IN THE SUPREME COURT OF FLORIDA

ANTHONY MUNGIN,

Petitioner,

vs. **No. SC03-1774**

JAMES V. CROSBY,

Secretary, Florida Dep't.
Of Corrections,

Respondent.

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AMENDED PETITION FOR WRIT OF HABEAS CORPUS

COMES NOW THE PETITIONER, ANTHONY MUNGIN, by and through his undersigned counsel, and herein files this Amended Petition for a Writ of Habeas Corpus. In support thereof, Mr. Mungin states as follows:

INTRODUCTION

This petition for habeas corpus is being filed in order to address substantial claims of error under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and claims demonstrating that Mr. Mungin was deprived of the effective assistance of counsel on direct appeal.

JURISDICTION

A writ of habeas corpus is an original proceeding in this Court governed by Fla. R. App. P. 9.100. This Court has original jurisdiction under Fla. R. App. P. 9.030 (a)(3) and Article V, §3 (b)(9), Fla. Cont. The Constitution of the State of Florida guarantees that "[t]he writ of habeas corpus shall be grantable of right, freely and without cost." Art. I, § 13, Fla. Const.

REQUEST FOR ORAL ARGUMENT

Mr. Mungin requests oral argument on this petition.

PROCEDURAL STATEMENT OF THE CASE

On January 28, 1993, Mr. Mungin was convicted by a Duval County jury for the September 16, 1990, murder of a 51-year old Betty Jean Woods during a robbery of a convenience store. Following a penalty phase, the jury recommended the death penalty by a vote of seven to five. The trial court followed the jury recommendation, finding the existence of two aggravating circumstances, no statutory mitigation and minimal weight to the nonstatutory mitigation that Mr. Mungin could be rehabilitated and did not have an antisocial personality. This Court affirmed on direct appeal over the dissent of Justice Anstead. *Mungin v. State*, 689 So. 2d 1026 (Fla. 1995), *cert. denied*, 522 U.S. 833 (1997).

On September 16, 1998, Mr. Mungin initiated postconviction proceedings

pursuant to Fla. R. Crim. P. 3.850/3.851. Following a limited evidentiary hearing, the circuit court denied relief, and Mr. Mungin's Rule 3.850/3.851 appeal is presently pending before this Court in Case No. SC03-780. The specifics of the Rule 3.850/3.851 proceedings are detailed in the procedural history in Mr. Mungin's Amended Initial Brief filed in that case and will not be repeated herein.

ARGUMENT

I

MR. MUNGIN RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL ON DIRECT APPEAL, IN VIOLATION OF THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

A. Introduction.

Mr. Mungin had the constitutional right to the effective assistance of counsel for purposes of presenting his direct appeal to this Court. *Strickland v. Washington*, 466 U.S. 668 (1984). "A first appeal as of right [] is not adjudicated in accord with due process of law if the appellant does not have the effective assistance of an attorney." *Evitts v. Lucey*, 469 U.S. 387, 396 (1985). The *Strickland* test applies equally to ineffectiveness allegations of trial counsel and appellate counsel. *See Orazio v. Dugger*, 876 F.2d 1508 (11th Cir. 1989).

Numerous constitutional deprivations which occurred at trial were not raised in Mr. Mungin's direct appeal. Because these constitutional violations were "obvious on the record" and "leaped out upon even a casual reading of transcript," it cannot be said that the "adversarial testing process worked in [Mr. Mungin's] direct appeal." *Matire v. Wainwright*, 811 F.2d 1430, 1438 (11th Cir. 1987). The lack of appellate advocacy on Mr. Mungin's behalf is identical to the lack of

advocacy present in other cases in which this Court has granted habeas corpus relief. *Wilson v. Wainwright*, 474 So.2d 1162 (Fla. 1985). Appellate counsel's failure to present the meritorious issues discussed in this petition demonstrates that his representation of Mr. Mungin involved "serious and substantial deficiencies." *Fitzpatrick v. Wainwright*, 490 So.2d 938, 940 (Fla. 1986). Individually and "cumulatively," *Barclay v. Wainwright*, 444 So.2d 956, 959 (Fla. 1984), the claims omitted by appellate counsel establish that "*confidence* in the correctness and fairness of the result has been undermined." *Wilson v. Wainwright*, 474 So.2d 1162, 1165 (Fla. 1985) (emphasis in original). In light of the serious reversible errors which appellate counsel never raised, there is more than a reasonable probability that the outcome of the appeal would have been different, and a new direct appeal must be ordered.

