IN THE SUPREME COURT OF FLORIDA

ROBERT EARL PETERSON,

Appellant,

v. **CASE NO. SC10-274**

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTH JUDICIAL CIRCUIT,
IN AND FOR DUVAL COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

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INITIAL BRIEF OF APELLANT

I. PRELIMINARY STATEMENT

ROBERT EARL PETERSON, was the defendant in the trial court and will be referred to in this brief as either "appellant," "defendant," or by his proper name.

References to the Record on Appeal will be by the volume number in Arabic numbers followed by the appropriate page number, all in parentheses.

II. STATEMENT OF THE CASE

An Indictment was filed in the Circuit Court for Duval County on December 15, 2005, charging Robert Peterson with one count of first-degree murder, one count of possession of a firearm by a convicted felon, and one count of destruction of evidence (4 R 681). The State also filed a notice that it would seek a death sentence if he were convicted of the murder (4 R 693).

Peterson filed several death penalty related motions, see volumes 12 and 13, which the court uniformly denied (See generally volumes 15 and 16). He also filed the following motions, which have relevance to this appeal:

1. Motion to Suppress Statements (14 R 2664). Denied (18 R 3367).

2. Second Motion to Suppress Statements (14 R 2668). Denied (18 R 3367).

3. State's Motion for Pre-Penalty Phase Ruling [on admissibility of evidence that the victim was a retired police officer] (15 R 2819). Granted (16 R 2989).

4. Motion to Declare Florida's Capital Sentencing Procedure Unconstitutional under Ring v. Arizona. (12 R 2327). Denied (24 R 14)

Peterson proceeded to trial before Judge Lawrence P. Haddock on the murder and destruction of evidenced charges, and the jury convicted him as

charged (15 R 2812-14). As to the murder conviction, it also found that he had discharged a firearm during the commission of the murder (15 R 2812-13).

The defendant proceeded to the penalty phase of the trial, during which the State presented four witnesses who testified only as to victim impact. Peterson presented several witnesses to mitigate a death sentence. The jury, after it had heard this evidence, recommended death by a vote of 7-5 (16 R 3003).

Following that recommendation, the court conducted the hearing required by this Court's opinion in Spencer v. State, 615 So.2d 688 (Fla. 1993). It then imposed a sentence of death. Justifying it, it found in aggravation that the murder

> 1. Was especially heinous, atrocious, or cruel.
> 2. Was committed in a cold, calculated, and premeditated manner without any pretense of legal or moral justification.
> 3. Was committed for pecuniary gain.

(17 R 3126)

In mitigation, the court found the following:

> 1. The defendant had a long and well documented history of drug abuse. Slight weight.
> 2. The defendant has skills as a mechanic
> 3. The defendant is a good son.
> 4. A sentence of death would have serious negative impact on others.
> 5. The defendant was a good friend.
> 6. The defendant contributed to the community.
> 7. The defendant has been an exceptional inmate
> 8. The defendant exhibited good and mannerly behavior throughout the court proceedings.
> 9. The defendant is amenable to rehabilitation and a productive live in prison

(17 R 3130-33)

This appeal follows.

III. STATEMENT OF THE FACTS

Between 9 and 10 a.m. on Monday August 8, 2005, two gunshots were heard in the vicinity of the Greenlawn Cemetery in Jacksonville (20 R 291, 293). About the same time or shortly after, a green pickup truck was also seen in the cemetery backing up "really fast" and leaving the cemetery (20 R 292). As it sped off, workers at a nearby welding shop saw a single white male driving (20 R 304).

Two cemetery maintenance workers approached another pickup that was parked near where the other truck had just left. They saw a man, Roy Andrews, laying on the ground on the passenger side of the truck with blood coming from his head (20 R 313). A baseball cap lay nearby (20 R 329). When the police arrived, they also discovered he still wore his watch and a ring, and his wallet had over $1100 in cash (20 R 372).

Roy Andrews had been badly beaten about the face, as if with brass knuckles (21 R 478). He also had some wounds about his shoulder, neck and one of his hands (21 R 477). He had also been shot twice in the head, and the latter wounds were the cause of death (21 R 480, 499-500).

By August 8, 2005 Robert Peterson and Clara Keene had been dating for about a month (20 R 415). She had a green pickup truck, and on that date she gave him the keys to it (20 R 417-19). She never saw it again although she would look for it "a lot." (20 R 419)

Roy Andrews was Peterson's step father. Peterson, about 40, lived with him and his mother in his parent's house (22 R 720). He worked, but his mother would give him money occasionally (20 R 456). Roy, for his part threw his stepson out of the house (21 R 529, 531). Peterson was very angry at this and said he was going to kill Andrews (21 R 531).

Within two days of Andrew's death, the police had focused their investigation on Peterson. They talked with Jimmie Jackson, a friend or acquaintance of the defendant, and convinced him to let them record conversations they wanted Jackson to have with Peterson. Jackson called him, and in the rambling conversation, Peterson admitted killing his stepfather because Andrews had "come home from church and call her a fat bitch. You fat bitch. Is that the best you can do is sit on your lazy ass?" (22 R 627) This angered the defendant because you "Don't fuck with me, my mama or my family. That's the way it is. Don't fuck with us. . . .Hey, you slap my mama, you cross the fucking line. That's all there is to it. You slap my old lady, you cross it. You slap my kids; you slap me, you cross the fucking line. I don't give a fuck who you are. That's the way it is." (22 R 626)

The defendant also explained how he committed the homicide. He pretended that his truck had broken down in the cemetery, and he called Andrews for help. When he showed up, he beat him with brass knuckles, breaking his jaw,

knocking out his teeth and "his eyeball hanging out of his fucking head." (22 R 638-39). Andrews was still alive, so Peterson then shot him twice (22 R 640).

He left, took a shower, and then disposed of his clothes, the gun, and the truck by apparently taking it to a metal crushing facility (22 R 637).

The Defense Case

In 2005, 41-year-old Robert Peterson lived with his mother, who had chronic emphysema, and his stepfather, Roy Andrews. Peterson saw Andrews as much more than a stepfather, but as his best friend (22 R 660). They would go fishing, car racing, and to church together. They built cars as a father and son (22 R 660). They were a close family, and arguments that arose from time to time were quickly solved or resolved (22 R 664). From time to time, his mother and stepfather had insulted the other, and Peterson, bothered by the rude language, had pulled them aside to let them know this (22 R 664).

On August 7, 2005, Peterson was talking with Andrews when he noticed some blood on his nose (22 R 667). After wiping it off, he got some money from his mother who wanted him to use it to buy some lottery tickets (22 R 668). He was in a bit of a hurry because he had left his girlfriend at a motel, and he wanted to get back to her, so they could party (22 R 669-70). As he rushed about he knocked his head on the door of his father's truck, and his hat fell inside the

passenger side of the vehicle. Because he was in such a rush, he did not pick it up (22 R 670).

Now, Peterson used cocaine, and sometime in the third week of July, he had given Jimmie Jackson, a drug dealer $10,000 for the latter to buy a large amount of cocaine (22 R 670-71). They had done drug deals before, and this time, Peterson was confident he could "clear" $4,000 from the $10,000 investment in cocaine, which he believed he could sell (22 R 671)

In any event, Peterson and his girlfriend partied until about 4:30 a.m. ofn August 8 (22 R 672). He left the motel room and by 7 a.m. returned home (22 R 674). He left some time later looking for Jackson. He could not find him and by 9 a.m. he had gone to work at a house across the street from where he lived (22 R 677). He noticed that he had lost his cell phone, so figuring he had left it with his father he drove around town looking for him. Eventually, he returned to the motel room and brought his girlfriend home so she could sit with his mother (22 R 679)

Two days later, on August 10, he met up with Jackson because the latter was supposed to give him the $14,000 (22 R 681). They got into Jackson's car, and the defendant soon knew that he was not going to get the money from the drug dealer (22 R 681). He then tried to intimidate Jackson by telling him that he had killed his father two days earlier as a way to get the money (22 R 689, 702, 720). He told him that he had beaten his father until an eye had fallen out (22 R 639) (it had not

(21 R 501), he had shot his father twice and shot off the side of his face (22 R 640), and he told Jackson that Andrew's brains were all over the place (22 R 684). In short, he "absolutely did not" kill his stepfather (22 R 689). He had gotten details of the murder correct from viewing his father's body in a casket shortly before he was buried (22 R 685).

Over the course of a year, Peterson's mother had given her son about $25,000, some apparently as a gift and other for work he had done (22 R 709). From that amount he paid his $350 monthly child support and rent for a mini storage unit (22 R 709). That yearly sum also included $10,000 she gave him (22 R 709-710).

At the Spencer[1] hearing, Peterson's counsel called Doctor William Morton who was board certified in psychiatric pharmacy (17 R 3199). He had examined or talked with Peterson, and concluded that the defendant had a cocaine addiction that had a profound effect on his thinking and behavior in 2005 (17 R 3205).

According to Dr. Morton, the defendant had used marijuana, alcohol, and cocaine, but not so much marijuana because it was not "his thing." (17 R 3214). He did, however, heavily use cocaine, using up to a quarter of an ounce of the drug a week, which is a large amount (17 R 3214). He ingested about 3.24 grams a day (17 R 3214). Indeed, he was using so much at the time of the murder that his

[1] Spencer v. State, 615 So.2d 688 (Fla. 1993)

"perceptions of Roy Andrews, of his mom, Ms. Andrews, of other people would not be accurate, would be contaminated with paranoia, contaminated with delusional thinking." (17 R 3238)

Although Peterson was able to hide his cocaine addiction from his wife, its effects, nonetheless, led to the breakup of his marriage (17 R 3216). Not only did his addiction lead to the collapse of his marriage, it affected every other area of his life. Because of the cocaine, he had chest pains, an inconsistent work history, persistent legal and financial problems, and a family that left him (17 R 3120-21). Indeed, at times, he had no functional family (17 R 3222)

Well, not all his family left him. His father was a drug dealer, and he taught his son how to use crack effectively and deal it, and he even used it with him (17 R 3221-22).

