

court struck the aggravating factor of great risk of death to many as inapplicable; the aggravating factor of pecuniary gain as duplicative; and determined that the crime was not heinous, atrocious or cruel. Id. at 177-178. This court found that the trial court's erroneous finding of two statutory aggravating circumstances was harmless and did not impair the sentencing process. Id. at 179. The remaining aggravating factors present in this case are 1) under sentence of imprisonment; 2) previous conviction of violent felony and 3) during the commission of a felony. There were no mitigating factors. Id. at 177-179. Certiorari was denied by the United States Supreme Court on February 24, 1986. Mills v. Florida, 475 U.S. 1031 (1985).

On February 24, 1988, Mills filed a motion for post-conviction relief pursuant to Florida Rule of Criminal Procedure 3.850². On November 14, 1989, Mills filed a consolidated proffer in support of request for evidentiary hearing, application for stay of execution and motion for Fla.R.Crim.P. 3.850 relief. The

court erred in denying the motion to dismiss the indictment; (5) the trial court erred in denying the motion for new trial; (6) the trial court erred in convicting the defendant of both felony murder and burglary; (7) the trial court erred in adjudicating the defendant guilty of both murder and aggravated battery; (8) the death sentence was impermissibly imposed over the jury's recommendation of life; and (9) the Florida capital sentencing statute is unconstitutional on its face and as applied.

² The issues raised in the Rule 3,850 motion were: 1) the death penalty is cruel and unusual punishment for felony murder; 2) the application of the death penalty is arbitrary and capricious; 3) the death sentence is predicated upon the finding of an automatic aggravating circumstance; 4) the trial court erred in considering victim impact evidence; 5) prosecutorial misconduct at sentencing; 6) bench conferences were not recorded; 7) evidence of gun residue tests should not have been admitted; 8) ineffective assistance of counsel at the guilt and penalty phases; and 9) ineffective assistance of counsel at sentencing.

motion was denied, without a hearing, on December 20, 1989. Rehearing was denied on January 3, 1990. On November 17, 1989, Mills had filed a petition for extraordinary relief, for a writ of habeas corpus, request for stay of execution and application for stay of execution pending disposition of petition for writ of certiorari, with the Florida Supreme Court³. This court denied habeas corpus relief, but remanded for an evidentiary hearing in regard to counsel's failure to develop and present evidence that would tend to establish statutory or nonstatutory mental mitigating circumstances. Mills v. Dugger, 559 So.2d 578 (Fla. 1990). An evidentiary hearing was held November 2, 1990. The trial court denied relief on January 3, 1991. Mills appealed and this court affirmed the trial court's denial of relief. Mills v. State, 17 F.L.W. S339 (Fla. June 4, 1992). Mills served a Motion for Rehearing on July 6, 1992. On July 8, 1992, Mills served a second petition for a writ of habeas corpus which is the subject of this Response.

FACTS

The facts found by this court on direct appeal are:

The evidence at the trial showed that Gregory Mills and his accomplice Vincent Ashley broke into the home of James and

³ Mills raised seven issues in his habeas petition: 1) this court decided wrongly on appeal the issue of Mills not being allowed to impeach his codefendant; 2) the override was improper; 3) appellate counsel was ineffective because Mills should have been resentenced based on Elledge v. State, 346 So.2d 998 (Fla. 1977); 4) the trial court erred in finding an automatic aggravating factor (felony murder); 5) **the** trial court erred in allowing gunshot residue test evidence; 6) the trial court impermissibly shifted to Mills the burden of proving life to be the proper penalty; and 7) consideration of victim impact evidence.

Margaret Wright in Sanford between two and three o'clock in the morning, intending to find something to steal. When James Wright woke up and left his bedroom to investigate, Mills shot him with a shotgun. Margaret Wright awakened in time to see one of the intruders run across her front yard to a bicycle lying under a tree. Mr. Wright died from loss of blood caused by multiple shotgun pellet wounds.

Ashley, seen riding his bicycle a few blocks from the Wright home, was stopped and detained by an officer on his way to the crime scene. Another officer saw a bicycle at the entrance to a nearby hospital emergency room, found Mills inside, and arrested him. At police headquarters officers questioned both men and conducted gunshot residue tests on them. They were then released.

At trial Mills' roommate testified that he and his girlfriend hid some shotgun shells that Mills had given them, that Mills had been carrying a firearm when he left the house the night of the murder, and that Mills had said he had shot someone. He **also** stated that Mills told him that a city worker had found a shotgun later shown to have fired an expended shell found near the victim's body.

After the murder, Ashley was arrested on some unrelated charges. He then learned that Mills had told his roommate and his girlfriend about the murder and that they in turn had told the police, so he decided to tell the police about the incident. Ashley testified that Mills entered the house (through a window) first, that he, Ashley, then handed the shotgun in to him, and that he then entered the house himself. Ashley saw that the man in the house had awakened and was getting up, so he exited the house and ran to his bicycle. Then he heard the shot and ran back the house, where he saw Mills. They both departed the scene on their bicycles, taking separate routes. Ashley was

granted immunity from prosecution for these crimes and also for several unrelated charges pending against him at the time he decided to confess and cooperate.

