

IN THE SUPREME COURT OF FLORIDA

MARTIN GROSSMAN,

Petitioner,

VS.

Case No. SC03-1413

JAMES V. CROSBY, JR.,

Respondent.

\_\_\_\_\_ /

**RESPONSE TO SUCCESSIVE PETITION FOR WRIT OF HABEAS CORPUS**

COMES NOW, Respondent, James V. Crosby, Jr., by and through the undersigned Assistant Attorney General, and hereby responds to the successive Petition for Writ of Habeas Corpus filed herein, pursuant to this Court's Order of August 28, 2003. Respondent respectfully submits that the petition should be dismissed as procedurally barred; alternatively, the petition should be denied as meritless.

**FACTS AND PROCEDURAL HISTORY**

Petitioner Grossman is again seeking extraordinary relief from the murder conviction and sentence of death entered against him in 1985. His conviction and sentence were affirmed on appeal. Grossman v. State, 525 So. 2d 833 (Fla. 1988), cert. denied, 489 U.S. 1071 (1989). The facts of the case are summarized in this Court's opinion:

Appellant and a companion, Taylor, drove to a wooded area of Pinellas County on the night of December 13, 1984, to shoot a handgun which appellant had recently obtained by burglarizing a home. Appellant lived in neighboring Pasco County at his mother's home and was on probation following a recent prison term. Wildlife Officer Margaret Park, patrolling the area in her vehicle, came upon the two men and became suspicious. She left her vehicle with the motor, lights, and flashers on, and took possession of appellant's weapon and driver's license. Appellant pleaded with her not to turn him in as having a weapon in his possession and being outside of Pasco County would cause him to return to prison for violation of probation. Officer Park refused the plea, opened the driver's door to her vehicle and picked up the radio microphone to call the sheriff's office. Appellant then grabbed the officer's large flashlight and struck her repeatedly on the head and shoulders, forcing her upper body into the vehicle. Officer Park reported "I'm hit" over the radio and screamed. Appellant continued the attack, and called for help from Taylor, who joined in the assault. Officer Park managed to draw her weapon, a .357 magnum, and fired a wild shot within the vehicle. Simultaneously, she temporarily disabled Taylor by kicking him in the groin. Appellant, who is a large man, wrestled the officer's weapon away and fired a fatal shot into the back of her head. The spent slug exited her head in front and fell into a drinking cup inside the vehicle. Blood stains, high velocity splatters, the location of the spent slug, and the entry and exit wounds show that the victim's upper body was inside the vehicle with her face turned inward or downward at the moment she was killed. Appellant and Taylor took back the seized handgun and driver's license, and fled with the officer's weapon. They returned to the Grossman home, where they told the story of the killing, individually and collectively,

to a friend who lived with the Grossmans. The friend, Brian Hancock, and Taylor buried the two weapons nearby. Appellant, who was covered with blood, attempted unsuccessfully to burn his clothes and shoes which Taylor later disposed of in a nearby lake. Approximately a week later appellant and Taylor, individually and collectively, recounted the story of the murder to another friend, Brian Allan. Approximately eleven days after the murder, Hancock told his story to the police and appellant and Taylor were arrested. Taylor, upon his arrest, recounted the story of the murder to a policeman and, later, appellant told the story to a jailmate, Charles Brewer. Appellant and Taylor were tried jointly over appellant's objection. At trial, the state introduced the testimony of Hancock, Allan, and Brewer against appellant. The state also introduced Taylor's statement to the policeman against Taylor only. In addition, the state introduced the charred shoes, the two weapons, prints taken from the victim's vehicle, testimony from a neighbor who observed the attempted burning of the clothes, appellant's efforts to clean the Grossman van, and the changing of the van tires. Expert testimony as to the cause of death and the significance of blood splatter evidence was also introduced by the state. The jury was instructed that Taylor's admissions to the policeman could only be used against him, not appellant. The jury was instructed on premeditation and felony murder based on robbery, burglary, and escape. A general verdict of first-degree murder was returned against the appellant and Taylor was found guilty of third-degree murder. The judge followed the jury's twelve-to-zero recommendation that the appellant be sentenced to death.

525 So. 2d at 835-836. Grossman's sentence was supported by four aggravating circumstances: (1) the murder was committed during the course of a robbery or burglary; (2) the murder was

committed for the purpose of avoiding arrest; (3) the murder was committed to disrupt or hinder law enforcement; and (4) the murder was especially wicked, evil, atrocious, or cruel.<sup>1</sup> The judge did not find any mitigating factors which outweighed the aggravating circumstances.

