IN THE SUPREME COURT OF FLORIDA

CASE NO. SC02-1122

LANCELOT URILEY ARMSTRONG,

Appellant,

v.

MICHAEL W. MOORE,
Secretary, Florida Department of Corrections,

Respondent.

REPLY TO STATE'S RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

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ARGUMENT IN REPLY TO
CLAIM IV

THE APPRENDI/RING CLAIM

Mr. Armstrong filed his Petition for Writ of Habeas Corpus on May, 14, 2002. Claim IV raised the issue that Mr. Armstrong is entitled to relief under Apprendi v. New Jersey, 530 U.S. 455 (2000). Since Mr. Armstrong filed his petition on June 26, 2002, the United States Supreme Court issued an opinion in Ring v. Arizona, 122 S. Ct. 2428 (2002), which specifically held that Apprendi applied to capital sentencing statutes, and held the Arizona sentencing statute unconstitutional. Though filed substantially after Ring, the State's Response fails to mention the Ring opinion. Ring has a significant impact on Mr. Armstrong's case.

This Court discussed in it opinions in Bottoson v. Moore, 27 Fla. L. Weekly S 891(Fla. Oct. 24, 2002) and King v. Moore, 27 Fla. L. Weekly S 906 (Fla. Oct. 24, 2002), how Ring applies to the Florida sentencing statute. Even though there was not a consensus among the Court about the retroactive application of Ring, it is clear that much confusion exists about the impact of Ring in Florida. The Court, however, refused to apply Ring to either Mr. Bottoson or Mr. King, in part, because they both had prior violent felony aggravators in their cases. Mr. Armstrong's case is distinguishable from both cases.

The State's Response suggests that the Apprendi/Ring claim is

procedurally barred. However, the State's procedural arguments have in fact been repeatedly rejected by this Court in each case where the Court has addressed claims brought under either Apprendi or Ring. In Bottoson and King, the State argued that the claims was procedurally barred, yet the Court addressed all of the Apprendi/Ring claims on the merits. This Court also addressed the Ring issue on its merits when it had been raised for the first time in a Motion for Rehearing. See Chavez v. State, 2002 Fla. Lexis 2452 (Nov. 21, 2002).

More importantly, Mr. Armstrong has repeatedly argued throughout his trial, direct appeal and post-conviction appeal that Florida's capital sentencing scheme was unconstitutional, specifically citing the exact issues addressed in Ring. See, Armstrong v. State, 642 So. 2d 730,734-35 (Fla. 1994)[1]. There are no procedural impediments to a merits ruling in Mr. Armstrong's case.

The facts of Mr. Armstrong's case are distinguishable from those in Bottoson or King. Both Bottoson and King involved an aggravating

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[1]Among the claims raised on direct appeal were claims regarding: (8)the trial court erred in allowing the State to proceed on a felony-murder theory when the indictment gave no notice of that theory; Penalty phase (1)the trial judge formulated the sentencing decision before giving Mr. Armstrong an opportunity to be heard;(2) & (3) certain aggravating circumstances were duplicative and the trial judge erred in denying Armstrong's requested limiting instruction on doubling aggravators; (10) the trial judge erred in denying Armstrong's requested jury instruction that mitigating evidence does not have to be found unanimously; (11) the jury's instruction given on sentencing minimized the jury's sense of responsibility; (14) Florida's death penalty statute is unconstitutional; (15) the aggravating circumstances used in this case are unconstitutional.

circumstance of a prior violent felony. See Amendarez-Torres v. United States, 523 U.S. 224 (1998). As explained in Mr. Armstrong's initial brief on the merits and his petition for habeas corpus, this aggravating circumstance no longer applies.

In Mr. Armstrong’s case, the trial judge gave the jury instructions on and found four aggravating circumstances. These were:

(1) Committed for the purpose of avoiding arrest;
(2) Murder of a law enforcement officer engaged in the performance of official duties;
(3) Committed during a robbery or flight therefrom; and
(4) Prior conviction of a violent felony.

(R.2429).

The jury was instructed that the contemporaneous attempted murder and robbery charges and the prior Massachusetts conviction for indecent assault and battery were the basis for the "prior conviction of a violent felony" aggravating circumstance.

On direct appeal, Mr. Armstrong argued that the lower court's finding of these four aggravating circumstances was error because it was based on two instances of improper doubling. Armstrong v. State, 642 So. 2d at 738. Mr. Armstrong argued that the trial judge had doubled the "committed for the purpose of avoiding arrest" and the "murder of a law enforcement officer engaged in the performance of official duties" aggravating circumstances. Mr. Armstrong also argued that the "committed during a robbery or flight therefrom," was based on the same contemporaneous convictions for attempted murder and

robbery as the "prior conviction of a violent felony."

This Court agreed that "committed for the purpose of avoiding arrest" and the "murder of a law enforcement officer engaged in the performance of official duties" aggravating circumstances were improperly doubled. However, this Court rejected the argument that these aggravators were improperly doubled because it relied on the remaining Massachusetts conviction, holding that:

> Armstrong's argument, however that the "committed while engaged in the commission of a robbery or flight therefrom" and "prior conviction of a violent felony" aggravators are also duplicative is without merit because the record reflects that Armstrong had a previous felony conviction for indecent battery on a fourteen year old child.

