IN THE SUPREME COURT OF FLORIDA

TROY MERCK, JR.,

Petitioner,

v. CASE NO. SC11-1676
L.T. No. CRC 91-16659 CFANO

KENNETH S. TUCKER, ETC.,

Respondents.
_____/

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

COMES NOW, Respondent, KENNETH S. TUCKER, Secretary, Florida Department of Corrections, by and through the undersigned counsel, and hereby responds to the Petition for Writ of Habeas Corpus filed in the above-styled case. Respondent respectfully submits that the petition should be denied, and states as grounds therefore:

FACTS AND PROCEDURAL HISTORY

In 1993, Troy Merck was convicted of the first degree murder of James Newton and sentenced to death. The following factual background was taken from this Court's opinion affirming Merck's conviction, but reversing his death sentence and remanding the case for a new sentencing phase proceeding:

> Merck was convicted of first-degree murder of the victim, James Anthony Newton. Newton died after Merck repeatedly stabbed him while the two men were in the parking lot of a bar in Pinellas County shortly after

2 a.m. on October 12, 1991. The bar had closed at 2 a.m., and several patrons of the bar remained in the parking lot. The evidence was that several of these individuals, including the victim, Merck, and those who witnessed the murder, had consumed a substantial amount of alcohol during the evening while at the bar.

After closing, Merck and his companion, both of whom had recently come to Florida from North Carolina, were in the bar's parking lot. The two were either close to or leaning on a vehicle in which several people were sitting. One of the car's occupants asked them not to lean on the car. Merck and his companion sarcastically apologized. The victim approached the car and began talking to the car's owner. When Merck overheard the owner congratulate the victim on his birthday, Merck made a snide remark. The victim responded by telling Merck to mind his own business. Merck attempted to provoke the victim to fight; however, the victim refused.

Merck then asked his companion for the keys to the car in which he had come to the bar. At the car, Merck unlocked the passenger-side door and took off his shirt and threw it in the back seat. Thereafter, Merck approached the victim, telling the victim that Merck was going to "teach him how to bleed." Merck rushed the victim and began hitting him in the back with punches. The person who had been talking to the victim testified that she saw a glint of light from some sort of blade and saw blood spots on the victim's back. The victim fell to the ground and died from multiple stab wounds; the main fatal wound was to the neck.

Merck was indicted on November 14, 1991, for the first-degree murder of James Anthony Newton. The case went to trial and ended in a mistrial on November 6, 1992, because the jury was unable to reach a verdict. After a second trial, Merck was found guilty as charged. The jury recommended death by a vote of nine to three. The trial judge found two aggravating factors: (1) the murder was especially heinous, atrocious, or cruel; and (2) previous conviction of felonies involving the use or threat of violence. The court found no statutory mitigating factors and two

> nonstatutory mitigating factors: (1) abused childhood; and (2) alcohol use on the night of the offense. The trial court sentenced Merck to death.

Merck v. State, 664 So. 2d 939, 940-41 (Fla. 1995) (footnotes omitted). After remanding the case for a new sentencing hearing, Merck was again sentenced to death in September, 1997. This Court reversed Merck's death sentence, Merck v. State, 763 So. 2d 295 (Fla. 2000), and remanded for another sentencing hearing. At Merck's third sentencing hearing in 2004, the jury recommended the death penalty by a vote of nine to three. The trial court followed the jury's recommendation and sentenced Merck to death.

On direct appeal, Merck raised the following six claims:

> ISSUE I: THE TRIAL COURT IMPROPERLY EXCLUDED EVIDENCE RELATING TO APPELLANT'S PRESUMPTIVE PAROLE DATE THAT WAS RELEVANT TO THE JURY'S DETERMINATION OF SENTENCE.
>
> ISSUE II: THE TRIAL COURT IMPROPERLY EXCLUDED EVIDENCE THAT WAS RELEVANT TO THE NATURE AND CIRCUMSTANCES OF THE OFFENSE, HAD BEARING ON THE FINDING OF AN AGGRAVATING FACTOR, AND COULD HAVE BEEN THE BASIS OF ADDITIONAL MITIGATING FACTORS.
>
> ISSUE III: IMPROPER REMARKS TO THE JURY, MADE BY THE ASSISTANT STATE ATTORNEY DURING CLOSING ARGUMENT, DENIED APPELLANT A FAIR PENALTY PHASE PROCEEDING.
>
> ISSUE IV: THE DEATH SENTENCE MUST BE REVERSED BECAUSE THE TRIAL COURT FAILED TO FIND OR GAVE TOO LITTLE WEIGHT TO MITIGATING FACTORS.
>
> ISSUE V: THE DEATH SENTENCE IS NOT PROPORTIONATE.
>
> ISSUE VI: FLORIDA'S DEATH PENALTY STATUTE IS UNCONSTITUTIONAL.

Initial Brief of Appellant, Merck v. State, Case No. SC04-1902. This Court rejected Merck's claims and affirmed the death sentence. Merck v. State, 975 So. 2d 1054 (Fla. 2007). A petition for writ of certiorari was filed, and denied on October 6, 2008. Merck v. Florida, 555 U.S. 840, 129 S. Ct. 73 (2008).

Merck filed a motion for postconviction relief on September 2, 2009, and raised the following seven claims:

> CLAIM I: MR. MERCK WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE GUILT/INNOCENCE AND PENALTY PHASE OF HIS CAPITAL TRIAL, IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION, AND AS A RESULT, MR. MERCK'S CONVICTIONS AND DEATH SENTENCE ARE UNRELIABLE.
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> CLAIM II: MR. MERCK DID NOT RECEIVE EFFECTIVE ASSISTANCE OF COUNSEL THROUGHOUT HIS PENALTY PHASE, VIOLATING HIS FOURTH, FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS UNDER THE UNITED STATES CONSTITUTION, AND HIS CORRESPONDING RIGHTS UNDER THE FLORIDA CONSTITUTION.
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> CLAIM III: FLORIDA STATUTE 921.141 IS FACIALLY VAGUE AND OVERBROAD IN VIOLATION OF THE 8TH AND 14TH AMENDMENTS, AND THE UNCONSTITUTIONALITY WAS NOT CURED BECAUSE THE JURY DID NOT RECEIVE ADEQUATE GUIDANCE IN VIOLATION OF THE 8TH AND 14TH AMENDMENTS. THE TRIAL COURT'S INSTRUCTIONS TO THE JURY UNCONSTITUTIONALLY DILUTED ITS SENSE OF RESPONSIBILITY IN DETERMINING THE PROPER SENTENCE. MR. MERCK'S DEATH SENTENCE IS PREMISED ON FUNDAMENTAL ERROR WHICH MUST BE CORRECTED. TO THE EXTENT TRIAL COUNSEL FAILED TO LITIGATE THESE ISSUES, TRIAL COUNSEL WAS INEFFECTIVE.
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> CLAIM IV: FLORIDA'S CAPITAL SENTENCING STATUTE IS UNCONSTITUTIONAL ON ITS FACE AND AS APPLIED FOR FAILING TO PREVENT THE ARBITRARY AND CAPRICIOUS IMPOSITION OF THE DEATH PENALTY AND FOR VIOLATING THE GUARANTEE AGAINST CRUEL AND UNUSUAL PUNISHMENT IN

