

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC02-63

CHADWICK D. BANKS,

Petitioner,

vs.

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

Respondent,

and

ROBERT BUTTERWORTH, Attorney General,
State of Florida,

Additional Respondent.

PETITION FOR WRIT OF HABEAS CORPUS

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PRELIMINARY STATEMENT

Article I, section 13 of the Florida Constitution provides: "The writ of habeas corpus shall be grantable of right, freely and without cost." This petition for habeas corpus relief is being filed in order to address substantial claims of error under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. These claims demonstrate that Mr. Banks was deprived of the right to a fair and reliable and individualized sentencing proceeding that the proceedings resulted in his death sentence violated fundamental, constitutional imperatives. Citations shall be as follows: The record on appeal concerning the original court proceedings will be referred to as the letter, R, followed by the appropriate page numbers. The post-conviction record on appeal will be referred to as the letter combination, PCR-, followed by the appropriate volume and page numbers.

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INTRODUCTION

Significant errors which occurred at Mr. Banks capital sentencing were not presented to this court on direct appeal and preserved for federal habeas review due to ineffective assistance of appellate counsel.

The issue which appellate counsel neglected, demonstrates that counsel's performance was deficient and that these deficiencies prejudiced Mr. Banks

This petition presents a question that was not ruled on in direct appeal, but should be revisited in light of subsequent case law or in order to correct error in the appeal process that denied fundamental constitutional rights. This petition will demonstrate that Mr. Banks is entitled to habeas relief.

JURISDICTION TO ENTERTAIN PETITION
AND GRANT HABEAS CORPUS RELIEF

This is an original action under Fla.R.App.P. 9.100(a). See Art. I, Sec. 13, Fla. Const. This Court has original jurisdiction pursuant to Fla. R. App.P. 9.030(a)(3) and Art. V, sec. 3(b)(9), Fla. Const. The Petition presents constitutional issues which directly concern the judgment of this court during the appellate process and the legality of Mr. Bank's sentence of death.

Jurisdiction in this action lies in Court, see, e.g., Smith v. State, 400 So. 2d 956, 960, (Fla. 1981), for the fundamental constitutional errors challenged herein arise in the context of a capital case in which this Court heard and denied Mr. Banks' direct appeal. See, Wilson v. Wainwright, 474 So. 2d 1162, 1163 (Fla. 1985).

This Court has the inherent power to do justice. The ends of justice call on this Court to grant the relief sought in this case, as the Court has done in similar cases in the past. The petition pleads claims involving fundamental constitutional error. See, Palmes v. Wainwright, 460 So. 2d 362(Fla. 1984). The Court's exercise of its habeas corpus jurisdiction, and of its authority to correct constitutional errors such as those herein pled, is warranted in this action. As the petition shows, habeas corpus relief would be more than

proper on the basis of Mr. Banks' claim.

GROUNDS FOR HABEAS CORPUS RELIEF

By his Petition for Writ of Habeas Corpus, Mr. Banks asserts that his sentence of death was obtained and then affirmed during this Court's appellate review process in violation of his rights as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the Florida Constitution.

PROCEDURAL HISTORY

On October 2, 1992, the Petitioner was indicted by a Gadsden County, Florida Grand Jury and charged with the following crimes: Count I, First degree murder in that on or about September 24, 1992, Defendant, Chadwick Banks, did unlawfully kill a human being, Sandra Banks, by shooting with a firearm; Count II, on or about September 24, 1992, Defendant, Chadwick Banks, did unlawfully kill a human being, Melody Cooper, by shooting with a firearm; Count III, on or about September 24, 1992, Chadwick Banks, did unlawfully commit a sexual battery on Melody Cooper, a person less than twelve years of age. On November 5, 1992, trial counsel for defendant, Steven Seliger, filed a Motion for Finding of Fact by the Jury. On November 17, 1993, the government filed its Response. The trial court did not require findings of fact by the jury in their deliberation on March 18, 1994.

On March 13, 1994, Petitioner, Chadwick Banks, changed his plea from not guilty to a plea of no contest as to Count I, the first degree murder of Cassandra Banks, and Count III, the sexual battery of Melody Cooper, with an agreed upon life-sentence in prison with a twenty-five year, minimum mandatory period. Petitioner also pled no contest to Count II, the murder of Melody Cooper, without an agreement as to what the

sentence would be on that count. The trial court adjudicated defendant guilty on that date.

On March 13, 1994, jury selection for the penalty phase of the trial commenced.

