IN THE SUPREME COURT OF FLORIDA

WILLIAM JAMES DEPARVINE,

Petitioner,

v.

CASE NO. SC12-2124
L.T. No. 04-CF-000774
DEATH PENALTY CASE

KENNETH S. TUCKER,
Secretary Florida
Department of Corrections, 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

On January 28, 2004, a Hillsborough County grand jury indicted William Deparvine for the first degree murders of Richard Van Dusen and Karla Van Dusen, as well as two counts of armed kidnapping,[1] and armed carjacking. (DAR V1:71-74). At

[1] The trial court granted Deparvine's motion for judgment of acquittal on the two counts of kidnapping during trial. (DAR V37:3109-10).

trial, Deparvine was represented by the Public Defender's Office, specifically, John Skye, Debra Goins, and Samantha Ward. In affirming Deparvine's convictions and two sentences of death on direct appeal, this Court set forth the facts as follows:

> According to testimony at trial, the Van Dusens placed an ad in the St. Petersburg Times ("Times") seeking to sell their truck from February 11, 2003, to March 14, 2003. In March 2003, Rick placed the truck on consignment with auctioneer Stuart Myers, who testified that Rick placed a reserve price of $17,000 on the truck and rejected a bid of $15,000. Unable to sell the truck, the Van Dusens ran another ad from July 8, 2003, to August 8, 2003, asking for $14,500. The Van Dusens ran a final ad in the Times from November 20, 2003, to December 21, 2003, asking for "$13,700 or partial trade for four wheel drive jeep."
>
> The State presented the testimony of Christopher Coviello, the Van Dusens' neighbor, who stated that on November 25, 2003, the day before the Van Dusens' bodies were discovered, he saw the Van Dusens driving away from their house in Tierra Verde, which is approximately twenty minutes southwest of the St. Petersburg area, between 5:15 p.m. and 5:45 p.m. Coviello saw Rick driving the truck by himself and Karla driving a Jeep, also owned by them, by herself and following Rick. The State was able to use the Van Dusens' cell phone records which indicated the cell towers used to track the Van Dusens' movement on November 25, 2003. The Van Dusens' phone records indicated that between the times of 4:45 p.m. and 6:37 p.m., they moved northeast from their home in Tierra Verde through the St. Petersburg area and ended up north of St. Petersburg around the Oldsmar area. Their bodies were discovered on November 26, some 3.4 miles from the last recorded cell tower used by the Van Dusens in Oldsmar.
>
> One of the phone calls Karla made during this time period was to her mother, Billie Ferris, which began at approximately 5:54 p.m. This phone call began by using a cell tower located on Central Avenue in St.

Petersburg and lasted approximately thirty-seven minutes, ending with the use of the cell tower in Oldsmar. Over defense counsel's objections, Ferris testified that during this conversation, when she heard the motor of the car running in the background, she asked Karla whether she was in the car, and Karla responded:

> A: I'm following Rick and the guy that bought the truck. He knows where to get the paperwork done tonight.
>
> ....
>
> Q: [State]: Did Karla Van Dusen tell you how the guy was going to pay for the truck that night?
>
> A: She said he's got cash.

The very next morning, on November 26, the bodies of Rick and Karla were found along a dirt road next to a residence, approximately one mile east of Oldsmar. Rick was shot once in the back of the head. He was found with his wallet and money clip containing eighty-three dollars, two gold rings, a cell phone, and a watch. Karla was shot twice in the head and stabbed twice in the chest. She was found with four gold rings, gold hoop earrings, and a watch. Detective Chuck Sackman testified that he discovered a knife blade and a nine millimeter shell casing under her body.

The Jeep, owned by the Van Dusens, was discovered 1.3 miles away from their bodies at a local business. Detective Sackman testified that the windshield was cracked and that he recovered a bullet fragment from the dashboard, a shell casing between the passenger front seat and the doorway, a bullet fragment on the front passenger floorboard, a global positioning system (GPS) device and an address book on the front passenger seat floorboard, a black purse on the passenger seat, and two cell phones from the center console. On the ground floor next to the Jeep on the driver's side was a Florida identification (ID) card belonging to Henry Sullivan. Castings were made from the footprints and tire marks around the Jeep.

