IN THE SUPREME COURT OF FLORIDA

RONNIE FERRELL,

Petitioner,

v. CASE NO. SC07-1447

WALTER A. MCNEIL, Secretary,
Department of Corrections
State of Florida,

Respondent.
______________________________/

RESPONSE TO THE PETITION FOR WRIT OF HABEAS CORPUS

COMES NOW, Respondent, WALTER A. MCNEIL, by and through the undersigned Assistant Attorney General, and hereby responds to Ferrell's Petition for Writ of Habeas Corpus filed in the above-styled case. Respondent respectfully submits that the petition should be denied, and states as grounds therefor:

Statement of the Case and Procedural History

Ronnie Ferrell, born on March 19, 1964, was 27 years old when he, along with Kenneth Hartley and Sylvester Johnson, murdered seventeen year old Gino Mayhew. The relevant facts surrounding the April 22, 1991 murder are set forth in this Court's opinion on direct appeal as follows:

> On April 20, 1991, the victim ran into the apartment of Lynwood Smith acting very excited and upset. The victim told Smith that he had just been beaten up and robbed by two men, one of whom looked

like Kenneth Hartley and one of whom had his face covered. Later that evening, a witness saw Ferrell and Johnson at a pool room and the witness overheard Ferrell state that he had beat and robbed the victim.

Sidney Jones worked for the victim in the victim's crack cocaine business. He testified to the following information. On April 22, the victim was selling crack from his Chevrolet Blazer at an apartment complex. On that date, Jones saw the three codefendants together near the Blazer. He saw Hartley holding a gun to the victim's head and saw him force the victim into the driver's seat. Hartley climbed into the back seat behind the victim. Ferrell climbed into the front passenger seat. Johnson was outside the Blazer talking to Hartley. After Hartley, Ferrell, and the victim entered the Blazer, Jones saw it leave the apartment complex at a high speed and heard Ferrell shout out of the Blazer that the victim would "be back." Johnson followed soon thereafter in a truck.

Another witness confirmed that the victim, Ferrell, and another individual left the apartment complex together in the victim's Blazer at a high rate of speed.

On April 23, police found the victim's Blazer parked in a field behind an elementary school. The victim's body was found slumped over in the driver's side seat of the Blazer. He had been killed by bullet wounds to the head (he had been shot five times: one shot was fired into his forehead, three shots were fired into the back of his head, and one shot was fired into his shoulder).

Several weeks after the victim was found, Jones told police what he had seen on April 22, and Ferrell, Hartley, and Johnson were arrested for the victim's murder. Ferrell provided police with several conflicting stories as to his whereabouts on the night of the murder, which were rebutted at trial.

While in jail, Ferrell talked to a cellmate about the crime. The cellmate testified as follows. Ferrell told him that Hartley and Johnson had previously robbed the victim and that Ferrell was

> involved in that robbery; that Johnson and Hartley had been recognized by the victim; and that Ferrell, Hartley, and Johnson conspired to murder the victim to prevent him from retaliating for the robbery. Ferrell told the cellmate that the three of them agreed on a plan to purchase a large amount of crack from the victim to get the victim off by himself. Ferrell was the one who approached the victim about the sale because the victim knew him and had not recognized him in the previous robbery. Ferrell further stated that Hartley entered the Blazer with his gun and told the victim "you know what this is." They took the victim to the isolated field where they robbed him of drugs and money and then Hartley shot the victim in the head four or five times. Johnson met them at the field in the truck and drove them away from the scene. The cellmate's testimony included details about the crime that had not been released to the public. Ferrell presented no evidence or witnesses in his defense and was convicted as charged.

Ferrell v. State, 686 So.2d 1324, 1326 (Fla. 1996).

Ferrell's co-defendants, Kenneth Hartley and Sylvester Johnson were also convicted of the first-degree murder, robbery, and kidnapping of Gino Mayhew. They were each tried separately. Hartley was sentenced to death. Johnson was sentenced to life in prison. Ferrell’s defense theory was to attempt to discredit each of the State’s primary witnesses and raise a reasonable doubt about Ferrell’s guilt.

At the penalty phase proceeding, the State introduced Ferrell's convictions for a 1984 armed robbery and a 1988 riot. A correctional officer testified regarding Ferrell's actions during the 1988 riot. Ferrell presented no evidence at the

penalty phase of the trial. The jury recommended Ferrell be sentenced to death by a vote of 7-5.

The trial judge sentenced Ferrell to death after finding and giving great weight to five aggravating circumstances (1) prior violent felonies (2) the murder was committed in the course of a kidnapping (3) the murder was committed for financial gain; (4) the murder was heinous, atrocious, or cruel (HAC); and (5) the murder was cold, calculated, and premeditated (CCP)). He also found, but gave slight weight to, the mitigating circumstance that Ferrell was not the actual shooter. Although not considered in aggravation, the trial judge noted that Ferrell was just as culpable as the shooter because he used his friendship with the victim to lure the victim to his death. The trial judge sentenced Ferrell to consecutive sentences for the other two convictions: thirty years as a habitual felony offender for the robbery conviction and life imprisonment as a habitual felony offender for the kidnapping conviction. Ferrell v. State, 686 So.2d at 1327.

Ferrell raised twelve issues on direct appeal. Ferrell argued: (1) the trial judge improperly commented on the biblical origins of the commandment "thou shalt not kill"; (2) the trial judge erred in admitting evidence that Ferrell and Hartley robbed the victim two days before the murder; (3) the trial judge erroneously admitted, as an excited utterance, a statement

made by the victim regarding the robbery that occurred two days before the victim was murdered; (4) insufficient evidence exists to support Ferrell's first-degree murder conviction; (5) insufficient evidence exists to support Ferrell's armed robbery conviction; (6) the trial judge erred in sentencing Ferrell as a habitual felony offender; (7) the trial judge erroneously instructed the jury on CCP; (8) the trial judge erred in finding that the murder was CCP; (9) the trial judge erred in finding that the murder was committed for financial gain; (10) the trial judge erred in finding that this murder was HAC; (11) the trial judge improperly doubled the aggravating factors of kidnapping and committed for pecuniary gain; and (12) the trial judge erred in denying Ferrell's request for a special verdict.

