IN THE SUPREME COURT OF FLORIDA

ANGEL NIEVES DIAZ,

Petitioner,

vs. Case No. 74,927

HARRY K. SINGLETARY, JR.,
Secretary, Florida Department
of Corrections,

Respondent.
_____/

STATE'S RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

SARA D. BAGGETT
ASSISTANT ATTORNEY GENERAL
FLA. BAR NO. 0857238
1655 PALM BEACH LAKES BLVD.
SUITE 300
WEST PALM BEACH, FL. 33409
(407) 688-7759

ATTORNEY FOR RESPONDENT

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PROCEDURAL HISTORY

The State accepts Petitioner's procedural history, but would add the following:

In his direct appeal, Diaz raised the following issues for review:

I. The Court erred in denying a defense continuance when a crucial witness had been listed by the State only one week before trial

II. Two jurors who opposed the death penalty in general were improperly excused for cause

III. The defendant's appearance in shackles, heavily guarded and surrounded by conspicuous security measures throughout the trial inevitably biased the jury against him

IV. The Court erred in granting the defendant's untimely request to represent himself where, in view of his background and the circumstances of his trial, he lacked the capacity to do so

A. The defendant's request to represent himself was not timely made

B. The defendant was not competent to represent himself when he could not read or speak English well, and his mental competence was in doubt

C. The prejudicial effect of the defendant's shackles and the Court's security precautions became overwhelming when he was allowed to represent himself

D. The defendant's inability to conduct himself properly should have required the Court to withdraw its permission to

proceed pro se, even if the substitution of counsel necessitated mistrial

V. The death sentence in this case violates the Eighth Amendment to the United States Constitution

A. All death penalties are unconstitutional

B. The jury instructions in this case did not require the necessary finding of intent

C. The death sentence is disproportionate to the crime

VI. The Court improperly considered one of the aggravating factors in sentencing the defendant

VII. The Court erred in failing to grant a mistrial based on the Court's own prejudicial remark during the sentencing proceeding

On October 8, 1987, this Court unanimously affirmed the defendant's convictions and sentences, including the death sentence. Diaz v. State, 513 So. 2d 1045 (Fla. 1987).

REASONS FOR DENYING THE WRIT

ISSUE I

WHETHER APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO CHALLENGE ON DIRECT APPEAL ANY ISSUE REGARDING THE COMPETENCY PROCEEDINGS CONDUCTED DURING THE TRIAL (Restated).

In his petition, Diaz claims that he is "entitled to a new direct appeal" because appellate counsel failed to challenge (1) the procedural propriety of his competency evaluation and the trial court's competency determination, (2) his absence during Dr. Haber's and Dr. Castiello's oral report to the court, and (3) the professional adequacy of the competency evaluations themselves. **Habeas petition** at 12-28. In argument IV on direct appeal, appellate counsel challenged the trial court's determination that Diaz was competent to represent himself during the guilt phase, and in that argument alleged as follows:

> First, it should be noted that defense counsel raised the question of his client's mental competence in view of some bizarre behavior, asking for an examination and a mistrial [TR-365] before the court began its colloquy with the defendant himself. The court found merit in the issue and actually ordered an examination, but refused to stop the proceedings; the examination was to occur during the evening recess [TR-376]. (A formal finding that defendant was competent for trial was made the next morning [TR-55, TR-552], halfway through the prosecution's case.) The decision to allow self-representation was entered well before the issue of mental

> incompetence had been settled [TR-382] and was error on that basis.

Id. at 26 (emphasis added). Appellate counsel continued to challenge the trial court's finding that Diaz was capable of self-representation, noting Diaz's admission during the guilt phase that he was "'incapable of continuing,'" and noting the trial court's denial of his request to proceed pro se during the penalty phase. Id. at 27. This Court rejected his claim. Diaz v. State, 513 So. 2d 1045, 1048 (Fla. 1987). Thus, Diaz's allegation that appellate counsel failed to challenge the procedural propriety of his competency evaluation and waiver of counsel is patently false.

Moreover, all of these allegations were raised in Claims III, IV, IX, and X(A) of Diaz's motion for postconviction relief, though framed as fundamental error or ineffective assistance of trial counsel. Claims III, IX, and X were denied as procedurally barred, and Claim IV was denied as legally insufficient. (PCSRII 600-01).[1]

This Court has held numerous times that "[h]abeas corpus is not to be used to relitigate issues that have been determined in a prior appeal." Porter v. Dugger, 559 So. 2d 201, 203 (Fla. 1990). This Court has also condemned similar practices of seeking second and third bites at the apple: "By raising the issue in the

[1] Reference to the original record on appeal will be by the symbol "R," reference to the postconviction record and postconviction supplemental record will be by the symbols "PCR" and "PCSRII," followed by the appropriate page numbers.

petition for writ of 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), sentence vacated on other grounds, 943 F.2d 1477 (11th Cir. 1991). Since Diaz raised part of this issue on direct appeal, and raised all of it in his 3.850 motion and appeal therefrom, he is procedurally barred from raising it again under the guise of ineffective assistance of appellate counsel in this habeas petition.