Grossman previously litigated a postconviction appeal in this Court, Grossman v. State, Florida Supreme Court Case No. 87,121, as well as a petition for writ of habeas corpus, Grossman v. Dugger, Florida Supreme Court Case No. 75,738. Relief was denied in both cases. Grossman v. State, 708 So. 2d 249 (Fla. 1997). The postconviction issues considered and rejected by this Court were: (1) ineffective assistance of counsel at the penalty phase; (2) Brady v. Maryland, 373 U.S. 83 (1963) violations; (3) witness Brewer was a State agent; (4) ineffective assistance of counsel at the guilt phase; (5) ineffective assistance of counsel in procuring a mental health exam; (6) faulty jury instruction on the heinous, atrocious or cruel aggravating factor; (7) trial counsel had a conflict of interest; (8) the defendant was not present at all critical stages; (9) prosecutorial misconduct; and (10) improper weighing of aggravating and mitigating circumstances. His habeas petition asserted three claims: (1) ineffective assistance of

---

<sup>1</sup>Factors (2) and (3) were merged and treated as one factor by the trial judge.

appellate counsel; (2) Caldwell v. Mississippi, 472 U.S. 320 (1985), error; and (3) recent decisions of this Court, including Campbell v. State, 571 So. 2d 415 (Fla. 1990), Porter v. State, 564 So. 2d 1060 (Fla. 1990), Hallman v. State, 560 So. 2d 223 (Fla. 1990), and Brown v. State, 526 So. 2d 903 (Fla. 1988), compelled relief.

#### **RESPONSE TO REQUEST FOR ORAL ARGUMENT**

Grossman's petition includes a request for this Court to schedule an oral argument on the petition. Respondent respectfully submits that no oral argument is necessary. Grossman has raised three claims which are procedurally barred and clearly without merit. No useful purpose would be served by scheduling oral argument for these claims, and to preserve scarce state and judicial resources, this Court should dispense with oral argument in this case. In addition, this Court should resolve Grossman's petition as expeditiously as possible, because Grossman's federal habeas petition, which has been pending since 1998, is currently administratively closed and will not be considered until this Court resolves the pending state habeas petition (see App. 1, orders and pleading from United States District Court).

#### **SUMMARY DISMISSAL OF PETITION**

Grossman's current petition should be summarily dismissed. It is untimely. See Mann v. Moore, 794 So. 2d 595, 598 (Fla. 2001), cert. denied, 536 U.S. 962 (2002). In addition, the petition is successive, and it presents issues which could and should have been raised in Grossman's prior state habeas petition. Therefore, these claims are barred. King v. Moore, 808 So. 2d 1237, 1246 (Fla. 2002); Johnson v. Singletary, 647 So. 2d 106, 109 (Fla. 1994); Mills v. Dugger, 574 So. 2d 63, 65 (Fla. 1990).

The petition asserts that it is properly filed because "new law" has developed since the filing of Grossman's initial habeas petition, citing Harvey v. State, 28 Fla. L. Weekly S513 (Fla. July 3, 2003); Nixon v. State, 28 Fla. L. Weekly S597 (Fla. July 10, 2003); Bottoson v. Moore, 833 So. 2d 693 (Fla. 2002); King v. Moore, 831 So. 2d 143 (Fla. 2002); Wiggins v. Smith, 123 S. Ct. 2527 (2003); and Ring v. Arizona, 536 U.S. 584 (2002). However, none of these cases provide any basis for the filing of a successive petition. Harvey, Nixon and Wiggins merely apply claims of ineffective assistance of counsel to specific factual situations; Ring invalidated the Arizona death penalty scheme and, as this Court recognized in Bottoson and King, did not impact Florida law. As Petitioner has framed his issues in three distinct claims, the procedural bars applicable will be more fully developed within the framework of the State's

substantive response to each issue.

ARGUMENT

ISSUE I

WHETHER GROSSMAN'S PRIOR CLAIM OF  
INEFFECTIVE ASSISTANCE OF GUILT PHASE  
COUNSEL SHOULD BE REVISITED IN LIGHT OF  
HARVEY V. STATE, AND NIXON V. STATE.

In his first claim, Grossman asserts that his trial attorneys were ineffective for conceding his guilt without his knowledge and consent. As previously noted, this claim is subject to summary dismissal as it is procedurally barred for a number of reasons. First, a claim of ineffective assistance of trial counsel is not properly presented in a habeas petition; this Court will only assess the performance of appellate attorneys in a habeas action. Shere v. State, 742 So. 2d 215, 217, n.6 (Fla. 1999) (claim of ineffective assistance must be presented to court where alleged ineffectiveness occurred); State v. District Court of Appeal, First Dist., 569 So. 2d 439, 441 (Fla. 1990) (claims of ineffective assistance of trial counsel are cognizable only by rule 3.850 and may not be raised by a petition for habeas corpus); Knight v. State, 394 So. 2d 997 (Fla. 1981).<sup>2</sup> Even if presented in a proper forum, however, Grossman's current claim would be barred. Grossman clearly

---

<sup>2</sup>Petitioner's inappropriate request that this Court grant a limited evidentiary hearing on this issue (Petition, p. 11), demonstrates that a habeas petition is not the proper vehicle for presentation of this claim.

could have pled this claim previously; he was aware of counsel's strategy since the time of trial. Yet he did not assert this strategy as a basis of ineffective assistance of counsel in his prior postconviction actions; therefore, the claim is barred. Parker v. Dugger, 550 So. 2d 459, 460 (Fla. 1989) (habeas corpus petitions are not to be used for additional appeals on questions which could have been, should have been, or were raised on appeal or in a rule 3.850 motion, or on matters that were not objected to at trial).

