IN THE SUPREME COURT OF FLORIDA

CASE NO. SC03-1374

LOWER COURT CASE NO. 96-2517

MICHAEL DUANE ZACK, III,

Appellant,

v.

STATE OF FLORIDA

Appellee.

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

REPLY BRIEF OF APPELLANT

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INTRODUCTION

COMES NOW, the Appellant, **Michael Duane Zack**, by and through undersigned counsel and hereby submits this Reply to the State's Answer Brief. Appellant 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, Appellant stands on the arguments presented in his Initial Brief.

ARGUMENT IN REPLY

ARGUMENT I

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

The State argues that "there were no real grounds to challenge either the DNA results or the expert's qualifications." (Answer Brief at 21, hereinafter "AB at ___"). But shortly before Mr. Zack's trial, this Court released its opinion in Murray v. State, 692 So. 2d 157, 163 (Fla. 1997), and found that PCR DNA testing was not admissible because it was unreliable. Had trial counsel had any familiarity with DNA testing he would have known that PCR

testing was still a primitive form of DNA analysis and had not been accepted by the scientific community. Further, the RFLP testing and PCR testing were only done on six and five markers, respectively, which was considered suspect even in 1997.

The support that the State suggests was available for PCR testing in 1997 was not before the circuit court when it made its ruling (AB at 24). It is inappropriate for the State to attempt to introduce evidence to this Court in support of its argument. It matters not what evidence may have been introduced following Mr. Zack's trial or whether PCR testing became generally accepted. At the time of Mr. Zack's trial, this Court held that it was not admissible. Had trial counsel been aware of the law he would have had "real grounds" to challenge the DNA evidence and successfully exclude the PCR results. Trial counsel was ineffective for failing to know the law.

The State, like the lower court also accepts trial counsel's testimony that he used the DNA evidence in the Okaloosa homicide to refute the sexual battery charge in the Escambia homicide. However, trial counsel's recollection was incorrect. During his examination of Agent McClure, trial counsel asked why there was insufficient sperm for testing

found in the vaginal swab of the Okaloosa victim (T. 686-7). Agent McClure could not answer the question (Id.). Trial counsel continued to question the FDLE agent about the amount of time sperm could survive in another's body (Id.). The agent responded that normally sperm could survive for seventy-two (72) hours after ejaculation, but possibly even longer due to the fact that the Okaloosa victim was deceased (Id.). Trial counsel then asked why the agent was able to find sufficient sperm in the Escambia victim's vaginal swab, which he claimed had markers similar to Mr. Zack, but not find sufficient sperm in the Okaloosa victim's vaginal swab (Id.). The comparison trial counsel was trying to make made no sense and Agent McClure said that he could not say that the failure to find sufficient sperm in the Okaloosa victim's vaginal swab did not mean anything in terms of the analysis of the DNA from the Escambia victim's vaginal swab (T. 686-8). The failure to find DNA from the vaginal swab of the Okaloosa victim did not assist the defense in any way.

Trial counsel could have disputed the sexual battery had he actually challenged the DNA analysis of the sperm found in Ms. Smith's vaginal swab because he would have been able to exclude the PCR testing and demonstrate the weaknesses in the RFLP testing. Thus, as to the sexual battery the jury would

have only heard that Ms. Smith spoke to Mr. Zack throughout the night; left with him and another male and used drugs; returned to the bar with Mr. Zack and then left with him voluntarily; and through Mr. Zack's testimony and statement had consensual sex with Mr. Zack.

The State also suggests that no prejudice can be shown because the State could simply retest the evidence before Mr. Zack's trial and correct any errors (AB at 25). The State misses the point. If the evidence was inadmissible, then re-testing the evidence would not cure the problems with the analysis.

