

IN THE SUPREME COURT OF FLORIDA

SAMUEL JASON DERRICK,

Petitioner,

v.

Case No. SC06-1380

L.T. No. 87-1775CFAWS

JAMES R. McDONOUGH,
Secretary, Florida
Department of Corrections,

Respondent.

_____ /

RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

COMES NOW, Respondent, JAMES R. 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

In the opinion affirming Derrick's first-degree murder conviction on direct appeal, this Court set forth the salient facts as follows:

On June 25, 1987, at 6:30 a.m., Harry Lee found the body of Rama Sharma in a path in the woods near Sharma's Moon Lake General Store in Pasco County. Blood trailed from the body to a blood puddle twenty feet away. The police found a piece of a tee shirt near the body as well as two sets of tennis shoe prints, one set belonging to Harry Lee. The medical examiner found that Sharma had died from over thirty-

one stab wounds and that he had died approximately ten to fifteen minutes after the last wound was inflicted.

Derrick was implicated in the murder by his friend, David Lowry. At trial Lowry testified that he and his wife visited Derrick on June 24 at Derrick's mother's house and that Derrick had knives out. Lowry drove Derrick to another friend's house, at which time Lowry noticed that Derrick had a knife in the back of his pants. At the time, Derrick was wearing a tee shirt, jeans, and tennis shoes. The friend's house was about two blocks from Sharma's store. At approximately 1:30 a.m. on June 25, Derrick showed up at Lowry's house in a sweaty condition and without a shirt. When Lowry drove Derrick home, Derrick told him that he had robbed the Moon Lake General Store. Derrick gave Lowry twenty dollars for gas. Later that day, after Lowry heard that Sharma had been killed, he asked Derrick whether he had killed him. Derrick admitted killing Sharma, stating that he had stabbed him thirteen times because Sharma kept screaming. Lowry testified that Derrick "kind of laughed and said it was easy." Lowry also noted that on June 25 Derrick had a new car that was worth approximately \$ 200-\$ 300. On June 29, Lowry notified the sheriff's department about Derrick's involvement in the murder.

After being arrested and advised of his rights, Derrick denied any knowledge of the murder to Detective Vaughn. Vaughn then advised Derrick that they had a witness, David Lowry. After denying that Lowry had told them anything, Derrick demanded, "I'd like to have him in front of me. Let him tell me." Vaughn then brought Lowry and Derrick into the same room and Derrick confessed to the murder. He stated that he went to Sharma's store to rob it and jumped Sharma as he left the store. Sharma turned to run back to the store. When Derrick grabbed him, Sharma turned around and saw that it was Derrick. Sharma started screaming and Derrick stabbed him "to shut him up." Derrick then took approximately \$ 360 from Sharma's pocket. Derrick also admitted that he tore off a piece of his tee shirt at the scene because it had blood on it. After the murder, Derrick threw the knife into the woods and ran to Lowry's house. Derrick also stated that he lost the money and that he threw his shoes and some clothing into a pond. The police took Derrick to

the Moon Lake General Store, and he showed them where he had attacked and murdered Sharma. The police never located the clothing, shoes, or knife.

At trial, several officers testified to Derrick's confession. They noted that after his initial confession his wife had been brought into the room. He had sobbed to her that he did not know why he killed Sharma and that he could not believe that he stabbed him over thirty times. He also had said that an aunt had always said that he was an "animal" and that she was right.

After the defense had presented two witnesses, they announced that they were calling Derrick to testify. At this point, the prosecutor announced that if Derrick testified that he had not committed the murder, he planned to call in rebuttal an inmate named Randall James. The prosecutor said that, after the first defense witness began to testify, he had received a note informing him that Detective Vaughn had just been told by James that Derrick told James that he had killed Sharma and that he would kill again. The prosecutor offered to make James available for a deposition.

Derrick's attorneys, who were public defenders, requested a recess to determine what to do because their office also represented James [n1] and they were therefore concerned about the implications of cross-examining James. The prosecutor indicated that it was his understanding that James was willing to waive the attorney-client privilege. After the recess, the judge removed the public defender's office from representing James in an effort to alleviate the conflict. Continuing to express concern over the dual representation, [n2] Derrick's attorneys made a motion for mistrial which was denied. They then decided to rest without calling Derrick as a witness. The jury found Derrick guilty. Derrick's attorneys took James's deposition while the jury was deliberating.

