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IN THE SUPREME COURT OF FLORIDA

TERRY SMITH,

Petitioner,

CASE NO. SC19-680

vs.

MARK S. INCH, et al.,

Respondent.
_____/

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RESPONSE BRIEF OF RESPONDENT

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RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

COMES NOW, Respondent, the STATE OF FLORIDA, by and through the undersigned counsel, and hereby responds to the Petition for Writ of Habeas Corpus filed herein, pursuant to this Court's Order of May 1, 2019. Respondent respectfully submits that the petition should be denied as meritless.

FACTS AND PROCEDURAL HISTORY

The relevant facts concerning the June 5, 2007, murder of Berthum Gibson, Keenethia Keenan, and Desmond Robinson are recited in the Florida Supreme Court's opinion on direct appeal:

> While looking for narcotics on June 5, 2007, Terry Smith, then age nineteen, called an acquaintance, Breon Williams. Williams, a street level drug dealer, informed Smith that he was going to purchase some drugs and invited Smith to join him. Smith took Williams up on his offer. In the late evening of June 5, Williams picked Smith up from the home of Smith's mother. From there they rode on Williams' motorized scooter to a house in Jacksonville, Florida, where Desmond Robinson and Berthum Gibson sold drugs.
>
> Williams had previously purchases drugs from Desmond Robinson at that location. On previous occasions, Williams had entered through the back door of the home, which was locked and contained a sheet of Plexiglas on its interior. When Williams and Smith arrived at the house, they pulled into the driveway, parked Williams' scooter, and walked up to the back door. Williams knocked on the door, and Robinson let them in.
>
> After Williams and Smith entered the kitchen, Robinson locked the door and left the key in it. When they entered, Gibson and Keenethia Keenan were sitting at a table in the kitchen and dining room area of the home. Williams walked to the kitchen counter, which was located near the door, and began to count his money to determine how much cocaine he could purchase. While Williams was counting his money, he heard Smith say

"[g]ive it up," followed by gunshots. Williams turned to run out of the residence, which required turning the key that was already in the door to unlock it. Before exiting, Williams saw Smith shoot Robinson multiple times. Williams was in such a hurry to leave the house that he left approximately $400 on the kitchen counter and his scooter in the driveway.

The State then presented circumstantial evidence that instead of escaping out the back door after killing Robinson, Smith stepped over Robinson's body and proceeded into the hallway, where he shot in the direction of Gibson and Keenan. Gibson and Keenan each died from a single gunshot wound that was attributed to Smith's ten[-]millimeter handgun. Keenan's body was found unarmed in the back of the southeast bedroom, where she died within seconds of the gunshot piercing her heart. When police arrived, they found Gibson, who was still alive despite a gunshot wound to his abdomen. He was leaning against the bed in the same bedroom with a rifle in his hands. Paramedics transported Gibson to the hospital, where he died due to internal injuries from the gunshot wound. Police found shell casings from the gun used by Smith in the kitchen and dining room area as well as in the living room area of the home. They also found shell casings from the rifle used by Gibson in the southeast bedroom and the hallway leading up to the bedroom.

After shooting Gibson and Keenan, Smith ran out the back door of the house, touching the Plexiglas portion of the door on his way out. When police arrived, they found Williams' money on the kitchen counter and drugs on the dining room table. After exiting the crime scene, Smith called Ullysses Johnson to pick him up from the area. At the time, Johnson was at home playing video games with his brother Raylan Johnson and Jonathan Peterson. The three then picked Smith up near the crime scene. In the car, Smith told them that he had shot three people.

After arriving at the Johnsons' home, Ullysses Johnson and Peterson went inside, while Smith and Raylan Johnson remained outside. Smith gave his gun to Raylan Johnson, who buried it in the yard and then sold it a few days later to Walter Dumas. They also burned Smith's clothes in a bin that was in the yard.

The jury found Smith guilty of first-degree murder for the deaths of Robinson, Gibson, and Keenan. The jury found Smith guilty of first-degree murder under both the felony murder and premeditated theories in the deaths of Gibson and Keenan, and guilty under only the felony murder theory in the death of Robinson. The jury also found Smith guilty of attempted armed robbery.

