IN THE SUPREME COURT OF FLORIDA

EDDIE WAYNE DAVIS,

Appellant,

v. **CASE NO. SC02-2472**
Lower Tribunal No. CF 94-1248 A1-XX

JAMES V. CROSBY, JR., ETC.,

Secretary,
Florida Department of Corrections,
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

Eddie Wayne Davis was indicted on April 7, 1994 for first-degree murder, burglary with assault or battery, kidnapping a child under thirteen years of age, and sexual battery on a child under twelve years of age. (PCR 1/127-131) He was found guilty as charged, the jury unanimously recommended a sentence of death and the trial court sentenced Davis to death. (PCR 1/132-163)

An appeal was taken to this Court raising the following

claims: 1) Denial of motion to suppress statements; 2) Admission into evidence at the guilt phase of appellant's trial, a transcript of the 911 call made by victim's mother after discovering her daughter missing; 3) Admission of irrelevant matters, improper arguments and emotional displays; 4) Florida's standard jury instruction on reasonable doubt; 5) Compelled mental health examination by a prosecutor expert; 6) Prosecutor's comment, cross-examination of witnesses, and introduction of irrelevant evidence, and by the trial court's exclusion of certain defense testimony; 7) Denial of appellant's request to instruct the jury on specific nonstatutory mitigating circumstances and that unanimous agreement required for the consideration of mitigating factors; 8) Jury instruction on aggravating circumstance of avoid arrest; 9) Instruction and finding on the aggravating circumstance of under sentence of imprisonment; 10) Aggravating circumstance of heinous, atrocious or cruel is unconstitutionally vague, arbitrary and capricious and does not narrow the class of persons eligible for the death penalty and whether the jury was properly instructed on the aggravating circumstance of heinous, atrocious or cruel.

This Court denied relief and affirmed the judgment and sentence. Davis v. State, 698 So. 2d 1182 (Fla. 1997). Davis' motion for rehearing was denied on September 11, 1997 and the

mandate was filed on October 15, 1997. (PCR 1/169). The U.S. Supreme Court denied certiorari on February 28, 1998. Davis v. Florida, 522 U.S. 1127 (1998).

Davis' initial Motion to Vacate Judgment of Convictions and Sentences with Special Request for Leave to Amend was filed pursuant to Florida Rule of Criminal Procedure 3.850 on May 28, 1998. (PCR 2/180-204) After a series of motions and responses for records requests, the Court sent out an Order setting post-conviction relief deadlines. (PCR 2/279-281) On June 23, 2000, Davis filed his First Amended Motion to Vacate Judgement of Convictions and Sentences with Special Request for Leave to Amend and for Evidentiary Hearing. (PCR 2-3/282-410) The State responded on August 21, 2000. (PCR 3/415-21) A hearing was held pursuant to Huff v. State, 622 So. 2d 982 (Fla. 1993) on January 25, 2001, based on the June 23, 2000 Motion to Vacate Judgement of Convictions and Sentences. (PCR 3/422-53) The Court entered an Order Granting in Part and Denying in Part Defendant's Request for an Evidentiary Hearing on his First Amended Motion to Vacate Judgement and Sentences on January 30, 2001. (PCR 4/454-95) On October 8 and 9, 2001, an evidentiary hearing was held. The motion was denied on June 12, 2002 and a timely Notice of Appeal followed. (PCR 687-713, 714) The instant petition was filed contemporaneously with the Initial Brief of

Appellant on December 2, 2002.

