**IN THE SUPREME COURT OF FLORIDA**

**CASE NO. SC07-1894**

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**MAURICE LAMAR FLOYD**

**Petitioner,**

**v.**

**JAMES McDONOUGH, Secretary,**
**Florida Department of Corrections, Etc.**

**Respondents.**

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# RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

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## RESPONSE TO PRELIMINARY STATEMENT

To the extent that the "Preliminary Statement" set out on page 1 of Floyd's petition claims that the petition contains "substantial claims" which are a basis for relief, that statement is argumentative and is denied.

## RESPONSE TO REQUEST FOR ORAL ARGUMENT

The Respondents recognize that oral argument is routinely granted in death penalty cases. However, the issues contained in Floyd's petition are not complex, and are limited in scope. The Respondents defer to the judgment of the Court.

## RESPONSE TO INTRODUCTION

The "Introduction" set out on page 2 of the petition is argumentative and is denied.

## RESPONSE TO JURISDICTIONAL STATEMENT

The Respondents do not dispute that this Court has the jurisdiction to entertain petitions for writs of habeas corpus. However, to the extent that Floyd'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.

## RESPONSE TO GROUNDS FOR RELIEF

No error occurred in Floyd's case, and he is not entitled to relief.

## RESPONSE TO PROCEDURAL HISTORY

The "Procedural History" set out on pages 4-5 of the petition is greatly abbreviated. The Respondents rely on the facts and procedural history summarized by this Court on direct appeal:

> Mary Goss, the victim in this case, was found dead at approximately 11:30 p.m. on July 13, 1998. Police found her body on the ground beside her house located on Bronson Street in Palatka, Florida. The cause of Ms. Goss's death was a single .357 caliber gunshot that entered the left side of her face and proceeded to sever her brain stem, killing her instantaneously. Two days later, on July 15, 1998, police found Floyd, Ms. Goss's son-in-law, hiding in the attic of a house in the Palatka area. Floyd was subsequently charged with the murder of Ms. Goss. [FN1]
>
> > FN1. The indictment returned against Floyd was for premeditated murder or felony murder (Count I), armed burglary of a dwelling (Count II), and aggravated assault (Count III).
>
> Testimony adduced at trial indicated that Floyd exhibited very controlling behavior toward his wife, Trelane, [FN2] who was Ms. Goss's daughter. On July 11, 1998 (extending into the early morning hours of July 12), Trelane had gone with some of her cousins to a supper club to celebrate her birthday. Floyd followed her to the club and spotted her consuming alcohol *388 and dancing. He later approached the group and told Trelane that it would be necessary for her to find another way home, because he was going to take her car, which she had driven to the club. In the

past Floyd had expressed his disapproval of Trelane's alcohol consumption.

> FN2. When she testified at trial, Trelane was no longer married to Floyd.

When Trelane returned home around 5 a.m. on the morning of July 12, Floyd informed her that he would not permit her to sleep, and he proceeded to increase the volume on the televisions and the radio in their apartment. He also threatened to kill Trelane or someone she loved as a reprisal for her drinking or if she ever attempted to run or hide from him. Shortly thereafter, Trelane felt a gun being placed beside her head as she was lying in bed. Floyd pulled the trigger three times, but the weapon did not fire. [FN3] Trelane advised Floyd that she was going to seek a divorce and testified at trial that she did not call the police about this incident because she was in a very confused state.

> FN3. The record does not indicate whether the gun was loaded at that time. Later in the day on July 12 (one day before Ms. Goss was murdered), Trelane surmised that the gun must have been a .357, because she saw a .357 on the toilet tank in the bathroom when Floyd was showering. She hid the gun behind the bar in their apartment, and testified that she never saw the gun again.

On July 13, the day Ms. Goss was murdered, Trelane and Floyd had a heated argument on a Palatka street not far from their apartment. Trelane had stopped her car in the street to speak with a friend. Her three-year-old goddaughter was also in the vehicle. Floyd was in his car behind Trelane and he insisted that Trelane take her goddaughter home, calling Trelane a "whore." Fearful for the safety of both herself and her goddaughter, Trelane decided to seek protection in a sheriff's office. Floyd followed and proceeded to ram his car into the back of Trelane's vehicle.

