

IN THE SUPREME COURT OF FLORIDA

CASE NO.

MARTIN GROSSMAN

Petitioner,

v.

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

Respondent.

PETITION FOR WRIT OF HABEAS CORPUS

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COUNSELS FOR PETITIONER

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PRELIMINARY STATEMENT

Article 1, Section 13 of the Florida Constitution provides: “The writ of habeas corpus shall be grantable of right, freely and without cost.” This petition for habeas corpus relief is being filed 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. Grossman was deprived of the right to a fair, reliable trial and individualized sentencing proceeding and that the proceedings resulting in his conviction and death sentence violated fundamental constitutional imperatives.

Citations shall be as follows: The record on appeal concerning the original court proceedings shall be referred to as “R. ___” followed by the appropriate page numbers. The postconviction record on appeal will be referred to as “PC-R. ___” followed by the appropriate page numbers. All other references will be self-explanatory or otherwise explained herein.

REQUEST FOR ORAL ARGUMENT

The resolution of the issues in this action will determine whether Mr. Grossman lives or dies. This Court has allowed oral argument in other capital cases in a similar procedural posture. A full opportunity to air the issues through oral argument would be appropriate in this case, given the seriousness of the claims

involved and the fact that a life is at stake. Mr. Grossman accordingly requests that this Court permit oral argument.

INTRODUCTION

Significant errors occurred at Mr. Grossman's trial which were not presented to this court because since filing Mr. Grossman's first petition for habeas corpus, new law developed which has an impact on Mr. Grossman's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the Florida Constitution. The issues raised in this petition are based upon this Court's opinions in Harvey v. State, __ So.2d __ (Fla. 2003) 2003 WL 21511339 (Fla.), Nixon v. State, __ So.2d __ (Fla. 2003) 2003WL21543769, Bottoson v. Moore, 833 So. 2d 693 (Fla. 2002) and King v. Moore, 831 So.2d 143 (Fla. 2002) and the United States Supreme Court decisions in Wiggins v. Smith, 123 S.Ct. 2527 (2003) and Ring v. Arizona, 122 S.Ct. 2428 (2002). This petition is not seeking the same relief as raised in a previous petition for habeas corpus relief as this petition is based on changes in the law and not upon facts that were known or should have been known to petitioner at the time of previous filing. "Successive habeas corpus petitions seeking the same relief are not permitted nor can new claims be raised in a second petition when the circumstances upon which they are based were known at the time the prior petition was filed."

King v. State, 808 So.2d 1237, 1246 (Fla. 2002).

This petition presents questions that were ruled on at trial or on direct appeal but should now be revisited in light of the subsequent case law or in order to correct error in the appeal process that denied fundamental constitutional rights. As this petition will demonstrate, Mr. Grossman is entitled to relief.

**JURISDICTION TO ENTERTAIN PETITION AND GRANT HABEAS
CORPUS RELIEF**

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

Jurisdiction in this action lies in this Court, see, e.g., Smith v. State, 400 So.2d 956, 960 (Fla. 1981), for the fundamental constitutional errors challenged herein arise in the context of a capital case in which this Court heard and denied Mr. Grossman's direct appeal. See Wilson, 474 So.2d 1327 (Fla. 1981). A petition for a writ of habeas corpus is the proper means for Mr. Grossman 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. Wainright, 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 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. Wainright, 175 So.2d 785 (Fla. 1965); Palms v. Wainright, 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 more than proper on the basis of Mr. Grossman's claims.

GROUND FOR HABEAS CORPUS RELIEF

By his petition for a writ of habeas corpus, Mr. Grossman 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 of the Florida Constitution.

PROCEDURAL HISTORY

The Circuit Court of the Sixth Judicial Circuit in and for Pinellas County,

Florida entered the judgment and sentence at issue. Mr. Grossman was charged by indictment on January 18, 1985 with one count of first degree murder. Mr. Grossman's trial, which over his objection was conducted jointly with the trial of his co-defendant, Thayne Taylor, was held in October of 1985. The jury found Mr. Grossman guilty of first degree murder and Mr. Taylor guilty of third degree murder.

A penalty phase proceeding was conducted on October 31, 1985, after which the jury recommended a sentence of death. On December 13, 1985, a sentence of death was entered by the trial court. At that time, the court made no findings in support of the death sentence. On March 19, 1986, three months after a Notice of Appeal was filed, the court entered essentially conclusory written findings supporting the death sentence it had entered earlier. Mr. Grossman's direct appeal was decided on February 18, 1988, when his conviction and sentence were affirmed. A petition for certiorari in the U.S. Supreme Court was denied on March 6, 1989. On March 8, 1990, the Governor of the State of Florida signed a warrant for the execution of Mr. Grossman. On March 23, 1990, Mr. Grossman filed a Petition for Writ of Extraordinary Relief, Writ of Habeas Corpus, Request for Stay of Execution and Request for Leave to Amend. On April 5, 1990, the Court entered an order staying Mr. Grossman's execution. Mr. Grossman filed a rule

3.850 motion in circuit court and an amended habeas petition in this Court in August 1990. Mr. Grossman appealed the denial of his 3.850 to this Court which denied his appeal and habeas petition on December 18, 1997. A rehearing was denied on February 26, 1998. A federal habeas petition was filed on September 18, 1998 and is pending in the Federal District Court in the Middle District of Florida..

