IN THE SUPREME COURT OF FLORIDA

MARVIN JONES,

Appellant,

vs.

CASE NO. SC04-282
L.T. No.16-1993-CF-2757

STATE OF FLORIDA,

Appellee.
_____/

APPEAL FROM THE CIRCUIT COURT
OF THE FOURTH JUDICIAL CIRCUIT
IN AND FOR DUVAL COUNTY
STATE OF FLORIDA

REPLY BRIEF OF APPELLANT/PETITIONER

ROBERT A. NORGARD
ATTORNEY AT LAW
FLORIDA BAR NUMBER 322059

P.O. BOX 811
BARTOW, FL 33831
(863)533-8556

ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

TABLE OF CITATIONS

PRELIMINARY STATEMENT

The Appellant, Mr. Jones, will rely upon the Statement of Facts, argument, and citations of authority set forth in the Initial Brief as to each issue. The Reply Brief will contain additional argument as to Issues I, II, IV, and VIII as set forth in the Initial Brief.

ARGUMENT

ISSUE I

THE TRIAL COURT ERRED IN REJECTING APPELLANT'S CLAIM THAT TRIAL COUNSEL WAS INEFFECTIVE IN INVESTIGATING AND PRESENTING MENTAL HEALTH TESTIMONY TO THE JURY WHICH WOULD HAVE RENDERED INAPPLICABLE THE APPLICATION OF THE COLD, CALCULATED, AND PREMEDITATED AGGRAVATING FACTOR IN THIS CASE

The Appellant's request for relief in this issue is grounded upon trial counsel's failure to adequately investigate mental health mitigation and to present mental health mitigation to the jury in order to attack the aggravating factor of CCP. The presentation of this evidence would have made the aggravating factor of CCP inapplicable to this case. Aggressively rebutting the CCP aggravating factor was critical to the defense of Mr. Jones. CCP is acknowledged as one of the most serious aggravating factors. Larkin v. State, 739 So. 2d 90 (Fla.

1999). After the penalty phase, but before sentencing, the CCP jury instruction given in this case as found to be unconstitutional in Jackson v. State, 648 So. 2d 85 (Fla. 1994). Trial counsel had failed to object to this instruction during the trial, despite the existence on long and ongoing challenges to the CCP instruction. Trial counsel's deficient performance was compounded by his failure to become familiar with the holding of Jackson that issued prior to sentencing. Not only did Jackson determine that the jury instruction on CCP was unconstitutional, it also set forth, for the first time, the criteria or facts that were necessary in order for CCP to apply.

The State's response in Issue I of the Answer Brief (pages 12-17) to trial counsel's failure to respond to Jackson rests on the argument that counsel could not be responsible for failing to assert a claim that did not exist. This argument must fail because Jackson was pending before the Florida Supreme Court at the time of trial (thus the issue in capital litigation did exist) and the opinion was issued in this case before sentence was imposed.

The State relies on the cases of Walton v. State, 847 So. 2d 438 (2003) and Johnson v. State, WL 729169, 12 (Fla. 2005), in support of this argument. Both are distinguish-

able from the facts in this case and are not determinative of this issue. Walton went to trial and was sentenced in 1991- his case had concluded prior to the issuance of Jackson in 1992. Defendant Johnson's trial ended with a jury verdict on March 11, 1989. Trial counsel in both Walton and Johnson failed to raise any objection to CCP jury instruction or to challenge the aggravator in any fashion.

In contrast, Mr. Jones' case had not reached finality in the trial court at the time Jackson issued. Sentencing was still pending. Thus, it is distinguishable from Walton. There is a difference between failing to anticipate changes in the law and fulfilling the Sixth Amendment requirement for counsel by educating oneself as to current issues in active litigation that dramatically impact on the client you are charged with representing. The challenges to the aggravating factor jury instructions for HAC and CCP were not new, novel, or unanticipated at the time of Mr. Jones' trial. Trial counsel was certainly aware of the challenges to the CCP instruction, as he had filed two pre-trial motions to declare the CCP instruction unconstitutional and to prohibit the giving of the standard CCP instruction. To claim that trial counsel should not be

responsible for knowing about the change in the law is not logical- trial counsel knew the issue existed but failed to act accordingly to preserve the issue for appellate review by requesting a special or different jury instruction.

