IN THE SUPREME COURT OF FLORIDA

PERRY ALEXANDER TAYLOR,

Petitioner,

v. **Case No. SC07-1168**
L.T. No. CF 88-15525

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

Taylor's appeal from the denial of his post-conviction motion is currently pending before this Court in Taylor v. State, Case No. SC06-615. Taylor's habeas petition was filed contemporaneously with his initial brief in the appeal of the denial of his motion for post-conviction relief.

1989 – 1991: Trial and Direct Appeal Proceedings

In May of 1989, the defendant, Perry Taylor, was convicted of first-degree murder and sexual battery of Geraldine Birch. Taylor confessed to killing Geraldine Birch. At trial, Taylor claimed that the sexual contact was consensual and that the beating from which she died was done without premeditation. On May 12, 1989, Hillsborough County Circuit Judge William Graybill sentenced Taylor to death on the first-degree murder conviction and to life in prison on the contemporaneous sexual battery conviction. On direct appeal, Taylor v. State, 583 So. 2d 323 (Fla. 1991), this Court set forth the following summary of the facts:

> Taylor was charged with the murder and sexual battery of Geraldine Birch whose severely beaten body was found in a dugout at a little league baseball field. Shoe prints matching Taylor's shoes were found at the scene. Taylor confessed to killing Birch but claimed that the sexual contact was consensual and that the beating from which she died was done in a rage without premeditation. Taylor testified that on the night of the killing, he was standing with a small group of people when Birch walked up. She talked briefly with others in the group and then all but Taylor and a friend walked off. Taylor testified that as he began to walk away, Birch called to him and told him she was trying to get to Sulphur Springs. He told her he did not have a car. She then offered sex in exchange for cocaine and money. Taylor agreed to give

her ten dollars in exchange for sex, and the two of them went to the dugout. [n1][1]

Taylor testified that when he and Birch reached the dugout they attempted to have vaginal intercourse for less than a minute. She ended the attempt at intercourse and began performing oral sex on him. According to Taylor, he complained that her teeth were irritating him and attempted to pull away. She bit down on his penis. He choked her in an attempt to get her to release him. After he succeeded in getting her to release her bite, he struck and kicked her several times in anger.

Taylor, 583 So. 2d at 325.

On direct appeal, this Court affirmed Taylor's convictions, but vacated Taylor's death sentence due to improper prosecutorial arguments during the penalty phase. Therefore, this Court remanded for resentencing before a new jury. Taylor, 583 So. 2d at 330.

1992 Resentencing Proceedings

On resentencing, the new jury recommended death by an eight to four vote. The trial judge found the following aggravating factors: (1) Taylor had a previous felony conviction involving the use or threat of violence; (2) the capital felony occurred

[1] [n1] "The testimony of defense witnesses Otis Allen and Adrian Mitchell, friends of Taylor, corroborated this portion of Taylor's testimony. Allen testified that he heard Birch tell Taylor that she wanted to have sex for money or crack cocaine and that he saw Birch and Taylor walk off toward the little league park together. Mitchell testified that he saw Birch talking to Taylor, then she walked away and he followed as though they were together." Id. at 325.

during the commission of a sexual battery; and (3) the capital felony was especially heinous, atrocious, or cruel. The trial court found no statutory mitigators, but did give some weight to Taylor's deprived family background and the abuse he was reported to have suffered as a child. The trial court considered but gave little weight to Taylor's remorse, to psychological testimony that while Taylor has above-average intelligence, he suffers from an organic brain injury, and to testimony concerning Taylor's good conduct in custody. The trial judge determined that the aggravating circumstances outweighed the mitigating factors and sentenced Taylor to death. See, Taylor v. State, 638 So. 2d 30, 32 (Fla. 1994).

1994 Resentencing Appeal

On his resentencing appeal, Taylor argued that: (1) the jury should not have been allowed to consider sexual battery as an aggravating circumstance because it allegedly unconstitutionally repeated an element of first-degree murder; (2) a prospective juror was improperly excused after stating her opposition to the death penalty; (3) the trial court erred in not requiring a Neil inquiry when the State exercised a peremptory challenge of a prospective juror; (4) the Florida death penalty statute which allows a bare majority death recommendation violates the Constitution; (5) the death penalty

statute conflicts with the Florida Rules of Criminal Procedure; (6) the penalty phase judge erred in admitting a graphic photo into evidence; (7) the penalty phase judge failed to instruct the jury on the intent element of the HAC aggravator; (8) the penalty phase judge failed to instruct the jury on several nonstatutory mitigating factors; and (9) the sentence of death was not proportional considering the balance of aggravating versus mitigating factors. Taylor v. State, 638 So. 2d 30 (Fla. 1994). This Court rejected Taylor's resentencing claims and affirmed Taylor's death sentence, Taylor II, 638 So. 2d at 33.

