IN THE SUPREME COURT OF FLORIDA

CASE NO.SC06-1575

NORMAN GRIM,

Petitioner,

v.

JAMES MCDONOUGH,

Secretary, Florida Department of Corrections,

Respondent.

PETITION FOR WRIT OF HABEAS CORPUS

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PRELIMINARY STATEMENT

This is Mr. Grim's first habeas corpus petition in this Court. Art. 1, Sec. 13 of the Florida Constitution provides: "The writ of habeas corpus shall be grantable of right, freely and without cost." This petition for habeas corpus relief is being filed in order to address substantial claims of error under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, claims demonstrating that Mr. Grim was deprived of the right to a fair, reliable, and individualized sentencing proceeding and that the proceedings resulting in his convictions and death sentence violated fundamental constitutional imperatives.

Citations shall be as follows:

"R. ___." The record on direct appeal.

"TT. ___." The trial transcript.

"PC-R. ___." The post-conviction record on appeal.

All other references will be self-explanatory or otherwise explained herein.

REQUEST FOR ORAL ARGUMENT

Due to the seriousness of the issues involved, Petitioner respectfully requests oral argument.

PROCEDURAL HISTORY

On February 16, 1999, Mr. Grim was indicted by a Santa Rosa County grand jury for one count each of first-degree murder and sexual battery. (R. 9-12) On November 1, 2000, a jury found Mr. Grim guilty of all charges. (R. 219) The next day, that same jury recommended death by a vote of 12-0. (R. 2120) Subsequent to the jury=s recommendation, the trial court sentenced Mr. Grim to death on December 21, 2000. (R. 235-48)

Mr. Grim timely sought direct appeal to this Court. This Court affirmed Mr. Grim's convictions and death sentence. Grim v. State, 841 So.2d 455 (Fla. 2003). The United States Supreme Court denied certiorari. Grim v. Florida, 122 S.Ct. 230 (2003).

Mr. Grim filed his initial post-conviction motion on October 5, 2004. (PC-R. 1-78) A Huff[1] hearing was held in the matter on January 31, 2005. (PC-R. 85-86) On February 8, 2005 the lower court entered an order granting an evidentiary hearing on the factual claims asserted in Mr. Grim's post-conviction motion. (PC-R. 87-88) An evidentiary hearing was held in this matter on April 14-15, 2005. The evidentiary hearing was continued and completed on September 1, 2005. After the hearing, both Mr. Grim and the state submitted written closing arguments. (PC-R. 151-85) The lower court denied all relief on December

[1] Huff v. State, 622 So.2d 982 (Fla. 1993).

20, 2005. (PC-R. 186-215) Simultaneously with this Petition, Mr. Grim has filed a brief appealing the denial of his post-conviction motion.

JURISDICTION TO ENTERTAIN PETITION AND GRANT HABEAS CORPUS RELIEF

This is an original action under Fla. R. App. P. 9.100(a). See Art. 1, Sec. 13, Fla. Const. This Court has original jurisdiction pursuant to Fla. R. App. P. 9.030(a)(3) and Article V, sec. 3(b)(9), Fla. Const. The petition presents constitutional issues which directly concern the judgment of this Court during the appellate process, and the legality of Petitioner's convictions and sentences of death.

Jurisdiction in this action lies in this Court. See, e.g., Smith v. State, 400 So.2d 956, 960 (Fla. 1981). The fundamental constitutional errors challenged herein arise in the context of a capital case in which this Court heard and denied Petitioner's direct appeal. See Wilson, 474 So.2d at 1163; cf. Brown v. Wainwright, 392 So.2d 1327 (Fla. 1981). A petition for a writ of habeas corpus is the proper means for Mr. Grim to raise the claims presented herein. See, e.g., 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); Wilson, 474 So.2d at 1162.

This Court has the inherent power to do justice. The ends of justice call on the Court to grant the relief sought in this case, as the Court has done in similar cases in the past. The petition pleads claims involving fundamental constitutional error. See Dallas v. Wainwright, 175 So.2d 785 (Fla. 1965); Palmes v. Wainwright, 460 So.2d 362 (Fla. 1984). The Court's exercise of its habeas corpus jurisdiction, and of its authority to correct constitutional errors such as those herein pled, is warranted in this action. As the petition shows, habeas corpus relief would be proper.

