

IN THE SUPREME COURT OF FLORIDA

GEORGE JAMES TREPAL

Petitioner,

v.

Case No. SC01-2267

MICHAEL W. MOORE,

Respondent.

_____ /

RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

COMES NOW, Respondent, MICHAEL W. MOORE, by and through the undersigned Assistant Attorney General, and hereby responds to the 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:

FACTS AND PROCEDURAL HISTORY

Petitioner Trepal was indicted by the grand jury in the Tenth Judicial Circuit, Polk County, Florida, on April 5, 1990, for one count of first-degree murder, several counts of attempted first-degree murder, poisoning food or water, and tampering with

a consumer product. Jury trial commenced January 7, 1991. At the close of the four-week trial, the jury convicted Trepal on all counts. The penalty phase took place on February 7, 1991, and the jury recommended death by a vote of nine to three. On March 6, 1991, the Honorable Dennis P. Maloney, Circuit Court Judge, sentenced Trepal to death. This Court affirmed. Trepal v. State, 621 So. 2d 1361 (Fla. 1993), cert. denied, 510 U.S. 1077 [114 S. Ct. 892] (1994).

On appeal, Trepal was represented by Ronald N. Toward, Esquire, and filed a 110-page brief presenting seven issues:

ISSUE I

DID THE TRIAL COURT ERR IN FAILING TO GRANT APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL?

ISSUE II

DID THE TRIAL COURT ERR IN DENYING APPELLANT'S MOTION TO SUPPRESS?

ISSUE III

DID THE TRIAL COURT ERR IN PERMITTING THE INTRODUCTION OF NUMEROUS ITEMS OF TESTIMONY PURSUANT TO SECTION 90.404(2), FLORIDA STATUTES?

ISSUE IV

DID THE TRIAL COURT ERR IN DENYING APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL WHEN THERE WAS NO SUBSTANTIAL COMPETENT EVIDENCE BY WHICH THE JURY COULD CONCLUDE BEYOND A REASONABLE DOUBT THAT APPELLANT CAUSED THE DEATH OF PEGGY CARR AND WHERE THE TRIAL COURT FAILED TO PROPERLY INSTRUCT THE JURY AS TO THE LEGAL MEANING OF "CAUSE OF DEATH"?

ISSUE V

DID THE TRIAL COURT COMMIT FUNDAMENTAL ERROR BY FAILING TO CHARGE THE JURY ON THE MAXIMUM AND MINIMUM PENALTIES FOR THE OFFENSE OF FIRST DEGREE MURDER?

ISSUE VI

DID THE COURT BELOW ABUSE ITS DISCRETION IN REFUSING TO GIVE APPELLANT'S REQUESTED CIRCUMSTANTIAL EVIDENCE INSTRUCTION BECAUSE, BY MISSTATEMENT, THE TRIAL COURT DID NOT AFFORD APPELLANT THE FULL PROTECTIONS OF THE REASONABLE DOUBT INSTRUCTION?

ISSUE VII

DID THE TRIAL COURT ERR IN IMPOSING A DEATH SENTENCE?

Trepal filed an amended motion for postconviction relief in 1996, and an evidentiary hearing was held in October, 1996, on several of Trepal's claims. Relief was ultimately denied and an appeal was taken to this Court. Jurisdiction was relinquished to the circuit court in order to conduct further postconviction litigation involving allegations pertaining to the scientific testing conducted by the FBI laboratory during the investigation in this case. Evidentiary hearings were held in February, 1999, and July, 2000. Relief was ultimately denied on October 26, 2000, and an appeal was taken. During the course of the postconviction litigation, two interlocutory appeals were taken to this Court. Trepal v. State, 704 So. 2d 498 (Fla. 1997); Trepal v. State, 754 So. 2d 702 (2000). The instant habeas petition was timely filed contemporaneously with the initial brief in the appeal of the denial of postconviction relief (Trepal v. State, Florida Supreme Court Case No. SC89,710).

