IN THE SUPREME COURT OF FLORIDA

NO. SC04-705

MARK ALLEN DAVIS,

Petitioner,

v.

JAMES V. CROSBY, Jr.
Secretary, Florida Department of Corrections,

Respondent.

PETITION FOR WRIT OF HABEAS CORPUS

LINDA McDERMOTT
Florida Bar No. 0102857
141 N.E. 30th Street
Wilton Manors, FL 33334
(850) 322-2172

COUNSEL FOR PETITIONER

PRELIMINARY STATEMENT

This is Petitioner's first habeas corpus petition in this Court. Article 1, Section 13 of the Florida Constitution provides: "The writ of habeas corpus shall be grantable of right, freely and without cost." This petition for habeas corpus relief is being filed to address substantial claims of error, which demonstrate Mr. Davis was deprived of his right to a fair, reliable, and individualized sentencing proceeding and that the proceedings which resulted in his conviction and death sentence violated fundamental constitutional imperatives.

INTRODUCTION

This petition presents significant errors which occurred at Mr. Davis' trial and sentencing but that were not presented to this Court on direct appeal due to the ineffective assistance of appellate counsel.

In November, 1988, appellate counsel filed a four issue, 21-page brief on direct appeal.[1] In April, 1989, appellate counsel filed a one issue, six page supplement to the initial

---

[1]Appellate counsel raised the following issues: Introduction of Fla. Stat. 921.141(5)(h) constitutes reversible error; introduction of a victim impact statement is unconstitutional as well as reversible error requiring resentencing; the State did not prove that the crime was premeditated so that Fla. Stat. 921.141 (5)(I) was not applicable as an aggravating factor; the Court should order a resentencing since it cannot forecast the jury and judge's findings if the proceedings had been free of error. See Initial Brief, Case #70,551 (Nov. 17, 1988).

brief, raising a claim that the introduction of a photograph and video tape constitutes reversible error due to their inflammatory nature. See Supplement to Initial Brief of Appellant, Case #70,551 (Apr. 19, 1989).

Appellate counsel's brief was entirely deficient and omitted meritorious issues, which had they been raised, would have entitled Mr. Davis to relief. In fact, Mr. Davis attempted to raise, pro se, several issues which appellate counsel had neglected. See Pro Se Companion Brief, Case #70,551 (Apr. 17, 1989). One of those issues, based on Mr. Davis' absence during a critical stage of the trial, was remanded by this Court for an evidentiary hearing. See Davis v. State, 586 So. 2d 1038, 1041 (Fla. 1991).[2] From December 1990 on, appellate counsel litigated Mr. Davis' case without the benefit of trial transcripts. Thus, he had no transcripts while litigating the motion for rehearing and certiorari to the United States Supreme Court. Such behavior was deficient.

Amongst the many meritorious issues which appellate counsel neglected to raise were prosecutorial misconduct and the introduction of a juvenile adjudication as a prior violent felony. Counsel's failure to present these issues, as well as others discussed herein, demonstrates that his representation of Mr. Davis involved "serious and substantial" deficiencies.

---

[2]Subsequent to the evidentiary hearing, appellate counsel filed a supplemental brief regarding this issue.

Fitzgerald v. Wainwright, 490 So. 2d 938, 940 (Fla. 1986).

Neglecting to raise such fundamental issues, as those discussed herein, "is far below the range of acceptable appellate performance and must undermine confidence in the fairness and correctness of the outcome." Wilson v. Wainwright, 474 So. 2d 1162, 1164 (Fla. 1985). Had counsel presented these issues, Mr. Davis would have received a new trial, or, at a minimum, a new penalty phase. Individually and "cumulatively," Barclay v. Wainwright, 444 So. 2d 956, 969 (Fla. 1984), the claims omitted by appellate counsel establish that "confidence in the correctness and fairness of the result has been undermined." Wilson, 474 So. 2d at 1165. Furthermore, fundamental error occurred that mandates relief. Mr. Davis is entitled to relief.

REQUEST FOR ORAL ARGUMENT

Mr. Davis respectfully requests oral argument.

JURISDICTION TO ENTERTAIN PETITION AND GRANT HABEAS CORPUS RELIEF

This is an original action under Fla. R. App. P. 9.100(a). See Art. 1, Sec. 13, Fla. Const. This Court has original jurisdiction pursuant to Fla. R. App. 9.030(a)(3) and Article V, sec. 3(b)(9), Fla. Const. The petition presents issues which directly concern the constitutionality of Mr. Davis' conviction and sentence of death.

Jurisdiction in this action lies in the Court, see, e.g., Smith v. State, 400 So. 2d 956, 960 (Fla. 1981), for the

fundamental constitutional errors challenged herein arise in the context of a capital case in which this Court heard and denied Mr. Davis' direct appeal. See Wilson, 474 So. 2d at 1163; Baggett v. Wainwright, 229 So. 2d 239, 243 (Fla. 1969). The Court's exercise of its habeas corpus jurisdiction, and of its authority to correct constitutional errors such as those herein pled, is warranted.

GROUNDS FOR HABEAS CORPUS RELIEF

By his petition for a writ of habeas corpus, Mr. Davis asserts that his capital conviction and sentence of death were obtained and then affirmed, by this Court, in violation of his rights guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the Florida Constitution.

CLAIM I

MR. DAVIS WAS DENIED A FAIR TRIAL IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS BECAUSE THE PROSECUTOR'S ARGUMENTS PRESENTED IMPERMISSIBLE CONSIDERATIONS TO THE JURY, MISSTATED THE LAW AND FACTS, AND WERE INFLAMMATORY AND IMPROPER. APPELLATE COUNSEL WAS INEFFECTIVE IN FAILING TO RAISE THIS ISSUE.

The prosecutor's conduct was contrary to the law and prejudiced the jury's consideration of the evidence in violation of the Constitution. This Court has held that when improper conduct by the prosecutor "permeates" a case, relief is proper. Garcia v. State, So. 2d 1325 (Fla. 1993); Nowitzke v. State, 572 So. 2d 1346 (Fla. 1990).

During its guilt phase closing argument, the prosecution improperly commented on Mr. Davis' failure to testify and shifted the burden of proof to Mr. Davis:

> Although the state has the burden of proving a Defendant in a Criminal case guilty of the crime which we have him charged, the Defendant has the same power to subpoena witnesses. If he chose, he could have called any witnesses in his behalf. So let him try to have you think we're hiding something, we certainly are not.

(R. 1388-89). Additionally, the prosecutor argued:

> Did you at any point in time hear Mr. White impeach those

> ladies on the statements this defendant made to them? Do you think for one minute if the defendant hadn't made those statements and they reported those...reported those statements to the police that night on July 2nd when the murder was discovered, don't you think he would have been standing there, impeaching.

(R. 1404). And:

> All of those statements made by that defendant have not been challenged once by the defense in this case. They haven't been challenged because the defendant made his intent clear all day long as to what he was going to do with the victim in this case.

(R. 1421). The prosecution's comments were clearly improper. Doyle v. Ohio, 426 U.S. 610 (1976); Wainwright v. Greenfield, 474 U.S. 284 (1986).

Later, during the guilt phase closing arguments, the prosecutor improperly referred to Mr. Davis as "a cagey little murderer. Little robber, cagey little thief." (R. 1390). Subsequently, the prosecutor attacked Mr. Davis for exercising his right to assist in his defense:

> What else did he tell you? That this Defendant, showed him an article from his hometown paper and first thing he thought, my Lord, this article says he confessed. How can you confess and try to get a lesser crime, a murder two or something less. Explain that to me and what did he tell you? What did he tell Shannon Stevens? I didn't tell them what I told you. I am claiming self-defense. I have my theories. **The facts you heard is from a jailhouse lawyer. Well there sits one, he is busy on his defense in this case, doing his legal research, listening to scuttle-butt at the jail to see what defenses work, what defenses didn't work, to decide what's the best defense for him in this case.** And what did he think the best defense was? The old man is a queer and made a sexual advance.

(R. 1420)(emphasis added).

The prosecutor also improperly attempted to select a jury

that would not consider Mr. Davis' age, despite the fact that it is a statutorily recognized mitigating factor:

> Okay. That brings to mind something. The Defendant stood up in this case. You can see he is a young man. Some of you may have children his age. Some of you may have grand children his age and some of you folks over here probably are not too far off from his age.
> Do you feel that would have any impact on your ability to sit here as a juror? **The fact the man accused of this crime is a young man, does have any –**

(R. 812-13)(emphasis added).

* * *

> Ladies and gentlemen, and up there, there are a few single ladies up here. **Younger single ladies. Do you feel that you would have any particular empathy, if you will, because the Defendant is a young man in this case?**

(R. 813)(emphasis added).