Grossman's contention that he could not have asserted this claim previously because Harvey v. State, 28 Fla. L. Weekly S513 (Fla. July 3, 2003), and Nixon v. State, 28 Fla. L. Weekly S597 (Fla. July 10, 2003), had not been decided is without merit. There has been no change of law with regard to this claim. Harvey and Nixon simply applied established law on ineffective assistance of counsel claims which challenged an attorney's concession of guilt to the charged offense rather than subjecting the State's case to adversarial testing. Harvey and Nixon are consistent with a number of prior decisions of this Court, including Atwater v. State, 788 So. 2d 223, 231 (Fla. 2001), Nixon v. State, 758 So. 2d 618, 622 (Fla. 2000), and Brown v. State, 755 So. 2d 616 (Fla. 2000).

Grossman has not cited any facts which were not known at the time of his prior habeas petition; he relies only on facts

discerned from the records in prior proceedings before this Court. No prior constitutional claim has ever been offered with regard to these facts. Furthermore, a review of the record in this case establishes that Grossman is not entitled to relief as a matter of law.

Grossman's petition initially asserts, in a conclusory manner, that his attorney, "essentially conceded that the crux of the State's case was provable and in doing so essentially admitted the defendant's guilt," citing to pages 1824-26 of the record from Grossman's direct appeal. Grossman does not recite any of the purported concession, but quotes only from part of the defense opening argument where counsel is telling the jury that there was no premeditated killing but only a terrified reaction to the discharge of the gun. Grossman then challenges these statements as "weak" and chastises counsel for failing to present evidence to support this theory of defense. From this, it appears that Grossman is not challenging his attorney's concession of guilt, but is challenging the strength of his attorney's assertion of innocence.

A review of the defense opening and closing statements confirms that counsel did challenge the State's case, particularly with regard to the element of premeditation. To the extent that Grossman claims that his attorneys should not have conceded any of the elements of murder, his argument is

without merit. This Court has distinguished cases where an attorney conceded guilt, as a matter of trial strategy, to a lesser included offense, noting such trial tactics do not require a defendant's affirmative consent. Atwater, 788 So. 2d at 231; Brown, 755 So. 2d at 630.

The record in this case demonstrates that defense counsel forcefully argued to Grossman's jury that Grossman was only guilty of second degree murder. In his brief opening statement, counsel admitted to the jury that Grossman "did things wrong," but followed with, "I'd adamantly defend Martin Grossman on the principle that he did not commit first degree murder. The evidence in this case will not show that Mr. Grossman committed a premeditated homicide of this lady, nor will it show that the homicide was committed because of some felony, one of the enumerated felonies that may be argued at the conclusion of this trial" (DA-R. 1825).<sup>3</sup>

A reading of the opening argument in its entirety demonstrates that defense counsel never wavered from the forceful argument that "this is not a first degree murder" (DA-R. 1830), with counsel repeatedly urging that "the evidence does

---

<sup>3</sup>References to the record from the direct appeal of Grossman's judgment and sentence, Florida Supreme Court Case No. 68,096, will be designated by "DA-R." followed by the appropriate page number; references to the record in his postconviction appeal, Florida Supreme Court Case No. 87,121, will be designated as "PC-R." followed by the appropriate page number.

not establish a premeditated killing or does not establish one of the enumerated felonies" (DA-R. 1826); "there was no intent" (DA-R. 1827, 1829). Since Grossman's attorneys did not abandon his defense or acknowledge that he was guilty of first degree murder, this case is easily distinguished from Harvey and Nixon.

Thus, this claim must be rejected as procedurally barred, since it could have been presented when Grossman initially challenged his attorneys' guilt phase performance. In addition, the claim is without merit as the record does not support Grossman's assertion that his attorney conceded guilt as to the charged offense rather than subject his case to adversarial testing. Therefore, this Court must deny relief on this issue.

## ISSUE II

### **WHETHER GROSSMAN'S PRIOR CLAIM OF INEFFECTIVE ASSISTANCE OF PENALTY PHASE COUNSEL SHOULD BE REVISITED IN LIGHT OF WIGGINS V. SMITH.**

In his second issue, Grossman re-asserts his prior postconviction claim that his trial attorneys were ineffective for failing to adequately explore possible mitigating circumstances. Citing Wiggins v. Smith, 123 S. Ct. 2527 (2003), Grossman claims that his attorneys' penalty phase investigation was incomplete and constitutionally deficient.

Once again, this is an issue which is procedurally barred, as it is an improper challenge to the performance of trial counsel, and it was previously litigated and rejected in Grossman's prior postconviction proceedings. Shere, 742 So. 2d at 217, n.6; Parker, 550 So. 2d at 460.

Once again, Grossman has not offered any additional facts which were not known at the time of his prior ineffective assistance of counsel claim. In fact, he relies exclusively on the postconviction affidavits and testimony to support his assertion that his attorneys rendered constitutionally deficient performance. And again, there has been no change of law on the issue. Grossman's reliance on Wiggins offers nothing more than a renewal of his prior claim under Strickland v. Washington, 466 U.S. 668 (1984). Wiggins merely applied Strickland to the facts of that case, it did not change the standard by which a claim of ineffective counsel is to be judged. Thus, this claim is barred and not subject to reconsideration.

