

IN THE SUPREME COURT OF FLORIDA

BRUCE DOUGLAS PACE,

Petitioner,

v.

CASE NO. SC02-519

MICHAEL W. MOORE,
Secretary, Fla. Dept of Corrections

Respondent.

RESPONSE TO
PETITION FOR WRIT OF HABEAS CORPUS

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PRELIMINARY STATEMENT

The State will cite to the original trial record as "TR," and, if necessary, to the record on Pace's postconviction appeal as "PCR" or "SuppPCR" (there are two supplemental volumes in that record). All citations to the record will include reference to the appropriate volume number.

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On December 14, 1988, a Santa Rosa County grand jury indicted Bruce Douglas Pace for the first-degree murder and armed robbery of Floyd Covington (6TR 1132-33). Pace pled not guilty (7TR 1252). In August of 1989, a jury found him guilty as charged (7TR 1210), and recommended a death sentence by a vote of seven to five (7TR 1211). On November 16, 1989, Judge Ben Gordon sentenced Pace to death for the murder and to 15 years imprisonment for the robbery (7TR 1238-43). Judge Gordon found three aggravating circumstances (Pace had a previous conviction for a violent felony; Pace was on parole at the time of the murder; the murder was committed during the course of a robbery) and no mitigating circumstances.

Pace appealed his conviction and death sentence to this Court, raising seven issues: (1) the trial court erred in admitting into evidence statements Pace had made to his stepfather; (2) the trial court erred in limiting defense cross-

examination about an alleged third shotgun shell found in the same location as the two which had been fired from Pace's gun; (3) the trial court erred in allowing into evidence the statement Pace had made the day before the murder, to the effect that he would do something "tomorrow" to make money; (4) the trial court erred in admitting in evidence the two shotgun shells shown to have been fired from Pace's shotgun; (5) the trial court erred in denying the motion for judgment of acquittal; (6) the trial court erred in failing to find any nonstatutory mitigating circumstances; and (7) Pace's death sentence was disproportionate.

On March 26, 1992, this Court affirmed. Pace v. State, 596 So.2d 1034 (1992). This Court found that the trial court had erred in disallowing defense cross-examination about the "third" shotgun shell, but, by unanimous vote, determined that the error was harmless because "evidence of the shells was of little significance and thus not a factor in the jury's determination of guilt." Id. at 1035. This Court also agreed unanimously that "the facts linking Pace to this killing. . . . [were] sufficient to support the jury's determination of guilt," and that all other guilt-phase claims of error were meritless. Id. at 1035. Pace's penalty-phase claims were rejected by a four to three vote, id. at 1035-36, and his conviction and death

sentence were affirmed. The United States Supreme Court denied Pace's petition for writ of certiorari. Pace v. Florida, 506 U.S. 885 (1992).

On October 11, 1993, Pace's collateral counsel filed a motion for postconviction relief under Rule 3.850. Pace filed several amended motions, culminating with a final "modified" amended motion for postconviction relief, which he filed on March 7, 1997. This final amended motion contained 21 claims: (1) failure of state agencies to provide public records; (2) a four-part claim alleging ineffective assistance of counsel at the guilt phase, state suppression of exculpatory evidence, newly discovered evidence of innocence, and erroneous evidentiary rulings at trial; (3) a "shell" claim of newly discovered evidence of innocence; (4) ineffectiveness of counsel at the penalty phase; (5) trial court erred by failing to excuse certain prospective jurors for cause; (6) jury venire did not represent a fair cross section of the community; (7) illegal seizure of Pace's shotgun by police; (8) erroneous limitation of defense cross-examination about a third shotgun shell; (9) evidence insufficient to support Pace's robbery conviction; (10) improper comment on defendant's silence by prosecutor in closing argument at the guilt phase; (11) and (12) improper argument by the prosecutor at the penalty phase; (13) the murder-committed-

during-a-felony aggravator is unconstitutional; (14) avoid-arrest instructions were inadequate; (15) CCP instructions were inadequate; (16) prior-violent-felony aggravator is invalid because Pace's prior conviction was invalid; (17) penalty-phase jury instructions were burden shifting; (18) pecuniary-gain aggravator was "improper"; (19) improper evidence and argument on "non-statutory" aggravating factors; (20) rules precluding juror interviews are unconstitutional; and (21) electrocution is cruel or unusual punishment.

Following a "Huff" hearing, the circuit court issued a 12-page order addressing each of the 21 claims and whether or not an evidentiary hearing would be required; in summary, the court determined "that an evidentiary hearing will be required on the following claims: claim two, parts (a), (b), and (c); claim four; claim ten; and claim eleven" (4PCR 794). The remaining claims, the court concluded, "can be refuted by the record, were addressed on direct appeal, [are] insufficiently plead or are issues directed toward challenging established case law and statutory law at the appellate level" (4PCR 794).

The evidentiary hearing was conducted on June 12, 13 and 14, 2000. The parties submitted written closing arguments, and on June 11, 2001, the circuit court entered a 28-page written order denying relief (7PCR 1164-91), accompanied by some 200 pages of

attachments (7PCR 1192-1392). Pace has appealed that order to this Court, Case No. SC01-1831. Simultaneously with the filing of his original brief on that appeal, Pace filed the instant Petition for Writ of Habeas Corpus, as required by the rules of appellate and criminal procedure. Mann v. Moore, 794 So.2d 595 (Fla. 2001).¹

¹ Pace's original brief was struck for being over long, but on April 2, 2002, he presented a brief in compliance with the rules.

