IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC15-767

LANCELOT URILEY ARMSTRONG

Petitioner,

VS.

JULIE JONES, Secretary,
Florida Department of Corrections,

Respondent.

RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

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PRELIMINARY STATEMENT

Petitioner, Lancelot Uriley Armstrong, Defendant below, will be referred to as "Armstrong" and Respondent, State of Florida, will be referred to as "State". Reference to the appellate records will be as follows:

Original direct appeal - "1994-ROA;"
First postconviction relief appeal "1-PCR;"
Re-sentencing direct appeal - "RS-ROA;" and
Postconviction appellate record - "2-PCR"
Supplemental records will be identified with an "S"

The record citation will be followed by the appropriate volume and page number(s). Armstrong's Petition will be notated as "P."

STATEMENT OF THE CASE AND FACTS

On March 7, 1990, Armstrong was indicted with Ercely Wayne Coleman ("Coleman") for the February 17, 1990 first-degree murder of Broward Sheriff Deputy John Greeney, attempted first-degree murder of Broward Sheriff Deputy Robert Sallustio, and armed robbery. (RS-ROA.1 1-2). The jury returned a guilty verdict and a nine to three death recommendation which the trial court followed. In affirming the conviction and sentence on direct appeal, *Armstrong v. State*, 642 So.2d 730 (Fla. 1994),[1]

[1] In his original direct appeal, Armstrong raised 24 issues. Relevant here were the 15 penalty phase issues: "(1) the trial judge formulated his sentencing decision before giving Armstrong an opportunity to be heard; (2) & (3) certain aggravating circumstances were duplicative and the trial judge erred in denying Armstrong's requested limiting instruction on duplicate

cert. denied, 514 U.S. 1085 (1995), this Court found the following facts:

> The record reflects the following facts. In the early morning hours of February 17, 1990, Armstrong called a friend and asked him to go with him to rob Church's Fried Chicken restaurant. The friend refused. According to several employees of Church's, around two o'clock that same morning, Armstrong and Michael Coleman came to the restaurant asking to see Kay Allen, who was the assistant manager of the restaurant and Armstrong's former girlfriend. The restaurant employees testified that Allen did not want to see Armstrong[2] and asked him to leave. Armstrong and Coleman, however, remained at the restaurant and eventually Allen accompanied Armstrong to the vehicle he was driving while Coleman remained inside the restaurant. The employees additionally testified that Allen and Armstrong appeared to be arguing while they were sitting in the vehicle.

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aggravating circumstances; (4) & (5) the trial judge erred in refusing to find certain nonstatutory mitigating factors and in failing to consider certain nonstatutory mitigating factors in its sentencing order; (6) the death penalty is disproportionate in this case; (7) the trial court erred in not granting Armstrong's motion for a magnetic resonance imaging examination; (8) victim impact information was considered by the trial judge in sentencing Armstrong; (9) the trial judge improperly denied Armstrong's request for new counsel; (10) the trial judge erred in denying Armstrong's requested jury instruction that mitigating evidence does not have to be found unanimously; (11) the jury instruction given on sentencing minimized the jury's sense of responsibility, thus depriving Armstrong of a fair sentencing; (12) the trial judge failed to adequately define nonstatutory mitigating circumstances; (13) the trial judge failed to instruct the jury on the correct burden of proof in the penalty phase; (14) Florida's death penalty statute is unconstitutional; and (15) the aggravating circumstances used in this case are unconstitutional." *Armstrong v. State*, 642 So.2d 730, 734, n.2 (Fla. 1994).

[2] Although the Florida Supreme Court identified the co-defendant as Michael Coleman, the indictment was for Ercely Wayne Coleman (RS-ROA.1 1-2).

Allen testified that, while she was in the car with Armstrong, he told her he was going to rob the restaurant, showed her a gun under the seat of the car, and told her he might have to kill her if she didn't cooperate. Coleman then came out to the car, and Armstrong, Coleman, and Allen went back into the restaurant. Allen was responsible for closing the restaurant, and by this time, the other employees had left. Coleman and Armstrong ordered Allen to get the money from the safe. Before doing so, she managed to push the silent alarm. Shortly thereafter, Armstrong returned to the car. Coleman remained in the restaurant with Allen to collect the money from the safe.

Other testimony reflected the following facts. When the alarm signal was received by the alarm company, the police were notified and Deputy Sheriffs Robert Sallustio and John Greeney went to the restaurant where they found Armstrong sitting in a blue Toyota. Greeney ordered Armstrong out of the car and told him to put his hands on the car. After Greeney ordered Armstrong to put his hands on the car, Greeney holstered his gun to "pat down" Armstrong. Sallustio then noticed movement within the restaurant, heard shots being fired from the restaurant and from the direction of the car, and felt a shot to his chest. Apparently, when the movement and shots from the restaurant distracted the officers, Armstrong managed to get his gun and began firing at the officers.

According to Allen, when Coleman noticed that police officers were outside the building, he started firing at the officers. Allen took cover inside the restaurant, from where she heard Coleman firing more shots and heard a machine gun being fired outside the restaurant. Sallustio was shot three times, but still managed to run from Armstrong and radio for assistance. When other officers arrived, they found Greeney dead at the scene. Greeney had died instantly. Allen was found inside the restaurant; Coleman and Armstrong had fled.

