vIN THE SUPREME COURT OF FLORIDA

THOMAS ANTHONY WYATT,

Petitioner,

vs. Case No. SC09-556

WALTER McNEIL,
Secretary, Florida Department
of Corrections,

Respondent.
_____/

RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

BILL McCOLLUM.
ATTORNEY GENERAL

LISA-MARIE LERNER
ASSISTANT ATTORNEY GENERAL
FLA. BAR NO. 698271
1515 NORTH FLAGLER DRIVE
9TH FLOOR
WEST PALM BEACH, FL. 33401
(561) 837-5000
FAX-(561) 837-5108

ATTORNEY FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

RULES & STATUTES:

PROCEDURAL HISTORY

On May 10, 1989, the defendant, Thomas A. Wyatt ("Wyatt"), was indicted for the first-degree murders of William Edwards, Frances Edwards, and Matthew Bornoosh (Counts I, II and III) (R 3960-66). The indictment also charged Wyatt and Michael Lovette with sexual battery, kidnapping, robbery with a firearm, grand theft, arson and possession of a firearm by a convicted felon (R 3960-66). There was also one count charging the first-degree murder of Cathy Nydegger (Count IV). It was severed and tried separately (R 4172). After jury trial, Wyatt was found guilty as charged on all counts (R 4381-83). The jury recommended a sentence of death, by a vote of 12 to 0. The judge followed the recommendation, sentencing Wyatt to death on February 22, 1991, for the first-degree murders of William Edwards, Frances Edwards, and Matthew Bornoosh (R 3915-3958). The judge found the following aggravators: (1) Wyatt was under a sentence of imprisonment at the time of the murders; (2) Wyatt had prior violent felonies; (3) the murders were committed during the course of felonies to-wit, robbery and sexual battery; (4) the murders were committed for the purpose of avoiding arrest; (5) the murders were committed for pecuniary gain; (6) the murders were CCP and

(7) the murders were HAC. The court found no mitigators.

On direct appeal, Wyatt presented seventeen issues:

I The trial court erred in conducting voir dire.

II The trial court erred by denying Wyatt's motion to suppress.

III The trial court erred by admitting the dna evidence.

IV The trial court erred by admitting evidence of Wyatt's prior imprisonment.

V The trial court erred by admitting collateral crime evidence.

VI Shackling of Wyatt was prejudicial.

VII The trial court precluded defense counsel from fully arguing his point.

VIII The medical examiner gave speculative testimony.

IX The jury was improperly instructed on flight, premeditation and reasonable doubt.

X The prosecutor's closing argument was improper.

XI The trial court improperly denied Wyatt's motion for continuance of the penalty phase.

XII The CCP and HAC aggravators are unconstitutional.

XIII The trial court improperly admitted evidence of Wyatt's escape from prison.

XIV The trial court improperly admitted evidence of Wyatt's prior violent felony.

XV The trial court improperly admitted details regarding the prior violent felonies.

XVI The prosecutor's closing argument was improper.

XVII Florida's death penalty statute is unconstitutional.

The State filed an Answer Brief, arguing that Wyatt's contentions lacked merit and Wyatt filed a Reply Brief. Affirming the convictions and sentences on direct appeal, the Florida Supreme Court found the following facts:

> Wyatt and Michael Lovette escaped from a prison work crew in North Carolina and fled to Florida. They stole a Cadillac in Jacksonville and proceeded to Vero Beach where they entered a Domino's Pizza restaurant armed with guns. Wyatt put two of the employees, Frances Edwards and Michael Bornoosh, in the bathroom. While Lovette stayed in front of the restaurant wearing Bornoosh's shirt, Wyatt made the other employee, William Edwards, who was Frances Edwards' husband, open the safe. After taking the money from the safe, Wyatt raped Frances Edwards and then shot all three employees to death.
>
> Wyatt was convicted of three counts of first-degree murder, sexual battery, kidnapping, robbery with a firearm, grand theft, arson, and possession of a firearm by a convicted felon. The jury recommended the death sentence for each of the three murders by a vote of twelve to zero. The trial judge followed this recommendation finding that the following aggravating factors existed: (1) the murders were committed while Wyatt was under a sentence of imprisonment; (2) Wyatt was previously convicted of a violent felony; (3) Wyatt was engaged in the commission of felonies when the murders were committed; (4) the murders were committed for the purpose of avoiding arrest; (5) the murders were committed for pecuniary gain; (6) the murders were especially heinous, atrocious, or cruel; (7) the murders were cold, calculated, and premeditated. § 921.141(5)(a), (b), (d), (e), (f), (h), (I), Fla.Stat. (1989). The court found no mitigating

factors.

