CASE NO. SC03-1374

LOWER COURT CASE NO. 96-2517

MICHAEL DUANE ZACK, III,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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

INITIAL BRIEF OF APPELLANT

LINDA McDERMOTT
Florida Bar No. 0102857
141 N.E. 30th Street
Wilton Manors, FL 33334
(850) 322-2172

COUNSEL FOR APPELLANT

PRELIMINARY STATEMENT

This proceeding involves the appeal of the circuit court's denial of Mr. Zack's initial motion for post-conviction relief. The motion was brought pursuant to Fla. R. Crim. P. 3.850. The circuit court denied some of Mr. Zack's claims without an evidentiary hearing. The circuit court held a limited evidentiary hearing on Mr. Zack's ineffective of counsel claims. The following abbreviations will be utilized to cite to the record in this cause, with appropriate page number(s) following the abbreviation.

"R. ___." – record on direct appeal to this Court;

"T. ___." – transcript of trial proceedings;

"PC-R. ___." – record on appeal from the denial of postconviction relief.

All other references will be self-explanatory or otherwise explained herewith.

STANDARD OF REVIEW

Mr. Zack has presented several issues which involve mixed questions of law and fact and purely legal questions. Thus, a de novo standard applies.

REQUEST FOR ORAL ARGUMENT

Mr. Zack has been sentenced to death. The resolution of the issues in this action will determine whether Mr. Zack lives or dies. This Court has not hesitated to allow oral argument in other capital cases in similar procedural posture. A full opportunity to air the issues through oral argument would be appropriate in this case, given the seriousness of the claims involved and the stakes at issue. Mr. Zack, through counsel, accordingly urges that the Court permit oral argument.

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STATEMENT OF THE CASE

Mr. Zack was indicted on June 25, 1996, with one count of first-degree murder in the death of Ravonne Kennedy Smith, one count of robbery and one count of sexual battery (R. 1-3). Mr. Zack pled not guilty to the charges.

Mr. Zack's capital jury trial commenced on September 8, 1997. The jury returned guilty verdicts on all of the charges on September 15, 1997 (T. 1521-2; R. 419-20). The penalty phase began on October 14, 1997. The jury recommended a death sentence by a vote of eleven to one (T. 2117; R. 792). A sentencing hearing was held on November 10, 1997, and two weeks later, Mr. Zack was sentenced to death for the one count of first degree murder (R. 852-858; 859-875).

On direct appeal, this Court affirmed Mr. Zack's convictions and sentences. Zack v. State, 753 So. 2d 9 (Fla. 2000). The United States Supreme Court denied certiorari. Zack v. Florida, 531 U.S. 858 (2000).

On July 6, 2001, Glenn Arnold was court appointed to represent Mr. Zack as registry counsel (PC-R. 122). Mr. Arnold filed a motion to this Court to extend the time for filing Mr. Zack's Rule 3.850 motion. This Court granted Mr.

Arnold's motion (PC-R. 131).

A motion to vacate judgements and sentences pursuant to Rule 3.850 was filed on May 6, 2002 (PC-R. 132-42). State-funded counsel raised seven claims in the motion: 1) Mr. Zack was interrogated by law enforcement and provided statements despite his signs of mental impairment and trial counsel was ineffective in failing to suppress the statements; 2) Mr. Zack was denied effective assistance of counsel because law enforcement failed to provide him with an attorney; 3) trial counsel was ineffective for failing to move for a change of venue; 4) trial counsel was ineffective for having Mr. Zack testify without preparing him for cross-examination or explaining that it was Mr. Zack's choice of whether or not to testify; 5) trial counsel was ineffective at the guilt phase of Mr. Zack's trial for failing to have Mr. Zack evaluated to determine Mr. Zack's competency to proceed and state of mind at the time of the crimes; 6) Mr. Zack was incompetent at trial and is incompetent in postconviction; 7) trial counsel was ineffective in his closing arguments to the jury (PC-R. 132-42).

The State responded to Mr. Zack's Rule 3.850 motion (PC-R. 143-90). In the response, the State informed the court that Mr. Zack's motion regarding his competency to proceed in postconviction did not comply with the requirements set forth

by this Court, i.e., Fla. R. Crim. P. 3.851 (d) and Carter v. State, 706 So. 2d 873 (Fla. 1997). The State also agreed to allow Mr. Zack the opportunity to amend his motion in order to comply with the requirements this Court has set forth to determine competency.

Additionally, the Court conceded that an evidentiary hearing should be held as to claims four and seven involving the ineffective assistance of trial counsel in calling Mr. Zack as a witness and in his closing arguments (PC-R. 143-90).

On October 18, 2002, postconviction counsel filed an amended Rule 3.850 motion (PC-R. 219-40). The motion abandoned several of the previously pled claims and added new claims. The amended motion contained the following claims: 1) trial counsel was ineffective in failing to object to the DNA evidence and requesting a Frye hearing as to the evidence; 2) the court erred in failing to conduct a Frye hearing on the DNA evidence; 3) trial counsel was ineffective for having Mr. Zack testify without preparing him for cross-examination or explaining that it was Mr. Zack's choice of whether or not to testify; 4) the death penalty is an excessive punishment; 5) trial counsel was ineffective in his closing arguments to the jury; 6) a Ring v. Arizona claim (PC-R. 219-40).

The State again responded and this time conceded that an evidentiary hearing should be held as to claims one, three and

five (PC-R. 257-297). The State argued that the other claims should be summarily denied (PC-R. 257-297).

A Huff hearing was held on January 27, 2003, and on March 20, 2003, the lower court entered an order granting a limited evidentiary hearing on claims one, three and five (PC-R. 338-9). The court summarily denied the other claims (PC-R. 338-9). On May 14, 2003, an evidentiary hearing commenced. Following the hearing, the lower court entered an order denying all relief on July 15, 2003 (PC-R. 567-81).

Mr. Zack timely filed a notice of appeal on August 5, 2003 (PC-R. 816).

STATEMENT OF FACTS

Mr. Zack was indicted for one count of first-degree murder, one count of robbery and one count of sexual battery on January 25, 1996 (R. 1-3). The Public Defender's Office represented Mr. Zack. Specifically, Elton Killam was assigned to represent Mr. Zack as his trial counsel. Trial counsel proceeded to file a series of motions to declare Florida Statute 921.141 unconstitutional and to vacate the death penalty (R. 12-26; 27-31; 32-4; 35-7; 38-51; 64-79; 80-6). Specifically, trial counsel challenged Florida Statute 921.141 because the heinous, atrocious or cruel aggravator is unconstitutionally vague and overbroad and makes it impossible to conduct proportionality review. Additionally, the statute

violates the right to trial by jury (R. 12-26). Trial counsel moved to vacate the death penalty or declare it invalid as to Mr. Zack for a number of reasons, including, but not limited to: it is an excessive penalty; it is not a deterrent; the aggravating factors are vague and indefinite; the statute calls for an automatic aggravator; the ambiguity of the sentencing role of the judge; the inability to conduct proportionality review and harmless error review; the lack of a special verdict form; the lack of unanimity in finding aggravators; and the cold, calculated and premeditated aggravator is unconstitutional (R. 27-31; 27-31; 35-7; 38-51; 64-79; 80-6).

All of the defense's motions were denied (R. 119-20).

The State filed a series of motions indicating its intention to offer evidence of other crimes, including the Okaloosa murder, and the thefts of the red Honda and firearms (R. 230-1; 232-3; 234-5; 236-7; 238-9; 240-1; 242-3; 244-5; 246-7). In response, trial counsel filed a motion to preclude similar fact evidence from being admitted (R. 273-5). The court denied the defense's motion and allowed the State to admit almost all of the other crimes that it had requested to admit (R. 357-61).

The State was also attempting to prohibit the defense from presenting mental health testimony, from a non-examining

expert in the guilt phase (R. 303-5), because the defense had indicated that Mr. Zack was relying on mental defect and intoxication (R. 356). At a hearing, a week before trial, the court denied the State's motion and allowed the defense to present evidence of posttraumatic stress disorder (PTSD), and fetal alcohol syndrome through the testimony of a non-examining expert (R. 362-412). However, the court denied the defense's request to introduce a report from an examining doctor prior to the crimes diagnosing Mr. Zack with PTSD (R. 380).

Mr. Zack's capital trial commenced in September, 1997. At trial the State introduced evidence that Mr. Zack was present at the bar where the victim, Ms. Smith, worked on June 13, 1996 (T. 201-10). Debra Forsyth who also worked at the bar saw Mr. Zack and Ms. Smith speaking to one another and observed Mr. Zack drink two or three beers in a couple of hours (T. 204-6). Mr. Zack did not appear intoxicated (T. 206).

Others saw Mr. Zack and Ms. Smith speaking to one another and observed Mr. Zack drinking beer (T. 212; 224; 236-7; 249; 342-50). And, Russell Williams met Mr. Zack and Ms. Smith at the bar and then proceeded to drive around with them so that the three could "smoke a joint" (T. 250).

Later that night, Danny Schaffer, Ms. Smith's live-in

boyfriend, returned home to find Ms. Smith's beaten and stabbed body in the spare room (T. 269-276). Items had been removed from the house (T. 294-5).

The crime scene technician explained that a struggle had occurred in the living room, where a broken beer bottle was found (T. 317). Ms. Smith's bloody clothes were found in the bedroom (T. 318). Florida Department of Law Enforcement analysts also described the scene of the house, including the blood splatter which the State claimed showed that the bloodshed began in the living room, continued down the hall into the bedroom and then into the empty room (T. 373). Also, Mr. Zack's fingerprints were identified in Ms. Smith's vehicle and the red Honda (T. 708-12).

The medical examiner testified that Ms. Smith suffered four knife wounds to the chest and bruising to the face, neck and chest (T. 505-6). The stab wounds to the chest were lethal (T. 509). Ms. Smith also tested at .26 for her blood-alcohol content (T. 515). The medical examiner could not be certain whether or not Ms. Smith was conscious when she received her injuries (T. 549).

DNA analysis, both PCR and RFLP, were conducted on evidence from both the Escambia and Okaloosa homicides. DNA obtained from the vaginal swab of Ms. Smith corresponded with the markers identified in Mr. Zack's DNA profile and

statistically matched to 1 in 18,700 Caucasian individuals (T. 672-3). The DNA, PCR analysis also showed that both Ms. Smith and Ms. Russillo's blood was found on Mr. Zack's right tennis shoe and clothes (T. 677-9, 697-9). FDLE Analyst McClure also testified that Ms. Smith's DNA profile occurs in 1 in 8,200 individuals in the Caucasian population (T. 684).

The day following the homicides, Mr. Zack attempted to pawn the items taken from Ms. Smith's house (T. 628-42).

