IN THE SUPREME COURT OF FLORIDA

CASE NO. SC02-2643

MICHAEL MORDENTI,

Petitioner,

v.

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

Respondent.

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

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PRELIMINARY STATEMENT

Citations in this brief to designate references to the records, followed by the appropriate page number, are as follows:

"R. ___"	- Record on direct appeal to this Court;
"PC-R. ___"	- Post conviction record on appeal
"PC-T. ___"	- Evidentiary hearing transcript
"D-Ex. __"	- Defense exhibits entered at the evidentiary hearing and made part of the post conviction record on appeal.
"S-Ex. __"	- State exhibits entered at the evidentiary hearing

All other citations will be self-explanatory or will otherwise be explained.

STATEMENT OF THE CASE

The Initial and Reply Briefs filed in Mordenti v. State, Case No. SC02-1159, should be considered in conjunction with Mr. Mordenti's habeas petition and this reply as those pleadings provide additional context and background to the issues presented herein.

ARGUMENT IN REPLY

CLAIM I

PLAIN AND FUNDAMENTAL ERROR OCCURRED ON DIRECT APPEAL WHEN THIS COURT WAS MISINFORMED REGARDING EVIDENCE IN THE CASE AND MADE RULINGS ACCORDING TO THAT MISINFORMATION. APPELLATE COUNSEL ALSO RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL IN PROVIDING THIS COURT WITH INCORRECT FACTS. MR. MORDENTI WAS DENIED HIS CONSTITUTIONAL RIGHT TO A RELIABLE DIRECT

APPEAL AS A RESULT.

In this Court'S opinion denying Mr. Mordenti's direct appeal, this Court found the admission of Barnes' testimony to be error, but ruled that "the elimination of the cellmate's testimony would not have changed the outcome." Mordenti v. State, 630 So. 2d at 1085. Clearly, this Court was misled by the State as to who Horace Barnes was and his relationship with Mr. Mordenti. **He was not a cellmate of Mr. Mordenti.** He was a bank robber who was apprehended and prosecuted by federal authorities as a result of the assistance provided by Mr. Mordenti. Mr. Mordenti argued in his habeas petition that "[r]eliance upon this incorrect information constitutes plain error and fundamental error not subject to harmless analysis." For the proposition that fundamental error is not subject to harmless error analysis, Mr. Mordenti cited Reed v. State, 837 So. 2d 366, 369-70 (Fla. 2002), wherein this Court stated, "[f]undamental error is not subject to harmless error analysis." Yet, despite this Court's statement in Reed, the State in its Response characterizes Mr. Mordenti's "contention is meritless and at or near the border separating the insubstantial from the frivolous." Response at 6.

Another way to view Mr. Mordenti's contention is that the error was structural in nature. Certain constitutional error constituting "structural defects in the constitution of the trial mechanism," have been found to "defy analysis by

'harmless error' standards." Arizona v. Fulminante, 499 U.S. 279, 309 (1991). Structural defects, subject to automatic reversal have been found where there has been a "complete denial of counsel," a "biased trial judge," "racial discrimination in [the] selection of [the] grand jury," the "denial of self-representation at trial," the "denial of a public trial," and a "defective reasonable-doubt instruction." Neder v. United States, 119 S.Ct. 1827, 1833 (1999).

In the direct appeal, in finding the identified error harmless, this Court misunderstood who Horace Barnes was while ruling that his testimony that Mr. Mordenti introduced himself by letting Barnes "know that he was in the mob" (R. 747) was harmless. The elimination of this testimony in fact was not harmless, or inconsequential, as the State in its Answer Brief indicates was the basis of this Court's conclusion not to reverse for a new trial. Answer Brief, Case No. 02-1159, at 36 ("The lower court concluded that it was unnecessary to examine the contention that the state improperly induced the testimony of Horace Barnes who subsequently stated that Mordenti had mob connections, by providing undisclosed benefits to Barnes and Leslie **since this Court on direct appeal had found Barnes' testimony to be inconsequential**.")(emphasis added). Clearly then, the circuit court and the State have interpreted this Court's direct appeal opinion as constituting a finding that Horace Barnes' testimony was inconsequential. Given that fact not mentioned

by the State in its Response to the habeas petition, this Court's conclusion was erroneous.

