

IN THE SUPREME COURT OF FLORIDA

CASE NO. 02-1797

DENNIS SOCHOR,

Petitioner,

v.

JAMES V. CROSBY, JR.

Secretary, Florida Department of Corrections,

Respondent.

**REPLY TO STATE'S RESPONSE TO PETITION FOR HABEAS
CORPUS**

**RACHEL L. DAY
Assistant CCRC
Florida Bar No. 0068535**

**PAUL KALIL
ASSISTANT CCRC
Florida Bar No. 174114**

**OFFICE OF THE CAPITAL
COLLATERAL REGIONAL**

COUNSEL - SOUTH
101 N.E. 3rd Ave., Suite 400
Fort Lauderdale, FL 33301
(954) 713-1284

COUNSEL FOR PETITIONER

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REPLY TO ISSUE II

Contrary to the State's contention that the U.S. Supreme Court "remanded this case for clarification or confirmation that harmless error analysis was in fact conducted," (Response 10), the Supreme Court explicitly stated that this Court had not even mentioned "harmless error", nor explained or "declare[d] a belief that" the error was harmless beyond a reasonable doubt. Sochor v. Florida, 504 U.S. 527, at 540.

The State argues that Mr. Sochor's challenge to this Court's harmless error analysis is based on the fact that "no federal cases were cited." The State fails to address that in State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986), Florida adopted the test set forth by the United States Supreme Court in Chapman v. California, 386 U.S. 18 (1987), which requires an analysis of federal constitutional error. The U.S. Supreme Court required this Court to determine beyond a reasonable doubt whether the aggravator did not contribute to the sentence in conformity with Chapman, which this Court has yet to do.

The State's reliance on this Court's statement in Martin v. Singletary, 599 So. 2d 119, that this Court had conducted a harmless error analysis in Mr. Sochor's case, is flawed because Martin was decided prior to the United State's Supreme Court remanding this case to this Court to conduct that analysis after determining that this Court had not adequately done so.

Furthermore, while there is precedent establishing that an appellate court can cure error by either a harmless error analysis or appellate reweighing, see, e.g.

Clemons v. Mississippi, 494 U.S. 738 (1990), Mr. Sochor submits that, in light of Ring v. Arizona, 122 S. Ct. 2428 (2002), appellate reweighing of aggravators and mitigators violates the Sixth Amendment right to “a jury determination of any fact on which the legislature conditions an increase in the[] maximum punishment.” Ring, 122 S. Ct. at 2432. Under Ring, capital defendants are “entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment.” Ring, 122 S. Ct. at 2432-33 (citing Apprendi v. New Jersey, 530 U.S. 466, 482-83 (2000)). Therefore, the Sixth Amendment requires a jury determination of the statutorily required “sufficient aggravating circumstances” necessary for death eligibility. It is clear that the factual determination of “sufficient aggravating circumstances” at the sentencing is the finding of those additional facts that are necessary under the Eighth Amendment requirement that death eligibility be narrowed beyond the traditional definition of first degree murder. Zant v. Stephens, 462 U.S. 862, 878 (“[S]tatutory aggravating circumstances play a constitutionally necessary function at the stage of legislative definition: they circumscribe the class of persons eligible for the death penalty”). It is impossible to know what aggravating factors the jury relied on in making its advisory recommendation; certainly, there is no way to know whether the jury relied on the aggravating factor struck by the Court on direct appeal. Habeas relief is warranted.

REPLY TO ISSUE V

The State argues that a petition for habeas corpus is not the appropriate method for Mr. Sochor to obtain relief under Ring v. Arizona, 122 S.Ct. 2428 (2002), and “since the claim was never preserved for appeal, he is not allowed to raise the claim in this collateral proceeding.” (Response 16). Mr. Sochor has raised this issue in a petition for habeas corpus – an original proceeding in this Court - 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.