ARGUMENT I

MR. GROSSMAN WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS. TRIAL COUNSEL FAILED TO SUBJECT THE PROSECUTION'S CASE TO MEANINGFUL ADVERSARIAL TESTING IN THE GUILT PHASE OF THE DEFENDANT'S TRIAL BY CONCEDED GUILT WITHOUT CONSULTATION

In Harvey v. State, __So.2d__(Fla. 2003) 2003 WL 21511339*5(Fla.) the defendant was granted a new trial although he confessed to murder. The Court held:

Trial counsel cannot be excused for conceding guilt and, under the facts of this case, failing to subject the prosecution's case to a meaningful adversarial testing just because Harvey confessed to the crime charged Here, Harvey pled not guilty to the charges against him, including first- degree murder. Trial counsel's concessions, however, rendered that not guilty plea a nullity Thus, we conclude that under Nixon and

Cronic, counsel's performance in this case constituted per se ineffective assistance of counsel. For this reason we reverse the denial of Harvey's motion for postconviction relief and remand with directions that his convictions be vacated. *Id.* At *5

In Nixon v. State, __So.2d__ (Fla.2003) 2003 WL 21543769*3(Fla.) the Court held:

Without a client's affirmative and explicit consent to a strategy of admitting guilt to the crime charged or a lesser included offense, counsel's duty is to "hold the State to its burden of proof by clearly articulating to the jury or fact-finder that the State must establish each element of the crime charged and that a conviction can only be based upon proof beyond a reasonable doubt." *Nixon II*, 758 So.2d at 625 (emphasis added). Since we held in *Nixon* that silent acquiescence to counsel's strategy is not sufficient, we find that *Nixon* must be given a new trial. *Id.* at *3

An analysis of the defense strategy in Mr. Grossman's case, as revealed by an examination of the trial transcript, shows that counsel's exclusive emphasis and efforts were directed towards the penalty phase. The defense, in the presentation of its guilt phase, called no witnesses, presented no evidence and essentially made no case on behalf of Mr. Grossman.

The State, in its opening statement, told the jury that there were two ways to find either defendant guilty of first degree murder: premeditation and felony

murder. The State told the jury they would prove beyond a reasonable doubt that the defendants were guilty of premeditated first degree murder. (R. Vol. XI-1819-20). Defense counsel in his opening statement essentially conceded that the crux of the State's case was provable and in so doing essentially admitted the defendant's guilt. (R. Vol XI-1824-26) It is abundantly clear from the context of these statements that the defense conceded Mr. Grossman's guilt.

Although defense counsel did somewhat obligingly allude to some of the elements which would be necessary to a finding of premeditated murder, it failed to assert to the jury a strong and unequivocal profession of the defendant's being not guilty of the crime. The weak inference left by the remarks of trial counsel was that somehow the elements of premeditation could not be proved and that the jury should keep an open mind and reserve judgment. Defense counsel stated in his opening:

What happened here happened and it is a tragedy, but I ask you to, please, honestly evaluate the evidence, decide if in fact these individuals consciously wanted to eliminate this lady, or did this happen because of the struggle that was going on over the gun and was not a premeditated killing. It was in fact a reaction, a terrified reaction to the firing of the gun by the officer. (R. Vol. XI-1828-29)

Defense counsel failed to offer the jury any evidence whatsoever on this issue, no

evidence was presented in the way of expert testimony regarding the defendant's state of mind and the organic and environmental factors bearing upon it in either the guilt or penalty phase.

Mr. Grossman and co-defendant Taylor were tried together. Neither Mr. Taylor nor Mr. Grossman testified at trial. Mr. Grossman was convicted by the testimony of third parties including jailhouse informants and reward seekers. Also testifying against Mr. Grossman was Brian Hancock, who obtained the gun used in the crime by burglarizing his own parent's home.

At the 3.850 hearing, trial counsel admitted that he had completely misjudged the community attitude towards Mr. Grossman. (PCR. Vol. 1-33-4). Co-counsel, Ira Berman, admitted that he believed that a jury could have easily found Mr. Grossman guilty of first degree murder based upon the evidence and that it was clear that there was a likelihood of a second phase in the trial. (PCR. Vol. III 291-292). Co-counsel Berman stated, "The first phase of the trial from an objective standpoint, there was not much chance of a lesser included or a not guilty." (PCR. Vol. III 267).