In the Initial Brief the failure of defense counsel to present evidence from mental health experts that contradicted the finding of CCP and demonstrated the failure of proof on several of the Jackson criteria was presented in Issue I as the first prong of a two-part argument of ineffective assistance of trial counsel as related to the CCP aggravator. The State's Answer Brief does not address this argument in Issue I, but only somewhat addresses it in Issue II. (See, Answer Brief, p.18) Issue II in the Initial Brief addressed the failure of trial counsel to investigate and present mitigation evidence in mitigation, an issue apart from trial counsel's failure to present mental health testimony relative to rebutting CCP. For the sake of continuity and clarity, Appellant's response to the State argument will remain in Issue I, as presented in the Initial Brief.

The State largely fails to address the failure of defense counsel to present mental health testimony as an affirmative defense against the finding of CCP. As pointed

out in the Initial Brief, the trial court noted the utter lack of evidence which was present in the record to explain the seeming "Dr. Jekyll/Mr. Hyde" nature of this offense and to show that this was anything other than an "intended, deliberate, and calculated" crime. The lack of evidence on the record is exactly why defense counsel was ineffective- the trial level record was silent not because no such evidence existed to rebut the required elements of CCP, but because trial counsel failed to investigate and present it.

No state testimony was presented at the post-conviction evidentiary hearing to rebut or contradict the findings of Dr. Miller that the crimes were not "contrived, logically planned, or thought out, or the product of any reasoning of substance". (V,R811)(emphasis added). No state testimony was presented at the evidentiary hearing to rebut or contradict the conclusion of Dr. McMahon that the instant offenses were a tragic response to an emotionally charged encounter rather than a calculated and cold plan to kill. Had evidence of the mental state of Mr. Jones been presented at penalty phase which was clearly inconsistent with a finding of CCP, the trial court would have had the answer to the question asked in the sentencing order- what was the emotional make up of Mr. Jones that rebutted the

conclusion that these crimes were planned and deliberate?

Trial counsel had the opportunity to act affirmatively on behalf of Mr. Jones in light of Jackson and to benefit from that decision. He failed to do so. Trial counsel took no affirmative action in light of Jackson- he did not seek a new penalty phase, he did not present additional testimony to the court which specifically addressed the four-pronged criteria for CCP outlined in Jackson, he did not even direct the trial court's attention to the existence of Jackson. Trial counsel did not render effective assistance of counsel to Mr. Jones when he failed to offer the evidence necessary to show the trial court why CCP could not apply to this case under Jackson. Trial counsel offered no explanation for his failure and there is no acceptable strategic reason for failing to do so. The omissions of trial counsel deprived Mr. Jones of his constitutional right to counsel under the Sixth Amendment.

ISSUE II

THE TRIAL COURT ERRED IN REJECTING APPLLANT'S CLAIM THAT TRIAL COUNSEL WAS INEFFECTIVE IN INVESTIGATING AND PRESENTING EVIDENCE TO THE JURY OF NUMEROUS AND SIGNIFICANT NON-STATUTORY MITIGATING CIRCUMSTANCES.

In the Initial Brief it was argued that trial counsel

was ineffective in failing to present mitigation evidence in three main categories: mental health testimony, evidence of positive behavior by Mr. Jones since his arrest and throughout the judicial proceedings, and detailed and specific testimony from friends and family members as to the character of Mr. Jones, his reputation for peacefulness, and his remorse and sorrow over the crimes.

As to the first area of testimony, the State argues that that trial counsel's decision to forgo the testimony of the trial mental health expert, Dr. Miller, was not deficient because of concerns of negative testimony. (State's Answer Brief at p.26) The State relies on Gaskins v. State, 822 So. 2d 1243 (Fla. 2002), for this position. Gaskins is distinguishable from this case.

In Gaskins trial counsel chose not to present the testimony of Dr. Krop because Dr. Krop had advised counsel that he would not be of help if called as a witness because of extremely damaging testimony that he would have to give about the defendant. This testimony included acts of sexual deviancy, lack of remorse, and Gaskin's claim that he enjoyed killing. This Court determined that trial counsel was not ineffective in failing to call Dr. Krop, given the fact that his testimony would open the door to

very damaging testimony about the defendant.

In this case the State argues that the decision to forgo the testimony of Dr. Miller was because Dr. Miller could not be of much help because he did not find either statutory mitigator and because of potential concerns about a door being opened to "future dangerousness" or other negative information. Dr. Miller's testimony at the evidentiary hearing does not support this argument.

