IN THE SUPREME COURT OF FLORIDA

ROBERT IRA PEEDE,

Petitioner,

v. **CASE No. SC05-1885**
Lower Tribunal No. CR83-1682

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

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.

In light of the fact that the State has provided a detailed factual recitation in the accompanying brief on the 3.850 appellate brief, Respondent will not burden the Court with repeating those facts again in this Habeas Response.

DIRECT APPEAL

Peede's appellate counsel raised nine issues on his direct appeal: (1) the defendant's due process rights were violated when Peede was excused from critical stages of his trial; (2) the trial court erred in allowing court appointed counsel to represent him when Peede expressed the desire to represent himself; (3) the trial court violated Peede's due process rights when it limited the time allowed for closing argument to 30 minutes; (4) the trial court admitted reversible error in admitting hearsay testimony; (5) the trial court erred in refusing to grant a motion for judgment of acquittal for kidnapping; (6) the Florida capital sentencing statute is unconstitutional on its face and as applied; (7) Section 921.141 is unconstitutional in that the existence of aggravating and mitigating circumstances is found by the trial judge as opposed to the jury; (8) the evidence was insufficient to support the cold, calculated, and premeditated aggravator; (9) improper aggravating circumstances were considered by the judge and jury and mitigating circumstances were not considered, rendering the death sentence improper. (Petitioner's Initial Direct Appeal Brief, filed September 10, 1984).

In an opinion issued on August 15, 1985, this Court affirmed Peede's convictions and sentences, but, agreed, with Peede's counsel, that the trial court erred in finding that the murder was cold,

calculated, and premeditated. Peede v. State, 474 So. 2d 808, 817-18 (Fla. 1985). Appellate counsel was a capable advocate and his performance did not fall below the standards demanded by the Sixth Amendment.

THE LEGAL STANDARD

In Rutherford v. Moore, 774 So. 2d 637 (Fla. 2000), this Court summarized and reiterated its jurisprudence relating to claims of ineffective assistance of appellate counsel. Subsequent decisions also repeat these principles. Habeas corpus petitions are the proper vehicle to advance claims of ineffective assistance of appellate counsel but such claims may not be used to camouflage issues that should have been raised on direct appeal or in a postconviction motion. Id. at 643; Thompson v. State, 759 So. 2d 650, 660, n. 6 (Fla. 2000); Hardwick v. Dugger, 648 So. 2d 100, 106 (Fla. 1994). The Court's ability to grant relief is limited to those situations where the Petitioner established first that counsel's performance was deficient because the "omissions are of such magnitude as to constitute a serious error or substantial deficiency falling measurably outside the range of professionally acceptable performance" and second that the Petitioner was prejudiced because counsel's deficiency "compromised the appellate process to such a degree as to undermine confidence in the correctness of the result."

Rutherford at 643. Groover v. Singletary, 656 So. 2d 424, 425 (Fla. 1995).

If a legal issue would in all probability have been found to be without merit had counsel raised the issue on direct appeal, the failure of appellate counsel to raise the issue will not render his performance ineffective. This is generally true as to issues that would have been found to be procedurally barred had they been raised on direct appeal. Id. at 643. Appellate counsel is not deficient for failing to anticipate a change in the law. Darden v. State, 475 So. 2d 214, 216-17, (Fla. 1985); Lambrix v. Singletary, 641 So. 2d 847 (Fla. 1994). Appellate counsel is not ineffective for not convincing the Court to rule in his favor on issues actually raised on direct appeal and the Court will not consider a claim on habeas that counsel was ineffective for failing to raise additional arguments in support of the claim on appeal. Rutherford at 645.

Procedurally barred claims not properly raised at trial could not form a basis for finding appellate counsel ineffective absent a showing of fundamental error, i.e., error that "reaches down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error." Id. at 646; Chandler v. State, 702 So. 2d 186, 191, n. 5 (Fla. 1997).

