IN THE SUPREME COURT OF FLORIDA

JAMES M. DAILEY,

Petitioner,

v. **Case No. SC06-576**
L.T. No. CR 85-07084-CFANO-D

JAMES McDONOUGH,
Secretary, Florida
Department of Corrections,

Respondent.
_____/

RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

COMES NOW, Respondent, JAMES McDONOUGH, Secretary, Florida Department of Corrections, 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 January 22, 1986, the petitioner/defendant, James Dailey was charged by indictment with one count of murder in the first degree. (ROA-V1/7-8). The indictment cited §782.04(1)(a), Florida Statutes, and charged that James Dailey, between the 5th day and the 6th day of May, 1985,

> unlawfully and from a premeditated design to effect the death of Shelley Boggio, a human being, did stab with a knife, did choke or did hold Shelley Boggio's head under the water, thereby inflicting upon the said

> Shelley Boggio mortal wounds, of which said mortal wounds, and by the means aforesaid and as a direct result thereof, the said Shelley Boggio died;
>
> (ROA-V1/7-8; ROA-Supp/R1613)

On June 23, 1986, defense counsel filed six separate written motions to dismiss the indictment. (ROA-V1/36-37; 38; 39-40; 41-43; 44-45; 46). The trial court was familiar with these "standard" defense motions, which raised arguments that had been repeatedly rejected by this Court, and denied the multiple motions to dismiss. (ROA-Supp/R1595).

Dailey's jury trial was held on June 23 – 30, 1987. During the charge conference, the trial court granted the defense motion to exclude any first-degree murder instruction based on the theory of felony murder.[1] (ROA-V9/1209). Consequently, in Dailey's trial, the trial court's instructions to the jury on first-degree murder were based solely on premeditated murder. (ROA-V10/1299-1300). Dailey was convicted of first-degree murder on June 27, 1987. (ROA-V1/103) The jury unanimously recommended the death penalty (ROA-V2/156; V11/1433) and the Honorable Thomas E. Penick, Jr. imposed the death penalty on August 7, 1987. (ROA-V1/228-231; V11/1440-1449)

[1] As the prosecutor noted during the charge conference, the instruction on felony murder was given at co-defendant Pearcy's trial because, in that case, the State had the benefit of Pearcy's admissions to Hill (that [sexual battery] was the reason they had taken the victim to that area). (ROA-V9/1209).

Direct Appeal:

In Dailey v. State, FSC Case No. 71,164, Dailey's appellate counsel, Assistant Public Defender Anne Owens, filed a 124-page initial brief asserting the following issues on direct appeal:

> ISSUE I: THE TRIAL COURT ERRED BY ADMITTING EVIDENCE THAT THE APPELLANT EXERCISED HIS RIGHT TO AN EXTRADITION HEARING AND BY PERMITTING THE PROSECUTOR TO COMMENT ON THAT EVIDENCE DURING HIS OPENING ARGUMENT.
>
> ISSUE II: THE TRIAL COURT COMMITTED PER SE REVERSIBLE ERROR BY ALLOWING THE STATE TO INTRODUCE INTO EVIDENCE A BOOK-IN PHOTOGRAPH OF DAILEY THAT WAS NOT PROVIDED TO DEFENSE COUNSEL DURING DISCOVERY, WITHOUT HOLDING A RICHARDSON HEARING.
>
> ISSUE III: THE TRIAL COURT ERRED BY ADMITTING EVIDENCE BASED ON OUT—OF—COURT STATEMENTS BY THE CODEFENDANT WHO DID NOT TESTIFY AT TRIAL, THUS VIOLATING DAILEY'S RIGHT TO CONFRONTATION.
>
> ISSUE IV: THE TRIAL COURT ERRED IN ADMITTING THE KNIFE SHEATH AS AN EXHIBIT, AND ACCOMPANYING EVIDENCE CONCERNING ITS DISCOVERY, BECAUSE THE KNIFE SHEATH WAS NOT CONNECTED TO THE APPELLANT OR TO THE CRIME AND, THEREFORE, WAS IRRELEVANT AND INADMISSIBLE.
>
> ISSUE V: THE TRIAL COURT ERRED BY PERMITTING THE STATE TO ELICIT HEARSAY EVIDENCE OF PRIOR CONSISTENT STATEMENTS MADE TO DETECTIVE HALLIDAY BY THE THREE INMATE WITNESSES.
>
> ISSUE VI: THE TRIAL COURT ERRED BY RESTRICTING DEFENSE COUNSEL'S CROSS-EXAMINATION OF PAUL SKALNIK ABOUT THE NATURE OF HIS PAST AND PENDING FELONY CHARGES FOR TAKING MONEY FROM WOMEN UNDER DISHONEST CIRCUMSTANCES.
>
> ISSUE VII: THE TRIAL COURT ERRED BY INSTRUCTING THE JURY OVER DEFENSE OBJECTION THAT THE DEFENDANT NEED NOT HAVE BEEN PRESENT WHEN THE CRIME WAS COMMITTED TO BE GUILTY OF FIRST DEGREE MURDER.

