IN THE SUPREME COURT OF FLORIDA

JOEL DALE WRIGHT,
Appellant,

v. **CASE NO. SC01-2866**

STATE OF FLORIDA,
Appellee.
_____/

ON APPEAL FROM THE SEVENTH JUDICIAL CIRCUIT
IN AND FOR PUTNAM COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

This Honorable Court summarized the facts of the crimes on direct appeal as follows:

> The facts reflect that the body of a 75-year-old woman was found in the bedroom of her home on February 6, 1983. The victim was discovered by her brother, who testified that he became concerned when she failed to respond to his knock on the door. Finding all the doors to her home locked, he entered through an open window at the rear of the house and subsequently found her body. Medical testimony established that the victim died between the evening of February 5 and the morning of February 6 as a result of multiple stab wounds to the neck and face, and that a vaginal laceration could have contributed to the victim's death.
>
> The state's primary witness, Charles Westberry, testified that shortly after daylight on the morning of February 6, appellant came to Westberry's trailer and confessed to him that he had killed the victim; that appellant told him he entered the victim's house through a back window to take money from her purse and, as appellant wiped his fingerprints off the purse, he saw the victim in the hallway and cut her throat; and that appellant stated he killed the victim because she recognized him and he did not want to go back to prison. Westberry further stated that appellant counted out approximately $290 he said he had taken from the victim's home and that appellant asked Westberry to tell the police
> that appellant had spent the night of February 5 at Westberry's trailer. When Westberry related appellant's confession to his wife several weeks later, she notified the police. The record also reflects that a sheriff's department fingerprint analyst identified a fingerprint taken from a portable stove located in the victim's bedroom as belonging to appellant, and that, over appellant's objection, the court instructed the jury on the Williams rule and permitted Paul House to testify for the state that approximately one month before the murder, he and appellant had entered the victim's home through the

same window that was found open by the victim's brother, and had stolen money.

In his defense, appellant denied involvement in the murder and introduced testimony that, between 5:00 and 6:00 p.m. on February 5, a friend had dropped him off at his parents' home, which neighbored the victim's, and that he left at 8:00 p.m. to attend a party at his employer's house. Testifying in his own behalf, appellant stated that he returned to his parents' home, where he resided, at approximately 1:00 a.m. on February 6, but was unable to get into the house because his parents had locked him out. Appellant testified that he then walked by way of Highway 19 to Westberry's trailer, where he spent the night. Appellant also presented a witness who testified that, late in the night of February 5 and early in the morning of February 6, he had seen a group of three men whom he did not recognize in the general vicinity of the victim's home.

After the close of the evidence but prior to final arguments, appellant proffered the newly discovered testimony of Kathy Waters, who had listened to portions of the trial testimony, followed newspaper accounts of the trial, and discussed testimony with various persons attending the trial. Her proffered testimony revealed that, shortly after midnight on February 6, she had observed a person, who may have been similar in appearance to appellant, walking along Highway 19, and had also seen three persons, whom she did not recognize, congregated in the general vicinity of the victim's house. The trial court denied appellant's motion to re-open the case, noting that the rule of sequestration is rendered "meaningless" when a witness is permitted "to testify in support of one side or the other, almost as if that testimony were tailor-made," after the witness has conferred with numerous people concerning the case. The jury found appellant guilty as charged.

Appellant, in the penalty phase, presented the testimony of members of his family relating to his character and upbringing, as well as a nine-year-old psychological report which indicated that at that time appellant was depressed, emotionally immature, and had

> difficulty controlling his impulses. By a nine-to-three vote, the jury recommended that appellant receive the death sentence.

Wright v. State, 473 So. 2d 1277, 1278-80 (Fla. 1985).

Wright filed his Florida Rules of Criminal Procedure 3.850 motion for post-conviction relief on February 22, 1988. The briefs have been filed. In his appeal, Wright raised six claims. The oral argument was held on February 5, 2002.

CLAIM I

PETITIONER WAS NOT DENIED ANY CONSTITUTIONAL RIGHTS AS A RESULT OF THE BRIEFING OF THE STATE ON DIRECT APPEAL.

Direct Appeal Confrontation Claim

In his first claim on direct appeal, Wright complained that the trial court improperly limited his right to confront witnesses. Herein, he complains about representations the State made in its answer brief in regard to cross examination of two witnesses, Charles Westberry and Officer Perkins. He claims that misrepresentations of the record were made to this Court, and those misrepresentations "denigrated" his direct appeal. (Petition at 8).

The State contends that these claims are wholly inappropriate. They are blatant attempts to reargue the underlying substantive issues which Wright admits were presented by his counsel on appeal. Moreover, same are procedurally

barred because they are “an improper relitigation of an issue upon which this Court has already ruled.” *Foster v. State*, No. SC01-240, slip op. at 12 (Fla. Feb. 14, 2002).

1. Charles Westberry:

On direct appeal, Wright raised a claim regarding a limitation on confrontation rights in regard to State witness, Charles Westberry. (Petition at 8). He claims that at trial, he “sought to establish that Westberry and Appellant had routinely stolen metals to sell for huge profit . . . to show a motive existed for Westberry to try to eliminate Appellant whereby Westberry would be the sole participant in the lucrative enterprise . . ..” (Petition at 9). Wright adds that another component of this point on appeal was to use that information “to demonstrate that Westberry’s testimony was influenced by the hope that his illegal activity . . . would not result in charges being filed if Westberry testified favorable (sic) to the State.” *Id*.

In his habeas petition, Wright complains that “[o]n appeal, the State did not disclose to this Court that Judge Perry’s ruling precluded the jury from knowing of the prison term Westberry was afraid that he faced but for the good graces of Mr. Dunning” [the trial prosecutor]. (Petition at 13). He adds that that information “would have revealed to this Court that

Westberry had good reason to curry favor with Mr. Dunning . . ..” *Id*. He claims that had this “limited grant of immunity” been disclosed “to this Court, a new trial would have been ordered . . ..” *Id*. at 13-14.

The record shows that on cross examination of Mr. Westberry, Mr. Pearl asked: “And did not that business consist of you and Jody obtaining, by theft -- . . . -- surplus --. (Appendix A, at 32). Upon objection by the State, the jury was removed and Defense Counsel continued to inquire in detail on proffer. The proffer, argument thereon, and ruling of the court is contained at record pages 2184-97 of the direct appeal.

Defense Counsel argued that the information contained in the proffer was admissible to show Mr. Westberry may have testified as he did against Wright because he had “an idea . . . that by getting . . . Wright out of the way he would no longer have to share the proceeds . . ..” (Appendix A, at 33). He did **not** argue, or suggest, that he wanted the evidence to show that Mr. Westberry was afraid of being prosecuted for the scrap metal thefts and wanted to curry favor with the prosecutor to avoid that. Certainly, he asked not even a single question in that vein when questioning Mr. Westberry on proffer.

To claim, as Wright does herein, that the State violated his constitutional rights when in its brief, responding to the

issues Wright raised on direct appeal, it did not advise this Court that the trial judge had ruled against Wright on the proffer on an issue not raised by the party with the burden of proving error is absurd. Wright's complaint appears to be that the State did not present and argue his appeal for him.

Moreover, his specific complaint against the State is that it did not tell this Court that the judge had ruled the theft evidence inadmissible thereby "preclud[ing] the jury from knowing of the prison term Westberry was afraid that he faced . . .." (Petition at 13). There is nothing in the record which indicates that Westberry was afraid of any such thing. Such a representation would have been wholly unsupported by the evidence, at trial, or on proffer.

Further, Wright claims that the value of the revelation would have been to let this Court know "that Westberry had good reason to curry favor with Mr. Dunning . . .." (Petition at 13). Clearly, this Court already knew that, as it knew of the deal for immunity in connection with the murder. Moreover, Wright's claim that had the State told this Court of the unestablished possibility that Mr. Westberry was afraid he might go to prison for the scrap metal thefts if he did not testify against Wright that relevation would have required this Court to grant a new trial is wholly without merit. The little additional value of

this alleged impeachment evidence would not have affected the outcome of the appeal.

