

IN THE SUPREME COURT OF FLORIDA

LANCELOT URILEY ARMSTRONG,

Appellant,

vs.

Case No. 02-1122

STATE OF FLORIDA,

Appellee.

_____ /

RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

CELIA A. TERENCE
ASSISTANT ATTORNEY GENERAL
FLA. BAR NO.0656879
1515 N. FLAGLER DRIVE DRIVE
SUITE 900
WEST PALM BEACH, FL. 33409
(561) 837-5000

ATTORNEY FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF CONTENTS.
.i

TABLE OF CITATIONS.
.ii

PROCEDURAL HISTORY
.1

ARGUMENT.
. 8

ISSUE I

APPELLATE COUNSEL DID NOT FAIL TO RAISE ANY
PRESERVED OR MERITORIOUS ISSUES ON DIRECT APPEAL. .
. 8

ISSUE II

PETITIONER’S CHALLENGE TO THIS COURT’S HARMLESS
ERROR ANALYSIS IS PROCEDURALLY BARRED AND WITHOUT
MERIT. . 22

ISSUE III

PETITIONER’S ALLEGATION THAT HE WAS DENIED A PROPER
DIRECT APPEAL DUE TO OMISSIONS IN THE RECORD IS
LEGALLY INSUFFICIENT AS PLED.
.24

ISSUE IV

PETITIONER’S CLAIM THAT THE MURDER INDICTMENT IN
THIS CASE MUST BE REVIEWED IN LIGHT OF APPRENDI V.
NEW JERSEY, IS PROCEDURALLY BARRED.
. . .25

CONCLUSION.
.27

CERTIFICATE OF SERVICE.
.27

CERTIFICATE OF FONT SIZE.
.27

TABLE OF CITATIONS

CASES

PAGE(S)

FEDERAL CASES

<u>Apprendi v. New Jersey,</u> 530 U.S. 466 (2000)	25,26
<u>Frye v. United States,</u> 293 Fd. 2d 1013 (D.C. Cir.1923)	14
<u>Johnson v. Mississippi,</u> 486 U.S. 578 (1988)	23
<u>Jones v. Barnes,</u> 463 U.S. 745 (1983)	9

STATE CASES

<u>Hunter v. State,</u> 660 So. 2d 244 (Fla. 1995)	25
<u>Armstrong v. State,</u> 642 So. 2d 730 (Fla. 1994)	5,6,22
<u>Bottoson v. State,</u> 674 So. 2d 621 (Fla. 1996)	15
<u>Breedlove v. Singletary,</u> 595 So. 2d 8 (Fla.1992)	8
<u>Card v. State,</u> 26 Fla. L. 803, So. 2d 613 (Fla. 2001)	26
<u>Correll v. State,</u> 523 So. 2d 52 (Fla. 1988)	14,16
<u>Davis v. State,</u> 461 So. 2d 67 (Fla. 1984)	11

<u>Engle v. Dugger,</u> 576 So. 2d 696 (Fla. 1991)	12,15
<u>Ferguson v. Singletray,</u> 632 So. 2d 53 (Fla. 1993(same))	20,24
<u>Fotopolous v. State,</u> 608 So. 2d 784 (Fla. 1992)	25
<u>Groover v. Singletary,</u> 656 So. 2d 424 (Fla. 1995)	11,18
<u>Hardwick v. Dugger,</u> 648 So. 2d 100 (Fla.1994)	9
<u>Hoy v. State,</u> 353 So. 2d 826 (Fla. 1977)	12
<u>Kokal v. Dugger,</u> 718 So. 2d 138 (Fla.1998)	10
<u>Looney v. State,</u> 803 So. 2d 656 (Fla. 2001)	26
<u>Mann v. Moore,</u> 794 So. 2d 595 (Fla. 2001)	26
<u>Manning v. State,</u> 378 So. 2d 274 (Fla. 1979)	11
<u>Medina v. Dugger,</u> 586 So. 2d 317 (Fla.1991)	11
<u>Melendez v. State,</u> 718 So. 2d 746 (Fla. 1998)	21
<u>Mendyk v. Dugger,</u> 592 So. 2d 1076 (Fla. 1992)	19
<u>Mills v. State,</u> 786 So. 2d 532 (Fla. 2001)	25
<u>Parker v. Dugger,</u> 550 So. 2d 459 (Fla. 1989)	23,25
<u>Patton v. State,</u> 784 So. 2d 380 (Fla. 2000)	12

