IN THE SUPREME COURT OF FLORIDA

CASE NO. SCO2-1300

JAMES AREN DUCKETT,

Petitioner,

v.

MICHAEL C. MOORE,
SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,

Respondent.

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

M. Elizabeth Wells
376 Milledge Avenue, S.E.
Atlanta, Georgia 30312-3240
Telephone 404-688-7530
Florida Bar No. 0866067

COUNSEL FOR PETITIONER

REQUEST FOR ORAL ARGUMENT

Mr. Duckett respectfully reiterates his request for oral argument in this case. Mr. Duckett asserts that oral argument is necessary to allow this Court a sufficient opportunity to consider the claims in his habeas petition.

REPLY TO RESPONSE TO PROCEDURAL HISTORY

Mr. Duckett objects to the state's recitation of facts in the procedural history (Response at 2-7). The State simply block quotes the facts as found by this Court on direct appeal, yet fails to note that the testimony of one of the Williams rules witnesses, Kimberely Ruetz, was found by this Court to have been improperly admitted at trial. Reliance on the facts concerning the witness is inappropriate at this stage.

Additionally, since the time of his direct appeal, Mr. Duckett has completed his Rule 3.850 proceedings in state court. As correctly noted by the State, the circuit court conducted approximately nine days of evidence. Petitioner contends that the facts adduced at the evidentiary hearing must also be considered along with the facts available at the time of the trial and direct appeal. In order to conduct the appropriate cumulative review of errors presented in this

habeas, the Court must have the full record so that it can see the complete picture.

REPLY AS TO CLAIM II

The State fails to meaningfully discuss Mr. Duckett's assertion that it has an obligation to comply with due process in the course of a direct appeal. The State instead insists that the claim is not cognizable in a habeas petition as it should be and was raised in Mr. Duckett's Rule 3.850 proceedings (Response at 10-11). The State also contends that since Malone testified at trial about his qualifications, no Brady violation exists (Response at 11). The State then asserts that the claim has no factual basis (Response at 11). Finally, the State takes the position that it could not have notified Mr. Duckett about Malone's false testimony in Hastings because the O.I.G. did not issue its report until 1997 (Response at 10-11).

However, Mr. Duckett asserts that just as habeas proceedings are the proper means for seeking to challenge the adquacy of appellate counsel's advocacy on direct appeal, habeas proceedings must be the proper vehicle for challenging the conduct of the State during the direct appeal. *See* Wilson v. Wainwright, 474 So. 2d 1162 (Fla. 1985). Here, Mr. Duckett

asserts that information vital to this Court's resolution of Mr. Duckett's direct appeal was withheld from the Court by the State. The resulting question that must be answered is whether the principles enunciated in Brady v. Maryland, 373 U.S. 83 (1963), and Giglio v. United States, 405 U.S. 150 (1972), apply during a direct appeal.[1] Must the State's representatives comply with the dictates of Brady and Giglio when presenting their case on direct appeal to this Court? If so, then habeas procedings must be the appropriate vehicle for vindicating a breach of the State's direct appeal obligation.[2]

The analysis of Brady and Giglio claims, of necessity requires revisiting previously presented contentions in order to determine whether the information withheld from this Court during the direct appeal impacted the resolution of the appeal. Here, Mr. Duckett has been denied a new trial because pertinent information was not disclosed by the State during

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[1]This Court has previously held that the Brady obligation continues on into post-conviction. Roberts v. Butterworth, 668 So. 2d 580 (Fla. 1996); Johnson v. Butterworth, 713 So. 2d 985 (Fla. 1998).

[2]It has long been recognized that ineffective assistance claims and Brady claims are parallel claims. *See* State v. Gunsby, 670 So. 2d 920 (1996). Since habeas proceedings are the recognized vehicle for asserting ineffective assistance of counsel in a direct appeal, logic dictates that it is the appropriate vehicle for asserting that the State's representative did not comply with his or her due process obligation during the direct appeal.

the direct appeal in violation of due process. Given that this information was withheld from this Court by the State during the direct appeal, reconsideration of the issues that were impacted by the State's breach of due process is required.