Wyatt v. State, 641 So.2d 1336 (Fla. 1994).

Thereafter, on January 17, 1995, Wyatt filed a Petition for Writ of Certiorari in the United States Supreme Court raising two issues:

> I. Whether the trial court violated the confrontation clause by letting the state present hearsay evidence during the penalty phase (restated)?
>
> II. Whether the Florida Supreme Court's review of Wyatt's death sentence violated the eighth and fourteenth amendments by conducting an improper harmless error analysis (restated)?

The State filed a response, arguing that the petition should be denied and Wyatt filed a Reply. On March 20, 1995, the United States Supreme Court denied the petition. Wyatt v. Florida, 514 U.S. 1023 (1995).

Wyatt then filed a post-conviction motion follows raising the following claims:

Claim I	Whether Wyatt was denied due process and equal protection because certain public agencies withheld records.
Claim II	Whether section 119.19, Florida Statutes (1998) and Florida Rule of Criminal Procedure 3.852 (1998) are unconstitutional.
Claim III	Whether Wyatt was denied adequate adversarial testing due to ineffectiveness of counsel, state misconduct and trial court error.
Claim IV	Whether "newly discovered evidence" in the form of a recantation by state witness Patrick McCoombs resulted in constitutionally unreliable convictions.
Claim V	Whether the State withheld evidence of Patrick McCoombs testimony in violation of Brady/Giglio.

Claim VI Whether counsel was ineffective for not conducting voir dire on media coverage and for sitting particular juror exposed to that media.

Claim VII Whether Wyatt was denied his constitutional right to a competent mental health evaluation under Ake v. Oklahoma because counsel failed to obtain an adequate mental health evaluation and failed to provide the expert with a history of his background.

Claim VIII Whether Wyatt‘s constitutional rights were violated by the admission of gruesome photographs and testimony.

Claim IX Whether trial counsel failed to adequately investigate and prepare mitigation , failed to provide the mental health experts with this mitigation and failed to adequately challenge the state's case at penalty phase, are legally insufficient, procedurally barred and refuted from the record.

Claim X Whether Wyatt's claim of a violation of the fifth, sixth, eighth, and fourteenth amendments to the united states constitution due to incorrect penalty phase jury instructions, improper burden shifting to him to prove death was not an appropriate sentence and improper use by the trial court of a presumption of death for sentencing is legally insufficient, procedurally barred, and meritless. (restated)

Claim XI Whether Wyatt's claims that the jury was improperly instructed on the "avoid arrest" and ccp aggravating circumstances and that counsel was ineffective for failing to object are procedurally barred and meritless.

Claim XII Whether Wyatt's claims that the "during commission of a felony" aggravator is unconstitutionally vague and overbroad, that his jury was improperly instructed on the aggravator and that counsel was ineffective for failing to object are legally insufficient, procedurally barred and without merit. (restated).

Claim XIII Whether Wyatt's claims that the "pecuniary gain" aggravator is unconstitutionally vague and overbroad, that his jury was improperly instructed on the aggravator and that counsel was ineffective for failing to object are legally insufficient, procedurally barred and without merit (restated).

Claim XIV Whether Wyatt's claims that the "under sentence of

imprisonment" aggravator is unconstitutionally vague and that his jury was improperly instructed on the aggravator are legally insufficient, procedurally barred and without merit. (restated).

Claim XV Whether Wyatt's claim that the trial court committed fundamental error by giving the HAC instruction because the aggravator did not apply and the instruction was unconstitutionally vague is procedurally barred and meritless. (restated).

Claim XVI Whether Wyatt's claim that prosecutorial argument and inadequate jury instructions misled the jury regarding its ability to exercise mercy and sympathy and that trial counsel was ineffective for failing to request that the jury be instructed that it could consider mercy and sympathy in rendering its penalty phase verdict is procedurally barred and without merit. (restated).

Claim XVII Whether Wyatt's claims that his sentencing jury was misled by comments, questions and jury instructions that diluted its responsibility in sentencing and that counsel was ineffective for failing to object to such argument and jury instructions is procedurally barred and meritless. (restated).

ClaimXVIII Whether Wyatt's challenge to Florida Rule of Professional Responsibility 4-3.5(d)(4), the rule prohibiting the interviewing of jurors, is legally insufficient, procedurally barred and meritless. (restated).

Claim XIX Whether Wyatt's claim that electrocution and/or lethal injection constitute cruel and unusual punishment under the eighth amendment to the united states constitution is legally insufficient and meritless. (restated)

Claim XX Whether Wyatt's constitutional attack to florida's death penalty statute is procedurally barred, legally insufficient and without merit. (restated).

