IN THE SUPREME COURT OF FLORIDA

LORAN COLE,
Petitioner,

v. CASE NO. SC01-192

MICHAEL W. MOORE, Secretary,
Florida Department of Corrections,
Respondent.
_____/

ON APPEAL FROM THE FIFTH JUDICIAL CIRCUIT
IN AND FOR MARION COUNTY, FLORIDA

RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

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STATEMENT OF THE CASE AND FACTS

This Court summarized the facts of the crimes on direct appeal as follows:

> On February 18, 1994, Pam Edwards, a senior at Eckerd College in St. Petersburg, Florida, drove to the Ocala National Forest, where she met her brother, John Edwards, a freshman at Florida State University in Tallahassee, Florida. The two planned on camping in the forest for the weekend and eventually decided to camp in Hopkins Prairie. They were setting up camp when Loran Cole briefly stopped by their campsite. Cole soon returned to the campsite, introduced himself as "Kevin," and helped them set up camp. After John and Pam ate dinner, Cole and William Paul came to the Edwards' campsite. Paul was carrying a walking stick and was introduced to the Edwards as Cole's brother. The four sat around the campfire, and at about 10:45 p.m., they decided to walk to a pond.
>
> The four walked for a while but never found the pond. Instead, Cole jumped on Pam and knocked her to the ground. She got up and tried to run; however, Cole caught her, hit her on the back of the head, handcuffed her, and threw her down on the ground. Meanwhile, John had taken Paul's walking stick and was hitting him with it. Cole then helped Paul subdue John and moved John on the ground next to Pam. While they lay close to each other on the ground, John apologized to Pam for having exposed them to the dangers of these two strangers. Cole told the Edwards that he wanted to take their cars, and he went through their pockets and took their personal property, including their jewelry.
>
> Paul took Pam up the trail, and he was complaining about his hand and head, which were injured in the altercation with John. Pam could hear Cole asking John why he hurt Cole's brother and could hear John grunt a few times. Cole then came to where Pam and Paul were sitting and told them that they were going to wait until John passed out. Cole called back to John several times, and John responded by moaning. Eventually, Cole told Pam he was going to move John off the trail and tie him up. Pam then heard something that resembled a gagging sound. When Cole

returned, he said that John must be having trouble with his dinner, hinting that John was vomiting. John died that night from a slashed throat and three blows to the head, which fractured his skull. The injury to the throat caused a loss of blood externally and internally into John's lungs.

Pam, Paul, and Cole then started walking back to Cole's campsite. On the way, they walked past John, and he was not moving. At the campsite, Cole forced Pam to sleep naked by threatening her that unless she cooperated, she and John would be killed. Cole then forced her to have sexual intercourse with him.

The next morning, Cole went to check on John and told Pam that John was fine. Cole left the campsite to purchase marijuana. When he returned, the three smoked marijuana, and Cole again forced Pam to have intercourse with him. After eating dinner, they packed up as much of the camp as would fit into the backpacks carried by Cole and Paul. Cole then gagged Pam and tied her to two trees. Cole and Paul left in Pam's car and went to a friend's trailer, where they spent the night. The two left several items of John Edwards' personal property at the trailer. Thereafter, Cole and Paul returned Pam's car to the Ocala National Forest and took John's car, a Geo Metro.

By the early morning on Sunday, Pam was able to free herself of the ropes. She did not move because she was afraid that if Cole and Paul returned and she was not there, they would hurt John. She stayed in that spot until daylight and tried to find John. When she was unable to find him, she flagged down a motorist, who took her to call the police. The police returned with Pam to the scene, and the police located John's body. The body was face down and was covered with pine needles, sand, debris, and small, freshly cut palm fronds. Both of his hands were in an upward fetal position; there was a shoestring ligature around his left wrist and a shoestring partially wrapped around his right wrist.

Police thereafter arrested Paul and Cole in Ocala on Monday, February 21, 1994. Paul and Cole were

> indicted on charges of first-degree murder, two counts of kidnapping (sic) with a weapon, and two counts of robbery with a weapon. Cole was also indicted on two counts of sexual battery. Paul pleaded nolo contendere to the charges and was sentenced to life in prison without possibility of parole for twenty-five years on the murder charge and concurrent terms on the remaining charges. After a jury trial, Cole was found guilty on all counts of the indictment. A penalty-phase hearing was held, after which the jury unanimously recommended death. Finding four aggravators, [footnote omitted], no statutory mitigators, and two nonstatutory mitigators, [footnote omitted] the trial court followed the jury's recommendation and sentenced Cole to death.