The jury recommended a life sentence in the first-degree murder of Robinson. The jury recommended sentences of death by a vote of eight to four for the first-degree murder of Gibson and by a vote of ten to two for the first-degree murder of Keenan.

The trial court held a hearing pursuant to *Spencer v. State*, 615 So. 2d 688 (Fla. 1993), prior to sentencing Smith to death for the first-degree murders of Gibson and Keenan and to life imprisonment for the first-degree murder of Robinson. The court gave great weight to the aggravating circumstances that Smith was previously convicted of another capital felony, § 921.141(5)(b), Fla. Stat. (2011), and that the capital felony was committed while Smith was engaged in an attempt to commit robbery, § 921.141(5)(d), Fla. Stat. (2011), merged with the aggravator that Smith committed the capital felony for pecuniary gain, § 921.141(5)(f), Fla. Stat. (2011). The court found the statutory mitigating circumstance of Smith's age at the time of the crime, nineteen, established and gave it moderate weight. Regarding the nonstatutory mitigating factors sought by Smith, the court concluded that the following factors were established: (1) Smith's mental status was mitigating (moderate weight); (2) Smith loves his children and their mothers and they love him (some weight); (3) Smith was a good brother to his siblings (little weight); (4) Smith took care of his sister's seven children while she was at work (moderate weight); (5) Smith is dependable (some weight); (6) Smith was a good employee and therefore he would do well in prison (slight weight); (7) Smith was well behaved during court proceedings (no weight because it is not mitigating); (8) Smith could be rehabilitated in prison and make positive contributions to society (little weight); (9) Breon Williams was never charged with a crime arising out of the murders on June 5, 2007 (no weight because it is not mitigating); (10) Smith grew up in a "terrible" neighborhood (some weight).

Smith v. State, 139 So. 3d 839, 841-43 (Fla. 2014).

On direct appeal this Court addressed four issues: (1) whether the evidence was sufficient to support the convictions for premeditated murder for the killings of Gibson and Keenan; (2) whether the trial court erred in giving additional weight to the felony murder aggravating circumstance on the basis that the murders were premeditated; (3) whether Smith's sentence is proportional; and (4) whether the trial court erred in sentencing Smith to death because Florida's capital sentencing proceedings are unconstitutional under *Ring v. Arizona*, 536 U.S. 584 (2002).

On January 16, 2014, after briefing and oral argument, this Court rejected each of Smith's issues on appeal. *Smith*, 139 So. 3d 839. On August 14, 2014, Smith filed a petition for writ of certiorari in the United States Supreme Court, claiming Florida's capital sentencing structure violates *Ring*. On December 1, 2014, the United States Supreme Court denied review. *Smith v. Florida*, 135 S. Ct. 711 (2014). Finally, Smith filed his 3.851 motion for postconviction relief on November 20, 2015. An evidentiary hearing was held from December 5, 2017, to December 8, 2017. After the parties filed their written closings, the postconviction court filed an order denying relief on the guilt-phase claims and granting relief under *Hurst*. An appeal followed and is currently pending under case number SC18-1763.

On April 25, 2019, Petitioner filed a habeas petition, raising nine claims. On May 1, 2019, this Court issued an order directing a response.

ARGUMENT IN OPPOSITION TO CLAIMS RAISED

Smith's petition alleges that extraordinary relief is warranted because he was denied the effective assistance of counsel in his direct appeal. The standard of review applicable to ineffective assistance of appellate counsel claims mirrors the *Strickland v. Washington*, 466 U.S. 668 (1984), standard for claims of trial counsel ineffectiveness. *See Valle v. Moore*, 837 So. 2d 905 (Fla. 2002); *Rutherford v. Moore*, 774 So. 2d 637, 645 (Fla. 2000). Such a claim requires an evaluation of whether counsel's performance was so deficient that it fell outside the range of professionally acceptable performance and, if so, whether the deficiency was so egregious that it compromised the appellate process to such a degree that it undermined the confidence in the correctness of the result. *Groover v. Singletary*, 656 So. 2d 424, 425 (Fla. 1995); *Byrd v. Singletary*, 655 So. 2d 67, 68-69 (Fla. 1995).