After being arrested, Mr. Zack made statements to Investigator Vecker of the Bay County Sheriff's Office and Investigator Henry of the Escambia County Sheriff's Office (T. 770-800, 928-966). In his statements, Mr. Zack admitted that he had killed Ms. Smith, but he maintained that they had had consensual sex at Ms. Smith's house and that after having sex, Ms. Smith made a comment about his mother's murder and Mr. Zack hit the victim (T. 770-800, 928-966). The victim managed to get away from Mr. Zack and Mr. Zack believed that she was going to get a gun, so he went to the kitchen, found a knife and stabbed Ms. Smith (T. 770-800, 928-966). The jury also heard Mr. Zack's statement about the Okaloosa homicide as well as other crimes (T. 770-800, 817-910, 928, 966).

The State introduced evidence of other crimes, including the auto theft from Edith Pope, the theft of firearms and money from Bobby Chandler, Ms. Russillo's homicide and the

burglary in Panama City (T. 419, 449, 462, 532-6, 554-64, 570-3, 573-97, 605-16, 628-42, 656-90, 691-701, 702-23, 723-30, 730-6, 746-815, 817-910).[1]

Mr. Zack's trial counsel introduced some evidence of Mr. Zack's abusive family background and mental problems in an attempt to establish that Mr. Zack suffered from fetal alcohol syndrome, posttraumatic stress disorder and suffered severe abuse as a child (T. 1016-28, 1029-44, 1055-69, 1168-1246).

Dr. Maher, testified as a non-examining mental health expert and explained the features of fetal alcohol syndrome and posttraumatic stress disorder (T. 1168-1246). Dr. Maher testified that individuals who suffer from fetal alcohol syndrome have poor emotional and impulse control (T. 1189). Likewise, individuals who suffer from PTSD suffer from impairments. Dr. Maher opined based on a hypothetical based of the facts of the case that a person of Mr. Zack's mental and emotional makeup would be impaired in a situation such as the one with Ms. Smith and that those impairments would cause Mr. Zack not to premeditate the same way as others (T. 1205-6).

Trial counsel also presented the testimony of Mr. Zack

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[1]All total twenty of the thirty witnesses called to testify testified about other crimes that Mr. Zack had allegedly committed – none of which he had been convicted.

(T. 1068-1167). Mr. Zack told the jury that he had been drinking for much of June 13, 1996, and had also used marijuana and LSD (T. 1087). Mr. Zack's testimony was consistent with his statements when he described how he and Ms. Smith met, arrived at her house, had consensual sex and when the attack ensued (T. 1086-95). Mr. Zack also described his torturous and unstable upbringing as well as his drug and alcohol abuse (T. 1097-1106).

In order to rebut the defense's mental health defense and show that Mr. Zack could in fact form the premeditation required to be guilty of first degree murder, the State presented the testimony of Dr. Harry McClaren (T. 1251-1308). Dr. McClaren testified that while he could not say that Mr. Zack did not suffer from fetal alcohol syndrome or posttraumatic stress disorder, he believed that the behavior described in a hypothetical based on the evidence presented to the jury showed purposeful behavior (T. 1257-8, 1281).

The jury found Mr. Zack guilty as charged (R. 419-20).

In October, 1997, the penalty proceedings occurred. In addition to the evidence presented in the guilt phase, the State introduced evidence that at the time of the crimes Mr. Zack was on felony probation in Oklahoma (T. 1619-23). Additionally, three of the victim's family members testified about the loss of Ms. Smith, i.e., victim impact testimony (T.

1623-9, 1629-32, 1632-5).

Trial counsel introduced evidence of the dysfunctional and abusive environment in which Mr. Zack was raised. Mr. Zack's mother drank heavily while she was pregnant (T. 1701-4). In fact, Mr. Zack was born early, after his mother was in a car accident which caused her to go into labor (T. 1705). Mr. Zack's natural father abandoned him when he was less than a year old (T. 1708). As a child and teenager, Mr. Zack was moved from home to home, even spending time in mental institutions and foster care because he was a difficult child (T. 1663-7). Mr. Zack's stepfather, Tony Midkiff, violently abused Mr. Zack, physically, sexually and mentally. Mr. Midkiff jerked Mr. Zack by the hair, put scalding spoons to his tongue and forks to his penis, beat him about the face with his fists, kicked him with spurs and sexually abused him (T. 1727-30, 1753-63, 1768-95).

In addition to the horrific background information, trial counsel presented mental health testimony through four experts: Drs. William Spence, Michael Maher, Barry Crown and James Larson. Dr. Spence had evaluated Mr. Zack prior to the crimes and believed that he suffered from PTSD, chronic

depression and addiction (T. 1825-9). He believed Mr. Zack needed residential treatment (T. 1830).

Dr. Larson agreed with Dr. Spence's diagnosis (T. 1862). Dr. Larson testified that Mr. Zack's mental impairments were similar to those of a mildly mentally retarded individual and that they indicated possible brain damage (T. 1866). Dr. Larson believed that at the time of the crime Mr. Zack was under extreme emotional distress and his ability to appreciate the criminality of his conduct was substantially impaired (T. 1873).

Dr. Crown concurred that the statutory mental health mitigators were present at the time of the crimes (T. 1909-10). Dr. Crown also evaluated Mr. Zack and determined that he suffered from fetal alcohol syndrome (T. 1892), as well as PTSD (T. 1907).

Dr. Maher, who evaluated Mr. Zack following the guilt phase agreed with the other experts as to Mr. Zack's diagnosis and the presence of the mental health mitigators (T. 1929-57).

Drs. Eric Mings and Harry McClaren were used to rebut the defense's mental health experts. Neither Dr. Mings nor Dr. McClaren could say that Mr. Zack suffered form PTSD or fetal alcohol syndrome (T. 1992), but agreed that Mr. Zack could be diagnosed with PTSD (T. 2006, 2022). Dr. McClaren conceded

that Mr. Zack exhibited a profile similar to a mentally retarded individual (T. 2043).

Finally, the State presented the testimony of Candice Fletcher, Mr. Zack's former girlfriend and mother of his child (T. 2048-56). Ms. Fletcher testified that Mr. Zack used to visit with his stepfather and only stopped spending time with him when Mr. Midkiff refused to see Mr. Zack after Mr. Zack stole from him (T. 2051-2). Ms. Fletcher also told the jury that Mr. Zack only sought help when he faced going to jail (T. 2054).

The jury recommended a death sentence by a vote of eleven to one (R. 792). On November 24, 1997, the trial court imposed a death sentence and entered his sentencing order (R. 859-75). The court found six aggravators: 1) Mr. Zack was on felony probation at the time of the crimes; 2) Mr. Zack committed the murder to avoid arrest; 3) Mr. Zack committed the murder during the course of the sexual battery or burglary; 4) Mr. Zack committed the murder for pecuniary gain; 5) the murder was heinous, atrocious or cruel; and 6) the murder was cold, calculated and premeditated (R. 852-8, 859-75).

This Court affirmed Mr. Zack's conviction and sentence on direct appeal. Zack v. State, 753 So. 2d 9 (Fla. 2000). However, this Court did find that error occurred during Mr.

Zack's penalty phase because the avoiding arrest aggravator did not apply in Mr. Zack's case. Id. at 20. Likewise, this Court found error in the application of the felony probation aggravator. Id. at 25.

On July 6, 2001, Glenn Arnold was court appointed to represent Mr. Zack as registry counsel (PC-R. 122). Mr. Arnold filed a motion to this Court to extend the time for filing Mr. Zack's Rule 3.850 motion. This Court granted Mr. Arnold's motion (PC-R. 131).

A motion to vacate judgements and sentences pursuant to Rule 3.850 was filed on May 6, 2002 (PC-R. 132-42), and in October, an amended Rule 3.850 motion was filed (PC-R. 219-40).

On May 14, 2003, an evidentiary hearing commenced. At the hearing, the court considered three issues: 1) trial counsel was ineffective in failing to object to the DNA evidence and requesting a Frye hearing as to the evidence; 2) trial counsel was ineffective for having Mr. Zack testify without preparing him for cross-examination or explaining that it was Mr. Zack's choice of whether or not to testify; and 3) trial counsel was ineffective in his closing arguments to the jury.

In support of Mr. Zack's claims, postconviction counsel presented the testimony of two witnesses – the trial attorney,

Elton Killam, and the defendant, Michael Zack.

Mr. Killam testified that as to the issue about failing to challenge the DNA testimony, including the analysts qualifications, the testing method and the statistical analysis, that it was not his strategy to question the DNA evidence (PC-R. 349). Mr. Killam did not believe that the DNA evidence affected the case (PC-R. 359). Mr. Killam explained that the evidence was going to show that Mr. Zack was involved in the murders, so he decided not to argue that the DNA analysis was incorrect (PC-R. 375). He also believed that it did not help Mr. Zack to try to challenge the DNA analysis that showed Mr. Zack had sex with the victim (PC-R. 381).

As to his closing argument, Mr. Killam testified that he did concede that Mr. Zack killed the Okaloosa victim because he knew that fact was going to be proven; he thought it was going to be obvious (PC-R. 393, 407). Mr. Killam admitted that he conceded both murders to the jury (PC-R. 394). But, he tried to argue that Mr. Zack did not engage in purposeful conduct and focused on the intent issue (PC-R. 399, 402-3). Mr. Killam wanted the jury to find that there was no premeditation because of Mr. Zack's mental and emotional condition (PC-R. 414).

Finally, Mr. Killam testified that he wanted Mr. Zack to testify so that he could "fill in the gaps" with the jury (PC-

R. 465). He believed Mr. Zack's testimony was "crucial" (PC-R. 465). Mr. Killam stated that he informed Mr. Zack that he could be cross examined and Mr. Zack understood the importance of his testifying (PC-R. 466, 471-2, 473).

Mr. Zack testified that he was never told he would be testifying and he did not know he would be cross examined (PC-R. 432-3). Mr. Zack was not prepared and testified that he would not have testified if he had known what would happen (PC-R. 434, 455).

Following the hearing, the lower court entered an order denying all relief on July 15, 2003 (PC-R. 567-81).

The lower court found that trial counsel made a strategic decision not to challenge the DNA results either through a Frye hearing or at trial due to several reasons (PC-R. 569-70). The court credited trial counsel's testimony that if he challenged the DNA evidence he would lose credibility with the jury (PC-R. 570). The court found that trial counsel's failure to challenge the DNA evidence did not constitute ineffective assistance of counsel.

As to Mr. Zack's claim that his trial counsel failed to prepare him to testify and that he would not have testified if he had known that he did not have to and that he would be subject to cross examination, the court found that trial counsel's testimony was more credible than Mr. Zack's (PC-R.

575-6). The court determined that trial counsel had met with Mr. Zack and advised him about his testimony and what to expect (PC-R. 576).

Likewise, the court found that trial counsel was not ineffective during his arguments to the jury when he discussed the Okaloosa homicide and the way he described the homicide as a "brutal killing" which "look[ed] real bad" and "did not make sense." (PC-R. 577-80). The court believed that in reviewing the comments in context, trial counsel was trying to convince the jury that the crime scene and the homicide itself did not reflect premeditation (PC-R. 579).

The court also summarily denied Mr. Zack's claim that the trial court should have ordered a Frye hearing, Mr. Zack's death sentence was not proportional and Mr. Zack's death sentence is unconstitutional under Ring v. Arizons.

