IN THE SUPREME COURT OF FLORIDA

DAVID JOSEPH PITTMAN,

Pittman,

v.

CASE NO. SC08-2486
L.T. No. CF90-2242A1-XX
DEATH PENALTY CASE

WALTER A. McNEIL,
Secretary, Florida
Department of Corrections,

Respondent.
_____/

**RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS**
**AND**
**MEMORANDUM OF LAW**

COMES NOW, Respondent, WALTER A. McNEIL, 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**

Pittman was charged in a seven count indictment with the first degree murders of Bonnie Knowles, Barbara Knowles and Clarence Knowles (DA-R 4636-40).[1] He was also charged with two

[1] The record on direct appeal will be cited throughout this Response as "DA-R" followed by the appropriate page numbers; the post conviction record will be cited as "PCR" followed by the appropriate volumes and page numbers.

counts of arson, burglary and grand theft. Pittman was married to Marie, the daughter of Barbara and Clarence, and sister to Bonnie (DA-R 2525, 2527). The murders were committed on May 19, 1990 (DA-R 4636-40). At this time, Marie was seeking to divorce Pittman who was opposed to the divorce (DA-R 2525, 2529). Pittman had threatened to harm Marie and her family if she tried to divorce him (DA-R 2547-48).

Following a jury trial, Pittman was found guilty of the three first degree murders, guilty of two counts of arson, guilty of grand theft and not guilty of burglary (DA-R 5108-14). After penalty phase proceedings, the jury returned death recommendations by a vote of 9 – 3 on each of the three first degree murder counts (DA-R 5165-67). The trial court followed the jury's recommendation and sentenced Pittman to death for each of the murders (DA-R 5181-82). In doing so, the trial court found two aggravating circumstances for each murder: (1) previous conviction of another capital or violent felony, and (2) the murders were heinous, atrocious and cruel (HAC) (DA-R 5175-78). With regard to mitigation, the trial court considered and rejected that Pittman was under the influence of extreme mental and emotional disturbance (DA-R 5178-80). The trial court then found the following mitigating circumstances to have little if any connection to the murders: the expert testimony

that Pittman suffered from brain damage, the expert testimony that Pittman was an impulsive person with memory problems and impaired social judgment, that Pittman was and may still be a hyperactive personality and that Pittman may have suffered physical and sexual abuse as a child (DA-R 5180).

Pittman appealed his convictions and sentences to this Court, raising 10 issues in a 98-page brief:

> ISSUE I: THE TRIAL COURT ERRED BY ALLOWING THE STATE TO INTRODUCE A MYRIAD OF EVIDENCE OF COLLATERAL CRIMES AND BAD ACTS BECAUSE THE EVIDENCE WAS IRRELEVANT, EXTREMELY PREJUDICIAL AND BECAME A FEATURE OF THE TRIAL.
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> ISSUE II: THE TRIAL COURT ERRED BY FAILING TO GRANT DEFENSE MOTIONS TO SUPPRESS THE STATE'S IDENTIFICATION EVIDENCE BECAUSE OF THE UNDULY SUGGESTIVE PRETRIAL IDENTIFICATION PROCEDURES.
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> ISSUE III: THE TRIAL COURT ERRED BY EXCLUDING THE TESTIMONY OF GEORGE HODGES THAT HIS STEPSON CONFESSED TO THE CRIME FOR WHICH PITTMAN WAS ON TRIAL, AND RELATED EVIDENCE, OR, ALTERNATIVELY, GRANTING A CONTINUANCE FOR FURTHER INVESTIGATION,THUS PRECLUDING THE DEFENSE THAT SOMEONE ELSE COMMITTED THE CRIME.
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> ISSUE IV: THE TRIAL COURT FAILED TO HOLD A PRESENTENCING HEARING TO CONSIDER EVIDENCE, ARGUMENTS OF COUNSEL, AND PITTMAN'S OWN STATEMENT, PRIOR TO SENTENCING HIM TO DEATH.
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> ISSUE V: THE TRIAL JUDGE RENDERED A LEGALLY INSUFFICIENT SENTENCING ORDER IMPOSING THREE DEATH SENTENCES.
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> ISSUE VI: PITTMAN'S DEATH SENTENCE VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS BECAUSE THE HEINOUS, ATROCIOUS OR CRUEL AGGRAVATING CIRCUMSTANCE IS VAGUE, ARBITRARILY AND CAPRICIOUSLY APPLIED, AND DOES NOT

> GENUINELY NARROW THE CLASS OF PERSONS ELIGIBLE FOR THE DEATH PENALTY.
>
> ISSUE VII: THE TRIAL COURT ERRED BY INSTRUCTING THE JURY ON AND FINDING THE AGGRAVATING CIRCUMSTANCE THAT THE CAPITAL FELONY WAS ESPECIALLY HEINOUS, ATROCIOUS, OR CRUEL.
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> ISSUE VIII: THE TRIAL COURT ERRED BY FAILING TO FIND AND WEIGH THE TWO STATUTORY MENTAL MITIGATING CIRCUMSTANCES ESTABLISHED BY THE EVIDENCE.
>
> ISSUE IX: THE TRIAL COURT ERRED BY FAILING TO FIND UNREBUTTED NONSTATUTORY MITIGATION WHICH WAS CLEARLY ESTABLISHED BY THE EVIDENCE.
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> ISSUE X: THE DEATH PENALTY IS DISPROPORTIONATE BECAUSE OF THE SUBSTANTIAL MITIGATION IN THIS CASE.
>
> Initial Brief of Appellant, Florida Supreme Court Case No. SC78,605.

Pittman later filed a 32-page reply brief. Reply Brief of Appellant, Florida Supreme Court Case No. SC78,605.

This Court affirmed Pittman's convictions and sentences on direct appeal. Pittman v. State, 646 So. 2d 167 (Fla. 1994). The facts, as found by this Court, are:

> [S]hortly after 3 a.m. on May 15, 1990, a newspaper deliveryman in Mulberry, Florida, reported to law enforcement authorities that he had just seen a burst of flame on the horizon. When the authorities investigated they found the home of Clarence and Barbara Knowles fully engulfed in fire. After the fire was extinguished, the police entered the house and discovered the bodies of Clarence and Barbara, as well as the body of their twenty-year-old daughter, Bonnie. Although all of the bodies were burned in the fire, a medical examiner determined that the cause of death in each instance was massive bleeding from multiple stab wounds. In addition, the medical examiner testified

that Bonnie Knowles' throat had been cut. A subsequent investigation revealed that the fire was the result of arson, that the phone line to the house had been cut, and that Bonnie Knowles' brown Toyota was missing.

A construction worker testified that, when he arrived at work at 6:30 a.m. on the morning of the fire, he noticed a brown Toyota in a ditch on the side of the road near his job site. Other testimony revealed that the location of the Toyota was about one-half mile from the Knowles residence. The worker also observed a homemade wrecker, which he later identified as belonging to Pittman, pull up to the Toyota and, shortly thereafter, saw a cloud of smoke coming from that direction. Another witness who lived near the construction site also saw the smoke and observed a man running away from a burning car. This witness later identified Pittman from a photo-pack as the man she saw that morning. Investigators determined that the car fire, like the earlier house fire, was the work of an arsonist.

At the time of the murders, another of the Knowles' daughters, Marie, was in the process of divorcing Pittman. The divorce was not amicable and the State introduced testimony that Pittman had made several threats against Marie and her family. The State also produced evidence that Pittman had recently learned that Bonnie Knowles had tried to press criminal charges against him for an alleged rape that had occurred five years earlier.

Carl Hughes, a jailhouse informant, testified that Pittman told him that he had gone to the Knowles' house on the evening of the murders to speak with Bonnie Knowles about the problems he was having with her family. Bonnie let Pittman in the house and, when she refused his sexual advances, he killed her to stop her cries for help. Pittman then admitted to killing Barbara Knowles in the hallway outside Bonnie's bedroom and to killing Clarence in the living room as Clarence tried to use the phone. Pittman also told Hughes that he burned the house, stole the Toyota and abandoned it on the side of the road, and later returned to the Toyota and burned it as well.

