IN THE SUPREME COURT OF FLORIDA

NO. SC-03-482

DANIEL JON PETERKA,

Petitioner,

v.

JAMES V. CROSBY,
Secretary, Florida Department of Corrections,

Respondent.

REPLY TO RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

LINDA MCDERMOTT
Florida Bar No. 0102857
141 N.E. 30th Street
Wilton Manors, FL 33334
(850) 322-2172

COUNSEL FOR PETITIONER

ARGUMENT IN REPLY

INTRODUCTION

COMES NOW, the Petitioner, **Daniel John Peterka**, by and through undersigned counsel and hereby submits this Reply to the State's Response to Mr. Peterka'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.

CLAIM I – RING v. ARIZONA

Respondent argues that Ring v. Arizona, 122 S. Ct. 2428(2002), is not retroactive because it is a procedural rule (Response at 4 -5). And, in discussing the retroactivity issue argues that this Court should adopt the test set forth in Teague v. Lane, 489 U.S. 288 (1989). In fact, Respondent argues that Ring is not retroactive under Teague, rather than the appropriate analysis adopted by this Court in Witt v. State, 387 So. 2d 922 (Fla. 1980). Because Ring is retroactive Mr. Peterka is entitled to relief.

Under Witt, a change in law supports postconviction relief in a capital case when "the change: (a) emanates from this Court or the United States Supreme Court, (b) is constitutional in nature, and (c) constitutes a development of fundamental significance." Id. at 931. The first two criteria are met here. In elaborating what "constitutes a development of fundamental significance," the Witt opinion includes in that category "changes of law which are of sufficient magnitude to necessitate retroactive application as ascertained by the three-fold test of Stovall [v. Denno, 388 U.S. 293 (1967)] and Linkletter [v. Walker, 381 U.S. 618 (1965)]," adding that "Gideon v. Wainwright . . . is the prime example of a law change included within this category." See Witt, 387 So. 2d at 929.

This three-fold test considers "(a) the purpose to be served by the new rule; (b) the extent of reliance on the old rule; and (c) the effect on the administration of justice of a retroactive application of the new rule." See id. at 926. It is not an easy test to use, because there is a tension at the heart of it. Any change of law which "constitutes a development of fundamental significance" is bound to have a broadly unsettling "effect on the administration of justice" and to upset a goodly measure of "reliance on the old rule." The example of Gideon – a profoundly unsettling and upsetting change of constitutional law – makes the tension obvious. How the tension is resolved ordinarily depends mostly on the first prong of the Stovall-Linkletter test – the purpose to be served by the new rule – and whether an analysis of that purpose reflects that the new rule is a "fundamental and constitutional law change[] which cast[s] serious doubt on the veracity or integrity of the original trial proceeding." See Witt, 387 So. 2d at 929.

Two considerations call for recognizing that the Apprendi-Ring rule is such a fundamental constitutional change: First, the purpose of the rule is to change the very identity of the decisionmaker with respect to critical issues of fact that are decisive of life or death. In the most basic sense, this change remedies a "'structural defect [ ] in the constitution of the trial mechanism,'" Sullivan v. Louisiana, 508 U.S. 275, 281 (1993): it vindicates "the jury guarantee . . . [as] a 'basic protectio[n]' whose precise effects are unmeasurable, but without which a criminal trial cannot reliably serve its function." Id. In Johnson v. Zerbst, 304 U.S. 458 (1938) – which was the taproot of Gideon v. Wainwright, this Court's model of the case for retroactive application of constitutional change – the Supreme Court held that a denial of the right to counsel could be vindicated in postconviction proceedings because the Sixth Amendment required a lawyer's participation in a criminal trial to "complete the court", see Johnson, 304 U.S. 458; and a judgment

rendered by an incomplete court was subject to collateral attack. What was a mere imaginative metaphor in Johnson is literally true of a capital sentencing proceeding in which the jury has not participated in the life-or-death factfinding role that the Sixth Amendment reserves to a jury under Apprendi and Ring: the constitutionally requisite tribunal was simply not all there; and such a radical defect necessarily "cast[s] serious doubt on the veracity or integrity of the . . . trial proceeding." See Witt, 387 So. 2d at 929.