Claim XXI Whether Wyatt's claim that he was denied a proper direct appeal due to omissions in the record on appeal is refuted from the record, procedurally barred and legally insufficient. (restated).

Claim XXII Whether Wyatt's claim that the Florida Supreme Court failed to conduct a constitutionally adequate harmless error analysis on

direct appeal is procedurally barred and meritless. (restated).

Claim XXIII Whether Wyatt's claim that he was deprived of a fair trial because of excessive security measures and/or shackling and that counsel was ineffective in this regard is refuted from the record and procedurally barred. (restated)

Claim XXIV Whether Wyatt's claim that his death sentence is unconstitutional in violation of Johnson V. Mississippi, 108 S. Ct. 1981 (1988), is legally insufficient, procedurally barred and without merit. (restated).

Claim XXV Whether the sixth amendment challenge to Wyatt's capital sentence based upon Ring v. Arizona and Apprendi v. New Jersey is procedurally barred and without merit. (restated).

Claim XXVI Whether Wyatt's claims there is "newly discovered evidence" showing that false and misleading scientific evidence was introduced at trial. Additionally, he argues that there has been a Giglio violation and/or ineffective assistance of counsel. (restated).

The trial court held an evidentiary hearing in August 2007 on various claims of ineffective assistance of counsel, Brady, Gigilio, and newly discovered evidence claims. That court denied relief after the hearing. During the pendency of the appeal from that denial, this Court relinquished the case for further evidentiary development of certain claims. The trial court concluded those hearings in August 2009, issuing its order at the end of October 2009. Jurisdiction in related case cumbers SC08-655 and SC08-656 has now returned to this Court.

REASONS FOR DENYING THE PETITION

CLAIM I

WYATT WAS NOT DENIED EFFECTIVE ASSISTANCE OF COUNSEL ON DIRECT APPEAL. (Restated)

Wyatt claims that his appellate counsel was ineffective for failing to present the following issues on appeal: the trial record was incomplete; the trial court improperly announced during voir dire that the penalty phase would follow the guilt phase; the felony murder aggravator given by the court was unconstitutional. While a petition for writ of habeas corpus is the appropriate vehicle to raise claims of ineffective assistance of appellate counsel; Rutherford v. Moore, 774 So.2d 637, 643 (Fla. 2000); Groover v. Singletary, 656 So.2d 424, 425 (Fla. 1995), this Court will find that the issues are without merit since Wyatt has failed to prove that appellate counsel's actions were both deficient and prejudicial as required under Strickland v. Washington, 466 U.S. 668 (1984). Relief must be denied.

"The standard of review applicable to claims of ineffective assistance of appellate counsel raised in a habeas petition mirrors the Strickland v. Washington . standard for claims of trial counsel ineffectiveness." Valle v. Moore, 837 So.2d 905, 907-08 (Fla. 2002) (citations omitted). Given that the Strickland standard

applies, this Court stated recently:

> Thus, the Court must consider first, whether the alleged omissions are of such magnitude as to constitute a serious error or substantial deficiency falling measurably outside the range of professionally acceptable performance and, second, whether the deficiency in performance compromised the appellate process to such a degree as to undermine confidence in the correctness of the result. ... "If a legal issue 'would in all probability have been found to be without merit' had counsel raised the issue on direct appeal, the failure of appellate counsel to raise the meritless issue will not render appellate counsel's performance ineffective." ... Nor is appellate counsel "necessarily ineffective for failing to raise a claim that might have had some possibility of success; effective appellate counsel need not raise every conceivable nonfrivolous issue."... Additionally, this Court has stated that appellate counsel cannot be ineffective for failing to raise claims which were not preserved due to trial counsel's failure to object. See, e.g., *Ferguson v. Singletary*, 632 So.2d 53, 58 (Fla. 1993) (finding appellate counsel was not ineffective in failing to raise allegedly improper prosecutorial comments made during the penalty phase where trial counsel did not preserve the issues by objection).

Walls v. State, 926 So.2d 1156, 1175-76 (Fla. 2006) (citation omitted). See Armstrong v. State, 862 So.2d 705 (Fla. 2003).