ISSUE VIII: THE TRIAL COURT ERRED BY FAILING TO GRANT A MISTRIAL WHEN THE PROSECUTOR MADE TWO COMMENTS ON THE DEFENDANT'S FAILURE TO TESTIFY DURING HER CLOSING ARGUMENT.

ISSUE IX: THE TRIAL COURT ERRED IN QUALIFYING DETECTIVE HALLIDAY AS AN EXPERT IN HOMICIDE INVESTIGATION AND SEXUAL BATTERY BECAUSE HIS OPINION WAS BASED ON NOTHING MORE THAN COMMON INTELLIGENCE AND SPECULATION.

ISSUE X: THE TRIAL JUDGE ERRED BY FINDING THREE AGGRAVATING FACTORS THAT WERE NOT SUPPORTED BY THE EVIDENCE AND BY CONSIDERING A NON STATUTORY AGGRAVATING FACTOR IN HIS DISCUSSION OF POSSIBLE MITIGATING FACTORS.

A. Crime committed while defendant engaged in sexual battery or attempted sexual battery.

B. Crime committed for purpose of avoiding or preventing lawful arrest.

C. Crime committed in a cold, calculated and premeditated manner.

D. For past twenty years Dailey had been drifter going from city to city and job to job.

ISSUE XI: THE TRIAL COURT ERRED BY ADMITTING INTO EVIDENCE A CERTIFIED COPY OF DAILEY'S 1979 CONVICTION FOR AGGRAVATED BATTERY, INCLUDING A NOTATION THAT ANOTHER CHARGE HAD BEEN DROPPED PURSUANT TO A PLEA BARGAIN.

ISSUE XII: THE TRIAL COURT ERRED BY FAILING TO CONSIDER STATUTORY AND NONSTATUTORY MITIGATION PRESENTED BY THE DEFENSE.

A. Capacity to appreciate criminality of conduct substantially impaired by alcohol or drugs.

B. Any other aspect of character or record and any other circumstance of offense.

ISSUE XIII: THE TRIAL JUDGE ERRED BY BASING HIS SENTENCE, IN PART, ON OFF—THE-RECORD INFORMATION FROM THE CODEFENDANT'S TRIAL, THE CODEFENDANT'S PSI, AND THE PROSECUTOR'S SENTENCING MEMORANDUM, THUS VIOLATING THE APPELLANT'S RIGHT TO CONFRONT THE WITNESSES.

On direct appeal, this Court affirmed the defendant's conviction for first-degree murder, but reversed the death sentence on November 14, 1991, in Dailey v. State, 594 So. 2d 254 (Fla. 1991).

On remand, the trial judge resentenced Dailey to death after finding three aggravating and numerous mitigating circumstances. Dailey was resentenced to death on January 21, 1994. (RS-V2/242-253; V3/349-366). The trial court found the following three aggravating circumstances: The defendant had been previously convicted of a violent felony; the murder was committed during a sexual battery; the murder was especially heinous, atrocious, or cruel (HAC). See, Dailey v. State, 659 So. 2d 246, 247, n.3 (Fla. 1995).

On his resentencing appeal in Dailey v. State, FSC Case No. 83,160, Dailey's appellate counsel, Assistant Public Defender Paul Helm, raised the following issues:

> ISSUE I: THE TRIAL COURT ERRED BY DENYING APPELLANT'S MOTION FOR A NEW PENALTY PHASE TRIAL BECAUSE THE JURY'S DEATH RECOMMENDATION WAS BASED ON INVALID JURY INSTRUCTIONS ON THREE OF FIVE AGGRAVATING FACTORS, HAC, AVOID ARREST, AND CCP, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS AND THE FLORIDA CONSTITUTION.
>
> ISSUE II: THE TRIAL COURT FAILED TO FIND AND WEIGH MITIGATING CIRCUMSTANCES SHOWN BY THE EVIDENCE AND NOT REFUTED BY THE STATE IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS AND THE FLORIDA CONSTITUTION.

