IN THE SUPREME COURT OF FLORIDA

KENNETH STEWART,

Petitioner,

v. **Case No. SC02-2716**

JAMES V. CROSBY, JR.,

Respondent.

_____/

RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

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

FACTS AND PROCEDURAL HISTORY

The facts of this case are recited in this Court's initial opinion, reported at Stewart v. State, 549 So. 2d 171, 172 (Fla. 1989):

> In April 1985, Michele Acosta and Mark Harris picked up appellant, Kenneth Stewart, while he was hitchhiking. When Acosta stopped to drop Stewart off, he struck her on the head with the butt of a gun and fired

> three shots, hitting Acosta in the shoulder and Harris in the spine. Stewart then forced Acosta and Harris from the car before driving off and picking up a friend, Terry Smith. The two removed items from the car's trunk and Stewart burned the car after telling Smith that the car belonged to a woman and a man whom he had shot. Acosta recovered from her injuries; Harris later died.
>
> Stewart was arrested and ultimately charged with first-degree murder, attempted first-degree murder, armed robbery, and arson. He consented to a search of his apartment, which yielded the items he and Smith had taken from Acosta's car. When shown a photopack display of suspects, Harris, who had not yet expired, and Acosta identified Stewart as the assailant. Acosta also identified Stewart in person at a preliminary hearing. While in jail, Stewart telephoned his grandparents. Detective Lease, who was visiting the grandparents, obtained their permission to secretly listen in on an extension. Via pretrial motions, Stewart sought to suppress the identifications made by Acosta and Harris, and the telephone conversation overheard by Lease. The court excluded the identification made by Harris, but ruled admissible both of Acosta's identifications and the telephone conversation.

Petitioner Stewart was charged with the first degree murder of Mark Harris, the attempted first degree murder and armed robbery of Michelle Acosta, and second degree arson (DA-R. V7/857-58, 874-75, 920).[1] Stewart pled not guilty and trial

[1]References to the record in the direct appeal from Stewart's convictions and sentences, Florida Supreme Court Case No. 70,015, will be referred to as "DA-R," followed by the appropriate volume and page number; references to the one-volume

commenced on August 25, 1986, before the Honorable John P. Griffin, Circuit Judge (DA-R. V1-V5).

The State's case focused on the testimony of Michelle Acosta, the eyewitness and surviving victim, describing the events surrounding Harris' murder; and Terry Smith, a friend of Stewart's that testified that Stewart had admitted the shootings and provided details about the offense to Smith (DA-R. V3/287-315, V3/350-381). The State also presented testimony about a telephone conversation Stewart had with his grandmother, overheard by a police detective, wherein Stewart admitted that he shot the victims to rob them (DA-R. V3/381-388, 400-403). Finally, the State offered forensic testimony about the bullets recovered from the scene matching a gun and ammunition found in Stewart's possession at the time of his arrest (DA-R. V4/465-496).

The theory of defense was to admit that Stewart shot Harris and Acosta, but under circumstances which would require the jury to return verdicts for lesser offenses (DA-R. V3/280-284). The jurors were told during opening statements that Stewart would

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record in the direct appeal from Stewart's resentencing, Florida Supreme Court Case No. 75,337, will be referred to as "RS-R," followed by the appropriate page number; references to the record in Stewart's postconviction appeal, Florida Supreme Court Case No. 96,177, will be referred to as "PC-R," followed by the appropriate volume and page number.

not testify and the defense would not be presenting its own case (DA-R. V3/280). The defense seized upon Acosta's testimony that she hit the gas pedal just at the time of the shootings, trying to throw Stewart off balance, and noted discrepancies between Acosta's description of the offense and that provided by state witness Terry Smith, in order to present a defense that the shooting was accidental and not in furtherance of a felony (DA-R. V4/512-527, 537-544).

