**IN THE SUPREME COURT OF FLORIDA**

LUTHER DOUGLAS,

Petitioner,

v. CASE NO. SC10-1725

WALTER A. MCNEIL, Secretary,
Department of Corrections
State of Florida,

Respondent.
_____/

**RESPONSE TO THE PETITION FOR WRIT OF HABEAS CORPUS**

COMES NOW, Respondent, WALTER A. MCNEIL, by and through the undersigned Assistant Attorney General, and hereby responds to Douglas's Petition for Writ of Habeas Corpus filed in the above-styled case. Respondent respectfully submits the petition should be denied, and states as grounds therefore:

**Statement of the Case and Procedural History**

The relevant facts concerning the December 26, 1999 murder of eighteen year old Mary Ann Hobgood are recited by the Florida Supreme Court on direct appeal:

> …On the evening of December 25, 1999, Hobgood left her parents' house in Jacksonville, Florida, with her friend, Misty Jones. Douglas, who was Jones's boyfriend at the time and who had not previously met Hobgood, drove Jones to Hobgood's house and drove away with both women in his vehicle. The vehicle Douglas was driving that night was a red Ford Escort, which belonged to Jimela Dozier, the mother of one of

Douglas's children. Jones later described the condition of the vehicle that night as dirty with trash inside and pollen and dirt on the exterior. After leaving Hobgood's, the three first stopped at a liquor store and bought a bottle of rum and soda, which Douglas and Hobgood drank. They then went to several bars in the Jacksonville area. Around midnight, Jones indicated that she was not feeling well and Douglas drove her home. Douglas then left Jones's house in the Escort with Hobgood.

Approximately two hours later, Douglas arrived at the apartment where he was living and asked a teenage occupant to go with him to "take care of some business." When Douglas's request was refused he left the apartment.

Jones testified that Douglas called her in the early morning hours of December 26, first telling her that he had dropped Hobgood off at a bar and then stating that he had taken Hobgood home. When Jones saw Douglas that morning she noticed scratch marks on his neck that had not been there the previous evening. In Douglas's presence, Jones called Hobgood's home, and after speaking with Hobgood's mother, learned that Hobgood had not returned home. When Hobgood's sister called Jones sometime later that day, Jones told her that they had been out the night before with Timothy Hightower, Jones's ex-boyfriend. Jones testified that she lied to Hobgood's sister because Douglas was with her and she figured that something was wrong.

Jones then confronted Douglas regarding Hobgood's whereabouts. The two went for a drive in the red Escort, which Jones noticed was newly clean inside and out. During the drive, Douglas admitted to Jones that he had beaten Hobgood and thrown her out of the car, leaving her for dead. Jones recalled that when she asked Douglas if he beat Hobgood because "she didn't have sex with black boys," Douglas just smiled. Douglas also told Jones that if she was questioned she should point the blame toward Hightower or she would end up like Hobgood. When police officers questioned Jones later that night she told them the same story she relayed to Hobgood's sister--that she and Hobgood had gone out with Hightower. Jones also gave a sworn statement to that effect. Jones subsequently recanted

those statements when the officers questioned her again in January 2000 and told her that they knew she had lied.

On the afternoon of December 26, 1999, Hobgood's body was found along a set of railroad tracks. She was positioned on her back in a shrub line with her legs stretched out in front of her. Hobgood's body was nude from the waist down, except for her black socks. Her knit top and black bra were torn and pushed up to her shoulders, exposing her breasts. A few feet from Hobgood's body, the police found a tire lug wrench, a rubber car part and a blood soaked maroon jacket. The maroon jacket was later identified by Jones as the one worn by Douglas on December 25. A Jacksonville Sheriff's Office detective testified that the rubber car part looked identical to a part recovered from the red Ford Escort.

Associate medical examiner Dr. Matthew Areford, who went to the scene on December 26 and performed the autopsy on Hobgood on December 27, noted that Hobgood had suffered extensive injury, particularly to her head. Dr. Areford concluded that she died of blunt head trauma. Dr. Areford testified that while Hobgood was alive she received at least ten separate blows to her face, seven blows to the back of her head and seven to ten blows to her hands and arms. Her jaw and nose were broken, several of her teeth had been knocked out and her right shoulder was dislocated. Dr. Areford indicated that these injuries could have been inflicted by another person's fist or by a hard object such as the lug wrench found at the scene. Several of the wounds on Hobgood's arms and hands were consistent with defensive wounds.

