

IN THE SUPREME COURT OF FLORIDA

NO. SC-02-949

GEORGE MICHAEL HODGES,

Petitioner,

v.

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

Respondent.

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

MICHAEL P. REITER
Florida Bar No. 0320234
Capital Collateral Counsel -
Northern Region

LINDA MCDERMOTT
Florida Bar No. 0102857
Assistant CCC-NR
1533 S. Monroe Street

**Tallahassee, FL 32301
(850) 488-7200**

COUNSEL FOR PETITIONER

ARGUMENT IN REPLY

INTRODUCTION

COMES NOW, the Petitioner, **George Michael Hodges**, by and through undersigned counsel and hereby submits this Reply to the State's Response to Mr. Hodges'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.

CLAIM II – STATE'S CHALLENGE FOR CAUSE

Respondent argues that trial counsel's failure to object to the removal of a juror waived this claim for appeal. However, trial counsel objected to the dismissal of jurors based upon their views on the death penalty (R. 130-131, 138, 140, 197). Appellate counsel failed to address this issue which denied Mr. Hodges his right to effective assistance of counsel.

Furthermore, Ms. Alvarez-Gil's removal for cause was an abuse of judicial discretion. Respondent states that Ms. Alvarez-Gil's substantial reservations place her outside the range of acceptable performance on a jury. (Resp. at 15). However, Respondents's analogy to the juror struck in Kokal v. Dugger is problematic. 718 So. 2d 138 (Fla. 1998). While the juror in Kokal was unwavering in his views about

the death penalty, Ms. Alvarez-Gil stated that she would be able to follow the law (®. 131). Much like the juror in Farina, Ms. Alvarez-Gil said that she could perform her duties in conformance with the court's instruction and the jury's oath. See Farina v. State, 680 So. 2d 392, 396 (Fla. 1996). Striking Ms. Alvarez-Gil because of her earlier equivocal statements about the death penalty was wrong because the justification for her removal no longer existed. Her statement qualified her to serve as a juror. The erroneous exclusion of Ms. Alvarez-Gil is violation of Mr. Hodges' fundamental right to a trial by a jury. "The right to an impartial jury is so basic to a fair trial that its infraction cannot be considered harmless." Farina at 398, citing Gray v. Mississippi, 481 U.S. 648, 668 (1987). The failure of appellate counsel to raise this issue denied Mr. Hodges' the effective assistance of counsel. Habeas relief is warranted.

CLAIM III – RING v. ARIZONA

Respondent alleges that Mr. Hodges is procedurally barred from bringing his claim because he failed to present the claim at trial or on direct appeal. (Resp. at 17). However, Mr. Hodges preserved his Ring claim through pretrial motions (®. 824-827), and during the penalty phase by trial counsel (®. 704-706). Appellate counsel's failure to argue these claims during the direct appeal amounts to ineffective assistance of counsel.

Furthermore, Respondent does not and cannot dispute the fact that until the United State's Supreme Court's decision in Ring v. Arizona, 122 S. Ct. 2428 (2002), in June of this year, this Court's cases foreclosed Mr. Hodges's from obtaining relief on his claim. Therefore, any contention that Mr. Hodges'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 Respondent 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'").

Next, Respondent alleges that the decision of Ring v. Arizona should not be retroactively applied under Witt v. State, 387 So. 2d 922 (1980). (Resp. at 18-19). While Respondent is correct in that Witt does define the standard for retroactivity (Resp. at 18-19), Respondent 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 ©) 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 ©) the effect on the administration of justice of a retroactive application of the new rule.” See id. at 926. It is not an easy test to use, because there is a tension at the heart of it. Any change of law which “constitutes a development of fundamental significance” is bound to have a broadly unsettling “effect on the administration of justice” and to upset a goodly measure of

“reliance on the old rule.”¹ The example of Gideon – a profoundly unsettling and

¹The decision in Ring has had an unsettling effect on the federal and state capital sentencing schemes:

Arizona passed new capital sentencing legislation in response to the decision.

Idaho overturned a death sentence based on the Ring decision. The Idaho Supreme Court held that the ruling appears to invalidate the death penalty scheme in Idaho.