Cole v. State, 701 So. 2d 845, 848 - 850 (Fla. 1997).

Cole filed his initial brief from the appeal of the orders denying his Rule 3.850 motion for post-conviction relief contemporaneously with this petition. In his initial brief, he raised some 22 issues, including numerous claims of ineffective assistance of trial counsel at both the guilt and penalty stages. The State filed its answer brief in the 3.850 appeal contemporaneously with its response herein.

Claim I

FLORIDA'S DEATH PENALTY SENTENCING STATUTE IS NOT UNCONSTITUTIONAL UNDER THE UNITED STATES SUPREME COURT HOLDING IN *APPRENDI V. NEW JERSEY*. COLE HAS NOT CARRIED HIS BURDEN TO PROVE THAT APPELLATE COUNSEL RENDERED HIM INEFFECTIVE ASSISTANCE FOR FAILING TO RAISE THE ISSUE ON APPEAL.

A. FLORIDA'S DEATH PENALTY SCHEME IS NOT UNCONSTITUTIONAL UNDER *APPRENDI* AS APPLIED IN COLE'S CASE.

Cole complains that Florida's death penalty scheme is unconstitutional because the aggravators are elements of the crime of first degree murder and must be charged in the indictment, submitted to the jury, and proven beyond a reasonable doubt. (P 5, 6). He claims that *Apprendi v. New Jersey*, 120 S.Ct. 2348 (2000) compels this conclusion. (P 7). Clearly, he is wrong.

The State submits that Cole is also wrong in his assertion that the 1994 version of Florida Statute §775.082 applies. (P 6). However, he is correct that the statute in effect at the time of the trial is the one to be applied in consideration of the instant issue. (P 6). Cole's trial was held in 199**5**. Thus, the 1995 version of the statute applies and provides:

> (1) A person who has been convicted of a capital felony shall be punished by death if the proceeding held to determine sentence according to the procedure set forth in s. 921.141 results in findings by the court that such person shall be punished by death, otherwise such person shall be punished by life imprisonment and shall be ineligible for parole.

§ 775.082(1), Fla. Stat. (1995).

Cole claims that *Apprendi* requires the Court to determine "'does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict.'"

(P 5). He contends that the aggravators under Florida's scheme "are elements of the offense which must be charged in an indictment, submitted to a jury during guilt phase, and proven beyond a reasonable doubt by a unanimous verdict." (P 6). This is true, Cole says, because "the state must prove at least one aggravating factor in the separate penalty phase proceeding **before** a person convicted of first degree murder is eligible for the death penalty." (P 6). Therefore, he reasons, "the death sentence is not within the statutory maximum" under *Apprendi*, "because it increases the penalty for first degree murder beyond the life sentence a defendant is eligible for based solely upon the jury's guilty verdict." (P 6).

This issue was recently argued to, and decided by, this Court in *Mills v. Moore*, 2001 WL 360893 (Fla. April 12, 2001). Therein, Mills argued

> the statute in effect at the time of the initial trial made the maximum penalty for his crime life imprisonment. Only after the jury verdict and further sentencing proceedings, Mills argues, could death be a possible sentence. This particular scheme, Mills argues, puts the sentence of death outside of the maximum penalty available and triggers *apprendi* protection.
>
> . . .
>
> Mills argues that this statute makes life imprisonment the maximum penalty available. Mills argues . . . the maximum possible

> penalty is life imprisonment unless and until the judge holds a separate hearing and finds that the defendant is death eligible.

2001 WL 360893 at 5. As is readily apparent, this part of the Mills argument is virtually identical to that advanced by Cole herein.

In *Mills*, this Court analyzed the *Apprendi* decision in considerable detail. This Court wrote in pertinent part:

> The [*Apprendi*] Court specifically stated . . . that *Apprendi* does not apply to already challenged capital sentencing schemes that have been deemed constitutional. The Court stated:
>
> > ‘Finally, this Court has previously considered and rejected the argument that the principles guiding our decision today render invalid state capital sentencing schemes requiring judges, after a jury verdict holding a defendant guilty of a capital crime, to find specific aggravating factors before imposing a sentence of death. . . . [O]nce a jury has found the defendant guilty of all the elements of an offense which carries as its maximum penalty the sentence of death, it may be left to the judge to decide whether that maximum penalty, rather than a lesser one, ought to be imposed.’ . . .
>
> The Court was referring to . . . *Walton v. Arizona* . . ., wherein it addressed a capital sentencing scheme and held that the presence of an aggravating circumstance in a capital case may constitutionally be determined by a judge rather than a jury. . . . Because *Apprendi* did not overrule *Walton*, the basic scheme in Florida is not overruled either.