Chief forensic print analyst Mary Ellen Holmberg analyzed the prints lifted from the interior and exterior of the Jeep and one lifted from Sullivan's ID card, but none of them matched Deparvine. Latent print analyst Kimberly Cashwell analyzed the knife blade discovered under Karla's body, but was not able to lift any prints of value for comparison. Footwear and tire crime scene analyst Lynn Ernst eliminated Deparvine's shoes as a match with the castings taken from the scene. Ernst also eliminated the Van Dusens' truck as having made the tire marks around the Jeep.

Blood stains were found throughout the driver and passenger sides of the Jeep. Susannah Ulrey, a laboratory analyst for the Florida Department of Law Enforcement, testified that she analyzed five blood samples taken from different points on the steering wheel of the Jeep, and four of them matched Deparvine's DNA, including one mixture blood stain containing Deparvine's and Rick's DNA. Amber Moss, a supervisor of forensic case work at Orchid-Cellmark, a private laboratory, testified that the two blood samples she analyzed, which were taken from different locations on the steering wheel of the Jeep, matched Deparvine, thus totaling six different blood stains on the steering wheel that were linked to Deparvine's DNA. Numerous other blood samples were taken from inside the Jeep and the Van Dusens' clothing, but none of those matched Deparvine.

On November 27, 2003, Professor Raymonda Letrice Burgman, who lived near Deparvine's apartment complex, discovered the 1971 Chevrolet truck parked there, and called the police. Detective Charles Keene secured and executed a search warrant for Deparvine's apartment on December 24, 2003. He discovered a document indicating a 1971 Chevy Cheyenne pickup truck for sale and a handwritten note with a phone number and a list of fourteen questions regarding the truck. One of the documents indicated that the Van Dusens' truck was being sold for $18,900. Detective Keene also found an affidavit, dated December 12, 2003, wherein Deparvine was requesting a vehicle title application for the truck, an insurance policy for the truck in Deparvine's name, and old truck repair documents

indicating Rick's name. A notarized bill of sale from Rick to Deparvine, dated November 25, 2003, was also discovered indicating a purchase price of $6,500. Susan A. Kienker, who notarized this bill of sale, later testified that Rick, whom she knew personally, asked her to notarize the bill of sale on November 25, 2003, and handwriting expert Don Quinn confirmed Rick's handwriting on the bill of sale as authentic. No guns were discovered at Deparvine's apartment.

George Harrington testified that he came into contact with Deparvine in August 2003, when Harrington was seeking to sell his 1996 F-150 pickup truck for approximately $7,800. Harrington testified that Deparvine wanted to purchase the truck, but before he did, he asked to take the truck to Oldsmar where his mechanic friend would inspect it. Deparvine indicated that he would pay for the truck in cash, which he kept at his friend's house in Oldsmar. Deparvine gave Harrington a blank bill of sale and told him to have it notarized, which he did, but the sale was never completed, and Harrington never met or spoke with Deparvine's Oldsmar friend.

Deparvine testified in his own defense and stated that prior to November 2003, he was looking to purchase a pickup truck during a six-month period. He said that he saw the Van Dusens' February, July, and November ads and inquired about the truck in February, July, September, and November. Deparvine testified that on the Sunday morning of November 23, 2003, he spoke with Rick, who gave him directions to his house in Tierra Verde. When Deparvine arrived, Rick offered to let Deparvine test drive the truck. Deparvine drove the truck and Rick came along, but within three-quarters of a mile, the truck ran out of gas and the two men abandoned the truck on the side of the road and walked back to the Van Dusen home. At the home, Rick picked up a can of gas, which already contained approximately three-quarters of a gallon of gas, and the two men rode in the Jeep back to the truck with Rick driving. [FN1] Rick poured gas in the gas tank, but the truck did not start. They decided to "prime the carburetor," which Deparvine testified involves pulling the air cleaner assembly off the carburetor, and pouring gas into the carburetor while another person turns the key

in the ignition. Rick turned the key in the ignition while Deparvine primed the carburetor. During this process, Deparvine states that he opened a wound and scab under his right index finger, which originated as a cut he received at work. After they were able to start the truck, Rick drove the truck to the gas station while Deparvine followed driving the Jeep. Rick then put gas in the truck and the two drove back to the Van Dusens' home, with Deparvine still driving the Jeep. Deparvine testified that he stayed at the home for approximately two hours during which Rick showed him an original title to the truck. Deparvine told Rick that he only had $6,500 in cash to pay for the truck, which Rick accepted because he just wanted to get rid of the truck. Rick was able to show Deparvine that there were no liens on the truck; and Deparvine then paid $1,500 in cash as a deposit, for which Rick wrote out a receipt. Deparvine gave Rick a blank bill of sale for Rick to complete and they agreed that the Van Dusens would deliver the truck to Deparvine's apartment complex in central St. Petersburg on Tuesday, November 25, 2003, after 5 p.m.

