IN THE SUPREME COURT OF FLORIDA

BRUCE DOUGLAS PACE,

Appellant,

v. CASE NO. SCO1-1831

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE FIRST JUDICIAL CIRCUIT,
IN AND FOR SANTA ROSA COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

The State will cite to the original trial record as "TR," and to the record on this appeal as "PCR" or "SuppPCR" (there are two supplemental volumes on this appeal). All citations to the record will include reference to the appropriate volume number.

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On December 14, 1988, a Santa Rosa County grand jury indicted Bruce Douglas Pace for the first-degree murder and armed robbery of Floyd Covington (6TR 1132-33). Pace pled not guilty (7TR 1252). In August of 1989, a jury found him guilty as charged (7TR 1210), and recommended a death sentence by a vote of seven to five (7TR 1211). On November 16, 1989, Judge Ben Gordon sentenced Pace to death for the murder and to 15 years imprisonment for the robbery (7TR 1238-43). Judge Gordon found three aggravating circumstances (Pace had a previous conviction for a violent felony; Pace was on parole at the time of the murder; the murder was committed during the course of a robbery) and no mitigating circumstances.

Pace appealed his conviction and death sentence to this Court, raising seven issues: (1) the trial court erred in admitting into evidence statements Pace had made to his stepfather; (2) the trial court erred in limiting defense cross-

examination about an alleged third shotgun shell found in the same location as the two which had been fired from Pace's gun; (3) the trial court erred in allowing into evidence the statement Pace had made the day before the murder, to the effect that he would do something "tomorrow" to make money; (4) the trial court erred in admitting in evidence the two shotgun shells shown to have been fired from Pace's shotgun; (5) the trial court erred in denying the motion for judgment of acquittal; (6) the trial court erred in failing to find any nonstatutory mitigating circumstances; and (7) Pace's death sentence was disproportionate.

On March 26, 1992, this Court affirmed. Pace v. State, 596 So.2d 1034 (1992). This Court found that the trial court had erred in disallowing defense cross-examination about the "third" shotgun shell, but, by unanimous vote, determined that the error was harmless because "evidence of the shells was of little significance and thus not a factor in the jury's determination of guilt." Id. at 1035. This Court also agreed unanimously that "the facts linking Pace to this killing. . . . [were] sufficient to support the jury's determination of guilt," and that all other guilt-phase claims of error were meritless. Id. at 1035. Pace's penalty-phase claims were rejected by a four to three vote, id. at 1035-36, and his conviction and death

sentence were affirmed. The United States Supreme Court denied Pace's petition for writ of certiorari. Pace v. Florida, 506 U.S. 885 (1992).

On October 11, 1993, Pace's collateral counsel filed a motion for postconviction relief under Rule 3.850. This motion was not properly verified as required by the Rule, and was dismissed without prejudice by order of the circuit court dated March 28, 1994. Collateral counsel then obtained a personal verification from Pace dated April 8, 1994, and filed the same, along with a motion, dated April 9, 1994, seeking rehearing of the dismissal order, based upon collateral counsel's belated submission of proper verification. By order dated April 13, 1994, the circuit court vacated its March 28 order of dismissal.

On or about September 15, 1994, collateral counsel filed an amended motion for postconviction relief. This amended motion, like the original, was not properly verified by Pace himself, and was dismissed without prejudice by way of an oral pronouncement of the circuit court on September 27, 1994, reduced to writing by way of written order issued October 21, 1994, nunc pro tunc to September 27, 1994. Collateral counsel appealed this order to this Court. The State moved to dismiss the appeal. This Court granted the State's motion to dismiss on

March 6, 1995. Collateral counsel's motion for rehearing was denied on May 4, 1995.

On August 29, 1995, collateral counsel filed yet another amended motion for postconviction relief. Attached to this amended motion was a personal verification from Pace. However, Pace's next amended motion for postconviction relief, dated March 4, 1997, and filed on or about March 5, 1997 contained no personal verification from Pace. Two days later, Pace filed a final "modified" amended motion for postconviction relief, which was identical to the motion filed March 5, 1997, except for the omission of the final claim of the that motion.

This final amended motion, the denial of which forms the basis of this appeal, contained 21 claims: (1) failure of state agencies to provide public records; (2) a four-part claim alleging ineffective assistance of counsel at the guilt phase, state suppression of exculpatory evidence, newly discovered evidence of innocence, and erroneous evidentiary rulings at trial; (3) a "shell" claim of newly discovered evidence of innocence; (4) ineffectiveness of counsel at the penalty phase; (5) trial court erred by failing to excuse certain prospective jurors for cause; (6) jury venire did not represent a fair cross section of the community; (7) illegal seizure of Pace's shotgun by police; (8) erroneous limitation of defense cross-examination

about a third shotgun shell; (9) evidence insufficient to support Pace's robbery conviction; (10) improper comment on defendant's silence by prosecutor in closing argument at the guilt phase; (11) and (12) improper argument by the prosecutor at the penalty phase; (13) the murder-committed-during-a-felony aggravator is unconstitutional; (14) avoid-arrest instructions were inadequate; (15) CCP instructions were inadequate; (16) prior-violent-felony aggravator is invalid because Pace's prior conviction was invalid; (17) penalty-phase jury instructions were burden shifting; (18) pecuniary-gain aggravator was "improper"; (19) improper evidence and argument on "non-statutory" aggravating factors; (20) rules precluding juror interviews are unconstitutional; and (21) electrocution is cruel or unusual punishment.

A "Huff" hearing was held on August 18, 1998 on this final amended motion, see Huff v. State, 622 So.2d 982 (Fla. 1993). On December 15, 1998, the circuit court issued a 12-page order addressing each of the 21 claims and whether or not an evidentiary hearing would be required; in summary, the court determined "that an evidentiary hearing will be required on the following claims: claim two, parts (a), (b), and (c); claim four; claim ten; and claim eleven" (4PCR 794). The remaining claims, the court concluded, "can be refuted by the record, were

addressed on direct appeal, [are] insufficiently plead or are issues directed toward challenging established case law and statutory law at the appellate level" (4PCR 794).

In rejecting the need for further public records inquiry, the court stated:

> (a) In response to this Court's Order of June 23, 1994, and clarified in the Order of July 6, 1994, the Office of CCR filed a Notice of Compliance on July 20, 1994 identifying chapter 119 material in the possession of eight agencies which they believed they were entitled [to]. Over the net [sic] two (2) years the Court attempted in a series of Orders and hearings to identify those materials that CCR had not obtained or viewed and which documents, if any, that the agency possessing the documents was claiming an exemption. On September 20, 1996, the Court set a hearing for October 18, 1996, to determine which agencies had not yet fully complied with or filed the exemption to the public records requests, the order listed nine (9) types of materials from five (5) agencies listed by CCR as not being in compliance with previous Orders. As a result of said hearing, the Court entered an Order on October 29, 1996 finding that with only two (2) exceptions the public records had been complied with by the agencies and no agency filed for exemption. The exceptions were: (1) the Santa Rosa County Sheriff's Department had three (3) types of materials that would be made available by no latter [sic] than October 21, 1996 and; (2) the Department of Corrections would supply inmate records on Anthony Williams after a proper identification was made. On January 16, 1997, the Defendant filed a Motion to Show Cause taking exception to the Court's findings of October 29, 1996, and requesting the Court order the agencies to turn over the public records to which they were entitled. The Court denied the request in its Order of January 30, 1997, finding that no exceptions were taken by the Defendant to the Court's Order of October 29, 1996, until an Order setting the matter for final hearing was entered. The Office of Capitol [sic] Collateral Counsel, Northern Region, filed a

> Motion to Compel, pursuant to Fla.R.Crim.P. 3.852 alleging that five (5) agencies previously identified had not fully complied with Defendant's request. The motion was denied citing the Court's Order of January 30, 1997.
>
> (b) The Court has attempted through every means available to bring some finality to Defendant's requests for public records disclosure. The Court recognizes that the Defendant has had a series of counsel appointed to represent him and that their office relocation can explain misplaced records and documents but the previous findings of the Court and objections of counsel at the time are a matter of record. The matter does not require an evidentiary hearing.

(4PCR 784-85).

The evidentiary hearing was conducted on June 12, 13 and 14, 2000. The parties submitted written closing arguments, and on June 11, 2001, the circuit court entered a 28-page written order denying relief (7PCR 1164-91), accompanied by some 200 pages of attachments (7PCR 1192-1392).

STATEMENT OF THE FACTS

The State will summarize the evidence presented at the original trial and sentencing proceedings and that presented at the three-day postconviction evidentiary hearing.

The Original Trial and Sentencing Proceedings

The basic facts of this crime are set out in the opinion of this Court affirming Pace's conviction and death sentence:

> On November 7, 198[8], following a report from the victim's daughter that she had not heard from her father for three days, investigators commenced a

> search for Floyd Covington, a taxicab operator. They found Covington's bloodstained taxicab hidden in a wooded area that evening. Serology testing showed the bloodstains in the car to be consistent with Covington's blood type. A bloodstain pattern analyst testified that the bloodstains showed that someone sitting behind the steering wheel had been shot, with the shot coming from the passenger's side. Based on blood smears, the analyst concluded that the victim was moved from the driver's seat to the passenger's side of the car. Investigators found Covington's body in another wooded area approximately twelve miles from the taxicab on November 10, 198[8]. Covington had been shot twice in the chest, from distances of three to seven feet, with a shotgun. The medical examiner testified that either of the wounds would have cause death and that Covington had been shot two to seven days before the searchers found his body.

Pace v. State, supra at 1034-35.

As for the evidence linking Pace to the murder, the following facts appear from the trial record: On Thursday, November 3, 1988, Pace had told a friend that he was tired of being broke, and that there was something he would do to make money "tomorrow" (4TR 682). Pace was seen with Floyd Covington in his taxicab on the morning November 4, 1988 - the day Covington had disappeared (4TR 668-72). Pace's fingerprint was found on a window in Covington's taxicab (4TR 766-67). Two shotgun shells found in the yard of Pace's home were the same kind used to murder the victim (5TR 894-97, 900), and had been fired from the shotgun Pace had left at May Green's house after the murder (5TR 899). Pace had human blood on his clothing which was the same type as the victim (5TR 788, 799). It also

was the same type as Pace's; however, Pace had no injuries (5TR 790, and had claimed to May Green that the blood was squirrel blood (5TR 710). When confronted by his stepfather, Pace claimed that someone had attacked him in his room and choked him into unconsciousness; that he had awakened in the woods near Floyd Covington's taxi; that there was blood in the taxi; and that Pace's brother's gun lay nearby (5TR 852-54).

At the penalty phase, the State introduced a copy of a judgment of conviction for strong-armed robbery that Pace had committed on December 4, 1981, for which he had received a 15 year sentence (6TR 1037). In addition, the State presented the testimony of probation officer Robert Mann, who testified that Pace was on parole at the time of Covington's murder (6TR 1038-39).

The defense presented five witnesses: Paul Campbell, Hurley Manning, Robert Settles, Evelyn Rich and Lillian Rich.

Paul Campbell was a Santa Rosa County correctional officer who testified that he had been in contact with Pace since his arrest for this murder, and that Pace had been a model prisoner who was extremely cooperative and respectful and had given his jailers "absolutely no trouble whatsoever" (6TR 1041).

Hurley Manning had been head football coach at Milton High School before retiring a year before trial (6TR 1043). He

described Pace as the kind of athlete “you would like to have in the program;” Pace would work, he did what he was told, and he stayed out of trouble (6TR 1044). He had a “very good” relationship with Pace while he was in high school (6TR 1047).

Robert Settles was a home builder, operating out of Milton (6TR 1049-50). He had known Pace over ten years, having first come in contact with him when Settles had been vocational coordinator at Milton High (6TR 1050). Settles went into business for himself and, after Pace graduated from high school, Settles hired Pace to work for him (6TR 1051). Pace did a “super” job for him (6TR 1052). Pace was a “master sawman” who had a lot of potential which he unfortunately had not lived up to (6TR 1054).

Eleanor Louise Rich is Pace’s aunt (6TR 1057-58). She described Pace as a “loving, caring person” (6TR 1059). He helped care for his siblings when his stepfather left, and he helped care for Ms. Rich after she had surgery (6TR 1060-61). Pace came from a good, supportive family (6TR 1062).

Lillian Rich is Pace’s mother (6TR 1063). She testified that, before Pace went to prison in 1981, he had never been in any kind of trouble as a juvenile or as an adult and had never been arrested (6TR 1065). He had worked to help support the

family after his stepfather had left when he was 13 or 14, providing clothes and other needs for his four siblings (6TR 1066-67). She identified photographs dating from his early childhood, as well as various athletic awards Pace had received, along with school records and report cards from elementary, middle and high school (6TR 1069-70). She asked the jury to show her son mercy (6TR 1071-72).

Defense counsel Sam Hall gave the defense closing argument (6TR 1104-19). He argued that the jury's sentencing decision was not a "clinical process;" it was not just about "the law," it was about "human beings" (6TR 1104). He noted that even the prosecutor had acknowledged that Ms. Rich's testimony was "moving" (6TR 1105). In response to the prosecutor's argument that the only mitigation offered was that Pace was a "human being," Hall argued that when you say someone is a human being, you are not saying just that he has a heart and lungs and breathes, you are saying he is a "good person." That, Hall urged, was what Pace's family had said; Pace was a good person with a good heart, a person who had taken care of his family (6TR 1108). Hall pointed out that the State had trusted Pace's family members enough to have used a number of them as witnesses at the guilt phase; they had done what "was right" and now only asked that the jury be fair at the penalty phase (6TR 1105).

