IN THE SUPREME COURT OF FLORIDA

ARTHUR DENNIS RUTHERFORD,

Petitioner,

v. CASE NO. 1999-150

MICHAEL W. MOORE, etc.,

Respondent.
_____/

RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

Michael W. Moore, by and through undersigned counsel, responds to Rutherford's petition for writ of habeas corpus and states the following:

Procedural Historv

Rutherford was convicted of one count of first-degree murder and one count of armed robbery in connection with the murder of an elderly widow and was sentenced to death for the murder conviction. The facts of this case are set out in the opinion affirming Rutherford's convictions and death sentence. Rutherford v. State, 545 So.2d 853 (Fla. 1989). Rutherford filed a motion for postconviction relief in 1991, and, after an evidentiary hearing, the circuit court denied all relief. This Court affirmed that denial of relief on appeal. Rutherford v. State, 727 So.2d 216 (Fla. 1998). Rutherford recently filed this petition for writ of habeas corpus.

Preliminary Statement

The issue of appellate counsel's effectiveness is appropriately raised in a petition for writ of habeas corpus. Teffeteller v. Dugger, 734 So.2d 1009 (Fla. 1999). The standard for reviewing claims of appellate counsel's ineffectiveness is set out in Strickland v. Washington, 466 U.S. 668 (1984). Williamson v. Dugger, 651 So.2d 84 (Fla. 1994). Thus, in evaluating a claim of appellate ineffectiveness, this Court must determine

> 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.

Pope v. Wainwright, 496 So.2d 798, 800 (Fla 1986), cert. denied, 480 U.S. 951 (1987) ; Teffeteller; Haliburton v. Singletary, 691 So.2d 466 (Fla. 1997); Hardwick v. Dugger, 648 So.2d 100 (Fla. 1994) . However, habeas corpus is "not to be used for additional appeals 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." Parker v. Dugger, 550 So.2d 459, 460 (Fla. 1989); Teffeteller; Hardwick; Medina v. Dugger, 586 So.2d 317 (Fla. 1991). Allegations of ineffectiveness will not be allowed to abrogate the rule that habeas proceedings cannot be used

as a second appeal. Breedlove v. Singletary, 595 So.2d 8 (Fla. 1992) ; Medina.

Rutherford raises eleven issues in his habeas petition. Seven of these issues repeat claims made on direct appeal and in his motion for postconviction relief. As this Court has remarked several times: "By raising the issue in the petition for habeas corpus, in addition to the rule 3.850 petition, collateral counsel has accomplished nothing except to unnecessarily burden this Court with redundant material." Blanco v. Wainwright, 507 So.2d 1377, 1384 (Fla. 1987); Kokal v. Dugger, 714 So.2d 138 (Fla. 1998); Demps v. Dugger, 714 So.2d 365 (Fla. 1998). Most of the currently raised issues are procedurally barred. On any issues that are not barred Rutherford has failed to demonstrate substandard performance that prejudiced him.

ISSUE I

WHETHER APPELLATE COUNSEL WAS INEFFECTIVE FOR NOT RAISING THE DENIAL OF SEVERAL PRETRIAL MOTIONS.

Rutherford argues that appellate counsel was ineffective for not raising on appeal the trial court's denial of numerous pretrial motions, a request for individual voir dire, and four defense-requested penalty instructions. Besides being procedurally barred, there is no merit to this claim.

Pretrial Motions

Prior to trial Rutherford filed numerous motions claiming that: section 921.141, Florida Statutes, does not set out how a jury is to make its advisory recommendation (ROA 116)[1]; electrocution is cruel and unusual punishment (ROA 123); subsection 782.04(1), Florida Statutes, is unconstitutional because it removes the element of intent from felony murder (ROA 125); and motions challenging the death penalty as: unconstitutional on its face and as applied; impossible to justify; arbitrary and capricious; failing to define the aggravators; being a rule of procedure; and allowing the use of nonrecord information in sentencing. (ROA 133, 136, 138, 141). The trial court denied all of these motions (see ROA 176-85), and counsel did not object to those denials at appropriate times. Rutherford, therefore, failed to preserve this subclaim for review, and counsel is not ineffective for not raising unpreserved claims. E.g., Williamson.

[1] "ROA 116" refers to page 116 of the record on appeal in case no. 69,825, Rutherford's direct appeal of his conviction and sentence. The record in that case consists of 5 unnumbered volumes plus 2 unnumbered volumes of supplemental record.