An uncle sexually abused him, and his grandfather physically did so. As a result, and in addition to his drug and alcohol addictions, Peterson has a panic disorder, possibly suffers from a post-traumatic stress disorder, and is depressed (17 R 3224).

As a result of his cocaine addiction, the defendant was paranoid, impulsive, irritable, aggressive, had delusional thinking, auditory hallucinations, panic attacks, felt agitated or restless, and constantly craved cocaine (17 R 3231-32, 3235). He also had some psychotic symptoms (17 R 3235) When he stopped using the drug

he had a significant "crash" in which he would go into a rage and act like a wild man, which resulted in him destroying things and being physically aggressive (17 R 3232).

Consequently, Dr. Morton concluded that Peterson's cocaine addiction "played a significant role" in the death of Roy Andrews. "I think it played a significant role because, again, cocaine is so powerful and so pervasive from what he reported, what I know of working with cocaine addicts, these behaviors could very easily have led to a crime . . . .I don't want to say that they caused the crime, but they are factors that one would consider leading up to the crime." (17 R 3237)

More specifically, because of the addiction and the resulting delusional thinking, Andrews's threat to cut off his money supply and kick him out of the house created a crisis of huge proportions to Peterson. He did not think logically (17 R 3235) "His whole survival means was being threatened, both where he was going to live, how he was going to live, . . And I think it probably fed into this survival mode where, again, where cocaine is the main thing, where am I going to get a place to stay? Where am I going to get cocaine?" (17 R 3238) Under these conditions, Dr. Morton said that violence was common (17 R 3239), and as a result, he believed that Peterson's cocaine addiction "was a factor that definitely needed to be considered." (17 R 3254)

IV. SUMMARY OF THE ARGUMENT

ISSUE I. About a year before Andrews's death, Cheryl Greer, Peterson's girlfriend had been hit by a car and killed. She was buried near where Andrews's body was found. The police used Jimmie Jackson, a drug dealer acquaintance of Peterson's to record a conversation he had with the defendant a couple of days after the murder. During that talk, he admitted that he had "stacked them double." This clearly implied that Greer's death may not have been so accidental, and that Peterson may have somehow caused it. Now if the jury had heard that "stacked them double" comment only once, then perhaps whatever error had occurred in admitting this testimony would have been harmless. But it did not. Instead, for virtually every nonpolice or death investigation witness the State called, it asked them about that admission. Moreover, it emphasized the sinister import of that statement in its closing argument by replaying the portion of the taped conversation. Not only that, the jury, during its deliberations asked to hear the tape again, and it did. Thus, the implication that Peterson may have killed Greer a year earlier and apparently gotten away with it fatally and fundamentally damaged the fairness of his trial. Not only there, but the error also puts into doubt the validity of the jury's 7-5 death recommendation.

ISSUE II. During the penalty phase part of Peterson's trial the State presented only victim impact evidence. While it could do so, it could not use that evidence, particularly that the victim, Roy Andrews, was a retired police officer

and that he had served his country as a paratrooper in the United States Army to help justify a death recommendation. Moreover, one of Andrews' sons, at the end of his testimony, said he wanted a "just punishment." That was improper because this Court has specifically held that victim impact witnesses cannot express the punishment they believe the defendant should get. That, however, happened here.

ISSUE III. Peterson confessed to killing his stepfather to Jimmie Jackson, a drug dealer he had worked with. But the police had "wired" Jackson and sent him to talk with Peterson specifically about the murder. At the police station, the informant initiated the telephone conversations that led to the meeting with the defendant at the Waffle House. Until this conversation, Jackson had never called him. During the subsequent conversations, Jackson specifically asked the defendant "But how did you do it," and as a result, Peterson confessed to killing his stepfather and destroying the truck. At no time did Jackson tell Peterson to leave, or, in fact, give any indication he could leave.

Based on these fact, it is clear that Peterson was in custody when he talked with Jackson. As such, he should have been informed of his Miranda rights.

ISSUE IV. Without any challenge, Peterson had a cold and premeditated intent when he killed his stepfather. He did not, however, have the necessary calculation also required if the cold, calculated, and premeditated aggravator is to be found. In this case, he lacked that essential element.

ISSUE V. The court improperly found that Peterson killed his stepfather for pecuniary gain. In justifying finding this aggravator, it relied on hearsay that Andrews planned or had said he was going to order his son to leave his house. Thus, the reason he killed his step father was to prevent him from doing so. But the evidence of that intent was hearsay, and as such, the court should not have used it to justify finding the pecuniary gain aggravating factor.

ISSUE VI. The court considered but rejected as deserving "little weight" the essentially unchallenged testimony of Dr. William Morton. This expert found that because of Peterson's heavy dependence on cocaine, it was a significant fact in the murder of Roy Andrews. With such strong unrefuted evidence that explained better than any evidence the State presented the defendant's mental state when he killed his stepfather, the court could not simply ignore it by finding it merited only little weight.

ISSUE VII. A death sentence is proportionately unwarranted because although there is only one valid aggravator there is also strong mitigation that Peterson's addiction to cocaine had a significant impact on this murder. As such, this is not one of the most aggravated and least mitigated of first degree murders.

ISSUE VIII. This Court wrongly avoided the issues presented by Ring v. Arizona, 536 U.S. 584 (2002), in Bottoson v. Moore, 833 So. 2d 693 (Fla. 2002), cert. denied, 123 S. Ct. 662 (2002), and King v. Moore, 831 So. 2d 143 (Fla.

2002), cert denied, 123 S. Ct. 657 (2002). Because Ring was an "intervening development of the law" this Court could determine its affects on Florida's death penalty scheme without incurring the wrath of the United States Supreme Court, as this Court was leery of doing in those state cases. When it conducts that examination, this Court should conclude that Ring requires at least unanimous jury recommendations of death. This Court should also find that even though the defendant may have a single valid aggravator, Ring still has relevance to the constitutionality of his death sentence.

V. ARGUMENT

ISSUE I:

THE COURT FUNDAMENTALLY ERRED WHEN IT ALLOWED THE STATE TO REPEATEDLY PRESENT EVIDENCE THAT PETERSON MAY HAVE COMMITTED ANOTHER MURDER, A VIOLATION OF THE DEFENDANT'S FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS TO A FAIR TRIAL AND SENTENCE.

Before trial, Peterson filed three motions to suppress the statement he had made to Jimmie Jackson, a drug dealer that he knew and had had dealings with (22 R 670). At the hearing, the court heard a telephone conversation between the pair in which the defendant mentioned that a former girlfriend had been killed by a car as she walked on a highway in Jacksonville. Peterson said he had been accused of that and faced an involuntary manslaughter charge.

> Mr. Peterson: They said I threw her out in front of a car. So what, you know. Hey, maybe it happened like that, maybe it didn't. shit's got to happen sometimes they shit's got to happen, you know. The kids are a fucking lot better off now than if that hadn't –if she still was alive—
>
> Mr. Jackson: I thought she might was just drinking, just wandered out there. Goddamn.
>
> Mr. Peterson: Yeah, go ahead and think that.
>
> * * *
>
> Mr. Peterson: Yeah, well an old lady did hit her, but she tripped and fell in the fucking highway, didn't she? And you know what? This man landed on top of her grave. Okay. I stacked them double.
>
> * * *
>
> Look listen, she put so much stuff in my fucking face and she pissed me off so bad, and she—she went somewhere she wasn't supposed to

go. She went there. So when she went there, boom, that was the end of that. I had enough.

* * *

I'm just as coldhearted as the next motherfucker, man.

(18 R 3348-50)

The court denied the motion, but at trial, the State did not play that telephone conversation. Instead, it introduced what Peterson told Jackson as they sat in the truck at the waffle house. Significantly, it played the part where Peterson mentioned the death of his former girlfriend.

Mr. Peterson: I was sitting at my mama's house when they came and informed us he got killed.

I'm - - I'm busted up, man, rrrrr. They loaded me up and take me downtown right off the fucking bat.

Mr. Jackson**:** You crying?

Mr. Peterson**:** No. Because I'm the number one suspect. ...

Mr. Jackson: I didn't know you was –I didn't know that you was (inaudible) suspect. (inaudible).

Mr. Peterson: Hey, the girl that got killed on Phillips Highway - -

Mr. Jackson**:** Yeah. She probably drinking, just wandered out there. (inaudible) that's what I thought (inaudible) old lady (inaudible).

Mr. Peterson**:** Yeah, well an old lady did hit her, but she tripped and fell in the fucking highway, didn't she? And you know what? This man landed on her grave. Okay? I stacked them double.

Mr. Jackson: Damn

Mr. Peterson: And then my truck –

Mr. Jackson: That—that the one (inaudible) go with.

Mr. Peterson: Yeah. She's dead. I put one on top of her.

Mr. Jackson: (Inaudible)

Mr. Peterson: Cheryl, yeah. Like I said, I ain't got a problem doing it. I'm just as coldhearted as the next motherfucker, man....

(22 R 641-42)

While the evidence that Andrews was killed close to where Cheryl Greer, Peterson's dead girlfriend was buried, the additional statement that he had "stacked them double" had so little relevance to this case and such great prejudicial value, that the court, without any objection by defense counsel, should have excluded it. §90.403, Fla. Stat. (2005).