ARGUMENT IN OPPOSITION TO CLAIMS FOR RELIEF

Petitioner Trepal alleges that extraordinary relief is warranted because he was denied the effective assistance of appellate counsel. Such a claim requires an

evaluation of whether counsel's performance was so deficient that it fell outside the range of professionally acceptable performance and, if so, whether the deficiency was so egregious that it undermined confidence in the correctness of the result. Groover v. Singletary, 656 So. 2d 424, 425 (Fla. 1995); Byrd v. Singletary, 655 So. 2d 67, 68-69 (Fla. 1995), cert. denied, 516 U.S. 1175 (1996). A review of the record in this case demonstrates that neither deficiency nor prejudice has been shown by Trepal. As will be seen, none of his claims warrant the granting of habeas relief, and therefore his petition for writ of habeas corpus should be denied.

Claim I

(As stated by Petitioner)

The State was erroneously allowed to introduce testimony based solely on hearsay to establish a link between Mr. Trepal and the brown bottle, and this Court erred in failing to address this issue on direct appeal, or appellate counsel provided ineffective assistance in failing to raise it properly.

Trepal's first claim seeks reconsideration of an issue which was raised and rejected in his direct appeal. Trepal asserts that his trial was flawed by the admission of hearsay testimony from DEA Agent Broughton. The record reflects that Broughton had previously been qualified as an expert regarding the investigation and operation of clandestine drug labs (DA-R. V13/3469). He testified that Trepal was the chemist and mastermind of an illegal methamphetamine lab in the 1970s (DA-R. V14/3479-81). He also testified that thallium I nitrate was a by-product of one method for manufacturing methamphetamine (DA-R. V14/3481). Broughton's knowledge of this fact was obtained through a review of a DEA publication which discussed the formulas for the production of various drugs (DA-R. V13/3441-43, 3450-51). He acknowledged on cross-examination that he was not a chemist; that he had merely researched the use of thallium and found this "recipe" for the manufacture of methamphetamine based on his prior knowledge of Trepal; that he could not explain the chemical processes involved; and that this method of manufacturing methamphetamine was not commonly

used, particularly on the east coast (DA-R. V14/3481-85).

Trepal now asserts that Broughton's testimony as to thallium I nitrate as a by-product of one manufacturing method was inadmissible hearsay. However, counsel for Trepal presented this same argument in his direct appeal brief (Initial Brief of Appellant, Trepal v. State, Florida Supreme Court Case No. 77,667, pp. 70 - 75). Clearly, counsel cannot have been ineffective since this claim was in fact presented in the direct appeal. Thus, the issue is not properly before this Court in this proceeding. Bryan v. Dugger, 641 So. 2d 61, 65 (Fla. 1994); Turner v. Dugger, 614 So. 2d 1075, 1080 (Fla. 1992) (declining to revisit issues where the issues, or variations thereof, were rejected on direct appeal); Blanco v. Wainwright, 507 So. 2d 1377, 1384 (Fla. 1987) (direct appeal issues will not be revisited under the guise of ineffective assistance of appellate counsel).

Trepal suggests that because this Court failed to address the issue, his argument should be reconsidered in this habeas pursuant to Parker v. State, 643 So. 2d 1032 (Fla. 1994). Parker was before this Court after remand from the United States Supreme Court, which found this Court's appellate review to be constitutionally inadequate. Parker provides no authority for review of previously rejected claims that are alleged in later proceedings to have been incorrectly resolved.