After deliberations, the jury found Stewart guilty of first degree felony murder, attempted second degree murder with a firearm (a lesser offense), robbery with a firearm, and second degree arson (DA-R. V4/582, V8/904-06, 1011). Following the penalty phase of the trial, a jury recommended that the court impose a sentence of death by a vote of 10 - 2 (DA-R. V5/756-57). Judge Griffin followed the recommendation and imposed a sentence of death on the murder conviction, two fifteen year sentences on the attempted murder and arson convictions, and a life sentence for the armed robbery conviction (DA-R. V7/837-840).

On appeal, Stewart was represented by Assistant Public Defender Douglas Connor, and alleged the following errors:

ISSUE I

THE TRIAL COURT ERRED BY REFUSING TO

SUPPRESS INCRIMINATING STATEMENTS MADE BY STEWART DURING A TELEPHONE CONVERSATION WITH HIS GRANDMOTHER WHICH DETECTIVE LEASE INTERCEPTED.

ISSUE II

THE TRIAL COURT ERRED BY FORCING STEWART TO STAND TRIAL IN SHACKLES WITHOUT CONDUCTING AN EVIDENTIARY HEARING OR CONSIDERING ALTERNATIVE SECURITY MEASURES.

ISSUE III

THE TRIAL JUDGE ERRED BY OVERRULING APPELLANT'S OBJECTION TO THE BAILIFF, DEPUTY MORONE, TESTIFYING AS A PROSECUTION WITNESS IN THE PENALTY PHASE.

ISSUE IV

THE TRIAL JUDGE ERRED BY REFUSING TO GIVE DEFENSE REQUESTED SPECIAL PENALTY PHASE INSTRUCTION NUMBER ONE BECAUSE THE STANDARD JURY INSTRUCTIONS ARE OTHERWISE SUBJECT TO INTERPRETATION IN AN UNCONSTITUTIONAL MANNER.

ISSUE V

THE JURY WAS IMPROPERLY INSTRUCTED BECAUSE DEFENSE COUNSEL’S REQUEST FOR INSTRUCTION ON ALL OF THE AGGRAVATING CIRCUMSTANCES WAS DENIED; THE JURY WAS TOLD THAT AGGRAVATING CIRCUMSTANCES WERE ESTABLISHED; AND THE JURY WAS INSTRUCTED TO WEIGH A NONVIOLENT FELONY CONVICTION.

ISSUE VI

THE TRIAL COURT ERRED BY FAILING TO MODIFY

THE PENALTY INSTRUCTION AS REQUESTED TO INFORM THE JURY THAT STEWART WOULD NOT NECESSARILY BE ELIGIBLE FOR PAROLE IN TWENTY-FIVE YEARS IF A LIFE SENTENCE WERE IMPOSED.

ISSUE VII

THE TRIAL COURT ERRED BY EXCLUDING RELEVANT EVIDENCE IN MITIGATION AND ALLOWING STATE CROSS-EXAMINATION TO ESTABLISH A NON-STATUTORY AGGRAVATING CIRCUMSTANCE.

ISSUE VIII

THE SENTENCE OF DEATH WAS IMPOSED IN VIOLATION OF THE EIGHTH AMENDMENT, UNITED STATES CONSTITUTION BECAUSE THE SENTENCING JUDGE HEARD TESTIMONY FROM THE VICTIM'S FATHER DESCRIBING THE CHARACTER OF THE VICTIM AND URGING A SENTENCE OF DEATH.

ISSUE IX

THE SENTENCE OF DEATH MUST BE VACATED BECAUSE THE SENTENCING JUDGE FAILED TO PREPARE WRITTEN FINDINGS AS REQUIRED. ALSO, HE FAILED TO PREPARE WRITTEN REASONS FOR DEPARTURE FROM THE SENTENCING GUIDELINES WHEN IMPOSING SENTENCE ON THE NON-CAPITAL FELONIES.