A penalty phase proceeding followed jury selection per the provisions of section 921.141, Fla. Stat. On or about March 17, 1994, the jury, by a vote of nine-to-three, recommended the death sentence as to the first degree murder in Count II as to Melody Cooper (T-899). The trial court followed the jury's advisory recommendation and on April 18, 1994, sentenced Banks to death for the murder of Melody Cooper under the provisions of section 75.082, Fla. Stat. (T-944-957). The trial court, on the same date, sentenced Banks to life in prison on the remaining counts. Thus, as to each count, the defendant was sentenced as follows:

Count I: Life in prison, with a minimum,
mandatory sentence of 25 years;

Count II: Death;

Count III: Life in prison, with a
minimum, mandatory sentence
of 25 years.

The death sentence is the only sentence under attack by this Motion.

The trial judge imposing the sentence was the Honorable William Gary, Circuit Judge, Second Judicial Circuit of Florida.

Petitioner filed a Notice of Appeal was filed on April 29, 1994 (R. 207). There was a direct appeal of the judgment and sentence to the Supreme Court of Florida in Case No. 83,774. Petitioner was represented by Teresa Sopp of Jacksonville, Florida. The appeal was denied and the defendant's judgment and sentence affirmed on August 28, 1997. See Banks v. State, 700 So. 2d 363 (Fla. 1997). Rehearing was denied on October 13, 1997. The mandate was issued on November 13, 1997.

Petitioner then filed a timely Petition for Writ of Certiorari in the United States Supreme Court, but the Petition was denied on March 23, 1998. A Motion for Post-conviction Relief was filed in the Circuit Court on June 10, 1999. A hearing was held before the Honorable William L. Gary, Circuit Judge, in and for Gadsden County, Florida, on November 15, 2000.

An Order was entered denying the Motion for Post Conviction Relief on April 30, 2001. Petitioner filed a Notice of Appeal of the Order denying Post-conviction Relief on May 10, 2001. On September 13, 2001, this Court entered an

Order directing Appellant's Brief to be served on or before January 11, 2002. This original Petition for Habeas Corpus relief is filed simultaneously with Bank's Initial Brief in Case No. SC01-1153.

CLAIM I

The Florida Death Sentencing statute as applied is unconstitutional under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and corresponding provisions of the Florida Constitution.

A. Apprendi v. New Jersey, 120 S.Ct. 2348 (2000), is a fundamental change in law.

On November 5, 1992, trial counsel for defendant, Steven Seliger, filed a Motion for Finding of Fact by the Jury. On November 17, 1993, the government filed its Response (R-111-112). The trial court did not require findings of fact by the jury in their deliberation on March 18, 1994.

Chadwick Banks's jury made a general recommendation of death by a vote of nine to three. Because the jury was not required to makes specific findings of fact as to aggravation and mitigation, neither the trial court nor this Court, on appellate review, have any basis for reviewing the propriety of the findings the jury relied upon in coming to its verdict of death.

Petitioner submits that this lack of specificity by the jury in determining the facts which control the outcome of the sentencing procedure in his case is contrary to the due

process requirements of the United States constitution as applied to the states in the recently announced cases of *U.S. v. Jones*, 526 U.S. 227 (1999) and *Apprendi v. New Jersey*, 120 S.Ct. 2348 (2000). In *Jones v. United States*, *supra*, the United States Supreme Court held, "under the due process clause of the Fifth Amendment and the notice and jury guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an Indictment, submitted to a jury, and proven beyond a reasonable doubt. *Jones*, *supra*, 526 U.S. 243, note 6. Subsequently, in *Apprendi v. New Jersey*, the court held that the Fourteenth Amendment affords citizens the same protection under state law. *Id.* at 2355.

In *Apprendi*, the issue was whether a New Jersey hate crime sentencing enhancement, which increased the punishment beyond the statutory maximum, operated as an element of an offense so as to require a jury termination beyond a reasonable doubt. *Id.* at 2365. "[T]he relevant inquiry here is not one of form, but of effect- does the required finding expose the defendant to a greater punishment than that required by the jury's guilty verdict?" *Id.* at 2365.

