IN THE SUPREME COURT OF FLORIDA

DEAN KILGORE,

Petitioner,

v. **CASE NO. SC09-1552**
L.T. No. CF89-0686A1-XX

WALTER A. McNEIL, ETC.

Respondents.
_____/

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

COME NOW, Respondents, WALTER A. McNEIL, Secretary, Florida Department of Corrections, etc., by and through the undersigned counsel, and hereby respond to the Petition for Writ of Habeas Corpus filed in the above-styled case. Respondents respectfully submit that the petition should be denied, and state as grounds:

FACTS AND PROCEDURAL HISTORY

In 1989, the Appellant/Petitioner, Dean Kilgore, was charged by Indictment with the first degree premeditated murder of Emerson Jackson ('Pearl') and one count of possession of contraband by an inmate. Kilgore was initially sentenced to death after pleading *nolo contendere* to first degree murder. However, Kilgore was subsequently allowed to withdraw that plea; and, in 1994, Kilgore was tried by a jury, convicted and sentenced to death.

The facts of this case are summarized in this Court's opinion on direct appeal, *Kilgore v. State*, 688 So. 2d 895, 896-897 (Fla.

1996):

> Kilgore was serving a life sentence for first degree murder, a consecutive life sentence for kidnapping, and an additional consecutive five year sentence at the Polk Correctional Institution when the events in the instant case took place.
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> On February 13, 1989, Kilgore and his homosexual lover, Emerson Robert Jackson, had a confrontation as Jackson was leaving his cell. Prior to the confrontation with Jackson, Kilgore waited outside Jackson's cell and smoked a cigarette with another inmate. Kilgore carried a homemade shank knife. Kilgore approached Jackson outside his cell and stabbed him three times. After the stabbing, Kilgore poured a caustic liquid onto Jackson's face and into his mouth. Jackson died as a result of the stab wounds. Kilgore went to the administration building immediately after the incident and told the guards, "I stabbed the bitch."
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> Kilgore was indicted for first degree murder and possession of contraband by an inmate. Originally, Kilgore pleaded nolo contendere to both charges. When a sentence of death was announced, however, Kilgore moved to withdraw his plea on the grounds that his attorney had mistakenly advised him that the death sentence would not be imposed because of the plea. Although a notice of appeal had been filed, this Court relinquished jurisdiction to the circuit court in order that it might address the motion. The lower court granted the motion to withdraw the plea and Kilgore was tried by a jury. At one point during voir dire, Kilgore waived his presence in the courtroom. At other times during the trial, he expressed dissatisfaction with the proceedings. Kilgore was found guilty on both counts and, by a vote of nine to three, the jury recommended that the death penalty be imposed for the murder.
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> The trial judge found that two aggravating circumstances were proven beyond a reasonable doubt: (1) Kilgore was under sentence of imprisonment at the time he committed the murder; and (2) Kilgore was previously convicted of a felony involving the use or threat of violence to the person (first degree murder, kidnapping, trespass with a firearm, three counts of assault with intent to commit murder in the second degree, two counts of aggravated assault, and resisting arrest with force).

> The trial judge also found that two statutory mitigating factors applied: (1) Kilgore acted under the influence of extreme mental or emotional disturbance; and (2) Kilgore's capacity to conform his conduct to the requirements of law was substantially impaired. Furthermore, the trial judge stated that he considered the following nonstatutory mitigating factors: Kilgore's extreme poverty as a child, his lack of education, and his poor mental and physical condition. After all factors were weighed, the trial judge ruled that the death sentence was the appropriate sanction. He reasoned that "the accomplishment of this murder necessitated considerable preparation, cunning, and stealth" because entry to Jackson's dormitory was planned, the shank knife was borrowed, the caustic liquid was hidden, and Jackson's presence was anticipated.

