

IN THE SUPREME COURT OF FLORIDA

CHARLES W. FINNEY,

Petitioner,

v.

Case No. SC01-356

MICHAEL W. MOORE,

Respondent.

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**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**

The facts of this case are recited in this Court's initial opinion, Finney v. State, 660 So. 2d 674, 678-79 (Fla. 1995), cert. denied, 516 U.S. 1096 (1996):

According to the testimony at trial, Sandra Sutherland was discovered stabbed to death in her apartment shortly after 2 p.m. on January 16, 1991. The victim was found lying face down on her bed. Her ankles and wrists were tied and she had been gagged. On a nightstand near the bed was an open jar

of face cream. The lid was lying next to the jar. The victim's bedroom had been ransacked, the contents of her purse had been dumped on the floor, and her VCR was missing.

According to the medical examiner the cause of death was multiple stab wounds to the back. Of the thirteen stab wounds, all but one penetrated the lungs causing bleeding and loss of oxygen, ultimately resulting in death. No bruises or other trauma was observed.

Numerous fingerprints were gathered from the victim's apartment, including prints from a piece of paper with German writing and from the jar on the nightstand. Fingerprints also were taken from the missing VCR, which was located at a local pawn shop. Pawn shop records indicated that the VCR was brought in on January 16 at 1:42 p.m. by Charles W. Finney for a loan of thirty dollars. Finney's fingerprints matched prints taken from the pawn ticket, the VCR, the jar lid, and the paper with German writing.

After it was determined that Finney had pawned the victim's VCR, Detective Bell of the Tampa Police Department interviewed Finney on the afternoon of January 30, 1991. Finney told Bell that he knew the victim due to the fact that they had lived near each other in the same apartment complex. Finney told Bell that he had seen the victim twice since she moved to another apartment in the complex. Once, he had talked to her about putting a screened porch on the back of her new apartment and then about two months prior to the murder he talked to her by the mailboxes at the complex. When asked about his whereabouts on the day of the murder, Finney told Detective Bell that he was home sick all day and never left his apartment. Upon being confronted with the fact that he

had pawned the victim's VCR, Finney told the detective he found it near the dumpster when he took out the garbage and then pawned it.

Finney called a witness who testified that the day before the murder he saw the victim arguing with a white male near the mailboxes at the apartment complex. Another defense witness testified that around 10 a.m. on the day of the murder, he saw William Kunkle, who worked as a carpenter at the apartment complex, come out of the victim's apartment. According to the witness, when Kunkle saw him, Kunkle came out of the door very quickly, locked the door with a key, and walked around the corner. The witness's girlfriend offered similar testimony as to Kunkle's conduct. In rebuttal, Kunkle testified that on January 16 he worked in the building next door to Ms. Sutherland's apartment, but had not been in her apartment that day. He denied ever having any conversation or interaction with the victim. The fingerprint examiner also testified during rebuttal that Kunkle's fingerprints did not match those found in the victim's apartment.

The defense sought to recall the medical examiner, Dr. Diggs, to testify that the crime scene was consistent with both a consensual sexual bondage situation and a situation where the victim consented to being bound and gagged out of fear. The State objected to the testimony as speculative. During proffer, Dr. Diggs told the court that whether a bondage situation was consensual was not something that a medical examiner would typically testify about or try to determine. The trial judge disallowed any testimony about the circumstances being consistent with sexual bondage, but allowed Dr. Diggs to testify concerning the probable positions of the victim and of the attacker and about the fact that there were no defensive wounds or

other signs of a struggle.

Finney took the stand in his own defense. He testified that he had lived near Ms. Sutherland in the same apartment complex until she moved about eight months prior to the murder. A couple of months after she moved, Ms. Sutherland talked to him about screening in the patio of her new apartment. At that time, she handed him a piece of paper to write down measurements but took the paper back. Finney testified that he returned about a week or two later but Ms. Sutherland had decided not to screen the patio. On that occasion he was in the victim's apartment, helped her move boxes and took various items out of the boxes. According to Finney the last time he saw Ms. Sutherland was a day or two before the murder. She was coming out of her apartment early one morning. She came over to his car and they talked. He further testified that he found the VCR near the dumpsters at the complex and had pawned it the same day for pocket cash. He stated that he did not steal the VCR and that he did not kill Ms. Sutherland.

Finney was convicted as charged with first degree murder, armed robbery, and dealing in stolen property (DA-R. V5/ 758).<sup>1</sup> In the penalty phase, the State presented testimony about Finney's prior violent felony conviction, and the defense presented three witness: Finney's common law wife, Tammy Gallimore; a close friend and co-worker, Joseph Williams; and a

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<sup>1</sup>The designation "DA-R." will be used to refer to the record in the direct appeal of Finney's convictions and sentences, Florida Supreme Court # 80,990; "PC-R." will be used to refer to the record in the postconviction appeal, Florida Supreme Court #SC00-1351.

forensic psychologist, Dr. Michael Gamache (DA-R. V6/ 820-892). These witnesses described Finney's deprived background, positive character traits, strong work ethic, military service, and close relationship with his daughter.