Appellate counsel cannot be deemed ineffective for failing to raise issues "that were not properly raised during the trial court proceedings," or that "do not present a question of fundamental error." Valle, 837 So.2d at 907-08 (citations omitted); See Rodriguez v. State, 919 So.2d 1252, 1282 (Fla. 2005). Further, appellate counsel is not ineffective for failing to raise non-meritorious claims on appeal. Id. at 907-08 (citations omitted). "If a legal issue would in all probability

have been found to be without merit had counsel raised it on direct appeal, the failure of appellate counsel to raise the meritless issue will not render appellate counsel's performance ineffective." Armstrong, 862 So.2d at 718. See Jones v. Barnes, 463 U.S. 745, 751-753 (1983); Provenzano v. Dugger, 561 So. 2d 541, 549 (Fla. 1990). This Court has reiterated that "the core principle" in reviewing claims of ineffectiveness raised in a state habeas corpus petition is that "appellate counsel will not be considered ineffective for failing to raise issues that have little or no chance of success." Holland v. State, 916 So.2d 750, 760 (Fla. 2005). With these principles in mind, it is clear that Wyatt has not met his burden and all relief must be denied.

A. THE RECORD WAS REGENERATED AND WYATT HAS SHOWN NO ERROR IN THOSE PORTIONS OF THE TRIAL. (Restated)

Wyatt asserts that the record of his trial was not complete and, therefore, he was prejudiced from not having this Court review those portions of the trial. Specifically, he points to portions of the trial transcript for jury questions during deliberations, the penalty phase charging conference, and allegedly off the record instructions. This claim is without merit since Wyatt cannot demonstrate that any portion of the record is absent nor that there are any meritorious issues for appeal contained in those portions of the record. Relief should be denied.

Despite Wyatt's contentions, the record is complete and provides a thorough record for appellate review. During deliberations in the guilt phase the jury posed two questions. The trial court responded in writing on the questions themselves. Those questions and responses are part of the record located on pages 4378 & 4379 in the Record on Appeal. Consequently, the jury's questions and the court's response are fully represented in the record and were available during the direct appeal. The discussion between counsel and the court on how to respond to the questions (the response already being part of the record) was missing from the transcript. The trial court and counsel did meet after the trial to reconstruct that very limited portion of the record. Both the defense attorney and the state attorney agreed that the court should tell the jury to rely on the original instructions, which it did. All three parties agreed that there was no objection to that course of conduct. [ROA Supp. Vol. I 2-7] Wyatt's appellate counsel was present and participated in the reconstruction of the record, ensuring that all possible grounds were covered. Wyatt has not shown that this portion of the record is inaccurate or misses any relevant events. He also fails to demonstrate where there was any error present, much less error of a fundamental nature.

At the reconstruction hearing the parties also discussed the jury instruction conference which occurred during the penalty phase. The state attorney stated that

he had drawn up standard penalty phase instructions and provided copies of them to court and counsel. Counsel then compared those instructions to those in the court's book of jury instructions to make sure they were accurate. The defense also indicated which mitigators it was waiving as inapplicable to this case. On the original record, there are discussions of the defense going through those instructions and indicating which mitigators they were waiving. Wyatt then waived those in writing. [ROA 3614-3617, 3627] The trial defense counsel indicated that the brief discussion on those pages was the charge conference and that the parties did not meet and go over the instructions line by line. [[ROA Supp. Vol. I 18-19] Neither the court nor the parties recalled any defense objections to the penalty phase instructions. [[ROA Supp. Vol. I 19-20] Finally, there were no instructions given to the jury which were absent from the trial transcript. The portions cited by Wyatt [ROA 3616-19] as off the record instructions were part of the above noted discussions between counsel about the instructions typed up by the state, given to the defense and the court, and about the inapplicability of certain mitigators. Again, Wyatt has not shown either that the record is incomplete or that there was any fundamental error which occurred at that point of the trial. He has thus failed to demonstrate how counsel was deficient, especially since counsel brought the

discrepancies in the record to the attention of all, or how Wyatt was prejudiced.[1]

Finally, Wyatt's claim is facially insufficient because he has failed to show any errors which occurred during those proceedings that were omitted from the record on appeal. Cf. Hardwick v. Dugger, 648 So. 2d 100, 105 (Fla. 1994); Ferguson v. Singletary, 632 So. 2d 53, 58 (Fla. 1993)("As to those portions which are still not transcribed, Ferguson points to no specific error which occurred during these time periods. Under these circumstances, we reject this claim."); Turner v. Dugger, 614 So. 2d 1075, 1079-80 (Fla. 1992). In Jones v. State, 923 So.2d 486, 489 (Fla.2006), this Court rejected the line of authority that had developed in this and other courts of appeal in Florida that reversals of a conviction were nearly *ipso facto* required if, through no fault of the defendant, the transcript of a criminal trial was unavailable for review to appellate counsel. Id. at 488, 490 (disapproving Vargas v. State, 902 So.2d 166 (Fla. 3d DCA 2004)(citing Rozier v. State, 669 So.2d 353, 353 (Fla. 3d DCA 1996)). Instead, this Court reaffirmed its earlier authority that, in order to prevail on a claim for a new trial based upon the unavailability of a transcript, "the defendant must demonstrate that there is a basis