Mills testified in his defense. He said that he arrived home from work on May 24 at about 9:30 p.m. Then he went out, first to one bar, then another, playing pool and socializing. He went home afterwards but could not sleep, he said, because of a toothache and a headache, so he went to the hospital emergency room. There police officers took him into custody.

Mills v. State, 476 So.2d 172, 174-175 (Fla. 1985).

The state also presented evidence of the gunshot residue test performed on Mills the morning of the murder.

The tests were performed about two hours after the estimated time of the shooting, by which time, according to the state's expert, approximately 99% of the residues the test detects would have been dissipated. Ashley's test result was negative. Mills' test was positive in that it revealed the presence of antimony in an amount not to be expected on a person who had not fired a gun, although it was not enough to prove conclusively that he had done so.

Id. at 176.

CLAIM I

THIS COURT'S HARMLESS ERROR ANALYSIS AFTER AGGRAVATING CIRCUMSTANCES WERE STRICKEN DID NOT VIOLATE MILLS' CONSTITUTIONAL RIGHTS AND THIS ISSUE IS PROCEDURALLY BARRED.

Mills claims this court's harmless error analysis was flawed. He cites Sochor v. Florida, 504 U.S. ___, 112 S.Ct. 2114 (1992) and Stringer v. Black, 503 U.S. ___, 112 S.Ct. 1130 (1992) to support his argument this court did not engage in the proper

analysis in evaluating the impact of the erroneous aggravating circumstances.

As stated in Mills' petition, Sochor relied on the harmless error analysis established in Chapman v. California, 386 U.S. 18 (1967). Mills' direct appeal was decided in 1985. This issue should have been raised on rehearing, in the motion **for** postconviction relief, or in the previous habeas petition.

Habeas corpus is not a vehicle for additional appeals of issues that could have been, should have been, or were raised on appeal or in other post conviction motions. Medina v. Dugger, 586 So.2d 317 (Fla. 1991); Clark v. Dugger, 559 So.2d 192 (Fla. 1990); Porter v. Dugger, 559 So.2d 201 (Fla. 1990); Provenzano v. Dugger, 561 So.2d 541 (Fla. 1990); Roberts v. State, 568 So.2d 1255 (Fla. 1990); Mills v. Dugger, 559 So.2d 578 (Fla. 1990); Suarez v. Dugger, 527 So.2d 190 (Fla. 1988); White v. Dugger, 565 So.2d 700 (Fla. 1990). This issue was not raised in either the previous motion for postconviction relief or the previous habeas petition. It was not raised in the recent motion for rehearing served July 6, 1992.

There is no "new law" which requires relief. Florida courts have always applied the Chapman harmless error standard. See Witt v. State, 387 So.2d 922 (Fla. 1980); State v. Diguilio, 491 So.2d 1129 (Fla. 1986). This court made a specific finding that striking the aggravating circumstances was harmless error in compliance with Chapman.⁴ Mills is not entitled to relief.

⁴ In Sochor, supra, the issue was whether this court's harmless error analysis in that case was ambiguous. The Court specifically stated it does not "require a particular formulaic

CLAIM II

MILLS' SENTENCE DOES NOT REST UPON
AN UNCONSTITUTIONAL AUTOMATIC
AGGRAVATING CIRCUMSTANCE, AND THIS
ISSUE IS PROCEDURALLY **BARRED**.

Mills admits he raised this issue on direct appeal and in his prior habeas corpus petition. He requests reconsideration on the basis of Stringer v. Black, 503 U.S. ___, 112 S.Ct. 1130 (1992).

Habeas corpus is not a vehicle for additional appeals of issues that could have been, should have been, or were raised on appeal or in other post conviction motions. Medina v. Dugger, 586 So.2d 317 (Fla. 1991); Clark v. Dugger, 559 So.2d 192 (Fla. 1990); Porter v. Dugger, 559 So.2d 201 (Fla. 1990); Provenzano v. Dugger, 561 So.2d 541 (Fla. 1990); Roberts v. State, 568 So.2d 1255 (Fla. 1990); Mills v. Dugger, 559 So.2d 578 (Fla. 1990); Suarez v. Dugger, 527 So.2d 190 (Fla. 1988); White v. Dugger, 565 So.2d 700 (Fla. 1990). Stringer is not new law which entitles Mills to relief.

indication by state courts before their review for harmless federal error will pass scrutiny", but noted that "a plain statement that the judgment survives on such enquiry is clearly preferable...". 112 S.Ct. at 2123, The Mills court specifically stated that "[b]ecause there were no mitigating Circumstances [found by the trial court], we find that the court's erroneous finding of two statutory aggravating circumstances was harmless and did not impair the sentencing process". 476 So.2d at 179. The court further analyzed **the** remaining aggravating circumstances in conjunction with the purported mitigation claimed by Mills and the life recommendation, and again concluded that death was appropriate, Id.

CONCLUSION

Based on the arguments and authorities presented herein, the respondent respectfully requests this court deny the request for habeas corpus relief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Response to Petition for Writ of Habeas Corpus has been furnished by U.S. Mail to Larry Helm Spalding, Gail E. Anderson, and Todd G. Scher, Office of the Capital Collateral Representative, **1533** South Monroe Street, Tallahassee, Florida 32301, this 29th day of July, 1992.



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