The jury recommended a sentence of death by a vote of nine to three, and on November 10, 1992, the judge followed the recommendation, finding three aggravating circumstances: prior violent felony conviction; murder committed for pecuniary gain; and heinous, atrocious, or cruel (DA-R. V1/ 153-57; V6/ 921). The judge also found the following nonstatutory mitigating factors: 1) Finney's contributions to the community as evidenced by his work and military history; 2) Finney's positive character traits; 3) Finney would adjust well to a prison setting and had potential for rehabilitation; 4) Finney had a deprived childhood; and 5) Finney's bonding with and love for his daughter (DA-R. V1/ 153-57). On appeal, Finney was represented by Assistant Public Defender Steven L. Bolotin, and alleged the following errors:

#### ISSUE I

THE CIRCUMSTANTIAL EVIDENCE IS INSUFFICIENT TO SUSTAIN APPELLANT'S CONVICTIONS OF FIRST DEGREE MURDER, ARMED ROBBERY, AND DEALING IN STOLEN PROPERTY.

A. The Evidence is Insufficient to

Prove Identity

B. The Evidence is Insufficient to Prove Premeditation

C. The Evidence is Insufficient to Prove Felony Murder and Armed Robbery

D. The Evidence is Insufficient to Prove the Aggravating Factor that the Homicide was Committed for Pecuniary Gain

ISSUE II

THE TRIAL COURT ERRED IN REFUSING TO ALLOW THE DEFENSE TO PRESENT THE TESTIMONY OF DR. DIGGS THAT HIS OBSERVATIONS AT THE SCENE WERE CONSISTENT WITH AN ACT OF SEXUAL BONDAGE WHICH ESCALATED INTO A HOMICIDE.

ISSUE III

THE TRIAL COURT ERRED IN OVERRULING THE DEFENSE OBJECTION TO APPELLANT'S BEING SHACKLED DURING THE PENALTY PHASE OF HIS TRIAL, WHERE THERE WAS NO APPARENT REASON (MUCH LESS A NECESSITY) FOR THE SHACKLING, AND WHERE THE COURT MERELY DEFERRED TO THE WISHES OF THE SHERIFF'S PERSONNEL.

ISSUE IV

THE TRIAL COURT ERRED IN OVERRULING DEFENSE OBJECTIONS TO THE TESTIMONY OF JUDY BAKER AND TO THE PROSECUTOR'S CLOSING ARGUMENT, WHERE THE INFLAMMATORY AND PREJUDICIAL IMPACT OF HER TESTIMONY OUTWEIGHED ITS PROBATIVE VALUE; ESPECIALLY SINCE THE TRIAL COURT TOOK JUDICIAL NOTICE AND INSTRUCTED THE JURY ON THE FACT OF THE PRIOR CONVICTIONS, AND THE INVESTIGATING OFFICER WAS AVAILABLE TO TESTIFY AS TO THE

CIRCUMSTANCES.

ISSUE V

THE TRIAL COURT ERRED IN REFUSING TO ALLOW THE DEFENSE TO CROSS-EXAMINE JUDY BAKER AS TO HER DESCRIPTION OF HER ATTACKER.

ISSUE VI

THE TRIAL COURT ERRED IN REFUSING TO INSTRUCT THE JURY ON SPECIFIC NON-STATUTORY MITIGATING CIRCUMSTANCES INCLUDING (1) APPELLANT'S DEPRIVED CHILDHOOD, (2) HIS CONTRIBUTIONS TO HIS COMMUNITY AND TO SOCIETY, (3) HIS POTENTIAL FOR REHABILITATION AND POSITIVE ADJUSTMENT WITH THE PRISON SETTING, AND (4) HIS STRONG BONDING WITH HIS DAUGHTER. THE HARMFUL EFFECT OF THE ERROR WAS COMPOUNDED BY THE PROSECUTOR'S MISLEADING ARGUMENT TO THE JURY.

ISSUE VII

THE TRIAL COURT ERRED IN INSTRUCTING ON AND FINDING AGGRAVATING FACTORS, AND THE SENTENCE OF DEATH IS DISPROPORTIONATE.

- A. Pecuniary Gain
- B. Prior Violent Felony
- C. Especially Heinous, Atrocious or Cruel
- D. Proportionality

This Court affirmed the convictions and sentence of death. Finney v. State, 660 So. 2d 674 (Fla. 1995), cert. denied, 516

U.S. 1096 (1996). An amended motion for postconviction relief was filed in April, 1999, and was summarily denied (PC-R. V1/ 133-162; V3/ 335-340). Finney's petition for habeas relief in this Court was timely filed contemporaneously with his brief in the appeal of the denial of his motion for postconviction relief.

