

IN THE SUPREME COURT OF FLORIDA

MICHAEL BERNARD BELL

Petitioner,

v.

CASE NO. SC05-610

JAMES V. CROSBY, Jr. Secretary,
Department of Corrections
State of Florida
Respondent

_____/

RESPONSE TO BELL'S PETITION FOR WRIT OF HABEAS CORPUS

COMES NOW, Respondent, by and through the undersigned Assistant Attorney General, and hereby responds to Bell's Petition for Writ of Habeas Corpus filed in the above styled case. Respondent respectfully submits the petition should be denied.

PRELIMINARY STATEMENT

Petitioner, MICHAEL BERNARD BELL raises eight claims in his second successive petition for writ of habeas corpus. References to petitioner will be to Bell or Petitioner, and references to respondent will be to the State or Respondent.

References to the original trial record will be to "TR" followed by the appropriate volume and page number. References to Bell's Initial Brief shall be to "IB" followed by the

appropriate page number. References to the record from Bell's initial and amended post-conviction proceedings will be to "PCR" followed by the appropriate volume and page number. References to the instant habeas petition will be to "Pet." followed by the appropriate page.

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Michael Bell, born November 24, 1970, was 23 years old at the time he murdered Jimmy West and Tameka Smith outside a nightclub in Jacksonville, Florida. The relevant facts concerning the December 9, 1993 murders are recited in this Court's opinion on direct appeal:

.... On December 9, 1993, appellant Michael Bell shot to death Jimmy West and Tamecka Smith as they entered a car outside a liquor lounge in Jacksonville. Three eyewitnesses testified regarding the murders, which the trial court described in the sentencing order as follows.

In June 1993, Theodore Wright killed Lamar Bell in a shoot-out which was found to be justifiable homicide committed in self-defense. Michael Bell then swore to get revenge for the murder of his brother, Lamar Bell. During the five months following Lamar Bell's death, Michael Bell repeatedly told friends and relatives he planned to kill Wright. On December 8, 1993, Michael Bell, through a girlfriend, purchased an AK-47 assault rifle, a thirty-round magazine, and 160 bullets. The next night, Bell saw Theodore Wright's car, a yellow Plymouth. Bell left the area and shortly returned with two friends and his rifle loaded with thirty bullets. After a short search, he saw the yellow car in the parking lot of a liquor lounge. Bell did not know that Wright had sold the car to Wright's half-brother, Jimmy West, and that West had parked it and had gone into the lounge. Bell waited in the parking lot until

West left the lounge with Tamecka Smith and another female. Bell picked up the loaded AK-47 and approached the car as West got into the driver's seat and Smith began to enter on the passenger's side.

Bell approached the open door on the driver's side and at point-blank range fired twelve bullets into West and four into Smith. The other female ducked and escaped injury. After shooting West and Smith, Bell riddled with bullets the front of the lounge where about a dozen people were waiting to go inside. Bell then drove to his aunt's house and said to her, "Theodore got my brother and now I got his brother."

Appellant was charged with two counts of first-degree murder. At trial in March 1995, appellant pleaded not guilty by reason of self-defense, stating that he believed West had reached for a weapon just before appellant began shooting. The defense presented no evidence or witnesses. A jury found appellant guilty of the first-degree murders of Smith and West and unanimously recommended the death penalty for both murders.

During the penalty phase, a lounge security guard testified for the State that he and seven or eight other people were in the line of fire and hit the ground when appellant sprayed bullets in the parking lot of the lounge. He also testified that appellant shot four or five bullets into a house next door in which three children were residing at the time. The State introduced a copy of a record showing that appellant was convicted of armed robbery in 1990. Also during the penalty phase, appellant's mother testified for the defense that she and appellant had received death threats from Wright and West. She testified that appellant was in good mental health and was gainfully employed and that she believed he did not commit the murders.

Bell v. State, 699 So.2d 674 (Fla. 1997).

The jury, by a vote of 12-0, recommended Bell be sentenced to death for both murders. (TR Vol. I 89, 91). The trial court

found three aggravating factors: (1) Bell had previously been convicted of a prior violent felony,¹ (2) Bell knowingly created a great risk of death to many persons, and (3) the murder was cold, calculated and premeditated. The trial court found, in marginal mitigation that, at the time of the murder, Bell acted under extreme mental or emotional disturbance because of the death of his brother some five months earlier. The trial court followed the jury's unanimous recommendation as to each murder and sentenced Bell to death on June 2, 1995. (TR Vol. I 106-115).

Appellant raised four issues in his direct appeal.¹ On July 17, 1997, this Court affirmed Bell's convictions and sentences to death in Bell v. State, 699 So.2d 674, 679 (Fla. 1997). Bell's motion for rehearing was denied on September 17, 1997 and mandate issued on October 17, 1997. The United States Supreme Court denied review on February 23, 1998, in Bell v. Florida, 521 U.S. 1123, 118 S. Ct. 1067 (1998).

¹ In January and May 1990, when he was nineteen years old, Bell committed, and was convicted, of armed robbery with a deadly weapon.

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On direct appeal, Bell claimed the trial court erred: (1) in failing to conduct proper inquiries under Nelson v. State, 274 So.2d 256 (Fla. 4th DCA 1973) and Faretta v. California, 422 U.S. 806 (1975); (2) in finding the murders were CCP; (3) in instructing the jury on the CCP aggravator; (4) in failing to properly consider and find mitigating circumstances.

On June 1, 1999, Bell filed his first motion pursuant to Rule 3.850, Florida Rules of Criminal Procedure. The trial court summarily denied the motion on January 13, 2000. Bell appealed and on April 26, 2001, the Florida Supreme Court reversed and remanded with instructions to allow Bell to file an amended motion. On October 3, 2001, Bell filed an amended motion for post-conviction relief. On May 31, 2002, the trial court denied the motion. On August 2, 2002, Bell filed a notice of appeal from the denial of his amended post-conviction motion. On April 1, 2005, Bell filed the instant petition.

PRELIMINARY DISCUSSION OF APPLICABLE LAW

A habeas petition is the proper vehicle to raise claims of ineffective assistance of appellate counsel. See Rutherford v. Moore, 774 So.2d 637, 643 (Fla. 2000). The standard of review applicable to claims of ineffective assistance of appellate counsel mirrors the standard outlined in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984) for analyzing claims of ineffective assistance of trial counsel. Valle v. Moore, 837 So.2d 905, 907 (Fla. 2002); Jones v. State, 794 So.2d 579, 586 (Fla. 2001).

When evaluating an ineffective assistance of appellate counsel claim raised in a petition for writ of habeas corpus, this Court must determine, (1) 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 (2) whether the performance deficiency compromised the appellate process to such a degree as to undermine confidence in the correctness of the result. Johnson v. Moore, 837 So.2d 343 (Fla. 2002). The petitioner bears the burden of alleging a specific and serious omission or overt act upon which the claim of ineffective assistance of counsel can be based. Freeman v. State, 761 So.2d 1055, 1069 (Fla. 2000). It is not enough to show an omission or act by appellate counsel constituted error. Rather, the "deficiency must concern an issue which is error affecting the outcome, not simply harmless error." Knight v. State, 394 So.2d 997, 1001 (Fla. 1981).

