

IN THE SUPREME COURT OF FLORIDA

JAMES FLOYD,

Petitioner,

v.

Case No. SC00-1533

MICHAEL W. MOORE,

Respondent.

RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

COMES NOW, Respondent, MICHAEL W. MOORE, by and through the undersigned Assistant Attorney General, and hereby responds to the Petition for Writ of Habeas Corpus filed in the above-styled case. Respondent respectfully submits that the petition should be denied, and states as grounds therefor:

FACTS AND PROCEDURAL HISTORY

This Court's opinion in Petitioner Floyd's initial direct appeal, Floyd v. State, 497 So. 2d 1211 (Fla. 1986), cert. denied, 501 U.S. 1259 (1991), reflects the following

facts:

James Floyd was indicted for the murder of Annie Bar Anderson. He was also charged with two counts of forgery, two counts of uttering a forged check, and two counts of grand theft.

The victim was found dead in one of the bedrooms of her home on the evening of Tuesday, January 17, 1984. She was last seen alive on the afternoon of January 16, 1984, when she cashed a check at her bank. According to the testimony of the medical examiner, she had been killed sometime that afternoon or evening by a stab wound to her chest. When the police arrived at the victim's home on January 17, 1984, the back door was unlocked, and there were no signs of a forced entry. In the room in which they found the victim, there were fresh "pry marks" beneath the window, indicating that someone had attempted to exit from that window.

On the afternoon of the victim's death (Monday, January 16), Floyd had cashed a check for \$500 from the victim's account. He was arrested after attempting to flee from the police when he tried to cash a second check for \$700 on the same account two days later (Wednesday, January 18). When questioned by the police, Floyd admitted forging the \$700 check, explaining that he had found the checkbook on Tuesday near a dumpster. He subsequently revised his story when confronted with the police knowledge that he had cashed the \$500 check on Monday. In addition, he admitted owning a brown jacket that was found outside the bank where he was arrested. A sock soaked with blood of the victim's blood type (which was not the defendant's blood type) was found in one of the jacket pockets.

Over objection at trial, the court permitted an officer to testify to Floyd's statement at the police station that: "I know the police are mad at me for running, but I've been in jail before and I don't want to go back."

At trial the state also presented the testimony of Greg Anderson, a cellmate of Floyd's who testified that Floyd told him that he had stabbed the victim when she surprised him in the course of the burglary.

497 So. 2d at 1212-13. The direct appeal from Floyd's resentencing, Floyd v. State, 569 So. 2d 1225 (Fla. 1990), cert. denied, 501 U.S. 1259 (1991), summarizes the testimony from that proceeding as follows:

The state's case at resentencing revealed that on January 17, 1984, the St. Petersburg Police Department received a telephone call requesting police to check on the welfare of Annie Barr Anderson, who was eighty-six years old. Upon arrival at Anderson's home, Officer Ray Olsen was met by Anderson's pastor. He explained that he was concerned because he had not seen Anderson that day, her car was in the rear driveway, her newspaper had not been picked up, her mail remained in the mail box, and she failed to answer after several knocks on her door. Olsen entered the home through the unlocked back door and discovered Anderson lying on her bed, dead. The medical examiner testified that Anderson had received multiple stab wounds, one to the upper chest that penetrated the heart and was rapidly fatal; eleven to the abdomen that were potentially fatal; and one in the left wrist that exited the hand.

Officer Donald Crotty of the St. Petersburg Police Department testified that Floyd cashed a \$500 check on Anderson's account on January 16, 1984. Two days later, the bank summoned police when Floyd tried to cash a \$700 check on her account. When detectives confronted Floyd, he fled. The detectives gave chase, arrested Floyd, and discovered Anderson's checkbook in his pocket. The detectives also discovered in Floyd's jacket an athletic sock containing dried blood. Officer Robert Engelke testified that the blood on the sock was consistent with Anderson's blood

type, but not Floyd's. The officer also testified that tire tracks on the driveway alongside Anderson's home were similar to the tire tread on Floyd's motorcycle.

