

IN THE SUPREME COURT OF FLORIDA

THOMAS JAMES MOORE,

Petitioner,

v.

MICHAEL W. MOORE,
Secretary, Fla. Dept. of Corrections

Respondent.

CASE NO. SC00-2186

RESPONSE TO
AMENDED PETITION FOR WRIT OF HABEAS CORPUS

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

STEPHEN R. WHITE
ASSISTANT ATTORNEY GENERAL
FLORIDA BAR NO. 159089

OFFICE OF THE ATTORNEY
GENERAL
PL-01, THE CAPITOL
TALLAHASSEE, FL 32399-1050
(850) 414-3300 EXT 4579
(850) 487-0997 (FAX)

COUNSEL FOR RESPONDENT

PRELIMINARY STATEMENT

Petitioner, Thomas James Moore, was the defendant in the trial court; this Response will refer to Petitioner as such, Defendant, or by proper name. Respondent, Michael W. Moore will be referenced as such, the prosecution, or the State.

"Petition" and "Response" will indicate, respectively, the Amended Petition for Writ of Habeas Corpus and this Response to Amended Petition for Writ of Habeas Corpus. The Petition will be cited as "Pet," followed by any appropriate page number. The direct-appeal record will be referenced as "R," followed by volume and page numbers.

All bold-type emphasis is supplied, and all other emphasis is contained within original quotations unless the contrary is indicated.

ARGUMENT IN OPPOSITION TO PETITION

Because the State relies upon a number of the standards and principles throughout this Response, they are discussed at this juncture.

In his Petition, Moore tenders nine complaints that his appellate attorney rendered ineffective assistance of counsel. To prevail on any such a claim, Moore must show both that his attorney's performance was professionally deficient and that he was prejudiced by that deficiency. See Strickland v. Washington, 466 U.S. 668 (1984); Johnson v. Dugger, 523 So.2d 161 (Fla. 1988). The deficiency must be such that had it not occurred, the result of the appeal would have been different. See 523 So.2d at 162-63.

In assessing an ineffectiveness claim, the "defendant has the burden of alleging a specific, serious omission or overt act upon which the claim of ineffective assistance of counsel can be based," Freeman v. State, 761 So.2d 1055, 106 (Fla. 2000), citing Knight v. State, 394 So.2d 997 (Fla. 1981).

"[T]he distorting effects of hindsight" must be avoided and the "circumstances of counsel's challenged conduct" must be reconstructed, "evaluat[ing] the conduct from counsel's perspective at the time." Shere v. State, 742 So.2d 215, 219 (Fla. 1999).¹

Second-guessing appellate counsel's choice of issues, or presentation of them, does not meet the Strickland standard. See Shere v. State, 742 So.2d at 219 n.9 (trial counsel); Card v. Dugger, 911 F.2d 1494, 1507, 1510-11 (11th Cir. 1990) ("consistently has refused to second-guess counsel's choice of the manner in which to present testimony relating to a defendant's background").

Appellate counsel need not raise every issue that might possibly prevail on appeal. See Provenzano v. Dugger, 561 So.2d 541, 548-49 (Fla. 1990) ("it is well established that counsel need not raise every nonfrivolous issue revealed by the record"); Atkins v. Dugger, 541 So.2d 1165, 1167 (Fla. 1989) ("the point had so little merit that appellate counsel cannot be faulted for not raising it on appeal"; "the assertion of every conceivable argument often has the effect of diluting the impact of the stronger points").

¹ However, subsequent case law that would support counsel's actions or inactions against a Strickland claim is considered to avoid a "windfall" in which a defendant would benefit from an interpretation in the law that is ultimately abrogated. See Lockhart v. Fretwell, 506 U.S. 364, 113 S.Ct. 838, 841, 122 L.Ed.2d 180 (1993) (8th USCA affirmed U.S. District Court's grant of habeas relief and held that the pertinent state court was bound by the law that existed at the time of the alleged ineffectiveness; USSC reversed Eighth Circuit; Strickland's prohibition against evaluating trial defense counsel's performance against hindsight is a protection for counsel). Under Strickland's prejudice prong, "Unreliability or unfairness does not result if the ineffectiveness of counsel does not deprive the defendant of any substantive or procedural right to which the law entitles him," 506 U.S. at 372, 113 S.Ct. at 844, as ultimately determined by case law.

Appellate counsel is not ineffective if the habeas claim was, in fact, "raised on direct appeal," Atkins v. Dugger, 541 So.2d at 1166-67. Accord Provenzano, 561 So.2d at 548 ("However, appellate counsel raised this claim on appeal, but it was rejected by this Court"). Hall v. Moore, slip op. No. SC00-1599 (Fla. May 10, 2001), recently reiterated this principle and applied it to a mitigator claim:

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

Thus, Appellate counsel is not ineffective for failing to convince this Court to rule in Moore's favor. See Freeman v. State, 761 So.2d 1055, 1071 (Fla. 2000) ("Appellate counsel cannot be ineffective for failing to convince the Court to rule in appellant's favor"), citing Swafford v. Dugger, 569 So.2d 1264, 1266 (Fla. 1990). It is "almost always possible to imagine a more thorough job being done than was actually done," Maxwell v. Wainwright, 490 So.2d 927, 932 (Fla. 1986) (trial counsel), but, that is not the test.

