IN THE SUPREME COURT OF FLORIDA

MICAH NELSON,

Petitioner,

v.

CASE NO. SC08-1965
L.T. No. CF97-06806A-XX
DEATH PENALTY CASE

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

Respondent.
_____/

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

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 therefore:

FACTS AND PROCEDURAL HISTORY

The facts of this case are recited in this Court's opinion on direct appeal of Petitioner's convictions and sentence, Nelson v. State, 850 So. 2d 514 (Fla. 2003):

> The evidence presented at trial indicated that during the early morning hours of November 17, 1997, Micah Louis Nelson (Nelson) entered Virginia Brace's (Brace) home by removing the screen and climbing through the bathroom window. Seventy-eight-year-old Brace had been

in bed and her glasses and hearing aid were on her bedroom dresser. Nelson sexually assaulted Brace, took her car keys from her purse, and then placed her in the trunk of her own car. He drove around with Brace in the trunk for a period of hours and eventually drove to an orange grove, where he apparently intended to leave her. However, the car became stuck in soft sand and had to be pulled out with the assistance of machinery at about 9:30 a.m. on November 17, 1997.

Steven Weir, the heavy equipment operator who pulled the car out of the sand, felt a thud when he put his hand on the car's trunk. Nelson advised him that there was a dog in the trunk and then proceeded to turn up the car radio. The heavy equipment operator observed Nelson to be nervous and pacing, and Nelson would not look him in the eye when they spoke. Nelson sped off as soon as the car was lifted out of the sand and drove to another orange grove where he let Brace out of the trunk and walked her or dragged her 175 feet into the grove. [FN 1] With Brace on the ground, Nelson attempted to strangle her with his bare hands, emptied the contents of a fire extinguisher into her mouth, and forced a tire iron into her mouth and through the back of her head.

At 3:30 p.m. on November 17, 1997, Joann Lambert noticed an unfamiliar car parked on the road behind her house. The car was still parked in the same location when it began to get dark that evening so she called the Highlands County Sheriff's Department. When Deputy Vance Pope arrived to investigate the car, he found Nelson asleep in the back seat. Deputy Pope also noticed an insurance card on the floorboard with the name Virginia Brace. Nelson told Pope that he borrowed the car from a family friend. Pope could not verify the vehicle's registration because the DMV computer was not working at that time. Pope would not allow Nelson to drive because he did not have a driver's license, so he gave Nelson a ride to Nelson's sister's house. Later that evening, Pope heard the name Virginia Brace over the police radio, which prompted him to contact Sergeant Hofstra regarding his earlier contact with Nelson. Police recovered the car where Deputy Pope had last seen it, and it was identified as belonging to Brace.

At 11 p.m. on November 17, 1997, Deputy Pope returned to the house where he previously dropped off Nelson. Nelson agreed to be questioned by the Avon Park Police. After a series of interrogations on November 18, 1997, and November 19, 1997, Nelson showed the police where Brace's body was located and he confessed to killing her.

Nelson told police that some time after midnight, he broke into Brace's home through her bathroom window. He stated that he entered her bedroom and she woke up and started screaming. He said that they had a struggle on her bed, after which he took her car keys and placed her in the trunk of her car. Nelson stated that he drove around in the car for hours and that at one point he stopped to get gas. He then drove to an orange grove where he was going to kill Brace, but the car became stuck in the sand and he required help to extricate the car from the sand. He then took Brace to another orange grove where he and Brace walked into the grove. He stated that he started to choke Brace on the ground, but she did not pass out, so he sprayed a fire extinguisher into her mouth, which made her cough. He stated that he then took the tire iron and stuck it into her mouth until it came through the back of her neck and into the ground. He stated that Brace gasped for air when he pushed the tire iron into her mouth. Nelson denied having any sexual contact with Brace.