The Delaware Supreme Court ordered attorneys in its death penalty appeal cases currently pending to brief how Ring applies to their cases. Also, the President Judge of the Delaware Supreme Court has halted all capital murder trials and sentences. State legislators passed a bill giving juries sole authority to unanimously determine whether a defendant is eligible for the death penalty.

Nebraska’s Attorney General has asked the state’s Supreme Court whether the state can continue its death penalty system in light of the Ring decision.

Colorado state legislators have approved legislation changing their death penalty system to coincide with the Ring holding.

Missouri’s Attorney General announced that all of its death penalty cases are currently under review due to the Ring decision.

Indiana enacted a new law requiring unanimous jury votes for a death sentence which are binding on the judge. The jury must find at least one aggravating factor beyond a reasonable doubt.

Additionally, Montana changed their capital sentencing statute so that a judge can no longer impose a death penalty without a jury’s unanimous findings of an aggravating factor beyond a reasonable doubt.

New Jersey state and defense attorneys requested a statewide freeze on all capital cases until the New Jersey Supreme Court decides the matter in relation to Ring.

The U.S. Supreme Court vacated the death sentence of a federal death row inmate and remanded the case back to the Eighth Circuit for reconsideration in light of Ring.

Death Penalty Information Center, *U.S. Supreme Court: Ring v. Arizona; Developments related to Ring*, (2002), available at <http://www.deathpenaltyinfo.org/Ring.html> (last modified September 18, 2002).

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 v. Florida, 490 U.S. 638 (1989) and Walton v. Arizona, 490 U.S. 639 (1990) in Ring restores a right to jury trial that is neither trivial nor transitory but “the most transcendent privilege which any subject can enjoy.” Mr. Hodges should not be denied its benefit simply because the Supreme Court temporarily overlooked the point before finally getting it right.

In addition, Respondent 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)]”. Respondent 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 defendants, 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 used to impose Mr. Hodges’ 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 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.

Respondent further argues that Florida law makes a death sentence contingent not on the finding of a single aggravating circumstance, as Respondent claims (Resp. at 19), but on a fact finding that there are “sufficient aggravating circumstances.” See Fla. Stat. § 921. 141 (3). Yet the penalty phase jury is not instructed that Respondent 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).

Additionally, Respondent argues that the existence of a prior violent felony aggravator satisfies the Sixth Amendment jury requirement which allows a judge to make further sentencing decisions. (Resp. at 20, fn 1). In Apprendi, the Court preserved the ruling established in Almendarez-Torres v. United States, that a prior violent felony conviction could be used for sentence enhancement purposes without a jury determination. 523 U.S. 224 (1998). However, Mr. Hodges has no prior violent felony convictions that would transfer the sentencing issue out of a jury’s hands under the standard established in Apprendi and Almendarez-Torres. Because there is no transfer from jury to judge based on a prior felony conviction, the jury must determine the sentence beyond a reasonable doubt. During Mr.

Hodges' guilt phase, the two aggravating factors were not presented as elements of the crime. Nor were they proven beyond a reasonable doubt in the penalty phase. The failure to present the two aggravators as elements during the guilt and penalty phase is a fundamental error requiring habeas relief.

Respondent 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 also significant," (Resp. at 21), 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.² As Ring puts it in plain English: "*Apprendi* repeatedly instructs . . . that the

²This 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 Respondent's response suggests that Mr. Hodges is seeking to have "jury sentencing," (Resp. at 21) Respondent misconstrues Mr. Hodges's position. Mr. Hodges asserts that juries must make any and all findings

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.

The effect of finding an aggravator exposes Mr. Hodges to a greater punishment than that authorized by the jury’s guilty verdict. The aggravators must be charged in the indictment, submitted to a jury, and proven beyond a reasonable doubt. See Ring, 122 S.Ct. at 2443. This did not occur in Mr. Hodges’ case, thus, the death sentence against him is unconstitutional and habeas relief is warranted.

CLAIM IV – BURDEN SHIFTING

Respondent argues that this claim is procedurally barred because it was not preserved for appeal. (Resp. at 24). However, appellate counsel failed to raise this issue after trial counsel preserved the issue in a post-trial motion (R. 911). Appellate counsel provided ineffective assistance.