This Court affirmed the judgments, but remanded for entry of written orders to support the death sentence as well as the guidelines departure on the robbery sentence. Stewart v. State, 549 So. 2d 171 (Fla. 1989). Thereafter, Stewart sought certiorari review in the United States Supreme Court, but his

petition was denied. Stewart v. Florida, 497 U.S. 1032 (1990).

Upon remand, the trial court entered a written order consistent with the prior oral findings that there were two aggravating circumstances, prior conviction of a violent felony and murder committed during the course of a robbery, and ascribing little weight to the mitigating circumstances of extreme disturbance, impaired capacity, age, and childhood trauma (RS-R. 24-27). The judge reimposed the life sentence for the robbery, providing written reasons to support the guidelines departure (RS-R. 11-12). On appeal from this resentencing, Assistant Public Defender Douglas Connor again represented Stewart, and advanced the following claims of error:

ISSUE I

THE SENTENCING JUDGE ERRED BY FINDING AS AN AGGRAVATING CIRCUMSTANCE SECTION 921.141(5)(d) (COMMISSION OF A ROBBERY) WHICH MERELY DUPLICATED A NECESSARY ELEMENT OF APPELLANT'S FIRST DEGREE MURDER CONVICTION.

ISSUE II

APPELLANT'S SENTENCE OF DEATH WAS IMPOSED IN VIOLATION OF THE FOURTEENTH AMENDMENT, UNITED STATES CONSTITUTION BECAUSE A STATE STATUTE MANDATING A SENTENCE OF LIFE IMPRISONMENT WAS ARBITRARILY DISREGARDED.

ISSUE III

THE TRIAL COURT ERRED BY FAILING TO MAKE FURTHER INQUIRY BEFORE DENYING STEWART'S REQUEST FOR A CONTINUANCE TO PRESENT "CHARACTER WITNESSES."

ISSUE IV

THE SENTENCING JUDGE'S WRITTEN SENTENCE DOES NOT SUPPORT HIS FINDING OF THE SECTION 921.141(5)(d) (COURSE OF ROBBERY) AGGRAVATING CIRCUMSTANCE.

ISSUE V

THE SENTENCING JUDGE FAILED TO CONSIDER OR GIVE WEIGHT TO ESTABLISHED NON-STATUTORY MITIGATING CIRCUMSTANCES.

ISSUE VI

THE SENTENCING JUDGE ERRED BY REIMPOSING A GUIDELINES DEPARTURE SENTENCE BECAUSE NO WRITTEN REASONS HAD ACCOMPANIED THE ORIGINAL GUIDELINES DEPARTURE.

This Court affirmed the death sentence but remanded the robbery sentence with directions to impose a guidelines sentence on that conviction. Stewart v. State, 588 So. 2d 972 (Fla. 1991). United States Supreme Court certiorari review was again sought and denied. Stewart v. Florida, 503 U.S. 976 (1992).

Postconviction proceedings were initiated in 1993. On September 17, 1996, Stewart filed his Third Amended Motion to Vacate Judgments of Conviction and Sentence, raising twenty-four

claims (PC-R. V1/R42-186). The trial court summarily denied twenty of the claims and granted an evidentiary hearing on the other four (PC-R. V2/R295-304). The evidentiary hearing was held on December 17, 1998, and continued on March 19, 1999, before the Honorable Daniel Perry (PC-R. V4-V5). Following the hearing, the court issued an Order denying Stewart's remaining postconviction claims (PC-R. V3/R373-395). This Court affirmed the denial of postconviction relief. Stewart v. State, 801 So. 2d 59 (Fla. 2001).

ARGUMENT IN OPPOSITION TO CLAIMS FOR RELIEF

Stewart's habeas petition presents three issues, each of which will be addressed in turn. As will be seen, none of his claims warrant the granting of habeas relief, and therefore his petition for writ of habeas corpus should be denied.

CLAIM I

WHETHER THE FLORIDA DEATH PENALTY SENTENCING STATUTE IS UNCONSTITUTIONAL.

