IN THE SUPREME COURT OF FLORIDA

**ROBERT EARL PETERSON,**

Appellant,

v. Case No. **SC10-274**

STATE OF FLORIDA,

Appellee.
_____/

# REPLY BRIEF OF APPELLANT

NANCY A. DANIELS
PUBLIC DEFENDER

**DAVID A. DAVIS**
ASSISTANT PUBLIC DEFENDER
FLORIDA BAR NUMBER **0271543**
LEON COUNTY COURTHOUSE
SUITE 401
301 SOUTH MONROE STREET
TALLAHASSEE, FLORIDA 32301
(850) 606-8500
david.davis@flpd2.com
ATTORNEY FOR PETITIONER

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# REPLY BRIEF OF APPELLANT

## PRELIMINARY STATEMENT

References to the State's Answer Brief shall be as "State's Brief" followed by the appropriate page numbers. All other references shall be as set forth initially.

## 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.

If one has cancer, the medical profession, as appellate counsel understands it, has a three-step regimen to remove it: chemotherapy, radiation, and surgery. The object, of course, is to remove the cancer, and while the patient and doctors rejoice that most of it is removed by one or more of those methods, their joy is not complete unless all of it is removed. This is so because the reality is that even if a little of the cancer remains it can rebuild with fatal results.

The analogy to this case is clear and obvious. The parties below diligently worked to remove the legal cancer of the evidence Peterson may have admitted or said he had committed an uncharged murder, and as the State points out in its Answer Brief, they were largely successful in doing so. But only largely, and not completely because what remained could, like cancer to the human body, destroy the fairness of the defendant's trial.

The State on pages 20 and 21 of its brief relies on Keen v. State, 775 So. 2d 263, 279 (Fla. 2000) to support its argument. At Keen's murder trial, Ken Shapiro, a witness to the murder and confidant of Keen, provided the key testimony, and it was "the centerpiece of the State's case against Keen.," The jury, this Court said, needed to hear the compelling detail and volume of the planning and execution of the murder, which included a statement by Shapiro: "And in, in light of -- past history, even she [Keen's girlfriend] believes that you're guilty."

Such is not the case here. While the jury may have needed to hear what the defendant told Jimmie Jackson about the killing of his father, there was no need for or admissible relevance to them also hearing that he had "stacked them double" and "put one on top of her." (22 R 641-42)

Moreover, the State emphasized and re-emphasized the defendant's damning, inadmissible statements as part of its initial and final closing arguments, replaying the "stacked them double" and "I put one on top of her" parts of his taped statements (22 R 777; 23 R 822, 824, 836). The jury responded to the improper implications because during its deliberations it specifically asked to hear the recording of what Peterson had told Jackson, which included the "Stacked them double" and "I'm just as coldhearted as the next motherfucker, man" claims (23 R 890-91).

Now, maybe in a perfect, cancer-free world, what Peterson said, would have been ignored by the jury, and it would not have planted the seed that he may have murdered his girlfriend a year before the State claimed he killed his father. Yet, we do not, and the real, distinct possibility exists that the jury reached the evident and logical conclusion that the defendant murdered Cheryl Greer. As such, the error in allowing the jury to hear this improper evidence denied the defendant his fundamental right to a fair trial, and this Court should, therefore, reverse the trial court's 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.

When boiled down to its essentials, the State admits on page 28 of its brief that the victim impact evidence "Not necessarily because it established a loss to the community but because it showed 'the victim's uniqueness as an individual human being.'" (citation omitted.)

But how does having been at one time a soldier or police officer, or even having been a soldier and a police officer show uniqueness to the community? It only does so in Lake Woebegon where everyone is "above average" and "good looking." It does so when you compare Roy Andrews's devotion to country and others with Peterson's devotion only to himself. Contrary to the State's warning in its closing argument, it made Peterson's penalty phase trial a comparison between the victim's service and the defendant's self indulgence (24 R 187-88).

In Bolender v. State, 422 So. 2d 833, 837 (Fla. 1982), the defendant killed four drug dealers, and he argued that their way of earning a living made them deserving of death. This Court rejected that victim impact evidence holding that

the victim's livelihood did not "justify a night of robbery, torture, kidnapping, and murder." Accord, Coleman v. State, 610 So. 2d 1283, 1287 (Fla. 1992).

If so, it follows that Andrews's son's call for a "just punishment" was equally impermissible. And while, as the State notes on page 31 of its brief, that "it did not suggest a particular sentence" there were only two possibilities: life or death. With such extreme sentencing alternatives, and the son's obvious animosity for Peterson and the "senseless horrific murder" of his father (24 R 58) and his love for him, the call for a just punishment could only mean he wanted death for the defendant.

## ISSUE IV:

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.

The State, on page 41 of its brief, says the Court could disregard Dr. Morton's testimony. But the trial judge did so only with argument, not evidence, and that is impermissible. That is, while a court can disregard or minimize an expert's conclusions, it cannot do so on a whim or because it did not want to accept it. It must be able to point to some evidence, some established facts in the record to support its conclusions. And, in this case, the State on appeal, not the court, provided a rationale, though that was weak and unacceptable.

As mentioned in the Initial Brief, Dr. Morton's testimony was unrefuted. The State had the opportunity to call experts of its own to refute what the defense expert concluded. But it did not. It could have thoroughly cross-examined the defense witnesses about their testimony regarding his rage and acting "like a wild man at times" and always being angry, staying away from home for weeks at a time (17 R 3234). And it did, but he never backed off or significantly modified his conclusions about Peterson or his cocaine use.

Thus, it seems unfair for the court to dismiss this testimony with nothing more than its unsupported opinion that Peterson coldly killed his father.