In addition, Wiggins does not demonstrate that Grossman's prior postconviction appeal was wrongly decided. In Wiggins, the defense attorney made a passing reference in penalty phase to Wiggins' poor childhood, but presented no evidence at all on the issue, focusing instead on the defense penalty phase theory that Wiggins was not directly responsible for the victim's death. The decision to focus on retrying Wiggins' criminal

culpability rather than present mitigating evidence was premised solely on a review of Wiggins' PSI and a social services file relating Wiggins' background in foster care from the time he was about six years old. Although these records gave some indication of a severe history of physical and sexual abuse, counsel chose not to investigate this background in light of the adopted defense strategy. The United States Supreme Court found that his attorneys were ineffective because they did not adequately explore the available mitigation before choosing the alternative theory of retrying culpability.

In the instant case, Grossman's claim of ineffective assistance is easily refuted by the postconviction record. The petition, unfortunately, does not accurately relate many of the facts from the postconviction evidentiary hearing.<sup>4</sup> Although the petition repeatedly asserts that attorneys Tom McCoun and Ira Berman did absolutely nothing to investigate mitigation beyond speaking with Grossman, his mother, and grandmother, the record reflects that much more was done.

Tom McCoun testified that he had begun a preliminary investigation for possible penalty phase witnesses before the

---

<sup>4</sup>The petition also misstates the direct appeal record by claiming that only Grossman's mother, Myra, testified, along with three other witnesses "employed by the jail," when the defense presented the testimony of Steven Martakas, a long-time friend of Grossman's, as well as two witnesses from the jail (Petition, p. 17; DA-R. 2631-34).

guilt phase of the trial commenced (PC-R. 1999-2002). Specifically, McCoun had talked to Grossman, his mother and grandmother a number of times, and had attempted to develop other possible witnesses through these people, but Grossman's mother indicated she did not know of anyone that would come in to speak on Grossman's behalf (PC-R. 2047, 2227, 2241-43, 2248). McCoun located and presented Steven Martakas, a witness that testified that he had been Grossman's best friend in junior high; he had also researched Grossman's past addresses, and his educational, medical, and emotional background (PC-R. 1999-2002, 2030-31). He sought funds to get a court appointed confidential expert and explored the possibility of mental mitigators with Dr. Sidney Merin (PC-R. 1999-2000). When a motion to continue the trial was denied two weeks prior to the start of the penalty phase, McCoun enlisted the aid of Ira Berman in further penalty phase preparation (PC-R. 2225). Berman was able to locate witnesses that had known Grossman while he had been in jail for the previous year, and these witnesses were presented and accomplished the defense's goal of demonstrating that Grossman was "not a beast" but could be courteous, cooperative and nonviolent (PC-R. 2251-52).

Grossman recites from McCoun's prehearing affidavit, which McCoun acknowledged had been composed from the perspective of hindsight (PC-R. 2023), and offers selective comments from

McCoun and Berman, admitting that there was more they could have done, as there always is. As this Court has held, an attorney's own admission of ineffectiveness is "of little persuasion." Routly v. State, 590 So. 2d 397, 401, n.4 (Fla. 1991); Kelley v. State, 569 So. 2d 754 (Fla. 1990). Notably, while both attorneys expressed concern that some additional background witnesses had been discovered, both attorneys also acknowledged that putting on additional mitigation probably would not have changed the outcome in this case (PC-R. 2005, 2035, 2245-48, 2269-70).

The petition repeatedly asserts that, had counsel been effective, they would have located and interviewed Grossman's uncle, Paul Melton (Petition, pp. 15-16, 19). Melton is the only potential witness specifically identified in the petition to support Grossman's current claim, yet the petition fails to acknowledge that McCoun testified affirmatively that he had in fact spoken with Paul Melton, as well as Paul's wife, Rosol, and another relative, Louise Levine (PC-R. 2000, 2030, 2035-36). He stated unequivocally that he would not have called either Rosol or Paul, who were instrumental in turning Grossman in to the police, because they had harmful information that would have been detrimental to the defense (PC-R. 2036-39, 2048, 2263-65). Myra Grossman was presented as a penalty phase witness, and the defense would have avoided calling other witnesses that would

have made Myra look bad (PC-R. 2038, 2040-42).

At the time of trial, McCoun was aware of many of the proffered affiants as potential penalty phase witnesses, but decided not to use them (PC-R. 2035-38, 2045, 2046). He would not have emphasized testimony about Grossman's heavy drug use or probation, since he was trying to avoid negative comments and evidence about Grossman, and would not have called witnesses that believed Grossman should get the death sentence (PC-R. 2042, 2045, 2048, 2050). He and Berman made a strategic decision not to use Dr. Merin as an expert witness (PC-R. 2000, 2050-51, 2263-64, 2281).

