IN THE SUPREME COURT OF FLORIDA

ALFRED LEWIS FENNIE,

Petitioner,

v. Case No. SC02-1180

STATE OF FLORIDA,

Respondent.

_____/

RESPONSE TO PETITION FOR HABEAS CORPUS

AND

MEMORANDUM OF LAW

COMES NOW, Respondent, State of Florida, by and through the undersigned Assistant Attorney General, and hereby responds to the Petition for Writ of Habeas Corpus filed in the above-styled case. Respondent respectfully submits that the petition should be denied, and states as grounds therefor:

I.

FACTS AND PROCEDURAL HISTORY

The facts of this case are recited in this Court's opinion on the direct appeal of Fennie's convictions and sentences, Fennie v. State, 648 So. 2d 95, 96-97 (Fla. 1994) (footnotes omitted):

> On September 8, 1991, two men reported observing the body of a woman lying face down along a road in the Ridge Manor area of Hernando County. Police

officers responding to the report discovered the woman's hands had been bound behind her and she had been shot in the back of the head. Investigators later identified the victim as Mary Elaine Shearin.

Shearin's husband informed officers that his wife left their home early that morning driving a 1986 Cadillac. On September 9, 1991, Tampa police located Shearin's vehicle in the possession of two males who identified themselves as Ezell Foster and Ansell Rose. The officers impounded the vehicle and in a subsequent search uncovered certain items relating to Shearin's murder, including a .25 caliber pistol that fired the bullet recovered from Shearin's body and a piece of rope matching that used to tie Shearin's hands. Investigators also discovered evidence indicating that the victim, while still alive, had been placed in the trunk of the vehicle.

The two men in the vehicle were taken into custody and questioned. Police released Rose after verifying that he met the driver of the vehicle shortly before the arrest and was not involved in the murder. The driver, later identified as Alfred L. Fennie, gave several conflicting accounts of how he came to be in possession of Shearin's car. Fennie's statements to investigators differed each time with respect to the identity of a second suspect and his knowledge of that suspect's involvement in Shearin's death. Fennie finally identified the second suspect as Michael Frazier and admitted that he drove Shearin's car, at Frazier's behest, to the remote location where Frazier eventually shot Shearin.

Michael Frazier testified that Fennie was responsible for Shearin's kidnapping and murder. Frazier stated that Fennie waved Shearin down while she was driving, then forced her into the trunk of her car at gunpoint. Frazier stated that he rode with Fennie in Shearin's car for a period of time, during which Fennie attempted to use Shearin's credit cards to obtain money from several ATM machines. According to Frazier, Fennie also stopped to pick up several concrete blocks. Fennie and

> Frazier then proceeded to Frazier's home where they picked up Paula Colbert, who was both Frazier's cousin and Fennie's girlfriend. Fennie also collected some rope from Frazier's home before all three got back into Shearin's car. Fennie later told Frazier and Colbert that he planned to use the rope and concrete blocks to drown Shearin, but then decided to shoot her instead. Frazier further testified that after making several stops, Colbert drove the car to a wooded area where Frazier and Fennie removed Shearin from the trunk. Fennie then walked Shearin down a dirt road until the two were out of sight and shot her.
>
> Frazier was charged with robbery, armed kidnapping and first-degree murder. He was convicted on all three counts and agreed to cooperate in Fennie's prosecution in exchange for the state's promise not to seek the death penalty.
>
> Fennie was charged and convicted of first-degree murder, robbery with a firearm and armed kidnapping. The jury unanimously recommended death and the judge followed the recommendation, sentencing Fennie to death for the first-degree murder count and to consecutive life sentences for the remaining two counts. In support of the death penalty the trial judge found five aggravating factors: (1) the crime was committed while engaged in the commission of a kidnapping; (2) the crime was committed to avoid arrest; (3) the crime was committed for financial gain; (4) the crime was heinous, atrocious or cruel; and (5) the crime was cold, calculated and premeditated. The court also found a number of nonstatutory mitigating factors but determined they were not of sufficient weight to preclude the death penalty.

Petitioner's trial was conducted November 5-13, 1992, before the Honorable John W. Springstead. In his direct appeal, Florida Supreme Court Case No. 80,923, Petitioner was represented by Assistant Public Defender Michael S. Becker.

Mr. Becker raised the following eight issues:

> I--IN VIOLATION OF THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 9 AND 16 OF THE FLORIDA CONSTITUTION, THE TRIAL COURT ERRED IN DENYING A CONTINUANCE AFTER THE LATE DISCLOSURE OF A MATERIAL STATE WITNESS WHICH DEPRIVED THE DEFENSE OF THE OPPORTUNITY TO INVESTIGATE POTENTIAL IMPEACHMENT EVIDENCE TO USE AGAINST THE WITNESS.
>
> II--IN VIOLATION OF THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 9 AND 16 OF THE FLORIDA CONSTITUTION, THE TRIAL COURT ERRED IN DENYING APPELLANT'S REQUEST TO BE PRESENT DURING THE DEPOSITION OF MICHAEL FRAZIER.
>
> III–IN VIOLATION OF THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 9 AND 17 OF THE FLORIDA CONSTITUTION, THE TRIAL COURT ERRED IN REFUSING TO GIVE LIMITING INSTRUCTIONS WITH REGARD TO THE AGGRAVATING CIRCUMSTANCES OF HEINOUS, ATROCIOUS, AND CRUEL AND COLD, CALCULATED AND PREMEDITATED AS REQUESTED BY DEFENSE COUNSEL.
>
> IV--THE STATUTORY AGGRAVATING FACTOR OF AN ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL MURDER IS UNCONSTITUTIONALLY VAGUE UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 9, 16 AND 17 OF THE FLORIDA CONSTITUTION.
>
> V--FLORIDA'S DEATH PENALTY STATUTE IS UNCONSTITUTIONAL BECAUSE THE FLORIDA SUPREME COURT'S INTERPRETATION AND APPLICATION OF THE AGGRAVATING FACTOR OF COLD, CALCULATED AND PREMEDITATED WITHOUT PRETENSE OF MORAL OR LEGAL JUSTIFICATION AS SET FORTH IN SECTION 921.141(5)(I), FLORIDA STATUTES (1989), HAS RESULTED IN AN ARBITRARY AND CAPRICIOUS APPLICATION OF THE DEATH PENALTY.
>
> VI--IN VIOLATION OF THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 9, 16 AND 22 OF THE FLORIDA CONSTITUTION, THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S MOTION FOR MISTRIAL WHEN THE PROSECUTOR COMMENTED DURING HIS CLOSING ARGUMENT IN THE PENALTY PHASE ON APPELLANT'S FAILURE TO TESTIFY.