In addition to habeas being inappropriate to contest the manner in which appellate counsel raised a claim, a claim that has been resolved in a previous review of the case is barred as "the law of the case." See Mills v. State, 603 So.2d 482, 486 (Fla. 1992).

"[S]ubstantive claims are procedurally barred either because they were raised on direct appeal and rejected by this Court or could have been raised on direct appeal." Teffeteller v. Dugger, 734 So.2d 1009, 1025 (Fla. 1999)(footnotes omitted). Habeas claims "may not be used to camouflage issues that should have been raised on direct appeal or in a postconviction motion," Rutherford v. Moore, 25 Fla. L. Weekly S891 (Fla. Oct. 12, 2000), citing Thompson v. State, 759 So.2d 650, 657 n.6 (Fla. 2000); Hardwick v. Dugger, 648 So.2d 100, 106 (Fla. 1994); Breedlove v. Singletary, 595 So.2d 8, 10 (Fla. 1992).

Claims properly raised in a previous motion for post-conviction relief are also procedurally barred from a habeas petition. See Scott v. Dugger, 604 So.2d 465, 469-70 (Fla. 1992).²

Page v. U.S., 884 F.2d 300, 302-303 (7th Cir. 1989), held that the defendant failed to show that appellate counsel "omitt[ed] a **dead-bang winner** even while zealously pressing other strong (but unsuccessful) claims."

Thus, would-be appellate claims that were unpreserved by trial defense counsel are generally not grounds for ineffective assistance of appellate counsel. See, e.g., Freeman, 761 So.2d at 1071 ("Appellate counsel cannot be ineffective for failing to raise issues not properly preserved for appeal"); Provenzano v. Dugger, 561 So.2d 541, 548 (Fla. 1990) ("Trial counsel did not object to one of these, thereby precluding an effective argument on appeal"); Atkins v. Dugger, 541 So.2d 1165, 1166 (Fla. 1989) (rejected ineffective assistance of appellate counsel claims as "not properly preserved for appeal by trial counsel, thus precluding appellate review"); Downs v. Wainwright, 476 So.2d 654, 657 (Fla. 1985)("appellate counsel cannot be considered ineffective for failing to raise issues which he was procedurally barred from raising because they were not properly raised at trial").

And, issues that would have been non-meritorious in the direct appeal are not the basis for ineffective assistance of appellate counsel. See, e.g., Freeman v. State, 761 So.2d at 1070-71.

Similarly, the omission of an issue that constitutes "harmless error" is not ineffectiveness. See Freeman, 761 So.2d at 1069.

² Likewise, successive habeas claims are not permissible, nor are claims that should have been raised in a previous habeas petition. See Johnson v. Singletary, 647 So.2d 106, 109 (Fla. 1994), citing Card v. Dugger, 512 So.2d 829 (Fla. 1987).

"[I]neffective assistance of appellate counsel may not be used as a disguise to raise issues which should have been raised on direct appeal or in a postconviction motion," Id.

The bottom-line of the prejudice-prong burdening each ineffectiveness claim is whether "counsel's deficiency prejudices defendant" so that "the defendant is deprived of a "fair [appeal], a[n appeal] whose result is reliable.'" Shere v. State, 742 So.2d 215, 219 (Fla. 1999) (trial counsel).

To summarize in the words of Haliburton v. Singletary, 691 So.2d 466, 472 (Fla. 1997), quoting Pope v. Wainwright, 496 So.2d 798, 800 (Fla. 1986), and Ferguson v. Singletary, 632 So.2d 53, 57 (Fla. 1993):

{T}his Court must determine 'first, 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, second, whether the deficiency in performance compromised the appellate process to such a degree as to undermine confidence in the correctness of the result.'

Under the foregoing standards and principles, each of the Petition's claims fails.

CLAIM I
WAS APPELLATE COUNSEL UNCONSTITUTIONALLY
INEFFECTIVE FOR FAILING TO ARGUE THAT MOORE'S
CONSTITUTIONAL RIGHTS WERE VIOLATED BY HIS
ABSENCE FROM A JUNE 22, 1993, DISCUSSION AMONG
COUNSEL AND BY THE FAILURE TO HAVE THE DISCUSSION
TRANSCRIBED? (Restated)

Moore claims (Pet 6-10) that his rights were violated by his absence at June 22, 1993, "discussions" concerning discovery and a continuance and by the failure to include the transcript of those discussions in the direct-appeal record. He argues that it is "obvious" that the June 22 discussions were a "critical stage" and, in passing, mentions a violation of Fla. R. Cr. P. 3.180(a)(3).