At trial, Dr. Melamud, the medical examiner, testified that the condition of Brace's body corresponded with her being dead for two days before she was found. He testified that Brace's injuries were consistent with asphyxiation, an object being forced into her mouth through the back of her neck, such as a tire iron, and a fire extinguisher being discharged into her mouth. He stated that she also suffered a crushed vertebra as a result of the compression of her neck and spinal cord, and three broken ribs. He testified that her death could have resulted from any one of those injuries, or a combination of them. Although he could not assign an order in which the injuries occurred, he stated that the medical evidence indicated that she was alive both when the object was forced into her

mouth and through the back of her neck, and when the fire extinguisher's contents were expelled into her mouth. [FN 2] He could not say with certainty if she was conscious when those injuries were inflicted, but he opined that if Brace had been conscious during the infliction of any of these injuries, she would have experienced severe pain.

Karen Cooper, a laboratory analyst with the Florida Department of Law Enforcement (FDLE), testified that prints made from boots recovered from Nelson's bedroom at his sister's house were consistent with boot prints found at the orange grove on the ground near Brace's body. Stephen Stark, a latent fingerprint examiner with FDLE, testified that Nelson's latent prints were found inside Brace's bathroom on the towel rack, on tiles under the bathroom window, on the bathroom tub, and on the bathroom door jamb. Stark, who also processed the crime scene at the orange grove, testified that there was a hole in the ground beneath the back of the victim's head and that a yellow powdery substance was found on the ground where the body was located. He also testified that three prints found in the interior of the trunk were consistent with Brace's fingerprints. Stark stated that when he processed the car, the trunk liner was moist and smelled of urine. Jennifer Garrison, an FDLE crime lab analyst in the serology DNA section, testified that testing revealed the semen found on Brace's bedspread was consistent with Nelson's DNA profile. Darrin Esposito, an FDLE crime lab analyst in the serology DNA section, testified that he tested the vaginal swab taken in this case, and it was consistent with a mixture of DNA from both Brace and Nelson. Jeannie Eberhardt, a serologist with FDLE, testified that the swabbing of the tire iron found in the trunk of Brace's car came back positive for indications of blood.

> [FN 1] The medical examiner testified that the soles of Brace's feet were dirty, indicating that "she probably left standing on her feet," but that there was also evidence that she had been dragged on her back.

> [FN 2] An emptied fire extinguisher was recovered on the rear floor of the driver's seat of Brace's car. A yellow powdery substance from the extinguisher's contents was located around the hose. The yellow powder was also found on the rear floorboard behind the driver's seat, in the trunk, and on Brace's face and in her bronchial tubes.

The jury convicted Petitioner of first-degree murder, burglary of a dwelling with a battery, grand theft (motor vehicle), kidnapping, burglary of a conveyance with a battery and sexual battery. (DAR V6:859-64).[1] Following a nine to three jury death recommendation, the trial court imposed a sentence of death after finding the presence of six statutory aggravators. (DAR V6:881, V7:1073-82).[2] The six aggravators found were: (1) the defendant was previously convicted of a felony, was under a sentence of imprisonment and was on felony probation, or controlled release, at the time of the murder; (2) the crime for which the defendant was to be sentenced was committed while the defendant was engaged in the commission of, or flight after, committing a sexual battery, burglary or kidnapping; (3) the capital felony was committed for the purpose of avoiding or

[1] Citations to the direct appeal record will be referred to by "DAR", followed by the appropriate volume and page number. Citation to the postconviction record will be referred to by "PCR", followed by the appropriate volume and page number.

