IN THE SUPREME COURT OF FLORIDA

DERRICK TYRONE SMITH,

Petitioner,

v. **CASE NO. SC05-100**
Lower Tribunal No. CRC83-265 CFANO

JAMES V. CROSBY, JR.,

Respondent.
_____/

RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

COMES NOW, Respondent, JAMES V. CROSBY, JR., by and through the undersigned counsel, and hereby responds to the Petition for Writ of Habeas Corpus filed in the above-styled case. Respondent respectfully submits that the petition should be denied, and states as grounds therefore:

FACTS AND PROCEDURAL HISTORY

On May 24, 1983, the petitioner/defendant, Derrick Tyrone Smith was charged by Indictment with one count of first-degree murder. Following a jury trial, Smith was convicted of first-degree murder on November 10, 1983. The jury recommended the death penalty by a vote of 7 to 5, and the Honorable William Walker imposed the death penalty on November 29, 1983.

On July 17, 1986, this Court reversed Smith's conviction on direct appeal, and remanded for a new trial. Smith v. State, 492 So. 2d 1063 (Fla. 1986). This Court reversed Smith's

original conviction and sentence because (1) the State elicited an improper comment on Smith's exercise of his right to remain silent and (2) the trial court admitted a statement Smith made to a detective after exercising his right to remain silent. Smith, 492 So. 2d at 1065-1066.[1]

Smith's retrial was conducted in May of 1990, and Smith again was convicted of first-degree murder. On May 16, 1990,

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[1]Justice Shaw dissented from this holding and explained that he would have found any error harmless. Smith, 492 So. 2d at 1069 (Shaw, J. dissenting). Justice Shaw summarized the evidence presented at Smith's trial, which he deemed overwhelming:

> . . . Turning to the harmless error analysis, I note first that the evidence against appellant was overwhelming. An accomplice testified that the two men went from establishment to establishment during the course of the evening. Other witnesses corroborated the accomplice's testimony. The accomplice testified that he and appellant agreed to commit a robbery in order to obtain money, and, after discussing several possibilities, agreed to rob a taxicab. There was testimony from numerous witnesses that appellant either had a handgun or had access to one. There was testimony from two robbery victims that appellant robbed them approximately twelve hours after the murder using a handgun. (Appellant pleaded guilty to this offense.) The accomplice testified that appellant called a taxicab from a restaurant; appellant's fingerprints were found on the phone. Other witnesses saw the two men enter the taxicab. The accomplice testified that the appellant shot the victim taxicab driver as he attempted to flee on foot. A bystander who knew both appellant and the accomplice by sight testified that he saw the murder and that appellant shot the fleeing taxicab driver as the accomplice had testified." Id. at 1069 (Shaw, J., dissenting).

the jury voted 8 to 4 for the death penalty. On July 13, 1990, Smith was sentenced to death by the Honorable Claire K. Luten.

The trial court found the existence of two statutory aggravating circumstances: (1) the murder was committed while Smith was attempting to commit a robbery and (2) Smith had a previous conviction for a violent felony. The trial court found one statutory mitigating circumstance of no significant history of criminal activity because Smith's prior offenses were nonviolent. The trial court also found several nonstatutory mitigating circumstances relating to Smith's background, character, and record. See, Smith, 641 So. 2d at 1323.

On direct appeal following Smith's retrial, this Court set forth the following summary of the facts:

> At retrial, the evidence showed that Smith and a friend, Derrick Johnson, planned a robbery. To carry out the plan, Smith called a cab from a restaurant's pay telephone at 12:28 a.m. on March 21, 1983. Smith's fingerprint was later matched with a print found on that phone. Songer picked up Smith and Johnson outside the restaurant, then reported to his dispatcher that he was taking the fares to a nearby residential area. A few minutes later, Songer called in "D-16," which was a coded distress call. The dispatcher called the police and sent another cab driver to assist Songer. The driver found Songer lying face down about seventy feet from his cab, dead of a single shot in the back.
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> An eyewitness testified that he recognized Smith and Johnson. The witness also testified that he saw Smith aim and fire at Songer as the driver tried to run from the cab. Although authorities never found the murder weapon, several witnesses linked Smith to a

> .38-caliber pistol. Smith's uncle, with whom Smith had once lived, testified that a .38-caliber pistol was missing from his home. A lead fragment found on the victim matched the lead composition of bullets Smith's uncle obtained when he bought the gun. Other witnesses testified that they saw Smith with a gun during the day before the shooting. Johnson's testimony also placed a gun in Smith's possession.
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> One witness, a Canadian tourist, testified that Smith robbed his wife and him in their motel room about twelve hours after Songer was killed. The robbery victim's description of Smith's gun resembled the description of the gun Smith used in the shooting; however, it was never established that the gun was the same because the weapon was never found. Smith's fingerprints were found on a suitcase in the motel room, and, after Smith's arrest, police recovered a watch that the robbery victim identified as one Smith took.
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> Smith did not testify at his retrial. Larry Martin, who had been in the Pinellas County Jail with Johnson, testified that Johnson told him Smith did not shoot the cab driver.
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> Smith, 641 So. 2d 1319-1320.

Direct Appeal

In Smith v. State, FSC Case No. 76,491, Smith raised the following issues on direct appeal following his retrial:

ISSUE I

> THE TRIAL COURT VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS TO THE EFFECTIVE ASSISTANCE OF COUNSEL AND TO SELF-REPRESENTATION BY FAILING TO INQUIRE INTO THE BASIS FOR APPELLANT'S PRO SE REQUEST TO DISCHARGE COURT-APPOINTED COUNSEL.

ISSUE II

THE TRIAL COURT ERRED BY FAILING TO CONDUCT AN ADEQUATE RICHARDSON INQUIRY WHEN DEFENSE COUNSEL OBJECTED TO THE STATE'S VIOLATION OF THE DISCOVERY RULE.

ISSUE III

THE TRIAL COURT ERRED BY ADMITTING EVIDENCE OF AN UNRELATED ROBBERY WHICH WAS NOT RELEVANT TO ANY MATERIAL FACT IN ISSUE.

ISSUE IV

THE TRIAL COURT VIOLATED APPELLANT'S CONSTITUTIONAL RIGHT TO CONFRONT AND CROSS-EXAMINE THE WITNESSES AGAINST HIM WHEN IT ALLOWED THE STATE TO CONCEAL THE TERMS OF MELVIN JONES' PRIOR SENTENCING AGREEMENTS WITH THE STATE.

ISSUE V

THE DEATH SENTENCE IS DISPROPORTIONATE TO THE CHARACTER AND RECORD OF THE APPELLANT, THE CIRCUMSTANCES OF THE OFFENSE, AND OTHER CAPITAL CASES IN WHICH DEATH SENTENCES WERE VACATED.

This Court affirmed Smith's first-degree murder conviction and death sentence on June 9, 1994. Smith v. State, 641 So. 2d 1319 (Fla. 1994).

Smith filed a petition for writ of certiorari on December 9, 1994 in Smith v. Florida, Case No. 94-7223. The United States Supreme Court denied certiorari review on February 21, 1995. See, Smith v. Florida, 513 U.S. 1163 (1995).

Postconviction Proceedings

Smith asserted the following postconviction claims (Amended Rule 3.850 Motion, filed on September 13, 2000):

> CLAIM I: MR. SMITH WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL PRETRIAL AND AT THE GUILT/INNOCENCE PHASE OF HIS TRIAL, IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS. COUNSEL FAILED TO ADEQUATELY INVESTIGATE AND PREPARE MR. SMITH'S CASE TO CHALLENGE TO THE STATE'S CASE. COUNSEL FAILED TO EFFECTIVELY CROSS EXAMINE THE STATE'S WITNESSES. A FULL ADVERSARIAL TESTING DID NOT OCCUR. THE ACTIONS OF THE STATE RENDERED COUNSEL INEFFECTIVE. COUNSEL'S PERFORMANCE WAS DEFICIENT, AND AS A RESULT, MR. SMITH'S CONVICTIONS AND DEATH SENTENCE ARE UNRELIABLE.
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> CLAIM II: MR. SMITH WAS DEPRIVED OF HIS RIGHTS TO DUE PROCESS UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND HIS RIGHTS UNDER THE FIFTH, SIXTH, AND EIGHTH AMENDMENTS, BECAUSE THE STATE WITHHELD EVIDENCE WHICH WAS MATERIAL AND EXCULPATORY IN NATURE AND/OR PRESENTED MISLEADING AND FALSE EVIDENCE. SUCH OMISSIONS RENDERED DEFENSE COUNSEL'S REPRESENTATION INEFFECTIVE AND PREVENTED A FULL ADVERSARIAL TESTING.
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> CLAIM III: NEWLY DISCOVERED EVIDENCE DEMONSTRATES THAT MR. SMITH'S CAPITAL CONVICTION AND DEATH SENTENCE ARE CONSTITUTIONALLY UNRELIABLE IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.
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> CLAIM IV: IMPOSITION OF THE DEATH PENALTY FOR THE UNPREMEDITATED SINGLE-VICTIM HOMICIDE FOR WHICH MR. SMITH WAS CONVICTED IS ARBITRARY, CAPRICIOUS, AND DISPROPORTIONATE COMPARED TO THE SENTENCES IMPOSED FOR SIMILAR CRIMES IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, THE CORRESPONDING PROVISIONS OF FLORIDA CONSTITUTION, THE HUMAN RIGHTS OBLIGATIONS OF THE UNITED STATES, THE SUPREMACY CLAUSE, THE INTERNATIONAL COVENANT OF CIVIL AND POLITICAL RIGHTS, CUSTOMARY INTERNATIONAL LAW, AND *JUS COGENS*.