<u>Provenzano v. Dugger,</u> 561 So. 2d 541 (Fla. 1990)	9,12
<u>Robinson v. State,</u> 610 So. 2d 1288 (Fla. 1992)	14,16
<u>Rolling v. State,</u> 695 So. 2d 278 (Fla. 1997)	12
<u>Rutherford v. Moore,</u> 774 So. 2d 637 (Fla. 2000)	9
<u>Stano v. State,</u> 473 So. 2d 1282 (Fla. 1985)	13,17
<u>Teffeteller v. Dugger,</u> 734 So. 2d 1009 (Fla.1999)	8,9
<u>Thompson v. State,</u> 759 So. 2d 650 (Fla.2000)	9,20,23,24
<u>Turner v. Dugger,</u> 614 So. 2d 1075 (Fla. 1992)	20,24
<u>Williamson v. Dugger,</u> 651 So. 2d 84 (Fla.1994)	9
<u>Wilson v. Wainwright,</u> 474 So. 2d 1162 (Fla.1985)	8
<u>Armstrong v. State,</u> Case No. 01-1874	22
<u>Bottonson v. State,</u> 27 Fla. L. Weekly S119 (Fla. January 31, 2002)	22
<u>Brown v. State,</u> 803 So. 2d 223 (Fla. 2001)	26
<u>Johnson v. Moore,</u> Case No.: 01-2182	20,23
<u>Porter v. Moore,</u> 27 Fla. L. Weekly S606 (Fla. June 20, 2002)	26
<u>Sireci v. State,</u> 27 Fla. L. Weekly S183 (Fla. February 28, 2002)	21
<u>Wike v. State,</u>	

27 Fla. L. Weekly S95 (Fla. January 24, 2002) 12

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Case No. 02-1122

STATE OF FLORIDA,

Appellee.

_____ /

PROCEDURAL HISOTRY

The state would make the following addition to the procedural history. This Court recounted the facts of the case as follows:

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 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.

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)

At the penalty phase, the State presented evidence showing Armstrong's prior conviction of indecent assault and battery on a fourteen-year-old child. Armstrong presented evidence from a number of witnesses in support of the following nonstatutory mitigating circumstances: (1) he had significant physical problems during childhood (he was dyslexic but a good student and had a brain hemorrhage when he was a baby); (2) helped others and had a positive impact on others (routinely assisted his grandmother, brothers and sisters, both financially and emotionally; was a good father and provider to his son; trained others to do carpentry work and was a positive influence on those he assisted); (3) was present as a child when his mother was abused and would come to her aid; (4) could be

productive in prison (was an excellent carpenter and plumber); (5) is a good prospect for rehabilitation; (6) codefendant received a life sentence; (7) the alternative sentence is life imprisonment without the possibility of parole; (8) Armstrong is religious (attends church); and (9) Armstrong failed to receive adequate medical care and treatment as a child (had a brain hemorrhage when he was a baby but, due to finances, did not receive the medical attention he needed).

The jury recommended death by a nine-to-three vote. The trial judge found no statutory mitigating circumstances and four aggravating circumstances: (1) prior conviction of a violent felony; (2) committed while engaged in the commission of a robbery or flight therefrom; (3) committed for the purpose of avoiding arrest or effecting an escape from custody; and (4) murder of a law enforcement officer engaged in the performance of official duties. The trial judge sentenced Armstrong to death for the murder of Officer Greeney, to life imprisonment for the attempted murder of Officer Sallustio, and to life imprisonment for the armed robbery.

Armstrong v. State, 642 So.2d 730, 733-734 (Fla. 1994).

