IN THE SUPREME COURT OF FLORIDA

NO. SC02-519

BRUCE DOUGLAS PACE,

Petitioner,

v.

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

Respondent.

PETITION FOR WRIT OF HABEAS CORPUS

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PRELIMINARY STATEMENT

This is Mr. Pace's first habeas corpus petition in this Court. Article 1, Section 13 of the Florida Constitution provides: "The writ of habeas corpus shall be grantable of right, freely and without cost." This petition for habeas corpus relief is being filed in order to address substantial claims of error under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and corresponding provisions of the Florida Constitution, claims demonstrating that Mr. Pace was deprived of his right to a fair, reliable, and individualized sentencing proceeding and that the proceedings resulting in his convictions and death sentence violated fundamental constitutional imperatives.

Citations shall be as follows: The record on appeal from Mr. Pace's trial shall be referred to as "R.__" followed by the appropriate page number. Mr. Pace's post-conviction record on appeal shall be referred to as "PCR. __" followed by the appropriate page number. All other references will be self-explanatory or otherwise explained herein.

INTRODUCTION

This petition presents significant errors which occurred at Mr. Pace's capital trial and sentencing but that were not presented to this Court on direct appeal due to the ineffective assistance of appellate counsel. For instance, Mr. Pace's

sentencing jury was improperly instructed on two aggravating circumstances. Appellate counsel's failure to present the meritorious issues discussed in this petition demonstrates that his representation of Mr. Pace involved "serious and substantial" deficiencies. Fitzgerald v. Wainwright, 490 So. 2d 938, 940 (Fla. 1986). The issues which appellate counsel neglected to raise demonstrate that his performance was deficient and the deficiencies prejudiced Mr. Pace. "[E]xtant legal principle[s] . . . provided a clear basis for . . . compelling appellate argument[s]," which should have been raised in Mr. Pace's appeal. Fitzpatrick, 490 So. 2d at 940.

Neglecting to raise such fundamental issues, as those discussed herein, "is far below the range of acceptable appellate performance and must undermine confidence in the fairness and correctness of the outcome." Wilson v. Wainwright, 474 So. 2d 1162, 1164 (Fla. 1985). Had counsel presented these issues, Mr. Pace would have received a new trial, or, at a minimum, a new penalty phase. Individually and "cumulatively," Barclay v. Wainwright, 444 So. 2d 956, 969 (Fla. 1984), the claims omitted by appellate counsel establish that "confidence in the correctness and fairness of the result has been undermined." Wilson, 474 So. 2d at 1165 (emphasis in original).

Additionally, this petition presents issues that were addressed on direct appeal but that should now be revisited to correct error in the appellate process that has denied Mr. Pace his constitutional rights. Particularly, this Court did not weigh the aggravating and mitigating factors of Mr. Pace's sentence against other death cases to assess whether his sentence was disproportionate.

As this petition will demonstrate, Mr. Pace is entitled to habeas relief.

REQUEST FOR ORAL ARGUMENT

Due to the seriousness of the issues involved, Petitioner respectfully requests oral argument.

PROCEDURAL HISTORY

On December 14, 1988, a Grand Jury in the Circuit Court of County Santa Rosa issued an indictment of Mr. Pace for the first degree murder and armed robbery of Floyd Covington. (R. 1132-33) Mr. Pace pleaded not guilty to the charges. (R. 1252) Jury selection for Mr. Pace's trial began on August 21, 1989. (R. 1) On August 23, 1989, Mr. Pace's guilt phase started. (R. 532) The jury found him guilty on all counts. (R. 1210) A penalty phase proceeding was conducted on August 26, 1989. (R. 1030), after which the jury recommended a sentence of death for the murder of Mr. Covington by a vote of seven to five. (R. 1211)

On November 16, 1989, Circuit Judge Ben Gordon adjudged Mr. Pace guilty and sentenced him to death for the murder and 15 years imprisonment for the robbery. (R. 1238-43) In support of the death sentence, the court found three aggravating circumstances: (1) Mr. Pace had a previous conviction for a violent felony, a robbery in 1982; (2) Mr. Pace was on parole at the time of the homicide; and (3) the homicide was committed during the course of a robbery. (R. 1234-45) The court found no mitigating circumstances. (R. 1236-37)

On direct appeal, this Court affirmed Mr. Pace's conviction and the death sentence. Justices Overton, Barkett, and Kogan concurred with the conviction but dissented, without an opinion, as to the death sentence. See Pace v. State, 596 So. 2d 1034, 1036 (Fla. 1992).

On March 7, 1997, Mr. Pace filed an amended motion for postconviction relief under Florida Rule of Criminal Procedure 3.850. Pursuant to Huff v. State, 622 So. 2d 982 (Fla. 1993) and Florida Rule of Criminal Procedure 3.851(c), a hearing was held on August 18, 1998 to determine whether Mr. Pace was entitled to an evidentiary hearing. (PCR. 1192) On December 15, 1998, the circuit court issued an order, directing that an evidentiary hearing be held on several claims: failure by the State to disclose exculpatory or impeachment evidence; newly discovered evidence; ineffective assistance of counsel for failure to perform an

adequate investigation, failure to properly cross-examine certain witnesses, failure to call available witnesses, failure to object to improper prosecutorial comments in guilt and penalty phase closing arguments, failure to investigate and present mitigating evidence of Mr. Pace's mental health and difficult childhood. (PCR. 1192-1203)

The evidentiary hearing was conducted on June 12, 13, and 14, 2000. (PCR. 1165) On June 11, 2001, the circuit court entered an order that denied Mr. Pace relief. (PCR. 1164-91)

Mr. Pace now files this petition seeking habeas corpus relief. With this petition, Mr. Pace simultaneously files an appeal from the circuit court's denial of postconviction relief.

