

IN THE SUPREME COURT OF FLORIDA

F.W. CUMMINGS-EL,

Petitioner,

v.

CASE NO.SC02-1784

MICHAEL W. MOORE,

Respondent.

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RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

COMES NOW, Respondent, MICHAEL W. MOORE, by and through the undersigned Assistant Attorney General, 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 accordance with Fla. R. Crim. P. 3.851(b)(2), this petition is being pursued concurrently with the appeal from the order denying Petitioner's motion for post conviction relief. Cummings-El v. State, No. SC01-1501. Respondent will therefore rely on its statements of the case and facts contained in its brief in that matter. Respondent additionally notes that on direct appeal to this Court, Petitioner raised the following claims:

- 1) the trial court erred in striking two jurors for cause;
- 2) the trial court erred in commenting on the Defendant's right to remain silent;
- 3) the trial court erred in instructing on the heinous, atrocious, or cruel aggravating circumstance;
- 4) the trial court erred in finding HAC applicable;
- 5) the trial court erred in finding the cold, calculated, and premeditated aggravating circumstance applicable;
- 6) the trial court erred in imposing death in this domestic case.

This Court rejected the first three of the above claims, as procedurally barred for failure to object to same in the lower court, upheld the lower court's findings with respect to the HAC and CCP aggravating factors and found the sentence of death to be proportional in light of the four (4) aggravating factors and "virtually nothing in mitigation." Cummings-El v. State, 684 So. 2d 729, 732 (Fla. 1996).

STATEMENT REGARDING PROCEDURAL BARS

This Court has consistently and repeatedly stated that a state habeas proceeding cannot be used as a second appeal. Issues that were or could have been raised on direct appeal or in prior collateral proceedings may not be litigated anew, even if couched in ineffective assistance of counsel language. See Teffeteller v. Dugger, 734 So. 2d 1009, 1025 (Fla. 1999) (holding that habeas petition claims were procedurally barred

because the claims were raised on direct appeal and rejected by this Court or could have been raised on direct appeal); Johnson v. Singletary, 695 So. 2d 263, 265 (Fla. 1996) ("All of Johnson's twenty-three claims are procedurally barred--because they were either already examined on the merits by this Court on direct appeal or in Johnson's 3.850 proceeding, or because they could have been but were not raised in any earlier proceeding--or meritless."); Medina v. State, 573 So. 2d 293 (Fla. 1990) (stating that it is inappropriate to use a different argument to relitigate the same issue).

STATEMENT REGARDING LEGAL STANDARD

In Rutherford v. Moore, 774 So. 2d 637 (Fla. 2000) this Court summarized the jurisprudence relating to claims of ineffective assistance of appellate counsel. 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 post-conviction 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); Breedlove v. Singletary, 595 So. 2d 8, 10 (Fla. 1992). As in the standard for ineffective trial counsel, 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, quoting from Thompson, 759 So. 2d at 660; Groover v. Singletary, 656 So. 2d 424, 425 (Fla. 1995). And if a legal issue "would in all probability have been found to be without merit" had counsel raised the issue on direct appeal, the failure of appellate counsel to raise the meritless issue will not render his performance ineffective. Williamson v. Dugger, 651 So. 2d 84, 86 (Fla. 1994); Kokal v. Dugger, 718 So. 2d 138, 142 (Fla. 1998); Groover, 656 So. 2d at 425. This is generally true as to issues that would have been found to be procedurally barred had they been raised on direct appeal. Rutherford at 643; Groover, 656 So. 2d at 425; Medina v. Dugger, 586 So. 2d 317, 318 (Fla. 1991). Appellate counsel is not ineffective for failing to raise a claim that would have been rejected on appeal and counsel is not deficient for failing to anticipate a change in the law. Darden v. State, 475 So. 2d

214, 216-17 (Fla. 1985). See, also, Nelms v. State, 596 So. 2d 441 (Fla. 1992); Stevens v. State, 552 So. 2d 1082, 1085 (Fla. 1989); Lambrix v. Singletary, 641 So. 2d 847 (Fla. 1994).

Additionally this Court in Rutherford rejected a claim that appellate counsel was ineffective for not convincing the Court to rule in his favor on issues actually raised on direct appeal. Citing, Routly v. Wainwright, 502 So. 2d 901, 903 (Fla. 1987) and Grossman v. Dugger, 708 So. 2d 249, 252 (Fla. 1997), this Court explained that it will not consider a claim on habeas that appellate counsel was ineffective for failing to raise additional arguments in support of the claim on appeal. Id. at 645. This Court declined to fault appellate counsel for failing to investigate and present facts in order to support an issue on appeal since the "appellate record is limited to the record presented to the trial court." Id. at 646; Finney v. State, 660 So. 2d 674, 684 (Fla. 1995).

Rutherford also reiterated that issues that were procedurally barred because not properly raised at trial could not form a basis for finding appellate counsel ineffective absent a showing of fundamental error, i.e. error that "reaches down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error." Id. at 646; Chandler v.

State, 702 So. 2d 186, 191 n. 5 (Fla. 1997).

The habeas corpus writ may not be used to reargue issues raised and ruled upon because Petitioner is dissatisfied with the outcome on direct appeal. Appellate counsel is not required to raise every conceivable claim. Happ v. Moore, 784 So. 2d 1091, 1099 (Fla. 2001), citing, Kokal v. Dugger, 718 So. 2d 138, 143 n. 18 (Fla.1998). Moreover, a petitioner may not reargue the same issue, under the guise of ineffective assistance of appellate counsel, a similar contention urged in the appeal from the denial of a 3.850 motion that trial counsel was ineffective on that issue. Id. at 303. Accord, Atwater v. State, 788 So. 2d 223 (Fla. 2001) (Habeas Corpus petitions are not to be used for additional appeal on questions which could have been, should have been, or were raised on appeal or in a rule 3.850 motion, or on matters that were not objected to at trial); Freeman v. State, 761 So. 2d 1055, 1069 (Fla. 2000) (Ineffective assistance of counsel cannot be argued where the issue was not preserved for appeal or where the appellate attorney chose not to argue the issue as a matter of strategy); 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

affect of diluting the impact of the stronger points"); Jones v. Moore, 794 So. 2d 579, 586 (Fla. 2001) (appellate counsel not deemed ineffective for failing to argue a variant to an issue argued and decided on direct appeal; nor is appellate counsel ineffective for failing to raise unpreserved claims); Provenzano v. Dugger, 561 So. 2d 541, 549 (Fla. 1990) (noting that "it is well established that counsel need not raise every non-frivolous issue revealed by the record.")

