

IN THE SUPREME COURT OF FLORIDA

GEORGE MICHAEL HODGES,

Petitioner,

v.

CASE NO. SC02-949

MICHAEL W. MOORE,

Respondent.

_____ /

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

Hodges was convicted and sentenced to death on August 10, 1989, for the first degree murder of Betty Ricks. (TR 7/901-908) The jury recommended death by a vote of 10 to 2. (TR 6/742) The trial court found two aggravating circumstances: 1) cold, calculated and premeditated, and 2) heinous, atrocious or cruel. (TR 7/907) In mitigation the court considered Hodges' family members' testimony concerning his character and dedication to his family relationships, including his loyalty to

his wife and the loving relationship with his stepson. (TR 7/798, 907-908).

Upon consideration of Hodges' direct appeal, this Court set forth the salient facts as follows:

In November 1986 Plant City police arrested Hodges for indecent exposure based on the complaint of a twenty-year-old convenience store clerk. Around 6:00 a.m. on January 8, 1987, the day Hodges' indecent exposure charge was scheduled for a criminal diversion program arbitration hearing, the clerk was found lying next to her car in the store's parking lot. She had been shot twice with a rifle and died the following day without regaining consciousness.

Hodges worked on the maintenance crew of a department store located across the road from the convenience store. A co-worker told police that she saw Hodges' truck at the convenience store around 5:40 a.m. on January 8. Hodges, however, claimed to have been home asleep at the time of the murder because he did not have to work that day. His stepson, Jesse Watson, and his wife, Jesse's mother, supported his story. The police took a rifle from the Hodges' residence that turned out not to be the murder weapon. The investigation kept coming back to Hodges, however, and the police arrested him for this murder in February 1989.

At trial Watson's girlfriend testified that, during the summer of 1988, she asked Hodges if he had ever shot anyone. She said he responded that he had shot a girl and had given Watson's rifle to the police and had disposed of his. Hodges' wife, contrary to her original statement to the police, testified that she did not know if Hodges had been in bed all night or when he had gotten up, that her son and husband had identical rifles, and that she did not know that Hodges had been arrested for indecent exposure.

As did his mother's, Watson's trial testimony differed from his original statement. He testified that he and Hodges had identical rifles and that his,

not Hodges', had been given to the police. He said that he awakened before 6:00 a.m. the morning of the murder and heard Hodges drive up in his truck. Hodges then came into the kitchen carrying his rifle. When asked why he did not originally tell the police about this, he responded that he had wanted to protect Hodges. Watson also said that, two months after the murder, he saw the rifle in the back of Hodges' truck, wrapped in dirty plastic, and that there was a hole in the ground near the toolshed. He also testified that, several months later, Hodges told him that he had shot the girl at the convenience store.

The jury convicted Hodges as charged, and the penalty proceeding began the following day. At the end of the defense presentation counsel told the court that Hodges had become uncooperative, and Hodges stated on the record that he did not want to testify in his own behalf. After the jury retired to decide its recommendation, it sent a question to the court regarding the instructions. The court had the parties return to discuss the jury's request, but, shortly before that, Hodges had attempted to commit suicide in his holding cell. Defense counsel moved for a continuance and said that he could not waive Hodges' presence. The court, however, held that Hodges had voluntarily absented himself, told the jury that Hodges was absent because of a medical emergency, and reread the instructions on aggravating and mitigating circumstances. When the jury returned with its recommendation of death, Hodges was still absent.

After accepting the jury's recommendation, the court appointed two mental health experts to determine Hodges' competency to be sentenced. These experts' reports cautioned that Hodges might attempt to commit suicide again because of his anger and frustration, but concluded that he was competent to be sentenced. After considering these reports and hearing argument on the appropriate sentence, the court sentenced Hodges to death.

