

IN THE SUPREME COURT OF FLORIDA

RICHARD BARRY RANDOLPH,

Petitioner,

v.

James V. Crosby, Jr.,  
ETC.,

Respondent.

CASE NO. SC03-1056

RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

CHARLES J. CRIST, JR.  
ATTORNEY GENERAL

DOUGLAS T. SQUIRE  
ASSISTANT ATTORNEY GENERAL  
FLORIDA BAR NO. 0088730

OFFICE OF THE ATTORNEY GENERAL  
444 Seabreeze Blvd., Suite 500  
Daytona Beach, Florida 32118  
Telephone: (386)238-4990  
Facsimile: (386)226-0457

COUNSEL FOR APPELLEE

PRELIMINARY STATEMENT

Respondent, James V. Crosby, Jr., Secretary, Florida Department of Corrections, will be referenced in this brief as Respondent. Petitioner, Richard Barry Randolph, the defendant in the trial court, will be referenced in this brief as Petitioner or Randolph.

All bold-type emphasis is supplied, and all other emphasis is contained within original quotations unless the contrary is indicated.

STATEMENT OF THE CASE AND FACTS

Respondent would make the following addition to Randolph's statement of the case and facts. This Court recounted the facts of the case as follows:

Minnie Ruth McCollum managed a Handy-Way store in Palatka, and Randolph was a former employee of the same store. Shortly after 7 a.m. on August 15, 1988, Terry Sorrell, a regular customer, and Dorothy and Deborah Patilla, custodians of the store, observed Randolph, wearing a Handy-Way smock, locking the front door. When the Patillas inquired about Mrs. McCollum's whereabouts and why the store was locked, Randolph told them that Mrs. McCollum's car had broken down and that she had taken his car. He indicated that he had repaired her car and was leaving to pick her up. Randolph then drove away in Mrs. McCollum's car.

The women tried the door and, finding it locked, peered in through the window. They saw that the security camera in the ceiling was pulled down; wires were coming out of the trash can, which had been tipped over; the area behind the counter was in disarray; and the door to the back room, normally kept open, was almost completely closed. Thinking that something was awry, they called the sheriff's office.

After breaking into the store, a deputy found Mrs. McCollum lying on her back, naked from the waist

down, with blood coming out of the back of her head and neck. She was breathing and moaning slightly. The deputy also observed a knife beside her head. Paramedics transported Mrs. McCollum to the hospital.

Dr. Kirby Bland, a general surgeon, testified that Mrs. McCollum arrived at the \*333 emergency room comatose, and with her head massively beaten and contused. She had multiple skin breaks and skin lacerations about the scalp, face, and neck and her left jawbone was fractured. Dr. Bland indicated that Mrs. McCollum had knife lacerations to the left side of her neck that caused a hematoma around the heart. There was also a stab wound in the area of the left eye. Dr. Albert Rhoten, Jr., a neurologist, testified that in twenty years of neurosurgical practice he had not seen brain swelling so diffuse, and he likened it to someone who had been ejected out of a car or thrown from a motorcycle and received multiple hits on the head. Mrs. McCollum died at the hospital six days after the assault.

After leaving the Handy-Way, Randolph drove Mrs. McCollum's car to the home of Norma Janene Betts, Randolph's girlfriend and mother of their daughter. She testified that he admitted robbing the Handy-Way store and attacking Mrs. McCollum. He told her that he was going to Jacksonville to borrow money from the manager of a Sav-A-Lot grocery store and cash in lottery tickets. He promised to return to take Betts and their daughter to North Carolina.

Betts also testified that while they lived in North Carolina Randolph was a "nice young man" and was employed. After they moved to Palatka, he began socializing with the wrong crowd, became addicted to crack cocaine, and changed altogether. On the morning of the incident, she testified, Randolph did not appear to be under the influence of crack cocaine, but she did not know whether he had taken any cocaine between 11 p.m. the night before and 6 a.m. the morning of the incident.