That same day, Armstrong told one friend that he got shot and that he returned a shot; he told his girlfriend that a police officer had asked him to step out of his car and that, when he did so, the officer

> pulled a gun on him and tried to shoot him; and he told another friend that someone shot him while trying to rob him. Thereafter, Armstrong and Coleman fled the state but were apprehended the next day in Maryland. Before being apprehended, Armstrong had two bullets removed from his arm by a Maryland doctor.
>
> A number of shell casings were recovered from the scene. All of the bullets removed from Sallustio and Greeney were fired from a nine-millimeter, semi-automatic weapon; Greeney had been shot from close range. Evidence reflected that Armstrong had purchased a nine-millimeter, semi-automatic weapon the month before the crime. Armstrong's prints were found in the blue Toyota as well as on firearm forms found in the car. Additional ballistics evidence reflected that the shots fired from the restaurant did not come from a nine-millimeter, semi-automatic weapon. This indicated that only someone near the car could have fired the shots that wounded Sallustio and killed Greeney. Additionally, testimony was introduced to show that Armstrong was seen with a nine-millimeter, semi-automatic gun right after the incident. Armstrong was convicted as charged.FN1
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> FN1. Coleman was tried and convicted separately and received a sentence of life imprisonment.

Armstrong, 642 So.2d at 733-34. It was on this evidence that Armstrong's conviction was affirmed. *Id*. at 740.

Subsequently, Armstrong filed a motion for postconviciton relief, and was granted an evidentiary hearing. Following the trial court's denial of relief, this Court affirmed the denial of collateral relief on the guilt phase issues, but vacated the death sentence and remanded for a new penalty phase upon finding that a prior violent felony conviction used in aggravation had

been invalidated.[3] *Armstrong v. State*, 862 So.2d 705, 715 (Fla. 2003). The State filed a Petition for Writ of Certiorari with the United States Supreme Court, and on May 17, 2004, it was denied. *Florida v. Armstrong*, 541 U.S. 1056 (2004)

Armstrong's new penalty phase commenced on April 16, with the jury being sworn. (RS-ROA.20 24; RS-ROA.23 414). Following the State's presentation (RS-ROA.23 – RS-ROA.28), the defense presented mitigating evidence including Armstrong's testimony asserting that he was neither involved in the robbery nor was he the shooter of the two deputies. (RS-ROA.28 – RS-ROA.30) On April 25, 2007, the jury recommended death by a nine to three vote. (RS-ROA.2 448; RS-ROA.34 1862-65). The *Spencer v. State*,

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[3] In the appeal from the re-sentencing, the following history of the collateral proceedings was given:

> On appeal, Armstrong raised sixteen claims alleging that he was entitled to postconviction relief for various issues relating to both the guilt and penalty phase trial below. In his first penalty phase claim, Armstrong alleged that he was entitled to relief because his sentence of death was based on a prior violent felony conviction that was subsequently invalidated. Pursuant to *Johnson v. Mississippi*, 486 U.S. 578, 108 S.Ct. 1981, 100 L.Ed.2d 575 (1988), this Court agreed. Therefore, this Court affirmed all issues relating solely to the guilt phase trial, but vacated the death sentence and remanded the case for a new penalty phase and resentencing. *Armstrong II*, 862 So.2d at 721.

Armstrong, 73 So.3d at 163 (Fla. 2011) (footnote omitted, emphasis supplied). Given the ruling on the *Johnson v. Mississippi* claim, the remaining penalty phase claims were denied as moot. *Id*.

615 So.2d 688 (Fla. 1993) hearing was held on September 7, 2007, November 15, 2007, November 21, 2007, and November 30, 2007 where Armstrong presented additional witnesses and sought the mercy of the trial court. (RS-ROA.36 – RS-ROA.37; SRS-ROA.1 and 2). On August 7, 2009, the trial judge imposed a death sentence for the first-degree murder of Deputy John Greeney having independently found three aggravators, no statutory mitigators, and five non-statutory mitigating factors. (RS-ROA.5 758-95; SRS-ROA.3 54-126).

Armstrong appealed, and this Court set out the case and facts as follows:

> Armstrong's New Penalty Phase
>
> Prior to the new penalty phase, the State filed a motion in limine seeking to preclude Armstrong from presenting testimony, evidence, or any arguments concerning Armstrong's innocence pursuant to *Preston v. State*, 607 So.2d 404, 411 (Fla. 1992) (explaining that such arguments would be considered improper). The trial court granted the motion, but permitted Armstrong to challenge the extent of his involvement in the robbery and homicide based on the mitigating circumstances he raised. Armstrong claimed the mitigation revealed that Coleman was the shooter and that Armstrong's involvement in the crime was minor and a result of his acting under duress.
>
> Pursuant to this Court's mandate, jury selection for the capital resentencing hearing began on April 10, 2007. On April 11, 2007, the jury panel was accepted. During jury selection, the State and defense resolved a defensive challenge for cause by agreement to excuse the challenged juror.
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> On April 16, 2007, the panel was sworn in and the evidentiary portion of the penalty phase proceeded. At the conclusion of the new penalty phase trial, the

trial court instructed the jury that its recommendation should either be for: (1) death, or (2) life imprisonment without the possibility of parole for 25 years. Specifically, the trial court instructed: "If you find the aggravating circumstances do not justify the death penalty, your advisory sentence should be one of life imprisonment without possibility of parole for twenty-five (25) years." The trial court further instructed the jury, "If a majority of the jury determine that Lancelot Armstrong should be sentenced to death, your advisory sentence will be a majority of the jury by a vote of blank to blank, advised, recommend to the Court that it impose the death penalty upon Lancelot Armstrong." Additionally, the trial court instructed:

> On the other hand, if by six or more votes the jury determines that Lancelot Armstrong should not be sentenced to death, your advisory sentence would be, the jury advises and recommends to the Court by a vote of blank to blank that it impose a sentence of life imprisonment to Lancelot Armstrong without the possibility of parole for 25 years.

