IN THE SUPREME COURT OF FLORIDA

TIMOTHY A. ROBINSON,

Petitioner,

v.

SECRETARY,
FLA. DEPT. OF CORRECTIONS

Respondent.

Case No. SC10-695

RESPONSE OPPOSING
PETITION FOR WRIT OF HABEAS CORPUS

BILL McCOLLUM
ATTORNEY GENERAL

STEPHEN R. WHITE
ASSISTANT ATTORNEY GENERAL
Florida Bar No. 159089

Office of the Attorney General
PL-01, The Capitol
Tallahassee, Fl 32399-1050
(850) 414-3300 Ext. 4579
(850) 487-0997 (FAX)

COUNSEL FOR RESPONDENT

PRELIMINARY STATEMENT

It appears that the Petition incorrectly used this Court's case number from the appeal from the trial court's denial of postconviction relief (SC09-1860). Respondent has substituted the correct case number (SC10-695).

This Response refers to Petitioner as such, Defendant, or by proper name, "Robinson." This Response will refer to Respondent, the Secretary of the Florida Department of Corrections, as Respondent, State, or Secretary.

The Petition for Writ of Habeas Corpus, which this Response opposes, will be referenced in the text of this Response as "Petition."

Unless the contrary is indicated, bold-typeface and bold-underlined emphasis is supplied; cases cited in the text of this response and not within quotations are underlined; other emphases are contained within the original quotations, unless otherwise indicated.

This Response uses the following referencing symbols:

"R"	Direct-appeal record of this case; Roman numeral designates a volume number, followed by any page number(s), for example, "R/IV 779-80" refers to pp. 779-80 of volume IV of the direct-appeal record;
"PC"	Postconviction record; Roman numeral designates a volume number, followed by any page number(s);
"PC-EH"	Transcript of postconviction evidentiary hearing on April 21 & 22, 2009, with volume number and any page number(s);
"PC-EXH"	Exhibits in postconviction evidentiary hearing, with volume number and any page number(s);
"PC-SE" or	State Exhibit or Defense Exhibit, respectively,

"PC-DE"	followed by any exhibit number(s);
"Pet"	The Petition for Writ of Habeas Corpus, which this Response opposes, followed by applicable page number(s);
"Pet-App"	The Appendix to the Petition, followed by the Petition's letter designation, for example, Pet-App D refers to Appendix D of the Petition;
"IAC"	Ineffective assistance of counsel.

For the convenience of the Court, Respondent provides the following Table of Contents.

TABLE OF CONTENTS

PAGE#

STATEMENT OF THE CASE AND FACTS

Respondent submits his rendition of the case and facts.

Case Timeline.

To provide a basic framework and an index for portions of the record, a timeline of major events and pleadings in the case is presented.

DATE	NATURE OF MAJOR EVENT OR PLEADING
9/20/1988	Bodies of four victims discovered on the floor of a house in Escambia County Florida, and rape victim Amanda Merrell discovered alive with her throat slit (R/IV 779-80; R/VII 1300-1305; VIII 1396-1401);
1989	17-count indictment charging Robinson and others with four murders, one attempted murder, six kidnappings, two armed sexual batteries, conspiracy to traffic in cocaine, armed burglary of a dwelling with assault, and two armed robberies (R/XII 2106-2110); **CLAIM III of the Petition (Pet 12-14) concerns the attempted murder conviction;**
1989	Timothy Robinson, Michael Coleman,[1] and Darrell Frazier, tried together (See, e.g., R/IV 594); subsequently, Ronald Williams, was tried separately, See Williams v. State, 622 So.2d 456, 460 (Fla. 1993);
1989	Jury returned verdicts finding Robinson guilty as charged (R/XI 1970-72; R/XIII 2431-39) as to all 17 counts of the Indictment (R/XII 2106-2110);
1989	Penalty phase of the jury trial in which jury voted six-to-six for life imprisonment (R/XI 2096-97; R/XIII 2449);
1989	Spencer-type[2] proceedings (R/XIV 2478-2508);
1989	Robinson's counsel's written Memorandum in Support of the Jury's Advisory Sentence (R/XIV 2530-34);
1989	Trial court's death sentences (R/XIV 2562-66, 2582-87), overriding the jury's 6-to-6 life recommendation (R/XI 2096-97; R/XIII 2449) and finding five aggravating circumstances, rejecting statutory mitigation, finding that Robinson was "clearly the ringleader and the person who directed the other participants" (R/XIV 2586), and considering aspects of non-statutory mitigation (R/XIV 2586);

[1] Coleman's case is pending in this Court on a habeas petition (SC09-92) and on review of the trial court's denial of postconviction relief (SC04-1520); this Court, in Williams v. State, 987 So.2d 1 (Fla. 2008), has reversed Williams' death sentence.

[2] See Spencer v. State, 615 So.2d 688, 690-91 (Fla. 1993).

6/25/1992	Robinson v. State, 610 So.2d 1288 (Fla. 1992)(rehearing denied Oct. 15, 1992), on direct appeal, rejected several guilt-phase and penalty-phase issues, including claims regarding shackling, the jury override, and the trial court's findings concerning "potential mitigating evidence presented in this case"; although this Court struck the avoid or prevent arrest aggravator, it upheld Robinson's death sentence as proportionate;[3]
1994	United States Supreme Court denied certiorari at Robinson v. Florida, 510 U.S. 1170, 114 S.Ct. 1205, 127 L.Ed.2d 553, 62 USLW 3574 (1994); here, **CLAIM I (Pet 5-11) alleges IAC concerning the USSC certiorari proceeding**;
1995	Postconviction motion (PC/I 16-188) citing to Fla.R.Crim.P. 3.850 (PC/I 16) and indicating that Fla.R.Crim.P. 3.851's one-year filing requirement applies except for this Court granting an extension to file Robinson's Fla.R.Crim.P. 3.850 motion to July 1, 1995 (PC/I 20);
1999	Robinson's "Second Amended" postconviction motion (PC/II 256-373);
2000	Robinson's 244-page amended postconviction motion (PC/III 398-PC/IV 641), and the State's response (PC/IV 671-735);
2000	Defendant's third amended postconviction motion (PC/V 830-PC/VI 1085); Robinson clarified that this postconviction motion added Claims XIX, XX, and XXI [pages 243a through 243f]" (PC/VI 1105-1108); and the State responded to the added claims (PC/VI 1109-35);
2004	Huff[4] hearing (PC/VIII 1354-94);
2008	At Robinson's postconviction instigation (See, e.g., PC/VII 1246, PC/VIII 1396-98 et seq.[5]; PC/X 1824-26), DNA testing (PC/X 1842-48, 1849-55) that ultimately showed that the odds of DNA coming from anyone other

[3] Claim V (regarding lethal injection) mentions IAC/appellate counsel but develops no supportive argument.

[4] Huff v. State, 622 So.2d 982 (Fla. 1993).

[5] Proceedings and litigation concerning the postconviction DNA testing consume most of a number of volumes of the record on appeal.

	than Robinson were 1 in 2.0 quadrillion among U.S. Africa-Americans (PC/X 1845, 1852);
2008	Robinson filed a "Supplement to Third Amended Motion to Vacate …" (PC/X 1867-97, which the State moved to strike and alleged that the "Supplement" exceed the trial court's and the Rules' authorization (PC/X 1899-1908); the trial court denied the State's motion to strike (PC/X 1909), and the State responded to the "Supplement" (PC/X 1918-47);
2009	Huff hearing (PC/XI 1982-2037) on Robinson's "Supplemental" postconviction motion (PC/X 1867-97) and attendant order (PC/XI 2087-88);
2009	Evidentiary hearing on aspects of Robinson's postconviction motion (PC-EH/I, II); parties' post-evidentiary hearing memoranda (PC/XIII 2376-2443, 2448-81, 2482-93);
2009	Trial court denied postconviction relief (PC/XIV 2494-2535) and included extensive supportive attachments (PC/XIV 2536-PC/XVII 3271), resulting in an appeal (SC09-1860; PC/XVII 3272-73) and **the accompanying habeas petition, which Respondent opposes here**.

Summary of Guilt-Phase and Sentencing-Phase Facts.

For an overview of the facts of this case, this Court's direct-appeal opinion, at Robinson v. State, 610 So.2d 1288, 1289 (Fla. 1992), referenced its opinion in co-defendant Michael Coleman's case, which summarized:

> Michael Coleman, Timothy Robinson, and brothers Bruce and Darrell Frazier were members of the 'Miami Boys' drug organization, which operated throughout Florida. Pensacola members of the group moved a safe containing drugs and money to the home of Michael McCormick from which his neighbors Derek Hill and Morris Douglas stole it. Hill and Douglas gave the safe's contents to Darlene Crenshaw for safekeeping.
>
> Late in the evening of September 19, 1988 Robinson, Coleman, and Bruce Frazier, accompanied by McCormick, pushed their way into Hill and Douglas' apartment. They forced Hill and Douglas, along with their visitors Crenshaw and Amanda Merrell, as well as McCormick, to remove their jewelry and clothes and tied them up with electrical cords. Darrell Frazier then brought Mildred Baker, McCormick's

girlfriend, to the apartment. Robinson demanded the drugs and money from the safe and, when no one answered, started stabbing Hill. Crenshaw said she could take them to the drugs and money and left with the Fraziers. Coleman and Robinson each then sexually assaulted both Merrell and Baker.

After giving them the drugs and money, Crenshaw escaped from the Fraziers, who returned to the apartment. Coleman and Robinson then slashed and shot their five prisoners, after which they and the Fraziers left. Despite having had her throat slashed three times and having been shot in the head, Merrell freed herself and summoned the authorities. The four other victims were dead at the scene.

Merrell and Crenshaw identified their abductors and assailants through photographs, and Coleman, Robinson, and Darrell Frazier were arrested eventually.[FN1] A grand jury returned multiple-count indictments against them, charging first-degree murder, attempted first-degree murder, armed kidnapping, armed sexual battery, armed robbery, armed burglary, and conspiracy to traffic. Among other evidence presented at the joint trial, the medical examiner testified that three of the victims died from a combination of stab wounds and gunshots to the head and that the fourth died from a gunshot to the head. Both Crenshaw and Merrell identified Coleman, Robinson, and Frazier at trial, and Merrell identified a ring Coleman gave to a girlfriend as having been taken from her at the apartment. Several witnesses testified to drug dealing in Pensacola and to the people involved in that enterprise. Coleman and Robinson told their alibis to the jury[FN2] with Coleman claiming to have been in Miami at the time of these crimes and Robinson claiming he had been in New Jersey then. The jury found Coleman and Robinson guilty of all counts as charged and, after the penalty phase, recommended that they receive sentences of life imprisonment.[FN3] The trial court, however, disagreed with that recommendation and sentenced Coleman and Robinson to death.

> [FN1]. According to the State's brief, Bruce Frazier has not been apprehended.
>
> [FN2]. Frazier did not testify.
>
> [FN3]. On the murder counts the jury convicted Frazier of first-degree murder of only one of the victims and of second-degree murder of the other three and recommended that he be sentenced to life imprisonment by a vote of eleven to one. The trial judge imposed a death sentence, but, when this Court relinquished jurisdiction, vacated that sentence in favor of life imprisonment. This Court then transferred Frazier's appeal to the district court of appeal. *Frazier v. State*, no. 74,943.

Coleman v. State, 610 So.2d 1283, 1284-85 (Fla. 1992).

Robinson, 610 So.2d at 1291, 1292, summarized additional aspects of Robinson's sentencing proceedings:

> In support of the death sentences the trial court found that five aggravators had been established: previous conviction of a prior violent felony; committed during a robbery, sexual battery, burglary, and kidnapping; committed to avoid or prevent a lawful arrest; heinous, atrocious, or cruel; and cold, calculated, and premeditated.
>
> ***
>
> [T]he trial court found in mitigation only that Robinson had maintained close family ties and had been supportive of his mother. As to the other potential mitigating evidence, the court stated:
>
> > The remaining contentions are not borne out by the evidence, and even if they were, would have no mitigating value: defendant's education while incomplete was not altogether lacking and would not excuse or mitigate the vicious crimes committed; his low IQ did not impair his judgment or actions; he was not an abused child and this fact cannot serve to mitigate his conduct. Finally, the victim's background cannot be used to mitigate the sentence to be imposed and warranted under these facts.

Direct Appeal.

Robinson, 610 So.2d at 1292, "affirm[ed] Robinson's convictions and sentences of death." This Court rejected several direct-appeal claims and concluded:

> [Claim] that the trial court erred in denying both a continuance and a change of venue, but has shown no abuse of discretion that would require reversal of the court's decisions. [610 So.2d at 1289]
>
> We also find no error in not severing out the conspiracy count because the offenses are based on connected acts or transactions. [Id.]
>
> Contrary to Robinson's assertion, the evidence is sufficient to support his conviction of conspiracy to traffic. [Id. at 1290]
>
> During closing argument, the prosecutor placed two knives that had been entered into evidence on the bar of the jury box. The defense objected, and the court asked the prosecutor to remove them. Robinson now argues that the prosecutor's acts served only to inflame the jury and that he should receive a new trial. We disagree. [Id.]

> Robinson also claims that the trial court's ordering the defendants to remain shackled during trial violated his due process rights. *** The court excused the jury and had Robinson's shackles removed before he took the witness stand. A piece of cardboard placed under the defense table to hide the defendants' legs fell over during trial, but Robinson has not shown that the jurors noticed, or were affected by, the shackles. We therefore find no merit to this issue. [Id.]
>
> … Robinson argues that the trial court erred both in denying the continuance and in admitting the DNA testimony. We disagree. [Id. at 1291]
>
> We hold, therefore, that on the facts of this case Robinson has shown no reversible error or abuse of the trial court's discretion regarding admissibility of the DNA test results. [Id.]
>
> We agree with Robinson that the evidence does not support finding committed to avoid or prevent arrest in aggravation. *** The other aggravators are fully supported by the record. [Id.]
>
> Robinson also argues that the trial court erred in overriding the jury's recommendation of life imprisonment. As we did with Coleman, however, we disagree with this contention. *** We agree that the potential mitigating evidence presented in this case does not provide a reasonable basis for the jury's recommendation. *** As with Coleman, any sentence other than death for Robinson would be disproportionate. *** Striking one of the aggravators does not alter this conclusion because there is no reasonable likelihood that the trial court would conclude that the mitigating evidence outweighed the four valid aggravators. Any error, therefore, was harmless. [Id. at 1291-92]
>
> Robinson's death sentence is not disproportionate because Frazier received a sentence of life imprisonment. In contrast to Robinson and Coleman, the jury convicted Frazier of only one count of first-degree murder and recommended that he not be sentenced to death by a vote of eleven to one. This disparate treatment is warranted by the facts, facts that show that Frazier was less culpable than Robinson or Coleman. [Id. at 1292]

Petition for Writ of Certiorari in United States Supreme Court.