Hodges v. State, 595 So. 2d 929, 930-31 (Fla. 1992)

This Court rejected the following claims Hodges raised on appeal:

ISSUE I - THE TRIAL COURT VIOLATED APPELLANT'S CONSTITUTIONAL RIGHT TO CONFRONT AND CROSS-EXAMINE HIS ACCUSER BY ERRONEOUSLY ADMITTING HEARSAY EVIDENCE OF BETTY RICKS' STATEMENTS TO THE POLICE AND HER SISTER.

ISSUE II - THE TRIAL COURT VIOLATED APPELLANT'S RIGHT TO DUE PROCESS OF LAW BY ALLOWING THE PROSECUTOR TO ELICIT A POLICE OFFICER'S TESTIMONY THAT NEITHER HE NOR THE PROSECUTOR BELIEVED A KEY STATE WITNESS'S PRIOR INCONSISTENT STATEMENT WHICH EXCULPATED APPELLANT.

ISSUE III - THE TRIAL COURT VIOLATED APPELLANT'S DUE PROCESS RIGHTS TO BE MENTALLY COMPETENT TO STAND TRIAL AND TO BE PRESENT WHEN IT PROCEEDED WITH THE PENALTY PHASE TRIAL FOLLOWING APPELLANT'S SUICIDE ATTEMPT WITHOUT FIRST CONDUCTING A COMPETENCY HEARING.

ISSUE IV - THE TRIAL COURT VIOLATED APPELLANT'S EIGHTH AMENDMENT RIGHT TO A FAIR PENALTY PHASE TRIAL AND SENTENCING HEARING BY ALLOWING EVIDENCE, AN EMOTIONAL DISPLAY, AND PROSECUTORIAL REMARKS ABOUT THE IMPACT OF THE OFFENSES UPON THE VICTIM AND HER FAMILY.

ISSUE V - THE TRIAL COURT VIOLATED THE EIGHTH AMENDMENT BY GIVING THE JURY THE STANDARD INSTRUCTION ON THE COLD, CALCULATED, AND PREMEDITATED AGGRAVATING CIRCUMSTANCE WITHOUT INFORMING THE JURY OF THIS COURT'S LIMITING CONSTRUCTION OF THAT CIRCUMSTANCE.

ISSUE VI - THE TRIAL COURT ERRED BY FINDING THAT THE OFFENSE WAS COMMITTED TO DISRUPT OR HINDER LAW ENFORCEMENT AND WAS COLD, CALCULATED, AND PREMEDITATED BECAUSE THE STATE'S EVIDENCE FAILED TO PROVE EITHER CIRCUMSTANCE BEYOND A REASONABLE DOUBT.

ISSUE VII - THE TRIAL COURT ERRED BY FINDING TWO SEPARATE AGGRAVATING CIRCUMSTANCES BASED UPON THE SAME ESSENTIAL FEATURE OF THE OFFENSE.

ISSUE VIII - THE TRIAL COURT VIOLATED THE EIGHTH AMENDMENT BY FAILING TO PROPERLY CONSIDER APPELLANT'S

EVIDENCE OF MITIGATING CIRCUMSTANCES.

ISSUE IX - THE DEATH SENTENCE IS DISPROPORTIONATE TO THE PERSONAL CULPABILITY OF APPELLANT AND THE CIRCUMSTANCES OF THE OFFENSE.

The judgement and death sentence were affirmed. Hodges v. State, 595 So. 2d 929, 930-31 (Fla. 1992). A petition for writ of certiorari was then taken to the United States Supreme Court. The United States Supreme Court vacated the opinion for further consideration in light of Espinosa v. Florida, 509 U.S. 1079 (1992). Hodges v. Florida, 506 U.S. 803 (1992). Upon remand this Court reaffirmed the earlier decision, finding that the sufficiency of the cold, calculated and premeditated instruction was not preserved for review and that any error in the instruction, if any existed, was harmless and would not have affected the jury's recommendation or the judge's sentence. Certiorari was then denied by the United States Supreme Court. Hodges v. Florida, 510 U.S. 996 (1993).

