

IN THE SUPREME COURT OF FLORIDA

SAMUEL L. SMITHERS

Petitioner,

v.

CASE NO. SC08-868

Lower Tribunal No. 96-8093

WALTER A. McNEIL, Secretary,
Florida Department of Corrections,

Respondent.

_____ /

RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

COMES NOW, Respondent, WALTER A. McNEIL, Secretary, Florida Department of Corrections, by and through the undersigned counsel, 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

In its opinion affirming Smithers' conviction and death sentence, the Florida Supreme Court set forth the salient facts as follows:

The record reveals the following facts. In 1995, Sam Smithers agreed to mow the grass at a vacant Plant City house owned by Marion Whitehurst. Whitehurst and Smithers attended the same church. Whitehurst was attempting to sell the house and therefore needed the landscape to be maintained by Smithers. There are three ponds surrounding the house and the twenty-seven acre property is enclosed by a fence with a gate at the front. Whitehurst gave Smithers a key to the gate but not the house.

In 1996, Smithers and Whitehurst renewed their agreement. Smithers mowed the lawn the week of May 20 and Whitehurst paid Smithers on May 26. At approximately 7 p.m. on May 28, Whitehurst decided to stop by the property. The gate was locked when she arrived, but after opening the gate and driving to the house, Whitehurst found Smithers' truck parked just outside the carport. Smithers was sitting in the carport cleaning an axe. Smithers told Whitehurst that he had returned to the property to cut down some tree limbs. During the conversation, Whitehurst noticed a pool of blood in the carport. Smithers told her that someone must have come by and killed a small animal. He assured her that he would clean up the mess.

Although Whitehurst left the house, she was bothered by the pool of blood, and therefore she contacted the Sheriff's Department. Later that night, Deputy Skolnik met Whitehurst at the property. The pool of blood had been cleaned up, but the deputy noticed what appeared to be drag marks in the grass leading towards one of the ponds. The deputy followed the drag marks down to the pond and discovered a dead female body floating in the water. The woman was later identified as Cristy Cowan. A dive team subsequently discovered a second dead female body in another part of the pond. She was later identified as Denise Roach.

A search of the Whitehurst house revealed a condom wrapper in one of the bedrooms and a semen stain on the carpet. Test results established that Cowan could not have contributed to this stain, but Roach and Smithers could not be excluded. A fingerprint taken from the kitchen was identified as having been made by Smithers. Roach's DNA was consistent with a blood stain found in the carport. Shoe prints by the pond matched the shoes found in Smithers' home. Also, Smithers and Cowan were seen on a convenience store videotape about an hour before Whitehurst arrived at the property on May 26. The videotape depicted Smithers and Cowan entering and leaving the store together.

On the night of May 26, two detectives went to Smithers' home and Smithers agreed to accompany them to the Sheriff's Office for an interview. Smithers requested that his wife join them. Smithers was questioned for almost three hours. Detective Flair read Smithers his

Miranda rights and Smithers waived his rights. At the end of the interview, Smithers agreed to return the next morning and take a polygraph test.

Upon returning the following morning, Smithers was given a written version of his *Miranda* rights. Smithers signed a waiver of rights form and proceeded to take the polygraph test. Afterwards, Detective Metzgar explained to Smithers that the polygraph test indicated that he was not telling the truth and Smithers responded by making some incriminating statements. Metzgar called Detectives Flair and Blake into the room and Flair and Blake continued the interview. Smithers again insisted that his wife be present during the interview. Smithers subsequently admitted that he killed Cristy Cowan and Denise Roach.