Although Dr. Areford could not determine the sequence of the injuries inflicted on Hobgood while she was alive, he opined that it was unlikely that Hobgood was struck from behind, fell to the ground and was hit a number of times while unconscious. Dr. Areford explained that such a scenario was inconsistent with the defensive type injuries found on Hobgood's hands and forearm as well as with the fact that there were injuries to all sides of her head, which indicated that she was rolling from side to side.

The autopsy also disclosed extensive injuries to Hobgood's body, in addition to those described above, which were inflicted after her death. Dr. Areford testified that these injuries were consistent with her body having been run over by the undercarriage of a car.

During the autopsy, Dr. Areford collected a rape kit, which included a set of vaginal swabs. Further analysis of the rape kit was conducted by David George, a serology analyst employed by the Florida Department of Law Enforcement (FDLE). George testified that the vaginal swabs tested positive for the presence of semen.

Subsequent DNA testing matched the semen collected from Hobgood to Douglas. Thomas Petree, an FDLE crime analyst with expertise in serology and DNA, testified that the odds of finding a random match between the sperm taken from the first vaginal swab and Douglas's known DNA profile are approximately one in 660 trillion African-Americans. The odds of finding a random match between the sperm taken from the second vaginal swab and Douglas's known DNA profile are approximately one in 170 quadrillion African-Americans.

On December 27, 1999, Douglas called Jimela Dozier, who had returned to Jacksonville the night before. During the conversation, Douglas asked Dozier to retrieve some items from the trunk of the Escort. When Dozier opened the trunk she found a watch and two rings in the pocket of a black leather jacket. Douglas explained that the leather jacket and the jewelry were Christmas presents for her. The black leather jacket and jewelry were identified at trial as belonging to Hobgood.

The Ford Escort was taken to the FDLE laboratory in Jacksonville. Douglas's fingerprints were found on the inside and outside of the car and Jones's prints were found on the passenger side of the car. Human blood was identified at several locations inside and on the undercarriage of the Escort. DNA analysis of the blood samples taken from the Escort revealed a match with Hobgood's blood. The blood found on the black leather jacket Douglas gave to Dozier and the blood found on

the maroon jacket recovered at the crime scene also matched Hobgood's blood. Petree testified that the odds of finding a random match between the DNA in the blood samples and Hobgood's known DNA are approximately one in 3.3 quadrillion Caucasians. Lastly, the lug wrench recovered near Hobgood's body tested positive for human blood but the DNA analysis yielded no results.

On January 24, 2000, lead detective Robert Hinson interviewed Douglas at the police station. Detective Hinson testified that Douglas admitted driving Dozier's red Ford Escort during the Christmas holiday and giving Dozier the black leather jacket and jewelry. Douglas claimed that on Christmas night he had been out with only Jones. After being shown a recent color photograph of Hobgood, Douglas claimed that he did not know Hobgood and had never seen her before. When asked about the presence of blood in the Escort, Douglas stated that the blood belonged to a friend named Eric Ransom, who had gotten into an altercation at a night club and was driven to the hospital by Douglas. However, jail records showed that Ransom was incarcerated in the Duval County Jail from March 25, 1999, to January 16, 2000. The police placed Douglas under arrest and questioned him a second time. Douglas then admitted that Jones had a female friend with her that night but stated he could not remember whether he had taken Jones's friend home.

While in jail awaiting trial, Douglas talked to fellow inmate Thomas Brown about Hobgood's murder. During their first conversation about the murder, Douglas told Brown that he was charged with the murder of a girl and that he had run over her with a car because she would not move. However, in a later conversation Douglas stated that he ran over the girl because he had beaten her to death but wanted to make it look like a vehicular homicide. Douglas also told Brown that the State had a lot of evidence against him because he "took the pussy." Brown testified that he understood Douglas's statement "took the pussy" to mean that Douglas raped the girl.

Douglas v. State, 878 So.2d 1246, 1250-1253 (Fla. 2004).

Contrary to his pleas of not guilty, a Duval County jury found Douglas guilty, by special verdict, of first-degree felony murder with sexual battery as the underlying felony. At the penalty phase of his capital trial, Douglas put on 12 witnesses in mitigation.[1] The gist of their testimony was that Douglas comes from a religious, close-knit family, that Douglas's father, who was strict and controlling, sexually molested Douglas's older sister and was forced to leave when Douglas was nine or ten years old, that Douglas loves and cares for his own four children, that Douglas is a good brother and son, that Douglas is a positive, upbeat and friendly person, that Douglas is a smart person, although he dropped out of high school due to reading problems, and that Douglas worked at various jobs.

