IN THE SUPREME COURT OF FLORIDA

ROBERT L. HENRY,

Petitioner,

vs. Case No. SC04-1285

JAMES CROSBY, JR.,

Respondent.
_______________________________/

STATE'S RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

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PROCEDURAL HISTORY

The facts adduced at trial which overwhelmingly supported Henry's conviction were as follows:

> Robert Henry appeals his convictions of first-degree murder and the resultant death sentences as well as the two concurrent terms of life imprisonment for armed robbery with a deadly weapon and arson. We have jurisdiction Art. V, § 3(b)(1), Fla. Const. We affirm the convictions and sentences.
>
> Around 9:30 p.m. on November 1, 1987 fire fighters and police officers responded to a fire at a fabric store in Deerfield Beach. Inside they found two of the store's employees, Phyllis Harris, tied up in the men's restroom, and Janet Thermidor, on the floor of the women's restroom. Each had been hit in the head with a hammer and set on fire. Harris was dead when found. Although suffering from a head wound and burns over more than ninety Percent of her body, Thermidor was conscious. After being taken to a local hospital, she told a police officer that Henry, the store's maintenance man, had entered the office, hit her in the head, and stolen the store's money. Henry then left the office, but returned, threw a liquid on her, and set her on fire. Thermidor said she ran to the restroom in an effort to extinguish the fire. She died the following morning.
>
> Based on Thermidor's statement, the police began looking for Henry and found him shortly before 7:00 a.m. on November 3, at which time they arrested him. Henry initially claimed that three unknown men robbed the store and abducted him, but later made statements incriminating himself. A grand jury indicted Henry for two counts of first-degree murder, armed robbery, and arson. The jury convicted him as charged and recommended the death sentence for each of

> the murders, which the trial court imposed.

Henry v. State, 613 So. 2d 429 (Fla. 1992).

This Court upheld the trial court's imposition of the death sentence based on the following:

> The trial court found as aggravating factors that these murders had been committed during the commission of robbery and arson, to avoid or prevent arrest, for pecuniary gain, and in a cold, calculated, and cruel manner and that they were heinous, atrocious, or cruel. The court weighed these aggravators against the statutory mitigating factor that Henry had no prior criminal history and the nonstatutory factor of Henry's service in the Marine Corps. Finding that the aggravators outweighed the mitigators, the court imposed two death sentences.

Henry, at 432.

On direct appeal Henry raised the following issues:

1. Trial court erred in finding his confessions to be admissible

2. The trial court erred in allowing the state to introduce the "dying declaration" of the victim.

3. Trial court erred in finding no discovery violation.

4. The state committed prosecutorial misconduct.

5. The trial court failed to give an instruction of duress.

6. Trial court erred in allowing the state to introduce victim impact testimony.

7. It was error to require a defendant to forgo presentation of evidence in order to retain first and last closing argument.

8. It was error to allow the state to proceed on alternate

theories of first degree murder

9.The trial court erred in allowing the state to introduce numerous photographs of the victims.

10. The trial court applied the wrong standard when assessing the sufficiency of the evidence to sustain the aggravating factors.

11. Trial court erred in accepting Henry’s waiver of mitigation.

12. The trial court erred in failing to give several penalty phase jury instructions.

13. The trial court erred in finding sufficient evidence to sustain the aggravating factors.

14. Florida’s death penalty statute is unconstitutional.

15. The aggravating factors are unconstitutional.

16. It was error to consider the pre-sentence investigative report.

All relief was denied. Henry, 613 So. 2d at 431-433.

REASONS FOR DENYING THE WRIT

ISSUE I

THE ONE HUNDRED PAGE LIMITATION ON APPELLATE BRIEFS DID NOT AMOUNT TO COURT INTERFERENCE WITH APPELLATE'S RIGHT TO EFFECTIVE ASSISTANCE OF APPELLATE COUNSEL

Henry alleges that he was forced to "either drop claims from his brief altogether or abbreviate claims to abide by this Court's ruling that he delete fifty-nine (59) pages from his initial brief." **Initial brief at 4.** Henry further argues that he is "entitled to relief." **Id. at 9.** Henry's argument is frivolous and must be denied.

First, Henry's allegations are legally insufficient as pled, as he does not identify which meritorious issues he was forced to abandon or which meritorious issues were presented without sufficient argument. Owen v. Crosby, 28 Fla. L. Weekly S615, 618 (Fla. July 11, 2003)(affirming denial of claim that counsel had conflict of interest where petitioner fails to identify specific evidence in the record in support of claim).

Second, appellate courts, including this Court have rejected this very claim in the past. Johnson v. Singletary, 695 So. 2d 263, 266 (Fla. 1996)(rejecting claim that page limitation on appellate brief resulted in the denial of effective assistance). More recently this Court explained the value of page limitation on effective advocacy:

> Placing page limits on writ petitions simply

> requires a petitioner to provide a distinct and succinct focus and improves the ability of a court to issue rulings in writ cases in a more timely and efficient fashion than if the court had to pore through countless pages of what may be unnecessary and repetitive arguments or irrelevant information. Therefore, we conclude that courts may impose reasonable page limits on petitions for extraordinary writs

Basse v. State, 740 So. 2d 518, 520 (Fla. 1999). The federal appellate courts have taken a similar view:

> We do not understand a limitation on the number of pages in a brief to be a blow against an appellant's case or an act that undercuts effective advocacy. To the contrary, we see reasonable limitations of pages to be a help to good advocacy by directing busy lawyers to sharpen and to simplify their arguments in a way that -- as experience has taught us -- makes cases stronger, not weaker.