CLAIM V: MR. SMITH HAS BEEN AND IS BEING DENIED EFFECTIVE ASSISTANCE OF POSTCONVICTION COUNSEL, AND IS BEING DENIED ACCESS TO THE COURTS OF THE STATE OF FLORIDA AND THE UNITED STATES.

CLAIM VI: MR. SMITH IS BEING DENIED HIS RIGHTS TO DUE PROCESS AND EQUAL PROTECTION AS GUARANTEED BY THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION, BECAUSE ACCESS TO THE FILES AND RECORDS PERTAINING TO MR. SMITH'S CASE IN THE POSSESSION OF CERTAIN STATE AGENCIES HAVE BEEN WITHHELD IN VIOLATION OF CHAPTER 119, FLA. STAT., OR HAVE BEEN DESTROYED BY THE AGENCIES. MR. SMITH CANNOT PREPARE AND ADEQUATE 3.850 MOTION UNTIL HE HAS RECEIVED PUBLIC RECORDS MATERIALS, BEEN AFFORDED DUE TIME TO REVIEW THOSE MATERIALS, BEEN AFFORDED DUE TIME TO INVESTIGATE CLAIMS ARISING FROM THOSE MATERIALS, AND BEEN AFFORDED AN OPPORTUNITY TO AMEND THIS MOTION. THIS LACK OF PUBLIC RECORDS COMPLIANCE BY STATE AGENCIES HAS RENDERED MR. SMITH'S PRESENT POSTCONVICTION COUNSEL INEFFECTIVE. MR. SMITH'S PREVIOUS POSTCONVICTION COUNSEL PROVIDED INEFFECTIVE ASSISTANCE BY NOT PURSUING PUBLIC RECORDS DISCLOSURE.

CLAIM VII: MR. SMITH'S SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS WERE VIOLATED BECAUSE NO RELIABLE TRANSCRIPT OF HIS CAPITAL TRIAL EXISTS, RELIABLE APPELLATE REVIEW WAS AND IS NOT POSSIBLE, THERE IS NO WAY TO ENSURE THAT WHICH OCCURRED IN THE TRIAL COURT WAS OR CAN BE REVIEWED ON APPEAL, AND THE JUDGMENT AND SENTENCE MUST BE VACATED.

CLAIM VIII: MR. SMITH WAS DENIED A PROPER DIRECT APPEAL FROM HIS JUDGMENT OF CONVICTION AND A PROPER APPEAL FROM HIS SENTENCE OF DEATH IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, ART. 5, SEC. 3(B)(1) OF THE FLORIDA CONSTITUTION AND FLORIDA STATUTES ANNOTATED, SEC. 921.141(4), DUE TO OMISSIONS IN THE RECORD.

CLAIM IX: MR. SMITH IS DENIED HIS FIRST, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION AND IS DENIED EFFECTIVE ASSISTANCE OF COUNSEL IN PURSUING HIS POSTCONVICTION

REMEDIES BECAUSE OF THE RULES PROHIBITING MR. SMITH'S LAWYERS FROM INTERVIEWING JURORS TO DETERMINE IF CONSTITUTIONAL ERROR WAS PRESENT.

CLAIM X: MR. SMITH'S RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION WERE VIOLATED BY COUNSEL'S INEFFECTIVENESS DURING VOIR DIRE WHETHER DUE TO COUNSEL'S DEFICIENCIES OR BEING RENDERED INEFFECTIVE BY STATE ACTION.

CLAIM XI: MR. SMITH'S TRIAL COUNSEL WAS OPERATING UNDER A CONFLICT OF INTEREST WHICH RENDERED HIS REPRESENTATION OF MR. SMITH'S UNCONSTITUTIONAL AND VIOLATED MR. SMITH'S RIGHTS UNDER THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

CLAIM XII: MR. SMITH WAS ABSENT FROM CRITICAL STAGES OF HIS TRIAL IN VIOLATION OF HIS SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION. TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO ENSURE MR. SMITH'S PRESENCE.

CLAIM XIII: MR. SMITH WAS DENIED A FAIR TRIAL AND A FAIR, RELIABLE AND INDIVIDUALIZED CAPITAL SENTENCING DETERMINATION IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS, BECAUSE THE PROSECUTOR'S ARGUMENTS AT THE GUILT/INNOCENCE AND PENALTY PHASES PRESENTED IMPERMISSIBLE CONSIDERATIONS TO THE JURY, MISSTATED THE LAW AND FACTS, AND WERE INFLAMMATORY AND IMPROPER. DEFENSE COUNSEL'S FAILURE TO RAISE PROPER OBJECTIONS WAS DEFICIENT PERFORMANCE WHICH DENIED MR. SMITH EFFECTIVE ASSISTANCE OF COUNSEL.

CLAIM XVI (out of order in motion): MR. SMITH'S DEATH SENTENCE IS FUNDAMENTALLY UNFAIR AND UNRELIABLE, IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS DUE TO THE STATE'S INTRODUCTION OF NON-STATUTORY AGGRAVATING FACTORS AND THE STATE'S ARGUMENTS UPON NON-STATUTORY AGGRAVATING FACTORS. DEFENSE COUNSEL'S FAILURE TO OBJECT OR ARGUE EFFECTIVELY CONSTITUTED INEFFECTIVE ASSISTANCE.

CLAIM XV: MR. SMITH WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE SENTENCING PHASE OF HIS TRIAL IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS. TRIAL COUNSEL WAS RENDERED INEFFECTIVE BY THE TRIAL COURT'S AND STATE'S ACTIONS. TRIAL COUNSEL FAILED TO ADEQUATELY INVESTIGATE AND PREPARE MITIGATING EVIDENCE, FAILED TO PROVIDE THE MENTAL HEALTH EXPERTS WITH THIS MITIGATION, AND FAILED TO ADEQUATELY CHALLENGE THE STATE'S CASE. COUNSEL FAILED TO ADEQUATELY OBJECT TO EIGHTH AMENDMENT ERROR. COUNSEL'S PERFORMANCE WAS DEFICIENT, AND AS A RESULT, MR. SMITH'S DEATH SENTENCE IS UNRELIABLE.

CLAIM XIV (out of order in motion): MR. SMITH WAS DENIED HIS RIGHTS UNDER AKE V. OKLAHOMA AT THE GUILT AND PENALTY PHASES OF HIS CAPITAL TRIAL, WHEN COUNSEL FAILED TO OBTAIN AN ADEQUATE MENTAL HEALTH EVALUATION AND FAILED TO PROVIDE THE NECESSARY BACKGROUND INFORMATION TO THE MENTAL HEALTH CONSULTANT IN VIOLATION OF MR. SMITH'S RIGHTS TO DUE PROCESS AND EQUAL PROTECTION UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION , AS WELL AS HIS RIGHTS UNDER THE FIFTH, SIXTH, AND EIGHTH AMENDMENTS.

CLAIM XVII: THE JURY AND JUDGE WERE PROVIDED WITH AND RELIED UPON MISINFORMATION OF CONSTITUTIONAL MAGNITUDE IN SENTENCING MR. SMITH TO DEATH, IN VIOLATION OF JOHNSON V. MISSISSIPPI, 108 s. Ct. 1981 (1988), AND THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

CLAIM XVIII: MR. SMITH'S TRIAL WAS FRAUGHT WITH PROCEDURAL AND SUBSTANTIVE ERRORS WHICH CANNOT BE HARMLESS WHEN VIEWED AS A WHOLE, SINCE THE COMBINATION OF ERRORS DEPRIVED HIM OF THE FUNDAMENTALLY FAIR TRIAL GUARANTEED UNDER THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

CLAIM XIX: FLA. STAT. § 119.19 AND FLA. R. CRIM. P. 3.852(1998) IS UNCONSTITUTIONAL ON ITS FACE AND AS APPLIED AND IT VIOLATES ART. I, § 24 OF THE FLORIDA CONSTITUTION AND CORRESPONDING FLORIDA CASELAW AS WELL AS MR. SMITH'S FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS AND HIS RIGHT TO DUE PROCESS AND ACCESS TO THE COURTS.

CLAIM XX: MR. SMITH'S SENTENCE OF DEATH VIOLATES THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS BECAUSE THE PENALTY PHASE JURY INSTRUCTIONS WERE INCORRECT UNDER FLORIDA LAW AND SHIFTED THE BURDEN TO MR. SMITH TO PROVE THAT DEATH WAS INAPPROPRIATE AND BECAUSE THE TRIAL COURT EMPLOYED A PRESUMPTION OF DEATH IN SENTENCING MR. SMITH. TRIAL COUNSEL WAS INEFFECTIVE FOR NOT OBJECTING TO THESE ERRORS.

