IN THE SUPREME COURT OF FLORIDA

ROBERT DWAYNE MORRIS,

Petitioner,

CASE NO. SC05-227

v. **Lower Tribunal No. CF94-3961A1-XX**

JAMES V. CROSBY, JR.,
Secretary, Department of Corrections,
State of Florida,

Respondent.
_____/

RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

AND

MEMORANDUM OF LAW

COMES NOW, Respondent, James V. Crosby, Jr., Secretary of the Department of Corrections for the State of Florida, by and through the Attorney General of the State of Florida and the undersigned counsel, who answers the petition, and states:

PRELIMINARY STATEMENT

Respondent denies petitioner is being illegally restrained and denies each and every allegation in the instant petition indicating in any manner that petitioner is entitled to relief from this Court.

RELEVANT FACTS

A detailed statement of the facts is contained in the Respondent's Answer Brief filed in response on appeal from the denial of Petitioner's Motion for Post-Conviction Relief filed on the same date as this Response.

ARGUMENT

I.

WHETHER APPELLATE COUNSEL WAS INEFFECTIVE IN FAILING TO RAISE A CLAIM THAT FLORIA'S CAPITAL SENTENCING STATUTE IS UNCONSTITUTIONAL IN LIGHT OF THE SUPREME COURT'S OPINIONS IN APPRENDI V. NEW JERSEY AND RING V. ARIZONA? (STATED BY RESPONDENT).

Petitioner summarily asserts that his appellate counsel was ineffective in failing to challenge Florida's capital sentencing scheme based upon Supreme Court precedent. However, Petitioner never explains how appellate counsel can be ineffective for failing to anticipate Ring nor how he suffered prejudice because no capital defendant in Florida has ever obtained relief based upon that decision.[1] To his credit, Petitioner's counsel acknowledges adverse precedent on this issue and that these claims are being raised "to preserve the claims for possible federal review." (Habeas Petition at 7-8).

The Supreme Court's decisions in Apprendi v. New Jersey, 530 U.S. 466 (2000) and Ring v. Arizona, 536 U.S. 584 (2002) do not provide any basis for questioning petitioner's conviction or resulting death sentence. This Court has repeatedly rejected petitioner's claim that Ring invalidated Florida's capital sentencing procedures. See Duest v. State, 855 So. 2d 33, 49 (Fla. 2003);

[1]Claims of ineffective assistance of appellate counsel are properly raised in a petition for writ of habeas corpus. Such claims must be analyzed using the same two-pronged test promulgated in Strickland v. Washington, 466 U.S. 668 (1984).

Kormondy v. State, 845 So. 2d 41, 54 (Fla. 2003)(Ring does not encompass Florida procedures nor require either notice of the aggravating factors that the State will present at sentencing or a special verdict form indicating the aggravating factors found by the jury); Butler v. State, 842 So. 2d 817, 834 (Fla. 2003)(rejecting Ring claim in a single aggravator {HAC} case); Porter v. Crosby, 840 So. 2d 981, 986 (Fla. 2003); Bottoson v. Moore, 833 So. 2d 693 (Fla.), cert. denied, 537 U.S. 1070 (2002); King v. Moore, 831 So. 2d 143 (Fla.), cert. denied, 537 U.S. 1067 (2002).

Even if Ring has some application under Florida law, it would not retroactively apply to this case. In Schriro v. Summerlin, 124 S.Ct. 2519 (2004), the Supreme Court held that Ring announced a new "procedural rule" and is not retroactive to cases on collateral review. See also Turner v. Crosby, 339 F.3d 1247, 1283 (11th Cir. 2003)(holding that Ring is not retroactive to death sentences imposed before it was handed down). This Court recently decided that Ring is not retroactive to cases on postconviction review.[2] Johnson v. State, 2005 Fla. LEXIS 755 (Fla., April 28, 2005); See also Monlyn v. State, 894 So. 2d 832 (Fla. 2005) and Windom v. State, 886 So. 2d 915 (Fla. 2004)(Cantero, J., concurring). See also Modest v. State, 892 So. 2d 566 (Fla. 3d DCA 2005)(noting a "majority of the Florida Supreme

[2]See Cannon v. Mullin, 297 F.3d 989 (10th Cir. 2002)(rejecting the claim that Ring is retroactive in federal courts); Whisler v. State, 36 P.3d 290 (Kan. 2001)(state supreme court rejecting retroactivity of Apprendi).