Further, the prosecution improperly urged the jury not to consider sympathy towards Mr. Davis by asking them if they could "put aside pity and sympathy in accordance with the law that the Judge will give you" (R. 727). The prosecutor stated,

> Now, we have a lot of ladies here in the front row and a fair number of ladies already up there in the box. Sometimes ladies are thought of as being very sympathetic to various issues. That's something we've addressed a little bit already but something which comes into play in a case like this because **we're all human beings and we all have sympathies. Can you assure us you will not let those sympathies enter into your deliberations?**

(R. 865)(emphasis added).

Prosecutors have a special duty of integrity in their arguments. The comments made here violate that duty of integrity to the jury. Davis v. Zant, 36 F.3d 1538 (11th Cir.

1994); Brooks v. Kemp, 762 F.2d 1383 (11th Cir. 1985). Under the sentencing scheme in Florida the jury has complete discretion in choosing between life imprisonment or a death recommendation. "Mercy may be a part of that discretion." Drake v. Kemp, 762 F.2d 1449 (11th Cir. 1985)(en banc). The argument in Mr. Davis' case is precisely the type of argument that violates due process and the Eighth Amendment. See Drake, 762 F.2d 1449 at 1458-61.

During its examination of Mr. Davis at the penalty phase, the prosecution improperly attempted to impeach Mr. Davis with alleged prior bad acts, which had no bearing on aggravating circumstances:

> Q This isn't the first incident you've been (sic) your mother through mental anguish and pain that a mother would suffer because of something like this?

(R. 1523).

* * *

> Q Is it not correct, Mr. Davis, that you discussed with several different inmates at the County Jail escape attempts, sit down and plan how you and possibly them could escape from the County Jail, or for that matter from the State prison facilities?

(R. 1536).

* * *

> Q Is it true, Mr. Davis, that, in fact, some tennis shoes were sent to you, but intercepted in the process, that contained jeweler's wire which is commonly used for attempted escapes? I'll let you explain but just a yes or no for that.

(R. 1536).

* * *

> Q You brought up the subject of keys. Is it not true that you attempted to make keys at the County jail?

(R. 1539).

* * *

> Q Now, I understand while you were at the County Jail you received an injury which required medical treatment; is that correct?
> A Yes, sir.
> Q Did you advise another inmate that you had either self-inflicted that injury or were going to blow air into that injury to aggravate it to leave the County Jail and receive medical treatment at one of the local hospitals?
> A No, I didn't.
> Q Did you indicate to any inmate at the County Jail that while you were receiving this medical treatment you were going to attempt to make an escape?
> A No, ma'am.

(R. 1540).[3]

Finally, during the penalty phase closing argument, the prosecutor violated the Golden Rule:

> You heard the testimony of Dr. Wood. Dr. Wood could not give you any type of an estimate on the shortening of his life by the additional stab wounds but we know that the injury to the neck occurred first. What else did she tell you? That Mr. Landis would have been conscious for approximately five minutes prior to his death. Folks, I ask you to do something. **If any of you have a second on your watch, go back to the jury room and sit in silence, total silence for two minutes, not five, just two, and I suggest to you it is going to seem like an eternity to sit there and look at one another for two minutes. Contemplate Orville Landis and the time he spent, not two minutes, but closer to five minutes with his throat cut, bleeding profusely, then with that man continuing the attack by repeatedly stabbing him in the chest with enough force to go through his body to the back five times breaking bones, with enough force in his back to have nine of the eleven stab wounds, again, through his body breaking bones. And that two to five minutes to Orville Landis, I suggest to you, was like an eternity of pain, suffering and hell.** That is cruel punishment, that is cruel treatment to a victim. That's what this aggravating factor is all about. I suggest to

---

[3]Counsel objected to this line of questioning during a proffer examination by the State, but the court overruled the objection. (R. 1533-5).

you that we have met that burden.

(R. 1558-59)(emphasis added). "Such violations of the 'Golden Rule' against placing the jury in the position of the victim, and having them imagine their pain are clearly prohibited." Urbin v. State, 714 So. 2d 411, 419 (Fla. 1998)(citation omitted); See Gomez v. State, 751 So. 2d 630 (3rd DCA 1999)("Prosecutor 'golden rule' arguments during closing argument of attempted murder trial, suggesting that jurors would have acted differently if they had placed themselves in defendant's shoes and if case really involved self-defense, and unfounded questions during cross-examination concerning gang membership and familiarity with guns were improper and unprofessional"); See also Bullard v. State, 436 So. 2d 962 (3rd DCA 1983).

The cumulative effect of the prosecutor's comments was to "improperly appeal to the jury's passions and prejudices." Cunningham v. Zant, 928 F.2d 1006, 1020 (11th Cir. 1991). "Although this legal precept -- and indeed the rule of objective, dispassionate law in general -- may sometimes be hard to abide, the alternative, -- a court ruled by emotion -- is far worse." Jones v. State, 705 So. 2d 1364, 1367 (Fla. 1998). Such remarks prejudicially affect the substantial rights of the defendant when they "so infect the trial with unfairness as to make the resulting conviction a denial of due process." Donnelly v. DeChristoforo, 416 U.S. 647 (1974); See also Ruiz v. State, 743 So. 2d 1, 4 (Fla. 1999)("The role of

counsel in closing argument is to assist the jury in analyzing the evidence, not to obscure the jury's view with personal opinion, emotion, and nonrecord evidence.")

Appellate counsel was ineffective for failing to raise this issue, even in the absence of an objection by defense counsel. Egregious prosecutorial misconduct, like that which occurred here, constitutes fundamental error. Robinson v. State, 520 So. 2d 1, 7 (Fla. 1988)("Our cases have also recognized that improper remarks to the jury may in some instances be so prejudicial that neither rebuke nor retraction will destroy their influence, and a new trial should be granted despite the absence of an objection below or even in the presence of a rebuke by the trial judge."); see also Urbin v. State, 714 So. 2d 411, 418, fn8 (Fla. 1998).

Appellate counsel's failure to raise this issue constitutes deficient performance which prejudiced Mr. Davis. Habeas relief is warranted.

CLAIM II

FLORIDA'S CAPITAL SENTENCING PROCEDURE DEPRIVED MR. DAVIS OF HIS SIXTH AMENDMENT RIGHTS TO NOTICE AND TO A JURY TRIAL AND OF HIS RIGHT TO DUE PROCESS.

Ring v. Arizona, 122 S. Ct. 2428(2002), 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 at 2443. The role of the jury in Florida's capital sentencing scheme, and in particular Mr. Davis'

capital trial, neither satisfies the Sixth Amendment, nor renders harmless the failure to satisfy Apprendi v. New Jersey, 530 U.S. 466 (2000)and Ring.

1. JURORS' AWARENESS OF THE IMPACT OF THEIR RECOMMENDATION.

Initially, at the beginning of the penalty phase, the Judge's preliminary instructions to the jury were:

> All right. Now, ladies and gentleman of the jury, you have found the defendant guilty of murder in the first degree. The punishment for this crime is either death or life imprisonment without the possibility of parole for 25 years. **The final decision as to what punishment shall be imposed rests solely with the judge of this court; however, the law requires that you, the jury, rendered** (sic) **to the Court an advisory sentence as to what punishment should be imposed upon the defendant.** The State and the defendant may now present evidence relative to the nature of the crime and the character of the defendant. You are instructed that this evidence when considered with the evidence you have already heard is presented in order that you might determine, first, whether sufficient aggravating circumstances exist that would justify the imposition of the death penalty and, second, whether there are mitigating circumstances sufficient to outweigh the aggravating circumstances, if any.

(R. 1506-07)(emphasis added).

The record also shows the prosecutor's argument emphasized that the jurors' role was to provide a mere recommendation:

> Do each of you agree with me or **can you agree with me that jurors do not sentence people? There is only one person in the courtroom who has the ability to sentence a Defendant. That's His Honor, Judge Penick.** Do all of you agree with that?

(R. 644) (emphasis added).

* * *

> Do you understand that it is just that, a recommendation

> to the Judge? **The jurors do not sentence people.** It's not within your power.

(R. 682)(emphasis added).

* * *

> We give you written instructions so you can see right there in writing when you go back exactly what the law is that you have to apply and you may hear additional evidence that applies to that law and you are asked just as you are during the first part of the trial to make a decision and render a recommendation. **Not sentence the man, but render a recommendation based on the evidence and that law that the Judge will be instructing you on.**

(R. 724-25)(emphasis added)(See also R. 642-43,647-48, 869).

While instructing the jurors prior to their sentencing deliberations, the judge never so much as informed the jury that their recommendation would be entitled to great weight:

> Members of the jury, it is now your duty to advise the Court as to what punishment should be imposed upon the defendant for his crime of murder in the first degree. **As you have been told, the final decision as to what punishment should be imposed is the responsibility of the Judge; however, it is your duty to follow the law that will now be given to you by the Court and render to the Court an advisory sentence** based upon your determination as to whether sufficient aggravating circumstances exist to justify the imposition of the death penalty and whether sufficient mitigating circumstances exist to outweigh and aggravating circumstances found to exist.

