

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC-01-1718

LOWER TRIBUNAL No. 89-2165

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GEORGE MICHAEL HODGES,

Appellant,

v.

STATE OF FLORIDA

Appellee.

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ON APPEAL FROM THE CIRCUIT COURT  
OF THE THIRTEENTH JUDICIAL CIRCUIT,  
IN AND FOR HILLSBOROUGH COUNTY, STATE OF FLORIDA

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REPLY BRIEF OF APPELLANT

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ARGUMENT IN REPLY<sup>1</sup>

**ARGUMENT I - INEFFECTIVE ASSISTANCE OF COUNSEL AT PENALTY  
PHASE**

**A. Deficient Performance**

Appellee, like the circuit court, excuses counsel's deficient performance in developing and presenting substantial, compelling mitigation about George Hodges' background by arguing that Mr. Hodges was uncooperative with trial counsel. (Answer Brief at 25-27, 29)(hereinafter AB). Appellee refers to the court's order wherein the court stated: "The record also reflects that during the penalty phase Hodges became uncooperative with counsel and announced that he would not testify in his own behalf." (AB at 25).

Both the circuit court and Appellee fail to cite to any evidence that Mr. Hodges was uncooperative with counsel because none exists. In fact, the record contradicts the court's finding and Appellee's argument. During the evidentiary hearing, trial counsel testified that Mr. Hodges was cooperative and provided counsel with information about his family and background:

Q: And how would you characterize Mr. Hodges when you . . . What was he like?

A: (BY MR. PERRY) Quiet; unassuming; you know

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<sup>1</sup>Mr. Hodges will not reply to every issue and argument, however he does not expressly abandon the issues and claims not specifically replied to herein. For arguments not addressed herein, Mr. Hodges stands on the arguments presented in his Initial Brief.

cooperative as far as, you know, if you asked a question, he certainly answered your questions. He was not combative. I don't think he ever tried to fire us. I don't believe that. That is something that happens quite often. He - he was cooperative. I mean, like I said, he acted appropriately. Maybe a little depressed; but again, that is not unusual in the situation he was in at that time.

\* \* \*

Q: [I]n your consultations with Mr. Hodges, was his behavior appropriate and -

A: From what I can recall, it was always appropriate. I don't ever recall any inappropriate behavior, I mean -

Q: Being disrespectful, loud?

A: Ever getting angry, not - not a whole lot of emotion in any - one way or the other. Not crying, not angry; just -

(PC-T. 411-3; see also PC-T. 433). When the circuit court judge inquired of trial counsel and asked if Mr. Hodges thwarted his efforts to investigate and prepare for the penalty phase, trial counsel responded that he did not (PC-T. 445-6, 447).<sup>2</sup>

Further, the record reflects that Mr. Hodges provided trial counsel with names of family members, friends and employers, (PC-T. 424; Def. Ex. 22), and the names of hospitals, treatment centers and schools that had information

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<sup>2</sup>Contrary to counsel's testimony that Mr. Hodges **did not** thwart counsel's efforts at the penalty phase, the court found that Mr. Hodges thwarted trial counsel's efforts (PC-R. 1572-3). The court's order is conclusively rebutted by the record.

about Mr. Hodges (PC-T. 397-8; Def. Exs. 19, 20 & 21).<sup>3</sup> Mr. Hodges also cooperated with the mental health experts (PC-T. 249, 252, 303-4). The court's determination that Mr. Hodges failed to supply trial counsel with information about his background is not supported by the record.

The court's conclusion that Mr. Hodges became uncooperative at the penalty phase of his trial is also belied by the record. During his trial, Mr. Hodges' counsel stated for the record:

Judge, just for the record I talked to Mr. Hodges, me and Mr. Perry both talked to Mr. Hodges, about whether he wanted to testify during this part of the trial or not. **After reviewing everything with him and giving him the benefit of my advice concerning that decision, he has decided that he is not going to testify.** And I just wanted to put that on the record for the Court and for Mr. Hodges.

(R. 701)(emphasis added).

The records from both the trial and evidentiary hearing clearly reflect that Mr. Hodges was cooperative and did not

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<sup>3</sup>The circuit court acknowledged in its order: "The 'Mitigating Circumstances Checklist' introduced at the evidentiary hearing clearly reflects that Hodges disclosed to counsel considerable detail regarding his history." (PC-R. 1581). Thus, the court made inconsistent findings: the court initially found that Mr. Hodges was not cooperative with trial counsel and thwarted his efforts to investigate and present mitigation, yet the court later acknowledged that Mr. Hodges supplied trial counsel with "considerable" details about his history. The record reflects that the court's initial conclusion is not supported by the evidence - evidence that the circuit court later acknowledged in its order denying Mr. Hodges' claim. Also, Appellee's assertion that Mr. Hodges' "did not provide counsel with the information now urged as mitigating" (AB at 27), is also refuted by the record.

interfere with counsel's preparation or presentation of mitigation. Appellee's argument is meritless; likewise, the circuit court erred in finding that Mr. Hodges thwarted trial counsel's efforts and was uncooperative.

Because Appellee's argument is not supported by the record, Appellee's reliance on Bruno v. State, 807 So. 2d 55 (Fla. 2001), is misplaced. In Bruno, this Court found that Bruno failed to cooperate with counsel and "prevented counsel from initially obtaining relevant information for penalty phase." 807 So. 2d at 68. Contrary to Appellee's argument, Mr. Hodges, unlike Bruno, was cooperative with trial counsel and assisted with his defense to the best of his abilities. Thus, Bruno has no effect on the resolution of Mr. Hodges' claim.<sup>4</sup>

Appellee also argues that trial counsel's investigation into Mr. Hodges' background was reasonable. (AB at 25, 27). Appellee and the court rely on the fact that trial counsel attempted to present mitigation.<sup>5</sup> (AB at 25; PC-R. 1572-3).

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<sup>4</sup>Appellee also relies on Bruno to argue that Mr. Hodges' did not cooperate with the mental health experts at trial, therefore he cannot complain about the inadequate mental health evaluations. (AB at 29). Again, Dr. Maher testified that Mr. Hodges did cooperate with him and provided him with information about his background (PC-T. 249, 252, 303-4).

<sup>5</sup>The court also found that trial counsel's performance was not deficient because counsel "was one of the most experienced trial lawyers in the Public Defender's office." (PC-R. 1572). However, the court ignored trial counsel's testimony that at the time of Mr. Hodges' trial, he was a felony bureau chief and his duties entailed that he supervise thirty attorneys,



Appellee also relies upon Sweet v. State, 810 So. 2d 854 (Fla. 2002), and suggests that because Mr. Hodges' trial counsel spoke to "various potential witnesses concerning mitigation" counsel did not fail to investigate available mitigating witnesses.<sup>6</sup> (AB at 27).