GROUNDS FOR HABEAS CORPUS RELIEF

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

GROUND I

FLORIDA STATUTE § 921.141 VIOLATES THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION, THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION, AND RING V. ARIZONA.[2]

[2] Mr. Grim takes the opportunity at the outset of this claim to acknowledge that this claim was not raised at trial or on direct appeal to this Court. Further, Mr. Grim acknowledges the United States Supreme Court's opinion in Schiro v. Summerlin, 543 U.S. 348 (2004). In that opinion, the Court held that Ring is not retroactively applicable to cases already final on direct appeal. Mr. Grim also acknowledges this Court's opinion in Johnson v. State, 904 So.2d 400 (Fla. 2005).

Florida's Capital Sentencing Scheme is Unconstitutional under Ring v. Arizona

The holding of Ring

Ring v. Arizona, 122 S.Ct. 2428 (2002), held unconstitutional a capital sentencing scheme that makes a death sentence contingent upon finding an aggravating circumstance and assigns responsibility for finding that circumstance to the judge. The Supreme Court based its Ring holding on its earlier decision in Apprendi v. New Jersey, 530 U.S. 466 (2000), where it held that "[i]t is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed." Id. at 490 (quoting Jones v. United States, 526 U.S. 227, 252-53 (1999) (Stevens, J., concurring)). Capital sentencing schemes such as Florida's and Arizona's violate the notice and jury trial rights guaranteed by the Sixth and Fourteenth Amendments because they do not allow the jury to reach a verdict with respect to an "aggravating fact [that] is an element of the aggravated crime" punishable by death. Ring, slip op. at 19 (quoting Apprendi, 530 U.S. at 501 (Thomas, J., concurring)).

Applying the Apprendi test in Ring, the Court said "[t]he dispositive question . . . 'is not one of form but

of effect.'" Ring, slip op. at 16 (quoting Apprendi, 530 U.S. at 494). The question is not whether death is an authorized punishment in first-degree murder cases, but whether the "facts increasing punishment beyond the maximum authorized by a guilty verdict standing alone," Ring, slip op. at 19, are found by the judge or jury. "If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact . . . must be found by a jury beyond a reasonable doubt." Ring, slip op. at 16. "All the facts which must exist in order to subject the defendant to a legally prescribed punishment must be found by the jury." Id. (quoting Apprendi at 499 (Scalia, J., concurring)).

The Court in Ring held that Arizona's sentencing statute could not survive Apprendi because "[a] defendant convicted of first-degree murder in Arizona cannot receive a death sentence unless a judge makes the factual determination that a statutory aggravating factor exists. Without that critical finding, the maximum sentence to which the defendant is exposed is life imprisonment, and not the death penalty." Ring, slip op. at 9. Thus, the Court 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, slip op. at 22.

Application of Ring to Florida's sentencing scheme

This Court has previously held that, "[b]ecause Apprendi did not overrule Walton, the basic scheme in Florida is not overruled either." Mills v. Moore, 786 So.2d 532, 537 (Fla. 2001). Ring overruled Walton, and the basic principle of Hildwin v. Florida, 490 U.S. 638 (1989) (per curiam), which had upheld the basic scheme in Florida "on grounds that 'the Sixth Amendment does not require that the specific findings authorizing imposition of the sentence of death be made by the jury.'" Ring, slip op. at 11 (quoting Walton, 497 U.S. at 648). Additionally, Ring undermines the reasoning of this Court's decision in Mills by establishing (a) that Apprendi applies to capital sentencing schemes, Ring, slip op. at 2 ("Capital defendants, no less than non-capital defendants . . . are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment"); id. at 23, (b) that States may not avoid the Sixth Amendment requirements of Apprendi by simply "specif[ying] 'death or life imprisonment' as the only sentencing options," Ring, slip op. at 17, and clarifying

(c) that the relevant and dispositive question is whether under state law death is "authorized by a guilty verdict standing alone." Ring, slip op. at 19.

Florida's capital sentencing statute, like the Arizona statute struck down in Ring, makes imposition of the death penalty contingent upon the factual findings of the judge – not the jury. Section 775.082 of the Florida Statutes provides that a person convicted of first-degree murder must be sentenced to life imprisonment "unless the proceedings held to determine sentence according to the procedure set forth in § 921.141 result in finding by the court that such person shall be punished by death." This Court has long held that sections 775.082 and 921.141 do not allow imposition of a death sentence upon a jury's verdict of guilt, but only upon the finding of sufficient aggravating circumstances. Dixon v. State, 283 So.2d 1, 7 (Fla. 1973).

