IN THE SUPREME COURT OF FLORIDA

MARK ALLEN DAVIS,

Petitioner,

v.

CASE NO. SC04-705
Lower Tribunal No. CRC 85-8933 CFANO

JAMES V. CROSBY, JR.

Respondent.
_____/

RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

COMES NOW the Respondent, James V. Crosby, Jr., by and through the undersigned counsel and hereby files its response in opposition to the Petition for Writ of Habeas Corpus. Respondent would show unto the Court as follows:

STATEMENT OF THE CASE

The appellant, Mark A. Davis, was charged by indictment with first degree murder, robbery and grand theft. (TR 1/8) The cause proceeded to trial on January 13, 1987. (TR 5/588) The jury returned a verdict of guilty as charged on all counts on January 20, 1987. (TR 2/220, 7/892) On January 23, 1987, the sentencing phase was commenced. At the conclusion of that hearing, the jury recommended by a vote of 8 to 4 that the appellant be sentenced to death. (TR 2/234, 265-73) The

sentencing hearing was continued until January 30, 1987. At that time, the trial court made oral findings as to the aggravating factors in support of the death sentence and imposed sentences on all judgments before the court. (TR 9/1641-1645) A written sentencing order was filed on March 18, 1987 finding the following with regard to the aggravating and mitigating circumstances. (TR 2/269-73)

> 1. That the aggravating circumstances found by the Court to be present and listed by the Court with the lettering as set forth in Florida Statute 921.141(5), are as follows:
> (a) That the capital felony was committed while the Defendant, MARK A. DAVIS, was under sentence of imprisonment.
> (b) That the Defendant, MARK A. DAVIS, has been previously convicted of another capital offense or felony involving the use or threat of violence to some person.
> (i) This Court specifically finds, based upon the evidence, that the Defendant has been convicted of the crime of Attempted Armed Robbery. The Attempted Armed Robbery was a felony involving the use or threatened use of violence to another person and that although the Defendant was 16 years of age at that time, he was not adjudicated delinquent, but rather convicted of the crime and sentenced to the Department of Corrections as an adult. Additionally, Defendant was found guilty of Robbery by the Jury herein which found him guilty of Murder in the First Degree.
> (d) That the capital felony was committed while the Defendant was engaged in the commission of the crime of Robbery.
> (f) That the capital felony was committed for pecuniary gain. ***SPECIAL NOTE:*** *This Court does find that aggravating factors, Florida Statute*

921.141(5)(b), (d), and (f) exist in this case. However, the Court consider[s] these three factors as constituting only a single aggravating circumstance.

(h) That the capital felony was especially heinous, atrocious, or cruel, in that the victim, Orville O. Landis, was severely beaten about the face, resulting in two black eyes and abrasions to his nose and forehead, as well as an injury to his mouth. After beating the victim, the Defendant cut the victim's throat after either trying to strangle or strike the victim in the throat with sufficient force to break the victim's hyoid bone. Further, while the victim was still alive, the Defendant slashed the victim's throat eight times. One of these slashes severed the victim's jugular vein. The evidence showed that the slashes to the victim's throat area were made with a small-bladed knife. This knife was broken during the attack, thus forcing the Defendant to find another knife to continue the attack. The Defendant then savagely stabbed the victim with a large butcher knife. The Defendant stabbed the victim five times in the chest area with a butcher knife with such force that blood was splattered high onto the walls around the bed area, and two of the five chest wounds went entirely through the victim's body to the back tissue causing massive internal injuries. Notwithstanding all of these horrendous wounds to the victim, the Defendant continued to attack the victim stabbing him 11 times in the back. Nine of the 11 stabs inflicted with the larger knife (butcher knife) were driven completely through the body with sufficient force to break the victim's ribs in the knife blade's path and penetrate the victim's lungs and heart.

(i) That the capital felony was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. The evidence clearly establishes beyond all reasonable doubt that MARK A. DAVIS had a premeditated and calculated design to murder the victim, Orville O. Landis. Earlier in the day of

the murder, MARK A. DAVIS stated to Beverly Castle that he was going to “rip the old queer off and do away with him.” Further, the Defendant’s actions during the attack clearly establish his calculated and premeditated plan. He first beat the victim and attempted to cut his throat. However, before he could complete this endeavor, the knife broke. Retreating long enough to find yet a large butcher knife, the Defendant returned to the wounded victim and continued with the brutal and vicious attack on Orville O. Landis. “He wouldn’t go down; he just would not die,” the Defendant later said to Shannon Stevens.

2. That none of the remaining aggravating circumstances, set out by statute to be considered, were proved beyond a reasonable doubt.

3. That, as to mitigating circumstances, the Court finds as follows:

(a) That the mitigating circumstance of whether the Defendant has significant history of prior criminal activity does not apply because the Defendant waived this circumstance in exchange for the State not putting on evidence to refute the Defendant’s lack of a criminal record.

(b) That the Defendant was not under the influence of extreme mental or emotional disturbance when the capital felony was committed.

(c) That the victim was not a participant in the Defendant’s conduct nor did he consent to his acts.

(d) That the Defendant was not an accomplice in the capital felony committed by another person and that his participation was not relatively minor.

(e) That the Defendant did not act under extreme duress or under the substantial domination of another person.

(f) That although there is some possibility of an impaired capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law, the Court finds that such capacity was not substantially impaired. There is some evidence that the Defendant had been drinking prior to the murder, but no evidence to

substantiate any substantial impairment on the Defendant's part. Witness testimony established the fact that the Defendant did not show any indicia of intoxication. The evidence clearly established the Defendant was able to have sufficient cognizant powers to clean the murder weapons, take the victim's money, steal the victim's car, negotiate and drive the victim's vehicle across the bridge into Tampa, obtain a motel room, and register under a fictitious name.

(g) That the age of the Defendant at the time of the crime, 21 years, is not a mitigating factor.

4. The Defendant, MARK A. DAVIS, attempted to raise an additional mitigating circumstance through his testimony during the penalty phase. This last mitigating factor which might be considered by the Court consisted of four areas of argument: (1) The Defendant did not take the stand and perjure himself during the guilt phase; (2) The Defendant had enough conscience not to call his mother to the stand to testify in mitigation for him; (3) The Defendant had adjusted well to prison life and would be satisfied to spend 25 years in State Prison; and (4) The Defendant comported himself like a 'gentleman' throughout the trial. The Court finds that the vast majority of all defendants who stand trial fall into areas (1), (2), and (4) raised by Defendant. As to area (3), Defendant, MARK A. DAVIS, admitted during cross-examination that he had discussed escape attempts with other prisoners and had participated in smuggling contraband into the Pinellas County Jail. Clearly, these are not mitigating circumstances sufficient to affect the aggravating circumstances present in this case.

(TR 2/269-272)

An appeal was then taken to this Court. Several briefs were filed prior to this Court's consideration of the case. The Initial Brief of Appellant raised the following claims:

I. INTRODUCTION OF FLA. STAT. §921.141(5)(h)

CONSTITUTES REVERSIBLE ERROR.