Direct Appeal

On direct appeal, *Kilgore v. State*, SC Case No. 83,684, Kilgore was represented by an experienced appellate counsel, Assistant Public Defender Paul Helm.[1] On direct appeal in 1995, Mr. Helm filed a 66-page initial brief which set forth a detailed statement of the facts, evidencing counsel's thorough familiarity with the record and trial proceedings below, and which raised the following six substantive issues:

> APPELLANT'S RIGHT TO DUE PROCESS OF LAW WAS VIOLATED WHEN THE COURT DENIED HIS REQUESTED INSTRUCTION ON HEAT OF PASSION AND THE STATE MISLED BOTH THE COURT AND THE JURY ABOUT THE LAW APPLICABLE TO APPELLANT'S THEORY OF DEFENSE.

[1] Assistant Public Defender Paul Helm has represented criminal defendants on appeal in Florida for more than thirty years. See, e.g., *Johnson v. State*, 351 So. 2d 82, 82 (Fla. 2d DCA 1977); *Worthington v. State,* 364 So. 2d 1218, 1219 (Fla. 1978); *Witt v. State*, 387 So. 2d 922, 926 (Fla. 1980).

THE TRIAL COURT VIOLATED APPELLANT'S RIGHT TO DUE PROCESS OF LAW BY DENYING DEFENSE COUNSEL'S REQUEST TO REEVALUATE APPELLANT'S COMPETENCY AFTER APPELLANT DISRUPTED THE TRIAL.

THE TRIAL COURT ERRED BY ALLOWING APPELLANT TO LEAVE THE COURTROOM DURING PART OF THE JURY SELECTION PROCESS WITHOUT A VALID WAIVER OF HIS RIGHT TO BE PRESENT AND WITHOUT INQUIRING TO DETERMINE WHETHER HE APPROVED COUNSEL'S USE OF PEREMPTORY CHALLENGES IN HIS ABSENCE.

THE TRIAL COURT VIOLATED THE EIGHTH AMENDMENT BY FINDING THAT THE COMMISSION OF A MURDER BY AN INMATE SERVING LIFE SENTENCES FOR A PRIOR MURDER AND KIDNAPPING OBLIGED THE COURT TO SENTENCE APPELLANT TO DEATH.

THE TRIAL COURT VIOLATED THE EIGHTH AMENDMENT BY CONTRADICTING ITS OWN FINDINGS OF MENTAL MITIGATING FACTORS, BY FAILING TO EXPRESSLY EVALUATE EACH MITIGATING FACTOR PROPOSED BY APPELLANT, AND BY FAILING TO GIVE ANY WEIGHT TO THE MITIGATING FACTORS IT CONSIDERED.

THE TRIAL COURT VIOLATED THE EIGHTH AND FOURTEENTH AMENDMENTS BY DENYING APPELLANT'S REQUESTED JURY INSTRUCTION ON NONSTATUTORY MITIGATING CIRCUMSTANCES.

This Court affirmed Kilgore's convictions and sentences on direct appeal. *Kilgore v. State*, 688 So. 2d 895 (Fla. 1996), *cert. den.*, 522 U.S. 834 (1997).

Post-Conviction Proceedings

A shell 3.850 motion was filed on June 5, 1998. On March 24, 2000, Kilgore filed a successful motion to disqualify the presiding judge, Judge Maloney, based on the fact that Kilgore's trial attorney, Roger Alcott had been appointed to the bench and had an office adjacent to Judge Maloney. Eventually, Judge J. Rogers Padgett was appointed to the case. Kilgore then filed an amended 3.850 motion on October 18, 2001. On July 1, 2002, Kilgore served

his [second] amended motion for post-conviction relief. A *Huff* hearing was held on February 7, 2003.

On April 29, 2004, the circuit court entered a 91-page written order which summarily denied relief on post-conviction claims #1, 2 (in part), 3, 4 (in part), 5 (in part), 6 (in part), 9, 10, 11, 12, 13, 14, 15 (in part), 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, and 26. The circuit court's Order of April 29, 2004 granted, in part, an evidentiary hearing on post-conviction claims #2 (in part) [IAC/pre-trial and trial], #4 (in part) [IAC/voir dire], #5 (in part) [IAC/prosecutorial misconduct], #6 (in part) [IAC/*Ake* Claim], #8 [IAC/sentencing phase], and #15 [IAC/prior violent felony/*Ring*], and reserved ruling on claims #7 [cumulative error] and 27 [cumulative error]. A multi-day evidentiary hearing was conducted on June 13 - 17, 2005.