The written instruction was consistent with the verbal instruction.

The trial evidence revealed that Armstrong was originally incarcerated in 1990 and sentenced in 1991. After jury deliberations began, the jury submitted a question, asking, "Will the 17 yrs he served be included in his 25 yrs sentence?" The trial court relayed the jury question to counsel, stating, "Will the 17 years he served be included in his sentence?"

After considering the arguments presented, the trial court stated:

> THE COURT: I'm troubled by the language in the *Downs [v. State*, 572 So.2d 895 (Fla. 1990),] case because in the Downs case says under the facts presented we find that the trial court did not use the discretion.

> State argued that the Downs case created issue decision because he said, quote stands 25 more years. We haven't heard that here. They have narrowly by this case permitted the response.

Ultimately, the jury was instructed as follows: "The defendant will receive credit for the time served on this charge."

On April 25, 2007, the jury again recommended a sentence of death by a vote of nine to three.

Nelson FN3 Hearing

> FN3. *Nelson v. State*, 274 So.2d 256 (Fla. 4th DCA 1973).

On May 31, 2007, Armstrong filed a "motion to discharge counsel of record and appoint counsel outside of Public Defender's office." On June 14, 2007, based on the contents of that motion, the trial court held a "modified" Nelson hearing. There, Armstrong announced the names of the witnesses he alleged to have asked counsel to contact, and complained that counsel had not provided him with a copy of the postconviction evidentiary hearing transcript. The matter was taken under advisement. On July 2, 2007, the trial court denied the motion to discharge counsel.

Spencer Hearing

On September 7, 2007, the trial court conducted a *Spencer* hearing. During the *Spencer* hearing, Armstrong presented testimony from (1) David Massar, a crime filmmaker who came to know Armstrong through a prison pen pal program; (2) Avia Joy McKenzie, a woman who befriended Armstrong after he was incarcerated and testified that Armstrong was there for her when her daughter died in 1996; and (3) Armstrong. However, at that time, Armstrong made several comments that were clearly an attempt to relitigate the 1991 guilt phase, the new penalty phase proceedings, the presentation of mitigation, and the motion to discharge counsel. The trial court categorized Armstrong's comments as a hybrid Muhammad,FN4 Boyd,FN5 and Grim FN6 claim. As a result, the trial court recessed. On October 7, 2007,

the trial court entered an order resetting the Spencer hearing.

> FN4. *Muhammad v. State*, 782 So.2d 343 (Fla. 2001).
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> *FN5. Boyd* v. State, 910 So.2d 167 (Fla. 2005).
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> FN6. *Grim v. State*, 841 So.2d 455 (Fla. 2003).

On November 15, 2007, and November 30, 2007, the trial court continued the Spencer hearing. Although the Spencer hearing concluded in November 2007, the trial court was unable to enter its sentencing order until 2009. The delay appears to be the result of extensive transcription problems.

The August 7, 2009, Sentencing Order

On August 7, 2009, the trial court entered it (sic) order sentencing Armstrong to death. In its extensive sentencing order, the trial court found and afforded "great weight" to each of the following three aggravating circumstances: (1) the Defendant was convicted of another capital felony or of a felony involving the use or threat of violence to the person (prior violent felony); (2) the capital felony was committed while the Defendant was engaged or was an accomplice in the commission of or an attempt to commit the crime of robbery (robbery); and (3) the victim in this capital felony case was a law enforcement officer engaged in the performance of his duties.FN7

> FN7. Below, the trial court specifically instructed the jury on improper doubling. The jury was also instructed on and found the avoid arrest aggravator. In Armstrong's first direct appeal, we noted that "the only evidence supporting the 'committed to avoid arrest' aggravating circumstance was the fact that the victim was a law enforcement officer." *Id.* at 738. Accordingly, the trial court declined to merge the avoid arrest aggravator with the aggravating factor that the victim was a law enforcement officer.

> ***
>
> The trial court weighed the aggravating factors and the mitigating factors and found that "the aggravating circumstances in this case far outweigh the mitigating circumstances. The aggravating circumstances in this case are overwhelming." Armstrong was again sentenced to death for his conviction of first-degree murder. He was also sentence (sic) to two consecutive life sentences for the attempted first-degree murder and armed robbery convictions.
>
> This Appeal
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> In his second direct appeal following the completion of his new penalty phase and resentencing, Armstrong raises four issues: (1) whether the trial court abused its discretion in admitting into evidence a vial of blood or photographs of the victim that were taken at the scene of the crime and the medical examiner's office, (2) whether the trial court abused its discretion in admitting into evidence the remaining bullet fragment of the three original bullet fragments, (3) whether the trial court abused its discretion when it instructed the jury on the terms of a life sentence or when it answered the jury's question regarding credit for time served, and (4) cumulative error. The State raises proportionality as the fifth issue. Each of these issues is discussed below.