STATEMENT OF THE FACTS

The basic facts of this crime are set out in the opinion of this Court affirming Pace's conviction and death sentence:

On November 7, 198[8], following a report from the victim's daughter that she had not heard from her father for three days, investigators commenced a search for Floyd Covington, a taxicab operator. They found Covington's bloodstained taxicab hidden in a wooded area that evening. Serology testing showed the bloodstains in the car to be consistent with Covington's blood type. A bloodstain pattern analyst testified that the bloodstains showed that someone sitting behind the steering wheel had been shot, with the shot coming from the passenger's side. Based on blood smears, the analyst concluded that the victim was moved from the driver's seat to the passenger's side of the car. Investigators found Covington's body in another wooded area approximately twelve miles from the taxicab on November 10, 198[8]. Covington had been shot twice in the chest, from distances of three to seven feet, with a shotgun. The medical examiner testified that either of the wounds would have cause death and that Covington had been shot two to seven days before the searchers found his body.

Pace v. State, supra at 1034-35.

As for the evidence linking Pace to the murder, the following facts appear from the trial record: On Thursday, November 3, 1988, Pace had told a friend that he was tired of being broke, and that there was something he would do to make money "tomorrow" (4TR 682). Pace was seen with Floyd Covington in his taxicab on the morning November 4, 1988 - the day Covington had disappeared (4TR 668-72). Pace's fingerprint was found on a window in Covington's taxicab (4TR 766-67). Two

shotgun shells found in the yard of Pace's home were the same kind used to murder the victim (5TR 894-97, 900), and had been fired from the shotgun Pace had left at May Green's house after the murder (5TR 899). Pace had human blood on his clothing which was the same type as the victim (5TR 788, 799). It also was the same type as Pace's; however, Pace had no injuries (5TR 790, and had claimed to May Green that the blood was squirrel blood (5TR 710). When confronted by his stepfather, Pace claimed that someone had attacked him in his room and choked him into unconsciousness; that he had awakened in the woods near Floyd Covington's taxi; that there was blood in the taxi; and that Pace's brother's gun lay nearby (5TR 852-54).

At the penalty phase, the State introduced a copy of a judgment of conviction for strong-armed robbery that Pace had committed on December 4, 1981, for which he had received a 15 year sentence (6TR 1037). In addition, the State presented the testimony of probation officer Robert Mann, who testified that Pace was on parole at the time of Covington's murder (6TR 1038-39).

The defense presented five witnesses: Paul Campbell, Hurley Manning, Robert Settles, Evelyn Rich and Lillian Rich.

Paul Campbell was a Santa Rosa County correctional officer who testified that he had been in contact with Pace since his

arrest for this murder, and that Pace had been a model prisoner who was extremely cooperative and respectful and had given his jailers "absolutely no trouble whatsoever" (6TR 1041).

Hurley Manning had been head football coach at Milton High School before retiring a year before trial (6TR 1043). He described Pace as the kind of athlete "you would like to have in the program;" Pace would work, he did what he was told, and he stayed out of trouble (6TR 1044). He had a "very good" relationship with Pace while he was in high school (6TR 1047).

Robert Settles was a home builder, operating out of Milton (6TR 1049-50). He had known Pace over ten years, having first come in contact with him when Settles had been vocational coordinator at Milton High (6TR 1050). Settles went into business for himself and, after Pace graduated from high school, Settles hired Pace to work for him (6TR 1051). Pace did a "super" job for him (6TR 1052). Pace was a "master sawman" who had a lot of potential which he unfortunately had not lived up to (6TR 1054).

Eleanor Louise Rich is Pace's aunt (6TR 1057-58). She described Pace as a "loving, caring person" (6TR 1059). He helped care for his siblings when his stepfather left, and he helped care for Ms. Rich after she had surgery (6TR 1060-61).

Pace came from a good, supportive family (6TR 1062).

Lillian Rich is Pace's mother (6TR 1063). She testified that, before Pace went to prison in 1981, he had never been in any kind of trouble as a juvenile or as an adult and had never been arrested (6TR 1065). He had worked to help support the family after his stepfather had left when he was 13 or 14, providing clothes and other needs for his four siblings (6TR 1066-67). She identified photographs dating from his early childhood, as well as various athletic awards Pace had received, along with school records and report cards from elementary, middle and high school (6TR 1069-70). She asked the jury to show her son mercy (6TR 1071-72).

PRELIMINARY DISCUSSION OF APPLICABLE LAW

There are a number of well-settled principles applicable to habeas corpus proceedings filed in this Court. The State will discuss them at this juncture and then elaborate to the extent necessary in its responses to specific claims.

First, this Court has repeatedly stated that capital habeas corpus proceedings were not intended as second appeals of issues which could have been or were presented on direct appeal or in a rule 3.850 proceeding. E.g., Jones v. Moore, 794 So.2d 579 (Fla. 2001); Teffeteller v. Dugger, 734 So.2d 1009 (Fla. 1999); Hildwin v. Dugger, 654 So.2d 107, 111 (Fla. 1995); Hardwick v.

Dugger, 648 So.2d 100, 105 (Fla. 1994); Scott v. Dugger, 604 So.2d 465, 470 (Fla. 1992); Medina v. Dugger, 586 So.2d 317 (Fla. 1991).

