IN THE SUPREME COURT OF FLORIDA

ROGER LEE CHERRY,
Petitioner, **Case No. SC01-2862**

v.

MICHAEL W. MOORE,
Respondent.
_____/

ON APPEAL FROM THE SEVENTH JUDICIAL CIRCUIT
IN AND FOR VOLUSIA COUNTY, FLORIDA

RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

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RESPONSE TO PRELIMINARY STATEMENT

The "Preliminary Statement" set out on pages 1-2 of the petition, to the extent that it alleges that any error occurred in Cherry's trial, is argumentative, and is denied.

RESPONSE TO INTRODUCTION

The "Introduction" set out on pages 2-4 of the petition is argumentative and is denied. Any averments contained therein are specifically denied.

RESPONSE TO REQUEST FOR ORAL ARGUMENT

The Respondent defers to the Court with respect to the necessity of oral argument.

RESPONSE TO PROCEDURAL HISTORY

The "Procedural History" set out on pages 4-7 of the petition is substantially correct, if somewhat argumentative and abbreviated. The Respondent relies on the following summary of the facts and the course of prior proceedings in this case:

> Appellant was convicted of two counts of first-degree murder, one count of burglary with assault, and one count of grand theft and was sentenced to death for the 1986 slaying of an elderly couple in Deland, Florida. The facts in this case are set forth in greater detail in our opinion on direct appeal, in which we affirmed Cherry's convictions. *See Cherry v. State*, 544 So. 2d 184 (Fla. 1989), *cert. denied*, 494 U.S. 1090, 110 S.Ct. 1835, 108 L.Ed.2d 963 (1990).
>
> Briefly, Cherry had burglarized the home of Esther and Leonard Wayne, during which burglary Esther Wayne was killed by multiple blows to the head and Leonard Wayne died from cardiac arrest. The jury recommended death for both murders. The trial court followed the jury's recommendation, finding four aggravating factors for each

victim: (1) Cherry had been previously convicted of a felony involving the use and threat of violence (*i.e.*, robbery); (2) the murders were committed while Cherry was engaged in a burglary; (3) the murders were committed for pecuniary gain; and (4) the murders were "especially wicked, evil, atrocious, or cruel."

On appeal we held the aggravators for murder committed while engaged in a burglary and murder committed for pecuniary gain should have been considered as a single aggravating factor because they were based on the same aspect of the crime. We found that the heinous, atrocious, or cruel (HAC) aggravator was appropriate to the death of Esther Wayne but not as to Leonard Wayne. We then found the sentence of death proportionate as to the murder of Esther Wayne but not as to the death of Leonard Wayne. We stated:

> Second, Cherry contends that the circumstances of this case do not support the trial court's finding that the murders were "especially wicked, evil, atrocious or cruel." We disagree and find that, as to Mrs. Wayne, the state has demonstrated the existence of this aggravating factor beyond a reasonable doubt.
>
> ....
>
> The testimony of the district medical examiner indicates that Mrs. Wayne was literally beaten to death. The medical examiner's external observations of Mrs. Wayne revealed multiple areas of contusion around the neck, eyes, lip, the right shoulder and collarbone, and over the left collarbone. A subdural hemorrhage covered most of the brain and was attributed to a forceful blow to the head. The left temporal bone was fractured and the skull dislocated from the spine at its juncture. Those injuries were consistent with trauma caused by her being struck with a fist, hand, or blunt instrument and resulted from at least five blows.
>
> In addition, there was a shoe print on the back of Mrs. Wayne's pajama bottom with a corresponding bruise on her right buttock. The medical examiner concluded that the injuries

> received by Mrs. Wayne were severe and must have been inflicted with great force. Under these circumstances, the aggravating factor of heinous, atrocious, or cruel is appropriate to the murder of Mrs. Wayne. However, we find this aggravating factor inapplicable to the murder of Mr. Wayne.
>
> Although we have concluded that there was an improper doubling, we are still left with three aggravating factors as to Mrs. Wayne - prior conviction of a violent felony, murder committed for pecuniary gain, and that the murder was especially heinous, atrocious, or cruel. In the absence of any mitigating factors, under these circumstances we affirm the death penalty as to Mrs. Wayne. However, we reverse the death sentence imposed as to Mr. Wayne on the ground that it is disproportionate as applied. We cannot conclude that death is a proportionate punishment when the victim dies of a heart attack during a felony in the absence of any deliberate attempt to cause the heart attack.

Id. at 187-88 (footnote omitted).

Cherry subsequently filed a motion for postconviction relief pursuant to *Florida Rule of Criminal Procedure* 3.850. The trial court summarily denied the motion without holding an evidentiary hearing on the ground that most of the claims could have been raised on direct appeal. As for Cherry's remaining claim concerning ineffective assistance of counsel, the trial court denied the motion because Cherry failed to satisfy the standards set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). On appeal, we affirmed the summary denials of all claims except those claims alleging counsel was ineffective in the penalty phase of the trial. We remanded for an evidentiary hearing on those claims. *See Cherry v. State*, 659 So. 2d 1069 (Fla. 1995).