A. UNDER MAYNARD, FLA. STAT. §921.141(5)(h) IS UNCONSTITUTIONAL.

II. INTRODUCTION OF A VICTIM IMPACT STATEMENT IS UNCONSTITUTIONAL AS WELL AS REVERSIBLE ERROR REQUIRING RESENTENCING.

A. UNDER BOOTH, INTRODUCTION OF A VICTIM IMPACT STATEMENT AT THE SENTENCING PHASE PURSUANT TO FLA. STAT. §921.141 CONSTITUTES REVERSIBLE ERROR.

III. THE STATE DID NOT PROVE THAT THE CRIME WAS PREMEDITATED SO THAT FLA. STAT. §921.141(5)(i) WAS NOT APPLICABLE AS AN AGGRAVATING FACTOR.

IV. THE COURT SHOULD ORDER A RESENTENCING SINCE IT CANNOT FORECAST THE JURY AND JUDGE'S FINDINGS IF THE PROCEEDINGS HAD BEEN FREE OF ERROR.

Appellant then filed a supplement to the initial brief, asserting the following claim:

INTRODUCTION OF PHOTOGRAPH #11-A AND THE VIDEO TAPE CONSTITUTES REVERSIBLE ERROR DUE TO THEIR INFLAMMATORY NATURE.

Mark Davis then filed a pro se brief raising these additional claims:

I. THE TRIAL COURT ERRED IN LIMITING THE SCOPE OF THE DEFENDANTS RIGHT TO ACT AS CO-COUNSEL.

II. THE TRIAL COURT ERRED IN HEARING AND RULING ON CHALLENGES IN THE DEFENDANTS ABSENCE.

THE RIGHT TO BE PRESENT DURING ALL CRITICAL STATES ATTACHES TO THE EXERCISE OF CAUSE CHALLENGES IN THE DEFENDANTS ABSENCE.

A. UNDER FRANCIS, THE DEFENDANTS ABSENCE AT THIS CRITICAL STAGE OF HIS TRIAL BY JURY CONSTITUTES REVERSIBLE ERROR.

III. COMMENTS ON A DEFENDANTS FAILURE TO TESTIFY IS SERIOUS ERROR.

ANY COMMENTS BY THE PROSECUTION ON ACCUSED FAILURE TO TESTIFY IS A VIOLATION OF THE U.S. FIFTH AMENDMENT.

IV. IT WAS PROSECUTORIAL ERROR FOR THE STATE TO ELICIT TESTIMONY WHICH PLACED THE DEFENDANTS CHARACTER AT ISSUE.

V. IMPROPER COMMENTS BY THE PROSECUTOR IS SERIOUS ERROR.

During the direct appeal, this Court remanded the case for the circuit court to hold a hearing to determine whether Davis was absent when jury challenges were exercised and, if so, whether he waived his presence. Davis v. State, 586 So. 2d 1038, 1041 (Fla. 1991) Circuit Judge John P. Griffin held the hearing where the trial court reporter, the trial judge, appellant, his trial counsel, and counsel for the State testified. Judge Griffin found that appellant was in the courtroom during the time in question. This Court agreed that the finding was supported by competent substantial evidence and therefore the issue was without merit. This Court also affirmed the judgment and sentence, Davis v. State, 586 So. 2d 1038 (Fla. 1991), denying Davis' claims for relief. A motion for rehearing was denied on October 30, 1991.

A Petition for Writ of Certiorari filed in the United States Supreme Court was granted on September 4, 1992. The Court remanded the case to this Court for consideration of the

heinous, atrocious or cruel instruction in light of Espinosa v. Florida, 505 U.S. 1079, 112 S. Ct. 2926, 120, L.Ed.2d 854 (1992). Upon review this Court determined that Davis' challenge to the jury instruction was procedurally barred and that error, if any, was harmless. Davis v. State, 620 So. 2d 152 (Fla. 1993). A motion for rehearing was denied, as was a subsequent petition to the United States Supreme Court. Davis. v. Florida, 510 U.S. 1170 (1994).

In July, 1995, appellant filed an incomplete motion to vacate. (PCR 1/25-191). An amended motion was filed on May 4, 2000. (PCR 12/2044-67) An evidentiary hearing was held on November 5-9, 2001 and relief was denied on April 1, 2002. (PCR 17/2898-2928) A Motion for Rehearing was denied on May 16, 2002 and the Notice of Appeal was filed on June 17, 2002. (PCR 18/3167-8)

STATEMENT OF FACTS

The salient facts from Davis' trial were set forth by this Court as follows in the direct appeal opinion:

> Appellant came to St. Petersburg, Florida, during late June 1985, and immediately prior to the murder of Orville Landis apparently had been living in the parking lot of Gandy Efficiency Apartments. On July 1, 1985, Landis was moving into one of the apartments, and appellant offered to assist him. Subsequent to moving, the two men began drinking beer together, and appellant borrowed money from Landis. Witnesses testified that Landis had approximately $500 in cash that day. Appellant told Kimberly Rieck, a resident of the apartment complex, that he planned to get Landis drunk and "see what he could get out of him." During approximately the same time, appellant told Beverly Castle, another resident, that he was going to "rip him [Landis] off and do him in." Shortly thereafter, Landis and appellant were seen arguing about money and they went to Landis' apartment. Landis was last seen alive on July 1, 1985, at approximately 8:30 p.m. Castle testified that appellant appeared at her door at about midnight and told her that he had to leave town right away, and would not be seen for two or three years. Castle observed appellant driving away in Landis' car. During the afternoon of July 2, Castle became concerned and had Landis' apartment window opened, through which she observed him lying on his bed in a pool of blood.
>
> When the police arrived they found Landis' wallet empty of all but a dollar bill. A fingerprint found on a beer can in the apartment was later identified as appellant's. The medical examiner testified that the victim sustained multiple stab wounds to the back, chest, and neck; multiple blows to the face; was choked or hit with sufficient force to break his hyoid bone; was intoxicated to a degree that impaired his ability to defend himself; and was alive and conscious when each injury was inflicted. The evidence showed that the slashes to the victim's throat were made with a small-bladed knife, which was broken during the attack, and the wounds to the chest and back were made

with a large butcher knife, found at the crime scene.

> Appellant confessed to the police to the killing, as well as to the taking of Landis' money and car. He also told a fellow inmate that he killed Landis but expected to "get second degree," despite his confession, by claiming self- defense.
>
> Davis v. State, 586 So. 2d 1038, 1040 (Fla. 1991)

STATEMENT REGARDING PROCEDURAL BARS

This Court has consistently and repeatedly stated that a state habeas proceeding cannot be used as a second appeal. Issues that were or could have been raised on direct appeal or in prior collateral proceedings may not be litigated anew, even if couched in ineffective assistance of counsel language. See Teffeteller v. Dugger, 734 So. 2d 1009, 1025 (Fla. 1999) (holding that habeas petition claims were procedurally barred because the claims were raised on direct appeal and rejected by this Court or could have been raised on direct appeal); Johnson v. Singletary, 695 So. 2d 263, 265 (Fla. 1996)("All of Johnson's twenty-three claims are procedurally barred - - because they were either already examined on the merits by this Court on direct appeal or in Johnson's 3.850 proceeding, or because they could have been but were not raised in any earlier proceeding - -or meritless."); Medina v. State, 573 So. 2d 293 (Fla. 1990)(stating that it is inappropriate to use a different

argument to relitigate the same issue).