STATEMENT OF FACTS

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

> On the afternoon of March 4, 1994, police found the body of eleven-year-old Kimberly Waters in a dumpster not far from her home. She had numerous bruises on her body, and the area between her vagina and anus had been lacerated. An autopsy revealed that the cause of death was strangulation.
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> On March 5, police questioned Davis, a former boyfriend of Kimberly's mother, at the new residence where he and his girlfriend were moving. Davis denied having any knowledge of the incident and said that he had been drinking at a nearby bar on the night of the murder. Later that same day police again located Davis at a job site and brought him to the police station for further questioning, where he repeated his alibi. Davis also agreed to and did provide a blood sample.
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> While Davis was being questioned at the station, police obtained a pair of blood-stained boots from the trailer Davis and his girlfriend had just vacated. Subsequent DNA tests revealed that the blood on the boots was consistent with the victim's blood and that Davis's DNA matched scrapings taken from the victim's fingernails. A warrant was issued for Davis's arrest.
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> On March 18, Davis agreed to go to the police station for more questioning. He was not told about the arrest warrant. At the station, he denied any involvement and repeated the alibi he had given earlier. After about fifteen minutes, police advised Davis of the DNA test results. Davis insisted they had the wrong person and asked if he was being arrested. Police told him that he was. At that point Davis requested to contact his mother so she could obtain an attorney for him, and the interview ceased. Davis was placed in a holding cell.
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> A few minutes later, while Davis was in the holding cell, Major Grady Judd approached him and, making eye contact, said that he was disappointed in Davis. When Davis responded inaudibly, Judd asked him to repeat what he had said. Davis made a comment

suggesting that the victim's mother, Beverly Schultz, was involved. Judd explained that he could not discuss the case with Davis unless he reinitiated contact because Davis had requested an attorney. Davis said he wanted to talk, and he did so, confessing to the crimes against Kimberly and implicating Beverly Schultz as having solicited the crimes. Within a half hour after this interview, police conducted a taped interview in which Davis gave statements similar in substance to the untaped confession. Davis's full Miranda warnings were not read to him until the taped confession began.

In May, 1994, Davis wrote a note asking to speak to detectives about the case. In response, police conducted a second taped interview on May 26, 1994. Police asked Davis if he was willing to proceed without the advice of his counsel, to which Davis responded yes, but specific Miranda warnings were not recited to Davis. During this interview, Davis again confessed to killing Kimberly but stated that Beverly Schultz was not involved. Davis explained that he originally went to Schultz's house to look for money to buy more beer. Because Schultz normally did not work on Thursday nights and because her car was gone, Davis believed that no one was home. Indeed, Schultz was not home at the time because she had agreed to work a double shift at the nursing rehabilitation center where she was employed. However, her daughters, Crystal and Kimberly, were at the house sleeping. When Davis turned on the lights in Beverly Schultz's bedroom, he saw Kimberly, who was sleeping in Schultz's bed. Kimberly woke up and saw him. He put his hand over her mouth and told her not to holler, telling her that he wanted to talk to her. Kimberly went with him into the living room. Davis put a rag in her mouth so she could not yell.

Davis related that they went outside and jumped a fence into the adjacent trailer park where Davis's old trailer was located. Davis said that while they were in the trailer, he tried to put his penis inside of Kimberly. When he did not succeed, he resorted to pushing two of his fingers into Kimberly's vagina. Afterwards, Davis took Kimberly to the nearby Moose Lodge. He struck her several times, then placed a piece of plastic over her mouth. She struggled and ripped the plastic with her fingers but Davis held it

over her mouth and nose until she stopped moving. He put her in a dumpster and left.

Davis moved to suppress the March 18 and May 26 statements he made to law enforcement officers, arguing that his Miranda rights were violated. The trial court denied those motions. The jury found Davis guilty of first-degree murder, burglary with assault or battery, kidnapping a child under thirteen years of age, and sexual battery on a child under twelve years of age. The jury unanimously recommended a sentence of death and the trial court sentenced Davis to death.

Davis at 1186-87 (footnote omitted)

ARGUMENT

Petitioner raises six claims in the instant petition under the umbrella of an ineffective assistance of appellate counsel claim. The issues raised in the instant petition are:

Claim One: Denial of the right to testify.

Claim Two: Constitutionality of statute under Apprendi and Ring.

Claim Three: Victim's mother remaining in courtroom after her testimony.

Claim Four: Admission of victim's photographs.

Claim Five: Cumulative error.

Claim Six: Potential incompetency at time of execution.

In his Rule 3.850 appeal, Davis raised the following issues:

1) Waiver of Davis' right to testify.

2) Failure to present any evidence of post traumatic stress due to extensive sexual abuse.

3) Failure to present defense of voluntary intoxication.

4) Failure to argue the inherent unreliability of Davis' confessions.

5) Florida's capital sentencing statute is unconstitutional.

6) Incompetency at the time of execution.

7) Cumulative error.

