IN THE FLORIDA SUPREME COURT
CASE NO. SC05-1612

DAVID WYATT JONES, *Petitioner*

v.

JAMES CROSBY, *Respondent.*

RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

COMES NOW Respondent, James Crosby, by and through undersigned counsel and responds as follows to the petition for writ of habeas corpus. For the reasons discussed, the petition should be denied.

Statement of the Facts

The facts underlying petitioner's convictions, as found by this Court on direct appeal, are as follows:

> David Jones, who was thirty-six years old at the time of the crime, was convicted of the first-degree murder of Lori McRae. The evidence at trial revealed that McRae was abducted from a parking lot in the early morning hours of January 31, 1995. Her body was found abandoned in a wooded area in a neighboring county. The most likely cause of death was ligature strangulation.

The evidence revealed that over the two days following her abduction, Jones stole $600 from McRae's ATM account. The first withdrawal, for $300, occurred at 3:09 a.m. on the morning of the murder. Jones was captured on the film of the bank's security camera while making that transaction. Jones eventually attempted over 100 withdrawals in the next two days, but only eleven were successful. Jones was apprehended on February 1 near an ATM machine that police were staking out. At the time, he was driving McRae's Chevy Blazer.

When Jones was arrested he had bloody scratches on his face and reddish stains on his jeans, which later DNA testing revealed "almost conclusively" was McRae's blood. Traces of blood were found in the Blazer as well. The State also presented the testimony of two automobile detailers who testified that Jones attempted to have the interior of the Blazer cleaned on the day after McRae's disappearance.

After his arrest, Jones was transported to police headquarters and questioned by Detective Parker of the Jacksonville Sheriff's Office, the lead investigator in the case. Jones was properly advised of his rights under Miranda, n1 and initially denied his involvement in McRae's disappearance. He eventually terminated the interview, invoking his right to remain silent and asking to speak with his attorney. Twenty days later, Jones confessed to Detective Parker that he committed the murder and accompanied police to the location where he had hidden McRae's body. . . .

McRae's body was badly decomposed; thus, an exact determination of the cause of her death was difficult. The medical examiner opined that she died as a result of "ligature strangulation." Her body exhibited multiple bruises and defensive wounds, and there was a blood stain on her jacket.

There was a rope tied around McCrae's [sic] ankles, a cord tied

n1 Miranda v. Arizona, 384 U.S. 436, 16 L. Ed. 2d 694, 86 S. Ct. 1602 (1966).

around her neck, and on top of the cord a sleeve from a black sweater.

> The sleeve from the sweater matched a sweater owned by Jones' wife, and rope found in the trunk of Jones' automobile was of the same type as the rope around McRae's ankles. McRae had on jeans, which were unzipped, exposing her pubic area and buttocks. Whether McRae had been sexually abused could not be determined due to decomposition of the genital area. McRae also had on a blouse, which was missing some buttons. Two buttons later found in McRae's vehicle were from that blouse.
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> The jury returned a verdict of guilt of first-degree murder, robbery, and kidnapping. . . .
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> * * * * *

Jones v. State, 748 So. 2d 1012, 1016 (Fla. 1999), cert. denied, 530 U.S. 1232 (2000).

Statement of the Case

Jones was charged by indictment on February 16, 1995, with the first-degree murder, kidnapping, and robbery of Lori McRae. R.-I, at 3-4.[1] Jones pled not guilty to the charges and proceeded to a jury trial. The jury, on March 21, 1997, following a five-day trial, found Jones guilty as charged. R-IV, at 679; Tr.-XXI, at 1516-1517. On April 10, 1997, the jury returned its advisory verdict for death by a

[1] Based on the nature of petitioner's claims for relief, the State relies upon the direct appeal record and therefore respectfully requests that the Court take judicial notice of its file in cause number 90,664. Reference to the direct appeal record will be to the record (hereinafter "R.") and the transcript (hereinafter "Tr."), with the applicable volume and page citations.

vote of 9-3. R-V, at 858; Tr.-XXVI, at 2120. The parties filed memoranda concerning sentencing, R.-VI, at 989, 1020, 1034, and the trial court held a hearing on April 16, 1997, thereafter sentencing Jones on April 25, 1997. See R.-VI, at 1135. In regard to sentencing, as summarized by this Court,

> . . . . [d]uring the penalty phase, several witnesses testified regarding Jones' addiction to crack cocaine, use of other drugs, and the effect of these drugs on Jones' personality. According to the testimony, Jones began "drinking and drugging" when he was fourteen or fifteen years old. Jones' wife reported that he began serious abuse of illegal substances in 1986, when he began "shooting up" cocaine and dilaudid. He began smoking crack cocaine in 1994, quickly escalating to the point where he spent all his time seeking and smoking crack, often neglecting to eat, bathe, or sleep. Jones' wife testified that they financed their crack habit with extensive shoplifting.
>
> Defense counsel also called Drew Edwards to testify as an expert in the penalty-phase proceedings. Edwards offered his testimony as an expert regarding the effect of cocaine on the brain. Edwards testified that Jones was a crack addict, suffering from these symptoms. Edwards made clear that he did not believe addiction to cocaine is an excuse for crime, yet he admitted that a cocaine addict would suffer impairment of his ability to conform his conduct to the requirements of the law. Edwards testified that despite his addiction, Jones would have always known the difference between right and wrong.
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> Another defense expert testified that Jones has an I.Q. of 78, placing him between the fifth and ninth percentiles of the population. The expert testified that standardized tests revealed that Jones had little ability to control his impulses, but admitted that his motivation to get the right answer during his testing appeared to "vary." She opined that he was able to conform his conduct to the requirements of the law, "provided he's not impaired in some other way."

The penalty-phase testimony also revealed that Jones was previously convicted of the murder of Jasper Highsmith in 1986 in Duval County, Florida. The murder was committed after Jones escaped from jail where he was being held on a burglary charge. Jones was found guilty of second-degree murder and sentenced to twenty years in prison. He was released from prison in 1992, after serving only six years. According to the presentence investigation report, not submitted to the jury, Jones' criminal history also included convictions for disorderly conduct, burglary, drug possession, DUI, resisting arrest, and shoplifting.