> [FN1] In its rebuttal case, the State recalled Detective Hoover, who testified that on November 27, 2003, he interviewed Deparvine. Hoover testified that Deparvine stated that when the truck ran out of gas, he and Rick walked back to the house to get a can of gas. When they arrived, "he, Rick and Karla drove back to get gas and filled the truck up."

Deparvine testified that on November 25, 2003, at approximately 5:30 p.m., Rick arrived at the apartment complex driving the truck and Karla followed driving the Jeep. Deparvine told the Van Dusens to drive around to the back parking lot of the complex to complete the sale. Deparvine then noticed a person driving a red vintage truck that was similar to the 1971 Chevrolet and seemed to be with the Van Dusens. Deparvine described the driver of the similar truck as a white male in his mid-fifties with a salt-and-pepper-colored beard, a receding hairline, and wearing sunglasses. On cross-examination, Deparvine admitted that this description was consistent with his own appearance. Once at the back parking lot, Rick exited

his truck and entered the passenger side of the Jeep. Deparvine entered the Jeep and sat in the backseat behind Karla. Deparvine then paid the $5,000 remaining balance of the sales price in cash and Rick gave him a notarized bill of sale indicating a purchase price of $6,500. According to Deparvine, Rick had not been able to find the title but agreed to send it to Deparvine after Thanksgiving. After Deparvine exited the Jeep, Rick entered the similar red vintage truck Deparvine had seen and the two vehicles left, with Karla following the red truck in the Jeep. Deparvine testified that after the Van Dusens left, he did not leave the vicinity of his apartment complex. He denied killing the Van Dusens.

When asked how he obtained funds to purchase the truck, Deparvine testified that he sold a Rolex watch that he inherited while he was in prison from a terminally ill inmate named Bill Jamison, whom he had befriended. Deparvine testified that because the Rolex was not on his prison personal property list, he had to smuggle the watch outside of the correctional facility by hiding it in the ground in the visitors park. Joseph Fish, a customer service manager with the St. Petersburg Times, testified that Deparvine placed a one-day advertisement on October 26, 2003, to sell a Presidential Rolex watch. Deparvine testified that he sold the watch for $7,000 to the first people that came by his house, who were "a couple of Hispanic guys." Deparvine could not give any other description of these buyers. Instead of depositing the funds from the sale in his bank account, Deparvine testified that he kept the cash at his apartment. The highest balance ever recorded in Deparvine's bank account between June 27, 2003, and December 31, 2003, was $826.21.

The defense also presented testimony from Martha Baker, who lived behind the Van Dusens and shared the fence to the back end of their respective homes. Baker testified that on the night of November 25, 2003, between 7:15 p.m. and 7:50 p.m., while she was entertaining guests, she heard Karla's voice coming from the Van Dusen home.

Deparvine's cell phone records revealed that he received a call on the night of November 25, 2003,

> from his ex-wife at 8:57 p.m., but because the call went unanswered, the cell phone did not record any cell tower. Nevertheless, Deparvine received a text message that night at 9:13 p.m., which used a tower on Central Avenue in St. Petersburg. At 5:35 a.m. on November 26, 2003, Deparvine's phone records indicate that he checked his voice mail using the same St. Petersburg tower.

Deparvine v. State, 995 So. 2d 351, 356-60 (Fla. 2008).

After hearing these facts, the jury found Deparvine guilty on both counts of first degree murder under both the premeditated and felony murder theories, and also found Deparvine guilty on the single count of armed carjacking. (DAR V40:3737). Following the penalty phase proceedings, the jury returned an advisory recommendation of death by votes of 8-4 on both counts. (DAR V41:3930-31).

The trial court followed the jury's recommendation and sentenced Deparvine to death. The court found the following four aggravating circumstances and gave each "great weight": (1) each capital felony was especially cold, calculated and premeditated without any pretense of legal or moral justification; (2) the capital felonies were committed for pecuniary gain; (3) the capital felonies were committed by a person previously convicted of a felony and under sentence of imprisonment, or placed on community control, or on felony probation; and (4) the defendant was previously convicted of another capital felony. (DAR V15:2558-61). The court gave "little weight" to the following

mitigating circumstances: Deparvine (1) suffered from serious emotional deprivation as a child because of family dysfunction; (2) suffered from inability to form and maintain close relationships with others; (3) suffered from estrangement from some family members; (4) persevered after marrying his teenage girlfriend, who had become pregnant, and worked hard to put himself through college and law school; and (5) was once a true family man and his children grieve at the predicament they find him in. (DAR V15:2561).