Armstrong v. State, 73 So.3d 155, 163-66 (Fla. 2011)

During the new penalty phase, the State presented evidence and witnesses which comported with the facts presented in the initial trial in order to educate the jury about the crime and establish aggravating factors. The State re-established that on February 17, 1990, Broward Sheriff Deputies Robert Sallustio ("Sallustio") and John Greeney ("Greeney") responded to a silent hold up alarm from the Church's Chicken restaurant in Fort

Lauderdale where they encountered Armstrong sitting in his car and ordered him to exit. (RS-ROA.23 457-58, 463-65, 478, 487-88). From his covering position, Sallustio saw Armstrong standing at the open driver's door with Greeney starting the pat down. Next, Sallustio saw the kitchen door inside the restaurant open and Kay Allen ("Allen") poke her head out. Less than a second after Greeney ordered Armstrong to put his hands back on the car, Sallustio, wearing a bullet proof vest, was hit in the chest by a bullet fired from the restaurant. (RS-ROA..23 465-67, 472, 479, 488-89). Turning, Sallustio saw Wayne Coleman ("Coleman"), using Allen as a shield. Sallustio saw a muzzle flash and the window break just before being shot in the wrist and taking fire from the direction of the car and restaurant. (RS-ROA..23 466-69).

Sallustio could see Greeney lying on his back motionless as Armstrong, using a .9 millimeter semi-automatic weapon with a 32-round clip, and Coleman, with a revolver, continued to fire upon Sallustio, who had emptied his .9 millimeter. While being followed by Armstrong as he crawled away, Sallustio resorted to his .38 caliber ankle revolver to return fire. Realizing Sallustio was still armed, Armstrong fled with Coleman. (RS-ROA..23 469-72, 482-83).

Greeney died at the scene. Sallustio survived his three gunshot wounds. Greeney's autopsy revealed he had suffered a

grazing gunshot wound to his ear and two penetrating gunshot wounds to his neck and left side.[4] He was from a distance of 12 to 18 inches and could have survived only a few minutes. (RS-ROA.23 492-96; RS-ROA.24 531-34; RS-ROA.25 676-82, 684-85, 689-91). The ballistics from the scene revealed that bullets fired from inside the restaurant were from a revolver, Greeney did not fire his weapon, and Sallustio fired 19 shots (RS-ROA.23 469-72, 482-83, RS-ROA.24 542, 554-56; RS-ROA.25 623, 630, 779-84). The bullets recovered from Sallustio and Greeney, along with the stippling noted on Greeney's wounds establish they were fired by Armstrong from a Tech-nine. (RS-ROA.23 498-504; RS-ROA.24 531-39; RS-ROA.25 635-36; RS-ROA.27 986-87, 995-1001, 1010).

Shortly after hearing gunfire, Vincent Rozier ("Rozier"), was approached by Armstrong carrying a "Uzi-like" weapon and Coleman holding a revolver. Rozier agreed to drive the men taking them first to Armstrong's home then to a Miami apartment. (RS-ROA.25 732-39). Upon arrival at Doris Harvard's ("Harvard") Miami home, she noticed Armstrong had been shot; there he tried to remove the bullet and treat his injury. (RS-ROA.26 850-51).

[4] One of the penetrating wounds was to Greeney's anterior neck which passed through his trachea, esophagus, carotid artery and spinal cord before exiting through the back of his neck and landing in the back of his bullet proof vest. The other entered his left side under his shoulder and went through the bone, aorta, and lungs before lodging under the skin of his lower back. (RS-ROA.25 676-82, 684-85, 689-91).

Armstrong removed a long clip from his weapon which looked like a "machine gun" and placed the items in a bag along with a brown handled/black barreled revolver and bullets. Coleman left with the bag, returning five minutes later empty-handed. Harvard saw Armstrong had a bag with him. (RS-ROA.26 850-56)

The next day, Armstrong and Coleman were apprehended in Maryland carrying almost $1000.00 in cash and a receipt for a .9 millimeter Intertech Tech-nine pistol with a 32-round clip. Swabs taken from Armstrong's vehicle were tested for DNA revealing Greeney's blood was on the driver's seat of the car. (RS-ROA.25 751-57, 767-71 802; (RS-ROA.26 830-31, 833-35, 838). Armstrong admitted he was shot by Sallustio. (RS-ROA.25 716-19, 723-25, 728-29; RS-ROA.27 1001-02; RS-ROA.28 1154-56). The State also presented evidence that Armstrong was convicted not only of the related violent felonies of attempted murder and armed robbery, but of a February 4, 1990 armed robbery. (RS-ROA.26 917-18; RS-ROA.27 946).

In mitigation, Dr. Rhodd discussed the chaotic political and poor socio-economic conditions that existed in Jamaica in the late 1970's and early 1980's. (RS-ROA.28 1051-75). Dr. Michael Morrison was called to testify Armstrong had a benign/non-cancerous lymphoma in his hip/groin area. (RS-ROA.30 1356-57, 1364-65, 1370-71).

