IN THE SUPREME COURT OF FLORIDA

HARRY JONES,

Petitioner,

v. CASE NO. SC07-729

JAMES R. McDONOUGH Jr. Secretary,
Department of Corrections
State of Florida

Respondent.
_____/

RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

COMES NOW, Respondent, by and through the undersigned Assistant Attorney General, and hereby responds to Jones' Petition for Writ of Habeas Corpus. Respondent respectfully requests this Court deny the petition.

FACTS AND PROCEDURAL HISTORY

The facts of the case and its procedural history are recited in the accompanying answer brief. Jones was represented on direct appeal by Special Assistant Public Defender James C. Banks.

Mr. Banks was admitted to the Florida Bar in 1979. At the time Mr. Banks handled Jones' appeal in 1994, he had been a member of the bar for fifteen years. Mr. Banks has handled 97 published criminal appeals cases. Mr. Banks is

listed as a Special Assistant Public Defender in 58 appellate cases in the Second District Court of Appeal. He is listed as attorney of record in over 300 appellate cases in the First District Court of Appeal.[1]

In Jones' direct appeal, Mr. Banks wrote a 73 page initial brief raising six issues; two guilt phase issues and four penalty phase issues. Jones v. State, 648 So.2d 669, 673, n.4 (Fla. 1994) (listing the six issues raised on appeal). The initial brief contained 22 pages of facts.

Mr. Banks' reply brief was 33 pages long. In it, Mr. Banks addressed all six issues raised on appeal. Much of the reply brief was devoted to the search and seizure issue. RB at 4-18. The reply brief also included a section on harmless error. RB at 17-18.

This Court agreed the illegally seized evidence and testimony relating to it should have been suppressed but found the admission of this evidence harmless. Jones, 648 So.2d at 679. This Court rejected the State's exigent circumstances argument and its open view and plain view arguments as well, concluding "none of the State's theories are supported by the evidence presented at the suppression hearing in this case." Jones, 648 So.2d at 673-679. This

[1] Information retrieved from the on-line docketing system of both the First and Second District Courts of Appeal.

Court relied, in part, on United States v. Jeffers, 342 U.S. 48, 52, 72 S.Ct. 93, 95, 96 L.Ed. 59 (1951), to reject the State's exigent circumstances argument which was discussed by appellate counsel in his reply brief. RB at 5-6.

ISSUE I

WHETHER FLORIDA'S DEATH PENALTY STATUTES VIOLATE THE SIXTH AMENDMENT AS INTERPRETED IN RING V. ARIZONA, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002)?

Jones contends that Florida's death penalty statute violates the Sixth Amendment as interpreted in Ring v. Arizona, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002). This claim should be denied.

First, Ring is not retroactive. Ring does not apply because it was decided seven years after Jones' conviction become final. Moreover, Ring does not apply because one of the aggravators found by the trial court was the prior violent felony aggravator. This Court has held numerous times that Ring does not apply to cases where the prior violent felony is present. And, even if Ring applied, the jury here found an aggravator during the guilt phase and also necessarily found an aggravator during the penalty phase as well when it recommended death by a vote of ten to two.

The standard of review

Whether Florida's death penalty statute violates the Sixth Amendment right to a jury trial is a pure question of law reviewed *de novo*. Cf. United States v. Petrie, 302 F.3d 1280, 1289 (11th Cir. 2002) (observing that the applicability of Apprendi is a question of law reviewed *de novo*).

Retroactivity

Ring is not retroactive. Jones' conviction became final on June 19, 1995, when the United States Supreme Court denied certiorari. Jones v. Florida, 515 U.S. 1147, 115 S.Ct. 2588, 132 L.Ed.2d 836 (1995). Ring was decided on June 24, 2002.

