IN THE SUPREME COURT OF FLORIDA

NO. SC03-631

ASKARI ABDULLAH MUHAMMAD
f/k/a THOMAS KNIGHT,

Appellant,

v.

STATE OF FLORIDA

Appellee.

REPLY BRIEF

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PRELIMINARY STATEMENT

Citations in Mr. Muhammad's's Reply Brief shall be as follows: The record on appeal "R." followed by the appropriate page number(s). References to the initial brief "I.B." followed by the appropriate page number(s). References to the answer brief "A.B." followed by the appropriate page number(s). All other references will be self-explanatory or otherwise explained herein.

ARGUMENT IN REPLY

I. MR. MUHAMMAD'S *RING* CLAIM IS NOT PROCEDURALLY BARRED AND THE HOLDING IN *RING* IS RETROACTIVE

A. *WITT* IS THE CONTROLLING PRECEDENT AS TO RETROACTIVE APPLICATION OF CHANGES IN DECISIONAL LAW IN FLORIDA.

Witt is the controlling precedent in Florida when determining whether a change in decisional law in Florida has retroactive application. The *Witt* Court stated:

> To summarize, we today hold that an alleged change in the law will not be considered in a capital case under Rule 3.850 unless the change: (a) emanates from this Court or the U.S. Supreme Court, (b) is constitutional in nature, and (c) constitutes a development of fundamental significance. *Witt v. State*, 387 So.2d 922 (Fla. 1980).

The first two parts of the three-part test promulgated in *Witt* are present in Mr. Muhammad's case regarding his *Ring* claim. The third requirement whether the change wrought by *Ring* is of fundamental significance thus manifests itself as the crucial inquiry. Justice Shaw specifically found Bottoson's *Ring* claim was to be applied retroactively, stating as to the third prong of *Witt,* "And third, *Ring* is of 'fundamental significance,' for its purpose is to safeguard the basic protections guaranteed by the right to trial by jury." *Bottoson v. Moore*, 833 So.2d 693, 717 (Shaw, J. concurring) (Fla. 2002). The State argues Mr. Muhammad should have

raised the issue originally in the trial court or on direct appeal. The State made similar arguments in *Bottoson* and Justice Shaw observed in his concurring opinion:

> "The state contends that Bottoson cannot obtain relief under *Ring* because he failed to raise the issue at trial. I find this argument disingenuous in light of the fact that Bottoson was tried nearly twenty years before *Apprendi* was decided and thus had no basis for arguing that a 'death qualifying' aggravator must be treated as an element of the offense." (citations omitted) *Bottoson* at 718.

While Muhammad's guilt phase was tried more than thirty years ago and his penalty phase eight years ago well before the U.S. Supreme Court decided *Ring*. Mr. Muhammad should receive review of his *Ring* claim just as Linroy Bottoson and Timothy Ring received review.

B. LEGAL DEVELOPMENTS POST-*RING*

Following the United States Supreme Court decision in *Ring v. Arizona*, 536 U.S. 584 (2002), considerable confusion over the scope of that decision has developed. In *Ring*, the Supreme Court noted that the Sixth Amendment jury trial guarantee applied to factual determinations necessary to render a criminal defendant death-eligible. Accordingly, the application of this principle required a determination of what constituted the factual prerequisites for death-eligibility under state law. The Supreme Court decided in *Ring v. Arizona* that the presence of an aggravating circumstance was a factual issue that constituted an "element" under

Arizona law because its presence was necessary to render one convicted of first degree murder eligible for a death sentence.