On August 15, 2005, CCRC served an amended motion to vacate, asserting a claim of mental retardation as a bar to execution, pursuant to Rule 3.203, Florida Rules of Criminal Procedure. An evidentiary hearing on Kilgore's claim of mental retardation was held on January 22 - 23, 2007.

On December 3, 2008, a 110-page order was issued and then re-entered, following a motion by Kilgore to re-enter for failure to have been served. Kilgore's appeal of the denial of post-conviction relief is pending in this Court; his initial brief was filed contemporaneously with this petition.

PRELIMINARY LEGAL PRINCIPLES AND STANDARDS OF REVIEW

In *Grim v. State*, 971 So. 2d 85, 104 (Fla. 2007), this Court reiterated the standards for reviewing claims of ineffective assistance of appellate counsel. As this Court explained in *Grim*:

> We summarized the test for reviewing ineffective assistance of appellate counsel claims in *Nixon v. State*, 932 So. 2d 1009 (Fla. 2006):
>
> > Claims of ineffective assistance of appellate counsel are properly raised in a habeas petition before the court that heard the defendant's direct appeal. The standard to be applied to these claims parallels the standard applied to claims involving the effectiveness of trial counsel as set forth in *Strickland v. Washington*, 466 U.S. 668[, 104 S.Ct. 2052, 80 L.Ed.2d 674] (1984). Thus, a defendant must demonstrate that appellate counsel's performance was deficient and that the defendant was prejudiced by the deficient performance. Prejudice is demonstrated by showing that the appellate process was compromised to the degree that confidence in the correctness of the appellate result is undermined. Moreover, the appellate court must presume that counsel's performance falls within that wide range of reasonable professional assistance.
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> *Id*. at 1023 (citations omitted). When considering whether appellate counsel was ineffective for failing to appeal a trial court's evidentiary ruling, this Court reviews the prejudice prong first:
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> > With regard to evidentiary objections which trial counsel made during the trial and which appellate counsel did not raise on direct appeal, this Court evaluates the prejudice or second prong of the *Strickland* test first.... If we conclude that the trial court's ruling was not erroneous, then it naturally follows that habeas petitioner was not prejudiced on account of appellate counsel's failure to raise that issue.

> *Peterka v. State*, 890 So. 2d 219, 242 (Fla. 2004) (quoting *Jones v. Moore*, 794 So. 2d 579, 583-84 (Fla. 2001)).
>
> *Grim*, 971 So.2d at 104

Moreover, as this Court further emphasized in *Peterka v. State*, 890 So. 2d 219, 242 (Fla. 2004), "appellate counsel is not necessarily ineffective for failing to raise a claim that might have had some possibility of success; effective appellate counsel need not raise every conceivable nonfrivolous issue." *Id*., 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); *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")

ARGUMENT IN OPPOSITION TO CLAIMS RAISED

Procedural Bar:

CCRC asserts that extraordinary habeas relief is warranted because Kilgore allegedly was denied the effective assistance of appellate counsel. CCRC's argument consists, entirely, of listing seven 'claims' that were not presented on direct appeal (Habeas Petition at pages 5 – 8) and then adding a single paragraph in which CCRC concludes that appellate counsel was deficient and "there is more than a reasonable probability that the outcome of the appeal would have been different." (Petition at page 8)

CCRC's pro forma habeas petition, which contains a perfunctory list and *ipso facto* conclusion, is insufficiently pled and should be denied as such. See, *Franqui v. State*, 965 So. 2d 22, 37 (Fla. 2007) ("Franqui claims ineffective assistance of appellate counsel for failing to challenge alleged improper prosecutorial comments made at trial. Given that the particular comments are not argued with any specificity and there is no attempt to demonstrate that any alleged errors were preserved for appeal, we find any such claim to be insufficiently pled and we deny relief. See *Patton v. State*, 878 So. 2d 368, 380 (Fla. 2004) (holding that conclusory allegations are insufficient to properly state a claim)"). See also, *Duckett v. State,* 918 So. 2d 224, 239 (Fla. 2005) (finding claim that appellate counsel failed to raise numerous meritorious issues on direct appeal was insufficiently pled and, therefore, denied); *Henry v. State*, 937 So. 2d 563, 577 (Fla. 2006) ("Henry must first demonstrate that the error was so substantial that it fell outside of the range of professionally acceptable performance and, furthermore, that this deficiency compromised the appellate proceedings to such an extent as to undermine confidence in the result. . . . Aside from asserting that appellate counsel should have pursued this claim on appeal, Henry has alleged no facts establishing how the confidence in Henry's appeal has been compromised. . ."). Collateral counsel does not identify what critical arguments were not made or what critical case was not

