IN THE SUPREME COURT OF FLORIDA

CASE NO. 04-1286

JAMES E. HITCHCOCK,
Petitioner,
v.
JAMES V. CROSBY,
Secretary,
Florida Department of Corrections,
Respondent,
and
CHARLIE CHRIST,
Attorney General,
Additional Respondent.

REPLY PETITION FOR WRIT OF HABEAS CORPUS

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REPLY TO STATE'S RESPONSE

GROUND I

PETITIONER WAS DEPRIVED OF ADEQUATE NOTICE OF FELONY MURDER AND DEPRIVED OF A UNANIMOUS VERDICT WITH REGARD TO BOTH THE DETERMINATION OF GUILT/INNOCENCE AND THE SENTENCE BY VIRTUE OF THE TRIAL COURT'S INSTRUCTIONS AND THE VERDICT FORMS WHICH ALLOWED THE JURY TO ARRIVE AT A NON-UNANIMOUS VERDICT AS TO THE COUNT OF MURDER ON WHICH THE CONVICTION WAS BASED IN VIOLATION OF THE 5th, 6th, 8TH, AND 14TH AMENDMENTS OF THE UNITED STATES CONSTITUTION. APPELLATE COUNSEL WAS INEFFECTIVE IN FAILING TO RAISE THIS ISSUE IN THE DIRECT APPEAL.

Mr. Hitchcock stands by his argument made in Ground I of his Petition. This argument is a multifaceted one which requires this Court to address the inherent unconstitutionality of this State's capital charging scheme. Additionally, this Court must address the specific facts from the record on appeal that are fully detailed in the Petition.

This Court should grant relief because the denial of Mr. Hitchcock's rights was both fundamental and severe. The denial of adequate notice and proper charging in Mr. Hitchcock's case denied him his rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

Mr. Hitchcock raises the inherent unconstitutionality of Florida's first degree murder law as fundamental error which should be addressed in light of the United States Supreme Court's decisions in *Ring v. Arizona*, 536 U.S. 584 (2002), and *Apprendi v. New Jersey,* 530 U.S. 466 (2000). Appellate

counsel, however, was still ineffective for not addressing the obvious constitutional deprivation that occurred on the record in Mr. Hitchcock's case.

The State attempts to have a double benefit of procedural bar. While *Ring* was not issued until after Mr. Hitchcock's last resentencing, the State argues first that counsel was not ineffective for failing to raise the issue of Ground I, Response at 5, and second that constitutional challenges to Florida's capital sentencing statute must be raised on direct appeal, Response at 7-8. No procedural bar prevents this Court from addressing this challenge to Florida's death penalty scheme -- it was either unconstitutional in Mr. Hitchcock's case or it was not. This Court should decide this issue after considering the arguments made in Mr. Hitchcock's Petition.

Contrary to the State's Response, this Court has not repeatedly ruled that constitutional challenges to Florida's capital sentencing statute must be raised on direct appeal. *See* Response at 7-8. *Finney v. State*, 831 So.2d 651 (Fla. 2002), as cited by the State, ruled that "[p]ostconviction motions are not to be used as second appeals. Issues that were or could have been raised on direct appeal are not cognizable in a Rule 3.850 motion." 831 So.2d at 657. *Finney* did not hold that Habeas Corpus is not the right forum to raise a constitutional challenge to Florida's death penalty

scheme in light of new case law from the United States Supreme Court that was issued after a direct appeal became final. *Floyd v. State*, 808 So.2d 175 (Fla. 2002), and *Arbelaez v. State*, 775 So.2d 909 (Fla. 2000), were also both appeals from the denial of postconviction motions and not denials of habeas corpus, let alone claims of ineffectiveness of appellate counsel. Ground I was made possible by *Ring* and could not have been raised until the authority of *Ring* existed.

