IN THE SUPREME COURT OF FLORIDA

MICHAEL MORDENTI,

Petitioner,

v. **Case No. SC02-2643**

JAMES V. CROSBY, JR.,

Respondent.

_____/

RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

COMES NOW, Respondent, JAMES V. CROSBY, JR., by and through the undersigned Assistant Attorney General, and hereby responds to the 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:

STATEMENT OF FACTS

On his direct appeal Mordenti's appellate counsel raised the following issues:

1. WHETHER THE TRIAL COURT COMMITTED FUNDAMENTAL ERROR BY PERMITTING THE HUSBAND AND WIFE PROSECUTORS TO TRY THE CASE;

2. WHETHER THE TRIAL COURT ERRED BY FAILING TO REPLACE JUROR HAIGHT;

3. WHETHER THE TRIAL COURT ERRED BY ALLOWING TESTIMONY OF THE VICTIM'S MOTHER AS TO IDENTITY AND BY ADMITTING

PHOTOS OF THE VICTIM;

4. WHETHER THE LOWER COURT ERRED REVERSIBLY BY ALLEGEDLY ADMITTING EVIDENCE OF APPELLANT'S PRIOR INVOLVEMENT WITH CRIME;

5. WHETHER THE TRIAL COURT ERRED IN INSTRUCTING THE JURY ON THE "HAC" AGGRAVATOR;

6. WHETHER THE LOWER COURT ERRED IN PERMITTING A REFERENCE TO "CON ARTIST" IN THE PROSECUTOR'S CLOSING ARGUMENT;

7. WHETHER THE LOWER COURT ERRED WHEN IT ALLOWED THE STATE ALLEGEDLY TO "THREATEN" TO REBUT THE MITIGATING FACTOR OF NO SIGNIFICANT HISTORY

8. WHETHER THE LOWER COURT ERRED WHEN IT INSTRUCTED THE JURY ON BOTH THE "CCP" AGGRAVATOR AND FINANCIAL GAIN AGGRAVATOR; AND

9. WHETHER THE DEATH SENTENCE IS DISPROPORTIONATE.

This Court affirmed the judgment and sentence of death. Mordenti v. State, 630 So. 2d 1080 (Fla. 1994), cert. denied, Mordenti v. Florida, 512 U.S. 1227 (1994).

PRELIMINARY STATEMENT

The Legal Standard -

In Rutherford v. Moore, 774 So. 2d 637 (Fla. 2000), this Court summarized and reiterated its jurisprudence relating to claims of ineffective assistance of appellate counsel. Subsequent decisions also repeat these principles. Habeas

corpus petitions are the proper vehicle to advance claims of ineffective assistance of appellate counsel but such claims may not be used to camouflage issues that should have been raised on direct appeal or in a post-conviction motion. Id. at 643; Thompson v. State, 759 So. 2d 650, 660, n. 6 (Fla. 2000); Hardwick v. Dugger, 648 So. 2d 100, 106 (Fla. 1994). The Court's ability to grant relief is limited to those situations where the petitioner established first that counsel's performance was deficient because the "omissions are of such magnitude as to constitute a serious error or substantial deficiency falling measurably outside the range of professionally acceptable performance" and second that the petitioner was prejudiced because counsel's deficiency "compromised the appellate process to such a degree as to undermine confidence in the correctness of the result." Rutherford at 643. Groover v. Singletary, 656 So. 2d 424, 425 (Fla. 1995).

If a legal issue would in all probability have been found to be without merit had counsel raised the issue on direct appeal, the failure of appellate counsel to raise the meritless issue will not render his performance ineffective. This is generally true as to issues that would have been found to be procedurally barred had they been raised on direct appeal. Id.

at 643. Appellate counsel is not deficient for failing to anticipate a change in the law. Darden v. State, 475 So. 2d 214, 216-17, (Fla. 1985); Lambrix v. Singletary, 641 So. 2d 847 (Fla. 1994). Appellate counsel is not ineffective for not convincing the Court to rule in his favor on issues actually raised on direct appeal and the Court will not consider a claim on habeas that counsel was ineffective for failing to raise additional arguments in support of the claim on appeal. Rutherford at 645. Appellate counsel will not be faulted for failing to investigate and present facts in order to support an issue on appeal since the "appellate record is limited to the record presented to the trial court". Id. at 646. Finney v. State, 660 So. 2d 674, 684 (Fla. 1995).

Procedurally barred claims not properly raised at trial could not form a basis for finding appellate counsel ineffective absent a showing of fundamental error, i.e. error that "reaches 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." Id. at 646; Chandler v. State, 702 So. 2d 186, 191, n. 5 (Fla. 1997).

Moreover, appellate counsel cannot be deemed ineffective for failing to raise on appeal a claim of ineffective trial counsel. Id. at 648. Blanco v. Wainwright, 507 So. 2d 1377, 1384 (Fla.

1987). The habeas corpus writ may not be used to reargue issues raised and ruled upon because petitioner is dissatisfied with the outcome on direct appeal. Appellate counsel is not required to raise every conceivable claim. See 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"). Accord, Waterhouse v. Moore, 838 So. 2d 480 (Fla. 2002); Porter v. Crosby, 840 So. 2d 981 (Fla. 2003); Sweet v. Moore, 822 So. 2d 1269 (Fla. 2002); P.B. Johnson v. Moore, 837 So. 2d 343 (Fla. 2002); Cherry v. Moore, 829 So. 2d 873 (Fla. 2002); Lawrence v. State/Moore, 831 So. 2d 121 (Fla. 2002); Gilliam v. State/Moore, 817 So. 2d 768 (Fla. 2002); Carroll v. State/Moore, 815 So. 2d 601 (Fla. 2002); Downs v. Moore, 801 So. 2d 906 (Fla. 2001); Mann v. Moore, 794 So. 2d 595 (Fla. 2001); Jones v. Moore, 794 So. 2d 579 (Fla. 2001); Happ v. Moore, 784 So. 2d 1091 (Fla. 2001).

