IN THE SUPREME COURT OF FLORIDA

NO. SC02-1180

ALFRED LEWIS FENNIE,

Petitioner,

v.

MICHAEL W. MOORE,
Secretary, Florida Department of Corrections,

Respondent.

REPLY TO RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

MICHAEL P. REITER
Florida Bar No. 0320234
Capital Collateral Counsel - Northern Region

JOHN M. JACKSON
Florida Bar No. 0993476
Assistant CCRC-N

CAPITAL COLLATERAL REGIONAL COUNSEL - NORTH
1533-B South Monroe Street
Tallahassee, FL 32301
(850) 488-7200

COUNSEL FOR PETITIONER

INTRODUCTION

COMES NOW, the Petitioner, **Alfred Lewis Fennie**, by and through undersigned counsel and hereby submits this Reply to the State's Response to Mr. Fennie's Petition for Writ of Habeas Corpus.[1] For arguments not addressed herein, Petitioner stands on the arguments presented in his Petition for Writ of Habeas Corpus.

REPLY TO CLAIM I

Contrary to the State's assertion, this claim is properly presented in a habeas petition. The State's reliance on Robinson v. Moore, 773 So.2d 1 (Fla.2000), is misplaced. In Robinson, this Court held that a claim regarding comments by the prosecutors and the trial court to the jury discouraging sympathy and mercy was not properly raised on appeal. However, Mr. Robinson's claim was pled as neither fundamental error nor ineffective assistance of appellate counsel.[2] Mr. Fennie's claims are both the result of ineffective assistance of appellate counsel and rise to the level of fundamental error. Further, every one of Mr. Robinson's claims of ineffective assistance of appellate counsel was addressed on the merits. See also Jones v. Moore, 794 So.2d 579, 589

---

[1]Mr. Fennie notes that he has corrected his caption so that it reads Michael Moore as Respondent. Mr. Fennie's habeas petition had previously inadvertently named only the State of Florida as Respondent.

[2]Mr. Robinson's habeas petition can be accessed at "http://www.law.fsu.edu/library/flsupct/sc95336/95336pet.pdf".

(Fla.2001).

A. Trial Court's Adoption of the State's Sentencing Order

The State admits that "the trial judge's sentencing order **mirrors** the State's sentencing memorandum in regard to a couple of aggravating circumstances and the mitigating factors." (Resp., p. 9, emphasis added.) The State goes on to assert that the court "made numerous changes to a number of the aggravating factors proposed by the State (during the commission of a kidnaping, preventing lawful arrest, and crime committed for financial gain)." (Resp., p. 11-12.) Such an assertion is disingenuous at best.

As noted in Mr. Fennie's initial brief, the discussion of "during the commission of a kidnaping" is an expansion upon the State's brief treatment in their memorandum and amounts to a paraphrasing of the other aggravators. However, neither "preventing lawful arrest" nor "committed for financial gain" contain any substantive changes, and barely any changes at all even of a grammatical nature. For example, in his discussion of preventing lawful arrest, the court stated that the crimes against Mr. Fennie were "serious in nature and punishable by life in prison" rather than simply "punishable by life in prison" as was stated in the State's memorandum. (RI. 453; RI. 469.) In committed for financial gain, the State's discussion of attempts to withdraw money "with it," meaning the victim's ATM card, becomes in the court's order "from her account using the same." (R.I. 470; R.I. 454.) These are the

kinds of "numerous changes" to which the State alludes. This Court can see for itself by comparing the two documents (see Attachments A and B of habeas petition) that the changes are neither meaningful nor numerous. The State relies upon Nibert v. State, 508 So.2d 1 (Fla. 1987), for the proposition that a court's failure to prepare written findings is not reversible error so long as the court made the requisite findings at the sentencing hearing. It seems clear from the opinion, however, that the trial court in Nibert made oral findings in open court, then "instructed the state attorney to reduce his findings to writing." 508 So.2d at 4.

The State asserts that, "The court's written order, **along with his comments at the sentencing hearing**, conclusively establish that the trial judge independently weighed the established aggravating and mitigating factors and did not simply rely on the State to perform such an analysis." (Resp., p.14, emphasis added.) The State does not cite to these comments in the record because, unlike Nibert, there are no such comments to be found. The trial court in Mr. Fennie's case did not make any oral findings beyond reading the sentencing order into the record, thus the adoption of the State's sentencing order is reversible error.[3]

---

[3]The State argues that appellate counsel could have easily concluded this issue lacks merit based upon the status of the law at the time. However, Nibert v. State, 508 So.2d 1 (Fla. 1987), and Patterson v. State, 513 So.2d 1257 (Fla.1987), were both decided at least five years before Mr. Fennie's appeal.

