

**IN THE SUPREME COURT OF  
FLORIDA CASE NO. SC14-1248**

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**TAI A. PHAM,**

**Petitioner,**

**v.**

**SECRETARY, FLORIDA DEPARTMENT OF  
CORRECTIONS, STATE OF FLORIDA**

**Respondent.**

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**RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS**

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**COUNSEL FOR RESPONDENT**

**RESPONSE TO PETITION FOR  
WRIT OF HABEAS CORPUS**

COMES NOW the Respondent, by and through counsel, and responds as follows to Pham's petition for a writ of habeas corpus which was filed on June 26, 2014 (Petition). For the reasons set out below, the Respondent moves this Honorable Court to deny the petition.

**RESPONSE TO PRELIMINARY STATEMENT**

The "Preliminary Statement" found on page 1 of the petition correctly recites Article 1, Section 13 of the Florida Constitution. The citation form used in the petition is accurately described.

**RESPONSE TO REQUEST FOR ORAL ARGUMENT**

The Respondent defers to the Court's judgment as to whether oral argument is necessary or justified in this case.

**RESPONSE TO JURISDICTION**

In this original action, the Petitioner raises a claim challenging the constitutionality of his convictions and sentences and the judgment of this Court. Under Article V, Section 3(b)(9) of the Florida Constitution, this Court has jurisdiction. *See also Reynolds v. State*, 99 So. 3d 459, 465 (Fla. 2012), *Fla. R. App. P.* 9.030(a)(3), *Fla. R. App. P.* 9.100(a). However, Pham is not entitled to relief.

## **RESPONSE TO STATEMENT OF THE CASE**

While essentially accurate, the statement of the case and facts contained in the petition is significantly augmented. On direct appeal, this Court summarized the facts of this case in the following way:

### ***Overview***

On March 7, 2008, Tai Pham (Pham) was convicted in Seminole County for the first-degree murder of his estranged wife Phi Pham (Phi), the attempted first-degree murder of her boyfriend Christopher Higgins (Higgins), the armed kidnapping of his stepdaughter Lana Pham (Lana), and armed burglary. Pham entered Phi's apartment where her oldest daughter, his stepdaughter Lana, was alone and awaiting Phi's return. After binding Lana, Pham hid in her bedroom for an hour, then stabbed Phi at least six times as she entered the room. Prior to returning to the apartment, Phi and Higgins were together at a party and returned in different vehicles. Phi's stabbing occurred while Higgins secured his motorcycle outside. Once Higgins entered the apartment, he struggled with Pham. During the struggle, Lana was able to get free and call the police. Higgins was severely injured during the struggle, but was able to subdue Pham until the police arrived. Both Lana and Higgins testified at trial. Pham was the sole witness for the defense. On May 22, 2008, the jury, by a vote of ten to two, recommended the death penalty after the penalty phase. After the *Spencer* hearing held on November 14, 2008, the trial court found the aggravators outweighed the mitigation and entered a sentence of death. This is Pham's direct appeal.

*Pham v. State*, 70 So. 3d 485, 491 (Fla. 2011) (footnotes omitted).

As to the issue of juror misconduct based on the same statements and underlying issues raised in the Petition at bar, this Court found the following in its opinion on direct appeal:

## **Juror Misconduct**

Next, Pham alleges that the jurors prejudged him and began deliberations prior to receiving instructions. The crux of Pham's claim is that his Vietnamese nationality figured prominently in the penalty phase and that the jury was prematurely disinclined to accept Pham's nationality and upbringing as mitigation. **Because it is not apparent on the record that the comments affected the verdict or sentence recommendation in any way, the trial court did not abuse its discretion in denying Pham's motion for a new penalty phase and we deny Pham's claim.**

An alternate juror, Valenti, brought these allegations to the trial court's attention. Valenti wrote a letter stating that he had overheard jurors making inappropriate statements. Based on the information contained in the letter, the trial court interviewed Valenti and two other jurors.

Juror Kristen Appleman stated that she heard a comment in passing:

“I think just the comment of, you know yes, everyone had a rough life in some case, but you are - this is the law, this is - there is right and wrong, and, you know, if you wanted to come to America, you have to live by American standards, American Law.”

Appleman stated that the comment was made in passing and not directed at anyone-it was not a conversation. She further stated that she did not

“get the sense that anyone ha[d] their mind made up or would not listen to a certain piece of information and take it in consideration.”

Juror Peter Perkins stated that he heard idle chitchat about people having tough luck, but that he did not know who said it. Perkins stated that the comments were made walking down the hallways, but not in

the jury room.

The trial court reserved ruling on the defense's motion for mistrial, but reminded the jury not to form any definite or fixed opinion on the merits of the case until all evidence had been presented. The court ultimately denied the motion. While we strongly discourage jurors from this sort of behavior, indeed any discussion of the case or parties at all prior to deliberations, we do not find that these comments rise to the level of ethnic bias.

