IN THE SUPREME COURT OF FLORIDA

NO. SC-04-705

MARK ALLEN DAVIS,

Petitioner,

v.

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

Respondent.

REPLY TO RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

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ARGUMENT IN REPLY

INTRODUCTION

COMES NOW, the Petitioner, **Mark Allen Davis**, by and through undersigned counsel and hereby submits this Reply to the State's Response to Mr. Davis' 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.

INTRODUCTION

The arguments relied on throughout the State's brief are primarily based upon three principles: procedural bar, no merit and that Mr. Davis, acting as co-counsel is responsible for the deficiencies of his direct appeal, due to this Court's allowing him to file a pro se companion brief on direct appeal.

As to the State's claim that Mr. Davis was co-counsel, the State begins by asserting that Mr. Davis did not mention in his petition that he filed a pro se companion brief. (Response at 15). This is false. In Mr. Davis' introduction in his petition he specifically informed this Court that he filed a pro se companion brief arguing several claims. See Petition at 2. Mr. Davis was forced to file the brief due to the circumstances surrounding his direct appeal. However, the fact that the brief was filed does not reflect in any way

that Mr. Davis was not entitled to the effective assistance of counsel on direct appeal. Mr. Davis was neither co-counsel nor represented himself.

In November 1988, Mr. Davis received his first a letter from his appellate counsel – this was counsel's first communication with Mr. Davis. Enclosed with the letter was a copy of the brief that had already been filed in Mr. Davis' case. Mr. Davis replied to the letter by questioning why he was not contacted prior to the filing of the brief.

In January, 1989, appellate counsel wrote Mr. Davis again and assured him that diligent research was conducted before filing the brief. Mr. Davis replied, requesting the opportunity to discuss the issues with counsel and indicating he believed other issues may need addressing. His appellate counsel complied and requested a motion for an extension of time with this Court.

After meeting with Mr. Davis, appellate counsel sought this Court's permission for Mr. Davis to file a companion brief. Mr. Davis then drafted and filed a companion brief. Appellate counsel did not want to file a supplemental brief and instructed Mr. Davis to draft any claims he believed should be considered by this Court. It was not Mr. Davis' desire to represent himself, act as co-counsel or draft a brief.

This Court has held that a defendant has a right to effective assistance of counsel during direct appeal.

Therefore, if a defendant desired to represent himself or would be held responsible for omissions from his appeal, he would have to be instructed about the benefits he was relinquishing and he would have to waive those rights freely and voluntarily. See Faretta v. California, 422 U.S. 806 (1975). This includes his right to effective assistance of counsel. In Mr. Davis' case no Faretta inquiry ever occurred. Mr. Davis is not responsible for any errors that occurred during his direct appeal.

Additionally, Mr. Davis would note that appellate counsel actually litigated portions of his case without his transcripts.

Further, the State argues that Mr. Davis' claims are procedurally barred because they could have been raised on direct appeal but were not. The State's argument makes no sense. Mr. Davis contends that his appellate counsel was ineffective. It is indisputable that Mr. Davis was entitled to effective assistance of counsel in a direct appeal. Davis v. State, 789 So. 2d 978, 981 (Fla. 2001). In addition, this Court has held that it is proper to raise claims of ineffective assistance of counsel in a direct appeal in a state habeas corpus proceeding. Rutherford v. Moore, 774 So. 2d 637, 643 (Fla. 2000). Therefore, this is Mr. Davis' first opportunity to raise claims that his direct appeal counsel was ineffective. Mr. Davis' claims are properly brought and must be analyzed under the caselaw requiring that appellate counsel

provide effective assistance.

CLAIM I – PROSECUTORIAL MISCONDUCT

The State contends that Mr. Davis' claim is procedurally barred because several of the complained of arguments were not objected to by trial counsel. However, this Court has held that improper comments may constitute fundamental error. Kilgore v. State, 688 So. 2d 895, 898 (Fla. 1996), cert. denied, 118 S.Ct. 103 (1997). Fundamental error is defined as that which "reaches 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." Id. In Mr. Davis' case, the remarks injected "elements of emotion and fear into the jury's deliberations". King v. State, 623 So. 2d 486 (Fla. 1993).

At Mr. Davis' trial, the prosecutor shifted the burden to Mr. Davis to prove that he was not guilty of the crimes with which he was charged and criticized his assisting his defense counsel. Additionally, the prosecutor called Mr. Davis a "a cagey little murderer. Little robber, cagey little thief." (R. 1390). The prosecutor also argued an improper "Golden Rule" argument to the jury.

The prosecutor's behavior and comments were improper. Appellate counsel was ineffective in failing to raise this claim. Relief is proper.

