IN THE SUPREME COURT OF FLORIDA

BILLY JIM SHEPPARD,
Petitioner,

v. CASE NO.: SC20-422

MARK S. INCH,
Respondent.
_____/

RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

CLAIMS

Petitioner claims that appellate counsel provided ineffective assistance by failing to argue that: (1) fundamental error occurred when the prosecution committed misconduct; and, (2) Appellant's death sentence violates *Roper v. Simmons*, 543 U.S. 551 (2005).

TIMELINESS

Florida Rule of Appellate Procedure 9.142(b)(4)(B) requires that a petition alleging ineffective assistance of appellate counsel in a death penalty case "be filed simultaneously with the initial brief in the appeal from the lower tribunal's order on the defendant's application for relief under Florida Rule of Criminal Procedure 3.851." Because the initial brief in case number SC19-1512 was filed the same day as the instant petition, the ineffective assistance of appellate counsel claim is timely. Additionally, this Court requested that the State respond on or before June 1, 2020. Thereafter, this Court granted the State's motion to extend the filing

deadline to July 1, 2020. Thus, this Response is timely.

FACTS

Appellant shoots Christopher Wakefield in 2001

On January 15, 2001, Appellant shot Christopher Wakefield "in the leg while [Wakefield was] leaving a mall in a vehicle with five to seven other people." *Sheppard*, 151 So.3d at 1163. Although he was a minor at the time, Appellant "was prosecuted as an adult." *Id*. On June 22, 2001, Appellant "was convicted of the felony of aggravated battery and shooting or throwing deadly missiles." *Id*. Initially, Appellant "received a sentence of four years in prison followed by two years of probation." *Id*. However, Appellant "violated probation and was sentenced to five years and six months in prison." *Id*. Appellant was released from prison on February 19, 2017. *See* http://www.dc.state.fl.us/offendersearch/.

Appellant argues with "some boys from West Jax"

Appellant is from the Paxon neighborhood[1] of Jacksonville and is a member of the Pakastan Yulee Clique (PYC) gang; sometime during the middle of July 2008, Appellant got "in a big argument… 'with some boys from West Jax…'" *See Sheppard*, 151 So.3d at 1162:

> Roberts also testified that he overheard [Appellant] telling some other inmates that, later on the day of the carjacking attempt, they "shot that

[1] Paxon is located west of the St. Johns River, but east of I-295. It is bounded by Highway 90 to the south, Edgewood Avenue to the east, railroad tracks to the north, and Ellis Road to the west. *See* https://www.google.com/maps.

> fuck nigger from West Jax that was on his bike" and with whom Sheppard said he had argued. Roberts explained that [Appellant] said he had been in a big argument a few days before with "some boys from West Jax because him and Dirt, they're from Paxon and PYC," which are gang references.

Appellant "going hard" on drugs

In the days leading up to July 20, 2008, Appellant and co-defendant Rashard Evans ("Evans") "were going hard [apparently a reference to doing drugs]." *Sheppard*, 151 So.3d at 1161.

Appellant murders Patrick Stafford

Sometime after midnight on July 20, 2008, Patrick Stafford ("Stafford") and Leporyon Worthey arrived at the house of Shamika Worthey on Academy Street, which is located three to four miles east of the Paxon neighborhood in Jacksonville, Florida. *See Sheppard*, 151 So.3d at 1160; *see also* https://www.google.com/maps. Leporyon Worthey and Shamika Worthey are brother and sister as well as cousins to Stafford. *See Sheppard*, 151 So.3d at 1160. Around 3:00 a.m., Leporyon went to bed, "leaving Stafford sitting on the hood of Leporyon's car waiting for a ride." *Id*. Sometime after 3:00 a.m. but before 5:30 a.m., Shamika "went out to her car to retrieve some diapers and saw Patrick Stafford asleep in [Leporyon's] car." *Id*. Around this same time, Appellant and Evans "were trying to find a car and… they went to rob a guy…" *Id* at 1161.

At about 5:30 or 5:45 a.m., Appellant and Evans attempted to steal

Leporyon's car. *See Sheppard*, 151 So.33d at 1160 ("[Shamika] was awakened by the sound of gunshots at about 5:30 or 5:45 a.m."). However, Stafford "'bucked,' which meant that he was not giving up the car." *Id.* at 1160-61. In response, both Appellant and Evans shot Stafford. *See id*. at 1161-62 ("'So [Appellant] said that him and Rashard [Evans] shot him… He said they both put fire on him,' which meant shooting him."); *see also id*. at 1157-58 ("Evidence was presented, however, that Sheppard confessed to a jail inmate that he and Evans shot Stafford when he refused to cooperate with their attempt to steal the car in which Stafford had been sleeping."); *id.* at 1161 ("Roberts said he asked about it and Sheppard told him Evans, his codefendant, was housed on the other side of the jail and was bragging about a carjacking, saying 'the guy bucked and that they shot him,' referring to the Stafford murder."); *id.* at 1176 ("Sheppard told Roberts that he had shot Stafford when he 'bucked' as he and Evans tried to steal the car in which Stafford had been sleeping.").