cited. Kilgore's habeas petition is insufficiently pled and should be denied as procedurally barred.

Assuming, *arguendo*, that the seven claims listed at pages 5 – 8 of the habeas petition are properly before this Court, which the State strongly disputes, Kilgore has failed to establish any deficiency of counsel and resulting prejudice under *Strickland*. In *Jones v. Barnes*, 463 U.S. 745, 103 S. Ct. 3308, 77 L.Ed.2d 987 (1983), the U.S. Supreme Court held that appellate counsel need not (and should not) raise every non-frivolous claim, but rather may select from among them in order to maximize the likelihood of success on appeal. Moreover, the criminal defendant bears the burden to establish ineffective assistance of appellate counsel by showing: (1) appellate counsel's performance was deficient, and (2) but for counsel's deficient performance he would have prevailed on appeal. The defendant must satisfy both prongs of the *Strickland* test in order to prevail on his claim of ineffective assistance of appellate counsel. See, *Smith v. Robbins*, 528 U.S. 259, 285-86, 120 S. Ct. 746, 764 (2000).

In order to preserve an issue for appeal, it is necessary to raise in the trial court the specific argument raised on appeal. *Steinhorst v. State*, 412 So. 2d 332, 338 (Fla. 1982) (objection must be based on same grounds raised on appeal for issue to be preserved). CCRC alleges that appellate counsel was ineffective in failing to challenge the discretionary evidentiary ruling of the

trial court regarding the murder victim's purported HIV status. Of course, the issue of relevancy is within the purview of the trial court. *Murray v. State,* 3 So. 3d 1108, 1124 (Fla. 2009). According to the prosecutor, the Medical Examiner was informed that the victim was HIV positive, but the ME did not do any tests to confirm HIV because the tests were costly and wouldn't have anything to do with the ME's determination. (DA-R T641-642) The prosecutor argued that the [hearsay report of the] HIV status of the victim was not relevant to this case, and defense counsel replied that [the hearsay report of the HIV status] "dealt with the homosexual relationship the parties had." (DA-R T642) CCRC has not established that a hearsay statement, alleging that the victim was HIV positive was: (1) reliable and admissible at trial, (2) relevant to the issues to be decided by the jury at trial,[2] (3) not cumulative to what was undisputed – that the victim 'Pearl' was a homosexual, (4) not unduly prejudicial, (5) improperly excluded under an abuse of discretion standard, and (6) if raised on appeal, the issue would have been deemed preserved, meritorious, not harmless and would have resulted in a new trial.

Next, CCRC asserts that appellate counsel was ineffective for

[2] See, *State v. Coney*, 845 So. 2d 120, 136 (Fla. 2003) (noting that the defendant's theory "may be good fiction but it has no relevance to the facts of this case. Here, the victim was dying because he was being burned alive, not because he was dying from AIDS." See also, *Thomas v. State*, 618 So. 2d 155, 157 (Fla. 1993) (holding that the victim's efforts to commit a crime [buy cocaine] were irrelevant to the defendant's culpability for first-degree murder)

