IN THE FLORIDA SUPREME COURT
CASE NO. SC09-1010

VICTOR MARCUS FARR, *Petitioner*

v.

WALTER A. McNEIL, *Respondent*.

RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

Farr filed a petition for writ of habeas corpus in this Court raising four issues. For the reasons discussed, the petition should be denied.

FACTS AND PROCEDURAL HISTORY

The facts of the case and its procedural history are recited in the accompanying answer brief. Farr was represented in the first direct appeal and the second appeal of the resentencing by Assistant Public Defender W.C. McLain. Mr. W.C. McLain was admitted to the Florida Bar in 1975. Assistant Public Defender W.C. McLain has extensive experience in capital appeals. According to this Court's docketing, he has represented capital defendants in this Court since 1983. APD McLain was counsel of record in forty-four (44) capital cases prior to representing Farr. He had nine years of experience in capital appeals when he represented Farr in the first appeal.

In the first direct appeal, Assistant Public Defender McLain raised three issues including a claim that the trial court was required to consider any evidence of mitigation in the record, including the psychiatric evaluation and the presentence investigation. *Farr v. State*, 621 So.2d 1368 (Fla. 1993). This Court agreed and remanded for a new penalty phase. So, one of appellate counsel issues in the first direct appeal was a "winner." In the second appeal, the appeal from the remand for a new penalty phase, Assistant Public Defender McLain raised four issues. *Farr v. State*, 656 So.2d 448 (Fla. 1995). He obtained a fractured court with several concurring opinions.

INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL

This Court noted that a habeas petition is the proper vehicle to assert ineffective assistance of appellate counsel. *Davis v. State*, 928 So.2d 1089, 1126 (Fla. 2005)(citing *Rutherford v. Moore*, 774 So.2d 637, 643 (Fla. 2000) and *Thompson v. State*, 759 So.2d 650, 660 (Fla. 2000)). "Claims of ineffective assistance of appellate counsel are properly raised in a petition for writ of habeas corpus addressed to the appellate court that heard the direct appeal." *Connor v. State*, 979 So.2d 852, 868-869 (Fla. 2007)

In *Rutherford v. Moore*, 774 So.2d 637 (Fla. 2000), this Court explained that the standard for proving ineffective assistance of appellate counsel mirrors the standard for proving ineffective assistance of trial counsel established in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). So, appellate's counsel performance must be deficient and there must be prejudice. Appellate counsel's performance will not be deficient if the legal issue that appellate counsel failed to raise was meritless. *Spencer v. State*, 842 So.2d 52, 74 (Fla. 2003)(observing that appellate counsel will not be considered ineffective for failing to raise issues that have little or no chance of success.) Appellate counsel has a "professional duty to winnow out weaker arguments in order to concentrate on key issues" even in capital cases. *Thompson v. State*, 759 So.2d 650, 656, n.5 (Fla. 2000)(citing *Cave v. State*, 476 So.2d 180, 183 n. 1 (Fla. 1985)). Furthermore, appellate counsel is not

ineffective for failing to raise claims that were not preserved in the trial court, in the absence of fundamental error. *Lowe v. State*, 2 So.3d 21, 45 (Fla. 2008)(explaining that appellate counsel cannot be deemed ineffective for failing to present a claim that was not preserved citing *Davis v. State*, 928 So.2d 1089, 1132-1133 (Fla. 2005)); *Morton v. State*, 995 So.2d 233, 247 (Fla. 2008)(noting that appellate counsel is not ineffective for failing to raise an issue that was not preserved at trial unless the claim rises to the level of fundamental error citing *Rodriguez v. State*, 919 So.2d 1252, 1281-1282 (Fla. 2005)).

In the appellate context, the prejudice prong of *Strickland* requires a showing that the appellate court would have afforded relief on appeal. *United States v. Phillips*, 210 F.3d 345, 350 (5th Cir. 2000). Petitioner must show that he would have won a reversal from this Court had the issue been raised. This Court has explained that to show prejudice petitioner must show that the appellate process was compromised to such a degree as to undermine confidence in the correctness of the result. *Rutherford*, 774 So.2d at 643.

The standard of review of an ineffectiveness claim is *de novo. Stephens v. State*, 748 So.2d 1028, 1034 (Fla. 1999); *Holladay v. Haley*, 209 F.3d 1243, 1247 (11th Cir. 2000).