Contrary to the State's Response, in which the State cites a long list of cases, Florida law is not well settled that *Ring* and *Apprendi* "have no impact on Florida's capital sentencing structure because death eligibility is determined at the guilt stage of a Florida capital trial." *See* Response at 6-7. Clearly, if this were true, Florida would have no limit on the class of murder defendants who may receive the death penalty. Florida's death penalty scheme would not only violate *Furman v. Georgia*, 408 U.S. 238 (1972), but also *Proffitt v. Florida*, 428 U.S. 242 (1976). While Mr. Hitchcock is cognizant that this Court has not granted *Ring* relief on the standard *Ring* claim, *see* Ground V *infra*, the claim made herein is not the standard *Ring* claim that this Court has denied relief.

The full impact of *Ring* and *Apprendi* is yet to be seen. Clearly this Ground, while challenging Florida's death penalty scheme in light of *Ring* and *Apprendi,* goes beyond the standard

Ring claim and should be addressed by this Court. The Respondent's arguments do not justify this Court's denial of Mr. Hitchcock's claim. This Court should grant relief.

GROUND II

1977 APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE THE CLAIM THAT MR. HITCHCOCK WAS NOT PRESENT AT BENCH CONFERENCES AT CRITICAL STAGES AND TRIAL COUNSEL FAILED TO MAKE AN ADEQUATE RECORD OF BENCH CONFERENCES

Mr. Hitchcock stands firmly by the argument he made in Ground II of his Petition. Appellate counsel failed to raise the claim that Mr. Hitchcock was not present during bench conferences at critical stages of the proceedings against him and that there was an inadequate record made of his bench conferences. This violated Mr. Hitchcock's rights under the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. Appellate counsel had a duty to raise the violations of these important rights. Appellate counsel's failure to do so was deficient and prejudiced Mr. Hitchcock by denying Mr. Hitchcock a remedy for these violations, thus compounding the denial of Mr. Hitchcock's rights under the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

The claim that appellate counsel failed to raise was not a claim under state procedural law, as seen in *Boyett v. State*, 688 So.2d 308 (Fla. 1996), cited in Response 11-13. Rather, appellate counsel was deficient for failing to raise a serious

deprivation of Mr. Hitchcock's constitutional right to be present at the critical stages of the proceedings against him and to have his murder trial recorded for further review. If State procedural or constitutional law supports relief, Mr. Hitchcock accepts and claims its support in favor of this Court granting relief. If it does not, Mr. Hitchcock respectfully submits that he is entitled to relief under the United States Constitution which guarantees that he be present at each and every critical stage of the proceedings against him, an adequate record and effective appellate counsel to remedy the denial of these rights.

GROUND III

APPELLATE COUNSEL WAS INEFFECTIVE FOR NOT RAISING ON APPEAL THAT THE TRIAL COURT ERRONEOUSLY FOUND THAT THE AGGRAVATOR OF "DURING THE COURSE OF A FELONY" APPLIED IN MR. HITCHCOCK'S CASE

Mr. Hitchcock stands firmly by the argument he made in Ground III. Appellate counsel was ineffective for failing to raise this issue on direct appeal. Apart from the ineffectiveness of trial counsel in failing to argue that there was a break in the nexus between the alleged sexual battery and the murder, appellate counsel had an affirmative duty to argue on appeal that the trial court erroneously found that this aggravating factor existed.

The error addressed in this ground occurred when the trial court issued its order sentencing Mr. Hitchcock to death based

in part on a finding of the “during the course of a felony” aggravating circumstance. This aggravating circumstance was not supported by the evidence from Mr. Hitchcock’s penalty phase because it was clear, even from Mr. Hitchcock’s false confession, that the sexual contact was complete before the homicide took place. To support this aggravating circumstance the trial court needed to find that the murder occurred during the course of a violent felony, not that a violent felony occurred and then later a murder occurred. As far as a lack of evidence for this aggravating circumstance, trial counsel was not required to object, nor could they object, to the finding of this aggravating circumstance because it was the very last thing that the trial court did in its order sentencing Mr. Hitchcock to death. Appellate counsel could have simply raised the lack of evidence for this aggravating circumstance on appeal as appellate counsel regularly does on one or more aggravating factors in almost every capital direct appeal this Court hears.