Armstrong testified on his own behalf and offered that he

suffered several accidents, had medical problems, including dyslexia since childhood, and currently had medical issues. He complained that being on death row was very stressful. (RS-ROA.28 1076-82, 1097-98, 1123; RS-ROA.29 1209-10, 1322-23) Armstrong spoke of his impoverished childhood in Jamaica, his home life, siblings, and the punishment he suffered at the hands of his step-father. (RS-ROA.28 1082-97) He described his education, employment opportunities, political unrest in Jamaica, artwork he completed, and his religious beliefs. (RS-ROA.28 1097-1108, 1137; RS-ROA.29 1230, 1305-06). Armstrong testified about moving to the United States and development of a successful construction business, before losing it after his arrest. (RS-ROA.28 1103, 1107-11, 1113-21, 1130). Also, he claimed he always helped the police and that in both Jamaica and the United States he tried to stop children from becoming involved with drugs. (RS-ROA.28 1109-11; RS-ROA.29 1321-22). He revealed his daughter broke her neck in a car accident; that his brother was murdered; and there had been an attempt on his life. (RS-ROA.28 1110-12, 1121-22; RS-ROA.29 1258-62). Armstrong spoke of the children he had and noted how he supported their mothers (RS-ROA.28 1123-26; RS-ROA.29 1245-57, 1262-68)

Armstrong claimed he was a victim of circumstances as Coleman was with him the night he was to pick up Allen from Church's Chicken. It was once there that Coleman announced his

intent to rob the establishment. Armstrong testified that he complied with all police orders and refuted Sallustio's account, instead offering that it was Coleman who shot both deputies or that Greeney died from friendly fire. (RS-ROA.28 1126-35, 1137-38, 1141-60, 1188-89; RS-ROA.29 1214, 1220-22, 1226-27, 1229, 1231, 1233-37, 1268-71, 1273, 1276-77, 1287-88, 1301-02, 1305, 1323-25). Armstrong testified he purchased a Tech-nine pistol with a 32-round clip from A&B Pawn as well as other guns and ammunition prior to the February 1990 killing, but they were for security purposes. (RS-ROA.28 1180-84, 1186-88; RS-ROA.29 1230-31, 1242-43, 1258-60, 1319-21) Armstrong denied firing a gun or shooting Sallustio; Armstrong suggested evidence was planted. (RS-ROA.28 1188; RS-ROA.29 1194, 1207-08, 1213, 1224-25, 1285-87, 1321).

After affirming he was aware of the mitigation evidence available from the postconviction litigation, Armstrong averred that he did not wish to call any other witnesses for mitigation. (T.30 1382-85, 1388-90). The case was submitted to the jury which returned a sentencing recommendation of death by a nine to three vote. (RS-ROA.3 448; RS-ROA.34 1862-65). Following the bifurcated *Spencer v. State*, 615 So.2d 688 (Fla. 1993) hearing where Armstrong presented additional witnesses and again testified on his behalf, the trial court imposed the death penalty finding aggravation of: (1) prior violent felony; (2)

felony murder (robbery); and (3) victim was law enforcement officer. *Armstrong v. State*, 73 So.3d 155, 164-66 (Fla. 2011).

On direct appeal, this Court set out the trial court's mitigation findings as follows:

> However, the trial court did find one statutory mitigator: (1) the existence of any other factors in the defendant's background that would mitigate against the imposition of the death penalty. The trial court considered the following background mitigation under this statutory mitigator: (a) Armstrong was born and raised in an impoverished country (Jamaica) where living conditions were deplorable and there was a constant threat of erupting and escalating violence (little weight); (b) had a problematic health history as a child and suffered from dyslexia (little weight); (c) was a good prisoner and regularly attended religious ceremonies while incarcerated (little weight); (d) suffered abuse at the hands of his stepfather and his brother cut off a portion of his finger when he was working in the cane fields (some weight); and (e) assisted in raising his siblings in Jamaica (some weight).
>
> Finally, the trial court found that four of the nonstatutory mitigating circumstances were applicable after considering whether Armstrong (1) had problems growing up because he was biracial (little weight); (2) was a member of the police in Jamaica who assisted during times of rioting and political unrest (not applicable); (3) assisted and trained others for jobs and counseled young adults while in Boston and Florida (not applicable); (4) taught himself how to read and write while imprisoned (not applicable); (5) was suffering from a benign internal tumor, at the time of sentencing, the size of a golf ball which could turn into cancer in the future (not mitigating); (6) having been incarcerated for 18 years at that point, was deprived of seeing his children grow as a result of his incarceration (not mitigating); (7) was a kind, gentle man (not mitigating); (8) assisted the police in preventing the sale of drugs while in Massachusetts (nonexistent); (9) was a good businessman (rejected); (10) expressed sorrow for the death of Greeney and the

> shooting of Sallustio and for their families, but maintained that he did not commit the crimes (no remorse); and (11) properly raised a residual or lingering doubt (not appropriate).

Armstrong, 73 So.3d at 164-66 (footnote omitted).

Based on the foregoing evidence, this Court affirmed the death sentence. *Armstrong v. State*, 73 So.3d 155 (Fla. 2011) and on June 11, 2012, the United States Supreme Court denied certiorari. *Armstrong v. Florida*, 132 S.Ct. 2741 (2012).

Armstrong now challenges this Court's proportionality determination. He also has filed a related postconviction appeal in *Armstrong v. State*, case number SC14-1967.