B. Singular and Combined Error of Introduction of Hearsay at Penalty Phase and Irrelevant and Unduly Prejudicial Photograph of Victim of Prior Violent Felony.

At Mr. Mungin's penalty phase, the State was permitted, over objection by the defense, to present testimony through Tallahassee Police Department officer Cecil Towle, regarding the underlying facts of the Tallahassee shooting in order to establish that Mr. Mungin had been convicted of a prior crime of violence. After establishing the witness's involvement in the investigation into the Tallahassee

incident, the prosecutor questioned Towle about what occurred as a result of his and other detectives' interviews with the victim of the Tallahassee shooting. The following then transpired:

> Q Can you tell us what occurred as a result of that interview with the victim?
>
> A (No response.)
>
> Q Specifically what she stated?
>
> A The victim stated that –
>
> MR. BUZZELL: Objection, Your Honor.
>
> Your Honor, that's hearsay.
>
> THE COURT: Hold on. When somebody objects stop.
>
> MR. BUZZELL: It's hearsay and otherwise inadmissible.
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> MR. de la RIONDA: Your Honor, I believe hearsay is admissible in this proceeding.
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> THE COURT: I will overrule the objection.
>
> BY MR. de la RIONDA:
>
> Q Continue, please.
>
> A The victim stated that a young black male came in the store, and as he came in he locked the front door, which is a thumb bolt latch on the front door. She asked him what he wanted. He was looking for a gift for a friend. She showed him a jewelry box. He said he would take it. She went to the rear of the store, it's a little office

area, and wrapped it up and handed him a receipt book to sign for the sale, which in turn he gave her a fifty-dollar bill. When she pulled out the cash box to make the change he pulled out a .25 automatic pistol, which, according to her, was just a gun, and told her step back and get the money out of the cash box. As he was doing this she pushed a Sonitrol alarm, which did not activate. She kept telling him to get out, leave. The person starts walking back toward the front door, she was following him telling him to leave, he stops, turns back towards her, pulls the slide back on the automatic pistol, puts it up to her head. She takes her right hand and throws it up and turns her head to the right and was shot through the hand in behind the right ear and the bullet rested under her right cheek. She started screaming for help. He goes out the front door and then she comes out bleeding, screaming for help, and then the witnesses there at the scene –

MR. BUZZELL: That is not responsive to the question. It was totally what she did.

THE COURT: All right. Yes. The objection is not timely, but go ahead.

BY MR. de la RIONDA:

Q Where is she now, sir?

A In China.

(R1127-28).

Following this line of questioning, the State questioned the detective about whether the victim had been shot at close contact (R1128). The State then moved into evidence two photographs; one photograph depicted the right hand of the victim "with a contact wound to the middle finger with charring and blackening

around the wound area (R1130). The second photograph depicted the victim in the emergency room "where she was right before she was treated . . . with blood on her pillow and in front of her blouse" (*Id*.). The defense objected to the admission of the photographs because their prejudicial nature outweighed their probative value and noted that the defense was stipulating that Mr. Mungin had been convicted of a violent felony as a result of this incident (R1131). The defense also objected that the photographs were an improper attempt to use victim impact evidence, in violation of Mr. Mungin's constitutional rights (*Id*.). The State argued that the photographs were not intended to be victim impact but rather "to show who the victim was since she is not here and able to testify" and to show that "it was a close-range shot" (*Id*.).[1] The trial court overruled the defense objections and admitted the two photographs without ever engaging in the requisite balancing test to determine if the probative value of the photographs was outweighed by their prejudicial nature (*Id*.).

1. The Law at the Time of Direct Appeal.

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[1]This argument was highly disingenuous given the fact that the State was permitted, over defense objection, to present the Tallahassee case as *Williams*-rule evidence in the guilt phase. *See Mungin v. State*, 689 So. 2d 1026 (Fla. 1995). During the guilt phase, the jurors were made well-aware of who the victim was and that she was shot (R756-58; 762).