A review of the foregoing claims makes it clear that many

of the claims raised in the instant petition for writ of habeas corpus are also presented in the Rule 3.850 appeal. By including these types of claims within his petition for writ of habeas corpus, "collateral counsel has accomplished nothing except to unnecessarily burden this Court with redundant material." Blanco v. Wainwright, 507 So. 2d 1377, 1384 (Fla. 1987) 507 So. 2d at 1384. Accord, Demps v. Dugger, 714 So. 2d 365, 368 (Fla. 1998).

With respect to several of the issues raised in this habeas petition, petitioner gratuitously asserts that appellate counsel was ineffective for failing to raise the issues on direct appeal. In McCrae v. Wainwright, 439 So. 2d 868 (Fla. 1983), this Court held that "[h]abeas corpus should not be used as a vehicle for presenting issues which should have been raised at trial and on appeal", citing Hargrave v. Wainwright, 388 So. 2d 1021 (Fla. 1980), and State ex rel. Copeland v. Mayo, 87 So. 2d 501 (Fla. 1956). In McCrae, this Court specifically opined that:

> . . . Allegations of ineffective appellate counsel therefore should not be allowed to serve as a means of circumventing the rule that habeas corpus proceedings do not provide a second or substitute appeal.
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> Id. at 870

This type of admonition has been consistently followed by

this Honorable Court and this Court has specifically noted "that habeas corpus is not a vehicle for obtaining additional appeals of issues which were raised, or should have been raised, on direct appeal or which were waived at trial or which could have, should have, or have been raised in Rule 3.850 proceedings." White v. Dugger, 511 So. 2d 554 (Fla. 1987), citing Blanco, supra, and Copeland v. Wainwright, 505 So. 2d 425 (Fla. 1987). Thus, to the extent that petitioner is again asking this Court to exercise its jurisdiction over issues not legally cognizable on habeas review, this Court should decline to do so.

Respondent urges this Court to continue to enforce its procedural default policy; otherwise, appeal will follow appeal and there will be no finality in capital litigation. Cf. Johnson v. State, 536 So. 2d 1009 (Fla. 1988) (the credibility of the criminal justice system depends upon both fairness and finality). In Harris v. Reed, 489 U.S. 255 (1989), the Supreme Court held that where a state court was ambiguous in its ruling denying relief on both procedural and substantive grounds, the federal habeas courts should reach the merits:

> Faced with a common problem, we adopt a common solution: a procedural default does not bar consideration of a federal claim on either direct or habeas review unless the last state court rendering a judgment in the case "clearly and expressly" states that its judgment rests on a state procedural bar.
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> The court added in footnote 12:

> . . . Additionally, the dissent's fear, post, p.11-12 and n.6, that our holding will submerge courts in a flood of improper prisoner petitions is unrealistic: a state court that wishes to rely on a procedural bar rule in a one-line pro forma order can easily write that "relief is denied for reasons of procedural default."

Notwithstanding the foregoing, the state asserts that as the following will show, petitioner is not entitled to relief on his claims of ineffective assistance of appellate counsel as he has failed to establish (1) specific errors or omissions which show that appellate counsel's performance deviated from the norm or fell outside the range of professionally acceptable performance; and (2) the deficiency of that performance compromised the appellate process to such a degree as to undermine confidence in the fairness and correctness of the appellate result." Strickland v. Washington, 466 U.S. 668 (1984).

Claim 1: Denial of the right to testify.

Davis first asserts that *appellate* counsel was ineffective for failing to assert on appeal that fundamental error occurred when Davis "was denied his right to testify on his own behalf in the penalty phase of his trial." As previously noted, this Court has made it clear that claims raised in a habeas petition which petitioner has raised in prior proceedings and which have

been previously decided on the merits in those proceedings are procedurally barred in the habeas petition. See Mann v. Moore, 794 So. 2d 595, 600-01 (Fla. 2001). The substance of this claim was presented in the motion to vacate as an ineffective assistance of *trial* counsel claim and was denied after an evidentiary hearing. This claim has also been presented in the Rule 3.850 appeal. In that appeal, Davis asserted that trial counsel was ineffective for failing to insist that the court inquire as to whether Davis wanted to take the witness stand during the penalty phase of his trial and that it was fundamental error to allow defense counsel to waive Davis' right to testify. The state asserted in response that to the extent that Davis was asserting fundamental error occurred by allowing defense counsel to waive Davis' right to testify, it is procedurally barred as a direct appeal issue. As for Davis' claim of ineffective assistance of counsel for failing to obtain an on-the-record waiver, the state contended that this claim was properly denied as Davis had not shown either deficient performance or prejudice with regard to this claim.