This Court rejected all but two of Ferrell's claims on appeal. This Court found the evidence insufficient to support a finding the murder was HAC. This Court found the error to be harmless, however, in light of the four other aggravating factors and minimal mitigation. This Court also found the trial court erred in sentencing Ferrell to two consecutive habitual felony offender prison terms. This Court ordered the HFO sentences to run concurrently, instead. On September 19, 1996, this Court unanimously affirmed Ferrell's convictions and sentence of death. Ferrell v. State, 686 So.2d 1324 (Fla. 1996).

Ferrell filed a Petition for Writ of Certiorari with the United States Supreme Court. Ferrell's petition was denied on April 14, 1997. Ferrell v. Florida, 520 U.S. 1173 (1997).

Ferrell filed an initial motion for post-conviction relief on April 10, 1998. On August 31, 2004, Ferrell filed an amended motion to vacate his convictions and sentences. He raised eleven (11) claims. The court granted an evidentiary hearing on several of Ferrell's claims. The evidentiary hearing was held on December 5-7, 2005 and April 16, 2006.

After an evidentiary hearing, the collateral court denied Ferrell's claims regarding the guilt phase. The court granted Ferrell a new penalty phase based on the collateral court's conclusion that trial counsel was ineffective for failing to present mental mitigation testimony at the penalty phase of Ferrell's capital trial.

Ferrell appealed, raising the same eleven claims he raised before the collateral court. Contemporaneously with the initial brief, Ferrell filed the instant petition for a writ of habeas corpus. Ferrell raised two claims, presenting the same issues he raised in his appeal from the denial of his motion for post-conviction relief, albeit in the guise of ineffective assistance of appellate counsel claims. This is the State's response in opposition to the petition.

Statement of the Law Applicable to Claims of Ineffective Assistance of Appellate Counsel

Claims of ineffective assistance of appellate counsel are properly presented in a petition for writ of habeas corpus. Freeman v. State, 761 So. 2d 1055, 1069 (Fla. 2000). Like claims of ineffective assistance of trial counsel, claims of ineffective assistance of appellate counsel are reviewed under the standard set forth in Strickland v. Washington, 466 U.S. 668 (1994). Consistent with this standard, this Court must determine (1) whether the alleged omissions are of such magnitude as to constitute a serious error or substantial deficiency falling measurably outside the range of professionally acceptable performance and, (2) whether the deficiency in performance compromised the appellate process to such a degree as to undermine confidence in the correctness of the result. Overton v. State, 2007 Fla. LEXIS 2204 (Fla. Nov. 29, 2007). If a capital defendant cannot make both showings, appellate counsel cannot be deemed ineffective. Id.

As a general rule, appellate counsel cannot be deemed ineffective for failing to raise an issue on appeal that was not preserved for appeal by a contemporaneous objection below. Johnson v. State, 921 So. 2d 490, 511 (Fla. 2006). An exception to this general rule has been made when the error constitutes

fundamental error. In reviewing allegations concerning prosecutorial misconduct, fundamental error arises only when, but for the misconduct, the jury could not have reached the verdict it did. Miller v. State, 782 So. 2d 426, 432 (Fla. 2d DCA 2001). *See also* Miller v. State, 926 So.2d 1243 (Fla. 2006) (noting that in order for improper comments made in the closing arguments of a penalty phase to constitute fundamental error, they must be so prejudicial as to taint the jury's recommended sentence).

The ineffectiveness of appellate counsel cannot be based upon the failure of counsel to assert a theory which was not at the time of the appeal fully articulated or established in the law. Alvord v. State, 396 So. 2d 184, 191 (Fla. 1981). Appellate counsel is not required to anticipate changes in the law and cannot be deemed ineffective for failing to do so. Dailey v. State, 965 So. 2d 38,47 (Fla. 2007).

A review of the record on appeal demonstrates that Ferrell has shown neither deficiency nor prejudice in this case. To the contrary, the record reflects that appellate counsel acted as a capable advocate, asserting twelve issues for judicial review in a 61-page brief, two of which were ultimately successful.

Argument

CLAIM I

WHETHER APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE A CLAIM OF PROSECUTORIAL MISCONDUCT ON APPEAL.

Ferrell claims that, in light of this Court's decisions in Urbin v. State, 714 So.2d 411 (Fla. 1998) and Brooks v State, 762 So.2d 879 (Fla. 2000) appellate counsel was ineffective for failing to raise a prosecutorial misconduct claim on direct appeal. Specifically, Ferrell argues that certain comments of the prosecutor during closing argument, in both the guilt and penalty phases of Ferrell's capital trial, were improper.

During the guilt phase closing arguments, Ferrell complains the prosecutor used the word execute or a variation of it eleven to thirteen times, accused the defendant of lying five times, and vouched for witnesses' credibility. (Pet. at page 8). Ferrell also alleges the prosecutor commented on matters not actually introduced into evidence, including a gold chain that Ferrell took from Mayhew during the robbery/murder, the fact the murder weapon was an automatic and an argument about why drugs paraphernalia was left at the murder scene. (Pet. at page 8).[1]

---

[1] Contrary to Ferrell's assertions, there was testimony establishing that Ferrell personally stole a gold chain from around Gino's neck before he was shot, that the murder weapon was an automatic and that Hartley, Ferrell, and Johnson intentionally left drug paraphernalia on the seat of Gino's Blazer. It should be obvious to Ferrell why the State did not introduce either the gold chain or the pistol into evidence.

At the penalty phase, Ferrell alleges that the prosecutor used the word execute eleven times, attempted to dehumanize the defendant, denigrated the mitigation offered by the defendant, told jurors they would be breaking the law if they did not vote for death, misstated the law of mitigation, violated the Golden Rule six times, told the jury that the State did not seek death in every case, used the "same mercy" argument, injected his personal beliefs and referred to matters not in evidence. (Pet. at page 8).

Ferrell acknowledges that none of the comments about which he takes issue were objected to at trial. (Pet. at page 5, n.1). Nonetheless, Ferrell contends that, because these comments constituted fundamental error, appellate counsel was ineffective for failing to raise prosecutorial misconduct as claim of error on direct appeal.

