IN THE SUPREME COURT OF FLORIDA

CASE NO. SC04-83

BYRON BRYANT,

Petitioner,

-vs-

JAMES CROSBY, as Secretary
for the Florida Department of Corrections,

Respondent.

PETITION FOR WRIT OF HABEAS CORPUS

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PRELIMINARY STATEMENT

Article I, section 13, of the Florida Constitution provides that "the writ of habeas corpus shall be grantable of right, freely and without cost." This petition for habeas corpus relief is being filed in order to address substantial claims of error under the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. These claims demonstrate that Mr. Bryant was deprived of the right to a fair, reliable appellate review of his trial, conviction and death sentence.

Significant errors which occurred at Mr. Bryant's capital trial and sentencing hearing were not presented to this Court on direct appeal due to the ineffective assistance of appellate counsel. The issues, which appellate counsel neglected to address, demonstrate that counsel's performance was deficient and that the deficiencies prejudiced Bryant, satisfying *Strickland.* Neglecting to raise fundamental issues such as a denial of a motion to suppress statements where there was no other evidence linking Bryant to the crime is far below the range of acceptable appellate performance and undermines the confidence in the fairness and correctness of the outcome. *See Wilson v. Wainwright*, 474 So.2d 1162, 1164 (Fla. 1985).

Citations shall be as follows:

The record on appeal concerning the original court proceedings (the second trial) shall be referred to as "R. ____" followed by the appropriate page numbers. The appellant's initial brief on direct appeal will be referred to as "IB. ___" followed by the appropriate page numbers. The postconviction record on appeal will be referred to as "PC-R ___" followed by the appropriate page numbers. The supplemental record on appeal concerning the original court proceedings (the second trial) shall be referred to as "SR ___" followed by the appropriate page numbers. All other references will be self-explanatory or otherwise explained herein.

No Request for Oral Argument

JURISDICTIONAL STATEMENT

Jurisdiction to entertain petition and grant habeas relief.

This is an original action under rule 9.100(a), Florida Rules of Appellate Procedure. *See* Art. I, Sec. 13, Fla. Const. This Court has original jurisdiction pursuant to rule 9.030(a)(3), Florida Rules of Appellate Procedure, and Article V, section 3(b)(9), Florida Constitution. The petition presents constitutional issues which directly concern the judgment of this Court during the appellate process and the legality of Bryant's sentence of death.

Jurisdiction in this action lies in this Court, *see 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 Bryant's direct appeal. *See Wilson*, 474 So.2d at 1163; *Baggett v. Wainwright, 392 So.2d 1327 (Fla. 1981).*

A petition for writ of habeas corpus is the proper means for Bryant to raise the claims presented herein. *See Way v. Dugger*, 568 So.2d 1263 (Fla.

1990); *Downs v. Dugger*, 514 So.2d 1069 (Fla. 1987); *Riley v. Wainwright*, 517 So.2d 656 (Fla. 1987).

GROUNDS FOR HABEAS CORPUS RELIEF

By his petition for a writ of habeas corpus, Bryant asserts that his capital conviction and sentence of death were obtained and then affirmed during this Court's appellate review process in violation of his rights as guaranteed by the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and the corresponding provisions in the Florida Constitution.

PROCEDURAL HISTORY

This case involves a retrial. *Bryant v. State*, 785 So. 2d 422 (Fla. 2001)(second trial direct appeal); *Bryant v. State*, 656 So.2d 426 (Fla. 1995)(first trial direct appeal)(R 1993-2005). Byron Bryant was charged by way of indictment with count one first degree murder and count two armed robbery with a firearm on February 6, 1992 (R 15-16). A motion to determine competency was filed on April 1, 1997 (R 2592-93). The trial court determined that Mr. Bryant was competent to stand trial on February 6, 1998 (SR 254), after conducting a hearing as to competency on February 2, February 4, and February 6, 1998 (SR 1-254). The (second) jury trial was conducted on February 9 through February 13, 1998, before the now-deceased Marvin U. Mounts, Jr., Circuit Judge of the Fifteenth Judicial

Circuit in and for Palm Beach County, Florida, in West Palm Beach, Florida (T 1-1052). Mr. Bryant was found guilty as charged on February 13, 1998 (R 2967-68). Defense's motion for a new trial was filed on February 17, 1998 (R 3000-03) and denied on September 14, 1998 (R 3392).

On April 14, 1998 and September 10, 1998, phase II penalty proceedings were conducted without a jury (T 1053-1329). A sentencing hearing was conducted on February 5, 1999 by the same trial judge who sentenced Bryant to death after the first trial (T 1330-42), and a written sentencing order was rendered thereafter (R 3857-67). The trial court found three aggravating circumstances: Bryant previously had been convicted of a violent felony; the murder was committed during a robbery; and the murder was committed for the purpose of avoiding or preventing a lawful arrest or affecting an escape from custody (R 3857-67). The court found no statutory mitigating circumstances and only one nonstatutory mitigator, remorse, but gave it very little weight. *Bryant v. State*, 785 So.2d 422, 426-27 (Fla. 2001). The trial court sentenced defendant to death by electrocution as to count one and life imprisonment as to count two (R 3868-69). This judgment and sentence were appealed to the Supreme Court of Florida and

both were affirmed on April 5, 2001. *Bryant v. State*, 785 So.2d 422 (Fla. 2001).

A petition for certiorari was filed in the United States Supreme Court and was denied on November 12, 2001. This petition is filed within the one year time limitation set forth under rule 3.851, Florida Rules of Criminal Procedure. The lead trial counsel was Michael Dubiner, and the trial co-counsel for the phase II penalty was Gregg Lehrman. The appellate counsel was Michael Dubiner and Mark Wilensky.

In Bryant's direct appeal, the issues listed were the following: one, the trial court erred in requiring the defendant to be shackled before the jury; two, electrocution is cruel and unusual punishment; three, the trial court erred in failing to evaluate properly the non-statutory mitigating factor of the defendant's lack of education; three, the trial court erred in failing to evaluate the non-statutory mitigating factor that defendant lacked a positive role mode; five, the trial court erred in determining that the defendant was competent to stand trial; six, the trial court failed to exercise its discretion in evaluating the non-statutory mitigating factor of defendant's neurological impairment due to head injuries and meningitis; seven, the death penalty is not proportionally warranted in this case (IB 48-78). This Court affirmed

Bryant's conviction and sentence of death. *Bryant v. State*, 785 So.2d 422 (Fla. 2001).