Hall argued that the prosecutor had greatly exaggerated how aggravated this murder was; Pace in fact had only one prior conviction of any kind, having otherwise never before been in trouble in his entire life (6TR 1106). He had also been a good athlete and a good employee with great potential (6TR 1113, 1115), and had demonstrated that he behaved himself and was not a threat to others in prison (6TR 1114). Hall pointed out that, if his life were spared, Pace would serve at least a life sentence with no chance of parole for 25 years, and could get a life without parole sentence on the robbery charge (6TR 1115). He appealed to the jury's "compassion" and asked the jury to "do something positive and not something vindictive" (6TR 1116).

The June, 2000 evidentiary hearing

The major focus of Pace's evidentiary presentation was his claim of ineffectiveness at the penalty phase. It was shown that trial counsel had taken numerous statements and depositions while preparing for the guilt and penalty phases of Pace's trial. As the result of their investigations, which indicated, inter alia, that Pace had suffered a blow to the head as a child and had been abusing cocaine prior to murder of Floyd Covington, they obtained the services of two mental health experts, Dr. James Larson and Dr. Peter Szmurlo (12 PCR 2113). Trial counsel provided material to each of these experts, as shown by

Defendant's Exhibit 6 (material furnished by trial counsel to Dr. Larson) and Defendant's Exhibit 28 (material furnished by trial counsel to Dr. Szmurlo).

As shown by Defendant's exhibit 6, Dr. Larson had been given more than two hundred pages of material by trial counsel, including police reports and statements and depositions from Jennifer Wadsworth, Kenneth Bembo, Ms. Lillie Rich, Rayvon Williams, Ella Mae Green, Angela Pace, Melanie Pace, Cynthia Pace, Hilda Pace, Christopher Lee Green, Jeffrey Scott Green, and Michael Angelo Green. After reviewing this material and talking to Pace, Dr. Larson issued a written report (Defendant's exhibit 3, 4th tab from the back) that was highly unfavorable to Pace in many respects, not the least of which was the complete rejection of mitigation.

In his August 21, 1989 written report to Sam Hall (who was trial counsel primarily responsible for the penalty phase), Dr. Larson noted that "we discussed this case several time in considerable detail," including, in particular, Hall's "concern of possible prior head injury and possible neuropsychological impairment associated with the incident for which the defendant is charged." Dr. Larson reported that he had performed a neuropsychological battery as well as other testing to ascertain

his neuropsychological status. In addition, Dr. Larson performed a complete psychological evaluation.

Dr. Larson noted that Pace had told him about a head injury resulting from a blow to the right frontal region of his head with a lead pipe when Pace was 7-8 years old. Pace also reported having migraine headaches. Pace denied experiencing any physical or sexual abuse as a child, although he thought his stepfather was unfair.

Pace reported to Dr. Larson that, following his graduation from high school, he began frequently to use drugs. He especially liked cocaine and liked partying all night long; for three months prior to the murder of Floyd Covington, he had used cocaine almost daily. However, Pace denied using cocaine on the day of or the day before the murder.

Dr. Larson stated in his 1989 report to Sam Hall that he had administered a "Luria-Nebraska Neuropsychological Battery" to Pace, the results of which indicated "normal neuropsychological functioning."

In addition, Dr. Larson administered the Wechsler Adult Intelligence Scale-Revised (which indicated that Pace's IQ was average) and the Minnesota Multiphasic Personality Inventory (MMPI). As to the latter test, a "high reliability index," which is a measure of internal consistency, indicated that the

results were a “reliable and valid measure of his personality functioning.” The MMPI indicated that Pace was a sociopath, was dishonest, boastful, self-centered, irritable, unfriendly and negativistic. Pace was likely to react to frustration with anger and violence, with assaultive, combative or even homicidal potential. Pace’s alcoholism scale was elevated, indicating either an alcohol or drug abuse problem, which Dr. Larson considered to be consistent with the interview information.

Another test, the Leary Adjective Checklist, showed overt and covert hostility.

Ultimately, Dr. Larson found that Pace was free of any major mental disorder. He was of at least average intelligence, and his judgment and memory were “intact.” Addressing potential mitigation, Dr. Larson found “no indication based on this evaluation that the Defendant suffered from any emotional disturbance at the time of the incident for which he is charged,” and found that his “capacity was not impaired.”

As shown by Defense Exhibit 28, material furnished to Dr. Szmurlo by trial counsel included transcripts of statements by Ken McCloud, Ella Mae Green, Lilly Rich, Barry Copeland, Harvey Rich, Donna Frazier, Jennifer Wadsworth, Phillip Brand, Christopher Green, Jeffery Scott Green, Kenneth Bembo and Angela Pace (defense exhibit 28, 12PCR 2023-24). Dr. Szmurlo was

specifically told by Mr. Hall that if he felt that this additional material would be helpful, Hall would be glad to provide same (defense exhibit 28, 12PCR 2040).

Dr. Szmurlo was asked by defense counsel, inter alia, to "determine the presence of any mitigating psychiatric evidence." (July 26, 1989 report of Dr. Szmurlo, contained in Defendant's exhibit 3). Dr. Szmurlo found no indication of organic personality disorder related to any head trauma.

Pace told Dr. Szmurlo he had been using cocaine for the past three months, but had not used cocaine the day of the murder (although he did claim to have used it the night before). Pace told Dr. Szmurlo he had been using $150 worth of cocaine a day, but it only cost him $100 a week because he was "buying for people who were afraid or did not want to do it by themselves." Pace explicitly admitted that he had killed Floyd Covington, alone, and he told Szmurlo how he had disposed of the body and the victim's taxi. Pace described his background and history, including a claim of head trauma while playing football in the fourth grade. Dr. Szmurlo administered neurological screening, which failed "to reveal any signs of organicity." Dr. Szmurlo concluded that Pace had known what he was doing at the time of the crime and that there were no psychiatric problems that could influence a court's sentencing decision "except for a rather

heavy use of cocaine prior to the offense." (July 26, 1989 report of Dr. Szmurlo, part of Defendant's Exhibit 3).

Dr. Larson and Dr. Szmurlo both testified at the postconviction evidentiary hearing.

Dr. Larson, a psychologist, acknowledged that he had examined Pace in 1989, looking for possible mitigation, and had not found extreme mental or emotional disturbance or substantial impairment (9PCR 1739-40). However, he testified that he had re-evaluated his previous opinion in light of affidavits contained in Defendant's exhibit 7 focusing on Pace's cocaine use (9PCR 1742-43), and the PSI from Pace's prior strong arm robbery conviction which showed that Pace had no juvenile criminal history and that the robbery had been a senseless crime committed while Pace was intoxicated (9PCR 1744).

Dr. Larson testified that he was now of the opinion that Pace was under "appreciable emotional distress" at the time of the murder and that, "[a]ssuming that he was drug dependent, . . . he would have impairments to his capacity to conform his behavior to the requirements of the law" (9PCR 1747-48).[1]

Dr. Larson acknowledged on cross-examination that in 1989 he had been provided with a lot of information, that he was

[1] Dr. Larson did not state that he found "extreme" emotional disturbance or "substantial" impairment.

"aware of the extent of [Pace's] drug problem at that time," and that he had felt at the time that he had enough information to evaluate Pace's mental condition accurately (9PCR 1754, 1756-57, 1758). Otherwise, he would sought additional information before delivering his conclusions to trial counsel (9PCR 1759). Dr. Larson acknowledged that there was much in his report that "would not be beneficial to someone in a penalty phase" (9PCR 1758).

Dr. Szmurlo, a psychiatrist, testified at the postconviction hearing that trial counsel had sought his assistance in evaluating Pace for mitigation (11PCR 1871, 1890). He acknowledged that his report (Defendant's exhibit 3) indicates that the reason for referral was to "determine the presence of any mitigating psychiatric evidence" (11PCR 1890). Dr. Szmurlo testified that he understood the simple definition of the word "mitigating" and understood that he was looking for any pre-existing psychiatric condition or for any intoxication or drug use which might have rendered Pace's judgment deficient (11PCR 1877-78). Although Szmurlo had not found mitigation in his original evaluation, he was now of the opinion that the two statutory mental mitigators applied (11PCR 1888). He testified, however, that this change of heart was not due to any new evidence, but to his belief that he had approached his original

evaluation from the "wrong angle" (11PCR 1895). He was looking for any "connectiveness between his intoxication and the crime" when he should have been trying "to provide an explanation why this crime seemed to be out of his character" (11PCR 1895-96).

In addition to Dr. Larson and Dr. Szmurlo, Pace called Dr. Barry Crown (a neuropsychologist) and Dr. Herkov (a psychologist and claimed expert on cocaine addiction).

Dr. Crown testified that, on November 22, 1994 (some six years after the murder), he had administered a neuropsychological battery of tests to Pace, the results of which indicate "organic brain damage (9PCR 1619-21). He acknowledged that testing conducted in 1994 would have indicated Pace's brain functioning at that time; it would only be "probabilistic" as to his brain functioning in 1988 (9PCR 1633). Pace's present impairments include a reduced ability to "shift" smoothly from one task to another (9PCR 1622, 1626), to pay attention and concentrate, especially in the face of distractions (9PCR 1625, 1627), and to draw (9PCR 1628). Dr. Crown acknowledged that Pace functioned normally in many ways, and that many people with Pace's degree of impairment do not commit crimes (9PCR 1633-35). In fact, Pace's "impairments"

could easily be overlooked in a clinical psychological examination (9PCR 1639-40).

Dr. Herkov testified at the postconviction hearing that, in his opinion, Pace is crack cocaine dependent and that the two statutory mental mitigators apply to his crime (9PCR 1708-09). He acknowledged on cross-examination that he had not reviewed Pace's pre-trial statement or the trial transcript and was not familiar with the facts of the murder (9PCR 1712-13, 1715). His opinion was largely based on what Pace had told Dr. Herkov 11 years after the crime (9PCR 1712, 1715). Dr. Herkov admitted that it would have "an effect" on his opinion if Pace had not used cocaine the day of the murder (9PCR 1713).

Kenneth Bembo, Barry Copeland, Melanie Pace, Ella Mae Green, Cynthia Pace and Hilda Pace testified at the evidentiary hearing about Pace's use of crack cocaine. All had been deposed by defense counsel prior to trial and their depositions (excepting only Copeland) had been furnished to Dr. Larson in 1989, as shown by examination of Defendant's Exhibit 6.

Kenneth Bembo, who has a felony conviction for sale of cocaine, testified that Pace was using between $50 and $100 worth of crack cocaine each day (9PCR 1650-55). He testified that when on crack, Pace was nervous and paranoid; he could not "keep still" (9PCR 1653). Asked if Pace was in control of

himself, Bembo answered "no" (9PCR 1653). However, he had "never seen him lose control" (9PCR 1655). Bembo had last seen Pace either Thursday night, Friday night or Sunday night before the murder (9PCR 1658). He was acting "jittery, nervous, paranoia [sic]" (9PCR 1660).[2] Bembo acknowledged on cross-examination that he was not with Pace every day and did not really know how much Pace was spending on crack (9PCR 1667-68).

Pace's cousin **Melanie Pace** testified that Pace's stepfather administered stricter punishment "sometimes" to Pace than to the other children (PCR 1775-76). Pace's grandmother died soon after Pace was released from prison (PCR 1776). When she died, Pace "withdrew" and "stopped taking care of himself" (9PCR 1777). On the morning of the day Floyd Covington disappeared, she saw Pace; he needed a bath and smelled of alcohol (9PCR 1778). She acknowledged having testified in her pre-trial deposition that, when she had seen Pace that morning, he had not

[2] Pace contends in his brief (p. 14) that Bembo testified that Pace appeared to be "strung out on crack" *the night before the victim disappeared*. Bembo, however, never clearly identified the night he last saw Pace; he admitted that he did not know what day the murder occurred, and did not know what Pace did after he last saw him (9PCR 1669-70). Further, while the rest of the assertion is technically correct in the sense that Bembo responded affirmatively to collateral counsel's question, it should be noted that the phrase "strung out on crack" was collateral counsel's, not Bembo's.

appeared to be under the influence of drugs or alcohol (9PCR 1780).

Pace's second cousin **Margaret Dixon** testified that at the end of 1987 she "noticed" that Pace had started using crack cocaine; she could tell by the nervous way he acted (9PCR 1786-87). By the middle to the end of 1988, he was "on it real heavy" (9PCR 1787). She "felt sorry for him," but there was nothing she could do; he spent his time "on the side of" Floyd Covington's place smoking drugs (9PCR 1788).

Barry Copeland testified that he has a number of felony convictions, most of which are drug related (10PCR 1816). He has know Pace all his life (10PCR 1806). Pace began smoking crack cocaine in the late 1980s; Copeland sometimes smoked it with Pace (10PCR 1807). Copeland claimed that Pace was using $300 to $500 worth of crack a day (10PCR 1807). He also drank alcohol, partly to keep the "want" for crack down (10PCR 1810). Pace became "paranoid" from crack cocaine use (10PCR 1808). Copeland saw Pace off and on Tuesday through Thursday, and then again on Friday afternoon, when the two of them smoked crack (10PCR 1811-13). On cross-examination, Copeland acknowledged having given a pretrial deposition in which he had testified that Pace smoked crack, but he did not know whether or not Pace was a heavy user (10PCR 1816). Copeland admitted that he was

doing $300-500 worth of crack a day himself at the time of the murder, paying for it by selling drugs (10PCR 1817).