Moreover, that little relevance only tended to prove or strongly suggest that the defendant may have killed his former girlfriend. Except for the provisions of §90.404(2), Fla. Stat. (2005)[2] evidence that the defendant may have committed other, uncharged crimes is inadmissible. That is virtually black letter law, because such proof has relevance only to exhibit the defendant's bad character or propensity to commit crime. Czubak v. State, 570 So.2d 925, 928 (Fla. 1990). It has no tendency to prove any contested issue. Moreover, the error would have prompted a new trial because the wrongful admission of collateral crimes evidence is presumptively harmful. Castro v. State, 547 So.2d 111, 116 (Fla. 1989). In this case, the court, without any objection by Peterson's counsel, allowed the jury hear

[2] Other Crimes, Wrongs, or Acts. "(a) Similar fact evidence of other crimes, wrongs, or acts is admissible when relevant to prove a material fact in issue, including, but not limited to, proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, but it is inadmissible when the evidence is relevant solely to prove bad character or propensity."

testimony that strongly implied that the defendant might have murdered his former girlfriend. That was error, and this Court should review this issue as fundamental error.

Admittedly, the fact that Andrews was killed almost next to the grave of Peterson's girlfriend has some marginal relevance, and Peterson raises no issue about the admissibility of that evidence. But the defendant's claim that he had "stacked them double" simply swamped its slight relevance. That evidence got early billing and was played and replayed throughout the trial from opening statement to the final closing argument. In its opening statement, the State told the jury that "the defendant's choice of the cemetery was not just happenstance. . . . His former girlfriend had been buried there less than a year before. And the defendant himself will tell you exactly what he did. In his words, he stacked them double." (20 R 271)

In its case in chief, every witness, who was not a police officer or otherwise connected with the investigation of the murder, was asked about Cheryl Greer, the girlfriend. Clara Keene, his current girlfriend admitted Peterson had talked about her. "No, she wasn't alive. She was supposedly got run over by—an old man and lady supposedly hit her with a car." (21 R 416) His aunt, Lavern Rundall, said that Cheryl Greer had been her nephew's girlfriend who had died about a year earlier and was buried in the Greenlawn cemetery (21 R 453). Pat Diamond, the

general manager of the cemetery admitted Ms. Greer was buried there (21 R 464). Becky Price, a cousin, also said that he knew that Ms. Greer and Peterson dated, and she was buried in the Greenlawn cemetery (21 R 532).

Of course, the most damning statement came when Jimmie Jackson and Peterson talked outside the Waffle House:

> Mr. Peterson: Hey, the girl that got killed on Phillips Highway - -
>
> Mr. Jackson: Yeah. She probably drinking, just wandered out there. (inaudible) that's what I thought (inaudible) old lady (inaudible).
>
> Mr. Peterson: Yeah, well an old lady did hit her, but she tripped and fell in the fucking highway, didn't she? And you know what? This man landed on her grave. Okay? I stacked them double.
>
> Mr. Jackson: Damn
>
> Mr. Peterson: And then my truck –
>
> Mr. Jackson: That—that the one (inaudible) go with.
>
> Mr. Peterson: Yeah. She's dead. I put one on top of her.
>
> Mr. Jackson: (Inaudible)
>
> Mr. Peterson: Cheryl, yeah. Like I said, I ain't got a problem doing it. I'm just as coldhearted as the next motherfucker, man....

(22 R 641-42)

When Peterson testified, the State asked him about Cheryl Greer, where her grave was, that they had had a relationship, and she was now dead (22 R 690). He also admitted that Roy Andrews had been killed in the same cemetery as her and that he said he "stacked him double on top of Cheryl." (22 R 697).

Then, as part of its Initial closing argument, the prosecutor emphasized the number of people that knew that Ms. Greer was buried in 2004 in the Greenlawn

cemetery. But it did more: it replayed the critical part of the Jackson/Peterson conversation, not to show so much that the defendant had killed Andrews close to Greer's grave, but to plant the seed that he may have also killed his former girlfriend.

> (Audiotape playing as follows:)
> **THE DEFENDANT:** And you know what? This man landed on her grave. Okay? I stacked them double.
> **MR. JACKSON:** Damn.
> * * *
> **THE DEFENDANT:** Yeah. She's dead. I put one on top of her."

(22 R 766)

And it harped on the "stacked them double" theme in this closing as well as in its final closing argument (22 R 777; 23 R 822, 824, 836)

Then, to make matters worse, the jury, during deliberations, asked to rehear the Jackson/Peterson conversation, with its "stacked them double" and "I'm just as coldhearted as the next motherfucker, man." (23 R 890-91)

Finally, as part of its closing argument in the penalty phase, the State replayed Peterson's admission:

> (Audiotape playing as follows:)
> **THE DEFENDANT:** And you know what? This man landed on her grave. Okay? I stacked them double.
> **MR. JACKSON:** Damn.
> * * *
> **THE DEFENDANT:** Yeah. She's dead. I put one on top of her."

(24 R 181)

Clearly, Peterson's "stacked them double" comment infers that not only did he kill his stepfather, he had also murdered Cheryl Greer. If it was no coincidence that Peterson killed his father in the same cemetery and near where she was buried, as the State argued (23 R 822), then it also followed that if he had killed or murdered his father, he may have done the same to Ms. Greer. And to make sure the jury got that message it played Peterson's "stacked them double" comment repeatedly during its case in chief and closing arguments.

Now even if what the State did was not fundamentally wrong for the guilt phase of the trial, it certainly unfairly prejudiced the jury against Peterson in the penalty phase of his trial. And, given the 7-5 vote for death, it is hard to say that this evidence of what Peterson might have done had no impact on at least one of the jurors who recommended death. Thus, under the restrictions of limiting the admission of even relevant evidence when its prejudicial value substantial outweighs its relevance,§90.403, Fla. Stat. (2005), the trial court should have excluded the comments that Peterson "stacked them double."

As such, this Court should reverse at least the trial court's sentence of death and remand for a new sentencing hearing, or more fairly, reverse its judgment and sentence and remand for a new trial.

ISSUE II.

THE COURT ERRED IN ALLOWING THE STATE TO PRESENT, AS ITS ONLY PENALTY PHASE EVIDENCE, SEVERAL VICTIM IMPACT STATEMENTS IN VIOLATION OF THE DEFENDANT'S EIGHTH AND FOURTEENTH AMENDMENT RIGHTS.

Over defense objection (12 R 2290), the State presented four witnesses as its penalty phase case. These witnesses had nothing to say about the aggravation or mitigation that might or might not apply. Instead, they testified, among other things, as to the impact the death of Roy Andrews had on them.[3] They were, in short, called and testified as victim impact witnesses. The court specifically erred in allowing the jury to hear the testimony police officer James Ross, and this Court should review this issue under an abuse of discretion standard of review.

A. Victim Impact Evidence.

In Payne v. Tennessee, 501 U.S. 808, 823, 825 (1991), the United States Supreme Court allowed a death penalty sentencing jury to hear evidence of the loss the death of the victim had on his or her community. "[Victim Impact Evidence] is designed to show instead *each* victim's 'uniqueness as an individual human being,' whatever the jury might think the loss to the community resulting from his death

[3] These witnesses were Andrews's daughter, granddaughter, a fellow police officer on the Jacksonville Sheriff's Office, and a mental health counselor with whom he worked.

might be. . . Victim impact evidence is simply another form or method of informing the sentencing authority about the specific harm caused by the crime in question." (Emphasis in opinion)

This Court in Windom v. State, 656 So.2d 432, 438 (Fla. 1995), following Payne also allowed jurors to hear this evidence.

> [W]e believe that section 921.141(7) indicates clearly that victim impact evidence is admitted only after there is present in the record evidence of one or more aggravating circumstances. The evidence is not admitted as an aggravator but, instead, as set forth in section 921.141(7), allows the jury to consider "the victim's uniqueness as an individual human being and the resultant loss to the community's members by the victim's death." § 921.141(7), Fla.Stat. (1993)

There is an almost intuitively obvious problem with this special type of evidence. In a proceeding that considers only evidence relevant to the aggravating and mitigating factors, the jury hears evidence that has explicitly no relevance to either. For jurors, untrained in the law and the fictions it sometimes employs, admitting such evidence must be inherently confusing. Why hear witnesses testify about the loss of their father, grandfather, and former coworker if they cannot consider it in their deliberations? Not only is this situation confusing the real danger exists that the jurors, and in this case, also the prosecutor, will use this irrelevant evidence to justify a death recommendation.

In this case, the potential problem became a reality because the jury heard irrelevant evidence, even under the Payne and Windom standard, and making

matters worse, the prosecutor used this victim impact evidence to justify asking the jury to return a death recommendation, which it did by a vote of 7-5 (16 R 3003). Additionally, Wayne Andrews, Roy Andrews's son, concluded his victim impact testimony, by telling the jury that "this was a senseless, horrific murder. The crime deserves just punishment."

B. The irrelevant victim impact evidence

Specifically, the jury heard from James R. Ross, an assistant chief with the Jacksonville Sheriff's Office (24 R 51). Ross met Andrews in 1974 when he attended the police academy and Andrews was assigned as his field training officer. They immediately became close friends, and that friendship continued for "the next 20 plus years." (24 R 53). Ross mentioned that Andrews had been a paratrooper in the Army, and he had worked in the downtown area his entire career "making many friendships and serving the community he loved so much." (24 R 54)

During the State's penalty phase argument, the prosecutor picked up and amplified on Ross's testimony:

> Roy Bryan Andrews, after serving this country and everyone, he went to work for the Sheriff's office. His chosen profession--- responding, rushing, racing, running into places that everybody else was running away from, helping this community and everyone for almost 30 years.
>
> And then he retired. . . . .

(24 R 187)

`First, there is no evidence Andrews rushed, raced, or ran into places everyone else fled. More significant, such argument cannot use victim impact evidence to justify a death sentence.