[n1] Defense attorney Dehnart was representing both Derrick and James.

[n2] Derrick's counsel expressed concern over James's agreeing to waive his attorney-client

privilege without the benefit of conferring with new counsel.

Derrick v. State, 581 So. 2d 31, 32-34 (Fla. 1991).

Direct Appeal:

In Derrick v. State, FSC Case No. 73,076, Derrick's initial brief asserted the following nine issues on direct appeal:

ISSUE I: THE TRIAL COURT ERRED IN FAILING TO CONDUCT AN ADEQUATE RICHARDSON HEARING AND IN FAILING TO TAKE APPROPRIATE REMEDIAL ACTION WHEN THE STATE REVEALED RANDALL JAMES AS A SURPRISE WITNESS IN THE MIDST OF APPELLANT'S TRIAL.

ISSUE II: THE PENALTY RECOMMENDATION OF THE JURY HEREIN WAS TAINTED BY THE JURY'S RECEIPT OF IRRELEVANT, HIGHLY PREJUDICIAL TESTIMONY WHICH THE DEFENSE WAS NOT GIVEN AN OPPORTUNITY TO MEET.

ISSUE III: APPELLANT WAS DENIED A FAIR TRIAL BECAUSE HE WAS IN SHACKLES THROUGHOUT THE PROCEEDINGS.

ISSUE IV: APPELLANT WAS DENIED HIS RIGHT TO A FAIR TRIAL BY AN IMPARTIAL JURY WHEN THE TRIAL COURT REFUSED DEFENSE REQUESTS TO INQUIRE OF THE JURORS WHETHER THEY HAD SEEN OR READ A PREJUDICIAL NEWSPAPER ARTICLE CONCERNING APPELLANT'S CASE THAT APPEARED IN THE LOCAL PRESS AND DENIED APPELLANT'S MOTION TO SEQUESTER THE JURY DURING TRIAL.

ISSUE V: THE TRIAL COURT ERRED IN UNDULY RESTRICTING APPELLANT'S CROSS-EXAMINATION OF SEVERAL STATE WITNESSES.

ISSUE VI: THE COURT BELOW ERRED IN FAILING TO SUSTAIN DEFENSE OBJECTIONS WHEN THE PROSECUTOR MISSTATED THE LAW IN HIS CLOSING ARGUMENTS DURING BOTH THE GUILT PHASE AND THE PENALTY PHASE.

ISSUE VII: APPELLANT WAS DENIED HIS RIGHT TO A FAIR PENALTY RECOMMENDATION BY THE TRIAL COURT'S REFUSAL TO GIVE HIS PROPOSED INSTRUCTION WHICH WOULD HAVE PREVENTED THE JURY FROM GIVING IMPROPER DOUBLE

CONSIDERATION TO THE AGGRAVATING CIRCUMSTANCES OF PECUNIARY GAIN AND COMMITTED DURING A ROBBERY.

ISSUE VIII: THE TRIAL COURT'S INSTRUCTIONS ON THE ESPECIALLY HEINOUS, ATROCIOUS, OR CRUEL AND COLD, CALCULATED, AND PREMEDITATED AGGRAVATING CIRCUMSTANCES WERE UNCONSTITUTIONALLY VAGUE BECAUSE THEY DID NOT INFORM APPELLANT'S JURY OF THE LIMITING CONSTRUCTION GIVEN TO THESE AGGRAVATING CIRCUMSTANCES.

ISSUE IX: THE TRIAL COURT ERRED IN SENTENCING SAMUEL JASON DERRICK TO DIE IN THE ELECTRIC CHAIR, BECAUSE THE SENTENCING WEIGHING PROCESS INCLUDED IMPROPER AGGRAVATING CIRCUMSTANCES AND EXCLUDED EXISTING MITIGATING CIRCUMSTANCES, RENDERING THE DEATH SENTENCE UNCONSTITUTIONAL UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

This Court, in Derrick v. State, 581 So. 2d 31, 37 (Fla. 1991), affirmed Derrick's conviction but vacated his death sentence and remanded for a new sentencing hearing before a jury.

Derrick was resentenced to death and raised the following seven issues in his direct appeal following resentencing:

ISSUE I: THE TRIAL COURT ERRED IN RESPONDING TO THE JURY'S INQUIRY REGARDING A SIX TO SIX VOTE.