Court has also ruled that Ring is not retroactive.")(citations omitted).

Even if some deficiency in the statute could be discerned, petitioner has no legitimate claim of any Sixth Amendment error on the facts of this case. Clearly, a Sixth Amendment violation can be harmless. Any claim to the contrary ignores the plain result of Ring itself, which was remanded so that the state court could conduct a harmless error analysis. Ring, 536 U.S. at 609, n.7. This result is consistent with a number of other United States Supreme Court decisions. See United States v. Cotton, 535 U.S. 625 (2002)(failure to recite amount of drugs for enhanced sentence in indictment did not require conviction to be vacated); Neder v. United States, 527 U.S. 1, 8-9 (1999)(failure to submit an element to the jury did not constitute structural error).

Petitioner had two prior violent felony convictions for robbery. The prior violent felony aggravator takes this case out of consideration from the class of cases to which Ring might conceivably apply. See Doorbal v. State, 837 So. 2d 940, 963 (Fla. 2003) (rejecting Ring claim noting that one of the aggravating circumstances found by the trial judge to support the sentences of death was that Doorbal had been convicted of a prior violent felony); accord, Lugo v. State, 845 So. 2d 74, 119 n.79 (Fla. 2003); Duest v. State, 855 So. 2d 33, 49 (Fla. 2003). Thus, in the unlikely event Ring might apply to Florida's capital sentencing scheme, under the

particular facts of this case, petitioner would not be entitled to any relief.

II.

WHETHER THE TRIAL COURT ERRED IN DENYING PETITIONER'S SPECIALLY REQUESTED JURY INSTRUCTION ON MITIGATING CIRCUMSTANCES? (STATED BY RESPONDENT).

Petitioner takes issue with this Court's decision on direct appeal which affirmed the trial court's decision to deny a special instruction on non-statutory mitigation.[3] Petitioner asserts in his statement of the issue that to the extent appellate counsel failed to fully litigate this issue on direct appeal he was ineffective. However, at no point in his argument does he identify a defect in counsel's briefing of this issue on direct appeal. A review of the record reveals that this issue was fully briefed [Appellant's Initial Brief at 76], considered and rejected by this Court's opinion. Appellate counsel cannot be ineffective for failing to raise an issue that he in fact did raise on appeal. Moreover, state habeas petitions are not a vehicle to relitigate direct appeal claims. The underlying claim is procedurally barred from review in this habeas

[3]"Morris additionally argues that the trial court erred in refusing to instruct the jury on specific nonstatutory mitigating circumstances. This Court has previously declined to mandate the requested jury instruction. Thus, we reject this claim of error. See, e.g., Shellito v. State, 701 So.2d 837, 842 (Fla.1997)(citing Finney v. State, 660 So.2d 674, 684 (Fla.1995))." Morris v. State, 811 So.2d 661, 667-668 (Fla. 2002).

proceeding. Orme v. State, 896 So. 2d 725 (Fla. 2005); Bryan v. Dugger, 641 So. 2d 61, 65 (Fla. 1994); Turner v. Dugger, 614 So. 2d 1075, 1080 (Fla. 1992)(declining to revisit issues where the issues, or variations thereof, were rejected on direct appeal); Blanco v. Wainwright, 507 So. 2d 1377, 1384 (Fla. 1987)(direct appeal issues will not be revisited under the guise of ineffective assistance of appellate counsel).

