty statute standardless, in violation of the Eighth and

[2]Even if Almendarez-Torres is still good law, the finding of one aggravator is not the only fact that must be found in Florida under Ring, as discussed in the text supra.

Fourteenth Amendments.[34] In Bertolotti v. Dugger, 883 F. 2d 1503, 1527-28 (11th Cir. 1989), the Eleventh Circuit understood that under Florida's sentencing scheme conviction of felony murder did not equate with a finding of death-eligibility under the felony-murder aggravating circumstance because "the jury could have found Bertolotti guilty of felony murder and yet still not have concluded that the parallel aggravating circumstance justified the imposition of capital punishment; nor need the sentencing judge have agreed with the jury's determination that felony murder had been proven beyond a reasonable doubt." See also Rembert v. State, 445 So.2d 337 (Fla. 1984) (single aggravator of murder in course of felony insufficient to sustain death sentence); Menendez v. State, 419 So.2d 312 (Fla. 1982) (same); Terry v. State, 668 So.2d 954 (Fla. 1996) (same).

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[3] The Supreme Court upheld Florida's death penalty statute based in part on this Court's "'guarantee that the aggravating and mitigating reasons present in one case will reach a similar result to that reached under similar circumstances in another case.'" Proffitt v. Florida, 428 U.S. 242, 251 (1978) (quoting State v. Dixon, 283 So.2d 1, 10 (Fla. 1973); id., at 253. To hold now that a single aggravating circumstance is in every case sufficient to justify imposition of the death penalty would remove the degree of consistency provided by this Court's case-by-case review.

[4]The felony murder aggravator automatically applies to every felony murder. Each person convicted of felony murder would enter the penalty phase automatically eligible for the death penalty, while a person who committed a much more heinous premeditated murder would not. See Engberg v. Meyer, 820 P.2d 70, 89 (Wyo. 1991).

3. Ring should be applied retroactively

Citing to cases which hold that Ring is not retroactive under the analysis set forth in Teague v. Lane, 489 U.S. 288 (1989), Appellee argues that Ring is not retroactive. (Answer at 12 n.9). These citations are of no consequence because, as Appellee later recognized, the retroactivity analysis this Court uses was explained in Witt v. State, 387 So.2d 922 (Fla.1980). The Teague analysis is based on federal habeas corpus law. Teague's rigid and narrow standard for retroactivity was based on the function of *federal* habeas review: to ensure that state courts provide the minimum *federal* constitutional protections. Teague, 485 U.S. at 305-10. The Witt standard preserves the primacy this Court is obligated to afford the Florida Constitution, Traylor v. State, 596 So.2d 957, 962-63 (Fla.1992), provides flexibility that Teague lacks, and "permits this Court to consider the particular facts and legal issues relevant to the specific issue before the Court". State v. Whitfield, 107 S.W.3d 253, 267 (Mo.2003). See also Cowell v. Leapley, 458 N.W.2d 514, 517-18 (S.D.1990). Accordingly, the cases following the Teague analysis are neither relevant nor controlling.

Respondent also cites First and Fourth District Court of Appeals opinions regarding the effect of Apprendi v. New Jersey, 530 U.S. 466 (2000), on a sentencing guidelines cases for the proposition that Ring is not retroactive. These

cases are not relevant to the issue. They hold that Apprendi is not retroactive in sentencing guidelines cases because it does not meet the Witt criteria for retroactive application because Apprendi is not a decision of "fundamental significance". While the First and Fourth Districts might consider Apprendi not to be of fundamental significance in a sentencing guidelines case, the same logic cannot survive Ring and the death penalty context. As several members of this Court have noted, Ring is a decision of fundamental significance. Justice Shaw wrote in Bottoson v. Moore, 833 So.2d 693 (Fla.2002), that Ring "goes to the very heart of the constitutional right to trial by jury". Bottoson, 833 So.2d at 717 (Shaw, Justice, concurring in result only). Justice Lewis wrote that Ring "set forth a new constitutional framework" Id. at 725 (Lewis, Justice, concurring in result only). Justice Quince wrote, "[b]y referring to the sentence that a defendant may receive based on the jury verdict only, the Court seems to have turned that concept of statutory maximum on its head." Bottoson, 833 So.2d at 701 (Quince, Justice, concurring). In King, Justice Parriente noted that the Sixth Amendment right to a jury trial in the penalty phase was "unanticipated" by prior law, and that Apprendi, upon which Ring is based, "inescapably changed the landscape of Sixth

Amendment jurisprudence." King v. Moore, 831 So.2d 143, 149 (Fla.2002). [5]

4. **Appellee's remaining arguments**

Appellee argues that "[a]fter *Ring*, no good faith argument can be made that Florida's statute is anything like Arizona's, especially in light of this Court's clear interpretation of Florida law," yet Appellee provides absolutely no legal basis for that argument other than citations to Mills v. Moore, 786 So.2d 532 (Fla.2001). (Answer at 19).

Appellee's repeated citations to Mills v. Moore, 786 So.2d 532 (Fla. 2001), as the law that renders Florida's death penalty sentencing scheme outside the Sixth Amendment mandates of Ring are perplexing. Mills did not distinguish Florida's capital sentencing scheme from Arizona's; Mills emphasized that, regarding the requirements of the Sixth Amendment, the Florida and Arizona death penalty schemes are indistinguishable. Mills, 786 So.2d at 537 ("Because *Apprendi* did not overrule *Walton*, the basic scheme in Florida is not overruled either."). As much wiser attorneys[6] wrote: "To argue in the face of *Ring*'s discussion of

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[5]Appellee's argument that Ring is not retroactive under Witt because there is no "obvious injustice" is simply ludicrous (Answer at 14). The denial of a jury verdict upon the element which makes a person eligible for the death penalty is clearly an obvious justice. See Sullivan v. Louisiana, 508 U.S. 275, 278 (1993).

[6]Tim Schardl and Mark Olive.

Hildwin v. Florida, 490 U.S. 638 (1989) (*per curiam*), the *only* Sixth Amendment case relied upon in *Walton*, *Ring*, slip op. at 11, that the Supreme Court has "left intact all prior opinions upholding the constitutionality of Florida's death penalty scheme" (Resp. at 11), is to bathe in denial." Since Florida's capital sentencing scheme was approved in Proffit v. Florida, 428 U.S. 242, 251 (1976), death never has never been, in form or effect, the maximum punishment for first degree murder based on the jury's guilt phase verdict. Ring, Apprendi.

As extensively discussed in the initial brief, the process under which Mr. Gudinas was sentenced to death violated the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and corresponding Florida law because it did not allow the jury to reach a unanimous verdict on an 'aggravating fact [that] is an element of the aggravated crime' punishable by death, and Mr. Gudinas did not have notice of the crimes for which he was being tried. These structural errors cannot be harmless because harmless error analysis presupposes a constitutional verdict to begin with. Sullivan v. Louisiana, 508 U.S. 275 (1993).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Reply Brief of Appellant has been furnished by U. S. Mail to all counsel of record on this _____ day of August, 2003.

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