Finally, victim impact evidence has relevance because it shows the "resultant" loss the community suffers because of his or her death. §921.141(7), Fla. Stat. (2009),[4] In this case, there was no loss. That is, Andrews had admittedly served as a police officer for 30 years, but at the time of his death, he was retired. If the community suffered any loss, it was at the time of his retirement or before. By 2005, he was no longer an officer, so there was nothing for any community to have lost as there would have been had he been an active duty officer at the time of his death. In Kormondy v. State, 845 So.2d 41, 54 (Fla. 2003), this Court said that victim impact evidence "is permissible, but is to be limited to the victim's uniqueness and the loss to the community caused by the victim's death." In this case, Ross' testimony showed no loss to the community.

[4] VICTIM IMPACT EVIDENCE.-Once the prosecution has provided evidence of the existence of one or more aggravating circumstances as described in subsection (5), the prosecution may introduce, and subsequently argue, victim impact evidence to the jury. Such evidence shall be designed to demonstrate the victim's uniqueness as an individual human being and the resultant loss to the community's members by the victim's death. Characterizations and opinions about the crime, the defendant, and the appropriate sentence shall not be permitted as part of victim impact evidence.

This is even more clear by the prosecutor's reference that he had served his country. What loss could the country have suffered because at some unknown time in the past he had once been a soldier.

For example, Andrews was also a father and grandfather, so the loss his daughter and granddaughter felt at his death was relevant victim impact evidence because it demonstrated what they currently suffered. There is no comparable loss the community can demonstrate at the death of a retired police officer or former soldier. He had no continuing, police related duties, and no current call to bear arms that would create an absence like that for his daughters and granddaughters.

But, the larger problem is that the prosecutor argued that this victim impact evidence help justified a death sentence.

> All three of those aggravators have been proven beyond a reasonable doubt. Not just one of them, all of them. I submit to you together they justify the death penalty, and they grossly outweigh the mitigation that you heard today. There's not getting around that fact. All of them exist beyond a reasonable doubt.
>
> Roy Bryan Andrews, after serving this country and everyone, he went to work for the Sheriff's Office. His chosen profession - - responding, rushing, racing, running into places that everybody else was running away from, helping this community and everyone for almost 30 years.
>
> And then he retired. And he took up a different path as a mental health counselor for as long as he could, serving this community again, but this time, one person at a time. And this time more often than not before it was too late. And isn't that exactly and fittingly, exactly the way he died? What was Roy Andrews' last act on this earth? He put aside his personal time. He put aside his personal life. And he pulled over in his truck to help someone in need, get in Robbie, and the very last thing he did on this earth.

> And don't misunderstand me, please. This proceeding, as I said before, is not about Roy Andrews. It's about Robert Peterson. And death is not the correct or appropriate recommendation because Roy Andrews is who he was. It's the appropriate recommendation because Robert Earl Peterson is who he is.

But it was about Roy Andrews, and by comparing his saint like life with the defendant and his three aggravating factors, the prosecutor unfairly compared Peterson's life with that of Andrews. This Court has repeatedly condemned this type of argument, and it has as often warned prosecutors not to do it again.

In Wheeler v. State, 4 So.3d 599, 607 (Fla. 2009), the prosecutor compared the choices the victim had made in his life with those the defendant had. That, this Court held was improper, but not reversible error because Wheeler's lawyer had not objected to it. It, however, added this caveat:

> [W]e nevertheless caution prosecutors to be ever mindful of the limited purpose for which victim impact evidence may be introduced.

Id. At 609.

Undeterred, the prosecutor in Hayward v. State, 24 So.3d 17 (Fla. 2009) made a similar comparison in its penalty phase closing argument. Again, the defendant raised no contemporaneous objection, and again this Court condemned what had been argued but refused to reverse. Again, it warned the prosecutors:

> However, we feel compelled to once again voice our disapproval of this type of prosecutorial comment comparing the life or choices of the victim with that of the defendant.

Id. At 42-43.

Undeterred, the prosecution in this case, as had been done in Wheeler and Hayward compared the victim's life with that of the defendant's. That was unobjected to, but it was error that this Court has put the State on notice not once but twice and recently at that, that it was improper.

Is this Court going to once again wag its finger at the prosecutors and say "You naughty child. Now don't do that again." It can, but what it should do is say, "Enough is enough." One, two, three strikes and you're out.

This Court should reverse the trial court's sentence of death and remand for a new sentencing trial.

C. Just punishment

One of the four victim impact witnesses the State called was Wayne Andrews, the son of Roy Andrews. He testified that his father had served in the army and had been police officer (24 R 57). In concluding his testimony, he told the jury that "This was a senseless horrific murder. The crime deserves just punishment." (24 R 58). Peterson objected to that opinion, saying it was "wholly inappropriate. That's beyond the scope of what victim impact is." (24 R 65). The State found nothing wrong with what its witness had said, but after denying the defendant's motion for a mistrial, gave the jury a "curative – generic curative instruction." (24 R 67-68) "You're not to consider this testimony in any way as

testimony recommending or requesting either type of sentence." (24 R 68) The court erred in denying the motion for mistrial.

Section 921.141(7), Fla. Stat. (2005), specifically prohibits the victim impact witnesses from making any "characterization . . . about the appropriate sentence." In this case, perhaps as the State noted, a call by Wayne Andrews for a "just punishment," would have been permitted. "All he said was a just punishment and that's why we're here." (24 R 66) But what takes this perhaps innocuous request and pushes it over the edge of allowable impact evidence is what he said before that. "This was a senseless horrific murder." When the "just punishment" recommendation is put in the larger context of the "horrific murder" comment, it becomes reasonably clear that the son wanted death for Peterson. It became the prohibited characterization about the appropriate sentence.

In light of the jury's very close vote on death, 7-5, and the irrelevant and inherently inflammatory nature of Andrews's testimony, the court's curative instruction could not, beyond a reasonable doubt, have mended the wound created by what he said.

For this reason, then, in addition to the other errors in the victim impact testimony argued above, this Court should reverse the trial court's sentence of death and remand for a new sentencing hearing.

ISSUE III:

THE COURT ERRED IN DENYING PETERSON'S MOTIONS TO SUPPRESS STATEMENTS HE MADE TO CONFIDENTIAL INFORMANT JIMMIE JACKSON BECAUSE THEY WERE EITHER COERCED, OR HE HAD NOT BEEN GIVEN HIS MIRANDA RIGHTS, A VIOLATION OF HIS FIFTH AND FOURTEENTH AMENDMENT RIGHTS.

Before trial, Peterson filed two motions to suppress statements he had given to Jimmie Jackson, a drug dealer he had had dealings with and knew he carried a firearm (14 R 2641-44, 2645-48). In those motions, he alleged Jackson contacted him on August 11, 2005, and they agreed to meet in the parking lot of a Waffle House in Jacksonville. By this time the police suspected the defendant of killing his step father, and they enlisted Jackson's assistance to build a case against him. Before meeting the defendant, the police "wired" Jackson with a monitoring/recording device. At the restaurant, Peterson got into the informant's car and during their ensuing conversation, he noticed that he was "constantly reaching for a firearm" in between the door and his left leg. (14 2646, 18 R 3358)[5] Although he never saw a gun, (18 R 3358), Peterson was afraid of what Jackson might do. He decided to intimidate the informant/drug dealer by telling him that

[5] In the motion, Peterson said Jackson was reaching for a gun that was between the driver's seat area (14 R 264), but at the hearing on the motion, he amended that to be between the driver's seat and Jackson's left leg. He also never saw a firearm (18 R 3358).

he had killed his father. By this time, the police, who had been listening to the conversation, decided to arrest the defendant, and they, in fact did so (22 R 620).

The court held a hearing on these motions, and at the hearing, the evidence confirmed many of the allegations Peterson had made in the motions. The police, after arresting Jimmie Jackson for driving while his driver's license was suspended, convinced him to act as a confidential informant in their investigation of the Roy Andrews homicide (18 R 3300, 3308). They put recording devices on Jackson and in his car after they had searched it and found no weapons (18 R 3293, 3309). At the Waffle House, Peterson got into Jackson's vehicle and talked about the murder. A testifying officer said that "it's impossible" that Jackson was ever reaching for a gun (18 R 3315). After the police had heard what they believed was enough incriminating evidence, they arrested him as he sat in Jackson's truck (18 R 3318). When arrested, Peterson did not appear to be impaired (18 R 3318).

The court denied both motions, and in doing so, it specifically rejected the factual allegations Peterson had made in his motions, finding it "totally contradicted by the testimony taken today." (18 R 3361) It also found Jackson had not intimidated the defendant, he was not in custody, so there was no custodial interrogation, and no confrontation of the defendant with evidence of his guilt . The court also found that even if the police had decided to arrest him, "it's the

mind of the suspect that we are looking to here. To determine whether or not he is under the belief that he's in custody." (18 R 3363-64)

The court erred in denying Peterson's motions to suppress, and this Court should review this issue under an abuse of discretion standard.

Contrary to the court's finding, whether a suspect is in custody or not, does not depend on the defendant's state of mind. As the First District Court of Appeal said in Lee v. State, 988 So.2d 52, 55 (Fla. 1st DCA 2008), "An objective test is used to determine whether an individual is in custody."

In Lee, the First DCA also identified four factors a court should use in determining whether a suspect is in custody:

> Four factors shape the determination of whether a suspect is in custody: (1) the manner in which police summon the suspect for questioning; (2) the purpose, place, and manner of the interrogation; (3) the extent to which the suspect is confronted with evidence of his guilt; and (4) whether the suspect is informed that he is free to leave the place of questioning

Id. At 55, citations omitted.

In this case, Jackson, the acknowledged police informant, initiated the telephone conversations that led to the meeting with the defendant at the Waffle House (18 R 3300-3301, 3320). Indeed, until this conversation, Jackson had never called him. "He always calls me." (18 R 3322). During the subsequent conversations, Jackson specifically asked the defendant "But how did you do it?" (18 R 3330). At that point, Peterson went into a long recounting of how he killed

his stepfather, destroyed the truck, the police suspicions, and how his girlfriend had supported him (18 R 3330-51). At no time did Jackson tell Peterson to leave, or, in fact, give any indication he could leave.