The habeas corpus writ may not be used to reargue issues raised and ruled upon because Petitioner is dissatisfied with the outcome on direct appeal. Appellate counsel is not required to raise every conceivable claim. See Atkins v. Dugger, 541 So. 2d 1165, 1167 (Fla. 1989) ("Most successful appellate counsel agree that from a tactical standpoint it is more advantageous to raise only the strongest points on appeal and that the assertion of every conceivable argument often has the effect of diluting the impact of the stronger points"). Accord, Waterhouse v. Moore, 838 So. 2d 480 (Fla. 2002); Porter v. Crosby, 840 So. 2d 981 (Fla. 2003).

A claim of ineffective assistance of appellate counsel may not be used to circumvent the rule that habeas does not serve as a second or substitute appeal, may not be used as a variant to an issue already raised, nor added as an issue raised in the 3.850 motion and appeal. Fotopoulos v. State, 838 So. 2d. 1122 (Fla. 2002). As stated by this Court in Bruno v. State, 838 So. 2d 485 (Fla. 2002), quoting Pope v. Wainwright, 496 So. 2d 798, 800 (Fla. 1986) this Court must determine:

> "...Whether the alleged omissions are of such magnitude as to constitute a serious error or substantial deficiency falling measurably outside the range of professionally acceptable performance and, second, whether the deficiency in performance compromised the appellate process to such a degree as to undermine confidence in the correctness of the result."
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> 838 So. 2d at 490 (emphasis supplied).

ARGUMENT

CLAIM I

WHETHER APPELLATE COUNSEL RENDERED INEFFECTIVE ASSISTANCE FOR FAILING TO CHALLENGE THE REPEATED INTRODUCTION OF COLLATERAL CRIME EVIDENCE?

Peede contends that evidence showing his intent to kill Geraldine Peede and Calvin Wagoner in North Carolina was not relevant and/or too prejudicial and should have been raised as error on appeal. However, this issue lacks any merit as the challenged testimony was clearly relevant in that it establishes that Peede kidnapped Darla with the intention of taking her to North Carolina in order to murder Geraldine and Calvin Wagoner. The evidence was admissible pursuant to Williams v. State, 110 So. 2d 654 (Fla. 1959) and its progeny, i.e., that an offense is relevant to show motive, opportunity, intent or absence of mistake in the crime charged.

n addition, the evidence was relevant evidence admissible under F.S. 90.402. Peede's threats to harm Geraldine served to corroborate his confession, wherein he admitted he intended to use Darla with the intent to lure his intended victims out where he could kill them. There was no intelligent way to prosecute this case without reference to Peede's motive in kidnapping Darla. In effect, Darla's kidnapping was the first step in a single criminal episode, in which Peede planned to murder his ex-wives for their alleged infidelity and

posing naked in swinger magazines.

In proving its case, the State is entitled to paint an accurate picture of events surrounding the charged crimes. Smith v. State, 699 So. 2d 629 (Fla. 1997). Inextricably intertwined evidence or inseparable crime evidence may be admitted at trial to establish the entire context out of which a criminal act arose. State v. Cohens, 701 So. 2d 362, 364 (Fla. 2nd DCA 1997); Hunter v. State, 660 So. 2d 244, 251 (Fla. 1995), cert. denied, 516 U.S. 1128 (1996).

With regard to the victim's daughter's testimony that the victim was afraid of being put in with the other people Peede was planning on killing (TR. 600), appellate counsel did challenge this testimony on direct appeal on the basis of hearsay and relevance. (Appellant's Initial Brief at 24- 25). This Court rejected this claim of error stating:

> Peede further argues that the court committed reversible error in allowing the victim's daughter to testify that her mother told her that she was going to pick up Peede at the airport, that she was nervous and scared that she might be in danger, that her daughter should call the police if she was not back by midnight, that she was afraid of being with the other people he had threatened to kill, and that he would kill them all on Easter. He argues that this testimony was hearsay and inadmissible.
>
> The state, in response, correctly points out that two of the statements relating to the victim's telling her to call the police if she did not return and that

