

IN THE FLORIDA SUPREME COURT
CASE NO. SC06-1946

ARTHUR DENNIS RUTHERFORD, *Petitioner*

v.

JAMES R. McDONOUGH, *Respondent*.

RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

Rutherford has filed a fourth successive petition for a writ habeas corpus raising a claim that Florida's death penalty statute violates the Eighth Amendment relying on the ABA Report. Rutherford has filed numerous prior habeas petitions in this case. His first habeas petition raised eleven claims of ineffectiveness of appellate counsel which this Court denied. *Rutherford v. Moore*, 774 So.2d 637 (Fla. 2000). Rutherford filed a second habeas petition raising a *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004) claim which this Court denied on August 18, 2005. *Rutherford v. Crosby*, No. SC05-376. Rutherford filed a third successive habeas petition raising a shackling claim based on *Deck v. Missouri*, 544 U.S. -, 125 S.Ct. 2007, 161 L.Ed.2d 953 (2005), which was denied by the Florida Supreme Court on January 5, 2006. *Rutherford v. Crosby*,

No. SC05-2139.

It is improper to use a habeas petition as a substitute for an appeal. *Rodriguez v. State*, 919 So.2d 1252, 1284 (Fla. 2005)(denying relief where defendant raised the same claim in his 3.851 appeal and in his habeas petition and noting it is improper to use a habeas petition as a substitute for or an additional appeal of a postconviction motion). For the reasons discussed in the State's answer brief, the fourth successive habeas petition should be denied.

CONCLUSION

The State respectfully requests that this Honorable Court deny the successive habeas petition.

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 electronic mail Linda McDermott, Esq. at lindammcdermott@msn.com with a follow up hard copy by U.S. mail to Linda McDermott, 141 N.E. 30th Street, Wilton Manors, FL 32334 9th day of October, 2006.

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CERTIFICATE OF FONT AND TYPE SIZE

Counsel certifies that this brief was typed using Courier New 12.

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