> The record further reflects that Pittman feared that the police suspected his involvement in the murders, and, at the prompting of his mother, Pittman turned himself in to the police on the day after the murders.
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> In response to the prosecution's case, the defense presented testimony critical of the police investigation and attempted to establish that Marie, Pittman's former wife, and her new husband had a motive to commit the murders. Pittman testified in his own defense and stated that he had nothing to do with the crimes charged. He also denied that he had told anyone he had committed the murders. The jury found Pittman guilty of three counts of first-degree murder, two counts of arson, and one count of grand theft, and found him not guilty of burglary.
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> Pittman, 646 So. at 168-69 (footnotes omitted).

Pittman's convictions and sentences became final on May 15, 1995, when the United States Supreme Court denied certiorari from direct appeal. Pittman v. Florida, 514 U.S. 1119, 115 S. Ct. 1982 (1995).

Pittman pursued post conviction relief, which was denied November 5, 2007. The appeal from the denial of post conviction relief is currently pending before this Court. Pittman v. State, SC08-146. Pittman's writ of habeas corpus was timely filed.

## ARGUMENT IN OPPOSITION TO CLAIMS RAISED

Pittman alleges that extraordinary relief is warranted because he was denied the effective assistance of appellate counsel. Additionally, he urges relief for non—cognizable claims. In Rutherford v. Moore, 774 So. 2d 637 (Fla. 2000) this Court summarized the jurisprudence relating to claims of ineffective assistance of appellate counsel. As is the standard for ineffective trial counsel, the Court's ability to grant relief is limited to those situations where Pittman established first that counsel's performance was deficient because the "omissions are of such magnitude as to constitute a serious error or substantial deficiency falling measurably outside the range of professionally acceptable performance" and second that Pittman was prejudiced because counsel's deficiency "compromised the appellate process to such a degree as to undermine confidence in the correctness of the result." Rutherford, 774 So. 2d at 643 (*quoting* Thompson, 759 So. 2d 650 at 660 (Fla. 2000)); Groover v. Singletary, 656 So. 2d 424, 425 (Fla. 1995)).

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 his performance ineffective. Kokal v. Dugger, 718 So. 2d 138, 142 (Fla. 1998); Groover, 656 So. 2d at

425; Williamson v. Dugger, 651 So. 2d 84, 86 (Fla. 1994). Furthermore, appellate counsel is not ineffective for failing to investigate and present facts in order to support an issue on appeal since the "appellate record is limited to the record presented to the trial court." Rutherford, 774 So. 2d at 646; Finally, appellate counsel is not required to raise every conceivable claim.

A review of the record demonstrates that neither deficiency nor prejudice has been shown in this case. Pittman's arguments are based on appellate counsel's alleged failure to raise a number of issues, each of which will be addressed in turn. However, none of the issues now asserted would have been successful if argued in Pittman's direct appeal. Therefore, counsel was not ineffective for failing to present these claims. Further, no extraordinary relief is warranted where Pittman's current arguments were not preserved for appellate review and, even if preserved, no reversible error could be demonstrated. See Teffeteller v. Dugger, 734 So. 2d 1009 (Fla. 1999); Hardwick v. Dugger, 648 So. 2d 100 (Fla. 1994); Breedlove v. Singletary, 595 So. 2d 8 (Fla. 1992).

## ARGUMENT

## CLAIM I

**APPELLATE COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO CHALLENGE THE SUFFICIENCY OF THE EVIDENCE ON DIRECT APPEAL. (restated by Respondent)**

Pittman asserts appellate counsel was ineffective for failing to challenge the sufficiency of the evidence. Even though counsel did not raise a sufficiency of the evidence issue, counsel's performance was neither deficient nor prejudicial. There was no deficiency because the evidence is sufficient to support the verdict. No prejudice arose from counsel's omission, as this Court, as it identifies its duty, independently reviews all capital cases for sufficiency of the evidence irrespective of whether the parties raise the issue; and in this case, the conviction was affirmed. See Hardwick v. Wainwright, 496 So. 2d 796, 798 (Fla. 1986) (rejecting claim of ineffectiveness of appellate counsel for failing to raise the issue of the sufficiency of the evidence because the Court independently reviews each conviction and sentence to ensure they are supported by sufficient evidence); see also Hojan v. State, 2009 Fla. LEXIS 272, *30 (Fla. Feb. 27, 2009) (explaining that while defendant did not challenge sufficiency of the evidence, this Court has obligation to independently review record for sufficiency of evidence); Mora v. State, 814 So. 2d

322, 331 (Fla. 2002) (explaining that even if Mora had not raised issue, we would have still reviewed record under our independent duty to ensure sufficiency of the evidence); Sexton v. State, 775 So. 2d 923, 933 (Fla. 2000) (noting that although parties did not specifically raise issue of whether there was sufficient evidence, "it is this Court's independent obligation to review the record for sufficiency of evidence"). Further, Appellate counsel is not ineffective for failing to raise an insufficiency issue that has no merit. Suarez v. Dugger, 527 So. 2d 190, 193 (Fla. 1988) (rejecting an ineffective assistance of appellate counsel claim for failing to raise the denial of his motion for judgment of acquittal on direct appeal because the evidence was legally sufficient).

Here, there is sufficient evidence of Pittman's guilt. As this Court found regarding the crimes:

> When the authorities investigated they found the home of Clarence and Barbara Knowles fully engulfed in fire. After the fire was extinguished, the police entered the house and discovered the bodies of Clarence and Barbara, as well as the body of their twenty-year-old daughter, Bonnie. . . . A subsequent investigation revealed that the fire was the result of arson, that the phone line to the house had been cut, and that Bonnie Knowles' brown Toyota was missing.
>
> A construction worker testified that, when he arrived at work at 6:30 a.m. on the morning of the fire, he noticed a brown Toyota in a ditch on the side of the road near his job site. Other testimony revealed that the location of the Toyota was about one-half mile from the Knowles residence. The worker also observed a

> homemade wrecker, which he later identified as belonging to Pittman, pull up to the Toyota and, shortly thereafter, saw a cloud of smoke coming from that direction. Another witness who lived near the construction site also saw the smoke and observed a man running away from a burning car. This witness later identified Pittman from a photo-pack as the man she saw that morning. Investigators determined that the car fire, like the earlier house fire, was the work of an arsonist.
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> Carl Hughes, a jailhouse informant, testified that Pittman told him that he had gone to the Knowles' house on the evening of the murders to speak with Bonnie Knowles about the problems he was having with her family. Bonnie let Pittman in the house and, when she refused his sexual advances, he killed her to stop her cries for help. Pittman then admitted to killing Barbara Knowles in the hallway outside Bonnie's bedroom and to killing Clarence in the living room as Clarence tried to use the phone. Pittman also told Hughes that he burned the house, stole the Toyota and abandoned it on the side of the road, and later returned to the Toyota and burned it as well.
>
> Pittman, 646 So. 2d at 168.

In addition to construction worker Dennis Waters' observation of the wrecker and William Smith's observations of the wrecker, gas can, and suspect[2], identifying Pittman that critical morning was Barbara Davis. She identified Pittman as the man next to the passenger side of the burning car and who

[2] William Smith, who lived near the Majic Market on Highway 60, testified that between 6:30 and 6:45 a.m., he saw a home-made wrecker come to a stop behind the store (DA-R 1793). A white male got out of the vehicle and picked up a five gallon gas can, shook it on the ground and set it back in the truck (DA-R 1795). Later, on the 6:00 news, Smith saw Pittman had been arrested and he told his wife that it was the same person that he had seen earlier (DA-R 1801).

came up the embankment at a "jog-like" pace. Davis lived in an apartment on Prairie Mine Road next to where the Toyota was abandoned and burned (DA-R 1699—1700). At approximately 6:40 a.m. on the morning of the fire, Davis was outside picking roses when she saw a ball of smoke (DA-R 1702-03). When she subsequently approached the location of the fire, she saw a man coming up the embankment from beside the car (DA-R 1704-05). The man was right next to the passenger side of the car - an inch or two away from it (DA-R 1704). The man went across the parking lot, taking "big steps at record speed." (DA-R 1705). Davis saw the right side of the man's face; she described him as a white male with acne or indents in his face, a long and pointed nose, and dirty blonde hair hanging down on his head (DA-R 1705, 1711-12, 1714). Later that day, the police took her to Bartow where she identified Pittman's photo from two separate photo-packs; the first group of photos were front view only and the second group were right-side profile photographs (DA-R 1714-16, 1720). Davis also identified Pittman in court (DA-R 1719).