Mr. Grossman contends that the chance of a lesser included or a not guilty was "not much" due to the fact that the evidence was not subjected to a fair

adversarial testing. Had the evidence been subjected to a fair adversarial testing, there would not have been the likelihood of a second phase in the trial. Defense counsel's concession of guilt without consultation was as inexcusable as counsel's actions in both Harvey and Nixon.

There is nothing in the trial record or the 3.850 hearing record to indicate that counsel ever discussed a concession of guilt with Mr. Grossman much less an agreement by Mr. Grossman to such a concession. A new trial should be granted or at the very least, a limited evidentiary hearing on this issue should be granted.

ARGUMENT II

MR. GROSSMAN WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE PENALTY PHASE OF HIS TRIAL IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND CONTRARY TO THE HOLDING IN WIGGINS.

In Wiggins v. Smith, 123 S.Ct. 2527 (2003) the Supreme Court of the United States ultimately held that "The performance of Wiggins' attorneys at sentencing violated his Sixth Amendment right to effective assistance of counsel." Id. at 2529. Justice O'Connor, in delivering the opinion of the Court, stated:

We established the legal principles that govern claims of ineffective assistance of counsel in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). An ineffective assistance claim has two components: A petitioner must show that counsel's performance was deficient, and that the deficiency prejudiced the defense. *Id.*, at 687, 104 S.Ct. 2052. To establish deficient performance, a petitioner must demonstrate that counsel's representation "fell below an objective standard of reasonableness." *Id.*, at 688, 104 S.Ct. 2052. We have declined to articulate specific guidelines for appropriate attorney conduct and instead have emphasized that "[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Ibid.*

The performance of trial counsel in Mr. Grossman's case fell below prevailing professional norms. The deficiencies of counsel extended to the investigative aspect of the case. Mr. Grossman is entitled to relief under Wiggins.

Trial Counsel's Investigative Deficiencies

Trial counsel was not prepared for the penalty phase of Mr. Grossman's trial. (PCR. Vol. I -31). Trial counsel did not obtain any documents concerning Mr. Grossman's educational background. Trial counsel characterized his preparation for Mr. Grossman's penalty phase as inadequate. (PCR. Vol. I-38-39) also (PCR. Vol. XVIII - 2875-79) (Defense Exhibit No.3 for identification affidavit of Tom McCoun)).

Trial counsel admitted that he did not present to the jury things that they could have heard about Mr. Grossman. Trial counsel stated that there were some real nuggets of information that have been developed by others that could have made for a much more effective penalty phase, and that trial counsel did not develop that information. (PCR. Vol. I-42-43).

In the 3.850 hearing, on cross examination, Judge McCoun was unshakable in his contention that although the prosecutor was well prepared, the prosecutor was assisted by the lack of good quality penalty phase work that could have been done but was not done. A fairer picture of Mr. Grossman could have been painted by the trial counsel, as it was a pretty one-sided picture. (PCR. Vol. I-58).

Penalty phase counsel Ira Berman did no preparation to the penalty phase prior to the trial commencing. Berman admitted that the defense team was not adequately prepared for penalty phase. (PCR. Vol.III - 265).

Mr. Berman only talked to witnesses who were employed at the jail. He did not make any attempt to locate any other possible witnesses nor did he travel to Hialeah, the community where Mr. Grossman had spent his early years . He did not talk to any school associates, teachers, neighbors or any one else who could have testified in penalty phase. The defense team did not use an investigator to

assist in developing mitigation. (PCR. Vol. III 267-269) also (PCR. Vol. I- 70).

Mr. Berman testified that the state of preparedness of penalty phase at time of trial was whatever Mr. McCoun had accomplished pretrial and whatever he had accomplished in the last couple of days during the actual trial. Mr. Berman also testified that with respect to Mr. Grossman's family and friends in Hialeah and New Port Richey, these issues could have been discovered prior to trial. (PCR. Vol. III - 268-73).

Mr. Berman admitted that he did not know when he met with Mr. Grossman and he did not take an in-depth statement of Mr. Grossman. (PCR. Vol. III - 289).

Mr. Berman admitted that the first time he had seen an important penalty phase witness (Myra Grossman) was when she testified in court. (PCR. Vol. III - 309). Berman was unaware that Myra's mental illness and inability to perform as a competent parent had a profound and negative aspect on every aspect of Martin's life. Had he known of this aspect of Myra Grossman, there might have been a concern in putting Myra Grossman on as a witness. (PCR. Vol. III - 311-12).