[2] The court also imposed life imprisonment sentences for the burglary offenses, sexual battery and kidnapping offenses and fifteen years imprisonment on the grand theft charge. (DAR V7:1056-72).

preventing a lawful arrest; (4) the murder was especially heinous, atrocious or cruel (HAC); (5) the murder was committed in a cold and calculated and premeditated manner, and without any pretense of moral or legal justification (CCP); and (6) the victim was particularly vulnerable due to advanced age or disability. (DAR V7:1073-76). In mitigation, the court addressed and rejected the following statutory mitigation: (1) age of the defendant at the time of the offense; (2) the defendant was under extreme mental or emotional disturbance at the time of the offense, and (3) his capacity to appreciate the criminality of his conduct to the requirements of law was substantially impaired. (DAR V7:1076-77). The court did, however, find the following nonstatutory mitigating circumstances: (1) defendant demonstrated appropriate courtroom conduct and behavior; (2) defendant is capable of forming loving relationships with family members and friends; (3) any mental illness of the defendant may have been controlled by his medication; (4) it is unlikely the defendant will be a danger to others while serving a life sentence in prison; (5) defendant did not resist arrest, cooperated with the police, and showed authorities where the body was located; (6) defendant never knew his father and lost his mother at a young age; (7) defendant was the victim of inappropriate sexual conduct and abuse as a child;

(8) defendant suffered from depression as a result of his conduct and attempted suicide in jail; (9) defendant had diminished educational experience; (10) defendant was sexually assaulted while in prison; (11) defendant has limited intelligence; (12) defendant has no prior violent felony convictions; (13) the circumstances which resulted in the homicide are unlikely to recur since the defendant will be spending the rest of his life in prison; (14) defendant has never received treatment for his mental or emotional problems; and (15) defendant was willing to plead guilty to all charged for consecutive life sentences without parole. (DAR V7:1078-81).

On direct appeal to this Court, Petitioner raised five issues in his 101-page brief:

> ISSUE I:
> THE TRIAL COURT ERRED BY FAILING TO GRANT NELSON'S MOTION TO SUPPRESS HIS STATEMENTS AND ADMISSIONS, AND THE RESULTING EVIDENCE, BECAUSE HIS STATEMENTS WERE INVOLUNTARY AND THUS WERE NOT TRUSTWORTHY OR RELIABLE.
>
> ISSUE II:
> THE TRIAL COURT ERRED BY INSTRUCTING THE JURY ON AND FINDING THAT NELSON KILLED THE VICTIM TO AVOID A LAWFUL ARREST, BECAUSE THE EVIDENCE FAILED TO PROVE THIS AGGRAVATOR BEYOND A REASONABLE DOUBT.
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> ISSUE III:
> THE TRIAL COURT ERRED BY FINDING THAT THE HOMICIDES WERE COMMITTED IN A COLD, CALCULATED AND PREMEDITATED MANNER WITHOUT ANY PRETENSE OF MORAL OR LEGAL JUSTIFICATION.

> ISSUE IV:
> THE TRIAL COURT ERRED BY FAILING TO CONSIDER AND WEIGH SEVERAL UNREBUTTED MITIGATING CIRCUMSTANCES THAT WERE CLEARLY ESTABLISHED.
>
> ISSUE V:
> A SENTENCE OF DEATH IN THIS CASE IS DISPROPORTIONATE WHEN COMPARED TO OTHER CAPITAL CASES IN WHICH THE DEFENDANT WAS MENTALLY DISTURBED.

Initial Brief of Appellant, Nelson v. State, Florida Supreme Court Case No. SC00-876. This Court affirmed Petitioner's conviction and death sentence. Nelson v. State, 850 So. 2d 514 (Fla. 2003). A petition for writ of certiorari was filed, and denied on December 15, 2003. Nelson v. Florida, 540 U.S. 1091, 124 S. Ct. 961 (2003).

Nelson's motion for postconviction relief was filed on September 17, 2004, and raised the following twelve issues:

> CLAIM I
> Mr. Nelson's Constitutional rights under the 6th, 8th, and 14th Amendments of the United States Constitution and the corresponding amendments to the Florida Constitution were violated during the guilt and penalty phases of his trial. Trial counsel was ineffective in failing to move for a determination of competency to proceed and the trial court erred in not conducting a hearing to determine if Mr. Nelson was competent to proceed.
>
> CLAIM II
> Mr. Nelson was denied his substantive due process rights under the 6th, 8th, and 14th Amendments to the Constitution of the United States and the corresponding provisions of the Florida Constitution because he was tried and convicted while mentally incompetent.