Even if this Court considers this issue, the previous rejection of the claim was

proper. The relevant question is whether the trial judge abused his discretion in admitting this testimony. Ray v. State, 755 So. 2d 604, 610 (Fla. 2000) (trial court's ruling as to admissibility of evidence will not be reversed unless there has been a clear abuse of discretion). No abuse of discretion has been shown on the facts of the instant case. Agent Broughton was an expert in the investigation of clandestine drug labs, and was qualified to testify as to these matters; just as an expert can rely on reference books and materials, he was entitled to use the information from the DEA publication. The fact that the underlying document was deemed hearsay is not a basis for exclusion of Broughton's testimony. The purpose of this testimony was to establish Trepal's knowledge of, and access to, thallium; it was not necessary for Broughton to be able to describe the chemical reactions involved in the methamphetamine manufacturing process in order to establish the relevance or be cross-examined on the significance of these facts. Trepal's constitutional right to confront the witness was not violated, since the jury heard the basis of Broughton's knowledge and could weigh that in consideration of his testimony. In addition, given the other substantial testimony in this case with regard to Trepal's knowledge of chemistry and access to chemicals, any possible error would clearly be harmless.

Since there was no abuse of discretion in the trial court's ruling to permit this testimony, this issue had no merit, and confidence in the outcome of Trepal's appeal

is not undermined. On these facts, Trepal is not entitled to habeas relief.

Claim II

(As stated by Petitioner)

Appellate counsel failed to raise on appeal numerous meritorious issues which warrant reversal of either or both the convictions and sentences.

Trepal also alleges that three other issues should have been presented in the direct appeal. Specifically, he submits that counsel should have raised issues about the State's presentation of inadmissible and unfairly prejudicial evidence; the trial court's limitations on defense counsel's cross-examination of State witnesses; and the unconstitutionality of jury instructions on the aggravating circumstances. Each of these arguments will be addressed in turn; however, as to each claim, Trepal has failed to demonstrate that his attorney was deficient or that confidence in the outcome of his appeal is undermined.

A. FAILURE TO RAISE ON APPEAL THE STATE'S REPEATED PRESENTATION OF INADMISSIBLE, IRRELEVANT, INFLAMMATORY AND UNFAIRLY PREJUDICIAL EVIDENCE.

Trepal characterizes appellate counsel as ineffective for failing to assert that

irrelevant and inflammatory evidence was presented during trial. According to Trepal, there was “no real evidence” against him, only “a smokescreen of innuendo and fear” (Petition, p. 17). He neglects to mention that this Court found this alleged “innuendo” to be sufficient to support the jury verdicts rendered against him. To the extent that Trepal is challenging the sufficiency of the evidence, that point has obviously been rejected and put to rest by this Court’s opinion in the direct appeal. Trepal, 621 So. 2d at 1365.

Trepal’s petition identifies the following evidence as improperly admitted at trial: the voodoo pamphlet from a Mensa murder weekend; bottles of chemicals, chemistry books, and chemistry equipment found in Trepal’s Sebring home; Trepal’s “odd behavior” in discussing or declining to discuss the poisoning of his neighbors; a photograph which may have suggested that someone had jimmied a screen door to the victims’ house and Trepal’s preference for Coca-Cola; and other “irrelevant” evidence such as Trepal’s prior possession of an antique bottle capper, his possession of gloves, a roll of stamps, and a fictional book that Trepal’s wife had read. All of this evidence, according to Trepal, was wholly irrelevant and, to the extent it could be relevant, should have been excluded under Section 90.403, Florida Statutes, as any probative value was substantially outweighed by its prejudicial impact. Thus, Trepal asserts, counsel was ineffective for failing to challenge the admission of this testimony

in his direct appeal.

Once again, the pertinent question is whether the trial judge abused his discretion in admitting this evidence. Sims v. Brown, 574 So. 2d 131, 133 (Fla. 1991) (noting that the weighing of relevance versus prejudice or confusion is best performed by the trial judge who is present and best able to compare the two); State v. McClain, 525 So. 2d 420, 422 (Fla. 1988) (observing that in applying the balancing test of § 90.403, the trial court necessarily exercises its discretion). Clearly, no abuse of discretion occurred on the facts of this case. In fact, Trepal's argument on this issue is completely circular: he claims that the evidence was not probative of any fact but was highly prejudicial because it incriminated him *in the charged offenses*. The fallacy with this argument is that Section 90.403 does not provide a basis for exclusion of prejudicial evidence; it only prohibits the admission of testimony which presents a danger of *unfair* prejudice. None of the evidence now challenged was unfairly prejudicial; it did not suggest that Trepal was a bad person outside of his actions against the Carr family. In fact, all of this testimony is seemingly innocent by itself -- the fact that Trepal was a member of Mensa and a chemist who preferred Coke to Pepsi is hardly inflammatory. Yet, on the facts of this case, this evidence was highly relevant. The voodoo pamphlet Trepal prepared for the Mensa murder weekend was hauntingly similar to a threatening note received by the Carr family prior to the