The various courts that have addressed the implications of *Ring* on specific capital sentencing schemes have split on not only what constitutes a factual determination necessary for death-eligibility, but also where to look to find the answer. The Nevada Supreme Court found that its capital scheme violated the Sixth Amendment in those cases where it permitted a judge to impose a death sentence after a jury was unable to arrive at unanimous decision. *Johnson v. State*, 59 P.3d 450, 460 (Nev. 2002). There, the Nevada Supreme Court explained that Nevada law "requires two distinct findings to render a defendant death-eligible." There must be at least one aggravating circumstance and no mitigation sufficient to outweigh the aggravating circumstances. Employing *Ring*, the Nevada Supreme Court concluded that these two findings were factual elements that were subject to the jury trial guarantee. Because in *Johnson*, the jury had been unable to return a unanimous verdict, the Nevada Supreme Court concluded that the error was not harmless, and it vacated the death sentence.[1]

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[1]The Arizona Supreme Court while considering whether *Ring* error was harmless cited *Johnson* while concluding that the factual determination as to whether the mitigating factors prohibit the imposition of a death sentence is subject to the right to trial by jury. *State v. Ring*, 65 P.3d 915, 942-43 (Ariz. 2003).

Similarly, the Missouri Supreme Court in *State v. Whitfield*, 107 S.W. 3d 253 (Mo. 2003), concluded that Missouri's statutory scheme required three factual determinations to be made before a death sentence could be imposed. First, a finding of at least one statutory aggravator was required. Second, a determination that the aggravating factors were sufficient to justify the imposition of a death sentence was required. Third, a factual resolution that the mitigating factors did not outweigh the aggravating factors was required. If these factual determinations cannot be made, the defendant is not eligible for a death sentence. Accordingly, the Missouri Supreme Court found that each of these three steps required a factual finding that was prerequisite to death-eligibility, and in turn constituted elements of capital murder.[2]

However, Mr.Muhammad recognizes that this Court has refused to look to the Florida statutory requirements, focusing instead on the language in the Supreme Court's *Ring* opinion that the presence of an aggravating circumstance was an element under Arizona law. This Court first addressed *Ring* in its decision denying a habeas petition in *Bottoson v. Moore*, 833 So. 2d 693 (Fla. 2002), *cert. denied*

[2]As discussed in *Whitfield*, the Colorado Supreme Court has also determined that the factual determinations made in a series steps before the imposition of a death sentence are elements of capital murder within the meaning of the Sixth Amendment. *Woldt v. People*, 64 P.3d 256 (Colo. 2003).

537 U.S. 1070. The seven justices of this Court wrote seven different opinions as to the effect if any of *Ring* in Florida. Similarly, this Court denied a habeas petition in *King v. Moore*, 831 So. 2d 143 (Fla. 2002), *cert. denied*. 537 U.S. 1067. Since those decisions, this Court has generally cited *Bottoson* and/or *King* while denying *Ring* claims. Since its decision in *Bottoson*, this Court has consistently ruled that the presence of one aggravating circumstance precludes *Ring* error. *Duest v. State*, 855 So. 2d 33, 39 Fla. 2003) ("We have previously rejected claims under *Apprendi* and *Ring* in cases involving the aggravating factor of a previous conviction of a felony involving violence."); *Wright v. State*, 2003 Fla. LEXIS 1144, *42, --- So. 2d --- (Fla. July 3, 2003)("In *Bottoson* and *King*, we discussed the application of *Ring* and *Apprendi* to Florida's capital sentencing scheme, and rejected the constitutional challenge, as we do here."); *McCoy v. State*, 853 So. 2d 896 (Fla. 2003)(same).

However, Mr.Muhammad respectfully submits that this Court has misconstrued the Supreme Court's opinion in *Ring* as simply establishing that the presence of an aggravating circumstance is necessary to render a defendant death eligible. According to the decisions from this Court, if an aggravator exists as a matter of law, then *Ring* does not apply to require a jury determination that the aggravator is present. This Court's analysis is at odds with the construction of

Ring by the Nevada Supreme Court and the Missouri Supreme Court, both of which read *Ring* to mean that a state's own statutory language controls as to what constitutes an element of capital first degree murder.[3]

In Florida, § 921.141, Fla. Stat., requires both the jury and the trial judge to make three factual determinations before a death sentence may be imposed. They (1) must find the existence of at least one aggravating circumstance, (2) must find that "sufficient aggravating circumstances exist" to justify imposition of death, and (3) must find that "there are insufficient mitigating circumstances to outweigh the aggravating circumstances." § 921.141(3), Fla. Stat. (emphasis added). If the judge does not make these findings, "the court shall impose a sentence of life imprisonment in accordance with [§]775.082." *Id*. (emphasis added). Mr. Muhammad's jury was instructed in conformity with the statutory requirements.