ARGUMENT

CLAIM I

WHETHER APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE CLAIM ON DIRECT APPEAL THAT EYEWITNESS TESTIMONY BY VICTIM'S MOTHER AND NEPHEW, ADMITTED DURING THE PENALTY PHASE IN SUPPORT OF THE HEINOUS, ATROCIOUS OR CRUEL AGGRAVATING FACTOR, AND THE PROSECUTOR'S ARGUMENT REGARDING SAME CONSTITUTED FUNDAMENTAL ERROR.

Petitioner's first claim asserts as error appellate counsel's failure to raise an issue regarding the penalty phase testimony of Daisy Adams, the victim's mother, and Michael Adams, the victim's nephew. Petitioner contends that counsel should have challenged on appeal the admission of their penalty phase testimony as cumulative and unduly prejudicial. Petitioner has conceded that this claim was not presented to the trial court below, but asserts that counsel should have raised the claim as fundamental error. Neither the facts nor the law support Petitioner's claim that the admission of this evidence constituted fundamental error or that counsel's performance was deficient. This Court has explained that in order for a penalty phase error to be fundamental and justify reversal in the absence of a timely objection, the error must be so prejudicial as to taint the jury's recommended sentence. Porter v. Moore, 2002 WL 1338528, 27 Fla. L. Weekly S606 (Fla. 2002). As the

following will establish that this evidence was relevant and admissible and clearly does not constitute fundamental error, counsel cannot be deemed ineffective for failing to raise the claim. Robinson v. Moore, 773 So. 2d 1, 7 (Fla.2000).

During the guilt phase, Michael Adams testified that Ms. Good had started dating Petitioner during the summer or fall of 1991, and that he had known Petitioner even before he had started dating Ms. Good. (T. 701-02) Michael was aware that Petitioner and Ms. Good's relationship was abusive in that he observed Ms. Good with a broken arm and saw an argument between them on August 27, 1991, during which Petitioner had a gun. (T. 702-04, 744)

On the evening of September 15, 1991, Michael, Ms. Good and some friends decided to go to a nightclub named Luke's. (T. 704-05) After spending some time at the club, the group left to return home with Ms. Good leaving about 15 minutes before Michael. (T. 705-06) Upon arriving home, Michael locked the door to the house, got ready for bed and went to sleep on the floor in Ms. Good's room. (T. 706-08) At the time that Michael went to sleep, Ms. Good, Daphne Roberts and Ms. Good's son Tadarius were in the room. (T. 709, 726) Despite the fact that the lights were off, there was enough light from the television in Ms. Adams' room, the spotlight in the neighbor's

yard, the street light and the lights from a church next to the house to see around the house. (T. 711-12)

As Michael was falling asleep, he suddenly heard Ms. Good jump up and scream that she was cut. (T. 713) Michael immediately rose onto his knees and saw a person who had light skin and no shirt on leave the house. (T. 713) The person ran into Ms. Adams as he was leaving the house and hit Ms. Adams, knocking her down onto the couch. (T. 714) The person then ran out the unlocked back door to the house with Michael chasing him. (T. 714-15, 719) After the person got out of the house, he disappeared. (T. 719) During the 50 seconds that Michael observed the person, he briefly saw the person's profile. (T. 719) He recognized the person as Petitioner. (T. 720) Michael was able to recognize Petitioner because he had known Petitioner for 3-4 years when Michael's father had dated Petitioner's sister and had developed a friendship with Petitioner when Petitioner was dating his aunt. (T. 720-21)

Once Michael lost sight of Petitioner, he went into the kitchen and called 911. (T. 723) While Michael was on the phone, Ms. Adams was holding Ms. Good. (T. 723) Michael noticed that Ms. Adams was unable to support Ms. Good, so he dropped the phone and went to assist Ms. Adams. (T. 723) Before Michael could reach Ms. Good, Ms. Good fell onto the

television. (T. 723) Michael then remained with Ms. Good while Ms. Adams went to the phone. (T. 723) Ms. Good died in Michael's arms. (T. 724)

After Ms. Good died, fire rescue and the police arrived. (T. 724) After fire rescue separated Michael from Ms. Good, Michael ran out of the house and banged on the car because he was angry and frustrated over the death of his aunt. (T. 725) Michael did not speak to the police or Tadarius at the scene. (T. 725-26) Ms. Adams did tell Michael that the person who had run into her was Petitioner. (T. 726-27)

During the penalty phase, Michael described Ms. Good's ability to scream loudly and speak quickly immediately after she was stabbed. (T. 936-38) He stated that Ms. Good was initially able to move quickly and under her own power. (T. 938-39) He asserted that Ms. Good was initially able to stand in the living but that as time passed she fell. (T. 939) He described holding Ms. Good after she fell and Ms. Good's initial ability to place her arms on his shoulders. (T. 939-40) He stated that Ms. Good's speech became slower and softer as time past. (T. 940-41) He stated that he tried to comfort Ms. Good by telling her that the paramedics were on their way. (T. 941) Ms. Good responded, "What's taking so long." (T. 941) He finally described the moment at which Ms. Good lost consciousness and

died. (T. 942)

During the guilt phase, Daisy Adams testified that Ms. Good had dated Petitioner for less than a year before her death and had broken up with Petitioner in September 1991. (T. 749-51) During the time that Ms. Good dated Petitioner, Ms. Good and Tadarius lived with Petitioner for a brief time. (T. 751) In August 1991, Ms. Good moved back in with Ms. Adams. (T. 751) Ms. Adams was aware that Ms. Good had obtained a restraining order against Petitioner and that Petitioner was still coming to the house and phoning Ms. Good after the restraining order was issued. (T. 752) Ms. Adams once informed Petitioner on the telephone that he was violating the restraining order and Petitioner acknowledged the wrongfulness of his conduct. (T. 752)