A high speed chase ensued, during which Trelane sounded the horn on her automobile to warn both oncoming traffic and pedestrians who might be in harm's way. The tires on both cars squealed as they slid into the parking lot at the sheriff's office. Trelane exited her car and screamed for help. Hearing both the sounds of squealing tires and Trelane's plaintive cries, Deputy Dean Kelly responded from his desk inside the sheriff's office. Deputy Kelly was the only armed officer in the vicinity as the events unfolded at approximately 7:30 p.m. that evening. Trelane hurriedly reported to Deputy Kelly that Floyd had rammed her car and that she was fearful for her safety. The deputy saw Floyd moving rapidly toward them as they spoke, and he held out his hand to prevent Floyd from accosting Trelane. He then advised Floyd that he was going to be placed into investigative custody until it could be determined exactly what had transpired. Deputy Kelly instructed Floyd to turn around and to place his hands behind his back. Floyd extended his hands in the air and backed up, insisting that he had done nothing wrong and that he merely wanted to talk to his wife. After the deputy repeated his order for Floyd to submit to custody, Floyd fled the scene. Deputy Kelly began pursuit for a few moments but then halted, fearful of leaving Trelane and her goddaughter defenseless if Floyd decided to double back to attempt to harm them. The subsequent efforts of a K-9 unit and other officers to apprehend Floyd on the evening of July 13 were fruitless.

After giving a statement to sheriff's office personnel, Trelane called her mother, Ms. Goss, from a pay phone at the sheriff's office. Trelane testified that she "told her [mother] what was going on" regarding the incident at the sheriff's office. Ms. Goss informed Trelane that Trelane's three children were at Ms. Goss's house. [FN4] After hearing what had transpired earlier on the street and at the sheriff's office between Trelane and Floyd, Ms. Goss said of Floyd, "I won't let him get my grandchildren." Ms. Goss was also aware that the twenty-one-year-old Floyd was then on probation for previous violations of the law.

FN4. Earlier on July 13, Floyd had

transported Trelane's three children to be with their grandmother, Ms. Goss.

During the trial, several witnesses described the subsequent events that led to the death of Ms. Goss. J.J. Jones, the oldest of Trelane's three children, testified [FN5] that on July 13, 1998, the day that Ms. Goss was killed, Floyd took him and his two younger siblings to the home of their grandmother, Ms. Goss. J.J. also stated that after he had fallen asleep that evening, Ms. Goss awakened him and instructed him to go to the home of her neighbor, Jeanette Figuero, and to call the police from there. Before he exited Ms. Goss's home, J.J. noted that she was clearly upset. As J.J. was moving toward Jeanette Figuero's home, he noticed that Floyd was "squeezing [Ms. Goss] behind the door" at the front of Ms. Goss's home. Moments later he saw Ms. Goss running outside. J.J. stated that he also observed Floyd standing on Ms. Goss's front porch and firing a gun three times. J.J.'s two siblings, LaJade Evans and Alex Evans, were directly behind him, as Ms. Goss had awakened them also. J.J. testified that he never saw Floyd leave the victim's porch, and that the last thing he observed before pounding on Jeanette Figuero's door for help was his grandmother, Ms. Goss, lying on her back. J.J. eventually led the police to the spot where he thought his grandmother's body would be. As one of the officers directed a flashlight beam on the ground, the light revealed Ms. Goss's lifeless body. Ms. Goss was clad only in a nightgown and was not wearing any undergarments. [FN6]

FN5. J.J. Jones was eight years old when he testified. The trial judge engaged in witness-qualification procedures to ensure that J.J. was capable of understanding the proceedings and that he understood his responsibility to testify truthfully. After the trial judge indicated that he was prepared to have J.J. sworn as a witness, the defense voiced no objection.