A petitioner cannot prevail on a claim of ineffective assistance of appellate counsel when the issue was not preserved for appeal. See Medina v. Dugger, 586 So.2d 317 (Fla. 1991). An exception is made only when appellate counsel fails to raise a claim which, although not preserved for appeal, constitutes fundamental error. Kilgore v. State, 688 So.2d 895,898 (Fla. 1997). Fundamental error is error that "reaches down into the validity of the trial itself to the extent a verdict of guilty could not have been obtained without the assistance of the

alleged error." State v. Delva, 575 So.2d 643, 644-645 (Fla. 1991)(quoting Brown v. State, 124 So.2d 481 (Fla. 1960)).

Likewise, appellate counsel is not ineffective for failing to raise a claim that likely would have been rejected on appeal. Downs v. State, 740 So.2d 506, 517 n. 18. *Accord*, Freeman v. State, 761 So.2d 1055, 1069-1070 (Fla. 2000) (appellate counsel not ineffective for failing to raise non-meritorious issues); Rutherford v. Moore, 774 So.2d 637, 643 (Fla. 2000)(same). This Court has also ruled that appellate counsel cannot be deemed ineffective if the habeas claim, or a variant thereof, was, in fact, "raised on direct appeal." Atkins v. Dugger, *supra*, 541 So.2d at 1166-67.

Finally, a claim that has been resolved in a previous review of the case is barred as "the law of the case." See Mills v. State, 603 So.2d 482, 486 (Fla. 1992). Thus, claims properly raised and rejected in a previous rule 3.850 motion for post-conviction relief cannot be raised again on habeas. Scott v. Dugger, 604 So.2d 465, 469-470 (Fla. 1992).

RESPONSE TO SPECIFIC CLAIMS

CLAIM I

WHETHER APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO SUFFICIENTLY ARGUE THAT THE TRIAL COURT ERRED IN FAILING TO MAKE AN ADEQUATE INQUIRY INTO BELL'S PRETRIAL COMPLAINTS OF INEFFECTIVE ASSISTANCE OF COUNSEL AND HIS REQUEST FOR APPOINTMENT OF SUBSTITUTE COUNSEL

Bell's sole argument in his first claim is that appellate counsel was ineffective because he failed to answer this Court's questions, during oral argument, pertaining to Bell's request to represent himself.² Bell alleges that because the trial record indicates that Bell did ask, twice, to represent himself, appellate counsel was ineffective for failing to "properly research the pre-trial, and the trial, records to locate these citations." (Pet. at page 13).

Bell cites to two places in the trial record (TR 23 and 27) in hearings held on January 3-4, 1995, where Bell asserts he "unequivocally invoked his Sixth Amendment Right to self-representation". Bell alleges appellate counsel's failure to

² While the heading of Bell's first claim in this habeas petition alleges appellate counsel was ineffective for failing to adequately present the issue of whether the trial court erred in failing to conduct an adequate Nelson and Faretta inquiry, Bell presents no substantive argument before this Court concerning the Nelson issue. Rather, Bell's sole argument is that appellate counsel was ineffective during oral argument on the Faretta issue.

An audio recording of the oral argument conducted before this court on December 6, 1996 is archived along with the record on direct appeal which includes the motion for rehearing and a notice of supplemental authority filed on December 18, 1996.

point to these citations during oral argument caused this Court to erroneously conclude, based on insufficient information, that "at no time during any proceedings did Appellant request to act alone as his own counsel", citing to Bell v. State, 699 So.2d 674, 677 (Fla. 1997).

Bell does not complain that appellate counsel's briefing on this issue was inadequate in any manner. This is likely so, because appellate counsel raised, and fully briefed, this Nelson/Faretta issue before this Court. Appellate counsel argued the trial court was required, but failed, to conduct an adequate hearing pursuant to Nelson and Faretta. Counsel also argued the trial court erred in giving too much weight to Bell's lack of legal acumen as a basis for its preemptive refusal to allow Bell to waive counsel and represent himself. (IB at 20). Further, to ensure this Court's attention was drawn to the specific portions of the record pertinent to this claim, appellate counsel, attached, as an appendix to his initial brief, excerpts from two hearings held on Bell's requests to discharge trial counsel.³

³ In two separate hearings, the trial court addressed Bell's request to discharge counsel. During the latter hearing, held on March 6, 1995 on the first day of trial, (a transcript of which appellate counsel attached to his initial brief on direct appeal), Bell sought to discharge counsel. Bell alleged trial counsel breached confidentiality by talking with him in the presence of the brother of a state witness. During this hearing, Bell did not ask to represent himself. (TR Vol. VIII 102-108).

During oral argument, appellate counsel focused much of his allotted time on this issue. He argued vigorously that the trial judge deprived Bell of any meaningful opportunity to exercise his Sixth Amendment rights when he ruled Bell was not capable of representing himself even before Bell was fully advised of, and allowed to consider, the option of waiving his right to counsel and representing himself. Twelve days after oral argument, appellate counsel provided this Court with supplemental authority decided eleven days after oral argument (Mundy v. State, 687 So.2d 1314 (Fla. 1st DCA 1996)).

This Court found no error in the trial judge's disposition of Bell's claims of ineffective assistance of counsel. This Court determined the trial court did comply with the standards of Nelson v. State, 274 So.2d 256 (Fla. 4th DCA 1973) which this Court adopted in Hardwick v. State, 521 So.2d 1071 (Fla. 1988). Further this Court found no grounds for requiring the trial court to appoint substitute counsel. Bell v. State, 699 So. 2d 674, 676 (Fla. 1997).

As to the Faretta issue, this Court first noted that it had carefully examined the record. Bell v. State, 699 So.2d at 677. This declaration belies any notion this Court acted on Bell's appeal with "insufficient information".

This Court determined Bell did not clearly and unequivocally declare his desire to represent himself. This

Court concluded Bell's request to act as co-counsel or stand-by counsel to his court-appointed lawyer did not rise to the level of an unequivocal request to exercise his right to self-representation.

The record of trial in this case bears out this Court's conclusions. The first incident Bell cites to occurred on January 3, 1995. During this pre-trial hearing, Bell told the judge that "I have ineffective assistance of counsel. I would like to get another counsel appointed to me or either represent myself." (TR Vol. VI 23). The trial judge responded that they would discuss the issue the next day. (TR Vol. VI 23).

The following day, on January 4, 1995, the court fully addressed Bell's concerns about his counsel. (TR Vol. VII 27-50). The Court read a letter written by Bell to the Court into the record. (TR Vol. VII 27-28).⁴ In that letter, Bell did not

⁴ Bell's references to the post-conviction record on page 13 of his habeas petition (PCR Vol II 255 and Vol IV 695) are not, contrary to his assertions, to a letter written on January 4, 1995. Instead both references are to a document that appears to be an unaddressed letter to the trial judge dated March 1, 1995.