On March 3, 2003, Bryant filed his initial (amended) postconviction motion alleging ineffective assistance of trial counsel (PC R 109-70). That motion was denied without an evidentiary hearing (PC R 785-93). An initial brief addressing that denial is being filed contemporaneously with this petition for writ of habeas corpus.

STANDARD OF REVIEW

Habeas relief on the basis of appellate counsel's ineffectiveness is limited to those situations where the petitioner establishes, first, that appellate counsel's performance was deficient because the alleged omissions are of such magnitude as to constitute a serious error or substantial deficiency falling measurably outside the range of professionally acceptable performance; and second, that the petitioner was prejudiced because appellate counsel's deficiency compromised the appellate process to such a degree as to undermine confidence in the correctness of the result. *See Gore v. State*, 846 So.2d 461, 471 (Fla. 2003); *Rutherford v. Moore*, 774 So.2d 637, 643 (Fla. 2000).

SUMMARY OF ARGUMENT

Appellate counsel's performance was deficient and prejudiced petitioner's appellate outcome. Appellate counsel did not raise as an issue for appellate review on direct appeal the trial court's denial of the motion to suppress the confession where the confession was the only evidence linking petitioner to the crime. Additionally, appellate counsel failed to raise as an issue for appellate review on direct appeal the trial court's finding of the Aavoiding arrest@ aggravator, where there was no competent, substantial evidence to support the trial court's finding.

ISSUE I
APPELLATE COUNSEL WAS INEFFECTIVE IN FAILING TO PRESENT AS AN ISSUE FOR APPELALTE REVIEW THE DENIAL OF TRIAL COUNSEL'S MOTION TO SUPRESS PETITIONER'S CONFESSION

One of the issues at trial was that Bryant's statement was obtained pursuant to an unlawful arrest and illegal coercion by the police. Defense filed a motion to suppress, and the trial court denied that motion (R 2270-71, 2570-72, 2878-82). However, appellate counsel failed to raise that denial as an error in the direct appeal (IB 48-78).

This was a crucial issue at trial, and thus would have been on appeal, because there was no other evidence linking Bryant to the robbery and murder. There was no independent evidence to connect the defendant to this crime: No eyewitness identification; no physical evidence linking defendant to the crime scene; and no physical evidence linking defendant to the firearm that was used to kill Mr. Andre.

The only evidence that incriminated the defendant at trial was his statement to the police some four hours after his arrest. The two eyewitnesses at the time of the robbery and murder did not identify Bryant, and neither did another eyewitness from across the street. Additionally, there was no physical evidence that linked Bryant to the robbery and murder.

The lack of eyewitness and physical evidence connecting Bryant to this crime goes to the importance and emphasis placed on his incriminating statement at trial. As such, the denial of the motion to suppress the confession should have been the most crucial issue presented for review on direct appeal.

From December 16, 1991, the night of the robbery and shooting, until January 16, 1992, when the police took a statement from interested person Betty Bueie alleging Bryant of admitting to the robbery and shooting, the police had nothing to connect Bryant to the robbery and shooting (R 3486-87) *Bryant*, 785 So. 2d at 426. When Betty Bueie came into the police station that night, she was very upset because Bryant had beaten up her sister to the extent that her sister was in the hospital (R 3487). Solely based on this statement along with other alleged statements from other interested individuals, Hartman arrested Bryant.

The defense filed a motion to suppress and argued that there was no probable cause to arrest Mr. Bryant. At the motion to suppress hearing, officer Hartman from the Delray Beach Police Department testified that he was the lead detective in the Andre shooting (R 3445). He testified that approximately one month after the shooting, he was contacted by Betty Bueie, accompanied by Mary Williams, who came into the Delray police station asking for whomever was in charge of the Andre homicide (R 3446).

They said they knew who committed the murder at Andre's grocery and told Hartman that it was Byron Bryant (R 3449). Betty Bueie informed Hartman that she was mad at Bryant for getting into a fight with her sister (Bryant's then-girlfriend) Tara Bueie, and that she had heard Bryant speak in Afront of her that he shot and killed the man in a robbery attempt; that he didn't mean to shoot and kill him but it happened@ (R 3450).

Hartman testified that Mary Williams also told him that Bryant stated in front of her that he committed this homicide and that he had given the gun used in it to his other girlfriend, Cheryl Evans, who in turn gave the gun to her other boyfriend (R 3451) Damien Remy to dispose of.

Hartman then testified that he spoke to Tara Bueie who had had a fight with Mr. Bryant that day about Mr. Bryant's other girlfriend, Cheryl Evans (R 3452). Hartman testified that Tara had told him that Bryant had told her that he was in a struggle with the victim and that the victim pulled the ski mask off that Bryant was wearing (R 3452).

Hartman then testified that he spoke to Cheryl Evans' other boyfriend, Damien Remy, regarding that the alleged murder weapon was given to him (R 3453). Remy was being held in jail in Martin County under federal narcotics charges, and Remy told Hartman that he had just found out that Bryant was dating Cheryl Evans at the same time Remy was dating Cheryl Evans, although Remy at the time had thought that Bryant was Cheryl's

cousin (R 3454). Hartman testified that Remy told him that Cheryl told Remy that it was her cousin Byron Bryant who murdered Mr. Andre (R 3455). Hartman further testified that Remy told him that Cheryl said that Bryant used her gun for the robbery and homicide and Remy discovered the gun in his car after talking to Cheryl (R 3455). Hartman testified that Remy told him that he took the gun and threw it out the window on 1-95 (R 3455). None of these witnesses testified at the suppression hearing as to the validity of their alleged statements.

Based solely on these hearsay statements from Evans, Remy, Williams, Tara Bueie and Betty Bueie, Hartman testified that he thought that he had probable cause to arrest Byron Bryant (R 3455) and was able to effectuate the arrest by subterfuge instead of by an arrest warrant. He had Bryant's ex-girlfriend Cheryl Evans pretend to need to obtain something from the Delray Beach Police Department and had Byron Bryant to accompany her on the drive to the Delray Beach Police Department (R 3456). Once Evans was inside the Delray police station, numerous law enforcement officers surrounded the car with guns drawn and arrested Bryant (R 3461, 3467). Immediately after his arrest, Bryant was brought into an interrogation room with his arms still in handcuffs behind his back (R 3467).