FN6. Ms. Goss's husband, Clifford Goss, testified that his wife never received guests in her home unless she was fully dressed. He said that she would never have

company inside her home if she was not wearing undergarments.

LaJade Evans, J.J. Jones' younger sister, testified [FN7] that she followed J.J. to Ms. Figuero's home to seek help. LaJade saw Floyd on the victim's porch, shooting a gun at the victim. LaJade said Floyd fired two shots from the porch, and that she heard one more shot fired in the direction of the victim. She added that she saw Floyd running toward the victim's home but that he did not go inside the home again after having fired his weapon.

FN7. LaJade Evans was six years old when she testified. After the trial judge and the State asked qualifying questions, LaJade was sworn as a witness. The defense did not object.

Jeanette Figuero testified [FN8] that during the evening of July 13, she heard three gunshots followed by the sounds of pounding on her door and the plaintive cries of a child or children saying, "Open the door, open the door, please open the door." Figuero's son, Gary Melendez, opened the door to allow J.J., LaJade, and Alex into the home. Figuero said the children were *390 talking very fast and when she inquired as to the problem, they exclaimed that their grandmother, Ms. Goss, had been shot. When she asked J.J. who shot Ms. Goss, he responded, "Maurice Floyd." [FN9] Figuero also testified that she heard J.J. mention Floyd's name when he talked to the 911 dispatcher. [FN10] The prosecutor asked Jeanette Figuero if she believed that J.J. was "smart" and "bright," and whether she believed him when he said that Floyd had shot Ms. Goss. Figuero answered that she believed J.J. was a bright child and that she believed his version of the events, especially after she called over to Ms. Goss from her front porch and received no response.

FN8. In the chronology of the trial, Jeanette Figuero testified before J.J. Jones.

FN9. Floyd's objection to this testimony as inadmissible hearsay and lacking in

foundation was overruled. Floyd did not object until Ms. Figuero had fully completed her answer. Gary Melendez, Figuero's son, also testified that the children said that "Maurice Floyd" shot Ms. Goss. He said the children were frightened, crying, and nervous when they first reached Figuero's home.

FN10. Relevant parts of J.J. Jones' conversation with the 911 dispatcher were played during the trial over Floyd's hearsay objections. On the 911 tape, J.J. Jones said that "Maurice Floyd" was the person "who was shooting."

Figuero also testified that earlier in the evening on July 13, she had been speaking with her neighbor, John Brown, from the porch of her house. Brown mentioned that a young male had been constantly walking up and down the sidewalk in front of Ms. Goss's home. Subsequently, Figuero noticed that a young African-American male was on Ms. Goss's front porch, and was talking to Ms. Goss for some time through the closed screen door. She could not recognize the young male because his back was to her and it was also dark. After leaving her porch for a few moments and then returning, Figuero noticed that the young male had apparently entered Ms. Goss's home. She heard the voice of an angry male emanating from inside the victim's home, addressing Ms. Goss in sometimes profane tones. Figuero testified that she clearly heard the young male say in an angry tone, "Why did she have to involve the GD crackers." [FN11] She also saw the young male move menacingly toward a person who was sitting on the sofa in Ms. Goss's home. The young male abruptly halted when he noticed that Figuero had spotted him. Figuero stated that she assumed at all times the young male was addressing himself to Ms. Goss because she knew that Ms. Goss was in the home. Approximately twenty-five minutes after hearing the angry male's voice, Figuero heard the sounds of gunfire which led J.J. Jones and his siblings to appear at her door.

FN11. The record indicates Figuero's moral reluctance to relate exactly the profane or

> sacrilegious statement made by the young male. Therefore, she used "GD" as a euphemism. The record also indicates Figuero's understanding that the term "cracker" as used in this context was a reference to a white person. The State posits in its brief that Floyd's reference was to Deputy Dean Kelly, who prevented Floyd from accosting Trelane earlier in the evening outside the sheriff's office. The State notes that Deputy Kelly is a white male and that Floyd is African-American.

