IN THE SUPREME COURT OF FLORIDA

Case No. SC02-1455

LINROY BOTTOSON,
Petitioner,

versus,

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

On Habeas Corpus

PETITIONER'S REPLY BRIEF

WILLIAM JENNINGS
Capital Collateral Regional Counsel
Middle Region
PETER J. CANNON
Assistant CCRC
Fla. Bar No. 109710
ERIC PINKARD
Assistant CCRC
Fla. Bar No. 651443
ELIZABETH WILLIAMS
Assistant CCRC
Fla. Bar No. 0967350
Office of the Capital Collateral
Regional Counsel
3801 Corporex Park Drive, Suite 201
Tampa, Florida 33619
813-740-3544
MARK E. OLIVE
Fla. Bar No. 0578533
Law Offices of Mark E. Olive, P.A.
320 West Jefferson Street
Tallahassee, Florida 32301
850-224-0004

Counsel for Petitioner

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I. *RING V. ARIZONA*

A. The bulk of respondent Moore's Answer Brief is devoted to arguing that Florida's death-sentencing scheme differs from Arizona's. The asserted differences boil down to two:

1. Respondent says that "[i]n Florida, death is the maximum sentence for murder." Answer Brief, p. 18, subtitle 1.[1] But the Attorney General of Arizona said exactly the same thing about the Arizona statute invalidated in *Ring v. Arizona*, 122 S. Ct. 2428 (2002). The United States Supreme Court dispatched that argument as follows:

> "In an effort to reconcile its capital sentencing system with the Sixth Amendment as interpreted by *Apprendi,* Arizona first restates the *Apprendi* majority's portrayal of Arizona's system: Ring was convicted of first-degree murder, for which Arizona law specifies 'death or life imprisonment' as the only sentencing options, see Ariz.Rev.Stat. Ann. § 13-1105(C) (West 2001); Ring was therefore sentenced within the range of punishment authorized by the jury verdict. See Brief for Respondent 9-19. This argument overlooks *Apprendi*'s instruction that 'the relevant inquiry is one not of form, but of effect.' 530 U.S., at 494, ... In effect, 'the required finding [of an aggravated circumstance] expose[d] [Ring] to a greater punishment than that authorized by the jury's guilty verdict.' *Ibid.;* see 200 Ariz., at 279, 25 P.3d, at 1151. The Arizona first-degree murder statute 'authorizes a maximum penalty of death only in a formal sense,' *Apprendi,* 530 U.S., at 541 . . . (O'CONNOR, J., dissenting), ***for it explicitly cross-references the***

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[1] Respondent's contention that "[d]eath eligibility in Florida is determined at the guilt stage," Answer Brief, p. 21, subtitle 2, is simply another way of stating the same exact point.

> ***statutory provision requiring the finding of an aggravating circumstance before imposition of the death penalty***. See § 13-1105(C) ('First degree murder is a class 1 felony and is punishable by death or life imprisonment as provided by § 13-703.' (emphasis added)). If Arizona prevailed on its opening argument, *Apprendi* would be reduced to a 'meaningless and formalistic' rule of statutory drafting. See 530 U.S., at 541 . . . (O'CONNOR, J., dissenting)."

Ring, 122 S. Ct. at 2440-2441 (emphasis added).

From the standpoint "not of form, but of effect," there is no rational way to distinguish either Florida's statutory structure or its actual functioning from Arizona's. Identically to Ariz. Rev. Stat. Ann. § 13- 1105(C) and even more explicitly, if possible, Fla. Stat. § 775.082 "cross-references the statutory provision" of Fla. Stat. § 921.141, requiring additional findings ***by a judge, not by a jury*** as the precondition for imposition of the death penalty (*Ring*, 122 S. Ct. at 2440):

> "A person who has been convicted of a capital felony shall be punished by life imprisonment and shall be required to serve no less than 25 years before becoming eligible for parole *unless the proceedings held to determine sentence according to the procedure set forth in § 921.141 result in a finding by the court* that such person shall be punished by death, and *in the latter event* such person shall be punished by death."

Fla. Stat. § 775.082 (1979) (emphasis added).

2. Respondent's second attempted distinction of the Arizona procedure invalidated in *Ring* says that "[t]he Florida capital sentencing statute provides for the jury's participation," Answer Brief, p. 30, because juries render an advisory verdict as to whether the defendant should live or die. This argument

blithely ignores the explicit holding and rationale of both *Apprendi v. New Jersey*, 530 U.S. 466, 483 (2000), and *Ring*. The unmistakable teaching of those two cases is that every fact which must be found as the necessary precondition for enhancing a defendant's maximum possible sentence from imprisonment to death *is required by the Sixth Amendment to be found by a jury* ***in the same way, and for the same reasons****, that the Sixth Amendment requires a jury to find every fact which is the necessary precondition for conviction of a crime.*[2] As *Ring* puts it in plain English: "*Apprendi* repeatedly instructs . . . that the characterization of a fact or circumstance as an 'element' [of a crime] or a 'sentencing factor' is not determinative of the question 'who decides,' judge or jury." *Ring*, 122 S. Ct. at 2441.

