

IN THE SUPREME COURT OF FLORIDA

KONSTANTINOS FOTOPOULOS,
Petitioner,

v.

CASE NO. SC01-2824

MICHAEL W. MOORE, Secretary,
Florida Department of Corrections,
Respondent.

_____ /

ON APPEAL FROM THE SEVENTH JUDICIAL CIRCUIT
IN AND FOR VOLUSIA COUNTY, FLORIDA

RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

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RESPONSE TO PRELIMINARY STATEMENT

To the extent that the "Preliminary Statement" set out in Fotopoulos' brief asserts that any error occurred that supplies a basis for relief, that assertion is expressly denied.

RESPONSE TO REQUEST FOR ORAL ARGUMENT

Respondent defers to the Court with respect to the necessity of oral argument in this case.

RESPONSE TO INTRODUCTION

The "Introduction" set out on page 1 of Fotopoulos' brief is argumentative and is denied in all respects. There is no basis for relief from Fotopoulos' convictions and sentences of death.

RESPONSE TO PROCEDURAL HISTORY

The "Procedural History" set out on pages 2-4 of the petition is substantially correct, if somewhat abbreviated. The Respondent relies on the following procedural and factual history.

In affirming Fotopoulos' convictions and sentences of death on direct appeal, this Court summarized the facts in the following way:

During the summer of 1989, Fotopoulos began an affair with Deidre Hunt, a bartender at Fotopoulos' bar. Hunt testified that one day in mid-to-late October 1989 Fotopoulos, Hunt, and Kevin Ramsey drove out to an isolated rifle range. According to her testimony, after they arrived Fotopoulos told Hunt she was going

to have to shoot Ramsey or she would die. Ramsey, who had been led to believe he was being initiated into a club, was tied to a tree. While Fotopoulos videotaped, Hunt shot Ramsey three times in the chest and once in the head with a .22. Fotopoulos then stopped taping and shot Ramsey once in the head with an AK-47. According to testimony, Ramsey was chosen as the victim because he was blackmailing Fotopoulos concerning Fotopoulos' alleged counterfeiting activities. The videotape of Hunt shooting Ramsey was recovered from Fotopoulos' residence pursuant to a search warrant. The voice on the tape was identified as that of Fotopoulos.

According to Hunt, Fotopoulos later used the videotape as leverage to insure that she would murder his wife, Lisa. Hunt was warned that if she did not cooperate the videotape of the Ramsey murder would be turned over to police. Hunt testified that Fotopoulos wanted Lisa dead so he could recover \$700,000 in insurance proceeds. Fotopoulos later instructed Hunt that rather than kill Lisa herself she should hire someone to do the job. Prior to enlisting Bryan Chase to kill Lisa, Hunt offered three different individuals \$10,000 to do the job. For various reasons, either the plans never materialized or the attempts to murder Lisa were unsuccessful. Chase then agreed to do the job for \$5,000. He too botched several attempts to murder Lisa. However, on November 4, 1989, Chase entered the Fotopoulos home and shot Lisa once in the head. The shot was not fatal. After Chase shot Lisa, Fotopoulos shot Chase repeatedly in an attempt to make it appear that Chase was killed during a burglary.

Fotopoulos and Hunt eventually were charged with two counts of first-degree murder, two counts of attempted first-degree murder, two counts of solicitation to commit first-degree murder, one count of conspiracy to commit first-degree murder, and one count of burglary of a dwelling while armed. Hunt pled guilty to all charges. She was given two death sentences prior to testifying at Fotopoulos' trial. *See Hunt v. State*, 1992 WL 289670, No. 76,692 (Fla. Oct. 15, 1992).

Fotopoulos testified in his own defense. He acknowledged his relationship with Hunt, but

maintained that he had nothing to do with Ramsey's murder. He stated that he had loaned Hunt his business partner's video camera and she later gave him a tape as a surprise but he never looked at it. He admitted shooting Chase, but denied that he knew Chase was coming to shoot Lisa.

A jury found Fotopoulos guilty of all charges and recommended that he be sentenced to death for each murder. The trial court followed the jury's recommendation. In connection with the Ramsey murder, the court found that 1) Fotopoulos was previously convicted of another violent felony; 2) the murder was committed for the purpose of avoiding or preventing a lawful arrest; and 3) the murder was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification. As to the Chase murder, the court found the three aggravating factors found in connection with the Ramsey murder plus 4) the murder was committed while Fotopoulos was engaged or was an accomplice in the commission or an attempt to commit a burglary; and 5) the murder was committed for pecuniary gain. Although no statutory mitigating factors were found, the following nonstatutory mitigating factors were found as to both murders: 1) Fotopoulos was a good son; 2) he came from a good family; 3) he was hard-working; 4) he had good manners and he had a good sense of humor; and 5) he completed his education through the master's level. Fotopoulos was sentenced to concurrent life sentences in connection with the remaining convictions.