The testimony was a lynch pin of the State's case. The trial prosecutor had explained its significance on the record

when the defense counsel asked for a new trial on the basis of the testimony:

> I think it's relevant for the reasons alleged at the time because it goes to show that his association with an enterprise that would allow him to get someone at short notice so corroborates Gail Mordenti's versions of how the crime occurred because according to Gail Mordenti, the morning of the crime is when it had to have been planned unbenounced [sic] to her, but that phone call that was made by Larry Royston from T & D's Auto and Marine where she was working to Michael Mordenti must have been the pivotal conversation and then that evening he's there with somebody else. So that went to corroborate or to show that he had the means to commit this crime or to have access to someone else.

(R. 1557)(emphasis added). Certainly, corroboration of Gail's testimony was essential to the State's effort to obtain a conviction. The importance of Gail's credibility is revealed by the prosecutor's closing argument. At the outset of the closing, the prosecutor said:

> So, really the only issue in this case is whether or not Michael Mordenti is the man involved.
>
> Michael Mordenti is the one who conspired with Larry Royston and caused Thelma Royston's death on June 7th, 1989. The only law that I'm going to specifically discuss with you that is important for you to listen to is the judge is going to tell you that a juror may believe or disbelieve any or all of the testimony of a witness, and that's your sole job.
>
> So, just the fact that someone comes in here and states under oath that something happened doesn't mean that you have to believe it. It's your job to judge the credibility of the witnesses.
>
> And I hope during this trial I've assisted you in your job, and assisted you in evaluating the credibility of the witnesses who have come and testified under oath.

(R. 1177-78). The prosecutor's initial closing ended with an

argument that the case came down to a question of who was telling the truth, Gail Mordenti Milligan or Michael Mordenti:

> The actions of Gail Mordenti show you that she's telling the truth, and the actions of Michael Mordenti in his repeated denials of ever knowing or even hearing of Larry Royston, **show you beyond any reasonable doubt that she's telling the truth**.

(R. 1201)(emphasis added).

In furtherance of her effort to bolster Gail's credibility, the prosecutor in her closing replayed the tape of Gail's phone call to Mr. Mordenti that was made as an agent of the State on March 8, 1990. Before replaying the tape, the prosecutor told the jury to listen because "he's very cagey on that phone conversation, he never admits anything flat-out, but **you can read between the lines**, and you can see from what he says and how he says it that he's involved. **And he knows what's going on, and he's concerned**" (R. 1196)(emphasis added).

During the taped conversation that was introduced into evidence at trial, the following exchange occurred:

> [GAIL]: Well, Michael, I've got a subpoena from the State Attorney's Office. I mean, we're not - - you know, they're not playing games here. I mean, you know - -
> [MR. MORDENTI]: What do you want me to say? I don't know what to tell you. **I was just talking to my friend**. He's sitting right here now. He told me that they are also gonna subpoena Michael [Milligan].
> [GAIL]: Michael who?
> [MR. MORDENTI]: Your Michael [Milligan].
> [GAIL]: My Michael?
> [MR. MORDENTI]: That'S what I heard.
> [GAIL]: They're going to subpoena him for what?
> [MR. MORDENTI]: **That's what I heard**.

> [GAIL]: Oh, Michael, I am really upset about this, you know.
>
> [MR. MORDENTI]: Stay cool. There's nothing to worry about. You didn't do anything.
>
> [GAIL]: Well, yeah, if they subpoena Michael, Michael's crazy.
>
> * * *
>
> [GAIL]: Now, (sigh) what if - - what if - - yeah, but what if - - you know, I don't know. What if they have information that I - -
>
> [MR. MORDENTI]: **They have nothing**.
>
> [GAIL]: They have nothing?
>
> [MR. MORDENTI]: **Nothing.**
>
> [GAIL]: **That's what your friend says**?
>
> [MR. MORDENTI]: They're on a fishing expedition, as usual.
>
> [GAIL]: You're sure?
>
> [MR. MORDENTI]: They - - positive. They figured - - I don't want too say too much on this phone. I'd rather - - why don't you meet me at the sale tonight, and I'll tell you everything point blank.

(PC-T. 1055-56, 1060)(emphasis added).