The defendants took both the chain and the gun from the scene and either concealed or disposed of them.

A. GUILT PHASE[2]

In order to show appellate counsel was ineffective for failing to raise unpreserved comments by the prosecutor during the guilt phase, Ferrell must show the comments rose to the level of fundamental error. Fundamental error arises only when, but for the misconduct, the jury could not have reached the verdict it did. Kilgore v. State, 688 So. 2d 895, 898 (Fla. 1996). Accordingly, Ferrell must show that, but for the comments, Ferrell would not have been found guilty of first degree murder.

This claim may be denied for at least two reasons. First, Ferrell raised a variation of this same claim on appeal from the denial of his motion for post-conviction relief. Indeed, Ferrell pointed to the exact same comments that he does in the instant petition and claims trial counsel was ineffective for failing to object to them. (IB 45-54).

In raising the same claim of error he makes in his appeal from the denial of his motion for post-conviction relief, Ferrell improperly attempts to use this habeas petition as a

---

[2] As he did in his initial brief before this court on appeal from the denial, in part, of his amended motion for post-conviction relief, Ferrell does not divide his claims separately between guilt phase and penalty phase allegations of error. Instead, as he did in his answer brief, he blends and mixes and matches allegations of error throughout his petition. The state has divided his claims of error into guilt phase claims and penalty phase claims but has numbered the claims in the same way Ferrell has in order to avoid confusion.

second appeal of the denial of those claims. Parker v. Dugger, 550 So. 2d 459, 460 (Fla. 1989). On this ground alone, this Court may deny this claim.

This Court may also deny this claim because many of the comments about which he complains were either supported by, or constituted fair comment on, the evidence introduced at trial. An analysis of each of Ferrell's guilt phase complaints demonstrates this is the case.

(1) **Using the word execute**

The State does not contest the fact that this Court has condemned emotional appeals designed to inflame the passions of the jury. Under the circumstances of this particular murder, it cannot be said that had the prosecutor used the word "murder" as opposed to "execute", a conviction could not have been obtained. As this Court noted on direct appeal, there was sufficient evidence to convict Ferrell of first degree murder. Two witnesses placed Ferrell in the victim's automobile as it sped toward the murder site; the victim was forced at gunpoint by Ferrell and Hartley to drive to the field where the crimes took place; just before the murder the victim was seen with a large sum of cash and drugs and those items were not found on the victim after the murder; the medical examiner concluded Gino was shot at close range multiple times in the head, and Ferrell confessed to a cellmate the murder was premeditated and the

defendants robbed the victim of drugs and money. Ferrell v. State, 686 So. 2d 1324, 1329 (Fla. 1996). Even this Court described this as an execution type killing. Id. at 1330. While this Court has admonished prosecutors to avoid using the term "execute", Ferrell has not shown that, under the facts of this case, he would not have been convicted if the prosecutor had used an alternative term to describe the murder.

(2) **Attacks on the defendant's character**

In this portion of Claim I, Ferrell alleges the prosecutor made repeated attacks on the character of the defendant in an attempt to convince the jury that it should convict Ferrell for reasons other than he was guilty of the crime. (Pet. at page 13). Ferrell points to two comments of the prosecutor and cites to the trial record at Volume XXIX pages 871 and 878.

The first comment about which Ferrell complains is found at page 871 of the record. In presenting this issue to this Court, Ferrell isolates one comment out of context.

In context and beginning at page 869 of the record, it is clear that prosecutor's comments were directed, not to the defendant's general bad character but to his various statements to the police. In those several statements, Ferrell initially contended he was at his mother-in-law's house with his wife, Daphne, continuously from 9:30 p.m. on the evening of the murder. He later told the police that he had actually left his

mother-in-law's house to give Clyde Porter a ride to and from the liquor store but had returned to his mother-in-law's house at about 11:00 or 11:30 and remained there the remainder of the night. (TR Vol. XXIX 870). Witnesses called at trial, including Daphne Ferrell and Ferrell's mother-in-law, refuted Ferrell's claims about his whereabouts.

This Court has said it is improper to call the defendant a liar. Zack v. State, 911 So. 2d 1190, 1205(Fla. 2005). However, this Court has also stated calling the defendant a liar is not reversible error when the evidence supports such a conclusion.

In the instant case, the evidence overwhelmingly supported a conclusion Ferrell lied to the police when he claimed he was at his mother-in-law's house from 9:30 or 11:30 p.m. on the night of the murder and never left. Both his mother-in-law, Iris Cobb, and his wife, Daphne Ferrell, testified that while Ferrell was with them, off and on, on the night of the murder, he left their home about 10:45 p.m. and never returned. (TR Vol. XXVII 796, 802).

As the evidence supports a conclusion the defendant attempted to cover up his involvement in the murder of Gino Mayhew by creating a false alibi, it was perfectly proper for the State to call Ferrell's attempt at deception to the jury's attention. Moreover, it is clear, in context, that the

prosecutor was not arguing that Ferrell should be convicted because he was a liar. Instead, the prosecutor's comments were aimed solely at Ferrell's statements to police, statements that the evidence demonstrated were entirely false. Because these comments did not constitute reversible error let alone fundamental error, appellate counsel was not ineffective for failing to raise these unpreserved comments as a claim of error on appeal.

(3) Golden Rule

Ferrell alleges that appellate counsel was ineffective for failing to raise a claim that the prosecutor violated the Golden Rule when he created an imaginary script to explain the events of Gino Mayhew's murder. This Court held in Urbin v. State, 714 So. 2d 411, 421 (Fla. 1998) that it is improper to create an imaginary script that asks jurors to put his or her own imaginary words in the victim's mouth. This Court has noted that this type of argument is prohibited because it is an attempt to "unduly create, arouse and inflame sympathy, prejudice and passions of [the] jury to the detriment of the accused." Id. (quoting Barnes v. State, 58 So. 2d 157, 158 (Fla. 1951)).

