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**IN THE SUPREME COURT OF FLORIDA**

**HAROLD A. BLAKE,**

**Petitioner,**

**v.**

**Case No. SC13-1065**

**L.T. No. CF02-05203A1-XX**

**MICHAEL D. CREWS, ETC.,**

**Respondents.**

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

**AND**

**MEMORANDUM OF LAW**

COME NOW, Respondents, Michael D. Crews, Secretary, Florida Department of Corrections, etc., by and through the undersigned counsel, and hereby respond to the Petition for Writ of Habeas Corpus filed in the above-styled case. Respondents respectfully submit that the petition should be denied, and state as grounds therefore:

**FACTS AND PROCEDURAL HISTORY**

Harold Blake was arrested on August 14, 2002 for the first degree murder of Maheshkumar [Mike] Patel. (DA V7/749-53). On August 29, 2002, the Grand Jury indicted Butler on one count of first degree murder, one count of attempted armed robbery and one count of grand theft (auto). (DA V1/102-04). Blake's jury trial was held on February 21-28, 2005; the jury returned a guilty verdict on February 25, 2005. (DA V10/1283). The penalty phase was held

on April 19-20, 2005. (DA V10/1312-V11/1554). On May 13, 2005, Blake was sentenced to death. (DA V3/394).

On direct appeal, *Blake v. State*, SC05-1302, Attorney Robert Norgard<sup>1</sup> filed a 79-page initial brief and a 21-page reply brief, asserting the following issues:

ISSUE I: THE TRIAL COURT ERRED IN DENYING THE MOTION TO SUPPRESS THE RECORDED STATEMENT OF MR. BLAKE WHERE THE RECORDED STATEMENT WAS TAKEN AS THE RESULT OF AN IMPLIED PROMISE TO MR. BLAKE THAT THE STATEMENT WOULD NOT BE RECORDED AFTER MR. BLAKE REFUSED TO CONSENT TO A RECORDED STATEMENT.

ISSUE II: THE TRIAL COURT ERRED IN FAILING TO ADVISE THE APPELLANT THAT HE COULD EXERCISE HIS RIGHT OF TO SELF-REPRESENTATION AFTER THE COURT DETERMINED THAT APPOINTED COUNSEL WOULD NOT BE REPLACED.

ISSUE III: THE SENTENCE OF DEATH IS NOT PROPORTIONATE.

On December 13, 2007, this Court affirmed Blake's convictions for first-degree murder, attempted armed robbery, and grand theft of a motor vehicle, and his sentence of death. *Blake v. State*, 972 So. 2d 839, 850 (Fla. 2007). No motion for rehearing was filed, and the mandate issued on January 4, 2008. On March 10, 2008, Attorney Norgard filed a petition for writ of certiorari, based on the videotaped confession issue. Certiorari review was denied by the U. S. Supreme Court on May 12, 2008. *Blake v. Florida*, 553 U.S. 1039, 128 S. Ct. 2442 (2008).

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<sup>1</sup>In *Lynch v. State*, 2 So. 3d 47 (Fla. 2008), this Court found that the post-conviction judge did not abuse his discretion in precluding expert testimony from Norgard on prevailing norms of capital representation, but also noted, "Attorney Norgard stated that he has testified as an expert witness in approximately fifteen capital cases." *Lynch*, 2 So. 3d at 82, fn 14.

## **Post-Conviction Proceedings**

On April 17, 2009, Blake's initial collateral counsel filed a motion to vacate pursuant to Florida Rule of Criminal Procedure 3.851. (PCR V3/332-35). The State filed its "Answer to Motion for Post-Conviction Relief Pursuant to Florida Rule of Criminal Procedure 3.851" on June 12, 2009. (PCR V3/452-87). On January 4, 2010, Blake's successor collateral counsel filed an amended motion which raised the following 12 issues:

CLAIM I: MR. BLAKE HAS NOT BEEN PROVIDED WITH THE QUALITY REPRESENTATION TO WHICH HE IS ENTITLED FOR THE PREPARATION AND FILING OF HIS POSTCONVICTION PLEADINGS. MOREOVER, THE COURT ERRED IN PENALIZING MR. BLAKE FOR ITS OWN FAILURE TO MONITOR COUNSEL'S PERFORMANCE AS REQUIRED BY FLA. STAT. §27.711(12). AND THE COURT ERRED IN REQUIRING MR. BLAKE TO FILE AN AMENDED POSTCONVICTION MOTION PRIOR TO THE COMPLETION OF THE PUBLIC RECORDS PROCESS. AS A RESULT OF THESE ERRORS, MR. BLAKE'S RIGHTS TO DUE PROCESS AS GUARANTEED BY THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION HAVE BEEN VIOLATED.

CLAIM II: MR. BLAKE WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE GUILT PHASE, IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION. TRIAL COUNSEL WAS RENDERED INEFFECTIVE BY THE ACTIONS OF THE TRIAL COURT AND THE STATE. TRIAL COUNSEL FAILED TO ADEQUATELY INVESTIGATE AND PREPARE A DEFENSE OR CHALLENGE THE STATE'S CASE. AS A RESULT, THE CONVICTIONS ARE UNRELIABLE.

CLAIM III: MR. BLAKE WAS DEPRIVED OF HIS RIGHTS TO DUE PROCESS UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND HIS RIGHTS UNDER THE FIFTH, SIXTH, AND EIGHTH AMENDMENTS, BECAUSE THE STATE WITHHELD EVIDENCE WHICH WAS MATERIAL AND EXCULPATORY IN NATURE AND/OR PRESENTED MISLEADING EVIDENCE. SUCH OMISSIONS RENDERED DEFENSE COUNSEL'S REPRESENTATION INEFFECTIVE AND PREVENTED A FULL ADVERSARIAL TESTING.