ISSUE III: THE TRIAL COURT VIOLATED APPELLANT'S CONSTITUTIONAL RIGHT TO DUE PROCESS OF LAW BY DENYING HIS MOTION TO DISQUALIFY THE SENTENCING JUDGE BECAUSE APPELLANT HAD REASONABLE GROUNDS TO FEAR THAT THE JUDGE COULD NOT BE IMPARTIAL AT RESENTENCING.

On May 25, 1995, this Court upheld Dailey's death sentence. Dailey v. State, 659 So. 2d 246 (Fla. 1995).

Dailey filed a petition for writ of certiorari in the United States Supreme Court on November 17, 1995 in Dailey v. Florida, Case No. 95-6801. The United States Supreme Court denied certiorari review on January 22, 1996. See, Dailey v. Florida, 516 U.S. 1095 (1996).

Post-conviction Proceedings:

Dailey's amended post-conviction motion, filed on November 12, 1999, raised the following claims:

CLAIM I: MR. DAILEY'S COUNSEL WAS PREJUDICIALLY INEFFECTIVE AT THE GUILT PHASE OF THE TRIAL IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

CLAIM II: MR. DAILEY WAS DENIED AN ADEQUATE ADVERSARIAL TESTING AT THE SENTENCING PHASE OF HIS TRIAL, IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS. TRIAL COUNSEL FAILED TO ADEQUATELY INVESTIGATE AND PREPARE MITIGATING EVIDENCE AND TO ADEQUATELY CHALLENGE THE STATE'S CASE. AS A RESULT, THE DEATH SENTENCE IS UNRELIABLE.

CLAIM III: MR. DAILEY WAS DEPRIVED OF HIS RIGHTS TO DUE PROCESS AND EQUAL PROTECTION UNDER THE FOURTEENTH AMENDMENT, AS WELL AS HIS RIGHTS UNDER THE FIFTH, SIXTH, AND EIGHTH AMENDMENTS BECAUSE HIS TRIAL COUNSEL FAILED TO PREPARE A COMPETENT MENTAL HEALTH PROFESSIONAL TO EVALUATE MR. DAILEY. AS A RESULT MR.

DAILEY WAS DENIED HIS RIGHT TO ADEQUATE MENTAL HEALTH ASSISTANCE UNDER AKE V. OKLAHOMA.

CLAIM IV: MR. DAILEY WAS DEPRIVED OF HIS RIGHTS TO DUE PROCESS UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AS WELL AS HIS RIGHTS UNDER THE FIFTH, SIXTH, AND EIGHTH AMENDMENTS, BECAUSE THE STATE WITHHELD EVIDENCE WHICH WAS MATERIAL AND EXCULPATORY IN NATURE.

CLAIM V: NEWLY DISCOVERED EVIDENCE ESTABLISHES THAT MR. DAILEY'S CONVICTION AND SENTENCE WERE IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

CLAIM VI: MR. DAILEY WAS DENIED HIS FUNDAMENTAL RIGHT TO A FAIR TRIAL, IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS, DUE TO PROSECUTORIAL MISCONDUCT, WHICH RENDERED THE OUTCOME OF HIS TRIAL UNRELIABLE. THE STATE ENCOURAGED AND PRESENTED MISLEADING EVIDENCE AND IMPROPER ARGUMENT TO THE JURY.

CLAIM VII: MR. DAILEY WAS DENIED HIS RIGHTS TO DUE PROCESS UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AS WELL AS HIS RIGHTS UNDER THE FIFTH, SIXTH, AND EIGHTH AMENDMENTS BECAUSE THE STATE EITHER KNOWINGLY PRESENTED OR FAILED TO CORRECT MATERIAL FALSE TESTIMONY.

CLAIM VIII: MR. DAILEY'S SENTENCE OF DEATH IS DISPROPORTIONATE TO THAT OF HIS CO-DEFENDANT, MAKING HIS SENTENCE ARBITRARY, CAPRICIOUS, DISPARATE, AND INVALID, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

CLAIM IX: THE TRIAL COURT COMMITTED FUNDAMENTAL ERROR BY INSTRUCTING THE JURY REGARDING THE AGGRAVATING FACTOR OF HEINOUS, ATROCIOUS, OR CRUEL. THE JURY INSTRUCTION WAS UNCONSTITUTIONALLY VAGUE, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

CLAIM X: FLORIDA'S CAPITAL SENTENCING STATUTE IS UNCONSTITUTIONAL ON ITS FACE AND AS APPLIED FOR FAILING TO PREVENT THE ARBITRARY AND CAPRICIOUS IMPOSITION OF THE DEATH PENALTY AND FOR VIOLATING THE

GUARANTEE AGAINST CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH ANENDMENTS TO THE UNITED STATES CONSTITUTION. TO THE EXTENT THIS ISSUE WAS NOT PROPERLY LITIGATED AT TRIAL OR ON APPEAL, MR. DAILEY RECEIVED PREJUDICIALLY INEFFECTIVE ASSISTANCE OF COUNSEL.