B. Failure to Weigh Aggravating and Mitigating Circumstances

The State's Response seems to confuse the assignment of weight to specific aggravating and mitigating circumstances with the weighing of circumstances against each other, the actual tipping of the scales. These are two distinct parts of the weighing process, and both portions require compliance to satisfy due process. The trial court in Mr. Fennie's case did not assign weight to any of the specific circumstances, and the trial court's assertions that the aggravators in aggregate outweigh the mitigators in aggregate cannot cure this fundamental flaw.[4]

Campbell's requirements are still very much intact. See Hurst v. State, 819 So.2d 689, 697 (Fla.2002); Asay v. State, 2002 WL 1290914, 3 (June 13, 2002). Recently this Court stated:

> Though we find the trial court's sentencing order adequate in this instance, we reiterate the importance of Campbell and its requirement of a thorough written evaluation of the proposed mitigating circumstances. Certainly, we will not remand where the trial court's order is only minimally defective. But where the order is made up of conclusory statements or otherwise reflects a perfunctory evaluation on the part of the trial

[4]The State further confuses the issue by relying on cases that are not on point. In Barwick v. State, 660 So.2d 685 (Fla.1995), Green v. State, 641 So.2d 391 (Fla.1994), and Gorby v. State, 819 So.2d 664 (Fla.2002), at issue was the trial court's failure **to find** and weigh mitigating factors. Weighing was only implicated in the sense that mitigating factors could not be weighed because they were never found. Here the trial court found mitigating factors but failed to assign them specific weight as required by Campbell v. State, 571 So.2d 415 (Fla.1990).

> court, harmless error analysis will not save that order.

Griffin v. State, 820 So.2d 906, FN 10 (Fla.2002).

C. Non-Record Information and Nonstatutory Aggravation

As for the allegations of rape, Mr. Fennie is unsure how to address the "facts surrounding the incident," (Resp. p. 19) but he would reiterate that the testimony presented at his trial did not establish that the victim was raped to any standard, and certainly not beyond a reasonable doubt as is required of aggravating circumstances. Any amount of "factual context" cannot save reliance upon this unproven charge in the sentencing order from being reliance upon the most highly prejudicial nonstatutory aggravation imaginable–the rape of a white woman by a black man.

The State mischaracterizes the importance of Mr. Fennie's suppression testimony. The issue is not whether the mitigating factor of significant prior criminal history would have applied without rebuttal from Mr. Fennie's suppression testimony. The issue is that the trial court used the suppression testimony at all. The trial court improperly relied upon Mr. Fennie's suppression testimony to turn a mitigator into an aggravator. It is likely that the trial court used Mr. Fennie's suppression testimony to assess the credibility of Mr. Fennie's taped statement as well as the credibility of his co-defendant, the State's star witness, Michael Frazier. It is undeniable that the suppression

testimony never should have been considered, for any purpose, during Mr. Fennie's sentencing. These errors should be evaluated cumulatively. Mr. Fennie is entitled to relief.

Reply to Claim II

Ineffective assistance of appellate counsel is appropriately raised in a habeas petition. Freeman v. State, 761 So.2d 1055, 1069 (Fla.2000); Rutherford v. Moore, 774 So.2d 637, 643 (Fla.2000). Appellate counsel cannot be held ineffective for failing to raise unpreserved claims except where these claims rise to the level of fundamental error. "In order for improper comments made in the closing arguments of a penalty phase to constitute fundamental error, they must be so prejudicial as to taint the jury's recommended sentence." Spencer v. State, 2002 WL 534441, 17 (Fla. 2002). The comments cited in Mr. Fennie's habeas petition rise to this level, and so his claims of appellate ineffective assistance of counsel are cognizable on habeas review.[5]

Not surprisingly the State cites no law in opposition to Mr. Fennie's "golden rule" claim. The prosecutor went far beyond commenting on the evidence, and it would be difficult

[5]To briefly clarify regarding two comments, the State says that the "totality of the State's evidence" established that Mr. Fennie raped the victim. (Resp., p. 26.) Mr. Fennie is not familiar with this standard, but reiterates that the evidence did not establish beyond a reasonable doubt that he raped the victim. Also, the prosecutor didn't simply ask the jury to consider that Mr. Fennie's co-defendants received life recommendations, he asked the jurors to speculate on the previous jury's deliberations.

if not impossible to find a more egregious argument than the one that occurred in Mr. Fennie's case. Further, Urbin v. State, 714 So.2d 411 (Fla.1998), was not new law, as the State implies. (Resp. p. 27, FN 10.) In Brooks v. State, 762 So.2d 879 (Fla.2000), this Court reviewed law on improper prosecutorial argument that went back decades. This Court stated:

> [T]he State's argument that "to the extent that Urbin arguably sets forth a rule of new law, unless this Court explicitly states otherwise, a rule of law which is to be given prospective application does not apply to those cases which have been tried before the rule is announced," Appellee's Answer Brief at 60, is meritless on its face. Urbin simply reiterated what this Court's decisions have declared time and time again.

