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IN THE SUPREME COURT OF FLORIDA

DERRICK McLEAN,

Petitioner,

v. **CASE NO. SC13-1788**
L.T. No. 2004-CF-015923-O

MICHAEL D. CREWS, ETC.

Respondent.
_____/

RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS
AND
MEMORANDUM OF LAW

COMES NOW, Respondent, MICHAEL D. CREWS, Secretary, Florida Department of Corrections, by and through the undersigned counsel, and hereby responds to the Petition for Writ of Habeas Corpus filed in the above-styled case. Respondent respectfully submits that the petition should be denied, and states as grounds therefore:

FACTS AND PROCEDURAL HISTORY

The State's answer brief on appeal from the denial of post-conviction relief in case no. SC13-632, contains a detailed summary of facts and procedural history and is being submitted along with the instant response. On direct appeal, appellate counsel generally raised the following issues:

> POINT 1: THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO SUPPRESS THE LIVE LINEUP IDENTIFICATION WHERE LAW ENFORCEMENT DID NOT OFFER OR PROVIDE ASSISTANCE OF COUNSEL.

> POINT II: APPELLANT'S DEATH SENTENCE IS DISPROPORTIONATE, EXCESSIVE, AND INAPPROPRIATE, AND IS CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF ARTICLE 1, SECTION 17 OF THE FLORIDA CONSTITUTION, AND THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.
>
> POINT III: THE TRIAL COURT ERRED IN CONDUCTING A PRETRIAL HEARINGS [SIC] WHERE THE APPELLANT WAS INVOLUNTARILY EXCLUDED THUS DENYING MCLEAN'S RIGHT TO DUE PROCESS UNDER THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE FLORIDA CONSTITUTION.
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> POINT IV: THE TRIAL COURT ERRED IN INSTRUCTING THE JURY, OVER TIMELY AND SPECIFIC OBJECTION, ON THE HEIGHTENED PREMEDITATION AGGRAVATING CIRCUMSTANCE WHERE IT WAS NOT SUPPORTED BY ANY QUANTUM OF EVIDENCE AND WAS ULTIMATELY REJECTED BY THE TRIAL COURT.
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> POINT V: FLORIDA'S DEATH SENTENCING SCHEME IS UNCONSTITUTIONAL UNDER THE SIXTH AMENDMENT PURSUANT TO *RING V. ARIZONA*.

This Court affirmed Petitioner's conviction and death sentence on February 11, 2010, in McLean v. State, 29 So. 3d 1045 (Fla. 2010).

Petitioner filed a petition for writ of certiorari in the United States Supreme Court on April 12, 2010 in McLean v. Florida, Case No. 09-11176. The United States Supreme Court denied certiorari review on October 4, 2010. See McLean v. Florida, 131 S. Ct. 153, 178 L.Ed.2d 92 (2010).

Petitioner's habeas petition in this Court was timely filed along with his initial brief in the appeal of the denial of his motion for post-conviction relief.

ARGUMENT

CLAIM I

MR. MCLEAN RECEIVED INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL FOR ABANDONING TRIAL COUNSEL'S EFFORTS TO OBTAIN INFORMATION ABOUT A TIPSTER WHO ACCUSED HIM OF THE CRIME AND THE ASSOCIATED "CRIMELINE" TAPE.

McLean first asserts that his appellate attorney was ineffective for failing to raise an allegation of error surrounding the destruction of the Crimeline tip implicating him in the robbery, murder and attempted murder of victims Jahvon Thompson and Theothlus Lewis. This claim lacks any merit. McLean cannot establish either deficient performance or resulting prejudice based upon counsel's failure to raise this claim on direct appeal.

A. The Legal Standard

In Rutherford v. Moore, 774 So. 2d 637 (Fla. 2000), this Court summarized and reiterated its jurisprudence relating to claims of ineffective assistance of appellate counsel. Subsequent decisions also repeat these principles. Habeas corpus petitions are the proper vehicle to advance claims of ineffective assistance of appellate counsel but such claims may not be used to camouflage issues that should have been raised on direct appeal or in a post-conviction motion. Id. at 643; Thompson v. State, 759 So. 2d 650, 660, n.6 (Fla. 2000);

Hardwick v. Dugger, 648 So. 2d 100, 106 (Fla. 1994). The Court's ability to grant relief is limited to those situations where the petitioner established first that counsel's performance was deficient because the "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, that the petitioner was prejudiced because counsel's deficiency "compromised the appellate process to such a degree as to undermine confidence in the correctness of the result." Rutherford at 643; Groover v. Singletary, 656 So. 2d 424, 425 (Fla. 1995).