CLAIM III

Mr. Nelson was deprived of his right to a reliable adversarial testing due to ineffective assistance of counsel at the guilt and penalty phases of his capital trial, in violation of Mr. Nelson's 5th, 6th, 8th, and 14th Amendment rights under the United States Constitution and his corresponding rights under the Florida Constitution. Trial counsel was ineffective in failing to call a witness in both the guilt and penalty phases of the trial to establish that Mr. Nelson lacked the *mens rea* in the guilt phase and to establish statutory mental mitigation in the penalty phase.

CLAIM IV

Mr. Nelson was deprived of his right to a reliable adversarial testing due to ineffective assistance of counsel at the penalty phase if his capital trial, in violation of his 5th, 6th, 8th, and l4th Amendment rights under the United States Constitution and his corresponding rights under the Florida Constitution. Trial counsel was ineffective in the investigation and preparation of the penalty phase. Trial counsel failed to call a witness to establish statutory mitigation in the penalty phase.

CLAIM V

Mr. Nelson was denied the effective assistance of counsel at the sentencing phase of his capital trial, in violation of the 6th, 8th, and 14th Amendments. Trial counsel failed to request the Court instruct the jury on statutory mitigators where evidence was presented on statutory mitigation in the sentencing phase of Mr. Nelson's trial. Counsel's performance was deficient, and as a result, the deaths sentence is unreliable.

CLAIM VI

Florida Statute 921.141 is facially vague and overbroad in violation of the 8th and 14th Amendments, and the unconstitutionality was not cured because the jury did not receive adequate guidance in violation of the 8th and 14th Amendments. The trial court's instructions to the jury unconstitutionally diluted its sense of responsibility in determining the proper sentence. Mr. Nelson's death sentence is premised on

fundamental error which must be corrected. To the extent trial counsel failed to litigate these issues, trial counsel was ineffective.

CLAIM VII

Mr. Nelson is denied his rights under the 5th, 6th, and 14th Amendments to the United States Constitution because he is incompetent to proceed.

CLAIM VIII

Mr. Nelson was denied the effective assistance of counsel, in violation of the 6th and 14th Amendments of the United States Constitution, by failing to object to the Court instructing the jury on and finding that Mr. Nelson killed the victim to avoid a lawful arrest, because the evidence failed to prove this aggravator beyond a reasonable doubt.

CLAIM IX

Mr. Nelson's 8th, Amendment right against cruel and unusual punishment will be violated as he may be incompetent at the time of execution.

CLAIM X

Mr. Nelson's trial was fraught with procedural and substantive errors which cannot be harmless when viewed as a whole, since the combination of errors deprived him of the fundamentally fair trial guaranteed under the 6th, 8th, and 14th Amendments.

CLAIM XI

The Florida death sentencing statute as applied is unconstitutional under the 6th, 8th, and 14th Amendments of the United States Constitution.

CLAIM XII

Florida's capital sentencing statute is unconstitutional on its face and as applied for failing to prevent the arbitrary and capricious imposition of the death penalty and for violating the guarantee against cruel and unusual punishment in violation of the 5th, 6th, and 14th Amendments to the United States Constitution. To the extent this issue was not properly litigated at trial or on appeal, Mr. Nelson received prejudicially ineffective assistance of counsel.

(PCR V6:864-927). After conducting an evidentiary hearing, the trial court denied Petitioner's claims. (PCR V9:1389-1462). Petitioner filed a timely notice of appeal of the denial of his motion to this Court on March 10, 2008. Petitioner's appeal from the denial of his postconviction motion is currently pending before this Court in Nelson v. State, SC08-589. Petitioner's state habeas petition was timely filed contemporaneously with his initial brief in the appeal of the denial of his motion for postconviction relief.