With regard to the admission of the hearsay testimony of the victim of the prior violent felony case from Tallahassee, Mr. Mungin submits that such violated his Sixth Amendment right to confrontation, his Fourteenth Amendment right to due process, and his Eighth Amendment right to a fair and reliable sentencing proceeding. Legal principles well-settled at the time of Mr. Mungin's appeal established that the Confrontation Clause does apply in capital sentencing proceedings at both the penalty phase before the jury. In *Engle v. State*, 438 So. 2d 803 (Fla. 1983), this Court reversed a death sentence, writing:

> The sixth amendment right of an accused to confront the witnesses against him is a fundamental right which is made obligatory on the states by the due process clause of the fourteenth amendment to the United States Constitution. *Pointer v. Texas*, 380 U.S. 400 (1965). The primary interest secured by, and the major reason underlying the confrontation clause, is the right of cross-examination. *Pointer v. Texas*. This right of confrontation protected by cross-examination is a right that has been applied to the sentencing process. *Sprecht v. Patterson*.
>
> In *Bruton v. United States*, 391 U.S. 123 (1968), it was held that a statement or confession of a co-defendant which implicates an accused is not admissible against the accused unless he has an opportunity to confront and cross-examine the co-defendant. To admit such a statement is unquestioned error.

Engle, 438 So. 2d at 814.

Subsequently, this Court found a confrontation clause violation in *Walton v. State*, 481 So. 2d 1197 (Fla. 1985). There, this Court relied upon the decision in

Engle when it ordered a new penalty phase proceeding:

> Appellant contends he was denied his right to confront witnesses against him in the penalty phase of his trial in violation of our decision in *Engle v. State*, 438 So. 2d 803 (Fla. 1983), *cert. denied* 465 U.S. 1074 (1984), because the confessions of the codefendants Cooper and McCoy were presented to the jury and considered by the judge in imposing sentence, without Cooper and McCoy being available for cross-examination. We agree with this contention and find that a new penalty trial before a new jury is required.

Walton, 481 So. 2d at 1200.

Similarly, a confrontation clause violation was found on the basis of *Engle* when the State introduced a taped statement of the victim in a prior felony conviction of the defendant during the penalty phase proceedings. *Rhodes v. State*, 547 So. 2d 1201, 1204 (Fla. 1989). In *Rhodes*, the Court noted that while it it appropriate in the penalty phase for the State to introduce testimony concerning the the details of a prior violent felony, such must be done in accordance with the Sixth Amendment. Because the defendant in *Rhodes* was not permitted to cross-examine the victim's taped statement (even though the police officer who conducted the interview was present in court)[2], this Court found Sixth Amendment error and

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[2]In *Rhodes*, the victim of the prior violent felony was not available to testify due to her age and health. *Rhodes*, 547 So. 2d at 1204 n.5. In Mr. Mungin's case, the victim of the prior violent felony was likewise not available since she was living in China (R1128).

ordered a new penalty phase proceeding.[3]

The Sixth Amendment issues found to be meritorious in *Rhodes* similarly plagued Mr. Mungin's penalty phase. In both this case and in *Rhodes*, there was extensive testimony admitted in the form of hearsay from the victim of the prior violent felony. In both cases, the defendants did not have the opportunity to confront and cross-examine the victims either at the penalty phase or at an earlier proceeding. In both cases, the reason for such hearsay was that the victim of the prior violent felony was not available. In both cases, the detectives who investigated the prior violent felonies at issue were in court and able to testify as to the circumstances underlying the case without use of hearsay testimony from the victims. In both cases, the defendants had pled guilty to the prior violent felonies, thus there was no dispute over the fact that the defendants had, in fact, been convicted of those prior violent felonies. And, as in *Rhodes*, there was "no reason" why, in Mr. Mungin's case, the State needed to introduce the hearsay testimony of the victim of the prior felony, since the State also introduced a

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[3]Most recently, this Court relied on *Engle* to find a confrontation violation when the trial court admitted the deposition testimony of a co-felon at a capital sentencing hearing. *Donaldson v. State*, 722 So. 2d 177, 186 (Fla. 1998). Since the penalty phase was reversed on other grounds, the Court addressed the Confrontation Clause issue to give the parties guidance on remand.

certified copy of the prior violent felony conviction in not only the Tallahassee case but also the Monticello case (R1134-36).[4] *Rhodes*, 547 So. 2d at 1205 n.6. *Accord Lebron v. State*, 2005 Fla. App. LEXIS 5, *9-*10 (Fla. Jan. 13, 2005) (although it is appropriate to admit evidence regarding prior violent felony, "the State may not introduce testimony or evidence pertaining to prior violent felony convictions that is irrelevant, violates the defendant's confrontation rights, or where the probative value is far outweighed by prejudicial effect"). Mr. Mungin would have been entitled to relief had appellate counsel raised this issue on appeal. That Mr. Mungin's Sixth Amendment rights were violated is unquestionable. Moreover, the State relied extensively on the hearsay testimony from the victim in its closing argument at the penalty phase, and also argued that "this by itself, that is, the Tallahassee incident, outweighs any mitigation in this case. That act by itself supports a recommendation of death in the case because