"If a legal issue 'would in all probability have been found to be without merit' had counsel raised the issue on direct appeal, the failure of appellate counsel to raise the meritless issue will not render appellate counsel's performance ineffective." *Rutherford,* 774 So. 2d at 643 (quoting *Williamson v. Dugger,* 651

So. 2d 84, 86 (Fla. 1994)). "This is generally true with regard to issues that would have been found to be procedurally barred had they been presented on direct appeal." *Davis v. State*, 928 So. 2d 1089, 1126-27 (Fla. 2005).

Moreover, appellate counsel is not required to present every conceivable claim. *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."). "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." *Valle*, 837 So. 2d at 908 (citing *Jones v. Barnes*, 463 U.S. 745, 751-53 (1983); *Provenzano v. Dugger*, 561 So. 2d 541, 549 (Fla. 1990)) (emphasis in original).

A review of the record demonstrates that neither deficiency nor prejudice has been shown in this case.

CLAIM I

Whether appellate counsel was ineffective in failing to raise the court's error in overruling a hearsay objection regarding testimony from three witnesses.

Petitioner argues that appellate counsel was ineffective for failing to raise a claim regarding the trial court overruling

hearsay objections for Ray Dukes, Justin Harper, and Detective Nelson. (Petition at 13).

"Generally, prior consistent statements are inadmissible to corroborate or bolster a witness's trial testimony" because they are usually hearsay, but a prior consistent statement may be admitted as nonhearsay if certain conditions are met. *Taylor v. State,* 855 So. 2d 1, 22-23 (Fla. 2003). The trial court found that Williams' prior consistent statements in this case were admissible under section 90.801(2)(b), Florida Statutes (2008). Section 90.801(2)(b), Florida Statutes, provides that prior statements that are "[c]onsistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of improper influence, motive, or recent fabrication" are not inadmissible hearsay if the declarant testifies at trial and is subject to cross-examination concerning the statement. § 90.801(2)(b), Fla. Stat. (2008).

On direct appeal, the court's decision is reviewed for an abuse of discretion. *See Chamberlain v. State*, 881 So. 2d 1087 (Fla. 2004) (holding prior consistent statement admissible where it was made after the codefendant was arrested but before plea negotiations with the State because defense counsel implied witness was testifying against the defendant to protect a favorable plea deal and sentence); *Rodriguez v. State,* 609 So. 2d 493, 500 (Fla. 1992) (holding prior consistent statements admissible

because "[d]efense counsel's references to plea agreements with the state during cross-examination [of the witness] were sufficient to create an inference of improper motive to fabricate"); *Jackson v. State,* 599 So. 2d 103, 107 (Fla. 1992) (holding that a prior consistent statement was admissible to rebut the inference that the codefendant had a motive to fabricate in light of agreement to testify against Jackson).

The State informed the trial court that it intended to call Mr. Harper and Mr. Dukes to rebut the inference of the recent fabrication on the part of Williams. (R. Vol. XIII at 704, 706).

> During Mr. Williams' cross-examination yesterday was elicited that he was threatened, um, that he was provided facts by the detectives, and that — and that he denied up until a point in time. And the inference obviously from that cross-examination, um, and frankly, that is going to be argued, I believe, with a number of witnesses, is that the police were feeding them facts and kept on interviewing them, regardless of their request, until they said what they wanted to hear.

(R. Vol. XIII at 704). The State anticipated Mr. Dukes, who was Williams' father, and Mr. Harper would testify that they each spoke with Williams in the days following the murders, where he would tell them he went to the house with a man named Terry to buy drugs and Terry turned it into a robbery and shot the victims. (R. Vol. XIII at 705). Mr. Harper was interviewed on July 18, 2008, approximately six to seven months before police interviewed Williams. (R. Vol. XIII at 705-06).

The trial court found:

> Because of the questions undertaken and under 801.2(b), the Court is going to overrule the hearsay objection, as the statements are being offered not for the truth of the matter asserted but rather to show prior consistent statement, which this Court understands based on the proffer, or based on the representation of the State that these were made within days of the episode, which would have been significantly prior to the interview at the Leon County Jail, and that those statements are being offered to show prior consistent statements to rebut, if not express, then certainly an implied fabrication based on improper influence or other motives of favorable treatment with the State.