The "explicitly cross-reference[d] . . . statutory provision requiring the finding of an aggravating circumstance before imposition of the death penalty," Ring, slip op. at 18, requires the judge – after the jury has been discharged and "[n]otwithstanding the recommendation of a majority of the jury" – to make three factual determinations. Fla. Stat. § 921.141(3). Section

921.141(3) provides that "if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts." Id. First, the trial court must find the existence of at least one aggravating circumstance. Id. Second, the judge must find that "sufficient aggravating circumstances exist" to justify death. Id. Third, the judge must find in writing that "there are insufficient mitigating circumstances to outweigh the aggravating circumstances." Id. "If the court does not make the findings requiring the death sentence, the court shall impose sentence of life imprisonment in accordance with § 775.082." Id.

Because Florida's death penalty statute makes imposition of death contingent upon findings of "sufficient aggravating circumstances" and "insufficient mitigating circumstances," and gives sole responsibility for making those findings to the judge, it violates the Sixth Amendment.

The role of the jury in Florida's capital sentencing scheme neither satisfies the Sixth Amendment, nor renders harmless the failure to satisfy *Apprendi* and *Ring*. Florida juries do not make findings of fact

Florida's death penalty statute differs from Arizona's in that it provides for the jury to hear evidence and "render an advisory sentence to the court." Fla. Stat. §

921.141(2). A Florida jury's role in the capital sentencing process is insignificant under Ring, however. Whether one looks to the plain meaning of Florida's death penalty statute, or cases interpreting it, "under section 921.141, the jury's advisory recommendation is not supported by findings of fact," Combs v. State, 525 So.2d 853, 859 (Fla. 1988) (Shaw, J., concurring), which is the central requirement of Ring.

This Court has rejected the idea that a defendant convicted of first degree murder has the right "to have the existence and validity of aggravating circumstances determined as they were placed before his jury." Engle v. State, 438 So.2d 803, 813 (Fla. 1983). The statute specifically requires the judge to "set forth . . . findings upon which the sentence of death is based as to the facts," but asks the jury generally to "render an advisory sentence . . . based upon the following matters" referring to the sufficiency of the aggravating and mitigating circumstances. Fla. Stat. 921.141(2) & (3). Thus, "the sentencing order is 'a statutorily required personal evaluation by the trial judge of the aggravating and mitigating factors' that forms the basis of a sentence of life or death." Morton v. State, 789 So.2d 324, 333

(Fla. 2001) (quoting Patton v. State, 784 So.2d 380 (Fla. 2000)).

As the Supreme Court said in Walton, "[a] Florida trial court no more has the assistance of a jury's findings of fact with respect to sentencing issues than does a trial judge in Arizona." Walton, 497 U.S. at 648. The Florida Supreme Court has repeatedly emphasized that a judge's findings must be made independently of the jury's recommendation. See Grossman v. State, 525 So.2d 833, 840 (Fla. 1988). Because the judge must find that "sufficient aggravating circumstances exist" "notwithstanding the recommendation of a majority of the jury," Fla. Stat. § 921.141(3), he may consider and rely upon evidence not submitted to the jury. The judge is also permitted to consider and rely upon aggravating circumstances that were not submitted to the jury. Davis, 703 So.2d at 1061.

Because the jury's role is merely advisory and contains no findings upon which to judge the proportionality of the sentence, this Court has recognized that its review of a death sentence is based and dependent upon the judge's written findings. Morton, 789 So.2d at 333.

Florida juries are not required to render a verdict on elements of capital murder

Although "[Florida's] enumerated aggravating factors operate as 'the functional equivalent of an element of a greater offense,'" and therefore must be found by a jury like any other element of an offense, Ring, slip op. at 23 (quoting Apprendi, 530 U.S. at 494), Florida law does not require the jury to reach a verdict on any of the factual determinations required for death. Section 921.141(2) does not call for a jury verdict, but rather an "advisory sentence." This Court has held that "'the jury's sentencing recommendation in a capital case is only advisory. The trial court is to conduct its own weighing of the aggravating and mitigating circumstances . . . .'" Combs, 525 So.2d at 858 (quoting Spaziano v. Florida, 468 U.S. 447, 451) (emphasis original in Combs). It is reversible error for a trial judge to consider himself bound to follow a jury's recommendation. Ross v. State, 386 So.2d 1191, 1198 (Fla. 1980). Florida law only requires the judge to consider "the recommendation of a majority of the jury." Fla. Stat. § 921.141(3). In contrast, "[n]o verdict may be rendered unless all of the trial jurors concur in it." Fla. R. Crim. Pro. 3.440. No authority of Florida law requires that all jurors concur in finding the requisite aggravating circumstances.