During the preparation of the case, Brian Allen testified in deposition that Taylor and Grossman came in and said "We're not ever going to get high again," yet no investigation regarding Martin Grossman's drug use was ever done. (PCR.

Vol. III -313-14).

Legal Argument

Mr. Grossman contends that not taking an in depth statement from his own client and meeting his client for the first time shortly before trial was unreasonable under prevailing professional norms. Berman's attempt to put together a penalty phase during the guilt phase of the trial was unreasonable under prevailing professional norms. Berman's failure to interview family and friends in the Hialeah and New Port Richey area was also unreasonable under prevailing professional norms, especially since he admitted during the 3.850 hearing that this could have been done prior to trial. Mr. Grossman further contends that Mr. McCoun's reliance on talking to the defendant, his mother, and grandmother, without confirming the reliability of the witnesses was unreasonable.

The similarities between the investigation in Mr. Grossman's case and the one done in Wiggins is uncanny. In Wiggins, counsel's investigation drew from three sources: a psychologist, a PSI, and a Baltimore City Department of Social Services report documenting Petitioner's various placements in the State's foster care system. Id. at 2536. In Mr. Grossman's case, trial counsel's investigation drew from three sources: Mr. Grossman, his mother Myra, and his grandmother.

Trial counsel's decision not to expand his investigation beyond interviewing the defendant and his immediate family was unreasonable and fell short of professional standards.

Had trial counsel interviewed other family members who lived in the New Port Richey area, as did post conviction counsel, they would have interviewed Paul Melton, Martin's uncle. Melton lived in New Port Richey and told post conviction counsel that Myra Grossman had considerable mental problems. A whole new and fertile area of mitigation would have opened up to trial counsel had pre-trial investigation been conducted. Trial counsel's refusal to expand his investigation and instead to rely on the testimony of Myra Grossman prejudiced Mr. Grossman. The penalty phase jury was deprived of important mitigation which would have been compelling to the jury. The Wiggins Court addressed the issue of strategic choices by citing Strickland:

[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgements support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for

reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." Id., at 690-691, 104 S.Ct. 2052.

In Mr. Grossman's case, prison records of Grossman's prior incarceration were not obtained, neighbors and relatives were not interviewed, and other than talking to Mr. Grossman, his mother, and his grandmother, no further investigation was done.

Trial counsel admitted that there were some real nuggets of information that have been developed by others that could have made for a much more effective penalty phase, and that trial counsel did not develop that information. (PCR. Vol. I- 42-43). Mr. Grossman contends that trial counsel did not develop the information that would have saved him from a sentence of death because they did not expand their investigation. Pursuant to Wiggins, that was unreasonable.

In its denial of Mr. Grossman's 3.850 motion, the trial court did not address the issue of expansion of investigation; the order was signed September 6, 1995 and Wiggins was released in 2003. (PCR. Vol. XVI - 2822-2838). The trial court said in its order: "However, Mr. Berman also said that at the time of the trial, he did not know of anything else that could be done in the search for witnesses to say beneficial things for the Defendant." (PCR. Vol. XVI- 2833). Mr. Grossman

contends that trial counsel should have expanded the investigation to include interviewing other family members in New Port Richey and Hialeah. Post conviction counsel provided thirty three affidavits that represented mitigation witnesses that were available at the time of trial but were not used by the defense. (PCR. Vol. XVI - 2833). Myra Grossman and only three other witnesses who were employed by the jail were used because counsel did not investigate and was unaware of the existence of these other mitigating witnesses.

The ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 11.4.1(C) (1989) provide that investigations into mitigating evidence “should comprise efforts to discover all reasonably available mitigation evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor.” Although this was put into effect in 1989, it clarifies what the reasonable professional norm was at the time of Mr. Grossman’s trial. Mr. Grossman contends that it is reasonable to expect his counsel to interview his relatives and friends and to investigate his past. Counsel abandoned their investigation after talking only to Grossman, his mother, and grandmother. Trial counsel obtained only rudimentary knowledge of Grossman’s history from a narrow set of sources.

The trial court focused on review of the thirty three affidavits and opined that trial counsel recognized that while trying to present a favorable picture of the defendant, equally negative things would also be presented. (PCR. Vol. XVI - 2833). However, a decision not to investigate must be directly assessed for the reasonableness in all the circumstances. Trial counsel was unable to make strategic decisions as to what these witnesses would say because he did not investigate them and could not make a strategic decision that was based on all the facts.

Mr. Grossman submits that in order for trial counsel to make an strategic choice, the choice must be an informed choice. Trial counsel cannot evaluate witnesses when counsel does not know if those witnesses even exist. An choice based on a lack of knowledge and information is not a strategic choice because strategy implies that the decision maker is informed of the relevant facts. Mr. Grossman's trial counsel was not informed of relevant facts, thus could not have made a strategic choice.