On appeal Armstrong raised the following issues:

Regarding the guilt phase, Armstrong claims that: (1) a new trial is warranted because a witness lied about material facts at trial; (2) the State elicited inadmissible evidence under the guise of refreshing a witness's recollection; (3) the trial judge erred in refusing to allow an in camera review of the grand jury testimony; (4) the trial judge erred in denying Armstrong's motion to suppress identification testimony; (5) the trial judge erred in denying Armstrong's objection to hearsay statements introduced into evidence; (6) the trial judge erred by permitting the State to introduce certain character evidence; (7) the jury instruction on reasonable doubt denied Armstrong due process and a fair trial; (8) the trial judge erred in allowing the State to proceed on a felony-murder theory when the indictment gave no notice of the theory; and (9) Armstrong's right to effective assistance of counsel and equal protection was violated by the trial judge's refusal to appoint co-counsel. As to the penalty phase, Armstrong asserts that: (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 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, 642 So.2d at 734 n. 2.

In denying all relief, this Court determined that the trial court committed harmless error in relying on one single aspect of the crime, i.e., the victim was a police officer, in finding the existence of two separate aggravators. Id at 739. Given that there remained three aggravating factors, death was still the appropriate penalty.

In this pleading, Armstrong will be referred as either Petitioner or Armstrong, and the state will be referred to as "the state." The following symbols will be used: ROA denotes record on direct appeal; SROA denotes supplemental record on direct appeal.

ARGUMENT

ISSUE I

APPELLATE COUNSEL DID NOT FAIL TO RAISE ANY
PRESERVED OR MERITORIOUS ISSUES ON DIRECT
APPEAL

Appellant alleges that appellate counsel rendered in effective assistance for failing to pursue several issues on direct appeal. Petitioner claims that all the issues identified in this petition had been properly preserved at trial and therefore should have been raised on appeal. Respondent will address each specific issue in turn.

When reviewing claims of ineffective assistance of appellate counsel the following principles and standard of review applies:

Habeas petitions are the proper vehicle to advance claims of ineffective assistance of appellate counsel. See Thompson v. State, 759 So.2d 650, 660 (Fla.2000); Teffeteller v. Dugger, 734 So.2d 1009, 1026 (Fla.1999). However, claims of ineffective assistance of appellate counsel may not be used to camouflage issues that should have been raised on direct appeal or in a postconviction motion. See, e.g., Thompson, 759 So.2d at 657 n. 6; Hardwick v. Dugger, 648 So.2d 100, 106 (Fla.1994); Breedlove v. Singletary, 595 So.2d 8, 10 (Fla.1992).

65[2] [3] [4] When analyzing the merits of the claim, "[t]he criteria for proving ineffective assistance of appellate counsel parallel the Strickland [(FN4)] standard for ineffective trial counsel." Wilson v. Wainwright, 474 So.2d 1162, 1163 (Fla.1985). Thus, this Court's ability to grant habeas relief on the basis of appellate counsel's ineffectiveness is limited to those situations where the petitioner establishes

first, that appellate counsel's performance was deficient because "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, that the petitioner was prejudiced because appellate counsel's deficiency "compromised the appellate process to such a degree as to undermine confidence in the correctness of the result." Thompson, 759 So.2d at 660 (emphasis supplied) (quoting Groover v. Singletary, 656 So.2d 424, 425 (Fla.1995)); see, e.g., Teffeteller, 734 So.2d at 1027. 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. Williamson v. Dugger, 651 So.2d 84, 86 (Fla.1994); see, e.g., Kokal v. Dugger, 718 So.2d 138, 142 (Fla.1998); Groover, 656 So.2d at 425. This is generally true as to issues that would have been found to be procedurally barred had they been raised on direct appeal. See, e.g., Groover, 656 So.2d at 425; Medina v. Dugger, 586 So.2d 317, 318 (Fla.1991)

Rutherford v. Moore 774 So.2d 637, 643 (Fla. 2000). Nor is appellate counsel required to raise every preserved or nonfrivolous issue. Jones v. Barnes, 463 U.S. 745, 751-753 (1983); see also Provenzano v. Dugger, 561 So. 2d 541, 549 (Fla. 1990). With these principles in mind, petitioner has not meet his burden. All relief must be denied.