Hodges' initial Motion to Vacate Judgment of Conviction and Sentence with Special Request for Leave to Amend and for Evidentiary Hearing pursuant to Fla. R. Crim. P. 3.850 was filed on June 23, 1995. On November 2 and 3, 2000, and January 29, 2001, an evidentiary hearing was held. The motion to vacate was denied on June 1, 2001. (PCR 11/1582) A motion for rehearing

filed on June 15, 2001 was denied on July 6, 2001 and a timely Notice of Appeal was filed on July 30, 2001. (PCR 11/1695, 1702, 1704).

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).

Thus, this Court should expressly reject all of the claims

raised in the instant petition as procedurally barred.

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). The Rutherford Court then held that counsel was not ineffective for failure to raise on appeal the denial of numerous pretrial motions because many of the underlying substantive claims were without merit - the failure to raise meritless claims does not render counsel's performance ineffective. Kokal, supra; Williamson, supra; Groover, supra. The Rutherford Court also held that some claims were not preserved for appellate review (e.g. that instructions were inapplicable but not unconstitutionally vague, or if initially asserted as vague were not renewed at the appropriate time or supported by an alternative instruction). Id. at 644. 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 the Court considered and rejected a claim in Rutherford that appellate counsel was ineffective for not convincing the Court to rule in his favor on issues actually raised on direct appeal. The Court citing Routly v. Wainwright, 502 So. 2d 901, 903 (Fla. 1987) and Grossman v. Dugger, 708 So. 2d 249, 252 (Fla. 1997) 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. The 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). See also Hall v. Moore, 792 So. 2d 447 (Fla. 2001).

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).

Finally in Happ v. Moore, 784 So. 2d 1091 (Fla. 2001), this Court ruled that appellate counsel cannot be deemed ineffective for failing to raise issues that are procedurally barred because they were not properly raised during the trial court proceedings; nor can appellate counsel be deemed ineffective for failing to raise non-meritorious claims on appeal, or claims that do not amount to fundamental error. Additionally, appellate counsel cannot be deemed ineffective where record refutes the claim that appellate counsel failed to argue certain points on appeal. 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. And where trial counsel did not preserve the specific arguments now raised in the petition appellate counsel cannot be faulted. 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/Moore, 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."). Clarence Jones v. Moore, 794 So. 2d 579 (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).

CLAIM I

WHETHER APPELLANT COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE CLAIM ON DIRECT APPEAL THAT EVIDENCE OF A COLLATERAL CRIME ADMITTED AT TRIAL WAS CONTRARY TO A PRETRIAL STIPULATION AND IN VIOLATION OF MR. HODGES' CONSTITUTIONAL RIGHTS UNDER THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

Hodges first asserts that appellant counsel was ineffective for failing to assert as error a claim that evidence of a collateral crime was erroneously admitted at trial. As this claim was raised on direct appeal and found harmless, appellate counsel cannot be deemed ineffective. "Habeas corpus is not to be used for second appeals. After appellate counsel raises an issue, failing to convince this Court to rule in an appellant's favor is not ineffective performance. Allegations of ineffective assistance of appellate counsel may not be used to evade the rule against using habeas corpus as a second appeal." Swafford v. State, 2002 WL 571660, 27 Fla. L. Weekly S349 (Fla. April 18, 2002).

Upon consideration of the evidence of the collateral crime, this Court stated:

In the guilt phase the court allowed two detectives to testify, over objection, that the victim was adamant about prosecuting Hodges for indecent exposure. These detectives repeated that testimony in the penalty phase and also testified that the victim told them Hodges had been trying to get her to drop the indecent exposure charge. The victim's sister also

testified to those matters, over objection, in the penalty phase. Hodges now argues that what the victim thought and said about prosecuting him was inadmissible hearsay. We agree that this hearsay should not have been admitted in the guilt phase.