> Peede had threatened to kill others in North Carolina were given at trial without any hearsay objection, and therefore the issue with reference to those statements was not preserved. Insofar as the other statements are concerned, the state contends, there is no basis for reversal. Peede's own statement presented to the jury established that he arranged for the victim to pick him up at the airport. Furthermore, the state urges that the daughter's testimony that her mother said she was scared was not prejudicial in light of the fact that the daughter testified that her mother seemed nervous and scared. Moreover, the state argues, those statements challenged below were properly admitted under the hearsay exception to show the declarant's state of mind which was relevant to the kidnapping charge which formed the basis for the state's felony murder theory.
>
> We agree. The daughter's testimony in this regard established Darla's state of mind. Under the "state of mind" hearsay exception, a statement demonstrating the declarant's state of mind when at issue in a case is admissible. § 90.803 (3)(a), Fla. Stat. (1983). In the present case, the victim's mental state was at issue regarding the elements of the kidnapping which formed the basis for the state's felony murder theory. Under section 787.01(1) (a), Florida Statutes (1983), it was necessary for the state to prove that the victim had been forcibly abducted against her will, which was not admitted by defendant. The victim's statements to her daughter just prior to her disappearance all serve to demonstrate that the declarant's state of mind at that time was not to voluntarily accompany the defendant outside of Miami or to North Carolina. We hold that the trial did not abuse its discretion in admitting the testimony at issue.

Peede v. State, 474 So. 2d 808, 816 (Fla. 1985). On direct appeal, this Court found this testimony relevant to the victim's

state of mind.[1] Petitioner's attempt to re-litigate this issue in his habeas petition is not well taken. Fotopoulos v. State, 838 So. 2d. 1122 (Fla. 2002) (A claim of ineffective assistance of appellate counsel may not be used to circumvent the rule that habeas does not serve as a second or substitute appeal and may not be used as a variant to an issue already raised).

Peede's threat to "take care of" his ex-wife for allegedly posing in a nudie magazine clearly corroborated Peede's confession, wherein he claimed it was his intent to "do what he wanted to do to these other two people" in North Carolina. (TR. 719). In his confession, Peede claimed that he saw two women, who he believed were Geraldine and Darla, along with Calvin Wagner posing together in a swinger magazine. (TR. 722). "[H]e decided to kill Calvin Wagner and Geraldine Peede. But he said he knew they were afraid of him, wouldn't be able to get close enough to do it without Darla's help. That's the time he decided to go to Miami and bring her back..." (TR. 722). "He said at one point he intended to use Darla to lure them to a

[1] The objection to Rebecca Keniston's testimony at trial was on the basis of hearsay. (TR. 614). Consequently, an objection on the basis of relevancy, the issue Peede asserts should have been lodged on appeal, was not preserved. Appellate counsel cannot be faulted for failing to raise an unpreserved issue on appeal.

hotel where he could kill them."[2] (TR. 723).

Generally, evidence of other crimes or acts are admissible if they are relevant to prove a material fact in issue. Bryan v. State, 533 So. 2d 744, 746 (Fla. 1988), cert. denied, 490 U.S. 1028 (1989); Williams v. State, 110 So. 2d 654 (Fla.), cert. denied, 361 U.S. 847 (1959); Pittman v. State, 646 So. 2d 167, 170-171 (Fla. 1994). *Relevance*, not necessity, is the standard for admissibility. The evidence need not prove the defendant's guilt of the charged offense if "it is in the nature of circumstantial evidence forming part of the web of truth" proving the defendant to be the perpetrator, Bryant v. State, 235 So. 2d 721 (Fla. 1970) or would "cast light" upon the character of the act under investigation. See U.S. v. Canelliere, 69 F.3d 1116, 1124 (11th Cir. 1995) ("Furthermore, Rule 404(b)[3] does not apply where the evidence concerns the 'context, motive, and set-up of the crime' and is 'linked in

[2]The fact that Peede kept a loaded shotgun where he would have easy access to it after Darla's murder evinces consciousness of guilt and was therefore relevant and admissible. See Anderson v. State, 574 So. 2d 87, 93 (Fla. 1991) (testimony of witness that defendant showed her a gun and said that "if it ever got hot or the heat was on" that he "could take out a couple of people" admissible to show defendant's consciousness of guilt).