At the conclusion of the penalty-phase proceedings, the jury recommended the death penalty by a vote of nine to three. The trial court accepted the jury's recommendation and sentenced Jones to death. The trial court found the following four aggravators: (1) that the murder was committed during the course of a kidnapping and a robbery; (2) that Jones had previously been convicted of a violent felony (murder); (3) that the murder was heinous, atrocious or cruel (HAC); and (4) that the murder was committed to avoid arrest. The court found the following statutory mitigators, which it gave "some weight": (1) that Jones' capacity to appreciate the criminality of his conduct was substantially impaired; and (2) that the capital felony was committed while Jones was under the influence of extreme mental or emotional disturbance.

The court also found the following nonstatutory mitigators, which it gave "some weight": (1) that Jones was a crack addict; (2) that Jones is the father of a teenaged son n2 and was a good worker and good provider when he was not using drugs on a regular basis; and (3) that jail records after the arrest for the McRae murder indicated that he had exhibited signs of a "psychotic episode." However, as the trial court found in its sentencing order, records one

n2 Jones' mother has had custody of Jones' son since shortly after the child's birth.

day after the date of Jones' arrest indicated that he showed no signs of mental illness, and no evidence was presented that he was incompetent to proceed or insane at the time of the crime.

* * * * *

Jones, 748 So. 2d at 1016-1017.

On direct appeal Jones was represented by Assistant Public Defender W.C. McLain, who was admitted to the Florida Bar in 1975. He raised the following thirteen issues:

> (1) Whether his confessions introduced against him were obtained in violation of *Edwards v. Arizona*, 451 U.S. 477, 68 L. Ed. 2d 378, 101 S. Ct. 1880 (1981); (2) whether the defendant is entitled to a new trial based on Detective Parker's testimony regarding Jones' invocation of his right to remain silent; (3) whether Detective Parker's reference to a racial slur used by the defendant during his statement to police and reference to a spider tatoo [sic] on his arm allegedly linked with unrelated racial killings require a new trial; (4) whether the evidence was sufficient to establish premeditated murder; (5) whether the trial court committed reversible error in refusing to allow the testimony, during the penalty phase, of a witness who would testify about the impact of crack cocaine; (6) whether the admission of details and photographs regarding the defendant's prior murder conviction requires a new penalty-phase proceeding; (7) whether the trial court's refusal to allow the defendant's prior counsel to testify regarding a psychiatric report prepared in 1986 finding the defendant incompetent requires a new trial; (8) whether the evidence supports the avoid arrest aggravator; (9) whether the trial court erred in denying Jones' counsel's motion to withdraw prior to the penalty phase proceeding; (10) whether the trial court erred in allowing the State to introduce victim impact evidence; (11) whether a new penalty phase is required for the trial court's substitution of "or" for "and" in the HAC instruction to the jury, and whether the HAC instruction is unconstitutional; (12) whether the trial court erred in instructing the jury that an aggravating circumstance could be based on the felony underlying the felony-murder conviction; and (13) whether the death penalty is unconstitutional.

Jones, 748 So. 2d at 1017 n.3. Following the filing of the State's responsive brief, appellate counsel filed a reply brief.

Statement of Legal Standard

This Court has stated that a habeas petition is the proper vehicle to assert ineffective assistance of appellate counsel. Davis v. State, 875 So. 2d 359, 372 (Fla. 2003). In Rutherford v. Moore, 774 So. 2d 637 (Fla. 2000), the Court explained that the standard for proving ineffective assistance of appellate counsel mirrors the standard for proving ineffective assistance of trial counsel established in Strickland v. Washington, 466 U.S. 668 (1984). Rutherford, 774 So. 2d at 642.

To demonstrate prejudice, petitioner must show that the appellate process was compromised to such a degree as to undermine confidence in the correctness of the result. Id. at 643; see also Downs v. Wainwright, 476 So. 2d 654, 655-657 (Fla. 1985). Appellate counsel's performance will not be deficient if the legal issue that appellate counsel did not raise was meritless. Spencer v. State, 842 So. 2d 52, 74 (Fla. 2003) (observing that appellate counsel will not be considered ineffective for failing to raise issues that have little or no chance of success). Indeed, appellate counsel has a "professional duty to winnow out weaker arguments in order to concentrate on key issues," even in capital cases. Thompson v. State, 759 So. 2d

650, 656 n.5 (Fla. 2000) (citing Cave v. State, 476 So. 2d 180, 183 n.1 (Fla. 1985), cert. denied, 476 U.S. 1178 (1986)).

This Court recently set out the applicable analysis it undertakes:

> [w]hen evaluating an ineffective assistance of appellate counsel claim raised in a writ of habeas corpus, this Court must determine 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.

Windom v. State, 886 So. 2d 915, 930-931 (Fla. 2004).

Argument

Issue I

WHETHER APPELLATE COUNSEL PROVIDED EFFECTIVE ASSISTANCE THOUGH HE DID NOT RAISE THE ISSUE OF THE ADMISSION OF EVIDENCE AND THE PROSECUTOR'S ARGUMENT PERTAINING TO THE CONDITION IN WHICH THE VICTIM'S BODY WAS FOUND -- THAT HER PANTS WERE UNZIPPED AND PULLED DOWN EXPOSING HER PUBIC AREA AND BUTTOCKS -- WHEN PETITIONER HAD NOT BEEN CHARGED WITH A SEXUAL OFFENSE AND COLLATERAL COUNSEL BELIEVES THERE IS A LACK OF EVIDENCE TO SUPPORT SUCH A CHARGE?