> VIOLATION OF THE 5TH, 6TH, AND 14TH AMENDMENTS TO THE UNITED STATES CONSTITUTION. TO THE EXTENT THIS ISSUE WAS NOT PROPERLY LITIGATED AT TRIAL OR ON APPEAL, MR. MERCK RECEIVED PREJUDICIALLY INEFFECTIVE ASSISTANCE OF COUNSEL.
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> CLAIM V: THE HEINOUS, ATROCIOUS OR CRUEL JURY INSTRUCTION WAS UNCONSTITUTIONALLY VAGUE AND BROAD, VIOLATING MR. MERCK'S EIGHTH AND FOURTEENTH AMENDMENT RIGHTS.
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> CLAIM VI: MR. MERCK'S TRIAL WAS FRAUGHT WITH PROCEDURAL AND SUBSTANTIVE ERRORS WHICH CANNOT BE HARMLESS WHEN VIEWED AS A WHOLE, SINCE THE COMBINATION OF ERRORS DEPRIVED HIM OF THE FUNDAMENTALLY FAIR TRIAL GUARANTEED UNDER THE 6TH, 8TH, AND 14TH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.
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> CLAIM VII: MR MERCK'S 8TH AMENDMENT RIGHT AGAINST CRUEL AND UNUSUAL PUNISHMENT WILL BE VIOLATED AS HE MAY BE INCOMPETENT AT THE TIME OF EXECUTION.

(PCR V1:1-169). After conducting an evidentiary hearing, the trial court issued a detailed order on August 27, 2010, denying Merck's motion for postconviction relief. (PCR V3:300-20). On September 17, 2010, Merck filed a timely notice of appeal of the denial of his motion to this Court. (PCR V5:682-84). The appeal from the denial of postconviction relief is currently pending before this Court in Merck v. State, SC10-1830.

ARGUMENT IN OPPOSITION TO CLAIMS RAISED

Petitioner alleges that extraordinary relief is warranted because he was denied the effective assistance of appellate counsel. The standard of review applicable to ineffective assistance of appellate counsel claims mirrors the Strickland v. Washington, 466 U.S. 668 (1984), standard for claims of trial counsel ineffectiveness. Valle v. Moore, 837 So. 2d 905 (Fla. 2002). Such a claim requires an evaluation of whether counsel's performance was so deficient that it fell outside the range of professionally acceptable performance and, if so, whether the deficiency was so egregious that it compromised the appellate process to such a degree that it undermined confidence in the correctness of the result. Groover v. Singletary, 656 So. 2d 424, 425 (Fla. 1995); Byrd v. Singletary, 655 So. 2d 67, 68-69 (Fla. 1995). A review of the record demonstrates that neither deficiency nor prejudice has been shown in this case.

Petitioner's arguments are based on appellate counsel's alleged failure to raise a number of issues, each of which will be addressed in turn. However, none of the issues now asserted would have been successful if argued in Petitioner's direct appeal. Therefore, counsel was not ineffective for failing to present these claims. Groover, 656 So. 2d at 425; Chandler v. Dugger, 634 So. 2d 1066, 1068 (Fla. 1994) (failure to raise

meritless issues is not ineffective assistance of appellate counsel). No extraordinary relief is warranted because Petitioner's current arguments were not preserved for appellate review and, even if preserved, no reversible error could be demonstrated. See Teffeteller v. Dugger, 734 So. 2d 1009 (Fla. 1999); Hardwick v. Dugger, 648 So. 2d 100 (Fla. 1994); Breedlove v. Singletary, 595 So. 2d 8 (Fla. 1992). As noted above, to obtain relief it must be shown that appellate counsel's performance was both deficient and prejudicial. The failure to raise a meritless issue on direct appeal will not render counsel's performance ineffective, and this is also true regarding issues that would have been found to be procedurally barred had they been raised on direct appeal. See Rutherford v. Moore, 774 So. 2d 637, 643 (Fla. 2000) (stating that although habeas petitions are a proper vehicle to advance claims of ineffective assistance of appellate counsel, such claims may not be used to camouflage issues that should have been raised on direct appeal or in a postconviction motion).

The United States Supreme Court recognized that "since time beyond memory" experienced advocates "have emphasized the importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues." Jones v. Barnes, 463 U.S. 745, 751-52 (1983). The

failure of appellate counsel to brief an issue which is without merit is not a deficient performance which falls measurably outside the range of professionally acceptable performance. See Card v. State, 497 So. 2d 1169, 1177 (Fla. 1986). Moreover, an appellate attorney will not be considered ineffective for failing to raise issues that "might have had some possibility of success; effective appellate counsel need not raise every conceivable nonfrivolous issue." Valle, 837 So. 2d at 908.