The three steps in Florida's statute and the jury instructions, like the steps in Missouri, also "require factual findings that are prerequisites to the trier of fact's determination that a defendant is death-eligible." Step 1 in the Florida procedure requires determining whether at least one aggravating circumstance exists. Step 2 in the Florida procedure requires determining whether "sufficient" aggravating

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[3]It also conflicts with decisions by the Colorado Supreme Court and the Arizona Supreme Court. *Woldt v. People*, 64 P.3d at 265; *State v. Ring*, 65 P.3d at 943

circumstances exist to justify imposition of death. Missouri's Step 2 is indistinguishable, requiring a determination of whether the evidence of all aggravating circumstances "warrants imposing the death sentence." Step 3 in the Florida procedure requires determining whether "there are insufficient mitigating circumstances to outweigh the aggravating circumstances." Missouri's Step 3, as well as Nevada's Step 2, are identical, requiring a determination of whether mitigating circumstances outweigh aggravating circumstances.

In Florida, as in Missouri and the other states discussed in *Whitfield*, the sentencer does not consider the ultimate question of whether or not to impose death until the eligibility steps are completed. After the first three steps, the Florida statute directs the jury to determine, "[b]ased on these considerations, whether the defendant should be sentenced to life imprisonment or death." § 921.141(2)(c), Fla. Stat. The structure of the statute clearly establishes that the steps which occur before this determination are necessary to make the defendant eligible for this ultimate determination, that is, to render the defendant death-eligible.

The instructions given to Mr. Muhammad's jury tracked the steps contained in the statute. The jury was required to find "sufficient aggravating circumstances exist to justify the imposition of the death penalty." The jury was then told, if so, to go to the next step and determine "whether sufficient mitigating circumstances exist

to outweigh any aggravating circumstances found to exist." Only after determining that the mitigating circumstances did not outweigh the aggravating circumstances was the jury told to consider whether to recommend a sentence of death. Under a proper reading of *Ring*, the Florida statutory provisions as reflected in the instructions given to Mr. Muhammad's jury makes the aforementioned steps required before the jury is free to consider which sentence to impose elements of capital first degree murder.

This weighing process is completely absent when this Court rules that any *Ring* error is harmless because there is a prior or contemporaneous conviction. The Court has no idea what weight, if any, the jury assigned to the prior or contemporaneous conviction. The problem is particularly acute in cases where other "weighty" aggravators are also argued to the jury, found by the judge, and then assigned great weight by the judge. Mr. Muhammad's case is a prime example of this phenomenon. The trial court found six aggravating circumstances: 1) prior conviction of violent felony; 2) during the course of a kidnaping; 3) avoid arrest; 4) the murder was especially heinous, atrocious, and cruel (HAC); 5) pecuniary gain; and 6) cold, calculated and premeditated.

An important legal development since the U.S. Supreme Court's *Ring* decision is found in the opinion issued by the U.S. Eighth Circuit Court of Appeals

on February 2, 2004 in *U.S. v. Allen*, 2004 U.S. App. LEXIS 1474 (8th Cir. February 2, 2004), *rehearing en banc granted, order vacated,* 2004 U.S. App. LEXIS 9190 (8th Cir. May 11, 2004). The issue in *Allen* is whether the Fifth Amendment Indictment clause required aggravating circumstances to be charged in the indictment in Federal Death Penalty cases. The Eighth Circuit answered the question in the affirmative by stating: "Just as the aggravating factors essential to qualify a particular defendant as death eligible must be found by a jury under *Apprendi* and *Ring*, they too must be alleged in the indictment." (citations omitted), *Id.* at *6. The Eighth Circuit additionally stated, "Because Allen's indictment cannot be reasonably construed to charge a statutory aggravating factor, as required for imposition of the death penalty, it is constitutionally deficient to charge a capital offense." *Id.* at *15. *U.S. v. Allen* demonstrates the claim is meritorious and should result in the reversal of Mr. Muhammad's convictions and a remand to the trial court for a new trial or imposition of a life sentence.