Fotopoulos v. State, 608 So. 2d 784, 786-87 (Fla. 1992). The United States Supreme Court denied Fotopoulos' petition for writ of certiorari on May 17, 1993. *Fotopoulos v. Florida*, 508 U.S. 924 (1993).

Fotopoulos next sought collateral relief from his convictions and sentences of death by filing a *Florida Rule of Criminal Procedure* 3.850 motion. The collateral proceeding trial

court denied relief, and Fotopoulos appealed.

After oral argument in the appeal from the denial of Rule 3.850 relief, this Court denied relief on certain claims, and remanded other claims for an evidentiary hearing. This Court's August 26, 1999, order reads, in pertinent part, as follows:

Upon consideration of the oral argument presented to this Court, we conclude that appellant's brief set forth positions and arguments that had not been properly presented to the trial court in either the original or amended rule 3.850 motion and, further, that appellant's oral argument attempted to assert positions and arguments that were not properly part of the appellate briefs filed with this Court. We criticize and condemn this practice, but in an attempt to properly administer justice, we hereby dismiss the above case without prejudice for the purpose of allowing appellant to amend his underlying motion brought pursuant to *Florida Rule of Criminal Procedure* 3.850. However, as a matter of law, we find that claims I, IV, V, IX, XII, and XV are procedurally barred, and claim III is facially insufficient to state a claim for ineffective assistance of counsel. Therefore, appellant is precluded from re-arguing those claims in his amended 3.850 motion.

An evidentiary hearing was subsequently conducted on the amended Rule 3.850 motion, and all relief was denied. Notice of appeal was given, and oral argument was conducted on November 8, 2001. No opinion has yet been issued in that proceeding.

RESPONSE TO JURISDICTIONAL STATEMENT

The Respondent does not contest the general proposition that this Court has jurisdiction to entertain petitions for habeas corpus relief. However, as this Court has long held:

It is important to note that habeas corpus petitions are not to be used for additional appeals on questions which could have been, should have been, or were raised on appeal or in a rule 3.850 motion, or on matters that were not objected to at trial. *Suarez v. Dugger*, 527 So. 2d 190 (Fla. 1988); *White v. Dugger*, 511 So. 2d 554 (Fla. 1987); *Blanco v. Wainwright*, 507 So. 2d 1377 (Fla. 1987).

Parker v. Dugger, 550 So. 2d 459, 460 (Fla. 1989).¹ As this Court

has emphasized:

Although claims of ineffective assistance by appellate counsel are cognizable in habeas corpus petitions, "using a different argument to relitigate an issue in postconviction proceedings is not appropriate." *Porter v. Dugger*, 559 So. 2d 201, 203 (Fla. 1990). Furthermore, "an allegation of ineffective counsel will not be permitted to serve as a means of circumventing the rule that habeas corpus proceedings do not provide a second or substitute appeal." *Blanco v. Wainwright*, 507 So. 2d 1377, 1384 (Fla. 1987).

Medina v. Dugger, 586 So. 2d 317, 318 (Fla. 1991). To the extent that the claims contained in the habeas petition are the same as the claims contained in Fotopoulos' Rule 3.850 motion, those claims are procedurally barred:

Mann's current argument is based on many of the closing argument statements brought to our attention in the direct appeal and on appeal of the 3.850 denial. Further, many of the passages cited in this argument are the same passages cited by him in the

¹Of course, "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." *Rutherford v. Moore*, 774 So. 2d 637, 645 (Fla. 2000).

previous issue in this habeas. As we find Mann's current claim to be a variant to those arguments previously made, we find this issue to be procedurally barred. See *Thompson v. State*, 759 So. 2d 650, 657 n. 6 (Fla. 2000) (habeas is not proper to argue a variant to an issue already decided).

Mann v. Moore, 794 So. 2d 595, 602 (Fla. 2001). As this Court has held, "claims of ineffective assistance of appellate counsel may not be used to camouflage issues that should have been raised on direct appeal or in a postconviction motion. See, e.g., *Thompson*, 759 So. 2d at 657 n. 6; *Hardwick v. Dugger*, 648 So. 2d 100, 106 (Fla. 1994); *Breedlove v. Singletary*, 595 So. 2d 8, 10 (Fla. 1992)." *Rutherford v. Moore*, 774 So. 2d 637, 643 (Fla. 2000). To the extent that the claims contained in the petition fall within the class of claims that are not properly brought in a habeas petition, this Court should deny relief on procedural bar grounds, and address the merits of such claims only in the alternative.

RESPONSE TO GROUNDS FOR RELIEF

For the reasons set out below, none of the claims contained in Fotopoulos' petition provide a basis for relief of any sort.

I. THE INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL CLAIMS

The Legal Standard

Fotopoulos' petition is based upon his various specifications of ineffective assistance of appellate counsel.