Upon remand, the trial court held a three-day evidentiary hearing. Following the presentation of evidence and arguments by counsel, the trial court denied relief. The trial court entered an extensive, detailed order setting forth her reasons for the denial of relief.

> This appeal follows, in which Cherry raises four issues for our review: (1) whether the trial court erred in denying Cherry's claim for ineffective assistance of penalty-phase counsel; (2) whether the trial court erred in denying Cherry's claim that he was denied a competent mental health evaluation and that counsel was ineffective for failing to provide the expert with sufficient background information; (3) whether trial counsel rendered ineffective assistance of counsel by failing to object to unconstitutional jury instructions and improper prosecutorial comments; and (4) whether the trial court erred in denying Cherry's motion to perpetuate testimony of out-of-state expert witnesses. For reasons stated below, we affirm the trial court.

Cherry v. State, 781 So. 2d 1040, 1042-44 (Fla. 2000).

The Direct Appeal Facts

On direct appeal from Cherry's conviction and sentence, this Court summarized the facts of the offense, and the evidence against Cherry, in the following way:

> Cherry burglarized a small two-bedroom house in DeLand belonging to an elderly couple, Leonard Wayne and Esther Wayne, during the late evening of June 27 or the early morning of June 28, 1986. When their son arrived for a visit about noon on the 28th, he noticed that their car was gone and a door to the house ajar. Upon entering the bedroom, he discovered his parents lying two feet apart on the bedroom floor, dead. Autopsies revealed that Mrs. Wayne died of multiple blows to the head and that Mr. Wayne died of cardiac arrest.
>
> At the trial, the state's chief witness, Lorraine Neloms, testified that Cherry left the apartment which they shared between 11 and 11:30 p.m. on June 27, 1986, explaining that "he needed some money." He returned about an hour later with two or three rifles and a wallet which contained a bank card and a license identifying a man named Wayne. She asked where he had been and he responded that he went inside a house by the armory. The prosecutor then asked:
>
> > Q. Did he tell you what happened inside the house?

> A: Yeah. When he went in there, the people was awoke and saw him and the lady tried to fight him or something and he hit her and pushed the man and he grabbed his chest and he found their car keys and took their car.

Ms. Neloms further testified that Cherry bled from a cut on his right thumb, which he stated was the result of having cut a line.

Cherry left the apartment twice more that evening. The first time he went to a bank and on his return stated that a card was stuck in the machine. The second time, about fifteen minutes later, he left "to ditch the car he stole."

The following night, Cherry had Ms. Neloms drive by the car he had "ditched." She identified it as a light blue Ford Fairmount. They saw several police officers around the car and did not stop. After returning home, Ms. Neloms then learned of the murders. As she and Cherry watched the eleven o'clock news, television footage showed the car and house by the armory. She described Cherry as acting "[r]eal strange." Ms. Neloms later went to the police and Cherry was arrested.

A Sun Bank supervisor then testified that the automatic teller machine three blocks from the Wayne residence captured a Master Card and a Sun Bank card belonging to the Waynes on June 28, 1986. Bank audit slips revealed that five or six transactions were unsuccessfully attempted between 1:55 and 2 a.m.

Police testimony indicated that the telephone wire outside the house had been cut at the junction box and that blood had been discovered on a piece of discarded paper near the box, on the walkway leading to the back porch, and on at least one of three jalousie panes found in a wooded thicket to the rear of the house. Those panes had been removed from the porch window. Cherry's blood was consistent with the blood found on the paper and the jalousie. Cherry's left palm print was found on the door frame at the entrance to the Waynes' bedroom and his left thumbprint appeared on one of the jalousie panes. However, a hair fragment was collected from the bedroom wardrobe and determined to be dissimilar to Cherry's known hair sample. Cherry was arrested on July 2 at his home, approximately three blocks from the Waynes' house.

Police noted at that time that Cherry had a cut on his thumb, which he remarked was the result of having cut the head off a fish.

Finally, evidence was presented that the Waynes' Fairmount had been discovered abandoned in a wooded area within a mile of their house. Inside its locked trunk, police found a metal tray bearing Cherry's left thumbprint. Cherry's blood was consistent with blood identified on a towel recovered from the front seat of the car.

A jury convicted Cherry of the four crimes charged in the indictment. During the penalty phase, the state offered no additional evidence. The defense evidence was limited to a September 10, 1987, psychiatric evaluation by George W. Barnard, M.D. (FN1) The jury recommended the imposition of the death penalty by a 7-5 vote for the murder of Leonard Wayne and by a 9-3 vote for the murder of Esther Wayne.

The trial judge sentenced Cherry to death on both capital counts in accordance with the jury's recommendation, finding that the aggravating circumstances (FN2) far outweighed any mitigating circumstances.

> FN1. Dr. Barnard reported that Cherry's father beat him severely and that his mother had alcohol problems. In the year before his arrest, Cherry smoked marijuana daily and smoked approximately $700 worth of "crack," the last time being on June 28, 1986.
>
> FN2. The court found that Cherry had been previously convicted of another felony involving the use and threat of violence, that is robbery; that the murders were committed while he was engaged in the commission of a burglary; that the murders were committed for pecuniary gain; and that the murders were "especially wicked, evil, atrocious or cruel."