Additionally, the trial record reveals that Pittman admitted committing the murders to David Pounds, whom he met while in state prison (DA-R 1894). Pounds testified Pittman told him how the victims were killed and, admitted "Yeah, I did it but there's no way they can pin it on me. My alibi is too

good" (DA-R 1895-97). Pittman spoke to Pounds about the car fire, saying there was no way fingerprints could be lifted from the car due to the fire and the water used to extinguish it (DA-R 1897-98). Pittman also had previously told Marie how you could burn an automobile to get rid of fingerprints (DA-R 2548).

Polk County Correctional Officer William Hunter testified that while Pittman was incarcerated he complained to him about problems he had with the Knowles family (DA-R 2791-92). He felt his in-laws were responsible for keeping Marie from him and he was adamant he would resort to violence to resolve the problem (DA-R 2792). He stated if necessary he would "kill them" (DA-R 2793). Hunter testified that Pittman told him he had a lot of knowledge about stealing cars and he would burn the car if he was in a rush and that the fire would take care of any evidence (DA-R 2794-95). Fire Marshall's crime lab analyst expert Victor Higg uncovered evidence of flammable liquids on Pittman's shoes and clothing (DA-R 2724-25, 2737-39).

Post conviction counsel's argument asserting that Pittman did not have the opportunity to commit these murders within a short window of time was made by trial counsel below. Trial counsel argued to the jury, complete with time chart, that Pittman did not have the opportunity in time to commit these murders and such was sufficient to demonstrate that the State

had not met its burden of proving the murders beyond a reasonable doubt (DA-R 4048-71). The jury's guilty verdicts rejected trial counsel's argument. Their resolution of the evidence should not be disturbed.

Based on the above and this Court's prior affirmance, appellate counsel was not deficient for failing to raise a meritless sufficiency of the evidence claim. Likewise, this Court's affirmance precludes a finding of prejudice. Hardwick, 496 So. 2d at 798. To the extent that Defendant may assert that this Court did not review the sufficiency of the evidence in this case because it did not mention it in its opinion, the claim is without merit. This Court has stated that the fact that a claim that it has a duty to review automatically was not mentioned in an opinion is not an indication that it did not do its job. See Booker v. State, 441 So. 2d 148, 152-53 (Fla. 1983).

Pittman's reliance on Wilson v. Wainwright, 474 So. 2d 1162 (Fla. 1985) is misplaced. In Wilson, this Court granted habeas relief where the appellate attorney raised only five issues on appeal; did not raise sufficiency of the evidence regarding premeditation where such issue was apparent from the 'cold record'; failed to properly brief an argument on proportionality after being requested to by this Court; and, demonstrated a lack

of preparation and zeal on behalf of his client's cause at oral argument.[3] Wilson, 474 So. 2d at 1164. Here, in a 98-page brief counsel raised ten issues on direct appeal, attacked the aggravators, and enumerated the proportionality of the sentences as error. Lastly, there is no indication in this Court's opinion that counsel was unprepared or lacked zeal in advocating the appeal. Relief must be denied.

[3] In Wilson, 474 So. 2d at 1164, the following was cited:
**THE COURT:** Well, let me ask a question. Do you feel that death is the appropriate punishment if he is guilty?
**CONNER:** It's, it's quite possible, yes sir. Uh, there was sufficient evidence in this case for the jury to find premeditation and they did find premeditation.

## CLAIM II

**PITTMAN'S CLAIM THAT THIS COURT ERRED IN AFFIRMING THE EXCLUSION OF HEARSAY TESTIMONY IS BARRED AND WITHOUT MERIT. (restated by Respondent)**

Pittman attempts to revisit this Court's direct appeal ruling that the "trial court correctly excluded Hodges' testimony as substantive evidence under the hearsay rule and that there is no applicable hearsay exception." Pittman, 646 So. 2d at 172. This claim is procedurally barred.

A habeas corpus petition "is not a vehicle for obtaining a second appeal of issues which were raised, or should have been raised, on direct appeal or which were waived at trial. Moreover, an allegation of ineffective counsel will not be permitted to serve as a means of circumventing the rule that habeas corpus proceedings do not provide a second or substitute appeal." Blanco v. Wainwright, 507 So. 2d 1377, 1384 (Fla. 1987); see also Jones v. Moore, 794 So. 2d 579, 586 (Fla. 2001) (reiterating "[t]his Court previously has made clear that habeas is not proper to argue a variant to an already decided issue."); Porter v. Crosby, 840 So. 2d 981, 984 (Fla. 2003) ("claims raised in a habeas petition which Pittman has raised in prior proceedings and which have been previously decided on the merits in those proceedings are procedurally barred in the habeas petition.").

The crux of Pittman's argument is that this Court ignored and did not address Pittman's reliance on Chambers v. Mississippi, 410 U.S. 284 (1973). As noted, this is to the contrary, Chambers was *addressed* on direct appeal and *rejected* by this Court. See Initial Brief of Appellant, Florida Supreme Court Case No. SC78,605 at pp. 54-69; Brief of Appellee, Florida Supreme Court Case No. SC78,605 at pp. 52-69.

Hodges purportedly had received a letter wherein his stepson Jesse Watson (who was a key witness against Hodges in Hodges' murder trial) confessed that he and his cousin Aaron Gibbons committed the murders (DA-R 2636-37, 3537). The alleged letter no longer exists (DA-R 3504, 3610, Supp. Record Volume 31 on Appeal-Court Exhibit #1).

There is no evidence that Jessie Watson confessed to anybody. There is no witness who claims to have seen Watson commit the crimes. In the phantom letter Watson didn't mention how the home was broken into, did not mention who the victims were, did not mention who killed the victims, how the victims were killed, and did not mention the theft or arson of the automobile. See Supp. Record Volume 31 on Appeal-Court Exhibit #1. There is no evidence to connect Watson or Gibbons to the crime, aside from Hodges' unsupported claims. Thus, the trial court's ruling that Hodges' testimony did not remotely compare

to Chambers in terms of reliability and trustworthiness was appropriate and exclusion of Hodges' testimony was proper (DA-R 3558-59). Chambers does not provide Pittman any relief here, just as it did not on direct appeal.

Because the instant claim was raised and rejected on direct appeal, Pittman may not use his habeas petition to obtain a second appeal of the matter. Nor may Pittman use his habeas petition to obtain an out-of-time rehearing of this Court's decision. This issue is procedurally barred and without merit. There is no basis for habeas relief.

## CLAIM III

**THE STATE OF FLORIDA DID NOT FAIL TO DISCLOSE PERTINENT FACTS ON DIRECT APPEAL. (restated by Respondent)**

Next, Pittman alleges that the State failed to disclose pertinent facts on direct appeal, specifically, that Carl Hughes had an alleged "incentive to testify" and allegedly "received consideration." (Petition for Writ of Habeas Corpus at p. 31). However, as this Court emphasized in Smith v. State, 931 So. 2d 790, 805 (Fla. 2006), the appellate record is limited to the record presented to the trial court. In his post conviction motion below, Pittman raised a variant of his "Carl Hughes" complaint within his Brady/Giglio sub-claims; and, after several days of evidentiary hearings, all relief was correctly denied. In Pittman's initial brief on his contemporaneous post conviction appeal (Pittman v. State, SC08-146), Pittman's initial Brady claim focuses, primarily, on State witness Carl Hughes, the disgraced director of operations for the Lakeland Housing Authority who was convicted in federal court and in state court on multiple criminal charges, including bribery and grand theft. Initial Brief of Appellant at pp. 62-75. Pittman's consecutive "Carl Hughes" claim, now raised under the guise of habeas corpus, is procedurally barred.

