IN THE SUPREME COURT OF FLORIDA

ANTHONY WASHINGTON

Appellant, CASE NO. SC04-15

v.

STATE OF FLORIDA

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE SIXTH JUDICIAL CIRCUIT,
IN AND FOR PINELLAS COUNTY, STATE OF FLORIDA

_____

REPLY BRIEF OF APPELLANT

_____

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ARGUMENT IN REPLY

ARGUMENT I SUBSEQUENT DEVELOPMENTS AND CLARIFICATION IN THE LAW CLEARLY INDICATE THAT BASED UPON THE UNIQUE FACTS AND CIRCUMSTANCES OF MR. WASHINGTON'S CASE HE IS ENTITLED TO RELIEF

Appellant argues that Mr. Washington improperly argued that the lower court erroneously denied relief on his prior motion for post conviction relief. Appellant is missing the point of Mr. Washington's argument. Mr. Washington's argument is that the cumulative effect of subsequent developments in the law, as applied to the unique facts and circumstances of Mr. Washington's case, entitle him to relief. Mr. Washington's argument is that Keen v. State, 775 So.2d 263 (Fla. 2000) established that Tedder v. State, 322 So.2d 908 (Fla. 1975) was improperly applied by the trial court in overriding Mr. Washington's life recommendation. Ring v. Arizona, 536 U.S. 584 (2002) casts further doubt into the validity of the trial court's override of the jury life recommendation because the judge, sitting alone, determined the presence or absence of aggravating factors as a basis for overriding the jury life recommendation. The retroactivity of both Keen and Ring is governed by the standard in Witt v. State, 387 So.2d 922 (Fla. 1980). Furthermore, Mr. Washington may present an argument that the jury override by the trial court was improper because the court in Massaro v. United States, 538 U.S. 500, 123 S.Ct.

1690 (2003) held:

> An ineffective-assistance-of-counsel claim may be brought in a collateral proceeding under §2255, whether or not the petitioner could have raised the claim on direct appeal. Requiring a criminal defendant to bring ineffective-assistance claims on direct appeal does not promote the procedural default rule's objectives: conserving judicial resources and respecting the law's important interest in the finality of judgments. Applying that rule to ineffective-assistance claims would create a risk that defendants would feel compelled to raise the issue before there has been an opportunity fully to develop the claim's factual predicate, and would raise the issue for the first time in a forum not best suited to assess those facts, even if the record contains some indication of deficiencies in counsel's performance. A §2255 motion is preferable to direct appeal for deciding an ineffective-assistance claim. When a claim is brought on direct appeal, appellate counsel and the court must proceed on a trial record that is not developed precisely for, and is therefore often incomplete or inadequate for, the purpose of litigating or preserving the claim. A defendant claiming ineffective counsel must show that counsel's actions were not supported by a reasonable strategy and that the error was prejudicial. Id. at 501

Although Massaro addresses ineffective-assistance of counsel claims and holds that claims not brought on direct appeal will not be procedurally defaulted, the holding is applicable to other Sixth Amendment claims, such as those raised by Mr. Washington.

Mr. Washington is not attempting to re-litigate claims that were previously

addressed. At the time of Mr. Washington's previous appeals, Ring had not been decided and Keen was decided during the pendency of his last appeal. The crux of the argument is that developments and changes in the law have a direct impact on Mr. Washington's case specifically because the trial court; (1) engaged in an improper weighing process of aggravating factors in violation of Keen; and (2) overrode a jury recommendation of life in violation of Ring. The decisions of King v. Moore, 831 So.2d 693 (Fla. 2002) and Bottoson v. Moore, 833 So.2d 693 (Fla. 2002), which addressed the applicability if Ring to the Florida death penalty statute had not been decided at the time of Mr. Washington's previous appeals. Although relief was denied King and Bottoson, those cases did not involve the unique facts and circumstances as does Mr. Washington's case. Neither King nor Bottoson had jury life recommendations which were overridden by a trial court that engaged in an improper weighing of aggravation and mitigation contrary to the precepts of Keen and Tedder.