[4]Not only were there Sixth Amendment problems associated with the introduction of this evidence, the jurors had been informed during the guilt phase of the facts of the Tallahassee and Monticello cases. Thus, the additional evidence at the penalty phase was cumulative and certainly prejudicial, particularly given the fact that Mr. Mungin was not able to cross-examine the hearsay testimony introduced by the State. In light of the State's presentation of the facts of the Tallahassee case during the guilt phase, it's purpose in presenting the additional hearsay as well as photographs of the victim in the penalty phase can only be viewed as an attempt to inflame the jurors and thus inject improper considerations into their penalty deliberations.

prior violence by the defendant has been shown" (R1217-19). In light of these arguments, as well as the combined effects of a slim 7-5 recommendation by the jury and the other errors already found by this Court on direct appeal,[5] the State would not have been in a position to establish harmlessness beyond a reasonable doubt had this issue been raised on direct appeal. *See State v. DiGuilio*, 491 So. 2d 1129 (Fla. 1986).

In addition to the improper introduction of hearsay at the penalty phase, the State was permitted, over defense objection, to introduce two photographs of the victim of the Tallahassee case. These photographs were irrelevant and prejudicial. One of the photographs depicted the right hand of the victim "with a contact wound to the middle finger with charring and blackening around the wound area (R1130). The second photograph depicted the victim in the emergency room "where she was right before she was treated . . . with blood on her pillow and in front of her blouse" (*Id*.). Defense counsel lodged proper objections, which were overruled. Appellate counsel, however, unreasonably failed to raise this issue on

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[5]On direct appeal, the Court found that the court had erred in not granting Mr. Mungin's motion for judgment of acquittal on the premeditated murder count, in instructing the jury on both felony and premeditated murder, and in introducing evidence at the guilt phase that the victim of the prior violent felony used as *Williams*-rule evidence had been shot in the spine. *Mungin v. State*, 689 So. 2d 1026, 1029-30 & n.7 (Fla. 1995).

appeal.

The law is and was clear that the State may not introduce irrelevant evidence at a penalty phase, or evidence whose "probative value . . . is far outweighed by prejudicial effect." *Lebron, supra*. The test for admissibility of photographic evidence "is relevancy rather than necessity." *Philmore v. State*, 820 So. 2d 919, 930 (Fla. 2002). *See also Almeida v. State*, 748 So. 2d 922, 929 (Fla. 1999) (explaining that the relevancy standard "by no means constitutes a carte blanche for the admission of gruesome photographs"). Here, the reasons proffered by the State for the introduction of the two photographs was "to show who the victim was since she is not here and able to testify" and to show that "it was a close-range shot" (R1131). Neither of these reasons is sufficient nor did the photographs even show "who the victim was." In the first place, as noted earlier, the jurors were well aware of "who the victim was" since the State introduced extensive testimony on the Tallahassee shooting during the guilt phase. Moreover, the first photograph depicted the right hand of the victim "with a contact wound to the middle finger with charring and blackening around the wound area (R1130). This did not show "who the victim was" but rather her right hand. The second photograph depicted the victim in the emergency room "where she was right before she was treated . . . with blood on her pillow and in front of her blouse" (*Id*.). This photograph was

entirely irrelevant; what the victim looked like in the emergency room, as well as blood on her pillow and blouse, are just not issues that were relevant to establishing that Mr. Mungin had been convicted of the Tallahassee shooting (a fact they had already been made aware of in the guilt phase). Moreover, the probative value of photographs showing the victim's injury and with blood on her pillow and blouse at the emergency room was far outweighed by their prejudicial effect. *See Duncan v. State*, 619 So. 2d 279, 282 (Fla. 1993). The error in admitting these photographs, alone and particularly in conjunction with the error in admitting the hearsay testimony, discussed above, the close 7-5 death recommendation, and the errors in the proceedings already found by the Court on direct appeal, cannot be considered harmless. Thus, appellate counsel's failure to raise this issue on appeal was prejudicially deficient and Mr. Mungin is entitled to habeas relief and a new direct appeal.