As the prosecutor clearly told the circuit court, her strategy was to corroborate Gail Mordenti's versions of how the crime occurred by having the jury believe Mr. Barnes' testimony that Mr. Mordenti was in the mob and to read between the lines and see that as corroboration of Gail's testimony and an explanation for Mr. Mordenti's comments in the taped conversation.

Barnes in fact testified to more than merely the "mob" comment. He testified that he was federally incarcerated as a result of a federal prosecution in Tampa (R. 746). He testified that he was receiving no consideration for his testimony and that he was not "promised anything" for his testimony (R. 746). He testified that he knew Michael Mordenti, and he identified him in the courtroom (R. 746). He

testified that he met Michael Mordenti in October or November of 1989 (R. 747). According to Barnes, Mr. Mordenti identified himself by letting Barnes "know that he was in the mob" (R. 747). He testified that he went to see Mr. Mordenti "at his car lot in St. Petersburg" (R. 750). He testified that he went there with a Joel Darden and observed "Darden purchase a gun from Mr. Mordenti" (R. 750).

This Court erred in concluding that the mob comment was harmless error. This Court's failure in the direct appeal to know who Barnes was and how the trial prosecutor indicated that his mob comment was relevant to the State's presentation of its case is a violation of due process. See Parker v. Dugger, 498 U.S. 308, 321 (1991)("there is a sense in which the court did not review Parker's sentence at all"). The record had it been read revealed that Mr. Barnes met Mr. Mordenti at his car dealership, not in jail.[1] Further, the record clearly contained the trial prosecutor's explanation after the conviction of the manner in which she used the testimony to obtain a conviction.

Having given Mr. Mordenti a state law right to a direct appeal, the State of Florida was obligated to afford Mr. Mordenti an appeal that comported with due process and provided Mr. Mordenti with a fair opportunity to vindicate his constitutional rights. Hewitt v. Helms, 459 U.S. 460 (1983).

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[1]Moreover, Mr. Mordenti was not jailed while awaiting trial. He was out on bond.

As the United States Supreme Court has held: "A first appeal as of right [] is not adjudicated in accord with due process of law if the appellant does not have the effective assistance of an attorney." Evitts v. Lucey, 469 U.S. 387, 396 (1985). To the extent that Mr. Mordenti's appellate counsel failed to adequately advise this Court of the pertinent matters necessary to demonstrate that the error was not harmless, his performance was deficient and Mr. Mordenti was prejudiced.

The State argues that Mr. Mordenti received "spirited advocacy on this point" while quoting from the Initial Brief a passage where the appellate counsel argued:

> Clearly, the electrifying information first from his ex-wife that appellant had 'throw away pieces' and that 'he was dealing with some people that were shady' and finally, from Barnes, that he [i.e. Mr. Mordenti] had introduced himself (to someone in prison, perhaps when he himself was in prison?) As someone 'in the mob' is not the kind of error that will not effect the jury's deliberations.

Response at 7, quoting Initial Brief on Direct Appeal at 49. Appellate counsel was shockingly deficient in writing this paragraph. He obviously did not know that Mr. Mordenti did not meet Mr. Barnes in jail and had failed to read Barnes' testimony that he along with Joel Darden went to see Mr. Mordenti "at his car lot in St. Petersburg" (R. 750), and observed "Darden purchase a gun from Mr. Mordenti" (R. 750). Appellate counsel's failure to read the record seems pretty inadequate performance.

But in this quoted paragraph, appellate counsel perhaps

unwittingly suggests that Barnes' testimony was cumulative to "the electrifying information" that was testified to by Gail Mordenti Milligan. This hardly constitutes advocacy. Appellate counsel failed to point out to this Court that the prosecutor introduced the mob comment to provide corroboration for Gail's story. "So that went to corroborate or to show that he had the means to commit this crime or to have access to someone else." (R. 1557).

Certainly, the same due process principle applies when the State withholds pertinent and exculpatory information regarding the factual circumstances underlying the issues raised in the appeal. As is now known from the evidentiary hearing, Barnes went to federal prison because of the assistance Mr. Mordenti provided to the FBI. Of course, the State kept this fact not just from the jury, but also from this Court.

The United States Supreme Court has recognized that a prosecutor is:

> the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.

Berger v. United States, 295 U.S. 78, 88 (1935). As a result, the United States Supreme Court has forbidden "the prosecution to engage in 'a deliberate deception of court and jury.'" Gray v. Netherland, 518 U.S. 152, 165 (1996), quoting Mooney v.