Appellee seeks to disregard a doctrine that would afford this Court "a meaningful opportunity to consider allegations of legal error without interference from the federal judiciary." Vasquez v. Hillery, 474 U.S. 254, 257 (1986). Mr. Washington is trying to provide to this Court every "opportunity to hear the claim sought to be vindicated." Id. at 257. The claims could not have been raised

previously because Ring, the law applicable to Mr. Washington's jury override, became known and was developed after his last pleading. The combined impact of Ring and Keen as applied to Tedder necessitated that Mr. Washington raise this claim before this Court at this instant. Appellee, by arguing that these issues have been raised earlier, seeks to deny this Court of an opportunity of meaningful review of Mr. Washington's claim. Furthermore, Mr. Washington must "apprise" the state court system "of facts and the legal theory upon which the petitioner bases his assertion." Galtieri v. Wainwright, 582 F.2d 348, 353 (5th Cir. 1978). Mr. Washington brought his Amended Motion to Vacate Judgments of Conviction and Sentences with Special Request For Leave to Amend in the circuit court based upon the recent developments in the law. Mr. Washington now appeals the denial of that motion to this Court and in his initial brief is apprising this Court of the facts and legal theory upon which bases his assertion. The Appellee is incorrect and this Court should address Mr. Washington's claims upon the merits.

ARGUMENT II BASED UPON RING V. ARIZONA AND THE CONCURRING OPINIONS IN KING AND BOTTOSON, MR. WASHINGTON SHOULD BE SENTENCED TO LIFE IMPRISONMENT

(A) WASHINGTON'S CLAIM IS NOT PROCEDURALLY BARRED

The State is incorrect in their assertion that Mr. Washington should be procedurally barred from raising his Ring/Apprendi claim because he failed to

present the claim in earlier proceedings. It is true that Mr. Washington did not assert a Ring claim at trial or at his prior appeals, however, Mr. Washington was sentenced in September 1992, almost seven years before the United State Supreme Court decided Apprendi and almost ten years before the decision in Ring. Mr. Washington filed his Amended Motion to Vacate Judgments of Conviction and Sentences with Special Request For Leave to Amend based on the decisions in Ring, King, and Bottoson. These cases were not decided at the time Mr. Washington was sentenced.

Furthermore, the State in both the King and Bottoson cases argued procedural bar as a defense contending that neither King nor Bottoson previously raised a Ring claim at trial, on direct appeal, or in other post conviction pleadings. Nonetheless, this Court addressed the claims on the merits. In fact, when addressing the procedural bar argument asserted by the State in Bottoson, Justice Shaw noted that:

> [t]he State contends that Bottoson cannot obtain relief under Ring because he failed to raise this issue at trial. I find this contention 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. In point of fact, there is no indication that either the Arizona Supreme Court or the United States Supreme Court required that Ring himself

> raise the issue at trial, and yet both courts reviewed his claim and the United States Supreme Court granted relief.

Bottoson at 718 (footnotes omitted)

This Court did not hold that Bottoson's claim was procedurally barred because it was not raised at trial, on direct appeal, or at post conviction. This Court ruled on the merits.

Both the lower court and the State are incorrect in their assertion that because Washington did not raise the Ring claim "at trial, at his sentencing proceeding, on appeal from his conviction and sentence, or in his first 3.851 Motion," he is barred from now bringing the claim. First, the assertion that Washington is procedurally barred is based on a misapplication of federal habeas doctrine to state proceedings. If Washington does not bring his Ring claim before the state courts, he will be barred from bringing the claim in federal court. Bringing the Ring claim before the circuit court does not procedurally bar a review of the claim. Washington brought the Ring claim in his Amended Motion to Vacate Judgments of Conviction and Sentences with Special Request For Leave to Amend specifically to allow the state courts an opportunity to hear the claim sought to be vindicated. O'Sullivan v. Boerckel, 526 U.S. 838, 844 (1999). Second, the circuit court stating that the claim was procedurally barred was in essence applying a

standard that the appellate courts would apply. This Court in Steinhorst v. State, 412 So.2d 322, 338 (Fla. 1982) stated that "[e]xcept in cases of fundamental error, an appellate court will not consider an issue unless it was presented to the lower court." Before a claim can be considered by an appellate court, the claim must first be presented to the lower court for review. In essence, the circuit court has elevated itself to that of an appellate court by ruling that Mr. Washington's Ring claim is procedurally barred. The circuit court should have addressed the claim on the merits and leave for the appellate courts the determination of whether any particular claim is procedurally barred.