Thus, this Court should expressly reject all of the claims raised in the instant petition as procedurally barred.

STATEMENT REGARDING LEGAL STANDARD

In Rutherford v. Moore, 774 So. 2d 637 (Fla. 2000) this Court summarized the jurisprudence relating to claims of ineffective assistance of appellate counsel. 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); Breedlove v. Singletary, 595 So. 2d 8, 10 (Fla. 1992). As in the standard for ineffective trial counsel, 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 quoting from Thompson, 759 So. 2d at 660; Groover v. Singletary, 656 So. 2d 424, 425 (Fla. 1995). And 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. Williamson v. Dugger, 651 So. 2d 84, 86 (Fla. 1994); Kokal v. Dugger, 718 So. 2d 138, 142 (Fla. 1998); Groover, 656 So. 2d at 425. This is generally true as to issues that would have been found to be procedurally barred had they been raised on direct appeal. Rutherford at 643; Groover at 425; Medina v. Dugger, 586 So. 2d 317, 318 (Fla. 1991). The Rutherford Court then held that counsel was not ineffective for failure to raise on appeal the denial of numerous pretrial motions because many of the underlying substantive claims were without merit - the failure to raise meritless claims does not render counsel's performance ineffective. Kokal, supra; Williamson, supra; Groover, supra, The Rutherford Court also held that some claims were not preserved for appellate review (e.g. that instructions were inapplicable but not unconstitutionally vague, or if initially asserted as vague were not renewed at the appropriate time or supported by an alternative instruction). Id. at 644. Appellate counsel is not ineffective for failing to raise a claim that would have been rejected on appeal and counsel is not deficient for failing to anticipate a change in the law. Darden v. State, 475 So. 2d 214, 216-17 (Fla. 1985); see also Nelms v.

State, 596 So. 2d 441 (Fla. 1992); Stevens v. State, 552 So. 2d 1082, 1085 (Fla. 1989); Lambrix v. Singletary, 641 So. 2d 847 (Fla. 1994).

Additionally the Court considered and rejected a claim in Rutherford that appellate counsel was ineffective for not convincing the Court to rule in his favor on issues actually raised on direct appeal. The Court, citing Routly v. Wainwright, 502 So. 2d 901, 903 (Fla. 1987) and Grossman v. Dugger, 708 So. 2d 249, 252 (Fla. 1997), explained that it will not consider a claim on habeas that appellate counsel was ineffective for failing to raise additional arguments in support of the claim on appeal. Id. at 645. The Court declined to fault appellate counsel 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). See also Hall v. Moore, 792 So. 2d 447 (Fla. 2001).

Rutherford also reiterated that issues that were procedurally barred because 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).

Finally in Happ v. Moore, 784 So. 2d 1091 (Fla. 2001), this Court ruled that appellate counsel cannot be deemed ineffective for failing to raise issues that are procedurally barred because they were not properly raised during the trial court proceedings; nor can appellate counsel be deemed ineffective for failing to raise non-meritorious claims on appeal, or claims that do not amount to fundamental error. Additionally, appellate counsel cannot be deemed ineffective where record refutes the claim that appellate counsel failed to argue certain points on appeal. 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. And where trial counsel did not preserve the specific arguments now raised in the petition, appellate counsel cannot be faulted. Moreover, a petitioner may not reargue the same issue, under the guise of ineffective assistance of appellate counsel, a similar contention urged in the appeal from the denial of a 3.850 motion that trial counsel was ineffective on that issue. Id. at 303. Accord, Jones v. Moore, 794 So. 2d 579, 587 (Fla.

2001)(appellate counsel not deemed ineffective for failing to argue a variant to an issue argued and decided on direct appeal; nor is appellate counsel ineffective for failing to raise unpreserved claims); Freeman v. State, 761 So. 2d 1055, 1069 (Fla. 2000) (Ineffective assistance of counsel cannot be argued where the issue was not preserved for appeal or where the appellate attorney chose not to argue the issue as a matter of strategy); 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 affect of diluting the impact of the stronger points.”)

ARGUMENT

CLAIM I

WHETHER DAVIS WAS DENIED A FAIR TRIAL IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS DUE TO IMPROPER PROSECUTOR'S ARGUMENTS AND WHETHER APPELLATE COUNSEL WAS INEFFECTIVE IN FAILING TO RAISE THIS ISSUE.

Petitioner's first claim maintains that several comments made by the prosecutor were improper and asserts that appellate counsel was ineffective for failing to raise the claim on appeal. Davis fails to mention, however, that he filed a pro se appellate brief that was considered by this Court. In that brief, Davis asserted the following claims raising prosecutorial misconduct:

> III. COMMENTS ON A DEFENDANTS FAILURE TO TESTIFY IS SERIOUS ERROR.
>
> ANY COMMENTS BY THE PROSECUTION ON ACCUSED FAILURE TO TESTIFY IS A VIOLATION OF THE U.S. FIFTH AMENDMENT.
>
> IV. IT WAS PROSECUTORIAL ERROR FOR THE STATE TO ELICIT TESTIMONY WHICH PLACED THE DEFENDANTS CHARACTER AT ISSUE.
>
> V. IMPROPER COMMENTS BY THE PROSECUTOR IS SERIOUS ERROR.

The State responded to the brief and this Court rejected the claims, stating that the claims " are unsupported by the record and are therefore without merit." Davis v. State, 586 So. 2d

1038, 1041 (Fla. 1991). As previously noted, this Court has made it clear that habeas is not to be used as a second appeal to reassert claims that have already been raised on direct and rejected. See Teffeteller v. Dugger, 734 So. 2d 1009, 1025 (Fla. 1999)(holding that habeas petition claims were procedurally barred because the claims were raised on direct appeal and rejected by this Court or could have been raised on direct appeal); Johnson v. Singletary, 695 So. 2d 263, 265 (Fla. 1996)("All of Johnson's twenty-three claims are procedurally barred - - because they were either already examined on the merits by this Court on direct appeal or in Johnson's 3.850 proceeding, or because they could have been but were not raised in any earlier proceeding - - or meritless.")

Moreover, as Davis was allowed to be co-counsel at trial and then filed a separate pro se brief in this Court, his claim of ineffective assistance of appellate counsel should be rejected. If Davis failed to raise all of the components of this argument to this Court, that failure rests on his shoulders and does not entitle him to relief. See Downs v. State, 740 So. 2d 506, 516 (Fla. 1999)(where defendant waived his right to representation during the resentencing proceeding and counsel was appointed as "stand-by" counsel only he may not complain of counsel's failure to present mitigating evidence); Goode v. State, 403 So. 2d 931,

933 (Fla. 1981)(where defendant acted as his own attorney and could not later complain that his "co-counsel" ineffectively "co-represented" him).