Moore predicates the "critical" nature of June 22 upon its significance for his waiver of speedy trial and the alleged "fail[ure] to advise Mr. Moore of the

consequences of waiving his right to speedy trial" (Pet 8) He claims that if he had known those consequences, he would have "withdrawn" his waiver.

Claim I demonstrates neither Strickland prong. It was not unreasonable for appellate counsel to omit this claim, and its omission was non-prejudicial because it would not have prevailed on direct appeal.

Here, as in Carmichael v. State, 715 So.2d 247, 249 (Fla. 1998), a supposed appellate claim that the defendant was absent during trial court proceedings was procedurally barred because to allow otherwise would allow the defendant to

await the trial's conclusion, and then--in the event of an adverse outcome--raise the issue on appeal for the first time. The price of such an 'ambush'--i.e., a new trial--is prohibitively steep in terms of resources and delay--and basic fairness.

See also Hill v. State, 549 So.2d 179, 182 (Fla. 1989)("[f]ailure to present the [constitutional due process] ground below procedurally bars appellant from presenting the argument on appeal"). Here, when the trial court announced on June 23 that there were discussions on June 22, Moore should have raised this matter rather than wait for an "adverse outcome." See State v. Ellis, 718 So.2d 749, 749-50 (Fla. 1998) ("although Ellis was present in the courtroom when the jury was selected, the record fails to show that either he or his lawyer expressed any interest in Ellis being present at the bench"); Cole v. State, 701 So.2d 845, 850 (Fla. 1997) ("claim is also procedurally barred because Cole did not make a contemporaneous objection to any bench conferences being held in the hallway or to his desire to participate in any of the conferences"); Gudinas v. State, 693 So.2d 953, 961-62 (Fla. 1997) ("Gudinas did not raise a contemporaneous objection to his exclusion from the in-chambers discussion between the attorneys and the trial judge. Therefore, we agree with the State that this issue is procedurally barred"; also held not fundamental error under the facts there). Because, this claim would have been procedurally barred on appeal, it was not ineffective nor prejudicial to omit it from the appeal.

U.S. v. Gagnon, 470 U.S. 522, 105 S.Ct. 1482 (1985), concerned an event more significant than the one here. There, the defendant was absent during an event in the trial itself, but the "encounter between the judge, the juror, and Gagnon's lawyer was a short interlude in a complex trial." Here, there is nothing to suggest anything other than the June 22 "discussions" were but a "short interlude in [otherwise] complex" proceedings. Here and there, the trial court announced the event in open court, yet the defendant expressed no concern over it at the time. Here and there, the right must be "assert[ed] ... at the time; [it] ... may not [be] claim[ed] ... for the first time on appeal from a sentence entered on a jury's verdict of 'guilty.'"

Beyond this claim being procedurally barred from the appeal, it also does not bear fruit upon closer analysis. In determining whether the omission of such a claim on direct appeal was "of such magnitude as to constitute a serious error or substantial deficiency falling measurably outside the range of professionally acceptable performance and *** compromis[ing] the appellate process to such a degree as to undermine confidence in the correctness of the result," Pomeranz v. State, 703 So.2d 465, 471 (Fla. 1997), stated the threshold principle concerning the absence of a defendant at a "pretrial conference":

In situations involving violations of rule 3.180, 'it is the constitutional question of whether fundamental fairness has been thwarted which determines whether the error is reversible.' Garcia v. State, 492 So.2d 360, 364 (Fla. 1986).

To prevail on this claim, Moore bears to burden, inter alia, of "alleg[ing] facts that would establish that his counsel's actions constituted a serious deficiency in his performance as an appellate advocate and ... establish prejudice," Downs v. Wainwright, 476 So.2d 654 (Fla. 1985) (state's contention, to which this Court agreed; "Alleging that he was denied effective assistance of appellate counsel and that the appellate review was based on an improper record, Ernest Charles Downs petitions for writ of habeas corpus").

Here, in contrast to allegations rooted in the Confrontation Clause or fairness-based due process, See generally Muhammad v. State, 26 Fla. L. Weekly S37 (Fla. 2001), Moore speculates that if he were present on June 22, he would have changed his mind regarding the waiver and continuance(s) he had endorsed before and after the June 22 "discussions" regarding the procedural matter, i.e., procedural speedy trial. Moreover, Moore's speculation (Pet 8-9) improperly relies upon his hindsight of steps the prosecution took during the continuance, while ignoring the plethora of pleadings his counsel filed on his behalf in that period. (See R I 12 et seq, II; transcript of 10/20/1993 motions hearings at R V 30-109) As here, in Stano v. State, 473 So.2d 1282, 1288 (Fla. 1985) ("state presented two motions at the status conference"), the totality of the record demonstrates that Moore suffered no prejudice. Here, because nothing was decided differently on June 22 than had been decided at other junctures with Moore present, such a claim on direct appeal would not have been meritorious, rendering this appellate-ineffectiveness claim ineffectual. The State elaborates.