(R. 1577-78) (emphasis added).

The judge proceeded to inform the jury that:

> Should you find sufficient aggravating circumstances do exist, it will then be your duty to determine whether mitigating circumstances exist that outweigh the aggravating circumstances.

(R. 1579). The jury was further advised that "In these proceedings it is not necessary that the advisory sentence be unanimous" (R. 1581) but that, "Your decision may be made by a

majority of the jury." (R. 1581). Subsequently, the court stated:

> When seven or more are in agreement as to what sentence should be recommended to the Court, that form of recommendation should be signed by your foreperson and returned to the Court.

(R. 1582). Thereafter, the jury's advisory verdict was returned and read in open court by the clerk:

> [A] majority of the jury, by a vote of eight to four, advise and recommend to the Court that it impose the death penalty upon Mark A. Davis.

(R. 1592). On January 30, 1987, the presiding judge imposed a sentence of death (R. 1643). In its sentencing order, the court found four aggravating circumstances. (R. 269-73).

Mr. Davis' jury was specifically instructed that its role was merely to make a recommendation by a majority vote. The jury was never told that its recommendation was binding in any way. In fact, the jury was not even instructed by the Judge that its recommendation would be given great weight. Under the circumstances, the jurors' sense of responsibility for determining Mr. Davis' sentence was substantially diminished.

The jury in Mr. Davis' case repeatedly heard during the voir dire examination that their penalty phase role was to render a recommendation. They were told that the recommendation was not binding upon the judge. They were told that the decision as to what sentence to impose was the judge's decision. In the judge's last remarks before the jury retired, he reminded them that it was his responsibility to

sentence Mr. Davis (R. 1577).

The diminution of the juror's role in Mr. Davis' case entitles him to relief.

2. Other Errors in Light of Ring.

Additionally Mr. Davis' death sentence was imposed in an unconstitutional manner because he was required to prove the non-existence of an element necessary to make him eligible for the death penalty. Under Florida law, a death sentence may not be imposed unless the judge finds the fact that "sufficient aggravating circumstances" exist to justify imposition of the death penalty. Fla. Sat. Sec 921.141 (3). Because imposition of a death sentence is contingent upon this fact being found, and the maximum sentence that could be imposed in the absence of that finding is life imprisonment, the Sixth Amendment required that the State bear the burden of proving it beyond a reasonable doubt. Ring at 2432("Capital defendants. . .are entitled to a jury determination of any fact the legislature conditions an increase in their maximum punishment.") In Mr. Davis' case, the judge gave the following preliminary instruction:

> You are instructed that this evidence when considered with the evidence you have already heard is presented in order that you might determine, first, whether sufficient aggravating circumstances exist that would justify the imposition of the death penalty and, second, **whether there are mitigating circumstances sufficient to outweigh the aggravating circumstances**, if any.

(R. 1506-7)(emphasis added). In closing penalty phase argument the prosecutor told the jury:

> Ladies and gentlemen, the Judge is going to tell you that any one of the circumstances that I've discussed with you in itself is sufficient for you to find that death is an appropriate recommendation. If you find that one or more of the aggravating circumstances justify the recommendation of death, **then you need to consider what mitigation has been shown to you to outweigh that recommendation.**

(R. 1561)(emphasis added). The Court then gave the jury its final instructions:

> [I]t is your duty to follow the law that will now be given to you by the Court and render to the Court an advisory sentence based upon your determination as to whether sufficient aggravating circumstances exist to justify the imposition of the death penalty and **whether sufficient mitigating circumstances exist to outweigh any aggravating circumstances found to exist.**

(R. 1577-78)(emphasis added)and:

> If you find the aggravating circumstances do not justify the death penalty, your advisory sentence should be one of life imprisonment without possibility of parole for 25 years.
>
> Should you find sufficient aggravating circumstances do exist, **it will then be your duty to determine whether mitigating circumstances exist that outweigh the aggravating circumstances**.

(R. 1579)(emphasis added).

The Due Process Clause of the Fourteenth Amendment requires the State to prove beyond a reasonable doubt every fact necessary to constitute a crime. In re Winship, 397 U.S. 358 (1970). The existence of "sufficient aggravating circumstances" that outweigh the mitigating circumstances is an essential element of death-penalty-eligible first degree murder because it is the sole element that distinguishes it from the crime of first degree murder, for which life is the only possible punishment. Fla.

Stat. Secs. 775.082, 921.141. For that reason, Winship requires the prosecution to prove the existence of that element beyond a reasonable doubt. Mr. Davis' jury was told otherwise. The instructions given to Mr. Davis' jury violated the Due Process Clause of the Fourteenth Amendment and the Sixth Amendment's right to trial by jury because it relieved the State of its burden to prove beyond a reasonable doubt the element that "sufficient aggravating circumstances exist" which outweigh mitigating circumstances by shifting the burden of proof to Mr. Davis to prove that the mitigating circumstances outweigh sufficient aggravating circumstances. Mullaney v. Wilbur, 421 U.S. 684, 698 (1975).[4]

Mr. Davis' death sentence is also invalid and must be vacated because the elements of the offense necessary to establish capital murder were not charged in the indictment in violation of the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, the Florida Constitution, and Due

[4]Defense counsel raised an objection regarding this issue at trial, "Section 921.141 violates the Defendant's rights under Florida Constitution, Art. 1, Sections 9 and 16, and United States Constitution, Amends. V and XIV because it does not require that the aggravating circumstances outweigh beyond a reasonable doubt the mitigating circumstances before a death sentence can be imposed." (R. 27-28).

Process.[5]

Mr. Davis was indicted on one count of premeditated murder, one count of robbery and one count of grand theft (R. 8). The indictment failed to charge the necessary elements of capital first degree murder (R. 8-10).

Jones v. United States, 526 U.S. 227 (1999), held that "under the Due Process Clause of the Fifth Amendment and the notice and jury guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." Jones, at 243, n. 6. Apprendi v. New Jersey, 530 U.S. 466 (2000), held that the Fourteenth Amendment affords citizens the same protections when they are prosecuted under state law. 530 U.S. at 475-476.[6] Ring v. Arizona, 122 S.Ct. 2428 (2002), held that a death penalty statute's aggravating factors operate as 'the functional equivalent of an element of a greater offense.'" Ring, at 2441 (quoting Apprendi, 530 U.S. at 494, n. 19).

---

[5]Defense counsel raised an objection regarding this issue at trial, "Said Indictment does not properly charge a capital offense in that the statutory aggravating circumstances upon which the State would rely in order to obtain the death penalty are not alleged in the Indictment, in violation of United States Constitution, Amends. V, VI, and XIV and Florida Constitution, Art. I, Sections 9 and 16." (R. 23).

[6]The grand jury clause of the Fifth Amendment has not been held to apply to the States. Apprendi, 530 U.S. at 477, n. 3.

Like the Fifth Amendment to the United States Constitution, Article I, Section 15 of the Florida Constitution provides that "no person shall be tried for a capital crime without presentment or indictment by a grand jury". Like 18 U.S.C sections 3591 and 3592(c), Florida's death penalty statutes, Florida Stats. §§ 775.082 and 921.141, makes imposition of the death penalty contingent upon the government proving the existence of aggravating circumstances, establishing "sufficient aggravating circumstances" to call for a death sentence, and that the mitigating circumstances are insufficient to outweigh the aggravating circumstances. Fla. Stat. § 921.141 (3). Florida law clearly requires every "element of the offense" to be alleged in the information or indictment. In State v. Dye, 346 So. 2d 538, 541 (Fla. 1977), this Court said "[a]n information must allege each of the essential elements of a crime to be valid. No essential element should be left to inference." Further, in State v. Gray, 435 So. 2d 816, 818 (Fla. 1983), this Court stated "[w]here an indictment or information wholly omits to allege one or more of the essential elements of the crime, it fails to charge a crime under the laws of the state," an indictment in violation of this rule cannot support a conviction; the conviction can be attacked at any stage, including "by habeas corpus". Gray, 435 So. 2d at 818.

It is impossible to know whether the grand jury in this case would have returned an indictment alleging the presence

of aggravating factors, sufficient aggravating circumstances, and insufficient mitigating circumstances, and thus charging Mr. Davis with a crime punishable by death. The State's authority to decide whether to seek the execution of an individual charged with a crime hardly overrides-in fact-is an archetypical reason for the constitutional requirement of neutral review of prosecutorial intentions. See e.g., United States v. Dionisie, 410 U.S. 19, 33 (1973); Wood v. Georgia, 370 U.S. 375, 390 (1962).

