I. Instruction on Sentencing

Smith contends that a curative instruction the trial court gave misadvised the jury about its role in sentencing, in violation of *Caldwell v. Mississippi*, 472 U.S. 320 (1985). During his closing argument in the penalty phase, defense counsel noted that the State knew about all of Smith's prior convictions and "[n]ow [the State] tells you today you gotta kill this poor man because he's got a prior record." The State objected that the argument was improper because defense counsel was "trying to transfer the ultimate sentencing to [the] jury." The court sustained the objection and, upon the State's request, gave a curative instruction:

> COURT: Members of the jury, I will instruct you that none of these arguments are intended to make you feel like you're the instrument of death in the event that is the ultimate sentence in this case. Your job is to listen to, weigh the evidence, listen to these arguments, apply the law to the facts as you find them, and make a verdict, a recommendation to this Court, which is the ultimate sentencer. And I will give your recommendation great weight. All right.

Smith argues that this instruction "affirmatively misadvised the jury that its recommendation did not matter." We disagree. The curative instruction is consistent with the standard jury instruction, which was given at the close of the evidence in the penalty phase. *See* Fla. Std. Jury Instr. (Crim.) 7.11. (Penalty Proceeding—Capital Cases).[14] As Smith acknowledges, we have consistently rejected challenges to the standard instruction, holding that it correctly advises the jury of its role and does not unconstitutionally denigrate it. *See Taylor v. State*, 937 So. 2d 590, 600 (Fla. 2006). Therefore, we find no error in the trial court's curative instruction.

J. Cumulative Error

Smith finally claims that as a result of cumulative error, he was denied a fair trial. Because we have found no individual error, no cumulative error can exist. *See Parker v. State*, 904 So. 2d 370, 380 (Fla. 2005) (noting that where the individual claims of error alleged are either procedurally barred or without merit, the claim of cumulative error necessarily fails); *Johnson v. Singletary*, 695 So. 2d 263, 267 (Fla. 1996).

III. CONCLUSION

Based on the analysis above, we affirm Smith's convictions and his sentence of death.

It is so ordered. (QUINCE, C.J., WELLS, PARIENTE, LEWIS, and BELL, JJ., and CANTERO, Senior Justice, concur. ANSTEAD, J., dissents with an opinion.)

(ANSTEAD, J., dissenting.) Because I find both the written and oral presentations of counsel for the appellant fundamentally lacking, I would strike the appellate briefs, discharge counsel, and direct the trial court to appoint new appellate counsel for the appellant. Capital cases represent the most serious category of cases reviewed by this Court and such cases require diligent and competent advocacy by counsel. While this Court has inherent responsibility to assure such representation, the Florida Legislature has explicitly called upon the courts to take responsibility for assuring such representation in capital litigation. We should honor that call here.[15]

By coincidence, the Clerk of this Court scheduled oral argument in this case and the case of *Hunter v. State*, No. SC06-1963 (Fla. Sept. 25, 2008) [33 Fla. L. Weekly S745a], for the same date. In examining the briefs for appellants in those two cases, I was struck by both the similarity in approach and the facially flawed advocacy contained in the briefs in both cases. The oral advocacy was similarly lacking in both cases. Of course, the appellants are represented by the same counsel in both cases, and I have come to the same conclusion in *Hunter* as I have here.

[1]The three prisoners also were indicted for the first-degree murder of another inmate, Charles Fuston. The State entered a *nolle prosequi* on that count as to Smith.

[3]Smith's brother testified by video deposition from a Rhode Island prison where he is serving a life sentence for murdering and raping his stepdaughter. The evidence at the penalty phase showed, however, that all of Smith's sisters are married, employed, and living productive lives.

[4]The trial court rejected Smith's antisocial personality disorder as a mitigator.

[5]Smith alleges that trial counsel provided ineffective assistance by (1) failing to preserve for review the trial court's denial of his motion to suppress; (2) failing to object to testimony that Smith planned to rape any female guard supervising him during the escape; (3) failing to move for judgment of acquittal on the ground that the murder was the independent act of codefendant Eaglin; (4) failing to raise a second challenge to the constitutionality of Florida's lethal injection procedures; and (5) failing to challenge the constitutionality of Florida's clemency process.