Awakened by the gunfire, Shamika looked outside and could "see that Stafford was lying by a tree in the yard [and that he] appeared to have blood on his shirt." *Sheppard*, 151 So.3d at 1160. Awakened by his sister, Leporyon went outside and "found Stafford on the ground, with the car door open and no one else present." *Id*. Sometime thereafter, a crime scene detective arrived and "found a Ford LTD parked in the yard with the door open and the passenger side window

shattered. Stafford's body was near the car and shell casing found around the area were collected for forensic examination." *Id*.

Stafford died from multiple gunshot wounds. *Sheppard*, 151 So.3d at 1160. All total, the police recovered six shell casings from the scene of Stafford's murder. *Id*. at 1161. Four of the six shell casings were ejected from a Smith and Wesson 9mm caliber pistol that fired two bullets into Stafford's body. *Id*. The other two shell casings were ejected by a different firearm. *Id*.; *see also id.* at 1157 ("Patrick Stafford died after being shot repeatedly by two different guns in the early morning hours of July 20…").

Appellant uses a firearm to steal Dorsette James' gray Ford Crown Victoria

At approximately 8:30 a.m., Appellant and Evans arrived at a Prime Stop Food Store. *See Sheppard*, 151 So.3d at 1159 ("Approximately one and a half hours before Wimberly was shot, a car matching the description of the Wimberly shooter's car was stolen at gunpoint from Dorsette James at the Prime Stop Food Store."). Although this Court's opinion does not identify the location of the Prime Stop Food Store, a "Prime Stop Grocery" is located on Highway 90, approximately one mile from Academy Street. *See* https://www.google.com/maps. Photographs taken inside the store depict both Appellant and Evans. *See Sheppard*, 151 So.3d at 1159 ("Photographs taken from inside the Prime Stop shore showed both Evans and Sheppard at the store that morning.").

Dorsette James was at the Prime Stop with Willie Lee Carter, Jr. *See Sheppard*, 151 So.3d at 1159. James entered the store while Carter waited outside, but not in James' car. *Id*. James exited the store and said "Man, don't do it like that." *Id*. Appellant then got inside the driver's side of James' gray Ford Crown Victoria while Evans entered through the passenger's side. *Id*. As Appellant drove off, Carter asked James why he let Appellant and Evans take his car. *Id*.; *see also id.* at 1157 ("Sheppard and his codefendant Rashard Evans stole a car at gunpoint from Dorsette James at a Prime Stop convenience store, with Sheppard driving it away from the store."). James told Carter that "one of the men had a gun." *Id*. Although he denied taking James' car by force, Appellant later "admitted that he and Evans took the car for a 'joyride' [and] that he got in the driver's side…" *Id* at 1161. And, a fingerprint from the car was identified as belonging to Rashard Evans. R-3738-3739.

Appellant murders Monquell Wimberly

At approximately 10:00 a.m. on July 20, 2008, and only four hours after murdering Patrick Stafford and only an hour and a half after stealing Dorsette James' car at gunpoint, Appellant and Evans drove to the Hollybrook Homes apartment complex ("Hollybrook") on King Street in Jacksonville. *See Sheppard*, 151 So.3d at 1158. Hollybrook is located approximately a mile and a half from Academy Street, where Appellant murdered Stafford outside the home of Shamika

Worthey. *See* https://www.google.com/maps.

Sometime after the theft of James' gray Ford Crown Victoria at the Prime Stop, Appellant and Evans switched places in the car – with Evans in the driver seat and Appellant in the passenger's seat as they approached Hollybrook. *See Sheppard*, 151 So.3d at 1162 ("He said because it was – I guess the way he put it was when they were pulling – when he looked up – after he shot the guy, he looked up and she was looking at him but Rashard [Evans] was already pulling away.").

Khalilah Mejors and Kieva Sherrod, cousins and residents at Hollybrook, were standing on their third-floor balcony on the morning of July 20, 2008. *See Sheppard*, 151 So.3d at 1159. They both saw Monquell Wimberly riding his bicycle toward the entrance to Hollybrook. *Id*. Then, they saw the gray Ford Crown Victoria driven by Evans approach Wimberly and slow down. *See id*:

> [Mejors] testified that as a dark gray Ford Crown Victoria or Mercury vehicle approached the boy and slowed down…
>
> [Sherrod] saw the vehicle, which looked like a gray Ford Crown Victoria, drive up to the person on the bicycle and slow down… She identified a photograph of the car, which witnesses later identified as one stolen from Dorsette James at the Prime Stop convenience store, as the car she saw that morning.