The first challenge is to appellate counsel's failure to pursue a denial of trial counsel's motion to change venue. Armstrong argues that because a number of jurors heard about the

case, media coverage was extensive, and discovery materials were released to the press, the judge erred in not granting trial counsel's motion for change of venue. Petitioner's argument is without merit for the following reasons. Irrespective of the fact that trial counsel filed two motions for change of venue, this issue was not properly preserved for appeal. The record reveals that counsel filed an initial motion for change of venue on August 1, October 1990. (ROA 2169-2170). Therein trial counsel alleged that "the barrage of newspaper, radio, and television pretrial publicity has saturated and incited the public concerning this alleged crime." The state responded that the motion was legally insufficient as pled as it did not contain any affidavits as required by Crim. R. of Proc. 3.240. (ROA 2246). Petitioner filed an amended motion for change of venue prior to January 18, 1991.¹ In response, the state argued that the defendant's motion was premature given the fact that he must attempt to select an impartial jury prior to filing a motion for change of venue. (ROA 2291-2292). Trial counsel did not renew his motion during the jury selection process, consequently the issue was not preserved for appeal. Manning v. State, 378 So. 2d. 274, 276 (Fla. 1979); Davis v. State, 461 So. 2d 67, 69 (Fla. 1984). Given trial counsel's failure to

¹ The record on appeal does not contain the "Amended Motion for Change of Venue." However the record does contain the state's response to that motion which was filed on January 18, 1991. (ROA 2291-2292).

preserve the issue appellate counsel cannot be considered ineffective for failing to raise the claim on appeal. Groover v. Singletary, 656 So. 2d 424, 425 (Fla. 1995); Medina v. Dugger, 586 So. 2d 317, 318 (Fla. 1991).

Second, the record is clear that even if preserved, the issue was unmeritorious. The entire voir dire process was completed in a single afternoon. (ROA 220-496). During the selection process, it appears that appellant either did not exhaust all his peremptory challenges or he never made a request for additional challenges. (ROA 468). Additionally, only seven people out of the entire venire had any prior knowledge of the case. (ROA 295-297, 299,304, 306, 400, 430). Two of those prospective jurors, Norma Coyne, and Willard Ripple, were chosen as jurors. (ROA 1778-1779). A review of their responses regarding the issue of publicity unequivocally demonstrates that they were not and would not be affected by any news paper/media accounts of the murder. Both jurors stated they had heard about the case when it happened, they had not heard any news about it recently and they completely have forgotten what they had heard. (ROA 400-401). Consequently, neither juror would have been subjected to a cause challenge based on pre-trial publicity. Had appellate counsel attempted to raise this issue on appeal, it would have been unsuccessful given the lack of prejudice established in the record. Rolling v. State, 695 So. 2d 278,

285 (Fla. 1997)(finding that review of the denial of motion to change venue includes whether there was difficulty in selecting impartial analysis); Hoy v. State, 353 So.2d 826 (Fla. 1977)(finding that review of the denial of motion to change venue includes whether defendant exhausted all his peremptory challenges); Wike v. State, 27 Fla. L. Weekly S95, S96 (Fla. January 24, 2002)(rejecting claim of ineffective assistance of counsel based on lack of prejudice as record demonstrates that no undue difficulty in selecting impartial jury); Provenzano, 561 So. 2d at 544 (recognizing that failure to renew motion for change of venue upon completion of voir dire "creates strong presumption that a fair and impartial jury was ultimately impaneled.") Patton v. State, 784 So. 2d 380, 389-390 (Fla. 2000)(finding no merit to claim that motion for change of venue would have been successful given that only few jurors heard about the case and had forgotten the details to which they had been exposed); Engle v. Dugger, 576 So. 2d 696 (Fla. 1991)(rejecting claim of ineffective assistance of appellate counsel as underlying claim is without merit).

Petitioner's next challenge to appellate counsel's effectiveness is counsel's failure to challenge the trial court's ruling regarding the qualifications of three state witnesses as experts in their respective fields. The first expert was George Duncan, a DNA serologist with the Broward

Sheriff's Office. Petitioner alleges that Duncan was not properly qualified to render an expert opinion regarding probability matches in the population as he was not a population geneticist. The state asserts that had this issue been raised on direct appeal, relief would have been denied.