Both the Florida Supreme Court and the United States Supreme Court have held that Ring is not retroactive. Johnson v. State, 904 So.2d 400 (Fla. 2005) (holding that Ring does not apply retroactively in Florida in postconviction proceedings to cases that were final on direct review at the time of the Ring decision); Schriro v. Summerlin, 542 U.S. 348, 124 S.Ct. 2519, 159 L.Ed.2d 442 (2004). A defendant may not rely on Ring when his conviction became final prior to the Ring decision. Franqui v. State, 32 Fla.L.Weekly S210, 2007 WL 1285921, *9

(Fla. May 3, 2007) (holding that a defendant, whose case became final in 2001, may not rely on Ring).

Merits

As this Court has held on many occasions, Ring does not apply to cases where the prior violent felony is present. Gore v. State, 2007 WL 1932061, *13 (Fla. July 5, 2007) (rejecting a Ring claim where one of the aggravating circumstances was a prior conviction of a violent felony, "a factor which under Apprendi and Ring need not be found by the jury", citing Jones v. State, 855 So.2d 611, 619 (Fla. 2003)); Morris v. State, 931 So.2d 821, 837 (Fla. 2006) (noting that this Court "had repeatedly relied on the presence of the prior violent felony aggravating circumstance in rejecting Ring claims.").

One of the aggravators in this case found in this case was that Jones had previously been convicted of several violent felonies. Jones v. State, 648 So.2d 669, 673 & n.1 (Fla. 1994) (listing the aggravators found including that Jones was previously convicted of another violent felony and explaining Jones previously was convicted of attempted robbery, robbery, two counts of robbery with a firearm, and robbery with a firearm and kidnapping). Accordingly, Ring does not apply. Additionally, the jury found an aggravator during the guilt phase when it convicted Jones of robbery.

Jones v. State, 648 So.2d 669, 673 (Fla. 1994) (listing the aggravators found including that Jones was engaged in the commission of a robbery).

Moreover, a recommendation of death in the penalty phase is equivalent to a finding of an aggravator. In State v. Steele, 921 So.2d 538 (Fla. 2005), this Court explained that, even if Ring applied in Florida, it would require only that the jury make a finding that at least one aggravator exists. Given the requirements of section 921.141 and the language of the standard jury instructions, such a finding is implicit in a jury's recommendation that the defendant be sentenced to death. Steele, 921 So.2d at 546. The Steele Court relied on Jones v. United States, 526 U.S. 227, 250-251, 119 S.Ct. 1215, 143 L.Ed.2d 311 (1999), in which the United States Supreme Court explained that in Hildwin v. Florida, 490 U.S. 638, 109 S.Ct. 2055, 104 L.Ed.2d 728 (1989), "a jury made a sentencing recommendation of death, thus necessarily engaging in the factfinding required for imposition of a higher sentence, that is, the determination that at least one aggravating factor had been proved."

In accord with this Court's decision Steele, a jury's recommendation of death means the jury found an aggravator, which is all Ring requires. Under the logic of Steele and

Jones, Jones' death sentence complies with Ring because the jury recommended death.

This Court has never granted a new penalty phase based on a violation of Ring. Franklin v. State, 2007 WL 1774414, 17 (Fla. June 21, 2007) (noting that in "over fifty cases since Ring's release, this Court has rejected similar Ring claims", citing Marshall v. Crosby, 911 So.2d 1129, 1134 n. 5 (Fla. 2005) (collecting case where Ring claims have been rejected). Ring is not retroactive; does not apply to this case because the prior violent felony aggravator is present; and was complied with in both the guilt and penalty phases. This claim should be denied.

ISSUE II

WHETHER THE JURY INSTRUCTION SHIFTED THE BURDEN TO THE DEFENDANT TO ESTABLISH THAT LIFE WAS THE APPROPRIATE PENALTY?

Jones argues the jury instruction improperly shifted the burden to him to establish that life was the appropriate penalty. This claim is procedurally barred and meritless. Such burden shifting claims have been repeatedly rejected by this Court.