ISSUE II: THE TRIAL COURT ERRED IN INSTRUCTING THE JURY ON BOTH AGGRAVATING FACTORS OF COMMISSION DURING THE COURSE OF A ROBBERY AND COMMISSION FOR PECUNIARY GAIN.

ISSUE III: THE TRIAL COURT ERRED BY FAILING TO CONSIDER ALL NON-STATUTORY MITIGATING FACTORS FOR WHICH EVIDENCE WAS PRESENTED WHEN IMPOSING SENTENCE.

ISSUE IV: THE TRIAL COURT ERRED IN FINDING THAT THE OFFENSE WAS COMMITTED FOR THE PURPOSE OF AVOIDING OR PREVENTING A LAWFUL ARREST WHEN THE EVIDENCE DID NOT ESTABLISH THAT FACTOR BEYOND A REASONABLE DOUBT.

ISSUE V: THE TRIAL COURT ERRED IN FINDING THAT THE OFFENSE WAS HEINOUS, ATROCIOUS OR CRUEL WHEN THE EVIDENCE OF THAT AGGRAVATING FACTOR WAS NOT ESTABLISHED BEYOND A REASONABLE DOUBT.

ISSUE VI: THE TRIAL COURT ERRED IN CONSIDERING AS AN AGGRAVATING FACTOR THAT THE MURDER WAS COMMITTED IN PERPETRATION OF A FELONY.

ISSUE VII: BASED UPON PROPORTIONALITY, THIS COURT SHOULD REDUCE APPELLANT'S SENTENCE TO ONE OF LIFE IMPRISONMENT.

Derrick's death sentence was affirmed June 23, 1994, rehearing denied August 31, 1994 in Derrick v. State, 641 So. 2d 378 (Fla. 1994).

Derrick filed a petition for writ of certiorari in the United States Supreme Court on November 18, 1994 in Derrick v. Florida, Case No. 94-6961. The United States Supreme Court denied certiorari review on January 23, 1995. See, Derrick v. Florida, 513 U.S. 1130 (1995).

Postconviction Proceedings:

Derrick's second amended motion for postconviction relief was filed on November 30, 2001 and raised the following claims:

CLAIM I: ACCESS TO THE FILES AND RECORDS PERTAINING TO MR. DERRICK'S CASE IN THE POSSESSION OF CERTAIN STATE AGENCIES HAVE BEEN WITHHELD IN VIOLATION OF THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION, THE EIGHTH AMENDMENT, AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

CLAIM II: MR. DERRICK 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.

CLAIM III: MR. DERRICK 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 EVIDENCE. SUCH OMISSIONS RENDERED DEFENSE COUNSEL'S REPRESENTATION INEFFECTIVE AND PREVENTED FULL ADVERSARIAL TESTING.

CLAIM IV: MR. DERRICK WAS DENIED A FULL AND FAIR ADVERSARIAL TESTING AT THE PENALTY PHASE AND SENTENCING, IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS DUE TO INEFFECTIVE ASSISTANCE OF COUNSEL. EITHER TRIAL COUNSEL FAILED TO ADEQUATELY INVESTIGATE AND PREPARE ADDITIONAL MITIGATING EVIDENCE AND FAILED TO ADEQUATELY CHALLENGE THE STATE'S CASE, OR THE STATE FAILED TO DISCLOSE EXCULPATORY EVIDENCE UNDER BRADY V. MARYLAND. AS A RESULT, MR DERRICK'S DEATH SENTENCE IS UNRELIABLE.

CLAIM V: MR. DERRICK 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 THERE WAS NO MENTAL HEALTH EXPERT RETAINED BY RE-SENTENCING COUNSEL TO EVALUATE MR. DERRICK EVEN AFTER HE WAS FOUND GUILTY OF FIRST DEGREE MURDER AND HIS DEATH SENTENCE WAS OVERTURNED BY THE FLORIDA SUPREME COURT, THUS COUNSEL WAS INEFFECTIVE THROUGH NEGLIGENCE OR A DELIBERATE FAILURE TO OBTAIN ADEQUATE MENTAL HEALTH ASSISTANCE FOR MR. DERRICK AS REQUIRED BY AKE V. OKLAHOMA.

CLAIM VI: MR. DERRICK'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.