The Court has addressed the issue of juror misconduct and a court's power to discharge the jury and declare a mistrial:

“It has been long established and continuously adhered to that the power to declare a mistrial and discharge the jury should be exercised with great care and caution and should be done only in cases of absolute necessity.” *Thomas v. State*, 748 So. 2d 970, 980 (Fla. 1999) (citing *Salvatore v. State*, 366 So. 2d 745, 750 (Fla. 1978)). Moreover, addressing allegations of juror misconduct is left to the sound discretion of the trial judge. *Doyle v. State*, 460 So. 2d 353, 357 (Fla. 1984); *England v. State*, 940 So. 2d 389, 402 (Fla. 2006).

Specifically, with respect to a motion for mistrial, the Court has noted:

A motion for a mistrial should only be granted when an error is so prejudicial as to vitiate the entire trial. *Snipes v. State*, 733 So. 2d 1000, 1005 (Fla. 1999). A trial court's ruling on a motion for mistrial is subject to an abuse of discretion standard of review. *Perez v. State*, 919 So. 2d 347 (Fla. 2005), *cert. denied*, 547 U.S. 1182, 126 S.Ct. 2359, 165 L.Ed.2d 285 (2006). *England*, 940 So. 2d at 401-02; *Seibert v. State*, 64 So. 3d 67 (Fla. 2010).

Any inquiry into juror misconduct must be limited to objective demonstration of overt acts committed by or in

the presence of the jury or jurors which reasonably could have affected the verdict. *Powell [v. Allstate Ins. Co.]*, 652 So. 2d [354,] 356 [ (Fla. 1995) ]; [*Baptist Hospital of Miami, Inc. v. Maler*, 579 So. 2d [97,] 101 [ (Fla. 1991)]; *State v. Hamilton*, 574 So. 2d 124, 128-29 (Fla. 1991). *Wilding v. State*, 674 So. 2d 114, 117-118 (Fla. 1996), receded from in part by *Devaney v. State*, 717 So. 2d 501, 505 (Fla. 1998) (“We recede from that portion of *Wilding* which says that, while the jurors' subjective beliefs inhere in the verdict, any discussion of them can become an overt act of misconduct.”).

If the [misconduct is] such that [it] would probably influence the jury, and the evidence in the cause is conflicting, the onus is not on the accused to show he was prejudiced for the law presumes he was. But it should be clearly understood that not all [misconduct] will vitiate a verdict, even though such conduct may be improper. It is necessary either to show that prejudice resulted or that the [misconduct was] of such character as to raise a presumption of prejudice. *Amazon v. State*, 487 So. 2d 8, 11 (Fla. 1986) (alterations in original) (quoting *Russ v. State*, 95 So. 2d 594, 600-01 (Fla. 1957)).

Pham's argument here is basically one of ethnic bias-that some jurors were not willing to accept his mitigation based on his upbringing and societal differences in Vietnam. While we continue to condemn ethnic bias in jurors, the comments here did not rise to the level of ethnic bias. As determined by the trial court, the statements made were not open appeals to the bias in others. Therefore, the trial court correctly denied Pham's request for a new penalty phase. Accordingly, we deny Pham's claim.

*Pham*, 70 So. 3d at 492-94 (emphasis supplied).

When presented with Valenti's letter and subsequent testimony implicating Jurors Appleman and Perkins, the trial court gave counsel an opportunity to

question the implicated jurors. (DAR, V13, R219-258).<sup>1</sup> Counsel chose to question the implicated jurors. After the inquiry of Appleman and Perkins, the trial court gave defense counsel an opportunity to further question the jurors, which was declined. Defense counsel Caudill later admitted<sup>2</sup> at the hearing on the Motion for New Sentencing Hearing and for Interviews of Jurors on this issue, "... yes the Court did give us the opportunity to-the question was asked at that time, do you want to conduct further interviews at this time ... and my response to the Court was, well, basically, I think we've clearly identified that these things happen. I don't know that anybody else is going at this time admit to specifically having been guilty of misconduct," and "[m]y response was that I don't think we're going to learn that anybody else has. We're not going to identify any other particular jurors at this time." (V17, R1083-1083). The penalty phase continued, the jury returned its advisory sentence of death, and defense counsel filed a Motion for New

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<sup>1</sup> Cites to the direct appeal record are referenced by "DAR" followed by Volume "V" and "R" for page number. Postconviction proceedings are referenced by Volume "V" followed by "R" for page number.

<sup>2</sup> Defense counsel directly speaks to the reason he did not avail himself of the opportunity to further query the jurors by these statements. In the hearing, he identifies the reasons cited *infra*, namely; the two-and-one-half hour deliberation, the inability to watch the demeanor of the jurors during deliberation, the fact it was a 10-2 vote, and the feeling he got while delivering closing arguments that he was talking "to a brick wall," as the factors that led him to believe there was additional "evidence" of juror misconduct not present at the time the court offered the opportunity for further inquiry which led to the subsequent motion.

