

IN THE SUPREME COURT OF FLORIDA

GARY MICHAEL HILTON,
Petitioner,

v.

CASE NO.: SC19-1766

MARK S. INCH,
Respondent.

_____/

RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

CLAIMS

Petitioner claims that appellate counsel provided ineffective assistance by failing to challenge the following actions by the trial court:

1. The denial of Petitioner's motion for change of venue;
2. The refusal by the judge to recuse himself *sua sponte* after denying Petitioner's motion for mistrial;
3. The denial of Petitioner's numerous juror challenges for cause;
4. The denial of Petitioner's collective challenge for cause against an entire panel of jurors (framed by Petitioner as a motion to strike the panel);
5. The denial of Petitioner's motion for a continuance; and
6. The admission of evidence of charred human bones.

TIMELINESS.

Florida Rule of Appellate Procedure 9.142(b)(4)(B) requires that a petition

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alleging ineffective assistance of appellate counsel in a death penalty case “be filed simultaneously with the initial brief in the appeal from the lower tribunal’s order on the defendant’s application for relief under Florida Rule of Criminal Procedure 3.851.” Because the initial brief in case number SC19-373 was filed the same day as the instant petition, the ineffective assistance of appellate counsel claim is timely. Additionally, this Court requested that the State respond on or before December 24, 2019. Thereafter, this Court granted the State’s motion to extend the filing deadline to January 23, 2020. Thus, this Response is timely.

FACTS.

The Victim.

Cheryl Dunlap is the victim in this case; she was 46 years old when she was last seen alive on December 1, 2007. *Hilton v. State*, 117 So.3d 742, 755 (Fla. 2013).

Late November 2007.

Sometime in late November 2007,

George Ferguson encountered [Petitioner] on LL Wallace Road[, which generally runs east to west and is located just north of the Leon Sinks Geological Area in southern Leon County, Florida]. [Petitioner] asked Ferguson for a jump start because his van, a white Chevrolet Astro, would not crank. Ferguson [thought] that it did not appear to him that [Petitioner] actually needed the assistance.

Hilton, 117 So.3d at 747.

Similarly, Petitioner “stopped [Ethan Davis in late November 2007] and

asked for help starting his vehicle. Davis declined.” *Hilton*, 117 So.3d at 747.

Around that same time, Shawn Matthews encountered Petitioner “near his LL Wallace Road camp. [Petitioner] appeared to be familiar with the area and told Matthews about a nearby sinkhole.” *Hilton*, 117 So.3d at 747.

December 1, 2007.

On the morning of Saturday, December 1, 2007, Ms. Dunlap called her friend, Kiona Hill, and arranged to have dinner with Ms. Hill later that evening. *Hilton*, 117 So.3d at 746. At 11:17 a.m. that morning, Ms. Dunlap cashed a check with a drive-through teller at Ameris Bank. *Id.* at 747.

Later that afternoon, Ms. Dunlap drove her white Toyota Camry to the Leon Sinks Geological Area in southern Leon County, Florida. *Hilton*, 117 So.3d at 746-47. Leon Sinks is accessible via US Highway 319, which is also known as Crawfordville Highway. Ms. Dunlap drove to Leon Sinks in order to read. *Id.* at 746. Sometime around 1:30 p.m., witnesses observed Ms. Dunlap at Leon Sinks “wearing jeans and a sweater and carrying a hardback book.” *Id.* Despite the plans made in the morning, Ms. Dunlap did not arrive for dinner with Ms. Hill. *Id.*

Sometime that day, Celeste Hutchins “saw [Petitioner] on Crawfordville Highway, not far from Leon Sinks.... [Petitioner] was rummaging through a white [Toyota] Camry on the side of the road.” *Hilton*, 117 So.3d at 747; *see also id.* at 755 (“On December 1, witnesses saw a man rummaging through Dunlap’s car and

later identified that man as [Petitioner].”).

Also that day, a member of the Florida Highway Patrol placed a disabled vehicle ticket on Ms. Dunlap’s white Toyota Camry. *Hilton*, 117 So.3d at 746.

December 2, 2007.

On the morning of Sunday, December 2, 2007, Ms. Dunlap failed to attend church services. *Hilton*, 117 So.3d at 746. Tanya Land, a friend of Ms. Dunlap’s, noticed Ms. Dunlap’s absence from church and drove to Ms. Dunlap’s residence. *Id.* While at the residence, Ms. Land observed Ms. Dunlap’s dog but noticed that Ms. Dunlap’s white Toyota Camry was missing. *Id.* Concerned, Ms. Land called the police. *Id.*

Also that day, the security camera at the Hancock Bank on West Tennessee Street in Tallahassee captured a person wearing “a blue and white patterned, long-sleeved shirt, glasses, a hat, and a make-shift mask made from tape” making an ATM withdrawal from Ms. Dunlap’s bank account. *Hilton*, 117 So.3d at 747.

December 3, 2007.

On December 3, 2007, an individual with the Wakulla County Sheriff’s Office (located just south of Leon County, Florida) took a missing person report regarding Ms. Dunlap. *Hilton*, 117 So.3d at 746.

That same day, Ms. Dunlap’s white Toyota Camry was discovered “on the side of Crawfordville Highway parked near the woods.” *Hilton*, 117 So.3d at 746.

“The car had deliberate tire punctures in the sidewall that was later identified as a bayonet piercing.... [I]t appeared that someone had driven into the woods with all four tires intact and punctured the tire after the car had been parked. [Ms.] Dunlap’s purse was recovered in her car, but no money was found.” *Id.* at 746-47. Petitioner’s bayonet matched “the puncture marks in Dunlap’s tire.” *Id.* at 748; *see also id.* at 755 (“Her car was located abandoned on Crawfordville Highway on December 3 with a tire that had been punctured by an item later identified as [Petitioner’s] bayonet.”).

Also that day, the security camera at the Hancock Bank on West Tennessee Street in Tallahassee captured a person wearing “a blue and white patterned, long-sleeved shirt, glasses, a hat, and a make-shift mask made from tape” making an ATM withdrawal from Ms. Dunlap’s bank account. *Hilton*, 117 So.3d at 747.

Sometime that day, Petitioner made a video on his camera wherein he is shown “talking to himself or his dog, describing hiding unknown items and killing ‘those b*tches.’” *Hilton*, 117 So.3d at 755.

December 4, 2007.

On December 4, 2007, the security camera at the Hancock Bank on West Tennessee Street in Tallahassee captured a person wearing “a blue and white patterned, long-sleeved shirt, glasses, a hat, and a make-shift mask made from tape” making an ATM withdrawal from Ms. Dunlap’s account. *Hilton*, 117 So.3d

at 747.

December 5-8, 2007.

Sometime between December 5, 2007, and December 8, 2007, Ms. Dunlap was killed in “a violent homicide.” *Hilton*, 117 So.3d at 747.

December 10, 2007.

“On December 10, 2007, Loretta Mayfield spoke to [Petitioner] at a convenience store on Crawfordville Highway.... [Petitioner] was wearing a blue and white patterned shirt. [Petitioner] was also wearing something on his left side that looked like a large knife holder.” *Hilton*, 117 So.3d at 747. The blue and white patterned shirt that Petitioner was wearing looked like the one seen in the ATM security videos for the December 2, 3, and 4, 2007, ATM withdrawals at the Hancock Bank on West Tennessee Street in Tallahassee. *Id.* at 748.

December 11, 2007.

“On December 11, 2007, Stephen Prosser saw [Petitioner] in the Apalachicola National Forest.” *Hilton*, 117 So.3d at 748.

December 12, 2007.

“On December 12, 2007, Michael Travis saw [Petitioner] in the [Apalachicola National Forest] near the Bloxham cutoff.” *Hilton*, 117 So.3d at 748.

December 14, 2007.

On December 14, 2007, Michael Travis saw Petitioner “again” in the Apalachicola National Forest. *Hilton*, 117 So.3d at 748.

December 15, 2007.

A hunter found Ms. Dunlap’s body in the Apalachicola National Forest. *See Hilton*, 117 So.3d at 747:

Dunlap’s body was near a forest road and had been covered with some brush and limbs. Additionally, her head and hands had been removed ... [postmortem] by an instrument with a sharp blade.... [T]here was a significant pre-mortem bruise located on Dunlap’s middle to lower back ... [that] was not consistent with a normal fall injury.

See also id. at 755 (“her decomposing body was found beheaded and with her hands removed”).

December 18, 2007.

“On December 18, 2007, Teresa Johnson saw [Petitioner] in Bristol, Florida, [which is located west of Tallahassee,] where [Petitioner] told her that she looked like Dunlap and that it was ‘too bad’ about that girl getting murdered.” *Hilton*, 117 So.3d at 748.

December 18, 2007 – January 1, 2008.