JURISDICTION TO ENTERTAIN PETITION AND GRANT HABEAS CORPUS RELIEF

This is an original action under Fla. R. App. P. 9.100(a). See Art. 1, Sec. 13, Fla. Const. This Court has original jurisdiction pursuant to Fla. R. App. 9.030(a)(3) and Article V, sec. 3(b)(9), Fla. Const. The petition presents constitutional issues which directly concern the constitutionality of Mr. Pace's conviction and sentence of death.

Jurisdiction in this action lies in the Court, see, e.g., Smith v. State, 400 So. 2d 956, 960 (Fla. 1981), for the fundamental constitutional errors challenged herein arise in the context of a capital case in which this Court heard and denied Mr. Pace's direct appeal. See Wilson, 474 So. 2d at 1163; Baggett v. Wainwright, 229 So. 2d 239, 243 (Fla. 1969); cf. Brown v. Wainwright, 392 So. 2d 1327 (Fla. 1981). A petition for a writ of habeas corpus is the proper means for Mr. Pace to raise the claims presented herein. See, e.g., Way v. Dugger, 568 So. 2d 1263 (Fla. 1990); Downs v. Dugger, 514 So. 2d 1069 (Fla. 1987); Riley v. Wainwright, 517 So. 2d 656 (Fla. 1987); Wilson v. Wainwright, 474 So. 2d 1162, 1163 (Fla. 1985).

This Court has the inherent power to do justice. The ends of justice call on the Court to grant the relief sought in this case, as the Court has done in similar cases in the past. This petition pleads claims involving fundamental constitutional error. See Dallas v. Wainwright, 175 So. 2d 785 (Fla. 1965); Palmes v. Wainwright, 460 So. 2d 362 (Fla. 1984). The Court's exercise of its habeas corpus jurisdiction, and of its authority to correct constitutional errors such as those herein pled, is warranted in this action. As the instant petition shows, habeas corpus relief would be more than proper on the basis of Mr. Pace's claims.

GROUNDS FOR HABEAS CORPUS RELIEF

By his petition for a writ of habeas corpus, Mr. Pace asserts that his capital conviction and sentence of death were obtained and then affirmed during this Court's appellate review process in violation of his rights guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the Florida Constitution.

CLAIM I

MR. PACE'S JURY WAS GIVEN UNCONSTITUTIONALLY VAGUE INSTRUCTIONS ON THE COLD, CALCULATED, AND PREMEDITATED AGGRAVATING CIRCUMSTANCE. FURTHER, THE FACTS OF THE INSTANT OFFENSE PRECLUDE THE FINDING OF THE COLD, CALCULATED, AND PREMEDITATED AGGRAVATOR.

Mr. Pace's jury was improperly instructed on the cold, calculated, and premeditated (CCP) aggravating circumstance. As the circuit court noted, because this matter was not argued on appeal and thus procedurally barred, the court was not permitted to address it in Mr. Pace's motion for postconviction relief. (R. 1200) (citing Jackson v. State, 615 So. 2d 668, 669 & n.3 (Fla. 1994)). Mr. Pace's appellate counsel was ineffective for failing to bring this claim.

The standard instruction on the CCP aggravator is laid out in Florida Statutes Section 921.141(5)(I) (1989): "the crime for which the defendant is to be sentenced was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification." This was the exact instruction given to Mr. Pace's jury. (R. 1121)

This instruction unconstitutionally fails to give jurors the legal guidance to properly find this aggravator; without guidance, "the average juror may characterize

all premeditated murders as CCP." See Jackson, 648 So.2d at 89-90; see also Espinosa v. Florida, 112 S. Ct. 2926 (1992); Stringer v. Black, 112 S. Ct. 1130 (1992); Sochor v. Florida, 112 S. Ct. 2114 (1992); Maynard v. Cartwright, 108 S. Ct. 1853 (1988).

In addition to objecting to the application of the aggravator during the trial, (R. 1076), Mr. Pace's counsel also filed a pretrial motion contesting the constitutionality of the CCP aggravating factor. (R. 1191-92) Trial counsel asserted that due to the vague and overbroad nature of the aggravator the jury "would have no guidance in deciding what facts would establish" the aggravator; "[i]n other words, the facts which might establish this aggravating circumstance for one juror may not establish it for another juror." (R. 1191) Mr. Pace properly preserved this claim at trial, yet, his appellate counsel failed to raise it on appeal.

Had appellate counsel directed the Court's attention to the unconstitutional instructions under which the jury recommended death, Mr. Pace would have received a new sentencing proceeding. See Jackson, 648 So. 2d at 90 (vacating death sentence and remanding for a new sentencing proceeding for the sole reason of unconstitutional CCP instructions).

This Court cannot assume that the CCP aggravator did not weigh into the jury's decision. In fact, a "jury is 'unlikely to disregard a theory flawed in law.'"

See id. (quoting Sochor, 112 S. Ct. at 2122). Although the trial court did not find that the CCP aggravator existed, (R. 1235), the court was obligated to give "great weight" to the jury recommendation, a recommendation that was reached under unconstitutional instructions.[1] See Johnson v. Singletary, 612 So. 2d 575 (Fla. 1993). "By giving 'great weight' to the jury recommendation, the trial court indirectly weighed the invalid aggravating factor this court must presume the jury found." Espinosa v. Florida, 112 S. Ct. 2926, 2928 (1992) (citation omitted).

The significance of the constitutional violation is magnified by the fact that Mr. Pace's jury recommendation was a seven to five vote. This Court "cannot say beyond a reasonable doubt that the invalid CCP instruction did not affect the jury's consideration or that its recommendation would have been the same" had an expanded instruction been given. See Jackson, 648 So. 2d at 90.