CLAIM XXI: MR. SMITH'S SENTENCING JURY WAS MISLED BY COMMENTS AND INSTRUCTIONS THAT UNCONSTITUTIONALLY AND INACCURATELY DILUTED THE JURY'S SENSE OF RESPONSIBILITY TOWARDS SENTENCING IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION. TRIAL COUNSEL WAS INEFFECTIVE FOR NOT PROPERLY OBJECTING.

CLAIM XXII: MR. SMITH'S SENTENCE RESTS UPON AN UNCONSTITUTIONALLY AUTOMATIC AGGRAVATING CIRCUMSTANCE, IN VIOLATION OF STRINGER V. BLACK, MAYNARD V. CARTWRIGHT, HITCHCOCK V. DUGGER, AND THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

CLAIM XXIII: THE CAPITAL FELONY WAS COMMITTED WHILE THE DEFENDANT WAS ENGAGED, OR WAS AN ACCOMPLICE, IN THE COMMISSION OF, OR AN ATTEMPT TO COMMIT, OR FLIGHT AFTER COMMITTING OR ATTEMPTING TO COMMIT, ANY: ROBBERY AGGRAVATING FACTOR IS UNCONSTITUTIONALLY VAGUE, AND MR. SMITH'S SENTENCING JURY WAS IMPROPERLY INSTRUCTED ON THE AVOIDING OR PREVENTING A LAWFUL ARREST AGGRAVATING FACTOR IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS. TO THE EXTENT COUNSEL FAILED TO PRESERVE THIS ISSUE FOR APPEAL, COUNSEL'S PERFORMANCE WAS DEFICIENT.

CLAIM XXIV: FLORIDA'S CAPITAL SENTENCING STATUTE IS UNCONSTITUTIONAL ON ITS FACE AND AS APPLIED IN THIS CASE, BECAUSE IT FAILS TO PREVENT THE ARBITRARY AND CAPRICIOUS IMPOSITION OF THE DEATH PENALTY.

On March 12, 2002, Smith filed a "Supplemental Amended Motion to Vacate Judgments of Conviction and Sentence." This motion supplemented the following grounds:

CLAIM I

MR. SMITH WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL PRETRIAL AND AT THE GUILT/INNOCENCE PHASE OF HIS TRIAL, IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS. COUNSEL FAILED TO ADEQUATELY INVESTIGATE AND PREPARE MR. SMITH'S CASE TO CHALLENGE TO THE STATE'S CASE. COUNSEL FAILED TO EFFECTIVELY CROSS EXAMINE THE STATE'S WITNESSES. A FULL ADVERSARIAL TESTING DID NOT OCCUR. THE ACTIONS OF THE STATE RENDERED COUNSEL INEFFECTIVE. COUNSEL'S PERFORMANCE WAS DEFICIENT, AND AS A RESULT, MR. SMITH'S CONVICTIONS AND DEATH SENTENCE ARE UNRELIABLE.

CLAIM II

MR. SMITH WAS DEPRIVED OF HIS RIGHTS TO DUE PROCESS UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND HIS RIGHTS UNDER THE FIFTH, SIXTH, AND EIGHTH AMENDMENTS, BECAUSE THE STATE WITHHELD EVIDENCE WHICH WAS MATERIAL AND EXCULPATORY IN NATURE AND/OR PRESENTED MISLEADING AND FALSE EVIDENCE. SUCH OMISSIONS RENDERED DEFENSE COUNSEL'S REPRESENTATION INEFFECTIVE AND PREVENTED A FULL ADVERSARIAL TESTING.

CLAIM III

NEWLY DISCOVERED EVIDENCE DEMONSTRATES THAT MR. SMITH'S CAPITAL CONVICTION AND DEATH SENTENCE ARE CONSTITUTIONALLY UNRELIABLE IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The Circuit Court conducted a multi-day evidentiary hearing, on July 23-26, 2003. On February 10, 2003, the Circuit Court entered a comprehensive written order denying postconviction relief. The Circuit Court addressed Smith's Brady/Giglio claims, IAC, and "newly discovered" evidence claims, both individually and cumulatively. (PC-R. V22/R4113).

ARGUMENT

CLAIM I

THE "INCOMPLETE RECORD ON DIRECT APPEAL" CLAIM

In his first habeas claim, Smith asserts that extraordinary habeas relief should be granted because the record on direct appeal failed to include a letter Smith sent to the trial court in May of 1989, and, therefore, this Court's decision on direct appeal allegedly rests upon a material "error of fact." For the following reasons, Smith's habeas claim is both procedurally barred in this extraordinary writ proceeding and, alternatively, without merit.

The petitioner/defendant, Derrick Tyrone Smith, was represented at his first trial by attorneys Richard Smith and Thomas Donnelly. (R2. V1/R5). On December 12, 1986, following this Court's remand for a new trial, the trial court again appointed attorneys Smith and Donnelly to represent this defendant. (R2. V1/R28).

On July 26, 1987, Smith wrote a letter to the trial court requesting that [he] "be appointed another lawyer." According to Smith's 1987 letter, he didn't feel that these attorneys [Smith and Donnelly] had his "best interest at heart," doubted their "effectiveness in a case of this magnitude," "no longer trust[ed]" their judgment and "didn't feel comfortable with

either of them" representing him on a first degree murder charge. (R2. V1/R50).

Smith and Donnelly moved to withdraw as counsel based upon Smith's request, irreconcilable differences, and an ethical conflict. (R2. V1/R51-52). The trial court granted the motion; and, on August 14, 1987, the trial court appointed attorney Richard Sanders to represent Smith. (R2. V1/R54, 56).

On October 25, 1989, Sanders moved to withdraw as counsel on the ground that Smith "wants counsel to represent testimony that counsel believes to be perjurious." (R2. V1/R86). On November 6, 1989, the trial court held a hearing, denied the motion, and directed Sanders to redetermine whether he could ethically call the witnesses at trial. (R2. V1/R95; V2/358-359). That same day, Smith wrote a letter to the trial judge. This letter (dated November 6, 1989), was in the direct appeal record and was addressed by this Court on direct appeal. Smith's letter of November 6, 1989, stated:

> Dear Judge Luten,
>
> I don't know how to file legal motions so all I can do is address you in a manner that I do and that's straightforward. Today you denied a motion which my lawyer filed to withdraw from my case. I can't understand all that was said but I do know that something isn't quite right. Richard Sanders and myself don't see eye-to-eye on many matters pertaining to this case. He used as a reason for withdrawing our different views on the matter of 2 witnesses. Judge Luten the state has offered a plea bargain that if I

> don't except [sic] will leave me in the position of going back on "Death Row" if found guilty. I know it's not justice to be threatened with dying on the strength that I choose to exercise my right to go to trial and not agree to a plea bargain that's not really feasible.
>
> I wrote to you in March of this year explaining my discomfort with Richard Sanders representing me, that uneasiness has only greatened. I'm on trial for my life and I feel it's only right that I be afforded the opportunity to be able to fight on equal terms. What I'm saying is Glen Martin and Mary McKeown are experienced trial lawyers. Richard Sanders told me my case was the first murder case he's handled, he's outclassed and it shows more and more as time passes. I don't want Richard Sanders representing me on this particular case and it's obvious that he and I have a conflict of interest. I relayed to you in my earlier letter that I don't want to be like a lamb lead [sic] to slaughter and that's how I feel with Richard Sanders representing me. I feel that a trial with him representing me is a mere formality. I ask that you reconsider your decision to deny his motion to withdraw. Thank-you!
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> (R2. V1/R92-93).

The trial judge responded by letter and told Smith that any communication with the court must be through his attorney. The court sent a copy of Smith's letter and the court's response to attorney Sanders on November 9, 1989. (R2. V2/R94). Smith's retrial did not begin until six months later, on May 8, 1990.

On direct appeal following Smith's retrial, the first issue, as identified by this Court, was "whether the trial court violated Smith's constitutional right to effective assistance of counsel and self-representation by failing to inquire into his

letter expressing dissatisfaction with court-appointed counsel." See, Smith, 641 So. 2d at 1320; see also, Initial Brief of Appellant, Smith v. State, Case No. 76,491, at pages 28-32.