The Sixth Amendment requires that "[i]n all criminal prosecutions, the accused shall . . be informed of the nature and cause of the accusation . . ." A conviction on a charge not made by the indictment is a denial of due process of law. State v. Gray, supra, citing Thornhill v. Alabama, 310 U.S 88 (1940), and DeJonge v. Oregon, 299 U.S. 353 (1937). By wholly omitting any reference to the aggravating circumstances that would be relied upon by the State in seeking a death sentence, the indictment prejudicially hindered Mr. Davis "in the preparation of a defense" to a sentence of death. Fla. R. Crim. P. 3.140(o).

3. JURY CONSIDERATION OF AN INVALID AGGRAVATOR.

At Mr. Davis' penalty phase, the jury was instructed, over defense counsel's objection, on the avoiding or preventing a lawful arrest aggravating factor. (R. 1550, T. 14). The State specifically informed the jury that it was "limited in a presentation during this part of the trial to

only those aggravating circumstances that apply as a matter of law." (R. 1550)(emphasis added).

However, after the jury recommendation, the State receded from this aggravating factor in its argument to the court. (R. 1622-23; see also Claim V, B). In its sentencing order, the lower court did not find the existence of this aggravator. (R. 269-73).

Ring requires that the jury make the unanimous finding that a capital defendant be sentenced to death based on valid aggravating factors. Because Mr. Davis' jury considered an invalid aggravating factor, he is entitled to relief.

4. FINDING OF PRIOR CONVICTION OF A CRIME OF VIOLENCE.

In Mr. Davis' case, the jury was erroneously presented with prior violent felony aggravators. Mr. Davis' prior conviction for a "crime of violence" was in actuality a juvenile adjudication, which is not a "conviction" within the meaning of 921.141(5)(b), Florida Statutes. and does not constitute a prior violent felony (See Claim III). Additionally, the jury was improperly instructed and the trial court improperly found that Mr. Davis' contemporaneous conviction for robbery constituted the aggravating circumstance of conviction of a prior violent felony (See Claim IV). In light of these circumstances, Mr. Davis is certainly entitled to relief.

5. Conclusion

Mr. Davis' sentence of death stands in violation of the

Sixth and Eighth Amendments. Based on the foregoing, Mr. Davis respectfully requests that his sentence of death as well as the advisory sentence be vacated in light of Ring v. Arizona and a life sentence imposed. At the very least, a re-sentencing proceeding that comports with the Sixth Amendment as explained by Ring v. Arizona is required.

CLAIM III

THE TRIAL COURT IMPROPERLY USED MR. DAVIS' JUVENILE ADJUDICATION TO FORM THE BASIS OF THE AGGRAVATING CIRCUMSTANCE OF A CONVICTION OF A PRIOR VIOLENT FELONY. MR. DAVIS' DEATH SENTENCE VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS. APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE THIS ISSUE.

During the penalty phase charge conference, defense counsel objected to the State's attempt to use a juvenile adjudication as a prior violent felony:

> [I]t is my understanding the attempted armed robbery alluded to in paragraph 2A that I've just referred to was, in fact a juvenile offense by the defendant and, hence, cannot be considered a crime.
>
> And, accordingly, **I would object** to that portion of the instruction set forth in 2A and would request the Court secure from the prosecution some kind of offer of proof so we can resolve this matter prior to the jury being seated in this cause.

(R. 1493)(emphasis added). The State responded as follows:

> The real issue we come down to was it was a prior juvenile armed robbery, if that precludes that from being given as an aggravating factor. I've researched this and **there's no case on point that says you can use prior juvenile and there's no case that says you cannot use them.**

(R. 1494)(emphasis added). The State proceeded to cite to several cases where juvenile records were admitted as rebuttal evidence, not as aggravating circumstances. (R. 1494-5).

Subsequently, defense counsel argued:

> The cases they've mentioned in open court in reference to this issue doesn't really seem to be on point. They could well be factually distinguishable. For instance, they indicated a juvenile record was to rebut a psychologist. Who knows, maybe the door was opened for that type of evidence. We have not arrived at a point where the defense has opened the door for the presentment --.

(R. 1496-7). Despite the fact that the "conviction" in question related to a juvenile adjudication, the State persisted in its argument and handed a copy of the judgment and sentence to both the Court and defense counsel. (R. 1497-8). Upon receiving these documents, the following occurred:

> MR. WHITE: It appears as though all of these documents relate to the attempted armed robbery as a juvenile.
> MS. McKEOWN: That is it. I have the records here, Mr. White, if you wish to review these.
> MR. WHITE: Obviously I'm not objecting to the authenticity of the documents, **I'm objecting on the admissibility of this whole business of attempted armed robbery as a juvenile.**

(R. 1498)(emphasis added). The court permitted the introduction of the juvenile adjudication based on the State's argument that such adjudications were admissible as a prior violent felony aggravator:

> THE COURT: All right. That's going to be given as written. **Let the record be clear I am aware of juvenile status but I'm relying on cases presented to me by the State of Florida.**
> MS. McKEOWN: The Judge has had an opportunity to review those cases because as Mr. James indicated they are not directly on point but being argued by way of analogy.
> THE COURT: I understand that. What else do we have.

(R. 1499) (emphasis added).

During the penalty phase, the State introduced the

judgment and sentence from the State of Illinois whereby Mr. Davis was sentenced for an attempted armed robbery in 1980, when he was 16 years old. (R. 1509).[7] Then, Officer Craig Salmon of the Pekin, Illinois Police Department testified, in detail, of the attempted armed robbery in which Mr. Davis was adjudicated in 1980. (R. 1510-16).[8]

Prior to its deliberations, the jury was instructed as follows:

> The aggravating circumstances that you may consider are limited to any of the following that are established by the evidence . . . .
> A, the (crime) of attempted armed robbery which occurred in the past (is a felony) involving the use or threat of violence to another person.

(R. 1578).

After the penalty phase, where the jury recommended death by an 8-4 vote, the State apparently realized its mistake in arguing a juvenile adjudication as a prior violent felony. This is evidenced by the fact that during the sentencing hearing, the State made a desperate attempt to then demonstrate that the juvenile adjudication was in fact a prior

---

[7]Defense counsel renewed his previous objection (R. 1509).

[8]Again, defense counsel raised an objection: “May it please the Court, I believe that Officer, or Detective Salmon is going to give testimony related to the juvenile attempted armed robbery that I’ve heretofore objected to as it related to the records that have now been placed in evidence. Accordingly, I would move -- to be consistent with that objection I would move to exclude his testimony as it would relate to that particular incident based upon the same legal arguments that I presented when I objected to the documentation of that juvenile offense.” (R. 1509-10).

violent felony. The State was allowed to "supplement the record" by introducing the testimony of Scott Hopkins (R. 1602), an investigator with the State Attorney's Office, as well as records from Illinois. Mr. Hopkins' testimony, in essence, was that, based on his inquiries, Mr. Davis was tried as an adult for the attempted armed robbery charge and not adjudicated a delinquent (R. 1602-9).

Defense counsel introduced documents contradicting Mr. Hopkins' testimony and also pointed out the drastic change in the State's argument:

> The second part of this composite exhibit is, in effect, a copy of an affidavit from that clerk's office saying these are all the records of the particular files in question. And then, thirdly, of course the official statement of the State Attorney and Judge was another part of all the documentation I got. There is a lot more documentation I got, but I put a copy of the envelope and a copy of the official statement of the State Attorney and Judge together just to show the bonaficity of the last document being a statement that reflects 80-Y911 was, in fact, a juvenile delinquency case. **And I point out when the State first postured themselves in penalty cases they didn't at that time try to make adult offenses. They tried to convince you that acts of delinquency were admissible to show prior criminal history or rebut any suggestion to the contrary. It is today they are, in effect, kind of reviewing this posture and are now trying to convince you this was not an act of delinquency, that it was an adult conviction.**

(R. 1619-20)(emphasis added).

The documentation to which defense counsel was referring, and which was admitted into evidence, was titled Official Statement of State's Attorney and Judge, proves otherwise. Under the heading of Previous Criminal Record and referring to Mr. Davis' 1980 attempted armed robbery:

> The Defendant was **adjudicated a delinquent as a juvenile** in Tazwell County. Tazwell Co. Case #80-Y-991 - 5-9-80 - Attempt (Armed Robbery)

(R. 1690, Def. Tr. Ex. #1). With regard to the records the State introduced, defense counsel stated:

> I would simply object to these records on the basis they add nothing but confusion to the status of this case under decision. Case 80-Y911 is reflected from these records of the Department of Corrections, but these are not clerk records and they're inconsistent with the records I presented to the Court from the clerk's office. You know I'm just of the position that something from the Department of Corrections is not particularly material or relevant and does nothing to clear up this cloudy issue, and to that extent I object.

