IN THE SUPREME COURT OF FLORIDA

FLOYD DAMREN,

Appellant,

v. CASE NO. SC01-2808

STATE OF FLORIDA,

Appellee.

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RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

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PROCEDURAL HISTORY

Floyd Damren was convicted in Clay County, Florida of first-degree murder, burglary and aggravated assault. The jury unanimously recommended a death sentence for the first-degree murder. The trial judge imposed the recommended sentence, finding four statutory aggravating circumstances (Damren had previously been convicted of a violent felony; the murder had taken place during the commission of a burglary; the murder was especially heinous, atrocious, or cruel; and the murder was committed in a cold, calculated and premeditated manner), no statutory mitigating circumstances, and some nonstatutory mitigation.

Damren appealed to this Court, represented on appeal by Theresa J. Sopp. Ms. Sopp raised nine issues on direct appeal, complaining about: (1) the introduction of evidence of prior burglaries Damren had committed at the scene of the instant murder; (2) the trial court's failure to give a Williams rule instruction; (3) prosecutorial argument at the guilt phase regarding the intoxication defense; (4) victim impact evidence; (5) the admission of hearsay testimony at the penalty phase; (6) the sufficiency of the evidence to support HAC; (7) the sufficiency of the evidence to support CCP; (8) the weight given

to nonstatutory mitigation; and (9) proportionality of Damren's death sentence.

Damren's conviction and sentence were affirmed. Damren v. State, 696 So.2d 709 (Fla. 1997). Damren's Petition for Writ of Certiorari was denied by the United States Supreme Court. Damren v. Florida, 522 U.S. 1054 (1998).

On November 9, 1998, Damren filed a motion for postconviction relief in circuit court. He amended his motion on July 20, 2000. An evidentiary hearing was conducted in the circuit court, on April 10, 2001. The parties timely submitted post-hearing memoranda, and the circuit court denied all relief by order dated June 20, 2001. Damren's appeal from that judgment is pending in this Court.

Damren filed the instant petition December 19, 2001, raising three grounds.

PRELIMINARY DISCUSSION OF APPLICABLE LAW

There are a number of well-settled principles applicable to habeas corpus proceedings filed in this Court. The State will discuss them at this juncture and then elaborate to the extent necessary in its responses to specific claims.

First, this Court has repeatedly stated that capital habeas corpus proceedings were not intended as second appeals of issues which could have been or were presented on direct appeal or in

a rule 3.850 proceeding. E.g., Jones v. Moore, 794 So.2d 579 (Fla. 2001); Teffeteller v. Dugger, 734 So.2d 1009 (Fla. 1999); Hildwin v. Dugger, 654 So.2d 107, 111 (Fla. 1995); Hardwick v. Dugger, 648 So.2d 100, 105 (Fla. 1994); Scott v. Dugger, 604 So.2d 465, 470 (Fla. 1992); Medina v. Dugger, 586 So.2d 317 (Fla. 1991).

"Habeas petitions *are* the proper vehicle to advance claims of ineffective assistance of appellate counsel." Rutherford v. Moore, 774 So.2d 637, 643 (Fla. 2000)(emphasis supplied). To prevail on such a claim, a defendant must show that his attorney's performance was professionally deficient and that he was prejudiced by that deficiency. See Strickland v. Washington, 466 U.S. 668 (1984); Johnson v. Dugger, 523 So. 2d 161 (Fla. 1988). In other words, "Petitioner must show 1) specific errors or omissions which show that appellate counsel's performance deviated from the norm or fell outside the range of professionally acceptable performance and 2) the deficiency of that performance compromised the appellate process to such a degree as to undermine confidence in the fairness and correctness of the appellate result." Wilson v. Wainwright, 474 So. 1162, 1163 (Fla. 1985). This Court recently summarized these principles:

> The issue of appellate counsel's effectiveness is appropriately raised in a petition for writ of habeas corpus. However, ineffective assistance of appellate counsel may not be used as a disguise to raise issues which should have been raised on direct appeal or in a postconviction motion. In evaluating an ineffectiveness claim, the court must determine
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>> whether 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, whether the deficiency in performance compromised the appellate process to such a degree as to undermine confidence in the correctness of the result.
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> Pope v. Wainwright, 496 So. 2d 798, 800 (Fla. 1986). See also Haliburton [v. Singletary], 691 So. 2d 470 [(Fla. 1997)]; Hardwick v. Dugger, 648 So.2d 100 (Fla. 1994). The 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. See Knight v. State, 394 So. 2d 997 (Fla. 1981). "In the case of appellate counsel, this means the deficiency must concern an issue which is error affecting the outcome, not simply harmless error." Id. at 1001. In addition, ineffective assistance of counsel cannot be argued where the issue was not preserved for appeal or where the appellate attorney chose not to argue the issue as a matter of strategy. See Medina v. Dugger, 586 So. 2d 317 (Fla. 1991); Atkins v. Dugger, 541 So. 2d 1165, 1167 (Fla. 1989) ("Most successful appellate counsel agree that from a tactical standpoint it is more advantageous to raise only the strongest points on appeal and that the assertion of every conceivable argument often has the effect of diluting the impact of the stronger points.").