> . . . With the majority of the justices refusing to disturb the rule of law announced in *Walton*, it is still the law and it is not within this Court's authority to overrule *Walton* . . .. *Apprendi* foreclosed Mills' claim because *Apprendi* preserves the constitutionality of capital sentencing schemes like Florida's. Therefore, on its face, *Apprendi* is inapplicable to this case.

Id. at 4. This Court proceeded to note that "[n]o court has extended *Apprehendi* to capital sentencing schemes, and the plain language of *Apprendi* indicates that the case is not intended to apply to capital schemes." *Id.* Pointing out that the United States Supreme Court refused to stay an execution in a capital case where an *Apprendi* claim had been raised, this Court concluded that the "denial of certiorari indicates that the Court meant what it said when it held that *Apprendi* was not intended to affect capital sentencing schemes." *Id.*

Cole has cited no authority for any contrary conclusion in this case.[1] His instant claim is identical to that part of the claim Mills raised and this Court decided as set out herein

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[1] Both *State v. Golphin*, 533 S.E.2d 168 (N.C. 2000) and *Weeks v. State*, 761 A.2d 804 (DE. 2000) rejected *Apprendi* based arguments challenging the capital statutes on the same ground advanced by Cole herein. Certiorari to the United States Supreme Court was denied in *Weeks* the day before Weeks was executed. *Mills*, 2001 WL 360893 at 4.

above. Thus, Cole's claim is without merit, and he is entitled to no relief. *Mills*.

Moreover, Cole's indictment, dated March 10, 1994, charged him with "murder in the first degree" and specified that the crime was "in violation of Florida Statute 782.04(1)(a)1." (Appendix A at 1, 4). The statute in effect on the date of the indictment, and referenced therein, provides in pertinent part that "murder in the first degree" is "a capital felony, punishable as provided in s. 775.082." 782.04(1)(a)3, Fla. Stat. (1993). As this Court said in *Mills,* a "'capital felony'" is by definition a felony that may be punishable by death." *Mills*, 2001 WL 360893 at 5. Thus, "[t]he maximum possible penalty described in the capital sentencing scheme is clearly death." *Id.* at 5-6.

This Court went on to note that "Mills is actually attacking the validity of the bifurcated guilt and sentencing phases of a capital trial. That issue was litigated and decided in *Proffitt v. Florida*, . . . and *Walton* . . .. The *Apprendi* majority clearly did not revisit these rulings." *Id.* at 5. Cole is following that same road, and the result at the end thereof should be the same as it was in *Mills*. He is entitled to no relief.

B. APPELLATE COUNSEL DID NOT RENDER COLE INEFFECTIVE ASSISTANCE UNDER *STRICKLAND* BY FAILING TO RAISE THE DENIAL OF COLE'S MOTION FOR STATEMENT OF PARTICULARS ON APPEAL.

Cole complains that his appellate counsel rendered deficient performance which prejudiced him when he failed to raise on direct appeal the trial court's denial of his Motion for Statement of Particulars. (P 10). The State contends that Cole has failed to meet either prong of the ineffective assistance of counsel standard.

To prevail on such a claim in relation to appellate counsel, Cole must show that his attorney's performance was professionally deficient and that he was prejudiced thereby. *Strickland v. Washington*, 466 U.S. 668 (1984); *Johnson v. Dugger*, 523 So. 2d 161 (Fla. 1988). When considering a habeas petition alleging ineffective assistance of appellate counsel, this Court's review is limited to

> first, 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.

Suarez v. Dugger, 527 So. 2d 190, 192-93 (Fla. 1988)(*quoting, Pope v. Wainwright*, 496 So. 2d 798, 800 (Fla. 1986)). *See*

Strickland v. Washington; *Johnson v. Dugger*. The deficiency must be such that had it not occurred, the result of the proceeding would have been different. *Suarez*, 527 So. 2d at 193.