Again, the record reflects that while trial counsel did speak to a few witnesses by phone (or had his investigator speak to a few witnesses by phone), and retained mental health experts, he failed to uncover the substantial mitigation about Mr. Hodges.<sup>7</sup> Appellee relies on a summary indicating that someone from trial counsel's office spoke to Mr. Hodges mother, his sisters, a childhood friend and a few employers,

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that he be involved in the administration of the office, including making hiring decisions, promoting decisions, training younger lawyers and "putting out fires with judges." (PC-T. 443). Trial counsel also testified that he carried a full capital case load as well as other felony cases (PC-T. 444-445).

<sup>6</sup>Appellee's reliance on Sweet is misplaced. In Sweet, this Court rejected Sweet's claim of ineffective assistance of counsel because Sweet did not demonstrate prejudice.

<sup>7</sup>Appellee characterizes the evidence presented at the penalty phase of Mr. Hodges' capital trial as "substantial". Trial counsel presented the testimony of two witnesses at Mr. Hodges' penalty phase, his mother and brother-in-law. The evidence presented concerned Mr. Hodges' dedication to his family. No evidence was presented regarding: the abject poverty Mr. Hodges' suffered as a child or Mr. Hodges' alcoholic, abusive father or Mr. Hodges' unstable, abusive mother or the "cesspool" of Lock Seven - where Mr. Hodges was raised, where toxic waste was dumped into the water and landfill within steps from the Hodges' home or Mr. Hodges' unhappy and miserable childhood or his mental health problems.

(Def. Ex. 22), in order to support the argument that trial counsel's investigation was reasonable.

However, in fact, the summary reveals that trial counsel did not conduct a reasonable investigation and failed to gain any substantive information from the witnesses. The summary indicates that substantive interviews were not conducted with many of the witnesses. Rather, it appears that an investigator spoke to three of Mr. Hodges' family members in West Virginia to arrange travel to the trial. In fact, trial counsel could not remember whether or not he ever spoke to Mr. Hodges' mother on the phone, but he did remember that his first substantive interview occurred when she arrived in Florida for the trial (PC-T. 404, 408). Likewise, trial counsel had never even spoken to Mr. Hodges' father until after the trial began when his father came to Florida for the trial (PC-T. 405).<sup>8</sup>

At the evidentiary hearing, Karen Sue Tucker testified that she would have traveled to Florida and testified for her brother (PC-T. 71-2). Contrary to Appellee's position, the notes compiled by trial counsel indicate that Karen Sue was concerned about traveling to Florida but that "[s]he might be able to fly down if she could get right back, possibly the

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<sup>8</sup>Trial counsel recalled that after Mr. Hodges attempted to commit suicide, while the jury was deliberating, Mr. Hodges' father asked trial counsel if he was "going to get his gun back" (PC-T. 406).

same day."<sup>9</sup> Trial counsel made no arrangements for Karen Sue to travel to Florida or any arrangements to provide the information she possessed to his mental health experts, i.e. affidavits, declarations, or phone interviews with Drs. Maher and Gamache.

Additionally, the summary of the conversation with Karen Sue contains no information about Mr. Hodges' background. Karen Sue testified that she was never asked questions about her family's poverty, her father's alcoholism, violence in the house or any other information about Mr. Hodges' childhood (PC-T. 70). Karen Sue would have provided the information about Mr. Hodges' horrific childhood had she been asked (PC-T. 71).

Also, trial counsel testified that Mr. Hodges' brother, Robert, was incarcerated at the time of the trial, so he did not attempt to speak with him (PC-T. 399-400). In fact, he was not.<sup>10</sup> Robert testified that he had been released from

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<sup>9</sup>Appellee asserts: "Karen Sue Tucker could not attend the trial based on family circumstances." (AB at 28). Also, the circuit court found: "Hodges' sister, Karen Sue Tucker, was contacted and told the investigator that she could not attend the trial." Appellee's assertion and the court's finding are refuted by the interview notes which indicate that the witness stated it would be difficult, but that she may be able to attend if she could make the trip and testify within a day. (Def. Ex. 22). There is no reason that the travel could not have been arranged.

<sup>10</sup>The court incorrectly stated that Robert testified he was incarcerated at the time of his brother's trial (PC-R. 1554).

prison a month and a half before the trial began; he was available to travel to Florida and would have provided background information about Mr. Hodges had he been asked to do so (PC-T. 94-6).

Mr. Hodges provided trial counsel with no less than sixteen names of family witnesses. Mr. Hodges also provided detailed information to trial counsel about his previous employment, education and treatment. Trial counsel contacted only a handful of the individuals Mr. Hodges' provided. Trial counsel failed to conduct any independent investigation; trial counsel failed to secure the attendance of the witnesses he did locate; trial counsel did not send an investigator to West Virginia or attempt to locate any teachers, neighbors or counselors who knew about Mr. Hodges' deplorable childhood. For example, Madeline Hamilton, a neighbor of the Hodges, provided information about George Hodges in the form of a sworn affidavit:

2. In 1963, I met Lula Hodges and her family when I moved next door to her in Lock Seven, near St. Albans, West Virginia.

\* \* \*

5. [Mr. Hodges' father] was an alcoholic and a gambler. He became a nasty, mean and vicious smart aleck when he drank.

6. [Mr. Hodges' father] was an unfaithful and abusive husband to Lula. They fought about his infidelities and their financial problems. They would yell and scream at each other and George [Sr.] would call Lula a fat cow and other demeaning names.

7. Lula and George [Sr.'s] fights were loud and would escalate into physical confrontations.

When George [Sr.] would leave town to head back to his job Lula would be left behind with black eyes and bruises all over her body. No one in the neighborhood spoke up for Lula. In West Virginia that was the way it was. You took what your husband dished out.

8. Lula was extremely unhappy and she was doing anything to try and be happy. She started drinking and taking diet pills and acting real silly. She would take her ironing out on her front porch and iron clothes in her bra and underwear.

\* \* \*

10. Lula didn't think about her kids. They were left to fend for themselves. She was spending most of her time getting back at George [Sr.].

11. Lula's kids were sickly, moody and sullen. [George Hodges] was skinny and scrawny. Karen and Robert's teeth were rotten.

\* \* \*

13. The poverty and living conditions in Lock Seven were horrific. Lock Seven was the tail end of the world. It was muddy and people were living in tar shacks everywhere. That area looked like one of those commercials you see on television that exposes the wretched living conditions in foreign lands.