This claim is procedurally barred because it should have been raised on direct appeal. Blackwood v. State, 946 So.2d 960, 976 (Fla. 2006) (finding habeas claims to be procedurally barred because they either have been raised or

could have been raised on appeal or at postconviction); Orme v. State, 896 So.2d 725, 740 (Fla. 2005) (finding five claims in a habeas petition to be procedurally barred because they either were raised on direct appeal or in postconviction or should have been). This claim is not proper in a habeas petition. While habeas counsel may raise a claim of ineffective assistance of appellate counsel for not raising the issue in the direct appeal; he may not raise a "straight" jury instruction claim. A habeas petition is not a second direct appeal. Breedlove v. Singletary, 595 So.2d 8, 10 (Fla. 1992) (observing that "[h]abeas corpus is not a second appeal and cannot be used to litigate or relitigate issues which could have been ... or were raised on direct appeal.").

This claim is also with merit. This Court has consistently and repeatedly rejected the same burden shifting argument Jones presents in his habeas petition. Johnson v. State, 2007 WL 1933048, *19 (Fla. July 5, 2007) (concluding that Florida's capital sentencing statute does not unconstitutionally place a burden of proof on the defendant to prove death inappropriate, citing Kansas v. Marsh, - U.S. -, 126 S.Ct. 2516, 2525, 165 L.Ed.2d 429 (2006); Williams v. State, 2007 WL 1774389, *20 (Fla. June 21, 2007) (finding a challenge to the jury instructions to

be "without merit because this Court has repeatedly rejected the argument that the standard penalty phase jury instructions impermissibly shift the burden to the defense to prove that death is not the appropriate sentence."); Taylor v. State, 937 So.2d 590, 599 (Fla. 2006) (citing Elledge v. State, 911 So.2d 57, 79 (Fla. 2005), and Sweet v. Moore, 822 So.2d 1269, 1274 (Fla.2002)); Griffin v. State, 866 So.2d 1, 14 (Fla. 2003)(stating: "We have also repeatedly rejected claims that the standard jury instruction impermissibly shifts the burden to the defense to prove that death is not the appropriate sentence.", citing Sweet v. Moore, 822 So.2d 1269, 1274 (Fla. 2002); Carroll v. State, 815 So.2d 601, 622-23 (Fla. 2002), and San Martin v. State, 705 So.2d 1337, 1350 (Fla. 1997)); Asay v. Moore, 828 So.2d 985, 993 (Fla. 2002) (noting that the "Court has repeatedly rejected the argument that the standard instruction shifted the burden to the to the defendant to prove that a life sentence was appropriate"); San Martin v. State, 705 So.2d 1337, 1350 (Fla. 1997) (concluding the weighing provisions in Florida's death penalty statute and the standard jury instruction did not unconstitutionally shift the burden to the defendant to prove why he should not be given a death sentence).

Without acknowledging this solid wall of precedent extending over a decade, habeas counsel cites one case, Hamblen v. Dugger, 546 So.2d 1039, 1041 (Fla. 1989), in which this Court found "no merit" to such a claim. Hamblen argued that his appellate counsel was ineffective for failing to argue that the language in the sentencing order "under the evidence and the law of this State a sentence of death is mandated" employed an express presumption of death and shifted the burden to Hamblen to prove that death was inappropriate. Hamblen, 546 So.2d 1041. The Hamblen Court found that there was "nothing in this sentencing order or in this record which reflects that the court applied an express presumption of death or required Hamblen to carry the burden of proving that death was inappropriate." Contrary to habeas counsel's assertion that the Court in Hamblen concluded that such claims are addressed on a case-by-case basis, there is no such language in Hamblen - dicta or otherwise. Petition at 30.

Nor does such an instruction conflict with the principles of Mullaney v. Wilbur, 421 U.S. 684, 691, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975); Caldwell v. Mississippi, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985); Hitchcock v. Dugger, 481 U.S. 393, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987); Maynard v. Cartwright, 486 U.S. 356,

108 S.Ct. 1853, 100 L.Ed.2d 372 (1988), or any other United States Supreme Court precedent. Petition at 30-31. The United States Supreme Court has recently held that a state statute allowing a death sentence even if aggravators and mitigators are equal was constitutional. Kansas v. Marsh, - U.S. -, 126 S.Ct. 2516, 2525, 165 L.Ed.2d 429 (2006) (finding that Supreme Court precedents do not impose a specific method for balancing aggravating and mitigating factors). The United States Supreme Court, in Marsh, concluded that it was not improper for a statute to require the defendant to offer "mitigating circumstances sufficiently substantial to call for leniency."