Ora Kay Jones, Pace's friend since childhood and a convicted felon, testified that she had smoked crack with Pace (10PCR 1820-21). In the week before the murder, Pace had tried to sell her what she believed was probably a stolen VCR (10PCR 1822).

Cynthia Pace, another cousin, testified that after Pace's grandmother died he "got to the point" that he did not keep himself neat and clean (10PCR 1834). She saw Pace the night before the murder in the company of several others; he looked worried (10PCR 1835). She saw him late the next morning, wearing the same clothes he had on the night before; however, he did not appear to be under the influence of either alcohol or drugs (PCR 1836, 1839).

Thomas Hill, who at the time of the hearing was an inmate at Century Correctional Institution for "about four or five different charges," testified that he had seen Pace smoke crack with Booker T. Jones in 1987 and 1988 (10PCR 1842-45).[3]

Trial defense investigator **Jim Martin** testified that he talked to Pace on November 10, 1988 (the day police found

[3] In his brief, Pace references postconviction affidavits by Paula King, Hilda Pace, Angela Pace, Ella Mae Green, and Johnnie "Peewee" Poole. Initial Brief of Appellant at pp 22-26. None of these witnesses testified at the evidentiary hearing.

Covington's body) (11PCR 1909). He tape recorded his interview with Pace (11PCR 1910). Pace confessed to Martin that he had murdered Floyd Covington (11PCR 1910). Pace told Martin that he had shot Covington twice, reloading between shootings (11PCR 1910). Pace did not say that anyone else was involved (11PCR 1911). When Martin took the statement, Pace was "coherent and did not act like he was under the influence of anything at that time" (11PCR 1913).

Martin testified that this was not the first or the last capital case he had investigated (11PCR 1932, 1941). He recalled that police reports mentioned Pace's crack cocaine usage (11PCR 1939). It was not easy, however, to "find people on the street" who would admit buying crack or selling it to a defendant (11PCR 1940). He knew Barry Copeland, and knew that Pace had stayed with him (11PCR 1936). In fact, Barry Copeland was well known in the community as a drug dealer and addict (11PCR 1950). Martin also was aware of Kenny Bembo, Cynthia Pace, Danny Hood, Dawson Rich, and Booker T. Jones (11PCR 1936-38, 1941).

Martin testified that his file, which had been in the custody of collateral counsel for some time, was incomplete and did not reflect all that he did to investigate this case; asked

if there was a “lot missing,” Martin said there was, and “it is not my fault” (11PCR 1950, 1962).

Martin had known Covington and had known Pace from when he had played high school football with Martin’s son; he did not want to believe that Pace had committed this crime by himself, but Martin was unable to find any evidence contrary to Pace’s admission that he had acted alone (11PCR 1952, 1962).

Trial counsel **Randall Etheridge** testified that he was second chair in this case, with primary responsibility for the guilt phase (11PCR 1964-65, 1986). In formulating his defense strategy at the guilt phase, he took into account Pace’s admission of guilt to the defense investigator and to Etheridge himself (11PCR 1987, 2004). Putting on testimony directly conflicting with what counsel knew to be the truth would have put him on an ethical “slippery slope” (11PCR 1988). The defense strategy at the guilt phase basically was to make the State prove its case, and to argue that the evidence was circumstantial and that guilt had not been proved beyond a reasonable doubt (11PCR 1966, 1988).

Etheridge was aware of a letter written by then Assistant State Attorney Kim Skievaski dated June 2, 1989, informing the public defender that Jean Shirah had given a false statement during a deposition in the Tony Dupree case (11PCR 1990).

Etheridge was unaware that the prosecutor had conducted an experiment to see if a fingerprint on the window of Covington's taxi would smudge if the window were rolled down, but Etheridge did elicit on cross-examination of the fingerprint expert that there was no way to age a fingerprint, and elicited other testimony establishing that Pace had been around Covington's taxi on numerous occasions - to explain why his fingerprints may have been on the taxi (11PCR 1976-77, 1991, 1994).

Although Etheridge was not primarily responsible for the penalty phase preparation, he was involved "somewhat" (12PCR 1994). His recollection was that the evidence of the length of time Pace had been using crack cocaine was "kind of vague" (12PCR 1995). Putting on evidence of crack cocaine use at the penalty phase "certainly could be a double edged sword" in Etheridge's opinion (12PCR 1995).

Sam Hall testified that he was the attorney primarily responsible for investigating and presenting the penalty phase case, but was assisted by Etheridge (12PCR 2008, 2014). He was, at the time of Pace's trial, an experienced capital attorney, as was Etheridge. In fact, they had together handled the Tony Dupree case (12PCR 2009-10). Hall was aware that Pace had been struck on the head as a child and that he had a possible history of drug or alcohol use, and had him evaluated by Dr. Larson and

Dr. Szmurlo "to see if there was any brain damage" or other possible mental mitigation (12PCR 2013, 2018-19, 2069). Dr. Larson was an experienced forensic psychologist; Hall has relied on him many times with "a lot of success" (12PCR 2134). Hall testified that it took some effort to find a psychiatrist willing to take the case; in his experience "it is fairly easy to find a psychologist, but not too easy to find a psychiatrist" (12PCR 2020). He talked to several psychiatrists before securing Dr. Szmurlo to evaluate Pace (PCR 2020).

Hall specifically asked both Dr. Larson and Dr. Szmurlo to focus on the possibility of neurological damage of some kind (12PCR 2113-14). Neither Dr. Larson nor Dr. Szmurlo found any sign of organic brain damage, however, and their reports were otherwise unfavorable and damaging to Pace (12PCR 2115-16, 2016-17). In addition, Hall asked both experts to evaluate for any other mitigation. Dr. Larson specifically addressed and rejected statutory mental mitigation (12PCR 2120) Hall asked Dr. Szmurlo "to look at the case from the standpoint of determining any mitigating circumstances which would be presented to the jury to aid them in deciding whether to recommend to the court a sentence of life or death in the electric chair should the jury convict Mr. Pace of first degree murder" (12PCR 2028-29)(Hall, reading from Defendant's exhibit

28). Dr. Szmurlo reported back that he found nothing which would help in the penalty phase; Dr. Szmurlo concluded that Pace was not under the influence of intoxicants and knew what he was doing at the time of the murder (12PCR 2031-33). This conclusion was consistent with what Pace himself had told counsel (12PCR 2033-34, 2036-37). Hall testified that, despite repeated questioning, Pace insisted to defense counsel that he had not been intoxicated at the time of the crime (12PCR 2073). Hall was not going to "beat the bushes" to find witnesses who could say he was intoxicated at the time of the crime when Pace insisted that he was not intoxicated (12PCR 2075).

Asked by postconviction counsel whether Hall would have used Dr. Larson if he had provided two statutory mitigators, Hall answered, "Yes . . . if he had something to back that up with" (12PCR 2016). But in view of the many damaging things in Dr. Larson's report, Hall "would have hesitated to put him on unless I had strong evidence that [Pace] was operating under extreme emotional distress at the time" (12PCR 2016-17). Hall did not doubt that long-term drug abuse could be mitigating, but he did not think such evidence would play well with the jury if you could not link it to the crime; otherwise, proof that the defendant is a drug abuser may very well have a negative impact on a jury (12PCR 2074, 2077).

As for the PSI from the prior conviction for strong-armed robbery, Hall considered this information to be a "two edged sword;" on the one hand, that Pace was under the influence when he committed that crime and showed remorse might be helpful in mitigation, but the fact that Pace was originally charged with armed robbery and attempted murder in a case in which he had hit the victim with an lead pipe and almost killed him would not have been helpful (12PCR 2044-46).[4] Hall would not have wanted a mental health expert to see the PSI, because it would be in the expert's report and would be brought out on cross-examination (12PCR 2046). Hall would not have wanted his experts discussing this before a jury; it was just "too aggravated of a case" (12PCR 2050). The prior crime actually was a "lot more serious than a strong arm robbery" (12PCR 1248-49). It would not have been beneficial for the jury to have a clearer understanding of that crime; better to restrict their information about it to that contained in the State's bare-bones presentation so that, for all the jury knew, Pace had simply snatched someone's purse (12PCR 2048-09). Nor would Hall have wanted the PSI's detailed information about the prior robbery

[4] According to the PSI (Defendant's exhibit 27), Pace assaulted a gas station attendant with a lead pipe during a robbery; the victim described the assault as "uncalled for" and felt that he would have died had he not received immediate medical attention (12PCR 2045).

presented to a judge; in Hall's view, a judge would "pick up on it probably quicker than a jury would" that the prior crime was "really a first degree felony instead of a second degree felony" (12PCDR 2051). He thought a judge would consider this "pretty serious stuff" and would prefer the judge not to know it (12PCR 2052-53). In all, the seriousness of the prior crime as shown by the prior PSI outweighed any potential mitigation contained therein (12PCR 2052).

Hall's penalty phase strategy was "basically to try to tell the jury that Bruce Pace was somebody that had a life, [was] a human being, he should be saved." He had good qualities; he had helped raise his siblings, he was a good employee, and he was a good athlete who was well thought of by his coach. Even though he had a prior strong-armed robbery conviction, the murder was out of his ordinarily non-violent character; he could live in prison and not be a threat to anyone (12PCR 2122-23). Hall testified that the problem with presenting evidence of drug addiction was that it was inconsistent to "[p]ut on all this good stuff to show what a good person he is, and then also, ladies and gentlemen, also by the way, he is [a] drug addict and a drug user" (PCR 2123). All things considered, including the absence of expert testimony that might have tied Pace's cocaine

usage to any mitigating circumstances, Hall thought the cocaine usage "was a negative" (12PCR 2124-25).

Hall testified that he and Etheridge represented Tony Dupree and was aware that sheriff's deputy Jean Shirah had "got in some kind of trouble" for giving false testimony in a deposition in that case, although he may not have known about the "reprimand" per se (12PCR 2085, 2104, 2106).[5] He would not have used this information to try to impeach her in this case unless her testimony was something "really important" (12PCR 2109-10).

Finally, former Assistant State Attorney, now Circuit Judge **Kim Skievaski**, testified about the so-called smudge report and the Shirah reprimand (12PCR 2091). Judge Skievaski was aware that Pace's fingerprint was found on a window of Floyd Covington's taxi, but that Pace had legitimate reasons to have been around the taxi and that latent prints can exist for a long time (12PCR 2093-94). So he tried to determine whether a print on the window of Covington's taxi would smudge if the window were rolled down; it did not (12PCR 2094). If it had smudged, it would have been something he could have argued to rebut testimony that fingerprints can "exist for months," but since it

[5] According to State's exhibit 2, Shirah had stated that she had read the consent to search to LeAnn Spencer; in fact deputy Allen had read the consent to search in Shirah's presence (12PCR 2105-06). Also, Shirah herself had not seized "the boots listed on the Consent to Search" (12 PCR 2106).

did not, the test was “of no value” (12PCR 2100). He did not regard the test to have inculpatory or exculpatory value; it was “a wash” (12PCR 2094). As for deputy Shirah, Judge Skievaski testified that the issue came up when Shirah came to his office and admitted she had “given incorrect information in her deposition” (12PCR 2095). Shirah had testified that she had collected a particular exhibit during a search when in fact the item had been collected by another officer (12PCR 2095). Judge Skievaski immediately gave this information to the Public Defender’s Office (12PCR 2096).

SUMMARY OF ARGUMENT

Pace presents six issues on appeal:

1. The circuit court properly rejected Pace's claim that trial counsel were ineffective failing to investigate and present evidence of Pace's mental condition and abuse of crack cocaine, or to investigate and present evidence of his allegedly abusive childhood. The record shows that trial counsel did investigate the issue of Pace's mental condition, including possible drug use. Counsel were well aware from talking to Pace, from reviewing police reports and witness statements, and from conducting numerous depositions that Pace had suffered a head injury when he was a child and had been abusing crack cocaine for several years. They were fully aware of the need to explore his mental condition and secured the services of two mental health experts: Dr. James Larson, an experienced psychologist; and Dr. Peter Szmurlo, a psychiatrist. Dr. Larson administered well-accepted neurological tests, and Dr. Szmurlo administered neurological screening. Both experts were aware of Pace's background, including his heavy drug usage, but neither expert found any organic impairments (i.e., brain damage). Dr. Larson did find some indication of personality disorder, but nothing significant except that he was a drug abuser. Likewise, Dr. Szmurlo found nothing significant in mitigation except for

heavy use of drugs. The reports of experts contained negative information that trial counsel explained they would not have wanted the jury to know. Furthermore, both experts concluded that Pace was not intoxicated at the time of the crime and knew what he was doing. Trial counsel was of the view that if Pace's drug abuse could not in some way be tied to the crime, proof that he had been abusing illegal drugs (and committing crimes to pay for his habit) would have been more harmful than helpful. Instead of trying to prove that Pace was a brain-damaged crackhead, they chose to portray him as person from a good family in Santa Rosa County, who had good qualities, had helped raise his siblings, had been a good athlete, was a good employee, and who was basically a good, nonviolent person who deserved mercy and who would not pose a threat to society in prison. While not every counsel would have chosen this strategy, it was not unreasonable, and Pace has failed to demonstrate that his present theory would have worked any better.