ISSUE I

WHETHER APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE AN *AKE V. OKLAHOMA*, 470 U.S. 68, 83, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985) CLAIM?

Farr contends that his due process rights under *Ake v. Oklahoma*, 470 U.S. 68, 83, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985) were violated and, alternatively, that appellate counsel was ineffective for failing to raise an *Ake* claim in the appeal from the resentencing.

First, any straight *Ake* claim is procedurally barred because it was not raised in the direct appeal of the resentencing. *Anderson v. State*, - So.3d -, 2009 WL 1954982, 14 (Fla. 2009)(finding an *Ake* claim to be procedurally barred because it was not raised in the direct appeal); *Ponticelli v. State*, 941 So.2d 1073, 1105-1106 (Fla. 2006)(concluding that even if the claim was a valid *Ake* claim, it was procedurally barred because it was not raised on direct appeal); *Whitfield v. State*, 923 So.2d 375, 379 (Fla. 2005)(rejecting an *Ake* claim as procedurally barred because it should have been raised on direct appeal citing cases). If a motion for the appointment of a mental health expert for the purposes of presenting mitigation had been made and denied, then the claim could have, and should have, been raised in the direct appeal. The *Ake* claim is procedurally barred.

Moreover, any claim of a violation of due process is meritless. A true *Ake* claim is a claim that the defendant asked for the assistance of a mental health expert and the trial court denied him that assistance. Those are the facts of *Ake*. In *Ake*, the defendant was

charged with first degree murder. He intended to raise an insanity defense at trial and made a motion pretrial for the appointment of a psychiatrist to evaluate him. The trial court denied the motion. A psychiatrist, appointed as a court expert for competency, had previously diagnosed Ake as a probable paranoid schizophrenic. In Ake's guilt phase, there was no testimony regarding Ake's sanity. Ake's jury rejected the insanity defense and convicted him on all counts. In Ake's penalty phase, the State presented a psychiatrist to establish future dangerousness but Ake had no expert witness to rebut this testimony or to establish mental mitigation. Ake was sentenced to death. The *Ake* Court noted that the "issue in this case is whether the Constitution requires that an indigent defendant have access to the psychiatric examination and assistance." *Ake* simply requires that the State pay for a capital defendant to retain an expert.

Here, the trial court appointed Dr. Mhatre to evaluate Farr. Farr had the "basic tools" in the form of an expert and that is all *Ake* requires. *Harris v. Vasquez*, 949 F.2d 1497, 1516 (9th Cir. 1990)(rejecting an *Ake* claim because "the state did in fact provide Harris with psychiatric assistance.")

The due process requirement of *Ake* is a right of access to an expert, not a matter of the competency of that expert. Farr's actual claim is not an *Ake* claim or an ineffectiveness of counsel claim; rather, it is an ineffective assistance of psychiatrist claim.

Habeas counsel attempts to weave strains of *Ake* together with strains of *Strickland* because it cannot meet either test individually. As to the Sixth Amendment claim, there is no Sixth Amendment right to effective assistance of a mental health expert. *Wright v. Moore*, 278 F.3d 1245, 1258 (11th Cir. 2002)(noting that a Sixth Amendment right to a mental competency examination is a "non-starter"). The Sixth Amendment is a right to counsel guarantee. The basis of *Ake* was the Fifth Amendment due process right. There is no right to effective assistance of an expert witness. *Mason v. Mitchell*, 320 F.3d 604, 616 (6th Cir. 2003)(rejecting an *Ake* claim that the psychiatrist provided was inadequate because the right is limited to whether a defendant had access to an expert, not whether the expert was, in fact, competent.); *Wilson v. Greene*, 155 F.3d 396, 401 (4th Cir. 1998) (rejecting the notion that there is either a procedural or constitutional rule of ineffective assistance of an expert witness); *Thomas v. Taylor*, 170 F.3d 466, 472 (4th Cir. 1999)(rejecting, yet again, the effort to recast a claim concerning the effectiveness of a court-appointed psychological expert as a claim of ineffective assistance of counsel); *Silagy v. Peters*, 905 F.2d 986, 1013 (7th Cir. 1990)(explaining that the ultimate result of recognizing a right to effective assistance of a mental health expert would be a never-ending battle of psychiatrists appointed as experts for the sole purpose of discrediting a prior psychiatrist's diagnosis). The Constitution does not entitle a criminal defendant to the effective assistance of

an expert witness. To entertain such claims would immerse judges in an endless battle of the experts to determine whether a particular psychiatric examination was appropriate. *Wilson v. Greene*, 155 F.3d 396, 401 (4th Cir. 1998). Although *Ake* refers to an appropriate evaluation, the Due Process Clause does not prescribe a malpractice standard for a court-appointed psychiatrist's performance. *Wilson*, 155 F.3d at 401. There is no such thing as ineffective assistance of expert.