Mr. Washington's Ring claim is a federal question, and as such, a state court by not reviewing the claim is engaging in an inconsistent and irregular application of state procedural rules.

> A procedural default which is held to bar challenge to a conviction in state courts, even on federal constitutional grounds, prevents implementation of the federal right. Accordingly, we have consistently held that the question of when and how defaults in compliance with state procedural rules can preclude our consideration of a federal question is itself a federal question.

Henry v. State of Miss., 379 U.S. 443, 447 (U.S. Miss. 1965)

It is not for a state circuit court to say when a federal claim is procedurally barred when the issue involves a federal right. Since Ring involves a federal right, the issue

of whether the claim is procedurally barred is one for the federal courts to decide and not the state circuit court. Additionally, the Court in Massaro held that failure to raise an ineffective-assistance-of-counsel claim on direct appeal does not bar the claim from being brought in a later, appropriate proceeding under § 2255. Id. at 504. It is inappropriate for a trial level circuit court to assert a federal claim procedurally barred where the United States Supreme Court would permit the claim being raised and not being procedurally barred from further review.

Furthermore, any state procedural bar to Mr. Washington's Ring claim is not based on adequate and independent state procedural grounds and does not bar federal review. Coleman v. Thompson, 501 U.S. 722, 729-32 (1991). Mr. Washington's claim, which involves his right to be tried by a jury and is based upon a United States Supreme Court case, is a matter so interwoven with federal law that it cannot be said to be an independent state ground. The state procedural bar asserted by the State to deny Mr. Washington a review of his Ring claim is not adequate or independent to bar federal review. If Mr. Washington's Ring claim would be reviewable at the federal level, it should be reviewed in the Florida courts.

(B) RING IS RETROACTIVE

Because Mr. Washington was sentenced to death by a judge after a jury recommended life imprisonment, Ring applies retroactively under the standard of

Witt v. State, 387 So.2d 922 (1980). The Teague standard which the State suggests this Court should apply to the issue of the retroactivity of Ring has not been adopted by this Court. Mr. Washington asserts that the Witt standard should be applied and that Ring applies retroactively to Mr. Washington's case.

This Court in Witt held that a change in law supports post-conviction relief in a capital case when "the change: (a) emanates from [the Florida Supreme] Court or the United States Supreme Court, (b) is constitutional in nature, and (c) constitutes a development of 'fundamental significance.'" 387 So.2d at 931. "[A] development of fundamental significance" includes "changes of law which are of sufficient magnitude to necessitate retroactive application as ascertained by the three-fold test of Stovall and Linkletter." 387 So.2d at 929. Ring, as it applies to Mr.Washington's case, where the jury recommended life imprisonment and the judge overrode the jury recommendation and sentenced him to death, is such a case that necessitates retroactive application. Ring satisfies the requirements for retroactive application.

Clearly, the holding of Ring meets the first two prongs of Witt, i.e., the United States Supreme Court issued a new rule that is constitutional in nature. See Witt 387 So.2d at 930. Whether Ring has retroactive application rests on the third prong of Witt: whether the rule constitutes a development of fundamental

significance. The 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." Witt, 387 So.2d at 926. An application of the Stovall-Linkletter test to Ring as it applies to overrides in Florida demonstrates that Ring is a development of fundamental significance.

The purpose to be served by the new rule in Ring is to change the identity of the decision maker with respect to critical issues of fact that determines whether a defendant receives a death sentence. In Ring the United States Supreme Court held that the Sixth Amendment right to a jury trial precludes a procedure whereby a sentencing judge, sitting without a jury, finds an aggravating circumstance necessary for imposition of a death penalty. The Court held that, "[b]ecause Arizona's enumerated aggravating factors operate as 'the functional equivalent of an element of a greater offense,' the Sixth Amendment requires that they be found by a jury." Ring at 609. This new rule is one of substantive law and not procedural law. The aggravating circumstances are the functional equivalent of an element of the greater offense of capital murder. As such, it is a new rule of substantive law which outlaws the sentencing procedure used by the trial court to override the jury recommendation for life in Mr. Washington's case.

