

**IN THE SUPREME COURT OF FLORIDA**

**CASE NO. SC02-1788**

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**MICHAEL T. RIVERA,**

**Petitioner,**

**v.**

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

**Respondent.**

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

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## **REPLY TO CLAIM I**

The State first argues that Mr. Rivera has not properly preserved this claim for “collateral review” as he did not “challenge the constitutionality of the death penalty statute in any manner” at trial or on appeal (Response at 6). Thus, the State asserts that Mr. Rivera’s claim is procedurally barred (Id.). However, a petition for habeas corpus is not a collateral proceeding, but an original action in this Court. Mr. Rivera raised this issue in a petition for habeas corpus as he views the Supreme Court’s decision in Ring to be new and novel; and as such, habeas corpus is precisely the avenue in which it should be raised. Notwithstanding these principles Mr. Rivera did challenge the constitutionality of the death penalty pretrial (2166-67; 2185-86; 2193-94).

Mr. Rivera recognizes that this Court has recently issued its decisions in Bottoson v. Moore, 2002 Fla. LEXIS 2200 (Fla. Oct. 24, 2002), and King v. Moore, 2002 Fla. LEXIS 2199 (Fla. Oct. 24, 2002). In both Bottoson and King, each justice wrote separate opinions explaining his or her reasoning for denying both petitioners relief. In both decisions, a *per curiam* opinion announced the result. In neither case does a majority of the sitting justices join the *per curiam* opinion or its reasoning. In both cases, four justices (Chief Justice Anstead, and Justices Shaw, Pariente, and Lewis) wrote separate opinions explaining that they

did not join the *per curiam* opinion, but concurred in result only.<sup>1</sup>

The State's procedural arguments have been repeatedly rejected in each case where the Court has addressed Ring claims or claims brought prior to Ring under the authority of Apprendi v. New Jersey, 530 U.S. 466 (2000). Indeed, in Bottoson and King, one of the State's primary arguments was procedural bar, yet the Court addressed all of the Ring issues in both cases on their merits.<sup>2</sup> Thus, no procedural impediments exist to a merits ruling as to Mr. Rivera's case.

The State's argument that Ring is not retroactive under Witt v. State, 387 So. 2d 922 (Fla. 1980) has been effectively foreclosed by the Bottoson and King decisions, wherein the majority of the justices denied relief without any discussion of the non-retroactivity of Ring. Certainly, if there was any validity to the State's retroactivity argument, it would have been discussed or addressed in Bottoson and/or King.

In any event, Mr. Rivera submits that Ring clearly meets all the criterion of

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<sup>1</sup>In many ways, the Bottoson decision contains the primary opinions of the seven justices. The Court had seven participating justices in that decision, while in King, Justice Quince was recused. Generally, the separate opinions in King rely upon the separate opinions in Bottoson as more fully reflecting the reasoning of its author.

<sup>2</sup>In fact, the Court recently addressed a Ring issue on the merits which had been raised for the first time in a motion for rehearing. Chavez v. State, No. SC944586 (Nov. 21, 2002).

Witt. As discussed by Justice Shaw in his opinion in Bottoson, Ring is a decision that emanated from the United States Supreme Court, its holding is constitutional in nature as it “goes to the very heart of the constitutional right to trial by jury,” and it is of fundamental significance. Bottoson v. Moore, 2002 Fla. LEXIS 2200 at \*71-73. (Shaw, J., concurring in result only).<sup>3</sup> As Ring is a significant change in the law and fulfills the retroactivity requirements of Witt, Mr. Rivera’s petition for writ of habeas is appropriately filed. See e.g. Hall v. State, 541 So. 2d 1125 (Fla. 1989).

The State argues that the requirements of Apprendi and Ring were met in Mr. Rivera’s case. The State concludes that because the jury recommended a death sentence, that means the aggravators were proven beyond a reasonable doubt (Response at 11). This is entirely speculative. It is impossible to know what aggravating factors the jury relied on in making its advisory recommendation. The Court’s recent decisions establish that at least three justices believe that Florida capital juries are not meeting the requirements of Apprendi and Ring. In Bottoson,

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<sup>3</sup> The State points to federal circuits that have found that Apprendi is not retroactive (Response at 7-8). The fact that the federal courts have not applied Apprendi retroactively is not significant. The federal courts determine retroactivity under the standards set forth under Teague v. Lane 489 U.S. 288 (1989). This has no bearing on whether this Court will determine whether Ring and Apprendi are retroactive under Witt v. State.

Justice Shaw expressed his view that the Florida death penalty statute violated the principle enunciated in Ring v. Arizona:

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 rigors of proof as other elements, including Florida’s requirement of a unanimous jury finding. Ring, therefore, has a direct impact on Florida’s capital sentencing statute.