VII–IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 17 OF THE FLORIDA CONSTITUTION, THE TRIAL COURT ERRED IN IMPOSING THE DEATH SENTENCE BASED ON ERRONEOUS FINDINGS OF SEVERAL AGGRAVATING FACTORS.

VIII–FLORIDA'S DEATH PENALTY SCHEME IS UNCONSTITUTIONAL ON ITS FACE AND AS APPLIED.

This Court affirmed the convictions and sentences. Fennie v. State, 648 So. 2d 95 (Fla. 1994). Petitioner then filed a petition for writ of certiorari to the United States Supreme Court. His petition was denied on February 21, 1995. Fennie v. Florida, 115 S. Ct. 1120 (1995).

Petitioner pursued postconviction relief, and after conducting an evidentiary hearing, the lower court concluded that Petitioner had failed to substantiate his claims. Relief was denied and the appeal is pending before this Court in Fennie v. State, Case No. SC01-2480. Petitioner's habeas petition in this Court was timely filed contemporaneously with his initial brief in the appeal of the denial of his motion for postconviction relief.

ARGUMENT IN OPPOSITION TO CLAIMS RAISED

Petitioner alleges that extraordinary relief is warranted because he was denied the effective assistance of appellate counsel. The standard of review applicable to ineffective assistance of counsel claims mirrors the Strickland v. Washington, 466 U.S. 668 (1984), standard for claims of trial

counsel ineffectiveness. Valle v. Moore, No. SC01-2865, slip op. at 4 (Fla. Aug. 29, 2002). Such a claim requires an evaluation of whether counsel's performance was so deficient that it fell outside the range of professionally acceptable performance and, if so, whether the deficiency was so egregious that it compromised the appellate process to such a degree that it undermined confidence in the correctness of the result. Groover v. Singletary, 656 So. 2d 424, 425 (Fla. 1995); Byrd v. Singletary, 655 So. 2d 67, 68-69 (Fla. 1995). A review of the record demonstrates that neither deficiency nor prejudice has been shown in this case.

Petitioner's arguments are based on appellate counsel's alleged failure to raise a number of issues, each of which will be addressed in turn. However, none of the issues now asserted would have been successful if argued in Petitioner's direct appeal. Therefore, counsel was not ineffective for failing to present these claims. Groover, 656 So. 2d at 425; Chandler v. Dugger, 634 So. 2d 1066, 1068 (Fla. 1994) (failure to raise meritless issues is not ineffective assistance of appellate counsel). No extraordinary relief is warranted because several of Petitioner's current arguments were not preserved for appellate review and, even if considered, no reversible error could be demonstrated. See also Teffeteller

v. Dugger, 734 So. 2d 1009 (Fla. 1999); Hardwick v. Dugger, 648 So. 2d 100 (Fla. 1994); Breedlove v. Singletary, 595 So. 2d 8 (Fla. 1992). As noted above, to obtain relief it must be shown that appellate counsel's performance was both deficient and prejudicial. The failure to raise a meritless issue on direct appeal will not render counsel's performance ineffective, and this is also true regarding issues that would have been found to be procedurally barred had they been raised on direct appeal. See Rutherford v. Moore, 774 So. 2d 637 (Fla. 2000) (stating that although habeas petitions are a proper vehicle to advance claims of ineffective assistance of appellate counsel, such claims may not be used to camouflage issues that should have been raised on direct appeal or in a postconviction motion).

The United States Supreme Court recognized that "since time beyond memory" experienced advocates "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." Jones v. Barnes, 463 U.S. 745, 751-52 (1983). The failure of appellate counsel to brief an issue which is without merit is not a deficient performance which falls measurably outside the range of professionally acceptable performance. See Card v. State, 497 So. 2d 1169, 1177 (Fla.

1986). Moreover, an appellate attorney will not be considered ineffective for failing to raise issues that "might have had some possibility of success; effective appellate counsel need not raise every conceivable nonfrivolous issue. Valle v. Moore, No. SC01-2865, slip op. at 4 (Fla. Aug. 29, 2002); Engle v. Dugger, 576 So. 2d 696 (Fla. 1991). Finally, appellate counsel is "not ineffective for failing to raise issues not preserved for appeal." Medina v. Dugger, 586 So. 2d 317, 318 (Fla. 1991).

CLAIM I: Whether appellate counsel rendered ineffective assistance of counsel by failing to argue on direct appeal that the trial judge failed to independently weigh the aggravating circumstances and mitigating factors when sentencing Petitioner to death.

Petitioner alleges that his appellate counsel was ineffective for failing to argue on direct appeal that the trial judge failed to independently weigh the aggravating and mitigating circumstances and erred in adopting the State's sentencing memorandum verbatim when issuing his sentencing order. Petitioner further alleges that appellate counsel was ineffective for failing to argue that the trial judge considered non-record information in sentencing Petitioner to death. The State submits that the instant claim is not

properly presented in a habeas petition. See Robinson v. Moore, 773 So. 2d 1, 7 (Fla. 2000) (stating that defendant's assertion in state habeas that he was deprived of an individualized sentencing determination was not properly raised in habeas petition because it could have and should have been raised in prior proceedings).

Even if this Court addresses this issue, Respondent submits that the issue is without merit. Appellate counsel did not perform deficiently by failing to raise these meritless claims on direct appeal. In addition, even if these claims had been raised, Petitioner has failed to establish that confidence in the outcome of his appeal has been undermined. Although the State addresses the deficiency prong in detail throughout this discussion, Respondent submits that this Court need not even reach this analysis because it is clear that Petitioner has failed to establish any prejudice regarding his current claims. See Strickland v. Washington, 466 U.S. 668, 697 (1984) (stating that if a claim of ineffectiveness can be disposed of on the prejudice prong, there is no need to consider the deficiency prong).

Petitioner first argues that the trial judge's alleged verbatim adoption of the State's sentencing memorandum necessitates a finding that the judge did not independently

weigh the aggravating and mitigating circumstances prior to sentencing Petitioner to death. Respondent submits that Petitioner's initial premise that the trial judge adopted the State's sentencing memorandum verbatim is misleading and incorrect. In addition, contrary to Petitioner's assertions, the record reflects that the trial judge clearly conducted an independent weighing of the aggravating and mitigating circumstances before sentencing Petitioner to death.