Wright has not carried his burden to establish habeas relief. The State's brief on direct appeal did not deprive Wright of a full and fair appeal. He is entitled to no relief.

2. Officer Perkins:

A. Gillman Complaint

Wright complains that in its answer brief on direct appeal, "[t]he State kept this Court in the dark regarding Deputy Perkins" on the issue of Wright's claim that he "had been deprived of his right to confront Deputy Perkins before the jury . . .." (Petition at 16). His support for this assertion is that "[i]n 1980" a woman, Ms. Gillman, had complained to some unspecified person "that Deputy Perkins' report regarding his response to her call for help was not truthful . . .." (Petition at 16). He adds a further claim about some information the Sheriff's Office had about this officer in 1986 - well after the direct appeal was final.

The claim about the false report is legally insufficient. Not only does it fail to identify who was told of the woman's complaint, and why the Assistant Attorney General should have known about this fact not on the direct appeal record, it specifies no prejudice. Indeed, he does not even make a claim

that had this Court been told of this woman's report, it would have changed the outcome on direct appeal. Clearly, it would not have.

Moreover, this claim was raised in the Rule 3.850 motion pending before this Court. *See* Case No. SC00-1389, Point I. Thus, it is procedurally barred in this petition, as it is an attempt to use this habeas petition as a second appeal on an issue previously raised in a Rule 3.850 motion. *See Gilliam v. State*, Case No. SC00-1438, slip op. at 28 n.20 (Fla. Feb. 7, 2002); *Rutherford v. Moore*, 774 So. 2d 637, 643 (Fla. 2000); *Parker v. Dugger*, 550 So. 2d 459, 460 (Fla. 1989).

Finally, the claim about the 1986 firing and information cannot support relief of any kind herein because the Assistant Attorney General could not have known of this information at the time of the direct appeal since it had not yet happened. Wright's claim is frivolous.

He is entitled to no relief.

B. Suppression Motion

In his initial brief, appellate counsel complained about the denial of Wright's motion to suppress statements he made to law enforcement. In the instant petition, he complains that the State improperly contended that the issue was not preserved for

appeal. (Petition at 18). Later in his petition, he contends that appellate counsel was ineffective for not arguing in his reply brief that it was preserved for review. *See*, Claim II, *infra*, at 36-37. He claims by inference that had the State not improperly argued procedural bar and/or had his appellate counsel argued against the bar in the reply brief, this Court would have granted him some unspecified relief because the error in admitting Officer Perkin's testimony of Wright's statements was "not harmless error." (Petition at 22). Wright's claim is entirely without merit.

Appellate Counsel represented in the initial brief on direct appeal that the matter had been the subject of a suppression motion and that the testimony at trial was permitted "over objection." (Appendix B, at 3, 4). Moreover, in his Statement of the Case, appellate counsel went into detail about the suppression hearing and the basis for the claim that the statement to Officer Perkins should not be admitted. (Appendix B, at 2). Thus, this Court was apprised that the defense felt it had properly preserved the claim for appellate review.[1] That

[1] To claim as Mr. McClain does, that having been apprised by one party that there was an objection to the evidence, and having been told by the other that the objection came too late to preserve the claim, this Honorable Court would simply accept the claim of one over the other without checking the record and deciding for itself is outrageous!

current counsel thinks he could have done a better job arguing such a claim does not render appellate counsel's presentation ineffective. *See Card v. Dugger*, 911 F.2d 1494, 1507 (11th Cir. 1990)[although current counsel would have performed differently, "this is not the test for ineffective assistance."]. *Cf. Johnson v. Cabana*, 818 F.2d 333, 340 (5th Cir.), *cert. denied*, 481 U.S. 1061 (1987)["Doubtless a fifth set of counsel could comb this record, suggest still more issues . . . and point the finger of incompetency at today's new lawyers."].

Moreover, this claim is procedurally barred because the underlying substantive issue - admission of Officer Perkins' testimony at trial - was raised on direct appeal and rejected by this Court. *See Teffeteller v. Dugger*, 734 So. 2d 1009, 1025 (Fla. 1999). State "'habeas corpus petitions are not to be used for additional appeals . . ..'" *Id.*(*quoting Parker v. Dugger*, 550 So. 2d 459, 460 (Fla. 1989)).

Finally, this claim lacks merit. Wright's claim for preservation in his petition is that Mr. Pearl made a very late objection to the testimony. After the lunch recess - well after the witness testified - he admitted to having "failed to make a

motion" he had "intended to make."[2] (Petition at 19). The court let him make his motion which included a motion to strike Officer Perkins' testimony of Wright's statements, and a motion for mistrial based upon the claim that the statements Officer Perkins testified to were "an election to remain silent." *Id*. These motions came much too late to preserve the issue under the law at the time of the trial.

"[P]ursuant to prior case law, a defendant is required to renew a pretrial motion to suppress at the time the evidence is introduced in order to preserve the issue for appellate review. . . . This principle is in recognition of the possibility that the trial court might change its prior ruling based on the testimony and evidence introduced at trial." (citations omitted) *State v. Gaines*, 770 So. 2d 1221, 1230 n.7 (Fla. 2000). In *Terry v. State*, 668 So. 2d 954 (Fla. 1996), this Court considered Terry's claim that blood taken from him should not have been admitted into evidence at trial. This Court found the claim procedurally barred for lack of preservation.

> To preserve an issue about evidence for appellate review, an approrpriate objection must be made at trial

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[2] The very late objection occurs some sixty four record pages after the subject testimony of Officer Perkins - after two other witnesses had followed him to the stand.

> when the evidence is offered. . . .. 'The preliminary interposition of [a motion to suppress] prior to the trial, and an exception to an adverse ruling thereon, is not tantamount to a proper and seasonable objection to the questioned evidence at the trial upon the issue.'

668 So. 2d at 959. The admission of the blood was accomplished "without objection by the defense," and it was not preserved for review. *Id*.

That is the same situation as in Wright. Thus, the issue raised on direct appeal was **not** preserved for appellate review. The State's argument in its brief was entirely proper and solidly based on the law at the time of the trial. *Gaines; Terry*.

Wright is entitled to no relief.

CLAIM II

APPELLATE COUNSEL DID NOT RENDER INEFFECTIVE ASSISTANCE TO WRIGHT BY FAILING TO RAISE ON APPEAL THE NUMEROUS ISSUES ABOUT WHICH WRIGHT HEREIN COMPLAINS.

Wright complains that his appellate counsel rendered deficient performance which prejudiced him when he failed to raise on direct appeal claims regarding improper prosecutorial argument, "[t]he glass jar," the time the victim died, that the murderer may have been right handed, latent prints, foreign hairs, absence from discussion of a jury request for the

readback of testimony, State's questioning regarding hair comparisons, Wright's absence from "the initial inquiry of juror's (sic) regarding their qualifications," and the judge's statement regarding the sentencing decision. (Petition at 22-47). He also complains that appellate counsel did not "contest in his reply brief the State's assertion that Mr. Wright had not objected to Deputy Perkins' testimony at trial." (Petition at 42). The State contends that Wright has failed to meet either prong of the ineffective assistance of appellate counsel standard.

The standard of review of ineffective assistance of appellate counsel under *Strickland v. Washington* is *de novo* review. *Stephens v. State*, 748 So. 2d 1028 (Fla. 1999). To prevail on such a claim in relation to appellate counsel, Wright must show that his attorney's performance was professionally deficient and that he was prejudiced thereby. *Strickland v. Washington*, 466 U.S. 668 (1984); *Johnson v. Dugger*, 523 So. 2d 161 (Fla. 1988). When considering a habeas petition alleging ineffective assistance of appellate counsel, this Court's review is limited to

> first, whether the alleged omissions are of such magnitude as to constitute a serious error or substantial deficiency falling measurably outside the range of professionally acceptable performance and,

> second, whether the deficiency in performance compromised the appellate process to such a degree as to undermine confidence in the correctness of the result.

