

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC04-1662

PATRICK C. HANNON,

Petitioner,

v.

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

Respondent.

**PETITIONER'S REPLY TO STATE'S RESPONSE TO PETITION FOR WRIT
OF HABEAS CORPUS**

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INTRODUCTION

This petition for habeas corpus relief is being filed in order to address substantial claims of error under the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, claims demonstrating that Mr. Hannon was deprived of the effective assistance of counsel on direct appeal and that the proceedings that resulted in his conviction and death sentence violated fundamental constitutional guarantees.

Citations to the Record on the Direct Appeal shall be as (R. ____). All other citations shall be self-explanatory.

JURISDICTION

A writ of habeas corpus is an original proceeding in this Court governed by Fla. R. App. P. 9.100. This Court has original jurisdiction under Fla. R. App. P. 9.030(a)(3) and Article V, '3(b)(9), Fla. Const. The Constitution of the State of Florida guarantees that "[t]he writ of habeas corpus shall be grantable of right, freely and without cost." Art. I, '13, Fla. Const.

REPLY TO CLAIM I

PETITIONER IS ENTITLED TO A NEW TRIAL DUE

TO FUNDAMENTAL ERROR. PETITIONER=S FIFTH, SIXTH, AND FOURTEENTH AMENDMENT RIGHTS WERE VIOLATED BECAUSE HE WAS CONVICTED OF A CRIME NOT CHARGED IN THE INDICTMENT.

While the State correctly points out that this Court has repeatedly held that the prosecution may proceed on a theory of felony murder despite the fact that the defendant was only indicted on first degree premeditated murder, an analysis of this Court's opinion in *Delgado v. State*, 776 So.2d 233 (Fla. 2000) demonstrates that these cases should not apply to Petitioner's case. In the narrow field of cases such as Petitioner's, the State's failure to charge both premeditated first-degree murder and first-degree felony murder (as well as giving notice of burglary as the underlying felony) deprived Petitioner of his constitutional rights to due process and notice of the true charges he faced.

Despite the fact that neither trial counsel nor direct appeal counsel challenged the State's theory of felony murder with burglary as the underlying felony, the likely reason this did not occur lies in the fact that Petitioner was not specifically charged with felony murder or burglary. Without notice of burglary as the State's theory in this case, the defense would not have mounted a defense to such a charge. Whereas in *Delgado* the defense was on notice of burglary, a challenge to the charge was based, in part, on the whether Delgado had consent to enter and remain in the premises, and whether the statutory definition of burglary was inadequate. In Petitioner's case,

without any notice of burglary as a State's theory, the defense had no reason to pursue the same challenge that was at issue in *Delgado*. Put another way, Petitioner's case [and subsequent relief granted] could have been *Delgado's* case had Petitioner been given the same notice of burglary. While the State in their Response argues that the facts in Petitioner's case would not entitle him to relief "even if *Delgado* arguably applied" (State's Response at p. 21), the State does not recognize that its "version" of the facts are mainly the product of a co-defendant with great incentive to spin a self-serving story. Additionally, without notice of the State's pursuit of burglary, the defense had no reason to argue their case in a manner to specifically dispute the burglary theory. Additionally, it is beyond dispute that Petitioner was an acquaintance of the victims and in their home on prior occasions. Had Petitioner had notice of the State's theory of burglary, the same issue regarding "consent" and "remaining in" that became crucial to *Delgado's* case did not occur in Petitioner's case precisely because he was deprived of his constitutional right to notice of the charges he faced. This Court should recede from its prior holdings allowing the prosecution to proceed to trial with dual theories of felony and premeditated murder despite the fact that neither felony murder nor notice of the specific underlying felony, was charged in the indictment.

REPLY TO CLAIM II

**FLORIDA'S CAPITAL SENTENCING STATUTE
VIOLATES THE SIXTH AND FOURTEENTH
AMENDMENTS UNDER *APPRENDI V. NEW JERSEY*
AND *RING V. ARIZONA*.**

The State's argument that Petitioner's *Ring* claim is procedurally barred is without merit. In numerous cases since its ruling in *Bottoson v. Moore*, 833 So.2d 93 (Fla. 2002) and *King v. Moore*, 831 So.2d 143 (Fla. 2002), this Court has not found *Ring* claims to be procedurally barred. Additionally, no majority opinion of this Court has found that *Ring* should not be applied retroactively under the applicable standard announced in *Witt v. State*, 387 So.2d 922 (Fla. 1980). Rather, this Court has denied relief based upon the merits of the claims. Petitioner's *Ring* claim should receive equal consideration and likewise be addressed on the merits.

CONCLUSION

For all of the arguments discussed above, Mr. Hannon respectfully urges this Court to grant habeas corpus relief.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Petition for Writ of Habeas Corpus has been furnished by United States Mail, first class postage prepaid, to Katherine Blanco, Assistant Attorney General, Concourse Center 4, 3507 East

Frontage Road, Suite 200, Tampa Florida 33607, on January 26, 2005.

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The undersigned counsel certifies that this petition is typed using Times New Roman 14 point font.

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