Holohan, 294 U.S. 103, 112 (1935). That principle applies even on appeal. "Truth is critical in the operation of our judicial system and we find such affirmative misrepresentations by any attorney, but especially one who represents the State of Florida, to be disturbing." The Florida Bar v. Feinberg, 760 So.2d 933, 939 (Fla. 2000). This Court's consideration of Barnes' testimony was hampered by the fact that the trial prosecutor withheld critical truths. This too constituted a due process violation that deprived Mr. Mordenti of a full and fair direct appeal.

As to Mr. Mordenti's contention that plain or fundamental error occurred when this Court was misled as to the nature of the immunity provided Gail Mordenti Milligan, the State argues, "that misdescription could only redound to the benefit of Petitioner since the jury might mistakenly believe the witness had been given a greater benefit (and hence had greater motivation to embellish) than was actually the case." Response at 9. The State's logic is more twisted and contorted than a pretzel.[2] A witness who has less protection and is in fact subject to prosecution for criminal activity has more motivation to curry favor with the State than a witness who has "total immunity."

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[2]If you have the benefit, you are less in need of the benefit. Someone who cannot be charged with crimes has less reason to curry favor with the prosecutor than a witness who is subject to prosecution. See Davis v. Alaska, 415 U.S. 308 (1974).

The State's position also ignores this Court's holding that "Truth is critical in the operation of our judicial system and we find such affirmative misrepresentations by any attorney, but especially one who represents the State of Florida, to be disturbing." The Florida Bar v. Feinberg, 760 So.2d 933, 939 (Fla. 2000). Surely truth is necessary for a correct resolution of a capital direct appeal. A capital direct appeal conducted

without truth because of misrepresentations by the State surely violates due process.

CLAIM II

FLORIDA'S CAPITAL SENTENCING PROCEDURE DEPRIVED MR. MORDENTI OF HIS SIXTH AMENDMENT RIGHTS TO NOTICE AND TO A JURY TRIAL AND OF HIS RIGHT TO DUE PROCESS.

In its Response as to Claim II, the State ignores many significant legal developments regarding this claim in the year since the habeas petition was filed. Following the United States Supreme Court decision in Ring v. Arizona, 536 U.S. 584 (2002), considerable confusion over the scope of that decision has developed. In Ring, the Supreme Court noted that the Sixth Amendment jury trial guarantee applied to factual determinations necessary to render a criminal defendant death-eligible. Accordingly, the application of this principle required a determination of what constituted the factual prerequisites for death-eligibility under state law. The Supreme Court decided in Ring v. Arizona that the presence of an aggravating circumstance was a factual issue that constituted an "element" under Arizona law because its presence was necessary to render one convicted of first degree murder eligible for a death sentence.

The various courts that have addressed the implications of Ring on specific capital sentencing schemes have split on not only what constitutes a factual determination necessary for death-eligibility, but also where to look to find the

answer. Recently, the Nevada Supreme Court found that its capital scheme violated the Sixth Amendment in those cases where it permitted a judge to impose a death sentence after a jury was unable to arrive at unanimous decision. Johnson v. State, 59 P.3d 450, 460 (Nev. 2002). There, the Nevada Supreme Court explained that Nevada law "requires two distinct findings to render a defendant death-eligible." There must be at least one aggravating circumstance and no mitigation sufficient to outweigh the aggravating circumstances. Employing Ring, the Nevada Supreme Court concluded that these two findings were factual elements that were subject to the jury trial guarantee. Because in Johnson, the jury had been unable to return a unanimous verdict, the Nevada Supreme Court concluded that the error was not harmless, and it vacated the death sentence.[3]

Similarly, the Missouri Supreme Court in State v. Whitfield, 107 S.W. 3d 253 (Mo. 2003), concluded that Missouri's statutory scheme required three factual determinations to be made before a death sentence could be imposed. First, a finding of at least one statutory aggravator was required. Second, a determination that the

[3]The Arizona Supreme Court while considering whether Ring error was harmless cited Johnson while concluding that the factual determination as to whether the mitigating factors prohibit the imposition of a death sentence is subject to the right to trial by jury. State v. Ring, 65 P.3d 915, 942-43 (Ariz. 2003).