Petitioner contends that notwithstanding the fact that he was not charged with sexual battery or any sex crime, the prosecutor "vigorously attempted to suggest,

through testimony and argument, that Petitioner sexually battered the victim." Petition, at 7. According to petitioner, "[t]his was a blatant attempt to further inflame the jury against Petitioner, especially concerning their sentencing recommendation." Id. Jones thereupon sets forth certain statements by the prosecutor during his opening statement, id. at 7-8, as well as testimony elicited from the medical examiner, id. at 8-9, Officer Grant, id. at 9-10, FDLE serologist Diane Hanson, id. at 10, and finally, certain statements from the prosecutor's closing argument. Id. at 11-12, 14, 15.

First, Jones does not identify what the legal basis upon which appellate counsel should have "present[ed] this issue in petitioner's direct appeal to this court." Id. at 7. Instead, petitioner jumbles together instances from the prosecutor's guilt phase opening statement, guilt and penalty phase closing arguments, and testimony adduced at trial, id. at 7-12, 14-15, and then appears to argue that the matters quoted on those pages constituted the presentation of evidence of uncharged crimes. Id. at 17-18. Petitioner does not, however, address the principle that argument is not evidence, Occhicone v. State, 570 So. 2d 902, 904 (Fla. 1990) ("Opening remarks are not evidence, and the purpose of opening argument is to outline what an attorney expects to be established by the evidence."), cert. denied, 500 U.S. 938 (1991); Conahan v. State, 844 So. 2d 629, 639-640

(Fla.), cert. denied, 540 U.S. 895 (2003), and that the jury was so instructed. Tr.-XVI, at 523 (instruction preceding opening argument); cf. id. at XXI-1510 (instruction before case submitted to the jury, telling jury that the "case must be decided only upon the evidence that you've heard from the answers of the witness and that you've seen in the form of exhibits in evidence and these instructions."). No objection was raised to the trial court's instructions pertaining to the prosecutor's arguments, and petitioner did not raise the claim as one of ineffectiveness in his postconviction proceedings.[2] And to the extent that the issue petitioner believes appellate counsel should have raised -- i.e., the inadmissibility of certain evidence -- as discussed infra, at 10-12, no objection was made concerning the cited witness testimony.

Secondly, Jones neglects to address the fact that no objection was raised to all but two of the cited instances of testimony and argument that are the subject of Issue I.[3] Compare Tr.-XVI, at 527-528, 529-530, 533-534; id. at XVII-609-610,

[2] The State simply points out that at no time were the instructions challenged and does not concede that a defendant can overcome a procedural default by subsequently cloaking the claim as one of ineffective assistance of counsel. See Stewart v. State, 801 So. 2d 59, 64 n.6 (Fla. 2001) (claim of "overbroad prosecutorial argument on aggravating circumstances and *ineffectiveness of counsel for failing to object to the same*" held procedurally defaulted as not raised on direct appeal) (emphasis added).

[3] There was a third objection that was raised at trial to one of the prosecutor's arguments cited by the petition, but the basis for that objection is different from that

614, 651-652; id. at XIX-1090; id. at XXI-1453; id. at XXVI-2042-2043, 2053 with id. at XXI-1459-1560; id. at XXVI-2056. Petitioner must have recognized the procedural defaults, as he raised those matters as a claim of ineffective assistance of trial counsel before the trial court in his Rule 3.851 motion.[4] See PCR.R.-I, at 119,¶20; 120-121,¶¶24-26; 123,¶¶32-33; 124-125,¶38; 125,¶39; see also petitioner's Initial Brief filed in his appeal of the order denying postconviction relief, under case number 04-2217 (hereinafter "IB (PCR)"), at 54-59.[5]

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upon which petitioner now relies. Compare Tr.-XXVI, at 2053 ("[T]he last comment that's inflammatory.") with Petition, at 15 (contending that "[t]he only reason for the comment was to suggest that Mr. Jones targeted the victim for the purpose of raping her."). Accordingly, any challenge to that argument was not preserved. Tillman v. State, 471 So. 2d 32, 35 (Fla. 1985) ("In order to be preserved for further review by a higher court, an issue must be presented to the lower court and the specific legal argument or ground to be argued on appeal or review must be part of that presentation if it is to be considered preserved."); Esparza v. State, 743 So. 2d 180 (Fla. 3d DCA 1999); see Spann v. State, 857 So. 2d 845, 856 (Fla. 2003). In any event, petitioner makes no attempt to demonstrate how an argument concerning the CCP aggravator -- that petitioner, in desperate need of money for his crack habit, was able to control his behavior while making a purchase in Walgreens and then abducts a vulnerable victim -- has anything to do with suggesting that she was targeted in order to rape her. See Tr.-XXVI, at 2052-2053.

[4] Respondent respectfully requests that the Court also take judicial notice of the appellate record in petitioner's postconviction appeal, case number SC04-2217, also pending before this Court. The postconviction record on appeal will be cited as "PCR.R." with the applicable volume number and page.

[5] Because the page numbering of the copy of petitioner's initial brief in the postconviction appeal as received by undersigned counsel does not match the content for the page numbering of the brief posted on the Court's web site, as well

"Appellate counsel has no obligation to raise an issue that was not preserved for review and is not ineffective for failing to raise an unpreserved issue on appeal." Zack v. State, 911 So. 2d 1190, 2005 Fla. LEXIS 1456 *30 (Fla. Jul. 7, 2005). Only where the claim constitutes fundamental error will appellate counsel be held ineffective under such circumstances.[6] Davis v. State, 2005 Fla. LEXIS 2052 *78-79 (Fla. Oct. 20, 2005); Rodriguez v. State, 2005 Fla. LEXIS 1169 *67 (Fla. May 26, 2005).

Petitioner makes no attempt to demonstrate fundamental error, instead arguing the defaulted claims on the merits. See Petition, at 17-23.[7] In respect to the

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as for other reasons under Rule 9.210(b) of the Florida Rules of Appellate Procedure, the State filed a motion to strike petitioner's "Initial Brief Of Appellant" in his postconviction appeal, case number SC04-2217. That motion is currently pending before the Court. In the meantime, the State has submitted a copy of petitioner's appellant's initial brief received by Respondent as part of its appendix upon the filing of its Answer Brief, as it is that copy of the brief that the State responded to and the cited page numbers refer.