[3]The Federal equivalent to Section 90.404 of the Florida Statutes.

time and circumstances with the charged crime, or forms an integral and natural part of an account of the crime, or is necessary to complete the story of the crime for the jury.'") (quoting United States v. Williford, 764 F.2d 1493, 1499 (11th Cir. 1985)).

Similarly, Petitioner's claim that the relevancy of this evidence was outweighed by the danger of unfair prejudice is without merit. In Williamson v. State, 681 So. 2d 688, 696 (Fla. 1996), this Court found the trial court did not abuse its discretion in admitting a statement of a witness who claimed that the defendant had previously beaten a baby to death. This Court stated:

> Almost all evidence introduced during a criminal prosecution is prejudicial to a defendant. Amoros v. State, 531 So.2d 1256, 1258 (Fla. 1988). In reviewing testimony about a collateral crime that is admitted over an objection based upon section 90.403, a trial judge must balance the import of the evidence with respect to the case of the party offering it against the danger of unfair prejudice. Only when the unfair prejudice substantially outweighs the probative value of the evidence should it be excluded. Id. Based upon our review of the record, we conclude that the trial judge did not abuse his discretion in performing the necessary weighing process and admitting the testimony regarding appellant's prior crime. See e.g, Jackson v. State, 522 So.2d 802, 806 (Fla.), cert. denied, 488 U.S. 871, 109 S.Ct. 183, 102 L.Ed.2d 153 (1988); Washington v. State, 432 So.2d 44, 47 (Fla. 1983). The testimony from O'Brien and Panoyan was integral to the State's theory of why its key witness acted as he did both during and after the criminal

> episode. **Had the trial judge precluded either witness's testimony, the jury would have been left with a materially incomplete account of the criminal episode. Thus, we conclude that the trial judge did not err in admitting this testimony.**

Williamson, 681 So. 2d at 696 (emphasis added).

In this case, the jury would have been left with a materially incomplete account if reference to his motive to kill people in North Carolina and his steps to accomplish that goal, which included the kidnapping of Darla Peede, had been excluded.

For example, the naked photographs Peede asserts should have been excluded (Habeas Petition at 8) formed the motive to kidnap Darla as part of his plan to murder Geraldine and Calvin in North Carolina. In any case, the record does not reveal any contemporaneous objection to these photographs by defense counsel. Consequently, the issue was not preserved for appeal. (TR. 861). Further, as noted, the photographs were relevant and served to corroborate Peede's confession. Consequently, it cannot be said the trial court abused its discretion in admitting the photographs.

A trial court's ruling on the relevancy of evidence and whether or not the probative value is outweighed by the danger of unfair prejudice is governed by an abuse of discretion standard of review. See Williamson v. State, 681 So. 2d 688,

696 (Fla. 1996). Here, reference to the threats Peede made against Geraldine and Calvin and his confession that his reason for kidnapping Darla was in order to lure them out so that he could kill them rendered evidence concerning his intent to commit the North Carolina crimes relevant and admissible. No abuse of discretion has been shown in this case; consequently, appellate counsel cannot be considered ineffective.

In any case, the evidence of Peede's guilt in this case was overwhelming, and, included his own voluntary, detailed, confession to murdering the victim. Thus, even if statements and evidence concerning his intent to commit crimes in North Carolina were excluded, admission of such evidence would not constitute reversible error. The outcome of Peede's direct appeal is not rendered unfair or unreliable based upon counsel's failure to raise this issue on direct appeal.

