

IN THE SUPREME COURT OF FLORIDA
CASE NO. SC02-623

RICHARD M. COOPER,

Prisoner #087442,
Florida State Prison
Starke, Florida

Petitioner,

v.

MICHAEL W. MOORE,

Secretary, Florida
Department of Corrections,

Respondent.

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

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COUNSEL FOR PETITIONER

TABLE OF CONTENTS

| | |
|---|-----|
| TABLE OF AUTHORITIES | iv |
| INTRODUCTORY STATEMENT ON REFERENCES | vii |
| ARGUMENT | 1 |
| INTRODUCTION | 1 |
| CLAIM 1: APPELLATE COUNSEL'S FAILURE TO RAISE ON APPEAL THE ISSUE OF THE TRIAL COURT'S DENIAL OF HIS MOTION FOR CONTINUANCE OF SENTENCING HEARING DENIED MR. COOPER EFFECTIVE ASSISTANCE OF APPELLATE COUNSEL | 1 |
| CLAIM 2: APPELLATE COUNSEL INEFFECTIVELY RAISED NO CLAIM REGARDING THE SENTENCING JURY'S AND JUDGE'S IMPROPER CONSIDERATION OF THE NON-STATUTORY AGGRAVATING FACTOR OF "LACK OF REMORSE" | 3 |
| CLAIM 5: MR. COOPER'S JURY WEIGHED INVALID AND UNCONSTITUTIONALLY VAGUE AGGRAVATING CIRCUMSTANCES IN VIOLATION OF HIS RIGHT TO AN INDIVIDUALIZED AND RELIABLE SENTENCING PROCEEDING AS GUARANTEED BY THE 8 TH AND 14 TH AMENDMENTS TO THE U. S. CONSTITUTION. APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE THIS ISSUE | 5 |
| CLAIM 6: MR. COOPER'S APPELLATE COUNSEL WAS INEFFECTIVE IN FAILING TO ARGUE THAT MR. COOPER WAS DENIED CONSIDERATION OF ALL MITIGATING FACTORS IN VIOLATION OF THE 8 TH AND 14 TH AMENDMENTS TO THE U. S. CONSTITUTION AND THAT THE PROSECUTOR'S IMPROPER COMMENTS CURRYING SYMPATHY SO INFLAMED THE JURY AS TO RISE TO THE LEVEL OF PROSECUTORIAL MISCONDUCT IN VIOLATION OF MR. COOPER'S 5 TH AND 14 TH AMENDMENT DUE PROCESS | |
| RIGHTS | 8 |
| CLAIM 8: THE FLORIDA DEATH SENTENCING STATUTE AS APPLIED IS UNCONSTITUTIONAL UNDER THE 5 TH , 6 TH , 8 TH AND 14 TH | |

| | |
|--|----|
| AMENDMENTS OF THE UNITED STATES CONSTITUTION BECAUSE MR. COOPER WAS DENIED HIS DUE PROCESS RIGHT TO TRIAL BY A JURY OF HIS PEERS IN VIOLATION OF <u>APPRENDI</u> <u>AND RING</u> | 10 |
| CLAIM 9: APPELLATE COUNSEL WAS INEFFECTIVE IN FAILING TO RAISE THE ERRONEOUS DIMINISHMENT OF THE ROLE OF THE JURY IN VIOLATION OF <u>CALDWELL</u> | 12 |
| CLAIM 12: MR. COOPER'S DEATH SENTENCE AS IMPOSED IS VIOLATIVE OF THE 8 TH AND 14 TH AMENDMENTS OF THE CONSTITUTION, THE DOUBLE JEOPARDY AND EX POST FACTO CLAUSES OF THE CONSTITUTION, THE CONVENTION ON CIVIL AND POLITICAL RIGHTS ("CCRP") AND THE CONVENTION AGAINST TORTURE ("CAT") | 14 |
| CONCLUSION AND RELIEF SOUGHT | 15 |