Although there has been vast reliance on the Florida death penalty statute in sentencing prisoners to death, application of the new rule in Ring to those cases in Florida, such as Mr. Washington's, where a jury recommendation of life imprisonment was overridden by the trial judge, will not have a potentially drastic effect on the administration of the death penalty in Florida. Applying Ring retroactively would have a minimal impact and effect on the administration of the death penalty in Florida. Of over 360 inmates currently residing on Death Row, fewer than 10 were sentenced to death by a judge after a jury recommended life. Mr. Washington is one of less than three percent of the Florida death row population that are jury override cases. The retroactive application of Ring to the override cases would not "destroy the stability of the law, render punishments uncertain and therefore ineffectual, and burden the judicial machinery of our state, fiscally and intellectually, beyond any tolerable limit." Witt, 387 So.2d at 929-30. In contrary, the retroactive application of Ring in override death cases would contribute to the stability of the law and render punishments certain as determinations by the decision makers as to critical issues of fact would be respected. Ring should be applied retroactively to Mr. Washington's override death sentence.

(C) RING IS APPLICABLE IN FLORIDA AS TO JURY OVERRIDES

Ring is applicable in Florida because before a death sentence can be imposed because both the jury and the judge must make factual determinations before a death sentence may be imposed. Florida Statute § 912.141 (3) requires that the jury (1) must find sufficient aggravating circumstances exist to justify imposition of death, and (2) must find that there are insufficient mitigating circumstances to outweigh the aggravating circumstances. If these findings are not made, the court shall impose a sentence of life in accordance with Florida Statute § 775.082.

The jury in Mr. Washington's case did not find that sufficient aggravating circumstances existed to justify the imposition of the death penalty. Nor did they find that there were insufficient mitigating circumstances to outweigh the aggravating circumstances. The jury in Mr. Washington's case did not recommend a sentence of death - they recommended a life sentence. At the time of the recommendation of life imprisonment was made by the jury, Mr. Washington's sentence should have been life, not death. The court should not be permitted to enhance the life recommendation - which at that time is the maximum permissible sentence - to a sentence of death. "If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact - no matter how the State labels it - **must be found by a jury** beyond a reasonable doubt." Ring v.

Arizona, 120 S.Ct 2428, 2441 (quoting Apprendi, 530 U.S. at 501 Thomas, J., concurring) (emphasis added).

Ring has application in Mr. Washington's override case because after the jury recommended life imprisonment, the judge sentenced him to death. Where a Florida trial court overrides a jury recommendation of life, and sentences a defendant to death, pursuant to Ring there is a denial of that defendant's Sixth Amendment's rights. The jury override provision in Florida has the same effect on sentencing as did the Arizona statute which was unconstitutional under Ring. Arizona Statute § 13-703, directs the judge who presided at trial to "conduct a separate hearing to determine the existence or nonexistance of [certain enumerated] circumstances ... for the purpose of determining the sentence to be imposed." § 13-703(C) (West Supp.2001). The statute further instructs: "The hearing shall be conducted before the court alone. The court alone shall make all factual determinations required by this section or the constitution of the United States or this state." Ring at 592. In Arizona, after the jury rendered their verdict in the guilt phase of the trial, they would be discharged. The judge would later, sitting alone, would consider the existence, or non-existence of factors for determining the sentence to be imposed. Where there is an override of a jury recommendation of life in Florida, the impact on the sentencing process is identical to that of the

sentencing scheme in Arizona which was held to be unconstitutional in Ring.

In Mr. Washington's case, after the verdict in the guilt phase, the jury recommended a life sentence in the penalty phase. At that point, Mr. Washington should have been sentenced to life imprisonment, the maximum sentence he could have received as the jury recommended life imprisonment. After the jury recommended life for Mr. Washington, the jury was discharged. The judge, then sitting alone, conducted a separate hearing to determine the existence of factors for determining the sentence to be imposed. The trial court overrode the jury life recommendation in imposed a sentence of death on Mr. Washington.

The process of the jury override in Florida is unconstitutional pursuant to Ring because it allows for a judge, sitting alone, to consider the existence of circumstances in determining the sentence to be imposed. Ring has applicability in Florida as it pertains to the jury override provision.

