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IN THE SUPREME COURT OF FLORIDA

CASE NO. SC13-2112

COREY SMITH,

Petitioner,

vs.

MICHAEL D. CREWS, Secretary,
Department of Corrections, State of Florida,

Respondent.

ON PETITION FOR
WRIT OF HABEAS CORPUS

RESPONSE

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STATEMENT OF THE CASE AND FACTS

In accordance with Fla. R. Crim. P. 3.851(b)(2), this petition is being pursued concurrently with the appeal from the order denying Defendant's motion for post conviction relief.[1] Smith v. State, FSC Case No. SC12-2466. The State will therefore rely on its statements of the case and facts contained in its brief in that matter.

ARGUMENT

I. APPELLATE COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO RAISE ISSUES REGARDING THE SEVERANCE OF CODEFENDANTS AND COUNTS.

Defendant asserts that his appellate counsel was ineffective for failing to raise an issue regarding the fact that he made motion to sever defendants and counts that were not granted. However, Defendant is entitled to no relief. The portion of the claim related to the motion to sever defendants is insufficiently plead, and appellate counsel cannot have been deemed ineffective for failing to have raised this meritless issue. Appellate counsel can also not been deemed ineffective for failing to raise the unpreserved and meritless issue regarding the severance of counsel.

[1] Petitioner will be referred to as Defendant. The prosecution and Respondent will be referred to as the State. The symbol "R/[volume number]" and will refer to the record from Defendant's direct appeal.

The standard for evaluating claims of ineffective assistance of appellate counsel is the same as the standard for determining whether trial counsel was ineffective. Williamson v. Dugger, 651 So. 2d 84, 86 (Fla. 1994). In Strickland v. Washington, 466 U.S. 668 (1984), the United States Supreme Court announced the standard under which claims of ineffective assistance must be evaluated. A petitioner must demonstrate both that counsel's performance was deficient, and that the deficient performance prejudiced the defense.

Moreover, appellate counsel cannot be deemed ineffective for failing to raise an issue that was not preserved. Groover v. Singletary, 656 So. 2d 424, 425 (Fla. 1995). Nor may counsel be considered ineffective for failing to raise an issue that was without merit. Kokal v. Dugger, 718 So. 2d 138, 143 (Fla. 1998). Similarly, counsel cannot be deemed ineffective for failing to raise an issue that would have been harmless error. Valle v. Moore, 837 So. 2d 905, 910 (Fla. 2002).

With regard to the portion of the claim related to the severance of defendants, Defendant does not even begin to assert what issue appellate counsel should have raised on appeal or how the failure to have raised that unidentified issue created a reasonable probability that this Court would have reversed on direct appeal. Instead, he simply asserts that he filed a

pretrial motion to sever defendants based on Burton v. United States, 391 U.S. 123 (1968), contends the trial court never ruled on that motion and notes that the motion would probably be considered moot. However, this Court has made it clear that a defendant must present specific facts and arguments meeting both prongs of Strickland to state a facially sufficient claim of ineffective assistance of appellate counsel. Conahan v. State, 118 So. 3d 718, 734-35 (Fla. 2013); Bradley v. State, 33 So. 3d 664, 685 (Fla. 2010); Patton v. State, 878 So. 2d 368, 380 (Fla. 2004). Since Defendant has not done so with regard to this claim, it should be denied.

Even if Defendant had sufficiently plead this claim, he would still be entitled to no relief. Appellate review is generally restricted to issues that were before the lower court on which the lower court ruled adversely to the person appealing. Robards v. State, 112 So. 3d 1256, 1266-67 (Fla. 2013). As such, appellate counsel cannot be deemed ineffective for failing to appeal a trial court's ruling in his favor. Cherry v. Moore, 829 So. 2d 873, 879 (Fla. 2002). Further, to preserve an issue for appeal, it is necessary for a defendant to obtain a ruling on issue from the lower court. Richardson v. State, 437 So. 2d 1091, 1094 (Fla. 1983). Again, appellate

counsel cannot be deemed ineffective for failing to raise an unpreserved issue. Groover, 656 So. 2d at 425.

Here, Defendant asserts that the trial court never ruled on his motion to sever defendants. If that were true, any issue regarding that motion would not be preserved for appeal. Richardson, 437 So. 2d at 1094. Since appellate counsel cannot be deemed ineffective for failing to raise an unpreserved issue, the claim would be meritless. It should be denied.

However, the record does not support Defendant's assertion that the trial court never ruled on his motion to sever defendants. Instead, it reflects that Defendant simultaneously filed a motion to sever defendants, a motion to sever counts and a motion to dismiss the indictment based on an alleged violation of the speedy trial provisions of the Interstate Agreement on Detainers (IAD) on June 4, 2004. (R2/267-73, 281-84) When the State indicated that it needed time to prepare regarding the motion to dismiss and the trial court agreed to give the State time to do so at a June 8, 2004 hearing, Defendant filed a speedy trial demand. (R3/360-67)

At a June 16, 2004 hearing related to the demand, the State asked that the trial court accelerate the trial date for the codefendants, as well as Defendant, so that a single trial could be held based on issues of judicial economy. (R4/444) All of

the codefendants present objected on the basis that they were not prepared for trial and requested that they be severed from Defendant. (R4/444-48) After considering these arguments, the trial court stated that he had to sever Defendant from his codefendants regardless of whether there was a legal basis on which severance could have been granted otherwise and ordered that Defendant would proceed to trial on his own. (R4/449)

Since the trial court actually granted severance of defendants, Defendant did not receive an adverse ruling on his motion to sever defendants and could not appeal from the ruling. Robards, 112 So. 3d at 1266-67. As such, appellate counsel cannot be deemed ineffective for failing to attempt to do so. Cherry, 829 So. 2d at 879. The claim should be denied.