TABLE OF AUTHORITIES

| CASES | PAGE(s) |
|---|---------|
| <u>Barclay v. Florida</u> , 463 U.S. 939 (1983) | 4 |
| <u>Barclay v. Wainwright</u> , 444 So. 2d 956 (Fla. 1984) | 3 |
| <u>Booker v. State</u> , 773 So. 2d 1079 (Fla. 2000) | 15 |
| <u>Bottoson v. State</u> , 813 So.2d 31 (Fla. 2002) | 11 |
| <u>Brown v. Moore</u> , 800 So.2d 223 (Fla. 2001) | 11 |
| <u>Cox v. State</u> , 27 Fla. L. Weekly S505 (Fla. May 23, 2002) | 11 |
| <u>Doyle v. Singletary</u> , 655 So. 2d 1120 (Fla. 1995) | 7 |
| <u>Elledge v. State</u> , 346 So. 2d 998 (Fla. 1977) | 4 |
| <u>Henderson v. Singletary</u> , 617 So. 2d 313 (Fla. 1993) | 7 |
| <u>Jackson v. State</u> , 704 So. 2d 500 (Fla. 1997) - | 9 |
| <u>King v. State</u> , 808 So.2d 1137 (Fla. 2002) | 11 |
| <u>Knight v. State</u> , 746 So. 2d 423 (Fla. 1998) | 9 |

| | |
|--|------------|
| <u>Lambrix v. Dugger,</u> 641 So. 2d 847 (Fla. 1994) | 7 |
| <u>Lockett v. Ohio,</u> 438 U.S. 586 (1978) | 3 |
| <u>Mann v. Moore,</u> 794 So.2d 595 (Fla. 2001) | 11 |
| <u>Mills v. Moore,</u> 786 So.2d 532 (Fla. 2001) | 11, 12 |
| <u>Reese v. State,</u> 694 So. 2d 678 (Fla. 1997) | 9 |
| <u>Ring v. Arizona,</u> 122 S. Ct. 2428 (2002) | 10, 11, 12 |
| <u>Sireci v. Moore,</u> 27 Fla. L. Weekly S183 (Fla. Feb. 28, 2002) | 11 |
| <u>Spencer v. State,</u> 27 Fla. L. Weekly S373 (Fla. April 11, 2002) | 11 |
| <u>State v. Amodeo,</u> 750 So. 2d 664 (Fla. 5th DCA 1999) | 6 |
| <u>State v. Williams,</u> 689 So. 2d 1233 (Fla. 2d DCA 1997) | 9, 13 |
| <u>Thomas v. State,</u> 599 So. 2d 158 (Fla. 1st DCA 1992) | 9 |
| <u>Witt v. State,</u> 387 So.2d 922 (Fla. 1980) | 12 |
| STATUTES AND RULES | |
| Ch. 119, Fla. Stat. | 15 |

§ 921.141(3)(a), Fla. Stat. 10

INTRODUCTORY STATEMENT ON REFERENCES

Citations shall be as follows: References to the Record on direct appeal of the judgments and sentences in this case will be denominated “(Dir. 123).” References to the Record in the post-conviction evidentiary hearing will be denominated “(ROA. 123).” References to Mr. Cooper’s Petition for Writ of Habeas Corpus (the "Petition") will be denominated “(Pet. 1).” References to the State’s Response to Petition for Writ of Habeas Corpus (the "Response") will be denominated “(Resp. 1).” Items that were not included in the post conviction Record as originally prepared by the Pinellas County Clerk, but were filed by the Clerk after Mr. Cooper's Initial Brief are cited as: Supplemental Record on Appeal "(SROA. 123)," Second Supplemental Record on Appeal "(SSROA.)," Third Supplemental Record on Appeal "(TSROA.)" and Fourth Supplemental Record on Appeal "(FSROA)." Citations to transcripts include the correct spelling for names transcribed phonetically by the court reporter.