[1]Wyatt asserts that the jury instructions were unconstitutional but these alleged record omissions were in the penalty phase alone. This Court has repeatedly held that both Florida's penalty phase scheme and its standard instructions are constitutional.

for a claim that the missing transcript would reflect matters which prejudice the defendant." Jones, 923 So.2d at 489. There, the defendant's contention that there was error in the voir dire was "based on pure conjecture," not entitling him to a new trial. Id. at 490.

In Darling v. State, 808 So.2d 145, 163 (Fla.2002), this Court said:

> Darling argues that there are no records of certain pretrial hearings which occurred in this case, precluding meaningful consideration of Darling's claims. However, Darling has failed to demonstrate what specific prejudice, if any, has been incurred because of the missing transcripts. The missing portion of the transcript has not been shown to be necessary for a complete review of this appeal. *Cf. Velez v. State*, 645 So.2d 42, 44 (Fla. 4th DCA 1994) (concluding that the appellant was not prejudiced in the review of his conviction and sentence, "[c]onsidering the limited portion of transcript which is missing and the errors alleged to have occurred in the trial court"). Therefore, this claim too lacks merit.

See also Armstrong v. State, 862 So.2d 705, 721 (Fla.2003) (new trial not warranted where defendant "failed to link a meritorious appellate issue to the allegedly missing record and thus cannot establish that he was prejudiced by its absence."); Johnson v. Moore, 837 So.2d 343, 345 (Fla.2002) (claim for ineffective assistance of appellate counsel based on counsel's failure to ensure a complete record on appeal was denied because defendant failed to show any specific errors that occurred due to failure of counsel on this basis). Wyatt too failed to point to any specific errors in the record or the resulting appeal which resulted from

counsel's conduct. He has failed to show either deficient performance or prejudice. This claim should be denied.

B. APPELLATE COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO RAISE NON-MERITORIOUS CLAIMS. (Restated)

Wyatt next argues that his appellate counsel was ineffective for failing to raise two issues to which trial counsel had objected: the trial judge's comment to the jury that the penalty phase would follow the guilt and his giving the felony murder instruction. Both of these objections were without merit and appellate counsel was not ineffective for not including them in the direct appeal. Relief should be denied.

At the beginning of voir dire, after reading the charges, the court instructed the jurors:

> To these charges, the defendant has entered his pleas of not guilty. This means you must presume or believe that the defendant is innocent. The presumption stays with the defendant as to each material allegation in the information and indictment, through each stage of the trial, until it has been over come by the evidence tot he exclusion of and beyond a reasonable doubt.

[ROA 26-27] During his voir dire the State Attorney told the jury:

> In the guilt phase, the first phase, you decide whether the defendant is guilty or not guilty of first degree murder.
> If you return a verdict – and that verdict must be unanimous, all of

> you must agree either that he's guilty or not guilty. If you return a verdict of guilty of first degree murder, we then go into the second phase of the trial.

[ROA 129] Both counsel then conducted extensive voir dire including on the burden of proof and the order of the trial. Both pointed out that the penalty phase was contingent on an unanimous guilty verdict in first degree murder. At one point the State Attorney said "should there be a second phase of this trial." [ROA 388] The defense counsel told them:

> please don't think for a moment because we are talking about the penalty phase, that we are feeling that we are going to get to that point in the trial.
> Is there anyone here that feels because we are discussing it, it's a foregone conclusion he is guilty? Does anyone here think that?

[ROA 405] The State Attorney said later that: "Do you both understand that under the law of Florida, the only time that the death penalty becomes a possibility is when there has first been a conviction for first degree murder?" [ROA 479] The voir dire continued in a similar vein for some time. At one point the defense attorney asked a potential juror what factors she would consider in not giving the death penalty. The court pointed out that he had yet to instruct them on the law regarding that and the juror could not possibly answer the question. He then said:

> Again, members of the jury and of the jury panel, *upon a finding of guilty in the guilt phase of this case of first degree murder* or of – that is premeditated murder or felony murder, we then go into

> a phase called penalty.
>
> It's a separate proceeding... At the end of that, I will give you certain criteria that you are to use in determining your recommendation ...
>
> Suffice it to say, will you all agree if we reach that stage – I'm not saying that we will...