Second, "the jury trial provisions in the Federal and State Constitutions reflect a fundamental decision about the exercise of official power – a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges. Fear of unchecked power . . . found expression . . . in this insistence upon community participation in the determination of guilt or innocence," Duncan v. Louisiana, 391 U.S. 145, 156 (1968) – including, under Apprendi and Ring, guilt or innocence of the factual accusations "necessary for the imposition of the death penalty." See Ring, 122 S. Ct. at 2443; Apprendi, 530 U.S. at 494-95. The right to a jury determination of factual accusations has long been the central bastion of the Anglo-American legal system's defenses against injustice.

The United States Supreme Court's retraction of Hildwin v. Florida, 490 U.S. 638 (1989) and Walton v. Arizona, 490 U.S. 639 (1990) in Ring restores a right to jury trial that is neither trivial nor transitory but "the most transcendent privilege which any subject can enjoy." Mr. Peterka should not be denied its benefit simply because the Supreme Court temporarily overlooked the point before finally getting it right.

In addition, Respondent argues that this Court's decisions demonstrate that Ring does not apply in Florida. (Response at 11-2). However, in Ring, the Supreme Court overruled Walton v. Arizona, 497 U.S. 639 (1990), "to the extent

that it allows a sentencing judge, sitting without a jury, to find an aggravating circumstance necessary for imposition of the death penalty." Ring, 122 S. Ct. at 2443. Quite simply, Ring subjected capital sentencing to the Sixth and Fourteenth Amendment rule of Apprendi v. New Jersey, 530 U.S. 466 (2000), "that the Sixth Amendment does not permit a defendant to be 'expose[d] . . . to a penalty *exceeding* the maximum he would receive if punished according to the facts reflected in the jury verdict alone.'" Ring, 2439-40 (quoting Apprendi, 530 U.S., at 483). "Capital defendants, no less than non-capital defendants," the Court in Ring declared, "are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment." Id.

That rule squarely and indisputably outlaws the Florida sentencing procedure used to impose Mr. Peterka's death sentence. In overruling Walton (which had upheld Arizona's capital sentencing procedure against the challenge that it violated capital defendant's Sixth Amendment right to jury trial), Ring necessarily overruled Hildwin and its precursors (which had upheld Florida's capital sentencing procedure against the identical challenge). The Walton decision treated Florida precedents as controlling, and regarded the Florida and Arizona capital-sentencing procedures, as indistinguishable. It is indisputable that just as Ring overruled Walton, in the wake of Ring, Hildwin is also no longer good law and thus does not control.

Finally, Respondent argues that establishing a single aggravator renders a defendant death eligible. (Response at 12). Respondent misconstrues the Supreme Court's opinion in Ring as simply establishing that the presence of an aggravating circumstance is necessary to render a defendant death eligible. Such a result is at odds with the construction of Ring by the Nevada Supreme Court and the Missouri Supreme Court, both of which read Ring to mean that a state's own statutory

language controls as to what constitutes an element of capital first degree murder.[1]

In Florida, § 921.141, Fla. Stat., requires both the jury and the trial judge to make three factual determinations before a death sentence may be imposed. They (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." § 921.141(3), Fla. Stat. (emphasis added). If the judge does not make these findings, "the court shall impose sentence of life imprisonment in accordance with [§]775.082." Id. (emphasis added). Mr. Peterka's jury was so instructed.

In Ring, the Supreme Court held that the Sixth Amendment to the United States Constitution requires that when aggravating factors are statutorily necessary for imposition of the death penalty, they must be found beyond a reasonable doubt by a jury:

> [W]e overrule *Walton* [*v. Arizona*, 497 U.S. 639 (1990),] to the extent that it allows a sentencing judge, sitting without a jury, to find an aggravating circumstance necessary for imposition of the death penalty. . . . Because Arizona's enumerated aggravating factors operate as 'the functional equivalent of an element of a greater offense,' . . . the Sixth Amendment requires that they be found by a jury.