INTRODUCTION

The Petitioner, Richard Cooper, through his undersigned counsel submits this Reply to the State's Response. Mr. Cooper will not reply to every issue and, hereby, expressly does not abandon the issues and claims not specifically addressed in this Reply. For claims partially addressed or not addressed in this Reply, Mr. Cooper stands on the arguments presented in his Petition.

CLAIM 1: APPELLATE COUNSEL'S FAILURE TO RAISE ON APPEAL THE ISSUE OF THE TRIAL COURT'S DENIAL OF HIS MOTION FOR CONTINUANCE OF SENTENCING HEARING DENIED MR. COOPER EFFECTIVE ASSISTANCE OF APPELLATE COUNSEL.

Contrary to the State's position in its Response, the trial judge's denial of Mr. Cooper's motion to continue the sentencing hearing constituted fundamental error. (Resp. 7). Immediately upon learning of McCoy's availability as a witness Mr. Crider requested that the trial judge permit him the opportunity to "talk to Mr. McCoy" to "explore" the "mitigating factors or other information that might come out in" the course of his questioning McCoy. (Dir. 393).

Exculpatory evidence in favor of Mr. Cooper did in fact surface the very first time that McCoy was questioned under oath. McCoy's testimony in co-defendant Terry Van Royal's trial was replete with evidence that Richard Cooper was the first one back to the car and that he did not return to the house to fire the "coup de grace" shot. (ROA. 340-41, 710-21, 1427-29, 1458). In addition, McCoy also

could have provided substantial testimony relating to the facts underlying the mitigating and aggravating factors relevant to Mr. Cooper's sentencing. (ROA. 1425, SROA. 2747, FSROA). For example, McCoy could have confirmed Mr. Cooper's position that he was entitled to a "substantial domination" mitigator because J. D. Walton was the dominant figure in charge of the group. (ROA. 1449, SROA. 2747, FSRO).

Had the trial judge accorded Mr. Cooper's attorneys the opportunity to solicit and to obtain this exculpatory information, the trial judge would have heard substantially different testimony prior to making his findings on the aggravating and mitigating factors in Mr. Cooper's case. McCoy's testimony was the sole source of eyewitness evidence regarding the events that were the subject of the jailhouse snitch's hearsay testimony – evidence of the underlying facts of Mr. Cooper's offenses, culpability and aggravating and mitigating circumstances. The trial court's unwillingness to hear such direct evidence from McCoy in favor of reliance upon the statements of a jailhouse snitch itself constitutes an abuse of discretion. And the failure of Mr. Cooper's appellate counsel to raise the continuance issue constitutes ineffective assistance of counsel.

By depriving Mr. Cooper of the opportunity to question McCoy, the trial court's denial of the motion for continuance had the effect of precluding Mr. Cooper from presenting *any* mitigating evidence at the sentencing hearing in

violation of Mr. Cooper's Eighth and Fourteenth Amendments rights. See Lockett v. Ohio, 438 U.S. 586 (1978). When considered cumulatively with the other sentencing errors that occurred in Mr. Cooper's case, confidence in Mr. Cooper's death sentence is undermined and Mr. Cooper is entitled to a new penalty phase. See Barclay v. Wainwright, 444 So. 2d 956, 959 (Fla. 1984).

CLAIM 2: APPELLATE COUNSEL INEFFECTIVELY RAISED NO CLAIM REGARDING THE SENTENCING JURY'S AND JUDGE'S IMPROPER CONSIDERATION OF THE NON-STATUTORY AGGRAVATING FACTOR OF "LACK OF REMORSE."