Contrary to the State’s response, the issue of the sufficiency of the evidence for the “during the course of a felony” aggravating circumstance was not procedurally barred and was meritorious. Appellate counsel was deficient for failing to raise this issue. The prejudice that resulted from this deficiency was overwhelming; Mr. Hitchcock’s death sentence was justified by the lower court and upheld by this

Court based on an aggravating circumstance that the State did not prove. Accordingly, this Court should grant relief.

GROUND IV

APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE THE *CALDWELL* ISSUE APPARENT ON THE RECORD IN THE DIRECT APPEAL OF THE FOURTH SENTENCING TRIAL.

Mr. Hitchcock stands firmly by this claim. Appellate counsel was ineffective for failing to raise on appeal the *Caldwell* violation that occurred in Mr. Hitchcock's 1996 resentencing. This issue was both preserved at trial and apparent in the record on appeal. The jury instruction violated Mr. Hitchcock's rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

Mr. Hitchcock does not concede that the standard jury instruction used in Florida passes constitutional muster. Mr. Hitchcock's resentencing, however, presents a far greater *Caldwell* violation than that which occurs by the reading of the standard jury instruction on the jury's role in sentencing.

Noticeably absent from the State's Response is what the sentencing court in Mr. Hitchcock's case actually told the sentencing jury which recommended a death sentence for Mr. Hitchcock. The court instructed:

> As you have been told, your final decision as to what punishment shall be imposed is the responsibility of me as the judge. However, it is your duty and responsibility to follow the law that I will now give you to render to me an advisory sentence based upon your determination as to whether sufficient aggravating circumstances exist to justify imposition of death penalty and what is sufficient mitigating circumstances exist to outweigh any aggravating circumstances you may find to exist.

1996 Vol. VII R. 363.(Emphasis added).

The jury that recommended death for Mr. Hitchcock was improperly instructed that the jury did not even have responsibility for the jury's own final decision. The actual instructions read to the jury went beyond the standard jury instruction's usual diminishing of the jury's role. In Mr. Hitchcock's case, the jury's role not only in sentencing but in the jury's own recommendation was diminished.

In postconviction, Mr. Hitchcock raised his resentencing counsel's ineffectiveness in failing to object when the above unconstitutional jury instruction was read to the jury. This was done in anticipation of the argument that resentencing counsel's motion to strike[1] was insufficient to preserve for appellate review the trial court's unconstitutional jury instruction.

Appellate counsel's ineffectiveness was quite another matter. As the State's response points out, the lower court

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[1]"MOTION TO STRIKE PORTIONS OF 'FLORIDA STANDARD JURY INSTRUCTIONS IN CRIMINAL CASES' RE: CALDWELL v. MISSISSIPPI," (1996 VOL. XIV R. 723-725)

found that the *Caldwell* claim could have been raised on direct appeal, but was not raised. Response at 15. The lower court found that Claim VIII of Mr. Hitchcock's postconviction motion was procedurally barred because the claim could have been raised on direct appeal and in light of *Apprendi v. New Jersey*, 530 U.S. 466 (2000); *citing Card v. State,* 803 So.2d 613(Fla. 2001). (VOL. XII PCR. 1127). Should this Court accept the lower court's reasoning, it is implicit that appellate counsel should have raised the *Caldwell* error. Appellate counsel's performance in this regard was both deficient and prejudicial.

Regardless of which forum is most appropriate for raising the *Caldwell* error in this case, the *Caldwell* error was both obvious and egregious. While the State's response cites the current status of the law, the jury instruction at issue here clearly was an improper description of "the role assigned to the jury by local law." Response at 16, *citing Romano v. Oklahoma*, 512 U.S. 1, 9 (1994)(*quoting Dugger v. Adams*, 489 U.S. 401, 407 (1989). Moreover, unlike the other federal cases cited by the State, *see* Response at 16-17, here it was the trial judge and not trial counsel which affirmatively misled the jury as to the jury's sentencing role. The judge, unlike a prosecutor, was the ultimate authority for the law during Mr. Hitchcock's resentencing. Thus, the trial judge's misrepresentation had far greater impact on the jury than mere

comments by a prosecutor during closing argument. This should have been addressed by appellate counsel.