After the jury unanimously recommended that Petitioner receive a death sentence on November 13, 1992, the trial court set a sentencing date of December 1, 1992, and ordered a presentence investigation report to be prepared prior to that date. (R:2150-53). At the outset of the sentencing hearing, defense counsel noted his objection to the State's sentencing memorandum that was sent to him the previous day. (RI:523-25). It is unclear whether defense counsel was objecting to the State's act of filing a memorandum despite the fact that it appears the trial court never requested one, or whether counsel was simply objecting to the five aggravating factors proposed by the State in the memorandum.[1] The trial judge

---

[1]At the sentencing hearing, defense counsel stated:

> Judge, I'm not a hundred percent sure of the procedure, but we would like to formally object to the memorandum regarding sentencing that was sent by

noted the objection and indicated that in addition to the State's memorandum, the court had also reviewed the presentence investigative report and an affidavit filed by Petitioner. (RI:525).

Admittedly, the trial judge's sentencing order mirrors the State's sentencing memorandum in regards to a couple of the aggravating circumstances and the mitigating factors.[2] The judge's sentencing order, however, differs from the State's memorandum regarding a number of significant factors. Furthermore, it is clear that the trial judge made an independent judgment when weighing these factors and sentencing Petitioner to death. At one point in the sentencing hearing, the trial judge stated:

> [T]he Court would simply respond by saying that the State Attorney's Office to my office yesterday. And we would object to their recommendation of five aggravating circumstances at least under the case law.

(RI:523-24). After attempting to rebut the aggravating factors proposed by the State, defense counsel concluded:

> So formally we would object to the finding of any aggravator based on the memorandum provided to us by the State Attorney's Office yesterday.

(RI:525).

[2]With regard to the HAC and CCP aggravators, the trial judge copied, almost verbatim, the State's memorandum and made only slight additions to the language.

> it has not taken its duties and responsibilities in this cause lightly; that the Court diligently used the time between the trial and the conclusion of the sentencing hearing and today's date to review the law, to read the case law, to reflect on the facts of this case.
>
> And clearly this Court is satisfied beyond any question that the aggravating circumstances outweigh the mitigating circumstances that have been presented to this Court.

(RI:546-47). The judge also noted in its written order that he had "carefully considered and weighed the aggravating and mitigating circumstances," and found that "the aggravating circumstances far outweigh the mitigating circumstances." (RI:463).

Contrary to Petitioner's assertions, the trial judge did not rubber-stamp the State's memorandum or adopt it verbatim.[3] The court made numerous changes to a number of the aggravating factors proposed by the State (during the commission of a kidnapping, preventing lawful arrest, and crime committed for financial gain), and added a significant discussion regarding mitigating factors that were not even addressed in the State's memorandum. These distinctions, in addition to the court's comments at the hearing, conclusively demonstrate that the

---

[3]Petitioner alleges in his habeas petition on a number of occasions that the trial judge adopted the State's memorandum "verbatim." See Petition for Writ of Habeas Corpus at 8, 17. Webster's Third New International Dictionary defines verbatim as "word for word." Clearly, the trial judge's order does not recite "word for word" the State's memorandum.

trial judge independently weighed the aggravating and mitigating circumstances.

This Court recently stated in Valle v. State, 778 So. 2d 960, 964 n.9 (Fla. 2001), that "[i]n the sentencing context, this Court has held that the trial court may not request that the parties submit proposed orders and adopt one of the proposals verbatim without a showing that the trial court independently weighed the aggravating and mitigating circumstances." In the instant case, the trial judge did not request proposed orders; the State apparently decided to provide the court and defense counsel with a memorandum prior to the sentencing hearing. Furthermore, the court did not adopt the State's memorandum and simply rubber-stamp it. The record reflects that the trial judge independently weighed the aggravating and mitigating circumstances and imposed a sentence of death.

As previously noted, appellate counsel is not ineffective for failing to raise an issue that lacks merit on direct appeal. In Nibert v. State, 508 So. 2d 1, 4 (Fla. 1987), this Court stated that no reversible error occurred when the trial judge did not actually prepare the order of findings in support of the death sentence, but instead, instructed the state attorney to reduce his findings to writing. This Court

noted that the failure of the trial court to prepare a written statement of its findings does not constitute reversible error "so long as the record reflects that the trial judge made the requisite findings at the sentencing hearing." Nibert v. State, 508 So. 2d 1, 4 (Fla. 1987); see also Patterson v. State, 513 So. 2d 1257 (Fla. 1987) (holding that the trial judge may not direct the state attorney to identify and explain the appropriate aggravating factors to justify the court's decision to impose a death sentence; the trial judge must prepare a contemporaneous written sentencing order that specifically identifies the applicable aggravating and mitigating circumstances).[4]

In the instant case, the trial judge's contemporaneous written order clearly and specifically identifies the five aggravating factors and multiple mitigating factors found to exist based on the evidence. The court's written order, along

---

[4]Petitioner also complains in his habeas petition that defense counsel could not have changed the trial judge's mind because the court had prepared his written order prior to orally imposing his sentence. In Grossman v. State, 525 So. 2d 833, 841 (Fla. 1988), this Court held that "all written orders imposing a death sentence be prepared prior to the oral pronouncement of sentence for filing concurrent with the pronouncement." See also Muehleman v. State, 503 So. 2d 310, 317 (Fla. 1987) (wherein this Court vigorously stressed that written findings should be prepared contemporaneously with the imposition of sentence). Thus, the trial judge was complying with the applicable law at the time by preparing his written order prior to orally pronouncing sentence.

with his comments at the sentencing hearing, conclusively establish that the trial judge independently weighed the established aggravating and mitigating factors and did not simply rely on the State to perform such an analysis. Accordingly, under existing statutory and decisional law from this Court, appellate counsel could have easily concluded that the instant issue lacked merit. Thus, Petitioner has failed to establish deficient performance by appellate counsel.

Petitioner further alleges that the trial judge failed to assign weight to the mitigating factors and failed to weigh the aggravating circumstances against the mitigating factors. As discussed previously, the trial judge's oral response to the State's request to find that any single aggravator was sufficient to outweigh the mitigating factors (RI:546-47), as well as the trial judge's written statements in his sentencing order, unquestionably demonstrate that the trial judge weighed the aggravating circumstances against the mitigating factors. As to Petitioner's claim that appellate counsel was ineffective for failing to raise the trial court's failure to assign weight to the mitigating factors, Respondent submits that this sub-claim is likewise without merit.

In 1990, this Court promulgated the following guidelines to be utilized by trial judges when addressing mitigating

factors:

> When addressing mitigating circumstances, the sentencing court must expressly evaluate in its written order each mitigating circumstance proposed by the defendant to determine whether it is supported by the evidence and whether, in the case of nonstatutory factors, it is truly of a mitigating nature. The court must find as a mitigating circumstance each proposed factor that is mitigating in nature and has been reasonably established by the greater weight of the evidence: "A mitigating circumstance need not be proved beyond a reasonable doubt by the defendant. If you are reasonably convinced that a mitigating circumstance exists, you may consider it as established." Fla. Std. Jury Instr. (Crim.) at 81. The court next must weigh the aggravating circumstances against the mitigating and, in order to facilitate appellate review, must expressly consider in its written order each established mitigating circumstance. Although the relative weight given each mitigating factor is within the province of the sentencing court, a mitigating factor once found cannot be dismissed as having no weight. To be sustained, the trial court's final decision in the weighing process must be supported by "sufficient competent evidence in the record."