The State's Response argues that Mr. Cooper's trial counsel did not raise "an issue of Skalnik's testimony about [Mr.] Cooper's demeanor." (Resp. 9). The State is incorrect. Defense counsel argued that "the defendant's remorse [is] extraneous as to whether [the] murder of which he was convicted was especially heinous, atrocious, or cruel." (Dir. 1419). Defense counsel further argued that "it is very clear that there cannot be evidence introduced and elicited to show lack of remorse because it is not and cannot be considered as an aggravating circumstance." (Dir. 1426). The trial court overruled this objection and unambiguously stated that "[a]ny aspect of the defendant's character *I think* is admissible. Objection overruled." (Dir. 1428; emphasis added). Mr. Cooper's attorneys next "interpose[d] [their] previous objection" when the State actually asked Mr. Skalnik about Mr. Cooper's level of remorse only to have the court

overrule them again. (Dir. 1448). Mr. Cooper's appellate counsel was ineffective in failing to argue that the jury's consideration of "lack of remorse" was improper.

The State's Response attempts to explain away the trial court's reasoning for admitting the evidence alleging "lack of remorse" by arguing that such evidence "was only used as a way to rebut [Mr.] Cooper's mitigation." (Resp. 9). The State argues that it had a right "to refute [Mr.] Cooper's presentation of remorse during the mitigation phase of the trial" because Defense counsel submitted a letter that Mr. Cooper wrote to co-defendant McCoy expressing sorrow over the incident. (Resp. 9). At trial, Mr. Cooper's attorney explicitly stated – and the trial court and prosecutors acknowledged – that Mr. Cooper's letter to McCoy was "not going in to prove remorse." (Dir. 1485). The State could not have been refuting an affirmative claim of remorse by Mr. Cooper since no evidence of remorse was ever offered on his behalf.

The State goes on to argue that had appellate "counsel raised an issue of Skalnik's testimony about [Mr.] Cooper's demeanor, [Mr. Cooper] would not have obtained any relief." (Resp. 9). The State is wrong, as is evidenced by its failure to cite any cases or facts supportive of this argument. The facts in this case indicate just the opposite: Mr. Cooper was prejudiced by the State's introduction of lack of remorse evidence for purposes other than impeachment. See Elledge v. State, 346 So. 2d 998, 1002-03 (Fla. 1977); Barclay v. Florida, 463 U.S. 939, 955 (1983).

CLAIM 5: MR. COOPER'S JURY WEIGHED INVALID AND UNCONSTITUTIONALLY VAGUE AGGRAVATING CIRCUMSTANCES IN VIOLATION OF HIS RIGHT TO AN INDIVIDUALIZED AND RELIABLE SENTENCING PROCEEDING AS GUARANTEED BY THE 8TH AND 14TH AMENDMENTS TO THE U. S. CONSTITUTION. APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE THIS ISSUE.

The State also incorrectly asserts in its Response that "no issue was preserved for appellate review" relevant to this claim. (Resp. 16). Defense counsel preserved the issue of improper finding and instruction of the *prior capital felony* aggravating factor by objecting that "these three deaths occurred so rapidly and [were] part of the same event" so that none of them could have been used as the prior capital felony upon which this aggravating factor could be grounded. (Dir. 1503). The court denied Defense's valid objection. (Dir. 1504).

Defense counsel also preserved its objection concerning the improper jury instruction of the *cold, calculating and premeditated* aggravating factor. Defense counsel explicitly objected to the issuance of the instruction (Dir. 1531), and was overruled by the court. (Dir. 1532).

Defense counsel similarly preserved the record regarding the improper use of the *heinous, atrocious, and cruel* aggravating factor. Defense counsel objected that "there is absolutely no evidence of any suffering on the part of any of these victims," (Dir. 1525), and that "based on these types of facts that the aggravating

factor of extremely heinous, atrocious, or cruel would not apply." (Dir. 1528.). The court again overruled Defense counsel's objection and allowed the improper use of the *heinous, atrocious, and cruel* aggravating instruction. (Dir. 1528).

The failure by Mr. Cooper's appellate counsel to address the unconstitutional vagueness of these mitigating instructions on direct appeal constituted ineffective assistance of counsel.