Even were it not barred, however, it is wholly without merit. In order to prevail on a claim of ineffective assistance of appellate counsel, Diaz must show that counsel's alleged omissions constitute a substantial deficiency that falls measurably outside the range of professionally acceptable performance and that such deficient performance compromised the appellate process so as to undermine confidence in the correctness of the result. Ferguson v. Singletary, 632 So. 2d 53, 58 (Fla. 1993). For the following reasons, Diaz has failed to show either deficient performance or prejudice. Regarding his absence during Dr. Haber's and Dr. Castiello's oral report to the court, neither he nor Mr. Lamons objected to his absence once they discovered that the doctors had given their oral reports. Regardless, nothing mandates a defendant's presence at such an event. Under most circumstances,

the evaluators merely file a written report. See Fla. R. Crim. P. 3.210 & 3.211. In any event, after obtaining the reports, the **trial** court communicated the doctors' findings to counsel.[2] (R 981-82). When the State asked the court to make findings on the record, the court responded, "The Court will do so when we are with the defendant. I am just giving you the oral report for your own information." (R 982-83). Immediately thereafter, Appellant was brought into the courtroom, and Judge Donner explained to him not only the doctors' findings, but also her findings regarding his competency to proceed. (R 983-84). Appellant personally stipulated to the doctors' findings. (R 985). He did not ask to call other witnesses or introduce other evidence to contest the court's competency finding. Nor did he object to his absence during the doctors' oral reports. Since nothing requires his

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[2] On the issue of his competency during the penalty phase, Robert Lamons testified that he spoke with both Dr. Haber and Dr. Castiello in the hallway the morning they presented their findings to the court. Neither indicated any history of psychiatric problems, or organic brain damage. (PCSRII 810, 854, 871). They also opined that Appellant exhibited antisocial behavior. (PCSRII 855). Dr. Castiello stated that Appellant was antisocial, which resulted in his criminal activity over **a** long period of time. (PCSRII 856, 869-70). Dr. Castiello also indicated there **was** no family social background problems which would warrant further review for purposes of mitigation. (PCSRII 866, 868). Both doctors indicated they had gone into the area of childhood and abuse and found no indication of abusive problems. (PCSRII 870). Thus, Appellant's claim that "no one representing [him] or his interests **was** present to question the experts on the adequacy of their evaluations," **habeas petition** at 25, is incorrect.

presence when the evaluators submit their reports, and he was present when the trial court reported the doctors' findings and made its own competency determination, appellate counsel cannot be considered ineffective for failing to raise a nonmeritorious claim. Swafford v. Dugger, 569 So. 2d 1264, 1266 (Fla. 1990).

Similarly, Appellant's claim that appellate counsel was ineffective for failing to challenge the adequacy of the evaluations is equally without merit. Florida Rule of Criminal Procedure 3.211(d) details the information that must be included in the evaluator's written report:[3]

> **(d) Written Findings of Experts.** Any written report submitted by the experts shall:
>
> (1) identify the 'specific matters referred for evaluation;
>
> (2) describe the evaluative procedures, techniques and tests used in the examination and the purpose or purposes for each;
>
> (3) state the expert's clinical observations, findings, and opinions on each issue referred for evaluation by the court, and indicate specifically those issues, if any, on which the expert could not give an opinion; and

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[3] Appellant cites to the provision of the rule which identifies the specific criteria the evaluator's must consider. However, Rule 3.211(d) specifically details what must be included in the evaluator's written report. The latter is a more appropriate frame of reference since Appellant challenges the adequacy of the evaluation based on the information reported. See **habeas petition** at 25.

> (4) identify the sources of information used by the expert and present the factual basis for the expert's clinical findings and opinions.

Although the doctors did not present their oral findings in explicit conformity to this provision, their written reports, in fact, follow this provision precisely. To avoid replicating the doctors' findings in this response, they are attached for the Court's reference as Appendix A, Since they clearly comport with the requirements of the rule, appellate counsel cannot be considered ineffective for failing to raise a nonmeritorious claim. Swafford v. Dugger, 569 So. 2d 1264, 1266 (Fla. 1990).

ISSUE II

> WHETHER APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO CHALLENGE ON DIRECT APPEAL APPELLANT'S ABSENCES FROM VARIOUS PRETRIAL HEARINGS AND CONFERENCES OUTSIDE THE JURY'S PRESENCE (Restated).

In his petition, Diaz claims that his appellate counsel was ineffective for failing to raise as fundamental error the absence of a court interpreter or Diaz's personal absence during (1) the competency hearing, (2) discussions about potential witness Hector Torres, (3) discussions about potential defense witnesses, (4) a pretrial hearing on a defense motion for the state to produce a witness, (5) a pretrial hearing on a motion to continue by the

state, (6) a pretrial hearing on a defense motion to appoint a mental health expert, (7) a pretrial hearing on a defense motion for production of favorable evidence, (8) a pretrial hearing on a defense motion to strike the death penalty, (9) the testimony of a security officer regarding the need for heightened security measures during trial, (10) discussions about the procedural aspect of Diaz testifying on his own behalf at the guilt phase and security matters, and (11) discussions about procedural matters like the length of closing argument and verdict forms. Habeas petition at 28-47.

Once again, Diaz raised the substance of this issue in Claims IX and X(A) of his 3.850 motion. (PCR 134-46, 147-53). Those claims were denied as procedurally barred (PCSRII 600), and he is appealing the denial of them in the consolidated 3.850 appeal. As a result, he is procedurally barred from raising them here under the guise of ineffective assistance of appellate counsel. Blanco v. Wainwright, 507 So. 2d 1377, 1384 (Fla. 1987), sentence vacated on other grounds, 943 F.2d 1477 (11th Cir. 1991).