Furthermore, even if this Court were to entertain effectiveness of experts claims, Dr. Umesh Mhatre, who is a psychiatrist, is a competent mental health expert. Dr. Umesh Mhatre often is appointed as a confidential mental expert in capital cases. See *Hamilton v. State*, 875 So.2d 586, 593 (Fla. 2004)(noting Dr. Umesh Mhatre, a psychiatrist, was as a confidential expert, who "could have testified to nonstatutory mitigators"). Dr. Mhatre's report contained non-statutory mitigation. *Farr*, 621 So.2d at 1370, n.3 (Fla. 1993)(stating: "the psychiatrist's report contained unrefuted evidence of nonstatutory mitigation" and quoting the last paragraph of the report "Victor's drinking does not constitute insanity I do think that it constitutes strong mitigating circumstances which might be useful should this case proceed to the death penalty phase.").

Alternatively, appellate counsel was not ineffective for failing to raise an *Ake* claim in the direct appeal from the resentencing. Farr was not denied the assistance of a mental health

expert. Dr. Umesh Mhatre was appointed to assist Farr and his counsel. Once an expert is appointed, that ends the matter. As the Ninth Circuit observed in *Harris v. Vasquez*, 949 F.2d 1497, 1516 (9th Cir. 1990), where they rejected an *Ake* claim because "the state did in fact provide Harris with psychiatric assistance." The Court noted that the "state provided Harris with access to any competent psychiatrist of his choice when it gave Harris the funds to hire two psychiatrists from the general psychiatric community" and observed "the state did not limit Harris's access to psychiatric assistance in any way." The Ninth Circuit noted that "[i]ndeed, the state went beyond the requirements of *Ake* by allowing Harris to choose his own psychiatrist." If the trial court appoints a mental health expert, much less the expert of defendant's choice, there can be no due process violation. There was no *Ake* violation for appellate counsel to raise.

Nor is there any prejudice. It was Farr who refused to present any mental mitigation. When a capital defendant refuses to allow his counsel to present any mental health expert's testimony, there necessarily is no prejudice from not having a "better" expert. Appellate counsel was not ineffective.

ISSUE II

WHETHER APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE THE ISSUE OF FARR'S COMPETENCY TO ENTER A PLEA AND WAIVE MITIGATION?

Farr argues that his appellate counsel was ineffective for failing to raise the issue of his competency to enter a plea and waive mitigation. Pet. at 10. Farr asserts that appellate counsel, based on Farr's letters, should have raised a claim that the trial court had a *sua sponte* duty to inquire into his competency.

Claims of incompetency are not proper in an original proceeding in an appellate court. This Court cannot conduct an evidentiary hearing to explore the claim. Such claims must be raised in the 3.851 motion filed in the trial court, so that the trial court may conduct an evidentiary hearing. This claim is not cognizable in a habeas petition.

There is also failure of proof as to this claim of incompetency. Dr. Umesh Mhatre, who examined Farr to determine competency, was not called as a witness at the evidentiary hearing to establish Farr's incompetency. Nor did collateral counsel present the testimony of any other mental health expert at the evidentiary hearing retroactively determining that Farr was not competent. The only evidence regarding Farr's competency at the relevant time is Dr. Mhatre's determination that Farr was, in fact, competent. *Lawrence v. State*, 969 So.2d 294, 304 (Fla. 2007)(explaining to evaluate a

claim of incompetency to enter a plea, in a postconviction setting, a court must answer two questions: "(1) whether the court could make a meaningful retrospective evaluation of the defendant's competence at the time of trial; and, if so, (2) whether the defendant was in fact competent at the time of trial" citing *Jones v. State*, 740 So.2d 520, 523 (Fla. 1999)).

Habeas counsel points to nothing in the transcript, that occurred in front of the judge, that would have required the trial court to *sua sponte* inquire further into Farr's competency. What the judge knew was that Dr. Mhatre had examined Farr and determined that Farr was competent. And nothing occurred that changed that determination.