The sole way that this Court can conclude that the erroneous instructions were harmless is "if the State can demonstrate beyond a reasonable doubt that the murder could only have been cold, calculated, and premeditated without any pretense of moral or legal justification even if the proper instruction had been

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[1] "The fact that the court correctly determined that the murder was not CCP does not change the fact that the jury instruction was unconstitutionally vague." Kearse v. State, 662 So. 2d 677, 686 (Fla. 1995).

given." Walls v. State, 641 So. 2d 381, 387 (Fla. 1994) (emphasis added). However, the State cannot meet this burden, evidenced by the fact that the trial court found that the CCP aggravator did not exist. The trial court had the benefit of legal knowledge, case law, and expertise to assess whether CCP applied to this offense yet properly rejected the aggravator.

At trial, Mr. Pace's counsel objected to the CCP aggravator on the grounds that the offense at hand does not meet the criteria for the aggravator. (R. 1077-78) As the Jackson Court explained not all premeditated murders qualify for this aggravator. The CCP aggravator

> applies to "murders more cold-blooded, more ruthless, and more plotting than the ordinary reprehensible crime of premeditated first-degree murder," and where the killing involves "calm and cool reflection." The Court has adopted the phrase "heightened premeditation" to distinguish this aggravating circumstance from the premeditation element of fist-degree murder. . . . These explications by the Court make it clear that CCP encompasses something more than premeditated first-degree murder.

Jackson, 648 So. 2d at 88-89. This explanation is strikingly similar to an objection raised by Mr. Pace's counsel: "[C]ase law is fairly clear that in most cases cold, calculated and premeditated goes to mafia-style contract killings, people laying in

wait and things of that nature. And this crime certainly does not rise to that level and that is a part of our objection." (R. 1077-78)

Defense counsel objected to the jury being instructed on this aggravator because "there is no evidence that it was cold, calculated, and premeditated without any pretense of moral or legal justification" and that this aggravator "is a higher standard than premeditated murder." (R. 1076) Nevertheless, counsel's objection was overruled, (R. 1077), and Mr. Pace's sentencing jury given the standard, and unconstitutional, instruction. (R. 1121) Appellate counsel neglected to raise this crucial issue on appeal.

To properly apply the CCP aggravator to an offense, four elements must exist: (1) the killing must be "'the product of cool and calm reflection and not an act prompted by emotional frenzy, panic, or a fit of rage'"; (2) the killing must be "the product of 'a careful plan or prearranged design'"; (3) the defendant must exhibit "premeditation over and above what is recovered for unaggravated first-degree murder"; (4) the killing must not have a "pretense of moral or legal justification." See Walls, 641 So. 2d at 378-88 (citations omitted).

The State alleged that Mr. Pace's offense met this criteria, because it occurred in a wooded area and the victim was shot twice with a shotgun. (R. 1097-98) However, that is not sufficient to show heightened premeditation:

> It is axiomatic that the State is required to establish the existence of an aggravating circumstance beyond reasonable doubt. The evidence in this case is entirely circumstantial. Consequently, to satisfy the burden of proof, the circumstantial evidence must be inconsistent with any reasonable hypothesis which might negate to aggravating factor.

Geralds v. State, 601 SO. 2d 1157, 1163 (Fla. 1992). That the victim was found in a wooded or remote area could indicate that Mr. Pace did not want to commit a robbery in view of others. It does not suggest that he intended to commit murder. See Gorsham v. State, 454 So. 2d 556, 559 (Fla. 1984) ("The record arguably bears evidence that the robbery was premeditated in a cold and calculated manner, but that premeditation cannot automatically be transferred to the murder itself.").

Moreover, without the State showing that Mr. Pace had "a careful plan or prearranged design to kill," application of this aggravator is improper. See, e.g., Wyatt v. State, 641 So. 2d 1336, 1341 (Fla. 1994).

Not only was the jury instructed on the cold, calculated, and premeditated aggravator when the facts of the offense preclude proper application of this aggravator, but the jury was also given unconstitutional instructions on the aggravator. Such an error undisputably harmed Mr. Pace, as the jury returned, by the narrowest of votes, a recommendation for death.

"It is the unique role of that [appellate] advocate to discover and highlight possible error and to present it to the court." Wilson v. Wainwright, 474 So. 2d 1162, 1165 (Fla. 1985). Here, Mr. Pace was prejudiced by appellate counsel's failure to present the singular and cumulative effect of the erroneous instructions and application of this aggravator. Barclay v. Wainwright, 444 So. 2d 956, 969 (Fla. 1984). As a result, this Court has a duty to vacate Mr. Pace's death sentence and order a new sentencing proceeding.

CLAIM II

THE TRIAL COURT ERRED BY INSTRUCTING MR. PACE'S JURY ON THE AGGRAVATING CIRCUMSTANCE THAT THE OFFENSE WAS COMMITTED TO AVOID ARREST.

During Mr. Pace's charge conference, the parties debated whether the trial court should instruct the jury on the aggravator that the crime was committed for the purpose of avoiding arrest:

> **Mr. Hall:** Judge, also, I have another objection on the – the crime was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody. And I don't believe that there is any evidence that, Your Honor, and I don't think that aggravating circumstance should be given.
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> **Mr. Skievaski:** I think the jury can find beyond a reasonable doubt that the motive for the robbery was to get money. But the reason that Floyd Covington was

killed was that if he did not kill him, then he would be reported for the robbery and the penalty for that crime and the parole ciolation.

So there is sufficient evidence for the jury to determine that Mr. Pace was well familiar with Mr. Covington and vice-versa and who apparently had no problems with Mr. Covington and indeed worked for him and everybody liked Mr. Covington and he helped everybody. And he would not have killed him but for the fact that if he did not kill him he would be subjected to penalties from the law.

The Court: I deny that.

(R. 1075-76)

The trial court denied the aggravator during the charge conference.[2] Nonetheless, the State argued it to the jury and the court subsequently instructed the jury on the avoid arrest aggravator.

