

IN THE SUPREME COURT OF FLORIDA

NO. SC-02-2142

CURTIS WINDOM,

Petitioner,

v.

**JAMES CROSBY,
Secretary, Florida Department of Corrections,**

Respondent.

**REPLY TO RESPONSE TO PETITION FOR WRIT OF HABEAS
CORPUS**

**MICHAEL P. REITER
Florida Bar No. 0320234
Capital Collateral Counsel -
Northern Region**

**JEFFREY M. HAZEN
Florida Bar No. 0153060
Assistant CCRC-N
1533-B S. Monroe Street**

**Tallahassee, FL 32301
(850) 488-7200**

COUNSEL FOR PETITIONER

ARGUMENT IN REPLY

INTRODUCTION

COMES NOW, the Petitioner, **CURTIS WINDOM**, by and through undersigned counsel and hereby submits this Reply to the State's Response to Mr. Windom's Petition for Writ of Habeas Corpus. Petitioner will not reply to every issue and argument, however does not expressly abandon the issues and claims not specifically replied to herein. For arguments not addressed herein, Petitioner stands on the arguments presented in his Petition for Writ of Habeas Corpus.

Ring v. Arizona¹

Respondent contends that this Court's decision in Bottoson² precludes Mr. Windom's claim under Ring. However, the opinions in Bottoson and King³ suggest that Ring claims should be considered on a case-by-case basis. The opinions of Justices Shaw, Pariente, and Lewis, as well as Chief Justice Anstead, all reflect an independent analysis of the claims made in Bottoson and King.

It appears from Justice Shaw's opinions that, in certain circumstances, he would vote to grant a capital habeas petitioner relief on the basis of Ring v.

¹Ring v. Arizona, 122 U.S. 2428 (2002).

²Bottoson v. Moore, 833 So.2d 693 (Fla. 2002).

³King v. Moore, 831 So.2d 143 (Fla. 2002).

Arizona. 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” aggravation as an element of the offense, imposes upon the aggravation 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 at 717. At another point in his opinion, Justice Shaw concluded that Florida’s statute was flawed:

I read Ring v. Arizona, 122 S.C. 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 at 718 (emphasis added).

In her opinion “concurring in result only” in Bottoson, Justice Pariente wrote, “I believe that we must confront the fact that the implications of Ring are inescapable.” Bottoson v. Moore at 22. Later in that opinion, she elaborated:

The crucial question after Ring is “one not of form, but of effect.” 122 S.C. 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 at 725 (italics in original). Thus, it is clear that Justice Pariente believes that the Florida death penalty statute violates the principles enunciated in Ring.⁴

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.

⁴At one point she wrote, “I agree with Justice Lewis that there are deficiencies in our current death penalty sentencing instructions.” Bottoson v. Moore at 723. Accordingly, Justice Pariente opined that the standard jury instructions should be changed, as well as the verdict form used in penalty phase proceedings.

Moore at 705 n.18. In otherwise explaining his view of Ring and its application to the Florida death penalty statute, 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 at 706.⁵

The jury in Mr. Windom's case was improperly instructed on the aggravating factor of cold, calculated, and premeditated. (PP-R. 102) Jackson v. State, 648 So.2d 85 (Fla. 1994). There is no question that the jurors were given an unconstitutionally vague instruction on CCP. After Mr. Windom's trial, the CCP instruction given in his case was found to be unconstitutionally vague without the addition of limiting instructions to guide the jurors' discretion. Jackson. See also Sochor v. Florida, 112 S. Ct. 2114 (1992).

⁵Chief Justice Anstead also indicated, "another factor important to my decision to concur in denying relief [] is that the U.S. Supreme Court has specifically denied Bottoson's petition for review and lifted the stay it previously granted as to his execution." Bottoson v. Moore, 2002 WL 31386790 at 7-8 n.17. However, that circumstance is not present in Mr. Windom's case, and thus, a different result is warranted.

In Bottoson, Justice Pariente cited her concern that the jury's consideration of improper aggravators that are later struck on appeal may render Florida's capital sentencing scheme

unconstitutional:

For example, in Porter v. Moore, No. SC01-2707 (Fla. June 20, 2002), a case presently before this Court on a motion for rehearing, the trial court imposed the death sentence finding four aggravators. However, this Court struck one of the aggravators on appeal. See Porter v. State, 564 So. 2d 1060, 1063 (Fla. 1990). Given the nonspecific death recommendation of the jury, it is impossible to tell whether any of the jurors relied on the aggravator this Court struck when recommending death. As a result, Porter's death sentence may rest on an unconstitutional element.

Bottoson v. Moore at 724, n. 65. Under Justice Pariente's reasoning, Mr. Windom is entitled to relief since there is no way to know whether any of the jurors considered an invalid aggravator in recommending that Mr. Windom be sentenced to death. In his opinion in Bottoson, Chief Justice Anstead also noted the problem with the process of appellate review. Chief Justice Anstead explained:

In addition to the necessity for the specific determination of aggravating circumstances in the trial court, as essential ingredient to the constitutionality of Florida's death penalty scheme is this Court's careful review of the sentencing process.

* * *

. . . there could hardly be any meaningful review of a Florida jury's advisory recommendation to a trial judge since that review would rest on sheer speculation as to the basis of the recommendation, whether considering the jury collectively or the jurors individually. In other words, from a jury's bare advisory recommendation, it would be impossible to tell which, if any aggravating circumstances, a jury or any individual juror may have determined existed.