In mitigation, the defense offered the testimony of numerous witnesses who had known Floyd for many years. Eula Williams regarded Floyd as a son. She stated that he was always respectful and helpful to her, especially in maintaining her yard. Rex Estelle, Floyd's supervisor at the First Baptist Church, testified that Floyd had been a willing and good worker and had been promoted to custodian about six months before the murder.

Floyd's father died of cancer within one year before the murder. Estelle testified that after Floyd's father died, Floyd exhibited extreme mood swings and had been fired after the church discovered missing property and money. Evidence also showed that Floyd's mother was an alcoholic who was hospitalized for her illness.

Thomas Snell, a police communications officer who had known Floyd for fifteen years, testified that Floyd took over Floyd's father's lawn service business after his death. Floyd was known as a conscientious, dependable, and hard worker who cared for his family during the period surrounding his father's demise and mother's alcoholism. He never knew Floyd to be a violent person or to have been in any kind of trouble.

Floyd's mother urged the jury to spare her son's life. Ann Shirley Anderson, the victim's daughter, testified that she corresponded with and visited Floyd in prison, and she urged the jury to consider that "[t]he people that God gives life to are worthwhile." Defense counsel proffered additional testimony from Ms. Anderson. He asked whether she thought that Floyd should be executed for his crimes, and she responded that he should not be executed. The trial court ruled that Ms. Anderson could not express her opinion about the specific sentence to be imposed in the case.

The jury recommended the death penalty by a vote of eight to four. The trial court found two aggravating

circumstances and no mitigating circumstances, and it sentenced Floyd to death.

569 So. 2d at 1228-29 (footnotes omitted). The pecuniary gain and the heinous, atrocious or cruel aggravating factors were upheld by this Court in that appeal.

In his initial direct appeal, Florida Supreme Court Case No. 66,088, Floyd was represented by Assistant Public Defender W.C. McLain. Mr. McLain raised the following five issues:

ISSUE I

THE TRIAL COURT ERRED IN ADMITTING IRRELEVANT EVIDENCE OF COLLATERAL CRIMES WHICH ONLY TENDED TO PROVE FLOYD'S PROPENSITY TO COMMIT CRIME.

ISSUE II

THE TRIAL COURT ERRED IN EXCLUDING PROSPECTIVE JURORS FROM FLOYD'S TRIAL BECAUSE OF THEIR OPPOSITION TO CAPITAL PUNISHMENT, SINCE A JURY SELECTED IN SUCH A MANNER IS NOT REPRESENTATIVE OF THE COMMUNITY AND IS ALSO MORE PRONE TO CONVICT IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS.

ISSUE III

THE TRIAL COURT ERRED IN REFUSING TO INSTRUCT THE JURY ON ANY MITIGATING CIRCUMSTANCES.

ISSUE IV

THE TRIAL COURT ERRED IN RULING THAT ANNE ANDERSON'S TESTIMONY DURING THE PENALTY PHASE OF THE TRIAL WAS IRRELEVANT TO SENTENCING.

ISSUE V

THE TRIAL COURT ERRED IN SENTENCING JAMES FLOYD TO DEATH BECAUSE THE SENTENCING WEIGHING PROCESS INCLUDED IMPROPER AGGRAVATING CIRCUMSTANCES AND EXCLUDED EXISTING MITIGATING CIRCUMSTANCES, RENDERING THE DEATH SENTENCE UNCONSTITUTIONAL UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS.

This Court reversed and remanded the case for a resentencing due to the trial court's application of the cold, calculated and premeditated and the avoid arrest aggravating factors, as well as the court's failure to properly instruct the jurors on mitigating circumstances. Floyd, 497 So. 2d at 1214-16.

In the appeal from the resentencing, Florida Supreme Court Case No. 72,207, Floyd was represented by Assistant Public Defender Robert Moeller; nine issues were raised:

ISSUE I

APPELLANT WAS DEPRIVED OF HIS RIGHTS UNDER THE FLORIDA AND UNITED STATES CONSTITUTIONS WHEN THE STATE PEREMPTORILY EXCUSED THE SOLE BLACK PROSPECTIVE JUROR REMAINING ON THE PANEL WITHOUT PROVIDING A VALID RACIALLY-NEUTRAL EXPLANATION FOR THE EXCUSAL.

