IN THE SUPREME COURT OF FLORIDA

DUANE EUGENE OWEN,)
)
Petitioner)
)
vs.) Case No.01-2146
)
Michael W. Moore)
)
Respondent,)
and)
)
ROBERT BUTTERWORTH)
ATTORNEY GENERAL)
)
Additional Respondent)
______________________________)

STATE'S RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

A. INTRODUCTION

Respondent accepts petitioner's statement regarding Jurisdiction.

B. PROCEDURAL HISTORY AND STATEMENT OF THE FACTS

The State accepts Owen's procedural history subject to the following additions, which are relevant for resolution of the issues on appeal. A rendition of the facts of this case is as follows:

> The body of the victim, Georgianna Worden, was discovered by her children on the morning of May 29, 1984, as they prepared for school. An intruder had forcibly entered the Boca Raton home during the night and bludgeoned Worden to death with a hammer as she slept, and then sexually assaulted her. Owen was arrested the following day on unrelated charges and was interrogated over

> several weeks. He eventually confessed to committing numerous crimes, including the present murder and a similar murder in Delray Beach in March 1984 [Slattery murder].

Owen v. State, 596 So.2d 985, 986-87 (Fla. 1992).

The law firm of Kohl, Springer, Mighdoll, Salnick and Krischer was appointed to represent Owen **on both murders** and the cases were divided among the various lawyers in the firm. Owen v. State 773 So.2d 510, 512 (Fla. 2000). The Slattery murder was tried first and Owen was represented by Barry Krischer. Id. For the Worden murder (this case), Owen was represented by Donald Kohl and Craig Boudreau. Id. Owen was convicted of the Slattery murder and sentenced to death. Id. On direct appeal, the Florida Supreme Court reversed his conviction and remanded for re-trial, which did not take place until March, 1999. Id. See Owen v. State, 560 So.2d 207 (Fla. 1990). Owen was also convicted and sentenced to death for the Worden murder. Owen, 773 So.2d at 511. The Florida Supreme Court affirmed the convictions and sentences. See Owen v. State, 596 So.2d 985 (Fla. 1992).

Thereafter, Owen filed a 3.850 motion for post-conviction relief in the Worden case. Owen, 773 So.2d at 512-13. An evidentiary hearing was granted on several ineffective assistance of counsel claims and a conflict of interest claim. The hearing was held on December 8, 1997. Prior to its

commencement, Carey Haughwout, Owen's new counsel in the Slattery re-trial, informed the court that Owen had invoked the attorney-client privilege in the Slattery case and asked for a stay of the Worden post-conviction proceeding until the Slattery re-trial was completed. In the alternative, Ms. Haughwout sought to prohibit disclosure of or use of any information disclosed at the hearing against Owen in the up-coming Slattery re-trial. Id. at 513. The court agreed to bar disclosure of privileged information.

Owen then called only **one (1) witness** at the evidentiary hearing-- Barry Krischer**, his trial counsel in the Slattery case.** Krischer testified that his "sole responsibility vis-a-vis Owen was to represent him in the Slattery case, that he played no role in the Worden case . . . [and] that he told Owen at the time of trial that he did not want to hear anything about the Worden murder." Owen, 773 So.2d at 513. Krischer noted that he and Mr. Salnick had litigated "the motion to suppress Owen's omnibus confession, portions of which were later introduced into evidence at both trials," Id.

After Krischer finished testifying, Pamela H. Izakowitz, collateral counsel for Owen, informed the court that Owen **had decided to not proceed any further with the evidentiary hearing**, arguing that to do so would violate the attorney-client privilege in the Slattery case. Thereafter, the trial court

denied Owen's 3.850 motion and Owen appealed to this Court. This Court affirmed the denial, holding that the trial court had not abused its discretion in the way it conducted the hearing and that Owen had failed to show any violation of the attorney-client privilege in the Slattery case:

> [B]y filing ineffectiveness and conflict of interest claims against trial counsel in the Worden case, Owen waived the attorney-client privilege in that case. Although he subsequently invoked the privilege in the Slattery case, he still was obligated to proceed in good faith in the present case to the extent that the privilege permitted. He did not do so. In fact, at the hearing below, he made no effort to introduce substantive evidence concerning the Worden trial. Instead, he called as his only witness Barry Krischer, i.e., his former trial counsel in the Slattery case. Krischer knew virtually nothing about the Worden trial and his testimony was guaranteed to implicate the privilege, which expressly applied only to the Slattery case. Further, although the court below agreed to bar disclosure of privileged information, Owen made no effort to proffer any substantive evidence that would have been excluded by the privilege. In short, Owen made no showing of prejudice.

Id. at 514-15.

C. STANDARDS OF REVIEW

Petitioner claims that appellate counsel was ineffective for failing to raise and argue several issues on direct appeal and for failing to effectively argue several issues that were raised.

"'Habeas petitions are the proper vehicle to advance claims of ineffective assistance of appellate counsel.'" Downs v. Moore, 26 Fla.L.Weekly S632, S633 (Fla. Sept. 26, 2001), citing Rutherford v. Moore, 774 So.2d 637, 643 (Fla.2000). The habeas corpus standard of review for ineffective assistance of appellate counsel mirrors the Strickland[1] standard for trial counsel ineffectiveness. Id. citing, Rutherford, at 643. In order to prevail on a claim of ineffective assistance of appellate counsel, [p]etitioner must show specific errors or omissions that 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.'" Jones v. Moore, 794 So.2d 579, 583 (Fla. 2001), citing Rutherford, at 643; Pope v. Wainwright, 496 So.2d 798, 800 (Fla.1986), cert. denied, 480 U.S. 951 (1987); Suarez v. Dugger, 527 So.2d 190 (Fla. 1988).

"[H]abeas corpus petitions are not to be used for additional appeals on questions which could have been, should have been, or

[1] Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

were raised on appeal or in a rule 3.850 motion, or on matters that were not objected to at trial." Parker v. Dugger, 550 So.2d 459, 460 (Fla.1989), Atwater v. State, 26 Fla. L. Weekly 395 (Fla. 2001). Further, "using a different argument to relitigate an issue in postconviction proceedings is not appropriate." Porter v. Dugger, 559 So.2d 201, 203 (Fla. 1990), Medina v. Dugger, 586 So.2d 317(Fla. 1991), Hall v. Moore, 26 Fla. L. Weekly S316 (May 10, 2001).