Campbell v. State, 571 So. 2d 415, 419-20 (Fla. 1990).

In the instant case, the trial judge complied with Campbell by evaluating and addressing each of the mitigating factors proposed by Petitioner and weighing these factors against the five aggravating circumstances. After “carefully consider[ing] and weigh[ing] the aggravating and mitigating circumstances,” the trial judge found that the aggravating circumstances “far outweigh[ed]” the mitigating circumstances. (RI:463). The trial judge’s sentencing order indicates that

the judge properly weighed the aggravating circumstances and mitigating factors as required by Campbell.

In Barwick v. State, 660 So. 2d 685, 696 (Fla. 1995), this Court rejected a similar claim when the trial judge's order provided:

> The Court has considered and weighed each of the applicable aggravating circumstances and each of the statutory and non-statutory mitigating circumstances that are established by the evidence or on which there has been any significant evidence produced as they relate to the murder charge.

The Barwick Court stated that "[t]his statement indicates that the trial judge weighed the factor as ultimately required by our decision in Campbell." Id.

Likewise, in Green v. State, 641 So. 2d 391 (Fla. 1994), this Court found that the trial judge complied with Campbell when he considered and weighed statutory and nonstatutory mitigating factors. This Court stated that the focus of Campbell is that a trial judge must give weight to mitigating factors. Id. at 396. This concern is met by the trial judge's weighing. Id. In Green, this Court stated that, although the trial judge may not have strictly complied with the requirements of Campbell, his sentencing order indicates that he gave careful consideration to the mitigating factors.[5]

---

[5]In affirming Green's death sentence, this Court stated that the following excerpt is sufficient to establish that the

Id.

More recently, in Gorby v. State, 819 So. 2d 664 (Fla. 2002), this Court addressed a defendant's state habeas claim contending that his appellate counsel was ineffective for not raising the issue of the trial judge's failure to find and weigh the applicable mitigating circumstances. This Court found that the sentencing order was replete with instances in which the trial judge considered both statutory and nonstatutory mitigating circumstances, and weighed them against the strong aggravators present. This Court determined that the defendant's claim was entirely without merit and likewise determined that appellate counsel's decision not to generate an issue did not constitute ineffectiveness. Gorby, 819 So. 2d at 687.

As the cases of Barwick, Green, and Gorby conclusively establish, Petitioner's claim that the trial judge failed to comply with Campbell is without merit. In rendering its

---

trial judge carefully considered the mitigating factors:

> After weighing the evidence the court finds four aggravating circumstances to exist. The court further finds that no statutory mitigating circumstances exist nor any nonstatutory mitigating circumstances. Aggravating factors are found to substantially outweigh mitigating circumstances.

Green, 641 So. 2d at 396 n.4.

individualized sentence, the trial judge weighed the five substantial aggravating circumstances against the established mitigation evidence and properly concluded that the aggravators far outweighed the mitigation.[6] Accordingly, appellate counsel cannot be deemed ineffective for failing to raise the instant meritless issue on direct appeal. Groover v. Singletary, 656 So. 2d 424, 425 (Fla. 1995).

Petitioner raises another sub-issue to this claim and argues that appellate counsel was ineffective for failing to argue on direct appeal that the trial judge relied on non-record and irrelevant evidence to rebut the mitigating factors and in support of nonstatutory aggravation in sentencing Petitioner to death. Specifically, Petitioner claims that the trial judge relied on an uncharged rape as nonstatutory aggravation and the court relied, in part, on non-record evidence (Appellant's testimony from a motion to suppress hearing) to reject a statutory mitigating factor. Both of these claims are without merit and appellate counsel was not ineffective for failing to raise these claims on direct

---

[6]On direct appeal, this Court agreed that the aggravating circumstances outweighed the mitigation and noted that "[t]he totality of the aggravating factors and the lack of significant mitigating circumstances conclusively demonstrate that death is the appropriate penalty in this case." Fennie v. State, 648 So. 2d 95, 99 (Fla. 1994).

appeal.

As to the uncharged rape, as discussed in greater detail in the Answer Brief of Appellee (Fennie v. State, Case No. SC01-2480) filed simultaneously with the instant Response, the evidence presented at Petitioner's trial established that Petitioner kidnaped the victim at gunpoint, placed her in the trunk of her car, and eventually drove to a dark area where he removed the victim from the trunk and raped her in the backseat of the car. Although Petitioner claimed that he engaged in consensual sex with the victim, the facts surrounding the incident establish that the victim was not a willing participant to Petitioner's sexual advances.[7] Thus, the trial judge was justified in characterizing the sexual intercourse as a "rape" in his sentencing order.

---

[7]Petitioner asserts that the evidence was "non-record evidence" improperly considered by the trial judge. Citing to Craig v. State, 510 So. 2d 857, 867 (Fla. 1987), Petitioner states that "[t]his Court defined non-record evidence as 'information obtained other than through evidence properly presented in court for consideration in sentencing.'" Petition for Writ of Habeas Corpus at 23. First it should be noted that this "definition" was actually the defendant's characterization of what "non-record" evidence constituted, not this Court's definition of the term. Id. Even assuming that this is a valid definition, it is clear that the evidence of the rape was information obtained through evidence properly presented in court at Petitioner's guilt phase trial. Because the State relied on the guilt phase evidence in the penalty phase, the evidence was rightfully considered by the trial judge in determining the appropriate sentence.

Furthermore, despite the fact that the trial judge referenced the uncharged rape in his sentencing order, the references were placed in factual context to the entire event.

Petitioner has completely failed to establish that the trial judge relied on the uncharged rape as a nonstatutory aggravator. In fact, to the contrary, it is obvious from reading the judge's sentencing order that his decision to follow the jury's unanimous recommendation and impose a death sentence was based on the five substantial aggravating circumstances[8] outweighing the insignificant mitigation. Because the trial judge did not rely on an uncharged rape as nonstatutory aggravation, appellate counsel cannot be deemed ineffective for failing to raise a meritless issue.