In denying relief on this issue on direct appeal, this Court set forth the following cogent analysis:

> The first issue is whether the trial court violated Smith's constitutional right to effective assistance of counsel and self-representation by failing to inquire into his letter expressing dissatisfaction with court-appointed counsel. Several months before trial Richard Sanders, Smith's court-appointed counsel, moved to withdraw because Smith wanted to present testimony that Sanders believed was false. [n3] After a hearing, the trial court denied the motion. Neither the trial judge nor Sanders questioned Smith at the hearing, and Smith did not address the court.
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> > [n3] Sanders was appointed to represent Smith after two other defense lawyers, who served as co-counsel, asked to be discharged because of "irreconcilable differences" with Smith. The trial court granted the motion, then appointed Sanders.
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> On the same day the hearing concluded, however, Smith wrote the trial judge and asked her to "reconsider your decision to deny [Sanders'] motion to withdraw." Smith questioned Sanders' lack of experience in first-degree murder cases and wrote, "I don't want Richard Sanders representing me on this particular case." The trial judge responded by letter and told Smith that any communication with the court must be through his attorney. The record reflects that the trial judge communicated with Smith during the trial, but Smith never raised this issue again. Thus, Sanders continued to represent Smith.
>
> Nonetheless, Smith claims the trial court committed reversible error by not conducting a hearing to determine whether there was reasonable cause to

> believe that Sanders was not rendering effective counsel and, if not, appointing a substitute. In addition, Smith argues that the trial court should have informed him of his right to self-representation and determined whether he knowingly and intelligently chose to waive his right to counsel. This claim is without merit.
>
> Initially, we find the trial court was not required to conduct a hearing on Sanders' representation. Although Smith's letter raises concerns about Sanders, the letter was, in effect, a motion for rehearing. A trial court must conduct an inquiry only if a defendant questions an attorney's competence. Hardwick v. State, 521 So. 2d 1071, 1074-75 (Fla.), cert. denied, 488 U.S. 871, 109 S. Ct. 185, 102 L. Ed. 2d 154 (1988). Smith expressed dissatisfaction with Sanders, but did not question his competence.
>
> Further, Smith's letter did not contain an explicit assertion of his right to self-representation, so a Faretta [n4] inquiry was not required. Raulerson v. Wainwright, 732 F.2d 803, 808 (11th Cir.), 736 F.2d 1528 (11th Cir.), cert. denied, 469 U.S. 966, 105 S. Ct. 366, 83 L. Ed. 2d 302 (1984). Thus, the trial court was not obliged to inform Smith of this right and to determine whether he knowingly and intelligently chose to waive his right to counsel. We find no error on this issue.
>
> [n4] Faretta v. California, 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975)].

Smith, 641 So. 2d at 1320-1321 (e.s.)

Smith now asserts that extraordinary habeas relief should be granted because this Court's decision on direct appeal

allegedly rests upon a material "error of fact."[2] Smith's habeas claim is both procedurally barred and, alternatively, meritless.

First, Smith's habeas claim, predicated on the contents of his own correspondence of May, 1989, is procedurally barred. Essentially, Smith's claim is that the record on direct appeal was incomplete. However, in Porter v. Crosby, 840 So. 2d 981, 984 (Fla. 2003), this Court found that a criminal defendant's claim of an incomplete record on direct appeal was procedurally barred on habeas review because this Court previously addressed the same claim or a variant to this claim in Porter's rule 3.850 proceeding. In Porter v. State, 788 So. 2d 917 (Fla. 2001), this Court found no error in the trial court's summary denial of postconviction relief on Porter's "incomplete record on direct appeal" claim, explaining that:

> . . . First, we find Porter's claim that the record on direct appeal was incomplete to be procedurally barred because it should have been raised on direct appeal. See Muhammad v. State, 603 So. 2d 488 (Fla. 1992). To the extent that this claim is

[2] In Wood v. State, 750 So. 2d 592, 593-594 (Fla. 1999), this Court, quoting Hallman v. State, superseded in part by, Jones v. State, 591 So. 2d 911, 915 (Fla. 1991), explained that the function of the ancient writ of error coram nobis was to correct errors of fact, not errors of law. Rule 3.850 was patterned after the writ of error coram nobis and largely supplanted this writ. Under both this ancient writ and the postconviction rule which replaced it , the facts upon which the petition is based must have been unknown by the trial court, by the party, or by counsel at the time of trial, and it must appear that defendant or his counsel could not have known them by the use of diligence.

> based on newly discovered evidence, we find that the record clearly refutes the claim. In fact, a comparison of the record that Porter has now obtained from postconviction counsel to the record on appeal reveals that the record on appeal was more complete and comprehensive. Therefore, Porter suffered no prejudice as a result, and no evidentiary hearing was required.
>
> Porter, 788 So. 2d at 926.

Thus, even if Smith could arguably frame his current complaint under the guise of "newly discovered" evidence, which the State does not concede and strongly disputes, his incomplete record as an alleged error-of-fact claim, is one which is cognizable in a motion for postconviction relief under Porter. See also, Sweet v. Moore, 822 So. 2d 1269, 1272, n.5 (Fla. 2002) (habeas proceeding noting that Sweet previously filed an amended postconviction motion raising 28 claims in the trial court, including claim (15), alleged omissions in the record on appeal deprived Sweet of meaningful appellate and postconviction review and trial counsel rendered ineffective assistance in failing to ensure a complete record, and claim (16), that the trial court's failure to ensure that Sweet had a complete record on appeal deprived him of a proper direct appeal).

Smith's habeas counsel asserts, as a factual matter, that counsel first discovered Smith's "misfiled" letter (at some unidentified point) during counsel's postconviction investigation. (Petition at 5). Apparently, petitioner has

concluded that his counsel's personal assertions of fact are not only expedient, but sufficient to circumvent the trial court altogether. However, the State emphatically disagrees.

The factual content and significance, if any, of Smith's May, 1989 letter *to the trial court* is an issue which could have been, and should have been, asserted *to the trial court* in Smith's postconviction motion to vacate. Smith's current claim involves specific allegations of fact; accordingly, it is one which should have been raised before the trier of fact: the trial judge in this postconviction case. Habeas claims may not be used to camouflage issues that should have been raised on direct appeal or in a postconviction motion. Rutherford v. Moore, 774 So. 2d 637, 643 (Fla. 2000).

At page 9 of his habeas petition, Smith cites one decision, Parker v. State, 643 So. 2d 1032, 1033 (Fla. 1994), a jury override case remanded by the United States Supreme Court, as ostensible authority for this Court to address his incomplete-record-on-direct-appeal claim as constituting an error of fact allegedly cognizable for the first time in this extraordinary writ proceeding. For the following reasons, nothing in Parker alters this Court's well-settled precedent that habeas corpus petitions may not be used to camouflage issues that timely should have been raised either on direct appeal or in a

postconviction motion. Thomas v. State, 759 So. 2d 650, 660, n.6 (Fla. 2000).

In Parker v. Dugger, 498 U.S. 308 (1991), the United States Supreme Court held that this Court, on direct appeal, misread the trial judge's findings regarding mitigating circumstances, and erroneously affirmed the defendant's sentence based on a mischaracterization of the trial judge's findings. See, Parker, 498 U.S. at 320. Accordingly, the United States Supreme Court found that Parker's appeal had been denied in an arbitrary manner and was constitutionally deficient. Id. On remand, this Court reexamined the entire record and concluded that the jury override was improper because jurors reasonably could have relied on nonstatutory factors established in the record to recommend a life sentence. Parker, 643 So. 2d at 1032. Nothing in Parker remotely addresses either an incomplete record or even a "newly discovered" evidence claim. See also, Herrera v. Collins, 506 U.S. 390, 400 (1993) (federal habeas corpus proceedings are unavailable to correct alleged errors of fact).

Moreover, the State strongly disputes Smith's conclusion that the alleged absence of Smith's letter (dated March 23, 1989 and filed May 30, 1989), undermines this Court's prior analysis one iota. In addressing Smith's successive letter of November 9, 1989, which was part of the record before this Court on

direct appeal, this Court emphasized that "Smith questioned Sanders' lack of experience in first-degree murder cases and wrote, "I don't want Richard Sanders representing me on this particular case." . . . The record reflects that the trial judge communicated with Smith during the trial, but Smith never raised this issue again. Thus, Sanders continued to represent Smith." Smith, 641 So. 2d at 1321.

Smith's letter of May, 1989 asserted that his retrial was set to begin on July 11, 1989. However, Smith's retrial, in fact, did not begin until the following year, on May 8, 1990. In his letter of May, 1989, Smith complained that this was Sanders' first murder case, that Smith had not been transported to Pinellas County "as soon as possible" as Sanders had assured him, that Sanders accepted the case for too little money, and that Smith's correspondence of May 14, 1989 had not yet been answered.

According to Smith's letter of November 9, 1989, included in the record on direct appeal, Smith's earlier correspondence voiced his "discomfort" with trial counsel. According to his subsequent letter, by November, Smith's "uneasiness has only greatened." Thus, by Smith's own admission, his own prior correspondence reflected only a lesser complaint. Consequently, inasmuch as this Court found that Smith's November letter, in

which Smith's "uneasiness has only greatened," did not warrant an inquiry under Hardwick v. State, 521 So. 2d 1071, 1074-75 (Fla. 1988), then Smith's prior letter, characterized by Smith as reflecting his "discomfort" with trial counsel, certainly would not have warranted any prior inquiry under Hardwick.

"As a practical matter, a trial judge's inquiry into a defendant's complaints of incompetence of counsel can be only as specific and meaningful as the defendant's complaint." Lowe v. State, 650 So. 2d 969, 975 (Fla. 1994). In this case, the misfiled letter originated more than a year prior to Smith's retrial. As this Court noted on Smith's direct appeal, the "record reflects that the trial judge communicated with Smith during the trial, but Smith never raised this issue again." Likewise, the complaints initially raised by Smith in the misfiled letter, which preceded his trial by one year, were never raised by Smith again.