Moreover, diminishing the weight of Dr. Morton's conclusions because "all of the testimony about the defendant's drug abuse is based upon self-reporting" from the defendant has no justification. Indeed, the State questioned this expert about relying on Peterson's self reporting:

> Q. Your reliance on the defendant's self report, had you not had anything to corroborate or dispute his self report, would you be in a better position–I mean, in other words, if the defendant's self report, if you couldn't place any credibility with it and –or there were things that cause you significant concern about the credibility of anything that came from his mouth, how comfortable would you be with the opinions you've rendered today?
>
> A. I would be comfortable that cocaine was a factor that definitely needed to be considered. I think if you can corroborate other reports and get some sense of what is relatively accurate, it helps. Self report is the basis of medicine, period. That is the way every part of medical care starts out. And so I have been involved in teaching people to learn how to take medication history and drug history to expect that some people would over report, under report, how to take it into perspective. So I've spent probably 15 years educating psychiatrist about this little tiny area that they might use in their diagnosis. So I feel pretty comfortable knowing the limitations and the benefits of self report.

(17 R 3254-55)

Thus, the court could not simply blow off Dr. Morton's conclusions because they were based, in part, on Peterson's admissions or "self report."

On page 42 of its brief, the State claims "Appellant does not claim a murder of passion, or that cocaine made him enraged and panicky." What's the difference? Peterson sees none. Moreover, he never argued that this was a crime of passion in the sense that it may have provided some defense to the murder charge. E.g. Hutchinson v. State, 17 So. 3d 696 (Fla. 2009) Instead, he has argued that the passion, the rage, and the panic he felt mitigated (but not in some sense justified) the sentence for the murder he committed.

On the same page the State argues that this "Court has repeatedly rejected claims that cocaine addiction negated the CCP aggravator." Maybe so, but it has never said that as a matter of law or fact it can never do so. In this case, the unrefuted testimony showed that Peterson was addicted to cocaine, and at the time he killed his father, it had some influence on that decision. It may not have affected his ability to premeditate or calculate the murder, but the rage it produced, the panic it caused did affect his ability to coldly kill him.

Finally, the State says that the court's error in finding this aggravator was harmless beyond a reasonable doubt. (Appellee's brief on page 43). But, if there was insufficient evidence the CCP aggravator existed, the jury should also not have considered it. But it did, and in light of its 7-5 death recommendation, this Court cannot say beyond a reasonable doubt that considering it would have had no effect

on its deliberations or recommendation. State v. DiGuilio, 491 So. 2d 1129, 1139 (Fla. 1986).

## 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.

As mentioned in the Initial Brief on page 43, "The key fact justifying this finding came from Laver Randall and Becky Price testifying that 'Roy Andrews had told the defendant that his lifestyle was not going to go on, that he had to move out of the house, and that he and his wife were going to terminate the flow of money.'" In the Initial Brief, Peterson argued that the court relied on inadmissible hearsay to justify finding the pecuniary gain aggravating factor.

The State, on appeal, however disagrees with his claim regarding the hearsay. "Appellant, without any analysis, declares Randall's testimony inadmissible hearsay. The State disagrees." (Appellee's Brief at p. 45)

Peterson made no analysis because he thought it was obvious that Randall's testimony was inadmissible hearsay when the court used it for the truth of the matter asserted-that Andrews intended to cut off Peterson's money source-in justifying the pecuniary gain aggravator.

Professor Ehrhardt provides some support for the defendant's assertion that Randall's testimony was hearsay: "When there is an inescapable inference from the testimony that a witness made an out-of-court statement, the testimony is treated as hearsay if it is offered to prove the truth of the matter asserted." Ehrhardt's Florida Evidence, 2010 edition §801.2. If that is true about what the witness may have said, it certainly is true about what the witness may have said the out of court declarant said. Keen v. State, 775 So. 2d 263, 272 (Fla. 2000).

In Keen, the State introduced evidence that what the police originally had thought was an accidental death of the defendant's wife was, in fact, murder. They reached this conclusion because the insurance companies that had written policies on her life had concluded that her death was not accidental but was murder. Also, Keen's brother (who did not testify) had also implicated him in the homicide of his wife. At trial, the State said this evidence was not hearsay because it showed only "an alleged sequence of events leading to an investigation and arrest." Id. at 274. Rejecting that justification for admitting this evidence, this Court held,

> When the only possible relevance of an out-of-court statement is directed to the truth of the matter stated by a declarant, the subject matter is classic hearsay even though the proponent of such evidence seeks to clothe such hearsay under a nonhearsay label.

Moreover, this Court also noted that the evidence of the insurance companies' murder determination was used by the State during closing argument for substantive support not 'sequence of events' purposes. Thus, regardless of the purpose for which the State now claims the testimony to have been directed, the evidence was in fact used to prove the truth of the content rendering the content of the statement hearsay.

## CONCLUSION

Based on the arguments presented here and the Initial Brief, Robert Peterson respectfully requests this Honorable Court to 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,

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

DAVID A. DAVIS
ASSISTANT PUBLIC DEFENDER
FLORIDA BAR NO. 271543
LEON COUNTY COURTHOUSE
301 S. MONROE ST., SUITE 401
TALLAHASSEE, FLORIDA 32301
(850) 606-8517
ATTORNEY FOR APPELLANT

## CERTIFICATES OF SERVICE AND FONT SIZE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by electronic transmission to **CAROLYN SNURKOWSKI**, 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, Florida 32026, on this _____ day of July, 2011. I also certify that, pursuant to Florida Rule of Appellate Procedure 9.210(a)(2), this brief was typed in Times New Roman 14 point.

_____

**DAVID A. DAVIS**
Assistant Public Defender