**IN THE SUPREME COURT OF FLORIDA**

**JOHN C. MARQUARD,**

**Petitioner,**

**v.** **CASE NO. SC00-1540**

**MICHAEL W. MOORE, Secretary,**
**Florida Department of Corrections,**
**and**
**ROBERT BUTTERWORTH, Attorney General,**

**Respondents.**

**_____/**

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

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

Come now the Respondents, and respond as follows to Marquard's petition for habeas corpus relief. In compliance with *Florida Rule of Criminal Procedure* 3.851(b)(2), the petition was filed contemporaneously with Marquard's *Initial Brief* on appeal from the denial of his Rule 3.850 motion.

RESPONSE TO PRELIMINARY STATEMENT

On page 2 of the petition, Marquard has set out a preliminary statement which primarily explains the citation form used in the petition. To the extent that the preliminary statement contains any assignments of error, such are denied.

RESPONSE TO INTRODUCTION

On pages 2-3 of the petition, Marquard has set out an introduction to the petition. To the extent that this part of the petition includes averments of error, those claims are denied.

RESPONSE TO PROCEDURAL HISTORY

On pages 3-6 of the petition, Marquard has set out a procedural history of this case which appears to be substantially accurate. To the extent that any legal or factual averments are contained therein, such averments are denied.

RESPONSE TO JURISDICTIONAL STATEMENT

On pages 6-7 of the petition, Marquard asserts that this

Court has jurisdiction over this petition, and that relief should be granted thereon. Respondents do not dispute the general proposition that this Court has jurisdiction to consider a habeas petition such as this one. However, for the reasons set out herein, certain claims are inappropriate for habeas review. By agreeing that jurisdiction is generally proper, Respondents waive no available defenses. To the extent that the jurisdictional portion of the petition includes an averment that relief should be granted, that averment has nothing to do with this Court's jurisdiction, and is specifically denied.

## STATEMENT OF THE FACTS

In its direct appeal decision affirming Marquard's conviction and sentence, this Court described the facts in the following way:

> We have on appeal the judgment and sentence of the trial court imposing the death penalty upon John Christopher Marquard. We have jurisdiction. Art. V, Sec. 3(b)(1), *Fla. Const*. We affirm.
>
> John Marquard, Mike Abshire, and the victim, Stacey Willets, decided to move from North Carolina to Florida in June 1991 using Stacey's car and sharing expenses. Prior to leaving, Marquard and Abshire discussed killing Stacey for her car and money, and during a stop in South Carolina Marquard told Abshire that he was going to kill her because he was tired of arguing with her. In St. Augustine, Marquard and Abshire formulated a plot to kill Stacey that night after luring her into the woods.
>
> Marquard and Abshire invited Stacey to attend a party, drove her to a deserted area, and walked her into the

woods. Marquard grabbed her from behind, stabbed her, threw her to the ground, and sat on her back. She was still breathing, so Marquard held her head under the rainwater that had accumulated in a puddle until she stopped breathing. When her body convulsed, he held her head underwater again. Abshire then stabbed her and the two tried to decapitate her. Marquard was arrested and confessed, saying he remembered walking into the woods with Stacey and standing over her body with a knife in hand. Abshire testified at trial, giving a detailed account of the murder.

Marquard was convicted of first-degree murder and armed robbery. The State put on a single witness to establish aggravation during the penalty phase -- a parole officer who testified that Marquard was on parole in North Carolina at the time of the killing. Marquard called Dr. Harry Krop to establish mitigation, and Dr. Krop testified extensively concerning Marquard's deprived childhood and present psychological state. The State put on its own mental health expert, Dr. Merwin, in rebuttal. The jury recommended death by a twelve-to-zero vote, and the court imposed death, finding four aggravating circumstances (FN1) and a number of nonstatutory mitigating factors. (FN2) The court imposed a consecutive life term for the armed robbery conviction. Marquard appeals his convictions and death sentence, raising twelve issues. (FN3)

> FN1. The judge found that the murder was committed while Marquard was under sentence of imprisonment; was committed during the course of a robbery; was especially heinous, atrocious, or cruel; and was cold, calculated, and premeditated.
>
> FN2. The judge made the following findings:
>
> The Court finds the Defendant had an unstable family life as a child and lacked the emotional support and care he should have received.
>
> ....