The circuit court correctly found that Pace had failed to establish that his childhood was abusive, or that his personality changed for the worse after the death of his grandmother. The court also correctly concluded that presenting evidence that Pace had been intoxicated during the prior robbery

used by the State in aggravation would have opened the door to the presentation of harmful details of the prior robbery (Pace had nearly beaten the victim to death with a lead pipe) which trial counsel had managed to keep from the jury.

2. Pace's claim that trial counsel were ineffective for failing to present a defense of involuntary intoxication was not timely raised, and is meritless. Even now, his own experts are of the opinion that Pace knew what he was doing at the time of the murder.

3. The circuit court correctly determined (a) that trial counsel were fully aware of all relevant information concerning the testimony of deputy Shirah in an unrelated case and that no suppression has been shown, and (b) that the prosecutor's fingerprint smudge test was not material.

4. The prosecutor did not impermissibly comment on Pace's right not to testify. The prosecutor's closing argument clearly was permissible comment on statements Pace made *before his arrest*, and properly focused on the inconsistencies and omissions in those statements.

5. Pace's Ring v. Arizona claim is procedurally barred and meritless.

6. Pace's Chapter 119 claim is procedurally barred because he never obtained a ruling from the circuit court on the records

demands he is complaining about on appeal. Furthermore, by his conduct in failing to raise any public records issue for two and a half years, Pace has waived any complaints about public records.

ARGUMENT

ISSUE I

THE CIRCUIT COURT CORRECTLY DETERMINED THAT PACE HAS FAILED TO ESTABLISH THAT TRIAL COUNSEL WERE INEFFECTIVE AT THE PENALTY PHASE

The applicable principles of law relating to claims of ineffective assistance of counsel are well settled. This Court recently summarized them in Spencer v. State, 27 Fla. L. Weekly S323, S324-25 (Fla. April 11, 2002):

> In order to prevail on a claim of ineffective assistance of trial counsel, a defendant must demonstrate that (1) counsel's performance was deficient and (2) there is a reasonable probability that the outcome of the proceeding would have been different. See Strickland v. Washington, 466 U.S. 668, 687, 694 (1984). A reasonable probability is a probability sufficient to undermine confidence in the outcome. See id. at 694. In reviewing counsel's performance, the court must be highly deferential to counsel, and in assessing the performance, every effort must "be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." Id. at 689; see also Rivera v. Dugger, 629 So. 2d 105, 107 (Fla. 1993). As to the first prong, the defendant must establish that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Strickland, 466 U.S. at 687; see also Cherry v. State, 659 So. 2d 1069, 1072 (Fla. 1995). For the prejudice prong, the reviewing court must determine whether there is a reasonable probability that, but for the deficiency, the result of the proceeding would have been different. See Strickland, 466 U.S. at 695; see also Valle v. State, 705 So. 2d 1331, 1333 (Fla. 1997). "Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process

> that renders the result unreliable." Strickland, 466 U.S. at 687.

Pace primarily contends here that trial counsel were ineffective for failing to "discover and present" what postconviction counsel describes as "readily available evidence" of Pace's crack cocaine addiction which, postconviction counsel claim, would have established two statutory mitigators. Although Pace acknowledged below that the pretrial reports of Dr. Szmurlo and Dr. Larson were "unflattering," (6PCR 1084), he argues that the fault lay with trial counsel because their investigation was inadequate and because they failed to present sufficient information to their two experts, Dr. Larson and Dr. Szurlo. It is the State's response that trial counsel performed an amply sufficient investigation into possible mental health mitigation, having secured the services of two mental health experts, one a PhD psychologist and the other a psychiatrist, and having provided those experts with considerable relevant background information. That mere fact that Pace has, many years after trial, found experts who can now give more favorable testimony, based on information from witnesses who have not been shown to be available to testify even now, much less at the time of the trial, or from witnesses who have changed their story since the time of the trial, does not establish that trial counsel were ineffective.

Pace has failed to demonstrate that trial counsel failed to conduct an adequate investigation or to deliver sufficient material to the experts. Defendant's Exhibit 6 shows that trial counsel had deposed numerous witnesses and had obtained numerous witness statements from the State. These depositions and statements tended to corroborate Pace's own statements to defense counsel that he had been using cocaine heavily in the months leading up to the murder. This information was disclosed to Dr. Larson. Furthermore, regardless of what may have been furnished by trial counsel to Dr. Szmurlo, he was not unaware of Pace's cocaine use. In fact, he reported that Pace was using $150 worth of cocaine a day. Although Dr. Szmurlo now has a different view of mitigation, he does not attribute his original diagnosis to an insufficiency of information delivered to him by defense counsel. Instead, he simply would evaluate the case from a different perspective. Likewise, in Dr. Larson's view, any evaluation is subject to revision (TR 174). Dr. Larson testified that, at the time he rendered his pre-trial report, he felt that he had been given enough information to evaluate Pace's mental condition. However, in re-evaluating this case 11 years later, he found "particularly helpful" the affidavits in defendant's exhibit 7, all of which were executed just a few

weeks before the hearing, and also the PSI from the 1981 robbery.

Several of these recent affiants did not testify at this hearing, and thus postconviction counsel not only have failed to demonstrate that they were reasonably available in 1989, but have not proved what they would say, as affidavits are not admissible substantively absent the stipulation of the parties and there was no stipulation in this case (TR 491-94). Routly v. State, 590 So.2d 397, 401 (fn. 5)(Fla. 1991) ("Absent stipulation or some other legal basis, we cannot see how the affidavits can be argued as substantive evidence."). The recent affiants not testifying at this hearing include Paula King, Johnnie Poole, Ella Mae Green and Hilda Pace.

Moreover, many of the affiants in defense exhibit 7 had given pretrial statements and depositions which had been furnished to Dr. Larson and were reviewed by him when he came to his original conclusion that there was no mitigation. These affiants include Melanie Pace, Ella Mae Green, Cynthia Pace and Hilda Pace. Compare the affidavits behind the last tab of defendant's exhibit 7 with the materials in defendant's exhibit 6. Trial counsel delivered to Dr. Larson information from these witnesses, and cannot be faulted for failing to deliver to Dr.

Larson information contrary to the affiants' previous statements which they only revealed just this year.[6]

Additional witnesses that Pace contends had information that should have been furnished to Dr. Larson include Kenneth Bembo and Barry Copeland. However, Bembo's testimony at the postconviction hearing is consistent with the sworn statement he gave to police (first tab of defendant's exhibit 6), *which was provided to Dr. Larson in 1989*. Barry Copeland's pre-trial deposition, on the other hand, apparently was not furnished to Dr. Larson, but Pace cannot demonstrate that it would have made a difference to Larson's evaluation, since Copeland testified at his deposition that at the time of the murder he had not seen Pace in at least a week and did not know if Pace was a heavy crack user (TR 225).[7]

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[6] Both Cynthia Pace and Melanie Pace testified in their depositions that they had seen Pace the morning of the day of the murder and he had not appeared to be drunk or under the influence of drugs (p. 12, deposition of Melanie Pace; pp. 21-23, deposition of Cynthia Pace). Ella Mae Green testified in her deposition that she had seen Pace on Saturday and he had not appeared to be under the influence of drugs or alcohol then (pp. 15-16 of her deposition, defendant's exhibit 6). Hilda Pace testified in her deposition that she had seen Pace a couple of days before the murder and he had not been under the influence of alcohol or drugs then; further, although she had heard that Pace had been doing drugs, she had not seen it herself (pp. 7-8 of her deposition, defendant's exhibit 6).

[7] Copeland had stated to police that, when he saw Pace on Friday (presumably the same Friday the murder was committed), he

At the time of their original evaluations, Dr. Larson, and Dr. Szmurlow as well, knew that Pace had been using crack cocaine, because Pace told them so, and trial counsel provided information to them that corroborated Pace's self-report. Notwithstanding their knowledge of Pace's crack cocaine usage, neither mental health expert found any significant mental health mitigation in their original evaluations of Pace. Further, as the trial court noted in its order, "neither expert believed at the time of the original evaluation that they had inadequate information to render a diagnosis nor requested additional information from counsel" (7PCR 1179). It was not unreasonable for trial counsel to expect that the experts would have asked for more information if, in their opinion, such was necessary.[8]

Pace also faults trial counsel for relying on Dr. Larson to assess possible brain damage because he is not a neuropsychologist. Initial Brief at 30. However, Dr. Larson

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had not seen Pace in a week, and before that had not seen him "in five years at least." Copeland statement, p. 8 (see Defendant's Exhibit 3). In his deposition, he said that when he saw Pace on Friday, it had been a "couple of weeks" since he had last seen him. Copeland deposition, p. 8 (see Defendant's Exhibit 3).

[8] One would think that if either of these experts lacked sufficient information to render a valid opinion, he would have said so then, not eleven years later.

administered a “Luria-Nebraska Neuropsychological Battery” to Pace, the results of which indicated “normal neuropsychological functioning,” while Dr. Smurlo administered neurological screening which failed “to reveal any signs of organicity.” The literature indicates that the Luria-Nebraska Neuropsychological Battery is one of the two most widely used and prominent approaches to neuropsychological assessment; in addition there is an array of “process” approaches. Lezak, M.D. (1995), Neuropsychological Assessment, New York, NY, Oxford University Press. Even within these approaches, there are a variety of different interpretive strategies for use with these batteries. Ibid. Pace has failed to show that either Dr. Larson, who is an experience forensic clinical psychologist, or Dr. Szmurlo, who is a psychiatrist, was unqualified to conduct a neurological assessment, or that trial counsel performed deficiently in relying on their assessments.[9] That Dr. Crown reached a different conclusion than Dr. Larson and Dr. Szmurlo may be a consequence of the five years that elapsed between the first two evaluations and his, or it may simply illustrate the validity of the criticism that “psychiatry is at best an inexact science,

[9] It seems obvious that neither Dr. Larson nor Dr. Szmurlo thought at the time that they were incompetent to conduct a neurological evaluation. Pace has not explained why trial counsel should have questioned their competence.

if, indeed, it is a science, lacking the coherent set of proven underlying values necessary for ultimate decisions on knowledge or competence." United States v. Byers, 740 F.2d 1104, 1167 (D.C. Cir. 1984)(Bazelon, J., dissenting)(quoting Suggs v. LaVallee, 570 F.2d 1092, 1119 (2d Cir. 1978)(Kaufman, J., concurring). See also Joseph D. Mattarazzo, Computerized Clinical Psychological Test Interpretation, 41 Am. Psychologist 14, 20 (1986) ("Clinical psychology today is still an art based on some scientific background and not a mature science. . . . Psychological Assessment is currently almost exclusively the still-to-be-well-validated work of a legislatively sanctioned, clinician-artisan."); Radomisli & Karasu, Medical and Nonmedical Models in Clinical Practice and Training, 31 Amer. J. Psychotherapy 116, 118 (1977)(claiming that mental health experts cannot yet accurately distinguish between organic disorders and those resulting from social and psychologic stress).

Furthermore, Dr. Crown's brain-damage testimony must be put into perspective. Cutting through the jargon, the only impairments he identifies are that Pace has a reduced ability to shift smoothly from one task to another, to pay attention and concentrate in the face of distractions, and to draw. Dr. Crown acknowledged that Pace functions normally in many ways, and that

his impairments are so mild that they could easily be overlooked in a clinical psychological evaluation. This testimony hardly establishes that the pretrial evaluations by Dr. Larson and Dr. Szmurlo were inadequate, and it is difficult to discern any prejudice in any event.[10]

Dr. Herkov's testimony is also problematic. He admitted he doesn't know the facts of the crime and had not reviewed the trial transcript (TR 121, 124). He also did not review Pace's statement to defense investigator Martin (TR 122). Furthermore, he acknowledged that his opinion was based on an assumption that Pace had used crack cocaine the day of the crime; if Pace had not, his opinion would be affected (TR 122). See Walls v.

[10] The State would note that Dr. Crown has a habit of finding brain damage several years after trial where the mental health experts at trial failed to find brain damage or psychological problems. To the State's knowledge, no capital defendant has ever received a new trial on the basis of Dr. Crown's testimony. See, e.g., Commonwealth v. Henry, 706 A.2d 313(Pa. 1997)(Dr. Barry Crown "discovered" brain damage that had been overlooked by three noted mental health experts at trial; no ineffectiveness of trial counsel for failing to "discover" Dr. Crown); Asay v. State, 760 So.2d 974 (Fla. 2000)(court rejected claim of ineffectiveness of counsel despite posttrial finding of brain damage by Dr. Barry Crown that went undetected by original penalty phase psychiatrist; Crown was unfamiliar with facts of crime and his diagnosis was speculative at best); Kokal v. State, supra (ineffectiveness of counsel claim rejected despite postrial finding of brain damage by Dr. Barry Crown which the original defense psychiatrist had failed to detect); Jones v. State, 732 So.2d 313 (Fla. 1999)(ineffectiveness of counsel claim rejected despite postrial finding of brain damage by Dr. Barry Crown which the original defense psychologist had failed to detect).

