IN THE SUPREME COURT OF FLORIDA

CASE NO. SC-01-1831
LOWER COURT CASE NO. 88-CF-689

BRUCE DOUGLAS PACE,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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

REPLY BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

References in this brief will be consistent with those made in Appellant's Initial Brief, with the following addition:

"AB. at _____." Appellee's Answer Brief.

“IB. at _____.” Appellant’s Initial Brief.

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SUMMARY OF ARGUMENTS IN REPLY

Appellant addresses several issues in his Reply Brief. Although Appellant will not reply to every issue and argument, he expressly does not abandon the issues and claims not specifically replied to herein. For arguments not addressed herein, Appellant stands on the arguments presented in his Initial Brief.

Reply to Argument I: The State asserts that trial counsel made a reasonable decision not to present mitigating evidence of Mr. Pace's drug addiction, as it was contrary to the information he had, it was prejudicial, and it was adverse to the theory of mitigation he chose to present. However, this argument is fallacious, as those are not the reasons that trial counsel declined to further investigate or present evidence of Mr. Pace's addiction; trial counsel did not pursue this route of mitigation, because he was ignorant to the law. Trial counsel thought that a history of drug use and addiction cannot be mitigating unless Mr. Pace used drugs on the day of the offense. However, this idea is erroneous and contrary to prior decisions of this Court, thus it cannot be deemed the basis of a reasonable decision

Reply to Argument III: The State's contention that the "smudge report" is not material is contrary to the State's actions at trial. The State's additional contention that Deputy Shirah's role in the investigation of this case was minimal is erroneous, as Shirah was involved in the crucial

aspects of investigating this case. Thus, a disciplinary report, reprimanding her for unethical behavior was material.

Reply to Argument V: Florida's death penalty scheme is unconstitutional, as the jury is not required to find the factors necessary to impose a sentence of death. The State's assertion that death is the statutory maximum sentence for first degree murder is ridiculous. By overruling Walton, Hildwin and its progeny are no longer controlling precedent, and Ring must be applied retroactively.

Reply to Argument VI: The State misses the issue and takes this argument out of context in its response that by raising a claim based on the denial of public records requests, Mr. Pace apparently concedes that his postconviction claims are without merit.

REPLY TO ARGUMENT I

In its response to the instant argument, the State contends that the "mere fact that [Mr.] Pace has, many years after trial, found experts who can now give more favorable testimony" (AB. at 34, 42) does not provide an adequate basis for granting Mr. Pace penalty phase relief. However, the State overlooks the fact that the experts at the evidentiary hearing, whose testimony includes the finding of numerous statutory and nonstatutory mitigators, are the same experts that trial counsel consulted; Drs. Szmurlo and Larson were the experts who evaluated Mr. Pace in 1987 and who trial counsel declined to present to the jury. Without the testimony of

these experts, the jury ultimately recommended, by a vote of seven to five, that Mr. Pace be executed.

The State argues "that trial counsel performed an amply sufficient investigation into possible mental health mitigation" by retaining two mental health experts and providing them with "considerable relevant background material." (AB. at 34) There are two errors in this response. First, Dr. Szmurlo was not provided "considerable" background material. In fact, the majority of documents with which trial counsel furnished Dr. Larson were not provided to Dr. Szmurlo. Second, although trial counsel retained these experts and gave them some data, trial counsel still failed to adequately prepare the experts.

For example, trial counsel neglected to explain to Dr. Szmurlo what could constitute mitigation, statutory and nonstatutory. (PCR. 1876, 2029) There is no question that the doctors were not given accurate direction on mitigation, as trial counsel himself was ignorant to what could constitute mitigation. In this case, trial counsel's ignorance of the mitigating value of long-term drug use and drug addiction caused Mr. Pace irreparable harm. Because trial counsel himself did not know that a history of drug use was mitigating, regardless of whether Mr. Pace used drugs on the day of the offense, counsel was unable to instruct his experts to explore and evaluate Mr. Pace's history of drug addiction. Consequently, Drs. Szmurlo and Larson did not attempt to find

out about the affect Mr. Pace's drug use had on him, his life, and his mental health.