John Brown, the neighbor with whom Figuero was speaking earlier that evening, testified that on the evening of July 13 he saw two men walking up and down the sidewalk in the vicinity of Ms. Goss's house. One man, dressed in black, was noticeably taller than the other. The shorter man eventually disappeared from sight, but the taller man continued walking up and down the sidewalk. The man dressed in black eventually made his way up the steps of the home to Ms. Goss's front porch and began talking to her. Brown testified that approximately an hour later he heard a loud "commotion" emanating from Ms. Goss's house, involving a loud, angry male voice. He heard "two big shots" while he was still inside his home and subsequently heard children running. Proceeding to the sidewalk in front of his home, Brown saw a man dressed in black run off the steps of Ms. Goss's home and then run up a side street in a northerly direction. Brown stated that this man "fit the general description" of the "black man" who had dropped off children at Ms. Goss' house earlier in the day on July 13. [FN12]

> FN12. Brown also said that the man who dropped off children at Ms. Goss's house drove a red Honda automobile. This matches the general description of Floyd's automobile which was established through other trial testimony.

Police officers Stokes and Zike responded to the 911 call made from Jeanette Figuero's home. Stokes spoke with J.J. Jones and his sister, LaJade Evans, about what had happened. He noted that they were in a very excited state when he spoke with them. He also stated

that when he asked if the children had seen the shooting, they responded that Floyd had fired a gun at their grandmother, Ms. Goss. [FN13] Zike testified that when he and Stokes entered Ms. Goss's home looking for suspects and clues, they noticed that "the door had been kicked in." [FN14]

> FN13. Floyd objected that the excited utterance exception was not a proper basis to admit Stokes's testimony regarding what the children had told him. The trial judge overruled the objection.
>
> FN14. Ms. Goss's husband, Clifford, testified that the lock on the door appeared as if it had been kicked or broken. He said the lock was not in that condition when he left for work on July 13 at approximately 4 p.m. Ms. Goss was not at home when Clifford left for work.

The State did not produce the murder weapon at trial. However, the State did present evidence of a confession that Floyd made to a friend. Tashoni Lamb testified that Floyd visited her apartment around midnight on July 13, and that he left after 6 a.m. on July 14. Floyd asked to speak with Lamb privately, out of the hearing of her children. Lamb stated that Floyd pulled a gun out of the pants he was wearing, placed it on a dresser in the apartment, and said, "I just shot Miss Mary, the grandmother." She related that Floyd's reason for shooting Ms. Goss was that "she had threatened to call the police on him." Lamb stated that she did not call the police because she concluded that they would certainly apprehend Floyd. She further testified that Floyd contacted her by phone later on July 14, a day before he was arrested. When the prosecutor asked at trial if anyone had ever asked her to provide an alibi for Floyd, she responded, "Maurice did." She also testified that during the phone conversation, Floyd asked, "Do you want to see me die?"

When the State sought to introduce evidence of the bullet that killed the victim, Floyd objected, asserting that the State had failed to establish a proper chain of custody for the bullet. The trial

judge sustained Floyd's initial objection that the testimony of Detective Mike Lassiter had not established a proper chain of custody, noting that Lassiter could not positively state that the bullet and its jacket were in the same condition at the trial as they were when he last saw them. The State then presented the testimony of Florida Department of Law Enforcement (FDLE) agent Steve Leary, who was the person to whom the medical examiner handed the bullet and jacket after removing them from the victim's head. Leary testified that the bullet and jacket were in the same condition at trial as when he last saw them. The trial judge overruled Floyd's subsequent chain-of-custody objection, on the bases that Leary's testimony established that the items in question were in the same condition at trial as they were when he last saw them, and that Floyd had not satisfied his legal burden of showing the probability that there had been tampering with the bullet and jacket. The trial judge did note, however, that the State could not definitively account for the bullet and jacket in the interval between the time Leary gave the items to an FDLE evidence technician and their introduction into evidence at Floyd's trial.