14. There was a dump right down the street from where Lula and I lived. People would go there and pick through the dump for food. Once, someone found a dead baby in a bag down there.

(Def. Ex. 8).<sup>11</sup> Trial counsel unreasonably failed to obtain any relevant information about Mr. Hodges' childhood.

Further, contrary to Appellee's contention, trial counsel

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<sup>11</sup>Several other witnesses attested to the wretched conditions of Mr. Hodges' childhood. (See Def. Exs. 4-8 - Affidavits of Richard Sanson, Jean Sanson and Lula Hodges).

did not speak to two of the three witnesses who testified at the evidentiary hearing and trial counsel failed to speak to anyone who provided sworn affidavits, other than Mr. Hodges' mother.<sup>12</sup>

Had trial counsel even scratched the surface of Mr. Hodges' background he could and would have discovered that the Southern Appalachian region was the subject of extensive sociological research which was available at the time of Mr. Hodges' trial. Dr. Richard Ball, a sociologist testified that he had conducted numerous studies about the poverty and social disorganization of the Southern Appalachian culture (PC-T. 457-8). Lock Seven, the area where Mr. Hodges was raised was one such area (PC-T. 460). Dr. Ball testified that research was conducted, beginning in the late 1960s and continuing throughout the 1970s and 1980s, about the Appalachian Region (PC-T. 481). These studies and reports would have been available in 1989 (PC-T. 481).

Dr. Ball testified that the Appalachia region was "cut off for a long period of time from the outside world." (PC-T. 463). The isolation, caused by the geographical circumstances, led to common behavior patterns and attitudes in the area (PC-T. 463). Physical and emotional abuse of

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<sup>12</sup>Actually, it is unclear from the record and trial counsel had no independent record of whether or not he ever spoke to Karen Sue Tucker or if his investigator did. Karen Sue testified that she was not asked to provide information similar to the information she provided at the evidentiary hearing (PC-T. 66).

one's wife and children became a normal aspect of family life (PC-T. 466). The area was also marked by serious financial and social impoverishment (PC-T. 468-9). Specifically, Dr. Ball testified that when George Hodges lived in Lock Seven the area was "at the bottom of the ladder socioeconomically" (PC-T. 474), and Mr. Hodges' family was at the bottom of that ladder in the area. (PC-T. 480).<sup>13</sup>

Dr. Ball also testified about his research of the dump: The dump's history dated back to the early 1900s. "[A]s it became a dumping ground for all sorts of things, not only the municipal dump for St. Albans, but also a dumping ground for various industrial waste; and so, it became even more problematic . . ." (PC-T. 476). Dr Ball described the dump:

The dump was actually the playground, and in some way it was part of the food supply. It was a - the children played in the dump. The - there were really very few areas there for children to play, and that was one area. And the children played there. There were items discarded there including food and so on, and people from Lock Seven would go to the dump. They would recover items which they could use for their homes in some way or other. They would recover discarded food which they could use.

(PC-T. 478).

Also, Dr. Ball testified that studies existed regarding the chemicals in the area impacting the residents' physical and mental health (PC-T. 491).

Dr. Marlin Delaney also testified that an Environmental

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<sup>13</sup>Dr. Ball also testified that the Appalachian Region was one of the poorest regions in the United States (PC-T. 484).

Protection Agency (EPA) report was released in 1984, five years before Mr. Hodges' capital trial, which detailed the dumping and waste materials that were deposited into the Kanawha River and the landfills in the nearby areas (PC-T. 128). Dr. Delaney stated that the report essentially depicted the area where Mr. Hodges was raised as a "cesspool" "because of the tremendous amount of dumping" (PC-T. 128).

Dr. Delaney also described the toxins in the river and in the area (PC-T. 129). He testified that exposure to the toxins could occur in several ways including, through the water in the river, if one ate the fish from the river, through air emissions and through skin contact with the soil around the area (PC-T. 129-30). Specifically, Dr. Delaney discussed the lead that was introduced into the system and that exposure to lead was proven to cause neurological and behavioral problems (PC-T. 131). The information and documents relating to the environmental contaminants in the Kanawha River and the surrounding areas and effects were available at the time of Mr. Hodges' capital trial.

A plethora of mitigating evidence was available to trial counsel. Mr. Hodges' assisted trial counsel in identifying potential witnesses and avenues of investigation. Trial counsel, through no fault of Mr. Hodges, failed to uncover the abundance of mitigation.

Likewise, trial counsel also failed to supply information to his mental health experts. Trial counsel testified that he



retained two mental health experts to evaluate Mr. Hodges at the time of his trial (PC-T. 423). Trial counsel requested that the experts: "review whatever we sent them; go out and talk to the defendant; indicate to us, you know, if they thought there were any mental health problems . . . determine if there was . . . anything mitigating we could present to a jury regarding their mental health." (PC-T. 423). However, trial counsel did not request that psychological testing be conducted. Also, trial counsel failed to provide his experts with any background materials. Rather, trial counsel sent his experts the police and autopsy reports. Trial counsel sought background records about Mr. Hodges, but the letters requesting records are dated **after** the experts had completed their evaluations and reported to trial counsel. Dr. Gamache's report is dated May 17<sup>th</sup>, yet, trial counsel did not request background records, including school records, hospital records and treatment records until June 1<sup>st</sup> (PC-T. 397-8, 438-9; Def. Ex. 19-21).<sup>14</sup> In fact, the records were received only two weeks before Mr. Hodges' trial began.

Dr. Gamache's report reflects that trial counsel failed to explain the purpose of his evaluation. Dr. Gamache indicated that Mr. Hodges suffered from a psychological disorder, however, he related that his diagnosis could be used

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<sup>14</sup>Not all of the records were requested on June 1, 1989, some records were requested at the end of June. Mr. Hodges' capital trial began on July 10, 1989.

by the State to argue for an "upward departure from the sentencing guidelines" (Def. Ex. 10). Clearly, Dr. Gamache did not understand the sentencing statute or the fact that the State was limited to arguing evidence relating to the enumerated aggravating circumstances. Therefore, Appellee's claim that it was reasonable for trial counsel to rely upon Dr. Gamache's conclusions does not make sense; as trial counsel testified, Dr. Gamache's conclusions were not made in the context of mitigating evidence that could be presented in a capital penalty phase (PC-T. 430).

Trial counsel recalled that the experts found something about depression, but that he believed it was "nothing that would rise to mitigation." (PC-T. 431). Trial counsel failed to investigate Mr. Hodges' depression any further.