Even were they not procedurally barred, they are wholly without merit. As for Appellant's claim regarding his absence from the oral reports of Drs. Haber and Castiello, the State will rely on its previous response in Issue I, supra. As for his absence during a discussion about Hector Torres' desire to talk to the

prosecution, the State submits that Appellant cannot show prejudice from his absence. Neither Appellant nor counsel had any standing to object to the prosecutor's talking to Mr. Torres. (R 1091-1092). Mr. Torres had pending charges in an unrelated case, and the trial court appointed Yale Galanter to represent Torres. (R 1097). Although the trial court told the State and Mr. Lamons that if Mr. Torres wanted to talk without a deal, the court would let him, the State indicated that it was not interested in talking to Mr. Torres. (R 1098, 1174-75). Furthermore, according to Mr. Galanter, there was no indication that Mr. Torres had exculpatory information (R 1171, 11751, and Appellant has not alleged otherwise. Thus, absent prejudice, the claim fails.

As for Appellant's absence at various pretrial hearings, the State submits that these were not critical stages of the trial under Florida Rule of Criminal Procedure 3.180. They involved legal issues to which the defendant could not have added anything. See, e.g., Blanco v. State, 452 So. 2d 520, 523-524 (Fla. 1984); Randall v. State, 346 So. 2d 1233 (Fla. 3d DCA 1987); In re Shriner, 735 F.2d 1236, 1241 (11th Cir. 1984). Therefore, his absence was not fundamentally erroneous, and appellate counsel was not ineffective for failing to challenge it. See Swafford v. Dugger, 569 So. 2d 1264, 1266 (Fla. 1990).

ISSUE III

WHETHER APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO CHALLENGE THE DENIAL OF DIAZ'S REQUEST TO CALL WITNESSES ON HIS BEHALF (Restated).

In his petition, Diaz claims that appellate counsel was ineffective for failing to challenge **as** fundamental error the trial court's denial of his right to call witnesses on his own behalf at the guilt phase of his trial. **Habeas petition** at 47-63. Again, Diaz raised the substance of this issue in Claim X(B) of his 3.850 motion. (PCR 153-54). That claim was denied as procedurally barred (PCSRII 600), and he is appealing the denial of it in the consolidated 3.850 appeal. Consequently, he is procedurally barred from raising it here under the guise of ineffective assistance of appellate counsel. Blanco v. Wainwright, 507 So. 2d 1377, 1384 (Fla. 1987), sentence vacated on other grounds, 943 F.2d 1477 (11th Cir. 1991).

Even were it not procedurally barred, however, it is wholly without merit. Appellant informed the court for the first time after the State had rested its case that he had witnesses he wanted to call. Appellant had also failed to alert standby counsel that he wanted to call witnesses. All **but** two of the witnesses were out of state, and Appellant had no addresses or phone numbers for them. The two in-state witnesses were in the county jail, and the trial

court made arrangements for Appellant to talk to them, but he ultimately decided not to call them. (R 1185-1217, 1221-26). Under these circumstances, the trial court was under no duty to stop the trial and keep the jury sequestered while someone tried to locate Appellant's witnesses and have them brought to trial. Appellant had every opportunity earlier in the trial to inform his standby counsel or the court of his desires so that arrangements could have been made. Instead, he waited until the "twelfth hour" when it was too late to do anything. By waiting, Appellant foreclosed himself from presenting witnesses on his behalf. Since the decision not to continue the trial was well within the trial court's discretion, appellate counsel was not ineffective for failing to raise a nonmeritorious claim. Swafford v. Dugger, 569 so. 2d 1264, 1266 (Fla. 1990).

ISSUE IV

WHETHER APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO ENSURE THAT THE RECORD ON APPEAL WAS COMPLETE (Restated).

In his petition, Diaz claims that appellate counsel was ineffective for failing to ensure that allegedly critical pleadings and hearings were made a part of the record on appeal. **Habeas petition** at 63-66. First, Diaz claims that counsel failed to ensure that Peter Ferrero's withdrawal from the case and Robert Lamons' appointment were included. Second, Diaz claims that "several pretrial conferences appear to be missing from the record," but fails to identify them. Finally, Diaz details a conversation he allegedly had with the judge on the first day of trial, which he claims was not included in the record, but fails to allege the source of the conversation. Id. at 64-65.

As with unrecorded bench conferences, the lack of pleadings showing one attorney's withdrawal and another attorney's appointment cannot be constitutional error unless it rendered review impossible. Hardwick v. Dugger, 648 So. 2d 100, 105 (Fla. 1994). Clearly, it did not. As for the alleged pretrial conferences that do not appear in the record, Diaz has failed to specify the dates or subject of those conferences, and has failed to allege any specific error that occurred during them. As such, his claim has no merit. Cf. Ferguson v. Singletary, 632 So. 2d

53, 58 (Fla. 1993) ("Ferguson points to no specific error which occurred during these [unreported portions of the trial]. Under these circumstances, we reject this claim."). Finally, regarding the alleged conversation between him and the judge, Diaz obviously knows the substance of that conversation, but has failed to allege any error that occurred during it. Thus, this claim is also without merit. Cf. Ferguson, 632 So. 2d at 58; Turner v. Dugger, 614 So. 2d 1075, 1079-80 (Fla. 1992).