Finally, even if this claim was properly before this Court, Davis is not entitled to relief. With the single exception of one line of questioning regarding Davis' attempted escape, the comments he now challenges were not objected to below. (TR 10/1388-90, 1404, 1420-21,812-13, 727, 865, 1523) In the absence of fundamental error, appellate counsel cannot be deemed ineffective for failing to raise an unpreserved claim. Hamilton v. State, 29 Fla. L. Weekly S291 (Fla. June 3, 2004); Thomas v. Wainwright, 486 So. 2d 574, 575 (Fla. 1986)("Habeas corpus is not available for the purpose of reviewing arguments that could have been raised but were not raised by timely objection at trial and argument on appeal.")

The escape inquiry was made over defense objection but was admitted by the lower court to rebut Davis' testimony that he was willing to live under confinement for twenty-five years. (TR 10/1533-34) It was within the lower court's discretion to admit the inquiry by the State on cross-examination. Chandler v. State, 702 So. 2d 186, 196 (Fla. 1997)(Cross examination extends to all matters that may modify, supplement, contradict, rebut, or make clearer the facts testified to in chief.)

Accordingly, Davis cannot show that counsel's performance was deficient or that he was prejudiced by counsel's failure to raise the claim. See Spencer v. State, 842 So. 2d 52, 74 (Fla. 2003)(A core principle of ineffective assistance of counsel claims is that appellate counsel will not be considered ineffective for failing to raise issues that have little or no chance of success.) Davis is not entitled to habeas relief.

CLAIM II

FLORIDA'S CAPITAL SENTENCING PROCEDURE DEPRIVED DAVIS OF HIS SIXTH AMENDMENT RIGHTS TO NOTICE AND TO A JURY TRIAL AND OF HIS RIGHT TO DUE PROCESS.

Davis' next claim is based on the United States Supreme Court's decision in Ring. v. Arizona, 536 U.S. 584 (2002). This claim is not properly raised in the instant petition, does not apply retroactively, is procedurally barred, without merit and is inapplicable to Davis' sentence.

Jurisdiction

Davis is seeking relief from the trial court's jury instructions and rulings. The exercise of habeas jurisdiction is very limited, and does not encompass Davis' request for review of this claim. See Trepal v. State,754 So. 2d 702 (Fla. 2000) (recognizing that habeas review is appropriate to review non-final orders regarding discovery issues in postconviction

proceedings); See also State v. Lewis, 656 So. 2d 1248 (Fla. 1994)(same); State v. Kokal, 562 So. 2d 324 (Fla. 1990)(same); State v. Fourth District Court of Appeal, 697 So. 2d 70 (Fla. 1997)(explaining that district courts of appeal do not have jurisdiction over capital defendants); State v. Matute-Chirinos, 713 So. 2d 1006 (Fla. 1998) (refusing to exercise jurisdiction from district court of appeal wherein case is in the lower court on certiorari review rather than direct review).

Limiting the scope of this Court's original jurisdiction has become necessary due to the practical difficulties experienced by this Court when it has decided to expand such jurisdiction in the past. See Hall v. State, 541 So. 2d 1125 (Fla. 1989)(directing that, in the future, claims under the then recently decided case of Hitchcock v. Dugger, 481 U.S. 393 (1987), would not be cognizable in habeas proceedings, and should be presented in a Rule 3.850 motion); See also Harvard v. Singletary, 733 So. 2d 1020 (Fla. 1999)(recognizing that expansion of original jurisdiction to alleviate burden on trial courts has been "neither time-saving or efficient."). The right to habeas relief, "like any other constitutional right, is subject to certain reasonable limitations consistent with the full and fair exercise of the right." Haag v. State, 591 So. 2d 614, 616 (Fla. 1992). As this Court has said in countless

opinions, habeas corpus is *not* a substitute for an appropriate motion for postconviction relief in the trial court, and is not "a means to circumvent the limitations provided in the rule for seeking collateral postconviction relief" in the original trial court.

The remedy of habeas corpus relief is in all events available only "in those limited circumstances where the petitioner is not seeking to collaterally attack a final criminal judgment of conviction and sentence, or where the original sentencing court would not have jurisdiction to grant the collateral relief requested. Davis cannot meet those requirements. Further, Davis cannot "repackage" this petition and file it in the circuit court as a properly filed successive motion for postconviction relief. See Rule 3.851 (d)(2)(B). Consequently, Davis' request to expand original jurisdiction further is not proper and his claim must be dismissed.

Retroactivity

The United States Supreme Court has recently held in Schriro v. Summerlin, 124 S. Ct. 2519 (2004) that its prior decision in Ring does not apply retroactively. Therefore, Davis is not entitled to relief based on the prior decision in Ring. See also Witt v. State, 387 So. 2d 922, 929-30 (Fla. 1980).

Procedural Bar

The claim that Florida's death penalty sentencing statute violates the Sixth Amendment right to a jury trial has been available since Davis' sentencing, but was never asserted as a basis for relief. Since Davis did not offer this claim in a timely manner, it is now barred. See Parker v. State, 790 So. 2d 1033, 1034-35 (Fla. 2001)(Denying claim under Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348, 147 L.Ed.2d 435 (2000) as not properly preserved for appellate review.)

Merits

Since this Court decided Bottoson v. Moore, 833 So. 2d 693 (Fla. 2002), and King v. Moore, 831 So. 2d 143 (Fla. 2002), it has repeatedly and consistently denied relief requested under Ring, both on direct review cases and on collateral challenges. See e.g. 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); Spencer v. State, 842 So. 2d 52 (Fla. 2003); Sochor v. State, 29 Fla. L. Weekly S363 (Fla. July 8, 2004).

Finally, even if Ring did apply to Florida's death penalty statute, Davis' sentencing court found three aggravators that

take this case outside of the Ring umbrella.[1] See e.g. Doorbal v. State, 837 So. 2d 940, 963 (Fla. 2003)(rejecting Ring claim where one of the aggravating circumstances found by the trial judge was defendant's prior conviction for a violent felony); Belcher v. State, 851 So. 2d 678, 685 (Fla. 2003)(rejecting Ring claim where two of the aggravating circumstances found by the trial judge were defendant's prior violent felony and that the murder was committed in the course of a felony.) Relief should be denied.

CLAIM III

THE TRIAL COURT IMPROPERLY USED DAVIS' JUVENILE ADJUDICATION TO FORM THE BASIS OF THE AGGRAVATING CIRCUMSTANCE OF A CONVICTION OF A PRIOR VIOLENT FELONY. WHETHER DAVIS' DEATH SENTENCE VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS. APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE THIS ISSUE.

Davis next argues that his appellate counsel was ineffective in failing to challenge the "prior violent felony" aggravator

---

[1] (a) That the capital felony was committed while the Defendant, MARK A. DAVIS, was under sentence of imprisonment.
(b) That the Defendant, MARK A. DAVIS, has been previously convicted of another capital offense or felony involving the use or threat of violence to some person.
(d) That the capital felony was committed while the Defendant was engaged in the commission of the crime of Robbery.

based on his 1980 conviction for attempted armed robbery in Illinois. For the following reasons, petitioner has not, and cannot, demonstrate any deficiency of counsel and resulting prejudice arising from appellate counsel's failure to assert a meritless claim.