In order to have obtained appellate relief, Armstrong would have had to demonstrate that the trial court, who enjoys broad discretion in determining the admissibility of expert testimony, committed clear error. Stano v. State, 473 So. 2d 1282 (Fla. 1985). A review of the record establishes that petitioner could not have met that standard.

Duncan, an expert in serology testified regarding various blood stains taken from the crime scene. Ultimately, only one blood sample taken from the scene was of value. (R 1232-1238). That sample was taken from the front seat of Armstrong's car and it matched the blood of the victim, Officer Greeney. (R 1240-1241). The portion of Duncan's testimony that was challenged at trial was the following, Duncan opined that the probability that the blood found in Armstrong's car was not that of the victim Greeney was four million to one. (ROA 1256-2357). In response the state elicited that Mr. Duncan had previously been qualified as an expert in the field of forensic serology, and DNA extraction. (ROA 1212, 1216). In an effort to establish those qualifications, Duncan gave a detailed explanation to the jury

regarding the DNA profiling process. At the time of his testimony, Duncan had completed between 250-300 such tests. Over Malavenda's objection, Duncan was qualified as expert in profiling. (R 1218-1228).

Had appellate counsel challenged Duncan's testimony regarding the probability statistics, he would not have been successful, consequently the state asserts that for the following reasons Armstrong is unable to satisfy either prong of Strickland. First, there was ample evidence presented regarding the admissibility of DNA testing under the requirements of Frye v. United States, 293 Fd. 2d 1013 (D.C. Cir.1923). At the time of this trial, Florida courts had recognized that DNA test results are generally accepted as reliable in the scientific community. See Robinson v. State, 610 So. 2d 1288 (Fla. 1992); Correll v. State, 523 So. 2d 52 (Fla. 1988). The court's decision to find Duncan an expert in DNA profiling was not an abuse of discretion.

Second, Armstrong cannot establish prejudice under Strickland. As noted above, the only relevant evidence established from the DNA testing conducted by the experts was that Officer Greeny's blood was found in Armstrong's car. However, absent Duncan's opinion, there was overwhelming evidence to establish that Officer Greeny was standing right next to Armstrong's car when he was fatally shot. (ROA 890-891,

917-930, 950, 1622-1623). Consequently, it is completely logical to assume that his blood would or could be found in Armstrong's vehicle regardless of Duncan's opinion that the probability that it was someone else's blood was one if four million. Therefore Duncan's testimony regarding the probability frequencies that it was someone else's blood in Armstrong's car was cumulative at best. In sum there is no reasonable probability that the outcome of the proceedings would have been different absent the DNA test's results. See Bottoson v. State, 674 So. 2d 621, 622 (Fla. 1996)(rejecting claim that counsel was of ineffective for failing to challenge state expert witness given overwhelming evidence of guilt); Engle v. State, 576 So. 2d at 700(finding that trial counsel's failure to object to inadmissible hearsay was not prejudicial as substance of evidence was presented through properly admitted testimony as well).

The second expert whose qualifications have been challenged is Dr. Martin Tracey. Dr. Tracey is an expert in the fields of genetic molecular biology, genetics, and population genetics. Tracey was called to review the protocols of the Broward Sheriff Office's crime lab, as well as the findings of George Duncan. Tracey testified before the jury, that DNA testing has been accepted in the scientific community since the mid-seventy's. (R 1174-1176, 1184-1188). Mr. Malavenda objected to the testimony of Dr. Tracey based on the fact that Tracey although

reviewed Duncan's work he did not take part in the actual collection, isolation and or separation of the blood samples. (ROA 1169-1170). The motion was denied. (R 1170).

In addition to reviewing Duncan's findings, Tracey's own independent conclusion was similar to the one reached by Duncan, i.e., there is a four million to one chance that the blood found on Armstrong's car belonged to someone other than Deputy Greeney. (ROA R 1150-1154, 1166-1170, 1196).