Unlike the situation in Wiggins, this trial included the presentation of background evidence for mitigation. The defense strategy for penalty phase was to demonstrate that Grossman was not an animal but a young man with positive characteristics that did not deserve to die (PC-R. 2036-38, 2042, 2048, 2050, 2227, 2229-30, 2244, 2245, 2248, 2263-64; DA-R. 2688-2696, 2703-2706). Grossman's mother, Myra, testified that Grossman's father had died when he was 50 years old and Grossman was 15 (DA-R. 2609). She noted that Grossman's father had suffered from myotonic dystrophy, and detailed how Grossman had assisted his father by helping him in and out of his wheelchair, carrying him to the bathroom, etc. (DA-R. 2611-13). She stated that the family had lived in Hialeah, Florida from the time Grossman was about five

months old until he was 13 or 14; that Grossman was a Boy Scout, had a difficult time dealing with his father's death, worked and supported his mother, and was a typical teenager with a car and pets (DA-R. 2610-2614). According to Mrs. Grossman, Grossman was never violent but was a normal boy, and this incident was completely out of character for him (DA-R. 2614, 2617). She testified that she still loved Grossman (DA-R. 2616).

The defense also presented Detention Officer Thomas Campbell and Corrections Social Worker Carolyn Middleton to describe Grossman as a good inmate who did not cause problems, was not violent, and took his trial seriously (DA-R. 2624-27; 2639-42). Another witness was Steven Martakas, a close friend of Grossman's from junior high school (DA-R. 2631-34). Martakas stated that Grossman was a good friend, always there for him, and that Grossman gave him advice and told him not to smoke or take drugs (DA-R. 2636-37). He also noted that Grossman was very protective of his family (DA-R. 2635).

To demonstrate that his attorneys' actions were insufficient, Grossman relies on the 1989 ABA standards, promulgated five years after his trial. Such reliance is inappropriate since the proper review applies the standards in place at the time of trial rather than years later. In addition, Grossman has failed to show that the strategy to present only favorable, positive penalty phase testimony about

him was unreasonable, uninformed, or inconsistent with the later-adopted standards. McCoun interviewed family members and school friends in furtherance of this strategy, reviewed Grossman's medical and educational history, and investigated potential mental health defenses (PC-R. 1999-2002, 2030-31).

Furthermore, Wiggins did not change the legal standard for the determination of prejudice when a claim of ineffective assistance of counsel is advanced. The Maryland state courts had not addressed prejudice, and the United States Supreme Court determined that the undiscovered mitigation may have made a difference to at least one juror. In the instant case, it is important to keep in mind that the jury recommendation of death in this case was unanimous. Both trial attorneys recognized at the evidentiary hearing below that putting on additional mitigating evidence probably would not have changed the outcome in this case (PC-R. 2035, 2245-48, 2269-70). Berman testified that this case presented the worst factual scenario as far as the emotional level created by the atrocity of the crime; the victim in this case had many qualities to generate sympathy with the jury, being a young, female, law enforcement wildlife officer (PC-R. 2274). However, he did not believe that additional information about Grossman's background as a young child, and even up to thirteen years of age, would have changed the jury recommendation in this case (PC-R. 2048, 2244-48).

Berman noted that generally, such information becomes more relevant as it relates to a defendant as he gets older and is closer in time to the date of the offense (PC-R. 2245).

The trial judge that considered all of the trial and postconviction evidence to mitigate Grossman's murder of Officer Park found that, even if some deficiency could be identified, no prejudice occurred:

The Court has evaluated the conduct of the Defendant's counsel from counsel's perspective at the time of the trial. Defendant introduced thirty-three affidavits that were represented as possible mitigation witnesses that were available at the time of trial but were not used by the defense. Several of the possible witnesses represented by the affidavits were known to the defense, and the defense had determined not to use them.

Defense counsel, Mr. McCoun, at the time of trial recognized that while trying to present a favorable picture of the Defendant, equally negative things would also be presented. Mr. McCoun did not want to use witnesses who would say that the Defendant was into stealing and heavy drug use. Moreover, defense counsel called three mitigating witnesses in addition to the Defendant's mother. The mitigating witnesses that were called had close contact with the defendant near the time that he committed the crime; whereas, many of the potential witnesses that were represented by the affidavits had not seen the Defendant in years.

The Court finds that Mr. McCoun did a competent, effective job of representing the Defendant at all phases of the trial. Even if counsel were deemed ineffective for the reasons stated by the Defendant, such alleged ineffectiveness did not come close to being so prejudicial to the Defendant

that it affected the outcome of the case. The facts of this case showed the Defendant's conduct to be so egregious that proof of mitigating circumstances was extremely difficult.

(PC-R. 2836-37). This finding is entitled to considerable weight, since it was rendered by the same judge that imposed Grossman's death sentence. Routly, 590 So. 2d at 402; Francis v. State, 529 So. 2d 670, 673, n. 9 (Fla. 1988).