Trial Court's Written Sentencing Order

The trial court's written sentencing order was filed on March 18, 1987, setting forth the multiple aggravating circumstances established in this case. (TR 2/269-73). The trial court specifically found that the defendant, Mark A. Davis, "has been previously convicted of another capital offense or felony involving the use or threat of violence to some person at §921.141(5)(b), Florida Statutes." The trial court's written order states, in pertinent part:

> 1. That the aggravating circumstances found by the Court to be present and listed by the Court with the lettering as set forth in Florida Statute 921.141(5), are as follows:
>
> * * *
>
> (b) That the Defendant, MARK A. DAVIS, has been previously convicted of another capital offense or felony involving the use or threat of violence to some person.
>
> (i) This Court specifically finds, based upon the evidence, that the Defendant has been convicted of the crime of Attempted Armed Robbery. The Attempted Armed Robbery was a felony involving the use or threatened use of violence to another person and that although the Defendant was 16 years of age at that time, he was not adjudicated

> delinquent, but rather convicted of the crime and sentenced to the Department of Corrections as an adult. Additionally, Defendant was found guilty of Robbery by the Jury herein which found him guilty of Murder in the First Degree.
>
> (TR 2/269-272)

During the defendant's sentencing hearing in 1987, defense counsel argued that the State failed to establish the defendant's prior violent felony conviction as an adult "beyond a reasonable doubt." (TR 11/1634-1635). Thus, although the defendant's "proof beyond a reasonable doubt" complaint arguably could be considered "preserved," it does not constitute a cognizable issue for review on direct appeal. As this Court reiterated in 1997, it "is not this Court's function to reweigh the evidence to determine whether the State proved each aggravating circumstance beyond a reasonable doubt –- that is the trial court's job. Rather, our task on appeal is to review the record to determine whether the trial court applied the right rule of law for each aggravating circumstance and, if so, whether competent substantial evidence supports its finding." Willacy v. State, 696 So. 2d 693, 695 (Fla. 1997). **Prior Violent Felony Aggravator**

Davis' prior record included both his 1980 and 1983 felony convictions from Illinois. Initially, the prosecutor in this

case viewed Davis' 1980 conviction for attempted armed robbery as a juvenile disposition and the trial court relied on analogous caselaw admitting juvenile records. (TR 10/1494-1499). During the penalty phase, the State presented evidence of Davis' May 16, 1983 judgment and sentence from Illinois for burglary, as well as statement from the records supervisor that Davis was on parole at the time of the instant offense. (TR 11/1508). Thereafter, the State also introduced Davis' judgment and sentence for the attempted armed robbery conviction in 1980, and introduced testimonial evidence that Davis committed this attempted armed robbery while armed with a knife. (TR 11/1515).

During the penalty phase, the prosecutor argued that the "prior violent felony" aggravator was supported by Davis' 1980 attempted armed robbery conviction and the prosecutor noted:

> . . . [the State] introduced documentation that, again, you may look at, that in 1980 this defendant was once again before the Court in Illinois for what? An attempted robbery. What did he use in that case? Just as he used in this case, a knife. In that case the victim screamed, he ran and the robbery was not completed. But, the man was convicted and was sentenced to prison and was paroled for that attempted armed robbery. You folks may consider that as one of the aggravating circumstances, a prior act of violence committed by this defendant prior to this particular robbery that's before you now. (TR 11/1552-1553)

During the penalty-phase, the trial court instructed the jury:

> The aggravating circumstances that you may

consider are limited to any of the following that are established by the evidence: First, the crime for which Mark Davis is to be sentenced was committed while he was under sentence of imprisonment. Second, that the defendant has been previously convicted of another capital offense or of a felony involving the use or threat of violence to some person.

A, the crimes of attempted armed robbery which occurred in the past, and, B, armed robbery which occurred during this episode are felonies involving the use or threat of violence to another person.

Third, the crime for which the defendant is to be sentenced was committed while he was engaged in the commission of the crime of robbery.

* * *

Five, the crime for which the defendant is to be sentenced was committed for financial gain.

* * *

If you find that aggravating circumstances number 2B, number 3 and number 5 are present in this case, you should still only consider them as constituting a single aggravating circumstance.

(TR 11/1578-1579)

The defendant's prior conviction status (juvenile vs. adult) again was addressed at the commencement of the sentencing hearing. At this time, the State introduced additional documentary exhibits from the State of Illinois and also presented the testimony of the State's investigator, Scott Hopkins, who conducted a follow-up investigation of Davis' 1980 conviction for attempted armed robbery. During this hearing,

the State established the following:

> [Prosecutor]:
> Q And what did you do pursuant to that follow-up?
>
> [Scott Hopkins]:
> A It was requested of me last Friday to obtain records from whatever sources that would reflect that Mark Davis was tried as an adult pursuant to his charge of attempted armed robbery in 1980.
>
> Q And what specifically did you do in that regard?
>
> A I contacted the Department of Corrections in Illinois and requested any documentation they had that would reflect that he was tried as an adult.
>
> Q And did you have occasion to receive some additional paperwork as well as additional copies of the order which is already introduced in evidence in this case?
>
> A Yes, but the order is –- they sent the second copy of the order which reflects he was convicted.
>
> Q Rather than adjudicated a delinquent?
>
> A Yes, ma'am.
>
> Q Did you then have occasion to talk with an individual with the Department of Corrections in Illinois as well as the district attorney or state attorney's office in Illinois as well as the defense lawyer who represented Mr. Davis in this attempted armed robbery case?
>
> A Yes, ma'am.
>
> Q If you would, please relate to the Court what your findings were, who specifically you spoke to, when you spoke to them and what they advised you.

MR. WHITE [Defense Counsel]: I object to any responses he might be trying to make as to that which might reflect conversations between my client and his former attorney based on the attorney/client privilege.

MS. McKEOWN: I'm not asking him to relate any conversations he had with Mr. Davis, but solely whether or not he was prosecuted as an adult or juvenile within the State of Illinois.

THE COURT: All right. Let's don't get into attorney/client privileges. That would be a matter of public record, actually. Proceed.

A Mark's record was prosecution as an adult.

Q Who specifically did you talk with?

A There were several people.

Q Okay. If you would, please name those individuals.

A The assistant state attorney, Pat Martin, and in Pekin, Illinois, Mark Davis' defense attorney, Peter Ault.

Q Based on your conversation with these two individuals they advised he had been prosecuted as an adult and sentenced as an adult in the State of Illinois?

A Yes, ma'am.

MS. McKEOWN: I have no further questions. Well, Judge, I do.

Q As to the prosecutor, did he have any basis for telling you or reasons for telling you he had been prosecuted as an adult rather than as a juvenile?

A The prosecutor I talked to did not handle this particular case, however, and he could not –- the file was not readily available. However,

he did review what records he did have and he was sure to a reasonable degree of certainty that Mark Davis was prosecuted as an adult. The reasons he gave were threefold. First of all, they do not keep index cards for juveniles; however, they did have an index card for Mark Davis that reflected attempted armed robbery in 1980. Secondly, it had a felony case number as opposed to a juvenile number, and thirdly, the index card reflected Davis received a determinate sentence as opposed to indeterminate sentence which would be consistent to adult sentencing.

Q And did you verify that he does have a distinction between adjudication of delinquency and actual conviction?

A Yes, I did.