SUMMARY OF ARGUMENT

1. Trial counsel was ineffective in failing to challenge the DNA evidence introduced in Mr. Zack's capital trial. The lower court erred in finding that trial counsel made a reasonable strategic decision in failing to request a Frye hearing or challenge the DNA evidence before the jury. Trial counsel's excuses about there being overwhelming evidence of Mr. Zack's guilt and not wanting to lose

credibility with the jury make no sense when considering that a Frye hearing would have been held before the trial when the jury was not present. Also, certainly the DNA evidence was used as more than evidence of Mr. Zack's guilt. Realistically, DNA evidence is powerful and contributed to the jury's verdict. Had trial counsel effectively challenged the evidence, it would have been inadmissible.

2. Trial counsel's presentation of Mr. Zack's testimony was ineffective. Trial counsel knew that Mr. Zack suffered from low IQ and exhibited features of a mentally retarded individual, but counsel did not adequately prepare Mr. Zack for his testimony or cross-examination.

3. Trial counsel was ineffective during his remarks to the jury. Trial counsel conceded that the Okaloosa homicide was "brutal" and made other unflattering comments about Mr. Zack and

the crimes. If trial counsel had a strategy, it was not reasonable.

4. The court erred in summarily denying Mr. Zack's claims that the trial court should have ordered a Frye hearing and that Mr. Zack's death sentence was not proportional.

5. Mr. Zack's sentence of death violates the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, as evidenced by Ring v. Arizona. Mr. Zack's death sentence must be vacated and a life sentence imposed.

6. Mr. Zack's state postconviction proceeding was infected with unreliability due to him being denied constitutionally competent and effective representation. Counsel is a statutory right in Florida and said right must be safeguarded by appointment of competent counsel, and case law from this Court requires competent and effective representation in capital postconviction proceedings. Mr. Zack has been denied due process of law and his postconviction attorney's incompetence denied him a full and fair hearing. Claims were waived and abandoned without Mr. Zack's knowledge, participation, or consent. The claims presented were unsubstantiated through errors of commission and omission. Mr. Zack has been severely prejudiced thereby and a new 3.850 proceeding is required.

ARGUMENT

ARGUMENT I

THE CIRCUIT COURT ERRED IN DENYING MR. ZACK'S CLAIM THAT HE WAS DENIED THE RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS TRIAL COUNSEL FAILED TO CHALLENGE THE DNA EVIDENCE INTRODUCED AT HIS TRIAL IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

During Mr. Zack's capital trial, the State presented DNA evidence that inculpated Mr. Zack in the Escambia and Okaloosa homicides and the Panama City burglary. Florida Department of Law Enforcement Agent Tim McClure testified at trial that he conducted PCR-DNA analysis on several items of evidence (T. 656-90). Agent McClure not only described his DNA analysis and his opinions about the result, he also testified as to the statistics he formed in his analysis (T. 672-3, 683). Specifically, Agent McClure testified that he had only ever testified in court twice – once as to DNA and once as to serology (T. 658) Agent McClure did not specifically testify as to what aspect of DNA analysis to which he had previously testified. Defense counsel, aske Agent McClure no questions about his experience and did not object to his testimony (T. 658).

Agent McClure tested blood samples from Mr. Zack, Ms. Smith and Ms. Russillo (T. 666, 669-70). In conducting the testing, Agent McClure used six markers (T. 667). He also tested the vaginal swab from Ms. Smith and testified that the makers correlated to the

profile of Mr. Zack to 1 in 18,700 Caucasian individuals (T. 671-2). He also conducted DNA analysis on several other exhibits which were stained with blood (T. 674-84). Some of those exhibits included Mr. Zack's clothes and shoes and the vehicles involved in the Escambia and Okaloosa homicides (T. 674-84).

Agent McClure testified to other statistical issues, such as the likelihood of the DNA type of Ms. Smith and Ms. Russillo, which also correlated to several exhibits, in Caucasian individuals.

Upon cross-examination, it became clear that trial counsel had no idea about fundamentals of the testing or the significance of the analysis and the statistics:

> Q: Okay. Thank you. When you talk about the donors of the DNA, Mr. McClure, you talked about the mother and the father, and I take it from the letters that you've used here, if I – if my blood type is A negative, for instance, and my wife's blood type is O, and that's my son sitting over there, would he have A and O combinations of blood?
>
> A: Well, you're talking about the ABO blood type and not the DNA type.
>
> Q: So is that different?
>
> A: Yes, sir, it is.
>
> Q: Okay, so we're not talking about blood types when you're talking about --
>
> A: No, sir, we're talking about the DNA type that I got from the blood.
>
> MR. KILLAM: Okay, Thank you.

(T. 690).

Following the testimony of Agent McClure, the State also presented the testimony of FDLE Agent Karen Barnes (T. 691-701). Agent Barnes conducted RFLP DNA analysis on a few of the same items that Agent McClure tested – the boxer shorts, jeans and tee-shirt (T. 697-9). Agent Barnes only used five markers (T. 696). Likewise, Agent Barnes also testified as to the statistical probability of the results she obtained, which were significantly greater that Agent McClure's analysis (T. 697-9). Agent Barnes admitted that she had no idea where the cuttings came from on the boxer shorts (T. 700).

Trial counsel never challenge the DNA analysis, qualifications of the examiners or statistical analysis at trial or pretrial. Trial counsel's performance was deficient.

"In admitting the results of scientific tests and experiments, the reliability of the testing methods is at issue, and the proper predicate to establish that reliability must be laid." Murray v. State, 838 So. 2d 1073, 1078 (Fla. 2002). Also, because the State was seeking to introduce the DNA test results, it bore the burden of proving the general acceptance of "both the underlying scientific principle and the testing procedures used to apply that principle to the facts of the case at hand." Ramirez v. State, 651 So. 2d 1164, 1168 (Fla. 1995). In Mr. Zack's case, trial counsel failed to

make the State meet its burden, despite the fact that they could not do so.

This Court has explained the process of examining scientific evidence as a four step process:

> The admission into evidence of expert opinion testimony concerning a new or novel scientific principle is a four-step process. First, the trial judge must determine whether such expert testimony will assist the jury in understanding the evidence or in determining a fact in issue. Second, the trial judge must decide whether the expert's testimony is based on a scientific principle or discovery that is "sufficiently established to have gained general acceptance in the particular field in which it belongs. This standard, currently referred to as the "Frye test", was expressly adopted by this Court in *Bundy v. State*, 471 So. 2d 9, 18 (Fla. 1985) . . . The third step in the process is for the trial judge to determine whether a particular witness is qualified as an expert to present opinion testimony on the subject in issue. All three of these steps are decisions to be made by the trial judge alone. Fourth, the judge may then allow the expert to render an opinion on the subject of his or her expertise, and it is then up to the jury to determine the credibility of the expert's opinion, which it may either accept or reject.

Ramirez v. State, 651 So. 2d 1164, 1166-7 (Fla. 1995)(citations omitted).

As to step two, evidence based on a novel theory is inherently unreliable and inadmissible in a legal proceeding unless the theory has been adequately tested and accepted by

the scientific community. See Frye v. United States, 54 App. D.C. 46 (D.C. Cir. 1923).

In Murray v. State, this Court addressed whether PCR DNA testing was admissible in a murder trial. 692 So. 2d 157 (Fla. 1997). This Court found that it was not. Id. at 163.

Furthermore, the second step of the DNA testing process relies upon "the calculation of population frequency statistics and population genetics" Brim v. State, 695 So. 2d 268, 270 (Fla. 1997). "Accordingly, calculation techniques in determining and reporting DNA population frequencies must also satisfy the Frye test." Id.

Trial counsel failed to ask a single question or challenge the population statistics. Trial counsel was ineffective in every regard as to the DNA evidence.

Clearly, had trial counsel challenged the PCR DNA analysis and results, they would have been excluded. In Murray I, a case decided six months prior to Mr. Zack's capital trial, this Court held that the PCR DNA method did not meet the Frye test for admissibility and should have been excluded from the trial. 692 So. 2d 157, 163 (Fla. 1997). Had trial counsel challenged this evidence it too would have been excluded.

Furthermore, the inexperience of the lab analyst would have supported exclusion of the evidence.

As to the RFLP analysis, it too was primitive and only considered five markers. Indeed, FDLE Analyst Barnes was unsure as to where the cuttings from Mr. Zack's boxer shorts even came from. And, the statistical analysis was never explained in order to determine whether or not it met the standards in the scientific community.

At the evidentiary hearing, trial counsel testified that he did not challenge the DNA evidence for strategic reasons.(PC-R. 349). Mr. Killam did not believe that the DNA evidence affected the case (PC-R. 359). Mr. Killam explained that the evidence was going to show that Mr. Zack was involved in the murders, so he decided not to argue that the DNA analysis was incorrect (PC-R. 375). The lower court credited trial counsel's testimony that challenging the evidence would have caused him to lose credibility with the jury (PC-R. 570).

However, trial counsel's explanations make no sense. First, moving to exclude the evidence and request a Frye hearing would have occurred prior to the trial, outside the presence of the jury, thus there was no issue about losing credibility with the jury. And under Murray, the PCR DNA analysis was inadmissible, so trial counsel had no reason not to move to exclude it.

Furthermore, trial counsel's excuse that there was evidence of Mr. Zack's involvement in the homicide and crimes

failed to recognize the power of scientific testimony, specifically about DNA, has on a jury. In Hayes v. State, this Court acknowledged:

> Forensic DNA analysis should be governed by the highest standards of scientific rigor in analysis and interpretation. Such high standards are appropriate for two reasons: **the probative power of DNA typing can be so great that it can outweigh all other evidence in a trial**; and the procedures for DNA typing are complex, and judges and juries cannot properly weigh and evaluate conclusions based on different standards of rigor.

660 So. 2d 257, 263-4 (Fla. 1995)(emphasis added). This Court's recognition of the power of DNA evidence came two years before Mr. Zack's trial. Certainly, an experienced trial attorney would not be so naive to believe that the DNA evidence didn't matter because there was other evidence of Mr. Zack's guilt. Trial counsel's role was to challenge the inculpatory evidence.

Trial counsel did not challenge the DNA evidence, not because of a strategic reason, but because he did not understand it. During his questioning of Agent McClure it was clear that trial counsel had no understanding of DNA analysis or what standards were used in determining whether or not the evidence was admissible. (See T. 690).

Trial counsel unreasonably failed to challenge the DNA

evidence – evidence that would have been excluded had he done so. Trial counsel was ineffective. Mr. Zack is entitled to relief.

ARGUMENT II

THE CIRCUIT COURT ERRED IN DENYING MR. ZACK'S CLAIM THAT HE WAS DENIED THE RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS TRIAL COUNSEL CAUSED HIM TO TESTIFY AT HIS CAPITAL TRAIL WITHOUT PREPARING HIM OR EXPLAINING THAT HE WOULD BE SUBJECT TO CROSS EXAMINATION IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Trial counsel called Mr. Zack to testify during the guilt phase of his capital trial (T. 1086-1167). Mr. Zack's testimony was confusing, non-responsive and at times made no sense. Mr. Zack did not even know how many times he had been convicted of a crime (T. 1086).