On the night of September 15, 1991, Ms. Adams went to play bingo and returned around 11:30 p.m. (T. 752) When she returned home, Ms. Good, Michael and some friends decided to go out to celebrate the birthday of one of the friends. (T. 753) After the group left, Ms. Adams watched T.V. in her bedroom and fell asleep with the television on. (T. 753-54) Ms. Adams awoke when Ms. Good returned home but did not speak to her and went back to sleep. (T. 755-56)

Later, Ms. Adams was awakened by the sound of her daughter

screaming. (T. 756) Ms. Adams originally believed that Ms. Good was just having fun. (T. 756) However, Ms. Adams realized that something was wrong when she heard Ms. Good say, "Mama. Mama. He hurting me. He hurting me." (T. 757) Upon hearing this, Ms. Adams got up to see what was wrong. (T. 757) As Ms. Adams got to the door to Ms. Good's room, she ran into Petitioner coming out of the room and stood face to face with him. (T. 758, 764) Petitioner pushed Ms. Adams out of his way, causing her to fall onto her sofa. (T. 761-62) Ms. Adams was able to recognize Petitioner because she had known him since he was a child and had seen him several times when he had been dating Ms. Good. (T. 763-64) At the time of the crime, Petitioner was not wearing a shirt. (T. 763)

After encountering Ms. Adams, Petitioner jumped over the sofa and ran out the back door to the house. (T. 764-65) Ms. Adams saw Michael follow Petitioner as far as the back door. (T. 765) As this was happening, Ms. Adams was holding Ms. Good, who said, "Fred, Fred." (T. 767, 770) After about a minute, Ms. Good became too heavy for Ms. Adams to hold so she asked Michael to hold Ms. Good while she spoke to the 911 operator. (T. 767, 770)

Ms. Adams testified that she did not lock her back door. (T. 765) However, she did keep a padlock on the inside latch to

the door, which prevent the door from being opened from the outside. (T. 765-66) After the crime, Ms. Adams discovered that the screen to the door had been cut next to the frame. (T. 766) This made it possible to reach through the screen to remove the padlock without the screen appearing to be damaged. (T. 766)

In contrast, at the penalty phase, Ms. Adams testified that Ms. Good screamed, without saying any words, loudly three times before Ms. Adams realized that something was wrong. (T. 925-28) After the three wordless screams, Ms. Good yelled loudly, "Mama, he is hurting me." (T. 928) Ms. Adams described how Ms. Good leaned against the wall with one hand reaching for the wound in her back and the other hanging limply as she emerged from her bedroom. (T. 929-31) She described how Ms. Good slumped over as Ms. Adams attempted to support her. (T. 932-34) She stated that there was no knife missing from her house and that the blue towel was not from her house. (T. 934)

Here, the focus of Michael's guilt phase testimony was his ability to perceive the events of the murder and Petitioner. It explained his level of consciousness, his opportunity to observe the events and the reason why his description of what he saw and heard would be different than his grandmother's testimony. It also focused on whether the family witnesses had the opportunity

to influence one another's identification of Petitioner. In contrast, his penalty phase testimony concerned Ms. Good's initial level of consciousness and ability to function and the decline of that ability over time. He also provided insight into Ms. Good's awareness of her own impending death during this time. Similarly, Ms. Adams' guilt phase testimony focused on her ability to observe the crime and Petitioner, her ability to identify Petitioner and the reasons why her testimony differed from Michael's. Her penalty phase testimony was directed to Ms. Good's abilities immediately after being stabbed, Ms. Good's awareness of her wound and her progressive weakening before her death. Thus, contrary to Petitioner's assertions, in the guilt phase, the evidence focused on identity and in the penalty phase the testimony focused on HAC.

Petitioner also contends as the State had other evidence to support the HAC factor, this evidence was of little probative value and it was unnecessary to prove HAC.¹ Therefore, he contends, its probative value outweighed its prejudicial value and its admission constituted fundamental error. The test for admissibility is relevancy; not necessity. See Gudinas v.

¹ Petitioner's present position is especially ironic, given that Petitioner contended both at the time of trial and on direct appeal that the evidence was insufficient to prove HAC. (T. 979); Appellant's Initial Brief, Florida Supreme Court Case No. 82,349, at 34-38.

State, 693 So. 2d 953, 963 (Fla. 1997); Pope v. State, 679 So. 2d 710, 713 (Fla.1996). Moreover, it is well settled that although most evidence that is admitted will be prejudicial to the party against whom it is offered, Section 90.403, Fla. Stat. does not bar this evidence. It is directed at evidence which inflames the jury or appeals improperly to the jury's emotions. Only when that unfair prejudice substantially outweighs the probative value of the evidence is the evidence excluded. Charles W. Ehrhardt, Florida Evidence § 403.1 at 100-03 (1984 ed.).

As previously noted, this evidence was introduced to establish that Ms. Good was aware of her wound, that she became progressively weaker and that she expressed knowledge that she was dying. Such evidence is relevant to the HAC aggravator. Wyatt v. State, 641 So. 2d 1336 (Fla. 1994); Hannon v. State, 638 So. 2d 39 (Fla. 1994). The State limited its questions to the level of the victim's consciousness, her knowledge of her wound, the decline of the victim and a statement that showed that she knew she was about to die. It did not seek to present the testimony in an overly emotional manner. As such, the prejudice from the jury learning of the facts that were relevant to a proper determination of his punishment was not undue. As this Court has stated, "Those whose work products are murdered

human beings should expect to be confronted by [evidence] of their accomplishments." Henderson v. State, 463 So. 2d 196, 200 (Fla. 1985). Where, as here, the evidence was introduced to demonstrate material facts at issue and the prosecutor did not use this evidence to needlessly inflame the jury or provide an improper basis for their verdict, there is no demonstrable fundamental error. See, Walker v. State, 707 So. 2d 300, 310 (Fla. 1997) (No basis for claim that evidence of abortion request be excluded from murder prosecution as prejudicial where evidence helped prove motive for murders of the victim and the child and that the murders were premeditated.) Accordingly, the failure to challenge this testimony on appeal as fundamental error, does not constitute deficient performance of appellate counsel.