CLAIM I concerns Robinson's certiorari petition filed in the United States Supreme Court.

The precise date on which a Petition for Writ of Certiorari was filed for Robinson is undetermined. The United States Supreme Court denied

certiorari at Robinson v. Florida, 510 U.S. 1170, 114 S.Ct. 1205, 127 L.Ed.2d 553, 62 USLW 3574 (1994), stating:

> Case below, 610 So.2d 1288.
>
> Petition for writ of certiorari to the Supreme Court of Florida denied.
>
> Justice BLACKMUN dissenting:
>
> Adhering to my view that the death penalty cannot be imposed fairly within the constraints of our Constitution, see my dissent in *Callins v. Collins*, 510 U.S. 1141, 1143, 114 S.Ct. 1127, 1128, 127 L.Ed.2d 435 (1994), I would grant the petition for writ of certiorari and vacate the death sentence in this case.

Respondent has found no indication of any motion for rehearing regarding the denial of certiorari.

The Petition excerpts from a number of letters that it attaches. The authenticity of those letters and whether they include all correspondence are unknown to Respondent, but Respondent's positions opposing Claim I infra assume, arguendo, without conceding that the letters are authentic, thereby obviating any need to determine the propriety of submitting evidence to this Court.

Respondent contests the Petition's assertion that any "issue was … clarified by the Supreme Court of Florida in the December 29, 1986 memorandum. Chief Justice McDonald specifically defined petitions for writ of certiorari as part of the direct appeal process" (Pet 6). To the contrary, this is neither a fact nor a matter of law. Assuming, arguendo, without conceding that such a memorandum exists, a 1986 memorandum by one Justice makes no Florida law; indeed, one Justice's official court opinion makes no law. See Art. V, §3(a), Fla. Const. ("concurrence of four justices

shall be necessary to a decision"); Santos v. State, 629 So.2d 838, 839-40 (Fla. 1994)("Under the Florida Constitution, both a binding decision and a binding precedential opinion are created to the extent that at least four members of the Court have joined in an opinion and decision"; footnotes omitted); Cf. Marks v. United States, 430 U.S. 188, 193 (1977)(when no majority of justices join in an opinion, "the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds").

Postconviction Proceedings.

Specific events within the postconviction proceedings are not a major feature of Robinson's habeas petition. Therefore, at this juncture, Respondent submits the Timeline supra as adequate coverage of events during postconviction proceedings.

ARGUMENT IN OPPOSITON TO HABEAS CLAIMS

CLAIM I: HAS PETITIONER MET HIS BURDENS TO DEMONSTRATE THAT A STATE HABEAS PETITION IS A PROPER VEHICLE TO RAISE A CLAIM ATTACKING THE EFFECTIVENESS OF COUNSEL IN A UNITED STATES SUPREME COURT PROCEEDING, AND, ARGUENDO, HAS PETITIONER MET HIS STRICKLAND IAC BURDENS? (PET 5-11, RESTATED)

A. An overview of CLAIM I and reasons for denying it.

Laura Keene represented Robinson in the state direct-appeal to this Court. CLAIM I attacks the quality of her representation pertaining to United States Supreme Court certiorari proceedings.

CLAIM I contends that Ms. Keene, after this Court's direct-appeal affirmance of the convictions and death sentences and denial of Ms. Keene's motion for rehearing, did not file Robinson's certiorari petition in the

United States Supreme Court, thereby rendering ineffective assistance of counsel; instead, another counsel filed a belated certiorari petition (Pet-App E), which the United States Supreme Court denied, without explanation, at Robinson v. Florida, 510 U.S. 1170, 114 S.Ct. 1205, 127 L.Ed.2d 553, 62 USLW 3574 (1994).

Based on insufficient and unsupported inferences and conclusions, CLAIM I requests relief by improperly requesting this Court to re-review claims that this Court rejected on direct appeal and, on the basis of that re-review, violate federal-state comity and federal supremacy by setting up a concocted avenue for a successive petition for writ of certiorari in the United States Supreme Court.

Arguendo, even if CLAIM I can be raised in this Court, it violates this Court's procedural bar and law of the case principles and fails to meet applicable burdens of showing deficiency and prejudice required by Strickland v. Washington, 466 U.S. 668 (1984).

Other than concluding that the belated certiorari petition was not "frivolous" and its claims "viab[le]," CLAIM I makes no attempt whatsoever to demonstrate that the allegedly belated certiorari petition had merit requisite to showing IAC deficiency and prejudice or was denied because it was late, requisite to showing IAC prejudice. Therefore, the Petition admits that the prejudice prong for an ineffective-assistance-of-counsel claim causes "some logical problems" with CLAIM I. (Pet 9)

CLAIM I also alleges that Ms. Keene wrote a letter to Robinson indicating that she and her husband had "researched and do not find any

additional relief available" and over a month earlier wrote letters to CCR indicating that she does not intend to file a certiorari petition in the United States Supreme Court and indicating that she is not a member of the U.S. Supreme Court and time-constrained to take any further action for Robinson (Pet 7-8). The Petition claims that Ms. Keene's letters to Robinson and to CCR "contradict" (Pet 8) each other, but this contradiction is the Petition's unwarranted self-serving inference. The Petition concludes that the mere filing of the belated certiorari petition shows that that Ms. Keene's statement to Robinson that she found no "additional relief available" was "simply false" (See Pet 8-9, 10, 11), but the Petition is devoid of any requisite Strickland discussion of whether any reasonable attorney would have filed the claims in the belated certiorari petition and whether they facially demonstrate the requisite reasonable probability of winning for Strickland prejudice.

CLAIM I attempts to by-pass Strickland's prejudice prong by invoking U.S. v. Cronic, 466 U.S. 648, 651, 104 S.Ct. 2039, 2042 (1984), (Pet 10) and by "urg[ing] adoption of an adverse effect standard of prejudice standard similar to that applied where there is a conflict of interest" (Pet 11). CLAIM I contends that the conflict of interest standard should apply because of the CCR letters to Ms. Keene about timely filing a certiorari petition and "Robinson's inability [to] secure timely review of his case in the [United States] Supreme Court." (Pet 11)

Contrary to CLAIM I, Strickland's prejudice prong does apply; Cronic does not apply.

CLAIM I's "alternative" assertion of a "conflict of interest" standard tenders no developed argument, no citations to any authority, and no discussion of authority whatsoever. As such, any such argument is not properly before this Court, and in any event, wrong.

Therefore, in the ensuing pages, Respondent shows the procedural bar/law-of-the-case principles and the Strickland burdens that require the denial of CLAIM I if, arguendo, Ross v. Moffitt, 417 U.S. 600, 616-618, 94 S.Ct. 2437, 2447 (1974), discussed in Section B, and the additional authorities discussed in this Response are ignored.

The Petition's attempted Cronic and conflict-of-interest by-passes to Strickland's prejudice prong are ineffectual. Finally, Respondent concludes by returning to the topic of whether CLAIM I improperly intrudes into the province of the United States Supreme Court.

Respondent will also contest a number of self-serving and unjustified factual inferences CLAIM I makes.

In sum, CLAIM I merits no relief for a number of alternative reasons. Indeed, this claim has several "problems" (Pet 9): some legal, some factual[6], and some "logical."

---

[6] As discussed in the Facts section "Petition for Writ of Certiorari in United States Supreme Court," this claim can be resolved without determining the propriety of this Court reviewing evidence submitted to it ab initio.

B. The Petition's burdens.

A threshold question is whether Robinson has demonstrated that he had a right to any counsel and thereby had a right to effective counsel. Ross v. Moffitt, 417 U.S. 600, 616-618, 94 S.Ct. 2437, 2447 (1974), resolved this question against CLAIM I and covered several principles discussed infra, elaborated especially in Section G.

> This Court's review … is discretionary and depends on numerous factors other than the perceived correctness of the judgment we are asked to review.
>
> *** [T]he source of the right to seek discretionary review in this Court *** is granted by statute enacted by Congress. *** The right to seek certiorari in this Court is not granted by any State, and exists by virtue of federal statute with or without the consent of the State whose judgment is sought to be reviewed.
>
> *** {T]his Court has followed a consistent policy of denying applications for appointment of counsel by persons seeking to file jurisdictional statements or petitions for certiorari in this Court. *See*, *e.g.*, *Drumm v. California*, 373 U.S. 947, 83 S.Ct. 1683 (1963); *Mooney v. New York*, 373 U.S. 947, 83 S.Ct. 1678 (1963); *Oppenheimer v. California*, 374 U.S. 819, 83 S.Ct. 1860 (1963). In the light of these authorities, it would be odd, indeed, to read the Fourteenth Amendment to impose such a requirement on the States, and we decline to do so.

Thus, CLAIM I depends upon a right to counsel that does not exist and presents it here to an improper Court.[7] This is a matter exclusively within the discretion of the U.S. Supreme Court, exclusively within the federal domain as defined by federal statutes, and where Robinson has no right to counsel, and therefore no right to effective counsel.

---

[7] As such, Ross v. Moffitt resolves CLAIM I and the ensuing pages are unnecessary, but, Respondent presents additional discussion in perhaps an overabundance of caution.

Assuming, arguendo, that CLAIM I is entertained here and assuming, arguendo, a right to effective counsel in United States Supreme Court certiorari proceedings, CLAIM I contends that Robinson has met his burdens, but he has not.

Robinson asserts (Pet 6) that the certiorari proceedings are part of the direct appeal. Although this assertion is incorrect,[8] yet-again arguendo, this Court has enunciated the basic principle concerning the performance of appellate counsel: "Habeas petitions are the proper vehicle by which to raise ineffective assistance of appellate counsel claims," Davis v. State, 875 So.2d 359, 372 (Fla. 2003), citing Rutherford v. Moore, 774 So.2d 637, 642 (Fla. 2000).

This Court's habeas corpus standard of review for ineffective assistance of appellate counsel "mirrors" the standard of Strickland v. Washington, 466 U.S. 668 (1984), pertaining to alleged trial counsel's ineffectiveness. Jones v. Moore, 794 So.2d 579, 583 (2001)(citing Rutherford v. Moore, 774 So.2d 637, 643 (Fla. 2000)). Therefore, "the analysis of" ineffective-assistance-of-appellate-counsel "claims follows the two-pronged analysis of *Strickland* as to both deficient performance and prejudice." Davis, 875 So.2d at 373, citing Rutherford. Accord Davis v. State, 928 So.2d 442, 446 (Fla. 5th DCA 2006)("criteria for proving

---

[8] As in the Petition's facts, CLAIM I improperly relies (Pet 6) upon one Justice's memorandum. A majority of this Court in an actual case is required to establish precedent. See authorities in the section "Petition for Writ of Certiorari in United States Supreme Court," supra.

ineffective assistance of appellate counsel parallel the standard used for establishing ineffective assistance of trial counsel claims").

"In reviewing counsel's performance, a court must 'indulge in a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.'" Davis, 928 So.2d at 446 (quoting Strickland, 466 U.S. at 689)). Accordingly, Washington v. State, 835 So.2d 1083, 1090 (Fla. 2002)(citing Strickland, 466 U.S. at 689), explicitly indicated that this "strong presumption" applies to evaluating IAC claims against appellate counsel.

Mills v. State, 507 So.2d 602, 605 (Fla. 1987), summarized two basic Strickland principles that apply to an IAC claim against appellate counsel as well as trial counsel: "In evaluating counsel's performance courts must try to eliminate the distortions of hindsight and indulge a strong presumption that counsel rendered effective assistance."

Thus, "'[t]he defendant has the burden of alleging a **specific, serious** omission or overt act upon which the claim of ineffective assistance of counsel can be based,'" Dufour v. State, 905 So.2d 42, 70 (2005)(quoting Freeman v. State, 761 So.2d 1055, 1069 (Fla. 2000)).

The standard is not whether counsel would have had "nothing to lose" in pursuing a matter. See Knowles v. Mirzayance, __U.S.__, 129 S.Ct. 1411, 1419 (2009)(reversed Court of Appeals, which used "… improper standard of review … [of] blam[ing] counsel for abandoning the NGI claim because there was nothing to lose by pursuing it").

Appellate counsel's performance also is not deficient if the legal issue that appellate counsel failed to raise was meritless or would have had "little or no chance of success." Spencer, 842 So.2d at 74. See also, e.g., Doorbal v. State, 983 So.2d 464, 489-90 (Fla. 2008)(failure of counsel to assert the meritless issue will not render the performance of appellate counsel ineffective); Eagle v. Linahan, 279 F.3d 926, 943 (11th Cir. 2001)(applied test that "appellate counsel fails to raise a claim on appeal that is so obviously valid that any competent lawyer would have raised it").

Chateloin v. Singletary, 89 F.3d 749, 754 (11th Cir. 1996), analyzed a claim of ineffective assistance of appellate counsel and concluded that defendant Chateloin failed to demonstrate that case law at the time of the appeal "clearly" provided a basis in the law for relief:

> Because the case law at the time of Chateloin's direct appeal **did not clearly require** a defendant to either personally waive his right to a twelve-person jury in open court or sign a written waiver of such right, we conclude that Chateloin's appellate counsel's failure to raise the lack of personal waiver claim did not fall below an objective standard of reasonableness.

Thus, the test is not whether an issue is non-frivolous or whether Robinson might have wanted a claim raised in a certain court. See Valle v. Moore, 837 So.2d 905, 908 (Fla. 2002)("effective appellate counsel need not raise every conceivable nonfrivolous issue")(citing Jones v. Barnes, 463 U.S. 745, 751-53, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983)(appellate counsel not required to argue all nonfrivolous issues, even at request of client) and Provenzano v. Dugger, 561 So.2d 541, 549 (Fla.1990) (noting that "it is

well established that counsel need not raise every nonfrivolous issue revealed by the record").

Even fundamental errors omitted from appeals do not necessarily establish ineffectiveness because "some possibility of success" and nonfrivolusness do not necessarily rise to Strickland's standards. See Farina v. State, 937 So.2d 612, 634 (Fla. 2006).

Where appellate counsel has raised an issue on direct appeal that was "rejected," "failing to prevail" "[cannot] be deemed ineffective." Lowe v. State, 2 So.3d 21, 42 (Fla. 2008)(citing Spencer v. State, 842 So.2d 52 (Fla. 2003)). Therefore, a "'Petitioner's contention that [the point] was inadequately argued merely expresses dissatisfaction with the outcome of the argument in that it did not achieve a favorable result for petitioner'" and therefore does not constitute a viable claim in a habeas proceeding. Thompson v. State, 759 So.2d 650, 657 n.6 (Fla. 2000)("We therefore decline petitioner's invitation to utilize the writ of habeas as a vehicle for the re-argument of issues which have been raised and ruled on by this Court")(quoting Routly v. Wainwright, 502 So.2d 901, 903 (Fla. 1987), quoting Steinhorst v. Wainwright, 477 So.2d 537, 540 (Fla. 1985)).