This Court has observed, however, that arguments, even arguments with some emotional flow, do not constitute this type of golden rule violation unless the comments go far beyond the

evidence and its reasonable inferences. Brooks v. State, 762 So.2d 879, 899-900 (Fla. 2000). Indeed, this Court has held that "a common-sense inference as to the victim's mental state" may be the basis of proper argument. Merck v. State, 32 Fla. L. Weekly S 789 (Fla. 2007); Banks v. State, 700 So. 2d 363, 366 (Fla. 1997)).

Ferrell complains about only two guilt phase comments. (Pet. at page 15). Neither of them constituted a golden rule violation or even error because in neither did the prosecutor ask the jury to imagine what the victim was thinking or even feeling.

The first comment about which Ferrell complains is that the prosecutor argued that the defendants intended to murder Gino Mayhew. (Pet. At page 15). This comment occurred during the prosecutor’s argument to the jury in support of a finding that Gino’s murder was premeditated. The prosecutor argued that the number and placement of the bullet wounds demonstrated the defendants’ intent to ensure Gino Mayhew died. The prosecutor told the jury that the fact that the defendants shot Gino in the head multiple times was evidence they intended to kill him. (TR Vol. XXIX 842). A prosecutor does not create an imaginary script when he argues matters introduced into evidence and fair inference from them.

The second comment about which Ferrell takes issue is a brief comment that Gino had an idea of what was going to be happening when Hartley approached him and pointed a pistol to his head. (Pet. At page 15). No golden rule violation occurred. Instead, the record reflects that the prosecutor made this comment when he discussed, with the jury, the chain of events leading to Gino's death, beginning with the kidnapping. The prosecutor's comment that Gino had an idea what was happening when Hartley held a gun to his head was not imaginary. Instead, it was fair inference from the testimony of Sidney Jones who testified at trial that while Hartley held a gun to Gino's head, he saw Gino's face. Jones told the jury that Gino looked "very frightened, very, very scared." (TR Vol XXVII 584).

In neither of the comments did the prosecutor ask the jurors to imagine what Mr. Mayhew must have thought or felt, attempt to place the jury in the victim's place, or argue facts that were not in evidence. As both comments were fair inferences drawn by the evidence actually admitted at trial, it cannot be said that the prosecutor created an imaginary script unsupported by any evidence. Merck v. State, 32 Fla. L. Weekly S 789 (Fla. 2007); Hutchinson v. State, 882 So. 2d 943, 954 (Fla. 2004). Banks v. State, 700 So. 2d 363, 366 (Fla. 1997)). Appellate counsel cannot be deemed ineffective for failing to raise a claim of error when none exists.

(7) <u>Vouching for witnesses' credibility</u>

In this claim, Ferrell alleges appellate counsel was ineffective for failing to raise a claim of fundamental error on direct appeal because the prosecutor improperly bolstered witnesses' testimony by repeatedly vouching for the credibility of the State's witnesses. (Pet. at page 20). Contrary to Ferrell's argument, bolstering does not occur when a prosecutor points to testimony, or other evidence, admitted at trial that corroborates or explains a witness' testimony.

Instead, improper bolstering occurs when the State places the prestige of the government behind the witness or indicates that information not presented to the jury supports the witness's testimony. <u>Gorby v. State</u>, 630 So. 2d 544, 547 (Fla. 1993). In this case, the State did not place the prestige of the government behind the witnesses' testimony, nor did the State rely on anything outside the record to support the witnesses' statements.

Ferrell, first, claims the prosecutor improperly bolstered the testimony of Sidney Jones and Juan Brown when he commented that both men "broke through a wall of silence" and "fear" when they came forward with information about the murder of Gino Mayhew. Ferrell claims that any reference to a "wall of

silence" was improper bolstering because "this line of argument had nothing to do with the matters in evidence." (Pet. at page 21).

The comments of the prosecutor neither placed the prestige of the government behind a witness nor argued matters outside the record. Indeed, both Sidney Jones and Juan Brown testified that their initial reluctance to come forward stemmed from fear. Additionally, the record established that trial counsel attempted to exploit that fact in order to convince the jury the witnesses were not credible.

During the testimony of Sidney Jones, the prosecutor asked Jones why he did not immediately report the kidnapping. Jones told the jury that he was very scared that the killers would find out that he told and they would come back and kill him. (TR Vol. XXVII 589).

Trial counsel, during cross-examination, elicited Jones' admissions that he did not come forward all until he was sitting in jail pending unrelated criminal charges. (TR Vol. XXVIII 615). Trial counsel, in his questioning, accused Jones of having "forgotten" his fears once he felt safe in jail. (TR Vol. XXVIII 616).

In response, the prosecutor questioned Jones why he did not come forward until he was in jail. Jones told the jury that he,

along with everyone else, was scared to come forward. He was still scared. (TR Vol. XXVIII 633).

Juan Brown faced a similar situation. Brown did not come forward for more than a month after the murder to tell the police what he had seen.

The prosecutor, in obvious anticipation that trial counsel would attempt to exploit Brown's failure to come forward immediately after the murder, asked Brown why he had not gone to the police as soon as he learned that Mayhew was found dead in his Blazer. Mr. Brown told the jury that he was nervous for his family and his mother. (TR Vol. XXVIII 652).

During closing argument, trial counsel argued the State's witnesses were not credible. Trial counsel told jurors that Jones was not a credible witness because, among other things, Jones did not come forward immediately like any truthful witness would. Trial counsel also reminded the jury that only after the police started investigating and Ferrell got arrested, that people, including Brown, started coming out of the wood work to look for some kind of deal. (TR Vol. XXIX 907).[3]

Appellate counsel was not ineffective for failing to raise an "improper bolstering claim" because none of the comments about which Ferrell takes issue constitute bolstering. In

---

[3] Brown was not pending any charges when he told the police what he saw.

pointing out to the jury that there was a reason, other than incredibility, to explain why witnesses did not immediately come forward, the prosecutor neither placed the prestige of the government behind the witness nor argued matters not presented to the jury. Appellate counsel is not ineffective for raising a meritless claim. Rutherford v. Moore, 774 So. 2d 637, 643 (Fla. 2000).[4]