"Habeas petitions are the proper vehicle to advance claims of ineffective assistance of appellate counsel." Rutherford v. Moore, 774 So.2d 637, 643 (Fla. 2000)(emphasis supplied). To prevail on such a claim, a defendant must show that his attorney's performance was professionally deficient and that he was prejudiced by that deficiency. See Strickland v. Washington, 466 U.S. 668 (1984); Johnson v. Dugger, 523 So. 2d 161 (Fla. 1988). In other words, "Petitioner must show 1) specific errors or omissions which show that appellate counsel's performance deviated from the norm or fell outside the range of professionally acceptable performance and 2) the deficiency of that performance compromised the appellate process to such a degree as to undermine confidence in the fairness and correctness of the appellate result." Wilson v. Wainwright, 474 So. 1162, 1163 (Fla. 1985). This Court recently summarized these principles:

The issue of appellate counsel's effectiveness is appropriately raised in a petition for writ of habeas corpus. However, ineffective assistance of appellate counsel may not be used as a disguise to raise issues which should have been raised on direct appeal or in a postconviction motion. In evaluating an ineffectiveness claim, the court must determine

whether the alleged omissions are of such magnitude as to constitute a serious error or substantial deficiency falling measurably outside the range of professionally acceptable performance and, second, whether the deficiency in performance compromised the appellate process to such a degree as to undermine confidence in the correctness of the result.

Pope v. Wainwright, 496 So. 2d 798, 800 (Fla. 1986). See also Haliburton [v. Singletary], 691 So. 2d 470 [(Fla. 1997)]; Hardwick v. Dugger, 648 So.2d 100 (Fla. 1994). The defendant has the burden of alleging a specific, serious omission or overt act upon which the claim of ineffective assistance of counsel can be based. See Knight v. State, 394 So. 2d 997 (Fla. 1981). "In the case of appellate counsel, this means the deficiency must concern an issue which is error affecting the outcome, not simply harmless error." Id. at 1001. In addition, ineffective assistance of counsel cannot be argued where the issue was not preserved for appeal or where the appellate attorney chose not to argue the issue as a matter of strategy. See Medina v. Dugger, 586 So. 2d 317 (Fla. 1991); Atkins v. Dugger, 541 So. 2d 1165, 1167 (Fla. 1989) ("Most successful appellate counsel agree that from a tactical standpoint it is more advantageous to raise only the strongest points on appeal and that the assertion of every conceivable argument often has the effect of diluting the impact of the stronger points.").

Freeman v. State, 761 So.2d 1055, 1069-70 (Fla. 2000).

Generally, appellate counsel cannot be considered ineffective for failing to raise issues that were *not* preserved by trial counsel, unless "trial counsel was so *obviously* inadequate that appellate counsel had to present that question to render adequate assistance." Page v. U.S., 884 F.2d 300, 302

(7th Cir. 1989). See e.g., Provenzano v. Dugger, 561 So.2d 541, 548 (Fla. 1990) ("Trial counsel did not object . . . , thereby precluding an effective argument on appeal"); Atkins v. Dugger, 541 So.2d 1165, 1166 (Fla. 1989) (appellate counsel not ineffective for failing to raise claims as "not properly preserved for appeal by trial counsel, thus precluding appellate review"); Downs v. Wainwright, 476 So.2d 654, 657 (Fla. 1985)("appellate counsel cannot be considered ineffective for failing to raise issues which he was procedurally barred from raising because they were not properly raised at trial").

In addition, "appellate counsel is not ineffective for failing to raise a claim that would have been rejected on appeal." Downs v. State, 740 So.2d 506, 517 n. 18. Accord, Freeman (appellate counsel not ineffective for failing to raise non-meritorious issues); Rutherford v. Moore, 774 So.2d 637, 643 (Fla. 2000)(same); Alvord v. Wainwright, 725 F.2d 1282, 1291 (11th Cir. 1984)(appellate counsel "need not brief issues reasonably considered to be without merit"). In fact, appellate counsel is not necessarily ineffective for failing to raise a claim that might have had *some* possibility of success; effective appellate counsel need not raise *every conceivable* non-frivolous issue. Jones v. Barnes, 463 U.S. 745, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983)(appellate counsel not required to argue all

non-frivolous issues, even at request of client). Accord, Provenzano, 561 So.2d at 548-49 ("it is well established that counsel need not raise every nonfrivolous issue revealed by the record"); Atkins v. Dugger, 541 So.2d at 1167 ("the assertion of every conceivable argument often has the effect of diluting the impact of the stronger points").

Nor can appellate counsel be deemed ineffective if the habeas claim, or a variant thereof, was, in fact, "raised on direct appeal," Atkins v. Dugger, supra, 541 So.2d at 1166-67. Accord, Provenzano, supra, 561 So.2d at 548 (no ineffective assistance where appellate counsel raised the claim on appeal, but it was rejected); Jones v. Moore, supra ("habeas is not proper to argue a variant of an already decided issue"). So long as appellate counsel raised the issue on appeal, mere quibbling with or criticism of the manner in which appellate counsel raised such issue on appeal is insufficient to state a habeas-cognizable issue. Jones; Thompson v. State, 759 So.2d 650, 657 n. 6 (Fla. 2000).

Finally, a claim that has been resolved in a previous review of the case is barred as "the law of the case." See Mills v. State, 603 So.2d 482, 486 (Fla. 1992). Thus, claims properly raised and rejected in a previous rule 3.850 motion for post-conviction relief cannot be raised again on habeas. See Scott

v. Dugger, 604 So.2d 465, 469-70 (Fla. 1992).