Smithers told the detectives the following version of events regarding the Cowan murder. Smithers was coming home from work when he spotted a car on the side of the road. He stopped to assist the driver (Cowan) and drove her to a convenience store. Once back in his truck, Cowan demanded money and threatened to accuse him of rape if he did not give her money. Smithers drove Cowan to the Whitehurst property. Smithers gave Cowan all the money that he had but she still was not satisfied and she threw a drink at him. In response, he picked up an axe and struck Cowan in the head. She fell down unconscious and he dragged her to the pond. He returned to the carport to rinse off the axe when Whitehurst arrived. During the time that Whitehurst was there, he could hear Cowan making noises from the pond (Whitehurst testified that she never heard any sounds). When Whitehurst left, he went back to the pond and hit Cowan in the head "to shut her up." He also threw some tree limbs at her.

Later in the interview, Smithers explained to the detectives his involvement with the Roach murder. On May 7, Smithers was at the Whitehurst property mowing the lawn when Roach approached him. Roach told him that she had permission to be on the property. When Smithers returned to the Whitehurst property on May 13, Roach was still there. Smithers asked her to leave and she refused. Roach then hit Smithers on the arm and Smithers punched Roach in the face. Smithers said that Roach picked up a planter in the carport and threw it at Smithers' truck, causing a dent. Smithers shoved Roach against the wall, causing a piece of wood to fall down from a shelf and hit

her on the head. Roach fell to the ground unconscious. Smithers left the property, but he returned the next day and dragged her body to the pond. He cleaned up the blood with mop and a bucket of water.

At the conclusion of the interview, Smithers was arrested and subsequently charged with two counts of murder. Prior to trial, the trial court denied Smithers' motion to sever the two charges and Smithers' motion to suppress his confession.

At trial, the medical examiner testified that at the time Cowan's body was discovered, she had not been dead for more than a couple of hours. There was a foam cone around her mouth which suggested that she might have drowned. Cowan had an injury to her eye, a laceration under her lip, a blunt impact injury to her jaw, a chop wound on the top of her head which penetrated her brain, and a chop wound behind her ear. She also had injuries consistent with manual strangulation. The medical examiner stated that death was caused by strangulation combined with the chop wounds.

Regarding Roach, the medical examiner testified that the body had been in the pond seven to ten days and was therefore very decomposed. There were two slits in Roach's clothing which were caused by a sharp instrument. Her face and skull were fractured. There were also sixteen puncture wounds to her skull, several of which penetrated the skull. Finally, she had injuries consistent with manual strangulation (the hyoid bone was fractured). The medical examiner stated that death was caused by the combined effects of strangulation, stab wounds, and blunt impact to the head.

The State presented the testimony of several witnesses who stated that both Cowan and Roach were prostitutes and worked in the same location (the Luxury Motel area). Prostitute Bonnie Kruse testified that she had previously "dated" Smithers at the Luxury Motel. Smithers offered Kruse extra money to go with him to Seffner, but she refused. Another prostitute testified that on the day Cowan disappeared, she gave her a condom. This condom was similar to the condom wrapper found inside the Whitehurst property.

Smithers testified during the guilt phase. His story at trial was different from the story he initially told

the detectives. Smithers said that he lied to the detectives because he was scared that his family would be harmed if he told the truth. Smithers told the jury that the incident actually began months earlier when he was a deacon at his church. A girl named Mimi was on probation and was fulfilling her community service requirement at the church. Smithers was Mimi's supervisor. Mimi, however, could not complete her hours and she therefore offered to have sex with Smithers if he would alter her records. He agreed. Weeks later, Smithers was approached by a man who was aware that Smithers was a caretaker at the Whitehurst property. Smithers did not know the man or his name (hereinafter Mr. X). Mr. X asked Smithers if he could use the property for a drug transaction. Mr. X had a picture of Smithers and Mimi. Mr. X said he would go public with the picture if Smithers did not cooperate. Smithers agreed to let Mr. X use the property. On two separate occasions, Mr. X contacted Smithers and asked Smithers to meet him at the property to unlock the gate. Several people were present during the first visit to the property, including Denise Roach. Roach got into an argument with Mr. X and Mr. X hit Roach in the head with a hatchet. Smithers claimed that he just stood and watched. Mr. X then approached Smithers and hit him with a tire tool. He ordered Smithers to drag Roach's body to the pond. Mr. X told Smithers that he would kill his family if he did not keep quiet. A week and a half later, Mr. X again asked Smithers to meet him at the Whitehurst property. This time Cristy Cowan was present. Several people went inside the house to conduct business. Afterwards, Mr. X ordered Smithers to go inside the house and clean up. When Smithers returned outside, Cowan's dead body was lying in the carport. Mr. X and his cohorts left and Smithers dragged the body to the pond and returned to clean up the carport. It was at this time that Mrs. Whitehurst arrived at the property.

