

IN THE SUPREME COURT OF FLORIDA

NO. SC-02-519

BRUCE DOUGLAS PACE,

Petitioner,

v.

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

Respondent.

**REPLY TO RESPONSE TO PETITION FOR WRIT OF HABEAS
CORPUS**

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INTRODUCTION

COMES NOW, the Petitioner, **Bruce Douglas Pace**, by and through undersigned counsel and hereby submits this Reply to the State's Response to Mr. Pace's Petition for Writ of Habeas Corpus. Petitioner will not reply to every issue and argument, however does not expressly abandon the issues and claims not specifically replied to herein. For arguments not addressed herein, Petitioner stands on the arguments presented in his Petition for Writ of Habeas Corpus.

REPLY TO CLAIM I

In its response to the instant claim, the State fails to address Mr. Pace's argument that appellate counsel was ineffective for failing to raise a claim that the facts of the offense precluded the jury being instructed on the cold, calculated, and premeditated (CCP) aggravator. As the State has not presented any argument, reason, or case that suggests how the facts of this case support CCP, the State apparently concedes that CCP could not properly have been found by the jury. Consequently, appellate counsel was ineffective for failing to draw this Court's attention to the jury being erroneously instructed on CCP, an aggravating factor that could not have been found. Under Florida law, the jury was not required to specify upon which aggravating factors they based their sentence of death. The jury was also not required to specify what weight they assigned to each aggravating factor.

Consequently, this Court is unable to assert that it was harmless error to instruct the jury on CCP. A new sentencing is warranted on the improper instructions of CCP, an inapplicable aggravating circumstance. See Claim III of Petition.

REPLY TO CLAIM III

The State alleges that in Florida “the statutory maximum sentence for first degree murder is death.” (Resp. at 27) But the Attorney General of Arizona said exactly the same thing about the Arizona statute invalidated in Ring v. Arizona, 122 S. Ct. 2428 (2002). The United States Supreme Court dispatched that argument as follows:

In an effort to reconcile its capital sentencing system with the Sixth Amendment as interpreted by *Apprendi*, Arizona first restates the *Apprendi* majority’s portrayal of Arizona’s system: Ring was convicted of first-degree murder, for which Arizona law specifies ‘death or life imprisonment’ as the only sentencing options, see Ariz. Rev. Stat. Ann. § 13-1105(C) (West 2001); Ring was therefore sentenced within the range of punishment authorized by the jury verdict. See Brief for Respondent 9-19. This argument overlooks *Apprendi*’s instruction that ‘the relevant inquiry is one not of form, but of effect.’ 530 U.S., at 494, In effect, ‘the required finding [of an aggravated circumstance] expose[d] [Ring] to a greater punishment than that authorized by the jury’s guilty verdict.’ *Ibid.*; see 200 Ariz., at 279, 25 P. 3d, at 1151. The Arizona first-degree murder statute ‘authorizes a maximum penalty of death only in a formal sense,’ *Apprendi*, 530 U.S., at 541 . . . (O’CONNOR, J., dissenting), *for it explicitly cross-*

references the statutory provision requiring the finding of an aggravating circumstance before imposition of the death penalty. See § 13-1105(C) ('First degree murder is a class 1 felony and is punishable by death or life imprisonment as provided by § 13-703.' (emphasis added)). If Arizona prevailed on its opening argument, *Apprendi* would be reduced to a 'meaningless and formalistic' rule of statutory drafting. See 530 U.S., at 541 . . . (O'CONNOR, J., dissenting).

Ring, 122 S. Ct. at 2440-2441 (emphasis added).

From the standpoint "not of form, but of effect," there is no rational way to distinguish either Florida's statutory structure or its actual functioning from Arizona's. Identically to Ariz. Rev. Stat. Ann. § 13- 1105(C) and even more explicitly, if possible, Fla. Stat. § 775.082 "cross-references the statutory provision" of Fla. Stat. § 921.141, requiring additional findings **by a judge, not by a jury** as the precondition for imposition of the death penalty (Ring, 122 S. Ct. at 2440):

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 proceedings held to determine sentence according to the procedure set forth in § 921.141 result in a finding 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 (1979) (emphasis added).

The State further attempts to distinguish Florida's death penalty scheme from the Arizona procedure that was invalidated in Ring on the grounds that "[t]he jury's role in Florida's sentencing process is significant," (Resp. at 24), because juries render an advisory verdict as to whether the defendant should live or die. This argument blithely ignores the explicit holding and rationale of both Apprendi v. New Jersey, 530 U.S. 466, 483 (2000), and Ring. The unmistakable teaching of those two cases is that every fact which must be found as the necessary precondition for enhancing a defendant's maximum possible sentence from imprisonment to death is required by the Sixth Amendment to be found by a jury **in the same way, and for the same reasons**, that the Sixth Amendment requires a jury to find every fact which is the necessary precondition for conviction of a crime.¹ As Ring puts it in plain English: "*Apprendi* repeatedly instructs . . . that the characterization of a fact or circumstance as an 'element' [of a crime] or a 'sentencing factor' is not determinative of the question 'who decides,' judge or jury." Ring, 122 S. Ct. at 2441.