**ARGUMENT IN OPPOSITION TO CLAIMS RAISED**

The bulk of Finney's habeas petition is premised on several claims of ineffective assistance of appellate counsel. 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. Thompson v. State, 759 So. 2d 650, 660 (Fla. 2000); 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 demonstrates that neither deficiency nor prejudice has been shown in this case. The record reflects that appellate counsel acted as a capable advocate, asserting seven issues for judicial review in a 94-page brief.

Finney's arguments are based on appellate counsel's alleged

failure to raise a number of issues, each of which will be addressed in turn. However, none of the issues now asserted would have been successful if argued in Finney's direct appeal. Therefore, counsel was not ineffective for failing to present these claims. 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). No extraordinary relief is warranted because several of Finney's current arguments were not preserved for appellate review and, even if considered, no reversible error could be demonstrated. See, Rutherford v. Moore, 25 Fla. L. Weekly S891 (Fla. Oct. 12, 2000)(while habeas petitions are proper vehicle to advance claims of ineffective assistance of appellate counsel, such claims may not be used to camouflage issues that should have been raised on direct appeal or in a postconviction motion). See also Thompson v. State, 759 So. 2d 650 (Fla. 2000); Teffeteller v. Dugger, 734 So. 2d 1009 (Fla. 1999); Hardwick v. Dugger, 648 So. 2d 100 (Fla. 1994); Breedlove v. Singletary, 595 So. 2d 8 (Fla. 1992). As noted above, to obtain relief it must be shown that appellate counsel's performance was both deficient and prejudicial. The failure to raise a meritless issue will not render counsel's performance ineffective, and this is generally true as to issues that would

have been found to be procedurally barred had they been raised on direct appeal. Rutherford.

Claim I: Whether appellate counsel rendered ineffective assistance of counsel by failing to raise the issue of the trial court allowing, over defense objection, the admission into evidence of certain photographs of the victim, Sandra Sutherland.

Finney first alleges that appellate counsel was ineffective for failing to raise an issue in the direct appeal challenging the admission of crime scene photographs. The record reflects that during the testimony of crime scene technician Kathleen Kunde, the State offered eight photographs for her identification (DA-R. V3/ 325). They were all pictures of the victim taken by Ms. Kunde (DA-R. V3/ 325). When the State offered them for admission, the judge asked the attorneys to approach the bench (DA-R. V3/ 325). The judge indicated that she had assumed the defense was going to object, and defense counsel remarked that although she didn't like the photographs being admitted, "[q]uite candidly, I have researched, and I can't come up with a legal reason to avoid it" (DA-R. V3/ 326). The judge then asked the State how many pictures had been taken, and after the witness indicated there were maybe one or two more, defense counsel asked the Court to consider if it was "necessary to introduce all of these photographs" (DA-R. V3/

326). There followed a discussion as to how many pictures had been taken at the morgue, and the prosecutor indicated that she was not planning to bring in any other photographs that had been taken at the morgue (DA-R. V3/ 327). The judge then reviewed each of the individual pictures with Technician Kunde; some of the pictures had been taken at the morgue, which showed the size of the wounds and the results of the ligatures (DA-R. V3/ 327-28).

After reviewing the pictures, the judge commented that the pictures were "not necessarily to me gruesome" but "very matter-of-fact" (DA-R. V3/ 328). She asked the prosecutor about Ex. 31, which was the only one which showed the gag in the victim's mouth; the prosecutor noted that it was offered to show premeditation, and that if she had a better picture with the gag, she would use it, but the only other one was a side view which showed a large puddle of blood (DA-R. V3/ 328-29). The judge noted that the others were fine, very matter-of-fact, and she would overrule the objection to the one that was "a little difficult to look at," but was the only one showing the gag (DA-R. V3/ 329-30). Defense counsel noted that it was "the only one we would have an objection to," and all of the pictures were admitted (DA-R. V3/ 330-31).

Thus, the record clearly establishes that only the admission

of one picture was preserved for appellate review. Although Finney now apparently challenges the admission of all of the photographs, any claim disputing the admission of all of these pictures 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); Ferguson v. Singletary, 632 So. 2d 53, 58 (Fla. 1993); Kelley v. Dugger, 597 So. 2d 262, 263 (Fla. 1992).