At the close of all the evidence, the jury convicted Smithers of two counts of first-degree murder. During the penalty phase, the State presented Smithers' time card on the day of the Cowan murder, which showed that he left work at 5:23 p.m. The convenience store videotape from that same day indicated that Smithers and Cowan were present at 6:19 p.m. Detective Iverson testified that he was assigned to drive the distance from Smithers' place of work to the Whitehurst property, stopping in between at the place where Cowan was picked up (the Luxury Motel) and at the convenience store where Smithers and Cowan

were seen on videotape. Detective Iverson left Smithers' place of work at 5:25 p.m. He arrived at the convenience store at 6:10 p.m. and arrived at the Whitehurst property at 6:17 p.m.

The defense presented the testimony of Smithers' two brothers, his former wife, his son, a local school principal, and a deputy from the detention facility where Smithers was housed during the trial. Smithers' brothers explained that Smithers was physically abused growing up. Smithers' mother would often hit her boys with a belt to "beat the devil out of them." Other witnesses explained that Smithers was a wonderful husband and father and that he never lost his temper with anyone. The deputy testified that Smithers was a model inmate. The defense also presented the testimony of three mental health experts. Apparently when Smithers was an infant, he fell out of his crib and landed on his head. When Smithers was twenty-seven, he was hit in the head with the butt of a shotgun during a robbery at a gas station where he worked. Dr. Wood testified that a PET scan of Smithers' head was abnormal and was consistent with brain damage due to head trauma. Dr. Berland testified that Smithers has a chronic mental illness and was suffering from extreme mental or emotional disturbance at the time of the murders. Dr. Berland also said that Smithers had a substantial impairment in his ability to conform his conduct to the requirements of the law. Dr. Maher testified that Smithers was suffering from extreme mental or emotional disturbance at the time of the murders, that Smithers had a substantial impairment in his ability to conform his conduct to the requirements of the law, and that Smithers had a decreased ability to appreciate the criminality of his conduct.

In rebuttal, the State presented three mental health experts. Dr. Ikeman testified that the PET scan photographs were insufficient to diagnose whether Smithers' brain was functioning properly. Dr. Taylor stated that although Smithers had head injuries, the injuries did not cause brain damage. Dr. Taylor also testified that Smithers is not psychotic. Dr. Stein agreed that Smithers does not have a psychiatric disorder.

The jury ultimately recommended death sentences by a vote of twelve to zero. At the *Spencer* hearing, John Cowan (Cristy Cowan's father) asked the trial court to

impose a life sentence. Smithers' former wife made a similar request.

Smithers v. State, 826 So. 2d 916, 918-922 (Fla. 2002)(footnotes omitted).