ISSUE II

THE TRIAL COURT ERRED BY DENYING APPELLANT'S CHALLENGE FOR CAUSE ON PROSPECTIVE JUROR HENDRY, WHO SHOWED A PREDISPOSITION IN FAVOR OF DEATH AS THE PROPER PENALTY.

ISSUE III

THE COURT BELOW ERRED IN PREVENTING ANN SHIRLEY ANDERSON, THE VICTIM'S DAUGHTER, FROM TESTIFYING THAT NEITHER SHE NOR HER MOTHER BELIEVED IN THE DEATH PENALTY, PARTICULARLY WHEN THE STATE HAD PUT BEFORE THE JURY CONSIDERABLE ARGUMENT AND EVIDENCE CONCERNING THE VICTIM'S CHARACTER AND LIFESTYLE.

ISSUE IV

THE DEATH RECOMMENDATION HEREIN WAS TAINTED BY THE JURY'S RECEIPT OF

IRRELEVANT, HIGHLY PREJUDICIAL TESTIMONY THAT APPELLANT HAD THREATENED STATE WITNESS GREGORY ANDERSON.

ISSUE V

THE TRIAL COURT ERRED IN ALLOWING THE PROSECUTOR TO ASK DEFENSE WITNESS THOMAS SNELL ABOUT HIS KNOWLEDGE OF APPELLANT'S PRIOR CRIMINAL RECORD AND TO INTRODUCE EXTENSIVE EVIDENCE PERTAINING TO THAT RECORD.

ISSUE VI

THE TRIAL COURT ERRED IN PERMITTING THREE OF THE STATE'S NONEXPERT WITNESSES TO OFFER THEIR OPINIONS AND CONCLUSIONS AS TO VARIOUS MATTERS DURING APPELLANT'S PENALTY TRIAL.

ISSUE VII

THE TRIAL COURT ERRED IN NOT PERMITTING APPELLANT'S COUNSEL TO ARGUE TO THE JURY A RELEVANT BASIS FOR RECOMMENDING A SENTENCE OF LIFE.

ISSUE VIII

THE TRIAL COURT ERRED IN INSTRUCTING THE JURY ON AND IN FINDING IN AGGRAVATION THAT THE HOMICIDE WAS COMMITTED FOR FINANCIAL

GAIN AND WAS ESPECIALLY HEINOUS,
ATROCIOUS OR CRUEL.

ISSUE IX

THE TRIAL COURT ERRED IN FAILING
ADEQUATELY TO CONSIDER THE MITIGATING
EVIDENCE PRESENTED HEREIN AND IN NOT
PROPERLY WEIGHING THE AGGRAVATING AND
MITIGATING CIRCUMSTANCES.

This Court affirmed Floyd's sentence. Thereafter, Floyd sought certiorari review in the United States Supreme Court, presenting the following questions: (1) Whether Petitioner was denied his constitutional rights to equal protection and due process of law when the Supreme Court of Florida formulated a new procedural rule in Petitioner's cause and used it to defeat Petitioner's contention that the State exercised a peremptory challenge in a racially discriminatory manner at Petitioner's penalty trial; and (2) Whether Petitioner was denied due process of law and subjected to cruel and unusual punishment when the trial court refused to permit him to present mitigating evidence at penalty phase of his capital murder trial that the victim and her family did not believe in capital punishment. Review was denied on June 28, 1991. Floyd v. Florida, 501 U.S. 1259 (1991).

Floyd filed a number of motions for postconviction relief, the last of which was summarily denied on March 2, 1999, and July 21, 1999. The instant habeas petition

was timely filed contemporaneously with the initial brief in the direct appeal of the denial of postconviction relief.

ARGUMENT

CLAIM I

MR. FLOYD'S APPELLATE COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO RAISE A CLAIM THAT THE TRIAL COURT ERRED IN ADMITTING GRUESOME, CUMULATIVE AND PREJUDICIAL PHOTOGRAPHS INTO EVIDENCE DURING THE TRIAL.