Here, as in Davis v. State, 703 So. 2d 1055, 1058 (Fla. 1997), Smith never made an unequivocal request to discharge his court-appointed counsel and he subsequently allowed his attorney to represent him throughout the trial. See also, Morrison v. State, 818 So. 2d 432, 441 (Fla. 2002) (Morrison's complaints can best be described as general complaints about his attorney's trial preparation, witness development, and trial strategy. A

trial court does not err in failing to conduct a Nelson inquiry where the defendant makes such general complaints.) In Logan v. State, 846 So. 2d 472, 477 (Fla. 2003), this Court reiterated that a criminal defendant's dissatisfaction with his court-appointed attorney does not automatically compel an inquiry. As this Court stressed in Logan:

> In Hardwick v. State, 521 So. 2d 1071 (Fla. 1988), this Court adopted the procedure announced in Nelson v. State, 274 So. 2d 256 (Fla. 4th DCA 1973), to be followed when a defendant complains that his appointed counsel is incompetent. When this occurs, the trial judge is required to make a sufficient inquiry of the defendant to determine whether or not appointed counsel is rendering effective assistance to the defendant. However, as a practical matter, the trial judge's inquiry can only be as specific as the defendant's complaint. This Court has consistently found a Nelson hearing unwarranted where a defendant presents general complaints about defense counsel's trial strategy and no formal allegations of incompetence have been made. See Davis v. State, 703 So. 2d 1055, 1058-59 (Fla. 1997); Gudinas v. State, 693 So. 2d 953, 962 n. 12 (Fla. 1997); Branch v. State, 685 So. 2d 1250, 1252 (Fla. 1996). Similarly, a trial court does not err in failing to conduct a Nelson inquiry where the defendant merely expresses dissatisfaction with his attorney. See Davis, 703 So. 2d at 1058-59; Branch, 685 So. 2d at 1252; Dunn v. State, 730 So. 2d 309, 311-12 (Fla. 4th DCA 1999).

Logan, 846 So. 2d at 477. In Dunn v. State, 730 So. 2d 309, 311-12 (Fla. 4th DCA 1999), cited with approval by this Court in Logan, 846 So. 2d at 477, the Fourth District determined that no Nelson hearing was required where the defendant expressed dissatisfaction with his counsel's trial preparation, his

witness development, and his lack of contact with the defendant. See, Dunn, 730 So. 2d at 312. Moreover, as this Court further noted in Logan, 846 So. 2d at 477:

> According to the district court, the defendant was not clearly alleging that defense counsel was incompetent. See id. A lack of communication is not a ground for an incompetency claim. See Watts v. State, 593 So. 2d 198, 203 (Fla. 1992); Parker v. State, 570 So. 2d 1053 (Fla. 1st DCA 1990). Moreover, in Branch, this Court found Nelson inapplicable where a defendant questioned defense counsel's preparation for trial, as well as the amount of communication he had with the defendant. See Branch, 685 So. 2d at 1250; see also Gudinas, 693 So. 2d at 962 n. 12 (stating that a Nelson inquiry was not required because the defendant's claim was a general complaint about defense's trial strategy and not a formal allegation of incompetence).

Smith's letter of May, 1989, was not materially different than his subsequent correspondence in November of 1989. As in the foregoing cases, Smith's initial complaints – primarily questioning trial counsel's general experience and communication – were insufficient to trigger a Hardwick/Nelson inquiry. Smith's appellate counsel raised the issue on direct appeal, without success. Thus, Smith's claim of ineffective assistance of appellate counsel likewise must fail. See, Jones v. Moore, 794 So. 2d 579, 587 (Fla. 2001) (appellate counsel not deemed ineffective for failing to argue a variant to an issue argued and decided on direct appeal). Smith has not demonstrated any deficiency of counsel and resulting prejudice under Strickland.

Finally, Smith has now received the benefit of several days of evidentiary hearings specifically evaluating trial counsel's representation. Thus, Smith's habeas claim, predicated on an underlying challenge to trial counsel's competence, is not only procedurally barred, and meritless, but, also effectively moot.

CLAIM II

THE "FAILURE TO DISCLOSE PERTINENT FACTS" CLAIM

As his second claim for relief, counsel for petitioner contends that the State, on direct appeal, withheld "pertinent and exculpatory information regarding the factual circumstances underlying the issues raised in the appeal." (Petition at p. 11). This contention is grounded on the absurd notion that appellate counsel for the State could have divined matters which were not contained within the record on direct appeal. Also, counsel for petitioner accuses the State's appellate counsel of "engaging in obvious wordplay" (Petition at p. 19, n. 6), yet petitioner's counsel does so himself by quoting extensively and selectively from the State's answer brief and omitting matters which would place everything in context or which would paint the complete picture as it existed at the time of direct appeal. Finally, in the guise of setting forth a cognizable issue in this habeas proceeding, counsel for petitioner merely and improperly bolsters his Rule 3.850 arguments by arguing matters

herein which are only appropriate for a 3.850 appeal. Thus, petitioner's Claim II, in addition to being totally disingenuous, is wholly devoid of merit and must fail.

Throughout this claim, counsel for petitioner cites to case law which has no relevance to the proposition that the State's appellate lawyer can somehow withhold matters on appeal. Indeed, the inability to cite a relevant case is not surprising since it is axiomatic beyond the need for citation that appellate counsel (and the appellate courts) are bound by the matters contained within the appellate record. Inasmuch as it is not possible for the appellate lawyer to "withhold" matters which were created by the parties in the lower court, the instant claim appears to be a poor attempt at relitigating the issues raised on direct appeal which were decided adversely to Smith. This is clearly improper. Hinson v. Crosby, 891 So. 2d 550 (Fla. 2004), citing Mills v. Dugger, 574 So. 2d 63, 65 (Fla. 1990) ("Habeas corpus is not to be used 'for obtaining additional appeals of issues which were raised ... on direct appeal ...'.").

Counsel for petitioner throughout this claim seeks to equate the responsibilities of the State's appellate lawyer with those which are uniquely applicable to the trial prosecutor. It is the trial prosecutor, and not the appellate lawyer, who

investigates the underlying facts of the case, or who has access to the fruits of such investigation, and who, therefore, has the particularized knowledge of factual matters not known to the appellate lawyer. Thus, the cases dealing with Brady claims stress the obligation of the trial prosecutor to not withhold exculpatory evidence, and it is those cases which counsel for petitioner now attempts to make applicable to an appellate lawyer who has knowledge only of those matters contained within the "cold" record. Such an attempt is, not surprisingly, unsupported by any authority.

As an example of attempting to stretch precedent to suit his own purposes, it is unnecessary to look beyond the first substantive matter discussed under this Claim, the purported discovery violation. As his Issue II on direct appeal, Smith asserted that the prosecutor had an affirmative obligation to assist in the preparation of the defense case by disclosing in discovery prior convictions of a *defense* witness. This Court held to the contrary and opined that "[t]he State is required to produce for discovery the criminal records of any witness *the prosecution* intends to call at trial." Smith v. State, 641 So. 2d 1319, 1321 (Fla. 1994) (emphasis in original). This Court further cited Hansbrough v. State, 509 So. 2d 1081, 1084 (Fla. 1987), wherein it was held that:

> [t]he defense has the initial burden of trying to discover impeachment evidence, and the state is not required to prepare the defense's case. This is especially true when the evidence is as accessible to the defense as to the state.
>
> Smith at 1322.

These precedents, as well as the other cases cited in Smith by this Court discussing this proposition, retain their authority, yet counsel for petitioner nevertheless maintains that "the United States Supreme Court has since specifically rejected such a contention." (Petition at p. 12). Counsel for petitioner is blatantly wrong and his reliance on Banks v. Dretke, 540 U.S. 668 (2004), which deals with a trial prosecutor's withholding of impeachment evidence which could have been used to discredit prosecution witnesses is misplaced. Banks has nothing to do with an appellate attorney allegedly "withholding" matters, and Banks has nothing to do with the failure of the prosecutor to provide information concerning a defense witness (information which was just as readily available to defense counsel)[3].

[3] Even a quotation from Banks upon which counsel for petitioner relies ("When police or prosecutors conceal significant exculpatory or impeaching material in the State's possession, it is *ordinarily* incumbent on the State to set the record straight;" emphasis supplied) shows that it is not always necessary for the State to disclose information. Certainly, as held in Smith, one of those times would be when a defense witness's prior record is the concern, a matter which is equally accessible to the defense as to the State.

Counsel for petitioner concludes his argument regarding this discovery issue railing about matters which are ONLY susceptible for consideration in a 3.850 postconviction proceeding. He sets forth that "the State was still sitting upon much more undisclosed evidence that was favorable," but continues, "As explained in much more detail in Mr. Smith's appeal from the denial of 3.850 relief. . ." (Petition at p. 12). Although recognizing that the matters raised were appropriate for postconviction relief, counsel for petitioner nevertheless attempts to hold the State's appellate counsel responsible for disclosing matters which were, years later, the subject of postconviction investigation and consideration. See also, Asay v. Florida Parole Comm'n, 649 So. 2d 859, 860 (Fla. 1994) (holding that Brady has no application to post-conviction clemency proceedings in Florida).