Hartman testified that he read Mr. Bryant his *Miranda* warnings from the standard *Miranda* card, but that Bryant could not sign it acknowledging same because his hands remained handcuffed behind his back (R 3476). Hartman testified that he did nothing to determine the reliability of Betty Bueie's allegations against Bryant prior to arresting Bryant (R 3487-88). Hartman testified that he did nothing to determine the reliability of Mary Williams' allegations against Bryant prior to arresting Bryant (R 3487-88). Hartman also testified that he did nothing to determine the reliability of Tara Bueie's allegation against Bryant prior to arresting Bryant (R 3493). It is clear that Hartman failed to determine the reliability of Remy's allegations against Bryant, and that Remy was motivated to turn someone else in by his own pending criminal charges. Each one of these witnesses had a personal vendetta and grudge against Mr. Bryant. None of these witnesses were disinterested, concerned citizens. It is undisputed that none of the sources**C**Mary Williams, Betty Bueie, Tara Bueie, Cheryl Evans, Damien Remy, were checked for reliability or used in prior cases. These people were essentially anonymous informants, or at best, citizen informants, but in either category, they still do not meet the standard for the police for probable cause to effectuate an arrest. The informants involved in this case are not ordinary citizens, mere eyewitnesses, disinterested bystanders or victims

whose statements are entitled to a presumption of veracity. *See, e.g., Roper v. State*, 588 So. 2d 330 (Fla. 5th DCA 1991).

Without specific details not easily accessible to the general public, a confidential informant's reliability cannot be established. *See Draper v. United States*, 358 U.S. 307 (1959). Because the reliability and veracity of the informants were not established, their statements about Byron Bryant to the Detective failed to establish lawful probable cause for an arrest.

Cheryl Evans was a ten time convicted felon whose gun, by her own admission, was used in the robbery and shooting. Due to Evans' cooperation with the police by pointing the finger at Bryant, she was not charged in connection with the robbery and shooting. Damien Remy was Byron Bryant's girlfriend's other boyfriend who had just found out about the romantic nature of their relationship. Remy, by his own admission, had disposed of the murder weapon and was facing federal narcotic charges. Remy was not charged in connection with the robbery and shooting after pointing the finger at Bryant.

The three other witnesses, Tara Bueie, Betty Bueie, and Mary Williams, were upset with Mr. Bryant for getting into a physical altercation with Tara and cheating on Tara with Cheryl. Without more, none of these witnesses provided the reliability that the police needed to effectuate a lawful arrest on Mr. Bryant. *See, e.g., Swartz v. State*, 857 So.2d 950, 952

(Fla. 4th DCA 2003)(independent evidence of criminal activity on the part of the suspect is a prerequisite before a tip can justify probable cause for an arrest); *Pinkney v. State*, 666 So.2d 590 (Fla. 4th DCA 1996)(due to the inherent unreliability of tips, the police must establish the reliability independently before it can be used for probable cause to arrest); *Holmes v. State*, 549 So.2d 1119 (Fla. 1st DCA 1989)(while a reliable tip can form the basis for probable cause, if it is sufficiently detailed and independently verified by a law enforcement officer using evidence other than the tip itself, the tip is insufficient to validate an arrest where there is no evidence which supports the tipster's allegation that the suspect had committed the crime); *Cunningham v. State*, 591 So.2d 1058, 1060 (Fla. 2d DCA 1991)(an arrest of a person is not authorized after an anonymous tip unless the officer develops independent evidence that the suspect is engaged in criminal activity); *compare State v. K.V.*, 821 So.2d 1127 (Fla. 4th DCA 2002)(probable cause can develop when officer acquires additional information corroborating tip).

The Fourth District Court of Appeal in *Pinkney* held:

> Anonymous tip situations, however, are treated differently because the informant's veracity, reliability and basis of knowledge are not known. Therefore, they provide an additional challenge for law enforcement, as they require detailed and specific information corroborated by police investigation. That corroboration often requires personal observations of suspicious activity to establish the required level of reliability.

666 So.2d at 592.

Courts have made a distinction between an anonymous tip and one given by a citizen informant. *See State v. Evans*, 692 So.2d 216 (1997). A

citizen informant is a person who is motivated not by pecuniary or other type of gain, but by the desire to further justice. *Evans*, 692 So.2d at 216. Such a tip is somewhat more reliable, but still must be carefully scrutinized before it can give rise to probable cause. *Evans*, 692 So.2d at 216. In anonymous tip cases, the police are required to show that there were other circumstances observed or otherwise independently verified which created the probable cause before the arrest was effectuated. *See St. John v. State*, 363 So.2d 862 (Fla. 4th DCA 1978)(Bolo from anonymous tipster not sufficient even for a mere investigatory stop). In this case, the tips given to the police by the Bouies, their friends and Evans, should be considered in the class of anonymous tips because their motivation was not one of a disinterested party merely seeking to further justice. Prior to arresting Bryant, the police should have tried to independently verify some of the hearsay information given to them through other means or applied for an arrest warrant to be authorized by a neutral magistrate based on the hearsay information given to them. Hartman clearly failed to investigate Bryant before the arrest or otherwise corroborate the tips to develop sufficient probable cause to arrest Bryant lawfully. Hartman could have followed Bryant to determine whether he was acting suspiciously. Hartman failed to obtain a search warrant for Bryant's house to look for a weapon or money from the store or clothes worn the night of the robbery. Hartman failed to obtain a search warrant for Bryant's

telephone to see if he could intercept a conversation where Bryant admitted to the robbery and homicide. Hartman failed to ask one of the informants to wear a wire in order to capture a conversation on tape between the informant and Bryant regarding the robbery and homicide. There were no exigent circumstances because the robbery and shooting was already over a month old, and Hartman could have tried to corroborate these tips in numerous ways in order to develop lawful probable cause to arrest. Hartman also failed to present his witness statements and police reports to the Office of the State Attorney, so that the State Attorney could file for a warrant after a neutral magistrate had examined the allegations and authorized an arrest warrant.

Because there was no arrest warrant, no exigent circumstances, and no probable cause to arrest, the arrest itself was unlawful. *See Dunaway v. New York*, 442 U.S. 200 (1979)(police must have probable cause to believe the individual is committing or has committed a crime in order to arrest that individual); s*ee also Rolling v. State*, 695 So.2d 278, 293 (Fla. 1997)(a key ingredient of the exigency requirement is that the police lack time to secure an arrest or search warrant); *Swartz* (no probable cause with undeveloped tip); *Holmes* (same); *Cunningham* (same) . Because the arrest was unlawful, the statement obtained several hours after the arrest was unlawfully obtained. *See generally Wong Sun v. United States*, 371 U.S. 471 (1963)(if

police do not have probable cause for arrest and a confession is obtained after that arrest, the confession must be suppressed*); Brown v. Illinois*, 422 U.S. 590, 595 (1975)(subsequently obtained confession is illegal when arrest is illegal and intervening *Miranda* warnings will not validate the confession); *see Taylor v. State*, 355 So.2d 180 (Fla. 3d DCA 1978)(subsequently obtained consent to search unlawful when officer illegally began search first).