[6] "Fundamental error is 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.'" Patton v. State, 878 So. 2d 368, 380 (Fla. 2004) (internal citations omitted).

[7] Petitioner cites Strickland v. Washington as the standard to evaluate appellate counsel's performance, Petition, at 23, but does not recognize the effect of the procedural defaults. Rather, according to petitioner, "[t]he bogus sexual battery was simply thrown in the middle of the evidence for pure, unadulterated prejudice," id. at 19, and "[i]t cannot be reasonably argued that the bogus rape scenario did not prejudice the jury against Petitioner in a manner that affected the outcome of its sentencing recommendation." Petition, at 22.

prosecutor's opening statement, evidence presented, and those portions of his closing argument that no objection was raised, the State relies upon its discussion in its Answer Brief filed in case number SC04-2217, at 55-61, pertaining to petitioner's claim of ineffective assistance for trial counsel's failure to object.[8] There the State demonstrates that, as found by the trial court, see PCR.R.-III, at 403-411, counsel made a strategic decision whether to object, and those matters were proper as it was based on what the prosecutor expected the evidence to be, what the evidence in fact established, and the arguments thereafter were based upon that evidence.

There are two statements made by the prosecutor during closing arguments, however, for which objections were raised on the same grounds that petitioner claims appellate counsel should have raised on direct appeal. As discussed below, petitioner has not demonstrated he is entitled to relief under Strickland.

This Court has addressed the standard by which it reviews claims of improper prosecutorial argument:

> [i]n order to require a new trial based on improper prosecutorial comments, the prosecutor's comments must either deprive the defendant of a fair and impartial trial, materially contribute to the conviction, be so harmful or fundamentally tainted as to require a new

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[8] This Court has previously observed that "[b]y raising the issue in the petition for writ of habeas corpus, in addition to the rule 3.850 petition, collateral counsel has accomplished nothing except to unnecessarily burden this Court with redundant material." Blanco v. Wainwright, 507 So. 2d 1377, 1384 (Fla. 1987).

> trial, or be so inflammatory that they might have influenced the jury to reach a more severe verdict than that it would have otherwise.

Anderson v. State, 863 So. 2d 169, 187 (Fla. 2003), cert. denied, 541 U.S. 940 (2004). In addition, "wide latitude is permitted in arguing to a jury." Perez v. State, 2005 Fla. LEXIS 2057 *32 (Fla. Oct. 27, 2005).

In respect to the portion of prosecutor's guilt phase closing argument that was preserved but not raised on appeal, petitioner quotes from pages 1459-1460, see Petition, at 12, but does not recognize that nearly all of the argument is a continuation of the prosecutor's discussion of a struggle, in response to petitioner's explanation in his confession, see, e.g., Tr.-XX, at 1255, 1337, 1358, that he simply strangled the victim into unconsciousness when he first abducted her:

> [Prosecutor:] . . . . And there's other evidence, too, that she's not unconscious immediately. There's evidence of a big struggle. You saw the picture of the defendant. This struggle, there's -- you know, there may even be more than one struggle. We don't know that, but we know that she struggled, that she fought desperately to live. There's no dispute from the evidence and the defendant's admissions that she did this to him.
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> Now, look at this one. This isn't just one scratch. She struggled with this man for a while. She scratched him here, too (indicating). She broke a fingernail on him, maybe even two. She struggled hard enough to get blood on her jacket, to get her blood on his jeans and she struggled hard enough, too, to sustain other injuries. Remember, there's defensive wounds, several bruises on her forearm, and you remember this, too. She didn't give up quietly. Look at the bruises on her legs (indicating).

* * * * *

> *Another reason*, while I'm standing here, *on the struggle*, this is the blouse we found her in (indicating). You can see from the close-up picture of this blouse that there are buttons missing. The top two are still there, but the rest of them, from there down (indicating), torn off. Okay. That just didn't -- all those bruises on her legs, bruises on her arms, scratches on his face, scratches on his neck, scratches on his back, getting blood all over everything, that just didn't happen in ten seconds. And you can see from this picture where the buttons were found in the Blazer underneath -- in the cargo area, underneath all the luggage that had been removed before they found the buttons, and you can still see the thread on the buttons where they had been ripped off the blouse. Gee, I wonder how or why those buttons were ripped off and her shirt opened up?

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Tr.-XXI, at 1454-1455, 1459-1460 (emphasis added). Petitioner's assertion that the prosecutor was attempting to inflame the jury based upon an uncharged crime simply ignores the context of the argument as well as the evidence presented at trial.

The remaining portion of the argument quoted by petitioner as improper is a reference to the physical evidence and an acknowledgement that petitioner's motive in respect to how he left the victim was not known: "[Prosecutor:] And another interesting thing about the ultimate scene. There's another thing I guess we don't know, is why her pants are unbuttoned." Id. at XXI-1460. At trial the evidence was that when the victim's body was found, her pants were unbuttoned, unzipped, and pulled down such that her public area and buttocks were exposed. Id. at XVII-

610.

Petitioner argues that "[t]he prosecutor in Petitioner's case clearly attempted to suggest to the jury, and thereby persuade them, that the victim was raped by Mr. Jones." Petitioner, at 17. According to petitioner, "the record makes clear that the victim was almost certainly dragged to the area where she was found and this is how her pants were pulled down." Id. at 21 (internal footnote omitted). Notwithstanding this assertion, he cites no evidence presented at trial that the dragging of the victim established how her pants became unbuttoned, unzipped, and were pulled down below her buttocks and genital area. Compare id. (citing Tr.-XVII, at 636, which was testimony only that the victim *could* have been dragged and without reference to how the pants ended up in the condition that they were).[9]

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[9] Specifically, the testimony on this subject as adduced by defense counsel during cross-examination of the medical examiner, is limited as follows:

> Q And isn't it true, doctor, that upon your examination of the body at the scene that the clothing suggested that body had been dragged?
>
> A There is a suggestion that the body was dragged.
>
> Q In a sense of being dragged across the ground, is that right?
>
> A Could be the ground, could be the bushes in the area, kind of heavy there.