In addition, this issue would not have been successful if argued in Finney's direct appeal. The relevant question is whether the trial judge abused her discretion in admitting the pictures. Nixon v. State, 572 So. 2d 1336, 1342 (Fla. 1990), cert. denied, 502 U.S. 854 (1991). Here, the State admitted eight photographs that were not cumulative and were each relevant to demonstrate the nature of the crime committed. No abuse of discretion has been shown on these facts. 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, 634 So. 2d at 1068

(failure to raise nonmeritorious issues is not ineffective assistance of appellate counsel). On these facts, Finney is not entitled to habeas relief.

Claim II. Whether appellate counsel rendered ineffective assistance of counsel by failing to raise the issue of the trial court allowing Ruth Sutherland, the mother of the victim, to remain in the courtroom to observe the trial after she had completed her testimony.

Finney next asserts that appellate counsel should have raised a claim of regarding the trial court's permitting the victim's mother, Ruth Sutherland, to remain in the courtroom after completion of her testimony. The trial transcript reflects that prior to the swearing of the jury, the State advised the court that the first witness would be the victim's mother, Ruth Sutherland, and that Mrs. Sutherland wanted to be permitted to remain in the courtroom for the rest of the testimony (DA-R. V3/ 242). The State did not intend to recall Mrs. Sutherland for any reason, although the possibility could not be ruled out (DA-R. V3/ 242). The defense objected, noting that they always had a right of recall, and therefore objected to her remaining in the courtroom (DA-R. V3/ 242-43). The court ruled that she could stay in the courtroom, and that if the defense needed to call her as a witness, they could go into the

question of her having been in the courtroom for the testimony (DA-R. V3/ 243).

Finney now claims that it was a violation of the rule of sequestration, codified in Section 90.616, Florida Statutes, for Mrs. Sutherland to remain in the courtroom after completing her testimony. He asserts that appellate counsel should have raised this alleged trial error as an issue on appeal, due to the prejudicial impact of having the jury observe the victim's mother throughout the trial. However, any potential issue raised on these facts would not merit any relief, and counsel cannot be deemed ineffective for failing to present this claim.

Although Mrs. Sutherland was presented as a witness by the State, her presence in the courtroom after the completion of her testimony did not violate the rule of witness sequestration. The purpose of the rule is to prevent a witness' testimony from being influenced by other testimony the witness may have heard. Gore v. State, 599 So. 2d 978, 985-986 (Fla. 1992) (courtroom presence of the stepmother, who testified only regarding jewelry which the victim commonly wore, did not prejudice the defendant; no abuse of discretion in allowing this nonmaterial witness to be excluded from the rule), cert. denied, 506 U.S. 1003 (1993); Wright v. State, 473 So. 2d 1277, 1280 (Fla. 1985), cert. denied, 474 U.S. 1094 (1986); Spencer v. State, 133 So. 2d 729

(Fla. 1961), cert. denied, 369 U.S. 880 (1962). Since neither side desired or attempted to call Mrs. Sutherland after she had been in the courtroom, any possible taint to her testimony is no basis for concern.

This Court has frequently acknowledged that the rule of sequestration is not a strict or absolute rule of law, and that the trial judge has broad discretion with regard to insuring compliance with the rule. Knight v. State, 721 So. 2d 287, 293-294 (Fla. 1998); Gore, 599 So. 2d at 985-986; Wright, 473 So. 2d at 1280; Randolph v. State, 463 So. 2d 186, 191 (Fla. 1984). The rule must not be enforced in a manner which produces injustice, and a trial court cannot exclude the testimony of a witness due to any violation of the rule unless the court first determines that the witness' testimony was affected by other testimony to such an extent that it substantially differs from what it would have been had the witness not heard the other testimony. Wright, 473 So. 2d at 1280; Steinhorst, 412 So. 2d at 336. The burden would be on Finney to demonstrate an abuse of discretion and a resultant injury. Spencer, 133 So. 2d at 731; Dupree v. State, 436 So. 2d 317, 318 (Fla. 1st DCA 1983).

Finney's complaint that no hearing was held pursuant to Thomas v. State, 372 So. 2d 997 (Fla. 4th DCA 1979), is of no

concern. The hearing mandated by Thomas is one to determine whether a witness' testimony may have been influenced by having been present in the courtroom prior to testifying; where, as here, the witness did not observe any other testimony prior to testifying, there is no basis to even conduct such an inquiry.

In Beasley v. State, 25 Fla. L. Weekly S915, S921 (Fla. Oct. 26, 2000), this Court noted that there are two bases for a challenge to the trial court's decision to exclude a witness who is the victim's next of kin from the rule of sequestration. One could argue that the witness has changed key testimony to conform to the evidence, or a second area of concern may be the prejudice potentially caused by emotional reactions of the victim's family members. Finney does not allege that either of these possible causes of prejudice occurred in his trial. The mere fact that a jury could observe a family member during the trial is clearly no basis for a finding that the trial court abused her discretion in permitting the victim's mother to remain in the courtroom.