Even if preserved, this subclaim has no merit.' Motions such as these are filed routinely in capital cases, denied by the trial courts, and, when raised on appeal, found to have no merit. E.g., Elledge v. State, 706 So.2d 1340 (Fla. 1997), cert. denied, 119 S.Ct. 366 (1998); Pooler v. State, 704 So.2d 1395 (Fla. 1997), cert. denied, 119 S.Ct. 119 (1998); Hunter v. State, 660 So.2d 244 (Fla. 1995), cert. denied, 516 U.S. 1128 (1996). Rutherford cites nothing demonstrating that any of the pretrial motions were meritorious or that, if raised on appeal, this Court would have granted him relief based on any of these motions. Appellate counsel, therefore, was not ineffective for not raising this non-meritorious subclaim. Teffeteller; Kokal; Johnson v. Sinsletarv, 695 So.2d 263 (Fla. 1996); Groover v. Singletary, 656 So.2d 424 (Fla. 1995); Byrd v. Singletary, 655 So.2d 67 (Fla. 1995); Williamson; Swafford v. Dugger, 569 So.2d 1264 (Fla. 1990); King v. Dugger, 555 So.2d 355 (Fla. 1990); cf. 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

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[2] The merits of the individual motions underlying this claim are not at issue. As noted by this Court when discussing claims of appellate ineffectiveness based on substantive issues: "The merits of the issues, however, are merely abstractions that will be considered only to the extent needed to dispose of the ineffectiveness claims." Chandler v. Dugger, 634 So.2d 1066, 1067 n.2 (Fla. 1994) (citing Pope v. Wainwright, 496 So.2d 798 (Fla. 1986), cert. denied, 480 U.S. 951 (1987); Johnson v. Wainwright, 463 So.2d 207 (Fla. 1985)).

conceivable argument often has the effect of diluting the impact of the stronger points").

Rutherford has failed to show substandard performance that prejudiced him, and this subclaim of ineffectiveness should be denied.

Individual Voir Dire

Rutherford's subclaim that appellate counsel should have challenged the denial of his motion for individual voir dire is also without merit. Rutherford committed this murder in Santa Rosa County, the site of his first trial. Amistrial was declared after that trial, however, and the second trial took place in Walton County. Rutherford filed a motion for individual voir dire because "[e]motionally charged and prejudicial publicity appeared in local newspapers" (ROA 148), and, at a pretrial motion hearing, the trial court took the motion under advisement until the voir dire began. (ROA 185). During general questioning, the entire venire was asked if anyone knew anything about the case; none of the prospective jurors did. (ROA 203).

It is obvious that, if raised on appeal, this Court would have found no error in the trial court's denying the motion for individual voir dire. Because the basic claim has no merit, appellate counsel cannot have been ineffective for not raising it.

Proposed Instructions

As the last part of this claim, Rutherford complains that counsel did not challenge on appeal the denial of certain requested instructions. Trial counsel did not object to the denial at the charge conference (ROA 893 et seq.) or when the jury was instructed. (ROA 920 et seq.). Because there was no objection regarding denial of the proposed instructions, any complaint about that denial was not preserved for appeal. E.g., Archer v. State, 673 So.2d 17 (Fla.), cert. denied, 519 U.S. 876 (1996). Because this subclaim was not preserved, appellate counsel did not render ineffective assistance by not raising it.

There is also no merit to this claim. Instead of the requested instructions, the trial court gave the standard jury instructions, which are presumed to be correct. Downs v. State, 740 So.2d 506 (Fla. 1999); Elledge; Ferrell v. State, 653 So.2d 367 (Fla. 1995), cert. denied, 117 S.Ct. 1262 (1997); Parker v. State, 641 So.2d 369 (Fla. 1994), cert. denied, 513 U.S. 1131 (1995); Lara v. State, 464 So.2d 1173 (Fla. 1985). Rutherford cites no case in which this Court vacated a death sentence because the currently complained-about instructions were not given. Again, appellate counsel is not ineffective for not raising a meritless claim.

All of the items Rutherford complains about in this issue are procedurally barred and/or have no merit. He has failed to

demonstrate ineffective assistance of appellate counsel, and this claim should be denied.

ISSUE II

WHETHER APPELLATE COUNSEL WAS INEFFECTIVE REGARDING THE RETRIAL ISSUE.