Q And did they have this distinction?

A They do.

(TR 11/1603-1606)(emphasis added)

* * *

BY MS. McKEOWN [Prosecutor]:
Q Mr. Hopkins, in talking with the Department of Corrections did you verify he was also on adult probation initially for this offense and it was pursuant to a violation of probation that he was convicted and sentenced to four years ago within the Department of Corrections?

A That's correct.

(TR 11/1608-1609)(emphasis added)

In response to the State's reliance on the certified copies of the written orders from the State of Illinois indicating that Davis' 1980 conviction was an adult conviction (TR 12/1689a-k),

the defense submitted a "statement" obtained from the 1983 burglary case (case 83-CF306) in which Davis, then age 19, was sentenced to three years in state prison. A section of this form in the 1983 burglary case referred to the defendant's "Previous Criminal Record" and listed Davis's prior record as a juvenile disposition. (TR 12/1691c) Addressing this defense exhibit, the prosecutor noted the following objections: (1) this statement (in the 1983 burglary case) was in "absolute conflict" with the [certified copy of the] court order in the 1980 case, (2) this "statement" was not an official judgment in the 1980 attempted armed robbery court case, but was a notation in case #83-CF306 (the subsequent burglary), and (3) if the Court admitted this defense exhibit, the prosecutor requested an opportunity to enter another document –- the official "statement" in case number 80-Y911, the attempted armed robbery case that (a) reflected that Davis was on *adult* probation at the time his probation was revoked, (b) made a distinction between Davis' two prior juvenile delinquencies, and (c) confirmed that, rather than being adjudicated delinquent, Davis was convicted. (See Penalty Phase documentary exhibits, TR 12/1685-1687; Sentencing hearing documentary exhibits, TR 12/1688-1691). The trial court determined that both sets of exhibits would be admitted.

In sum, in relying on Davis' 1980 attempted armed robbery offense as an adult felony conviction involving the use or threat of violence to another person, the State established that on September 17, 1980, the defendant, then age 16, was convicted of attempted armed robbery in Illinois and he was sentenced to four years in the Illinois Department of Corrections. The State not only introduced the written Order reflecting that conviction, confirming that the defendant pled guilty and was sentenced to four years of incarceration, but the State also introduced the in-court testimony of Officer Craig Salmon, the arresting officer from Pekin, Illinois. Officer Salmon testified that Davis and a co-defendant went to a grocery store where they attempted to take money and merchandise at knifepoint from the 60-year old proprietor. (TR 11/1514-1515). Finally, the State introduced additional documentary evidence and testimony from investigator Scott Hopkins who verified that the defendant's 1980 convictions were adult convictions, and were not juvenile dispositions. In Hudson v. State, 708 So. 2d 256, 261 (Fla. 1998), this Court, citing, Waterhouse v. State, 596 So. 2d 1008 (Fla. 1992), found no error in allowing a police officer to testify about the details of the defendant's prior violent crime. In addition, the introduction of the certified copy of the judgment reflecting the defendant's guilty plea to

the prior felony "established beyond a reasonable doubt the aggravating circumstance of prior conviction for a felony involving the use or threat of violence." Hudson, 708 So. 2d at 261, citing Tompkins v. State, 502 So. 2d 415, 420 (Fla. 1986). In this case, based on the documentary record and testimonial evidence, the State established that the 1980 attempted armed robbery offense was a felony involving the use or threatened use of violence to another person; and, although Davis was 16 at the time of this crime, he was not adjudicated delinquent; but, rather, he was convicted of the crime and sentenced as an adult.

On direct appeal, the petitioner's experienced appellate counsel and the *pro se* defendant did not, and credibly could not, challenge the trial court's underlying factual determination: that Davis' 1980 criminal conviction for attempted armed robbery was an adult conviction, not a juvenile disposition. Appellate counsel cannot be faulted for failing to raise a meritless challenge to the "prior violent felony" aggravator based on Davis' 1980 conviction for attempted armed robbery. Moreover, Davis' conspicuous failure to raise any *pro se* challenge to his 1980 attempted armed robbery conviction is the most telling indicator of its lack of merit.

In 1987, the State demonstrated that the defendant's prior violent felony conviction qualified as an aggravating

circumstances under §921.141(5)(b) Florida Statutes, and petitioner cannot establish any deficiency and resulting prejudice under Strickland in failing to raise a meritless issue on direct appeal. See Spencer, *supra*, 842 So. 2d at 74. Even if the prior violent felony aggravator had been struck by this Court, there remained three other valid aggravating factors (HAC, CCP and the merged factors of during the course of a robbery and pecuniary gain) balanced against little to no mitigating factors. This Court in Bruno v. Moore, 838 So. 2d 485, 489 (Fla. 2002), denied a virtually identical claim in a habeas petition, stating:

> As this Court stated in our opinion on direct appeal, the trial record supports the finding of three aggravators in this case: (1) that the murder was committed during a robbery and for pecuniary gain (merged); (2) HAC; and (3) CCP. The trial court determined that Bruno failed to establish any mitigation, either statutory or nonstatutory, and on direct appeal, this determination was upheld. Therefore, any error committed by the trial court was harmless beyond a reasonable doubt in that it did not contribute to the death sentence. Eliminating any such error would have made no difference in Bruno's sentence.
>
> Bruno at 489.

Moreover, at the time of Davis' direct appeal, this Court had not held that a juvenile conviction could not be used as an aggravator. See Campbell v. State, 571 So. 2d 415, 418 (Fla.

1990) (Noting that there is no authority precluding prior juvenile convictions being considered as prior violent felonies in aggravation.) It was not until this Court's decision in Merck v. State, 664 So. 2d 939, 944 (Fla. 1995) that juvenile adjudications were excluded as a conviction within the meaning of section 921.141(5)(b), Florida Statutes (1993). Accordingly, given the factual finding by the trial court, the weighty aggravators that remained and the state of the law at the time of Davis' trial, counsel cannot be faulted for failing to raise this nonmeritorious claim and no prejudice has been shown. Davis is not entitled to habeas relief.

CLAIM IV

THE JURY WAS IMPROPERLY INSTRUCTED AND THE TRIAL COURT IMPROPERLY FOUND THAT WHETHER DAVIS' CONTEMPORANEOUS CONVICTION FOR ROBBERY CONSTITUTED THE AGGRAVATING CIRCUMSTANCE OF A CONVICTION OF A PRIOR VIOLENT FELONY. WHETHER DAVIS' DEATH SENTENCE VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS AND WHETHER APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE THIS ISSUE.

Davis next argues that counsel was ineffective for failing to raise a claim that the lower court improperly considered his contemporaneous conviction of robbery as a prior violent felony. He asserts that if appellate counsel had raised this claim on appeal he would have received a new penalty phase. A review of the record clearly refutes this claim.