Petitioner Floyd alleges that extraordinary relief is warranted because he was denied the effective assistance of appellate counsel. Of course, such a claim requires an evaluation of whether counsel's performance was so deficient that it fell outside the range of professionally acceptable performance and, if so, whether the deficiency was so egregious that it undermined confidence in the correctness of the result. Groover v. Singletary, 656 So. 2d 424, 425 (Fla. 1995); Byrd v. Singletary, 655 So. 2d 67, 68-69 (Fla. 1995), cert. denied, 516 U.S. 1175 (1996). A review of the record in this case demonstrates that neither deficiency nor prejudice has been shown by Floyd.

Floyd's initial argument is based on his guilt phase appellate counsel's failure to raise an issue regarding the trial court's admission of photographs of the victim. The first impediment to Floyd's plea for relief in this regard is that the court below actually *sustained* all of the objections lodged by Floyd's trial counsel, Martin Murry. A review

of the record reflects that, during the testimony of the medical examiner, Dr. Corcoran, the State offered a composite exhibit, State's Exhibit 16, into evidence, "subject to the view of counsel" (DA-R. V4/458).

Floyd's petition recites some of the discussion that followed, but unfortunately omits the entire exchange below, resulting in a misleading inference that defense counsel continued to object even after the trial court had ruled. The record reflects that, after the trial judge sustained the defense objection to all of the photographs of the victim's "internal organs," he allowed the prosecutor to choose one of the pictures of the victim's stab wounds for admission (DA-R. V4/460). The record also reflects that defense counsel clearly acquiesced in this ruling:

THE COURT: Okay, pick one of those and the rest I will sustain it.

MR. GRATE: I would think we need this one because it shows the wound to the chest.

MR. MURRY: That's fair.

MR. GRATE: We'll just take this right off the top.

MR. MURRY: That's fine.

THE COURT: Okay, we can mark those two. On the rest of these, I'm going to sustain the objection.

MR. MURRY: The rest of these pictures are cumulative.

(DA-R. V4/460). At that point, the court turned back to the first group of internal organ photos, which the prosecutor had not commented on before the court sustained

the defense objection:

THE COURT: Do you want any of these?

MR. GRATE: Let me just take a look at them so I can see what we are talking about.

(Thereupon, a pause in the proceedings took place.)

MR. GRATE: I have no problems if this is what Mr. Murry wanted.

MR. MURRY: I'm just objecting to all of them. I think they are cumulative.

MR. GRATE: No problem.

(DA-R. V4/460-461).

When the record is read in context, it is readily apparent that any claim challenging the admission of the autopsy photograph into evidence was not preserved for appellate review. It is well established that appellate counsel cannot be deemed to have been ineffective for failing to raise a claim that was not preserved for review. Kokal v. Dugger, 718 So. 2d 138, 142-143 (Fla. 1998).

In addition, this issue would not have been successful if argued in Floyd's direct appeal. The relevant question is whether the trial judge abused his discretion in admitting the picture. Nixon v. State, 572 So. 2d 1336, 1342 (Fla. 1990), cert. denied, 502 U.S. 854 (1991). No abuse of discretion has been shown on the facts of the instant case. Absent some abuse, this issue had no merit, and therefore counsel was not ineffective for failing to present this claim. Mendyk v. Dugger, 592 So. 2d 1076, 1081-82 (Fla. 1992) (rejecting claim of ineffective assistance of counsel where defendant

failed to demonstrate an abuse of discretion in admission of photographs); Groover, 656 So. 2d at 425; Chandler v. Dugger, 634 So. 2d 1066, 1068 (Fla. 1994) (failure to raise nonmeritorious issues is not ineffective assistance of appellate counsel). On these facts, Floyd is not entitled to habeas relief.

CLAIM II

MR. FLOYD’S APPELLATE ATTORNEYS WERE NOT INEFFECTIVE FOR FAILING TO RAISE CLAIMS OF PROSECUTORIAL MISCONDUCT.

Floyd next alleges that both of his appellate attorneys failed to raise allegations of prosecutorial misconduct. Once again, no extraordinary relief is warranted because many of his arguments were not preserved for appellate review and, even if considered, no reversible error could be demonstrated.