This Court previously affirmed the rejection of Grossman's ineffective assistance claim, finding that the trial court's conclusions were supported by competent evidence and that the correct law was applied. Grossman, 708 So. 2d at 251. No reasonable basis for reconsideration of this ruling has been offered. This is clearly not a case where the postconviction proceeding revealed substantial mitigation that had not been presented at trial; the "new" mitigation offered in the prior postconviction action is simply a parade of character witnesses that knew Grossman or his parents years prior to the crime. Grossman committed outrageous and brutal acts against a young officer, striking her repeatedly with her own flashlight and then shooting her in the head with her own gun, and his actions are not reasonably mitigated by any newly proffered mitigation.

Once again, Grossman's claim of ineffective assistance of counsel is procedurally barred and without merit. No relief is warranted on this issue.

### ISSUE III

#### WHETHER GROSSMAN'S DEATH SENTENCE IS UNCONSTITUTIONAL UNDER RING V. ARIZONA.

In his last issue, Grossman asserts that he is entitled to relief pursuant to Ring v. Arizona, 536 U.S. 584 (2002). This claim must be rejected because it is procedurally barred, because Ring is not entitled to retroactive relief, because Ring did not invalidate Florida's sentencing scheme, and because any possible error would necessarily be harmless given the jury's unanimous death recommendation and the application of the during the course of a felony aggravating factor.

Of course, a challenge to the constitutionality of Grossman's sentence is an issue which should have been raised on direct appeal, and is not appropriate in a postconviction challenge. Hall v. State, 742 So. 2d 225, 226 (Fla. 1999); LeCroy v. Dugger, 727 So. 2d 236, 241, n. 11 (Fla. 1998). Grossman's allegation of Sixth Amendment error in Florida's death penalty statute should have been pursued prior to trial and on appeal. Thus, the issue is barred. Henderson v. Singletary, 617 So. 2d 313, 315 (Fla.), cert. denied, 507 U.S. 1047 (1993). Unless properly preserved and presented, any Apprendi/Ring claim is barred. See Barnes v. State, 794 So. 2d 590 (Fla. 2001) (Apprendi error not preserved for appellate

review); McGregor v. State, 789 So. 2d 976, 977 (Fla. 2001) (Apprendi claim procedurally barred for failure to raise in trial court).

In addition, Ring is not subject to retroactive application. This is the conclusion reached by nearly all courts to have addressed the issue. See Turner v. Crosby, 16 Fla. L. Weekly Fed. C926 (11th Cir. July 29, 2003); In Re Johnson, 334 F.3d 403, 405, n.1 (5th Cir. 2003) (noting that while the Court need not reach the issue, "since the rule in Ring is essentially an application of Apprendi, logical consistency suggests that the rule announced in Ring is not retroactively available"); Moore v. Kinney, 320 F.3d 767, 771, n.3 (8th Cir.) (en banc) ("Absent an express pronouncement on retroactivity from the Supreme Court, the rule from Ring is not retroactive"), cert. denied, 123 S. Ct. 2580 (2003); Szabo v. Walls, 313 F.3d 392, 398-99 (7th Cir. 2002); Cannon v. Mullin, 297 F.3d 989, 994 (10th Cir. 2002); Sibley v. Culliver, 243 F.Supp. 1278 (M.D. Ala. 2003); State v. Lotter, 664 N.W.2d 892 (Neb. 2003); Colwell v. State, 59 P.3d 463 (Nev. 2002); Towery v. State, 64 P.3d 828, 830 (Ariz. 2003); contra, Summerlin v. Stewart, 2003 U.S. App. LEXIS 18111 (9th Cir. Sept. 2, 2003); State v. Whitfield, 107 S.W.3d 253 (Mo. 2003).

The federal decisions addressing retroactivity apply the rule of Teague v. Lane, 489 U.S. 288 (1989), in consideration of

the issue.<sup>5</sup> Although this Court determines retroactivity under the principles of Witt v. State, 387 So. 2d 922 (Fla. 1980), this Court should apply the Teague test in the instant case. First of all, the question presented concerns the retroactivity of a federal constitutional decision, which is itself a federal question, requiring the application of federal retroactivity principles. See American Trucking Ass'ns., Inc., v. Smith, 496 U.S. 167, 178 (1990); Michigan v. Payne, 412 U.S. 47 (1973); State v. Tallard, 816 A.2d 977, 979 (N.H. 2003); State v. Sepulveda, 32 P.3d 1085, 1086-87 (Ariz. Ct. App. 2001); Meadows v. State, 849 S.W.2d 748, 754 (Tenn. 1993).

Even if not required to do so, this Court should adopt

---

<sup>5</sup>In Teague, the United States Supreme Court announced that new constitutional rules of criminal procedure will not be applicable to cases which have become final before the new rules are announced, unless they fall within an exception to the general rule. 489 U.S. at 310. A case announces a new rule when it breaks new ground or imposes a new obligation on the state or the federal government. To put it differently, a case announces a new rule if the result was not *dictated* by precedent existing at the time the defendant's conviction became final. Id. at 301.