Tr.-XVII, at 636.

Thus while petitioner could argue what he believed to be a reasonable inference from the evidence, so too could the prosecutor. Dessaure v. State, 891 So. 2d 455, 468 (Fla. 2004); Cherry v. State, 829 So. 2d 873, 880 (Fla. 2002). As stated by this Court in Dessaure,

> [c]losing argument presents an opportunity for both the State and the defendant to argue all reasonable inferences that might be drawn from the evidence. Indeed, "the proper exercise of closing argument is to review the evidence and to explicate those inferences which may reasonably be drawn from the evidence."

Id. at 468 (quoting Bertolotti v. State, 476 So. 2d 130, 134 (Fla. 1985)). The prosecutor did that here, arguing that the evidence does not establish petitioner's intent or what happened after her pants were unbuttoned, unzipped, and pulled down, where evidence had also been adduced that the victim's genitalia had been completely decomposed. Tr.-XVII, at 614, 617. Contrary to petitioner's contention, then, the prosecutor did not argue that the victim had in fact been raped. Moreover, the notion that the condition of the victim's body and how she was treated by petitioner is not relevant in a first degree murder case where the petitioner is charged with both felony and premeditated murder defies logic.

Finally, as pertains to the guilt phase, in addition to his apparent belief that it is impermissible for the prosecutor to state what he believes the evidence will be,[10]

[10] See Petition, at 7-8.

to present evidence from the crime scene,[11] and thereupon argue the physical evidence,[12] petitioner does not address that the prosecutor argued the felonies as charged. See, e.g., Tr.-XXI, at 1432, 1435-1437 (premeditated murder), 1438-1440 (felony murder, discussing robbery and kidnapping), 1448-1449 (robbery and kidnapping), 1457-1458 (robbery), 1460-1461 (premeditation).

Even if the preserved objection to the prosecutor's guilt phase argument should have been sustained, petitioner cannot demonstrate prejudice based upon appellate counsel's failure to raise that issue of improper prosecutorial argument on appeal. That is, the evidence that petitioner kidnapped, robbed, and murdered the victim was undisputed. Petitioner himself admitted to having abducted the victim and taking her vehicle, as well as having killed her.[13] Tr.-XX, at 1255, 1262, 1266, 1336-1337. Petitioner was found in possession of the victim's Blazer, id. at XVII-648-650, and her ATM cards when taken into custody, id. at XVII-652, as well as being caught on videotape attempting to use the ATM card on January 31, 1995.

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[11] See Petition, at 8-10.

[12] See Petition, at 11-12.

[13] Petitioner, however, offered a different explanation for how he committed the murder, telling police that she must have died when he strangled her outside of Winn-Dixie, see, e.g., Tr.-XX, at 1266-1267, 1337; id. at XXI-1380, as opposed to facts as proved at trial by the State.

Id. at XVII-756-759. Petitioner also led police to the victim's body, id. at XX-1340-1344, and he had her blood on his pants and her blood was also on her jacket. Id. at XIX-1143; id. at XX-1213-1214. Thus unquestionably the state established felony murder.

The following evidence likewise established that the murder was also premeditated: petitioner did not begin using the victim's ATM card until 3:09 a.m. on January 31, 1995, id. at XVII-737, approximately two hours after she was abducted, id. at XVIII-874-875, 879-880; in connection with physical evidence of at least one struggle based upon bruising of the victim -- the right arm, elbow area, wrist, mid-portion of the forearm, inside and front of the thigh, right knee, upper leg, and left shin, id. at XVII-611-612 -- and scratches on petitioner, id. at XVII-651-652; death from ligature strangulation with the use of two ligatures, id. at XVII-618; see id. at XVII-610; blood was found on Jones' blue jeans, and on the victim's jacket and in her car, id. at XVII-653, 787, 799-800 and id. at XVIII-807-813, with the jeans and jacket determined to be the victim's blood, id. at XIX-1143; id. at XX-1213-1214; defensive wounds, id. at XVII-612; the missing buttons to the victim's blouse were found underneath the back seat of her Blazer, id. at XVII-791, the victim's feet were tied together, id. at XVII-610, 614-615; and that the victim was abandoned in a secluded area. See, e.g., id. at XVIII-829-830, 845; id. at XX-

1341.

As the foregoing demonstrates, petitioner's unsupported claim of prejudice, Petition, at 23, is neither self-proving nor substantiated in light of the evidence at trial.

In respect to the portion of prosecutor's penalty phase closing argument that was preserved but not raised on appeal, appearing in the transcript at XXVI-2059, petitioner argues that it was "inappropriate and inflammatory. . . ."[14] Petition, at 15. The argument at issue is as follows:

> Now, another thing they brought up, and I'm not really too sure why, is asking the expert do crack addicts have any interest in sex? And his answer was well, no, not while they're high on cocaine. Well, why bring that up? What's mitigating about that? I mean, first of all, there's no evidence that he was high on cocaine when he kidnapped Lori, you know. So I don't know where that would be mitigating anyway. The evidence is to the opposite, that he wasn't high and that's why he tried to get her money in the first place, but you know, why bring that up? Oh, well, maybe he's not interested in sex. Well,

[14] Petitioner also argues that the quoted portion of the argument as set out on page 15 of his petition was "completely disingenuous as well." According to petitioner, the State's argument mischaracterized the testimony of the defense expert, Drew Edwards. First, no objection was made at trial on this basis as now argued, and thus any challenge is not preserved. Nor did petitioner raise a claim of ineffective assistance of trial counsel on this basis in his Rule 3.851 motion. See also supra, at 10 n.2. To the extent that petitioner's inclusion of this reference is intended as a means to bring a claim of appellate counsel's failure to raise the argument on direct appeal, review would be limited to fundamental error. Petitioner makes no such argument here. And as discussed infra, at 21-22, the prosecutor's argument clearly was in response to the witnesses' testimony.