Finally, the State argues that trial counsel's failing to understand DNA analysis is not relevant to determining whether he was ineffective (AB at 26). During cross-examination, trial counsel inquired:

> Q: Okay. Thank you. When you talk about the donors of the DNA, Mr. McClure, you talked about the mother and the father, and I take it from the letters that you've used here, if I – if my blood type is A negative, for instance, and my wife's blood type is O, and that's my son sitting over there, would he have A and O combinations of blood?
>
> A: Well, you're talking about the ABO blood type and not the DNA type.
>
> Q: So is that different?
>
> A: Yes, sir, it is.

Q: Okay, so we're not talking about blood types when you're talking about --

A: No, sir, we're talking about the DNA type that I got from the blood.

MR. KILLAM: Okay, Thank you.

(T. 690). Trial counsel's cross examination illustrates his failure to understand DNA analysis or the methods by which to challenge the analysis. Trial counsel's lack of knowledge is relevant to Mr. Zack's claim because it shows that he did not understand even the most basic principles of DNA analysis. So, in light of his cross-examination, when trial counsel attempts to excuse his failure to challenge the DNA by testifying that he believed he could use some of the DNA analysis to assist in the defense, his testimony rings hollow.

Trial counsel was ineffective in failing to challenge the DNA evidence, chain of custody and expert qualifications at Mr. Zack's trial. Relief is proper.

ARGUMENT II

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

The State suggests that trial counsel cannot be ineffective because he successfully restricted the scope of cross-examination so that the prosecutor could not question Mr. Zack about the Okaloosa homicide. Mr. Zack's claim was not based on being cross examined regarding the Okaloosa homicides. Rather, Mr. Zack's trial counsel was ineffective because he did not inform him that it was his choice to testify, he would be cross examined, and that he failed to prepare him for his testimony. Mr. Zack's testimony was confusing, non-responsive and at times made no sense (T. 432-4). If Mr. Zack had known that it was his choice to testify and that he would be subject to cross examination, he would not have taken the stand (T. 455).

The State also argues that trial counsel needed Mr. Zack to testify in his defense in order to establish his state of mind (AB at 34).

First, the defendant does not testify in every case with "[a] crime of passion defense." (AB at 34). Rather, and as in this case, trial counsel could establish his defense through the testimony of other witnesses, evidence and the defendant's own statements. During the trial, evidence was introduced that Mr. Zack met the victim at the bar and consumed alcohol and drugs in the hours preceding the homicide. The jury was

also told about Mr. Zack's horrific past and the brutal murder of his mother when he was a child and that the victim was aware of Mr. Zack's background. But, most importantly, the jury heard Mr. Zack's statement of the events that occurred on the night of the homicide wherein he specifically detailed what he was thinking throughout the night and that he believed the victim was going to retrieve a gun when he obtained the oyster knife. Thus, there was no need for Mr. Zack to testify.

The State ignores Mr. Zack's statement which was introduced through a law enforcement officer's testimony and was also presented to the jury in his taped statement. With this statement, Mr. Zack's testimony was unnecessary and only damaged his defense.

The State also suggests that Mr. Zack received an advantage in testifying because the trial court, in error, ruled that he could not be cross-examined about the Okaloosa homicide (AB at 36). However, on direct examination, Mr. Zack was not asked about the Okaloosa homicide, therefore, the restriction of cross examination was based on the fact that the Okaloosa homicide was beyond the scope of direct examination. The ruling was proper.

To suggest that Mr. Zack cannot complain about his

testimony because the trial court erred is specious and misses the point of Mr. Zack's claim. Mr. Zack was totally unprepared for his testimony. Trial counsel misinformed Mr. Zack that he needed to testify to get his story before the jury. The jury had already heard his story. Trial counsel should have explained that Mr. Zack did not have to testify, that the jury would hear his statements to law enforcement, that he would be subject to cross examination and at a minimum, prepared him for his testimony. Trial counsel was ineffective. Relief is proper.

ARGUMENT III

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

Contrary to the State's argument, Mr. Zack has not raised a new claim that was not raised in the lower court concerning his trial counsel's remarks to the jury (AB at 48). Rather, Mr. Zack's claim that trial counsel's comments effectively pleaded Mr. Zack guilty to first degree murder was explored in the lower court. Trial counsel testified at the evidentiary hearing, that he knew both murders were admissible, so he conceded them to the jury (T. 393-4). But, trial counsel attempted to show the jury that the crimes were not committed

due to any purposeful conduct (PC-R. 395).