Sometime between December 18, 2007, and January 1, 2008, [Petitioner] made his way to Georgia where he kidnapped and murdered Meredith Emerson. [Petitioner] took Emerson from Blood Mountain and held her for four days before murdering her. [Petitioner] cooperated with law enforcement in exchange for a life sentence. [Petitioner] was arrested in Georgia after Stephen Shaw saw [Petitioner] walk to the back of a convenience store in the direction of the store’s dumpsters and called law enforcement. Law

enforcement officers recovered items [Petitioner] was seen discarding in a dumpster at the convenience store. From the dumpster, law enforcement recovered a U.S. Forestry citation for unauthorized camping, a knife and sheath, Hi-Tec boots, some chain, a padlock, gloves, a jacket, a folding police baton, and a blue backpack. [Petitioner] gave Georgia officials information on where to find his bayonet on a hiking trail on Blood Mountain in North Georgia. Later, Jeff Foggy, an FDLE tool mark expert, matched the bayonet to the puncture marks in Dunlap's tire. Georgia law enforcement also gathered items from [Petitioner's] van. Items recovered from the van included clothing, jackets, gloves, camping equipment, duffel bags, two sleeping bags, Hi-Tec boots, a camera, tobacco rolling papers, [Petitioner's] Georgia driver's license, tape, paper towels, maps, two BB pistols, a book purchased at a Tallahassee book store, and dog food.

Hilton, 117 So.3d at 748.

“Dunlap's DNA was found on articles recovered from [Petitioner's] van, including two sleeping bags, [Petitioner's] duffel bag, some pants and on the Hi-Tec boots [Petitioner] was seen discarding.” *Hilton*, 117 So.3d at 755.

January 9, 2008.

On January 9, 2008, “investigators found what they believed to be the remains of Dunlap's head and hands in a fire pit at Joe Thomas campsite—approximately seven miles from where her body had been found. The bone fragments were charred.... [T]he bones were from an adult, and ... the bones were from a person with small hands.” *Hilton*, 117 So.3d at 747. The “[c]harred human bones, including a skull and hand bones, were found in a fire pit near a campsite where [Petitioner] was seen by Shawn Matthews. In addition, this campsite also

contained cigarette butts that contained [Petitioner's] DNA.” *Id.* at 755.

February 12, 2008.

On February 12, 2008, Sergeant David Graham and Detective Dawn Dennis with the Leon County Sheriff's Office executed a search warrant on [Petitioner] while he was in custody in Georgia. [Petitioner's] DNA was collected and the entire execution of the warrant was recorded. Portions of the recording were played for the jury.

Hilton, 117 So.3d at 748.

June 6, 2008, extradition and booking.

On June 6, 2008, Sergeant Graham and two other officers drove [Petitioner] from Georgia to Florida. Although [Petitioner] was not questioned, he spoke for nearly the entire five-hour drive, which was recorded. The State also played portions of this recording at trial. [Petitioner] stated:

I'm not all bad. I mean, you got to understand, I mean, I'm sure you can see. I mean, I'm a [expletive] genius, man. I'm not a—I'm not all bad. I just, you know, lost my mind for a little bit. Lost a grip on myself, man. What can I tell you? FBI and everybody else is trying to scratch their head, hey, guys don't get started doing my shit at 61 years old. It just don't happen, you know. Like there's a retired FBI (indecipherable) named Cliff Van, Clifford Van Zandt, that keeps getting himself in the news, talking about me. And he said, this guy didn't just fall off the turnip truck, he said. You know, in other words, he's been doing this. But like I told you before, you know, when I saw you before, I said, remember, I said I'd give you one for free. Nothing before September, okay? I mean, I'm not joking, okay? I just, I got old and sick and couldn't make a living and just lost, flat lost my [expletive] mind for a while, man. I couldn't get a grip on it.

Hilton, 117 So.3d at 748; *see also id.* at 755 (“On the drive from Georgia to

Florida, [Petitioner] told law enforcement that he had lost his mind, but hadn't done anything before September.”). That same day, Petitioner was booked into the Leon County Jail. R-1725.

Pre-trial statements while in jail.

[Petitioner] made statements to a fellow inmate at the Leon County Jail that were overheard by Correctional Officer Caleb Wynn. Specifically, [Petitioner] told inmate Summers that he could answer all the State Attorney's questions if he would give him a life sentence, that he would reveal where the head was located, that his bayonet was used on Dunlap's tire, that he would explain how he “pulled it off” on a busy highway, that he spent a few hours or a few days with Dunlap, and that he felt no regret other than getting caught.

Hilton, 117 So.3d at 748-49; *see also id.* at 755 (“[Petitioner] was overheard by law enforcement telling a fellow inmate that he would tell them where the head was if they would give him a life sentence.”).

February 15, 2011, jury verdict.

“On February 15, 2011, the jury returned a verdict of guilty as to First Degree Murder, Kidnapping with Intent to Commit a Felony and to Terrorize, and Grand Theft.” R-1725.

February 17, 2011, penalty phase commences.

The penalty phase began on February 17, 2011, during which the state called Clay Bridges of the Georgia Bureau of Investigation. Agent Bridges testified about [Petitioner's] prior felony conviction—the murder of Emerson in Georgia to which [Petitioner] pleaded guilty. The State played [Petitioner's] taped conversation with law enforcement where he described kidnapping Emerson, holding her captive, and stripping her body naked to remove DNA and fiber

evidence. He also stated that “you either kill them or you get caught.”

[Petitioner] presented four expert witnesses who testified regarding his psychological condition: Dr. Joseph Wu, a psychiatrist and clinical director of the Brain Imaging Center at the University of California, Irvine; Dr. Charles Golden, a clinical neuropsychologist performing neuropsychological testing and examinations; Dr. Abbey Strauss, a psychiatrist with special expertise in psychopharmacology; and Dr. William Morton, a board certified psychiatric pharmacist and professor; and nine lay witnesses. The State then called Dr. Greg Prichard in rebuttal.

Hilton, 117 So.3d at 749.

February 21, 2011, jury unanimously recommends death.

“On February 21, 2011, the jury recommended unanimously that [Petitioner] be sentenced to death for the murder of Cheryl Dunlap.” *Hilton*, 117 So.3d at 749.

April 7, 2011, *Spencer*¹ hearing.

The trial court held the *Spencer* hearing on April 7, 2011. The State presented three victim impact witnesses: (1) Ms. Emma Blount, the victim’s aunt; (2) Laura Walker, the victim’s best friend; and (3) Gloria Tucker, the victim’s cousin. [Petitioner] presented no witnesses.

The trial court found that the State had proven six aggravators beyond a reasonable doubt. Assigning weight to each aggravator, the trial court found: (1) the defendant was previously convicted of a violent felony (great weight); (2) the murder was committed in the course of a kidnapping (great weight); (3) the murder was committed to avoid arrest (moderate weight); (4) the murder was committed for pecuniary gain (some weight); (5) the murder was especially heinous, atrocious or cruel (HAC) (great weight); and (6) the murder was cold, calculated, and premeditated (CCP) (great weight).

The court also considered and weighed each mitigating circumstance

¹ *Spencer v. State*, 615 So.2d 688 (Fla. 1993).

proposed by [Petitioner] and found one statutory mental mitigating factor—at the time of the murder [Petitioner] was under extreme emotional distress (some weight). Under the catch-all provision, the trial court considered ten mitigating factors, finding that [Petitioner] established eight of them and rejecting two. The court found: (1) [Petitioner] grew up in an abusive household (some weight); (2) [Petitioner] abused drugs, specifically Ritalin (some weight); (3) [Petitioner] was deprived of a relationship with his biological father (moderate weight); (4) [Petitioner] is already serving a life sentence so society is protected (some weight); (5) [Petitioner] served his country in the U.S. military (very little weight); (6) [Petitioner] suffered maternal deprivation and lack of bonding between mother and child (some weight); (7) [Petitioner] was removed from his home and put into foster care when he was a child (some weight); (8) [Petitioner] grew up in a financially poor family (not proven); (9) [Petitioner] suffered a traumatic brain injury as a child (some weight); and (10) [Petitioner] suffers from severe mental defects (not proven).

Hilton, 117 So.3d at 749-50.

April 21, 2011, death sentence.

“On April 21, 2011, the trial court followed the jury’s unanimous recommendation and sentenced [Petitioner] to death. The court found beyond a reasonable doubt that the aggravators outweighed the mitigators.” *Hilton*, 117 So.3d at 750.

Direct Appeal.

On direct appeal, Petitioner raised the following, six issues:

1. “[H]is statements to law enforcement during his transport from Georgia to Florida should not have been introduced at trial because they constitute inadmissible *Williams*² rule evidence because the statements were only relevant to show his propensity to commit crime.

² *Williams v. State*, 110 So.2d 654 (Fla. 1959).