"One of appellate counsel's responsibilities is to 'winnow out' weaker arguments on appeal and to focus upon those most likely to prevail. *Smith v. Murray*, 477 U.S. 527 . . . (1986)." *Provenzano v. Dugger*, 561 So. 2d 541, 549 (Fla. 1990). "Most successful appellate counsel agree that from a tactical standpoint[,] it is more advantageous to raise only the strongest points on appeal and that the assertion of every conceivable argument often has the effect of diluting the impact of the stronger points." *Atkins v. Dugger*, 541 So. 2d at, 1167. Even where a claim is "preserved for appellate review, it is well established that counsel need not raise every nonfrivolous issue revealed by the record. *See Jones v. Barnes*, 463 U.S. 745 . . . (1983)." *Provenzano*, 541 So. 2d at 1167. Moreover, the failure of appellate counsel to brief a meritless issue, or even one with little merit, is not deficient performance. *Suarez*, 527 So. 2d at 193. Appellate counsel cannot be criticized for failing to raise weak issues. *Atkins v. Dugger*, 541 So. 2d at 1167. Neither will appellate counsel be deemed ineffective for

failing to raise a point, which even if correct, would amount to no more than harmless error. *Duest v. Dugger*, 555 So. 2d 849 (Fla. 1990).

The instant claim fails for several reasons. First, the *Apprendi* claim is without merit, and so, the failure to appeal the denial of the motion for particulars regarding potential aggravating circumstances is also without merit. Moreover, the motion below was not premised on the claim that the aggravators are elements of the offense of murder in the first degree, and therefore, an otherwise viable *Apprendi* claim should not be considered by this Court because it is procedurally barred for failure to raise it below. *See generally*, *Steinhorst v. State*, 412 So. 2d 332 (Fla. 1982) [issue as raised in trial court only one considered on appeal]. Moreover, appellate counsel is not ineffective for failing to raise a procedurally barred claim on appeal. *Suarez*, 527 So. 2d at 193.

Finally, the claim is utterly without merit. In *Clark v. State*, 379 So. 2d 97 (Fla. 1980), this Court rejected the defendant's challenge to his sentence based upon his claim "that he was entitled to a statement of particulars as to the aggravating circumstances upon which the State would rely and present evidence of to support its request for the death penalty." 397 So. 2d at 104. Subsequently, this Court

consistently denied such claims, holding they lacked merit. *See Chandler v. State*, 442 So. 2d 171, 172 n.1(4) (Fla. 1984); *Cave v. State*, 476 So. 2d 180, 183 n.1 (Fla. 1985). Thus, Cole's claim is devoid of merit, as well as procedurally barred.

The failure of appellate counsel to brief an issue with a little merit, much less one with none, is not deficient performance. *Parker v. Dugger,* 537 So. 2d 969, 971 (Fla. 1989); *Suarez*, 527 So. 2d at 193. Cole has not carried his burden to prove deficient performance, and thus his claim fails under *Strickland/Suarez.*

Neither has he shown the requisite prejudice. He has not claimed, much less proved, that the State's failure to charge the aggravators in the indictment resulted in his being surprised by which aggravators were at issue. Neither has he alleged which aggravators he could have defended against to such an extent that they could not have been proved had they been charged in the indictment. Such allegations are required to state a legally sufficient ineffective assistance claim. *See Sireci v. State*, 773 So. 2d 34, 40 n.11 (Fla. 2000)[Defendant must specifically allege "how he was prejudiced by counsel's failure."]. Moreover, due to the overwhelming evidence supporting the finding of each of the four strong aggravators in this case, any error was harmless. Appellate counsel is not

deemed ineffective for failing to raise a point, which even if correct, would amount to no more than harmless error. *Duest*, 555 So. 2d at 852.

Cole is entitled to no relief.

C. APPELLATE COUNSEL DID NOT RENDER INEFFECTIVE ASSISTANCE UNDER *STRICKLAND* WHEN HE DID NOT RAISE THE CLAIM THAT JURORS MUST UNANIMOUSLY DECIDE WHICH AGGRAVATORS HAVE BEEN PROVED BEYOND A REASONABLE DOUBT.

Cole complains that since *Apprendi* made aggravators "elements of the crime for which the death penalty can be imposed," his sentence is unconstitutional "because it is impossible to determine whether a unanimous jury found any one aggravating circumstance." (P 11-12). He claims that appellate counsel's performance was deficient because he did not challenge the denial of his Motion to Declare Section 921.141, Florida Statutes Unconstitutional Because Only A Bare Majority Of Jurors Is Sufficient To Recommend A Death Sentence." (P 12).