¹ This is what Apprendi held; it is what Ring held; it is what our Petition For a Writ of Habeas Corpus asserted that Apprendi held. To the extent that the State's response suggests that Mr. Pace is seeking to have "jury sentencing," (Resp. 20, 23) the State misconstrues Mr. Pace's position. Mr. Pace asserts that juries must make any and all findings on which a death sentence is contingent under state law.

In addition, the State contends that “the Ring decision left intact all prior opinions upholding the constitutionality of Florida’s death penalty scheme, including Spaziano v. Florida, 468 U.S. 447 (1984), and Hildwin v. Florida, 490 U.S. 638 (1989) [(per curiam)]” the State is plainly wrong. In Ring, the Supreme Court overruled Walton v. Arizona, 497 U.S. 639 (1990), “to the extent that it allows a sentencing judge, sitting without a jury, to find an aggravating circumstance necessary for imposition of the death penalty.” Ring, 122 S. Ct. at 2443. Quite simply, Ring subjected capital sentencing to the Sixth and Fourteenth Amendment rule of Apprendi v. New Jersey, 530 U.S. 466 (2000), “that the Sixth Amendment does not permit a defendant to be ‘expose[d] . . . to a penalty *exceeding* the maximum he would receive if punished according to the facts reflected in the jury verdict alone.’” Ring, 2439-40 (quoting Apprendi, 530 U.S., at 483). “Capital defendant, no less than non-capital defendants,” the Court in ring declared, “are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment.” Id.

That rule squarely and indisputably outlaws the Florida sentencing procedure use to impose Mr. Pace’s death sentence. No other conclusion can plausibly be reached. In overruling Walton (which had upheld Arizona’s capital sentencing procedure against the challenge that it violated capital defendant’s Sixth

Amendment right to jury trial), Ring necessarily overruled Hildwin and its precursors (which had upheld Florida’s capital sentencing procedure against the identical challenge). The Walton decision had treated these Florida precedents as controlling and had regarding the Florida and Arizona capital-sentencing procedures as indistinguishable. Thus, Walton said:

We repeatedly have rejected constitutional challenges to Florida’s death sentencing scheme, which provides for sentencing by the judge, not the jury. *Hildwin v. Florida*, 490 U.S. 638 . . . (1989) (per curiam); *Spaziano v. Florida*, 468 U.S. 447 . . . (1984); *Proffitt v. Florida*, 428 U.S. 242 . . . (1976). In *Hildwin*, for example, we stated that “[t]his case presents us once again with the question whether the Sixth Amendment requires a jury to specify the aggravating factors that permit the imposition of capital punishment in Florida,” 490 U.S., at 638 . . . and we ultimately concluded that “the Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury.” *Id.*, at 640-641 . . .

The distinctions *Walton* attempts to draw between the Florida and Arizona statutory schemes are not persuasive. It is true that in Florida the jury recommends a sentence, but it does not make specific factual findings with regard to the existence of mitigating or aggravating circumstances and its recommendation is not binding on the trial judge. A Florida trial court no more has the assistance of a jury’s findings of fact with respect to sentencing issues than does a trial judge in Arizona.

497 U.S. at 647-48. Ring, too, explicitly recognized the indissolubility of the

Walton - Hildwin linkage:

In *Walton v. Arizona*, 497 U.S. 639 (1990), we upheld Arizona’s scheme against a charge that it violated the Sixth Amendment. The Court had previously denied a Sixth Amendment challenge to Florida’s capital sentencing system, in which the jury recommends a sentence but makes no explicit findings on aggravating circumstances; we so ruled, *Walton* notes, on the ground that “the Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury.” *Id.*, at 648 (quoting *Hildwin v. Florida*, 490 U.S. 638, 640-641 (per curiam)). ***Walton* found unavailing the attempts by the defendant-petitioner in that case to distinguish Florida’s capital sentencing system from Arizona’s.** In neither State, according to *Walton*, were the aggravating factors “elements of the offense”; in both States, they ranked as “sentencing considerations” guiding the choice between life and death. 497 U.S., at 648 (internal quotation marks omitted).

Ring, 122 S. Ct. at 2437 (emphasis added). It is indisputable that just as Ring overruled Walton, in the wake of Ring, Hildwin is also no longer good law and thus does not control.

