

IN THE SUPREME COURT OF FLORIDA

DAVID ALAN GORE,

Petitioner,

v.

Case No. SC05-733

STATE OF FLORIDA,

Respondent

RESPONSE TO HABEAS PETITION

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ARGUMENT

PETITIONER'S CLAIM THAT HIS CAPITAL SENTENCE IS UNCONSTITUTIONAL IS PROCEDURALLY BARRED AND WITHOUT MERIT

Relying on Ring v. Arizona, 536 U.S. 584 (2002), Gore alleges that his capital sentence is unconstitutional. He further claims that appellate counsel should have raised the issue on appeal and therefore counsel's performance was unconstitutional. Respondent asserts that this claim is procedurally barred and without merit.

This Court as well as the United States Supreme Court has ruled that Ring is not retroactive in collateral proceedings. Johnson v. State, 30 Fla. L. Weekly S297 (Fla. April 28, 2005); Mansfield v. State, 30 Fla. L. Weekly S598 (Fla. July 7, 2005); Schriro v. Summerlin, 159 L.Ed.2d 442 (2004). Summary denial is warranted.

Furthermore Gore was convicted of a prior violent felony. See Gore v. State, 706 So. 2d 1328 (Fla. 1997). Therefore the requirements of Ring have been satisfied. This Court has repeatedly held:

However, even if the claims were not barred, they would be without merit. This Court has recognized that a defendant is not entitled to relief under the "prior-conviction exception" to Apprendi where the aggravating circumstances include a prior violent felony conviction. See, e.g., Duest v. State, 855 So. 2d 33, 49 (Fla. 2003) (noting rejection

of Ring claims in a number of cases involving a prior-conviction aggravator), cert. denied, 541 U.S. 993, 124 S. Ct. 2023, 158 L. Ed. 2d 500 (2004); Grim v. State, 841 So. 2d 455, 465 (Fla.) (explaining that defendant was not entitled to relief under Ring where aggravating circumstances of multiple convictions for prior violent felonies and contemporaneous felony of sexual battery were unanimously found by jury), cert. denied, 540 U.S. 892, 157 L. Ed. 2d 166 (2003).

Ferrel v. State, 30 Fla. L. Weekly S451 (Fla. June 16, 2004). Summary denial is warranted. See Marshall v. Crosby, 30 Fla. L. Weekly S399 (Fla. May 26, 2005)(recognizing that this Court has rejected Ring claim in over fifty cases).

CONCLUSION

WHEREFORE, Respondent respectfully requests that this Court summarily DENY this petition.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by E-Mail and U.S. Regular Mail to Andrew Graham, 10 Suntree Place, Melbourne, FL 32940 this 1st day of August, 2005.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

COUNSEL FOR RESPONDENT