(10) The defendant chose his witnesses

In this portion of his claim, Ferrell alleges that appellate counsel was ineffective when he failed to raise a claim of fundamental error when the prosecutor told the jury that Ferrell chose the persons who would witness the events leading to Gino's murder. (Pet. at page 32). Ferrell fails to point out a single case in which this Court has ruled such a

---

[4] Ferrell also claims the state improperly bolstered the testimony of Robert Williams because contrary to the state's argument that Williams could not have gotten his information from anywhere other than Ferrell, Williams could have gotten all of his testimony from the news media. (Pet. at page 24). Ferrell also complains the state bolstered Williams' testimony when the prosecutor reminded the jury that Williams had a motive to testify truthfully because he was testifying pursuant to a ten year plea deal. (Pet. at pages 24-26). Neither of these allegations are bolstering claims but are, instead, a kind of Giglio claim. Indeed, in his motion for post-conviction relief and on appeal from the denial of the claim, Ferrell claimed Williams' testimony and the prosecutor's arguments constituted Giglio violations. Ferrell offers no support for the notion that an appellate counsel is ineffective for failing to raise a Giglio claim on direct appeal.

comment constitutes fundamental error. Instead, Ferrell wonders, aloud, why the State choose not to call witnesses he thinks the State should have called or ask questions he thinks the State should have asked. (Pet. at page 33). None of Ferrell's musing about witnesses not called or questions not asked have any relevance to a claim of ineffective assistance of appellate counsel.

Ferrell cannot show this argument constituted fundamental error because in context, it is clear that the prosecutor is simply explaining that while several of the state's witnesses were not angels, the State was required to put on witnesses who had some knowledge of the events leading up to the murder. This Court has not found reversible error for a similar comment when the prosecutor told the jury that "crimes conceived in hell will not have angels as witnesses. " Moore v. State, 820 So. 2d 199, 202 (Fla. 2002).

Ferrell has not shown reversible error, let alone fundamental error. Appellate counsel is not ineffective for failing to raise a meritless claim on appeal. Rutherford v. Moore, 774 So. 2d 637, 643 (Fla. 2000).[5]

[5] In the heading of this particular argument, Ferrell accused the prosecutor of improperly attacking the defense attorney by telling the jury the defense attorney lied to them. Ferrell provides no record support for such an allegation nor does he actually make such an allegation in the body of his argument.

B. <u>PENALTY PHASE</u>

(1) <u>Using the word execute</u>

Ferrell claims that appellate counsel was ineffective for failing to raise, as a claim of fundamental error, the prosecution's use of the word "execute" to describe Gino Mayhew's murder. The record citation to which Ferrell points this Court in his argument (TR Vol. XXIX 1002) shows that the prosecutor was arguing that the cold, calculated, and premeditated aggravator should be found to exist beyond a reasonable doubt. (Pet. at page 12).

Ferrell cites to <u>Brooks</u> and <u>Urbin</u>, which had not yet been decided at the time appellate counsel filed his brief. Indeed, Ferrell does not cite to a single case that had been decided by the time Ferrell's counsel filed his initial brief in which this Court reversed for a new penalty phase because of this unpreserved error. (Pet. At 11-13).

While the term "execute" may evoke some emotional response in some people, as opposed to the term "murdered", or "fired five shots at point blank range into Gino's face, head, and shoulder", the term is not so emotionally evocative as to rise to the level of fundamental error. The evidence supported a conclusion that Kenneth Hartley, aided by Ronnie Ferrell, coldly

and without any pretense of moral justification, fired five shots at Gino's face and head as he sat defenseless behind the wheel of his Blazer.

Without the benefit of Urbin or Brooks to guide him and in light of the other issues that appellate counsel did raise in a thorough and comprehensive appellate brief, appellate counsel should not be deemed ineffective for failing to raise this unpreserved claim of error on appeal. This Court should reject this portion of Ferrell's petition.

(2) Attacks on Defendant's character

Ferrell claims appellate counsel was ineffective for failing to raise a claim of fundamental error when the prosecutor commented on the Defendant's history of violence. Ferrell fails to cite to any case decided before his initial brief was filed that found that appellate counsel was ineffective for failing to raise this unpreserved error on appeal.

A review of the record refutes any notion that the prosecutor was commenting on Ferrell's general bad character. Instead, the prosecutor argued the jury should give significant weight to the prior violent felony aggravator because Ferrell had, on two occasions before the murder of Gino Mayhew, been convicted of prior violent felonies. (TR Vol. XXIX 993). It is not error, let alone fundamental error, for the prosecutor to

ask the jury to give significant weight to the prior violent felony aggravator when the evidence supports the notion the instant murder was one final act in a pattern of escalating violence.

(3) Golden Rule violation

In this penalty phase claim, Ferrell alleges trial counsel was ineffective for failing to raise a claim of fundamental error when the prosecutor created an imaginary script of Gino's last thoughts. Ferrell points to a portion of the penalty phase arguments in which the prosecutor argued in support of the heinous, atrocious, or cruel aggravator. (TR Vol. XXIX 997-1000).

This Court has held in Urbin v. State, 714 So. 2d 411, 421 (Fla. 1998) that it is improper to create an imaginary script that asks jurors to put his or her own imaginary words in the victim's mouth. This Court has noted that this type of argument is prohibited because it is an attempt to "unduly create, arouse and inflame sympathy, prejudice and passions of [the] jury to the detriment of the accused." Id. (quoting Barnes v. State, 58 So. 2d 157, 158 (Fla. 1951)). This Court has observed, however, that arguments, even arguments with some emotional flow, do not constitute this type of golden rule violation unless the comments go far beyond the evidence and its reasonable

inferences. Brooks v. State, 762 So.2d 879, 899-900 (Fla. 2000).

The prosecutor's arguments, about which Ferrell complains, were made in support of the HAC aggravator, an aggravator that focuses on the victim's perspective of the events leading up to his death. Barnhill v. State, 834 So.2d 836, 850 (Fla. 2002)(HAC focuses on the means and manner in which the death is inflicted, not the intent and motivation of a defendant). In this case, there was no golden rule violation because the evidence, as well as its reasonable inferences, support a conclusion that Gino Mayhew was well aware that this robbery and kidnapping was no ordinary "drug dealer" robbery.