Dr. Michael Maher was retained to evaluate Mr. Hodges in 1989. Dr. Maher testified that he was only provided with police and autopsy reports (PC-T. 246). He received no background materials about Mr. Hodges (PC-T. 250). Dr. Maher admitted that he missed the diagnosis of Mr. Hodges because he didn't have the information, including neuropsychological testing, to conduct a proper evaluation (PC-T. 320). Dr. Maher also testified that when he rendered his opinion to trial counsel he made clear that his findings were preliminary and trial counsel should contact him if any other background material was obtained (PC-T. 253-4).

Trial counsel failed to provide the mental health experts

with available information that would have assisted them in properly evaluating Mr. Hodges.<sup>15</sup> For example, a wealth of information about Mr. Hodges' mental health was well documented in his jail records. Upon admission to the jail, a "Receiving Screening" was performed. In that screening, Mr. Hodges informed the prison health services that he had sustained head injuries in his past (Def. Ex. 3). Also, within days of Mr. Hodges' incarceration, and four months before his trial, he threatened to commit suicide (Def. Ex. 3). Four days later Mr. Hodges slit his right wrist, but maintained that he cut himself when he fell in the shower (Def. Ex. 3). Trial counsel did not provide any medical or jail records to the mental health experts.

Furthermore, Lula Hodges told trial counsel that Mr. Hodges fell out of a truck when he was five years old and that he did not receive any medical attention for his injuries. Several other head injuries were also documented. Again, trial counsel failed to supply his experts with any information about Mr. Hodges' medical history.

Appellee asserts that trial counsel made a strategic decision not to present the opinions of the mental health

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<sup>15</sup>The State's own expert, Dr. Sidney Merin, criticized the original evaluation conducted at trial. Dr. Merin explained that an adequate evaluation consists of: 1) taking a history from the client; 2) observing the client; 3) administering psychological tests and 4) reviewing documents regarding background information. Drs. Maher and Gamache failed to conduct any psychological testing or review any background records about Mr. Hodges. (Supp. PC-R. 22).

professionals. (AB at 28, 29). Appellee cites to trial counsel's testimony at the evidentiary hearing. However, trial counsel did not testify that he made a strategic decision. See PC-T. 431-432, as cited by Appellee. Additionally, trial counsel did not make an informed decision because he failed to provide his mental health experts with the necessary background information to adequately evaluate Mr. Hodges and render competent opinions. Thus even if trial counsel had testified that his decisions were strategic his performance cannot be deemed reasonable. See Stevens v. State, 552 So. 2d 1082, 1087 (Fla. 1989).

As addressed previously, trial counsel failed to provide the mental health experts with any information from Mr. Hodges' family members, friends, neighbors, teachers or employers about Mr. Hodges' childhood and background. Trial counsel's performance was deficient.

"[A]n attorney has a strict duty to conduct a reasonable investigation of a defendant's background for possible mitigating evidence." State v. Riechmann, 777 So. 2d 342, 350 (Fla. 2000), quoting Rose v. State, 675 So. 2d 567, 571 (Fla. 1996). At the time of Mr. Hodges' capital trial it was "well settled that evidence of family background and personal history may be considered in mitigation." Stevens v. State, 552 So. 2d 1082, 1086 (Fla. 1989), citing Brown v. State, 526 So. 2d 903, 908 (Fla.), cert. denied 488 U.S. 944 (1988). In Ragsdale v. State, this Court held that trial counsel's

performance was deficient because:

[T]rial counsel's entire investigation consisted of a few phone calls made by his wife to Ragsdale's family members. Counsel did not know who his wife contacted or the content of the conversations between his wife and the individuals contacted. Further, counsel did not talk to any family members himself; he only understood from his wife that Ragsdale's family was not particularly helpful or interested.

798 So. 2d 713, 719 (Fla. 2001). Likewise, in Mr. Hodges' case, trial counsel directed his investigator to call a few family members (PC-T. 390), and trial counsel had no independent recollection of speaking to any of the potential witnesses, except for Mr. Hodges' mother, with whom he interviewed **after** she traveled to Florida for Mr. Hodges' trial (PC-T. 404). Further, substantive interviews were not conducted with the family members with whom the investigator spoke and several witnesses supplied by Mr. Hodges were never even contacted. (Def. Ex. 22).

Perhaps the most egregious inadequacy of trial counsel's "investigation" was that he did not send an investigator to West Virginia. In Stevens v. State, this Court found that the fact that trial counsel failed to uncover valuable mitigating evidence was caused, in part, by the fact that Stevens' had only recently moved to Florida and "most of the individuals able to provide mitigation testimony lived in Kentucky, Stevens' previous home." 552 So. 2d 1082, 1086, n. 7 (Fla. 1989). As in Stevens, trial counsel in Mr. Hodges' case did not adequately question the potential witnesses he did

contact. Id. Thus, as did Steven's trial counsel, Mr. Hodges' trial counsel failed to obtain available, compelling background information.

Similarly, in Ventura v. State, this Court found trial counsel's performance at the penalty phase of Ventura's trial deficient. 794 So. 2d 553, 570 (Fla. 2001). In Ventura, trial counsel called three witnesses to testify, but failed to contact several other witnesses who either testified at the evidentiary hearing or submitted affidavits. Id. Mr. Hodges' trial counsel's performance was equally deficient, because he did not contact several of the witnesses provided by Mr. Hodges and he failed to conduct adequate interviews with the witnesses who were contacted. Additionally, as in Mr. Hodges' case, trial counsel solely relied on Mr. Hodges' to provide mitigating information. Id.

In Hildwin v. Dugger, this Court found trial counsel's performance deficient because trial counsel "failed to unearth a large amount of mitigating evidence". 654 So. 2d 107, 109 (Fla. 1995). This Court noted that trial counsel failed to uncover Hildwin's psychiatric hospitalizations and suicide attempts. Id. In Mr. Hodges' case, trial counsel failed to uncover Mr. Hodges' several, documented attempts to commit suicide. And while trial counsel obtained some of the records relating to Mr. Hodges' prior mental health evaluations and counseling, they were discovered after the mental health experts performed their evaluations and trial counsel did not

provide the materials to his mental health experts.

Trial counsel did virtually no preparation for the penalty phase. His performance was deficient.

## **B. Prejudice**

Appellee also argues that Mr. Hodges has not demonstrated prejudice. (AB at 26). Appellee characterizes the mitigation presented at the evidentiary hearing as "substantial". (AB at 26, 27). Thus, Appellee contends that the additional evidence presented by Mr. Hodges in postconviction was not qualitatively or quantitatively different from the mitigation presented at Mr. Hodges' penalty phase. (AB at 26). Appellee again relies on Bruno v. State, 807 So. 2d 55 (Fla. 2002).