As Cole acknowledges in his petition, Florida's law has long been, and is, that a jury may recommend imposition of the death penalty based upon a majority vote of the jurors. (P 12). In *Thompson v. State*, 648 So. 2d 692 (Fla. 1994), this Court rejected Cole's instant claim on its merits. "The . . . issue . . . is whether it is unconstitutional for a jury to be allowed

to recommend death on aa simple majority vote. . . . [T]his issue has already been decided by this Court contrary to his position." 648 So. 2d at 698. Reaffirming its prior holdings to this effect, this Court denied Thompson relief. *Id.* Subsequently, this Court again rejected that claim as "without merit." *Whitfield v. State*, 706 So. 2d 1, 6 (Fla. 1997). Since it is a meritless claim, appellate counsel did not render deficient performance in failing to raise it on appeal.

Moreover, in *Rutherford v. Moore*, 774 So. 2d 637, 643 (Fla. 2000), this Court rejected a claim of appellate counsel's ineffectiveness for failure "to raise on appeal denial of numerous pretrial motions . . .." Among the matters about which Rutherford complained was that the burden to prove that death was not appropriate was shifted to him. 774 So. 2d at 643-44. Finding this claim without merit, this Court rejected the claim that appellate counsel was ineffective. *Id.*

Appellate counsel is not ineffective for failing to raise weak or meritless issues. *Rutherford*, 774 So. 2d at 643; *Atkins v. Dugger,* 541 So. 2d 1165, 1167 (Fla. 1989)*; Suarez v. Dugger*, 527 So. 2d 190, 193 (Fla. 1988). *Whitfield* makes it clear that this issue is meritless. Neither is appellate counsel ineffective for failing to raise issues which would have most likely been held procedurally barred. *Rutherford*, 774 So. 2d at

643. The *Apprendi* component of this issue was not raised below, and therefore, it was not preserved for appeal. *See Steinhorst v. State*, 412 So. 2d 332 (Fla. 1982).

Moreover, "claims of ineffective assistance of appellate counsel may not be used to camouflage issues that should have been raised on direct appeal or in a postconviction motion." *Rutherford*, 774 So. 2d at 643. In fact, collateral counsel concedes that appellate counsel "challenge[d] the constitutionality of Florida Statute 921.141 for various reasons, including majority verdicts . . ." on direct appeal. (P 12 n.1). Appellate counsel is not ineffective for failing to convince the appellate court to rule in his favor. *See Routly v. Wainwright*, 502 So. 2d 901, 903 (Fla. 1987)[rejecting ineffective assistance of appellate counsel claim expressing dissatisfaction with the outcome of an issue raised on appeal because the result was not favorable to the defendant]. Moreover, "if an issue was actually raised on direct appeal, the Court will not consider a claim that appellate counsel was ineffective for failing to raise additional arguments in support of the claim on appeal." *Rutherford*, 774 So. 2d at 645. Thus, Cole's concession defeats his instant claim.

He is entitled to no relief.

Claim II

THE PROSECUTOR'S PENALTY PHASE CLOSING ARGUMENT WAS NOT IMPROPER. COLE HAS NOT CARRIED HIS BURDEN TO PROVE THAT HIS APPELLATE COUNSEL RENDERED HIM INEFFECTIVE ASSISTANCE BY FAILING TO RAISE THE PROSECUTOR'S ARGUMENT ON APPEAL.

Cole raised the issue of the prosecutor's penalty phase closing argument in his Rule 3.850 motion. Therein, he contended that trial counsel was ineffective because he did not object to the prosecutor's closing argument submitting that the Co-Defendant did not stab the victim because his hand was broken. (3.850 IB 21-22). Claiming that the Co-Defendant's hand injury was not as severe as the prosecutor suggested, he charged that this argument was not only misleading, but was based on facts "not in evidence" and "not true." (3.850 IB 22). According to Cole, his trial counsel should have refuted this argument in his closing argument and should have pointed out that the Co-Defendant could have stabbed the victim with his other hand which was his dominate hand. (3.850 IB 23).

The postconviction court denied the claim as to ineffectiveness of trial counsel, as follows:

> . . . Paul's hand was not broken. However, it is also clear that Paul's hand was badly injured . . . [and] Pam Edwards testified that Paul was moaning and said he thought his hand was broken. . . . She also testified that Defendant had her roll a joint for Paul because his hand was cut and swollen. . . . John

> Tomson (sic) testified that . . . Paul was in pain and that his hand was swollen and 'quite large.' . . . Mary Gamble testified that . . . his hand was 'very swollen up' and 'he could barely move it.' . . . The evidence demonstrates that even though Paul's hand was not broken, it was injured to the point that he may have had difficulty using it. Therefore, even though the prosecutor's statement that Paul's hand was broken was technically incorrect, it was not prejudicial to the outcome. . . . Claims of ineffective assistance of counsel are insufficient[ly] pleaded when they fail to allege facts to demonstrate deficient performance and prejudice.