Additionally, Defendant is not entitled to any relief regarding his motion to sever counts. While Defendant claims that he preserved the issue that the various murder counts sufficiently related to one another and that the RICO counts did not provide a sufficient relationship for the counts to be joined, this is not true. This Court has held that an issue is not preserved when the grounds asserted in support of the issue on appeal are not the grounds that were presented to the trial court in connection with the issue. 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). Moreover, an issue is not preserved for appeal when a defendant never obtained a ruling on it from the trial court. Richardson, 437 So. 2d at 1094. Since the grounds Defendant presently asserts are not the grounds asserted below and Defendant never obtained any ruling even on the grounds he did present, this issue is not preserved.

On June 3, 2004, Defendant filed a motion to sever Counts IX, X and XIII of the indictment pending against him at that time. (R2/281-82) In the indictment to which the motion was directed, Count IX charged Defendant, Julius Stevens, Eric Stokes and Jean Henry with conspiring to murder Jackie Pope; Count X charged Stevens, Stokes and Henry with the first degree murder of Pope; and Count XIII charged Latravis Gallashaw with the first degree murder of Kevin Smalls. (R1/60-61, 64) The basis of the motion for severance was that these murders were not related to the RICO counts, that Pope had been killed because he had been a witness when Off. Ricky Taylor was shot by "drunken revelers during New Years Eve celebrations" and that Smalls had been killed during a barroom brawl. (R2/281-82) As such, the record reflects that Defendant never moved for severance on the grounds that the murders with which he was

charged were separate events and that the RICO counts did not provide a sufficient basis to connect the crimes.

Moreover, contrary to Defendant's assertion, the record does not reflect that this motion was heard and denied on September 14, 2004. Instead, the record reflects that at the beginning of the hearing on September 14, 2004, the trial court noted that there were a number of motions set and attempted to discern how much time would be needed to hear them. (R25/3) During the course of this discussion, the trial court noted:

> There is also, according to the calendar, pending a Motion to Sever. I'm not sure that's right, given that, in effect, [Defendant] is on the case that's going to trial.
>
> Do we still need to move forward on the --

(R25/4) The State responded that it believed that what had already occurred regarding the demand mooted any need to hearing the motion, and the trial court agreed. (R25/4-5) As noted above, the trial court had already granted the motion to sever defendants as a result of the speedy trial demand. Given this context, it is apparent that this discussion referred to previously granted motion to sever defendants and not the motion to sever counts.

This is all the more true as Defendant made no attempt to suggest that the fact that Defendant was going to trial by himself as a result of the demand did not moot the motion for

severance being discussed. (R25/5) Instead, he noted that he had other motions pending regarding the manner in which he had been charged, which would include severance of counts. (R25/5) He asked the trial court not to consider those motions at the hearing because he understood that the State was in the process of amending the indictment and believed that the amended indictment might moot his motions. (R25/5) After the amended indictment was returned on September 23, 2004 (R1/70-94), Defendant never asked the trial court to consider the motions he filed directed to the old indictment. As such, the record reflects that Defendant never obtained a ruling on his motion for severance of counts.

Given these circumstances, the issue that Defendant is suggesting that appellate counsel should have raised is not preserved for review. Richardson, 437 So. 2d at 1094; Steinhorst, 412 So. 2d at 338. Since appellate counsel cannot be deemed ineffective for failing to raise an unpreserved issue, this claim is meritless and should be denied. Groover, 656 So. 2d at 425.

To the extent that Defendant may be attempting to suggest that the failure to sever the count constituted fundamental error, he would still be entitled to no relief. In Lugo v. State, 845 So. 2d 74, 92-96 (Fla. 2003), this Court addressed

the propriety of denying a motion for severance where a defendant was charged with RICO, RICO conspiracy and substantive offense that were part of the RICO charges. This Court noted that a defendant was entitled to severance when the various crimes charged did not have a meaningful relationship with one another but held that properly plead and proven RICO charges provided the necessary relationship, where the other offenses were predicate acts to the RICO charges. Id.

Here, the State properly charged Defendant with RICO related charges in which the substantive offenses where properly alleged as predicate acts. (R1/70-94) As the facts laid out in this Court's opinion show, the State proved that Defendant was the head of a criminal enterprise that sold and distributed drugs and that the murders were committed, largely on Defendant's orders, to prevent individuals and the police from disrupting that business. Smith v. State, 7 So. 3d 473, 480-89 (Fla. 2009). Given these circumstances, any attempt that Defendant might make to claim that the failure to sever counts was fundamental error was meritless. As such, appellate counsel cannot be deemed ineffective for failing to raise this issue. Kokal, 718 So. 2d at 143. The claim should be denied.

