IN THE SUPREME COURT OF FLORIDA

ANTHONY LAMARCA,

Petitioner,

v. **CASE NO. SC04-847**

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

Respondent.
_____/

RESPONSE TO PETITION FOR HABEAS CORPUS

AND

MEMORANDUM OF LAW

COMES NOW, Respondent, James V. Crosby, Jr., Secretary of the Department of Corrections for the State of Florida, by and through the Attorney General of the State of Florida and the undersigned counsel, who answers the petition, and states:

PRELIMINARY STATEMENT

Respondent denies petitioner is being illegally restrained and denies each and every allegation in the instant petition indicating in any manner that petitioner is entitled to relief from this Court.

RELEVANT FACTS

A detailed statement of the facts is contained in the Respondent's Answer Brief filed in response on appeal from the denial of Petitioner's Motion for Post-Conviction Relief filed on the same date as this Response.

ARGUMENT

I-VI.[1]

WHETHER FLORIDA'S CAPITAL SENTENCING SCHEME IS CONSTITUTIONAL IN LIGHT OF APPRENDI V. NEW JERSEY AND RING V. ARIZONA? (STATED BY RESPONDENT).

The Supreme Court's decisions in Apprendi v. New Jersey, 530 U.S. 466 (2000) and Ring v. Arizona, 536 U.S. 584 (2002) do not provide any basis for questioning petitioner's conviction or resulting death sentence. This Court has repeatedly rejected petitioner's claim that Ring invalidated Florida's capital sentencing procedures. See Duest v. State, 855 So. 2d 33, 49 (Fla. 2003); Kormondy v. State, 845 So. 2d 41, 54 (Fla. 2003)(Ring does not encompass Florida procedures or require either notice of the aggravating factors that the State will present at sentencing or a special verdict form indicating the aggravating factors found by the jury); Butler v. State, 842 So. 2d 817, 834 (Fla. 2003) (rejecting Ring claim in a single

[1]Sections I thru III reference preliminary statements contained in Lamarca's Habeas Petition. Sections IV thru VI of the Petition allege claims relating to Ring v. Arizona.

aggravator (HAC) case); Porter v. Crosby, 840 So. 2d 981, 986 (Fla. 2003); Bottoson v. Moore, 833 So. 2d 693 (Fla.), cert. denied, 537 U.S. 1070 (2002); King v. Moore, 831 So. 2d 143 (Fla.), cert. denied, 537 U.S. 657 (2002).

Even if Ring has some application under Florida law, it would not retroactively apply to this case. In Schriro v. Summerlin, 124 S. Ct. 2519, 159 L. Ed. 2d 442 (2004), the Supreme Court held that Ring announced a new "procedural rule" and is not retroactive to cases on collateral review. See also Turner v. Crosby, 339 F.3d 1247, 1283 (11th Cir. 2003)(holding that Ring is not retroactive to death sentences imposed before it was handed down.). A majority of this Court has now determined that Ring will not apply retroactively to cases on postconviction review.[2] See Monlyn v. State, 29 Fla. L. Weekly S741 (February 11, 2005) and Windom v. State, 886 So. 2d 915 (Fla. 2004)(Cantero, J., concurring). See also Modest v. State, 30 Fla. L. Weekly D409 (Fla. 3d DCA, February 9, 2005)(noting a "majority of the Florida Supreme Court has also ruled that Ring is not retroactive.")(citations omitted).

Even if some deficiency in the statute could be discerned,

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[2]See Cannon v. Mullin, 297 F.3d 989 (10th Cir. 2002) (rejecting the claim that Ring is retroactive in federal courts); Whisler v. State, 36 P.3d 290 (Kan. 2001)(state supreme court rejecting retroactivity of Apprendi).

petitioner has no legitimate claim of any Sixth Amendment error on the facts of this case. Clearly, a Sixth Amendment violation can be harmless. Any claim to the contrary ignores the plain result of Ring itself, which was remanded so that the state court could conduct a harmless error analysis. Ring, 536 U.S. at 609, n.7. This result is consistent with a number of other United States Supreme Court decisions. See United States v. Cotton, 535 U.S. 625 (2002)(failure to recite amount of drugs for enhanced sentence in indictment did not require conviction to be vacated); Neder v. United States, 527 U.S. 1, 8-9 (1999) (failure to submit an element to the jury did not constitute structural error).