Additionally, contrary to the State's assertion otherwise, *Ring v. Arizona* and *Apprendi v. New Jersey* do indeed require greater scrutiny of *Caldwell* violations. Respectfully, Mr. Hitchcock asserts that despite the quoted language from this Court's *Robinson* opinion, *see* Response at 17, to the extent that Florida's death penalty scheme remains constitutional, it is because of the role of Florida juries in that scheme. The resentencing court's improper instruction, which was far worse than the standard jury instruction, clearly rendered Mr. Hitchcock's death sentence unconstitutional regardless of whether Florida's death penalty scheme survives *Ring* and *Apprendi*.

Appellate counsel was deficient in failing to raise the aggravated *Caldwell* error that arose in Mr. Hitchcock's case. The issue was either properly preserved or fundamental and thus appropriate for appellate challenge. Had counsel done so this Court would have reversed Mr. Hitchcock's death sentence. This Court should grant Mr. Hitchcock a new sentencing.

GROUND V

THE FLORIDA DEATH SENTENCING STATUTE AS APPLIED IS UNCONSTITUTIONAL UNDER THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION. APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE THIS ISSUE IN THE DIRECT APPEAL

Mr. Hitchcock raised this claim, despite this Court's

opinions as cited by the State, Response at 18. Mr. Hitchcock does so to preserve this issue for later federal and state review should this Court or the United States Supreme Court address Florida's death penalty scheme in light of *Ring* and *Apprendi*. He also does so with the knowledge that one day the deficiencies in Florida's death penalty scheme may be corrected just as the constitutional infirmity of his first death sentence was corrected in *Hitchcock v. Dugger*.

Mr. Hitchcock raised the underlying error under two different procedures; his postconviction motion and appeal and in this Petition. This was done to avoid a denial of relief from an unconstitutional death sentence based on one of the many procedural grounds that regularly deny remedy for constitutional violations. Regular practice has shown that in whatever forum a party raises a claim, the State will inevitably claim that it should be raised somewhere else, usually a proceeding which is no longer available. Here, if this claim should have been raised on direct appeal it was appellate counsel who should have raised the claim. Thus, this claim is properly raised here even if this Court was presented with other theories, such as those raised in Mr. Hitchcock's contemporaneously filed appeal from the denial of postconviction relief.

Regarding retroactivity, this Court and the United States Supreme Court have not held that *Ring* and *Apprendi* apply to

Florida's death penalty, let alone whether these decision apply retroactively. The State's arguments on retroactivity are therefore premature; some court has to first find that *Ring* and *Apprendi* apply to Florida's death penalty scheme. Then and only then will the issue of retroactivity be ripe.

Two points on retroactivity should also be considered: First, this Court, which makes its own decisions on retroactivity, has not held that *Ring* and *Apprendi* do not apply retroactively as a matter of State law. *See generally*, *Windom v. State*,29 Fla. L. Weekly S191(Fla. May 6, 2004)(denying relief on grounds other then retroactivity); *Witt v. State,* 465 So.2d 510 (Fla. 1985). Second, *Schriro v. Summerlin, 524 U.S. ___ (2004)*, deals with retroactive application of *Ring* and *Apprendi* on federal review. In federal habeas corpus practice, issues often are raised for the first time in a habeas petition in light of new law. A federal habeas petitioner faces a number of obstacles to retroactive application of new federal law. Mr. Hitchcock may have arguments concerning whether he is entitled to retroactive application of *Ring* or *Apprendi* in his particular case if federal review is necessary. These issues, however, do not affect this Court's decision on whether Mr. Hitchcock should be granted relief.

Mr. Hitchcock's direct appeal was at least pending while *Apprendi* was being resolved. Perhaps trial counsel did not

have the benefit of seeing *Apprendi*'s flow through the federal system, but appellate counsel did.[2] Certainly, the arguments made for Mr. Apprendi and Mr. Ring could have been made by the appellate attorney for Mr. Hitchcock. This issue, however, is fundamental, and is akin to a sentence that exceeds the statutory maximum.