State, 641 So.2d 381, 390-91 (Fla. 1994) (expert opinion testimony "gains its greatest force to the degree it is supported by the facts at hand, and its weight diminished to the degree such support is lacking"). Of all the witnesses Pace has presented, only convicted drug dealer Barry Copeland has ever said that Pace smoked crack the day of the murder, and his various statements are not only inconsistent in this respect with what Pace himself told his attorneys, but are internally inconsistent in numerous respects (e.g., he was with Pace in the days leading up to the murder, he hadn't seen Pace in over a week; Pace is a heavy crack user, he doesn't know if Pace is a heavy user).

This is not a case in which counsel "never attempted to meaningfully investigate mitigation," Rose v. State, 675 So.2d 567, 572 (Fla. 1996), or where counsel's investigation was "woefully inadequate." Hildwin v. Dugger, 654 So.2d 107, 109 (fla. 1995). Trial counsel retained **two** mental health experts and explicitly asked them to look for mental mitigation. While trial counsel has a duty to conduct a reasonable investigation, counsel is not required to follow every possible path until it bears fruit or all hope withers. Gates v. Zant, 863 F.2d 1492 (11th Cir. 1989). Trial counsel is required only to conduct an

investigation that is reasonable under the circumstances. Ibid.

In Asay v. State, 769 So.2d 974 (Fla. 2000), this Court said:

> [I]n those cases where counsel did conduct a reasonable investigation of mental health mitigation prior to trial and then made a strategic decision not to present this information, we have affirmed the trial court's findings that counsel's performance was not deficient. See Rutherford [v. State], 727 So.2d [216] at 223 [(Fla. 1998)]; Jones [v. State], 732 So.2d [313] at 317 [(Fla. 1999)]; Rose v. State, 617 So.2d 291, 293-94 (Fla. 1993). This case is similar to Jones, where the defendant had been examined prior to trial by a mental health expert who gave unfavorable diagnosis. As we concluded in Jones, the first evaluation is not rendered less than competent "simply because appellant has been able to provide testimony to conflict" with the first evaluation. 732 So.2d at 320; see Rose, 617 So.2d at 295. Also instructive is our opinion in Rose, where a psychologist advised trial counsel prior to the penalty phase that the defendant suffered from antisocial personality disorder and ruled out the possibility of an organic brain disorder. 617 So.2d at 294. In both Rose and Jones, we affirmed the trial court's finding that counsel had made a reasonable tactical decision not to further pursue an investigation of mental health mitigation evidence after receiving an initial unfavorable diagnosis. [cits]

Here, as in Asay, "trial counsel had conducted a reasonable investigation into mental health mitigation evidence, which is not rendered incompetent merely because the defendant has now secured the testimony of a more favorable mental health expert."

Not only did counsel conduct a reasonable investigation, but counsel's decision not to emphasize Pace's drug problems and criminal activity was eminently reasonable. It should be noted

that in order to present mitigation based on crack cocaine addiction, counsel would have had to show the jury that: (1) Pace hung around with convicted felons like Barry Copeland (a notorious drug dealer), Kenneth Bembo, Ora Kay Jones and Thomas Hill; (2) Pace spent more on drugs than he legitimately could earn; and (3) Pace supplemented his income by dealing drugs and stealing. While it is true that drug addiction can be mitigating, it is also true that theft and possession and sale of crack cocaine are serious crimes and that evidence demonstrating that a defendant has committed these serious crimes may adversely affect the jury's opinion of the defendant's character. Moreover, in this case, counsel would have been unable to show that Pace got involved with drugs as the result of an impoverished or abusive childhood, or as the result of a lack of moral guidance during his formative years. The evidence in this case, considered in toto, establishes that Pace had no juvenile record, was able to play sports in high school, graduated from high school, was a talented carpenter, and only became involved with cocaine when he was around 26 years old (12 PCR 2121-22). A jury could well conclude that Pace was old enough to know better and had no real excuse for becoming involved with cocaine to start with, and have little sympathy with (and possibly considerable antipathy for) his

addiction in the circumstances of this case. Any theory of mitigation based on crack cocaine addiction would be, as trial counsel acknowledged, a "two-edged sword," admissible in mitigation and possibly helpful, but also potentially harmful. See Gorby v. State, 27 Fla. L. Weekly S315 (Fla. April 11, 2002)("attorney's reasoned tactical decision not to present evidence of dubious mitigating value does not constitute ineffective assistance").

Present counsel have not demonstrated that their mitigation theory that Pace-is-a-brain-damaged-crackhead would have been more effective than trial counsel's defense that Pace is basically a good person from a good family who committed an act which is an aberration in an otherwise unremarkable and decent life. These two theories of mitigation are not compatible; by choosing one, the other of necessity has to be rejected. Pace is simply indulging in the kind of after-the-fact second guessing of trial counsel that Strickland counsels us to avoid. The original mitigation theory having failed (barely), Pace now presents another. What he has not done, however, is establish that the choice made by trial counsel was unreasonable. He also has failed to demonstrate prejudice.[11] Although Pace points to

[11] With regard to the decision not to present evidence of Pace's drug use, the circuit court found that, since "counsel's performance was not deficient, it is unnecessary to determine

the 7-5 jury recommendation as evidence that if only trial counsel had pursued postconviction counsel's theory of mitigation, the jury would have recommended a life sentence, the State would suggest that if the jury had learned of Pace's habitual crack use and all-night partying with convicted felons and drug dealers, spending more on drugs than he could earn legitimately and committing crimes to support his habit, the jury would have recommended death by a greater margin.[12]

Likewise, Pace has failed to demonstrate that was unreasonable for counsel not to have attempted to buttress an addiction theory of mitigation by trying to show that Pace had been intoxicated when he committed the crime for which he was on parole at the time of the Covington murder. Such an attempt would have opened the door for the State to flesh out the details of the prior crime, and would have disclosed to the jury

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whether the Defendant was prejudiced by counsel's actions" (7PCR 1183). While this is a correct analysis, see, e.g., Stewart v. State, 801 So. 2d 59, 64-65 (Fla. 2001), the State will argue that, based on the facts found by the circuit court, Pace has also failed to demonstrate prejudice. That legal conclusion may be addressed de novo by this Court. Stephens v. State, 748 So.2d 1028, 1033 (Fla. 2000).

[12] It should be noted that the negative aspects of the pre-trial reports by Dr. Larson and Dr. Szmurlo do not disappear simply because they now have a more defense-favorable view of mitigation. Presentation of their present testimony would have the same negative repercussions that discouraged trial counsel from using them in the first place.

the fact that Pace had nearly beaten the victim to death with a lead pipe during a robbery.

Finally, Pace argues that trial counsel should have presented evidence of Pace's unpleasant and abusive childhood, as well as personality changes he had undergone following the death of his beloved grandmother. However, while Pace's childhood may not have been totally pleasant, he cannot even now demonstrate that his childhood was abusive.[13] Furthermore, such evidence would have been contradictory to evidence trial counsel did present that Pace was a good kid from a good family. As for the grandmother's death, it occurred several years after Pace had almost killed someone by hitting him on the head with an iron pipe during a robbery - a fact which trial counsel surely did not want to emphasize, and which contradicts any theory that Pace's violent behavior was precipitated by a personality change following her death. Pace has demonstrated no deficient attorney performance here, or any reasonable probability that this evidence would have affected his sentence.

ISSUE II

[13] In its order, the trial court found: "Cynthia and Melanie [Pace] only provided a cursory description of the relationship Pace had with his stepfather. However, their descriptions fail to establish an abusive childhood . . . ." (7PCR 1184).

THE CIRCUIT COURT CORRECTLY REJECTED PACE'S CLAIM THAT TRIAL COUNSEL WERE INEFFECTIVE AT THE GUILT PHASE FOR FAILING TO PRESENT A VOLUNTARY INTOXICATION DEFENSE

Pace argues here that the circuit court erred in denying Pace's claim that trial counsel were ineffective for failing to pursue a voluntary intoxication defense.

The State would note that Pace first raised this particular claim of ineffectiveness of trial counsel for the first time after evidentiary hearing in his written closing argument after evidentiary hearing on the sixth incarnation of Pace's motion for postconviction relief. The State objected to consideration of this claim in its post-hearing written argument, arguing that it was time barred (6PCR 1110-11). The State again objects to consideration of this claim. Pace had ample opportunity to raise this claim based on what he knew long ago and has failed to offer any justification for failing to raise the claim in a timely manner. McConn v. State, 708 So.2d 308, 310 (Fla. 2nd DCA 1998) (en banc) ("We believe that a request to amend a motion which contains new grounds for relief should be handled in the same manner that the court would consider a successive motion under the rule.").

This Court recently reiterated that a "defendant may not raise claims of ineffective assistance of counsel on a piecemeal basis by refining his or her claims to include additional

factual allegations after the postconviction court concludes that no evidentiary hearing is required." Vining v. State, No. SC99-67 (Fla. July 3, 2002). Pace raised a claim of ineffective asistance of counsel at the guilt phase in his amended postconviction motion, in which he alleged that trial counsel failed to present evidence that another person was a participant with Pace in the murder of Floyd Covington. This claim was addressed and rejected in the circuit court's order denying relief (7PCR 1166-68), and Pace does not complain about that ruling on appeal. Nowhere in his motion did Pace contend that trial counsel should have raised a voluntary intoxication claim. If Pace wanted to raise such a claim, he should have done so in his motion. Vining, slip opinion at 16 ("Where a previous motion for postconviction relief has raised a claim of ineffective assistance of counsel, the postconviction court may summarily deny a successive motion which raises an additional ground for ineffective assistance of counsel.").

Although the circuit court rejected this claim on the merits without addressing the bar, the State would again urge the procedural bar under the right-for-any-reason rule of Caso v. State, 524 So.2d 422 (Fla. 1988)(holding that a judgment may be affirmed on the basis of an alternate theory supporting the judgment). The circuit court's judgment denying this claim may

be affirmed not only on the ground relied on by the circuit court, but also on the basis of a ground not addressed by the circuit court, i.e., the claim was presented well outside the time limit provided by rule and Pace failed to demonstrate any justification or excuse for the delay.[14]

There is another reason not explicitly addressed by the trial court which justifies the denial of relief. As the trial court noted (7PCR 1170), Section 775.051, Fla. Stat. (1999) eliminated the voluntary intoxication defense effective October 1, 1999. That being the case, any deficient performance by trial counsel *cannot* be prejudicial under Strickland. Under Lockhart v. Fretwell, 506 U.S. 364 (1993), Pace simply cannot obtain a new trial on the basis of the failure to raise an issue (i.e., to present a voluntary intoxication defense) that he would not be able to raise at any retrial.

Finally, the trial court's rejection of the claim on the merits is amply supported by the record. The evidence available to trial counsel, including Pace's own representations to them that he was not intoxicated at the time of the murder, failed to

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[14] Although Pace's claim here is patently meritless, the State nevertheless insists on the procedural bar. Rules are rules, and the State would appreciate having timely notice of claims a defendant intends to raise. It would be different if Pace had offered any justification for belatedly raising this claim, but he has not.

establish that Pace was so intoxicated that he was unable to form the intent to kill. Linehan v. State, 476 So.2d 1262, 1264 (Fla. 1985). Even now, Pace has not presented evidence that would support a voluntary intoxication defense; in fact his own addiction specialist, Dr. Herkov, is of the opinion that Pace "clearly . . . knew what was going on (9PCR 128). In these circumstances, Pace would not have been entitled to an instruction on voluntary intoxication if counsel had asked for it. Spencer v. State, supra (because there is no defense of diminished capacity, trial counsel cannot be ineffective for failing to present evidence of such at the guilt phase).

Moreover, a voluntary intoxication defense is an affirmative defense, the practical effect of which is "confession and avoidance." See State v. Cohen, 568 So.2d 49, 51-52 (Fla. 1990) (an affirmative defense "assumes the charges to be correct but raises other facts that, if true, would establish a valid excuse or justification or a right to engage in the conduct in question. . . . In effect, an affirmative defense says, 'Yes, I did it, but I had a good reason."). The assertion of a voluntary intoxication defense would effectively have undermined any persuasive alternative argument concerning insufficiency of the evidence. Thus, trial counsel would have had to abandon their reasonable-doubt defense in a case in which there were no

eyewitnesses to the murder, no confession, and only circumstantial evidence of guilt, and admit that Pace had killed Floyd Covington. Their decision not to do so cannot be described as unreasonable.

In fact, postconviction counsel has failed to present any evidence that Pace would have agreed to such a tactic, and it is a very large assumption indeed that Pace would have sanctioned a voluntary intoxication defense, especially where he had told defense counsel and the defense mental health experts that he had not used cocaine the day of the crime, was not intoxicated and knew what he was doing (9PCR 1684, 1713-14; 12PCR 2033-34, 2073).

For all these reasons, the circuit court did not err in rejecting Pace's claim that trial counsel were ineffective at the guilt phase of his trial for failing to present a voluntary intoxication defense.

ISSUE III

THE CIRCUIT COURT CORRECTLY REJECTED PACE'S BRADY CLAIMS

Pace claimed that the prosecution withheld materially exculpatory information from his trial counsel in violation of

Brady v. Maryland, 373 U.S. 83 (1963). This Court recently stated:

> "To be entitled to relief under Brady, a defendant must satisfy three elements: '[1] The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; [2] that evidence must have been suppressed by the State, either willfully or inadvertently; and [3] prejudice must have ensued.' Way v. State, 760 So.2d 903, 910 (Fla.2000) (quoting Strickler v. Greene, 527 U.S. 263, 281-82, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999))."