Mr. Pace's jury was instructed to consider the aggravating circumstance that "[t]he crime for which the defendant is to be sentenced was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody." (R. 1120-21)

In its closing argument, the State alleged that the crime was committed for the purpose of avoiding or preventing a lawful arrest or affecting an escape from custody:

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[2] In the event that this Court perceives the trial court's denial as ambiguous, it should note when the court declined prosecutorial or defense requests, the court repeatedly stated that the requests where "denied." For instance, when Mr. Pace's requested an jury instruction that even if the facts justified a death sentence, the jury could exercise its judgment and recommend a life sentence, the court stated "[t]hat is denied." (R. 1080) Again, when Mr. Pace requested instructions that the jury would not violate the law by not recommending death as well as when Mr. Pace requested a lingering doubt instruction, the court said that the proposed instructions were "denied." (R. 1081)

Moreover, when the court approved a proposed instruction, the court did not deny the objection, but rather granted the request. In response to the cold, calculated, and premeditated aggravator, the court said, "I am going to give it." (R. 1077) In response to the State's argument "that both the financial gain and robbery should be given," the court stated, "I agree. And that is what I'll do." (R. 1075)

> We know that Bruce Pace's motive for robbing Floyd Covington was to obtain money. But, ladies and gentlemen, I submit to you that his motive for killing Floyd Covington was because when he robbed him if he left Floyd Covington alive, then he would be arrested and prosecuted for robbery.
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> And the evidence is without question, conclusively, that Floyd Covington and Bruce Pace knew each other and indeed Bruce Pace worked for him. And the whole family knew him; everybody in the community knew Floyd and everybody in the community knew Bruce. So, if Bruce was to rob Floyd, there is nothing to keep Floyd Covington from reporting that to the law but to kill him. And that is what happened in this case.
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> * * *
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> And indeed as Mrs. Rich said in her testimony, Mr. Floyd would have taken him wherever he needed to go and loaned him money, according to her testimony. And the only reason that Floyd Covington is dead is because Bruce Pace wanted the money and if he did not kill him, Bruce Pace would be sent to jail, be arrested, which indeed happened after all.

(R. 1094-96)

Mr. Pace's counsel, under the impression that the court had denied this aggravator, did not argue against it in his closing statement. However, he did argue against each of the other aggravators on which the court instructed the jury. (R. 1106-07 (offense committed while on parole and prior conviction for a violent felony)); (R. 1111-12 (offense committed during the course of a robbery and

offense committed for pecuniary gain)); (R. 1112-13 (cold, calculated, and premeditated)).

Although trial counsel did not object to the State's argument nor the court's instruction of the aggravator, this error is fundamental. "The decision not to raise this issue cannot be excused as mere strategy or allocation of appellate resources. This issue is crucial to the validity of the conviction and goes to the heart of the case." Wilson v. Wainwright, 474 So. 2d 1162, 1163 (Fla. 1985).

The court's error of giving the instruction and permitting the State to argue the aggravator is magnified by the fact that the circumstances of this offense do not meet the standard of the aggravator. Thus, it could not apply.

Appellate counsel should have argued on appeal that the avoid arrest aggravator was inapplicable, as Mr. Pace's trial attorney preserved the issue. (R. 1075-76) "To have failed to raise so fundamental an issue" constitutes ineffective assistance of counsel. Wilson v. Wainwright, 474 So. 2d 1162, 1163 (Fla. 1985).

"[T]he proof must demonstrate beyond a reasonable doubt that the victim was murdered solely or predominately for the purpose of witness elimination." Urbin v. State, 714 So. 2d 411, 416 (Fla. 1998). However, by only arguing that Mr. Pace and the victim knew one another, the State never established that the motive of the offense was to eliminate the victim as a witness. See, e.g., Caruthers v. State,

465 So. 2d 496, 499 (Fla. 1985) ("The state does not without more establish this [aggravating] fact by proving that the victim knew her assailant, even for a number of years.").

In instances where the Court upheld a finding of the avoid arrest aggravator, the Court found something more than just that the defendant and the victim knew one another. See Jennings v. State, 718 So. 2d 144, 151 (Fla. 1998):

> It is significant that the victims knew and could identify their killer. While this fact alone is insufficient to prove the avoid arrest aggravator, there was further evidence presented that Jennings used gloves, did not use a mask, and stated that if he ever committed a robbery, he would not leave any witnesses.

See also Riley v. State, 366 So. 2d 19, 22 (Fla. 1978) (holding that the aggravator existed, because the victim was "executed after one of the perpetrators expressed a concern for subsequent identification"); Hertz v. State, 803 So. 2d 629, 648 (Fla. 2001) (upholding the avoid arrest aggravator, as the defendants discussed the need to eliminate all witnesses and subsequently set a fire to destroy evidence).

This Court "cannot assume [Mr. Pace]'s motive; the burden was on the state to prove it." Menendez v. State, 386 So. 2d 1278, 1282 (Fla. 1979). On numerous occasions, the Court has struck the avoid arrest aggravator when the State failed to prove the motive. See Robertson v. State, 611 So. 2d 1228, 1232 (Fla.

1993)(concluding that the court erred in finding the aggravator when the defendant shot the victim "instinctively and without a plan to eliminate her as a witness"); Hansbrough v. State, 509 So. 2d 1081, 1086 (Fla. 1987) ("Instead of an intended witness elimination murder, it is more likely that this robbery simply got out of hand.").

In this case, the State also failed to prove Mr. Pace's motive was to avoid arrest by eliminating the victim as a potential witness.

While the judge did not find that this aggravator existed, (R. 1235), the jury may have. During deliberations, Mr. Pace's jury requested, via a handwritten note from their foreperson, "a copy of the instructions that define the aggravating and mitigating circumstances that may/should be considered." (R. 1126) However, the jury's request was denied. (R. 1129) While it is impossible to know the precise reasons for this request, it is clear that the jury was concerned with what factors they were to assess in recommending a sentence.