Although *Allen*'s claim involved the Fifth Amendment Indictment Clause, which has not been made applicable to the States. The idea that all elements should be charged in the indictment is a basic premise in Florida law as well. Article I, Section 15 of the Florida Constitution provides that "no person shall be tried for a capital crime without presentment or indictment by a grand jury." *State v. Dye*, 346

So.2d 538,541 (Fla. 1977), *State v. Gray,* 435 So.2d 816, 818 (Fla. 1983) and *Chicone v. State*, 684 So.2d 736, 744 (Fla. 1996) demonstrate that, pursuant to Florida law, every element must be alleged in the indictment or information. Thus *Allen* supports the argument that this Court should recognize that aggravating factors must be charged in the indictment in light of *Ring* and reverse Mr. Muhammad's case accordingly.

II. MR. MUHAMMAD'S CLAIM THAT HE WAS DENIED HIS RIGHTS UNDER *AKE V. OKLAHOMA* AT HIS RE-SENTENCING, WHEN COUNSEL FAILED TO OBTAIN AN ADEQUATE MENTAL HEALTH EVALUATION AND FAILED TO PROVIDE THE NECESSARY BACKGROUND INFORMATION TO THE MENTAL HEALTH CONSULTANTS, ALL IN VIOLATION OF MR. MUHAMMAD'S RIGHTS TO DUE PROCESS AND EQUAL PROTECTION UNDER THE FOURTEENTH AMENDMENT TO THE U.S. CONSTITUTION, AS WELL AS HIS RIGHTS UNDER THE FIFTH, SIXTH, AND EIGHTH AMENDMENTS WAS IMPROPERLY DENIED.

In their answer brief the State contends that trial counsel did provide the mental health experts with background materials. *See* A.B. at 35. This argument only illustrates the need for an evidentiary hearing. For instance, the State argues Dr. Fisher testified he reviewed six boxes of material. The volume of materials alone does not establish exactly what was reviewed. Unless the materials

specifically enumerated in Mr. Muhammad's 3.850 motion were reviewed by Dr. Fisher these other documents do not refute the claim from the record. Dr. Corwin according to the State only reviewed a report of Mr. Muhammad's hospitalization. *See* A.B. at 35. How reviewing this sole report refutes the wealth of information specifically enumerated by Mr. Muhammad in his 3.850 motion is difficult to imagine. *See* R. at 3788. The other doctor's generally stated they had reviewed documents, however, this is not record evidence specifically refuting Mr. Muhammad's claim. *See* R. at 2749-52, 2848, 2949-51, and 3038-39.

The State attempts to argue that the record demonstrates that Mr. Muhammad was not psychotic at the time of the offense, regardless of the information now possessed by Mr. Muhammad. *See* A.B. at 37. For the State to set forth that argument is illogical. If on the one hand they argue that Mr. Muhammad failed to specifically outline the background materials provided, they cannot then purport to have enough knowledge regarding that information to argue that the record refutes the conclusions drawn from these same materials. When addressing the merits of the claim the State argues facts supposedly evincing purposeful behavior. Purposeful behavior does not negate a diagnosis that Mr. Muhammad is a paranoid schizophrenic who was out of touch with reality at the time of the crime. Purposeful actions can be taken by an individual yet not be based

on a rational assessment of the events surrounding that action. Mr. Muhammad's *Ake* claim merits an evidentiary hearing.

CONCLUSION

Mr. Muhammad requests this Court reverse the trial court and remand for a new trial or, in the alternative, for imposition of a life sentence.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Reply Brief has been furnished by U.S. Mail, next day delivery to the Clerk of Court and by United

States Mail, first class postage prepaid to all counsel of record on October 5, 2004.

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