SPECIFIC RESPONSE TO CLAIMS

CLAIM I

THE CLAIM THAT THE CCP INSTRUCTIONS DELIVERED IN THIS CASE WERE UNCONSTITUTIONALLY VAGUE

This is the same claim as Claim XV of Pace's 3.850 motion (2SuppPCR 75-81). The State's response to that claim was that IT was procedurally barred and that the conclusory allegation of ineffective assistance of counsel was insufficient to overcome the procedural bar (2SuppPCR 168-69). Claim XV was summarily denied by the circuit court(4PCR 794).

As in the 3.850, Pace is attempting to litigate a procedurally barred claim by throwing in a conclusory allegation of ineffective assistance of (now appellate) counsel. This attempt should be again denied.

Although trial counsel objected to the jury being instructed on this aggravator (6TR 1076), he did so only on the ground that "the facts did not support the finding that the murder was cold, calculated and premeditated." Bush v. State, 682 So.2d 85, 88 (Fla. 1996). As in Bush, trial counsel "never contended that the wording of the instruction was unconstitutionally vague and did not submit an alternate instruction." Ibid. Thus, this claim was not preserved for

appellate review. See, e.g., Pope v. State, 702 So.2d 221, 223-24 (Fla.1997) ("However, we have made it clear that claims that the CCP instruction is unconstitutionally vague are procedurally barred unless a specific objection is made at trial and pursued on appeal. The objection at trial must attack the instruction itself, either by submitting a limiting instruction or making an objection to the instruction as worded."). The seven-to-five jury recommendation in this case is not a reason to "lift the procedural bar." Wuornos v. State, 676 So.2d 972, 974 (Fla. 1996). Appellate counsel cannot be faulted for failing to raise an unpreserved issue.

Nor can appellate counsel be faulted for failing to anticipate this Court's subsequent decision in Jackson v. State, 648 So.2d 85 (Fla. 1994), requiring supplemental instructions on the CCP aggravator. As noted above, Pace's direct appeal was concluded in March of 1992. Jackson was decided in April of 1994 - more than two years later. See Waterhouse v. State, 26 Fla. L. Weekly S375 (Fla. May 31, 2001) (trial counsel not ineffective for failing to object to pre-Jackson CCP instruction); 792 So.2d 1196 (Fla. 2001); Harvey v. Dugger, 656 So.2d 1253, 1258 (Fla 1995) (same). In fact, any contention by Pace's appellate counsel that the CCP jury instruction was invalid would have been summarily rejected under then existing

precedent. Brown v. State, 565 So.2d 304, 308 (Fla. 1990). Appellate counsel did not perform in a constitutionally deficient manner by failing to raise what would then have been a meritless and unpreserved attack on the CCP jury instruction.

Pace's claim that appellate counsel was ineffective for failing to attack the CCP instruction on appeal should be denied.

CLAIM II

THE CLAIM THAT THE TRIAL COURT ERRED IN INSTRUCTING THE JURY ON THE AVOID ARREST AGGRAVATOR

Pace contends here that the trial court erred in instructing the jury on the avoid-arrest aggravator because the court ultimately found the aggravator not to apply.² However, "[t]he fact that the state did not prove this aggravator to the trial court's satisfaction does not require a conclusion that there was insufficient evidence . . . to allow the jury to consider the factor." Bowden v. State, 588 So.2d 225, 231 (Fla. 1991). When some evidence has been presented as to an aggravating

²He also contends that the trial court sustained the defense objection to the jury instruction on this aggravator but then delivered the instruction anyway. If this is the case (and the record is not free from ambiguity), then trial counsel should have objected when the court delivered the instruction. There was no such objection, and so trial counsel failed to preserve for appeal any issue that the court mistakenly gave the instruction after indicating he would not.

factor, it is not inappropriate to instruct the jury on the factor; in fact, this Court has held that such instruction is required. Ibid. See, also, Hunter v. State, 660 So.2d 244, 252 (Fla. 1995) (jury should be instructed on those aggravators for which "credible and competent evidence has been presented;" by contrast, trial court may find the aggravator only if it has been proved beyond a reasonable doubt).

There was at least some evidence in this case that Pace murdered Covington to eliminate him as a witness. Covington was unarmed and physically impaired, and so could not have presented any immediate threat to Pace.³ However, Covington knew Pace and could have identified him if he had survived. Pace armed himself in advance, shot the victim twice in the chest from a distance of three to seven feet, and hid the body and the taxi in separate wooded areas.⁴

Although the trial court ultimately rejected the avoid arrest aggravator, it cannot be said that no evidence supported it, or that it was improper to instruct the jury on it. Pace

³ Covington's daughter-in-law testified that he wore shorts "because of his leg," and identified the pillows he sat on while driving his taxi, as well as his cane (3TR 590-92). His daughter testified that Covington had arthritis and could not walk without his cane (3TR 576, 584).

⁴ In fact, Covington's body was not found for another three days after his taxi was found (4TR 738).

does not even contend that the instruction was a constitutionally insufficient explanation of the aggravator or was otherwise invalid; he contends only that the aggravator was not supported by sufficient evidence. The jury, however, may be presumed to have rejected an aggravator not supported by the evidence, since "jurors are well equipped to analyze the evidence." Griffin v. United States, 502 US. 46 (1991)(emphasis in original).