In order to prevail on these claims, Fotopoulos must demonstrate that the performance of his appellate counsel was deficient, **and** that he was prejudiced as a result of such deficient performance. See, *Strickland v. Washington*, 466 U.S. 668 (1984); *Johnson v. Dugger*, 523 So.2d 161 (Fla. 1988). The "deficiency" must be of such a magnitude that, but for that deficiency, the result of the proceeding would have been different. *Id.* In reviewing a claim of ineffective assistance of counsel, this Court must determine:

whether the alleged omissions are of such magnitude as to constitute a serious or substantial deficiency falling measurably outside the range of professionally acceptable performance and, second, whether the deficiency in performance compromised the appellate process to such a degree as to undermine confidence in the correctness of the result.

Freeman v. State, 761 So. 2d 1055, 1069 (Fla. 2000).

The law has long been settled that appellate counsel is not required to raise every colorable claim in order to provide "effective" assistance on appeal. Instead, as the United States Supreme Court has emphasized:

Experienced advocates since time beyond memory have emphasized the importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues. Justice Jackson, after observing appellate advocates for many years, stated:

"One of the first tests of a discriminating advocate is to select the question, or

questions, that he will present orally. Legal contentions, like the currency, depreciate through over-issue. The mind of an appellate judge is habitually receptive to the suggestion that a lower court committed an error. But receptiveness declines as the number of assigned errors increases. Multiplicity hints at lack of confidence in any one.... [E]xperience on the bench convinces me that multiplying assignments of error will dilute and weaken a good case and will not save a bad one." Jackson, *Advocacy Before the Supreme Court*, 25 Temple L.Q. 115, 119 (1951).

Justice Jackson's observation echoes the advice of countless advocates before him and since. An authoritative work on appellate practice observes:

"Most cases present only one, two, or three significant questions.... Usually, ... if you cannot win on a few major points, the others are not likely to help, and to attempt to deal with a great many in the limited number of pages allowed for briefs will mean that none may receive adequate attention. The effect of adding weak arguments will be to dilute the force of the stronger ones." R. Stern, *Appellate Practice in the United States* 266 (1981).

There can hardly be any question about the importance of having the appellate advocate examine the record with a view to selecting the most promising issues for review. This has assumed a greater importance in an era when oral argument is strictly limited in most courts -- often to as little as 15 minutes -- and when page limits on briefs are widely imposed. See, e.g., *Fed. Rules App. Proc.* 28(g); McKinney's 1982 *New York Rules of Court* §§ 670.17(g)(2), 670.22. Even in a court that imposes no time or page limits, however, the new per se rule laid down by the Court of Appeals is contrary to all experience and logic. A brief that raises every colorable issue runs the risk of burying good arguments -- those that, in the words of the

great advocate John W. Davis, "go for the jugular," Davis, *The Argument of an Appeal*, 26 A.B.A.J. 895, 897 (1940) -- in a verbal mound made up of strong and weak contentions. See generally, e.g., Godbold, *Twenty Pages and Twenty Minutes -- Effective Advocacy on Appeal*, 30 SW.L.J. 801 (1976).

Jones v. Barnes, 463 U.S. 745, 751-53 (1983). [footnotes omitted]; *Smith v. Murray*, 477 U.S. 527, 536 (1986) ("This process of 'winnowing out weaker arguments on appeal and focusing on' those more likely to prevail, far from being evidence of incompetence, is the hallmark of effective appellate advocacy."); *Provenzano v. Dugger*, 561 So. 2d 541, 549 (Fla. 1990) (" . . . counsel need not raise every nonfrivolous issue revealed by the record."); *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.**") [emphasis added].

In the context of a claim of ineffective assistance of appellate counsel, Eleventh Circuit Court of Appeals Judge Edmonson concurred in the denial of relief, stating:

. . . I cannot agree that the quality of counsel's performance can be judged much by the length of briefs or the number of issues raised. Especially in the death penalty context, too many briefs are too long; and too many lawyers raise too many issues. **Effective lawyering involves the ability to discern strong**

arguments from weak ones and the courage to eliminate the unnecessary so that the necessary may be seen most clearly. The Supreme Court -- as today's court recognizes -- has never required counsel to raise every nonfrivolous argument to be effective. See *Smith v. Murray*, 477 U.S. 527, 536, 106 S.Ct. 2661, 2667, 91 L.Ed.2d 434 (1986). That the custom in death penalty cases is for lawyers to file long briefs with lots of issues means little to me. This kind of "custom" does not define the standard of objective reasonableness. See *Gleason v. Title Guar. Co.*, 300 F.2d 813 (5th Cir. 1962). While compliance with custom may generally shield a lawyer from a valid claim of ineffectiveness, noncompliance should not necessarily mean he is ineffective. Not all customs are good ones, and customs can obstruct the creation of better practices.

Heath v. Jones, 941 F.2d 1126, 1141 (11th Cir. 1991) [emphasis added].