In *Rodgers v. State*, 3 So.3d 1127, 1132-1133 (Fla. 2009), this Court concluded that the trial court was not required to hold a hearing on defendant's competency to proceed. Rogers had a prior history of mental illness and he affirmatively stated that he wished to waive the jury recommendation and additional mitigation in an effort to be sentenced to death. This Court explained that once a defendant is declared competent, only if bona fide doubt is raised as to a defendant's mental capacity is the court required to conduct another competency proceeding. *Rodgers*, 3 So.3d at 1132 (citing *Hunter v. State*, 660 So.2d 244, 248 (Fla. 1995). This Court observed that Rodgers' statements to the court showed that he understood the consequences of his decisions and that Rodgers weighed his options

of a life sentence or a death sentence in a rational and careful manner. Rodgers "clearly showed the capacity to appreciate the proceedings and the nature of possible penalties; he showed that he understood the adversary nature of the legal process; he manifested appropriate courtroom behavior; and he was able to testify in a relevant manner. *Rodgers*, 3 So.3d at 1132-1133. This Court concluded that Rodgers was competent to waive the penalty phase jury and to waive mitigation.

Appellate counsel's performance was not deficient. There was nothing in the record for appellate counsel to raise. There was no record evidence of incompetency for appellate counsel to point to. Habeas counsel asserts that this "information" was in the record which should have alerted appellate counsel to the issue of Farr's competency. Pet. at 14. This "information" is Farr's letter and his wish for a death sentence. A defendant's own letters do not undermine an expert's conclusion that Farr was competent. The record evidence available to appellate counsel was a determination by an expert that Farr was competent and nothing occurred in front of the trial court to undermine that expert's conclusion.

Furthermore, the standard of review is an abuse of discretion. *Lawrence v. State*, 846 So.2d 440, 447, n.10 (Fla. 2003)(rejecting an invitation to change the standard of review and concluding that trial court did not abuse its discretion by not conducting a competency hearing during the penalty phase). Appellate counsel is

not ineffective for recognizing that this is a difficult standard to meet. Appellate counsel was not ineffective.

Nor was there any prejudice from appellate counsel not raising the issue of Farr's competency. As the record stands, even after postconviction proceedings, there is no evidence that Farr was incompetent. No contrary expert testimony to that of Dr. Mhatre has ever been presented. Appellate counsel was not ineffective.

ISSUE III

WHETHER THE WAIVER OF MITIGATION WAS KNOWINGLY, INTELLIGENTLY AND VOLUNTARILY MADE AND WHETHER TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO INVESTIGATE MITIGATION?

Farr asserts that his waiver of the right to present mitigating evidence was not knowing, intelligent and voluntary because his trial counsel was ineffective for failing to investigate mitigation. Pet at 14.

Farr does not frame this claim as a claim of ineffective assistance of appellate counsel. A habeas petition is a vehicle to raise claims of ineffective assistance of appellate counsel; it is not a vehicle to raise claims of ineffective assistance of trial counsel. *Thompson v. State*, 759 So.2d 650, 668, n.13 (Fla. 2000)(noting that allegations of ineffectiveness of trial counsel are not cognizable in a habeas petition). Claims of ineffective assistance of trial counsel are not proper in an original proceeding in an appellate court. This Court cannot conduct an evidentiary hearing to explore the claim. Claims of ineffectiveness of trial counsel must be raised in the 3.851 motion filed in the trial court, so that the trial court may conduct an evidentiary hearing. This claim is not cognizable in a habeas petition.

This Court has stated that a capital defendant's decision to waive mitigation must be knowing, intelligent and voluntary. In *State v. Pearce*, 994 So.2d 1094, 1102 (Fla. 2008), this Court explained that, although a defendant may waive mitigation, he should