Cherry v. State, 544 So. 2d 184, 185-86 (Fla. 1989).

The Direct Appeal Issues

On direct appeal, this Court addressed Cherry's claims that

the trial court had improperly prevented him from presenting testimony that would have impeached Neloms; that the sentencing court improperly "doubled" two aggravators; and, that the heinous, atrocious, or cruel aggravator should not have been applied to this case. *Cherry v. State, supra,* at 186-88. In addition to those claims, Cherry also argued that death was a disproportionate sentence; that the aggravators and mitigators do not "genuinely narrow" the class of death-eligible defendants; that the death penalty was imposed in contravention of the right to a jury trial; that the sentencing court erred in not considering a psychiatric report introduced by the defense at the penalty phase; and a double jeopardy claim.[1] This Court did not write to these claims in its opinion. *Cherry v. State,* at 187.

RESPONSE TO JURISDICTIONAL STATEMENT

The Respondent does not dispute that this Court has the jurisdiction to entertain petitions for writs of habeas corpus. However, to the extent that Cherry's jurisdictional statement contains allegations of error, those allegations have nothing to do with the scope of this Court's jurisdiction, and are expressly denied.

Moreover, as this Court has long held:

> It is important to note that habeas corpus petitions are not to be used for additional appeals on questions which

[1]Cherry's *Initial Brief* on direct appeal is attached as Appendix A.

> 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. *Suarez v. Dugger*, 527 So. 2d 190 (Fla. 1988); *White v. Dugger*, 511 So. 2d 554 (Fla. 1987); *Blanco v. Wainwright*, 507 So. 2d 1377 (Fla. 1987).

Parker v. Dugger, 550 So. 2d 459, 460 (Fla. 1989).[2] As this Court has emphasized:

> Although claims of ineffective assistance by appellate counsel are cognizable in habeas corpus petitions, "using a different argument to relitigate an issue in postconviction proceedings is not appropriate." *Porter v. Dugger*, 559 So. 2d 201, 203 (Fla. 1990). Furthermore, "an allegation of ineffective counsel will not be permitted to serve as a means of circumventing the rule that habeas corpus proceedings do not provide a second or substitute appeal." *Blanco v. Wainwright*, 507 So.2d 1377, 1384 (Fla.1987).

Medina v. Dugger, 586 So. 2d 317, 318(Fla. 1991). To the extent that the claims contained in the habeas petition are the same as the claims contained in Cherry's Rule 3.850 motion, those claims are procedurally barred:

> Mann's current argument is based on many of the closing argument statements brought to our attention in the direct appeal and on appeal of the 3.850 denial. Further, many of the passages cited in this argument are the same passages cited by him in the previous issue in this habeas. As we find Mann's current claim to be a variant to those arguments previously made, we find this issue to be procedurally barred. *See Thompson v. State*, 759 So. 2d 650, 657 n. 6 (Fla. 2000) (habeas is not proper to argue a variant to an issue already decided).

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[2]Of course, "if an issue was actually raised on direct appeal, the Court will not consider a claim that appellate counsel was ineffective for failing to raise additional arguments in support of the claim on appeal." *Rutherford v. Moore*, 774 So. 2d 637, 645 (Fla. 2000).

Mann v. Moore, 794 So. 2d 595, 602 (Fla. 2001). As this Court has held, "claims of ineffective assistance of appellate counsel may not be used to camouflage issues that should have been raised on direct appeal or in a postconviction motion. *See, e.g., Thompson*, 759 So. 2d at 657 n. 6; *Hardwick v. Dugger,* 648 So. 2d 100, 106 (Fla. 1994); *Breedlove v. Singletary*, 595 So. 2d 8, 10 (Fla. 1992)." *Rutherford v. Moore,* 774 So. 2d 637, 643 (Fla. 2000).

To the extent that the claims contained in the petition fall within the scope of prohibited claims, this Court should deny relief on procedural bar grounds, and only address the merits of such claims in the alternative.

THE INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS

The Legal Standard

Cherry's petition is based upon his various specifications of ineffective assistance of appellate counsel. In order to prevail on these claims, Cherry must demonstrate that the performance of his appellate counsel was deficient, **and** that he was prejudiced as a result of such deficient performance. *See, Strickland v. Washington,* 466 U.S. 668 (1984); *Johnson v. Dugger,* 523 So. 2d 161 (Fla. 1988). The "deficiency" must be of such a magnitude that, but for that deficiency, the result of the proceeding would have been different. *Id.* In reviewing a claim of ineffective assistance of counsel, this Court must determine:

> whether the alleged omissions are of such magnitude as to constitute a serious 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.