Deparvine appealed his convictions to this Court and raised eight issues:

> ISSUE I: THE TRIAL COURT ERRED IN ALLOWING THE STATE TO INTRODUCE, UNDER THE "SPONTANEOUS STATEMENT" HEARSAY EXCEPTION, EVIDENCE OF OUT-OF-COURT STATEMENTS MADE BY KARLA VAN DUSEN DURING A TELEPHONE CONVERSATION WITH HER MOTHER, BILLIE FERRIS.
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> ISSUE II: APPELLANT WAS TRIED UNDER A CAPITAL INDICTMENT WHICH WAS FATALLY, FUNDAMENTALLY, AND JURISDICTIONALLY DEFECTIVE, WHERE THE COUNTS PURPORTING TO CHARGE FIRST-DEGREE MURDER FAILED TO ALLEGE EITHER PREMEDITATION OR FELONY MURDER.
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> ISSUE III: THE TRIAL COURT COMMITTED FUNDAMENTAL ERROR, AND CONSTRUCTIVELY AMENDED THE GRAND JURY INDICTMENT, BY GIVING THE JURY THE OPTION TO CONVICT APPELLANT OF PREMEDITATED MURDER.
>
> ISSUE IV: THE EVIDENCE WAS LEGALLY INSUFFICIENT TO PROVE CARJACKING; IN ADDITION THE TRIAL COURT COMMITTED FUNDAMENTAL ERROR BY FAILING TO ENSURE JURY UNANIMITY ON THE CARJACKING COUNT, WHERE THE INDICTMENT AND INSTRUCTIONS FAILED TO SPECIFY WHICH VEHICLE - - THE JEEP CHEROKEE OR THE CHEVY PICKUP TRUCK - - WAS THE SUBJECT OF THE ALLEGED CARJACKING.

ISSUE V: THE TRIAL COURT ERRED IN ALLOWING THE STATE TO INTRODUCE EXCESSIVE AND UNDULY EMOTIONAL "VICTIM IMPACT" EVIDENCE, WHICH DOMINATED THE PENALTY PROCEEDING AND RENDERED IT FUNDAMENTALLY UNFAIR.

ISSUE VI: THE TRIAL COURT ERRED, AND VIOLATED THE APPLICABLE CONSTITUTIONAL STANDARD, BY EXCLUDING FOR CAUSE JUROR DARYL RUCKER, WHOSE VIEWS ON THE DEATH PENALTY WOULD NOT HAVE PREVENTED OR IMPAIRED THE PERFORMANCE OF HIS DUTIES AS A JUROR IN ACCORDANCE WITH HIS OATH AND THE COURT'S INSTRUCTIONS.

ISSUE VII: FLORIDA'S CAPITAL SENTENCING SCHEME, WHICH EMPHASIZES THE ROLE OF THE CIRCUIT JUDGE OVER THE TRIAL JURY IN THE DECISION TO IMPOSE A SENTENCE OF DEATH, IS CONSTITUTIONALLY INVALID UNDER RING V. ARIZONA, 536 U.S. 584 (2002).

ISSUE VIII: THE TRIAL COURT'S SENTENCING ORDER IS DEFECTIVE FOR FAILURE TO CLEARLY INDICATE WHAT MITIGATING CIRCUMSTANCES HE FOUND.

This Court affirmed Deparvine's convictions and sentences on September 29, 2008. Deparvine v. State, 995 So. 2d 351 (Fla. 2008). Deparvine's motion for rehearing was denied November 18, 2008, and the mandate issued on December 4, 2008. Deparvine did not seek certiorari review in the United States Supreme Court.

On February 5, 2010, Deparvine filed a motion for postconviction relief in the trial court and raised twenty-eight claims, and subsequently amended a number of his claims. (PCR V3:363-500; V6:934-63). On February 7-9, 2011, the trial court conducted an evidentiary hearing on the vast majority of Deparvine's ineffective assistance of counsel claims. Following the evidentiary hearing, the trial court issued a detailed 85-

page order denying postconviction relief. (PCR V9-10:1634-1718). The appeal from the denial of postconviction relief is currently pending before this Court in Deparvine v. State, SC 12-407.