The State also argues that Claim 5 of Mr. Cooper's Habeas Petition should be denied because the "defense did not offer its own instruction to clarify the definitions," of the aggravating factors. (Resp. 16). The State, however, fails to place the circumstances surrounding the penalty proceeding in their proper context. The Court threatened Defense counsel the night before the penalty phase began by saying that "I don't want to be at 8:30 A.M. fiddling around with a bunch of – with several different drafts [of jury instructions regarding aggravating factors]." (Dir. 1372). Furthermore, the Court added "I don't want to be sitting here at 6 o'clock tomorrow evening just getting this [the jury instructions regarding aggravating factors] to the jury." (Dir. 1372).

When evidence exists that a trial judge rushed through a hearing, the court must permit attorneys to appeal issues arising from that hearing. State v. Amodeo, 750 So. 2d 664, 667 (Fla. 5th DCA 1999). Therefore, the trial court's pressure on Mr. Cooper's counsel to agree to the State's instructions regarding aggravating

factors and to end the sentencing proceeding as soon as possible explains and excuses Mr. Cooper's attorneys' inability to provide its own instructions clarifying the fundamentally erroneous definitions of the aggravating factors.

The State additionally argues that this “claim would have been rejected, even if raised.” (Resp. 16). The State’s argument, however, does not rely on any cases holding that vague aggravating circumstances are insufficient to overturn a death sentence. Instead, the State cites cases stating that failure to preserve the issue of vague aggravating circumstances for appeal procedurally bars Mr. Cooper from raising the issue in a habeas petition – cases that are irrelevant under the State's own assumption that the claim was properly raised. (Resp. 16). See Doyle v. Singletary, 655 So. 2d 1120, 1121 (Fla. 1995); Lambrix v. Dugger, 641 So. 2d 847, 849 (Fla. 1994); Henderson v. Singletary, 617 So. 2d 313, 316-17 (Fla. 1993). Thus, the State has failed to respond meaningfully to the merits of Mr. Cooper's claim. The unconstitutional vagueness of these instructions renders the mitigating and aggravating findings so erroneous as to merit vacating Mr. Cooper's death sentence.

CLAIM 6: MR. COOPER'S APPELLATE COUNSEL WAS INEFFECTIVE IN FAILING TO ARGUE THAT MR. COOPER WAS DENIED CONSIDERATION OF ALL MITIGATING FACTORS IN VIOLATION OF THE 8TH AND 14TH AMENDMENTS TO THE U.S. CONSTITUTION AND THAT THE PROSECUTOR'S IMPROPER COMMENTS CURRYING SYMPATHY SO INFLAMED THE JURY AS TO RISE TO THE LEVEL OF PROSECUTORIAL MISCONDUCT IN VIOLATION OF MR. COOPER'S 5TH AND 14TH AMENDMENT DUE PROCESS RIGHTS.

The State's Response argues that "any possible argument related to the prosecutor's comments would have been found procedurally barred" because Defense counsel did not specifically object to the Prosecutor's misconduct in currying juror sympathy during the penalty phase. (Resp. 17). The State is accurate in its assertion that Defense counsel failed to object to the prosecutorial misconduct during the penalty phase. The record on appeal clearly indicates, however, that any such objection would have been futile given the Court's blatant disregard for Mr. Cooper's attorneys' numerous objections to prosecutorial misconduct throughout the guilt phase of the trial. Mr. Cooper's trial attorneys repeatedly objected to the prosecutors' misconduct (Dir. 777, 786, 956, 1104, 1110, 1306), noting that the State was "testifying and putting references in the mind of the jury." (Dir. 956). Mr. Cooper's attorneys even moved for a mistrial based on the State's repeated speaking objections and statements made in an attempt to inflame the jury. (Dir. 1306). Despite the numerous objections culminating in the