poisonings; Trepal's knowledge of and access to chemicals and chemistry materials and equipment demonstrated his opportunity to commit these offenses. All of the reasons noted in Trepal's current complaint that this testimony was "highly inflammatory in the context of this case," demonstrate the plain relevance of this evidence.

Trepal suggests that evidence which is "no more consistent with guilt than innocence" is inadmissible, citing Merritt v. State, 523 So. 2d 573 (Fla. 1988). In that case, this Court ruled that evidence of flight was improperly admitted because the facts affirmatively demonstrated that Merritt was not fleeing to avoid prosecution, but in fact had committed other crimes. While the evidence of Merritt's escape was a prior bad act, the evidence which Trepal challenges was not otherwise inflammatory. Therefore, it was not required to be excluded under Merritt.

Since none of this evidence suggested that Trepal had committed bad acts or other crimes, it was not subject to exclusion under Section 90.403. No abuse of discretion has been shown on the facts of the instant case. Absent some abuse, this issue had no merit, and therefore counsel was not ineffective for failing to present this claim. Mendyk v. Dugger, 592 So. 2d 1076, 1081-82 (Fla. 1992) (rejecting claim of ineffective assistance of counsel where defendant failed to demonstrate an abuse of discretion); Groover, 656 So. 2d at 425; Chandler v. Dugger, 634 So. 2d 1066, 1068

(Fla. 1994) (failure to raise nonmeritorious issues is not ineffective assistance of appellate counsel).

Trepal's appellate brief was over one hundred pages long, and counsel would have had to abandon one or more of his arguments in order to present this claim. Trepal does not identify any frivolous issue from his direct appeal which could have been foregone in order to raise this claim. Counsel has no obligation to raise every conceivable claim -- to the contrary, counsel is supposed to winnow out weaker arguments so that they do not detract from possibly meritorious claims. Hardwick v. Dugger, 648 So. 2d 100, 107 (Fla. 1994); Cave v. State, 476 So. 2d 180, 190, n. 1 (Fla. 1985), cert. denied, 476 U.S. 1178 (1986). Trepal's appellate counsel raised seven claims, all of which were worthy of this Court's serious consideration. On these facts, Trepal has failed to show any deficiency in his appellate counsel's performance, and he is not entitled to habeas relief.

**B. FAILURE TO RAISE ON APPEAL THE IMPROPER
LIMITATIONS ON THE DEFENSE CROSS-
EXAMINATION OF STATE WITNESSES.**

Trepal next asserts that counsel should have presented an issue regarding the trial court's rulings limiting his cross-examination of State witnesses. Trial judges

possess wide latitude to impose reasonable limits on cross-examination, and the limitation of cross-examination is subject to an abuse of discretion standard. Delaware v. Van Arsdall, 475 U.S. 673, 679 (1986); Moore v. State, 701 So. 2d 545 (Fla. 1997), cert. denied, 523 U.S. 1083 (1998). Once again, Trepal has failed to demonstrate that his attorney's performance was deficient with regard to this issue, and no habeas relief is appropriate.

Trepal first claims defense counsel should have been able to cross-examine Diana Carr about the extent to which Trepal participated in the writing of the Mensa murder weekend plots; about whether Trepal drank bottled or regular water; and about Trepal's speech impediment.¹ All of these questions were properly found to be beyond the scope of cross-examination. Trepal does not identify any testimony from Diana Carr's direct examination which either directly or indirectly addressed any of these general subject matters. Rather, he contends that because evidence as to these subjects was presented *through other witnesses* at trial, he should have been permitted to question Diana Carr about them under Zerguera v. State, 549 So. 2d 189 (Fla. 1989).