III.

WHETHER APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO ARGUE THAT FLORIDA STATUTE 921.141 (5) IS FACIALLY VAGUE AND OVERBROAD IN VIOLATION OF THE U.S. CONSTITUTION? (STATED BY RESPONDENT).

Petitioner next contends that Florida's capital sentencing scheme is unconstitutional. Specifically, he contends that the jury instruction on during the commission of, or course of a robbery is unconstitutional. He also contends that the instructions unconstitutionally diminished the jury's sense of responsibility in determining the appropriate sentence. In neither case does he argue why or how appellate counsel was deficient in failing to raise these issues on appeal. Indeed, it appears petitioner is simply attempting to raise additional direct appeal issues, which is not the function of a state habeas petition. Orme, 896 So. 2d at 725. In any case, this Court has repeatedly rejected the claims petitioner asserts in

this Petition.

A. The During The Course Of A Felony Instruction Is Not Unconstitutional

Petitioner's contention that the during the course of a felony instruction is unconstitutional has been repeatedly rejected by this Court and federal courts. See, e.g., Blanco v. State, 706 So. 2d 7, 11 (Fla. 1997), cert. denied, 525 U.S. 837 (1998)(rejecting constitutional challenge to commission during the course of an enumerated felony aggravator);[4] Johnson v. Singletary, 991 F.2d 663, 669 (11th Cir. 1993)("Nothing in Stringer indicates that there is any constitutional infirmity in the Florida statute which permits a defendant to be death eligible based upon a felony murder conviction, and to be sentenced to death based upon an aggravating circumstance that duplicates an element of the underlying conviction.")(discussing Stringer v. Black, 503 U.S. 222 (1992)); Adams v. Wainwright, 709 F.2d 1443, 1446-47 (11th Cir. 1983), cert. denied, 464 U.S. 1063 (1984)(rejecting argument that Florida has impermissibly made the death penalty the "automatically preferred sentence" in

[4]The United States Supreme Court has held that consideration of an aggravating factor that duplicates an element of the crime is not unconstitutional. See Lowenfield v. Phelps, 484 U.S. 231, 241-46 (1988). The Eleventh Circuit has applied this reasoning to find the application of the felony murder aggravating factor in Florida constitutional. Johnson v. Dugger, 932 F.2d 1360, 1368-70 (11th Cir. 1991); see also Adams v. Wainwright, 709 F.2d 1443, 1447 (11th Cir. 1983)(finding that use of felony murder aggravator was constitutional even prior to Lowenfield).

any felony murder case because one of the statutory aggravating factors is the murder taking place during the course of a felony). Appellate counsel cannot be faulted for failing to raise a meritless issue on appeal. See Card v. State, 497 So. 2d 1169, 1177 (Fla. 1986), cert. denied, 481 U.S. 1059 (1987).

B. The Trial Court's Instructions Did Not Dilute The Jury's Sense Of Responsibility In Determining An Appropriate Sentence

The trial court's instructions in this case did not dilute the jury's sense of responsibility for petitioner's sentence.[5] The court instructed the jury, in part:

> As you have been told, the final decision about what sentence to impose is my responsibility; however, your advisory sentence is entitled by law to great weight by this court. And it is only under rare circumstances that I would impose a sentence other than what you recommend.

(V-35, 4581-82). Thus, the trial court in this case emphasized the jury's role in sentencing under Florida law.