There are two exceptions to the general rule on non-retroactivity. First, a new rule should be applied retroactively if it places a certain kind of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe. Id. at 311. The second exception, derived from an earlier view by Justice Harlan, requires that the new rule must "alter our understanding of the *bedrock procedural elements* that must be found to vitiate the fairness of a particular conviction." Thus, this exception is limited in scope to "those new procedures without which the likelihood of an accurate conviction is seriously diminished." 489 U.S. at 311-313.

Teague as the proper analysis. Several states have used the question of retroactivity of Ring and Apprendi to reconsider state retroactivity principles; this Court should also take advantage of the opportunity to consider the continued applicability of Witt v. State, 387 So. 2d 922 (Fla. 1980). As several courts have noted, Teague offers several advantages over prior federal analyses, which serve as the basis of this Court's Witt test. The Witt standard has been criticized as leading to inconsistent results and disparate treatment, and unnecessarily intruding on prior convictions where the trials comported with constitutional norms at the time. See Teague, 489 U.S. at 309-311. Teague's foundation is the substantial respect it pays to the finality of state convictions, respect which is no less deserving from the state courts assessing their own convictions. See Teague v. Palmateer, 57 P.3d 176, 183 (Ore. App. 2002) ("It would be a perversion of the comity principles reflected in state post-conviction procedures, not a service to them, to adopt rules of retroactivity for new federal pronouncements that are broader than those adopted by federal courts, therefore according *less* respect to the finality of state court judgments than the federal courts themselves require"). Given the similarity of purpose behind federal habeas review and state collateral proceedings, using the same analysis for retroactivity is both intellectually honest and

vastly practical. See Daniels v. State, 561 N.E.2d 487, 489 (Ind. 1990). Because the retroactive application of new procedural rules seriously undermines the principle of finality which is essential to the operation of our criminal justice system, this Court should only permit retroactive application where required in the interests of justice, as outlined in Teague. 489 U.S. at 309-311.

Under Teague, as a number of courts have recognized, retroactive application of Ring is not appropriate. Ring is clearly a new procedural rule, having overruled Walton v. Arizona, 497 U.S. 639 (1990), as to the procedure to be used in imposing a capital sentence. See Towery, 64 P.3d at 832-833 (rejecting defendant's claim that Ring was substantive rather than procedural). And Ring does not meet the exception as a "watershed" rule necessary for fundamental fairness; it does not enhance the accuracy of a sentence, or diminish the likelihood of an unfair sentence. See Towery, 64 P.3d at 833-834; Colwell, 59 P.3d at 473.

The finding of non-retroactivity is consistent with the numerous decisions holding that Apprendi v. New Jersey, 530 U.S. 466 (2002) is not retroactive. Ring arises from application of Apprendi to Arizona's capital scheme. Every federal circuit court to address the issue has found that Apprendi is not retroactive. See United States v. Swinton, 333 F.3d 481 (3d

Cir. 2003); Sepulveda v. United States, 330 F.3d 55 (1st Cir. 2003); Coleman v. United States, 329 F.3d 77 (2d Cir. 2003); Goode v. United States, 305 F.3d 378 (6th Cir. 2002); United States v. Brown, 305 F.3d 304 (5th Cir. 2002); Curtis v. United States, 294 F.3d 841 (7th Cir. 2002); United States v. Mora, 293 F.3d 1213 (10th Cir. 2002); United States v. Sanchez-Cervantes, 282 F.3d 664 (9th Cir. 2002); McCoy v. United States, 266 F.3d 1245, 1257 (11th Cir. 2001); United States v. Moss, 252 F.3d 993, 996-1001 (8th Cir. 2001); United States v. Sanders, 247 F.3d 139, 146-51 (4th Cir. 2001); Jones v. Smith, 231 F.3d 1227 (9th Cir. 2000). Several state courts have similarly held that Apprendi does not apply retroactively. See People v. De La Paz, 791 N.E.2d 489 (Ill. 2003) (applying Teague); State v. Tallard, 816 A.2d 977 (N.H. 2003)(applying Teague); Teague v. Palmateer, 57 P.3d 176 (Ore. App. 2002) (applying Teague); Greenup v. State, 2002 Tenn. Crim. App. LEXIS 836 (Tenn. App. 2002) (applying Teague); People v. Bradbury, 68 P.3d 494 (Colo. App. 2002) (applying Teague); State v. Sepulveda, 32 P.3d 1085 (Az. App. 2001); Whisler v. State, 36 P.3d 290 (Kan. 2001) (applying Teague), cert. denied, 535 U.S. 1066 (2002); Sanders v. State, 815 So. 2d 590 (Ala. Crim. App. 2001); State v. Sprick, 59 S.W.3d 515 (Mo. 2001).

In addition, at least six of the United States Supreme Court Justices have, in varying individual opinions, made clear their

belief that Apprendi is not to be retroactively applied. See Ring, 536 U.S. 620-621 (O'Connor, J., dissenting); Harris v. United States, 536 U.S. 545, 581 (2002)(Thomas, J., dissenting).