aggravating factors were sufficient to justify the imposition of a death sentence was required. Third, a factual resolution that the mitigating factors did not outweigh the aggravating factors was required. If these factual determinations cannot be made, the defendant is not eligible for a death sentence. Accordingly, the Missouri Supreme Court found that each of these three steps required a factual finding that was prerequisite to death-eligibility, and in turn constituted elements of capital murder.[4]

However, Mr. Mordenti recognizes that this Court has refused to look to the Florida statutory requirements, focusing instead on the language in the Supreme Court's Ring opinion that the presence of an aggravating circumstance was an element under Arizona law. This Court first addressed Ring in its decision denying a habeas petition in Bottoson v. Moore, 833 So. 2d 693 (Fla. 2002), cert. denied 537 U.S. 1070. The seven justices of this Court wrote seven different opinions as to the effect if any of Ring in Florida. Similarly, this Court denied a habeas petition in King v. Moore, 831 So. 2d 143 (Fla. 2002), cert. denied. 537 U.S. 1067. Since those decisions, this Court has generally cited

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[4]As discussed in Whitfield, the Colorado Supreme Court has also determined that the factual determinations made in a series steps before the imposition of a death sentence are elements of capital murder within the meaning of the Sixth Amendment. Woldt v. People, 64 P.3d 256 (Colo. 2003).

Bottoson and/or King while denying Ring claims. Since its decision in Bottoson, this Court has consistently ruled that the presence of one aggravating circumstance precludes Ring error. Duest v. State, 855 So. 2d 33, 39 Fla. 2003) ("We have previously rejected claims under Apprendi and Ring in cases involving the aggravating factor of a previous conviction of a felony involving violence."); Wright v. State, 2003 Fla. LEXIS 1144, *42, --- So. 2d --- (Fla. July 3, 2003)("In Bottoson and King, we discussed the application of Ring and Apprendi to Florida's capital sentencing scheme, and rejected the constitutional challenge, as we do here."); McCoy v. State, 853 So. 2d 896 (Fla. 2003)(same).

However, Mr. Mordenti respectfully submits that this Court has misconstrued the Supreme Court's opinion in Ring as simply establishing that the presence of an aggravating circumstance is necessary to render a defendant death eligible. According to the decisions from this Court, if an aggravator exists as a matter of law, then Ring does not apply to require a jury determination that the aggravator is present. This Court's analysis is at odds with the construction of Ring by the Nevada Supreme Court and the Missouri Supreme Court, both of which read Ring to mean that a state's own statutory language controls as to what constitutes an element of capital first degree murder.[5]

[5]It also conflicts with decisions by the Colorado Supreme Court and the Arizona Supreme Court. Woldt v. People, 64 P.3d at 265; State v. Ring, 65 P.3d at 943

In Florida, § 921.141, Fla. Stat., requires both the jury and the trial judge to make three factual determinations before a death sentence may be imposed. They (1) must find the existence of at least one aggravating circumstance, (2) must find that "sufficient aggravating circumstances exist" to justify imposition of death, and (3) must find that "there are insufficient mitigating circumstances to outweigh the aggravating circumstances." § 921.141(3), Fla. Stat. (emphasis added). If the judge does not make these findings, "the court shall impose sentence of life imprisonment in accordance with [§]775.082." Id. (emphasis added).

In conformity with the statutory requirements, Mr. Mordenti's jury was instructed:

> It is now your duty as jurors to **advise** the Court as to what punishment should be imposed upon the defendant, Michael Mordenti, for his crime of first degree murder of Thelma Royston.
>
> As you have been told, **the final decision as to what punishment shall be imposed, is the responsibility of the Judge.** However, your advisory verdict as to what sentence should be imposed on the defendant, Michael Mordenti, is entitled by law and will be given great weight by this Court in determining what sentence to impose in this case. It is only under rare circumstances that this Court could impose a sentence other than the sentence that you, the jurors, recommend.
>
> It is your duty to follow the law that will now be given to you by this Court and render to the court an advisory sentence based upon your determination as to **whether sufficient aggravating circumstances exist to justify the imposition of the death penalty**, and **whether sufficient mitigating circumstances exist to outweigh any aggravating circumstances found to exist**.
>
> Your advisory sentence should be based upon the evidence that you have heard while trying the

> guilt or innocence of the defendant and the evidence that has been presented to you in these proceedings.
>
> * * *
>
> If you find the aggravating circumstances do not justify the death penalty, your advisory sentence should bo one of life imprisonment, without possibility of parole for twenty-five years. Should you find sufficient aggravating circumstances do exist, it will then be your duty to determine whether mitigating circumstances exist that outweigh the aggravating circumstances.