Appellate counsel was not ineffective for failing to raise a meritless issue.

ISSUE III

THE APPRENDI/RING ISSUE

Pace contends here that various of Florida's sentencing procedures are invalid under Apprendi v. New Jersey, 530 U.S. 466 (2000) and Jones v. United States, 526 U.S. 227 (1999). He notes (fn. 4) that the United States Supreme Court granted certiorari in Ring v. Arizona to review Arizona's judge-sentencing procedures in capital cases. Since Pace filed his petition, the United States Supreme Court has issued a decision in Ring, 2002 WL 1357257 (U.S. June 24, 2002), holding that Arizona's death penalty statute violates the Sixth Amendment right to a jury trial "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.”

The Ring decision is very narrow and limited in scope (2002 WL 1357257 at *9, n.4), and it has no impact on the sentence imposed in this case. For a number of reasons, Pace is not entitled to any relief.

PROCEDURAL BAR

First of all, Pace’s challenge to the facial validity of Florida’s capital sentencing scheme is procedurally barred. Although the Ring and Apprendi decisions are recent, the statutory scheme and argument to present a claim that Florida’s death penalty process violates the Sixth Amendment right to a jury trial has been available since Pace’s sentencing, but were never asserted as a basis for relief until after he was denied relief by the circuit court on postconviction. This Court has consistently and repeatedly stated that the habeas vehicle does not constitute a second appeal. Issues that were or could have been raised on direct appeal or in prior collateral proceedings may not be litigated anew. See Teffeteller v. Dugger, 734 So. 2d 1009, 1025 (Fla. 1999) (holding that habeas petition claims were procedurally barred because the claims were raised on direct appeal and rejected by this Court or could have been raised on direct appeal); Johnson v. Singletary, 695 So. 2d 263, 265 (Fla. 1996). Since Pace did not offer this claim in a

timely manner, it is now barred.

Not only is this claim barred, but, in addition, the Ring decision is not subject to retroactive application to Pace's trial and sentencing under the principles of Witt v. State, 387 So. 2d 922, 929-30 (Fla. 1980).⁵ Pursuant to Witt, Ring is only entitled to retroactive application if it is a decision of fundamental significance, which so drastically alters the underpinnings of King's death sentence that "obvious injustice" exists. New v. State, 807 So. 2d 52 (Fla. 2001). In determining whether this standard has been met, this Court must consider three factors: the purpose served by the new case; the extent of reliance on the old law; and the effect on the administration of justice from retroactive application. Ferguson v. State, 789 So. 2d 306, 311 (Fla. 2001). Application of these factors to Ring, which did not directly or indirectly address Florida law, provides no basis for consideration of Ring in this case.⁶

⁵ Although Pace's argument centers around the application of Apprendi to this case, the now-decided Ring case is the more appropriate focus of attention. Thus, the State's response will address that decision, rather than Apprendi.

⁶ The United States Supreme Court recently held that an Apprendi claim is not plain error. United States v. Cotton, 122 S.Ct. 1781 (May 20, 2002) (holding an indictment's failure to include the quantity of drugs was an Apprendi error but it did not seriously affect fairness, integrity, or public reputation of judicial proceedings, and thus did not rise to

Ring does not present a case of fundamental significance. The fact that the question accepted for review in Ring presented potential far-reaching implications does not mean that the ultimate opinion issued meets the Witt standard of fundamental significance. Since, as will be seen, Ring has little or no impact on capital sentencing in Florida, it is not a case of fundamental significance. Clearly, Ring does not demonstrate that any "obvious injustice" occurred on the facts of this case.

FLORIDA'S DEATH PENALTY STATUTE IS NOT UNCONSTITUTIONAL

Even if Pace's argument is considered, he has not demonstrated that he is entitled to any relief. It is important to recognize that Ring does not require jury sentencing in

level of plain error). If an error is not plain error cognizable on direct appeal, it is not of sufficient magnitude to be a candidate for retroactive application in collateral proceedings. United States v. Sanders, 247 F.3d 139, 150-151 (4th Cir 2002) (emphasizing that finding something to be a structural error would seem to be a necessary predicate for a new rule to apply retroactively and therefore, concluding that Apprendi is not retroactive). Every federal circuit that has addressed the issue had found that Apprendi is not retroactive. See, e.g., McCoy v. United States, 266 F.3d 1245 (11th Cir. 2001). The one state supreme court that has addressed the retroactivity of Apprendi has, likewise, determine that the decision is not retroactive. Whisler v. State, 36 P.3d 290 (Kan. 2001). Moreover, the United States Supreme Court has held that a violation of the right to a jury trial is not retroactive. DeStefano v. Woods, 392 U.S. 631 (1968) (refusing to apply the right to a jury trial retroactively because there were no serious doubts about the fairness or the reliability of the factfinding process being done by the judge rather than the jury).

capital cases. The case does not involve the jury's role in imposing sentence, but only the requirement that the jury find a defendant death-eligible. See Ring, at *18 ("What today's decision says is that the jury must find the existence of the fact that an aggravating factor existed") (Scalia, J., concurring). This is a critical distinction. The Court studied Arizona law and concluded that, because additional findings by a judge alone are required in order for the death penalty to be imposed, the "statutory maximum" for practical purposes is life, until such time as a judge has found an aggravating circumstance to be present. In other words, under the Arizona law examined in Ring, the jury plays no role in "narrowing" the class of defendants eligible for the death penalty upon conviction of first degree murder. This conclusion is consistent with the Arizona Supreme Court's description of state law, which recognized the statutory maximum permitted by the jury's conviction alone to be life. See Ring, at *8; Ring v. State, 25 P.3d 1139, 1150 (Ariz. 2001).