Similarly, counsel for petitioner also reargues what was originally a facet of Issue III on direct appeal. He complains that the discussion regarding the similarity of the weapon used in the instant homicide and in a robbery of other victims was tainted by the withholding of the fact that the testimony regarding description of the gun was allegedly the result of a meeting between the eyewitness, Jones, and Smith's co-defendant, Johnson. Again, how can appellate counsel for the State or, for

that matter the Court, know anything about this from a reading of the record on appeal? That is why 3.850 postconviction proceedings are conducted, and the inclusion in this habeas proceeding of these matters is an improper attempt to bolster the claims which can ONLY be properly raised in 3.850 postconviction proceedings.

In his final attempt to relitigate issues previously determined on direct appeal, counsel for petitioner engages in deceptive wordplay himself by quoting verbatim from Smith's direct appeal brief at pp. 43-46, but then quotes *selectively* from the State's brief. Smith's Issue IV on direct appeal concerned the purported limitation on cross-examination of the State's witness, Melvin Jones. In the answer brief on direct appeal, the State discussed those matters which were contained in the record about the matters raised by the defendant. The State, on direct appeal, recognized that any issues concerning the circumstances surrounding any "deal" obtained by Jones may need to be fleshed out on postconviction, but this notion has been ignored by counsel for petitioner when he omits, conveniently, the following portions of the State's answer brief which commenced as the second sentence of the second paragraph at p. 20 in the State's Brief of the Appellee (and was located

where the first "* * *" appears near the top of the Petition at p. 18):

> "Appellant's claim asserted on direct appeal is one more appropriate for a motion to vacate pursuant to *Florida Rule of Criminal Procedure 3.850*, the appropriate vehicle if appellant believes that there is an undisclosed deal."

The omitted portion of the State's brief continued by observing that, "The record of the instant case, however, reveals exactly what Melvin Jones obtained from the state:

> BY MR. SANDERS:
>
> Q. Now, Mr. Jones, when up for sentencing on all these charges, the state attorney came and testified on your behalf based on the fact that you had come forward with this information, is that correct?
>
> A. Yes, it is.
>
> Q. And you did, in fact, get a break on your sentence as a result of the state attorney's actions, is that correct?
>
> A. Well, from my side,[4] I don't think so, but you can say so. (R1000)"

Brief of Appellee at 20-21. This is another attempt to argue a claim only appropriate for consideration in a 3.850 motion as opposed to the instant habeas petition. As noted above, the *record* reveals what occurred at trial, and that is all that

[4] That portion of Jones' testimony, "Well, from my side," was significantly omitted from the quote set forth by counsel for petitioner in his footnote 8 at page 20 of the Petition.

could be within the knowledge of the State's appellate counsel at the time the direct appeal brief was prepared.

Finally, in Wright v. State, 857 So. 2d 861, 874 (Fla. 2003), this Court addressed another capital defendant's claim that the State allegedly failed to disclose pertinent facts to this court on appeal. In Wright, this Court denied habeas relief, explaining:

> Wright first argues that the State intentionally deceived this Court regarding issues he raised in his direct appeal. In his direct appeal, Wright challenged numerous rulings made by the judge at trial. Wright now asserts that the State was in possession of, but did not divulge, pertinent information that would have favorably resolved his challenges on appeal. This is a claim that was or could have been presented in Wright's direct appeal or his 3.850 proceedings. Issues which were or could have been presented in prior proceedings cannot be reconsidered in a petition for writ of habeas corpus. See Mann v. Moore, 794 So.2d 595, 600-01 (Fla.2001). This procedural bar also acts to prohibit variant claims previously decided. See Jones v. Moore, 794 So.2d 579, 586 (Fla.2001) (finding procedural bar to habeas claim which was variant to claim previously addressed). This claim is therefore procedurally barred.

There are various other instances where counsel for petitioner has attacked the State's appellate counsel, but it serves no purpose to highlight each and every alleged instance – to do so would further burden an overburdened Court. Suffice it to say that petitioner's attempt to attribute clairvoyant abilities to the State's appellate counsel, or suggest that

appellate counsel may discern matters not of record at the time of the direct appeal and, indeed, to divine matters which would be developed in postconviction proceedings years after the fact, should fall upon deaf ears.

CLAIM III

INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL

Smith's third habeas claim alleges ineffective assistance of appellate counsel. Florida courts routinely apply Strickland to claims of ineffective assistance of appellate counsel. Wright v. State, 857 So. 2d 861, 875 (Fla. 2003). "The defendant must demonstrate that counsel's performance was below that expected of competent counsel and that counsel's deficient performance resulted in prejudice to the defendant. However, claims 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." Wright at 875, citing Rutherford v. Moore, 774 So. 2d 637, 643 (Fla. 2000). Appellate counsel has no obligation to raise issues on appeal that were not preserved for review. Id., citing Robinson v. Moore, 773 So. 2d 1, 4 (Fla. 2000).

Such a claim requires an evaluation of whether counsel's performance was so deficient that it fell outside the range of

professionally acceptable performance and, if so, whether the deficiency was so egregious that it undermined confidence in the correctness of the result. See, Thompson v. State, 759 So. 2d 650, 660 (Fla. 2000). A review of the record demonstrates that neither deficiency nor prejudice has been shown in this case.

Following his retrial, Smith's appellate counsel raised five substantive issues on direct appeal: 1) Whether the trial court violated Smith's right to effective assistance of counsel and self-representation; (2) whether the trial court erred by failing to conduct an adequate Richardson inquiry when defense counsel objected to the State's violation of the discovery rule; (3) whether the trial court erred by admitting evidence of an unrelated robbery; (4) whether the trial court violated Smith's right to confront and cross-examine witnesses against him when it allowed the State to conceal the terms of a witness's prior sentencing agreement with the State; and (5) whether the death sentence is disproportionate as applied in this case. Smith v. State, 641 So. 2d 1319 (Fla. 1994).

Smith's current habeas complaints are based on appellate counsel's failure to raise additional issues, each of which will be addressed in turn. No extraordinary relief is warranted because Smith's current arguments were not preserved for appellate review and, even if considered, no reversible error

could be demonstrated. See, Rutherford v. Moore, 774 So. 2d 637 (Fla. 2000) (while habeas petitions are proper vehicle to advance claims of ineffective assistance of appellate counsel, such claims may not be used to camouflage issues that should have been raised on direct appeal or in a postconviction motion); See also, Thompson v. State, 759 So. 2d 650 (Fla. 2000); Teffeteller v. Dugger, 734 So. 2d 1009 (Fla. 1999). As noted above, to obtain relief it must be shown that appellate counsel's performance was both deficient and prejudicial. The failure to raise a meritless issue will not render counsel's performance ineffective, and this is generally true as to issues that would have been found to be procedurally barred had they been raised on direct appeal. See, Rutherford, 774 So. 2d 637.

Smith now asserts that appellate counsel was ineffective to assert the following additional issues on direct appeal.

Scientific Evidence

On direct appeal, this Court noted:

> Although authorities never found the murder weapon, several witnesses linked Smith to a .38-caliber pistol. Smith's uncle, with whom Smith had once lived, testified that a .38-caliber pistol was missing from his home. A lead fragment found on the victim matched the lead composition of bullets Smith's uncle obtained when he bought the gun. Other witnesses testified that they saw Smith with a gun during the day before the shooting. Johnson's testimony also placed a gun in Smith's possession.

Smith, 641 So. 2d at 1320.

Smith now asserts that appellate counsel was ineffective in failing to assert a claim concerning the scientific testimony of the FBI experts. However, trial counsel did not request a hearing on the admissibility of the evidence under Frye v. United States, 293 F. 1013 (D.C. Cir. 1923). Inasmuch as a Frye claim was not presented at trial, this issue was not preserved for appeal. See, Steinhorst v. State, 412 So. 2d 332, 338 (Fla. 1982) ("Except in cases of fundamental error, an appellate court will not consider an issue unless it was presented to the lower court."); Washington v. State, 835 So. 2d 1083, 1087 (Fla. 2002) (As for Washington's claim that trial counsel was ineffective for failing to request a Frye hearing on the DNA evidence, this issue is procedurally barred; it was not raised below in his rule 3.850 motion.)

In Washington v. State, 653 So. 2d 362, 365 (Fla. 1994), this Court addressed the predicate for the admissibility of scientific tests. As this Court explained in Washington,

> In admitting the results of scientific tests and experiments, the reliability of the testing methods is at issue, and the proper predicate to establish that reliability must be laid. If the reliability of a test's results is recognized and accepted among scientists, admitting those results is within a trial court's discretion. When such reliable evidence is offered, "any inquiry into its reliability for purposes of admissibility is only necessary when the opposing party makes a timely request for such an inquiry supported by authorities indicating that there may not be general scientific acceptance of the

technique employed.

> The DNA test results were presented through the testimony of FBI Special Agent Dwight Adams, Baumstark's supervisor. Adams testified as to the scientific reliability of the tests, interpreted the DNA test results, worked as a team with Baumstark, and supervised her as she conducted the actual test. Adams's familiarity with the test, his supervision over Baumstark's work, and Baumstark's affidavit laid a proper predicate for admission of the DNA test results.

