

IN THE SUPREME COURT OF FLORIDA

ANTHONY JOHN PONTICELLI,
Appellant,

v.

CASE NO. SC03-1858

STATE OF FLORIDA,
Appellee.

_____ /

RESPONSE TO CORRECTED PETITION FOR
WRIT OF HABEAS CORPUS

RESPONSE TO INTRODUCTION

The "Introduction" set out on pages 1-2 of the Petition is argumentative and conclusory, and is denied.

RESPONSE TO REQUEST FOR ORAL ARGUMENT

The Respondent recognizes that oral argument is routinely scheduled in capital cases. However, the issues contained in the habeas petition are, on the face of the petition, not grounds for relief.

RESPONSE TO PROCEDURAL HISTORY

On direct appeal from his conviction and sentence of death, this Court summarized the facts and procedural history of Ponticelli's case in the following way:

Anthony J. Ponticelli appeals his convictions of first-degree murder and sentences of death. We have jurisdiction, article V, section 3(b)(1), Florida Constitution, and affirm the convictions and sentences. According to testimony at trial, on

November 27, 1987, Ponticelli was invited to watch video movies at the home of Keith Dotson, whom Ponticelli met while at a convenience store that afternoon. Ponticelli arrived at Dotson's house between 6:30 and 7:00 p.m. and stayed thirty to forty-five minutes. Later that evening he returned to Dotson's house in an automobile. Upon his return, Ponticelli told Dotson's cousin, Ed Brown, that there were two people in the car whom he intended to kill for money and cocaine. Ponticelli showed Brown a gun and told him he would need a ride back to his house. Brown agreed to give him a ride and gave Ponticelli Dotson's telephone number. When the phone later rang several times, Dotson and his friends intentionally did not answer it. Around 11:30 p.m., Ponticelli returned to Dotson's house in a taxi cab. He told those present that he had killed the two people in the car for cocaine and \$ 2,000. Ponticelli asked Brown if he thought that a person would live after being shot in the head. Although Brown told him he did not think he had to worry about it, Ponticelli expressed concern, telling Brown that he had heard one of his victims moaning. After Ponticelli washed his clothes to remove blood stains, Brown drove him home. According to testimony of Timothy Keese, who lived with Ralph and Nick Grandinetti, on the evening of November 27, Keese saw Ponticelli at the Grandinetti brothers' home around 7:30 p.m. The three were discussing money Ponticelli owed the brothers for cocaine he had purchased from Ralph. Ponticelli told the brothers that he would sell whatever cocaine they had and then settle up with them. The brothers agreed to take Ponticelli to sell the cocaine. Keese left the house; and when he returned around 10:00 p.m. the Grandinettis were not at home. The brothers did not return that night. The Grandinettis were found in their car the following day. Nick was found badly injured with his head on the floorboard of the car. He was gasping for air and kicking his foot when found. Nick's head was covered with blood and there was blood spattered all over the car. Ralph was found dead in the back seat. According to the medical examiner, Ralph died within one to two minutes of being shot once in the back of the head at close range. Nick Grandinetti survived until December 12, 1987. An autopsy revealed that he had suffered two gunshot wounds to the back of the head. There were a number of

bruises on the back and side of his head that were consistent with blunt trauma to the head. The skin on the right ear was peeling and red which was consistent with hot pressure being placed on the ear for an extended period of time. Nick died of cardiac arrest which was secondary to the gunshot wounds. Ponticelli's best friend, Joseph Leonard, testified that around 9:30 p.m. on November 27, Ponticelli came to Leonard's house and returned a gun Leonard had given him. Ponticelli told Leonard that he "did Nick" which Leonard understood to mean that Ponticelli had shot and killed Nick Grandinetti. Ponticelli asked Leonard and his roommate what he should do with the bodies. Leonard further testified that the next day Ponticelli told him that the Grandinettis had been harassing him about money that he owed them and were not going to let him leave their house until they got their money. The three left in a car. Ponticelli directed the brothers around the back roads trying to sell their cocaine. He then shot them both in the head. After dropping the gun off at Leonard's house, he had a flat tire so he left the bodies and took a cab home. Leonard eventually gave the police the murder weapon and a statement. After the murder weapon was given to police and statements from Leonard and his roommate were taken, Ponticelli was arrested. There was also testimony that on the Sunday after the shootings, Ponticelli burned some clothes in Ronald Halsey's back yard. When asked why he was burning the clothes, Ponticelli told Halsey that he had shot two men whom he owed money for cocaine. He told Halsey that he shot both of the men in the back of the head and threw one of them in the back seat. The other man was still moving so he hit him a couple of times in the head with the butt of the gun. He parked the car when he had a flat tire and took several grams of cocaine and \$ 900 in cash. After his arrest for the murders, Ponticelli discussed the murders with a cellmate, Dennis Freeman, who testified at trial. According to Freeman, Ponticelli asked him if he would help him dispose of some evidence and drew Freeman a map showing the location of the evidence. The map had Keith Dotson's name and telephone number on it. Ponticelli told Freeman that he made several phone calls from the victims' house to get them to believe that he was trying to sell cocaine for them. He thought about killing the brothers at their home but