Pace asserts that this Court "erred" in previously stating that Apprendi did not apply to capital sentencing procedures. See Mills v. Moore, 786 So. 2d 532 (Fla.), cert. denied, 121 S. Ct. 1752 (2001). But Ring proves that this Court was correct -- in fact, Apprendi is not a case about sentencing, and more

importantly, neither is Ring. This point is made obvious by Pace's assertion (Petition at 22) that aggravating circumstances are elements of the offense of capital murder rather than traditional sentencing factors. Apprendi and Ring both involve the jury's role in convicting a defendant of a qualifying offense, subject to the death penalty.

A clear understanding of what Ring does and does not say is essential to analyze any possible Ring implications to Florida's capital sentencing procedures. Notably, 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). It quotes Proffitt v. Florida, 428 U.S. 242, 252 (1976), acknowledging that ("[i]t has never [been] suggested that jury sentencing is constitutionally required."). Ring, at *9, n.4. In Florida, any death sentence which was imposed following a jury recommendation of death necessarily satisfies the Sixth Amendment as construed in Ring, because the jury necessarily found beyond a reasonable doubt that at least one aggravating factor existed. Since the finding of an aggravating factor authorizes the imposition of a death sentence, the requirement that a jury determine the conviction to have been a capital offense has been fulfilled in any case in which the jury

recommended a death sentence.

Even in the wake of Ring, a jury only has to make a finding of one aggravator and then the judge may make the remaining findings. Ring is limited to the finding of an aggravator, not any additional aggravators, nor mitigation, nor any weighing. Ring, at *18 (Scalia, J., concurring) (explaining that the factfinding necessary for the jury to make in a capital case is limited to "an aggravating factor" and does not extend to mitigation); Ring, at *19 (Kennedy, J., concurring) (noting that it is the finding of "an aggravating circumstance" that exposes the defendant to a greater punishment than that authorized by the jury's verdict). Constitutionally, to be eligible for the death penalty, all the sentencer must find is one narrower, i.e., one aggravator, at either the guilt or penalty phase. Tuilaepa v. California, 512 U.S. 967, 972 (1994) (observing "[t]o render a defendant eligible for the death penalty in a homicide case, we have indicated that the trier of fact must convict the defendant of murder and find one 'aggravating circumstance' (or its equivalent) at either the guilt or penalty phase."). Once a jury has found one aggravator, the Constitution is satisfied, the judge may do the rest.⁷

⁷ We know this is true because the Court in Apprendi held, and reaffirmed in Ring, that a prior violent felony aggravator satisfied the Sixth Amendment; therefore, no further jury

Ring does not directly or indirectly preclude a judge from serving in the role of sentencer. There is no language in Ring which suggests that, once a defendant has been convicted of a capital offense, a judge may not hear evidence or make findings in addition to any findings a jury may have made. Justice Scalia commented that, "[t]hose States that leave the ultimate life-or-death decision to the judge may continue to do so." Ring, at *18 (Scalia, J., concurring). The fact that Florida provides an additional level of judicial consideration to enhance the reliability of the sentence before a death sentence is imposed does not render our capital sentencing statute unconstitutional. Pace unfairly criticizes state law for requiring judicial participation in capital sentencing, but does not identify how judicial findings after a jury recommendation can interfere with the right to a jury trial. Any suggestion that Ring has removed the judge from the sentencing process is not well taken. The judicial role in Florida alleviates Eighth Amendment concerns as well, and in fact provides defendants with another "bite at the apple" in securing a life sentence; it also enhances appellate review and provides a reasoned basis for a proportionality analysis.

consideration is necessary once a qualifying aggravator is found.

The jury's role in Florida's sentencing process is also significant. Section 921.141, Florida Statutes, states:

(1) Separate proceedings on issue of penalty.--Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by s. 775.082. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable. If, through impossibility or inability, the trial jury is unable to reconvene for a hearing on the issue of penalty, having determined the guilt of the accused, the trial judge may summon a special juror or jurors as provided in chapter 913 to determine the issue of the imposition of the penalty. If the trial jury has been waived, or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose, unless waived by the defendant. ...

(2) Advisory sentence by the jury.--After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court, based upon the following matters:

(a) Whether sufficient aggravating circumstances exist as enumerated in subsection (5);

(b) Whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist; and

(c) Based on these considerations, whether the defendant should be sentenced to

life imprisonment or death.

This statute clearly secures and preserves significant jury participation in narrowing the class of individuals eligible to be sentenced to death. The jury's role is so vital to the sentencing process that the jury has been characterized as a "co-sentencer" in Florida. Espinosa v. Florida, 509 U.S. 1079 (1992).

To the extent that Pace claims the death penalty statute is unconstitutional for failing to require juror unanimity, or the charging of the aggravating factors in the indictment, or special jury verdicts, Ring provides no support for his claims. These issues are expressly not addressed in Ring, and in the absence of any United States Supreme Court ruling to the contrary, there is no need to reconsider this Court's well established rejection of these claims. Sweet v. Moore, 27 Fla. L. Weekly S585 (Fla. June 13, 2002); Cox v. State, 27 Fla. L. Weekly S505, n.17 (Fla. May 23, 2002) (noting that prior decisions on these issues need not be revisited "unless and until" the United States Supreme Court recedes from Proffitt v. Florida, 428 U.S. 242 (1976)).