The problem with trial counsel's performance was that while realistically he may have been attempting to gain credibility with the jury, he never challenged the felonies that made Mr. Zack eligible for first degree murder, even if he did not do so in a premeditated manner. Trial counsel knew that Mr. Zack was charged with sexual battery, robbery and the jury was instructed that they could find that Mr. Zack was guilty of first degree murder if they found that he had committed a burglary, so he effectively pleaded Mr. Zack guilty. However, trial counsel never challenged the burglary or robbery charges. Thus, trial counsel conceded that Mr. Zack was guilty of first degree murder and eligible for the death penalty.

Even if trial counsel had not made such a prejudicial blunder, his acknowledgment of circumstances surrounding the homicides in the way that he did was ineffective. The State argues that trial counsel had two choices: he could ignore the circumstances or acknowledge them (AB at 47). In the State's opinion acknowledging the circumstances in the way that he did was more prudent then ignoring them. Also, in the State's opinion, trial counsel could only have acknowledged the circumstances in the way that he did. The State is incorrect.

Trial counsel could have gained credibility with the jury and prepared the jury for the graphic slides and photos they would see and testimony they would hear. But he could have done so in an effective way – he could have told the jury that they would see and hear graphic photos and testimony; he could have told them that Mr. Zack took responsibility for causing the deaths of the victim's, but he did not do so with any premeditated intent; he could have told the jury that Mr. Zack was a disturbed individual who was incapable of forming the intent required to be guilty of first degree murder or robbery or burglary. But, instead, trial counsel articulated his defense in the most unflattering and negative way that he could.

Trial counsel's performance in opening statements and closing arguments was deficient. Relief is warranted.

ARGUMENT IV

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

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

The State claims that the trial court could have denied any request for a Frye hearing or to exclude evidence because PCR DNA analysis was generally accepted at the time of Mr. Zack's trial (AB at 62). As authority the State cites a few

other jurisdictions which allowed PCR analysis to be admitted close in time to Mr. Zack's trial. While that may be so, the State cannot refute the fact that this Court had found that PCR analysis was not admissible at the time of Mr. Zack's trial. Murray v. State, 692 So. 2d 157, 163 (Fla. 1997). Therefore, the trial court could not have denied Mr. Zack's claim, had it been made.

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

Contrary to the State's position, the lower court did not find that Mr. Zack is not mentally retarded (AB at 63). Rather, the lower court found that based on the IQ scores presented at the trial, Mr. Zack's IQ would not meet the guidelines set forth in Atkins v. Virginia, 122 S.Ct. 2242 (2002). Mr. Zack was not given the opportunity to prove that he is mentally retarded because he was denied a hearing on this claim. Mr. Zack should be provided the opportunity to prove his mental retardation.

However, Mr. Zack's claim from the existing record is based on the fact that his trial experts believe that he exhibits behavior and brain function similar to a mentally retarded individual. Even the State's expert, Dr. McClaren, conceded that Mr. Zack exhibited a profile similar to a

mentally retarded individual (T. 2043). Mental retardation is brain dysfunction. Likewise, Mr. Zack suffers from organic brain damage and deficits that do not allow him to function differently from a mentally retarded individual. As such, logic dictates that Mr. Zack be provided the same protections as a mentally retarded individual.

Also, in its argument, the State relies on several pre-Atkins cases from this Court to suggest that Mr. Zack is not entitled to relief (AB at 66). In the wake of Atkins the State's authority is not longer good law and must be disregarded. Relief is proper.