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

The law has long been settled that appellate counsel is not required to raise every colorable claim in order to provide "effective" assistance on appeal. Instead, as the United States Supreme Court has emphasized:

> Experienced advocates since time beyond memory have emphasized the importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues. Justice Jackson, after observing appellate advocates for many years, stated:
>
> > "One of the first tests of a discriminating advocate is to select the question, or questions, that he will present orally. Legal contentions, like the currency, depreciate through over-issue. The mind of an appellate judge is habitually receptive to the suggestion that a lower court committed an error. But receptiveness declines as the number of assigned errors increases. Multiplicity hints at lack of confidence in any one.... [E]xperience on the bench convinces me that multiplying assignments of error will dilute and weaken a good case and will not save a bad one." Jackson, *Advocacy Before the Supreme Court*, 25 Temple L.Q. 115, 119 (1951).
>
> Justice Jackson's observation echoes the advice of countless advocates before him and since. An authoritative work on appellate practice observes:
>
> > "Most cases present only one, two, or three significant questions.... Usually, ... if you cannot win on a few major points, the others are not likely to help, and to attempt to deal

> with a great many in the limited number of pages allowed for briefs will mean that none may receive adequate attention. The effect of adding weak arguments will be to dilute the force of the stronger ones." R. Stern, *Appellate Practice in the United States* 266 (1981).
>
> There can hardly be any question about the importance of having the appellate advocate examine the record with a view to selecting the most promising issues for review. This has assumed a greater importance in an era when oral argument is strictly limited in most courts -- often to as little as 15 minutes -- and when page limits on briefs are widely imposed. *See, e.g., Fed.Rules App.Proc.* 28(g); McKinney's 1982 *New York Rules of Court* §§ 670.17(g)(2), 670.22. Even in a court that imposes no time or page limits, however, the new per se rule laid down by the Court of Appeals is contrary to all experience and logic. A brief that raises every colorable issue runs the risk of burying good arguments -- those that, in the words of the great advocate John W. Davis, "go for the jugular," Davis, *The Argument of an Appeal*, 26 A.B.A.J. 895, 897 (1940) -- in a verbal mound made up of strong and weak contentions. *See generally, e.g.*, Godbold, *Twenty Pages and Twenty Minutes -- Effective Advocacy on Appeal*, 30 SW.L.J. 801 (1976).

Jones v. Barnes, 463 U.S. 745, 751-53 (1983). [footnotes omitted]; *Smith v. Murray*, 477 U.S. 527, 536 (1986) ("This process of 'winnowing out weaker arguments on appeal and focusing on' those more likely to prevail, far from being evidence of incompetence, is the hallmark of effective appellate advocacy."); *Provenzano v. Dugger,* 561 So.2d 541, 549 (Fla. 1990) (". . . counsel need not raise every nonfrivolous issue revealed by the record."); *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.**") [emphasis added].

In the context of a claim of ineffective assistance of appellate counsel, Eleventh Circuit Court of Appeals Judge Edmonson concurred in the denial of relief, stating:

> . . . I cannot agree that the quality of counsel's performance can be judged much by the length of briefs or the number of issues raised. Especially in the death penalty context, too many briefs are too long; and too many lawyers raise too many issues. **Effective lawyering involves the ability to discern strong arguments from weak ones and the courage to eliminate the unnecessary so that the necessary may be seen most clearly.** The Supreme Court -- as today's court recognizes -- has never required counsel to raise every nonfrivolous argument to be effective. *See Smith v. Murray*, 477 U.S. 527, 536, 106 S.Ct. 2661, 2667, 91 L.Ed.2d 434 (1986). That the custom in death penalty cases is for lawyers to file long briefs with lots of issues means little to me. This kind of "custom" does not define the standard of objective reasonableness. *See Gleason v. Title Guar. Co.*, 300 F.2d 813 (5th Cir. 1962). While compliance with custom may generally shield a lawyer from a valid claim of ineffectiveness, noncompliance should not necessarily mean he is ineffective. Not all customs are good ones, and customs can obstruct the creation of better practices.

Heath v. Jones, 941 F.2d 1126, 1141 (11th Cir. 1991) [emphasis added].

Appellate counsel is not "ineffective" for "failing" to raise issues which are not properly preserved for review. *See, Freeman, supra; Suarez v. Dugger,* 527 So.2d 190, 193 (Fla. 1988). Likewise, "failure" to brief a meritless issue, or one having little merit, is not deficient performance. *Id.* Further, the "failure" to raise

weak issues, or the "failure" to raise an issue that, at most, is harmless error, does not establish a basis for relief on ineffective assistance of counsel grounds. *Atkins v. Dugger,* 541 So.2d 1165, 1167 (Fla. 1989); *Duest v. Dugger,* 555 So.2d 849 (Fla. 1990). Of course, counsel is not "ineffective" when he "chose not to argue the issue as a matter of strategy." *Freeman, supra.*

Appellate counsel is not ineffective for failing to convince this Court of the merit of the claims raised on appeal. *Freeman, supra; Alford v. Wainwright,* 725 F.2d 1282, 1289 (11th Cir.), *modified,* 731 F.2d 1486, *cert. denied,* 469 U.S. 956 (1984) ("[trial counsel] cannot be faulted simply because he did not succeed."). How present counsel would have argued the issues had he been appellate counsel is not the standard -- petitioner must allege "a specific, serious omission or overt act upon which the claim of ineffective assistance of counsel can be based." *Card v. Dugger,* 911 F.2d 1496, 1507 (11th Cir. 1990); *Freeman, supra.*