2. New law establishes a Sixth Amendment violation.

While Mr. Mungin contends that extant legal principles at the time of his direct appeal warranted relief had the above hearsay issue been raised on appeal, new case law from the Supreme Court has now established that Mr. Mungin's right to confrontation was unquestionably violated. In *Crawford v. Washington*, 124 S. Ct. 1354 (2004), the Supreme Court of the United States announced:

> Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law–as does [*Ohio v.] Roberts*[, 448 U.S. 56 (1980)], and as would an approach that exempted such statements from Confrontation Clause scrutiny altogether. **Where testimonial evidence is at issue, however, the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination**. We leave for another day any effort to spell out a comprehensive definition of "testimonial." Whatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; **and to police interrogations**. These are the modern practices with the closest kinship to the abuses at which the Confrontation Clause was directed.
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> In this case, the State admitted Sylvia's testimonial statement against petitioner, despite the fact that he had no opportunity to cross-examine her. That alone is sufficient to make out a violation of the Sixth Amendment. *Roberts* notwithstanding, we decline to mine the record in search of indicia of reliability. **Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actual prescribes: confrontation**.

Id. (emphasis added). The significance of the Supreme Court's pronouncement was underscored when the Court concluded that as to testimonial hearsay, the Court's own rationale in *Ohio v. Roberts* deviated from "the historical principles" upon which the Confrontation Clause rested. The Court further called into question its decision in *White v. Illinois*, 502 U.S. 346 (1992). Thus, the Supreme Court in *Crawford* discarded the notion that the Confrontation Clause could be satisfied where rules of evidence permitted the introduction of testimonial hearsay.

Crawford implicates a fundamental right essential to a reliable and accurate trial. *Crawford* itself describes the Confrontation Clause as a "bedrock procedural guarantee," 124 S. Ct. at 1359, and explains, "the Clause's ultimate goal is to ensure reliability of evidence." *Id*. at 1370. In *Pointer v. Texas*, 380 U.S. 400, 403-04 (1965), the Supreme Court ruled that the Sixth Amendment's Confrontation Clause applied to state criminal prosecutions precisely because it is a "fundamental right" essential to a fair trial. The Supreme Court recognized "the value of cross-examination in exposing falsehood and bringing out the truth in a criminal case." *Id*. The Supreme Court has held that cross-examination is important because it is "the greatest legal engine ever invented for the discovery of truth," *White v. Illinois*, 502 U.S. 346, 356 (1992), *quoting California v. Green*, 399 U.S. 149, 158 (1970), and has explained that the "basic purpose" of the Confrontation Clause is the "promotion of the integrity of the fact finding process." *White v. Illinois*, 502 U.S. at 356, *quoting Coy v. Iowa*, 487 U.S. 1012 (1988).

In *Crawford*, the Court examined the history of the Confrontation Clause and concluded, "Leaving the regulation of out-of-court statements to the law of evidence would render the Confrontation Clause powerless." 124 S. Ct. at 1364. Thus, the Confrontation Clause "applies to 'witnesses' against the accused--in other words, those who 'bear testimony.'" *Id*. This definition of "*ex parte*

testimony" encompasses "[s]tatements taken by police officers." *Id.*

The hearsay statements of the victim of the prior violent felony introduced at Mr. Mungin's penalty phase unquestionably were *ex parte* statements and introduced without the Sixth Amendment guarantee addressed in *Crawford*: actual confrontation. Mr. Mungin submits that *Crawford* should be applied to his case at this time. *See Witt v. State*, 387 So. 2d 922 (Fla. 1980). Under *Crawford*, Mr. Mungin's right to confrontation was violated, and relief is warranted at this time.

II

THE COURT SHOULD RECONSIDER ITS RULING ON DIRECT APPEAL THAT *GRIFFIN V. UNITED STATES*, 502 U.S. 46 (1991), COMPELLED A FINDING THAT REVERSAL OF MR. MUNGIN'S CONVICTION FOR FIRST-DEGREE MURDER.

On direct appeal, this Court held that the trial court erred in failing to grant Mr. Mungin's motion for a judgment of acquittal on the charge of premeditated first-degree murder but found, over the ardent dissent of Justice Anstead, that reversal was not compelled under *Griffin v. United States*, 502 U.S. 46 (1991), because there was sufficient evidence to support a conviction for felony murder. *Mungin v. State*, 689 So. 2d 1026, 1029-30 (Fla. 1995). Review of the Court's direct appeal decision clearly establishes that the Court's majority felt that the *Griffin* holding was required to be applied in Florida, since it was the only case cited by the majority opinion as compelling the conclusion that reversal was not warranted.[6]