Unlike a noncapital defendant, Mr. Hitchcock was prohibited from raising an illegal sentence claim under Florida Rule of Criminal Procedure 3.800(b). Under this rule, the trial court can correct a sentencing error, including an illegal sentence, but only in a noncapital case. The rule specifically exempts capital sentenced defendants: "This subdivision shall not be applicable to those cases in which the death sentence has been imposed and direct appeal jurisdiction is in [this Court] under article V, section 3(b)(1) of the Florida Constitution." Rule 3.800(b). This was precisely the procedural position of Mr. Hitchcock after the trial court imposed death. Unlike a noncapital defendant, however, Mr. Hitchcock had no opportunity to claim that his sentence exceeded the maximum allowed by the jury's verdict. Failure to object to a sentence that exceeds the maximum is not waived by a failure to object at the time of imposition

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[2] This Court denied rehearing in *Hitchcock v. State*, 755 So. 2d 638 (Fla. 2000) on May 3, 2000. *Apprendi* was decided on June 26, 2000. This Court issued the mandate on *Hitchcock*, on July 21, 2000. *See* docket for SC60-92717.

because for the noncapital defendant there exists a remedy under Florida Rule of Criminal Procedure 3.800. Implicit under Rule 3.800's exclusion of capital defendants is the principle that the remedy lies with this Court, as it should in Mr. Hitchcock's case.

Accordingly, this Court should grant relief.

GROUND VI

MR. HITCHCOCK'S EIGHTH AMENDMENT RIGHT AGAINST CRUEL AND UNUSUAL PUNISHMENT WILL BE VIOLATED BECAUSE MR. HITCHCOCK MAY BE INCOMPETENT AT THE TIME OF EXECUTION.

Mr. Hitchcock raised this issue to preserve this issue for federal review. The State asks this court to *dismiss* this claim rather than deny it. Response at 19. In each of the cases cited by the State this Court has acknowledged that the Petitioner's claim of incompetence to be executed was untimely and *denied* the claim.

There is no reason for this Court to dismiss this claim rather than deny it. This claim was properly raised in Mr. Hitchcock's Petition, albeit with the understanding that the claim was raised to allow for federal review should that be necessary.

If Mr. Hitchcock is ever subjected to a death warrant he may be incompetent to be executed. Should this occur, Mr. Hitchcock's counsel will seek to protect his Eighth Amendment rights, first in State court and then federal court. To

proceed in federal court will require exhaustion of his State remedies. Mr. Hitchcock raised this claim now for precisely this purpose. Dismissal of this claim rather than denial may have real consequences for federal review of Mr. Hitchcock's competency to be executed.

Whether or not the State asked this Court to dismiss rather than deny this claim to obtain a procedural defense at a later date is irrelevant. However, this Court should not rule in such a manner that it would deny Mr. Hitchcock access to federal court and possibly allow him to be executed contrary to the Eighth Amendment's prohibition of cruel and unusual punishment simply because the rules of federal exhaustion require that he raise this claim now. This Court has original jurisdiction to hear Mr. Hitchcock's Petition for Writ of Habeas Corpus. *See* art. V,§3(b)(1), (9), Fla. Const. Mr. Hitchcock invoked this jurisdiction by simultaneously filing the instant Petition with his initial brief appealing the circuit court's denial of postconviction relief. *See* Florida Rule of Criminal Procedure 3.851(d)(3). Accordingly, Mr. Hitchcock's entire Petition is properly before this Court and should be ruled upon by this Court.

CONCLUSION

Based on the arguments contained in Mr. Hitchcock's initial petition and here in reply, this Court should grant all relief requested.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing REPLY PETITION FOR WRIT OF HABEAS CORPUS has been furnished by United States mail to all counsel of record on this 13th day of December, 2004.

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CERTIFICATE OF COMPLIANCE

I hereby certify that a true copy of the foregoing REPLY PETITION FOR WRIT OF HABEAS CORPUS of the Petitioner was generated in a courier new 12 point font, pursuant to Fla. R. App. P. 9.210.

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