CLAIM XI: MR. DAILEY'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. DAILEY TO PROVE THAT DEATH WAS INAPPROPRIATE AND BECAUSE THE SENTENCING JUDGE EMPLOYED THIS IMPROPER STANDARD IN SENTENCING MR. DAILEY TO DEATH. FAILURE TO OBJECT RENDERED DEFENSE COUNSEL'S REPRESENTATION INEFFECTIVE.

CLAIM XII: MR. DAILEY'S SENTENCING JURY WAS MISLED BY COMMENTS, QUESTIONS, 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. TO THE EXTENT THIS ISSUE WAS NOT PROPERLY LITIGATED AT TRIAL OR ON APPEAL, MR. DAILEY RECEIVED PREJUDICIALLY INEFFECTIVE ASISTANCE OF COUNSEL.

CLAIM XIII: THE RULES PROHIBITING MR. DAILEY'S LAWYERS FROM INTERVIEWING JURORS TO DETERMINE IF CONSTITUTIONAL ERROR WAS PRESENT VIOLATES EQUAL PROTECTION PRINCIPLES, THE FIRST, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION AND DENIES MR. DAILEY ADEQUATE ASSISTANCE OF COUNSEL IN PURSUING HIS POST-CONVICTION REMEDIES.

XIV: EXECUTION BY ELECTROCUTION IS CRUEL AND/OR UNUSUAL PUNISHMENT AND VIOLATES MR. DAILEY'S RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND UNDER THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

XV: MR. DAILEY'S TRIAL COURT PROCEEDINGS WERE 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.

On November 19, 2001, a Huff[2] hearing was held before the Honorable Jack Espinosa, Jr., Circuit Judge, and the Circuit Court ordered that Dailey was entitled to an evidentiary hearing on grounds I, II, III, IV, V, VI, VII, VIII, and XV of his Amended Motion and grounds IX, X, XI, XII, XIII, and XIV of his Amended Motion were denied. The post-conviction evidentiary hearings were held on March 19, 2003, November 7, 2003, December 11, 2003, June 29, 2004, and November 5, 2004 on grounds I through VIII, and XV.

On July 20, 2005, the Circuit Court entered an 81-page written Order Denying Amended Motion to Vacate Judgments of Conviction and Sentence with Special Leave to Amend. (PCR-V2/136-217).

Dailey's appeal from the denial of his post-conviction motion is currently pending before this Court in Dailey v. State, Case No. 05-1512. Dailey's habeas petition was filed contemporaneously with his initial brief in the appeal of the denial of his motion for post-conviction relief.

[2] Huff v. State, 622 So. 2d 982 (Fla. 1993).

ARGUMENT IN OPPOSITION TO CLAIMS RAISED

Preliminary Legal Principles and Standards of Review:

The standard of review applicable to ineffective assistance of appellate counsel claims mirrors the two-part Strickland v. Washington, 466 U.S. 668 (1984) standard for claims of trial counsel ineffectiveness. Valle v. Moore, 837 So. 2d 905 (Fla. 2002). To prevail on a claim of ineffective assistance of appellate counsel in a habeas petition, a criminal defendant must show (1) specific errors or omissions by appellate counsel that "constitute a serious error or substantial deficiency falling measurably outside the range of professionally acceptable performance," and (2) that the "deficiency in performance compromised the appellate process to such a degree as to undermine confidence in the correctness of the result." Dufour v. State, 905 So. 2d 42, 70 (Fla. 2005) (quoting Pope v. Wainwright, 496 So. 2d 798, 800 (Fla. 1986)); See also, Thompson v. State, 759 So. 2d 650, 660 (Fla. 2000). Moreover, the appellate court must presume that counsel's performance falls within the wide range of reasonable professional assistance.