The evidence adduced at trial, as found by this Court on direct appeal, demonstrated that on the Saturday before the murder, Hartley and a person that Mayhew did not immediately recognize, robbed Mayhew at gunpoint. Ferrell v. State, 686 So.2d 1324, 1326 (Fla. 1996). The robbers took only money and drugs. During that particular robbery, Hartley did not attempt to take Mayhew to a remote location at gunpoint nor, apparently, take anything other than money and drugs. Id.

On that Monday evening, however, Sidney Jones testified that as Hartley held the gun to Gino's head, Gino looked very, very scared. (TR Vol. XXVII 584). Unlike the previous Saturday evening, the robbers forced him to drive to a remote location.

Robert Williams testified that Ferrell told him that just before Hartley shot Gino at point blank range, Ferrell reached over and took a gold rope chain from around Gino's neck and then got out of the Blazer leaving Mayhew alone with Hartley. (TR Vol. XXVIII 676). It is a reasonable inference from the evidence that Gino Mayhew knew at that moment, if not well before, that Hartley intended to use the pistol that held him hostage to ensure Mayhew never left the field behind Sherwood Park Elementary School alive.

During the argument about which Ferrell complains, the prosecutor confined himself to the evidence and its reasonable inferences. The prosecutor did not attempt to place the jury in the victim's place or argue facts that were not in evidence. Moreover, the prosecutor was entitled, based on the evidence that was introduced at trial, to argue in support of the HAC aggravator which focuses on, among other things, the victim's awareness that he is about to die. Zakrzewski v. State, 717 So. 2d 488, 493 (Fla. 1998) (HAC requires showing of awareness of impending death). *See also* Merck v. State, 32 Fla. L. Weekly S 789 (Fla. Dec. 6, 2007)(a common-sense inference as to the victim's mental state may be the basis of proper argument).

Appellate counsel is not ineffective for failing to raise this unpreserved error when the evidence, and its reasonable inferences, supports a conclusion that this argument, made in

support of the HAC aggravator did not constitute a golden rule violation. This Court should reject this part Ferrell's petition.

(4) <u>The jury vote and victim's age</u>

In this sub-claim, Ferrell alleges appellate counsel was ineffective for failing to raise two claims of fundamental error.

a. Law requires death

In this portion of his petition, Ferrell claims appellate counsel was ineffective for failing to claim fundamental error because the prosecutor openly invited the jury to disregard the law when he told jurors they would be violating the law if they did not vote for death. (Pet. at page 16). Ferrell points to the prosecutor's statement on page 1011 of the trial record. During this argument, the prosecutor asked the jury to carefully weigh the aggravators and mitigating circumstances instead of taking the easy way out and immediately voting for life. Ferrell claims this argument implies the jury was required by law to vote for death. The prosecutor argued:

> Some of you may be tempted to take the easy way out, and by that, I mean, you may be tempted not to weigh all of these aggravating circumstances and to consider the mitigating circumstances. That you may not want to carry out your full responsibility under the law and just decide to take the easy way out and to vote for death. I'm sorry, vote for life…. I ask you not to be tempted to do that, I ask you to follow the law, to carefully weigh the aggravating circumstances, to

> consider the mitigating circumstances, and you will see these aggravating circumstances clearly outweigh any mitigating circumstances if there are any. And then under the law and the facts death is a proper recommendation.

(TR Vol. XXIX 1011).

In context, however, during this part of his argument, the prosecutor did not advise the jury that the law required it to recommend death. Instead, he asked the jury to fully weigh the aggravators and mitigators, to find the aggravators outweighed the mitigators, and to recommend death. This Court has never found it to be fundamental error for a prosecutor to advocate for the imposition of the death penalty. [6]

Even if any of the jurors may have initially been misled by any of the prosecutor's comments, trial counsel subsequently set them straight. Trial counsel reminded jurors that even if they found the aggravating circumstances outweighed the mitigating circumstances, there was nothing in the law that required them to vote for death. (TR Vol. XXIX 1016). Additionally, the trial court properly instructed the jury on the weighing process. Nowhere in his instructions did he even hint the jury was

---

[6] In another portion of this argument, the prosecutor did incorrectly tell the jurors must recommend death if the sufficient aggravators exists which justify the death penalty and the mitigators did not outweigh the mitigators. (TR Vol. XXIX 988). Any misstatement was corrected by trial counsel when he advised the jury it was never required to recommend death. (TR Vol. XXIX 1016).

required to recommend death under any circumstances. (TR Vol. II 212-217).

In light of the fact the prosecutor did not actually inform the jury that it was required to recommend death, trial counsel reminded the jury it was never obligated to recommend death, and the trial judge properly instructed the jury, it cannot be said that appellate counsel was ineffective for failing to raise this as a claim of fundamental error.

b. Age of victim

Ferrell next alleges appellate counsel was ineffective when he failed to raise a claim of fundamental error because the prosecutor, on several occasions, referred to Gino's age. (Pet. at page 17). Ferrell alleges the prosecutor was permitted to argue Gino's age as non-statutory aggravator.

The record does not support a conclusion the jury was permitted to consider Gino's age as a non-statutory aggravator. First, Gino was indeed 17 years old when he died. It is not improper to argue facts admitted into evidence. During his closing arguments, the prosecutor limited his arguments to those supporting the five aggravators upon which the jury was instructed. The trial judge instructed the jury properly that the only aggravators it could consider were the five upon which he instructed. Gino's age was not among the five. (TR Vol. II 212-217).

Given that the record does not support a conclusion that the prosecutor argued Gino's age as a non-statutory mitigation or that the trial court failed to instruct the jury it could consider only the five aggravators upon which it was instructed, Ferrell failed to show this unpreserved claim of error rose to the level of fundamental error. This Court should reject this portion of Ferrell's habeas petition.