The jury recommended the death penalty by a vote of eleven to one (11-1). Subsequently, the trial court held a Spencer hearing to allow both the State and Douglas to present additional evidence and arguments concerning sentencing.

The trial court found two aggravating circumstances: (1) the murder was especially heinous, atrocious or cruel (HAC); and

[1] These witnesses were: (1) Charlie McCloud, Douglas's brother-in-law; (2) Janice Williams, Douglas's maternal aunt; (3) John Williams, Douglas's uncle by marriage; (4) Tammy Wright, a close friend; (5) Joyce Douglas, Douglas's sister-in-law; (6) Sandra Wright, a friend of the family; (7) Lavern Montgomery, Douglas's brother-in-law; (8) Matthew McKever, Douglas's stepfather; (9) James Douglas, Douglas's brother; (10) Lavonia Montgomery, Douglas's sister; (11) Roy Smith, Douglas's maternal uncle; and (12) Sheryl McKever, Douglas's mother.

(2) the murder was committed in the course of a sexual battery. The trial court found one statutory mitigator--that Douglas had no significant history of prior criminal activity in that he did not have a prior felony conviction--but assigned this mitigating circumstance little weight due to evidence that Douglas engaged in illegal drug activity that did not lead to arrests or convictions. The Court also considered thirty (30) non-statutory mitigators proposed by trial counsel and found sixteen (16) of them to exist.[2] The Court rejected the remaining fourteen (14) mitigators proposed by Douglas's trial counsel.[3]

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[2] (1) Douglas has a close-knit, religious family (little weight); (2) Douglas's family supports him even after his conviction (little weight); (3) Douglas was abused by his father both psychologically and physically (little weight); (4) Douglas witnessed his father commit acts of domestic violence against his mother (little weight); (5) Douglas and his siblings were afraid of their father when they were children (little weight); (6) Douglas's father was arrested for child abuse after beating Douglas with a belt (little weight); (7) Douglas's father sexually abused Douglas's oldest sister for seven years and was eventually arrested for the crime (little weight); (8) the revelation of the sexual abuse of Douglas's oldest sister had a devastating impact on Douglas and the rest of his family (little weight); (9) Douglas has an interest in the scriptures (little weight); (10) Douglas was helpful to his father around the house (little weight); (11) Douglas was diagnosed with learning disabilities in the second grade (very little weight); (12) Douglas never finished high school (very little weight); (13) Douglas has made plans for self-improvement since his incarceration, including obtaining his GED (little weight); (14) Douglas can be rehabilitated (moderate weight); (15) Douglas can be a productive inmate in prison (moderate weight); and (16) Douglas exhibited appropriate behavior during the trial (little weight).

[3] The mitigating circumstances rejected by the trial court were: (1) Douglas's father left the home when Douglas was nine

The trial judge followed the jury's recommendation and sentenced Douglas to death. Douglas v. State, 878 So.2d 1246 (Fla. 2004).

Douglas raised five issues on appeal in a fifty-eight (58) page initial brief. Douglas was represented on appeal by veteran Assistant Public Defender Nada Carey.[4] Douglas argued: (1) the trial court erred in allowing the introduction of enlarged crime scene and autopsy photographs; (2) the trial court erred in rejecting several proposed mitigating circumstances and in assigning little weight to the mitigating circumstances related to Douglas's abusive childhood; (3) the trial court erred in instructing the jury on, and in finding, HAC; (4) Douglas's death sentence is not proportionate; and (5) Florida's capital sentencing procedure is unconstitutional under

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years old (not mitigating); (2) Douglas's father did not spend a significant amount of time with Douglas after he left the home (not mitigating); (3) Douglas loves his children (not proven); (4) Douglas is a good father to his children (not proven); (5) Douglas supports his children by buying food, diapers and other items (not proven); (6) Douglas is a positive, upbeat person (not proven); (7) Douglas has worked at several different jobs (not mitigating); (8) Douglas has an outgoing, friendly personality (not proven); (9) Douglas is and always has been respectful to his elders (not proven); (10) Douglas has been a good son to his mother and is protective of her (not proven); (11) Douglas has been a good brother to his siblings (not proven); (12) Douglas was impaired by alcohol at the time of the crime (not mitigating); (13) Douglas has been courteous and pleasant to the courtroom personnel (not proven); and (14) codefendant Misty Jones entered a guilty plea to the charge of accessory after the fact and will receive a maximum sentence of seven years' imprisonment (not proven).