II. APPELLATE COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO RAISE AN ISSUE REGARDING THE PENALTY PHASE JURY INSTRUCTIONS.

Defendant next asserts that his appellate counsel was ineffective because she did not claim that a 2006 ABA report and this Court's subsequent revision of Fla. Std. Jury Instr. (Crim.) 7.11, somehow shows that the jury was improperly instructed in this case. However, Defendant is entitled to no relief because the claim is insufficiently plead, procedurally barred and meritless.

Once again, Defendant makes no attempt to explain what argument counsel could have presented on direct appeal regarding the jury instructions based on the ABA report or offer any explanation of how the failure to present this unidentified argument created a reasonable probability of a different result. In fact, while Defendant suggests that his complaint concerns the instructions related to the jury's role in sentencing in the heading to the claim, he does not identify which portion of the revisions to Fla. Std. Jury Instr. (Crim.) 7.11 relates to the manner in which the jury was instructed in this matter. Given these circumstances, this claim is insufficiently plead and should be rejected as such. Conahan, 118 So. 3d at 734-35; Bradley, 33 So. 3d at 685; Patton, 878 So. 2d at 380.

Instead of presenting actual argument on his claim, Defendant merely states that he is appealing the summary denial of a post conviction claim in which he made the same assertions about the ABA report and the revisions the jury instruction, notes that the lower court rejected his claim because challenges to the jury instructions are issues that should have been raised on direct appeal and asserts that his appellate counsel should be deemed ineffective to the extent the lower court was correct. In doing so, Defendant ignore that this Court had held that it is improper to present the same issue in both a post conviction appeal and a state habeas petition and results in the habeas claim being procedurally barred. Mann v. State, 112 So. 3d 1158, 1164 (Fla. 2013); Schoenwetter v. State, 46 So. 3d 535, 536 (Fla. 2010); McDonald v. State, 952 So. 2d 484, 496 (Fla. 2006). This is true even where the defendant couches the claim in terms of ineffective assistance of appellate counsel. Green v. State, 975 So. 2d 1090, 1115 (Fla. 2008). Since this is exactly what Defendant has done, this claim is procedurally barred and should be denied as such.

Even if Defendant has sufficiently plead a claim and it was not barred, Defendant would still be entitled to no relief. In his post conviction motion, Defendant asserted that this Court revisions to the jury instruction in light of the ABA report

showed that the jury instructions were unconstitutional. (PCR. 365-80) However, this Court affirmed Defendant's convictions and sentences on March 18, 2009. Smith, 7 So. 3d at 473. This Court did not revise the jury instructions until October 29, 2009. In re Standard Jury Instructions in Criminal Cases-Report No. 2005-2, 22 So. 3d 17, 17 (Fla. 2009). As such, appellate counsel cannot be deemed ineffective for failing to present this argument. Seibert v. State, 64 So. 3d 67, 81-82 (Fla. 2010). The claim should be denied.

Moreover, this Court has held that the claim that the revisions to the jury instructions on the jury's role in sentencing does not show that the manner in which the jury was instructed was unconstitutional. McCray v. State, 71 So. 3d 848, 879 (Fla. 2011). As such, the claim would have been meritless even if appellate counsel did have the ability to present it. Since appellate counsel cannot be deemed ineffective for failing to raise a nonmeritorious issue, this claim should be denied. Kokal, 718 So. 2d at 143.

III. APPELLATE COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO RAISE AN ISSUE REGARDING LETHAL INJECTION.

Defendant next asserts that his appellate counsel was ineffective for failing to raise an issue regarding the constitutionality of the then existing lethal injection protocol. However, Defendant is entitled to no relief.

Once again, Defendant makes no attempt to explain what argument counsel could have presented on direct appeal regarding the constitutionality of Florida's lethal injection protocols or offer any explanation of how the failure to present this unidentified argument created a reasonable probability of a different result. As such, this claim is insufficiently plead and should be rejected as such. Conahan, 118 So. 3d at 734-35; Bradley, 33 So. 3d at 685; Patton, 878 So. 2d at 380.

Once again, instead of explanation what issue appellate counsel should have argued on direct appeal and how, Defendant merely states that he raised a challenge to Florida's lethal injection protocols during the proceedings regarding his post conviction motion, that the lower court denied the claim as procedurally barred and that appellate counsel was ineffective for failing to raise the issue to the extent the bar ruling is correct. Again, by doing so, Defendant has barred his habeas claim. Mann v. State, 112 So. 3d 1158, 1164 (Fla. 2013);

Schoenwetter v. State, 46 So. 3d 535, 536 (Fla. 2010); McDonald v. State, 952 So. 2d 484, 496 (Fla. 2006); see also Green v. State, 975 So. 2d 1090, 1115 (Fla. 2008). Since the claim is barred, it should be denied.