Furthermore, the State presented overwhelming evidence of four aggravating factors: (1) the murder of Kathy Good by the defendant occurred during the course of him committing some other felony, felony murder; (2) the defendant had prior violent felony convictions; (3) HAC; and (4) CCP. (T. 1032-33) And although the defense presented three mitigating factors: (1) no significant history of prior criminal activity; (2) age; and (3) defendant's character, the court followed the jury's eight-to-four vote and imposed the death sentence, finding four

aggravating circumstances and no statutory mitigating circumstances. (T. 1078-85). Therefore, even taking away the testimony of Daisy and Michael Adams as it related to HAC, there is no reasonable doubt that the jury would have recommended death, given the strength of the aggravating circumstances and the scintilla of evidence in mitigation. Accordingly, no prejudice can be established by Petitioner.

Petitioner also asserts that his appellate counsel was ineffective for failing to challenge on appeal comments made by the State during the penalty stage closing argument that were allegedly improper and highly prejudicial. Petitioner claims that the State's closing arguments were replete with improper comments that were so egregious, inflammatory, and unfairly prejudicial that they deprived Petitioner of a fair and reliable sentencing hearing.

Petitioner claims that the State improperly: (1) commented on non-statutory aggravation; (2) suggested that there were matters outside the record that the trial court could consider in determining the ultimate sentence; (3) bolstered the weight of its evidence by arguing that the trial court had already sanctioned the existence of the felony murder aggravator; (4) argued future dangerousness; (5) worked to inflame the passions of jury by inviting it to imagine the victim's pain and

suffering as it acted out the victim's last moments of life. Petitioner claims that the cumulative effect of both the improper penalty phase testimony and the series of prejudicial comments during closing argument prejudiced him in the eyes of the jury. Petitioner alleges that such impropriety contributed substantially to the jury's decision to recommend a sentence of death.

In order to preserve issues regarding comments in closing, it is necessary to make a contemporaneous objection to that comment. See McDonald v. State, 743 So. 2d 501, 505 (Fla. 1999); Chandler v. State, 702 So. 2d 186, 191 (Fla. 1997); Kilgore v. State, 688 So. 2d 895, 898 (Fla. 1996). No contemporaneous objections were made to these comments and, therefore, the issues were not preserved.

Appellate counsel cannot be deemed ineffective for failing to raise an unpreserved issue. Groover, 656 So. 2d at 425; Hildwin, 654 So. 2d at 111; Breedlove, 595 So. 2d at 11. As such, this claim should be denied. Therefore, to prevail on his claim of ineffective assistance of counsel, Petitioner must establish not only that the comments by the State were improper, but, also, that they rose to the level of fundamental error that would require reasonable appellate counsel to assert error on appeal or that would require a new sentencing hearing. Robinson

v. Moore, 773 So. 2d 1, 7 (Fla. 2000); Bertolotti v. State, 476 So. 2d 130, 133 (Fla.1985) (finding that although prosecutor's comments exceeded proper bounds of argument, misconduct was not so outrageous as to taint validity of jury's recommendation). In addition to fundamental error, Petitioner must also establish that counsel's performance was deficient. The failure to raise even meritorious claims does not establish deficiency per se and Petitioner has failed to establish same in the instant case.

(1) non-statutory aggravation

The State did not in fact urge the jury to consider non-statutory aggravation. The prosecutor stated, "After you have considered [these four aggravating factors] and after you have determined which ones have been established, you then take those aggravating factors and consider them in combination with, together with the factors that you know occurred in this crime, the way the murder happened and using those aggravating factors and the facts of this crime you make a decision about whether or not the death penalty or life imprisonment is the appropriate sanction." (T. 1033). In doing so, the prosecutor was not referring to non-statutory aggravation but merely advising the jury to consider the statutory aggravating factors in combination with the "facts of the crime." This was done in an effort to advise the jury to consider the "facts of the crime"

coupled with the statutory aggravators in order to determine the weight to afford to each statutory aggravator. Therefore, the prosecutor was merely advising the jury to follow the law.

Further, encouraging a jury to follow the law is not improper as juries are instructed to follow the law. Fla. Std. Jury Instr. (Crim.) 2.09; Fla. Std. Jury Instr. (Crim.) Penalty Phase Proceedings. As such, appellate counsel was not ineffective for failing to raise this issue. Kokal, 718 So. 2d at 143; Groover, 656 So. 2d at 425; Hildwin, 654 So. 2d at 111; Breedlove, 595 So. 2d at 11. The claim should be rejected.

(2) matters outside the record

Petitioner's claim that it was improper for the prosecutor to make reference to matters outside of evidence is also without merit and therefore, counsel cannot be deemed ineffective for failing to raise the claim on appeal. In support of his argument, Petitioner cites two cases, Ford v. State, 702 So. 2d 279, 281 (Fla. 4th DCA 1997) and Ruiz v. State, 743 So. 2d 1, 4 (Fla. 1999). In Ford, the court held that an argument suggesting to the jury that there is evidence harmful to the accused that the jury did not hear is highly improper. 702 So. 2d at 281. In Ruiz, this Court held that an attorney may not suggest that evidence which was not presented at trial provides additional grounds for finding the defendant guilty. 743 So. 2d

at 4. However, in the case at bar, the State merely said, "What happens then ladies and gentlemen is in combination with some other factors your advisory sentence is considered by the judge." (T. 1035). There was no suggestion at all that there is evidence harmful to the accused that the jury did not hear. Nor did the State suggest that evidence which was not presented at trial provides additional grounds for finding the defendant guilty. The State here made a very neutral statement with regard to "other factors". As such, there was nothing improper concerning the State's comments and counsel was not ineffective for failing to raise this claim.