With regard to his initial direct appeal, Floyd asserts that several instances of “prosecutorial misconduct” appear in the record. He identifies (1) unsolicited testimony from the medical examiner referring to vaginal washings taken from the victim’s body; (2) testimony from Det. Totz that, at the time of booking, Floyd was “staring like he should be charged with something else;” (3) an unanswered question to a crime scene technician as to whether Floyd was cooperative in providing hair samples; (4) testimony from Det. Engelke explaining why, in his experience,

fingerprints are not often found at burglary scenes; and (5) further testimony from Det. Engelke about his observations of the dirt tire track found on the victim's driveway. Rather than actually discussing the challenged testimony, Floyd merely recites the incidents, makes a conclusory allegation that misconduct is evident, and requests habeas relief. However, no relief is due.

The record reflects that in response to Det. Totz' testimony about Floyd's appearance during booking, defense counsel objected, the judge struck the testimony and thereafter instructed the jury to disregard the statement (DA-R. V4/509). Since no other relief was requested, there was no issue available for appellate review. Similarly, no issue was preserved based on the question about Floyd's cooperation in providing the court-ordered hair samples, since this objection was also sustained and no further relief was requested (DA-R. V4/443-444). No additional relief was requested after the court sustained the hearsay objection to Det. Engelke's testimony of talking to burglary defendants about the lack of fingerprints, which is now attacked as speculative, rather than on the hearsay basis offered below (DA-R. V4/585-587). Once again, appellate counsel cannot be deemed ineffective since none of these claims were preserved for appellate review.

The two remaining allegations clearly did not warrant a mistrial. The medical examiner's unsolicited reference to the vaginal washings was inadvertent and not

mentioned again during the trial. The State never suggested that Mrs. Anderson was the victim of a sexual battery, and clearly this isolated comment did not vitiate the fairness of Floyd's trial. Similarly, Det. Engelke's testimony about having observed a dirt tire track at the scene, and noting that the track was similar to the tire on Floyd's motorcycle – "a common tire used on Japanese motorcycle street bikes" – was not improper or unnecessarily prejudicial. Thus, no error has been demonstrated by appellate counsel's failure to raise these claims of alleged prosecutorial misconduct from this record.

Floyd also contends that his appeal from his resentencing was inadequate because his resentencing appellate attorney did not assert that error occurred during the prosecutor's penalty phase closing argument. It is well established that counsel will not be deemed ineffective for failing to raise claims pertaining to prosecutorial arguments which were not objected to at trial. Ferguson v. Singletary, 632 So. 2d 53, 58 (Fla. 1993); Kelley v. Dugger, 597 So. 2d 262, 263 (Fla. 1992). In this case, Floyd's assertion that the prosecutor's closing argument was "constitutional" error and appellate counsel should have briefed the issue is an improper attempt to have this Court review a direct appeal issue under the guise of ineffective assistance of counsel. Bryan v. Dugger, 641 So. 2d 61, 65 (Fla. 1994); Turner v. Dugger, 614 So. 2d 1075, 1080 (Fla. 1992).

In addition, counsel cannot be ineffective for failing to raise a nonmeritorious issue, and there is no merit to the claim that the prosecutor's closing argument presented constitutional or fundamental error. Floyd recites an isolated, rhetorical question where the prosecutor asked the jury if the facts demonstrated any remorse, and claims that this amounted to an improper argument on lack of remorse as an aggravating factor. However, the facts noted by the prosecutor were clearly relevant in establishing that Mrs. Anderson's murder was "conscienceless and pitiless" to support the applicability of the heinous, atrocious or cruel aggravating factor. This factor was ultimately found by the trial judge and upheld on appeal. See, Muehleman v. State, 503 So. 2d 310, 317 (Fla.) (comments may have excited passions but were highly relevant in establishing aggravating factors), cert. denied, 484 U.S. 882 (1987). Since the prosecutor was not suggesting that any lack of remorse could be used as an aggravating factor, but only attempting to help the jury understand the atrocity of Floyd's actions, no improper argument was made. See, Davis v. State, 461 So. 2d 67, 70 (Fla. 1984) (comments not Golden Rule violation based on manner and context), cert. denied, 473 U.S. 913 (1985).