It is not sufficient as Petitioner seems to suggest in his pleading simply to assert that deficiency is established by the fact that supporting authority for an alleged error was extant or that prejudice is established if this Court did not address the claim on a previous appeal. Such a formula would render

Strickland v. Washington, 466 U.S. 668 (1984) and its progeny a dead letter. Rather, as stated by this Court in Bruno v. Moore, 838 So. 2d 485 (Fla. 2002), quoting Pope v. Wainwright, 496 So. 2d 798, 800 (Fla. 1986) this Court must determine:

> "Whether the alleged omissions are of such magnitude as to constitute a serious error 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." (Emphasis supplied) (27 Fla. L. Weekly at S1027)

Moreover, a claim of ineffective assistance of appellate counsel may not be used to circumvent the rule that habeas does not serve as a second or substitute appeal, may not be used as a variant to an issue already raised, nor added as an issue raised in the 3.850 motion and appeal. Fotopoulos v. State, 838 So. 2d. 1122 (Fla. 2002).

ISSUE I

WHETHER FUNDAMENTAL ERROR OCCURRED AND APPELLATE COUNSEL WAS INEFFECTIVE BY THIS COURT'S USE OF THE WORDS CELLMATE AND TOTAL IMMUNITY.

Petitioner contends, as we can best determine the assertion, that either fundamental error has occurred or appellate counsel rendered ineffective assistance on direct appeal because this Court's opinion referred to witness Horace Barnes as Mordenti's "cellmate." Since Horace Barnes was not Petitioner's cellmate,

the argument goes, this Court's "reliance upon this information constitutes plain error and fundamental error not subject to harmless analysis" (Petition, p. 10). This contention is meritless and at or near the border separating the insubstantial from the frivolous.

At trial Horace Barnes testified that he was residing at the Lewisburg, Pennsylvania federal prison following a prosecution by the U.S. Attorney's Office in Tampa (DAR 745-746). He met Mordenti in October or November of 1989 (DAR 747). The trial court sustained the defense objection to the witness's statement that Mordenti when he met him "let me know that he was in the mob" (DAR 747-750). Barnes testified that when he went to see Mordenti at his car lot in St. Petersburg with Joel Darden, he saw Darden purchase a gun from Mordenti (DAR 750). On cross examination Barnes admitted to numerous - more than five - convictions (DAR 750-751). The testimony clearly established that Barnes first met Mordenti in October or November 1989 (the murder of Thelma Royston had occurred in June of 1989) and that they had met at Mordenti's place of business in St. Petersburg.

Mordenti chastises appellate counsel for the argument at page 49 of the Initial Brief in Issue IV relating to the allegedly impermissible evidence of prior involvement with crime which recites:

> "Clearly, the electrifying information first from his ex-wife that appellant had 'throw away pieces' and that 'he was dealing with some people that were shady' and finally, from Barnes, that he had introduced himself (to someone in prison, perhaps when he himself was in prison?) as someone 'in the mob' is not the kind of error that will not effect the jury's deliberations."

Despite appellate counsel's spirited advocacy on this point, this Court found the testimony of "mob" association to be error, but barred for the failure to request a mistrial and even if not barred constituted harmless error. Mordenti v. State, 630 So. 2d at 1084-1085 (Fla. 1994). Neither appellate counsel's reference to Barnes' imprisonment nor this Court's perhaps elliptical shorthand reference to "cellmate" amounts to anything more than de minimis error. There can be no meaningful comparison between this asserted error and Reed v. State, 837 So. 2d 366 (Fla. 2002), where this Court ruled prospectively that the giving of the standard jury instruction for aggravated child abuse was fundamental error when it inaccurately defined the disputed element of malice. The misdescription or mischaracterization of Barnes as a "cellmate" does not approach fundamental error or error that goes to the core and undermines confidence in the outcome of the trial, or in this case the

prior affirmance of the judgment and sentence on direct appeal.[1] This Court has indicated in the past that minor factual inaccuracies that occur in the Court's opinions do not necessarily require granting postconviction relief. See, e.g., Happ v. Moore, 784 So. 2d 1091, 1098-1099 (Fla. 2001)("...the corrected facts do not significantly alter the events believed to have occurred in this case.") Thus, the ineffective counsel claim in Happ was meritless as the performance did not compromise the appellate process to such a degree as to undermine confidence in the fairness and correctness of the appellate result. Id. at 1099. Appellate counsel is not ineffective for not convincing the court to rule in his favor on issues actually raised on direct appeal. Rutherford v. Moore, 774 So. 2d 637, 645 (Fla. 2000); Routly v. Wainwright, 502 So. 2d 901, 903 (Fla. 1987); Grossman v. Dugger, 708 So. 2d 249, 252 (Fla. 1997).

Petitioner also repeats the contention urged in the motion for post-conviction relief and appeal from denial of relief therein that Gail Mordenti was only provided use immunity, not as reported complete immunity. No extended response is

[1]If the doctrine of fundamental error as imagined by Petitioner has become so trivialized to embrace every factual misstatement in an appellate opinion, there will be little need for concern about prison overcrowding, as the jail doors will be open after the most cursory literary review.

necessary. The State will address that issue in the Answer Brief in the post-conviction appeal brief. Suffice it to say, the trial court denied post-conviction relief, noting that the jury heard her direct examination and cross-examination testimony including her understanding of the immunity provided and the jury "could then evaluate her credibility" (R X, 1386-87). Respondent would add that even if it could be concluded that Gail Mordenti misdescribed the immunity granted -- i.e., that she actually received only use immunity instead of full immunity -- that misdescription could only redound to the benefit of Petitioner since the jury might mistakenly believe the witness had been given a greater benefit (and hence had greater motivation to embellish) than was actually the case.

Petitioner may not permissibly urge on his habeas petition the same claim asserted in his 3.850 motion or appeal from 3.850 denial. Fotopoulos v. State, 838 So. 2d. 1122 (Fla. 2002); Randolph v. State, 853 So. 2d 1051 (Fla. 2003).

Petitioner's claim for relief on this first issue is meritless; relief must be denied.

ISSUE II

WHETHER FLORIDA'S CAPITAL SENTENCING PROCEDURE DEPRIVED PETITIONER OF HIS SIXTH AMENDMENT RIGHTS TO NOTICE AND JURY TRIAL.