A. THE WITHHELD INFORMATION

The State's assertion of 1997 as the date upon which they could have first disclosed Malone's false testimony in the Hastings hearing ignores the facts upon which the Department of Justice based its findings. Malone testified falsely in the Hastings' trial in 1985, three years prior to his testimony in Mr. Duckett's trial and five years before this Court decided Mr. Duckett's case on direct appeal. Thus the Malone, a State agent, and the State were aware of the false testimony from 1985 prior to Mr. Duckett's trial and direct appeal.

The State asserts that the issue regarding the expert shopping with respect to the hair is barred as it has been litigated on 3.850 (Response at 11), but this response mischaracterizes the claim in the habeas. The habeas claim is that the state was well aware of Malone's false testimony prior to the direct appeal, but did nothing to correct this Court's view on direct appeal that Malone was a credible

witness. Defense counsel argued vehemently that Malone should not be accepted as an expert because he lied about his qualifications. Trial counsel even went to far in his brief to argue that he believed Malone lied about other matters, but had no way of proving it. Not only did the State not present the evidence within it's possession that supported this argument, but the State actually argued that Malone's qualifications and credibility as an expert had already been decided by the trial court and there was no cause to revisit those findings. The State in its desperate attempt to preserve the conviction tainted by serious Brady and Giglio violations completely disregards the implications of the withheld information.

By withholding this vital information concerning the State's expert, Mr.Duckett was denied his right to confront the witness and his rights to a fair trial and due process, as guaranteed by the Florida and United States Constitutions. The errors here were fundamental. Appellate counsel has an obligation to "review the record and current case law to determine if any unpreserved errors amount to fundamental error." Spencer v. State, 2002 WL 534441, *21 (Fla. April 11, 2002) (Pariente, J., concurring). As these were issues of fundamental error, a reversal on direct appeal would have been

appropriate had appellate counsel properly raised and litigated these issues in the appeal. *See Id.*[3]

REPLY AS TO CLAIM IV

Mr. Duckett argued under Apprendi v. New Jersey, 530 U.S. 466 (2000), that his death sentence violates the Sixth Amendment because the elements of capital murder were not determined by the jury. Since Mr. Duckett's Initial Brief was filed, the United States Supreme Court decided Ring v. Arizona, 122 S. Ct. 2428 (2002), holding that Apprendi applies to capital sentencing and overruling Walton v. Arizona, 497 U.S. 639 (1990). Ring fully supports Mr. Duckett's argument.

A. THIS COURT'S RECENT OPINIONS IN BOTTOSON AND KING SUPPORT MR. DUCKETT's REQUEST FOR RELIEF.

On October 24, 2002, this Court issued its decisions in Bottoson and King. A careful reading of the separate opinions in Bottoson and King establishes that Mr. Duckett is entitled to sentencing relief. In both cases, each justice wrote a

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[3]*See also* State v. Jones, 377 So. 2d 1163, 1164 (Fla. 1979) (trial court's failure to give instruction on the elements of the underlying felony of robbery was fundamental error not waived by defendant's failure to object); Pait v. State, 112 So. 2d 380, 285 (Fla. 1959) (comments of prosecutor concerning defendant's right to appeal and how state thought death appropriate); Holcomb v. State, 760 So. 2d 1097, 1097 (Fla. 3d DCA 2000) (trial court's failure to instruct jury as to essential element of crime was fundamental error - reversal of conviction).

separate opinion explaining his or her reasoning for denying both petitioners relief. While a *per curiam* opinion announced the result in both cases, in neither case did a majority join the *per curiam* opinion or its reasoning. In both cases, four justices wrote separate opinions explaining that they did not join the per curiam opinion, but "concur[red] in result only." Bottoson v. Moore, 2002 WL 31386790 at 2; King v. Moore, 2002 WL 31386234 at 1-2. The four opinions concurring in result only raised substantial concerns about the constitutionality of Florida's capital sentencing statute in light of Ring v. Arizona, 122 S. Ct. 2428 (2002). Under the logic of those four opinions, Mr. Duckett is entitled to sentencing relief under Ring.