D. REASONS FOR DENYING THE PETITION

ISSUE I

APPELLATE COUNSEL WAS NOT INEFFECTIVE BECAUSE THE STATEMENTS MADE BY PETITIONER THAT WERE ADMITTED INTO EVIDENCE BY THE STATE WERE NOT MADE DURING PLEA NEGOTIATIONS.

Petitioner claims that at trial the state violated section 90.401, Florida Statutes, and Florida Rule of Criminal Procedure 3.172, by introducing statements the petitioner made during plea negotiations. Petitioner also claims that appellate counsel was ineffective for failing to raise the issue on direct appeal.

This claim is procedurally barred because it is nothing more than an attempt to re-litigate the propriety of petitioner's confession. The admission of petitioner's confession has

already been upheld by this Court on direct appeal. Owen v. State, 596 So. 2d 985 (Fla. 1992). Its admissibility was also challenged in petitioner's 3.850 and the claim was found by this Court to be procedurally barred. Owen v. State, 773 So. 2d 510 (Fla. 2000). Petitioner cannot now raise the same claim under the guise of statements made during plea negotiations. See Parker v. Dugger, 550 So.2d 459, 460 (Fla.1989)("[H]abeas corpus petitions are not to be used for additional appeals on questions which could have been, should have been, or were raised on appeal or in a rule 3.850 motion, or on matters that were not objected to at trial."); Atwater v. State, 26 Fla. L. Weekly 395 (Fla. 2001) (same); Porter v. Dugger, 559 So.2d 201, 203 (Fla. 1990)("using a different argument to relitigate an issue in postconviction proceedings is not appropriate."). Hence, this claim should be denied as procedurally barred.

This claim should also be denied because it is legally insufficient. Nowhere in the habeas petition does petitioner specify exactly what "plea statements" were improperly admitted. Finally, even though the State was not told what "plea statements" petitioner is objecting to, its review of the record shows that petitioner's ineffectiveness claim is wholly without merit. See Kokal v. Dugger, 718 So.2d 138, 142 (Fla.1998) ("Appellate counsel cannot be faulted for failing to raise a

nonmeritorious claim."); Chandler v. Dugger, 634 So.2d 1066 (Fla.1994) (same).

To determine whether a discussion should be characterized as a plea negotiation and thus, be inadmissible, the trial court must apply the following two-tiered analysis from U.S. v. Robertson, 582 F.2d 1356, 1366 (5th Cir 1978): first, the trial court must determine whether the accused exhibited an actual subjective expectation to negotiate a plea at the time of the discussion, and second, it must determine whether the accused's expectation was reasonable given the totality of objective circumstances. Each case turns on it's own facts and the trial court should carefully consider the totality of the circumstances. Id.

Petitioner has failed to meet the first prong of the Robertson test because the record reveals that he understood that the police could not guarantee him anything or make him any promises (Transcript of Defendant's Statement p. 166, 246). Petitioner has misrepresented the record with respect to his actual, subjective expectation. It is apparent from a review of the transcript that Officer McCoy repeatedly read petitioner his Miranda rights, which include the statement "I can not make any threats or promises to induce you to make a statement and it must be of your own free will". (Transcript of Defendant's

Statement, pp. 18, 182, 265, 426). Further, Officer McCoy told the petitioner that he did not have the final decision, and that there are no guarantees (T. of Defendant's Statement, pp. 62, 103, 237, 395).

Most importantly, petitioner acknowledged that Officer McCoy could not guarantee him anything or make him any promises ("you can't guarantee me nothing, you can't make me any promises," T. Defendant's Statement, p. 166). The petitioner also told McCoy that if he did confess, he did not see how McCoy could help him because McCoy could not make him any guarantees or promises and petitioner knew that it was up to the State Attorney(T. Defendant's Statement, p. 246, 247, 386). Hence, the petitioner fails to satisfy the first prong of the Robertson test and has failed to show any substantial deficiency. His claim should be denied.

Petitioner's reliance upon Richardson v. State, 706 So.2d 1349 (Fla. 1998), is misplaced. In Richardson there was a written plea agreement presented to Richardson for consideration, predicated upon prior plea discussions, which was already fully executed by the State Attorney. Conversely, in the instant case, no such agreement exists. Hence, Richardson does not apply.

Lastly, petitioner's claim that appellate counsel should

have raised, on direct appeal, that trial counsel was ineffective for failing to move to suppress the petitioner's "plea statements," but failed to do so because he had a conflict of interest is without merit. Unless ineffectiveness is apparent from the face of the record, it can only be raised in a 3.850. Gore v. State, 784 So.2d 418 (Fla. 2001). Here, there is no showing of ineffective assistance of trial counsel on the face of the record.

ISSUE II

APPELLATE COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO RAISE AND ARGUE THAT THE VENIRE FROM WHICH THE JURY WAS SELECTED IN THE PETITIONER'S TRIAL, WAS UNCONSTITUTIONAL FOR EXCLUDING AFRICAN AMERICANS.

While petitioner's appeal was pending, this Court found in Spencer v. State, 545 So.2d 1352 (Fla. 1989), that the use of a special districting process in Palm Beach County to select jurors resulted in an unconstitutional systematic exclusion of a significant portion of the black population from the jury pool. Because this same jury selection process was used to select petitioner's jurors, he argues that his appellate counsel was ineffective for failing to raise the issue on direct appeal.