Dr. Miller testified that he found no evidence in Mr. Jones' background of anything that would suggest that the instant crime was typical for him- in fact, it was out of his character. (V,T813) According to Dr. Miller, Mr. Jones did not have any anti-social personality disorders and no anti-social behaviors. (V,T813) Dr. Miller in no way testified that Mr. Jones was a future danger if incarcerated as opposed to being executed. Even if such evidence had been found, Dr. Miller would not have been permitted to testify as such at trial, as this type of testimony would have been the equivalent of an unauthorized statutory aggravator.

Further, Dr. Miller's testimony at the post-conviction evidentiary hearing dovetailed with trial counsel's decision to present Mr. Jones in a positive light to the

jury. Dr. Miller certainly did not find any of the type of issues presented by the defendant in Gaskins. Dr. Miller's opinion that Mr. Jones could "function quite well in the world" was consistent with the trial strategy for penalty phase. Dr. Miller did not report any "negative" statement made by Mr. Jones that would have caused concern or undermined the strategy to present Mr. Jones as having had a "golden background". (State's Answer Brief at p. 26) Had Dr. Miller prepared a report or testified in a manner that contradicted this trial strategy, his exclusion as a witness would be reasonable under Gaskins, but that was simply not the case.

Whether or not trial counsel ever spoke about possible mental health mitigation with Dr. Miller is murky, to say the least. Dr. Miller testified that he remembered no conversations with trial counsel about Mr. Jones' personality disorder. (V,T819) Dr. Miller's personal recollection was that trial counsel did not speak with him after Dr. Miller mailed his report to trial counsel, but since he was told that trial counsel had talked with him he wouldn't deny a conversation because he had no written notes to contradict that assertion. (VT820) In most instances where he is asked to examine a defendant for the

issues of competency and insanity, as in this case, Dr. Miller will not hear back from trial counsel if he excludes those issues. (V,T822) According to Dr. Miller the defense attorney orchestrates what occurs in a case and an expert such as Dr. Miller participates at a level structured by the lawyer. (VT819) Trial counsel could not recall speaking with Dr. Miller, but stated that it would normally be his practice to do so.

The State argues that trial counsel was not ineffective in failing to present the testimony another doctor such as Dr. McMahon because she did not find either statutory mental health mitigator and because trial counsel had already consulted with Dr. Miller. (State's Answer Brief at p.27)

Because a mental health professional cannot testify that the two statutory mental health mitigators are present is not, as the State suggests, a conclusive determination that their findings and testimony are without merit or that their testimony should not be pursued. This assertion overlooks the obvious- that mitigation is not limited solely to the enumerated statutory mitigators, but includes countless non-statutory mitigators as well. Capital case opinions are replete with factual recitations of

significant mitigation having been established through mental health testimony when neither statutory mental health mitigator was present. The testimony of Drs. Miller and McMahon clearly established mitigation that has been recognized by this Court as worthy of consideration in determining the appropriateness of the death penalty. The decision to exclude such evidence, if in fact any such thought process was even used, was error by trial counsel.

As previously argued in the Initial Brief, the trial court's reliance on Asay v. State, 769 So. 2d 974 (Fla. 2000) was misplaced because Asay focused on whether or not trial counsel was ineffective in failing to secure a more favorable expert for trial than the mental health expert that he had secured that gave an unfavorable report. The issue presented in this case is not whether counsel was ineffective in failing to secure a more favorable expert, but instead was he ineffective for failing to develop and use favorable expert testimony that existed at the time of trial from an expert already favorable to his case. This is not a situation where the quality of the mitigation was at issue- it is a case where the absence of information was at issue. Trial counsel in this case wholly failed to adequately investigate and develop mitigation through his

mental health expert.

The testimony at the evidentiary hearing completely contradicted the testimony of trial counsel that he was concerned that if he presented testimony from Dr. Miller that the door would be opened for the State to present evidence of the future dangerousness of Mr. Jones, creating negative testimony for the jury on this point. It was undisputed that Mr. Jones had no prior criminal history before these offenses. It was stipulated at the evidentiary hearing that Mr. Jones was a model inmate and exhibited nothing but appropriate behavior during the trial. Mr. Jones was especially mindful of the victim and decedents family during the trial. Dr. Miller's opinion at the time of the original trial was that this crime was an absolute aberration in behavior for Mr. Jones and not likely to occur again. There is not a scintilla of evidence which existed at the time of trial to support trial counsel's assertion that he was concerned about having Dr. Miller testify because of the "future dangerousness" question.