Bottoson v. Moore, 2002 Fla. LEXIS 2200 at 70. At another point in his opinion,

Justice Shaw concluded that Florida’s statute was flawed:

I read Ring v. Arizona, 122 S.Ct. 2428 (2002), as holding that “an aggravating circumstance necessary for imposition of a death sentence” operates as “the functional equivalent of an element of a greater offense than the one covered by the jury’s verdict” and must be subjected to the same rigors of proof as every other element of the offense. Because Florida’s capital sentencing statute requires a finding of at least one aggravating circumstance as a predicate to a recommendation of death, that “death qualifying” aggravator operates as the functional equivalent of an element of the offense and is subject to the same rigors of proof as the other elements. When the dictates of Ring are applied to Florida’s capital sentencing statute, I believe our statute is rendered **flawed** because it lacks a unanimity requirement for the “death qualifying” aggravator.

Bottoson v. Moore, 2002 Fla. LEXIS 2200 at 74 (emphasis added). In her opinion

“concur[ring] in result only” in Bottoson, Justice Pariente said, “I believe that we must confront the fact that the implications of Ring are inescapable.” Bottoson v. Moore, 2002 Fla. LEXIS 2200 at 89. Later in that opinion, she elaborated:

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, 2002 Fla. LEXIS 2200 at 94-95 (emphasis in original). Thus, it is clear that Justice Pariente believes that the Florida death penalty statute violates the principles enunciated in Ring.

Chief Justice Anstead also has concerns regarding the implications of Ring.

In his opinion in Bottoson, 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, 2002 Fla. LEXIS 2200 at 39.

The State argues “not only did Mr. Rivera have a jury that recommended death, but one of the aggravators that the judge relied on was found by the jury in the guilt phase” (Response at 12). Respondent’s argument overlooks the structure of Florida’s capital sentencing procedure, which requires that in order for a defendant to be eligible for a death sentence, the sentencer must find not only that an aggravating circumstance exists, but also that “sufficient” aggravating circumstances exist. Use of the felony murder aggravator may not properly be used as a substitute for a jury determination that sufficient aggravators existed in Mr. Rivera’s case. Moreover, to do so with felony-murder convictions would carry automatic aggravation and death eligibility which does not “genuinely narrow the class of persons eligible for the death penalty” and which does not “reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder.” Lowenfield v. Phelps, 484 U.S. 231, 244 (1988) (quoting Zant v. Stephens, 462 U.S. 862, 877 (1983)).

Respondent’s argument would mean that Florida has determined that a felony-murder conviction automatically renders a defendant death eligible, while a

premeditated murder conviction does not. Porter v. State, 564 So.2d 1060, 1064 (Fla. 1990). Under the logic of Porter, the “in the course of a felony” aggravating circumstance cannot be mechanically applied to every felony-murder conviction.<sup>4</sup> If every felony-murder conviction automatically carried with it a finding of an underlying felony that constitutes an aggravating circumstance and death eligibility, Florida’s death penalty statute would violate Furman v. Georgia, 408 U.S. 238 (1972). Such an overbroad death eligibility scheme was condemned by Furman. Zant v. Stephens.

The State argues that in Mr. Rivera’s case the prior violent felony aggravator found by the trial court exempts him from the holding in Apprendi. Mr. Rivera acknowledges that the Court’s recent decisions in Bottoson and King denied relief on the basis that both Bottoson and King had prior violent felonies. See Amendarez-Torres v. United States, 523 U.S. 224 (1998). Three of this Court’s Justices concurring in the result only indicated that the existence of the aggravating

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<sup>4</sup>In Proffitt v. State, 510 So.2d 896, 898 (Fla. 1987), this Court specifically rejected the State’s argument that the “in the course of a felony” aggravating circumstance could by itself “justify the death penalty” in a felony-murder case. In Proffitt, this Court cited Rembert v. State, 445 So.2d 337 (Fla. 1984), and Menendez v. State, 368 So.2d 1278 (Fla. 1979).

circumstance served as a basis for denying relief in both of those cases.<sup>5</sup>