ARGUMENT IN OPPOSITION TO CLAIMS RAISED

Petitioner alleges that extraordinary relief is warranted because he was denied the effective assistance of appellate counsel. Additionally, he urges relief for non—cognizable claims. The standard of review applicable to ineffective assistance of appellate counsel claims mirrors the Strickland v. Washington, 466 U.S. 668 (1984), standard for claims of trial counsel ineffectiveness. Valle v. Moore, 837 So. 2d 905 (Fla. 2002). Such a claim requires an evaluation of whether counsel's performance was so deficient that it fell outside the range of professionally acceptable performance and, if so, whether the deficiency was so egregious that it compromised the appellate process to such a degree that it undermined confidence in the correctness of the result. Groover v. Singletary, 656 So. 2d

424, 425 (Fla. 1995); Byrd v. Singletary, 655 So. 2d 67, 68-69 (Fla. 1995). A review of the record demonstrates that neither deficiency nor prejudice has been shown in this case.

Petitioner's arguments are based on appellate counsel's alleged failure to raise a number of issues, each of which will be addressed in turn. However, none of the issues now asserted would have been successful if argued in Petitioner's direct appeal. Therefore, counsel was not ineffective for failing to present these claims. Groover, 656 So. 2d at 425; Chandler v. Dugger, 634 So. 2d 1066, 1068 (Fla. 1994) (failure to raise meritless issues is not ineffective assistance of appellate counsel). No extraordinary relief is warranted because Petitioner's current arguments were not preserved for appellate review and, even if preserved, no reversible error could be demonstrated. See Teffeteller v. Dugger, 734 So. 2d 1009 (Fla. 1999); Hardwick v. Dugger, 648 So. 2d 100 (Fla. 1994); Breedlove v. Singletary, 595 So. 2d 8 (Fla. 1992). As noted above, to obtain relief it must be shown that appellate counsel's performance was both deficient and prejudicial. The failure to raise a meritless issue on direct appeal will not render counsel's performance ineffective, and this is also true regarding issues that would have been found to be procedurally barred had they been raised on direct appeal. See Rutherford v.

Moore, 774 So. 2d 637, 643 (Fla. 2000) (stating that although habeas petitions are a proper vehicle to advance claims of ineffective assistance of appellate counsel, such claims may not be used to camouflage issues that should have been raised on direct appeal or in a postconviction motion).

The United States Supreme Court recognized that "since time beyond memory" experienced advocates "have emphasized the importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues." Jones v. Barnes, 463 U.S. 745, 751-52 (1983). The failure of appellate counsel to brief an issue which is without merit is not a deficient performance which falls measurably outside the range of professionally acceptable performance. See Card v. State, 497 So. 2d 1169, 1177 (Fla. 1986). Moreover, an appellate attorney will not be considered ineffective for failing to raise issues that "might have had some possibility of success; effective appellate counsel need not raise *every conceivable* nonfrivolous issue." Valle, 837 So. 2d at 908.

ARGUMENT

CLAIM I

PETITIONER'S INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL CLAIM BASED ON CALDWELL V. MISSISSIPPI, 472 U.S. 320 (1985), IS PROCEDURALLY BARRED AND WITHOUT MERIT.

In a cursory fashion Petitioner asserts that he is entitled to habeas relief because the jury was instructed its role was "advisory" and this instruction violated Caldwell v. Mississippi, 472 U.S. 320 (1985).[3] Petitioner's failure to present argument in support of this claim renders the claim waived. Bryant v. State, 901 So. 2d 810, 827-28 (2005).