Moreover, even if the claim was properly plead and not procedurally barred, Defendant would still be entitled to no relief. Appellate counsel cannot be deemed ineffective for failing to present an unpreserved issue. Groover, 656 So. 2d at 425. An issue is not preserved for direct appeal when it was not presented to the trial court. Castor v. State, 365 So. 2d 701 (Fla. 1978). Here, Defendant never presented the issue of the constitutionality of Florida's lethal injection protocols to the trial court prior to, or during, trial. As such, appellate counsel cannot be deemed ineffective for failing to raise this unpreserved issue. The claim should be denied.

Moreover, this Court has repeatedly held that Florida's lethal injection protocols are constitutional. Muhammad v. State, 2013 WL 6869010, *4-*12(Fla. Dec. 19, 2013); Pardo v. State, 108 So. 3d 558, 561-65 (Fla. 2012); Valle v. State, 70 So. 3d 530, 538-46 (Fla. 2011); Lightbourne v. McCollum, 969 So. 2d 326 (Fla. 2007); Sims v. State, 754 So. 2d 657, 666-68 (Fla. 2000). As such, the argument that the protocol is

unconstitutional is without merit. Appellate counsel cannot be deemed ineffective for failing to raise a nonmeritorious issue.

In arguing this claim, Defendant admits that he had raised this claim in his 3.851 brief. There, he claimed that the Florida's then current protocol for execution violated his Eight Amendment rights as evidenced by the Diaz execution. Now, in his habeas petition, he states that he raises this same claim because the trial court denied this claim as procedurally barred as it should have been raised on direct appeal. However, Defendant is entitled to no relief. Kokal, 718 So. 2d at 143. The claim should be denied.

IV. THE CLAIM REGARDING THE JURY INSTRUCTION ON PRINCIPALS AND MANSLAUGHTER.

Defendant asserts that his appellate counsel was ineffective for failing to raise issues regarding the guilty phase jury instructions. Specifically, Defendant asserts that his appellate counsel should have argued that jury instruction regarding principals should not have been given in connection with the conspiracy counts. He also asserts that his appellate counsel the jury instruction on manslaughter was fundamental error under State v. Montgomery, 39 So. 3d 252 (Fla. 2010). However, Defendant is entitled to no relief.

As to the jury instruction on principals claim, again the claim is insufficiently plead. Once again, Defendant does not suggest what argument appellate counsel could have presented regarding the manner in which the principal instruction was given or offer any explanation of how the failure to present the unidentified argument created a reasonable probability that this Court would have reversed. Instead, Defendant asserted that trial counsel was ineffective for failing to object to the jury instruction on principals applying to the conspiracy counts and notes that the lower court found that any substantive claim regarding the jury instructions was procedurally barred. However, claims of ineffective assistance of trial counsel are

not cognizable in state habeas petitions. Nelson v. State, 43 So. 3d 20, 33 (Fla. 2010). Moreover, since Defendant fails to present a claim of ineffective assistance of appellate counsel sufficiently, the claim should be rejected. Conahan, 118 So. 3d at 734-35; Bradley, 33 So. 3d at 685; Patton, 878 So. 2d at 380.

Moreover, even if the claim was sufficiently plead, Defendant would still be entitled to no relief. To preserve an issue regarding the propriety of the jury instructions, a defendant must specifically object to the jury instructions. Overton v. State, 801 So. 2d 877, 901-02 (Fla. 2001). Here, the record reflects that Defendant not only did not object to the jury instructions on principals or conspiracy but also that he specifically informed the trial court that he and the State had come to an agreement regarding the form of these instructions before the charge conference. (R68/5751-69) As such, any claim that the lower court erred in instructing the jury regarding principals and conspiracy is not preserved for review. Since appellate counsel cannot be deemed ineffective for failing to raise an unpreserved issue, this claim should be denied. Groover, 656 So. 2d at 425.

Because the issue of the propriety of the principal instruction was not preserved for review, the only issue that appellate counsel could have raised regarding the instruction

was that it constituted fundamental error. See Overton, 801 So. 2d at 901-02. "Fundamental error in a jury instruction requires that the error 'reach 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.'" Hunter v. State, 8 So. 3d 1052, 1070 (Fla. 2008). In the context of a jury instruction error related to the law of principals, this Court has held that a reviewing court must consider the totality of the record, including the strength of the evidence against the defendant, the nature of the arguments presented and other instructions given. Garzon v. State, 980 So. 2d 1038, 1043 (Fla. 2008).

Applying this standard here, it cannot be said that the instructional error was fundamental. While Defendant never clearly explains why he considers the giving of a principal instruction in connection with the conspiracy counts to be error, he does rely heavily on Ramirez v. State, 371 So. 2d 1063 (Fla. 3d DCA 1979). In Ramirez, the court had reversed conspiracy convictions on the basis that conspiracy required proof of an agreement to commit a crime and that evidence that a group of defendants were principals to the commission of the crime was not sufficient to prove that such an agreement existed. Id. at 1065-66. As such, it appears that Defendant is

contending that the problem with the jury instructions was that it permitted him to be convicted of the conspiracy counts without evidence that he actually entered into agreements to commit the underlying offenses based merely on evidence that he was a principal to the underlying offenses.