2. “[T]he trial court erred in permitting Dr. Gregory Prichard to testify about allegations of [Petitioner’s] past criminal conduct during the penalty phase and that such testimony constituted improper nonstatutory aggravating circumstances.
3. “[T]he trial court erred in permitting Dr. Prichard to stay in the courtroom, despite the sequestration rule.
4. “[T]he evidence was insufficient to establish the HAC and CCP aggravating circumstances and that the trial court erred in finding these circumstances applied in [Petitioner’s] case.
5. “[T]he trial court improperly rejected the lack of capacity mitigating factor and failed to provide reasons why there is substantial, competent evidence in the record to support the rejection of the mitigating circumstance.
6. “*Ring*³ Claim.”

Hilton, 117 So.3d at 750-54.

INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL

Rule.

An individual under a sentence of death who seeks to challenge the effectiveness of appellate counsel should file a petition under Florida Rule of Appellate Procedure 9.142(b)(4). *See* Fla. R. App. P. 9.142(b)(4). Despite the Rule, appellate courts often refer to these pleadings as petitions for writ of habeas corpus. *See, e.g., Davis v. State*, 875 So.2d 359, 372 (Fla. 2003) (“Habeas petitions are the proper vehicle by which to raise ineffective assistance of appellate counsel claims....”); *see also* Philip J. Padovano, Habeas corpus, 2 Fla. Prac.,

³ *Ring v. Arizona*, 536 U.S. 584 (2002).

Appellate Practice §30:6 (2019 ed.).

The petition should be filed in the court that decided the direct appeal; because this Court considers direct appeals in death penalty cases, it also hears corresponding petitions alleging ineffective assistance of appellate counsel. *See Davis*, 875 So.2d at 373 (“Because these claims are presented first to this Court in cases involving the imposition of a death sentence, we are called on to analyze the performance of appellate counsel in handling the defendant’s direct appeal.”).

***Strickland*⁴ applies.**

The standard for claims of ineffective assistance of appellate counsel mirrors the *Strickland* standard for ineffective assistance of trial counsel: Petitioner must demonstrate deficient performance and resulting prejudice. *See Frances v. State*, 143 So.3d 340, 358 (Fla. 2014) (“[T]his Court’s ability to grant habeas relief on the basis of appellate counsel’s ineffectiveness is determined by the defendant’s ability to meet both the deficiency and prejudice prongs of *Strickland*.”); *see also Israel v. State*, 985 So.2d 510, 521 (Fla. 2008); *Rodriguez v. State*, 39 So.3d 275, 295 (Fla. 2010). The Petitioner enjoys the burden of meeting both prongs. *See Nixon v. State*, 932 So.2d 1009, 1023 (Fla. 2006) (“[A] defendant must demonstrate that appellate counsel’s performance was deficient and that the defendant was prejudiced by the deficient performance.”).

Specificity required.

⁴ *Strickland v. Washington*, 466 U.S. 668 (1984).

A petition alleging ineffective assistance of appellate counsel in a death penalty case “shall include detailed allegations of the *specific acts* that constitute the alleged ineffective assistance of counsel on direct appeal.” Fla. R. App. P. 9.142(b)(4)(A) (emphasis added); *see also Knight v. State*, 394 So.2d 997, 1001 (Fla. 1981) (“[T]he specific omission or overt act upon which the claim of ineffective assistance of counsel is based must be detailed in the appropriate pleading.”); *Freeman v. State*, 761 So.2d 1055, 1069 (Fla. 2000) (“The defendant has the burden of alleging a specific, serious omission or overt act upon which the claim of ineffective assistance of counsel can be based.”).

Because the petition must include specific facts and detailed analysis, conclusory allegations are insufficient to support a claim. *See Wright v. State*, 857 So.2d 861, 876-77 (Fla. 2003), citing *Kennedy v. State*, 547 So.2d 912, 913 (Fla. 1989) (“Wright fails to make the appropriate showing for consideration of a claim of ineffective assistance of counsel under *Strickland*, and his conclusory allegations are insufficient to warrant relief.”); *see also Conahan v. State*, 118 So.3d 718, 734 (Fla. 2013) (“A habeas petition must plead specific facts that entitle the defendant to relief. Conclusory allegations have repeatedly been held insufficient by this Court because they do not permit the court to examine the specific allegations against the record.”); *Patton v. State*, 878 So.2d 368, 380 (Fla. 2004), quoting *Ragsdale v. State*, 720 So.2d 203, 207 (Fla. 1998) (“A summary or

conclusory allegation is insufficient to allow the trial court to examine the specific allegations against the record.”); *Bradley v. State*, 33 So.3d 664 (Fla. 2010).

Deficient Performance.

A petitioner alleging ineffective assistance bears the burden of establishing that appellate counsel’s performance fell below the level of professionally acceptable representation. *See Rodriguez*, 39 So.3d at 295 (“Rodriguez must first establish that his appellate counsel’s performance was deficient because of errors that are of such magnitude and are so serious that they fall outside the range of professionally acceptable performance.”).

To do that, a petitioner must overcome the strong presumption of effectiveness. *See Conahan*, 118 So.3d at 733 (“The reviewing court must presume that counsel’s conduct was within the broad range of reasonable professional conduct, and the defendant bears the burden of overcoming this presumption.”).

In order to be considered effective, appellate counsel need not present every conceivable claim — particularly if such a claim has a limited chance of success. *See Davis v. State*, 928 So.2d 1089, 1126 (Fla. 2005) (“[A]ppellate counsel is not required to present every conceivable claim.”); *see also Spencer v. State*, 842 So.2d 52, 74 (Fla. 2003) (“[A]ppellate counsel will not be considered ineffective for failing to raise issues that have little or no chance of success.”).

Hence, the failure of appellate counsel to raise a meritless issue does not constitute ineffective assistance. *See Breedlove v. Singletary*, 595 So.2d 8, 11 (Fla. 1992) (“[A]ppellate counsel is not ineffective for not raising nonmeritorious issues.”); *see also Mansfield v. State*, 911 So.2d 1160, 1179 (Fla. 2005), quoting *Rutherford v. Moore*, 774 So.2d 637, 643 (Fla. 2000) (quoting *Williamson v. Dugger*, 651 So.2d 84, 86 (Fla. 1994)) (“Appellate counsel cannot be deemed ineffective for failing to raise a claim which ‘would in all probability’ have been without merit ... on direct appeal.”).

Similarly, the failure of appellate counsel to raise a procedurally barred claim does not constitute ineffective assistance. *See Ruffin v. Wainwright*, 461 So.2d 109, 111 (Fla. 1984) (“Appellate counsel cannot be considered incompetent or ineffective for failing to raise issues which he was procedurally barred from raising because they were not properly presented at trial.”).

Likewise, the failure to raise an unpreserved issue not amounting to fundamental⁵ error does not constitute ineffective assistance. *See Valle v. Moore*, 837 So.2d 905, 907-08 (Fla. 2002) (“[A]ppellate counsel cannot be considered ineffective under this standard for failing to raise issues that were not properly raised during the trial court proceedings and do not present a question of

⁵ “We have defined fundamental error as being error that ‘reach[es] 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.’” *Kilgore v. State*, 688 So.2d 895, 898 (Fla. 1996), quoting *State v. Delva*, 575 So.2d 643, 644-45 (Fla. 1991) (quoting *Brown v. State*, 124 So.2d 481, 484 (Fla. 1960)).

fundamental error.”); *see also* *Ruffin*, 461 So.2d at 111; *Davis*, 928 So.2d at 1127; *Patton*, 878 So.2d at 379, citing *Schwab v. State*, 814 So.2d 402, 414 (Fla. 2002); *Geralds v. State*, 111 So.3d 778, 805 (Fla. 2010).

Just because something qualifies as fundamental error now does not necessarily mean that it qualified as fundamental error at the time of the direct appeal; because the first prong of *Strickland* measures performance based upon the prevailing standards in effect at the time of representation, not every instance of fundamental error establishes ineffective assistance of appellate counsel. *See Strickland v. Washington*, 466 U.S. 668, 688 (1984) (“The proper measure of attorney performance remains simply reasonableness *under prevailing professional norms.*”) (emphasis added); *see, e.g., Johnson v. Moore*, 837 So.2d 343, 346 (Fla. 2002), citing *Downs v. State*, 740 So.2d 506, 518 (Fla. 1999) (“Appellate counsel cannot be considered ineffective for failing to challenge a jury instruction on the basis of decisions that had not yet been decided.”).

Additionally, reviewing courts recognize that, in order to increase chances for success, appellate counsel must winnow down claims so that the arguments actually presented garner adequate attention. *See Thomas v. Wainwright*, 495 So.2d 172, 175 (Fla. 1986) (“Appellate counsel need not put forth every conceivable issue but must concentrate on those offering some chance of doing the client some good.”); *see also* Philip J. Padovano, Organization, 2 Fla. Prac.,

Appellate Practice §16:16 (2019 ed.) (“Forcing the reader to spend time and energy working through the weak issues in a case detracts from the importance of the strong issues and ultimately diminishes the chance of success. It is much more effective to include only those issues that survive the process of careful research and evaluation.”).