Moreover, appellate counsel cannot be ineffective for not raising on appeal an issue with little or no merit. Mann v. Moore, 794 So. 2d 595, 599 (Fla. 2001); Rutherford v. Moore, 774 So. 2d 637, 643 (Fla. 2000). As the state noted in the answer

brief in the Rule 3.850 appeal, the underlying claim is simply without merit and no error, fundamental or otherwise, has been shown. Most recently, in Lawrence v. State, 831 So. 2d 121 (Fla. 2002), this Court reiterated that due process does not require that the Defendant waive his right to testify on-the-record. Citing to Occhicone v. State, 570 So. 2d 902 (Fla. 1990); State v. Singletary, 549 So. 2d 996 (Fla. 1989); Torres-Arboledo v. State, 524 So. 2d 403, 410-11 (Fla. 1988), this Court has repeatedly considered and rejected the claim it should adopt a rule requiring a record waiver of the right to testify. Id.

The record in the instant case established that his allegation that he was denied the right to testify is specifically refuted by the testimony of trial counsel Austin Maslanik at the evidentiary hearing below. In response to an inquiry as to whether he ever talked to Davis about testifying in the penalty phase of the trial, Maslanik stated, “Yes, I had.” (PCR 4/511) Maslanik further testified that his procedure is to talk to the client about testifying in guilt and penalty phase. He would give them his advice but if they insisted, the ultimate decision was theirs to make. He testified that his notes reflect that he and Davis discussed what Davis could tell the jury about his life and how he feels about Kimberly’s death.

(PCR 4/512) He also noted that Davis never told him he wanted to testify. (PCR 4/531) The record further shows that during the guilt phase Davis was advised of his right to testify on the record and that he waived that right. (TR 17/2008-09)

Accordingly, as the claim has little or no merit, Davis has not established that appellate counsel's failure to raise the claim constitutes ineffective assistance of counsel. This claim should be denied.

Claim 2: Constitutionality of statute under APPRENDI and RING.

Davis' next claim is that Florida's death penalty statute is unconstitutional under Apprendi v. New Jersey, 120 S. Ct. 2348 (2000) and Ring v. Arizona, 122 S. Ct. 2428 (2002). Although Davis does not actually assert the basis of this Court's jurisdiction to review the claim, petitioner makes a single assertion at the end of his claim that he "is entitled to the benefit of *Apprendi* and *Ring* under Witt v. State, 387 So. 2d 922, 929-930 (Fla. 1980)." This single reference to Witt, without argument or other supporting authority is not sufficient to properly raise this claim. Reaves v. Crosby 28 Fla. L. Weekly S32, __ So. 2d __ (Fla. Jan. 9, 2003) (claim that prior convictions should not have been considered as an aggravating factor not properly before Court, where it is presented in one

cursory sentence without any argument relative to this ground), quoting, Duest v. Dugger, 555 So. 2d 849, 852 (Fla. 1990) ("'The purpose of an appellate brief is to present arguments in support of the points on appeal. Merely making reference to arguments below without further elucidation does not suffice to preserve issues, and these claims are deemed to have been waived.'") Even if this claim is properly presented in the instant petition, Davis is not entitled to relief.

First, it is procedurally barred since Davis failed to assert at the time of trial or on appeal that it would violate his Sixth Amendment right to trial by jury for the jury not to determine the appropriate aggravating factors.[1] This Court has applied the procedural bar doctrine to claims brought under the predecessor decision of Apprendi v. New Jersey, 530 U.S. 466 (2000). 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).