Sentencing Hearing and for Interviews of Jurors.<sup>3</sup>

A hearing was held on this motion on June 18, 2008. (DAR, V17, R1077). Defense counsel Caudill relied on the following facts to support his suspicion of juror misconduct: that there was a two and one-half hour deliberation period (DAR, V17, R1083), that it was a 10-2 vote (DAR, V17, R1084), that he felt he was arguing to a "brick wall" (DAR, V17, R1080), and the fact that he did not have an opportunity to see the demeanor of the jurors while they deliberated.<sup>4</sup> (DAR, V17, R1085). The trial court specifically stated at this hearing that trial counsel had not availed himself of the opportunity to further question the jurors at the conclusion of Appleman and Perkins' testimony, and that nothing new had happened to warrant the further juror inquiry. (DAR, VI7, R1098). The court denied both subparts of this motion. (DAR, VI7, R1098).

As to the issue of Bulic testifying in lieu of Parsons, Bulic, current medical examiner, reviewed Phi's autopsy file. The autopsy was performed on October 25, 2005, by Parsons. (DAR, V9, R1161, 1164, 1167, 1190). Parsons was working at

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<sup>3</sup> This motion does not appear in the record because it was sealed. However, from the Clerk of Courts' docket notation and the transcript on the hearing for said motion, it is clear this motion was titled and argued as a single motion containing two subparts.

<sup>4</sup> Not, as Pham now alleges, that the jurors' "inappropriate" demeanor after the verdict led to a suspicion of further juror misconduct. (*Petition* at 14).

the medical examiner's office in Texas at the time of trial. (DAR, V9, R1165). Defense counsel stipulated to Bulic testifying in lieu of Parsons due to Parsons' unavailability. The actual stipulation between defense counsel and the State does not appear in the record. The trial court is not aware of the parameters of the stipulation. (DAR, V9, R1173). There were only two pertinent objections made during Bulic's testimony; the first to the use of the word "interesting," as defense counsel took that to be Bulic's own comment on the evidence, and the second to Bulic's getting "into issues of amount of force," allegedly exceeding the scope of defense's stipulation to have Bulic testify. (DAR, V9, R1171). Bulic testified in the penalty phase without objection.<sup>5</sup>

Pham was represented by Michael S. Becker, Esq., of the Office of the Public Defender, Jim Purdy, Seventh Judicial Circuit, on appeal. Notice of appeal was duly given on December 10, 2008. (DAR, V3, R576-77). Becker raised seven (7) issues on appeal which were articulated in Appellant's eighty-six (86) page Initial Brief. Florida Supreme Court Case No. SC08-2355. Pham's Initial Brief was filed on or about September 29, 2009. The issues raised were as follows:

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<sup>5</sup> The four other objections defense counsel made during Bulic's testimony are not at issue here. They pertained, respectively, to cumulative testimony (DAR, V9, R1183-84), leaving an "inflammatory" photograph in front of the jury for the "longest period of time" (DAR, V9, R1184), to a witness testifying as to the manner of death under the theory that murder is the ultimate question for a jury to decide (DAR, V9, R1188-89), and a discovery objection, which was withdrawn (DAR, V9, R1166).

- (1) that the prosecutor's improper statements during closing arguments entitled him to a new trial;
- (2) that juror misconduct entitled him to a new penalty phase;
- (3) that the trial court erred in finding the prior violent felony aggravator;
- (4) that his death sentence was unconstitutional because the aggravating circumstances were not alleged in the charging document;
- (5) that the trial court erred in finding the murder was heinous, atrocious, or cruel (HAC);
- (6) that the trial court erred in finding the murder cold, calculated, and premeditated (CCP); and
- (7) that his death sentence was not proportionate.

Additionally, this Court reviewed the sufficiency of the evidence to support Pham's conviction.

This Court denied relief on all of Pham's direct appeal claims and affirmed the convictions and sentences of death. *Pham*, 70 So. 3d at 503. A motion for rehearing was denied on September 9, 2011. Pham's petition for writ of certiorari in the United States Supreme Court was denied on March 19, 2012. *Pham v. Florida*, 132 S.Ct 1752 (2012).

Pham filed a motion for post-conviction relief pursuant to *Fla R. Crim. P.* 3.851 which was denied on December 20, 2013, following a five-day evidentiary

hearing. Pham's contemporaneous appeal from the denial of post-conviction relief is pending before this Court in case number SC14-142.

### **THE FAILURE TO RAISE ISSUES CLAIM**

In his sole claim of the Petition, Pham argues that appellate counsel failed to raise meritorious issues on appeal. (*Petition* at 10). (quoting *Brown v. State*, 894 So. 2d 137, 159 (Fla. 2004)). This claim is broken into two subparts; “B,” which alleges ineffective assistance of appellate counsel for “failing to raise a specific claim regarding the trial court's denial of Mr. Pham's motion to interview jurors” (*Petition* at 12), and “C,” which alleges ineffective assistance of appellate counsel for failing to raise a claim regarding Dr. Bulic testifying in lieu of Dr. Parsons. (*Petition* at 18).

