**IN THE SUPREME COURT OF FLORIDA**

**CASE NO. SC05-1313**

**DAVID COOK,**

**Petitioner,**

**vs.**

**JAMES V. CROSBY,**
**Secretary, Florida Department of Corrections,**

**Respondent.**

**ON PETITION FOR**
**WRIT OF HABEAS CORPUS**

**RESPONSE**

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## STATEMENT OF CASE AND FACTS

In accordance with Fla. R. Crim. P. 3.851(b)(2), this petition is being pursued concurrently with the appeal from the order denying Defendant=s motion for post conviction relief. *Cook v. State*, No. SC04-2066. The State will therefore rely on its statements of the case and facts contained in its brief in that matter.

## ARGUMENT

### I. INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL.

Defendant[1] contends that his appellate counsel was ineffective because he did not raise claims regarding judicial bias, the absence of a written sentencing order at the time sentence was pronounced on resentencing, and cumulative error. However, the claims regarding judicial bias and the sentencing order were unpreserved, meritless, and any error regarding these claims was harmless. The cumulative error claim is without merit. Appellate counsel cannot be deemed ineffective for failing to raise unpreserved and meritless claims. Defendant's claim should, therefore, be denied.

The standard for evaluating claims of ineffective assistance of appellate counsel is the same as the standard for determining whether trial counsel was ineffective. *Jones v. Moore*, 794 So. 2d 579, 586 (Fla. 2001); *Williamson v. Dugger*, 651 So. 2d 84, 86 (Fla. 1994), *cert. denied*, 516 U.S. 850 (1995); *Wilson v. Wainwright*, 474 So. 2d 1162, 1163 (Fla. 1985). In *Strickland v. Washington*, 466 U.S. 668 (1984), the United States Supreme Court announced the standard under which claims of ineffective assistance must be evaluated. A petitioner must

[1] Petitioner will be referred to as Defendant and the prosecution and Respondent as the State.

demonstrate both that counsel's performance was deficient, and that the deficient performance prejudiced the defense.

Deficient performance requires a showing that counsel's representation fell below an objective standard of reasonableness under prevailing professional norms, and a fair assessment of performance of a criminal defense attorney:

> requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. . . . [A] court must indulge a strong presumption that criminal defense counsel's conduct falls within the wide range of reasonable professional assistance, that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy.

*Strickland*, 466 U.S. at 694-95. The test for prejudice requires the petitioner to show that, but for counsel's unprofessional errors, there is a reasonable probability that the result of the proceeding would have been different. *Id.* at 694.

Habeas petitions are the proper vehicle to raise claims of ineffective assistance of appellate counsel. *See Rutherford v. Moore*, 774 So. 2d 637, 643 (Fla. 2000). However, appellate counsel cannot be considered ineffective under the *Strickland* standard for failing to raise issues that were not properly preserved and which do not present a question of fundamental error. *Groover v. Singletary*, 656 So. 2d 424 (Fla. 1995);

*Hildwin v. Dugger*, 654 So. 2d 107 (Fla. 1995); *Breedlove v. Singletary*, 595 So. 2d 8, 11 (Fla. 1992). The same is true for claims without merit. Appellate counsel cannot be deemed ineffective for failing to raise non-meritorious claims on appeal. *Kokal v. Dugger*, 718 So. 2d 138, 143 (Fla. 1998); *Groover*, 656 So. 2d at 425; *Hildwin*, 654 So. 2d at 111; *Breedlove*, 595 So. 2d at 11.

Even where a claim is preserved or meritorious Defendant might still not be entitled to relief. This Court has held that a claim of ineffective assistance of appellate counsel should be rejected when the alleged error that counsel did not raise would have been found harmless if it had been raised. *Valle v. Moore*, 837 So. 2d 905, 910 (Fla. 2002). Moreover, 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 non-frivolous issue. *See Jones v. Barnes*, 463 U.S. 745, 751-53 (1983)(appellate counsel not required to argue all non-frivolous issues, even at request of client); *Provenzano v. Dugger*, 561 So. 2d 541, 549 (Fla. 1990)(noting that Ait is well established that counsel need not raise every non-frivolous issue revealed by the record@). Finally, a claim that has been resolved in a previous review of

the case is barred as Athe law of the case.@ *See Mills v. State*, 603 So. 2d 482, 486 (Fla. 1992).