Medical examiner Dr. Terence Steiner testified that the victim sustained a gunshot injury to her face, facial bones, and brain. The bullet entered the victim through her left cheek, and the cause of death was trauma to the brain caused by a single shot. The manner of death was a homicide. Dr. Steiner stated that during the autopsy he recovered a spent bullet, a bullet jacket, and a lead fragment. He identified those items at trial as the ones he recovered during the autopsy. When Dr. Steiner was asked to describe the physical position of the victim when she was shot, he first opined that based on blood spatter evidence, the victim was "standing up." Moments later, however, he elaborated that "perhaps she was almost maybe kneeling, but she was upright to the injury to the brain, severed the brainstem, which is instantaneous, if you will, death."

After Dr. Steiner's testimony, the State rested and Floyd presented his motion for judgment of acquittal, which was denied. Floyd did not testify in his own defense, nor did he present any witnesses or evidence

on his behalf during the guilt phase. The jury convicted Floyd on all charges. [FN15]

> FN15. In its verdict form, the jury found Floyd guilty based on the theories of both premeditated murder and felony murder. On the verdict
> form, the line for Count I, indicating that the jury found Floyd "GUILTY of First Degree Premeditated Murder, and First Degree Felony Murder as charged in the indictment" was checked, and the verdict form was signed by the jury foreperson. The jury found that the homicide involved a firearm. The verdict form also indicates that the jury found Floyd guilty of armed burglary of a dwelling, and that a firearm was involved in this offense. Floyd was convicted in 1999.

Additionally, the verdict form indicates that the jury found Floyd guilty of aggravated assault. Floyd does not challenge his conviction for aggravated assault. Nevertheless, we determine that competent, substantial evidence supports the aggravated assault conviction.

The State introduced victim impact evidence during the penalty phase, along with evidence of Floyd's prior conviction for a violent felony in North Carolina and evidence of his current parole violation. Floyd did not testify in the penalty phase, nor did he present any witnesses or evidence on his behalf. The jury recommended a sentence of death by a vote of eleven to one. A Spencer hearing [FN16] was held prior to the pronouncement of sentence. In sentencing Floyd to death for the murder of Ms. Goss, the trial judge found four statutory aggravating factors [FN17] and no statutory mitigating factors. Four nonstatutory mitigating factors were found, [FN18] with each receiving little weight. The trial judge also sentenced Floyd to thirty years for the armed burglary conviction, and to five years for the aggravated assault conviction. The five-year sentence for aggravated assault was ordered to run concurrently with the thirty-year sentence for armed burglary. This appeal followed.

> FN16. See *Spencer v. State*, 615 So.2d 688 (Fla.1993).
>
> FN17. Those statutory aggravating factors are: (1) Floyd was on probation for the felonies of burglary and accessory after the fact to robbery when he committed the murder (great weight); (2) Floyd had previously been convicted of the violent felony of the voluntary manslaughter of his brother (substantial weight); (3) Floyd committed the murder while engaged in the commission of armed burglary of the victim's home (great weight); and (4) Floyd committed the murder for the purpose of avoiding or preventing a lawful arrest (substantial weight).
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> FN18. Those nonstatutory mitigating factors are: (1) Floyd displayed exemplary courtroom behavior in the face of much adversity; (2) Floyd assisted defense counsel throughout the proceedings by taking notes and communicating with counsel; (3) Floyd was successfully completing his probation for other offenses before he committed the murder; and (4) Floyd expressed concern that his wife conduct herself in such a way that she not use alcohol and that she not subject their relationship to the potential stresses of the use of alcohol.

*Floyd v. State,* 850 So. 2d 383, 387-393 (Fla. 2002).