The State's Answer brief does not address trial counsel's failure to present as mitigation Mr. Jones' model behavior in court, jail, and prison and his appropriate

adjustment to incarceration. It is presumed that the State concedes that this mitigation was established and that trial counsel was ineffective in failing to present it.

Trial counsel's failure to adequately develop and present the testimony of family members regarding Mr. Jones, his character, his reputation for peacefulness, and his great remorse over the crimes was also presented the Initial Brief. The State addresses only one witnesses testimony, that of Abigail Taylor, and simply refers to the remaining witnesses as a "herd". (State's Answer Brief at p.35) It should be remembered that these witnesses were not animals, but individuals and family members who knew Mr. Jones and would have been instrumental in developing for the jury an accurate portrait of who Mr. Jones was.

The State has argued through out the Answer Brief that defense counsel's strategy for penalty phase was to present the "golden" background of Mr. Jones. The effective way to accomplish this goal would have been to present meaningful, detailed, and specific examples of Mr. Jones' character and life to the jury. Asking only if Mr. Jones was a good son or a good brother as defense counsel did as opposed to presenting detailed and specific testimony about the character and background of Mr. Jones completely fails to

achieve the desired objective. It is the difference between a drawing of stick figures and an oil portrait.

Trial counsel's failure to adequately prepare and present evidence to support his penalty phase strategy constitutes ineffective assistance of counsel of a degree sufficient to have undermined confidence in the lower court proceedings. The jury and trial court were denied mitigation evidence of substantial quality at the time sentence was imposed. This Court was deprived of information crucial to ensuring that proportionality review was appropriately conducted. The trial court erred in determining that counsel was not ineffective for failing to ensure that mitigating evidence was presented to the jury , trial court, and contained in the appellate record.

ISSUE IV

THE TRIAL COURT ERRED IN DENYING APPELLANT'S REQUEST TO CONDUCT JUROR INTERVIEWS IN ORDER TO DETERMINE THE EXISTENCE OF JUROR MISCONDUCT

Post-conviction counsel filed a motion to interview jurors based on two grounds: (1) statements contained in trial counsel's motion for new trial indicating that he suspected juror misconduct and (2) a newspaper article dated nine months after the verdict which raised

substantial questions about the integrity of the deliberations based upon interviews with several of the jurors in this case. Ground one is based upon the ineffective assistance of trial counsel during the period of time that he represented Mr. Jones. Ground two, based upon the content of the newspaper article, constitutes newly discovered evidence for which a juror interview was necessary in order to effectively pursue post-conviction remedies.

The State contends that this issue is procedurally barred as it should have been raised on direct appeal. This assertion overlooks the fact that the issue was not preserved for direct appeal as to the first ground because trial counsel had failed to pursue the issues raised in the motion for new trial and had not sought juror interviews prior to sentence being imposed or prior to the filing of the notice of appeal. Appellate counsel is not expected to challenge issues which are clearly not preserved for appellate review. Trial counsel's failure to take the necessary steps to perfect this claim for appellate review is appropriate for post-conviction relief. The cases relied upon by the State for this ground are distinguishable from this case.

In Parker v. State, 2005 WL 673686 *6 (Fla. 2005), this court rejected a post-conviction claim relating to juror interviews because the claim should have been raised on direct appeal. The trial lawyer in Parker had raised the issue at trial- he had brought a news story that had reported conversations among the jurors to the attention of the judge, he attempted to raise and preserve the issue, and the trial lawyer had called witnesses at a hearing who testified about conversations engaged in by the jurors. Because trial counsel had raised the issue in the lower court and preserved the issue for direct appeal, a claim of ineffective assistance against trial counsel was properly barred- trial counsel had adequately raised and preserved the issue sufficient to allow direct appellate review. In the case at bar, defense counsel failed to adequately raise and preserve any issue of juror misconduct that he was aware of at the time for direct appellate review. The two additional cases cited by the State in support of their position, Jennings v. State, 782 So.2d 853 (Fla. 2001) and Gaskins v. State, 737 So.2d 509 (Fla. 1999) do not contain any factual information about the claim raised in order for then to be used for comparative purposes or as precedent for denial of claims such as raised by Mr. Jones.