Wimberly stopped his bicycle, put his hands in the air, was shot by Appellant, fell to the ground, and was shot by Appellant again. *Id*.; *see also id.* at 1162 ("And he said that he pulled up to him and he was on a bicycle. And they slowed down and he hung his arm out the window and started shooting. And he said the dude looked

at him and was like – (demonstrating) – and shot. And he said he went ahead and shot him.").

Dtalya Barrett was working as a security guard at Hollybrook. *See Sheppard*, 151 So.3d at 1158. After she heard gunshots, Barrett ran from the entrance gate to the sidewalk and saw Appellant "holding a gun out of the passenger side window" of James' stolen gray Ford Crown Victoria. *Id*. at 1158-59. Barrett then saw Appellant shoot Wimberly. *Id*. Barrett "ran to call police and when she returned" she saw Appellant "leaning out of the car window and looking back toward" Wimberly's body on the ground. *Id*. at 1158. Subsequently, Barrett "identified [Appellant] in court as the man she saw shoot Wimberly [and] she also identified Dorsette James' stolen car as matching the vehicle in which the shooter was riding." *Id*. at 1158-59.

Wimberly died of multiple gunshot wounds. *See Sheppard*, 151 So.3d at 1160. The police recovered six shell casings from the scene of Wimberly's murder. *Id*. at 1161. The six shell casings found on King Street (Wimberly murder) matched four of the six shell casings found on Academy Street (Stafford murder). *Id*. Additionally, the three bullets recovered from Wimberly's body were fired from the same Smith and Wesson 9mm caliber pistol that fired two bullets into Stafford's body. *Id*. Thus, the gun used during the murder of Stafford was used several hours later to murder Wimberly. *See id*. ("Thus, two different

firearms were used to shoot Stafford on Academy Street and only one of those firearms was used to shoot Wimberly on King Street.").

Appellant confesses both murders to fellow inmate

Michael Roberts, who was housed in the Duval County Jail with Appellant, "testified that [Appellant] later told him directly about shooting the boy on the bicycle after he and Evans had shot the man who 'bucked' in the attempted carjacking earlier that morning." *Sheppard*, 151 So.3d at 1162.

Appellant admits that Barrett saw his face

While in the Duval County Jail, Appellant told Roberts that Barrett saw him and could identify him. *See Sheppard*, 151 So.3d at 1162 ("And then he said whenever they – he shot the guy. He looked up when they were pulling away, and there was a lady looking right in his face.").

Appellant asks Roberts to kill Barrett

While at the Duval County Jail, Appellant asked Roberts to kill Barrett in exchange for money. *See Sheppard*, 151 So.3d at 1162:

> Roberts also testified that at the point where his own charges were about to be dropped, [Appellant] asked him for a favor. When Roberts asked what the favor was, [Appellant] said, "Man, you know, if she don't come and testify on me, they ain't got no case. You told me yourself… [y]ou said, man, if she don't come testify, they ain't got no case on me at all, other than what my codefendant told that other guy." Roberts said [Appellant] told him he would get all the information to Roberts through [Appellant's] sister and could pay him with his income tax return… Roberts testified, "He wanted me to kill her."

Appellant convicted

On January 12, 2012, the jury in Appellant's case returned a verdict. *See Sheppard*, 151 So.3d at 1162. For the killing of Stafford, Appellant was convicted of first-degree felony murder, "attempted robbery and additional firearms and theft offenses." *Sheppard* 151 So.3d at 1157; *see also id.*, n.1; *id*. at 1162-63 ("The jury also found [Appellant] guilty of the first-degree murder of Patrick Stafford in the commission of or attempt to commit armed robbery, and that [Appellant] actually possessed and discharged a firearm in the commission of the offense causing great bodily harm or death.").

For the theft of James' gray Ford Crown Victoria, the jury "convicted [Appellant] of 'grand theft auto' of Dorsette James' vehicle as charged, and found that [Appellant] actually possessed a firearm during the commission of the offense." *Sheppard*, 151 So.3d at 1163, n.5.

For the death of Wimberly, the jury "returned a verdict finding [Appellant] guilty of the first-degree murder of Monquell Wimberly as charged, and that [Appellant] actually possessed and discharged a firearm in the commission of the murder causing great bodily harm or death." *Sheppard*, 151 So.3d at 1162.

Appellant sentenced

For the murder of Stafford, Appellant received a life sentence. *See Sheppard*, 151 So.3d at 1157.

For the murder of Wimberly, Appellant received a death sentence. *See Sheppard*, 151 So.3d at 1164. The trial court found one aggravator – prior violent felony convictions – and assigned that aggravator great weight. *See id*. at 1175 ("That one aggravator, however, was based on the murder of Stafford just hours earlier, as well as [Appellant's] prior conviction as a juvenile of two violent felonies – a 2001 aggravated battery, and shooting or throwing a deadly missile, relating to the shooting of 15-year-old Christopher Wakefield when [Appellant] fired into a vehicle occupied by numerous teenagers.").