United States b. Battle, 163 F.3d 1, 2 (11th Cir. 1998); Cf. Jones v. Barnes, 463 U.S. 745 (1983)(explaining that appellate advocacy requires counsel to select the most viable issues given the time limitations on oral arguments and the page limitations on appellate briefs). Because Henry has failed to demonstrate how he was prejudiced[1] in his appellate presentation, his argument must fail.

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[1] A comparison of the initial brief at one hundred and fifty-nine pages and the amended initial brief at one hundred pages reveals that petitioner raised the identical issues.

ISSUE II

HENRY'S CLAIM THAT APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO CHALLENGE THE DENIAL OF A MOTION TO CHANGE VENUE AND ARGUE THAT THE RECORD ON APPEAL WAS INCOMPLETE IS LEGALLY INSUFFICIENT AND MUST BE SUMMARILY DENIED

Henry claims that appellate counsel failed to argue that record on appeal was incomplete. He writes that "critical exhibits, depositions, bench conferences, transcripts of hearings, and jury questionnaires were omitted from the record." **Initial brief at 9, 12.** Summary denial is warranted as Henry does not identify what errors occurred during the un-transcribed portions of the proceedings, nor does he identify what critical pleadings/documents have been omitted. Moreover, Henry does not allege let alone demonstrate what specific prejudice he has endured, his claim must fail. See Thompson v. Singletary, 759 So. 2d 650 (Fla. 2000)(rejecting claim of ineffective assistance of appellate counsel based on incomplete record as petitioner cannot point to any errors that occurred in untranscribed portion) Ferguson v. Singletray, 632 So. 2d 53, 58 (Fla. 1993(same); Johnson v. Moore, Case No. 01-2182 (Fla. September 26, 2002)(same); Turner v. Dugger, 614 So. 2d 1075 (Fla. 1992)(finding no prejudice in failure to transcribe charge conference); Sochor v. State, 29 Fla. L. Weekly S363 (Fla. July 8, 2004).

Henry also argues in very cursory fashion, that appellate

counsel should have presented a challenge to the unsuccessful motion for change of venue. He does not present any factual or legal support for this issue. As pled this claim is legally insufficient and must be summarily denied. Cf. Owen v. Crosby, 28 Fla. L. Weekly S615, 618 (Fla. July 11, 2003)(affirming denial of claim that counsel had conflict of interest where petitioner fails to identify specific evidence in the record in support of claim).

ISSUE III

HENRY'S CHALLENGE TO FLORIDA'S DEATH PENALTY STATUTE IN LIGHT OF APPRENDI V. NEW JERSEY AND RING V. ARIZONA IS PROCEDURALLY BARRED AND WITHOUT MERIT

Henry claims that in light of Ring v. Arizona, 536 U.S. 584 (2002), his death sentence cannot stand. Specifically he alleges that Ring requires that aggravating factors must be alleged in the indictment as they are element s of the offense of first degree murder. He further argues that a jury should be required to unanimously find the existence of each factor and it must do so in writing. Henry's claims must be summarily denied for the following reasons.

Irrespective of whether Ring is applicable to Florida's capital scheme, Henry's claim is not properly preserved for collateral review. It is well established that for an issue to be preserved for appeal, it must be presented to the lower court and "the specific legal argument or ground to be argued on appeal must be part of that presentation if it is to be considered preserved." Archer v. State, 613 So. 2d 446 (Fla. 1993), quoting Tillman v. State, 471 So. 2d 32, 35 (Fla. 1985); See also Steinhorst v. State, 412 So. 2d 332, 338 (Fla. 1982). In the instant case, Henry never challenged the constitutionality of the death penalty statute based on the arguments presented here. At no time did Henry argue that the

aggravating factors must be pled in the indictment or that the jury's findings must be in writing. Since the claim was never preserved for appeal, he is not allowed to raise the claim in this collateral proceeding. See Parker v. State, 550 So. 2d 449 (Fla. 1989)(finding collateral challenge to Florida's capital sentencing scheme based on Booth v. Maryland, is procedurally barred for failure to preserve the issue at trial or on direct appeal).

Notwithstanding the procedural default, this Court has clearly rejected the argument that Ring has implicitly overruled its earlier opinions upholding Florida's sentencing scheme. In Bottoson v. Moore, 27 Fla. L. Weekly S891 (Fla. October 24, 2002) this Court stated:

> Although Bottoson contends that he is entitled to relief under Ring, we decline to so hold. The United States Supreme Court in February 2002 stayed Bottoson's execution and placed the present case in abeyance while it decided Ring. That Court then in June 2002 issued its decision in Ring, summarily denied Bottonson's petition for certiorari, and lifted the stay without mentioning Ring in the Bottonson order. The Court did not direct the Florida Supreme Court to reconsider Bottoson in light of Ring.