May 11, 1993, had been scheduled as the "final pretrial date." (R V 15, 17) On May 11, the month prior to the "discussion" targeted here, **Moore was present** in open court (See R V 16-17), when defense counsel discussed delaying the trial date due to "a great deal of discovery that has to be done." (R V 18-20) Defense counsel continued, **in Moore's presence**:

Your Honor, I would suggest that, and I would request, an additional pretrial. This is a very complicated case. **I have discussed it with Mr. Moore.** My advice is that we do need an additional pretrial to have this case properly prepared for trial. **Mr. Moore is willing to execute a waiver of speedy trial.**

(R V 19-20) After the trial court expressed reservations about a waiver of speedy trial, defense counsel reiterated, **in Moore's presence**, that he was prepared to waive it:

[PROSECUTOR]: I was under the impression [defense counsel] was going to waive speedy trial.

[DEFENSE COUNSEL]: Yes, sir, I'm prepared to do that.

(R V 22) After a recess, the parties announced to the trial court that they had coordinated calendars and jointly recommended a trial date of July 12. On May 11, 1993, **Moore personally executed** a written waiver of speedy trial, which was filed on June 23, 1993. (R II 240)

On June 23, 1993, at the open-court hearing excerpted in the Petition (Pet 7), the trial court and counsel discussed possible trial dates beyond July 12. (R V 25) At the June 23 hearing, defense counsel again indicated his need for further discovery (R V 24-25) and again confirmed the waiver of speedy trial. (See R V 25-26) At the June 23 hearing, the trial was scheduled for August 30. (R V 25)

On August 27, 1993, in open court, defense counsel requested another continuance, and the trial court elicited Moore's explicit consent:

THE COURT: Mr. Moore, do you understand that [defense counsel] is asking to continue this trial which is scheduled this Monday? I indicated to him that the earliest time I have would be October 25th. I have plenty of time next week. That's what I have scheduled it for.

MR. MOORE: Yes, sir.

THE COURT: October 25th would be the earliest date I could reschedule the trial;

Do you understand that?

MR. MOORE: Yes, sir.

(R V 28) The trial court then announced, in Moore's presence, that speedy trial previously had been waived by the defense's prior motion for continuance. (R V 28)

The foregoing reported events show that, contrary to the Petition (Pet 8), Moore was, in fact, "involve[d]" in the decision to waive his procedural speedy trial rights by signing the May 11 waiver and by, after being informed of the June 22 "discussions," explicitly endorsing continuing the trial. The trial was conducted the week of October 25 (See R VI et seq), that is, the very week to which Moore personally and explicitly agreed.

In sum, within a few weeks prior to the June 22 "discussions," Moore personally agreed to waive speedy trial. The day after the "discussions," Moore failed to contest his defense counsel's efforts to delay the trial and failed to contest or even question the waiver he had previously executed. And, then a few weeks later, Moore explicitly endorsed continuing the case.

Thus, the June 22 "discussions" merely mirrored what Moore had agreed to on other days. The context of June 22, as shown in the direct-appeal record, affirmatively shows that nothing adverse to Moore's wishes occurred that day. Nothing "critical" occurred on June 22. The appellate process was not compromised nor confidence in its outcome undermined by the omission of any direct-appeal claim targeting the June 22 "discussions."

Furthermore, here the defense had requested more than one continuance, any one of which would have waived speedy trial, See Stewart v. State, 491 So.2d 271, 272 (Fla. 1986) (collecting authorities), and for the absence of any waiver to have any impact, Moore would have been required to invoke and satisfy the processes of Fla. R. Cr. P. 3.191(h),(j), and (p) (1993),³ matters that his Petition does not even perfunctorily allege, much less establish, rendering this habeas claim facially insufficient.

Applying Garcia v. State, 492 So.2d 360, 363 (Fla. 1986) ("no adverse rulings were made on the motions"), Moore has "not shown that he was prejudiced by his absence." See also Provenzano v. Dugger, 561 So.2d 541, 547-48 (Fla. 1990) (alleged defendant's absence at "several pretrial motions" as basis for ineffective assistance of appellate counsel claim; "Provenzano could not have made a meaningful contribution to counsel's legal arguments on these occasions"; "appellate

³ Indeed, Fla. R. Cr. P. 3.191(j)(2) provides that the actions of defense counsel alone can prevent procedural-speedy-trial discharge.

counsel cannot be considered ineffective for failing to argue a point which would have had little chance of success before this Court"); Rutherford v. Moore, 25 Fla. L. Weekly S891(Fla. 2000) ("because the trial judge and attorneys only discussed legal arguments at the charge conference, Rutherford's absence did not frustrate the fairness of the proceedings").