As this Court has recognized, "[t]he Supreme Court has specifically directed lower courts to 'leav[e] to this Court the prerogative of overruling its own decisions.'" Agostini v.

Felton, 521 U.S. 203, 237, 117 S.Ct. 1997, 138 L.Ed.2d 391 (1997) (quoting Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 484, 109 S.Ct. 1917, 104 L.Ed.2d 526 (1989))." Mills, 786 So. 2d at 537. The United States Supreme Court has declined to disturb its prior decisions upholding the constitutionality of Florida's capital sentencing process, and that result is dispositive of Pace's claims.

In addition, Ring affirms the distinction between "sentencing factors" and "elements" of an offense recognized in prior case law. See Ring at *14; Harris v. United States, 2002 WL 1357277 (U.S. June 24, 2002). Pace's argument, suggesting that the jury role in Florida's capital sentencing process is insufficient, improperly assumes the jury recommendation itself to be a jury vote as to the existence of aggravating factors. However, the jury vote only represents the final jury determination as to appropriateness of the death sentence in the case, and does not dictate what the jury found with regard to particular aggravating factors. When the jury recommends death, it necessarily finds an aggravating factor to exist beyond a reasonable doubt and satisfies the Sixth Amendment as construed in Ring. To the extent that Ring suggests that capital murder may have an additional "element" that must be found by a jury to authorize the imposition of the death penalty, that "element"

would be the existence of any aggravating factor, and would not be the determination that the aggravating factors outweighed any mitigating factors established. Pace asserts that the jury must determine death to the appropriate sentence, but nothing in Ring supports Pace's speculation that the ultimate sentencing determination is an additional "element" which must be proven beyond a reasonable doubt.

The United States Supreme Court elaborated on Apprendi in Harris v. United States, which was released on the same day as Ring. In Harris, the Court described the holding in Apprendi in the following way:

Apprendi said that any fact extending the defendant's sentence beyond the maximum authorized by the jury's verdict would have been considered an element of an aggravated crime -- and thus the domain of the jury -- by those who framed the Bill of Rights.

Harris v. United States, 2002 WL 1357277 (U.S. June 24, 2002).

In light of that plain statement by the United States Supreme Court, which speaks volumes in the interpretation of Ring, there is no basis for relief of any sort. Under this Court's precedents, death clearly was the maximum sentence which could be imposed on Pace by virtue of his conviction for the offense of first degree murder, and that is the end of the inquiry.

Therefore, Ring has no effect on prior decisions upholding Florida's capital sentencing scheme. This Court has previously

recognized that the statutory maximum for first degree murder is death, and has repeatedly rejected claims similar to those raised herein. Cox v. State, 27 Fla. L. Weekly S585 (Fla. May 23, 2002); Bottoson v. State, 813 So. 2d 31, 36 (Fla. 2002), cert. denied, Case No. 01-8099 (U.S. June 28, 2002); Hertz v. State, 803 So. 2d 629, 648 (Fla. 2001), cert. denied, Case No. 01-9154 (U.S. June 28, 2002); Looney v. State, 803 So. 2d 656, 675 (Fla. 2001), cert. denied, Case No. 01-9932 (U.S. June 28, 2002); Brown v. Moore, 800 So. 2d 223, 224-225 (Fla. 2001); Mann v. Moore, 794 So. 2d 595, 599 (Fla. 2001), cert. denied, Case No. 01-7092 (U.S. June 28, 2002); Mills, 786 So. 2d at 536-38. This interpretation of state law demands respect, and offers a pivotal distinction between Florida and Arizona. Ring, at *13; Mullaney v. Wilbur, 421 U.S. 684 (1975). However, should there be any question about the correctness of this conclusion, Florida juries routinely "authorize" the imposition of the death penalty by recommending that a death sentence be imposed, as in the instant case.

It should be noted that, on June 28, 2002, the United States Supreme Court remanded four cases in light of Ring: Harrod v. Arizona, Case No. 01-6821; Pandelt v. Arizona, Case No. 01-7743; Sansing v. Arizona, Case No. 01-7837; and Allen v. United States, Case No. 01-7310. Significantly, however, the Court

denied certiorari in at least seven cases raising the "Ring" issue, including **six Florida cases**: Holladay v. Alabama, Case No. 00-10728; King v. Florida, Case No. 01-7804 (under warrant); Bottoson v. Florida, Case No. 01-8099 (under warrant); Mann v. Florida, Case No. 01-7092 (state habeas); Card v. Florida, Case No. 01-9152 (direct appeal); Hertz v. Florida, Case No. 01-9154 (direct appeal); and Looney v. Florida, Case No. 01-9932 (direct appeal). 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.

Of course, Pace's death sentence was also supported by a prior violent felony conviction, which provides a basis to impose a sentence higher than authorized by the jury without any additional jury findings. See Almendarez-Torrez v. United States, 523 U.S. 224 (1998), Apprendi v. New Jersey, 530 U.S. 466 (2000). There is no constitutional violation because the prior conviction constitutes a finding by a jury which the judge may rely upon to impose an aggravated sentence. In addition, Pace's jury convicted him of robbery (necessarily finding the aggravating factor of during the course of a felony); the Sixth Amendment is satisfied by this jury finding as it is an

additional fact which authorize the judicially-imposed sentence.⁸

For all of the reasons discussed in this response, the Ring decision does not warrant the grant of relief in this case.