In Sireci v. State, 587 So. 2d 450, 454 (Fla. 1992), this Court noted that Florida's Constitution granted to victims, including the next of kin of homicide victims, the right to be present at all crucial stages of criminal proceedings. Art. I,

§ 16(b), Fla. Const. Although this right cannot interfere with the constitutional rights of the accused, Finney does not attempt to explain how any of his rights could have been adversely affected by the court's ruling. He does not allege that Mrs. Sutherland's testimony was changed due to her having been present in the courtroom, and his failure to allege any specific prejudice leaves his argument completely without support. No abuse of discretion has been demonstrated on these facts.

Since no error has been demonstrated with regard to the trial court's ruling permitting the victim's mother to remain in the courtroom after completion of her testimony, appellate counsel was not ineffective in failing to present this claim as an issue of on appeal. No habeas relief is warranted.

Claim III: Whether appellate counsel rendered ineffective assistance of counsel by failing to raise the issue of the trial court never ruling on trial counsel's motion for sequestration.

Finney's next claim asserts that his appellate counsel should have raised an issue challenging the trial court's failure to rule on a motion for sequestration. First of all, contrary to the allegations in Finney's petition, the record reflects that the trial court in fact denied the motion to

sequester the jurors throughout the entire trial (DA-R. V3/ 311). When defense counsel initially requested that the jurors be sequestered, noting that Mr. Finney had asked her to pursue sequestration "in an abundance of caution," the judge indicated that she wanted the parties to research the issue during a recess, and that she would also check on the rule (DA-R. V3/ 245-47). Later in the day, just prior to a recess, the judge stated, "let's see if we can find any law on the sequestration issue to resolve it" (DA-R. V3/ 300). After the recess, the attorneys agreed that the question was discretionary with the court, and discussed relevant authorities; the defense renewed its request to have the jury sequestered (DA-R. V3/ 307). The court thereafter ruled that, based on the arguments of counsel, she was denying the request to sequester the jury (DA-R. V3/ 311). No error has been shown with regard to this ruling.

In Banda v. State, 536 So. 2d 221 (Fla. 1988), cert. denied, 489 U.S. 1087 (1989), this Court upheld a trial court's denial of a request to sequester jurors in a capital case between the guilt and penalty phases of the trial. Although Finney now suggests that his jury should have been sequestered to avoid "extensive media coverage," there is no suggestion in the record of any such coverage. On these facts, no abuse of discretion could possibly be demonstrated, and Finney would not have

secured any relief had the issue been raised on appeal. Neither deficiency nor prejudice can be attributed to appellate counsel in failing to brief this claim, and therefore once again no habeas relief is warranted.

Claim IV.                   Whether appellate counsel rendered ineffective assistance of counsel by failing to raise the issue of the trial court excusing two jurors for cause.

Finney's next claim presents the allegation that counsel was ineffective for failing to raise an issue on appeal challenging the trial court's granting of the State's cause challenges on two prospective jurors. Although Finney does not identify the prospective jurors at issue, the record reflects that veniremen Jennings and Silas were excused for cause over the objection of the defense (DA-R. V3/ 218, 220-221, 244). However, despite the fact that this issue was preserved for appellate review, it would not have been successful even if presented, and therefore no basis for ineffectiveness of appellate counsel has been demonstrated.

The trial transcript reflects that early in voir dire, both prospective jurors Jennings and Silas indicated that they were troubled by the death penalty, and that it would even affect their guilt phase deliberations. Prosecutor Christine Vogel was the State's guilt phase counsel, and as she concluded her

questioning before turning the panel over to the State's penalty prosecutor, Nick Cox, she addressed the panel as follows:

[MS. VOGEL:] Okay. As Judge Sexton told you, this is a case where the State is seeking the death penalty. And as to that part of it, Mr. Cox is going to do voir dire as to the death penalty and your individual feelings about that.

But I do have one last question: With that in mind, is there anybody who is going to, in the guilt/nonguilt issue -- and that is the first thing that the Judge explained to you that you have to determine, is whether or not Mr. Finney is guilty of anything at all. Okay. Is there anybody who is going to be thinking of the next step before we have even gone through the first step? And that is, if Mr. Finney is guilty, and if so, of what?

Is there anybody who is going to be troubled or concerned about the potential penalty before you have even determined if he's, in fact, guilty of anything? Anybody who is going to put the proverbial cart before the horse?

(DA-R. V2/93-94). Prospective Juror Alter responded that he did not believe in the death penalty, and that his opposition to it would cloud his judgment as to guilt or innocence (DA-R. V2/94). Mr. Jennings also responded that he did not believe in the death penalty (DA-R. V2/94). After a couple of other people on the panel volunteered opposition to the death penalty, Ms. Vogel noted that opposition wasn't really her question:

But do you think -- I mean, maybe I didn't clarify the question. There are two separate issues to be decided. The first one is whether or not he's guilty of

anything. Okay? And that is the first issue.