The State can find nothing in the trial record indicating the letter was delivered to the Court prior to trial, addressed during a pre-trial hearing, or even mentioned by the defendant prior to the commencement of voir dire on March 6, 1995. It is not in the State's copy of record on direct appeal. In the letter, while Bell said he wanted to represent himself, Bell also asked for an opportunity to hire his own attorney.

On March 6, 1995, the Court held a hearing on Bell's request to discharge counsel based on an alleged breach of attorney client

ask to represent himself. Rather, he requested the court to appoint him a new attorney; "someone who is going to fight for me."

Upon inquiry, the trial judge learned that Bell's complaints centered around trial counsel's failure to visit him. Bell alleged trial counsel was not keeping him informed about the case and not seeking Bell's input in preparing the case for trial. Bell also alleged he had witnesses he wanted interviewed but trial counsel had not gotten the list from him. (TR Vol. VII 27-30). The trial judge questioned Bell thoroughly about his concerns, queried trial counsel on his efforts on Bell's behalf, and subsequently authorized the appointment of an investigator to interview the witnesses Bell told the court he wanted questioned. (TR Vol. VII 30-39).

While Bell did request to act as co-counsel or stand by counsel, Bell never asked to waive his right to counsel and proceed alone. There is nothing in the record to support a conclusion that Bell ever expressed, clearly and unequivocally, that he wished to waive his right to counsel and exercise his right to representation without the assistance of counsel. When Bell's complaints about counsel were fleshed out in the January

privilege that occurred just prior to trial. During the hearing, Bell was allowed to air his complaint and address the court. Bell did not present or mention the letter nor did he ask he be allowed to represent himself. (TR Vol. VIII 103-109).

4, 1995 pre-trial hearing, the record supports this Court's finding that Bell never requested or expressed a desire to act alone to represent himself.

After the Court denied Bell's direct appeal, appellate counsel persisted in advocating for his client on this issue. Counsel filed a motion for rehearing aimed solely at persuading this Court to reconsider its denial of Bell's Nelson/Faretta claim. In short, appellate counsel diligently pursued this issue on direct appeal before, during, and after oral argument, and even after this Court denied his claim on direct appeal. The fact he was not successful in his argument does not render his performance ineffective.

Bell does nothing more, here, than criticize the manner in which appellate counsel raised this issue before this Court. Because appellate counsel fully and vigorously litigated this matter on direct appeal, Bell is not entitled to habeas relief on this claim. Atkins v. Dugger, supra, 541 So.2d at 1166-67 (ruling that that appellate counsel cannot be deemed ineffective if the habeas claim, or a variant thereof, was, in fact, "raised on direct appeal."); Thompson v. State, 759 So.2d 650, 657, n. 6 (Fla. 2000) (ruling that if appellate counsel raised the issue on direct appeal, mere quibbling with or criticism of the manner in which appellate counsel raised such issue on appeal is insufficient to state a habeas-cognizable issue).

CLAIM II

WHETHER APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE A CLAIM ON APPEAL THAT THE TRIAL JUDGE ERRED IN STRIKING JUROR GEORGE DAWSON FOR CAUSE

Bell alleges that appellate counsel was ineffective for failing to raise, on direct appeal, a claim that venireman George Dawson was improperly struck for cause. According to Bell, after voir dire, the State made a motion to excuse venireman Dawson on the basis he "seemed to be a little retarded". Trial counsel agreed and the juror was struck for cause.

According to Bell, striking this juror was error. Bell claims that while illness or disability is a basis to excuse a juror, there was no evidence that venireman Dawson was actually retarded. Bell claims that absent such medical evidence, it was error to grant the State's challenge for cause even though trial counsel offered no objection to the strike. Bell alleges appellate counsel was ineffective for failing to raise a claim of fundamental error on direct appeal. Bell also claims appellate counsel was ineffective for failing to raise a claim of ineffective assistance of counsel on direct appeal.

The record reveals that during the initial stages of voir dire, members of the venire were asked to stand and read a juror information sheet. The trial judge provided an example of how he wished venire members to read the sheet by reciting his own

personal information in accord with the information sought by the questionnaire. (TR Vol. VIII 72).

Information requested included potential jurors' names, the area of town in which they reside, how long they lived in the Jacksonville area, where employed, what kind of work done, marital status, whether and where the spouse works, whether the potential juror has children living at home or away from home, how many and their ages, and whether the potential juror owned his own home or rented. The information sheet also requested potential jurors to disclose whether they knew someone in law enforcement, the State Attorney's office or the Public Defender's Office. Finally, the court requested venire members to state whether they had served on a jury before, whether the case was criminal or civil, whether that jury reached a verdict, and whether they served as the foreperson. In seeking information about prior jury service, Judge Oliff explained the difference between a civil and criminal jury trial. (TR Vol. VIII 72-73).

Thereafter, beginning with Mrs. Mulroe, members of the venire were called upon to "introduce" themselves in accord with the information requested on the juror information sheet. (TR Vol. VIII 74).⁵ Prior to Mr. Dawson's turn, twenty members of

⁵ For instance, Ms. Mulroe told the court that her name was Carolyn Mulroe, she lived on the northside, had lived in

the venire introduced themselves to the court. All but one of these first twenty potential jurors provided all of the information requested by the questionnaire and the trial judge did not follow-up to request they provide any omitted information. (TR Vol. VIII 74-83). Mr. Gardenhire, the seventeenth member of the venire to speak, omitted information only about prior jury service. When the trial judge asked whether he had served on a jury before, Mr. Gardenhire told the court he was picked but did not serve. (TR Vol. VIII 82).⁶

Mr. Dawson was the twenty-first member of the venire asked to introduce himself. Mr. Dawson told the court his name was George Dawson, he lived on the northside, lived there all his life, was unemployed, single, and lived with his mother. He also told the court "I serve on the jury." Because Mr. Dawson did not state whether he knew anyone in law enforcement, the trial judge asked him whether he knew anyone in law enforcement or the police department. Mr. Dawson said he did not. The

Jacksonville for 28 years, was employed by the U.S. Army Corps of Engineers as a secretary, is married, her husband works for the Naval Supply Center as a systems analyst, there were no children living at home or away and she owned her own home. She had an acquaintance who worked in the Sheriff's Office and had previously served on a jury in a criminal trial. That jury reached a verdict and she was not the foreperson. (TR Vol. VIII 74-75).

⁶ Mr. Gardenhire was ultimately excused upon the State's peremptory challenge based on his views about the death penalty. (TR Vol. VIII 231)

court followed up with "[a]nd you have not previously served on a jury." (TR Vol. VIII 84). Mr. Dawson said he did.

The trial judge asked him whether the trial was civil or criminal. Mr. Dawson responded "What was that again?" The judge asked again whether the trial was criminal or civil. Mr. Dawson replied "Federal". (TR Vol. VIII 84).

Subsequently, Mr. Dawson was individually questioned by the prosecutor. Mr. Dawson stated that, while he was unemployed at the time, he had worked recently in a department store. When asked which Department store he replied "I can't say it at the present time cause I forgot it." (TR Vol. VIII 147). He could not remember when he worked there. He told the prosecutor it had been a long time because he had a stroke in the past. (TR Vol. VIII 147).