ARGUMENT V

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

Mr. Zack's sentence of death is unconstitutional. In response to Mr. Zack's claim, based on Ring v. Arizona, 536 U.S. 584 (2002), the State argues that Ring is not retroactive. However, the State's entire claim is based upon a Teague analysis. Teague v. Lane, 489 U.S. 288 (1989). However, Teague does not control the analysis that is to be conducted in Florida to determine retroactivity. The State's

reliance on Teague is misplaced. As stated in Mr. Zack's Initial Brief, under Witt v. State, 387 So. 2d 922 (1980), Ring is retroactive.

The State also argues that Mr. Zack's claim lacks merit because he was convicted of sexual battery and robbery – thus establishing an automatic aggravator (AB at 90). The State's position ignores the specific provisions of the Florida Statute governing how a jury must make the determination of sentence in Florida. According to the State, if an aggravator exists as a matter of law, then Ring does not apply to require a jury determination that the aggravator is present. In Florida, § 921.141, Fla. Stat., requires both the jury and the trial judge to make three factual determinations before a death sentence may be imposed. They (1) must find the existence of at least one aggravating circumstance, (2) must find that "sufficient aggravating circumstances exist" to justify imposition of death, and (3) must find that "there are insufficient mitigating circumstances to outweigh the aggravating circumstances." § 921.141(3), Fla. Stat. (emphasis added). If the judge does not make these findings, "the court shall impose sentence of life imprisonment in accordance with [§]775.082." Id. (emphasis added). Mr. Zack's jury was so instructed.

The three steps in Florida's statute and the jury instructions also require factual findings that are

prerequisites to the trier of fact's determination that a defendant is death-eligible. Also, in Florida, the sentencer does not consider the ultimate question of whether or not to impose death until the eligibility steps are completed. After the first three steps, the Florida statute directs the jury to determine, "[b]ased on these considerations, whether the defendant should be sentenced to life imprisonment or death." Section 921.141(2)(c), Fla. Stat. The structure of the statute clearly establishes that the steps which occur before this determination are necessary to make the defendant eligible for this ultimate determination, that is, to render the defendant death-eligible.

The instructions given to Mr. Zack's jury tracked the steps contained in the statute. The jury was required to find "sufficient aggravating circumstances exist to justify the imposition of the death penalty." The jury was then told, if so, to go to the next step and determine "whether sufficient mitigating circumstances exist to outweigh any aggravating circumstances found to exist." Only after determining that the mitigating circumstances did not outweigh the aggravating circumstances was the jury told to consider whether to recommend a sentence of death.

Thus, under Ring, the Florida statutory provisions as

reflected in the instructions given to Mr. Zack's jury makes the steps required before the jury is free to consider which sentence to impose elements of capital first degree murder.

Furthermore, the State's position that the finding of the aggravator that the crime was committed in the course of an enumerated felony relieves any Ring error is in error and suggests that Florida's death penalty scheme violates the United State Supreme Court's determination that aggravating factors must channel and narrow sentencer's discretion. A state cannot use aggravating "factors which as a practical matter fail to guide the sentencer's discretion." Stringer v. Black. The use of an automatic aggravating circumstance does not "genuinely narrow the class of persons eligible for the death penalty," Zant v. Stephens, 462 U.S. 862, 876 (1983), and therefore the sentencing process is rendered unconstitutionally unreliable. Id. "Limiting the sentencer's discretion in imposing the death penalty is a fundamental constitutional requirement for sufficiently minimizing the risk of wholly arbitrary and capricious action." Maynard v. Cartwright, 486 U.S. 356, 362 (1988).

The Stringer Court emphasized, "if a State uses aggravating factors in deciding who shall be eligible for the death penalty or who shall receive the death penalty, it

cannot use factors which as a practical matter fail to guide the sentencer's discretion." Stringer, 112 S. Ct. at 1139. The Supreme Court then explained that use of an improper aggravating factor in a weighing scheme (like Florida's) has the potential for creating greater harm than it does in an eligibility scheme:

> Although our precedents do not require the use of aggravating factors, they have not permitted a State in which aggravating factors are decisive to use factors of vague or imprecise content. A vague aggravating factor employed for the purpose of determining whether a defendant is eligible for the death penalty fails to channel the sentencer's discretion. A vague aggravating factor used in the weighing process is in a sense worse, for it creates the risk that the jury will treat the defendant as more deserving of the death penalty than he might otherwise be by relying upon the existence of an illusory circumstance. Because the use of a vague aggravating factor in the weighing process creates the possibility not only of randomness but also of bias in favor of the death penalty, we cautioned in *Zant* that there might be a requirement that when the weighing process has been infected with a vague factor the death sentence must be invalidated.