II.

WHETHER PEEDE'S RIGHT OF CONFRONTATION WAS VIOLATED BY ADMISSION OF THE VICTIM'S STATEMENTS?

Once again, Peede asserts that Tanya Bullis's testimony should have been challenged on direct appeal. However, as noted above, this issue was raised on direct appeal and rejected by

this Court's opinion. Appellate counsel cannot be faulted for failing to raise an issue **which he did, in fact raise on direct appeal.** Petitioner simply seeks to re-litigate an issue decided adversely to him on direct appeal.

Rebecca Keniston's testimony was cumulative to Tanya Bullis and was admissible on the same basis as Tanya Bullis's. It cannot be said that appellate counsel was ineffective in failing to assert as error her brief testimony concerning her mother's intent in picking Peede up at the airport.

As for Geraldine Peede's testimony concerning Petitioner's statements evincing anger and jealousy over Darla, defense counsel lodged no hearsay objection to this testimony. (TR. 622-23). Consequently, the issue was not preserved for appeal. Appellate counsel cannot be faulted for failing to raise this unpreserved issue on direct appeal.

In any case, with respect to Peede's statements of jealousy and displeasure with Darla, Peede was the declarant. Consequently, it was an admission of a party opponent and not inadmissible hearsay. See Swafford v. State, 533 So. 2d 270, 271 (Fla. 1988). Peede was the out of court declarant. Furthermore, the statements reflected Peede's jealousy and therefore were relevant to his state of mind. See Escobar v.

State, 699 So. 2d 988, 998 (Fla. 1997) (defendant's statements that he carried a gun and that he would kill a police officer before going back to jail was admissible as a statement of plan or intent which served to explain his subsequent conduct).

Petitioner's reliance upon Crawford v. Washington, 541 U.S. 36 (2004) is misplaced. This Court has recently decided that Crawford is not retroactive under Florida law. Chandler v. Crosby, 30 Fla.L.Weekly S661 (Fla. October, 6, 2005) ("Because we find that Crawford does not apply retroactively, we deny the petition for a writ of habeas corpus."). See also Murillo v. Frank, 402 F.3d 786, 789-91 (7th Cir. 2005); Dorchy v. Jones, 398 F.3d 783, 788 (6th Cir. 2005); Mungo v. Duncan, 393 F.3d 327, 336 (2d Cir. 2004); Brown v. Uphoff, 381 F.3d 1219, 1227 (10th Cir. 2004); Evans v. Luebbers, 371 F.3d 438, 444-45 (8th Cir. 2004) (Deciding that Crawford is not retroactive). Moreover, as noted above, the hearsay issue was fully addressed on direct appeal and a habeas petition is not to be used as a second appeal.

In any case, Crawford did not invalidate the state of mind hearsay exception upon which this Court ruled Darla's statements were admissible. Moreover, Petitioner is not entitled to relief because he forfeited any possible confrontation rights. It was

Petitioner's act of murdering the victim, Darla Peede that caused her to be unavailable to testify. The "forfeiture by wrongdoing doctrine" is an equitable exception to both the rule against hearsay and the Confrontation Clause. See Richard D. Friedman, Confrontation: The Search for Basic Principles, 86 Geo. L.J. 1011, 1031 (1998) ("If the accused's own wrongful conduct is responsible for his inability to confront the witness, then he should be deemed to have forfeited the confrontation right with respect to her statements."). The forfeiture by wrongdoing doctrine creates a hearsay exception when the party, who is objecting to the hearsay, caused the declarant to be unavailable. The United States Supreme Court has long endorsed the forfeiture by wrongdoing doctrine and reaffirmed that position in Crawford. Reynolds v. United States, 98 U.S. 145 (1878) (recognizing that Sixth Amendment Confrontation Clause rights could be waived by a party's misconduct in a bigamy case where the defendant prevented the marshal from serving the subpoena on his second wife by falsely representing that the second wife was not present); Crawford, 541 U.S. at 62 (stating that "the rule of forfeiture by wrongdoing (which we accept) extinguishes confrontation claims on essentially equitable grounds"). Petitioner may not kill the

declarant and then assert that the State violated his confrontation rights by not producing the declarant at trial. Thus, any possible confrontation violation was forfeited by Petitioner's act of murdering Darla.