(3.850 R 1214-15).

The prosecutorial statement at issue is: "Now this guy with a broken hand is going to get this knife out of his pocket, get it open, go back, cut John Edwards' throat, and then get it back in his pocket, with a broken hand? Because all the evidence is he had to have done all that." (P 17). He claims that appellate counsel was ineffective because he did not raise this claim as fundamental error. The State hereby incorporates and reasserts by this reference, the ineffective assistance of appellate counsel standards set out in the foregoing claim, *supra*, at 6-12 and adds thereto as follows.

"[A]ppellate counsel will not be deemed ineffective for failing to raise issues not preserved for appeal." *Robinson v. Moore*, 773 So. 2d 1, 3 (Fla. 2000). Clearly, Cole claims that his trial counsel did not preserve this issue for appeal. However, an exception to this rule exists where the error is so

egregious that it constitutes fundamental error. *Id.* at 4. "A fundamental error is defined as an 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.*(*quoting, Kilgore v. State*, 688 So. 2d 895, 898 (Fla. 1997)(*quoting, State v. Delva*, 575 So. 2d 643, 644-45 (Fla. 1991)).

To raise this claim to the level of fundamental error, Cole charges that this comment "most likely induced the jury to return a death recommendation on the false belief that Paul could not have physically committed the murder." (P 18). There is no merit to this claim.

In *Monlyn v. State*, 705 So. 2d 1, 4 (Fla. 1997), the defendant objected to a closing argument statement that the defendant would have done the victim "'a big favor if he had shot him. It would certainly have been a less painful death.'" This Court noted evidence that "there were shotguns available" and held the argument to be a proper comment on the evidence relating to "Monlyn's choice of method in committing the murder." 705 So. 2d at 5.

The State submits that the Cole prosecutor's statement during closing argument was a fair comment on the evidence admitted at trial. Pam Edwards testified that Paul repeatedly

complained that his hand was broken and Cole had her do things for Paul - such as roll a joint for him - because of Paul's inability to use his hand due to the injury. Thus, the prosecutor's statement that Paul's hand was broken was based on Paul's own statements to Ms. Edwards made at the time of the crimes. (See 3.850 R 1582). Moreover, the thrust of the prosecutor's argument was not that the hand was actually broken, and thus, it was physically impossible for Paul to use it, but was that Paul believed that it was broken, was treating it as if it was, and therefore, would not even attempt the things that he would have had to have done with that hand in order to slit the throat of John Edwards. There was no prosecutorial misconduct, and therefore, no error.

Moreover, as in *Robinson*, this comment did not play a critical role in the State's case against Cole. *See Robinson*, 773 So. 2d at 4. To the contrary, the evidence that Cole, not Paul, slit John's throat is overwhelming. *See Cole v. State*, 701 So. 2d 845, 848-49 (Fla. 1997). Thus, the characterization of the injury to Paul's hand as being a break when it was a severe injury, but not a break, did not rise to the level of fundamental error. *See Robinson*, 773 So. 2d at 4.

Certainly, Cole has not established that appellate counsel's decision not to raise this claim as fundamental error is outside

the bounds of professionally acceptable performance. *See Teffeteller v. Dugger*, 734 So. 2d 1009, 1027 (Fla. 1999). Clearly, it is counsel's job to winnow out the weaker arguments, *Smith v. Murray*, 477 U.S. 527 (1986); *Provenzano v. Dugger*, 561 So. 2d 541, 549 (Fla. 1990), and Cole has not carried his burden to prove that counsel's failure to include the fundamental error claim he raises herein was deficient performance, much less that it prejudiced him.

In his petition, Cole also raises a complaint about the prosecutor's argument which he characterizes as a request that "the jurors should show Mr. Cole the same amount of mercy that he showed his victims." (P 18). However, he does not allege that these comments constitute fundamental error on their own. Rather, he says "these comments, when considered with the other misconduct, probably caused the jury to recommend the death penalty." (P 20). Neither does he allege that on its own, the failure to raise this part of the prosecutorial argument constitutes ineffective assistance of appellate counsel. Thus, his claim is legally insufficient and should be denied on that basis. Moreover, since there was no impropriety in the argument commenting on Paul's belief that he had a broken hand, there is no error to cumulate with the alleged "mercy" argument component of the claim. Since Cole's claim of prejudice relies on the

cumulation of these two allegedly improper comments, his claim must fail if the broken hand comment is not fundamental error. Since that claim is not fundamental error as explained above, the "mercy" component of his argument fails to state a claim upon which relief can be granted.