(5) <u>Misstating the law of mitigation</u>

In this claim, Ferrell alleges appellate counsel was ineffective for failing to raise a claim of fundamental error when the prosecutor misstated the law of mitigation.

a. Age

Ferrell claims appellate counsel should have raised a claim of fundamental error because the prosecutor urged the jury not to find Ferrell's age as a statutory mitigator. (Pet. at page 18). Ferrell notes that there is no *per se* rule that precludes the jury from finding age as a mitigator. Ferrell points to cases that have come before this Court in which the trial court found the age mitigator to apply to defendants who were 21 and 23 years old at the time of the murder. Ferrell avers he was 22 at the time of the crime. (Pet. at page 18).

First, Ferrell was not 22 at the time of the April 1991 murder. Born in March of 1964, Ferrell was actually 27 years old when he murdered Gino Mayhew.

Nonetheless, the prosecutor did not inform the jury the law precluded a finding of the age mitigator if the defendant was 21, 23, or even 27 years old. Instead, the prosecutor argued that the jury should not find this mitigator because Ferrell was a person with a lot of life experience who already had committed two prior felonies. (TR Vol. XXIX 1008).

This Court has found no abuse of discretion when a judge rejected age as a mitigator even in cases where the defendant was only 18 or 20 years old at the time of the murder. Cooper v. State, 492 So. 2d 1059 (Fla. 1986). *See also* Garcia v. State, 492 So. 2d 360, 367 (Fla. 1986)(the fact that the defendant was only 20 at the time of the murder, does not in and of itself, require a finding of the age mitigator). Given that Ferrell was 27 years old at the time of the murder, was married, had two children, and had already been twice convicted of violent felonies, it is not error, let alone fundamental error for a prosecutor to argue that the age mitigator should not apply or be given little weight.[7] Appellate counsel is not ineffective for failing to raise a claim with little or no

[7] The State agrees that a prosecutor should not argue that the mitigator should be found only when the defendant is a minor because persons under 18 at the time of the murder may now not be executed. However, the prosecutor did not suggest that a 14, 15, or 16 year old would be eligible for the death penalty. Given Ferrell's age of 27, any error in this brief mention of 14-16 year olds in the context of his argument was harmless.

success on appeal. Rutherford v. Moore, 774 So. 2d 637, 643 (Fla. 2000).

b. ***Ferrell's ability to appreciate the criminality of his conduct***

Ferrell also claims the prosecutor misstated the law of mitigation and attacked Ferrell's character when he argued that the jury should not find that Ferrell could not appreciate the criminality of his conduct. In context, the prosecutor argued that this mitigator should not apply because there was no evidence that Ferrell's capacity to appreciate the criminality of his conduct was impaired in any way. (TR XXIX 1007). Indeed, Ferrell presented no evidence at trial that his capacity to appreciate the criminality of his conduct was impaired in any way. Instead, the evidence introduced at Ferrell's trial proved that that Ferrell, along with Kenneth Hartley and Sylvester Johnson, planned and executed the murder with calculated efficiency.

While the prosecutor's brief comment that the defendant was "mean" may have been intemperate, Ferrell offers no authority such a comment constituted fundamental error. This Court should deny this portion of Ferrell's claim.

(6) State does not always seek death

The State acknowledges that this Court has found this comment to be improper in Urbin and Brooks. However, Ferrell

has failed to show this remark rose to the level of fundamental error. While this Court has held it is improper for the State to imply Ferrell's case was inherently cloaked with legitimacy as a "death penalty case" simply because the State decided to seek the death penalty, Ferrell failed to demonstrate that the error rose to the level of fundamental error.

The jury was instructed that argument is not evidence. (Tr Vol. I 141). Additionally, the jury was properly instructed on its responsibilities during the penalty phase. It is unlikely any reasonable juror would be driven to return a verdict he would not otherwise return or be unduly influenced by the State's decision to seek the death penalty, a statement made obvious by the fact jurors were serving in a capital case. It is also beyond obvious, even to a lay person, that not every death case warrants the death penalty. Appellate counsel is not ineffective if he chooses to raise issues that, in his view, are more likely to attain positive results.

(8) <u>Same mercy</u>

The State acknowledges this comment is improper and has been held to be improper by this Court even before Ferrell's trial. However, trial counsel did not object but instead exploited the prosecutor's use of the argument in his attempt to persuade Ferrell's jury to recommend a life sentence.

While the comment was error, this comment, especially in light of trial counsel's counter-attack, cannot reasonably be said to have been so prejudicial, that but for the misconduct, the jury could not have reached the verdict it did. Miller v. State, 926 So.2d 1243 (Fla. 2006) (noting that in order for improper comments made in the closing arguments of a penalty phase to constitute fundamental error, they must be so prejudicial as to taint the jury's recommended sentence). Because the record demonstrated that trial counsel sought to exploit this comment during his own arguments, appellate counsel is not ineffective for choosing to put his efforts into issues that, at the time he filed his initial brief, had a better likelihood of success.[8]

(9) Injecting personal beliefs

In this claim, Ferrell repeats several of his claims of error including the prosecutor's arguments that the case cries out for death and that Gino suffered when he was shot. Ferrell does not explain how these comments, which arose from the evidence or fair inferences, rise to the level of personal comment.

---

[8] Ferrell cites to Rhodes v. State, 547 So.2d 1201, 1206 (Fla. 1989) where this Court reversed for a new penalty phase in part because of improper prosecutorial comments. However in Rhodes, the comments at issue were objected to by trial counsel and, as such, not reviewed for fundamental error.

Ferrell also complains that the prosecutor pointed to Williams' testimony that Ferrell told him he had taken a gold rope chain from Gino's neck before Hartley shot Gino to death. (TR Vol. XXVIII 676). Ferrell calls it a "blatant misrepresentation" for the prosecutor to argue that Williams' testimony supports a finding the murder was committed for pecuniary gain. (Pet. at page 31).

Ferrell avers the prosecutor misled the jury because Williams testified about the gold chain only at trial, and not in any of his earlier statements to the police. On its face, this is a nonsensical argument because a prosecutor is bound only to argue evidence adduced at trial and not from matters, such as pre-trial statements.[9]

Because Ferrell, in this claim, merely repeated allegations of error or makes an allegation of error completely unsupported by the record, Ferrell has failed to show appellate counsel was ineffective for failing to object to these unpreserved claims of error. Rutherford v. Moore, 774 So. 2d 637, 643 (Fla. 2000) (appellate counsel not ineffective for failing to raise a meritless claim).