ISSUE V

WHETHER APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO CHALLENGE THE TRIAL COURT'S RESPONSE WHEN THE JURY REQUESTED THAT TESTIMONY BE READ BACK (Restated).

In his petition, Diaz claims that appellate counsel was ineffective for failing to challenge on appeal the trial court's refusal to read back the testimony of Candice Braun and Ralph Gajus, instead telling them to rely on their collective memory. **Habeas petition** at 66-69. However, when the trial court indicated its preferred response to the jury's question, Diaz, who **was** representing himself, made no objection. Thus, appellate counsel was precluded from raising this claim on appeal. Ferguson v. Sinaletary, 632 So. 2d 53, 57 (Fla. 1993). Regardless, the trial court's decision to instruct the jury to rely on their collective memory was not error, much less fundamental error. Henry v. State, 649 So. 2d 1361, 1365 (Fla. 1994) ("A trial court has broad discretion in deciding whether or not to have testimony re-read."). Thus, appellate counsel cannot be considered ineffective for failing to raise a nonmeritorious issue. Swafford v. Dugger, 569 So. 2d 1264, 1266 (Fla. 1990).

ISSUE VI

WHETHER APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO EFFECTIVELY ARGUE THAT DIAZ'S SENTENCE WAS DISPROPORTIONATE TO THAT OF HIS CODEFENDANT (Restated).

In his petition, Diaz alleges that appellate counsel was ineffective for failing to point out "the compelling facts in the record showing the injustice of **[his] death** sentence in comparison to Toro's life sentence." **Habeas petition** at 69-74. At the outset, Diaz concedes that his appellate counsel challenged the proportionality of his sentence based on the alleged disparate treatment of his codefendant. However, he claims that she **was** ineffective because she was unpersuasive. This Court has previously held that, "[a]fter appellate counsel raises an issue, failing to convince this Court to rule in an appellant's favor is not ineffective performance." Swafford v. Dugger, 569 So. 2d 1264, 1266 (Fla. 1990). More importantly, this Court has repeatedly stressed that habeas petitions must not be used as second appeals. See, e.g., Lopez v. Singletary, 18 Fla. L. Weekly S633, 634 (Fla. Dec. 9, 1993) (quoting Mills v. Dusser, 559 So. 2d 578, 579 (Fla. 1990) ("'Habeas corpus is not to be used for additional appeals of issues that could have been, should have been, or were raised on appeal or in other postconviction motions."'). Since Diaz raised

this issue previously, he is procedurally barred from raising it again.

ISSUE VII

WHETHER APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO CHALLENGE THE TRIAL COURT'S FAILURE TO INDEPENDENTLY WEIGH THE AGGRAVATORS AND MITIGATORS (Restated).

In his petition, Diaz claims that appellate counsel was ineffective for failing to challenge the trial court's assessment of the aggravating and mitigating factors, given that the State prepared the written sentencing order. Habeas petition at 74-80. Diaz raised the substance of this issue in Claim XIV of his 3.850 motion. (PCR 207-13). That claim was denied as procedurally barred (PCSRII 600), and he is appealing the denial of it in the consolidated 3.850 appeal. Consequently, he is procedurally barred from raising it here under the guise of ineffective assistance of appellate counsel. Blanco v. Wainwright, 507 So. 2d 1377, 1384 (Fla. 1987), sentence vacated on other grounds, 943 F.2d 1477 (11th Cir. 1991).

Even were they not procedurally barred, however, his allegations are wholly without merit. Although this Court has condemned the practice of requesting the state to prepare a written sentencing order, the record reflects that the trial court made the

requisite findings at the sentencing hearing. (R 1467-69). See Nibert v. State, 508 So. 2d 1, 4 (Fla. 1987). Thus, appellate counsel was not ineffective for failing to raise a nonmeritorious claim. Swafford v. Dugger, 569 So. 2d 1264, 1266 (Fla. 1990).

ISSUE VIII

WHETHER THIS COURT FAILED TO CONDUCT A CONSTITUTIONALLY ADEQUATE HARMLESS ERROR ANALYSIS AFTER STRIKING ONE OF THE AGGRAVATING FACTORS (Restated).

In his petition, Appellant claims that this Court failed to conduct an adequate harmless error analysis after it struck the 'great risk" aggravating factor on direct appeal. **Habeas petition** at 80-88. In its opinion, after striking this aggravating factor, this Court listed the four remaining valid aggravating factors and noted that the trial court had found nothing in mitigation. It then stated, "' [W]hen there are one or more valid aggravating factors and none in mitigation, death is presumed to be the appropriate penalty."' Diaz v. State, 513 So. 2d 1045, 1049 (Fla. 1987) (quoting Jackson v. State, 502 So. 2d 409, 413 (Fla. 1986)). Citing principally to Sochor v. Florida, 504 U.S. 527, 112 S. Ct. 2114, 119 L. Ed. 2d 326 (1992), and Richmond v. Lewis, U.S. __, 113 s. ct. 528, 121 L. Ed. 2d 411 (1992), Diaz claims that this Court failed to assess the effect of the "great risk" factor on the

jury and failed to make independent findings that there was, in fact, no mitigation established. Therefore, he demands that his case be remanded for resentencing. This Court has repeatedly rejected similar claims. E.g., Johnson v. Singletary, 647 So. 2d 106, 108-09 (Fla. 1994); Fersuson v. Singletary, 632 So. 2d 53, 57-58 (Fla. 1993); Mills v. Sinsletary, 622 So. 2d 943, 944 (Fla. 1993); Mills v. Sinsletary, **606** So. 2d 622, **623** (Fla. 1992). Therefore, appellate counsel cannot be considered ineffective for failing to raise a nonmeritorious issue. Swafford v. Dusser, 569 so. 2d 1264, 1266 (Fla. 1990).