Nevertheless, this claim is procedurally barred and meritless. This claim is procedurally barred because it should have been raised on direct appeal. Blackwood v. State, 946 So. 2d 960, 976 (Fla. 2006) (finding habeas claims to be procedurally barred because they either have been raised or could have been raised on appeal or at postconviction); Orme v. State, 896 So. 2d 725, 740 (Fla. 2005) (finding five claims in a

[3] In Caldwell, the United States Supreme Court held that the jury must be fully advised of the importance of its role, and neither comments nor instructions may minimize the jury's sense of responsibility for determining the appropriateness of death. However, the United States Supreme Court has clarified Caldwell in a subsequent case. Romano v. Oklahoma, 512 U.S. 1 (2004) (clarifying that Caldwell is limited to types of comments that mislead the jury as to its role in the sentencing process in a way that allows the jury to feel less responsible than it should for the sentencing decision).

habeas petition to be procedurally barred because they either were raised on direct appeal or in postconviction or should have been).

This claim is also with merit. Caldwell challenges have repeatedly been rejected by this Court. Recently in Jones v. State, 2008 Fla. LEXIS 2434, *39 (Fla. December 23, 2008), addressing the jury's advisory role charge, this Court stated "[w]e have consistently held the standard penalty phase 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. See also Thomas v. State, 838 So. 2d 535, 541 (Fla. 2003) (reiterating that the Florida Standard Jury Instructions have been determined to be in compliance with the requirements of Caldwell); Card v. State, 803 So. 2d 613, 628 (Fla. 2001) (advisory instruction does not violate Caldwell).

The jury instructions correctly describe Florida's sentencing structure and the relationship between the jury and judge in imposing a sentence of death. The jury's recommendation of death is, in fact, only advisory and the judge is the ultimate sentencer. See Fla. Stat. §921.141(2) & (3). The standard jury instructions given to Petitioner's jury are correct statements of Florida law regarding the role of the jury

in capital sentencing in Florida, and did not denigrate the jury's role in violation of Caldwell.

Lastly, Petitioner's instant claim mirrors Claim VI of his 3.851 motion for postconviction relief. Petition for Writ of Habeas Corpus at 6-7; PCR V6:908, V9:1449-50. "By raising th[is] issue in the petition for writ of habeas corpus, in addition to the rule 3.850 petition, collateral counsel has accomplished nothing except to unnecessarily burden this Court with redundant material." Blanco v. Wainwright, 507 So. 2d 1377, 1384 (Fla. 1987). Petitioner is not entitled to habeas relief.

CLAIM II

PETITIONER'S CLAIM OF INCOMPETENCY IS IMPROPERLY RAISED IN THE INSTANT HABEAS PETITION.

In his second claim, Petitioner reasserts the allegations he made during his postconviction proceedings and claims that he is incompetent to proceed. Petitioner does not raise a claim of ineffective assistance of counsel, but rather, contests the postconviction court's finding that Petitioner was malingering and competent to proceed. Such a claim is improper in a habeas petition. Blanco v. Wainwright, 507 So. 2d 1377, 1384 (Fla. 1987). Additionally, as this issue has been raised and addressed in the briefs in Nelson v. State, SC08-589, Respondent will rely on the arguments contained in the State's Answer Brief regarding the trial court's finding that Petitioner was competent to proceed during his postconviction proceedings.

CLAIM III

PETITIONER'S CLAIM REGARDING THE AVOID ARREST AGGRAVATING CIRCUMSTANCE IS IMPROPERLY RAISED IN THE INSTANT HABEAS PETITION AND IS WITHOUT MERIT.

Petitioner asserts he is entitled to habeas relief as **trial** counsel did not lodge the proper objection to the trial court's avoid arrest aggravator instruction. Such a claim is not cognizable in habeas corpus and should not be included in this petition. See Breedlove v. Singletary, 595 So. 2d 8, 10 (Fla. 1992); King v. Dugger, 555 So. 2d 355, 358 (Fla. 1990)("[C]laims of ineffective assistance of trial counsel should be raised under Florida Rule of Criminal Procedure 3.850, not habeas corpus."). Petitioner's instant claim mirrors Claim VIII of his 3.851 motion for postconviction relief. Petition for Writ of Habeas Corpus at 19-25; PCR V6:910-15, V9:1454-58. Obviously Petitioner is aware that this claim was cognizable in his postconviction motion but still burdens this Court with the same claim in the instant petition. Such a tactic is inappropriate and unnecessarily taxing. Blanco v. Wainwright, 507 So. 2d 1377, 1384 (Fla. 1987).