Even the failure to raise a claim that enjoys some level of merit may not satisfy *Strickland*’s deficient performance prong. *See Atkins v. Dugger*, 541 So.2d 1165, 1167 (Fla. 1989) (“Most successful appellate counsel agree that from a tactical standpoint it is more advantageous to raise only the strongest points on appeal and that the assertion of every conceivable argument often has the effect of diluting the impact of the stronger points.”); *see also Valle*, 837 So.2d at 908:

In fact, appellate counsel is not necessarily ineffective for failing to raise a claim that might have had *some* possibility of success; effective appellate counsel need not raise *every conceivable* nonfrivolous issue. *See Jones v. Barnes*, 463 U.S. 745, 751-53 (1983) (appellate counsel not required to argue all nonfrivolous issues, even at request of client); *Provenzano v. Dugger*, 561 So.2d 541, 549 (Fla. 1990) (noting that “it is well established that counsel need not raise every nonfrivolous issue revealed by the record”).

(Emphasis in original.)

Furthermore, if counsel raised a claim on direct appeal, then counsel cannot be considered ineffective simply because counsel failed to present better or additional arguments in support of that claim. *See Rutherford*, 774 So.2d at 645:

When analyzing claims that appellate counsel was ineffective for

failing to raise additional arguments in support of a claim raised on direct appeal, we have previously observed that

“petitioner’s contention that [the point] was inadequately argued merely expresses dissatisfaction with the outcome of the argument in that it did not achieve a favorable result for petitioner.” We therefore decline petitioner’s invitation to utilize the writ of habeas as a vehicle for the re-argument of issues which have been raised and ruled on by this Court.

Routly v. Wainwright, 502 So.2d 901, 903 (Fla. 1987) (quoting *Steinhorst v. Wainwright*, 477 So.2d 537, 540 (Fla. 1985)); *see also* *Grossman v. Dugger*, 708 So.2d 249, 252 (Fla. 1997) (finding claim that appellate counsel was ineffective for failing to make arguments “more convincingly” to be procedurally barred in a habeas petition). Under these precedents, if an issue was actually raised on direct appeal, the Court will not consider a claim that appellate counsel was ineffective for failing to raise additional arguments in support of the claim on appeal.

See also *Peterka v. State*, 890 So.2d 219, 246 (Fla. 2004):

Peterka admits that these issues were raised on direct appeal but asks the Court to reconsider them. In *Rutherford v. Moore*, 774 So.2d 637, 645 (Fla. 2000), we held that “if an issue was actually raised on direct appeal, the Court will not consider a claim that appellate counsel was ineffective for failing to raise additional arguments in support of the claim on appeal.” Accordingly, we decline to address these issues.

Similarly, appellate counsel cannot be considered ineffective solely because the actual arguments presented in support of the claim failed to succeed. *See* *Thomas*, 495 So.2d at 174:

Appellate counsel did argue that a sentence of life imprisonment was the appropriate sentence under the law in view of the jury’s recommendation of such sentence. Petitioner’s present argument appears merely to seek to relitigate the point and ascribes ineffectiveness to appellate counsel’s efforts simply because they did

not succeed.

Finally, the “law of the case” doctrine applies to claims alleging ineffective assistance of appellate counsel. *See Valle*, 837 So.2d at 908, quoting *Mills v. State*, 603 So.2d 482, 486 (Fla. 1992) (“[A] claim that has been resolved in a previous review of the case is barred as ‘the law of the case.’”).

Prejudice.

A petitioner bears the burden of showing that appellate counsel’s deficient performance resulted in actual prejudice. *See Rodriguez*, 39 So.3d at 295 (“Second, Rodriguez must establish that he was prejudiced because of the deficiency.”). Without that showing, there can be no ineffectiveness. *See, e.g., Farr v. State*, 124 So.3d 766, 785 (Fla. 2012) (“Farr has failed to establish ineffective assistance of appellate counsel because no prejudice has been demonstrated.”).

Prejudice can be established only if the deficient performance significantly undermined confidence in the outcome of the proceedings. *See Knight*, 394 So.2d at 1001 (“[T]he defendant has the burden to show that this specific, serious deficiency, when considered under the circumstances of the individual case, was substantial enough to demonstrate a prejudice to the defendant to the extent that there is a likelihood that the deficient conduct affected the outcome of the court proceedings.”); *see also Nixon*, 932 So.2d at 1023 (“Prejudice is demonstrated by

showing that the appellate process was compromised to the degree that confidence in the correctness of the appellate result is undermined.”).

Because detailed analysis is required in order to prevail, conclusory allegations are insufficient to establish prejudice. Hence, a Petitioner cannot simply argue that the result would have been different “had the evidence been presented” or “but for counsel’s deficient performance.” *See Jones v. State*, 998 So.2d 573, 584 (Fla. 2008):

While we conclude that trial counsel’s performance was deficient, Jones has failed to prove prejudice. He offers nothing more than the blanket assertion that “[h]ad the evidence been presented, the result of the penalty proceedings would have been different.” A mere conclusory allegation that the outcome would have been different is insufficient to state a claim of prejudice under *Strickland*; the defendant must demonstrate how, if counsel had acted otherwise, a reasonable probability exists that the outcome would have been different—that is, a probability sufficient to undermine confidence in the outcome. *See Holland v. State*, 916 So.2d 750, 758 (Fla. 2005) (defendant’s claim that “he was prejudiced because penalty phase counsel’s deficiencies substantially impair confidence in the outcome of the proceedings is merely conclusory and must be rejected”); *Brown v. State*, 894 So.2d 137, 160 (Fla. 2004); *Armstrong v. State*, 862 So.2d 705, 712 (Fla. 2003) (finding that a mere conclusory allegation of prejudice was legally insufficient).

(Emphasis added.)

If the lack of any prejudice is obvious, then a reviewing court need not make any determination regarding deficient performance. *See Maxwell v. Wainwright*, 490 So.2d 927, 932 (Fla. 1986) (“A court considering a claim of ineffectiveness of counsel need not make a specific ruling on the performance component of the test

when it is clear that the prejudice component is not satisfied.”).

Not a second appeal or a collateral attack.

A petition alleging ineffective assistance of appellate counsel cannot be used to “camouflage” issues that should have been raised on direct appeal or in post-conviction proceedings. *See Rutherford*, 774 So.2d at 643 (“[C]laims 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.”).

Likewise, petitions alleging ineffective assistance of appellate counsel should not be treated as a second appeal. *See Breedlove*, 595 So.2d at 10 (“Allegations of counsel’s ineffectiveness cannot circumvent the rule that habeas corpus proceedings are not a second appeal.”); *see also Blanco v. Wainwright*, 507 So.2d 1377, 1384 (Fla. 1987).

Furthermore, petitions alleging ineffective assistance of appellate counsel cannot be used as a means of challenging the effectiveness of trial counsel. *See Nelson v. State*, 43 So.3d 20, 34 (Fla. 2010) (“Nelson’s claim that trial counsel was ineffective is denied because ineffective assistance of trial counsel is not cognizable in habeas corpus.”); *see also Griffin v. State*, 976 So.2d 107, 108 (Fla. 3d DCA 2008) (“Habeas corpus is ... the improper vehicle to address ... the performance of trial counsel.”) (emphasis omitted).

As a general rule, appellate counsel should not be considered ineffective for

failing to claim ineffective assistance of trial counsel on direct appeal. *See Suarez v. Dugger*, 527 So.2d 190, 193 (Fla. 1988):

The next claim raised by Suarez is that he received ineffective assistance of appellate counsel due to the failure of appellate counsel to raise, on direct appeal, trial counsel's abandonment of the theory of not guilty by reason of insanity. The gravamen of this issue, in effect, is ineffective assistance of trial counsel. As this Court recently noted in *Blanco v. Wainwright*, 507 So.2d 1377 (Fla. 1987)], ineffective assistance of trial counsel is generally not cognizable on direct appeal. Rather, a more proper and effective remedy is a claim of ineffective assistance of trial counsel pursuant to Rule 3.850.

Remedy.

Finally, the remedy for a successful petition alleging ineffective assistance of appellate counsel is a new direct appeal. *See Marrero v. State*, 967 So.2d 934, 936 (Fla. 2d DCA 2007), citing *Wilson v. Wainwright*, 474 So.2d 1162, 1163 (Fla. 1985) ("When a claim of ineffective assistance of appellate counsel is successful, the remedy is to award the petitioner a new appeal in order that the appellate court may determine the merits of an issue that should have been raised in the original direct appeal."). Awarding any other remedy runs the risk of ineffective assistance of appellate counsel claims devolving into second appeals.

PETITIONER'S CLAIMS.

1. Ineffective assistance of appellate counsel – change of venue

Claim. Petitioner claims that appellate counsel provided ineffective assistance by failing to challenge the trial court's denial of the motion to change

venue.

Analysis. Rather than comparing the decisions made by appellate counsel against prevailing professional norms, and instead of showing how the outcome of the direct appeal would have been any different, Petitioner re-litigates the motion for change of venue and makes conclusory allegations. In doing so, he fails to establish either deficient performance or prejudice.