Subsection 90.801(1)(c), Florida Statutes (1989), defines hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." The victim's statements were admitted to prove that she desired prosecution of Hodges. The State used the statements to prove that Hodges had a motive to kill the victim. The truth of the matter asserted was the victim's adherence to her desire to prosecute and, thus, the statements fall within the definition of hearsay.

The State suggests that if the statements were hearsay, an exception to the prohibition of their admission exists because they were used to prove a state of mind. In Bailey v. State, 419 So. 2d 721 (Fla. 1st DCA 1982), the district court correctly held that statements of a victim cannot be used to prove the state of mind or motive of a defendant because the hearsay exception created by subsection 90.803(3)(a), Florida Statutes (1989), does not apply to such a situation. We conclude, therefore, that the admission of the detectives' testimony as to statements made by the victim was error.

We then must determine whether the admission was harmless error. On the day of the homicide Hodges was scheduled for a pretrial diversion interview on the indecent exposure charge which had been initiated by the victim's complaint. On that date, but sometime after the homicide, Hodges called the mediator of the Community Mediation Program, told her there was no reason for him to come through diversion, and asked for the case to be sent back to the state attorney's office. Thus, it appears clear that Hodges knew of his continued prosecution. The victim's statements of her desire to continue prosecution become cumulative and could not have, in and of themselves, been a critical factor in the jury's deliberation. We, therefore, conclude that admitting the detectives' testimony was

harmless error.

Hodges v. State, 595 So. 2d 929, 931-932 (Fla. 1992)

As previously stated, habeas is not a second appeal and where a claim was raised on direct appeal and rejected by this Court, relief is not warranted. Teffeteller v. Dugger, 734 So. 2d 1009, 1025 (Fla. 1999). Accordingly, this claim should be denied as procedurally barred.

CLAIM II

WHETHER THE TRIAL COURT ERRONEOUSLY EXCLUDED JUROR ALVAREZ-GIL FOR CAUSE BASED ON HER GENERAL CONCERNS REGARDING THE DEATH PENALTY IN VIOLATION OF HODGES' CONSTITUTIONAL RIGHTS TO A FAIR TRIAL AND DUE PROCESS OF LAW UNDER THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS. APPELLANT COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE THIS ISSUE ON DIRECT APPEAL.

Hodges next asserts that the lower court erroneously excluded venire person Alvarez-Gil due to her views on the death penalty and that appellate counsel was ineffective for failing to raise this claim on direct appeal. "In order to grant habeas relief on the basis of ineffectiveness of appellate counsel, this Court must determine whether the alleged omissions are of such magnitude as to constitute a serious error or substantial deficiency falling measurably outside the range of professionally acceptable performance and, second, whether the deficiency in performance compromised the appellate process to such a degree as to undermine confidence in the correctness of the result." Floyd v. State, 808 So. 2d 175, 183 (Fla. 2002).

The record shows that while defense counsel disagreed as to the nature of the juror's position, no specific objection was made to the dismissal for cause at the time of the dismissal or at the conclusion of the jury selection. (TR 2/138, 197) As this claim was not preserved for appeal, counsel cannot be

deemed ineffective for failing to raise it.

Moreover, the alleged omission is not of such magnitude as to constitute a "substantial deficiency falling measurably outside the range of professionally acceptable performance." The record shows that Alvarez-Gil did have substantial reservation about the death penalty and expressed an opinion that she did not believe that she could give an opinion to do something she did not believe in. (TR 2/131) Under these circumstances, this Court has rejected similar claims of appellate counsel's deficiency:

Kokal next claims that the trial court improperly excused a life-biased juror for cause and that appellate counsel was ineffective for failing to raise this issue. Again, we disagree. Juror excusals for cause are normally within the trial court's discretion, and a court's ruling will be sustained unless no reasonable person would agree with the court. The present record is replete with statements by venireperson Davis indicating that he was averse to imposing death: He said he did not think he could vote to recommend a death sentence; he would require the State to remove all doubt; he would require the State to prove its case beyond all doubt; he could not follow an instruction on reasonable doubt. On this record, we cannot say that no reasonable person would agree with the court's ruling. Appellate counsel cannot be faulted.