The failure to raise a meritless issue on direct appeal will not render counsel's performance ineffective, and this is also true regarding new arguments that would have been found to be procedurally barred had they been raised on direct appeal.

See, Rutherford v. Moore, 774 So. 2d 637, 643 (Fla. 2000) (emphasizing that appellate counsel cannot be deemed ineffective for failing to raise a claim which "would in all probability" have been without merit or would have been procedurally barred on direct appeal); Spencer v. State, 842 So. 2d 52, 74 (Fla. 2003) ("[A]ppellate counsel will not be considered ineffective for failing to raise issues that have little or no chance of success"). In sum, appellate counsel cannot be ineffective for failing to raise an issue that has not been preserved for appeal, that is not fundamental error, and that would not be supported by the record. See, Medina v. Dugger, 586 So. 2d 317, 318 (Fla. 1991). Finally, habeas corpus "is not a second appeal and cannot be used to litigate or relitigate issues which could have been . . . or were raised on direct appeal." See, Breedlove v. Singletary, 595 So. 2d 8, 10 (Fla. 1992).

CLAIM I

APPELLATE COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO RAISE AN ISSUE ON APPEAL CHALLENGING THE INDICTMENT FOR FIRST DEGREE MURDER AND DAILEY'S BELATED HABEAS CHALLENGE TO THE INDICTMENT CHARGING HIM WITH FIRST-DEGREE MURDER IS BOTH PROCEDURALLY BARRED AND WITHOUT MERIT.

Petitioner, James Dailey, asserts that extraordinary habeas relief is warranted because he allegedly was denied the effective assistance of appellate counsel, that his first-degree murder indictment was "fatally flawed," and that he is entitled

to relief under Ring v. Arizona, 536 U.S. 584 (2002). Dailey's indictment charged him with premeditated murder, the jury's instructions on first-degree murder were based solely on premeditated murder, and the jury returned both a unanimous guilty verdict and a unanimous 12-0 sentencing recommendation.

Dailey's post-conviction counsel correctly concedes that Dailey's current habeas claims were recently rejected by this Court in Mansfield v. State, 911 So. 2d 1160, 1178 (Fla. 2005). Mansfield's habeas petition, like Dailey's, also claimed that his appellate counsel was ineffective, that his indictment was defective, and that his death sentence was unconstitutional under Ring v. Arizona, 536 U.S. 584 (2002). In denying these same habeas claims in Mansfield, this Court explained:

> Appellate counsel is deemed ineffective when (1) "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 (2) "the deficiency in performance compromised the appellate process to such a degree as to undermine confidence in the correctness of the result." Pope v. Wainwright, 496 So. 2d 798, 800 (Fla. 1986). Appellate counsel cannot be deemed ineffective for failing to raise a claim which "would in all probability" have been without merit or would have been procedurally barred on direct appeal. Rutherford v. Moore, 774 So. 2d 637, 643 (Fla. 2000) (quoting Williamson v. Dugger, 651 So. 2d 84, 86 (Fla. 1994)).
>
> Mansfield first claims that appellate counsel was ineffective for failing to challenge the jury instructions that allowed the jury to find him guilty of first-degree murder if he was found guilty of

> either felony or premeditated murder. This Court and the United States Supreme Court have repeatedly rejected relief on this issue. In Schad v. Arizona, 501 U.S. 624, 645, 115 L. Ed. 2d 555, 111 S. Ct. 2491 (1991), the Supreme Court held that the United States Constitution did not require the jury to come to a unanimous decision on the theory of first-degree murder and that separate verdict forms for felony and premeditated murder were not required. "**It is well established that an indictment which charges premeditated murder permits the State to prosecute under both the premeditated and felony murder theories.**" Parker v. State, 904 So. 2d 370, 382, 2005 Fla. LEXIS 547, *31, 30 Fla. L. Weekly S 421, S425 (Fla. 2005). Furthermore "because the State has no obligation to charge felony murder in the indictment, it similarly has no obligation to give notice of the underlying felonies that it will rely upon to prove felony murder." Kearse v. State, 662 So. 2d 677, 682 (Fla. 1995). **Mansfield's appellate counsel was not ineffective for failing to raise a claim which we have repeatedly rejected**. Floyd v. State, 808 So. 2d 175, 185 (Fla. 2002). **To the extent that Mansfield raises a substantive claim on this issue, this claim is without merit under this prior case law**.
>
> Mansfield also argues that the Supreme Court decisions in Ring and Apprendi v. New Jersey, 530 U.S. 466, 147 L. Ed. 2d 435, 120 S. Ct. 2348 (2000), have changed the constitutional requirements for a death penalty jury. However, Mansfield fails to demonstrate how the holdings in Ring and Apprendi overruled the decision in Schad. Also, the Apprendi and Ring decisions were released after our decision on Mansfield's direct appeal, and appellate counsel is not required to anticipate changes in the law. Walton v. State, 847 So. 2d 438, 445 (Fla. 2003). Thus, this claim would not have had any merit on direct appeal.