As Justice Anstead's dissenting opinion pointed out, the rationale of *Griffin* is "unpersuasive" in light of Florida decisional law developed in district courts of

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[6]The majority decision cited to *Stromberg v. California*, 283 U.S. 359 (1931), and *Yates v. United States*, 354 U.S. 298 (1975), but noted that those cases were distinguishable from *Griffin*. *Mungin*, 689 So. 2d at 1030 nn. 5 & 6.

appeal. *Mungin*, 689 So. 2d at 1034. In the time period since this Court's decision in Mr. Mungin's direct appeal, numerous state court decisions have clarified that *Griffin* was applicable only to federal law and thus not binding on the states. For example, just recently, the Supreme Court of Hawaii held that it was not bound by *Griffin* and rejected its holding as applied to Hawaii, relying instead on its own state law to reverse a case in a posture like Mr. Mungin's case. *See State v. Jones*, 96 Haw. 171 (Ha. 2001). As the Hawaii Supreme Court wrote:

> Although *Griffin* established that, under federal law, sufficient evidence was required for only one of the alternative means supporting a conviction, a number of state courts have rejected such analysis on state law grounds, holding that there must be sufficient evidence to support each alternative theory submitted to the jury to uphold a general verdict of guilty.

Id. at 179. The Hawaii Supreme Court went on to list the state jurisdiction which have rejected *Griffin* in lieu of state law grounds, including Massachusetts, Washington, and Colorado. *Id*. Because it was "not convinced by the reasoning of the Supreme Court in *Griffin*, the Hawaii Supreme Court, like the other jurisdictions it cited, decided to reject it and apply instead longstanding state law principles. *See also Commonweath v. Plunkett*, 422 Mass. 634, 664 N.E. 2d 833 (Mass. 1996) ("The premise of the Supreme Court's position . . . is not so well founded as to attract our attention to it").

Since first citing *Griffin* in a Florida case, *see Atwater v. State*, 626 So. 2d 1325 n.1 (Fla. 1993), this Court has never addressed state law but simply presumed that because *Griffin* emanated from the Supreme Court its holding was required to be applied in Florida. As Justice Anstead noted in his dissent on Mr. Mungin's direct appeal, however, Florida law counters against the application of the *Griffin* reasoning in this state. *Griffin* is not binding on the states, and given the subsequent state court decisions which have rejected its reasoning, Mr. Mungin respectfully requests that this issue warrants revisiting at this time.

II

FLORIDA'S CAPITAL SENTENCING PROCEDURE DEPRIVED MR. MUNGIN 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. Mungin's 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*. Mr. Mungin acknowledges that this Court has repeatedly rejected *Ring* claims raised by capital defendants, and is raising the claim herein in order to preserve it. *See Sireci v. State*, 773 So. 2d 34, 41 n.14 (Fla. 2000).

Mr. Mungin's 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.").

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. Mungin's jury was told otherwise. The instructions given to Mr. Mungin's jury violated the Due Process Clause of the Fourteenth Amendment to the United States Constitution 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. Mungin to prove that the

mitigating circumstances outweigh sufficient aggravating circumstances. *Mullaney v. Wilbur*, 421 U.S. 684, 698 (1975).

Mr. Mungin's death sentences are 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 Process. *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. *Apprendi*, 530 U.S. at 475-476. *Ring* 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). In *Jones*, the United States Supreme Court noted that "[much turns on the determination that a fact is an element of an offense, rather than a sentencing consideration," in significant part because "elements must be charged in the indictment." *Jones*, 526 U.S. at 232.

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 statute, 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." 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. Finally, in *Chicone v. State*, 684 So. 2d 736, 744 (Fla. 1996), this Court stated "[a]s a general rule, an information must allege each of the essential elements of a

crime to be valid." 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. Mungin 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); *Campbell v. Louisiana*, 523 U.S. 393, 399 (1998).

Because Mr. Mungin's sentencing proceeding was not conducted in accordance with the principles set forth in *Ring*, a resentencing is required at this time.

CONCLUSION

Based upon the record and the arguments presented herein, Mr. Mungin respectfully urges the Court to vacate his conviction and his unconstitutional death sentence

CERTIFICATE OF FONT

I hereby certify that this petition was typed in New Times Roman font, 14 pt. type.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Amended Petition for Habeas Corpus has been furnished by United States Mail, first class postage prepaid to Curtis French, Senior Assistant Attorney General, The Capitol, Tallahassee, FL, 32399-1050, this 20th day of January, 2005.

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