Deficient Performance

Instead of demonstrating deficient performance, Petitioner re-litigates the motion for change of venue — presenting pages of information surrounding the local media coverage surrounding the trial. Yet, Petitioner fails to address whether the absence of any challenge to the denial of the motion represents a substantial and serious deviation from the level of performance expected of *appellate* counsel. *See Strickland*, 466 U.S. at 696 (“[T]he ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged.”).

At best, Petitioner raises a conclusory allegation of ineffectiveness. *See* Petition, p.16 (“This Court should find appellate counsel ineffective for failing to raise this claim....”). Such a conclusory allegation, however, remains insufficient to satisfy the deficient performance prong of *Strickland*. *See Bradley*, 33 So.3d at 685 (“Bradley has failed to set forth any basis upon which this Court could grant him relief. Instead, he simply refers the Court to his claims filed below. As we

have previously held, vague and conclusory allegations are insufficient to warrant relief.”); *see also Conahan*, 118 So.3d at 734-35:

A habeas petition must plead specific facts that entitle the defendant to relief. Conclusory allegations have repeatedly been held insufficient by this Court because they do not permit the court to examine the specific allegations against the record. *Bradley v. State*, 33 So.3d 664, 685 (Fla. 2010) (citing *Doorbal v. State*, 983 So.2d 464, 482 (Fla. 2008)); *Patton v. State*, 878 So.2d 368, 380 (Fla. 2004) (citing *Ragsdale v. State*, 720 So.2d 203, 207 (Fla. 1998) (finding that conclusory allegations are also not sufficient for appellate purposes in habeas proceedings)).

Additionally, Petitioner fails to acknowledge the need for counsel to winnow down issues on appeal so that stronger arguments garner adequate attention. *See Farina v. State*, 937 So.2d 612, 634 (Fla. 2006):

In this case, appellate counsel’s brief was 96 pages long and raised ten issues. He also filed a supplemental brief raising two claims related to the appropriateness of his death sentence after Jeffrey had been sentenced to life imprisonment. Appellate counsel could have reasonably concluded that these issues represented his strongest arguments. He could have reasoned that the prosecutor’s alleged misconduct, given that it was not properly objected to, was a weaker claim with less chance of success. Thus, counsel was not ineffective for failing to raise it on appeal.

(Citation omitted.)

In the initial brief, appellate counsel raised six issues — all of which attacked the evidence of guilt and aggravation in the case. *See Hilton*, 117 So.3d at 750-55. Given the strength of that evidence, it was not unreasonable for appellate counsel to conclude that an attack on the admissibility or use of that evidence

presented the best chance of success on appeal. *See Mosley v. State*, 209 So.3d 1248, 1271 (Fla. 2016) (“[C]ounsel will not be considered ineffective simply because he or she limited the appellate arguments to those that were the strongest.”).

Prejudice

Petitioner’s discussion of prejudice only pertains to the review of a trial court’s decision to grant or deny a motion for change of venue. *See* Petition, p.12, citing *Coleman v. Kemp*, 778 F.2d 1487, 1489 (11th Cir. 1985) (“There are two standards which guide analysis of this question [of whether a trial court may be able to seat an impartial jury because of prejudicial pretrial publicity or an inflamed community atmosphere], the ‘actual prejudice’ standard and the ‘presumed prejudice’ standard.”).

Nowhere, however, does Petitioner address the prejudice required for an ineffective assistance of counsel claim. *See Strickland*, 466 U.S. at 668 (Defendant must show that there is a “reasonable probability,” which is a probability sufficient to undermine confidence in the outcome, that, but for counsel’s unprofessional errors, result of the proceeding would have been different.).

As to the likelihood of success on direct appeal, Petitioner fails to identify a biased juror who actually served; additionally, he fails to specify which jurors, if any, could not be rehabilitated but were not challenged for cause. *See Gonzalez v.*

State, 253 So.3d 526, 529 (Fla. 2018) (“Gonzalez does not point to a specific biased juror who served, nor does Gonzalez specifically allege which juror, if any, was not properly rehabilitated during voir dire or, failing that, that Gonzalez was unable to strike either for cause or by using one of his peremptory strikes.”).

At best, Petitioner raises a conclusory allegation that “[h]ad appellate counsel raised this error on direct appeal, there is a reasonable probability that this Court would have granted relief.” Petition, p.12. Such a conclusory allegation, however, remains insufficient to satisfy the prejudice prong of *Strickland*. See *Jones*, 998 So.2d at 584.

Ultimately, Petitioner fails to establish how his direct appeal would have been different than all of the other cases in which this Court held that a trial court did not abuse its discretion when denying a motion for change of venue. See, e.g., *Pietri v. State*, 644 So.2d 1347, 1352 (Fla. 1994):

As mentioned, the trial judge excused members of the venire who said they were biased. The jurors who recalled reading about the case and were ultimately chosen to serve all said they could set aside any prior knowledge and decide the case based on evidence presented at trial. Thus, the pretrial knowledge of the jurors who served did not preclude a fair and impartial jury, and the trial judge did not abuse his discretion in denying the motion for a change of venue.

Remedy. Petitioner seeks an improper remedy; instead of asking this Court for a new direct appeal, he seeks to set aside his conviction and sentence. See Petition, p.18 (“This Court should find appellate counsel ineffective for failing to

raise this claim and vacate Mr. Hilton’s conviction and sentence.”).

Conclusion. Instead of demonstrating deficient performance by appellate counsel, Petitioner re-litigates the motion to change venue. And rather than establishing a reasonable probability that the outcome of the direct appeal would have been different, Petitioner simply makes a conclusory allegation of prejudice. Therefore, this Court should deny Petitioner’s claim.

2. Ineffective assistance of appellate counsel – judicial bias

Claim. Petitioner claims that appellate counsel provided ineffective assistance by failing to raise judicial bias as an issue on direct appeal. According to Petitioner, counsel should have argued that the motion for mistrial was also a motion for recusal; in the alternative, appellate counsel should have argued judicial bias as a basis for fundamental error. *See* Petition, p.23 (“Even if this court does not find that trial counsel’s motion for mistrial constitutes a motion for recusal, this was fundamental error that the court itself was required to address sua sponte.”).

Analysis. Although he chronicles several adverse rulings by the trial court, Petitioner fails to establish actual, judicial bias. Therefore, Appellate counsel was not deficient for failing to raise the issue on direct appeal. Furthermore, Petitioner’s conclusory allegations of prejudice fail to show how the absence of any challenge undermines confidence in the outcome of the direct appeal.

Deficient Performance

Instead of showing deficient performance, Petitioner argues that appellate counsel should have raised judicial impartiality as an issue on direct appeal. *See* Petition, p.25 (“Appellate counsel was ineffective in failing to raise this claim”).

However, given that the purported bias identified by Petitioner occurred during the trial, Petitioner fails to address whether a claim of judicial bias would have been procedurally barred on direct appeal due to the lack of a motion to disqualify. *See Mungin v. State*, 932 So.2d 986, 994 (Fla. 2006):

[A] claim of judicial bias is procedurally barred on direct appeal if the defendant fails to seek disqualification of the judge after having specific knowledge of the grounds for disqualification.... Mungin had specific knowledge of the alleged grounds for disqualification but failed to file a motion to disqualify.

See also Schwab, 814 So.2d at 407:

We have held that where the grounds for a judicial bias claim are known at the time of the original trial, yet are not raised, such claims are waived and cannot be raised in a postconviction appeal. Schwab’s judicial bias claim is procedurally barred because Schwab failed to seek the disqualification of Judge Richardson after having specific knowledge of the grounds now claimed.

(Citations omitted.)

Rather than analyzing the actual performance of appellate counsel, Petitioner once again raises a conclusory allegation of deficient performance. In this case, however, it does not appear that trial counsel preserved the issue for appellate review; furthermore, the claim does not rise to the level of fundamental error because no actual bias has been shown. *See State v. Murray*, 262 So.3d 26, 43

(Fla. 2018), citing *Valle*, 837 So.2d at 908 (“[A]ppellate counsel cannot be deemed ineffective for failing to raise meritless issues or issues that were not properly raised in the trial court and are not fundamental error.”). Therefore, Petitioner’s conclusory allegation of deficient performance remains insufficient to satisfy the first prong of *Strickland*. See *Bradley*, 33 So.3d at 685; see also *Conahan*, 118 So.3d at 734-35.

Prejudice

Instead of applying the *Strickland* standard for prejudice, Petitioner focuses on the federal standard for reversible error on direct appeal for a claim involving judicial bias. See Petition, p.17, citing *United States v. Ramirez-Chilel*, 289 F.3d 744 (11th Cir. 2002) (To amount to reversible error on the basis of bias, a judge’s remarks must demonstrate such pervasive bias and unfairness that they prejudice one of the parties in the case.).