Washington, 653 So. 2d at 365 (citations omitted). In his subsequent postconviction appeal and habeas proceedings in Washington v. State, 835 So. 2d 1083, 1087 (Fla. 2002), this same defendant also claimed that appellate counsel was ineffective because he failed to argue that the trial court erred in not holding a Frye hearing concerning the admissibility of scientific evidence [DNA]. This Court soundly disagreed, and explained:

> In the present case, Washington has not shown that appellate counsel rendered deficient performance by failing to raise Frye on appeal. Trial counsel did not mention Frye in the proceedings below. First, as noted above, trial counsel's four pretrial motions were all motions to compel, not motions to exclude. Neither Frye nor the principles underlying Frye were implicated in those motions or in the hearings on the motions. Second, although one paragraph in the motion in limine questioned the validity of the FBI's DNA testing procedures and statistical analyses, [n16] trial counsel presented this issue to the trial court in the context of Baumstark's unavailability for questioning, i.e., counsel claimed that he could not challenge the validity of the tests performed by Baumstark because she was unavailable for questioning. [n17] At no point did trial counsel raise Frye as an

> issue or request a hearing on the general soundness of the FBI's testing procedures. Thus, counsel did nothing to put the court on notice that Frye was at issue in this case.
>
> Washington, 835 So. 2d at 1090

In Washington, this Court reiterated that appellate counsel cannot be deemed deficient for failing to raise an issue that was not raised or preserved at trial. In this case, as in Washington, Smith's appellate counsel was also an experienced assistant public defender who filed an extensive initial brief (58 pages) asserting numerous legal issues. Here, as in Washington, Smith's experienced appellate counsel rendered "reasonably effective representation" under Strickland.

Moreover, in denying Smith's claim of ineffective assistance of trial counsel in connection with the F.B.I. expert's testimony regarding the bullet lead composition, the trial court set forth the following detailed analysis:

> . . . Special Agent Robert Sibert, Special Agent Roger Asbury, and Special Agent Donald Havekost testified at trial as to this issue. Dr. Erik Randich and Charles Peters testified at the evidentiary hearing as to this issue.
>
> Special Agent Robert Sibert, an expert in firearms identification, testified at trial. He indicated that his specialty was to compare the microscopic marks on fired bullets and cartridge cases to a particular firearm. He testified that he discovered lead residue on both of the garments submitted for testing.
>
> Special Agent Roger Asbery initially performed

the testing in 1983. Utilizing neutron activation analyses, which tests antimony, copper, and arsenic, Agent Asbery tested the metal composition of the bullet fragment extracted from the victim's body and compared it to the metal composition of the two unfired .38 special plus p caliber cartridges manufactured by Winchester-Western from the box owned by Roy Cone, the defendant's uncle. Agent Asbery found the elemental composition to be the same. [R2 Pages: 1035-1045]. The State's theory of the case, as argued at trial, was that the defendant used his uncle's gun and bullets during the murder of Jeffrey Songer and the subsequent robbery of the DeBulles.

Next, Donald Havekost, a Special Agent for the F.B.I. assigned to the elemental composition unit in Washington, D.C., testified as an expert witness in neutron activation analysis and inductively coupled plasma atomic emissions spectrometry (ICP). He testified that in 1988, Agent Asbery came to him with the evidence in hand, and explained that this case, which originated in 1983, was going back to trial. Agent Asbery inquired as to whether any new technologies had developed, such that additional testing should be completed. Agent Havekost explained that ICP was a newer analysis that permitted testing of two additional elements – bismuth and silver. Subsequently, Agent Havekost retrieved the samples and conducted his own neutron activation analysis as well as the newer ICP analysis. His ultimate conclusion was that the neutron activation and ICP analyses he conducted, which chemically compared the elements of antimony, copper, arsenic, bismuth, and silver, revealed no difference in the samples, such that the samples originated from a common source. [R2 Pages: 1066-1071].

Essentially, CCRC maintains that Agent Havekost's testimony went unchallenged, particularly the aspect of his testimony dealing with the chance that another box of bullets would have the same, materially indistinguishable levels of the five chemical elements. CCRC also takes issue with Agent Havekost's testimony of R2, page 1083. CCRC asserts that defense counsel should have, at the very least, hired a metallurgist to advise him regarding the significance

of another match. In support of this argument, CCRC, at the evidentiary hearing, presented the testimony of Dr. Erik Randich, a metallurgist employed at Livermore National Laboratories. He testified, in pertinent part, that Agent Havekost's opinion — the samples originated from a common source — is erroneous unless that source is unique. In short, Dr. Randich would correct the statement to indicate that they could have come from the same source. [Pages: 439-443].

The record reflects that Agent Havekost addressed this issue on direct-examination. According to Roy Cone's trial testimony, the unfired cartridges that comprised one of the two samples, the other being the bullet fragment extracted from the victim, were at least eleven years old. [R2 Pages: 890-892]. Agent Havekost explained that the chances of finding a box that was purchased or manufactured say, a year ago, with the same compositional make-up would be, in his opinion, "very unlikely." He opined that as time progresses, the chances of finding another box with the same compositional make-up becomes less and less remote, and that the chance of finding such "would be an insurmountable job." [R2 Pages: 710-711].

Moreover, Agent Charles Peters, the 27-year veteran F.B.I. laboratory technician, testified at the evidentiary hearing. As a rebuttal witness to Dr. Randich, he explained that Agent Havekost, in 1974, took samples from the melting pot at Winchester-Western and from three different billets [sic], compared them, and found them to be homogenous as to their contents. Agent Peters indicated that he reviewed the trial testimony of Agent Asbery and Agent Havekost, and that based on his expertise, neither of those Agents misled or exaggerated the relevance of the lead comparison analysis. [R2 Pages: 522-523].

Sanders testified that he did, in fact, consult an expert in the area to assist him with the lead comparison testimony. State's Ex. 24, which is a Motion for Costs of Expert, confirms that he sought costs for "experts on ballistics and fingerprinting to aid in trial preparation," and State's Ex. 23 confirms that he hired a firearms expert. In particular, Sanders indicated that he called an expert

> clearinghouse, and was referred to a qualified expert in the area. He recalled "I just wanted to see if there was any way — if he [his expert] saw any way I could challenge what they did or the conclusions they reached, at the very least, with respect to that lead analysis testimony they gave." He further testified "I sent that [F.B.I. reports on lead comparison tests as furnished in discovery] to him [his expert] and asked him — explained to him what the case was about and asked him whether he saw any problems with what the F.B.I. expert had done and what he had concluded. And he called me back sometime later, as best I recall, and said something to the effect that he didn't see any problem with it." Finally, Sanders indicated that he conducted research at Stetson College of Law to familiarize himself with neutron activation analysis. [Pages: 672-676; 678-681].
>
> * * *
>
> The court was unable to find any testimony or evidence offered at the evidentiary hearing concerning Sanders' failure to hire a chemical residue expert. At the evidentiary hearing, Dr. Randich discussed, in detail, the bullet lead comparison testing and how Agent Havekost's opinion at trial was "flawed." He did not, however, offer testimony on the testing that determined lead to be present on the victim's sweater and t-shirt, and on the defendant's jeans. Therefore, to the extent it is distinct, the chemical residue expert claim shall be deemed abandoned. Anderson, 822 So. 2d at 1266-67.
>
> (PC-R. V22/R4102-4104)

Appellate counsel cannot be considered ineffective for failing to raise issues which were not properly raised at trial or preserved for review. See, Wright v. State, 857 So. 2d 861, 877 (Fla. 2003). Nor can appellate counsel be deemed ineffective for failing to raise non-meritorious claims on appeal, or claims that do not amount to fundamental error. See,

Happ v. Moore, 784 So. 2d 1091 (Fla. 2001).

False "alibi" Testimony

Trial counsel made a strategic decision in this case, see, Florida v. Nixon, 125 S. Ct. 551 (2004), ethically declining to present false alibi testimony. Now, Smith asserts that appellate counsel should have asserted on direct appeal that Smith was precluded from presenting his "own" witnesses to present Smith's false alibi. Smith was not entitled to hybrid representation, McKaskle v. Wiggins, 465 U.S. 168, 183 (1984), nor was he entitled to a "license to lie." Appellate counsel was not ineffective in failing to present an unpreserved issue or an issue which is patently without merit.

Defendant's Absences

Again, Smith asserts a claim of ineffective assistance of appellate counsel based on an unpreserved issue. In Wright, *supra*, this Court addressed, and denied, a similar habeas claim.

> In affirming the denial of Wright's first postconviction motion, we adopted the trial court's written order which stated that a claim involving Wright's absence from the courtroom while the Court communicated with the jurors should have been raised on direct appeal. See Wright v. State, 581 So.2d 882, 885-86 (Fla.1991). However, there was no objection at trial to the procedure that was utilized in answering the jury's inquiry. Therefore, appellate counsel was not ineffective for failing to raise an unpreserved issue. See Freeman v. State, 761 So.2d 1055 (Fla. 2000).

Wright, 857 So.2d at 874-876

Under Florida law, this issue must be preserved by an objection. See, Carmichael v. State, 715 So. 2d 247 (Fla. 1998); see also, Cole v. State, 701 So. 2d 845, 850 (Fla. 1997); Gibson v. State, 661 So. 2d 288 (Fla. 1995). In fact, this Court has rejected the claim that appellate counsel can be deemed ineffective for failing to claim that the denial of the right to be present is fundamental error. See, Rutherford v. Moore, 774 So. 2d 637, 647 (Fla. 2000).