Pittman's attempt to recast this claim under the guise of habeas corpus is improper under Florida law, as the defense well knows. In both Wright v. State, 857 So. 2d 861 (Fla. 2003) and Smith v. State, 931 So. 2d 790 (Fla. 2006), Pittman's *same* collateral counsel previously, and unsuccessfully, attempted to raise similar claims based on the alleged failure-to-disclose-facts-pertinent-to-direct-appeal under the guise of habeas corpus. In clearly enforcing procedural bars in both Smith and Wright, this Court emphasized that the claim that "the State intentionally deceived this Court" regarding issues raised on direct appeal could have been presented on direct appeal or in 3.850 proceedings and "*cannot be reconsidered in a petition for writ of habeas corpus*." Smith, 931 So. 2d at 805, *citing* Wright, 857 So. 2d at 874. In Wright, this Court stressed:

> Failure to Disclose Pertinent Facts
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> Wright first argues that the State intentionally deceived this Court regarding issues he raised in his direct appeal. In his direct appeal, Wright challenged numerous rulings made by the judge at trial. Wright now asserts that the State was in possession of, but did not divulge, pertinent information that would have favorably resolved his challenges on appeal. This is a claim that was or could have been presented in Wright's direct appeal or his 3.850 proceedings. Issues which were or could have been presented in prior proceedings cannot be reconsidered in a petition for writ of habeas corpus. See Mann v. Moore, 794 So. 2d 595, 600-01 (Fla. 2001). This procedural bar also acts to prohibit variant claims previously decided. See Jones v. Moore, 794 So. 2d 579, 586 (Fla. 2001) (finding procedural bar to

habeas claim which was variant to claim previously addressed). This claim is therefore procedurally barred.

Wright, 857 So. 2d at 874-875 (emphasis supplied).

And, in Smith, this Court reiterated:

> In his second issue, Smith alleges that he was deprived of due process in his direct appeal because of the State's failure to disclose facts pertinent to his direct appeal. These claims are procedurally barred because they were or should have been litigated on direct appeal or were or should have been brought in his 3.850 motion. See Wright, 857 So. 2d at 874 (holding that habeas claims that "the State intentionally deceived this Court" regarding issues raised on direct appeal could have been presented on direct appeal or in 3.850 proceedings and "cannot be reconsidered in a petition for writ of habeas corpus"); Breedlove v. Singletary, 595 So. 2d 8, 10 (Fla. 1992) (noting that "[h]abeas 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 Jones v. Moore, 794 So. 2d 579, 586 (Fla. 2001) ("This Court previously has made clear that habeas is not proper to argue a variant to an already decided issue."
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> Smith, 931 So. 2d at 805 (emphasis supplied).

Pittman's successive attempt to repeat his "Carl Hughes" claim in habeas must be rejected under Smith and Jones.

Furthermore, if Pittman is alleging that Carl Hughes was a planted police informant/government "agent" (Petition for Writ of Habeas Corpus at p. 32, footnote 19) under Massiah v. United States, 377 U.S. 201, 84 S. Ct. 1199 (1964) and its progeny,[4] any

[4]After Massiah's Sixth Amendment right to counsel attached, law enforcement officers installed a radio transmitter under the

such claim is procedurally barred on several independent grounds. First, any claim that an inmate is a "government agent" is cognizable on direct appeal.[5] See e.g. Rolling v.

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front seat of the co-defendant's car and instructed the cooperating co-defendant to elicit information from Massiah while sitting in the car, while a federal agent listened to their conversation via the transmitter. "The clear rule of Massiah is that once adversary proceedings have commenced against an individual, he has a right to legal representation when the government interrogates him." Brewer v. Williams, 430 U.S. 387, 401; 97 S. Ct. 1232 (1977); United States v. Henry, 447 U.S. 264, 100 S. Ct. 2183 (1980) (violation occurred when government used paid informant to pose as cell mate and obtain information from defendant after indictment). There are two prongs necessary to establish a Massiah/Henry claim involving jailhouse informants: the "agency" prong and the "deliberate elicitation" prong. See Kuhlmann v. Wilson, 477 U.S. 436, 455, 106 S. Ct. 2616, 2628 (1986) (defendant's right to counsel was not violated under Henry where police placed informant in defendant's cell because informant obeyed instructions not to question defendant, but merely to listen for information).

[5]Hughes pled "straight up" to the charges on April 25, 1990, and faced a maximum penalty of 85 years (DA-R 2295-96). Three days after his plea, Hughes wrote to the trial judge offering to be debriefed by the State on the HUD charges and do anything to correct his mistakes (DA-R 2297). Both before and after his plea, Hughes made offers to testify against other people. Hughes said he "had been asked to do that all through the course of [his] confinement." Hughes wanted a specific plea agreement, stating a specific amount of time (DA-R 2298). Between the time of Hughes' plea and sentencing, Hughes had conversations with FDLE case agent Randy Dey and negotiated giving information about the HUD charges (DA-R 2300). Hughes entered his plea in federal court on May 23, 1990 (DA-R 2305-6).

Hughes did not know if Pittman's statements were true. Therefore, Hughes had his wife [Kathie] contact law enforcement to confirm the information from Pittman. At trial, both Randy Dey and Hughes addressed the initial contact by Hughes' wife [Kathie] (DA-R 2338-39, 2408). According to Hughes, Kathie contacted FDLE agent Randy Dey, who confirmed, "Yes, in fact that murder did occur. We will be very interested in talking to

State, 695 So. 2d 278, 291 (Fla. 1997) (direct appeal rejecting Massiah/Henry claim predicated on inmate's own opportunistic strategy to somehow benefit from the relationship he cultivated with Rolling and finding that Rolling's incriminatory statements were in no way the product of "the State's strategem deliberately designed to elicit an incriminating statement." Rolling, 695 So. 2d at 292; Lightbourne v. State, 438 So. 2d 380, 386 (Fla. 1983) (investigator's advice to informant to keep his ears open did not constitute an attempt by the State to deliberately elicit incriminating statements - "Without some promise or guarantee of compensation, some overt scheme in which the state took part, or some other evidence of prearrangement aimed at discovering incriminating information we are unwilling to elevate the state's actions in this case to an agency relationship with the informant"); see also State v. Zecckine, 946 So. 2d 72, 74 (Fla. 1st DCA 2006) (concluding that mere fact that inmate may have had a self-serving motive from the beginning, and may have hoped for a lighter sentence in exchange for eliciting incriminating information from defendant, did not, of itself, render inmate a "government agent").

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Carl about it." (DA-R 2338-39). On June 26, 1990, Hughes gave information about Pittman to law enforcement; the meeting [with Cosper and Dey] lasted about an hour (DA-R 2306).

Second, a post conviction claim under Brady/Giglio - that an inmate witness allegedly was an undisclosed government agent - is cognizable *via* a timely Rule 3.850/3.851 motion. See Suggs v. State, 923 So. 2d 419, 428 (Fla. 2005) (noting that post conviction court found insufficient evidence to support defense claim that inmate witnesses were state agents). In Cooper v. State, 856 So. 2d 969 (Fla. 2003), this Court affirmed the denial of a post conviction claim that an inmate was a "de facto state agent." In Cooper, this Court emphasized:

> As an initial matter, Cooper's contention that Skalnik was a *de facto* state agent at the time of their conversation in jail is refuted by the record. Under this Court's decision in Rolling v. State, 695 So. 2d 278 (Fla. 1997), the Sixth Amendment to the United States Constitution prohibits law enforcement officers from prearranging the questioning of defendants by incarcerated informants. See id. at 290. The principle is self-evident: the police may not sidestep constitutional protections by employing jail residents as independent contractors to interrogate defendants without the presence of an attorney. See United States v. Henry, 447 U.S. 264, 65 L. Ed. 2d 115, 100 S. Ct. 2183 (1980). However, a violation of the dictates of Rolling is only shown where the defendant establishes that the informant and the authorities had a preexisting plan for the informing witness to obtain a confession.
>
> In the instant case, the record refutes Cooper's contention that the State recruited Skalnik as an informant. Indeed, the entirety of the evidence before this Court supports the State's contention that Skalnik was upset by Cooper's bragging regarding the murders, and he subsequently contacted the authorities of his own accord. Skalnik had, at one time, been employed as a police officer in Texas, and this also motivated him to report what Cooper had told him.