Based on the factors articulated in Lee, it is clear that Peterson was in custody when he talked with Jackson. As such, he should have been informed of his Miranda rights. That he was not, therefore, was error, and this Court should reverse the trial court's judgment and sentence and remand for a new trial.

ISSUE IV:

THE COURT ERRED IN FINDING THAT PETERSON COMMITTED THE MURDER IN A COLD, CALCULATED, AND PREMEDITATED MANNER WITHOUT ANY PRETENSE OF MORAL OR LEGAL JUSTIFICATION, A VIOLATION OF HIS EIGHTH AND FOURTEENTH AMENDMENT RIGHTS.

In sentencing Peterson to death, the court found that he had committed the murder in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. That was error because there is no evidence he committed it "coldly" as this Court has required. Jackson v. State, 645 So.2d 84, 89 (Fla. 1994).

In justifying finding this aggravator, the court said:

1. Peterson threatened many times to kill his stepfather.

2. He borrowed a truck to avoid being seen in his truck.

3. He scouted out the murder location-a largely deserted cemetery.

4. He made advanced arrangements to destroy the truck, his clothes and gun.

5. He claimed to owe a man $3,000 for helping destroy the truck.

6. He lured the victim to his death by claiming he had problems with his truck.

7. He prepared for the murder by buying brass knuckles, a change of clothing, and a firearm.

8. He murdered Andrews as a matter of course without any pretense of legal or moral justification.

9. After having ample time to change his mind he did not

(17 R 3128)

While the court's order provides sufficient evidence, Peterson committed the murder with calculation and premeditation, there is no evidence he did so coldly. In order for the CCP aggravator to apply it needed to do so.

This Court has aided a trial judge faced with the daunting task of exercising its limited discretion when it seeks to justify the taking of a human life particularly as it applies the cold, calculated, and premeditated aggravating factor. Specifically, in Jackson v. State, 645 So.2d 84, 89 (Fla. 1994), and most recently in Zommer v. State, 31 So.3d 733, 745 (Fla. 2010), this Court provided the analytical approach for the sentencing judge to use:

> Thus, in order to find the CCP aggravating factor under our case law, the jury must determine that the killing was the product of cool and calm reflection and not an act prompted by emotional frenzy, panic, or a fit of rage (cold), ...that the defendant had a careful plan or prearranged design to commit murder before the fatal incident (calculated), ... that the defendant exhibited heightened premeditation (premeditated), and that the defendant had no pretense of moral or legal justification.

Jackson v. State, supra; accord, Lynch v. State, 841 So.2d 362 (Fla. 2003) (Citations omitted, emphasis in opinion.)

The argument in this issue focuses on the requirement that CCP murders, besides being calculated and premeditated, must also and necessarily be cold. Or, as this Court said, the murder must have been the result of "cool and calm reflection and not an act prompted by emotional frenzy, panic, or a fit of rage." Id.

Dr. William Morton, the defense expert who testified at the Spencer hearing, provided unrefuted evidence that Peterson acted in a panic when he killed his stepfather. First, the defendant not only used cocaine, he was addicted to it (17 R 3205). Not only was he addicted to it, he was heavily so (17 R 3214). Not only was he heavily addicted, his perceptions of his stepfather were "contaminated with paranoia, contaminated with delusional thinking." (17 R 3238)

As a result of his cocaine addiction, the defendant was paranoid, impulsive, irritable, aggressive, had delusional thinking, auditory hallucinations, panic attacks, felt agitated or restless, and constantly craved cocaine (17 R 3231-32, 3235). He also had some psychotic symptoms (17 R 3235). When he stopped using the drug he had a significant "crash" in which he would go into a rage and act like a wild man, which resulted in him destroying things and being physically aggressive (17 R 3232).

Consequently, Dr. Morton concluded that Peterson's cocaine addiction "played a significant role" in the death of Roy Andrews. "I think it played a significant role because, again, cocaine is so powerful and so pervasive from what

he reported, what I know of working with cocaine addicts, these behaviors could very easily have led to a crime." (17 R 3237)

More specifically, because of the addiction and the resulting delusional thinking, Andrews's threat to cut off his money supply and kick him out of the house created a crisis of huge proportions to Peterson. He did not think logically (17 R 3235) "His whole survival means was being threatened, both where he was going to live, how he was going to live, . . And I think it probably fed into this survival mode where, again, where cocaine is the main thing, where am I going to get a place to stay? Where am I going to get cocaine?" (17 R 3238) Under these conditions, Dr. Morton said that violence was common (17 R 3239), and as a result, he believed that Peterson's cocaine addiction "was a factor that definitely needed to be considered." (17 R 3254)

Dr. Morton's testimony and conclusions were unrefuted. Nowhere did the State make any significant effort to rebut what he said. Moreover, none of the evidence presented at trial contradicts his findings that Peterson acted in a panic or an emotional rage. Indeed, the "tough love" solution forced on him by Andrews brought to the fore his paranoia and delusional thinking besides the fears for the future.

Of course, as a general rule of law, the court could reject Dr. Morton's conclusion. But, it could do so only if that opinion could not "be reconciled with

other evidence in the case." Coday v. State, 946 So.2d 988, 1003 (Fla. 2006) ("While we have given trial judges road discretion in considering unrefuted expert testimony, we have always required that rejection to have a rational basis."). Moreover, if the court rejected this expert's testimony, it would do so only if it provided a "rational basis" for doing so. Williams v. State, 37 So.3d 187, 204-205 (Fla. 2010). This is particularly true in capital cases, which require sentencing orders to be of "unmistakable clarity." Mann v. State, 420 So.2d 578, 581 (Fla. 1982)("The trial judge's findings in regard to the death sentence should be of unmistakable clarity so that we can properly review them and not speculate as to what he found.")

Not only that, the trial court could not simply dismiss this very significant mitigation without any explanation. Cf., Bell v. State, 841 So.2d 329, 335 (Fla. 2002)("Thus, the trial court must afford the mitigating factor of age 'full' weight unless the trial court makes a finding of unusual maturity.")(Emphasis in opinion.) Here, contrary to Bell's rationale, it never said why it gave no consideration to Dr. Morton's conclusions.

Now, with normal people, the feelings of rage and panic that might have reasonably erupted when told that news may have subsided in time, but things are different with cocaine addicts such as Peterson. That addiction not only fueled his rage, delusions, and paranoia, but kept the fires stoked (17 R 3237). He was

always angry, had problems controlling his impulses and frequently had temper tantrums (17 R 3232) As Lisa Peterson, his former wife, told Dr. Morton: "He would go into a rage, he was like a wild man at times, . . he was always angry, he'd get angry easily at the drop of a pin." (17 R 3232) And he would stay that way for weeks (17 R 3234).

This explains how Peterson could kill the man with whom, until the murder, he had had a close, respectful, and even loving father-son relationship (22 R 660). The ultimatum caused the simmering paranoia, delusional thinking, and ever present possibility of violence (17R 3232), to erupt into an act of total criminality. His simply lost control of himself and became physically destructive (17 R 3232). As Dr. Morton concluded, "I think his [cocaine addiction] played a significant role because, again, cocaine is so powerful and so pervasive from what he reported, what I know of working with cocaine addicts, the behavior could very easily have led to a crime . . . I don't want to say they caused the crime, but they are factors that one would consider leading up to the crime." (17 R 3237)

As such Peterson never committed the murder "coldly;" hence, the murder, as calculated and premeditated as it concededly may have been, was not cold, calculated, and premeditated.

The trial court, therefore, erred in finding that aggravator applied to this case. This court should, therefore, reverse the trial court's judgment and sentence and remand for a new sentencing hearing.[6]

[6] The trial court said that any one of the aggravators, by itself, could justify imposition of a death sentence (17 R 3130). While the court may have imposed that punishment if only one or two of the aggravators had been proven, there is no evidence the jury would have recommended that sentence had it had only two aggravators to consider. Indeed, considering that their recommendation was 7-5 in favor of death, it is reasonable to believe that at least one of the seven might have changed their vote if the CCP aggravator had been omitted.

ISSUE V:

THE COURT ERRED IN FINDING THAT PETERSON COMMITTED THE MURDER FOR PECUNIARY GAIN BECAUSE THE STATE PRESENTED INSUFFICIENT COMPETENT EVIDENCE THAT HE HAD DONE SO, A VIOLATION OF HIS EIGHTH AND FOURTEENTH AMENDMENT RIGHTS.

This should be an easy issue to resolve, and this Court should review it under a competent, substantial evidence standard of review.

In sentencing Peterson to death, the court found, as an aggravating factor, that he had killed his step-father for pecuniary gain.

> The defendant had no steady employment, and had had no steady employment for over a decade at the time of the murder. For that time period he lived with his mother and the victim. They paid his child support of $350.00 per month, they paid for his truck, and gave him over $25,000.00 in cash during the year preceding the murder. Patricia Andrews also gave the defendant $10,000.00 in cash approximately one month before the murder, as prepayment for doing repairs to Laverne Rundall's home. Laverne Rundall testified that the defendant never ordered any materials or did any actual work on her home. Laverne Rundall and Becky Price both testified that Roy Andrews had told the defendant that this lifestyle was not going to go on, that he had to move out of the house, and that he and his wife (Andrews) were going to terminate the flow of money to the defendant. Penalty phase witnesses proved that the defendant spent large sums of money on hotel rooms, entertaining females, and cocaine during this period of his life. It has been proven beyond a reasonable doubt that this murder was motivated almost entirely by a desire to obtain money and financial gain.