Petitioner next argues that he should be entitled to relief

under Ring v. Arizona, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002). For the reasons that follow, relief must be denied.

Initially, Respondent would submit that the instant claim is procedurally barred since Mordenti did not raise any assertion contemporaneously before or at trial, or on direct appeal, pertaining to a claim about the Sixth Amendment and the jury's participation in regard to aggravating factors at penalty phase. See McGregor v. State, 789 So. 2d 976, 977 (Fla. 2001)(Apprendi claim procedurally barred for failure to raise in trial court); Barnes v. State, 794 So. 2d 590 (Fla. 2001)(Apprendi error not preserved for appellate review). It is clear that Mordenti did not at the time of trial or direct appeal assert a claim that the Sixth Amendment right to jury trial required the jury to find aggravating factors. While petitioner might contend that Ring v. Arizona had not been decided at the time of trial, that fact does not suffice to avoid the procedural default. What is important is not the existence of a particular decision but whether the tools were available to construct the argument. Engle v. Isaac, 456 U.S. 107, 133 (1982); Pitts v. Cook, 923 F.2d 1568, 1571-1572 (11th Cir. 1991). The Sixth Amendment right to jury trial has always been known and the tools have been available for the defense to construct the argument. See Proffitt v. Florida, 428 U.S. 242,

252 (1976)(holding Constitution does not require jury sentencing); Hildwin v. Florida, 490 U.S. 638 (1989)("This case presents us once again with the question whether the Sixth Amendment requires a jury to specify the aggravating factors that permit the imposition of capital punishment in Florida."); Spaziano v. Florida, 468 U.S. 447 (1984). The decision in Ring was not required as a predicate for counsel for Ring to assert his Sixth Amendment claim in a timely and appropriate fashion in the Arizona trial court.

Secondly, this Court has repeatedly and consistently denied relief requested under Ring. See King v. Moore, 831 So. 2d 143 (Fla. 2002); Bottoson v. Moore, 833 So. 2d 693 (Fla. 2002); Marquard v. State/Moore, 850 So. 2d 417, 431 n 12 (Fla. 2002); Chavez v. State, 832 So. 2d 730, 767 (Fla. 2002); Bruno v. Moore, 838 So. 2d 485 (Fla. 2002); Fotopoulos v. State, 838 So. 2d 1122 (Fla. 2002); Lucas v. State/Moore, 841 So. 2d 380 (Fla. 2003); Porter v. Crosby, 840 So. 2d 981 (Fla. 2003)("Contrary to Porter's claims, we have repeatedly held that the maximum penalty under the statute is death and have rejected the other Apprendi arguments."); Spencer v. State, 842 So. 2d 52 (Fla. 2003); Conahan v. State, 844 So. 2d 629 (Fla. 2003); Anderson v. State, 841 So. 2d 390 (Fla. 2003); Cole v. State, 841 So. 2d 409 (Fla. 2003); Doorbal v. State, 837 So. 2d 940 (Fla. 2003);

Kormondy v. State, 845 So. 2d 41 (Fla. 2003)("Ring does not require either notice of the aggravating factors that the State will present at sentencing or a special verdict form indicating the aggravating factors found by the jury."); R. S. Jones v. State/Crosby, 845 So. 2d 55 (Fla. 2003); Lugo v. State, 845 So. 2d 74 (Fla. 2003); Lawrence v. State, 846 So. 2d 440 (Fla. 2003); Banks v. State/Crosby, 842 So. 2d 788 (Fla. 2003); Grim v. State, 841 So. 2d 455 (Fla. 2003), Butler v. State, 842 So. 2d 817 (Fla. 2003) (relying on Bottoson v. Moore, 833 So. 2d 693 and King v. Moore, 831 So. 2d 143 to a Ring claim in a single aggravator (HAC) case); Chandler v. State, 848 So. 2d 1031, 1034 n 4 (Fla. 2003); Pace v. State/Crosby, 854 So. 2d 167 (Fla. 2003); Cooper v. State/Crosby, ___ So. 2d ___, 28 Fla. L. Weekly S 497 (Fla., June 26, 2003); Duest v. State, ___ So. 2d ___, 28 Fla. L. Weekly S 501 (Fla. June 26, 2003); Blackwelder v. State, 851 So. 2d 650 (Fla. 2003); Wright v. State/Crosby, ___ So. 2d ___, 28 Fla. L. Weekly S 517 (Fla., July 3, 2003). See also Nelson v. State, 850 So. 2d 514 (Fla. 2003); Caballero v. State, 851 So. 2d 655 (Fla. 2003); Belcher v. State, 851 So. 2d 678 (Fla. 2003); Allen v. State/Crosby, ___ So. 2d ___, 28 Fla. L. Weekly S 604 (Fla., July 10, 2003); Fennie v. State/Crosby, ___ So. 2d ___, 28 Fla. L. Weekly S 619 n 10 (Fla., July 11, 2003); Owen v. Crosby/State, 854 So. 2d 182

(Fla. 2003); McCoy v. State, 853 So. 2d 396 (Fla. 2003); Conde v. State, ___ So. 2d ___, 28 Fla. L. Weekly S 669 (Fla., Sept. 4, 2003); Stewart v. State, ___ So. 2d ___, 28 Fla. L. Weekly S 700 (Fla., Sept. 11, 2003); Jones v. State/Crosby, ___ So. 2d ___, 28 Fla. L. Weekly S 701 (Fla., Sept. 11, 2003); Rivera v. State/Crosby, ___ So. 2d ___, 28 Fla. L. Weekly S 704 (Fla., Sept. 11, 2003); Davis v. State, ___ So. 2d ___, 28 Fla. L. Weekly S 692 (Fla., Sept. 11, 2003); F. Anderson v. State, ___ So. 2d ___, 28 Fla. L. Weekly S 731 (Fla., Sept. 25, 2003); J. Henry v. State, ___ So. 2d ___, 28 Fla. L. Weekly S 753 (Fla., Oct. 9, 2003); Cummings-El v. State, ___ So. 2d ___, 28 Fla. L. Weekly S 757 (Fla., Oct. 9, 2003); R. L. Johnston v. State, ___ So. 2d ___, 28 Fla. L. Weekly S 779, 783 (Fla., Oct. 16, 2003); Owen v. State, ___ So. 2d ___, 28 Fla. L. Weekly S 790, 795 (Fla., Oct. 23, 2003).