> Because Cooper's claim that Skalnik was an agent of the State at the time of their jailhouse conversation is refuted by the record, we deny relief based thereon.

Cooper, 856 So. 2d at 973 (emphasis supplied).

Although Pittman amended his post conviction motion several times, he did not allege any claim under Massiah v. United States, 377 U.S. 201, 84 S. Ct. 1199 (1964) (unlawful for police to plan with cooperating co-defendant to utilize listening device to gather incriminating evidence on charged offense from represented defendant), United States v. Henry, 447 U.S. 264, 100 S. Ct. 2183 (1980) (paid informant commissioned by the government to obtain incriminating evidence) and/or Kuhlmann v. Wilson, 477 U.S. 436, 455, 106 S. Ct. 2616 (1986) (defendant's right to counsel was not violated where police placed informant in defendant's cell and informant obeyed instructions not to question defendant, but to listen for information).

Most recently, in Muehleman v. State, 2009 Fla. LEXIS 245 (Fla. Feb. 19, 2009), this Court applied dual procedural bars to another capital defendant's post conviction challenge to a jail inmate's trial testimony. In Muehleman, this Court cogently explained:

> Muehleman's next claim asserts error in the admission of the former testimony of witness Ronald Rewis, a jail inmate incarcerated with Muehleman before he was charged with the murder Rewis's testimony, given at the first penalty phase and read

into the record of the second proceeding, included incriminating statements that Muehleman made to him revealing details of the murder that had not been made public. The record establishes that Rewis was not recruited by law enforcement to obtain the statements, but did report Muehleman's statements to the authorities, who then requested that Rewis wear a body bug to record any further statements Muehleman might make. Rewis agreed and obtained a number of incriminating statements that were presented to the jury through his testimony. Muehleman objected to admission of this testimony on the grounds that the State should be precluded from presenting "false" testimony from this "jail agent." He now argues on appeal that Rewis's testimony violated his right against self-incrimination and right to counsel under Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

The claim Muehleman now makes is procedurally barred for two reasons. First, this specific contention was not made to the trial court below. See F.B. v. State, 852 So. 2d 226, 229 (Fla. 2003) (stating that for an issue "to be cognizable on appeal, it must be the specific contention asserted as legal ground for the objection, exception, or motion below") (quoting Steinhorst v. State, 412 So. 2d 332, 338 (Fla. 1982)). Second, and more importantly, the very same issue Muehleman presents in this appeal was raised and ruled upon in the direct appeal from the first penalty phase. The law of the case doctrine bars consideration of those issues actually considered and decided in a former appeal in the same case. Fla. Dep't of Transp. v. Juliano, 801 So. 2d 101, 107 (Fla. 2001). In the first appeal, we stated:

> Muehleman's next claim involves an alleged violation of his sixth amendment right to counsel. He contends that fellow inmate Ronald Rewis became a state agent for the impermissible purpose of acquiring incriminating evidence which properly lay beyond the state's reach. Maine v. Moulton, 474 U.S. 159, 106 S. Ct. 477, 88 L. Ed. 2d 481 (1985); United States v. Henry, 447 U.S. 264, 100 S. Ct. 2183, 65 L. Ed. 2d 115

(1980). We find in this case no violation of Muehleman's sixth amendment rights, as a review of the facts discloses that his incriminating admissions were not a product of a "'stratagem deliberately designed to elicit an incriminating statement.'" Miller v. State, 415 So. 2d 1262, 1263 (Fla. 1982), cert. denied, 459 U.S. 1158, 103 S. Ct. 802, 74 L. Ed. 2d 1005 (1983) (quoting Malone v. State, 390 So. 2d 338, 339 (Fla. 1980), cert. denied, 450 U.S.1034, 101 S. Ct. 1749, 68 L. Ed. 2d 231 (1981)).

> First, Muehleman, apparently eager to talk, approached Rewis and began to repeatedly attempt to discuss details of the crime with him. Second, after unsuccessfully attempting to dissuade Muehleman from "talking too much," Rewis approached the authorities on his own initiative. Bottoson v. State, 443 So. 2d 962 (Fla. 1983), cert. denied, 469 U.S. 873, 105 S. Ct. 223, 83 L. Ed. 2d 153 (1984); Barfield v. State, 402 So. 2d 377 (Fla. 1981). Third, Rewis was at that point instructed not to initiate any conversations with the suspect. Finally, no evidence exists in the record that Rewis' efforts were induced by promises of any form of compensation. The contingent fee arrangement reflecting an improper relationship between police and informant in Henry is absent in this case.
>
> Muehleman v. State, 503 So. 2d at 314.

Rewis's testimony in the second penalty phase was identical to that presented on direct examination in the first penalty phase. Muehleman brought up the subject of the murder and persisted in talking about it even after Rewis attempted to dissuade him from doing so. The State did not approach him with a request that he get close to Muehleman to obtain the statements, and there is no evidence that Rewis was promised anything. Just as this Court found in the first appeal, Rewis's testimony was not the result of a State stratagem, Rewis was "instructed not to

initiate any conversations with the suspect," and "no evidence exists in the record that Rewis' efforts were induced by promises of any form of compensation." Muehleman, 503 So. 2d at 314. In Rolling v. State, 695 So. 2d 278, 291 (Fla. 1997), we explained that whether a violation such as alleged here has occurred "turns on whether the confession was obtained through the active efforts of law enforcement or whether it came to them passively." We also explained our holding in Muehleman's direct appeal by stating:

> Likewise, in Muehleman v. State, we interpreted the "deliberately elicited" standard in terms of its plain meaning and found that the defendant's right to counsel had not been violated because his statements were not a product of a "stratagem deliberately designed to elicit an incriminating statement." Rolling, 695 So. 2d at 291 (citations omitted) (quoting Muehleman, 503 So. 2d at 314).

We recognize that "[t]his Court has the power to reconsider and correct erroneous rulings [made in earlier appeals] in exceptional circumstances and where reliance on the previous decision would result in manifest injustice." Parker v. State, 873 So. 2d 270, 278 (Fla. 2004) (quoting State v. Owen, 696 So. 2d 715, 720 (Fla. 1997)). However, Muehleman has provided no basis upon which we can conclude our prior ruling was erroneous or should be revisited.

Because this claim is procedurally barred by Muehleman's failure to raise it below and also by this Court's decision in the first direct appeal, and because no exceptional circumstances or manifest injustice have been shown to require reversal of that ruling, relief is denied on this claim.

Muehleman, 2009 Fla. LEXIS 245, *38-43 (emphasis supplied).

As demonstrated by the foregoing, a Brady/Giglio/government agent claim is cognizable in the trial court and on appeal, not *via* the extraordinary writ of habeas corpus.

Finally, the trial court correctly rejected Pittman's post conviction claim regarding inmate Carl Hughes, and there is no legitimate ground for habeas relief. As the court explained,

> A review of the direct and cross-examination of Mr. Hughes at trial shows that any purported deal Mr. Pittman thinks Mr. Hughes received was addressed on direct examination and cross-examination at trial. On cross-examination it was brought out that Mr. Hughes had written a letter to the sentencing judge prior to his sentencing letting him know of his cooperation with FBI, and FDLE on HUD cases and in the David Pittman case. It was also brought out that Assistant State Attorney Bergdoll told the Court at sentencing that looking at the cooperation and full magnitude of his case they had arrived at a recommendation of 6 years rather than 85 years. Additionally, the defendant has not shown that Mr. Hughes's hearsay statements to Ms. Anders were admissible at trial. Even assuming the undisclosed evidence regarding Ms. Anders had some impeachment value, the Court finds that the Defendant has not shown any reasonable probability that this information weakens the case against the Defendant so as to give rise to a reasonable doubt as to his culpability or might have led to a different jury verdict.