Stewart v. State, 801 So.2d 59, 70 (Fla. 2001). Although due diligence is not an express part of this test, nevertheless, there is no Brady violation when the information is equally accessible to the defense and the prosecution or where the defense either had the information or could have obtained it through the exercise of due diligence. Ibid. (citing Provenzano v. State, 616 So.2d 428, 430 (Fla. 1993)). If the defendant knew of the evidence or actually was in possession of it, the prosecution simply cannot be said to have withheld the information from the defendant. Occhicone v. State, 768 So.2d 1037, 1042 (Fla. 2000).

Furthermore, the allegedly suppressed information must be ***material***; to be material, the suppressed information must at the very least be (a) admissible evidence, or (b) something that demonstrably would have led to admissible evidence. Williamson v. Moore, 221 F.3d 1177, 1183 (11th Cir. 2000). Speculation

about what might have been discovered is insufficient to demonstrate materiality. Ibid (citing Wright v. Hopper, 169 F.3d 695, 703 (11th Cir. 1999)).

Pace complains about the failure of the prosecution to disclose a "Shirah reprimand," and a "smudge report."

1. "**Smudge report**"

The State would rely on the circuit court's order on this issue:

> The defendant alleges that the State failed to disclose the results of a fingerprint smudge experiment (hereafter the "smudge report") in violation of Brady. On August 22, 1989 (the second day of jury selection), [then Assistant State Attorney] Skievaski directed Officer L.L. Daniels to conduct an experiment to determine if fingerprints on the window of Covington's taxi would smudge if the window were rolled down. The test revealed that the prints did not smudge. (Def.'s Ex. 15). Skievaski testified at the evidentiary hearing that he did not believe the results of the smudge test were material and he did not provide them to defense counsel. (EH at 502-503) The Defendant contends that the State's nondisclosure of the smudge report undermined the outcome of his trial because the information within the report was exculpatory and would have assisted the defense in rebutting the State's argument that Pace left the pring on the window when he took Covington's cab.
>
> At the Defendant's trial, the evidence revealed the existence of one latent print attributable to Pace on the exterior of the driver's side window of Covington's cab. (Trial Trans. 641-642, 766-767). Defense counsel diminished the evidentiary value of this print by eliciting testimony that Pace occasionally worked for Covington and had often ridden in his cab (Trial Trans. 596; 684-688). In addition,

> the State's expert conceded that there is no scientific method to determine the age of a print and a print can remain on a surface for an indefinite period of time under ideal conditions. (Trial Trans. 768, 7720773). Thus, the fingerprint evidence alone failed to establish a sufficient link between the Defendant and the murder of Covington.* Given the weakiness of the fingerprint evidence, a report that indicated that a print would not smudge if the window were rolled down is of little significance. Consequently, the Defendant has failed to demonstrate that the withheld evidence was sufficiently exculpatory to have affected the outcome of the trial. See Cherry[v. State], 659 So.2d [1069] at 1073 [Fla. 1995].
>
> * Examples of more substantial evidence linking Pace to the crime are the following: witnesses placed the Defendant in Covington's cab on the morning of the murder, Pace had possession of the shotgun believed to be the murder weapon, the Defendant had human blood that matched the victim's blood type on his clothing the day of the murder, and witnesses placed the Defendant near the location where the cab was dumped after the murder.

(7PCR 1188-89). The State would add only that if the report were not material, then the prosecutor was under no duty to disclose it to the defense. Moreover, if he was under such duty, the failure to disclose was not prejudicial, as it cannot "reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." Occhicone v. State, supra, 768 So.2d at 1041 (internal quotes and citations omitted).

2. "**Shirah reprimand**"

Pace contends here that the State violated Brady by failing to disclose that Deputy Jean Shirah had been issued a written reprimand for giving false information under oath in an unrelated case involving a defendant named Dupree. However, it is undisputed that the State Attorney had written a letter informing the Public Defender that deputy Shirah had given false statements in the Dupree case (State's Exhibit 2), and that both trial counsel in this case were aware of the information contained in the letter (11PCR 1990, 12PCR 2103). Moreover, trial attorney Hall testified that he was "probably aware" that Shirah had been reprimanded (12PCR 2104-05), even if he did not actually see a copy of the reprimand itself.

Deputy Shirah's false statements in the Dupree case concerned relatively minor facts, i.e., which officer had read a consent to search and which officer had seized a pair of shoes (11PCR 1991, 12PCR 2105-06). As for the Pace trial, Shirah's entire testimony lasted perhaps two to three minutes, with no cross-examination: she testified at trial that she had gone to May Green's house at 5:45 p.m. on November 7, and retrieved a shotgun; on November 8, she participated in a search of Pace's residence, where she recovered a jacket, a pair of pants and a pair of tennis shoes (12 PCR 2109, 4TR 688-93).

The circuit court analyzed this claim as follows:

The Defendant contends that the State violated Brady by failing to disclose that Deputy Jean Shirah was issued a written reprimand for knowingly giving false information under oath during a deposition in an unrelated case. (Def's. Ex. 13). The Defendant argues that this information would have been useful in impeaching Shirah, the lead investigator in Pace's case, at trial. Because the jury was never alerted to Shirah's unreliability, confidence in the outcome of the Defendant's trial was undermined.

Approximately two months prior to Pace's trial, Kim Skievaski of the State Attorney's Office wrote a letter to Sam Hall informing him that Shirah gave false testimony at a recent deposition. (State's Ex. 2). At the evidentiary hearing, both Hall and Etheridge testified that they were aware of the contents of the letter. (EH at 398-399, 517). Further, Hall tesifified that he was probably aware that Shirah had been reprimanded prior to Pace's trial. (EH at 513, 514). Consequently, the Defendant has failed to demonstrate that the State suppressed evidence of the Shirah reprimand.

Assuming arguendo that the State did suppress the Shirah reprimand, the Defendant has failed to establish that had counsel presented this evidence that the outcome of the trial would have been different. The reprimand itself involved a relatively minor factual misrepresentation and pertained to the Tony Dupree case, a case unrelated to the Pace investigation. At trial, Shirah was only [a] peripheral witness and the purpose of her testimony was to lay a factual foundation to some of the evidence obtained in the investigation, such as the shotgun and Pace's clothing (Trial Trans. 688-693). Thus, the value of impeaching her testimony is questionable. Also, Shirah's involvement in the investigation was coordinated with other officers and the State's case was not presented through her investigative reports but through numerous witnesses.* As a result, the disclosure of the Shirah reprimand would not have reasonably changed the outcome of the trial.

> *Pace has not presented any competent evidence that Shirah manipulated evidence or attempted to influence witnesses she interviewed in the course of her investigation.

(7PCR 1187-88). This analysis is factually supported by the record and the circuit court followed the right rule of law. The State would add only that the issue of Shirah's testimony in the Dupree case arose in the first place because Shirah informed on herself to the State Attorney (12PCR 2095). Especially given the limited scope of her testimony in the Pace case, it is possible that an attempted impeachment of an officer who was conscientious enough to tell on herself about what might be perceived as a relatively minor misstatement of fact in her Dupree deposition testimony would have hurt Pace more than it helped him. That possibility supports trial counsel's choice not to attempt to impeach her testimony with information that, in all material respects, trial counsel were fully aware of.

3. Conclusion: Pace has failed to demonstrate that any prosecutorial nondisclosure is sufficiently material to warrant a new trial.

ISSUE IV

> THE TRIAL COURT CORRECTLY CONCLUDED THAT PACE HAS FAILED TO SHOW THAT TRIAL COUNSEL WERE INEFFECTIVE FOR FAILING TO OBJECT TO PROSECUTORIAL ARGUMENT ALLEGEDLY COMMENTING ON PACE'S RIGHT TO REMAIN SILENT

In Claim X of his final amended postconviction motion, Pace alleged that the prosecutor impermissibly commented on Pace's right to remain silent (1SuppPCR 54-57). In the final four sentences of this claim, Pace alleged that trial counsel were ineffective for failing to object to this argument (1SuppPCR 57). The State responded that any complaint about prosecutorial argument was procedurally barred because Pace could and should have raised it at trial and on direct appeal, and his "incidental claim of ineffectiveness of counsel" was insufficient to avoid the procedural bar (1SuppPCR 160). (The State also contended that the arguments were not improper.)

The circuit court granted an evidentiary hearing on, inter alia, this claim (4PCR 794). However, the State is unable to discern that Pace presented any evidence on this claim other than Randall Etheridge's testimony that *if* the prosecutor improperly commented on Pace's right to remain silent, defense counsel was negligent if he did not seek a mistrial. The State's position remains that this issue is not preserved for review.

As Pace acknowledged in his 3.850 motion and in his brief on appeal, defense counsel did not object to the comments about which Pace now complains. Nor was this issue raised on direct appeal. The contemporaneous objection rule applies to closing

arguments. Pangburn v. State, 661 So.2d 1182, 1187 (Fla. 1995; Suggs v. State, 644 So.2d 64, 68 (Fla. 1994); Wyatt v. State, 641 So.2d 355, 359 (Fla. 1994); Street v. State, 636 So.2d 1297, 1303 (Fla. 1994). Therefore, this claim is procedurally barred because Pace could have and should have raised this issue at trial and on direct appeal. Pace's incidental claim of ineffective assistance of trial counsel for failing to object to the comments at issue here is insufficient to avoid the procedural bar. "Charges of ineffective assistance of counsel cannot be used to get around the rule that postconviction proceedings cannot be used as a second appeal." Lopez v. Singletary, 634 So.2d 1054, 1057 (Fla. 1993).

Furthermore, if the merits of Pace's ineffectiveness claim are properly reached, the circuit court correctly determined that the comments at issue were not improper, and, thus, trial counsel did not perform deficiently by failing to object (7PCR 1169-70). The prosecutor properly was commenting on the evidence and responding to the theory of innocence presented by the defense.

Floyd Covington disappeared the morning of November 4, 1988 (3TR 578). Three days later, on November 7, Pace told his stepfather he thought he needed to leave--Pace believed something had happened to Floyd Covington. Pace explained:

Floyd Covington had carried him home the morning of November 4; Pace had entered the home; no one seemed to be home; as he came to a gun rack, he had observed that his brother's gun was missing from the rack; someone had jumped him from behind and choked him until he passed out; he had regained consciousness in some woods, next to Floyd Covington's car; he had seen his brother's gun, picked it up and walked to the car; there had been blood in the car; and Pace had left the scene, walking (5TR 852-54). However, when Pace had talked to his friend Kim Linburger the afternoon of the day Floyd Covington disappeared, Pace had not mentioned Floyd Covington, nor being injured; nor had he appeared to be injured in any way (5TR 922-23). Furthermore, the day after Floyd Covington had disappeared - two days before Pace told his stepfather that he had been knocked out, abducted and left in the woods near Floyd Covington's bloody cab - Pace had used the same gun supposedly stolen from his home, and which Pace supposedly had recovered from the area of the victim's bloody cab, to engage in target practice with Michael Green (4TR 698). Pace had not mentioned Floyd Covington to either Michael Green nor the latter's mother May Green, nor complained about having been injured (4TR 703-04, 707, 717). Nor had he identified a stain on his pants as having come from Floyd Covington's bloody taxi during any abduction; instead he

had claimed to May Green that it was squirrel blood (4TR 709-10). In fact, as later analysis showed, the stain on Pace's trousers was human blood of the same type as Floyd Covington's (4TR 787-88).

During the initial defense closing argument, defense counsel argued that Pace's statement to his stepfather was a reasonable theory of innocence which the State had not disproved (5TR 957-60). The prosecutor responded to this defense argument, inter alia, by noting that Pace's story was inconsistent with his previous statements and behavior, with his apparent lack of any injuries, and with his claim that the blood on his pants was squirrel blood. Pace quotes two paragraphs from the prosecutor's argument in a manner that deprives them of their true context. Here's what the prosecutor said:

> Now, ladies and gentlemen, consider a moment, the defendant's story to Mr. Rich. Somebody chokes him and he loses consciousness and wakes up. Unconscious. Next to the cab in Bagdad. And then apparently he gets some beer from somewhere and drinks beer. And he left beer here and left two cans at May Green's. Does that sound like something that someone would [do] if he has been choked out and wakes up beside a cab full of blood? Go drink some beer?

(5PCR 977).

> You also heard the testimony, ladies and gentlemen, of Michael Green who indicated on the following morning of November 5 that he came upon the defendant walking down Woodville Road. And he picked him up. And he mentioned to him about going squirrel hunting and that is when he told him about the

shotgun; told him he would take him to get the shotgun. And the defendant told Michael Green and May Green that shotgun was his. And he did not say that it was his brother's, said it was his.

(5PCR 978).

Now ladies and gentlemen, also you will recall the testimony of Michael Green and May Green who both indicated that they'd know the defendant a long time and I think that Michael Green said that he had known him all his life.

The Defendant never makes one mention of Floyd Covington or about the story that he told [Rich] to either May Green or Michael Green. And you recall their testimony about whether or not it appeared he had been injured in any way or complained about being injured in any way. And you will also recall the testimony of Kim Linburger who told you on that Friday afternoon at approximately 12:30 that she saw the defendant and she described to you the clothes that he wore and the vest and pants and shoes. And that he did not complain to her about any injury. That certainly could not have been long after what had happened. He never makes any mention of Floyd Covington. And according to her he did not appear to be nervous or upset.