Appellate counsel has no obligation to raise issues on appeal that were not preserved for review. Wright v. State, 857 So. 2d 861, 875 (Fla. 2003) (citing Robinson v. Moore, 773 So. 2d 1, 4 (Fla. 2000)). Procedurally barred claims not properly raised at trial could not form a basis for finding appellate counsel ineffective absent a showing of fundamental error, i.e., 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." Rutherford at 646; Chandler v. State, 702 So. 2d 186, 191, n.5 (Fla. 1997).

B. Appellate Counsel Was Not Ineffective For Failing To Raise This Procedurally Defaulted Claim

As an initial matter, this claim was not properly preserved for appeal. While trial counsel filed a motion to disclose the Crimeline tip, it is apparent that counsel did not pursue the matter after being informed that the tape had been destroyed or taped over. Without a hearing to develop a factual record, there was simply no basis to raise, much less present a meritorious claim on appeal. Consequently, appellate counsel cannot be considered ineffective in this case. Wright, 857 So. 2d at 875 (counsel not ineffective for failing to raise claim not properly preserved below).

Further, the record clearly establishes that the direct appeal record provides no basis for reversal of McLean's conviction for destruction of evidence. While trial counsel sought the identity of the Crimeline tipster (V 685), there was no showing below that such information was relevant, much less exculpatory.[1] During a pretrial hearing, trial counsel referenced

[1] As found by the post-conviction court disposing of a related claim of ineffective assistance, the court stated:

> Mr. McLean has failed to show that counsel was deficient because he has not proven the tape to be exculpatory in nature or that it was even available for production. He has also not proven that the destruction of the tape was in bad faith. Claim III is denied.

(V7, 1172-74).

why he desired the Crimeline tipster's identity, but, was apparently satisfied with the information he received and made no effort to pursue a destruction of evidence claim. The prosecutor explained that he had provided all the information that was known to the State, but, that the tipster is "unknown" and he could not provide the defense with his or her identity. (I 123-26). Aside from lack of preservation by a proper objection below, there is insufficient evidence in the record to support a due process destruction of evidence claim.

In Guzman v. State, 868 So. 2d 498, 509 (Fla. 2003), this Court recognized the defendant bears a heavy burden to establish a constitutional violation on the basis of destruction of evidence. The court stated:

> The loss or destruction of evidence that is potentially useful to the defense violates due process only if the defendant can show bad faith on the part of the police or prosecution. *See Arizona v. Youngblood*, 488 U.S. 51, 58, 109 S.Ct. 333, 102 L.Ed.2d 281 (1988). Under *Youngblood*, bad faith exists only when police intentionally destroy evidence they believe would exonerate a defendant. *Youngblood* explained that the "presence or absence of bad faith ... must necessarily turn on the police's knowledge of the exculpatory value of the evidence at the time it was lost or destroyed." *Id.* at 57 n. *, 109 S.Ct. 333. Evidence that has not been examined or tested by government agents does not have "apparent exculpatory value" and thus cannot form the basis of a claim of bad faith destruction of evidence. See *id.* at 57, 109 S.Ct. 333 (rejecting a due process claim based on the government's failure to preserve evidence "of which no more can be said than that it could have been subjected to tests, the results of which might have

> exonerated the defendant"); *see also King v. State*, 808 So. 2d 1237, 1242 (Fla. 2002) (holding that a defendant failed to show bad faith on the part of the State in destroying hair and tissue evidence, in part because the defendant failed to show the police made a "conscious effort to prevent the defense from securing the evidence"); *Merck v. State*, 664 So. 2d 939, 942 (Fla. 1995) (holding that the defendant failed to show bad faith in a police detective's failure to preserve a pair of pants found at a crime scene, because the detective believed they did not have evidentiary value).

Guzman, 868 So. 2d at 509.