ISSUE IX

WHETHER APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO CHALLENGE ON APPEAL ARGUMENTS AND INSTRUCTIONS WHICH DILUTED THE JURY'S ROLE IN SENTENCING (Restated).

In his petition, Diaz claims that appellate counsel was ineffective for failing to challenge on direct appeal argument by the State and instruction by the court that impermissibly diluted the jury's sense of responsibility for sentencing. **Habeas petition** at 88. Diaz raised the substance of this issue in Claim XX of his 3.850 motion. (PCR 255-67). That claim was denied as procedurally barred (PCSRII 600), and he is appealing the denial of it in the consolidated 3.850 appeal. Consequently, he is procedurally barred

from raising it here under the guise of ineffective assistance of appellate counsel. Blanco v. Wainwright, 507 So. 2d 1377, 1384 (Fla. 1987), sentence vacated on other grounds, 943 F.2d 1477 (11th Cir. 1991).

Regardless, even though trial counsel objected to some of the state's argument based on a violation of Caldwell v. Mississippi, 472 U.S. 320 (1985), he did not object to all of them. Thus, appellate counsel was precluded from challenging most of the alleged misstatements and misinstructions on appeal. Ferguson v. Singletary, 632 So. 2d 53, 57 (Fla. 1993). Be that as it may, this Court has repeatedly rejected challenges to similar arguments and instructions. E.g., Sochor v. State, 619 So. 2d 285, 291-92 (Fla. 1993) ('Florida's standard jury instructions fully advise the jury of the importance of its role and do not violate Caldwell."). Thus, appellate counsel cannot be considered ineffective for failing to raise a nonmeritorious issue. Swafford v. Dugger, 569 so. 2d 1264, 1266 (Fla. 1990).

ISSUE X

WHETHER APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO CHALLENGE ON APPEAL INSTRUCTIONS WHICH SHIFTED THE BURDEN TO DIAZ TO PROVE THAT DEATH WAS INAPPROPRIATE (Restated).

In his petition, Diaz claims that appellate counsel **was** ineffective for failing to challenge on appeal instructions which allegedly shifted the burden to him to prove that the mitigation outweighed the aggravation. **Habeas petition** at 94-97. Diaz raised the substance of this issue in Claim XVIII of his 3.850 motion. (PCR 237-51). That claim was denied as procedurally barred (PCSRII 600), and he is appealing the denial of it in the consolidated 3.850 appeal. Consequently, he is procedurally barred from raising it here under the guise of ineffective assistance of appellate counsel. Blanco v. Wainwrisht, 507 So. 2d 1377, 1384 (Fla. 1987), sentence vacated on other grounds, 943 F.2d 1477 (11th Cir. 1991).

Regardless, trial counsel failed to object to the instruction; thus, appellate counsel was precluded from raising this issue on appeal. Ferauson v. Sinsletarv, 632 So. 2d 53, 57 (Fla. 1993). In any event, this Court has repeatedly rejected similar claims. E.g., Brown v. State, 565 So. 2d 304, 308 (Fla. 1990). Thus, appellate counsel cannot be considered ineffective for failing to raise **a** nonmeritorious issue. Swafford v. Dugger, 569 So. 2d **1264, 1266** (Fla. 1990).

ISSUE XI

WHETHER NEW LAW MANDATES RECONSIDERATION OF DIAZ'S CLAIM THAT THE SECURITY MEASURES AT HIS TRIAL WERE TOO SEVERE (Restated).

In his petition, Diaz concedes that he challenged on appeal the trial court's security measures at the trial. However, he alleges that "new law" has changed the standard for assessing this type of claim. **Habeas petition** at 98-101. Diaz also raised this issue in Claim II of his 3.850 motion. (PCR 47-60). That claim was denied as procedurally barred (PCSRII 600), and he is appealing the denial of it in the consolidated 3.850 appeal. Consequently, he is procedurally barred from raising it here as well. Blanco v. Wainwright, 507 So. 2d 1377, 1384 (Fla. 1987), sentence vacated on other grounds, 943 F.2d 1477 (11th Cir. 1991).

Regardless, the **cases** cited by Appellant simply do not constitute "jurisprudential upheavals" sufficient for retroactive application. Rather, as Appellant concedes, they have merely "altered the standards previously applied in [his] case." **Habeas petition** at 100. Such "evolutionary refinements" cannot be used to undermine this Court's prior adjudication of this issue. See Witt v. State, 387 So. 2d 922 (Fla. 1980). Therefore, this claim should be denied.

ISSUE XII

WHETHER APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO CHALLENGE ON APPEAL THE TRIAL COURT'S REQUIREMENT THAT A SECURITY OFFICER BE PRESENT IN THE JURY ROOM WHEN DIAZ CONFERRED WITH COUNSEL REGARDING A PLEA OFFER (Restated).