(R3. 1489-92)(emphasis added.).

The three steps in Florida's statute and the jury instructions, like the steps in Missouri, also "require factual findings that are prerequisites to the trier of fact's determination that a defendant is death-eligible." Step 1 in the Florida procedure requires determining whether at least one aggravating circumstance exists. Step 2 in the Florida procedure requires determining whether "sufficient" aggravating circumstances exist to justify imposition of death. Missouri's Step 2 is indistinguishable, requiring a determination of whether the evidence of all aggravating circumstances "warrants imposing the death sentence." Step 3 in the Florida procedure requires determining whether "there are insufficient mitigating circumstances to outweigh the aggravating circumstances." Missouri's Step 3, as well as Nevada's Step 2, are identical, requiring a determination of whether mitigating circumstances outweigh aggravating circumstances.

In Florida, as in Missouri and the other states discussed

in Whitfield, the sentencer does not consider the ultimate question of whether or not to impose death until the eligibility steps are completed. After the first three steps, the Florida statute directs the jury to determine, "[b]ased on these considerations, whether the defendant should be sentenced to life imprisonment or death." Section 921.141(2)(c), Fla. Stat. The structure of the statute clearly establishes that the steps which occur before this determination are necessary to make the defendant eligible for this ultimate determination, that is, to render the defendant death-eligible.

The instructions given to Mr. Mordenti's jury tracked the steps contained in the statute. The jury was required to find "sufficient aggravating circumstances exist to justify the imposition of the death penalty." The jury was then told, if so, to go to the next step and determine "whether sufficient mitigating circumstances exist to outweigh any aggravating circumstances found to exist." Only after determining that the mitigating circumstances did not outweigh the aggravating circumstances was the jury told to consider whether to recommend a sentence of death.

In Ring, the Supreme Court held that the Sixth Amendment to the United States Constitution requires that when aggravating factors are statutorily necessary for imposition of the death penalty, they must be found beyond a reasonable doubt by a jury:

> [W]e overrule *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. . . . Because Arizona's enumerated aggravating factors operate as 'the functional equivalent of an element of a greater offense,' . . . the Sixth Amendment requires that they be found by a jury.

Ring, 536 U.S. at 609 (citations omitted). This was in conformity with its earlier ruling in Apprendi v. New Jersey, where the Supreme Court held, "If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact--no matter how the State labels it--must be found by a jury beyond a reasonable doubt." 530 U.S. at 482-83. Ring applied Apprendi to the category of capital murder cases and concluded any fact rendering a person eligible for a death sentence is an element of the offense. 536 U.S. at 604, *quoting* Apprendi, 530 U.S. at 494 ("In effect, 'the required finding [of an aggravating circumstance] expose[d] [Ring] to a greater punishment than that authorized by the jury's guilty verdict'"). The Supreme Court has even more recently elaborated upon the meaning of Ring. In Sattazahn v. Pennsylvania, 123 S.Ct. 732, 739 (2003), the Supreme Court explained:

> Put simply, if the existence of any fact (other than a prior conviction) increases the maximum punishment that may be imposed on a defendant, that fact–no matter how the State labels it– constitutes an element, and must be found by a jury beyond a reasonable doubt.

The question which Ring v. Arizona decided was what facts

constitute “elements” in capital sentencing proceedings. The bulk of the Ring opinion addresses how to determine whether a fact is an “element” of a crime. See Ring, 122 S. Ct. at 2437-43. The question in Ring was not whether the Sixth Amendment requires a jury to decide elements. That has been a given since the Bill of Rights was adopted. The question was what facts are elements. Justice Thomas explained this in his concurring opinion in Apprendi v. New Jersey:

