IN THE SUPREME COURT OF FLORIDA

CASE NO. SC04-772

MICHAEL ROBINSON,

Petitioner,

v.

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

Respondent.

REPLY TO RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

MELISSA MINSK DONOHO
500 S.E. 6TH ST., STE. 100
FORT LAUDERDALE, FL 33301
(954) 523-7949
FLORIDA BAR NUMBER 955700

JAMES S. LEWIS
500 S.E. 6TH ST., STE. 100
FORT LAUDERDALE, FL 33301
(954)523-7949
FLORIDA BAR NUMBER 318957

COUNSEL FOR PETITIONER

ARGUMENT IN REPLY

ARGUMENT I

THIS COURT'S DECISION ON DIRECT APPEAL PRECLUDING MR. ROBINSON FROM SEEKING A JURY PENALTY PHASE WAS ERROR, AND APPELLATE COUNSEL UNREASONABLY FAILED TO BRING THIS MATTER TO THE COURT'S ATTENTION, THEREBY RENDERING INEFFECTIVE ASSISTANCE OF COUNSEL.

In its first opinion addressing Mr. Robinson's case, this Court vacated Mr. Robinson's death sentence and remanded the case "to the trial court to conduct a new penalty-phase hearing before the judge alone . . . " *Robinson v. State*, 684 So. 2d 175, 180 (Fla. 1999). This Court did *not* remand for a mere reweighing under *Campbell v. State*, 571 So. 2d 415 (Fla. 1990), and Respondent makes no suggestion that the proceedings ordered by the Court were anything less than a *de novo* sentencing proceeding.

Respondent argues, however, that appellate counsel was not ineffective for failing to raise a claim that was unpreserved (Response at 12). Respondent misperceives Mr. Robinson's claim, only a part of which is premised on ineffective assistance of appellate counsel. Mr. Robinson's first complaint is that this Court's decision limiting the proceedings to a judge-only proceeding. This is error in the

appellate process, not an error that needed to be, or even could be, preserved in the trial court. However, to the extent that the Respondent does contend that this error should have been preserved at the trial court level, Mr. Robinson's Rule 3.851 motion has alleged trial counsel's ineffectiveness, as Respondent acknowledges (Response at 12).[1]

Aside from generic arguments and citation to cases in which the Court has previously rejected appellate ineffective assistance of counsel claims (Response at 12-14), Respondent offers no real argument in response to Mr. Robinson's allegations other than to conclude they are "without merit" (Response at 13). Respondent does not discuss the fact that this Court remanded for a *de novo* resentencing proceeding. Respondent does not discuss the fact that Mr. Robinson had a "fundamental and cherished right of trial by jury" that vests with all criminal defendants. *See Floyd v. State*, 90 So. 2d 105, 106 (Fla. 1956). Respondent does not address or distinguish the Court's decision in *Pangburn v. State*, 661 So. 2d

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[1]Respondent appears to be mixing up the allegations made by Mr. Robinson. In his Rule 3.851 motion and the appeal therefrom, Mr. Robinson has alleged that trial counsel, after this Court remanded for a judge-only sentencing, prejudicially failed to assert Mr. Robinson's entitlement to a jury resentencing proceeding. In this petition, Mr. Robinson is alleging that this Court's decision remanding for a judge-only sentencing proceeding was in error under prevailing law, and that appellate counsel's failure to apprise this Court of its error in that proceeding was prejudicially deficient.

1182 (Fla. 1995). Simply because at the 1995 plea hearing Mr. Robinson wanted the court to impose the death penalty does not vitiate his right to a *de novo* sentencing proceeding once this Court vacated the earlier proceeding. Just as a defendant who pleads guilty and on appeal the guilt plea is vacated is entitled to a new trial (or at least the opportunity to avail himself of a trial), Mr. Robinson was entitled to a complete new proceeding. This Court, when it vacated Mr. Robinson's sentence and remanded for a new penalty phase, should not have limited it to a judge-only hearing. Rather, the Court's opinion should not have placed any restriction on Mr. Robinson's ability, at the resentencing, to invoke his right, or waive his right, to a jury resentencing. Because this Court's decision on appeal unduly restricted Mr. Robinson's ability to seek a jury determination at the penalty phase, and because of appellate counsel's prejudicially deficient performance in failing to argue such on appeal, Mr. Robinson submits that habeas corpus relief is warranted.

ARGUMENT II

FLORIDA'S CAPITAL SENTENCING STATUTE VIOLATES THE SIXTH AND FOURTEENTH AMENDMENTS.