RESPONSE TO INDIVIDUAL CLAIMS

I. THE "DEPRIVATION OF AN INDIVIDUALIZED SENTENCING DETERMINATION" CLAIM

On pages 9-25 of the petition, Cherry sets out a lengthy argument in which he asserts that the sentencing court, and, by implication, this Court, did not properly deal with the mitigation evidence introduced at his capital trial, and that his appellate counsel was "ineffective" for not arguing that Cherry should have received a "reweighing" of the aggravators and mitigators after

this Court found that two aggravating circumstances were improperly "doubled." The "doubling" component of this claim is easily disposed of, because it is based on a false premise. The true facts are that appellate counsel did, in fact, argue that a new penalty phase was the proper remedy when two aggravators are merged, as they were here.[3]

The remaining components of this claim revolve around the psychiatric report introduced at Cherry's penalty phase, and this Court's subsequent treatment of it. Specifically, this issue was raised on direct appeal as a claim that the sentencing court did not "consider" the psychiatric report. Appendix A at 67. Further, this issue was extensively addressed in the *Florida Rule of Criminal Procedure* 3.850 proceedings, and was discussed at length by this Court. Despite the hyperbole of Cherry's petition, there is no inconsistency with respect to the mental state issues:

> In the present case, it appears at first blush that counsel failed to properly conduct the penalty phase of the trial. No witnesses were called, and only one objection was raised during the entire proceeding. Counsel's closing argument referred to biblical references and did not address the mitigating or aggravating circumstances in this case. However, counsel's actions must be considered in light of other factors such as trial strategy. *See Rose*, 675 So. 2d at

[3]Appellate counsel pressed this argument in the *Initial Brief*, and in his motion for rehearing (Appendix B). No case cited by Cherry suggests that, at the time of the appeal, "reweighing," as opposed to a new penalty phase, was the likely remedy. Just the opposite is true -- the cases cited in Cherry's brief suggest that a new penalty phase, which is what appellate counsel argued for, was the more likely result.

572. The trial court noted that by admitting Dr. Barnard's report instead of calling him as a witness, the defense eliminated the State's ability to cross-examine the facts presented in the report. Additionally, the trial court found Cherry's present claim that he was under the influence of drugs and alcohol at the time of the offense to be refuted by his testimony during the trial. Even if this mitigator did exist, it would have been inconsistent with Cherry's theory of defense during trial (*i.e.*, that he did not commit the offense). Therefore, the trial court found that counsel was not deficient in failing to present a mitigator that was not supported by the record or would have been inconsistent with the evidence and testimony presented by the defendant. We agree.

Cherry testified during trial and admitted to drinking several beers on the night of the murder. In his interview with Dr. Barnard, Cherry admitted to smoking crack cocaine on June 28, 1986. However, nowhere in his testimony does Cherry indicate that he was intoxicated on the night of the murder.

Dr. Barry Crown, a psychologist who was hired by Cherry's postconviction counsel in July 1996 for purposes of the 1996 evidentiary hearing, did not provide any facts to support his conclusion that Cherry was under the influence of alcohol or drugs at the time the murders were committed. Thus, counsel was not deficient in failing to present a mitigator unsupported by the record. Further, Cherry maintained throughout trial that he was not present at the scene of the murder and that he was innocent of all charges against him. Therefore, to argue in mitigation that Cherry was intoxicated at the time of the offense would be wholly inconsistent with the theory of defense, and therefore counsel cannot be deemed ineffective for failing to present it. *See Rose v. State*, 617 So. 2d 291, 294 (Fla. 1993) ("When a defendant preempts his attorney's strategy by insisting that a different defense be followed, no claim of ineffectiveness can be made.").

Finally, as noted above, Cherry failed to provide defense counsel with the names of any witnesses who would testify on Cherry's behalf. During the evidentiary hearing, trial counsel testified that Cherry did not provide him with names of any witnesses who could have provided mitigating evidence. Further, upon commencement of the penalty phase

proceeding, trial counsel asked Cherry in open court whether he knew "of anyone who would be able to come in and substantiate mitigating grounds that the Court has enumerated here." Cherry responded in the negative. As the Supreme Court noted in *Strickland,* "the reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions." *Strickland,* 466 U.S. at 691, 104 S.Ct. 2052. By failing to provide trial counsel with the names of witnesses who could assist in presenting mitigating evidence, Cherry may not now complain that trial counsel's failure to pursue such mitigation was unreasonable. *See id.* Accordingly, it appears the trial court correctly found that counsel was not deficient in failing to investigate and present mitigating evidence because Cherry refused to communicate with trial counsel or provide him with names of witnesses to call for mitigation purposes.