CLAIM IV: MR. BLAKE WAS DENIED AN ADEQUATE ADVERSARIAL TESTING AT THE SENTENCING PHASE OF HIS TRIAL, IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION. TRIAL COUNSEL FAILED TO ADEQUATELY INVESTIGATE AND PREPARE MITIGATING EVIDENCE AND TO ADEQUATELY CHALLENGE THE STATE'S CASE. AS A RESULT, THE DEATH SENTENCE IS UNRELIABLE.

CLAIM V: MR. BLAKE WAS DENIED A FAIR TRIAL AND A FAIR, RELIABLE AND INDIVIDUALIZED CAPITAL SENTENCING DETERMINATION IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, BECAUSE THE PROSECUTOR'S ARGUMENTS AT THE GUILT/INNOCENCE AND PENALTY PHASES PRESENTED IMPERMISSIBLE CONSIDERATIONS TO THE JURY, MISSTATED THE LAW AND FACTS, AND WERE INFLAMMATORY AND IMPROPER. DEFENSE COUNSEL'S FAILURE TO RAISE PROPER OBJECTIONS WAS DEFICIENT PERFORMANCE WHICH DENIED MR. BLAKE EFFECTIVE ASSISTANCE OF COUNSEL.

CLAIM VI: MR. BLAKE WAS DENIED HIS RIGHTS UNDER AKE V. OKLAHOMA AT THE GUILT AND PENALTY PHASE OF HIS CAPITAL TRIAL, IN VIOLATION OF MR. BLAKE'S RIGHTS TO DUE PROCESS AND EQUAL PROTECTION UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION, AS WELL AS HIS RIGHTS UNDER THE FIFTH, SIXTH, AND EIGHTH AMENDMENTS.

CLAIM VII: THE STATE VIOLATED MR. BLAKE'S RIGHT TO DUE PROCESS BY UTILIZING INCONSISTENT THEORIES OF THE ROLES OF THE CODEFENDANTS IN THE CRIME FOR WHICH MR. BLAKE WAS CONVICTED AND SENTENCED TO DEATH.

CLAIM VIII: NEWLY DISCOVERED EVIDENCE ESTABLISHES THAT MR. BLAKE'S CONVICTION AND SENTENCE WERE IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

CLAIM IX: MR. BLAKE WAS DENIED HIS RIGHTS UNDER THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS WHEN THE TRIAL COURT ALLOWED THE JURY TO HEAR EVIDENCE IN DETAIL OF A PRIOR FELONY OF WHICH MR. BLAKE HAD BEEN CONVICTED.

CLAIM X: MR. BLAKE'S DEATH SENTENCE IS FUNDAMENTALLY UNFAIR AND UNRELIABLE, IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS DUE TO THE STATE'S INTRODUCTION OF NON-STATUTORY AGGRAVATING FACTORS AND THE STATE'S ARGUMENTS UPON NON-STATUTORY AGGRAVATING FACTORS. DEFENSE COUNSEL'S FAILURE TO OBJECT OR ARGUE EFFECTIVELY CONSTITUTED INEFFECTIVE ASSISTANCE.

CLAIM XI: MR. BLAKE'S RIGHT OF CONFRONTATION WAS VIOLATED AT HIS TRIAL WHEN THE STATE WAS PERMITTED TO INTRODUCE HEARSAY STATEMENTS OF WITNESSES AND THUS WAS NOT ALLOWED CROSS-EXAMINATION OF NON-TESTIFYING WITNESSES.

CLAIM XII: MR. BLAKE'S TRIAL WAS FRAUGHT WITH PROCEDURAL AND SUBSTANTIVE ERRORS WHICH CANNOT BE HARMLESS WHEN VIEWED AS A WHOLE, SINCE THE COMBINATION OF ERRORS DEPRIVED HIM OF THE FUNDAMENTALLY FAIR TRIAL GUARANTEED UNDER THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

(PCR V5/718-822). The State filed a response to the Amended Motion on March 3, 2010. (PCR V6/958-88). Blake also filed a second amended motion to vacate on August 5, 2010; but the second amended motion did not materially alter any of the claims previously raised in the amended motion to vacate. (See, Order at PCR V45/7605).

On June 29, 2010, the trial court entered an "Order on Case Management Conference," granting an evidentiary hearing on the following claims: Claim II - Ineffective Assistance of Counsel/Guilt Phase; Claim III - *Brady* Claim; Claim IV - IAC/Penalty Phase; Claim V (in part) - IAC/prosecutor comment; Claim VI (in part) - IAC/mental health expert and IAC/confession expert; Claim VIII - Newly Discovered Evidence (Witness' Recantation); and Claim X (in part) - IAC/penalty phase. (PCR V7/1099-1100).

A five-day evidentiary hearing was held on March 28, 2011 - April 1, 2011. (PCR V8/1320 - V16/2730). Two additional days of post-conviction hearings were conducted on June 19 - 20, 2012. (PCR V41/6927 - V42/7275). Thirty-four witnesses testified at the post-conviction hearing below; the defense called 31 of them to

testify. At the conclusion of the hearings, the trial court issued its Order on Defendant's Second Amended Motion to Vacate, denying relief on the guilt phase, but granting relief on the penalty phase. (PCR V45/7600-99). The State did not cross-appeal the order granting a new penalty phase.

Blake's appeal from the denial of his post-conviction motion is currently pending before this Court in *Blake v. State*, Case No. SC12-2102. Blake's habeas petition was filed contemporaneously with his initial brief in the appeal of the denial of his motion for post-conviction relief.