ISSUE IV

THE ADMISSION OF PANTS INTO EVIDENCE

Pace argues that his appellate counsel was ineffective for failing to challenge the trial court's admission of a pair of pants found in Pace's bedroom on the ground that the State never proved that they actually belonged to Pace.

The pants, along with a jacket and pair of tennis shoes were recovered from Pace's bedroom during a search of his residence on November 8, 1988 (4TR 690-91). The pants were in a cardboard box with the jacket (4TR 691). Both May Green and Pace's mother Lilly Rich testified that the pants looked like a pair that Pace owned, although they could not positively identify them as Pace's (4TR 709, 875-76). However, Mrs. Rich testified that the pants taken by the Santa Rosa Sheriff's department were the same ones that Pace had been wearing the Monday after the murder (5TR

⁸Ring is not such a cataclysmic change in the law that any Sixth Amendment violation premised on that decision must be deemed harmful. See Ring, at *16, n.7 (remanding case for harmless error analysis by state court); United States v. Cotton, 122 S. Ct. 1781 (2002) (failure to recite amount of drugs in indictment was harmless due to overwhelming evidence). On the facts of this case, no harmful error can be shown.

876). Furthermore, both Mrs. Rich and May Green positively identified the jacket found in the same box as the pants as belonging to Pace (5TR 875, 4TR 708). In addition, May Green testified that there were spots on the pants that Pace was wearing Saturday morning, mostly on the back right pocket, like he had been sitting in something (4TR 709-10). She testified that Pace told her it was squirrel blood (4TR 710). Mrs. Rich also saw stains on Pace's pants when she saw him on Monday (5TR 875). The pants seized from the box in Pace's bedroom had human blood on them, primarily on the back pocket (4TR 785-91).

Pace contends the State never "positively" identified the pants as having belonged to Pace, and contends that appellate counsel should have argued that it was error to have admitted them, citing Section 90.901, Fla. Stat. Petition at 27-28. It is not necessary, however, to authenticate an item conclusively. "The finding of authenticity does not mean that the trial court has made a finding that the proffered evidence is genuine; rather, it only determines that prima facie evidence of genuineness exists. Once the matter has been admitted, the opposing party then can challenge its genuineness." ITT Real Estate Equities, Inc. v. Chandler Ins. Agency, Inc., 617 So.2d 750, 750-51 (Fla. 4th DCA 1993)(quoting Ehrhardt, Fla. Evidence). In this case, an ample prima facie case was presented. The

pants looked like Pace's and were found in his bedroom, in a box containing a jacket positively identified as having belonged to Pace; they bore stains similar to stains observed by May Green and also by Mrs. Rich. They were properly admitted and Pace was not prohibited from arguing to the jury that they had not been sufficiently identified as his.

The underlying claim being meritless, Pace has failed to demonstrate that appellate counsel performed deficiently in choosing not to raise this claim. Moreover, any error would have been harmless, given his own admission to Mr. Rich that he had been in Covington's bloody taxi.

There is no merit to Pace's claim that appellate counsel was ineffective for failing to argue on appeal that the pants recovered from a box in Pace's bedroom were admitted in evidence erroneously.⁹

ISSUE V

THE PROPORTIONALITY CLAIM

⁹ Pace's argument has overtones of a chain-of-custody argument. However, the witness who seized the pants positively identified State's Exhibit 37 as the pair of pants she had recovered from Pace's bedroom (4TR 691-92). Trial counsel interposed no chain-of-custody objection, and never contended that State's Exhibit 37 was not the pair of pants taken from Pace's bedroom; counsel contended only that the pair of pants taken from Pace's bedroom had not been shown to have belonged to Pace. Thus, no chain-of-custody objection was preserved for appeal, and appellate counsel was not ineffective for failing to raise an unpreserved claim.

Pace contends here that this Court affirmed his death sentence without conducting a proportionality review. The State is confident that this Court did not omit to evaluate the proportionality of Pace's sentence. Furthermore, there is no merit to Pace's contention that his death sentence is disproportionate. Three statutory aggravators were established in this case: murder committed during a robbery, prior violent felony, and murder was committed while defendant was on parole. Pace previously had beaten and practically killed a gas station clerk during a robbery, and was on parole for that offense when he murdered Floyd Covington during a robbery. Death is a proportionate sentence in these circumstances. Miller v. State, 770 So.2d 1144 (Fla. 2000)(death sentence appropriate defendant with prior violent felony conviction committed murder during robbery); Shellito v. State, 701 So.2d 837 (Fla. 1997) (same).

CONCLUSION

Pace has failed to demonstrate that his appellate counsel was constitutionally ineffective, and he presents no other issues that are cognizable in these habeas proceedings. His Petition for Writ of Habeas Corpus should be denied in its totality.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to John M. Jackson, Assistant CCC- Northern Region, Office of the Capital Collateral Counsel-Northern Region, 1533-B South Monroe Street, Tallahassee, Florida, this 8th day of July, 2002.

Curtis M. French

Senior Assistant Attorney General

CERTIFICATE OF FONT AND TYPE SIZE

Counsel certifies that this pleading was typed using 12 point Courier New.

Curtis M. French
Senior Assistant Attorney General