In order to overcome this presumption of the confession being tainted by the illegal arrest, the State must show by clear and convincing evidence that there was an unequivocal break in the chain of any illegality resulting from the illegal arrest to the confession. *See Faulkner v. State*, 834 So.2d 400, 403 (Fla. 2d DCA 2003); *Findley v. State*, 771 So.2d 1235, 1237 (Fla. 2d DCA 2000).

Bryant was handcuffed from the time that the officers forced him out of the vehicle until he gave a confession, some four hours later (R 3494-95, 3514-15). There is little doubt that petitioner was Aseized@ in the Fourth Amendment sense when he was commanded out of the vehicle by gunpoint, handcuffed and taken inside the police station. That seizure amounted to an arrest**C**petitioner was not questioned briefly where he was found, but rather, taken forcibly from the car he was sitting in by gunpoint, handcuffed and marched to the police station and placed in an interrogation room. He was

never informed that he was Afree to go.@ Indeed, Bryant was physically restrained from leaving.

Similarly, in *Brown v. Illinois*, 422 U.S. 590, 595 (1975), at the back entrance to Brown's apartment, the police officers drew their guns, informed Brown he was under arrest for murder and handcuffed him. The police took Brown to the police station, *Mirandized* him and questioned him about a murder that happened one week earlier. The officers had obtained Brown's name from the victim's brother, but he was identified as an acquaintance and not as a suspect by the brother. 422 U.S. at 592. The officers in *Brown* had testified that the purpose of their action was to question Brown about his involvement in the crime in the hope that he would confess. 422 U.S. at 605. Brown gave two confessions, one less than two hours after his arrest, and the second, upon the arrival of the prosecutor.

The trial court denied the subsequent motion to suppress. Upon appeal from Brown's conviction, the Illinois Supreme Court held that at the time of Brown's apprehension, there was no probable cause for arrest. 422 U.S. at 597. However, the court concluded that the giving of *Miranda* warnings broke the causal connection between the illegal arrest and the giving of the confessions. Upon appeal to the Supreme Court of the United States, the *Brown* court held that *Wong Sun v. United States*, 371 U.S. 471 (1963), mandated that the confessions be suppressed due to the illegality of

Brown's arrest. 422 U.S. at 602 (if *Miranda* warnings by themselves were held to attenuate the taint of an unconstitutional arrest, the effect of the exclusionary rule would be substantially diluted)(citing *Davis v. Mississippi*, 394 U.S. 721, 726-27 (1969)).

The *Brown* Court concluded by holding that the Amanner in which Brown's arrest was affected gives the appearance of having been calculated to cause surprise, fright and confusion.@ 422 U.S. at 605. And as such, the impropriety of the arrest was obvious: the officers wanted to corner Brown in order to extract a confession without having to apply for an arrest warrant. *Id.*

Likewise, in the instant case, the officers purposefully did not obtain an arrest warrant, but rather took Bryant by surprise by arranging to have his exgirlfriend Astop by@ the police station. Clearly, the officers knew that their information Bfrom dubious sourcesCwould not pass muster on an application for an arrest warrant. Under *Brown* and *Wong Sun*, petitioner's arrest was unlawful and therefore his confession should have been suppressed.

The United States Supreme Court in *Illinois v. Gates*, 462 U.S. 213 (1983), upheld the totality-of-the-circumstances analysis that is the basis of probable-cause judicial determinations. The task of the neutral magistrate is simply to make a decision whether, given all the circumstances set forth in

the affidavit before him/her, including the "veracity" and "basis of knowledge" of the persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. *See State v. Butler*, 655 So.2d 1123 (Fla. 1985)(Supreme Court of Florida adopted the "totality of the circumstances" test set forth by the U.S. Supreme Court in *Gates* in determining whether information from a confidential informant gives rise to probable cause).

There is no totality of the circumstances test in the instant case. The police failed to obtain an arrest warrant. The police failed to obtain a search warrant for Byron Bryant's house or car. The police failed to test the ski cap found at the scene of the crime to determine whether Bryon Bryant had ever come into contact with it. The police failed to corroborate any statements about Byron Bryant by simply monitoring Bryant's activities or obtaining a warrant to wiretap his telephone. The police failed to obtain a statement from Bryant by using one of the alleged five informants to record a possible conversation that Bryant may have with one of the five informants regarding his alleged role in the robbery and shooting. There was no exigent circumstance that prohibited the police from corroborating the tips they received. The police simply were in a hurry to make an arrest for this robbery and shooting and as such, arrested the first person Athe street@ said had done it.

There was no testimony from the prosecution witnesses that any of the sources had a prior history of providing reliable tips that had proven to be accurate; nor were these individuals disinterested citizens. An anonymous tip, without more, is insufficient to demonstrate the informant's basis of knowledge or veracity. *Alabama v. White*, 496 U.S. 325, 329 (1990). An anonymous tip corroborated by independent police work can exhibit sufficient indicia of reliability to provide reasonable suspicion to conduct a stop or probable cause to search. *White*, 496 U.S. at 330. The reliability of such a tip is evaluated, among other considerations, on its degree of specificity, the extent of corroboration of predicted future conduct, and the significance of the informant's predictions. *Kimball v. State*, 801 So.2d 264, 265 (Fla. 4th DCA 2001)(citing *Gates*, 462 U.S. at 246)). Here, the anonymous tips were combined with nothing, much less independent police observation; and therefore was insufficient to provide probable cause to arrest Mr. Bryant.

None of the arresting officer's Asources@C Mary Williams, Betty Bueie, Tara Bueie, Cheryl Evans, Damien Remy, were checked for reliability or used in prior cases. These people were essentially anonymous informants, or at best, citizen informants, but in either category, they still do not meet the standard for the police for probable cause to effectuate an arrest. The informants involved in this case are not ordinary citizens, mere

eyewitnesses, disinterested bystanders or victims whose statements are entitled to a presumption of veracity. *See, e.g., Roper v. State*, 588 So. 2d 330 (Fla. 5th DCA 1991). Without specific details not easily accessible to the general public, a confidential informant's reliability cannot be established. *See Draper v. United States*, 358 U.S. 307 (1959). Because the reliability and veracity of the informants were not established, their statements about Byron Bryant failed to establish probable cause for an arrest.