The State additionally alleges that Dr. Szmurlo "does not attribute his original diagnosis to an insufficiency of information." (AB. at 35) However, this allegation is false. Dr. Szmurlo explained at the evidentiary hearing that at the time of trial, he was not informed of the statutory mitigators or given any explanation of what constituted nonstatutory mitigation. (PCR. 1876, 2029) After being given this information by postconviction counsel and being provided additional background data regarding Mr. Pace, his lifestyle,

and his behavior in the months preceding the offense,[1] Dr. Szmurlo found the statutory mental mitigators. (PCR. 1879-81)

The State continued, "[o]ne would think that if either of these experts lacked sufficient information to render a valid opinion, he would have said so then . . .." (AB. at 38, n.8) Mr. Pace has not alleged that the opinions of Drs. Szmurlo and Larson rendered prior to trial were **invalid**. Rather, Mr. Pace has argued that with additional information, information that was available in 1987, the experts were able to find existing

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[1] Among the documents provided to the experts were several affidavits from people who knew Mr. Pace. In its response, the State emphasizes that the affidavits upon which the experts relied were executed in the year prior to the evidentiary hearing, implying that the date of the affidavits diminished their weight. (AB. at 35, 36) However, the date of the affidavits does not decease the significance of their content in any manner. Although the affidavits were obtained in the year before the hearing, postconviction counsel learned of the substance of the affidavits prior to filing Mr. Pace's postconviction motion in August, 1997. Moreover, the information within the affidavits is not new information; it was available to counsel at the time of trial, had trial counsel only attempted to investigate and obtain such information. By failing to adequately investigate possible mitigation, such as Mr. Pace's substance addiction, and failing to, at least, consider presenting evidence of Mr. Pace's addiction, trial counsel was ineffective.

The State also argues that the affidavits relied upon by the experts from the evidentiary hearing would have been inadmissible at trial, "as affidavits are not admissible substantively absent the stipulation of the parties and there was no stipulation in this case." (AB. at 35-36) However, Appellant does not argue that trial counsel should have admitted affidavits at trial, rather that he should have, and could have, provided information, such as the instant affidavits, to his experts. It would have been completely acceptable and proper for the experts to rely on information such as the affidavits. Furthermore, hearsay evidence is admissible in the penalty phase of a capital trial. See Fla. Stat. § 921.141(1) (1987).

mitigation. It is both common and proper for a mental health expert to alter an opinion after learning more about his client or patient; refusing to reconsider, and perhaps adjust, an opinion in light of additional evidence would be improper, unprofessional, and unethical.

The State further asserts that trial counsel had provided to Dr. Larson depositions from several of the witnesses who gave affidavits and that trial counsel "cannot be faulted for failing to deliver to Dr. Larson information contrary to the affiants' previous statements . . .." (AB. at 36) The information contained in the affidavits is not **contrary** to the depositions; rather, the affidavits contain details and specific accounts of Mr. Pace, his behavior, appearance, and attitude. Had trial counsel pursued an investigation based on the depositions and asked follow-up questions during the depositions, the affiants, Mr. Pace's relatives and friends, would have given trial counsel the same information they gave to postconviction counsel.

Any inconsistencies between the depositions and affidavits (AB. at 41) are due to counsel's failure to explain to Mr. Pace's friends and family the concept of mitigation. When a person's friend or relative is charged with first degree murder, the person does not want to cause any more trouble for their friend or relative. Because mitigation can often be counter-intuitive, if no one explains to a potential witness that information which might otherwise be damaging or

unfavorable to the defendant can actually help him, then the potential witness may be reluctant to provide the relevant information. For example, a person who has never before been exposed to the penalty phase of a capital trial cannot be expected to automatically understand that information, such as extensive drug use and drug addiction, can actually help a defendant. In fact, a layperson likely believes the opposite – that such information can only hurt the defendant. Without being told what constitutes mitigation, a layperson is apt to think that the only way to help a defendant it to provide information that he was a stable, healthy, average person who did not engage in unusual behavior or drug use and who came from a functional, intact, sound family.

In fact, this is what occurred at Mr. Pace's trial. Friends, such as Barry Copeland, downplayed Mr. Pace's cocaine use in an attempt to avoid Mr. Pace from suffering additional harm. (PCR. 1817-18) However, had trial counsel explained to Mr. Copeland that information about Mr. Pace's addiction to crack cocaine could help Mr. Pace, Mr. Copeland would have been forthcoming with such information, as he was when postconviction counsel explained mitigation to him. (PCR. 1818)

Trial counsel never explained to Mr. Pace's friends and relatives that if Mr. Pace suffered from a drug addiction and/or had a history of severe drug use, it could be mitigating. Trial counsel didn't explain this, because trial

counsel himself didn't know that it could constitute mitigation.

The State contends that "[n]otwithstanding their knowledge of Pace's crack cocaine usage, neither mental health expert found any significant mental health mitigation in their original evaluations of Pace." (AB. at 37) However, trial counsel never explained to one of the experts, Dr. Szmurlo, that Mr. Pace's drug addiction constituted mitigation. Furthermore, counsel never requested that either expert explore how Mr. Pace's addiction affected him despite that both experts from trial concluded that Mr. Pace had a severe drug addiction.