> The Court finds that Defendant suffers from either a personality disorder not otherwise specified or an antisocial personality. There is not much difference between the two. The Court further finds Defendant did not have a stable home, but had divorced parents and an alcoholic mother with whom he lived. He had a difficult childhood. He may have been sexually abused on one occasion. Defendant used various drugs and alcohol, however, there is no evidence that use of those had anything whatsoever to do with the commission of the murder.
>
> FN3. Marquard claims the trial court erred in ruling on the following matters: 1) excusing for cause a death-qualified venireperson; 2) refusing to suppress knives and camouflage pants; 3) permitting the State to introduce evidence of Marquard's talk of how to kill people with knives and how to make a "silent kill;" 4) denying defense request for judgment of acquittal on the armed robbery count; 5) refusing to allow defense counsel to argue to the jury concerning the consequences of life imprisonment; 6) permitting cross-exam into Marquard's criminal history during the penalty phase; 7) in instructing on and finding the aggravating circumstance of commission while under sentence of imprisonment; 8) in instructing on and finding that the murder was especially heinous, atrocious, or cruel; 9) in finding that the murder was for pecuniary gain; 10) in finding that the murder was cold, calculated, and premeditated; 11) the cumulative effect of numerous minor errors; 12) the constitutionality of the death penalty scheme.

*Marquard v. State,* 641 So.2d 54, 55-56 (Fla. 1994). This Court addressed certain claims raised on direct appeal and found no

error. The remainder of the claims were disposed of in the following way:

> We dispose of the remainder of Marquard's claims as follows: Issue 6 (no error); Issue 8 (no error); Issue 9 (no error); Issue 10 (no error); Issue 11 (not preserved as to the trial court's denial of motion for judgment of acquittal on murder charge; no error as to admission of shirt, boot, knife, and photo; not preserved as to prosecutor's comments; no error in allowing State mental health expert to sit in on trial; no error in admitting opinion testimony of Dr. Merwin); Issue 12 (no merit).

*Marquard v. State,* 641 So.2d at 58 n. 4.

## THE LEGAL STANDARD

With the exception of two claims, one which is not ripe for review and one which is not properly brought in a habeas petition, Marquard's petition is based upon his various specifications of ineffective assistance of appellate counsel. In order to prevail on these claims, Marquard must demonstrate that the performance of his appellate counsel was deficient, **and** that he was prejudiced as a result of such deficient performance. *See, Strickland v. Washington,* 466 U.S. 668 (1984); *Johnson v. Dugger,* 523 So.2d 161 (Fla. 1988). The "deficiency" must be of such a magnitude that, but for that deficiency, the result of the proceeding would have been different. *Id.* In reviewing a claim of ineffective assistance of counsel, this

Court must determine:

> whether the alleged omissions are of such magnitude as to constitute a serious or substantial deficiency falling measurably outside the range of professionally acceptable performance and, second, whether the deficiency in performance compromised the appellate process to such a degree as to undermine confidence in the correctness of the result.

*Freeman v. State,* 25 Fla. L. Weekly S451 (June 8, 2000).

The law has long been settled that appellate counsel is not required to raise every colorable claim in order to provide "effective" assistance on appeal. Instead, as the United States Supreme Court has emphasized:

> Experienced advocates since time beyond memory have emphasized the importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues. Justice Jackson, after observing appellate advocates for many years, stated:
>
> > "One of the first tests of a discriminating advocate is to select the question, or questions, that he will present orally. Legal contentions, like the currency, depreciate through over-issue. The mind of an appellate judge is habitually receptive to the suggestion that a lower court committed an error. But receptiveness declines as the number of assigned errors increases. Multiplicity hints at lack of confidence in any one.... [E]xperience on the bench convinces me that multiplying assignments of error will dilute and weaken a good case and will not save a bad one." Jackson, *Advocacy Before the Supreme Court*, 25 Temple L.Q. 115, 119 (1951).