[4] Ms. Carey has been a member since 1987. http://www.floridabar.org

Ring v. Arizona, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002). Though not raised by Douglas, the Florida Supreme Court also considered whether there was sufficient evidence to support Douglas's conviction for first-degree felony murder.

On May 6, 2004, the Florida Supreme Court rejected Douglas's arguments on appeal. The Court found the evidence sufficient to support Douglas's conviction for first degree murder and Douglas's sentence to death proportionate. The Florida Supreme Court affirmed Douglas's convictions and sentence to death. Douglas v. State, 878 So.2d 1246 (Fla. 2004). Mandate issued on July 15, 2004.

On October 13, 2004, Douglas filed a petition for a writ of certiorari in the United States Supreme Court. On January 10, 2005, the Court denied review. Douglas v. Florida, 543 U.S. 1061 (2005).

On May 17, 2005, Douglas filed an initial motion for post-conviction relief, which he labeled an amended motion. (PCR Vol. I 89-169). On December 27, 2005, Douglas filed an amended motion for post-conviction relief, which he labeled a second amended motion for post-conviction relief. (PCR Supp.24-159). He raised thirty-two (32) claims. On January 17, 2006, the State filed a response. (PCR Vol. II 190-268).

On April 7, 2006, the collateral court held a case management conference (Huff hearing) pursuant to Rule

3.851(f)(5), Florida Rules of Criminal Procedure.[5] Both sides were given an opportunity to present arguments on Douglas's purely legal claims. Likewise, both sides were given an opportunity to present arguments on those issues that did not involve disputed facts and could be decided as a matter of law on the record in the case. (PCR Vol. II 299).

On May 15, 2006, the collateral court issued a case management order granting an evidentiary hearing on two claims listed by collateral counsel as requiring an evidentiary hearing. (PCR Vol. II 299-312). The court granted an evidentiary hearing on Claim X, which alleged ineffective assistance of counsel for failing to investigate and present the testimony of Dr. Harry Krop. The Court also granted an evidentiary hearing on Douglas's Claim XVIII-2, which alleged trial counsel was ineffective for failing to present available mental health mitigation evidence. (PCR Vol. II 299-312).

On October 12, 2006 and November 21, 2006, the collateral court held an evidentiary hearing on Douglas's claims. Afterwards, the collateral court granted the parties' request to submit written closing arguments, in lieu of oral argument. On January 29, 2007, both parties submitted written closing arguments. (PCR Vol. III 479-517, 518-523).

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

On November 20, 2009, the collateral court judge issued an order denying Douglas's motion for post-conviction relief. (PCR Vol. V 788-850). On December 7, 2009, Douglas filed a motion for rehearing. (PCR Vol. V 851-856). On December 14, 2009, the State filed a response. (PCR Vol. V 851-866). On January 14, 2010, the collateral court denied Douglas's motion for rehearing.

On February 11, 2010, Douglas filed a notice of appeal. (PCR Vol. V 880-881). On September 3, 2010, Douglas filed his initial brief. On the same day, Douglas filed the instant petition for writ of habeas corpus. This is the State's response.

## Statement of the Law Applicable to Claims of Ineffective Assistance of Appellate Counsel

Claims of ineffective assistance of appellate counsel are properly presented in a petition for writ of habeas corpus. Freeman v. State, 761 So. 2d 1055, 1069 (Fla. 2000). Like claims of ineffective assistance of trial counsel, claims of ineffective assistance of appellate counsel are reviewed under the standard set forth in Strickland v. Washington, 466 U.S. 668 (1984).

Consistent with this standard, 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. Overton v. State, 976 So.2d 536 (Fla. 2007). If a capital defendant cannot make both showings, appellate counsel cannot be deemed ineffective. Id.