Here, the State's theory of the case was based almost entirely on the assertion that Defendant had hired and entered into agreements with others to commit the substantive offenses for him. (R69/5788-5849, 5852-83) In support of this theory, the State presented overwhelming evidence that Defendant had entered into agreements with others to commit the crimes he was charged with conspiracy to commit. (R37/1831; R42/2532, 2586; R43/2611; R44/1289; R48/3283; R51/3900; R52/3772, 3889; R57/4300; R58/4307-08, 4310-12; R65/5256-58, 5292, 5308-11, 5318-21; R66/5434-5540, R41/2375-88; R58/4316-20; R40/2300-17; R37/1862-63; R43/2612-14; R44/1276-77; R48/3271-73; R54/3998-4009; R37/1922-24; R48/3282-88; R58/4330-31; R37/1924-25; R52/3905-13; R52/3810; R43/2613-18; R39/2124-25; R37/1931-32; R52/3900-04; R48/3290-92; R42/2544-52; R37/1935-38; R43/2622-25; R44-1315-18)

Further, Defendant's defense was not that the evidence might show that he was a principal but that there were never any agreements. (R69/5883-5929) Instead, the defense was that

Defendant was not guilty of any crime because the State's witnesses were not credible. Id.

In instructing the jury on the various conspiracy charges, the trial court informed the jury that a conspiracy required that there had to be an agreement among two or more people to try to commit the crimes and that Defendant had to have "knowingly and willfully bec[o]me a member of the conspiracy." (R70/5971) Regarding the trafficking conspiracies, the trial court informed the jury that Defendant had to intend to traffic in drugs and had to have entered into an agreement and that he and his named conspirators all had to have committed the elements of trafficking. (R70/ 5980-89) It also told the jury that Defendant had to have intended the murders of Hadley, Fail, Pope and Brown and agreed with others to commit these murders to be guilty of the murder conspiracy counts. (R70/5990, 6002-03, 6009-10, 6020) While the instruction on principals did not expressly indicate that it did not apply to the conspiracy charges, it was also not expressly tied to those charges either. (R70/6029-30) The jury was also told that it had to consider the evidence of each crime separately. (R70/6042)

Given all of these circumstances, it cannot be said that the jury would not have convicted Defendant had it been informed that the principal instruction did not apply to the conspiracy

counts. As such, Defendant has failed to show that the alleged error regarding the principal instruction constituted fundamental error. Hunter, 8 So. 3d at 1070. As such, appellate counsel cannot be deemed ineffective for failing to make the meritless argument that it was fundamental error. Kokal, 718 So. 2d at 143.

Additionally, it should be remembered that the United States Supreme Court has held that appellate counsel is not required to raise every nonfrivolous issue and that a good appellate attorney winnows out weaker issues to concentrate on those issue that provide the greatest chance for success. Jones v. Barnes, 463 U.S. 745, 751-52 (1983). Here, appellate counsel counsel cannot be deemed ineffective for having winnowed out this issue.

Defendant's appellate counsel filed a 104-page initial brief on merits raising nine issues, all but one of which were preserved. Moreover, through these issues, Defendant sought reversal on grounds that would have included the more serious counts of first degree murder and their life and death sentences. As argued above, any issue regarding the principal instruction would not have had a great chance for success because it was based on a theory of fundamental error that was not consistent with the theory of either the prosecution or

defense. In the few cases that Defendant cites in which the issue was found to be meritorious, the issue was preserved and consistent with the defense theory at trial. Evans v. State, 985 So. 2d 1105, 1106-07 (Fla. 3d DCA 2007); McKay v. State, 988 So. 2d 51, 51 (Fla. 3d DCA 2008). Moreover, even in those cases, the remedy was limited to ordering a new trial on the conspiracy counts while leaving the convictions and sentences on the substantive offenses intact. Evans, 985 So. 2d at 1107-08; McKay, 988 So. 2d at 51. Given these circumstances, counsel cannot be deemed ineffective for having winnowed out the weaker issue regarding the principal instruction and the conspiracy counts.[2]

The portion of the claim regarding the manslaughter instruction also provides no basis for relief. Recognizing that this Court's decision in State v. Montgomery, 39 So. 3d 252 (Fla. 2010), was not issued until after his direct appeal had concluded, Defendant suggests that his appellate counsel was ineffective for failing to raise the issue based on the First

[2] The fact that there has not been an evidentiary hearing to confirm that appellate counsel did not affirmatively chose to omit this issue is irrelevant. The United States Supreme Court has made it clear that the standard for deficiency is objective and does not require counsel to confirm a strategic decision was made. Harrington v. Richter, 131 S. Ct. 770, 790 (2011)("Strickland, however, calls for an inquiry into the objective reasonableness of counsel's performance, not counsel's subjective state of mind.").

District's decision in Montgomery v. State, 70 So. 3d 603 (Fla. 1st DCA 2009). However, this reliance does not change the fact that counsel cannot be deemed ineffective for failing to anticipate changes in the law. Nelms v. State, 596 So. 2d 441, 442 (Fla. 1992).

As United States Supreme Court has recognized, a determination of whether counsel was deficient must be based on what counsel knew or should have known at the time counsel acted and cannot be based on the distorting effects of hindsight. Strickland v. Washington, 466 U.S. 688, 690 (1984). As this Court has recognized the proper time for counsel to decide what issues to raise on an appeal is before the initial brief is filed. See Hoskins v. State, 75 So. 3d 250, 257 (Fla. 2011); Jones v. State, 966 So. 2d 319, 330 (Fla. 2007); Cleveland v. State, 887 So. 2d 362, 363-64 (5th DCA 2004).