As Rutherford v. Moore, 774 So.2d 637, 645 (Fla. 2000)(citing Routly, 502 So.2d at 903, Steinhorst, 477 So.2d at 540, and Grossman v. Dugger, 708 So.2d 249, 252 (Fla. 1997)), put it: "if an issue was actually raised on direct appeal, the Court will not consider a claim that appellate counsel was ineffective for failing to raise additional arguments in support of the claim on appeal." Thus, habeas proceedings should not be used to attempt to

obtain "additional appeal[]" of an issue that has already been raised in this Court. Williamson v. Dugger, 651 So.2d 84, 86 (Fla. 1994)(quoting White v. Dugger, 511 So.2d 554, 555 (Fla. 1987)).

"A claim that has been resolved in a previous review of the case is barred as 'the law of the case,'" Valle, 837 at 908 (citing Mills v. State, 603 So.2d 482, 486 (Fla. 1992)).

Rutherford, 774 So.2d at 643, noted that "claims of ineffective assistance of appellate counsel may not be used to camouflage issues that should have been raised on direct appeal or in a postconviction motion."

For prejudice, the petitioner must show that the appellate process was compromised to such a degree as to undermine confidence in the correctness of the result. Rutherford, 774 So.2d at 643. The prejudice prong of Strickland requires a showing that the appellate court would have afforded relief on appeal. United States v. Phillips, 210 F.3d 345, 350 (5th Cir. 2000). In other words, "the defendant has the burden to show counsel's deficient performance prejudiced the defense, so that the decision reached would reasonably likely have been different, absent the errors made." Davis, 928 So.2d at 446 (IAC appellate counsel)(citing Strickland)). Therefore, "[i]f a legal issue 'would in all probability have been found to be without merit' had counsel raised the issue on direct appeal, the failure of appellate counsel to raise the meritless issue will not render appellate counsel's performance ineffective." Rutherford v. Moore, 774 So.2d 637, 643 (Fla. 2000)(quoting Williamson v. Dugger, 651 So.2d 84, 86 (Fla. 1994)).

Given the strong presumption attached to appellate counsel's performance and a defendant's burden to show prejudice, a defendant bears the burden of citing persuasive case law supporting an IAC claim. See Rutherford v. Moore, 774 So.2d 637, 646 (Fla. 2000)("Rutherford cites no case in support of his argument that the failure of the trial court to examine witnesses' competency on the court's own motion constitutes fundamental error that would have resulted in a reversal had appellate counsel raised this issue on direct appeal. Therefore, we deny relief on this claim"). Accordingly, Moore v. Gibson, 195 F.3d 1152, 1180 (10th Cir. 1999), reasoned that "[a]n appellate counsel's performance may be deficient and may prejudice the defendant only if counsel fails to argue a '**dead-bang winner**.'"

Here, if CLAIM I is reviewed as a viable IAC claim, it fails to meet the forgoing burdens.

C. Application of IAC Principles: CLAIM I is procedurally barred by the direct appeal.

CLAIM I asserts that IAC is demonstrated by Ms. Keene, Robinson's direct appeal attorney, failing to seek certiorari in the United States Supreme Court. As purported support, CLAIM I attaches (Pet-App E) the belated certiorari petition filed by another counsel. However, the attached certiorari petition raises two claims the foundations of which this Court considered and rejected on direct appeal, thereby barring them from consideration here. The certiorari petition contended that "[t]he refusal to consider in mitigation … the character of the decedents … requires

reversal of the death sentences" (Pet-App E p.8) and this Court, after striking an aggravating circumstance, failed to reweigh the evidence and "undertake[] an adequate harmless error analysis" (Pet-App E pp. 8-10).

ISSUE I of Appellant's Initial Brief in this Court's Case No. 74,945, resulting in the decision reported at Robinson v. State, 610 So.2d 1288 (Fla. 1992), contended (at pp. 9, 23-24) that a mitigator supporting the jury's life recommendation, which the trial court erroneously rejected, was the background of the victims. The direct-appeal Initial Brief argued that the murder victims participated in wrongdoing that "led to the instant charges," including two of them stealing "a safe containing a large quantity of cocaine as well as several thousand dollars in cash" and some of the murder victims "must reasonably have known" that the owner of the safe "would be extremely upset at its theft and would take extreme measures to recover both the cash and cocaine"; the brief argued that this background was mitigation supporting the jury's life recommendation. The Initial Brief contended (at pp. 21-22) that the avoid-arrest aggravator was "unsubstantiated by the facts of the case" and that, weighing the aggravation and mitigation, the trial court improperly overrode the jury's recommendation (Initial Brief, e.g. at p. 24).

This Court explicitly addressed the issues that the Initial Brief presented and held:

> In support of the death sentences the trial court found that five aggravators had been established: previous conviction of a prior violent felony; committed during a robbery, sexual battery, burglary, and kidnapping; committed to avoid or prevent a lawful arrest; heinous, atrocious, or cruel; and cold, calculated, and premeditated. We agree with Robinson that the evidence does not support finding

committed to avoid or prevent arrest in aggravation. *Cf. Riley v. State*, 366 So.2d 19, 22 (Fla.1978) ('[T]he mere fact of a death is not enough to invoke this factor when the victim is not a law enforcement official. Proof of the requisite intent to avoid arrest and detection must be very strong in these cases.'). The other aggravators are fully supported by the record.

Robinson also argues that the trial court erred in overriding the jury's recommendation of life imprisonment. As we did with Coleman, however, we disagree with this contention. Robinson relies on cases such as *Ferry v. State*, 507 So.2d 1373 (Fla. 1987), and *Washington v. State*, 432 So.2d 44 (Fla.1983), where this Court reversed jury overrides. In the cases relied on, however, the defendants established overwhelming mitigating evidence that provided reasonable bases for their juries' recommendations. Here, on the other hand, the trial court found in mitigation only that Robinson had maintained close family ties and had been supportive of his mother. As to the other potential mitigating evidence, the court stated:

> The remaining contentions are not borne out by the evidence, and even if they were, would have no mitigating value: defendant's education while incomplete was not altogether lacking and would not excuse or mitigate the vicious crimes committed; his low IQ did not impair his judgment or actions; he was not an abused child and this fact cannot serve to mitigate his conduct. **Finally, the victim's background cannot be used to mitigate the sentence to be imposed and warranted under these facts.**

We agree that the potential mitigating evidence presented in this case does not provide a reasonable basis for the jury's recommendation. *Cf. Thompson v. State*, 553 So.2d 153 (Fla. 1989) (defendant killed friend who stole money from him, five aggravators), *cert. denied*, 495 U.S. 940, 110 S.Ct. 2194, 109 L.Ed.2d 521 (1990); *Bolender v. State*, 422 So.2d 833, 837 (Fla. 1982) (defendants killed four drug dealers, whose livelihood did 'not justify a night of robbery, torture, kidnapping, and murder'), *cert. denied*, 461 U.S. 939, 103 S.Ct. 2111, 77 L.Ed.2d 315 (1983); *White v. State*, 403 So.2d 331 (Fla.1981) (execution-style killing of six victims during a residential robbery), *cert. denied*, 463 U.S. 1229, 103 S.Ct. 3571, 77 L.Ed.2d 1412 (1983). **As with Coleman, any sentence other than death for Robinson would be disproportionate.** See *Bolender* (four victims); Correll (four victims); *Ferguson v. State*, 474 So.2d 208 (Fla. 1985) (six victims); *Francois v. State*, 407 So.2d 885 (Fla.1981) (six victims), *cert. denied*, 458 U.S. 1122, 102 S.Ct. 3511, 73 L.Ed.2d 1384 (1982). **Striking one of the aggravators does not alter this conclusion because there is no reasonable likelihood that the trial court would conclude that the mitigating evidence outweighed the four valid aggravators. Any error, therefore, was harmless.** *Holton v. State*, 573 So.2d 284 (Fla. 1990), *cert. denied*, 500 U.S. 960, 111

S.Ct. 2275, 114 L.Ed.2d 726 (1991); *Bassett v. State*, 449 So.2d 803 (Fla.1984).

Robinson, 610 So.2d at 1291.[9]

Thus, this Court's direct-appeal decision rejected claims that the trial court should have considered the drug-entangled character of some of the victims and did conduct a harmless error analysis. Therefore, on direct appeal this Court rejected the foundation for an Eighth Amendment claim in the certiorari petition, and CLAIM I is procedurally barred by Robinson, 610 So.2d at 1291, which establishes the law of this case. As such, this claim is an improper attempt to obtain a re-review. See Rutherford, 774 So.2d at 645 (citing Routly, 502 So.2d at 903, Steinhorst, 477 So.2d at 540, and Grossman, 708 So.2d at 252); Williamson, 651 So.2d at 86 (quoting White, 511 So.2d at 555); Valle, 837 at 908 (citing Mills, 603 So.2d at 486).

Rodriguez v. State, 2010 WL 1791139, *16 (Fla. 2010), recently held:

> As to the last claim, that this Court performed an improper harmless error analysis on direct appeal, this claim is an improper attempt to relitigate a claim we have already rejected. *See*, *e.g.*, *Taylor v. State*, 3 So.3d 986, 1000 (Fla. 2009) (holding that a petitioner 'cannot relitigate the merits of an issue through a habeas petition or use an ineffective assistance claim to argue the merits of claims that either were or should have been raised below').

---

[9] To the degree that Robinson may claim that the direct-appeal did not present the precise arguments that the certiorari petition presented, the claim is still improper as a contention that the direct-appeal brief could have done a better job. Embellishing a claim is not a proper ground for habeas relief here. See Lowe, 2 So.3d at 42 (citing Spencer, 842 So.2d 52; Thompson, 759 So.2d at 657 n.6 (quoting Routly, 502 So.2d at 903, quoting Steinhorst, 477 So.2d at 540).

Jones v. Moore, 794 So.2d 579, 583 n.5 & n.6 and accompanying text (Fla. 2001), rejected habeas claims that "(5) this Court applied the incorrect standard when reviewing Jones's mitigation" and "(7) this Court erred by applying an incorrect harmless error review after striking an aggravator." Jones held "issues five and seven to be procedurally barred because these issues were adversely decided against Jones on direct appeal." See also Thompson v. State, 759 So.2d 650, 656 n.5, 657 n.6 (Fla. 2000)(habeas claims included "(3) this Court conducted an improper harmless error analysis during direct appeal"; "Because appellate counsel actually raised these claims, we deny Thompson's habeas claims …, which included claims that appellate counsel was ineffective for failing to raise these issues").

In sum, this Court has already rejected the claims providing the arguable foundation for the certiorari petition, procedurally barring CLAIM I's attempted re-litigation. For this reason alone, CLAIM I fails. However, if all of the foregoing reasons for denying CLAIM I are rejected, it still fails because of its failure to demonstrate Strickland deficiency and Strickland prejudice, as discussed in the next section.

D. Application of IAC Principles: The failure to meet Strickland's burdens of demonstrating deficiency and prejudice.

A "short answer" to the question of whether CLAIM I meets its burden of demonstrating the Strickland deficiency and Strickland prejudice prongs is that CLAIM I contains no developed argument attempting to meet them. As such, CLAIM I should be rejected. See Bradley v. State, 33 So.3d 664, 685

(Fla. 2010)(state habeas petition; "… Bradley fails to set forth any argument explaining why these records were allegedly 'illegally obtained' or how their admission violated his rights"); Sexton v. State, 997 So.2d 1073, 1086 (Fla. 2008)("Sexton has chosen not to present this Court with specific arguments explaining how, in each instance, counsel was ineffective or what prejudice flows from the deficiency. Because Sexton does not provide in the initial brief 'an explanation why summary denial was inappropriate or what factual determination was required on each claim so as to necessitate an evidentiary hearing,' his conclusory argument is insufficient to preserve his claim"); Doorbal v. State, 983 So.2d 464, 482-483, 485 (Fla. 2008)("the purpose of an appellate brief is to present arguments in support of the points on appeal"; "general, conclusory argument is insufficient to preserve the issues raised in the 3.851 motion … and, therefore, this claim is waived ***"); Bryant v. State, 901 So.2d 810, 827-28 (Fla. 2005)(rejecting state habeas petition alleging IAC claim concerning appellate counsel: "cursory argument is insufficient to preserve the issue for consideration"); Simmons v. State, 934 So.2d 1100, 1111 n.12 (Fla. 2006)("Simmons' claim that the prosecutor made improper remarks concerning the mtDNA evidence on Simmons' car seat is waived because Simmons' counsel did not properly brief this issue for appeal"); Pagan v. State, 830 So.2d 792, 811 (Fla. 2002)("The rest of the argument is devoted to a simple recitation of instances where a motion for mistrial was made; no substantive argument accompanies these recitations. Therefore, as with Pagan's argument concerning the motion for a new trial, the lack of

specificity precludes effective appellate review. Pagan is not entitled to relief based on this nonspecific claim"); U.S. v. Wiggins, 104 F.3d 174, 177 n. 2 (8th Cir. 1997) ("passing reference to this procedure as erroneous," but "failed to argue this point or cite any law in support of that contention"; "Failure to specify error or provide citations in support of an argument constitutes waiver, ... so we decline to reach the propriety of the district court's actions in this regard").[10]

Further, a bald conclusion that a non-frivolous certiorari petition was eventually filed (Pet 8) "in good faith" (Pet 9) does not address Strickland's mandatory prongs. See Valle, 837 So.2d at 908 ("effective appellate counsel need not raise every conceivable nonfrivolous issue")(citing Jones, 463 U.S. 745, 751-53 (appellate counsel not required to argue all nonfrivolous issues, even at request of client) and Provenzano, 561 So.2d at 549 (noting that "it is well established that counsel need not raise every nonfrivolous issue revealed by the record"); Farina, 937 So.2d at 634 ("some possibility of success" and a nonfrivolusness do not necessarily rise to Strickland's standards).

Although CLAIM I is procedurally barred as seeking re-review of issues this Court has already rejected and as law of the case and is facially deficient, Respondent addresses Strickland's prongs further.

---

[10] A reply is not a proper vehicle for providing a prima facie basis for a claim. See, e.g., Jones v. State, 966 So.2d 319, 330 (Fla. 2007)("In his reply brief, Jones raises for the first time a claim that ... the trial court abused its discretion by ... "; "we need not address it").

A necessary, but not sufficient, condition for CLAIM I to prevail is that specific federal claims that counsel failed to argue to the United States Supreme Court were of such an obvious magnitude that (a) the strong presumption attached to counsel's performance is overcome because any reasonable appellate attorney would have made them and (b) they had a reasonable probability of prevailing. See discussion of Strickland burdens in section B supra.