The trial court said in its order that Berman did not know of anything else that could be done in the search for witnesses to say beneficial things for the defendant. One potential defense witness, Paul Melton, was in the same town where Mr. Grossman lived yet trial counsel did not bother to look for Mr. Melton.

The Wiggins Court further held:

As the Federal District Court emphasized, any reasonably competent attorney would have realized that pursuing these leads was necessary to making an informed choice among possible defenses, particularly given the apparent absence of any aggravating factors in petitioner's background. 164 F.Supp.2d, at 559. Indeed, counsel uncovered no evidence in their investigation to suggest that a mitigation case, in its own right, would have been counterproductive, or that further investigation would have been fruitless; this case is therefore distinguishable from our precedents in which we have found limited investigation into mitigating evidence to be reasonable. Id. at 2537.

Since Mr. Grossman had no prior violent felonies, pursuing these leads was necessary to making an informed choice among possible defenses. Trial counsel failed to pursue these leads which were especially crucial because of the absence of prior violent felonies in Mr. Grossman's background.

The Wiggins Court further addressed the unreasonableness of counsel's conduct in the following manner:

The record of the actual sentencing proceedings underscores the unreasonableness of counsel's conduct by suggesting that their failure to investigate thoroughly resulted from inattention, not reasoned strategic judgment. Counsel sought, until the day before sentencing, to have the proceedings bifurcated into a retrial of guilt and a mitigation stage. On the eve of

sentencing, counsel represented to the court that they were prepared to come forward with mitigating evidence, App. 45, and that they intended to present such evidence in the event the court granted their motion to bifurcate. In other words, prior to sentencing, counsel never actually abandoned the possibility that they would present a mitigation defense. Until the court denied their motion, then, they had every reason to develop the most powerful mitigation case possible.....Far from focusing exclusively on petitioner's direct responsibility, then, counsel put on a halfhearted mitigation case, taking precisely the type of "shotgun" approach the Maryland Court of Appeals concluded counsel sought to avoid. Wiggins v. State, 352 Md., at 609, 724 A.2d, at 15. When viewed in this light, the "strategic decision" the state courts and respondents all invoke to justify counsel's limited pursuit of mitigating evidence resembles more *post-hoc* rationalization of counsel's conduct than an accurate description of their deliberations prior to sentencing. Id. at 2537,2538.

In Mr. Grossman's case, it was only after counsel's motion to continue was denied did Berman start working on the penalty phase. Trial counsel's claims that the failure to investigate and call witnesses in the penalty phase was a strategic decision on their part is an attempt to justify counsel's limited pursuit of mitigating evidence which resembles more *post-hoc* rationalization of counsel's conduct than an accurate description of their deliberations prior to sentencing.

Perhaps the most telling evidence that counsel's failure to investigate the mitigation in this case is found in the affidavit of Tom McCoun, (PCR. Vol.

XVIII - 2875-79). Paragraph 9 clearly states, “We neither sought nor obtained any records or documents concerning his background.” When questioned about paragraph 9 in the 3.850 hearing, trial counsel stated: “I’m not in dispute with that at all.” (PCR. Vol. I - 39). Trial counsel testified in the 3.850 hearing that, “There were just some things that we could have done that we didn’t do and it would have made it a much fairer picture of Mr. Grossman.” (PCR. Vol. I - 58). If trial counsel’s objective was to paint a fair and complete picture of Mr. Grossman, it would not be unreasonable to expect his lawyers to obtain records or documents concerning his background.

In Wiggins, the United States Supreme Court held that if counsel’s investigation in this case had consisted exclusively of the PSI and the DSS records, the court’s decision would have constituted an unreasonable application of Strickland. Id. at 2539. In Mr. Grossman’s case, Mr. McCoun’s investigation began and ended with Mr. Grossman, his mother, and grandmother. Limiting the investigation of mitigation to Mr. Grossman, his mother, and grandmother reduced counsel’s representation below an objective standard of reasonableness. Furthermore, the record of the 3.850 proceedings underscores the unreasonableness of counsel’s conduct by showing that their failure to investigate thoroughly stemmed from inattention, not strategic judgment. Pursuant to the

holding in Wiggins, Mr. Grossman is entitled to relief.

The mitigating evidence which trial counsel failed to discover is powerful. Witnesses would have painted a more complete picture of Mr. Grossman's life if only the investigation continued. Myra Grossman's mental illness would have provided insight as to the dysfunctional home life that Martin endured. Myra's neglect of Martin, her lack of nurturing and guidance would have explained his inability to hold a conversation and his general insecurity. This mitigating evidence would have shown the jury that he had the kind of troubled history relevant to assessing a defendant's moral culpability. Penry v. Lynaugh, 492 U.S. 302, 319, 109 S.Ct. 2934, 106 L.Ed.2d 256.