(R. Vol. XIII at 710). The testimony of Mr. Harper and Mr. Dukes regarding the timeline of when they spoke with Petitioner about the murder was not entered for the truth of the matter, but as a prior consistent statement to rebut the inference that Williams had recently fabricated his testimony.

Additionally, Petitioner suffered no prejudice from the testimony of Detective Nelson regarding his interview with Williams. Williams testified to everything he saw the night of the murders. His statement to Detective Nelson was not a feature of Detective Nelson's testimony and Detective Nelson did not testify about his opinion to whether Williams' story was truthful. Any error is harmless, and any claim raised by appellate counsel would not have succeeded. Therefore, this claim should be denied.

CLAIM II

Whether appellate counsel was ineffective for failing to raise a claim regarding the trial court sustaining the State's relevancy objection while trial counsel cross-examined Anthony Nixon.

Petitioner argues that the trial court erred in sustaining the State's relevancy objection regarding Anthony Nixon's testimony that he did not trust the police and that they had a bad reputation. (Petition at 16).

"All witnesses who testify during a trial place their credibility in issue. Regardless of the subject matter of the witness' testimony, a party on cross-examination may inquire into matters that affect the truthfulness of the witness' testimony." *Morrison v. State*, 818 So. 2d 432, 446 (Fla. 2002) (quoting *Chandler v. State,* 702 So. 2d 186, 195 (Fla. 1997)); *see also Shere v. State,* 579 So. 2d 86, 90 (Fla. 1991) (recognizing the general rule that the "purpose of cross-examination is to elicit testimony favorable to the cross-examining party ... and to challenge the witness's credibility when appropriate"). This Court has also stated, "Our evidence code liberally permits the introduction of evidence to show the bias or motive of a witness." *Gibson v. State,* 661 So. 2d 288, 291 (Fla. 1995).

Mr. Nixon, during direct examination, testified that, "[t]he police don't have a bad rep — a good reputation, I don't — I don't trust the police." (R. Vol. XIII at 723). During cross-examination, Mr. Nixon confirmed that he did not trust the police.

> Mr. Hernandez: Okay. And you stated you didn't call the police because you didn't trust them; is that correct?
>
> Mr. Nixon: Exactly.

(R. Vol. XIII at 727). Mr. Nixon further agreed that his distrust of police was based on past experiences. (R. Vol. XIII at 728). Mr. Kuritz confronted Detective Nelson that Petitioner requested 43 times to go back to his cell and that he was done talking. (R. Vol. XVI at 1295). Mr. Kuritz also confronted Detective Nelson that Breon Williams requested 5 different times in the first 45 minutes of his interview that he wanted to go back to his cell. (R. Vol. XVI at 1296). The jury was able to hear that Mr. Nixon did not trust the police based on prior experiences. The jury was also able to hear how Detective Nelson did not end the interviews when Petitioner and Mr. Williams both requested to be taken back to their cells. Evidence was introduced to show any bias or motive of Mr. Nixon, who did not contact police initially because of his distrust of the police.

Any error in the trial court sustaining the relevancy objection is harmless as the jury was still able to consider facts that would affect Mr. Nixon's credibility. Appellate counsel was not ineffective for not raising a claim that would have been meritless in the direct appeal. As such, this claim should be denied.

CLAIM III

Whether appellate counsel was ineffective for failing to raise a claim regarding Edward Haney's statement that he did not believe Raylan Johnson's "confession" to the murders.

Petitioner argues that the trial court erred in allowing Mr. Haney to testify that he did not believe Raylan Johnson when Johnson claimed to have committed the murders. (Petitioner at 18-19). Trial counsel objected to this testimony based on speculation. However, this was not the proper objection and was not properly preserved for appeal. *See Steinhorst v. State,* 412 So. 2d 332, 338 (Fla. 1982) ("[I]n order for an argument to be cognizable on appeal, it must be the specific contention asserted as legal ground for the objection, exception, or motion below."). Because this was not properly preserved, this claim on direct appeal would have been subject to fundamental error review. *See Dufour v. State*, 905 So. 2d 42, 71 (Fla. 2005) ("Given the lack of preservation, Dufour could obtain relief only if he could demonstrate that the error rose to the level of fundamental error."); *Power v. State*, 886 So. 2d 952, 963 (Fla. 2004).