Kokal v. Dugger, 718 So. 2d 138, 142-143 (Fla. 1998)(footnotes omitted).

See also Morrison v. State, 2002 WL 432561, 27 Fla. L. Weekly S253, (Fla. March 21, 2002) (This equivocation, i.e., "not

sure," is sufficient to support excusal for cause); Fernandez v. State, 730 So. 2d 277, 281 (Fla. 1999) (holding no manifest error shown in excusing four prospective jurors who "gave equivocal responses to questions from the prosecutor, defense counsel, and the court as to whether they could follow the law and set aside their beliefs concerning the death penalty"); Sims v. State, 681 So. 2d 1112, 1117 (Fla. 1996) (holding that trial court did not abuse discretion in excusing venireperson for cause because venireperson's response to whether she would be able to vote for the death of defendant was "I am not sure"); Castro v. State, 644 So. 2d 987, 989 (Fla. 1994) (rejecting defendant's argument that the trial court impermissibly excused a juror for cause over defense objection when juror ultimately said he would vote for death); Foster v. State, 614 So. 2d 455, 462-63 (Fla. 1992) (no error to excuse venireperson who was not sure if she could set aside her feelings against the death penalty)

As this Court has held that 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 claim should be denied.

CLAIM III

WHETHER THE FLORIDA DEATH PENALTY SENTENCING STATUTE AS APPLIED IS UNCONSTITUTIONAL UNDER THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

Hodges next asserts that Florida's death penalty scheme is unconstitutional under the Sixth Amendment to the United States Constitution; he contends that the effect of finding an aggravator exposes him to a greater punishment than that authorized by the jury's verdict, the aggravator must be charged in the indictment, submitted to a jury and proven beyond a reasonable doubt. It is the State's contention that this claim is procedurally barred as it was not presented to the trial court nor to this Court on direct appeal. The claim that Florida's death penalty sentencing statute violates the Sixth Amendment right to a jury trial has been available since Hodges' sentencing, but was never asserted as a basis for relief. Since Hodges did not offer this claim in a timely manner, it is now barred. See Parker v. State, 790 So. 2d 1033, 1034-35 (Fla. 2001) (Denying claim under Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000) as not properly preserved for appellate review.) Additionally, as this Court has consistently and repeatedly stated, the habeas vehicle does not

constitute a second appeal; issues that were or could have been raised on direct appeal or in prior collateral proceedings may not be litigated anew. 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); Medina v. State, 573 So. 2d 293 (Fla. 1990) (stating that it is inappropriate to use a different argument to relitigate the same issue); Gorby v. State, 2002 WL 534413, 27 Fla. L. Weekly S315, (Fla. April 11, 2002) (Denying Gorby's challenges to the constitutionality of Florida's death penalty statute as procedurally barred where he made no assertion of ineffective assistance of counsel.)

Moreover, to the extent that Hodges relies upon the recent decision of Ring v. Arizona, 2002 WL 1357257 (U.S. June 24, 2002), to demonstrate that Florida's death penalty statute is unconstitutional, the State asserts that the Ring decision is not subject to retroactive application under the principles of Witt v. State, 387 So. 2d 922, 929-30 (Fla. 1980). 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 Hodges' 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 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 directly or indirectly address Florida law, provides no basis for consideration of Ring in this case.