Suarez v. Dugger, 527 So. 2d 190, 192-93 (Fla. 1988)(*quoting Pope v. Wainwright*, 496 So. 2d 798, 800 (Fla. 1986)). *See Strickland v. Washington*; *Johnson v. Dugger*. The deficiency must be such that had it not occurred, the result of the proceeding would have been different. *Suarez*, 527 So. 2d at 193.

"[A]ppellate counsel will not be deemed ineffective for failing to raise issues not preserved for appeal." *Robinson v. Moore*, 773 So. 2d 1, 3 (Fla. 2000). The only exception is claims so eggregious they amount to fundamental error. *Id*. Wright has not claimed that the prosecutor's closing argument constituted fundamental error (and it did not). Moreover, he has not established that his appellate counsel's decision not to raise such a claim is outside the bounds of professionally acceptable performance, and therefore, cannot prevail. *See Teffeteller v. Dugger*, 734 So. 2d 1009, 1027 (Fla. 1999).

"One of appellate counsel's responsibilities is to 'winnow out' weaker arguments on appeal and to focus upon those most likely to prevail. *Smith v. Murray*, 477 U.S. 527 . . . (1986)." *Provenzano v. Dugger*, 561 So. 2d 541, 549 (Fla. 1990). "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. *Atkins v. Dugger*, 541 So. 2d 1165, 1167 (Fla. 1989). Even where a claim is "preserved for appellate review, it is well established that counsel need not raise every nonfrivolous issue revealed by the record. *See Jones v. Barnes*, 463 U.S. 745 . . . (1983)." *Atkins*, 541 So. 2d at 1167. Moreover, the failure of appellate counsel to brief a meritless issue, or even one with little merit, is not deficient performance. *Suarez*, 527 So. 2d at 193. For example, where the State elicited improper opinion testimony, and trial counsel objected each time, thereby preserving the claims for appeal, appellate counsel was not ineffective because he does not have to raise every possible argument to be effective. *Floyd v. State*, 27 Fla. L. Weekly S75, S77 (Fla. January 17, 2002). Thus, it is clear that appellate counsel cannot be criticized for failing to raise weak issues. *Id.*; *Atkins*, 541 So. 2d at 1167. Neither will appellate counsel be deemed ineffective for failing to raise a point, which even if correct, would amount to no more than harmless error. *Freeman v. State*, 761 So. 2d 1055, 1069 (Fla. 2000); *Thompson v. State*, 759 So. 2d 650, 664 (Fla.

2000); *Duest v. Dugger*, 555 So. 2d 849 (Fla. 1990); *Knight v. State*, 394 So. 2d 997 (Fla. 1981).

Claims of ineffective appellate counsel may not be used to raise issues which could have been, or were, raised on direct appeal or in a Rule 3.850 postconviction motion. *Freeman*, 761 So. at 1069; *Parker v. Dugger*, 550 So. 2d 459, 460 (Fla. 1989). It is the defendant's burden to allege a specific, serious omission or overt act which rises to the magnitude of a serious error or substantial deficiency well outside that of professional norms. *Freeman*, 761 So. 2d at 1069. If the defendant meets that burden, he must still demonstrate that the performance deficiency was of such a nature as to undermine confidence in the correctness of the result reached in the case. *Id.* Thus, issues having no merit, or harmless errors, cannot be the basis for a successful claim of ineffective assistance of appellate counsel. *Id.* Appellate counsel is not ineffective where he does not raise issues that are procedurally barred because they were not properly raised during the trial court proceedings and do not constitute fundamental error. *Downs v. Moore*, 801 So. 2d 906, 909-10 (Fla. 2001); *Rutherford v. Moore*, 774 So. 2d 637, 646 (Fla. 2000); *Freeman*, 761 So. 2d at 1069.

Moreover, many of the claims presented in this habeas petition are procedurally barred because they (or a variant thereof) were raised in the Rule 3.850 motion pending before this Court. See Case No. SC00-1389. It has long been the law that habeas petition "are not to be used for additional appeals on questions which . . . were raised . . . in a rule 3.850 motion . . .." *Parker*, 550 So. 2d at 460. *See Freeman*, 761 So. 2d at 1069. More recently, this Court made it clear that it will not countenance an attempt "to use this habeas petition as a substitute or additional appeal of his postconviction motion. *See Rutherford v. Moore*, 774 So. 2d 637, 643 (Fla. 2000)("[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.")." *Gilliam v. State*, Case No. SC00-1438, slip op. at 28 n.20 (Fla. Feb. 7, 2002). Many of Wright's claims raised herein are thinly veiled attempts to have another direct appeal which is impermissible. *Gilliam*; *Freeman*, 761 So. 2d at 1070.

I. Prosecutorial Argument to Jury.

In this petition, Wright complains that the prosecutor made improper comments to the jury during his closing argument in regard to a jar of coins, the ME's testimony regarding the time of the victim's death, whether the murderer was left handed or

right handed, a reference to the latent prints evidence, and head hair analysis. (Petition at 26-37). Trial counsel did not object to any of these improper comments or argument by the prosecutor." (Appendix A, at 46). Wright's claim should be denied on this basis alone. *See Robinson*, 773 So. 2d at 3.

This Court has long held that "allegedly improper prosecutorial remarks cannot be raised on appeal unless a contemporaneous objection is lodged." *Rogers v. State*, 783 So. 2d 980, 1002 (Fla. 2001). An exception exists "where the prosecutor's erroneous comments constitute fundamental error, which has been defined as . . . error that 'reaches 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.'" *Id*. However, Wright has not alleged that the subject comments rose to the level of fundamental error, and the State contends that they do not. *See Sims v. State*, 681 So. 2d 1112, 1116-17 (Fla. 1996)[Although "the prosecutor called him [Sims] a liar, accused defense counsel of misleading the jury, and bolstered his attacks on Sims' credibility by expressing his personal views and knowledge of extra-record matters," the claim was denied "[b]ecause defense counsel failed to object contemporaneously to any of the comments at issue . . .."]. Thus, the instant claim was not preserved for appellate review,

and appellate counsel's performance was not deficient. *Downs*; *Rutherford*; *Freeman*.

Moreover, three of these claims are also procedurally barred because they were raised in the pending Rule 3.850 motion. (Appendix C, at 2-4, 6-8). *See* Case No. SC00-1389. Wright is merely attempting to use this habeas petition as a second appeal on an issue previously raised in a Rule 3.850 motion. He is not permitted to do that. *See Gilliam v. State*, Case No. SC00-1438, slip op. at 28 n.20 (Fla. Feb. 7, 2002); *Rutherford*, 774 So. 2d at 643; *Parker*, 550 So. 2d at 460 (Fla. 1989).

Moreover, the law is clear that "attorneys are granted wide latitude in closing argument." *Ford v. State*, 802 So. 2d, 1121, 1132 (Fla. 2001). *See Thomas v. State*, 748 So. 2d 970, 984 (Fla. 1999). "Logical inferences may be drawn, and counsel is allowed to advance all legitimate arguments." *Thomas*, 748 So. 2d at 984. Control of comments made to a jury is a matter within the trial court's discretion. *Ford*, 802 So. 2d at 1132.

A. The Glass Money Jar.

The evidence at trial was that Wright told Mr. Westbury that on the night he robbed and killed Ms. Smith, he took folding money and a jar of coins from her home. Another witness testified that she obtained possession of a glass jar of money

from Wright after Ms. Smith's death. Alledgely, Trial Defense Counsel Pearl located a witness who would have testified that the glass jar Wright possessed matched a set owned by someone in Wright's family. However, this person did not testify at trial.