Brooks, 762 So.2d at 879, FN 29.

The State cannot dispute the prosecutor's statement, that if the aggravators outweighed the mitigators the law **required** the jury to impose a sentence of death, was a blatant misstatement of the law. Instead the State argues that it does not rise to the level of fundamental error. Such comments were found not to be fundamental error when made during voir dire in Cox v. State, 819 So.2d 705 (Fla.2002), Franqui v. State, 804 So.2d 1185 (Fla.2001), and Henyard v. State, 689 So.2d 239 (Fla.1996). However, in those cases a crucial distinction is made between those harmless misrepresentations made to the venire during voir dire and

those grievous ones made to the jury prior to deliberations.[6] Further, Mr. Fennie's jury was never instructed as to the proper standard for making its recommendation.[7] Thus the jury was never told that, contrary to the State's instruction, it cannot be required to return a verdict of death, that mercy is always an option.[8] Relief is warranted.

Reply to Claim III

On October 24, 2002, the Florida Supreme Court denied relief to Mr. King and Mr. Bottoson in their challenges to the constitutionality of Florida's sentencing scheme based upon the United States Supreme Court decision in Apprendi v. New Jersey, 530 U.S. 466 (2000) and subsequently in Ring v.

---

[6]In Cox, noting that the State later retreated from its position, and, "Also, the trial court did not repeat the prosecutor's misstatements of law during its instruction of the jury–indeed the trial court's instructions properly informed the jury of its role under Florida law." 819 So.2d at 717-718. In Henyard, "Henyard does not contend that the jury was improperly instructed before making an advisory sentence recommendation in the penalty phase of his trial." 689 So.2d at 250. In Franqui, "More importantly the trial court did not repeat the misstatement of law when instructing the jury prior to its deliberations." 804 So.2d at 1193.)

[7]In fact, the trial court's instructions regarding the weighing process were also a misstatement of the law and provided no guidance: "[I]t is your duty to follow the law that will now be given you by the court and render to the court an advisory sentence based upon your determination as to whether sufficient aggravating circumstances exist to outweigh any aggravating circumstances found to exist." (R.I. 391.)

[8]While trial counsel never requested an explicit mercy instruction, he did propose two instructions that the finding of an aggravating circumstance does not dictate a death sentence, but only allows the juror to consider death as a possible penalty. (R.I. 407, 417.)

Arizona, 122 S.Ct. 2428 (2002). See King v. Moore, 2002 WL 31386234; Bottoson v. Moore, 2002 WL 31386790. However, these cases will be appealed to the United States Supreme Court, and Mr. Fennie believes his arguments remain valid.[9]

The State alleges that Mr. Fennie is procedurally barred from bringing his claim because he failed to present the claim at trial or on direct appeal. (Resp. at 31). In fact, Mr. Fennie preserved his Ring claim through pretrial motions (R.I. 168-77, 181-83, 194-98, 213-14, 421-22), and appellate counsel's failure to argue these claims on direct appeal was ineffective assistance of counsel. Further, The State does not and cannot dispute the fact that until the United State's Supreme Court's decision in Ring v. Arizona, 122 S. Ct. 2428 (2002), in June of this year, this Court's cases foreclosed Mr. Fennie from obtaining relief on his claim. Therefore, any contention that Mr. Fennie's claims are time-barred or barred as successive is without merit.[10]

Next, the State alleges that the decision of Ring v. Arizona should not be retroactively applied under Witt v.

---

[9]Mr. Fennie elects to follow the State's example and adopt the arguments made by Mr. King and Mr. Bottoson. (Resp. p. 30, FN 13.)

[10]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); Downs v. Dugger, 514 So. 2d 1069, 1070 (Fla. 1987).