¹It should be noted that, although the State's objection was sustained when defense counsel asked about the speech impediment, the witness actually answered the question before the objection was made, so this information was before the jury (DA-R. V14/3580-81).

Trepal's reliance on Zerguera to establish error during his trial is misplaced. Zerguera simply applied the well established law that cross-examination is appropriate on any subject matter discussed in direct examination. Zerguera and his codefendant committed an armed robbery during which a cab driver was shot and killed; both admitted their participation in the offense, and the only issue was which of the defendants had actually shot the victim. A plastic bag with incriminating bullets and casings was discovered among the codefendant's personal belongings. When the codefendant testified against Zerguera, the defense attempted to question him on cross-examination as to the fact that the bullets were found with his items. This Court found that the trial court erred by refusing to allow such cross-examination, noting that once direct examination opens a general subject, cross-examination is not confined to the details discussed but may explore other facts within the same general subject. This does not help Trepal because the questions his defense attorneys attempted to ask on cross-examination were not within any of the general subject matters discussed on direct. Trepal's assertion that Zerguera permits such cross-examination where the State offers evidence at trial through other witnesses on the same subject is without merit; Zerguera's comments that the State had presented evidence during the trial implying that the bullets were located among items jointly possessed by Zerguera and his codefendant were not offered as to the finding of error in restricting cross-

examination but only to explain why the error was not harmless on the facts of the case. 549 So. 2d at 192.

To the extent that Trepal suggests any impropriety may have occurred based on the State's comments that Diana Carr's use immunity would not extend to testimony Carr may have provided as a defense witness, this was not a matter of improper intimidation, but was controlled by statute. The immunity statute, Section 914.04, Florida Statutes, confers use immunity on anyone testifying under the compulsion of a subpoena. The use immunity does not extend to additional voluntary testimony offered on behalf of another party at the trial. No impropriety is demonstrated by the State's courtesy of reminding Diana Carr of the limits of the immunity conferred on her by statute.

Thus, no error has been shown with regard to the restrictions placed on Diana Carr's cross-examination. The claim that cross-examination was improperly limited relating the status of the marriage between Pye and Peggy Carr is similarly without merit. In this claim, Trepal attacks a number of different rulings on different bases, lumping them all together in an argument that it was "unfair" to exclude proffered evidence that, in Peggy's eyes, Pye Carr drank too much, had other girlfriends, and did not treat his children well, since the State was able to properly admit testimony suggesting that Pye Carr had not committed these crimes. Trepal chooses to combine

all the different rulings into one issue because, when viewed individually, it is clear that the rulings were correct. He cites no authority to suggest that the admission of evidence is governed by a defendant's view of what is fair rather than the evidence code.

Of course, Trepal was permitted to elicit testimony from Rita Tacker that Peggy Carr had taken the children and stayed with Tacker for a few days because Peggy and Pye were having marital problems (DA-R. V8/1537); testimony from Peggy's daughter, Sissy, that Sissy believed Pye should have taken Peggy to the hospital sooner (DA-R. V9/1646); testimony from Pye acknowledging that there had been marital trouble (DA-R. V14/3667); testimony from law enforcement that Pye was a prime suspect but ultimately excluded as the perpetrator (DA-R. V11/3006; V12/3173, 3178); and testimony from the Carrs' pastor, Robert Grant, and from Peggy's son, Duane Dubberly, that Pye and Peggy were separated just before Peggy got sick (DA-R. V14/3616, 3666). The trial court also ruled that the defense could elicit hearsay testimony about Pye and Peggy's marital problems to the extent that it related to the thoroughness of the police investigation (DA-R. V8/1509), and the particular limitations now challenged by Trepal were consistent with this ruling. The fact that the defense was not permitted to take this as far as they would have liked into attacking Pye's character does not present any error, and no issue with regard to these rulings

was constitutionally compelled in Trepal's appeal.