[ROA 749-750 (emphasis added)] The trial judge did not assume the penalty phase was inevitable; his statement was contingent, both the first and second time he mentioned it. The jury was repeatedly told the correct law and was not misinformed or misled. The objection, and this issue, are without merit.

Wyatt next argues that the felony murder aggravator, and its instruction, were unconstitutional as automatic aggravators. This Court has consistently rejected constitutional challenges to the "felony murder" aggravating circumstance and instruction. Hudson v. State, 708 So. 2d 256, 261 (Fla. 1998) (rejecting claim that prior violent felony aggravator is unconstitutionally vague); Blanco v. State, 706 So. 2d 7, 11 (Fla. 1997) (finding felony murder instruction not vague or over broad); Banks v. State, 700 So.2d 363, 367 (Fla.1997)(finding felony murder instruction constitutional); Francis v. State, 808 So.2d 110 (Fla. 2001); Atwater v. State, 788 So.2d 223 (Fla. 2001). This issue, too, is without merit.

On both of these issues, Wyatt has failed to demonstrate deficiency by his appellate counsel. Appellate counsel is not ineffective for failing to raise non-

meritorious claims on appeal. Valle, 837 So.2d at 907-08; Armstrong, 862 So.2d at 718. Finally, Wyatt demonstrated no prejudice as required by Strickland. Relief should be denied.

C. FLORIDA'S RULE GOVERNING JUROR INTERVIEWS IS CONSTITUTIONAL AND COUNSEL WAS NOT DEFICIENT FOR FAILING TO RAISE A NON-MERITORIOUS CLAIM. (Restated)

Wyatt asserts Rule 4-3.5(d)(4), Rules Regulating the Florida Bar is unconstitutional under the Florida and Federal Constitutions and that counsel was ineffective in not challenging it on direct appeal. He cites various comments by jurors *during voir dire* about their opinions on the death penalty and following the court's instructions and the law, insisting that such comments indicate potential bias against him as a criminal defendant once they entered the jury deliberations, allegedly creating a need for him to investigate and interview them *after the trial*. The allegation that Wyatt was unconstitutionally precluded from attaining juror interviews is without merit. Florida law provides for juror interviews if Wyatt can meet its requirements which he has not shown that he could. The allegations made here are insufficient to grant interviews, by law the jury is presumed to follow the court's instructions, and any comments about jurors' feelings on the evidence or

the death penalty in general inhere in the verdict. Wyatt cannot show deficient performance or prejudice. Counsel was not ineffective and relief should be denied.

The constitutional challenge to Rule 4-3.5(d)(4) is meritless. Florida law does allow juror interviews under certain circumstances, thereby protecting against due process or equal protection violations. As explained in Baptist Hospital of Miami, Inc. v. Maler, 579 So.2d 97, 100 (Fla. 1991), "juror interviews are not permissible unless the moving party has made sworn allegations that, if true, would require the court to order a new trial because the alleged error was so fundamental and prejudicial as to vitiate the entire proceedings. This standard was formulated 'in light of the strong public policy against allowing litigants either to harass jurors or to upset a verdict by attempting to ascertain some improper motive underlying it.'" In order to do so, a defendant must make a prima facie showing that juror misconduct occurred. See generally, Roland v. State, 584 So. 2d 68, 70 (Fla. 1st DCA 1991) (finding no criminal rule allowing for post-verdict juror interviews, but noting application for such by motion "as a matter of practice"); Sconyers v. State, 513 So. 2d 1113, 1115 (Fla. 2d DCA 1987) (construing criminal rules to allow post-verdict juror interviews upon motion which makes a prima facie showing of juror misconduct); cf. Gilliam v. State, 582 So. 2d 610, 611 (Fla. 1991) (affirming denial of defendant's motion to conduct post-verdict interview of jurors where

defendant failed to make prima facie showing of misconduct); Shere v. State, 579 So. 2d 86, 94 (Fla. 1991) (affirming denial of defendant's motion to conduct post-verdict interview of jurors); Rule 1.431(h) Florida Rules of Civil Procedure (providing that "[a] party who believes that grounds for legal challenge to a verdict exists may move for an order permitting an interview of a juror or jurors to determine whether the verdict is subject to challenge").