In Bruno, this Court stated:

The trial court noted that Bruno's failure to cooperate with counsel prevented counsel from initially obtaining relevant information pertaining to the penalty phase. Despite this obstacle, counsel still presented evidence concerning several potential mitigating circumstances: Bruno's extensive emotional and drug history, Bruno's drug use at the time of the murder, Dr. Stillman's testimony that Bruno had organic brain damage as a result of his drug use, and testimony that Bruno had attempted suicide and was briefly hospitalized. . . . Counsel's performance in this case may not have been perfect, but it did not fall below the required standard. . . . Moreover, counsel's performance cannot be considered deficient simply because the evidence presented during the 3.850 hearing may have been more detailed than the evidence presented at trial, especially in light of the fact that the substance of both presentations was essentially the same.

Bruno, 807 So. 2d at 68. Appellee mischaracterizes the evidence presented at Mr. Hodges' capital penalty phase.

At Mr. Hodges' capital penalty phase, trial counsel

presented the testimony of two witnesses: Mr. Hodges' mother and his brother-in-law. There testimony comprises less than five-and-a-half transcript pages and primarily focused on the fact that Mr. Hodges was dedicated to his family (R. 694-8). Lula Hodges also testified that the family moved a lot when George was young and George's brother, Randy drowned and this seemed to effect George (R. 694). Appellee's argument that the evidence presented was "substantial" is ridiculous.

In comparison, at the evidentiary hearing, Mr. Hodges presented testimony from several witnesses about his background and three mental health experts. The quantity and quality of the evidence presented at the evidentiary hearing was markedly different from that presented at Mr. Hodges' trial. Mr. Hodges' family was one of the poorest families in the United States in the 1960s through the 1970s (PC-T. 474, 480). The family had little to eat and the children were malnourished (PC-T. 78). The family wore feed sacks as clothes and searched through the waste and garbage in the dump near their home to find food, clothes and toys (PC-T. 31). The Hodges moved over twenty times in thirteen years (PC-T. 30). The Hodges' homes were usually two bedroom shacks where the five children all slept in the same room, in the same bed (PC-T. 40). The homes did not have heat and some only had outdoor plumbing (PC-T. 39).

Lock Seven, the area where George Hodges lived, is in the Appalachian region, located along the Kanawha River. Chemical



plants line the river and spew toxic waste into the air, soil and water (PC-T. 128). Due to the contamination, Lock Seven always smelled like skunk (PC-T. 38). There were no paved roads in Lock Seven, just muddy paths to the shacks and trailers (PC-T. 107).

Mr. Hodges' father was an abusive alcoholic who beat his wife and children several times a week (PC-T. 41-3). He would use his fists or a belt and he would often shake the children then and throw them up against walls (PC-T. 41-3). Mr. Hodges' mother was also abusive and unstable (PC-T. 43). Both of his parents were unfaithful and indiscreet about their infidelities. At one time during Mr. Hodges' childhood, his father moved his sixteen year old, pregnant girlfriend into the house with the family (PC-T. 45). The girlfriend and her child slept in the same room as the Hodges' children (PC-T. 45).

Mr. Hodges' had only two friends as a child, his brother, Randy, who was "a little off" and Raymond Riffle, a retarded child (PC-T. 46-7). The children at school viciously teased Mr. Hodges because of his big ears, speech impediment and the clothes he wore (PC-T. 105). Mr. Hodges' brother, Randy, drowned in the river when Mr. Hodges was in his early teens (PC-T. 48). Randy's death changed Mr. Hodges (PC-T. 48-50). Randy also sexually abused Mr. Hodges for much of his childhood (Supp. PC-R. 69).

Mr. Hodges and his brothers suffer from depression (PC-T.

92-3). Mr. Hodges has attempted to commit suicide several times; his brother Robert attempted to commit suicide three times and the family suspects that Randy's drowning was actually a suicide (PC-T. 48-9). Mr. Hodges' also suffered several head injuries throughout his life, at times losing consciousness.

Mr. Hodges has a low IQ and suffers from a learning disability. Additionally, three experts agree that Mr. Hodges' suffers from organic brain damage in his frontal lobe.<sup>16</sup> The experts also agree that Mr. Hodges' was under the influence of an extreme mental or emotional disturbance at the time of the crime.<sup>17</sup> And there may have been evidence to rebut the cold, calculated and premeditated aggravating factor.

Appellee asserts that the circumstances of the crime evidence that the cold, calculated and premeditated aggravator existed beyond a reasonable doubt. (AB at 34). Likewise, the

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<sup>16</sup>Dr. Merin, the State's expert disagreed with the diagnosis of frontal lobe impairment. However, Dr. Merin did concede that Mr. Hodges' suffers from a learning disability which may be caused by brain impairment and that his test scores reflect brain impairment (Supp. PC-R. 156-7, 168).

<sup>17</sup>Dr. Merin disagreed about the statutory mitigator (Supp. PC-R. 126). However, his explanation of why Mr. Hodges would not qualify for the mitigator makes no sense: "[A]t worst, he had this personality disorder that I was referring to and also the dysthymic disorder. The dysthymic disorder, that type of pervasive impression is not a mental disorder that would remove him from reality." (Supp. PC-R. 126). Being removed from reality is neither the definition nor necessarily the result of being under an extreme mental or emotional disturbance.

court made this finding (PC-R. 1578-9). However, none of Mr. Hodges' experts testified that the aggravator did not exist. Rather, the experts stated that due to Mr. Hodges' brain damage and depression, there may have been evidence and an argument that would rebut the aggravator (PC-T. 215-6; 300).

Even the State's expert, Dr. Merin, diagnosed Mr. Hodges with a major mental illness and found that Mr. Hodges' suffered from a personality disorder with borderline features (Supp. PC-R. 85-9). Dr. Merin believed that Mr. Hodges suffered from depression for his entire adult life and as a child (Supp. PC-R. 138, 152). He also described Mr. Hodges' family life as "disturbing" and that he had a "very bad background" (Supp. PC-R. 92). Dr. Merin testified that he believed that even his diagnosis and conclusions should have been presented to the jury charged with recommending whether Mr. Hodges was sentenced to life or death (Supp. PC-R. 130, 132).

None of this evidence was presented to the capital jury which recommended that Mr. Hodges' be sentenced to death. Only two aggravating factors were presented to the jury: 1) the crime was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws; and 2) the crime was committed in a cold, calculated and

premeditated manner.<sup>18</sup> Therefore, the abundant, compelling mitigation would surely have made a difference.