In making this argument, Petitioner essentially posits that “actual bias” is the *Strickland* standard for prejudice for this type of claim. Compare *United States v. Boling*, 648 F.3d 474 (7th Cir. 2011) (the Court of Appeals will not reverse for judicial bias unless the defendant can show: (1) that the district court judge demonstrated actual bias regarding defendant’s honesty or guilt, and (2) that defendant suffered serious prejudice as a result), with *Carratelli v. State*, 961 So.2d 312, 324 (Fla. 2007) (“We therefore hold that where 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.”).

Under that standard, Petitioner’s claim fails. While he chronicles many adverse rulings that occurred during the trial, Petitioner nonetheless fails to show any clear instance of actual bias. *See generally Schwab*, 814 So.2d at 414 (“Schwab’s claim that Judge Richardson demonstrated his actual bias throughout the trial is also without merit. Schwab’s alternative judicial bias claims are merely based on rulings adverse to Schwab and are thus legally insufficient to warrant Judge Richardson’s disqualification.”). Therefore, Petitioner fails to establish any prejudice. *Cf. Nyabwa v. Unknown Jailers at Corr. Corp. of Am.*, 700 F.App’x 379, 381 (5th Cir. 2017), citing *Liteky v. United States*, 510 U.S. 540, 555 (1994):

Because Nyabwa’s conclusory arguments for recusal were based on the district judge’s actions in the course of judicial proceedings and failed to show that the judge had an actual personal bias or prejudice against him, the district court did not abuse its discretion by denying his recusal motions or his motion for a hearing on the recusal issue.

Remedy. Petitioner fails to identify any remedy. However, the proper remedy would be a new direct appeal.

Conclusion. Petitioner fails to establish actual, judicial bias; therefore, appellate counsel was not deficient for failing to raise the issue. Additionally, Petitioner’s conclusory allegations fail to demonstrate prejudice. Therefore, this Court should deny Petitioner’s claim.

3. Ineffective assistance of appellate counsel – challenges for cause

Claim. Petitioner claims that appellate counsel provided ineffective assistance by failing to raise the denial of unpreserved challenges for cause.

Analysis. Petitioner claimed in postconviction that trial counsel was ineffective for failing to preserve the challenges for cause at issue here; therefore, this claim is procedurally barred. In the alternative, Petitioner cannot establish deficient performance because the cause challenges were not preserved and are therefore abandoned; therefore, appellate counsel cannot be deemed ineffective for failing to raise them on direct appeal. With no deficient performance, no prejudice examination is required. Finally, Petitioner adopts the wrong standard for prejudice; and he fails to show actual bias under the applicable standard.

Procedural Bar

This claim is procedurally barred because it was raised in postconviction.

See Schwab, 814 So.2d at 414:

Schwab's first habeas claim is procedurally barred as it was raised and rejected in our discussion of Schwab's rule 3.850 appeal. *See Parker v. Dugger*, 550 So.2d 459, 460 (Fla. 1989) ("[H]abeas corpus petitions are not to be used for additional appeals on questions which could have been ... or were raised on appeal or in a rule 3.850 motion, or on matters that were not objected to at trial.").

In postconviction, Petitioner argued that "trial counsel was ineffective for their failure to preserve for appeal the denial of cause challenges during jury selection." Initial Brief, p.64, *Hilton v. State*, Case No. SC19-373 (Fla.). Here,

Petitioner argues that appellate counsel failed to raise the denial of cause challenges as an issue on direct appeal. *See* Petition, p.25 (“Appellate counsel then ineffectively failed to raise this viable claim on direct appeal.”).

Admittedly, the former involves the failure to preserve an issue for appellate review whereas the latter involves the failure to raise that issue on appeal. Nonetheless, both claims are governed by *Carratelli*. *See Salazar v. State*, 188 So.3d 799, 821 (Fla. 2016), citing *Carratelli*, 961 So.2d at 324:

Additionally, assuming that a defendant must demonstrate the same prejudice standard when raising an ineffective assistance of appellate counsel claim as when raising an ineffective assistance of trial counsel claim, Salazar did not claim and failed to show that an actually biased juror served on the jury. Based on the trial court’s denial of the for cause challenge made as to Ms. W, trial counsel requested an additional peremptory challenge to dismiss Ms. G. However, the trial court denied the defense’s request, and Ms. G ultimately served on the jury. But Salazar does not claim and has failed to demonstrate that a biased venire person actually served on the jury.

But see Murray, 262 So.3d at 44.

If there is any doubt about whether or not *Carratelli* should apply to an ineffective assistance of appellate counsel claim, then this Court should consider the two purposes behind the *Carratelli* standard: it honors the preservation rule, thereby discouraging sandbagging; and it respects the importance of the finality of judgments. *See Carratelli*, 961 So.2d at 324-25. Both purposes are just as important in a habeas petition alleging ineffective assistance of appellate counsel as they are in a motion for postconviction relief.

Deficient Performance

Instead of demonstrating deficient performance, Petitioner simply argues that appellate counsel should have raised the issue on direct appeal. *See* Petition, p.25 (“[T]he trial court denied numerous cause challenges.... This forced the defense to expend their peremptory strikes on jurors who should have been excused for cause and resulted in a jury consisting of biased members. Appellate counsel then ineffectively failed to raise this viable claim on direct appeal.”).

Relying on a conclusory allegation of deficient performance, Petitioner fails to identify whether trial counsel preserved this issue for appellate review. This remains an important point, as preservation (or lack thereof) plays a significant role when evaluating the performance of appellate counsel. *See Murray*, 262 So.3d at 43, citing *Valle*, 837 So.2d at 908.

As to that point, Petitioner claimed in a collateral proceeding that trial counsel was ineffective for failing to preserve the cause challenges at issue in this case.⁶ *See* Initial Brief, p.64, *Hilton v. State*, Case No. 19-373 (Fla.) (“The trial court erred in denying Mr. Hilton’s claim that trial counsel was ineffective for their failure to preserve for appeal the denial of cause challenges during jury

⁶ In order to preserve a challenge for cause, a defendant must object when the challenge is denied and then renew that objection before the jury is sworn. *See Carratelli*, 961 So.2d at 318. If a party fails to renew the objection prior to the jury being sworn, then both the trial court and reviewing courts can deem the objection abandoned. *See Zack v. State*, 911 So.2d 1190, 1204 (Fla. 2005); *see also Joiner v. State*, 618 So.2d 174, 176 (Fla. 1993). Unpreserved and abandoned, any such claim cannot be raised on direct appeal. *See Carratelli*, 961 So.2d at 325.

selection.”).

By arguing in a collateral proceeding that trial counsel failed to adequately preserve the cause challenges for appellate review, Petitioner essentially concedes that appellate counsel cannot be considered ineffective for failing to challenge the denial of the challenges for cause. *See Downs v. Wainwright*, 476 So.2d 654, 657 (Fla. 1985):

Several of the omissions alleged by Downs involve matters which appellate counsel was precluded from raising on appeal. We have repeatedly held that appellate counsel cannot be considered ineffective for failing to raise issues which he was procedurally barred from raising because they were not properly raised at trial.

Prejudice

Because a showing of deficient performance is impossible due to the lack of preservation and abandonment, this Court need not conduct any prejudice analysis. *See Orme v. State*, 896 So.2d 725, 736 n.2 (Fla. 2005) (“Because we find no deficient performance in Smith’s failure to request a continuance, we need not examine this claim for its prejudicial effect.”).

Nonetheless, instead of addressing the *Strickland* standard for prejudice, Petitioner argues the direct appeal standard for cause challenges. *Compare* Petition, p.28, citing *Busby v. State*, 894 So.2d 88, 96-97 (Fla. 2004) (“To show prejudice — and thus for Hilton to show that there would have been a reasonable likelihood of success on appeal, an appellant must show he exhausted all

peremptory strikes and an objectionable jury served.”), with *Carratelli*, 961 So.2d at 319, quoting *Busby*, 894 So.2d at 96-97:

Having demonstrated [preserved] error [on direct appeal], the defendant must then show that the error requires reversal. The “expenditure of a peremptory challenge to cure the trial court’s improper denial of a cause challenge constitutes reversible error if a defendant exhausts all remaining peremptory challenges and can show that an objectionable jury has served on the jury.”

See also Petition, p.33 (“As explained previously, the trial court’s error prejudiced Hilton because he can show he exhausted all remaining peremptories and an objectionable juror ultimately served.”).

For this claim, however, prejudice can only be shown through a demonstration of actual bias — something Petitioner fails to do. *See Salazar*, 188 So.3d at 821, citing *Carratelli*, 961 So.2d at 324.

Remedy. Petitioner fails to identify any remedy. However, the proper remedy would be a new direct appeal.

Conclusion. Because *Carratelli* controls Petitioner’s postconviction claim as well as his ineffective assistance of appellate counsel claim, the latter is procedurally barred. In the alternative, Petitioner cannot establish deficient performance because the cause challenges were not preserved and are therefore deemed abandoned; with no deficient performance, no prejudice examination is required. Furthermore, Petitioner adopts the wrong standard for prejudice; and he fails to show actual bias under the applicable standard. Thus, this Court should

deny Petitioner's claim.