(PCR 34/5386) (emphasis supplied).

At trial, Hughes testified that Pittman told different stories the first two nights. Pittman first said that Barker committed the murders. Pittman then said his estranged wife, Marie, did it for the insurance money (DA-R 2257). The third night, Pittman admitted that he did it himself (DA-R 2256-58).

When Bonnie started to holler, Pittman hit her and cut her throat and stabbed her. Her mother, Barbara, ran from the bedroom, down the hall and Pittman stabbed her outside Bonnie's bedroom. Clarence, her father, was getting on the phone and Pittman hit him, knocked him down and killed him by the phone in the hallway. Pittman got gasoline from the shed behind the house, poured it on Bonnie's bed, placed a tire under the bed because it would burn much hotter and she was incinerated. Pittman spread the gas all over the house, cleaned up in the bathroom and set the house on fire (DA-R 2254). After Pittman made his admissions to Hughes, Hughes asked his wife [Kathie] to contact FDLE agent Randy Dey (DA-R 2262).[6] Dey and Detective Tom Cosper, Mulberry Police Department, came to see Hughes. Other inmates could see Hughes talking to the officers (DA-R 2262, 2409). Early the next morning, Hughes was attacked in his jail cell by Pittman and another inmate, John Schneider [Snyder] (DA-R 2265). Sheriff's Correctional Officer Jeffrey Evans testified that Hughes, Pittman and Snyder were inmates in the same cell;

[6] FDLE special agent Randy Dey was the case agent assigned to initiate the state criminal case against Carl Hughes. Prior to sentencing, Hughes decided to cooperate at the time he pled guilty. Dey contacted Detective Cosper about Hughes; when Cosper and Dey talked to Hughes, they were not in a secure area (DA-R 2409). Dey testified that Hughes was told that the only thing that could be done for him was that the court be made aware of his cooperation (DA-R 2411).

and on June 27, 1990, he witnessed the incident at 4:30 a.m. where Pittman and Snyder hit and kicked Hughes (DA-R 2394).

Hughes offered to testify against a number of others concerning the HUD charges (DA-R 2297-98). However, Hughes' agreement in the federal cases included his not providing information to the State concerning the HUD charges (DA-R 2305-06). The day after Pittman's arrest, Hughes wrote to the state court judge; Hughes said that FDLE was upset with him and his PSI was not going well because the probation officer thought Hughes lied to him (DA-R 2203—04). Hughes was sentenced in federal court on August 3, 1990. FDLE agent Randy Dey spoke to the judge on Hughes' behalf at sentencing (DA-R 2321). On September 7, 1990, Hughes wrote to the state court judge again, telling the judge of his cooperation in Pittman's case (DA-R 2322). Hughes was sentenced in state court on September 26, 1990 (DA-R 2323), and prosecutor David Bergdoll reconsidered his original demand for an 85—year sentence, and sought a six—year sentence (DA-R 3007-08). Because Hughes cooperated, he was eligible for the statutory exception to the career criminal statute (DA-R 2325). When Hughes later balked at testifying at Pittman's trial, the prosecutor in Pittman's case threatened to seek a six—month contempt sentence against Hughes (DA-R 2359).

In post conviction, the trial court noted that prosecutor Pickard's pre-trial letter to Detective Cosper stated, in part:

> Hughes claims he will refuse to testify unless we assist him in getting him out of prison. Please locate Hughes in the prison system and talk to him again and find out what his problem is. In case he asks, we will do nothing more to help or assist him. If he will not testify, we will ask that he be held in contempt. If that prospect, which would be added to his present sentence and delay his release, does not concern him and he still refuses to testify, we will simply try the case without him.

(PCR 34/5346-47) (emphasis supplied).

At the post conviction hearing, prosecutor Pickard confirmed that FDLE agent Randy Dey had been contacted by Kathie Hughes [Anders] who told Dey that her husband [Carl Hughes] had information about the Pittman case. Dey contacted Detective Cosper because Cosper was the investigator on the Pittman case. Both Dey and Cosper went to the jail to talk to Hughes about the Pittman case and later that night, Hughes was attacked (PCR 34/5350). Prosecutor Pickard denied that Hughes would be put back in the cell to get additional information (PCR 34/5345).

At trial, it was established that Hughes was convicted of multiple felony offenses, repeatedly offered to testify against other people, wrote several letters to the judge and thanked prosecutor Bergdoll "for giving [Hughes] another chance in life." (DA-R 2324, 2327-29). Hughes' letter to prosecutor Bergdoll also stated, "I respect you for standing firmly on your

decision not to plea bargain with me. Because of your persistence I was forced to offer assistance." (DA-R 2331). Hughes' self-important hearsay statements to his wife were addressed in post conviction and do not form any cognizable claim in the instant habeas proceeding. Habeas relief must be denied.

## CLAIM IV

**THE TRIAL COURT PROPERLY FOUND PITTMAN'S CONTEMPORANEOUS CONVICTIONS FOR MURDER TO BE AGGRAVATING CIRCUMSTANCES. (restated by Respondent)**

In the instant case, the trial court found the prior violent felony aggravator based upon the contemporaneous murder of each Knowles family member (DA-R 5176). Pittman, not citing a single case in support of his position, now asserts this as error. This claim is procedurally barred as it could have and should have been raised on direct appeal. Teffeteller, 734 So. 2d 1009, 1025 (Fla. 1999). Further, this claim is wholly without merit.

This Court has repeatedly held that when a defendant is convicted of multiple murders, arising from the same criminal episode, the contemporaneous conviction as to one victim supports a finding of the prior violent felony aggravator as to the murder of another victim. Bevel v. State, 983 So. 2d 505, 517 (Fla. 2008); see also Winkles v. State, 894 So. 2d 842, 846 (Fla. 2005) (finding that each murder in the indictment to which defendant pled guilty constituted a prior violent felony conviction as to the other murder conviction); Doorbal v. State, 837 So. 2d 940, 963 (Fla. 2003) (noting that one of the aggravating factors found was prior violent felony based on the contemporaneous murders of the two victims); Francis v. State,

808 So. 2d 110, 136 (Fla. 2001) (finding that trial court correctly found that murder conviction as to one victim aggravated the murder conviction as to other victim, and vice versa). Thus, the trial court properly considered the contemporaneous convictions as a prior violent felony. Pittman offers no compelling argument for this Court to depart from its precedent. Pittman is not entitled to habeas relief.

## CLAIM V

**APPELLATE COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO CHALLENGE THE STATE'S PENALTY PHASE CLOSING ARGUMENTS. (restated by Respondent)**

Pittman argues he is entitled to habeas relief as the State made allegedly improper comments on seven occasions. The comments he complains of either were not objected to, or if objected to, were proper. Each of the prosecutor's comments will be addressed in turn.

As a general rule, failure to lodge a contemporaneous objection bars review of a claim on appeal. McDonald v. State, 743 So. 2d 501, 505 (Fla. 1999); Urbin v. State, 714 So. 2d 411, 418 n. 8 (Fla. 1998). The sole exception to this rule is where the comments rise to the level of fundamental error. McDonald, 743 So. 2d at 505.

This Court has defined fundamental error as error that reaches down into the validity of the verdict itself to the extent that the verdict of guilty or jury recommendation of death could not have been obtained without the assistance of the alleged error. McDonald, 743 So. 2d at 505.

First, Pittman asserts that the prosecutor's explanation of the penalty phase weighing process impermissibly shifted the burden to Pittman to prove mitigation circumstances outweighed aggravating circumstances. However, no objection was lodged

leaving the issue unpreserved for appeal. Appellate counsel is not ineffective for failing to raise unpreserved issues. See Grossman v. Dugger, 708 So. 2d 249, 253 (Fla. 1997); Johnson v. Singletary, 695 So. 2d 263, 266-67 (Fla. 1996); Groover v. Singletary, 656 So. 2d 424, 425 (Fla. 1995). Further, such comment did not rise to the level of error, much less fundamental error.