Freeman v. State, 761 So.2d 1055, 1069-70 (Fla. 2000).

Generally, appellate counsel cannot be considered ineffective for failing to raise issues that were *not* preserved by trial counsel. See e.g., Provenzano v. Dugger, 561 So.2d 541, 548 (Fla. 1990) ("Trial counsel did not object . . ., thereby precluding an effective argument on appeal"); Atkins v. Dugger, 541 So.2d 1165, 1166 (Fla. 1989) (appellate counsel not ineffective for failing to raise claims as "not properly preserved for appeal by trial counsel, thus precluding appellate review"); Downs v. Wainwright, 476 So.2d 654, 657 (Fla. 1985)("appellate counsel cannot be considered ineffective for failing to raise issues which he was procedurally barred from raising because they were not properly raised at trial").

In addition, "appellate counsel is not ineffective for failing to raise a claim that would have been rejected on appeal." Downs v. State, 740 So.2d 506, 517 n. 18. Accord, Freeman (appellate counsel not ineffective for failing to raise non-meritorious issues); Rutherford v. Moore, 774 So.2d 637, 643 (Fla. 2000)(same); Alvord v. Wainwright, 725 F.2d 1282, 1291 (11th Cir. 1984)(appellate counsel "need not brief issues reasonably considered to be without merit"). In fact, appellate counsel is not necessarily ineffective for failing to raise a claim that might have had *some* possibility of success; effective appellate counsel need not raise *every conceivable* non-frivolous

issue. Jones v. Barnes, 463 U.S. 745, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983)(appellate counsel not required to argue all non-frivolous issues, even at request of client). Accord, Provenzano, 561 So.2d at 548-49 ("it is well established that counsel need not raise every nonfrivolous issue revealed by the record"); Atkins v. Dugger, 541 So.2d at 1167 ("the assertion of every conceivable argument often has the effect of diluting the impact of the stronger points").

Nor can appellate counsel be deemed ineffective if the habeas claim, or a variant thereof, was, in fact, "raised on direct appeal," Atkins v. Dugger, supra, 541 So.2d at 1166-67. Accord, Provenzano, supra, 561 So.2d at 548 (no ineffective assistance where appellate counsel raised the claim on appeal, but it was rejected); Jones v. Moore, supra ("habeas is not proper to argue a variant of an already decided issue"). So long as appellate counsel raised the issue on appeal, mere quibbling with or criticism of the manner in which appellate counsel raised such issue on appeal is insufficient to state a habeas-cognizable issue. Jones; Thompson v. State, 759 So.2d 650, 657 n. 6 (Fla. 2000).

Finally, a claim that has been resolved in a previous review of the case is barred as "the law of the case." See Mills v. State, 603 So.2d 482, 486 (Fla. 1992).

SPECIFIC RESPONSE TO CLAIMS

CLAIM I

DAMREN'S COMPLAINT ABOUT THE SUFFICIENCY OF THE EVIDENCE TO SUPPORT A FINDING OF THE HEINOUS, ATROCIOUS OR CRUEL AGGRAVATOR IS PROCEDURALLY BARRED BECAUSE IT SIMPLY A VARIATION OF A CLAIM THAT WAS RAISED AND REJECTED ON DIRECT APPEAL

Damren contends here that the evidence supporting the HAC aggravator was insufficient because it was based on "inadmissible hearsay evidence." Petition, end of second full paragraph of Claim I.[1] On direct appeal, however, Damren's appellate counsel complained in her Issue V about the admission of Jeff Chittam's statements, which she characterized as inadmissible "hearsay," and argued in her Issue VI that the evidence was insufficient to support the HAC aggravator. Initial Brief of Appellant, case no. 86,003, Issues V and VI, pp. 59-68. In its Answer Brief, the State argued that testimony about Chittam's statements was properly admitted and considered, and that the evidence, including in particular Jeff Chittam's statements, was sufficient to support a finding of the HAC aggravator. Answer Brief of Appellee, case no. 86,003, Issues V and VI, pp. 38-49. Thus, the claim Damren raises now is merely a variant of claims raised and argued on direct appeal. As such, it is procedurally barred.

[1] There are no page numbers on Damren's petition.

Furthermore, this Court expressly ruled on these issue on direct appeal, concluding that the out-of-court statements by Jeff Chittam admitted at the penalty phase were not "inadmissible hearsay," and that the evidence was sufficient to support the HAC aggravator. 696 So.2d at 713-714 and at 714 (fns. 16 and 17).[2] This is binding precedent establishing that Damren's present claim is meritless.