This Court has further held that:

> [t]o succeed on the ineffective assistance of appellate counsel portion of the claim, [Defendant] must establish that counsel's failure to raise the claim on appeal is of "such magnitude as to constitute a serious error 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." Floyd v. State, 808 So. 2d 175, 183 (Fla. 2002) (quoting Pope v. Wainwright, 496 So. 2d 798, 800 (Fla. 1986)). The failure to raise a meritless issue does not constitute ineffective assistance of counsel. See Valle v. Moore, 837 So. 2d 905, 908 (Fla. 2002); Chandler v. Dugger, 634 So. 2d 1066, 1068 (Fla. 1994). In fact, appellate counsel is not required to raise every conceivable nonfrivolous issue. See Valle, 837 So. 2d at 908.

*Fennie v. State*, 855 So. 2d 597, 607 (Fla. 2003). In light of these standards all of Defendant’s claims fail and must be denied.

**A. JUDICIAL BIAS**

Defendant first claims that his appellate counsel was ineffective for failing to raise on direct appeal the claim that the trial and resentencing judge was biased. This claim is unpreserved and meritless. Accordingly it should be denied.

At no time during the trial did Defendant ever make a motion to disqualify the judge. As such, this claim was not properly preserved below. *See Rivera v. State*, 717 So. 2d 477, 481 n. 3 (Fla. 1998) ("motion must be filed within 30 days after the movant learned of the alleged grounds for disqualification, 'otherwise the ground, or grounds, of disqualification shall be taken and considered as waived'"; procedurally barred (*citing Steinhorst v. State*, 636 So.2d 498, 500 (Fla. 1994)). Appellate counsel cannot be deemed ineffective for failing to raise this unpreserved claim. *Groover v. Singletary*, 656 So. 2d 424; *Hildwin v. Dugger*, 654 So. 2d 107; *Breedlove v. Singletary*, 595 So. 2d at 11.

Furthermore, the claim is meritless. Defendant fails to make specific allegations with regard to the claim that the trial judge was biased. Defendant states that the record is "replete with instances of the Court's bias and abuse of discretion," yet he fails to name but one. Defendant argues that the judge's rehabilitation of jurors who had difficulty with the English language evidences the court's bias. A claim that this rehabilitation was improper was raised on direct appeal and addressed exhaustively by this Court, which quoted the trial judge's questioning of the jurors at length. *Cook v. State*, 542 So. 2d at 966-70. The questioning does not reflect

any bias. Moreover, one of the purposes of voir dire is to ascertain the jurors' qualifications. To this end, Fla. R. Crim. P. 3.300(b) expressly authorizes the trial judge to "examine" prospective jurors individually or collectively. The State fails to see how questioning the jurors to ensure qualification constitutes judicial bias. The lack of bias stemming from this particular action is further supported by this Court's finding that the lower court had not abused its discretion in denying the cause challenges. *See Mills.*

Furthermore, an adverse ruling based upon record pleadings and arguments, is not a ground for disqualification. *Barwick v. State*, 660 So. 2d at 692 (the rule providing for disqualification of a judge is not intended as a vehicle to oust the judge because of disagreements with the judge's rulings); *Hardwick v. Dugger*, 648 So. 2d 100, 103 (Fla. 1994); *Provenzano v. State*, 616 So. 2d 428, 432 (Fla. 1993); *Fischer v. Knuck*, 497 So. 2d 240, 242 (Fla. 1986); *Nateman v. Greenbaum*, 582 So. 2d 643, 644 (Fla. 3d DCA 1991). As the claim of bias by the trial court is both unpreserved and meritless, appellate counsel cannot be deemed ineffective for failing to raise is. *Groover*; *Hildwin*; *Breedlove; Kokal.*

With respect to the allegation that the judge was biased during the resentencing, this claim is likewise unpreserved.

Defendant's own petition states the fact that no objection was made at the time. (Petition p. 7) Neither was there a motion for disqualification made at that time.[2] Counsel cannot be deemed ineffective for failing to raise an unpreserved claim. *Groover*; *Hildwin*; *Breedlove*.