there were other people there, so he asked the brothers to take him to Keith Dotson's house to sell the cocaine. After leaving Dotson's house, they drove to a place where he killed them. Ponticelli told Freeman that he shot the driver first with two shots to the head and then shot the passenger once in the head. One of the men was still alive. Ponticelli then drove to Joey Leonard's house, where he told Leonard and his roommate what he had done. He gave Leonard the gun and discussed disposing of the bodies. After he left Leonard's house, he had a flat tire, so he abandoned the car. He took a cab to Dotson's house where he washed his clothes which he later burned. Ponticelli told Freeman that he shot the brothers because he wanted to rob them of cocaine and money. Ponticelli was charged with two counts of first-degree murder and one count of robbery with a deadly weapon. At the close of the state's case-in-chief, a judgment of acquittal was entered as to the robbery charge. The jury found Ponticelli guilty of both counts of first-degree murder and recommended that he be sentenced to death for each murder. The trial court sentenced Ponticelli to death in connection with both convictions. The court found two aggravating factors [FN1] applicable to both murders and a third factor [FN2] applicable to the murder of Nick Grandinetti and two mitigating factors in connection with both murders. [FN3]

[FN1] The murders were committed for pecuniary gain, and the murders were committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification.

[FN2] The murder was especially heinous, atrocious or cruel.

[FN3] In mitigation the court found that Ponticelli had no significant history of prior criminal activity, and that he was twenty years old at the time of the offense.

Ponticelli v. State, 593 So. 2d 483, 486-487 (Fla. 1991).¹

THE DIRECT APPEAL ISSUES

On appeal to this Court from his convictions and sentences of death, Ponticelli raised the following issues, as framed by this Court:

Ponticelli raises the following twelve claims in this appeal: 1) the trial court erred in finding appellant competent to stand trial; 2) the trial court erred in denying appellant's motion to suppress statements made to investigators; 3) the trial court erred in preventing appellant from presenting the testimony of an expert in the field of behavioral psychology; 4) the trial court erred in limiting the defense's voir dire examination; 5) the trial court erred by refusing to grant a mistrial after a state witness was allowed to testify regarding the potential danger he faced as a result of his testimony where such danger was never connected to the defendant; 6) the trial court erred by admitting a photograph of the victim which was cumulative to photographs already in evidence and allowing extended publication of photographs to the jury; 7) the trial court erred in permitting the state to elicit irrelevant and prejudicial testimony during the penalty phase; 8) the trial court erred in finding the murder of Nick Grandinetti heinous, atrocious or cruel, under section 921.141(5)(h), *Florida Statutes* (1987); 9) the trial court erred in finding the murders were committed in a cold, calculated and premeditated manner, under 921.141(5)(i); 10) sections 921.141(5)(h) and (i) are unconstitutionally vague and applied in an arbitrary and capricious manner; 11) the trial court erred in its consideration of valid un rebutted mitigating factors; 12) Florida's capital sentencing statute is unconstitutional on its face and

¹On Petition for Certiorari to the United States Supreme Court, this case was remanded in light of *Espinosa v. Florida*, 505 U.S. 1079 (1992). On remand, this Court affirmed Ponticelli's convictions and death sentences. *Ponticelli v. State*, 618 So. 2d 154 (Fla. 1993).

as applied. Only seven of these claims merit discussion.[FN4]

[FN4] Ponticelli's third, fourth, and sixth claims merit no discussion. His tenth claim regarding the constitutionality of the aggravating factors of heinous, atrocious, or cruel, and cold, calculated, and premeditated previously has been rejected by this Court. *Robinson v. State*, 574 So. 2d 108, 113 n.6 (Fla.), cert. denied, (U.S. Oct. 7, 1991) (No. 90-8177). His twelfth claim challenging the constitutionality of the death penalty statute likewise has been rejected. *Van Poyck v. State*, 564 So. 2d 1066 (Fla. 1990), cert. denied, 113 L. Ed. 2d 270, 111 S. Ct. 1339 (1991).