Is respondent Moore seriously arguing that this Court would or constitutionally could sustain a first-degree murder conviction based solely on a *judge*'s written finding of premeditation, simply because a jury sat through the guilt trial and, at the end of the trial – before the judge retired to make his or her findings and convict the defendant – the jury rendered an advisory verdict saying that "the

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[2] This is what *Apprendi* held; it is what *Ring* held; it is what our petition to this Court for a writ of habeas corpus asserted that *Apprendi* and *Ring* held; it is what our opening brief asserted that *Apprendi* and *Ring* held. "To the extent that" the respondent's brief asserts that "Bottoson argues that *Ring* requires jury sentencing" (Answer Brief, p. 25; *see also* Answer Brief at pp. 26-30), respondent misrepresents our position.

defendant should be found guilty" –

- **without** the jury's making any finding of premeditation (or of any other *fact*), and
- **without** the jury's being charged that it needs to make any specific finding of *fact* in order to recommend conviction, and
- **although** the jury has been specifically charged that its verdict is only advisory and will not result in the defendant's conviction, and
- **although** (as in petitioner Bottoson's case) the jury was unable to achieve unanimity even with respect to its fact-free advisory verdict?

That proposition cannot survive thirty seconds' scrutiny; and almost all of Moore's Answer Brief self-destructs along with it.

B. We accordingly confine the balance of petitioner's reply brief to the few collateral arguments advanced by respondent which do not involve this fundamental absurdity. They are, for the most part, defenses in confession-and-avoidance. None has any merit.

1. Respondent argues that petitioner's *Apprendi-Ring* claim is procedurally defaulted. But this Court entertained the identical claim on petitioner's previous habeas petition, filed after the grant of *certiorari* but before the merits

decision in *Ring*. See *Bottoson v. State*, 813 So.2d 31, 36 (Fla. 2002).[3] Since that time, petitioner and respondent have been occupied virtually full-time litigating precisely the same claim, so when can the alleged procedural default have occurred? Manifestly, there has been no such default.

2. Alternatively, respondent argues that this Court's ruling on the merits in the interim between the grant of *certiorari* and the merits decision in *Ring* remains controlling. Respondent fails to call this argument by its real name – a law-of-the-case argument – because, if it did, the baselessness of the argument would be patent. See *State v. Owen,* 696 So.2d 715, 720 (Fla. 1997); and *Brunner Enterprises, Inc. v. Department of Revenue*, 452 So.2d 550, 552-553 (Fla. 1984), both holding that the law of the case yields to a subsequent, controlling change of law by the U.S. Supreme Court. Accord: *Strazzulla v. Hendrick*, 177 So.2d 1, 4 (Fla. 1965). Respondent's argument is no less baseless for being misnamed.

3. Respondent then argues that *Ring* is not retroactive, citing federal cases like *Cannon v. Mullin*, 2002 WL 1587921 (10th Cir. 2002). Of course, these

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[3] In so doing, the Court acted consistently with precedent. *See*, *e.g.*, *Thompson v. Dugger*, 515 So.2d 173, 175 (Fla. 1987), holding that the Supreme Court's decision in *Hitchcock v. Dugger*, 481 U.S. 393 (1987), "represent[ed] a sufficient change in the law that potentially affect[ed] a class of petitioners . . . to defeat the claim of a procedural default." *Apprendi* and *Ring* cannot conceivably be regarded as less drastic, fundamental, or sweeping changes of law than *Hitchcock*.

cases do not involve retroactivity in the sense in which this court has used that term and developed rules for determining when it will give retroactive effect to "fundamental and constitutional law changes which cast serious doubt on the veracity or integrity of the original trial proceeding." *Witt v. State*, 387 So.2d 922, 929 (1980). Respondent's federal citations are, instead, cases applying the unique federal habeas corpus doctrine of *Teague v. Lane*, 489 U.S. 288 (1989). The *Teague* doctrine is a tortuous and tricky one, of unpredictable application, as exemplified by the very *Cannon* case that is respondent's lead-off citation. (There the Oklahoma Court of Criminal Appeals disagreed with the United States Court of Appeals for the Tenth Circuit and held that *Ring* claims **are** cognizable in postconviction proceedings in the first instance, despite *Teague*.[4]) Fortunately for coherence, retroactivity in this Court is governed by *Witt*, not *Teague*. *See*, *e.g.*, *House v. State*, 696 So.2d 515, 518 n.8 (Fla. 4th DCA) (by Pariente, J.); *Gantorius v. State*, 693 So.2d 1040, 1042 n.2 (Fla. 3d DCA 1997), *approved in State v. Gantorius*, 708 So.2d 276 (Fla. 1998). And, as we have shown at pages 29-34 of our opening brief, *Ring* is retroactive under the *Witt* criteria.