(5TR 979-80).

Now, ladies and gentlemen, let's consider for a moment - before we move on - ladies and gentlemen, let's consider the defendant's story that he told Mr. Rich.

Mr. Rich comes home that day, the morning or afternoon of Monday, November 7 - if you recall, ladies and gentlemen, the calendar, remember the 4th is the day that Floyd Covington disappears. And you heard Barbara Mack testify that's the last time that she say him, heard from him. We know that's the same day that the defendant told Mr. Rich he had Floyd Covington take him over to the house. We also know that is the same day that Phillip Brand saw the cab on

Highway 87 south going off the road south of Yellow River Bridge.

Now, on November 5, Saturday morning, November 5, was when Michael Green picked the defendant up, got the shotgun and went to May Green's house. And now we are down to Monday, November 7.

And Mr. Rich testified that he was concerned about the fact that Floyd Covington was missing and that Bruce Pace was possibly missing. He also indicated that he came early that Monday afternoon and that the defendant was there. What does the defendant tell him? "I think I need to leave." And you heard the defense talk that oh, he stayed around and he didn't go anywhere and went down to the sheriff's office. First thing he tells Mr. Rich, "I need to leave, something happened to Mr. Floyd." And then he tells Mr. Rich that yes, on that morning of November 4, Floyd Covington gave him a ride to the house. And he couldn't get in the front door so he goes in the back door and through the kitchen window. He goes in the bedroom and noticed a shotgun missing on the wall and somebody grabs him from behind and chokes him and he passes out. Wakes up in Bagdad next to the taxicab, shotgun in the taxicab, blood in the taxicab, takes the shotgun and goes walking to May Green's.

Ladies and gentlemen, that is their reasonable hypothesis of innocence. That is what they would have you believe happened on that morning of November 4.

Let's consider that story that the defendant told Mr. Rich. We know from the testimony of Mrs. Rich and Mr. Rich that when they got home that Friday evening, November 4, nothing was knocked over, nothing was torn up, no sign of a struggle. And you must ask yourself why, who would have been sitting there waiting fore the defendant to walk in so he could choke him and then take him out and apparently shoot Floyd Covington, take Floyd Covington out and dump him out beyond Yellow River Bridge and then take the defendant to Bagdad and leave him laying next to the taxicab? Why didn't he kill Bruce Pace? Why take him along? Why not leave him at the house? What was the point, ladies and gentlemen? Use your common sense.

> He never reported it, not to any law enforcement agency, not to May Green, Michael Green, not to anyone else. He never tells anybody that he was injured, never reports what happened to him or Floyd Covington.
>
> You heard the testimony of the witnesses regarding any injury or any complaint of injury by the defendant either on the 4th of November or the 5th of November. And, ladies and gentlemen, I submit to you that if he was knocked out or choked out up here on Welcome Road and then taken down Highway 87 where the body was dumped and then back here to where the cab was found in Bagdad where he said that he woke up, he would have had to have been unconscious for at least thirty minutes. No visible injury, no complaint of injury.
>
> If you were going to kill Floyd Covington why wouldn't you kill the defendant? And if you were trying to blame the death of Floyd Covington on the defendant he certainly did a lousy job. And why not leave him in the cab out in front of Rich's house. And that certainly would be more incriminating than leaving him unconscious next to a cab back in the woods in Bagdad.
>
> And also, wasn't it convenient for him to have taken the cab back to Bagdad so when the defendant woke up that he could get up and go to May Green's house that he knew was just a mile away.

(5TR 982-85).

The State is entitled to comment upon the evidence as it exists before the jury, White v. State, 377 So.2d 1149, 1150 (Fla. 1979), and likewise may "fairly reply" to a prior defense argument. State v. Mathis, 278 So.2d 280 (Fla. 1973). Here, as in Barwick v. State, 660 So.2d 685, 694 (Fla. 1995), the prosecutor's argument "did not draw the jury's attention to [Pace's] failure to testify but merely directed the jury to

consider the evidence presented." The fact that, before he was arrested, Pace had attempted to provide his stepfather an explanation of innocence which was inconsistent with his previous behavior and his previous statements to May Green and to Michael Green "shows not only guilty knowledge but also the very real intent to cover up the fact that . . . [Floyd Covington's] death was the result of his criminal agency." Blair v. State, 406 So.2d 1103, 1106-07 (Fla. 1981). See also Reaser v. State, 356 So.2d 891 (Fla. 3rd DCA (1978) (not improper for prosecutor to comment on fact that defendant had, prior to his arrest, failed to inform police of defense he later asserted at trial, i.e., that someone else had committed the crime). Furthermore, it is not improper to comment on a defendant's silence when he is not in custody, as Miranda applies only to custodial statements. Cf., Nelson v. State, 748 So.2d 237 (Fla. 1999) (out-of-court statements of third party admissible under adoptive admission rationale where defendant failed to dispute same; a defendant's silence in the face of an accusation is admissible).

Because there is no merit to the basic complaint, trial counsel cannot have performed deficiently for failing to have objected to the argument. Turner v. Dugger, 614 So.2d 1075 (Fla. 1992); Melendez v. State, 612 So.2d 1366 (Fla. 1992).

Furthermore, even if any portion of this argument might have been objectionable, the argument as a whole was properly directed to the evidence and to the defense that Pace himself proffered. Thus, Pace has failed to carry his burden under Strickland to establish prejudice. The circuit court correctly denied relief on this claim.

ISSUE V

PACE'S APPRENDI/RING ISSUE IS PROCEDURALLY BARRED AND MERITLESS

Pace contends here that various of Florida's sentencing procedures are invalid under Apprendi v. New Jersey, 530 U.S. 466 (2000) and Jones v. United States, 526 U.S. 227 (1999). He notes (fn. 16) that the United States Supreme Court granted certiorari in Ring v. Arizona to review Arizona's judge-sentencing procedures in capital cases. Since Pace filed his brief, the United States Supreme Court has issued a decision in Ring, 2002 WL 1357257 (U.S. June 24, 2002), holding that Arizona's death penalty statute violates the Sixth Amendment right to a jury trial "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."

The Ring decision is very narrow and limited in scope (2002 WL 1357257 at *9, n.4), and it has no impact on the sentence

imposed in this case. For a number of reasons, Pace is not entitled to any relief.

PROCEDURAL BAR

First of all, Pace's challenge to the facial validity of Florida's capital sentencing scheme is procedurally barred. Although the Ring and Apprendi decisions are recent, the statutory scheme and argument to present a claim that Florida's death penalty process violates the Sixth Amendment right to a jury trial has been available since Pace's sentencing, but were never asserted as a basis for relief at trial or even in the circuit court postconviction proceedings. Instead, it is being raised for the first time on this appeal (and in Pace's habeas petition filed concurrently with this appeal). Because the issue was not raised below, it not been preserved for this appeal, and there is no ruling by the court below to review.

Furthermore, contrary to Pace's argument, this claim would not have been cognizable if it had been raised below for the first time in postconviction. This Court has consistently and repeatedly stated that the postconviction proceedings do not constitute a second appeal. Issues that were or could have been raised on direct appeal or in prior collateral proceedings may not be litigated anew. See Teffeteller v. Dugger, 734 So. 2d 1009, 1025 (Fla. 1999) (holding that habeas petition claims were

procedurally barred because the claims were raised on direct appeal and rejected by this Court or could have been raised on direct appeal); Johnson v. Singletary, 695 So. 2d 263, 265 (Fla. 1996). Pace did not offer this claim at trial or on direct appeal, and he is barred from doing so for the first time on postconviction.

Not only is this claim barred, but, in addition, the Ring decision is not subject to retroactive application to Pace's trial and sentencing under the principles of Witt v. State, 387 So. 2d 922, 929-30 (Fla. 1980).[15] Pursuant to Witt, Ring is only entitled to retroactive application if it is a decision of fundamental significance, which so drastically alters the underpinnings of King's death sentence that "obvious injustice" exists. New v. State, 807 So. 2d 52 (Fla. 2001). In determining whether this standard has been met, this Court must consider three factors: the purpose served by the new case; the extent of reliance on the old law; and the effect on the administration of justice from retroactive application. Ferguson v. State, 789 So. 2d 306, 311 (Fla. 2001). Application of these factors to Ring, which did not directly or indirectly

[15]Although Pace's argument centers around the application of Apprendi to this case, the now-decided Ring case is the more appropriate focus of attention. Thus, the State's response will address that decision, rather than Apprendi.

address Florida law, provides no basis for consideration of Ring in this case.[16]

Ring does not present a case of fundamental significance. The fact that the question accepted for review in Ring presented potential far-reaching implications does not mean that the ultimate opinion issued meets the Witt standard of fundamental significance. Since, as will be seen, Ring has little or no impact on capital sentencing in Florida, it is not a case of

[16] The United States Supreme Court recently held that an Apprendi claim is not plain error. United States v. Cotton, 122 S.Ct. 1781 (May 20, 2002) (holding an indictment's failure to include the quantity of drugs was an Apprendi error but it did not seriously affect fairness, integrity, or public reputation of judicial proceedings, and thus did not rise to level of plain error). If an error is not plain error cognizable on direct appeal, it is not of sufficient magnitude to be a candidate for retroactive application in collateral proceedings. United States v. Sanders, 247 F.3d 139, 150-151 (4th Cir 2002) (emphasizing that finding something to be a structural error would seem to be a necessary predicate for a new rule to apply retroactively and therefore, concluding that Apprendi is not retroactive). Every federal circuit that has addressed the issue had found that Apprendi is not retroactive. See, e.g., McCoy v. United States, 266 F.3d 1245 (11th Cir. 2001). The one state supreme court that has addressed the retroactivity of Apprendi has, likewise, determine that the decision is not retroactive. Whisler v. State, 36 P.3d 290 (Kan. 2001). Moreover, the United States Supreme Court has held that a violation of the right to a jury trial is not retroactive. DeStefano v. Woods, 392 U.S. 631 (1968) (refusing to apply the right to a jury trial retroactively because there were no serious doubts about the fairness or the reliability of the factfinding process being done by the judge rather than the jury).

fundamental significance. Clearly, Ring does not demonstrate that any "obvious injustice" occurred on the facts of this case.

FLORIDA'S DEATH PENALTY STATUTE IS NOT UNCONSTITUTIONAL

Even if Pace's argument is considered, he has not demonstrated that he is entitled to any relief. It is important to recognize that Ring does not require jury sentencing in capital cases. The case does not involve the jury's role in imposing sentence, but only the requirement that the jury find a defendant death-eligible. See Ring, at *18 ("What today's decision says is that the jury must find the existence of the *fact* that an aggravating factor existed") (Scalia, J., concurring). This is a critical distinction. The Court studied Arizona law and concluded that, because additional findings by a judge alone are required in order for the death penalty to be imposed, the "statutory maximum" for practical purposes is life, until such time as a judge has found an aggravating circumstance to be present. In other words, under the Arizona law examined in Ring, the jury plays no role in "narrowing" the class of defendants eligible for the death penalty upon conviction of first degree murder. This conclusion is consistent with the Arizona Supreme Court's description of state law, which recognized the statutory maximum permitted by the jury's

conviction alone to be life. See Ring, at *8; Ring v. State, 25 P.3d 1139, 1150 (Ariz. 2001).

Pace asserts that this Court "erred" in previously stating that Apprendi did not apply to capital sentencing procedures. See Mills v. Moore, 786 So. 2d 532 (Fla.), cert. denied, 121 S. Ct. 1752 (2001). But Ring proves that this Court was correct -- in fact, Apprendi is not a case about sentencing, and more importantly, neither is Ring. This point is made obvious by Pace's assertion (Initial Brief of Appellant at 94) that aggravating circumstances are elements of the offense of capital murder rather than traditional sentencing factors. Apprendi and Ring both involve the jury's role in convicting a defendant of a qualifying offense, subject to the death penalty.

A clear understanding of what Ring does and does not say is essential to analyze any possible Ring implications to Florida's capital sentencing procedures. Notably, 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). It quotes Proffitt v. Florida, 428 U.S. 242, 252 (1976), acknowledging that ("[i]t has never [been] suggested that jury sentencing is constitutionally required."). Ring, at *9, n.4. In Florida, any death sentence which was imposed

following a jury recommendation of death necessarily satisfies the Sixth Amendment as construed in Ring, because the jury necessarily found beyond a reasonable doubt that at least one aggravating factor existed. Since the finding of an aggravating factor authorizes the imposition of a death sentence, the requirement that a jury determine the conviction to have been a capital offense has been fulfilled in any case in which the jury recommended a death sentence.