---

[9] Ferrell also alleges that Williams never testified that Ferrell was the one who took the chain. (Pet. at page 31). Ferrell is mistaken. At trial, Williams testified that Ferrell told him that he took a gold rope chain from Mayhew's neck before Hartley shot him to death. (TR Vol. XXVIII 676).

CLAIM II

WHETHER APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE A CRONIC VIOLATION ON DIRECT APPEAL

Ferrell alleges appellate counsel was ineffective for failing to raise a Cronic violation on direct appeal. In presenting his claim, Ferrell alleges that counsel was absent from 28 of 40 pre-trial dates, did not take depositions of several main witnesses, failed to show up at Ferrell's trial,[10] waived Ferrell's presence at pre-trial conferences without a valid waiver, failed to offer any evidence at the penalty phase, failed to file any motions other than "boilerplate" motions, failed to conduct any penalty phase investigation, and failed to present any additional matters at the sentencing hearing. (Pet. at pages 37-45).

This claim may be denied for two reasons. First, Ferrell raised almost every one of these allegations as a claim of ineffective assistance of trial counsel in his amended motion for post-conviction relief. Ferrell asked for, and was granted, an evidentiary hearing on his claim.

The collateral court denied Ferrell's motion in part, and granted it, in part. Ferrell appealed and raises these same complaints in his initial brief before this Court.

[10] Trial counsel did not fail to show up at Ferrell's trial. Counsel was present for trial and represented Ferrell throughout.

In raising the same claims of error he makes in his appeal from the denial of his motion for post-conviction relief, Ferrell improperly attempts to use this habeas petition as a second appeal for questions that have already been raised in a Rule 3.851 motion. Parker v. Dugger, 550 So. 2d 459, 460 (Fla. 1989). On this ground alone, this Court may deny this claim.

Second, this Court may also deny this claim because appellate counsel is not ineffective for failing to raise a claim of ineffective assistance of trial counsel on direct appeal. A claim pursuant to United States v. Cronic, 466 U.S. 648 (1984) is a claim of ineffective assistance of counsel.

By its nature, in almost every instance, a claim of ineffective assistance of counsel requires the development of facts at an evidentiary hearing. *See* Nixon v. State, 572 So. 2d 1336, 1340 (Fla. 1990) (remanding for an evidentiary hearing on same claim and then declining to address issue, identifying issue as one more appropriate for postconviction), *cert. denied*, 502 U.S. 854 (1991).[11] Indeed, when Ferrell raised these same

---

[11] This Court has held, claims of ineffective assistance of counsel are only cognizable on direct appeal when the alleged ineffectiveness is apparent on the face of the record and it would be a waste of judicial resources to require the trial court to address the issue. *See* Gore v. State, 784 So. 2d 418, 437-38 (Fla. 2001); Martinez v. State, 761 So. 2d 1074, 1078, n. 2 (Fla. 2000); Blanco v. Wainwright, 507 So. 2d 1377, 1384 (Fla. 1987). However, even if Ferrell were to convince this court that at least a portion of his claim could have been raised on direct appeal, Ferrell still falls short of demonstrating that

allegations of in his motion for post-conviction relief, Ferrell claimed he was entitled to an evidentiary hearing because his claims required a factual determination. (PCR Vol I 454-46, para 3 and 4).

While Ferrell asserts that counsel's absences from "critical stages" of the proceedings were apparent from the face of the record, factual development is still necessary. For instance, while a Cronic violation can occur because of counsel's absence from a "critical stage" of the proceeding, a collateral court must necessarily find that the hearing at issue was a "critical stage" of the proceeding.[12] It is even more obvious that factual development, by way of a post-conviction evidentiary hearing, is required when a defendant alleges his counsel failed to take depositions, investigate potential mitigation, file meritorious motions, or put on evidence at the penalty phase of a capital trial. Ferrell fails to cite to even a single case in which this Court has held appellate counsel was ineffective for failing to raise a claim of ineffective assistance of trial counsel on direct appeal. This Court has,

---

appellate counsel was constitutionally ineffective for not raising the claim on direct appeal.

[12] The collateral court found that many of the hearings about which Ferrell complained were held in accord with Judge Oliff's practice to hold weekly pre-trial conferences. The collateral court noted that on numerous occasions, the only thing that happened was the case passed to the next conference. (PCR Vol. IV 660).

however, decided, in one recent case, that appellate counsel is not obligated to raise a claim of ineffective assistance of trial counsel on direct appeal.

In Stewart v. Crosby, 880 So. 2d 529 (Fla. 2004), the defendant alleged that appellate counsel was ineffective when he did not raise a claim, on direct appeal, that trial counsel improperly conceded his guilt. This Court ruled that "appellate counsel is not ineffective for failing to raise a claim of ineffective assistance of trial counsel on direct appeal because such claims are more effectively raised in a motion for post-conviction relief under rule 3.850." Id. at 531. Ferrell's claim that his appellate counsel was ineffective for failing to raise a Cronic violation on direct appeal should be denied.

CONCLUSION

Ferrell has failed to demonstrate that appellate counsel was ineffective for failing to raise unpreserved claims of prosecutorial misconduct on direct appeal. Likewise, Ferrell has failed to demonstrate that appellate counsel was ineffective for failing to file a Cronic claim on direct appeal. The Petition for Writ of Habeas Corpus should be denied.

Respectfully submitted,

BILL McCOLLUM
ATTORNEY GENERAL

____

MEREDITH CHARBULA
Assistant Attorney General
Florida Bar No. 0607399
OFFICE OF THE ATTORNEY GENERAL
PL-01, The Capitol
Tallahassee, FL 32399-1050
PHONE: (850) 414-3583
FAX: (850) 487-0997

Counsel for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS has been furnished by U.S. Mail to Mr. Frank Tassone and Rick Sichta, 1833 Atlantic Coast Boulevard, Jacksonville, Florida 32207 this 17th day of March 2008.

____
Meredith Charbula
Assistant Attorney General

CERTIFICATE OF FONT AND TYPE SIZE

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

____
Meredith Charbula
Assistant Attorney General