The only explanation the jury had of what facts meet the threshold of the aggravator came from the prosecutor and the prosecutor's argument that the aggravator proven because the victim knew Mr. Pace. (R. 1094-96) If even one juror improperly found this aggravator, then Mr. Pace's sentence is unconstitutional. As Mr. Pace was sentenced to death by a seven to five vote,

instructions to the jury on a undisputedly inapplicable aggravator cannot be deemed harmless.

CLAIM III

THE FLORIDA DEATH PENALTY SENTENCING STATUTE AS APPLIED IS UNCONSTITUTIONAL UNDER THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.[3]

In Jones v. United States, the United States Supreme Court held that "under the Due Process Clause of the Fifth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an

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[3] In order to ensure that Mr. Pace has properly pled this claim, he brings it in this petition for writ of habeas corpus as well as his appeal from the circuit court's denial of postconviction relief. This Court has addressed Apprendi claims in several petitions for writ of habeas corpus: Mills v. Moore, 786 So. 2d 532 (Fla. 2001); Mann v. Moore, 794 So. 2d 595 (Fla. 2001); Brown v. Moore, 800 So. 2d 223 (Fla. 2001).

However, Mr. Pace recognizes that claims of fundamental changes in the law are generally raised in motions for postconviction relief under Florida Rule of Criminal Procedure 3.850. See Adams v. State, 543 So. 2d 1244 (Fla. 1989); Dixon v. State, 730 So. 2d 265 (Fla. 1999). Because Mr. Pace is currently appealing the circuit court's denial of his motion for postconviction relief, he does not have an opportunity to raise this claim in such a motion. If this claim must be brought in a motion for postconviction relief, Mr. Pace requests that this Court relinquish jurisdiction, so that he may file such a motion in circuit court.

indictment, submitted to a jury, and proven beyond a reasonable doubt." Jones v. United States, 526 U.S. 227, 243 n.6 (1999). Subsequently, in Apprendi v. New Jersey, the Court held that the Fourteenth Amendment affords citizens the same protections under state law. See Apprendi v. New Jersey, 530 U.S. 466 (2000).

In Apprendi, the issue was whether a New Jersey hate crime sentencing enhancement, which increased the punishment beyond the statutory maximum, operated as an element of an offense so as to require a jury determination beyond a reasonable doubt. Apprendi, 120 S. Ct. at 2365. "[T]he relevant inquiry here is not one of form, but of effect – does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?" Apprendi, 120 S. Ct. at 2365. Applying this test, it is clear that aggravators under Florida's death penalty sentencing scheme are elements of the offense which must be charged in an indictment, submitted to a jury during guilt phase, and proven beyond a reasonable doubt by a unanimous verdict.

Like in Apprendi, in Mr. Pace's case, the aggravating sentencing factors came into play only after he was found guilty and the maximum statutory penalty, based upon the guilty verdict, was increased from life imprisonment to death. At the time of Mr. Pace's penalty phase, Florida Statutes, Section 775.082(1) (1989), provided:

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

Fla. Stat. § 775.082(1) (1989).

Under this statute, the state must prove at least one aggravating factor in the separate penalty phase proceeding before a person convicted of first degree murder is eligible for the death penalty. See State v. Dixon, 283 So. 2d 1, 9 (Fla. 1973); Fla. Stat. § 775.082(1) (2001); Fla. Stat. §§ 921.141(2)(a), (3)(a) (2001). Thus, Florida capital defendants are not eligible for a death sentence simply upon conviction of first degree murder. If a court sentenced a defendant immediately after conviction, the court could only impose a life sentence. See Fla. Stat. § 775.082 (2001). Therefore, under Florida law, the death sentence is not within the statutory maximum sentence, as analyzed in Apprendi, because it increased the penalty for first degree murder beyond the life sentence a defendant is eligible for based solely upon the jury's guilty verdict.

In Apprendi, a hate crime sentencing enhancement was applied after the defendant was found guilty and increased the sentenced the statutory maximum

penalty by up to ten years. Apprendi, 120 S. Ct. at 2351. The Apprendi Court clearly dispensed with the fiction that the sentencing enhancement was not an element which received Sixth Amendment protections. “[I]t can hardly be said that the potential doubling of one’s sentence from 10 to 20 years has no more than a nominal effect. Both in terms of absolute years behind bars, and because of the severe stigma attached, the differential here is unquestionably of constitutional significance.” Apprendi, 120 S. Ct. at 2365. Similarly, in Mr. Pace’s case, the aggravators were applied only after he was found guilty, yet it was these aggravators that increased the statutory maximum penalty to which he could be sentenced based on the jury’s guilty verdict from life imprisonment to death. Certainly, the difference between life and death has more than a nominal effect and is of constitutional significance. “[T]he penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two.” Woodson v. North Carolina, 428 U.S. 280, 305 (1975); see Gardner v. Florida, 430 U.S. 349, 357 (1976).

Under Apprendi’s reasoning, aggravating factors in the Florida death penalty scheme are elements of a capital crime which must be decided by a unanimous jury. Florida Rule of Criminal Procedure 3.440, requires unanimous jury verdicts on

criminal charges. However, in capital cases, this Court permits jury recommendations of death based upon a simple majority vote. See Fla. Stat. §§ 921.141(1), (2) (1981); Walton v. Arizona, 497 U.S. 639, 648 (1990). The trial judge instructed Mr. Pace's jury of this: "In these proceedings, it is not required that the advisory sentence of the jury be unanimous." (R. 1124) Consequently, Mr. Pace was sentenced to death by only seven jurors. (R. 1129)