Direct Appeal

On direct appeal, Appellant raised the following, five issues:

1. Whether the trial court committed fundamental error when it admitted a video tape of Petitioner's interrogation;
2. Whether the trial court abused its discretion when it admitted codefendant Evans' out-of-court statement to Chaeva Powell;
3. Whether the trial court committed fundamental error when it admitted testimony from Dtalya Barrett regarding her fear of the shooter;
4. Whether the trial court committed fundamental error when it addressed allegations of juror misconduct; and,
5. Whether Petitioner's death sentence is proportionate.

Sheppard, 151 So.3d at 1165-1175.

On September 4, 2014, this Court affirmed the judgment and sentence. *Sheppard*, 151 So.3d at 1157.

INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL

Rule of Criminal Procedure

An individual under a sentence of death who seeks to challenge the effectiveness of appellate counsel should file a petition under Florida Rule of Appellate Procedure 9.142(b)(4). *See* Fla. R. App. P. 9.142(b)(4). Despite the Rule, appellate courts often refer to these pleadings as petitions for writ of habeas corpus. *See, e.g., Davis v. State*, 875 So.2d 359, 372 (Fla. 2003) ("Habeas petitions are the proper vehicle by which to raise ineffective assistance of appellate counsel claims…."); *see also* Philip J. Padovano, Habeas corpus, 2 Fla. Prac., Appellate Practice §30:6 (2019 ed.).

The petition should be filed in the court that decided the direct appeal; because this Court considers direct appeals in death penalty cases, it also hears corresponding petitions alleging ineffective assistance of appellate counsel. *See Davis*, 875 So.2d at 373 ("Because these claims are presented first to this Court in cases involving the imposition of a death sentence, we are called on to analyze the performance of appellate counsel in handling the defendant's direct appeal.").

***Strickland*[2] applies**

The standard for claims of ineffective assistance of appellate counsel mirrors

[2] *Strickland v. Washington*, 466 U.S. 668 (1984).

the *Strickland* standard for ineffective assistance of trial counsel: Petitioner must demonstrate deficient performance and resulting prejudice. *See Frances v. State*, 143 So.3d 340, 358 (Fla. 2014) ("[T]his Court's ability to grant habeas relief on the basis of appellate counsel's ineffectiveness is determined by the defendant's ability to meet both the deficiency and prejudice prongs of *Strickland*."); *see also Israel v. State*, 985 So.2d 510, 521 (Fla. 2008); *Rodriguez v. State*, 39 So.3d 275, 295 (Fla. 2010). The Petitioner enjoys the burden of meeting both prongs. *See Nixon v. State*, 932 So.2d 1009, 1023 (Fla. 2006) ("[A] defendant must demonstrate that appellate counsel's performance was deficient and that the defendant was prejudiced by the deficient performance.").

Specificity required

A petition alleging ineffective assistance of appellate counsel in a death penalty case "shall include detailed allegations of the *specific acts* that constitute the alleged ineffective assistance of counsel on direct appeal." Fla. R. App. P. 9.142(b)(4)(A) (emphasis added); *see also Knight v. State*, 394 So.2d 997, 1001 (Fla. 1981) ("[T]he specific omission or overt act upon which the claim of ineffective assistance of counsel is based must be detailed in the appropriate pleading."); *Freeman v. State*, 761 So.2d 1055, 1069 (Fla. 2000) ("The defendant has the burden of alleging a specific, serious omission or overt act upon which the claim of ineffective assistance of counsel can be based.").

Because the petition must include specific facts and detailed analysis, conclusory allegations are insufficient to support a claim. *See Wright v. State*, 857 So.2d 861, 876-77 (Fla. 2003), citing *Kennedy v. State*, 547 So.2d 912, 913 (Fla. 1989) ("Wright fails to make the appropriate showing for consideration of a claim of ineffective assistance of counsel under *Strickland*, and his conclusory allegations are insufficient to warrant relief."); *see also Conahan v. State*, 118 So.3d 718, 734 (Fla. 2013) ("A habeas petition must plead specific facts that entitle the defendant to relief. Conclusory allegations have repeatedly been held insufficient by this Court because they do not permit the court to examine the specific allegations against the record."); *Patton v. State*, 878 So.2d 368, 380 (Fla. 2004), quoting *Ragsdale v. State*, 720 So.2d 203, 207 (Fla. 1998) ("A summary or conclusory allegation is insufficient to allow the trial court to examine the specific allegations against the record."); *Bradley v. State*, 33 So.3d 664 (Fla. 2010).

Deficient Performance

A petitioner alleging ineffective assistance bears the burden of establishing that appellate counsel's performance fell below the level of professionally acceptable representation. *See Rodriguez*, 39 So.3d at 295 ("Rodriguez must first establish that his appellate counsel's performance was deficient because of errors that are of such magnitude and are so serious that they fall outside the range of professionally acceptable performance.").