On November 14, 1994, the United States Supreme Court denied Taylor's petition for writ of certiorari. Taylor v. Florida, 513 U.S. 1003 (1994).

1994 – 2005: Post-Conviction Proceedings

Taylor's Motion to Vacate Judgments of Convictions and Sentences With Special Request For Leave To Amend, filed on March 12, 1996, in Hillsborough County, was amended several times. Taylor's "Fourth Amended Motion To Vacate Judgments of Conviction And Sentence With Special Request For Leave To Amend And For Evidentiary Hearing," was filed on February 17, 2005. The post-conviction claims, as framed by Petitioner, were:

CLAIM I

MR. TAYLOR'S SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS

AS GUARANTEED BY THE CONSTITUTION OF THE UNITED STATES AND THE COROLLARY PROVISIONS WITHIN THE CONSTITUTION OF THE STATE OF FLORIDA WERE VIOLATED BECAUSE NO RELIABLE TRANSCRIPT OF HIS CAPITAL TRIAL EXISTS, AND APPELLATE AND POSTCONVICTION REVIEW IS IMPOSSIBLE, IN THAT THERE IS NO WAY TO REVIEW WHAT OCCURRED IN THE TRIAL COURT FOR APPEAL DUE TO OMISSIONS IN THE RECORD.

CLAIM II

MR. TAYLOR DID NOT KNOWINGLY AND INTELLIGENTLY WAIVE HIS CONSTITUTIONAL RIGHTS, AND HIS STATEMENTS WERE ADMITTED INTO EVIDENCE IN VIOLATION OF THE FOURTH, FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

CLAIM III

THE PROSECUTOR'S MISCONDUCT DURING MR. TAYLOR'S CAPITAL TRIAL RENDERED THE CONVICTIONS AND DEATH SENTENCE UNRELIABLE IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION. COUNSEL FOR MR. TAYLOR WAS INEFFECTIVE FOR FAILURE TO OBJECT.

CLAIM IV

MR. TAYLOR'S ABSENCE FROM CRITICAL STAGES OF THE PROCEEDINGS PREJUDICED HIS TRIAL AND VIOLATED THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND TO THE PARALLEL PROVISIONS WITHIN THE FLORIDA CONSTITUTION.

CLAIM V

MR. TAYLOR WAS DENIED AN ADVERSARIAL TESTING AT THE GUILT - INNOCENCE PHASE OF HIS CAPITAL TRIAL DUE TO THE STATE'S SUPPRESSION OF CRITICAL, EXCULPATORY AND IMPEACHMENT EVIDENCE; THE TRIAL COURT'S ERRONEOUS RULINGS; AND DEFENSE COUNSEL'S FAILURE TO INVESTIGATE AND PRESENT EVIDENCE, ALL IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

CLAIM VI

THE STATE FAILED TO PROVE EVERY ELEMENT OF THE OFFENSES CHARGED AGAINST MR. TAYLOR IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

CLAIM VII

MR. TAYLOR DID NOT RECEIVE ASSISTANCE OF A COMPETENT MENTAL HEALTH EXPERT AT HIS CAPITAL TRIAL IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND SIMILAR PROVISIONS OF THE FLORIDA CONSTITUTION.

CLAIM VIII

MR. TAYLOR WAS PRECLUDED FROM CONFRONTING AND CROSS-EXAMINING WITNESSES AND CALLING WITNESSES IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDENT RIGHTS AS PROVIDED IN THE FEDERAL AND STATE CONSTITUTIONS.

CLAIM IX

IMPROPER COMMENTS BY THE PROSECUTOR AT THE RESENTENCING HEARING RENDERED MR. TAYLOR'S DEATH SENTENCE UNRELIABLE IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES AND TO THE COROLLARY PROVISIONS WITHIN THE CONSTITUTION OF THE STATE OF FLORIDA.