Ponticelli v. State, 593 So. 2d 483, 487 (Fla. 1991).

THE RULE 3.850 PROCEEDINGS

Ponticelli filed an initial 3.850 Motion under Rule 3.850 of the *Florida Rules of Criminal Procedure* to Vacate on April 11, 1995. (SR1-60). Amended 3.850 Motions were filed on July 26, 1995, October 11, 1995, April 4, 1996, and June 20, 1997. (SR195-296, 297-494, 495-699, 700-849). A Fifth Amended 3.850 Motion was filed on July 30, 1998. (SR1255-1612). Evidentiary hearings were held over several days before the Honorable Victor J. Musleh, Circuit Court Judge for the Fifth Judicial Circuit of Florida, in and for Marion County, on April 21, 1997, (R170-290),² July 10-14, 2000, (R491-1633), October 16-17, 2000,

²This hearing pertained to Ponticelli's public records request. The defense presented the testimony of six witnesses, Judith Bunker, Julie Ellicott, Mary Helen Brannan, James Gettemy, Yvonne Shores and Lois Smith. (R171-290).

(R1634-1970), January 29-30, 2001, (R1986-2321), and May 24, 2001. (R2341-2469). An Order denying in part Ponticelli's Fifth Amended Motion to Vacate was issued on November 3, 1998. (SR1673-93). A final Order denying Ponticelli's remaining claims was issued on November 1, 2002. (SR7136-60). He filed a Motion for Rehearing on November 18, 2002. (R2481-2713). An Order denying the Motion for Rehearing was issued on December 17, 2002. (R2758). Ponticelli timely filed a Notice of Appeal on January 3, 2003. (R2759-60). Because of the inadvertent omission of one claim from the trial court's dispositive order, this case was remanded for entry of a corrected order. That order was entered on November 4, 2004.

Ponticelli filed a petition for writ of habeas corpus on October 16, 2003, and filed the corrected petition on October 23, 2003. This Court consolidated the habeas proceeding with the Rule 3.851 appeal in an order issued on March 18, 2005.

RESPONSE TO JURISDICTIONAL STATEMENT

The Respondent agrees that this Court has jurisdiction over original petitions for habeas corpus relief in cases in which the death penalty has been imposed. However, the Respondent does not agree that the claims contained in the petition are properly presented in a petition for habeas corpus relief, nor does the Respondent agree that Ponticelli is entitled to relief of any sort.

RESPONSE TO GROUNDS FOR RELIEF

I. THE *RING V. ARIZONA* CLAIM

On pages 6-22 of the petition, Ponticelli argues that he is entitled to relief based on *Ring v. Arizona*, 536 U.S. 584 (2002). This claim is not a basis for relief for two independently adequate reasons.

First, Florida law is clear that *Ring* is not retroactively applicable to cases like this one, which were final before *Ring* was decided. *Johnson v. State*, 904 So. 2d 400 (Fla. 2005). Likewise, the United States Supreme Court has held that *Ring* is not retroactive to final cases. *Schriro v. Summerlin*, 542 U.S. 348 (2004).

Second, this claim is not available to Ponticelli because it was not preserved by timely objection at trial. The failure to preserve this claim by contemporaneous objection is a procedural bar to consideration of the claim. *Dufour v. State/Crosby*, 905 So. 2d 42 (Fla. 2005); *Wright v. State*, 857 So. 2d 338, 358 (Fla. 2003).

II. THE *RING*-BASED INDICTMENT CLAIM

On pages 22-26 of the petition, Ponticelli argues that the indictment charging him with two counts of First Degree Murder was deficient because it did not set out the aggravating factors that the State intended to establish. This, according to

Ponticelli, violates *Ring v. Arizona*. This claim is not a basis for relief for the following reasons.

Florida law is clear, as discussed *infra*, that *Ring* is not retroactively applicable to cases, like this one, which were final when *Ring* was decided. *Johnson v. State, supra*. Because that is the law, this claim, which is based squarely on *Ring*, fails.