ISSUE III

WHETHER FLORIDA'S PENALTY PHASE JURY INSTRUCTION REFERRING TO THE JURY'S RECOMMENDATION AS ADVISORY AND THE JUDGE AS THE ULTIMATE SENTENCER VIOLATE CALDWELL v. MISSISSIPPI, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985)?

Jones asserts the penalty phase jury instruction improperly refers to the jury's recommendation of death as advisory and incorrectly informs the jury that the judge is the ultimate sentencer in Florida in violation of Caldwell v. Mississippi, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985). This claim is procedurally barred. Moreover, it is meritless. Caldwell challenges have previously been rejected by this Court. These jury instructions correctly

describe Florida's sentencing structure and the relationship between the jury and judge in imposing a sentence of death. The jury's recommendation of death is, in fact, only advisory and the judge is the ultimate sentencer.

This claim is procedurally barred because it should have been raised on direct appeal. Blackwood v. State, 946 So.2d 960, 976 (Fla. 2006) (finding habeas claims to be procedurally barred because they either have been raised or could have been raised on appeal or at postconviction); Orme v. State, 896 So.2d 725, 740 (Fla. 2005) (finding five claims in a habeas petition to be procedurally barred because they either were raised on direct appeal or in postconviction or should have been). This claim is not proper in a habeas petition. While habeas counsel may raise a claim of ineffective assistance of appellate counsel for not raising the issue in the direct appeal; he may not raise a "straight" Caldwell violation. Peede v. State, 955 So.2d 480, 503 (Fla. 2007) (explaining that a claim of ineffective assistance of appellate counsel for failing to raise a Caldwell issue in the direct appeal is cognizable in a habeas petition but finding "no merit" to the claim). A habeas petition is not a second direct appeal. Breedlove v. Singletary, 595 So.2d 8, 10 (Fla.

1992) (observing that "[h]abeas corpus is not a second appeal and cannot be used to litigate or relitigate issues which could have been ... or were raised on direct appeal.").

This claim is also with merit. "This Court has repeatedly held that the Florida Standard Jury Instructions are in compliance with Caldwell." Coday v. State, 946 So.2d 988, 1008 (Fla. 2006) (citing Globe v. State, 877 So.2d 663, 674 (Fla. 2004), and Thomas v. State, 838 So.2d 535, 542 (Fla. 2003) (reiterating that the Florida Standard Jury Instructions have been determined to be in compliance with the requirements of Caldwell)). This Court has also rejected Caldwell challenges to the standard jury instructions in the wake of Ring and has specifically rejected hybrid Caldwell/Ring claims. Hannon v. State, 941 So.2d 1109, 1150 (Fla. 2006) (denying, in a habeas petition, a hybrid claim under Ring and Caldwell "as we did in Robinson v. State, 865 So.2d 1259, 1266 (Fla. 2004)"); Robinson v. State, 865 So.2d 1259, 1266 (Fla. 2004) (rejecting a claim that Florida's standard jury instructions in capital cases do not comply with Caldwell, in light of the Ring opinion.)

In Caldwell v. Mississippi, 472 U.S. 320, 341, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985), the United States

Supreme Court held that the jury must be fully advised of the importance of its role, and neither comments nor instructions may minimize the jury's sense of responsibility for determining the appropriateness of death. However, the United States Supreme Court has clarified Caldwell in a subsequent case. Romano v. Oklahoma, 512 U.S. 1, 114 S.Ct. 2004, 129 L.Ed.2d 1 (1994) (clarifying that Caldwell is limited to only certain types of comments - those that mislead the jury as to its role in the sentencing process in a way that allows the jury to feel less responsible than it should for the sentencing decision).