not do so blindly. "Counsel must first investigate and advise the defendant so that the defendant reasonably understands what is being waived and reasonably understands the ramifications of a waiver. The defendant must be able to make an informed, intelligent decision." *Pearce*, 994 So.2d at 1102 (citing *State v. Lewis,* 838 So.2d 1102, 1113 (Fla. 2002) and *Deaton v. Dugger*, 635 So.2d 4, 8 (Fla. 1993); *but see Schriro v. Landrigan*, 550 U.S. 465, 479, 127 S.Ct. 1933, 1942, 167 L.Ed.2d 836 (2007)(stating that "[w]e have never imposed an 'informed and knowing' requirement upon a defendant's decision not to introduce evidence"). The concept of "knowing, intelligent and voluntary" does not naturally fit with mitigation. Mitigation, in a capital case, is the defendant's own background. A capital defendant already knows this information. He is well aware of his own childhood; any prior physical or sexual abuse; any drug or alcohol problems; etc. His decision to waive presentation of his own background is automatically knowing. Moreover, it is odd to speak of an "involuntary" waiver of mitigation. Most waivers involve informing a defendant of his legal rights, such as *Miranda*, but in the context of presenting mitigation, all this means is that a defendant must know that he has the right to present mitigation. And the waiver colloquy establishes that. A plea is not considered involuntary because every witness the defendant could have presented is not listed. The only requirement is that a defendant be informed that he has the right to present witnesses (unidentified witnesses).

Counsel's performance was not deficient. *Schriro v. Landrigan*, 550 U.S. 465, 127 S.Ct. 1933, 1942, 167 L.Ed.2d 836 (2007)(when a defendant informs the trial court that he does not want mitigating evidence presented, counsel is not required to present such evidence against his client's clear directive); *Wood v. Quarterman*, 491 F.3d 196, 203 (5th Cir. 2007)(explaining that a defendant cannot instruct his counsel not to present evidence at trial and then later claim that his lawyer performed deficiently by following those instructions). While counsel has a duty to investigate mitigation in a capital case, that duty ends when the defendant instructs counsel not to contact his family or not to present any mitigation. There is no point in counsel wasting his time investigating that which the defendant will not allow him to present. While this Court has held that counsel still has a duty to investigate mitigation, despite a waiver, the problem is that these cases conflict with this Court's cases saying an attorney is not required to ignore the directions or wishes of his client. Compare *State v. Lewis,* 838 So.2d 1102, 1113 (Fla. 2002)(concluding that Lewis's waiver of the presentation of mitigating evidence was not knowingly, voluntarily, and intelligently made because his counsel's failure to investigate mitigation including Lewis's background information; failure to interview family members and who retained a mental health expert but the expert had not yet reached a diagnosis because he did not have sufficient information); *Deaton v. Dugger*, 635 So.2d 4, 8 (Fla.

1993)(finding that despite defendant's waiver, counsel was still ineffective for failure to investigate and prepare for penalty phase) with *Grim v. State*, 971 So.2d 85, 101 (Fla. 2007)(rejecting a claim of ineffectiveness for failing to investigate the mitigation of drug use and explosive disorder because counsel did not seek an expert based on Grim's desire not to present any mitigation evidence); *Brown v. State*, 894 So.2d 137, 146 (Fla. 2004)("An attorney will not be deemed ineffective for honoring his client's wishes."). Defense counsel faced with a client that does not want his family contacted cannot do both. This Court's cases requiring an attorney to investigate mitigation despite his client's decision not to present mitigation puts counsel, who is representing a client who does not want his family to be contacted at all, in an impossible situation.

Nor was there any prejudice. As the United States Supreme Court recently explained in *Schriro v. Landrigan*, 550 U.S. 465, 127 S.Ct. 1933, 167 L.Ed.2d 836 (2007), there is necessarily no prejudice from an attorney's failure to investigate mitigation because regardless of what mitigation that attorney could have uncovered, the defendant would not permit it to be presented. That the jury or judge would not hear that mitigation is a result of the defendant's decision, not his counsel's conduct.

Even under a more liberal prejudice standard, Farr has not established any prejudice. To establish prejudice in the context of a plea, a defendant must establish that he would not have pleaded

guilty and instead would have insisted on going to trial. *Hill v. Lockhart*, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985); *Lynch v. State*, 2 So.3d 47, 57 (Fla. 2008); *Grosvenor v. State*, 874 So.2d 1176, 1181 (Fla.2004)(following *Hill* and concluding that the prejudice in the plea context is that the defendant must prove that he would not have entered the plea, not that he would have prevailed at trial)). A plea, of course, is a waiver of the right to trial. The waiver of mitigation is the waiver of a right to present a defense case in the penalty phase. Analogously to the prejudice of *Hill*, *Lynch*, and *Grosvenor,* the prejudice that Farr must establish from his counsel's failure to investigate mitigation is that, had he known of that particular mitigation, he would have changed his mind and allowed that mitigation to be presented. Farr has not identified any item of mitigation that had trial counsel discovered, he would have changed his mind and allowed the presentation of mitigation. Indeed, the state cannot conceive of any type of mitigation that would have this effect.