The jury instructions during the penalty phase violated Florida law and the Eighth and Fourteenth Amendments in two ways. First, the instructions shifted the burden of proof to Mr. Hodges on the central sentencing issue of whether he should live or die. Under Mullaney, this unconstitutional burden-shifting violated Mr. Hodges’ due process and Eighth Amendment rights. See also Sandstrom v.

on which a death sentence is contingent under state law.

Montana, 442 U.S. 510 (1979); Jackson v. Dugger, 837 F.2d 1469 (11th Cir. 1988).

The jury was not instructed in conformity with the standard set forth in Dixon.

Second, in being instructed that mitigating circumstances must outweigh aggravating circumstances before the jury could recommend life, the jury was effectively told that once aggravating circumstances were established, it need not consider mitigating circumstances unless those mitigating circumstances were "sufficient" to outweigh the aggravating circumstances. Cf. Mills v. Maryland, 108 S. Ct. 1860 (1988); Hitchcock v. Dugger, 481 U.S. 393, 107 S. Ct. 1821 (1987). Thus, the jury was precluded from considering mitigating evidence, Hitchcock, and from evaluating the "totality of the circumstances" in considering the appropriate penalty. State v. Dixon, 283 So. 2d at 10. According to the instructions, jurors would reasonably have understood that only mitigating evidence which rose to the level of "outweighing" aggravation need be considered. Mr. Hodges is entitled to relief in the form of a new sentencing hearing.

CLAIM V – UNCONSTITUTIONAL SENTENCE

The imposition of the death penalty in Mr. Hodges' case is arbitrary and capricious for several reasons. First, the aggravating circumstances presented to

the jury during penalty phase were virtually indistinguishable from each other³.

Justice Barkett, in a dissenting opinion, stated,

In essence there is really only one aggravating circumstance in this case. The aggravating factors of witness elimination and cold, calculated, and premeditated are so intertwined here that they should be considered as one. Against this aggravating factor, Hodges has grown to adulthood with no significant prior criminal history. . . The death penalty is not to be applied to *all* murderers but is supposed to be reserved *only* for the most egregious and heinous of criminals. Hodges does not have a criminal record and, despite his terrible crime, he does not fit that description.

Hodges v. Florida, 595 So.2d 929 (Fla. 1992). Mr. Hodges' case does not rise to the level of type of cases that the death penalty should be applied. Second, this case has been overturned on substantive grounds. The direct appeal decision was vacated because of an Espinosa error. Espinosa v. Florida, 112 S.Ct. 2926, 505 U.S. 1079 (1992).

Finally, the mitigation evidence presented in the Rule 3.850 motion would have changed the outcome of the penalty phase of Mr. Hodges' trial. See Initial Brief of Appellant at 12-26, Hodges v. Florida, 595 So.2d 929 (Fla. 1992) (No. SC01-1718). Trial and appellate counsel failed to present even minimal evidence

³The aggravating circumstances were the disruption, or hindrance of the lawful exercise of any governmental function or enforcement of laws, and cold, calculated and premeditated (R. 906-907).

about Mr. Hodges' traumatic childhood in the Appalachian region of West Virginia. Also, Mr. Hodges' mental health problems were not sufficiently investigated by trial counsel. These factors establish the arbitrary and capricious nature of the application of the death penalty in Mr. Hodges' case. Appellate counsel was ineffective for failing to raise this issue on direct appeal. Therefore, Mr. Hodges is entitled to habeas 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 Candance Sabella, Chief of Capital Appeals, 2002 North Lois Ave., Suite 700, Westwood Center, Tampa, Florida 33607, counsel of record on this 23rd day of September, 2002.

CERTIFICATE OF TYPE SIZE AND STYLE

This is to certify that the Petition has been reproduced in a 12 point Courier type, a font that is not proportionately spaced.

MICHAEL P. REITER
Capital Collateral Counsel -
Northern Region
Florida Bar No. 0320234

LINDA MCDERMOTT
Florida Bar No. 0102857
Assistant CCC-NR
1533 S. Monroe Street
Tallahassee, FL 32301
(850) 488-7200
Attorney for Mr. Hodges