Apparently, aware of the existence of this witness who did not testify, Mr. Dunning decided not to argue to the jury that the jar of money the witness received from Wright was the same one he told Mr. Westbury he had taken from Ms. Smith when he killed her. In fact, Mr. Dunning began to comment on the evidence adduced at trial by stating that "[t]he State's the first to admit that the jar can either be attached to the residence of Lima Paige Smith or it can be unattached . . .." (Appendix A, at 46). Certainly, the evidence well supports that statement. Indeed, the evidence supports the inference that the glass money jar was that taken from Ms. Smith; however, in making sure he did not violate any ethical rules, the prosecutor argued that it might or might not be the same jar. Indeed, even had a witness testified that the jar matched others in the Wright family, that would not have precluded a finding by the jury that this particular jar was taken from Ms. Smith's house at the time she was killed.[3] That is all Mr. Dunning argued;

[3] There has been no allegation that the jar was part of a one-of-a-kind set; neither was there any evidence that Ms. Smith

in fact, he went out of his way to point out that Wright might have gotten the jar "from somewhere else. I don't know." (Appendix A, at 46). Thus, the argument was a proper comment on the evidence adduced at trial.

In context, it is clear that the "prosecutor is merely submitting to the jury a conclusion that he is arguing can be drawn from the evidence." *Craig v. State*, 510 So. 2d 857, 865 (Fla. 1987), *cert. denied*, 484 U. S. 1020 (1988). Such does not invade the province of the jury, but leaves it free "to decide what evidence and testimony was worthy of belief . . .." *Id.* The prosecutor is permitted to submit "his view of the evidence to them for consideration." *Id.*

There was no deception and no misleading argument. Therefore, the claim is without merit. The failure of appellate counsel to brief an issue with a little merit, much less a meritless one, is not deficient performance. *Downs*, 801 So. 2d at 909-10; *Parker v. Dugger,* 537 So. 2d 969, 971 (Fla. 1989); *Suarez*, 527 So. 2d at 193. Appellate Counsel simply does not have to raise every possible argument to be effective. *Floyd v.*

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did not come into possession of a jar that belonged to Wright. The important thing was that Wright suddenly had possession of a jar that matched the one he told Mr. Westbury he took from Ms. Smith's house (with her money inside) when he murdered her.

State, 27 Fla. L. Weekly at S77. Wright has not carried his burden to prove deficient performance, and thus his claim fails under *Strickland/Suarez*.

B. The ME's Testimony re Time of Death.

Wright next complains that the prosecutor "intentionally misrepresented Dr. Latimer's testimony in his closing argument and deliberately sought to deceive the jury."[4] (Petition at 30). The evidence at trial established that based on the contents of Ms. Smith's stomach (or lack thereof) and her state of dress (not wearing clothes he recognized as sleep wear), he had concluded she was "maybe . . . killed the night before we found her, before she had had a chance to go to bed, and maybe even as early as before she had eaten her dinner." (Petition at 28).

During closing, Mr. Dunning commented on this evidence that if Ms. Smith did not "follow those type of norms," referring to the time for dinner and sleep (and some evidence indicated that she did not), then the time of death "based upon the condition of her body, would have been . . ." within the time the State

[4] Mr. McClain accuses Mr. Dunning of misrepresenting the evidence as to the time of death because he knew "Wright's whereabouts were accounted for until approximately 1:00 a.m." (Petition at 30).

argued Wright had killed her.[5] (Appendix A, at 36-37). Thus, the State's argument was a reasonable inference from the evidence, and therefore, a fair comment on it. *See Robinson v. Moore*, 773 So. 2d 1, 6 (Fla. 2000)["prosecutor's remarks as to what the victims said did not materially depart from what the witness actually testified to or were proper inferences from the witness's testimony."]. The State is entitled to present its view of the evidence, including reasonable inferences therefrom, to the jury at argument. Craig, 510 So. 2d at 865 (Fla. 1987)[prosecutor may submit his view of the evidence, including reasonable inferences, to the jury for consideration]. Thus,

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[5] Later, the prosecutor argued the evidence showed that Ms. Smith "didn't know how to cook," and "the only appliance for cooking purposes that worked . . . was a hot plate, that she was not apt to eat a very large meal and that that might affect the doctor's determination . . . ." (Appendix A, at 42, 43). Moreover, he pointed out that the evidence showed that "nightgowns" were found "several feet" under the "trash" strewn around the house, implying "a strong possibility that she didn't wear nightgowns . . . to bed . . .." (Appendix A, at 43). In his closing, Defense Counsel agreed that the place was "full of trash, three feet high, in every room . . .." (Appendix A, at 47). Defense Counsel also admitted that Dr. Latimer had, contrary to Mr. McClain's representations in the petition, testified "at first that his opinion as to the time of her death was between twelve and twenty-four hours prior to the time that Dr. Latimer performed his autopsy . . . which would put the time of death, as he first testified to, at approximately 9:00 in the evening on Saturday and 9:00 in the morning on Sunday." *Compare* Appendix A, at 53 *with* Petition at 29 n.15. Moreover, Trial Counsel Pearl conceded "[t]here's no issue about when she died." (Appendix A, at 54).

Wright has failed to carry his burden to show that the comment was improper.

C. Right or Left Handed Assailant.

Wright next complains that the prosecutor "intentionally misrepresented Dr. Latimer's testimony and deceived the jury" when arguing his view of the evidence from Dr. Latimer in regard to whether the murderer was right or left handed. (Petition at 30-32). Dr. Latimer testified that he was "reasonably," but not absolutely, "certain" that Ms. Smith was stabbed by "a person in front" of her. (Appendix A, at 3-4). If that was so, then he felt reasonably certain that she was stabbed by a person wielding the knife in his right hand. *Id*.

The prosecutor told the jury of "yet another issue" to be considered: "Was the assailant left-handed or was the assailant right-handed." (Appendix A, at 37). He then pointed out that Wright had been writing left-handed throughout the trial, and the jury had heard his relatives testify that he was left-handed. (Appendix A, at 38). He also pointed out that other testimony had established that Wright was "perfectly capable of using either his left or his right hand." *Id*. He then reminded them "how the doctor was able to arrive at [his] conclusion" which was based on where the assailant was standing (in front or behind Ms. Smith) and the angle of the stab wounds.

Id.

It appears that in going over this evidence, the prosecutor misspoke when relating what hand the doctor thought the murderer used if he was standing in front of Ms. Smith when he stabbed her. However, from the context of the statements preceeding and the one immediately following the misstatement, it is clear that he intended to present differing senarios to the jury, and there is no reason to believe that the jury did not recall the doctor's testimony and interpret the argument as the prosecutor obviously intended - a statement that if Ms. Smith was stabbed from the front, the doctor thought the assailant probably used his right hand, but if she was stabbed from the rear, the assailant probably used his left hand. Allegedly improper comments must be viewed in context. *Muhammad*, 782 So. 2d at 360. *See Card v. State*, 803 So. 2d 613, 622 (Fla. 2001)["We do not examine allegedly improper comments in isolation."].

There is absolutely no evidence that the prosecutor intentionally misrepresented anything - even prosecutors ocassionally misspeak.[6] Had trial counsel thought the point was

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[6] Moreover, later in his argument, the prosecutor made it clear that the State's view of the evidence is that the victim was stabbed from behind, and that is why there were no defensive wounds to her arms. (Appendix A, at 45). Clearly, the State was never trying to convince the jury that the doctor had testified that someone stabbing her from the front did so

worth making, he certainly could have interposed an objection. Since he did not, appellate counsel appropriately discharged his duty to winnow out the weaker claims when he did not include this one in his appellate arguments! *See Downs*, 801 So. 2d at 910; *Provenzano*, 561 So. 2d at 549; *Atkins v. Dugger*, 541 So. 2d 1165, 1167 (Fla. 1989).

Finally, any error in this regard was clearly harmless. In his argument, Defense Counsel framed "Mr. Dunning's contest" as being "whether Miss Lima was attacked from the front or the back and whether . . . by a right-handed man or a left-handed man." (Appendix A, at 48). Then, he goes into Dr. Latimer's testimony in detail. *Id*. at 48-49. He made it clear that Dr. Latimer's opinion was that it was "an attack from the front by a right-handed man," *Id*. at 49, 52, and certainly, the jury heard the testimony and the prosecutor's admonishments to use their recollection of the testimony over any argument he might make. Thus, any error was harmless, and does not meet Wright's burden herein. *Duest v. Dugger*, 555 So. 2d 849, 853 (Fla. 1990).