Furthermore, jury interviews are not warranted in this case, and were not warranted on direct appeal, because there are no sworn allegations that, if true, would constitute fundamental error warranting a new trial. Baptist Hospital, 579 So.2d at 100. See Devoney v. State, 717 So.2d 501, 502 (Fla. 1998)(describing matters that may be inquired into as: that a juror was improperly approached by a party, his agent, or attorney; witnesses or others conversed as to facts or merits of the cause, out of court and in the presence of jurors; that verdict was determined by aggregation and average or by lot, or game of chance or other artifice or improper manner). This Court has "cautioned against permitting jury interviews to support post-conviction relief" for allegations which focus upon jury deliberations. Griffin v. State, 866 So.2d 1, 20-21 (Fla. 2003) (citing Johnson v. State, 593 So.2d 206, 210 (Fla. 1992)(stating "it is a well-settled rule that a verdict cannot be subsequently impeached by conduct which inheres in the verdict and relates to the

jury's deliberations"). Section 90.607(2)(b), Fla. Stat., mandates that a "juror is not competent to testify as to any matter which essentially inheres in the verdict or indictment." Matters that "inhere in the verdict" have been defined as "'those which arise during the deliberation process.'" Sconyers v. State, 513 So.2d 1113, 1115 (Fla. 2d DCA 1987). See Mitchell v. State, 527 So.2d 179, 181 (Fla. 1988). The statute forbids judicial inquiry into the jurors' emotions, mental processes, mistaken beliefs, understanding of the applicable law, or other matter resting alone in the juror's breast. See Devoney, 717 So.2d at 502; State v. Hamilton, 574 So.2d 124 (Fla. 1991). "[M]atters that inhere in the verdict are subjective in nature, whereas matters that are extrinsic to the verdict are objective." Id. Florida common law and now Rule 3.575 Fla.R.Crim.P provide for an avenue for juror interviews. Wyatt has an avenue to interview jurors, should he meet the rule's requirements, thus, there is no merit to his constitutional challenge.

Additionally, his allegation of potential bias based on the voir dire comments does not constitute juror misconduct and will not meet the requirements outlined above for jury interviews; they are based solely on speculation regarding what jurors might say if defense counsel were allowed access to jurors. The claim is meritless. The voir dire process itself provides the means to question and to uncover any bias in potential jurors. If a party discovers bias, he can challenge the

juror for cause or use a peremptory challenge to excuse them. Once seated, any individual feelings or attitudes of the individual jurors inhere in the verdict and are not improper behavior. Consequently, counsel had no basis to request interviews and cannot be deemed ineffective for failing to do so on the record presented here. After the presentation of evidence, the court properly instructed the jury on the law, including to put aside bias or sympathy for any party or witness, and they are presumed to have heeded those instructions. U.S. v. Olano, 507 U.S. 725, 740 (1993) (finding presumption jurors follow instructions); Burnette v. State, 157 So.2d 65, 70 (Fla. 1963)(same). Appellate counsel is not ineffective for failing to raise non-meritorious claims on appeal. Valle, 837 So.2d at 907-08; Armstrong, 862 So.2d at 718. Finally, Wyatt can show no prejudice as required by Strickland. Relief should be denied.

CLAIM II

THE CLAIM THAT THE FLORIDA SUPREME COURT FAILED TO CONDUCT AN ADEQUATE HARMLESS ERROR ANALYSIS IS PROCEDURALLY BARRED AND WITHOUT MERIT. (Restated)

Wyatt next claims that this Court failed to conduct an adequate harmless error analysis when it struck the CCP aggravator on direct appeal. He argues that the case should have been sent down to the trial court for re-sentencing because he summarily concludes that the striking of any aggravator, despite how many remained, had to be prejudicial. This claim is procedurally barred since the issue was raised and rejected on direct appeal. Lambrix v. Singletary, 641 So.2d 847, 848-49 (Fla.1994); Francis v. Barton, 581 So.2d 583, 584 (Fla.1991). Furthermore, the Florida Supreme Court did conduct a proper analysis. This claim is without merit.

In its sentencing order the trial court found the following *seven* circumstances in aggravation: (1) Wyatt was under a sentence of imprisonment at the time of the murders; (2) Wyatt had prior violent felonies; (3) the murders were committed during the course of felonies to-wit, robbery and sexual battery; (4) the murders were committed for the purpose of avoiding arrest; (5) the murders were

committed for pecuniary gain; (6) the murders were CCP and (7) the murders were HAC. (ROA 4486-4503). This Court then struck the CCP aggravator on direct appeal and went on to weigh the remaining aggravators and mitigator, saying:

> With the elimination of the aggravating circumstance that the murders were cold, calculated, and premeditated, there remain six aggravating circumstances and no mitigation. On this record, we conclude that the elimination of this aggravator was harmless beyond a reasonable doubt. Further, the death penalty in this case is clearly proportionate. Accordingly, we affirm all of Wyatt's convictions and his sentence of death.