Mr. Zack was unaware that it was his choice whether he testified or not and did not know he was going to testify until he was called (T. 432). Trial counsel did not prepare Mr. Zack or explain that he would be cross examined (T. 433-4). If Mr. Zack had known that it was his choice to testify and that he would be subject to cross examination, he would not have taken the stand (T. 455).

Trial counsel testified that he wanted Mr. Zack to testify (T. 465). He wanted to "get Mr. Zack's story into evidence" so that he could argue it to the jury (T. 466). Trial counsel recalled that he did explain to Mr. Zack that he could be cross examined (T. 466).

The lower court found that trial counsel was more credible than Mr. Zack (PC-R. 575-6).

The lower court erred in denying Mr. Zack's claim. Trial counsel did not testify that he prepared Mr. Zack for his testimony or even that he gave him the choice to testify. Rather, trial counsel could only say that Mr. Zack understood that trial counsel wanted to get Mr. Zack's story into evidence in order to argue it to the jury (T. 471-2). However, even counsel's reason for calling Mr. Zack to testify made no sense. Mr. Zack had made statements to law enforcement about the crimes and those statements were admitted in evidence. So, the jury was well aware of Mr. Zack's story as to how the crimes occurred. Likewise, trial counsel introduced evidence of Mr. Zack's background through other witnesses, including his grandmother and sister. Thus, Mr. Zack's testimony was unnecessary.

Calling Mr. Zack to testify allowed the State to illustrate inconsistencies between Mr. Zack's statements and testimony which the State then used to characterize Mr. Zack as a liar. The State also used Mr. Zack's testimony against him in his closing argument (T. 1373-4).

Under the Fifth Amendment of the United States Constitution and Article I, § 9 of the Florida Constitution, Mr, Zack had an absolute right not to testify. In Mr. Zack's

case, he had no choice; he was only told that he had to get his story before the jury so that his counsel could argue it. Furthermore, trial counsel exacerbated the damage of Mr. Zack testifying by failing to prepare him.

Counsel has "a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." Strickland v. Washington, 466 U.S. 668 (1984). Counsel's highest duty is the duty to investigate and prepare. Where, as here, counsel unreasonably fails to investigate and prepare, the defendant is denied a fair adversarial testing process and the proceedings' results are rendered unreliable. See, e.g., Kimmelman v. Morrison, 477 U.S. 365, 384-88 (1986) (failure to request discovery based on mistaken belief state obligated to hand over evidence); Henderson v. Sargent, 926 F.2d 706 (8th Cir. 1991)(failure to conduct pretrial investigation was deficient performance); Chambers v. Armontrout, 907 F.2d 825(8th Cir. 1990)(en banc) (failure to interview potential self-defense witness was ineffective assistance); Nixon v. Newsome, 888 F.2d 112 (11th Cir. 1989)(failure to have obtained transcript witness's testimony at co-defendant's trial was ineffective assistance); Code v. Montgomery, 799 F.2d 1481, 1483 (11th Cir. 1986) (failure to interview potential alibi witnesses).

In Mr. Zack’s case, trial counsel failed to properly

advise his client or prepare him for testifying. The result was devastating to Mr. Zack's defense. Relief is proper.

ARGUMENT III

THE CIRCUIT COURT ERRED IN DENYING MR. ZACK'S CLAIM THAT HIS TRIAL COUNSEL WAS INEFFECTIVE IN HIS REMARKS TO THE JURY IN VIOLATION OF MR. ZACK'S FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS.

In Strickland v. Washington, 466 U.S. 668, 688 (1984) the Supreme Court held that counsel has a "duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." Strickland requires a defendant to plead and show: 1) unreasonable attorney performance, and 2) prejudice. Courts have recognized that in order to render reasonably effective assistance an attorney must present "an intelligent and knowledgeable defense" on behalf of his client. Caraway v.Beto, 421 F.2d 636, 637 (5th Cir. 1970). An attorney is responsible for presenting argument consistent with the applicable principles of law. Harrison v. Jones, 880 F.2d 1279 (11th Cir. 1989).

Mr. Zack was denied the effective assistance of counsel when his counsel made prejudicial remarks to the jury during his opening statement and closing argument.

Trial counsel was deficient, and denied the effective assistance of counsel during his various arguments before the jury because he exacerbated the theory of the State's case, and he presented the defendant in poor light, and in a distasteful, incriminating manner before the jury. The

cumulative effect of the arguments by trial counsel was to allow the jury an opportunity to convict based upon the defendant's bad character, or to convict because of his voluntary, impulsive and brutal conduct, as admitted by his own lawyer.

During his opening statement, trial counsel told the jury: "It looks real bad . . . he's done a lot of stuff." (T. 190). Trial counsel later characterized the homicide by saying that Mr. Zack "brutally, brutally killed" the victim (T. 192). During closing argument, trial counsel stated: "I agree with the State", and that the crime scene was a "horrible, messy scene" (T. 1421). And, trial counsel again reiterated that Mr. Zack: "brutally killed the [victim]."

At the evidentiary hearing, trial counsel testified that he knew both murders were admissible, so he conceded them to the jury (T. 393-4). But, trial counsel attempted to show the jury that the crimes were not committed due to any purposeful conduct (PC-R. 395).

The lower court found that trial counsel's strategy was to avoid the death penalty and to show that Mr. Zack could not form the premeditation required to be convicted of the crimes (PC-R. 578-9). The lower court's order was in error.

First, trial counsel's concessions both in opening and closing arguments "were the functional equivalent of a guilty

plea to first-degree" premeditated murder. Harvey v. State, ___ So. 2d ___ (Fla. July 3, 2003), 2003 Fla. Lexis 1140, *5. In opening statement, trial counsel told the jury that Mr. Zack had committed the offenses, but that he was unable to form premeditation (T. 190). Yet, because Mr. Zack was charged with sexual battery, robbery and the jury was instructed that they could find that Mr. Zack was guilty of first degree murder if they found that he had committed a burglary, he effectively pleaded Mr. Zack guilty. In fact, trial counsel never challenged the burglary or robbery charges. Trial counsel did challenge the sexual battery charge. See also Nixon v. State, 758 So. 2d 618 (Fla. 2000).

As in Harvey and Nixon, Mr. Zack pleaded not guilty and did not consent to trial counsel's strategy of conceding felony first-degree murder. Thus, as this Court has held, trial counsel's performance constituted per se ineffective assistance of counsel and amounted to a violation of United States v. Cronic, 466 U.S. 648 (1984).

Also, trial counsel could have articulated his defense without having to tell the jury that Mr. Zack 's had done "a lot of stuff." (T. 190), or that he "brutally, brutally killed" the victim (T. 192).[2]

[2]Trial counsel could have simply told the jury that the defense did not contest that Mr. Zack caused the victims'

Trial counsel's performance in opening statements and closing arguments was deficient. Had trial counsel performed effectively, Mr. Zack would not have been convicted of first-degree murder. Relief is warranted.

ARGUMENT IV

THE LOWER COURT ERRED IN SUMMARILY DENYING MR. ZACK'S CLAIMS.

The lower court erred when it summarily denied two of Mr. Zack's claims (PC-R. 567-81).

A. THE TRIAL COURT ERRED IN FAILING TO ORDER A FRYE HEARING IN VIOLATION OF MR. ZACK'S FIFTH AND FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS OF LAW.

As stated in Argument I, during Mr. Zack's capital trial, the State presented DNA evidence that inculpated Mr. Zack in the Escambia and Okaloosa homicides and the Panama City burglary. The evidence was presented through two Florida Department of Law Enforcement agents (T. 656-90; 691-701).

The trial court was obligated to conduct a Frye hearing in order to determine whether or not the DNA analysis, including the statistical analysis was admissible.

In Frye v. United States, 293 F. 1013, 1014 (D.C. Cir. 1923), a trial judge must determine if an expert's testimony

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deaths, but that he did not do so in any manner that was consistent with first degree murder. The defense also could have argued that Mr. Zack was invited into the victim's home, so he was not guilty of burglary.

is based on a scientific principle or discovery which is sufficiently established to have gained general acceptance in the field.

Furthermore, in Hayes v. State, this Court recognized that the "admissibility of DNA evidence in the courts throughout the country has been an issue of considerable interest and concern" because of the "substantial questions surrounding DNA typing, reliability and methodology standards . . ." 660 So. 2d 257, 262 (Fla. 1995).

Because of the concerns about DNA analysis and the requirement that the courts make the findings as to the first three steps of admissibility, the trial court should have ordered a Frye hearing prior to the admission of the DNA evidence. See Ramirez v. State, 651 So. 2d 1164, 1166-7 (Fla. 1995).

B. MR. ZACK'S DEATH SENTENCE IS EXCESSIVE AND VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

At trial, a plethora of evidence was introduced, both at the guilt and penalty phases of Mr. Zack's capital trial, concerning Mr. Zack's horrific and torturous childhood and adolescence and his struggle with mental health problems. In sum, trial counsel introduced evidence of the dysfunctional and abusive environment in which Mr. Zack was raised. Mr. Zack's mother drank heavily while she was pregnant (T. 1701-

4). In fact, Mr. Zack was born early, after his mother was in a car accident which caused her to go into labor (T. 1705). Mr. Zack's natural father abandoned him when he was less than a year old (T. 1708). As a child and teenager, Mr. Zack was moved from home to home, even spending time in mental institutions and foster care because he was a difficult child and his mother wanted to spare him from further abuse (T. 1663-7). Mr. Zack's stepfather, Tony Midkiff, violently abused Mr. Zack, physically, sexually and mentally. Mr. Midkiff jerked Mr. Zack by the hair, put scalding spoons to his tongue and forks to his penis, beat him about the face with his fists, kicked him with spurs, created devices to give Mr. Zack an electric shock if he wet the bed and sexually abused him. Mr. Zack was also abused while in foster care.

In addition to the horrific background information, trial counsel presented mental health testimony through four experts: Drs. William Spence, Michael Maher, Barry Crown and James Larson. Dr. Spence had evaluated Mr. Zack prior to the crimes and believed that he suffered from PTSD, chronic depression and addiction (T. 1825-9). He believed Mr. Zack need residential treatment (T. 1830).

Dr. Larson agreed with Dr. Spence's diagnosis (T. 1862). Dr. Larson testified that Mr. Zack's mental impairments were similar to those of a mildly mentally retarded individual and

that they indicated possible brain damage (T. 1866). Dr. Larson believed that at the time of the crime Mr. Zack was under extreme emotional distress and his ability to appreciate the criminality of his conduct was substantially impaired (T. 1873).

Dr. Crown concurred that the statutory mental health mitigators were present at the time of the crimes (T. 1909-10). Dr. Crown also evaluated Mr. Zack and determined that he suffered from fetal alcohol syndrome (T. 1892), as well as PTSD (T. 1907).

Dr. Maher, who evaluated Mr. Zack following the guilt phase agreed with the other experts as to Mr. Zack's diagnosis and the presence of the mental health mitigators (T. 1929-57).