Mr. Sochor 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.¹

The State’s procedural arguments have been repeatedly rejected in each

¹ 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.

case where the Court has addressed Ring claims or claims brought prior to Ring under the authority of Appendi 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.² Thus, no procedural impediments exist to a merits ruling as to Mr. Sochor'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. Indeed, a majority of the justices denied relief on the basis that the prior violent felony issue exempted both Mr. Bottoson and Mr. King from Ring's application, thereby implicitly recognizing Ring's retroactive application.

In any event, Mr. Sochor submits that Ring clearly meets all the criteria of 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-

² In fact, this 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).

73. (Shaw, J., concurring in result only).³ As Ring is a significant change in the law and fulfills the retroactivity requirements of Witt, Mr. Sochor's petition for writ of habeas is appropriately filed. See e.g. Hall v. State, 541 So. 2d 1125 (Fla. 1989).

Mr. Sochor 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 Almendarez-Torres v. United States, 523 U.S. 224 (1998). In both cases, three of this Court's Justices concurring in the result only indicated that the existence of this aggravating circumstance served as a basis for denying relief.⁴

3 The State points to federal circuits that have found that Apprendi is not retroactive (Response 17). 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.

4 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

Mr. Sochor also acknowledges that the jury found him guilty of kidnaping, and that he had previously been convicted of a violent felony. However, Mr. Sochor submits that the holding of Almendarez-Torres did not survive Apprendi and Ring. In Apprendi, Justice Thomas, whose vote was decisive in the five-to-four decision in Almendarez-Torres, announced that he was receding from his support of Almendarez-Torres.⁵ The Apprendi majority found it unnecessary 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.

5 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

overrule Almendarez-Torres explicitly in order to decide the issues before it, but 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.15.⁶

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

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.

6 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).

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 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”).

The State also asserts that Ring does not require jury sentencing in capital cases and that the jury is required only to find the defendant “death eligible.” (Response 19). The State asserts that “any death sentence which was imposed following a jury recommendation of death necessarily satisfies the Sixth Amendment as construed in Ring, because the jury necessarily found beyond a reasonable doubt that at least one aggravating factor existed” and that “the finding of an aggravating factor authorizes the imposition of a death sentence.” (Response 19-20). This Court’s recent decisions establish the fallacy of the State’s argument. In Bottoson, 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 expressed 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.

Furthermore, the State's argument that the trial court's finding that "the murder was committed in the course of a felony" and therefore "the underlying factual premise for the finding of this aggravator was made by the jury at the guilt phase" (Response 20) 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. In conformity with the statutory language, Mr. Sochor's jury was instructed to determine whether "sufficient aggravating circumstances" were present that justified considering a

sentence of death. Use of the felony murder aggravator may not properly be used as a substitute for a jury determination that sufficient aggravators existed in Mr. Sochor'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)).

The State'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.⁷ 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.

⁷ 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).

Thus, Mr. Sochor is entitled to habeas relief under Ring v. Arizona.

CONCLUSION AND RELIEF SOUGHT

For all the reasons discussed herein, Mr. Sochor respectfully urges this Court to grant habeas corpus relief. For issues not addressed in this reply, Mr. Sochor relies on the arguments set forth in his Petition for Writ of Habeas Corpus. No issue is abandoned or waived.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing brief has been furnished by United States Mail, first class postage prepaid, to Celia Terenzio, Esq., Office of the Attorney General, 1515 N. Flagler Drive, 9th Floor, West Palm Beach, Florida 33401-2225 on January 13, 2003.

RACHEL L. DAY
Florida Bar No.
Assistant CCRC
101 N.E. 3rd Ave, #400
Fort Lauderdale, FL 33301
(954) 713-1284
Attorney for Appellant

CERTIFICATE OF COMPLIANCE

The undersigned counsel hereby certifies that this Reply to State's Response complies with the font requirements of rule 9.100(1), Fla. R. App. P.

RACHEL L. DAY
Florida Bar No. 0068535
Assistant CCRC
101 N.E. 3rd Ave, #400
Fort Lauderdale, FL 33301
(954) 713-1284
Attorney for Appellant