#### **LEGAL PRINCIPLES and STANDARDS OF REVIEW**

A habeas petition is the proper vehicle to assert claims of ineffective assistance of appellate counsel. *Valle v. Moore*, 837 So. 2d 905, 907 (Fla. 2002). "However, claims of ineffective assistance of appellate counsel may not be used to camouflage issues that could and should have been presented on direct appeal or in a proper postconviction motion." *Lukehart v. State*, 70 So. 3d 503, 525 (Fla. 2011) (quoting *Davis v. State*, 928 So. 2d 1089, 1126 (Fla. 2005) (citations omitted), citing *Rutherford v. Moore*, 774 So. 2d 637, 643 (Fla. 2000)).

The standard of review for claims of ineffective assistance of appellate counsel mirrors the two-part *Strickland v. Washington*, 466 U. S. 668 (1984) standard for ineffective assistance of trial counsel. *Wickham v. State*, 2013 WL 1830950 (Fla. 2013); *State v.*

*Riechmann*, 777 So. 2d 342, 364 (Fla. 2000). To grant habeas relief on an IAC/appellate counsel claim, this Court must resolve: 1) whether the alleged omissions are of such magnitude as to constitute a serious error or substantial deficiency falling measurably outside the range of professionally acceptable performance, and 2) whether the deficiency in performance compromised the appellate process to such a degree as to undermine confidence in the correctness of the result. *Bradley v. State*, 33 So. 3d 664, 684 (Fla. 2010). Thus, in the appellate context, the prejudice prong of *Strickland* requires a showing that the appellate court would have afforded relief on appeal.

Appellate counsel's performance will not be deficient if the omitted issue was meritless. *Wyatt v. State*, 71 So. 3d 86, 112-113 (Fla. 2011); *Spencer v. State*, 842 So. 2d 52, 74 (Fla. 2003) (Appellate counsel will not be considered ineffective for failing to raise issues that have little or no chance of success.) Appellate counsel is not required to raise every claim that might have had some possibility of success; effective appellate counsel need not raise every conceivable non-frivolous issue. *Zack v. State*, 911 So. 2d 1190, 1204 (Fla. 2005); *Thompson v. State*, 759 So. 2d 650, 656, n.5 (Fla. 2000).

Appellate counsel is not ineffective for failing to raise an issue that was not preserved at trial, unless the claim rises to the level of fundamental error. *Morton v. State*, 995 So. 2d 233, 247 (Fla. 2008). "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." *Jennings v. State*, 2013 WL 3214442 (Fla. 2013).

#### CLAIM I

##### **IAC/APPELLATE COUNSEL CLAIM - FAILURE TO RAISE A CLAIM OF FUNDAMENTAL ERROR ON DIRECT APPEAL BASED UPON JUROR RHODES' UNOBJECTED-TO SERVICE ON THE JURY PANEL.**

Any substantive claim based on juror competency was available for direct appeal and, therefore, is procedurally barred in post-conviction. See, *Spencer v. State*, 842 So. 2d 52, 68 (Fla. 2003). Habeas petitions "cannot be used as a means to seek a second appeal or to litigate issues that could have been or were raised in a post-conviction appeal." *McDonald v. State*, 952 So. 2d 484, 498 (Fla. 2006).

Likewise, any claim of ineffective assistance of trial counsel is procedurally barred and not cognizable in this habeas proceeding. *Merck v. State*, 2013 WL 264437 (Fla. 2013); *State v. Riechmann*, 777 So. 2d 342, 364, fn. 22 (Fla. 2000). Blake faults trial counsel for not exercising a cause challenge<sup>2</sup> or a peremptory challenge to Juror Rhodes. Blake's amended Rule 3.851 motion did

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<sup>2</sup>The standard for granting a cause challenge is whether there is reasonable doubt "as to whether the juror possesses an impartial state of mind," which turns on "whether the juror can lay aside any bias or prejudice and render a verdict solely on the evidence presented and the instructions on the law given by the court." *Busby v. State*, 894 So. 2d 88, 95 (Fla. 2004).

not raise any claim that trial counsel was ineffective in failing to challenge Juror Rhodes. Any claim of ineffective assistance of trial counsel, based on Juror Rhodes, is procedurally barred and not cognizable in this habeas proceeding.<sup>3</sup> See, *Smithers v. State* 18 So. 3d 460, 465, n.2 (Fla. 2009) (noting that to the extent Smithers argued that trial counsel was ineffective for failing to question the juror in question, his argument was procedurally barred and without merit). In *Smithers*, this Court also stated, "Smithers did not raise that argument before the postconviction court. See *Green v. State*, 975 So. 2d 1090, 1104 (Fla. 2008). Moreover, in *Green*, this Court held that an allegation that further questioning would have established a basis for a cause challenge was "speculative" and not a basis for relief. *Id.* at 1105."

The only claim that is cognizable in this habeas proceeding is the claim of ineffective assistance of appellate counsel. However, appellate counsel cannot be deemed ineffective for failing to raise an unpreserved claim. *Peede v. State*, 955 So. 2d 480, 503 (Fla. 2007). Unpreserved errors cannot successfully be raised on appeal unless they amount to fundamental error. *Valentine v. State*, 98

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<sup>3</sup>Trial counsel's failure to exercise a cause challenge or a peremptory challenge to strike a prospective juror is subject to the prejudice standard set forth in *Carratelli v. State*, 961 So. 2d 312, 324 (Fla. 2007). Since Blake failed to raise any IAC claim based on Juror Rhodes in his Rule 3.851 motion below, he obviously failed to demonstrate that a biased juror actually served. See, *Lugo v. State*, 2 So. 3d 1, 13 (Fla. 2008) (citing *Carratelli*, "[W]here a postconviction motion alleges that trial counsel was ineffective for failing to raise or preserve a cause challenge, the defendant must demonstrate that a juror was actually biased.").

So. 3d 44, 58 (Fla. 2012). For the following reasons, Blake has failed to demonstrate that his appellate counsel was ineffective for not asserting a claim of fundamental error on direct appeal based on Juror Rhodes' unobjected-to jury service.