McLean's allegations do not show that the tip line or reward information would have been useful, or, that the destruction of "evidence" was in bad faith. More importantly, the record on appeal does not contain facts which would warrant raising such a claim on appeal. Obviously, the information identifying McLean as a participant in the robbery and murder is incriminating. At no point has McLean offered a credible scenario to suggest, much less establish that information favorable to the defense was contained in the confidential tip line or reward information. There is simply no evidence of bad-faith contained anywhere in the direct appeal record, which would be necessary to prevail on such a claim. See King v. State, 808 So. 2d 1237, 1243 (Fla. 2002) ("Without a showing of bad faith, the defendant simply cannot prevail."). Reversible error cannot be predicated on conjecture or speculation. See Spencer v. State, 842 So. 2d 52, 63 (Fla. 2003) (In rejecting an

ineffectiveness claim this Court noted that reversible error cannot be predicated on "conjecture.") (citing Sullivan v. State, 303 So. 2d 632, 635 (Fla. 1974)). Accordingly, appellate counsel cannot be faulted for failing to raise this meritless claim on appeal.

CLAIM II

FLORIDA'S DEATH PENALTY STATUTE, WHICH ALLOWS A NON-UNANIMOUS VERDICT, IS UNCONSTITUTIONAL UNDER THE EIGHTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND VIOLATES EVOLVING STANDARDS OF DECENCY WHICH MARK THE PROGRESS OF A MATURING SOCIETY.

As an initial matter, this claim is not raised in this petition as an allegation of ineffective assistance of appellate counsel. Habeas corpus does not serve as a second direct appeal. See Pittman v. State, 90 So. 3d 794, 818 (Fla. 2011) ("A habeas petition is not a second appeal."); Breedlove v. Singletary, 595 So. 2d 8, 10 (Fla. 1992) ("Habeas corpus is not a second appeal and cannot be used to litigate or relitigate issues which could have been, should have been, or were raised on direct appeal."). Accordingly, this claim is procedurally barred from review in this habeas petition.

Assuming for a moment, this Court reads into this claim an allegation of ineffective assistance of appellate counsel, such

a claim would clearly fail on the merits.[2] Appellate counsel cannot be considered ineffective for failing to raise or pursue meritless claims. At the time of McLean's direct appeal, and, indeed, even now, binding precedent forecloses the non-unanimous jury recommendation claim.

This identical claim was rejected by this Court in opinions issued in October and April of this year during warrant litigation in Mann v. State, 112 So. 3d 1158, 1162 (Fla. 2013) and Kimbrough v. State, ___ So. 3d ____, 2013 WL 5878900, 1 (Fla.) (Fla. October 31, 2013). This Court has also denied this claim on the merits in a direct appeal where the jury had recommended death by a seven-to-five vote. Robards v. State, 112 So. 3d 1256, 1267 (Fla. 2013) (rejecting arguments that seven-to-five jury recommendations are inherently unconstitutional).

As this Court recently made clear in Mann, Sixth Amendment challenges to Florida's death penalty statute, including those based on non-unanimity, have been repeatedly rejected. Kopsho v. State, 84 So. 3d 204, 220 (Fla.), cert. denied, 133 S. Ct. 190 (2012) (citing Parker v. State, 904 So. 2d 370, 383 (Fla.

[2] Trial defense counsel filed a motion below to declare Florida's statute unconstitutional because "only a bare majority of jurors is sufficient to recommend a death sentence." (VII 1060). However, counsel recognized that this Court "has rejected attacks on the statute based on lack of unanimity in the jury recommendation." Id. at 1061.

2005)); Whitfield v. State, 706 So. 2d 1 (Fla. 1997); Thompson v. State, 648 So. 2d 692 (Fla. 1994); Zommer v. State, 31 So. 3d 733, 752-53 (Fla. 2010) (citing cases); Grim v. Sec'y, Fla. Dep't of Corr., 705 F.3d 1284 (11th Cir. 2013) (holding Florida's hybrid system for capital sentencing did not violate the right to jury trial); Evans v. Sec'y, Fla. Dep't of Corr., 699 F.3d 1249 (11th Cir. 2012), cert. denied, 133 S. Ct. 2393 (2013) (overturning a district court's order finding Florida death penalty statute unconstitutional on Sixth Amendment grounds). McLean offers no compelling reasons for this Court to depart from its settled precedent on this issue. See Brown v. Nagelhout, 84 So. 3d 304, 309 (Fla. 2012) (noting that in Florida the "'presumption in favor of stare decisis is strong []'" and that it "'provides stability to the law and to the society governed by that law.'") (quoting N. Fla. Women's Health & Counseling Servs., Inc. v. State, 866 So. 2d 612, 637-38 (Fla. 2003) and Rotemi Realty, Inc. v. Act Realty Co., 911 So. 2d 1181, 1188 (Fla. 2005)).