Appellate counsel is not "ineffective" for "failing" to raise issues which are not properly preserved for review. See, *Freeman, supra*; *Suarez v. Dugger*, 527 So. 2d 190, 193 (Fla. 1988). Likewise, "failure" to brief a meritless issue, or one having little merit, is not deficient performance. *Id.* Further, the "failure" to raise weak issues, or the "failure" to raise an issue that, at most, is harmless error, does not establish a basis for relief on ineffective assistance of counsel grounds. *Atkins v. Dugger*, 541 So. 2d 1165, 1167 (Fla. 1989); *Duest v. Dugger*, 555 So. 2d 849 (Fla. 1990). Of course, counsel is not "ineffective" when he "chose not to argue the issue as a matter of strategy." *Freeman, supra.*

Appellate counsel is not ineffective for failing to convince this Court of the merit of the claims raised on appeal. *Freeman, supra; Alford v. Wainwright*, 725 F.2d 1282, 1289 (11th Cir.), *modified*, 731 F.2d 1486, *cert. denied*, 469 U.S. 956 (1984) (“[trial counsel] cannot be faulted simply because he did not succeed.”). How present counsel would have argued the issues had he been appellate counsel is not the standard -- petitioner must allege “a specific, serious omission or overt act upon which the claim of ineffective assistance of counsel can be based.” *Card v. Dugger*, 911 F.2d 1496, 1507 (11th Cir. 1990); *Freeman, supra*.

The Individual Claims

On pages 5-31 of the petition, Fotopoulos asserts that appellate counsel was ineffective for not raising a claimed violation of *Giglio v. United States*, for not raising an ineffective assistance of counsel claim directed at trial counsel, and for not raising an issue concerning the improper introduction of evidence of co-defendant Hunt’s “state of mind.” None of those claims establish ineffectiveness on the part of appellate counsel, and there is no basis for relief.

With respect to the *Giglio* claim, the true facts are that this claim was raised in Fotopoulos’ Rule 3.850 motion, and that the facts upon which the present claim is based were argued in

the *Initial Brief* on appeal from the denial of Rule 3.850 relief. See, Appendix A, *Initial Brief* at 36-45. Under settled law, Fotopoulos cannot present this claim in this habeas corpus petition by doing no more than labeling it one of ineffective assistance of counsel. This claim is before this Court already (though under a slightly different theory), and Fotopoulos cannot avoid the settled rule that habeas corpus is inappropriate for claims that were raised in a postconviction motion. The facts of what Fotopoulos now calls a *Giglio* claim are before this Court in the Rule 3.850 proceeding -- Fotopoulos does not get a second opportunity to relitigate the same claim under a different theory.

Moreover, the *Giglio* claim contained in the habeas petition could have been but was not raised at the time of Fotopoulos' capital trial. Florida law is long settled that appellate counsel is not ineffective for "failing" to raise an issue that was not preserved by objection at trial. That is the case with respect to this claim, and appellate counsel cannot be "ineffective" for not raising this unpreserved claim.

Finally, the evidence supported the arguments of counsel, and, because that is so, there is simply no basis for error to be predicated upon such arguments. There is no presentation of false or misleading evidence, and there is, therefore, no

factual basis for the claim contained in Fotopoulos' petition. When the claim was presented to the collateral proceeding trial court, where it was the subject of extensive testimony, that court concluded, after hearing all of the evidence, that Fotopoulos was the "prime motivator, leader, and dominate member of this group of co-conspirators." (R971). The court also concluded, based upon the evidence, that there "was **no evidence** of Ms. Hunt's domination of the defendant while there was arguable evidence to the contrary." (R1066). [emphasis added]. That factual finding, which the collateral proceeding trial court made after hearing all of the witnesses, is supported by the evidence. The factbound nature of this claim, and the fact that it is already before this Court on appeal from the denial of Rule 3.850 relief, demonstrate the impropriety of habeas review of this claim. If this claim were before the Court on the merits, there would be no basis for a finding of ineffective assistance on the part of appellate counsel. The second specification of appellate ineffective assistance of counsel is Fotopoulos' claim that appellate counsel should have appealed the "obvious, on the record ineffective assistance of trial counsel." This claim is set out on pages 36-45 of Fotopoulos' *Initial Brief* on appeal from the denial of Rule 3.850 relief (Appendix A, attached), and cannot be relitigated herein under

the guise of a claim of appellate ineffective assistance of counsel. This claim is improperly contained in the habeas petition, and should be dismissed on that basis alone.

Moreover, Fotopoulos provides this Court with no authority for his position that a claim of trial level ineffective assistance of counsel can be raised on direct appeal from a conviction and death sentence, and the precedents of this Court are squarely to the contrary. *Rivera v. State*, 717 So. 2d 477, 484 (Fla. 1998); *Wuornos v. State*, 676 So. 2d 972, 974 (Fla. 1996) (concluding that claim of error on direct appeal constituted an ineffective assistance claim cognizable "only by collateral challenge"); *Kelley v. State*, 486 So. 2d 578, 585 (Fla. 1986) (stating that ineffective assistance claims are generally not reviewable on direct appeal and are more properly brought in postconviction motions). Appellate counsel cannot have been ineffective for "failing" to raise a claim that was not cognizable on direct appeal, and, in any event, is not a basis for relief.