Again, petitioner has failed to show a substantial deficiency in counsel's performance or that any deficiency compromised the appellate process. To begin with, the issue was

not preserved for appellate review. It is well established that for an issue to be preserved for appeal, it must be presented to the lower court and the specific legal argument or ground to be argued on appeal must be part of that presentation if it is to be considered preserved. Archer v. State,613 So. 2d 446 (Fla 1993), quoting Tillman v. State, 471 So.2d 32, 35 (Fla. 1985); See also: Sapp v. State, 411 So.2d 363, 364 (Fla 4th DCA 1982). No objection or motion was ever made at trial in this case challenging the constitutionality of the jury selection. Appellate counsel cannot be deemed ineffective for failing to raise issues that are procedurally barred because they were not properly raised during the trial proceedings. Downs v. Moore, 26 Fla.L.Weekly S632, S633 (Fla. Sept. 26, 2001).

Further, Petitioner's trial counsel, Craig Boudreau (who was also his appellate counsel) cannot be deemed ineffective for failing to raise an issue that did not exist at the time of trial or appeal. Spencer was not decided until several years after the trial in this case and eight (8) months after appellate oral arguments had been completed. Finally, as will be fully explained below, Spencer can only be applied retroactively to cases where a constitutional challenge to the jury selection process is raised, which did not happen here. Consequently, counsel cannot be deemed ineffective for failing

to raise the argument.

In Craig v. State, 583 So.2d 1018, (Fla. 1991), the defendant made a motion, three or four days prior to the commencement of the trial, to draw the jury pool from all of Palm Beach County, rather than the West Palm Beach jury district. His motion was denied by the trial court and further denied on appeal to the district court. This Court held that Craig did not waive the issue and that the unconstitutionality of the jury pool system required a remand for a new trial. Id at 1020.

Similarly, in Moreland v. State, 582 So.2d 618 (Fla. 1991), the defendant was tried for first degree murder in Palm Beach County. While Spencer was pending before this Court, Moreland made the same sixth amendment challenge to the county's jury districts that Spencer made. Id. at 619. This Court held: "that Spencer, should be applied retroactively to Moreland and to persons like him who challenged the Palm Beach County jury districts at trial and raised that issue on appeal." Id. (emphasis supplied)at 618. In so holding, this court specifically relied upon the fact that Moreland made the claim, on which Spencer received relief, in the trial court and pursued it on appeal, stating: "Had he not done so he would not be entitled to relief." Id. at F.N. 3. Here, Owen never

challenged the constitutionality of the jury selection procedure before or during trial, nor on appeal. As such, Craig and Moreland do not apply here and Spencer cannot be retroactively applied to Owen.

Rather, this case is similar to Nelms v. State, 596 So. 2d 441 (Fla. 1992), where the defendant's trial was also held before the decision in Spencer. Nelms' petit jury panel was selected from the eastern district of Palm Beach County, but his grand jury was selected from the entire county. Nelms filed a pretrial motion to dismiss the indictment because the grand jury had not been summoned from the same geographical area as the petit jury in violation of 905.01(1), Florida Statutes (1981). The trial court denied the motion. Id. at 441.

Nelms was convicted and sentenced to life imprisonment. Id. at 442. When Spencer was decided several years later, Nelms sought postconviction relief, which the trial court denied, finding that the issue was not raised on direct appeal and that defense counsel could not be held responsible for subsequent changes in law. Id.at 442.

This Court agreed with the trial court's conclusion and related Nelms to the Moreland case: "[W]e determined that fundamental fairness and uniformity required applying Spencer retroactively to Moreland. While Spencer was pending in this

Court, Moreland raised at trial and on direct appeal the same claim upon which Spencer received relief." Id.

Then this Court distinguished the situation in Moreland with the situation in Nelms:

> Nelms did not raise the issue at trial or on direct appeal the issue upon which we granted relief in Moreland. His statutory challenge to the grand jury cannot be equated to the constitutional claim regarding petit jury selection upon which relief was granted in Moreland. The fundamental fairness or uniformity concerns present in that case are not present here. Further, Spencer, the first case recognizing this claim, was decided more than three years after Nelms' conviction was affirmed. Defense counsel cannot be held ineffective for failing to anticipate the change in the law. Stevens v, State, 552 So.2d 1082, 1085 (Fla.1989). Id.

Nelms directly applies to Owen. Trial counsel in this case also filed a statutory challenge to the grand jury panel, based on a violation of section 905.01(1), but did not file a constitutional challenge to the grand jury pool. (Record, Vol. 32. p. 4714). Thus, as in Nelms, the statutory challenge raised by Owen is insufficient to trigger the application of Spencer.

Owen argues that appellate counsel, Craig Boudreau, was counsel of record for two cases where Spencer has been applied, Mitchell v. State, 567 So.2d 1037 (Fla. 4th DCA 1990) and Amos v. State, 545 So.2d 1352 (Fla. 1989) (Petition, p.16), and

therefore should have known about the issue. Amos was a joint defendant with Spencer. In applying Spencer, this Court noted that Amos "**timely challenged** as unconstitutional the jury system utilized in Palm Beach County to select his jury." Amos,(emphasis supplied)at 1352. No constitutional objection was raised in this case. Mr. Boudreau cannot be deemed ineffective for failing to raise a claim that was untimely.

Spencer was decided while Mitchell's appeal was pending before the Fourth District. The constitutionality of the jury pool had not been raised at any time. In applying Spencer, the Fourth District noted:

> The supreme court has held that appellate counsel was not obligated to bring to the attention of the court two cases decided several months after the case was orally argued before the court. *Darden v. State*, 475 So.2d 214 (Fla. 1985). Again, however, that is not the situation here where *Spencer* was decided before this court had considered petitioner's appeal at an oral argument waived conference. Mitchell, at 1038.

Thus, while the Fourth District applied Spencer to Mitchell even though the issue was not previously raised, it distinguished the procedural history of Mitchell, noting that Spencer was decided before the court had considered the appeal at an oral argument waived conference. The Court specifically cites Darden to clarify that Mitchell is not a situation where

cases changing the law were decided months after oral argument. Such a situation is presented in this case. The critical Spencer case was decided months after the oral argument in Owen.