Cotton v. State, 764 So.2d 2, 3 (Fla. 4th DCA 1998), is persuasive. Here and there, defendant alleged that he was not present during an event in which a defense continuance was discussed. Here and there, the context of the event, at which the defendant was not present, indicates that nothing occurred there of a magnitude contemplated in Rule 3.180(a)(3). Here and there, after the targeted event, defense counsel moved for a continuance. A fortiori, here, the defendant personally agreed to delay the trial.

Moore's allegation (Pet 8) that, if he had been present at the June 22 "discussions," he would have "withdrawn" his waiver is nugatory for several reasons. It overlooks not only Fla. R. Cr. P. 3.191(h),(j), and (p) (1993), not only his failures to interpose any objection when continuances and the waiver were discussed at other times, and not only his explicit endorsement of them, but also, it interjects additional alleged facts that are not proper in this habeas proceeding. He essentially is arguing that trial-level defense counsel was ineffective due to that counsel's failure to involve him in his discussions. If appellate counsel had attempted to argue such additional facts, de hors the record on direct appeal, his brief would have been subject to a motion to strike.

Moore essentially claims (Pet 8-9) that **trial** defense counsel was ineffective due to the consequences of continuing the case. In addition to improperly injecting hindsight, at issue here is appellate counsel, not trial counsel. Similarly, Moore

continues (Pet 8-9) by improperly alleging here that the result of the trial was unreliable. The issue here is whether the result of the **appeal** was unreliable.⁴

In this claim, Moore (Pet 9-10) also attacks the absence of a June 22 transcript from the record on direct appeal.⁵ However, his claim fails to, in any way specify, what significance would have appeared in the June 22 transcript. To the contrary, as discussed supra, he improperly alleges (Pet 8) facts that would not have appeared in the transcript. Further, all of the reported proceedings immediately before and after June 22 indicate an unabated and uninterrupted theme that defense counsel, with Moore's consent, needed more time to prepare for trial and to prepare a multitude on motions (See R I 12 et seq, II; transcript of 10/20/1993 motions hearings at R V 30-109). Compare Rose v. State, 617 So.2d 291, 296 (Fla. 1993) (appeal from denial of post conviction motion; in camera discussion with defense counsel regarding counsel's conflict with defendant; "[n]o evidence was presented or discussed"; "no discussion of anything that would bear on the judge's ultimate sentencing decision in this case").

Concerning the transcript, Moore cites (Pet 9) to Delap v. State, 350 So.2d 462 (Fla. 1977), but the stark contrast between the facts there and those here belie Moore's claim. In Delap, 350 So.2d at 463, the trial court summarized the missing transcripts:

It further appears to the Court that no portions of the transcript of the jury charge conferences; charge to the jury in both the trial and penalty phases; voir dire of the jury; or closing arguments of counsel in both the trial and

⁴ Indeed, Moore's unreliability allegations are conclusory and therefore facially insufficient. "For the record," the State denies that the trial, as well as the appeal, were unreliable in any way.

⁵ Moore (pet 10) also summarily throws in an ineffective-assistance-of-post-conviction counsel claim, which fatally lacks facial specificity and which is improper in this habeas proceeding.

penalty phases regarding the trial of this cause have been filed with the Clerk as directed by said Order of May 11, 1977.

Here, the "missing" transcript concerns events that were mirrored by events before and after the "discussions" and that do not implicate, as such, any different trial-level result, such as a speedy trial discharge.

Songer v. Wainwright, 423 So.2d 355, 356 (Fla. 1982), applied Delap and rejected a claim of ineffective assistance of appellate counsel. There, "appellate counsel failed to include the charge conference in the record and failed to contest its absence." Here, as there, no prejudice attached to the absence of a transcript; Moore has failed to even allege that the transcript would show anything different from what the trial court summarized on June 23. Moreover, as here, no timely objection was interposed, precluding "appellate counsel ... from raising the question on appeal."

Hardwick v. Dugger, 648 So.2d 100, 105 (Fla. 1994), rejected an ineffective assistance of trial counsel claim regarding bench conferences at which he was not present and that were not recorded. Hardwick indicated that the test is whether the "absence of recorded bench conferences ... renders review impossible." Here, assuming arguendo the unavailability of a transcript of June 22, review would have been very possible and to the appeal's detriment due to the context of the events surrounding June 22.

CLAIM II
WAS APPELLATE COUNSEL UNCONSTITUTIONALLY
INEFFECTIVE FOR FAILING TO ARGUE THAT MOORE'S
SENTENCE WAS DISPROPORTIONATE? (Restated)

This Court explicitly addressed proportionality in its opinion affirming the death penalty in this case. See Moore v. State, 701 So.2d 545, 551 (Fla. 1997). Moore held that the death sentence here is proportionate. Therefore, the State only briefly responds to this claim.