Further, it would be unconstitutional to rely on a jury's majority advisory sentence as the basis for the fact-findings required for a death sentence. In Harris v. United States, 122 S.Ct. 2406 (2002), the Supreme Court held that under Apprendi "those facts setting the outer limits of a sentence, and of the judicial power to impose it, are the elements of the crime for the purposes of the constitutional analysis." Id. And in Ring, the Court held that the aggravating factors enumerated under Arizona law operated as "the functional equivalent of an element of a greater offense" and thus had to be found by a jury. Id. Pursuant to the reasoning set forth in Apprendi and Ring, aggravating factors are equivalent to elements of the capital crime itself and must be treated as such.

Findings of the elements of a capital crime by a mere simple majority is unconstitutional under the Sixth and Fourteenth Amendments. In the same way that the Constitution guarantees a baseline level of certainty before a jury can convict a defendant, it also constrains the number of jurors who can render a guilty verdict. See Apodaca v. Oregon, 406 U.S. 404 (1972) (the Sixth and Fourteenth Amendments require that a criminal verdict must be supported by at least a "substantial majority" of the jurors). Clearly, a mere numerical majority -- which is

all that is required under Section 921.141(3) for the jury's advisory sentence -- would not satisfy the "substantial majority" requirement of Apodaca. See, e.g., Johnson v. Louisiana, 406 U.S. 356, 366 (1972) (Blackmun, J., concurring) (a state statute authorizing a 7-5 verdict would violate Due Process Clause of Fourteenth Amendment).

The state was not required to convince the jury that death was a proper sentence beyond a reasonable doubt

The jury in Mr. Grim's case was not required to make the requisite findings beyond a reasonable doubt as required by the Sixth Amendment. "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 found by a jury beyond a reasonable doubt." Ring, slip op. at 16. Florida law makes a death sentence contingent not upon the existence of any individual aggravating circumstance, but on a judicial finding "[t]hat sufficient aggravating circumstances exist." Fla. Stat. § 921.141(3). Although Mr. Grim's jury was told that individual jurors could consider only those aggravating circumstances that had been proven beyond a reasonable doubt, it was not required to find beyond a reasonable doubt "whether sufficient aggravating

circumstances exist to justify the imposition of the death penalty."

In summary, in light of the plain language of Florida's statute, the Rules of Criminal Procedure, and this Court's death penalty jurisprudence, it is clear that the limited role of the jury in Florida's capital sentencing scheme fails to satisfy the requirements of the Sixth Amendment. Even if the Florida Supreme Court were to redefine the jury's role under Florida law, it would not make Mr. Grim's death sentence valid. Defendant's jury was repeatedly instructed that their recommendation was merely advisory. As the Supreme Court held in Caldwell v. Mississippi, 472 U.S. 320 (1985):

> [I]t is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere. Caldwell, 472 U.S. at 328-329.

Were this Court to conclude now that Mr. Grim's death sentence rests on findings made by the jury after they were told, and Florida law clearly provided, that a death sentence would not rest upon their recommendation, it would establish that Mr. Grim's death sentence was imposed in violation of Caldwell.

Caldwell embodies the principle stated in Justice Breyer's concurring opinion in Ring: "the Eighth Amendment requires individual jurors to make, and to take responsibility for, a decision to sentence a person to death." Ring,(Breyer, J., concurring).

Mr. Grim's death sentence is invalid because the elements of the offense necessary to establish capital murder were not charged in the indictment.

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 held that the Fourteenth Amendment affords citizens the same protections when they are prosecuted under state law. Apprendi at 475-476. Ring held that a death penalty statute's "aggravating factors operate as 'the functional equivalent of an element or a greater offense.'" Ring, slip op. at 23 (quoting Apprendi, 530 U.S. at 494, n. 19).