failing to challenge the trial court's denial of the defense request for a jury view of the crime scene, i.e., the DOC correctional facility. The State opposed the defense request because (1) there was no showing that the crime scene was in substantially the same condition as it was five years earlier, so that the jury would not be misled, (2) there was no showing that the crime scene could not properly be depicted to the jury by way of photographs and testimony, and (3) the crime scene was "clearly enough represented by the testimony and photographs" so that it was not necessary for the jury to go to the scene. (DA-R T1211-1212) The trial court specifically found that the photographs were sufficient. (DA-R T1211-1214) Again, this is a matter left to the discretion of the trial judge and there is a presumption of correctness as to his rulings. See, *Thomas v. State*, 748 So. 2d 970, 983 (Fla. 1999), citing *Bundy v. State*, 471 So. 2d 9, 20 (Fla. 1985) (holding that trial judge did not abuse his discretion in denying defendant's motion for a jury view when the defendant had ample opportunity to cross-examine the witness and the scene had changed between the time of the murder and the trial); *Ferguson v. State*, 158 Fla. 345, 349-50, 28 So. 2d 427, 430 (Fla. 1947) (holding that the trial judge did not abuse his discretion in denying defendant's motion for a jury view requested in order to allow the jury to determine for themselves whether the witness had the opportunity to see defendant). Again, CCRC has not alleged,

nor demonstrated, that appellate counsel was deficient in failing to challenge this discretionary ruling and that any prejudice was established under *Strickland.*

Next, CCRC alleges that appellate counsel was ineffective in failing to challenge the denial of a requested instruction on third degree murder. Again, "[d]ecisions regarding jury instructions are within the sound discretion of the trial court and should not be disturbed on appeal absent prejudicial error." *Coday v. State*, 946 So. 2d 988, 994 (Fla. 2006); *James v. State*, 695 So. 2d 1229, 1236 (Fla. 1997) (noting that the trial court has wide discretion in instructing jury). The trial court's ruling will be upheld "unless the judicial action is arbitrary, fanciful, or unreasonable, which is another way of saying that discretion is abused only where no reasonable man would take the view adopted by the trial court." *Canakaris v. Canakaris*, 382 So. 2d 1197, 1203 (Fla. 1980); See also, *Trease v. State*, 768 So. 2d 1050, 1053, n. 2 (Fla. 2000). Furthermore, it is a long standing rule that a particular jury instruction will not be given absent evidence adduced at trial that would support it. See, *Herrington v. State*, 538 So. 2d 850 (Fla. 1989); *Green v. State*, 475 So. 2d 235 (1985). (If there is no evidence to support a third-degree felony murder conviction, an instruction on the crime is not required.)

In this case, the State's theory of first-degree murder was based solely on premeditation. (See, DA-R T1301; 1308; 1311) The

jury was instructed on first-degree murder (premeditated), second degree murder and manslaughter. (DA-R T1361; 1364-1367) The trial court based its decision upon the evidence brought out at the trial and, therefore, appellate counsel could not show any abuse of discretion in rejecting this defense request instruction. Because this issue has no merit, appellate counsel cannot be deemed ineffective. Furthermore, CCRC has not alleged, nor demonstrated, that any alleged error would not be deemed harmless. See, *Pope v. State,* 679 So. 2d 710, 715 (Fla. 1996) (stating that the trial court properly denied the third-degree murder instruction for two reasons: "First, the facts of this case do not support such an instruction. The court is not required to give requested instructions on lesser degrees of murder unless they are supported by the evidence. *Herrington v. State*, 538 So. 2d 850, 851 (Fla. 1989). Second, third-degree murder is two steps removed from the crime for which Pope was convicted. Any error is presumed harmless because "[w]here the omitted instruction relates to an offense two or more steps removed ... reviewing courts may properly find such error harmless." *State v. Abreau*, 363 So. 2d 1063, 1064 (Fla. 1978). We find that the trial judge did not commit error, but had we found error we would find it to be harmless in this instance.")

Next, CCRC alleges that appellate counsel was ineffective in failing to challenge the trial court's denial of defense counsel's motion for a mistrial. The motion for mistrial was based on the

defendant's own disruptive conduct and defense counsel stated "I think that the Jury has seen something which is going to taint their opportunity to fairly deliberate and I suggest a mistrial is in order." (DA-R T1251 – 1252) Again, even if this issue had been raised on direct appeal, this Court applies an abuse of discretion standard to denials of a motion for a mistrial. See, *Evans v. State,* 995 So. 2d 933, 953 (Fla. 2008), citing *England v. State*, 940 So. 2d 389, 402 (Fla. 2006). CCRC has not alleged, nor demonstrated, that a mistrial was warranted on the basis of Kilgore's own deliberate disruption. Indeed, in *England*, the defendant's outbursts were an intentional attempt to get a mistrial; and, on direct appeal, this Court held that the trial judge did not commit fundamental error by gagging England where he was warned approximately seven times that he was going to be gagged if he continued to disrupt the trial proceedings. *Id.* at 403-404.