In sum, Owen's appellate counsel cannot be deemed ineffective for failing to argue that the jury selection procedure was unconstitutional. No issue concerning the constitutionality of Owen's petit jury was made during the trial or on direct appeal because the law had not yet changed. Defense counsel cannot be held ineffective for failing to anticipate the change in law. Stevens v. State, 552 So.2d 1082, 1085 (Fla. 1989), Nelms, at 442. Spencer was not decided until eight (8) months after oral argument on the direct appeal. The issue could not have been brought out in the Supplemental Brief filed on April 26, 1990 (1 year and 5 months after oral argument and 10 months after Spencer was decided), because Moreland, the first decision to apply Spencer retroactively, was not decided until **a year after** the Supplemental Brief was filed. Thus, the constitutional issue for Owen's jury still did not exist.

Moreover, appellate counsel cannot be deemed ineffective for not citing Supreme Court cases which were issued after oral argument. See Darden v. State, 475 So2d 214, (Fla. 1985) (holding that appellate counsel's failure to file as supplemental authority Supreme Court cases coming after oral

argument in defendant's case did not deviate from the norm or fall outside the range of acceptable performance of appellate counsel, even though Supreme Court cases may have suggested additional ground for appeal.)

Certainly it can be argued that Owen was subjected to a jury selection process which was later declared unconstitutional. Yet as in Nelms, there are no fundamental fairness or uniformity concerns for this case. The constitutionality of jury selection was not raised at trial or on direct appeal. Appellate counsel cannot be deemed ineffective for failing to raise an issue which was procedurally barred and which in fact did not yet exist. As this Court noted in Nelms, while comparing the case to Moreland: "The fundamental fairness or uniformity concerns present in that case [Moreland] are not present here." Nelms at 442. Claim II has no validity and should be dismissed.

ISSUE III

APPELLATE COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO ARGUE THAT SGT. MCCOY'S STATEMENT WAS IMPROPER

Petitioner claims that appellate counsel was ineffective for failing to raise on direct appeal the trial court's improper admission of Sgt. McCoy's testimony that "the hurting would start all over again", to which Petitioner "nodded his head in the affirmative." (R. 3354). Trial counsel objected to the

statement, moved to strike and motioned for a mistrial. (T 3354). The trial court properly denied the motions. (T 3354).

Petitioner's claim is procedurally barred. This Court has already held that Petitioner's confession was voluntary and that he was not psychologically coerced into making the confession. Owen v. State, 560 So.2d at 210. The "hurting" statement is part of the entire confession, which has been upheld by this Court. Id. Petitioner is now improperly taking one statement from the confession and crafting a new argument for ineffective assistance of counsel in a habeas corpus petition. See Parker v. Dugger, 550 So.2d 459 (Fla 1989) (A habeas petition is not to be used for appeals on questions which could have been, or should have been raised on appeal or in a rule 3.850 motion); Atwater v. State, 26 Fla. L. Weekly 395 (Fla. 2001). Since the entire confession has been upheld by this Court, Petitioner's argument is procedurally barred.

Petitioner has also failed to show that appellate counsel was ineffective for failing to argue on appeal that admission of the statement was unfairly prejudicial, in violation of Section 90.403, Florida Statutes. A trial court has wide discretion concerning the admissibility of evidence, and a ruling on admissibility will not be disturbed unless there has been an abuse of discretion. Jent v. State, 408 So. 2d 1024, 1029 (Fla.

1981) cert. denied, 457 U.S. 1111, 102 S.Ct. 2916, 73 L.Ed.2d 1322 (1982). "The test for admissibility of evidence is relevance. Generally, any facts relevant to prove a fact in issue are admissible unless admission is precluded by a specific rule." Council v. State, 691 So. 2d 1192, 1194 (Fla. 4th DCA 1997).

According to petitioner, the statement implies that petitioner had a violent character and that if he was found not guilty, his violence would continue in the future. Reviewing Sgt. McCoy's testimony as a whole and in context, the "hurting" statement clearly indicates petitioner's state of mind. When confessing to the murder, Sergeant McCoy inquires of petitioner as to who would be the winner if a jury found him not guilty. Petitioner responds that no one would be the winner. (R. 3355). Sergeant McCoy replies: "Then the hurting will start all over again." Id. Petitioner nods his head in agreement. Id.

Counsel for the State answered the objection by stating that "the context in which the statement was made...was an expression of his [petitioner's] own emotional terms as it relates to the homicide. (R. 3356). After some additional side bar discussion, the trial judge dismissed the motion to strike and the motion for a mistrial. (R. 3357). Sgt. McCoy never referred to petitioner hurting or continuing to hurt other people. In fact,

no reference to Petitioner's propensity to violence is mentioned in Sgt. McCoy's entire testimony. Considering the statement in context, it could mean that Petitioner would not be "a winner" if he was found not guilty because then his own "hurting" would continue.

In any event, the admission of the statement was harmless because it is cumulative to other statements made during the videotaped confession and is harmless. See Bradley v. State, 787 So.2d 732 (Fla. 2001) (holding that improper admission of hearsay statement was harmless because it was cumulative to other testimony properly admitted). Officer McCoy told Owen during the video taped confession that "if you like hurting people for the sake of hurting people, okay, then the only hope you got to do it again is if everything in the file burned" (Transcript of Petitioner's Statement, p. 370). McCoy also tells Owen "that his own brother wants him stopped, that his brother does not want Owen to go out and roam around again and then here we are again" (Transcript of Petitioner's Statement, p. 370). These statements imply the very same thing that Petitioner objects to--that he has a violent character and that if he was found not guilty, his violence would continue in the future. No motion was made, after the motion to suppress was denied, to redact any portions of the confession because they

violated section 90.403. As such, any error in admitting Sgt. McCoy's statement was harmless because his statement was cumulative to other properly, admitted testimony.

Appellate counsel did not raise the issue on direct appeal because it is not a legitimate claim to bring before this Court. See Kokal v. Dugger, 718 So.2d 138, 142 (Fla.1998) ("Appellate counsel cannot be faulted for failing to raise a nonmeritorious claim."). Counsel did argue on direct appeal that the entire confession was improper-- a claim that was rejected by this court. Owen v. State, 560 So. 2d at 210. In sum, Claim III must be denied because Petitioner has failed to show that counsel's representation fell below an objective standard of reasonableness, and that he suffered actual and substantial prejudice as a result.