### **LEGAL STANDARD**

In raising a habeas claim, “[t]he defendant has the burden of alleging a specific, serious omission or overt act upon which the claim of ineffective assistance of counsel can be based.” *Freeman v. State*, 761 So. 2d 1055, 1069 (Fla. 2000) (citing *Knight v. State*, 394 So. 2d 997, 1001 (Fla. 1981)).

Habeas petitions are the proper vehicle to advance claims of ineffective assistance of appellate counsel. See *Thompson v. State*, 759 So. 2d 650, 660 (Fla. 2000); *Teffeteller v. Dugger*, 734 So. 2d 1009, 1026 (Fla. 1999).

When analyzing the merits of the claim, “[t]he criteria for proving ineffective assistance of appellate counsel parallel the *Strickland*

standard for ineffective trial counsel." *Wilson v. Wainwright*, 474 So. 2d 1162, 1163 (Fla. 1985). Thus, this Court's ability to grant habeas relief on the basis of appellate counsel's ineffectiveness is limited to those situations where the petitioner establishes first, that appellate counsel's performance was *deficient* because "the alleged omissions are of such magnitude as to constitute a serious error or substantial deficiency falling measurably outside the range of professionally acceptable performance" and second, that the petitioner was *prejudiced* because appellate counsel's deficiency "compromised the appellate process to such a degree as to undermine confidence in the correctness of the result." *Thompson*, 759 So. 2d at 660 (emphasis supplied) (quoting *Groover v. Singletary*, 656 So. 2d 424, 425 (Fla. 1995)); *see, e.g., Teffeteller*, 734 So. 2d at 1027. If a legal issue "would in all probability have been found to be without merit" had counsel raised the issue on direct appeal, the failure of appellate counsel to raise the meritless issue will not render appellate counsel's performance ineffective. *Williamson v. Dugger*, 651 So. 2d 84, 86 (Fla. 1994); *see, e.g., Kokal v. Dugger*, 718 So. 2d 138, 142 (Fla. 1998); *Groover*, 656 So. 2d at 425. This is generally true as to issues that would have been found to be procedurally barred had they been raised on direct appeal. *See, e.g., Groover*, 656 So. 2d at 425; *Medina v. Dugger*, 586 So. 2d 317, 318 (Fla. 1991).

*Rutherford v. Moore*, 774 So. 2d 637, 643 (Fla. 2000).

## **ARGUMENT**

### **Interview Jurors claim**

Pham argues that he received ineffective assistance of appellate counsel due to "counsel's failure to raise a specific claim regarding the trial court's denial of Mr. Pham's motion to interview jurors." (*Petition* at 12). Specifically, Pham asserts that appellate counsel was ineffective for failing to raise a claim as to the trial court's denial of Pham's post-conviction Motion for New Sentencing Hearing and

for Interviews of Jurors under *Fla R. Crim. P.* 3.575.

The record reflects, during the penalty phase of Pham's trial, alternate juror Valenti wrote a letter to the trial court alleging that jurors were inappropriately discussing the case, and he was concerned they did not have an open mind to all of the mitigation evidence. (DAR, V13, R219-258). Based on this letter, the court and counsel questioned alternate juror Valenti, whose testimony was substantially different than that which he had written. (DAR, V13, R219-258). He was able to describe, however, the two jurors who appeared to be those who had made the offending comments, jurors Appleman and Perkins. (DAR, V13, R219-258). Counsel questioned Appleman and Perkins individually. (DAR, V13, R239-40). Upon examination, Appleman stated she had heard comments amounting to "everyone has a rough life ... the law is the law ... if you want to come to America, you have to live by American Standards, American Law." (DAR, V13, R240-41). She testified however, that she did not "get the sense that anyone ha[d] their mind made up or would not listen to a certain piece of information and take it in consideration." (DAR, V13, R244). Perkins stated that he heard chitchat in the hallway about people having tough luck. (DAR, V13, R246-47). At the conclusion of this testimony, defense counsel was given the opportunity to further question the jury, which he declined, later stating, he did not feel further questioning would have been fruitful. (DAR, V13, R251-53; DAR, V17, R1082-83).

Eight (8) days after the jury returned its advisory recommendation for death, defense counsel Caudill filed his Motion for New Sentencing Hearing and for Interviews of Jurors. In it, he relied on alleged juror misconduct based on the letter written by Valenti regarding Appleman and Perkins, and appended the following facts, as relayed in the hearing, to bolster his suspicion of juror misconduct: that there was a two and one-half hour deliberation period (DAR, V17, R1083), that it was a 10-2 vote (V17, R1084), that he felt he was arguing to a "brick wall" (DAR, V17, R1080), and the fact that he did not have an opportunity to see the demeanor of the jurors while they deliberated.<sup>6</sup> (DAR, V17, R1085). A hearing was held on this motion, and the trial court denied both subparts. (DAR, VI 7, R1098). In denying the motion to interview jurors portion of the Motion for New Sentencing Hearing and for Interviews of Jurors, the trial court stated:

Again, as to the opportunity for the jury inquiry the Court had previously offered that opportunity. That opportunity was declined. There has been nothing new that has occurred since that time that would justify further inquiry.