REASON FOR DENYING THE WRIT

ISSUE I

APPELLATE COUNSEL DID NOT RENDER INEFFECTIVE ASSISTANCE FOR NOT CHALLENGING PROPORTIONALITY AS ARMSTRONG WAIVED THE 2001 POSTCONVICTION MITIGATION OFFERED NOW (restated)

Armstrong asserts that his appellate counsel litigating his resentencing rendered ineffective assistance for not placing before this Court evidence adduced at the 2001 postconviction litigation and waived by Armstrong in his 2007 resentencing. Pointing to *Muhammad v. State*, 782 So.2d 343 (Fla. 2001), Armstrong argues that such failure, deprived this Court the ability to perform an adequate proportionality analysis. Contrary to Armstrong's claim, this Court was provided with the mitigation record Armstrong, with the assistance of penalty phase counsel developed for his resentencing. Armstrong knowingly, intelligently, and voluntarily waived the mitigation evidence developed in the 2001 postconviction litigation. Hence, appellate counsel rendered constitutionally professional representation and this Court's proportionally decision is not undermined.

A. STANDARD OF REVIEW

Claims of ineffective assistance of appellate counsel are presented appropriately in a petition for writ of habeas corpus. *See Freeman v. State*, 761 So.2d 1055, 1069 (Fla. 2000). When

analyzing the merits of the claim of ineffectiveness of appellate counsel, the criteria parallel those for ineffective assistance of trial counsel outlined in *Strickland*). *See Rutherford v. Moore*, 774 So.2d 637, 643 (Fla. 2000) (explaining that the standard of review applicable to claims of ineffective assistance of appellate counsel raised in a habeas petition mirrors the *Strickland* standard for trial counsel ineffectiveness, i.e., deficient performance and prejudice from the deficiency)).

In *Freeman v. State*, 761 So.2d 1055, 1069 (Fla. 2000), this Court set out the review appropriate for claims of ineffective assistance of appellate counsel stating:

> In evaluating an ineffectiveness claim, the court must determine
>
> > 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, second, whether the deficiency in performance compromised the appellate process to such a degree as to undermine confidence in the correctness of the result.
>
> *Pope v. Wainwright*, 496 So.2d 798, 800 (Fla. 1986). *See also Haliburton*, 691 So.2d at 470; *Hardwick*, 648 So.2d at 104. The defendant has the burden of alleging a specific, serious omission or overt act upon which the claim of ineffective assistance of counsel can be based. *See Knight v. State*, 394 So.2d 997 (Fla. 1981). "In the case of appellate counsel, this means the deficiency must concern an issue which is error affecting the outcome, not simply harmless error." *Id. at 1001*. In addition, ineffective assistance of

> counsel cannot be argued where the issue was not preserved for appeal or where the appellate attorney chose not to argue the issue as a matter of strategy. *See Medina v. Dugger*, 586 So.2d 317 (Fla. 1991); *Atkins v. Dugger*, 541 So.2d 1165, 1167 (Fla. 1989) ("Most successful appellate counsel agree that from a tactical standpoint it is more advantageous to raise only the strongest points on appeal and that the assertion of every conceivable argument often has the effect of diluting the impact of the stronger points.").

Freeman, 761 So.2d at 1069. *See also, Schoenwetter v. State*, 46 So.3d 535, 563 (Fla. 2010) Appellate counsel cannot be deemed ineffective for failing to raise issues "that were not properly raised during the trial court proceedings," or that "do not present a question of fundamental error." *Valle v. Moore*, 837 So.2d 905, 907-08 (Fla. 2002) (citations omitted). "If a legal issue 'would in all probability have been found to be without merit' had counsel raised the issue on direct appeal, the failure of appellate counsel to raise the meritless issue will not render appellate counsel's performance ineffective." *Rutherford*, 774 So.2d at 643. (*quoting Williamson v. Dugger*, 651 So.2d 84, 86 (Fla. 1994). Where trial counsel does not raise a contemporaneous objection, the habeas petitioner "must demonstrate that the underlying claim constituted fundamental error" in order to establish ineffective assistance of appellate counsel. *See Jennings v. State*, 2013 WL 3214442, 20 (Fla. 2013) (*citing Power v. State*, 886 So.2d 952, 963 (Fla. 2004). "Fundamental error is the type of error which 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." *Power*, 886 So.2d at 963.

Also, "habeas corpus is not a vehicle for obtaining a second appeal of issues which were raised, or should have been raised, on direct appeal or which were waived at trial. Moreover, an allegation of ineffective counsel will not be permitted to serve as a means of circumventing the rule that habeas corpus proceedings do not provide a second or substitute appeal." *Blanco v. Wainwright*, 507 So.2d 1377, 1384 (Fla. 1987). *See also Parker v. Dugger*, 550 So.2d 459, 460 (Fla. 1989) (stating "habeas corpus petitions are not to be used for additional appeals on questions which could have been ... or were raised on appeal or in a rule 3.850 motion, or on matters that were not objected to at trial."). As noted in *Chavez v. State*, 12 So.3d 199, 213 (Fla. 2009):

> capital defendants may not use claims of ineffective assistance of appellate counsel to camouflage issues that should have been presented on direct appeal or in a postconviction motion. *See Rutherford v. Moore*, 774 So.2d 637, 643 (Fla. 2000). Moreover, appellate counsel cannot be ineffective for failing to raise a meritless issue. *See Lawrence v. State*, 831 So.2d 121, 135 (Fla. 2002); *see also Kokal v. Dugger*, 718 So.2d 138, 142 (Fla. 1998) ("Appellate counsel cannot be faulted for failing to raise a nonmeritorious claim.").

Chavez, 12 So.3d at 213.