(D) RING RELIEF IS AVAILABLE BECAUSE THE TRIER OF FACT DETERMINED THAT WASHINGTON SHOULD BE SENTENCED TO LIFE IMPRISONMENT

The State contends that Ring/Apprendi does not apply because in Mr. Washington's guilt phase the jury found him guilty of underlying felonies, that he had prior violent felony convictions, and was under a sentence of imprisonment at the time of the murder. However, the State ignores the jury's ultimate conclusion

and recommendation, that even if they found beyond a reasonable doubt that these circumstances existed, the jury found that the aggravating circumstances did not outweigh the mitigating circumstances, ergo a life recommendation by the jury. It is not irrelevant that the jury made a final recommendation of life over death. The crux of the argument is that the jury did not believe that aggravating circumstances existed to justify imposition of the death penalty and that mitigating circumstances outweighed any aggravating circumstances. Pursuant to Ring/Apprendi, at the time of the jury recommendation, life was the maximum penalty that Mr. Washington should have received.

The State's conclusion is based on disregarding the weighing process done by the jury. The State's position, that the aggravating circumstances existed, therefore we should ignore the weighing process done by the jury and their subsequent recommendation for life imprisonment, is incorrect. The State cited the concurring opinion of Justice Scalia in Ring where he said that:

> ... the unfortunate fact is that today's judgment has nothing to do with jury sentencing. What today's decision says is that the jury must find the existence of the fact that an aggravating factor existed. Those States that leave the ultimate life-or-death decision to the judge may continue to do so - - by requiring a prior jury finding of aggravating factor in the sentencing phase or, more simply, by placing the aggravating-factor determination (where it logically belongs anyway) in the guilt phase.

Ring at 609

In Mr. Washington's case, the jury may have found the aggravating factors existed in the guilt phase, but based upon their findings in the penalty phase - and presumably relying upon those aggravating factors found in the guilt phase- the same jury recommended a life sentence.

Justice Lewis was correct in his concern about the validity of the override in light of Ring which "counsels that this Court cannot allow a sentencing judicial officer to find aggravating factors contrary to the specific findings of a jury on those aggravating factors and override jury recommendations of life imprisonment." Bottoson at 726. This is so because, in Justice Lewis' view, "a logical reading and comparison of the texts of Spaziano and Ring opinions produces an inescapable conflict." The State dismisses Justice Lewis' concerns about jury overrides as dicta, however, although this Court has addressed Ring/Apprendi in cases involving prior violent felony and contemporaneous felony aggravators, this Court has not addressed Ring/Apprendi in a jury override case. Justice Lewis' concerns about the validity of the override in light of Ring are sound. The language in Ring is clear as it pertains to the jury override in Mr. Washington's case.

In Mr. Washington's case, the jury made findings on aggravating factors and recommended a life sentence. The trial court made findings contrary to the findings

of the jury regarding the same aggravators. The trial court then found the henious atrocious and cruel aggravator (which the trial court conceded in her order of November 18, 2003) contrary to the jury's findings as the jury did not find that aggravator. The trial court then overrode the jury recommendation of life and sentenced Mr. Washington to death.

Ring/Apprendi require that an aggravating factor be found by a jury and not by a judge sitting alone. The trial court, sitting alone, sentenced Mr. Washington to death based on the finding of an aggravating circumstance (HAC) and other circumstances found by the jury, weighed by the jury, and determined by the jury not sufficient to support a sentence of death. Since the trier of fact determined that Mr. Washington should be sentenced to life imprisonment, the trial court's override of the life recommendation should be set aside pursuant to Ring/Apprendi.

CONCLUSION AND RELIEF SOUGHT

Based on the forgoing, the lower court improperly denied Mr. Washington's Amended Motion to Vacate Judgments of Conviction and Sentences with Special Request For Leave to Amend. This Court should order that his conviction and sentence be vacated and remand the case for a new trial, penalty phase, evidentiary hearing, or for such relief as the Court deems proper.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Reply Brief of Appellant has been furnished by United States Mail, first class postage prepaid, to all counsel of record on this 26th day of May, 2004.

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CERTIFICATE OF COMPLIANCE

I hereby certify that a true copy of the foregoing, Initial Brief of Appellant was generated in a Times New Roman, 14 point font, pursuant to Fla. R. App. P. 9.210**.**

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