Moreover, this Court does not require jury unanimity as to the existence of specific aggravating factors. In Florida, it is the judge and not the jury who finds the specific aggravating factors that make a person death-eligible. See Fla. Stat. §§ 921.141(1), (2) (1981); Walton v. Arizona, 497 U.S. 639, 648 (1990). For Sixth Amendment purposes, these aggravators are elements of a death penalty offense. Consequently, the procedure followed in the sentencing phase should receive the protections guaranteed by Apprendi. The trial court's weighing of the jury's recommendation does not change that. See Walton, 497 U.S. at 648. Although this Court has said that Apprendi did not overrule Walton, see Mills v. Moore, 786 So. 2d 532, 537 (Fla. 2001), and Mr. Pace contends that the Florida death penalty scheme is unconstitutional as applied, the United States Supreme Court has granted certiorari in Ring v. Arizona to decide precisely that

question. See State v. Ring, 25 P.3d 1139 (Ariz. 2001), *cert. granted*, Ring v. Arizona, 122 S. Ct. 865 (2001).[4]

In fact, Mr. Pace's jury recommended a death sentence by a vote of seven to five. (R. 1129) This is especially significant since, as the trial court explained, none of the statutory or nonstatutory mitigating factors presented were established. (R. 1235-36) However, even in the absence of proven mitigating factors, five of Mr. Pace's jurors recommended that he receive a life sentence. (R. 1129) These jurors were following the trial court's instructions to not merely count the aggravating and mitigating circumstances but to compare the quality of the circumstances.

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[4] On January 11, 2002, the United Stated Supreme Court granted Timothy Stuart Ring's petition for Writ of Certiorari. The petition raised, as it sole issue, the question of whether Walton v. Arizona, 479 U.S. 639 (1990), should be overruled in light of the Court's subsequent holding in Apprendi that "for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed" violates the defendant's Sixth Amendment right to a jury trial. Apprendi, 530 U.S. at 490. The Florida capital sentencing scheme is in significant part subject to the same constitutional inadequacies as Arizona's capital sentencing scheme, and the Ring petition identified Florida as one of nine states whose capital sentencing schemes have questionable constitutional underpinnings pursuant to the language of Apprendi. As a result of the implications Ring could have on Florida's death penalty scheme, the United States Supreme Court recently stayed the executions of two Florida inmates until an opinion is reached in Ring. See King v. Florida, 122 S. Ct. 932 (2002); Bottoson v. Florida, 2002 WL 181142 (2002).

> [T]he procedure to be followed by the jury is not a mere counting process of the number of aggravating circumstances and the number of mitigating circumstances. But rather, a reasoned judgment as to what factual situations require the imposition of death and which can be satisfied by life imprisonment in light of the totality of circumstances present.

(R. 1120) Despite the lack of mitigating factors, five jurors either did not find the aggravators had been proven beyond a reasonable doubt or did not find that Mr. Pace's situation required the imposition of death.[5] In either event, it is undisputed that the aggravating factors which made Mr. Pace eligible for a death sentence were not found by a unanimous jury to be proven beyond a reasonable doubt. As such, his sentence was unconstitutionally imposed and must be vacated.

In addition to not requiring jury unanimity of a sentence nor jury unanimity of each aggravator, this Court does not require that the prosecution inform the defendant in the indictment which aggravating factors will be presented. The indictment against Mr. Pace alleged the following:

> BRUCE DOUGLAS PACE did unlawfully from a premeditated design to effect the death of a human being, to-wit: Floyd Covington, or while engaged in the preparation of or in an attempt to perpetuate a felony, to-

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[5] Likewise, on Mr. Pace's direct appeal to the Court, Justices Overton, Barkett, and Kogan found a death sentence to be inappropriate and unwarranted. See Pace, 596 So. 2d at 1036.

> wit: Robbery, did kill and murder said Floyd Covington, by shooting him with a firearm, to-wit: a shotgun, in violation of Sections 782.04 and 775.087(2), Florida Statutes.

(R. 1132)

In response to this indictment, Mr. Pace's trial counsel filed a motion to dismiss indictment or to declare that death is not a possible penalty:

> A sentence of death may be imposed only when aggravating circumstances are found to outweigh mitigating circumstances. . . . Aggravating circumstances, therefore, are the essential facts constituting any charged capital offense and must be alleged in the indictment in order to confer jurisdiction on this Court to impose a sentence of death. . . . Aggravating circumstances must be alleged in the indictment to notify the Defendant that death is a possible penalty as well as confer jurisdiction on the Court. . . . Failure to provide notice of such essential allegations deprives the Defendant of an opportunity to adequately prepare his defense and, therefore, render[s] the entire sentencing phase unreliable and in violation of the Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States. . . . No aggravating circumstances are alleged in the indictment. . . . The indictment does not, therefore, charge and offense punishable by death.

(R. 1151-52)

Mr. Pace's trial counsel further filed a motion for statement of particulars regarding aggravating and mitigating circumstances, alleging "that the Indictment fails to sufficiently inform the Defendant of the particulars of the offense, relevant

to imposition of the death penalty under Florida Statute Section 921.141, to enable him to prepare his defense." (R. 1158) The Court denied each of these motions.

Because the effect of finding an aggravator exposes the defendant to a greater punishment than that authorized by the jury's guilty verdict, the aggravator must be charged in the indictment, submitted to a jury, and proven beyond a reasonable doubt. See Apprendi, 530 U.S. 494-95. This did not occur in Mr. Pace's case, thus, the death sentence against him is unconstitutional.

CLAIM IV

APPELLATE COUNSEL FAILED TO CONTEST THE TRIAL COURT'S ADMITTANCE OF PHYSICAL EVIDENCE DESPITE THAT NO PROPER PREDICATE WAS ESTABLISHED AND THE EVIDENCE WAS NEVER POSITIVELY IDENTIFIED.

Mr. Pace was also provided ineffective appellate assistance when his counsel failed to assert that the trial court erred by improperly admitting of a piece of physical evidence. The trial court admitted into evidence, State Exhibit 37, a pair of pants alleged to belong to Mr. Pace, despite the defense's repeated objections that the State did not lay a proper foundation for the pants and that the pants were never identified as belonging to Mr. Pace.