The United States Supreme Court has indicated that its holding in Apprendi is not worthy of retroactive application. It has itself procedurally barred an Apprendi claim. United States v. Cotton, 535 U.S. 625 (2002)(finding that Apprendi error did not qualify as plain error, the federal equivalent of fundamental error). It has held that the failure to submit an element to the jury did not constitute structural error. Neder v. United States, 527 U.S. 1, 8-9 (1999). See also DeStefano v. Woods, 392 U.S. 631 (1968) (right to jury trial not to be applied retroactively).

Grossman cannot prevail on his claim for entitlement to relief by retroactive application of Ring in this habeas challenge. Ring announced a change in procedural law which does not fit within either exception to Teague's general rule of non-retroactivity. Similarly, Grossman cannot prevail under this Court's current standard of retroactivity under the principles of Witt v. State, 387 So. 2d 922 (Fla. 1980), which requires a decision of fundamental significance which so drastically alters the underpinnings of Grossman's death sentence that "obvious injustice" exists. See New v. State, 807 So. 2d 52 (Fla. 2001); Ferguson v. State, 789 So. 2d 306, 311 (Fla. 2001) (court must

consider the purpose served by the new case, the extent of reliance on the old law, and the effect on the administration of justice from retroactive application). Grossman cannot show that adoption of Ring satisfies these criteria. See Towery, 64 P.2d at 835-836 (finding Ring is not subject to retroactive application under Allen v. Hardy, 478 U.S. 255 (1986)); DeStefano, 392 U.S. at 634-635.

Finally, Grossman's substantive claim that Florida's procedures for imposition of a capital sentence are unconstitutional under Ring can be easily dismissed. Obviously, it is a claim which this Court has repeatedly rejected over the course of the past year. See Bottoson v. Moore, 833 So. 2d 693 (Fla.), cert. denied, 123 S. Ct. 662 (2002); King v. Moore, 831 So. 2d 143 (Fla.), cert. denied, 123 S. Ct. 657 (2002); Kormondy v. State, 845 So. 2d 41, 54 (Fla. 2003) (Ring does not encompass Florida procedures or require either notice of the aggravating factors that the State will present at sentencing or a special verdict form indicating the aggravating factors found by the jury); Butler v. State, 842 So. 2d 817 (Fla. 2003) (rejecting Ring claim in a single aggravator (HAC) case); Porter v. Crosby, 840 So. 2d 981, 986 (Fla. 2003) ("Contrary to Porter's claims, we have repeatedly held that the maximum penalty under the statute is death and have rejected the other Apprendi arguments").

Despite Grossman's attempt to cobble a majority view out of excerpts of concurring opinions of a few individual justices which have not commanded a majority view, the fact remains that this Court has consistently maintained that, unlike the situation in Arizona, the statutory maximum sentence for first degree murder is death. See Mills v. Moore, 786 So. 2d 532, 536-538 (Fla. 2001); Mann, 794 So. 2d at 599; Porter, 840 So. 2d at 986; Shere v. Moore, 830 So. 2d 56, 61 (Fla. 2003) ("This Court has defined a capital felony to be one where the maximum possible punishment is death").

Finally, any possible error would necessarily be harmless under the facts of this case. The jury at the guilt phase unanimously found Grossman guilty of first degree murder, and unanimously recommended a sentence of death. The jury was instructed on four aggravators: (1) during the course of a robbery or burglary;<sup>6</sup> (2) murder committed to avoid arrest; (3) murder committed to hinder or disrupt law enforcement; and (4) heinous, atrocious or cruel. These factors were established by overwhelming evidence and upheld on appeal. The jury was clearly instructed that their sentencing recommendation was entitled to great weight, and that each aggravating factor must be proven beyond a reasonable doubt in order to be considered as

---

<sup>6</sup>Grossman was not charged with, or convicted of, any underlying felony in connection with his murder conviction.

a basis for their recommendation. They were also clearly informed that before they recommended a sentence of death they must find at least one or more aggravating factors were proven beyond a reasonable doubt and determine that the proven aggravators were sufficient to justify the death penalty. If they so concluded they should then consider whether the aggravating factors outweighed the mitigating factors they found to exist. Based upon the evidence presented and in accordance with these directives, the jury unanimously recommended that the death penalty be imposed. Thus, the jury adequately participated in the sentencing process. See Hildwin v. Florida, 490 U.S. 638 (1989).

**CONCLUSION**

Grossman's petition is successive and untimely, and does not offer any reasonable basis for relief. Respondent respectfully requests that this Honorable Court DISMISS and/or DENY the Petition for Writ of Habeas Corpus filed herein.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to Richard Kiley and James Viggiano, Capital Collateral Regional Counsel - Middle, 3801 Corporex Park Drive, Suite 210, Tampa, Florida, 33619, this \_\_\_\_\_ day of September, 2003.

**CERTIFICATE OF FONT COMPLIANCE**

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

Respectfully submitted,

**CHARLES J. CRIST, JR.**  
**ATTORNEY GENERAL**

---

CAROL M. DITTMAR  
Senior Assistant Attorney General  
Florida Bar No. 0503843  
Concourse Center 4  
3507 E. Frontage Road, Suite 200  
Tampa, Florida 33607-7013  
(813) 287-7910  
(813) 281-5501 Facsimile  
**COUNSEL FOR RESPONDENT**