CLAIM X

MR. TAYLOR DID NOT RECEIVE THE ASSISTANCE OF A COMPETENT MENTAL HEALTH EXPERT AT HIS CAPITAL RESENTENCING, TO WHICH HE IS ENTITLED, IN VIOLATION OF MR. TAYLOR'S RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND TO SIMILAR PROVISIONS WITHIN THE FLORIDA CONSTITUTION.

CLAIM XI

DUE TO COUNSEL'S FAILURE TO INVESTIGATE AND PRESENT EVIDENCE IN SUPPORT OF MITIGATING CIRCUMSTANCES, MR. TAYLOR WAS DENIED HIS RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND

SIMILAR PROVISIONS OF THE FLORIDA CONSTITUTION.

CLAIM XII

MR. TAYLOR IS INNOCENT OF THE DEATH PENALTY AND WAS SENTENCED TO DEATH IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS OF THE FEDERAL AND STATE CONSTITUTIONS.

CLAIM XIII

MR. TAYLOR WAS DENIED HIS RIGHTS UNDER THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND TO THE COROLLARY PROVISIONS WITHIN THE FLORIDA CONSTITUTION WHEN THE COURT FOUND AN AUTOMATIC AGGRAVAING CIRCUMSTANCE THAT THE MURDER WAS COMMITTED DURING THE COURSE OF A SEXUAL BATTERY.

CLAIM XIV

THE PRIOR CONVICTION USED TO SUPPORT THE FINDINGS OF A "PRIOR CONVICTION OF A VIOLENT FELONY" AS AN AGGRAVATING CIRCUMSTANCE WAS UNCONSTITUTIALLY OBTAINED AND INADMISSIBLE UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

CLAIM XV

FLORIDA'S STATUTE SETTING FORTH THE AGGRAVATING CIRUMSTANCES TO BE CONSIDERED IN A CAPITAL CASE IS FACIALLY VAGUE AND WAS NOT CURED BY JURY INSTRUCTIONS, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND SIMILAR PROVISIONS OF THE FLORIDA CONSTITUTION.

CLAIM XVI

MR. TAYLOR'S RESENTENCING JURY WAS MISLED BY COMMENTS AND UNCONSTITUTIONAL INSTRUCTIONS WHICH DILUTED ITS SENSE OF RESPONSIBILITY FOR SENTENCING IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES AND FLORIDA CONSTITUTIONS.

CLAIM XVII

MR. TAYLOR'S SENTENCE OF DEATH VIOLATES THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION BECAUSE THE LAW SHIFTED THE BURDEN TO MR. TAYLOR TO PROVE THAT DEATH WAS INAPPROPRIATE AND BECAUSE THE TRIAL COURT EMPLOYED A PRESUMPTION OF DEATH IN SENTENCING MR. TAYLOR.

CLAIM XVIII

FLORIDA'S CAPITAL SENTENCING STATUTE IS UNCONSTITUTIONAL ON ITS FACE AND AS APPLIED IN THIS CASE BECAUSE IT FAILS TO PREVENT THE ARBITRARY AND CAPRICIOUS IMPOSITION OF THE DEATH PENALTY, AND IT VIOLATES THE CONSTITUTIONAL GUARANTEES OF DUE PROCESS AND PROHIBITING CRUEL AND UNUSUAL PUNISHMENT.

CLAIM XIX

MR. TAYLOR DID NOT RECEIVE THE ASSISTANCE OF A COMPETENT FORENSIC EXPERT AT HIS CAPITAL TRIAL, TO WHICH HE IS ENTITLED UNDER AKE V. OKLAHOMA, IN VIOLATION OF MR. TAYLOR'S RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS RIGHTS AS GUARANTEED BY THE CONSTITUTION OF THE UNITED STATES AND THOSE COROLLARY PROVISIONS WITHIN THE CONSTITUTION OF THE STATE OF FLORIDA.

CLAIM XX

MR. TAYLOR'S TRIAL AND RESENTENCING COURT PROCEEDINGS CONTAINED PROCEDURAL AND SUBSTANTIVE ERRORS WHICH CANNOT BE HARMLESS WHEN VIEWED AS A WHOLE SINCE THE COMBINATION OF ERRORS DEPRIVED HIM OF THE RIGHTS GUARANTEED UNDER THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE STATE AND FEDERAL CONSTITUTIONS.

CLAIM XXI

MR. TAYLOR WAS DENIED DUE PROCESS, A FAIR TRIAL, AN ADVERSARIAL TESTING AND EFFECTIVE ASSISTANCE OF COUNSEL IN THE GUILT PHASE OF THE TRIAL WHEN WITHOUT HIS CONSENT, DEFENSE COUNSEL CONCEDED MR. TAYLOR'S GUILT, IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS

OF THE FLORIDA CONSTITUTION.