The state asserts that had appellate counsel challenged the admissibility of Tracey's testimony on appeal, he would not have been successful. Robinson; Correll. Furthermore, as noted above, the fact that Deputy Greeney was standing next to petitioner's car when he was fatally wounded was established by independent evidence. Consequently, Tracey's testimony like Duncan's was cumulative at best.

The final expert petitioner claims should have been challenged on appeal is Charles Edel, a firearm's expert. Petitioner claims that Edel was improperly allowed to testify regarding "searing." The state pointed out that Edel has training in the operation, safety, and proficiency of firearms. (ROA 975). Edel also explained that there is no such thing as the field of searing, nor is there such thing as a "searing school." (ROA 976). Edel was qualified as an expert in firearms operation. (ROA 976). Edel went on to testify that

based on evidence of searing found on Greeny's clothing, he opined that Greeny was shot from close range. (ROA 976-977). The state asserts that Armstrong cannot establish that appellate counsel was ineffective for failing to raise this issue on direct appeal, as the trial court did not abuse its discretion in allowing this testimony. Stano. Additionally, Edel's testimony regarding the searing was cumulative, as the medical examiner had already testified that Greeny was shot at close range. Consequently, there can be no prejudice in failing to challenge on appeal the admissibility of Edel's testimony. (ROA 919-920). Armstrong has not established that appellate counsel was ineffective for failing to challenge the qualifications of three experts

The third allegation of ineffective assistance of appellate counsel is the failure to raise on appeal the introduction of three "gory closeups of the wounds on the victim's body." **Petition at 14.** Petitioner claims that trial counsel preserved this issue by objecting to all three photographs arguing that there were less inflammatory photos that could have been used. **Petition at 15.** Petitioner's factual assertions are belied by the record.

The three photographs challenged as gory photographs of the deceased victim, exhibits Q, S, and T, were in fact photographs of the second victim, Deputy Robert Saullstio. Deputy Sallustio

was shot at five times and received three serious non-fatal injuries to his wrist, foot, and back. (ROA 806-807, 809, 826-828). Each of the three photographs depict each of the wounds to Sallustio. (ROA 826-827). The only objection raised was to exhibit "S." Trial counsel argued that it was repetitive, there were other photographs that better depicted the wound, and it was inflammatory. (ROA 827-828). That objection was overruled.

The state asserts that appellate counsel was not ineffective for failing to raise this issue on direct appeal for the following reasons. First of all, there was only one photo that was challenged, "S," consequently any challenge to any other photo was not preserved and would not have been reviewed on appeal. Appellate counsel cannot be deemed ineffective for failing to raise an issue that was not preserved for appeal. Groover.

Secondly the photo as already noted was not an autopsy photograph of the deceased victim, Deputy Greeny. It merely depicted one of the three wounds to Deputy Sallustio. Clearly, appellate counsel would not have been able to demonstrate that the trial court abused its discretion and committed reversible error by admitting the one photograph. This claim has no merit. Mendyk v. Dugger, 592 So. 2d 1076, 1082-1082 (Fla. 1992)(rejecting claim of ineffective assistance of appellate

counsel for failing to object to admission of photographs, slides, and videotapes)

The next allegation of appellate ineffectiveness involves counsel's failure to ensure that there was an adequate record on appeal. Counsel alleges that it appears that one prospective juror, Mr. Coffie, was stricken on the basis of race.² Counsel alleges that jurors with similar life experiences to those of Mr. Coffie did sit on the jury. However since the strike conference was not recorded the issue could not be properly litigated on appeal. **Petition at 15-16.** Petitioner's argument is without merit as his factual assertions are belied by the record.