Moreover, the State contends that the "mercy" component of this claim is procedurally barred because it was not raised by objection on this basis at trial. *See Steinhorst v. State*, 412 So. 2d 332 (Fla. 1982); *Parker v. Dugger*, 537 So. 2d 969 (Fla. 1989) [failure to preserve issue at trial, or raise on direct appeal, constitutes procedural bar in habeas petition]. Appellate counsel cannot be ineffective for failing to raise issues which are not preserved, absent fundamental error. *Robinson*, 773 So. 2d at 3; *Parker*, 537 So. 2d at 971; *Suarez*, 527 So. 2d at 193. As noted above, there is no claim in the instant petition that the “mercy” argument is fundamental error. The attempt to raise this claim via habeas petition is a thinly disguised attempt to gain a second direct appeal; such a claim should be denied without further consideration.

Further, the “mercy” argument is not fundamental error. In *Robinson*, 773 So. 2d at 3, 4, the defendant raised the issue in a state habeas petition. His prosecutor had argued:

She [the victim] paid the ultimate penalty with her

> life. She didn't do anything wrong, I would suggest to you. She did everything by the textbook. Went along with the whole ball of wax, submitted herself to the ultimate humiliation. For what? To be given the ultimate punishment. [State]: I would suggest Mr. Robinson, as a result of this, deserves the ultimate punishment and nothing less..."

773 So. 2d at 6-7. This Court agreed that the comments "were improper," but held "they still do not rise 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." *Id.* at 7.

Indeed, in *Kearse v. State*, 770 So. 2d 1119 (Fla. 2000), a more egregious mercy argument was insufficient to merit relief despite preservation of the claim in the trial court. In *Kearse*, the prosecutor said: "Kearse 'wants to live, even though he denied that right to Officer Parrish' and urged the jury to show 'this Defendant the same mercy he showed Officer Parrish.'" 770 So. 2d at 1129. This Court noted having "found similar prosecutorial comments to be error," but explained that alone is not sufficient to warrant relief. *Id.* at 1130. This Court hold that the mercy argument "was not so egregious as to require reversal of the entire resentencing proceeding." *Id.*

In *Richardson v. State*, 604 So. 2d 1107, 1109 (Fla. 1992), this Court rejected a claim for relief based on the prosecutor

having asked "the jury to show Richardson as much pity as he showed his victim." Agreeing that this was error, this Court found the error harmless. *Id.* That finding was based on the "moral certainty that Richardson killed Newton." *Id.* This Court concluded that "there is no reasonable possibility the verdict would have been different in the absence of this error." *Id.*

The evidence at trial proved to a moral certainty that Cole killed John Edwards. The evidence of his guilt is truly overwhelming, as is the evidence of the horrible manner in which he killed Mr. Edwards. There is no reasonable possibility that absent the "mercy" argument in this case Cole would have received a life recommendation, much less a life sentence. There was no fundamental error. *Robinson. See Kearse; Richardson*.

Neither can appellate counsel be deemed ineffective for failing to raise a point, which even if correct, would amount to no more than harmless error. *Duest v. Dugger*, 555 So. 2d 849 (Fla. 1990). Clearly, that is the case here.

Cole is entitled to no relief.

Claim III

COLE HAS NOT CARRIED HIS BURDEN TO PROVE A VIOLATION OF THE EIGHTH AMENDMENT PROSCRIBING CRUEL AND UNUSUAL PUNISHMENT; HE HAS FAILED TO ALLEGE OR PROVE THAT HE IS INCOMPETENT FOR EXECUTION.

Cole claims that he may become incompetent for execution at the unspecified future point in time when the Governor signs his death warrant. He alleges that he "suffers from mental illness and brain damage," and speculates that due to the living conditions at the prison, "[h]is mental condition may well decline to the point that he is incompetent to be executed." (P 23). Cole acknowledges that this claim is not properly brought at this time under Florida law, (P 21), but claims that it "is necessary at this stage because federal law requires that, in order to preserve a competency to be executed claim, the claim must be raised in the initial petition for habeas corpus, and . . . be exhausted in state court." (P 23).

Cole is correct in his concession that this claim is not ripe for review because his execution has not been scheduled. *Thompson v. State*, 759 So. 2d 650, 668 (Fla. 2000). *See* §922.07, Fla. Stat. (2000); Fla. R. Crim. P. 3.811(d). That is also the case under federal law. *See Martinez-Villareal v. Stewart*, 523 U.S. 637 (1998). Cole is entitled to no relief on this speculative and premature claim.