State, 387 So. 2d 922 (1980). (Resp. at 31-32). While the State is correct that Witt defines the standard for retroactivity (Resp. at 31), the standard is applied incorrectly in their response. 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 "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)]," 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.[11]

The Apprendi-Ring rule is precisely such a fundamental

[11]Resolution 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).

constitutional change for two reasons: First, the purpose of the rule is to change the very identity of the decisionmaker with respect to critical issues of fact that are decisive of life or death. In the most basic sense, this change remedies a "'structural defect [ ] in the constitution of the trial mechanism,'" Sullivan v. Louisiana, 508 U.S. 275, 281 (1993): it vindicates "the jury guarantee . . . [as] a 'basic protectio[n]' whose precise effects are unmeasurable, but without which a criminal trial cannot reliably serve its function." Id. In Johnson v. Zerbst, 304 U.S. 458 (1938) – which was the taproot of Gideon v. Wainwright, this Court's model of the case for retroactive application of constitutional change – the Supreme Court held that a denial of the right to counsel could be vindicated in postconviction proceedings because the Sixth Amendment required a lawyer's participation in a criminal trial to "complete the court", see Johnson, 304 U.S. 458; and a judgment rendered by an incomplete court was subject to collateral attack. What was an 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.[12]

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

In addition, The State contends that "the Ring decision left intact all prior opinions upholding the constitutionality

---

[12]The right to a jury determination of factual accusations like these 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).

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 defendants, no less than non-capital defendants," the Court in Ring declared, "are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment." Id.

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

treated these Florida precedents as controlling, and regarding the Florida and Arizona capital-sentencing procedures, as indistinguishable. 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 follows that just as Ring overruled Walton, in the wake of Ring, Hildwin is also no longer good law and thus does not control.

The State further argues that Florida law makes a death sentence contingent not on the finding of a single aggravating circumstance, as the State claims (Resp. at 34), but on a fact finding that there are "sufficient aggravating circumstances." See Fla. Stat. § 921. 141 (3). Yet the penalty phase jury is not instructed that The State must prove the existence of sufficient aggravating circumstances beyond a reasonable doubt, or even by a preponderance of the evidence. That is a

structural error for which the only possible cure is the vacating of the death sentences. See Sullivan v. Louisiana, 508 U.S. 275, 280 (1993).

The State 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 also significant," (Resp. at 21), 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. 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.[13] As Ring puts it in plain English: "*Apprendi* repeatedly instructs . . . that the characterization of a fact or circumstance as an 'element' [of a crime] or a 'sentencing factor' is not determinative of the question 'who decides,' judge or jury." Ring, 122 S. Ct. at 2441.

---

[13]This is what Apprendi held; it is what Ring held; it is what Mr. Fennie's Petition For a Writ of Habeas Corpus asserted that Apprendi held. To the extent that the State's response suggests that Mr. Fennie is seeking to have "jury sentencing," the State misconstrues Mr. Fennie's position. Mr. Fennie asserts that juries must make any and all findings on which a death sentence is contingent under state law.

During Mr. Fennie's guilt phase, the aggravating factors were not presented as elements of the crime, nor were they proven beyond a reasonable doubt in the penalty phase.[14] The failure to present the aggravators as elements during the guilt and penalty phase is fundamental error requiring habeas relief. The effect of finding an aggravator exposes Mr. Fennie to a greater punishment than that authorized by the jury's guilty verdict. The aggravators must be charged in the indictment, submitted to a jury, and proven beyond a reasonable doubt. See Ring, 122 S.Ct. at 2443. This did not occur in Mr. Fennie's case, thus, the death sentence against him is unconstitutional and habeas relief is warranted.

CONCLUSION AND RELIEF SOUGHT

For all the reasons discussed herein, Mr. Fennie respectfully urges this Court to grant habeas corpus relief.

[14]The State notes that Mr. Fennie received a unanimous death recommendation. However, there is no indication that the jurors found any one aggravator unanimously. Recall that on direct appeal this Court found that Mr. Fennie's jury had been improperly instructed on the cold, calculated, premeditated aggravator. 648 So.2d 98-99. All twelve jurors could have relied solely upon this improper definition in sentencing Mr. Fennie to death, or they could have agreed on none of the proposed aggravators at all.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing **REPLY TO RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS** has been furnished by United States Mail, first-class postage prepaid, to Stephen D. Ake, Assistant Attorney General, Department of Legal Affairs, 2002 North Lois Avenue, Westwood Center, Suite 700, Tampa, Florida 33607, counsel of record on this ___ day of November, 2002.

CERTIFICATE OF TYPE SIZE AND STYLE

This is to certify that the Petition has been reproduced in a 12 point Courier type, a font that is not proportionately spaced.

MICHAEL P. REITER
Capital Collateral Counsel -
Northern Region
Florida Bar No. 0320234

_____
JOHN M. JACKSON
Florida Bar No. 0993476
Assistant CCC-NR
1533 S. Monroe Street
Tallahassee, FL 32301
(850) 488-7200
Attorney for Mr. Pace