(R. 1632-3). It was disingenuous for the State to argue that Mr. Davis' 1980 adjudication for attempted armed robbery was a conviction, thus making it eligible to be used as an aggravator. Court documents, including those accepted by the court at trial, lead to a contrary conclusion. There is nothing in those records that prove, beyond a reasonable doubt, that Mr. Davis was adjudicated an adult. Thus, neither the documents nor Officer Salmon's testimony should have been admitted nor should have this adjudication been used as an aggravator. In fact, the aforementioned document entered into evidence by defense counsel makes clear that Mr. Davis was adjudicated a delinquent and not convicted of a felony.

After further argument by the defense (R. 1634-5), the court orally sentenced Mr. Davis to death, relying in part on Mr.

Davis' juvenile adjudication as an aggravator:

> In this case the aggravating factors far outweigh the mitigating factors. And just briefly recapping that . . . when you look at the prior record and the attempted armed robbery . . . you come to (a) particular aggravating (factor) that stand(s) out in this particular case.

(R. 1642). It was improper for the trial court to allow Mr. Davis' juvenile adjudication to form the basis of the aggravating circumstance of conviction of a prior violent felony, because a juvenile adjudication is not a "conviction" within the meaning of 921.141(5)(b), Fla. Statutes. In Merck v. State, 664 So.2d 939, hn 7 (Fla. 1995), this Court stated:

> [j]uvenile adjudication was not a "conviction" within meaning of statute making a prior conviction of a capital felony or felony involving the use of or threat of use of violence to a person aggravating circumstance supporting imposition of death penalty.
>
> * * *
>
> As noted in *Trotter*, penal statutes must be strictly construed in favor of the one against whom a penalty is imposed. *Id.* At 694. We therefore conclude as we did in *Trotter*, that a resentencing is required.

Id at 943. It was also improper for both the sentencing jury and judge to consider this prior juvenile adjudication in sentencing Mr. Davis to death.[9] It was error for the trial court to instruct the jury to consider this aggravating circumstance, which, as a matter of law, did not apply. Atkins v. State, 452 So. 2d 529 (Fla. 1984). See Kearse v. State, 662

[9]It was not until his written sentencing order where the judge, for the first time, erroneously concluded that "although the Defendant was 16 years of age at the time, he was not adjudicated delinquent, but rather convicted of the crime and sentenced to the Department of Corrections as an adult." (R. 269-70)

So. 2d 677 (Fla. 1995); See also Donaldson v. State, 722 So. 2d 77 (Fla. 1988). It cannot be said that the testimony concerning the Illinois attempted armed robbery and the fact that it was considered as an aggravator did not taint the recommendation of the jury.

Despite the fact that this issue was properly preserved at trial, appellate counsel failed to raise it on appeal. But for counsel's deficiencies, Mr. Davis would have received penalty phase relief. This error requires that Mr. Davis be resentenced.

CLAIM IV

THE JURY WAS IMPROPERLY INSTRUCTED AND THE TRIAL COURT IMPROPERLY FOUND THAT MR. DAVIS' CONTEMPORANEOUS CONVICTION FOR ROBBERY CONSTITUTED THE AGGRAVATING CIRCUMSTANCE OF A CONVICTION OF A PRIOR VIOLENT FELONY. MR. DAVIS' DEATH SENTENCE VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS. APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE THIS ISSUE.

During the charge conference, the State argued that the robbery of Mr. Landis could be used as an aggravating circumstance and defense counsel objected, "We're objecting to the instant armed robbery of Orville Landis of being the basis for instruction number two... (Vol. XI, T. 12-13).[10] Over counsel's objection, the trial court instructed the jury to consider its conviction of Mr. Davis for robbery of Orville Landis as an aggravating circumstance:

Second, that the defendant has been previously convicted

---

[10]Defense counsel later renewed his objections to the penalty phase instructions. (R. 1576).

> of another capital offense or of a felony involving the use or threat of violence to some person.
>
> A, the crimes of attempted armed robbery which occurred in the past, and B, armed robbery which occurred during this episode are felonies involving the use or threat of violence to another person.

(R. 1578). Subsequently, the court's sentencing order found:

> (b) That the Defendant, MARK A. DAVIS, has been previously convicted of another capital offense or felony involving the use or threat of violence to some person.
>
> (i) This court specifically finds, based upon the evidence, that the Defendant has been convicted of the crime of Attempted Armed Robbery. The Attempted Armed Robbery was a felony involving the use or threatened use of violence to another person and that although the Defendant was 16 years of age at that time, he was not adjudicated delinquent, but rather convicted of the crime and sentenced to the Department of Corrections as an adult. Additionally, Defendant was found guilty of Robbery by the Jury herein which found him guilty of Murder in the First Degree.

(R. 270).

Florida law clearly prohibits the consideration of a contemporaneous robbery of a murder victim as an aggravating circumstance for the murder of that victim. Bruno v. State, 574 So. 2d 76 (Fla. 1991)(holding that conviction of robbery of murder victim could not be used to establish the aggravating circumstance of prior violent felony); Schafer v. State, 537 So. 2d 988 (Fla. 1989)(holding that conviction of robbery of murder victim could not be used to establish the aggravating circumstance of prior violent felony).

In United States v. Tucker, 404 U.S. 443, 447-49 (1972), the Supreme Court held that a sentence in a noncapital case must be set aside as a violation of due process if the trial

court relied even in part upon "misinformation of constitutional magnitude," such as prior uncounseled convictions that were unconstitutionally imposed. In Zant v. Stephens, 462 U.S. 879 (1983), the Supreme Court made clear that the rule of Tucker applies with equal force in a capital case. Id. at 887-88 and n.23. Accordingly, Stephens and Tucker require that a death sentence be set aside if the sentencing court relied on a prior unconstitutional conviction as an aggravating circumstance supporting the imposition of a death sentence.

Despite the fact that this issue was properly preserved at trial, appellate counsel failed to raise it on appeal. But for counsel's deficiencies, Mr. Davis would have received penalty phase relief. This error requires that Mr. Davis be resentenced.

CLAIM V

THE JURY WAS IMPROPERLY INSTRUCTED AND THE TRIAL COURT IMPROPERLY CONSIDERED INVALID AGGRAVATING CIRCUMSTANCES IN VIOLATION OF MR. DAVIS' EIGHTH AND FOURTEENTH AMENDMENT RIGHTS. APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE THIS ISSUE.[11]

A. DUPLICATIVE AND AUTOMATIC AGGRAVATING FACTORS

Mr. Davis' jury was instructed to consider three duplicative aggravating factors. The prosecutor argued that each of these three aggravating circumstances existed, based on a single aspect of the crime, the robbery of Orville

[11]Petitioner discusses the improper use of the prior violent aggravators in Claims III and IV.

Landis. (R. 1552-1556).

The trial court found these three duplicative aggravating circumstances: that the armed robbery for which Mr. Davis was convicted in a separate count of the indictment was a prior violent felony, that the crime was committed while Mr. Davis was engaged in the commission of a robbery, and that the crime was committed for financial gain (R. 270).

This Court has consistently held that "doubling" or "tripling" of aggravating circumstances is improper. See Richardson v. State, 437 So. 2d 1091 (Fla. 1983); Provence v. State, 337 So. 2d 783, 786 (Fla. 1976); Clark v. State, 379 So. 2d 97, 104 (Fla. 1980).

The jury was allowed to rely upon these duplicative aggravating circumstances in reaching a recommendation for death. This "tripling" rendered Mr. Davis' capital sentencing proceeding fundamentally unreliable and unfair.

Additionally, the use of these duplicative aggravators violated Mr. Davis' Eighth and Fourteenth Amendment rights because it allowed the jury to consider aggravating circumstances which applied automatically to Mr. Davis' case because they had convicted Mr. Davis on the basis of the state's theory of felony murder during the guilt phase of the trial ("He did it in the process of a robbery....")(R. 905-08).

None of these aggravators, either considered separately, or "merged" as the court claimed was appropriate, should have

been considered by the jury or found by the court, as none of them served to channel and guide the jury's discretion in sentencing because the state relied on the felony murder theory during the guilt phase of the trial.

The prosecutor's argument for the application of the aggravating circumstance of "committed while engaged in the commission of the crime of robbery" (R. 1553) urged the jury to find this aggravating circumstance automatically:

> The third aggravating factor which you may consider is the crime for which the defendant is to be sentenced was committed while he was engaged in the commission of the crime of robbery. During voir dire we talked a little bit about the fact that the Legislature has deemed certain crimes, violence, robberies, sexual batteries, kidnapping to be inherently dangerous to human lives in and of themselves. If a death occurs it's first degree felony murder. The law then says that that constitutes an additional aggravating factor. The fact that this death occurred during a robbery is an aggravating factor which you may consider in determining whether or not the death penalty is an appropriate sentence in this case.
>
> Ladies and gentlemen, **by your verdict you have concluded beyond and to the exclusion of a reasonable doubt that he was, in fact, involved in a robbery at the time of the offense.**

(R. 1553)(emphasis added).