motion for mistrial, the Court never once attempted to stop the prosecutorial misconduct. By the time of the penalty phase, it had become futile for Mr. Cooper's attorneys to continue to attempt to object to the misconduct of the prosecutors. See State v. Williams, 689 So. 2d 1233, 1234 (Fla. 2d DCA 1997) (holding that “a lawyer is not required to pursue a completely useless course when the judge has announced in advance that it will be fruitless”); Thomas v. State, 599 So. 2d 158, 161 (Fla. 1st DCA 1992) (stating that “[t]he courts of this state have recognized that there is no need to make further obviously vain and futile objections once an issue has been clearly ruled on by the trial judge”). Because objecting to the prosecutors' continuing and repetitive misconduct begun in the trial phase and continued throughout the penalty phase would have been obviously vain and futile, the prosecutorial misconduct issue is not procedurally barred.

The State's Response also argues that this court “has routinely denied relief on comments more egregious than those challenged in this case.” (Resp. 17). The State incorrectly cites Knight v. State, 746 So. 2d 423, 433 (Fla. 1998), as one such “routine” case where the prosecutorial misconduct was more egregious than the current case. In Knight, this court held that *one* improper comment made by the prosecutor was not sufficiently prejudicial to rise to the level of reversible error. Id. at 433. Likewise, both Reese v. State, 694 So. 2d 678 (Fla. 1997) and Jackson v. State, 704 So. 2d 500 (Fla. 1997) – also heavily relied upon by the State – each

involved a single isolated comment that was patently less serious than the numerous incidents of prosecutorial misconduct present in Mr. Cooper's case. Mr. Cooper's Petition, demonstrates how pervasive the prosecutorial misconduct was in Mr. Cooper's trial by highlighting *seven* separate egregious examples of the prosecutors having made improper inflammatory comments that prejudiced Mr. Cooper's jury. (Pet. 25-31). This pervasive prosecutorial misconduct and concurrent jury inflammation should entitle Mr. Cooper to habeas relief.

CLAIM 8: THE FLORIDA DEATH SENTENCING STATUTE AS APPLIED IS UNCONSTITUTIONAL UNDER THE 5TH, 6TH, 8TH AND 14TH AMENDMENTS OF THE UNITED STATES CONSTITUTION BECAUSE MR. COOPER WAS DENIED HIS DUE PROCESS RIGHT TO TRIAL BY A JURY OF HIS PEERS IN VIOLATION OF APPRENDI AND RING.

After Mr. Cooper's Petition for Habeas Corpus was filed, the United States Supreme Court issued its ruling in Ring v. Arizona, 122 S. Ct. 2428 (2002), and held that “[c]apital defendants . . . are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment.” Id. at 2432. Ring requires any and all facts that are relied upon by State support a finding of sufficient aggravating circumstances so as to justify imposition of the death penalty under Florida Statute Section 921.141(3)(a) be: (a) charged in the indictment; (b) submitted to the jury and (c) proved beyond a reasonable doubt the satisfaction of the twelve members of the jury. See id. The ultimate inquiry under

Ring is whether the facts relied upon by the court at sentencing were specifically found by a properly instructed unanimous jury after adequate notice to the defense.¹ See id. Mr. Cooper's jury – split 9:3, 7:5 and 7:5 in its recommendations of death – found none of the underlying facts necessary to justify the trial court's death sentence to be proven beyond a reasonable doubt.

The State incorrectly asserts that Mr. Cooper's claim of a violation of his rights under Apprendi and Ring is procedurally barred because the issue was not "presented earlier." (Resp. at 20). This Court has consistently reached the merits of Apprendi claims in capital cases when an Apprendi claim had not been previously raised.² Until Ring, this Court consistently held that Apprendi did not apply to capital sentencing schemes. See, e.g., Bottoson v. State, 813 So.2d 31, 36 (Fla. 2002), citing King v. State, 808 So.2d 1137 (Fla. 2002). As all the United States Supreme Court Justices recognized in Ring, this was error committed by this

¹ In addition, the jurors must be accurately instructed that their findings would determine whether or not Mr. Cooper could be sentenced to death. In other words, the jurors must understand and appreciate that they are being called upon to convict of a capital crime. See Caldwell argument in Claim IX, *infra*.