Farr incorrectly asserts that "the prejudice is the ensuing involuntary waiver" itself. Pet. at 15. This "prejudice" is circular and not supported by any caselaw.

Farr, throughout his pleadings, relies on the ABA Guidelines. Pet. at 19 citing American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases. While the ABA may believe their guidelines are minimum

requirements, they are, in fact, merely hortatory. *Yarbrough v. Johnson*, 520 F.3d 329, 339 (4th Cir.), cert. denied, - U.S. -, 128 S.Ct. 2993 (2008)(observing that the "ABA Guidelines themselves deliver a mixed message about whether they are aspirational or mandatory" and stating: "[w]hile the ABA Guidelines provide noble standards for legal representation in capital cases and are intended to improve that representation, they nevertheless can only be considered as part of the overall calculus of whether counsel's representation falls below an objective standard of reasonableness; they still serve only as guides, not minimum constitutional standards"); Cf. *Morton v. State*, 995 So.2d 233, 244 (Fla. 2008)(rejecting a claim that the postconviction court abused its discretion in failing to take judicial notice of the ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases because the ABA standards are "guides to determining what is reasonable, but they are only guides" quoting *Strickland v. Washington,* 466 U.S. 668, 688-689, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)). And an example show this. The ABA, in the wake of this Court's decision in *Nixon v. State*, 857 So.2d 172 (Fla. 2003), made it a "requirement" that an attorney obtain the personal consent of his client before conceding guilt. Yet, the United States Supreme Court in *Florida v. Nixon*, 543 U.S. 175, 125 S.Ct. 551, 160 L.Ed.2d 565 (2004), concluded that the personal consent of the defendant was not required. It is clear that courts are perfectly free to reject

the ABA guidelines just as the Supreme Court did. The ABA guidelines are just that - guidelines, not requirements.

Farr's reliance on *Williams v. Taylor*, 529 U.S. 362, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000) and *Wiggins v. Smith*, 539 U.S. 510, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003), is misplaced. Pet. at 18-19. Neither *Williams* nor *Wiggins* involved a waiver of mitigation, as Farr's case does. It is the Supreme Court's case of *Landrigan* which did involve a waiver of mitigation that controls.

This claim of ineffectiveness of trial counsel is not cognizable in a habeas petition and trial counsel was not ineffective for failing to investigate mitigation.

ISSUE IV

WHETHER APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE THE ISSUE OF WHETHER THE FOUR AGGRAVATING CIRCUMSTANCES FOUND IN THE RESENTENCING WERE SUPPORTED BY COMPETENT, SUBSTANTIAL EVIDENCE?

Farr asserts that his appellate counsel was ineffective for failing to raise the issue of whether the aggravators were supported by competent, substantial evidence. Pet. at 27.

The aggravators in the original sentencing order were the same four aggravators found by the same judge in the resentencing order. Compare habeas pet. at 27 with *Farr v. State*, 621 So.2d 1368, 1369 (Fla. 1993)(listing that four aggravators as: (1) Farr had previously been convicted of another capital felony or of a felony involving the threat of violence to the person; (2) the homicide was committed while Farr was fleeing from the commission of a kidnapping, a robbery, two attempted kidnappings, and an attempted robbery; (3) the homicide was committed to disrupt or hinder the lawful exercise of a governmental function or the enforcement of laws; and (4) the homicide was especially heinous, atrocious, or cruel). This Court, in the original direct appeal found those aggravators to be supported by the evidence. Specifically, this Court said: "we agree with the trial court's conclusions respecting aggravating circumstances. The four factors cited by the trial court clearly were established beyond a reasonable doubt." *Farr*, 621 So.2d at 1370.

Appellate counsel was not ineffective because any claim that these four aggravators were not supported by the evidence would be

barred by the law of the case doctrine. *Denson v. State*, 775 So.2d 288, 290 (Fla. 2000). Appellate counsel, who was also appellate counsel in the first appeal, was well aware that this Court had affirmed the trial court's finding relating to these four aggravating circumstances and considered them to be "clearly established." Additionally, appellate counsel did reassert a claim that the aggravatrors were not supported by the evidence in the second appeal. *Farr v. State*, 656 So.2d 448, 450, n.1 (Fla. 1995)(finding the claim that the trial court improperly found aggravating factors to be procedurally barred because it was "considered and rejected in the previous direct appeal."). There was no deficient performance.