A clear understanding of what Ring does and does not say is essential to analyze any possible Ring implications to Florida's capital sentencing procedures. Notably, the Ring decision left intact all prior opinions upholding the constitutionality of Florida's death penalty scheme, including Spaziano v. Florida, 468 U.S. 447 (1984), and Hildwin v. Florida, 490 U.S. 638 (1989). It quotes Proffitt v. Florida, 428 U.S. 242, 252 (1976), acknowledging that ("[i]t has never [been] suggested that jury sentencing is constitutionally required."). Ring, at *9, n. 4. In Florida, any death sentence which was imposed following a jury recommendation of death necessarily satisfies the Sixth Amendment as construed in Ring, because the jury necessarily found beyond a reasonable doubt that at least one aggravating factor existed. Since the finding of an aggravating

factor authorizes the imposition of a death sentence, the requirement that a jury determine the conviction to have been a capital offense has been fulfilled in any case in which the jury recommended a death sentence.

Even in the wake of Ring, a jury only has to make a finding of one aggravator and then the judge may make the remaining findings. Ring is limited to the finding of an aggravator, not any additional aggravators, nor mitigation, nor any weighing. Ring, at *18 (Scalia, J., concurring) (explaining that the factfinding necessary for the jury to make in a capital case is limited to "an aggravating factor" and does not extend to mitigation); Ring, at *19 (Kennedy, J., concurring) (noting that it is the finding of "an aggravating circumstance" that exposes the defendant to a greater punishment than that authorized by the jury's verdict). Constitutionally, to be eligible for the death penalty, all the sentencer must find is one narrower, i.e., one aggravator, at either the guilt or penalty phase. Tuilaepa v. California, 512 U.S. 967, 972 (1994) (observing "[t]o render a defendant eligible for the death penalty in a homicide case, we have indicated that the trier of fact must convict the defendant of murder and find one 'aggravating circumstance' (or its equivalent) at either the guilt or penalty phase."). Once a jury has found one aggravator, the

Constitution is satisfied, the judge may do the rest.¹

Ring does not directly or indirectly preclude a judge from serving in the role of sentencer. There is no language in Ring which suggests that, once a defendant has been convicted of a capital offense, a judge may not hear evidence or make findings in addition to any findings a jury may have made. Justice Scalia commented that, “[t]hose States that leave the ultimate life-or-death decision to the judge may continue to do so.” Ring, at *18 (Scalia, J., concurring). The fact that Florida provides an additional level of judicial consideration to enhance the reliability of the sentence before a death sentence is imposed does not render our capital sentencing statute unconstitutional. Hodges unfairly criticizes state law for requiring judicial participation in capital sentencing, but does not identify how judicial findings after a jury recommendation can interfere with the right to a jury trial. Any suggestion that Ring has removed the judge from the sentencing process is not well taken. The judicial role in Florida alleviates Eighth Amendment concerns as well, and in fact provides defendants with another “bite at the apple” in securing a life sentence; it also

¹ We know this is true because the Court in Apprendi held, and reaffirmed in Ring, that a prior violent felony aggravator satisfied the Sixth Amendment; therefore, no further jury consideration is necessary once a qualifying aggravator is found.

enhances appellate review and provides a reasoned basis for a proportionality analysis.

The jury's role in Florida's sentencing process is also significant. The jury's role is so vital to the sentencing process that the jury has been characterized as a "co-sentencer" in Florida. Espinosa v. Florida, 509 U.S. 1079 (1992).

The United States Supreme Court elaborated on Apprendi in Harris v. United States, which was released on the same day as Ring. In Harris, the Court described the holding in Apprendi in the following way:

Apprendi said that any fact extending the defendant's sentence beyond the maximum authorized by the jury's verdict would have been considered an element of an aggravated crime -- and thus the domain of the jury -- by those who framed the Bill of Rights.

Harris v. United States, 2002 WL 1357277 (U.S. June 24, 2002).

In light of that plain statement by the United States Supreme Court, which speaks volumes in the interpretation of Ring, there is no basis for relief of any sort. This Court has clearly held that death was the maximum sentence which could be imposed on Hodges by virtue of his conviction for the offense of first degree murder, and that is the end of the inquiry.

