IN THE SUPREME COURT OF FLORIDA

BRODERICK MONLYN,

Petitioner,

v. Case No. SC 03-1757

JAMES V. CROSBY, Secretary,
Florida Department of Corrections,

Respondent.
_____/

PETITION FOR WRIT OF HABEAS CORPUS

Comes now Broderick Monlyn, petitioner, through undersigned court-appointed Registry counsel, and files this petition for writ of habeas corpus per the provisions of Florida Rule of Criminal Procedure 3.851(b)(2), Florida Rule of Appellate Procedure 9.140(b)(6)(E),[1] and Section 27.711, Florida Statutes (1998 as amended). In support thereof, the petitioner states:

Procedural History and Facts

1. Monlyn was convicted in 1993 and sentenced to death for the first-degree murder of Alton Watson. The facts in the case are set forth in this Court's opinion affirming Monlyn's conviction and sentence on direct appeal. See *Monlyn*

[1] Because Monlyn's post conviction motion, and amended motion, were filed prior to October 1, 2001, the old version of the rule was referenced. The same provision under the current version of the rule is found at Florida Rule of Criminal Procedure 3.851(d)(3).

v. State, 705 So. 2d 1 (Fla. 1995). On June 26, 1998, the United States Supreme Court denied certiorari review. *Monlyn v. Florida*, 524 U.S. 957 (1998).

2. Monlyn filed his initial motion for post conviction relief on June 15, 1999. He filed an amended post conviction motion on August 1, 2001. After conducting a Huff[2] hearing, the trial court granted an evidentiary hearing as to claims 1 through 6, 9, 11, and 12(c) and (h), but denied an evidentiary hearing as to the remaining claims. An evidentiary hearing was held on the above referenced claims. On June 24, 2002, the trial court rendered an order denying relief as to those claims. Thereafter, Monlyn filed a timely notice of appeal to this Court.

Jurisdiction

3. The claim presented herein challenges the validity of Florida's death penalty statute, arguing that it is unconstitutional under the principles established in *Ring v. Arizona*, 122 S.Ct. 2428 (2002). Such a claim is cognizable in a habeas proceeding. See *Mills v. Moore*, 786 So. 2d 532 (Fla. 2000), where this Court considered the merits of a similar claim in a habeas proceeding.[3] The instant petition

[2] *Huff v. State*, 622 So. 2d 982 (Fla. 1993).

[3] In *Mills* the prisoner argued that Florida's death penalty statute was unconstitutional under the principles set forth in *Apprendi v. New Jersey*. This Court denied the petition noting that the United States Supreme Court "specifically stated in the majority opinion that *Apprendi* does not apply to already challenged capital sentencing schemes that have been deemed constitutional." *Mills*, 786 So. 2d at 536. In denying the petition, this Court also held "[b]ecause *Apprendi* did not overrule *Walton*, the basic scheme in Florida is not overruled either." *Id.* at 537. The *Ring v. Arizona*, 122 S.Ct. 2428 (2002) decision (which applied the *Apprendi* principles to capital sentencing schemes and overruled *Walton*) requires this Court to reconsider

for writ of habeas corpus is submitted simultaneously with Monlyn's initial brief from the circuit court's denial of his 3.850 motion. *See* Fla. R. Crim. P. 3.851(b)(2) and Florida Rule of Appellate Procedure 9.140(b)(6)(E). Thus, this Court has jurisdiction pursuant to Article V, Section 3(b)(9), Florida Constitution.

Claim for Relief

4. Monlyn alleges that his death sentence must be vacated because Florida's death penalty statute, Section 921.141, Florida Statutes (1993), is unconstitutional under the principles set forth in *Ring v. Arizona*, 122 S.Ct. 2428 (2002). Specifically, Monlyn argues that Florida's death penalty statute is not constitutional because it (a) does not require the jury to find the existence of each aggravating circumstance beyond a reasonable doubt, (b) does not require the jury to find beyond a reasonable doubt that the mitigating circumstances are insufficient to outweigh the aggravating circumstances that were established, (c) does not require the jury's findings noted above to be unanimous, (d) provides that the jury's verdict is only advisory and not binding,[4] and (e) only requires a bare majority of the jurors (a non-unanimous jury verdict) to make a death recommendation to the court.

5. In *Ring v. Arizona*, 122 S.Ct. 2428 (2002), the U.S. Supreme Court declared Arizona's death penalty statute unconstitutional because it violated the Sixth Amendment's guarantee of a trial by jury. Under Arizona law the trial judge rather than the jury made the necessary findings of fact on aggravating factors required to subject the defendant to the death penalty.[5] Because Florida trial judges

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its holding in *Mills*.