Rutherford claims that appellate counsel was ineffective regarding the issue of his retrial after the trial court granted a mistrial because of a discovery violation. This issue is procedurally barred.

On direct appeal Rutherford argued that the retrial violated his right not to be placed in double jeopardy. This Court fully considered that claim and found it to have no merit. Rutherford, 543 So.2d at 855. When he raised the same claim in his postconviction motion (PCI 177-81)[3], the circuit court found it to be procedurally barred because it had been raised on direct appeal (PC11 393), and this Court affirmed that ruling. Rutherford, 727 So.2d at 218. Now, Rutherford, with no support for the claim, asserts that the prosecutor purposely caused the mistrial by withholding statements against interest made by Rutherford so that he could go "judge and jury shopping." (Petition at 17). He claims that appellate counsel was ineffective for not discovering

[3] "PCI 177-81" refers to pages 177 through 181 of volume I of the record on appeal in case no. 89,142, the appeal of the circuit court's denial of Rutherford's motion for postconviction relief.

the prosecutor's scheme and asks this court to relinquish jurisdiction for evidentiary development of his claim.

Such an extraordinary procedure is not warranted. Rutherford has always claimed that the prosecution intentionally caused the mistrial. Originally, he argued that the discovery violation was intentional and that the retrial cured that violation and insured that the complained-about testimony would be admissible. This Court disagreed, however, and held that "there is no indication that [the prosecutor's] motive was to obtain a mistrial." Rutherford, 543 So.2d at 855. The current claim is merely a speculative variation of the original theme. As such, the claim is procedurally barred.

Rutherford states that "[o]bjective evidence of the prosecutor's intent to provoke a mistrial and thereby gain tactical advantage was available to appellate counsel, but not asserted on appeal." (Petition at 14). AS just set out, however, that was precisely what counsel argued on appeal. Habeas is not meant to serve as a second appeal, and this claim is procedurally barred in these proceedings. Devising another theory to support a claim will not overcome a procedural bar, and this issue should be denied. E.g., Bryan v. Singletary, 641 So.2d 61 (Fla. 1994); Breedlove; Francis v. Barton, 581 So.2d 583 (Fla. 1991); Medina; Porter v. Dugger, 559 So.2d 201 (Fla. 1990).

ISSUE III

WHETHER COUNSEL WAS INEFFECTIVE FOR NOT CHALLENGING THE COMPETENCY OF WITNESSES ON APPEAL.

Rutherford argues that appellate counsel should have challenged the competency to testify of two witnesses. This issue is both procedurally barred and without merit.

According to the current claim, neither Mary Heaton nor Elizabeth Ward was competent to testify, Heaton because she had been in a mental institution and had a nervous breakdown, a stroke, and brain damage and Ward because she was only thirteen years old. (Petition at 18). Rutherford, however, did not object to these witnesses at trial because of their currently supposed incompetency. The issue, therefore, was not preserved for appeal, and appellate counsel cannot be faulted for not raising it.

To overcome this procedural bar, Rutherford now claims that the presentation of testimony by incompetent witnesses was fundamental error. Cf. Bertolotti v. Dugger, 514 So.2d 1095, 1097 (Fla. 1987) ("Appellate counsel's failure to raise an issue which was not preserved for appellate review and which does not present a fundamental error does not amount to a serious deficiency in performance"). Contrary to this contention, no fundamental error has been demonstrated.

It is recognized that "every person is presumed competent to testify," but that a witness may be disqualified "if he or she

lacks the capacity (i) to communicate in such a manner as to be understood, (ii) to understand the duty of a witness to tell the truth, or (iii) to perceive and recollect the facts when testifying." State v. Green, 733 So.2d 583, 584 (Fla. 1st DCA 1999). Rutherford cites nothing to support his assumption that fundamental error occurred because the trial court did not sua *sponte* determine the competency to testify of Heaton and Ward. Instead, he relies on cases that are factually distinguishable. Green challenged the competency of a witness against him, and the district court upheld the finding of the trial court which determined, after an evidentiary hearing, that the witness was incompetent to testify. Id. In Hammond v. State, 660 So.2d 1152 (Fla. 2d DCA 1995), the defendant to child sexual battery charges appealed the trial court's finding two witnesses competent to testify against him. The district court held that the trial court should not have found the severely retarded eighteen-year-old and the borderline retarded thirteen-year-old, who had a mental age of eight to ten, competent to testify. Both Green and Hammond specifically challenged the competency to testify against them

Rutherford, on the other hand, did not challenge the competency of Heaton and Ward at trial. Moreover, the record shows that any such challenge would not have succeeded. Rutherford brought out Heaton's problems on cross-examination (ROA 412), but she withstood intense cross-examination. Rutherford points to

nothing in her testimony (ROA 397-424) or that of Ward (ROA 425-35) that calls into question either's competency to testify.