Officer Hartman was in possession of his firearm while in the interrogation room at the police station with Bryant (R 3485-86). Officer Brand was in possession of at least one firearm while in the interrogation room at the police station with Bryant (R 3496). Petitioner later alleged that Brand had put a firearm to petitioner's head in order to procure a confession.

Both police officers, Hartman and Brand, testified that Bryant stated that he would give them a statement if he were allowed to see and talk to his mother (R 3510). Mr. Bryant's statement was conditioned on the production of his mother. The police procured Mr. Bryant's mother, as promised to him, as a condition to his giving a statement. After the police obtained Mr. Bryant's mother and produced her at the police station for Mr. Bryant to talk to, Mr. Bryant gave a statement implicating himself in the robbery and

shooting. Because there was a promise made in exchange for a statement, the statement should have been ruled as involuntary and suppressed.

In the instant case, the erroneous admission of petitioner's statement is not harmless beyond a reasonable doubt because that statement was the only piece of evidence linking petitioner to the crime. "A confession is like no other evidence ... the defendant's own confession is probably the most probative and damaging evidence that can be admitted against him ...." *Arizona v. Fulminante*, 499 U.S. 279, 296 (1991). Here, the State cannot meet its burden of showing that the admission of the coerced statements was harmless beyond a reasonable doubt. After a motion hearing to suppress petitioner's statement as coerced, the trial court denied the motion, relying on the ruling in the first trial: AI find that this was not a promise of the type that you endeavored to describe, it was an accommodation and an act of courtesy and kindness on the part of the police for which I commended them in the last trial and I commend them now. And the statement was voluntary then and it's voluntary now.@ (R 3528).

Mr. Bryant conditioned his statement on the police production of his mother at the police station. Mr. Bryant told the police that he would give them a statement if he could first talk to his mother. The police produced Mr. Bryant's mother at the police station, and then after Mr. Bryant met with his mother, he gave a statement implicating himself in the robbery and

shooting. Because there was a promise by the police of doing something for Mr. Bryant, i.e., bringing his mother to the police station, in order to obtain a statement from Mr. Bryant, that statement was not voluntary and it should have been suppressed as such.

If a statement is given in exchange for something, then that statement is involuntary. An involuntary or coerced confession violates the Fifth Amendment privilege against compelled self-incrimination. *See Colorado v. Connelly*, 479 U.S. 157, 163 (1986). For a confession or inculpatory statement to be voluntary, the totality of the circumstances surrounding the statement must indicate the statement was the result of a free and rational choice. *Walker v. State*, 771 So. 2d 573, 574 (Fla. 1st DCA 2000); *See Johnson v. State,* 696 So.2d 326 (Fla.1997), *cert. den*., 522 U.S. 1095, 118 S.Ct. 892, 139 L.Ed.2d 878 (1998); *see also Traylor v. State*, 596 So.2d 957, 964 (Fla.1992). The mind of the accused should, at the time, be free to act, uninfluenced by fear or hope. *See Traylor*, 596 So.2d at 964.

To exclude a confession or an inculpatory statement, it is not necessary that any direct promises or threats be made to the accused. *See id.* A confession or inculpatory statement is not freely and voluntarily given if it has been elicited by direct or implied promises, however slight. *See Johnson,* 696 So.2d at 330*; Bruno v. State*, 574 So .2d 76, 79-80 (Fla.1991); *see also Grasle v. State*, 779 So.2d 334 (Fla. 2d DCA 2000).

In *Albritton v. State*, 769 So.2d 438 (Fla. 2d DCA 2000), the Second District held that the defendant's confession was not voluntary in light of the promise of the interrogating detective made to the defendant that if the offense was part of a religious ritual, then the defendant would not be charged with a crime. In that case, the defendant had claimed she had made incriminating statements in order to protect her son who actually committed the crime. She made the incriminating statement after the police told her that if it was part of a religious ceremony, then that conduct would be constitutionally protected. 769 So.2d at 440.

The trial court found that the detective's statements did not constitute a promise. However, the Second District Court held that a promise does not have to be direct to render a confession involuntary, but can be implied. 769 So.2d at 441-42 (citing to *Almeida v. State*, 737 So.2d 520 (Fla. 1999)). A defendant is entitled to suppression of a confession which is induced by direct or implied benefit. *Rivera v. State*, 547 So.2d 140 (Fla. 4th DCA 1989), *rev. denied*, 558 So.2d 19 (Fla. 1990); *Hanthorn v. State*, 622 So.2d 1370 (Fla. 4th DCA 1993). If the totality of the circumstances were calculated to exert undue influence over him, the confession must be excluded. *Frazier v. State*, 107 So.2d 16 (Fla. 1958); *G.G.P. v. State*, 382 So.2d 128, 129 (Fla. 5th DCA 1980). If the actions of the interrogator were such that they induced the suspect to confess by promises of a benefit, then

the statement is untrustworthy and should be excluded. *GGP v. State*, 382 So.2d 128, 129 (Fla. 5th DCA 1980); *Fillinger v. State*, 349 So.2d 714 (Fla. 2d DCA 1977). The State carries the burden of proof that the confession was freely and voluntarily made. *Hanthorn*, 622 So.2d at 1370.

Petitioner in the instant case was a young man of twenty-four years of age. There was substantial testimony that he suffered from mental disability due to a severe blow to the head at age 18; a childhood bout of meningitis; and loss of blood when he was victimized by a drive-by shooting. While he may have had an imperfect competency issue, he had a better false confession issue which counsel failed to raise.

While it is alleged that Mr. Bryant was read *Miranda* warnings, there was no showing that he was capable of understanding them, or that he waived them by since he did not sign the *Miranda* card. He was promised that he could see his family before giving a statement. He was handcuffed behind his back for over four hours after being surrounded by gunpoint in a surprise arrest, based on dubious probable cause. The officers induced Mr. Bryant into giving a statement by granting him the benefit of seeing his mother. It is undisputed that immediately after visiting with his mother, Mr. Bryant gave the officers an incriminating statement against himself. Under these circumstances, the police conduct was sufficient to make Bryant's statement inadmissible. By the police procuring Mr. Bryant's

mother, this exchange exacerbated an already coercive atmosphere. *See, e.g., Gaspard v. State*, 387 So. 2d 1016, 1022 (Fla. 1st DCA 1980)(defendant's incriminating statements were properly suppressed because they were the product of a coercive interrogation).