B. ANALYSIS

It is well settled that habeas claims do not afford the defendant an opportunity for a second appeal. *Parker v. Dugger*, 550 So.2d 459, 460 (Fla. 1989) (opining "[H]abeas corpus petitions are not to be used for additional appeals on questions which ... were raised on appeal or in a rule 3.850 motion...."); *Rutherford v. Moore*, 774 So.2d 637, 645 (Fla. 2000) (holding that when a claim is actually raised on direct appeal, the appellate court will not consider a claim that appellate counsel was ineffective for failing to present additional arguments in support of the claim on appeal). Because this Court had the record of the resentencing before it and conducted a proportionality analysis based on the evidence Armstrong permitted to be presented, he should not be heard to complain here and the matter should be found procedurally barred. See Diaz v. State, 132 So.3d 93, 123 (Fla. 2013) (finding habeas claim that Florida Supreme Court did not conduct an adequate proportionality review on direct appeal is not cognizable in habeas proceedings)

In the event this Court overlooks the bar, it must be noted that *Muhammad* does not apply in this case as Armstrong did not waive his mitigation in its entirety, but instead, opted to offer a different presentation than he argued for in his 2001 postconviction litigation. (See Order denying postconviction relief 2-PCR.8 1365-83) Instead, *Boyd v. State*, 910 So.2d 167

(Fla. 2005) was the controlling authority and neither defense counsel nor the trial court was obligated to follow the protocols set out in *Muhammad*. In *Boyd*, this Court reasoned:

> ... we have long recognized that a competent defendant may waive the **right to present all mitigating evidence**. *Hamblen v. State*, 527 So.2d 800 (Fla. 1988). This right is not altered when the defendant has counsel. Again, **Boyd did not waive his right to present mitigating evidence. Instead, he limited the presentation of such evidence to his testimony and that of his pastor**. Boyd argues that the trial court erred in failing to comply with *Koon* (discussed above under Issue 8) and *Mora v. State*, 814 So.2d 322 (Fla. 2002), in accepting Boyd's presentation of mitigating evidence.
>
> *** *Koon* simply developed a procedure so that the record clearly reflects "a defendant's knowing waiver of his or her right to present mitigating evidence." *Id.* at 332-33. The defendant received a new penalty phase, because the record reflected that he had only wished to waive a portion of the mitigating evidence and had done so knowingly, intelligently, and voluntarily.
>
> ... Whether a defendant is represented by counsel or is proceeding *pro se*, the defendant has the right to choose what evidence, if any, the defense will present during the penalty phase ***
>
> **The record provides extensive support to substantiate that Boyd understood his rights and understood the consequences of his choice to present only the testimony of his pastor and himself. Boyd was exercising his right to be the "captain of the ship" in determining what would be presented during the penalty phase**. *** **Therefore, we hold that the trial court correctly allowed Boyd to make a knowing and voluntary decision as to what testimony was to be presented in mitigation**.

Boyd, 910 So.2d at 189-90 (emphasis supplied). Armstrong's reference to *Muhammad*, a case involving a full waiver of

mitigation, is misplaced.

Armstrong has not pointed to a cares where there has been a limited mitigation presentation chosen by the defense, yet, counsel was required under professional norms to present all mitigation collected irrespective of his client's wishes. However, under *Boyd*, which controls those cases where there has not been a complete waiver of mitigation, Armstrong circumscribed his mitigation presentation and this Court properly considered proportionality based on the evidence Armstrong wished considered. A resentencing is a new proceeding – a "clean slate." *See, e.g., Phillips v. State*, 705 So.2d 1320, 1322 (Fla. 1997) (characterizing post-remand resentencing as a completely new proceeding in which the trial court is not obliged to make the same findings as those made at prior sentencing proceeding); *Preston v. State*, 607 So.2d 404, 408 (Fla. 1992) (referring to new penalty phase proceeding as a "clean slate" and stating that "a resentencing is a completely new proceeding"). As such, it follows that counsel is not required to present the same mitigation and/or witnesses presented in the initial penalty phase or on collateral review. Likewise, neither the trial court nor this Court on appellate review would have to comb the prior collateral proceeding for mitigation as such would not be in keeping with the "clean slate" record for consideration of mitigating evidence. As a

result, appellate counsel was not deficient in not directing this Court's attention to mitigation waived by Armstrong.

Furthermore, while Armstrong points to Justice Anstead's concurrence in the postconviciton appeal opinion remanding for a new penalty phase based on a *Johnson v. Mississippi* violation, *Armstrong v. State*, 862 So.2d 705, 725 (Fla. 2003), such does not command that this Court rely upon that 2001 postconviction evidentiary development in its 2007 proportionality analysis. Armstrong did not present that evidence for consideration on resentencing and use of such evidence would run afoul of *Boyd*'s recognition that a defendant may limit his penalty phase presentation and the "clean slate" rule discussed in *Phillips* and *Preston*.