The use of the underlying felony, robbery, as a basis for any aggravating factor, rendered those aggravating circumstances "illusory" in violation of Stringer v. Black, 112 S. Ct. 1130 (1992). Due to the outcome of the guilt phase, the jury's consideration of automatic aggravating circumstances served as a basis for Mr. Davis' death sentence.

The use of these automatic aggravating circumstances did not "genuinely narrow the class of persons eligible for the

death penalty," Zant v. Stephens, 462 U.S. 862, 876 (1983); therefore, the sentencing process was unconstitutionally unreliable. Id. Defense counsel specifically objected to this instruction, "[i]t makes no logical sense to me to instruct them that those contemporaneous acts, essential elements to both offenses [sic], can create a compounding of the situation by adding another aggravating circumstance to this case" (R. 1491). Counsel argued further:

> I would further point out that this particular issue we're dealing with right now is set forth in paragraph number two of page three of proposed jury instruction. If you look at paragraph number three of the same set of instructions it states, "the crime for which the defendant is to be sentenced was committed while he was engaged in the commission of the crime of robbery." So, now, all of a sudden we've got him being -- getting two aggravating circumstances out of one factual situation. Then we go down to paragraph five which follows and it says, "The crime for which the defendant is to be sentenced was committed for financial gain." **Financial gain was a component of the felony murder theory presented by the state. So, now we have him being penalized three times for the same activities he did before**.

(R. 1491-92)(emphasis added). This objection was overruled and the automatic aggravating circumstances were considered.[12]

The result of these errors was an improper capital sentence. However, despite the preservation of this issue by trial counsel, appellate counsel failed to raise this issue on appeal. But for counsel's deficient performance, Mr. Davis would have received penalty phase relief. Habeas relief is

[12]Trial counsel also raised this issue in a pre-trial motion. (R. 24).

warranted.

B. AVOIDING OR PREVENTING A LAWFUL ARREST.

Mr. Davis' jury was instructed to consider the following aggravating circumstance:

> Fourth, the crime for which the defendant is to be sentenced was committed for the purpose of avoiding or preventing a lawful arrest or affecting an escape from custody.

(R. 1578-79). However, the trial court found that this aggravating circumstance did not exist (R. 270-71).

The court erred by instructing the jury that it could consider an aggravating circumstance which as a matter of law did not apply in Mr. Davis' case. There was virtually no evidence presented by the state to support this aggravator, yet the instruction was given over defense counsel's objection (Vol. XI, T. 13-14).

The prosecution mislead the jury into believing that all the aggravators which it would be instructed to consider had been determined to apply as a matter of law. The prosecutor argued:

> The State is limited in a presentation of its evidence during this part of the trial to **only those aggravating circumstances that apply as a matter of law.**

(R. 1550)(emphasis added).

Aggravating circumstances must be proven beyond a reasonable doubt. The trial court found that the state failed to prove the existence of the "avoiding arrest" aggravating circumstance. Therefore it was error for the trial court to

instruct the jury to consider this aggravating circumstance. Atkins v. State, 452 So. 2d 529 (Fla. 1984). See also Kearse v. State, 662 So. 2d 677 (Fla. 1995).

Since this aggravating circumstance did not apply as a matter of law, it was error for this aggravating circumstance to be submitted for the jury's consideration over objection. Omelus v. State, 584 So. 2d 563 (Fla. 1991)(error to instruct the jury on an aggravator which as a matter of law did not apply). See Archer v. State, 613 So. 2d 446, 448 (Fla. 1993).[13] The jury's consideration of this invalid aggravator in its sentencing calculus deprived Mr. Davis of a meaningful individualized sentencing.

Additionally, after the jury recommendation, the State receded from this aggravating factor in its argument to the court:

> The fourth aggravating factor I have down here is one the Court may consider, but may also reject based on the testimony. It is that this was committed for the purpose of preventing a lawful arrest. I would suggest to the Court there is evidence in the record that suggests that this, in fact, was committed for the purpose, as well as many other purposes, but one of the purposes was to prevent Orville Landis from coming into a court at a later time and pointing a finger at him as the man who robbed him. **However, I acknowledge and we placed in our memorandum of law the fact that the law, certain law of the Florida Supreme Court, is that the evidence must be very strong that the overriding motive was to eliminate the victim as a witness.** As I indicated to the Court, the evidence essentially suggests that whether or not the

[13]In Omelus and Archer, this Court ordered new penalty phase proceedings where juries were instructed on an aggravating circumstance over objection and where the aggravating circumstance did not apply as a matter of law.

> Court finds we have proven it beyond and to the exclusion of a reasonable doubt is a finding that the Court may consider, **but we may not have clearly established.**

(R. 1622-2)(emphasis added).

As defense counsel pointed out,

> Then we get to the one that the State is kind of chameleonic about, the waiver, the one instance **they tried to get the Court to make a finding that this homicide was committed to kill a witness and to effect my client's escape. But they waivered on that**, and I would point out to the Court that if you were to have cases to read, the total case law on this particular aggravating factor, you would find, **and I believe the State already conceded it**, that for a finding that this particular aggravating factor has been proven beyond a reasonable doubt must encompass that it was the dominant theme of the homicide and clearly that would harm the prosecution of this case which was that the killing of Mr. Landis was a part of an armed robbery, and I would certainly urge the Court to avoid error, but not finding that circumstance has been proven beyond a reasonable doubt as required by law.

(R. 1636-7)(emphasis added).

Where facts fail to establish that the dominant or only motive for the homicide was the elimination of witnesses, the avoiding arrest aggravator is improper. Menendez v. State, 368 So. 2d 1278 (Fla. 1979), appeal after remand, 419 So. 2d 312 (Fla. 1982), 366 So. 2d 19 (Fla. 1978). Accord Clark v. State, 443 So. 2d 973, 977 (Fla. 1983); Pope v. State, 441 So. 2d 1073, 1076 (Fla. 1983). It is impossible for the State to prove beyond a reasonable doubt that the primary motive for the killing was pecuniary gain, and at the same time prove beyond a reasonable doubt that the sole or dominant motive for the killing was elimination of a witness. That a sentencing court could instruct a jury to consider and/or find both

aggravating factors illustrates the point that the aggravating factors and the jury instructions are vague and overbroad.

This is precisely the argument made by Mr. Davis' defense attorney during the charge conference:

> I would object. I think the philosophy of my learned opponent was the gentleman was killed during the course of a robbery and the killing was force or violence utilized to take the money from his person. You can't have it both ways.

(T. 14).

The fact that the court did not find the existence of this aggravating circumstance does not render the error of a vague instruction harmless. Kearse v. State, 662 So. 2d 677 (Fla. 1995). In Florida, neither the judge nor the jury is permitted to weigh invalid aggravating factors. Espinosa, 112 S. Ct. at 2929. As the Supreme Court has explained, the jury is unlikely to disregard a flawed legal theory and therefore instructing the jury to consider an invalid aggravating circumstance is not harmless error. Sochor, 112 S. Ct. at 2122.

Mr. Davis was denied a reliable and individualized capital sentencing determination, in violation of the Sixth, Eighth, and Fourteenth Amendments. However, despite the preservation of this issue by trial counsel, appellate counsel failed to raise this issue on appeal. But for counsel's deficient performance, Mr. Davis would have received penalty phase relief.

C. COLD, CALCULATED, AND PREMEDITATED

Additionally, the Court did not instruct Mr. Davis' jury regarding the cold, calculated, and premeditated aggravating factor in accordance with this Court's limiting construction. Jackson v. State, 648 So. 2d 85 (Fla. 1994). This Court has adopted several limiting instructions regarding this aggravating factor. This Court has held that the jury should be instructed on the limiting constructions of this aggravating circumstance, whenever they are allowed to consider it. The instruction authorized by this Court reads as follows:

> The crime for which the defendant is to be sentenced was committed in a cold, calculated and premeditated manner without any pretense or moral or legal justification. In order for you to consider this aggravating factor, you must find the murder was cold, and calculated, and premeditated, and that there was no pretense of moral or legal justification. 'Cold' means the murder was the product of calm and cool reflection. 'Calculated' means the defendant had a careful plan or prearranged design to commit the murder. 'Premeditated' means the defendant exhibited a higher degree of premeditation than that which is normally required in a premeditated murder. A 'pretense of moral or legal justification' is any claim of justification or excuse that, though insufficient to reduce the degree of homicide, nevertheless rebuts the otherwise cold and calculating nature of the homicide.