Floyd raised thirteen issues on direct appeal: (1) the trial judge impermissibly allowed the State to exercise a peremptory challenge against a Hispanic prospective juror; (2) the trial judge erred in denying the motion for acquittal; (3) the State failed to establish a proper chain of custody for the bullet and jacket that were removed from the victim's head, and the trial judge improperly admitted those items into evidence;

(4) the trial judge improperly admitted hearsay evidence in the form of testimony by State witness Jeanette Figuero, and allowed Ms. Figuero to bolster the credibility of another State witness; (5) the trial judge erred in refusing to give the defense's requested jury instruction on circumstantial evidence; (6) fundamental error occurred during the penalty phase regarding the jury instructions on mitigating circumstances; (7) competent, substantial evidence did not support the trial judge's decision to instruct the jury on the heinous, atrocious, or cruel (HAC) aggravating circumstance during the penalty phase; (8) competent, substantial evidence did not support the trial judge's finding of the avoid arrest aggravating circumstance; (9) the trial judge impermissibly admitted victim impact evidence during the penalty phase, thereby compelling the jury to recommend a sentence of death; (10) competent, substantial evidence did not support the trial judge's finding of the "committed during a burglary" aggravating circumstance; (11) fundamental error occurred during the prosecutor's penalty phase closing argument; (12) the cumulative effect of errors occurring during the trial violated Floyd's right to a fair trial; and (13) the sentence of death is not proportional.

This Court affirmed Floyd's conviction for first-degree murder and sentence of death, along with the conviction and sentence for aggravated assault but reversed his conviction for

armed burglary and struck the aggravator "during the course of a felony." *Floyd v. State*, 850 So. 2d 383, 409 (Fla. 2002). Floyd's petition for writ of certiorari was denied on January 12, 2004. *Floyd v. Florida*, 540 U.S. 1112 (2004).

Floyd filed a Rule 3.850 motion on January 10, 2005. (V1, R1-79). He raised three issues in the motion: (1) Counsel was ineffective during the investigative, guilt and penalty phases; (2) The court-appointed psychologist failed to conduct the appropriate tests for organic brain damage and mental illness; Counsel was ineffective for failing to protect Floyd's rights; (3) Cumulative effect- Floyd was denied the right to a fair trial and penalty phase; the court should grant a new trial, penalty phase or both due to the cumulative effect of error. On October 13, 2005, Floyd filed a motion to amend his 3.851 motion, raising one additional claim: 1) His constitutional rights were violated when he was shackled in front of the jury. (V2, R395-415). The trial judge held an evidentiary hearing and, on January 31, 2007, denied relief.[1] (V7, R1259-78).

## ARGUMENT

### CLAIM I: EFFECTIVE ASSISTANCE OF MENTAL HEALTH EXPERT CLAIM

On pages 5-6 of his petition, Floyd claims appellate counsel was ineffective in failing to raise on direct appeal that Floyd was

1 The appeal from that decision is pending before this Court. *Floyd v. State*, Case No. SC07-330.

denied the effective assistance of a mental health expert. First, this claim raises essentially the same issue that was raised in his postconviction appeal in Claim I. "Habeas corpus is not to be used for additional appeals of issues that could have been or were raised on appeal or in other postconviction motions." *Green v. State/McDonough*, 32 Fla. L. Weekly S619, 626 (Fla. Oct. 11, 2007); *Mills v. Dugger*, 559 So. 2d 578, 579 (Fla. 1990) (citing *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)). Second, Dr. Krop did not testify at trial, and any facts regarding his role were only developed on collateral review. Floyd fails to explain how appellate counsel should raise an issue which is not in the record. Appellate counsel is not considered ineffective for failing to present evidence which was outside of the appellate record on review. *Rutherford v. Moore,* 774 So. 2d 637, 646 (Fla. 2000).

**CLAIM II: CUMULATIVE ERROR CLAIM**

On pages 6-8 of his petition, Floyd argues that "cumulative error" entitles him to relief. However, none of those claimed errors are identified. A bare assertion of error that is unsupported by citation to any authority is not sufficient to present an issue for review. *Simmons v. State*, 934 So. 2d 1100,

1112 n.13 (Fla. 2006) (“The State correctly points out in its brief that Simmons' counsel adopts arguments made in the court below in her initial brief to this Court. This practice does not preserve an issue for review by an appellate court.”); *Duest v Dugger*, 555 So. 2d 849, 852 (Fla. 1990)(the purpose of an appellate brief is to present arguments in support of the points on appeal); *Lawrence v. State/Moore*, 831 So. 2d 121, 133 (Fla. 2002). Until some individual error can be shown, there can be no claim of cumulative error. *See Harvey, v. State*, 946 So. 2d 937 (Fla. 2006); *see also, Downs v. State*, 740 So. 2d 506 (Fla. 1999) (where allegations of individual error are without merit, a cumulative error argument based thereupon must also fail.) This claim presents no issue for consideration, and should be denied on that basis.