Regarding the State’s suggestion that Mr. Pace is barred from raising a claim based on Ring, (Resp. 17-18), the State does not and could not dispute that until the Supreme Court’s decision in Ring v. Arizona, 122 S. Ct. 2428 (2002), in June of this year, this Court’s cases foreclosed relief on Mr. Pace’s claim. Therefore, any contention that Mr. Pace’s claims are time-barred or barred as successive is without merit. This Court’s cases applying Hitchcock v. Dugger, 481 U.S. 393

(1987), to cases in which it had previously denied relief based on a conflict between Florida's standard jury instruction and Lockett v. Ohio, 438 U.S. 586 (1987), are controlling under these circumstances, and the State makes no attempt to distinguish them. See, e.g., Delap v. Dugger, 513 So. 2d 659, 660 (Fla. 1987) (“Because *Hitchcock* represents a substantial change in the law occurring since we first affirmed Delap's sentence, we are constrained to readdress his *Lockett* claim on its merits”); Downs v. Dugger, 514 So. 2d 1069, 1070 (Fla. 1987) (*Hitchcock* constitutes “a substantial change in the law . . . that requires us to reconsider issues first raised on direct appeal and then in Downs' prior collateral challenges”).

The State also argues that under Witt v. State, 387 So. 2d 922 (1980), Ring does not apply retroactively, thus Mr. Pace is precluded from raising a Ring claim. (Resp. at 18-20) While the State is correct in that Witt does define the standard for retroactivity (Resp. at 19), the State incorrectly applies the standard.

Under Witt, a change in law supports postconviction relief in a capital case when “the change: (a) emanates from this Court or the United States Supreme Court, (b) is constitutional in nature, and (c) constitutes a development of fundamental significance.” Id. at 931. The first two criteria are obviously met here; the third presents the crucial inquiry. In elaborating what “constitutes a development of fundamental significance,” the Witt opinion includes 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, generally on in the present case, because there is a tension at the heart of it. Any change os 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, and the Witt Court was aware of it. See Witt, 387 So. 2d at 924-25. 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. Cf.

Thompson v. Dugger, 515 So. 2d 173, 175 (Fla. 1987).

Two considerations call for recognizing that the Apprendi-Ring rule is precisely 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, this Court’s model of the case for retroactive application of constitutional change – the Supreme Court held that a denial of the right to counsel could be vindicated in postconviction proceedings because the Sixth Amendment required a lawyer’s participation in a criminal trial to “complete the court”, see Johnson, 304 U.S. 458; and a judgment rendered by an incomplete court was subject to collateral attack. What was 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 like these has long been the central bastion of the Anglo-American legal system’s defenses against injustice and oppression. As former Justice Lewis F. Powell, Jr. wrote: “jury trial has been a principal element in maintaining individual freedom among English speaking peoples fo the longest span in the history of man.” See Powell, “Jury Trial of Crimes,” 23 WASHINGTON & LEE L. REV. 1, 11 (1966).

The United States Supreme Court’s retraction of Hildwin, and Walton, in Ring restores a right to jury trial that is neither trivial nor transitory but “the most transcendent privilege which any subject can enjoy.” Mr. Pace should not be denied

its benefit simply because the Supreme Court temporarily overlooked the point before finally getting it right.

In addition, Florida law makes a death sentence contingent not on the finding of a single aggravating circumstance, as the State claims (Resp. 22), but on a fact finding that there are “sufficient aggravating circumstances.”² See Fla. Stat. § 921.141 (3). Yet the penalty phase jury is not instructed that the State must prove the existence of sufficient aggravating circumstances beyond a reasonable doubt, or even by a preponderance of the evidence. That is a structural error for which the only possible cure is the vacating of the death sentences. See Sullivan v. Louisiana, 508 U.S. 275, 280 (1993).

The State additionally argues that because one of the aggravating circumstances on which the trial judge relied to impose petitioner’s death sentence was a prior conviction, Mr. Pace’s case is taken out of the rule of Apprendi and Ring by an

² The State simply skips over this step in the Florida capital sentencing process and argues that “the determination that the aggravating factors outweigh any mitigating factors” is not an element of capital murder in Florida. (Resp. at 26) The State disagrees, and so the Justices of the Supreme Court. See Barclay v. Florida, 463 U.S. 939 (1983). But, regardless of whether the balance of aggravating and mitigating circumstances (the third step in Florida’s tri-fold sentencing analysis) is a fact or not, the State does not and could not dispute that the existence of sufficient aggravating circumstances to establish death-eligibility is a fact which the judge and only the judge must decide in Florida.

exception to that rule established in Almendarez-Torres v. United States, 523 U.S. 224 (1998).³ However, it is plain that Almendarez-Torres does not survive Apprendi and Ring but rather fell along with Hildwin v. Florida, 490 U.S. 638 (1989) (per curiam), and Walton v. Arizona, 497 U.S. 639 (1990). In Apprendi, Justice Thomas – whose vote was decisive of the five-to-four decision in Almendarez-Torres – announced that he was receding from his support of Almendarez-Torres.⁴ The Apprendi majority

³ Respondent also invokes the Almenarez-Torres exception on the supposed logic that petitioner committed other contemporaneous felonies against the victim of the homicide for which he was sentenced to death. (AB. at 17) This is nonsense. Those felonies are “prior convictions” neither under Almendarez-Torres nor under Florida law. See, e.g., Perry v. State, 522 So.2d 817, 820 (Fla.1988); Holton v. State, 573 So.2d 284, 291 (Fla. 1991); Bruno v. State, 574 So.2d 76, 81 (Fla. 1991); compare Bogle v. State, 655 So.2d 1103, 1108 (Fla. 1995).