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 two issues, each of which will be addressed in turn. However, as will be shown, appellate counsel actually raised both of these specific claims on appeal, and this Court rejected them both. Therefore, counsel was not ineffective for allegedly failing to present these claims.

CLAIM I

CONTRARY TO DEPARVINE'S ASSERTION, APPELLATE COUNSEL RAISED THE INSTANT CLAIM OF FUNDAMENTAL ERROR AND AN ALLEGED DUE PROCESS VIOLATION ON DIRECT APPEAL.

Deparvine claims that the State failed to specifically allege which "motor vehicle" was the subject of the armed carjacking charge in the indictment, the victims' 1971 Chevrolet Cheyenne pickup truck or their Jeep Cherokee SUV, and asserts that appellate counsel was ineffective for failing to argue on appeal that the failure to specify the vehicle in the indictment was fundamental error and a denial of due process. The record, however, clearly refutes Deparvine's claim because appellate counsel made this exact argument on direct appeal.

In his direct appeal Initial Brief, appellate counsel made the identical arguments presented by collateral counsel in his habeas petition, and this Court rejected his claim. See Initial Brief of Appellant at 48-55 (arguing that it was fundamental error and a violation of due process for the jury to be instructed on armed carjacking when the State failed to specify which vehicle was the subject of the offense), Reply Brief of Appellant at 21-25 (same), Deparvine v. State SC06-155. This Court rejected Deparvine's argument on direct appeal and stated:

> Deparvine also contests several aspects of the carjacking charge, **including the indictment**, the jury instructions, the jury's unanimity in reaching a guilty verdict, and the sufficiency of the evidence.

The crux of Deparvine's argument is that the 1971 Chevrolet truck was never specified as the subject motor vehicle of the carjacking charge in the indictment, and the State's arguments as well as the trial court's instructions may have confused the jury as to whether it was the truck or the Jeep that was claimed to have been carjacked.

Initially, we reject any claim that the indictment insufficiently described the motor vehicle that was the subject of the carjacking. Deparvine did not attack the indictment on this ground in the trial court. We also reject Deparvine's contention that the State contended that the Jeep, not the truck, was the subject of the carjacking charge in count five. The State did not argue to the jury that the Jeep was the subject of the carjacking. The most that can be said of the State's arguments during discussions on the motion for judgment of acquittal and outside the presence of the jury is that the State asserted that Deparvine may also have seized the Jeep to get back to the truck after the murders, but, nevertheless, the State asserted his "ultimate goal is the unlawful taking ... of the truck." The State focused on its theory that Deparvine coveted the truck and murdered the Van Dusens to get it. The State argued that Deparvine "intended to obtain, acquire that truck by whatever means necessary" and that "[i]t was a robbery for that title [(referring to the ownership title of the truck)]."

Indeed, after reviewing the record on the court's instructions and the State's closing argument, we do not agree with Deparvine that there was a genuine risk that the jury was confused or that unanimity was compromised in considering the carjacking charge. In closing argument, the State never made any arguments that the Jeep was carjacked or stolen. Rather, the State began its closing argument stating, "Why kill for a truck, a truck, a motor vehicle, something as common and accessible as a truck? Because that truck was coveted by this defendant." Similarly, in defense counsel's closing argument, counsel focused on rebutting the State's theory that the truck (and not the Jeep) was stolen. For example, defense counsel stated, "Common sense tells you that any devious plan

to steal a truck, much less kill people, much less with a person with legal knowledge would not have left a trail a mile wide and big flashing arrows pointing directly to the guilty person." On this record, we reject the claim that there is a genuine risk that some members of the jury may have convicted Deparvine of carjacking the truck while others may have convicted him of carjacking the Jeep.

We also reject Deparvine's claim of error on the carjacking instructions. We agree with the State that defense counsel never objected to the instructions on the basis argued here.[FN23] Where a defendant does not object to the jury instructions at trial, the defendant waives the issue for appellate review unless the error, if any, is fundamental. State v. Weaver, 957 So. 2d 586, 588 (Fla. 2007) (citing Reed v. State, 837 So. 2d 366, 370 (Fla. 2002)). In State v. Delva, 575 So. 2d 643 (Fla. 1991), we explained:

> To justify not imposing the contemporaneous objection rule, "the error must 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." In other words, "fundamental error occurs only when the omission is pertinent or material to what the jury must consider in order to convict." Failing to instruct on an element of the crime over which the record reflects there was no dispute is not fundamental error and there must be an objection to preserve the issue for appeal.