In the sentencing order the lower court addressed the robbery conviction as follows:

> That the aggravating circumstances found by the Court to be present and listed by the Court with the lettering as set forth in Florida Statute 921.141(5), are as follows:
>
> (a) That the capital felony was committed while the Defendant, MARK A. DAVIS, was under sentence of imprisonment.
> (b) That the Defendant, MARK A. DAVIS, has been previously convicted of another capital offense or felony involving the use or threat of violence to some person.
> (i) This Court specifically finds, based upon the evidence, that the Defendant has been convicted of the crime of Attempted Armed Robbery. The Attempted Armed Robbery was a felony involving the use or threatened use

> of violence to another person and that although the Defendant was 16 years of age at that time, he was not adjudicated delinquent, but rather convicted of the crime and sentenced to the Department of Corrections as an adult. Additionally, Defendant was found guilty of Robbery by the Jury herein which found him guilty of Murder in the First Degree.
>
> (d) That the capital felony was committed while the Defendant was engaged in the commission of the crime of Robbery.
>
> (f) That the capital felony was committed for pecuniary gain. ***SPECIAL NOTE:*** *This Court does find that aggravating factors, Florida Statute 921.141(5)(b), (d), and (f) exist in this case. However, the Court consider[s] these three factors as constituting only a single aggravating circumstance.*
>
> (TR 2/269-73)

Thus, contrary to Davis argument, the lower court specifically noted that the robbery could not be considered for all three factors and merged it into one aggravator. Moreover, the prior violent felony aggravator was supported by a prior conviction. Accordingly, no improper factor was considered.

Further, this Court reviews claims of improperly found aggravators for harmless error. Barnhill v. State, 834 So. 2d 836 (Fla. 2002); Rimmer v. State, 825 So. 2d 304, 329 (Fla. 2002). Clearly, in light of the trial court's recognition of the limitations in weighing the robbery, any error in applying it was harmless. Accordingly, Davis cannot show deficient

performance or prejudice and relief should be denied.

CLAIM V

THE JURY WAS IMPROPERLY INSTRUCTED AND THE TRIAL COURT IMPROPERLY CONSIDERED INVALID AGGRAVATING CIRCUMSTANCES IN VIOLATION OF DAVIS' EIGHTH AND FOURTEENTH AMENDMENT RIGHTS. APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE THIS ISSUE.

A. DUPLICATIVE AND AUTOMATIC AGGRAVATING FACTORS.

The question of duplicative factors was addressed in claim 4. With regard to Davis' unpreserved claim that his jury was improperly instructed on "automatic aggravators", this Court has repeatedly rejected such claims stating, "it is extremely unlikely that [petitioner] would have successfully appealed this issue because each of the four aggravating circumstances that remained following [the] direct appeal have withstood similar attacks. See Banks v. State, 700 So. 2d 363, 367 (Fla. 1997)(finding instruction of aggravating circumstance of committed while engaged in a sexual battery does not constitute an automatic aggravator); Whitton v. State, 649 So. 2d 861, 867 n. 10 (Fla. 1994)(noting the avoid arrest factor does not contain terms so vague as to leave the jury without sufficient guidance for determining the absence or presence of the factor); Washington v. State, 653 So. 2d 362 (Fla. 1994)(finding HAC aggravating circumstance was neither vague nor arbitrarily and capriciously applied); Kelley v. Dugger, 597 So. 2d 262 (Fla.

1992) (rejecting argument that aggravating factor of pecuniary gain was overly broad). Appellate counsel's failure to appeal an unpreserved and meritless issue is not deficient performance. Reed v. State, 29 Fla. L. Weekly S156, 164 (Fla. April 15, 2004).

B. AVOIDING OR PREVENTING A LAWFUL ARREST.

The avoid arrest factor was not found by the sentencing judge. However, an instruction was given to the jury. As this Court has held that it is not error to instruct a jury on a factor even if it is not found by the trial court, appellate counsel cannot be deemed ineffective for failing to raise the claim. Pace v. State, 854 So. 2d 167, 181 (Fla. 2003)("'The fact that the state did not prove this aggravator to the trial court's satisfaction does not require a conclusion that there was insufficient evidence . . . to allow the jury to consider the factor.' Bowden v. State, 588 So. 2d 225, 231 (Fla. 1991)"). Appellate counsel was not ineffective for failing to raise this issue. Id. at 181.

C. COLD, CALCULATED, AND PREMEDITATED.

The sufficiency of the evidence to support this claim was upheld on appeal.[2] Although Davis' pro se brief challenged the

[2] "Appellant asserts there was insufficient evidence that the murder was cold, calculated, and

HAC instruction as unconstitutionally vague, he did not challenge the CCP instruction as he does now. Thus, Davis has clearly waived this claim. Furthermore, just as Davis' HAC claim was found to be procedurally barred and harmless, Davis v. State, 620 So. 2d 152 (Fla. 1993), so would have this claim as no objection was raised to the instruction below on this basis. Counsel is not ineffective for failing to raise an unpreserved claim.

D. PECUNIARY GAIN.

Davis next asserts that counsel was ineffective for failing to argue error based on the instruction to the jury on the pecuniary gain factor. Davis was found guilty of robbery and

---

> premeditated. n2 We disagree. Castle testified that appellant told her he was going to rip the victim off and "do him in." Furthermore, during the course of inflicting twenty-five stab wounds upon the victim, appellant first used a butcher knife and then resorted to a second knife to continue the brutal slaying. The medical expert opined that no struggle took place other than in the victim's bed, and that the attacker was standing next to the bed during the murder. These facts support the finding that this murder was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. Haliburton v. State, 561 So. 2d 248 (Fla. 1990), cert. denied, 115 L. Ed. 2d 1073, 111 S. Ct. 2910 (1991)."
>
> Davis v. State, 586 So. 2d 1038, 1040 (Fla. 1991)

this conviction was affirmed on appeal.[3] No challenge was made to the vagueness of the instruction thus, this claim would not have been successful on appeal. Davis' claim of ineffective assistance of counsel must fail.

[3] Davis v. State, 586 So. 2d at 1040 n1 (finding that although appellant did not challenge his grand theft and robbery convictions, they are supported by competent substantial evidence in the record.)

CLAIM VI

THE INTRODUCTION OF VICTIM IMPACT EVIDENCE DURING THE GUILT PHASE OF DAVIS' CASE WAS SIXTH, EIGHTH AND FOURTEENTH AMENDMENT ERROR. APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE THIS ISSUE ON APPEAL.

Petitioner's next claim asserts that although appellate counsel challenged the introduction of the victim impact testimony during the sentencing hearing and this Court rejected same, his failure to additionally challenge the admission of testimony by the victim's son-in-law during the guilt phase constitutes ineffective assistance of counsel. This is a classic case of using habeas corpus to obtain a second appeal of the same issue and, as such, should be denied. As explained in Rutherford, this Court will not consider a claim on habeas that appellate counsel was ineffective for failing to raise additional arguments in support of the claim on appeal. Id. at 645. See also Jones v. Moore, 794 So. 2d 579, 587 (Fla. 2001)(appellate counsel not deemed ineffective for failing to argue a variant to an issue argued and decided on direct appeal; nor is appellate counsel ineffective for failing to raise unpreserved claims).