Furthermore, the failure of counsel to expand the investigation when they became aware of the deposition statement, "We're not ever going to get high again," prejudiced Mr. Grossman in two ways. First, it deprived him of the defense of voluntary intoxication in guilt phase and second, it deprived him of the statutory mitigator of "The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired." Relief is proper and a new penalty phase is the remedy.

ARGUMENT III

In light of this Court's recent decisions on October 24, 2002 in Bottoson v. Moore, 2002 WL 31386790 (Fla.), and King v. Moore, 2002 WL 31386234 (Fla.) based on Ring v. Arizona, 122 S.Ct. 2428, 2002 WL 1357257, Mr. Grossman is entitled to relief.

In Ring the United States Supreme Court held that the Arizona statute pursuant to which, following a jury adjudication of a defendant's guilt of first-degree murder, the trial judge, sitting alone, determines the presence or absence of the aggravating factors required by Arizona law for imposition of the death penalty, violates the Sixth Amendment right to a jury trial in capital prosecutions; receding from Walton v. Arizona, 497 U.S. 639, 110 S.Ct. 3047, 111 L.Ed.2d 511. If a State makes an increase in a defendant's authorized punishment contingent on the finding of fact, that fact - - no matter how the State labels it - - must be found by a jury beyond a reasonable doubt. A defendant may not be exposed to a penalty *exceeding* the maximum he would receive if punished according to the facts reflected in the jury verdict alone. The court noted that 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 noncapital defendant's sentence by a term of years, as was the case in Apprendi, but not the fact-finding necessary to put him to death.

In Bottoson and King, the Court, for the first time, addressed the impact of Ring on Florida's sentencing scheme. In both Bottoson and King, each justice wrote separate opinions explaining his or her reasoning for denying petitioners relief. In both decisions, a *per curiam* opinion announced the result. In neither case does a majority of the sitting justices join the *per curiam* opinion or its reasoning. In both cases, four justices (Chief Justice Anstead, and Justices Shaw, Pariente, and Lewis) wrote separate opinions explaining that they did not join the *per curiam* opinion, but concurred in result only.

An application of the Court's reasoning in Bottoson and King to the facts in Mr. Grossman's case demonstrates that Mr. Grossman is entitled to relief. Before the penalty phase in Mr. Grossman's case, the trial court read the following instructions to the jury:

Ladies and gentlemen of the jury, it is now your duty to advise the Court as to what punishment should be imposed upon the Defendant for his crime of murder in the first degree.

As you have been told, the final decision as to what punishment shall be imposed is the responsibility of the Judge. However, it is your duty to follow the law that will now be given to you by the Court and render to the Court an advisory sentence based upon your determination as to whether sufficient aggravating circumstances exist to justify the imposition of the death penalty and whether sufficient mitigating circumstances

exist to outweigh any aggravating circumstances found to exist.

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

...In these proceedings, it is not necessary that the advisory sentence of the jury be unanimous. The fact that the determination of whether you recommend a sentence of death or a sentence of life imprisonment in this case can be reached by a single ballot should not influence you to act hastily or without regard to the gravity of these proceedings.

(R. 2707, 2708, 2711)

On December 13, 1985, a sentence of death was entered by the trial court.

At that time, the court made no findings in support of the death sentence. On March 19, 1986, the court entered written findings supporting the death sentence it had entered earlier. The sentencing order found four aggravating circumstances; (1) the murder was committed while engaged in the commission of or an attempt to commit, or flight after committing or attempting to commit, the crime of robbery or burglary; (2) the murder was committed for the purpose of avoiding or preventing a lawful arrest; (3) the murder was committed to disrupt or hinder the lawful exercise of a government function or the enforcement of laws; and (4) the murder was especially wicked, evil, atrocious, or cruel. Mr. Grossman had no prior violent felonies and no such aggravating circumstance was found by the jury or judge.

In the opinions in the Bottoson and King cases applying the holding in Ring v. Arizona, the Court denied petitioners relief apparently because petitioners in those cases had prior violent felonies. The opinions in the Bottoson and King cases indicate that based on the facts and circumstances of Mr. Grossman's case, particularly that Mr. Grossman had no prior violent felony, he is entitled to relief.

In denying relief in King and Bottoson, Justice Shaw relied on the prior violent felony circumstance. In denying Bottoson relief, Justice Shaw stated, "this particular factor is excluded from Ring's purview and standing by itself, can serve as a basis to 'death qualify' a defendant. Accordingly, I agree that Bottoson's petition for writ of habeas corpus must be denied." Bottoson, 833 So. 2d at 718-9 (Shaw, J., concurring in result only) In denying King relief, Justice Shaw stated, "King's death sentence was based on at least one "death qualifying" aggravating circumstance: "previous conviction of violent felony." For the reasons stated in my concurring in result only opinion in Bottoson v. Moore, 833 So.2d 693 (Fla.2002), I agree that King is not entitled to relief." King, 831 So.2d at 148-9 (footnote omitted).

