IN THE SUPREME COURT OF FLORIDA

ALVIN MORTON,

Petitioner,

v. **CASE No. SC07-1201**

JAMES R. McDONOUGH, Secretary,
Florida Department of Corrections,

Respondent.
_____/

RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS
AND
MEMORANDUM OF LAW

COMES NOW, Respondent, James R. McDonough, 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[1]

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.

---

[1] Citation to the direct appeal record for Morton's 1994 convictions will be referred to as "DAR." Citation to the 1999 resentencing record will be referred to as "RS."

PROCEDURAL HISTORY AND FACTS

The Respondent generally accepts Morton's statement of procedural history, but adds the following:

Morton's initial appellate counsel, Steven L. Bolotin, raised the following issues on direct appeal: (1) whether Morton's right to a fair trial was violated by the prosecutor's repeated introduction of out-of-court statements to either refresh the recollection of, or, impeach state witnesses; 2) whether the trial court abused its discretion in admitting conversations between the co-perpetrators as adoptive admissions; 3) whether the trial court failed to find and weigh non-statutory mitigating factors; 4) whether the trial court erred in finding and instructing the jury on the aggravating factor of cold, calculated, and premeditated; and 5) whether the trial court erred in finding and instructing the jury on the avoiding arrest aggravator.

This Court provided the following summary of facts in affirming Morton's convictions on direct appeal:

> Early morning of January 27, 1992, appellant Alvin LeRoy Morton, accompanied by Bobby Garner and Tim Kane, forcibly entered the home of John Bowers and his mother Madeline Weisser. Two other individuals, Chris Walker and Mike Rodkey, went with them to the house but did not enter. Morton carried a shotgun and one of the others possessed a "Rambo" style knife. They began looking around the living room for something to take when Bowers and Weisser entered the room from another area of the house. Morton ordered the two of them to get down on the floor, and they complied. Bowers agreed to give them whatever they

> wanted and pleaded for his life but Morton replied that Bowers would call the cops. When Bowers insisted that he would not, Morton retorted, "That's what they all say," and shot Bowers in the back of the neck, killing him. Morton also attempted to shoot Weisser, but the gun jammed. He then tried to stab her, but when the knife would not penetrate, Garner stepped on the knife and pushed it in. Weisser ultimately was stabbed eight times in the back of the neck and her spinal cord was severed. Before leaving the scene, either Garner or Morton cut off one of Bowers' pinky fingers. They later showed it to their friend Jeff Madden.
>
> Acting on a tip, police and firefighters went to the victims' residence, where the mattresses had been set on fire, and discovered the bodies. Morton was later found hiding in the attic of his home. The murder weapons were discovered underneath Garner's mother's trailer. Morton later confessed to shooting Bowers and helping make the first cut on Weisser.

Morton v. State, 689 So. 2d 259, 261 (Fla. 1997).

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).

Appellate counsel has no obligation to raise issues on appeal that were not preserved for review. Wright v. State, 857 So. 2d 861, 875 (Fla. 2003)(citing Robinson v. Moore, 773 So. 2d 1, 4 (Fla. 2000)). 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." Rutherford, at 646; Chandler v. State, 702 So. 2d 186, 191, n. 5 (Fla. 1997).

ARGUMENT

CLAIM I

WHETHER APPELLATE COUNSEL RENDERED INEFFECTIVE ASSISTANCE ON DIRECT APPEAL BY FAILING TO RAISE MERITORIOUS ISSUES FOR REVIEW BY THIS COURT. (STATED BY RESPONDENT)

(A) Failure of Appellate Counsel to Challenge the Ownership or Possession Element of Burglary

Morton first asserts that his initial appellate counsel rendered ineffective assistance by failing to challenge the sufficiency of evidence establishing burglary on appeal. Specifically, he asserts the State never established that the murder victims owned or possessed the home in which they were murdered. The State disagrees.

Morton did not challenge the ownership or possession element relating to burglary at trial. Consequently, this issue was not preserved for appeal. "An issue raised on appeal must first be presented to the lower court, 'and the specific legal argument or ground to be argued on appeal must be part of that presentation.'" Williams v. State, 957 So. 2d 595 (Fla. 2007)(quoting Archer v. State v. State, 613 So. 2d 446, 448 (Fla. 1993)). Since this issue was not preserved for appeal, appellate counsel cannot be considered ineffective for failing to raise it. Wright, 857 So. 2d at 875.