Justice Jackson's observation echoes the advice of

countless advocates before him and since. An authoritative work on appellate practice observes:

> "Most cases present only one, two, or three significant questions.... Usually, ... if you cannot win on a few major points, the others are not likely to help, and to attempt to deal with a great many in the limited number of pages allowed for briefs will mean that none may receive adequate attention. The effect of adding weak arguments will be to dilute the force of the stronger ones." R. Stern, *Appellate Practice in the United States* 266 (1981).

There can hardly be any question about the importance of having the appellate advocate examine the record with a view to selecting the most promising issues for review. This has assumed a greater importance in an era when oral argument is strictly limited in most courts -- often to as little as 15 minutes -- and when page limits on briefs are widely imposed. *See, e.g., Fed.Rules App.Proc*. 28(g); McKinney's 1982 *New York Rules of Court* §§ 670.17(g)(2), 670.22. Even in a court that imposes no time or page limits, however, the new per se rule laid down by the Court of Appeals is contrary to all experience and logic. A brief that raises every colorable issue runs the risk of burying good arguments -- those that, in the words of the great advocate John W. Davis, "go for the jugular," Davis, *The Argument of an Appeal*, 26 A.B.A.J. 895, 897 (1940) -- in a verbal mound made up of strong and weak contentions. *See generally, e.g.*, Godbold, *Twenty Pages and Twenty Minutes -- Effective Advocacy on Appeal*, 30 SW.L.J. 801 (1976).

*Jones v. Barnes*, 463 U.S. 745, 751-53 (1983). [footnotes omitted]; *Smith v. Murray*, 477 U.S. 527, 536 (1986) (“This process of ‘winnowing out weaker arguments on appeal and focusing on’ those more likely to prevail, far from being evidence of incompetence, is the hallmark of effective appellate

advocacy."); *Provenzano v. Dugger,* 561 So.2d 541, 549 (Fla. 1990) (". . . counsel need not raise every nonfrivolous issue revealed by the record."); *Atkins v. Dugger,* 541 So.2d 1165, 1167 (Fla. 1989) ("Most successful appellate counsel agree that from a tactical standpoint it is more advantageous to raise only the strongest points on appeal and that the assertion of **every conceivable argument often has the effect of diluting the impact of the stronger points**.") [emphasis added].

In the context of a claim of ineffective assistance of appellate counsel, Eleventh Circuit Court of Appeals Judge Edmonson concurred in the denial of relief, stating:

> . . . I cannot agree that the quality of counsel's performance can be judged much by the length of briefs or the number of issues raised. Especially in the death penalty context, too many briefs are too long; and too many lawyers raise too many issues. **Effective lawyering involves the ability to discern strong arguments from weak ones and the courage to eliminate the unnecessary so that the necessary may be seen most clearly**. The Supreme Court -- as today's court recognizes -- has never required counsel to raise every nonfrivolous argument to be effective. *See Smith v. Murray*, 477 U.S. 527, 536, 106 S.Ct. 2661, 2667, 91 L.Ed.2d 434 (1986). That the custom in death penalty cases is for lawyers to file long briefs with lots of issues means little to me. This kind of "custom" does not define the standard of objective reasonableness. *See Gleason v. Title Guar. Co.*, 300 F.2d 813 (5th Cir. 1962). While compliance with custom may generally shield a lawyer from a valid claim of ineffectiveness, noncompliance should not necessarily mean he is ineffective. Not all customs are good ones, and customs can obstruct the creation of better practices.