The burden of establishing voluntariness is on the prosecution, by a preponderance of evidence. *See Lego v. Twomey*, 404 U.S. 477, 489 (1972). If a coerced statement is admitted in error, reversal is required unless the State can show the error to have been harmless beyond a reasonable doubt. *See Arizona v. Fulminante*, 499 U.S. 279, 295-96 (1991). In the instant case, the erroneous admission of petitioner's statement is not harmless beyond a reasonable doubt because that statement was the only evidence linking petitioner to the crime. "A confession is like no other evidence ... the defendant's own confession is probably the most probative and damaging evidence that can be admitted against him ....". *Fulminante*, 499 U.S. at 296 (citation quotation marks omitted). Here, the State cannot meet its burden of showing that admission of the coerced statements was harmless beyond a reasonable doubt when there was no other evidence at trial linking petitioner to the crime. Because these statements were admitted in error, Mr. Bryant was entitled to a new trial. Because appellate counsel failed to present this issue for review, counsel's performance was deficient and prejudiced the outcome of the appeal.

Based only upon the hearsay statements of several people—all with grudges and complaints against Bryant and none of whom testified at the later suppression hearing—the police arrested Bryant for the robbery and murder. Within four hours after the arrest, the police obtained an incriminating statement from Mr. Bryant. There was no probable cause to arrest the defendant; as such, his confession was obtained pursuant to the unlawful arrest and should have been suppressed. Additionally, his confession should have been suppressed due to the coercive nature of the police in having Bryant's mother visit him in exchange for his statement.

Because the confession given to police was the only piece of evidence at trial linking Mr. Bryant to the crime, the denial of the motion to suppress should have been reviewed on direct appeal. However, because appellate counsel did not present this issue for appellate review, this Honorable Court did not address this issue. This Honorable Court would have reviewed *de novo* the trial court's application of the law to the facts in ruling on a motion to suppress. *See Hines v. State*, 737 So.2d 1182, 1184 (Fla. 1st DCA 1999); *Sims v. State*, 805 So.2d 44, 46 (Fla. 1st DCA 2001); *State v. T.W.*, 783 So.2d 314, 315 (Fla. 1st DCA 2001). If this Honorable Court would have been presented with the appellate issue of the trial court's error in denying the motion to suppress the confession, then petitioner would have been entitled

to a new trial. As such, appellate counsel's deficient performance prejudiced the outcome of Bryant's direct appeal.

ISSUE II

APPELLATE COUNSEL WAS INEFFECTIVE IN FAILING TO RAISE ON DIRECT APPEAL THE AGGRAVATOR OF AAVOIDING ARREST@

Appellate counsel failed to raise as an issue on direct appeal that the trial court erred in applying the aggravator of "avoiding arrest." Because this aggravator was not supported by competent, substantial evidence, appellate counsel's failure to raise it prejudiced the outcome of the appeal where his death sentence was affirmed.

Section 921.141(5)(e), Florida Statutes (1997), provided: "Aggravating circumstances.--Aggravating circumstances shall be limited to the following: . . . (e)The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody."

The sentencing court determined that at the time of the murder in the instant case, the victim was depriving appellant of his right to leave during the commission of an armed robbery by effectuating a lawful citizen's arrest, and consequently, an eventual arrest by law enforcement personnel (R 178). There is no competent, substantial evidence to support the trial court's determination that the victim intended to detain appellant to effectuate a citizen's arrest. There is no competent, substantial evidence to support the trial court's determination that appellant decided to murder the victim

primarily because he believed the victim was effectuating a citizen's arrest and he chose to murder him to avoid that arrest.

The murder was not committed to avoid arrest; the murder was a by-product of an armed robbery gone awry. Most "avoiding arrest" aggravators are found where the defendant has committed a kidnapping or a rape and there was testimony indicating that the defendant wished to kill the victim to avoid identification. *See, e.g., Randolph v. State*, 853 So.2d 1051, 1055 (Fla. 2003)(defendant admitted to brutal beating and cover-up rape); *Philmore v. State*, 820 So.2d 919, 935 (Fla. 2002)(defendant admitted he killed the person whose car he carjacked so he could not be identified and would have enough time to get away with the car); *Feenie v. State*, 648 So.2d 95, 96-97 (Fla. 1994)(victim, while alive, placed in trunk and taken to different location to be killed; *Preston v. State*, 607 So.2d 404, 409 (Fla. 1992)(victim abducted from the scene of the crime and transported to a different location to be killed); *Cave v. State*, 476 So.2d 180, 188 (Fla. 1985)(avoid arrest aggravator appropriate where defendant kidnapped victim and transported her "some thirteen miles to a rural area in order to kill and thereby silence the sole witness to the robbery").

With regard to the avoid arrest aggravator, this Court has held in *Philmore v. State*, 820 So.2d 919, 935 (Fla. 2002):

> The avoid arrest/witness elimination aggravating circumstance focuses on the motivation for the crimes. Where the victim is not a police officer, "the evidence [supporting the avoid arrest aggravator] must prove that the sole or dominant motive for

the killing was to eliminate a witness," and "[m]ere speculation on the part of the state that witness elimination was the dominant motive behind a murder cannot support the avoid arrest aggravator." . . .

In other cases, this Court has found it significant that the victims knew and could identify their killer. While this fact alone is sufficient to prove the avoid arrest aggravator, we have looked at any further evidence presented, such as whether the defendant used gloves, wore a mask, or made any incriminating statements about witness elimination; whether the victims offered resistance; and whether the victims were confined or were in a position to pose a threat to the defendant. *Farina v. State,* 801 So.2d 51, 54 (Fla. 2001).

The trial court's sentencing order in the *Philmore* case stated that:

Philmore stated to law enforcement that he killed the person whose car he carjacked so he could not be identified and would have enough time to get away with the car; Philmore further stated to law enforcement that once he carjacked Perron's vehicle, Philmore took Perron to a remote area, and upon exiting the vehicle, Philmore shot Perron in the forehead in an execution-style manner; and Perron's body was discovered in an isolated location.

820 So.2d at 935.

This Honorable Court in *Philmore* concluded that the trial court did not err in finding the avoid arrest aggravator where, "Philmore confessed that the reason for killing Perron was witness elimination." *Id.* No such statement occurred in the instant case; rather, the trial court based its rationale on that appellant stated in his confession that the victim wrestled appellant for the gun and "we was struggling and it was like both of us was fighting for our life" (R 178)

In order to establish that the murder was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody, the evidence must prove beyond a reasonable doubt that the sole or dominant motive for the killing was to eliminate a witness. *See Hurst v.*

State, 819 So.2d 689, 695 (Fla. 2002); *Zack v. State*,753 So.2d 9, 20 (Fla. 2000); see also *Riley v. State*, 366 So.2d 19, 22 (Fla. 1978)("the mere fact of a death is not enough to invoke this factor when the victim is not a law enforcement official. Proof of the requisite intent to avoid arrest and detection must be very strong in these cases.").