Respondent argues that it is dispositive that Mr. Robinson waived his penalty phase jury (Response at 17). However, although Mr. Robinson acknowledges that, at his original trial proceedings, he waived a penalty phase jury, this Court on appeal vacated that proceeding and remanded "to the trial court to conduct a new penalty-phase hearing before the judge alone . . . " *Robinson v. State*, 684 So. 2d 175, 180 (Fla. 1999). As urged in Argument I of his petition, this Court refused to permit Mr. Robinson to have a jury determination as to his death eligibility at the new penalty phase. Thus, Mr. Robinson submits that not only should his judge-only imposed death sentence be vacated for the reasons set forth in Argument I, his judge-only death sentence also violates the Sixth Amendment and *Ring*. Moreover, because Mr. Robinson asserts that *Ring* is new law that should be retroactively applied to him, Mr. Robinson cannot be deemed to have waived a right that did not exist at the time of his capital trial.

Respondent argues that this claim is procedurally barred (Response at 17). The State fails to cite any authority for this proposition. In not one decision by this Court addressing *Ring* claims has this Court applied a procedural bar. This

has been true whether the *Ring* claim was presented on direct appeal[2] or in post-conviction proceedings.[3] This Court has considered the merits of claims first presented in a motion for rehearing[4] or notice of supplemental authority.[5] To single

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[2]*See Anderson v. State*, 863 So. 2d 169 (Fla. 2003); *Owen v. State*, 862 So. 2d 687 (Fla. 2003); *Davis v. State*, 859 So. 2d 465, 480 (Fla. 2003); *Duest v. State*, 855 So. 2d 33, 39 (Fla. 2003); *Belcher v. State*, 851 So. 2d 678, 685 (Fla. 2003); *Caballero v. State*, 851 So. 2d 655, 663 (Fla. 2003); *Blackwelder v. State*, 851 So. 2d 650, 653-54 (Fla. 2003); *Lawrence v. State*, 846 So. 2d 440, 451 (Fla. 2003); *Lugo v. State*, 845 So. 2d 74, 119 n.79 (Fla. 2003); *Kormondy v. State*, 845 So. 2d 41, 54 (Fla. 2003); *Anderson v. State*, 841 So. 2d 390, 408-09 (Fla. 2003); *Cox v. State*, 819 So. 2d 705, 724-25 (Fla. 2002); *Hurst v. State*, 819 So. 2d 689, 702-03 (Fla. 2002).

[3]*See Robinson v. State*, 865 So. 1259 S50 (Fla. 2004); *Zakrzewski v. State*, 866 So. 2d 688 (Fla. 2003); *Cummings-El v. State*, 863 So. 2d 246 (Fla. 2003); *Rivera v. State*, 859 So. 2d 495, 508 (Fla. 2003); *Wright v. State*, 857 So. 2d 861, 877-78 (Fla. 2003); *Cooper v. State*, 856 So. 2d 969, 977 nn. 6 & 8 (Fla. 2003); *Jones v. State*, 855 So. 2d 611, 619 (Fla. 2003); *Fennie v. State*, 855 So. 2d 597, 607 n.10 (Fla. 2003); *Allen v. State*, 854 So. 2d 1255, 1262 (Fla. 2003); *Owen v. Crosby*, 854 So. 2d 182, 193 (Fla. 2003); *Chandler v. State*, 848 So. 2d 1031, 1034 n.4 (Fla. 2003); *Banks v. State*, 842 So. 2d 788, 793 (Fla. 2003); *Jones v. State*, 845 So. 2d 55, 74 (Fla. 2003)*; Spencer v. State*, 842 So. 2d 52, 72 (Fla. 2003); *Lucas v. State*, 841 So. 2d 380, 389 (Fla. 2003); *Porter v. Crosby*, 840 So. 2d 981, 986 (Fla. 2003); *Fotopoulos v. State*, 838 So. 2d 1122, 1136 (Fla. 2002); *Bruno v. Moore*, 838 So. 2d 485, 492 (Fla. 2002); *King v. Moore*, 831 So. 2d 143 (Fla. 2002); *Bottoson v. Moore*, 833 So. 2d 693 (Fla. 2002); *Sweet v. Moore*, 822 So. 2d 1269, 1275 (Fla. 2002); *Sireci v. Moore*, 825 So. 2d 882, 888 (Fla. 2002); *Mills v. Moore*, 786 So. 2d 532 (Fla. 2001).

[4]*See Butler v. State*, 842 So. 2d 817, 834 (Fla. 2003); *Grim v. State*, 841 So. 2d 455, 465 (Fla. 2003); *Doorbal v. State*, 837 So. 2d 940, 963 (Fla. 2003); *Chavez v. State*, 832 So. 2d 730, 767 (Fla. 2002).

[5]*See Marquard v. State*, 850 So. 2d 417, 431 n.12 (Fla. 2002).