4. Ineffective assistance of appellate counsel – strike the panel

Claim. Petitioner claims that appellate counsel provided ineffective assistance by failing to raise the denial of a collective challenge for cause to an entire panel (framed by Petitioner as a motion to strike the panel).

Analysis. As with Claim 3, trial counsel failed to preserve any cause challenges for appellate review; because Petitioner challenges that failure in postconviction, this claim is procedurally barred. In the alternative, Petitioner cannot establish deficient performance because the cause challenges were not preserved and are therefore abandoned; therefore, appellate counsel cannot be deemed ineffective for failing to raise them on direct appeal. With no deficient performance, no prejudice examination is required. Nonetheless, Petitioner fails to show actual bias under the applicable standard.

Procedural Bar

In faulting appellate counsel for failing to challenge the denial of the “motion to strike the entire panel,” Petitioner points to an ore tenus motion made by trial counsel during voir dire: “I’m going to move to strike the whole afternoon panel that we’ve had so far based on the fact that we learned that there have been [sic] some taint based on the use of the Internet and the cell phone concerning the facts of this case.” Vol. 19, p.348.

Rather than a motion to strike the panel under Rule 3.290 (Challenge to Panel), however, this appears to be a cause challenge to every juror on the panel.

But see Morris v. State, 219 So.3d 33, 41 (Fla. 2017):

The denial of a motion to strike the jury panel is reviewed for abuse of discretion. *Williams v. Osking*, 105 So.3d 653, 655 (Fla. 4th DCA 2013). “In order for the statement of one venire member to taint the panel, the venire member must mention facts that would not otherwise be presented to the jury.” *Johnson v. State*, 903 So.2d 888, 897 (Fla. 2005). Additionally, “[a] venire member’s expression of an opinion before the entire panel is not normally considered sufficient to taint the remainder of the panel.” *Id.*

Just like trial counsel, Petitioner fails to identify the procedural basis for the motion to strike the venire. Instead of Rule 3.290 (Challenge to Panel), Petitioner relies on a line of decisions that extend Rule 3.251 (Right to Trial by Jury) to panel strikes. *See* Petition, p.39, citing *Richardson v. State*, 666 So.2d 223, 224 (Fla. 2d DCA 1995); *see also Wilding v. State*, 427 So.2d 1069 (Fla. 2d DCA 1983), citing *Marrero v. State*, 343 So.2d 883 (Fla. 2d DCA 1977) (“Both the Florida Constitution and the Florida Rules of Criminal Procedure provide that an accused has the right to an impartial jury. Fla. Const. art. I, § 16; Fla. R. Crim. P. 3.251. The appellant was deprived of this right because the jury panel was bound to be unfairly prejudiced by virtue of their knowledge of his arrest for another crime.”).

However, the “motion to strike” appears to be nothing more than a collective challenge for cause filed under Rule 3.320 and section 913.03, Florida Statutes. During voir dire Juror Van Stratum brought the issue of possible taint to the

attention of the court and counsel. *See* Vol. 18, pp.334-38. When asked by the trial court whether she wished to strike Juror Van Stratum for cause, trial counsel answered: “Yes, yes, I wish to — .” Vol. 18, p.339. The trial court denied the challenge. *Id.* After another juror was interviewed and successfully challenged for cause on other grounds, the trial court took a brief recess. *Id.*, pp.339-44. Immediately after the court reconvened, trial counsel made an ore tenus motion to strike the entire panel for “taint” due to pretrial publicity. Vol. 19, p.348.

For all intents and purposes, the “motion to strike” was nothing more than the cause challenge of Juror Van Stratum applied collectively to the entire panel. *See generally Ortiz v. State*, 543 So.2d 377, 379 (Fla. 3d DCA 1989) (“Ms. Arnold’s candid admission that, upon reading the newspaper account of the fire, she had ‘felt at that time that he had done it [and] he was guilty,’ disqualified her from service on the jury even after she stated that she would try to render a fair and impartial verdict after listening to the evidence.”).

A collective challenge for cause, this claim is procedurally barred because it was or should have been raised in postconviction. *See Schwab*, 814 So.2d at 414.

Deficient Performance

Trial counsel failed to preserve the issue for appellate review; therefore, appellate counsel cannot be considered ineffective for failing to raise it as an issue on direct appeal. *See Downs*, 476 So.2d at 657.

At the start of trial but after the jury had been sworn, trial counsel attempted to “renew” the motion to strike/collective challenge for cause. *See* Vol. 24, p.19 (“I also want to renew my motion to strike the jury due to contamination.”). However, the trial court correctly noted that the “motion” was untimely because it was made after the jury had been sworn. *See id.*, pp.19-20 (“First, I don’t think a motion to strike is timely at this point. The jury has been sworn.”). Trial counsel responded that she objected to the jury prior to the jury being sworn. *See id.*, p.20 (“I objected to the swearing of the jury and I want the record to reflect.”). At that time, however, trial counsel simply stated: “I will have the prior objections put on the record, Judge.” Vol. 23, p.1078. Such a generalized statement accomplishes nothing. *See Gore v. State*, 964 So.2d 1257, 1265 (Fla. 2007), citing *F.B. v. State*, 852 So.2d 226, 229 (Fla. 2003), *Steinhorst v. State*, 412 So.2d 332, 338 (Fla. 1982) (“To preserve error for appellate review, the general rule is a contemporaneous, specific objection must occur during trial at the time of the alleged error.”). Petitioner essentially concedes this point by arguing in a collateral proceeding that trial counsel was ineffective for failing to preserve cause challenges. *See* Initial Brief, p.64, *Hilton v. State*, Case No. SC19-373 (Fla.).

Unpreserved and abandoned, this claim could not be raised on direct appeal. *See Carratelli*, 961 So.2d at 325. Therefore, appellate counsel’s performance was not deficient.

Prejudice

Because a showing of deficient performance is impossible due to the lack of preservation and abandonment, this Court need not conduct any prejudice analysis. *See Orme*, 896 So.2d at 736 n.2.

Nonetheless, instead of detailing how the allegedly deficient performance significantly undermined confidence in the outcome of the appellate proceedings, Petitioner argues that: (1) the “trial court’s failure to take any action following a credible claim of juror misconduct and subsequent denial of defense counsel’s motion to strike the panel violated Mr. Hilton’s right to an impartial jury”; and therefore, (2) the failure to raise that claim on direct appeal “rendered appellate counsel ineffective.” Petition, p.39. These types of conclusory allegations are insufficient to merit relief. *See Bradley*, 33 So.3d at 685; *see also Conahan*, 118 So.3d at 734-35.

For this claim, prejudice can only be shown through a demonstration of actual bias — something Petitioner fails to do. *See Salazar*, 188 So.3d at 821, citing *Carratelli*, 961 So.2d at 324.

Remedy. Petitioner fails to identify any remedy. However, the proper remedy would be a new direct appeal.

Conclusion. Because *Carratelli* controls Petitioner’s postconviction claim as well as his ineffective assistance of appellate counsel claim, the latter is

procedurally barred. In the alternative, Petitioner cannot establish deficient performance because the collective cause challenge was not preserved and is therefore deemed abandoned; with no deficient performance, no prejudice examination is required. Furthermore, Petitioner fails to show actual bias. Thus, this Court should deny Petitioner's claim.

5. Ineffective assistance of appellate counsel – continuance

Claim. Petitioner claims that appellate counsel provided ineffective assistance by failing to challenge the denial of a pre-trial motion for a continuance.

Analysis. Under the highly-deferential abuse of discretion standard of review that would have applied on direct appeal, Petitioner fails to establish how the denial of the motion to continue caused him any undue prejudice at trial. Even assuming it were an abuse of discretion for the trial court to deny the continuance, any such denial was harmless error given the overwhelming evidence of guilt. Therefore, Appellate counsel was not deficient for failing to raise the issue on direct appeal. Furthermore, Petitioner's conclusory allegations of prejudice fail to show how the absence of any challenge to the denial undermines confidence in the outcome of the direct appeal.

Deficient Performance

Petitioner argues that the trial court abused its discretion and committed reversible error when it denied the January 2011 motion for continuance. *See*

Petition, p.45 (“The trial court’s failure to grant this short continuance was reversible error.”).

From there, Petitioner argues that the issue “had a reasonable likelihood of success” and therefore concludes that appellate counsel must be ineffective for failing to raise the denial of the motion as an issue in the initial brief. *See* Petition, p.46 (“Appellate counsel had a reasonable likelihood of success had he raised this claim and was ineffective for not doing so.”).

In support of his argument, Petitioner mentions two motions for continuance filed by trial counsel, the latter of which was filed on January 26, 2011 — approximately one week before the commencement of trial on February 2, 2011. *See* Vol. 11, p.2100; *see also Hilton*, 117 So.3d at 746.