Here, appellate counsel filed Defendant's initial brief in merits on November 20, 2006. As Defendant admits, the First District did not issue the decision in Montgomery on which he relies until February 12, 2009. Montgomery, 70 So. 3d at 603.[3] Since this decision still did not exist when counsel was

[3] The First District has issued an earlier opinion in that matter on December 31, 2008. Montgomery v. State, 34 Fla. L. Weekly D47 (Fla. 1st DCA Dec. 31, 2008). Given that this version was withdrawn on rehearing and that it was still well after the initial brief was filed, it would not affect the analysis here.

choosing what issues to present on direct appeal, counsel would still have had to anticipate a change in the law to raise this argument. Since counsel cannot be deemed ineffective for failing to do so, the claim is meritless and should be denied. Nelms, 596 So. 2d at 442.

Defendant's reliance on Pierce v. State, 121 So. 3d 1091 (Fla. 5th DCA 2013), Shabazz v. State, 955 So. 2d 57 (Fla. 1st DCA 2007), and Whatley v. State, 679 So. 2d 1269 (Fla. 2d DCA 1996), does not compel a different result. In Pierce, Shabazz, and Whatley, the opinion which provided the basis for raising the claim had been issued before the initial brief was filed. Pierce, 121 So. 3d at 1092-93; Shabazz, 955 So. 2d at 58; Whatley, 679 So. 2d at 1269-70. As such, counsel had caselaw to support the argument and was not required to anticipate a change in the law. In contrast, here, the First District's decision in Montgomery was not issued for more than two years after the initial brief was filed. As such, none of these cases support Defendant's claim. The claim should be denied.

Ortiz v. State, 905 So. 2d 1016 (Fla. 2d DCA 2005), also does not support Defendant's position. There, while the case that supported the claim was issued after the initial brief was filed, it was issued before the answer brief was filed. Id. at 1017. Moreover, counsel had filed an Anders brief. Id. Here,

the First District's decision in Montgomery was not only issued more than two years after the initial brief was filed, it was also issued almost two years after the State filed its answer brief and more than a year after oral argument. Moreover, counsel did not file an Anders brief but a 104 page long brief raising nine issues. Given these circumstances, Defendant's reliance on Ortiz does not support his claim of ineffective appellate counsel.

Additionally, it should be remembered that Defendant would not be entitled to relief even if State v. Montgomery, 39 So. 3d 252 (Fla. 2010), applied to his case. This Court has made it clear that the error in the manslaughter instruction only constitutes fundamental error where the intent element that was misstated in the instruction was in dispute and the defendant was not convicted of an offense that is two or more steps removed from manslaughter. Daniels v. State, 121 So. 3d 409, 417-19 (Fla. 2013); Haygood v. State, 109 So. 3d 735, 741 (Fla. 2013); Montgomery, 39 So. 2d at 257-59. Where the intent element in the manslaughter instruction was not in dispute at trial, the error is not fundamental. Griffin v. State, 128 So. 3d 88, 90 (Fla. 2d DCA 2013).

Here, while the trial court instructed the jury on manslaughter with respect to the deaths of Hadley, Brown, Pope,

Wilson, Lipscomb and Beneby, it also instructed the jury regarding first and second degree murder regarding Hadley, Brown, Pope and Wilson. (R70/5991-6002, 6003-09, 6010-17, 6018-20, 6021-29) Defendant was convicted of first degree murder regarding Hadley, Brown, Pope and Wilson. (R20/2695-98, R21/2803-07) As such, manslaughter was two steps removed regarding these offenses, and any error in the manslaughter instruction was not fundamental error. Pena v. State, 901 So. 2d 781, 786-88 (Fla. 2005).

While Defendant was convicted of manslaughter regarding Beneby and Lipscomb (R20/2696-27, R21/2804), the record shows that the intent element was not in dispute regarding these crimes. Instead, Defendant asserted that these victims were killed by people other than him and that he was not a principal to the killings. (R35/1519-20, 1530, R67/5585-86, 5590-91, R69/5883-5929) In fact, Defendant even asserted during closing that all of the evidence the State had presented regarding manner of the killings in this case was an irrelevant, smoke screen to cover the lack of evidence of Defendant's involvement. (R69/5893) Given these circumstances any error in the intent element of the manslaughter instruction would not constitute fundamental error. Griffin, 128 So. 3d at 90. As such, appellate counsel cannot be deemed ineffective for failing to

make the meritless argument that it was fundamental error. Kokal, 718 So. 2d at 143. The claim should be denied.

V. APPELLATE COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO ARGUE THAT HIS CONVICTIONS FOR MULTIPLE COUNTS OF CONSPIRACY TO COMMIT DIFFERENT CRIMES VIOLATED DOUBLE JEOPARDY.

