IN THE SUPREME COURT OF FLORIDA

NORMAN MEARLE GRIM,

Petitioner,

v. Case No.: SC06-1575

JAMES R. MCDONOUGH,

Secretary, Florida Department
of Corrections
Respondent.
_____/

RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

COMES NOW, Respondent, JAMES R. MCDONOUGH, by and through the undersigned Assistant Attorney General, and hereby responds to the Petition for Writ of Habeas Corpus filed in the above-styled case. Respondent respectfully submits that the petition should be denied, and hereby submits the following.

STATEMENT OF THE CASE

Grim's Petition for Writ of Habeas Corpus was filed in conjunction with his appeal from the denial of his motion for postconviction relief (Case No. SC06-122). The State has submitted an answer brief in that case outlining a detailed Statement of the Facts and of the Case; therefore, recitation of the underlying facts and procedural history will not be repeated herein.

Grim's habeas petition essentially raises two claims: (1) that sentencing him to death contravenes *Ring v. Arizona*; and (2) that he was denied effective assistance of appellate counsel because his counsel did not challenge the trial court's denial of his motion to

suppress and thereby allowed his prior felony conviction to become a dominating feature of his penalty phase.

All of the issues raised by Grim's habeas petition are either procedurally barred, or foreclosed by this Court's precedent. First, Grim argues that his death sentence is unconstitutional under *Ring v. Arizona*, 536 U.S. 584 (2002). Grim acknowledges that this claim was not raised on direct appeal nor was preserved. As is well-understood, "issues raised and disposed of on direct appeal, as well as those issues which *could* have been raised on direct appeal are not the proper subject of a post-conviction motion." *Foster v. State,* 400 So. 2d 1, 4 (Fla. 1981) (emphasis added); *see also Floyd v. State,* 808 So. 2d 175, 187 (Fla. 2002) (recognizing that issues which have not been preserved at the trial level or on direct appeal may not be raised in a post-conviction motion). As such, because this issue has not been properly preserved, it must be denied.[1]

Second, Grim alleges several grounds of ineffective assistance of appellate counsel. They are all without merit. Grim contends that his appellate counsel should have challenged the trial court's denial of his motion to suppress items found in Grim's home. As

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[1]Moreover, this Court has already held that *Ring* does not have retroactive applicability, therefore *Ring* has absolutely no bearing on Grim's case, *see Johnson v. State,* 904 So. 2d 400, 412 (Fla. 2005); and Grim does not fall within the ambit of *Ring* for another reason: the trial court found that the violent felony aggravator was applicable to his case. *See Evans v. State,* 2006 Fla. LEXIS 2277, at * 40-41(Fla. Oct. 5, 2006).

referenced above, this claim should have been raised on direct appeal. It was not. Therefore, his claim should be procedurally barred. *See, e.g., Suggs v. State,* 923 So. 2d 419, 439 (Fla. 2005) ("Any challenge to the denial of a motion to suppress should have been raised on direct appeal. Since the ... allegation [that the search warrant was not sufficiently particularized] was not raised on direct appeal . . . this claim is procedurally barred.").

If this Court chooses to entertain Grim's assertion, it must still fail. Grim is basically asking this Court to find that his appellate attorney on direct appeal was ineffective for failing to challenge the trial court's denial of his motion to suppress evidence found in his home. In order to suppress the fruits of a search warrant, a defendant must make a showing that the search warrant contained intentionally false statements. *See Pardo v. State,* 2006 Fla. LEXIS 1404, at * 22-23 (Fla. June 29, 2006). Or conversely, the defendant must demonstrate that the affidavit seeking the search warrant has omitted facts that were necessary in the magistrate's decision to grant the warrant. *Id.* at *23. If probable cause does not exist after the false facts have been removed from the affidavit, the evidence in question must be suppressed. *Id.*

Grim argues that the warrant mischaracterized several facts which undergirded the magistrate's probable cause determination. This Court has observed that "'probable cause exists where the

facts and circumstances within their (the officers') knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been . . . committed.'" *State v. Betz,* 815 So. 2d 627, 633 (Fla. 2002) (quoting *Brinegar v. United States,* 338 U.S. U.S. 160, 175-76 (1949)). Grim has failed to demonstrate any material facts were intentionally omitted. Moreover, he seems to ignore the litany of inculpatory evidence that supported probable cause for the search warrant, including, but not limited to the fact that: (1) Grim was seen by law enforcement with blood on his person – including his arms; (2) Grim's strange behavior with law enforcement wherein he allowed them to enter his home then denied them access, went to his shed, then reentered his home and waited three to five minutes before allowing officers to enter the home; (3) the odd placement of his car in backyard (neighbors stated they could recall ever seeing the parked there before); (4) Grim failure to show up for work on the day in question. Thus, there was sufficient evidence to support probable cause, *see, e.g., Freeman v. State,* 909 So. 2d 965, 968 (Fla. 3DCA 2005) ("The facts constituting probable cause need not meet the standard of conclusiveness and probability required of the circumstantial facts upon which a conviction must be based."); and his attorney on direct appeal was not ineffective for failing to challenge the denial of the motion to suppress. *See, e.g., Dufour*

v. State, 905 So. 2d 42, 74 (Fla. 2006) (recognizing that a defendant's appellate attorney will not be held liable for failing to bring forth a meritless claim).

Finally, Grim argues that his prior violent felonies improperly became the focus of his penalty phase. Specifically, he takes issues with testimony offered relating to his 1982 crime spree. But as this Court has previously noted, this testimony was entirely permissible:

> "[I]t is appropriate in the penalty phase of a capital trial to introduce testimony concerning the details of any prior felony conviction involving the use or threat of violence to the person rather than the bare admission of the conviction." *Rhodes v. State, 547 So. 2d 1201, 1204 (Fla. 1989)*. Further, this Court explained that "[t]estimony concerning the events which resulted in the conviction assists the [factfinder] in evaluating the character of the defendant and the circumstances of the crime so that the [factfinder] can make an informed recommendation as to the appropriate sentence." Id.

Dufour, 905 So. 2d at 63. Accordingly, Grim's contention is without merit and should be rejected by this Court.

CONCLUSION

For the foregoing reasons, Grim's habeas petition should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing ANSWER BRIEF has been furnished by U.S. Mail to Jeffrey M. Hazen, Brody & Hazen, P.O. Box 16515, Tallahassee, Fl 32317 this 13th day of November, 2006.

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Ronald A. Lathan, Jr.
Attorney for the State of Florida

CERTIFICATE OF FONT AND TYPE SIZE

Counsel certifies that this brief was typed using Courier New font 12 point.

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