Additionally, Mr. Zack's IQ is in the range of low intelligence and he demonstrates impairments that are commonly associated with mentally retarded individuals. Indeed, Dr. Larson testified that Mr. Zack had a mental age of fifteen and the emotional age of a ten-year old. And, Dr. Crown testified that his testing showed Mr. Zack had the mental age of an eleven year old.

In Allen v. State, this Court held that "the death penalty is either cruel or unusual if imposed upon one who was under the age of sixteen when committing the crime." 636 So. 2d 494, 497 (Fla. 1999). Thus, Mr. Zack's mental and

emotional age should prohibit him from being eligible for the death penalty.

In Atkins v. Virginia, the United States Supreme Court stated: "A claim that punishment is excessive is judged not by the standards that prevailed in 1685 when Lord Jeffreys presided over the 'Bloody Assizes' or when the Bill of Rights was adopted, but rather by those that currently prevail." 122 S.Ct. 2242, 2247 (2002). The Court concluded that the death penalty is excessive in regard to mentally retarded persons and the constitution "places a substantive restriction on the States' power to take the life" of a mentally retarded offender. Id. at 2252.

At Mr. Zack's trial, the sentencing judge found that four mitigating circumstances were entitled to little weight: 1) the defendant committed the crime while under extreme mental or emotional disturbance; 2) the defendant was acting under extreme duress; 3) the defendant lacked the capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law; and 4) nonstatutory mitigating factors of remorse, voluntary confession and good character while incarcerated. Zack v. State, 753 So. 2d 9, 13 (Fla. 2000).

The evidence at trial was overwhelming that Mr. Zack suffered from mental and emotional impairments.

The very same situation as in Mr. Zack's case was before this Court in Crook v. State, 813 So. 2d 68 (Fla. 2002). Crook had a low IQ, frontal lobe brain damage, his reading ability was of a first grader, and he was borderline mentally retarded. This Court ruled that "Crook was borderline mentally retarded and given the significance that borderline mental retardation may have in considering whether the death penalty is appropriate in a given case, we hold that the trial court erred in rejecting the uncontroverted evidence that Crook was borderline mentally retarded." Id. at 77. This Court also inferred that when considering mental retardation as a mitigating factor for imposing the death penalty, society's understanding of mental retardation continues to evolve, and mental retardation is a severe and permanent impairment which affects almost every aspect of a person's life. Such is true with Mr. Zack.

Mr. Zack falls into the same category as a mentally retarded individual. Accordingly, his death sentence is excessive and a life sentence should be imposed.

ARGUMENT V

THE LOWER COURT ERRED IN DENYING MR. ZACK'S CLAIM THAT FLORIDA'S CAPITAL SENTENCING SCHEME VIOLATES THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AS EVIDENCED BY RING v. ARIZONA, RENDERING MR. ZACK'S DEATH SENTENCE ILLEGAL AND ENTITLES HIM TO A LIFE

SENTENCE.

In the circuit court, Mr. Zack raised a claim pursuant to the United States Supreme Court decision in Ring v. Arizona, 536 U.S. 584 (2002). 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). The Court's ruling 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.

In Ring, the Supreme Court noted that Arizona was one of five states that committed sentencing factfinding and the ultimate sentencing decision to judges. Ring, 536 U.S. at 609 n. 6 (the other four were identified as Colorado, Idaho, Montana, and Nebraska). The Supreme Court further noted that four additional states had hybrid capital sentencing schemes. Id. (Alabama, Delaware, Florida, and Indiana). Subsequently, it has been recognized that additional hybrid states were overlooked by the United States Supreme Court. Johnson v. State, 59 P.3d 450, 460 (Nev. 2002)(under Nevada law, the judge determines the sentence in a capital case if the jury is unable to return a unanimous verdict imposing either a death

or a life sentence); State v. Whitfield, 107 S.W.3d 253 (Mo. 2003)(under Missouri law, the judge determines the sentence in a capital case if the jury is unable to return a unanimous verdict imposing either a death or a life sentence).[3] In Summerlin v. Stewart, 341 F.3d 1082 (9th Cir. 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.

In Mr. Zack's case, the circuit court denied Mr. Zack's claim and found that Florida's capital sentencing scheme is constitutional and has been held to be so by this Court (PC-R. 580-1). The court also held that Ring is not retroactive (PC-R. 580-1). And the court, in error found that even if Ring were to be applied to Mr. Zack's case, the finding of the aggravator that the crime was committed while Mr. Zack was on felony probation was sufficient, and need not be found by the jury, for a death sentence (PC-R. 580-1).

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[3]Even though the United States Supreme Court in its opinion did not suggest that Ring had any implications for the capital sentencing schemes in Nevada or Missouri, the courts in those states took the logic of the decision in Ring, analyzed their state law, and reached the conclusion that under the principles enunciated in Ring that Sixth Amendment error was present in individual cases.

The circuit court erred in its holdings. First, in Bottoson v. Moore and King v. Moore, this Court's decisions were reached on the merits; the decisions did not go off on any procedural ground; nor did it hold that, if Ring invalidated the Florida procedure used to sentence Bottoson and King to death, that the petitioners could not claim the benefit of such a ruling under Florida's established criteria for determining the retroactive application of constitutional decisions of the United States Supreme Court in Florida capital cases.

Furthermore, the majority of the justices held that Ring and Apprendi did apply to Florida's capital sentencing procedures.

Mr. Zack's case presents many of the problems identified in Bottoson and King which entitle Mr. Zack to relief. Before the trial began, Mr. Zack specifically challenged Florida's capital sentencing scheme for a variety of reasons, some of which Ring addressed. For example, Mr. Zack challenged the statute based on the fact that the vague and overbroad aggravators, like heinous, atrocious or cruel, make impossible for this Court to conduct a proportionality analysis (R. 12-26). Likewise, Mr. Zack challenged the statute because it is ambiguous as to the role of the judge and creates appellate problems for review when error is committed at the penalty

phase (R. 38-51). Mr. Zack also challenged the fact that there was no requirement for a special verdict form and that the verdict need not be unanimous as to the individual aggravators (R. 38-51).

Also, during the proceedings at trial, the trial judge, prosecutor and defense counsel told the jury that they would be making a "recommendation" to the judge and that their role was "advisory" (T. 97, 99, 124, 128, 1591, 1605).

The jury was instructed upon six aggravating circumstances. The totality of the instructions given the jury on these aggravating circumstances were:

> The aggravating circumstances which you may consider are limited to any of the following that are established by the evidence: No. 1, the crime for which Michael Duane Zack, III, is to be sentenced was committed while he had been previously convicted of a felony and was under sentence of imprisonment or on felony probation; secondly, the crime for which the defendant is to be sentenced was committed while engaged in the commission of, an attempt to commit, or flight after committing or attempting to commit the crime of robbery or sexual battery or burglary; third, the crime was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody; four, the crime for which the defendant was to be sentenced was committed for financial gain; five, the crime for which the defendant is to be sentenced was especially heinous, atrocious, or cruel.
>
> "Heinous" means extremely wicked or shockingly evil. "Atrocious" means outrageously wicked and vile. "Cruel"

means designed to inflict a high degree of pain with utter indifference to or even enjoyment of the suffering of others.

The kind of crime intended to be included as heinous, atrocious or cruel is one accompanied by additional acts that show that the crime was conscienceless or pitiless and was unnecessarily torturous to the victim.

Six, the crime for which the defendant is to be sentenced was committed in a cold, calculated and premeditated manner and without any pretense of moral or legal justification.

"Cold" means the murder was the product of calm and cool reflection, and not an act prompted by emotional frenzy, panic or a fit of rage. "Calculated" means having a careful plan or prearranged design to commit murder.

As I have previously defined for you, a killing is premeditated if it occurs after the defendant consciously decides to kill. The decision must be present in the mind at the time of the killing. The law does not fix the exact period of time that must pass between the formation of the premeditated intent to kill and the killing. The period of time must be long enough to allow reflection by the defendant. The premeditated intent to kill must be formed before the killing. However, in order for this aggravator to apply, a heightened level of premeditation demonstrated by a substantial period of reflection is required.

A pretense of moral or legal justification is any claim of justification or excuse that, though insufficient to reduce the degree of murder, nevertheless rebuts the otherwise cold, calculated or premeditated nature of the murder.

* * *

If you find the aggravating circumstances do not justify the death

> penalty, your advisory sentence should be one of life imprisonment without possibility of parole.
>
> Should you find sufficient aggravating circumstances do exist, it will then be your duty to determine whether mitigating circumstances exist to outweigh the aggravating circumstances.

(T. 2108-11). Mr. Zack had no prior violent felony convictions and this aggravator was not considered.[4]

The jury was also advised that it was its duty to render to the Court an advisory sentence (T. 2113). Thereafter, an advisory verdict was returned stating, "A majority of the jury by a vote of 11 to 1 advise and recommend to the Court that it impose the death penalty for Michael Duane Zack, III" (T. 2117).

The trial court imposed a sentence of death (R. 859-75), and found the same aggravating circumstances upon which the jury was instructed (Id.).

On direct appeal, this Court struck two of the aggravating factors on which the jury and lower court relied. Zack v. State, 753 So. 2d 9 (Fla. 2000)(finding error occurred because the avoid arrest aggravator did not apply in Mr. Zack's case and in the application of the felony probation

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[4]The fact that Mr. Zack's death sentence was not dependent upon the "previously convicted of a crime of violence" aggravating circumstance distinguishes Mr. Zack's case from that of Mr. Bottoson and Mr. King.

aggravator).

Another, problem is that Mr. Zack was never charged with burglary, or attempted burglary. Mr. Zack requested a special verdict form be used, but the court denied his request (T. 1332-3). So, it is likely that the jury made no unanimous finding, beyond a reasonable doubt, in the guilt phase or even in the penalty phase that Mr. Zack committed the crime during the course of a burglary. These errors that occurred at Mr. Zack's penalty phase entitle him to relief.

Also, the Court's finding that Ring is not retroactive was in error. Under Witt v. State, 387 So. 2d 922 (1980), 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 met here. 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, because there is a tension at the heart of it. Any change of 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. 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.

Two considerations call for recognizing that the Apprendi-Ring rule is 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 was the taproot of Gideon v. Wainwright, 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 has long been the central bastion of the Anglo-American legal system's defenses against injustice.

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." Contrary to the lower court's order, Mr. Zack should not be denied its benefit simply because the Supreme Court temporarily overlooked the point before finally getting it right.

The court also incorrectly denied Mr. Zack's claim by finding that due to the aggravator that the jury heard and the sentencing court found, that Mr. Zack was on felony probation at the time of the crime, Mr. Zack was not entitled to relief. This Court struck the aggravator upon which the circuit court relied to deny Mr. Zack's claim, so the court improperly relied on the aggravator. Zack v. State, 753 So. 2d 9, 25 (Fla. 2000).