Consequently Henry is not entitled to relief based on Ring.

Moreover, even if Ring was applicable in Florida and the issue had been preserved for review, the procedural rule announced in Ring, is not subject to retroactive application in

collateral proceedings. See Schriro v. Summerlin, 124 S.Ct. 2519 (2004). Under Florida law as detailed in Witt v. State, 387 So. 2d 922, 929-30 (Fla. 1980) Ring is only entitled to retroactive application if it is a decision of fundamental significance, which so drastically alters the underpinnings of Anderson's death sentence that "obvious injustice" exists. New v. State, 807 So. 2d 52 (Fla. 2001). 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). Application of these factors to Ring, which did not directly or indirectly address Florida law, provides no basis for consideration of Ring in this case..

As for the merits, the state further asserts that Ring does not apply to Florida's death penalty scheme. The Arizona statute at issue in Ring is different from Florida's death sentencing statute:

> Based solely on the jury's verdict finding Ring guilty of first-degree felony murder, the maximum penalty he could have received was life imprisonment.

Ring v. Arizona, 122 S.Ct. at 2437. Under Arizona law, the determination of death eligibility takes place during the penalty phase proceedings, and requires that an aggravating factor exists. This Court has previously recognized that the

statutory maximum for first degree murder in Florida is death, and has repeatedly rejected claims similar to those raised herein. Cox v. State, 819 So. 2d 705 (Fla. 2002); Bottoson v. State, 813 So. 2d 31, 36 (Fla. 2002), cert. denied, Case No. 01-8099 (U.S. June 28, 2002); Hertz v. State, 803 So. 2d 629, 648 (Fla. 2001), cert. denied, Case No. 01-9154 (U.S. June 28, 2002); Looney v. State, 803 So. 2d 656, 675 (Fla. 2001), cert. denied, Case No. 01-9932 (U.S. June 28, 2002); Brown v. Moore, 800 So. 2d 223, 224-225 (Fla. 2001); Mann v. Moore, 794 So. 2d 595, 599 (Fla. 2001), cert. denied, Case No. 01-7092 (U.S. June 28, 2002); Mills, 786 So. 2d at 536-38. This interpretation of state law demands respect, and offers a pivotal distinction between Florida and Arizona. Ring, at *13; Mullaney v. Wilbur, 421 U.S. 684 (1975)

Moreover, contrary to Henry's claim, Ring does not require jury sentencing in capital cases, rather it involves only the requirement that the jury find the defendant death-eligible. Id. at n.4. A clear understanding of what Ring does and does not say is essential to analyze any possible Ring implications to Florida's capital sentencing procedures. As already recognized by this Court, the Ring decision left intact all prior opinions upholding the constitutionality of Florida's death penalty scheme, including Spaziano v. Florida, 468 U.S. 447 (1984), and Hildwin v. Florida, 490 U.S. 638 (1989). Indeed the opinion

quotes Proffitt v. Florida, 428 U.S. 242, 252 (1976), acknowledging that ("[i]t has never [been] suggested that jury sentencing is constitutionally required."). Ring, at *9, n.4. In Florida, any death sentence which was imposed following a jury recommendation of death necessarily satisfies the Sixth Amendment as construed in Ring, because the jury necessarily found beyond a reasonable doubt that at least one aggravating factor existed. Since the finding of an aggravating factor authorizes the imposition of a death sentence, the requirement that a jury determine the conviction to have been a capital offense has been fulfilled in any case in which the jury recommended a death sentence.

And finally, to the extent Ring would be applicable to petitioner the requirements of same have been met. The trial court found the existence of the aggravating factor that the murder was committed during the course of a felony. Henry, 613 So. 2d 429, 432 (Fla. 1992). The jury had already convicted Henry of both arson and armed robbery. Consequently, the underlying factual premise for the finding of this aggravator was made by the jury at the guilt phase. Sochor v. State, 29 Fla. L. Weekly S363 (Fla. July 8, 2004)(rejecting Ring claim based on fact that jury previously convicted appellant of felonies that subsequently formed the basis of an aggravating factor); Doorbal v. State, 837 So. 2d 940, 963 (Fla.

2003)(same); Belcher v. State, 851 So. 2d 678, 685 (Fla. 2003)(same).

CONCLUSION

Wherefore, based on the foregoing arguments and authorities, Respondent respectfully requests that this Honorable Court deny Petitioner's request for writ of habeas corpus.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was sent by United States mail, postage prepaid, to William M. Hennis III, Office of the Capital Collateral Regional Counsel, 101 N.E. 3rd Ave., Suite 400, Fort Lauderdale, Florida 3301, this ____ day of October, 2004.

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CERTIFICATE OF COMPLIANCE

I HEREBY certify the size and style of type used in this brief is 12 point Courier New, a font that is is not proportionally spaced.

____
CELIA A. TERENZIO