As a general rule, appellate counsel cannot be deemed ineffective for failing to raise an issue on appeal that was not preserved for appeal by a contemporaneous objection below. Johnson v. State, 921 So. 2d 490, 511 (Fla. 2005). An exception to this general rule has been made when the error constitutes fundamental error. In reviewing allegations concerning prosecutorial misconduct, fundamental error arises only when, but for the misconduct, the jury could not have reached the verdict it did. Miller v. State, 782 So.2d 426, 432 (Fla. 2d DCA 2001). *See also* Miller v. State, 926 So.2d 1243 (Fla. 2006) (noting that in order for improper comments made in the closing arguments of a penalty phase to constitute fundamental error, they must be so prejudicial as to taint the jury's recommended sentence).

The failure to raise a meritless issue does not constitute ineffective assistance of counsel. See Valle v. Moore, 837 So.2d 905, 908 (Fla. 2002); Chandler v. Dugger, 634 So.2d 1066, 1068

(Fla. 1994). In fact, appellate counsel is not even required to raise every conceivable non-frivolous issue in order to render effective assistance of appellate counsel. Valle v. Moore, 837 So.2d at 908. *See also* Fennie v. State, 855 So.2d 597, 607 (Fla. 2003)(appellate counsel is not required to raise every conceivable non-frivolous issue).

A review of the record on appeal demonstrates that Douglas has shown neither deficiency nor prejudice in this case. To the contrary, the record reflects that experienced appellate counsel acted as a capable advocate, asserting five issues for judicial review in a fifty-eight (58) page brief.

## CLAIM I

**WHETHER APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE A CLAIM THAT THE TRIAL JUDGE ERRED IN ALLOWING THE JURY TO TAKE DEMONSTRATIVE AIDS INTO THE DELIBERATION ROOM.**

Douglas first claims that appellate counsel was ineffective for failing to raise a claim, on appeal, that the trial judge erred in allowing the jury, over the defendant's objection, to take boards used by the prosecutor during his closing argument into the deliberation room. According to Douglas, the boards contained definitions of the two aggravating factors upon which the jury was instructed; HAC and murder in the course of a felony. (Pet. at page 8-9). Douglas speculates that allowing this demonstrative aid into the jury deliberation room allowed

the jury to give "undue emphasis" to the aggravating factors given that the defendant did not have its mitigating factors blown up for the jury's use as well. (Pet. at page 12). Douglas avers the trial judge's error was compounded by the failure to give the jury a cautionary instruction about the proper use of such an aid. However, no such cautionary instruction was requested. (TR Vol. XVII 1512-1517).

The record of the penalty phase proceedings demonstrates that about 15 minutes after the jury retired to deliberate, the jury made a request for the "boards with full aggravating circumstances, definitions, and the ones used by the prosecutor during his summary? It will be helpful for us to use during our deliberations." (TR Vol. XVII 1511).

The defense posed an objection. The court queried whether the definitions depicted on the boards were the same as the standard instructions. (TR Vol. XVII 1512). The prosecutor answered in the affirmative.

Trial counsel protested that the defendant didn't have the mitigating circumstances blown up to that size, so it would be unfair to send them a blow-up of the State's presentation. (TR Vol. XVII 1512). Trial counsel went on to note the blow-up was a demonstrative aid, which had not been introduced into evidence. Douglas asked the Court to deny the request. Trial counsel suggested, as an alternative, that the state could make

a copy of the instructions for each juror, rather than the one copy they had. (TR Vol. XVII 1512-1513). Trial counsel did not request time, or an opportunity, to make a blow-up of the mitigating factors it wished the jury to consider.

Before ruling, the trial court looked at each board to make sure the definition contained on the board was identical to the standard instruction. Once satisfied it was, the trial court agreed to allow the boards to be taken into the jury room for the jury's use during deliberations. (TR Vol. XVII 1512, 1515).

Douglas admits that the standard of review of this issue, had appellate counsel raised it on appeal, would have been an abuse of discretion. Douglas also contends that this Court, as well as the First District Court of Appeal, has found no abuse of discretion when the trial court has allowed the jury to have demonstrative aids in the deliberation room even though they were not admitted into evidence. Douglas cites to this Court's decisions in Chamberlain v. State, 881 So.2d 1087, 1102 (Fla. 2004) and the First District Court's decision in Hunt v. State, 746 So.2d 559, 561 (Fla. 1st DCA 1999).

However, these two cases are not particularly helpful to this Court's analysis. In Chamberlain, a friction lock baton or asp, was used during the testimony of a witness to assist her in describing the weapon she saw in the defendant's hand. The state

did not contend the asp was the actual weapon used by the defendant, only similar.