Petitioner argues that Mr. Haney's testimony that he did not believe Raylan Johnson's claim that he killed the victims at Ahmad Drive assessed the reliability of Raylan Johnson for the jury, which was improper because it is the sole province of the jury to assess that evidence. (Petition at 19). Specifically, Mr. Haney was asked if he believed Raylan Johnson's claim of committing the murders. (R. Vol. XV at 1022). Mr. Haney indicated that he did not believe Raylan Johnson's claim. (R. Vol. XV at 1022). The question

asked did not call for speculation. As such, this objection was not properly preserved.

The jury was able to hear that Raylan Johnson was unable to give details about the murder at all and Raylan Johnson later recanted his claims and stated that he had actually picked up Petitioner from the murder scene. (R. Vol. XV at 1022-23).

Had appellate counsel raised this claim, this claim would not have met the fundamental error standard. The evidence against Petitioner was overwhelming. The State presented the testimony of Breon Williams, an eyewitness who saw Smith shoot and kill Desmond Robinson. It was the testimony of Breon Williams that was central to the State's case, and much of the other witnesses presented by the State went to corroborate Williams' testimony. Those other witnesses also testified that Smith had confessed to them that he committed the murders. Petitioner's handprint was also recovered from the interior Plexiglas of the back door. Any error would be harmless, and this claim should be denied.

CLAIM IV

Whether appellate counsel was ineffective for not raising a claim regarding Jonathan Peterson's testimony that he had seen Petitioner with a 10mm gun on previous occasions and recognized the gun he saw the night of the murders as the same gun.

Petitioner argues appellate counsel was ineffective for failing to raise a claim regarding the issue of Mr. Peterson

testifying that he had seen Petitioner with a 10mm handgun prior to the murders. (Petition at 19-23). As Mr. Peterson's testimony established a sufficient link between the weapon and the crime, appellate counsel was not deficient for not raising this claim.

For testimony regarding the prior occasions where Petitioner was seen with the same handgun as the gun observed on the night of the murders, the State must establish a sufficient link between the weapon and the crime. *Amoros v. State*, 531 So. 2d 1256, 1260 (Fla. 1988); *Hunter v. State*, 660 So. 2d 244, 251 (Fla. 1995) (holding that evidence that the defendant possessed the gun shortly after the murder and pointed it at a colleague was relevant and admissible). In *Amoros*, this Court held "that the trial court did not err in admitting facts that the defendant was seen in possession of a gun on a prior occasion and that the bullet fired from that gun showed that the same weapon was used to kill the victim." *Amoros*, 531 So. 2d at 1260.

In this case, there was sufficient evidence to link the handgun to this case. Mr. Peterson testified that Petitioner had a weapon on him when he got into the car and Mr. Peterson was able to get a good look at the gun when Petitioner pulled the gun from his waistband. (R. Vol. XIV at 897). Mr. Peterson also testified to seeing Petitioner and Raylan Johnson bury the gun in the backyard. (R. Vol. XIV at 900-01). A few days after the murder, Mr. Peterson saw Raylan Johnson and Petitioner sell the gun to an

unknown individual. (R. Vol. XIV at 902). Mr. Peterson testified that the 10mm handgun he had previously seen on Petitioner's person was the "same gun [he] saw in the car" the night Mr. Peterson, Ulysses Johnson, and Raylan Johnson picked Petitioner up. (R. Vol. XIV at 903). It was also the same gun he saw sold to another person a few days after the murder. (R. Vol. XIV at 903). On the same day the gun was sold, Petitioner admitted to shooting the victims. (R. Vol. XIV at 902).

Mr. Peterson was able to recognize the handgun seen on previous occasions as being the same gun Petitioner pulled from his waistband on the night they picked up Petitioner immediately after the murders. The actions of burying the gun in the backyard and then selling the gun a few days after clearly establish the gun as being the one used in the murders. As such, any claim raised by appellate counsel would have been meritless. *See Rutherford*, 774 So. 2d at 644 (finding no ineffective assistance of appellate counsel for failing to raise meritless claims); *Williamson*, 651 So. 2d at 86. Therefore, appellate counsel did not render ineffective assistance of appellate counsel and this claim should be denied.