Moreover, on rebuttal closing argument, Mr. Dunning made it absolutely clear that although Dr. Latimer had indicated he

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left-handed - which is what the prosecutor said when he misspoke.

believed that the attack was a "frontal attack," it might not have been that. (Appendix A, at 57). He also pointed out that there was no testimony that the dominant hand was used to stab Ms. Smith. *Id*. Thus, even if Ms. Smith was stabbed from the front by a person wielding the knife in his right hand, that did not exclude Wright as the murderer. *Id*. The State is entitled to present its view of the evidence, including reasonable inferences therefrom, to the jury at argument. *Craig*, 510 So. 2d at 865.

Appellate counsel does not render deficient performance when he fails to brief an issue with a little merit, much less no, merit. *Downs*, 801 So. 2d at 909-10; *Parker*, 537 So. 2d at 971; *Suarez*, 527 So. 2d at 193. He simply does not have to raise every possible argument to be effective. *Floyd v. State*, 27 Fla. L. Weekly at S77. Wright has failed to carry his burden to prove deficient performance under *Strickland/Suarez*. He is entitled to no relief.

D. Latent Fingerprints at the Crime Scene.

It is clear from the context of the prosecutor's argument regarding the latent fingerprints, that when he said "only two people were not eliminated . . . as having their prints there," he was referring to those on "a list of persons that were all submitted for . . . elimination purposes." (Appendix A, at 39).

Such comments must be viewed in context. *Muhammad*, 782 So. 2d at 360. *See Card*, 803 So. 2d 613, 622 (Fla. 2001)[“We do not examine allegedly improper comments in isolation.”]. Wright’s claim that the prosecutor “intentionally misrepresented Dr. Latimer’s testimony and (sic) in order to deceive the jury” that the only people in the world who were not eliminated were Taylor Douglas and Joel Dale Wright is not supported by the record and is baseless. Clearly, appellate counsel is not ineffective for failing to raise such a frivolous claim. See *Downs*, 801 So. 2d at 909-10; *Parker*, 537 So. 2d at 971; *Suarez*, 527 So. 2d at 193. Wright has not carried his burden under *Strickland/Suarez*. He is entitled to no relief.

E. Head and Pubic Hairs.

Again, Wright charges that the trial prosecutor “intentionally misrepresented . . . testimony in order to deceived (sic) the jury.” (Petition at 37). He claims that Mr. Dunning omitted a witness’s “conclusion that the two head hairs found on Ms. Smith’s dress . . . were different from Ms. Smith’s known hairs” and “were also different from Mr. Wright’s known hairs.” (Petition at 37). The bulk of the questioning and testimony below concerned the pubic hair. The head hairs from the maroon dress were very briefly mentioned, (Appendix A, at

10, 13), along with many other hair samples taken from the cluttered scene. (Appendix A, at 5-7, 20). Not a single question was asked about the head hair from the dress by the Defense, although much was made of the pubic hair.[7] (Appendix A, at 21-26 and 27-31). Thus, it is clear that the entire focus on Ms. Lasko's testimony was on the pubic hair - which was the hair for which there were insufficient characteristics for comparison purposes. Since there was no issue about the two hairs on the dress, that was not mentioned in closing argument - by either side. Again, Wright raises a baseless complaint about appellate counsel's performance on direct appeal.

It is clear from the comments Mr. Dunning made to the Wright jury that he had no intent to mislead them or misstate anything that any witness said. At the beginning of his argument, he explained to the jury:

> I am an Assistant State Attorney, I have a client to represent, that client being the State of Florida. . . .
>
> Please understand that I'm sure that neither of us during the course of our argument will intentionally try to mislead you or misstate what a witness has said during the course of this trial, but there is always a possibility that our recollection of what a witness

[7] Moreover, the only hair of significance argued by the Defense was the pubic hair for which no comparison could be made. (Appendix A, at 50-52).

> testified to, what the witness said, or what the witness didn't say, may not be the same as that which you remember.
>
> Now, we hope that doesn't happen. But if it does, we ask of you to accept your own memory, your own recollection of what has been testified to during the course of this trial.
>
> . . .
>
> So, there's always the possibility of your putting some more importance to a particular thing testified to by a particular witness than either myself or Mr. Pearl may do during our closing argument.
>
> . . .

(Appendix A, at 34-35). Later, in rebuttal argument, Mr. Dunning again cautioned the jury:

> At times, in the heat of closing argument, we may, myself, and/or Mr. Pearl, perhaps suggest to you something being testified to that maybe you don't recall it being testified to.

(Appendix A, at 56). The prosecutor then discussed several things Mr. Pearl had said in his argument which the prosecutor recalled differently, and asked the jury "to limit yourselves . . . to the evidence presented at trial." (Appendix A, at 59). Clearly, Mr. Dunning did not intend to misstate any testimony or deceive the jury in any manner.

Finally, there is no reasonable possibility that the allegedly improper argument contributed to the jury's guilty verdict. Thus, any error was harmless. *See Muhammad v. State*,

782 So. 2d 343, 359-60 (Fla. 2001). It is axiomatic that a harmless error does not merit relief on direct appeal. Neither does it do so on state habeas. *Duest*, 555 So. 2d at 853.

Wright has not carried his burden to demonstrate that his unsubstantiated accusations have merit.[8] Absent a showing of merit demanding relief on direct appeal, he cannot prevail on his claim of ineffective assistance of appellate counsel. *See Downs*, 801 So. 2d at 909-10; *Parker*, 537 So. 2d at 971; *Suarez*, 527 So. 2d at 193.

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[8] To hear Collateral Counsel tell it, every prosecutor in Wright's case has been out to get him at all costs and has thrown their ethical obligations aside in favor of trouncing truth and justice in the single-minded quest to convict and execute Wright. Mr. McClain repeatedly accuses - without the benefit of any facts to support his claims - that the trial prosecutor, Mr. Dunning, "intentionally misrepresented" testimony to the jury for the purpose of obtaining a murder conviction from a jury not likely to convict on an accurate representation of the facts. (Petition at 11, 20, 27, 30-34, 36-37). He also accuses the appellate prosecutor, the Assistant Attorney General, of making material misrepresentations to this Court in its answer brief on direct appeal, claiming she "affirmatively misrepresented the record." (Petition at 20). He further accuses her of failing to disclose pertinent information in order to deceive this Court into making an unjust decision on appeal. (Petition at 13). Moreover, in the Rule 3.850 appeal, Mr. McClain charged in his Reply Brief that the Undersigned representative of the State was not seeking truth and justice. (Appendix D, at 2). Such charges against the State's representatives are outrageous! They cross the bounds of acceptible advocacy by such a wide margin that they should be sanctioned. *See* Fla. R. App. P. 9.410.

Wright has utterly failed to carry his burden to prove deficient performance under *Strickland/Suarez*. He is entitled to no relief.

II. Absence from Proceeding re Jury Request.

Wright next complains that he "was excluded from the hearing on whether the jury's request to have testimony read back to them would be permitted." (Petition at 40). Experienced collateral counsel gives no record citation to support this claim. Thus, his pleading is facially insufficient, and the petition should be denied for that reason. See *Freeman v. State*, 761 So. 2d 1055, 1072-73 (Fla. 2000)[petition denied for failure to plead a prima facie case of ineffective assistance of appellate counsel where prejudice not "demonstrated."].