Appellee's argument that Mr. Hodges' has failed to demonstrate prejudice is meritless. Appellee attempts to liken the case to Robinson v. State, 707 So. 2d 688 (Fla. 1998). (AB at 30). However, Appellee's reliance is misplaced. As cited by Appellee, this Court rejected Robinson's claim based on the reasoning in Breedlove v. State, 692 So. 2d 874 (Fla. 1997), wherein the defendant had not established prejudice because the additional witnesses "would have allowed cross-examination and rebuttal evidence that would have countered any value Breedlove might have gained from the evidence." Robinson, 606 So. 2d at 696, citing Breedlove. In Mr. Hodges' case there was no risk in uncovering the mitigation and presenting it to the jury. The evidence would not have opened the door to any harmful rebuttal evidence.

### **C. Cumulative Review**

Appellee misunderstands the requirement of cumulative review of the errors that occurred at the penalty phase of Mr. Hodges' capital trial. Appellee attempts to argue that because the errors found by this Court on direct appeal did not rise to the level to warrant relief independently they do not require relief under a cumulative analysis. (AB at 35-6).

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<sup>18</sup>Appellee incorrectly identifies one of the aggravators as heinous, atrocious or cruel. (AB at 33). There was no evidence to support this aggravator and the aggravator was not found by the trial judge.

A cumulative review of the errors that occurred at Mr. Hodges' capital penalty phase is required. Trial counsel failed to object to improper prosecutorial argument and vague jury instructions regarding the cold, calculated and premeditated aggravator and burden shifting. Trial counsel was also deficient in investigating and preparing for the penalty phase.

"Counsel's errors deprived [Mr. Hodges] of a reliable penalty phase proceeding." Hildwin v. Dugger, 654 So. 2d 107, 110 (Fla.), cert. denied, 516 U.S. 965 (1995). Mr. Hodges respectfully requests that this Court reverse the lower court's order and order a new penalty phase.

#### **ARGUMENT II - AKE v. OKLAHOMA**

Appellee argues that Mr. Hodges' claim is procedurally barred. (AB at 39). However, Mr. Hodges' Ake claim is based on facts which were not available to counsel from the record.

Contrary to Appellee's argument and the court's order, the mental health experts at trial failed to conduct a reasonable evaluation of Mr. Hodges and therefore violated his rights under Ake v. Oklahoma, 470 U.S. 68 (1985). The evaluations were not reasonable because counsel failed to request psychological testing and failed to provide his experts with background information. Even the State's expert agreed that the trial evaluations were inadequate (Supp. PC-R. 22).

The circuit court erred in finding that the evaluations were appropriate and that Mr. Hodges failed to cooperate with

the experts. The court's findings are refuted by the record. Relief is warranted.

### ARGUMENT III - DUE PROCESS

Appellee incorrectly cites the standard of review for a motion to disqualify. (AB at 42). The standard is not an abuse of discretion as Appellee states, but de novo review. Arbelaez v. State, 775 So. 2d 909 (Fla. 2001) ("To determine if a motion to disqualify is legally sufficient, this Court looks to see whether the facts alleged would place a reasonably prudent person in the fear of not receiving a fair and impartial trial."). In Arbelaez, this Court analyzed Arbelaez's claim under a de novo standard. Id. Likewise, a de novo review of circuit court's ruling of Mr. Hodges' motion is required.

Appellee argues that no ex parte communication occurred because the contact was between the judge's staff attorney and the state; the merits were not discussed; and opposing counsel was informed about the communication. (AB at 44).

It makes no difference that the communications occurred between a member of the judge's staff and the State. The Commentary to Canon 3B (7) of Florida's Code of Judicial Conduct indicates that the Canon applies equally to court personnel:

A judge must make reasonable efforts, including the provision of appropriate supervision, to ensure that Section 3B(7) is not violated through law clerks or other personnel on the judge's staff.

Fla. Code Jud. Conduct, Commentary to Canon 3B (7). The

judge's conduct, under the circumstances presented, was prohibited.

This Court explained in In re Inquiry Concerning a Judge: Clayton, 504 So. 2d 394 (Fla. 1987), that the intent of Canon 3 was to exclude all ex parte communications except those authorized by statute or rules. It "implements a fundamental requirement for all judicial proceedings under our form of government. Except under limited circumstances, no party should be allowed the advantage of presenting matters to or having matters decided by the judge without notice to all interest parties." Id. at 395.

Second, the merits of the case were discussed and the result was that an evidentiary hearing was scheduled. Further, an ex parte communication is prejudicial per se. As this Court has observed regarding a similar ex parte communication in a postconviction proceeding:

No matter how pure the intent of the party who engages in such contacts, without the benefit of a reply, a judge is placed in the position of possibly receiving inaccurate information or being unduly swayed by unrebutted remarks about the other side's case. The other party should not have to bear the risk of factual oversights or inadvertent negative impressions that might easily be corrected by the chance to present counter arguments.

Rose v. State, 601 So. 2d 1181, 1183 (Fla. 1992)(emphasis added).

Moreover, the Judge failed to promptly notify counsel of the substance of the ex parte communications, an especially glaring failure in light of the fact that the communications

resulted in the scheduling of an evidentiary hearing at which Mr. Hodges, as the moving party, would carry the burden of proof.

Additionally, the cases cited by Appellee concerned purely procedural matters. (AB at 44). This is not the case at hand. The court discussed the issues with the assistant state attorney and made decisions about the case based on those discussions.

Appellee also argues that Mr. Hodges has shown no bias by the circuit judge. An ex parte communication is prejudicial per se. It is "[t]he essence of due process is that fair notice and reasonable opportunity to be heard must be given to interested parties before judgment is rendered." Huff v. State, 622 So. 2d 982 (Fla. 1993), quoting Scull v. State, 568 So. 2d 1251, 1252 (Fla. 1990). Also, the court showed its bias when it granted the State's discovery motion, granted the State's motion for access to Mr. Hodges and denied Mr. Hodges' motion for continuance of the January evidentiary hearing and Mr. Hodges' motion in limine as to Dr. Merin's testimony.

Appellee also argues that the court did not abuse its discretion in granting the State's motions for access to Mr. Hodges and discovery. (AB at 46). Appellee argues that the State did not purposefully delay requesting discovery and access to Mr. Hodges. (AB at 48). Appellee suggests that because there was no reciprocal discovery order, the State's conduct was not improper. (AB at 48). Appellee misses the



point. The court ordered that the parties file witness lists in the case. Mr. Hodges complied. The State did not because the State had no witnesses. Moreover, the State's obligation to disclose its witnesses became an issue because of the timing of the motion for access to Mr. Hodges.