> This case turns on the seemingly simple question of what constitutes a "crime." Under the Federal Constitution, "the accused" has the right (1) "to be informed of the nature and cause of the accusation" (that is, the basis on which he is accused of a crime), (2) to be "held to answer for a capital, or otherwise infamous crime" only on an indictment or presentment of a grand jury, and (3) to be tried by "an impartial jury of the State and district wherein the crime shall have been committed." Amdts. 5 and 6. See also Art. III, [Sec.] 2, cl. 3 ("The Trial of all Crimes . . . shall be by Jury"). With the exception of the Grand Jury Clause, see Hurtado v. California, 110 U.S. 516, 538 . . . (1884), the Court has held that these protections apply in state prosecutions. Herring v. New York, 422 U.S. 853, 857, and n.7 . . . (1975). Further, the Court has held that due process requires that the jury find beyond a reasonable doubt every fact necessary to constitute the crime. In re Winship, 397 U.S. 358, 364 . . . (1970).
>
> *All of these constitutional protections turn on determining which facts constitute the "crime"--that is, which facts are the "elements" or "ingredients" of a crime.* In order for an accusation of a crime (whether by indictment or some other form) to be proper under the common law, and thus proper under the codification of the common-law rights in the Fifth and Sixth Amendments, it must allege all elements of that crime; likewise, in order for a jury trial of a crime to be proper, all elements of the crime must be proved to the jury (and, under Winship, proved beyond a reasonable doubt).

Apprendi, 120 S. Ct. at 2367-68 (Thomas, J., concurring) (emphasis added). Justice Thomas explained that courts have "long had to consider which facts are elements," but that once that question is answered, "it is then a simple matter to apply that answer to whatever constitutional right may be at issue in a case--here, Winship and the right to trial by jury." Id. at 2368.

Just as Justice Thomas explained in Apprendi, there was no question in Ring that the jury trial right applies to elements. The dispute in Ring involved what was an element. Thus, the question in Ring is akin to a statutory construction issue, and "retroactivity is not at issue." Fiore v. White, 531 U.S. 225, 226 (2001); Bunkley v. Florida, 123 S. Ct. 2020, 2023 (2003). That is, the Sixth Amendment right to have a jury decide elements is a bedrock, indisputable right.

Under a proper reading of Ring, the Florida statutory provisions as reflected in the instructions given to Mr. Mordenti's jury makes the steps required before the jury is free to consider which sentence to impose elements of capital first degree murder.

The State also argues that Ring is not retroactive. However, it cites not a single case from this Court finding Ring not retroactive. Instead, the State relies upon federal decisions concerning whether the provisions of Teague v. Lane, 489 U.S. 288 (1989), which governs federal habeas corpus proceedings, permit consideration of Ring as authority in cases that were final at the time Ring issued. In its argument, the State neglected to mention authority contrary to its position. In Summerlin v. Stewart, 2003 U.S. App. LEXIS 18111 (9th Cir. September 2, 2003)(in banc), the in banc Ninth Circuit concluded that Ring announced substantive criminal law which by definition applied retroactively. Further, the in banc Ninth Circuit concluded that Ring error was structural

error not subject to harmless error analysis.

Mr. Mordenti acknowledges that Summerlin was in conflict with decisions from other circuit courts of appeal. In fact, the United States Supreme Court has granted certiorari review in Summerlin in order to resolve the split among the circuits. Schriro v. Summerlin, 2003 U.S. LEXIS 8574 (Dec. 1, 2003).

Under the law ignored by the State in its Response, Mr. Mordenti was deprived of his Sixth Amendment right to have the jury unanimously determine whether the statutory requirements for death eligibility were met. Habeas relief is warranted.

CLAIM III

MR. MORDENTI WAS DENIED HIS RIGHTS UNDER THE FOURTH, FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION, WHEN THE PROSECUTOR IMPERMISSIBLY SUGGESTED TO THE JURY THE LAW REQUIRED THAT IT RECOMMEND A SENTENCE OF DEATH. APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE THIS ISSUE ON DIRECT APPEAL.

The State in its Response refuses to address the egregious comments made by the trial prosecutor in his closing during the penalty phase. He argued to the jury:

> Nothing that the defense can say, nothing that the defense can do can mitigate this murder. Any killing of a human being is atrocious. Any killing of a human being is aggravating. Nothing mitigates the killing of a human being, but absolutely nothing at all mitigates this. Nothing. Nothing mitigates this.

(R. 1468-1469).