**CLAIM III: SHACKLING CLAIM**

On page 9 of his petition, Floyd argues appellate counsel was ineffective for failing to argue that the use of shackles denied him a fair trial. The State first notes that Floyd attempts to incorporate by reference the arguments raised in his 3.851 appeal. However, "[m]erely making reference to arguments below without further elucidation does not suffice to preserve issues, and these claims are deemed to have been waived." *Duest v. Dugger*, 555 So. 2d 849, 852 (Fla. 1990). Further, Floyd raised this issue as ineffective assistance of trial counsel in

his Motion to Vacate Judgments and Sentences, and this argument is Issue IV on appeal from denial of that motion. Case No. SC07-330. "Habeas corpus is not to be used for additional appeals of issues that could have been or were raised on appeal or in other postconviction motions." *Green v. State/McDonough*, 32 Fla. L. Weekly S619, 626 (Fla. Oct. 11, 2007); *Mills v. Dugger*, 559 So. 2d 578, 579 (Fla. 1990) (citing *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)).

This issue has no merit. The record on direct appeal shows that the trial judge was going to shackle Floyd before the penalty phase, but trial counsel objected. (ROA 2011-2017). Floyd was not shackled and there was no issue to raise on appeal.

**CLAIM IV: FAILURE TO ATTACK THE QUALIFICATIONS OF THE CHILD WITNESS CLAIM**

On pages 9-13 of his petition, Floyd claims appellate counsel was ineffective for failing to raise the issue of competency of the victim's two grandchildren, J.J. and LaJade. As stated on page 10 of the petition, there was no objection to their testimony at the trial level. This Court has stated that appellate counsel cannot be ineffective for failing to raise claims which were not preserved due to trial counsel's failure

to object. *Walls v. State/Crosby*, 926 So. 2d 1156 (Fla. 2006); *Ferguson v. Singletary*, 632 So. 2d 53, 58 (Fla. 1993). Because there was no objection at trial to this statement, appellate counsel cannot be deemed ineffective for failing to raise an unpreserved issue on appeal. *See Randolph v. State*, 853 So. 2d 1051, 1066 (Fla. 2003); *Zack v. State/Crosby*, 911 So. 2d 1190 (Fla. 2005).

Second, this issue is raised as ineffective assistance of trial counsel in the Rule 3.851 appeal pending before this Court. Case No. SC07-330. Habeas corpus petitions are not to be used for additional appeals on questions which could have been or were raised on appeal or in a rule 3.850 motion. *See Hardwick v. Dugger*, 648 So. 2d 100, 105 (Fla. 1994). *Rodriguez v. State/Crosby*, 919 So. 2d 1252 (Fla. 2005).

Last, the claim has no merit. To succeed on the ineffective assistance of appellate counsel claim, a defendant must establish that counsel's failure to raise a claim on appeal is 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 deficiency in performance compromised the appellate process to such a degree as to undermine confidence in the correctness of the result." *Floyd v. State*, 808 So. 2d 175, 183 (Fla. 2002) (quoting *Pope v. Wainwright*, 496 So. 2d 798, 800 (Fla. 1986).

However, appellate counsel's failure to raise a meritless issue does not constitute ineffective assistance of counsel. *See Valle v. Moore*, 837 So. 2d 905, 908 (Fla. 2002); *Chandler v. Dugger*, 634 So. 2d 1066, 1068 (Fla. 1994). The trial judge conducted a detailed colloquy and qualified the child witnesses. (ROA 1699-1701; 1724-1726).