[4] This relates to what is commonly referred to as a "jury override," meaning that if the jury recommends that the defendant should be sentenced to life in prison, the trial judge has the authority to override the jury's recommendation and impose death. Of course a jury override could also occur where the jury recommends death but the judge imposes a life sentence. However, the latter type of jury override does not have constitutional implications as it is generally recognized that a life sentence is less severe than a sentence of death. See *Bottoson v. Moore*, 833 So. 2d 693, 728 (Fla. 2002) (Lewis, J., concurring in result only) (noting that it is "within constitutional parameters" for a trial judge to adjust a defendant's sentence downward from death to life).

[5] Subsequent to the *Ring* decision, this Court decided *Bottoson v. Moore*, 833 So.

make the same factual findings aided by a non-binding, advisory recommendation of non-unanimous juries, Florida's death penalty statute must be struck down as unconstitutional as well.

6. This Court first addressed the applicability of the *Ring* issue to Florida's death penalty statute in *Bottoson v. Moore*, 833 So. 2d 693 (Fla. 2002) and *King v. Moore*, 831 So. 2d 143 (Fla. 2002). In *Bottoson*, this Court held that the petitioner was not entitled to relief under *Ring* because, had the U.S. Supreme Court intended to extend the *Ring* decision to Florida's death penalty scheme, it would have either granted Bottoson's petition for writ of certiorari or directed the Florida Supreme Court to reconsider *Bottoson* in light of *Ring*. *Bottoson*, 833 So. 2d at 695. Furthermore, this Court determined that the petitioner was not entitled to relief because *Ring* did not expressly overrule its prior decisions[6] upholding Florida's death penalty statute. *Id.* However, although all of the justices concurred that Bottoson was not entitled to relief under *Ring*, only a plurality of the justices believed Florida's death penalty scheme remained unaffected by *Ring*.[7] In this regard, a majority of this Court, as set forth in the separately filed opinions, stated that Florida's death penalty scheme was inconsistent with (or at least affected by) *Ring* and concurred in the result only, namely because one of Bottoson's aggravating factors was for a prior violent felony conviction, which was considered by this Court as a factor not requiring a jury determination.

7. Monlyn contends that this Court misapplied the principles announced in *Ring* -- in that, although it is true that *Ring* did not explicitly overrule its earlier decisions upholding Florida's death penalty scheme, by virtue of the *Ring* decision itself, any earlier decision that does not comport with or cannot be reconciled with the legal principles announced in *Ring* are implicitly overruled. Simply because the U.S. Supreme Court did not expressly overrule *Hildwin*, *Spaziano* and *Proffitt* in *Ring* is irrelevant. In *Ring*, the Court had no reason to overrule those decisions

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2d 693 (Fla. 2002) and *King v. Moore*, 831 So. 2d 143 (Fla. 2002). These cases are discussed herein.

[6] See, *e.g.*, *Hildwin v. Florida*, 490 U.S. 638 (1989); *Spaziano v. Florida*, 468 U.S. 447 (1984); *Barclay v. Florida*, 463 U.S. 939 (1983); *Proffitt v. Florida*, 428 U.S. 242 (1976).

[7] In *Bottoson*, Senior Justice Harding and Justices Wells and Quince concurred with the per curiam opinion, stating that Florida's death penalty statute was not unconstitutional under *Ring*. However, Chief Justice Anstead and Justices Shaw, Pariente, and Lewis only concurred in the result while, although supporting the denial of relief to Bottoson, stated that the constitutionality of Florida's death penalty statute has been called into question by *Ring*.

for the reason that the Court was applying its *Apprendi* decision to Arizona's statute, not Florida's.

8. The argument that Florida's death penalty statute should survive scrutiny because the U.S. Supreme Court did not grant certiorari in the *Bottoson* and *King* cases in light of *Apprendi* should be rejected. The U.S. Supreme Court has repeatedly cautioned that no significance whatsoever should be given to a denial of certiorari because that Court regularly denies certiorari for reasons completely unrelated to the merits of a particular case. *See, e.g., Knight v. Florida*, 528 U.S. 990 (1999) (opinion of Stevens, J., respecting denial of petitions for writs of certiorari) (noting that "it seems appropriate to emphasize that the denial of these petitions for certiorari does not constitute a ruling on the merits").