(DAR, V17, R22).

Initially, this claim should be denied because it is insufficiently pled. Pham

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<sup>6</sup> Not, as Pham alleged, that the jurors' "inappropriate" demeanor after the verdict led to a suspicion of further juror misconduct. (*Petition* at 14).

has not directly addressed this ruling in his Petition and has provided no basis for finding the court below abused its discretion.

Moreover, this claim is barred because a variation of the underlying substantive claim was raised as Claims II of Pham's Direct Appeal. (*Petition* at 6). Even though the direct appeal claim was argued as error in denying the motion for mistrial and for a new penalty phase, it was based on the same allegations of juror misconduct, specifically the letter written by Valenti implicating Appleman and Perkins. "[C]laims of ineffective assistance of appellate counsel may not be used to camouflage issues that should have been raised on direct appeal or in a postconviction motion." *Rutherford*, 774 So. 2d at 643 (citing *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)).

"Claims raised in a habeas petition which petitioner has raised in prior proceedings and which have been previously decided on the merits in those proceedings are procedurally barred in the habeas petition." *Pietri v. State*, 885 So. 2d 245, 275 (Fla. 2004); *Porter v. Crosby*, 840 So. 2d 981, 984 (Fla. 2003). "[H]abeas corpus petitions are not to be used for additional appeals on questions which ... were raised on appeal or in a rule 3.850 motion ...." *Parker v. Dugger*, 550 So. 2d 459, 460 (Fla. 1989). *See also Porter v. Crosby*, 840 So. 2d 981, 984 (Fla. 2003) (citing *Jones v. Moore*, 794 So. 2d 579, 586 (Fla. 2001) (finding

procedural bar to habeas claim which was variant to claim previously addressed). This claim is procedurally barred and should be denied.

Pham's claim is also insufficient because the underlying motion is not even before this Court. The actual motion was sealed and only the transcript of the hearing on said motion is available (DAR, V3, R506; D A R V17, R1077-1099). Since the motion was sealed (presumably because it contained the jurors' names) Pham cannot now know, or in good faith argue, said motion was insufficient. The presumption Pham must overcome is that he received effective assistance of counsel. *Looney v. State*, 941 So. 2d 1017, 1024 (Fla. 2006). Since there is no motion in the record, and only the transcript of the hearing on said motion, the ruling on that motion is not even properly before this Court. This presents yet another procedural bar to deny Pham's claim.

This Court then considered the juror misconduct issue, recounted its in-depth analysis, and made the determination that the trial court did not abuse its discretion in refusing to grant a new penalty phase based on the substance of the alleged juror misconduct.

Even if the claim is considered, it is refuted by the record. First, Pham's appellate counsel cannot be considered deficient because he did present the juror misconduct issue to this Court. Like in *Johnston v. State*, 63 So. 3d 730, 746 (Fla. 2011), contrary to Pham's assertion, appellate counsel *did* raise the issue of

entitlement to a new trial based on juror misconduct on direct appeal. The motion collectively asked for a new penalty phase and to interview the jurors. The actual motion was sealed and only the transcript of the hearing on said motion is available (DAR, V3, R506; V17, R1077- 1099). However, during this hearing, it is clear that there are no additional factors presented to the court for it to reasonably believe that there was juror misconduct, and even less still, that it tainted the verdict. (DAR, V17, R1098).

Because this issue was fully litigated on direct appeal the claim is procedurally barred and should be dismissed. While the issue of appealing a motion for a mistrial and a motion to interview jurors are two different rulings, there can be no deficiency when appellate counsel raised a claim as to the same underlying issue, and variations on the same claim are procedurally barred in a habeas petition. *See Jones*.

The failure to raise a claim that would have been rejected at the time of the appeal does not amount to deficient performance. *Henderson v. Singletary*, 617 So. 2d 313, 317 (Fla. 1993). Moreover, even if this Court were to find appellate counsel's performance deficient, the failure to raise this claim clearly did not result in prejudice because the claim would have been rejected on direct appeal.

Even if this claim were not procedurally barred, it is meritless. There was an inquiry done of Valenti, Appleman, and Perkins. After which, the trial court found

no misconduct. (DAR, V13, R504). When the trial court offered defense counsel the opportunity to further question the jurors, he declined. This would have been the opportunity to follow up, but defense counsel clearly make a strategic decision not to do so, having felt he'd done enough to secure a mistrial, and that further questioning would not have been fruitful.

Furthermore, had the specific denial of the Motion for Interview of Jurors portion of the Motion for New Sentencing Hearing and for Interviews of Jurors been raised on appeal, that denial would have also been reviewed under the abuse of discretion standard. "A trial court's decision on a motion to interview jurors is reviewed pursuant to an abuse of discretion standard." *Foster v. State*, 132 So. 3d 40, 65 (Fla. 2013) (quoting *Anderson v. State*, 18 So. 3d 501, 519 (Fla. 2009)). Moreover, a trial court's decision regarding the manner and scope of questioning of jurors also is subject to review for an abuse of discretion. *Marshall*, 976 So. 2d at 1079.