Despite Petitioner's attempt to cobble a majority view out of excerpts of concurring opinions of a few individual justices which have not commanded a majority view, the fact remains that this Court has consistently maintained that, unlike the situation in Arizona, the statutory maximum sentence for first degree murder is death. See Mills v. Moore, 786 So. 2d 532, 536-538 (Fla. 2001); Mann v. Moore, 794 So. 2d 595, 599 (Fla. 2001); Porter v. Crosby, *supra*; Shere v. Moore, 830 So. 2d 56,

61 (Fla. 2002)("This Court has defined a capital felony to be one where the maximum possible punishment is death. [citation omitted] The only such crime in the State of Florida is first-degree murder, premeditated or felony.").

Petitioner's contention that a prior felony conviction aggravator is required for exemption is mistaken. See Butler v. State, *supra*.

Third, any error must be regarded as harmless error. The jury at the guilt phase unanimously found Mordenti guilty of first degree murder and conspiracy to commit murder (DAR 1300-02; DAR 1735). The jury was instructed on three aggravators: (1) that the murder was committed for pecuniary gain; (2) that the murder was particularly heinous, atrocious or cruel; and (3) that the murder was cold, calculated and premeditated. The jury was also instructed on the available mitigating circumstances and that each aggravating circumstance must be proved beyond a reasonable doubt before it may be considered in arriving at their decision (DAR 1489-96). The jury adequately participated in the sentencing process. See Hildwin v. Florida, 490 U.S. 638 (1989).

Moreover, the jury in fact and in effect found unanimously the aggravating factors of heightened premeditation and pecuniary gain in the guilt phase by the return of a guilty

verdict as to Count II, conspiracy to commit first degree murder. Count II recites:

"COUNT TWO

> The Grand Jurors of the County of Hillsborough, State of Florida, charge that on or about the 7th day of June, 1989, in the County of Hillsborough and elsewhere in the State of Florida, LARRY ROYSTON and MICHAEL MORDENTI did unlawfully and feloniously conspire, combine, confederate, and agree with and among themselves and with others, both known and unknown, to commit a felony, to-wit: Murder in the First Degree, in that LARRY ROYSTON did solicit MICHAEL MORDENTI to kill THELMA ROYSTON in return for a sum of money, and MICHAEL MORDENTI having so agreed, did in fact murder or cause the murder of THELMA ROYSTON by the shooting of her with a firearm and the stabbing of her with a knife, and said MICHAEL MORDENTI did thereafter receive money from LARRY ROYSTON in fulfillment of this contract to commit murder for hire, contrary to the form of the statute in such cases made and provided, to-wit: Florida Statute 782.04 (1) and 777.04 (3)." (DAR 1592)

The jury returned its verdict of guilty of conspiracy to commit murder in the first degree "as charged" (DAR 1300; DAR 1735). Since the jury confirmed unanimously and beyond a reasonable doubt that Mordenti had agreed to, and did, murder Thelma Royston and that "MICHAEL MORDENTI did thereafter receive money from LARRY ROYSTON in fulfillment of this contract to commit murder for hire," it is clear that the jury found the pecuniary gain factor at both guilt and penalty phases. Thus,

this case is in the same posture as a number of other cases wherein this Court has rejected Ring challenges either because of the presence of the prior felony conviction aggravator or the presence of another felony with a unanimous jury verdict of guilty.

Finally, Petitioner is not entitled to relief -- since Ring v. Arizona is not retroactive to cases that have become final -- on collateral challenge.

In Teague v. Lane, 489 U.S. 288 (1989), the United States Supreme Court announced that new constitutional rules of criminal procedure will not be applicable to cases which have become final before the new rules are announced, unless they fall within an exception to the general rule. 489 U.S. at 310. A case announces a new rule when it breaks new ground or imposes a new obligation on the state or the federal government. To put it differently, a case announces a new rule if the result was not *dictated* by precedent existing at the time the defendant's conviction became final. Id. at 301. A case is final when the judgment of conviction has been rendered, the availability of appeal exhausted and the time for petition for certiorari has elapsed. Mordenti's case became final with this Court's affirmance of the judgment and sentence on direct appeal and the denial of certiorari on June 20, 1994. Mordenti v. State, 630

So. 2d 1080 (Fla. 1994), cert. denied, 512 U.S. 1227 (1994). The Teague Court announced two exceptions to the general rule on non-retroactivity. First, a new rule should be applied retroactively if it places a certain kind of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe. Id. at 311. The second exception, derived from an earlier view by Justice Harlan, requires that the new rule must "alter our understanding of the *bedrock procedural elements* that must be found to vitiate the fairness of a particular conviction." Thus, this exception is limited in scope to "those new procedures without which the likelihood of an accurate conviction is seriously diminished." 489 U.S. at 311-313.[2] Subsequent Supreme Court decisions have reinforced this standard. In Sawyer v. Smith, 497 U.S. 227 (1990), the Court rejected a defense argument that the second Teague exception should be read only to include new rules of capital sentencing that "preserve the accuracy and fairness of capital sentencing judgments":

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[2]In Teague itself the court determined that the petitioner could not receive the benefit of Batson v. Kentucky, 476 U.S. 79 (1986), decided subsequently to petitioner's conviction since the absence of a fair cross section on the jury venire does not undermine the fundamental fairness that must underlie a conviction or seriously diminish the likelihood of obtaining an accurate conviction. The rule requiring petit juries be composed of a fair cross section of the community was not a bedrock procedural element. Id. at 315.

> It is thus not enough under Teague to say that a new rule is aimed at improving the accuracy of trial. More is required. A rule that qualifies under this exception must not only improve accuracy, but also "'alter our understanding of the *bedrock procedural elements*'" essential to the fairness of a proceeding. (497 U.S. at 242.)