Therefore, Ring has no effect on prior decisions upholding Florida's capital sentencing scheme. This Court has previously recognized that the statutory maximum for first degree murder is

death, and has repeatedly rejected claims similar to those raised herein. Cox v. State, 27 Fla. L. Weekly S585 (Fla. May 23, 2002); Bottoson v. State, 813 So. 2d 31, 36 (Fla. 2002), cert. denied, Case No. 01-8099 (U.S. June 28, 2002); Hertz v. State, 803 So. 2d 629, 648 (Fla. 2001), cert. denied, Case No. 01-9154 (U.S. June 28, 2002); Looney v. State, 803 So. 2d 656, 675 (Fla. 2001), cert. denied, Case No. 01-9932 (U.S. June 28, 2002); Brown v. Moore, 800 So. 2d 223, 224-225 (Fla. 2001); Mann v. Moore, 794 So. 2d 595, 599 (Fla. 2001), cert. denied, Case No. 01-7092 (U.S. June 28, 2002); Mills, 786 So. 2d at 536-38. This interpretation of state law demands respect, and offers a pivotal distinction between Florida and Arizona. Ring, at *13; Mullaney v. Wilbur, 421 U.S. 684 (1975). Accordingly, this claim should be denied.

CLAIM IV

WHETHER HODGES' SENTENCE OF DEATH VIOLATES THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS BECAUSE THE PENALTY PHASE JURY INSTRUCTIONS SHIFTED THE BURDEN TO HODGES TO PROVE THAT DEATH WAS INAPPROPRIATE AND BECAUSE THE SENTENCING JUDGE HIMSELF EMPLOYED IMPROPER STANDARDS IN SENTENCING HODGES TO DEATH AND WHETHER APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE THIS ISSUE ON APPEAL.

This claim is also procedurally barred as it was not preserved for appeal and does not constitute fundamental error.

This Court has consistently rejected this claim:

Carroll also alleges that appellate counsel was ineffective for failing to argue that the penalty phase jury instructions improperly shifted the burden to him to prove that a life sentence would be appropriate. Trial counsel did not object to the instructions on the ground that they improperly shifted the burden. Therefore, this issue was not properly preserved for appeal. Furthermore, this Court has consistently held that the burden-shifting argument is without merit. See Rutherford, 774 So. 2d at 644 & n. 8; Demps v. Dugger, 714 So. 2d 365, 368 & n. 8 (Fla.1998). Appellate counsel's failure to raise nonmeritorious issues does not constitute ineffective assistance. See Groover, 656 So. 2d at 425.

Carroll v. State, 2002 WL 352844, 27 Fla. L. Weekly S214, (Fla. March 7, 2002)

This claim should be denied as procedurally barred.

CLAIM VI

FLORIDA'S CAPITAL SENTENCING STATUTE IS UNCONSTITUTIONAL ON ITS FACE AND AS APPLIED IN THIS CASE BECAUSE IT FAILS TO PREVENT THE ARBITRARY AND CAPRICIOUS IMPOSITIONS OF THE DEATH PENALTY AND IT VIOLATES THE CONSTITUTIONAL GUARANTEES OF DUE PROCESS AND THE PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENT.

No relief is warranted on this claim as this Court has consistently held that appellate counsel is not ineffective for failing to raise a claim that would have been rejected on appeal as unpreserved in the court below. Lambrix v. Singletary, 641 So. 2d 847, 848-49 (Fla. 1994) Hodges has failed to establish either fundamental error or that counsel's failure to raise an unpreserved claim constitutes deficient performance. This claim should be denied as procedurally barred.

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 true and correct copy of the foregoing has been furnished by U.S. Regular Mail to Bret B. Strand, Assistant CCC, Office of the Capital Collateral Counsel-Northern Region, 1533-B South Monroe Street, Tallahassee, Florida 32301, this _____ day of July, 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