Ring, 536 U.S. at 609 (citations omitted). This was in conformity with its earlier ruling in Apprendi v. New Jersey, where the Supreme Court held, "If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact--no matter how the State labels it--must be found by a jury beyond a reasonable doubt." 530 U.S. at 482-83. Ring applied Apprendi to the category of

---

[1]It also conflicts with decisions by the Colorado Supreme Court and the Arizona Supreme Court. Woldt v. People, 64 P.3d at 265; State v. Ring, 65 P.3d at 943

capital murder cases and concluded any fact rendering a person eligible for a death sentence is an element of the offense. 536 U.S. at 604, *quoting* Apprendi, 530 U.S. at 494 ("In effect, 'the required finding [of an aggravating circumstance] expose[d] [Ring] to a greater punishment than that authorized by the jury's guilty verdict'"). The Supreme Court has even more recently elaborated upon the meaning of Ring. In Sattazahn v. Pennsylvania, 123 S.Ct. 732, 739 (2003), the Supreme Court explained:

> Put simply, if the existence of any fact (other than a prior conviction) increases the maximum punishment that may be imposed on a defendant, that fact–no matter how the State labels it– constitutes an element, and must be found by a jury beyond a reasonable doubt.

Under a proper reading of Ring, the Florida statutory provisions make the steps required before the jury is free to consider which sentence to impose elements of capital first degree murder. Habeas relief is warranted.

CLAIM III – THE WARRANTLESS SEIZURE CLAIM

Respondent alleges that Mr. Peterka's claim has no merit because the trial court found that Mr. Peterka consented to the search of his apartment. (Response at 15). Respondent cites no authority for such a proclamation and, like many claims of error Mr. Peterka challenges the trial court's ruling that about consent and the scope of the consent that was given. Mr. Peterka's claim was properly preserved and the trial court erred in finding that consent was given when ruling on Mr. Peterka's motion to suppress.

Respondent also argues that the trial court did not err in denying the motion to suppress because the wallet and its contents would have inevitably been discovered. (Response at 16). Respondent contends that because Mr. Peterka confessed, the police would have searched the apartment and located the wallet.

(Response at 16). Respondent's argument makes no sense.

First, the trial court did not rule that the wallet would have been discovered. Rather, the trial court ruled that the search was proper because it was incident to arrest and Mr. Peterka consented. The United States Supreme Court has held that in making a case for inevitable discovery the State must show "that at the time of the constitutional violation an investigation was already underway." Nix v. Williams, 467 U.S. 431, 457 (1984)(Stevens, J. concurring). "Inevitable discovery involves no speculative elements . . ." Id. at 444 n.5. In Mr. Peterka's case, the police had not initiated any investigation of the shooting when they arrested Mr. Peterka. Mr. Peterka was arrested for an out of state warrant that had nothing to do with Mr. Russell, his disappearance or the shooting. Therefore, the doctrine of inevitable discovery cannot apply in this case.

Also, the State's argument that Mr. Peterka's statement would have allowed the police to obtain a search warrant and they would have found the wallet is not supported by the facts or the case law. Mr. Peterka's statements were made following his arrest and the search of his apartment. Furthermore, Ms. Thompson offered to remove the contents of the apartment for Mr. Peterka, so it is only speculation to assume that the police would have discovered the wallet.

In Moody v. State, this Court held that speculation may not play a part in the inevitable discovery rule and that the focus must be on verifiable facts. 824 So. 2d 754, 759-60 (Fla. 2003). Respondent's argument that the wallet would have inevitably been seized is completely speculative and has no merit.

Furthermore, contrary to Respondent's assertion, the contents of the wallet provided support for the State's theory that the murder was premeditated and committed so that Mr. Peterka could assume the victim's identity.

The facts surrounding the search of Mr. Peterka's apartment demonstrate

that Mr. Peterka did not consent to the search of his apartment and if he did consent to the search, the search of his wallet was outside of the scope of any consent. Habeas relief is warranted.

CLAIM IV – PROSECUTORIAL MISCONDUCT CLAIM

Respondent argues that Mr. Peterka's claim must be denied because it was not preserved for appeal. (Resp. at 24). Without further argument, Respondent asserts that the arguments do not constitute fundamental error.