Justice Pariente agreed with Justice Shaw in Bottoson when she said,

"I share the concerns expressed by Justice Shaw in his concurring in result only opinion that *Ring* may render

our sentencing statute invalid under state constitutional law to the extent that there is no requirement that the jury find the existence of aggravators by unanimous verdict. As noted above, in this case the jury recommended the death penalty by a vote of 10-2. However, notwithstanding my concerns regarding the lack of a requirement of a unanimous verdict as to the aggravators, I would deny relief to Bottoson because one of the four aggravating circumstances found in this case was a prior violent felony.

Bottoson, 833 So.2d at 722.

Justice Pariente, regarding the existence of a prior violent felony in Bottoson, also stated, “In my view, the presence of a prior violent felony conviction meets the threshold requirement of Apprendi as extended to capital sentencing by Ring.” Id. at 722. Justice Pariente later stated, “*Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.*” Id. at 723. (emphasis in original)

Existence of a prior violent felony, according to the reasoning of Justices Shaw and Pariente, was the determinating factor in denying relief to Bottoson and King. As explained by Justice Pariente, the presence of the prior violent felonies in those cases meet the threshold requirement of Apprendi and Ring. Without the presence of prior violent felonies, the requirements of Ring dictate that any increase

in the authorized punishment be on findings of fact and beyond a reasonable doubt. Since there is not the presence of a prior violent felony in Grossman's case, any and all aggravators relied upon to enhance Grossman's punishment should have been proven beyond a reasonable doubt.

It cannot be said that the aggravators relied upon to enhance Grossman's sentence met the test of Apprendi and Ring. It cannot be said which, if any, of the aggravator's listed by the court in Grossman's case were proven by a reasonable doubt. The jury verdict in Grossman's case did not show which aggravators jurors found to exist beyond a reasonable doubt because under Florida law the jury recommends a sentence but makes no explicit findings on aggravating circumstances. FL ST § 921.141 (3) provides that:

(3) Findings in support of sentence of death. - -
Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death, but 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:
(a) That sufficient aggravating circumstances exist as enumerated in subsection (5), and (b) That there are insufficient mitigating circumstances to outweigh the aggravating circumstances.

The inherent deficiencies with the Florida death penalty instructions were

addressed by Justice Pariente in the Bottoson case. Justice Pariente suggested changes to Florida jury instruction so that the instructions comport with the requirements of Apprendi and Ring. Justice Pariente said:

First, I agree with Justice Lewis that there are deficiencies in our current death penalty sentencing instructions. Because our present standard penalty phase jury instructions emphasize the jury's advisory role and minimize the jury's duty under *Ring* to find the aggravating factors, Florida's penalty phase jury instructions should be immediately reevaluated so that at a minimum the jurors are told that they are the finders of fact as to the aggravating circumstances. I thus would also concur with Justice Shaw's recommendation for an amended jury instruction to be used prospectively. Second, I would immediately require that trial courts utilize special verdicts that require the jury to indicate what aggravators the jury has found and the jury vote as to each aggravator.

Bottoson, 803 So.2d at 723.

In Mr. Grossman's case, the aggravators were not shown to exist beyond a reasonable doubt and the jury was not instructed that they were finders of fact. The jurors were instructed only on their advisory role. The instructions given to the jury in Mr. Grossman's case were deficient.

In the Bottoson opinion, Chief Justice Anstead addressed the application of *Ring* to the Florida death penalty statute saying:

Thus, *Ring* requires that the aggravating circumstances necessary to enhance a particular defendant's sentence to death must be found by a jury beyond a reasonable doubt in the same manner that a jury must find that the government has proven all the elements of the crime of murder in the guilt phase. It appears that the provision for judicial findings of fact and the purely advisory role of the jury in capital sentencing in Florida falls short of the mandates announced in *Ring* and *Apprendi* for jury fact-finding.

Bottoson, 833 So.2d at 706.

In Mr. Grossman's case, the juror's were not told that they were the finders of fact as to the aggravating circumstances nor did the jury verdict indicate the jury vote as to each aggravator. There can be no way to know how the jury voted in Mr. Grossman's case and no way to know whether any of the aggravators were found to exist beyond a reasonable doubt. Since Mr. Grossman had no prior violent felonies which could meet the threshold requirement of Apprendi and Ring, Mr. Grossman is entitled to relief.