McLean's non-unanimous jury vote complaint conflates the Sixth Amendment right to a jury trial with the Eighth Amendment prohibition on cruel and unusual punishment. The Eighth Amendment does not apply. Where there is a specific constitutional provision covering an area of the law, it is that

provision that governs, not a more general provision. In Graham v. Connor, 490 U.S. 386, 395, 109 S. Ct. 1865, 1871 (1989), the United States Supreme Court explained that where a particular Amendment provides an explicit textual source of constitutional protection against a particular sort of government behavior, that Amendment must be the guide for analyzing these claims. See also Elkins v. District of Columbia, 690 F.3d 554, 562 (D.C. Cir. 2012) (refusing to consider a search question under the Fifth Amendment rather than the Fourth Amendment because the Fourth Amendment is the specific provision applicable to searches, citing Graham). Constitutional provisions are not interchangeable in the manner collateral counsel would have it. The provision that controls any question regarding jury unanimity is the Sixth Amendment right to a jury trial.

Moreover, the Sixth Amendment right to a jury trial provision does not require unanimity. Apodaca v. Oregon, 406 U.S. 404, 92 S. Ct. 1628 (1972) (holding non-unanimous jury verdicts in state criminal trials did not violate the Sixth Amendment and affirming convictions based on 10-2 and 11-1 jury votes); Richardson v. United States, 526 U.S. 813, 821, 119 S. Ct. 1707, 1712 (1999) (stating that "this Court has not held that the Constitution imposes a jury-unanimity requirement."); McDonald v. City of Chicago, Ill., 130 S. Ct. 3020, 3035 n.14

(2010) (noting that the U.S. Supreme Court has never held that a unanimous jury was required in state criminal trials).

Lastly, McLean's assertion that Florida's death penalty statute is unconstitutional because it is different than other states is untimely, procedurally barred and meritless. No state or federal court has rejected the well-settled law upholding Florida's capital procedures. Spaziano v. Florida, 468 U.S. 447, 464, 104 S. Ct. 3154, 3164 (1984) (rejecting Fifth, Sixth, Eighth, and Fourteenth Amendment challenges); Barclay v. Florida, 463 U.S. 939, 103 S. Ct. 3418 (1983); Dobbert v. Florida, 432 U.S. 282, 97 S. Ct. 2290 (1977); Proffitt v. Florida, 428 U.S. 242, 96 S. Ct. 2960 (1976). Moreover, the United States Supreme Court has specifically rejected the notion that a state's capital sentencing statute violates the Eighth Amendment if its statute is different from other states. Even if a sentencing scheme is different, that does not establish a violation of the Eighth Amendment. In Spaziano, 468 U.S. at 464, the Court underscored that "[t]he Eighth Amendment is not violated every time a State reaches a conclusion different from a majority of its sisters over how best to administer its criminal laws."

Since controlling precedent foreclosed this claim at the time of McLean's direct appeal, appellate counsel cannot be

considered ineffective for failing to raise it on direct appeal. McLean has provided no basis to disturb his death sentence in this case. Accordingly, this Court should deny habeas relief.

CONCLUSION

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

Respectfully submitted,

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s/ Scott A. Browne
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished electronically to Mark S. Gruber and Julie Morley, Assistants CCRC-M, Law Office of the Capital Collateral Regional Counsel - Middle, 3801 Corporex Park Dr., Suite 210, Tampa Florida 33619-1136 (gruber@ccmr.state.fl.us, morley@ccmr.state.fl.us and support@ccmr.state.fl.us), on this 9th day of December, 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(l).

s/ Scott A. Browne
COUNSEL FOR RESPONDENTS