According to Florida Statutes, Section 90.901 (2001), "[a]uthentication or identification of evidence is required as a condition precedent to its admissibility." This requirement is "satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." See § 90.901, Fla. Stat. In Mr. Pace's case, no one identified State Exhibit 37, the pants, as belonging to Mr. Pace.

Admissibility is contingent upon the offering party demonstrating that the "proffered evidence is, in fact, the seized object and that its condition is materially unchanged. This can be accomplished by showing a 'chain of custody,' which indirectly establishes the identity and integrity of the evidence by tracing its continuous whereabouts. Or such evidence may be visually identified by witnesses." United States v. Zink, 612 F.2d 511, 514 (10th Cir. 1980) (citations omitted).

Nonetheless, the State did not establish the chain of custody, yet introduced the pants through Jean Shirah, an investigator with the Santa Rosa Sheriff's Office.

> **Q.** Are these shoes, jacket, and pants essentially in the same condition as when you found them?
>
> **A.** They appear to be, yes, sir.

* * *

Q. Now, Mrs. Shirah, do you know of these items of clothing, you took them to the sheriff's office. Do you know if they were ever turned in to the lab in Pensacola?

A. They were obtained at the residence by CS officer Don Sienkiewicz and I believe that he turned it over to Pensacola lab.

* * *

Mr. Hill: Your honor, at this time we also would move to introduce into evidence exhibits – 37, 38, and 39.

Mr. Hall: Same objection, Your Honor, no predicate, irrelevant and we have not established that it was Mr. Pace's clothing, just that it came from his room.

The Court: Overruled. It will be admitted.

(R. 692-93) Clearly, the State did not lay a proper predicate to introduce the pants. Jean Shirah was neither the person who obtained the pants nor the person who gave them to the laboratory. Consequently, she had no way of knowing if the pants were the item seized nor if the pants were in same condition at trial as when they were seized. Here, trial counsel made a proper objection which should have been sustained.

In addition to his initial objection, throughout trial Mr. Pace's trial counsel continued to object that the pants were not positively identified, thus could not be described as belonging to Mr. Pace. Every witness the State attempted to have

identify the pants could not do so.[6] For example, Ella May Green testified that Mr. Pace was wearing "old grayish pants" when she saw him on November 6, 1988.[7] (R. 708) However, when shown State Exhibit 37, she did not recognize the pants as Mr. Pace's.

> **Q.** And, Mrs. Green, I'll hand you also what was marked as State's Exhibit 37 and ask you if you recognize these pants?
>
> **A.** Can you hold them up, please? That does not look like the pants that he was wearing; it might have been like they was washed or something but they was mostly that color.
>
> **Q.** But they looked similar to these pants?
>
> **A.** Yes. They could be the pants, but I am not going to be sure.

(R. 709) Similarly, Mr. Pace's mother, Lilly Pace, the person who did his laundry, could not positively identify the pants.[8] (R. 875-76)

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[6] Michael Green could not remember what clothes Mr. Pace was wearing on the Sunday after the offense, November 6, 1988. (R. 702) The State did not ask Mr. Pace's stepfather, Harvey Rich, if he could identify the pants. (R. 846-61)

[7] Ms. Green initially told the police that Mr. Pace had been wearing blue jeans when she saw him. However, she later changed her story to say that he had been wearing light-colored pants. (R. 723-24)

[8] Although Mrs. Rich could not identify the pants, she was able to positively identify the jacket and shoes as belonging to Mr. Pace. (R. 875-76)

Moreover, since State Exhibit 37 was never identified as his, the pants were entirely irrelevant in Mr. Pace's trial. (R. 693) Despite that the pants were never positively identified, the State continued to refer to them as "Mr. Pace's pants" and the trial court erroneously allowed such references. The following exchange occurred during the testimony of Lonnie Ginsberg, a forensic serologist with the Florida Department of Law Enforcement crime laboratory. (R. 775)

> **Q.** Now, Mr. Ginsberg, were you also provided some exhibits that were identified to you as having belonged to the defendant in this case, Bruce Pace?
>
> * * *
>
> **(At the bench:**
>
> **Mr. Hall:** Judge, I don't believe all of those exhibits have been identified as Mr. Pace's, and especially the pants – and he just stated in front of the jury that these were identified as Mr. Pace's. And maybe my recollection is incorrect.
>
> **Mr. Etheridge:** Not positively identified.
>
> * * *
>
> **Mr. Etheridge:** Ask for a curative instruction as to the pants. Those have not –
>
> **The Court:** I'm not so sure, I have some reservations about the pants.
>
> **Mr. Skievaski:** If I may speak on that, Judge. May Green testified that they were like the pants, although she could not say for sure that

they were the pants. However, the pants that she saw had a red, what she thought was blood stain on the right back pants pocket. And these items were collected from the room identified to be Bruce Pace's. And the evidence will speak for itself there is a blood-like stain on the right back pocket.

Mr. Etheridge: Your Honor, the only one that said anything about the pants was Jean Shirah. And they have not been authenticated or corroborated by anyone. But she said that she got them from a room represented to be the defendant's and no one came forward and said that they are his pants. And I take an exception –

The Court: Overruled.

Bench conference concluded.)

(R. 785-87) Unfortunately, the State's improper references continued throughout Mr. Pace's trial; after each improper reference, Mr. Pace's counsel continued to

object.[9] However, appellate counsel failed to alert the Court to the evidentiary problems surrounding State Exhibit 37.

In a case built entirely on circumstantial evidence, such as this one, the State relies on each piece of evidence to persuade the jury to accept its theory of the events. Here, the prosecutor characterized the pants, as the "fatal mistake" that established Mr. Pace's guilt:

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[9] **Mr. Skievaski:** For the record, can that Exhibit be identified by description.

Mr. Etheridge: Identify it as Number 37.

Mr. Skievaski: That is number, physically identify the item itself by description.

The Court: What is it?

Mr. Etheridge: Pair of pants.

Mr. Skievaski: Defendant's pants.