In his petition, Diaz claims that appellate counsel was ineffective for failing to challenge the trial court's requirement that a security officer accompany Diaz into the jury room while Diaz and his attorney conferred regarding a plea offer. Habeas petition at 102-03. Diaz raised the substance of this issue in Claim VIII of his 3.850 motion. (PCR 131-34). That claim was denied as procedurally barred (PCSRII 600), and he is appealing the denial of it in the consolidated 3.850 appeal. Consequently, he is procedurally barred from raising it here under the guise of ineffective assistance of appellate counsel. Blanco v. Wainwright, 507 so. 2d 1377, 1384 (Fla. 1987), sentence vacated on other grounds, 943 F.2d 1477 (11th Cir. 1991).

Regardless, it is wholly without merit. Appellant had escaped from prisons in Puerto Rico and Connecticut, and had attempted to escape prior to trial by bribing a guard. He also had a history of violence, having killed the director of a drug rehabilitation center, and having taken guards hostage during his escape in Connecticut. As a result, the sheriff's department had tightened

security on him, and the trial court had decided that he would remain shackled during the trial. When defense counsel indicated that he wanted to meet with his client in the jury room, the trial court decided that it was too dangerous to leave counsel alone with Appellant in a room full of objects that Appellant could use against him. (R 434-38, 450-55). Its decision was prudent under the circumstances and did not unduly hinder Appellant's ability to converse with his attorney regarding the plea offered by the State. Cf. Williamson v. Duaaer, 651 So. 2d 87, 88 (Fla. 1994); Correll v. Dugger, 558 So. 2d 422, 424 (Fla. 1990). Thus, appellate counsel cannot be considered ineffective for failing to raise a nonmeritorious issue. Swafford v. Dugger, 569 So. 2d 1264, 1266 (Fla. 1990).

ISSUE XIII

WHETHER APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO CHALLENGE ON APPEAL THE TRIAL COURT'S REFUSAL TO ALLOW DIAZ TO REPRESENT HIMSELF DURING THE PENALTY PHASE (Restated).

In his petition, Diaz claims that appellate counsel **was** ineffective for failing to challenge the trial court's decision not to allow him to represent himself during the penalty phase. **Habeas petition** at 103-05. Diaz raised the substance of this issue in Claim VII of his 3.850 motion. (PCR 129-31). That claim was

denied as procedurally barred (PCSRII 600), and he is appealing the denial of it in the consolidated 3.850 appeal. Consequently, he is procedurally barred from raising it here under the guise of ineffective assistance of appellate counsel. Blanco v. Wainwright, 507 so. 2d 1377, 1384 (Fla. 1987), sentence vacated on other grounds, 943 F.2d 1477 (11th Cir. 1991).

Regardless, it is wholly without merit. Appellant told the court at the close of the guilt phase that he wanted Mr. Lamons to represent him during the penalty phase. (R 1341). Two weeks later, at the penalty phase, Appellant changed his mind. However, he repeatedly stated that he was not capable of representing himself. He simply did not trust anyone else to do it for him. (R 1354-63). Given Appellant's persistent response that he was not capable, the trial court properly rejected his request to represent himself. Cf. Valdes v. St-ate, 626 So. 2d 1316, 1319-20 (Fla. 1993); Waterhouse v. State, 596 So. 2d 1008, 1014 (Fla.), cert. denied, ___ U.S. ___, 113 S. Ct. 418, 121 L. Ed. 2d 341 (1992); Haram v. State, 625 So. 2d 875, 875 (Fla. 5th DCA 1993). Thus, appellate counsel cannot be considered ineffective for failing to raise a nonmeritorious issue. Swafford v. Dusser, 569 So. 2d 1264, 1266 (Fla. 1990).

ISSUE XIV

WHETHER APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO CHALLENGE ON APPEAL THE STATE'S PROFFER OF EVIDENCE AT THE SENTENCING HEARING REGARDING THE REASON DIAZ'S CODEFENDANT WAS OFFERED A PLEA TO LIFE IMPRISONMENT (Restated).

In his petition, **Diaz** claims that appellate counsel **was** ineffective for failing to challenge on appeal the State's proffer of the testimony of Assistant State Attorney John Hogan, regarding the reason why Angel Toro was offered **a** plea to life imprisonment. **Habeas petition** at 105. Diaz raised the substance of this issue in Claim X(C) of his 3.850 motion. (PCR 154). Although the trial court erroneously found this particular part of claim X procedurally barred, it could have found the claim legally insufficient on its face. This particular claim was nine sentences long. It alleged neither deficient conduct nor prejudice, and contained no legal analysis.[4] Diaz is appealing the denial of this claim in the consolidated 3.850 appeal. Consequently, he is procedurally barred from raising it here under the guise of ineffective assistance of appellate counsel. Blanco v. Wainwright, 507 so. 2d 1377, 1384 (Fla. 1987), sentence vacated on other grounds, 943 F.2d 1477 (11th Cir. **1991)** .

[4] Diaz's claim in his habeas petition is identical to that in his 3.850 motion, and is thus equally insufficient.

Moreover, Diaz concedes that trial counsel not only failed to object to the proffer, he stipulated to it. Thus, appellate counsel was precluded from challenging the proffer on appeal. Fersuson v. Singletary, 632 So. 2d 53, 57 (Fla. 1993). Regardless, Diaz's claim does not constitute fundamental error since there was competent, substantial evidence in the record, absent the proffer, to support the finding that Appellant was more culpable than his codefendant. For example, in rejecting Diaz's claim that he was merely an accomplice and that his participation was relatively minor, the trial court detailed the following contradictory facts:

> The defendant knew of the plan to rob the lounge prior to leaving his residence. The defendant armed himself with a large caliber weapon equipped with a silencer. The defendant cased the bar from the vantage point of his seat for a long period of time prior to committing the robbery. The defendant brandished his weapon and fired shots within the establishment, one of which almost struck a lady who was dancing on a stage. The defendant forcibly removed property from the patrons at the bar, and then participated in the armed removal to a place of confinement so as to avoid detection and identification. The defendant also participated in the armed abduction of Gina Fredericks, a waitress, back to the office area so that the safe's contents could be secured. Finally, upon arriving back at his residence the defendant divided the booty from this crime among his cohorts.