The constitutional requirements of Ring are particularly critical in Mr. Grossman's case. Chief Justice Anstead , in the Bottoson opinion said:

Regardless of the jury's collective or individual advisory recommendation, Florida's death sentencing statute states that it is the trial court that "shall enter a sentence of life imprisonment or death." § 921.141(3), Fla. Stat. (2001). Further, and critical to the resolution of the *Ring* issue, our statute provides, "In each case in which the court

imposes the death sentence, *the determination of the court shall be supported by specific written findings of fact* based upon the [aggravating and mitigating] circumstances ... and upon the records of the trial and the sentencing proceedings." *Id.* (emphasis supplied). Even in cases where the jury has given an advisory recommendation of death, "[i]f the court does not make the findings requiring the death sentence within 30 days after the rendition of the judgment and sentence, the court shall impose sentence of life imprisonment."

Bottoson, 833 So.2d at 706 -707 (emphasis in original)

Chief Justice Anstead discussed how F.S. § 921.141 (3) is critical to resolution of the Ring issue because written findings of fact must be made by the court to support the imposition of the death sentence. In Bottoson, Justice Anstead further went on to say that, "[i]n, Spencer v. State, 615 So.2d 688 (Fla.1993), we explained the critical importance that the trial court plays in conducting capital sentencing under Florida law: In Grossman v. State, 525 So.2d 833 (Fla.1988), we directed that written orders imposing the death sentence be prepared prior to the oral pronouncement of sentence." *Id.* at 707.

Mr. Grossman did not receive the protection of the ruling in Grossman v. State as the rule was applied prospectively and not to Mr. Grossman in his case. In Mr. Grossman's case, the aggravating circumstances were not supported by written findings. *Id.* at 841 Mr. Grossman should be granted relief because the failure to make written findings of fact before sentencing Mr. Grossman to death

falls short of the mandates announced in Ring and Apprendi.

In Mr. Grossman's case, the jury was told that it was to make a recommendation regarding a death sentence and that the judge was the ultimate sentencing authority. The jury was told that the final sentence was the responsibility of the judge. The instructions given to the jury diminished their sense of responsibility in recommending a sentence in Mr. Grossman's case.

In the Bottoson case, Justice Lewis discussed the validity of the Florida standard jury instructions in light of Ring and Caldwell v. Mississippi, 472 U.S. 320 (1985). Justice Lewis said:

Under Florida's standard penalty jury instructions, the jury is told, even before evidence is presented in the penalty phase, that its sentence is only advisory and the judge is the final decision maker. See Fla. Std. Jury Instr. (Crim.) 7.11. The words "advise" and "advisory" are used more than ten times in the instructions, while the members of the jury are only told once that they must find the aggravating factors beyond a reasonable doubt. See *id.* The jury is also instructed several times that its sentence is simply a recommendation. See *id.* By highlighting the jury's advisory role, and minimizing its duty under Ring to find the aggravating factors, Florida's standard penalty phase jury instructions must certainly be reevaluated under the Supreme Court's Caldwell v. Mississippi decision. Just as the high Court stated in Caldwell, Florida's standard jury instructions "minimize the jury's sense of responsibility for determining the appropriateness of death." Caldwell, 472 U.S. at 341, 105 S.Ct. 2633.

Id. at 733.

Mr. Grossman's jury was instructed such that their sense of responsibility for sentencing was lessened. The diminished sense of responsibility resulted in a verdict contrary to Caldwell. The jury in Mr. Grossman's case was told that their sentencing role was advisory and thus minimized their duty under Ring to find aggravating factors. Mr. Grossman was denied due process because of the jury instructions given and he is entitled to relief.

The application of Ring and Apprendi to Mr. Grossman's case should be applied retroactively. Although on July 29, 2003 the Eleventh Circuit Court of Appeals in Turner v. Crosby L 21739734 (11th Cir. (C.A. 11 Fla.), 2003) ruled that Ring and Apprendi does not apply retroactively on federal collateral review, the court did not address whether Florida's capital sentencing structure which includes a jury's advisory verdict followed by sentencing by the trial judge, would still pass constitutional muster under Ring. Id. at footnote 34. Whether the Florida sentencing scheme passes constitutional muster pursuant to Ring and Apprendi remains an issue for this Court to address. Based on the reasons stated above, Mr. Grossman was denied essential fairness in a proceeding which resulted him being condemned to death. Mr. Grossman should be granted relief.

CONCLUSION AND RELIEF SOUGHT

For all the reasons discussed herein, Martin Grossman respectfully urges this Honorable Court to grant him habeas relief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Petition for Writ of Habeas Corpus has been furnished by United States Mail, first class postage prepaid, to all counsel of record on August ____, 2003.

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Petition for Writ of Habeas Corpus was generated in Times New Roman 14-point font pursuant to Fla. R. App. P. 9.210.

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