In order to show prejudice, Pham must demonstrate that appellate counsel would likely have prevailed on a claim of abuse of discretion, if raised. In order to have prevailed on this claim, appellate counsel would have had to demonstrate that the trial court's decision was "arbitrary, fanciful, or unreasonable . . . discretion is abused only where no reasonable [person] would take the view adopted by the trial court." *Salazar v. State*, 991 So. 2d 364, 372 (Fla. 2008) (citing *Trease v. State*,

768 So. 2d 1050, 1053 n.2 (Fla. 2000). In analyzing the issue under the abuse of discretion standard, the failure to interview the jurors was not arbitrary, fanciful, or unreasonable given Valenti's testimony, which did not substantiate any juror misconduct that was so fundamental and prejudicial as to vitiate the entire proceedings. Pham would not have been allowed to interview the jurors in an attempt to *find* juror misconduct, or to conduct a “fishing expedition” merely because a guilty verdict was returned. *Israel v. State*, 985 So. 2d 510, 523 (Fla. 2008); *Arbelaez v. State*, 775 So. 2d 909, 920 (Fla. 2000).

As stated in *Foster v. State*, 132 So. 3d 40, 65-66 (Fla. 2013), reh'g denied (Jan. 31, 2014):

Florida Rule of Criminal Procedure 3.575 requires that a party must have reason to believe the verdict may be subject to legal challenge to warrant a juror interview. Juror interviews are not permitted as to matters which inhere in the verdict. *See Reaves* [v. State, 826 So. 2d 932, 943 (Fla. 2002)]. Moreover, “[i]n order to be entitled to juror interviews, [a defendant] must present ‘sworn allegations that, if true, would require the court to order a new trial because the alleged error was so fundamental and prejudicial as to vitiate the entire proceedings.’” *Id.* (quoting *Johnson v. State*, 804 So. 2d 1218, 1225 (Fla. 2001)).

Even if raising the claim as to interviewing jurors was not procedurally barred in this habeas petition because it is merely a variation on a claim already raised in direct appeal, it would not have been meritorious had it been raised by appellate counsel, because the variant on the claim was not successful on direct

appeal. “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.” *Johnston v. State*, 63 So. 3d 730, 746 (Fla. 2011) (quoting *Williamson v. Dugger*, 651 So. 2d 84, 86 (Fla. 1994)).

Like in *Faster*, where this Court held that the trial court had not abused its discretion in denying a motion to interview jurors, the argument presents only “speculative and conclusory allegations concerning [jurors] which, on their face, fail to provide a reasonable basis for the court to conclude that the verdict was illegal and that a juror interview should have been granted *Foster*, 132 So. 3d at 66. The original inquiry of the identified jurors on May 21, 2008 resulted in “it's a sad story” and “verdicts are emotional decisions.” (V17, R1097). The State characterized these statements as comments in passing, said under the breath with no impermissible follow-up discussion, akin to shaking one's head or rolling one's eyes. (V17, R1091-92).

Similarly, in *Marshall v. State*, 976 So. 2d 1071, 1079 (Fla. 2007), this Court concluded that it was not an abuse of discretion for the trial court to decline to “expand the scope of the inquiry of the other former jurors” based on another juror's allegations. This Court found it significant in *Marshall*, that the defendant opted against further inquiry of jurors about the allegations, which is what we have

here. When given the opportunity by the trial court to further question the jurors on the allegations in Valenti's letter, Pham declined. (V17, R1097). Here, like in *Marshall*, the testimony Valenti gave did not allege that any juror had prematurely decided the case, refused to consider mitigation, or expressed a racial bias. Like in *Arbelaez v. State*, 775 So. 2d 909, 920 (Fla. 2000), Pham did not make a *prima facie* showing of any juror misconduct and the claim. The trial court found there was no basis to grant a new penalty phase, and nothing new to warrant further juror interviews, and accordingly, denied both parts of the motion. (V17, R1098). Had appellate counsel raised this specific issue, it would have been decided with the same analysis this Court already employed, to the same result.

Consequently, Pham has failed to show deficiency or prejudice and his petition should be denied.

### **Surrogate Medical Examiner Claim**

Pham next argues that he “received ineffective assistance of appellate counsel due to counsel's failure to raise a claim regarding Doctor Predrag Bulic testifying in both the guilt phase and penalty phase of Mr. Pham's trial in lieu of Doctor Thomas Parsons, the Attending Medical Examiner.” (*Petition* at 18). Parsons performed the autopsy on the victim, and documented his findings in the autopsy report and body diagram. Bulic reviewed the medical examiner file, which included the photos, the body diagram, Parsons's deposition, and the autopsy

report. (DAR, V9, R1165-70). Defense stipulated to Bulic testifying in place of Parsons. (DAR, V9, R1171). Bulic was qualified to render an opinion as a medical doctor and forensic pathologist. He testified that he had performed more than six hundred autopsies, and currently performs them on a daily basis as an associate medical examiner. (DAR, V9, R1162-63). He then testified as to his own, independent, expert opinion at trial and was cross-examined. (DAR, V9, R1176-1190). Bulic formed his opinion on the manner and cause of death on the basis of his review of the documents created by Parsons. (DAR, V9, R1176-1190). The body diagram was admitted at trial, but the autopsy report was not. There were only two pertinent objections made during Bulic's testimony; the first to the use of the word "interesting," as defense counsel took that to be Bulic's own comment on the evidence, and the second to Bulic's getting "into issues of amount of force," allegedly exceeding the scope of defense's stipulation to have Bulic testify. (DAR, V9, R1171).