ISSUE IV

PETITIONER'S CLAIM THAT APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE AND ARGUE ON DIRECT APPEAL THAT THE TRIAL JUDGE WAS BIASED AND SHOULD HAVE RECUSED ITSELF IS PROCEDURALLY BARRED AND WITHOUT MERIT.

Petitioner claims that he was denied due process when the trial court asked the state what effect granting the defendant's motion to suppress would have on the state's cases against him. Petitioner also argues that appellate counsel was ineffective for failing to raise this issue on direct appeal.

This claim is procedurally barred because it was raised on direct appeal. See Parker v. Dugger, 550 So.2d 459, 460 (Fla.1989)("[H]abeas corpus petitions are not to be used for additional appeals on questions which could have been, should have been, or were raised on appeal or in a rule 3.850 motion, or on matters that were not objected to at trial."); Atwater v. State, 26 Fla. L. Weekly 395 (Fla. 2001). On direct appeal, appellate counsel argued that the trial judge's inquiry was improper and that it nullified the presumption of correctness afforded to the trial court's denial of the motion to suppress (Initial Brief p. 24-25). Further, petitioner never made a motion at trial to have the judge recused. Therefore, the issue was not preserved for appellate review and counsel cannot be deficient for failing to raise an unpreserved issue. See Groover v. State, 656 So.2d 424 (Fla. 1995) (appellate counsel is not ineffective for failing to raise issues not preserved for appeal).

Moreover, a review of the transcript of the motion to suppress hearing reveals that this claim is without merit. The trial court stated that whether or not the state could go forward with the case would not be a consideration with regard to the resolution of the matter in the Worden case.(T. 1314). Specifically, in reference to this case, the state responded

that if the trial court granted the petitioner's motion to suppress, it would not prevent the state from going forward with the case (T. 1317). Hence, this claim must be denied.

ISSUE V

PETITIONER'S CLAIM THAT APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE AND ARGUE ON DIRECT APPEAL THAT THE TRIAL COURT ERRED BY DENYING PETITIONER'S REQUESTED JURY INSTRUCTION ON THE DIFFERENCE BETWEEN SEXUAL BATTERY AND PENETRATION OF A DECEASED PERSON IS PROCEDURALLY BARRED AND WITHOUT MERIT.

Petitioner claims that appellate counsel was ineffective for failing to argue on direct appeal that the trial court committed reversible error when it denied petitioner's requested jury instruction that sexual battery requires a live victim.

Petitioner requested the following special jury instruction:

> If you find from the evidence that the Defendant did with his penis penetrate or had union with the vagina of Georgianna S. Worden, and at that time, Georgianna S. Worden was not a living and breathing, human being, then you must fine the defendant not guilty of sexual battery, as contained in count 2 of the indictment.(R. 4905).

The trial court gave the following standard instruction:

> [B]efore you can find the Defendant guilty of sexual battery, the state must prove the following four elements beyond a reasonable doubt: One, Georgianna Worden was over the age of eleven years, Two, Duane Owen, with his sexual organ or with a blunt instrument, or both, penetrated the vagina of Georgianna Worden, Three, Duane Owen, in the process, used or threatened to use, a deadly weapon,

> or used actual, physical force likely to cause serious personal injury, four, the act was done without the consent of Georgianna Worden. (T. 217).

Petitioner's claim is procedurally barred because it was argued on direct appeal and in petitioner's fourth amended 3.850 motion. See Blanco v. Wainwright, 507 So.2d 1377, 1384 (Fla.1987), Parker v. Dugger, 550 So.2d 459, 460 (Fla.1989), Atwater v. State, 26 Fla. L. Weekly 395 (Fla. 2001).

On direct appeal, petitioner argued that the trial court erred by denying his motion for judgment of acquittal on the sexual battery charge because it was not on a live person. (Initial Brief, p. 14-16). This court rejected that argument, finding that whether the victim was alive or dead at the time of sexual union, is an issue of fact to be determined by the jury and that competent, substantial evidence supported the jury's finding of sexual battery in this case.[2] Owen v. State, 596

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[2] At trial, the substantial competent evidence included Dr. Benz's testimony that Mrs. Worden did not die immediately (T. 3069). Dr. Benz stated that the autopsy revealed that between the blows to the head and death there was a time lapse where Mrs. Worden went into heart failure because she had accumulated fluid in the lungs which shows that she did not die right away (T. 3069-3070). Dr. Benz stated that while Mrs. Worden was near death, she lived at least 3-4 minutes after suffering the injuries and could have survived for as long as half an hour to an hour (T. 4041). Moreover, during his confession, petitioner stated that he remembered Mrs. Worden trying to get up and grab him, and that he pushed her back off him (T. 3600-3622). Hence, the petitioner can not show that the trial court's failure to give the requested

So.2d 985, 987 (Fla. 1992). Furthermore, in his fourth amended 3.850 motion, petitioner argued that his right to due process was violated when the trial court instructed the jury on sexual battery. (Fourth Amended 3.850, p. 188). Specifically, petitioner argued that the instruction on sexual battery prejudiced him because the trial court refused to instruct the jury on the distinction between sexual battery on a living person or one that had expired. (Fourth Amended 3.850, p. 190). This court found that the claim was procedurally barred. Owen, 773 So.2d 510.

Finally, petitioner's claim that the jury was improperly instructed is without merit. Appellate counsel cannot be ineffective for failing to raise an issue that is without merit. Freeman v. State, 761 So.2d 1055 (Fla. 2000); Atkins v. Dugger, 541 So.2d 1165, 1167 (Fla.1989). While a defendant is entitled to have the jury instructed on his theory of defense, the failure to give special jury instructions does not constitute error where the instructions given adequately address the applicable legal standards. Stephens v. State, 787 So.2d 747, 755 (Fla. 2001) citing Palmes v. State, 397 So.2d 648 (Fla.1981). Standard jury instructions are presumed correct and

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instruction compromised the appellate process. Therefore, this claim should be denied.

are preferred over special instructions. Id. at 755 citing State v. Bryan, 290 So.2d 482 (Fla.1974). The party challenging the giving of standard jury instructions has the burden of demonstrating that the trial court abused its discretion in the giving of such instructions. Id. see also Phillips v. State, 476 So.2d 194 (Fla.1985); Williams v. State, 437 So.2d 133 (Fla.1983). To be entitled to a special jury instruction, defendant must prove: (1) the special instruction was supported by the evidence, (2) the standard instruction did not adequately cover the theory of defense, and (3) the special instruction was a correct statement of the law and not misleading or confusing. Id.