Applying the Petition's burden of demonstrating the two Strickland prongs, it must demonstrate that the United States Supreme Court's denial of the belated certiorari petition at Robinson v. Florida, 510 U.S. 1170 (1994), was due to the belatedness of the petition that was eventually filed. Robinson may argue that he cannot control whether the United States Supreme Court provides reasoning for a denial of certiorari; however, such an argument overlooks that the counsel eventually filing the certiorari petition apparently failed to file a motion for rehearing under United States Supreme Court Rule 44 (1993), requesting reasoning for the denial. Moreover, if untimeliness had been dispositive of the certiorari petition, United States Supreme Court Rule 13.3 (1993) required the clerk to "refuse to receive any petition for writ of certiorari which is jurisdictionally out of time," which, given the decision reported at 510 U.S. 1170, apparently did not occur here. See also Rule 39.3 (1993)("While making due allowance for any case presented under this Rule by a person appearing pro se, the Clerk will not file any document if it does not comply with the substance of these Rules or is jurisdictionally out of time"). Therefore,

contrary to the instant Petition's affirmative burdens, there are indicia that the United States Supreme Court rejected the certiorari petition on its merits. Further, these considerations buttress the principle, argued infra, that this Court should not engage in review of the United States Supreme Court review of a certiorari petition.

Moreover, if the merits of the certiorari petition (at Pet-App E) are examined, they had none that merited United States Supreme Court review. The Petition's first issue, concerning the victims' character, presented no case law that demonstrated that this Court's direct-appeal opinion conflicted with any United States Supreme Court precedent, triggered review through a conflict among the United States Courts of Appeal, or otherwise decided an "important question of federal law," See United States Supreme Court Rule 10 (1993). Indeed, the certiorari petition (Pet-App E) was, on its face, meritless. It cited (Pet-App E p. 8) to two cases: Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 872 (1982), and Hitchcock v. Dugger, 481 U.S. 393, 397, 107 S.Ct. 1821, 1823-24 (1987); neither of these cases apply here.

In Eddings, the defendant "presented substantial evidence at the hearing of his troubled youth," 455 U.S. at 107, but the trial judge "would not consider in mitigation the circumstances of Eddings' unhappy upbringing and emotional disturbance," 455 U.S. at 109. For example, the Eddings Court wrote, 455 U.S. at 115:

> Nor do we doubt that the evidence Eddings offered was relevant mitigating evidence. Eddings was a youth of 16 years at the time of the murder. Evidence of a difficult family history and of emotional disturbance is typically introduced by defendants in mitigation. See

> *McGautha v. California*, 402 U.S. 183, 187-188, 193, 91 S.Ct. 1454, 1457, 1460, 28 L.Ed.2d 711 (1971). In some cases, such evidence properly may be given little weight. But when the defendant was 16 years old at the time of the offense there can be no doubt that evidence of a turbulent family history, of beatings by a harsh father, and of severe emotional disturbance is particularly relevant.

Here, in contrast, Robinson wanted the trial court to weigh, as mitigation, evidence that was irrelevant to **Robinson's** culpability, that is, evidence that some of the victim's were associated with drugs and drug money, which was not a feature of Robinson's youth or psychological composition and which did not make Robinson's conduct less culpable. See also, e.g., Eaglin v. State, 19 So.3d 935, 944 (Fla. 2009)("any negligence on the part of the prison does not reduce the moral culpability of Eaglin for the murders of Lathrem and Fuston. Eaglin has presented no case law recognizing third-party negligence as a factor in lessening the fault of a defendant. Thus, we conclude that the trial court did not err in rejecting the various security, systems, and supervision failures at the prison as nonstatutory mitigation"); Farina v. State, 937 So.2d 612, 619 (Fla. 2006)("As with all evidence, however, mitigating evidence must meet a threshold of relevance"); Bolender v. State, 422 So. 2d 833, 837 (Fla. 1982)("That the victims were armed cocaine dealers does not justify a night of robbery, torture, kidnapping, and murder. Two of the victims were unarmed and present at the Macker residence because of a previous agreement with Bolender").

Likewise, in Hitchcock, the jury was told not to consider only statutory mitigation evidence, thereby excluding from consideration evidence of **the defendant/petitioner** --

> inhaling gasoline fumes from automobile gas tanks; that he had once passed out after doing so; that thereafter his mind tended to wander; that petitioner had been one of seven children in a poor family that earned its living by picking cotton; that his father had died of cancer; and that petitioner had been a fond and affectionate uncle to the children of one of his brothers ….

In sum, CLAIM I, even when one examines the underlying matter of decedents' character in the certiorari petition, still fails to show a federal issue of sufficient magnitude that any reasonable attorney would have sought certiorari on it or that could have made any difference in the outcome. Indeed, this issue in the certiorari petition that was filed was, and is, meritless.

The other issue in the certiorari petition, an allegation that this Court failed to conduct a harmless error analysis, was, and is, also meritless and certainly not of sufficient magnitude to satisfy either of Strickland's prongs. The United States Supreme Court has held that when this Court considers the correct aggravators and mitigators, under state law, and conducts a proportionality review, the federal Constitution is satisfied:

> On direct appeal to the Florida Supreme Court, the court stated that 'comparing the aggravating and mitigating circumstances with those shown in other capital cases and weighing the evidence in the case sub judice, our judgment is that death is the proper sentence.' *Goode v. State,* 365 So.2d 381, 384-85 (1978). Whatever may have been true of the sentencing judge, there is no claim that in conducting its independent reweighing of the aggravating and mitigating circumstances the Florida Supreme Court considered [the improper aggravator of] Goode's future dangerousness. Consequently, there is no sound basis for concluding that the procedures followed by the State produced an arbitrary or freakish sentence forbidden by the Eighth Amendment.

Wainwright v. Goode, 464 U.S. 78, 86-87, 104 S.Ct. 378, 383 (1983)("Court of Appeals … erred in reversing the district court's dismissal of Goode's

habeas petition"). Here, as block-quoted above, after striking an aggravator, this Court re-weighed the aggravators and mitigators and upheld the trial judge's jury override as well as the death sentences proportionality, thereby satisfying the federal constitution.

Accordingly, Bolender v. Singletary, 16 F.3d 1547, 1568-69 (11th Cir. 1994), distinguished Sochor v. Florida, 504 U.S. 527, 112 S.Ct. 2114, 119 L.Ed.2d 326 (1992), discussed Clemons v. Mississippi, 494 U.S. 738, 110 S.Ct. 1441, 108 L.Ed.2d 725 (1990)(approved appellate court's proportionality review), reasoned, and held:

> But the opinion in Bolender's case on direct appeal, unlike the decision in *Sochor,* does indicate that the Florida Supreme Court reweighed the aggravating and mitigating circumstances in the manner contemplated by *Clemons.* First, the court determined that '[t]he disparity between Bolender's death sentences and Macker's twelve concurrent life sentences is supported by the facts.' *Bolender I,* 422 So.2d at 837 [Bolender v. State, 422 So.2d 833 (Fla. 1982)]. Having evaluated the only aspect of the case that was argued as mitigation, the court then found that, '[b]ased on the evidence and testimony at trial, we agree with the trial court that virtually no reasonable person could differ on the sentence.' *Id.* Finally, the court concluded by comparing the aggravating and mitigating circumstances proved and finding that, on the record before the court, '[i]n the absence of any mitigating circumstance disapproval of two aggravating factors does not require reversal of the death sentence.' *Id.* at 838. Accordingly, the Florida Supreme Court conducted the proper form of review after it invalidated the use of two aggravating circumstances and concluded that the balance of the aggravating and mitigating factors clearly justified the imposition of the death penalty; it did not err in declining to remand the case for resentencing.

Further, this Court's reliance upon the trial court's findings provided an independent basis for rejecting the issue. Compare Parker v. Dugger, 498 U.S. 308, 321, 322-23, 111 S.Ct. 731, 740 (1991)("The Florida Supreme Court affirmed Parker's death sentence neither based on a review of the individual record in this case nor in reliance on the trial judge's

findings based on that record, but in reliance on some other nonexistent findings"; "remand with instructions to return the case to the District Court to enter an order directing the State of Florida to initiate appropriate proceedings in state court so that Parker's death sentence may be reconsidered in light of the entire record of his trial and sentencing hearing and the trial judge's findings").

Moreover, this Court's direct appeal opinion essentially resolved Strickland's prejudice prong when it concluded that aggravators of this multi-felonied quadruple murder, rape, and attempted murder render the death sentence proportional. See also, e.g., Coleman v. State, 610 So.2d 1283, 1285 (Fla. 1992)("eyewitness, Merrell, testified that Coleman and Robinson slashed and shot the victims and played the major roles in these crimes" at the crime scene).

E. U.S. v. Cronic, 466 U.S. 648, 104 S.Ct. 2039 (1984), is inapplicable.

The Petition (Pet 10-11) summarily attempts to equate Ms. Keene's decision not to initiate certiorari here with a total failure of counsel in Cronic to subject the prosecution's case **at trial** to adversary testing and to thereby attempt to escape its burden to demonstrate Strickland prejudice. The Petition is incorrect. For example, Cronic, 466 U.S. at 658-59 (footnote omitted), reasoned:

> The presumption that counsel's assistance is essential requires us to conclude that a **trial** is unfair if the accused is denied counsel at a **critical stage of his trial**. Similarly, if counsel **entirely fails to subject the prosecution's case to meaningful adversarial testing**, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable.

In such a situation, "[n]o specific showing of prejudice is required," Id. Accordingly, Chavez v. State, 12 So.3d 199, 212 (Fla. 2009), explained:

> The *Cronic* standard is reserved for situations where the assistance of counsel has been denied entirely or withheld during a critical stage of the proceeding such that the 'likelihood that the verdict is unreliable is so high that a case-by-case inquiry is unnecessary.' *Mickens*, 535 U.S. at 166, 122 S.Ct. 1237 [Mickens v. Taylor, 535 U.S. 162, 122 S.Ct. 1237, 152 L.Ed.2d 291 (2002)]. This presumption functions to protect the **right of an accused to a fair trial** because the failure to receive such assistance jeopardizes the functioning of the adversarial system as a whole.

Indeed, this Court has properly concluded that, even at trial, the application of Cronic is very limited. See, e.g., Stein v. State, 995 So.2d 329, 336 (Fla. 2008)(rejecting Cronic's application to trial IAC claim; "United States Supreme Court has held that the proper standard to be applied in cases involving counsel's concession of guilt is the two-pronged test outlined in *Strickland")(*citing Florida v. Nixon*,* 543 U.S. 175, 178, 125 S.Ct. 551, 160 L.Ed.2d 565 (2004) and Harvey v. State*,* 946 So.2d 937, 940, 942 (Fla. 2006)); Chavez, 12 So.3d at 211-12 ("allegation that lead counsel's strategy created an absolute failure of the adversarial system does not qualify under the *Cronic* exception to *Strickland*").

Here, as in Bell v. Cone, 535 U.S. 685, 697, 122 S.Ct. 1843, 1851 (2002)(aspects of penalty phase), the defendant's "argument is not that his counsel failed to oppose the prosecution throughout the sentencing proceeding as a whole, but that his counsel failed to do so at specific points." Here, not only is CLAIM I contesting the sentencing at a "specific point[]," but it is contesting it by attacking a counsel's representation

after the trial was completed and **after the direct appeal in this Court was completed**. Cronic does not apply.

Moreover, unlike a trial situation, the contested counsel performance here concerns a **review that is not only entirely discretionary** but also is **very seldom exercised** even when federal rights are actually at stake, unlike here.

Since Strickland's prejudice prong applies to a claim that "guilt phase counsel was ineffective for failing to require [Defendant's] presence at … specific pretrial conferences," Kormondy v. State, 983 So.2d 418, 429 (Fla. 2007), then it certainly applies to certiorari as well as counsel's postconviction letters here, discussed next.

F. The Petition's self-serving, false, and irrelevant inferences: Cronic remains inapplicable and conflict-of-interest principles do not assist CLAIM I.

The Petition contends that Cronic (Pet 10-11) and conflict-of-interest (Pet 11) principles should apply to by-pass Strickland's prejudice prong because Ms. Keene's letters to CCR and to Robinson contradict each other. However, they are not mutually contradictory, and, in any event, as Kormondy, 983 So.2d at 429, suggests, they do not trigger Cronic or any conflict-of-interest principles.

The Petition relies upon a September 24, 1992, letter to CCR in which Ms. Keene indicated that she did "not feel qualified to file" a certiorari petition in the United States Supreme Court and that she is "not a member of that of the United States Supreme Court." (Pet-App D) The Petition (Pet 8-10) then self-servingly and unjustifiably assumes that Ms. Keene was

being deceptive when she wrote a November 3, 1992, letter to Robinson indicating that there no is "additional relief available." As discussed above, such an evaluation of a certiorari petition was actually accurate: The issues presented in a certiorari petition that was eventually filed by another attorney were meritless. The letters, or any other aspect of the attorney-client relationship at the level of United States Supreme Court certiorari, do not trigger Cronic. See Cronic, 466 U.S. at 657 n.21 ("the appropriate inquiry focuses on the adversarial process, not on the accused's relationship with his lawyer as such"); Fla.R.Crim.P. 3.851(c)(3) ("Prisoner's Presence Not Required"); Provenzano v. Dugger, 561 So.2d 541, 548 (Fla. 1990)("Provenzano could not have made a meaningful contribution to counsel's legal arguments on these occasions. Thus, appellate counsel cannot be considered ineffective for failing to argue a point which would have had little chance of success before this Court"); Hooks v. State, 253 So.2d 424, 427 (Fla. 1971)("An appeal is limited to a consideration of the record of the lower court proceeding, and there is no need for further investigation or further consultation"; showing of prejudice required).

Moreover, Ms. Keene's November 3, 1992, letter to Robinson indicated that **she and trial counsel, Barry Beroset**,[11] "have **both** researched and do not find any additional relief available." (Pet-App D) There has been no

[11] Robinson, 610 So.2d at 1289, reflects that Laura Keene represented Robinson in direct-appeal proceedings before this Court and that, at the time, she was partnered with Robinson's trial counsel, Barry Beroset: "Laura E. Keene of Beroset & Keene, Pensacola, for appellant." (See also, e.g., R/XIV 2534)

allegation, bald or otherwise, that Mr. Beroset was unqualified to review Robinson's case to determine if there was a certiorari-worthy claim; further, there has been no allegation that he or Ms. Keene suggested anything to the contrary to anyone concerning Mr. Beroset's qualifications.