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[2] This Court determined that Chittam's statements were properly admitted under the excited utterance exception to the hearsay rule and also that they were properly admitted under the rationale that hearsay is admissible at the penalty phase so long as the defendant has a fair opportunity for rebuttal. Here, fair opportunity for rebuttal existed: the witnesses who observed Chittam's statements were available for cross-examination, and the facts Chittam related were corroborated by first-hand witnesses who were available for cross-examination. In addition, this Court found it significant that Chittam himself was unavailable for cross-examination only because Damren had beaten him to death not long after he made these statements, in order to silence him. The State would note that the Federal Rules of Evidence were amended in 1997 to provide an explicit exception to the hearsay rule for "A statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness." Federal Rule of Evidence 804 (b) (6). The committee notes to the rule state that the new rule "recognizes the need for a prophylactic rule to deal with abhorrent behavior 'which strikes at the heart of the system of justice itself,'" (quoting U.S. v. Mastrangelo, 693 F.2d 269 (2d Cir. 1982), and simply formalizes a principle routinely applied in federal courts: "Every circuit that has resolved the question has recognized the principle of forfeiture by misconduct." See, e.g., United States v. Thevis, 665 F.2d 616, 630-31 (5th Cir. 1982) (defendant forfeited his confrontation clause rights as well as his right to complain about hearsay when he silenced a witness against him by murdering him).

This procedurally-barred and meritless claim should be summarily denied.

CLAIM II

THERE IS NO MERIT TO DAMREN'S COMPLAINT THAT APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO ARGUE THAT THE HAC AGGRAVATOR IS UNCONSTITUTIONALLY VAGUE AND OVERBROAD

Damren contends that appellate counsel was ineffective for failing to argue that the jury instruction defining the heinous, atrocious, or cruel aggravator was constitutionally inadequate.[3] He does not cite to any portion of the record to show how this claim was preserved for appeal. If it was not, then appellate counsel could not have been ineffective for failing to raise it on appeal.[4] Even if it was preserved, however, appellate counsel was not ineffective. The HAC instruction delivered in this case

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[3] Damren begins this claim by setting out the statutory definition of HAC, contemporaneous commission of a felony, and prior violent/capital felony. However, the State is unable to find in Damren's discussion of this claim any complaint about any aggravator other than HAC. Thus, the State will not address the other two aggravators except to say that appellate counsel cannot be ineffective for failing to complain about aggravators or standard jury instructions that were valid at the time.

[4] It is Damren's burden to demonstrate that appellate counsel was ineffective; i.e., that appellate counsel's performance was constitutionally deficient, and that such deficiency was prejudicial. Since it is well settled that appellate counsel cannot be deemed ineffective for failing to raise an issue that was not preserved for appeal by trial counsel, it is Damren's burden to demonstrate that the issue was preserved for appeal. He has failed to do so.

(6TR 969) is the same instruction this Court explicitly approved in Hall v. State, 614 So.2d 473, 478 (Fla. 1993). Since that time, this Court has consistently rejected claims that either the HAC aggravator or our present HAC instruction is constitutionally deficient. Nelson v. State, 748 So.2d 237, 245-46 (Fla. 1999); Walker v. State, 707 So.2d 300, 316 (Fla. 1997); Chandler v. State, 702 So.2d 186, 201 (Fla. 1997). Appellate counsel cannot be deemed ineffective for failing to attack an HAC jury instruction that has consistently been upheld by this Court.

This claim is meritless and should be denied.

CLAIM III

FLORIDA'S STANDARD JURY INSTRUCTIONS ARE NOT BURDEN SHIFTING AND APPELLATE COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO COMPLAIN ABOUT THEM ON DIRECT APPEAL

Damren contends that the standard jury sentencing instructions delivered to the jury in his penalty phase - which advised the jury that the "final decision" as to punishment was the court's responsibility, but that it was the jury's duty to render an advisory sentence - impermissibly diluted the jury's sense of responsibility for its decision. Although Damren does not cite Caldwell v. Mississippi, 472 U.S. 320 (1985), this appears to be a so-called Caldwell claim. Damren once again fails to tell us how this claim was preserved for appeal. In

fact, his invocation of fundamental error and his attack on *trial* counsel seems to be an implicit concession that the issue was *not* preserved for appeal. Damren's problem, however, is that effectiveness of *trial* counsel is not an issue properly before this Court in this habeas proceeding. The State is unable to discern any attack on *appellate* counsel in Damren's Claim III. However, if there is one, the State's responses are: (a) appellate counsel cannot have been ineffective for failing to raise a non-preserved claim, and (b) even if the issue was preserved at trial, appellate counsel cannot be deemed ineffective for failing to argue a meritless issue, and this Court has repeatedly rejected claims that accurately describing to a Florida jury its advisory role in sentencing impermissibly dilutes its sense of responsibility. See, e.g., Wuornos v. State, 644 So.2d 1000, 1010 (Fla. 1994); Sochor v. State, 619 So.2d 285 (Fla. 1994).

This claim, like the first two, is meritless and should be denied.

CONCLUSION

Damren has failed to demonstrate that his appellate counsel was constitutionally ineffective, and he presents no other issues that are cognizable in these habeas proceedings. Damren's Petition for Writ of Habeas Corpus should be denied in its totality.

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. Mail to Jefferson W. Morrow, P.A., 1301 Riverplace Boulevard, Suite 2600, Jacksonville, Florida 32207, this 19th day of March, 2002.

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Curtis M. French
Senior Assistant Attorney General

CERTIFICATE OF FONT AND TYPE SIZE

Counsel certifies that this pleading was typed using 12 point Courier New.

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Curtis M. French
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