Moreover, his claim that the testimony the jury was inquring about, that of Ms. Lasko, "had been misrepresented by the prosecutor in his closing," is patently false. *See* Claim II, *supra*, at 26-29. Ms. Lasko's testimony centered around the pubic hair, and that is the specific part of her testimony the jury wanted read to it. (Petition at 39). *See* Appendix A, at 1. In regard to that hair, she clearly testified, as the prosecutor argued, that there were insufficient characteristics for comparison purposes. *Compare* Appendix A, at 41 *with* Appendix A, at 13. Thus, any claim that Wright was prejudiced because the

prosecutor misrepresentated Ms. Lasko's testimony in closing in regard to the matter which the jury was interested (i.e., the pubic hair) is firmly defeated by the record.

Further, the issue was waived at trial when counsel not only failed to make a contemporaneous objection to Wright's absence, but also communicated with the trial judge and prosecutor on the issue. Mr. Pearl agreed with the judge that they should "either read them all of it or let them rely on their memory." (Appendix A, at 60-63). Moreover, as Wright concedes, Mr. Pearl did not make any objection when the judge opted for advising them to rely on their collective memory. (Petition at 40).

In *Thomas v. State*, 730 So. 2d 667, 668 (Fla. 1998), this Court reiterated its position that in order to complain about a violation of Rule 3.410 requiring the presence and opportunity to be heard of the defense and the prosecution on jury questions, the rule "must be invoked by contemporaneous objection at trial." Moreover, "[w]here counsel communicates to the trial judge his acceptance of the procedure employed, the issue will be considered waived." 730 So. 2d at 668. Since defense counsel had told the trial judge he had no objection, Thomas did not demonstrate error. *Id*. at 669.

What Wright does not tell this Court is that Pearl did more than fail to object to the judge's decision regarding how to

handle the request. His pertinent comments include:

> Mr. Pearl: Well, certainly we have no choice except, in my opinion, either read them all of it or let them rely on their memory. We do have the further risk, that if you grant their request you will have opened up a Pandora's Box.
>
> The Court: Absolutely. And that is why I am not inclined to do it. . . .
>
> . . .
>
> The Court: My thinking is that I will bring them back. Now, what say you? Shall I say that they must rely, and say that strickly, or shall I inform them that the transcript has not been made, and we would have to read theentire matter, and that it is impossible, and that they therefore should rely on their own memories?
>
> . . .
>
> Mr. Pearl: That would be a fair statement.

(Appendix A, at 60-61). Thus, it is clear that Defense Counsel agreed to the manner in which the inquiry was handled, and therefore, Wright's claim has no merit.

Moreover, the State submits that the record affirmatively refutes the claim made by collateral counsel that Wright was not present at the time of this discussion. As already pointed out above, Mr. McClain gives no record citation to support his claim that Wright was absent. However, he does cite to the record for his claim that "Wright were brought into the courtroom to hear Judge Perry deny the request for a (sic) any read-back . . .." (Petition at 40). In so doing, he misrepresents the record to

this Honorable Court.

At page 2907, Judge Perry instructs that the jury be brought in - not the defendant and the jury. (Appendix A, at 61). The record then reflects that "[t]he jury returned to the courtroom, was seated in the jury box, and the following further proceedings were had in the presence of the jury." (Appendix A, at 61-62). Thereafter, Judge Perry states: "Madam Reporter, please show the jury in the box, the Defendant present, Counsel present." (Appendix A, at 62). Obviously, counsel were present at the discussion on how to respond to the jury question, and thus, this reference to the Defendant being shown present does not support Mr. McClain's representation that Wright was not there or that he was brought in. There is absolutely no indication that Wright was not present. It is the Defendant's burden to establish his entitlement to relief, and he clearly has not done so in this case.

Moreover, where "both counsel were notified and given the opportunity to make their positions known to the judge," the rule is satisfied. *Hildwin v. State*, 531 So. 2d 124, 126 (Fla. 1988). This is true, even where "there is no indication that the defendant was present in chambers." *Id*. Thus, even if Wright was not present for this discussion, his counsel clearly was present and fully participated in the decision making

process. Indeed, he agreed to it. *See Francis v. State*, 27 Fla. L. Weekly S2, S8 (Fla. Dec. 20, 2001)[no error where extensive discussions with both counsel occurred before the response was made to the jury, and defense counsel agreed with the trial court as to what the jury should be told]. Thus, this claim lacks merit, as there was either no error, or, at most, a harmless one.

The failure of appellate counsel to brief an issue with a little merit, much less a meritless one, is not deficient performance. *Downs*, 801 So. 2d at 909-10; *Rutherford*, 774 So. 2d at 643; *Parker*, 537 So. 2d at 971; *Suarez*, 527 So. 2d at 193. Appellate Counsel simply does not have to raise every possible argument to be effective. *Floyd v. State*, 27 Fla. L. Weekly at S77. Neither will appellate counsel be deemed ineffective for failing to raise a point, which even if correct, would amount to no more than harmless error. *Freeman v. State*, 761 So. 2d 1055, 1069 (Fla. 2000); *Thompson v. State*, 759 So. 2d 650, 664 (Fla. 2000); *Duest v. Dugger*, 555 So. 2d 849 (Fla. 1990); *Knight v. State*, 394 So. 2d 997 (Fla. 1981). Wright has not carried his burden to prove deficient performance, and thus his claim fails under *Strickland/Suarez*.

III. State's Questioning re Hair Comparisons.

Wright next complains that his appellate counsel should have raised on direct appeal a claim that the hair comparison expert, Ms. Lasko, should not have been permitted to testify to "her ability to make successful hair comparisons in other cases." (Petition at 41). Specifically, he complains about the following question and answer:

> Prosecutor: With what frequency are you able to make successfully, for lack of a better word, make comparisons between a known hair standard and debris such as you have before you that's submitted to you?
>
> A. On the basis of the question that you have asked, basically any hair that I compare I am able to make a determination. Consequently, it would be probably about ninety-nine percent of the hairs I have examined and compared.

(Appendix A, at 15-16). *See* Petition at 41.

Wright claims that his trial counsel made "a relevance objection" to that question; that claim is not true. The record clearly shows that Mr. Pearl did not object to that question or answer; moreover, there was a good reason not to, since the answer favored the Defense case. The record shows that Mr. Pearl objected to questions before and after that one, and later asked for a standing objection on a certain matter; thus, further demonstrating that Mr. Pearl intentionally decided not to object to the complained-of question and answer. Since there was no objection, the matter was not preserved for appeal.

Appellate counsel is not ineffective for failing to raise issues not preserved for appeal. *Robinson v. Moore*, 773 So. 2d 1, 3 (Fla. 2000).

Further, only where a deficiency in performance affects "the outcome" will habeas relief be found. *Freeman*, 761 So. 2d at 1069(*quoting Knight v. State*, 394 So. 2d 997 (Fla. 1981)). The affect Wright claims this had on his case was that Ms. Lasko looked like she was very good at her job of matching hair samples. (Petition at 41). First, Pearl stipulated she was an expert, and more importantly, since she repeatedly testified she could not match Wright's hair sample to those she tested from the scene, that she had a high percentage match rate was a point in Wright's favor.[9] Indeed, this was a very good tactical reason why Mr. Pearl did not object to this question and answer. There is no possibility that Ms. Lasko's answering the complained-of question affected the outcome of Wright's trial in a manner adverse to him.[10]

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[9] If anyone could have matched that hair to Wright, Ms. Lasko - with her 99% success rate - could have. This made the exculpatory character of the failure to make a match that much stronger.

[10] That the failure to match the hair found on the victim to Wright stemmed from the inadequacy of the hair and not from Wright's alleged innocence could be inferred from the properly

Appellate counsel is not ineffective for failing to raise meritless claims, claims with little merit, or harmless errors. *See Floyd v. State*, 27 Fla. L. Weekly at S77; *Downs*, 801 So. 2d at 909-10; *Rutherford*, 774 So. 2d at 643; *Freeman*, 761 So. 2d at 1069; *Thompson*, 759 So. 2d at 664; *Duest v. Dugger*, 555 So. 2d 849 (Fla. 1990); *Parker*, 537 So. 2d at 971; *Suarez*, 527 So. 2d at 193; *Knight v. State*, 394 So. 2d 997 (Fla. 1981). Wright has not carried his burden to prove deficient performance, and thus his claim fails under *Strickland/Suarez*.