Accordingly, on August 26, 1992, when Ms. Keene first wrote to CCR about a possible certiorari petition, she simply indicated that "[a]t this time it is not my intention to file a petition for writ of certiorari." She followed up with the her September 24th letter in response to CCR's September 17, 1992, letter that repeated CCR's June 28th request that she file a certiorari petition **for delay** in order to afford CCR more time to file its state postconviction motion. The CCR letters do not focus on any arguable merit to any certiorari claims.

Therefore, any suggestion that Ms. Keene's and Mr. Beroset's evaluation of potential certiorari claims rose to the level of a total failure of adversary-trial-testing requisite to invoke Cronic is groundless. No adversary testing, at a Cronic level or, for that matter, at any level, was compromised through a refusal to pursue groundless claims for the sake of delay or through one attorney seeking the assistance of another attorney, especially an attorney already extremely familiar with the case.

The Petition summarily, without any developed argument, without any discussion of any legal authority, and even without any citations to authority, also tries to invoke an unspecified conflict-of-interest standard. As such, any such argument is waived, and Respondent objects to any attempt to remedy the fatal deficiency in a Reply. See Jones v. State,

966 So.2d 319, 330 (Fla. 2007) ("In his reply brief, Jones raises for the first time a claim that ... the trial court abused its discretion by ... "; "we need not address it"); Bradley, 33 So.3d at 685 (state habeas petition; "… Bradley fails to set forth any argument explaining why these records were allegedly 'illegally obtained' or how their admission violated his rights"); Sexton, 997 So.2d at 1086 ("Sexton has chosen not to present this Court with specific arguments explaining how, in each instance, counsel was ineffective or what prejudice flows from the deficiency … conclusory argument is insufficient to preserve his claim"); Doorbal, 983 So.2d at 482-483, 485 ("the purpose of an appellate brief is to present arguments in support of the points on appeal"; "general, conclusory argument is insufficient to preserve the issues raised in the 3.851 motion … and, therefore, this claim is waived ***"); Bryant, 901 So.2d at 827-28 (rejecting state habeas petition alleging IAC claim concerning appellate counsel: "cursory argument is insufficient to preserve the issue for consideration"); Pagan, 830 So.2d at 811 ("The rest of the argument is devoted to a simple recitation of instances where a motion for mistrial was made; no substantive argument accompanies these recitations. Therefore, … the lack of specificity precludes effective appellate review. Pagan is not entitled to relief based on this nonspecific claim"); Wiggins, 104 F.3d at 177 n. 2 ("passing reference to this procedure as erroneous," but "failed to argue this point or cite any law in support of that contention"; "Failure to specify error or provide citations in support of an argument

constitutes waiver, ... so we decline to reach the propriety of the district court's actions in this regard").

Moreover, Respondent submits that the principle requiring a non-prevailing-party-below to specify and develop claims at the review-level is paramount where accusations are made against the ethics of a member of the Florida Bar and made contrary to the strong presumption attached to counsel's performance, including in capital cases.

Yet further, as discussed in the foregoing paragraphs Ms. Keene's letters did not conflict with each other, and, indeed, as discussed in Section D supra, her November 3d letter even accurately assessed the meritless nature of certiorari issues. There were no such "conflicts" on which to supposedly base a conflict of interest.

Still further, an examination of conflict-of-interest case law shows its inapplicability. Chavez v. State, 12 So.3d 199, 210-11 (Fla. 2009), rejected a postconviction claim based upon an alleged "conflict between the attorneys concerning the proper mitigation strategy as a conflict of interest that affected the adequacy of his representation." Chavez alleged that his "lead counsel [w]as a one-man threat to the adversarial system." Chavez, 12 So.3d at 212-13, reasoned and held:

> Conflict of interest generally occurs when an attorney actively represents conflicting interests, not when a defense team considers conflicting strategic approaches. *See*, *e.g.*, *Mickens*, 535 U.S. at 166-172, 122 S.Ct. 1237 (examining cases that found presumptive ineffective assistance when the defendant's attorney actively represented conflicting interests, which were *Cuyler* [Cuyler v. Sullivan, 446 U.S. 335 (1980)], *Holloway v. Arkansas*, 435 U.S. 475, 98 S.Ct. 1173, 55 L.Ed.2d 426 (1978), and *Wood v. Georgia*, 450 U.S. 261, 101 S.Ct. 1097, 67 L.Ed.2d 220 (1981)). Thus, there is no merit

> to Chavez's allegation that any alleged internal debate over strategy rose to the magnitude of per se ineffective assistance.

Here, CLAIM I's attempt to apply conflict-of-interest principle to a situation in which counsel wrote to the defendant that no "additional relief [is] available" does not remotely approach situations in which conflict of interest has been held to apply.

Thus, Nix v. Whiteside, 475 U.S. 157 (1986), reversed Whiteside v. Scurr's, 744 F.2d 1323, 1330 (8th Cir. 1984), application of the conflict-of-interest principle of Cuyler v. Sullivan, 446 U.S. 335 (1980), even though Whiteside entailed counsel's belief that the defendant's intended testimony would constitute perjury, counsel's intent to testify against the defendant at trial, and the defendant's "fundamental constitutional right to testify in his or her own behalf at trial." The United States Supreme Court explained: "This is not remotely the kind of conflict of interests dealt with in *Cuyler v. Sullivan*." 475 U.S. at 176. Here then, the discretionary and rarely granted United States Supreme Court certiorari review is more remote than Whiteside's "not remotely" akin to situations in which the conflict-of-interest principle would apply.

Indeed, even if Ms. Keene and Mr. Beroset's assessment of the non-viability of "additional relief" had been incorrect, it would not have risen to the level of conflict of interest; otherwise, the conflict-of-interest rule would gut Strickland and the presumption of correctness attached to counsel's evaluation of an aspect of the case.

Not only is a disagreement among counsel or between counsel and the defendant on the merits of a claim insufficient to trigger a judicially

cognizable conflict of interest, but also, even counsel's own self-evaluation is insufficient. Analogously, a counsel's belief that s/he was ineffective does not determine whether, as a matter of law, Strickland's prongs have been met. Meeting Strickland's rigorous tests is a matter for the courts' determination. See, e.g., Marek v. State, 14 So.3d 985, 1000 (Fla. 2009)("trial counsel's own admission that he or she was ineffective is not evidence of counsel's performance and thus fails to form the basis for an ineffective assistance of counsel claim")(citing Breedlove v. State, 692 So.2d 874, 877 n. 3 (Fla. 1997)(noting that "an attorney's own admission that he or she was ineffective is of little persuasion" in determining whether trial counsel was ineffective); Routly v. State, 590 So.2d 397, 401 n. 4 (Fla. 1991); Kelley v. State, 569 So.2d 754, 761 (Fla. 1990). Marek's discussion of counsel's self-evaluation also expressly rejected its resolution of the applicable prejudice prong: "Moreover, in this claim, Marek wholly fails to address how Moldof's opinion could possibly establish the prejudice prong of a claim of ineffective assistance of counsel."

Therefore, any self-doubting belief counsel expressed over a month prior to writing to Robinson does not trigger conflict of interest, and, of course, here she actually enlisted the assistance of another counsel in making the determination not to attempt to seek "additional relief" beyond the direct appeal and beyond her motion for rehearing in this Court.

Furthermore, the conflict-of-interest principle still requires a showing of harm to the defendant that is causally linked to the conflict.

See, e.g., Mickens, 535 U.S. at 171 ("'an actual conflict of interest' meant precisely a conflict that affected counsel's performance-as opposed to a mere theoretical division of loyalties"); Wright v. State, 857 So.2d 861, 871-72 (Fla. 2003)("defendant must demonstrate that counsel actively represented conflicting interests and that an actual conflict of interest adversely affected his lawyer's performance")(citing Hunter v. State, 817 So.2d 786, 792 (Fla. 2002)); Thompson v. State, 759 So.2d 650, 661 (Fla. 2000)(habeas; "'To prove a claim that an actual conflict of interest existed between a defendant and his counsel, the defendant must show that his counsel actively represented conflicting interests and that the conflict adversely affected counsel's performance'")(quoting Quince v. State, 732 So.2d 1059, 1063 (Fla. 1999)). Here, as discussed above, the certiorari petition had no merit, and so there has been no harm, thereby rendering conflict-of-interest principles inapplicable.

In sum, conflict of interest principles, even if not waived here, do not apply. There was no cognizable conflict, and there was no harm. CLAIM I's burden was to demonstrate both; it demonstrated neither.

G. This is not the proper forum for review of counsel's performance in certiorari proceedings in the United States Supreme Court.

The discussion returns to the topic introduced through the block quote of Moss v. Moffitt, 417 U.S. at 616-618, in Section B supra, which contended that, as a threshold matter, CLAIM I is not properly before this Court. At this juncture, Respondent elaborates. The foregoing discussions

of Strickland, Cronic, and conflict assume, arguendo, that CLAIM I is properly before this Court. It is not.

Robinson essentially asks this Court to provide another review in the United States Supreme Court by affording him another direct-appeal in this Court. Due to the nature of the federal and state judiciaries, Robinson's request is misguided.

CLAIM I does not address counsel's performance in this Court but rather in the United States Supreme Court.[12] It requests that this Court determine whether any reasonable counsel would have presented the certiorari claims he tenders (Pet-App E) and assess whether timely presenting them in about 1993 would have resulted in a reasonable probability that not only the U.S. Court would have accepted the claims but also would have granted relief. CLAIM I thereby request this Court to divine the probable exercise of a matter of accepting certiorari that is with the totally discretionary province of the United States Supreme Court; CLAIM I's request not only asks the impossible but also asks for an intrusion into the United States

---

[12] Accordingly, the control over counsel's performance in United States Supreme Court cases was and is that Court's province. See Rule 8, Rules of the Supreme Court of the United States (1993)(the Court may "take any appropriate disciplinary action against any attorney who is admitted to practice before it for conduct unbecoming a member of the Bar or for failure to comply with these Rules or any Rule or order of the Court"). Robinson might respond that Rule 8 is inapplicable because Ms. Keene indicated that she was not a member of the United States Supreme Court, but such an argument would miss the point that Robinson is requesting this Court control how counsel appears in the U.S. court, regardless of what claims were presented in the 1990-1992 direct appeal and how they are presented, thereby undermining the purpose of Rule 8.

Supreme Court's exclusive province, thereby violating federal supremacy and federal-state comity.

While this Court's decision in Robinson addressed the decedent's character and essentially addressed harmlessness, those claims were not argued in the Initial Brief to this Court as federal constitutional claims. (See Initial Brief, Case No. 74,945, at pp. 9, 22-24). The Petition does not allege IAC in this Court but rather in the United States Supreme Court. In essence, therefore, the Petition requests that this Court improperly intrude into the province of the United States Supreme Court by requesting that this Court provide another "ticket" to the federal court so that the thus-far unperfected federal claim can be perfected almost two decades later. Respondent respectfully submits that this Court deny such a request to undermine the finality of not only this Court's review but also the United States Supreme Court's authority over its discretionary review.[13]

---

[13] Adams v. Robertson, 520 U.S. 83, 86-92, 117 S.Ct. 1028, 1029-1032 (1997), discussed at length federal-state relationships and the United States Supreme Court's general refusal to consider an issue that had not been presented precisely as such in state court. Adams explained: "Nor have petitioners met their burden of showing that the issue was properly presented to that court. When the highest state court is silent on a federal question before us, we assume that the issue was not properly presented." See also Illinois v. Gates, 462 U.S. 213, 222-24 (1983)("adhere scrupulously to the customary limitations on discretion," thereby requiring that the specific claim have been presented to the state court; Fourth Amendment argument in state court insufficient for presenting in USSC certiorari petition a "question [of] whether the exclusionary rule should be modified"; "wise exercise of the powers confided in this Court dictates that we reserve for another day the question whether the exclusionary rule should be modified"; "fact that the Illinois courts affirmatively applied the federal exclusionary rule-suppressing evidence against respondents-does

The preceding point suggests the next one. CLAIM I requests that this Court review counsel's performance in federal court and thereby provide Robinson "a new appeal de novo" in this Court. Respondent respectfully responds that such a remedy would be absurd. CLAIM I requests this Court assess the viability of certiorari claims in Pet-App E that were not fully presented to this Court in 1990-1992 so that any claim(s) whatsoever can then be presented to this Court, regardless of whether those claims bear any legal or logical relationship to the certiorari claims in Pet-App E. This would be fundamentally unfair to the State. CLAIM I takes this unfairness beyond an absurd level by asking (Pet 10) that Robinson receive the remedy now of a life sentence that would have been the ultimate remedy he could have received if he had succeeded in convincing the United States Supreme Court to accept the case and to rule with him on the merits; acceptance is an extremely rare outcome, and the merits of the tendered certiorari petition are groundless as a matter of law. CLAIM I improperly requests everything based upon claims that are essentially nothing, that is, that had far less than a requisite reasonable probability of prevailing.

Finally, but still very important, where the requested review is extremely rare and afforded in another court system (federal), the principle of finality of the original direct appeal process should control. This policy should especially apply here where about 18 years have elapsed

---

not affect our conclusion").

since this Court affirmed the convictions and sentences on direct appeal. Robinson's collateral counsel improperly requested that Ms. Keene file a certiorari petition for purposes of delaying the deadline for Robinson's state postconviction motion; Robinson should not be allowed to use CLAIM I to extensively delay proceedings by re-starting the direct appeal process.

H. Conclusion.

CLAIM I is tantamount to a motion for this Court to review its 1992 direct-appeal decision. In other words, CLAIM I is tantamount to a second motion for rehearing on this Court's 1992 direct appeal decision. Second motions for rehearing are not allowed, especially ones that intrude into an exclusively federal province using claims that have no merit. Compare Sims v. State, 998 So.2d 494, 497-98 (Fla. 2008)(review exclusively within state courts of a matter that had merit).

CLAIM II: WHETHER THIS COURT ERRED IN REJECTING ROBISNOSN'S PRO SE PLEADING FILED IN THIS COURT. (PET 12, RESTATED)

CLAIM II, in one-half page, concludes that this Court should have afforded Robinson a "*Nelson*" hearing when he expressed dissatisfaction with his appellate counsel. As an undeveloped argument with no citation to, or discussion of authority, this claim is waived or unpreserved here. See Jones, 966 So.2d at 330; Bradley, 33 So.3d at 685 (state habeas petition; "… Bradley fails to set forth any argument explaining why these records were allegedly 'illegally obtained' or how their admission violated his rights"); Sexton, 997 So.2d at 1086 ("Sexton has chosen not to present this Court with specific arguments explaining how…"); Doorbal, 983 So.2d at 482-

483, 485 ("general, conclusory argument is insufficient to preserve the issues raised in the 3.851 motion … and, therefore, this claim is waived ***"); Bryant, 901 So.2d at 827-28 (rejecting state habeas petition alleging IAC claim concerning appellate counsel: "cursory argument is insufficient to preserve the issue for consideration"); Wiggins, 104 F.3d at 177 n. 2 ("passing reference to this procedure as erroneous," but "failed to argue this point or cite any law in support of that contention … we decline to reach the propriety of the district court's actions in this regard").