To establish a Caldwell violation, a defendant must show that the instructions or remarks improperly describe the jury's role under state law. Romano, 512 U.S. at 9. If the jury instructions or the prosecutor's remarks correctly describe the jury's role under local law, there is no Caldwell violation. Fleenor v. Anderson, 171 F.3d 1096, 1100 (7th Cir. 1999) (rejecting a Caldwell challenge to the prosecutor's comments that the judge is going to make the final decision because the jury was not told anything that was not true under Indiana law; the judge is not required to give the jury's recommendation weight under the law of Indiana). Furthermore, Caldwell is a one way

street. Jury instructions that inflate, not denigrate, the jury's role do not violate Caldwell. The basis of a Caldwell violation is that the jury feels less responsible than it should for the sentencing decision. If the jury is improperly instructed such that the jury feels more responsible than it should, this is not a Caldwell problem.

In Florida, the jury's recommendation is advisory and Florida's death penalty statute specifically refers to it as an "advisory sentence by the jury." *§921.141(2), Fla. Stat.* (providing that after hearing all the evidence, the jury shall "render an advisory sentence to the court"). Moreover, in Florida, the judge is the ultimate sentencer. A death recommendation by the jury is not necessarily entitled to great weight and the judge is required by statute to make his own findings regarding aggravating and mitigating circumstances "notwithstanding" the jury's death recommendation. Muhammad v. State, 782 So.2d 343, 362 (Fla. 2001) (explaining that it is only a jury's recommendation of life that should be given "great weight" pursuant to Tedder v. State, 322 So.2d 908, 910 (Fla.1975) and that "the court not only has the ability but also the duty to lessen its reliance on the jury's verdict if other considerations make the jury's recommendation entitled to less weight."); §921.141(3), Fla. Stat. (providing that

"[n]otwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based . . .). A judge is completely free to reject a jury's recommendation of death and a judge's decision in favor of life is final and unreviewable. If a judge sentences a defendant to life based on a mistake of law or even for a completely frivolous reason, that decision is not even appealable due to double jeopardy principles. Williams v. State, 595 So.2d 936 (Fla. 1992) (holding that the double jeopardy clause prohibits a new penalty phase where the judge had imposed a life sentence at the first penalty phase, citing Brown v. State, 521 So.2d 110 (Fla. 1988); Arizona v. Rumsey, 467 U.S. 203, 104 S.Ct. 2305, 81 L.Ed.2d 164 (1984) (concluding that the Double Jeopardy Clause barred a new penalty phase where trial judge had found no aggravating circumstances and sentenced the defendant to life at the first penalty phase because a life sentence constitutes an "acquittal of the death penalty"); State v. Ballard, 956 So.2d 470, 475 (Fla. 2d DCA 2007) (Villanti, J., concurring) (noting that it is only a judge's decision to

override a jury's recommendation of life that is appealable; conversely, a decision to override a jury's recommendation of death is not appealable). The standard jury instructions given to Jones' jury are correct statements of Florida law regarding the role of the jury in capital sentencing in Florida, did not denigrate the jury's role and therefore, did not violate Caldwell.

CONCLUSION

The State respectfully requests that this Honorable Court deny the habeas petition.

Respectfully submitted,

BILL McCOLLUM
ATTORNEY GENERAL

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CHARMAINE M. MILLSAPS
ASSISTANT ATTORNEY GENERAL
FLORIDA BAR NO. 0989134

OFFICE OF THE ATTORNEY GENERAL
THE CAPITOL
TALLAHASSEE, FL 32399-1050
(850) 414-3300
COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Harry P. Brody, Brody & Hazen PA, PO Box 16515 Tallahassee, FL 32317-6515, this 24th day of July, 2007.

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Charmaine M. Millsaps
Attorney for the State of Florida

CERTIFICATE OF FONT AND TYPE SIZE

Counsel certifies that this brief was typed using Courier New 12 point font.

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Charmaine M. Millsaps
Attorney for the State of Florida