Mr. Rivera also acknowledges that the trial court in his case found as an

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5 Justice Shaw explained in his opinion in Bottoson that "this particular factor is excluded from Ring's purview and standing by itself, can serve as a basis to 'death qualify' a defendant. Accordingly, I agree that Bottoson's petition for writ of habeas corpus must be denied." Bottoson v. Moore, 2002 Fla. LEXIS 2200 at 75-76 (Shaw, J., concurring in result only)(footnote omitted). In his opinion in King, Justice Shaw indicated that habeas relief should be denied because King's sentence of death was based in part on the aggravating circumstance of "previous conviction of violent felony." King v. Moore, 2002 Fla. LEXIS 2199 at 16. But for the presence of this aggravating factor, it appears from Justice Shaw's opinions that he would vote to grant a capital habeas petitioner relief on the basis of Ring. In Bottoson, Justice Pariente agreed with Justice Shaw that "a prior violent felony conviction meets the threshold requirement of Apprendi as extended to capital sentencing by Ring." Bottoson v. Moore, 2002 Fla LEXIS 2200 at 86-87 (Pariente, J., concurring in result only). Accordingly, she too concurred in the denial of habeas relief in Bottoson, saying, "I would deny relief to Bottoson because one of the four aggravating circumstances found in this case was a prior violent felony." Id. Similarly in King, Justice Pariente explained that she concurred in the court's denial of King's petition for habeas relief because "one of the aggravators found in King's case was a 'previous conviction of violent felony.'" King v. Moore, 2002 Fla. LEXIS 2199 at 17. And finally, in his opinion in Bottoson, Chief Justice Anstead noted that he concurred in that portion of Justice Pariente's opinion discussing "a finding of the existence of aggravating circumstances before a death penalty may be imposed." Bottoson v. Moore, 2002 Fla. LEXIS 2200 at 36 n.18. In his opinion in King v. Moore, Chief Justice Anstead specifically concurred in Justice Pariente's opinion stating her reasons for concurring in the denial of relief to Mr. King. Thus, he found the presence of the "prior conviction of a crime of violence" aggravating circumstance and the unanimous death recommendation determinative in that instance.

aggravating circumstance a prior violent felony. However, Mr. Rivera submits that the holding of Almendarez-Torres did not survive Apprendi and Ring. In Apprendi, Justice Thomas, whose vote was decisive of the five-to-four decision in Almendarez-Torres, announced that he was receding from his support of Almendarez-Torres.<sup>6</sup> The Apprendi majority found it unnecessary to overrule Almendarez-Torres explicitly in order to decide the issues before it, but

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6 The five-Justice majority in Almendarez-Torres was comprised of Justices Breyer, Rehnquist, O'Connor, Kennedy, and Thomas. The first four of these were the dissenters in Apprendi. The dissenters in Almendarez-Torres were Justices Stevens, Souter, Scalia, and Ginsburg, all of whom are in the Apprendi majority. Between 1998 and 2000, Justice Thomas changed his thinking about the appropriate analysis to determine what an "element" of a crime is and accordingly disavowed his vote in Almendarez-Torres. In his Apprendi concurrence, Justice Thomas described his change of mind:

"[O]ne of the chief errors of Almendarez-Torres - an error to which I succumbed - was to attempt to discern whether a particular fact is traditionally (or typically) a basis for a sentencing court to increase an offender's sentence . . . For the reasons I have given [here], it should be clear that this approach just defines away the real issue. What matters is the way by which a fact enters into the sentence. If a fact is by law the basis for imposing or increasing punishment - for establishing or increasing the prosecution's entitlement - it is an element.

Apprendi, 530 U.S. at 520-21.

acknowledged that “it is arguable that Almendarez-Torres was incorrectly decided.” Apprendi, 530 U.S. at 489. It then went on in a footnote to add to “the reasons set forth in Justice SCALIA’s [Almendarez-Torres] dissent, 523 U.S. at 248-60,” the observation that “the [Almendarez-Torres] Court’s extensive discussion of the term ‘sentencing factor’ virtually ignored the pedigree of the pleading requirement at issue,” which drive the Sixth Amendment ruling in Apprendi. Apprendi, 530 U.S. at 489 n.15.<sup>7</sup>

At the same time, the Apprendi majority did explicitly restrict whatever precedential force Almendarez-Torres ever had to the status of a “narrow exception to the general rule” that every fact which is necessary to enhance a criminal defendant’s maximum sentencing exposure must be found by a jury – an exception limited to the “unique facts” in Almendarez-Torres. The unique facts of Almendarez-Torres were that the defendant **pleaded guilty** to an indictment charging that he had returned to the United States after having been deported and, in

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<sup>7</sup> The majority opinion in Almendarez-Torres notably relied on McMillan v. Pennsylvania, 477 U.S. 79 (1986), and, in so doing, refused to distinguish between a “sentencing factor . . . [that] triggered a mandatory minimum sentence” in McMillan and a “sentencing factor . . . [that] triggers an increase in the maximum permissive sentence” in Almendarez-Torres. 523 U.S. at 224. That aspect of Almendarez-Torres has, of course, now been explicitly repudiated. See Harris v. United States, 122 S. Ct. 2406, 2419 (2002) (decided together with Ring).

addition, **admitted** that he had been deported because he was previously convicted of three aggravated felonies. He thus elected to forgo a trial and accept an uncontested adjudication of his guilt for a crime that by definition included the felony convictions later used to enhance his sentence. Nothing about the priors – any more than anything else about the elements of the crime of reentry after deportation -- remained for a jury to try in light of the defendant’s guilt plea.