9. Moreover, when this Court stated that *Bottoson* was not entitled to relief because one of his aggravating factors was based on a prior conviction, which *Apprendi* seemed to exclude from its jury trial requirement,[8] this Court failed to appreciate the context in which that limitation was made. At the time *Apprendi* was decided, the U.S. Supreme Court was announcing what the Sixth Amendment required as to a non-capital offense. *Apprendi's* language was proper because it would be unnecessary and futile to require a jury to determine the existence of a prior conviction as to a non-capital offense. This is so because virtually all the non-capital statutes that utilize the defendant's prior convictions to trigger the enhancement statute do so automatically and no additional findings are required. For example, if a particular non-capital state statute (i.e., an habitual offender statute) provides for increased penalties for repeat offenders, a trial judge is permitted to determine the existence of the prior convictions under *Apprendi*. But when prior convictions are used as aggravating factors in a death penalty proceeding, the same analysis fails. That is, the existence of a prior violent felony conviction (which is an aggravating factor in Florida) is not all that is required to subject a defendant to the death penalty. In Florida, in addition to the requirement that there be at least one aggravating factor proven, there must also be a finding that "there are insufficient mitigating circumstances to outweigh the aggravating circumstances." *See* Sec. 921.141(3)(b), Fla. Stat. (1993). Thus, under the logic of the *Bottoson* decision, if a defendant had a prior violent felony conviction, it would automatically subject him to the death penalty notwithstanding the statute's additional requirement that there are insufficient mitigating factors to outweigh the

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[8] The *Apprendi* language was "other than a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi*, 530 U.S. at 490.

aggravating factors. This result surely is not what *Apprendi* intended. Thus, because Florida's death penalty statute requires the existence of at least one aggravating factor that must outweigh the existence of the mitigating factors, when a prior conviction is used as an aggravating factor it must be proven beyond a reasonable doubt by a jury.[9]

10. The principles announced in *Ring* are entitled to retroactive application. In considering whether to apply a new rule of law retroactively to cases on collateral review, Florida follows the test set forth in *Witt v. State*, 387 So. 2d 922 (Fla. 1980). In *Witt*, this Court held,

> To summarize, we today hold that an alleged change of law will not be considered in a capital case under Rule 3.850 unless the change: (a) emanates from this Court or the United States Supreme Court, (b) is constitutional in nature, and (c) constitutes a development of fundamental significance.

Id. at 931. Clearly, *Ring* satisfies this standard because *Ring* originated from the United States Supreme Court, the claim was predicated upon the Sixth Amendment to the U.S. Constitution, and the change in law was a development of fundamental significance.

11. The Ninth Circuit Court of Appeals recently held in an en banc decision that *Ring* applies retroactively to cases on collateral review. See *Summerlin v. Stewart*, 2003 U.S. App. LEXIS 18111 (9th Cir. September 2, 2003) (en banc). In doing so, the court initially pointed out that "[t]he threshold question in a Teague analysis is whether the rule the petitioner seeks to apply is a substantive rule or a procedural rule." *Id*. at 46. "If the rule is procedural, the

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[9] In *Ring*, the Court held that "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*, 122 S.Ct. at 2439 (citing *Apprendi*, 530 U.S. at 482-83).

court then conducts a three-step analysis to determine whether Teague bars its application." *Id.* In contrast, if the rule is substantive, then the rule is "presumptively retroactive." *Id.* at 48. The court concluded that whether the *Ring* decision was characterized as establishing a new substantive or procedural rule of law, it was entitled to retroactive application.

12. For the foregoing reasons, Florida's death penalty statute must be declared unconstitutional under the Sixth Amendment and the principles announced in *Ring*, and Monlyn's death sentence must be vacated.

CONCLUSION

This Court is therefore respectfully requested to vacate Monlyn's sentence of death and declare Florida's death penalty statute unconstitutional pursuant to the principles established in the United States Supreme Court's decision in *Ring v. Arizona*.

Respectfully submitted,

_____
Baya Harrison, III
P.O. Drawer 1219
Monticello, Florida 32345
Tel: (850) 997-8469
Fla. Bar No. 099568
Court-Appointed Counsel for
Broderick W. Monlyn

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was provided by United States mail delivery to the Office of the Attorney General of Florida, Department of Legal Affairs, The Florida Capitol Building, Plaza Level One, Tallahassee, Florida 32399-1050, and to Ernest M. Page, III, Esq., Assistant State Attorney, Office of the State Attorney, Third Judicial Circuit of Florida, Post Office Drawer 1546, Live Oak, Florida 32064 this ____ day of October, 2003.

_____
Baya Harrison, III

CERTIFICATE OF COMPLIANCE

I certify that this petition has been prepared using a Times New Roman 14 point font not proportionally spaced in compliance with Florida Rule of Appellate

Procedure 9.210(a)(2).

_____
Baya Harrison, III