CLAIM II – RING v. ARIZONA

The State argues that this Court does not have

jurisdiction to entertain Mr. Davis' Ring v. Arizona, claim, because he raised it in state habeas proceedings. (Response at 18). However, the remedy of habeas corpus is a traditional remedy for seeking postconviction relief in criminal cases. See generally Richardson v. State, 546 So. 2d 1037 (Fla. 1989). And, where a defendant seeks to vindicate a right that affects the **appellate process**, habeas corpus remains the appropriate vehicle, as the trial courts have no power or authority over appellate courts. See Baker v. State, 878 So. 2d 1236, 1241-2 (Fla. 2004)(noting that habeas corpus is the appropriate remedy in those circumstances "where the petitioner is not seeking to collaterally attack a final criminal judgment of conviction and sentence, or **where the original sentencing court would not have jurisdiction to grant the collateral postconviction relief requested even if the requirements of the rule had been timely met**")(emphasis added)(footnote omitted).

In addition, in the area of capital collateral litigation, this Court has historically exercised its authority to entertain issues brought not only by death-sentenced inmates but also by the State of Florida in a variety of collateral procedural postures. Indeed, this Court has noted that it has "**exclusive** jurisdiction to review **all types of collateral proceedings in death penalty cases**." State v. Fourth District Court of Appeal, 697 So. 2d 70, 71 (Fla. 1997)(emphasis added). See also State v. Matute-Chirinos, 713

So. 2d 1006 (Fla. 1998); Trepal v. State, 754 So. 2d 702 (Fla. 2000). This Court has repeatedly entertained similar petitions and claims, like Mr. Davis'. See Bottoson v. Moore, 833 So. 2d 693 (Fla. 2002); King v. Moore, 831 So. 2d 143 (Fla. 2002). Given that this Court has exercised jurisdiction in similar cases, cases in which the State raised no jurisdictional issue, it is suspect that the State now makes such an argument.

It is clear that "there is a history of the Supreme Court of Florida accepting jurisdiction," Trepal, 754 So. 2d at 706, in capital cases where defendants are seeking to challenge the prior decision of the Court either in direct appeal or in a postconviction appeal when the United States Supreme Court later issues a decision which, in the defendant's view, establishes that this Court's resolution of a constitutional claim was erroneous. The oft-expressed and longstanding view is that Rule 3.850 is a vehicle to challenge errors over which the trial court has authority and jurisdiction to correct, and habeas corpus is the vehicle to challenge errors which affect the appellate process where there are no factual matters to be resolved. This principle establishes that Mr. Davis properly filed his claim in his petition for writ of habeas corpus.

The State also contends that Ring is not retroactive and cites Schiro v. Summerlin, 124 S. Ct. 2519 (2004). However, the State fails to mention that in Summerlin, the United States Supreme Court analyzed the retroactivity issue under

the test set forth in Teague v. Lane, 489 U.S. 288 (1989). The State fails to recognize that retroactivity is not governed by Teague, but rather the appropriate analysis adopted by this Court in Witt v. State, 387 So. 2d 922 (Fla. 1980). The State makes no attempt to urge this Court to adopt Teague. Ring is retroactive.

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.[1]

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. Davis should not be denied its benefit simply because the Supreme Court temporarily overlooked the point before finally getting it right.

Also the State argues that establishing a single aggravator renders a defendant death eligible. (Response at 21). The State 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 Ring.

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)

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[1]Likewise, in Blakely v. Washington, the United States Supreme Court recently reaffirmed the value of the jury's role. In Mr. Davis' case, the trial court imposed a sentence for the robbery conviction that was higher than the sentencing guidelines. 124 S.Ct. 2531. Under the guidelines, Mr. Davis should have been sentenced to 9-12 years. However, the court sentenced Mr. Davis to life so that if his death sentence was overturned he would remain in prison for the rest of his life. This was improper.

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. Davis' 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. Ring, 536 U.S. at 609. 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 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.

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 PRIOR JUVENILE ADJUDICATION CLAIM

The State argues that Mr. Davis should have raised his claim on direct appeal. (Response at 31). However, Mr. Davis' raised this claim as an ineffective assistance of counsel claim, therefore it is properly before this Court. See Rutherford v. Moore, 774 So. 2d 637, 643 (Fla. 2000).

The State also asserts that it proved that Mr. Davis' juvenile adjudication was a felony conviction at trial. However, the documents introduced demonstrate that Mr. Davis was in fact a juvenile. In fact, the Official Statement of the State's Attorney and Judge from Tazwell County indicated the exact opposite:

> The Defendant was **adjudicated a delinquent as a juvenile** in Tazwell County. Tazwell Co. Case #80-Y-991 - 5-9-80 - Attempt (Armed Robbery)

(R. 1690, Def. Tr. Ex. #1). Thus, the juvenile adjudication was not a prior violent felony and appellate counsel was ineffective in failing to raise the sufficiency of evidence claim as to the aggravator.