Petitioner's argument that the standard instruction is

[5]In order to establish constitutional error under Caldwell v. Mississippi, 472 U.S. 320 (1985), a petitioner must show that the comments or instructions to the jury "improperly described the role assigned to the jury by local law." Romano v. Oklahoma, 512 U.S. 1, 9 (1994). The Eleventh Circuit has repeatedly recognized that comments describing the jury's role in Florida as making an advisory recommendation and the judge as the final sentencing authority does not present Caldwell error. See Johnston v. Singletary, 162 F.3d 630 (11th Cir. 1998); Provenzano v. Singletary, 148 F.3d 1327, 1334 (11th Cir. 1998); Davis v. Singletary, 119 F.3d 1471, 1482 (11th Cir. 1997).

unconstitutional has been repeatedly rejected by this Court. See Melendez v. State, 612 So. 2d 1366, 1369 (Fla. 1992); Turner v. Dugger, 614 So. 2d 1075, 1079 (Fla. 1992). Consequently, appellate counsel cannot be faulted for failing to raise this meritless issue on appeal.

IV.

WHETHER PETITIONER'S TRIAL WAS FRAUGHT WITH PROCEDURAL AND SUBSTANTIVE ERRORS WHICH DEPRIVED HIM OF A FUNDAMENTALLY FAIR TRIAL IN VIOLATION OF THE CONSTITUTION? (STATED BY RESPONDENT).

Petitioner next asserts that a combination of errors deprived him of a fundamentally fair trial. Petitioner has not established error in his individual allegations, much less some type of cumulative error. See Melendez v. State, 718 So. 2d 746, 749 (Fla. 1998)(where claims were either meritless or procedurally barred, there was no cumulative effect to consider); Johnson v. Singletary, 695 So. 2d 263, 267 (Fla. 1996)(no cumulative error where all issues which were not barred were meritless). Petitioner has not raised any allegation of error which calls into question the validity of his trial or direct appeal.

V.

WHETHER PETITIONER'S CONSTITUTIONAL RIGHTS WILL BE VIOLATED AS HE MAY BE INCOMPETENT AT THE TIME OF HIS EXECUTION? (STATED BY RESPONDENT).

Petitioner asserts that he may be incompetent to be executed. Although Petitioner acknowledges that this claim is not currently ripe for judicial review, since no execution is pending, he suggests that it is included in his current habeas petition in order to preserve the issue for federal court review. Clearly, there is no basis for this Court to rule on Petitioner's present claim of possible incompetence.

Florida law provides specific protection against the execution of an incompetent inmate. In order to invoke judicial review of a competency to be executed claim, a defendant must file a motion for stay of execution pursuant to Florida Rule of Criminal Procedure 3.811(d). Such motion can only be considered after a defendant has pursued an administrative determination of competency under Florida Statutes 922.07, and the Governor of Florida, subsequent to the signing of a death warrant, has determined that the defendant is sane to be executed. Since the prerequisites for judicial review of this claim have not occurred in this case, there is no basis for consideration of this issue in the present habeas petition. Compare, Provenzano v. State, 751 So. 2d 37 (Fla. 1999); Provenzano v. State, 760

So. 2d 137 (Fla. 2000)(detailing procedural history of similar claim); Medina v. State, 690 So. 2d 1241 (Fla. 1997)(remanding for evidentiary hearing on issue in post-conviction appeal from Pasco County).

Petitioner's concern with preservation of this issue for federal review does not offer a reason for a premature ruling by this Court. Although the federal courts have refused to permit successive federal habeas petitions in order to secure federal review of this claim, that default may be avoided if a defendant presents the issue prematurely in his initial habeas petition. See Stewart v. Martinez-Villareal, 523 U.S. 637 (1998). No federal decision requires this Court to consider and address the claim now presented, contrary to state law, in order to preserve Petitioner's federal rights. The State also notes that none of the mental health testimony presented during the postconviction hearing below calls into question petitioner's competence.

CONCLUSION

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

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 and James V. Viggiano, Jr., Assistant CCRC-Middle Region, 3801 Corporex Park Drive, Suite 210, Tampa, Florida 33619-1136; and to John K. Aguero, Assistant State Attorney, Tenth Judicial Circuit, P.O. Box 9000 - Drawer SA, Bartow, Florida 33831-9000, this _____ day of May, 2005.

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).

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COUNSEL FOR APPELLEE