Even if the prosecutor's comments in this case were deemed to be improper, such comments are not reversible error, let alone fundamental, where the remarks did not become a feature of the trial. See, Sims v. State, 602 So. 2d 1253, 1257 (Fla. 1992)

(rejecting claim of ineffective assistance of counsel for failure to object to Golden Rule violation), cert. denied, 506 U.S. 1065 (1993); Bertolotti v. State, 476 So. 2d 130, 133 (Fla. 1985) (prosecutor’s penalty phase closing argument not egregious enough to warrant new sentencing). In this case, the prosecutor’s closing argument comprises twelve pages of transcript (RS-R. V7/985-997). Petitioner has recited from selected portions of the prosecutor’s discussion on the applicability of the heinous, atrocious or cruel aggravator, and no error has been demonstrated.

In order to constitute fundamental error, the prosecutor’s statements had to “reach down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error.” State v. Delva, 575 So. 2d 643, 644-45 (Fla. 1991), quoting Brown v. State, 124 So. 2d 481, 484 (Fla. 1960). The complained-of comments herein clearly did not meet this standard. See, Crump v. State, 622 So. 2d 963, 972 (Fla. 1993) (prosecutor’s comments, including a narrative to gain sympathy for the victim, not so outrageous as to taint the jury recommendation); Jones v. Wainwright, 473 So. 2d 1244, 1245 (Fla. 1985) (rejecting ineffective assistance of appellate counsel claim based on failure to challenge prosecutorial comments). This was a deplorable offense involving two aggravating circumstances (one of which was merged from two factors) and no mitigating factors. The recommendation of death could surely have been obtained, followed, and upheld

on appeal without the challenged comments.

Floyd has failed to show any deficiency in his appellate counsels' performance regarding any possible claim relating to his current allegations of prosecutorial misconduct, or any prejudice resulting from any alleged deficiency. No habeas relief is warranted.

CLAIM III

MR. FLOYD'S APPELLATE COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO RAISE A CLAIM OF A VIOLATION OF CALDWELL V. MISSISSIPPI, 472 U.S. 320 (1985).

Floyd next alleges that his jury's sense of responsibility was unconstitutionally diminished by comments and instructions characterizing their role as "advisory." Once again, this claim would have been both procedurally barred and without merit if it had been raised in Floyd's resentencing appeal. Defense counsel requested a special instruction telling the jury that their recommendation would be given great weight, but that the court would have the final word on sentencing (RS-R. V7/965-966). The record clearly reflects that this instruction was in fact given to Floyd's jury (RS-R. V7/1030). Since no objection was offered to the characterizations of the jury's role as "advisory" in voir dire and no further instruction was requested, no claim of error

regarding the descriptions provided for the jury role could have been argued on appeal.

In addition, this claim would be without merit since describing the jury role as advisory is in fact consistent with Florida law. This Court has consistently rejected this issue in later cases. Archer v. State, 673 So. 2d 17, 21 (Fla.), cert. denied, 519 U.S. 876 (1996) (Florida standard jury instructions adequately describe role to jury); Johnson v. State, 660 So. 2d 637, 647 (Fla. 1995), cert. denied, 517 U.S. 1159 (1996); Hunter v. State, 660 So. 2d 244, 253 (Fla. 1995), cert. denied, 516 U.S. 1128 (1996); Fotopoulos v. State, 608 So. 2d 784, 794, n. 7 (Fla. 1992), cert. denied, 508 U.S. 924 (1993). This Court has repeatedly rejected claims identical to the one presented herein. Johnston v. Dugger, 583 So. 2d 657, 662-663, n. 2; Rose v. State, 617 So. 2d 291, 297 (Fla. 1993).

Floyd also asserts that the jury may have been misled as to the effect of a six-to-six tie on a jury recommendation. Since the jury was given the standard instruction that if six or more jurors recommend life, they have made a life recommendation, this claim is without merit (RS-R. V7/1028, 1029). Furthermore, since the jury's recommendation was eight to four, there is no merit to the suggestion that one juror may have been swayed from a tie vote, and any possible error would clearly be harmless.