*Heath v. Jones,* 941 F.2d 1126, 1141 (11th Cir. 1991) [emphasis added].

Appellate counsel is not "ineffective" for "failing" to raise issues which are not properly preserved for review. *See, Freeman, supra; Suarez v. Dugger,* 527 So.2d 190, 193 (Fla. 1988). Likewise, "failure" to brief a meritless issue, or one having little merit, is not deficient performance. *Id.* Further, the "failure" to raise weak issues, or the "failure" to raise an issue that, at most, is harmless error, does not establish a basis for relief on ineffective assistance of counsel grounds. *Atkins v. Dugger,* 541 So.2d 1165, 1167 (Fla. 1989); *Duest v. Dugger,* 555 So.2d 849 (Fla. 1990). Of course, counsel is not "ineffective" when he "chose not to argue the issue as a matter of strategy." *Freeman, supra.*

Appellate counsel is not ineffective for failing to convince this Court of the merit of the claims raised on appeal. *Freeman, supra; Alford v. Wainwright,* 725 F.2d 1282, 1289 (11th Cir.), *modified,* 731 F.2d 1486, *cert. denied,* 469 U.S. 956 (1984) ("[trial counsel] cannot be faulted simply because he did not succeed."). How present counsel would have argued the issues had he been appellate counsel is not the standard -- petitioner must allege "a specific, serious omission or overt act upon

which the claim of ineffective assistance of counsel can be based." *Card v. Dugger,* 911 F.2d 1496, 1507 (11th Cir. 1990); *Freeman, supra.*

**THE INDIVIDUAL CLAIMS**

I. THE "NEW EVIDENCE"/DISPROPORTIONATE SENTENCE CLAIM

On pages 7-23 of the petition, Marquard argues that "new evidence" of co-perpetrator Abshire's sentence renders his death sentence disproportionate. This claim is not proper for a habeas corpus proceeding, and should be dismissed.

This Court has specifically addressed the proportionality issue as it is framed in this petition, and has held that such a claim is properly brought in a *Florida Rule of Criminal Procedure* 3.850 motion. This Court has stated:

> Scott characterizes Robinson's life sentence, which was imposed after this Court affirmed Scott's conviction and death sentence, as "newly discovered evidence" and, thus, cognizable under Rule 3.850.
>
> Traditionally, a defendant seeking relief on the basis of evidence discovered after his conviction has been affirmed on appeal was required to apply to the appellate court for leave to petition the trial court for a writ of error coram nobis. *Hallman v. State,* 371 So.2d 482 (Fla. 1979), *abrogated on other grounds, Jones v. State*, 591 So.2d 911 (Fla. 1991). However, rule 3.850 has supplanted the writ of error coram nobis, and **newly discovered evidence claims are now brought under rule 3.850.** *Richardson v. State,* 546 So.2d 1037 (Fla. 1989). **Thus, the issue presented here is whether a codefendant's subsequent life sentence constitutes newly discovered evidence which would permit collateral relief.**

*Scott v. Dugger,* 604 So.2d 465, 468 (Fla. 1992).[1] [emphasis added]. Under settled precedent, the proportionality claim set out in the petition is not properly brought in a habeas petition. *See also, Parker v. Dugger,* 550 So.2d 549 (Fla. 1989).

To the extent that Marquard raises a "new evidence/proportionality" claim based upon Abshire's testimony at the evidentiary hearing, such a claim is likewise properly brought in a Rule 3.850 motion, not in a habeas petition, for the reasons set out above. This claim should be dismissed, and all relief should be denied.

II. THE "NONSTATUTORY AGGRAVATION" CLAIM

On pages 24-28 of the petition, Marquard argues that the "prosecutor introduced illegal non-statutory aggravating circumstances." *Petition,* at 24. This claim is not a basis for relief for the following independently adequate reasons.