The State alleges that trial counsel's decision not to "emphasize" Mr. Pace's drug addiction "was eminently reasonable." (AB. at 42, 44) Although trial counsel could have ultimately made a decision to not present to the jury evidence of Mr. Pace's addiction to crack cocaine, he could not have made such a decision before conducting a full investigation into Mr. Pace's addiction. Any decision of trial counsel to not present available evidence of Mr. Pace's drug addiction cannot be deemed reasonable when counsel based the decision on his belief that a history of drug abuse and addiction (without evidence of drug use at the time of the offense) could not constitute mitigation and was thus irrelevant.

> An attorney is not obligated to present mitigation evidence if, after reasonable investigation, he or she determines that such evidence may do more harm than good. . . . However, such decisions must flow from an informed judgment. Here, counsel's failure to present or investigate mitigation evidence, resulted not from an informed judgment, but from neglect. Each lawyer . . . admitted ignorance abut the type of mitigation evidence available to them. Such ignorance precluded [the trial attorneys] from making strategic decisions on whether to introduce testimony from [the defendant's] friends and relatives. We conclude, therefore, that the lawyers rendered inadequate assistance of counsel.

Harris v. Dugger, 874 F.2d 756, 763 (11th Cir. 1989) (remanding case for a resentencing). Trial counsel's decision in the instant case was based on his ignorance of the law, as well as his lack of awareness that drug addiction and long-term drug abuse constitutes mitigation, regardless of whether Mr. Pace used cocaine on the day of the offense.

The State relies on Asay v. State, 769 So. 2d 974 (Fla. 2000), to urge this Court to deny Mr. Pace relief. However, the State focus is misplaced. In Ragsdale v. State, 798 So. 2d 713, 720 (Fla. 2001), this Court distinguished Asay from a situation where trial counsel was ineffective during the penalty phase: "Furthermore, unlike the situation in Asay, since counsel did not conduct a reasonable investigation, he was not informed as to the extent of child abuse suffered, and thus he could not have made an informed strategic decision not to present mitigation witnesses." Likewise, in the instant case, trial counsel did not investigate Mr. Pace's drug

addiction, did not learn the extent and severity of his drug abuse, did not become aware of the effect his addiction had on his mental health, and did not discover the implications his addiction had on his lifestyle and behavior. See also Rose v. State, 675 So. 2d 567, 572-73 (Fla. 1996) ("It is apparent that counsel's decision . . . was neither informed not strategic. Without ever investigating his options, counsel latched onto a strategy which even he believed to be ill-conceived.") Mr. Pace's trial attorney neglected to investigate his history of drug use and abuse, because he was unaware that it could constitute mitigation. Such a decision is neither informed nor strategic.

Even if, as the State suggests, trial counsel was concerned about possible prejudice the jury may have of a crack cocaine addiction, counsel could have explored the issue during voir dire. In voir dire, he could have attempted to strike or challenge jurors who did not recognize the mitigating effect of a drug addiction. If trial counsel was still concerned that Mr. Pace's drug addiction "may adversely affect the jury's opinion," counsel could have presented the evidence to the trial court during the sentencing hearing, which occurred outside the presence of the jury. Trial counsel never considered presenting this information, as he did not believe it could be mitigating. At the evidentiary hearing, counsel repeatedly stated that any history of long-term drug abuse and addiction of Mr. Pace was irrelevant if

Mr. Pace had not used drugs on the day of the offense. (PCR. 2033) Counsel was completely ignorant to the fact that a drug addiction alone, without evidence that Mr. Pace had used drugs immediately prior to the offense, constituted mitigating evidence.

The State contends that introducing Mr. Pace's history of drug abuse would entail informing the jury that Mr. Pace "hung around with convicted felons," "spent more [money] on drugs than he could legitimately earn," and "supplemented his income by dealing drugs and stealing." (AB. at 43) However, presenting Mr. Pace's addiction would not automatically necessitate the introduction this evidence. Trial counsel could have presented expert testimony about Mr. Pace's addiction, whereby the experts could have explained the signs of addiction and the effects of an addiction. Although the jury may have been exposed to some unflattering information, this information would come from the mental health experts who could put the information in perspective.

Furthermore, Mr. Pace was on trial for first degree murder and armed robbery. The jury had convicted him of these crimes. For the State to suggest that the jury would have been prejudiced by hearing that Mr. Pace stole to support his drug addiction is ludicrous. The jury would not have been surprised much less prejudiced by such evidence. The jury convicted Mr. Pace of robbery and murder without having any explanation for why he committed these crimes. By presenting

expert testimony that Mr. Pace suffered from a severe drug addiction, trial counsel could have provided the jury with an explanation for his actions on the day of the murder.