Likewise, in a desperate attempt to preserve the aggravator the State reverts back to its initial position at trial and claims that juvenile convictions could be used to support the prior violent felony aggravator. (Response at 32). But, while Merck v. State, 664 So.2d 939 (Fla. 1995), had not been decided prior to Mr. Davis' direct appeal, the logic in Merck would have applied to Mr. Davis' case in that "penal statutes must be strictly construed in favor of the one

against whom a penalty is imposed." Id. at 943.

By itself and certainly cumulatively with the other errors that occurred during Mr. Davis' capital penalty phase, the error would have required relief had it been raised. Appellate counsel was ineffective. Relief is proper.

CLAIM IV – THE IMPROPER CONTEMPORANEOUS CONVICTION CLAIM

In claiming that no error occurred by improperly admitting the contemporaneous conviction of robbery to support the prior violent felony aggravator the State concedes that using the robbery to support the aggravator was improper, but argues that since the jury was told that the robbery could be used to support other aggravators the error was harmless. (Response at 34). While the trial court noted that the robbery supported three separate aggravators, the jury heard no such instruction. Because the jury is the co-sentencer in Florida it is insufficient to claim that any error was harmless by arguing that the judge made the correct analysis.

Further, the State claims that the aggravator was properly proved by the introduction of Mr. Davis' juvenile adjudication. As explained in Claim III, supra, this is not the case.

Mr. Davis' appellate counsel was ineffective in failing to raise this claim. Relief is proper.

CLAIM V – THE INVALID AGGRAVATOR CLAIM

The State claims that Mr. Davis somehow waived any challenge to the vague and overbroad instruction regarding the

cold, calculated and premeditated claim. (Response at 37). Apparently the State takes such a position based upon the mistaken belief that Mr. Davis was responsible for his direct appeal. As stated previously he was not. He was entitled to effective assistance of counsel and it was his direct appeal counsel's obligation to raise this meritorious issue. Relief is proper.

CLAIM VII – THE SENTENCING ORDER CLAIM

The State completely misunderstands Mr. Davis' claim and this Court's caselaw on the issue of the timing of the sentencing order. The State admits that the sentencing order was filed after the pronouncement of sentence in Mr. Davis' case (Response at 40-2). However, the State argues that appellate counsel was not ineffective because the trial court entered the order a year before this Court found error to have occurred in Grossman v. State, 525 So. 2d 833 (Fla. 1988). But, obviously that means that appellate counsel had the benefit of this Court's caselaw when filing Mr. Davis' direct appeal brief and Mr. Davis' case was not final. Therefore, the claim was cognizable.

Appellate counsel was ineffective. Relief is proper.

CLAIM VIII – INSUFFICIENCY OF EVIDENCE SUPPORTING ROBBERY CLAIM

Mr. Davis' state habeas initial argument to the robbery defies the State's minimal argument against and undermines

this Court's previous review of the record.

It does so in no small part due to the careful partisan scrutiny of a zaelous advocate, something that Davis' entire brief brings clearly to the attention of the Court in his principal arguments.

In Wilson v. Wainwright, 474 So. 2d 1164, 1165 (Fla. 1985), this Court specifically addressed the role of an advocate in appellate proceedings and this Court's independent review of records:

> We will be the first to agree that our judicially, neutral review of so many death cases, many with records running to the thousands of pages, is no substitute for the careful scrutiny of a zealous advocate . . . advocacy is an art, not a science.
>
> We cannot, in hindsight, precisely measure the impact of counsel's failure to urge his clients best claims.

Id. at 1165.

Mr. Davis requests that this Court review his record and like Wilson find that confidence in their original "footnoted" response is undermined to such a degree that his robbery conviction cannot stand, there is insufficient evidence to support otherwise and relief is proper.

CLAIM IX – THE CRITICAL STAGES CLAIM

This argument also falls under Wilson. Mr. Davis' appellate counsel, despite Mr. Davis' urging and faced with a cold record that unsupported evidence was used to deny Mr. Davis' claim, did nothing to further that argument or direct the Court's attention to the administrative judge's clearly

erroneous finding of the record.

Mr. Davis' current plea to this Court is not an attempt to re-litigate an issue raised on direct appeal, but a plea to correct a manifest injustice regarding the facts. A new trial is warranted under the true facts.

The issue failed relief on direct appeal only because the administrative judge wrote in his ruling, following remand, that a certain admission during Mr. Davis' testimony cast grave doubts on the validity of Mr. Davis' claim. Mr. Davis has clearly brought this to the attention of this Court and the State does not address the issue in its response.

A literal reading of the record and comparison to the judge's findings makes clear that justice has been denied. Manifest injustice will continue to plague his appellate proceedings if not corrected. Mr. Davis' appellate counsel was ineffective in failing to bring the problem to this Court's attention. Relief is proper.

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 Candance Sabella, Chief of Capital Appeals, Office of the Attorney General, Concourse Center 4, 3507 East Frontage Road, Suite 200, Tampa, FL 33607-7013, on October 28, 2004.

CERTIFICATE OF TYPE SIZE AND STYLE

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