(3) bolstered the weight of its evidence

Petitioner's next claim is that the State improperly bolstered the weight of its evidence by arguing that the trial court had already sanctioned the existence of the felony murder aggravator by stating:

First of all, felony murder. The Judge took judicial notice before we rested of the fact that your verdict reflected the defendant had done the homicide or committed this murder during the course of his committing a burglary and we discussed this to [sic] you in closing the case.

(TR VI 1035).

In support of his argument that this was improper, petitioner cites Brooks v. State, 762 So. 2d 879, 901-02 (Fla.

2000) (finding state's argument improper where prosecutor used authority of office to argue that defendant's case had been pre-screened and warranted death penalty). In the instant case, the State did not use the authority of trial court to bolster the existence and weight of the felony murder aggravator. The State merely stated, as matter of fact, that the Judge took judicial notice that the jury's verdict reflected Petitioner had done this homicide or committed this murder during the course of his committing a burglary. There is nothing improper about the State making a statement of fact and referring to the record. Counsel's failure to raise this claim on appeal does not constitute ineffective assistance of counsel.

(4) future dangerousness

Petitioner also contends that the prosecutor's reference in closing to the fact that the defendant's history of violent convictions shows that he is not going to be rehabilitated constituted an argument on a nonstatutory aggravator of future dangerousness. This comment clearly related to Petitioner's prior convictions and the weight to be given them. It was not objected to at trial. In similar cases, this Court has declined to find ineffective assistance of counsel, Bates v. State, 750 So. 2d 6, 11 (Fla. 1999); Diaz v. Dugger, 719 So. 2d 865, 869 (Fla. 1998), fundamental error, Knight v. State, 746 So. 2d 423,

440 (Fla. 1998) or harmful error, Walker v. State, 707 So. 2d 300, 314 (Fla. 1997). The failure to raise this unchallenged comment does not constitute ineffective assistance of counsel.

(5) victim's pain and suffering

Petitioner's last claim is that comments by the prosecutor allegedly improperly inflamed the passions of the jury by inviting it to imagine the victim's pain and suffering as it acted out the victim's last moments of life. In support of this argument Petitioner cites Urbin v. State, 714 So. 2d 411 (Fla. 1998). In Urbin, this Court held that:

[T]he prosecutor . . . went far beyond the evidence in emotionally creating an imaginary script demonstrating that the victim was shot while "pleading for his life." We find that . . . the prosecutor's comments constitute a subtle "golden rule" argument, a type of emotional appeal we have long held impermissible. By literally putting his own imaginary words in the victim's mouth, i.e., "Don't hurt me. Take my money, take my jewelry. Don't hurt me," the prosecutor was apparently trying to "unduly create, arouse and inflame the sympathy, prejudice and passions of [the] jury to the detriment of the accused."

714 So. 2d at 420-21. However, Urbin is very distinguishable from the case at bar. In Urbin the prosecutor literally put his own imaginary words in the victims mouth. Here, there was testimony from the victim's mother and nephew concerning her last words. There was also testimony from the medical examiner

concerning the victim's inability to breathe. Therefore, there was nothing imaginary about the mental picture that the prosecutor painted based on the testimony that was given.

Moreover, the comments on the victim's suffering were related to the HAC aggravator. "Golden rule" arguments ask the jury to place themselves in the shoes of the victim. Here, the State was not doing that. Here, the State was merely commenting on the facts in evidence that were relevant to an aggravator, which Petitioner was contesting. Accordingly, counsel's failure to raise this claim does not constitute deficient performance. Moreover, the comments were brief. The State presented overwhelming evidence of four aggravating factors: (1) the murder of Kathy Good by the defendant occurred during the course of him committing some other felony, felony murder; (2) the defendant had prior violent felony convictions; (3) HAC; and (4) CCP. (T. 1032-33). Given the strength of the aggravating circumstances and the scintilla of evidence in mitigation, there is no reasonable doubt that the jury would have recommended death regardless of this comment. As such, any error in these comments were harmless. State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986). Because the failure to raise this issue would not have affected the outcome of the appeal, appellate counsel cannot be deemed ineffective. Strickland, 466 U.S. at 694. The

claim should be denied.

CLAIM II

WHETHER APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO ENSURE PROPER PREPARATION OF THE RECORD ON APPEAL.

Petitioner next asserts that his appellate counsel was ineffective for failing to ensure proper preparation of the record on appeal. Specifically, Petitioner contends that when his appellate counsel filed a statement of judicial acts to be reviewed and a designation to the court reporter, he failed to include in the designation a critical hearing held three weeks before trial, on January 4, 1993.² Petitioner claims that the judge at this hearing, the Honorable Joseph Farina, failed to conduct an adequate inquiry into Petitioner's claims of ineffective assistance of counsel. Petitioner alleges that had the court considered the matter thoughtfully, it would have found reasonable cause to believe that Petitioner's trial counsel was rendering ineffective assistance to his client.

Further, Petitioner claims that even if his allegations were

²The State introduced into evidence the transcripts from this January, 4, 1993 hearing at Petitioner's 3.851 evidentiary hearing. It was designated as State's Exhibit #8. For the Court's convenience, Petitioner has appended it to his Petition as Appendix A.

insufficient to warrant discharge, the trial court failed to rule on Petitioner's motion, as required by Hardwick v. State, and failed to inform Petitioner of his option of self-representation. 521 So. 2d 1071 (Fla.), cert. denied, 488 U.S. 871 (1988). By doing so, Petitioner alleges that the trial court deprived him of his right to counsel and his alternative right to waive counsel.

Consequently, Petitioner claims that his appellate counsel, Mr. Lipinski, failed to challenge the trial court's actions (inaction) because he (Lipinski) failed to ensure the complete and accurate preparation of the record on appeal. Therefore, Petitioner argues that his failure to do so prejudiced Petitioner's right to raise a meritorious issue on appeal. As the following will establish, these allegations are unsupported by the record and no ineffective assistance of appellate counsel has been shown.