No fundamental error occurred, and appellate counsel was not ineffective for not raising this unpreserved and nonmeritorious issue. This claim, therefore, should be denied.

ISSUE IV

WHETHER COUNSEL WAS INEFFECTIVE FOR NOT RAISING THE ADMISSION OF PHOTOGRAPHS ON APPEAL.

Rutherford claims that appellate counsel was ineffective for not raising on appeal the state's introduction of four photographs of the victim.[4] There is no merit to this issue.

During the testimony of Lonel Daniels, a crime scene investigator with the Santa Rosa County Sheriff's Office, the state introduced two photographs of the victim taken at the scene of her murder. (ROA 504). Defense counsel objected, but the court allowed the photographs into evidence. (ROA 504-05). Daniels testified that the photographs accurately depicted the body. (ROA 505). Later, during the penalty phase, the state introduced two more photographs of the victim, taken at the morgue. (ROA 785-87). Defense counsel again objected, and the prosecutor stated that the photographs would be used to identify and locate specific injuries.

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[4] Rutherford raised this claim in his motion for postconviction relief (PCI 159-62), and the circuit court found it procedurally barred. (PC11 393).

(ROA 786). The trial court allowed the photographs into evidence, and chuck Sloan, another sheriff's department investigator, testified that they accurately depicted the injuries to the victim's face and head. (ROA 787).

This Court has addressed the admissibility of photographs many times and in Henderson v. State, 463 So.2d 196, 200 (Fla. 1986), stated: "Persons accused of crimes can generally expect that any relevant evidence against them will be presented in court. The test of admissibility is relevance. Those whose work products are murdered human beings should expect to be confronted by photographs of their accomplishments." Photographs are admissible if they assist a medical examiner in explaining the nature and manner in which wounds were inflicted. Bush v. State, 461 So.2d 936 (Fla. 1984), cert. denied, 475 U.S. 1031 (1986). They are also admissible when they "show the manner of death, the location of wounds, and identity of the victim." Larkins v. State, 655 So.2d 95, 98 (Fla. 1995). The fact that photographs are gruesome does not mean that they are inadmissible. Preston v. State, 607 So.2d 404 (Fla. 1992), cert. denied, 507 U.S. 999 (1993); Thompson v. State, 565 So.2d 1311 (Fla. 1990); Foster v. State, 369 So.2d 928 (Fla.), cert. denied, 444 U.S. 885 (1979).

The admission of photographs is within the trial court's discretion, Wilson v. State, 436 So.2d 908 (Fla. 1983), and a trial court's ruling will not be disturbed absent a clear abuse of

discretion. Pangburn v. State, 661 So.2d 1182 (Fla. 1995); Wilson. Rutherford has shown no abuse of discretion in the trial court's allowing the introduction of these photographs. If appellate counsel had raised this issue, this Court would not have granted any relief. Appellate counsel need not raise every conceivable claim to be effective. Hardwick; Provenzano v. Dugger, 561 So.2d 541 (Fla. 1990).

Rutherford has failed to demonstrate ineffective assistance by appellate counse1, and this claim should be denied.

ISSUE V

WHETHER APPELLATE COUNSEL WAS INEFFECTIVE FOR NOT CHALLENGING RUTHERFORD'S ABSENCE FROM THE PENALTY-PHASE CHARGE CONFERENCE.

Rutherford claims that his absence from the penalty-phase charge conference constituted fundamental error that counsel should have raised on appeal. Besides being procedurally barred, this claim has no merit.

At the penalty-phase charge conference, the prosecutor asked if Rutherford should be present. (ROA 894). The trial court responded that the charge conference was not a critical stage of the proceedings requiring his presence. (ROA 894). Defense counsel did not object, leaving this issue unpreserved. As stated earlier, appellate counsel cannot be ineffective for not raising an unpreserved issue.

To overcome this procedural bar, Rutherford claims that a charge conference is a critical stage of the proceedings (petition at 23) and that the denial of his right to be present violated his constitutional rights and constitutes fundamental error. (Petition at 24). He cites absolutely nothing to support this claim, however, and makes no attempt to demonstrate how appellate counsel might have rendered substandard performance that prejudiced him.