During the exercise of challenges, the prosecutor, Mr. Bateh, told the judge he "saw" Mr. Dawson for cause. Trial counsel told the court, "Oh, yeah, we agree". Mr. Bateh noted that Mr. Dawson seemed to be a little retarded. The judge asked whether both the state and defense agreed on this. Trial counsel said "Yeah". The Court noted that Mr. Dawson would be excused for cause by both the state and the defense. (TR Vol. VIII 228-229).

Trial counsel exercised two of his ten peremptory strikes against the venire and one peremptory against a potential

alternate juror.⁷ The State exercised five of its ten peremptory challenges against the venire and one peremptory strike against a potential alternate. (TR Vol. VIII 228-233).

Bell's claim is without merit. This Court has consistently held that trial judges have broad discretion in deciding whether to grant a challenge against a potential juror. In Cook v. State, 542 So.2d 964 (Fla. 1989) this Court noted that "[t]here is hardly an area of the law in which the trial judge is given more discretion than in ruling on challenges of jurors for cause.

Appellate courts consistently recognize that a trial judge present during voir dire is in a far superior position to properly evaluate the responses to the questions propounded to the jurors." This Court went on in Cook to observe that "[t]here are few aspects of a jury trial where we would be less inclined to disturb a trial judge's exercise of discretion, absent clear abuse, than in ruling on challenges for cause in the empanelling of a jury". Cook at 969. See also Kokal v. Dugger, 718 So.2d 138, 142-143 (Fla. 1998) (ruling that a court's determination of whether to excuse a juror will be sustained unless no reasonable person would agree with the court); Ault v. State, 866 So.2d 674, 684 (Fla. 2003) (A trial

⁷ Trial counsel struck peremptorily potential jurors Stogner and Powell (TR Vol. VIII 209-211). Trial counsel struck alternate juror Tamplin (TR Vol. VIII 232).

court's determination of juror competency will not be overturned absent manifest error). The record supports a conclusion that Mr. Dawson's demeanor and responses to voir dire raised concerns for both sides that Mr. Dawson would not be able to follow the instructions of the trial judge.

The test for juror competency is whether the juror can set aside any bias or prejudice and render a verdict solely on the evidence presented and the instructions on the law given by the court. Peterka v. State, 890 So.2d 219, 239 (Fla. 2004). While most juror claims raised on direct appeal center on impartiality, the test for juror competency also includes a requirement that a potential juror be able to render a verdict on the evidence presented and the instructions on the law given by the court. Inherent in such a prerequisite to jury service is the ability to understand the instructions on the law provided by the trial court. See Section 913.03(2), Florida Statutes (providing that a juror may be challenged for cause if he is of unsound mind or has a bodily defect that renders him incapable of performing duties as a juror).

The record supports a conclusion that Mr. Dawson was not able to understand the trial judge's instructions or questions during voir dire. Further, Mr. Dawson was unable to provide coherent information concerning his prior jury service and employment. Both counsel, present during voir dire and able to

observe Mr. Dawson's demeanor and to hear his responses, agreed that Mr. Dawson should be excused for cause. Because the record supports the challenge for cause and no abuse of discretion could be shown, appellate counsel cannot be ineffective for failing to raise this issue on appeal. Valle v. Moore, 837 So.2d 905, 907-908 (Fla. 2002).

CLAIM III

WHETHER APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE A CLAIM ON APPEAL THAT THE BELL'S RIGHT TO BE PRESUMED INNOCENT WAS IMPAIRED WHEN THE COURT ALLOWED BELL TO BE VIEWED IN SHACKLES AND CHAINS

Though Bell alleges in the heading of this third claim that appellate counsel was ineffective for failing to raise a claim the jury was allowed to see him in shackles and chains, Bell makes no such claim in the body of his argument. In his petition, Bell does not even allege he was shackled or chained at all.⁸ Instead, Bell argues that because the jury was allowed to see him in his jail clothes during voir dire, his right to be presumed innocent was unconstitutionally impaired. Bell claims that appellate counsel was ineffective for failing to raise a

⁸ Bell raised this as a substantive claim in his motion for post-conviction relief. After an evidentiary hearing, the Court ruled that Bell presented no evidence he was shackled during the trial. (PCR Vol. IV 733).

claim that the trial court erred in allowing Bell to appear before the jury in "jail clothes".⁹

The record reflects the following colloquy immediately before jury selection began.

TRIAL COUNSEL: We've made efforts for over a month to try to contact family members for a number of different reasons, but one of which is to advise them about his needing clothes. And both Don Marks, who you may know, retired homicide detective for me--

THE BAILIFF: Judge he's not going to wear any hand-me-down clothes.¹⁰

THE COURT: Mr. Bell, they have--Mr. Nichols has obtained some clothes for you to wear during the course of the trial if you want to wear them. Makes no difference to me. You can go through the trial in your orange jump suit there if you want to, it's entirely up to you. But these clothes that they have obtained for you are clothes that are customarily--they are provided by the Public Defender's Office, they customarily have them cleaned after every trial. If you want to wear them, fine, if you don't that's up to you. That's all he can do for you. Since you haven't made any arrangements to get your own clothes,

⁹ In his petition Bell alleges facts not in the direct appeal record before this Court. For instance, Bell claims that Bell told Mr. Nichols that he wanted to wear his own clothes, that the clothes provided were dirty, and that Bell's orange jump suit had a "big label on the front of his shirt and pants containing the words Duval County Jail." (Pet. at page 21-22).

Bell also alleges the record shows the bailiff informed the trial judge that he did not want to the clothes obtained for him because they had a foul, offensive odor. Contrary to his assertions, there is nothing in the direct appeal record supporting the allegation that Bell told anyone he objected to wearing the clothes because they had a "foul, offensive odor."

¹⁰ Though not on the record, it is reasonable to conclude the bailiff was reporting Mr. Bell's refusal to wear the clothes provided by the Public Defender because they were hand-me-downs. Bell admits this is the case in his petition. (Pet. at page 21).

and since you don't want to come out with a jump suit on, you have your choice of either wearing those or the jump suit, it's up to you, makes no difference to me. What do you want to do?

THE DEFENDANT: I will wear my own clothes.

THE COURT: You got your own clothes, where are they?

THE DEFENDANT: I need to make a phone call to get them.

THE COURT: We are not going to wait. You knew this case was coming up for trial, you should have made arrangements some time ago.

THE DEFENDANT: I can't use the phone at the jail house or have no visits, so I can't tell nobody.

THE COURT: Well, I tell you what we can do Mr.— we can waive his presence at the jury selection if you want to but I have to bring him out sometime and have the jury say—ask if they know this defendant or related to him in any way. If he wants to for that purpose only he can put on the coat and trousers and we will start trial tomorrow and between now and tomorrow we can—he can make arrangements to get his clothes from home, we will use the phone here and call whoever he wants to call.

TRIAL COUNSEL: May I have a second to explain that to him. (confers with Bell).

TRIAL COUNSEL: He's indicated to me that rather than being absent during jury selection he would rather be present, not in the clothes we provided for him but in the orange prison jump suit.