Moreover, Robinson's pro se pleading in this Court (Pet-App B) merely indicated a general distrust of appellate counsel (p. 4), a general complaint that he has more issues that he wished included in the direct appeal (pp. 5-7), and a list of postconviction-type complaints not properly included in a direct appeal and general trial issues devoid of any specificity (pp. 8-14). As such, there was no ground for further action from this Court. Simply attaching a document that spews 25 supposed issues does not actually raise any issue here. See Cooper v. State, 856 So.2d 969, 977 n.7 (Fla. 2003)("Cooper has chosen to contest the trial court's summary denial of various claims, by contending, without specific reference or supportive argument, that the 'lower court erred in its summary denial of these claims.' We find speculative, unsupported argument of this type to be improper, and deny relief based thereon"); Pagan v. State, 830 So.2d 792, 810-11 n.17 and accompanying text (Fla. 2002)(list of 16 issues raised in a motion for mistrial; "The claim as raised here has not been argued with

specificity"; "'Merely making reference to arguments below without further elucidation does not suffice to preserve issues, and these claims are deemed to have been waived'")(quoting Duest v. Dugger, 555 So.2d 849, 852 (Fla. 1990)(referring to arguments presented in his motion for postconviction relief); Roberts v. State, 568 So.2d 1255, 1260 (Fla. 1990)("Other alleged instances of ineffectiveness which Roberts attempts to raise by merely referring to arguments presented in his motion for postconviction relief are deemed waived").

If CLAIM II is not waived, it should still be rejected because this Court's prior decision on the same matter is law of the case. See, e.g., Valle, 837 at 908 (citing Mills v. State, 603 So.2d 482, 486 (Fla. 1992)). See also Parker v. State, 873 So. 2d 270, 279 (Fla. 2004)(discussion of law of the case and res judicata).

Robinson now has collateral counsel, and any **specific** complaints that he has concerning appellate counsel's effectiveness should have been brought through **specific** issues in this habeas and developed here with discussion and citation to authority.

CLAIM II is insufficient for any relief.

CLAIM III: WHETHER ROBINSON IS ENTITLED TO ANY RELIEF BECAUSE HE MAY HAVE BEEN CONVICTED OF ATTEMPTED FELONY MURDER. (PET 12-14, RESTATED)

This is a direct-appeal type of claim, thereby procedurally barring it here. See Lopez v. Singletary, 634 So.2d 1054, 1055 (Fla. 1993)("(8) the court applied an improper automatic aggravator" barred).

Even if the claim were not procedurally barred, it would still have no merit, even if construed as "ineffective assistance of appellate counsel

claim," as this Court did in Williamson v. State, 994 So.2d 1000, 1015 (Fla. 2008).

State v. Gray, 654 So.2d 552 (Fla. **1995**), is not retroactive; therefore, it does not apply here, where Robinson was tried in 1989 (see, e.g., R/X) and where this Court affirmed the convictions in **1992**. See State v. Woodley, 695 So.2d 297, 298 (Fla. 1997); State v. Wilson, 680 So.2d 411 (Fla. 1996); Van Poyck v. Singletary, 715 So.2d 930, 935 (Fla. 1998)("Because the crime of attempted felony murder was a valid offense when Van Poyck's convictions became final, he is not entitled to the relief requested"). Thus, Williamson, 994 So.2d at 1016, reiterated that Gray was prospective, rather than retroactive: "The Court held that the *Gray* decision 'must be applied to all cases pending on direct review or not yet final.'"

Williamson application of Gray there as an IAC/appellate counsel claim does not apply here because there, unlike here, Gray was released while the Williamson appeal was pending. See 994 So.2d at 1016 ("While Williamson's case was on appeal before this Court …"). Counsel is not deficient for failing to anticipate a change in the law. See, e.g., State v. Lewis, 838 So. 2d 1102, 1122 (Fla. 2002)("appellate counsel is not considered ineffective for failing to anticipate a change in law")(citing Nelms v. State, 596 So. 2d 441, 442 (Fla. 1992)("Defense counsel cannot be held ineffective for failing to anticipate the change in the law."); see also Lockhart v. Fretwell, 506 U.S. 364, 113 S.Ct. 838, 841 (1993)(Strickland's

prohibition against evaluating trial defense counsel's performance against hindsight is a protection for counsel).

Accordingly, Hannon v. State, 941 So.2d 1109, 1149 (Fla. 2006), rejected claim based on a general verdict form and Delgado v. State, 776 So.2d 233 (Fla. 2000), because Delgado had been decided in 2000 and "Hannon's convictions and sentences were affirmed on direct appeal on June 2, 1994, and therefore had become final prior to the release of *Delgado*," which was not retroactive.

Moreover, contrary to CLAIM III's bald conclusion that Robinson's death sentences rested in part on the conviction of attempted murder, the trial court relied on the following aggravators, which this Court upheld on direct appeal:

- Prior violent felony through these quadruple murders;
- Committed during a robbery, sexual battery, burglary, and kidnapping;
- Heinous, atrocious, or cruel, as the "four victims were stripped naked, bound face down, slashed with knives and sharp objects over the length of their torsoes, repeatedly stabbed and finally executed"; "[a]t least one victim pleaded for her life to be spared but she was slain nevertheless"; and
- Cold, calculated, and premeditated, as "[t]hese execution-style murders, carried out in the manner already described, were clearly calculated acts done with premeditation."

(R/XIV 2584-85) Attempted murder was not part of the trial court's rationale for the death penalty or this Court's rationale for upholding it, and even if it were, the remaining aggravation, including three other murders, multiple other felonies, HAC, and CCP would have been so weighty

that striking one felony among multiple counts of robbery, sexual battery, burglary, and kidnapping would have made no difference whatsoever.

For each of the above reasons, the conviction of attempted murder should not be struck, and Robinson is entitled no relief from the death sentences.

CLAIM IV: WHETHER FEDERAL LAW PREEMPTS FLORIDA'S STATUTORY PROHIBITION ON CCRC FROM CHALLENGING A LETHAL INJECTION METHOD THROUGH A SECTION 1983 ACTION. (PET 14-20, RESTATED)

CLAIM IV "argues that Florida's legislative scheme … is preempted by federal statute to the extent that it prohibits CCRC (and registry)[14] from challenging the State's intended method of execution by way of a 42 USC §1983 action …."

Darling v. State, 2010 WL 2606029, *8 (Fla. 2010), recently held:

> Today, we hold that section 1983 actions that challenge Florida's intended method of execution as set forth in the judgment and as part of the sentence seeking injunctive relief are, like habeas petitions, quasi-criminal in nature and are therefore not included under section 27.7001's restriction on civil litigation.

The four Justices in the majority continued, 2010 WL 2606029, at *9 (citing Section 3599(a)(2) of title 18, United States Code):

> Our decision today is also compelled by federal law because representation for method-of-execution challenges pursuant to section 1983 is mandatory.

Respondent respectfully submits here that Darling's majority was incorrect. (A Motion for Rehearing is being filed in Darling.)

---

[14] Respondent's arguments concerning CCRC apply with equal force to state-funded registry counsel.

For the reasons that the three dissenting justices (Chief Justice Canady and Justices Quince and Polston) provided in Darling, the majority's decision incorrectly interprets pertinent Florida and federal statutes. As the dissenting justices explained, "Contrary to the majority's conclusion that federal law compels the interpretation of state law adopted by the majority, the federal law in question does nothing to compel the State of Florida to do anything." 2010 WL 2606029 at *11. The three dissenting Justices continued, 2010 WL 2606029 at *14-16, by explicitly addressing matters pertaining to preemption, which Respondent adopts and excerpts as argument here:

> **II. FEDERAL LAW IMPOSES NO OBLIGATION ON CCRC TO LITIGATE SECTION 1983 METHOD-OF-EXECUTION CLAIMS**
>
> The majority attempts to buttress its view concerning the need to recede from Kenny by asserting that we are 'compelled by federal law' to permit CCRC representation in section 1983 actions raising method-of-execution challenges. Majority op. at 19. The majority reasons that section 1983 method-of-execution challenges are covered by section 3599, of title 18, United States Code (2006), and that section 3599 requires CCRC counsel appointed under its provisions to represent their clients in any proceeding covered by section 3599. This line of reasoning is flawed in two fundamental respects.
>
> First, despite the majority's assertion that it is 'abundantly clear' that section 1983 method-of-execution challenges are covered by section 3599, majority op. at 19, the majority cites no authority which actually supports that assertion. The availability of counsel under section 3599 was not at issue in either the United States Supreme Court decisions - *Hill* [Hill v. McDonough, 547 U.S. 573, 126 S.Ct. 2096, 165 L.Ed.2d 44 (2006)] and *Nelson* [Nelson v. Campbell, 541 U.S. 637, 643, 124 S.Ct. 2117, 158 L.Ed.2d 924 (2004)] - or the Eleventh Circuit decision - *Tompkins v. Secretary, Department of Corrections*, 557 F.3d 1257 (11th Cir.), *cert. denied*, --- U.S. ----, 129 S.Ct. 1305, 173 L.Ed.2d 482 (2009) - relied on by the majority as support for its assertion regarding the availability of the counsel under section 3599. ***
>
> … section 3599 … does not impose any 'mandatory' requirements on the State of Florida or the lawyers it employs through CCRC *** the

> majority reads requirements into the federal statute that are not present in the statute. To begin with, it is important to understand that the federal statute does not require that any state provide counsel for appointment under the statute. Nor does the statute provide that a lawyer appointed under its provisions is obligated to participate in all proceedings covered by the statute. On the contrary, section 3599(e) specifically provides that counsel appointed under the statute may be 'replaced by similarly qualified counsel upon the attorney's own motion.' (Emphasis added.) Nothing in the federal statute is inconsistent with Florida's statutory limitations on CCRC representation. And nothing in the federal statute indicates that Congress sought to dragoon lawyers employed by a state for purposes forbidden by the law of that state.
>
> Serious constitutional concerns would, of course, be raised by any such attempt by Congress to impress state employees into service to further the policy objectives of the Congress. *See Prinz v. United States*, 521 U.S. 898, 928, 117 S.Ct. 2365, 138 L.Ed.2d 914 (1997) ('It is an essential attribute of the States' retained sovereignty that they remain independent and autonomous within their proper sphere of authority. It is no more compatible with this independence and autonomy that their officers be "dragooned" ... into administering federal law, than it would be compatible with the independence and autonomy of the United States that its officers be impressed into service for the execution of state laws.') (citation omitted). Here, the constitutional concerns are raised not by the federal statute itself but by the majority's misreading of the federal statute.
>
> The reasoning underlying the majority's conclusion regarding the 'mandatory' nature of the federal statute necessarily has implications beyond the context of section 1983 method-of-execution claims. ***

Respondent highlights the following points that require the rejection of CLAIM IV:

- The intent of the Florida legislature in enacting Chapter 27's limitations on CCRC and thereby prohibiting CCRC from pursuing Section 1983 actions, as correctly interpreted in Henyard v. State, 992 So. 2d 120, 129 n.6 (Fla. 2008), should not, and does not, change through state court interpretation of a federal statute or federal case;
- The Petition improperly requests that this Court interpret a federal statute so that it mandates state action, but interpreting the federal statute here is exclusively a matter for the federal courts;

- Granting this claim would result in forcing the State of Florida to provide resources for litigation in federal court, thereby violating well-established federal-state comity principles, Cf. Coleman v. Thompson, 501 U.S. 722, 730, 111 S.Ct. 2546, 2554 (1991)("application of the independent and adequate state ground doctrine is grounded in concerns of comity and federalism"); 28 U.S.C.A. § 2254 (rigorous AEDPA requirements imposed, limiting federal court's intervention in state criminal cases);

- This claim would improperly require the State of Florida to staff and fund federal litigation or force state-paid employees into federal service, which violates state sovereignty, See Prinz v. United States, 521 U.S. 898, 928 (1997); alternatively, this claim would violate federal supremacy by requiring the federal government to fund a state agency based upon a state court interpretation of a federal statute;

- At issue in Harbison v. Bell, --U.S.--, 129 S.Ct. 1481, 1484, 173 L.Ed.2d 347 (2009), was the role of an attorney with the federally funded "Federal Defender Services of Eastern Tennessee," not a state funded agency like CCRC; thus, Harbison repeatedly references the federally funded nature of that agency;

- Harbison concerned clemency, not Section 1983, and therefore its holding is totally inapplicable to challenges to the method of execution;

- In contrast to the limitation in Section 27.702(1), Fla. Stat., of CCRC to participating in "collateral actions" "for the sole purpose of … challenging the judgment and sentence imposed against" a CCRC client, a Section 1983 action is an ancillary proceeding available for review of isolated and discrete matters, such as challenges to conditions of confinement and therefore beyond the scope of the plain language of Chapter 27's authorization of CCR; the plain language in Chapter 27 is entitled to federal (and this Court's) deference.

Thus, only a couple of years ago, this Court properly interpreted Chapter 27's limitations on CCR/CCRC to prohibit CCRC from pursuing Section 1983 litigation:

> … Henyard argues that this Court's decision in *State v. Kilgore*, 976 So. 2d 1066 (Fla. 2007), *petition for cert. filed*, No. 07-11177 (U.S. May 28, 2008), requires a re-reading of section 27.702 to allow CCRC to file federal petitions under section 1983. However, this claim is also meritless. While Kilgore does appear to suggest a right to prosecute collateral attacks to a sentence of death, it explicitly precludes CCRC from acting as counsel in such cases. 976 So. 2d at

> 1070 ('CCRC is not authorized to represent a death-sentenced individual in a collateral postconviction proceeding attacking the validity of a prior violent felony conviction that was used as an aggravator in support of a sentence of death.'). Nowhere does *Kilgore* suggest a per se right to counsel as Henyard argues. Accordingly, we also reject this portion of Henyard's claim.

Henyard v. State, 992 So.2d 120, 129 n.6 (Fla. 2008).

If, contrary to Henyard's correct application of Chapter 27's limits on CCRC, Congress wishes attorneys to pursue any type of litigation that is not constitutionally mandated, then **Congress should fund entities that hire attorneys as federal employees** for that purpose. Congress cannot constitutionally order Florida to fund and provide organizations for such pursuits, and federal statutes should be interpreted so that statutes are constitutional, that is, without any such requirement. Section 1983 litigation is not per se at a constitutional level, as illustrated by the federal court's order refusing to appoint counsel to pursue it in Suggs v. McDonough, Case No. 3:06cv111 (N.D. Fla. July 3, 2009)(attached to State's Motion for Rehearing in Darling).