In addition, Taylor belatedly sought to amend his petition to add three additional post-conviction claims. The trial court denied Claims XXII, XXIII, and XXIV as follows:

> The Motion is DENIED as to Claim XXII, pages 102-13, regarding the Sexual Battery charge, as the claim is already adequately raised in the existing pleadings. In addition, Defendant's addition of this claim is DENIED as untimely pursuant to Rule 3.851(f)(4), which allows amendments up to 30 days prior to the evidentiary hearing. Defendant's evidentiary hearing is scheduled for March 3, 2005.
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> The Motion is DENIED as to Claim XXIII, pages 113 – 114; Defendant's claim that trial counsel was ineffective pursuant to Strickland v. Washington, 466 U.S. 668 (1984), for failing to present the testimony of the Victim's sister, Gloria House, in the penalty phase. This claim was abandoned by the Defendant in Memorandum In Support Of Amendment Of Motion To Vacate, Motion To admit Deposition Of Sonya Davis Into Evidence, And Addressing Proposed Order On Amending Motion To Vacate, filed on February 25, 2005. In addition, Defendant's addition of this claim is DENIED as untimely pursuant to Rule 3.851 (f)(4), which allows amendments up to 30 days prior to the evidentiary hearing. Defendant's evidentiary hearing is scheduled for March 3, 2005.
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> The Motion is DENIED as to Claim XXIV, pages 114 – 115; Defendant's claim that trial counsel was ineffective pursuant to Strickland for failing to present the testimony of the Victim's daughter, Sonya Davis, in the Guilt Phase. Defendant's proffer of the deposition of Sonya Davis taken on February 24, 2005, clearly shows Ms. Davis would not have been willing to testify in the prior proceedings. In addition, Defendant's addition of Claim XXIV is DENIED as untimely pursuant to Rule 3.851(f)(4), which allows amendments up to 30 days prior to the evidentiary hearing. Defendant's evidentiary hearing is scheduled for March 3, 2005.
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> (PCR V5/722-723)

Following evidentiary hearings held on October 7 – 8, 2003, April 8, 2004, June 7-8, 2004 and March 3, 2005, post-conviction relief was denied on February 1, 2006. (PCR V5/717-785). Taylor's notice of appeal was filed on February 27, 2006.

ARGUMENT IN OPPOSITION TO CLAIMS RAISED

Preliminary Legal Principles and Standards of Review

Procedural Bars:

Claims that either have been raised or could have been raised on direct appeal or at postconviction, are procedurally barred in habeas proceedings. See, Blackwood v. State, 946 So. 2d 960, 976 (Fla. 2006), citing Breedlove v. Singletary, 595 So. 2d 8, 10 (Fla. 1992) ("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 also, Davis v. State, 928 So. 2d 1089, 1136 (Fla. 2005), citing Parker v. Dugger, 550 So. 2d 459, 460 (Fla. 1989) ("It is important to note that habeas corpus petitions are not to be used for additional appeals on questions which could have been, should have been, or were raised on appeal or in a rule 3.850 motion, or on matters that were not objected to at trial.").

Ineffective Assistance of Appellate Counsel:

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, 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). 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. Rutherford v. Moore, 774 So. 2d 637, 643 (Fla. 2000) (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). 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 would not be supported by the record. Medina v. Dugger, 586 So. 2d 317, 318 (Fla. 1991).

CLAIM I

THE DEFENDANT'S UNCHALLENGED PRIOR VIOLENT FELONY CONVICTION CLAIM IS PROCEDURALLY BARRED IN HABEAS AND LEGALLY INSUFFICIENT TO PRESENT ANY COGNIZABLE CLAIM UNDER JOHNSON v. MISSISSIPPI.

In his first habeas claim, Taylor asserts (1) that his 1982 unchallenged plea and adult conviction for sexual battery is allegedly invalid, (2) that his prior violent felony conviction for the sexual battery of Tracie Barchie, which occurred approximately six years before the murder of Geraldine Birch [Johnson], was "too remote" to be considered as an aggravating factor, and (3) that his death sentence, which was based, in part, on the prior violent felony aggravator, allegedly violates Johnson v. Mississippi, 486 U.S. 578 (1988). For the following reasons, Taylor's complaints are procedurally barred in this habeas proceeding and legally insufficient under controlling caselaw.