Applying this test, it is clear that aggravators under the Florida death penalty sentencing scheme are arguably elements

of the offense which must be charged in the indictment, submitted to a jury during guilt phase and proven beyond a reasonable doubt by unanimous verdict. Under the § 775.082, Fla. Stat. (1993) and § 921.141, the state must prove at least one aggravating factor in the separate penalty phase proceeding before a person convicted of first degree murder is eligible for the death penalty. *State v. Dixon*, 283 So. 2d 1,9 (Fla. 1973);, § 775.082, Fla. Stat. (1994); §921.141(2)(a), (3)(a), Fla. Stat. (1994). Thus, Florida capital defendants, such as Chadwick Banks, are not eligible for the death sentence simply upon a conviction of first degree murder. Appellant only became eligible for the death sentence upon a finding by a judge that the aggravation outweighed the mitigation. It is only the judge who makes the specific finding that the aggravation outweighed the mitigation and imposes death. Here, the jury made a general recommendation, but we do not know which aggravating factors to which the jury attached weight and those which they ignored. This is particularly important where, in a case such as this, where trial counsel moved for specific findings of fact by the jury and secondly, objected to the jury instructions on cold, calculated and premeditated a statutory aggravating factor. This Court, in Banks's opinion agreed

that the jury instruction given in his case was an incorrect statement of the law. However, this Court concluded that the improper instruction was harmless given the amount of premeditation evidence that was submitted. *See Banks v. State*, 700 So. 2d 363, 366 (Fla. 1997). It may be that had there be specific findings of fact required on each individual , aggravating factor as *Apprendi* suggests there should have been, it may have been shown that this jury found the CCC aggravator as part of its recommendation of death. We would then not be speculating on whether they did or they didn't and whether the error was harmless or it wasn't harmless. Likewise, we cannot know what the jury thought of the other factors in aggravation or in mitigation. The court is simply guessing when it reviews a death sentence under this scheme. In *Apprendi*, the hate crime sentencing enhancement was applied after the defendant was found guilty and increased the statutory maximum penalty by up to ten years. *Apprendi*, at 2341. The *Apprendi* court clearly dispensed with the fiction that such an enhancement was not an element which received Sixth Amendment protections if the simple enhancement of a term of years is "unquestionably of constitutional significance." *Apprendi* at 2365. Then, the aggravators found here, in the penalty phase, are clearly of constitutional

significance. The aggravators increase the statutory maximum penalty from life imprisonment to death. Because the effect of finding an aggravator by the trial court exposes the defendant to a greater punishment than that merely authorized by the jury's first degree murder verdict, the aggravator must either be charged in the indictment, submitted to a jury and proven beyond a reasonable doubt as required by *Apprendi* or specifically found by a jury because it is defendant's right to have the jury make the finding of facts on all things other than a prior conviction which enhance the statutory maximum of his offense. The Florida death penalty scheme is unconstitutional as applied as long as juries are allowed to make general non-unanimous recommendations of death. No court has extended *Apprendi* to capital sentencing scheme and the plain language of *Apprendi* in the cases not intended to apply to capital schemes. However the rationale that death is different is a slender reed upon which to deny a capital defendant the protections of the due process requirements of the United States Constitution and grant them to the less serious criminal perpetrator such as *Apprendi*.

Application of *Apprendi* to Florida's capital sentencing scheme would be a fundamental change in the law. Petitioner submits that he should be entitled to the benefit of *Apprendi*

at this time as the case was decided after his direct appeal and Petition for Writ of Certiorari to the United States Supreme Court under the doctrine of *Witt v. State*, 387 So. 2d 922, 929, 930 (Fla. 1980). In *Witt*, this Court held that major constitutional changes of law as determined by either this Court or the United States Supreme Court are cognizable on post-conviction proceedings. Under *Witt*, for a new rule of law to apply retroactively a three-part test is applied. First, the new rule must originate either in the United States Supreme Court or the Florida Supreme Court. Second, the new rule must be constitutional in nature. Third, the new rule must have fundamental significance. *Apprendi* and the burden it imposes upon the state's sentencing schemes. Petitioner also alleges that the argument he advanced in his motion for factual findings by the jury is akin to the argument made in *Apprendi* or the position taken by the court in *Apprendi* and he had, therefore, properly preserved this issue. Therefore, Petitioner's prior presentation of the issue to the trial court entitles him to the benefit of *Apprendi*.

CONCLUSION AND RELIEF SOUGHT

For all of the reasons discussed herein, Mr. Banks respectfully urges this Honorable Court to grant *habeas* relief.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Petition for Writ of Habeas Corpus has been furnished by United States Mail, first-class postage prepaid, to Curtis M. French, Assistant Attorney General, Office of the Attorney General, The Capitol, PL-01 Tallahassee, FL 32399-1050, this 11th day of January, 2002.

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the font requirements set forth in Florida Rule of Appellate Procedure 9.210(a)(2). The size and style of type used in this brief is Courier New Regular 12 pt. (Western) and Courier New Italic 12 pt. (Western).

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