In any case, Petitioner's argument is patently devoid of merit. As noted by this Court on direct appeal, the State's evidence establishing Morton's guilt in this case was strong and included

Morton's detailed confession. In finding use of prior inconsistent statements harmless error in the guilt phase, this Court stated:

> Despite these circumstances, we do not find it necessary to reverse the judgment of guilt. It is undisputed that Morton and his companion committed burglary by breaking into the victims' house, and Morton admitted killing Bowers and attempting to shoot and to stab Weisser. This confession together with other substantive evidence proved a strong case of felony murder without the benefit of the impeaching statements. See Brumbley v. State, 453 So. 2d 381 (Fla. 1984). We are convinced that any error which occurred in the guilt phase was harmless beyond a reasonable doubt.

Morton v. State, 689 So. 2d 259, 265 (Fla. 1997).

Firefighters and police found the victims, John Bowers, age 55, and, his mother, Madeline Weisser, age 75 dead at 6730 Sanderling Drive in Hudson on January 27, 1992. A co-worker of victim Bowers, Linda Custer, stated that she visited him at his home which he shared with his mother on Sanderling Lane, in Pasco County. They lived there alone with two dogs. She was able to identify both bodies at the medical examiner's office. (DAR V12, 858-59).

Morton had no legitimate defense to the burglary charge. He certainly had no ownership or possessory interest in the house on Sanderling Lane.[2] The State presented sufficient evidence to show

[2] As stated by this Court in D.S.S v. State at 462 (Fla. 2003): "The purposes of the ownership element are to prove the accused does not own the property and to sufficiently identify the offense to protect the accused from a second prosecution for the same offense. In re M.E., 370 So. 2d at 796-97. This Court has held that the ownership element in burglary is not the same as ownership in property law but, rather, means 'any possession

that the victims had ownership or control of the Sanderling house. See D.S.S. v. State, 850 So. 2d 459 (Fla. 2003)(where the state presented sufficient testimony to "establish that Indian River County had 'special or temporary ownership, possession, or control' superior to that of the accused."). Consequently, appellate counsel was not ineffective in failing to raise this issue below. Appellate counsel was under no obligation to waste his own time, or this Court's, on this meritless issue.

Similarly, appellate counsel had no reason to challenge the in the course of a felony aggravator based upon an underlying burglary. Trial counsel did not make this argument during the resentencing proceeding below and the issue was therefore not preserved for appeal. Indeed, when specifically asked if he had any problem with burglary, defense counsel said: "No." (RS V7, 698). At that point, Morton had been convicted of burglary and his conviction had been affirmed on direct appeal by this Court. Consequently, appellate counsel on resentencing had even less reason than Morton's initial counsel to challenge the in the course of a felony aggravator based upon an underlying burglary.

---

which is rightful as against the burglar and is satisfied by proof of special or temporary ownership, possession, or control.' 370 So. 2d at 797. This is true regarding the ownership element in criminal mischief and theft as well. See Duncan v. State, 29 Fla. 439, 10 So. 815, 816 (Fla. 1892); R.C. v. State, 481 So. 2d 14, 15 (Fla. 1st DCA 1985)."

(B) Failure To Challenge The CCP And Avoiding Arrest Aggravators

(i) Failure to Challenge The CCP Finding For Insufficient Evidence

The trial court extensively discussed the CCP finding in its order on resentencing, stating:

> The Defendant had a heightened level of premeditation as indicated by his having thought and discussed committing this murder for several days beforehand to the point of apparent obsession, having enunciated this intent on several occasions to several individuals, having considered and solicited suggestions of what proof would be needed to establish the murder — such as a human body part as a trophy; having made careful plans as evidenced by the thought process demonstrated in choosing a victim who lived only with his elderly mother in an isolated area, on a dead-end street, across from a vacant dwelling which served as headquarters for a preliminary stakeout and/or "dry run"; arranging for the phone wires to be cut in carrying out the preordained plan under cover of darkness, to kick in the front door and rush into the dwelling while heavily armed with a sawed-off shotgun loaded with four rounds, and Rambo-style knife, both being serious deadly weapons which could have no other purpose than implements of destruction or death, and extra ammunition; having taken the time to carefully conceal the shotgun in a towel, and concealing the getaway bikes in nearby brush; having worn gloves to avoid leaving fingerprints; having expressed a hope that the killing would produce a rush; all as further evidence by the Defendant's own confession and statements to others.