Stringer, 112 S. Ct. at 1139. Stringer thus also teaches that in a weighing state, reliance upon an invalid aggravating factor is constitutional error requiring a harmless error analysis, even if other aggravating factors exist.

Effectively, one convicted of premeditated first degree

murder is better off than one who is convicted of committing first degree murder in the course of an enumerated felony because under the first scenario, a premeditated murder is not automatically eligible for the death penalty and would receive the greater protections afforded by Ring.

Also, under Florida law, capital sentencers may reject or give little weight to any particular aggravating circumstance. A jury may return a binding life recommendation because the aggravators are insufficient. Hallman v. State, 560 So. 2d 233 (Fla. 1990). The sentencer's understanding and consideration of aggravating factors may lead to a life sentence.

A state cannot use aggravating "factors which as a practical matter fail to guide the sentencer's discretion." Stringer v. Black. The State's argument that in Mr. Zack's case the sentencer was entitled automatically to return a death sentence upon a finding of first degree felony murder, even though that conclusion may not have been unanimous and a proper weighing was not conducted is improper. Thus, every felony murder would involve, by necessity, the finding of a statutory aggravating circumstance, a fact which, under the particulars of Florida's statute, violates the Eighth Amendment to the United States Constitution. This is so because an automatic aggravating circumstance is created, one

which does not "genuinely narrow the class of persons eligible for the death penalty," Zant v. Stephens, 462 U.S. 862, 876 (1983), and one which therefore renders the sentencing process unconstitutionally unreliable. Id. "Limiting the sentencer's discretion in imposing the death penalty is a fundamental constitutional requirement for sufficiently minimizing the risk of wholly arbitrary and capricious action." Maynard v. Cartwright, 486 U.S. 356, 362 (1988).

Mr. Zack was denied a reliable and individualized capital sentencing determination under Ring v. Arizona, and in violation of the Sixth, Eighth, and Fourteenth Amendments. Relief is proper.

ARGUMENT VI

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

Once again, the State attempts to re-characterize Mr. Zack's claim that his collateral counsel was ineffective into a claim that Mr. Zack has no Sixth Amendment right to effective assistance of counsel (AB at 91). That is not Mr. Zack's claim.[1]

[1]The cases the State relies on have to do with a defendant's claim that he is entitled to a Sixth Amendment right to effective assistance of counsel. Mr. Zack's claim is based on the specific language from the Florida Legislature

Rather, Mr. Zack's claim is that the State of Florida, through a statute has provided him the right to have effective assistance of counsel. Likewise, this Court has long since held that a capital postconviction defendant is entitled to effective assistance of counsel. Spalding v. Dugger, 526 So. 2d 71, 72 (Fla. 1988); Graham v. State, 372 So. 2d 1363 (Fla. 1979); Spaziano v. State, 660 So. 2d 1363 (Fla. 1995).

Mr. Zack wants effective assistance of counsel. He was deprived of that right in the circuit court and thus should be provided with the opportunity to have effective postconviction counsel litigate a Rule 3.850 motion on his behalf. Relief is proper.

CONCLUSION

The circuit court erred in denying Mr. Zack's Rule 3.850 motion. Mr. Zack is entitled to relief.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Reply Brief has been furnished by first class mail, postage prepaid, to Charmaine Millsaps, Assistant Attorney General, Office of the Attorney General, The Capitol - PL-01, Tallahassee, Florida, 32399-1050, on August 18, 2004.

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and this Court that he is entitled to effective representation and due process.

CERTIFICATION OF TYPE SIZE AND STYLE

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