4. Finally (apart from arguments which were anticipated and refuted

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[4] The opinion of the Oklahoma Court of Criminal Appeals is appended to this brief. It rejects the argument that *Teague* bars Cannon's *Ring* claim (*see* footnote 14), although it then decides the claim against Cannon on the merits.

in our opening brief), respondent argues that because one of the aggravating circumstances on which the trial judge relied to impose petitioner's death sentence was a prior conviction of bank robbery, petitioner's case is taken out of the rule of *Apprendi* and *Ring* by an exception to that rule established in *Almendarez-Torres v. United States*, 523 U.S. 224 (1998).[5] There are two short answers to this contention:

- It is plain that *Almendarez-Torres* does not survive *Apprendi* and *Ring* but rather fell along with *Hildwin v. Florida*, 490 U.S. 638 (1989) (*per curiam*), and *Walton v. Arizona*, 497 U.S. 639 (1990). 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*.[6] The *Apprendi* majority found it

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[5] Respondent also invokes the *Almenarez-Torres* exception on the supposed logic that petitioner committed other contemporaneous felonies against the victim of the homicide for which he was sentenced to death. See Answer Brief, pp. 13-16. This is nonsense. Those felonies are "prior convictions" ***neither*** under *Almendarez-Torres* ***nor*** under Florida law. See, *e.g.*, *Perry v. State*, 522 So.2d 817, 820 (Fla.1988); *Holton v. State*, 573 So.2d 284, 291 (Fla. 1991); *Bruno v. State*, 574 So.2d 76, 81 (Fla. 1991); compare *Bogle v. State*, 655 So.2d 1103, 1108 (Fla. 1995).

[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

(continued...)

unnecessary to overrule *Alemndarez-Torres* explicitly in order to decide the issues before it, but acknowledged that "it is arguable that *Almendarez-Torres* was incorrectly decided." 530 U.S. at 489. It then went on in footnote to *add* to "the reasons set forth in Justice SCALIA's [*Almendarez-Torres*] dissent, 523 U.S., at 248-260," 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 drove the Sixth Amendment ruling in *Apprendi*. *Id*. at 489 n. 15.[7]

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[6](...continued)
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 describes this change of mind as follows:

> "[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."

530 U.S. at 520-521 .

[7] The majority opinion in *Almendarez-Torres* notably relied upon *McMillan* (continued...)

- 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 Almendarez-Torres **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 which *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

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[7](...continued)
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 244; see generally *id*. at 242-246. 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*.

remained for a jury to try in the light of Almendarez-Torres' guilty plea.

II. *ATKINS V. VIRGINIA*[8]

Respondent's principal argument in the *Atkins* section of his brief (and the only argument that was not anticipated and refuted in our opening brief) is that petitioner Bottoson was earlier found not to be mentally retarded. Of course that is true, but it is not the point. The point is that the earlier adjudication of whether petitioner is or is not mentally retarded was made before the U.S. Supreme Court's *Atkins* decision attached constitutional consequences and procedural protections to the issue of mental retardation. An adjudication made without appreciation of its constitutional significance and without observance of the procedural safeguards that its constitutional status calls into play is insufficiently reliable or scrupulous to serve as the basis for petitioner's execution. If he is to be put to death after *Atkins*, it should be on the basis of an adjudication that meets *Atkins*' exacting standards.

[8] 122 S. Ct. 2242 (2002).

CONCLUSION

Nothing in respondent's brief provides any reason to deny petitioner the relief to which he is entitled under *Ring* and *Atkins*.

Respectfully submitted,

WILLIAM JENNINGS
Capital Collateral Regional Counsel
Middle Region

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PETER J. CANNON
Assistant CCRC
Fla. Bar No. 109710
ERIC PINKARD
Assistant CCRC
Fla. Bar No. 651443
Office of the Capital Collateral
Regional Counsel
3801 Corporex Park Drive, Suite 201
Tampa, Florida 33619
813-740-3544

MARK E. OLIVE
Fla. Bar No. 0578533
Law Offices of Mark E. Olive, P.A.
320 West Jefferson Street
Tallahassee, Florida 32301
850-224-0004

Counsel for Petitioner Linroy Bottoson

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing reply brief is being furnished by facsimile transmission to counsel for Respondent, Assistant Attorney General Kenneth Sloane Nunnelley, Office of the Attorney General 444 Seabreeze Boulevard, Suite 500, Daytona Beach, Florida 32818, this 5th day of August, 2002.

CERTIFICATE OF COMPLIANCE

This petition was prepared using Times New Roman 14 point font.

_____
Mark E. Olive

APPENDIX A