Mansfield, 911 So. 2d at 1178-1179 (e.s.)

In this case, as in Mansfield, Dailey has not established any credible basis for habeas relief. Furthermore, Dailey's argument is even weaker than the defense argument in Mansfield

because the jury's instructions on first-degree murder in Dailey's case were based solely on premeditated murder. See also, Davis v. State, 915 So. 2d 95, 143 (Fla. 2005).[3]

The indictment in this case cited §782.04(1)(a), Florida Statutes, and charged that James Dailey, between the 5th day and the 6th day of May, 1985,

> unlawfully and from a premeditated design to effect the death of Shelley Boggio, a human being, did stab with a knife, did choke or did hold Shelley Boggio's head under the water, thereby inflicting upon the said Shelley Boggio mortal wounds, of which said mortal wounds, and by the means aforesaid and as a direct result thereof, the said Shelley Boggio died;

(ROA-V1/7-8)

Defense counsel filed six separate written motions to dismiss the indictment. (ROA-V1/36-37; 38; 39-40; 41-43; 44-45; 46). The trial court denied these motions, which raised the "standard" defense arguments that had been repeatedly rejected by this Court in prior cases. (ROA-Supp/R1595). The fact that appellate counsel chose not to raise a meritless issue on direct

[3] In Davis, this Court also denied relief on similar habeas claims, citing "Freeman v. State, 761 So. 2d 1055, 1071 (Fla. 2000) (rejecting appellant's argument that appellate counsel was ineffective for failing to argue that the trial court erred in denying the pretrial motion to dismiss the indictment because it did not specifically charge felony murder and only charged him with premeditated murder); see also Gudinas v. State, 693 So. 2d 953, 964 (Fla. 1997) ('We have repeatedly rejected claims that it is error for a trial court to allow the State to pursue a felony murder theory when the indictment gave no notice of the theory.'). Thus, no habeas relief is warranted." Davis, 915 So. 2d at 143.

appeal does not equate to a finding of deficient performance which falls measurably outside the range of professionally acceptable performance. See, Card v. State, 497 So. 2d 1169, 1177 (Fla. 1986).

Appellate counsel cannot be found ineffective for failing to raise an issue which lacks merit. See, Bryant v. State, 901 So. 2d 810, 826 (Fla. 2005). This Court has repeatedly held that an indictment which charges premeditated murder permits the State to prosecute under both the premeditated or felony murder theories. See, Anderson v. State, 841 So. 2d 390, 404 (Fla. 2003); Parker v. State, 904 So. 2d 370, 382-383 (Fla. 2005) ("It is well established that an indictment which charges premeditated murder permits the State to prosecute under both the premeditated and felony murder theories. See Kearse v. State, 662 So. 2d 677, 682 (Fla. 1995) ('The State need not charge felony murder in an indictment in order to prosecute a defendant under alternative theories of premeditated and felony murder when the indictment charges premeditated murder.')"). Here, as in Parker, Dailey's habeas claim is without merit, and appellate counsel cannot be deemed ineffective for failing to have raised it on direct appeal. Where an issue has been repeatedly rejected by the reviewing courts, appellate counsel is not ineffective in declining to raise the same issue. See

also, Mansfield, citing Floyd v. State, 808 So. 2d 175, 185 (Fla. 2002) (recognizing appellate counsel not ineffective for failing to raise issue repeatedly rejected by reviewing court); Groover v. Singletary, 656 So. 2d 424, 425 (Fla. 1995) (same)[4] Furthermore, this Court has repeatedly held that arguments which could have been raised on direct appeal, but were not, are procedurally barred from habeas review. See, Rutherford v. Moore, 774 So. 2d 637, 646 (Fla. 2000) ("Because this issue was not preserved for review, if it had been raised on direct appeal, it would have warranted reversal only if it constituted fundamental error, which has been defined as an error that