Petitioner had prior violent felony convictions for armed sexual battery and armed kidnapping.[3] The prior violent felony aggravator takes this case out of consideration from the class of cases to which Ring might conceivably apply. See Doorbal v. State, 837 So. 2d 940, 963 (Fla. 2003)(rejecting Ring claim noting that one of the aggravating circumstances found by the trial judge to support the sentences of death was that Doorbal had been convicted of a prior violent felony); Accord, Lugo v. State, 845 So. 2d 74, 119 n.79 (Fla. 2003); Duest v. State, 855

[3]The fact that petitioner received a partial reduction in his sentence for the armed kidnapping is of no consequence. The conviction was not overturned.

So. 2d 33, 49 (Fla. 2003). Thus, in the unlikely event Ring might apply to Florida's capital sentencing scheme, under the particular facts of this case, petitioner would not be entitled to any relief.

VII.

WHETHER THE TRIAL COURT'S INQUIRY PURSUANT TO FARETTA V. CALIFORNIA WAS ADEQUATE. (STATED BY RESPONDENT).

Petitioner takes issue with the Faretta[4] inquiry conducted by the trial court below. However, he does not articulate how the inquiry was deficient. Indeed, his claim is largely devoid of facts and provides no basis for finding appellate counsel ineffective for failing to raise the issue on appeal.

Any challenge to the sufficiency of the Faretta inquiry in this case would be rejected as the trial court advised petitioner of the advantages of representation by counsel and the disadvantages of self-representation. (T-32, 4-12). The trial court stressed that he would be at a distinct disadvantage should he choose to represent himself. Id. The trial court noted that Petitioner was "intelligent" and had prior experience with the criminal justice system. (T-32, 9-11). Nonetheless, at the conclusion of this inquiry, petitioner told the court that he desired to forego representation by counsel[5] and that he wished to represent himself in this case. Petitioner stated: "I elected to do this. I asked my attorneys to withdraw. I am satisfied with their representation previous to this. I hope

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[4]Faretta v. California, 422 U.S. 806 (1975).

[5]Appellant stated that he did not want either Ms. Perry or Mr. Sosa representing him. (R. 1074).

that they will stay for the rest of it, but I wish to do this, yes." (T-32, 19).

In Potts v. State, 718 So. 2d 757, 759 (Fla. 1998), this Court held that the defendant validly waived his right to counsel, stating, in part:

> [a] defendant's demand for self-representation places the trial court in a quandary, for the court must balance seemingly conflicting fundamental rights-i.e., the court must weigh the right of self-representation against the rights to counsel and to a fair trial. Because the court's ruling turns primarily on an assessment of demeanor and credibility, its decision is entitled to great weight and will be affirmed on review if supported by competent substantial evidence in the record.

Potts reiterated the requirement that a decision of self-representation must be made "knowingly and intelligently, i.e., 'with eyes open.'" Id. However, in determining the validity of a waiver of counsel, an appellate court should not focus on the specific advice given by the trial court, "but rather on the defendant's general understanding of his or her rights" because "there are no 'magic words' under Faretta." Id. at 760.

"To determine whether appellate counsel was ineffective, our evaluation is limited to 'first, whether the alleged omissions are of such magnitude as to constitute a serious error or substantial deficiency falling measurably outside the range of professionally acceptable performance and, second, whether the

deficiency in performance compromised the appellate process to such a degree as to undermine confidence in the correctness of the result.'" Rogers v. Singletary, 698 So. 2d 1178, 1180 (Fla. 1997)(citations omitted). Petitioner has failed to meet either prong in this case.

Petitioner neglects to specifically argue how the court's inquiry below was deficient.[6] Consequently, he has completely failed to show his appellate counsel was ineffective for failing to brief this issue on appeal. Petitioner clearly understood the nature and effect of his decision below.

VIII.

WHETHER PETITIONER WAS DENIED HIS RIGHT TO PARTICIPATE IN JURY SELECTION? (STATED BY RESPONDENT).

Petitioner apparently contends that his appellate counsel was ineffective in failing to raise trial counsel's waiver of his presence at a single bench conference during jury selection. (Habeas Petition at 40-43). However, this case was tried in November of 1997 and was not within the window period where this court's decision in Coney v. State, 653 So. 2d 1009 (Fla. 1995) applies. In Carmichael v. State, 715 So. 2d 247, 248 n.1 (Fla. 1998), this Court stated the following:

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[6]Indeed, petitioner's argument is confusing and much of it is not related to Faretta. For example, petitioner spends several pages relating qualifications on minimum standards for counsel in capital cases. (Habeas Petition at 33-40).