This claim is procedurally barred and should be summarily denied.

ISSUE VI

WHETHER APPELLATE COUNSEL WAS INEFFECTIVE REGARDING TRIAL COUNSEL'S DISCLOSURE OF A PLEA OFFER.

Rutherford argues that trial counsel's telling the court that Rutherford rejected a plea offer was an improper revelation of confidential information that constituted a conflict of interest. According to Rutherford, this was fundamental error because the trial court relied on the information to use lack of remorse against him. Any claim regarding the trial court's improper use of remorse is procedurally barred, and any claim of appellate ineffectiveness is without merit.

In discussing the applicability of the HAC aggravator in the sentencing order, the trial court stated:

> While the Court cannot use the attitude of the defendant and his lack of remorse as an

> aggravating circumstance, the Court does find that the defendant's lack of remorse adds weight to the Court's determination that the crime was especially heinous, atrocious and cruel.

Rutherford, 545 So.3d at 856, quoting trial court's order. On appeal counsel claimed that this paragraph was an improper use of remorse as an aggravator. (Initial brief at 23-25). This Court disagreed, stating that the "order makes it clear . . . that the judge knew that a defendant's lack of remorse could not be considered as an aggravating circumstance." Rutherford, 545 So.2d at 856. The Court viewed "the comment as a gratuitous statement which did not affect the finding already made by the judge that the crime was especially heinous, atrocious, and cruel." Id.

Rutherford clothed his remorse argument in the garb of a conflict of interest in his motion for postconviction relief (PCI 150-58), and the circuit court found it procedurally barred and, facially, without merit. (PC11 392). With the addition of one sentence, Rutherford reproduces his postconviction claim verbatim here.

Rutherford was a notoriously difficult client. As set out by the circuit court in its postconviction order, Rutherford was uncooperative (PCIV 681, 685, 690), obstructed his attorneys' efforts to assist him (PCIV 686), preempted his attorneys' strategy options (PCIV 686), and refused to assist his counsel (PCIV 685), all while continually maintaining his innocence. (PCIV 682, 687).

During his guilt-phase testimony, Rutherford denied telling anyone he killed the victim (ROA 617, 647), denied telling anyone he planned to kill the victim (ROA 627, 648), and professed his innocence. (ROA 651, 655). However, as this Court commented in affirming the denial of postconviction relief: "There was overwhelming evidence of Rutherford's guilt." Rutherford, 727 So.2d at 220. This Court memorialized the circuit court's findings by quoting them regarding Rutherford's refusal to cooperate and stated that Rutherford "not only refused to cooperate, but actually encouraged his parents not to speak with defense investigators." Id. at 225, emphasis in original. This Court also stated that it found "additional support for counsel's testimony about his difficulties with Rutherford, based on the fact that Rutherford was 'placed in restraints before closing arguments in the penalty phase because of his threatening conduct.'" Id.

Given the facts of this case, it was reasonable for the trial court to ask Rutherford if he was satisfied with his attorneys. (ROA 927). Also given the facts of this case, it was reasonable for defense counsel to put on the record the fact that Rutherford rejected a plea offer. The failure to convey a plea offer to a defendant is ineffective assistance by trial counsel. Cottle v. State, 733 So.2d 963 (Fla. 1999). If trial counsel had not put the plea offer on the record, Rutherford, no doubt, would have claimed he was ineffective regarding the plea in his postconviction motion.

Be that as it may, Rutherford has demonstrated no basis for relief in this claim. Any complaint about the trial court's use of remorse was raised and rejected on appeal and is now procedurally barred. No fundamental error occurred. Given the facts that Rutherford has always claimed not to have murdered the victim and that counsel must convey plea offers to their clients, there is no likelihood that, on appeal, this Court would have found any merit to the instant conflict of interest claim. Counsel is not ineffective for not raising a claim that has no merit.

Rutherford has not shown substandard performance by appellate counsel that prejudiced him. This claim, therefore, should be denied.

ISSUE VII

WHETHER APPELLATE COUNSEL WAS INEFFECTIVE REGARDING THE JURY'S REQUEST TO HAVE TESTIMONY READ BACK TO IT.

Rutherford argues that the court erred in not telling him that he had the right to have testimony read back at the jury's request and that counsel was ineffective for not raising this claim on appeal. This claim is both procedurally barred and without merit.