² See Bottoson, 813 So.2d at 36; Porter v. Moore, No. SC01-2707 (Fla. June 20, 2002); Sweet v. Moore, SC01-2867 (Fla. June 13, 2002); Cox v. State, 27 Fla. L. Weekly S505 (Fla. May 23, 2002); Spencer v. State, 27 Fla. L. Weekly S373 (Fla. April 11, 2002); Sireci v. Moore, 27 Fla. L. Weekly S183 (Fla. Feb. 28, 2002); King v. State, 808 So.2d 1237, 1245-46 (Fla. 2002); Brown v. Moore, 800 So.2d 223 (Fla. 2001); Mann v. Moore, 794 So.2d 595 (Fla. 2001); Mills v. Moore, 786 So.2d 532 (Fla. 2001). The only time this Court has not is when the claim was barred on habeas review after being adjudicated on the merits in rule 3.850 proceeding. See King v. State, 808 So.2d 1237, 1245-46 (Fla. 2002).

Court. Habeas is available to correct such errors committed in this Court, and the Court should correct its error now by applying Apprendi as Ring demands.

Furthermore, Ring should be applied retroactively to Mr. Cooper's case because it meets the three criteria for retroactive application set forth in Witt v. State, 387 So.2d 922 (Fla. 1980). First, Ring issued from the United States Supreme Court. Witt, 387 So.2d at 930. Second, Ring's Sixth Amendment rule unquestionably "is constitutional in nature." Id. at 931. Third, it is beyond dispute that Ring "constitutes a development of fundamental significance." Id.³ This Court should, therefore, proceed to the merits of Mr. Cooper's Apprendi/Ring claim. When it does, the Court is left with no other alternative but to vacate Mr. Cooper's death sentence due to its being rendered in violation of Apprendi/Ring.

CLAIM 9: APPELLATE COUNSEL WAS INEFFECTIVE IN FAILING TO RAISE THE ERRONEOUS DIMINISHMENT OF THE ROLE OF THE JURY IN VIOLATION OF CALDWELL.

The State's Response incorrectly argues that a Caldwell "claim would have been both procedurally barred and without merit if it had been raised in [Mr.]

³ This Court's decision in Mills v. Moore, 786 So.2d 532 (Fla. 2001), in which it was said at least four times that Apprendi did not apply to capital sentencing procedures, establishes beyond a doubt that Ring constitutes a change in what this Court believed was the law. The State can hardly claim that Ring lacks fundamental significance. The State appeared before the Supreme Court as an *amicus curiae* in Ring and argued it had a "strong interest in seeing that th[e Supreme] Court's capital jurisprudence, ensuring the validity of judicial capital sentencing, remains intact." Ring v. Arizona, No. 01-488, Brief for Amici Curiae Alabama, Colorado, Delaware, Florida, *et al.*, available through Lexis at 2002 U.S. Briefs 488 at *1.

Cooper's appeal." (Resp. 20-21). Mr. Cooper's attorneys informed the jury during

the penalty phase that “[s]hould you make the recommend [sic], that Richard Cooper be executed, it’s a virtual certainty that will occur.” (Dir. 1592). The State then objected by stating “it’s your Honor’s decision as to whether to impose [the death penalty] and not the jury’s.” (Dir. 1592). The Court sustained the objection by stating the jury's verdict “in this instance is a recommendation only” (Dir. 1593), and did not permit Defense counsel to have an opportunity to respond. These comments by the prosecutor and the trial court, coupled with the trial court's patently erroneous sustaining of the prosecutor's objection, misguided the jury as to the seriousness of its role in determining whether or not Mr. Cooper would receive the death penalty. The trial court *affirmatively denied* Mr. Cooper's counsel an opportunity to present any argument on the issue of jury diminishment under Caldwell. Such jury diminishment is not precluded from being preserved for appellate review by virtue of the trial court's affirmative actions. See Williams, 689 So. 2d at 1234.