CLAIM V

Whether appellate counsel was ineffective for not raising the issue of prosecutorial misconduct where the State elicited testimony that witnesses had a generalized fear of Petitioner.

Petitioner argues that appellate counsel was ineffective for failing to raise a claim regarding the testimony by Ulysses Johnson, Breon Williams, and Jonathan Peterson that they feared retaliation for coming forward. (Petition at 24-27). As their testimony was an issue of credibility, appellate counsel was not ineffective for failing to bring a claim challenging this testimony.

Evidence that the three witnesses were fearful of retaliation if they came forward with incriminating information is relevant to their credibility. Credibility is a material issue for any witness that testifies. *Morrison*, 818 So. 2d at 446 ("All witnesses who testify during a trial place their credibility at issue.") (quoting *Chandler*, 702 So. 2d at 195). The witnesses' fear of retaliation is probative of their credibility because it provides a plausible explanation as to why they did not voluntarily come forward and why they initially denied having knowledge of the crime. *See Wright v. State*, 19 So. 3d 277, 291 (Fla. 2009) ("All evidence tending to prove or disprove a material fact is admissible. . . ."). The witnesses each had prior inconsistent statements denying having any knowledge of the crime. As such, had the jury not heard of the witnesses' fear of retaliation, the jury likely would have questioned the veracity of the witnesses' trial testimony. The fear of retaliation explains the witnesses' reticence and is admissible for credibility purposes.

The evidence was more probative than prejudicial and was admissible to prove a material issue—credibility. As such, appellate counsel was not ineffective for raising a claim challenging admissible evidence and this claim must be denied.

CLAIM VI

Whether appellate counsel rendered ineffective assistance of counsel for failing to raise a fundamental error claim for the admission of evidence of uncharged crimes.

Petitioner asserts that his appellate counsel was ineffective for failing to raise a fundamental error claim regarding the admission of evidence of uncharged crimes, specifically that Petitioner harbored Edward Haney, who was a fugitive. (Petition at 27-28).

This Court has recognized:

> [i]t is settled law in this State that evidence of any facts relevant to a material fact in issue, except where the sole relevancy is character or propensity of the accused is admissible unless precluded by some specific exception or rule of exclusion. *Williams v. State*, 110 So. 2d 654 (Fla. 1959).

Alford v. State, 307 So. 2d 433, 436 (Fla. 1975). Under Florida Statute § 90.404(2)(a), "[s]imilar fact evidence of other crimes, wrongs, or acts is admissible when relevant to prove a material fact in issue, . . . but it is inadmissible when the evidence is relevant solely to prove bad character or propensity." "[C]ollateral-crime evidence, such as bad acts not included in the charged offenses, is admissible when relevant to prove a *material*

fact in issue, but is inadmissible when the evidence is relevant *solely* to prove bad character or propensity." *Wright*, 19 So. 3d at 291-92 (emphasis in original). Counsel cannot be ineffective for objecting to the introduction of admissible evidence. *Schoenwetter v. State*, 46 So. 3d 535, 546-48 (Fla. 2010) (holding no ineffective assistance of counsel where counsel did not object to the introduction of admissible evidence).

In *Doorbal v. State*, 837 So. 2d 940, 954 (Fla. 2003), the defendant claimed the State elicited improper character evidence from various witnesses who claimed to have heard Doorbal threaten to kill and cut people up regardless of who they were should he become angry. *Id*. In denying Doorbal's claim, this Court found that the testimony was not used to show Doorbal's propensity to commit a crime but was "relevant to explain why [the witness] did not report the kidnap[p]ing . . . to the police and to establish [the witness's] fear of Doorbal." *Id*. at 955; *see Wyatt v. State*, 641 So. 2d 1336, 1339-40 (Fla. 1994) (finding that a witness's references to the "convict code" during guilt phase testimony "was not made to infer bad character on the part of Wyatt, but was made to show the unpopularity of convicts testifying against other convicts and the risks involved from the prison population in general"); *see also Straight v. State*, 397 So. 2d 903, 908 (Fla. 1981) (stating "[w]hen a suspected person in any manner attempts to escape or evade a threatened prosecution by flight, concealment,

resistance to lawful arrest, or other indications after the fact of a desire to evade prosecution, such fact is admissible, being relevant to the consciousness of guilt which may be inferred from such circumstance").