THE COURT: All right. When we get through with the jury selection we will let him—we've got a phone here since he's not allowed phone privileges at the jail, let him call and get somebody to bring him clothes tomorrow.

Make sure when you bring the clothes tomorrow they are here when we start the trial. We will start at 10:00 o'clock in the morning so tell them to have them here by 10:00 o'clock, they with [sic] bring them right to the courtroom.

PROSECUTOR: Your honor, I did want the record to reflect that Mr. Nichols stated a little bit earlier he made repeated attempts to contact the defendant's family members in an attempt

to get them to have clothes for him but that was all to no avail.

THE COURT: Mr. Nichols, on the record, as I understand you've made repeated attempts to contact members of his family about the clothes but you haven't been able to reach them, is that correct?

TRIAL COUNSEL: That's right, your Honor.

THE COURT: All right. Let's go ahead with the jury selection process.

(TR Vol. VIII 62-64).

Bell cites to Estelle v. Williams, 425 U.S. 501 (1976) in support of his claim. In Estelle, the United States Supreme Court ruled that a State cannot, consistently with the Fourteenth Amendment, compel an accused to stand trial before a jury while dressed in identifiable prison clothes. The Court made clear that the linchpin of a successful claim is a finding that the State compelled the defendant to stand trial in prison garb. The Court noted that a failure to object is sufficient to negate the presence of compulsion necessary to establish a constitutional violation. Estelle at 513. See also Torres-Arbeldo v. State, 524 So.2d 403, 409 (Fla.1988)

Bell's claim must fail because the record does not support a conclusion Bell was compelled, over his objection, to stand trial in his prison garb. Bell was not forced to attend voir dire or any other portion of the trial in prison clothes. The record reveals Mr. Nichols provided appropriate civilian

attire but Bell chose to wear his prison jump suit over the suit provided to him. When Bell affirmatively elected to wear prison garb instead of the suit provided by trial counsel, Mr. Bell waived any claim of constitutional error. (TR Vol. VIII 64)

Because the record is devoid of evidence the state or the trial judge compelled Bell to attend voir dire in an orange jump suit, Bell can show no error. Because Bell can show no error, appellate counsel cannot be ineffective for failing to raise this meritless issue. Freeman v. State, 761 So.2d 1055, 1069-1070 (Fla. 2000) (appellate counsel not ineffective for failing to raise non-meritorious issues); Rutherford v. Moore, 774 So.2d 637, 643 (Fla. 2000)(same).

CLAIM IV

WHETHER A CONFLICT OF INTEREST AROSE WHEN THE PUBLIC DEFENDER WAS APPOINTED TO REPRESENT BELL ON DIRECT APPEAL

Bell claims that appellate counsel, Mr. W.C. McClain, an Assistant Public Defender with the Public Defender's Office of the Second Judicial Circuit, suffered from a conflict of interest when he represented Bell on appeal after the Public Defender's Office, Fourth Judicial Circuit was a "conflicted-out" of Bell's case. Bell asserts that, on July 5, 1995, the Public Defender's Office, Fourth Judicial Circuit, despite knowledge of the conflict, filed a notice of appearance as well

as numerous pleadings on Bell's behalf, including a motion for statement of judicial acts to be reviewed.¹¹

Bell alleges many of his "viable" claims were not raised on direct appeal and argues "the prejudice suffered can be seen unequivocally in the trial court's order denying defendant's post conviction 3.850, wherein the trial court held that the following claims should have been raised by Mr. McClain on Mr. Bell's direct appeal." (Pet. at 27). Bell asserts the trial judge's ruling that certain issues raised in Bell's post-conviction motion were procedurally barred constitutes a finding these issues would have been meritorious if appellate counsel would have raised these claims on appeal. (Pet. 27-28).

"To prove a claim that an actual conflict of interest existed between a defendant and his counsel, the defendant must show that his counsel actively represented conflicting interests and that the conflict adversely affected counsel's performance." Quince v. State, 732 So.2d 1059, 1063 (Fla. 1999). A possible,

¹¹ The trial court, in its sentencing order, appointed the Office of the Public Defender to represent Bell on direct appeal. (TR Vol. I, 115). Thereafter the Office of the Public Defender, Fourth Judicial Circuit, filed a timely notice of appeal, a statement of judicial acts to be reviewed, and directions to the court reporter to transcribe the trial proceedings all of which were filed on June 29, 1995. (TR Vol. I, 122-126). No substantive pleadings were filed on Bell's behalf by the Office of the Public Defender, 4th Judicial Circuit. Appellate counsel did not limit himself to the statement of judicial acts to be reviewed filed by the Assistant Public Defender from the Fourth Judicial Circuit.

speculative or merely hypothetical conflict is "insufficient to impugn a criminal conviction." Hunter v. State, 817 So.2d 786, 791-92 (Fla.2002). See also Owen v. Crosby, 854 So.2d 182, 193-194 (Fla. 2003). In order to prevail on this claim, Bell must show both that Mr. McClain actively represented conflicting interests and this conflict adversely affected Mr. McClain's performance. Bell has made neither showing.

First, Bell has not shown appellate counsel suffered from an actual conflict of interest. Bell points to no facts supporting a conclusion that Mr. McClain actively represented conflicting interests at the time he represented Bell on direct appeal. For instance, Bell makes no allegation Mr. McClain represented a witness or other person involved in Bell's murder case or was burdened by competing obligations to other clients. Bell simply attempts to piggyback his original assistant public defender's unspecified conflict of interest onto appellate counsel.¹² Bell provides no legal support for his argument that his original trial attorney's conflict of interest should be imputed to Mr. McClain.¹³

¹² On September 20, 1994, five days after Bell was arrested, the Office of the Public Defender, Fourth Judicial Circuit, moved to withdraw based on a conflict of interest. The motion was granted on October 4, 1994 and substitute counsel was appointed. (TR Vol I 6, 10).

¹³ Section 27.51(4)(a), Florida Statutes designates the Office of the Public Defender, Second Judicial Circuit, to handle appeals

Bell's claim must also fail because Bell has made no showing that Mr. McClain's alleged conflict of interest adversely affected his performance on direct appeal. To show an adverse impact, Bell must necessarily show a conflict of interest caused appellate counsel to refrain from raising meritorious issues on direct appeal. Bell did not present any argument or law demonstrating his procedurally barred post-conviction claims had any merit. As such, Bell has failed to meet his burden to show appellate counsel's performance was adversely affected by a conflict of interest.

For instance, Bell alleges that appellate counsel's conflict of interest caused him to refrain from raising a claim that the prosecutor's arguments and the standard jury instructions violated the dictates of Caldwell v. Mississippi, 472 U.S. 320 (1985). (Pet. at 28). A review of the record, however, demonstrates that such a claim would have been both procedurally barred and without legal merit.

for indigent clients in cases tried in the circuit courts within the district comprising the First District Court of Appeal which includes the Fourth Judicial Circuit. On December 7, 1995, in accord with the provision, designated the Office of the Public Defender, 2d Judicial Circuit to represent Bell on appeal.

Bell does not even seem to recognize that his original trial attorney and appellate counsel, Mr. McClain, were employed by separate and independent Offices of the Public Defender from two different judicial circuits.