In the instant case, there was no competent, substantial evidence to prove that appellant's dominant motive for the murder was to avoid an effectuation of a citizen's arrest. Therefore, appellate counsel was ineffective in failing to raise this issue on direct appeal, and petitioner's appeal was prejudiced as a result.

ISSUE III
PETITIONER'S SENTENCE OF DEATH CANNOT STAND UNDER *RING* AND *APPRENDI*.

In *Ring v. Arizona*, --U.S.--, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), the United States Supreme Court held that the Arizona statute allowing a trial judge without a jury to determine the presence or absence of aggravating factors required for the imposition of the death penalty violates the Sixth Amendment right to a jury trial in capital prosecutions. Previously, in *Walton v. Arizona*, 497 U.S. 639, 649 (1990), the Supreme Court of the United States had held that the death penalty statute in Arizona was compatible with the Sixth Amendment because the additional facts found by the trial judge were sentencing considerations and not elements of the offense of capital murder. *Ring*, 122 S.Ct. at 2432. However, in *Apprendi v. New Jersey*, 530 U.S. 466, 483-92, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), the Supreme Court of the United States held that the Sixth Amendment prohibits a defendant from being exposed to a penalty exceeding the maximum punishment he could receive if punished according to the jury's findings reflected in the jury's verdict. *Ring*, 122 S.Ct. at 2432. This prohibition applies even if the additional findings made by the trial judge were characterized as sentencing factors. *Ring*, 122 S.Ct. at 2432. Because the ruling in *Apprendi* conflicts with the holding in *Walton*, the Supreme Court overruled the holding in *Walton* in its decision in *Ring*. As

such, defendants in capital cases are now entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment.

In order words, because the finding of aggravating factors increases the maximum penalty in a murder case from life to death, a jury must determine whether the State has demonstrated the existence of the aggravators; a judge is no longer able to make this factual determination. In light of this holding in *Ring*, petitioner is now entitled to a jury determination whether he should receive life imprisonment or a death sentence after the jury considers all aggravating and mitigating factors. Mr. Bryant is entitled to a new sentencing hearing before a jury to determine whether there is substantial evidence to support the existence of aggravators and whether the aggravators outweigh the mitigators.

The Florida capital sentencing scheme is exactly the same as the Arizona capital sentencing scheme; the two cannot be distinguished. *See Ring*, 122 S.Ct. at 2427; *Walton*, 497 U.S. at 648; *see also Hildwin v. Florida*, 490 U.S. 638, 640-41 (1989). The flaws that existed in the Arizona statute also exist in the Florida statute. Moreover, in the instant case, Mr. Bryant did not have a jury to make specific findings, and the holdings in *Ring* and *Apprendi* require a jury--not the trial judge-- to make specific findings in order to impose a greater penalty such as death on a defendant.

See Ring, 122 S.Ct. at 2439 ("if a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact "no matter how the State labels it" must be jury by a jury beyond a reasonable doubt."); *Apprendi*, 530 U.S. at 482. Because the aggravating factors were not determined by a jury beyond and to the exclusion of all reasonable doubt in the instant case, Mr. Bryant is entitled a new penalty trial. *Ring*, 122 S.Ct. at 2443 (because aggravating factors operate as the "functional equivalent of an element of a greater offense," the Sixth Amendment requires that they be found by a jury).

In *Bottoson v. State*, 813 So.2d 31, 36 (Fla. 2002), the Supreme Court of Florida rejected the defendant's *Apprendi/Ring* claim on the merits, on authority of *Mills v. Moore*, 786 So. 2d 532 (Fla. 2001) and *King v. State*, 808 So.2d 1237 (Fla. 2002)(relying on *Mills*). The premise of the *Mills* decision was that *Apprendi* does not apply to already challenged capital sentencing schemes that have been deemed constitutional. 786 So.2d at 536. However, the United States Supreme Court in *Ring* now has held that *Apprendi* does invalidate previously challenged and upheld capital sentencing schemes.

What is notably different in the instant case compared with *King v. Moore*,831 So.2d 143 (Fla.), *cert. denied*, 123 S.Ct. 657 (2002), and *Bottoson v. Moore*, 833 So.2d 693 (Fla.), *cert. denied*, 123 S.Ct. 662 (2002),

is that this *Ring/Arizona* issue is contained in appellant's amended initial postconviction motion. Both Mr. King and Mr. Bottoson were under active death warrants and had completed their entire round of appellate reviews. In the instant case, Mr. Bryant is now only filing his initial postconviction motion. As such, a change in the law which takes place prior to the defendant filing his postconviction motion can be applied to this case.

Clearly, the new holding of *Apprendi/Ring* involves a fundamental constitutional change. The purpose of the rule is to change the very identity of the decision maker with respect to critical issues of fact that are decisive of life or death. Mr. Bryant's case has yet to exhaust his appellate remedies when the United States Supreme Court decided to apply the *Apprendi* requirement to capital cases in *Ring*. Mr. Bryant is uniquely able to have the trial court address his *Apprendi/Ring* claim because he is still in the "appellate pipeline" when the decision was rendered.

Under *Apprendi* and *Ring*, the Florida death statutes as applied to Mr. Bryant are unconstitutional. In *Jones v. United States*, 526 U.S. 227, 243 n. 6 (1999), the Supreme Court held "under the Due Process Clause of the Fifth Amendment and the notice and jury guarantees of the Sixth Amendment, any fact (other than a prior conviction) that increases the maximum penalty for a crime must be charged in the indictment, submitted to a jury and proven beyond a reasonable doubt."

Under the capital sentencing statute applicable to the case at bar, the state must prove at least on aggravating factor in a subsequent proceeding before a person convicted of first degree murder is eligible for the death penalty after a jury has found the defendant guilty. *State v. Dixon*, 283 So.2d 1, 19 (Fla. 1973). As such, Florida capital defendants are not eligible for a death sentence simply upon conviction of first degree murder. Another element must be proven, and that is an aggravating factor which would warrant the imposition of the sentence of death. For example, if a trial court were to sentence a defendant immediately after a verdict is rendered, the court, statutorily, could only legally impose a life sentence. Under Florida law, the death sentence is not within the statutory maximum sentence under section 775.082, Florida Statutes. As held in *Apprendi* and *Ring*, a sentence of death increases the penalty for first degree murder beyond the life sentence under section 775.082, Florida Statutes, which the defendant is eligible for based solely on the jury's guilty verdict.