CLAIM IV

MR. FLOYD'S APPELLATE COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO RAISE A CLAIM THAT THE PENALTY PHASE JURY INSTRUCTIONS IMPROPERLY SHIFTED THE BURDEN OF PROOF.

Floyd next alleges that his resentencing appellate attorney should have raised an issue claiming that the jury instructions improperly shifted the burden of proof. This claim is not preserved for appellate review as Floyd is not challenging the denial of a particular requested instruction. Furthermore, this Court has repeatedly recognized that the burden shifting claim is without merit. Freeman v. Singletary, 25 Fla. L. Weekly S451, S457 (Fla. June 8, 2000); Demps v. Dugger, 714 So. 2d 365 (Fla. 1998); Shellito v. State, 701 So. 2d 837 (Fla. 1997). Counsel cannot be deemed ineffective for failing to raise a barred, meritless claim.

CLAIM V

MR. FLOYD'S APPELLATE COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO RAISE A CLAIM THAT THE PENALTY PHASE JURY INSTRUCTIONS DEFINING THE THREE AGGRAVATING FACTORS WERE UNCONSTITUTIONALLY VAGUE.

Floyd next asserts that appellate counsel should have challenged the adequacy of the jury instructions defining the aggravating factors. This Court has repeatedly

rejected such claims where, as here, no issue was preserved for appellate review. Byrd, 655 So. 2d at 69; Hardwick v. Dugger, 648 So. 2d 100, 106 (Fla. 1994). The record in the instant case reflects that an enhanced instruction on the definition of heinous, atrocious, or cruel was provided to the jury at Floyd's request, and no objection to the burglary or pecuniary gain instructions was offered (RS-R. V2/298; V7/968-971, 1025). Clearly this claim was not preserved for review. Harvey v. Dugger, 656 So. 2d 1253, 1258 (Fla. 1995); Beltran-Lopez v. State, 626 So. 2d 163 (Fla. 1993), cert. denied, 511 U.S. 1115 (1994). Furthermore, this Court has rejected the failure to raise this claim as a basis for ineffective assistance of appellate counsel because, prior to Espinosa v. Florida, 505 U.S. 1079 (1992), the claim would have been rejected, even if raised. Doyle v. Singletary, 655 So. 2d 1120, 1121 (Fla. 1995); Lambrix v. Dugger, 641 So. 2d 847, 849 (Fla. 1994); Henderson v. Singletary, 617 So. 2d 313, 316-17 (Fla. 1993). Thus, the failure to raise this issue at the time of Floyd's 1988 appeal did not constitute ineffective assistance of appellate counsel.

CLAIM VI

MR. FLOYD'S APPELLATE COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO RAISE A CLAIM THAT FLORIDA'S DEATH PENALTY STATUTE IS UNCONSTITUTIONAL BECAUSE THE AGGRAVATING FACTORS ARE VAGUE AND

OVERBROAD.

Floyd's last allegation attacks counsel's failure to raise an issue as to the facial validity of Florida's death penalty statute. Floyd relies on two cases, decided after his appeals, to suggest that Florida's statute is unconstitutional. Since no argument premised on Espinosa v. Florida, 505 U.S. 1079 (1992), or Richmond v. Lewis, 505 U.S. 40 (1992), was available at the time of Floyd's appeal, counsel cannot be found ineffective for the failure to raise this issue. Furthermore, the issue is clearly without merit. Freeman, 25 Fla. L. Weekly at S456; Elledge v. State, 706 So. 2d 1340, 1347, n. 9 (Fla. 1997). Thus, no habeas relief is warranted.

WHEREFORE, Respondent respectfully requests that this Honorable Court DENY the Petition for Writ of Habeas Corpus filed in this case.

Respectfully submitted,

CAROL M. DITTMAR
Florida Bar No. 0503843
Assistant Attorney General
2002 North Lois Ave., Ste. 700
Tampa, Florida 33607
Phone: (813) 873-4739
Fax: (813) 356-1292
COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been furnished by U.S. Mail to Pamela Izakowitz, 303 S. Westland Ave., P. O. Box 3294, Tampa, FL 33606, this _____ day of September, 2000.

COUNSEL FOR RESPONDENT