(RS V1, 153-154).

"On appeal, this Court does not reweigh the evidence to determine whether the State proved each aggravating circumstance beyond a reasonable doubt--that is the trial court's job. Rather, this Court reviews the record to determine whether the trial court applied the right rule of law for each aggravating circumstance and, if so, whether competent, substantial evidence

supports its finding." Pearce v. State, 880 So. 2d 561, 575 (Fla. 2004)(citing, Alston v. State, 723 So. 2d 148, 160 (Fla. 1998)). The trial court's findings are well supported by the record. Consequently, appellate counsel cannot be faulted for failing to raise this issue on appeal.

In Pearce v. State, 880 So. 2d 561, 576 (Fla. 2004), this Court affirmed the CCP aggravator for an execution-type killing, even without statements evidencing a preplanned intent to kill as in this case. This Court stated:

> This Court has held that execution-style killing is by its very nature a "cold" crime. See Lynch v. State, 841 So. 2d 362, 372 (Fla.), cert. denied, 540 U.S. 867, 157 L. Ed. 2d 123, 124 S. Ct. 189 (2003); Walls v. State, 641 So. 2d 381, 388 (Fla. 1994). As to the "calculated" element of CCP, this Court has held that where a defendant arms himself in advance, kills execution-style, and has time to coldly and calmly decide to kill, the element of calculated is supported. See Hertz v. State, 803 So. 2d 629, 650 (Fla. 2001); Knight v. State, 746 So. 2d 423, 436 (Fla. 1998) (holding "even if Knight did not make the final decision to execute the two victims until sometime during his lengthy journey to his final destination, that journey provided an abundance of time for Knight to coldly and calmly decide to kill"). This Court has "previously found the heightened premeditation required to sustain this aggravator where a defendant has the opportunity to leave the crime scene and not commit the murder but, instead, commits the murder." Alston v. State, 723 So. 2d at 162; see also Lynch, 841 So. 2d at 372 (noting that defendant had five- to seven-minute opportunity to withdraw from the scene or seek help for victim, but instead calculated to shoot her again, execution-style).

Morton's assertion that the evidence showed "an emotional, spur of the moment act in killing Bowers" is simply wrong. To the contrary, the facts indicate this was a planned execution-style killing as in Pearce. Morton talked about killing the victims well prior to entering the victims' home. Mike Rodkey testified that before entering the house, Morton and the other boys talked about killing the people in the house they had selected about one week earlier, Walker's former neighbors. (RS V4, 377-78, 381, 403-04). Indeed, Rodkey testified that one week prior to the murders, he went to the house on Sanderling with Morton, Kane and Walker, where they said they were going to kill the people in the home. (RS V4, 400-01, 403, 411).

Prior to entering the victims' house, Morton armed himself with a shotgun. (RS V4, 379-80). When the elderly victims were lying helpless on the ground, and were pleading for their lives, Morton shot Bowers in the back of the head. Thereafter, he attempted to shoot Weisser and, when the shotgun jammed, used the knife to stab her in the back of the neck. See Gordon v. State, 704 So. 2d 107, 115-16 (Fla. 1997)(notwithstanding defendant's claim that he and his accomplice simply planned a burglary or robbery, the fact they knew the victim's schedule and could have avoided him had they wanted to along with evidence they bound and gagged the victim before killing him was sufficient to uphold the trial court's CCP finding).

These facts, coupled with Morton's previous statements that he wanted to kill (RS V4, 289-90) and that he planned to kill people (RS V4, 289-90), provided ample support for the CCP aggravator.[3] As such, Petitioner has failed to establish either deficient performance or resulting prejudice from appellate counsel's failure to brief this issue.