A) Trial Court Proceedings

Smithers was convicted and sentenced to death on June 25, 1999, for the first degree murders of Cristy Cowan and Denise Roach. In the sentencing order, the trial court found the following three aggravators for the Cowan murder: (1) previous violent felony (contemporaneous murder), (2) the murder was especially heinous, atrocious, or cruel (HAC), and (3) the murder was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification (CCP); and two aggravators for the Roach murder: (1) previous violent felony (contemporaneous murder) and (2) HAC. The trial court found the following two statutory mitigators: (1) the murder was committed while Smithers was under the influence of extreme mental or emotional disturbance (moderate weight) and (2) Smithers' capacity to appreciate the criminality of his conduct or conform his conduct to the requirements of the law was substantially impaired (moderate weight). The trial court also found the following nonstatutory mitigators: (1) Smithers was a good husband and father, (2) Smithers enjoyed a close relationship with his siblings, (3) Smithers was physically and emotionally abused by his mother as a child, (4) Smithers regularly attended church and was devoted

religiously, (5) since being arrested, Smithers has been a model inmate and he would conduct himself appropriately in a prison setting, (6) Smithers has made several contributions to the community, and (7) Smithers confessed to the crimes, but his trial testimony was in conflict with his statements to the detectives. All of the nonstatutory mitigators were given moderate weight. Finally, the court gave great weight to John Cowan's request that Smithers be given a life sentence. The trial court concluded that the aggravators outweighed the mitigators and therefore sentenced Smithers to death for both murders.

B) Appellate Proceedings

Smithers' judgments and death sentences were affirmed by this Court in *Smithers v. State*, 826 So. 2d 916 (Fla. 2002). On direct appeal he presented the following claims:

ISSUE I: THE TRIAL COURT ERRED BY DENYING APPELLANT'S MOTION TO SEVER THE TWO OFFENSES.

ISSUE II: THE TRIAL COURT ERRED BY DENYING APPELLANT'S MOTION TO SUPPRESS HIS CONFESSION.

ISSUE III: FUNDAMENTAL ERROR OCCURRED WHEN DEFENSE COUNSEL WAIVED APPELLANT'S PRESENCE FOR A PRETRIAL HEARING WHERE A DEFENSE MOTION IN LIMINE WAS HEARD AND DENIED.

ISSUE IV: THE SENTENCING JUDGE ERRED BY FINDING THAT THE ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL AGGRAVATING CIRCUMSTANCE APPLIED TO THE HOMICIDE OF DENISE ROACH.

ISSUE V: THE SENTENCING JUDGE ERRED BY FINDING THAT THE COLD, CALCULATED AND PREMEDITATED AGGRAVATING CIRCUMSTANCE APPLIED TO THE HOMICIDE OF CRISTY COWAN.

ISSUE VI: THE TRIAL JUDGE ERRED BY FAILING TO DECLARE A MISTRIAL DURING PENALTY PHASE WHEN ONE OF THE STATE'S WITNESSES INTRODUCED LACK OF REMORSE AS A CONSIDERATION.

A petition for writ of certiorari was then taken to the United States Supreme Court raising the following claim:

WHETHER A CONFESSION MAY BE CONSTITUTIONALLY ADMISSIBLE WHEN THE POLICE ALLOW A SUSPECT'S WIFE TO PARTICIPATE IN THE CUSTODIAL INTERROGATION OF A SUSPECT BUT DO NOT DIRECT THE WIFE'S ACTIONS?

Certiorari was denied on February 24, 2003. *Smithers v. Florida*, 537 U.S. 1203 (2003).

C) Postconviction Proceedings

Smithers' initial 3.851 motion was filed on or about December 16, 2003. The motion alleged the following seven claims: 1) public records; 2) ineffective assistance of guilt phase counsel; 3) ineffective assistance of penalty phase counsel; 4) prohibition against juror interviews; 5) ineffective for failing to litigate the following claims: a) jury was unconstitutionally relieved of its responsibility to determine the appropriateness of Smithers' death sentence; b) jury instructions unconstitutionally relieved the state of its burden to prove an element of the death penalty eligible offense; c) heinous, atrocious or cruel jury instruction was unconstitutionally vague and broad; d) cold, calculated and premeditated jury instruction was unconstitutionally vague and broad; 6) Florida's capital sentencing scheme was unconstitutional as applied under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. Smithers claims that

to the extent trial counsel failed to litigate these issues, he was denied his Sixth and Fourteenth Amendment rights to counsel; 7) cumulative error. Smithers sought leave to amend the motion at the conclusion of the public records litigation. The Amended Motion to Vacate was filed on April 25, 2005. After an evidentiary hearing was held, the lower court entered its written order denying Smithers' amended motion to vacate on October 24, 2007. No motion for rehearing was filed.