Armstrong v. State, 642 So.2d 730, 738, (Fla. 1994).

Therefore, without the Massachusetts conviction, these aggravators would have been found to be improperly doubled as well.

This Court found that although the trial judge had improperly doubled two sets of aggravating circumstances and instructed the jury on all of the invalid aggravators, this was:

> harmless error beyond a reasonable doubt in the light of the remaining three valid aggravating circumstances and the negligible mitigating evidence in this case.

Armstrong v. State, 642 So. 2d at 739).

Now, this Court has the benefit of knowing that the prior Massachusetts conviction was in fact unconstitutional and invalid.

See, Initial Brief at 7. Thus, this Court's finding that three valid aggravating circumstances existed was incorrect. More importantly, the jury was improperly instructed on two aggravating circumstances. Under Johnson v. Mississippi, 108 S. Ct. 1981 (1988) and Ring, this error is fatal to Mr. Armstrong's sentence. Cf. Initial Brief, Argument I at page 6. The error is not harmless, as this Court previously held.

In addition, this Court found no prejudice to Mr. Armstrong when the trial judge prepared the sentencing order prior to conducting a Spencer[2] hearing and giving Mr. Armstrong an opportunity to be heard at his sentencing. Armstrong v. State, 642 So. 2d at 738. Nor did this Court find merit in Mr. Armstrong's claim that the jury instructions diluted the jury's sense of responsibility for sentencing. Both of these issues become important under Ring, particularly when considered cumulatively with the errors in instructing on the aggravating circumstances. This puts Mr. Armstrong's case in a radically different posture from Mr. Bottoson or Mr. King.

In Bottoson, Justice Shaw explained that the prior violent felony aggravator was the particular factor that excluded Mr. Bottoson from "Ring's purview and standing by itself, can serve as a basis to 'death qualify' a defendant" Bottoson v. Moore, 27 Fla. L. Weekly S 891(Fla. Oct. 24, 2002). Justice Pariente agreed with his assessment.

In King, Justice Shaw also found that habeas relief should be

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[2]Spencer v. State, 615 So. 2d 600 (Fla. 1993).

denied because King's sentence of death was based in part on the aggravating circumstance of "previous conviction of violent felony." King v. Moore, 27 Fla. L. Weekly S 906 (October 24, 2002). Without the "previous conviction of violent felony" aggravating factor, Justice Shaw would have granted relief on the basis of Ring v. Arizona. Justice Pariente also agreed with Justice Shaw:

> The crucial question after Ring is "one not of form, but of effect." 122 S. Ct. at 2439. *In effect*, the maximum penalty of death can be imposed only with the additional factual finding that aggravating factors outweigh mitigating factors. *In effect*, Florida juries in capital cases *do not do* what Ring mandates – that is, make specific findings of fact regarding the aggravators necessary for the imposition of the death penalty. *In effect*, Florida juries *advise* the judge on the sentence and the judge *finds* the specific aggravators that support the sentence imposed. Indeed, under both the Florida and Arizona schemes, it is the judge who *independently* finds the aggravators necessary to impose the death sentence.

Bottoson v. Moore, 27 Fla. L. Weekly S 891(Fla. Oct. 24, 2002) (italics in original).

Chief Justice Anstead stated:

> Thus, Ring requires that the aggravating circumstances necessary to enhance a particular defendant's sentence to death must be found by a jury beyond a reasonable doubt in the same manner that a jury must find that the government has proven all the elements of the crime of murder in the guilt phase. It appears that the provision for judicial findings of fact and the purely advisory role of the jury in capital sentencing in Florida falls short of the mandates announced

in Ring and Apprendi for jury fact-finding.

Bottoson v. Moore, 27 Fla. L. Weekly S 891(Fla. Oct. 24, 2002).

Given the unconstitutionality of Mr. Armstrong's Massachusetts conviction, the circumstances here are different from Bottoson and King. This claim is not procedurally barred as the State argues in its Response. Mr. Armstrong's sentence of death violates the Sixth and Eighth Amendments.

Even if Mr. Armstrong's prior violent felony aggravating circumstance were to be upheld, it is clear that every fact necessary to enhance Mr. Armstrong's sentence to impose death was not found by a jury.

In Apprendi, Justice Thomas, whose vote was decisive in the five to four Amandarez-Torres vote, receded from his support of Amandarez-Torres. Apprendi 530 U.S. at 520-21. The Apprendi majority found it unnecessary to overrule Amandarez-Torres explicitly in order to decide the issues before it but acknowledged that "it is arguable that Amandarez-Torres was incorrectly decided" Apprendi, 530 U.S. at 439.

At the same time, the Apprendi majority explicitly restricted Amandarez-Torres to a "narrow exception to the general rule "that every fact which is necessary to enhance a criminal defendant's maximum sentence exposure must be found by a jury - an exception limited to the unique facts in Amandarez-Torres.