Any analysis of this argument demonstrates that the

prosecutor first argued that the Eighth Amendment requirement that a capital defendant was entitled to present mitigating evidence did not apply here. The prosecutor is arguing for an automatic death sentence which has been repeatedly found to violate the Eighth Amendment. Sumner v. Shuman, 483 U.S. 66 (1987)("the Eighth Amendment and Fourteenth Amendments require that the sentencing authority be permitted to consider any relevant mitigating circumstance before imposing a death sentence").

Second, the prosecutor said, "[a]ny killing of a human being is atrocious." That is most assuredly not the law. Godfrey v. Georgia, 446 U.S. 420 (1980); Maynard v. Cartwright, 486 U.S. 356 (1988); Espinosa v. Florida, 505 U.S. 1079 (1992). In fact, such an argument undeniably is contrary to Eighth Amendment jurisprudence. It is an argument that any murder qualifies as "heinous, atrocious or cruel." Such an argument deprives the aggravating circumstance of its narrowing function. Smalley v. State, 546 So. 2d 720 (Fla. 1989).

Third, the prosecutor argued, "[a]ny killing of a human being is aggravating." With this, the prosecutor was arguing against the application of the core value of the Eighth Amendment recognized in Furman v. Georgia, 408 U.S. 238 (1972).

Fourth, the prosecutor argued, "[n]othing mitigates the killing of a human being." Here, the prosecutor argued

against the application of the core value of the Eighth Amendment recognized in Lockett v. Ohio, 438 U.S. 586 (1978).

In its Response, the State asserts, "[t]he prosecutor's comments did not constitute fundamental error and were appropriate advocacy as justice under the facts of this case." In making this argument, the State ignores the prosecutor's actual argument which urged the jury not to perform a narrowing function on the basis of the facts of this case, and not to consider the mitigating evidence necessary to conduct an individualized sentencing. The prosecutor's argument most assuredly was not proper advocacy.

The remarks were of the type that this Court has found "so egregious, inflammatory, and unfairly prejudicial that a mistrial was the only proper remedy." Garron v. State, 528 So. 2d 353, 358 (Fla. 1988). The circumstances are parallel to the situation at the guilt phase in Nowitzke v. State, 572 So. 2d 1346 (Fla. 1990), where this Court ordered a new trial, commenting:

> We also are persuaded that [the Defendant] was denied a fair trial by the prosecutorial misconduct that permeated this case. . . . While isolated incidents of overreaching may or may not warrant a mistrial, in this case the cumulative effect of one impropriety after another was so overwhelming as to deprive [the Defendant] of a fair trial.

Nowitzke, 572 So. 2d at 1350.

To the extent that the State argues that this claim was raised and decided on direct appeal, the State ignores the fact that this Court was denied adequate appellate advocacy.

The lack of appellate advocacy on Mr. Mordenti's behalf is identical to the lack of advocacy present in other cases in which this Court has granted habeas corpus relief. Wilson v. Wainwright, 474 So.2d 1162 (Fla. 1985). Advocacy includes not just listing of issues, but argument as to how the error violated the defendant's rights and why a reversal is required. Yet, counsel failed to adequately argue the claim.

Ample case law was available. Arguments such as those presented here have been long-condemned as violative of due process and the Eighth Amendment. See Drake v. Kemp, 762 F.2d 1449, 1458-61 (11th Cir. 1985)(in banc). Such arguments render a sentence of death fundamentally unreliable and unfair. Drake, 762 F.2d at 1460. ("[T]he remark's prejudice exceeded even its factually misleading and legally incorrect character"); Potts v. Zant, 734 F.2d 526, 536 (11th Cir. 1984)(because of improper prosecutorial argument, the jury may have "failed to give its decision the independent and unprejudiced consideration the law requires").

Habeas relief is warranted.

CONCLUSION

For all of the reasons discussed herein and in his petition, Mr. Mordenti respectfully urges the Court to grant habeas corpus relief.

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 Robert Landry, Assistant Attorney General, Department of Legal Affairs, Concourse Center #4, 3507 Frontage Road, Suite 200, Tampa, FL 33607 on January 14, 2004.

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I hereby certify that the foregoing petition has been reproduced in a 12 point Courier type, a font which is not proportionately spaced.

By: _____
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Counsel for Petitioner