In Freeman, the defendant contended that appellate counsel was ineffective for failing to argue that the trial court erred in denying motions requesting special jury instructions. 761 So. 2d at 1071. The judge heard defense counsel's arguments in favor of the requested instructions but decided to give the standard jury instructions instead. This court found that the standard jury instructions are presumed to be correct and that Freeman had not shown that the instructions given were incorrect.

Analogizing Freeman to this case, it is clear that although the issue regarding the trial court’s denial of the special jury

instruction was preserved for appeal, appellate counsel here was not deficient for failing to raise the jury instruction issue because it is without merit. There was no error because the trial court used the standard jury instruction for sexual battery. Since the petitioner can not show that the instruction given was incorrect petitioner cannot make any showing of prejudice and this claim must be denied.

ISSUE VI

PETITIONER'S CLAIM THAT APPELLATE COUNSEL INEFFECTIVELY ARGUED THE SUFFICIENCY OF THE STATE'S EVIDENCE IN SUPPORT OF THE AGGRAVATORS AND FAILURE TO ARGUE THAT THE TRIAL COURT DID NOT PROPERLY CONSIDER ALL OF THE MITIGATION IS PROCEDURALLY BARRED, LEGALLY INSUFFICIENT AS PLED, AND WITHOUT MERIT.

Petitioner argues that appellate counsel was ineffective for failing to thoroughly argue on direct appeal that the cold calculated and premeditated aggravator was not met in this case and for failing to argue that the trial court erred by not considering all of the non-statutory mitigation evidence. These claims are procedurally barred because both issues were argued on direct appeal (Initial Brief pp. 35-39). See Parker v. Dugger, 550 So.2d 459, 460 (Fla.1989), Atwater v. State, 26 Fla. L. Weekly 395 (Fla. 2001).

According to petitioner, appellate counsel should have argued that the state's evidence was insufficient to prove that the murder was cold, calculated and premeditated because

petitioner did not have a careful or prearranged plan to kill. This court, however, has already made factual findings that the murder was committed as part of a careful or prearranged plan to kill. Owen, 596 SO. 2d 985, 990. This court found that the petitioner selected the victim, removed his own outer garments to prevent them from being soiled by blood, placed socks on his hands, broke into the home, closed and blocked the door to the children's room, selected a hammer and knife from the kitchen, and bludgeoned the sleeping victim before strangling and sexually assaulting her. Id.

Petitioner's second argument, that appellate counsel should have claimed that the trial court failed to consider all non-statutory mitigation, is likewise without merit. Petitioner claims that the trial court abused it's discretion by failing to consider the 21 hours of videotaped confession as evidence of mental health problems for which the petitioner was seeking treatment. Petitioner also claims that the trial court should have considered these tapes as evidence of the petitioner's cooperation with law enforcement.

This claim is legally insufficient as plead because the petition does not specify how this alleged deficiency compromised the appellate process. Further, it is wholly without merit. The record reflects that the trial court

considered all mitigation presented, even the mitigation presented in the Slattery case, and mitigation that was not presented to the jury (R. 4953). The trial court considered that Owen was an orphan, that his mother died when he was young, that his father was an alcoholic and committed suicide, that he lived in a foster home where he was sexually abused, that he wanted to be a policeman, and that he twice enlisted in the army (R. 4952-4953). On appeal, high deference is afforded to these findings by the trial court and it's rulings are not reversed unless an abuse of discretion is shown. Sochor v. State, 619 So. 2d 285 (Fla. 1993). Hence, this claim should be denied because appellate counsel cannot be ineffective for failing to raise an issue which is without merit. Freeman v. State, 761 So.2d 1055 (Fla. 2000); Atkins v. Dugger, 541 So.2d 1165, 1167 (Fla.1989).

ISSUE VII

PETITIONER'S CLAIM THAT HIS SENTENCES ON THE NON CAPITAL OFFENSES ARE ILLEGAL IS WITHOUT MERIT.

Petitioner claims that pursuant to Smith v. State, 537 So. 2d 982 (Fla. 1989), his sentences on the non-capital cases are illegal because the offenses predated the effective date of the guidelines. This claim is without merit.

Petitioner improperly argues that habeas is the proper vehicle to correct this error. Specifically with respect to the errors complained of in the instant case, it has been held that

a 3.800 motion to correct an "unconstitutional" guideline sentence is the proper procedure. Wahl v. State, 543 So.2d 299 (Fla. 2d DCA 1989);
Gibbons v. State, 543 So.2d 860 (Fla. 2d DCA 1989).

It is noteworthy that petitioner has filed a 3.800 motion, which is pending in the circuit court with respect to case numbers 84-3459, 84-4001, and 84-4003. Accordingly, it is clear that habeas corpus is not the proper pleading in which to raise such an issue.

Moreover, the issue is not ripe for review. Petitioner is requesting that this court vacate his sentence on the non-capital felonies and remand the case for a new sentencing hearing where he could affirmatively elect to either be sentenced under the pre-guideline procedure and be eligible for parole or to waive the illegality and be sentenced under the guidelines. Unless petitioner's death sentence is vacated this claim will never ripen. Petitioner would never be eligible for parole at this time because he is under a sentence of death. As such, that option is currently foreclosed to him.[3]

ISSUE VIII

PETITIONER'S CLAIM THAT APPELLATE COUNSEL WAS

[3] The State notes that petitioner is also under sentence of death in case number 95-526, which makes it even more unlikely that he would ever be eligible for parole.