[4] In England v. State, 2006 Fla. LEXIS 942 (Fla. 2006), this Court recently rejected a related claim on direct appeal -- that the jury should have been presented with a special verdict form distinguishing between first-degree premeditated murder and felony murder. This Court held that England was not entitled to a new trial on this ground inasmuch as "[b]oth the United States Supreme Court and this Court have repeatedly rejected similar claims. See Schad v. Arizona, 501 U.S. 624, 645, 111 S. Ct. 2491, 115 L. Ed. 2d 555 (1991); Johnson v. State, 750 So. 2d 22, 26-27 (Fla. 1999). In Schad, the Supreme Court held that the United States Constitution did not require the jury to come to a unanimous decision on the theory of first-degree murder and that separate verdict forms for felony and premeditated murder were not required. 501 U.S. at 645. In Johnson, this Court held that trial courts need not 'submit special verdict forms to the jury regarding the alternate theories of felony first-degree murder and premeditated first-degree murder.' 750 So. 2d at 26-27." See also, State v. Steele, 921 So. 2d 538 (Fla. 2005) (noting that Section 921.141 does not require jury findings on aggravating circumstances, and this Court has held that Ring does not require special verdicts on aggravators).

'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.'")(quoting Urbin v. State, 714 So. 2d 411, 418 n.8 (1988)). A state habeas petition may not be utilized as a second appeal. Id. (although habeas petitions are a 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 post-conviction motion).

CLAIM II

DAILEY'S CHALLENGE TO THE CONSTITUTIONALITY OF FLORIDA'S DEATH PENALTY SCHEME IS PROCEDURALLY BARRED AND MERITLESS.

Dailey candidly admits that the "weight of the case law clearly is against" [his Ring claim/Issue II], but his arguments are "made to preserve the issues" [for federal habeas review]. (See, Petition at page 30).

In Philmore v. State, 2006 Fla. LEXIS 1254, 26-28 (Fla. 2006), another capital defendant's Ring claim was also raised "only to preserve it for possible federal review." In denying Philmore's habeas petition, this Court stated, in pertinent part:

> Philmore next argues that Florida's death penalty statute is unconstitutional as applied to him under Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), and Ring v. Arizona, 536

U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002). However, Philmore states that he is raising this issue only to preserve it for possible federal review. Further, this Court has held that Ring does not apply retroactively. See Johnson v. State, 904 So. 2d 400, 412 (Fla. 2005).

To the extent that Philmore attempts to raise this issue as an ineffective assistance of appellate counsel claim, we deny relief. "If a legal issue 'would in all probability have been found to be without merit' had counsel raised the issue on direct appeal, the failure of appellate counsel to raise the meritless issue will not render appellate counsel's performance ineffective." Rutherford, 774 So. 2d at 643 (quoting Williamson v. Dugger, 651 So. 2d 84, 86 (Fla. 1994)). First, at the time the Court issued its decision in Philmore's direct appeal, Ring had not been decided. Second, this Court has rejected claims under Ring in direct appeals where the trial judge has found the aggravating factor of a previous conviction of a violent felony based on either prior or contemporaneous felony convictions. See, e.g., Duest v. State, 855 So. 2d 33, 49 (Fla. 2003); Caballero v. State, 851 So. 2d 655, 663-64 (Fla. 2003). In this case, one of the aggravating circumstances found by the trial court was that Philmore was previously convicted of another capital felony or of a felony involving the use or threat of violence. In addition, the jury unanimously recommended the death sentence. Cf. Anderson v. State, 863 So. 2d 169, 189 (Fla. 2003) (rejecting a Ring claim on direct appeal where the jury recommended the death sentence by a unanimous vote and one of the aggravating circumstances found by the trial judge was that the defendant had been convicted of a prior violent felony for the contemporaneous conviction of attempted murder). Accordingly, Philmore's claim is without merit. Appellate counsel was not ineffective for failing to raise this issue on direct appeal.

Philmore, 2006 Fla. LEXIS 1254 (e.s.)

Dailey's death sentence became final when the United States Supreme Court denied his petition for writ of certiorari on January 22, 1996. See, Dailey v. Florida, 516 U.S. 1095 (1996). This was before Ring was decided. Both the United States Supreme Court and this Court have held that Ring does not apply retroactively. See, Schriro v. Summerlin, 542 U.S. 348, 358, 124 S. Ct. 2519, 159 L. Ed. 2d 442 (2004); Johnson v. State, 904 So. 2d 400 (Fla. 2005); See also, Mungin v. State, 2006 Fla. LEXIS 553 (Fla. 2006) ("Mungin acknowledges that this Court has repeatedly rejected claims for relief under Ring, and states that he raises the claim only to preserve it for federal review" . . . [and] this Court has "expressly held that Ring does not apply retroactively.")