On these facts, no abuse of discretion has been demonstrated with regard to the trial court's rulings limiting the defense cross-examination of State witnesses. Trepal's assertion that his constitutional right to confrontation was violated by these rulings is without merit as the evidence code, properly enforced, did not operate to unreasonably deprive Trepal of his right to challenge the State's case or present a defense. In addition, given the nature of the testimony sought by the defense and the other substantial evidence of guilt in this case, any possible error in these regards would clearly be harmless beyond any reasonable doubt. Therefore, no habeas relief is warranted.

C. FAILURE TO RAISE ON APPEAL THE IMPROPER JURY INSTRUCTIONS ON AGGRAVATING CIRCUMSTANCES.

Trepal's last claim asserts that appellate counsel should have challenged the adequacy of the jury instructions defining the aggravating factors. This Court has repeatedly rejected such claims where, as here, no issue was preserved for appellate review. Byrd, 655 So. 2d at 69; Hardwick, 648 So. 2d at 106. The record reflects that Trepal's assertion that this issue was properly preserved is a blatant misrepresentation

of the record. Although Trepal objected to these instructions based on the argument that they had not been proven factually, he did not challenge the constitutional adequacy of the instructions themselves (DA-R. V18/4339-55). The quote in his petition about “insufficient meaningful standards” was taken from a Motion to Dismiss the Indictment which alleged that the death penalty statute was unconstitutional because the aggravating factors did not provide necessary standards (V22/5079-81). Counsel never, as stated in the petition, “argued that the instruction is vague and overbroad” (Petition, p. 45), and this Court should not tolerate such obvious misstatements. Clearly this claim was not preserved for review. Harvey v. Dugger, 656 So. 2d 1253, 1258 (Fla. 1995); Beltran-Lopez v. State, 626 So. 2d 163 (Fla. 1993), cert. denied, 511 U.S. 1115 (1994).

In addition, this Court has rejected the failure to raise this claim as a basis for ineffective assistance of appellate counsel in the context of a jury instruction on the heinous, atrocious, or cruel factor because, prior to Espinosa v. Florida, 505 U.S. 1079 (1992), the claim would have been rejected, even if raised. Doyle v. Singletary, 655 So. 2d 1120, 1121 (Fla. 1995); Lambrix v. Dugger, 641 So. 2d 847, 849 (Fla. 1994); Henderson v. Singletary, 617 So. 2d 313, 316-17 (Fla. 1993). Although Espinosa was decided during the pendency of Trepal’s appeal (although after the filing of his reply brief), no valid claim as to the instruction on the cold, calculated and

premeditated factor was recognized until this Court's holding in Jackson v. State, 648 So. 2d 85 (Fla. 1994), after Trepal's appeal. Counsel cannot be deemed ineffective for failing to have anticipated this change in the law. Trepal has not cited any relevant authority to support his argument that the instruction on the great risk of death to many persons factor was improper, and no error is presented with regard to the heinous, atrocious or cruel instruction since that factor was rejected factually. Thus, the failure to raise an issue with regard to the adequacy of the jury instructions on these factors at the time of Trepal's appeal did not constitute ineffective assistance of appellate counsel. Once again, no habeas relief is appropriate.

CONCLUSION

WHEREFORE, Respondent respectfully requests that this Honorable Court DENY Trepal's Petition for Writ of Habeas Corpus.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to Todd G. Scher, Litigation Director, Office of the Capital Collateral Regional Counsel - South, 101 N.E. 3rd Ave., Suite 400, Ft. Lauderdale, Florida, 33301, this _____ day of February, 2002.

CERTIFICATE OF TYPE SIZE AND STYLE

I HEREBY CERTIFY that the size and style of type used in this response is 12-point Courier New.

COUNSEL FOR APPELLEE