Notwithstanding, Petitioner's claim should be rejected as this Court on direct appeal found the facts, including Petitioner's own admissions, supported the instruction and that the trial court properly found the aggravator. Nelson, 850 So.

2d at 525-26. Furthermore, as the instruction on this aggravator was raised by appellate counsel and addressed by this Court on direct appeal, Petitioner can claim neither deficient performance nor prejudice under Strickland. As such, this Court must deny the instant claim.

CLAIM IV

PETITIONER'S CLAIM THAT HE MAY BE INCOMPETENT TO BE EXECUTED IS NOT RIPE FOR REVIEW.

Petitioner next asserts 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. Although he acknowledges that this claim is not currently ripe for judicial review since no execution is pending, he suggests that it is included in his current habeas petition in order to preserve the issue for federal court review. Clearly, there is no basis for this Court to rule on Petitioner's present claim of possible incompetence. Petitioner's claim is not ripe for review until a death warrant has issued. As such, this claim must be rejected for lack of ripeness. Morton v. State, 2008 Fla. LEXIS 1457, *39 n.22 (August 28, 2008) (habeas relief rejected where warrant has not issued); Hitchcock v. State, 991 So. 2d 337, 364 (Fla. 2008) (same); Israel v. State, 985 So. 2d 510, 522 (Fla. 2008) (same).

It should be noted that this claim is identical to Claim IX of Petitioner's 3.851 motion for postconviction relief. Petition for Writ of Habeas Corpus at 25-28; PCR V6:915-17, V9:1458. Again Petitioner unnecessarily burdens this Court and the postconviction proceedings with duplicitous pleadings. Blanco v. Wainwright, 507 So. 2d 1377, 1384 (Fla. 1987).

CLAIM V

PETITIONER'S CUMULATIVE ERROR CLAIM IS WITHOUT MERIT.

Petitioner next asserts that a combination of errors deprived him of a fundamentally fair trial.[4] Petitioner has not established error in his individual allegations, much less some type of cumulative error. See Melendez v. State, 718 So. 2d 746, 749 (Fla. 1998) (where claims were either meritless or procedurally barred, there was no cumulative effect to consider); Johnson v. Singletary, 695 So. 2d 263, 267 (Fla. 1996) (no cumulative error where all issues which were not barred were meritless). Petitioner has not raised any allegation of error which calls into question the validity of his trial or direct appeal.

[4] Petitioner attempts to revisit this Court's harmless error analyses regarding sentencing phase errors in his direct appeal. See Nelson v. State, 850 So. 2d at 530-31. The law is well settled that Petitioner is not entitled to utilize this habeas petition as a second direct appeal. Swafford v. State, 828 So. 2d 966 (Fla. 2002); Brooks v. McGlothin, 819 So. 2d 133 (Fla. 2002).

CLAIM VI

PETITIONER IS NOT ENTITLED TO HABEAS RELIEF ON HIS CLAIM THAT FLORIDA'S DEATH SENTENCING STATUTE IS UNCONSTITUTIONAL.

Petitioner asserts that his appellate counsel was ineffective in failing to challenge Florida's capital sentencing scheme based upon Supreme Court precedent. Petitioner acknowledges adverse precedent on this issue and notes that this claim is being raised "to preserve the claims for possible federal review." Petition for Writ of Habeas Corpus at 29. Quizzically though, Petitioner fails to mention he previously asserted on rehearing from his direct appeal that Florida's scheme violated Ring v. Arizona, 536 U.S. 584 (2002), and that this Court denied relief. Nelson, 850 So. 2d at 533. As this issue was raised in the direct appeal proceeding, Petitioner is barred from raising the claim again in this habeas petition. Orme v. State, 896 So. 2d 725, 740 (Fla. 2005); Swafford v. State, 828 So. 2d 966 (Fla. 2002).