Moreover, under both Florida and federal law, a defendant must show that "his presence ha[d] a relation, reasonably substantial, to the fullness of his opportunity to defend against the charges," and that his presence would not be "useless, or the benefit but a shadow." Kentucky v. Stincer, 482 U.S. 730, 745 (1987) (quoting Snyder v. Massachusetts, 291 U.S. 97, 105-07 (1934)); Francis v. State, 413 So. 2d 1175, 1177 (Fla. 1982). Because the claims regarding Smith's absence were unpreserved and there was no showing of a benefit from Smith's presence, Smith cannot demonstrate entitlement to any relief under Strickland. Furthermore, in Orme v. State, 30 Fla. L. Weekly S127 (Fla. Feb. 24, 2005), this Court recently denied habeas relief to another capital defendant asserting a similar claim. In Orme, this Court stated, in pertinent part:

Absence from Critical Stages of Trial

> Orme claims appellate counsel was ineffective for failing to raise on appeal the fact that he was involuntarily absent from two bench conferences which he claims were critical stages of his trial. He further argues the issue should have been raised on appeal, although not preserved by objection, because the issue amounts to fundamental error. At one conference, the State and defense counsel agreed upon penalty phase instructions. At another conference, the trial court denied one of Orme's proposed jury instructions. [FN3] We deny relief because counsel is not ineffective for failing to raise nonpreserved, nonfundamental issues.
>
> A defendant has a constitutional right to be present at all "crucial stages of his trial where his absence might frustrate the fairness of the proceedings." Garcia v. State, 492 So. 2d 360 (Fla. 1986). However, the right "does not confer upon the defendant the right to be present at every conference at which a matter pertinent to the case is discussed, or even at every conference with the trial judge at which a matter relative to the case is discussed." United States v. Vasquez, 732 F.2d 846, 848 (11th Cir. 1984); see also Rutherford v. Moore, 774 So. 2d 637 (Fla. 2000); Cole v. State, 701 So. 2d 845 (Fla. 1997) (finding that the constitutional right to be present does not extend to conferences involving purely legal matters because the defendant's presence would be of no assistance to counsel). Furthermore, Orme has not shown that anything discussed during the bench conferences required his consultation. He has failed to demonstrate any prejudice from his absence. Thus, he has not shown that his failure to be present at the bench conferences affected the validity of the trial itself to the extent that the verdict could not have been obtained. Appellate counsel was not ineffective for failing to raise a claim that was not preserved for appeal and that did not amount to fundamental error.

Orme v. State, 30 Fla. L. Weekly S127 (Fla. Feb. 24, 2005)(footnote omitted).

CLAIM IV

THE RING CLAIM

Lastly, Smith challenges the validity of his death sentence by arguing that Florida's capital sentencing statute is unconstitutional under Ring v. Arizona, 536 U.S. 584, 153 L. Ed. 2d 556, 122 S. Ct. 2428 (2002). Smith's Ring claim is both procedurally barred and also without merit.

The purpose of a writ of habeas corpus is to inquire into the legality of a prisoner's present detention. Wright v. State, 857 So. 2d 861, 874 (Fla. 2003), citing McCrae v. Wainwright, 439 So. 2d 868 (Fla. 1983). Habeas corpus should not be used as a vehicle for presenting issues which should have been raised at trial and on direct appeal or in postconviction proceedings. Id. Smith's request for habeas relief must be denied inasmuch as his current claim is not properly raised in the instant petition, does not apply retroactively, is procedurally barred, without merit and is inapplicable to Smith's death sentence.

None of the petitioner's current complaints were raised at trial and direct appeal. Therefore, they are procedurally barred. The claim that Florida's death penalty sentencing statute violates the Sixth Amendment right to a jury trial has been available since petitioner's trial and sentencing, but was

never asserted as a basis for relief. Since Smith did not raise this claim at trial and on direct appeal, it is now procedurally barred. See, Parker v. State, 790 So. 2d 1033, 1034-35 (Fla. 2001) (denying claim under Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000) as not properly preserved for appellate review); Finney v. State, 831 So. 2d 651, 657 (Fla. 2002) (ruling that because Finney could have asserted that Florida's capital sentencing statute was unconstitutional on direct appeal his claim was procedurally barred on post-conviction motion); Floyd v. State, 808 So. 2d 175 (Fla. 2002) (claim that Florida's death penalty statute is unconstitutional is procedurally barred because it should have been raised on direct appeal); Arbelaez v. State, 775 So. 2d 909, 919 (Fla. 2000) (challenges to the constitutionality of Florida's death penalty scheme should be raised on direct appeal); Swafford v. State, 828 So. 2d 966 (Fla. 2002) (observing that habeas proceedings cannot be used for second appeals). See also, Turner v. Crosby, 339 F.3d 1247 (11th Cir. 2003) (ruling that capital defendant's Ring claim was procedurally barred because Turner never claimed, in state court, that Florida's capital sentencing structure violated his Sixth Amendment right to a trial by jury).

Like his Ring claim, Smith did not previously assert, at trial and direct appeal, any claim that his indictment allegedly failed to include all of the elements of capital murder. Accordingly, this claim is also procedurally barred. See Smith v. State, 445 So. 2d 323, 325 (Fla. 1983) (holding that Smith's claim that he was deprived of due process by the state's failure to provide notice of the aggravating circumstances upon which it intended to rely was procedurally barred in postconviction proceeding). In Kormondy v. State, 845 So. 2d 41 (Fla.), cert. denied, 124 S.Ct. 392 (2003), this Court ruled that the absence of notice of the aggravating factors the State will present to the jury and the absence of specific jury findings of any aggravating circumstances does not violate the dictates of Ring. This Court also held that a special verdict form indicating the aggravating factors found by the jury is also not required by the decision in Ring. Accord, Fennie v. State, 855 So. 2d 597 (Fla. 2003) (rejecting Fennie's claim that Florida's death penalty statute was unconstitutional because it fails to require aggravators to be charged in the indictment, submitted to a jury, and proven beyond a reasonable doubt); Blackwelder v. State, 851 So. 2d 650 (Fla. 2003) (specifically rejecting Blackwelder's argument that aggravating circumstances must be alleged in the indictment, submitted to the jury, and

individually found by a unanimous jury verdict); Porter v. Crosby, 840 So. 2d 981, 986 (Fla. 2003) (rejecting argument that aggravating circumstances must be alleged in the indictment, submitted to the jury, and individually found by a unanimous jury verdict).

Assuming, *arguendo*, that Ring has any effect on Florida's capital sentencing structure, Ring is not applicable retroactively to Smith's case. See, Schriro v. Summerlin, 124 S. Ct. 2519 (2004) (holding that Ring does not apply retroactively); Kokal v. State, 2005 Fla. LEXIS 6, 42-43 (Fla. January 13, 2005) (Pariente, C.J., specially concurring, stating "A majority of this Court has now concluded that Ring does not apply retroactively in Florida to cases that are final, under the test of Witt v. State, 387 So. 2d 922 (Fla. 1980). See, Monlyn v. State, 2004 Fla. LEXIS 2170, 29 Fla. L. Weekly S741, S743-44 (Fla. Dec. 2, 2004) (Pariente, C.J., specially concurring, with Quince, J., concurring) (Cantero, J., concurring, with Wells and Bell, JJ., concurring). Accordingly, [defendant's] Ring claim is procedurally barred in postconviction proceedings.")

Finally, this Court consistently has rejected Ring claims. See, Bottoson v. Moore, 833 So. 2d 693 (Fla.), cert. denied, 537 U.S. 1070, 154 L. Ed. 2d 564, 123 S. Ct. 662 (2002); King v.

Moore, 831 So. 2d 143 (Fla.), cert. denied, 537 U.S. 1067, 154 L. Ed. 2d 556 (2002); Dillbeck v. State, 882 So. 2d 969, 976 (Fla. 2004). Furthermore, one of the aggravating circumstances found by the trial court in this case was Smith's prior conviction of a violent felony, "a factor which under Apprendi and Ring need not be found by the jury." See, Dufour v. State, 2005 Fla. LEXIS 691, 83-84 (Fla., April 14, 2005), citing Jones v. State, 855 So. 2d 611, 619 (Fla. 2003); see also Doorbal, 837 So. 2d at 963 (rejecting Ring claim where one of the aggravating circumstances found by the trial judge was defendant's prior conviction for a violent felony), cert. denied, 539 U.S. 962, 156 L. Ed. 2d 663, 123 S. Ct. 2647 (2003). Smith's final habeas claim, based on Ring, is both procedurally barred and without merit.

CONCLUSION

Petitioner's habeas claims are not properly raised in the instant petition, do not apply retroactively, are procedurally barred, and without merit. The instant petition should be denied.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to Martin J. McClain, Esq., McClain & McDermott, P.A., 141 N.E. 30th Street, Wilton Manors, Florida 33334; to the Honorable Mark I. Shames, Circuit Judge, Room 200, 545 First Ave. N., St. Petersburg, Florida 33701; and to C. Marie King, Assistant State Attorney, P.O. Box 5028, Clearwater, Florida 33758-5028, this 25th day of April, 2005.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this response is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

Respectfully submitted,

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