Bottoson v. Moore at 708. Ring requires that the jury make the unanimous finding that a capital defendant be sentenced to death based on valid aggravating factors. Because Mr. Windom's jury considered invalid aggravating factors, he is entitled to relief.

Mr. Windom's's death sentence was imposed in violation of the due process clause of the Fifth Amendment and the jury trial right guaranteed by the Sixth Amendment because he was required to prove the non-existence of an element necessary to make him eligible for the death penalty, that "sufficient aggravating circumstances" existed to justify imposition of the death penalty. Fla. Stat. §921.141(3). Mr. Windom's jury was routinely instructed that it was their duty to render an opinion on life or death by deciding **whether sufficient mitigating circumstances exist to outweigh any aggravating circumstances found to exist.** (PP-R. 101) It is clear that in Mr. Windom's case the jury instructions unconstitutionally relieved the state of its burden to prove the element of intent.

Further, because Mr. Windom’s jury was never required to find the element of sufficient aggravating circumstances beyond a reasonable doubt, the error here cannot be subjected to harmless error analysis. Sullivan v. Louisiana, 508 U.S. 275, 279-280 (1993). Consequently, this Court must grant relief.

Mr. Windom’s jury was specifically instructed that its role was merely to make a recommendation by a majority vote. (PP-R. 101, 104) Under the circumstances, the jurors’ sense of responsibility for determining Mr. Windom’s sentence was substantially diminished. As the Supreme Court held in Caldwell v. Mississippi, 472 U.S. 320 (1985):

[I]t is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant’s death rests elsewhere. Caldwell, 472 U.S. at 328 -329.

Caldwell embodies the principle stated in Justice Breyer’s concurring opinion in Ring: “the Eighth Amendment requires individual jurors to make, and to take responsibility for, a decision to sentence a person to death.” Ring, slip op. at 6 (Breyer, J.,)

Justice Lewis explained in his view that “the validity of jury instructions given in [Bottoson’s] case should be addressed in light of [Bottoson’s] facial attack upon Florida’s death penalty scheme on the basis of the holding in Ring v.

Arizona.” Bottoson v. Moore at 733.⁶ According to Justice Lewis:

[I]n light of the dictates of Ring v. Arizona, it necessarily follows that Florida’s standard penalty phase jury instructions may no longer be valid and are certainly subject to further analysis under the United States Supreme Court’s Caldwell v. Mississippi, 472 U.S. 320 (1985), holding.

Bottoson v. Moore at 731. Pursuant to this view, Justice Lewis proceeded in his opinion to carefully review the voir dire proceedings and the jury instructions, thereby suggesting that a case-by-case analysis is warranted in determining whether any death-sentenced individuals are entitled to post-conviction relief in the light of Ring v. Arizona. In his opinion, Justice Lewis concluded, “there was a tendency to minimize the role of the jury, not only in the standard jury instructions, but also in the trial court’s added explanation of Florida’s death penalty scheme.” Id. at 30. However, he found the standard jury instructions and judicial commentary were not so flawed in Mr. Bottoson’s case to warrant reversal. Justice Lewis explained, “although the standard jury instructions may not be flawed to the extent that they are invalid or require a reversal **in this case**, such instructions should now receive a

⁶Justice Lewis acknowledged that Ring v. Arizona has application to Florida’s death penalty statute when he wrote, after Ring, a jury’s “life recommendation must be respected.” Bottoson v. Moore at 729. He concluded that as to jury overrides in favor of death, Florida law and Ring are in “irreconcilable conflict.” Id.

detailed review and analysis to reflect the factors which inherently flow from Ring.” Id. (emphasis added). Clearly, Justice Lewis’ position carries with it the unstated inference that a reversal will be required in some cases where the proper analysis is conducted and it is determined that the minimization of the jury’s role exceeded that occurring in Bottoson.

The circumstances of Mr. Windom’s case are much more extreme than those Justice Lewis addressed in Bottoson v. Moore. The jury repeatedly heard during the voir dire examination that their penalty phase role was to render a recommendation or an advisory verdict. They were told that the decision as to what sentence to impose was the judge’s decision. Under the analysis that Justice Lewis requires, Mr. Windom is entitled to relief. The diminution of the juror’s role in Mr. Windom’s case far exceeded what Justice Lewis noted was present in Bottoson. In her opinion in Bottoson v. Moore, Justice Pariente expressed her agreement with Justice Lewis: “I agree with Justice Lewis that there are deficiencies in our current death penalty sentencing instructions.” Bottoson v. Moore at 723.

Under the analyses employed by Chief Justice Anstead, Justice Shaw, Justice Pariente, and Justice Lewis, Mr. Windom’s sentence of death stands in violation of the Sixth and Eighth Amendments. The circumstances present in Bottoson and King that largely caused those justices to concur in the denial of post-conviction

relief are not present here. Habeas relief should issue. This Court should vacate the sentence of death and order a new penalty phase proceeding.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing **REPLY TO RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS** has been furnished by United States Mail, first-class postage prepaid, to Scott A. Browne, Assistant Attorney General, 2002 North Lois Ave., Suite 700, Westwood Center, Tampa, Florida 33607, counsel of record on this 27th day of March, 2003.

CERTIFICATE OF TYPE SIZE AND STYLE

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MICHAEL P. REITER
Capital Collateral Counsel -
Northern Region
Florida Bar No. 0320234

JEFFREY M. HAZEN
Florida Bar No. 0153060

Assistant CCRC-N
1533-B S. Monroe Street
Tallahassee, FL 32301
(850) 488-7200
Attorney for Mr. Windom