Petitioner's allegation that the trial judge relied, in part, on non-record information in rejecting the statutory mitigator of no significant history of prior criminal activity is also without merit. The only statutory mitigators proposed

---

[8]The five aggravating factors found to exist were: (1) the crime was committed while Petitioner was engaged in a kidnapping; (2) the crime was committed for the purpose of avoiding or preventing a lawful arrest; (3) the crime was committed for financial gain; (4) the crime was especially heinous, atrocious or cruel; and (5) the crime was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification.

and argued by defense counsel were: (1) the defendant was an accomplice in the offense for which he is to be sentenced but the offense was committed by another person and the defendant's participation was relatively minor; (2) the defendant acted under extreme duress or under the substantial domination of another person; and (3) any additional mitigating factors that may arise from any other aspect of the defendant's character or record and any other circumstance of the offense. (R:2118-48). Defense counsel specifically stated that he was not asserting the applicability of the statutory mitigating factor of no significant history of prior criminal activity. (R:2093).

Although the defendant only proposed two statutory mitigators, the trial judge addressed *all* of the statutory mitigating factors in his sentencing order. In rejecting the mitigating factor of no significant history of criminal activity the trial judge stated:

> No evidence has been presented to even suggest that this circumstance exists. To the contrary, at the hearing upon his motion to suppress, Mr. Fennie admitted to in excess of twenty prior felony convictions. There was also testimony from his mother and sister that he had been to prison and jail on several occasions.

(RI:459). Admittedly, the trial judge referenced Petitioner's testimony at the suppression hearing when addressing this

mitigating factor, but the trial judge did not rely exclusively on this factor, nor was this factor even relevant to his analysis. Based on counsel's concession that this factor did not apply, coupled with the testimony at the penalty phase of Petitioner's mother and sister, the trial judge was never going to find this mitigating factor to exist regardless of whether Petitioner testified at the suppression hearing. Thus, this superfluous language in the trial judge's sentencing order did not contribute in any way to the judge's decision to sentence Petitioner to death.

Petitioner further alleges that these alleged errors should be considered cumulatively by this Court and he should be granted extraordinary relief. As demonstrated above, none of Petitioner's claims have merit. All of the alleged errors were, in fact, not erroneous. Because there was no individual error to consider, Petitioner is not entitled to combine meritless claims together in an attempt to create a valid "cumulative error" claim. See Spencer v. State, 27 Fla. L. Weekly S323 (Fla. Apr. 11, 2002) (denying defendant's claims that he was deprived of a fair trial by the cumulative errors that occurred during his trial proceedings because claims of error are either procedurally barred or without merit); Mann v. Moore, 794 So. 2d 595 (Fla. 2001) (finding no cumulative

effect to consider where all claims were either meritless or procedurally barred).

As set forth above, Petitioner has failed to establish deficient performance by appellate counsel in his failure to raise meritless claims on direct appeal. Even if this Court were to find that Petitioner met this burden, Respondent submits that he has failed to establish that appellate counsel's deficiency was so egregious that it undermined confidence in the correctness of the result. See Groover v. Singletary, 656 So. 2d 424, 425 (Fla. 1995); Byrd v. Singletary, 655 So. 2d 67, 68-69 (Fla. 1995). Although the trial judge may have utilized the State's sentencing memorandum as some sort of guideline or template, Petitioner cannot establish any prejudice upon this record given the significant differences between the State's memorandum and the court's sentencing order. Each of the five aggravating circumstances relied on by the trial judge have ample support in the record. The trial judge's individualized sentencing did not rely on a nonstatutory aggravator or non-record evidence. Furthermore, the trial judge properly weighed the five valid aggravating circumstances against the insubstantial mitigation presented and determined that the aggravators greatly outweighed the mitigation. After reviewing the trial

judge's order on direct appeal, this Court stated that, even if the Court did not consider the CCP aggravator, "[t]he totality of the aggravating factors and the lack of significant mitigating circumstances conclusively demonstrate that death is the appropriate penalty in this case." Fennie v. State, 648 So. 2d 95, 99 (Fla. 1994). Thus, any deficient performance by appellate counsel would not have undermined the confidence in the correctness of the result.

CLAIM II: Whether appellate counsel rendered ineffective assistance of counsel by failing to raise allegations of prosecutorial misconduct where the comments were not preserved for review.

Petitioner urges this Court to find that his appellate counsel rendered ineffective assistance of counsel in failing to raise a number of unpreserved issues stemming from allegedly improper comments made by the prosecutor during Petitioner's trial and penalty phase. Petitioner acknowledges that the vast majority of these comments were not objected to and therefore unpreserved,[9] but asserts that the comments

[9]The only comment defense counsel objected to at trial was a comment during the State's penalty phase closing argument which defense counsel argued was an impermissible comment on Petitioner's constitutional right not to testify. This issue was raised on direct appeal and rejected by this Court. Fennie v. State, 648 So. 2d 95 (Fla. 1994). Petitioner reargues this issue in the instant petition, but this claim is procedurally barred. Bryan v. Dugger, 641 So. 2d 61, 65 (Fla. 1994).

constitute fundamental error. Respondent submits that the instant claim is not properly raised in his habeas petition. Even if properly raised, Petitioner has failed to establish deficient performance and prejudice.

Respondent first submits that the instant issue is improperly presented in a habeas petition. As this Court has previously stated, "claims of ineffective assistance of appellate counsel may not be used to camouflage issues that should have been raised on direct appeal or in a postconviction motion." Rutherford v. Moore, 774 So. 2d 637, 643 (Fla. 2000). The instant claim could have and should have been raised in prior proceedings and is not properly raised in the instant habeas petition camouflaged as an ineffective assistance of appellate counsel claim. See Robinson v, Moore, 773 So. 2d 1 (Fla. 2000) (denying ineffective assistance of counsel claim based on failure to allege prosecutorial misconduct during closing argument of penalty phase because issue was not properly preserved at trial so that appellate counsel could raise claim). This issue is a thinly veiled attempt to have an appeal on the merits, which is clearly not the purpose of a habeas petition. Freeman v. State, 761 So. 2d 1055, 1069-70 (Fla. 2000).

In the recent case of Spencer v. State, 27 Fla. L. Weekly

S323 (Fla. Apr. 11, 2002), the defendant claimed that appellate counsel was ineffective for failing to raise several instances of prosecutorial misconduct even though no objection was raised at trial. This Court reiterated that appellate counsel cannot be ineffective for failing to raise claims which were not preserved due to trial counsel's failure to object. Id. at S329; see also Ferguson v. Singletary, 632 So. 2d 53, 58 (Fla. 1993) (finding appellate counsel was not ineffective in failing to raise allegedly improper comments by the prosecutor which were not preserved for appeal by objection). This Court noted that as a general rule, the failure to raise a contemporaneous objection when improper closing argument comments are made waives any claim concerning such comments for appellate review. The sole exception to this general rule is where the unpreserved comments rise to the level of fundamental error. Spencer, 27 Fla. L. Weekly at S329. This Court further stated:

> In order for an error to be fundamental and justify reversal in the absence of a timely objection, 'the error must reach down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error.' In order for improper comments made in the closing arguments of a penalty phase to constitute fundamental error, they must be so prejudicial as to taint the jury's recommended sentence.