Furthermore, the claim is meritless. Defendant's only allegation in support of this claim is that the judge's bias is evidenced by the judge's allegedly improper consideration of non-statutory aggravating factors. Defendant cites to pages 19 and 22 of the transcript of the resentencing proceeding in support of this claim. On the first of these, the Court's only statements essentially pose a question to defense counsel, who was making his argument at the time, urging the court to consider that the shooting of Mrs. Betancourt was an instinctive and reflexive action and that Defendant was not free to leave as the State had argued. The court asked counsel to reconcile his argument in light of the Defendant's confession (which essentially stated he had shot Mrs. Betancourt to shut her up).

[2] It should be noted that the only time a motion to disqualify was filed was after the lower court denied Defendant's motion for post conviction relief. (PCR1 297-311) This claim was raised on appeal from the denial of post conviction relief (claim 3c) and it was rejected by this Court. *Cook v. State*, 792 So. 2d 1197, 1201 (Fla. 2001) (citing *Ragsdale* where there was no show of bias when the judge called Defendant's public record's request "bogus" and a "sham".)

(RSR. 19)[3] This discussion related to the proper weight the court should give to the fact that Defendant had previously committed a prior violent felony, i.e., the murder of Mr. Betancourt, a proper aggravating factor.

After defense counsel concluded his argument, the court went on to state that it was readopting its prior finding that Defendant had no significant criminal history. (RSR. 22) The court then stated that the case involved a double killing, highlighting that this, not the aggravators stricken by this Court, was the primary basis on which the previous sentence had been given, as the court had given great weight to the prior violent felony aggravator. Accordingly, since that aggravator remained, the sentence would also remain. In accordance with this Court's mandate, no new evidence had been presented at the resentencing. The judge was merely reweighing the remaining aggravators and properly giving great weight to the murder of Mr. Betancourt as a prior violent felony aggravator. There is absolutely no mention, let alone a "plethora," of non-statutory aggravators, as Defendant alleges. An adverse ruling, based upon record pleadings and arguments, is not a ground for

[3] The symbols RSR. and RSR-SR. will be used to refer to the record on appeal and supplemental record on appeal from the resentencing proceedings , FSC Case No. 75,725.

disqualification. *Barwick*; *Hardwick; Provenzano*; *Fischer*; *Nateman*.

Furthermore, this Court, on direct appeal of the resentencing, considered and rejected the claim that the judge had considered inapplicable aggravating factors. *Cook v. State*, 581 So. 2d at 142. Rephrasing the same argument in terms of a habeas claim based on judicial bias is improper. *Mills*; *Rutherford*; *Hardwick*; *Breedlove*.

Defendant also claims that the resentencing judge's failure to make written findings contemporaneous with his oral pronouncement of the sentence also evidences his bias. The record is clear that the judge, at one point, thought he did not need to enter a new written order, and subsequently corrected the error. It is unclear how the court's mistaken belief and desire to comply with the requirements of the law evidences bias.

Defendant also argues that because Judge Carney stated that his misapprehension that a new written order did not have to be prepared had been corrected by something or someone, the judge must have engaged in ex parte communications with the State.[4]

[4] In the discussion pertaining to this claim (and again in the discussion of the next claim) Defendant points out that the second resentencing hearing was conducted without Defendant being present. It should be noted that this claim was previously raised in Defendant's appeal from the denial of his

Allegations regarding ex parte communications must be set forth with specificity. *Nassetta v. Kaplan*, 557 So. 2d 919, 921 (Fla. 4th DCA 1990); *Barwick v. State*, 660 So. 2d 685, 692 (Fla. 1995). Defendant makes only a conclusory allegation that such a communication must have occurred because there is no other reason to explain the court's change in position. This claim is facially insufficient and simply unsupported by any evidence.