Here, neither the United States Constitution, nor the plain language of 18 U.S.C. §3599, nor Harbison, entitles Robinson to the appointment of counsel in order to bring an independent Section 1983 civil rights lawsuit.

As Printz v. U.S., 521 U.S. 898, 918-19, 117 S.Ct. 2365, 2376-77 (1997), demonstrates, interpreting the federal statute so that it preempts state statutory limitations on a state-funded agency violates Florida's sovereignty and the Tenth Amendment and expands Congressional authority beyond its constitutional authorization:

> It is incontestible that the Constitution established a system of 'dual sovereignty.' *Gregory v. Ashcroft*, 501 U.S. 452, 457, 111 S.Ct. 2395, 2399, 115 L.Ed.2d 410 (1991); *Tafflin v. Levitt*, 493 U.S. 455, 458, 110 S.Ct. 792, 795, 107 L.Ed.2d 887 (1990). Although the States surrendered many of their powers to the new Federal Government, they retained 'a residuary and inviolable sovereignty,' The Federalist No. 39, at 245 (J. Madison). This is reflected throughout the Constitution's text, *Lane County v. Oregon*, 7 Wall. 71, 76, 19 L.Ed. 101 (1869); Texas v. White, 7 Wall. 700, 725, 19 L.Ed. 227 (1869), including (to mention only a few examples) the prohibition on any involuntary reduction or combination of a State's territory, Art. IV, § 3; the Judicial Power Clause, Art. III, § 2, and the Privileges and Immunities Clause, Art. IV, § 2, which speak of the 'Citizens' of the States; the amendment provision, Article V, which requires the votes of three-fourths of the States to amend the Constitution; and the Guarantee Clause, Art. IV, § 4, which 'presupposes the continued existence of the states and ... those means and instrumentalities which are the creation of their sovereign and reserved rights,' *Helvering v. Gerhardt*, 304 U.S. 405, 414-415, 58 S.Ct. 969, 973, 82 L.Ed. 1427 (1938). Residual state sovereignty was also implicit, of course, in the Constitution's conferral upon Congress of not all governmental powers, but only discrete, enumerated ones, Art. I, § 8, which implication was rendered express by the Tenth Amendment's assertion that '[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.'

The Petition (Pet 17-18) mentions Murray v. Giarratano, 492 U.S. 1, 109 S. Ct. 2765, 106 L. Ed. 2d 1 (1989), and Pennsylvania v. Finley, 481 U.S. 551, 107 S. Ct. 1990, 95 L. Ed. 2d 539 (1987). See also, e.g., Hartley v. State, 990 So.2d 1008, 1016 (Fla. 2008)(rejected claim that "should remand the case for new postconviction proceedings because postconviction counsel (Morrow and Malnick) failed to adequately investigate the case and to obtain a mental health expert"; "Sixth Amendment does not guarantee a right to the effective assistance of postconviction counsel")(citing Lambrix v. State, 698 So.2d 247, 248 (Fla. 1996) ("[C]laims of ineffective assistance of postconviction counsel do not present a valid basis for relief."), and Zack v. State, 911 So.2d 1190, 1203 (Fla. 2005)("Under Florida and federal

law, a defendant has no constitutional right to effective collateral counsel.")). The well-settled legal principle of Murray v. Giarratano, Pennsylvania v. Finley, and their progeny, holding no constitutional right to postconviction counsel, comports with the nature of the trial as the adversarial "main event," Wainwright v. Sykes, 433 U.S. 72, 90 (U.S. 1977)(a federal habeas case), **NOT** postconviction proceedings and **NOT** Section 1983 proceedings.

Congress's choosing to provide a federally funded employee to perform a non-main-event function, See Harbison, in no way mandates Florida to provide personnel and its funds for non-main-event functions. Instead, the Florida legislature has chosen, as it has a right to do, to prohibit state-funded and state-organized CCRC (and registry counsel) from pursuing matters ancillary to the validity of the judgment and sentence, See Hill v. McDonough, 547 U.S. 573, 580 (2006)(method of execution challenge is not a challenge to the inmate's judgment or sentence).

Section 27.702(1), Fla. Stat., is clear:

> The capital collateral regional counsel shall represent each person convicted and sentenced to death in this state for the **sole purpose** of instituting and prosecuting collateral actions challenging the legality of the judgment and sentence imposed against such person in the state courts, federal courts in this state, the United States Court of Appeals for the Eleventh Circuit, and the United States Supreme Court. The capital collateral regional counsel and the attorneys appointed pursuant to s. 27.710 shall file **only** those postconviction or collateral actions authorized by statute.

CLAIM IV would violate the plain intent of this statute prohibiting CCRC representation in federal Section 1983 actions attacking a method of execution. A federal statute should not be interpreted by this Court to

violate Florida's rights to limit the functions of its employees, especially where there is no authoritative and final federal court interpretation of the federal statute that clearly requires discarding the will of Florida citizens; federal-state comity, state sovereignty, and the Tenth Amendment of the United States Constitution require no less.

For all of the foregoing reasons, any suggestion that Harbison's discussion of the functions of a **federal** employee in any way impacts state employees, or otherwise state-funded, representation in "clemency and other related proceedings" (Pet 14) is incorrect and violative of state sovereignty and federal-state comity.

Moreover, arguendo, if this Court were to incorrectly engage in interpreting federal law and applying that state-interpreted federal law to reinterpret state statutes, then the interpretation process should also include a determination of whether Robinson is a proper party to raise this claim at all, that is, whether he has any claim that could be viably brought under Section 1983. Robinson has not tendered anything that meets this burden and therefore this claim should be rejected here.

Moreover, facially, any Section 1983 claim raised now by Robinson in federal court would be barred by the statute of limitations. Robinson has no standing to raise this claim because he clearly does not have the right to the federal litigation that he claims here. On January 14, 2000, Florida adopted lethal injection as a method of execution. See Sims v. State, 754 So.2d 657, 664 n.11 (Fla. 2000). For inmates who were sentenced to death before, the statute of limitations for filing an action under Section 1983

expired on February 13, 2004. See Henyard v. Secretary, 543 F.3d 644, 647-48 (11th Cir. 2008). Robinson was sentenced in 1989 (R/XIV 2558-66, 2582-87) and therefore any Section 1983 law suit he files now will be barred by the statute of limitations and subject to dismissal. Therefore, CLAIM IV should be rejected without reaching its merits, or more accurately, without reaching its lack of merit.

In sum, the federal statute does not, should not, and under the United States Constitution, cannot deal with the scope of CCRC's authority; accordingly, the federal statute should not be unconstitutionally stretched beyond its plain language to intrude into Florida's sovereign affairs. Indeed, here this Petitioner could not even benefit from any such unconstitutional stretch, and therefore he is not a proper person to bring this claim.

CLAIM V: IS FLORIDA'S LETHAL INJECTION CONSTITUTIONAL? (PET 20-21, RESTATED)

This Court has rejected this type of claim many times, and, for the reasons discussed in those cases, this claim should be rejected here. For example, Chavez v. State, 12 So.3d 199, 213-14 (Fla. 2009), recently reasoned and held:

> To the extent that Chavez disputes the constitutionality of Florida's current lethal-injection protocol, we have repeatedly rejected such Eighth Amendment challenges. *See Tompkins v. State*, 994 So.2d 1072, 1081 (Fla.2008), *cert. denied*, ---U.S. ----, 129 S.Ct. 1305, --- L.Ed.2d ----(2009); *Power v. State*, 992 So.2d 218, 220-21 (Fla.2008); *Sexton v. State*, 997 So.2d 1073, 1089 (Fla. 2008); *Schwab v. State*, 995 So.2d 922, 933 (Fla. 2008), *petition for cert. filed*, No. 08-5020 (U.S. June 30, 2008); *Woodel v. State*, 985 So.2d 524, 533-34 (Fla.), *cert. denied*, --- U.S. ----, 129 S.Ct. 607, 172 L.Ed.2d 465 (2008); *Lebron v. State*, 982 So.2d 649, 666 (Fla. 2008); *Schwab v. State*, 982

> So.2d 1158, 1159-60 (Fla.2008); *Lightbourne v. McCollum*, 969 So.2d 326, 350-53 (Fla.2007). Finally, with regard to reliance upon Baze, this Court recently reaffirmed that 'Florida's current lethal-injection protocol passes muster under any of the risk-based standards considered by the *Baze* [Baze v. Rees, 553 U.S. 35, 128 S.Ct. 1520 (2008)] Court.' *Ventura v. State*, 2 So.3d 194, 200 (Fla. 2009), *petition for cert. filed*, No. 08-10098 (U.S. Apr. 16, 2009). Thus, we deny this habeas claim.

Thus, the portion of Darling, WL 2606029, *2-3 (Fla. 2010), that upheld lethal injection was unanimous. See also, e.g., Schoenwetter v. State, 2010 WL 2605961, *10 (Fla. 2010).

CLAIM V (Pet 21) tacks on a conclusory IAC appellate counsel claim. It should be denied as undeveloped.

Moreover, appellate counsel could not have attacked Florida's lethal injection procedure, which was not implemented until years after the direct appeal. Further, because this claim is meritless, there can be no IAC based on a failure to raise it. See, e.g., Stewart v. State, 2010 WL 2104125, *18 (Fla. 2010)("Stewart contends that his appellate counsel was ineffective for failing to challenge on direct appeal Florida's use of lethal injection and its lethal injection protocol"; "eliminate the distorting effects of hindsight"; "Appellate counsel cannot be deemed ineffective for failing to raise a meritless argument").

CLAIM VI: WHETHER THE POSSIBILIY OF ROBINSON BEING INCOMPETENT AT THE TIME OF HIS EXECUTION IS A VIOLATION OF THE EIGHTH AMENDMENT. (PET 22, RESTATED)

At this juncture, this claim should be denied as premature. See, e.g., Nelson v. State, 2010 WL 1707218, *11 (Fla., April 29, 2010)("We also deny Nelson's competency claims because they are not ripe for review"); Anderson

v. State, 18 So.3d 501, 522 (Fla. 2009)("Anderson concedes that this claim is not ripe for review as he has not yet been found incompetent and a death warrant has not yet been signed"; "Thus, Anderson is not entitled to habeas relief on this claim"); Carroll v. State, 815 So.2d 601, 624 n.22 (Fla. 2002)("premature").

CLAIM VII: WHETHER ALLEGED MENTAL ILLNESS AT THE TIME OF THE OFFENSE PER SE BARS ROBINSON'S EXECUTION. (PET 23-25, RESTATED)

This claim (Pet 23) improperly attempts to cross-reference "[a]ll allegations regarding Petitioner's mental condition asserted elsewhere." The general impropriety of this cross-reference is exacerbated by a total failure to include any specific citations to specific facts. Indeed, it is not Respondent's duty to attempt to ferret out the facts to which a claim refers and then rebut the specifics of Respondent's guess at Petitioner's claim. As such, this portion of this claim should be disregarded and rendered waived. See, e.g., Jones, 966 So.2d at 330 (reply brief does not cure defect); Bradley, 33 So.3d at 685 (state habeas petition; "… Bradley fails to set forth any argument explaining why these records were allegedly 'illegally obtained' or how their admission violated his rights"); Sexton, 997 So.2d at 1086 ("Sexton has chosen not to present this Court with specific arguments explaining how…"); Doorbal, 983 So.2d at 482-483, 485 ("general, conclusory argument is insufficient to preserve the issues raised in the 3.851 motion … and, therefore, this claim is waived ***").

Further, as a matter of law, this Court has rejected claims that attempt to extend Atkins v. Virginia, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002), to other mental conditions, and this claim should,

therefore, be rejected here. For example, Seibert v. State, 2010 WL 2680239, *12 (Fla. July 08, 2010), reasoned and held:

> [W]ith respect to Seibert's claim that the postconviction court erred in denying his claim that he is exempt from execution because he is mentally ill, this issue has already been decided adversely to Seibert. *See Diaz v. State*, 945 So.2d 1136, 1151 (Fla. 2006) ('[N]either this Court nor the Supreme Court has recognized mental illness as a per se bar to execution[']).

Further, as Seibert, at *12, also rejected reliance upon ABA discussions, the Petition's vague references to ABA "task force" and related organizations' work (See Pet 23-25) should be rejected here:

> {W]ith respect to Seibert's claim that the postconviction court erred in denying his claim that the report of the American Bar Association entitled Evaluating Fairness and Accuracy in the State Death Penalty System: The Florida Death Penalty Assessment Report (the ABA Report), published September 17, 2006, shows that the death penalty is unconstitutional in Florida, this issue has already been decided adversely to Seibert. *See Rolling v. State*, 944 So.2d 176, 181 (Fla. 2006) ('[N]othing in the report would cause this Court to recede from its past decisions upholding the facial constitutionality of the death penalty.').

In this venue, the ABA does not control constitutional jurisprudence; this Court does, and its function should not be ceded to the ABA or its associates. See also Henyard v. State, 992 So.2d 120, 130-31 (Fla. 2008)(applied procedural bars; collecting authorities contrary to the merits of the claim)(citing Diaz, 945 So.2d at 1151 (rejecting a claim that ABA Resolution 122A supports the proposition that personality disorders are akin to being mentally retarded) and Connor v. State, 979 So.2d 852, 867 (Fla.2007) (holding that mental conditions that are not insanity or mental retardation are not constitutional bars to execution)). Otherwise, constitutional jurisprudence would be reduced to the parties marshalling organizations that agree with their respective viewpoints.

Moreover, arguendo, even if this claim were viable as a matter of law, this Court is not the proper forum for determining the facts on which this claim alleges it is based. As such, this claim should have been raised in the trial court years ago. Further, there are already numerous indicia and findings in the record demonstrating that this claim is factually baseless:

- Robinson's leadership role in the events of these quadruple murders and the rape and attempted murder of Amanda Merrell (See references to Robinson as "Red" at R/VII 1294-1305); accordingly the trial court's finding that Robinson was "clearly the ringleader and the person who directed the other participants" (R/XIV 2586);
- the responsive, detailed, and articulate nature of Robinson's trial testimony negating any suggestion that he suffered from any serious mental deficiency (See R/IX 1554-90);
- the trial court's postconviction finding that alleged mental deficiencies were contradicted by Robinson's alibi defense at trial (PC/XIV 2527-29);
- the trial court's rejection of mental mitigators at sentencing (R/XIV 2585-86) and the trial court's postconviction order rejecting Robinson's postconviction evidence as ineffectual in the outcome of the sentencing (See PV/XIV 2512-13); and,
- the trial court's factual finding accrediting postconviction testimony negating any "residual effects of head injury" (PC/XIV 2512).

In sum, CLAIM VII, on its face, is not recognized as a matter of law, and, even it were, it is not properly before this Court, and if this Court entertains it, the record shows it is baseless as a matter of fact.