Although not mentioned by Petitioner, trial counsel renewed the motion for continuance at the start of trial on February 4, 2011. *See* Vol. 24, p.18 (“Your Honor, based on the number of witnesses in this case, and all of which are in those boxes, I’m going to once again file — or renew my motion to continue. The defense is not prepared to proceed. We have not had the chance to depose over 200 witnesses listed as Category A.”).

Thus, trial counsel preserved the denial of the motion for appellate review. *See Guillen v. State*, 189 So.3d 1004, 1008 (Fla. 3d DCA 2016), citing *McCray v. State*, 369 So.2d 111 (Fla. 1st DCA 1979) (“Because the defendant failed to renew

his motion for a continuance at the start of the trial and defense counsel actually stated that he was prepared to go to trial, the defendant failed to preserve for appellate review the trial court's denial of his motion for a continuance.”).

Despite Petitioner's assertion that the issue “had a reasonable likelihood of success” on appeal, however, Petitioner fails to demonstrate how the trial court abused its discretion. With regard to the denial of a motion to continue specifically, Petitioner fails to establish that he suffered any undue prejudice. *See Guillen*, 189 So.3d at 1008:

However, even if the defendant had preserved for appellate review the denial of his motion for a continuance, we would still affirm because no prejudice has been demonstrated. A reviewing court will not reverse a trial court's denial of a motion for a continuance unless the trial court abused its discretion. *Bouie v. State*, 559 So.2d 1113, 1114 (Fla. 1990). “An abuse of discretion is generally not found unless the court's ruling on a continuance results in undue prejudice to the defendant.” *Randolph v. State*, 853 So.2d 1051, 1062 (Fla. 2003).

A trial court does not abuse its discretion by denying a motion for a continuance if the defendant will not suffer undue prejudice. *See Randolph*, 853 So.2d at 1062.

In short, Petitioner fails to show how the lack of a continuance impacted trial counsel's ability to cross-examine the Category A witnesses referenced in the renewed motion. *See generally Bouie v. State*, 559 So.2d 1113, 1114 (Fla. 1990); *see also Fennie v. State*, 648 So.2d 95, 97 (Fla. 1994).

At best, Petitioner highlights the large number of potential witnesses that trial counsel would like to have interviewed and deposed prior to the start of trial.

But, an “undue burden” on counsel remains an insufficient basis to grant a motion for continuance. *See Guillen*, 189 So.3d at 1009:

We are also unpersuaded by the defendant’s argument that it created an undue burden upon defense counsel to prepare for Wright’s testimony in the days leading up to the trial. As the Florida Supreme Court stated, “[o]ur rules were not designed to eliminate the onerous burdens of trial practice.” *Cooper*[v. *State*, 336 So.2d 1133, 1138 (Fla. 1976)]. The fact that defense counsel had only a few days prior to trial to consider Wright’s largely cumulative testimony does not establish undue prejudice. *See, e.g., Gause v. State*, 270 So.2d 383, 384 (Fla. 3d DCA 1972) (affirming the trial court’s denial of a motion for a continuance and rejecting the defendant’s argument that his new defense counsel, who was substituted only five days before trial, had insufficient time to prepare).

(Emphasis added.)

Because Petitioner fails to demonstrate any undue prejudice caused by the denial of the motion to continue, Petitioner cannot show that the trial court abused its discretion. Therefore, Petitioner cannot establish that appellate counsel committed deficient performance by failing to raise the issue on direct appeal.

Prejudice

Instead of demonstrating prejudice, Petitioner re-litigates the pre-trial motion for a continuance — with pages dedicated to witnesses and categories. Yet, even assuming it were an abuse of discretion for the trial court to deny the renewed motion to continue, the evidence of Petitioner’s guilt remains overwhelming. *See Hilton*, 117 So.3d at 746-49, 755. Therefore, any such denial was harmless error. *See Ventura v. State*, 29 So.3d 1086, 1092 (Fla. 2010) (Canady, J., dissenting) (“In

numerous cases, we have expressly relied on the existence of overwhelming evidence of guilt in reaching the conclusion that an error was harmless.”); *but see id.* at 1089-90 (Test for harmless error was not whether defendant’s guilt was otherwise demonstrated by overwhelming evidence, but whether there was no reasonable possibility that the error contributed to the conviction.).

Instead of showing prejudice, Petitioner raises a conclusory allegation of ineffectiveness. *See* Petition, p.46 (“Appellate counsel had a reasonable likelihood of success had he raised this claim and was ineffective in not doing so.”). Such a conclusory allegation, however, remains insufficient to satisfy the prejudice prong of *Strickland*. *See Jones*, 998 So.2d at 584.

Ultimately, Petitioner fails to establish how appellate counsel’s failure to challenge the denial of the renewed motion to continue undermined confidence in the outcome of the direct appeal.

Remedy. Petitioner fails to identify any remedy. However, the proper remedy would be a new direct appeal.

Conclusion. Petitioner fails to show any undue prejudice caused by the denial of the renewed motion to continue. Therefore, appellate counsel was not deficient for failing to raise the issue under the highly deferential abuse of discretion standard. Even assuming it were an abuse of discretion for the trial court to deny the continuance, any such denial was harmless error. Additionally,

Petitioner's conclusory allegations of prejudice fail to show how the absence of any challenge to the denial undermines confidence in the outcome of the direct appeal.

6. Ineffective assistance of appellate counsel – charred human bones

Claim. Petitioner claims that appellate counsel provided ineffective assistance by failing to challenge the admission of evidence pertaining to charred human bones found in a fire pit.

Analysis. Because the State connected the evidence to the victim and to Petitioner, the trial court did not abuse its discretion when it admitted evidence of charred human bones. Therefore, appellate counsel was not deficient for failing to raise the issue on direct appeal. Furthermore, Petitioner's conclusory allegations of prejudice fail to show how the absence of any challenge to the denial undermines confidence in the outcome of the direct appeal.

Deficient Performance

Petitioner claims that evidence of charred human bones: was irrelevant; and, if relevant, had its probative value substantially outweighed by the danger of unfair prejudice. *See* Petition, p.48 (“The State was not required to prove beyond a reasonable doubt that some unidentified, charred bone fragments were found in a national forest near where Mr. Hilton had been seen.”); *see also id.*, p.50 (“Even if the bone fragments were relevant to this case ... their admission at trial was highly

prejudicial and substantially outweighed their probative value.”).

In making this argument, however, Petitioner fails to address four critical facts: (1) the victim’s “decomposing body was found beheaded and with her hands removed”; (2) “Charred human bones, including a skull and hand bones, were found in a fire pit near a campsite where [Petitioner] was seen ...”; (3) “this campsite also contained cigarette butts that contained [Petitioner’s] DNA”; and (4) the victim’s “DNA was found on articles recovered from [Petitioner’s] van.” *Hilton*, 117 So.3d at 755. Given this evidence, the jury could fairly infer from the charred human bones that Petitioner murdered the victim. Hence, demonstrating an abuse of discretion by the trial court would have proven difficult, if not impossible. *See generally Sims v. Brown*, 574 So.2d 131, 133 (Fla. 1991) (“The weighing of relevance versus prejudice or confusion is best performed by the trial judge who is present and best able to compare the two.”).

Ultimately, any challenge to the admission of this evidence would have enjoyed little, if any, chance of success on direct appeal. Therefore, appellate counsel cannot be considered deficient for failing to raise the issue.

Prejudice

Petitioner fails to establish how, under the circumstances of this case, the absence of a challenge to the evidence of charred human bones compromised the appellate process “to the degree that confidence in the correctness of the appellate

result is undermined.” *Nixon*, 932 So.2d at 1023. Even though the State could not establish that the bones came from the victim’s body, other evidence (victim’s headless and handless body, head and hands found at campsite, victim’s DNA on items in Petitioner’s van, and Petitioner’s DNA at the campsite) strongly suggested it. Furthermore, the evidence of Petitioner’s guilt was overwhelming. *See Hilton*, 117 So.3d at 746-49, 755. Therefore, any error regarding the admissibility of the evidence most likely would have been held harmless. *See Ventura*, 29 So.3d at 1092 (Canady, J., dissenting); *but see id.* at 1089-90.

Remedy. Petitioner seeks an improper remedy; instead of asking for a new direct appeal, he asks this Court to “vacate the conviction.” Petition, p.50.

Conclusion. Strong evidence tied the charred human bones to the murder of the victim by Petitioner. Hence, the likelihood of successfully demonstrating an abuse of discretion on direct appeal would have been slim, at best. Even if an abuse of discretion could be proven, any error in admitting the evidence would be harmless. Consequently, Petitioner can establish neither deficient performance nor prejudice. Therefore, this Court should deny the claim.

CONCLUSION

Based on the foregoing arguments and authorities, Respondent, the State of Florida, respectfully requests that this Court deny the petition.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Response has been furnished via the eportal to counsel of record, this 23rd day of January, 2020.

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CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 14-point Times New Roman, in compliance with Rule 9.210(a)(2), Florida Rules of Appellate Procedure.

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