> you know, why did he make her take her shoes off? Why are her pants unzipped and unbuttoned?

Tr.-XXVI, at 2059.

Petitioner's expert testified that in many cases someone under the effect of cocaine does not feel thirsty or want sex, id. at XXV-1914, and he also testified that he did not know anything about the facts of the murder. Id. at XXVI-1959-1960. The evidence at trial did not establish that petitioner had in fact used crack cocaine at the time of the abduction and murder; indeed the evidence appeared to be to the contrary. See id. at XVII-764, 767-770 (testimony of bartender at the Bikini Club having observed petitioner from about 9:00 p.m. to 11:00 p.m. acting anxious); id. at XVII-772 (bartender's testimony that petitioner appeared to be "almost needing drugs at that time. . . ."); id. at XVIII-936 (testimony of Jackie Doll that petitioner would become "sometimes quiet and subdued and sometimes really anxious and aggravated" when he was not on crack). Based upon the foregoing, the prosecutor properly pointed out during closing argument the irrelevancy of the defense witnesses' testimony to the jury. That is, the argument at issue was in response to petitioner's evidence.[15] And as discussed, supra, at 17, it is proper to argue reasonable inferences from the evidence, Dessaure, 891 So. 2d at 468, including

[15] To the extent that petitioner may believe counsel did not properly examine his expert, that claim would have been proper as one of ineffective assistance of trial

that of the crime scene and of the victim's condition when recovered. See Brown v. State, 718 So. 2d 923, 925 (Fla. 5th DCA 1998) ("[A] prosecutor is entitled to argue the evidence admitted at trial and all reasonable inferences therefrom.").

Accordingly, cases cited and relied upon by petitioner, Petition, at 18-19, are inapposite because they deal with the admissibility of uncharged crimes, and not evidence of the crime scene and condition that the victim's body was found and reasonable inferences from that evidence. Petitioner makes no attempt to demonstrate that the State's inference was not reasonable, contending instead that the evidence and thus argument were not relevant. Petition, at 20. In addition, petitioner ignores that the argument was in response to his evidence that crack addicts under the influence of the drug are not interested in sex. See Tr.-XXV, at 1914. Petitioner does not explain why the prosecutor, given the lack of evidence that petitioner had used crack at the time, could not then question why the victim's pants were unzipped and pulled down as they were. Nor does petitioner's reliance upon Chapman v. State, 417 So. 2d 1028 (Fla. 3rd DCA 1982) support his irrelevancy argument. In Chapman, evidence of the victim having been raped in the course of the robbery was not relevant because *the defendant did not perpetrate the offense*. Id. at 1029 ("It was conceded that if a sexual battery had occurred, the

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counsel, but was not brought in petitioner's Rule 3.851 proceeding.

defendant was not the perpetrator."). As previously stated, the evidence here was limited to the crime scene and the condition that the victim's body was found, and argument was based upon that evidence and in response to defense evidence.

Even if the preserved objection to the prosecutor's penalty phase argument should have been sustained, petitioner cannot demonstrate prejudice from appellate counsel's failure to raise the issue on appeal. Petitioner's conclusory assertion of prejudice during the penalty phase is without merit. The aggravating circumstances as established at trial include the following:

> (1) that the murder was committed during the course of a kidnapping and a robbery; (2) that Jones had previously been convicted of a violent felony (murder); (3) that the murder was heinous, atrocious or cruel (HAC); and (4) that the murder was committed to avoid arrest.

Jones, 748 So. 2d at 1017. In comparison, the mitigation was not extensive and given "some weight." See id. This Court has upheld death sentences involving similar aggravating and mitigation circumstances. Lawrence v. State, 846 So. 2d 440, 453-455 (Fla.) (and citing cases), cert. denied, 540 U.S. 952 (2003).

Petitioner has not met the standard as set forth in Anderson, 863 So. 2d at 187, and thus cannot demonstrate that appellate counsel was ineffective. Based upon the foregoing, Issue I should be denied.

Issue II

WHETHER APPELLATE COUNSEL PROVIDED EFFECTIVE ASSISTANCE NOTWITHSTANDING THAT HE DID NOT RAISE THE ISSUE CONCERNING THE PROSECUTOR'S ARGUMENT AND PRESENTATION OF EVIDENCE PERTAINING TO A KNIFE FOUND IN THE VICTIM'S VEHICLE THAT DID NOT BELONG TO THE VICTIM OR HER HUSBAND?

Petitioner next argues that appellate counsel was ineffective for not raising on direct appeal that the prosecutor, through his opening statement, presentation of evidence, and closing argument, presented irrelevant evidence in respect to a knife found in the victim's truck stolen by petitioner. See Petition, at 24, 28-30.

First, Jones does not identify what the legal basis upon which appellate counsel should have "present[ed] this issue in petitioner's direct appeal to this court." Id. at 24. Instead, petitioner jumbles together a number of instances from the prosecutor's guilt phase opening statement, guilt and penalty phase closing arguments, and testimony adduced at trial. Id. at 24-26, 28. And while petitioner appears to argue that the matters quoted on those pages constituted the presentation of irrelevant evidence that should have been excluded, id. at 28-30, he does not address the principle that argument is not evidence, Occhicone, 570 So. 2d at 904 ("Opening remarks are not evidence, and the purpose of opening argument is to outline what an attorney expects to be established by the evidence."); Conahan, 844

So. 2d at 639-640, and that the jury was so instructed. Tr.-XVI, at 523 (instruction preceding opening argument); cf. id. at XXI-1510 (instruction before case submitted to the jury, telling jury that the "case must be decided only upon the evidence that you've heard from the answers of the witness and that you've seen in the form of exhibits in evidence and these instructions."). No objection was raised to the trial court's instructions pertaining to the attorney's arguments, and petitioner did not raise the claim as one of ineffectiveness in his postconviction proceedings. See also supra, at 10 n.2. And as discussed infra, at 26-27, an objection was raised as to one witness's testimony and the objection was in effect sustained as the trial court gave a curative instruction, while no other objection was raised to witness testimony.