Moreover, the record supports the determination that Armstrong made a knowing and intelligent waiver of a portion of the possible mitigation evidence he had available. Just before and following Armstrong's mitigation presentation before the jury, and as a result of Armstrong's original penalty phase and postconviction allegations, the State requested, and the trial court inquired whether Armstrong had any other witnesses he wished to present. Armstrong affirmed that he had discussed strategy and defenses with counsel and that he had nothing further to present in mitigation. (RS-ROA.30 1374, 1382-86). Armstrong confirmed that this was his opportunity to present

mitigation to the jury; that he knew he could call friends and family members, but elected not to call those witnesses; that he had conferred with counsel in formulating the defense mitigation case; and counsel presented the case Armstrong wanted with the exception of a claim of prosecutorial misconduct.[5] (RS-ROA.30 1382-85, 1388-90). Armstrong agreed that in his postconviction litigation he had raised the claim of ineffective assistance of counsel for failing to present mental health issues in the original 1991 penalty phase and that he had received an evidentiary hearing on the matter. Further, he averred that he now had chosen not to present the mental health information to the instant jury. (RS-ROA.30 1382-85, 1388).

On May 31, 2007, between the end of the penalty phase and commencement of the *Spencer* hearing, Armstrong moved to discharge counsel and to appoint new counsel. (RS-ROA.3 468-75; RS-ROA.35 2-3). During the ensuing hearing, Armstrong complained that counsel had not interviewed certain witnesses he wanted and that he had not been given all of the witness lists to compare when he waived further testimony at the end of the penalty

[5] The trial court questioned defense counsel about this matter and counsel reported that he believed prosecutorial misconduct would fall under the "catch all" mitigator, but in this case he did not find evidence to support such a mitigation factor. Both defense counsel, David Rowe and Donovan Parker, discussed the matter and reached the same conclusion that there was no evidence of prosecutorial misconduct and that they would not participate in any filings alleging prosecutorial misconduct. (RS-ROA.30 1385-86)

phase. He announced the names of those he wanted called; none were the mental health experts presented in 2001. (RS-ROA.35 4-6, 9-11). The *Spencer* hearing was continued and eventually Armstrong called David Massar, Avia Joy McKenzie, and his mother, Dorrett English. (SRS-ROA.1 5-28; RS-ROA.37 8-19). The transcripts of the penalty phase presentation before the jury and during the multiple *Spencer* hearings were before this Court on direct appeal and available for this Court's independent proportionality review. Appellate counsel cannot be deemed ineffective for presenting the record developed at the resentencing circumscribed by Armstrong's knowing, intelligent, and voluntary waiver of potential mitigating evidence.

Nonetheless, even if appellate counsel should have pointed to the 2001 postconviction record, prejudice cannot be established; confidence in the outcome has not been undermined. The 2001 postconviction court found Armstrong's mental health mitigation offering of "very little weight" given the fact that the experts did not have an accurate understating or grasp of the salient facts" and their opinions regarding frontal lobe dysfunction, impaired impulse control was refuted by the case facts showing Armstrong planned the crimes. (1-PCR 803-04) Also, the 2001 lay witness testimony was cumulative to that presented at the initial penalty phase (1-PCR 793=96) and should be found cumulative to the 2007 presentation. The resentencing

court found three aggravators: (1) prior violent felony for the contemporaneous attempted murder of Deputy Sallustio and an armed robbery committed 13 days before the murder, (2) committed during the course of a felony (robbery); and (3) victim was law enforcement officer engaged in the performance of his duties. (RS-ROA.5 758-95) This Court stated: "We have previously affirmed the death penalty in a single-aggravator case where the single aggravator was a prior violent felony" and noted it had "upheld the imposition of the death penalty as proportionate where there was similar aggravation and more mitigation."

As such, this Court's confidence in the outcome of the proceedings has not been undermined even if the 2001 postconviction evidence is considered. *See Wheeler v. State*, 4 So.3d 599 (Fla. 2009) (affirming death sentence as proportionate for defendant who fatally shot sheriff's deputy where trial court found CCP, avoid arrest, and prior violent felony aggravators, statutory mental mitigators of extreme mental and emotional disturbance, and capacity to conform conduct to law was substantially impaired, and eleven nonstatutory mitigators); *Bailey v. State*, 998 So.2d 545 (Fla. 2008) (finding sentence proportionate based on killing of police officer during traffic stop where avoid arrest and felony probation aggravators were found and weighed against the statutory age mitigator and eight nonstatutory mitigators including low IQ, history of mental

illness, and intoxication at time of offense); *McLean v. State*, 29 So.3d 1045 (Fla. 2010) (finding sentence proportionate for a robbery with multiple gunshot victims and the prior violent felony aand felony murder aggravators outweighing both statutory mental health mitigators, and nonstatutory mitigators including substance abuse, family problems, mild brain injury) *cert. denied*, 131 S.Ct. 153 (2010); *Pope v. State*, 679 So.2d 710 (Fla. 1996) (affirming death penalty for defendant who fatally beat and stabbed girlfriend, based on finding prior violent felony and pecuniary gain aggravators outweighed both statutory mental health mitigators and several nonstatutory mitigators, including intoxication at the time of the murder and fighting with the victim's girlfriend just before the murder); *Heath v. State*, 648 So.2d 660, 663 (Fla. 1994) (holding death sentence proportionate where prior violent felony and felony murder aggravators outweighed that statutory mitigating factor of extreme mental or emotional disturbance and several non-statutory mitigating circumstances). Habeas relief should be denied.

CONCLUSION

Based upon the foregoing, the State requests respectfully this Court deny the 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 electronic mail through the e-portal to: Rachel L. Day, Esq., at dayr@ccsr.state.fl.us and Nicole M. Noel, Esq. at noeln@ccsr.state.fl.us this 6th day of July, 2015.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

Respectfully submitted,

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