INEFFECTIVE FOR FAILING TO CITE CONTROLLING PRECEDENT ON THE ISSUE OF WHETHER PETITIONER'S CONFESSION WAS INVOLUNTARY IS PROCEDURALLY BARRED AND WITHOUT MERIT.

Petitioner claims that law enforcement engaged in ongoing systematic coercion to obtain his confession and that appellate counsel failed to present the issue in a meaningful way because he failed to cite controlling caselaw.

This claim is procedurally barred because it was raised and decided on direct appeal.[4] Parker v. Dugger, 550 So.2d 459, 460 (Fla.1989), Atwater v. State, 26 Fla. L. Weekly 395 (Fla. 2001). This court has already rejected petitioner's assertion that his confession was obtained through psychological coercion. Owen, 596 So. 2d 985, 987 (Fla. 1992)("Owen's assertion that his statements to police were obtained through psychological coercion has already been rejected by this court). In so holding, this court relied upon its previous findings in Owen v. State, 560 So. 2d at 207 (Fla. 1990)(Slattery Murder), where it rejected petitioner's claim of coercion:

> Owen's more serious argument is that he was psychologically coerced into confessing by extended interrogation sessions, feigned empathy, flattery, and lengthy discourse by the police. These interrogation sessions

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[4] Argument II B of Defendant's initial brief argued that the trial court erred by denying the motion to suppress defendant's confession due to the manner in which the statements were obtained (from psychological coercion due to many hours of interrogation).

> were videotaped and we have, as did the trial judge, the benefit of actually viewing and hearing them. It is clear from these tapes that the sessions were initiated by Owen, who was repeatedly advised of his rights to counsel and to remain silent. Moreover, he acknowledged on the tapes that he was completely familiar with his Miranda rights and knew them as well as the police officers. It is also clear that the sessions, which encompassed six days, were not individually lengthy and that Owen was given refreshments, food, and breaks during the sessions. The tapes show that the confession was entirely voluntary under the fifth amendment and that no improper coercion was employed.

Because this Court has already found that the confession was entirely voluntary and that no improper coercion was used, this claim must be denied as procedurally barred.

Turning to the merits, petitioner's claim that counsel should have cited Alabama v. Blackburn, 361 U.S. 199 (1960), is without merit because the police in this case did not coerce Owen or exploit his mental problems. In Blackburn, the Supreme Court held that a confession was involuntary where the evidence established a strong probability that the defendant was insane and incompetent at the time he allegedly confessed to a robbery, where the confession was the result of an 8 or 9 hour sustained interrogation in tiny room (which was filled with police officers but absent any of defendant's relatives or legal counsel), and where the confession was composed by the deputy

sheriff. Id. at 205. The Court stated that the examination of prolonged interrogation procedures must be broad and based upon 'the totality of the circumstances'. Id. at 206.

Blackburn is clearly distinguishable from this case. There is no evidence that Owen was insane or incompetent at the time of the interrogation. In fact, this Court had the benefit of viewing the interrogation tapes and made no mention of defendant appearing insane, delusional or incoherent during the interrogation.[5] While Detective Woods knew of Petitioner's past psychological problems (he had helped Owen "[get] a hold of doctors"), there is no evidence that he knew about a "mental illness" or that law enforcement abused this knowledge. (S.R. 74-75).

Petitioner cites to multiple portions of the interrogation, arguing that they show that he suffers from a mental illness and that the officers were taking advantage of that. The interrogation, however, merely shows that law enforcement was aware that petitioner sought help, i.e., "saw a doctor," in the past, for a psychological condition. The totality of the circumstances of the questioning shows that the officers did not attempt to confuse, coerce or trick Owen and that Owen was

[5] This Court found that Petitioner actually initiated the interrogation sessions. Owen v. State, 560 So.2d 207, 210 (Fla. 1990).

coherent during the six day period of interrogation. Accordingly, it is clear that Owen was not coerced into confessing. See Owen, 560 So. 2d at 207. Counsel cannot be deficient for failing to cite Blackburn because it does not apply.

ISSUE IX

APPRENDI V. NEW JERSEY DOES NOT APPLY TO CAPITAL SENTENCING.

Petitioner next claims that his death sentence is unconstitutional, under Apprendi v. New Jersey, 530 U.S. 466 (2000), because the aggravators were not submitted for the jury to determine whether they had been proved beyond a reasonable doubt.

This claim is without merit as it has been rejected by this court. This court has found that the rule announced by the United States Supreme Court in Apprendi v. New Jersey, 530 U.S. 466 (2000) requiring any fact increasing penalty for a crime beyond the prescribed statutory maximum to be submitted to jury and proved beyond reasonable doubt, does not apply to the state capital sentencing scheme. Mills v. Moore, 786 So.2d 532 (Fla. 2001), Mann v. Moore, 794 So. 2d 595 (Fla. 2001), Card v. State, 26 Fla. L. Weekly s670 (Fla. October 11, 2001), Brown v. Moore, SC 01-884, (Fla. November 1, 2001), Looney v. State, SC 01-458,

(Fla. November 1, 2001), Hertz v. State, SC 00-457, (Fla. November 1, 2001).

ISSUE X

PETITIONER'S CLAIM THAT HIS EIGHTH AMENDMENT RIGHT AGAINST CRUEL AND UNUSUAL PUNISHMENT WILL BE VIOLATED BECAUSE HE MAY BE INCOMPETENT AT THE TIME OF EXECUTION IS NOT RIPE FOR CONSIDERATION.

Petitioner concedes that this claim is not ripe for review and is only being raised to preserve the issue for federal review. A habeas petitioner can not legally raise the issue of his competency to be executed until after a death warrant is issued. Hall v. Moore, 26 Fla. L. Weekly S316,(Fla. 2001), see Fla. R.Crim. P. 3.811(c)(no motion for a stay of execution pending hearing, based on grounds of the prisoner's insanity to be executed, shall be entertained by any court until such time as the Governor of Florida shall have held appropriate proceedings for determining the issue pursuant to the appropriate Florida Statutes).

Since no death warrant has, as yet, been issued in this case, petitioner's claim must be denied as premature.