Stewart first asserts that Florida's death penalty statute is unconstitutional. Citing Ring v. Arizona, 122 S.Ct. 2428 (2002), Apprendi v. New Jersey, 530 U.S. 466 (2000), and Jones v. United States, 526 U.S. 227 (1999), he claims that the sentencing scheme violated his constitutional rights to due

process and a jury trial. Stewart's allegations do not present any basis for relief, as this Court has repeatedly declined to invalidate Florida's capital sentencing law based on Ring. See Bottoson v. Moore, 27 Fla. L. Weekly S891 (Fla. Oct. 24, 2002), cert. denied, 123 S. Ct. 662 (2002); King v. Moore, 831 So. 2d 143 (Fla.), cert. denied, 123 S. Ct. 657 (2002); Porter v. Crosby, 28 Fla. L. Weekly S33 (Fla. Jan. 9, 2003); Lucas v. Crosby, 28 Fla. L. Weekly S29 (Fla. Jan. 9, 2003); Fotopoulos v. Crosby, 28 Fla. L. Weekly S1 (Fla. Dec. 19, 2002).

Initially, it should be noted that this claim is procedurally barred, as any challenge to the constitutionality of the death penalty statute in this case must have been presented in Stewart's direct appeal. This Court has repeatedly recognized that habeas petitions are not to be used as successive appeals, and that issues which could and should have been presented earlier will not be considered. See Gorby v. State, 819 So. 2d 664, 687 (Fla. 2002) ("In claim 8 Gorby challenges the constitutionality of Florida's death penalty statute. He makes no assertion of ineffective assistance of counsel; therefore, his claim is procedurally barred because it could have been raised on direct appeal"); Rutherford v. Moore, 774 So. 2d 637, 643 (Fla. 2000) (while habeas petitions are proper vehicle to advance claims of ineffective assistance of

appellate counsel, such claims may not be used to camouflage issues that should have been raised on direct appeal or in a postconviction motion); Thompson v. State, 759 So. 2d 650 (Fla. 2000); Teffeteller v. Dugger, 734 So. 2d 1009 (Fla. 1999); Breedlove v. Singletary, 595 So. 2d 8 (Fla. 1992). Although Apprendi and Ring were not decided until after Stewart's appeals, the basic argument that the Sixth Amendment required jury sentencing in capital cases was available and, in fact, routinely advanced around the time of Stewart's trial and resentencing. See Hildwin v. Florida, 390 U.S. 638 (1989); Spaziano v. Florida, 468 U.S. 447, 472 (1984); Chandler v. State, 442 So. 2d 171, 173, n. 1 (Fla. 1983). Stewart's failure to allege this claim in an earlier direct appeal procedurally bars this Court from consideration of this issue in his petition.

In addition, Stewart's conclusory assertion that he is entitled to any benefit from the Apprendi and Ring decisions retroactively under the principles of Witt v. State, 387 So. 2d 922, 929-30 (Fla. 1980), is not persuasive. Stewart does not even attempt to offer any reasoning to support this assertion. Pursuant to Witt, retroactive application is only available for decisions of fundamental significance, which so drastically alter the underpinnings of Stewart's death sentence that

"obvious injustice" exists. New v. State, 807 So. 2d 52, 53 (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 offers no basis to provide any alleged benefit from the Apprendi and Ring decisions to Stewart in this habeas action.

Even if Stewart's substantive claim is considered, habeas relief is not warranted. Stewart's claim that Florida's death penalty statute is unconstitutional is without merit. Stewart alleges that Florida's death penalty scheme must fall because Florida's statute is indistinguishable with the Arizona statute stricken in Ring, and that aggravating factors must be treated as elements of the offense of capital murder which must be charged in an indictment and proven to a unanimous jury beyond any reasonable doubt.