Blake argues that seating Juror Rhodes on his jury panel created fundamental error because her husband's murder in 1988 was similar to Mr. Patel's murder in 2002, in that both victims were doing their jobs when they were shot by strangers. Essentially, collateral counsel disagrees with trial counsel's strategic decision during jury selection.<sup>4</sup> Blake insists that Juror Rhodes "could not possibly qualify as an impartial juror," yet he fails to mention any of Juror Rhodes' responses to defense counsel's inquiry during *voir dire*. During defense counsel's inquiry, Juror Rhodes (1) agreed that she "accentuated" the presumption of innocence in the courtroom (DA V4/288); (2) explained that someone might falsely confess "to cover for somebody else" (DA V4/293); (3) believed that a false confession "can happen" and gave examples, such as a mother might confess to protect a child or an individual might confess because they were threatened, (DA V4/294-294); (4) would evaluate

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<sup>4</sup>To the extent Blake claims that peremptory challenges should have been used differently, his IAC/trial counsel claim is procedurally barred and he made no attempt to allege which challenged jurors were better suited to serve than those who were selected or that there was a likelihood that the outcome of the case would have been different. See, *Phillips v. State*, 894 So. 2d 28 (Fla. 2005) (noting that the failure to exercise peremptory challenges is not a right of "constitutional dimension," . . . but "are a means of assuring an impartial jury" and concluding that Phillips failed to demonstrate that the jury was not impartial.)

the credibility of witnesses by considering their body language, how they're presenting their testimony, their voice, what they have to say and how it matches up with other testimony, and "does it fit in with other testimony, does it make sense with other testimony," (DA V4/298); and (5) agreed that she could follow the law and the State had the burden to prove their case. (DA V4/300-302). A juror is competent if he or she "can lay aside any bias or prejudice and render his verdict solely upon the evidence presented and the instructions on the law given to him by the court." *Carratelli*, 961 So. 2d at 324 (citations omitted). The full context of Juror Rhodes' statements are indicative of an unbiased juror and do not show that she was actually biased. See, *Lugo v. State*, 2 So. 3d 1, 16 (Fla. 2008).

In *Owen v. State*, 986 So. 2d 534, 550 (Fla. 2008), the defendant argued in post-conviction that his trial counsel should have removed a particular juror, Ms. Knowles, who had recently been the victim of a home invasion where her daughter was raped, because that crime was similar to the crime at issue in Owen's trial. This Court denied relief and stated, "[t]his argument is without merit. Knowles' responses during *voir dire* indicated that she would be able to "lay aside any bias or prejudice and render [her] verdict solely upon the evidence presented and the instructions on the law given to [her] by the court." . . . Based upon the totality of Knowles' responses in her *voir dire*, Owen has not shown her to be actually biased." *Owen*, 986 So. 2d at 550.

On Owen's federal habeas appeal, *Owen v. Florida Dept. of Corrections*, 686 F.3d 1181, 1198 (11<sup>th</sup> Cir. 2012), the Eleventh Circuit also noted that "Knowles answered all counsel's questions in a manner indicative of an unbiased juror. Indeed, Knowles's responses to the *voir dire* questions about critical issues such as the burden of proof, the non-automatic nature of the death penalty, the ability to be objective, and the ability to consider an insanity defense – exactly what Owen sought to prove – strongly suggested Knowles would be a capable juror. Owen had experienced defense counsel, who are "strongly presumed" to have "made all significant decisions in the exercise of reasonable professional judgment." *Strickland*, 466 U.S. at 690, 104 S.Ct. at 2066. Based on these facts, Owen's trial counsel could have reasonably chosen not to strike Knowles from the jury."<sup>5</sup>

Here, as in *Owen*, Juror Rhodes answered all counsel's questions in a manner indicative of an unbiased juror, and any IAC complaint based on trial counsel's acceptance of Juror Rhodes is procedurally barred. Appellate counsel is not ineffective for failing to raise an unreserved and meritless claim. Blake has not shown any error at all, much less "fundamental error."

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<sup>5</sup>The Eleventh Circuit also noted that it did not need to decide whether the *Carratelli* actual-bias test for prejudice imposes a higher burden or contradicts the governing *Strickland* prejudice standard, because "[e]ven if the *Carratelli* prejudice test applied by the Florida Supreme Court in *Owen V* were contrary to *Strickland*, and thus our review were *de novo*, we conclude that Owen cannot prevail on his ineffective assistance claim." *Owen*, 686 F.3d at 1201.

## CLAIM II

### IAC/APPELLATE COUNSEL - FALIURE TO RAISE A CLAIM OF FUNDAMENTAL ERROR ON DIRECT APPEAL BASED ON THE PROSECUTOR'S UNOBJECTED-TO STATEMENTS AT TRIAL.

Blake now attempts to reargue substantive claims of allegedly improper prosecutorial arguments that were raised in his post-conviction motion and deemed procedurally barred below. See, *Valentine v. State*, 98 So. 3d 44, 58 (Fla. 2012) (citing *Spencer v. State*, 842 So. 2d 52, 60 (Fla. 2003) (“We conclude that [the defendant’s] substantive claims of prosecutorial misconduct could and should have been raised on direct appeal and thus are procedurally barred from consideration in a postconviction motion.”)).

This habeas claim largely duplicates Issue 5 from Blake’s concurrent post-conviction appeal, SC12-2102. (Appellant’s Initial Brief at 97-99). Again, habeas corpus petitions “cannot be used as a means to seek a second appeal or to litigate issues that could have been or were raised in a post-conviction appeal.” *McDonald v. State*, 952 So. 2d 484, 498 (Fla. 2006).