Moreover, Davis has failed to show that counsel's failure to raise this additional aspect of the claim constitutes ineffective assistance of counsel as there was no objection to

the admission of the evidence. This Court in Rutherford also reiterated that issues that were procedurally barred because 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 A review of the testimony of Raymond Hansbrough shows that his references to personal facts about the victim was very limited and was only in the context of explaining the victim's actions at the time of the murder. (TR 7/1004-10)

No fundamental error can be shown here. This evidence was not admitted as victim impact evidence. Furthermore, even if it could be construed as such, there is no prohibition against providing background information about the victim. In Payne v. Tennessee, 501 U.S. 808 (1991), the United States Supreme Court held that "[i]f the State chooses to permit the admission of victim impact evidence and prosecutorial argument on that subject, the Eighth Amendment erects no per se bar." After Payne, Florida chose to allow the admission of victim impact evidence. Section 921.141(7), Florida Statutes (1995). Jackson v. State, 704 So. 2d 500, 502 (Fla. 1997).

Accordingly, this claim should be denied.

CLAIM VII

WHETHER DAVIS' RIGHTS TO AN INDIVIDUALIZED AND CASE-SPECIFIC SENTENCE WERE VIOLATED BY THE TRIAL COURT'S FAILURE TO FILE WRITTEN FINDINGS IN SUPPORT OF THE SENTENCE OF DEATH IN ACCORDANCE WITH THE REQUIREMENTS OF FLORIDA LAW. WHETHER DAVIS' DEATH SENTENCE VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS. APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE THIS ISSUE ON APPEAL.

Davis was sentenced on January 30, 1987. On March 18, 1987, the lower court entered a written order setting forth the aggravators and mitigators found with regard to Davis' sentence of death. Davis now contends that appellate counsel was ineffective for failing to raise this as a claim of error.

This Court in Rutherford v. Moore, 774 So. 2d 637, 649 (Fla. 2000) rejected this same claim, stating:

> Finally, in his eleventh claim, Rutherford argues that his appellate counsel was ineffective for not arguing on appeal that error occurred when the trial court failed to properly state reasons for imposing the death penalty during the sentencing hearing and then failed to file the written sentencing order for eight days. In Rutherford II, this Court affirmed the trial court's finding that this substantive claim was procedurally barred in his 3.850 motion because it could have been raised on direct appeal, even though couched in terms of ineffective assistance of trial counsel. 727 So. 2d at 218-19 n.2. We now reject Rutherford's current claim that appellate counsel was ineffective for failing to raise this issue on direct appeal because the underlying issue is without merit.

This Court explained that although the law now requires the

orders to be filed contemporaneously, that prior to the issuance of Grossman v. State, 525 So. 2d 833, 841 (Fla. 1988), orders could be filed anytime prior to the certification of the record on appeal. Specifically, this Court explained,

> In Van Royal v. State, 497 So. 2d 625, 628 (Fla. 1986), this Court vacated a death penalty sentence because the trial court overrode the jury's life recommendation without making any oral findings at the sentencing hearing and then did not file a written sentencing order for six months, which was after the record on appeal had been certified to this Court. We stated that as long as sentencing orders are filed "on a timely basis before the trial court loses jurisdiction, we see no problem." Id. Then, in Muehleman v. State, 503 So. 2d 310, 317 (Fla. 1987), we declined to vacate a death sentence on the grounds that the sentencing order had been filed two-and-one-half months after the oral pronouncement of sentence, but prior to the record being certified to this Court.
>
> In a subsequent case decided after the direct appeal in Rutherford I, the Court established a prospective procedural rule "that all written orders imposing a death sentence be prepared prior to the oral pronouncement of sentence for filing concurrent with the pronouncement." Grossman v. State, 525 So. 2d 833, 841 (Fla. 1988). However, this Court has previously rejected arguments that Grossman applied retrospectively to cases in which the penalty phase occurred before the decision in Grossman. See Holton v. State, 573 So. 2d 284, 291 (Fla. 1990) (finding no error where sentencing order was filed two months after the oral pronouncement and six days after the record was certified). In this case, the written sentencing order was filed only eight days after the sentencing order and Rutherford does not challenge the sufficiency of the written findings. This short lapse would not have constituted error under Van Royal, Muehleman, and Holton. Appellate counsel cannot be considered ineffective for failing to raise issues on appeal that would have been found to be meritless.

> See, e.g., Kokal, 718 So. 2d at 142; Williamson, 651 So. 2d at 86.
>
> Id. at 649

As the sentencing order in question was entered a year before Grossman was issued, appellate counsel was not ineffective for failing to raise this claim. Rutherford. Accord Cooper v. State, 856 So. 2d 969, 979 (Fla. 2003)(denying habeas relief to Cooper based on the same claim).

CLAIM VIII

WHETHER DAVIS' CONVICTION FOR ROBBERY WAS NOT APPROPRIATE AS THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT SUCH A CONVICTION AND ANY AGGRAVATORS STEMMING FROM THAT CONVICTION. WHETHER DAVIS' SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS WERE VIOLATED AND HIS APPELLATE COUNSEL WAS INEFFECTIVE.

The sufficiency of the evidence to support the robbery conviction was considered by this Court on direct appeal. This Court found that the evidence was sufficient. Davis v. State, 586 So. 2d at 1040, n. 1 (finding that although appellant did not challenge his grand theft and robbery convictions, they are supported by competent substantial evidence in the record.) Accordingly, Davis' attempt to relitigate this issue on habeas review should be denied.

CLAIM IX

WHETHER DAVIS WAS DENIED HIS RIGHT TO BE PRESENT AT ALL CRITICAL STAGES OF HIS CAPITAL TRIAL IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION. WHETHER APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO PROPERLY RAISE THIS ISSUE ON APPEAL.

As petitioner acknowledges, this claim was raised on direct appeal. During the direct appeal, this Court remanded the case for the circuit court to hold a hearing to determine whether Davis was absent when jury challenges were exercised and, if so, whether he waived his presence. Davis v. State, 586 So. 2d 1038, 1041 (Fla. 1991) Circuit Judge John P. Griffin held the hearing after which he found that appellant was in the courtroom during the time in question. This Court agreed that the finding was supported by competent substantial evidence and therefore the issue was without merit. Id. at 1041.

Davis now urges this Court to reconsider its prior ruling because adherence would result in "manifest injustice." (Petition at pgs. 45-46) This Court's habeas jurisprudence clearly warns against such attempts to use habeas corpus as a vehicle to relitigate claims that have already been rejected by this Court. See Parker v. Dugger, 550 So. 2d 459, 460 (Fla. 1989)(habeas is not proper to relitigate issues that were raised

on direct appeal.) Relief should be denied.

CONCLUSION

Based on the foregoing reasons, this Honorable Court should deny the 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 Linda McDermott, Esq., 141 N.E. 30th Street, Wilton Manors, Florida 33334 and to C. Marie King, Assistant State Attorney, P.O. Box 5028, Clearwater, Florida 33758-5028, this _____ day of July, 2004.

CERTIFICATE OF FONT COMPLIANCE

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.
ATTORNEY GENERAL

CANDANCE M. SABELLA
Assistant Attorney General
Chief of Capital Appeals
Florida Bar No. 0445071
3507 East Frontage Road, Suite 200
Tampa, Florida 33607-7013
Telephone: (813) 287-7910
Facsimile: (813) 281-5501

COUNSEL FOR RESPONDENT