To do that, a petitioner must overcome the strong presumption of effectiveness. *See Conahan*, 118 So.3d at 733 ("The reviewing court must presume that counsel's conduct was within the broad range of reasonable professional conduct, and the defendant bears the burden of overcoming this presumption.").

In order to be considered effective, appellate counsel need not present every conceivable claim — particularly if such a claim has a limited chance of success. *See Davis v. State*, 928 So.2d 1089, 1126 (Fla. 2005) ("[A]ppellate counsel is not required to present every conceivable claim."); *see also Spencer v. State*, 842 So.2d 52, 74 (Fla. 2003) ("[A]ppellate counsel will not be considered ineffective for failing to raise issues that have little or no chance of success.").

Hence, the failure of appellate counsel to raise a meritless issue does not constitute ineffective assistance. *See Breedlove v. Singletary*, 595 So.2d 8, 11 (Fla. 1992) ("[A]ppellate counsel is not ineffective for not raising nonmeritorious issues."); *see also Mansfield v. State*, 911 So.2d 1160, 1179 (Fla. 2005), quoting *Rutherford v. Moore*, 774 So.2d 637, 643 (Fla. 2000) (quoting *Williamson v. Dugger*, 651 So.2d 84, 86 (Fla. 1994)) ("Appellate counsel cannot be deemed ineffective for failing to raise a claim which 'would in all probability' have been without merit … on direct appeal.").

Similarly, the failure of appellate counsel to raise a procedurally barred

claim does not constitute ineffective assistance. *See Ruffin v. Wainwright*, 461 So.2d 109, 111 (Fla. 1984) ("Appellate counsel cannot be considered incompetent or ineffective for failing to raise issues which he was procedurally barred from raising because they were not properly presented at trial.").

Likewise, the failure to raise an unpreserved issue not amounting to fundamental[3] error does not constitute ineffective assistance. *See Valle v. Moore*, 837 So.2d 905, 907-08 (Fla. 2002) ("[A]ppellate counsel cannot be considered ineffective under this standard for failing to raise issues that were not properly raised during the trial court proceedings and do not present a question of fundamental error."); *see also Ruffin*, 461 So.2d at 111; *Davis*, 928 So.2d at 1127; *Patton*, 878 So.2d at 379, citing *Schwab v. State*, 814 So.2d 402, 414 (Fla. 2002); *Geralds v. State*, 111 So.3d 778, 805 (Fla. 2010).

Just because something qualifies as fundamental error now does not necessarily mean that it qualified as fundamental error at the time of the direct appeal; because the first prong of *Strickland* measures performance based upon the prevailing standards in effect at the time of representation, not every instance of fundamental error establishes ineffective assistance of appellate counsel. *See Strickland v. Washington*, 466 U.S. 668, 688 (1984) ("The proper measure of

[3] "We have defined fundamental error as being error that 'reach[es] down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error.'" *Kilgore v. State*, 688 So.2d 895, 898 (Fla. 1996), quoting *State v. Delva*, 575 So.2d 643, 644-45 (Fla. 1991) (quoting *Brown v. State*, 124 So.2d 481, 484 (Fla. 1960)).

attorney performance remains simply reasonableness *under prevailing professional norms*.") (emphasis added); *see, e.g., Johnson v. Moore*, 837 So.2d 343, 346 (Fla. 2002), citing *Downs v. State*, 740 So.2d 506, 518 (Fla. 1999) ("Appellate counsel cannot be considered ineffective for failing to challenge a jury instruction on the basis of decisions that had not yet been decided.").

Additionally, reviewing courts recognize that, in order to increase chances for success, appellate counsel must winnow down claims so that the arguments actually presented garner adequate attention. *See Thomas v. Wainwright*, 495 So.2d 172, 175 (Fla. 1986) ("Appellate counsel need not put forth every conceivable issue but must concentrate on those offering some chance of doing the client some good."); *see also* Philip J. Padovano, Organization, 2 Fla. Prac., Appellate Practice §16:16 (2019 ed.) ("Forcing the reader to spend time and energy working through the weak issues in a case detracts from the importance of the strong issues and ultimately diminishes the chance of success. It is much more effective to include only those issues that survive the process of careful research and evaluation.").

Even the failure to raise a claim that enjoys some level of merit may not satisfy *Strickland*'s deficient performance prong. *See Atkins v. Dugger*, 541 So.2d 1165, 1167 (Fla. 1989) ("Most successful appellate counsel agree that from a tactical standpoint it is more advantageous to raise only the strongest points on

appeal and that the assertion of every conceivable argument often has the effect of diluting the impact of the stronger points."); *see also Valle*, 837 So.2d at 908:

> In fact, appellate counsel is not necessarily ineffective for failing to raise a claim that might have had *some* possibility of success; effective appellate counsel need not raise *every conceivable* nonfrivolous issue. *See Jones v. Barnes*, 463 U.S. 745, 751-53 (1983) (appellate counsel not required to argue all nonfrivolous issues, even at request of client); *Provenzano v. Dugger*, 561 So.2d 541, 549 (Fla. 1990) (noting that "it is well established that counsel need not raise every nonfrivolous issue revealed by the record").