Secondly, Jones neglects to address the fact that no objection was raised to all but one of the cited instances of testimony and argument that are the subject of Issue II. Compare Tr.-XVI, at 537; id. at XVII-615-616, 632-633; id. at XVIII-822; id. at XXI-1452-1453 with id. at XVII-792-793.

"Appellate counsel has no obligation to raise an issue that was not preserved for review and is not ineffective for failing to raise an unpreserved issue on appeal." Zack v. State, 911 So. 2d 1190, 2005 Fla. LEXIS 1456 *30 (Fla. Jul. 7, 2005). Only where the claim constitutes fundamental error will appellate counsel be held

ineffective under such circumstances.[16] Davis v. State, 2005 Fla. LEXIS 2052 *78-79 (Fla. Oct. 20, 2005); Rodriguez v. State, 2005 Fla. LEXIS 1169 *67 (Fla. May 26, 2005). Petitioner makes no attempt to demonstrate fundamental error, instead arguing the defaulted claims on the merits. Compare Petition, at 24-31.[17]

Concerning the preserved objection, as reflected on page 27 of the petition, the trial court denied the motion for mistrial but in effect sustained the defense objection by giving the jury a curative instruction. Tr.-XVII, at 793-796. The trial court instructed the jury as follows:

> All right. Ladies and gentlemen of the jury, let me give you a correct statement here. The last statement that the witness gave in response to a question from Miss Corey was involving some stab wounds on the victim. There is -- that was a misstatement by Mr. Miller, the witness, there has been no evidence of any stab wounds on the victim nor will there be any concerning the stab wounds on the victim, so you're to disregard that, that's absolutely a misstatement on Mr. Miller's part, okay.

Id. at XVII-795-796.

Jones does not argue in his habeas petition that appellate counsel was

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[16] "Fundamental error is 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.'" Patton, 878 So. 2d at 380 (internal citations omitted).

[17] Petitioner cites Strickland v. Washington as the standard to evaluate appellate counsel's performance, Petition, at 30, without any reference to the procedural defaults.

ineffective for not raising on direct appeal that he was entitled to a mistrial. Instead, petitioner apparently seeks, as was the case under Argument I, that this Court consider both preserved and unpreserved claims collectively, without regard to the differing legal issues they present, to determine if appellate counsel was ineffective. Petitioner does not cite any authority for that proposition.

Even if the claim in relation to the objection to the officer's testimony and the resulting denial of a mistrial was properly before this Court, petitioner cannot demonstrate prejudice.

"[A] trial court's ruling on a motion for mistrial is subject to an abuse of discretion standard of review." Perez v. State, 2005 Fla. LEXIS 2057 *32 (Fla. Oct. 27, 2005) (internal citation and quotation marks omitted). In addition, "[a] motion for mistrial is properly denied where the matter on which the motion is based is rendered harmless by a curative instruction." Id. at *36. Thus "[t]he use of a harmless error analysis under *State v. DiGuilio*, 491 So. 2d 1129 (Fla. 1986), is not necessary where the trial court recognized the error, sustained the objection and gave a curative instruction. Instead, the correct appellate standard of review is abuse of discretion." Chamberlain v. State, 881 So. 2d 1087, 1098 (Fla. 2004) (internal citation and quotation marks omitted), cert. denied, 125 S.Ct. 1669 (2005). Here, the trial court made it perfectly clear that the witness had misspoke, that there

was no evidence that the victim had been stabbed. Denial of the motion for mistrial would have been upheld, as "[t]he curative instruction was sufficient in this case to dissipate any prejudicial effect of . . . ." the misstatement by the witness. Buenoano v. State, 527 So. 2d 194, 198 (Fla. 1988); see Marek v. State, 492 So. 2d 1055, 1057 (Fla. 1986) (mistrial properly denied notwithstanding police testimony of recovery of a gun where there was no evidence that the gun had been used in connection with the murder and other charged crimes, in light of curative instruction). Thus the claim, if reviewable, is without merit. Rutherford, 774 So. 2d at 643 (appellate counsel's failure to raise what in all probability would be a meritless issue will not render his performance ineffective).

Turning to the matters for which no objection was raised at trial, petitioner argues that appellate counsel was ineffective for failing to "present this issue," seeking collective review of all the references to the knife, irrespective of whether the specific instance of the alleged impropriety was preserved or not and whether it involved counsel's argument or the presentation of evidence. See Petition, at 24-31. That, however, would not constitute a proper issue on direct appeal, as claims of prosecutorial misconduct based upon improper argument are distinct from one challenging the admission of witness testimony. To allow a defendant following the denial of relief on direct appeal to compile argument and testimony from the

transcript and raise a claim of ineffectiveness because appellate counsel did not do the same ignores the standards by which these individual claims are reviewed and whether the defendant even gave the trial court the opportunity to correct any alleged error. See Power v. State, 886 So. 2d 952, 963 (Fla. 2004) ("A timely objection allows the trial court an opportunity to give a curative instruction or admonish counsel for making an improper argument."); Castor v. State, 365 So. 2d 701, 703 (Fla. 1978) ("The requirement of a contemporaneous objection is based on practical necessity and basic fairness in the operation of a judicial system. It places the trial judge on notice that error may have been committed, and provides him an opportunity to correct it at an early stage of the proceedings.").