Wyatt, 641 So.2d at 1341. This Court did indeed consider the effect of the invalid aggravating factor on the sentencer's decision, preformed an appropriate harmless error analysis, and found the sentence proportional. Wyatt fails to articulate in what way this Court's analysis and conclusion was flawed nor does he show prejudice; he merely assumes both. Relief should be denied.

CLAIM III

CLAIMS THAT THE AGGRAVATING FACTORS OR THEIR INSTRUCTIONS WERE IMPROPER OR INVALID ARE INSUFFICIENTLY PLED, PROCEDURALLY BARRED, AND WITHOUT MERIT. (Restated)

Wyatt claims, in purely conclusionary terms and without discussion or argument, that the "heinous, atrocious, and cruel" and "cold, calculated, and premeditated" aggravators are unconstitutionally vague and overbroad. Initially, this claim is insufficiently pled and should be denied on that basis. See Stewart v. Crosby, 880 So.2d 529, 531 (Fla. 2004); Shere v. State, 742 So.2d 215, 218 n. 6 (Fla.1999); State v. Mitchell, 719 So.2d 1245, 1247 (Fla. 1st DCA 1998) (finding that issues raised in appellate brief which contain no argument are deemed abandoned). Furthermore, it is also procedurally barred and without merit. Relief should be denied.

This claim is procedurally barred. This issue should have been raised on direct appeal. It is not proper to use a habeas petition to gain a second appeal. "[H]abeas corpus petitions are not to be used for additional appeals on questions which could have been, should have been, or were raised on appeal or in a rule 3.850 motion, or on matters that were not objected to at trial." Parker v. Dugger, 550 So.2d 459, 460 (Fla.1989); Harvey v. Dugger, 656 So. 2d 1253, 1256 (Fla.

1995) (stating that issues that could have been but were not raised on direct appeal or issues that were raised and rejected on direct appeal are not cognizable through collateral attack). Claims that the HAC and CCP instructions were unconstitutionally vague are procedurally barred unless specific objection is made at trial on that ground and pursued on appeal. James v. State, 615 So.2d 668, 669 (Fla.1993). Wyatt's trial counsel preserved the issue at trial by objecting but his appellate counsel failed to pursue the issue on direct appeal. Thus, Wyatt's claim is procedurally barred. Doyle v. Singletary, 655 So.2d 1120, 1121 (Fla. 1995).

Furthermore, this claim is without merit. This Court has repeatedly upheld the constitutionality of these two aggravators. Klokoc v. State, 589 So.2d 219, 222 (Fla. 1991) (rejecting claim that CCP aggravator is unconstitutionally vague); State v. Dixon, 283 So.2d 1, 9 (Fla.1973); Hall v. State, 614 So.2d 473 (Fla.1993) (finding the HAC aggravator constitutional); Harvey, 656 So.2d at 1258(noting "counsel cannot be deemed ineffective under the test set out in Strickland for failing to object to [the HAC and CCP] instructions when this Court had previously upheld the validity of these instructions."). Furthermore, even if Wyatt received the instruction found inadequate in Espinosa v. Florida, 505 U.S. 1079, 112 S.Ct. 2926 (1992), this Court has stated that Espinosa was not a fundamental change in law which would overcome a procedural bar. Chandler v. Dugger, 634 So.2d 1066,

1069 (Fla.1994); Jackson v. Dugger, 633 So.2d 1051, 1055 (Fla.1993); Doyle, 655 So.2d at 1121. Relief should be denied.

CONCLUSION

WHEREFORE, the State respectfully requests that this Honorable Court deny all relief based on the merits.

Respectfully submitted,

BILL McCOLLUM.
ATTORNEY GENERAL

_____

LISA-MARIE LERNER
ASSISTANT ATTORNEY GENERAL
FLA. BAR NO. 698271
1515 NORTH FLAGLER DRIVE
9TH FLOOR
WEST PALM BEACH, FL. 33401
(561) 837-5000
FAX-(561) 837-5108

ATTORNEY FOR RESPONDENT

CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that a true copy of the foregoing Response to the Petition for Writ of Habeas Corpus has been furnished by United States mail to Rahcel Day and M. Chance Meyer, CCRC- South, 10 1 N.E. 3rd Ave., Suite 400, Fr. Lauderdale, Fl. 33301, this 10th day of December, 2009.

_____
LISA-MARIE LERNER

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY the size and style of type used in this brief is 14 point Times New Roman, a font that is not proportionally spaced.

_____
LISA-MARIE LERNER