At the conclusion of the original resentencing hearing, when the judge had pronounced sentence, in the presence of the Defendant and his counsel, the judge had asked the prosecutor to prepare a written order from the "text" of his findings. (RSR. 22-23) On March 30, 1990, when the case was set again for a resentencing hearing due to the lack of a new written sentencing order being issued, the judge stated that he had not entered such an order because he did not think he had to and that he had since "been persuaded that another order" was necessary and that

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first post conviction motion and found to be procedurally barred by this Court as it could have been raised in the direct appeal of the resentencing. However, Defendant does not specifically allege that appellate counsel was ineffective for failing to raise this claim. As discussed at length in the discussion of Defendant's next claim, this hearing was conducted for the sole purpose of providing the parties with the written sentencing order, which merely readopted the findings made at the earlier sentencing hearing in the presence of Defendant and counsel. *Cf Jackson v. State*, 767 So. 2d 1156 (Fla. 2000). Moreover, no prejudice has been demonstrated, where the entry of the written order was a ministerial act that did not require any consultation or assistance from the Defendant. *See Coney v. State*, 653 So. 2d 1009, 1016, n.5 (Fla. 1995).

"[t]o that end [the court] ha[d] prepared one and ha[d] given copies to Mr. Waksman and to [Defendant's] attorney." (RSR. 26) The State respectfully submits that such a statement does not reflect "ex parte" contact with any party. The judge's earlier statement asking the State to prepare the order from the text of the court's findings clearly indicates that, at that point, the court believed a new written order was necessary. The judge's own research, reflection, a conversation with a colleague or a request from this Court while compiling the record on appeal, was likely the more "persuasive" factor that rectified the judge's earlier misapprehension. Accordingly, this claim is without merit and, as such, counsel cannot be considered ineffective for failing to raise it. *Kokal*; *Groover*; *Hildwin*; *Breedlove*.

In concluding the argument that the trial and resentencing court was biased Defendant cites *Chastine v. Broom*, 629 So. 2d 293, 294 (Fla. 4th DCA 1993). Defendant's reliance on *Chastine* is unwarranted as that case involved a judge who was "passing" notes to the prosecutor with "tips" on how to minimize the defense testimony. The court deemed the "concern over the trial judge's advice to the prosecution on trial strategy" to be an indication that she may not be fair and impartial. *Id*. *Chastine* bears no resemblance to the instant case.

Defendant further concludes his argument by stating that "the sheer number of rulings based solely on bias is extraordinary" yet, again, fails to mention a single one of the rulings or explain how they are so unreasonable that they must be based on bias. In light of the fact that this Court, in reviewing both the original sentencing and the resentencing, has upheld the only adverse ruling specifically complained of in this alleged "plethora" of adverse ruling, namely the jury selection issue and the propriety of the resentencing court's reweighing of aggravators and mitigators, Defendant has failed to establish any prejudice with regard to this claim. As the substance of the claims is the same, bringing them under a claim of judicial bias would have produced the same result.

In sum, adverse rulings by the court, based upon the record of litigation before it, are legally insufficient for disqualification. *Barwick*; *Hardwick*; *Fischer*; *Nateman*. As the claims regarding judicial bias at both the trial and the resentencing are both unpreserved and without merit, appellate counsel was not ineffective for failing to raise them. *Kokal*; *Groover*; *Hildwin*; *Breedlove*.

**B.SENTENCING JUDGE'S FAILURE TO PREPARE A WRITTEN ORDER AT RESENTENCING**

Defendant next contends that his appellate counsel was ineffective for failing to raise on appeal the fact that the judge, on resentencing, allegedly failed to make findings of fact contemporaneous with the imposition of the sentence. Defendant alleges that this failure is evidenced by the court's failure to issue a written sentencing order until approximately two months later.[5] This claim is both unpreserved and meritless. As such appellate counsel was not ineffective for failing to raise them. *Kokal*; *Groover*; *Hildwin*; *Breedlove*.