The Sawyer Court echoed Teague that the second exception is directed only at new rules essential to the accuracy and fairness of the trial and it is "unlikely that many such components of basic due process have yet to emerge. 489 U.S. at 313." 497 U.S. at 243. Consequently, the petitioner was not entitled to habeas relief by reliance on Caldwell v. Mississippi, 472 U.S. 320 (1985), decided subsequently to when his murder conviction became final. While Caldwell announced a new rule, it did not come within the Teague exception for "watershed rules fundamental to the integrity of the criminal proceeding." 497 U.S. at 229. In Graham v. Collins, 506 U.S. 461 (1993), the Court held that a claim that the Texas capital sentencing procedures barred the jury from giving effect to particular mitigating evidence was held to propose a new rule. Prior case law did not "dictate" the result requested. The new rule sought by Graham did not decriminalize a class of conduct nor did Graham's special jury instructions concerning his mitigating evidence of youth, family background and positive

character traits seriously diminish the likelihood of obtaining an accurate determination in his sentencing proceeding. 506 U.S. at 477-478.

In Tyler v. Cain, 533 U.S. 656, 150 L.Ed.2d 632 (2001), a petitioner argued in a second federal habeas petition that he was entitled to the retroactive benefit of the jury instruction rule in Cage v. Louisiana, 498 U.S. 39 (1990), that a jury instruction is unconstitutional if there is a reasonable likelihood that the jury understood the instruction to allow conviction without proof beyond a reasonable doubt. The Court denied relief noting that it had not made Cage retroactive. Moreover, in footnote 7 of the opinion, the Court explained that the second Teague exception is available only if the new rule "alters our understanding of the bedrock procedural elements" essential to the fairness of a proceeding. Even classifying an error as structural does not necessarily alter our understanding of these bedrock procedural elements. Nor can it be said that all new rules relating to due process alter such understanding. The second Teague exception is reserved only for truly "watershed" rules, a small core of rules which not only seriously enhance accuracy but also require observance of those procedures that are implicit in the concept of ordered liberty. See also Butler v. McKellar, 494 U.S. 407 (1990)(rejecting

collateral attack under the Teague retroactivity standard and holding that Arizona v. Roberson, 486 U.S. 675 (1988) announced a new rule even though the Court had said Roberson was directly controlled by Edwards v. Arizona, 451 U.S. 477 (1981)):

> But the fact that a court says that its decision is within the "logical compass" of an earlier decision, or indeed that it is "controlled" by a prior decision, is not conclusive for purposes of deciding whether the current decision is a "new rule" under Teague. Courts frequently view their decisions as being "controlled" or "governed" by prior opinions even when aware of reasonable contrary conclusions reached by other courts. . . That the outcome in Roberson was susceptible to debate among reasonable minds is evidenced further by the differing positions taken by the judges of the Courts of Appeals for the Fourth and Seventh Circuits noted previously. It would not have been an illogical or even a grudging application of Edwards to decide that it did not extend to the facts of Roberson. (Id. at 415.)

Saffle v. Parks, 494 U.S. 484 (1990)(rejecting defense claim that rule should be announced as to how the jury must consider the mitigating evidence and even if declared such a new rule would not be a watershed rule of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding); Lambrix v. Singletary, 520 U.S. 518, 539-40 (1997)(holding that Espinosa v. Florida, 505 U.S. 1079 (1992) announced a new rule under Teague but that neither of the two exceptions were applicable: neither a class of private conduct

was placed beyond the power of the state to proscribe nor was it a watershed rule implicating the fundamental fairness and accuracy of the criminal proceeding).

Ring arises from application of Apprendi v. New Jersey, 530 U.S. 466 (2000) to Arizona's capital scheme. Every federal circuit court to address the issue has found that Apprendi is not retroactive. E.g., United States v. Sanders, 247 F.3d 139, 146-51 (4th Cir. 2001)(finding that Apprendi's requirements of jury finding beyond a reasonable doubt of fact that increases statutory maximum for an offense "are not the types of watershed rules implicating fundamental fairness that require retroactive application."); United States v. Brown, 305 F.3d 304 (5th Cir. 2002); Goode v. United States, 305 F.3d 378 (6th Cir. 2002)("Apprendi does not create a new 'watershed rule.'"); Curtis v. United States, 294 F.3d 841 (7th Cir. 2002); United States v. Moss, 252 F.3d 993, 996-1001 (8th Cir. 2001)("Apprendi is not of watershed magnitude."); United States v. Sanchez-Cervantes, 282 F.3d 664 (9th Cir. 2002); United States v. Mora, 293 F.3d 1213 (10th Cir. 2002); McCoy v. United States, 266 F.3d 1245 (11th Cir. 2001); Coleman v. United States, 329 F.3d 77 (2d Cir. 2003); Sepulveda v. United States, 330 F.3d 55 (1st Cir. 2003). Several state courts have similarly held that Apprendi (and therefore Ring) does not apply retroactively.

E.g., Sanders v. State, 815 So. 2d 590 (Ala. Crim. App. 2001); Whisler v. State, 36 P.3d 290 (Kan. 2001); State v. Sprick, 59 S.W.3d 515 (Mo. 2001); State v. Tallard, 816 A.2d 977 (NH 2003)(applying Teague test to deny Apprendi claim collaterally in New Hampshire); People v. DeLaPaz, 791 N.E.2d 489 (Ill. 2003). In fact, the United States Supreme Court is clearly not of the opinion that its holding in Apprendi is retroactive. It has itself procedurally barred an Apprendi claim. See United States v. Cotton, 122 S. Ct. 1781 (2002)(finding that Apprendi error did not qualify as plain error, the federal equivalent of fundamental error). See also In Re Johnson, 334 F.3d 403 n 1 (5th Cir. 2003)(noting that while the Court need not reach the issue, "since the rule in Ring is essentially an application of Apprendi, logical consistency suggests that the rule announced in Ring is not retroactively available"); Moore v. Kinney, 320 F.3d 767, 771 n 3 (8th Cir. 2003)("Absent an express pronouncement on retroactivity from the Supreme Court, the rule from Ring is not retroactive"); Turner v. Crosby, 339 F.3d 1247, 1282 (11th Cir. 2003)(Turner is procedurally barred from bring a Ring claim . . . and alternatively, Ring does not apply retroactively to Turner); Colwell v. State, 59 P.3d 463 (Nev. 2002)(retroactive application of Ring on collateral review is not warranted); State v. Towery, 64 P.3d 828 (Ariz. 2003)(Ring