ARGUMENT

CLAIM I: JUROR INTERVIEWS

Smithers' first claim is that the rules prohibiting petitioner's lawyers from interviewing jurors to determine if constitutional error was present is unconstitutional and denies Smithers adequate assistance of counsel in pursuing his postconviction remedies. It is the state's contention that this claim should be denied as procedurally barred and meritless. *Griffin v. State*, 866 So. 2d 1, 21 (Fla. 2003); *Arbelaez v. State*, 775 So. 2d 909 (Fla. 2000).

Smithers has not alleged that he filed a motion either before or after trial requesting permission to interview jurors, nor has he alleged any specific juror misconduct. Further, the state notes that Smithers does not assert that counsel was ineffective for failing to raise the claim on appeal and this Court has made it clear "allegations of ineffective assistance cannot be used to circumvent the rule that postconviction proceedings cannot serve as a second appeal." *Green v. State*, 975 So. 2d 1090, 1105 (Fla. 2008); *Blanco v. Wainwright*, 507 So. 2d 1377 (Fla. 1987); *Sireci v. State*, 469 So. 2d 119 (Fla. 1985). This claim should be denied as procedurally barred.

Moreover, this Court has consistently rejected constitutional challenges to Florida Rule of Professional Conduct 4-3.5(d)(4). *Green v. State*, 975 So. 2d at 1108, citing *Power v. State*, 886 So.

2d 952, 957 (Fla. 2004); *State v. Duncan*, 894 So. 2d 817, 826 & n.7 (Fla. 2004); *Johnson v. State*, 804 So. 2d 1218, 1224 (Fla. 2001). "Juror interviews are not permissible unless the moving party has made sworn allegations that, if true, would require the court to order a new trial because the alleged error was so fundamental and prejudicial as to vitiate the entire proceedings." *Green v. State*, 975 So. 2d at 1108, citing *Johnson*, 804 So. 2d at 1225 (citing *Baptist Hospital of Miami, Inc. v. Maler*, 579 So. 2d 97, 100 (Fla. 1991)).

As previously noted, Smithers has not alleged how he was prejudiced by the rule or what information he would hope to obtain through interviews. Rather, it seems, he feels defendants, in general, are entitled to a "fishing expedition" into the jury deliberations. This Court has frequently condemned such attempts in the past and should do so here. *Israel v. State*, 2008 Fla. LEXIS 441 (Fla. Mar. 20, 2008) (rejecting claim which appears to be nothing more than a request to investigate possible grounds for finding juror misconduct); *Arbelaez v. State*, 775 So. 2d 909, 920 (Fla. 2000) (finding that a defendant does not have a right to conduct "fishing expedition" interviews with the jurors after a guilty verdict is returned). This claim should be denied.

CLAIM II: JURY INSTRUCTIONS

Petitioner raises a number of sub-claims that he contends establish that the jury did not receive adequate guidance, that his death sentences are premised on fundamental error which must be corrected and that to the extent trial counsel failed to litigate these issues, he contends that counsel was ineffective. As the following will show, these claims should be denied as procedurally barred and without merit.

Notably, challenges to jury instructions must be raised on direct appeal and are not properly raised in postconviction attacks. The procedural bar is not excused by the claim of ineffective assistance of trial counsel for failing to preserve the claim below. *Green v. State*, 975 So. 2d 1090, 1105 (Fla. 2008) ("allegations of ineffective assistance cannot be used to circumvent the rule that postconviction proceedings cannot serve as a second appeal"); *Breedlove v. Singletary*, 595 So. 2d 8, 10 (Fla. 1992) (petition for extraordinary relief is not a second appeal and cannot be used to litigate or relitigate issues which were or could have been raised on direct appeal or in prior postconviction proceedings.)