This Court in Morrison v. State, 818 So. 2d 432, 440 (Fla. 2002), recently addressed the underlying claim raised herein and stated:

First, in Hardwick, this Court adopted the procedure announced in Nelson v. State, 274 So.2d 256 (Fla. 4th DCA 1973), to be followed when a defendant complains that his appointed counsel is incompetent. When this occurs, the trial judge is required to make a sufficient inquiry of the defendant to determine whether or not appointed counsel

is rendering effective assistance to the defendant. See Howell v. State, 707 So.2d 674, 680 (Fla.1998). However, as a practical matter, the trial judge's inquiry can only be as specific as the defendant's complaint. See Lowe v. State, 650 So.2d 969 (Fla.1994). This Court has consistently found a Nelson hearing unwarranted where a defendant presents general complaints about defense counsel's trial strategy and no formal allegations of incompetence have been made. See Davis v. State, 703 So.2d 1055, 1058-59 (Fla.1997); Gudinas v. State, 693 So.2d 953, 962 n. 12 (Fla.1997); Branch v. State, 685 So.2d 1250, 1252 (Fla. 1996). Similarly, a trial court does not err in failing to conduct a Nelson inquiry where the defendant merely expresses dissatisfaction with his attorney. See Davis, 703 So.2d at 1058-59; Branch, 685 So.2d at 1252; Dunn v. State, 730 So.2d 309, 311-12 (Fla. 4th DCA 1999).

In Dunn, the Fourth District determined that no Nelson hearing was required where the defendant expressed dissatisfaction with his counsel's trial preparation, his witness development, and his lack of contact with the defendant. See Dunn, 730 So.2d at 312. According to the district court, the defendant was not clearly alleging that defense counsel was incompetent. See id. A lack of communication is not a ground for an incompetency claim. See Watts v. State, 593 So.2d 198, 203 (Fla.1992); Parker v. State, 570 So.2d 1053 (Fla. 1st DCA 1990). Moreover, in Branch, this Court found Nelson inapplicable where a defendant questioned defense counsel's preparation for trial, as well as the amount of communication he had with the defendant. See Branch, 685 So.2d at 1250; see also Gudinas, 693 So.2d at 962 n. 12 (stating that a Nelson inquiry was not required because the defendant's claim was a general complaint about defense's trial strategy and not a formal allegation of incompetence).

Id. at 440

This Court further noted that in Sexton v. State, 775 So. 2d 923 (Fla.2000), a similar claim had been rejected where it did not appear that the defendant made a formal allegation of incompetence entitling him to a Nelson hearing as the defendant was merely noting his disagreement with his attorney's trial strategy and preparation and was not asserting a sufficient basis to support a contention that his attorney was incompetent.

In the instant case, the record establishes that Petitioner did not make a formal allegation of incompetence entitling him to a Nelson hearing. Branch v. State, 685 So. 2d 1250, 1252 (Fla.1996) (Nelson inapplicable where a defendant questioned defense counsel's preparation for trial, as well as the amount of communication he had with the defendant.) Nevertheless, the trial court conducted the requisite inquiry, allowing Cummings-El to voice his complaints concerning the number of times counsel had visited him and his impression that counsel was working for the State. Defense counsel, Mastos then put on the record the extensive preparation he had done on the case. When the court offered Petitioner the opportunity to assert what other action counsel should take that he had not, Petitioner could not say. At that point he agreed to keep his counsel and stated that he was ready to go to trial. He never requested the

opportunity to represent himself and after the initial discussion did not request another attorney. As the complaints by Petitioner were wholly insufficient to mandate a Nelson inquiry, the court conducted a sufficient inquiry and Cummings-El stated he was ready to go to trial with defense attorney Mastos, and no reversible error has been established. Accordingly, counsel cannot be faulted for not raising this claim on appeal. See Petitioner's Brief, Appendix A ("App. A").

Specifically, the transcript of the hearing reflects that the matter before the court was counsel's concern that Cummings-El was refusing to allow him to present penalty phase evidence.³ When defense counsel agreed with the State that a psychological evaluation would be appropriate even though he had no concerns about his client's mental state, Petitioner then expressed his displeasure with counsel. (App. A., p. 14) The complaints were very limited and generalized in nature. Petitioner also expressed displeasure with counsel's discussing a plea of Second Degree Murder with him. See App. A, p. 20. These complaints can best be described as general complaints about his attorney's trial preparation and trial strategy. As this Court repeatedly has stated, a trial court does not err in failing to conduct a

³ Ultimately Cummings-El agreed to a limited presentation of evidence in mitigation. (T 1005-25, PCR. 1607-08)

Nelson inquiry where the defendant makes such general complaints and is not clearly alleging incompetence. Davis v. State, 703 So. 2d 1055, 1058-59 (Fla.1997).

Moreover, as stated in Lowe v. State, 650 So. 2d 969 (Fla. 1994), a trial judge's inquiry into a defendant's complaints about his or her attorneys "can only be as specific and meaningful as the defendant's complaint." 650 So. 2d at 975. Thus, even if an inquiry was mandated, given the generalized complaints made by Cummings-El at the hearing, the trial court's inquiry was sufficient to satisfy Nelson. See App. A, p. 20-21. Not only did Cummings-El not persist in his complaints about counsel when given the opportunity to do so at the January 4, 1993 hearing, but, following that hearing, which occurred almost three weeks before trial, Petitioner made no further motions or complaints. See Davis, 703 So. 2d at 1059 ("Davis's silence after hearing what his attorney had been doing to ready the case for trial would lead one to believe that Davis felt his concerns had been heard by the judge and his lawyer and he was content to proceed."). As this Court noted in Morrison, "given the opportunity to raise anything further, petitioner was silent. The court had every reason to assume that petitioner's concerns had been addressed and alleviated by the inquiry that occurred and the explanations given to him." Id., 818 So. 2d at 442.