(ii) Failure to Challenge The Sufficiency Of Evidence Supporting The Avoiding Arrest Aggravator

The trial court below stated the following in finding the avoiding arrest aggravator:

> …It is apparent from the overall testimony and evidence that the Defendant wanted to commit a murder and he did not want to get caught. This was not an impulsive killing, and as such aggravators a and c are not mutually exclusive. Specifically, the killing occurred immediately after the victim begged for his life, asserting that he wouldn't inform on the Defendant, and the Defendant remarking, "That's what they all say!"; and then pulling the trigger of the shotgun against the victim's neck. The Defendant later also admitted that "he had no choice" but to kill this victim since he turned and looked at the Defendant. As further evidence of Defendant's desire to avoid arrest for these murders he caused fires to be set in the victims' house in an effort to conceal the murders.

(RS V1, 154-55). The evidence clearly supports the trial court's findings in this case.

In Zack v. State, 753 So. 2d 9, 20 (Fla. 2000), this Court explained:

[3] Petitioner's sister in a sworn statement stated that appellant "was bragging about what he was going to do." (RS V5, 516). Victoria Fitch was in the car with Morton in January and heard Morton state "he was going–he wanted to kill someone." (RS V4, 348).

> Application of the "avoiding lawful arrest" aggravator requires strong proof that the dominant motive for the murder was witness elimination. See Mahn v. State, 714 So. 2d at 402. This aggravator has been applied to cases in which the evidence supported a finding that the victim would have summoned the authorities and in cases where the defendant had expressed an apprehension regarding arrest. See, e.g., Sliney v. State, 699 So. 2d 662 (Fla. 1997) (aggravator justified where defendant testified that his accomplice told him that "Sliney would have to kill the victim because '[s]omebody will find out or something'"); Peterka v. State, 640 So. 2d 59 (Fla. 1994) (aggravator applicable where defendant, who feared incarceration, had established a new identity which the victim threatened to expose).

In recounting the murder, Morton said that the man asked the boys not to hurt them, and offered to give them all their money. Morton said that the man would call the cops, when the man replied that he would not, Morton said "[t]hat's what you all say," and pulled the trigger. (RS V4, 285-87; 305). In addition, a corrections officer overheard Morton state that he had to shoot the man because "[t]he guy turned around and looked. We told him not to, he turned around, and I shot him. I didn't have a choice, he looked." (RS V5, 444). Morton admitted that they set fire to the victims' house in order to destroy evidence they might have left behind. They all wore gloves. (RS V3, 261). However, they did not wear anything to cover their faces. (RS V3, 261-62).

Based on the foregoing, it is clear the State presented strong, indeed, overwhelming evidence to establish that the

murder was for the dominant purpose of avoiding arrest. Appellate counsel had no obligation to raise such a meritless issue on appeal.

(iii) Failure to Challenge Improper Doubling Of CCP and Avoiding Arrest

This Court has repeatedly upheld the finding of both the CCP and avoiding arrest aggravators even though interrelated facts are used to establish each aggravator. See Stein v. State, 632 So. 2d 1361, 1366 (Fla. 1994); Kearse v. State, 662 So. 2d 677 (Fla. 1995). In Sireci v. Moore, 825 So. 2d 882, 885-886 (Fla. 2002), this Court rejected a similar ineffective assistance of appellate counsel claim based upon failure to challenge improper doubling. In rejecting the claim, this Court stated:

> In his second claim, the petitioner asserts that the trial court unconstitutionally based its findings of the cold, calculated, and premeditated aggravator; the avoiding or preventing lawful arrest aggravator; and the in the course of a robbery or for pecuniary gain aggravator upon the same facts. Since petitioner's appellate counsel did not raise this issue on direct appeal, Mr. Sireci now asserts that the assistance rendered by his appellate attorney was ineffective.
>
> In Banks v. State, 700 So. 2d 363 (Fla. 1997), we enunciated the proper analysis concerning the duplication of aggravating factors:
>
> > Improper doubling occurs when both aggravators rely on the same essential feature or aspect of the crime. However, there is no reason why the facts in a given case may not support multiple aggravating factors so long as they are separate and distinct aggravators and not merely restatements of each other, as in murder