Finally, the circuit court also failed to look at the jurisprudence that has developed in the wake of Ring. Not surprisingly, the states labeled by the United States Supreme Court as being in the same category as Arizona have generally recognized that Sixth Amendment error pervades their capital sentencing schemes. State v. Fetterly, 52 P.3d 875 (Idaho 2002)(in light of Ring, death sentence vacated and remanded for further proceedings); State v. Gales, 658 N.W.2d 604, 624 (Neb. 2003)("It is clear that the jury made no explicit determination that any of the statutory aggravating circumstances existed in this case. Instead, that determination was made by a judge."); Woldt v. People, 64 P.3d 256 (Colo. 2003)(death sentences vacated in consolidated direct appeal for two of the three individuals sentenced to death under 1995 scheme providing for three-judge panel to conduct capital sentencing factfinding and cases remanded for

the imposition of life sentences); State v. Ring, 65 P.3d 915 (Ariz. 2003)(in a consolidated case involving those on Arizona's death row, Arizona Supreme Court established parameters for evaluating each case for harmless error analysis).[5] Each of these states has found that the necessary facts under Ring to render the defendant death eligible were not made by the jury at the guilt phase of the capital case.

Also, as to the hybrid states, such as Florida, courts have also acknowledged Ring's impact on their capital sentencing statutes. For example, in Indiana, the hybrid sentencing scheme is employed not just in determining whether to impose death, but also in determining what sentence to impose in murder cases not reaching the capital level. In Bostnick v. State, 773 N.E.2d 266 (Ind. 2002), the Indiana Supreme Court was faced with a case in which the judge overrode a jury's recommendation against a sentence of life without parole. The Bostnick court concluded, "[t]he jury during the sentencing phase was unable to reach a unanimous recommendation, and thus there was no jury determination finding the qualifying aggravating circumstances beyond a reasonable doubt." Id. at 273. Under the Indiana sentencing

[5]These opinions show disparity in application of harmless error analysis to the Sixth Amendment violation defined by Ring.

scheme, the judge made the finding of the aggravating circumstances necessary to warrant the imposition of life without parole. "Because of the absence of a jury determination that qualifying aggravating circumstances were proven beyond a reasonable doubt, we must therefore vacate the trial court's sentence of life without parole." Id.[6]

Another case further illuminates Indiana law and its interplay with Ring.[7] In Overstreet v. State, 783 N.E.2d 1140, 1160-61 (Ind. 2003), while addressing a capital case, the Indiana Supreme Court explained, "[u]nder the terms of our death penalty statute, before a jury can recommend a sentence of death, it must unanimously find that one or more of the charged aggravating circumstances was proven beyond a reasonable doubt."[8] In Overstreet, the defense had requested

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[6]A similar decision was reached in People v. Swift, 781 N.E.2d 292 (Ill. 2002)(non-capital application of Ring in a murder case). There the Illinois Supreme Court stated, "the 'sentencing range' for first degree murder in Illinois is 20 to 60 years imprisonment. This is the only range of sentence permissible based on an ordinary jury verdict of guilt." 781 N.E.2d at 300. Accordingly, a sentence above that range imposed after a judge found one aggravating factor was overturned.

[7]In Wrinkles v. State, 776 N.E.2d 905 (Ind. 2002), the Indiana Supreme Court found it unnecessary to consider the implications of Ring in a successor post-conviction motion because the defendant had been convicted of three murders thereby rendering the defendant death eligible.

[8]The obvious and important distinctions from Florida include: 1) the unanimity requirement on which the jury is

to have a special finding to this effect made by the jury. The Indiana Supreme Court noted that on the basis of Hildwin v. Florida, 490 U.S. 638 (1989), the trial court had denied the requested special verdict. No reversible error was found because the jury had been explicitly instructed that this unanimous finding beyond a reasonable doubt was necessary before it could return a death recommendation.[9] In another hybrid state, the Delaware legislature enacted legislation following the decision in Ring. In pending capital prosecutions, four questions were certified to the Delaware Supreme Court in light of the new legislation passed in an effort to conform with Ring. The Delaware Supreme Court thereupon undertook a review of Delaware's capital sentencing

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instructed, 2) the charging requirement, and 3) the provision under Indiana law specifically requiring the jury to determine whether one or more aggravating circumstances are present.

The Indiana legislature specifically defined the eligibility issue solely upon the presence of one aggravating circumstance. The Florida legislature has defined the issue differently, and has not sought to modify the statute in the wake of Ring. The sentencer is to determine whether "**sufficient** aggravating circumstances exist" to warrant the imposition of a death sentence, and if so, whether "there are insufficient mitigating circumstances to outweigh the aggravating circumstances." Fla. Stat. § 921.141(3)(emphasis added).

[9]However, the Indiana legislature had amended the statute after the Ring decision to require that the jury make a special finding that it had unanimously found one or more of the charged aggravating circumstances beyond a reasonable doubt. Both the Indiana Supreme Court and the Indiana legislature implicitly recognized that Hildwin v. Florida did not survive the reasoning of Ring.

scheme. Brice v. State, 815 A.2d 314, 322 (Del. 2003). The new statutory language provided that a death sentence could not be imposed unless "a jury (unless waived by the parties) first determines unanimously and beyond a reasonable doubt that at least one statutory aggravating circumstances exists."[10] Further under Delaware law, first degree murder was defined by the statute in seven alternative ways. Delaware Code, Title 11, §636(a)(1-7).[11] According to Delaware law, "[i]n any case where the defendant has been convicted of murder in the first degree in violation of any provision of §636(a)(2)-(7) of this title, that conviction shall establish the existence of a statutory aggravating circumstance and the jury, or judge where appropriate, shall be so instructed." Delaware Code, Title 11, §4209(e)(2). Thus, the Delaware legislature had defined first degree murder on the basis of the presence of six alternative aggravating circumstances and determined that a finding by the jury of the presence of one these circumstances constituted capital first degree murder

[10]This is decidedly different than Florida law which requires 1) the presence of an aggravating circumstance; 2) the determination that sufficient aggravating circumstances are present to justify a death sentence; and 3) the aggravating circumstances are not outweighed by the mitigating circumstances. §921.141, Fla. Stat.

[11]The first definition under the statute is intentional murder. The second through the seventh definitions are premised upon alternative aggravating circumstances.

subject to the death penalty. Accordingly, the Delaware Supreme Court found that the provisions complied with Ring. Brice, 815 A.2d at 322-23.[12]

[12]In Duest, Justice Pariente cited Brice for the proposition that the "determination that aggravators outweigh the mitigators is not a factual finding that must be made by jury under Ring." Duest v. State, 855 So. 2d 33, 46 (Fla. 2003). Unfortunately, this overlooks the fact that the Delaware legislation specifically defined the issue differently than the Florida legislature has defined it (under Delaware law, the guilt phase verdict includes aggravating circumstances from the penalty phase). The real lesson of Brice is that the proper Ring analysis must focus on the Florida statute which sets forth three

In Brice, the Delaware Supreme Court indicated that it would review cases in which death had been imposed under the old law case-by-case to determine whether any Ring error was harmless or whether relief was warranted. Subsequently, the court has issued opinions. Garden v. State, 815 A.2d 327, 342 n.4 (Del. 2003)
(death sentence vacated in an override case because judge failed to give life recommendation sufficient weight; therefore the Ring challenge was held to be moot); Reyes v. State, 819 A.2d 305, 316 (Del. 2003)(jury that returned a nine to three death recommendation had first explicitly and unanimously found during the guilt phase a statutory aggravator; therefore relief was denied). In these case, the Sixth Amendment right of confrontation was neither implicated nor discussed.

The Alabama Supreme Court has also analyzed its capital sentencing provisions in light of Ring. The Alabama Supreme Court has explained that under Alabama's statutory definition of capital first degree murder, the jury must find an aggravating circumstance at the guilt phase of a capital trial to render a defendant death-eligible. Ex parte Waldrop, ___ So.2d ___, 2002 Ala. LEXIS 336, *13 (Ala. November 22,

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factual findings that must be made before the defendant is death eligible.

2002)("'Unless at least one aggravating circumstance as defined in Section 13A- 5-49 exists, the sentence shall be life imprisonment without parole.'"); Martin v. State, ___ So.2d ___, 2003 Ala. Crim. App. LEXIS 136, *55 (Ala. App. May 30, 2003)("the jury in the guilt phase entered a verdict finding Martin guilty of capital murder because it was committed for pecuniary gain. Murder committed for pecuniary gain is also an aggravating circumstance"). Thus, like Delaware, Alabama provides that unless there is a finding of an aggravating circumstance at the guilt phase proceeding, the sentence is life imprisonment. This clearly distinguishes Alabama law from Florida law in a critical fashion.

Recently, the Nevada Supreme Court found that its capital scheme was a "hybrid" scheme because if the jury failed to return a unanimous verdict, the judge made the sentencing findings. Johnson v. State, 59 P.3d 450, 460 (Nev. 2002). 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.[13] Because in Johnson,

[13]The steps are defined and numbered somewhat differently than they are in Florida's statute. But the Nevada statute is much closer to the Florida statute than either the Alabama or Delaware statutes. According to the Nevada Supreme Court, the legislative definition of capital murder determined what "facts" were subject to the right to trial by jury.

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.

The Missouri Supreme Court also found that its death sentencing scheme was a "hybrid" scheme because the judge imposed the sentence whenever the jury could not return a unanimous verdict. That Court explained that in those circumstances Ring was violated because the first three steps of the Missouri procedure for determining death-eligibility had not been decided beyond a reasonable doubt by a jury:

> In the second, or "penalty" phase, the jury is required to be instructed to follow the four-step process set out in section 565.030.4:
>
> > The trier shall assess and declare the punishment at life imprisonment without eligibility for probation, parole, or release except by act of the governor:
> >
> > (1) If the trier does not find beyond a reasonable doubt at least one of the statutory aggravating circumstances set out in subsection 2 of section 565.032; or
> >
> > (2) If the trier does not find that the evidence in aggravation of punishment, including but not limited to evidence supporting the statutory aggravating circumstances listed in subsection 2 of section 565.032, warrants imposing the death sentence; or

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Certainly, the right of confrontation would apply to proceedings at which the State was held to prove these elements at a jury trial because both rights arise from the same source, the Sixth Amendment.

> (3) If the trier concludes that there is evidence in mitigation of punishment, including but not limited to evidence supporting the statutory mitigating circumstances listed in subsection 3 of section 565.032, which is sufficient to outweigh the evidence in aggravation of punishment found by the trier; or
>
> (4) If the trier decides under all of the circumstances not to assess and declare the punishment at death.

Id . Section 565.030.4 on its face requires that steps 1, 2, 3, and 4 be determined against defendant before a death sentence can be imposed. ***Id.***; ***see Whitfield*, 837 S.W.2d 503, 515 (Mo. banc 1992)**.

Step 1. Step 1 requires the trier of fact to find the presence of one or more statutory aggravating factors set out in section 565.032.2. Both the State and Mr. Whitfield agree that this is a fact that normally must be found by the jury in order to impose a sentence of death.

The State contends that steps 2, 3, and 4 merely call for the jury to give its subjective opinion as to whether the death penalty is appropriate, however, not to make findings as to whether the factual predicates for imposing the death penalty are present. It urges that the principles set out in ***Ring*** are not offended even if the judge rather than the jury determines those three steps. This Court disagrees.