In Jones, the Supreme Court noted that "[m]uch 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. On June 28, 2002, after the Court's decision in Ring, the death sentence imposed in United States v. Allen, 247 F.3d 741 (8th Cir. 2001), was overturned when the Supreme Court granted the writ of certiorari, vacated the judgement of the United States Court of Appeals for the Eighth Circuit upholding the death sentence, and remanded the case for reconsideration in light of Ring's holding that aggravating factors that are prerequisites of a death sentence must be treated as elements of the offense. Allen v. United States, 122 S.Ct. 2653 (2002).

The question presented in Allen was this:

> Whether aggravating factors required for a sentence of death under the Federal Death Penalty Act of 1994, 18 U.S.C. § 3591 et seq., are elements of a capital crime and thus must be alleged in the indictment in order to comply with the Due Process and Grand Jury clauses of the Fifth Amendment?

The Eighth Circuit rejected Allen's argument because in its view aggravating factors are not elements of federal capital murder but rather "sentencing protections that shield a defendant from automatically receiving the statutorily authorized death sentence." United States v. Allen, 247 F.3d at 763.

Like the Fifth Amendment to the United State 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 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 circumstance. 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 held that "[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), the Court held "[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), the Florida Supreme Court held "[a]s a general rule, an information must allege each of the essential elements of a crime to be valid."

The most "celebrated purpose" of the grand jury "is to stand between the government and the citizen" and protect individuals from the abuse of arbitrary prosecution. United States v. Dionisio, 410 U.S. 19, 33 (1973); see also Wood v. Georgia, 370 U.S. 375, 390 (1962). The Supreme Court explained that function of the grand jury in Dionisio:

> Properly functioning, the grand jury is to be the servant of neither the Government nor the courts, but of the people . . . As such, we assume that it comes to its task without bias or self-interest. Unlike the prosecutor or policeman, it has no election to win or executive appointment to keep.

Id., 410 U.S. at 35. The shielding function of the grand jury is uniquely important in capital cases. See Campbell v. Louisiana, 523 U.S. 392, 399 (1998)(recognizing that the grand jury "acts as a vital check against the wrongful exercise of power by the State and its prosecutors" with respect to "significant decisions such as how many counts to charge and . . . the important decision to charge a capital crime").

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. Grim with a crime punishable by death. Nor can one have confidence that the grand jury intended to subject Mr. Grim and his petit jurors to the crucible of the capital sentencing process. The state's authority to decide whether to seek the execution of an individual charged with crime hardly overrides - in fact is an archetypical reason for - the constitutional requirement of neutral review of prosecutorial intentions.

The Sixth Amendment requires that "[i]n all criminal prosecutions, the accused shall . . . be informed of the nature and cause of the accusation . . . ." A conviction on a charge not made by the indictment is a denial of due process of law. State v. Gray, supra, citing Thornhill v. Alabama, 310 U.S. 88 (1940), and De Jonge v. Oregon, 299 U.S. 353 (1937).

Because the state did not submit to the grand jury, and the indictment did not state, the essential elements of the aggravated crime of capital murder, Mr. Grim's right under Article I, section 15 of the Florida Constitution, and the Sixth Amendment to the federal Constitution were

violated. By wholly omitting any reference to the aggravating circumstances that would be relied upon by the State in seeking a death sentence, the indictment prejudicially hindered Mr. Grim "in the preparation of a defense" to a sentence of death. Fla. R. Crim Pro.3.140(o).

Mr. Grim's death sentence was imposed in violation of the due process clause of the Fifth Amendment and the jury trial right guaranteed by the Sixth Amendment 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. Stat. §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 requires that the state bear the burden of proving it beyond a reasonable doubt. Ring, slip op. at 2 ("Capital defendants . . . are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment."). Nevertheless, Florida juries, like Mr. Grim's, are routinely instructed that it is their duty to render an

opinion on life or death by deciding "whether sufficient mitigating circumstances exist[ed] to outweigh any aggravating circumstances found to exist."

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. §§775.082, 921.141. For that reason, Winship requires the prosecution to prove the existence of that element beyond a reasonable doubt. The instruction given Mr. Grim's jury violated the Due Process Clause of the Fourteenth Amendment of the United States Constitution and the Sixth Amendment's jury trial right because it relieves 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 the defendant to prove that the mitigating circumstances outweigh sufficient aggravating circumstances. Mullaney v. Wilbur, 421 U.S. 684, 698 (1975).