In denying relief on Blake’s IAC/prosecutor argument claim, the post-conviction court ruled that any substantive challenge to the prosecutor’s argument and examination was procedurally barred and that Blake failed to demonstrate any deficiency of counsel and resulting prejudice under *Strickland*. The post-conviction court’s order stated, in pertinent part:

In his Motion, the Defendant alleges that the prosecutor's statements throughout the Defendant's trial unfairly prejudiced him from getting a fair trial. The Defendant mentions a number of examples of statements by the Assistant State Attorney during the trial that he argues are improper. One of the State's witnesses was Teresa Jones. The Defendant alleges that "On direct examination, the prosecutor elicited testimony about Jones' fear of Mr. Blake and his family to explain why she committed perjury before the grand jury as to the fact that Mr. Blake had been the one who removed two guns from the car." The Defendant also alleges that "Again, on redirect examination, in order to explain Jones' shifting stories about Mr. Blake's actions, the State brought up the fact that Jones had concerns for her safety." The Defendant alleges there is no evidence that Mr. Jones had been threatened by Mr. Blake or his family. The defense alleges that the prosecutor argued at the trial of Mr. Green that Mr. Jones' excuse that she feared Mr. Blake was fabricated.

The defense alleges that the prosecutor elicited improper character evidence from Mr. Blake during his cross-examination when he inquired about Mr. Blake's business of "stealing property and selling it." During cross-examination, Mr. Blake explained why he was crying on the videotape by saying, "when I get real mad, I cry." The defense alleges that this allowed the prosecutor to assert his theme of lack of remorse getting Mr. Blake to acknowledge that he wasn't "crying because you felt bad about what happened to Mr. Patel."

The defense argues that in the closing argument, the Assistant State Attorney pointed out that the arrest of Mr. Blake was very serious and the officers had to be "extremely careful with [Mr. Blake]. The defense alleges that the prosecutor also told the jury to look at Mr. Blake's demeanor on the stand." You had an opportunity to see Mr. Blake in this case when he testified, Mr. Blake, I would suggest to you, is incapable, incapable, of being told what to do. He had anger in his tone. He was combative with the questions that I was asking. He was not responsive to the things I was - that I was trying to get from him. He accused me of behaving like the detectives did.

\* \* \* [omitted re: penalty phase]

**To the extent that the Defendant is challenging the prosecutor's arguments, statements, or examination at trial on some basis other than ineffective assistance of**

counsel, the challenges are procedurally barred. See Floyd v. State, 18 So. 3d 432 (Fla. 2009). The Court finds that arguments made by the prosecutors that are the subject of Claim V constitute fair argument based on the evidence presented at the trial, fair comment on the evidence, or a proper response to the arguments made by the Defendant. See Franqui v. State, 59 So. 3d 82 (Fla. 2011). The Court also finds the arguments made by the prosecutor regarding the circumstances of the underlying crimes do not constitute non-statutory aggravation. The Court finds that counsel's performance did not fall below an objective standard of reasonableness with regard to the Claim V of the Defendant's Motion.

**Additionally, the court finds that even if defense counsel was deficient in some manner with regard to raising proper objections to the arguments and statements of the prosecutor, such deficiency does not establish a probability sufficient to undermine confidence in the outcome of his Trial.** Claim V of the Defendant's Motion is denied.

(PCR V45/7683-85) (e.s.).

The only claim cognizable in this proceeding is Blake's claim of ineffective assistance of appellate counsel. As previously noted, unpreserved errors cannot successfully be raised on appeal unless they amount to fundamental error. *Valentine v. State*, 98 So. 3d 44, 58 (Fla. 2012). Except for the single admonition regarding the prosecutor's tone of voice (DA V9/1065), the statements now criticized by Blake were not objected to at trial. Thus, any appellate challenge to the prosecutor's argument and examination would have been limited to review for fundamental error, which is error that reaches "down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error." Absent

fundamental error, relief would not be warranted on appeal. *Spencer v. State*, 842 So. 2d 52, 74 (Fla. 2003).

Blake failed to demonstrate the existence of "fundamental error." Reviewed in context, the prosecutor's arguments and examination were proper. The unchallenged comments were properly within the prosecutor's role in presenting evidence to the jury and suggesting what conclusions could be drawn from that evidence. See, *Valentine*, 98 So. 3d at 56-57. Unfortunately, it is not an unusual circumstance to have a witness who initially failed to truthfully disclose "all" of their relevant information to law enforcement. It is not inconsistent for the prosecutor to recognize that a witness's reluctance and varying levels of disclosure may have been influenced by many different factors -- including being castigated by the defense as a "snitch," intimidation from others, or their relationship with the suspects. Thus, the circumstances impacting the witness might be different for each case. Further, the prosecutor's closing was fair reply to defense counsel's preceding closing arguments on the credibility of Teresa Jones. (See, DA V9/1166-67). The "proper exercise of closing argument is to review the evidence and to explicate those inferences which may reasonably be drawn from the evidence." *Wade v. State*, 41 So. 3d 857, 868 (Fla. 2010). Merely "arguing a conclusion that can be drawn from the evidence is permissible fair comment." *Griffin v. State*, 866 So. 2d 1, 16 (Fla. 2003).