(Emphasis in original.)

Furthermore, if counsel raised a claim on direct appeal, then counsel cannot be considered ineffective simply because counsel failed to present better or additional arguments in support of that claim. *See Rutherford*, 774 So.2d at 645:

> When analyzing claims that appellate counsel was ineffective for failing to raise additional arguments in support of a claim raised on direct appeal, we have previously observed that
>
> > "petitioner's contention that [the point] was inadequately argued merely expresses dissatisfaction with the outcome of the argument in that it did not achieve a favorable result for petitioner." We therefore decline petitioner's invitation to utilize the writ of habeas as a vehicle for the re-argument of issues which have been raised and ruled on by this Court.
>
> *Routly v. Wainwright*, 502 So.2d 901, 903 (Fla. 1987) (quoting *Steinhorst v. Wainwright*, 477 So.2d 537, 540 (Fla. 1985)); *see also Grossman v. Dugger*, 708 So.2d 249, 252 (Fla. 1997) (finding claim that appellate counsel was ineffective for failing to make arguments "more convincingly" to be procedurally barred in a habeas petition). Under these precedents, if an issue was actually raised on direct appeal, the Court will not consider a claim that appellate counsel was ineffective for failing to raise additional arguments in support of the

claim on appeal.

See also Peterka v. State, 890 So.2d 219, 246 (Fla. 2004):

> Peterka admits that these issues were raised on direct appeal but asks the Court to reconsider them. In *Rutherford v. Moore*, 774 So.2d 637, 645 (Fla. 2000), we held that "if an issue was actually raised on direct appeal, the Court will not consider a claim that appellate counsel was ineffective for failing to raise additional arguments in support of the claim on appeal." Accordingly, we decline to address these issues.

Similarly, appellate counsel cannot be considered ineffective solely because the actual arguments presented in support of the claim failed to succeed. *See Thomas*, 495 So.2d at 174:

> Appellate counsel did argue that a sentence of life imprisonment was the appropriate sentence under the law in view of the jury's recommendation of such sentence. Petitioner's present argument appears merely to seek to relitigate the point and ascribes ineffectiveness to appellate counsel's efforts simply because they did not succeed.

Finally, the "law of the case" doctrine applies to claims alleging ineffective assistance of appellate counsel. *See Valle*, 837 So.2d at 908, quoting *Mills v. State*, 603 So.2d 482, 486 (Fla. 1992) ("[A] claim that has been resolved in a previous review of the case is barred as 'the law of the case.'").

Prejudice

A petitioner bears the burden of showing that appellate counsel's deficient performance resulted in actual prejudice. *See Rodriguez*, 39 So.3d at 295 ("Second, Rodriguez must establish that he was prejudiced because of the

deficiency."). Without that showing, there can be no ineffectiveness. *See, e.g., Farr v. State*, 124 So.3d 766, 785 (Fla. 2012) ("Farr has failed to establish ineffective assistance of appellate counsel because no prejudice has been demonstrated.").

Prejudice can be established only if the deficient performance significantly undermined confidence in the outcome of the proceedings. *See Knight*, 394 So.2d at 1001 ("[T]he defendant has the burden to show that this specific, serious deficiency, when considered under the circumstances of the individual case, was substantial enough to demonstrate a prejudice to the defendant to the extent that there is a likelihood that the deficient conduct affected the outcome of the court proceedings."); *see also Nixon*, 932 So.2d at 1023 ("Prejudice is demonstrated by showing that the appellate process was compromised to the degree that confidence in the correctness of the appellate result is undermined.").

Because detailed analysis is required in order to prevail, conclusory allegations are insufficient to establish prejudice. Hence, a Petitioner cannot simply argue that the result would have been different "had the evidence been presented" or "but for counsel's deficient performance." *See Jones v. State*, 998 So.2d 573, 584 (Fla. 2008):

> While we conclude that trial counsel's performance was deficient, Jones has failed to prove prejudice. He offers nothing more than the blanket assertion that "*[h]ad the evidence been presented, the result of the penalty proceedings would have been different*." A mere

> conclusory allegation that the outcome would have been different is insufficient to state a claim of prejudice under *Strickland*; the defendant must demonstrate how, if counsel had acted otherwise, a reasonable probability exists that the outcome would have been different—that is, a probability sufficient to undermine confidence in the outcome. *See Holland v. State*, 916 So.2d 750, 758 (Fla. 2005) (defendant's claim that "he was prejudiced because penalty phase counsel's deficiencies substantially impair confidence in the outcome of the proceedings is merely conclusory and must be rejected"); *Brown v. State*, 894 So.2d 137, 160 (Fla. 2004); *Armstrong v. State*, 862 So.2d 705, 712 (Fla. 2003) (finding that a mere conclusory allegation of prejudice was legally insufficient).