> committed during a burglary or robbery and murder for pecuniary gain, or murder committed to avoid arrest and murder committed to hinder law enforcement.
>
> Id. at 367 (citation omitted). Hence, the focus in an examination of a claim of unconstitutional doubling is on the particular aggravators themselves, as opposed to whether different and independent underlying facts support each separate aggravating factor.
>
> In the instant case, the three aggravators Mr. Sireci challenges are the cold, calculated, and premeditated aggravator; the avoiding or preventing a lawful arrest aggravator; and the in the course of a robbery or for pecuniary gain aggravator. In accordance with Banks, all of these aggravators are distinct from each other. Further, even though the aggravators are all based upon interrelated facts, the focus of each aggravator is upon a different facet or motivation of Mr. Sireci's crime.
>
> The avoiding or preventing a lawful arrest aggravator, found based upon a witness elimination rationale, focuses on the petitioner's motive for murdering the victim. In sharp contrast, in finding that Mr. Sireci's acts were cold, calculated, and premeditated, the focus of the trial court was upon the manner in which the crime was executed. n2 Finally, the finding that the murder was committed in the course of a robbery and for pecuniary gain is a conclusion regarding the context in which the murder occurred--during a robbery.

In this case, as in Sireci, some of the same facts may have been used to support each aggravator, nonetheless, each aggravator requires proof of another aspect of the offense that the other does not. As such, the trial court was able to find both aggravators under the facts of this case. See generally Garcia v. State, 492 So. 2d 360, 366 (Fla. 1986)("Evidence or comments intended to show a calculated plan to execute all witnesses can also support the aggravating factors of heinous,

atrocious and cruel and cold, calculated and premeditated.").

Here, the cold, calculated and premeditated aggravator focuses on the planning and cold nature of the murder. The avoiding arrest aggravator focuses on the underlying reason for committing the murder, to eliminate a witness. See Gore v. State, 706 So. 2d 1328, 1334 (Fla. 1997)("In any event, we find no error because the avoid arrest and CCP aggravators were based on different aspects of the crime.")(citing Stein v. State, 632 So. 2d 1361, 1366 (Fla. 1994)). Not every cold, calculated, and premeditated murder will also satisfy the elimination of a witness rationale to qualify for the avoiding arrest aggravator. Similarly, not every murder with the motive to avoid arrest or eliminate a witness will be considered cold, calculated, and premeditated. Consequently, the aggravators are not simply restatements of each other as is the case of a murder committed during the course of a robbery or burglary and pecuniary gain. See Stein v. State, 632 So. 2d 1361, 1366 (Fla. 1994)(no impermissible doubling of aggravators where the avoiding arrest aggravator focused on the motive for the murder and CCP focused on the manner.). See also Kearse v. State, 662 So. 2d 677 (Fla. 1995)(commission during robbery and avoiding arrest aggravator did not constitute improper doubling even though robbery of police officer's gun may have been motivated by defendant's desire to avoid arrest).

As noted by the foregoing, at the time of Morton's resentencing, this Court had repeatedly rejected improper doubling challenges based upon CCP and the avoiding or preventing a lawful arrest aggravator. Consequently, appellate counsel was well advised not to raise an issue on appeal which possessed little chance of success. 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 stronger points.").

In any case, assuming one of the aggravators is merged or even struck, this case would not require remand for resentencing. This case possesses significant aggravation, and any error would be considered harmless. Included among the remaining aggravators are two of the most weighty in Florida's sentencing calculus, prior violent felony conviction (contemporaneous first degree murder) and that the murder was heinous, atrocious or cruel. See e.g., Larkins v. State, 739 So. 2d 90, 95 (Fla. 1999).

(C) Failure to Challenge The Courtroom Closure

Morton next asserts appellate counsel should have objected to closure of the courtroom prior to the court instructing the jury for deliberations in the 1994 trial and 1999 penalty

phases. However, no objection was raised by trial counsel during the 1994 or 1999 proceedings on this basis. Consequently, the issue was not preserved for appeal. Since the issue was not preserved, appellate counsel cannot be faulted for failing to raise these claims on appeal. Medina v. Dugger, 586 So. 2d 317, 318 (Fla. 1991)(Finally, appellate counsel is "not ineffective for failing to raise issues not preserved for appeal.").