Petitioner acknowledges that Mr. Coffie has a brother who was arrested by Broward Sheriff's Department and is currently in prison. However petitioner claims that another juror, Ms. Peabody, also has a brother who was in trouble with the law and yet that person sat as a juror in this case. Petitioner is incorrect. Ms. Peabody did in fact state that she has a brother who has gotten into trouble because of drugs. (ROA 460). However, Ms. Peabody did not sit on this jury. (ROA 1778-1779). Consequently, to the extent that Mr. Coffie was stricken from the panel because of his brother's criminal history, that reason

² Petitioner does not explain how he knows that Mr. Coffie is a member of any specific minority group.

was genuine and valid. Additionally, Mr. Coffie also stated that he personally felt that he had been "hassled" for no apparent reason by Broward Sheriff's Office on several occasions. (ROA 421). Given that the victim in this case was a Deputy with Broward Sheriff's Office, there was absolutely no error in striking Mr. Coffie from the panel. Petitioner's speculation that a complete record would demonstrate that Mr. Coffie was impermissibly stricken based on his alleged race, is completely refuted from the current record. This claim is without merit. See Thompson v. Singletary, 759 So. 2d 650 (Fla. 2000)(rejecting claim of ineffective assistance of appellate counsel based on incomplete record as petitioner cannot point to any errors that occurred in untranscribed portion) Ferguson v. Singletary, 632 So. 2d 53, 58 (Fla. 1993(same) Johnson v. Moore, Case No. 01-2182 (Fla. September 26, 2002)(same); Turner v. Dugger, 614 So. 2d 1075 (Fla. 1992)(finding no prejudice in failure to transcribe charge conference).

And finally, petitioner alleges that the sheer number of errors that occurred deprived petitioner of an adversarial testing and fair trial. **Petitioner at 19.** However, given the fact that Armstrong cannot establish that any error occurred let alone harmful error, this claim must fall. Melendez v. State, 718 So. 2d 746, 749 (Fla. 1998)(finding all claims to be either without merit or procedurally barred and therefore there is no

cumulative error effect to consider); Sireci v. State, 27 Fla.
L. Weekly S183, S185 (Fla. February 28, 2002).

ISSUE II

PETITIONER'S CHALLENGE TO THIS COURT'S
HARMLESS ERROR ANALYSIS IS PROCEDURALLY
BARRED AND WITHOUT MERIT

Armstrong claims that this Court's harmless error analysis on direct appeal was incorrect. On direct appeal, this Court conducted a harmless error analysis regarding Armstrong's claim that the aggravating factors of "committed to avoid arrest"³ and "victim was a law enforcement officer"⁴ were improperly based on a single aspect of the crime, i.e., the victim was a police officer. Armstrong v. State, 642 So. 2d 730, 738 (Fla. 1994). This Court agreed that there was an improper doubling, however, any error was harmless given that there still remained three valid aggravators. Id. Armstrong also alleged that the aggravating factor of "committed while engaged in the commission of a robbery"⁵ and "prior conviction of a violent felony"⁶ were also improper as they both relied on the single factor that a robbery had been committed. Armstrong, 642 So. 2d at 738. This Court properly rejected this claim as there existed another prior violent felony to satisfy this aggravator, i.e., Armstrong's prior conviction for indecent assault. Id.

³ 921.141 (5)(e)

⁴ 921.141 (5)(j)

⁵ 921.141 (5)(d)

⁶ 921.141 (5)(b)

Armstrong alleges that this analysis is now flawed because his prior conviction for indecent assault has been vacated.⁷ Armstrong therefore opines that the aggravating factor of "prior violent felony" therefore cannot stand, and would now skew this Court's previous analysis. Armstrong is incorrect.

This Court has repeatedly found that challenges to this Court's previous standard of review are procedurally barred. Bottonson v. State, 27 Fla. L. Weekly S119, S120 (Fla. January 31, 2002); Thompson v. State, 759 So. 2d 650, 657 n. 6 (Fla. 2000); Parker v. Dugger, 550 So. 2d 459, 460 (Fla. 1989).

In any event, Armstrong's argument is without merit. Although Armstrong's prior conviction for indecent assault has been vacated, there still remains a third conviction that satisfies the aggravator. Armstrong was convicted for the attempted first murder of Deputy Sallustio. (ROA 2430). Consequently, this Court's harmless error analysis was not flawed. Review is not warranted.

⁷ Currently pending before this Court in Armstrong v. State, Case No. 01-1874, is a claim based on Johnson v. Mississippi, 486 U.S. 578 (1988).