Furthermore, there is no prejudice. The four aggravators were supported by competent, substantial evidence. Confessions are direct evidence and may be used as evidence to support the finding of an aggravating circumstance. *Simpson v. State*, 3 So.3d 1135, 1147 (Fla. 2009)(finding competent, substantial evidence to support convictions for the first-degree murders where the defendant confessed because the confession constituted direct evidence of guilt citing *Murray v. State*, 838 So.2d 1073, 1087 (Fla. 2002)). Appellate counsel was not ineffective.

Corpus delicti

Appellate counsel was not ineffective for failing to raise a claim that the state failed to prove the corpus delicti of the murder absent Farr's confession. Pet. at 29. The corpus delicti for murder requires proof of the victim's death via the criminal agency of another. *Crain v. State*, 894 So.2d 59, 72 (Fla. 2004)(citing *Meyers v. State*, 704 So.2d 1368, 1369 (Fla.1997)). Corpus delicti only requires independent proof that the victim died through the criminal agency of another, not the mental state of the defendant. *Jefferson v. State*, 128 So.2d 132 (Fla. 1961)(concluding that corpus delicti of first-degree murder does not require proof, independent of defendant's admission or confession, of premeditation). Indeed, corpus delicti does not require that the State prove the identity of the perpetrator, much less that perpetrator's mental state. *Meyers v. State*, 704 So.2d 1368, 1369 (Fla. 1997)(explaining that the corpus delicti rule does not require that the state show that the defendant committed the crime citing *Burks v. State*, 613 So.2d 441, 443 (Fla. 1993)). Appellate counsel is not ineffective for failing to raise a claim with controlling Florida Supreme Court precedent against it. *Ayala v. State*, 879 So.2d 1, 3 (Fla. 2d DCA 2004)(concluding that appellate counsel was not ineffective when counsel chose not to brief an issue as fundamental error when there was controlling precedent from the Florida Supreme Court prohibiting the granting of relief).

Furthermore, there was no prejudice. If appellate counsel had

raised a corpus delicti issue, this Court, following *Jefferson*, would have denied the claim as meritless. Appellate counsel was not ineffective.

Unreliable evidence

Farr asserts that the trial court's reliance on unreliable evidence violated the Eighth Amendment requirement of nonarbitrary capital sentencing. Pet. at 31. Farr does not frame this claim as a claim of ineffective assistance of appellate counsel. It, therefore, is not properly raised in the habeas petition. A habeas petition is a vehicle to raise claims of ineffective assistance of appellate counsel; it is not a second appeal. *Breedlove v. Singletary*, 595 So.2d 8, 10 (Fla. 1992)(observing that habeas corpus is not a second appeal). Moreover, his claim is procedurally barred. Any due process or Eighth Amendment claim regarding the reliability of the evidence could have, and should have, been raised in the direct appeal. *Farina v. State*, 937 So.2d 612, 617, n.4 (Fla. 2006)(finding a claim that the aggravating factors were not proven beyond a reasonable doubt to be procedurally barred in postconviction because it should have been raised on direct appeal). Indeed, in the second appeal, appellate counsel asked this Court "to reject Farr's testimony as self-serving and unreliable." *Farr*, 656 So.2d at 449. If habeas counsel had framed the claim as an ineffectiveness of appellate counsel claim, it would meritless because appellate counsel did raise such an issue in his brief to this Court.

CONCLUSION

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

Respectfully submitted,
BILL McCOLLUM
ATTORNEY GENERAL

CHARMAINE M. MILLSAPS
ASSISTANT ATTORNEY GENERAL
FLORIDA BAR NO. 0989134
OFFICE OF THE ATTORNEY GENERAL
THE CAPITOL
TALLAHASSEE, FL 32399-1050
(850) 414-3300
COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing response to petition for writ of habeas corpus has been furnished by U.S. Mail to James C. Lohman, 1806 East 39th Street, Autin TX 78722 and Linda McDermott, 141 N.E. 30th Street, Wilton Manors, FL 33334 this 15th day of September, 2009.

Charmaine M. Millsaps
Attorney for the State of Florida

CERTIFICATE OF FONT AND TYPE SIZE

Counsel certifies that this brief was typed using Courier New 12 point font.

Charmaine M. Millsaps
Attorney for the State of Florida