Randolph was arrested in Jacksonville at a Sav-A-Lot store, while waiting for the manager to advance him some money. After waiving his rights under *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), Randolph gave a statement to two Putnam County detectives. Detective William Hord testified that Randolph had said he had ridden his bicycle to the Handy-Way store with a toy gun, which he hid

behind the store. He said he knew the routine at the store, having worked there, and knew there should be approximately \$1,000 in the safe. He planned to enter the store unseen, open the safe, remove the money, and leave while the manager was outside checking the gas pumps. However, the manager returned and saw him. He rushed her, she panicked, and a struggle ensued. Randolph indicated that she was "a lot tougher than he had expected," but that finally he forced her into the back room where he hit her with his hands and fists until she "quieted down."

Randolph tried unsuccessfully to open the store safe. When Mrs. McCollum started moving again, he approached her. He said that she pulled the draw string out of his hooded sweat shirt, which he then wrapped around her neck until she stopped struggling. Randolph then found a slip of paper with the combination of the safe. Unsuccessful in opening it, he took the store's lottery tickets.

At this point, the victim started screaming. Randolph again struck her until "she hushed." Because she continued to make noises, Randolph grabbed a small knife and stabbed her. He again grabbed the string and "tried to cut her wind." To make it appear as if "a maniac" had committed the crime, Randolph said he then raped her. He put on a Handy-Way uniform, grabbed the store video camera out of its mount and put it into the garbage. He took Mrs. McCollum's keys and locked the store before leaving in her car.

On the way to Jacksonville, Randolph stopped at several convenience stores where he cashed in winning lottery tickets and discarded the losing tickets, and at a McDonald's where he disposed of his bloodstained clothing and shoes. The sheriff's detectives recovered the lottery tickets and articles of clothing when they returned to Putnam County with Randolph.

During the penalty phase, the state called the medical examiner, who testified that Mrs. McCollum died as the result of severe brain injury. He also described the \*334 extensive bruises to Mrs. McCollum depicted by a series of photographs.

Randolph presented the testimony of Dr. Harry Krop, a psychologist who examined Randolph. He opined that none of the statutory mitigating circumstances

existed, although several nonstatutory circumstances most likely contributed to the offense. He testified that Randolph, who was adopted when he was five months old, had problems getting along with people in school, and his behavior problems caused him to be referred to psychotherapy for a year in the third grade. His mother was emotionally unstable and was hospitalized for psychiatric reasons on a number of occasions, and his father was physically abusive, and administered discipline by tying him and beating him with his hands, a broomstick, and a belt.

Despite his emotional deficiencies, Randolph graduated from high school. He received an honorable discharge from the Army; however, he started using drugs during his service, including marijuana and cocaine. In 1984 he began using highly-addictive crack cocaine. Dr. Krop testified that, unlike alcohol intoxication, crack cocaine's effects are not readily apparent from merely looking at a person. When someone regularly uses crack cocaine, the effects of the drug stay in the blood; one's personality and behavior are affected, not necessarily by an immediate ingestion of the drug, but rather by its use over time. He believed that Randolph's abnormal personality was greatly influenced by his drug addiction at the time of the offense.

Dr. Krop further testified that Randolph regretted what had happened; he was ashamed and embarrassed that he had lost control, and was remorseful about what he had done. The psychologist believed that Randolph had nothing against Mrs. McCollum, that he fully intended only to enter the store and steal the money while she was outside, but that things happened that caused him to panic. He concluded that Randolph's criminal behavior was influenced by his drug addiction.

The jury found Randolph guilty of first-degree murder, armed robbery, sexual battery with force likely to cause serious personal injury or with a deadly weapon, and grand theft of a motor vehicle. [FN2] The jury recommended the death penalty by a vote of eight to four. The judge accepted the jury recommendation and imposed the death penalty, finding four aggravating circumstances, [FN3] no statutory mitigating circumstances, and two nonstatutory mitigating circumstances. [FN4]

FN2. The trial court imposed a sentence of nine years' incarceration on the armed robbery count, and twenty-seven years' incarceration on the sexual battery count, to run concurrent with the sexual battery term. No sentence was imposed on the conviction for grand theft.