(R 325-26). In discussing on appeal the proportionality of Appellant's sentence, this Court also found that Appellant was

> actively involved in and present during the commission of the crimes. He and his fellow robbers each discharged a gun during the robbery. There is evidence that Diaz's gun had a silencer. . . . Based on our review of the record, we find that Diaz was a major participant in the felonies and at the very least was recklessly indifferent to human life.

Diaz v. State, 513 So. 2d 1045, 1048 (Fla. 1987). Therefore, appellate counsel cannot be considered ineffective for failing to raise a nonmeritorious issue. Swafford v. Dugger, 569 So. 2d 1264, 1266 (Fla. 1990).

ISSUE XV

> WHETHER APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO CHALLENGE ON APPEAL THE "PECUNIARY GAIN" AGGRAVATING FACTOR INSTRUCTION (Restated).

In his petition, Diaz claims that appellate counsel **was** ineffective for failing to challenge on appeal the jury instruction relating to the "pecuniary gain" aggravating factor. **Habeas petition** at 106-07. Diaz raised the substance of this issue in Claim XXIII of his 3.850 motion. (PCR 271-76). That claim was denied as procedurally barred (PCSRII 600), and he is appealing the denial of it in the consolidated 3.850 appeal. Consequently, he is procedurally barred from raising it here under the guise of ineffective assistance of appellate counsel. Blanco v. Wainwrisht,

507 so. 2d 1377, 1384 (Fla. 1987), sentence vacated on other grounds, 943 F.2d 1477 (11th Cir. 1991).

Regardless, trial counsel failed to object to the "pecuniary gain" instruction; thus, appellate counsel was precluded from challenging it on appeal. Ferguson v. Singletary, 632 So. 2d 53, 57 (Fla. 1993). In any event, this Court has repeatedly rejected this claim. E.g., Kelley v. Dugger, 597 So. 2d 262, 265 (Fla. 1992). Thus, appellate counsel cannot be considered ineffective for failing to raise a nonmeritorious issue. Swafford v. Dugger, 569 So. 2d 1264, 1266 (Fla. 1990).

ISSUE XVI

WHETHER APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO CHALLENGE ON APPEAL THE STATE'S ARGUMENT OF FUTURE DANGEROUSNESS AS A NONSTATUTORY AGGRAVATING FACTOR (Restated).

In his petition, Diaz claims that appellate counsel was ineffective for failing to challenge on appeal the **State's** argument of future dangerousness as a nonstatutory aggravating factor. **Habeas petition at 107-09.** Diaz raised the substance of this issue in Claim XV of his 3.850 motion. (PCR 214-19). That claim **was** denied as procedurally barred (PCSRII 600), and he is appealing the denial of it in the consolidated 3.850 appeal. Consequently, he is procedurally barred from raising it here under the guise of

ineffective assistance of appellate counsel. Blanco v. Wainwright, 507 so. 2d 1377, 1384 (Fla. 1987), sentence vacated on other grounds, 943 F.2d 1477 (11th Cir. 1991).

Regardless, this claim is wholly without merit. The State argued that Appellant had been "convicted of robbery and sent to prison; killed while in prison; escaped from prison in Puerto Rico; escaped from prison in Connecticut, holding guards hostage and threatening to kill --" (R 1436). Since it did not predict that Appellant would murder again if sentenced to life imprisonment and paroled after 25 years, this argument was not improper. See Allen v. State, 662 So. 2d 323, 331 (Fla. 1995); Parker v. State, 456 So. 2d 436, 443-44 (Fla. 1984). Even were it improper, the trial court gave a curative instruction. (R 1452-53). Moreover, the trial court relied only on the statutory aggravating factors proven by the State. (R 320-23). Thus, if error, any error was harmless beyond a reasonable doubt. Allen, 662 So. 2d at 331. It was not fundamental error. Therefore, appellate counsel cannot be considered ineffective for failing to raise a nonmeritorious issue. Swa or v. Dusser, 569 So. 2d 1264, 1266 (Fla. 1990).

ISSUE XVII

WHETHER APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO CHALLENGE ON APPEAL THE TRIAL COURT'S FAILURE TO FIND MITIGATING CIRCUMSTANCES (Restated).

In his petition, Diaz claims that appellate counsel **was** ineffective for failing to challenge the trial court's rejection of mitigation. **Habeas petition** at 110-13. Diaz raised the substance of this issue in Claim XVI of his 3.850 motion. (PCR 219-28). That claim **was** denied as procedurally barred (PCSRII 600), and he is appealing the denial of it in the consolidated 3.850 motion. Consequently, he is procedurally barred from raising it here under the guise of ineffective assistance of appellate counsel. Blanco v. Wainwrisht, 507 So. 2d 1377, 1384 (Fla. 1987), sentence vacated on other grounds, 943 F.2d 1477 (11th Cir. 1991).