The State erroneously asserts that trial counsel had to choose between presenting testimony that Mr. Pace was "a good person from a good family" and testimony that Mr. Pace suffered from a severe drug addiction. (AB. at 44) The State argues that "[t]hese two theories of mitigation are not compatible; by choosing one, the other of necessity has to be rejected." (AB. at 44) This assertion is entirely inaccurate. Not only are these two mitigation theories compatible, but they are complementary. Mr. Pace was a good person from a good family who developed a drug addiction. As a result of his addiction, he then engaged in uncharacteristic behavior that formed the basis of the jury's convictions.

The State additionally alleges that evidence that Mr. Pace was abused by his father would have been "contradictory" to evidence that Mr. Pace came from a good family. (AB. at 46) However, the ideas are not mutually exclusive. Mr. Pace had a good, close family who cared for and supported each other, but he also had a stepfather who was mean, unfair, and abusive. Mr. Pace's family worked to care for each other, emotionally and financially, while his stepfather moved in and out of the home. The State similarly suggests that the death of his grandmother could not have affected Mr. Pace, since his prior violent felony occurred before her death. (AB. at 46)

However, witnesses described that Mr. Pace changed after the loss of his grandmother, the person to whom he was closest. Thus, the value of presenting evidence of her death cannot be summarily dismissed due to his prior felony. The offense for which Mr. Pace was sentenced to death could have been mitigated by showing the pain he suffered and the changes in his appearance and behavior that occurred after his grandmother's death.

REPLY TO ARGUMENT III

The State's suggestion that the "smudge report" is immaterial is undermined by the State's actions at trial. At trial, the State placed enough significance on the fingerprint to present evidence that a fingerprint on the cab window was identified as belonging to Mr. Pace and to argue during closing statements that Mr. Pace left his fingerprint on the window during the course of this crime. (R. 767, 977-78) Clearly, the State found the fingerprint to be material to its case, thus any evidence diminishing the weight of the fingerprint was material to the defense and should have been disclosed.

Regarding the written reprimand of Deputy Shirah, the State downplays her role in this case, by reciting that her testimony "lasted perhaps two to three minutes." (AB. at 54) Although her testimony may have been fairly brief, her actions were of great magnitude. It was her affidavit that formed the basis of the warrant, permitting a search of Mr. Pace's

residence. She was also the individual who obtained the gun allegedly used in the murder. Perhaps more importantly, Deputy Shirah was the investigator who interviewed Ella Mae Green several times, during the course of which Ms. Green changed her description of what Mr. Pace was wearing when she saw him the day of the offense. She was also responsible for the interviews of Orestine Franklin and Barbara Mack; both women allegedly reported one thing to Deputy Shirah that they later denied. The written reprimand, which chided Deputy Shirah for knowingly providing false information while under oath in a deposition, was material in this case. Had counsel had it, he would have had a direct and concrete manner to impeach Deputy Shirah.

REPLY TO ARGUMENT V[2]

The State alleges that in Florida "the statutory maximum sentence for first degree murder is death." (AB. at 74) But the Attorney General of Arizona said exactly the same thing about the Arizona statute invalidated in Ring v. Arizona, 122 S. Ct. 2428 (2002). The United States Supreme Court dispatched that argument as follows:

> In an effort to reconcile its capital sentencing system with the Sixth Amendment as interpreted by *Apprendi,* Arizona first

[2] As Mr. Pace pointed out in his Initial Brief (IB. at 94, n.18), at the time he filed his Initial Brief, the United States Supreme Court had granted certiorari in State v. Ring, 25 P.3d 1139 (Ariz. 2001), cert. granted, Ring v. Arizona, 122 S. Ct. 865 (2001). The United States Supreme Court decided Ring v. Arizona, 122 S. Ct. 2428, on June 24, 2002.