The holding of Moore v. State, 701 So.2d 545, is the law of the case. Claim II is essentially a motion for rehearing over three years after this Court rendered its 1999 direct-appeal opinion.

Arguendo, if this motion for rehearing is entertained at all, Moore's contention (Pet 12-13) that this Court's proportionality analysis was a "mere counting of numbers" is itself erroneous. The Opinion carefully considered the nature of the aggravators and mitigators. The Opinion was not erroneous.

Moreover, the analysis and authorities cited in Moore, 701 So.2d at 551, demonstrate that if appellate counsel had raised proportionality, it would have been rejected on its merits. Indeed, in Trease v. State, 768 So.2d 1050, 1056 (Fla. 2000), this Court recently re-endorsed the holding and analysis here:

In *Moore v. State*, 701 So.2d 545 (Fla. 1997)(upholding death sentence where aggravators included prior violent felonies, avoiding arrest, and pecuniary gain; and where statutory mitigator of defendant's age (nineteen) was established), this Court explained:

We have upheld the death sentence in other cases based on only two of the three aggravating factors present here.... In *Melton v. State*, 638 So.2d 927 (Fla. 1994), we held the death penalty was proportionate where there were two aggravating factors (the murder was committed for pecuniary gain and the defendant had been convicted of a prior violent felony) and some nonstatutory mitigation. We find that the death penalty was proportionate here. *See also Consalvo* [, 697 So.2d at 811, 820] (holding death penalty was proportionate where there were two aggravating factors--avoiding arrest and commission during the course of a burglary--with some nonstatutory mitigation).

Id. at 551-52.

Appellate counsel was not ineffective for not raising a non-meritorious claim, and Moore has failed to show requisite prejudice.

Moore's instant motion for rehearing devotes pages (Pet 13-20) to isolating a single factor⁶ then citing cases involving reversals of death sentences that also

⁶ Interestingly, for example, Moore now posits (Pet 15-17) intoxication or addiction as mitigators. As purported support for these mitigators, he cites to his trial testimony (R XI 1089-90, 1101, 1108) that he had "regularly" drunk moonshine with the victim, was invited to drink with the

involved that factor. This approach is belied by the well-settled principle that this Court's "proportionality review requires it to 'consider the totality of circumstances in a case, and to compare it with other capital cases,'" Holland v. State, 25 Fla. L. Weekly S796 (Fla. 2000) (discussion of three aggravators and two nonstatutory mitigators; "death penalty is proportionate in this case"). See also, e.g., Sliney v. State, 699 So.2d 662, 667, 672 (Fla. 1997) ("consider the totality of the circumstances in a case and compare it with other capital cases"; no HAC but "brutal murder"; aggravators were "engaged in or was an accomplice in the commission of a robbery" and "committed for the purpose of avoiding or preventing a lawful arrest"; mitigators were "youthful age" (age 19), "no significant prior criminal history," and several nonstatutory mitigators; "trial court found that Witteman's life sentence for the same offenses was not a mitigating factor in this case because the two defendants were not equally culpable"; upheld death sentence). See also authorities cited in State's direct-appeal Answer Brief, pp. 68-70.

CLAIM III
WAS APPELLATE COUNSEL UNCONSTITUTIONALLY
INEFFECTIVE FOR FAILING TO ARGUE THAT MOORE'S
CONSTITUTIONAL RIGHTS WERE VIOLATED BY THE
PROSECUTOR'S PEREMPTORY CHALLENGES THAT THE
PROSECUTOR JUSTIFIED BASED UPON THE PROSPECTIVE
JURORS' ATTITUDES ON THE DEATH PENALTY? (Restated)

victim the day of this murder, and had smoked marijuana the day of the murder. However, drinking "[e]very now and then" with the victim (R XI 1089-90) does not remotely establish addiction, drinking a cup of shine (R XI 1101) does not remotely establish intoxication, and "fir[ing] up" a joint of "reefer" (R XI 1108) after leaving the victim is irrelevant to supposed intoxication at the pertinent time. Indeed, intoxication would have undermined the defendant's own trial testimony in which he supposedly remembered accurately the events before and after his interaction with the victim.

Moore argues (Pet 21) that the prosecutor masked "discriminatory intent" in exercising peremptory challenges by posing as the reason for the challenges the prospective jurors' attitude on the death penalty.

It was not Strickland ineffectiveness for appellate counsel to omit this claim from the direct appeal because such an appellate claim was procedurally barred, and it would have been non-meritorious. Therefore, counsel's performance was not deficient, and no prejudice has been established here.