The following occurred while to jury was deliberating during the guilt phase:

> THE COURT: Ladies and gentlemen, it has been reported to me by the bailiff that you have a question requesting that the testimony of the defendant and one of the

State's witness [sic], Mr. Johnny Perritt, Jr. be read back to you. Was that the question?

JUROR: Yes.

THE COURT: Okay. The Court after conference with the attorneys for the State and defendant will instruct you that we cannot read portions of the testimony back to you and you will have to use your individual and collective recollection of what the testimony was and apply that recollection to your deliberations in arriving at your verdict.

Have I fairly stated what we discussed in Chambers?

MR. SPENCER [Prosecutor]: Yes.

MR. GONTAREK [Defense Counsel]: Yes.

THE COURT: All right with that instruction you can go back and resume your deliberations.

(ROA 778). No objection on the basis now asserted was made to the court's handling of this matter so it was not preserved for appeal. Appellate counsel is not ineffective for not raising a procedurally barred claim.

Moreover, Rutherford has presented nothing going to the merits of this claim. He has not demonstrated substandard performance by appellate counsel that prejudiced him, and this claim should be denied.

ISSUE VIII

WHETHER THIS COURT MUST REVISIT THE SHACKLING ISSUE.

Rutherford argues that this Court must reconsider his having been shackled at the end of the penalty phase because of Bello v. State, 547 So.2d 914 (Fla. 1989). There is no merit to this claim.

Rutherford raised his being shackled on direct appeal (initial brief at 39-41), and this Court found the issue to have no merit. Rutherford, 545 So.2d at 857, n.4. He now claims that "this Court did not have the benefit of Bello when it decided this issue on direct appeal." (Petition at 35). Bello, however, was released on July 6, 1989, just three weeks after this Court affirmed Rutherford's conviction and sentence. The current claim is mere speculation that this Court has tunnel vision and is not aware of the various cases pending before it and ignores the factual differences between Bello's case and Rutherford.

This Court held that Bello should be resentenced before a jury because his trial judge ordered him shackled during the penalty phase "without making any inquiry into the necessity for the shackling." Bello, 547 So.2d at 918. In Rutherford's case, on the other hand, sufficient inquiry was made.

At the end of the penalty-phase charge conference, the court made the following statement: "The bailiff has expressed and deputies in charge of the defendant have expressed concern about the defendant's conduct, security, and based on his conviction for

the ultimate crime of first-degree murder and facing a possible recommendation of death, the Court has ordered that he be placed in leg irons. And I'm going to have him here in that posture." (ROA 895). After that, the prosecutor stated that "for further basis of putting him in leg irons, as he was leaving the stand he personally threatened me." **(ROA 895).** The court agreed and stated: "I don't think that's anything to get too upset about at this point, but he did do that." (ROA 895). Defense counsel objected to the shackling (ROA 895), and Rutherford was shackled during closing arguments and while the jury was instructed. This is a far cry from the refusal by Bello's judge to make any inquiry into why restraints might be necessary.

Bello is not a change in the law that would provide relief for Rutherford. Appellate counsel raised this issue. As this Court has recognized: "After appellate counsel raises an issue, failing to convince this Court to rule in an appellant's favor is not ineffective performance." Swafford, 569 So.2d at 1266; Haliburton. There is no merit to this claim, and it should be denied.

ISSUE IX

WHETHER APPELLATE COUNSEL WAS INEFFECTIVE REGARDING THE AGGRAVATORS.

Rutherford argues that this heinous, atrocious, or cruel (HAC) and cold, calculated, and premeditated (CCP) aggravators are constitutionally invalid and that the jury was given

unconstitutional instructions on these aggravators. He claims that appellate counsel was ineffective for not making the currently tendered arguments. This claim is procedurally barred.

Appellate counsel challenged the applicability of the HAC and CCP aggravators. (Initial brief at 23-28). This Court found that the facts supported the establishment of both. Rutherford, 545 So.2d at 855-56. Rutherford raised this same claim in his motion for postconviction relief. (PCI 99-36; PCII 333-59). The circuit court found it to be procedurally barred and noted that no objection to the HAC and CCP instruction had been made at trial. (PC11 389-91).