Notwithstanding, the United States Supreme Court's decisions in Apprendi v. New Jersey, 530 U.S. 466 (2000) and Ring do not provide any basis for questioning Petitioner's conviction or resulting death sentence. This Court has repeatedly rejected claims that Ring invalidated Florida's capital sentencing procedures. See Rogers v. State, 957 So. 2d

538, 554 (2007) (aggravating circumstances need not be charged in indictment); Duest v. State, 855 So. 2d 33, 49 (Fla. 2003) (and cases cited therein); Kormondy v. State, 845 So. 2d 41, 54 (Fla. 2003) (Ring does not encompass Florida procedures or 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. 2002); King v. Moore, 831 So. 2d 143 (Fla. 2002).

In the instant case, Petitioner committed the murder during the course of a burglary, sexual battery and subsequent kidnapping. The during the course of a felony aggravator meets any Ring requirements because it involves facts that were already submitted to a jury during trial. See Hudson v. State, 992 So. 2d 96, 117-18 (Fla. 2008) (Ring claim fails where defendant convicted of contemporaneous kidnapping); Gudinas v. State, 879 So. 2d 616, 617 (Fla. 2004) (and cases cited therein). Therefore, under the particular facts of this case, Petitioner is not entitled to any relief. Moreover, as his Ring claim was raised and addressed by this Court, Petitioner cannot claim either deficient performance or prejudice under

Strickland. As such, any claim of ineffective assistance of appellate counsel would necessarily fail. Petitioner's request for habeas relief must be rejected.

It should be noted again that this claim is identical to Claim XI of Petitioner's 3.851 motion for postconviction relief. Petition for Writ of Habeas Corpus at 29-36; PCR V6:918-23, V9:1459-60. Petitioner continues to unnecessarily burden this Court and the postconviction proceedings with duplicitous pleadings.

CLAIM VII

PETITIONER'S INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL CLAIM BASED ON THE CONSTITUITIONALITY OF FLORIDA'S CAPITAL SENTENCING STATUTE IS WITHOUT MERIT.

In his last claim, Petitioner asserts that Florida's death penalty statue is unconstitutional because it does not prevent the arbitrary and capricious imposition of the death penalty and thus violates due process and constitutes cruel and unusual punishment. This claim should have been raised on direct appeal and is thus is barred from these habeas proceedings. Blackwood v. State, 946 So.2d 960, 976 (Fla. 2006); Orme v. State, 896 So.2d 725, 740 (Fla. 2005).

Even if Petitioner could raise such a claim now it must be rejected as this Court has decided this issue adversely to Petitioner. See Hudson v. State, 992 So. 2d 96, 118 (Fla. 2008); Williams v. State, 967 So. 2d 735, 767 (Fla. 2007).

Again this claim is a copy of Claim XII of Petitioner's 3.851 motion for postconviction relief. Petition for Writ of Habeas Corpus at 37-39; PCR V6:923-25, V9:1460-61. Petitioner's unnecessary duplicitous filings are wholly without justification. Blanco, 507 So. 2d at 1384.

CONCLUSION

In conclusion, Respondent respectfully requests that this Honorable Court DENY the instant 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 AND MEMORANDUM OF LAW has been furnished by U.S. mail to Richard E. Kiley, Asst. CCRC, Capital Collateral Regional Counsel-Middle, 3801 Corporex Park Dr., Suite 210, Tampa, Florida 33619-1136 and to Paul Wallace, Assistant State Attorney, Post Office Box 9000-Drawer SA, Bartow, Florida 33831-9000, this 20th day of January, 2009.

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(*l*).

Respectfully submitted,

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