Moreover, Blake could not remotely establish any due process

violation. In *Darden v. Wainwright*, 477 U.S. 168, 106 S.Ct. 2464 (1986), the United States Supreme Court, while condemning the prosecutor's comments, held that the comments were not constitutional error because they did not deprive the defendant of a fair trial. The prosecutor's comments included calling the defendant an "animal" and expressing a personal wish for the defendant's death. The prosecutor, referring to the defendant, stated, "He shouldn't be out of his cell unless he has a leash on him and a prison guard at the other end of that leash" and "I wish someone had walked in the back door and blown his head off at that point." *Darden*, 477 U.S. at 180, n.12, 106 S.Ct. at 2471, n.12. In *Darden*, every court that reviewed the prosecutor's closing argument – including this Court, the Eleventh Circuit, and the United States Supreme Court – condemned it, but "no court ... held that the argument rendered the trial unfair." 477 U.S. at 179, 106 S.Ct. at 2471. It is not enough that the prosecutors' remarks were "undesirable or even universally condemned; rather, the relevant question is whether the prosecutors' comments "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Darden*, 477 U.S. at 181, 106 S.Ct. at 2471 (citing *Donnelly v. DeChristoforo*, 416 U.S. 637, 94 S.Ct. 1868 (1974)). In *Darden*, the Supreme Court relied on six factors in evaluating a due process claim arising from a prosecutor's inappropriate comments in closing argument: (1) whether the prosecutor manipulated or misstated the evidence, (2) whether the

comments implicated other specific rights of the accused (such as the right to remain silent), (3) whether the comments were invited by or responsive to defense counsel's arguments, (4) whether the trial court's instructions ameliorated the harm, (5) whether the evidence weighed heavily against the defendant, and (6) whether the defendant had an opportunity to rebut the prosecutor's comments. The *Darden* Court concluded that the prosecutor's improper comments "did not deprive petitioner of a fair trial." *Darden*, 477 U.S. at 181, 106 S.Ct. at 2471.

In *Parker v. Matthews*, - U.S. -, 132 S.Ct. 2148 (2012), the United States Supreme Court reversed the Sixth Circuit's decision which had granted federal habeas relief on the basis of the prosecutor's argument. The Sixth Circuit concluded that the prosecutor violated *Darden* by suggesting that Matthews had colluded with his lawyer and psychiatrist to manufacture an extreme emotional disturbance defense. However, the Sixth Circuit did not address the prosecutor's statement that immediately followed the quoted portion and expressly disavowed any suggestion of collusion. The Sixth Circuit also cited no precedent of the United States Supreme Court in support of its conclusion that due process prohibits a prosecutor from emphasizing a criminal defendant's motive to exaggerate exculpatory facts. The United States Supreme Court ruled that the Sixth Circuit "had no warrant to set aside the Kentucky Supreme Court's conclusion" that prosecutor's comments did not violate due process.

In *Reese v. Sec'y, Fla. Dep't. of Corr.*, 675 F.3d 1277, 1287-1288 (11th Cir. 2012), the Eleventh Circuit denied federal habeas relief in a Florida case where the prosecutor referred to the crime as "every woman's worst nightmare;" suggested that the defendant would be released on parole absent a sentence of death; compared the defendant to a "vicious dog;" and urged the jury to show the defendant "the same sympathy, the same pity that he showed to" the victim which was "none." In *Reese*, the Court denied the petitioner's due process claim under both the AEDPA and *de novo* review. The Court further noted that the United States Supreme Court has never granted federal habeas relief based upon a prosecutor's closing argument. *Reese*, 675 F.3d at 1287-88 (observing that "the Supreme Court has never held that a prosecutor's closing arguments were so unfair as to violate the right of a defendant to due process").

The instant record demonstrates that the prosecutor's unobjected-to arguments and examination of witnesses were not improper. Appellate counsel's failure to raise a non-meritorious claim cannot constitute ineffective assistance. *Barwick v. State*, 88 So. 3d 85, 109 (Fla. 2011). And, even assuming any impropriety, which the State emphatically disputes, any alleged error was harmless. Appellate counsel cannot be deemed ineffective for failing to raise a claim of allegedly improper comment that would not have constituted reversible error. *Thompson v. State*, 759 So. 2d 650, 664 (Fla. 2000).

### CLAIM III

#### IAC/APPELLATE COUNSEL CLAIM - FAILURE TO RAISE A CLAIM OF FUNDAMENTAL ERROR ON DIRECT APPEAL BASED ON ALLEGEDLY INCONSISTENT THEORIES OF PROSECUTION.

Any substantive claim based on *Bradshaw v. Stumpf*, 545 U.S. 175 (2005) is procedurally barred. This habeas claim largely duplicates Issue II, sub-claim 5, from Blake's concurrent post-conviction appeal, SC12-2102. (Appellant's Brief at 73-75). Once again, habeas petitions "cannot be used as a means to seek a second appeal or to litigate issues that could have been or were raised in a post-conviction appeal." *McDonald v. State*, 952 So. 2d 484, 498 (Fla. 2006).

The post-conviction court denied Blake's related claim of ineffective assistance of trial counsel as follows:

#### 4. Failure To Challenge the Inconsistent Theories of the Crimes.

The Defendant alleges that the State used inconsistent theories in Mr. Blake's trial and the trial of his co-defendant, Richard Green, and this violated Mr. Blake's right to due process. The Defendant alleges that counsel attempted to implicate Green for the murder of Mr. Patel to a greater extent in his trial than in Mr. Blake's trial. The Defendant alleges that in Mr. Blake's trial the prosecutor argued that Teresa Jones' shifting testimony was based on fear of Mr. Blake's family, while arguing in Mr. Green's trial that Ms. Jones had no fear of Mr. Blake or his family. **The Court finds the State has consistently argued that both Mr. Blake and Mr. Green were accountable for the crimes of first degree murder, attempted armed robbery, and grand theft; and both men were found guilty of these crimes in separate trials. The court does not find any deficiency by counsel with regard to this sub-claim.**

The Court does not find that the Defendant has proven that counsel's performance fell below an objective standard of reasonableness with respect to the claims and sub-claims argued in Ground II of his postconviction Motion. Additionally, the Court finds that even if it counsel could be considered to have performed deficiently with regard to the claims and sub-claims in Ground II, there is no reasonable possibility that the results of the trial would have been different but for this deficiency. **The Court finds that the videotaped statement given by the Defendant, the videotape from the store, the testimony of witnesses and evidence presented at his trial, and other evidence presented clearly show Mr. Blake's participation in a robbery that resulted in the first degree murder of Mr. Patel. Mr. Blake would clearly have been found guilty of these crimes whether he was the shooter or considered a principal in these crimes. The Court finds no reasonable basis to conclude Mr. Blake would not have been convicted of these crimes but for some deficiency of his counsel with regard to their preparation for the Guilt Phase of his trial.** Claim II of the Defendant's Motion is denied.