Again, Mr. Hodges' evidentiary hearing was originally scheduled for June, 1999. Days before the hearing the judge, sua sponte, recused himself. Before the hearing, the State did not turn over a witness list, did not ask for discovery or depositions and did not ask for access to Mr. Hodges. The State asked for these over a year later, two days before the next scheduled hearing.

Appellee again argues that the State was unaware of the claim that Mr. Hodges suffered from brain damage because Mr. Hodges used the words "organic brain damage" in his Rule 3.850 motion. (AB at 50). Organic brain damage and physical brain damage are one and the same. Certainly, the State was aware of the terms used to describe brain damage.

Appellee also argues that Mr. Hodges suffered no prejudice due to the State's dilatory tactics.<sup>19</sup> (AB at 50). However, the State was allowed to gain a tactical advantage because Mr. Hodges was forced to present all of his proof and then the State was allowed to prepare its case. Also, Dr.

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<sup>19</sup>Appellee states that Mr. Hodges has delayed his case for years. (AB at 52). Appellee's contention is outrageous. Mr. Hodges complied with all deadlines established in his case.

Merin's testimony was not limited to the issue the State maintained was the reason for filing the motion so late.

Counsel for Mr. Hodges' was also prejudiced by the fact that counsel was required to litigate the issue and was unable to adequately prepare for the evidentiary hearing.

#### **ARGUMENT VI - RING v. ARIZONA**

Appellee alleges that Mr. Hodges is procedurally barred from bringing his claim because he failed to present the claim at trial or on direct appeal. (AB at 60). However, Mr. Hodges preserved his Ring claim through pretrial motions (R. 824-827), and during the penalty phase by trial counsel (R. 704-706).

Appellee does not and cannot dispute the fact that until the United State's Supreme Court's decision in Ring v. Arizona, 122 S. Ct. 2428 (2002), this Court's cases foreclosed Mr. Hodges from obtaining relief on his claim. Any contention that Mr. Hodges' claims are time-barred or barred as successive is without merit.

This Court's cases applying Hitchcock v. Dugger, 481 U.S. 393 (1987), to cases in which it had previously denied relief based on a conflict between Florida's standard jury instruction and Lockett v. Ohio, 438 U.S. 586 (1987), are controlling under these circumstances, and Appellee makes no attempt to distinguish them. See, e.g., Delap v. Dugger, 513 So. 2d 659, 660 (Fla. 1987) ("Because Hitchcock represents a substantial change in the law occurring since we first

affirmed Delap's sentence, we are constrained to readdress his Lockett claim on its merits").

Appellee alleges that Ring v. Arizona should not be retroactively applied under Witt v. State, 387 So. 2d 922 (1980). (AB at 60).

Under Witt, a change in law supports postconviction relief in a capital case when "the change: (a) emanates from this Court or the United States Supreme Court, (b) is constitutional in nature, and ©) constitutes a development of fundamental significance." Id. at 931. The first two criteria are met here. In elaborating what "constitutes a development of fundamental significance," the Witt opinion includes in that category "changes of law which are of sufficient magnitude to necessitate retroactive application as ascertained by the three-fold test of Stovall [v. Denno], 388 U.S. 293 (1967)] and Linkletter [v. Walker], 381 U.S. 618 (1965)]," adding that "Gideon v. Wainwright . . . is the prime example of a law change included within this category." See Witt, 387 So. 2d at 929.

This three-fold test considers "(a) the purpose to be served by the new rule; (b) the extent of reliance on the old rule; and ©) the effect on the administration of justice of a retroactive application of the new rule." See id. at 926. It is not an easy test to use, because there is a tension at the heart of it. Any change of law which "constitutes a development of fundamental significance" is bound to have a

broadly unsettling "effect on the administration of justice" and to upset a goodly measure of "reliance on the old rule." The example of Gideon - a profoundly unsettling and upsetting change of constitutional law - makes the tension obvious. How the tension is resolved ordinarily depends mostly on the first prong of the Stovall-Linkletter test - the purpose to be served by the new rule - and whether an analysis of that purpose reflects that the new rule is a "fundamental and constitutional law change[] which cast[s] serious doubt on the veracity or integrity of the original trial proceeding." See Witt, 387 So. 2d at 929.

Two considerations call for recognizing that the Apprendi-Ring rule is such a fundamental constitutional change: First, the purpose of the rule is to change the very identity of the decisionmaker with respect to critical issues of fact that are decisive of life or death. In the most basic sense, this change remedies a "'structural defect [ ] in the constitution of the trial mechanism,'" Sullivan v. Louisiana, 508 U.S. 275, 281 (1993): it vindicates "the jury guarantee . . . [as] a 'basic protectio[n]' whose precise effects are unmeasurable, but without which a criminal trial cannot reliably serve its function." Id. In Johnson v. Zerbst, 304 U.S. 458 (1938) - which was the taproot of Gideon v. Wainwright, this Court's model of the case for retroactive application of constitutional change - the Supreme Court held that a denial of the right to counsel could be vindicated in

postconviction proceedings because the Sixth Amendment required a lawyer's participation in a criminal trial to "complete the court", see Johnson, 304 U.S. 458; and a judgment rendered by an incomplete court was subject to collateral attack. What was a mere imaginative metaphor in Johnson is literally true of a capital sentencing proceeding in which the jury has not participated in the life-or-death factfinding role that the Sixth Amendment reserves to a jury under Apprendi and Ring: the constitutionally requisite tribunal was simply not all there; and such a radical defect necessarily "cast[s] serious doubt on the veracity or integrity of the . . . trial proceeding." See Witt, 387 So. 2d at 929.

Second, "the jury trial provisions in the Federal and State Constitutions reflect a fundamental decision about the exercise of official power - a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges. Fear of unchecked power . . . found expression . . . in this insistence upon community participation in the determination of guilt or innocence," Duncan v. Louisiana, 391 U.S. 145, 156 (1968) - including, under Apprendi and Ring, guilt or innocence of the factual accusations "necessary for the imposition of the death penalty." See Ring, 122 S. Ct. at 2443; Apprendi, 530 U.S. at 494-95. The right to a jury determination of factual accusations has long been the central bastion of the Anglo-

American legal system's defenses against injustice.

The United States Supreme Court's retraction of Hildwin v. Florida, 490 U.S. 638 (1989) and Walton v. Arizona, 490 U.S. 639 (1990) in Ring restores a right to jury trial that is neither trivial nor transitory but "the most transcendent privilege which any subject can enjoy." Mr. Hodges should not be denied its benefit simply because the Supreme Court temporarily overlooked the point before finally getting it right.