does not apply retroactively); Cannon v. Mullin, 297 F.3d 989 (10th Cir. 2002)(Cannon has failed to make a prima facie showing that the Supreme Court has made Ring retroactively applicable to cases on collateral review); Sibley v. Culliver, 243 F.Supp.2d 1278 (U.S.D.C., M.D. Ala., N.D. 2003)("...the Court concludes that Ring may not be applied retroactively to Sibley's case which is on collateral review"); State v. Lotter, 664 N.W.2d 892 (Neb. 2003)(holding that Ring announced a new rule of criminal procedure which does not fall within either Teague exception to rule of nonretroactivity, and thus denying relief on collateral challenge to conviction); contra, State v. Whitfield, 107 S.W.3d 253 (Mo. 2003); Summerlin v. Stewart, 341 F.3d 1082 (9th Cir. 2003).

Mordenti cannot prevail on his claim for entitlement to relief by retroactive application of Ring in this postconviction challenge. Ring announced a change in procedural law. In Apprendi v. New Jersey, 530 U.S. 466 (2000), the Court held that a fact, other than a prior conviction, that increases the statutory maximum for a crime must be presented to the jury and proven beyond a reasonable doubt. Ring applied Apprendi to Arizona's sentencing scheme. As explained above, the maximum sentence for first degree murder is death in Florida, unlike the situation in Arizona. In any event, Ring only involves a

procedural question -- who decides a given question, the judge or jury. The courts have recognized that jury involvement in capital sentencing does not enhance accuracy. Not only is the requirement of improving the accuracy of a trial unsatisfied by application of Ring to the instant case, but also it is not a bedrock procedural element essential to the fairness of a proceeding, i.e., one that is implicit in the concept of ordered liberty as explained in Teague, *supra*, Sawyer, *supra*, and Tyler, *supra*. It goes without saying that the first exception of Teague is inapplicable since prosecution for first degree murder is not proscribed due to primary, private, individual conduct beyond the power of the criminal law-making authority to proscribe.

Similarly, Mordenti cannot prevail under this Court's standard of retroactivity under the principles of Witt v. State, 387 So. 2d 922 (Fla. 1980), which requires a decision of fundamental significance which so drastically alters the underpinnings of Mordenti's death sentence that "obvious injustice" exists. See New v. State, 807 So. 2d 52 (Fla. 2001); Ferguson v. State, 789 So. 2d 306, 311 (Fla. 2001)(The 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).

Mordenti cannot show that adoption of Ring satisfies these criteria.

Petitioner's claim for relief must be denied.

ISSUE III

WHETHER APPELLATE COUNSEL WAS INEFFECTIVE IN FAILING TO RAISE THE ISSUE THAT THE PROSECUTOR IMPERMISSIBLY SUGGESTED THAT THE LAW REQUIRED A DEATH SENTENCE.

The substantive claim regarding the prosecutor's remarks in opening statement at the beginning of the penalty phase (DAR 1369) and in the closing penalty phase argument (DAR 1456, 1468-69) is procedurally barred and not cognizable collaterally as assertions of improper prosecutorial comments and arguments should be urged on direct appeal and habeas corpus petitions do not constitute a second appeal. See generally, Cherry v. State, 659 So. 2d 1069, 1072 (Fla. 1995); Doyle v. State, 526 So. 2d 909, 911 (Fla. 1988).

Habeas corpus petitions are the proper vehicle to advance claims of ineffective assistance of appellate counsel but such claims may not be used to camouflage issues that should have been raised on direct appeal or in a post-conviction motion. Rutherford v. Moore, 774 So. 2d 637, 647 (Fla. 2000); Thompson v. State, 759 So. 2d 650, 657, n 6 (Fla. 2000); Hardwick v. Dugger, 648 So. 2d 100, 106 (Fla. 1994).

Appellate counsel does not render ineffective assistance for

failing to argue on appeal an issue that has not been preserved by contemporaneous objection at trial. There were no defense objections to the comments at DAR 1369, 1456, and 1468-69. Since not preserved, counsel was not deficient in failing to urge them. Rutherford, *supra*; Downs v. Moore, 801 So. 2d 906, 910 (Fla. 2001); Carroll v. State, 815 So. 2d 601, 621 (Fla. 2002); Cherry v. Moore, 829 So. 2d 873 (Fla. 2002); Lawrence v. State, 831 So. 2d 121, 134 (Fla. 2002). The prosecutor's comments did not constitute fundamental error and were appropriate advocacy as justice under the facts of this case -- a cold-blooded, premeditated contract killing merited the death penalty given the paucity of any meaningful suggested mitigation. There is no fundamental error. P. A. Brown v. State/Crosby, 846 So. 2d 1114 (Fla. 2003).

Moreover, the current argument is a variant of the appellate counsel's complaint about the prosecutor's remarks at DAR 1465-1469 urged in Issue V of the direct appeal brief.[3] This Court

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[3]At page 55 of the direct appeal brief filed by appellate counsel, there is the complaint that:

> "The prosecutor concluded:
>
> * * * *
>
> Nothing that the defense can say, nothing that the defense can do can mitigate this murder. Any killing of a human being is

previously ruled that the unpreserved issues raised did not amount to fundamental error. Mordenti v. State, 630 So. 2d 1080, 1084 (Fla. 1994); see also Damren v. State/Crosby, 838 So. 2d 512 (Fla. 2003); Porter v. Crosby, 840 So. 2d 981 (Fla. 2003); Thompson v. State, 759 So. 2d 650, 657 n 6 (Fla. 2000).