First, Taylor cannot use this habeas proceeding to now initiate a procedurally-barred challenge to the validity of a prior violent felony conviction imposed in another criminal case. See, Melton v. State, 949 So. 2d 994, 1012 (Fla. 2006) (noting that Melton's prior violent felony conviction was

affirmed by the First District and "is not subject to review in these proceedings").

Second, Taylor previously raised this claim in post-conviction, and the Circuit Court rejected Taylor's underlying complaint as follows:

CLAIM XIV

> THE PRIOR CONVICTION USED TO SUPPORT THE FINDINGS OF A "PRIOR CONVICTION OF A VIOLENT FELONY" AS AN AGGRAVATING CIRCUMSTANCE WAS UNCONSTITUTIALLY OBTAINED AND INADMISSIBLE UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.
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> Mr. Taylor alleges that the conviction for sexual battery when he was 16 years old, for which he was sentenced as an adult, was unconstitutional. This conviction was used to support the finding of a prior conviction of a violent felony. Mr. Taylor argues that a plea of nolo contendere was invalid because his mental condition caused by organic brain damage rendered him unable to make a knowing, intelligent and voluntary waiver of his right to trial. Mr. Taylor also alleges that because of the brain damage he was incapable of forming the specific intent which is an element of sexual battery. This issue should have been raised on direct appeal. Mr. Taylor alleges that his conviction for sexual battery was too remote in time to be used as an aggravating circumstance. This issue should have been raised on direct appeal. In addition, there is no indication of ineffectiveness of counsel with regard to this claim, because the substantive issue has been decided against the Defendant's position. See Kelley v. Dugger, 597 So.2d 262 (Fla. 1992). Claim XIV of Defendant's Motion is denied.

(PCR V5/778-779) (e.s.)

Third, Taylor's procedurally-barred post-conviction claims cannot be relitigated under the guise of a habeas petition. See, Knight v. State, 923 So. 2d 387, 395 (Fla. 2005) (noting that the defendant's remaining claims were raised in his postconviction motion and cannot be relitigated in a habeas petition), citing Baker v. State, 878 So. 2d 1236, 1241 (Fla. 2004) ("Nor can habeas corpus be used as a means . . . to litigate issues that . . . were raised in a motion under rule 3.850."); Parker v. Dugger, 550 So. 2d 459, 460 (Fla. 1989) ("[H]abeas corpus petitions are not to be used for additional appeals on questions which . . . were raised . . . in a rule 3.850 motion . . . .").

Fourth, Taylor's claim that his 1982 conviction was "too remote" to be considered as an aggravating factor for the 1988 murder involves an on-the-record claim which was available at the time of trial; and, therefore, could have been raised at trial and on direct appeal. Consequently, it remains procedurally barred in habeas. See, Branch v. State, 952 So. 2d 470, 482 (Fla. 2006), citing 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.").

Fifth, as the Circuit Court ruled in denying Taylor's IAC

claim, Taylor's complaint also fails because this substantive issue has been decided against the defendant. See, Kelley v. Dugger, 597 So. 2d 262 (Fla. 1992) (noting that "[b]ecause the death penalty statute is silent as to the time or place of the previous conviction, even a conviction remote in time may properly be considered as aggravating"); Melendez v. State, 498 So. 2d 1258 (Fla. 1986) (same). Moreover, Taylor's murder/sexual battery of Geraldine Birch occurred in October of 1988. Taylor's sexual battery against Tracy Barchie occurred in 1982. Between those six years, Taylor was in DOC custody from 10/01/1982 -08/09/1985, and from 06/17/1986 - 09/13/1988. See, http://www.dc.state.fl.us. Taylor's self-serving claim -- that his 1982 sexual battery conviction was "too remote" to be considered as an aggravating factor for his 1988 murder/sexual battery -- is procedurally barred in habeas, undermined by his terms of incarceration during the intervening years between 1982 and 1988, and also without merit. See, Kelley.