ISSUE XI

PETITIONER'S CLAIM THAT THIS COURT ERRED BY NOT APPOINTING CONFLICT FREE COUNSEL OR REMANDING THE CASE TO THE TRIAL COURT FOR A FINDING OF FACT IS PROCEDURALLY BARRED AND WITHOUT MERIT.

Petitioner claims that this court reversibly erred by not

appointing conflict-free counsel for his direct appeal. This claim is legally insufficient because the petition does not specify the substance of the conflict. Further, as will be fully explained below, this claim is waived/procedurally barred.

As best the State can discern, petitioner first raised a conflict of interest on his attorney's part prior to trial. Petitioner filed a bar complaint against Craig Boudreau claiming Boudreau had a conflict because he was roommates with an assistant state attorney. Petitioner also complained that this was Boudreau's first capital trial. In response to the bar complaint trial counsel Boudreau and co-counsel Donald Kohl filed a motion to withdraw, prompting an in camera hearing. (T 1664). At the hearing, Owen made it clear that he wanted Kohl, not Boudreau, as lead counsel because Boudreau had not previously handled a capital case (T. 1664-1751). It was determined that petitioner had previously told the court that Boudreau's rooming with an assistant state attorney did not create a problem or concern (T. 1718). The trial court denied the motion to withdraw and found no conflict of interest (T. 1747).

Thereafter, Donald Kohl appealed the denial of his motion to withdraw to the Fourth District. The Fourth District denied

Kohl's petition, stating that should its decision be erroneous petitioner would be able to raise the issue at a later date. Owen v. Burk, 481 So. 2d 998 (Fla. 4th DCA 1986). After trial, Kohl's law firm split up and he filed a Motion for Determination of Counsel in this court (during the appeal) seeking to have Craig Boudreau continue solely as counsel on the case. Petitioner filed an Objection to the Motion for Determination of Counsel in this court making the same allegations that he did in the trial court. This court granted Kohl's motion and determined that Boudreau is counsel for petitioner.

Petitioner's claim that this court erred by not appointing conflict-free counsel for the appeal is waived/procedurally barred because it was raised and rejected in petitioner's fourth amended 3.850 motion. (Fourth Amended 3.850, pp. 41-42). See Parker v. Dugger, 550 So.2d 459, 460 (Fla.1989), Atwater v. State, 26 Fla. L. Weekly 395 (Fla. 2001).

In his Fourth Amended 3.850 motion petitioner argued that his trial counsel, Craig Boudreau (also his appellate counsel), was ineffective and that a conflict of interest arose at the trial level because Boudreau lived with a state attorney (Fourth Amended 3.850, pp. 41-42). An evidentiary hearing was granted on both claims and was held on December 8, 1997. Prior to its commencement, Carey Haughwout, Owen's new counsel in the

Slattery re-trial, informed the court that Owen had invoked the attorney-client privilege in the Slattery case and asked for a stay of the Worden post-conviction proceeding until the Slattery re-trial was completed. In the alternative, Ms. Haughwout sought to prohibit disclosure of or use of any information disclosed at the hearing against Owen in the up-coming Slattery re-trial. Id. at 513. The court agreed to bar disclosure of privileged information.

Owen then called only **one (1) witness** at the evidentiary hearing-- Barry Krischer**, his trial counsel in the Slattery case.** Krischer testified that his "sole responsibility vis-a-vis Owen was to represent him in the Slattery case, that he played no role in the Worden case . . . [and] that he told Owen at the time of trial that he did not want to hear anything about the Worden murder." Owen, 773 So.2d at 513. Krischer noted that he and Mr. Salnick had litigated "the motion to suppress Owen's omnibus confession, portions of which were later introduced into evidence at both trials,"[6] Id.

After Krischer finished testifying, Pamela H. Izakowitz, collateral counsel for Owen, informed the court that Owen **had decided to not proceed any further with the evidentiary hearing**,

[6] The motion to suppress was not the subject of or involved in any of the ineffectiveness claims.

arguing that to do so would violate the attorney-client privilege in the Slattery case. Thereafter, the trial court denied Owen's 3.850 motion and Owen appealed to this Court. This Court affirmed the denial, holding that the trial court had not abused its discretion in the way it conducted the hearing and that Owen had failed to show any violation of the attorney-client privilege in the Slattery case:

> [B]y filing ineffectiveness and conflict of interest claims against trial counsel in the Worden case, Owen waived the attorney-client privilege in that case. Although he subsequently invoked the privilege in the Slattery case, he still was obligated to proceed in good faith in the present case to the extent that the privilege permitted. He did not do so. In fact, at the hearing below, he made no effort to introduce substantive evidence concerning the Worden trial. Instead, he called as his only witness Barry Krischer, i.e., his former trial counsel in the Slattery case. Krischer knew virtually nothing about the Worden trial and his testimony was guaranteed to implicate the privilege, which expressly applied only to the Slattery case. Further, although the court below agreed to bar disclosure of privileged information, Owen made no effort to proffer any substantive evidence that would have been excluded by the privilege. In short, Owen made no showing of prejudice.

Id. at 514-15. Thus, this Court found that Owen waived the claim that trial counsel in the Worden case was ineffective and suffered a conflict of interest. Owen, 773 So. 2d 510. This court reasoned that it was a fact based claim that required

development at an evidentiary hearing, and that petitioner made no effort at the hearing to introduce evidence concerning the Worden trial, but instead only called Barry Krischer who knew virtually nothing about the Worden trial and his testimony was guaranteed to implicate the attorney client privilege, which applied only to the Slattery case. Id. Consequently, this claim is waived/procedurally barred and should be denied.

WHEREFORE, the State respectfully requests that this Honorable Court dismiss this petition based on procedural default, or in the alternative deny all relief based on the merits.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that a true copy of the foregoing Response to the Petition for Writ of Habeas Corpus has been furnished by United States mail to JAMES L. DRISCOLL, JR., Capital Collateral

Regional Counsel- Middle, 3801 Corporex Park Drive, Suite 210, Tampa, Fl. 33619-1136, this 19th day of December, 2001.

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