The third specification of ineffective assistance of appellate counsel is set out on pages 26-30 of the petition, where Fotopoulos claims that counsel should have appealed the "improper evidence of Hunt's state of mind." Of course, appellate counsel is not required to raise every possible issue

in order to render "effective assistance" on appeal. *Floyd v. State*, 27 Fla. L. Weekly S75, 77 (Fla. Jan. 17, 2002); See *Atkins v. Dugger*, 541 So. 2d 1165, 1167 (Fla. 1989). And, moreover, counsel must select the issues to press on appeal, and this process of winnowing out the weak issues is the hallmark of effective appellate advocacy, not evidence of some deficiency. *Jones v. Barnes*, 463 U.S. 745, 750 (1983); *Provenzano v. State*, 561 So. 2d 541, 549 (Fla. 1990).

In this claim, Fotopoulos asserts that appellate counsel should have alleged that it was error for the trial court to allow Hunt to testify about various incidents of threats and torture that Fotopoulos subjected her to. As the State argued at trial, **the relevance of the abuse directed toward Hunt was that it demonstrated Fotopoulos' dominance over her.** *Petition*, at 28. In light of Fotopoulos' position, in opening statement, that **Hunt** was the driving force behind the two murders at issue, the testimony which tended to demonstrate Fotopoulos' dominance over Hunt was clearly relevant, as the trial Court found. If appellate counsel had raised this issue, it would not have been a basis for reversal because the trial court's ruling was not an abuse of discretion. *Duest v. Dugger*, 555 So. 2d 849 (Fla. 1990); *King v. State*, 555 So. 2d 355 (Fla. 1990). Because that is so, there can be no "ineffectiveness" for not raising a non-

meritorious claim. In any event, even if counsel should have raised this claim on direct appeal, the most that would have been shown was harmless error because, in light of the strength of the State's case, this testimony did not influence the outcome of Fotopoulos' trial. *State v. DiGuilio*, 491 So. 2d 1129 (Fla. 1986). Appellate counsel was not ineffective in failing to raise this meritless claim.

II. THE PROPORTIONALITY CLAIM

On pages 31-37 of the petition, Fotopoulos argues that his death sentence is disproportionate to the life sentence imposed on co-defendant Hunt after her original death sentences were set aside by this Court. This claim is pending before this Court in Fotopoulos' appeal from the denial of Rule 3.850 relief, and, because that is so, it is not properly pleaded as grounds for relief in this habeas petition.² *Parker, supra*. This claim is procedurally barred.

To the extent that further discussion of this claim is necessary and appropriate, and the Respondent does not concede that it is, the collateral proceeding trial court made the

²In his *Initial Brief* from the denial of his Rule 3.850 motion, Fotopoulos' proportionality claim took the same form as the one contained in the petition for writ of habeas corpus. Obviously, he cannot litigate the same claim, on the same grounds, in two proceedings. This claim was properly raised in the Rule 3.850 proceeding, and is not available to Fotopoulos here.

following findings of fact with respect to the relative culpability of Fotopoulos and Hunt:

This Court also rejects the defendant's assertion that Deidre Hunt's 1998 re-sentencing to life imprisonment constitutes "newly discovered evidence" justifying a re-sentencing proceeding for the defendant. **As previously noted the evidence originally presented in this cause, and uncontroverted by any new evidence adduced by the defendant, demonstrates that Konstantinos Fotopoulos was the prime movant and dominant actor in the killings at issue. He carried the motive that caused the death of Mark Kevin Ramsey and Bryan Chase and the near death of his wife Lisa.** Under the circumstances in this case the defendant presents no basis for this court to determine under a "proportionality" analysis that a resentencing is warranted. **The defendant was the most culpable and the most deserving of the death penalty.** See, *Jennings v. State*, 718 So. 2d 144 (Fla. 1998). The overwhelming evidence of guilt adduced against the defendant for the crimes at issue and the great weight of the numerous aggravating circumstances which exist against a minimum of mitigation does not warrant re-visiting Fotopoulos' death penalties.

Here, unlike the case of Ms. Hunt, the defendant did not come forward with evidence which assisted the state in the prosecution; rather, he held fast in his denial of any involvement against the overwhelming weight of the evidence. **There was no evidence of Ms. Hunt's domination of the defendant while there was arguable evidence to the contrary.** Furthermore, the defendant presents few if any mitigating circumstances compared to those asserted by his co-defendant in her separate sentencing proceeding. Recognizing that each sentencing proceeding is an individualized determination this court finds no basis for determining that the death penalties imposed on Mr. Fotopoulos were disproportional or otherwise provided any basis for relief.