In addition, Appellee contends that "the Ring decision left intact all prior opinions upholding the constitutionality of Florida's death penalty scheme, including Spaziano v. Florida, 468 U.S. 447 (1984), and Hildwin v. Florida, 490 U.S. 638 (1989) [(per curiam)]". Appellee is wrong. In Ring, the Supreme Court overruled Walton v. Arizona, 497 U.S. 639 (1990), "to the extent that it allows a sentencing judge, sitting without a jury, to find an aggravating circumstance necessary for imposition of the death penalty." Ring, 122 S. Ct. at 2443. Quite simply, Ring subjected capital sentencing to the Sixth and Fourteenth Amendment rule of Apprendi v. New Jersey, 530 U.S. 466 (2000), "that the Sixth Amendment does not permit a defendant to be 'expose[d] . . . to a penalty exceeding the maximum he would receive if punished according to the facts reflected in the jury verdict alone.'" Ring, 2439-40 (quoting Apprendi, 530 U.S., at 483). "Capital defendants, no less than non-capital defendants," the Court in

Ring declared, "are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment." Id.

That rule squarely and indisputably outlaws the Florida sentencing procedure used to impose Mr. Hodges' death sentence. In overruling Walton (which had upheld Arizona's capital sentencing procedure against the challenge that it violated capital defendant's Sixth Amendment right to jury trial), Ring necessarily overruled Hildwin and its precursors (which had upheld Florida's capital sentencing procedure against the identical challenge). The Walton decision treated Florida precedents as controlling, and regarded the Florida and Arizona capital-sentencing procedures, as indistinguishable. Walton said:

We repeatedly have rejected constitutional challenges to Florida's death sentencing scheme, which provides for sentencing by the judge, not the jury. *Hildwin v. Florida*, 490 U.S. 638 . . . (1989) (per curiam); *Spaziano v. Florida*, 468 U.S. 447 . . . (1984); *Proffitt v. Florida*, 428 U.S. 242 . . . (1976). In *Hildwin*, for example, we stated that "[t]his case presents us once again with the question whether the Sixth Amendment requires a jury to specify the aggravating factors that permit the imposition of capital punishment in Florida," 490 U.S., at 638 . . . and we ultimately concluded that "the Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury." *Id.*, at 640-641 . . .

The distinctions Walton attempts to draw between the Florida and Arizona statutory schemes are not persuasive. It is true that in Florida the jury recommends a sentence, but it does not make specific factual findings with regard to the existence of mitigating or aggravating circumstances and its recommendation is not binding on the trial judge. A Florida trial court no more has the assistance of a jury's findings of fact with respect to sentencing issues than does a trial judge in Arizona.

497 U.S. at 647-48. Ring, too, explicitly recognized the indissolubility of the Walton - Hildwin linkage:

In *Walton v. Arizona*, 497 U.S. 639 (1990), we upheld Arizona's scheme against a charge that it violated the Sixth Amendment. The Court had previously denied a Sixth Amendment challenge to Florida's capital sentencing system, in which the jury recommends a sentence but makes no explicit findings on aggravating circumstances; we so ruled, *Walton* notes, on the ground that "the Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury." *Id.*, at 648 (quoting *Hildwin v. Florida*, 490 U.S. 638, 640-641 (per curiam)). **Walton found unavailing the attempts by the defendant-petitioner in that case to distinguish Florida's capital sentencing system from Arizona's.** In neither State, according to *Walton*, were the aggravating factors "elements of the offense"; in both States, they ranked as "sentencing considerations" guiding the choice between life and death. 497 U.S. at 648.

Ring, 122 S. Ct. at 2437 (emphasis added). It is indisputable that just as Ring overruled Walton, in the wake of Ring, Hildwin is also no longer good law and thus does not control.

Appellee argues that Florida law makes a death sentence contingent not on the finding of a single aggravator, but on a fact finding that there are "sufficient aggravating circumstances." See Fla. Stat. § 921. 141 (3). Yet the penalty phase jury is not instructed that the State must prove the existence of sufficient aggravating circumstances beyond a reasonable doubt, or even by a preponderance of the evidence. That is a structural error for which the cure is vacating the death sentences. See Sullivan v. Louisiana, 508 U.S. 275, 280 (1993).

Additionally, Appellee argues that the existence of a



prior violent felony aggravator satisfies the Sixth Amendment jury requirement which allows a judge to make further sentencing decisions. However, Mr. Hodges has no prior violent felony convictions that would transfer the sentencing issue out of a jury's hands under the standard established in Apprendi and Almendarez-Torres. Because there is no transfer from jury to judge based on a prior felony conviction, the jury must determine the sentence beyond a reasonable doubt. During Mr. Hodges' guilt phase, the two aggravating factors were not presented as elements of the crime. Nor were they proven beyond a reasonable doubt in the penalty phase. The failure to present the two aggravators as elements during the guilt and penalty phase is a fundamental error requiring habeas relief.

Appellee attempts to distinguish Florida's death penalty scheme from the Arizona procedure that was invalidated in Ring, because juries render an advisory verdict. This argument ignores the explicit holding and rationale of Apprendi v. New Jersey, 530 U.S. 466, 483 (2000), and Ring. The unmistakable teaching of the cases is that every fact which must be found as the necessary precondition for enhancing a defendant's maximum possible sentence from imprisonment to death is required by the Sixth Amendment to be found by a jury **in the same way, and for the same reasons**, that the Sixth Amendment requires a jury to find every fact which is the necessary precondition for conviction of a crime.

As Ring puts it in plain English: "*Apprendi* repeatedly instructs . . . that the characterization of a fact or circumstance as an 'element' [of a crime] or a 'sentencing factor' is not determinative of the question 'who decides,' judge or jury." Ring, 122 S. Ct. at 2441.

The effect of finding an aggravator exposes Mr. Hodges to a greater punishment than authorized by the jury's guilty verdict. The aggravators must be charged in the indictment, submitted to a jury, and proven beyond a reasonable doubt. See Ring, 122 S.Ct. at 2443. This did not occur in Mr. Hodges' case, thus, the death sentence against him is unconstitutional and relief is warranted.

**CONCLUSION**

The circuit court erred in denying Mr. Hodges' Rule 3.850 motion. Mr. Hodges did not receive a full and fair evidentiary hearing before an impartial arbiter. The evidence establishing Mr. Hodges' claims entitle him to relief.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true copy of the foregoing Reply Brief has been furnished by first class mail, postage prepaid, to Candance Sabella, Chief of Capital Appeals, 2002 North Lois Ave., Suite 700, Westwood Center, Tampa, FL 33607, on September 23, 2002.

**CERTIFICATION OF TYPE SIZE AND STYLE**

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