Even if this Court found counsel's conduct to be deficient, Cherry would not be entitled to a new sentencing unless he showed prejudice from counsel's alleged errors. The trial court found four aggravating factors in this case: the murder was committed during a burglary; the murder was committed for pecuniary gain; Cherry had a prior violent felony conviction; and the murder was HAC. Although we later held that the murder during the commission of a burglary and pecuniary gain aggravators should have been considered as one, that still leaves three aggravating factors, one of which is HAC. The trial court also instructed the jury on three statutory mitigating factors: the crime for which the defendant was to be sentenced was committed while he was under the influence of extreme mental or emotional disturbance; the defendant acted under extreme duress or under the substantial domination of another person; and the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired. **These are the same three mitigators Dr. Crown believes to exist in this case.** The jury was also instructed that it could consider any aspect of the defendant's character.

Unlike *Rose*, however, the testimony concerning the statutory mitigating evidence and some of the nonstatutory mitigating evidence was controverted either by the State during cross-examination or by Dr. Barnard. The trial court rejected Dr. Crown's conclusions as to

organic brain damage, fetal alcohol syndrome, and mental retardation to the extent they were based on mere speculation from the fact that Cherry's mother drank while pregnant and Cherry had been exposed to toxins as a child. Dr. Crown admitted that he had not performed any physical tests on Cherry to confirm these conclusions. The trial court also found that Dr. Crown's findings as to Cherry's borderline retardation and antisocial personality were contradicted by Dr. Barnard's reassessment of Cherry. Most significantly, Dr. Barnard, after considering the same background materials supplied to Dr. Crown, did not find any indication of organic brain damage and maintained the information did not support any statutory mitigating factors. The applicability of mitigating circumstances and the credibility of expert testimony are matters within the sound discretion of the trial court. *See Rose*, 617 So. 2d at 293 ("The trial court has broad discretion in determining the applicability of mitigating circumstances and may accept or reject the testimony of an expert witness.") (*citing Roberts v. State*, 510 So. 2d 885 (Fla. 1987)).

Additionally, even if trial counsel should have presented witnesses to testify about Cherry's abusive background, most of the testimony now offered by Cherry is cumulative to that stated in Dr. Barnard's report. Although witnesses provided specific instances of abuse, such evidence merely would have lent further support to the conclusion that Cherry was abused by his father, a fact already known to the jury. It should also be noted that Cherry was thirty-five years old when he committed these murders, and his father had died almost eighteen years before that. The only unrefuted factors now presented that were not offered during the penalty phase include: Cherry's history of alcohol and substance abuse (FN2) and Cherry's borderline intelligence. Even if the jury had considered these factors, they do not appear to be sufficiently weighty to overcome the three aggravating factors in this case and the brutal nature of Mrs. Wayne's death. We find this case to be similar to *Sims v. Singletary*, 155 F.3d 1297 (11th Cir.1998), in which the Eleventh Circuit determined that a claim for ineffective penalty-phase counsel should be denied.

> FN2. Dr. Barnard's report does mention alcohol and drug use from the time Cherry was fifteen years of age. However, the report reflects

> that Cherry apparently denied any abuse of such substances.

Cherry v. State, 781 So. 2d 1040, 1049-51 (Fla. 2000). [emphasis added].

To the extent that Cherry claims that appellate counsel was ineffective for not arguing that the psychiatric report was not properly considered, that claim is refuted by the *Initial Brief* filed on direct appeal. Appendix A, at 67. To the extent that Cherry attempts to construct a claim out of the language of the sentencing order as contrasted with this Court's opinion affirming the denial of Rule 3.850 relief, his argument proves too much. As the portion of this Court's opinion reproduced above shows, this Court found that the result would be the same even if the jury **had** considered the only unrefuted mental state evidence. Stated differently, Cherry's claim is trumped by the omnibus Rule 3.850 decision, which considered all aspects of the mitigation component, and concluded that the result would not change even if the evidence from the rule 3.850 proceeding had been before the jury. The issue contained in the habeas petition is merely a variant of the Rule 3.850 issue which has already been decided adversely to Cherry. He is not free to relitigate it now under a different theory. All relief should be denied.[4]

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[4]Ironically, the relief requested by Cherry with respect to this claim is a new penalty phase proceeding -- the same relief sought by the appellate attorney whom Cherry alleges was ineffective.

II. THE "IMPEACHMENT" CLAIM

On pages 26-35 of his brief, Cherry argues that "fundamental error" occurred when he was not "permitted to impeach the prosecution's primary witness." Specifically, Cherry now claims that appellate counsel should have argued that it was error for the trial court to refuse to admit into evidence certain certified copies of documents relating to charges brought by witness Neloms against her former boyfriend, Chamberlain. The trial court refused to admit the documents, apparently on relevancy and materiality grounds. Appellate counsel did not perform deficiently by not raising this issue on appeal, nor was Cherry prejudiced by the absence of this issue. Because that is true, Cherry cannot meet the two-part deficient performance-prejudice standard required by *Strickland v. Washington* before relief can be granted on a claim of ineffective assistance of counsel. As this Court has held:

> The requirements for establishing a claim based on ineffective assistance of appellate counsel parallel the standards announced in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). *See Wilson v. Wainwright*, 474 So. 2d 1162, 1163 (Fla. 1985). Thus, in order to prevail, the "[p]etitioner 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." *Id.; see also Rutherford*, 774 So. 2d at 643; *Freeman v. State*, 761 So. 2d 1055, 1069 (Fla. 2000); *Groover v. Singletary*, 656 So. 2d 424, 425 (Fla. 1995); *Suarez v. Dugger*, 527 So. 2d 190 (Fla. 1988).
>
> However, appellate counsel cannot be considered

> ineffective under this standard for failing to raise issues that are procedurally barred because they were not properly raised during the trial court proceedings and do not present a question of fundamental error. *See Rutherford*, 774 So. 2d at 643; *Robinson v. Moore*, 773 So. 2d 1, 4 (Fla. 2000); *Roberts v. State*, 568 So. 2d 1255 (Fla. 1990) (holding that appellate counsel's failure to raise a claim which was not preserved for review and which does not present a question of fundamental error does not constitute ineffective performance warranting relief). The same is true for claims without merit; appellate counsel cannot be deemed ineffective for failing to raise non-meritorious claims on appeal. *See Rutherford,* 774 So. 2d at 643.

Downs v. Moore, 801 So. 2d 906 (Fla. 2001). *See also, Jones v. Moore,* 794 So. 2d 579(Fla. 2001); *Happ v. Moore,* 784 So. 2d 1091, 1095 (Fla. 2001) (no ineffectiveness for not raising a claim that does not amount to fundamental error). See pages 9-13, above.

The law is well-settled, in the context of claims of ineffectiveness of appellate counsel, that there is no requirement that every possible claim be raised, even in a death penalty case. *Jones v. Barnes, supra*; *Smith v. Murray, supra*. Moreover, this Court has long recognized that the process of issue selection involves the elimination of the weaker claims, and the presentation of the stronger ones. *Atkins v. Dugger,* 541 So. 2d 1165, 1167 (Fla. 1989). The fact that an issue could have been raised but was not does not establish ineffectiveness on the part of appellate counsel. *Id.* When those legal principles are applied to the claim contained in Cherry's brief, there is no basis for relief because Cherry cannot establish either deficient performance or prejudice.

Insofar as the performance prong of *Strickland* is concerned,

the document at issue indicates that the felony charge against Chamberlain was dismissed on March 10, 1986, well over a year before Cherry's capital trial. Under any view of the facts, the relevance of the dismissal of those charges is questionable, at best, and, moreover, the impeachment value of the dismissal with respect to witness Neloms' testimony is, at best, extremely weak.[5] It was not error for the trial court to sustain the State's objection to the admission of this confusing, collateral material, which was not relevant to the case before the jury. Appellate counsel's performance was not deficient for "failing" to raise this claim, and, under the most favorable view of the matter possible, Cherry has shown no more than harmless error. Under any view of the facts, any error in exclusion of the "evidence" at issue was harmless beyond a reasonable doubt, and would not have resulted in reversal on appeal because the trial judge did not abuse his discretion in sustaining the objection to the evidence at issue.[6] *State v. DiGuilio,* 491 So. 2d 1129 (Fla. 1986). Because that is so, appellate counsel was not ineffective under settled law. *See Duest v. Dugger,* 555 So. 2d 849 (Fla. 1990); *King v. Dugger,* 555

[5]Given the passage of time between Neloms' testimony and the prior dismissal of the Chamberlain charges, as well as the technical nature of the dismissal, any impeachment value is minimal, at best.

[6]Because any error was harmless beyond a reasonable doubt, Cherry cannot, by definition, meet the prejudice prong of the ineffective assistance of counsel analysis.

So. 2d 355 (Fla. 1990).

To the extent that further discussion of the issue is necessary, appellate counsel raised, and this Court addressed at length, another claim related to the exclusion of "impeachment" evidence related to Neloms. *Cherry v. State,* 544 So. 2d at 186. This Court found that the trial court did not abuse its discretion in refusing to admit the evidence at issue, and denied relief. *Id.* Appellate counsel performed reasonably in selecting that issue to raise on appeal, rather than raising the non-issue now favored by present counsel. There is no basis for relief.

The second claim of ineffectiveness on the part of appellate counsel begins on page 33 of Cherry's brief, and contends that appellate counsel should have raised the claim that a portion of the State's cross-examination of an investigator amounted to "bolstering" of Neloms' testimony. The flaw in this argument is that trial counsel objected to the testimony at issue, and the trial court sustained the objection. (R512). Because the objection was sustained, **there was no adverse ruling from which to appeal.** Appellate counsel, who has his credibility with this Court to consider, cannot be faulted for not raising a claim that has no legal basis.

To the extent that Cherry attempts to combine this claim with his prior claim, there is no "fundamental error" because the claims, individually and collectively, do not amount to a basis for

any relief. At most, any error was harmless, and a "failure" to raise an error that was harmless does not support a claim of ineffective assistance of appellate counsel. This claim is not a basis for relief, and the petition should be denied in all respects.