(R1055-56) [emphasis added]. Even if this issue were properly

before the Court, there is no basis for relief because, contrary to Fotopoulos' assertion, he and Hunt are **not** "equally culpable." Because that is the case, and because Fotopoulos is the most culpable defendant, there is no "disproportionality" issue in the first place, and no basis for relief. *See, Hertz v. State*, 803 So. 2d 629, 652 (Fla. 2001); *Looney v. State*, 803 So. 2d 656, 681 (Fla. 2001); *Larzelere v. State*, 676 So. 2d 394, 406-7 (Fla. 1996). This claim is not a basis for relief.

IV. THE *APPRENDI* CLAIM³

On pages 37-44 of his petition, Fotopoulos sets out a lengthy claim asserting that *Apprendi v. New Jersey*, 530 U.S. 466 (2000), applies to Florida's death sentencing scheme. This claim is not a basis for relief for the following, independently adequate reasons.

The first reason that the *Apprendi* claim is not available to Fotopoulos is because the claim is procedurally barred because it could have been but was not raised on direct appeal from his convictions and sentences of death. The failure to raise this claim at that time is a procedural bar to litigation of it in collateral

³This claim is actually the **third** claim contained in the petition. To avoid confusion, the Respondent has used Fotopoulos' numbering system.

attack.⁴ See, *Parker, supra*.

The second reason that this claim is procedurally barred from consideration in this proceeding is because, assuming *arguendo* that *Apprendi* is somehow "new law," the claim based thereon should have been raised no later than June 26, 2001, one year after the date on which *Apprendi* was decided (which was June 26, 2000). *Apprendi v. New Jersey*, 530 U.S. 466 (2000). Fotopoulos' habeas petition was not filed until **December** of 2001, well over a year after the release of the *Apprendi* decision, and well outside the one-year window for the presentation of "new law" claims. Moreover, Fotopoulos' time for filing such a claim actually began to run with the release of *Jones v. United States*, 526 U.S. 227 (1999), the decision on which *Apprendi* is based, on March 24, 1999.⁵ Fotopoulos' claim is not timely, regardless of the date on which his time began to run. This claim is procedurally barred, and should be disposed of on that basis.

The third reason that this claim is not available to

⁴Fotopoulos raised various challenges to Florida's death penalty scheme, but did not raise any claim alleging that the jury instead of the judge had to find the aggravators, or that there was any other constitutional deficiency with Florida's death penalty act.

⁵*Jones* is based upon long-standing precedent, and is, itself, not "new" for time-bar purposes.

Fotopoulos in this proceeding is because it could and should have been raised in his *Florida Rule of Criminal Procedure* 3.850 motion which is now pending before this Court.⁶ Because this claim could have been but was not raised in the Rule 3.850 proceeding, it is procedurally barred from consideration in this habeas corpus petition. *See, King v. State*, 27 Fla. L. Weekly S65 (Fla., Jan. 16, 2002).⁷

In addition to being procedurally barred by a triple layer of procedural default, the *Apprendi* claim is meritless for the following reasons. The linchpin of Fotopoulos' *Apprendi* claim is his position, for which he cites no authority, that "the state must prove at least one aggravating factor in the separate penalty phase proceeding before a person convicted of first degree murder is **eligible** for the death penalty." *Petition*, at 39. (emphasis added). That argument, which Fotopoulos must make in order to have any expectation of coming within the scope of the *Apprendi* decision, is based upon a misreading of Florida

⁶Notice of appeal was given in the Rule 3.850 proceeding on July 13, 2000. Fotopoulos did not attempt to raise the *Apprendi* issue in any fashion in that proceeding.

⁷Fotopoulos does not address or acknowledge any of the foregoing procedural bars in his petition, nor does he attempt to explain why they do not apply to him.

law.⁸

In *Mills*, this Court explained the statutory maximum sentence to which a defendant convicted of first degree murder was subject:

[Mills] argues that the statute in effect at the time of the initial trial made the maximum penalty for his crime life imprisonment. Only after the jury verdict and further sentencing proceedings, Mills argues, could death be a possible sentence. This particular scheme, Mills argues, puts the sentence of death outside of the maximum penalty available and triggers *Apprendi* protection.

With regard to the statute in effect at the time of trial, Mills cites section 775.082(1), *Florida Statutes* (1979), which provided:

A person who has been convicted of a capital felony shall be punished by life imprisonment and shall be required to serve no less than 25 years before becoming eligible for parole unless the proceeding held to determine sentence according to the procedure set forth in § 921.141 results in finding by the court that such person shall be punished by death, and in the latter event such person shall be punished by death.

§ 775.082(1) *Fla. Stat.* (1979). Mills argues that this statute makes life imprisonment the maximum penalty available. Mills argues that the statute allowing the judge to override the jury's recommendation makes it

⁸Fotopoulos' argument misstates Florida law. As discussed herein, Fotopoulos distorts the distinction between "eligibility" and "selection" for the death penalty. In Florida, a defendant is **eligible** for the death penalty upon conviction for First Degree Murder, even though he may not be ultimately "selected" for it at the penalty phase of his trial.

clear that the maximum possible penalty is life imprisonment unless and until the judge holds a separate hearing and finds that the defendant is death eligible.