In its Response, the State claims that Mr. Cooper's rights under Caldwell were not violated because the "jury's role was properly described by the prosecutor and the judge." (Resp. at 21). If, as the State apparently argues, the comments and instructions made by the prosecutor and the judge accurately informed the jury of its role in sentencing Mr. Cooper to death – which they did not – then the jury failed to perform its role as required by Ring because it did not make,

unanimously and beyond a reasonable doubt, the findings that would support the judge's death sentence. Either way, Mr. Cooper's death sentence must be vacated.

CLAIM 12:MR. COOPER’S DEATH SENTENCE AS IMPOSED IS VIOLATIVE OF THE 8TH AND 14TH AMENDMENTS OF THE CONSTITUTION, THE DOUBLE JEOPARDY AND EX POST FACTO CLAUSES OF THE CONSTITUTION, THE CONVENTION ON CIVIL AND POLITICAL RIGHTS (“CCRP”) AND THE CONVENTION AGAINST TORTURE (“CAT”).

In its Response, the State has incorrectly stated that it is Mr. Cooper's position that the inordinately long length of his prison sentence is the sole basis for his claim that his rights to humane treatment under constitutional and international law have been violated. The violation of Mr. Cooper rights extend far beyond the eighteen-plus year length of his prison sentence. The Florida Department of Corrections (the "Department") prides itself in treating Mr. Cooper like an abused animal. According to the Department's own promotional materials, Mr. Cooper is locked up almost 24 hours a day in a 10’ x 12’ cell without air-conditioning. See Florida Department of Corrections: "Death Row Fact Sheet," available at <http://www.dc.state.fl.us/oth/deathrow/index.html> (the "Death Row Fact Sheet"). He is in a facility that is far too small for the number of inmates it is holding. Id. He is stigmatized by having to wear a bright orange t-shirt distinguishing him from other prisoners and signifying that he is on death row. Id.

Contrary to the State's position, the eighteen-year prison term Mr. Cooper has served *on top of his death sentence* is also grounds for cruel and unusual punishment and double jeopardy claims where – as here – the State is primarily responsible for causing the delay in an inmate's proceedings. See Booker v. State, 773 So. 2d 1079, 1096 (Fla. 2000). According to statistics set forth in the Death Penalty Fact Sheet, Mr. Cooper's detention has exceeded the average length of stay by over *sixty percent*. Such excess time served is directly attributable to the State's failure to comply with Mr. Cooper's rights under Chapter 119 of the Florida Statutes.⁴

CONCLUSION AND RELIEF SOUGHT

For all the reasons discussed in this Reply as well as in Mr. Cooper's Petition for Writ of Habeas Corpus, Mr. Cooper respectfully urges this Court to grant habeas corpus relief.

⁴ See Mr. Cooper's Initial Brief and Reply Brief in the 3.850 appeal.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this the 28th day of August, 2002, a true and correct copy of the foregoing was furnished by U.S. Mail to **C. MARIE KING, BOB LEWIS, and JIM HELLICKSON**, Assistant State Attorneys, Office of the State Attorney, 14250 49th Street North, Clearwater, Florida 33762-2800; **CAROL M. DITTMAR**, Assistant Attorney General, Office of the Attorney General, Suite 700, Westwood Building, 2002 North Lois Avenue, Tampa, Florida 33607-2366.

CERTIFICATE OF TYPEFACE COMPLIANCE

Counsel for Appellant Richard Cooper, certifies that this Initial Brief is typed in 14 point (proportionately spaced) Times New Roman, in compliance with Rule 9.210 of the Florida Rules of Appellate Procedure.

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