(PCR-V1/6-61)

The State filed its response on February 12, 2002 (PCR-V1/80-198; V2/199-400; V3/401-567) and on March 7, 2002, a Huff¹

¹ Huff v. State, 622 So. 2d 982 (Fla. 1993).

hearing was held before the Honorable Stanley R. Mills, Circuit Judge. (PCR-SV1/1115-1237) The Circuit Court ordered that Derrick was entitled to an evidentiary hearing on ground 2, subissue E and ground 4, subissues A and B of his Amended Motion and that ground 6 would not be considered "unless and until Defendant establishes error at the evidentiary hearing." Ground 1; ground 2, subissues A, B, C and D; ground 3; ground 4, subissue C and ground 5 of his Amended Motion were denied. (PCR-V4/579) The postconviction evidentiary hearing was held on June 29th and 30th, 2005. (PCR-V6/821-1007; V7/1008-1114)

On July 15, 2005, the Circuit Court entered its written Final Order On Defendant's Motion For Post-Conviction Relief. (PCR-V5/804-809).

Derrick filed a timely notice of appeal from the denial of his postconviction motion which is currently pending before this Court in Derrick v. State, Case No. SC05-1559. Derrick's habeas petition was filed contemporaneously with his initial brief in the appeal of the denial of his motion for postconviction relief.

ARGUMENT IN OPPOSITION TO CLAIMS RAISED

**PETITIONER HAS NOT ESTABLISHED ANY
DEFICIENCY BY APPELLATE COUNSEL AND ANY
RESULTING PREJUDICE ON DIRECT APPEAL.**

Petitioner, Samuel Jason Derrick, asserts that extraordinary habeas relief is warranted because he allegedly was denied the effective assistance of appellate counsel on his original direct appeal. Claims of ineffective assistance of appellate counsel are appropriately raised in a petition for writ of habeas corpus. See, Freeman v. State, 761 So. 2d 1055, 1069 (Fla. 2000). However, claims of ineffective assistance of appellate counsel may not be used to camouflage issues that should have been presented on direct appeal or in a postconviction motion. See, Rutherford v. Moore, 774 So. 2d 637, 643 (Fla. 2000).

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.

Preliminary Legal Principles

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").

This Court has consistently stated that appellate counsel cannot be ineffective for failing to raise claims which were not preserved due to trial counsel's failure to object. See, e.g.,

Randolph v. State, 853 So. 2d 1051, 1068 (Fla. 2003); Brown v. State, 846 So. 2d 1114, 1127 (Fla. 2003); Ferguson v. Singletary, 632 So. 2d 53, 58 (Fla. 1993) (finding appellate counsel was not ineffective in failing to raise allegedly improper comments by the prosecutor which were not preserved for appeal by objection). The sole exception to this general rule is where appellate counsel fails to raise a claim which, although not preserved at trial, rises to the level of fundamental error. See, e.g., Rodriguez v. State, 919 So. 2d 1252, 1282 (Fla. 2005) In order for an error to be fundamental and justify reversal in the absence of a timely objection, "the error must reach 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." Branch v. State, 2006 Fla. LEXIS 1825 (Fla. 2006), citing Brown v. State, 124 So. 2d 481, 484 (Fla. 1960). 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). A defendant's

disagreement with the manner in which his appellate counsel raised the issue on direct appeal is an insufficient ground to be heard in a habeas corpus petition. See Brown v. State, 894 So. 2d 137, 159 (Fla. 2004) ("Habeas petitions, however, should not serve as a second or substitute appeal and may not be used as a variant to an issue already raised."); see also Swafford v. Dugger, 569 So. 2d 1264, 1266 (Fla. 1990) ("After appellate counsel raises an issue, failing to convince this Court to rule in an appellant's favor is not ineffective performance.").

a. The Record and Randall James

As his first claim of ineffective assistance of appellate counsel, Derrick alleges that the record was not fully transcribed. According to Derrick, the prosecutor's remarks about Randall James were "blurted out" within earshot of the jury, and "everything in the transcript from page 510 to page 516 was said in the presence of the jury." (Petition at 12-14). Derrick claims that appellate counsel was ineffective in failing to move for reconstruction of the record. Derrick's habeas claim of ineffective assistance of appellate counsel must fail for the following reasons.

First, the record on direct appeal directly contradicts the defendant's current, unsupported allegations and confirms the prosecutor's unmistakable request that the jury be excused *before* he addressed the issue of Randall James as a potential

rebuttal witness. The record shows the following exchange at trial:

MR. DEHNART [Defense Counsel]: We call Jason Derrick, Your Honor.