> restates the *Apprendi* majority's portrayal of Arizona's system: Ring was convicted of first-degree murder, for which Arizona law specifies 'death or life imprisonment' as the only sentencing options, see Ariz. Rev. Stat. Ann. § 13-1105(C) (West 2001); Ring was therefore sentenced within the range of punishment authorized by the jury verdict. See Brief for Respondent 9-19. This argument overlooks *Apprendi*'s instruction that 'the relevant inquiry is one not of form, but of effect.' 530 U.S., at 494, ... In effect, 'the required finding [of an aggravated circumstance] expose[d] [Ring] to a greater punishment than that authorized by the jury's guilty verdict.' *Ibid.;* see 200 Ariz., at 279, 25 P. 3d, at 1151. The Arizona first-degree murder statute 'authorizes a maximum penalty of death only in a formal sense,' *Apprendi,* 530 U.S., at 541 . . . (O'CONNOR, J., dissenting), ***for it explicitly cross-references the statutory provision requiring the finding of an aggravating circumstance before imposition of the death penalty***. See § 13-1105(C) ('First degree murder is a class 1 felony and is punishable by death or life imprisonment as provided by § 13-703.' (emphasis added)). If Arizona prevailed on its opening argument, *Apprendi* would be reduced to a 'meaningless and formalistic' rule of statutory drafting. See 530 U.S., at 541 . . . (O'CONNOR, J., dissenting).

Ring, 122 S. Ct. at 2440-2441 (emphasis added).

From the standpoint "not of form, but of effect," there is no rational way to distinguish either Florida's statutory structure or its actual functioning from Arizona's. Identically to Ariz. Rev. Stat. Ann. § 13- 1105(C) and even more explicitly, if possible, Fla. Stat. § 775.082 "cross-references the statutory provision" of Fla. Stat. § 921.141, requiring additional findings **by a judge, not by a**

jury as the precondition for imposition of the death penalty (Ring, 122 S. Ct. at 2440):

> A person who has been convicted of a capital felony shall be punished by life imprisonment and shall be required to serve no less than 25 years before becoming eligible for parole **unless the proceedings held to determine sentence according to the procedure set forth in § 921.141 result in a finding by the court** that such person shall be punished by death, and **in the latter event** such person shall be punished by death.

Fla. Stat. § 775.082 (1979) (emphasis added).

The State further attempts to distinguish Florida's death penalty scheme from the Arizona procedure that was invalidated in Ring on the grounds that "[t]he jury's role in Florida's sentencing process is significant," (AB. at 71), because juries render an advisory verdict as to whether the defendant should live or die. This argument blithely ignores the explicit holding and rationale of both Apprendi v. New Jersey, 530 U.S. 466, 483 (2000), and Ring. The unmistakable teaching of those two cases is that every fact which must be found as the necessary precondition for enhancing a defendant's maximum possible sentence from imprisonment to death is required by the Sixth Amendment to be found by a jury **in the same way, and for the same reasons**, that the Sixth Amendment requires a jury to find every fact which is the necessary precondition for conviction of a crime.[3] As Ring puts it in plain English:

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[3] This is what Apprendi held; it is what Ring held; it is what our Initial Brief asserted that Apprendi held. To the extent that the

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

The State cannot seriously argue that this Court would or constitutionally could sustain a first-degree murder conviction based solely on a **judge's** written finding of premeditation, simply because a jury sat through the guilt trial and, at the end of the trial the jury rendered an advisory verdict saying that "the defendant should be found guilty." Such a guilty verdict would come without the jury finding premeditation (or any other fact) and without the jury being charged that it needs to make any specific finding of fact in order to recommend conviction. The guilty verdict would also be rendered in spite of the fact that the jury has been specifically charged that its verdict is only advisory and will not result in the defendant's conviction, and in spite of the fact that there is no evidence the jury was able to achieve unanimity with respect to each basis for its fact-free advisory verdict. That proposition cannot survive any scrutiny; and almost all of the State's response to the instant argument self-destructs along with it.

Additionally, where the State contends that "the Ring

State's response suggests that Mr. Pace is seeking to have "jury sentencing," (AB. 67, 70-71) the State misconstrues Mr. Pace's position. Mr. Pace asserts that juries must make any and all findings on which a death sentence is contingent under state law.

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

That rule squarely and indisputably outlaws the Florida sentencing procedure used to impose Mr. Pace's death sentence. No other conclusion can plausibly be reached. In overruling Walton (which had upheld Arizona's capital sentencing procedure against the challenge that it violated capital defendant's Sixth Amendment right to jury trial), Ring necessarily overruled Hildwin and its precursors (which had

upheld Florida's capital sentencing procedure against the identical challenge). The Walton decision had treated these Florida precedents as controlling and had regarded the Florida and Arizona capital-sentencing procedures as indistinguishable. Thus, Walton said:

> We repeatedly have rejected constitutional challenges to Florida's death sentencing scheme, which provides for sentencing by the judge, not the jury. *Hildwin v. Florida*, 490 U.S. 638 . . . (1989) (per curiam); *Spaziano v. Florida*, 468 U.S. 447 . . . (1984); *Proffitt v. Florida*, 428 U.S. 242 . . . (1976). In *Hildwin*, for example, we stated that "[t]his case presents us once again with the question whether the Sixth Amendment requires a jury to specify the aggravating factors that permit the imposition of capital punishment in Florida," 490 U.S., at 638 . . . and we ultimately concluded that "the Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury." *Id.*, at 640-641 . . .
>
> The distinctions *Walton* attempts to draw between the Florida and Arizona statutory schemes are not persuasive. It is true that in Florida the jury recommends a sentence, but it does not make specific factual findings with regard to the existence of mitigating or aggravating circumstances and its recommendation is not binding on the trial judge. A Florida trial court no more has the assistance of a jury's findings of fact with respect to sentencing issues than does a trial judge in Arizona.