Regardless, this claim is wholly without merit. Of the three areas of mitigation allegedly rejected by the trial court, only one was specifically presented as mitigation. In rejecting Appellant's claim that he **was** merely an accomplice and that his participation was relatively minor, the trial court detailed the following contradictory facts:

> The defendant knew of the plan to rob the lounge prior to leaving his residence. The defendant armed himself with a large caliber weapon equipped with **a** silencer. The defendant cased the bar from the vantage point of his seat for a long period of time prior to

> committing the robbery. The defendant brandished his weapon and fired shots within the establishment, one of which almost struck a lady who was dancing on a stage. The defendant forcibly removed property from the patrons at the bar, and then participated in the armed removal to a place of confinement so as to avoid detection and identification. The defendant also participated in the armed abduction of Gina Fredericks, a waitress, back to the office area so that the safe's contents could be secured. Finally, upon arriving back at his residence the defendant divided the booty from this crime among his cohorts.

(R 325-26). In discussing on appeal the proportionality of Appellant's sentence, this Court also found that Appellant was "actively involved in and present during the commission of the crimes. He and his fellow robbers each discharged a gun during the robbery. There is evidence that Diaz's gun had a silencer. . . . Based on our review of the record, we find that Diaz was a major participant in the felonies and at the very least was recklessly indifferent to human life." Diaz v. State, 513 So. 2d 1045, 1048 (Fla. 1987). Thus, the record supports the rejection of this mitigating factor.

In addition, this court also found that Appellant was competent to represent himself. Id. at 1047. Thus, even though Appellant did not argue his competency as mitigation, the trial court could have properly rejected it.

As for Appellant's alleged drug use, the report of Drs. Haber and Rappaport indicated that Appellant "denied any current history of drug or alcohol problems." (PCSRII 475). Dr. Castiello's report indicated a misuse of drugs "for a short period of time," but noted that Appellant "called to the attention of the undersigned that he had been incarcerated now for several years and not involved with drugs at all for the same length of time." (PCSRII 478). Thus, evidence of drug use could have been rejected based on the period of abstinence prior to the murder, and the lack of nexus between the drug use and the crime. Cf. Hardwick v. State, 521. So. 2d 1071, 1076 (Fla. 1988). Therefore, appellate counsel cannot be considered ineffective for failing to raise a nonmeritorious issue. Swafford v. Dugger, 569 So. 2d 1264, 1266 (Fla. 1990).

ISSUE XVI II

WHETHER APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO CHALLENGE ON APPEAL ALLEGED MISSTATEMENTS BY THE STATE AND THE COURT REGARDING THE NECESSARY VOTE FOR A LIFE SENTENCE (Restated).

In his petition, Diaz claims that appellate counsel was ineffective for failing to challenge on appeal the State's and the trial court's alleged misstatements that a life recommendation required a majority vote. Habeas petition at 113-14. Diaz raised

the substance of this issue in Claim XIX of his 3.850 motion. (PCR 251-55). That claim was denied as procedurally barred (PCSRII 600), and he is appealing the denial of it in the consolidated 3.850 appeal. Consequently, he is procedurally barred from raising it here under the guise of ineffective assistance of appellate counsel. Blanco v. Wainwright, 507 So. 2d 1377, 1384 (Fla. 1987), sentence v[redacted]er grounds, 943 F.2d 1477 (11th Cir. 1991).

Regardless, this claim is wholly without merit. The trial court specifically instructed the jury that a vote of six to six was a life recommendation:

> On the other hand, if by six or more votes the jury determines that Angel Diaz should not be sentenced to death, your advisory sentence should be that it imposes a sentence of life imprisonment without the possibility of parole by [sic] 25 years by a vote of --

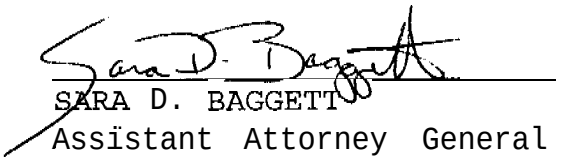
(R 1457). Therefore, appellate counsel cannot be considered ineffective for failing to raise a nonmeritorious issue. Swafford v. Dugger, 569 So. 2d 1264, 1266 (Fla. 1990).

CONCLUSION

Wherefore, based on the foregoing arguments and authorities, Respondent respectfully requests that this Honorable Court deny Petitioner's request for a writ of habeas corpus.

Respectfully submitted,

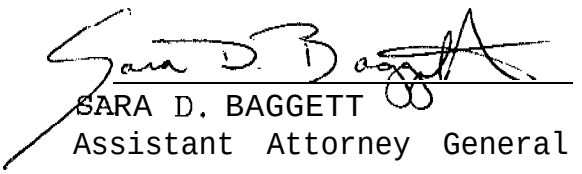
ROBERT A. BUTTERWORTH
Attorney General



SARA D. BAGGETT
Assistant Attorney General
Fla. Bar No. 0857238
1655 Palm Beach Lakes Blvd.
Suite 300
West Palm Beach, FL 33401-2299
(407) 688-7759

CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was sent by United States mail, postage prepaid, to Gail E. Anderson and Todd G. Scher, Assistant CCRs, Office of the Capital Collateral Representative, Post Office Drawer 5498, Tallahassee, Florida 32314-5498, this 4th day of October, 1996.



SARA D. BAGGETT
Assistant Attorney General