Finally, the claim is procedurally barred as it was raised as Issue XXIV in his Rule 3.850 motion and rejected as barred by the trial court (R 5, 639-643; R 9, 1211). Habeas corpus may not be used as a substitute or additional appeal of his post-conviction motion. Rutherford at 643; Gilliam v. State, 817 So. 2d 768, 781 n 20 (Fla. 2002); Randolph v. State, 853 So. 2d 1051, 1068 (Fla. 2003)("Additionally, this claim is a reargument of a claim from Randolph's 3.850 appeal couched in an ineffectiveness of appellate counsel argument. Thus, to the extent that Randolph is attempting to use this habeas petition as a substitute or an additional appeal of his post conviction motion, Randolph's claim is denied. Hardwick v. Dugger, 648 So. 2d 100, 105 (Fla. 1994)"); Fotopoulos v. State, 838 So. 2d 1122 (Fla. 2002)(Citing such cases as Medina v. Dugger, 586 So. 2d

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> atrocious. Any killing of a human being is aggravating. Nothing mitigates the killing of a human being, but absolutely nothing at all mitigates this. Nothing. Nothing mitigates this." (DAR 1468-69)

317, 318 (Fla. 1991), Thompson v. State, 759 So. 2d 650, 657 n 6 (Fla. 2000), and Mann v. Moore, 794 So. 2d 595, 600-01 (Fla. 2001), Court concludes that identical claims of ineffective appellate counsel [as those raised in 3.850 appeal] were procedurally barred).

ISSUE IV

WHETHER JUROR MISCONDUCT OCCURRED REGARDING JURORS BAKER AND JOHNSTON.

The substantive claim is not cognizable on habeas corpus and is procedurally barred, as it was a claim to be urged if at all on direct appeal and habeas corpus does not function as a second appeal. See Cherry, *supra*; Rutherford, *supra*. The instant claim was not preserved for appellate review by objection below.

Appellate counsel is not ineffective for failing to argue unpreserved or meritless claims. Rutherford, *supra*; Pace v. State/Crosby, 854 So. 2d 167 (Fla. 2003); Marquard v. State/Moore, 850 So. 2d 417 (Fla. 2002); Randolph v. State/Crosby, 853 So. 2d 1051 (Fla. 2003); P. A. Brown v. State/Crosby, 846 So. 2d 1114 (Fla. 2003); Gore v. State/Crosby, 846 So. 2d 461 (Fla. 2003); R. Jones v. State/Crosby, 845 So. 2d 55 (Fla. 2003).

Moreover, the instant claim was asserted as Claim XXVI below (R5, 646) which the trial court rejected as procedurally barred

(R9, 1213). It is impermissible to raise as a claim the same issue or variant in both the 3.850 proceeding and habeas petition. See Gilliam, *supra*; Rutherford, *supra*; Randolph v. State, *supra*; Hardwick v. Dugger, 648 So. 2d 100, 105 (Fla. 1994); Fotopoulos, *supra*; Mann v. Moore, 794 So. 2d 595, 600-01 (Fla. 2001); Parker v. Dugger, 550 So. 2d 459, 460 (Fla. 1989).

Additionally and alternatively the claim is meritless. The record reflects that after the guilt phase juror Baker admitted telling people he was on jury duty -- a murder trial -- and was not to talk about it. He heard that Barry Cohen was a previous defense attorney (DAR 1324-25). He told attorney Jimmy Muench whom he saw in court that he was on a jury trial in a murder case and wasn't to discuss anything; he knew Muench because Baker was a witness in a civil suit Muench was handling and had been deposed (DAR 1325-28). The defense declined to ask Baker questions but suggested making inquiry of the jurors individually (DAR 1326, 1330). The court was apprised that Cohen's name was mentioned and during the trial (DAR 1331, 1349). The court then questioned each juror individually and gave a similar opportunity to counsel as to whether they had been exposed to anything or discussed the case (DAR 1333-1348). All indicated there was not exposure that would limit their impartiality. Juror Johnston indicated that while at work

someone mentioned that Royston committed suicide -- he did not participate in the conversation and left the room (DAR 1342). It would not affect his ability to be fair and impartial (DAR 1344). Defense counsel stated they heard a reasonable explanation about Baker having heard about Mr. Cohen and there was no problem with the other jurors; he talked to his client about juror Johnston, then announced he had no further comment on Johnston. The court ruled there was no reason to remove them from the jury (DAR 1349-50). The defense had no objection to the court excusing the alternate jurors at that time (DAR 1350). This claim is barred and meritless.

ISSUE V

WHETHER THERE IS FUNDAMENTAL ERROR BECAUSE ALLEGEDLY NO RELIABLE TRANSCRIPT OF THE TRIAL EXISTS IN THE DIRECT APPEAL RECORD.

This claim is procedurally barred because it could have been raised as an issue on direct appeal and habeas corpus does not function as a second appeal. See Cherry, *supra*; Rutherford, *supra*; Doyle, *supra*.

Additionally, relief must be denied since Petitioner does not allege facts -- only conclusions -- for his claim nor does he allege prejudice. No relief is available where Petitioner fails to demonstrate how a defective transcript prejudiced his direct appeal. See Velez v. State, 645 So. 2d 42 (Fla. 4th DCA

1994); White v. Singletary, 939 F.2d 912, 914 (11th Cir. 1991); Ferguson v. Singletary, 632 So. 2d 53, 58 (Fla. 1993); Cherry v. State, 659 So. 2d 1069, 1071 n. 1 (Fla. 1995); Thompson v. State, 759 So. 2d 650, 660 (Fla. 2000); Huff v. State, 762 So. 2d 476, 478 n. 2 (Fla. 2000); Freeman v. State, 761 So. 2d 1055, 1061 n. 3 (Fla. 2000)("Even if the Court were to assume that failure to include this portion of the record fell measurably below the standard of competent counsel, Freeman has not demonstrated that the failure prejudiced him." Id. at 1073).

The transcript of the tape contention is meritless since this Court had access to the actual tape for appellate review.

Furthermore, Petitioner has attempted here to reassert the same claim as urged in Claim V below which the trial court rejected as procedurally barred (R5, 570-574; R9, 1189-90). Habeas corpus may not be used as a substitute or additional appeal of his post-conviction motion. See Rutherford, *supra*; Gilliam, *supra*; Randolph, *supra*; Hardwick, *supra*; Fotopoulos, *supra*; Mann, *supra*; Thompson, *supra*; Parker, *supra*.