A) Diminishing Jury Responsibility

Petitioner complains that his jury's responsibility was diminished because "on twenty-three separate occasions during the penalty phase jury instruction, the jury was reminded that their

verdict was merely an advisory recommendation," in violation of *Caldwell v. Mississippi*, 472 U.S. 320 (1985) but trial counsel made no objections. Petition at 11.

This claim is procedurally barred as it was not presented below nor raised on direct appeal. Appellate counsel cannot be faulted for failing to present a barred claim. Moreover, it is without merit as this Court has repeatedly rejected objections to Florida's standard jury instructions based on *Caldwell*. *Evans v. State*, 975 So. 2d 1035, 1053 (Fla. 2007); *Mansfield v. State*, 911 So. 2d 1160, 1180 (Fla. 2005); *Sochor v. State*, 619 So. 2d 285, 291 (Fla. 1993); *Turner v. Dugger*, 614 So. 2d 1075, 1079 (Fla. 1992).

This Court has also rejected the contention that in light of *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428 (2002) the jury instructions violated the principles of *Caldwell*, because they diminished the jury's true role in his death sentence. *Evans v. State*, 975 So. 2d at 1052.

B) Burden Shifting

This claim is likewise procedurally barred as an issue that could have been raised on direct appeal and the bar is not excused by a claim of ineffective assistance of counsel. Moreover, as this claim has consistently been rejected as meritless, counsel cannot be deemed ineffective for failing to present same. "This Court and the United States Supreme Court have repeatedly found that the standard jury instructions, when taken as a whole, do not shift the

burden of proof to the defendant." *Schoenwetter v. State*, 931 So. 2d 857, 876 (Fla. 2006), citing *Teffeteller v. Dugger*, 734 So. 2d 1009, 1024 (Fla. 1999); *San Martin v. State*, 705 So. 2d 1337, 1350 (Fla. 1997).

C) Heinous, Atrocious or Cruel Instruction

As petitioner concedes this claim was not preserved below, it should be denied as procedurally barred. The standard instruction was given and agreed to as complete by trial counsel. (DR 18/2339) Moreover, the claim is meritless. This Court has consistently rejected similar challenges to the instruction given in the instant case. *Hall v. State*, 614 So. 2d 473, 478 (Fla. 1993); *Sireci v. State*, 587 So. 2d 450 (Fla. 1991); *Jones v. State*, 569 So. 2d 1234 (Fla. 1990); *Eutzy v. State*, 541 So. 2d 1143 (Fla. 1989). Further, error, if any would be harmless. *Smithers v. State*, 826 So. 2d 916, 929 (Fla. 2002) (finding that competent, substantial evidence to support HAC.)

D) Cold, Calculated and Premeditated Instruction

As petitioner concedes this claim was not preserved below, it should be denied as procedurally barred. Moreover, the jury instruction given here was the same instruction approved by this Court and repeatedly found constitutional. See *Standard Jury Instructions in Criminal Cases*, 665 So. 2d 212 (Fla. 1995); *Knight v. State*, 746 So. 2d 423, 434 (Fla. 1998); *Jackson v. State*, 648 So. 2d 85 (Fla. 1994), *Walker v. State*, 707 So. 2d 300, 316-17

(Fla. 1997), *Bell v. State*, 699 So. 2d 674, 678 (Fla. 1997). Therefore, counsel cannot be ineffective for failing to have challenged this issue on appeal. *Johnson v. State*, 921 So. 2d 490, 506 (Fla. 2005). Further, error, if any is harmless. *Smithers v. State*, 826 So. 2d 916, 930 (Fla. 2002) (finding competent, substantial evidence in the record to support the existence of the CCP aggravator for the Cowan murder.)