CCRC's criticism of appellate counsel's failure to raise a directed verdict/judgment of acquittal/sufficiency of the evidence claim on appeal likewise must fail under *Strickland.* In denying the defense motion, the trial court specifically concluded "that there is sufficient evidence to establish premeditation." (DA-R T1257) On direct appeal, this court summarized the evidence supporting Kilgore's conviction for first-degree murder; and, the trial court's final post-conviction order also recapped the "overwhelming evidence" presented at Kilgore's jury trial (PCR

V34/5118-5119) as follows:

> A review of the trial transcript reflects that there was overwhelming evidence against Defendant. The evidence and testimony from numerous inmate and law enforcement witnesses reflected the following: Mr. Jackson and Defendant were lovers, but Mr. Jackson was known for being a troublemaker who had a pattern of becoming involved with other men, returning to Defendant to seek protection from those men, then again becoming involved with those other men; on February 13, 1989, at Polk Correctional Institution, Defendant carried a brown paper bag and furtively went into Mr. Jackson's dorm area, an area where Defendant did not live and was not supposed to be; Defendant confronted Mr. Jackson, they struggled and Defendant stabbed Mr. Jackson, then poured a chemical substance on Mr. Jackson; another inmate intervened and pulled Defendant away; Mr. Jackson died from one of the stab wounds and his face and chest were covered in a thick brown liquid which appeared to be and smelled like paint thinner or similar substance and contained wood chips or sawdust; after the stabbing, Defendant told detention deputies that he had stabbed Mr. Jackson and hoped he had killed him; Defendant subsequently pulled a knife, which had dried blood, out of his pocket and handed it over to the officers. Defendant worked in the hobby area almost daily and had access to caustic materials such as paint thinner; the day before the stabbing, Defendant hid something in a brown paper bag in the garbage can of the hobby area, and asked that the garbage not be thrown out. Detective Ore found, among Defendant's personal belongings, a hand written note dated February 13, 1989, written to his mother and confessing that he had killed his "only friend" that morning. Defendant gave a tape-recorded statement wherein he denied any intent to kill Mr. Jackson but admitted that he was "trying to nick him a little bit"; in his taped statement, Defendant further stated he went to confront Mr. Jackson, who then started calling him names, a struggled ensued and he stabbed Mr. Jackson. Defendant admitted that after thinking Mr. Jackson was only pretending to be hurt, he poured sealer on him but denied that he tried or intended to light a match or burn Mr. Jackson. (*See* trial transcript, pp. 563, 622, 624, 638-39, 655, 664, 681, 717, 734, 736, 760, 764, 783, 832, 842, 1006, 1021, 1031-35, 1037-40, 1045, 1066-1071, 1087-89, 1152-94).
>
> (PCR V34/5118-5119)

Any sufficiency of the evidence complaint is meritless. As emphasized by this Court in *Lowe v. State*, 2 So. 3d 21, 45 (Fla. 2008), this Court "independently reviews each conviction and sentence to ensure they are supported by sufficient evidence." *Id.*, citing *Hardwick v. Wainwright*, 496 So. 2d 796, 798 (Fla. 1986). In this case, as in *Lowe*, if appellate counsel had challenged the sufficiency of the evidence on direct appeal, the claim would have been found to be meritless. *Id.*, citing *Reed v. State*, 875 So. 2d 415 (Fla. 2004). As a result, appellate counsel cannot be deemed ineffective for failing to raise this issue on appeal.