CLAIM VIII: IF POSTCONVICITON RELIEF IS GRANTED, WHETHER THE JURY'S RECOMMENDATION OF LIFE BARS FOREVER A DEATH SENTENCE DUE TO THE DOUBLE JEOPARDY CLAUSE OF THE UNITED STATES CONSTITUTION. (PET 25-26, RESTATED)

CLAIM VIII contends that the Double Jeopardy Clause of the United States Constitution prohibits the death penalty if Petitioner is "afforded any postconviction relief." (Pet 26) As purported support, the Petition

cites to Bullington v. Missouri, 451 U.S. 430, 101 S.Ct. 1852, 68 L.Ed.2d 270 (1981), and Arizona v. Rumsey, 467 U.S. 203, 104 S.Ct. 2305, 81 L.Ed.2d 164 (1984).

CLAIM VIII is incorrect. Under Sattazahn v. Pennsylvania, 537 U.S. 101, 123 S.Ct. 732 (2003), because the fact-finder here, the judge, imposed death sentences (R/XIV 2558-66, 2582-87), federal double jeopardy does not bar death sentences if Petitioner convinces this Court to grant him postconviction relief.

However, as a threshold matter, Respondent contests this claim as untimely. Without any discussion or citation to authority, the Petition summarily states (Pet 25) that this claim "could not be asserted in a Rule 3.851 motion for postconviction relief." To the contrary, CLAIM VIII essentially requests the relief for Robinson's postconviction claims; two of those postconviction claims are currently pending in this Court's Case No. SC09-1860. As such, this claim should have been raised in a timely manner in the trial court postconviction proceedings. The Petition fails to show where this claim was raised in any of Robinson's array of postconviction motions below, and Respondent is unaware of any place where this claim was raised in those motions below. This claim should have been filed in the trial court years ago and thus is extremely untimely.

More specifically, as indicated in the TimeLine supra, this Court's direct-appeal opinion was rendered in 1992, and the United States Supreme Court denied certiorari in 1994. Robinson filed postconviction motions in

the trial court in 1995, 1999, 2000, again in 2000, and 2008, and the trial court completed the evidentiary hearing in April 2009.

With no tendered due diligence or good cause whatsoever, Robinson now claims he can wait until this April 2010 habeas petition to raise a double jeopardy claim that purports to wholly subsumed under, and integral with, the postconviction motions. This claim is untimely in the extreme and should be denied on that basis. See Fla.R.Crim.P. 3.851(f)(4)("A motion filed under this rule may be amended **up to 30 days prior to the evidentiary hearing upon motion and good cause shown**. The trial court may in its discretion grant a motion to amend provided that the motion sets forth the reason the claim was not raised earlier and attaches a copy of the claim sought to be added"); Fla.R.Crim.P. 3.851(d)(1)("Any motion to vacate judgment of conviction and sentence of death shall be filed by the prisoner **within 1 year** after the judgment and sentence become final"), (d)(2) No motion shall be filed or considered pursuant to this rule if filed beyond the time limitation provided in subdivision (d)(1) unless it alleges that (A) the facts on which the claim is predicated were unknown to the movant or the movant's attorney and could not have been ascertained by the exercise of **due diligence** ***"; Fla.R.Crim.P. 3.850(b)(1)(1992) ("… No other motion shall be filed or considered pursuant to this rule if filed more than 2 years after the judgment and sentence become final unless it alleges that (1) the facts on which the claim is predicated were unknown to the movant or the movant's attorney and could not have been ascertained by the exercise of **due diligence**"); Fla.R.Crim.P. 3.851(b)(1)(1993) ("Any rule

3.850 motion to vacate judgment of conviction and sentence of death **shall be filed by the prisoner within one year** after the judgment and sentence become final")[15].[16]

In sum, under any set of rules, this CLAIM is untimely and should be denied on that basis.

If the merits of CLAIM VIII are reached, it has none because, pursuant to Sattazahn v. Pennsylvania's rationale, in Florida, the trial judge, not the jury, is the fact-finder who triggers whether double jeopardy may apply.

In Sattazahn v. Pennsylvania, the defendant was sentenced to life after the jury hung on whether to recommend death. There, on remand, the

---

[15] Respondent includes citations to Fla.R.Crim.P. 3.850(b)(1)(1992) and Fla.R.Crim.P. 3.851(b)(1)(1993) because, under Derrick v. State, 983 So.2d 443, 450 n.6 (Fla. 2008), they, rather than the 3.851 adopted in 2001-2002, may apply. Under all of rules, however, this claim is extremely untimely.

[16] Fla.R.Crim.P. 3.851(f)(4), d)(1), and (d)(2) are reported at Amendments to Florida Rules of Criminal Procedure 3.851, 3.852, and 3.993 and Florida Rule of Judicial Admin. 2.050, 797 So.2d 1213, 1227 (Fla. 2001), and Amendments to Florida Rule of Criminal Procedure, 828 So.2d 999, 1004 (Fla. 2002).

Fla.R.Crim.P. 3.850(b)(1)(1992) is reported at In re Amendments to Florida Rules of Criminal Procedure, 606 So.2d 227, 340 (Fla. 1992).

Fla.R.Crim.P. 3.851(b)(1)(1993) is reported at In re Rule of Criminal Procedure 3.851 (Collateral Relief After Death Sentence has been Imposed), 626 So.2d 198, 198 (Fla. 1993). Respondent submits that the 1993 rule provision for postconviction motion amendments and supplements, at Fla.R.Crim.P. 3.851(b)(3), is not a license to add claims totally at a defendant's whim. Otherwise, rules promoting timeliness mean nothing. See, e.g., Moore v. State, 820 So. 2d 199 (Fla. 2002)(upheld trial court's striking of, "refused to consider," a third amended postconviction motion in a capital case).

defendant was resentenced, this time to death. The United States Supreme Court then rejected a double jeopardy claim and upheld the death sentence.

More specifically, in Sattazahn, at the initial trial proceedings, "After both sides presented their evidence, the jury deliberated for some 3 1/2 hours, … after which it returned a note signed by the foreman which read: 'We, the jury are hopelessly deadlocked at 9-3 for life imprisonment," 537 U.S. at 104. Under Pennsylvania law, when the jury deadlocks on its recommendation the trial judge was required to sentence the defendant to life in prison, which s/he did in Sattazahn. On appeal, the state appellate court "concluded that the trial judge had erred in instructing the jury in connection with various offenses with which petitioner was charged, including first-degree murder. It accordingly reversed petitioner's first-degree murder conviction and remanded for a new trial." 537 U.S. at 105. On remand, at the second trial, "**the jury** again convicted petitioner of first-degree murder, but this time **imposed a sentence of death**." 537 U.S. at 105.

After the Pennsylvania Supreme Court rejected double jeopardy claims and affirmed the death sentence, the United States Supreme Court accepted the case on certiorari and upheld the death sentence at the second sentencing for the same murder. Sattazahn, 537 U.S. at 106, discussed Bullington v. Missouri, 451 U.S. 430 (1981), where, under the facts of that case they applied Double Jeopardy and "concluded, a sentence of life imprisonment signifies that '"the jury has already acquitted the defendant of whatever was necessary to impose the death sentence,"' the Double

Jeopardy Clause bar[ring] a State from seeking the death penalty on retrial."

Sattazahn then discussed Arizona v. Rumsey, 467 U.S. 203 (1984), as "rifin[ing] Bullington's rationale," 537 U.S. at 107. Rumsey set aside a death sentence after a state appellate court had reversed a life sentence on a state appeal. Sattazahn, 537 U.S. at 107-108, explained:

> In setting that sentence aside, … '[t]he double jeopardy principle relevant to [Rumsey's] case is the same as that invoked in *Bullington*: an acquittal on the merits by the sole **decisionmaker** in the proceeding is final and bars retrial on the same charge.' *Id.*, at 211, 104 S.Ct. 2305.
>
> ***
>
> *Rumsey* thus reaffirmed that the relevant inquiry for double-jeopardy purposes was not whether the defendant received a life sentence the first time around, but rather whether a first life sentence was an 'acquittal' based on findings sufficient to establish legal entitlement to the life sentence - i.e., findings that the government failed to prove one or more aggravating circumstances beyond a reasonable doubt.

Sattazahn, 537 U.S. at 108-109, then explained that Poland v. Arizona, 476 U.S. 147, 106 S.Ct. 1749, 90 L.Ed.2d 123 (1986), was consistent with Bullington and Rumsey, even though Poland upheld a death sentence re-imposed after a state appellate reversal:

> … *Poland v. Arizona* … involved two defendants convicted of first-degree murder and sentenced to death. On appeal the Arizona Supreme Court set aside the convictions (because of jury consideration of nonrecord evidence) and further found that there was insufficient evidence to support the one aggravating circumstance found by the trial court. It concluded, however, that there was sufficient evidence to support a different aggravating circumstance, which the trial court had thought not proved. The court remanded for retrial; the defendants were again convicted of first-degree murder, and a sentence of death was again imposed. *Id.*, at 149-150, 106 S.Ct. 1749. We decided that in those circumstances, the Double Jeopardy Clause was not implicated. We distinguished *Bullington* and *Rumsey* on the ground that in *Poland*, unlike in those cases, **neither the judge nor**

> **the jury had 'acquitted' the defendant in his first capital-sentencing proceeding by entering findings sufficient to establish legal entitlement to the life sentence**. 476 U.S., at 155-157, 106 S.Ct. 1749.

Sattazahn, 537 U.S.at 109, then rejected the argument that Bullington's double-jeopardy protections applied to the Pennsylvania case and reasoned:

> Petitioner here cannot establish that the jury or the court 'acquitted' him during his first capital-sentencing proceeding. As to the jury: The verdict form returned by the foreman stated that the jury deadlocked 9-to-3 on whether to impose the death penalty; it made no findings with respect to the alleged aggravating circumstance. That result - or more appropriately, that non-result-cannot fairly be called an acquittal 'based on findings sufficient to establish legal entitlement to the life sentence.' *Rumsey*, *supra*, at 211, 104 S.Ct. 2305.

Sattazahn, 537 U.S. at 109-110, quoting the state court, explained that, under Pennsylvania law the judge was not the fact-finder because "the judge has **no discretion** to fashion sentence once he finds that the jury is deadlocked. **The statute directs him to enter a life sentence**."

In other words, in Sattazahn, it was not a violation in double jeopardy to impose death on remand because there, in the first trial the actual fact-finder would have been the jury, but the jury failed to reach a verdict, that is, failed to fulfill its fact-finding role. There, the judge was not the fact-finder because the judge was absolutely mandated by state law to impose life in that case. Applying Sattazahn's rationale to Florida, the fact-finder in Florida is the judge,[17] so, if the judge here had

[17] Therefore, even where the jury recommends life, the judge may impose death under Tedder v. State, 322 So.2d 908, 910 (Fla. 1975), and, in this case, this Court upheld the judge's death findings at Robinson v. State, 610 So.2d 1288 (Fla. 1992).

imposed a life sentence, then double jeopardy would apply to that life sentence; here, instead, the judge imposed death sentences. Thus, in Sattazahn and here, the actual fact-finder did not find for a life sentence.

Put slightly differently, in Sattazahn, in the first trial, "[t]he entry of a life sentence by the judge was not 'acquittal,'" 537 U.S. at 109, and here the jury's recommendation of life was not an "acquittal" because here the judge's sentence determines whether there is an "acquittal" of the death penalty for Double Jeopardy purposes. In Sattazahn, and here if this Court reverses on any postconviction ground, "the prospect of a second capital-sentencing proceeding [does not] implicate any of the 'perils against which the Double Jeopardy Clause seeks to protect.'" 537 U.S. at 114.

Here, as in Sattazahn, the Double Jeopardy Clause does not "bar[] [the State] from seeking the death penalty against petitioner on [any] retrial," 537 U.S. at 116.

Walls v. State, 641 So.2d 381, 385-86 (Fla. 1994), illustrates the foregoing principles:

> The jury found Walls guilty of all charges submitted and later recommended life imprisonment for the murder of Alger and death for the murder of Peterson. **The trial judge concurred**.[18] The conviction

---

[18] Accordingly, Walls v. State, 580 So.2d 131, 132 (Fla. 1991), which had reversed and remanded for a new trial, pointed out that "[t]he trial court complied with the jury's recommendations," that is imposed a "a life sentence for the death of Alger and a sentence of death for the murder of Peterson."

> later was reversed and a new trial ordered. *Walls v. State*, 580 So.2d 131 (Fla.1991).
>
> At the retrial, *** [t]he jury later found Walls guilty as charged. *** After the penalty phase, the jury recommended the death penalty for the Peterson murder by a unanimous vote. [FN1]
>
> > FN1. Because of the prior trial result, double jeopardy precluded the possibility of a death penalty for the murder of Alger on retrial. Art. I, § 9, Fla. Const.

Walls, 641 So.2d at 391, affirmed the judgment and sentences after the retrial. Thus, in Walls, where the trial judge had previously imposed the death sentence for one of the murders, another death sentence on remand was not barred, but where the judge had previously imposed a life sentence for the other murder, a death sentence on remand was barred. Here, where the judge imposed death sentences, death sentences on any reversal and remand would not be barred.

See also, e.g., Hitchcock v. Dugger, 481 U.S. 393, 399, 107 S.Ct. 1821, 1824 (1987)("State is not precluded from seeking to impose a death sentence upon petitioner, 'provided that it does so through a new sentencing hearing at which petitioner is permitted to present any and all relevant mitigating evidence that is available.'")(citing Skipper v. South Carolina, 476 U.S. 1 (1986), Eddings v. Oklahoma, 455 U.S. 104 (1982), and Lockett v. Ohio, 438 U.S. 586 (1978)); Santos v. State, 629 So.2d 838, 839 (Fla. 1994)(discussing proceedings transpiring upon a remand for new penalty phase).

However, Respondent submits here and in SC09-1860 that none of Robinsons' postconviction claims merit reversal.

CONCLUSION

Based on the foregoing discussions, the State respectfully submits that no additional fact-finding is required and requests this Honorable Court deny Robinson's Petition for Writ of Habeas Corpus.

CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to the following by U.S. MAIL on July 16, 2010: Maria Perinetti, Esq.; Assistant CCRC; Capital Collateral Regional Counsel; 3801 Corporex Park Drive, Suite 210; Tampa, FL 33619-1136.

CERTIFICATE OF COMPLIANCE

I certify that this brief was computer generated using Courier New 12 point font.

Respectfully submitted and certified,
BILL McCOLLUM, ATTORNEY GENERAL

_____

By: STEPHEN R. WHITE
Florida Bar No. 159089
Attorney for Respondent, Secretary/DOC
Office of the Attorney General
PL-01, The Capitol
Tallahassee, Fl 32399-1050
(850) 414-3300 (VOICE)
(850) 487-0997 (FAX)