In Mullaney, the United States Supreme Court held that a Maine statutory scheme delineating the crimes of murder and manslaughter violated the Due Process Clause of the Fourteenth Amendment. The Maine law at issue required a defendant to establish, by a preponderance of the evidence, that he acted in the heat of passion on sudden provocation, in order to reduce a charge of murder to manslaughter. Id. at 691-692. Like the Florida statute at issue here, "the potential difference in [punishment] attendant to each conviction . . . may be of greater importance than the difference between guilt or innocence for many lesser crimes." Id. at 698. The Supreme Court held that the statutory scheme unconstitutionally relieved the state of its burden to prove the element of intent. Id. at 701-702. The Florida instruction produces the same fatal flaw.

To comply with the Eighth Amendment's requirement that the death penalty be applied only to the worst offenders, Florida adopted statute 921.141 as a means of distinguishing between death-penalty eligible and non-death-penalty eligible murder. State v. Dixon, 283 So. 2d 1, 10 (Fla. 1973). Florida chose to distinguish those for whom "sufficient aggravating circumstances" outweigh mitigating circumstances from those for whom "sufficient aggravating circumstances" do not outweigh the mitigating

circumstances. Id. at 8. Because the former are more culpable, they are subjected to the most severe punishment: death. "By drawing this distinction, while refusing to require the prosecution to establish beyond a reasonable doubt the fact upon which it turns, [Florida] denigrates the interests found critical in Winship." Mullaney, 421 U.S. at 698.

Because Mr. Grim's jury was never required to find the element of sufficient aggravating circumstances beyond a reasonable doubt, the error here cannot be subjected to harmless error analysis. Sullivan v. Louisiana, 508 U.S. 275, 279-280 (1993). Consequently, this Court must vacate Mr. Grim's death sentence.

GROUND II

AT MR. GRIM'S CAPITAL TRIAL, THE TRIAL COURT ERRONEOUSLY DENIED MR. GRIM'S MOTION TO SUPPRESS THE SEARCH WARRANT RELATED TO HIS RESIDENCE. FURTHER, THE TRIAL COURT ERRED IN OVERRULING DEFENSE COUNSEL'S OBJECTION TO THE FACTS OF A PRIOR CONVICTION BECOMING THE DOMINATING FEATURE OF MR. GRIM'S PENALTY PHASE PROCEEDINGS. APPELLATE COUNSEL WAS INEFFECTIVE IN FAILING TO PRESENT THESE ISSUES IN Mr. GRIM'S DIRECT APPEAL TO THIS COURT.

A. Ruling on Motion to Suppress Evidence Seized Pursuant to Search Warrant

Prior to trial, counsel for Mr. Grim filed a motion to suppress "all evidence seized as a result of the Search Warrant executed at the Defendant's residence at 5236 Nimitz Road on July 28, 1998." (R. 134) Mr. Grim alleged that the facts alleged in the search warrant affidavit did not establish probable cause to search Mr. Grim's residence for evidence of a homicide. (Id.) Further alleged was that the crime scene was left unsecure, leaving it ripe for tampering, tainting, and planting, for hours after officers left the scene at 4:00 p.m. on July 27, 1998. (Id.) The trial court denied the motion to suppress. (R. 200-01)

As trial counsel's motion to suppress explained, there were material omissions form the search warrant affidavit which affected the magistrate's initial probable cause finding.

In the probable cause affidavit, Detective Blevin Davis, the affiant, referes to deputies observing what appeared to be dried blood on Mr. Grim's shoulder and shorts. (R. 2) Mr. Grim explained to deputies that he had been working on his car that morning with a red silicone substance. Mr. Grim's explanation was not included in the affidavit.

Additionally, Detective Davis also included in the affidavit that Mr. Grim refused to let the officers search his home, initially, which was, of course, Mr. Grim's constitutional right.

Further in the affidavit, Deputy Davis clarfies that Mr. Grim did let the officers search his house, but only states that the officers looked around "briefly." (R. 151) In his report, Deputy Davis more accurately stated that "Rutherford and McCauley entered the house through the front door along with Grim. They did a walk through the house, but could not locate Campbell. McCauley stated that he noticed a red substance on the kitchen floor but said it was too red and did not appear to be blood. McCauley told

us he noticed there were other stains and marks on the kitchen floor, but thought these were old stains. They also looked in the backyard and shed with negative results." (Id.) As stated in Mr. Grim's suppression motion, none of this information was presented in the probable cause affidavit.