In any case, it is apparent the trial court did not exclude everyone from the courtroom. The court stated: "Folks, anyone wishing to leave now must leave now prior to me instructing the jury." (DAR V12, 951). Consequently, the 1994 transcript reveals that the court simply did not want anyone leaving or entering the courtroom when he read the jury instructions. Presumably, the court did not want the distraction of the doors opening and closing and people shuffling in or out while the court read the instructions. See generally United States v. Juarez, 573 F.2d. 267, 281 (5th Cir. 1978)("The district court's restriction on access to the courtroom was reasonable and well within the requirements of the sixth amendment."). This limited restriction does not constitute closure or the denial of the right to a public trial.

Similarly, there was no objection to this procedure prior to the court instructing the jury during the 1999 penalty phase.

There is no evidence in this record that a single member of the public or press was excluded from Morton's 1999 trial. This procedure did not violate Morton's right to a public trial. Consequently, appellate counsel cannot be faulted for failing to raise this procedurally barred, meritless claim on appeal.

(D) Appellate Counsel's Failure To Raise General Challenges To Florida's Capital Sentencing Statute

As collateral counsel candidly admits, he raises several issues which have "no merit." They are simply raised to preserve the issues for federal review. Nonetheless, he simply refers to motions below and fails to provide supporting argument. Consequently, the State questions whether or not these claims are truly being presented for this Court's consideration. As Petitioner has largely failed to offer specific argument in support of these claims, his allegations of error may be deemed waived on appeal.

In Shere v. State, 742 So. 2d 215 (Fla. 1999), this Court addressed similar allegations of error, stating:

> In a heading in his brief, Shere asserts that the trial court erred by summarily denying nineteen of the twenty-three claims raised in his 3.850 motion. However, for most of these claims, Shere did not present any argument or allege on what grounds the trial court erred in denying these claims. We find that these claims are insufficiently presented for review. See State v. Mitchell, 719 So. 2d 1245, 1247 (Fla. 1st DCA 1998)(finding that issues raised in appellate brief which contain no argument are deemed abandoned), *review denied*, 729 So. 2d 393 (Fla. 1999).

As Petitioner fails to provide specific facts in support of his claims of error, these issues may be deemed waived. In any case, as Petitioner acknowledges, his general challenges to Florida's capital sentencing statute lack any merit. See Proffitt v. Florida, 428 U.S. 242 (1976)(upholding Florida's sentencing scheme against constitutional challenges). In Gorby v. State, 819 So. 2d 664, 687 (Fla. 2002), this Court rejected similar challenges, stating:

> 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. Moreover, we have previously considered similar constitutional challenges and found them lacking in merit.

Petitioner has not carried his burden of establishing any of his claims warranted briefing on direct appeal.[4] Consequently, appellate counsel cannot be considered deficient under Strickland.

CLAIM II

WHETHER MORTON'S DEATH SENTENCE IS UNCONSTITUTIONAL UNDER RING V. ARIZONA.

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

[4] For instance, Petitioner mentions a motion filed below arguing execution by electrocution constitutes cruel and unusual punishment. However, this is no longer the primary method of execution in Florida.

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); 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 has also decided that Ring is not retroactive to cases on post-conviction review. Johnson v. State, 904 So. 2d 400 (Fla. 2005); See also Monlyn v. State, 894 So. 2d 832 (Fla. 2005) and Windom v. State, 886 So. 2d 915 (Fla. 2004).

Finally, 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).

CLAIM III

WHETHER PETITIONER IS COMPETENT TO BE EXECUTED. (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 her current habeas petition in order to preserve the issue for federal court review. Clearly, there is no basis for this Court to rule on Morton'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.

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 Marie-Louise Samuels Parmer, Capital Collateral Regional Counsel - Middle Region, 3801 Corporex Park Drive, Suite 210, Tampa, Florida 33619, this 1st day of October, 2007.

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,

BILL MCCOLLUM
ATTORNEY GENERAL

_____

SCOTT A. BROWNE
Assistant Attorney General
Florida Bar No. 0802743
Concourse Center 4
3507 E. Frontage Rd, Ste. 200
Tampa, Florida 33607-7013
Telephone: (813) 287-7910
Facsimile: (813) 281-5501

COUNSEL FOR RESPONDENT