[6]*Miranda v. Arizona*, 384 U.S. 436 (1966).

[7]Smith gave statements to the agent on June 12, June 23, July 27, and July 31, 2003. Only his last statement was admitted at trial.

[8]This issue was preserved for review with the denial of the motion; trial counsel was not required to object at the time the evidence was admitted at trial. *See* § 90.104(1)(b), Fla. Stat. (2003); *In re Amendments to The Florida Evidence Code—Section 90.104*, 914 So. 2d 940, 941 (Fla. 2005).

[9]Even if Smith had not raised the issue, in death penalty appeals this Court must independently review the record to confirm that the verdict is supported by competent, substantial evidence. *See* Fla. R. App. P. 9.142(a)(6); *see also Floyd v. State*, 913 So. 2d 564, 572 n.2 (Fla. 2005) (recognizing the Court's independent duty).

[10]*Spencer v. State*, 615 So. 2d 688 (Fla. 1993).

[11]*Eaglin v. State*, No. SC06-760 (Fla. notice of appeal filed April 21, 2006), is currently pending in the Court. At oral argument, Smith's counsel admitted that he has not reviewed the codefendant's record to ascertain whether any evidence supports this claim. We have denied a motion, filed a month after oral argument, formally requesting the Court take judicial notice of the other record and asking permission to provide the necessary record citations and argument.

[12]We note that codefendant Eaglin was sentenced to death.

[13]The United States Supreme Court denied certiorari review in these cases following release of *Baze v. Rees*, 128 S. Ct. 1520 (2008), in which a majority of the Court upheld the constitutionality of Kentucky's lethal injection protocol against an Eighth Amendment challenge.

[14]The standard instruction provides as follows in pertinent part:

> Ladies and gentlemen of the jury, it is now your duty to advise the court as to what punishment should be imposed upon the defendant for [his] [her] crime of Murder in the First Degree. As you have been told, the final decision as to what punishment shall be imposed is the responsibility of the judge; however, it is your duty to follow the law that will now be given you by the court and render to the court an advisory sentence based upon your determination as to whether sufficient aggravating circumstances exist to justify the imposition of the death penalty and whether sufficient mitigating circumstances exist to outweigh any aggravating circumstances found to exist.
>
> Your advisory sentence should be based upon the evidence [that you have heard while trying the guilt or innocence of the defendant and evidence that has been presented to you in these proceedings] [that has been presented to you in these proceedings].

[15]I acknowledge that the Court, to its credit, has notified both the Florida Bar and the Executive Director of the Legislature's Commission on Capital Cases of concerns about the performance of counsel in the *Smith* and *Hunter* cases as well as other filings by counsel in this Court.

* * *

Attorneys—Discipline—Conduct involving dishonesty, fraud, deceit, or misrepresentation—Failure to abide by client's decisions concerning objectives of representation—Failure to competently represent client—Failure to make reasonable efforts to expedite litigation—Failure to adequately communicate with client—Failure to provide successor counsel with copy of client's file—Filing of voluntary dismissal of case without client's consent—Referee properly found as aggravating factors dishonest or selfish motive, pattern of misconduct, and multiple offenses—Referee properly declined to find as mitigating factors full cooperation with Bar, remoteness of prior disciplinary matter, and unreasonable delay in disciplinary proceeding—Proper discipline is one-year suspension

THE FLORIDA BAR, Complainant, vs. DEWEY HOMER VARNER, JR., Respondent. Supreme Court of Florida. Case No. SC06-1919. September 25, 2008. Original Proceeding—The Florida Bar. Counsel: Kenneth Lawrence Marvin, Director of Lawyer Regulation, The Florida Bar, Tallahassee, and Lorraine Christine Hoffmann, Bar Counsel, The Florida Bar, Fort Lauderdale, for Complainant. Kevin P. Tynan of Richardson and Tynan, PLC, Tamarac, for Respondent.

(PER CURIAM.) We review a referee's report recommending that Respondent, Dewey Homer Varner, Jr., be found guilty of professional misconduct and be suspended from the practice of law for