ARGUMENT

CLAIM I

MERCK'S ASSERTION OF A CUMULATIVE ERROR CLAIM IS IMPROPER AS IT RELIES ENTIRELY ON CLAIMS OF INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL.

In his first claim, Merck contends that he is entitled to state habeas relief because he was denied a fundamentally fair trial based on the number of errors which allegedly occurred in his guilt and penalty phase. As pled in the habeas petition, Merck relies exclusively on his postconviction allegations of ineffective assistance of *trial* counsel contained in his Rule 3.851 motion for postconviction relief and asserts that these alleged errors cumulatively denied him of his constitutional right to a fair trial. See Petition at 6-8. Such a claim is not cognizable in habeas corpus and should not be included in this petition. See Breedlove v. Singletary, 595 So. 2d 8, 10 (Fla. 1992); King v. Dugger, 555 So. 2d 355, 358 (Fla. 1990) ("[C]laims of ineffective assistance of trial counsel should be raised under Florida Rule of Criminal Procedure 3.850, not habeas corpus."). Obviously Petitioner is aware that these claims were cognizable in his postconviction motion as he raised them below and again on appeal, see Initial Brief of Appellant, Merck v. State, SC10-1830, but still burdens this Court with the same claims in the instant petition. Such a tactic is

inappropriate and unnecessarily taxing. Orme v. State, 896 So. 2d 725, 740 (Fla. 2005); Blanco v. Wainwright, 507 So. 2d 1377, 1384 (Fla. 1987).

In addition to improperly raising his claims of ineffective assistance of trial counsel in the instant petition, Respondent further asserts that each of his claims lack merit. After conducting an evidentiary hearing on Merck's postconviction claims, the court issued a detailed order denying each of these individual claims, as well as Merck's cumulative error claim. As set forth in the State's Answer Brief in Merck v. State, SC10-1830, filed contemporaneously with the instant response, the lower court properly denied these claims of ineffective assistance of trial counsel because Merck failed to establish deficient performance and prejudice as required by Strickland v. Washington, 466 U.S. 688 (1984). Given the absence of individual claims of error, Merck's claim of cumulative error has no merit and habeas relief must be denied. Nelson v. State, 43 So. 3d 20, 34 (Fla. 2010); Everett v. State, 54 So. 3d 464, 487-88 (Fla. 2010).

CLAIM II

PETITIONER'S CLAIM OF INCOMPETENCY IS IMPROPERLY RAISED IN THE INSTANT HABEAS PETITION.

Merck next contends that he may be incompetent to be executed in the future. However, collateral counsel properly acknowledges that his claim is not ripe, and that no relief is due at this time. Accordingly, Merck's habeas petition must be denied. Nelson v. State, 43 So. 3d 20, 34 (Fla. 2010); Anderson v. State, 18 So. 3d 501, 522 (Fla. 2009); State v. Coney, 845 So. 2d 120, 137 n.19 (Fla. 2003).

CLAIM III

MERCK'S CLAIM REGARDING THE CONSTITUTIONALITY OF FLORIDA'S DEATH PENALTY SENTENCING STATUTE WAS RAISED AND REJECTED ON APPEAL.

Petitioner asserts Florida's capital sentencing scheme is unconstitutional based upon Supreme Court precedent in Apprendi v. New Jersey, 530 U.S. 466 (2000), and Ring v. Arizona, 536 U.S. 584 (2002). Petitioner fails to note that this exact claim was raised by Merck's appellate counsel and was rejected by this Court in Merck v. State, 975 So. 2d 1054 (Fla. 2007), cert. denied, 555 U.S. 840, 129 S. Ct. 73 (2008). See Initial Brief of Appellant at 98-99, Merck v. State, SC04-1902.