Here, Mr. Haney's credibility was at issue. Evidence of Mr. Haney staying with Petitioner while Mr. Haney was evading police gave context as to why Petitioner confessed to Mr. Haney so long after the murders had occurred and lends credence to Mr. Haney's testimony. As this evidence was proper and any claim challenging it on direct appeal would have been meritless, appellate counsel was not ineffective for failing to raise this claim.

CLAIM VII

Whether appellate counsel provided ineffective assistance by failing to raise a prosecutorial misconduct claim during the State's closing arguments.

Petitioner argues that the State attempted to paint Petitioner as a criminal and reinforced the idea that Petitioner was a criminal by association. (Petition at 28-32). As the State's comments were proper argument, appellate counsel was not ineffective for raising a meritless claim and this claim should be denied.

"Attorneys are permitted wide latitude in closing arguments. . . ." *Merck v. State*, 975 So. 2d 1054, 1061 (Fla. 2007) (citing *Gore v. State*, 719 So. 2d 1197, 1200 (Fla. 1998)).

> Closing argument is an opportunity for counsel to review the evidence and to explicate those inferences which may reasonably be drawn from the evidence. Counsel must contemporaneously object to improper comments to preserve a claim for appellate review. Unobjected-to comments are grounds for reversal only if they rise to the level of fundamental error. The Court considers the cumulative effect of objected-to and unobjected-to comments when reviewing whether a defendant received a fair trial.

Id.

The State Attorney's comments during closing arguments were proper comments on the evidence presented at trial and were within the bounds of closing argument. Smith fails to cite to any legal authority to support his claim of prosecutorial misconduct. Attorneys are permitted wide latitude in closing argument. *Breedlove v. State*, 413 So. 2d 1 (Fla. 1982). Prosecutorial misconduct does not exist unless it is "reasonably evident that the remarks might have influenced the jury to reach a more severe verdict of guilt than it would have otherwise done." *Darden v. State*, 329 So. 2d 287, 289 (Fla. 1976) (holding that it was not improper for the prosecutor to say that the defense theory was based on defense counsel's "vivid" imagination, or bolster a State witness's credibility where defense counsel made closing arguments that were not based on the evidence and directly attacked the State witness's credibility); *Williamson v. State*, 994 So. 2d 1000, 1013 (Fla. 2008) (holding that prosecutor's suggestion that a State witness's testimony was credible was not improper bolstering when

made in response to defense's closing argument suggesting that the witness was not believable). The prosecutorial comments Smith complains of in this claim were made during closing argument and clearly do not meet the standard of prosecutorial misconduct. Additionally, the record is devoid of any examples of improper prosecutorial argument or comment during closing argument or rebuttal. The State argued what the facts meant and did not bolster the testimony of the witnesses, nor did the State shift the burden of proof to the defense. (R. Vol. XVII at 1372-99, 1444-63).

The State's reference to "picking" the witnesses was proper because it explained the relationship of the witnesses to Petitioner. The reference provided an explanation and context for the witnesses' criminal histories and, as such, the argument was proper. *See Miller v. State*, 926 So. 2d 1243, 1254-56 (Fla. 2006) ("[A]n attorney is allowed to argue reasonable inferences from the evidence and to argue credibility of witnesses or any other relevant issue as long as the argument is based on the evidence." (citing *Craig v. State*, 510 So. 2d 857, 865 (Fla. 1987))).

Furthermore, there was overwhelming evidence of Petitioner's guilt and the "picking" reference had no likelihood of changing the outcome of the trial in Petitioner's favor. The State presented the testimony of Breon Williams, an eyewitness who saw Smith shoot and kill Desmond Robinson. It was the testimony of Breon Williams that was central to the State's case, and much of the other

witnesses presented by the State went to corroborate Williams' testimony. Those other witnesses also testified that Smith had confessed to them that he committed the murders. Petitioner's handprint was also recovered from the interior Plexiglas of the back door.