(17 R 3129-30)

The key fact justifying this finding come from Lavern Rundall and Becky Price testifying that "Roy Andrews had told the defendant that this lifestyle was not going to go on, that he had to move out of the house, and that he and his wife(Andrews) were going to terminate the flow of money." It is the key to the pecuniary gain factor because apparently until Andrews gave his step-son the ultimatum, the latter had lived for years with financial help from his parents.

The problem is that Rundall's and Price's testimony about what Andrews had said was hearsay, and at least as to what Rundall had to say, Peterson objected:

> Q. Miss Rundall, what sorts of things was Roy angry at Robbie about?
>
> A. About - -
>
> MR. FLETCHER: Objection, Your Honor. Hearsay.
>
> THE COURT: Well, I don't think it would if it's not offered to prove the truth of the matter asserted, rather, being angry. So I'll overrule the objection.
>
> You can answer, Miss Rundall.
>
> THE WITNESS: Over the money Pat was giving Robbie.

(21 R 461-62)

Price's testimony about what Andrews said similarly was hearsay, but unobjected to:

> Q. Did you have any conversations with the defendant during the month of July, specifically as they related to Roy Andrews?
>
> A. Yes, sir, I did.
>
> Q. Please tell the ladies and gentlemen of the jury about the first one, when it was and how it happened.
>
> A. It was around the first of July. He called me on the phone. He was very upset. My uncle had thrown him out of the house and had told my aunt not to give him any more money.

* * *

Q. Did you have another conversation in the month of July with the defendant regarding the same or similar topic?

A. Yes, sir, I did, about two weeks later.

Q. Okay. Tell us the circumstances of that, please.

A. He showed up at my house. He was very upset because his mother wouldn't give him any money again because my uncle had told her not to.

(21 R 529, 531)

Now, Green's failure to object to what Price said Andrews said clearly was an oversight on counsel's part. He had objected to Rundall's similar testimony, and there is no reason he would not have similarly objected to what Price said, so his failure to point out the inadmissibility of her testimony on this point should not be held against Peterson.

Moreover, the trial court itself erred in using Rundall's testimony about what Andrews said, not to show he was angry at the defendant, but for the truth of the matter, that he was "angry at Robbie . . . Over the money Pat was giving Robbie." (21 R 461-62) That is, the court used Rundall's testimony for the very reason the defendant had objected to it. It was hearsay and inadmissible hearsay at that. Yet, the court, rather than using Rundall's testimony to show that Andrews was mad at Peterson used it to show he intended to cut off his stepson, which would have justified the pecuniary gain aggravator. It used Price's hearsay for the same purpose. Doing so, obviously was wrong.

Of course §921.141(1), Fla. Stat. (2006), allows the trial court to consider "Any such evidence which the court deems to have probative value . . . .regardless of the exclusionary rules of evidence." There is, however, a caveat. The defendant must still have a "fair opportunity to rebut any hearsay evidence." When the declarant is dead, as is the case here, the "fair opportunity" requirement cannot be met. As this court said in Hitchcock v. State, 991 So.2d 337, 354 (Fla. 2008):

> This Court has consistently held that a party is not accorded a fair opportunity to rebut hearsay where the declarant is deceased and thus cannot be called as a witness. See, e.g., Blackwood v. State, 777 So.2d 399, 411-12 (Fla.2000)."

Thus, the court erred in using Rundall's and Price's hearsay, and without it the pecuniary gain aggravator cannot be justified.

ISSUE VI:

THE COURT ERRED IN GIVING LITTLE WEIGHT TO THE UNREFUTED EVIDENCE THAT PETERSON'S COCAINE EVIDENCE WAS A SIGNIFICANT FACTOR LEADING TO THE DEATH OF ROY ANDREWS, A VIOLATION OF THE DEFENDANT'S EIGHTH AND FOURTEENTH AMENDMENT RIGHTS.

Without any argument, normally the weight a trial court gives to the mitigation present in a capital case is within the exclusive jurisdiction of the trial court. "The relative weight given each mitigating factor is within the discretion of the sentencing court." Trease v. State, 768 So.2d 1050, 1055 (Fla. 2000)

This Court modified that clear statement of the law in Bell v. State, 841 So.2d 329, 335 (Fla. 2002). In that case, the trial court found Bell's age, 17, as mitigation, but, without saying why, it gave it little weight. That was error, this Court held, and in reaching that conclusion it relied on its opinion in Ellis v. State, 622 So.2d 991, 1001 (Fla. 1993)

> Whenever a murder is committed by one who at the time was a minor, the mitigating factor of age must be found and weighed, but the weight can be diminished by other evidence showing unusual maturity. It is the assignment of weight that falls within the trial court's discretion.

The Bell court further noted that if the sentencing court were to have "unbridled discretion in the application of the age mitigator, then in effect the trial court would have the ability to exclude everyone from that category." Bell at 335. Rejecting that conclusion, this Court held,

> Thus, the trial court must afford the mitigating factor of age "full" weight, unless the trial court makes a finding of unusual maturity.

Id. (Emphasis in opinion.)

While Bell can obviously be limited to the age mitigator, there is no reason or logic to do so, particularly in this case, which involves compelling and unrefuted mitigation of the defendant's extensive addiction to cocaine and the effect it had on his murder.

Without any challenge, Peterson was seriously addicted to cocaine, and it had a profound effect on his thinking and behavior in 2005 (17 R 3205).[7]

He heavily used cocaine, ingesting up to a 3.24 grams or a quarter of an ounce of the drug a week, which is a large amount (17 R 3214). Indeed, he was using so much at the time of the murder that his "perceptions of Roy Andrews, of his mom, Ms. Andrews, of other people would not be accurate, would be contaminated with paranoia, contaminated with delusional thinking." (17 R 3238)

Peterson's cocaine addiction led to the breakup of his marriage (17 R 3216), and it affected every other area of his life. Because of the cocaine, he had chest pains, an inconsistent work history, persistent legal and financial problems, and a family that left him (17 R 3120-21). Indeed, at times, he had no functional family (17 R 3222).

[7] The defendant had also used alcohol, but not so much marijuana because it was not "his thing." (17 R 3214).

Well, not all his family left him. His father was a drug dealer, and he taught his son how to use crack effectively and deal it, and he even used it with him (17 R 3221-22).[8]

As a result of his cocaine addiction, the defendant was paranoid, impulsive, irritable, aggressive, had delusional thinking, auditory hallucinations, panic attacks, felt agitated or restless, and constantly craved cocaine (17 R 3231-32, 3235). He also had some psychotic symptoms. (17 R 3235) When he stopped using the drug he had a significant "crash" in which he would go into a rage and act like a wild man, which resulted in him destroying things and being physically aggressive (17 R 3232).

Consequently, Peterson's cocaine addiction "played a significant role" in the death of Roy Andrews because "cocaine is so powerful and so pervasive from what he reported, what I know of working with cocaine addicts, these behaviors could very easily have led to a crime . . . I don't want to say that they caused the crime, but they are factors that one would consider leading up to the crime." (17 R 3237)

More specifically, because of the addiction and the resulting delusional thinking, Andrews' threat to cut off his money supply and kick him out of the

[8] An uncle sexually abused him, and his grandfather physically did so. As a result, and in addition to his drug and alcohol addictions, Peterson has a panic disorder, possibly suffers from a post-traumatic stress disorder, and is depressed (17 R 3224).

house created a crisis of huge proportions to Peterson. He did not think logically (17 R 3235) "His whole survival means was being threatened, both where he was going to live, how he was going to live, . . And I think it probably fed into this survival mode where, again, where cocaine is the main thing, where am I going to get a place to stay? Where am I going to get cocaine? (17 R 3238) Under these conditions, Dr. Morton, the psychiatric pharmacist, said that violence was common (17 R 3239), and as a result, he believed that Peterson's cocaine addiction "was a factor that definitely needed to be considered." (17 R 3254)

Thus, Peterson argues in his case, but it can be extended to other similar situations, that when he presented unrefuted and essentially unchallenged evidence of his cocaine addiction and that dependency significantly influenced his thinking in deciding to kill his father, the trial court cannot dismiss it as worthy of only "little weight." Allowing it to virtually ignore this very strong mitigation would, as this Court, noted in Bell, gave the trial court "the ability to exclude everyone from that category." That is, anyone with such an overwhelming cocaine addiction that it significantly distorts their thinking and reasoning capability would be death worthy simply because the trial court had dismissed this evidence as of "little weight."

This Court should, therefore, reverse the trial court's sentence of death and remand for the court to enter a new sentencing order in which it allows "full" weight to the fact of Peterson's cocaine addiction.

ISSUE VII:

THE DEATH SENTENCE IMPOSED IN THIS CASE IS DISPROPORTIONATE.

Proportionality review of a death sentence requires this Court to evaluate the totality of the circumstances and compare the case to other capital cases to insure the death sentence does not rest on facts similar to cases where a death sentence has been disapproved. See, e.g., Offord v. State, 959 So.2d 187 (Fla. 2007); Urbin v. State, 714 So.2d 411, 417 (Fla. 1998); Terry v. State, 668 So.2d 954, 965 (Fla. 1996); Tillman v. State, 591 So.2d 167, 169 (Fla. 1996). Death sentences are reserved for the most aggravated and least mitigated of cases. Id. However, proportionality review is not a process of counting aggravating and mitigating circumstances –- the review is a qualitative evaluation of the facts to insure uniformity in the application of the death penalty. Id. A review of this case shows that the death sentence is not proportionate and must be reversed. Art. I, §§ 9, 17, Fla. Const.

First, as argued above, the court erred in finding the murder cold, calculated, and premeditated. The court also improperly found he committed the murder for pecuniary gain. That leaves only one aggravator, the murder was especially heinous, atrocious, or cruel.

On the other side of the scale, the court found 9 mitigators. Notably it observed that the defendant had a long and well documented history of drug abuse. (17 R 3130).

Thus, there remains one aggravator and at least one strong mitigator. It is hardly one of the most aggravated and least mitigated murders this Court has seen. Other cases.