B. Mr. DUCKETT'S CLAIMS ARE NOT PROCEDURALLY BARRED.

Respondent urges this Court "to enforce Florida's well-settled procedural rules and decline to review this claim" (Response at 15, n. 9). Regarding Ring claims, the rule followed by this Court has been to address the claims on the merits in successive post-conviction cases. *See* Bottoson v. Moore; King v. Moore; Bottoson v. State, 813 So. 2d 31, 36 (Fla. 2002); King v. State, 808 So. 2d 1237 (Fla. 2002); Mills v. Moore, 786 So. 2d 532, 536-37 (Fla. 2001). In Porter v.

Moore, 27 Fla. L. Weekly S606 (Fla. June 20, 2002), the Court cited the decision in the successive habeas case of Mills v. Moore for the proposition that the claim was "meritless." In these rulings, this Court has rejected the State's argument that such claims may be procedurally barred.

C. RING SHOULD BE APPLIED RETROACTIVELY.

Justice Shaw, the only member of the Court to consider Ring's retroactivity in Bottoson and King, concluded that Ring "must be applied retroactively" under the principles of Witt v. State, 387 So. 2d 922 (Fla. 1980). Bottoson v. Moore, 2002 WL 31386790 at *19 (Shaw, J., concurring in result only).

D. MR. DUCKETT'S CONTEMPORANEOUS FELONY CONVICTION DOES NOT DISENTITLE HIM FROM RELYING ON RING.

Respondent argues that Mr. Duckett is foreclosed from relying on Ring because he was convicted of a contemporaneous felony which support his death sentence (Response at 20). If accepted, this argument would leave Florida's death penalty statute in violation of Furman v. Georgia, 408 U.S. 238 (1972). Respondent's position is that a felony-murder conviction automatically carries with it a finding of an underlying felony that constitutes an aggravating circumstance. Respondent argues that since Mr. Duckett was convicted of felony-murder, he was determined to be death

qualified when the guilty verdict was returned (Response at 17-20).

Respondent's argument means that Florida has determined that a felony-murder conviction automatically renders a defendant death eligible, while a premeditated murder conviction does not. In Porter v. State, 564 So.2d 1060, 1064 (Fla. 1990), this Court addressed the "cold, calculated and premeditated" aggravating circumstance and held:

> To avoid arbitrary and capricious punishment, this aggravating circumstance "must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." Zant v. Stephens, 462 U.S. 862 (1983)(footnote omitted). Since premeditation is already an element of capital murder in Florida, section 921.141(5)(I) must have a different meaning; otherwise, it would apply to every premeditated murder.

Under the logic of Porter, the "in the course of a felony" aggravating circumstance cannot be mechanically applied to every felony-murder conviction. In Proffitt v. State, 510 So.2d 896, 898 (Fla. 1987), this Court specifically rejected the State's argument that the "in the course of a felony" aggravating circumstance could by itself "justify the death penalty" in a felony-murder case. In Proffitt, this Court cited Rembert v. State, 445 So.2d 337 (Fla. 1984), and Menendez v. State, 368 So.2d 1278 (Fla. 1979).

Further, Respondent's argument overlooks the structure of Florida's capital sentencing procedure, which requires that in order for a defendant to be eligible for a death sentence, the sentencer must find not only that an aggravating circumstance exists, but also that "sufficient" aggravating circumstances exist. In conformity with the statutory language, Mr. Duckett's jury was instructed to determine whether "sufficient aggravating circumstances" were present that justified considering a sentence of death. Use of the felony murder aggravator may not permissibly be used as a substitute for a jury determination that sufficient aggravating circumstances existed in Mr. Duckett's case. Moreover, to do so with felony-murder convictions would carry automatic aggravation and death eligibility which does not "genuinely narrow the class of persons eligible for the death penalty" and which does not "reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." Lowenfield v. Phelps, 484 U.S. 231, 244 (1988) (quoting Zant v. Stephens, 462 U.S. 862, 877 (1983)).