Even assuming the continuing validity of Almendarez-Torres, under Florida law, the mere existence of an aggravating circumstance does not make a defendant eligible for the death penalty. Rather, Florida Statute Section 921.141 (3) requires the trial judge to make three factual determinations before a death sentence may be imposed. The trial judge (1) must find the existence of at least one aggravating circumstance, (2) must find that “*sufficient* aggravating *circumstances* exist” to justify imposition of death, and (3) must find that “there are insufficient mitigating circumstances to outweigh the aggravating circumstances.” If the judge does not make these findings, “the court *shall* impose a sentence of life imprisonment in accordance with [Section] 775.082.” Id. (emphasis added). Thus, under a plain reading of the statute, it is not sufficient that an aggravating circumstance is present; that aggravator must also be “sufficient” and there must be insufficient mitigating circumstances to outweigh the aggravating circumstances.

See Barclay v. Florida, 463 U.S. 939, 954 n.12 (1983)(plurality opinion of Rehnquist, J.)(Florida requirement that “‘sufficient aggravating circumstances exist,’ 921.131 (3)(a), [Fla. Stat.] indicates that any single statutory aggravating circumstance may not be adequate to meet this standard of [death eligibility] if, in the circumstances of a particular case, it is not sufficiently weighty to justify the death penalty”).

## **REPLY TO CLAIM II**

### **A. Denial of Mr. Rivera’s Motion to Suppress**

Mr. Rivera relies on the argument made in his initial petition.

### **B. Prejudicial Photographs**

The State claims that only a portion of this issue has been preserved for review by this Court. However, in so asserting the State misconstrues Mr. Rivera’s argument. Mr. Rivera has not made a claim regarding the five photographs shown during the testimony of the medical examiner, but rather those cumulative photographs introduced through the testimony of Detective Haarer. The prosecutor testified that the photographs introduced through Haarer had not yet been introduced through the medical examiner (R. 924). The State concedes that this portion of the claim has been preserved for review (Response at 20). The State

however mistakenly claims that the “trial court allowed the photographs to be admitted because they aided the medical examiner in explaining how he determined identity and cause of death” (Id.) However, the trial court made no such ruling during the testimony of Detective Haarer. Detective Haarer was not the medical examiner, nor did Detective Haarer make an identification of the body or determine cause of death. Likewise, the medical examiner did not determine cause of death based on any injuries on the body, but rather on the basis of process of elimination of natural causes (R. 869).

Furthermore the State argues that trial counsel only objected to the video tape based on a discovery violation, but this is not what the record shows. While counsel did object based on the fact that he did not receive the video tape in discovery ( R. 1061), he clearly objects on cumulative grounds also. Trial counsel stated: “Judge, I would object to this videotape being played. The jury has seen enough of this” ( R. 1062). This claim was properly preserved.

### **C. Denial of Mr. Rivera’s Motion for Change of Venue**

Mr. Rivera relies on the argument made in his initial petition.

### **D. Improper Juror Comments**

The State argues that Mr. Rivera’s case is unlike Amazon v. State, 487 So. 2d 8 (Fla. 1986) and Scott V. State, 619 So. 2d 508 (Fla. 5<sup>th</sup> DCA 1993), because in

those cases there was sufficient reason to warrant inquiry. The State fails to mention how the statement overheard in Mr. Rivera's case differs from the statements in Amazon and Scott. The State does point out that Mr. Rivera was the only person to hear the comment made by the juror. This is not entirely accurate. While Mr. Rivera is the only one that heard Juror Thornton say "I think he did it," the Judge acknowledged hearing comments being made by one juror during testimony (R. 1076). The comments in both Amazon and Scott were similar, reflecting a jurors opinions regarding a witness' testimony in one case and comments regarding the defendants guilt in the other. The comments in Mr. Rivera's case cannot be distinguished and Mr. Rivera is entitled to habeas relief.

### **CONCLUSION**

For all of the reasons discussed herein, Mr. Rivera respectfully urges the Court to grant habeas corpus relief.

### **CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true copy of the foregoing Petition for Habeas Corpus has been furnished by United States Mail, first class postage prepaid, to Celia Terenzio, Assistant Attorney General, 1515 N. Flagler Drive, Suite 900, West Palm Beach, Florida 33409 on January 17, 2003.

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**CERTIFICATE OF COMPLIANCE**

The undersigned counsel certifies that this petition is typed using Courier 12  
font.

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