Trial counsel did not object to the HAC and CCP aggravators and the instructions on the bases now argued. The current claims, therefore, were not preserved for appeal. E.g., Downs; Grossman v. Dugger, 708 So.2d 249 (Fla. 1997); Phillips v. State, 705 So.2d 1320 (Fla. 1997), cert. denied, 119 S.Ct. 187 (1998); Johnson; Larzelere v. State, 676 So.2d 394 (Fla. 1996), cert. denied, 519 U.S. 1043 (1997); Squires v. Dugger, 564 So.2d 1074 (Fla. 1990). Because this issue is procedurally barred, appellate counsel cannot have been ineffective for not raising it. Grossman; Johnson; Squires. This claim, therefore, should be denied.[5]

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[5] The HAC and CCP aggravators have not been declared invalid, and, as this Court's opinion on direct appeal shows, the facts demonstrate that this murder was both HAC and CCP under any definition of those terms. Rutherford v. State, 545 So.2d 853, 856 (Fla. 1989).

ISSUE X

WHETHER THE INSTRUCTIONS IMPROPERLY SHIFTED THE BURDEN TO RUTHERFORD TO SHOW THAT DEATH WAS NOT AN APPROPRIATE SENTENCE.

Rutherford argues that the burden was improperly shifted to him of demonstrating that life imprisonment would be an appropriate sentence. Rutherford raised this issue in his motion for postconviction relief (PCI 89-99; PCII 322-32), and the circuit court held it was procedurally barred. (PC11 388). If this claim had been preserved at trial, it could have been raised on appeal. It was not preserved, however, and appellate counsel is not ineffective for not raising a procedurally barred issue.

To overcome the procedural bar, Rutherford now argues that fundamental error occurred. (Petition at 61). This claim is meritless because there is no merit to the basic burden-shifting claim. Demps; Walker v. State, 707 So.2d 300 (Fla. 1997); Shellito v. State, 701 So.2d 837 (Fla. 1997), cert. denied, 118 S.Ct. 1537 (1998) ; Johnson v. State, 660 So.2d 637 (Fla. 1995), cert. denied, 517 U.S. 1159 (1996).

This claim is procedurally barred and should be denied summarily.

ISSUE XI

WHETHER APPELLATE COUNSEL WAS INEFFECTIVE FOR NOT RAISING THE TIMING OF FILING OF THE SENTENCING ORDER.

Rutherford claims that counsel was ineffective for not raising on appeal the trial court's failure to file its sentencing order contemporaneously with the oral imposition of sentence."[6] There is no merit to this claim.

In Van Royal v. State, 497 So.2d 625 (Fla. 1986), this Court expressed its concern with trial courts filing their written orders in support of death sentences long after imposition of sentence. Subsequently, this Court established "a procedural rule that all written orders imposing a death sentence be prepared prior to the oral pronouncement of sentence for filing concurrent with the pronouncement." Grossman v. State, 525 So.2d 833, 841 (Fla. 1988), cert. denied, 489 U.S. 1071 (1989). In the instant case the trial court sentenced Rutherford to death on December 9, 1986, and its undated written sentencing order was date stamped as filed with the clerk of court's office on December 17, 1986.

Rutherford's sentencing occurred more than a year before the rule adopted in Grossman became effective. This Court has held that Grossman was prospective only and affirmed death sentences

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[6] Rutherford raised this claim in his motion for postconviction relief (PCI 136-42), and the circuit court found it procedurally barred. (PC11 391-92). This Court affirmed that finding. Rutherford v. State, 7.27 So.2d 216, 218 n.2 (Fla. 1998).

where written orders were not filed contemporaneously with oral pronouncement of sentence. E.g., Holton v. State, 573 So.2d 284 (Fla. 1990), cert. denied, 500 U.S. 960 (1991); Muehleman v. State, 503 So.2d 310 (Fla.), cert. denied, 484 U.S. 882 (1987). Because Grossman was not retroactive, no relief would have been granted if this issue had been raised on direct appeal.

Rutherford has failed to show substandard performance by appellate counsel that prejudiced him. This claim, therefore, should be denied.

CONCLUSION

For the foregoing reasons, Respondent asks this Court to deny Rutherford's 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 Response has been furnished by U.S. Mail to Andrew Thomas, Assistant Capital Collateral Regional Counsel, Capital Collateral Regional Counsel, Northern Region, Post Office Drawer 5498, Tallahassee, Florida 32314-5498, this 27th day of January 2000.

Barbara J. Yates

BARBARA J. YATES
Assistant Attorney General