Sixth, Taylor's prior violent felony convictions include both his prior conviction for sexual battery (of Tracie Barchie),[2] and Taylor's contemporaneous conviction for sexual

[2] Exhibit 29, the judgment of conviction in the Barchie case, was introduced without objection (RS2/344). Exhibit 28, the

battery (of Geraldine Birch). Taylor's prior violent felony convictions have not been vacated and remain valid. Therefore, Taylor does not remotely have any legitimate Johnson v. Mississippi claim, even if raised in post-conviction. See, Garcia v. State, 949 So. 2d 980, 990 (Fla. 2006) (affirming summary denial of post-conviction claims and rejecting claims – including claim that the trial court's finding of the prior conviction aggravator violated Johnson v. Mississippi, 486 U.S. 578 (1988) -- as legally insufficient under controlling caselaw); Nixon v. State, 932 So. 2d 1009, 1023 (Fla. 2006) (finding that the trial court properly denied this post-conviction claim because the prior violent felonies have not been vacated and are still valid convictions). Lastly, even if Taylor's 1982 conviction did not support this aggravating circumstance, which the State strongly disputes, any alleged error would be harmless in light of Taylor's contemporaneous conviction for sexual battery and the very compelling HAC aggravator in this case. See, Branch v. State, 952 So. 2d 470 (Fla. 2006).

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contemporaneous sexual battery conviction in this case, was introduced without objection. (RS2/345).

CLAIM II

PROCEDURALLY-BARRED CHALLENGE TO THE CONSTITUTIONALITY OF FLORIDA'S STATUTE ON AGGRAVATING FACTORS (HAC and PRIOR VIOLENT FELONY)

In Claim XV of his post-conviction motion, Taylor alleged that Florida's statute on aggravating circumstances (HAC and Prior Violent Felony) was facially vague and not cured by jury instructions. The Circuit Court ruled that Taylor's claim XV was procedurally barred in post-conviction:

> CLAIM XV
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> FLORIDA'S STATUTE SETTING FORTH THE AGGRAVATING CIRUMSTANCES TO BE CONSIDERED IN A CAPITAL CASE IS FACIALLY VAGUE AND WAS NOT CURED BY JURY INSTRUCTIONS, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND SIMILAR PROVISIONS OF THE FLORIDA CONSTITUTION.
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> This issue should have been raised on direct appeal. Claim XV of Defendant's Motion is denied.
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> (PCR V5/779)

Once again, Taylor's procedurally barred post-conviction claims cannot be relitigated under the guise of a habeas petition. See, Knight v. State, 923 So. 2d 387, 395 (Fla. 2005) (noting that the defendant's remaining claims were raised in his postconviction motion and cannot be relitigated in a habeas petition). Also, 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). Taylor's habeas challenges to the jury instructions are procedurally barred. Furthermore, this Court has rejected post-conviction challenges to these aggravating factors and jury instructions, including those reformulated under the guise of ineffective assistance of appellate counsel. See, Arbelaez v. State, 898 So. 2d 25, 46 (Fla. 2005) (HAC and CCP); Carroll v. State, 815 So. 2d 601, 623-624 (Fla. 2002) (HAC and Prior Violent Felony).

In support of this habeas claim, Taylor cites to only one case, Richmond v. Lewis, 506 U.S. 40 (1992). This Court has previously rejected similar defense claims based on Richmond. See, [Marvin] Johnson v. Singletary, 647 So. 2d 106, 108-109 (Fla. 1994); [Larry Joe] Johnson v. Singletary, 612 So. 2d 575, 577 (Fla. 1993) (addressing Richmond v. Lewis, 113 S. Ct. 528 (1992), regarding the judicial adoption of narrowing constructions of aggravating factors, and stating, ". . . it is clear that Florida has adopted a narrowing construction of its heinous, atrocious, or cruel factor, e.g., Richardson v. State, 604 So. 2d 1107, 1109 (Fla. 1992), that has tracked the language cited as acceptable in Sochor, 112 S.Ct. at 2121. This is all that Richmond requires. . . .")

Finally, the instruction on the HAC aggravator was challenged on Taylor's resentencing appeal. See, Taylor, 638 So. 2d at 33. Taylor's aggravating factors/jury instruction claims are procedurally barred in habeas. See, Branch v. State, 952 So. 2d 470, 482 (Fla. 2006), citing 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."); Preston v. State, 2007 Fla. LEXIS 961 (Fla. 2007); Rodriguez v. State, 919 So. 2d 1252, 1281 n.16 (Fla. 2005)

CLAIM III

PROCEDURALLY BARRED CALDWELL JURY INSTRUCTION CLAIM

Next, Taylor re-asserts another post-conviction claim which was denied below -- that his resentencing jury was allegedly misled by comments that purportedly diminished the jury's sense of responsibility. Taylor's claim, based on Caldwell v. Mississippi, 472 U.S. 320 (1985), is procedurally barred. See, Knight v. State, 923 So. 2d 387, 393 (Fla. 2005); Jones v. State, 928 So. 2d 1178, 1183 (Fla. 2006).