Petitioner, citing to Hardwick v. State, 521 So. 2d 1071 (Fla 1988) and Trease v. State, 768 So. 2d 1050 (Fla. 2000), further asserts that the trial court erred in not offering him self representation. This Court in Trease considered the argument being presented herein in light of Hardwick, and held:

In the present case, the trial court properly denied Trease's motion because he failed to state a legitimate reason for discharge. Trease's displeasure with defense counsel's negative response to his desire to file a motion to change venue was not an adequate reason to support discharge because counsel properly advised Trease that such a motion was untimely in that the trial court would not grant such a motion without first trying to empanel an impartial jury. Moreover, Trease's displeasure with counsel's advice regarding a plea offer entailing life imprisonment was not a sufficient reason for discharge. Defense counsel's theoretical statement regarding a heightened level of work for a client he knew to be 100% innocent and his impression that most of his clients were guilty do not support a finding of incompetence. Finally, Trease repeatedly stated that he did not want to represent himself. (FN3) We find no abuse of discretion.

Id., at 1053-1054.

Cummings-El never expressed a desire to proceed to trial without counsel and, in fact, readily agreed to proceed to trial represented by defense counsel Mastos. (App. A, p. 22)

Finally, petitioner complains that the trial court did not rule on the request. As the record clearly shows that Cummings-

El withdrew his request before the court could rule, no error has been shown. (App. A, p. 21-22)

Therefore, in light of the fact that neither a Nelson or Faretta inquiry was required in petitioner's case, his appellate counsel cannot be faulted for failing to include the January 4, 1993 hearing in the record on appeal. Accordingly, as these were non-meritorious issues that appellate counsel failed to raise he cannot be deemed ineffective for failing to assert them on appeal. See Rutherford v. Moore, 774 So. 2d 637, 643 (Fla. 2000). Relief should be denied.

CLAIM III

**WHETHER FLORIDA'S SENTENCING STATUTE IS
UNCONSTITUTIONAL IN LIGHT OF RING V.
ARIZONA, 122 S.CT. 2428 (2002)**

Petitioner's next issue alleges that Florida's death penalty statute is unconstitutional. Citing Ring v. Arizona, 122 S. Ct. 2428 (2002), and Apprendi v. New Jersey, 530 U.S. 466 (2000), he claims that the sentencing scheme violated his constitutional rights. Petitioner's allegations do not present any basis for relief; this Court has declined to invalidate Florida's capital sentencing law based on Ring. Bottoson v. State, 27 Fla. L. Weekly S891 (Fla. Oct. 24, 2002).

It must be noted initially that this issue should be

rejected as procedurally barred. A challenge to the constitutionality of a statute must be presented at trial and in the direct appeal of a defendant's judgment and sentence; it cannot be presented in postconviction proceedings for the first time. Eutzy v. State, 458 So. 2d 755 (Fla. 1984). This Court has repeatedly recognized that habeas petitions are not to be used as successive appeals, and that issues which could and should have been presented earlier will not be considered. Rutherford v. Moore, 774 So. 2d 637, 643 (Fla. 2000); White v. Dugger, 511 So. 2d 554 (Fla. 1987). Although Apprendi and Ring were not decided until after Petitioner's appeals, the basic argument that the Sixth Amendment required jury sentencing in capital cases was available and, in fact, routinely advanced around the time of Petitioner's trial. See Hildwin v. Florida, 490 U.S. 638 (1989); Spaziano v. Florida, 468 U.S. 447, 472 (1984); Chandler v. State, 442 So. 2d 171, 173, n. 1 (Fla. 1983). Petitioner's failure to present this claim at the proper time procedurally bars this Court from consideration of this issue in his petition.

In Barnes v. State, 794 So. 2d 590 (Fla. 2001), this Court found an alleged Apprendi⁴ error had not been preserved for

⁴Ring is merely an extension of Apprendi. Clearly, the application of Apprendi was limited to (1) factual findings, other than prior conviction, (2) which increase the statutory

appellate review. The United States Supreme Court has also held that an Apprendi claim is not plain error. United States v. Cotton, 122 S. Ct. 1781 (2002) (holding an indictment's failure to include the quantity of drugs was an Apprendi error but it did not seriously affect fairness, integrity, or public reputation of judicial proceedings, and thus did not rise to level of plain error). These cases confirm that any possible constitutional violation under Apprendi or Ring is not subject to consideration for the first time in postconviction pleadings.

Furthermore, Ring is not subject to retroactive application in Florida. Under the principles of Witt v. State, 387 So. 2d 922, 929-30 (Fla. 1980), retroactive application is not appropriate. Pursuant to Witt, Ring is only entitled to retroactive application if it is a decision of fundamental significance, which so drastically alters the underpinnings of Petitioner's death sentence that "obvious injustice" exists. New v. State, 807 So. 2d 52 (Fla. 2001). In determining whether this standard has been met, this Court must consider three factors: the purpose served by the new case; the extent of

maximum for a charged offense. Because the Arizona Supreme Court interpreted its law as prescribing only a life sentence upon conviction for first-degree murder, Ring, 122 S.Ct. at 2436; Ring v. State, 25 P.3d 1139, 1150 (Ariz. 2001), Ring fits squarely within the Apprendi holding, and thus, the Ring decision does not extend or expand the Sixth Amendment right at issue in Apprendi.

reliance on the old law; and the effect on the administration of justice from retroactive application. Ferguson v. State, 789 So. 2d 306, 311 (Fla. 2001). Application of these factors to Ring, which did not expressly address Florida law, provides no basis for consideration of the relevant issue in this case.

Even if Ring error could be deemed "fundamental" in some contexts, the present case does not provide the facts for such a conclusion here. Petitioner fails to acknowledge that, due to the existence of his "prior violent felony conviction" aggravating factor, the judge was authorized to impose the death penalty even if additional jury findings may be deemed necessary in the context of other cases. See Bottoson, 27 Fla. L. Weekly at S898; S900 (Shaw, J., concurring; Pariente, J., concurring). It is undisputed that Petitioner's judge properly found the existence of the prior conviction factor, and therefore no additional jury findings were required with regard to Petitioner's eligibility to receive the death penalty. Almendarez-Torres v. United States, 523 U.S. 224 (1998) (prior conviction properly used by judge alone to enhance defendant's statutorily authorized punishment). Since the defect alleged to invalidate the statute - lack of jury findings to enhance the sentence - is not implicated in this case due to the existence of the prior conviction, Petitioner has no standing to challenge

any potential error in the application of the statute on other facts.