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

> In *Walton* v. A*rizona*, 497 U.S. 639 (1990), we upheld Arizona's scheme against a charge that it violated the Sixth Amendment. The Court had previously denied a Sixth

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

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

Regarding the State's suggestion that Mr. Pace is barred from raising a claim based on Ring, (AB. 64-65), the State does not and could not dispute that until the Supreme Court's decision in Ring v. Arizona, 122 S. Ct. 2428 (2002), in June of this year, this Court's cases foreclosed relief on Mr. Pace's claim. Therefore, any contention that Mr. Pace's claims are time-barred or barred as successive is without merit. This Court's cases applying Hitchcock v. Dugger, 481 U.S. 393 (1987), to cases in which it had previously denied relief based on a conflict between Florida's standard jury instruction and Lockett v. Ohio, 438 U.S. 586 (1987), are controlling under these circumstances, and the State makes no

attempt to distinguish them. See, e.g., Delap v. Dugger, 513 So. 2d 659, 660 (Fla. 1987) ("Because *Hitchcock* represents a substantial change in the law occurring since we first affirmed Delap's sentence, we are constrained to readdress his *Lockett* claim on its merits"); Downs v. Dugger, 514 So. 2d 1069, 1070 (Fla. 1987) (*Hitchcock* constitutes "a substantial change in the law . . . that requires us to reconsider issues first raised on direct appeal and then in Downs' prior collateral challenges").

The State also argues that Mr. Pace is precluded from raising a Ring claim, because Ring does not apply retroactively under Witt v. State, 387 So. 2d 922 (1980). (AB. at 65) While the State is correct in that Witt does define the standard for retroactivity (AB. at 66), the State incorrectly applies the standard.

Under Witt, a change in law supports postconviction relief in a capital case when "the change: (a) emanates from this Court or the United States Supreme Court, (b) is constitutional in nature, and (c) constitutes a development of fundamental significance." Id. at 931. The first two criteria are obviously met here; the third presents the crucial inquiry. In elaborating what "constitutes a development of fundamental significance," the Witt opinion includes in that category "changes of law which are of sufficient magnitude to necessitate retroactive application as ascertained by the three-fold test of *Stovall* [*v. Denno*, 388 U.S. 293 (1967)] and

Linkletter [*v. Walker*, 381 U.S. 618 (1965)]," adding that "*Gideon v. Wainwright* . . . is the prime example of a law change included within this category." See Witt, 387 So. 2d at 929.

This three-fold test considers "(a) the purpose to be served by the new rule; (b) the extent of reliance on the old rule; and (c) the effect on the administration of justice of a retroactive application of the new rule." See id. at 926. It is not an easy test to use, generally on in the present case, because there is a tension at the heart of it. Any change os law which "constitutes a development of fundamental significance" is bound to have a broadly unsettling "effect on the administration of justice" and to upset a goodly measure of "reliance on the old rule." The example of Gideon – a profoundly unsettling and upsetting change of constitutional law – makes the tension obvious, and the Witt Court was aware of it. See Witt, 387 So. 2d at 924-25. How the tension is resolved ordinarily depends mostly on the first prong of the Stovall-Linkletter test – the purpose to be served by the new rule – and whether an analysis of that purpose reflects that the new rule is a "fundamental and constitutional law change[ ] which cast[s] serious doubt on the veracity or integrity of the original trial proceeding." See Witt, 387 So. 2d at 929. Cf. Thompson v. Dugger, 515 So. 2d 173, 175 (Fla. 1987).