ISSUE III

PETITIONER'S ALLEGATION THAT HE WAS DENIED
A PROPER DIRECT APPEAL DUE TO OMISSIONS IN
THE RECORD IS LEGALLY INSUFFICIENT AS PLED

Petitioner claims that critical depositions and strike conferences went unrecorded. **Petition at 25.** Based on that conclusory statement, Armstrong allege that appellate counsel was ineffective and therefore he is entitled to relief. As noted in a previous argument, petitioner's bare allegations are not legally sufficient to entitle him to relief. See Thompson v. Singletary, 759 So. 2d 650 (Fla. 2000)(rejecting claim of ineffective assistance of appellate counsel based on incomplete record as petitioner cannot point to any errors that occurred in untranscribed portion) Ferguson v. Singletray, 632 So. 2d 53, 58 (Fla. 1993(same)) Johnson v. Moore, Case No. 01-2182 (Fla. September 26, 2002)(same); Turner v. Dugger, 614 So. 2d 1075 (Fla. 1992)(finding no prejudice in failure to transcribe charge conference).

ISSUE IV

PETITIONER'S CLAIM THAT THE MURDER
INDICTMENT IN THIS CASE MUST BE REVIEWED IN
LIGHT OF APPRENDI V. NEW JERSEY, IS
PROCEDURALLY BARRED

Petitioner contends that he has previously preserved for further collateral review a constitutional challenge to Florida's death penalty statute in anticipation of Apprendi v. New Jersey, 530 U.S. 466 (2000). Petitioner is incorrect.

On appeal petitioner attempted to challenge the constitutionality of Florida's death penalty statute. However, the state correctly pointed out that Armstrong had not preserved the issue for appellate review. Consequently this issue is not properly before this Court, irrespective of Apprendi. Hunter v. State, 660 So. 2d 244, 253 (Fla. 1995)(finding constitutional challenge to Florida's death penalty statute to be procedurally barred for failing to preserve it); Fotopolous v. State, 608 So. 2d 784, 794 (Fla. 1992)(same). Even if this Court were to conclude that Armstrong had properly presented a constitutional challenge to Florida's death penalty statute on appeal, Armstrong's argument did not specifically challenge Florida's scheme based on the argument raised in Apprendi. Consequently the issue was not properly preserved for collateral review. Cf. Parker v. Dugger, 550 So. 2d 459, 460 (Fla. 1989)(finding appellant not entitled to refinement in the law on collateral review because issue was never preserved at trial).

To this date Apprendi has not altered let alone overrule this Court's precedent that since death is the maximum penalty under the statute, Apprendi does not apply to Florida's death penalty sentencing scheme. Mills v. State, 786 So. 2d 532, 537 (Fla. 2001); Brown v. State, 803 So.2d 223 (Fla. 2001); Mann v. Moore, 794 So. 2d 595, 599 (Fla. 2001); Looney v. State, 803 So. 2d 656 (Fla. 2001); Card v. State, 803 So. 2d 613 n. 13 (Fla. 2001); Porter v. Moore, 27 Fla. L. Weekly S606, S607 (Fla. June 20, 2002).

CONCLUSION

Wherefore, based on the foregoing arguments and authorities, the State requests that this Honorable Court DENY Appellant's habeas petition.

Respectfully submitted,

ROBERT A. BUTTERWORTH
Attorney General

CELIA A. TERENCE
Assistant Attorney General
Fla. Bar No. 0656879
1515 N. Flagler Dr. 9th

Floor.

West Palm Beach, FL 33401-2299
Office (561) 837-5000
Facsimile (561) 837-5108

CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was sent by United States mail, postage prepaid, to Rachel Day, Office of Capital Collateral Regional Counsel, 101 N.E. 3rd Ave. Suite 400, Fort Lauderdale, Fl. 33301, this ____ day of October, 2002.

CERTIFICATE OF FONT

I HEREBY CERTIFY that the size and style of the type used in this brief is Courier New, 12 point, a font that is not proportionately spaced.

CELIA A. TERENCE
Assistant Attorney General