MR. McCLURE [Defense Co-Counsel]: May we approach the bench?

BENCH CONFERENCE:

MR. DEHNART: Judge's [sic] he's got shackles on.

MR. HALKITIS [Prosecutor]: Judge, I'd like five-minute recess because something has come up which I have to apprise the Court about.

THE COURT: I think we ought to take the shackles off.

MR. DEHNART: Yes.

THE COURT: We will take a ten-minute recess.

MR. HALKITIS: Judge, will you wait here, though?

THE COURT: We will go back there.

MR. HALKITIS: I have something I want to alert the Court to. Do you want to do it in chambers? I can tell you here, but I'd rather have the jury in their room.

(Thereupon, the Jury is removed from the courtroom.)

MR. HALKITIS: An investigator from my office has brought down a note that indicates that Clint Vaughn was contacted this morning by an inmate by the name of Randall James. And Randall James told Detective Vaughn that he has spoke [sic] with the defendant and asked the defendant, "What are you in here for?" And the defendant said, "Murder." And Randall James asked him, "did you do it?" And Derrick responded, "Yeah, I killed the motherf[-----] and I may kill again." . . .

(R1. V3/509-510) (e.s.)

Second, Derrick's current self-serving recollection -- that the prosecutor's disclosure of Randall James' statement was purportedly blurted out in the presence of the jury in 1988 -- is conspicuously unsupported by any contemporaneous objection from either of his two experienced defense attorneys at the time of trial.

Third, Derrick's self-serving recollection is belied by defense counsel's contemporaneous written motion to strike/continue, filed on May 13, 1988. Defense counsel alleged:

1. During the guilt phase of this trial on May 11, 1988, immediately following the announcement in open court of the Defendant as the next Defense witness, a bench conference was held wherein the State announced that a note had recently been handed to him in court revealing that said RANDALL JAMES had taken a "jail house confession" from the Defendant.

2. The State indicated that the nature of the confession was "Yeah, I killed the mother f----- and I'll kill again."

3. After receiving this request and moving unsuccessfully for a mistrial and after a lengthy recess, the Defense decided to rest . . .

(R.1 V6/956).

Certainly, if the prosecutor had "blurted" out this information in the presence of the jury, as Derrick now alleges, defense counsel's written motion would have included such an allegation of impropriety. The conspicuous absence of any contemporaneous objection or complaint in the post-trial defense motions undermines Derrick's current complaint.

Fourth, there is nothing in any of the defense pleadings filed at the time of trial to remotely support Derrick's current self-serving version of events; and, as this Court reiterated in Smith v. State, 931 So. 2d 790 (Fla. 2006), appellate counsel has no duty to go beyond the record on appeal. Id. at 805, Rutherford v. Moore, 774 So. 2d 637, 646 (Fla. 2000) ("Appellate counsel cannot be deemed ineffective for failing to investigate and present facts in order to support an issue on appeal. The appellate record is limited to the record presented to the trial court.")

Fifth, at the time of his direct appeal, Derrick was represented by Robert F. Moeller, an experienced appellate lawyer who had been representing criminal defendants on appeal since the early 1980's. See, e.g., Pahl v. State, 415 So. 2d 42 (Fla. 2d DCA 1982). Attorney Moeller raised nine substantive issues on Derrick's direct appeal and this Court agreed with Attorney Moeller's claim that Randall James' testimony was erroneously admitted during the penalty phase and constituted reversible error. Derrick v. State, 581 So. 2d 31, 36 (Fla. 1991). Therefore, this Court remanded this case for a new sentencing proceeding. Id.

Sixth, appellate counsel did raise a "Randall James" claim on direct appeal. Thus, he cannot show that his appellate counsel was deficient. See Rutherford, 774 So. 2d at 645 ("[I]f

an issue was actually raised on direct appeal, the Court will not consider a claim that appellate counsel was ineffective for failing to raise additional arguments in support of the claim on appeal.”)