The plain language of section 775.082(1) is clear that the maximum penalty available for a person convicted of a capital felony is death. When section 775.082(1) is read *in pari materia* with section 921.141, *Florida Statutes*, **there can be no doubt that a person convicted of a capital felony faces a maximum possible penalty of death.** (FN4) Both sections 775.082 and 921.141 clearly refer to a "capital felony." *Black's Law Dictionary* defines "capital" as "punishable by execution; involving the death penalty." *Black's Law Dictionary* 200 (7th ed.1999). *Merriam Webster's Collegiate Dictionary* defines "capital" as "punishable by death ... involving execution." *Merriam Webster's Collegiate Dictionary* 169 (10th ed. 1998). Therefore, a "capital felony" is by definition a felony that may be punishable by death. The maximum possible penalty described in the capital sentencing scheme is clearly death.

(FN4.) Section 921.141, *Florida Statutes* (1979), provides:

Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by § 775.082.

....

(3) ... Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death....

Mills v. Moore, 786 So. 2d 532, 537-38 (Fla. 2001). [emphasis

added]. Under Florida law, as announced by this Court, a defendant convicted of a capital felony enters the penalty phase (or, in the phraseology of the United States Supreme Court, the selection phase) **eligible** for the death penalty. Because that is so, a death sentence is not an "enhancement" of the sentence -- it is a sentence that a defendant convicted of a capital felony is eligible to receive, and which can be imposed after the required penalty phase proceedings are conducted, the advisory verdict is rendered, and the sentencing court considers that advisory sentence in accordance with Florida law.⁹

The decisions of the United States Supreme Court interpreting Florida's death penalty act are in accord with the foregoing discussion -- a Florida capital defendant is "death eligible" based upon the jury's verdict of guilty of the capital felony (*i.e.*, first degree murder). Unlike the statutory schemes in some states, Florida's statute determines a defendant's **eligibility** to receive a death sentence at the guilt-innocence stage of the capital trial, not during the penalty (or selection) phase, as Fotopoulos argues. *See, Proffitt v.*

⁹On page 40 of the petition, Fotopoulos argues that if "a court sentenced a defendant immediately after conviction, the court could only impose a life sentence" is inaccurate and misses the point. Florida law contains no provision for aborting a capital trial in that fashion, and, in fact, such a procedure is not contemplated by the statute.

Florida, 428 U.S. 242 (1976).

In distinguishing between the eligibility and selection phases of a capital prosecution, the United States Supreme Court has stated:

The eligibility decision fits the crime within a defined classification. Eligibility factors almost of necessity require an answer to a question with a factual nexus to the crime or the defendant so as to "make rationally reviewable the process for imposing a sentence of death." *Arave, supra*, 507 U.S., at 471, 113 S.Ct., at 1540 (internal quotation marks omitted). **The selection decision, on the other hand, requires individualized sentencing and must be expansive enough to accommodate relevant mitigating evidence so as to assure an assessment of the defendant's culpability.** The objectives of these two inquiries can be in some tension, at least when the inquiries occur at the same time. See *Romano v. Oklahoma*, 512 U.S., at 6, 114 S.Ct., at 2009 (referring to "two somewhat contradictory tasks").

Tuilaepa v. California, 512 U.S. 967, 973 (1994). [emphasis added]. The distinction between the analytical basis of the two stages of a capital prosecution is significant, and, under Florida law, no argument can be made that a capital defendant does not enter the "selection" phase eligible for a death sentence.¹⁰ Even if *Apprendi* is somehow applicable to capital sentencing, and even if the procedurally barred claim is

¹⁰That the capital sentencing statutes in other states may not function in this way is not the issue, and is of no moment here -- Florida's statute answers the "eligibility" question at the **guilt** phase of a capital trial.

available to Fotopoulos, there is no basis for relief because of the manner in which Florida's death penalty statute operates.¹¹

This Court is well aware that, as of the filing of this response, *certiorari* is pending in the case of *Ring v. Arizona*, 122 S.Ct. 865 (2002), and that the executions of Amos King and Linroy Bottoson were stayed by the United States Supreme Court after both inmates filed last-minute *certiorari* petitions containing *Apprendi*-based claims. Regardless of the applicability of *Apprendi* to capital sentencing in general, and to Florida capital sentencing in particular, that claim is, in the context of this case, procedurally barred for the reasons set out above.¹² This Court should address the procedural bar

¹¹Fotopoulos' argument that aggravators are "elements of the crime" has been expressly rejected by this Court. *Hunter v. State*, 660 So. 2d 244, 254 (Fla. 1995); *Hildwin v. State*, 531 So. 2d 124, 128 (Fla. 1988), *aff'd*, 490 U.S. 638, 109 S.Ct. 2055, 104 L.Ed.2d 728 (1989). Likewise, the argument that a unanimous jury sentence recommendation is required has been rejected. *Evans v. State*, 800 So. 2d 182 (Fla. 2001); *Sexton v. State*, 775 So. 2d 923 (Fla. 2000); *Alvord v. State*, 322 So. 2d 533 (Fla. 1975). These sub-claims are not a basis for relief, and, in any event, are procedurally barred for the same reasons that the *Apprendi* claim is procedurally barred.