Id. (citations omitted). This Court ultimately concluded that

the instances of alleged prosecutorial misconduct cited by the defendant did not constitute fundamental error and thus appellate counsel did not render ineffective assistance in failing to raise the claims on direct appeal. Id.

Petitioner alleges that the prosecutor improperly relied on facts outside the record in arguing that Petitioner raped the victim. The State has previously addressed this issue in greater detail in its Answer Brief filed in the 3.850 appeal and in Claim I of the instant response, supra. In sum, by his own admission to law enforcement officers, Petitioner engaged in sexual intercourse with the victim. The totality of the State's evidence, however, rebutted Petitioner's claim that the intercourse was consensual and established that the victim was dragged out of her trunk and raped by her armed kidnapper after he was unable to withdraw money from her ATM bank account. The facts surrounding the sexual intercourse were inextricably intertwined with the charged offenses and was therefore admissible. In both the guilt and penalty phase closing arguments, the prosecuting attorney made reference to this admissible evidence and defense counsel never made an objection. Thus, counsel cannot be deemed ineffective for failing to raise an issue that was not preserved.

Petitioner next alleges that the prosecutor asked the

jury to consider non-record evidence by considering the life recommendations of codefendants Michael Frazier and Pamela Colbert and by commenting on Petitioner's right not to testify. As noted in footnote 9, supra, Petitioner raised this issue on direct appeal and this Court rejected his claim. Thus, the instant claim is procedurally barred. Bryan v. Dugger, 641 So. 2d 61, 65 (Fla. 1994).

Petitioner next argues that the prosecutor engaged in improper "Golden Rule" argument. During his closing argument, the prosecutor played a videotape of the crime scene and argued a theory of how the victim ended up in the position she was in after having been shot in the back of the head and the prosecutor apparently physically demonstrated how she came to be in that position. The prosecutor further referenced the evidence admitted at trial from Michael Frazier that the victim was crying and asking if she would ever be allowed to see her children again. (R:1493; 1504-05). Thus, the prosecutor's comments during his closing argument about the victim crying and asking about her children was based on evidence presented at trial.[10] Defense counsel did not raise

[10]The instant case is clearly distinguishable from State v. Urbin, 714 So. 2d 411 (Fla. 1998), a case relied on by Petitioner that did not even come out until years after Petitioner's trial. In Urbin, this Court stated that the prosecutor went "far beyond" the evidence in emotionally

an objection to the prosecutor's comments or actions. Accordingly, appellate counsel cannot be deemed ineffective for failing to raise an issue that has not been preserved.

Petitioner also argues that the prosecutor made improper comments during his closing argument encouraging the jury to perform their duty for the community.[11] Again, defense counsel did not preserve this issue by raising an objection. Furthermore, the prosecutor's comments are clearly distinguishable from the comments made in the cases relied on by Petitioner. The prosecutor's innocuous comments were not intended to "send a message to the community" or to play on the jurors' emotions.

---

creating an imaginary script demonstrating that the victim was pleading for his life when shot. Id. at 421. As noted, the prosecutor in the instant case did not go "far beyond" the evidence when making his argument because the evidence established that the victim was basically pleading for her life and crying immediately before she was executed by Petitioner.

[11]The prosecutor began his argument by stating:

> I come before you on behalf of the innocent, decent, law-abiding people of this community, and of this State, seeking justice. As you probably would suspect, Mr. Lee and I have a difference of opinion as to what that term, justice, means. The State has a very simple definition. We ask that the punishment fit the crime.

(R:2096). Petitioner's argument that the latter part of this comment was an attack on defense counsel's ethics is simply without merit and legal support.

Petitioner next alleges that the prosecutor misstated the law in his penalty phase argument by telling the jury that if the aggravating circumstances outweighed the mitigating circumstances, the law required the jury to return a verdict recommending death. This Court addressed similar comments in Cox v. State, 819 So. 2d 705 (Fla. 2002), Franqui v. State, 804 So. 2d 1185 (Fla. 2001), and Heynard v. State, 689 So. 2d 239 (Fla. 1996), all cases which post-dated the instant case. Although this Court noted that these comments were misstatements of the law, no reversible error occurred in any of these cases because the trial judge properly instructed the jury on the applicable law. Likewise, in the instant case, the comments do not rise to fundamental error.[12] Accordingly, this Court must deny the instant claim of ineffective assistance of appellate counsel.

In sum, all of the comments Petitioner claims were error were not preserved for appellate review. Thus, appellate counsel cannot be deemed ineffective for failing to raise this issue on direct appeal. Petitioner has further failed to demonstrate that the comments constituted fundamental error. The trial judge instructed the jury that the attorneys'

---

[12]This Court in Cox specifically stated that the prosecutor's similar comments did not constitute fundamental error. Cox, 819 So. 2d at 717.

comments during closing argument were not evidence and the judge properly instructed the jury on the applicable law. (R:2095-96; 2141-48). Given the substantial aggravation and insubstantial mitigation present in this case, and recognized by this Court on direct appeal, and the trial judge's actions in curing any alleged error by properly instructing the jury, the State submits that any alleged prosecutorial misconduct was harmless and did not constitute fundamental error. See Freeman v. State, 761 So. 2d 1055, 1069-70 (Fla. 2000) (holding that any prejudice created by the prosecutor's remarks was cured when the trial judge instructed the jury that the prosecutor's arguments were not the law).

CLAIM III: Whether Florida's death penalty statute is unconstitutional in light of Apprendi v. New Jersey, 530 U.S. 466 (2000) and Ring v. Arizona, 122 S. Ct. 2428 (2002).

Petitioner is before this Court seeking a determination that Florida's capital sentencing statute is unconstitutional. His argument relies primarily on the Sixth Amendment principle in Apprendi v. New Jersey, 530 U.S. 466, 490 (2000), holding that "[o]ther 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 the jury, and proved beyond a reasonable doubt." Petitioner's argument is that, because Florida's sentencing statute requires independent

factual findings by a trial judge beyond the facts found by the jury's verdict, the statute is facially invalid.