IV. Failure to Make Point in Reply Brief.

Wright next complains that his appellate counsel should have pointed out in his reply brief arguments which collateral counsel think would have established that the issue raised on appeal was preserved for review. (Petition at 42). In considering this claim, it is worth noting what has been said for many years: "The Constitution does not mandate error-free counsel." *Henry v. Wainwright*, 721 F.2d 990, 996 (5th Cir. Unit B 1983), *cert. denied*, 466 U.S. 933 (1984). "In retrospect, one

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admitted evidence - i.e., that the hair lacked sufficient characteristics to make a match - and had nothing to do with the complained-of testimony of a 99% matching rate. Wright has neither alleged, nor demonstrated, prejudice to the outcome of the case from the allegedly "self-serving vouching" testimony of a 99% match rate.

may always identify shortcomings." *Cape v. Francis*, 741 F.2d 1287, 1302 (11th Cir. 1984), *cert. denied*, 474 U.S. 911 (1985). The task of the reviewing court "is not to grade counsel's performance, but to determine whether counsel's performance impaired the defense . . .." *Daugherty v. Dugger*, 839 F.2d 1426, 1428 (11th Cir. 1988), *cert. denied*, 109 S.Ct. 187 (1988).

In his initial brief, appellate counsel represented that the matter had been the subject of a suppression motion and that the testimony at trial was permitted "over objection." (Appendix B, at 3-4). Moreover, in his Statement of the Case, appellate counsel went into detail about the suppression hearing and the basis for the claim that the statement to Officer Perkins should not be admitted. (Appendix B, at 2). Thus, this Court was apprised that the defense felt it had properly preserved the claim for appellate review. That current counsel thinks he could have done a better job arguing such a claim does not render appellate counsel's presentation ineffective. *See Card v. Dugger*, 911 F.2d 1494, 1507 (11th Cir. 1990)[although current counsel would have performed differently, "this is not the test for ineffective assistance."]. *Cf. Johnson v. Cabana*, 818 F.2d 333, 340 (5th Cir.), *cert. denied*, 481 U.S. 1061 (1987)["Doubtless a fifth set of counsel could comb this record, suggest still more issues . . . and point the finger of

incompetency at today's new lawyers."]

Moreover, this claim is procedurally barred because the underlying substantive issue - admission of Officer Perkins' testimony at trial - was raised on direct appeal and rejected by this Court. *See Teffeteller v. Dugger*, 734 So. 2d 1009, 1025 (Fla. 1999). State "'habeas corpus petitions are not to be used for additional appeals . . ..'" *Id*.(*quoting Parker v. Dugger*, 550 So. 2d 459, 460 (Fla. 1989)).

Finally, this claim lacks merit. See Claim I, *supra*, at 9-11. Therefore, appellate counsel is not ineffective. *See Downs*, 801 So. 2d at 909-10; *Rutherford*, 774 So. 2d at 643. *See Card*, 911 F.2d at 1520.

V. Absence from Initial Inquiry of Jurors's.

Wright next complains that his appellate counsel rendered ineffective assistance when he failed to raise on appeal that he was absent when the initial inquiry was made of potential jurors regarding their qualifications for service. (Petition at 42). He admits that these potential jurors were questioned by the trial judge and that the matters inquired about were "general qualifications." *Id*. He acknowledges that this is permissible, however, he adds that there was one such proceeding in which defense counsel was not present and no transcript of the proceeding exists. It is about this matter that he complains.

Wright offers nothing to establish this claim. He does not even state that appellate counsel was aware of this alleged proceeding, much less that he knew that defense counsel was not present and/or that a transcript was not prepared. Yet, this is the entire basis on which he asserts his case should be distinguished from the long line of precedent which says that general qualification questions may be asked by the judge without the presence of the defense. If there is nothing of record to establish that counsel was not present and no transcript was done, appellate counsel can hardly be ineffective for failing to raise the matter on direct appeal. Appellate counsel is not ineffective for failing to raise meritless claims, claims with little merit, or harmless errors. *See Floyd v. State*, 27 Fla. L. Weekly at S77; Downs, 801 So. 2d at 909-10; *Rutherford*, 774 So. 2d at 643; *Freeman*, 761 So. 2d at 1069; *Thompson*, 759 So. 2d at 664; *Duest v. Dugger*, 555 So. 2d 849 (Fla. 1990); *Parker*, 537 So. 2d at 971; *Suarez*, 527 So. 2d at 193; *Knight v. State*, 394 So. 2d 997 (Fla. 1981).

Moreover, Wright has not alleged how he was prejudiced by this proceeding from which he claims a single prospective juror was dismissed. Such allegations are required to state a legally sufficient ineffective assistance claim. *See Sireci v. State*, 773 So. 2d 34, 40 n.11 (Fla. 2000)[Defendant must specifically

allege "how he was prejudiced by counsel's failure."].

Further, this issue was not preserved at trial, and so, it would have been procedurally barred on appeal. Appellate counsel cannot be said to have rendered ineffective assistance in not arguing an unpreserved point on appeal. *Robinson*, 773 So. 2d 1, 3 (Fla. 2000).

Finally, in *Wright v. State*, 688 So. 2d 298, 300-01 (Fla. 1996), this Court pointed out a "distinction between the general qualification of the jury by the court and the qualification of a jury to try a specific case." This Court explained that in general qualification "[i]n many instances, counsel and the defendant are not present . . .." *Id*. at 301. Thus, regardless of whether Wright's attorney was present at the general qualification in his case, this Court made it clear that such is not required.[11]

Appellate counsel is not ineffective for failing to raise nonmeritorious issues. *See Floyd v. State*, 27 Fla. L. Weekly at S77; Downs, 801 So. 2d at 909-10; *Rutherford*, 774 So. 2d at 643; *Freeman*, 761 So. 2d at 1069; *Thompson*, 759 So. 2d at 664; *Duest*

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[11] Wright cites no authority for his complaint about a lack of a transcript of the general qualification proceedings. Thus, he has utterly failed to meet his burden to show entitlement to relief.

v. Dugger, 555 So. 2d 849 (Fla. 1990); *Parker*, 537 So. 2d at 971; *Suarez*, 527 So. 2d at 193; *Knight v. State*, 394 So. 2d 997 (Fla. 1981). Wright has not carried his burden to prove deficient performance, and thus his claim fails under *Strickland/Suarez*.

VI. Judge's Statements to Venire re Sentencing

Wright next complains that his appellate attorney should have raised on appeal a claim that Judge Perry impermissibly told the jury "venire that sentencing decisions 'are up to me, and to me alone.'" (Petition at 44). Wright's claim is legally insufficient. He does not allege that a single member of the venire who was present when this statement was made sat on the jury, nor does he allege that the judge improperly instructed the jury along these lines. *Caldwell* concerned a jury instruction given, not a statement made to a prospective juror in the presence of other prospective jurors. Moreover, there is no claim that the issue was properly preserved with an objection at the time any instructions were given to Wright's jury.

In *Hill v. State*, the defendant made a claim very similar to that raised herein. 549 So. 2d 179, 185 (Fla. 1989). There, he argued on direct appeal that

> the jury was misinformed on the importance of its sentencing responsibility, contrary to Caldwell . . ., by statements of the trial judge that the entire

> responsibility for sentencing rested on the trial judge. During jury selection, some members of the venire expressed personal misgivings about whether they could ever impose the death penalty. These misgivings were potentially a cause for challenge by the state . . .. In an effort to clarify the jury's role and obviate a challenge for cause, the trial judge advised the venire that under Florida law the responsibility for imposing a sentence rested entirely on the trial judge, not the jury. In selecting a jury, these comments work to the benefit of the defendant as well as the state and at this point in the trial defense counsel did not object. Later, during the penalty phase, the trial judge instructed the jury that the final responsibility for imposing sentence rested on the trial judge. Again, there was no objection. . . . Appellant's arguments are procedurally barred for failure to object below, and, were we to reach the merits, we have previously resolved the issue contrary to appellant's position . . ..