The facts in Amadarez-Torres were that the defendant had pleaded

guilty to an indictment that he had returned to the Unites States after being deported and that he had admitted to being deported because of his previous conviction of three aggravated felonies. He elected to forego trial and accept the uncontested adjudication of his guilt for a crime which by definition included the felony convictions later included to enhance his sentence. Thus, the guilty plea actively precluded a jury's finding of those elements of the crime.

The State suggests that "[t]o this date Apprendi has not altered, let alone overruled this Court's precedent that since death is the maximum penalty under the statute, Apprendi does not apply to Florida's death penalty statute." The State relies on Mills v. Moore, 786 So. 2d 532, 537(Fla. 2001) to support this position. However, the State omits that Mills cannot survive Ring.[3] In Mills, this Court held

> Because Apprendi did not overrule Walton[4] the basic schema in Florida is not overruled either
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> * * *
>
> The majority opinion in Apprendi forecloses Mills' claim because preserves the

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[3]Justice Pariente in this Court's Order Granting Stay of Execution and Setting Oral Argument dated July 8, 2002 in Bottoson v. Moore, Case No. SC02-1455 said:

> In Mills, we rejected the argument that because the maximum penalty is death, a jury finding was not necessary. Mills v. Moore, 786 So. 2d at 537. Based upon the U.S. Supreme Court's statements in Ring, we now know that **we were wrong**.

Bottoson v. Moore, Case No. SC02-1455; Order Granting Stay of Execution and Setting Oral Argument at page 7 (emphasis added).

[4] Walton v. Arizona, 497 U.S. 639 (1990).

> constitutionality of capital sentencing schemes like Florida's. Therefore on its face Apprendi is inapplicable to this case.

Mills v. Moore, 786 So. 2d 532, 537.

Given Ring's explicit holding that Apprendi does in fact apply to capital sentencing schemes, the State's reliance on Mills and its precursors is misplaced.

In Bottoson, the applicability of Ring to Florida's sentencing statute was made plain:

> Nowhere in Florida law is there a requirement that the finding of an aggravating circumstance must be unanimous. Ring, however, by treating a death qualifying aggravator as an element of the offense imposes upon the aggravator the burden of proof of other elements including Florida's requirement of a unanimous jury finding. Ring therefore has a direct impact on Florida's capital sentencing schema.

Bottoson v. Moore, 27 Fla. L. Weekly S 891 (Oct. 24, 2002)

Justice Pariente concurred:

> The crucial question after Ring is "not one of form but of effect" 122 S.Ct. at 2249. In effect the maximum effect of the penalty of death can only with the additional fact finding that aggravating factors outweigh mitigating factors. In effect Florida juries in capital cases do not do what Ring mandates - that is make specific findings of fact regarding the aggravators necessary for the imposition of the death penalty.In effect Florida juries advise the judge on the sentence and the judge finds the specific aggravators that support the sentence imposed. Indeed under both the Florida and Arizona schemes it is the judge who independently finds the aggravators necessary to impose the death

sentence.

Bottoson v. Moore, at 95)(emphasis in original)

Chief Justice Anstead concurred:

> ...Ring requires that the aggravating circumstances necessary to enhance a particular defendants sentence to death must be found by a jury beyond a reasonable doubt in the same manner that the jury must find that the government has proven all the elements of the crime of murder in the guilt phase. It appears that the provision for judicial findings of fact and the purely advisory role of the jury in capital sentencing in Florida falls short of the mandates announced in Ring and Apprendi for jury fact-finding.

Bottoson at 95.

The applicability of Ring to the Florida death penalty statute is plain. Ring deeply affects Mr. Armstrong's case in that the jury was incorrectly instructed on two of the four aggravating circumstances and relied on the unconstitutional prior Massachusetts conviction in sentencing Mr. Armstrong to death. These errors were compounded by jury instructions which diminished the responsibility of the jury in sentencing and by an indictment that did not explicitly give notice of the theory the State was relying on to charge Mr. Armstrong. These are all fatal errors under Ring. Mr. Armstrong properly preserved these issues.

Contrary to Bottoson and King, Mr. Armstrong is entitled to relief.

ARGUMENT IN REPLY
CLAIMS I-III

Because Claim IV, the Apprendi/Ring claim is dispositive of this petition, Mr. Armstrong relies on the Initial Petition for Habeas Corpus Relief as sufficient to rebut the State's arguments on Claims I-III. Mr. Armstrong does not waive any issues as to those claims.

CONCLUSION

Mr. Armstrong is entitled to relief under Ring. Because this claim is dispositive, Mr. Armstrong relies on the arguments set forth in his Petition for Habeas Corpus Relief and on the record on appeal to rebut the State's arguments as to the remaining claims.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing petition has been furnished by United States Mail, first class postage prepaid, to Celia Terenzio Esq., Office of the Attorney General, 1515 North Flagler Drive, 9th Floor, West Palm Beach, FL 33340-3432 on December 9, 2002.

CERTIFICATE OF COMPLIANCE

The undersigned counsel hereby certifies that this Reply to the State's Response to the Petition for Habeas Corpus Relief complies with the font requirements of Rule 9.210(a)(2), Fla. R. App. P.

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