Detective Davis additionally stated in his affidavit that, in essence, Mr. Grim ran from the scene and fled police. (Id.) This statement was woefully inaccurate and likely intentionally so. Davis conviently ignores the fact that Mr. Grim was not under arrest and was free to go as he pleased. It must be remembered, officers found ***nothing*** when they initially searched Mr. Grim's home.

The trial court's ruling denying Mr. Grim's suppression motion was in error. As the First District held in State v. Van Pietersen, 550 So.2d 1162, the omission of material facts from a search warrant affidavit will result in the invalidation of probable cause sufficient to justify the warrant. As this Court held in Pagan v. State, 830 So.2d 792 (Fla. 2002), a magistrate must make a determination based on the totality of circumstances whether a reasonable probability exists that the asserted contraband will be found at a particular place and time. Id at 806. This Court in Pagan cited to and

reiterated the United States Supreme Court's holding in Illinois v. Gates, 462 U.S. 213 (1983) that the magistrate's decision is based on "practical, commonsense" concerns given the facts asserted in the probable cause affidavit.

Thus, the magistrate must make an informed, commonsense decision based on the facts and those facts must be accurate. As demonstrated, the facts asserted by Detective Davis in his affidavit were crucially inaccurate. The affidavit omitted the fact that Mr. Grim reasonably explained the alleged blood on his body and pants and that Mr. Grim was not under arrest and was free to leave when he, as Detective Davis asserted, fled the scene. The affidavit also mischaracterizes the officers initial search of the residence as a brief glance at the premises. Further, the affidavit fails to acknowledge that officers left the scene completely unsecure for an untold number of hours on the afternoon and evening of July 27, 1998. These omitted facts were sufficient to invalidate the search warrant and suppress the fruits of evidence emanating from the search.[3] The trial court erred in not finding so.

B. Prior Violent Felony as Feature of Penalty Phase

[3] As the facts of the trial make clear, the fruits of the search were clearly and unequivocally crucial in securing Mr. Grim's conviction in this case.

At the penalty phase of trial, the state called Nancy Amanda Newland as a witness to prove the aggravating factor of conviction of a prior violent felony. (TT. 876) Specifically, Newland testified to Mr. Grim's convictions in several 1982 cases from Escambia County. However, Newland did not merely testify to the fact of the convictions. As the record demonstrates, she went well beyond the fact of conviction. Rather, she testified extensively as to the facts *of the crimes*.

Newland testified that on September 9, 1982, she was a patrol officer with the Pensacola Police Department. (TT. 877) Newland arrested Mr. Grim. (TT. 878) Newland identified Mr. Grim in court. (Id.) Newland testified that she attended a shift meeting where it was discussed that Mr. Grim had "committed certain crimes in the county, as well as the city area." (TT. 879) The convictions in question involved Mr. Grim using a weapon. (Id.) Two loaded firearms were found on Mr. Grim when he was arrested. (TT. 880) On of the convictions involved "a woman who said she had been abducted that morning" when a man "reached out and grabbed her" and "began choking her. . ." (Id.) After the woman ran, "[h]e chased her, caught her again and began choking her again and pulled her into the car eventually and told her if she didn't stop

screaming that he would kill her." (TT. 880-81) Newland next testified that in another case involving Mr. Grim, a man, in the bathroom of his home, "saw a white male standing behind him" and "chased the man out of the house" before calling police. (TT. 885) As the man was talking to police, "they heard a scream from the house next door." (Id.) In yet another case, Newland testified that a victim was "awakened by her bedroom lights flickering on and off." (TT. 886) The victim saw a white male with a knife walking toward her. (Id.) The man grabbed her and cut her before she could get away. (Id.) The victim's brother chased the man out of the house. (Id.) This occurred around 5:30-5:45 in the morning. (Id.) In still yet another case, Newland testified that a fourteen year old student walking to school was approached and "grabbed her by the hair and dragged her into a wooded area" near her school. (TT. 887) The victim "fought and screamed" until she alerted a security guard at the school who thwarted the attack. (Id.) The victim's "earrings had been torn from her ears leaving her ears bleeding." (Id.) The victim also received cuts on her hands and elbows. (Id.)