(Emphasis added.)

If the lack of any prejudice is obvious, then a reviewing court need not make any determination regarding deficient performance. *See Maxwell v. Wainwright*, 490 So.2d 927, 932 (Fla. 1986) ("A court considering a claim of ineffectiveness of counsel need not make a specific ruling on the performance component of the test when it is clear that the prejudice component is not satisfied.").

Not a second appeal or a collateral attack

A petition alleging ineffective assistance of appellate counsel cannot be used to "camouflage" issues that should have been raised on direct appeal or in post-conviction proceedings. *See Rutherford*, 774 So.2d at 643 ("[C]laims of ineffective assistance of appellate counsel may not be used to camouflage issues that should have been raised on direct appeal or in a postconviction motion.").

Likewise, petitions alleging ineffective assistance of appellate counsel should not be treated as a second appeal. *See Breedlove*, 595 So.2d at 10

("Allegations of counsel's ineffectiveness cannot circumvent the rule that habeas corpus proceedings are not a second appeal."); *see also Blanco v. Wainwright*, 507 So.2d 1377, 1384 (Fla. 1987).

Furthermore, petitions alleging ineffective assistance of appellate counsel cannot be used as a means of challenging the effectiveness of trial counsel. *See Nelson v. State*, 43 So.3d 20, 34 (Fla. 2010) ("Nelson's claim that trial counsel was ineffective is denied because ineffective assistance of trial counsel is not cognizable in habeas corpus."); *see also Griffin v. State*, 976 So.2d 107, 108 (Fla. 3d DCA 2008) ("Habeas corpus is ... the improper vehicle to address ... the performance of trial counsel.") (emphasis omitted).

As a general rule, appellate counsel should not be considered ineffective for failing to claim ineffective assistance of trial counsel on direct appeal. *See Suarez v. Dugger*, 527 So.2d 190, 193 (Fla. 1988):

> The next claim raised by Suarez is that he received ineffective assistance of appellate counsel due to the failure of appellate counsel to raise, on direct appeal, trial counsel's abandonment of the theory of not guilty by reason of insanity. The gravamen of this issue, in effect, is ineffective assistance of trial counsel. As this Court recently noted in *Blanco*[*v. Wainwright*, 507 So.2d 1377 (Fla. 1987)], ineffective assistance of trial counsel is generally not cognizable on direct appeal. Rather, a more proper and effective remedy is a claim of ineffective assistance of trial counsel pursuant to Rule 3.850.

Remedy

Finally, the remedy for a successful petition alleging ineffective assistance

of appellate counsel is a new direct appeal. *See Marrero v. State*, 967 So.2d 934, 936 (Fla. 2d DCA 2007), citing *Wilson v. Wainwright*, 474 So.2d 1162, 1163 (Fla. 1985) ("When a claim of ineffective assistance of appellate counsel is successful, the remedy is to award the petitioner a new appeal in order that the appellate court may determine the merits of an issue that should have been raised in the original direct appeal."). Awarding any other remedy runs the risk of ineffective assistance of appellate counsel claims devolving into second appeals.

PETITIONER'S CLAIMS

Ineffective assistance of appellate counsel – prosecutorial misconduct

Petitioner claims that appellate counsel provided ineffective assistance by failing to raise prosecutorial misconduct as an issue of fundamental error on direct appeal. Specifically, Petitioner argues that "[t]he prosecutor in [Petitioner's] trial committed prosecutorial misconduct in [the] guilt phase by deliberately misleading trial counsel on his intent to admit evidence about [Petitioner's] gang affiliation." Petition, p.9. According to Petitioner, the prosecutor "lulled the defense into a false sense of security" when he "told defense counsel he was no longer seeking to argue [Petitioner's] gang membership as an aggravating circumstance…" Petition, p.10. By using evidence of Petitioner's gang membership as a means of establishing motive, however, the prosecutor failed to "play fair." Petition, p.11.

Petitioner cannot demonstrate ineffective assistance of appellate counsel

because he relies on a novel legal argument, to wit: a prosecutor does not "play fair" if he informs the trial court and the defense that he will not pursue gang involvement as a statutory aggravator in a death case but then uses that involvement to establish a motive for the murder. *Cf. Sanchez-Torres v. State*, No. SC19-211, 2020 WL 1173750, at *6 (Fla. Mar. 12, 2020), quoting *Steinhorst v. Wainwright*, 477 So.2d 537, 540 (Fla. 1985) ("The flaw in Sanchez-Torres's argument is equally straightforward: 'The failure to present a novel legal argument not established as meritorious in the jurisdiction of the court to whom one is arguing is simply not ineffectiveness of legal counsel.'").