And do you think that your concerns with potential penalty -- and if you are -- if you don't feel that the death penalty is appropriate for whatever, do you feel that that would invade your decision as to the guilt or nonguilt of Mr. Finney on the charges?

(DA-R. V2/ 94-95). Thereafter, the following exchange occurred with Mr. Silas:

MR. SILAS: You said that the State's asking for the death penalty?

MS. VOGEL: Yes, sir.

MR. SILAS: I have trouble with that.

MS. VOGEL: Okay. Do you think that the concern with the potential penalty is going to cloud your being able to determine his guilt or nonguilt as to the charge of first-degree murder? And that is really the question. If you think that there is a possibility of this thing that you don't like happening, do you think that would enter your deliberations as to whether or not the State has proven its case of first-degree murder?

MR. SILAS: Yes.

(DA-R. V2/ 95). Shortly thereafter, Assistant State Attorney Cox took over the questioning (DA-R. V2/ 101). Cox conducted individual questioning of each prospective juror regarding how they felt about the death penalty. When he got to Mr. Jennings, Jennings reiterated that he did not believe in an eye for an eye, and that he could not impose the death penalty under any circumstances (DA-R. V2/ 118). Mr. Silas also indicated that he could not impose the death penalty under any circumstances,

although it was not because he didn't believe in it, but because it was not administered fairly; and having "seen who I have to deal with up there," that it would not be fair in Mr. Finney's case (DA-R. V2/ 132-134).

When defense counsel Pittman questioned the panel, she at one point asked them individually several generic questions about where they were from, how many children they had, and what kind of jobs they held. Upon questioning Mr. Jennings, she brought up his views about the death penalty:

MS. PITTMAN: Okay. Now, concerning your views on the death penalty, do you understand that if you're selected as a juror in this case, Judge Sexton will instruct you on the law?

MR. JENNINGS: Yes.

MS. PITTMAN: And you would have to follow the law as a juror in this case. Do you understand that?

MR. JENNINGS: Right. But --

MS. PITTMAN: Go ahead.

MR. JENNINGS: Can I ask you a question?

MS. PITTMAN: Yes.

MR. JENNINGS: I have made myself explain already, I wouldn't vote for the death penalty.

MS. PITTMAN: Then, you cannot follow the law if the Judge instructs you?

MR. JENNINGS: I have been given an instruction that if I -- that I can vote against it in the second phase. You see, they said the majority wins.

MS. PITTMAN: In the second phase, yes.

MR. JENNINGS: Right, in the second phase.

MS. PITTMAN: Okay. My question is, though: Are you saying that even if you're selected as a juror and Judge Sexton reads you these instructions, you see, you have to keep an

open mind that --

MR. JENNINGS: I'll keep an open mind, but I won't go for the death penalty.

(DA-R. V2/ 173-74). Upon questioning Mr. Silas further, Silas also told Ms. Pittman that he could keep an open mind and that he could listen to the evidence presented (DA-R. V2/ 193).

Finney now alleges that appellate counsel should have disputed the cause challenges granted on prospective jurors Jennings and Silas. However, the record reflects that both Jennings and Silas were properly excluded. Finney's petition merely asserts that these prospective jurors were rehabilitated, precluding the cause challenges. This does not establish any error in the trial court's ruling on this issue.

A trial court's decision on whether or not to strike a juror for cause is reviewed for abuse of discretion, and will not be disturbed absent manifest error. Kearse v. State, 770 So. 2d 1119 (Fla. 2000) (noting that a trial court has great discretion when deciding whether to grant or deny a challenge for cause, recognizing that the trial court has a unique vantage point because the trial court is able to see the jurors' voir dire responses and make observations which simply cannot be discerned from an appellate record, and concluding that it is the trial court's duty to determine whether a challenge for cause is proper); Fernandez v. State, 730 So. 2d 277, 281 (Fla. 1999).

In Kimbrough v. State, 700 So. 2d 634, 639 (Fla. 1997), this Court recognized that even if a prospective juror responds affirmatively to a defense attorney's query whether he could follow the oath administered and apply the law as instructed by the judge, an excusal for cause may be appropriate where he has previously expressed uncertainty during voir dire. See also, Castro v. State, 644 So. 2d 987 (Fla. 1994) (excusing a juror for cause is subject to abuse of discretion review because the trial court has the opportunity to observe and evaluate the prospective juror's demeanor and credibility). Because no abuse of discretion could be shown in the granting of the cause challenges to prospective jurors Jennings and Silas, any failure to challenge these rulings on appeal could not be prejudicial to Finney.