In explaining the jury's recommendation during the penalty phase, the prosecutor stated:

> What you're going to be asked to do in this particular phase of the trial is to weigh aggravating circumstances against mitigating circumstances or vice versa, and make your recommendation to the Court based on your conclusions or your view of the aggravating and mitigating circumstances. (DA-R 4544).

Pittman has not shown that this comment constitutes any error, much less fundamental error. This comment was made in the context of a legally correct explanation of the weighing process. See Fla. Stat. § 921.141. Further, any alleged error was cured by the trial court's standard jury instructions which are an accurate statement of the law (DA-R 4612-16). It is illogical to suggest that such comment made a difference to the jury's recommendation let alone rose to the level that a death recommendation could not have been obtained without the

assistance of the prosecutor's remark. Pittman is not entitled to relief.

Pittman next argues that the prosecutor impermissibly made an improper "Golden Rule" argument. Pittman cites to the following comments made without objection:

> But what does that allow you to consider in deciding whether the crime is heinous, atrocious or cruel? Well, the law allows you to consider such things as the fear and emotional strain on the victims at time of and prior to their death. In other words, what sort of fear do you feel that Barbara Knowles experienced when she was coming down the hallway that night and met David Pittman coming out of Bonnie Knowles' room with a knife in his hand? What sort of fear do you feel she experienced when he raised the knife and started bringing it down towards her chest to stab her three times?
>
> The emotional fear and strain put on the person who was killed is a valid consideration.
>
> What sort of fear do you feel Clarence Knowles experienced as he picked up the telephone to probably what he was doing was calling for help or starting to call for help, not knowing that the phone wires had been cut. When he saw Mr. Pittman approaching him, as he is standing there with that telephone and he sees Mr. Pittman approaching him with that knife in his hand after having already killed two people, what sort of fear and emotional strain was going through Clarence Knowles as that knife came up and started coming down towards him?
>
> Dr. Melamud told you that the victims would not necessarily have all died instantly. What sort of suffering did they feel or did they experience after the knife went in their body the first time and the knife was withdrawn and it went in again and it was withdrawn and it went in again?

> For Bonnie Knowles eight times, for Barbara Knowles three times, and for Clarence Knowles five times. (DA-R 4546-48).

Appellate counsel was not ineffective for failing to enumerate as error comments made without any objection. Grossman; Johnson; Groover. Further, such comments were proper in the context of the instant case and do not rise to the level of fundamental error which would warrant relief. The cited comments do not reach down into the validity of the jury's recommendation of death to the extent the death recommendation could not have been obtained without the assistance of the alleged error. McDonald, 743 So. 2d at 505; see e.g. Zack v. State, 911 So. 2d 1190, 1207-09 (Fla. 2005) (comment asking jury to "imagine" terror coursing through victim not fundamental error).

Generally, prosecutors are permitted to review evidence and fairly discuss and comment upon properly admitted evidence and logical inferences from that evidence. Conahan v. State, 844 So. 2d 629, 640 (Fla. 2003). However, a closing argument which "asks the jurors to place themselves in the victim's position, to imagine the victim's pain and terror, or to imagine how they would feel if the victim were a relative" is an improper "Golden Rule" argument. Zack, 911 So. 2d at 1207. Such an argument extends beyond the evidence and "unduly creates, arouses and

inflames the sympathy, prejudice and passions of [the] jury to the detriment of the accused." Urbin, 714 So. 2d at 421 (*citing* Barnes v. State, 58 So. 2d 157, 159 (Fla. 1951)). As the lower court found, where Pittman first raised this argument in his 3.851 appeal, "[i]n this case, the prosecutor's argument, addressing the 'HAC' aggravator, did not extend beyond the evidence and did not 'unduly create, arouse and inflame the sympathy, prejudice and passions of [the] jury to the detriment of the accused.'" (PCR 22/3334).

Indeed, these comments were proper. First, the comments were *directly relevant* to the HAC aggravator. The trial court instructed the jury on the HAC aggravator (DA-R 4613).[7] A victim's suffering and awareness of his or her impending death certainly supports the finding of the heinous, atrocious, or cruel aggravating circumstance. Cox v. State, 819 So. 2d 705, 720 (Fla. 2002). Moreover, this Court upheld the HAC aggravator in the instant case. This Court stated:

> Pittman also argues that the heinous, atrocious, or cruel aggravating factor is not applicable under the facts of this case. The record reflects that each victim was stabbed numerous times and bled to death. In addition, Bonnie Knowles' throat was cut. We have previously held that numerous stab wounds will support a finding of this aggravator. We find no error in the application of this aggravator under the facts of this

[7] Trial counsel conceded that the State could properly argue the HAC aggravator (DA-R 4505).

case. Pittman, 646 So. 2d at 172-73 (citations omitted).

The prosecutor's comments were directly related to an aggravator upon which the jury was instructed. Moreover, contrary to Pittman's claim, there was simply no Golden Rule violation in these comments. The jury was not asked to place themselves in the victims' positions. Habeas relief should be denied on this procedurally barred and meritless argument.

Pittman next in a single sentence asserts the following as error:

> The State next argued the premeditated nature of the crime as nonstatutory aggravation. Defense counsel objected to the State's remarks but the trial court overrule it. Petition for Writ of Habeas Corpus at p. 40.

Pittman offers no argument of why habeas relief should be granted on this ground. As such, this issue is waived. Bryant v. State, 901 So. 2d 810, 827-28 (Fla. 2005) (cursory argument insufficient to preserve issue for review).

Notwithstanding, the argument Pittman complains of was proper and cannot thus form the basis for habeas relief. The prosecutor commented:

> David Pittman did not have to kill Bonnie Knowles. David Pittman did have to kill Barbara Knowles. And David Pittman did not have to kill Clarence Knowles. He made a voluntary choice. When he came out of Bonnie Knowles' room and saw Barbara Knowles there in the hallway, David Pittman had two choices. He could

> choose to turn and run and flee the house, or he could choose to kill. (DA-R 4548-49).

The objected-to comments were a proper response to Pittman's mitigation expert, Dr. Dee, who opined that Pittman could not control his behavior and opined that Pittman's ability to conform his conduct to the requirements of the law was substantially impaired (DA-R 4451, 4455, 4457, 4467, 4475-76, 4491-93).[8] The prosecutor put his argument in "perspective" for the jury explaining the fact that Pittman had clear choices to make during the murders showed the "fallaciousness of Dr. Dee's arguments" (DA-R 4550—51). See Mann v. State, 603 So. 2d 1141, 1143 (Fla. 1992) (prosecutor's comments rebutting psychologist's conclusion that statutory mitigators applied proper).

Appellate counsel is not ineffective for failing to raise meritless claims. Kokal; Groover; Williamson. Habeas relief must be denied on this waived and meritless issue.

Pittman next urges that the prosecutor argued facts outside the record and injected an improper element of emotion into the jury's deliberations. An objection was lodged to the following comments:

> Well, there's such a thing as punishment. There is such a thing as punishment fitting the crime. If you give David Pittman a life sentence, David

[8] This mitigation claim by the defense was presented in counsel's opening statement and argued in his closing (DA-R 4267-71, 4600-06).

> Pittman may be in state prison but David Pittman is still alive. David Pittman can still talk, walk, watch television, read books, eat, have visitors, see friends. Even though he's sitting in state prison he's breathing and he's still alive.
>
> Bonnie and Clarence and Barbara Knowles are dead. As I said, a life sentence, even three life sentences in this case, does not fit the crime. Except for Marie Pridgen, who is still alive, David Pittman literally wiped out an entire family. Three of the four members of a family are dead because of his acts and his actions. (DA-R 4552).

Pittman's reliance on Jackson v. State, 522 So. 2d 802 (1988) does not garner him habeas relief. In Jackson, this Court found the prosecutor's comments that the victims could no longer enjoy certain activities as Jackson could if sentenced to life in prison was improper as it urged consideration outside the focus of the jury's deliberations. Jackson, 522 So 2d at 809. However, this Court found the comments did not warrant remand for a new penalty phase trial. Jackson, 522 So. 2d at 809.