CLAIM III: CONSTITUTIONALITY OF FLORIDA'S CAPITAL SENTENCING SCHEME

Petitioner asserts that Florida's sentencing scheme is unconstitutional under *Ring v. Arizona*, 536 U.S. 584 (2002). The opinion in *Ring* was issued while this case was pending on direct appeal. Appellate counsel filed a request to accept supplemental briefing and a supplemental brief raising the issue. This Court issued an Order on April 3, 2002 denying the motion to accept the supplemental brief and the opinion issued on May 16, 2002 without reference to the issue. Thus, Smithers' claim that counsel was ineffective for failing to present the claim is without merit.

Moreover, this Court has denied relief under these circumstances:

Notwithstanding that Evans' direct appeal was in the "pipeline" when *Ring* was decided in 2002, this claim is procedurally barred because Evans did not preserve this claim by challenging the constitutionality of Florida's sentencing scheme both at trial and on direct appeal. Notwithstanding this procedural bar, Evans would not be entitled to relief under *Ring* because the trial court

found the prior violent felony conviction aggravator applied in his case. "[T]his Court had repeatedly relied on the presence of the prior violent felony aggravating circumstance in rejecting *Ring* claims." *Morris v. State*, 931 So. 2d 821, 837 (Fla. 2006). A defendant's prior violent felony conviction is "'a factor which under *Apprendi* and *Ring* need not be found by the jury,'" *Dufour*, 905 So. 2d at 75 (quoting *Jones v. State*, 855 So. 2d 611, 619 (Fla. 2003)). Thus, even if Evans' claim were properly preserved, he would not be entitled to relief under *Ring*.

Evans v. State, 946 So. 2d 1, 15-16 (Fla. 2006)

Thus, the claim is procedurally barred, without merit and harmless as to Smithers because he has a contemporaneous felony conviction for each of the murders. Relief should be denied.

CLAIM IV: CUMULATIVE ERROR

Smithers' next claim asserts that the combined effect of all alleged errors in this case warrants a new trial and/or penalty phase. This cumulative error claim is contingent upon Smithers demonstrating error in at least two of the other claims presented in his motion. For the reasons previously discussed, he has not done so. Thus, the claim must be rejected because none of the allegations demonstrate any error, individually or collectively. No relief is warranted. *Atwater v. State*, 788 So. 2d 223, 228 (Fla. 2001) (where no errors occurred, cumulative error claim is without merit); *Downs v. State*, 740 So. 2d 506, 509 (Fla. 1999) (finding that where allegations of individual error are found without merit, a cumulative error argument based thereon must also

fail); *Johnson v. Singletary*, 695 So. 2d 263, 267 (Fla. 1996) (no cumulative error where all issues which were not barred were meritless.)

CLAIM V: DEFENDANT MAY BE INCOMPETENT AT TIME OF EXECUTION

Smithers next argues that it would violate the Eighth Amendment's prohibition against cruel and unusual punishment to execute him since he may be incompetent at the time of execution. He concedes, however, that this issue is premature and that he cannot legally raise the issue of his competency to be executed until after a death warrant is issued. Thus, this claim is without merit. See *Hunter v. State*, 817 So. 2d 786, 799 (Fla. 2002); *Hall v. Moore*, 792 So. 2d 447, 450 (Fla. 2001).

CONCLUSION

WHEREFORE, Respondent respectfully requests that this Court DENY Smithers' petition for writ of habeas corpus.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS has been furnished U.S. Regular mail to Richard E. Kiley, Assistant Capital Collateral Regional Counsel - Middle Region, 3801 Corporex Park Drive, Suite 210, Tampa, Florida 33619-1136 and to Ada Carmona, Assistant State Attorney, 800 E. Kennedy Blvd., Tampa, Florida 33602-4147, this 11th day of August, 2008.

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. 9.100(1).

Respectfully submitted,

BILL McCOLLUM
ATTORNEY GENERAL

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