Even in the wake of Ring, a jury only has to make a finding of one aggravator and then the judge may make the remaining findings. Ring is limited to the finding of an aggravator, not any additional aggravators, nor mitigation, nor any weighing. Ring, at *18 (Scalia, J., concurring) (explaining that the factfinding necessary for the jury to make in a capital case is limited to "an aggravating factor" and does not extend to mitigation); Ring, at *19 (Kennedy, J., concurring) (noting that it is the finding of "an aggravating circumstance" that exposes the defendant to a greater punishment than that authorized by the jury's verdict). Constitutionally, to be eligible for the death penalty, all the sentencer must find is one narrower, i.e., one aggravator, at either the guilt or penalty phase. Tuilaepa v. California, 512 U.S. 967, 972 (1994) (observing "[t]o render a defendant eligible for the death penalty in a

homicide case, we have indicated that the trier of fact must convict the defendant of murder and find one 'aggravating circumstance' (or its equivalent) at either the guilt or penalty phase."). Once a jury has found one aggravator, the Constitution is satisfied, the judge may do the rest.[17]

Ring does not directly or indirectly preclude a judge from serving in the role of sentencer. There is no language in Ring which suggests that, once a defendant has been convicted of a capital offense, a judge may not hear evidence or make findings in addition to any findings a jury may have made. Justice Scalia commented that, "[t]hose States that leave the ultimate life-or-death decision to the judge may continue to do so." Ring, at *18 (Scalia, J., concurring). The fact that Florida provides an additional level of judicial consideration to enhance the reliability of the sentence before a death sentence is imposed does not render our capital sentencing statute unconstitutional. Pace unfairly criticizes state law for requiring judicial participation in capital sentencing, but does not identify how judicial findings after a jury recommendation can interfere with the right to a jury trial. Any suggestion

[17] We know this is true because the Court in Apprendi held, and reaffirmed in Ring, that a prior violent felony aggravator satisfied the Sixth Amendment; therefore, no further jury consideration is necessary once a qualifying aggravator is found.

that Ring has removed the judge from the sentencing process is not well taken. The judicial role in Florida alleviates Eighth Amendment concerns as well, and in fact provides defendants with another "bite at the apple" in securing a life sentence; it also enhances appellate review and provides a reasoned basis for a proportionality analysis.

The jury's role in Florida's sentencing process is also significant. Section 921.141, Florida Statutes, states:

> **(1) Separate proceedings on issue of penalty.**--Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by s. 775.082. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable. If, through impossibility or inability, the trial jury is unable to reconvene for a hearing on the issue of penalty, having determined the guilt of the accused, the trial judge may summon a special juror or jurors as provided in chapter 913 to determine the issue of the imposition of the penalty. If the trial jury has been waived, or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose, unless waived by the defendant. ...
>
> **(2) Advisory sentence by the jury.**--After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court, based upon the following matters:

> (a) Whether sufficient aggravating circumstances exist as enumerated in subsection (5);
>
> (b) Whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist; and
>
> (c) Based on these considerations, whether the defendant should be sentenced to life imprisonment or death.

This statute clearly secures and preserves significant jury participation in narrowing the class of individuals eligible to be sentenced to death. The jury's role is so vital to the sentencing process that the jury has been characterized as a "co-sentencer" in Florida. Espinosa v. Florida, 509 U.S. 1079 (1992).

To the extent that Pace claims the death penalty statute is unconstitutional for failing to require juror unanimity, or the charging of the aggravating factors in the indictment, or special jury verdicts, Ring provides no support for his claims. These issues are expressly not addressed in Ring, and in the absence of any United States Supreme Court ruling to the contrary, there is no need to reconsider this Court's well established rejection of these claims. Sweet v. Moore, 27 Fla. L. Weekly S585 (Fla. June 13, 2002); Cox v. State, 27 Fla. L. Weekly S505, n.17 (Fla. May 23, 2002) (noting that prior

decisions on these issues need not be revisited "unless and until" the United States Supreme Court recedes from Proffitt v. Florida, 428 U.S. 242 (1976)).

As this Court has recognized, "[t]he Supreme Court has specifically directed lower courts to 'leav[e] to this Court the prerogative of overruling its own decisions.' Agostini v. Felton, 521 U.S. 203, 237, 117 S.Ct. 1997, 138 L.Ed.2d 391 (1997) (quoting Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 484, 109 S.Ct. 1917, 104 L.Ed.2d 526 (1989))." Mills, 786 So. 2d at 537. The United States Supreme Court has declined to disturb its prior decisions upholding the constitutionality of Florida's capital sentencing process, and that result is dispositive of Pace's claims.

In addition, Ring affirms the distinction between "sentencing factors" and "elements" of an offense recognized in prior case law. See Ring at *14; Harris v. United States, 2002 WL 1357277 (U.S. June 24, 2002). Pace's argument, suggesting that the jury role in Florida's capital sentencing process is insufficient, improperly assumes the jury recommendation itself to be a jury vote as to the existence of aggravating factors. However, the jury vote only represents the final jury determination as to appropriateness of the death sentence in the case, and does not dictate what the jury found with regard to

particular aggravating factors. When the jury recommends death, it necessarily finds an aggravating factor to exist beyond a reasonable doubt and satisfies the Sixth Amendment as construed in Ring. To the extent that Ring suggests that capital murder may have an additional "element" that must be found by a jury to authorize the imposition of the death penalty, that "element" would be the existence of any aggravating factor, and would not be the determination that the aggravating factors outweighed any mitigating factors established. Pace asserts that the jury must determine death to the appropriate sentence, but nothing in Ring supports Pace's speculation that the ultimate sentencing determination is an additional "element" which must be proven beyond a reasonable doubt.

The United States Supreme Court elaborated on Apprendi in Harris v. United States, which was released on the same day as Ring. In Harris, the Court described the holding in Apprendi in the following way:

> Apprendi said that any fact extending the defendant's sentence beyond the maximum authorized by the jury's verdict would have been considered an element of an aggravated crime -- and thus the domain of the jury -- by those who framed the Bill of Rights.

Harris v. United States, 2002 WL 1357277 (U.S. June 24, 2002). In light of that plain statement by the United States Supreme Court, which speaks volumes in the interpretation of Ring, there

is no basis for relief of any sort. Under this Court's precedents, death clearly was the maximum sentence which could be imposed on Pace by virtue of his conviction for the offense of first degree murder, and that is the end of the inquiry.

Therefore, Ring has no effect on prior decisions upholding Florida's capital sentencing scheme. This Court has previously recognized that the statutory maximum for first degree murder is death, and has repeatedly rejected claims similar to those raised herein. Cox v. State, 27 Fla. L. Weekly S585 (Fla. May 23, 2002); Bottoson v. State, 813 So. 2d 31, 36 (Fla. 2002), cert. denied, Case No. 01-8099 (U.S. June 28, 2002); Hertz v. State, 803 So. 2d 629, 648 (Fla. 2001), cert. denied, Case No. 01-9154 (U.S. June 28, 2002); Looney v. State, 803 So. 2d 656, 675 (Fla. 2001), cert. denied, Case No. 01-9932 (U.S. June 28, 2002); Brown v. Moore, 800 So. 2d 223, 224-225 (Fla. 2001); Mann v. Moore, 794 So. 2d 595, 599 (Fla. 2001), cert. denied, Case No. 01-7092 (U.S. June 28, 2002); Mills, 786 So. 2d at 536-38. This interpretation of state law demands respect, and offers a pivotal distinction between Florida and Arizona. Ring, at *13; Mullaney v. Wilbur, 421 U.S. 684 (1975). However, should there be any question about the correctness of this conclusion, Florida juries routinely "authorize" the imposition of the death

penalty by recommending that a death sentence be imposed, as in the instant case.

It should be noted that, on June 28, 2002, the United States Supreme Court remanded four cases in light of Ring: Harrod v. Arizona, Case No. 01-6821; Pandelt v. Arizona, Case No. 01-7743; Sansing v. Arizona, Case No. 01-7837; and Allen v. United States, Case No. 01-7310. Significantly, however, the Court **denied certiorari** in at least seven cases raising the "Ring" issue, including **six Florida cases**: Holladay v. Alabama, Case No. 00-10728; King v. Florida, Case No. 01-7804 (under warrant); Bottoson v. Florida, Case No. 01-8099 (under warrant); Mann v. Florida, Case No. 01-7092 (state habeas); Card v. Florida, Case No. 01-9152 (direct appeal); Hertz v. Florida, Case No. 01-9154 (direct appeal); and Looney v. Florida, Case No. 01-9932 (direct appeal). Obviously, if the Supreme Court had intended to apply Ring to Florida capital sentencing, it had every opportunity to do so. The fact that it did not speaks for itself.

Of course, Pace's death sentence was also supported by a prior violent felony conviction, which provides a basis to impose a sentence higher than authorized by the jury without any additional jury findings. See Almendarez-Torrez v. United States, 523 U.S. 224 (1998), Apprendi v. New Jersey, 530 U.S.

466 (2000). There is no constitutional violation because the prior conviction constitutes a finding by a jury which the judge may rely upon to impose an aggravated sentence. In addition, Pace's jury convicted him of robbery (necessarily finding the aggravating factor of during the course of a felony); the Sixth Amendment is satisfied by this jury finding as it is an additional fact which authorize the judicially-imposed sentence.[18]

For all of the reasons discussed in this response, the Ring decision does not warrant the grant of relief in this case.

ISSUE VI

PACE WAS NOT DENIED ACCESS TO PUBLIC RECORDS BY ANY RULING OF THE CIRCUIT COURT

Pace contends here that the circuit court "erroneously denied" requests for public records Pace had filed on December 28, 1998, see King records from the Santa Rosa County Sheriff's Department, the Milton Police Department, the Florida Department of Law Enforcement, and the First Judicial Circuit State

[18] Ring is not such a cataclysmic change in the law that any Sixth Amendment violation premised on that decision must be deemed harmful. See Ring, at *16, n.7 (remanding case for harmless error analysis by state court); United States v. Cotton, 122 S. Ct. 1781 (2002) (failure to recite amount of drugs in indictment was harmless due to overwhelming evidence). On the facts of this case, no harmful error can be shown.

Attorney's Office. Pace acknowledges that nothing in the postconviction record or the supplemental postconviction record indicates that the trial court issued any kind of order denying any of these requests. However, Pace contends that he was prevented from effectively challenging his conviction and sentence "as a result of not receiving additional public records." Initial Brief at 99.[19]

The record demonstrates that Pace had ample opportunity to pursue public records. The State will not detail the many demands that Pace has made over the years, but the circuit court's December 15, 1998 order summarizes the diligent effort made by that court to make sure that all legitimate public records demands were met.

But that is not the issue Pace is attempting to raise in this Court. He makes no complaint about any demands he lodged prior to the circuit court's December 15, 1998 order. Instead, he is complaining *in this Court for the first time* that the state agencies from whom Pace requested public records on December 28, 1998 - some two weeks after the circuit court's order - failed to furnish the requested records. However, Pace does not refer us to any indication in the record that he ever

[19] Pace appears to be conceding here that none of his postconviction claims are meritorious.

filed a motion to compel public records from these agencies, or that the circuit court ever participated in any way in the denial of any of these requested records. Moreover, he acknowledges that these demands should have been, but were not, filed under subsection (i) of Rule 3.852.

In short, Pace filed public records requests on December 28, 1998, which even he acknowledges were not properly filed, and then sought no relief from any court until filing his brief in this Court in April of 2002. He made no complaint to the circuit court in the year and a half that elapsed between filing these demands and the evidentiary hearing, and no complaint in the year that elapsed before the circuit court issued its order denying relief on Pace's postconviction motion. He did not even so much as mention any outstanding public records demands at the evidentiary hearing, or in his written argument following the evidentiary hearing, or in his motion for rehearing from the final order denying relief.

In short, he has failed to preserve any claim; he has failed to invoke any ruling from circuit court; and he had failed to obtain a ruling on this issue from the circuit court.

An appeal is just that - an ***appeal*** from the ruling of the court below. Here, there is no ruling by the court below, and nothing to appeal. See Armstrong v. State, 642 So.2d 730 (Fla.

1994) (because trial judge “apparently never issued a ruling ..., this issue is procedurally barred"); Richardson v. State, 437 So.2d 1091, 1094 (Fla. 1983) (where judge did not rule on defendant’s motion to strike, claim not preserved for appeal); Frazier v. State, 107 So.2d 16 (Fla. 1958) (“no ruling having been secured by the defendant,” there is nothing “properly before us for review”). Even if the court had denied these belated and concededly improper requests, there would have been no error. Pace failed to raise any public records issue for two and a half years. Through his own actions, he either waived or abandoned any claim that he was denied public records after December of 1998. Vining v. State, No. SC99-67, slip opinion at 31 (Fla. July 3, 2002)(“Although Vining now contends that there are many public records outstanding, he made no further complaint on the public records issue during the five-month span between the postconviction court’s public records order and the evidentiary hearing. Based on this record, we conclude that the court afforded Vining ample time and opportunity to pursue any public records claim. Through his own actions, Vining either waived or abandoned any claim that he was denied public records.”). See, also, Anderson v. State, No. SC01-24, slip opinion at 8 (Fla. June 13, 2002) (“based on the record in this

case, we conclude that Anderson intentionally abandoned the presentation of any Brady subclaims").

CONCLUSION

For all the foregoing reasons, the judgement of the court below should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to John M. Jackson, Assistant Capital Collateral Counsel, Northern Region, 1533 S. Monroe Street, Tallahassee, FL 32301, this 8th day of July, 2002.

_____
CURTIS M. FRENCH
Senior Assistant Attorney General

CERTIFICATE OF TYPE SIZE AND FONT

This brief has been prepared using 12 point Courier New, a font that is not proportionately spaced.

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CURTIS M. FRENCH
Senior Assistant Attorney General