Second, the square claim contained in the petition has been repeatedly rejected by this Court:

. . . we have rejected claims that *Ring* requires the aggravating circumstances to be alleged in the indictment or to be individually found by a unanimous jury verdict. See *Hodges v. State*, 885 So. 2d 338, 359 nn.9 & 10 (Fla. 2004); *Blackwelder v. State*, 851 So. 2d 650, 654 (Fla. 2003); *Porter v. Crosby*, 840 So. 2d 981, 986 (Fla. 2003).

Ferrell v. State, 30 Fla. L. Weekly S451 (Fla. June 16, 2005).

This claim is no different, and is not a basis for relief.

III. THE INEFFECTIVENESS OF COUNSEL CLAIM

On pages 26-35 of the petition, Ponticelli argues that appellate counsel was ineffective for not raising certain issues on direct appeal. These issues appear to relate to events that took place during trial (particularly during closing argument), and which were not objected to by trial counsel. In addition, Ponticelli argues extensively about various fact-specific issues

which are the subject of the pending appeal from the denial of his post-conviction relief motion.

Florida law is settled that a specific objection is required in order to preserve an issue for review on appeal. *Dufour v. State/Crosby*, 905 So. 2d 42 (Fla. 2005); *Wright v. State*, 857 So. 2d 338, 358 (Fla. 2003). In order to preserve the adequacy and integrity of Florida's settled contemporaneous objection rules, this Court should clearly state that the claims contained in Ponticelli's petition were not preserved at trial and that, because those issues were not preserved, appellate counsel cannot have been ineffective for "failing" to raise such an issue.

Perhaps recognizing the tenuous character of this claim, Ponticelli attempts to rescue it by casting it as a claim of "fundamental error." However, that reformulation of the claim itself does nothing to help him because the matters complained of are not error at all, and certainly do not rise to the level of fundamental error:

it is well-settled that, in order to raise a claim of error on appeal, the alleged error must be objected to at trial when it occurs. *F.B. v. State*, 852 So. 2d 226, 229 (Fla. 2003). The purpose of requiring a contemporaneous objection is to put the trial judge on notice of a possible error, to afford an opportunity to correct the error early in the proceedings, and to prevent a litigant from not challenging an error so that he or she may later use it as a tactical advantage. *Crumbley v. State*, 876 So. 2d 599 (Fla. 5th DCA 2004); *Fincke v. Peeples*, 476 So. 2d 1319, 1322

(Fla. 4th DCA 1985). The only recognized exception to the contemporaneous objection requirement is in the event of fundamental error. *State v. Delva*, 575 So. 2d 643, 644-45 (Fla. 1991).

Fundamental error is error that "goes to the foundation of the case or the merits of the cause of action and is equivalent to the denial of due process." *J.B. v. State*, 705 So. 2d 1376, 1378 (Fla. 1998). The fundamental error exception is very limited and "should be applied only in rare cases where a jurisdictional error appears or where the interests of justice present a compelling case for its application." *Ray v. State*, 403 So. 2d 956, 960 (Fla. 1981).

Defendant does not cite to any case which supports his position. Indeed, we have previously recognized that we are unaware of any reported case in Florida where the fundamental error exception has ever been invoked to cure an unpreserved evidentiary error at trial. *State v. Osvath*, 661 So. 2d 1252 (Fla. 3d DCA 1995). We do not find that the testimony concerning defendant's uncharged crimes was error that went to the foundation of the case or that it was so prejudicial as to vitiate the entire trial.

Wooten v. State, 904 So. 2d 590 (Fla. 3rd DCA 2005).

In addition to being unpreserved, this claim is contained in the appeal from the denial of Ponticelli's Rule 3.851 motion. Florida law is settled that claims which are properly raised in a Rule 3.851 motion cannot be re-litigated in a habeas petition. *Atwater v. State/Crosby*, 788 So. 2d 223, 227 (Fla. 2001). This claim is not available to Ponticelli in this proceeding, and does nothing other than burden this Court with duplicative filings. The petition should be denied.

CONCLUSION

Ponticelli is not entitled to any relief, and the petition for habeas corpus relief should be denied in all respects.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above has been furnished by U.S. Mail to **Linda McDermott**, Esquire, McClain & McDermott, P.A., 141 N. E. 30th Street, Wilton Manors, Florida 33334, this 3rd day of October, 2005.

Of Counsel

CERTIFICATE OF COMPLIANCE

This brief is typed in Courier New 12 point.

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