Step 2. Step 2 requires the trier of fact (whether jury or judge) to find that the evidence in aggravation of punishment, including but not limited to evidence supporting the statutory aggravating factors, warrants imposition of the death penalty. As noted, the State argues that this step merely calls for a subjective opinion by the trier of fact, not a finding. But, the State fails to note that this Court rejected this very argument in its opinion on Mr. Whitfield's appeal of his initial

conviction, in which it remanded for the new trial at issue here. In that decision, this Court held that step 2 requires a "finding of fact by the jury, not a discretionary decision." ***Whitfield*, 837 S.W.2d at 515**. This holding is supported by the plain language of the statute. In order to fulfill its duty, the trier of fact is required to make a case-by-case factual determination based on all the aggravating facts the trier of fact finds are present in the case. This is necessarily a determination to be made on the facts of each case. Accordingly, under ***Ring***, it is not permissible for a judge to make this factual determination. The *jury* is required to determine whether the statutory and other aggravators shown by the evidence warrants the imposition of death. . . .

Step 3. In step 3 the jury is required to determine whether the evidence in mitigation outweighs the evidence in aggravation found in steps 1 and 2. If it does, the defendant is not eligible for death, and the jury must return a sentence of life imprisonment. While the State once more argues that this merely calls for the jury to offer its subjective and discretionary opinion rather than to make a factual finding, this Court again disagrees.

The analysis undertaken in three recent decisions by other state courts of last resort, interpreting similar statutes, is instructive. In ***Woldt v. People*, 64 P.3d 256 (Colo. 2003)**, the Supreme Court of Colorado reversed the death sentences of two capital defendants after determining that Colorado's three-judge capital sentencing statute was unconstitutional in light of ***Ring***. Colorado's death penalty statute, like Missouri's, requires the fact-finder to complete a four-step process before death may be imposed. First, at least one statutory aggravator must be found. Second, whether mitigating factors exist must be determined. Third, mitigating factors must not outweigh the aggravating factors. Finally, whether death is the appropriate punishment is considered.

The Supreme Court of Colorado described the first three of these four steps as findings of fact that

are "prerequisites to a finding by the three-judge panel that a defendant was eligible for death." ***Woldt*, 64 P.3d at 265**. It noted that states are sometimes grouped into "weighing states" that require the jury to weigh the aggravating circumstances against those in mitigation in arriving at their determination of punishment, and "non-weighing states." It explained that, while in steps 1, 2, and 3 the jury is permitted to consider and weigh aggravators and mitigators, and to that extent Colorado's process is like that used in weighing states, Colorado is a non-weighing state in that, in step 4, in which the jury decides whether to impose death or to give a life sentence, the jury is permitted to consider all of the evidence without being required to give special significance to the weight of statutory aggravators or mitigators. ***Id.* at 263-64** . This last step thus "affords the sentencing body unlimited discretion to sentence the defendant to life imprisonment instead of death." ***Id.* at 265** . Because Colorado's death penalty statute required a three-judge panel to make the first three of these findings, the statute was declared unconstitutional. ***Id*. at 266-67**.

Similarly, in ***Johnson v. State*, 59 P.3d 450 (Nev. 2002)**, Nevada's Supreme Court considered the constitutionality of its capital sentencing scheme in light of ***Ring***. Its sentencing scheme provides for a three-judge panel to determine punishment if the jury is unable to do so. ***Johnson*** noted that Nevada "statutory law requires two distinct findings to render a defendant death-eligible: 'the jury or the panel of judges may impose a sentence of death only if it finds at least one aggravating circumstance and further finds that there are no mitigating circumstances sufficient to outweigh the aggravating circumstance or circumstances found.'" ***Johnson*, 59 P.3d at 460** (citation omitted).

Johnson determined the requisite statutory finding that the mitigating circumstances are not sufficient to outweigh the aggravating circumstances is at least "in part a factual determination, not merely discretionary weighing." ***Id*. at 460** . It held that, as a result, the rule announced in ***Ring*** required a

jury rather than a judge to determine the mitigating as well as the aggravating factor issues. ***Id.***

Finally, on remand from the United States Supreme Court, the Supreme Court of Arizona rejected the state's contention that the requirement of Arizona law -- that the court weigh mitigating circumstances against aggravating circumstances -- did not require a factual determination, stating:

> In both the superseded and current capital sentencing schemes*, the legislature assigned to the same fact-finder responsibility for considering both aggravating and mitigating factors, as well as for determining whether the mitigating factors, when compared with the aggravators, call for leniency*. Neither a judge, under the superseded statutes, nor the jury, under the new statutes, can impose the death penalty unless that entity concludes that the mitigating factors are not sufficiently substantial to call for leniency. A.R.S. [sections] 13-703.E (Supp.2002) and 13-703.F (Supp.2001). The process involved in determining whether mitigating factors prohibit imposing the death penalty plays an important part in Arizona's capital sentencing scheme.

***Ring* II, 65 P.3d at 943** (emphasis added). The Court continued:

> We will not speculate about how the State's proposal [to allow the judge to make these findings] would impact this essential process. *Clemons v. Mississippi,* 494 U.S. 738, 754, 110 S.Ct. 1441, 1451, 108 L.Ed.2d 725 (1990) ('In some situations, a state appellate court may conclude that peculiarities in a case make appellate...harmless error analysis extremely speculative or impossible.'); *see also Johnson v. Nevada* , 59 P.3d 450 (Nev. 2002) (as applied to Nevada law, *Ring...* requires [a] jury to weigh mitigating and

> aggravating factors under Nevada's statute requiring the fact-finder to further find whether mitigating circumstances are sufficient to outweigh the aggravating circumstances).
>
> ***Id.*** Accordingly, the Court held that, even were the presence of a statutory aggravator conceded or not contested, resentencing would be required unless the court found that the failure of the jury to make these factual findings was harmless on the particular facts of the case. ***Id.*** This was a necessary result of applying ***Ring's*** holding that "[c]apital defendants...are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment." ***Ring*****, 536 U.S. at 589**.
>
> Missouri's steps 1, 2, and 3 are the equivalent of the first three factual determinations required under Colorado's death penalty statute, so that, as in Colorado, the jury is told to find whether there are mitigating and aggravating circumstances and to weigh them to decide whether the defendant is eligible for the death penalty. These three steps are also similar to the aggravating and mitigating circumstance findings required under Nevada and Arizona law. As in those states, these three steps require factual findings that are prerequisites to the trier of fact's determination that a defendant is death-eligible.

State v. Whitfield, 107 S.W.3d 253, 258-61 (Mo. 2003) (footnote omitted).

The three steps in Florida's statute, 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. As in Missouri, Colorado, Indiana, Delaware, Arizona, and Nevada, this step involves a factual determination which is a prerequisite to rendering the defendant death-eligible.

Step 2 in the Florida procedure requires determining whether "sufficient" aggravating circumstances exist to justify imposition of death.[14] Missouri's Step 2 is indistinguishable, requiring a determination of whether the evidence of all aggravating circumstances "warrants imposing the death sentence." This step is obviously not the ultimate step of determining whether death will or not be imposed because other steps remain. Rather, in Florida as well as Missouri, this step involves a factual determination which is a prerequisite to rendering a defendant death-eligible.

Step 3 in the Florida procedure requires determining whether "there are insufficient mitigating circumstances to outweigh the aggravating circumstances." Missouri's and Colorado's Step 3, as well as Nevada's and Arizona's Step 2, are identical, requiring a determination of whether mitigating circumstances outweigh aggravating circumstances. Again, this step is not the ultimate determination of whether or not to

[14]Significantly, a second step is missing in the capital schemes in Indiana, Alabama and Delaware as construed by the state supreme courts in those states.

impose death because an additional step remains. Rather, in Florida as well as these other states, this step involves a factual determination which is a prerequisite to rendering a defendant death-eligible.

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 question which Ring v. Arizona decided was what facts constitute "elements" in capital sentencing proceedings. Following the Supreme Court's decision in Apprendi v. New Jersey, 530 U.S. 466 (2000), Mr. Ring raised an Apprendi challenge to his death sentence. In addressing that challenge, the Arizona Supreme Court stated that the United States Supreme Court's description of Arizona's capital sentencing scheme contained in Walton v. Arizona, 497 U.S. 639

(1990), was incorrect and provided the correct construction of the scheme. Ring, 122 S. Ct. at 2436. Based upon this correct construction, the United States Supreme Court then determined that Walton "cannot survive the reasoning of Apprendi." Ring, 122 S. Ct. at 2440.

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:

> 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.

The essence of criminal law is the definition of the offense. Jones v. United States, 526 U.S. 227 (1999), construed the federal statute at issue in that case, and stated that facts which increase the maximum punishment for an offense are elements of the offense. Apprendi applied the well-established rule that elements must be found by a jury

and determined that the sentencing factor identified by the New Jersey legislature was in fact an element. Ring merely held that based upon the clarification of the Arizona statute provided by the Arizona Supreme Court, aggravating circumstances in Arizona were elements subject to the Sixth Amendment right to a jury trial.

Ring's requirement that juries, not judges, find the elements of the charge is derived from ancient principles of law: "The principle that the jury were the judges of fact and the judges the deciders of law was stated as an established principle as early as 1628 by Coke. See 1 E. Coke, Institutes of the Laws of England 155b (1628)." Jones, 526 U.S. at 247. Walton did not contravene those principles but simply misread the Arizona statute. The Ring decision merely rejuvenated the longstanding rule which Walton temporarily rejected.

The Framers of the Bill of Rights included the Sixth Amendment's guarantee of a right to jury trial as an essential protection against government oppression. "Fear of unchecked power, so typical of our State and Federal Governments in other respects, found expression in the criminal law in this insistence upon community participation in the determination of guilt or innocence." Duncan v. Louisiana, 391 U.S. 145, 156 (1968). Only by maintaining the integrity of the factfinding

function does the jury "stand between the accused and a potentially arbitrary or abusive Government that is in command of the criminal sanction." United States v. Martin Linen Supply Co., 430 U.S. 564, 572 (1977). Thus, the adoption of the jury trial right in the Bill of Rights establishes the Founders' recognition that a jury trial is more reliable than a bench trial.

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. Mr. Zack was entitled to this Sixth Amendment protection at the time of his trial. The Sixth Amendment guarantees not only the right to a jury trial, but also the right of confrontation. Ring simply clarified that facts rendering a defendant eligible for a death sentence are elements of capital murder and therefore subject to the Sixth Amendment guarantees that are applicable to the states.

The ruling in Ring concerns an issue of substantive

criminal law. In concluding that the Sixth Amendment requires that the jury, rather than the judge, determine the existence of aggravating factors, the Supreme Court described aggravating factors as "the functional equivalent of an element of a greater offense." Ring, 122 S.Ct. at 2243 (citing Apprendi v. New Jersey, 530 U.S. 466, 494, n. 19 (2000)). Ring clarified the elements of the "greater" offense of capital murder. As explained above, Ring did not decide a procedural question (i.e., whether the Sixth Amendment requires that juries decide elements), but a substantive question (what is an element). Thus, retroactive application is required under Bousley v. United States, 523 U.S. 614 (1998), because the ruling addresses a matter of substantive criminal law, not a procedural rule.