The first reason that this claim is not a basis for habeas relief is because the "non-statutory aggravation" claim was not preserved at trial by a timely objection. Florida law is well-

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[1]*Scott* is cited in Marquard's petition, where he makes explicit reference to the part of that opinion quoted above. *Petition,* at 10. This issue is contained in the Rule 3.850 appeal in this case which is now pending before this Court.

settled that appellate counsel does not render ineffective assistance of counsel by "failing" to raise an unpreserved issue. *See, Suarez v. Dugger*, 527 So.2d 190, 193 (Fla. 1988). Habeas corpus proceedings do not function as a second or substitute appeal, and an allegation of ineffective assistance of counsel does not operate to evade application of that rule. *Blanco v. Wainwright,* 507 So.2d 1377, 1384 (Fla. 1987).

This claim is also not a basis for relief because the claim contained in Marquard's petition could and should have been raised in Marquard's motion for relief under Rule 3.850. Because this claim should have been raised in a Rule 3.850 motion, it is not properly brought in a petition for writ of habeas corpus. *Parker v. Dugger, supra.*

Finally, this claim is not a basis for relief because it has no merit. No identified basis for relief is error to begin with, despite Marquard's efforts to create an error about which he can complain. Because there is no legal basis for Marquard's claim, there is no basis upon which to base a claim of ineffectiveness on the part of appellate counsel. Even putting aside the procedural bars which preclude consideration of this claim, there is no basis for relief because, even if appellate counsel had raised this claim on appeal, the result would not have been different. Marquard cannot satisfy either prong of *Strickland*,

and is not entitled to relief on this claim.

III. THE AGGRAVATING CIRCUMSTANCE JURY INSTRUCTION CLAIMS

On pages 28-39 of the petition, Marquard raises various complaints with respect to the jury instructions given on various aggravating circumstances. These claims are separately addressed below.

With respect to the cold, calculated, and premeditated aggravator, appellate counsel cannot be ineffective for "failing" to raise a claim concerning the jury instruction given on this aggravator because no such claim was preserved at trial. *Suarez v. Dugger, supra.* In any event, this Court held that this aggravating circumstance was properly applied to this case. *Marquard v. State,* 641 So.2d at 56 n. 3.[2]

To the extent that further discussion of this claim is necessary, this Court's holding in *Larzelere* is controlling:

> We find that only one of appellant's arguments under this issue merits discussion; that is her claim that the aggravating circumstance of CCP is unconstitutionally vague. In this case, the trial judge provided the jury with the standard jury instruction on CCP. We have since determined that the standard instruction given in this case is, in fact,

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[2]Marquard's petition seems to waiver between whether this claim was preserved at trial, or whether trial counsel was ineffective for not objecting to the jury instructions. *Petition*, at 29-31. The record contains **no** objection to the jury instructions -- as set out above, the law is settled that a specific objection is required to preserve an issue for review.

> unconstitutionally vague. *See Jackson v. State*, 648 So.2d 85 (Fla. 1994). **We also stated in *Jackson*, however, that a claim that the CCP aggravating circumstance is unconstitutionally vague is procedurally barred unless a specific objection is made at trial.** A review of the record reflects that defense counsel failed to properly preserve this issue for appeal; consequently, this issue is procedurally barred. Moreover, even were we to find this issue properly preserved, we conclude that the giving of this instruction was harmless error because the facts of this murder as set forth earlier in this opinion establish that this murder was CCP under any definition. *Foster v. State*, 654 So.2d 112 (Fla.), *cert. denied*, 516 U.S. 920, 116 S.Ct. 314, 133 L.Ed.2d 217 (1995).

*Larzelere v. State,* 676 So.2d 394, 407 (Fla. 1996). [emphasis added]. Moreover, as this Court has held:

> As for Thompson's alternative ineffectiveness claims, we have previously stated that trial counsel's failure to object to standard jury instructions that have not been invalidated by this Court does not render counsel's performance deficient. *See Downs*, 740 So.2d at 518.