Jackson, 648 So. 2d at 90. Mr. Davis' jury was instead given an invalid instruction on the cold, calculated and premeditated aggravating circumstance:

> [T]he crime for which the defendant is to be sentenced was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification.

(R. 1578-79). The instruction given to Mr. Davis' jury violates this Court's decision in Jackson, the United States

Supreme Court decisions in Espinosa v. Florida, 112 S. Ct. 2926 (1992); Stringer v. Black, 112 S. Ct. 1130 (1992); Sochor v. Florida, 112 S. Ct. 2114 (1992); Maynard v. Cartwright, 486 U.S. 356 (1988), and the Eighth and Fourteenth Amendments to the United States Constitution.

The only instruction the jury ever received regarding the definition of "premeditated" was the instruction given at the guilt phase regarding the premeditation necessary to establish guilt of first-degree murder. As this Court has held, this definition does not define the "cold, calculated and premeditated" aggravating factor. See Rogers v. State, 511 So. 2d 526, 533 (Fla. 1987); Gorham v. State, 454 So. 2d 556 (Fla. 1984). Under these circumstances, it must be presumed that the erroneous instruction tainted the jury's recommendation, and in turn the judge's death sentence, with Eighth Amendment error.

This aggravating factor and instruction was overbroadly applied, see Godfrey v. Georgia, 446 U.S. 420 (1980); Maynard v. Cartwright, 486 U.S. 356 (1988), failed to genuinely narrow the class of persons eligible for the death sentence, see Zant v. Stephens, 462 U.S. 862, 876 (1983), and did not apply as a matter of law. As a result, Mr. Davis' death sentence was imposed in violation of the Eighth and Fourteenth Amendments to the United States Constitution. Given that defense counsel raised this issue at the trial level (R. 25), appellate counsel was ineffective for failing to raise this issue on

appeal.[14]

D. PECUNIARY GAIN.

The jury in Mr. Davis' case was instructed that it could find as an aggravating factor that the murder was committed for the purpose of financial gain (R. 1579). This Court has repeatedly held that in order for this aggravator to be applicable, it must be proven beyond a reasonable doubt. Scull v. State, 533 So. 2d 1137, 1142 (Fla. 1988); Rogers v. State, 511 So. 2d 526, 534 (Fla. 1987). This aggravating factor and the resulting instruction are not supported by the evidence. See Rogers; Simmons v. State, 419 So. 2d 316 (Fla. 1982). The instruction given to the jury was also vague under the Eighth and Fourteenth Amendments to the United States Constitution. It was impossible for the State to prove beyond a reasonable doubt that the primary motive for the killing was pecuniary gain, and at the same time prove beyond a reasonable doubt that the sole or dominant motive for the killing was elimination of a witness or avoiding arrest. That a sentencing court would allow the jury to consider both aggravating factors illustrates the point that the aggravating factors and the jury instructions are vague and overbroad. Defense counsel made precisely this objection during the charge conference (Vol. XI, T. 14). Defense counsel argued

[14]Although appellate counsel raised this issue as to the applicability of the instruction, he failed to raise the issue as to the vagueness of the instruction.

that the state should not be allowed to "**have it both ways**" (Vol. XI, T. 14)(emphasis added).

Without the complete instruction, the statute setting forth the "pecuniary gain" aggravating factor is facially vague and overbroad because it fails to adequately inform the sentencer what must be found for the aggravator to be present. The trial court found the existence of this aggravating factor, but did not apply the required construction (R. 270). In fact, the sentencing court found that this aggravating circumstance existed without setting forth any basis for the finding whatsoever. This was error.

Mr. Davis' jury was given the following instruction: "Five, the crime for which the defendant is to be sentenced was committed for financial gain." (R. 1579). The jury was never instructed that the state carried a burden of proving that the "primary motive" element of this aggravating circumstance existed beyond a reasonable doubt.

Such instruction violates Espinosa v. Florida, 112 S. Ct. 2926 (1992); Stringer v. Black, 112 S. Ct. 1130 (1992); Sochor v. Florida, 112 S. Ct. 2114 (1992); Maynard v. Cartwright, 108 S. Ct. 1853 (1988), and the Eighth and Fourteenth Amendments to the United States Constitution. Appellate counsel was ineffective for failing to raise this issue.

CLAIM VI

THE INTRODUCTION OF VICTIM IMPACT EVIDENCE DURING THE GUILT PHASE OF MR. DAVIS' CASE WAS SIXTH, EIGHTH AND FOURTEENTH AMENDMENT ERROR. APPELLATE COUNSEL WAS

INEFFECTIVE FOR FAILING TO RAISE THIS ISSUE ON APPEAL.

During the guilt phase of Mr. Davis' trial, the State introduced the testimony of the victim's son-in-law, Raymond Hansbrough (R. 1004-1010). Mr. Hansbrough's testimony was a "backdoor" way of entering victim impact testimony. Because Mr. Hansbrough's testimony exceeded the limited relevant purpose for which he was called to testify (the amount of money the victim had on the day of the crime), it violated the restrictions placed on victim impact testimony because it was not limited to the victim's uniqueness and the loss to the community's members by the victim's death. Through Mr. Hansbrough's testimony, the jury was able to hear details of his family (that the victim had seven children-five girls and two boys) (R. 1005); his nickname (Skip) (R. 1005); the fact that he had a little dog (R. 1006); and his former occupation (retired from Government, worked for NASA)(R. 1010). This testimony was violative of victim impact evidence and was prejudicial to Mr. Davis' case.

Section 921.141(7) reads:

> Once the prosecution has provided evidence of the existence of one or more aggravating circumstances . . . the prosecution may introduce, and subsequently argue, victim impact evidence. Such evidence shall be designed to demonstrate the victim's uniqueness as an individual human being and the resultant loss to the community's members by the victim's death. Characterizations and opinions about the crime, the defendant, and the appropriate sentence shall not be permitted as part of victim impact evidence.

See Windom v. State, 656 So. 2d 432 (Fla. 1995)(reiterating

the scope of victim impact evidence, stating, "[v]ictim impact evidence must be limited to that which is relevant as specified in (section) 921.141(7)").

Appellate counsel raised a victim impact issue regarding the statement by the victim's daughter at the sentencing hearing. See Davis, 586 So. 2d at 1040-41. This Court found the error harmless, in part, because, "Relevant to that analysis is the fact that the jury was not exposed to the improper evidence of victim impact, yet recommended death." Id at 1041.

Here, the jury was in fact exposed to the impermissible victim impact testimony. Appellate counsel's failure to raise the issue regarding the testimony of Raymond Hansbrough during the guilt phase constitutes ineffective assistance of counsel.

CLAIM VII

MR. DAVIS' RIGHTS TO AN INDIVIDUALIZED AND CASE-SPECIFIC SENTENCE WERE VIOLATED BY THE TRIAL COURT'S FAILURE TO FILE WRITTEN FINDINGS IN SUPPORT OF THE SENTENCE OF DEATH IN ACCORDANCE WITH THE REQUIREMENTS OF FLORIDA LAW. MR. DAVIS' DEATH SENTENCE VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS. APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE THIS ISSUE ON APPEAL.

At the court's sentencing hearing which was held one week following the jury's recommendation of death, the judge rendered conclusions from the bench regarding the application of the aggravating circumstances. The court indicated that it would be entering a written opinion setting forth findings in

regard to the mitigating circumstances (R. 1641). Defense counsel asked for a timely copy of the written findings (R. 1642) and the court responded that they could only have the findings at the time they were filed and that the court was "certainly not going to submit it on the five-day rule" (R. 1642).

Then the court proceeded to state findings regarding aggravating circumstances, but not mitigating circumstances (R. 1641-45). Despite the court's concession that it had not considered the mitigating circumstances or made findings regarding them, the court delivered its sentence of death (R. 1641-45). It was over six weeks before the court filed written findings regarding the mitigating and aggravating circumstances (R. 269-73).

Section 921.141(3) of the Florida Statutes states:

> In each case in which the court imposes the death sentence, the determination of the court shall by supported by specific written finding of fact based upon the [aggravating and mitigating circumstances] and upon the records of the trial and sentencing proceedings. If the court does not make the findings requiring the death sentence, the court shall impose sentence of life imprisonment.

This requirement is met when the written orders imposing a death sentence are prepared prior to the oral pronouncement of sentence for filing concurrent with the pronouncement. See Grossman v. State, 525 So. 2d 833, 841 (Fla. 1988).[15] The

[15]Petitioner acknowledges that Grossman, which has only been applied prospectively, proceeded Mr. Davis' trial. Petitioner contends, however, that the court's failure to adhere to the

purpose of this requirement of contemporaneousness is to implement the intent of the Legislature to ensure that written reasons are not merely after-the-fact rationalizations for the decision to impose death. Hernandez v. State, 621 So. 2d 1353, 1357 (Fla. 1993).