In order for an error to be fundamental and justify reversal in the absence of an objection, "the error must reach down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error." Brown v. State, 124 So. 2d 481, 484 (Fla. 1960). Moreover, improper comments made in closing arguments of a penalty phase may also constitute fundamental error if they are so prejudicial as to taint the jury's recommended sentence. See Thomas v. State, 748 So. 2d 970, 985 (Fla. 1999).

The arguments made by prosecutor in Mr. Peterka's trial constitute fundamental error. Habeas relief is warranted.

CLAIM V – THE VICTIM'S CHARACTER EVIDENCE CLAIM

Respondent argues that the trial court did not err in allowing three witnesses to testify to the victim's reputation for peacefulness and nonviolence because Mr. Peterka claimed that the shooting occurred while he was defending himself.[2]

First, Mr. Peterka did not claim that the shooting occurred in self defense, i.e., that he was imminent danger of losing his life or suffering great bodily injury at the hands of Mr. Russell, and that the shooting was therefore justified. See Fla.

---

[2]Defense counsel repeatedly objected to the evidence because it was premature, irrelevant and that created prejudice which outweighed any probative value.

Stat. §§ 776.012, 782.02. Instead, he claims he shot the victim unintentionally by pulling the gun's trigger when he was startled by the victim (R. 2442-44). Mr. Peterka's trial counsel never presented any evidence or made any argument that the shooting occurred in self defense. Thus, it was error to allow the admission of evidence to rebut a defense that was never asserted. Williams v. State, 238 So. 2d 137, 139 (Fla. 1st DCA)(holding that evidence of a victim's character is not admissible "until the defendant shows some evidence that he acted in self-defense. . ."), cert. denied 241 So. 2d 397 (Fla. 1970); Jacob v. State, 546 So. 2d 113, 115 (Fla. 3d DCA 1989)(finding "no authority which would allow anticipatory rehabilitation of a victim on direct examination by the prosecution. Moreover, the purpose of anticipatory rehabilitation is to mitigate damaging impeachment evidence; the tactic has no discernable application to character evidence.").

Second, Mr. Peterka's version of how the shooting occurred is not "the equivalent to" a claim of self defense, which is the trigger for the admissibility of evidence concerning a homicide victim's reputation for peacefulness and non-violence because he has never claimed that the victim was a violent aggressor. See generally, Charles W. Ehrhardt, Florida Evidence, § 404.6 (2003 ed.). Thus, the admission of the evidence was an error.

Contrary to the State's argument, the erroneous admission of evidence was not harmless beyond a reasonable doubt. (Response at 35-6). In fact, during closing argument, the State told the jury that it should consider Mr. Russell's reputation for peacefulness and non-violence when considering whether or not he would have confronted Mr. Peterka about the stolen check. And, that Mr. Peterka must have shot the victim with premeditated intent (R. 1780-1).

There is a reasonable probability that the jury considered the improper and prejudicial evidence. Habeas relief is warranted.

CLAIM VII – THE PREJUDICIAL HEARSAY: "ARMED AND DANGEROUS" CLAIM

Respondent argues that Mr. Peterka's claim should be denied because the claim was raised on direct appeal and because of the law of the case doctrine. This Court may reexamine a claim previously raised if adherence to the previous ruling would result in manifest injustice. Strazzulla v. Hendrick, 177 So. 2d 1, 4 (Fla. 1965).

On direct appeal, the State argued that the trial court did not err by allowing an arresting officer to testify, over defense counsel's objection to hearsay and unfair prejudice, that a teletype from the State of Nebraska considered him "armed and dangerous". The argument was based on the fact that the statement was admitted not to prove the truth of its contents but to prove the motive of the arresting officer. (Answer Brief on Direct Appeal at 54).

Under established law, however, such a statement may not be admitted unless the purpose for which it is offered is a material issue in the case. The officers state of mind was not a material issue in the case. Why the officers used a ruse to arrest Mr. Peterka some thirty-two hours after the shooting had no logical connection whatsoever to the issue in dispute – whether or not Mr. Peterka shot the victim with a premeditated intent. Thus, the admission of the hearsay was in error.