FN3. Murder during commission or flight after commission of a sexual battery, section 921.141(5)(d), Florida Statutes (1987); murder committed to avoid or prevent lawful arrest, section 921.141(5)(e), Florida Statutes (1987); murder committed for pecuniary gain, section 921.141(5)(f), Florida Statutes (1987); murder especially heinous, atrocious, or cruel, section 921.141(5)(h), Florida Statutes (1987).

FN4. Randolph possesses an atypical personality disorder and expressed shame and remorse for his conduct.

Randolph v. State, 562 So.2d 331, 332-34 (Fla. 1990).

ARGUMENT

**Jurisdiction**

This Court has jurisdiction pursuant to Article V, section 3(b)(9) of the Florida Constitution.

CLAIM

WHETHER RANDOLPH CAN USE THE INSTANT HABEAS PETITION TO CHALLENGE THE CONSTITUTIONALITY OF FLORIDA'S DEATH PENALTY STATUTE UNDER APPRENDI/RING?

**Statement of the Issue**

Respondent restates the issue because Randolph's formulation is not posed in the form of a neutral question which frames the issue to be decided by this Court.

**Argument**

**A. Randolph should not be allowed to use his Habeas Corpus Petition to raise a question which could have been, should have been, or was raised on appeal.**

Although Randolph attempts to characterize the issue he raised on direct appeal as having sought relief under the Sixth Amendment, to somehow make the Supreme Court's recent ruling in Ring v. Arizona, 122 S.Ct. 2428 (2002), applicable, he actually argued that "the **Eighth** Amendment challenge made in this issue on appeal is significantly different, in that this issue challenges the consistency of imposition of the death penalty following appellate review by this Court." (Initial Brief at 53)(emphasis in original). Clearly, Randolph was not appealing the lack of written findings by the jury under the Sixth Amendment, but, rather, under the Eighth Amendment. Therefore, Ring's application of the Sixth Amendment principle in Apprendi to capital cases has no relevance to the Eight Amendment issue Randolph raised on direct appeal.

Nonetheless, "[a]s [this Court] held in *Parker*, 'habeas corpus petitions are not to be used for additional appeals on questions which could have been, should have been, or were raised on appeal or in a rule 3.850 motion, or on matters that were not objected to at trial.' *Parker* 550 So.2d at 460. Thus, [this Court should] find that this claim is procedurally barred because [Randolph] is improperly attempting to obtain a second appeal of issue that were raised or should have been

raised in his prior 3.850 motion and appeal." Bottoson v. State, 813 So.2d 31, 35-6 (Fla. 2002)(quoting Parker v. Dugger, 550 So.2d 459, 460 (Fla. 1989)).

**B. Ring is not implicated in Florida.**

Ring, an extension of the Supreme Court's holding in Apprendi v. New Jersey, 530 U.S. 466 (1999), to death penalty cases, is not implicated in Florida, because the maximum penalty for a capital felony in Florida is death. See e.g., Porter v. Crosby, 840 So.2d 981 (Fla. 2003) (noting that this Court has repeatedly held that the maximum penalty under the statute is death), reh'g denied, (Mar. 13, 2003). See also Bottoson v. Moore, 833 So. 2d 693 (Fla.), cert. denied, 123 S. Ct. 662 (2002)(rejecting the claim that Florida's capital sentencing scheme is unconstitutional under Ring v. Arizona, 122 S. Ct. 2428 (2002), and Apprendi v. New Jersey, 530 U.S. 466 (2000)).

**C. Ring is not subject to retroactive application on collateral review.**

Randolph's reliance on Ring is misplaced, because Ring has no application to cases not on direct review.