Petitioner relies on this Court's decision in *Pittman v. State*, 90 So.3d 794 (Fla. 2011) to support his novel argument that appellate counsel was deficient. In that case, the defendant argued that appellate counsel provided ineffective assistance by failing to raise improper comments by the prosecution as an issue on direct appeal. *See id.* at 819 ("The gist of this claim is that the prosecutor made improper comments to the jury during the penalty phase closing argument, and that appellate counsel was ineffective in failing to raise this issue on appeal."). However, this Court denied relief. *See id.* ("This claim, however, warrants no relief."). As to the prosecutor's comments that did not elicit an objection from defense counsel, this Court found no basis for a claim of fundamental error. *See id*. ("In the present case, trial counsel voiced no objection to most of the

prosecutor's comments underlying this claim. None of those comments rise to the level of fundamental error, and appellate counsel cannot be deemed ineffective for failing to raise them on appeal."). As to those comments that did elicit an objection, this Court found no basis for a claim of reversible error. *See id*. ("As to those comments to which counsel did object, to the extent that any of those comments were improper, none was of such a nature as to undermine confidence in the correctness of the result, and appellate counsel cannot be deemed ineffective for failing to raise those comments on appeal.").

Instead of *Pittman*, however, this Court's decision in *State v. Murray*, 262 So.3d 26 (Fla. 2018) provides a better analogy. *See Murray*, 262 So.3d at 46 (holding that appellate counsel was not deficient for failing to make a novel prosecutorial misconduct claim on direct appeal). In that case, the defendant alleged "that appellate counsel was ineffective for failing to raise a claim of prosecutorial misconduct based on inconsistencies in testimony of various witnesses on direct appeal." *Id*. This Court found the argument meritless and lacking in support. *See id*. ("Appellate counsel cannot be deemed ineffective for failing to raise a meritless issue. Murray has not cited one case involving prosecutorial misconduct based upon inconsistent testimony of witnesses on retrial.") (internal citation omitted). Accordingly, this Court denied relief. *Id*.

Just as in *Murray*, Petitioner argues that appellate counsel was deficient for

failing to make a novel claim of prosecutorial misconduct on direct appeal. And just as in *Murray*, this Court should deny relief.

Ineffective assistance of appellate counsel – *Roper v. Simmons*

Petitioner claims that appellate counsel provided ineffective assistance by "failing to raise a claim under *Roper v. Simmons*…" Petitioner, p.12. While acknowledging that he was "twenty-one years old at the time of the murder," Petitioner nonetheless argues that the Eighth Amendment prohibition on the execution of minors should apply to him due to his "brief and traumatic childhood." Petition, p.17. Additionally, Petitioner argues that "[t]he evolving standards of decency *today* counsel that extended adolescents – young people in their late teens and early twenties – also do not have the requisite culpability to be sentenced to death." Petition, p.14. For support, Petitioner cites to a 2016 law review article. *See* Petition, p.18, citing Scott, E., Bonnie, R., & Steinberg, L., *Young Adulthood as a Transitional Legal Authority: Science, Social Change, and Justice Policy*, 85 Fordham L. Rev. 641 (No. 2016).

Unacknowledged by Petitioner, however, a 2016 law review article does not enjoy any relevance as to the question of whether or not appellate counsel provided deficient performance in a direct appeal that was decided by this Court in 2014. *Cf. Downs v. State*, 740 So.2d 506, 518 (Fla. 1999) ("Appellate counsel cannot be considered ineffective for failing to challenge a jury instruction on the basis of

decisions that had not yet been decided.").

Furthermore, by arguing that our standards of decency have evolved to the point where Petitioner's death sentence is no longer constitutional, Petitioner relies on an extension of Eighth Amendment caselaw. Constrained by the Conformity Clause in the Florida Constitution, this Court can provide no such relief. *See Bowles v. State*, 276 So. 3d 791, 796 (Fla. 2019), quoting *Correll v. State*, 184 So. 3d 478, 489 (Fla. 2015):

> In his habeas petition, Bowles claims that, given national trends in the death penalty, his execution would constitute cruel and unusual punishment. However, as we have explained, "this Court is bound by the conformity clause of the Florida Constitution to construe the state prohibition against cruel and unusual punishment consistently with pronouncements by the United States Supreme Court."

CONCLUSION

Based on the foregoing arguments and authorities, Respondent, the State of Florida, respectfully requests that this Court deny the petition.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Response has been furnished via the eportal to counsel of record, this 1st day of July, 2020.

ASHLEY MOODY
ATTORNEY GENERAL

/s/ *Michael T. Kennett*
MICHAEL T. KENNETT
ASSISTANT ATTORNEY GENERAL
Florida Bar No.: 177008
PL-01, The Capitol
Tallahassee, FL 32399-1050
Michael.kennett@myfloridalegal.com
capapp@myfloridalegal.com
Phone: (850) 414-3595
Attorney for Respondent

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 14-point Times New Roman, in compliance with Rule 9.210(a)(2), Florida Rules of Appellate Procedure.

/s/ *Michael T. Kennett*
MICHAEL T. KENNETT
COUNSEL FOR RESPONDENT