As such, appellate counsel was not ineffective, and this claim should be denied.

CLAIM VIII

Whether appellate counsel was ineffective for raising a fundamental error of the State's introduction of detective's opinions as to Petitioner's lack of remorse.

Petitioner alleges that appellate counsel was ineffective for failing to raise a claim that there was fundamental error for the introduction of the recorded interview between Detectives Nelson and Chizik and Petitioner. (Petition at 33-35). As the statements were properly entered because they provoked a relevant response from the defendant, appellate counsel was not ineffective for failing to raise a meritless claim.

This Court has recognized that a jury may hear an interrogating detective's remarks about a crime when they provoke a relevant response from the defendant. *McMillian v. State*, 214 So. 3d 1274 (Fla. 2017) (holding a jury may hear an interrogating detective's statements about a crime when they provoke a relevant response from the defendant); *Jackson v. State*, 18 So. 3d 1016, 1032 (Fla. 2009); *McWatters v. State*, 36 So. 3d 613, 638 (Fla.

2010) (holding that when the interrogating detective's statements are placed in "their proper context," the statements could be perceived as "techniques" used by law enforcement to secure confessions) (quoting *Worden v. State*, 603 So. 2d 581, 583 (Fla. 2d DCA 1992)).

The detectives' comments on the interrogation video were made for the purpose of eliciting a response from Smith, which he gave. (R. Vol. XV at 1183, 1188, 1192). Such comments are not unfairly prejudicial under *McMillian*, 214 So. 3d at 1286-87, or *Jackson*, 18 So. 3d at 1032. Petitioner continually denied being the shooter and denied even being at the scene of the murder. (R. Vol. XV at 1189, 1192).

As the complained-of remarks were from an interrogation that elicited a relevant response from Petitioner, this claim would have been meritless on direct appeal. Appellate counsel is not deficient for failing to raise a meritless claim. As such, this claim should be denied.

CLAIM IX

Cumulative error claim.

Smith asserts he is entitled to relief under an analysis of cumulative error because his trial was rife with minor errors which

deprived him of a fair trial.[1] (Petition at 35-37). However, the cumulative error analysis of postconviction claims is problematic.

Although Smith presents this claim as an independent basis for relief, a cumulative error claim cannot warrant relief unless the individual claims presented constitute a basis for relief. *Dufour*, 905 So. 2d at 75 ("[N]either the individual claims presented in Dufour's habeas petition nor those advanced in his motion for postconviction relief constitute a basis for relief."). *See Merck v. State*, 124 So. 3d 785, 802 (Fla. 2013) (finding habeas petitioner not entitled to cumulative error relief because the alleged individual errors were without merit); *Porter v. Crosby*, 840 So. 2d 981 (Fla. 2003) (concluding that habeas corpus petitioner's cumulative error claim was properly denied where individual allegations of error were found to be without merit). "[W]here individual claims of error alleged are either procedurally barred or without merit, the claim of cumulative error must fail." *Griffin v. State*, 866 So. 2d 1, 22 (Fla. 2003).

Each of the complained-of errors raised in the habeas petition are meritless. Additionally, the State did not engage in improper

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[1] Petitioner appears to argue that the State painted Petitioner as "a shell of a person that don't give a crap about society," but this statement was made by Detective Nelson when he was interviewing Petitioner. (Petition at 36). As stated under Claim VIII, this was a proper technique by detectives to elicit a response from Petitioner. Not once did the State argue that Petitioner was a "shell of a person."

conduct that denied Petitioner a fair trial. Accordingly, Smith is not entitled to relief on this claim.

CONCLUSION

Respondent respectfully requests that this Honorable Court DENY the instant petition for writ of habeas corpus.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on this 10th day of July, 2019, I electronically filed the foregoing with the Clerk of the Court by using the Florida Courts E-Portal Filing System which will send a notice of electronic filing to the following: Karen Moore, at Karen.Moore@ccrc-north.org, and Elizabeth Salerno, at Elizabeth.salerno@ccrc-north.org, attorneys for Appellant.

CERTIFICATE OF FONT COMPLIANCE

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

/s/ Lisa A. Hopkins
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