⁴ The five-Justice majority in Almendarez-Torres was comprised of Justices Breyer, Rehnquist, O’Connor, Kennedy, and Thomas. The first four of these were the dissenters in Apprendi. The dissenters in Almendarez-Torres were Justices Stevens, Souter, Scalia, and Ginsburg, all of whom are in the Apprendi majority. Between 1998 and 2000, Justice Thomas changed his thinking about the appropriate analysis to determine what an “element” of a crime is and accordingly disavowed his vote in Almendarez-Torres. In his Apprendi concurrence, Justice Thomas describes this change of mind as follows:

“[O]ne of the chief errors of Almendarez-Torres – an error to which I succumbed – was to attempt to discern whether a particular fact is traditionally (or typically) a basis for a sentencing court to increase an offender’s sentence. . . . For the reasons I have given [here], it

found it unnecessary to overrule Alemndarez-Torres explicitly in order to decide the issues before it, but acknowledged that “it is arguable that Almendarez-Torres was incorrectly decided.” 530 U.S. at 489. It then went on in footnote to add to “the reasons set forth in Justice SCALIA’s [Almendarez-Torres] dissent, 523 U.S., at 248-260,” the observation that “the [Almendarez-Torres] Court’s extensive discussion of the term ‘sentencing factor’ virtually ignored the pedigree of the pleading requirement at issue,” which drove the Sixth Amendment ruling in Apprendi. See id. at 489 n.15.⁵

Furthermore, at the same time, the Apprendi majority did explicitly restrict whatever precedential force Almendarez-Torres ever had to the status of “a narrow

should be clear that this approach just defines away the real issue. What matters is the way by which a fact enters into the sentence. If a fact is by law the basis for imposing or increasing punishment – for establishing or increasing the prosecution’s entitlement – it is an element.”

530 U.S. at 520-521.

⁵ The majority opinion in Almendarez-Torres notably relied upon McMillan v. Pennsylvania, 477 U.S. 79 (1986), and, in so doing, refused to distinguish between a “sentencing factor . . . [that] triggered a mandatory minimum sentence” in McMillan and a “sentencing factor . . . [that] triggers an increase in the maximum permissive sentence” in Almendarez-Torres, 523 U.S. at 244; see generally *id.* at 242-246. That aspect of Almendarez-Torres has, of course, now been explicitly repudiated. See Harris v. United States, 122 S. Ct. 2406, 2419 (2002), decided together with Ring.

exception to the general rule” that every fact which is necessary to enhance a criminal defendant’s maximum sentencing exposure must be found by a jury – an exception limited to the “unique facts” in Almendarez-Torres. The unique facts of Almendarez-Torres were that Almendarez-Torres **pleaded guilty** to an indictment charging that he had returned to the United States after having been deported and, in addition, **admitted** that he had been deported because he was previously convicted of three aggravated felonies. He thus elected to forgo a trial and accepted an uncontested adjudication of his guilt for a crime which **by definition** included the felony convictions later used to enhance his sentence. Nothing about the priors – any more than anything else about the elements of the crime of reentry after deportation remained for a jury to try in the light of Almendarez-Torres’ guilty plea.

The State asserts that the denial of certiorari in six Florida cases by the United States Supreme Court after Ring is significant: “Obviously, if the Supreme Court had intended to apply Ring to Florida capital sentencing, it had every opportunity to do so. The fact that it did not speaks for itself.” (Resp. at 28-29) However, according to this Court and the Supreme Court, the denial of certiorari does not hold any weight. See State v. White, 470 So. 2d 1377, 1379 (Fla. 1985) (“The denial of a writ of certiorari imports no expression of opinion upon the merits of the case, as the bar has been told many times.”) (citing United States v. Carver, 260 So. 2d 482, 490 (1923)); see also

Singleton v. Commissioner of Internal Revenue, 439 U.S. 940, 942-44 (1978).

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 **REPLY TO RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS** has been furnished by United States Mail, first-class postage prepaid, to Curtis M. French, Assistant Attorney General, The Capitol - PL-01, Tallahassee, Florida 32399, counsel of record on this 11th day of September, 2002.

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