Decided in June 2002, Ring, and its holding that a jury, not a judge, must make any factual findings which increase a sentence from imprisonment to death, is not implicated in this case. The Supreme Court did not, and has not, expressly made the ruling in Ring retroactive. See, e.g., Ring, 122 S.Ct. at 2449-50 (O'Connor, J., dissenting) (noting that current state death row inmates will not be able to invoke the principles of Ring and citing Teague v. Lane, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989)). Absent an express pronouncement on retroactivity from the Supreme

Court, the rule from Ring is not retroactive. See Tyler v. Cain, 533 U.S. 656, 663, 121 S.Ct. 2478, 150 L.Ed.2d 632 (2001) (holding that "a new rule is not 'made retroactive to cases on collateral review' unless the Supreme Court holds it to be retroactive") (quoting 28 U.S.C. S 2244(b)(2)(A)).

Moore v. Kinney, 320 F.3d 767, 771 n3 (3<sup>rd</sup> Cir. 2003). Further, as explained recently by the Eleventh Circuit Court of Appeals:

Just as Apprendi "constitutes a procedural rule because it dictates what fact-finding procedure must be employed," United States v. Sanders, 247 F.3d 139, 147 (4th Cir.2001), cited with approval in McCoy, 266 F.3d at 1256, Ring constitutes a procedural rule because it dictates what fact-finding procedure must be employed in a capital sentencing hearing. Ring, 536 U.S. at 609, 122 S.Ct. at 2443. Ring changed neither the underlying conduct the state must prove to establish a defendant's crime warrants death nor the state's burden of proof. Ring affected neither the facts necessary to establish Florida's aggravating factors nor that State's burden to establish those factors beyond a reasonable doubt. Instead, Ring altered only who decides whether any aggravating circumstances exist and, thus, altered only the fact-finding procedure.

Our conclusion that Ring announces a procedural rule is bolstered by Ring's status as an extension of Apprendi. We agree with other courts who have concluded that because Apprendi was a procedural rule, it axiomatically follows that Ring is also a procedural rule. As the Arizona Supreme Court aptly has stated: "Logic dictates that if Apprendi announced a procedural rule, then, by extension, Ring ... did also." Towery, 64 P.3d at 832-33 (also similarly noting that "Ring ... extends Apprendi's interpretation of the Sixth Amendment to the capital context"); cf. Cannon v. Mullin, 297 F.3d 989, 994 (10th Cir.2002) (concluding, in the context of a successive habeas petition, that "[i]t is clear ... that Ring is simply an extension of Apprendi to the death penalty context"). [FN31]

FN31. The Supreme Court specifically described Apprendi, on which Ring is based, as a procedural decision: "The substantive basis for New Jersey's enhancement is thus not at issue; the adequacy of

New Jersey's procedure is." *Apprendi*, 530 U.S. at 475, 120 S.Ct. at 2354 (emphasis added). Numerous courts addressing *Apprendi*'s retroactive application consistently conclude that *Apprendi* announced a procedural rule. See, e.g., *McCoy*, 266 F.3d at 1256 (listing cases); *Towery*, 64 P.3d at 832-33 (same).

\*\*\*\*\*

*Ring* is based on the Sixth Amendment right to a jury trial and not on a perceived, much less documented, need to enhance accuracy or fairness of the fact-finding in a capital sentencing context.

Turner v. Crosby, 2003 WL 21739734 (11<sup>th</sup> Cir. July 29, 2003). But see Summerlin v. Stewart, 2003 U.S. App. LEXIS 18111 (9th Cir. Sep. 2, 2003)(basing retroactivity under Teague in large part on a finding that application of the result in Ring would greatly enhance the accuracy of Arizona's sentencing process due to the "orderly presentation of evidence and argument" in penalty phases in jury trials, and because it would apply to all of Arizona's death penalty cases).