This conclusion becomes more evident when the facts in this case are compared with those in other cases.

A. Farinas v. State, 569 So.2d 425 (Fla. 1990). In Farinas, the defendant and victim had lived together for two years and had had a child together. Their relationship, however, floundered, and the victim left Farinas, taking the child with her. Two months later, he followed the victim as she and her sister drove their father to work. Afterwards, he continued to follow them, eventually forcing her car to stop. He then ordered her out of her vehicle and "guided" her to his car. He drove away but eventually stopped at stoplight, at which point the victim leaped out of the car and ran away screaming for help. Farinas followed her, shooting her once, paralyzing her. He then unjammed his gun and shot her two more times in the back of her head.

On appeal, this Court affirmed the defendant's convictions for first degree murder, armed burglary, and armed kidnapping. It also approved a trial court

finding that the murder was committed during the course of a kidnapping and it was especially heinous, atrocious, or cruel.[9] In mitigation, this Court concluded that Farinas committed the murder while under the influence of extreme mental or emotional disturbance, and it occurred during a heated domestic disturbance. Id . at 431. As such, this homicide, as torturous as it was, was not the most aggravated and least mitigated of murders this Court had considered, and it reduced the defendant's death sentence to life in prison.

B. In Blakely v. State, 561 So.2d 560 (Fla. 1990), Blakely killed his overbearing wife. In sentencing him to death the trial court found and this Court approved that the murder was especially heinous, atrocious, or cruel, and it was cold, calculated, and premeditated. On the other hand, it was also committed during a heated, domestic dispute. As such, like Farinas, it was not the most aggravated of murders, even though the one unchallenged aggravator is one of the most serious that can justify a death sentence. Suggs v. State, 923 So.2d 419 (Fla. 2005).

C. This case

Thus, when this case is compared with these, it clearly falls within their orbits and is among those capital murders which are not death worthy. Although Peterson's murder of his stepfather was especially heinous, atrocious, or cruel, it

[9] The trial court also found it to have been cold, calculated, and premeditated, but this Court rejected that finding

was a significant aberration from the loving relationship the two men otherwise had enjoyed for years (22 R 659-60). They had shared many happy times, and even though Peterson was Andrews's stepson, they had as close a friendship as if they had been natural father and son (22 R 660).

Moreover, as Dr. Morton explained, the defendant's severe drug addiction played a significant role in leading Peterson to kill his best friend (22 R 660). He had examined or talked with Peterson, and concluded that the defendant had a cocaine addiction that had a profound effect on his thinking and behavior in 2005 (17 R 3205).

According to Dr. Morton, the defendant had used marijuana, alcohol, and cocaine, but no marijuana so much because it was not "his thing." (17 R 3214). He did, however, heavily use cocaine, using up to a quarter of an ounce of the drug a week, which is a large amount (17 R 3214). He ingested about 3.24 grams a day (17 R 3214). Indeed, he was using so much at the time of the murder that his "perceptions of Roy Andrews, of his mom, Ms. Andrews, of other people would not be accurate, would be contaminated with paranoia, contaminated with delusional thinking." (17 R 3238)

Although Peterson was able to hide his cocaine addiction from his wife, its effects, nonetheless, led to the breakup of his marriage (17 R 3216). Not only did his addiction lead to the collapse of his marriage, it affected every other area of his

life. Because of the cocaine, he had chest pains, an inconsistent work history, persistent legal and financial problems, and a family that left him (17 R 3120-21). Indeed, at times, he had no functional family (17 R 3222)

Well, not all his family left him. His father was a drug dealer, and he taught his son how to use crack effectively and deal it, and he even used it with him (17 R 3221-22).

An uncle sexually abused him, and his grandfather physically did so. As a result, and in addition to his drug and alcohol addictions, Peterson has a panic disorder, possibly suffers from a post-traumatic stress disorder, and is depressed (17 R 3224).

As a result of his cocaine addiction, the defendant was paranoid, impulsive, irritable, aggressive, had delusional thinking, auditory hallucinations, panic attacks, felt agitated or restless, and constantly craved cocaine (17 R 3231-32, 3235). He also had some psychotic symptoms. (17 R 3235) When he stopped using the drug he had a significant "crash" in which he would go into a rage and act like a wild man, which resulted in him destroying things and being physically aggressive (17 R 3232).

Consequently, Dr. Morton concluded that Peterson's cocaine addiction "played a significant role" in the death of Roy Andrews. "I think it played a significant role because, again, cocaine is so powerful and so pervasive from what

he reported, what I know of working with cocaine addicts, these behaviors could very easily have led to a crime . . . I don't want to say that they caused the crime, but they are factors that one would consider leading up to the crime." (17 R 3237)

More specifically, because of the addiction and the resulting delusional thinking, Andrews's threat to cut off his money supply and kick him out of the house created a crisis of huge proportions to Peterson. He did not think logically (17 R 3235) "His whole survival means was being threatened, both where he was going to live, how he was going to live, . . . And I think it probably fed into this survival mode where, again, where cocaine is the main thing, where am I going to get a place to stay? Where am I going to get cocaine? (17 R 3238) Under these conditions, Dr. Morton said that violence was common (17 R 3239), and as a result, he believed that Peterson's cocaine addiction "was a factor that definitely needed to be considered." (17 R 3254)

Hence, this compelling evidence explains and mitigates, but does not justify, what the defendant did. As such, even though only one aggravator exists, this murder was not one of the most aggravated and least mitigated this Court has ever considered. It should, therefore, reverse the trial court's sentence of death and remand with instructions for it to impose a sentence of life in prison without the possibility of parole.

ISSUE VIII:

THIS COURT WRONGLY DECIDED BOTTOSON V. MOORE, 863 SO.2D 393 (FLA. 2002), AND KING V. MOORE, 831 SO.2D 403 (FLA. 2002).

To be blunt, this Court wrongly rejected Linroy Bottoson's and Amos King's arguments when it concluded that the United States Supreme Court's decision in Ring v. Arizona, 536 U.S. 584 (2002), had no relevance to Florida's death penalty scheme. Because this argument involves only matters of law, this Court should review it de novo.

In that case, the United States Supreme Court held that, pursuant to Apprendi v. New Jersey, 530 US. 446 (2000), capital defendants are entitled to a jury determination "of any fact on which the legislature conditions" an increase of the maximum punishment of death. Apprendi had held that any fact, other than a prior conviction, which increases the maximum penalty for a crime must be submitted to the jury and proved beyond a reasonable doubt.

In Bottoson v. Moore, 833 So.2d 693 (Fla. 2002), cert. denied, 123 S.Ct. 662 (2002), and King v. Moore, 831 So.2d 143 (Fla. 2002), cert denied, 123 S.Ct. 657 (2002), this Court rejected all Ring challenges by simply noting that the nation's high court had upheld Florida's capital sentencing statute several times, and this Court had no authority to declare it unconstitutional in light of that repeated approval.

> Significantly, the United States Supreme Court repeatedly has reviewed and upheld Florida's capital sentencing statute over the past quarter of a century, and although Bottoson contends that there now are areas of "irreconcilable conflict" in that precedent, the Court in Ring did not address this issue. In a comparable situation, the United States Supreme Court held:
>
> If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the [other courts] should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.

Rodriquez de Quijas v. Shearson/ American Express, 490 U.S. 477, 484 (1989); Bottoson, cited above, at 695 (footnote omitted.).

The rule followed in Rodriques de Quijas, has a notable exception. If there is an "intervening development in the law" this Court can determine that impact on Florida's administration of its death penalty statute. See, Hubbard v. United States, 514 U.S. 695 (1995).

> Our precedents are not sacrosanct, for we have overruled prior decisions where the necessity and propriety of doing so has been established. . . . Nonetheless, we have held that "any departure from the doctrine of stare decisis demands special justification." Arizona v. Rumsey, 467 U.S. 203, 212, 104 S. Ct. 2305, 2311, 81 L.Ed.2d 164 (1984). We have said also that the burden borne by the party advocating the abandonment of an established precedent is greater where the Court is asked to overrule a point of statutory construction. Considerations of stare decisis have special force in the area of statutory interpretation, for here, unlike in the context of constitutional interpretation, the legislative power is implicated, and Congress remains free to alter what we have done. . . .
>
> In cases where statutory precedents have been overruled, the primary reason for the Court's shift in position has been the intervening development of the law, through either the growth of judicial doctrine or further action taken by Congress. Where such changes have removed or weakened the conceptual underpinnings

> from the prior decision, . . . or where the later law has rendered the decision irreconcilable with competing legal doctrines or policies, ... the Court has not hesitated to overrule an earlier decision.

Patterson v. McLean Credit Union, 491 U.S.164, 172-73 (1989); see, Ring, cited above at 536 U.S. at 608. Moreover, the "intervening development of the law" exception has particularly strong relevance when those developments come from the case law produced by the United States Supreme Court. Hubbard, cited above (Rehnquist dissenting at pp. 719-20.). The question, therefore, focuses on whether Ring is such an "intervening development in the law" that this Court can re-examine the constitutionality of this state's death penalty law in light of that in decision.

The answer obviously is that it is a major decision whose seismic ripples have been felt not only in the United States Supreme Court's death penalty jurisprudence, but in that of the states. For example, Ring specifically overruled Walton v. Arizona, 497 U.S. 639 (1992), a case that 12 years earlier had upheld Arizona's capital sentencing scheme against a Sixth Amendment attack. Indeed, in overruling that case, the Ring court relied on part of the quoted portion of Patterson, that its decisions were not sacrosanct, but could be overruled "'where the necessity and propriety of doing so has been established.'" Ring, cited above at p. 608 (Quoting Patterson, at 172) Subsequent developments in the law, notably Apprendi, justified that unusual step of overruling its own case.