Defendant next asserts that his appellate counsel was ineffective for not asserting a double jeopardy violation based on his convictions for RICO conspiracy, conspiracy to traffic in cocaine and marijuana and conspiracy to commit first-degree murders of Leon Hadley, Cynthia Brown, Jackie Pope and Anthony Fail. However, Defendant is entitled to no relief.

In arguing his claim, Defendant does little more than cite to Rios v. State, 19 So. 3d 1004 (Fla. 2d DCA 2009), and suggests that it hold that a defendant can never be conviction of RICO conspiracy and other conspiracy counts where the other conspiracy counts are charged as predicate acts regarding the RICO conspiracy. He then avers that since he was allegedly charged in a similar manner,[4] his convictions for RICO conspiracy and other conspiracies violate Double Jeopardy and his appellate counsel was ineffective. However, in doing so, Defendant misrepresents the holding of Rios.

[4] Defendant is at least partially incorrect in this assertion. The conspiracy to murder Fail was not alleged as a predicate act for the RICO conspiracy. (R1/72-74) Moreover, while the predicates acts for the RICO conspiracy included discussions of killing Hadley among members of the RICO organization and the murder of Hadley (R1/73), the actual conspiracy or agreement to murder Hadley was not alleged. (R1/72-74)

In Rios, the Court did not hold that convictions for both the predicate acts underlying a RICO charge and a RICO charge violated Double Jeopardy. In fact, both Florida and federal courts have long rejected that assertion. Gross v. State, 728 So. 2d 1206, 1208 (Fla. 4th DCA 1999); Haggerty v. State, 531 So. 2d 364, 365 (Fla. 5th DCA 1988); United States v. Hampton, 786 F.2d 977, 979-80 (10th Cir. 1986); United States v. Rone, 598 F.2d 564, 571 (9th Cir. 1979).

Instead, Rios merely held that a defendant cannot be convicted of two conspiracy counts where the evidence showed there was only agreement to violate the law even if the agreement involved violating multiple laws. Rios, 19 So. 3d at 1006. Moreover, the court recognized that a determination of whether there was one or more agreement required the consideration of the evidence adduced at trial. Id. at 1007. This holding is consistent with longstanding United States Supreme Court precedent. Braverman v. United States, 317 U.S. 49, 52-54 (1942). However, as the Court has also recognized, multiple conspiracy convictions can be obtained when the evidence shows multiple agreements. United States v. Broce, 488 U.S. 563, 571 (Fla. 1989). As such, Defendant would need to show that the record showed that there was one only agreement

encompassing the RICO and other conspiracies for his claim to have merit.

However, Defendant makes no attempt to allege that the record shows that there was only one agreement that covered all of the conspiracies. Instead, he simply argues that because the other conspiracies were allegedly charged as part of the pattern of racketeering underlying the RICO conspiracy, double jeopardy was violated. However, as that assertion does not even begin to address the actual issue presented, Defendant has not sufficiently alleged a claim of ineffective assistance of counsel for failing to raise this issue. Conahan, 118 So. 3d at 734-35; Bradley, 33 So. 3d at 685; Patton, 878 So. 2d at 380. The claim should be denied.

Even if Defendant had plead the claim sufficiently, Defendant would still be entitled to no relief. As both this Court and the United States Supreme Court have recognized, a defendant can waive a Double Jeopardy violation through his actions. See Broce, 488 U.S. at 570-74; Novaton v. State, 634 So. 2d 607, 608-09 (Fla. 1994). Here, the record reflects such a waiver.

While Defendant asks as if the issue of whether the multiple conspiracy counts were proper is being raised for the first time on appeal, the record shows that Defendant actually

filed a motion to dismiss the conspiracy counts on the basis that convictions on all the conspiracy counts would violate double jeopardy on June 3, 2004, at the same time that he filed his motions for severance and his motion to dismiss based on the alleged violation of the IAD speedy trial provision. (R2/277-80) When the trial court refused to force the State to proceed to a hearing regarding the speedy trial motion to dismiss unprepared, Defendant filed a speedy trial demand. (R3/360-67) When the trial court subsequently attempted to hold a hearing on Defendant's outstanding pretrial motion, Defendant expressly asked that this motion not be heard because he was aware that the State was in the process of obtaining a superseding indictment and wanted to see that how that change in the indictment affected his arguments. (R25/5) He averred that if the superseding indictment did not fix his problem, he would ask the court to address the matter concerning the new indictment. (R25/5) When the new indictment was returned (R1/70-94), Defendant did not renew his motion and instead filed a notice of expiration. (R1/26)

When he moved for judgment of acquittal, Defendant renewed his argument that the two drug trafficking conspiracies should be disallowed because there was a single agreement to traffic in both cocaine and marijuana. (R67/5582-83) However, Defendant

chose to argue that the RICO conspiracy had to be dismissed because the State had not used the phrase pattern of racketeering in describing the predicate acts in the indictment. (R67/5581-82, 5583-84) He argued that the murder conspiracies were not sufficiently proven because he did not commit the murders and the evidence regarding his role in the conspiracies and murders was not credible. (R67/5584-85, 5587-90, 5592-93) Since Defendant did actually raise the issue below, then abandoned it and then sought only to raise part of the issue again, Defendant should be deemed to have waived this issue. Since Defendant waived the issue, appellate counsel cannot be deemed ineffective for failing to raise it. See Wheeler v. State, 124 So. 3d 865, 888 (Fla. 2013). The claim should be denied.