The State contends that review is also barred because appellate counsel failed to seek to interview the jurors in this case. As acknowledged by the State, the newspaper article appeared nine months after the trial concluded. Any information would not have been considered appropriate for direct appellate review, as the article was outside the record. The claim was appropriately raised at the first instance that it was possible to do so: as information appearing after the conclusion of the trial, the newspaper article which contained the juror comments constituted newly discovered evidence. In order to effectively investigate this claim, post-conviction counsel sought permission from the court to interview jurors once jurisdiction had returned to the trial court at the conclusion of the direct appeal. Thus, the questions raised by the newspaper article were brought to the attention of the appropriate court at the appropriate time. The trial court's refusal to permit full, fair, and complete investigation of this claim is the subject of the second ground or prong of this issue.

A "fishing expedition" was not what was sought in this case by post-conviction counsel. Based upon the comments reported in the newspaper article, a sound basis for

inquiry existed. In Johnson v. State, 804 So.2d 1218 (Fla. 2001), this Court dismissed the defendant's claims for juror interviews in his second post-conviction proceeding as a "fishing expedition". Johnson had sought to obtain information about the jurors' backgrounds in an apparent attempt to "research and discover" facts which may have rendered certain jurors ineligible to serve. Johnson's request was vague and failed to identify any real problem with the jury. Neither was this Johnson's first request for interviews- in his first post-conviction proceeding Johnson's lawyer had been permitted to interview the jury foreman. The facts on this record distinguish the present case from Johnson.

First, Johnson had already had one bite at the apple- his first post-conviction lawyer had already talked to the jury foreman, which had presumably resolved certain issues in the first post-conviction proceeding. Next, Johnson's second request was vague and not premised on any concrete assertions of misconduct or even possible misconduct. In contrast, Mr. Jones had not and has never had the opportunity to speak with the jurors and Mr. Jones did identify with specificity potential juror misconduct by virtue of the comments contained in the 1995 newspaper

article.

The State argues that none of the reported comments should give rise to any concern about juror misconduct, arguing each comment reported in the news story is a proper basis for a sentence recommendation in accord with the law and falls within "proper, normal jury deliberations and thought processes". [State's Answer Brief at p. 48] This is not correct.

The State characterizes two juror's statements regarding their belief or concern that Mr. Jones would kill again as comments about "specific deterrence". The State argues that "specific deterrence" was an appropriate basis for a juror to recommend a death sentence- "specific deterrence" being that a sentence of death would insure that Mr. Jones did not kill again. The State cites to two federal court cases to support the argument that a prosecutor may argue "specific deterrence" reasoning in urging a jury to recommend a death sentence, so it is therefore proper and not evidence of misconduct for a juror to base their sentence recommendation on concerns about or a desire to ensure "specific deterrence". {State's Answer Brief at p. 46]. This argument squarely contradicts this Court's opinion in Teffeteller v. State, 439 So. 2d 840

(Fla. 1983), cert.denied, 465 U.S. 1074, 104 S.Ct. 1430, 79 L.Ed. 2d 754 (1984), which specifically condemned prosecutorial arguments centered on "specific deterrence" and reversed the defendant's death sentence where the prosecutor had argued such to the jury- finding that this type of prosecutorial argument was overkill and had no place in our system of justice. Citing to Teffeteller, this Court in Allen v. State, 662 So. 2d 323 (Fla. 1995), held that it is improper for a prosecutor to argue "specific deterrence" to a jury because such argument is not relevant to any statutory aggravating factor and such argument could cause the jury to rely upon a non-statutory aggravator that the jury is forbidden to consider in reaching their recommendation. If a prosecutor is not allowed to argue to a jury that death should be imposed because the defendant may kill again due to the danger that the jury will recommend a death sentence based upon this improper rationale, how then can it not be error for a juror to actually recommend death based upon this improper reason? The reliance upon "specific deterrence" by Jurors McGee and Jeffson was not authorized under Florida's capital sentencing scheme and certainly gives rise to a credible concern, if not direct evidence, of juror

misconduct.

Likewise, Juror Jeffson's desire, as characterized in the State's Answer Brief, as "want[ing] to send a message to others who commit murder that death is a possible punishment…" [State's Answer Brief at p.48] is also evidence of juror misconduct. Again, this Court has found it reversible error for prosecutors to engage in prosecutorial argument that urges jurors to send a message to the community by recommending a death sentence because such considerations are outside the scope of the jury's deliberations. See, Campbell v. State, 679 So. 2d 720 (Fla. 1996); Bertolotti v. State, 476 So. 2d 130 (Fla. 1985). If it is reversible error for a prosecutor to urge a jury to utilize an impermissible basis upon which to recommend death, it logically follows that it is also error for a juror to actually base their recommendation on the same impermissible concern.