Appellate counsel's failure to litigate this issue denied Mr. Davis the effective assistance of counsel.

CLAIM VIII

MR. DAVIS' CONVICTION FOR ROBBERY WAS NOT APPROPRIATE AS THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT SUCH A CONVICTION AND ANY AGGRAVATORS STEMMING FROM THAT CONVICTION. MR. DAVIS' SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS WERE VIOLATED AND HIS APPELLATE COUNSEL WAS INEFFECTIVE.

At Mr. Davis' capital trial there was insufficient evidence to support a robbery with a weapon conviction. In Mahn v. State, this Court held:

> While the taking of property after the use of force can sometimes establish a robbery we have held that the taking of property after a murder, where the motive for the murder was not the taking of property, is not a robbery.

714 So. 2d 391, 397 (Fla. 1998).

In Mr. Davis' case, trial counsel abandoned Mr. Davis' defense of self defense by arguing to the jury that this was not his theory (R. 1431; see also PC-R. 707-8). However, Mr. Davis' claimed that the homicide occurred after he requested to borrow money from the victim and the victim grabbed him in

---

aforementioned procedure violates Mr. Davis' eighth and fourteenth amendment rights.

a sexual manner prompting a fight between the two. During the fight, the victim grabbed a knife and Mr. Davis was able to take the knife away from the victim and use it in the homicide. The motive of the homicide was not the taking of property but one of self defense and a frenzy due to Mr. Davis' mental state and intoxication.

The taking of property was an afterthought. Mr. Davis' actions were of "flight" not fancy. He took the victim's car in order to leave the scene and until he found further transportation, by bus, to continue his flight. In fact, Mr. Davis stayed at a hotel in Tampa, awaiting the first bus to Naples, the next morning, rather using the victim's car any further. These actions were not of a defendant who planned to rob the victim, but only thought to take money and the car after the fight occurred so that he could flee. Mr. Davis' travel demonstrate that he used the items taken from the victim to leave town – including all of the money. The State did not exclude Mr. Davis' hypothesis of his motive.

The State also told the jury that they had heard no evidence that Mr. Davis carried a knife with him when he arrived atthe victim's motel room (R. 1401). However, contrary to the jury instructions, the State informed the jury that they could find that Mr. Davis armed himself in the course of the robbery.

The jury found Mr. Davis guilty of robbery with a deadly weapon which is contrary to the evidence. Thus, the trial

court erred in failing to deny Mr. Davis motion for directed verdict.

The State did not prove that Mr. Davis carried a knife with him when he went to the victim's motel room. Rather, Mr. Davis obtained the knife during a struggle with the victim when no robbery was in progress or intended. The record demonstrates that the taking of the money and car were an afterthought.[16]

Appellate counsel was ineffective in failing to raise this claim on direct appeal. Relief is proper.

CLAIM IX

MR. DAVIS WAS DENIED HIS RIGHT TO BE PRESENT AT ALL CRITICAL STAGES OF HIS CAPITAL TRIAL IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION. APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO PROPERLY RAISE THIS ISSUE ON APPEAL.

The principle argument of whether or not Mr. Davis was present during jury selection and the exercise of peremptory challenges which resulted in eleven of the twelve jurors being seated for Mr. Davis' trial was first raised in April, 1989, in Mr. Davis' pro se companion brief on direct appeal. While this Court has addressed this issue previously, this Court may reexamine a claim previously raised if adherence to the previous ruling would result in manifest injustice. Strazzulla v. Hendrick, 177 So. 2d 1, 4 (Fla. 1965).

On direct appeal, this Court ordered than an evidentiary

---

[16]In fact, the amount of money has never been proven and the State has introduced no evidence that a check ever existed.

hearing be conducted to determine if Mr. Davis was present during the jury challenges and if not, whether he waived his presence. The hearing was held in late 1990, before Administrative Judge John Griffin of the Thirteenth Judicial Circuit.

Following the evidentiary hearing, Judge Griffin issued findings on December 1, 1990. Judge Griffin stated that the constitution and Francis v. State, 413 So. 2d 1175 (Fla. 1982), require that a defendant be present at every critical stage of the proceedings, including jury selection and the exercising of peremptory challenges or that a defendant make a knowing and intelligent waiver on the record that. The most incredible aspect of Judge Griffin's order is paragraph number 4. Judge Griffin found that 1) No such waiver had been made by Mr. Davis; 2) The issue of waiver was moot because:

> 4. Also of interest to the court was the testimony of the Defendant that after his conviction in this matter, he met Bobby Marion Francis, Francis v. State, 413 So.2d 1175 (Fla. 1982), while both were in prison. The Defendant admitted on cross-examination that his conversation with Mr. Francis involved the same alleged problem, i.e. Mr. Francis' allegation following his own conviction of having been absent from the courtroom during jury selection. The Defendant in the instant cause further admitted that his pro se motion which triggered the instant proceeding was developed after that conversation with Mr. Francis. Such admission casts grave doubts on the credibility of the Defendant's allegation that he was absent from the courtroom during the jury selection as he has alleged, especially since such allegation has arisen two (2) years post conviction.

(December 1, 1990 order, pg. 3-4).

Judge Griffin’s order as to the second prong of his

findings was in error and completely rebutted by the record. The record reflects that Mr. Davis testified:

> Q. [by Mr. Crow] Were any of those neighbors involved in litigation that involved the same issue that is present in this case?
>
> A. No.
>
> Q. None of those Defendants had that issue?
>
> A. No.
>
> Q. Have you ever met Mr. Francis?
>
> A. Oh, yeah. I talked to him **later after I filed this**.

(R. 1730)(emphasis added).

Incredulously, in his written findings, the lower court made a finding that was no where in the record and directly conflicted with Mr. Davis testimony – the only testimony on this subject.

The factual finding made by Judge Griffin should not have been presumed correct when the actual record contradicts the finding. To accept Judge Griffin's finding has caused a miscarriage of justice.

Mr. Davis was denied his right to be present at all aspects of the jury selection process in violation of the Sixth, Eighth and Fourteenth Amendments to the United States Constitution. See Pointer v. Texas, 380 U.S. 400 (1965); Coney v. State, 653 So. 2d 1009 (Fla. 1995); Francis v. State, 413 So. 2d 1175 (Fla. 1982).

There is no question that Mr. Davis was not present for jury selection. The trial court stated: "Let the record be

clear. The attorney is waiving [Mr. Davis'] presence." (R. 764).

Mr. Davis did not waive his right to be present at this critical stage and the record does not reflect any waiver or acquiescence of his presence or trial counsel's actions. Following the statement by the court, the parties, without Mr. Davis, proceeded to select eleven of the twelve jurors and exercised several challenges.

The record of Mr. Davis' case demonstrates numerous attempts by the defendant, pro se, to have this Court rectify the erroneous decision made on his direct appeal.

Mr. Davis' appellate counsel was ineffective for failing to pursue this issue and bringing the truth to light. Appellate counsel failed to subject the State's case to a meaningful adversarial testing and the result is that this Court presumed correct a finding that is not supported by the record and directly contradicts the testimony presented.

The Cronic standard of ineffectiveness applies to Mr. Davis' case, as to this issue. United States v. Cronic, 466 U.S. 648 (1984). In Cronic, the United States Supreme Court adopted a standard that applies to a narrow spectrum of cases where the defendant is completely denied effective assistance of counsel. See Chadwick v. Green, 740 F.2d 897, 900 (11th Cir. 1984).

This Court has the authority to change the law of the case. Brunner Enterprises v. Dept. of Revenue, 452 So. 2d 550

(Fla. 1984). Likewise, this Court has the power to reconsider and correct erroneous rulings in exceptional circumstances and where reliance on the previous decision would result in manifest injustice, notwithstanding that such rulings have become the law of the case. Preston v. State, 444 So. 2d 939 (Fla. 1984).

This Court should find that Mr. Davis was in fact not present during a critical stage of his proceedings – jury selection – and that his appellate counsel was ineffective. Relief is proper.

CONCLUSION AND RELIEF SOUGHT

For all the reasons discussed herein, Mr. Davis respectfully urges this Court to grant habeas corpus relief.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing PETITION FOR WRIT OF HABEAS CORPUS has been furnished by United States Mail, first-class postage prepaid, to Candance Sabella, Candance Sabella, Senior Assistant Attorney General, Concourse Center #4, 3507 E. Frontage Rd., Tampa, Florida 33607, counsel of record on this ____ day of April, 2004.

CERTIFICATE OF TYPE SIZE AND STYLE

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

_____

LINDA McDERMOTT
Florida Bar No. 0102857
141 N.E. 30th Street
Wilton Manors, Florida 33334
(850) 322-2172
Attorney for Petitioner