Petitioner's Apprendi argument has been previously rejected by this Court in a number of cases, and subsequent to the United States Supreme Court's decision in Ring v. Arizona, 122 S. Ct. 2428 (2002), this issue is again pending before this Court in the death warrant cases of King v. Moore, Case No. SC02-1457 and Bottoson v. Moore, Case No. SC02-1455.[13]

The decision in Apprendi, and the recently decided case of Ring, do not provide any basis for questioning Petitioner's convictions or resulting death sentence. First, this issue is procedurally barred as trial counsel did not lodge the specific constitutional objections below to Florida's capital sentencing statute that Petitioner now presents to this Court. While Apprendi was not decided until after Petitioner's trial and direct appeal, this fact does not excuse Petitioner from raising the legal tenets and factual basis for his argument below.

In addition, the Ring decision is not subject to retroactive application under the principles of Witt v. State, 387 So. 2d 922, 929-30 (Fla. 1980). Pursuant to Witt, Ring is

[13]The State adopts its arguments set forth in much greater detail in these cases pending before this Court.

only entitled to retroactive application if it is a decision of fundamental significance, which so drastically alters the underpinnings of Fennie's death sentence that "obvious injustice" exists. New v. State, 807 So. 2d 52 (Fla. 2001). In determining whether this standard has been met, this Court must consider three factors: 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. Ferguson v. State, 789 So. 2d 306, 311 (Fla. 2001). Application of these factors to Ring, which did not directly or indirectly address Florida law, provides no basis for consideration of Ring.[14]

---

[14]The United States Supreme Court recently held that an Apprendi claim is not plain error. United States v. Cotton, 122 S. Ct. 1781 (2002) (holding an indictment's failure to include the quantity of drugs was an Apprendi error but it did not seriously affect fairness, integrity, or public reputation of judicial proceedings, and thus did not rise to level of plain error). If an error is not plain error cognizable on direct appeal, it is not of sufficient magnitude to be a candidate for retroactive application in collateral proceedings. United States v. Sanders, 247 F.3d 139, 150-51 (4th Cir. 2002) (emphasizing that finding something to be a structural error would seem to be a necessary predicate for a new rule to apply retroactively and therefore, concluding that Apprendi is not retroactive). Every federal circuit that has addressed the issue has found that Apprendi is not retroactive. See, e.g., McCoy v. United States, 266 F.3d 1245 (11th Cir. 2001). The one state supreme court that has addressed the retroactivity of Apprendi has, likewise, determined that the decision is not retroactive. Whisler v. State, 36 P.3d 290 (Kan. 2001). Moreover, the United States Supreme Court has held that a violation of the right to a jury

Petitioner's argument that Apprendi and by implication Ring, presents a case of fundamental significance is not persuasive. The fact that the question accepted for review in Ring presented potential far-reaching implications does not mean that the ultimate opinion issued meets the Witt standard of fundamental significance. Since Ring has little or no impact on capital sentencing in Florida, it is not a case of fundamental significance. Clearly, Ring does not demonstrate that any "obvious injustice" occurred on the facts of this case.

Even if Petitioner's argument is considered, he has not demonstrated that he is entitled to any relief. It is important to recognize that Apprendi and Ring do not require jury sentencing in capital cases. Ring does not involve the jury's role in imposing sentence, but only the requirement that the jury find a defendant death-eligible. See Ring, 122 S. Ct. at 2445 (stating that "today's judgment has nothing to do with jury sentencing . . . [w]hat today's decision says is that the jury must find the existence of the *fact* that an aggravating factor existed") (Scalia, J., concurring). This

---

trial is not retroactive. DeStefano v. Woods, 392 U.S. 631 (1968) (refusing to apply the right to a jury trial retroactively because there were no serious doubts about the fairness or the reliability of the factfinding process being done by the judge rather than the jury).

is a critical distinction. The Court studied Arizona law and concluded that, because additional findings by a judge alone are required in order for the death penalty to be imposed, the "statutory maximum" for practical purposes is life, until such time as a judge has found an aggravating circumstance to be present. In other words, under the Arizona law examined in Ring, the jury plays no role in "narrowing" the class of defendants eligible for the death penalty upon conviction of first degree murder. This conclusion is consistent with the Arizona Supreme Court's description of state law, which recognized the statutory maximum permitted by the jury's conviction alone to be life. See Ring v. State, 25 P.3d 1139, 1150 (Ariz. 2001).

A clear understanding of what Ring does and does not say is essential to analyze any possible Ring implications to Florida's capital sentencing procedures. Notably, the Ring decision left intact all prior opinions upholding the constitutionality of Florida's death penalty scheme, including Spaziano v. Florida, 468 U.S. 447 (1984), and Hildwin v. Florida, 490 U.S. 638 (1989). It quotes Proffitt v. Florida, 428 U.S. 242, 252 (1976), acknowledging that "[i]t has never [been] suggested that jury sentencing is constitutionally required." Ring, 122 S. Ct. at 2437 n.4. In Florida, any

death sentence which was imposed following a jury recommendation of death necessarily satisfies the Sixth Amendment as construed in Ring, because the jury necessarily found beyond a reasonable doubt that at least one aggravating factor existed. Since the finding of an aggravating factor authorizes the imposition of a death sentence, the requirement that a jury determine the conviction to have been a capital offense has been fulfilled in any case in which the jury recommended a death sentence.

Even in the wake of Ring, a jury only has to make a finding of one aggravator and then the judge may make the remaining findings. Ring is limited to the finding of an aggravator, not any additional aggravators, nor mitigation, nor any weighing. Ring, 122 S. Ct. at 2443-45 (Scalia, J., concurring) (explaining that the factfinding necessary for the jury to make in a capital case is limited to "an aggravating factor" and does not extend to mitigation); Id. (noting that it is the finding of "an aggravating circumstance" that exposes the defendant to a greater punishment than that authorized by the jury's verdict) (Kennedy, J., concurring). Constitutionally, to be eligible for the death penalty, all the sentencer must find is one narrower, i.e., one aggravator, at either the guilt or penalty phase. Tuilaepa v. California,

512 U.S. 967, 972 (1994) (observing "[t]o render a defendant eligible for the death penalty in a homicide case, we have indicated that the trier of fact must convict the defendant of murder and find one 'aggravating circumstance' (or its equivalent) at either the guilt or penalty phase."). Once a jury has found one aggravator, the Constitution is satisfied, the judge may do the rest.