Seventh, Derrick argues generally that this “missing” information would have aided his direct appeal, but he does not point to specific reversible errors that occurred due to an allegedly untranscribed portion of the record. As this Court pointed out in Johnson v. Moore, 837 So. 2d 343, 345-346 (Fla. 2002), in Thompson v. State, 759 So. 2d 650, 660 (Fla. 2000), this Court rejected a similar claim and stated:

We have previously rejected a similar claim that appellate counsel was ineffective for failing to have transcribed portions of the record, including parts of voir dire, the charge conference, and a discussion of whether the defendant would testify. See Ferguson v. Singletary, 632 So. 2d 53, 58 (Fla. 1993). We reasoned that “[h]ad appellate counsel asserted error which went uncorrected because of the missing record, or had [the defendant] pointed to errors in this petition, this claim may have had merit.” *Id.* However, because the defendant “pointed to no specific error which occurred” during the portions of the record that remained untranscribed, we concluded that appellate counsel was not ineffective. *Id.*; see also Turner v. Dugger, 614 So. 2d 1075, 1079-80 (Fla. 1992) (finding defendant had not been prejudiced by failure of counsel to have charge conference transcribed). As with the defendant in Ferguson, Thompson has not pointed to any errors that occurred during the untranscribed portions of the proceedings.

(Alterations in original.) Similarly, Johnson has not demonstrated that the deficiencies he generally alleges undermine confidence in the correctness of his sentence. See Pope, 496 So. 2d at 800. Johnson is not entitled to relief on this claim.

Lastly, Derrick also raised an intertwined IAC/guilt phase claim based on Randall James in his postconviction motion. As reflected in this Court's decision affirming Derrick's conviction, Derrick v. State, 581 So. 2d 31, 33-36 (Fla. 1991), the denial of defense counsel's motion for mistrial concerning Randall James was affirmed, and this Court found no prejudice to Derrick by the trial court's ruling. Derrick's intertwined postconviction and habeas claims are procedurally barred as involving an issue raised on direct appeal and one now improperly attempted to be converted to an issue of ineffective assistance. See State v. Riechmann, 777 So. 2d 342, 353, n.14 (Fla. 2000). The trial court's ruling allowing James to testify in the penalty phase was raised on direct appeal and resulted in reversal of the penalty phase, but not for James's capacity to be a witness, nor for any failure of the opportunity to investigate, but for relevance of the testimony as to the penalty phase. Derrick v. State, 581 So. 2d 31, 36 (Fla. 1991). Derrick's postconviction motion and habeas petition do not allege that the State would have been unable to call James as a witness in the guilt phase, and Derrick has not established any

deficiency of appellate counsel and resulting prejudice under Strickland based on the failure to file a meritless motion to reconstruct the record.

b. Allegedly Improper Prosecutorial Argument

Derrick asserts that appellate counsel was ineffective in failing to raise, as fundamental error, a claim of improper prosecutorial comment based on the prosecutor's closing argument that the medical examiner's reference to the murder weapon as a *single-edged* knife was a mistake. (R1. V4/598)

This Court has consistently stated that appellate counsel cannot be ineffective for failing to raise claims which were not preserved due to trial counsel's failure to object. See, e.g., Randolph v. State, 853 So. 2d 1051, 1068 (Fla. 2003). The sole exception to this general rule is where appellate counsel fails to raise a claim which, although not preserved at trial, rises to the level of fundamental error. See, e.g., Rodriguez v. State, 919 So. 2d 1252, 1282 (Fla. 2005). In order for an error to be fundamental and justify reversal in the absence of a timely objection, "the error must reach 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." Branch v. State, 2006 Fla. LEXIS 1825 (Fla. 2006), citations omitted.

Derrick has not, and cannot, show fundamental error on the basis of the prosecutor's fair comment on the evidence presented at trial. In his postconviction motion, Derrick raised an IAC/guilt phase claim based on trial counsel's failure to object to an allegedly improper argument. Derrick alleged the failure of defense counsel to object and request a curative instruction to the State's closing that the medical examiner's discussion of the murder weapon as a single-edged knife was a mistake.

The postconviction court denied Derrick's IAC/guilt phase claim, noting that Derrick's own confession to the police included that he had used a double-edged knife to stab the victim. PCR-V4/571-572; R1. V2/375, 380; V3/432, 434. A defendant's confession is substantive and direct evidence. LaMarca v. State, 785 So. 2d 1209, 1215 (Fla. 2001). The Lowerys saw Derrick with both single and double-edged knives shortly before the murder. R1. V2/300-301, 354. There was no legal basis to object to the prosecutor's commenting in closing argument on matters in evidence. "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))

c. Alleged Comment on Concession

Lastly, Derrick cites to R. 509-510 and he alleges that appellate counsel was ineffective in failing to raise, as fundamental error, a claim that "[t]he prosecutor argued in closing that defense counsel conceded that appellant was guilty of second-degree murder." (Petition at 18, citing R. 509-510). However, this record citation provided by Derrick, R. 509-510, reflects only the prosecutor's request for a recess during the guilt phase, the jury's removal from the courtroom, and a discussion of that morning's discovery of the State's potential rebuttal witness, Randall James. See, R1. V3/509-510. This *pro forma* claim is insufficiently alleged and fails to present any arguable basis for habeas relief.