Next, CCRC alleges that appellate counsel should have raised a claim regarding the failure to allegedly allow a deposition of a penalty phase witness – the victim in the 1978 case, Barbara Jackson. However, the one, and only, record page cited by CCRC to allegedly support this perfunctory claim – DA-R T1403 – addressed the State's intention to submit the defendant's judgment and sentence, as well as the arrest affidavit, but the affidavit was withdrawn because Barbara Jackson was located the day before and would testify in person. Addressing the State's intent to rely on hearsay contained within the documents, defense counsel responded, "Your Honor, the only way that we would be in position to attempt to rebut it [hearsay] would be first of all go back and depose the victims, attempt to locate some witnesses, and try to present some testimony in rebuttal, *depending on what the hearsay is*." (DA-R

T1403) (e.s.) CCRC's newly-alleged 'denial-of-deposition' claim is unpreserved for appeal and unsupported by the record citation submitted by CCRC. This Court has repeatedly held that appellate counsel is not ineffective for failing to raise errors that were not preserved "and do not present a question of fundamental error." *Valle v. Moore*, 837 So. 2d 905, 907-08 (Fla. 2002).

Lastly, CCRC claims that appellate counsel was ineffective in failing to argue that the trial court allegedly erred in overruling defense counsel's objection to the testimony of witness Paul Downes regarding Kilgore's state of mind. (Petition at page 8) CCRC cites to the direct appeal record at DA-R T753. However, the direct appeal record page DA-R T753 contains *defense counsel's cross-examination* of Sergeant Downes. (Cross-examination at DA-R T746 – 757) Furthermore, on redirect examination, the record shows the following:

> Q. Did Mr. Kilgore keep asking that same question about is he dead the same approximate number of times that he initially made the statement I hope he's dead or were they the same type of repetitive actions?
>
> A. No sir, it was - - yes, he asked me several times. And I couldn't even begin to give you the exact number. But it was more out of concern from what was going to happen - -
>
> MR. ALCOTT: Objection, Your Honor. Speculation as to state of mind.
>
> THE COURT: Overruled.
>
> Q. It was more out of concern for what was going to happen to Kilgore from that point in time because of the stabbing.

> MR. WALLACE: Thank you. I have no further questions.
>
> (DA-R T761)

Once again, CCRC's claim is insufficiently pled and meritless. As emphasized in *Lowe v. State*, 2 So. 3d 21, 42 (Fla. 2008):

> . . . when evaluating a claim for ineffective assistance of appellate counsel, this Court must determine: (1) whether the alleged omissions are of such magnitude as to constitute a serious error or substantial deficiency falling measurably outside the range of professionally acceptable performance, and (2) whether the deficiency in performance compromised the appellate process to such a degree as to undermine confidence in the correctness of the result. See *Pope v. Wainwright*, 496 So. 2d 798, 800 (Fla. 1986); see also *Freeman v. State*, 761 So. 2d 1055, 1069 (Fla. 2000); *Thompson v. State*, 759 So. 2d 650, 660 (Fla. 2000).

"The 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." *Lowe*, citing *Freeman*, 761 So. 2d at 1069. Furthermore, a petitioner cannot prevail on a claim of ineffective assistance of appellate counsel "if a legal issue 'would in all probability have been found to be without merit' had counsel raised the issue on direct appeal." *Rutherford*, 774 So. 2d at 643 (quoting *Williamson v. Dugger*, 651 So. 2d 84, 86 (Fla. 1994)). Kilgore's habeas petition is insufficiently pled and also without merit. Accordingly, any requested relief must be denied.

CONCLUSION

WHEREFORE, the State respectfully requests that this Honorable Court deny Kilgore's Petition for Writ of Habeas Corpus.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished U.S. Regular mail to William M. Hennis III, Litigation Director, Capital Collateral Regional Counsel - South, 101 N.E. 3rd Avenue, Suite 400, Fort Lauderdale, Florida 33301, this 20th day of November, 2009.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this response is 12-point Courier New, in compliance with Fla. R. App. P. 9.100(*l*).

Respectfully submitted,

BILL McCOLLUM
ATTORNEY GENERAL

KATHERINE V. BLANCO
Assistant Attorney General
Florida Bar No. 0327832
Office of the Attorney General
Concourse Center 4
3507 East Frontage Road, Suite 200
Tampa, Florida 33607-7013
Telephone: (813) 287-7910
Facsimile: (813) 281-5501

COUNSEL FOR RESPONDENTS