Mr. Hall: Objection.

Mr. Etheridge: There is no testimony that that is the defendant's pants.

Mr. Hall: Ask that counsel's remarks be stricken from the record. They're not positively identified.

The Court: Denied.

Mr. Etheridge: And a curative instruction, Your Honor.

The Court: Denied.

(R. 799-800)

> [T]he defendant as he pushed Floyd Covington's body over, he pulled one of the cushions out so he would not sit in the blood. And you can see here there is very little blood on this cushion behind the driver's seat. And he put that there to keep from getting blood on his pants. And he made one fatal mistake, he did not put it in there good enough because he got a stain on the back of his pants, right here, between those two cushions. That is where that blood came on the back of the defendant's pants.

(R. 969-70)

The State presented the pants to the jury as a key piece of evidence of Mr. Pace's guilt; the jury accepted this argument and convicted Mr. Pace. However, no one ever testified that these pants were Mr. Pace's. Consequently, as Mr. Pace's counsel argued, they were irrelevant. (R. 693)

Trial counsel argued repeatedly that the pants should never have been admitted, much less referred to as Mr. Pace's pants. (R. 799-800) Mr. Pace was denied effective assistance on his direct appeal, as his counsel did not raise this issue, an issue "crucial to the validity of the conviction." See Wilson v. Wainwright, 474 So. 2d 1162, 1163 (Fla. 1985).

CLAIM V

THE FLORIDA SUPREME COURT ERRED BY AFFIRMING MR. PACE'S SENTENCE WITHOUT ASSESSING THE PROPORTIONALITY OF A DEATH SENTENCE.

Mr. Pace was sentenced to death in a case that the State presented as a premeditated murder, committed during a robbery. Under the best evidence available to the State, a death sentence is inappropriate:

> While the existence and number of aggravating or mitigating factors do not in themselves prohibit or require a finding that death is nonproportional, we nevertheless are required to weigh the nature and quality of those factors as compared with other similar reported death appeals.

Kramer v. State, 619 So. 2d274, 276 (Fla. 1993). Nevertheless, the Court did not assess the proportionality of Mr. Pace's sentence in his direct appeal. Had the Court compared the aggravating and mitigating factors of Mr. Pace's sentence with the circumstances and outcomes of other sentences, it would have found his death sentence disproportional and vacated it.

The trial court in Mr. Pace's case found the aggravating factors that Mr. Pace had a prior violent conviction, that the offense occurred while he was on parole,[10] and that the offense occurred during the course of a felony. Mr. Pace

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[10] Mr. Pace was on parole for the armed robbery which constituted his prior conviction.

presented evidence of nonstatutory mitigation but the trial court found none was established.[11] (R. 1235-36)

The trial court rejected evidence

> that the defendant has behaved himself while in custody and seems to have manifested a positive attitude during that period of time; second, that he was a good athlete in high school; third, that his father deserted his mother and he when he was a child; forth, that he was a good, loving child; and fifth, that the defense contends the case as a whole was somewhat "flaky."

(R. 1236)

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[11] As Mr. Pace argued in his direct appeal, the trial court erred by not finding and weighing the uncontroverted mitigation. See Nibert v. State, 574 So. 2d 1059, 1062-63 (Fla. 1990) ("[W]hen a reasonable quantum of competent, uncontroverted evidence of a mitigating circumstance is presented, the trial court *must* find that the mitigating circumstance has been proved.") (emphasis added).

Moreover, his sentencing order was deficient by failing to specify why he rejected the mitigation or how the aggravators outweighed the mitigation. See Campbell v. State, 571 So. 2d 415, 419-20 (Fla. 1990).

> When addressing mitigating circumstances, the sentencing court must expressly evaluate in its written order each mitigating circumstance proposed by the defendant to determine whether it is supported by the evidence. . . . The court next must weigh the aggravating circumstance against the mitigating and, in order to facilitate appalate review, must expressly consider in its order each established mitigating circumstance.

Id.

A premeditated murder during the commission of another felony, without additional aggravation, simply does not qualify for a death sentence when compared to similar cases. See, e.g., Proffitt v. State, 510 So. 2d 896 (Fla. 1987); Caruthers v. State, 465 So. 2d 496 (Fla. 1985); Rembert v. State, 445 So. 2d 337 (Fla. 1984); Richardson v. State, 437 So. 2d 1091 (Fla. 1983).

In Livingston v. State, 565 So. 2d 1288, 1292 (Fla. 1988), the Court found the death sentence to be disproportionate when the defendant had a previous conviction of a violent felony and the offense was committed during an armed robbery, yet the trial court found as mitigation the defendant's "unfortunate home life and rearing." See Livingston, 565 So. 2d at 1292.

The Rembert court found "the death penalty to be unwarranted" when the murder was committed during the course of a felony and, though the defendant "introduced a considerable amount of nonstatutory mitigating evidence," the trial court found that no mitigation had been established. See Rembert, 445 SO. 2d at 340. Likewise, Mr. Pace's trial court rejected the uncontroverted mitigation that he presented.

Similarly, in Caruthers, the Court vacated a death sentence and remanded the case for an imposition of a life sentence when the murder occurred while the

defendant was engaged in the commission on an armed robbery. See Caruthers, 465 So. 2d at 499.

Like the defendants in each of these cases, Mr. Pace also does not deserve to die for this offense. Bruce Pace's death sentence is disproportional to his crime. He urges this Court to reverse his death sentence with directions to the trial court to impose a life sentence.

CONCLUSION AND RELIEF SOUGHT

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing **PETITION FOR WRIT OF HABEAS CORPUS** has been furnished by United States Mail, first-class postage prepaid, to Curtis M. French, Assistant Attorney General, Office of the Attorney General, The Capitol - PL-01, Tallahassee, Florida 32399, on this 4th day of March, 2002.

CERTIFICATE OF TYPE SIZE AND STYLE

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