Moreover, the claim that was actually considered below regarding the drug trafficking conspiracies, as well as the issue regarding the RICO conspiracy, are also meritless. As this Court has recognized, the legislature had expressed its clear intent that Double Jeopardy issues be resolved under the standard announced in Blockburger v. United States, 284 U.S. 299 (1932). State v. Smith, 547 So. 2d 613 (Fla. 1989). In Albernaz v. United States, 450 U.S. 333 (1981), the Court addressed the propriety of multiple conspiracy convictions where

the conspiracy crimes were created by different substantive statutes and not as a result of the application of a single statute making it illegal to conspire to commit crimes. It held that when the various conspiracy conviction were the result of violations of different conspiracy statutes and those statutes meet the Blockburger test of being different crimes, there was no Double Jeopardy violation. Id. at 336-39. It explained that the Braverman rule of allowing only one conspiracy count where there was only one agreement only applied when the conspiracy counts were all the result of the violation of one general conspiracy statute. Id. at 339-41.

Under Florida law, the crime of RICO conspiracy is created by §895.03(4), Fla. Stat. The crime of conspiracy to traffick in marijuana is created by §893.135(1)(a)& (5), Fla. Stat. The crime of conspiracy to traffick in cocaine is created by §893.135(1)(b) & (5). Further, §893.135(5), Fla. Stat. specifically states that the legislature intends for multiple punishments to be imposed. Only the murder conspiracies are the result of a conviction under the general conspiracy statute. Moreover, there are be no serious contention can be made that RICO conspiracy, cocaine trafficking conspiracy and marijuana trafficking conspiracy do not each contain statutory elements that the other crimes do not. In fact, federal courts have

recognized that there is no Double Jeopardy violation in convicting a defendant of RICO conspiracy and underlying drug conspiracies. United States v. DeShaw, 974 F.2d 667, 671-72 (5th Cir. 1992). As such, Defendant's argument that his convictions for RICO conspiracy and the drug conspiracies violate Double Jeopardy is meritless under Albernaz. Since appellate counsel cannot be deemed ineffective for failing to raise a meritless issue, this claim should be denied. Kokal, 718 So. 2d at 143.

Further, both the indictment and the proof show that the RICO conspiracy was based on an agreement to run a large scale drug business in Liberty City from July 1994 to January 1999. (R1/71-72; R37/1831; R42/2532, 2586; R43/2611; R44/1289; R48/3283; R51/3900; R52/3772, 3889; R57/4300; R58/4307-08, 4310-12; R65/5256-58, 5292, 5308-11, 5318-21; R66/5434-5540) Each of the murder conspiracies involved separate agreements with select individuals for more limited periods of time to murder the victims. (R1/81, 85, 87, 91; R37/1922-25, 1931-32, 1924-25, 1938-39, 1994-95; R39/2124-25; R40/2300-17; R41/2375-88; R42/2544-52; R43/2613-18, 2624-25; R44/1318; R47/3209-17; R48/3271-73, 3290-92, 3282-88, 3326-27; R52/3905-13, 3810, 3900-04; R54/3998-4009, 4022-29; R58/4330-31, 4335-38) As such, any claim that the convictions for these conspiracies would violate

Double Jeopardy would be meritless. Albernaz, 450 U.S. at 336-41; Broce, 488 U.S. at 571. Since appellate counsel cannot be deemed ineffective for failing to raise a nonmeritorious claim, Defendant's request that this Court do so should be rejected. Kokal, 718 So. 2d at 143. The claim should be denied.

Finally, as already stated, appellate counsel does not have to raise every nonfrivolous issue and is expected to winnow out weaker issues. Jones, 463 U.S. at 751-52. Here, appellate counsel cannot be deemed ineffective for having winnowed out this issue.

Defendant's appellate counsel filed a 104-page initial brief on merits raising nine issues, all but one of which were preserved. Moreover, through these issues, Defendant sought reversal on grounds that would have included the more serious counts of first degree murder and their life and death sentences. Because a proper briefing of a Double Jeopardy claim concerning conspiracies would have involved an extensive review of the statutory creation of the conspiracy crimes and their statutory elements and of the evidence regarding whether one or more agreement was involved, briefing this issue would have required counsel to abandon some of the issues that were raised. Moreover, even if counsel could show the issue was meritorious, the remedy available for the claim would be limited to vacating

the convictions and sentences for the conspiracies that resulted in a lower sentence. Negron Gil De Rubio v. State, 987 So. 2d 217, 219 (Fla. 2d DCA 2008); see also Rios, 19 So. 3d at 1007. That remedy would have left Defendant still subject to multiple death sentences and sentences of life without the possibility of parole. Given these circumstances, appellate counsel cannot be deemed ineffective for having winnowed out this weaker issue. The claim should be denied.

CONCLUSION

For the foregoing reasons, the petition for habeas corpus relief should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was furnished by electronic transmission to Charles G. White, at cgwhitelaw@aim.com, on this 3rd day of March 2014.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief is typed in Courier New 12-point font.

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