Finney also makes an allegation that an unidentified juror was improperly excused for cause due to having a prior felony conviction, citing to the record at R217 and R231. The record reflects that this juror was excused peremptorily, and not challenged for cause. Thus, the record affirmatively refutes Finney's allegation on this claim. His petition must be denied.

Claim V: Whether appellate counsel rendered ineffective assistance of counsel by failing to raise the issue of the trial court refusing to instruct the jury to disregard the comment made by the state

attorney in closing argument that no semen was found in the victim either vaginally or anally.

Finney also asserts that appellate counsel should have argued that the trial court erred in refusing to instruct the jury that the prosecutor was arguing facts not in evidence during her closing argument. On this issue, the trial transcript reflects that the medical examiner was asked on cross examination about the presence of acid phosphatase in the victim's rectal area; Dr. Diggs responded that acid phosphatase was present, which indicated the presence of seminal fluid and some sort of sexual contact (DA-R. V3/ 393-394). However, this indication was ambiguous because it was impossible to tell how long the acid phosphatase had been there (DA-R. V3/ 394-395). On redirect, Dr. Diggs clarified that the acid phosphatase had been identified in a presumptive test conducted by an outside lab; Dr. Diggs did not find any evidence of any semen or sperm, and the lab results did not show any (DA-R. V3/ 399-400). Dr. Diggs noted that there are a number of different things that could account for the acid phosphatase (DA-R. V3/ 400).

During closing arguments, the defense attorney repeatedly stated that Dr. Diggs had testified that in his opinion, "the acid phosphatase that was there was male semen," and that there was some sort of sexual activity, supporting the defense theory that this was a crime of passion rather than a robbery (DA-R.

V5/ 659, 664-665). In rebuttal, the prosecutor noted that Dr. Diggs had said that the acid phosphatase could be found in seminal fluid, and was only a presumptive test. She continued,

It's like if you see it, you go further to the next step, which is what he told you.

What did the lab say? No semen, no sperm, anally, orally or vaginally. No semen, no sperm.

(DA-R. V5/ 694). The defense objected to these comments, stating that the prosecutor was arguing facts not in evidence (DA-R. V5/ 694). There followed an extensive discussion at the bench about what the medical examiner actually stated in his testimony, with everyone's recall of the details slightly varied (DA-R. V5/ 694-697). Defense counsel thought that Diggs had said no sperm was found, but that he had not mentioned there being no semen (DA-R. V5/ 694). The court recalled the "no semen, no sperm," but did not think Diggs had mentioned anally or orally (DA-R. V5/ 694). Because the judge could not recall the testimony distinctly, she sustained the objection (DA-R. V5/ 696-697). The defense then asked the court to instruct the jury that "no such evidence has been offered," and although the court declined this instruction, she did at this time remind the jurors that they needed "to rely on their own recollection of the witnesses," and that "What the attorneys say is not evidence and is not to be considered by you as such. You're to go on

your own recollection" (DA-R. V5/ 697).

Finney now asserts that appellate counsel should have presented the trial court's refusal to instruct the jury that no evidence had been offered to support the prosecutor's comment. Finney neglects to mention that in fact the court instructed the jurors that they should rely on their own recollection and that what the attorneys said was not to be considered evidence. Since defense counsel did not object to the curative instruction actually provided, and never requested a mistrial on this basis, no claim regarding these facts had been preserved for appellate review. Once again, counsel cannot be deemed ineffective for failing to raise a claim which was not preserved for review. Kokal, 718 So. 2d at 142-143; Ferguson, 632 So. 2d at 58.

Furthermore, because the prosecutor's statement was consistent with the testimony of the medical examiner, and since any possible misstatement would be cured by the court's instruction, no meritorious claim existed with regard to this issue. Counsel cannot be ineffective for failing to raise a nonmeritorious issue, and there is no merit to the claim that the trial court's failure to give a different curative instruction violated the fundamental fairness of Finney's trial.

Even if the prosecutor's comment in this case was not completely consistent with the testimony presented, any possible

misstatement was clearly cured by the trial court's instruction, as well as the repeated reminders during the trial that what the attorneys say is not evidence (DA-R. V3/ 248; V5/ 636). This is not a case of misconduct, let alone such egregious misconduct that a mistrial (which wasn't requested) was warranted. Claims of ineffective assistance of appellate counsel have been rejected which alleged much more serious prosecutorial misstatements not presented as appellate error. 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); Jones v. Wainwright, 473 So. 2d 1244, 1245 (Fla. 1985) (rejecting ineffective assistance of appellate counsel claim based on failure to challenge prosecutorial comments). Finney has failed to show any deficiency in his appellate counsels' performance regarding any possible claim relating to his current allegation that the trial court did not more completely instruct the jury to disregard the prosecutor's comment, or any prejudice resulting from any alleged deficiency. No habeas relief is warranted.