**CLAIM V: 3.851 CLAIMS THAT SHOULD BE RAISED IN A HABEAS PETITION**

On pages 13-15 of his petition, Floyd launches a "catch-all" maneuver in an attempt to cure any technical pleading deficiencies. He asks this Court to incorporate into this habeas proceeding any procedurally barred claim from his Rule 3.851 proceedings. Floyd attempts to incorporate by reference the arguments raised in his 3.851 appeal. However, "[m]erely making reference to arguments below without further elucidation does not suffice to preserve issues, and these claims are deemed to have been waived." *Duest v. Dugger*, 555 So. 2d 849, 852 (Fla. 1990). This is not an appropriate claim for relief, and this Court has repeatedly stated that habeas is not to be used as a substitute for Rule 3.851 proceedings. Habeas corpus petitions are not to be used for additional appeals on questions which could have been or were raised on appeal or in a rule 3.850 motion. *See Hardwick v. Dugger*, 648 So. 2d 100, 105 (Fla. 1994).*Rodriguez v. State/Crosby*, 919 So. 2d 1252(Fla. 2005).

**CLAIM VI: THE COMPETENCE FOR EXECUTION CLAIM**

On pages 15-18 of his petition, Floyd argues that because he "may be incompetent at time of execution, his Eighth Amendment right against cruel and unusual punishment will be violated." Florida law is settled that this claim is not ripe until a death warrant has been issued, an event that has not occurred in this case. *Darling v. State/McDonough*, 32 Fla. L. Weekly S486, 493 (Fla. July 12, 2007); *Morris v. State/McDonough,* 931 So. 2d 821, 837 n.15 (Fla. 2006); *See Griffin v. State*, 866 So. 2d 1, 21-22 (Fla. 2003) ("While Griffin is under a death sentence, no death warrant has been signed and his execution is not imminent. Thus, the issue of Griffin's sanity for execution is not ripe . . . ."); *See Thompson v. State*, 759 So. 2d 650, 668 (Fla. 2000); *Provenzano v. State,* 751 So. 2d 37 (Fla. 1999); Fla. R. Crim. P. 3.811(d). Because no warrant has been issued for the execution of Floyd's sentence, this claim is not a basis for relief.

**CLAIM VII: JUROR INTERVIEWS CLAIM**

On pages 18-21 of his petition, Floyd argues that appellate counsel was ineffective for not arguing that the rule prohibiting juror interviews is unconstitutional. This claim lacks merit, as this Court has repeatedly held. *Farina v. State/McDonough*, 937 So. 2d 612, 626 (Fla. 2006); *Duckett v. State/Crosby*, 918 So. 2d 224, 231 (Fla. 2005); *Elledge v.*

*State/Crosby,* 911 So. 2d 57, 78 (Fla. 2005); *Johnson v. State*, 804 So. 2d 1218, 1224-25 (Fla. 2001) (rejecting contention that Rule Regulating the Florida Bar 4-3.5(d)(4) conflicts with defendant's constitutional rights to a fair trial and effective assistance of counsel). Appellate counsel cannot be ineffective for failing to raise a meritless issue. *Connor v. State*, 32 Fla. L. Weekly S7129, 735 (Fla. Nov. 15, 2007).

## CONCLUSION

Floyd has failed to demonstrate that his appellate counsel was constitutionally ineffective, and he presents no other issues that are cognizable in these habeas proceedings. Based upon the foregoing, the Respondents respectfully request that this Court deny habeas corpus relief.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Response has been furnished by U.S. Mail to: David Gemmer, Assistant CCRC-Middle, 3801 Corporex Park Drive, Suite

210, Tampa, Florida 33609 on this ___ day of December, 2007.

_____
Of Counsel

**CERTIFICATE OF COMPLIANCE**

I HEREBY CERTIFY that the instant brief has been prepared with 12 point Courier New type, a font that is not spaced proportionately.

_____
BARBARA C. DAVIS