The Circuit Court denied post-conviction Claim XVI as follows:

> CLAIM XVI
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> MR. TAYLOR'S RESENTENCING JURY WAS MISLED BY COMMENTS AND UNCONSTITUTIONAL INSTRUCTIONS WHICH DILUTED ITS SENSE OF RESPONSIBILITY FOR SENTENCING IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES AND FLORIDA CONSTITUTION.
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> This issue should have been raised on direct appeal. A review of the judge's instructions shows that the jury was completely and adequately instructed. Claim XVI of Defendant's Motion is denied.
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> (PCR V5/779)(emphasis supplied)

Taylor's jury instruction complaint is procedurally barred in habeas; and, as the Circuit Court found, it is also without merit. See, Robinson v. State, 865 So. 2d 1259, 1266 (Fla.

2004) [rejecting habeas petitioner's claim that Florida's standard jury instructions in capital cases allegedly violate Caldwell v. Mississippi, 472 U.S. 320 (1985), in light of Ring v. Arizona, 536 U.S. 584 (2002)].

Taylor seeks to circumvent this procedural bar through conclusory allegations that appellate counsel was ineffective. Taylor cannot overcome a procedural default by "recasting the argument in the guise of an ineffective assistance claim." Preston v. State, 2007 Fla. LEXIS 961 (Fla. 2007), citing Freeman v. State, 761 So. 2d 1055, 1067 (Fla. 2000)); see also Thompson v. State, 796 So. 2d 511, 515 n.5 (Fla. 2001) (Conclusory allegations of ineffective assistance of counsel are "legally and facially insufficient to warrant relief under Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)")

CLAIM IV

PROCEDURALLY BARRED CHALLENGE TO THE CONSITIUTIONALITY OF FLORIDA'S DEATH PENALTY STATUTE

In his fourth claim, Taylor raises a perfunctory challenge to the constitutionality of Florida's death penalty statute, without citing to a single case which allegedly supports his claim. (Petition at 12 – 13). Again, Taylor improperly attempts to relitigate his post-conviction claim in habeas. See, Blackwood v. State, 946 So. 2d 960, 976 (Fla. 2006), citing Breedlove v. Singletary, 595 So. 2d 8, 10 (Fla. 1992) ("Habeas corpus is not a second appeal and cannot be used to litigate or relitigate issues . . ."). In denying post-conviction relief on Claim XVIII of Taylor's amended post-conviction motion, the Circuit Court ruled, in pertinent part:

> CLAIM XVIII
>
> FLORIDA'S CAPITAL SENTENCING STATUTE IS UNCONSTITUTIONAL ON ITS FACE AND AS APPLIED IN THIS CASE BECAUSE IT FAILS TO PREVENT THE ARBITRARY AND CAPRICIOUS IMPOSITION OF THE DEATH PENALTY, AND IT VIOLATES THE CONSTITUTIONAL GUARANTEES OF DUE PROCESS AND PROHIBITING CRUEL AND UNUSUAL PUNISHMENT.
>
> This issue should have been raised on direct appeal. This issue has been rejected in decisions by the Florida Supreme Court. See Elledge v. State, 911 So. 2d 57 (Fla. 2005). Claim XVIII of Defendant's Motion is denied.
>
> (PCR V5/780)

Taylor's renewed complaint is procedurally barred in habeas, insufficiently alleged, and also without merit. As this Court reiterated in Elledge:

> With regard to the other constitutional challenges presented by Elledge, this Court has repeatedly rejected similar claims. See Proffitt, 428 U.S. at 255-56 (upholding constitutionality of Florida's death penalty statute against multiple challenges, including challenge based on vagueness and overbreadth of aggravating and mitigating circumstances and the lack of guidance for the jury in weighing such factors); Griffin v. State, 866 So. 2d 1, 14 (Fla. 2003) (stating that this Court has repeatedly rejected claims that the standard jury instruction impermissibly shifts the burden to the defense to prove that death is not the appropriate sentence), cert. denied, 543 U.S. 962, 160 L. Ed. 2d 328, 125 S. Ct. 413 (2004); Freeman, 761 So. 2d at 1067 (rejecting contention that same felony underlying a felony murder conviction cannot be used as an aggravating circumstance); Merck v. State, 664 So. 2d 939, 943 (Fla. 1995) (rejecting overbreadth challenge to standard HAC instruction). Finally, this Court has rejected constitutional challenges to the State's failure to list aggravating factors in the indictment. See Brown v. Moore, 800 So. 2d 223, 225 (Fla. 2001) (rejecting constitutional challenge predicated on the failure to list aggravating factors in the indictment).
>
> Elledge, 911 So. 2d at 80.