Ring does not directly or indirectly preclude a judge from serving in the role of sentencer. There is no language in Ring which suggests that, once a defendant has been convicted of a capital offense, a judge may not hear evidence or make findings in addition to any findings a jury may have made. Justice Scalia commented that, "[t]hose States that leave the ultimate life-or-death decision to the judge may continue to do so." Ring, 122 S. Ct. at 2245 (Scalia, J., concurring). The fact that Florida provides an additional level of judicial consideration to enhance the reliability of the sentence before a death sentence is imposed does not render our capital sentencing statute unconstitutional. Petitioner unfairly criticizes state law for requiring judicial participation in capital sentencing, but does not identify how judicial findings after a jury recommendation can interfere with the right to a jury trial. Any suggestion that

Ring has removed the judge from the sentencing process is not well taken. The judicial role in Florida alleviates Eighth Amendment concerns as well, and in fact provides defendants with another "bite at the apple" in securing a life sentence; it also enhances appellate review and provides a reasoned basis for a proportionality analysis.

The jury's role in Florida's sentencing process, unlike Arizona, is significant. Section 921.141, Florida Statutes, states:

> (1) Separate proceedings on issue of penalty.--Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by s. 775.082. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable. If, through impossibility or inability, the trial jury is unable to reconvene for a hearing on the issue of penalty, having determined the guilt of the accused, the trial judge may summon a special juror or jurors as provided in chapter 913 to determine the issue of the imposition of the penalty. If the trial jury has been waived, or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose, unless waived by the defendant. ...
>
> (2) Advisory sentence by the jury.--After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court, based upon the following matters:
>
> (a) Whether sufficient aggravating circumstances exist as enumerated in subsection (5);
>
> (b) Whether sufficient mitigating circumstances

> exist which outweigh the aggravating circumstances found to exist; and
>
> (c) Based on these considerations, whether the defendant should be sentenced to life imprisonment or death.

This statute clearly secures and preserves significant jury participation in narrowing the class of individuals eligible to be sentenced to death. The jury's role is so vital to the sentencing process that the jury has been characterized as a "co-sentencer" in Florida. Espinosa v. Florida, 509 U.S. 1079 (1992).

In the instant case, Petitioner's sentence was unanimously recommended by a jury that had been instructed that aggravating factors had to be proven beyond a reasonable doubt. However, to the extent that he claims the death penalty statute is unconstitutional for failing to require juror unanimity, or the charging of the aggravating factors in the indictment, or special jury verdicts, Ring provides no support for his claims. These issues are expressly not addressed in Ring, and in the absence of any United States Supreme Court ruling to the contrary, there is no need to reconsider this Court's well established rejection of these claims. Sweet v. Moore, 27 Fla. L. Weekly S585 (Fla. June 13, 2002); Cox v. State, 819 So. 2d 705, 724 n.17 (Fla. 2002) (noting that prior decisions on these issues need not be

revisited "unless and until" the United States Supreme Court recedes from Proffitt v. Florida, 428 U.S. 242 (1976)).

As this Court has recognized, the United States Supreme Court has specifically directed lower courts to leave to it the prerogative of overruling its own decisions. Mills v. Moore, 786 So. 2d 532, 537 (Fla.), cert. denied, 532 U.S. 1015 (2001). The United States Supreme Court has declined to disturb its prior decisions upholding the constitutionality of Florida's capital sentencing process, and that result is dispositive of Petitioner's claims.

In addition, Ring affirms the distinction between "sentencing factors" and "elements" of an offense recognized in prior case law. See Ring, 122 S. Ct. at 2437-43; Harris v. United States, 122 S. Ct. 2406 (2002). Petitioner's argument, suggesting that the jury's role in Florida's capital sentencing process is insufficient, improperly assumes the jury recommendation itself to be a jury vote as to the existence of aggravating factors. However, the jury vote only represents the final jury determination as to appropriateness of the death sentence in the case, and does not dictate what the jury found with regard to particular aggravating factors. When the jury recommends death, it necessarily finds an aggravating factor to exist beyond a reasonable doubt and

satisfies the Sixth Amendment as construed in Ring. To the extent that Ring suggests that capital murder may have an additional "element" that must be found by a jury to authorize the imposition of the death penalty, that "element" would be the existence of any aggravating factor, and would not be the determination that the aggravating factors outweighed any mitigating factors established. Petitioner asserts that the jury must determine death to be the appropriate sentence, but nothing in Ring supports his speculation that the ultimate sentencing determination is an additional "element" which must be proven beyond a reasonable doubt.

Accordingly, the State submits that neither Apprendi nor Ring has any effect on prior decisions upholding Florida's capital sentencing scheme. This Court has previously recognized that the statutory maximum for first degree murder is death, and has repeatedly rejected claims similar to those raised herein. Cox v. State, 819 So. 2d 705 (Fla. 2002); Bottoson v. State, 813 So. 2d 31, 36 (Fla.), cert. denied, 122 S. Ct. 2670 (2002); King v. State, 808 So. 2d 1237 (Fla.), cert. denied, 122 S. Ct. 932 (2002); Hertz v. State, 803 So. 2d 629, 648 (Fla. 2001), cert. denied, 122 S. Ct. 2673 (2002); Looney v. State, 803 So. 2d 656, 675 (Fla. 2001), cert. denied, 122 S. Ct. 2678 (2002); Brown v. Moore, 800 So. 2d

223, 224-25 (Fla. 2001); Mann v. Moore, 794 So. 2d 595, 599 (Fla. 2001), cert. denied, 122 S. Ct. 2669 (2002); Mills, 786 So. 2d at 536-38.[15] This interpretation of state law demands respect, and offers a pivotal distinction between Florida and Arizona. Mullaney v. Wilbur, 421 U.S. 684 (1975). However, should there be any question about the correctness of this conclusion, Florida's juries routinely "authorize" the imposition of the death penalty by recommending that a death sentence be imposed, as in the instant case. Accordingly, this Court should deny the instant petition.

[15]The State recognizes that the denial of certiorari does not carry precedential value. However, the State notes that the Supreme Court denied certiorari in at least seven cases raising the Ring issue: Holladay v. Alabama, Case No. 00-10728; Card v. Florida, 122 S. Ct. 2673 (2002); Bottoson; King; Hertz; Looney; Mann. Obviously, if the United States Supreme Court had intended to apply Ring to Florida capital sentencing, it had every opportunity to do so. The fact that it did not speaks for itself.

WHEREFORE, based on the foregoing arguments and authorities, the instant Petition for Writ of Habeas Corpus should be denied.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

_____

STEPHEN D. AKE
Assistant Attorney General
Florida Bar No. 14087
Westwood Center
2002 North Lois Avenue, Suite 700
Tampa, Florida 33607-2366
Telephone: (813) 801-0600
Facsimile: (813) 356-1292

COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to John J. Jackson, Assistant Capital Collateral Counsel, Capital Collateral Counsel - Northern Region, 1533-B South Monroe Street, Tallahassee, Florida 32301, on this 3rd day of September, 2002.

_____
COUNSEL FOR RESPONDENT

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).

_____
COUNSEL FOR RESPONDENT