Stewart's argument is premised on a fundamental misunderstanding of Florida law. In Ring, the United States Supreme Court applied Apprendi to invalidate Arizona's capital sentencing scheme, which required a judge, acting alone, to determine a capital defendant's eligibility for the death

penalty. In Florida, unlike Arizona, death eligibility is determined by the jury upon conviction for first degree murder. See Porter, 28 Fla. L. Weekly at S34 (statutory maximum sentence for first degree murder is death); Bottoson, 27 Fla. L. Weekly at S893; S902 (J. Quince, concurring; J. Lewis, concurring); Shere v. Moore, 27 Fla. L. Weekly S752, S754 (Fla. Sept. 12, 2002); Mills v. Moore, 786 So. 2d 532, 538 (Fla.), cert. denied, 532 U.S. 1015 (2001). Ring is not applicable in Florida because capital punishment is not an "enhanced" sentence for first degree murder; accordingly, no further jury findings are required.

Thus, Stewart's argument that an aggravating factor must be alleged in the indictment and expressly found by a jury beyond a reasonable doubt is without merit, as the existence of an aggravating factor is a determination that concerns the defendant's selection for capital punishment, rather than his eligibility for the death penalty. Clearly, Ring does not require jury findings for sentencing, only for eligibility. As Justice Scalia stated, Ring "has nothing to do with jury sentencing." Ring, 122 S.Ct. at 2445. Apprendi and Ring involve the jury's role in determining death eligibility, but do not require that the actual selection of sentence be made by a jury. Quoting Proffitt v. Florida, 428 U.S. 242, 252 (1976),

Ring acknowledged that "[i]t has never [been] suggested that jury sentencing is constitutionally required."[2] Ring, 122 S.Ct. at 2447, n.4. Rather, Ring involves only the requirement that the jury find the defendant death eligible. That determination must be made by the jury, while the actual sentencing decision may constitutionally be made by the trial court. See Spaziano v. Florida, 468 U.S. 447, 459 (1984) (finding Sixth Amendment has no guarantee of right to jury trial on issue of sentence).

Even if Florida's statute is interpreted to require a jury finding of an aggravating factor as an element of capital murder, Stewart would not be entitled to relief because his trial judge relied on Stewart's prior violent felony conviction as a basis to support the death sentence imposed. Due to the existence of his "prior violent felony conviction" aggravating factor, the judge was authorized to impose the death penalty even if additional jury findings may be deemed necessary in the context of other cases. See Bottoson, 27 Fla. L. Weekly at S898; S900 (J. Shaw, concurring; J. Pariente, concurring). It is undisputed that Stewart's judge properly found the existence

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[2]See Harris v. Alabama, 513 U.S. 504, 515 (1995) (holding that "[t]he Constitution permits the trial judge, acting alone, to impose a capital sentence. It is thus not offended when a State further requires the sentencing judge to consider a jury's recommendation and trusts the judge to give it the proper weight.)

of the prior conviction factor, and therefore no additional jury findings were required. Almendarez-Torres v. United States, 523 U.S. 224 (1998) (prior conviction properly used by judge alone to exceed defendant's statutorily authorized punishment). Since the defect alleged to invalidate the statute - lack of jury findings to enhance the sentence - is not implicated in this case due to the existence of the prior conviction, Stewart has no standing to challenge any potential error in the application of the statute on other facts.

In addition, even if an aggravating factor is construed to determine eligibility rather than selection, the suggestion that it must be charged in the indictment has no basis in law. This claim has been repeatedly rejected. See Hildwin v. State, 531 So. 2d 124, 128 (Fla. 1988) (rejecting claim that Florida law makes aggravating factors into elements of the offense so as to make the defendant death-eligible), aff'd., 490 U.S. 638 (1989); Lightbourne v. State, 438 So. 2d 380 (Fla. 1983) (aggravating circumstances do not need to be charged in indictment). United States Supreme Court precedent similarly does not support Stewart's position. Hurtado v. California, 110 U.S. 516 (1984) (holding there is no requirement for an indictment in state capital cases). Apprendi did not address the indictment issue. Apprendi, 530 U.S. at 477, n.3. Ring similarly did not address

the issue, and although Ring, in part, overruled Walton v. Arizona, 497 U.S. 639 (1990), this claim was rejected by this Court prior to Walton being decided and does not, in any way, rely on Walton for support. Therefore, Ring does not compel further consideration of this issue.