If appellate counsel had raised this claim on direct appeal, this Court would have ruled the issue was procedurally barred because trial counsel did not object to the prosecutor's argument or the jury instructions on the grounds they violated the United States Supreme Court's ruling in Caldwell. Oats v. Dugger, 638 So.2d 20, 21 n.1 (Fla. 1994) (noting that Oats' Caldwell claim was procedurally barred because the issue was not preserved for review). Even if this Court addressed this claim on the merits, Bell would not have been entitled to relief.

In this case, the prosecutor told the jury, on several occasions, that while its role was to make a sentencing recommendation to the trial judge, its recommendation must be given great weight. (TR Vol. VIII, 210, 213, Vol. XI 683). The trial judge instructed the jury in accord with the standard penalty phase jury instructions. (TR XI 712-719).

The prosecutor's comments were consistent with Florida's statutory scheme in which the jury renders an advisory sentence to the court and the trial court, notwithstanding the recommendation of a majority of the jury, enters the sentence. Tefteller v. Dugger, 734 So.2d 1009, 1024 (Fla. 1999). Likewise, this Court has consistently held the standard jury instructions are in compliance with Caldwell. Thomas v. State, 838 So.2d 535, 541-542 (Fla. 2003). Because this claim had no

merit, Bell cannot show appellate counsel's imputed conflict of interest adversely affected his performance.

Additionally, Bell's allegation that appellate counsel's conflict of interest restrained him from raising a claim the trial court erred in finding the defendant knowingly created a great risk of death to many persons, is without merit. The record of trial supports the trial judge's findings as to this aggravator.

During the penalty phase, a security guard at Moncrief Liquor Lounge testified he was screening patrons when a "bunch of bullets went to flying everywhere shooting, shooting up the place." ¹⁴ He told the jury the bullets struck the building up by the front door area and the seven or eight people in the area hit the ground or went for cover when the shots rang out. The guard testified that they were all in the line of fire. (TR Vol. XI 655-658). He also testified that had he, and another man being security screened, not hit the ground when the bullets started flying, they would have both been dead. (TR Vol. XI 657-658). The witness told the jury that four or five of the bullets struck a house where three little children were. (TR. Vol XI 659).

¹⁴ As found by the court on direct appeal, the two murder victims died from multiple gunshot wounds from an AK-47 assault rifle. Bell v. State, 699 So.2d 674, 675 (Fla. 1997)

This Court has upheld the "great risk of death to many persons" aggravator when more than three persons (other than the homicide victims) have been exposed to the risk of death. Fitzpatrick v. State, 437 So.2d 1072 (Fla.1983)(holding a great risk of death to many was demonstrated where defendant shot at two nonvictims and held two other non-victims at gunpoint).

In the instant case, the State presented evidence that at least seven to eleven people were exposed to a great risk of death when the defendant fired multiple rounds from an AK-47 assault rifle in the vicinity of Moncrief's liquor lounge and a home where three children were present. Thirty shell casings from the rifle were found at the murder scene. (TR Vol. IX 352). Because the evidence was clearly sufficient to support the trial judge's finding of this aggravator, appellate counsel would not have been successful had appellate counsel raised this issue on direct appeal. Johnson v. State, 696 So.2d 326, 334 (Fla. 1997) (concluding the defendant created a great risk of death to many persons when the defendant broke into a Laundromat and began shooting and four non-victims were forced to hit the floor and take whatever cover was available).

Bell has failed to demonstrate appellate counsel's alleged conflict of interest prevented him from raising this issue on direct appeal. This Court should reject Bell's claim that his

constitutional rights were impaired when the public defender's office was appointed to represent him on appeal.¹⁵

CLAIM V

WHETHER APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE A CLAIM ON DIRECT APPEAL THE JURY WAS MISLED BY THE EXCUSABLE HOMICIDE JURY INSTRUCTION

Bell claims the trial judge erred in instructing the jury on excusable homicide. Bell argues that because there was evidence he acted in self-defense, it was critical that the jury be properly instructed on the defense of excusable homicide. Bell alleges the instructions misled the jury because the jury was likely led to believe the defendant's use of a weapon, in an altercation not classified as sudden combat, precluded the defense of excusable homicide.¹⁶ Bell is not entitled to the relief he seeks.¹⁷

¹⁵ It is well established that issues that could have been raised on direct appeal, but were not, are not cognizable through collateral attack. Torres-Arboleda v. Dugger, 636 So.2d 1321, 1323-1324 (Fla. 1994). The trial judge's rulings that some of Bell's post-conviction claims were not cognizable in a motion for post-conviction relief were in accord with that well-established law. Contrary to Bell's assertions, the court's rulings did not constitute a finding either that appellate counsel was ineffective or the claims would have been meritorious had they been raised on direct appeal.

¹⁶ To the extent Bell attempts to include an allegation of ineffective assistance of trial counsel for failure to object to the instruction, habeas proceedings are not the appropriate vehicle to raise such a claim. Ineffective assistance of trial counsel claims are appropriately brought in a motion filed pursuant to Rule 3.851, Florida Rules of Criminal Procedure. Thompson v. State, 759 So.2d 650, 668 n.13 (Fla. 2000). In any

In presenting this claim, Bell misstates the instruction on excusable homicide that was actually given to his jury before it retired to deliberate. (Pet. at pages 30-31). In his petition, Bell misstates the second prong of the excusable homicide instruction allegedly given to Bell's jury. (Pet. at pages 30-31).

Instead of the instructions that Bell alleges were given, the trial court followed the standard jury instructions adopted by this Court in 1992. Standard Jury Instructions-Criminal Cases No. 92-1, 603 So.2d 1175, 1176-1177 (Fla. 1992). Trial counsel made no objection to these standard instructions. (TR Vol. X. 631).

The trial court actually instructed the jury as follows:

Excusable homicide. The killing of a human being is excusable and therefore lawful under any of the following three circumstances. Number one, when the killing is committed by accident and misfortune in doing any lawful act by lawful means with usual ordinary caution and without any unlawful intent, or two when the killing occurs by accident and misfortune in the heat of passion upon any sudden and sufficient provocation, or three, when the killing is

event, trial counsel is not ineffective for failing to object to standard jury instructions not invalidated by this Court. Id. at 665.

¹⁷ In his petition, Bell claims that the Second District Court in Alego v. State, 483 So.2d 117 (Fla. 2d DCA 1986) held these same misleading instructions to constitute fundamental error. This is not the case, however. In Alego, the judge failed to include the definitions of justifiable and excusable homicide at all in his instructions to the jury on the lesser included crime of manslaughter. The Second District Court of Appeal reversed for a new trial.

committed by accident and misfortune resulting from sudden combat if a dangerous weapon is not used and if the killing is not done in a cruel or unusual manner. (TR Vol. X 616).