Claim VI.

Whether Finney's Eighth Amendment right against cruel and unusual punishment will be violated as Mr. Finney may be incompetent at the time of execution.

Finney also asserts that he may be incompetent to be executed. Although he acknowledges that this claim is not currently ripe for judicial review, since no execution is pending, he suggests that he is including this claim in his current petition in order to preserve the issue for federal court review. Clearly, there is no basis for this Court to rule on Finney's present claim of possible incompetence.

Florida law provides specific protection against the execution of an incompetent inmate. In order to invoke judicial review of a competency to be executed claim, a defendant must file a motion for stay of execution pursuant to Florida Rule of Criminal Procedure 3.811(d). Such motion can only be considered after a defendant has pursued an administrative determination of competency under Florida Statutes 922.07, and the Governor of Florida, subsequent to the signing of a death warrant, has determined that the defendant is sane to be executed. Since the prerequisites for judicial review of this claim have not occurred in this case, there is no basis for consideration of this issue in Finney's present habeas petition. Compare, Provenzano v. State, 751 So. 2d 37 (Fla. 1999); Provenzano v. State, 760 So. 2d 137 (Fla. 2000) (detailing procedural history of similar claim); Medina v. State, 690 So. 2d 1241 (Fla. 1997) (remanding for evidentiary hearing on issue in postconviction

appeal from Bradford County).

Finney's concern with preservation of this issue for federal review does not offer a reason for a premature ruling by this Court. Although the federal courts have refused to permit successive federal habeas petitions in order to secure federal review of this claim, that default may be avoided if a defendant presents the issue prematurely in his initial habeas petition. See, Stewart v. Martinez-Villareal, 523 U.S. 637 (1998). Finney has never pursued federal habeas relief, and any question as to whether this would be an appropriate claim in any future federal petition is a question to be properly resolved by the federal courts, not this Court. No federal decision requires this Court to consider and address the claim now presented, contrary to state law, in order to preserve Finney's federal rights. Since Finney's claim of incompetence to be executed is not properly before this Court, it must be denied.

In addition, it must be noted that the limited factual basis offered for this claim is refuted by the record. Although Finney's petition claims that his "already fragile mental condition" is likely to deteriorate, his penalty phase psychologist, Dr. Gamache, noted that he had conducted tests which revealed that Finney was not psychotic, had no major depression or mania, and no learning disability (DA-R. V6/ 882-

89). Finney had at least average intelligence, with good verbal skills and good job skills, and he had been truthful in the testing; there were no significant elevations observed in any of the clinical scales (DA-R. V6/ 884, 889). No contrary mental health opinion was alleged in his postconviction proceedings. On these facts, this claim must be denied.

Claim VII. Whether execution by electrocution is cruel and/or unusual punishment and violates Mr. Finney's rights under the Eight and Fourteenth Amendments of the United States Constitution and under of [sic] the Florida Constitution.

Finney also asserts that execution by electrocution is cruel and unusual punishment, and that because the Death Penalty Reform Act of 2000 is allegedly unconstitutional, electrocution is the only possible method of execution for carrying out his sentence. This claim has been repeatedly rejected by this Court, and no basis to reconsider this issue has been offered. See, Sims v. State, 754 So. 2d 657, 663-665 (Fla.), cert. denied, 120 S.Ct. 1233 (2000); Bryan v. State, 753 So. 2d 1244, 1253-1255 (Fla.), cert. denied, 120 S.Ct. 1236 (2000).

Claim VIII. Whether execution by lethal injection is cruel and/or unusual punishment and violates Mr. Finney's rights under the Eight and Fourteenth Amendments of the United States Constitution and under of [sic] the Florida Constitution.

Finney's last claim alleges that execution by lethal injection is also cruel and unusual punishment. This Court has again repeatedly rejected this issue, and Finney again has offered no basis to revisit the well established law denying his claim. Sims v. State, 754 So. 2d 657, 666-668 (Fla.), cert. denied, 120 S.Ct. 1233 (2000); Provenzano v. State, 761 So. 2d 1097 (Fla. 2000).

WHEREFORE, Respondent respectfully requests that this Honorable Court DENY Finney's Petition for Writ of Habeas Corpus.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail, to Joseph T. Hobson, CCRC, Office of the Capital Collateral Regional Counsel, 3801 Corporex Park Drive, Suite 210, Tampa, Florida 33619, this \_\_\_\_\_ day of April, 2001.

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COUNSEL FOR RESPONDENT

CERTIFICATE OF TYPE SIZE AND STYLE

I HEREBY CERTIFY that this response is presented in 12 point Courier New, a font that is not proportionately spaced.

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COUNSEL FOR RESPONDENT