If Petitioner had no prior conviction, his sentence would still be constitutionally valid. According to Petitioner, Florida's capital statute is constitutionally flawed due to its failure to require that the aggravating factors be alleged in the indictment and expressly found by a jury. This argument is premised on a fundamental misunderstanding of Florida law. In Ring, the United States Supreme Court applied Apprendi to invalidate Arizona's capital sentencing scheme, which required a judge, acting alone, to determine a capital defendant's eligibility for the death penalty. In Florida, unlike Arizona, death eligibility is determined by the jury upon conviction for first degree murder. See Bottoson, 27 Fla. L. Weekly at S893; S902 (Quince, J., concurring; Lewis, J., concurring); Shere v. Moore, 27 Fla. L. Weekly S752, S754 (Fla. Sept. 12, 2002) (statutory maximum sentence for first degree murder is death); Mills v. Moore, 786 So. 2d 532, 538 (Fla.), cert. denied, 532 U.S. 1015 (2001) (same). Ring is not applicable in Florida because capital punishment is not an "enhanced" sentence for first degree murder; accordingly, no further jury findings are required.

Thus, Petitioner's argument that an aggravating factor must

be alleged in the indictment and expressly found by a jury beyond a reasonable doubt is without merit, as the existence of an aggravating factor is a determination that concerns the defendant's selection for capital punishment, rather than his eligibility for the death penalty. Clearly, Ring does not require jury findings for sentencing, only for eligibility. As Justice Scalia stated, Ring "has nothing to do with jury sentencing." Ring, 122 S. Ct. at 2445. Apprendi and Ring involve the jury's role in determining death eligibility, but do not require that the actual selection of sentence be made by a jury. Quoting Proffitt v. Florida, 428 U.S. 242, 252 (1976), Ring acknowledged that "[i]t has never [been] suggested that jury sentencing is constitutionally required."⁵ Ring, 122 S.Ct. at 2447, n.4. Rather, Ring involves only the requirement that the jury find the defendant death eligible. That determination must be made by the jury, while the actual sentencing decision may constitutionally be made by the trial court. See Spaziano v. Florida, 468 U.S. 447, 459 (1984) (finding Sixth Amendment has no guarantee of right to jury trial on issue of sentence).

⁵See Harris v. Alabama, 513 U.S. 504, 515 (1995) (holding that "[t]he Constitution permits the trial judge, acting alone, to impose a capital sentence. It is thus not offended when a State further requires the sentencing judge to consider a jury's recommendation and trusts the judge to give it the proper weight.)

In addition, even if an aggravating factor is construed to determine eligibility rather than selection, the suggestion that it must be charged in the indictment has no basis in law. This claim has been repeatedly rejected. See Hildwin v. State, 531 So. 2d 124, 128 (Fla. 1988) (rejecting claim that Florida law makes aggravating factors into elements of the offense so as to make the defendant death-eligible), aff'd., 490 U.S. 638 (1989); Lightbourne v. State, 438 So. 2d 380 (Fla. 1983) (aggravating circumstances do not need to be charged in indictment). United States Supreme Court precedent similarly does not support Petitioner's position. Hurtado v. California, 110 U.S. 516 (1984) (holding there is no requirement for an indictment in state capital cases). Apprendi did not address the indictment issue. Apprendi, 530 U.S. at 477, n.3. Ring similarly did not address the issue, and although Ring, in part, overruled Walton v. Arizona, 497 U.S. 639 (1990), this claim was rejected by this Court prior to Walton being decided and does not, in any way, rely on Walton for support. Therefore, Ring does not compel further consideration of this issue.

Thus, Petitioner's death sentence satisfies the Sixth Amendment as construed in Ring. His prior violent felony convictions permitted the judge to impose a capital sentence, even without jury involvement. In addition, by returning a

recommendation for death, his jury necessarily found beyond a reasonable doubt that at least one statutory aggravating factor existed. Ring merely requires a jury, rather than a judge acting alone, make the determination of certain factors and that those factors be established beyond a reasonable doubt. These requirements have been met in this case. Petitioner had a penalty phase jury which heard evidence related to aggravation and mitigation. The jury was instructed that the aggravators had to be proven beyond a reasonable doubt. Following the instructions, Petitioner's jury recommended a death sentence. Clearly, aggravation was proven beyond a reasonable doubt. See Hildwin v. Florida, 490 U.S. 638 (1989) (holding that where jury made a sentencing recommendation of death it necessarily engaged in the factfinding required for imposition of a higher sentence, that is, the determination that at least one aggravating factor had been proved). Because the finding of an aggravating factor clearly authorized the imposition of a death sentence, the requirement that a jury determine the conviction to have been a capital offense is fulfilled.

In conclusion, aggravating factors in Florida are not elements of the offense, but are constitutionally mandated capital sentencing guidelines. Florida's capital sentencing scheme affords the sentencer the guidelines to follow in

determining the various sentencing selection factors related to the offense and the offender by providing accepted statutory aggravating factors and mitigating circumstances to be considered. Given that a defendant faces the statutory maximum sentence of death upon conviction of first degree murder, the employment of further proceedings to examine the assorted "sentencing selection factors," does not violate due process. The plain language of Apprendi and Ring establishes that those cases come into play when a defendant is exposed to a penalty exceeding the maximum allowable under the jury's verdict. Because Petitioner was death eligible upon conviction, Ring does not invalidate his death sentence or render Florida's sentencing scheme unconstitutional.

CONCLUSION

Based on the foregoing reasons, this Honorable Court should deny the Petition for Writ of Habeas Corpus.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been sent by U.S. Regular Mail to Tony Moss, Esq., Law Office of Tony Moss, P.A., 851 N.E. 118th Street, Miami, Florida 33161 and Sara D. Baggett, Esq., 2311 - 23rd Way, West Palm Beach, Florida 33407, this _____ day of November, 2002.

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).

COUNSEL FOR RESPONDENT