Thus, Stewart's death sentence satisfies the Sixth Amendment as construed in Ring. The jury convicted him of a death-eligible offense at the conclusion of the guilt phase of his trial. His prior violent felony convictions permitted the judge to impose a capital sentence, even without jury involvement. In addition, by returning a recommendation for death, his jury necessarily found beyond a reasonable doubt that at least one statutory aggravating factor existed. See Hildwin v. Florida, 490 U.S. 638 (1989) (holding that where jury made a sentencing recommendation of death it necessarily engaged in the factfinding required for imposition of a higher sentence, that is, the determination that at least one aggravating factor had been proved).

"Habeas petitions are the proper vehicle to advance claims of ineffective assistance of appellate counsel." Rutherford, 774 So. 2d at 643. However, Stewart makes no claim that appellate counsel was ineffective. Moreover, a claim of appellate ineffectiveness would be meritless. See Porter, 28

Fla. L. Weekly at S34 (rejecting ineffective assistance of counsel on this issue). The claim that under "principles of common law," aggravating circumstances must be charged in indictment has been rejected by this Court many times. See Chandler, 442 So. 2d at 173, n. 1; Tafero v. State, 403 So. 2d 355, 361 (Fla. 1981), cert. denied, 455 U.S. 983 (1982). Similarly, the suggestion that jury unanimity in recommending a death sentence is constitutionally required would have failed even if presented earlier; this Court has consistently held that a jury may recommend a death sentence on simple majority vote. See Thompson v. State, 648 So. 2d 692, 698 (Fla. 1994)(constitutional for a jury to recommend death based on a simple majority); Brown v. State, 565 So. 2d 304, 308 (Fla. 1990); Alvord v. State, 322 So. 2d 533 (Fla. 1975), cert. denied, 428 U.S. 923 (1976). Appellate counsel "is not ineffective for failing to raise a claim that would have been rejected on appeal." Downs v. State, 740 So. 2d 506, 517 n. 18 (Fla. 1999).

In conclusion, aggravating factors in Florida are not elements of the offense, but are constitutionally mandated capital sentencing guidelines. Florida's capital sentencing scheme affords the sentencer the guidelines to follow in determining the various sentencing selection factors related to

the offense and the offender by providing accepted statutory aggravating factors and mitigating circumstances to be considered. Given that a defendant faces the statutory maximum sentence of death upon conviction of first degree murder, the employment of further proceedings to examine the assorted "sentencing selection factors," does not violate due process. The plain language of Apprendi and Ring establishes that those cases come into play when a defendant is exposed to a penalty exceeding the maximum allowable under the jury's verdict. Because Stewart was death eligible upon conviction, Ring does not invalidate his death sentence or render Florida's sentencing scheme unconstitutional.

CLAIM II

WHETHER APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE MERITORIOUS ISSUES.

Stewart next alleges that his appellate attorney was ineffective for failing to raise meritorious issues in Stewart's direct appeals. This claim requires an evaluation of whether counsel's failure to raise the specified issues was so deficient that it fell outside the range of professionally acceptable performance and, if so, whether the deficiency was so egregious that it undermined confidence in the correctness of the result. Thompson v. State, 759 So. 2d 650, 660 (Fla. 2000); Groover v.