Mr. Robinson out for disparate treatment of his *Ring* claim would be an irregular and/or inconsistent application of a procedural bar. Mr. Robinson's claims are properly before the Court and should be addressed on the merits.

Respondent acknowledges that *Witt v. State*, 387 So. 2d 922 (Fla. 1980), provides the standard this state uses for determining retroactivity (Response at 20), but nonetheless argues that Justice Cantero's view in another case is correct and should be adopted (Response at 21). Justice Cantero's views were expressed in a dissenting opinion. Dissenting opinions carry no precedential value. *See Mills*, 786 So. 2d at 540 (Harding, J., concurring). The standard set forth by the United States Supreme Court in *Teague v. Lane*, 489 U.S. 288 (1989), is the retroactivity test for federal habeas purposes and is not the controlling law in Florida as to the retroactive application of new court decisions in state courts. In *Delgado v. State*, 776 So. 2d 233, 241 (Fla. 2000), this Court held that retroactivity analysis in Florida required application of the test set forth in *Witt*. This Court still more recently reaffirmed its adherence to the *Witt* test in its decision in *State v. Klayman*, 835 So. 2d 248, 252 (Fla. 2002).[6] There, this Court explained:

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[6]*Witt* was also recognized as providing the controlling standard in *Reed v. State*, 837 So. 2d 366 (2002). Moreover, the district courts regularly apply and follow *Witt*. *See Hughes v. State*, 826 So. 2d 1070 (1st DCA 2002); *Jackson v. State*, 849 So. 2d 321 (2nd DCA 2003); *Battie v. Singletary*, 791 So. 2d 1261 (3rd DCA 2001); *Figarola v. State*, 841 So. 2d 576 (4th DCA 2003); *Wilson v. State*,

> Although Florida courts have not previously recognized the *Fiore[v. White*, 531 U.S. 225 (2001),] distinction between a "clarification" and "change," we conclude that this distinction is beneficial to our analysis of Florida law. Previously, this Court analyzed such cases strictly under *Witt v. State*, 387 So. 2d 922 (Fla. 1980), and used the term "change" broadly to include what in fact were both clarifications and true changes. As explained in *Fiore*, however, a simple clarification in the law does not present an issue of retroactivity and thus does not lend itself to a *Witt* analysis. **Whereas *Witt* remains applicable to "changes" in the law**, *Fiore* is applicable to "clarifications" in the law.

Klayman, 835 So. 2d at 252-53 (emphasis added)(footnotes omitted).[7]

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812 So. 2d 452 (5th DCA 2002).

Abandoning *Witt* will result in great judicial upheaval. Courts will have to revisit issues of retroactivity previously resolved under *Witt* to determine if a different conclusion is reached under some new standard. Even if specific petitioners who lost under *Witt* are precluded from re-raising their claims, other claimants will be entitled to have their claims resolved under the new standard even if their claims are otherwise identical to claims previously found not to be retroactive under *Witt*. Of course, if different results will not occur when a different test is applied, what is the point in changing tests?

[7]Moreover, if this Court decides to change the standard that has governed for over twenty years, due process requires that the parties be given notice and an opportunity to heard. "An essential principle of due process is that a deprivation of life, liberty or property 'be preceded by notice and opportunity for hearing appropriate to the nature of the case.'" *Cleveland Bd. of Ed. v. Loudermill*, 470 U.S. 532, 542 (1985) (quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950). "[F]undamental fairness is the hallmark of the procedural protections afforded by the Due Process Clause." *Ford v. Wainwright*, 477 U.S. 399, 424 (1986)(Powell, J., concurring in part and concurring in the judgment).

CONCLUSION

Based upon the record and the arguments presented herein, Mr. Robinson respectfully urges the Court to grant habeas corpus relief, and/or vacate his unconstitutional convictions and death sentence.

Respectfully submitted,

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Melissa Minsk Donoho
Florida Bar No. 955700
500 S.E. 6th Street, Suite 100
Fort Lauderdale, FL 33301
(954) 523-7949

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James S. Lewis
Florida Bar No. 318957
500 S.E. 6th Street, Suite 100
Fort Lauderdale, FL 33301
(954) 523-7949

Attorneys for Defendant

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Reply was furnished by U.S. Mail to Barbara Davis, Assistant Attorney General, 444 Seabreeze Boulevard, 5th Floor, Daytona Beach, Florida, 32118, this 16th day of April, 2004.

_____
Melissa Minsk Donoho
Attorney for Defendant

CERTIFICATE OF TYPE SIZE AND FONT

Counsel certifies that this petition is typed in Times New Roman 14-point font, a font that is not proportionately spaced.

_____
Melissa Minsk Donoho
Attorney for Defendant