(PCR V45/7660-61) (e.s).

In *Fotopoulos v. State*, 838 So. 2d 1122, 1134 (Fla. 2002), the petitioner argued that his appellate counsel was ineffective in failing to raise a claim that the State allegedly took differing positions at the co-defendant's trial. This was a variant of the same claim that Fotopoulos raised on post-conviction appeal. In denying relief, this Court stated, in pertinent part:

**In his first two ineffective assistance of appellate counsel claims, Fotopoulos simply recharacterizes the claim that he raised in his postconviction motion appeal regarding the State's differing positions in the Hunt and Fotopoulos trial court proceedings.** Fotopoulos contends that his appellate counsel was ineffective because he should have asserted that the different positions taken by the prosecution violated the principles of *Giglio v. United States*, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972), and because he failed to assert that Fotopoulos's trial counsel was ineffective for not using the differing

testimony at trial. **Because the facts and argument underlying these two claims are identical to those identified and raised during Fotopoulos's 3.850 appeal, Fotopoulos's claims of ineffective assistance of appellate counsel are without merit.** This Court has stated many times:

**Although claims of ineffective assistance by appellate counsel are cognizable in habeas petitions, using a different argument to relitigate an issue in postconviction proceedings is not appropriate.** Furthermore, 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.

*Medina v. Dugger*, 586 So. 2d 317, 318 (Fla.1991) (quotation marks and citations omitted); see also *Thompson v. State*, 759 So. 2d 650, 657 n. 6 (Fla. 2000) (holding that it is not proper to argue a variant to an issue already raised in a habeas petition); *Mann v. Moore*, 794 So. 2d 595, 600-01 (Fla. 2001) (same). **Thus, these claims of ineffective assistance of appellate counsel are procedurally barred.**

Here, as in *Fotopoulos*, Blake is not entitled to relief on his re-characterized claim under the guise of ineffective assistance of appellate counsel.

Moreover, appellate counsel was not ineffective for failing to raise an unpreserved claim which did not constitute any error at all, much less fundamental error. The State consistently argued that both Blake and Green should be held accountable for the crimes of first degree murder, armed robbery and grand theft; and, following their separate jury trials, they each were found guilty

of those crimes.<sup>6</sup> As ASA Castillo's closing argument at Green's trial reflected (GR V6/832), and as ASA Castillo confirmed at the post-conviction evidentiary hearing below, both Blake and Green were equally accountable as principals. Accordingly, Blake could not establish deficiency of counsel and resulting prejudice related to his conviction for first-degree felony murder. See, *Mendoza v. State*, 87 So. 3d 644, 655 (Fla. 2011) (finding that where the defendant was convicted of first-degree felony murder, the identity of the shooter was not material); *Raleigh v. State*, 932 So. 2d 1054, 1065-1067 (Fla. 2006) (finding the State did not take inconsistent position during the defendant's and co-perpetrator's murder trials because the "essence" of the prosecutor's "argument was that Figueroa was no less culpable for the murder of Eberlin than Raleigh"); *United States v. Hill*, 643 F.3d 807, 834 (11th Cir. 2011) (rejecting a claim of prosecutorial inconsistency because the "government's consistent theory was that both Alcindor and Graham were guilty to the gills"); See also, *Parker v. State*, 542 So. 2d 356 (Fla. 1989) (holding that the State did not have a duty to tell the jury that it was taking an inconsistent position).

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<sup>6</sup>The jury found Blake guilty of first-degree murder, attempted robbery (with a finding that he discharged a firearm resulting in death) and grand theft of a motor vehicle. *Blake*, 972 at 840-42. As a result of his separate convictions for these crimes committed on 8/12/02, Green is serving a sentence of life imprisonment for the murder of Mr. Patel, fifteen years for attempted robbery with a deadly weapon, and five years for grand theft. Green is also serving a sentence of life imprisonment for an armed robbery committed on 9/12/02.

The United States Supreme Court has never held that due process prohibits the State from presenting inconsistent theories of prosecution. In *Bradshaw v. Stumpf*, 545 U.S. 175, 125 S.Ct. 2398 (2005), the Supreme Court held that the allegedly inconsistent prosecution theories could not have affected Stumpf's conviction and declined to address whether the allegedly inconsistent theories affected sentencing.<sup>7</sup> See also, *Bradshaw v. Stumpf*, 545 U.S. at 190 (Thomas, J., concurring) (observing that the "Court has never hinted, much less held, that the Due Process Clause prevents a State from prosecuting defendants based on inconsistent theories"); *Fotopoulos v. Sec'y, Dep't of Corr.*, 516 F. 3d 1229, 1235 (11th Cir. 2008) (recognizing that "[t]he *Bradshaw* Court did not hold that the use of inconsistent theories in the prosecution of two defendants violates the right to due process").