Initially, this claim is barred because it was raised as Claims III and XIV of Pham's Motion to Vacate Judgment of Conviction and Sentence of Death Pursuant to Fla. R. Crim. P. 3.851. (*Petition* at 23). The trial court stated that this claim could have been raised on direct appeal in summarily denying it, however, "claims of ineffective assistance of appellate counsel may not be used to camouflage issues that should have been raised on direct appeal or in a postconviction motion."

*Rutherford*, 774 So. 2d at 643 (citing *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)). In fact, this same underlying issue (of ineffective assistance of trial counsel for failing to object to Bulic testifying) is also currently pending before this Court in Pham's appeal of the circuit court's denial of his 3.851 motion, so this claim is procedurally barred and should be denied. *See England v. State*, 39 Fla. L. Weekly S475 (Fla. July 3, 2014); *Knight v. State*, 923 So. 2d 387, 395 (Fla. 2005); *Baker v. State*, 878 So. 2d 1236, 1241 (Fla. 2004); *Parker v. Dugger*, 550 So. 2d 459, 460 (Fla. 1989); *Blanco v. Wainwright*, 507 So. 2d 1377, 1384 (Fla. 1987) (“By raising the issue in the petition for writ of habeas corpus, in addition to the rule 3.850 petition, collateral counsel has accomplished nothing except to unnecessarily burden this Court with redundant material.”)

Additionally, there can be no deficient performance because the underlying issue was not preserved for appellate review. Pham argues that his appellate counsel was deficient for failing to raise a claim as to Bulic testifying, when it is clear from the conversations on the record that trial counsel stipulated to having Bulic testify in the place of Parsons. (DAR, V9, R1171). Additionally, there was no objection to Bulic testifying in the penalty phase. Given the lack of any contemporaneous objection, this issue was not preserved for review and “appellate counsel cannot be considered ineffective for failing to raise issues which [were]

procedurally barred ... because they were not properly raised at trial.” *Rutherford v. Moore*, 774 So. 2d 637, 648 (Fla. 2000) (citations omitted); *Rodriguez v. State*, 919 So. 2d 1252, 1281-82 (Fla. 2005) (citing *Medina v. Dugger*, 586 So. 2d 317, 318 (Fla. 1991); *Roberts v. State*, 568 So. 2d 1255, 1261 (Fla. 1990)).

In addition, Pham has not demonstrated prejudice because this issue would not have constituted fundamental error had it been raised on appeal. *Crump v. State*, 622 So. 2d 963, 972 (Fla. 1993) (“Only when error is fundamental can the error be raised on appeal in the absence of a contemporaneous objection.”) “Unobjected-to comments are grounds for reversal only if they rise to the level of fundamental error.” *Merck v. State*, 975 So. 2d 1054, 1061 (Fla. 2007). An error is fundamental when it goes to the foundation of the case or the merits of the cause of action and is equivalent to a denial of due process. *J.B. v. State*, 705 So. 2d 1376, 1378 (Fla. 1998).

There were only two pertinent objections made during Bulic's testimony; the first to the use of the word “interesting,” as defense counsel took that to be Bulic's own comment on the evidence, and the second to Bulic's getting “into issues of amount of force,” allegedly exceeding the scope of defense's stipulation to have Bulic testify.<sup>7</sup> (DAR, V9, R1171). While it is completely appropriate for Bulic to

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<sup>7</sup> The actual stipulation between defense counsel and the State appears nowhere in the record, so any comment on what the actual stipulation was is pure

testify as to his independent opinion as a qualified expert, having reviewed Parsons's report, trial counsel Caudill objects to keep Bulic from doing just that. He states, "... I can't tell whether that's an opinion, that doesn't sound like something Dr. Parsons wrote. It sounds like his own opinion." (DAR, V9, R1172).