Moreover, although Davis fails to acknowledge the legion of

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[1] No claim of ineffective assistance of appellate counsel has been presented as to this issue. Even if such a claim had been presented it is without merit as ineffective assistance can not be used to circumvent the procedural bar, it was unpreserved at trial and the underlying claim does not constitute fundamental error.

cases from this Court that are directly on point and contrary to his position, this Court has consistently upheld our statute in response to challenges under Ring, holding that unlike the situation in Arizona, the maximum sentence for first degree murder in Florida is death. Porter v. Crosby, __ So. 2d __, 28 Fla. L. Weekly S33, 34 (Fla. January 9, 2003) ("we have repeatedly held that maximum penalty under the statute is death and have rejected the other Apprendi arguments" [that aggravators read to be charged in the indictment, submitted to jury and individually found by unanimous jury]). See also King v. Moore, 831 So. 2d 143 (Fla. 2002); Bottoson v. Moore, 833 So. 2d 693 (Fla. 2002); Marquard v. State/Moore, __ So. 2d __, 27 Fla. L. Weekly S973 n. 12 (Fla. November 21, 2002) (As in King and Bottoson, defendant not entitled to relief); Chavez v. State, 832 So. 2d 730 (Fla. 2002); Bruno v. Moore, __ So. 2d __, 27 Fla. L. Weekly S1026, 1028 (Fla. December 5, 2002); Fotopoulos v. State/Moore, __ So. 2d __, 28 Fla. L. Weekly S1, 5 (Fla. December 19, 2002); Lucas v. State/Moore, __ So. 2d __, 28 Fla. L. Weekly S29, 32 (Fla. January 9, 2003); Dusty Ray Spencer v. State/Crosby, __ So. 2d __, 28 Fla. L. Weekly S35, 41 (Fla. January 9, 2003); Anderson v. State, __ So. 2d __, 28 Fla. L. Weekly S51 (Fla. January 16, 2003); Cole v. State/Crosby, __ So. 2d __, 28 Fla. L. Weekly S58, 64 (Fla. January 16, 2003);

Conahan v. State, __ So. 2d __, 28 Fla. L. Weekly S70, 57 n. 9 (Fla. January 16, 2003). Since the Florida death penalty statute does not suffer from the constitutional infirmities that resulted in the remand to Arizona in Ring, Davis is not entitled to relief.

In addition, the Ring decision is not subject to retroactive application under the principles of Witt v. State, 387 So. 2d 922, 929-30 (Fla. 1980). Pursuant to Witt, Ring is only entitled to retroactive application if it is a decision of fundamental significance, which so drastically alters the underpinnings of Davis' death sentence that "obvious injustice" exists. New v. State, 807 So. 2d 52 (Fla. 2001). In determining whether this standard has been met, this Court must consider three factors: the purpose served by the new case; the extent of reliance on the old law; and the effect on the administration of justice from retroactive application. Ferguson v. State, 789 So. 2d 306, 311 (Fla. 2001). Application of these factors to Ring, which did not directly or indirectly address Florida law, offers no basis for consideration of Ring in this case. Compare Cannon v. Mullin, 297 F.3d 989 (10th Cir. 2002) (rejecting the claim that Ring is retroactive in federal courts.)

Finally, any error must be regarded as harmless. The record

establishes that Davis was indicted and a jury found Davis guilty as charged of first-degree murder, burglary with assault or battery, kidnapping a child under thirteen years of age, and sexual battery on a child under twelve years of age. The jury also unanimously recommended a sentence of death. (TR 1/3-5, 4/529-30, 590) Accordingly, no relief is warranted.

Claim Three: Victim's mother remaining in courtroom after her testimony.

Petitioner next asserts that counsel was ineffective for failing to challenge the trial court's decision to allow the victim's mother Beverly Schultz to remain in the courtroom after her testimony was completed. Davis concedes that this is a matter within the trial court's discretion but argues that the presence of the young victim's mother in the courtroom caused egregious damage to the fairness of his trial. Davis fails, however, to point to anything that actually happened as a result of her being allowed to remain in the courtroom while the confessed killer of her child was tried. There is no evidence in this record that she in any way disrupted the proceedings. Under similar circumstances, this Court has recognized the right of the victim's mother to be present in the courtroom. Rose v. State, 787 So. 2d 786, 804 (Fla. 2001) (mother of minor child victim properly allowed to remain in the courtroom). See also

Gore v. State, 599 So. 2d 978, 985-86 (Fla. 1992) (rejecting claim where no showing here of any prejudice by the presence of victim's stepmother.)

Accordingly, it cannot be said that counsel's performance in failing to assert the nonmeritorious claim was deficient. Moreover, since there is no merit to the claim and as he has failed to show that he suffered undue prejudice by her presence, error, if any, would have been harmless. Davis is not entitled to relief on the claim.