III.

WHETHER APPELLATE COUNSEL WAS INEFFECTIVE IN FAILING CHALLENGE THE IDENTIFICATION TESTIMONY PROVIDED BY THE VICTIM'S DAUGHTER AND IN FALING TO RAISE AN ERROR BASED UPON ADMISSION OF NUDE PHOTOGRAPHS?

Petitioner's assertion that admission of Rebecca Keniston's identification testimony constituted reversible error and should have been raised on appeal is without merit. Petitioner's claim that the State did not demonstrate that it was unable to identify the victim through alternate means (Habeas Petition at 31), is not supported by the record. The prosecutor stated that she did not know of anyone else who could identify the body. The prosecutor even asked defense counsel if, through his review of the discovery, he could name someone else who might identify the victim's body. (TR. 588-89). Defense counsel failed to answer, but, the apparent lack of any other witness who could identify the victim's body is sufficient reason alone to uphold the trial court's ruling below.

In any case, the victim's daughter was not called solely to identify the victim's body. Keniston identified items of jewelry which belonged to the victim and the car in which she left to pick up Peede at the airport. (TR. 615-16). Moreover, Keniston testified regarding statements the victim made upon leaving to pick up Peede at the airport. Thus, her testimony was clearly relevant and admissible. The trial court did not abuse its discretion in allowing her brief, dispassionate, identification testimony.

Finally, even if some error could be discerned in allowing the victim's daughter to identify the body, it is clear that any such error was harmless in this case. See Thompson v. State, 565 So. 2d 1311, 1314 (Fla. 1990) (finding any error in allowing father to identify the body harmless where the witness displayed no emotional outburst or unduly prejudicial behavior to improperly influence the jury). Consequently, it cannot be said that the result of Peede's direct appeal was rendered unfair or unreliable based upon appellate counsel's failure to raise this issue.

Once again, Petitioner asserts that counsel should have objected to admission of nude photographs seized after Peede was arrested. However, State's Exhibit 9 was admitted into evidence

below without an objection. (TR. 861). Thus, any assignment of error concerning the nude photographs marked [apparently by Peede] C, D, and F, was not preserved for appeal. And, as noted above, under Issue I, the photographs were clearly relevant as they formed part of Peede's motive to commit murder in this case. Thompson, 565 So. 2d at 1314 (admission of photographic evidence is within the discretion of the trial court and that discretion is not abused if the photographs are relevant). For the foregoing reasons, appellate counsel cannot be considered ineffective for failing to raise this issue on direct appeal.

IV.

WHETHER THE SENTENCING INSTRUCTIONS AND COMMENTS OF THE PROSECUTOR DILUTED THE JURY'S SENSE OF RESPONSIBILITY FOR PEEDE'S SENTENCE?

Petitioner's claim that the jury's role was improperly denigrated in violation of Caldwell v. Mississippi, 472 U.S. 320 (1985) was not raised in the trial court and was procedurally barred on appeal. Gaskin v. State, 737 So. 2d 509, 520 (Fla. 1999) (Caldwell claim barred and without merit.). Moreover, this Court recently addressed this issue in Perez v. State, 30 Fla. L. Weekly S 729 (Fla., October 27, 2005) stating:

Perez also claims that indications made by the State

> and the trial court to the jury that their penalty phase verdict was advisory and not binding renders his penalty phase unconstitutional. This Court has addressed claims of this nature and has repeatedly denied relief. See Card v. State, 803 So. 2d 613 (Fla. 2001) (holding that claim that instructions "that refer to the jury as advisory and that refer to the jury's verdict as a recommendation violate Caldwell v. Mississippi, 472 U.S. 320, 86 L. Ed. 2d 231, 105 S. Ct. 2633 (1985)" was without merit); Brown v. State, 721 So. 2d 274, 283 (Fla. 1998) (holding that the standard jury instructions fully advise the jury of the importance of its role, correctly state the law, do not denigrate the role of the jury, and do not violate Caldwell); Rose v. State, 617 So. 2d 291, 297 (Fla. 1993) (same); Robinson v. State, 574 So. 2d 108 (Fla. 1991) (same); Combs v. State, 525 So. 2d 853 (Fla. 1988) (same).

The jury in this case was told to carefully deliberate and consider all evidence in mitigation and aggravation before arriving at an appropriate sentence. The jury was properly told of its role under Florida law. And, indeed, before the jury retired to deliberate, the judged emphasized that even though a sentence may be reached on one ballot, they should not be "influence[d] to act hastily without due regard to the gravity of these proceedings" and "carefully, weigh sift and consider the evidence," ... "realizing a human life is at stake, and bring to bear" their "best judgment in reaching" their "advisory sentence." (TR. 971). The jury's sense of responsibility was not diluted by the trial court's instructions. Appellate

counsel's failure to raise this procedurally barred issue below did not constitute deficient performance.

Finally, Petitioner asserts that his counsel was ineffective for failing to challenge the cold, calculated, and premeditated instruction on direct appeal. However, the record does not reflect that trial counsel objected to this instruction below. (TR. 968-973). Consequently, the issue was not preserved for appellate review. Moreover, appellate counsel did in fact challenge the cold, calculated and premeditated aggravating factor on direct appeal and **was successful in that challenge.** (Appellant's Initial Brief at 36-37).

This Court determined that the evidence was insufficient to support the cold, calculated, and premeditated finding by the trial court. This Court stated:

> Finally, Peede contends that the trial court erred in finding the aggravating circumstance that the murder of Darla was cold, calculated, and premeditated without any pretense of moral justification. Although we find that the evidence of premeditation is sufficient to support a finding of premeditated murder, there was no showing of the heightened premeditation, calculation, or planning that must be proven to support a finding of the aggravating factor that Darla's murder was cold, calculated, and premeditated. The record supports the conclusion that Peede intended to take Darla back to North Carolina as a lure to get Geraldine and Calvin to come to a location where he could kill them. It does not establish that he planned from the beginning to murder her once he had completed his plan in North Carolina.

> By prematurely murdering her at the time he did, he eliminated his bait.
>
> Even absent this circumstance, however, we know that the result of the trial court's weighing process would not be different because it expressly held that the one marginal mitigating circumstance that it found was outweighed by the single aggravating circumstance standing alone of the defendant's previous convictions of two felony crimes involving the use or threat of violence to some other person. We hold that the death sentence was properly imposed by the trial court.

Peede, 474 So. 2d at 817-818. Appellate counsel cannot be faulted for raising a successful challenge to the sufficiency of evidence supporting this aggravator on appeal rather than failing to anticipate a later change in the law. Jackson v. State, 648 So. 2d 85 (Fla. 1994). For the foregoing reasons, Petitioner's challenge to his appellate counsel's effectiveness is completely devoid of merit.

CONCLUSION

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

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., Special Assistant CCRC-Southern Region, 141 N.E. 30th Street, Wilton Manors, Florida 33334-1064; to the Honorable Alan C. Lawson, Circuit Court Judge, 425 N. Orange Avenue, Orlando, Florida 32801; and to Chris Lerner, Assistant State Attorney, 415 N. Orange Avenue, Orlando, Florida 32801, this 9th day of January, 2006.

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,

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