Nothing in Chamberlain implies the jury took the demonstrative weapon into the jury room. Indeed, in Chamberlain, this Court noted that the state "never made use of the demonstrative aid other than during [the witness's] testimony." Chamberlain at 1103.

In Hunt, the trial court allowed the jury to use a transcript to assist in following along when a difficult-to-hear video tape, capturing part of the crime, was played for the jury. The transcript was not introduced into evidence and the jury was told the transcript would not be available in the jury room. The trial court was apparently true to its word, as the First District Court of Appeal noted that copies of the transcript were "collected immediately [after the video tape was played]." Hunt v. State, 746 So.2d at 562.[6]

Rather than the cases to which Douglas cites, this Court need look only to the version of Rule 3.400, Florida Rules of Criminal Procedure in effect at the time of direct appeal. In

[6] This Court has noted that a chart in which the prosecutor had checked off aggravating and mitigating factors, was an improper item for submission to jury during its deliberation. White v. State, 446 So.2d 1031 (Fla. 1984). In this case, however, there were no marks on the chart. The Court in White did not specifically address the issue of whether this error would warrant a new penalty phase because trial counsel in White agreed the charts could go back with the jury. White at 1036.

2007, this court amended Rule 3.400, making it mandatory to send a written copy of the jury instructions to the jury in all criminal cases. Prior to the amendment, and at the time of Douglas's capital trial, a trial court could, in its discretion, allow the jury to have a copy of the jury instructions in the deliberation room as long as all the instructions are taken in. *See* In re Amendments to The Florida Rules of Civil Procedure, The Florida Rules of Criminal Procedure, 967 So.2d 178, 187 (Fla. 2007).

In this case, the record reflects that the jury had a copy of all the instructions. (TR Vol. XVII 1512-1513). Moreover, nothing in the jury's request supports Douglas's claim the jury gave the aggravating factors undue emphasis during deliberations. Likewise, nothing in the record supports the notion the boards displayed anything more than the standard jury instruction on each aggravating factor applicable in Douglas's case. For instance, the record does not reflect the boards had any markings, such as arrows or checks, that might be considered as advocacy or attempts at persuasion. Indeed, before granting the jury's request for the boards, the trial court made sure the wording on each board comported exactly with the standard instructions. (TR Vol. X 1513).

Given that the trial court, pursuant to the plain language of Rule 3.400, Florida Rules of Criminal Procedure, could allow

a copy of the jury instructions to go back to the deliberation room, coupled with the fact the boards contained nothing more than the standard instructions on aggravating factors upon which the jury had already been instructed, Douglas cannot show appellate counsel was ineffective when she failed to raise this claim on appeal.[7]

## CLAIM II

### WHETHER APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE A CLAIM OF FUNDAMENTAL ERROR DUE TO COMMENTS MADE BY THE PROSECUTION DURING THE GUILT PHASE CLOSING ARGUMENT.

In this second habeas claim, Douglas points to a number of comments made by the prosecutor during closing arguments in the guilt phase of Douglas's capital trial. Douglas admits he posed no objection, at trial, to any of the comments about which he now complains. Douglas claims that appellate counsel was ineffective for failing to raise a claim of fundamental error challenging the prosecutor's comments.

Appellate counsel was not ineffective for failing to challenge the unpreserved comments on direct appeal. Improper comments rise to the level of fundamental error only where the error "reaches down into the validity of the trial itself to the

[7] Using common sense to ascertain the purpose of the jury's request for the boards leads inevitably to the conclusion the boards simply made it easier for all members of the jury to look together, at the same time, at some of the law the trial court instructed it to apply in considering its recommended sentence.

extent that a verdict of guilty could not have been obtained without the assistance of the alleged error." Brooks v. State, 762 So.2d 879, 899 (Fla. 2000). *See also* Peterka v. State, 890 So.2d 219, 243 (Fla. 2004) (noting that fundamental error is error that reaches 'down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error'). Indeed, this Court has made clear that, even intemperate comments, such as calling the defendant a liar, will not rise to the level of fundamental error, as long as the prosecutor is merely submitting to the jury a conclusion he has drawn from the evidence and he does not drift far afield from the evidence adduced at trial. Zack v. State, 911 So.2d 1190, 1205-1206 (Fla. 2005), *pointing to this Court's decision in* Craig v. State, 510 So.2d 857, 865 (Fla.1987).