Singletary, 656 So. 2d 424, 425 (Fla. 1995); Byrd v. Singletary, 655 So. 2d 67, 68-69 (Fla. 1995), cert. denied, 516 U.S. 1175 (1996). A review of the record demonstrates that neither deficiency nor prejudice has been shown in this case. To the contrary, the record reflects that appellate counsel acted as a capable advocate, asserting nine issues for judicial review in a 73-page brief.[3]

A review of Stewart's current claims clearly demonstrate that no relief is warranted. This issue involves claims which were in fact considered and rejected in Stewart's postconviction proceedings. Since the ineffective assistance of appellate counsel allegations are merely variations of claims rejected in postconviction, they are procedurally barred. See Porter, 28 Fla. L. Weekly at S33. In addition, the claims could not have been presented in the direct appeal. This is facially apparent from the petition, which relies extensively on facts from the postconviction evidentiary hearing conducted years after Stewart's direct appeal. Since the claims would not have been successful even if presented in his direct appeal, counsel was not ineffective for failing to present these issues. Groover, 656 So. 2d at 425; Chandler v. Dugger, 634 So. 2d 1066, 1068

[3]Stewart does not allege any errors which purportedly should have been presented in the appeal from his resentencing.

(Fla. 1994) (failure to raise nonmeritorious issues is not ineffective assistance of appellate counsel).

1. Appellate counsel was ineffective in failing to raise on appeal that counsel was ineffective at the sentencing phase because he failed to conduct a reasonable investigation into possible mitigation.

Stewart's first complaint is that his appellate counsel failed to present an issue of ineffective trial counsel in Stewart's direct appeal. However, as this Court has held, claims of ineffective assistance of counsel are only cognizable on direct appeal when the alleged ineffectiveness is apparent on the face of the record and it would be a waste of judicial resources to require the trial court to address the issue. See Gore v. State, 784 So. 2d 418, 437-38 (Fla. 2001); Martinez v. State, 761 So. 2d 1074, 1078, n. 2 (Fla. 2000); Blanco v. Wainwright, 507 So. 2d 1377, 1384 (Fla. 1987). The claim which Stewart now asserts relies extensively on testimony presented at the postconviction evidentiary hearing held in 1998 and 1999, facts which were obviously not available to counsel at the time of Stewart's 1989 direct appeal (see Petition, pp. 29-34). Since Stewart goes beyond the record available in his direct appeal in describing this issue, it would have not been cognizable in the direct appeal. Clearly, counsel cannot be deemed to have been ineffective for failing to raise an issue

which was not available.

In fact, Stewart presented the same allegation of ineffective assistance of trial counsel in his postconviction motion. Following an evidentiary hearing, the trial court concluded that no ineffective assistance had been demonstrated, and this Court has affirmed that finding. Stewart v. State, 801 So. 2d 59 (Fla. 2001). Therefore, the underlying claim has been determined to be meritless and is not subject to further review.

2. Appellate counsel was ineffective for failing to raise on appeal that counsel was ineffective pre-trial and during the guilt phase in failing to prepare and present evidence of Stewart's voluntary intoxication in defense of the first-degree murder and armed robbery charges.

Stewart's next issue fails for the same reasons. Stewart asserts that his appellate counsel should have offered an issue challenging his trial counsel's performance in failing to present a defense of voluntary intoxication. Once again, this is not an issue which could have been presented in the direct appeal. Stewart again relies on the record from the postconviction proceedings conducted in 1998 and 1999; a record which obviously was not available to present this issue when the appeal was litigated in 1989. The failure to restrict this claim to facts available from the face of the direct appeal record establishes that appellate counsel could not have

presented the issue and therefore cannot be deemed ineffective. Gore; Martinez; Blanco. See also Nixon v. State, 572 So. 2d 1336, 1340 (Fla. 1990) (remanding for an evidentiary hearing on claim of ineffective assistance and then declining to address issue, identifying issue as one more appropriate for postconviction), cert. denied, 502 U.S. 854 (1991).