Id. at 644-45 (citations omitted) (quoting Brown v. State, 124 So. 2d 481, 484 (Fla. 1960), and Stewart v. State, 420 So. 2d 862, 863 (Fla. 1982)). In Deparvine's case, the instructions properly tracked the language of the indictment and the statute. See § 812.133, Fla. Stat. (2003).

> FN23. The only discussion on the carjacking charge instructions at trial related to whether the court should instruct on lesser included offenses.

> Furthermore, we reject Deparvine's argument that there was insufficient evidence to support his conviction of carjacking. Although Deparvine argues that the carjacking charge could not be based on the taking of the truck because there is no evidence regarding what may have occurred before the Van Dusens were killed, Florida Statutes provide: "An act shall be deemed 'in the course of the taking' if it occurs either prior to, contemporaneous with, or subsequent to the taking of the property and if it and the act of taking constitute a continuous series of acts or events." § 812.133(3)(b), Fla. Stat. (2003). Whether the Van Dusens were murdered after Deparvine took possession is irrelevant since a reasonable jury could infer from the evidence that the taking was the consequence of a continuous series of acts or events all focused on the taking of the truck.

Deparvine v. State, 995 So. 2d 351, 374-76 (Fla. 2008) (emphasis added).

Obviously, Deparvine'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 Deparvine's claim that fundamental error occurred when he was convicted of armed carjacking.

CLAIM II

CONTRARY TO DEPARVINE'S ASSERTION, APPELLATE COUNSEL RAISED THE INSTANT CLAIM WHEN ARGUING THAT THE EVIDENCE WAS INSUFFICIENT TO SUPPORT HIS CONVICTION FOR ARMED CARJACKING.

Deparvine claims that appellate counsel was ineffective for failing to argue that the evidence was insufficient to support his armed carjacking conviction because the evidence did not establish that the victims had control over the truck at the time of the taking. As in Claim I, supra, this is an attempt to relitigate a claim that was actually raised and argued by appellate counsel on direct appeal. See Initial Brief of Appellant at 48-55, Reply Brief of Appellant at 21-25, Deparvine v. State SC06-155. This Court rejected this claim on direct appeal and found the evidence sufficient to support his armed carjacking conviction:

> Furthermore, we reject Deparvine's argument that there was insufficient evidence to support his conviction of carjacking. Although Deparvine argues that the carjacking charge could not be based on the taking of the truck because there is no evidence regarding what may have occurred before the Van Dusens were killed, Florida Statutes provide: "An act shall be deemed 'in the course of the taking' if it occurs either prior to, contemporaneous with, or subsequent to the taking of the property and if it and the act of taking constitute a continuous series of acts or events." § 812.133(3)(b), Fla. Stat. (2003). Whether the Van Dusens were murdered after Deparvine took possession

> is irrelevant since a reasonable jury could infer from the evidence that the taking was the consequence of a continuous series of acts or events all focused on the taking of the truck.

Deparvine, 995 So. 2d at 375-76.

In addition to being procedurally barred and factually without merit, the State would further note that even if there were some deficiencies in appellate counsel's argument regarding the armed carjacking charge, Deparvine was not prejudiced as this Court determined that the evidence was sufficient to support his conviction. Finally, even if Deparvine's conviction for armed carjacking had been vacated, it would not have affected his two convictions for first degree murder as the jury specifically found that he was guilty of premeditated murder. (V40:3737).

CONCLUSION

In conclusion, Respondent respectfully requests that this Honorable Court DENY the instant petition for writ of habeas corpus.

CERTIFICATE OF SERVICE

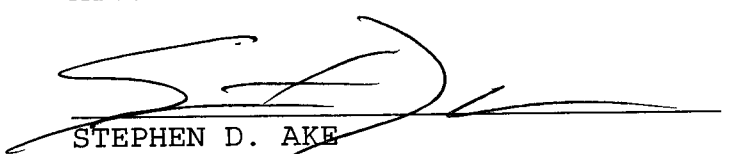
I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by email to David R. Gemmer, Assistant Capital Collateral Regional Counsel, Middle Region, at gemmer@ccmr.state.fl.us and support@ccmr.state.fl.us, this 21st day of December, 2012.

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
ATTORNEY GENERAL



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