Opinions of members of this Court also support the idea that this Court should examine Ring's impact on Florida's death sentencing scheme. Indeed, Justice Lewis, in his concurring opinion in Bottoson, hints or suggests that slavish obeisance to stare decisis was contrary to Ring's fundamental holding. "Blind adherence to prior authority, which is inconsistent with Ring, does not, in my view, adequately respond to or resolve the challenges presented by, or resolve the challenges presented by, the new constitutional framework announced in Ring." Bottoson, cited above at p. 725. Justice Anstead viewed Ring as "as the most significant death penalty decision from the United States Supreme Court in the past thirty years," and he believes the court "honor bound to apply Ring's interpretation of the requirements of the Sixth Amendment to Florida's death penalty scheme." Duest v. State, 855 So.2d 33 (Fla. 2003)(Anstead, concurring and dissenting); Bottoson, cited above, at page 703 (Anstead dissenting. Ring invalidates the "death penalty schemes of virtually all states.").[10] Justice Pariente agrees with Justice Anstead "that Ring does raise serious concerns as to potential constitutional infirmities in our present capital sentencing scheme." Id. at p. 719. Justice Shaw concludes that Ring, therefore, has a direct impact on Florida's capital sentencing statute." Id. at p. 717. That every member of this Court added a concurring or

[10] Justices Quince, Lewis and Pariente agree that "there are deficiencies in our current death penalty sentencing instructions." Id. at 702, 723, 731.

dissenting opinion to the per curiam opinion in Bottoson also underscores the conclusion that Ring qualifies as such a significant change or development in death penalty jurisprudence that this Court can and should determine the extent to which it affects it. Likewise, that members of the Court continue to discuss Ring, usually as a dissenting or concurring opinion, only justifies the conclusion that Ring has weighed heavily on this Court, as a court, and as individual members of it.

Of course, one might ask, as Justice Wells does in his concurring opinion in Bottoson, that if Ring were so significant a change, why the United States Supreme Court refused to consider Bottoson's serious Ring claim. Bottoson, at pp. 697-98. It may have refused certiorari for any reason, and that it failed to consider Bottoson's and King's claims give that denial no precedential value, as that Court and this one have said. Alabama v. Evans, 461 U.S. 230 (1983); Department of Legal Affairs v. District Court of Appeal, 5th District, 434 So.2d 310 (Fla. 1983). Moreover, if one must look for a reason, one need look no further than the procedural posture of Bottoson and King. That is, both cases were post conviction cases, and as such, notions of finality of verdicts are so strong that "new rules generally should not be applied retroactively to cases on collateral review." Teague v. Lane, 489 U.S. 288, 305, 310 (1989). Moreover, subsequent actions by the nation's high court refutes Justice Wells' conclusion that if Florida's capital sentencing statute has Ring problems, the United States Supreme Court would

have granted certiorari and remanded in light of that case. It has done so only for Arizona cases, e.g., Harrod v. Arizona, 536 U.S. 953 (2002); Pandeli v. Arizona, 536 U.S. 953 (2002); and Sansing v. Arizona, 536 U.S. 953 (2002). Moreover, it specifically rejected a Florida defendant's efforts to join his case to Ring. Rose v. Florida, 535 U.S. 951 (2002). Thus, in light of fn. 6 in Ring, in which the Supreme Court classified Florida's death scheme as a hybrid, and thus different from Arizona's method of sentencing defendant's to death, it may simply have not wanted to deal with a post conviction case from a state with a different death penalty scheme than that presented by Arizona. See, Bottoson, cited above, p. 728 (Lewis, concurring). While noting several similarities between Arizona's and Florida's death penalty statutes, he also found "several distinctions.")

There is, therefore, no reason to believe the United States Supreme Court will accept this Court's invitation to reconsider this State's death penalty statute without first hearing from this Court how it believes Ring does or does not affect it. This Court should and it has every right to re-examine the constitutionality of this State's death penalty statute and determine for itself if, or to what extent, Ring modifies how we, as a State, put men and women to death

When it does, this Court should consider the following issues:

A. Justice Pariente's position that no Ring problem exists if "one of the aggravating circumstances found by the trial court was a prior violent felony conviction." Lawrence v. State, 846 So.2d 440 (Fla. 2003)(Pariente, concurring):

> I have concluded that a strict reading of Ring does not require jury findings on all the considerations bearing on the trial judge's decision to impose death under section 921.141, Florida Statutes (2002).. . . [Proffitt v. Florida, 428 U.S.242, 252 (1976)] has 'never suggested that jury sentencing is required'.. . .I continue to believe that the strict holding of Ring is satisfied where the trial judge has found an aggravating circumstance that rests solely on the fact of a prior conviction, rendering the defendant eligible for the death penalty.

Duest, cited above (Pariente, concurring.) In this case, the trial court found three aggravating factors, none of which would have satisfied her criteria.

Justice Anstead rejected Justice Pariente's partial solution to the Ring problem, and Peterson adopts it as his response to her position.

> In effect, the Court's decision adopts a per se harmlessness rule as to Apprendi and Ring claims in cases that involve the existence of the prior violent felony aggravating circumstance, even though the trial court expressly found and relied upon other significant aggravating circumstances not found by a jury in imposing the death penalty. I believe this decision violates the core principle of Ring that aggravating circumstances actually relied upon to impose a death sentence may not be determined by a judge alone.

Duest, cited above (Anstead, concurring and dissenting). Or, as Justice Anstead said in a footnote in Duest, "The question, however, under Ring is whether a trial court may rely on aggravating circumstances not found by a jury in actually imposing a death sentence." (Emphasis in opinion.)

B. Unanimous jury recommendations and specific findings by it. Under Florida law, the jury, which this Court recognized in Espinosa v. Florida, 505 U.S. 1079 (1992), had a significant role in Florida's death penalty scheme, can only recommend death. The trial judge, giving that verdict "great weight," imposes the appropriate punishment. Id. This Court in Ring, identified Florida along with Delaware, Indiana, and Alabama as the only states that had a hybrid sentencing scheme that expected the judge and jury to actively participate in imposing the death penalty. Unique among other death penalty states and the sentencing schemes of the other hybrid statutes except Alabama[11], Florida allows a non-unanimous capital sentencing jury to recommend death. Section 921.141(3), Florida Statutes (2002). Under Ring, Peterson's death sentence may be unconstitutional. Bottoson, cited above, at 714 (Shaw, concurring in result only); Butler v. State, 842 So.2d 817 (Fla. 2003)(Pariente, concurring in part).

Pre-Ring, the Florida Supreme Court, relying on non capital cases from this Court that found no Sixth or Fourteenth Amendment problems to non-unanimous verdicts, Apodaca v. Oregon, 406 U.S. 404 (1972); Johnson v. Louisiana, 406

[11] Alabama, like Florida, allows juries to return a non-unanimous death recommendation, but at least 10 of the jurors must agree that is the appropriate punishment. Ala. Crim. Code. Florida requires only a bare majority vote for death. Section 921.141(3), Florida Statutes (2002). Since Ring, the Delaware legislature passed, and its Governor has signed legislation requiring unanimous death recommendations. SB449.

U.S. 356 (1972), approved non unanimous jury verdicts of death. Even without Ring, that Florida reliance on non-capital cases to justify its capital sentencing procedure would be troublesome in light of this Court's declaration that heightened Eighth Amendment protections guide its decisions in death penalty cases. Simmons v. South Carolina, 512 U.S. 154 (1994) (Souter, concurring); Ford v. Wainwright, 477 U.S. 399 (1986). Ring, with its express respect for the Sixth Amendment's fundamental right of the voice of the community to be heard in a capital case, presents a strong argument that when a person's life is at stake that voice should unanimously declare the defendant should die.

This approval of a non-unanimous jury vote in death sentencing in light of Ring has troubled members of the state court. Indeed, Justice Pariente, has repeatedly had problems with split death recommendations:

> The eleven -to-one vote on the advisory sentence may very well violate the constitutional right to a unanimous jury in light of the holding in Ring that the jury is the finder of fact on aggravating circumstances that qualify the defendant for the death penalty.

See Anderson v. State, 841 So.2d 390 (Fla. 2003)(Pariente, J. Concurring as to conviction and concurring in result only as to sentence)" Lawrence v. State, 846 So.2d 440 (Fla. 2003); Butler v. State, 842 So.2d 817 (Fla. 2003) (Pariente, concurring and dissenting); Hodges v. State, Case No. SC01-1718 (Fla. June 19, 2003)(Pariente, dissenting); Bottoson v. Moore, 833 So.2d 693, 709 (Fla. 2002)(Anstead, dissenting).

This Court should re-examine its holding in Bottoson and consider the impact Ring has on Florida's death penalty scheme. It should also reverse Peterson's sentence of death and remand for a new sentencing trial.

V. CONCLUSION

Based on the arguments presented here, Robert Peterson respectfully requests this Honorable Court 1. reverse the trial court's judgment and sentence and remand for a new trial, 2. reverse the trial court's sentence and remand with instructions that it resentence the defendant, 3. reverse the trial court's sentence and remand for a sentencing phase hearing with a jury, or 4. reverse the trial court's sentence of death and remand with instructions that the lower court impose a sentence of life in prison without the possibility of parole.

Respectfully submitted,

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CERTIFICATES OF SERVICE AND FONT SIZE

I hereby certify that a copy of the foregoing has been furnished by electronic transmission to **CHARMAINE MILLSAPS**, Assistant Attorney General, The Capitol, Tallahassee, FL 32399-1050, and by U.S. Mail to **ROBERT EARL PETERSON**, #287224, Florida State Prison, 7819 NW 228th Street, Raiford, FL 32026, on this ____ day of February, 2011. I hereby certify that this brief has been prepared using Times New Roman 14 point font in compliance with the Florida Rule of Appellate Procedure 9.210(a)(2).

_____

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