Under Florida's sentence of death statutes, there are two levels of first degree murder. The first, conviction for first degree premeditated murder or felony murder authorizes a life sentence. The second, if aggravating circumstances are proved beyond a reasonable doubt, the person so convicted can be sentenced to death. Florida law makes imposition of the sentence of death contingent on the judge's factual findings regarding the

existence of aggravating circumstances. Section 921.141(3), Florida Statutes, provides that "[n]otwithstanding the recommendations of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death." To enter a sentence of death, the judge must make "specific written findings of fact based upon the circumstances in subsections (5) [aggravating circumstances] and (6) [mitigating circumstances] and upon the records of the trial and the sentencing proceedings." If the judge fails to makes the findings requiring the sentence of death within a specific period of time, then the court must impose a sentence of life. s.921.141(3), Fla. Stat. (1998).

Thus, in Florida, as in Arizona, although the maximum sentence authorized for first degree murder is death, a defendant convicted of first degree murder cannot be sentenced to death without additional findings of fact that must be made, by explicit requirement of Florida law, by a judge and not a jury. *See Bottoson v. Moore,* 833 So.2d 693, 703 (Fla.)(Anstead, C.J., concurring), *cert. denied,* 123 S.Ct. 662 (2002). Because aggravating circumstances are elements of the offense of capital murder under *Ring*, Florida law requires that they be charged in the indictment and found unanimously by the jury beyond a reasonable doubt. *Ring* is premised in part on the principle that capital defendants, no less than non-capital defendants, are entitled to due process and jury trial rights that apply to the

determination of any fact on which the legislature conditions an increase in their maximum punishment: "The right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the fact-finding necessary to increase a defendant's sentence by two years, but not the fact-finding necessary to put him to death". 122 S.Ct. at 2432, 2443.

Florida's enumerated aggravating factors operate as "the functional equivalent of an element of a greater offense." *Ring*, 122 S.Ct. at 2443 (quoting *Apprendi*, 530 U.S. at 494 n. 19). Florida law has long recognized that aggravating circumstances "actually define those crimes . . . to which the death penalty is applicable in the absence of mitigating circumstances." *State v. Dixon*, 283 So.2d 1, 9 (Fla. 1973); *see also Hootman v. State*, 709 So.2d 1357, 1360 (Fla. 1998)(addition of new aggravating circumstances alters the criminal conduct that may subject the defendant to the death penalty and increases the punishment of a crime), *abrogated on jurisdictional grounds*, *State v. Matute-Chirinos*, 713 So.2d 1006 (Fla. 1998).

In the noncapital context, Florida courts have consistently treated aggravating factors which cause an offense to be reclassified to a more serious level or that trigger the application of a minimum, mandatory sentence as elements of an offense that must be charged in the indictment and specifically found by the jury, unanimously and beyond a reasonable

doubt. *See Bottoson*, 833 So.2d at 706 (Anstead, C.J. concurring). In contrast, the current procedures for imposing a sentence of death do not require notice of aggravating circumstances, do not require that the jury unanimously agree on the existence of any aggravating circumstances or on the ultimate question whether there are sufficient aggravating circumstances to warrant imposition of the sentence of death, do not require that a finding of sufficient aggravating circumstances be made beyond a reasonable doubt, and are not subject to the rules of evidence. This affords capital defendants fewer rights than defendants facing a three year minimum mandatory sentence for possession of a firearm during commission of a crime, or for a drunk driver who has been convicted of DUI previously. *See Bottoson*, 833 So.2d at 709-10 (Anstead, C.J., concurring).

Taking from the jury its obligation to determine any element of an offense which increases the penalty for that offense is a denial of due process and "an invasion of the jury's historical function." *State v. Overfelt*, 457 So.2d 1385, 1387 (Fla. 1984); *Henderson v. State*, 20 So.2d 649 (1945)(it is elementary that every element of a criminal offense must be proved sufficiently to satisfy the jury (not the court) of its existence). Conviction of an offense greater than what is charged in the indictment violates due process. *State v. Gray*, 435 So.2d 816, 818 (Fla. 1983);

Thornhill v. Alabama, 310 U.S. 88 (1940); *De Jonge v. Oregon*, 229 U.S. 353 (1937).

Florida's capital sentencing procedure is unconstitutional under the holding and reasoning of *Ring*, and under Florida law, which requires elements of an offense to be alleged in the charging document and found by a jury unanimously and beyond a reasonable doubt.

CONCLUSION

Petitioner Byron Bryant has sufficiently demonstrated both deficient performance and prejudice in his direct appeal. Petitioner's appellate counsel failed to raise as an issue for review the trial court's denial of the suppression issue. That issue was crucial because the confession was the only piece of evidence linking petitioner to the crime. The motion to suppress hearing was dispositive of the case, and therefore, failure of appellate counsel to raise it was negligent. Because petitioner would have been awarded a new trial due to the erroneous denial of the motion to suppress, he was prejudiced by appellate counsel's failure to raise that issue for review.

Appellate counsel also failed to raise as an issue for review the trial court's erroneous determination that the Aavoid arrest@ aggravator applied to petitioner's case. That aggravator in this case was a weighty aggravator, and the sentence of death may not have withstood review without it. To fail to dispute the trial court's finding on appeal was deficient performance, and petitioner was prejudiced by the deficient performance where his death sentence was affirmed.

Petitioner respectfully requests that this Honorable Court grant this petition for writ of habeas corpus and remand this case for a new sentencing before a jury or a new trial completely.

Respectfully submitted this _____ day of February, 2004.
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BY:

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished via US Mail to AAG Leslie T. Campbell, Office of the Attorney General, Criminal Appeals, 1515 N. Flagler Drive, 9th Floor, West Palm Beach, FL 33401; and to ASA Paul Zacks, Office of the State Attorney, 401 N. Dixie Hwy, West Palm Beach, FL 33401, on this _____ day of February, 2004.

_____
Jo Ann Barone Kotzen, Esq.

CERTIFICATE OF TYPE FONT

I hereby certify that the font requirement of Rule 9.210(a) has been complied with in this brief and Times New Roman 14-point has been used.

_____
Jo Ann Barone Kotzen, Esq.