The comments in the instant case pointed out Pittman murdered most members of the Knowles family and that the punishment should fit the crime. The prosecutor's comments were brief, and if any error existed, it was harmless in this triple murder case where prior violent felony and HAC aggravators were

established. As in Jackson, the comments were not so egregious as to warrant a new penalty phase. Relief must be denied.

Pittman next argues:

> The prosecutor also improperly denigrated the proper statutory and non statutory mitigating factors, literally arguing on several occasions, "So what?". Petition for Writ of Habeas Corpus at p. 41.

Beyond this single sentence, Pittman offers no explanation as to why habeas relief should be granted. As such, this issue is waived. Bryant, 901 So. 2d at 827-28. Further, there was no objection. Appellate counsel is not ineffective for failing to raise unpreserved issues. See Grossman; Johnson; Groover. In any case, the comments were fair rebuttal and did not rise to the level of fundamental error warranting relief.

The prosecutor's comments of "So what?" were in response to Dr. Dee's testimony and were proper in the context of rebutting mitigation (DA-R 4556). Habeas relief must be denied on this waived, unpreserved and meritless claim.

Pittman next urges relief for yet another unpreserved claim. He claims the prosecutor improperly argued that the right to present mitigation should be considered as non-statutory aggravation. There was no objection. Thus, Appellate counsel was not ineffective for failing to raise this unpreserved issue. See Grossman; Johnson; Groover. Further, the comments were not error, much less fundamental error.

Pittman complains of the following comments:

> The testimony that you heard yesterday, I'm not sure if the purpose is to make it appear that there are other people or other places or other things that are to some extent at fault in this case besides Mr.Pittman. Is it the school system that's at fault because they didn't teach him to read and write correctly, or is it the parents at fault because they abused him and didn't bring him up correctly? Or is someone else at fault in this case besides Mr. Pittman?
>
> The only person on trial is David Pittman. The person who committed these crimes is David Pittman. Not his mother, not his father, not his sister, not the school system, and not society. David Pittman is the one who went in that house and killed three people. Not anyone else, not any other system or group of people. Let me close by asking you one question. Why are we here today? Are we here today because David Pittman has problems? No.
>
> We're here today in a penalty phase of a first degree murder case because David Pittman killed three people. And please don't forget that fact. Don't get caught up in all this peripheral stuff about his "problems" that you forget why we're even here, what caused us to be involved in this particular phase of the trial to begin with. (DA-R 4559-60).

As this Court has repeatedly recognized, attorneys are permitted wide latitude in their closing arguments. Thomas v. State, 748 So. 2d 970, 984 (Fla. 1999); Breedlove v. State, 413 So. 2d 1, 8 (Fla.), cert. denied, 459 U.S. 882 (1982). Counsel may advance any legitimate argument. The prosecutor's explanation of why the jury should reject the mitigation offered in this case was not presented in a derogatory manner or with inflammatory labels; it was a proper argument as to why the jury

should not be swayed by the defense witnesses, in light of the nature of the crimes. A prosecutor is clearly entitled to offer the jury his view of the evidence presented. Shellito v. State, 701 So. 2d 837, 841 (Fla.), cert. denied, 523 U.S. 1084 (1998).

The comments challenged in the petition did not suggest to the jury that Pittman's upbringing should be considered or weighed as an aggravating circumstance. The prosecutor in this case was not arguing aggravating circumstances at this point in the closing argument, but was addressing the weight of the mitigation. As this Court has recognized, an argument that jurors should reject mitigation based on the evidence should not be equated with an argument that non-statutory aggravating factors existed. See Perez v. State, 919 So. 2d 347, 375 (Fla. 2005) (no error in using testimony of defendant's mental condition to evaluate weight to be afforded mitigation).

The record does not support any claim that the prosecutor engaged in improper argument. Fundamental error cannot be demonstrated. Habeas relief is not warranted.

Lastly, Pittman urges habeas relied for yet another comment made without any objection. At the end of his argument, the prosecutor shortly remarked:

> This man murdered three people. If we're going to have a death penalty in the State of Florida, let's enforce it. (DA-R 4560).

Relief is not warranted as this comment did not constitute any error, much less fundamental error, in this triple murder case. This comment did not reach down into the validity of the verdict itself to the extent that the jury recommendation of death could not have been obtained without the assistance of the alleged error. McDonald, 743 So. 2d at 505. This is especially so here, as there was less than a unanimous death recommendation.

The comments did not amount to "send-a-message" argument as Pittman asserts. See Zack, 911 So. 2d at 1206 (classic argument asks jurors to send message to other murderers/defendants). Moreover, the comments were brief and made at the end of the prosecutor's argument and did not otherwise permeate the State's closing argument. Thus, it could not and did not invalidate the entire trial. Zack, 911 So. 2d at 1207. Further, the comments did not appeal to the fears or emotions of the jurors nor can it be said it inflamed their passions or prejudices. Compare Urbin v. State, 714 So. 2d 411 (Fla. 1998); Bertolotti v. State, 476 So. 2d 130 (Fla. 1985). Relief must be denied.

Finally, to the extent Pittman suggests he is entitled to habeas relief because trial counsel failed to object to improper argument such a claim is not cognizable in habeas corpus and should not be included in this petition. See Breedlove v.

Singletary, 595 So. 2d 8, 10 n.1 (Fla. 1992); King v. Dugger, 555 So. 2d 355, 358 (Fla. 1990) ("[C]laims of ineffective assistance of trial counsel should be raised under Florida Rule of Criminal Procedure 3.850, not habeas corpus.").

## CLAIM VI

**THE TRIAL COURT PROPERLY INSTRUCTED THE JURY REGARDING ITS SENTENCING ROLE. (restated by Respondent)**

Pittman's last claim amounts to an argument that he is entitled to habeas relief because the jury was instructed its role was "advisory" and this instruction allegedly violated Caldwell v. Mississippi, 472 U.S. 320 (1985).[9]

This claim is procedurally barred and without merit. Caldwell challenges have repeatedly been rejected by this Court. Recently, in Jones v. State, 998 So. 2d 573, 590 (Fla. 2008), addressing the jury's advisory role charge, this Court stated "[w]e have consistently held the standard penalty phase jury instructions fully advise the jury of the importance of its role, correctly state the law, do not denigrate the role of the jury", and do not violate Caldwell. See also Thomas v. State, 838 So.2d 535, 542 (Fla. 2003) (reiterating that the Florida Standard Jury Instructions have been determined to be in

[9] In Caldwell, the United States Supreme Court held that the jury must be fully advised of the importance of its role, and neither comments nor instructions may minimize the jury's sense of responsibility for determining the appropriateness of death. However, the United States Supreme Court has clarified Caldwell in a subsequent case. Romano v. Oklahoma, 512 U.S. 1 (2004) (clarifying that Caldwell is limited to types of comments that mislead the jury as to its role in the sentencing process in a way that allows the jury to feel less responsible than it should for the sentencing decision).

compliance with the requirements of Caldwell); Card v. State, 803 So. 2d 613, 628 (Fla. 2001) (advisory instruction does not violate Caldwell).

The jury instructions correctly describe Florida's sentencing structure and the relationship between the jury and judge in imposing a sentence of death. The jury's recommendation of death is, in fact, only advisory and the judge is the ultimate sentencer. See Fla. Stat. §921.141(2) & (3). The standard jury instructions given to Pittman's jury are correct statements of Florida law regarding the role of the jury in capital sentencing in Florida and did not denigrate the jury's role.

Appellate counsel is not ineffective for failing to raise a meritless claim. Kokal; Groover; Williamson. Habeas relief must be denied.

## CONCLUSION

Respondent respectfully requests that this Honorable Court DENY the instant petition for writ of habeas corpus.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS AND MEMORANDUM OF LAW has been furnished by U.S. mail to Martin J. McClain, Esq., McCLAIN & McDERMOTT, P.A., 141 N.E. 30th Street, Wilton Manors, Florida 33334-1064, this 17th day of April, 2009.

**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. DA-R App. P. 9.100(*l*).

Respectfully submitted,

BILL McCOLLUM
ATTORNEY GENERAL

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