Id.

In the instant case, Mr. Pearl did object when the judge made the complained-of comment to the venire. However, there is no claim that he objected when the prosecutor made the complained-of statement, much less when the jury was instructed at trial. Thus, this claim was not preserved, and appellate counsel is not ineffective for failing to raise unpreserved claims on direct appeal.

There has been no contention that this isolated comment by the trial judge was fundamental error. Clearly, it was not. "In cases in which courts have found judges' . . . comments to be fundamental error, the improper comments were made in the

presence of the jury during presentation of evidence or arguments." *Randall v. State*, 760 So. 2d 892, 901 (Fla. 2000)[comments made to prospective jurors by trial judge]. Where the comments occurred "prior to *voir dire*, and in the context of describing trial procedure to prospective jurors," there was no fundamental error. The comment made to Wright's venire was also one describing trial procedure, and therefore, did not rise to the level of fundamental error. *Randall*. Moreover, the record shows that the trial judge correctly instructed the penalty phase jurors prior to their recommendation. Wright can establish no harmful error, and therefore, his claim is without merit.

Moreover, in *Johnson v. Singletary*, 695 So. 2d 263, 267 (Fla. 1996), this Court rejected an appellate ineffectiveness claim similar to the instant one. This Court found the *Caldwell* claim procedurally barred and specifically held the "claim is without merit." Id. Appellate counsel is not "ineffective in failing to raise a meritless issue." *Id*.

Wright has utterly failed to plead any facts which would render his *Caldwell* claim meritorious. Therefore, he has not met his burden under *Strickland/Suarez.*

CLAIM III

***APPRENDI* V. NEW JERSEY DOES NOT AFFORD WRIGHT RELIEF.**

Wright complains that in light of *Apprendi v. New Jersey*, 120 S. Ct. 2348 (2000), this Court should revisit its holding rejecting Wright's claim IX on direct appeal. (Petition at 47). On direct appeal, Wright argued to this Court that the facts underlying the aggravators and mitigators "were to have been determined by the jury," but "were here determined unconstitutionally by the judge." (Appendix B, at 5). This Court framed the claim as: "Section 921.141, Florida Statutes (1983), violates the federal constitution by depriving the appellant of his right to a trial by his peers." *Wright*, 473 So. 2d at 1281. That claim was expressly rejected. *Id*. at 1281-82. There is no reason to unsettle the law of the instant case.

Moreover, to the extent that the issue raised in Wright's direct appeal is raised in *Apprendi*, same has been rejected by this Court. In *Mills v. Moore*, 786 So. 2d 532 (Fla. 2001), this Court analyzed the *Apprendi* decision in considerable detail and wrote in pertinent part: "*Apprendi* does not apply to already challenged capital sentencing schemes that have been deemed constitutional." 786 So. 2d at 536.

In *Mills*, this Court analyzed the *Apprendi* decision in

considerable detail. This Court wrote in pertinent part:

> The [*Apprendi*] Court specifically stated . . . that *Apprendi* does not apply to already challenged capital sentencing schemes that have been deemed constitutional. The Court stated:
>
> > 'Finally, this Court has previously considered and rejected the argument that the principles guiding our decision today render invalid state capital sentencing schemes requiring judges, after a jury verdict holding a defendant guilty of a capital crime, to find specific aggravating factors before imposing a sentence of death. . . . [O]nce a jury has found the defendant guilty of all the elements of an offense which carries as its maximum penalty the sentence of death, it may be left to the judge to decide whether that maximum penalty, rather than a lesser one, ought to be imposed.' . . .
>
> The Court was referring to . . . *Walton v. Arizona* . . ., wherein it addressed a capital sentencing scheme and held that the presence of an aggravating circumstance in a capital case may constitutionally be determined by a judge rather than a jury. . . . Because *Apprendi* did not overrule *Walton*, the basic scheme in Florida is not overruled either.
>
> . . . With the majority of the justices refusing to disturb the rule of law announced in *Walton*, it is still the law and it is not within this Court's authority to overrule *Walton* . . .. *Apprendi* foreclosed Mills' claim because *Apprendi* preserves the constitutionality of capital sentencing schemes like Florida's. Therefore, on its face, *Apprendi* is inapplicable to this case.

786 So. 2d at 536-37. The Court proceeded to note that "[n]o

court has extended *Apprendi* to capital sentencing schemes, and the plain language of *Apprendi* indicates that the case is not intended to apply to capital schemes." *Id*.

Moreover, it has long been held that a jury may constitutionally recommend death "on a simple majority vote." *Thompson v. State*, 648 So. 2d 692, 698 (Fla. 1994). Wright has presented no reason to depart from that settled law.[12] Indeed, "this claim is procedurally barred because it is an improper relitigation of an issue upon which this Court has already ruled." *Foster v. State*, No. SC01-240, slip op. at 12 (Fla. Feb. 14, 2002). He is entitled to no relief.

CLAIM IV

WRIGHT IS ENTITLED TO NO RELIEF ON HIS CLAIM THAT THIS COURT FAILED TO COMPLY WITH THE REQUIREMENTS OF *SOCHOR V. FLORIDA* WHEN IT AFFIRMED WRIGHT'S DEATH SENTENCE ON DIRECT APPEAL.

Wright complains that "[t]his Court's ruling on direct appeal was erroneous as this Court struck and (sic) an

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[12] The State acknowledges that the executions of two Florida death row inmates, King and Bottoson, have recently been temporarily stayed, and that a type of *Apprendi* issue was raised in both. However, at this point, there is no indication that settled law will be changed in such a manner as to compel this Court to unsettle its prior decision on direct appeal.

aggravating factor on direct appeal and failed to conduct the proper harmless error analysis as required by *Sochor v. Florida*, 504 U.S. 527 (1992)." (Petition at 49-50). This claim was raised in Wright's pending Rule 3.850 motion. See Case No. SC00-1389, Argument VI, Initial Brief at 99. Thus, this claim is procedurally barred in this state habeas petition. *See Gilliam v. State*, Case No. SC00-1438, slip op. at 28 n.20 (Fla. Feb. 7, 2002); *Rutherford,* 774 So. 2d at 643.

Moreover, it is also procedurally barred because it should have been raised on rehearing from the opinion on direct appeal. *Bottoson v. State,* 27 Fla. L. Weekly S119, S120 (Fla. Jan. 31, 2002). The failure to so raise it, procedurally bars the claim.

Finally, the claim is thrice procedurally barred. In *Foster v. State*, No. SC01-240, slip op. (Fla. Feb. 14, 2002), this Court considered such a claim. Foster contended that

> this Court engaged in a constitutionally flawed harmless error analysis . . . [on direct appeal] in which we stated that because the trial court found no statutory mitigators and three strong aggravators, the giving of an erroneous cold, calculated, and premeditated aggravator instruction did not affect the jury's consideration of his sentence, and therefore the giving of such instruction was harmless error.

No. SC01-240, slip op. at 11. After ruling that "a postconviction motion is not the proper vehicle to challenge a decision of this Court," this Court went on to make it clear

that the claim "is procedurally barred because it is an improper relitigation of an issue upon which this Court has already ruled." *Id*. Certainly, that is the situation in Wright's case.

He is entitled to no relief.

CONCLUSION

Wherefore, based upon the foregoing arguments and authorities, the Respondent respectfully requests that this Court deny the Petition for Writ of Habeas Corpus.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above has been furnished by U.S. Mail to **Martin J. McClain**, Special Assistant CCRC - South, 9701 Shore Rd., Apt. 1-D, Brooklyn, NY 11209, on this _____ day of February, 2002.

JUDY TAYLOR RUSH
Of Counsel

CERTIFICATE OF COMPLIANCE

This brief is typed in Courier New 12 point.

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