This Court cannot be satisfied beyond a reasonable doubt that the erroneous admission of the hearsay, when considered in the context of the prosecution's theory, did not affect the jury and that it did not contribute to the conviction and sentence. There is a reasonable possibility that the jury considered Mr. Peterka's being "armed and dangerous" not only as proof of his bad character and a propensity for violence, but also as substantive evidence that Mr. Peterka shot the deceased with premeditated intent.

Appellate counsel was ineffective in failing to cogently articulate Mr. Peterka's claim on direct appeal. Counsel failed to point out on motion for rehearing that the trial court did not give the jury the limiting instruction on the armed and dangerous testimony that this Court (mis)concluded "eliminated any prejudice that may have resulted for [its admission]" State v. Peterka, 640 So. 2d 59, 68 (Fla. 1994). Habeas relief is warranted.

CLAIM VIII – THE PREJUDICIAL HEARSAY: FEAR OF MR. PETERKA'S GUN CLAIM

Respondent again contends that this claim should be denied because of the law of the case doctrine. Again, Mr. Peterka asserts that this Court should reexamine his claim because failure to reexamine the claim will result in manifest injustice. Strazzulla v. Hendrick, 177 So. 2d 1, 4 (Fla. 1965).

On direct appeal, the State argued that the hearsay statements were admissible because they were admitted to rebut Mr. Peterka's defense that the shooting occurred in self defense or accidentally. (Answer Brief on Direct Appeal at 63).

As previously argued, Mr. Peterka did not claim that the shooting occurred in self defense. No evidence or argument was presented by the defense of a self defense theory. The defense that Mr. Peterka unintentionally shot the victim did not place the victim's fear of Mr. Peterka's gun in issue. The admission of this hearsay testimony was an error.

Even if Mr. Peterka's defense had placed the victim's fear in issue, however, the prosecutor could not properly have used it to prove Mr. Peterka's state of mind, i.e., to prove that Mr. Peterka shot the victim with a premeditated intent.

Hodges v. State, 595 So. 2d 929, 931-2 (Fla. 1992). Yet, that is exactly how the prosecutor misused it in his closing argument:

> Ladies and gentlemen, the evidence in the case does prove that a criminal act occurred and the evidence in this case does prove there was premeditation . . .

(R. 1774-5). And:

> How do we know that Daniel Peterka's story is not true?

(R. 1779). And:

> You are supposed to believe that with Daniel Peterka, the gunman, with a gun laying out in the room, that [John Russell] started a fight with Daniel Peterka. That is what you're supposed to believe. No, ladies an gentlemen, John told everyone, he told Lori, his girlfriend, he told his cousin Deborah, and even the Bank Manager Kim Cox what he was going to do, he was going to go to the sheriff. **He was not going to confront Daniel Peterka about the check, especially when Daniel Peterka had the gun in the house. He feared that gun and he feared Daniel Peterka**.

(R. 1780-1)(empahsis added).

The error was not harmless beyond a reasonable doubt and this Court cannot be satisfied beyond a reasonable doubt that the erroneous admission of the hearsay, when considered in the context of the prosecution's theory, did not affect the jury and that it did not contribute to the conviction and sentence. There is a reasonable possibility that the jury considered the victim's fear of Mr. Peterka's gun to be a reflection of Mr. Peterka's state of mind, i.e., to be a true indication Mr. Peterka shot the victim with a premeditated intent.

Appellate counsel was ineffective in failing to cogently articulate Mr. Peterka's claim on direct appeal. Habeas relief is warranted.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing **REPLY TO RESPONSE TO AMENDED PETITION FOR WRIT OF HABEAS CORPUS** has been furnished by United States Mail, first-class postage prepaid, to Charmaine Millsaps, Assistant Attorney General, Office of the Attorney General, The Capitol, Tallahassee, Florida, 32399-1050, on this 26th day of February, 2004.

CERTIFICATE OF TYPE SIZE AND STYLE

This is to certify that the Petition has been reproduced in a 12 point Courier type, a font that is not proportionately spaced.

_____
LINDA MCDERMOTT
Florida Bar No. 0102857
141 N.E. 30th Street
Wilton Manors, Florida 33334
(850) 322-2172
Attorney for Mr. Peterka