ISSUE VI

WHETHER THE TRIAL COURT ERRONEOUSLY INSTRUCTED THE JURY ON THE STANDARD BY WHICH TO JUDGE EXPERT TESTIMONY AND WHETHER APPELLATE COUNSEL RENDERED INEFFECTIVE ASSISTANCE.

The substantive claim regarding the jury instruction is not

cognizable on this petition and is procedurally barred since it is an issue that could have been urged on direct appeal and habeas corpus is not a second appeal. See Rutherford v. Moore, 774 So. 2d 637, 643 (Fla. 2000); Thompson v. State, 759 So. 2d 650, 660, n. 6 (Fla. 2000); Hardwick v. Dugger, 648 So. 2d 100, 106 (Fla. 1994).

Petitioner acknowledges that trial counsel did not object to the instruction and thus it was not preserved for appellate review. Appellate counsel is not deficient in failing to assert an issue that has not been preserved by appropriate objection in the lower court. See Rutherford, *supra*; Pace, *supra*; Marquard, *supra*; Randolph, *supra*; Gore, *supra*; Jones, *supra*.

Additionally, Petitioner is impermissibly seeking to raise here the same claim presented as Claim X below in the post-conviction motion which the trial court rejected as procedurally barred (R5, 583-586; R9, 1196). See Gilliam, *supra*; Randolph v. State, 853 So. 2d 1051 (Fla. 2003); Hardwick, *supra*; Fotopoulos, *supra*; Mann, *supra*, Parker, *supra*.

ISSUE VII

WHETHER THE PROSECUTOR'S COMMENTS AND ARGUMENTS RENDERED THE DEATH SENTENCE FUNDAMENTALLY UNFAIR AND WHETHER APPELLATE COUNSEL RENDERED INEFFECTIVE ASSISTANCE.

Petitioner next contends that the prosecutor's closing

arguments in the penalty phase (DAR 1465-69) were improper and inflammatory and rendered the proceedings fundamentally unfair.

As to the substantive claim itself, any claim regarding the prosecutor's comments and arguments is procedurally barred as it could have been urged on direct appeal and habeas corpus may not be used as a substitute for, or a second, appeal. See Cherry, *supra*; Rutherford, *supra*.

As to an assertion that appellate counsel may have been ineffective, counsel cannot be deemed derelict in failing to argue claims that have not been preserved by proper and contemporaneous objection in the trial court. See Rutherford, *supra*; Pace, *supra*; Marquard, *supra*; Randolph, *supra*; Gore, *supra*; Jones, *supra*.

Additionally, appellate counsel nevertheless did argue unpreserved prosecutorial remarks found at DAR 1465-1469 in Point V of the direct appeal brief and this Court determined that many of the issues raised were barred and did not constitute fundamental error. Mordenti v. State, 630 So. 2d 1080, 1084 (Fla. 1994).

The habeas corpus vehicle may not be used to reargue issues raised and ruled upon, or a variant thereof because Petitioner is dissatisfied with the outcome received on direct appeal. Blanco v. Wainwright, 507 So. 2d 1377, 1384 (Fla. 1987).

None of the prosecutor's now-challenged remarks qualify for a finding of fundamental error, i.e., error that "reaches 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." Rutherford v. Moore, 774 So. 2d 637, 646 (Fla. 2000); Chandler v. State, 702 So. 2d 186, 191 n. 5 (Fla. 1997)(describing "fundamental error" as error "so prejudicial as to vitiate the entire trial"). In the penalty phase, similarly, the alleged error must be such that the death sentence would not have been imposed.[4]

Respondent would further note that Petitioner asserted below in his motion for post-conviction relief that the prosecutor had given inflammatory and improper comments in the penalty phase at Claim XIV (R5, 599-608) which the lower court rejected as procedurally barred (R9, 1200). It is impermissible to raise the same, or a variant of the same, issue in the habeas petition as in the post-conviction motion. See Gilliam, *supra*; Randolph, *supra*; Hardwick, *supra*; Fotopoulos, *supra*; Mann, *supra*; Parker, *supra*.

ISSUE VIII

[4]The prosecutor could permissibly urge that the fear depicted in the victim's eyes supported a finding of the HAC aggravator that he was arguing to the jury.

WHETHER FLORIDA'S CAPITAL SENTENCING STATUTE IS UNCONSTITUTIONAL ON ITS FACE AND AS APPLIED BECAUSE IT FAILS TO PREVENT THE ARBITRARY AND CAPRICIOUS IMPOSITION OF THE DEATH PENALTY.

This substantive claim is procedurally barred and is not cognizable on habeas corpus review as it is a claim that could have been and should have been raised on direct appeal and this Court has repeatedly held that habeas corpus is not to be utilized as a second appeal. See Cherry, *supra*; Rutherford, *supra*; Doyle, *supra*.

Petitioner acknowledges that this Court's opinions are to the contrary but claims he is raising the issue "for purposes of preservation." He may not permissibly do so, since he cannot erase the procedural default simply by improperly urging it in an untimely fashion. He must rather satisfy the cause and prejudice test of Wainwright v. Sykes, 433 U.S. 72 (1977) and since he has failed to do so, the claim remains procedurally barred. Petitioner acknowledges that this Court has previously rejected such claims challenging the constitutional validity of the capital statute; he is correct. Rutherford, *supra*, at 644, n 6; Elledge v. State, 706 So. 2d 1340, 1347, n 9 (Fla. 1997); Foster v. State, 679 So. 2d 747, 751-752, nn 4-5 (Fla. 1996). Finally, relief must be denied since petitioner is repeating in this petition a similar claim asserted and rejected below as

procedurally barred in Claim XXII of the post-conviction motion.

CONCLUSION

WHEREFORE, Respondent respectfully requests that this Honorable Court DENY Mordenti's Petition for Writ of Habeas Corpus.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail, to Martin J. McClain, Esq., 141 N.E. 30th St., Wilton Manors, FL 33334, this 10th day of November, 2003.

CERTIFICATE OF TYPE SIZE AND STYLE

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

Respectfully submitted,

CHARLES J. CRIST, JR.
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