Furthermore, Taylor's perfunctory challenge to execution by electrocution as alleged cruel and unusual punishment, is procedurally barred and also without merit. See, Suggs v. State, 923 So. 2d 419, 441 (Fla. 2005) ("Suggs claims that execution by electrocution or lethal injection constitutes cruel

and unusual punishment. Since this claim was not raised on direct appeal, it is procedurally barred. This claim is also without merit because this Court has consistently rejected arguments that these methods of execution are unconstitutional. See, e.g., Sochor v. State, 883 So. 2d 766, 789 (Fla. 2004) (rejecting claims that both electrocution and lethal injection are cruel and unusual punishment); Provenzano v. Moore, 744 So. 2d 413, 414-15 (Fla. 1999) (holding that execution by electrocution is not cruel and unusual punishment); Sims v. State, 754 So. 2d 657, 668 (Fla. 2000) (holding that execution by lethal injection is not cruel and unusual punishment").

Taylor is not entitled to any relief on the basis of his perfunctory allegation of ineffective assistance of appellate counsel. Taylor cannot overcome a procedural default by "recasting the argument in the guise of an ineffective assistance claim." Preston v. State, 2007 Fla. LEXIS 961 (Fla. 2007), citing Freeman v. State, 761 So. 2d 1055, 1067 (Fla. 2000). Furthermore, the requirements for establishing a claim based on ineffective assistance of appellate counsel parallel the standards announced in Strickland. The "[p]etitioner must show 1) specific errors or omissions which show that appellate counsel's performance deviated from the norm or fell outside the range of professionally acceptable performance, and 2) the

deficiency of that performance compromised the appellate process to such a degree as to undermine confidence in the fairness and correctness of the appellate result." See, Kearse v. State, 2007 Fla. LEXIS 1534 (Fla. 2007), citing Wilson v. Wainwright, 474 So. 2d 1162, 1163 (Fla. 1985). Counsel ordinarily is not deemed ineffective under this standard for failing to raise issues that are procedurally barred because they were not properly raised during the trial court proceedings. See Rutherford v. Moore, 774 So. 2d 637, 643 (Fla. 2000). Moreover, appellate counsel cannot be deemed ineffective for failing to raise nonmeritorious claims on appeal. See id. Taylor has not attempted to identify any preserved, meritorious issues and has not established any deficiency of counsel and resulting prejudice under Strickland.

ADDITIONAL CLAIMS

In conclusion, Taylor argues that this Court, on habeas review, "should reach the merits of any claims determined to have been incorrectly raised in the contemporaneous appeal." Petition at page 15. Taylor's 1½ page "Additional Claims" argument does not identify any particular issue and does not cite to any caselaw supporting his alleged entitlement to relief. Essentially, Taylor asks this Court to excuse any procedural bars applicable to Taylor's unspecified claims

[raised somewhere in this case] on the basis of ineffective assistance of appellate counsel. (See, Petition at 14). Taylor's mechanical complaint is insufficient to preserve any issue for review. See, e.g., Kearse v. State, 2007 Fla. LEXIS 1534 (Fla. 2007), citing Cooper v. State, 856 So. 2d 969, 977 n.7 (Fla. 2003) ("Cooper has chosen to contest the trial court's summary denial of various claims, by contending, without specific reference or supportive argument, that the 'lower court erred in its summary denial of these claims.' We find speculative, unsupported argument of this type to be improper, and deny relief based thereon."); see also, Duest v. Dugger, 555 So. 2d 849, 852 (Fla. 1990) ("The purpose of an appellate brief is to present arguments in support of the points on appeal. Merely making reference to arguments below without further elucidation does not suffice to preserve issues, and these claims are deemed to have been waived."). Taylor's token "additional claims" argument should be summarily denied as procedurally barred.

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 David R. Gemmer, Assistant CCRC, Office of the Capital Collateral Regional Counsel, Middle Region, 3801 Corporex Park Drive, Suite 210, Tampa, Florida 33619-1136 this 24th day of September, 2007.

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