The State's argument that the record demonstrates no misconduct occurred, but rather only proper jury deliberations is incorrect. The only way to determine if the jurors did not discuss any matter that they should not have [State's Answer Brief at p. 48] and specifically the improper and unauthorized aggravators that jurors McGee,

Jeffson, and Rooks admitted to considering was to interview the panel to determine the extent to which other jurors relied upon unauthorized aggravating factors in reaching their recommendations or if they were pressured or urged to recommend death by the utilization of these improper aggravators by fellow jurors.

The trial court's refusal to permit counsel to interview the jurors to investigate issues of juror misconduct in light of the clear indications that such misconduct had occurred was error. This was not a "fishing expedition", but a request premised upon factual material contained in a public document that raised credible concerns about the integrity of the jury's sentence recommendation. Under these facts, due process requires that Mr. Jones be afforded the opportunity to interview the jurors who recommended that he be executed.

ISSUE VIII

FLORIDA'S CAPITAL SENTENCING PROCEDURE IS UNCONSTITUTIONAL BECAUSE THE JUDGE RATHER THAN JURY DETERMINES SENTENCE.

In this Issue, Mr. Jones asserted that the dictates of Ring v. Arizona, 122 S. Ct. 2428 (2002) apply to capital sentencing proceedings in the state of Florida. The State

argues that Ring does not apply to this state, and even if it did, Mr. Jones would be denied relief due to the contemporaneous finding of the prior violent felony aggravator due to the contemporaneous conviction for attempted murder.

In deciding Ring, the United States Supreme Court overruled its prior decision in Walton v. Arizona, 497 U.S. 639 (1990) and held that Arizona's enumerated aggravating factors operated as the "functional equivalent of an element of a greater offense" under Apprendi v. New Jersey, 530 U.S. 466 (2000). Absent the presence of aggravating factors, a defendant in Arizona could not be exposed to the death penalty. Subsequent decisions from the United States Supreme Court have adhered to the principle that sentencing aggravators require a specific jury determination as opposed to one performed solely by the court. Blakely v. Washington, 124 S.Ct. 2531 (2004).

Similar to Arizona, under Florida law, in a "hybrid" state, the aggravating circumstances are matters of substantive law which actually "define those capital felonies which the legislature finds deserving of the death penalty". Vaught v. State, 410 So. 2d 146, 149 (Fla. 1982); State v. Dixon, 283 So. 2d 1, 9 (Fla. 1973). Under

Florida's statute, the jury submits a penalty recommendation, but makes no specific findings as to aggravating (or mitigating) factors, nor is jury unanimity required as to any or all of the aggravating factors. It is the judge who makes the findings of the statutory aggravating circumstances, and it is the judge who is required to independently weight the aggravating factors which he has found against the mitigating factors which he has found, and thereupon determine whether to sentence the defendant to death or life imprisonment. See, King v. State, 623 So. 2d 486, 489 (Fla. 1993). Even though the jury recommendation is to be given great weight, it is not the "de facto sentence", but rather the judge must make an "independent determination based on the aggravating and mitigating factors" as to what sentence can be legally imposed. Grossman v. State, 525 So.2d 833, 840 (Fla. 1988). Logically, since as in Arizona, it is the Florida trial judge who makes the crucial findings of fact necessary to impose a death sentence, it follows that Ring should apply to the State of Florida.

Mindful of this Court's decisions to the contrary, it is argued herein that the overruling of Walton v. Arizona is an implicit overruling of Hildwin v. Florida, 490 U.S.

638 (1989). Since the most basic holding of Walton derived directly from Hildwin and Walton found no distinction between "judge only" and the "hybrid" systems, the overruling of Walton in Ring is the logical conclusion.

The State's second position for rejecting Ring as applicable to Mr. Jones' case was his contemporaneous conviction for a prior violent felony. This Court has concluded in majority opinions that the constitutional requirements of Ring and Apprendi are satisfied when one of the aggravating circumstances is a prior conviction of one or more violent felonies (whether the crimes were committed previously, contemporaneously, or subsequently to the charged offense). See, Doorbal v. State, 837 So. 2d 940, 963 (Fla. 2003), cert. denied, 539 U.S. 962 (2003); Lugo v. State, 845 So. 2d 74, 119n.79 (Fla. 2003); Duest v. State, 855 So. 2d 33, 49 (Fla. 2003). In this case Mr. Jones was contemporaneously of attempted murder.