When the composition of the trial jury was determined (See R VII 375-88), defense counsel failed to alert the trial judge that he "still believed reversible error had occurred" by renewing any contention of racial discrimination. Instead, when the trial judge announced his intent to swear and instruct the jury, defense counsel each indicated, "Sounds good to me." (R VII 380)

For this reason alone, any appellate claim, as procedurally barred, would not have prevailed. See Joiner v. State, 618 So.2d 174, 176 (Fla. 1993) ("At that point the trial judge could have exercised discretion to either recall the challenged juror for service on the panel, strike the entire panel and begin anew, or stand by the earlier ruling"). See also Johnson v. State, 750 So.2d 22, 26 (Fla. 1999), citing and parenthetically summarizing Schummer v. State, 654 So.2d 1215 (Fla. 1st DCA 1995) (stating that to preserve error relating to disallowance of peremptory challenge under *State v. Neil*, 457 So.2d 481 (Fla. 1984), defendant must make objection to jury panel prior to acceptance of jury).

Here, as in Melbourne v. State, 679 So.2d 759, 765 (Fla. 1996), "[i]t is entirely possible⁷ that events transpiring subsequent to the initial objection caused Melbourne

⁷ Here, it is much more likely than "possible." After the end of the discussion of venireperson Carter (R VII 368), the defense peremptorily challenged a white male, and the State noted that the defense "continues to strike every white male they come across" (R VII 368-69), but, out of "an

to become satisfied with the jury and abandon her claim." Therefore, Melbourne and Moore, respectively, failed to "preserve this issue for review because [they] did not renew [their] objection before the jury was sworn." Id.

If the merits of any claim challenging the prosecutor's peremptory challenges were ever reached, they would have none. It is clear that a venireperson's death-penalty-attitude is a race-neutral reason. See Hudson v. State, 708 So.2d 256, 261 (Fla. 1998) (venireperson said "a lot of doubt in my mind" whether he could recommend the death penalty but later said he "could follow the law and impose the death penalty"; "we do not find that the trial court clearly erred in sustaining the peremptory strike of venireperson Siplin. Additionally, we find this claim to be procedurally barred because Hudson accepted the jury without renewing his challenge").

Moreover, even though it is facially race-neutral, Moore would have also borne the burdens on appeal of overcoming the presumption that peremptories are "exercised in a nondiscriminatory manner" and the principle that "the trial court's decision [concerning the prosecutor's tendered reason for the strike] turns primarily on an assessment of credibility and will be affirmed on appeal unless clearly erroneous." 679 So.2d 764-65. Deference to the trial judge recognizes the nuances of

abundance of caution," the trial court denied "any Neal challenge" (R VII 370-71). Then, the defense peremptorily challenged Mr. Curry, ostensibly because of his attitudes on the death penalty. (See R VII 371-72) Mr. Stout was then removed for cause because of his pro-death-penalty views. (R VII 372) A few more peremptories were used (R VII 372-74), including the State's use of one, due to death penalty attitudes, on a person who "goes to church" with the prosecutor. The defense successfully challenged Mr. Clifton for cause. (R VII 374-75) In selecting the alternates, the defense challenged for cause Mr. Hutchinson, a black male, based on his death penalty attitude. (R VII 376-77) The defense also succeeded in removing Mr. Geddis for cause based upon his death penalty attitude. (R VII 377-78)

the courtroom that cannot be captured in the cold record on appeal. Those nuances include, for example, not only the gestures and intonation of the prospective jurors but also of counsel in tendering the reason(s) for the strike.

Applying the words of Smith v. State, 699 So.2d 629, 637 (Fla. 1997) (inter alia, juror's attitude on death penalty), as to each complaint, "the explanation is facially race-neutral and the trial court believe[d] in light of the circumstances surrounding the strike [that] the explanation is not a pretext," resulting in sustaining the strike.

Even erroneously disregarding all of the above, Claim III still has no merit. For example, Moore complains (Pet 21-23) about the prosecutor's challenge to venireperson Dunbar. Moore's first complaint (Pet 22) on this venireperson amounts to an argument that he could not have been excused for cause, but this misses the point that the appellate issue would concern a peremptory challenge.⁸ Moore, "second[ly]" complains (Pet 22-23) that the trial court ignored the implications of the State's failure to strike venireperson Floss. This is incorrect because the trial judge considered this argument and noted that Floss's relationship with Raymond David was not at the same level as Dunbar's kinship with Charlie Adams. (R VII 357-58) In fact, Floss had qualified supposedly knowing Ray David "real well" with "I hardly see him" (See R VI 181-82). Moreover, the appellate record shows that Charlie Adams handled capital cases at the time (R VII 356), whereas there was no such indication in the record regarding Raymond David (See R VI 181-82). Appellate pursuit of this and the other Claim III arguments would have been fruitless, even if

⁸ Likewise, Moore's arguments concerning venireperson Pitts (Pet 23-24), Washington (Pet 24-25), and Carter (Pet 25) are fruitless complaints that there was insufficient ground to excuse each for cause. Death penalty attitude as a race neutral reason for a peremptory challenge, See, e.g., Hudson, even though arguably insufficient for a challenge for cause, is fatal to this argument.

they had been preserved. Appellate counsel was not ineffective, and, if raised, this claim would not have produced a different appellate result.