As discussed in detail in the discussion of the above claim, on February 5, 1990 the court held a resentencing hearing

[5] Within the discussion of this argument it appears that Defendant, almost as an afterthought, is also claiming that both trial and appellate counsel were ineffective for failing to object and raise on appeal, respectively, the alleged "ex-parte" communication that the resentencing judge allegedly had with the State with regard to the preparation of a written sentencing order. For the reasons discussed above with regard to the claim of judicial bias, this claim is both unpreserved and meritless. Appellate counsel cannot, therefore, be deemed ineffective for failing to raise it. As far as trial counsel's ineffectiveness for failing to object to the phantom ex-parte communication, that claim is procedurally barred as it should have been raised in a post conviction motion. *See Hall v. Moore*, 792 So. 2d 447, 449-50 ("such a claim concerning the failure to present evidence at trial is a claim concerning the effectiveness of trial counsel which is properly raised in a rule 3.850 motion and is not a claim concerning the effectiveness of appellate counsel, which is the sole subject of this habeas petition.")

during which an oral pronouncement of the sentence was made. Subsequently, the court held a second hearing on March 30, 1990, at which the court entered a written sentencing order that readopted its earlier findings. Counsel was present at both, and no objection was made at either time.[6] This claim, was therefore, not properly preserved. *Happ v. Moore*, 784 So. 2d 1091 (Fla. 2001)(counsel not ineffective where trial counsel did not object to oral pronouncement of sentence or the trial court's procedure in rendering sentence).

Furthermore, this claim is without merit. The absence of a written order at the time sentence was pronounced does not establish that the court made no findings at that time. The record supports the contrary. At the resentencing hearing, both sides were allowed to make arguments to the court. (RSR2. 3-21) After hearing from both sides, the court, in the presence of the Defendant, made specific findings of fact as to the remaining aggravators and mitigators not stricken by this Court on appeal.

As to the only mitigator in question, arguments were made relating to the Defendant's absence of prior criminal record.

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[6] This claim was raised in Defendant's appeal from the denial of his original post conviction motion in terms of ineffective assistance of resentencing counsel's for failing to object and request a mistrial based on *Grossman v. State,* 525 So. 2d 833 (Fla 1988) (Appellant's Brief in case No. SC 94134, p. 36) This Court affirmed the lower court's denial of this claim. *Cook v. State*, 792 So. 2d 1197, (Fla. 2001)

Specifically defense counsel had misstated that Defendant had no prior arrest, which the State corrected by providing documentation of Defendant's prior arrest but noting that it did not matter as they were not convictions. (RSR. 5-6) There was also discussion of Defendant's admission to years of drugs use. Defense counsel then argued that the court had already found this mitigator and that it "can't be taken away from him." (RSR. 16-17) The court then specifically stated that "[i]nsofar as the prior criminal activity or lack thereof is concerned, I'm going to leave that as it is." (RSR. 22)

Arguments and findings were also made with respect to the aggravator of prior violent felony. The State argued that this factor should be weighed heavily, rebutting the defense's argument from its memorandum that the killing of Mrs. Betancourt had been reflexive and spontaneous, and highlighting that after killing Mr. Betancourt, the Defendant chose not to walk away but to kill again. (RSR. 7-8) The defense argued that, because the victim was holding on to Defendant's legs, he could not walk away and insisted that the murder was reflexive and spontaneous. (RSR. 18-19) The court then stated: "[a]ll I can remember about this case that really impelled (sic) me to give the sentence that I did was that it was a double killing," in essence stating that it was the "prior violent felony" aggravator to which the

court had given the greatest weight. As this aggravator had remained undisturbed by this Court, the court then announced that "the sentence [death] will remain the same." (RSR. 22). The judge thereafter entered his written resentencing order, which readopted his prior findings with respect to the remaining aggravating factors and the mitigation presented at the original trial. (RSR-SR. 1-4). The court clearly made contemporaneous findings of fact. The claim is, therefore, meritless and appellate counsel cannot be deemed ineffective for failing to raise it. *Kokal.*

As far as the failure of the court to comply with the procedural rule set forth in *Grossman v. State*, 525 So. 2d 833, 841 (Fla. 1988), where this Court announced the "procedural rule" that written orders imposing a death sentence be prepared prior to the oral pronouncement of sentence for filing concurrent with the pronouncement, the claim was not preserved. *Happ*. Counsel cannot, therefore, be deemed ineffective for failing to raise it. *Id*.