The concept that recidivism findings might be exempt from otherwise applicable constitutional principles regarding the right to trial by jury or the standard of proof "represents at best an exceptional departure from …historic practice." Apprendi v. New Jersey, supra., 530 U.S. at 487. The recidivism exception was recognized in

the context of noncapital sentencing by a 5-4 vote of the United States Supreme Court in Almendarez-Torres v. United States, 523 U.S. 224, 118 S.Ct. 1219, 140 L.Ed. 2d 350 (1998). In his dissenting opinion, Justice Scalia, joined by Justices Stevens, Souter, and Ginsburg asserted "there is no rational basis for making recidivism an exception." 523 U.S. at 258 (emphasis in opinion). In Apprendi, supra., the majority consisted of the four dissenting Justices from Almendarez-Torres, with the addition of Justice Thomas (who had been in the Almendarez-Torres majority). The opinion of the Court in Apprendi states:

> Even though it is arguable that Almendarez-Torres was incorrectly decided [footnote omitted], and that a logical application of our reasoning today should apply if the recidivist issue were contested, Apprendi does not contest the decision's validity and we need not revisit it for purposes of our decision today…

530 U.S. at 489-90.

The Apprendi Court further remarked that "given its unique facts, [Almendarez-Torres] surely does not warrant rejection of the otherwise uniform course of decisions during the entire history of our jurisprudence." 530 U.S. at 490 (emphasis supplied). In his concurring opinion, Justice Scalia specifically noted that the fact of a prior

conviction, if necessary to aggravate a crime, is an element of the aggravated crime and that each fact necessary for the entitlement to an aggravated sentence is an element of the crime. 530 U.S. at 501.

In addition, it is noteworthy that the majority in Almendarez-Torres adopted the recidivism exception at least partially based on its assumption that a contrary ruling would be difficult to reconcile with the now-overruled precedent of Walton and implicitly overruled precedent of Hildwin. See, 523 U.S. at 247. It appears highly doubtful whether the Almendarez-Torres exception for "the fact of a prior conviction" is still good law.

Even if this exception still survives in noncapital contexts, it plainly, by its own rationale cannot apply to capital sentencing and it especially cannot apply to Florida's "prior violent felony" aggravator which involves much more- and puts before the jury much more than the simple "fact of the conviction".

Florida's prior violent felony aggravator focuses at least as much, if not more, upon the nature and details of the prior, contemporaneous, or subsequent criminal episode as it does on the mere "fact of the conviction". Most importantly, one of the main reasons given in Justice

Breyer's majority opinion in Almendarez-Torres for allowing a recidivism exception in noncapital sentencing was the importance of keeping the fact of the prior conviction or convictions and the details of the prior crimes from prejudicing the jury. Since the jury in a capital case is allowed to hear the details of the offenses that supply the basis for the prior violent felony aggravator, there is no rational basis for carving out an exception to Ring's holding that the findings of the aggravating factors necessary for the imposition of the death penalty must be made by a jury. Thus, the existence of a prior, contemporaneous, or subsequent felony conviction does not relieve the need for a jury finding under Ring as to each aggravating factor in order to meet constitutional safeguards.

Mr. Jones further urges this Court to reconsider the recent majority holding in Johnson v. State, 30 Fla. Law Weekly S297 (Fla. April 28, 2005), which held that Ring does not apply retroactively in Florida. To hold so is to "permit persons to go to their deaths in open violation of their fundamental and constitutional right to trial by jury." Johnson, Anstead, J. dissenting, at S307. To echo Justice Anstead "Justice has not been served today."

CONCLUSION

Based upon the arguments, citations of law and other authorities as set forth in the Initial and Reply Briefs, the Appellant respectfully requests that the order of the lower court denying postconviction relief be reversed and the judgment and sentence set aside.

CERTIFICATE OF FONT SIZE

I HEREBY CERTIFY that the font used in the preparing of this reply brief is Courier New 12 point font.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to the Office of the Attorney General, Assistant Attorney General Charmaine Millsaps, The Capital, Tallahassee, FL 32399, this ___ day of June, 2005.

Respectfully submitted,

ROBERT A. NORGARD
Attorney at Law
P.O. Box 811
Bartow, FL 33830
(863)533-8556
Fla. Bar No. 322059