Claim Four: Admission of victim's photographs.

Davis next asserts that appellate counsel was ineffective for failing to challenge the admission of victim's photographs. Davis is not entitled to habeas relief. The admission of photographic evidence of a murder victim is within the sound discretion of the trial court and its ruling will not be disturbed on appeal absent abuse. Carroll v. State, 815 So. 2d 601, 621 (Fla. 2002) (rejecting photograph claim on habeas). Where the photographs are relevant to "explain a medical examiner's testimony, to show the manner of death, the location of wounds, and the identity of the victim, "appellate counsel was not ineffective for failing to raise this issue on appeal." Id. at 621.

In the instant petition, Davis does not identify any specific photographs; he just generally asserts that the assistant state attorney introduced a "series of photographs of the victim into evidence." (Petition at 39) This presumably refers to the series of photographs the state introduced during the testimony of medical examiner Dr. Alexander Melamud. (TR 15/1705, 1712) A review of the record clearly shows that these photographs, as were the photographs in Carroll, supra, were relevant to explain the medical examiner's testimony, to show the manner of death, the location of wounds, and the identity of the victim.

Prior to the introduction of the photographs, the court heard argument as to their admissibility. (TR 15/1608-15) Defense counsel waived any objection to 5 photographs but objected to State's exhibits #62, #63, #64 and #66. Exhibit #62 was a picture of the victim in the dumpster, #66 was on the autopsy table. (TR 15/1609-11) The state explained that one would be used to describe the condition she was in when she was found and the other established the nature of her wounds. Exhibits #63 and #64 showed injuries which were not visible in the other pictures. They also showed the lividity which Dr. Melamud would testify about as it established the length of time she laid there. He noted that the medical examiner needed the

photographs to explain the extent of her injuries and that he was only seeking to introduce a few of the many, many photographs taken in the case. (TR 15/1612-14) Subsequently, the photographs were introduced and Dr. Alexander Melamud used them extensively to illustrate and explain his testimony. (TR 15/1705, 1712, 1715-35)

Accordingly, as there is no merit to the claim, appellate counsel cannot be deemed ineffective for failing to raise a nonmeritorious claim. Carroll; Finney v. State, 831 So. 2d 651 (Fla. 2002); Floyd v. State, 808 So. 2d 175 (Fla. 2002).

Claim Five: Cumulative error.

Davis' next claim asserts that the combined effect of all alleged errors in this case warrants a new trial and/or penalty phase. This cumulative error claim is contingent upon Davis demonstrating error in at least two of the other claims presented in his motion. For the reasons previously discussed, he has not done so. Thus, the claim must be rejected because none of the allegations demonstrate any error, individually or collectively. Although this may be a legitimate claim on the facts of a particular case, such facts are not present herein. No relief is warranted. Atwater v. State, 788 So. 2d 223, 238 (Fla. 2001) (where no errors occurred, cumulative error claim is

without merit); Downs v. State, 740 So. 2d 506, 509 (Fla. 1999) (finding that where allegations of individual error are found without merit, a cumulative error argument based thereon must also fail); Johnson v. Singletary, 695 So. 2d 263, 267 (Fla. 1996) (no cumulative error where all issues which were not barred were meritless.)

Claim Six: Potential incompetency at time of execution.

Davis next argues, as he has in his Rule 3.850 appeal, that it would violate the Eighth Amendment's prohibition against cruel and unusual punishment to execute him since he may be incompetent at the time of execution. He concedes, however, that this issue is premature and that he cannot legally raise the issue of his competency to be executed until after a death warrant is issued. Thus, this claim is without merit. See Hunter v. State, 817 So. 2d 786 (Fla. 2002); Hall v. Moore, 792 So. 2d 447, 450 (Fla. 2001).

CONCLUSION

Based on the foregoing reasons, this Honorable Court should deny the Petition for Writ of Habeas Corpus.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to Richard E. Kiley, Assistant CCC, Office of the Capital Collateral Counsel - Middle Region, 3801 Corporex Park Drive, Suite 700, Tampa, Florida 33619, this _____ day of March, 2003.

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).

COUNSEL FOR RESPONDENT