The record herein reflects that the written order that readopted the prior findings was entered at a subsequent hearing approximately two months after the judge, in the presence of the Defendant, had announced that, "the sentence will remain the same." (RSR. 25-28). At this hearing, the judge stated that he

had not realized previously that another written order was necessary but that he had then prepared such an order and had given copies of same to both counsel for the Defendant and the State. (RSR. 26). The judge noted that the Defendant was not present, and that:

> COURT: I am attempting, through this method, if Mr. Fleck [Defendant's resentencing counsel] will waive his client's presence, to simply get this down without running the State of Florida the expense of returning him here for essentially what would be what he received at the second sentencing hearing when he was here.

(RSR. 26-27). Resentencing counsel then stated:

> MR. FLECK: Mr. Cook was present in open court when your Honor orally pronounced the sentence. I see no reason for him to be here for what is essentially the ministerial duty of reducing this Court's oral sentence to writing, and that being the case, I expressly waive Mr. Cook's presence here today for this purpose.

(RSR. 27). The judge then noted that a notice of appeal had been filed. (RSR. 28). Defense counsel stated that he had filed the notice "prematurely," thinking that the judge had already "entered" the written order. *Id*. Defense counsel stated that he would file a new notice of appeal. *Id*. Nothing else was discussed at said hearing.

In *Gibson v. State,* 661 So. 2d 288, 293 (Fla. 1995), this Court made it clear that *Grossman* set out a procedural rule. In *Happ*, this Court denied a claim of ineffective assistance of appellate counsel for failing to raise a *Grossman* claim, where

trial counsel had clearly not objected to the oral pronouncement of sentence or to the procedure used by the trial court in rendering sentence. In *Happ*, the court had sentenced the defendant the same day the jury returned its recommendation, reading from a preliminary draft of a sentencing order which the court had apparently prepared prior to the jury returning its recommendation and which was not entered until a later date. Despite the fact that in that case the trial court had not merely failed to comply with *Grossman*'s procedural rule, but rather its preparation of the draft order in advance of the jury's recommendation cast doubts over the court's thorough consideration of all arguments and circumstances as envisioned by this Court in its decisions in *Grossman* and *Spencer*, this Court denied habeas relief because the claim had not been properly preserved through trial counsel's contemporaneous objection.

Moreover, the State would note that, although *Grossman* was decided prior to the appeal from the resentencing, at the time of said appeal this Court had not reversed any sentence based on the "procedural rule" in *Grossman.* This rule did not result in any reversal of sentence until three (3) years after the 1990 resentencing in the instant case, and even then only in cases involving the initial imposition of a death sentence. *See*

*Hernandez v. State*, 621 So. 2d 1353 (Fla. 1993). In *Hernandez*, this Court, having for the first time reversed a death sentence pursuant to *Grossman*, expressly held: "The purpose of this contemporaneity requirement is to implement the intent of the Legislature - to ensure that written reasons are not merely an after-the-fact rationalization for a hasty, visceral, or mistakenly reasoned initial decision imposing death." *Id*. at 1357 (emphasis added). The instant case does not involve an "initial" decision imposing death. Rather, it was a reweighing where no new evidence was presented, the trial judge had readopted his prior findings with respect to the remaining aggravators and mitigation - with which this Court had not previously found any fault, and where the trial judge had announced, in the presence of the Defendant, that: "the sentence will remain the same." In light of *Happ* and this Court's reasoning in *Hernandez*, there is no reasonable probability of a different result had counsel raised this claim.

Defendant also relies on *Van Royal v. State*, 497 So.2 d 625 (Fla. 1986), in support of this claim. *Van Royal*, too, involved an "initial" imposition of a death sentence. More importantly, the decision in *Van Royal* was based upon the fact that the initial sentencing order was not entered until after the record on appeal had been certified. This Court has held that where

even the initial sentencing order is entered prior to the certification of the record, there is no basis for reversal. *Grossman*, 525 So. 2d at 841. In the instant case, the written resentencing order was entered in March, 1990; the record on appeal was certified on May 30, 1990.

Accordingly, a claim based on the trial court's failure to enter a written sentencing order at the time sentence was pronounced is without merit. Moreover, it was unpreserved. Appellate counsel was not ineffective for failing to raise this unpreserved, meritless claim. *Kokal*; *Groover*; *Hildwin*; *Breedlove*. Moreover, a claim that the court failed to make contemporaneous finding of fact is unsupported by the record and, therefore also without merit. It is, likewise, unpreserved. Appellate counsel was, therefore, not ineffective for failing to raise it. *Id*.