In addition, as with Stewart's first subissue, this allegation of ineffective assistance of counsel was fully litigated in postconviction and this Court upheld the trial court's determination that trial counsel had not been ineffective. Since the underlying claim has been denied as meritless, there is no basis for further consideration of the issue.

3. Appellate counsel was ineffective for failing to raise on appeal that the competency hearing was unreliable.

Stewart next disputes his appellate attorney's failure to challenge the trial court's finding of competency. Stewart's entire argument on this issue simply acknowledges that this claim was found to be procedurally barred in his postconviction appeal, and asserts that the issue is only related in this petition in order to preserve the claim for federal review. Stewart has failed to preserve any claim; a defendant cannot revive a procedurally barred claim by recasting it as

ineffective assistance of counsel. In addition, Stewart has not identified any deficiency or error from his competency hearing which would suggest that the finding of competency should have been challenged on appeal. He has not offered any argument which appellate counsel reasonably could or should have presented. The absence of any facts to support this allegation compels a conclusion that Stewart has not demonstrated deficient performance or prejudicial affect, and therefore relief must be denied.

4. Appellate counsel was ineffective for failing to raise on appeal that Stewart was incompetent to proceed at all material stages.

Stewart's last allegation in this issue attacks counsel's failure to assert that Stewart was incompetent "at all material stages." Once again, however, Stewart does not identify a reasonable appellate argument which could have been made on this issue. Instead, he relies on facts developed years after his direct appeal which were not available to his appellate counsel (Petition, p. 41). Since no deficiency or prejudice has been specifically identified or demonstrated, no relief is warranted.

CLAIM III

APPELLATE COUNSEL WAS INEFFECTIVE IN FAILING TO RAISE ON DIRECT APPEAL THAT DEFENSE COUNSEL'S CONCESSION OF GUILT WAS IN VIOLATION OF MR. STEWART'S SIXTH AND FOURTEENTH AMENDMENT RIGHTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

Stewart's final claim involves his trial attorney's strategy in acknowledging that Stewart had killed Mark Harris, under the defense theory that Stewart's actions did not amount to first degree murder. Once again, appellate counsel cannot be deemed ineffective as this issue was not available to present in the direct appeal.

The claim which Stewart now asserts necessarily requires the development of facts at an evidentiary hearing, and therefore would not present an instance of ineffectiveness which could be apparent on the face of the record. See Nixon v. State, 572 So. 2d 1336, 1340 (Fla. 1990) (remanding for an evidentiary hearing on same claim and then declining to address issue, identifying issue as one more appropriate for postconviction), cert. denied, 502 U.S. 854 (1991). Thus, it could not have been presented on direct appeal.

Stewart relies on Nixon v. Singletary, 758 So. 2d 618 (Fla.), cert. denied, 531 U.S. 980 (2000), to assert that his attorney's strategy of conceding guilt as to some of the elements of the murder charge established that his

constitutional right to counsel was violated. Nixon and the other cases cited by Stewart establish that counsel's strategy to admit some elements of the crime may only amount to deficient performance if counsel was acting without Stewart's consent in this regard. Stewart has never personally alleged that counsel did not have his consent to pursue the defense presented at trial. Notably, the defense which current counsel suggests should have been adopted, one of an accidental shooting, would also require counsel to admit that Stewart was the one to shoot and kill Mark Harris.

For all of these reasons, Stewart's claim that his appellate counsel was ineffective for failing to challenge the competency of trial counsel in the direct appeal in this case must be denied.

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

Respectfully submitted,

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ATTORNEY GENERAL

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COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail, to Daphney Gaylord and Robert Strain, Office of the Capital Collateral Regional Counsel, 3801 Corporex Park Drive, Suite 210, Tampa, Florida 33619, this _____ day of February, 2003.

CERTIFICATE OF TYPE SIZE AND STYLE

This brief is presented in 12 point Courier New, a font that is not proportionately spaced.

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COUNSEL FOR RESPONDENT