Furthermore, examining the closing arguments, in context, reveals that Derrick's current allegation -- that "the prosecutor argued that defense counsel conceded that appellant was guilty of second degree murder" -- is unfounded. The prosecutor's initial closing argument addressed the jury instructions, the elements of the lesser included offenses, and the jury verdict forms. (R1. V4/601-605). At one point during the State's initial closing argument, the prosecutor stated, "*So if you find that the defendant wasn't going to commit a robbery here, and/or he didn't intend consciously to kill Mr. Sharma, then you can look to Murder Two.*" (R1. V4/604) (e.s.).

Thereafter, during defense counsel's closing argument, defense counsel discussed the two possible penalties for first degree murder (execution or life, without the possibility of parole for 25 years)² and defense counsel urged the jury to "see if it's [first degree murder] been proven beyond a reasonable doubt. Some things have. He [the prosecutor] proved that Rama was killed. And that's basically all he's proved. *He hasn't proved a robbery, and he sure as heck hasn't proved Jason is involved.* That's what he's got to do. . . ." (R1. V4/638) (e.s.). Consequently, on rebuttal, the prosecutor replied, ". . . Your job here today is to decide if this defendant is guilty of murder in the first degree. And Defense Counsel conceded, *you have to look for murder in the second degree or manslaughter.* Your job is to determine if this defendant is guilty of murder in the first degree or not guilty." (R1. V4/651).

Attorney Moeller's initial brief on direct appeal confirmed his obvious familiarity with the facts of this case and record on appeal. Twenty-five pages of the initial brief were devoted to the Appellant's Statement of Facts alone. See, Initial Brief of Appellant, Derrick v. State, Case No. 73,076, at pages 5-30. Additionally, Attorney Moeller raised a separate issue devoted

²Under the statute in effect at the time of the defendant's crime, first degree murder was punished either by a sentence of death or by life imprisonment without possibility of parole for twenty-five years. See § 775.082(1), Fla. Stat. (1987).

exclusively to the prosecutor's closing arguments during both the guilt phase and penalty phase. See, Issue VI on direct appeal, Derrick v. State, Case No. 73,076. The prosecutor's rebuttal, in context, was an accurate characterization of the State's initial unobjected-to and appropriate comments, *i.e.*, that the jury could "look to" "Murder Two" if they found "*that the defendant wasn't going to commit a robbery here,*" and a fair reply to defense counsel's argument that the State "*hasn't proved a robbery.*" Not surprisingly, defense counsel did not object to the prosecutor's fair rebuttal argument at trial.

The principle is well-settled that 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, 1204 (Fla. 2005). Appellate counsel may not be deemed ineffective for failing to challenge an unpreserved issue on direct appeal "unless it resulted in fundamental error." Hendrix v. State, 908 So. 2d 412, 426 (Fla. 2005). In this case, Derrick does not even remotely contend that the prosecutor's isolated comment in rebuttal arguably constituted alleged "fundamental error." Derrick's claim of ineffective assistance of appellate counsel is insufficiently alleged, apparently predicated on an unobjected-to comment in rebuttal, and based on an interpretation of the prosecutor's comment which is

unsupported on review of the parties' closing arguments, in context. Derrick has failed to establish any deficiency of appellate counsel and resulting prejudice under Strickland on the basis of any of his current habeas complaints.

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 Stanley R. Mills, Circuit Court Judge, West Pasco Government Center, 7530 Little Road, New Port Richey, Florida 34654; Harry P. Brody, Esq., Brody & Hazen, P.O. Box 16515, Tallahassee, Florida 32317; and to Michael Eric Rosario, Assistant State Attorney, P.O. Box 5028, Clearwater, Florida 33578-5028, this 9th day of October, 2006.

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).

COUNSEL FOR RESPONDENT