### C. APPELLATE COUNSEL'S FAILURE TO RAISE A CUMMULATIVE ERRORS CLAIM

Defendant next claims that his appellate counsel was ineffective for failing to raise a claim that his trial was fraught with such a quantity of errors that the cumulative effect deprived him a fundamentally fair trial to which he is entitled under the Eighth and Fourteenth Amendments. Defendant fails to make sufficient factual allegations with respect to

this claim. Defendant does not list a single solitary error that should have been alleged by appellate counsel, instead merely referencing generally his direct appeal and habeas petition arguments. Nor does Defendant allege how the claims were preserved such that raising them might be ineffective, let alone any support for how this claim would have been meritorious. As such, the claim is insufficiently plead and should be denied.

Even if sufficient factual allegation had been made with respect to this claim, it would still fail. Where the individual errors alleged are either procedurally barred or without merit, the claim of cumulative error also fails. *Downs v. State*, 740 So. 2d 506, 509 n.5 (Fla. 1999). As far as the claims of error raised in Defendant's direct appeal, two of the five were the basis of this Court's remand for resentencing. The remaining three claims regarding jury selection, mitigation and jury instruction were found by this Court to be without merit. In regard to the claims raised in this Petition, as outlined above, Defendant's individual claims are all without merit. As such, a claim of cumulative error is also without merit. Counsel cannot be deemed ineffective for failing to raise a meritless claim. *Kokal.*

## II. OMISSION IN THE RECORD ON APPEAL

Defendant next asserts that he was denied a proper direct appeal because the record on appeal was incomplete and inaccurate. Defendant specifically asserts that his appellate counsel was rendered ineffective, as the record of the "entire sentencing hearing," as well as transcripts of two bench conferences, were missing. Defendant's substantive claim is procedurally barred. With regard to his ineffective assistance of appellate counsel, the claim is facially insufficient as Defendant fails to sufficiently allege either deficiency or prejudice.

Defendant claims that he was denied a proper appeal due to omissions in the record. As it was not raised in Defendant's direct appeal, this claim is procedurally barred. *Thompson v. State*, 759 So. 2d 650, 660 (Fla. 2000).

Moreover, to the extent that Defendant is asserting that his appellate counsel was ineffective for failing to ensure that the record was complete, the claim is facially insufficient and without merit. Initially, Defendant fails to allege deficiency sufficiently. Defendant's allegations that the entire sentencing hearing transcript is missing is wrong. The sentencing hearing before the judge and jury was in fact transcribed and part of the record on appeal. The only missing

transcript is that of a hearing where the trial court entered its original written sentencing order. On direct appeal, appellate counsel requested, and this Court relinquished jurisdiction to the trial court, for a reconstruction of said hearing. (DAR-SR. 1). After a hearing before the trial judge, with the prosecutor, appellate and trial counsel all present, the parties reconstructed the record, and entered into a written stipulation of this reconstruction. (DAR-SR. 3-11; 2). The record on direct appeal was supplemented to include both the transcript of the reconstruction hearing and the stipulation of the parties. *Id*. This procedure was in accordance with Fla. R. App. P. 9.300(f)(1). S*ee also Draper v. Washington*, 372 U.S. 487, 495 (1963)("Alternative methods of reporting trial proceedings are permissible if they place before the appellant court an equivalent report of the events at trial from which the appellant's contentions arise. A statement of facts agreed to by both sides,... might all be adequate substitutes, equally as good as a transcript."). Defendant does not allege how these efforts fell below the standard of practice or what additional efforts reasonable appellate counsel should have made.

Furthermore, this Court has held that for a claim that appellate counsel was ineffective for failing to ensure the record was complete to be meritorious, a defendant must show

that an error went uncorrected because the record was incomplete. *Cummings-el v. State*, 863 So. 2d 246, 254-55 (Fla. 2003); *Thompson*, 759 So. 2d 650, 660 (Fla. 2000); *Ferguson v. Singletary*, 632 So. 2d 53, 58 (Fla. 1993); *see also Turner v. Dugger*, 614 So. 2d 1075, 1079-80 (Fla. 1992). Here, Defendant has not demonstrated that any error went uncorrected because the bench conferences were not transcribed. Accordingly, as no prejudice or deficiency has been properly alleged, this claim is facially insufficient and should be denied.