In rejecting Merck's constitutional challenge to Florida's death penalty statute, this Court stated:

> Finally, Merck asserts that Florida's capital sentencing scheme is unconstitutional under Ring v. Arizona, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002), and Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000). This Court addressed the constitutionality of Florida's capital sentencing scheme in light of those decisions in Bottoson v. Moore, 833 So. 2d 693 (Fla. 2002), and King v. Moore, 831 So. 2d 143 (Fla. 2002), and denied relief. Moreover, we have previously rejected each of Merck's specific arguments regarding the constitutionality of Florida's capital sentencing scheme. See State v. Steele, 921 So. 2d 538, 543 (Fla. 2005) (stating State must prove at least one aggravating circumstance beyond reasonable doubt to support death sentence); Parker v. State, 904 So. 2d 370, 383 (Fla. 2005) (holding jury may recommend death by majority vote); Lynch v. State, 841 So. 2d 362, 378 (Fla. 2003) (holding defendant not entitled to notice of aggravators in indictment because aggravators are clearly listed in statutes); Porter v. Crosby, 840 So. 2d 981, 986 (Fla. 2003) (holding jury not required to make specific findings of aggravating circumstances). Finally, one of the aggravating circumstances found by the trial court in this case was Merck's prior conviction of a violent felony. This Court has held that the requirement that the jury make all of the findings necessary to enhance a defendant's sentence is satisfied where one of the aggravators is the prior violent felony aggravator. See Patton v. State, 878 So. 2d 368, 377 (Fla. 2004) ("The existence of this prior violent felony aggravator satisfies the mandates of the United States and Florida Constitutions....") . Thus, Merck is not entitled to relief.

Merck, 975 So. 2d at 1067. Obviously, Merck's appellate counsel cannot be ineffective for failing to raise a claim that was actually raised and rejected by this Court. As this Court has previously noted, habeas corpus "is not a second appeal and

cannot be used to litigate or relitigate issues which could have been . . . or were raised on direct appeal." Breedlove v. Singletary, 595 So. 2d 8, 10 (Fla. 1992); see also 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"). Because the instant claim is procedurally barred and without merit, this Court should reject Merck's claim challenging the constitutionality of Florida's death penalty statute.

CLAIM IV

MERCK HAS FAILED TO ESTABLISH THAT HIS APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO ALLEGE THAT FLORIDA'S CAPITAL SENTENCING STATUTE IS UNCONSTITUTIONAL ON ITS FACE AND AS APPLIED FOR FAILING TO PREVENT THE ARBITRARY AND CAPRICIOUS IMPOSITION OF THE DEATH PENALTY AND FOR VIOLATING THE GUARANTEE AGAINST CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF THE 5TH 6TH, AND 14TH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

In his final claim, Merck alleges that his appellate counsel was ineffective for failing to litigate on appeal a challenge to the constitutionality of Florida's capital sentenced statute. Merck vaguely and in conclusory fashion alleges that Florida's death penalty statute is unconstitutional

because of the arbitrary and capricious application of the death penalty under the current statutory scheme and because the death penalty violates Merck's constitutional guarantee against cruel and unusual punishment. Merck fails to specify whether these claims were preserved for appellate review by objection below and further fails to allege how or why appellate counsel was deficient in failing to raise this claim on appeal. Indeed, it appears Petitioner is simply attempting to raise an additional direct appeal issue which is not the function of a state habeas petition. Orme v. State, 896 So. 2d 725, 740 (Fla. 2005). Furthermore, as this Court stated in Hodges v. State, 885 So. 2d 338, 359 (Fla. 2004), when rejecting a similar habeas claim, "[t]hese arguments have consistently been determined to lack merit. . . . [and] Hodges provides no compelling reason for us to reconsider long-established law on these points." Likewise, because Merck has failed to establish that his appellate counsel was ineffective for failing to raise a meritless issue on appeal, this Court should deny the instant claim.

CONCLUSION

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to Richard E. Kiley, Assistant CCRC, Office of the Capital Collateral Regional Counsel, Middle Region, 3801 Corporex Park Drive, Suite 210, Tampa, Florida 33619-1136, this 2nd day of December, 2011.

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,

PAMELA JO BONDI
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