*Thompson v. State,* 759 So.2d 650, 665 (Fla. 2000). Marquard's claim has no legal basis, and all relief should be denied. *See also*, *Brown v. State,* 755 So.2d 616,623 (Fla. 2000); *Jackson v. State,* 648 So.2d 85 (Fla. 1994); *Walls v. State*, 641 So.2d 381 (Fla. 1994); *Pope v. State*, 702 So.2d 221 (Fla. 1997).

Alternatively and secondarily, any error was harmless beyond a reasonable doubt because this murder was cold, calculated, and premeditated under any definition of that aggravating circumstance.

Marquard's claim concerning the "during the commission of a felony/pecuniary gain" jury instruction is not a basis for relief for the reasons set out above. There was no objection at trial, and appellate counsel cannot be considered ineffective for "failing" to raise an issue that was not preserved for appellate review. Moreover, this Court upheld the "pecuniary gain" aggravating circumstance found by the sentencing court, as well as affirming the separate robbery conviction. *Marquard, supra.* As this Court has long emphasized, "habeas corpus is not a vehicle for obtaining additional appeals of issues which were raised on direct appeal." *King v. Dugger,* 555 So.2d 355 (Fla. 1990). Whatever the precise nature of this claim is, this Court upheld the pecuniary gain aggravator on direct appeal -- habeas does not lie to relitigate that finding.

To the extent that Marquard's petition complains that the felony-murder aggravator is an "automatic" aggravating circumstance, that claim does not appear to have been raised at trial. Even if this claim were somehow before the Court, it would not be a basis for relief because that aggravator is valid, as this Court has held. *Blanco v. State,* 706 So.2d 7, 11 (Fla. 1997) ("This scheme thus narrows the class of death-eligible defendants. *See Zant v. Stephens*, 462 U.S. 862, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983). *See generally White v.*

*State*, 403 So.2d 331 (Fla. 1981)."); *Banks v. State,* 700 So.2d 363, 367(Fla. 1997), *Mills v. State*, 476 So.2d 172, 178 (1985). Moreover, as this Court has held:

> Moreover, this Court has held there is no merit to the argument that an underlying felony cannot be used as an aggravating factor. *See Blanco v. State*, 702 So.2d 1250 (Fla. 1997). Therefore, Freeman cannot demonstrate that the outcome of his trial was affected by defense counsel's failure to object to these aggravating factors. *See Strickland*, 466 U.S. at 668, 104 S.Ct. 2052.

*Freeman v. State,* 761 So.2d 1055, 1067 (Fla. 2000).[3]

Marquard's complaint concerning the application of the "under sentence of imprisonment" aggravator was raised and decided adversely to him on direct appeal from his conviction and sentence. This Court held:

> Marquard claims that there was insufficient evidence to support instructing on, and the finding of, the aggravating circumstance that the murder was committed while the perpetrator was under sentence of imprisonment. The State, however, introduced a certified copy of Marquard's North Carolina conviction for larceny, for which he was given a two-year sentence. His parole officer testified that he was on parole at the time of the murder. *See Carter v. State*, 576 So.2d 1291 (Fla. 1989), *cert. denied*, --- U.S. ----, 112 S.Ct. 225, 116 L.Ed.2d 182 (1991) (parole constitutes sentence of imprisonment for purpose of this aggravating circumstance). We find no error.

*Marquard v. State*, 641 So.2d at 58. This claim is procedurally

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[3] Marquard relies on a case decided by the Wyoming Supreme Court -- such is not controlling. This claim is meritless.

barred for habeas corpus purposes. *King v. Dugger, supra.*

IV. THE BURDEN-SHIFTING JURY INSTRUCTION CLAIM

On pages 39-42 of the petition, Marquard argues that the jury instruction on the weighing of aggravating and mitigating circumstances "shifted the burden of proof." This claim has been repeatedly rejected by this Court:

> San Martin also contends that the weighing provisions in Florida's death penalty statute (FN5) and the standard jury instruction thereon unconstitutionally shift the burden to the defendant to prove why he should not be given a death sentence. Initially, we note that because San Martin did not challenge the statute on this basis and raised no objection to the instruction, this issue is not preserved for review. Furthermore, this claim has been rejected by both the United States Supreme Court and this Court. *See Walton v. Arizona*, 497 U.S. 639, 649-51, 110 S.Ct. 3047, 3054-56, 111 L.Ed.2d 511 (1990); *Arango v. State*, 411 So.2d 172, 174 (Fla. 1982).
>
> > (FN5.) Section 921.141(2), *Florida Statutes* (1995), provides that the jury shall deliberate and render an advisory sentence based upon several matters, including "[w]hether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist."

*San Martin v. State,* 705 So.2d 1337, 1350 (Fla. 1997). *See also, Thompson v. State* 759 So.2d 650, 665 (Fla. 2000); *Downs v. State*, 740 So.2d 506, 517 n. 5 (Fla. 1999)(finding claim that counsel failed to object to instructions that allegedly shifted the burden of proving that death is not an appropriate penalty to the defendant to be without merit as a matter of law); *Demps*

*v. Dugger*, 714 So.2d 365, 368 & n. 8 (Fla. 1998) (noting that the Court had rejected this claim many times). As this Court has held:

> . . . Rutherford's claims regarding the trial court's failure to properly instruct the jury are without merit. This Court has previously rejected similar claims that the standard jury instructions improperly shift the burden to the defendant to prove that death is inappropriate, (FN8) . . . and that the trial court should have instructed the jury to merge its consideration of the aggravating circumstances that the murder was committed during the course of a robbery and committed for pecuniary gain. (FN10) The failure to raise meritless claims does not render appellate counsel's performance ineffective. *See, e.g., Kokal*, 718 So.2d at 142; *Williamson*, 651 So.2d at 86; *Groover*, 656 So.2d at 425.
>
> (FN8.) *See, e.g., Downs v. State*, 740 So.2d 506, 517 n. 5 (Fla. 1999); *Demps v. Dugger*, 714 So.2d 365, 368 & n. 8 (Fla. 1998).
>
> (FN10.) *See Thompson*, 759 So.2d at 666 (finding appellate counsel was not ineffective for failing to assert that the jury should have been instructed to merge its consideration of aggravating circumstances where trial court did not improperly double the aggravating circumstances); *Armstrong v. State*, 642 So.2d 730, 738-39 (Fla. 1994) (finding error in failing to instruct the jury not to consider the same facts in support of different aggravating factors to be harmless).

*Rutherford v. Moore,* 2000 WL 1508592, (Fla. 2000). This claim has no legal basis, and all relief should be denied.

## V. THE COMPETENCY FOR EXECUTION CLAIM

On pages 43-46 of the petition, Marquard asserts that his "Eighth Amendment right against cruel and unusual punishment will be violated as [he] **may** be incompetent at the time of execution." This claim is untimely, as Marquard acknowledges, because no death warrant has been issued for the execution of his sentence. *Provenzano v. State,* 751 So.2d 37 (Fla. 1999); *Thompson v. State,* 2000 WL 373757 (Fla. 2000). This claim should be dismissed as untimely. *Thompson v. State,* 2000 WL 373757 (Fla. 2000).

## CONCLUSION

For the reasons set out above, Marquard's petition for writ of habeas corpus should be denied in all respects.

Respectfully submitted,

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## CERTIFICATE OF FONT SIZE AND SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Response to Petition for Writ of Habeas Corpus, which has been typed in Font Courier New, Size 12, has been furnished by U.S. Mail to Julius J. Aulisio and Leslie Anne Scalley, Capital Collateral Regional Counsel - Middle, 3801 Corporex Park Drive, Suite 210, Tampa, Florida 33619, on this _____ day of April, 2001.

Respectfully submitted,

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