Moreover, the Ring decision is not retroactively applicable under Witt v. State, 387 So. 2d 922, 929-30 (Fla. 1980). Under Witt, Ring is not retroactively applicable unless it is a decision of fundamental significance, which so drastically alters the underpinnings of Randolph's death sentence that "obvious injustice" exists. New v. State, 807 So. 2d 52, 53 (Fla. 2001), cert. denied, 122 S.Ct. 2626 (2002). In determining whether this standard has been met, this Court must consider three factors: the purpose served by the new case; the extent of reliance on the old law; and the effect on the administration of justice from retroactive

application. Ferguson v. State, 789 So. 2d 306, 311 (Fla. 2001). The First District Court of Appeal recently conducted this analysis and concluded that:

(1) the Apprendi ruling does not operate to prevent any individual miscarriages of justice, (2) the courts have long-enjoyed the freedom to find sentence-enhancing factors beyond a preponderance of the evidence, and (3) retroactive application of the rule would result in an administrative and judicial maelstrom of postconviction litigation, we hold that the decision announced in Apprendi is not of sufficient magnitude to be fundamentally significant, and thus, does not warrant retroactive status.

Hughes v. State, 826 So.2d 1070, 1074-75 (Fla. 1<sup>st</sup> DCA 2002) (certifying the question "Does the ruling announced in Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), apply retroactively?"); see also Figarola v. State, 2003 WL 1239911 (Mar. 19, 2003).

**D. Ring has no application to the facts of this case.**

Ring, should it ever be applied retroactively, has no application to the facts of this case, because Randolph's death sentence was based in part on his convictions for armed robbery, sexual battery with force likely to cause serious personal injury or with a deadly weapon, and grand theft of a motor vehicle, all of which were charged by indictment<sup>1</sup> and found unanimously by the jury.<sup>2</sup> See Jones v. State, Nos. SC01-

---

<sup>1</sup>Original Trial Record at Vol. I, pp. 11-12.

<sup>2</sup> Randolph, 562 So.2d at 334.

734 & SC02-605 (Fla. May 8, 2003)(citing Bottoson v. Moore, 833 So.2d 693, 723 (Fla. 2002)(Pariente, J., concurring in result only) (explaining that "in extending Apprendi to capital sentencing, the Court in Ring did not eliminate the 'prior conviction' exception"))).

Randolph argues that relying upon contemporaneous felony convictions to deny him the benefit of Ring is unconstitutional because Florida's statute requires three findings before a defendant is eligible for a death sentence: the sentencer (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. (Petition at pp. 25-26). However, notwithstanding the exception for prior jury findings, Florida's sentencing process is a way to satisfy the Eighth Amendment and protect against capricious and arbitrary sentences, and does not translate into a constitutional analysis for Sixth Amendment purposes. The "three stage process" identified by Randolph narrows the class of defendants already subject to the death penalty by virtue of their conviction. See e.g., Porter v. Crosby, 840 So.2d 981 (Fla. 2003) (noting that this Court has repeatedly held that the maximum penalty under the statute is death), reh'g denied, (Mar. 13, 2003). It does not increase the punishment, it merely limits the selection of a death

sentence to a portion of those who have already been found eligible to receive that sentence.

CONCLUSION

Wherefore, the State, based on the foregoing arguments and authorities, respectfully requests that this Honorable Court deny the Petition for Writ of Habeas Corpus.

SIGNATURE OF ATTORNEY AND CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to: John P. Abatecola, Assistant CCRC - Southern Region, 101 N.E. 3<sup>rd</sup> Ave., Suite 400, Ft. Lauderdale, Florida 33301, by MAIL on September \_\_\_\_\_, 2003.

Respectfully submitted,

CHARLES J. CRIST, JR.  
ATTORNEY GENERAL

\_\_\_\_\_  
DOUGLAS T. SQUIRE  
ASSISTANT ATTORNEY GENERAL  
Florida Bar No. 0088730

OFFICE OF THE ATTORNEY GENERAL  
444 Seabreeze Blvd., Suite 500  
Daytona Beach, Florida 32118  
Telephone: (386)238-4990  
Facsimile: (386)226-0457

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the font requirements of Fla. R. App. P. 9.210.

\_\_\_\_\_  
Douglas T. Squire  
Attorney for State of  
Florida

[C:\Documents and Settings\beltonk\Desktop\Briefs Temp\03-1056\_response.wpd ---  
9/16/03,8:40 am]