The post-Ring jurisprudence from other courts demonstrates that the circuit court has erroneously denied Mr. Zack's arguments that he was deprived of his Sixth Amendment rights at his penalty phase and that his death sentence was unconstitutionally imposed. Relief is proper.

ARGUMENT VI

MR. ZACK WAS DENIED THE EFFECTIVE ASSISTANCE OF POSTCONVICTION COUNSEL AND DUE PROCESS IN THE CIRCUIT COURT, DURING HIS POSTCONVICTION PROCEEDINGS.

Mr. Zack's state-funded postconviction lawyer, Mr. Arnold, by

errors of commission and omission, deprived Mr. Zack of effective and competent representation during his postconviction proceedings in the circuit court.

This Court has held that claims of ineffective counsel must be evaluated upon the individual and particular circumstances surrounding the specific case. See Spalding v. Dugger, 526 So. 2d 71, 72 (Fla. 1988)("We recognize that, under section 27.702, each defendant under sentence of death is entitled, as a statutory right, to effective legal representation by the capital collateral representative in all collateral relief proceedings."); Graham v. State, 372 So. 2d 1363 (Fla. 1979).

This Court has found that an attorney who lacks the necessary resources and/or capital trial experience will be deemed not competent to continue representation of death sentenced client. See Spaziano v. State, 660 So. 2d 1363, 1369-1370 (Fla. 1995). Thus, this Court has explicitly acknowledged the need for effective representation in capital postconviction proceedings. Id.

In Arbelaez v. Butterworth, 738 So. 2d 326 (Fla. 1999), this Court acknowledged it has "a constitutional responsibility to ensure the death penalty is administered in a fair, consistent, and reliable manner...". Id. Further, in a special concurrence, the right to counsel in capital postconviction in terms of State Due Process was discussed. Counsel was characterized as an "essential requirement" in capital postconviction proceedings. Id. at 329. Reference was

also made to the Mississippi Supreme Court's opinion in Jackson v. State, 732 So. 2d 187 (Miss. 1999), wherein that Court ruled the right to counsel was constitutionally mandated in capital postconviction proceedings because "those proceedings provide the only opportunity for important constitutional issues such as the adequacy of trial counsel's performance to be considered". Id. at 330. No death sentenced person in Florida should be allowed to be executed unless he "has received the assistance of counsel in a **meaningful** postconviction proceeding". Id. (emphasis added).

As noted in Arbelaez, all capital litigation is particularly unique, complex and difficult. See White v. Board of County Comm'rs, 537 So. 2d 1376, 1378-1379 (Fla. 1989)("since the state of Florida enforces the death penalty, its primary obligation is to ensure that indigents are provided competent, effective counsel in capital cases"; "all capital cases by their very nature can be considered extraordinary and unusual"). The basic requirement of due process in an adversarial system is that an accused be zealously represented at "every level"; in a death penalty case such representation is the "very foundation of justice". Wilson v. Wainwright, 474 So. 2d 1162, 1164 (Fla. 1985). The special degree of reliability in capital cases, which can only be provided by competent and effective representation in postconviction proceedings, is necessary to ensure that capital punishment is not imposed in an arbitrary and capricious

manner and that no one who is innocent or who has been unconstitutionally convicted or sentenced to death is executed. Arbelaez v. Butterworth, 738 So. 2d 331 at n. 12.

In Peede v. State, this Court made clear that ineffective representation at any level of the capital punishment process will not be tolerated. 748 So. 2d 253 (Fla. 1999). This Court felt "constrained to comment on the representation afforded Peede in these proceedings [appeal from summary denial of motion for postconviction relief]", which included criticism of the length, lack of thoroughness, and conclusory nature of the initial brief, and reminded counsel of "the ethical obligation to provide coherent and competent representation, **especially in death penalty cases**, and we urge the trial court, upon remand, to **be certain that Peede receives effective representation"**. Id. at 256, n. 5 (emphasis added). Less than a week later, this Court entered an unpublished Order in Fotopoulos v. State, 741 So. 2d 1135 (Fla. 1999), which remanded the case for further proceedings in the lower court **despite having considered briefs on appeal and having heard oral argument**, because appellate counsel inappropriately attempted to raise issues and assert arguments and positions which should have been, but were not, presented to the lower court in the Rule 3.850 motion. The Court did not penalize Fotopoulos for his attorney's incompetence; rather, it remanded for corrective action to be taken prior to ruling on the

appeal. This Court has made clear that it will not tolerate incompetent and ineffective representation in capital postconviction proceedings.

Additionally, this Court has also noted that section 27.710, Florida Statutes, requires the Court to "monitor the performance of assigned counsel to ensure that the capital defendant is receiving quality representation".

In fact, this Court adopted minimum standards for certain attorneys litigating capital cases. In Re: Amendment to Florida Rules of Criminal Procedure -- Rule 3.112 -- Minimum Standards for Attorneys in Capital Cases, 759 So. 2d 610 (Fla. 1999). The opinion adopting new rules acknowledged the complexities, convoluted doctrines of procedural default, and uniqueness of capital law. This Court stated that under our system of justice, "the quality of lawyering is critical" in capital cases and acknowledged the Court's "inherent and fundamental obligation to ensure that lawyers are appointed to represent indigent capital defendants who possess the experience and training necessary to handle the complex and difficult issues inherent in death penalty cases". Id. at 613-614.

Federal and state due process requires that Mr. Zack be effectively represented throughout his postconviction proceedings. In Ohio Adult Parole Authority v. Woodard, 523 U.S. 272 (1998), the United States Supreme Court addressed the general due process guarantees afforded a capital postconviction defendant in the context

of Ohio's clemency scheme. 523 U.S. 272 (1998). A majority of the Court found that the Ohio clemency scheme did not violate due process, however, the court divided on the issue of the extent of due process rights which attach in capital postconviction proceedings. Id. In delivering the plurality opinion for the Court, Justice O'Connor, along with three (3) other justices held that: "[a] prisoner under a sentence of death remains a living person and consequently has an interest in his life." Id. at 288 (J. O'Connor concurring in part and concurring in judgment).

In finding that due process may attach to postconviction proceedings, Justice O'Connor referenced her concurring opinion in Ford v. Wainwright, 477 U.S. 399 (1986). At issue in Ford was Florida's statute requiring that a capital postconviction defendant be competent to be executed. Justice O'Connor, relying on precedent, found that "'[l]iberty interests protected by the Fourteenth Amendment may arise from two sources -- the Due Process Clause and the laws of the States.'" 477 U.S. 399, 428,(J. O'Connor concurring in part, dissenting in part)(quoting Hewitt v. Helms, 459 U.S. 460, 466 (1983)). Justice O'Connor made clear: "[R]egardless of the procedures the State deems adequate for determining the preconditions to adverse official action, federal law defines the kind of process a State must afford prior to depriving an individual of a protected liberty or property interest." Ford, 377 U.S. at 428-429. In analyzing Mr. Ford's liberty interest at the time of his execution,

Justice O'Connor noted that the Florida Statute governing postconviction procedures provided for mandatory action by the State. Id. at 428 ("The relevant provision of the Florida Statute, however, provides that the Governor "*shall*" have the prisoner committed . . . ")(emphasis in original).

Similarly, the Florida statute governing appointment of capital collateral counsel is mandatory. Fla, Stat. § 27.702 ("The capital collateral counsel shall represent each person convicted and sentenced to death in this state . . ."). The State of Florida has created a right by which Mr. Zack is appointed capital collateral counsel. Therefore, as in Ford, due process is required. Because Mr. Zack's appointed counsel failed to effectively represent him, his right to due process has been violated.

Mr. Zack has been penalized and deprived of due process because the court appointed a Registry attorney who was not qualified to represent him.

For example, upon being appointed to represent Mr. Zack, Mr. Arnold failed to request any supplemental records requests. Mr. Zack’s case effectively became several cases spanning several counties. Many records that are available and necessary to properly litigate a capital postconviction case have been ignored.

Likewise, postconviction counsel did not consult with a DNA expert, crime scene expert or a geneticist, despite the fact that all

of these experts are necessary to properly litigate Mr. Zack's postconviction proceedings. The State made issue of the DNA, the crime scene and specifically impeached the defense's mental health expert for not consulting with a geneticist – these areas of investigation are apparent solely form the trial transcripts. Also, trial counsel failed to present the testimony of an additional mental health expert, whom he had planned to present until the penalty phase was rescheduled. Trial counsel should have perpetuated her testimony.

Furthermore, postconviction counsel failed to properly present claims to the lower court and abandoned claims without Mr. Zack's waiver. Mr. Zack is mentally retarded. At trial, the experts, even the State's expert, agreed that Mr. Zack suffered from impairments that are usually found in persons with mental retardation. Mr. Zack suffered from low intelligence, had an intellectual and emotional age of fifteen and ten, respectively, and suffered from mental illness and fetal alcohol syndrome. The combined effect of these is that Mr. Zack functions as an individual with significant impairments, just as a mentally retarded person. However, Mr. Arnold presented this issue as a claim that Mr. Zack's sentence was excessive, rather than a claim that Mr. Zack is mentally retarded, or that trial counsel was ineffective in failing to raise significant issues in mitigation – such as retardation and brain damage.

Postconviction counsel also abandoned claims of ineffective

assistance of trial counsel, competency at trial and in postconviction, venue and an issue about the statements Mr. Zack provided (which also are implicated because of Mr. Zack's retardation). Mr. Zack did not agree to the waiver of these claims. These claims were legitimate and should have been pursued.[15]

There were also errors that were apparent from the record. For example, trial counsel failed to request that Mr. Zack's statements be redacted to remove any irrelevant and/or prejudicial information. Likewise, trial counsel failed to object to improper prosecutorial argument. Finally, trial counsel failed to call witnesses on Mr. Zack's behalf.

The former circuit court proceedings should be declared unreliable and this Court remand in order for undersigned to file an amended postconviction motion and for any other proceedings this Court deems necessary.

CONCLUSION

Based upon the foregoing argument, reasoning, citation to legal authority and the record, appellant, MICHAEL DUANE ZACK, urges this Court to reverse the lower court's order and grant him Rule 3.850 relief.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing

[15]Undersigned believes that Mr. Zack is incompetent to proceed.

Initial Brief of Appellant has been furnished by United States Mail, first class postage prepaid, to Charmaine Millsaps, Assistant Attorney General, Office of the Attorney General, The Capitol - PL-01, Tallahassee, Florida, 32399-1050, on February 10, 2004.

CERTIFICATION OF TYPE SIZE AND STYLE

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_____
LINDA McDERMOTT
Florida Bar No. 0102857
McClain & McDermott, P.A.
141 N.E. 30th St.
Wilton Manors, Florida 33334
(850) 322-2171

Attorney for Appellant