Trial counsel for Mr. Grim objected to this extensive recitation of facts regarding Mr. Grim's 1982 convictions. (TT. 882)

In Williams v. State, 110 So.2d 654 (Fla.), cert. denied, 361 U.S. 847 (1959), this Court held that similar fact evidence regarding collateral crimes can be admissible. However, the Court has also held, as an exception to the general rule, that such evidence may not become the "feature" of the trial on the substantive charges at issue. Williams v. State, 117 So.2d 473 (Fla. 1960). This is especially true at the penalty phase of a capital trial where the state may present evidence beyond the simple fact of conviction, but may not allow the prior crimes to the focus of the case at hand. Rhodes v. State, 547 So.2d 1201 (Fla. 1989); Mann v. State v. State, 453 So.2d 784 (Fla. 1984); Elledge v. State, 346 So.2d 998 (Fla. 1977).

In Rhodes, this Court reversed the appellant's sentence where the state presented, through a law enforcement officer involved in the prior arrest, a taped statement of the victim that illuminated details of the prior crime. In reversing, this Court held:

> Although this Court has approved the introduction of testimony concerning the details of prior felony convictions involving violence during the penalty phase of a capital trial, the line must be drawn when that testimony is not relevant, gives rise to a violation of defendant's confrontation rights, or the prejudicial value outweighs the

> probative value. Not only did the introduction of the tape recording deny Rhodes his right of cross-examination, but the testimony was irrelevant and highly prejudicial to Rhodes' case. The information presented to the jury did not directly relate to the crime for which Rhodes was on trial, but instead described the physical and emotional trauma and suffering of a victim of a totally collateral crime committed by the appellant.

Rhodes at 1204-05 (citations omitted). As in Rhodes, Officer Newland's testimony in the instant case contained prejudicial hearsay statements of the victims which Mr. Grim could not rebut, the information did not directly relate to the crime charged, and the information was certainly highly prejudicial. Further, the details of the prior crimes, as presented by Officer Newland, were irrelevant to prove the fact of a prior violent.[4]

Clearly, in the instant case, the facts presented in support of Mr. Grim's prior convictions went well beyond the boundaries allowable. Officer Newland expounded upon the facts of the prior crimes, including prejudicial details that were completely irrelevant to the narrow

[4] It should be noted that, as this Court is aware, Mr. Grim had waived the presentation of mitigation and was not contesting the state's case for aggravation. As the record demonstrates, Mr. Grim was willing to stipulate to the prior violent felony convictions. (TT. 883) These factors underscore the complete lack of necessity as to Newland's overboard testimony.

question of whether Mr. Grim was convicted of a prior violent felony vel non. The trial court erred in denying trial counsel's objection to the evidence in question.

C. Conclusion

Appellate counsel was ineffective in failing to raise the foregoing arguments on direct appeal. Petitioner's claim of ineffective assistance of appellate counsel is properly raised in this petition. Freeman v. State, 761 So.2d 1055, 1069 (Fla. 2000). The standard for relief on a claim such as this is the same as Strickland v. Washington, 466 U.S. 668 (1984). Henyard v. State, 883 So.2d 753 (Fla. 2003). That is,

> whether 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, whether the deficiency in performance compromised the appellate process to such a degree as to undermine confidence in the correctness of the result.

Id at 764. see also Freeman; Pope v. Wainwright, 496 So.2d 798 (Fla. 1986); Thompson v. State, 759 So.2d 650 (Fla. 2000).

Given the prevailing nature of the issues raised herein, appellate counsel should have been acutely aware.

Failing to raise the issue in Mr. Grim's direct appeal to this Court resulted in the prejudice thus demonstrated. A new trial and/or sentencing are warranted.

CONCLUSION AND RELIEF SOUGHT

For all the reasons discussed herein, Petitioner, Norman Grim, respectfully urges this Court to grant habeas corpus relief in the form of a new trial and/or penalty phase.

Respectfully submitted,

_____

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Attorneys for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Petition for Writ of Habeas Corpus, has been furnished by first class mail, postage prepaid to Ronald Lathan, Assistant Attorney General, Office of the Attorney General, Department of Legal Affairs, PL-01, The Capitol, Tallahassee, FL 32317, on this ___ day of _____, 2006.

CERTIFICATION OF TYPE SIZE AND STYLE

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