The comments which Douglas claims appellate counsel should have challenged on appeal came during the State's "sandwich" closing argument.[8] An examination of the record, indeed an examination of Douglas's habeas petition itself, reveals that the prosecutor's comments were in fair response to Mr. Eler's initial closing argument.

[8] Douglas's trial took place when Rule 3.250, Florida Rules of Criminal Procedureallowed the defendant to have first and last closing argument if the defendant did not put on any evidence, except the testimony of the defendant.

For instance, one of Mr. Eler's attacks on the State's case, during his closing argument, was that the State had not proven a sexual battery. (TR Vol. XIII 1115). Instead, Mr. Eler suggested, during closing, that the evidence did not show the sex was non-consensual because Ms. Hobgood, Douglas, and Misty Jones were all out "bar hopping" and "drinking" and that Douglas and Ms. Hobgood were "laughing, having a good time" together. (TR Vol. XIII 1117-1118). Mr. Eler also chided the state for calling DNA experts. Trial counsel told the jury that he didn't "know what the big deal was about DNA…" because Douglas admitted having sex with Ms. Hobgood. (TR Vol. XIII 1116).

It was trial counsel, and not the prosecutor, who first suggested Douglas was a "lady's man." (TR Vol. XIII 1120)). Indeed, Mr. Eler called Douglas a "lady's man" more than once. (TR Vol. XIII 1120, 1135). Mr. Eler told the jury that Douglas was a man who "liked ladies" and got what he wanted that night. (TR Vol. XIII 1120). Mr. Eler suggested that since the sex was consensual, there was no reason for Douglas to kill Ms. Hobgood. (TR Vol. XIII 1120-1121).

Mr. Eler also suggested it was Misty Jones who actually killed Ms. Hobgood. Mr. Eler posited that Jones was jealous that Douglas and Hobgood went out together. (TR Vol. XIII 1125, 1135). At another point, Mr. Eler told the jury that Mary Ann's blood was in the Escort but "it doesn't matter about the blood."

(TR Vol. XIII 1123). Mr. Eler also told the jury that maybe it was Misty Jones who was driving the Escort because she had as much access to the Escort as Mr. Douglas did. (TR Vol. XIII 1125).

Contrary to Douglas's claim now, none of the prosecutor's remarks questioned defense counsel's competency or derided the defendant and the theory of this defense at trial. Instead, the prosecutor responded to each of Mr. Eler's arguments weaving in evidence presented at trial that supported, overwhelmingly, that it was Luther Douglas, and Luther Douglas alone, who raped and murdered Mary Ann Hobgood.

This Court has consistently held that a prosecutor's comments are not improper where they fall into the category of an "invited response" by the preceding argument of defense counsel concerning the same subject. Walls v. State, 926 So.2d 1156 (Fla. 2006); Barwick v. State, 660 So.2d 685, 694 (Fla. 1995); Dufour v. State, 495 So.2d 154, 160 (Fla. 1986). A review of the record of the entire closing arguments of both counsel, as opposed to selected comments pulled out of context, demonstrates that appellate counsel was not ineffective for failing to challenge, as fundamental error, these unpreserved comments.

Had appellate counsel raised this issue on appeal, in all probability this Court would have found the claim meritless

because the comments were either supported by the evidence or in fair response to the defendant's closing arguments. Accordingly, Douglas has shown neither deficient performance or prejudice. This Court should deny Douglas's claim. Zack v. State, 911 So.2d 1190, 1205-1206 (Fla. 2005). *See also* Rutherford v. Moore, 774 So.2d 637, 643 (Fla. 2000) (the failure of appellate counsel to raise what in all probability would be a meritless issue will not render appellate counsel's performance ineffective).

## CONCLUSION

Douglas has failed to demonstrate that appellate counsel was ineffective. The Petition for Writ of Habeas Corpus should be denied.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS has been furnished by U.S. Mail to Frank Tassone, at Tassone, Sichta, and Dreicer, LLC, 1833 Atlantic Boulevard, Jacksonville, Florida 32207, this 6th day of December, 2010.

_____
Meredith Charbula
Assistant Attorney General

## CERTIFICATE OF FONT AND TYPE SIZE

I HEREBY CERTIFY that the instant brief has been prepared with 12 point Courier New type, a font that is not spaced proportionately.

_____
Meredith Charbula
Assistant Attorney General