Dailey has not shown any basis to revisit his procedurally-barred Ring claim. Dailey's claim that Florida's death penalty statute is unconstitutional under Apprendi v. New Jersey, 530 U.S. 466 (2000) and Ring v. Arizona, 536 U.S. 584 (2002), is procedurally barred because Dailey failed to assert at the time of trial or on appeal that it would violate his Sixth Amendment right to trial by jury for the jury not to determine the appropriate aggravating factors. This Court has applied the procedural bar doctrine to claims brought under the predecessor decision of Apprendi v. New Jersey, 530 U.S. 466 (2000). See

McGregor v. State, 789 So. 2d 976, 977 (Fla. 2001) (Apprendi claim procedurally barred for failure to raise in trial court); Barnes v. State, 794 So. 2d 590 (Fla. 2001) (Apprendi error not preserved for appellate review).

Dailey's Ring claim is procedurally barred and this Court should not address it on the merits. The instant challenge should have been presented to the trial court and on direct appeal as it is neither novel nor new. Instead, the claim, or a variation of it, has been known prior to Proffitt v. Florida, 428 U.S. 242, 252 (1976) (holding Constitution does not require jury sentencing). See Hildwin v. Florida, 490 U.S. 638 (1989); Chandler v. State, 442 So. 2d 171, 173, n.1 (Fla. 1983). Hence, Dailey is procedurally barred. Eutzy v. State, 458 So. 2d 755 (Fla. 1984). This Court has repeatedly recognized habeas petitions are not to be used as second appeals, and those issues which could and/or were presented earlier will not be considered. Rutherford v. Moore, 774 So. 2d 637, 643 (Fla. 2000)

This Court has consistently upheld Florida's death penalty statute in response to challenges under Ring, holding that unlike the situation in Arizona, the maximum sentence for first degree murder in Florida is death. Porter v. Crosby, 840 So. 2d 981, 986 (Fla. 2003) (stating that "we have repeatedly held that the maximum penalty under the statute is death and have rejected

the other Apprendi arguments" [that aggravators need to be charged in the indictment, submitted to jury and individually found by unanimous jury]); King v. Moore, 831 So. 2d 143 (Fla. 2002); Bottoson v. Moore, 833 So. 2d 693 (Fla. 2002). Since Florida's death penalty statute does not suffer from the same constitutional infirmities that resulted in the remand to Arizona in Ring, Dailey is not entitled to relief.

Moreover, this Court has rejected claims under Ring in direct appeals where the trial judge has found the aggravating factor of a previous conviction of a violent felony based on either prior or contemporaneous felony convictions. See, Duest v. State, 855 So. 2d 33, 49 (Fla. 2003) (collecting cases). See also, Morris v. State, 2006 Fla. LEXIS 652, 34-36 (Fla. 2006) (noting that even before this Court rejected any retroactive application of Ring, this Court had repeatedly relied on the presence of the prior violent felony aggravating circumstance in rejecting Ring claims; therefore, even if appellate counsel had raised a Ring claim on direct appeal, it likely would have been denied). Lastly, in this case, the jury unanimously recommended the death sentence. Thus, independent of the procedural bars, the jury's unanimous death recommendation in this case undeniably satisfies Ring. Indeed, this Court has previously relied, in part, on unanimous death recommendations by the jury

in denying relief under Ring. See, Anderson v. State, 863 So. 2d 169, 189 (Fla. 2003); Rivera v. State, 859 So. 2d 495, 508 (Fla. 2003). Thus, Dailey's Ring claim is procedurally barred and also without merit.

CONCLUSION

WHEREFORE, based on the foregoing arguments and authorities, the instant Petition for Writ of Habeas Corpus should be denied.

Respectfully submitted,

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COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular mail to the Honorable Jack Espinosa, Jr., Circuit Court Judge, 800 E. Twiggs Street, Room 416, Tampa, Florida 33602; Eric C. Pinkard, Assistant CCRC, Office of the Capital Collateral Regional Counsel, Middle Region, 3801 Corporex Park Drive, Suite 210, Tampa, Florida 33619-1136; and to James Hellickson, Assistant State Attorney, P.O. Box 5028, Clearwater, Florida 33578-5028, this 23rd day of June, 2006.

_____
COUNSEL FOR RESPONDENT

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).

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COUNSEL FOR RESPONDENT