Appellate counsel cannot be deemed ineffective for failing to raise a challenge, on direct appeal, to a jury instruction when the trial judge instructs the jury in accord with the standard jury instructions approved by this Court and there is no objection at trial. Downs v. State, 740 So.2d 506, 517 n. 18 (1999). In this case, the trial court gave the standard jury instruction approved by this Court and trial counsel posed no objection. Appellate counsel cannot be ineffective for failing to raise this issue on direct appeal. Rutherford v. Moore, 774 So.2d 637, 644 (Fla. 2000).

CLAIM VI

WHETHER APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE A CLAIM ON DIRECT APPEAL THAT THE PROSECUTOR'S STATEMENTS DIMINISHED THE JURY'S SENSE OF RESPONSIBILITY TOWARD SENTENCING

Bell alleges the prosecutor's statement, when he told the venire of its advisory role in sentencing, unconstitutionally diluted the jury's sense of responsibility toward sentencing.¹⁸ Though not cited by Bell here, (Bell cites

¹⁸ Bell points to the prosecutor's statement during voir dire that "you must understand that the jury no matter what the jury recommends, jury can recommend life, and the judge can impose death, and the reverse is true, the jury could recommend life [sic] and the Judge could"... (TR Vol. VIII 212). Bell claims this comment inevitably encouraged "the jury to attach a diminished consequence to their verdict and to assume less than full responsibility for their verdict". (Pet. at 36).

to a 1975 case from Georgia), habeas petitioners routinely bring this claim pursuant to the United States Supreme Court's decision in Caldwell v. Mississippi, 472 U.S. 320 (1985). Typically, defendants claim that statements made by the prosecutor and/or the standard penalty phase jury instructions allow the jury to attach less significance to its verdict and improperly minimize the jury's sense of responsibility during the sentencing phase of their capital trial.

In presenting this claim, Bell has isolated one comment by the prosecutor during voir dire. Bell fails to mention that, on several other occasions, the prosecutor told the jury the trial judge was required to give great weight to its recommendation as to the sentence that should be imposed. (TR Vol. VIII 211, 213; Vol. XI 683). At the close of the penalty phase, the trial judge instructed the jury in accord with the standard jury instructions. (TR Vol. XI 712-719).

Bell has failed to demonstrate this isolated comment by the prosecutor diminished the jury's sense of responsibility toward sentencing or even was a misstatement of the law. In fact, Bell has failed to show the prosecutor's comments were anything but consistent with Florida's statutory scheme in which the jury renders an advisory sentence to the court and the trial court, notwithstanding the recommendation of a majority of the jury,

enters the sentence. Tefteller v. Dugger, 734 So.2d 1009, 1024 (Fla. 1999).

This Court has repeatedly denied claims like the one Bell presents here. This Court has also rejected the notion that appellate counsel is ineffective for failing to present a Caldwell claim on direct appeal.

In Dufour v. State, 30 Fla. L. Weekly S247 (Fla. April 14, 2005), Dufour contended the trial court's comments with regard to the advisory role of the jury unconstitutionally minimized the jury's role in the sentencing process. This Court rejected Dufour's claim and noted that this Court has repeatedly determined that challenges to the standard jury instructions that refer to the jury as advisory and to the jury's verdict as a recommendation, on the grounds they violate Caldwell v. Mississippi, are without merit.

Even so, the rule of law outlined in Caldwell is distinguishable from Florida's capital sentencing statute. In Combs v. State, 525 So.2d 853 (Fla. 1988), this Court ruled that Caldwell is distinguishable because Mississippi's sentencing structure is significantly different than the one employed in Florida. In Combs, the defendant claimed the judge erred in giving the standard jury instructions which failed to inform the jury that a life sentence recommendation would be given great weight by the trial judge when imposing sentence and that a jury

recommendation of life could be overridden only if virtually no reasonable person could differ. Combs complained the judge erred in instructing the jury that the "final decision as to what punishment should be imposed rests solely with the judge of this court." Combs at 856. In rejecting his claims, this Court found Caldwell inapplicable because in Mississippi, the jury is the sole sentencer in capital cases, whereas in Florida it is not.

Additionally, "[t]o establish a Caldwell violation, a defendant necessarily must show that the remarks to the jury improperly described the role assigned to the jury by local law." Dugger v. Adams, 489 U.S. 401, 407 (1989). See also Romano v. Oklahoma, 114 S.Ct. 2004 (1994) (same). This Court has long recognized the jury's penalty phase decision is advisory and the judge does indeed make the final sentencing decision. Combs v. State, 525 So.2d 853, 855-58 (Fla. 1988).

Finally, this Court has held that the standard jury instruction fully advises the jury of the importance of its role, correctly states the law, and does not denigrate the role of the jury. Floyd v. State, 850 So.2d 383, 404 (Fla. 2002)(rejecting Floyd's claim the trial judge's refusal to instruct the jury that only in rare instances can the trial judge impose a sentence different than the jury recommends

violated the dictates of Caldwell v. Mississippi); Brown v. State, 721 So.2d 274, 283 (Fla. 1998).

In this case, the prosecutor told the venire several times that while the judge made the final decision as to sentence, the law required him to give its recommendation great weight. Further, the trial judge instructed the jury to recommend a sentence and the final decision on the penalty would be made by the trial court. The Court instructed the jury that each aggravating circumstance must be proven beyond a reasonable doubt before the jury can consider it. (TR Vol. XI 712-713, 715).

Because the standard penalty phase jury instructions given to Bell's jury properly characterized its role under Florida's capital punishment procedures, Bell's claim must fail. Globe v. State, 29 Fla.L.Weekly S119 (Fla. March 18, 2004)(ruling that Florida's standard penalty phase jury instructions fully advise the jury of the importance of its role, correctly states the law, does not denigrate the role of the jury, and are in compliance with Caldwell).

CLAIM VII

WHETHER APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE A CLAIM ON DIRECT APPEAL THAT THE DEFENDANT'S CONSTITUTIONAL RIGHTS WERE VIOLATED WHEN THE INDICTMENT FAILED TO ALLEGE THE AGGRVATING CIRCUMSTANCES UPON WHICH THE STATE INTENDED TO RELY IN SEEKING THE DEATH PENALTY

In the heading of this claim, Bell alleges appellate counsel was ineffective for failing to challenge the indictment on direct appeal. However, in his argument, Bell does not actually present this Court with a claim of ineffective assistance of appellate counsel. Rather, Bell presents Claim Seven as a substantive constitutional claim.

Bell alleges that this Court's decision in Dixon v. State, 283 So.2d 19 (Fla. 1973) and the United States Supreme Court decisions in Jones v. United States, 526 U.S. 227 (1999) and Apprendi v. New Jersey, 530 U.S. 466 (2000) require the State to allege, in the indictment, the aggravating factors it intends to rely upon in seeking the death penalty. Bell claims that because the State failed to allege the aggravating factors in the indictment and because the aggravating factors did not have

to be proven beyond a reasonable doubt, Bell's conviction must be vacated and set aside. (Pet. at page 39).¹⁹

Bell's claim is without merit. Bell fails to cite to the numerous cases in which this Court has consistently rejected the same claim Bell raises here.