The second objection, upon which Pham focuses his argument, was not, however, to Bulic having testified instead of Parsons; but rather, specifically to amount of force. Defense counsel augmented his objection to include the following at the sidebar conversation: "Well, I don't know. I thought we were going to stick to - that was our understanding, we were going to stick to these injuries that Dr. Parsons noted in the autopsy." (DAR, V9, R1174-75). Therefore, only this isolated comment presumably exceeding the bounds of trial counsel's stipulation which trial counsel further characterized as "...interesting things and amount of force" and any attempt by Bulic to exceed the scope of Parsons' report (which had not yet occurred) would have been preserved for appellate review. (DAR, V9, R1176). Since the objection was still not to the issue of substituting the medical

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conjecture at this point. Contrary to Pham's assertion, the record is clear that the trial court did not "direct the State to confine Dr. Bulic's testimony to the agreement." (*Petition* at 18). In fact, the court points out it has no idea what that stipulation entails, stating, "[o]bviously the Court's not privy to your agreement." Rather, the conversations held at sidebar indicate defense counsel took issue with Bulic testifying as to "interesting things and amount of force," to indicate Bulic was testifying beyond their stipulation, to which the court responded "[h]e can preface his speech. No one can control his manner of speech as long as the content is confined to your agreement." (DAR, V9, R1173).

examiner, this claim still isn't preserved.

Moreover, appellate counsel was not ineffective for failing to raise this issue on appeal because the underlying substantive claim that Bulic, as a qualified medical examiner in his own right could not testify as to his own impressions having reviewed the autopsy report, is without merit. “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.” *Johnston*, 63 So. 3d at 746 (quoting *Williamson*, 651 So. 2d at 86). As stated in *Schoenwetter v. State*, 931 So. 2d 857, 870-71 (Fla. 2006), “[t]he trial court did not abuse its discretion in allowing [medical examiner] to testify about the autopsies performed by [attending medical examiner], where [attending medical examiner] was unavailable to testify, and [medical examiner] was a qualified expert who had reviewed the autopsy reports, photos, and notes and had spoken with [attending medical examiner].” *See also Capehart v. State*, 583 So. 2d 1009 (Fla. 1991), where this Court held that a medical examiner could testify by relying on facts not in evidence where the expert formed her opinion based upon the autopsy report, and other data in the case because the information was of a type reasonably relied upon by medical examiners.

Here, as in *Schoenwetter*, Bulic was qualified to testify, with or without the

stipulation by defense counsel and the failure to raise meritless claims does not render appellate counsel's performance ineffective. *Rutherford*, 774 So. 2d at 644. To the extent that Pham is arguing that appellate counsel should have raised an issue as to the content of Bulic's testimony in regards to the stipulation, the actual stipulation is not part of the record on appeal, and as stated in *Rutherford*, 774 So. 2d at 646, “appellate counsel cannot be deemed ineffective for failing to investigate and present facts in order to support an issue on appeal. The appellate record is limited to the record presented to the trial court.”

In addition, even if appellate counsel had been deficient in failing to raise a claim as to Bulic testifying in lieu of Parsons, Pham can demonstrate no prejudice. There is no indication that the claim would have resulted in a reversal had appellate counsel raised the issue on direct appeal. The cause of death, manner of death, murder weapon, and identity of the killer were never at issue in this case. The jury heard the details of Amy's death through the eyewitness testimony of Higgins and Lana. Pham was still in Amy's apartment engaged in a bloody struggle with Higgins when law enforcement arrived, and Amy was dead of stab wounds consistent with the knife Lana had taken from Pham. HAC would have still been established by the facts testified to by Lana and Higgins; specifically that Amy struggled and screamed while she was being stabbed and slashed by Pham, as well her attempt to consciously communicate to Lana while she was bleeding to death

from the neck wound. The medical examiner's testimony was not crucial to any element in this case, and did not contribute to the conviction or sentence of death. In fact, the medical examiner's testimony is only mentioned once in this Court's opinion, specifically: “[s]he was stabbed at least six times, and the medical examiner testified that the nature of her wounds would have caused her a high degree of pain.” *Pham*, 70 So. 3d at 497. Any error in admitting the medical examiner's testimony could only have been harmless, and would not have resulted in a reversal on appeal.

Pham cites to *Bullcoming v. New Mexico*, 131 S.Ct. 2705 (2011) to support this claim, however, it is not applicable to these facts. *Bullcoming* deals with the admission of a blood sample laboratory report to substantiate a charge of driving while intoxicated, holding that the report itself is testimonial in nature. By contrast, here we have an independently qualified medical doctor testifying about the results of an autopsy, not admitting the autopsy document as a business record.

Consequently, Pham has failed to show deficiency or prejudice on either of his two claims and his habeas petition should be denied.

### **CONCLUSION**

Based on the foregoing authority and arguments, the Respondent respectfully requests that this Honorable Court deny Pham’s petition for a writ of habeas corpus.


### **CERTIFICATE OF SERVICE**

I certify that a copy hereof has been furnished by E-Portal filing to Raheela Ahmed, ahmed@ccmr.state.fl.us and Maria Christine Perinetti, Assistant(s) CCRC-Middle, 3801 Corporex Park Dr., Suite 210, Tampa, Florida, perinetti@ccmr.state.fl.us; and support@ccmr.state.fl.us, 3801 Corporex Park Dr., Suite 210, Tampa, Florida 33619 on this 8th day of September, 2014.

### **CERTIFICATE OF COMPLIANCE**

I certify that this brief was computer generated using Times New Roman 14 point font.

Respectfully submitted and certified,  
PAMELA JO BONDI  
ATTORNEY GENERAL

/s/ 

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