Blake's reliance on the concurring opinion in *Bradshaw v. Stumpf* is misplaced. That view of due process was adopted by only two Justices. The majority opinion, written by Justice O'Connor, was unanimous with all of the Justices joining. It is only that opinion that is binding precedent. See, *Marks v. United States*, 430 U.S. 188, 193, 97 S.Ct. 990, 993 (1977). Blake failed to establish that appellate counsel was ineffective. Ultimately, even

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<sup>7</sup>Stumpf argued that the State, in a separate proceeding after his conviction and sentence, presented new evidence, which arose after his trial, that a co-defendant actually may have fired the fatal shots. On remand, *Stumpf v. Robinson*, 2013 WL 3336739 (6th Cir. 2013), a majority of the Sixth Circuit, *en banc*, rejected Stumpf's claim that his due-process rights were violated at sentencing.

if appellate counsel had raised a "fundamental error" challenge to Blake's felony-murder conviction, based on *Bradshaw v. Stumpf*, any such challenge is without merit under *Bradshaw v. Stumpf*. Appellate counsel's failure to raise an unpreserved and non-meritorious claim cannot constitute ineffective assistance. See, *Barwick v. State*, 88 So. 3d 85, 109 (Fla. 2011).

#### CLAIM IV

##### **IAC/APPELLATE COUNSEL CLAIM - FAILURE TO RAISE A CLAIM OF FUNDAMENTAL ERROR ON DIRECT APPEAL BASED ON AKE v OKLAHOMA**

Any substantive claim under *Ake v. Oklahoma*, 470 U.S. 68, 105 S.Ct. 1087 (1985) is procedurally barred, as the post-conviction court found below. (PCR V45/7686-88). See *Floyd v. State*, 18 So. 3d 432, 456 (Fla. 2009).

Blake relies on a variant of the *Ake* claim that he presented in Issue 6 of his concurrent post-conviction appeal, SC12-2102. (Appellant's Brief at 99-100). The post-conviction court denied Blake's IAC/*Ake* claim below and stated, in pertinent part:

The defense also asserts that Mr. Blake was entitled to adequate mental health examination concerning guilt phase issues. Mr. Blake's susceptibility to coercion, his understanding of the circumstances surrounding his interrogation, and issues of his culpability compared to his co-defendant were not considered because no mental health expert was retained to consider these issues.

**The defense alleges that Ake is extended to non-psychological experts and that Mr. Blake was denied his right to assistance of an expert in false confessions. An expert could have assisted Mr. Blake in showing that his statement was in fact false and not freely and voluntarily given.**

To the extent the Defendant is arguing a substantive claim based on Ake v. Oklahoma, not based on a claim of ineffective assistance of counsel, his claim is procedurally barred. See Floyd v. State, 18 So. 3d 432 (Fla. 2009). In Stewart v. State, 37 So. 2d 243, 255 (Fla. 2010), the Florida Supreme Court discussed the type of postconviction claim based on Ake that is not procedurally barred because it could have been raised on direct appeal. "In Stewart, the Court opined, "In Ake v. Oklahoma, 470 U.S. 68, 84, 105 S.Ct. 1087, 84 L.Ed. 2d 53 (1985), the United States Supreme Court concluded that in a sentencing proceeding, "due process requires access to psychiatric examination on relevant issues, to the testimony of the psychiatrist, and to assistance in preparation at the sentencing phase." While ordinarily a postconviction claim based on is procedurally barred because it could have been raised on direct appeal, a defendant is entitled to litigate during postconviction a claim that a prior mental health expert's examination was so "grossly insufficient" that the expert "ignore(d) clear indications of either mental retardation or organic brain damage." Raleigh v. State, 932 So.2d 1054, 1060 (Fla. 2006) (quoting Sireci, 502 So. 2d at 1224)."

The Court finds that a claim based on Ake v. Oklahoma is not applicable to the facts of this case. The Court does not find that Dr. Kremper's examination was grossly insufficient or that he ignored clear indications of either mental retardation or organic brain damage. As more fully discussed in Claim IV of this Order, from a professional/ethical standpoint it was not appropriate for Doctor Kremper to be retained as the mental health professional by the defense when he had previously been retained by the State in another case involving Mr. Blake. The deficiency of counsel with respect to mental health mitigation is addressed by the Court in Claim IV of the Defendant's Motion. Claim VI of the Defendant's Motion is denied.

(PCR V45/7686-88) (e.s.).

Again, habeas corpus petitions "cannot be used as a means to seek a second appeal or to litigate issues that could have been or were raised in a post-conviction appeal." McDonald v. State, 952

So. 2d 484, 498 (Fla. 2006). Here, as in *Fotopoulos*, Blake is not entitled to habeas relief on his re-characterized claim under the guise of ineffective assistance of appellate counsel.

Unpreserved errors cannot successfully be raised on appeal unless they amount to fundamental error. *Valentine v. State*, 98 So. 3d 44, 58 (Fla. 2012). Blake failed to demonstrate that he had a meritorious *Ake* claim. Although Blake insists that *Ake* extends to non-psychological witnesses, such as a “false confession” expert, the Court in *Ake* limited its holding to psychiatric assistance. See, *Conklin v. Schofield*, 366 F.3d 1191, 1206 (11th Cir. 2004) (noting the limited holding of *Ake*). Blake failed to demonstrate any error at all, much less fundamental error. See, *Farr v. State*, 115 So. 3d 946, 963 (Fla. 2012) (concluding that “Farr has failed to demonstrate that he had a meritorious *Ake* claim, and as such, appellate counsel was not ineffective in failing to raise this claim on direct appeal. *Thompson*, 759 So.2d at 663 (“[A]ppellate counsel cannot be deemed ineffective for failing to raise a meritless issue.”)).

**CONCLUSION**

Based on the foregoing facts, arguments and citations of authority, the instant Petition for Writ of Habeas Corpus should be denied.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by electronic transmission to Linda McDermott, Esq. at [lindammcdermott@msn.com](mailto:lindammcdermott@msn.com), McClain & McDermott, P.A., 20301 Grande Oak Blvd., Suite 118-61, Estero, Florida 33928, this 12<sup>th</sup> day of August, 2013.

**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(1).

Respectfully submitted,

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