In Parker v. State, 30 Fla. L. Weekly S187, 30 Fla. L. Weekly S219 (Fla. March 24, 2005), the defendant claimed the State's failure to allege the aggravating factors in the indictment rendered his death sentence unconstitutional in light of the United States Supreme Court's decisions in Apprendi v. New Jersey, 530 U.S. 466 (2000) and Ring v. Arizona, 536 U.S. 584 (2002). This Court denied Parker relief, noting "[t]his Court has consistently rejected this claim." See also Winkles v. State, 894 So.2d 842 (Fla. 2005) (ruling that Winkles claim, that Florida's death penalty statute is unconstitutional because it does not require that aggravating circumstances be charged in the indictment, was without legal merit); Blackwelder v. State, 851 So.2d 650, 654 (Fla.2003) (denying Blackwelder's claim that aggravating circumstances must be alleged in the indictment and

¹⁹ In accord with Florida law, the trial judge instructed the jury, in this case, that before the jury could consider an aggravator, it must be proven beyond a reasonable doubt. (TR Vol. I 86).

individually found by a unanimous jury); Porter v. Crosby, 840 So.2d 981, 986 (Fla.2003) (rejecting claim that Appendi requires that the aggravating circumstances be charged in the indictment, submitted to the jury, and individually found by a unanimous jury verdict); Dessaure v. State, 891 So.2d 455 (Fla. 2004) (same).

To the extent, Bell actually presents an ineffective assistance of appellate counsel, Bell's claim must also fail. As the case law clearly establishes no error when the aggravating circumstances the State intends to rely upon in seeking the death penalty are not included in the indictment, appellate counsel cannot be deemed ineffective for failing to raise this issue on direct appeal. Appellate counsel cannot be deemed ineffective for failing to raise a non-meritorious issue. Freeman v. State, 761 So.2d 1055, 1071 (Fla. 2000) (ruling that appellate counsel cannot be ineffective for failing to raise issues that lack merit).

CLAIM VIII

WHETHER SECTION 921.141(5), FLORIDA STATUTE, IS FACIALLY VAGUE AND OVERBROAD AND AS A RESULT, BELL'S JURY RECEIVED INADEQUATE GUIDANCE CONCERNING THE AGGRAVATING FACTORS TO BE CONSIDERED

Bell's presents three sub-claims within claim eight. Bell first alleges, without citing to the record, that his jurors were instructed that "if [you] find that sufficient aggravating circumstances do exist, it will be your duty to determine whether mitigating circumstances exist that outweigh the aggravating and mitigating circumstances". Bell alleges, with no elaboration, that this instruction was error and appellate counsel was ineffective for failing to raise the issue on appeal. (Pet. at page 40).

Initially, Bell misstates the instruction actually given to the jury. The jury was actually instructed that "[s]hould you find sufficient aggravating circumstances do exist, it will then be your duty to determine whether mitigating circumstances exist that outweigh the aggravating circumstances. (TR Vol. 1, page 86, Vol. XI 715). Trial counsel made no objection to this instruction. (TR Vol. XI 719). Bell's claim must fail.

This Court has upheld the same standard jury instructions that the trial judge gave to Bell's jury in this case. This

Court has ruled the weighing provisions within Florida's capital sentencing statute require the jury to determine whether sufficient mitigating circumstances exist which outweigh the aggravating factors found to exist. This Court has also ruled this instruction does not unconstitutionally shift the burden to the defendant to prove that death is an inappropriate sentence. San Martin v. State, 705 SO.2d 1337, 1350 (Fla. 1997). See also Griffin v. State, 866 So.2d 1, 14 (Fla. 2003) (rejecting Griffin's claims that the standard jury instructions do not adequately instruct the jury on how to weigh the aggravating instructions and improperly shift the burden to the defendant to prove death was an appropriate punishment).

Bell has not demonstrated appellate counsel was ineffective for failing to raise this claim on direct appeal. Appellate counsel cannot be deemed ineffective for failing to raise a meritless claim. Because this Court has upheld the constitutionality of the standard jury instruction given to Bell's jury, appellate counsel cannot be ineffective for failing to raise this claim on direct appeal. Freeman v. State, 761 So.2d 1055, 1071 (Fla. 2000)(ruling that appellate counsel

cannot be ineffective for failing to raise issues that lack merit).

Next, Bell claims that because he was convicted of robbery, he entered the penalty phase "with the burden of proving he should live not die." (Pet. at page 40). Bell claims that the standard jury instructions essentially tells the jury that once the aggravating circumstances are established, it need not consider mitigating circumstances unless those mitigating circumstances were sufficient to outweigh the aggravating factors. The gravamen of Bell's claim is that the standard jury instructions shift the burden to the defendant to prove life is an appropriate sentence or that death is an inappropriate sentence.

Bell's claim is without merit and should be denied. This Court has repeatedly rejected the same claim Bell raises here. Hodges v. State, 885 So.2d 338, 359 (Fla. 2004). See also Sochor v. State, 883 So.2d 766, 788 (Fla. 2004)(rejecting Sochor's argument the standard jury instructions improperly shifted to him the burden of proving that a death sentence was inappropriate); Cooper v. State, 856 So.2d 969, 977 (Fla. 2004)(same).

Finally, Bell claims that because he was convicted of both first degree murder and robbery, he entered the penalty phase with an unconstitutional "automatic" aggravating factor applicable to every felony murder. Bell claims consideration of this automatic aggravator fails to genuinely narrow the class of persons eligible for the death penalty and renders the sentencing process unreliable. Bell's arguments are without support in Florida law.

Bell fails, once again, to cite to the many cases in which this Court has repeatedly denied this claim. This Court has consistently rejected the notion that consideration of the "in the course of an enumerated felony" aggravator is automatic and fails to narrow the class of persons eligible for the death penalty. Dufour v. State, 30 Fla. L. Weekly S247 (Fla. April 14, 2005)(rejecting Dufour's claim that Florida's capital felony sentencing statute is unconstitutional because every person who is convicted of first-degree felony murder automatically qualifies for the aggravating circumstance of commission during the course of an enumerated felony). See also Griffin v. State, 866 So.2d 1, 14 (Fla. 2003) (noting that this Court has "previously concluded that the 'murder in the course of a

felony' aggravating circumstance is not an unconstitutional automatic aggravator); Owen v. State, 862 So.2d 687, 704 (Fla. 2003) (rejecting Owen's claim the murder in the course of a felony aggravator is unconstitutional); Blanco v. State, 706 So.2d 7, 11 (Fla. 1997) (ruling that because the list of enumerated felonies in the provision defining felony murder is larger than the list of enumerated felonies defining the aggravating circumstance "in the course of an enumerated felony", this aggravator is not automatic and does sufficiently narrow the class of death-eligible defendants). This Court should deny Bell's claim.

CONCLUSION

Bell has failed to demonstrate entitlement to relief. The Petition for Writ of Habeas Corpus should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS has been furnished by U.S. Mail to Richard R. Kurtiz, Esq., 1301 Riverplace Boulevard, Suite 2600, Jacksonville, Florida 32207 this 31st day of May 2005.

Meredith Charbula
Assistant Attorney General

CERTIFICATE OF FONT AND TYPE SIZE

Counsel certifies that this pleading was typed using 12 point Courier New.

Meredith Charbula