Claim IV

EXECUTION PURSUANT TO FLORIDA'S DEATH PENALTY STATUTE IS NOT CRUEL AND/OR UNUSUAL.

Cole complains that "death by electrocution is cruel and/or unusual punishment" and violates his state and federal constitutional rights. This claim is without merit.

Cole claims that the Death Penalty Reform Act of 2000 is unconstitutional because it changed "all death sentences to death by lethal injection . . .." (P 24, 25). Although he acknowledges that "the person sentenced to die" can choose "the electric chair," he complains that in the absence of a choice made by a defendant, the State forces lethal injection on that person. He also claims that a defendant must be "offered counsel," and it must be determined that the defendant "intelligently and understandingly rejected the offer [of death by electrocution]." (P 25). He concludes that "a person's decision regarding the means of death imposed by the state is protected" by the federal constitution, and so, "[t]he legislature cannot waive a person's choice to die by the means to which they were sentenced." (P 26). He asks for "[a]n evidentiary hearing and 3.850 relief . . .." (P 26).

This issue is procedurally barred for failure to raise it in the 3.850 motion filed contemporaneously herewith. It is also barred for failure to raise it in the trial court at any time. *Steinhorst v. State*, 412 So. 2d 332 (Fla. 1982).

Moreover, it is procedurally barred for failure to raise it before the expiration of the time in which to select death by electrocution.[2]

Moreover, this Court "has repeatedly rejected various challenges to the death penalty statute . . .." *Bryant v. State*, 2001 WL 326697 (Fla. April 5, 2001). "[T]he Florida Legislature amended the death penalty statute to provide that execution shall be by lethal injection unless the sentenced person affirmatively elects to be executed by electrocution. See §922.105, Fla. Stat. (2000). Accordingly, there is no merit to Bryant's claim, and the sentence imposed should be affirmed." *Id.* Likewise, to the extent that Cole complains that electrocution is cruel and unusual punishment, his claim is without merit. *Bryant*.

Cole's claim that death by electrocution is cruel and unusual punishment was also rejected in *Holland v. State*, 773 So. 2d 1065 (Fla. 2000) and earlier in *Provenzano v. Moore*, 744 So. 2d 413 (Fla. 1999). Thus, "there is no merit to this claim." *Holland*, 773 So. 2d at 1079.

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[2]Apparently, Cole seeks to choose electrocution as his means of execution. However, he does not allege that he has requested execution by electrocution from the Department of Corrections, much less that the Department of Corrections refused his request. Thus, this claim is premature.

Claim V

DEATH BY LETHAL INJECTION IS NOT CRUEL AND/OR UNUSUAL.

Cole complains that "execution by electrocution is cruel and/or unusual punishment" and violates his state and federal constitutional rights. This claim is without merit.

Cole claims that although the perception is that "lethal injection is a painless and swift death, negligent or intentional errors have caused persons executed intense suffering." (P 28). He adds that it "often results in terror, pain and disgrace because the procedure . . . is often to (sic) technical for the executioners to follow or (sic) willingly ignored." (P 30). Finally, he complains that the State's use of the drugs "violates the Supremacy Clause" of the federal constitution. (P 31).

In *Sims v. State*, 754 So. 2d 657 (Fla. 2000), this Court decided this issue contrary to Cole's position. Therein, all of the issues Cole has raised herein were raised, considered, and rejected. 754 So. 2d at 666-669. Indeed, even the same alleged defense expert, Radelet, testified in *Sims*. *Id.* at 667.

Subsequently, in *Provenzano v. State*, 761 So. 2d 1097, 1099 (Fla. 2000), this Court again held "that execution by lethal injection does not amount to cruel and/or unusual punishment."

Cole is entitled to no relief. *Provenzano; Sims*.

CONCLUSION

Wherefore, based upon the foregoing arguments and authorities, the Respondent respectfully requests that this Court 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 above has been furnished by U.S. Mail to Julius J. Aulisio, Assistant CDCRC and Leslie A. Scalley, Staff Attorney, CCRC Middle, 3801 Corporex Park Drive, Suite 210, Tmapa, Florida, on this _____ day of April, 2001.

_____
Of Counsel

CERTIFICATE OF COMPLIANCE

This brief is typed in Courier New 12 Point.

_____
JUDY TAYLOR RUSH
ASSISTANT ATTORNEY GENERAL