Two considerations call for recognizing that the Apprendi-Ring rule is precisely such a fundamental

constitutional change:

First, the purpose of the rule is to change the very identity of the decisionmaker with respect to critical issues of fact that are decisive of life or death. In the most basic sense, this change remedies a "'structural defect[ ] in the constitution of the trial mechanism,'" Sullivan v. Louisiana, 508 U.S. 275, 281 (1993): it vindicates "the jury guarantee . . . [as] a 'basic protectio[n]' whose precise effects are unmeasurable, but without which a criminal trial cannot reliably serve its function." Id. In Johnson v. Zerbst, 304 U.S. 458 (1938) – which, of course, was the taproot of Gideon v. Wainwright, this Court's model of the case for retroactive application of constitutional change – the Supreme Court held that a denial of the right to counsel could be vindicated in postconviction proceedings because the Sixth Amendment required a lawyer's participation in a criminal trial to "complete the court", see Johnson, 304 U.S. 458; and a judgment rendered by an incomplete court was subject to collateral attack. What was a mere imaginative metaphor in Johnson is literally true of a capital sentencing proceeding in which the jury has not participated in the life-or-death factfinding role that the Sixth Amendment reserves to a jury under Apprendi and Ring: the constitutionally requisite tribunal was simply not all there; and such a radical defect necessarily "cast[s] serious doubt on the veracity or integrity of the . . . trial proceeding." See Witt, 387 So. 2d at 929.

Second, "the jury trial provisions in the Federal and State Constitutions reflect a fundamental decision about the exercise of official power – a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges. Fear of unchecked power . . . found expression . . . in this insistence upon community participation in the determination of guilt or innocence," Duncan v. Louisiana, 391 U.S. 145, 156 (1968) – including, under Apprendi and Ring, guilt or innocence of the factual accusations "necessary for the imposition of the death penalty." See Ring, 122 S. Ct. at 2443; Apprendi, 530 U.S. at 494-95. The right to a jury determination of factual accusations of this sort has long been the central bastion of the Anglo-American legal system's defenses against injustice and oppression. As former Justice Lewis F. Powell, Jr. Wrote: "jury trial has been a principal element in maintaining individual freedom among English speaking peoples fo the longest span in the history of man." See Powell, "Jury Trial of Crimes," 23 WASHINGTON & LEE L. REV. 1, 11 (1966).

The United States Supreme Court's retraction of Hildwin, and Walton, in Ring restores a right to jury trial that is neither trivial nor transitory but "the most transcendent privilege which any subject can enjoy." Mr. Pace should not be denied its benefit simply because the Supreme Court temporarily overlooked the point before finally getting it right.

In addition, Florida law makes a death sentence contingent not on the finding of a single aggravating circumstance, as the

State claims (AB. 69-70), but on a fact finding that there are "sufficient aggravating circumstances."[4] See Fla. Stat. § 921. 141 (3). Yet the penalty phase jury is not instructed that the State must prove the existence of sufficient aggravating circumstances beyond a reasonable doubt, or even by a preponderance of the evidence. That is a structural error for which the only possible cure is the vacating of the death sentences. See Sullivan v. Louisiana, 508 U.S. 275, 280 (1993).

The State additionally argues that because one of the aggravating circumstances on which the trial judge relied to impose petitioner's death sentence was a prior conviction, Mr. Pace's case is taken out of the rule of Apprendi and Ring by an exception to that rule established in Almendarez-Torres v. United States, 523 U.S. 224 (1998).[5] However, it is plain that

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[4] The State simply skips over this step in the Florida capital sentencing process and argues that "the determination that the aggravating factors outweigh any mitigating factors" is not an element of capital murder in Florida. (AB. at 73-74) The State disagrees, and so the Justices of the Supreme Court. See Barclay v. Florida, 463 U.S. 939 (1983). But, regardless of whether the balance of aggravating and mitigating circumstances (the third step in Florida's tri-fold sentencing analysis) is a fact or not, the State does not and could not dispute that the existence of sufficient aggravating circumstances to establish death-eligibility is a fact which the judge and only the judge must decide in Florida.

[5] Respondent also invokes the Almenarez-Torres exception on the supposed logic that petitioner committed other contemporaneous felonies against the victim of the homicide for which he was sentenced to death. (AB. at 76) This is nonsense. Those felonies are "prior convictions" neither under Almendarez-Torres nor under Florida law. See, e.g., Perry v. State, 522 So.2d 817, 820 (Fla.1988); Holton v. State, 573 So.2d 284, 291 (Fla. 1991); Bruno v. State, 574 So.2d 76, 81 (Fla. 1991); compare Bogle v. State, 655 So.2d 1103, 1108 (Fla. 1995).