III. THE PROSECUTORIAL ARGUMENT CLAIM

On pages 36-42 of his petition, Cherry argues that appellate counsel was ineffective for not raising various claims of "improper prosecutorial argument." This claim is procedurally barred for two reasons. First, this claim was contained in Cherry's *Florida Rule of Criminal Procedure* 3.850 motion, and was found procedurally barred in that proceeding. *Cherry v. State,* 659 So. 2d at 1072. Cherry is not entitled to relitigate that procedurally barred claim in this proceeding.[7] Moreover, this claim lacks merit.

In his brief, Cherry seems to take the position that this Court's procedural bar finding with respect to the prosecutorial argument claims raised in the Rule 3.850 proceeding gives him license to re-litigate those claims in this habeas petition. That is not what this Court held, and it is disingenuous in the extreme to attempt to mislead the Court as Cherry has done. The prosecutorial argument claims raised in the 3.850 proceeding were (and remain) procedurally barred because they were not preserved at

[7]Cherry's claim here is almost a verbatim recitation of the claim found in his Rule 3.850 motion. Appendix C.

trial by timely objection, an admission Cherry has indirectly made by asserting that the claim could have been raised as one of "fundamental error." The deficiency with that argument is that it ignores this Court's finding that trial counsel was not ineffective with respect to these claims. That is the law of the case, and, since trial counsel was not ineffective for not preserving the claims at issue here, appellate counsel cannot have been ineffective for not raising them. Of course, Florida law is well-settled that appellate counsel cannot have been ineffective for not raising a claim that was not preserved for review by timely objection. These claims were not so preserved, and appellate counsel cannot be faulted for not raising them on appeal. See pages 9-13, above. Cherry is not entitled to any relief on this claim.[8]

To the extent that further discussion of this procedurally barred claim is necessary, Cherry's citation to *Booth v. Maryland*, 482 U.S. 496 (1987), does not supply grounds for relief. Even assuming that some portion of the State's argument can be considered a "victim impact" argument, *Booth* was overruled by *Payne v. Tennessee,* 111 S.Ct. 2597 (1991), and is not the law. Nothing in the State's argument referred to in Cherry's brief is impermissible

[8]To the extent that the habeas petition contains claims not raised in the Rule 3.850 motion, that fact makes no difference -- the claims are still procedurally barred, and appellate counsel cannot be faulted for not raising unpreserved claims.

under either *Booth* or *Payne*, and there is no basis for relief.[9] When fairly considered, there is no error in the State's argument and questioning. Contrary to Cherry's assertions, nothing improper occurred. Even if these claims had been preserved for appellate review, they would not have provided a basis for relief.

IV. THE "JUROR MISCONDUCT" CLAIM

On pages 43-46 of the petition, Cherry complains that a juror "acted inappropriately" and that the Court failed to address the issue "properly." Specifically, Cherry claims that he is entitled to relief because "the victim's daughter-in-law, who was a state witness, was approached by and spoke with one of the jurors." Despite the histrionics of this claim, the true facts demonstrate that no impropriety took place, and that the matter was handled appropriately by the trial court.

The fundamental omission from Cherry's petition, and the fact that establishes a complete lack of foundation for relief, is that, while it is true that a juror did speak briefly to Mrs. Wayne (whom he did not know by name), **that conversation took place at a point in time when the juror did not know that Mrs. Wayne was a witness in this case.** (R467). The record also clearly establishes that no

[9]Obviously, a killer takes his victims as he finds them, and, in this case, Cherry chose to prey on an elderly couple. The fact that a killer selects an elderly victim does not somehow insulate him from the State's right to argue the facts, and the reasonable inferences flowing therefrom, merely because of a characteristic of the victim.

conversation about the case took place, and that the conversation, such as it was, ended immediately when the juror realized that Mrs. Wayne was a witness. (R467). Because that is so, and because the matter was made known to the Court and all parties, there is simply no legal basis for any sort of relief. *See, e.g., Morris v. State*, No. SC95623, slip op. at 11 (Fla., Feb. 21, 2002); *Amazon v. State*, 487 So. 2d 8 (Fla. 1987). Nothing improper took place, the events were disclosed to Cherry, who presumably discussed them with his lawyer - - after all was said and done, no objection to any aspect of these events was raised. Because that is so, there is no basis for a claim that appellate counsel was ineffective for not raising a claim that was not objected to at trial, and was apparently resolved to the satisfaction of the defense. There is no basis for relief because the underlying claim has no factual basis. There was no "misconduct" on the part of the juror, and appellate counsel was not ineffective for not raising this issue when there was no objection at trial giving rise to an adverse ruling from which to appeal.

CONCLUSION

Wherefore, based upon the foregoing arguments and authorities, the Respondent submits that the petition for writ of habeas corpus should be denied in all respects.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above has been furnished by U.S. Mail to: **Linda McDermott**, CCRC - Northern, 1533 S. Monroe St., Tallahassee, FL 32301, on this _____ day of February, 2002.

Of Counsel

CERTIFICATE OF COMPLIANCE

This brief is typed in Courier New 12 point.

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