¹²In *Borchardt v. State*, 367 Md. 91, 122-28, 786 A.2d 631, 649-53 (2002), the Court of Appeals of Maryland discussed the anomalous results that would be reached if *Apprendi* was applied to capital cases in the manner advanced by the defendant. As that Court pointed out, the result would require aggravating and **mitigating circumstances** to be set out in the indictment. *Brochardt*, 367 Md. at 127. That result is absurd.

first, and should only consider the merits of this claim in the alternative, in order to protect the validity and integrity of Florida's long-settled procedural bar rules. Fotopoulos is entitled to no relief on this procedurally barred claim.

Finally, Fotopoulos is entitled to no relief on this claim even if *Apprendi* is available to him because sufficient aggravators to support his sentences of death exist that fall within the "prior conviction" provision of *Apprendi*, and therefore do not implicate any constitutional issue. See pages 2-3, above. The prior violent felony conviction aggravator, and the murder committed during the course of a burglary aggravator, fall within the scope of the "prior conviction" component of *Apprendi*, and, therefore, even assuming *arguendo* that *Apprendi* applies to this case, those aggravating circumstances are exempt from the requirement of *Apprendi* by its plain language. *Apprendi v. New Jersey*, 530 U.S. at 489. Fotopoulos is not entitled to any relief, regardless of how *Apprendi* might, or might not, be applied.

V. THE CUMULATIVE ERROR CLAIM

On pages 45-46 of his petition, Fotopoulos argues that unidentified "cumulative error" occurred during his capital trial. None of the "errors" are identified other than by reference to the now-pending petition, the direct appeal, and

the Rule 3.850 proceedings. This claim is not a basis for relief for the reasons set out below.

The first reason that the cumulative error claim is not a basis for relief is because that claim is procedurally barred because it could have been but was not raised at trial or on direct appeal. A cumulative error claim is subject to a procedural bar, and Fotopoulos' claim should be denied on that basis.

Moreover, this claim is improperly and insufficiently pleaded because it does not identify **any** error on which this claim is predicated -- instead, this claim seeks to incorporate all of the other proceedings that have taken place over the history of this case, and relitigate the unspecified claims contained therein. Florida law does not allow for such a procedure, and, at least as to the claims raised on direct appeal, Fotopoulos has done nothing more than file a second motion for rehearing of claims which were decided adversely to him in 1992.

In the Rule 3.850 context, this Court has upheld summary denial of insufficiently plead claims of "cumulative error":

Freeman additionally argues the cumulative effect of the errors made during his trial deprived him of his constitutional right to a fair trial. The trial court summarily denied this claim as improperly pled, stating "no particular allegations or citations to the

record, nor any indication of the true nature of the claim" had been alleged. A postconviction movant must specifically identify the claims which demonstrate the prevention of a fair trial. Mere conclusory allegations do not warrant relief. See *Valle v. State*, 705 So. 2d 1331 (Fla. 1997); *Jackson v. Dugger*, 633 So. 2d 1051 (Fla. 1993); *Phillips v. State*, 608 So. 2d 778 (Fla. 1992); *Roberts v. State*, 568 So. 2d 1255 (Fla. 1990); *Smith v. Dugger*, 565 So. 2d 1293 (Fla. 1990); *Kennedy v. State*, 547 So. 2d 912 (Fla. 1989). Accordingly, this claim was insufficiently pled and properly summarily denied. See *Rivera v. State*, 717 So. 2d 477 (Fla. 1998).

Freeman v. State, 761 So. 2d 1055, 1068-69 (Fla. 2000). The same rationale holds true here. There is no basis for relief based upon this procedurally barred and improperly presented claim.

VI. THE COMPETENCY FOR EXECUTION CLAIM

On pages 46-47 of the petition, Fotopoulos alleges that the Eighth Amendment will be violated because he may be incompetent at the time of his execution. As Fotopoulos concedes, this claim is untimely because no warrant for the execution of his death sentence has been issued, and, until that event occurs, this claim is not ripe. *Provenzano v. State*, 751 So. 2d 37, 40 (Fla. 1999).

CONCLUSION

Wherefore, based upon the foregoing arguments and authorities, the Respondent requests that this Court deny the petition for writ of habeas corpus in all respects.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above has been furnished by U.S. Mail to **Kevin T. Beck**, CCRC - Middle, **and Leslie Anne Scalley**, Staff Attorney, CCRC - Middle, 3801 Corporex Park Dr., Suite 210, Tampa, FL 33619-1136, on this ___ day of February, 2002.

Of Counsel

CERTIFICATE OF COMPLIANCE

This brief is typed in Courier New 12 point.

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