E. UNDER RING, DEATH IS NOT THE MAXIMUM PUNISHMENT FOR FIRST-DEGREE MURDER IN FLORIDA.

Respondent contends that death is the maximum punishment for first-degree murder under Florida law and therefore that Ring does not apply to Florida (Response at 16-19). This argument includes the contention that in Florida, death eligibility is determined at the guilt/innocence stage of trial (Response at 18). These arguments were made by Respondent in Bottoson and King, but were not accepted by this Court, for good reason.

Respondent apparently agrees that some factor must be found to render a defendant death eligible. Respondent baldly asserts that this finding occurs at the guilt/innocence stage of trial, without ever pointing to the factor that establishes eligibility. Later in the Response, Respondent argues that Mr. Duckett's eligibility was established by his contemporaneous felony convictions (Response at 20). Does this mean that a defendant convicted of premeditated first-degree murder with no underlying felonies is not death eligible after the guilty verdict?

Respondent relies upon this Court's opinion in Mills v. Moore which say that death is the maximum sentence for first-degree murder under Florida law (Response at 16-17). This argument overlooks Ring's caution that a State may not avoid the Sixth Amendment by "specif[ying] 'death or life

imprisonment' as the only sentencing options" because "the relevant inquiry is one not of form, but of effect." *Id*. at 2440 (quoting Apprendi, 530 U.S. at 494). A comparison of Florida's and Arizona's statutes demonstrates that they are the same in "effect." In Bottoson, Justice Pariente explained the "effect" of Florida's statute:

> The crucial question after Ring is "one not of form, but of effect." 122 S.Ct. at 2439. *In effect*, the maximum penalty of death can be imposed only with the additional factual finding that aggravating factors outweigh mitigating factors. *In effect*, Florida juries in capital cases *do not do* what Ring mandates – that is, make specific findings of fact regarding the aggravators necessary for the imposition of the death penalty. *In effect*, Florida juries *advise* the judge on the sentence and the judge *finds* the specific aggravators that support the sentence imposed. Indeed, under both the Florida and Arizona schemes, it is the judge who *independently* finds the aggravators necessary to impose the death sentence.

Bottoson v. Moore, 2002 WL 31386790 at 24 (italics in original).

Moreover, section Fla. Stat. 921.141 provides:

> In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsections (5) and (6) and upon the records of the trial and the sentencing proceedings. **If the court does not make the findings requiring the death sentence, the court shall impose sentence of life imprisonment in accordance with S. 775.082.**

(Fla. Stat. § 921.141(3))(emphasis added).

In Stringer v. Black, 503 U.S. 222 (1992), the Supreme Court discussed capital sentencing schemes and their use of aggravating circumstances. According to the Supreme Court:

> In Louisiana, a person is not eligible for the death penalty unless found guilty of first-degree homicide, a category more narrow than the general category of homicide. [Citation]. A defendant is guilty of first-degree homicide if the Louisiana jury finds that the killing fits one of five statutory criteria. [Citation]. After determining that a defendant is guilty of first-degree murder, a Louisiana jury next must decide whether there is at least one statutory aggravating circumstance and, after considering any mitigating circumstances, determine whether the death penalty is appropriate. [Citation]. Unlike the Mississippi process, in Louisiana the jury is not required to weigh aggravating against mitigating factors.
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> In Lowenfield [v. Phelps, 484 U.S. 231 (1988)], the petitioner argued that his death sentence was invalid because the aggravating factor found by the jury duplicated the elements it already had found in determining there was a first-degree homicide. We rejected the argument that, as a consequence, the Louisiana sentencing procedures had failed to narrow the class of death-eligible defendants in a predictable manner. We observed that "[t]he use of 'aggravating circumstances' is not an end in itself, but a means of genuinely narrowing the class of death-eligible persons and thereby channeling the jury's discretion. We see no reason why this narrowing function may not be performed by jury findings at either the sentencing phase of the trial or the guilt phase." [Citation]. **We went on to compare the Louisiana scheme with the Texas scheme, under which the required narrowing occurs at the guilt phase**. [Citation]. **We also contrasted the Louisiana scheme with the Georgia and Florida schemes**. [Citation].