Almendarez-Torres does not survive Apprendi and Ring but rather fell along with Hildwin v. Florida, 490 U.S. 638 (1989) (per curiam), and Walton v. Arizona, 497 U.S. 639 (1990). In Apprendi, Justice Thomas – whose vote was decisive of the five-to-four decision in Almendarez-Torres – announced that he was receding from his support of Almendarez-Torres.[6] The Apprendi majority found it unnecessary to overrule Alemndarez-Torres explicitly in order to decide the issues before it, but acknowledged that "it is arguable that Almendarez-Torres was incorrectly decided." 530 U.S. at 489. It then went on in footnote to add to "the reasons set forth in Justice SCALIA's [Almendarez-Torres] dissent, 523 U.S., at 248-260," the

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[6] The five-Justice majority in Almendarez-Torres was comprised of Justices Breyer, Rehnquist, O'Connor, Kennedy, and Thomas. The first four of these were the dissenters in Apprendi. The dissenters in Almendarez-Torres were Justices Stevens, Souter, Scalia, and Ginsburg, all of whom are in the Apprendi majority. Between 1998 and 2000, Justice Thomas changed his thinking about the appropriate analysis to determine what an "element" of a crime is and accordingly disavowed his vote in Almendarez-Torres. In his Apprendi concurrence, Justice Thomas describes this change of mind as follows:

> "[O]ne of the chief errors of Almendarez-Torres – an error to which I succumbed – was to attempt to discern whether a particular fact is traditionally (or typically) a basis for a sentencing court to increase an offender's sentence. . . . For the reasons I have given [here], it should be clear that this approach just defines away the real issue. What matters is the way by which a fact enters into the sentence. If a fact is by law the basis for imposing or increasing punishment – for establishing or increasing the prosecution's entitlement – it is an element."

530 U.S. at 520-521.

observation that "the [Almendarez-Torres] Court's extensive discussion of the term 'sentencing factor' virtually ignored the pedigree of the pleading requirement at issue," which drove the Sixth Amendment ruling in Apprendi. See id. at 489 n.15.[7]

Furthermore, at the same time, the Apprendi majority did explicitly restrict whatever precedential force Almendarez-Torres ever had to the status of "a narrow exception to the general rule" that every fact which is necessary to enhance a criminal defendant's maximum sentencing exposure must be found by a jury – an exception limited to the "unique facts" in Almendarez-Torres. The unique facts of Almendarez-Torres were that Almendarez-Torres **pleaded guilty** to an indictment charging that he had returned to the United States after having been deported and, in addition, **admitted** that he had been deported because he was previously convicted of three aggravated felonies. He thus elected to forgo a trial and accepted an uncontested adjudication of his guilt for a crime which **by definition** included the felony convictions later used to enhance his sentence. Nothing about the priors – any more than anything else about the elements of the crime of reentry after

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[7] The majority opinion in Almendarez-Torres notably relied upon McMillan v. Pennsylvania, 477 U.S. 79 (1986), and, in so doing, refused to distinguish between a "sentencing factor . . . [that] triggered a mandatory minimum sentence" in McMillan and a "sentencing factor . . . [that] triggers an increase in the maximum permissive sentence" in Almendarez-Torres, 523 U.S. at 244; see generally *id*. at 242-246. That aspect of Almendarez-Torres has, of course, now been explicitly repudiated. See Harris v. United States, 122 S. Ct. 2406, 2419 (2002), decided together with Ring.

deportation remained for a jury to try in the light of Almendarez-Torres' guilty plea.

The State asserts that the denial of certiorari in six Florida cases by the United States Supreme Court after Ring is significant: "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." (AB. at 76) However, according to this Court and the Supreme Court, the denial of certiorari does not hold any weight. See State v. White, 470 So. 2d 1377, 1379 (Fla. 1985) ("The denial of a writ of certiorari imports no expression of opinion upon the merits of the case, as the bar has been told many times.") (citing United States v. Carver, 260 So. 2d 482, 490 (1923)); see also Singleton v. Commissioner of Internal Revenue, 439 U.S. 940, 942-44 (1978).

REPLY TO ARGUMENT VI

As a result of raising a claim based on the trial court's denial of numerous public records requests by postconviction counsel, the State alleges that Mr. Pace "appears to be conceding here that none of his postconviction claims are meritorious." (AB. at 77) Mr. Pace concedes no such thing. Mr. Pace has argued that the circuit court erred by denying public records requests and that this error hindered his ability to effectively present his case in postconviction, in violation of his due process rights. See Holland v. State, 503 So. 2d 1250 (Fla. 1987). Mr. Pace asserts that his

postconviction claims are meritorious, and he maintains that a new trial, and at a minimum a new sentencing, are warranted due to the issues presented during postconviction.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing **REPLY BRIEF OF APPELLANT** has been furnished by United States Mail, first-class postage prepaid, to Curtis M. French, Assistant Attorney General, The Capitol - PL-01, Tallahassee, Florida 32399, counsel of record on this 11th day of September, 2002.

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