## III. THE COURT'S FAILURE TO CONDUCT A CONSTITUTIONALLY ADEQUATE HARMLESS ERROR ANALYSIS ON DIRECT APPEAL FOLLOWING RESENTENCING

Defendant questions the propriety of this Court's harmless error analysis. This claim is procedurally barred. *See Bottoson v. State*, 813 So. 2d 31, 35 (Fla. 2002) ("This Court has consistently held that habeas claims wherein the defendant challenges this Court's previous standard of review in the case are procedurally barred."); *see also Thompson v. State*, 759 So. 2d 650, 657 n.6 (Fla. 2000) (defendant's claim that the court conducted improper harmless error analysis during direct appeal was improper "invitation to utilize the writ of habeas as a vehicle for the reargument of issues which have been raised and ruled on"); *Brown v. State*, 894 So. 2d 137, 159 (Fla. 2004)

(Habeas petitions should not serve as a second or substitute appeal and may not be used as a variant to an issue already raised (citing *Fotopoulos v. State*, 838 So. 2d 1122, 1134 (Fla. 2002) and *Medina v. Dugger*, 586 So. 2d 317, 318 (Fla. 1991)).

Moreover, in finding an issue presented on direct appeal procedurally barred from review in a habeas proceeding, this Court stated: "Habeas corpus is not to be used for second appeals. After appellate counsel raises an issue, failing to convince this Court to rule in an appellant's favor is not ineffective performance. Allegations of ineffective assistance of appellate counsel may not be used to evade the rule against using habeas corpus as a second appeal." *Swafford v. State*, 828 So. 2d 966 (Fla. 2002); s*ee also Turner v. Dugger*, 614 So. 2d 1075, 1080 (Fla. 1992) (declining to revisit issues where the issues, or variations thereof, were rejected on direct appeal); *Blanco v. Wainwright*, 507 So. 2d 1377, 1384 (Fla. 1987) (direct appeal issues will not be revisited under the guise of ineffective assistance of appellate counsel).

Furthermore, the claim is without merit. Defendant cites *Sochor v. Florida*, 504 U.S. 527 (1992), in support of this claim. Even if we were to ignore that *Sochor* was decided in 1992, two years after Defendant’s resentencing appeal, the case does not support Defendant’s claim. On resentencing, the trial

court weighed only the aggravators that were left undisturbed following Defendant's direct appeal. In affirming the resentence, this Court found that no error followed from the trial court's weighing of the remaining factors. This Court has explained that *Sochor* does not extend to cases where the aggravators weighed by the court had been upheld by this Court since "[i]f no error occurred, it follows that there was no need for a harmless error analysis." *Bruno v. Moore*, 838 So. 2d 485, 489 (Fla. 2002) (no harmless error analysis needed where no error occurred because all of the aggravators that were actually weighed by the trial court were upheld by this Court.) Furthermore, this Court has held that "it is not error for a trial court to provide the jury with a proper instruction on [an] aggravator even though that factor could not have existed as a matter of law;" *Johnson v. Singletary*, 612 So. 2d 575, 577 (Fla. 1993), as "a jury is unlikely to disregard a theory flawed in law, but it is likely to disregard an option simply unsupported by the evidence." *Foster v. State,* 679 So. 2d 747, 754 (Fla. 1996) (citing *Sochor* and finding that even if it was error, it was harmless for the jury to be instructed on HAC aggravator where it could not exist as a matter of law.) Accordingly, Defendant's claim is without merit and should be denied.

## CONCLUSION

For the foregoing reasons, the judgment and sentence of the trial court should be affirmed.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing was furnished by U.S. mail to **Rachel L. Day**, Assistant CCRC, Office of the Capital Collateral Regional Counsel, 101 N.E. 3rd Avenue, Suite 400, Fort Lauderdale, FL 33301, this 16th day of November, 2005.

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**CERTIFICATE OF COMPLIANCE**

I hereby certify that this brief is type in Courier New 12-point font.

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