In addition, putting aside the foregoing for the moment, petitioner ignores that the matters complained of did not establish that the victim had been stabbed, and all but one occurred prior to the trial judge's curative instruction, which was unequivocal that the victim had not been stabbed. Specifically, the prosecutor's opening statement concerning the knife was limited to the fact that a knife had been recovered from the victim's car and that it did not belong to the victim or her husband, see Tr.-XVI, at 537, as later supported by the evidence, id. at XVI-564, while the references to the medical examiner's testimony involved two matters -- i.e., after testifying that he *ruled out* that the victim had been stabbed in the chest,

the medical examiner testified that he could not rule out if the victim had her throat cut, see id. at XVII-615-616, and the possible cause of a hole in the victim's upper torso. See id. at XVII-632-633. The prosecutor's guilt phase closing argument, the only reference to the knife subsequent to the curative instruction, was brief and was in reference to the possibility that it may have been used to cut the victim's shoe lace, based upon the apparent condition of the shoe lace. See id. at XXI-1452-1453.

Even assuming that the quoted portion of the prosecutor's opening argument, his questions to the medical examiner and the responses, and the quoted portion of the guilt phase closing argument were improper, petitioner has not demonstrated fundamental error such that appellate counsel was ineffective for not raising them on direct appeal. To the contrary, in light of the substantial evidence of guilt, as set forth supra, at 18-20, petitioner cannot establish that the guilty verdict could not have been obtained without the assistance of the alleged error. Petitioner does not cite to any reference to the recovered knife during the penalty phase and thus offers no basis for his contention that a new penalty phase is "warranted." Petition, at 31. And in relation to the aggravating circumstances established at trial in comparison to the mitigating evidence, the conclusory assertion of prejudice during the penalty phase is without merit. See Lawrence, 846 So. 2d at 453-455

(and citing cases).

Based upon the foregoing discussion, Issue II should be denied.

Issue III

WHETHER APPELLATE COUNSEL WAS EFFECTIVE THOUGH HE DID NOT RAISE ON APPEAL THE ISSUE THAT DETECTIVE PARKER TESTIFIED TO THE DIFFERENT STATEMENTS THAT PETITIONER MADE TO HIM AS WELL AS WHAT DETECTIVE PARKER SAID TO PETITIONER DURING THE INTERROGATIONS, INCLUDING HIS BELIEF THAT PETITIONER WAS NOT BEING HONEST WITH THE POLICE?

Petitioner also argues that appellate counsel was ineffective for failing to raise on direct appeal the issue that Detective James Parker "improperly commented on Petitioner's credibility." Petition, at 32.

Contrary to petitioner's argument, Detective Parker was relating to the jury the substance of his interviews of petitioner. Tr.-XX, at 1291-1322, 1329-1341, 1343-1344.[18] Petitioner cites no pertinent authority for the proposition that a law enforcement officer cannot testify to his interrogation of the defendant, including questions asked by the officer, what the suspect answered, and the officer's response to that. Instead, petitioner cites cases that involve a witness at trial

[18] Petitioner raised a number of claims on direct appeal related to the admissibility of his confession, distinct from that now brought. Compare Jones, 748 So. 2d at

testifying as to his opinion of the credibility of another witness. Petition, at 38. For example, in Page v. State, 733 So. 2d 1079 (Fla. 4th DCA 1999), a police officer testified at trial as to the credibility of a confidential informant, who testified at trial against the defendant. Id. at 1080-1081. And in Thorp v. State, 777 So. 2d 385 (Fla. 2000), this Court reversed where a lay witness at trial, an inmate that had been housed with the defendant, testified as to what he thought the defendant meant when he told the witness that he "'did a hooker.'" Id. at 394-396. Neither of those cases address the factual situation in this case. Instead, Detective Parker testified to the circumstances in which petitioner gave statements, where the officer's comments at the time of the initial interviews were at least in part likely the reason why petitioner ultimately admitted committing the murder and then showing Detective Parker where he had concealed the victim's body.[19] Moreover, petitioner

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1018-1023.

[19] On direct appeal, in respect to petitioner's constitutional challenges to his confessions, this Court found the following in pertinent part (i.e., in respect to the confessions made to Detective Parker):

> When Jones was first questioned, on February 1, 1995, he asserted his right to silence and his right to an attorney. . . .
>
> After invoking his right to counsel on February 1, Jones reinitiated contact with law enforcement officials by asking to speak with Detective Parker on February 17. Detective Parker was unavailable at that time, but later, on February 21, went to the jail in response to Jones' request. On February 21, Jones waived his

fails to make a distinction between a police officer commenting on the credibility of a witness -- i.e., someone that testifies at trial, including a victim -- versus relating the content of his interactions with a suspect in the course of presenting the confession at trial. Compare Petition, at 38 (relying upon cases where a police officer testified at trial and commented or opined as to the credibility of another witnesses' credibility). Petitioner presents no authority for his apparent proposition that when a police officer interrogates a suspect and *at that time* challenges the statements made as false, that the presentation of the interrogation at trial violates the rule of a witness testifying as to the credibility of another witness.

Based upon the foregoing, Issue III should be denied.

> Miranda rights; however, he again denied murdering McRae and provided a location for her body that Detective Parker subsequently found to be inaccurate.
>
> * * * * *
>
> . . . Detective Parker responded to the supervisor's call and arrived at the jail as Jones had requested. When Detective Parker arrived at the jail, Jones approached Parker, told him that he needed to talk to him and "tell him about it." Parker testified that Jones "just started talking right then." Parker had said nothing to Jones and had not asked any questions when Jones began volunteering this information. Parker then interrupted Jones and asked if he had been advised of his rights. Jones said he had been advised of and understood his rights, but that he wanted to talk and tell where the body could be located.

CONCLUSION

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

Jones, 748 So. 2d at 1018-1019.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Undersigned counsel hereby certifies that a true and correct copy of the foregoing was mailed, postage prepaid, on this 6th day of December, 2005, to:

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CERTIFICATE OF TYPE SIZE AND STYLE

Undersigned counsel hereby certifies that this brief was typed using Times New Roman 14-point font, in conformity with Fla. R. App. P. 9.210(a).

_____
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