> The State's premise that the Mississippi sentencing scheme is comparable to Louisiana's is in error. The Mississippi Supreme Court itself has stated in no uncertain terms that, with the exception of one distinction not relevant here, its sentencing system operates in the same manner as the Florida system; and Florida, of course, is subject to the rule forbidding automatic affirmance by the state appellate court in an invalid aggravating factor is relied upon. In considering a Godfrey claim based on the same factor at issue here, the Mississippi Supreme Court considered decisions of the Florida Supreme Court to be the most appropriate source of guidance.

Stringer, 503 U.S. at 233-34 (emphasis added).

In fact in Lowenfield, 484 U.S. at 242, the Louisiana statute defined first degree murder as fitting within one five aggravating circumstances (all including a specific intent to kill) in contrast to Florida's provision that first degree murder is either premeditated or felony-murder. The Supreme Court in Lowenfield found that the Louisiana capital scheme operated similar to the Texas scheme that provided for death eligibility to be determined at the guilt phase of the trial as had been explained in Jurek v. Texas, 428 U.S. 262 (1976):

> It seems clear to us from this discussion that the narrowing function required for a regime of capital punishment may be provided in either of these two ways: **The legislature may itself narrow the definition of capital offenses, as Texas and Louisiana have done, so that the jury finding of guilt responds to this concern, or the legislature may more broadly define capital offenses and provide for narrowing by jury findings of aggravating circumstances at the penalty phase**. See also Zant

> [v. Stephens, 462 U.S. 862, 876 n.13 (1983)] discussing Jurek and concluding: "[I]n Texas, aggravating and mitigating circumstances were not considered at the same stage of the criminal prosecution."

Lowenfield, 484 U.S. 245-47 (emphasis added).

Thus, it is clear that the factual determination of "sufficient aggravating circumstances" at the sentencing is the finding of those additional facts that are necessary under the Eighth Amendment requirement that death eligibility be narrowed beyond the traditional definition of first degree murder. Zant, 462 U.S. at 878 ("[S]tatutory aggravating circumstances play a constitutionally necessary function at the stage of legislative definition: they circumscribe the class of persons eligible for the death penalty"). Clearly in Florida, the narrowing of the death eligible occurs in the sentencing phase. That factual determination that - "sufficient aggravating circumstances exist" - has not been made during the guilt phase of a capital trial under Florida law as it has operated during the past 25 years.

F. THE FLORIDA JURY'S ROLE DOES NOT COMPLY WITH RING.

Respondent finally presents argument contending that a Florida jury's penalty phase role satisfies Ring (Response at 18-19). According to Respondent, Ring "only requires that the jury make the determination of death-eligibility" (Response at

20). Thus, Respondent argues, Florida satisfies Ring because death eligibility is determined at the guilt/innocence phase (Response at 18). Nevertheless, Respondent never says what eligibility factor the Florida statute requires the jury to find at the guilt/innocence phase.

A jury which provides a "recommendation" without any factual findings as to which aggravating factors the jury found unanimously and without indicating whether the jury found "sufficient" aggravating factors beyond a reasonable doubt and without necessary Sixth Amendment procedures is not a Sixth Amendment jury.

CONCLUSION

For all of the reasons discussed herein and in his Petition, Mr. Duckett respectfully urges the Court to grant habeas corpus relief and grant a new trial.[4]

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Petition for Writ of Habeas Corpus has been furnished by first

[4]The page limitations do not permit Mr. Duckett to address all of the misrepresentations of fact and law contained in the Answer. For matters not addressed in this Reply, he relies upon the Petition and the record to refute the State's arguments.

class mail, postage prepaid, to Kenneth Nunnelley, Office of the Attorney General, 444 Seabreeze Blvd, Floor 5, Daytona Beach, Florida 32118-3958, on December 11, 2002.

CERTIFICATE OF COMPLIANCE AS TO TYPE SIZE AND STYLE

I HEREBY CERTIFY that this Petition for Writ of Habeas Corpus complies with the font requirements of Fl. R. App. P. 9.210(a)(2) typed in Courier New, 12 point type, not proportionately spaced, this date, December 11, 2002.

M. ELIZABETH WELLS
Florida Bar No. 0866067
376 Milledge Avenue
Atlanta, Georgia 30312-3240
Telephone (404) 688-7530

By: _____
Counsel for James A. Duckett