> We have since amended Florida Rule of Criminal Procedure 3.180 to supersede Coney. See Amendments to Florida Rules of Criminal Procedure, 685 So.2d 1253, 1254 n. 2 (Fla.1996) ("This amendment supersedes Coney v. State, 653 So.2d 1009 (Fla.1995)."). Our ruling in Coney thus is applicable only to those cases falling within a narrow window--i.e., where jury selection took place after April 27, 1995 (the date Coney became final), and before January 1, 1997 (the date the amendment to rule 3.180 became effective). See State v. Mejia, 696 So.2d 339 (Fla.1997); Amendments.

Appellate counsel cannot be considered ineffective for failing to raise this un-preserved, meritless issue. Petitioner voiced no objection to the procedure employed below. Muhammad v. State, 782 So. 2d 343, 353 (Fla. 2001)("this Court held that Coney errors must be preserved for appellate review through a specific objection.") (citing Carmichael, 715 So. 2d at 249). In fact, the record reflects defense counsel waived Lamarca's presence at the bench conference referenced in Lamarca's Petition. (T-25, 228-29). Appellate counsel cannot be considered ineffective for failing to raise an issue which is not preserved for appeal. Medina v. Dugger, 586 So. 2d 317, 318 (Fla. 1991)(appellate counsel is "not ineffective for failing to raise issues not preserved for appeal.")

The jurors were questioned in petitioner's presence in open court. Moreover, the record reflects that petitioner was present when peremptory and cause challenges were exercised during the selection process. (T-26, 497). The court noted

"Mr. Lamarca has been present in open court the entire time that we have been discussing the cause challenges." (T-26, 497). Moreover, the defendant indicated that he was following along with counsels' peremptory and cause challenges in selecting the jury. In discussing the remaining peremptory challenges, petitioner chimed in with the following: "Can we raise you one, your Honor." (T-26, 505). Thus, petitioner's assertion that his "mouth was taped shut when he was excluded from the selection of jurors as peremptory strikes where (sic) done at the bench without his knowledge or input" is incorrect. (Habeas Petition at 3). The record reflects that not only was petitioner present in the courtroom, but that he was in the immediate vicinity and was following along with counsel during the selection of his jury. For the foregoing reasons, a Coney issue would have no chance of success on appeal. See Griffin v. State, 866 So. 2d 1, 19-20 (Fla. 2003).

IX.

WHETHER APPELLATE COUNSEL WAS INEFFECTIVE IN FAILING TO CONTEST THE STATE'S EXERCISE OF CAUSE CHALLENGES ON DIRECT APPEAL. (STATED BY RESPONDENT).

Petitioner challenges the State's exercise of cause challenges below. However, he neglects to tell this Court how or why such challenges on the jurors were improper. Indeed, his argument on this issue is as follows: "At the side bar

conference, jurors 9, 18, 40, 42, 47, and 59 did not have valid cause challenges." Further, one witness (sic) was skeptical of law enforcement. (R. Vol. 25, p. 228-29)." Respondent respectfully submits that Petitioner's failure to provide argument as to the alleged error and ruling precludes review and reversal here. See Duest v. Dugger, 555 So. 2d 849, 851-852 (Fla. 1990)("The purpose of an appellate brief is to present arguments in support of the points on appeal. Merely making reference to arguments below without further elucidation does not suffice to preserve issues, and these claims are deemed to have been waived."); Griffin v. State, 866 So. 2d 1, 7 (Fla. 2003)(noting that where defendant "does not elaborate on his claims on appeal, this Court will not look to his postconviction motion for explanation."); Polyglycoat Corp. v. Hirsch Distributors, Inc., 442 So. 2d 958, 960 (Fla. 4th DCA 1983)("It is the duty of counsel to prepare appellate briefs so as to acquaint the Court with the material facts, the points of law involved, and the legal arguments supporting the position of the respective parties.")

The record reflects that almost all of the mentioned jurors were excused for cause without objection from trial counsel. Indeed, it appears potential juror 59, "the blond in the back" was struck by the defense. (T-25, 231). And, there was no

objection to prospective jurors 9, 18, 40, 42, 47, and 59. (T-25, 233). Appellate counsel cannot be considered ineffective for failing to raise this unpreserved issue. Medina, 586 So. 2d at 318.

Petitioner has failed in his burden to demonstrate either deficient performance or resulting prejudice from appellate counsel's failure to raise this issue on appeal.

CONCLUSION

WHEREFORE, based on the foregoing arguments and authorities, the instant Petition for Writ of Habeas Corpus should be summarily denied on the merits.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U. S. Mail to Peter J. Cannon and Daphney E. Gaylord, Assistant CCRC, Capital Collateral Regional Counsel - Middle Region, 3801 Corporex Park Drive, Suite 210, Tampa, Florida 33619-1136, on this _____ day of March, 2005.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this response is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

Respectfully submitted,

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