CLAIM IV
WAS APPELLATE COUNSEL UNCONSTITUTIONALLY
INEFFECTIVE FOR FAILING TO ARGUE THAT THE
PROSECUTOR'S ARGUMENTS CONSTITUTED
FUNDAMENTAL ERROR? (Restated)

In Claim IV Moore focuses (Pet 27) upon an excerpt of the prosecutor's argument in which the prosecutor characterized its witness as a "sinner" and Moore as the "devil" and in which she said she did the best she could. He contends that this prosecutor argument was improper and cites or discusses several cases as purported support for that contention (See Pet 26, 27, 28, 29) and then jumps to the conclusion that it constituted fundamental error, citing (Pet 30) only Kilgore v. State, 688 So.2d 895, 898 (Fla. 1996), as support for such a conclusion.

While the State contends infra that the prosecutor's comments were not improper, any appellate claim based upon it would have been procedurally barred. See, e.g., Byrd v. Singletary, 655 So.2d 67 (Fla. 1995) ("Byrd argues that his appellate counsel was ineffective for failing to raise *** (g) the prosecutor improperly vouched for the credibility of the State's witnesses and case"; "substance of issue[] ... (g), [was] raised in Byrd's rule 3.850 motion and were rejected because his trial counsel either failed to preserve the issues for review or because the issues were otherwise without merit"); Bonifay v. State, 680 So.2d 413, 418 (Fla. 1996) (procedurally barred; "We have carefully reviewed the prosecutor's closing argument and do not find that the biblical references [even though opinion cautioned against it] were fundamental error or even harmful error in the context of the entire argument. We also do not find, in the context of this case, the prosecutor's singular use of the word "exterminate" [even though improper] to be harmful error").

Accordingly, a claim attacking closing argument that has no basis in an objection is not at a level so obvious that any reasonable appellate counsel would brief it. See Roberts v. State, 568 So.2d 1255, 1261 (Fla. 1990) ("Roberts also maintains that appellate counsel was ineffective for failing to challenge improper closing argument on direct appeal. Because no objection to the comments complained of was made by trial counsel, appellate counsel was not deficient for failing to raise this point on appeal").

It is also apparent at the outset that Moore has failed to carry his habeas burden of demonstrating that the supposed trial-level error was so obviously at a fundamental level that any reasonable appellate attorney would have included it in the direct appeal. If, armed with several years of hindsight, his Petition cannot tender any case that holds that these comments were at a fundamental level, then he cannot reasonably argue that appellate counsel was incompetent for failing to include the claim. Thus, Moore has failed to show that appellate counsel omitted reversible error that would have been obvious to any competent appellate counsel.

Moreover, not only was the prosecutor's comment "fundamental-less," it was proper, given the total context of the record. At the outset, it is apparent that the prosecutor's reference to "a crime conceived in hell" indicated the nature of this crime, not the neighborhood, which, no reasonable juror would be convinced was actually "hell" anyway. Moore's excerpts concerning the prosecutor dealing with the co-defendants the "best [she] knew how" and concerning the "devil" overlook that the prosecutor's argument was a fair response to trial defense counsel repeatedly accusing the State's witnesses of lying and, essentially, the State having improperly elicited their lies with deals. Thus, defense counsel argued near the beginning of his closing argument:

Now, in this particular case we have heard from about half of Grand Park and about half of Flag Street. I won't even begin to suggest that I can make a lot of sense out of it, or that I can explain the inconsistencies in the testimony

which you heard from the State's witnesses. Suffice it to say that it's clear that not everyone was telling the truth.

(R XII 1239) Defense counsel then continued by accusing several State witnesses of lying. For example,

[W]hat is undisputed is that nothing Carlos Clemmons told you or told ... or told ... can possibly be the truth.

(R XII 1241) His accusations continued, for example: "you know it's a lie *** repeats the lie" (R XII 1243); "Chris Shorter says that Thomas Moore indicated that after killing Mr. Parrish he took the keys and threw them in a ditch. That's a lie" (R XII 1246); "somebody is doing some serious lying ... because it can't be true both ways" (R XII 1248); "... Randy Jackson ... a two-time convicted felon who asserts Thomas Moore admitted to killing Mr. Parrish" (R XII 1248); "Randy Jackson ... lied ... lied" (R XII 1249); "become so accustomed to lying for Carlos that he even lies about whether Carlos was in school that day" (R XII 1252); "Carlos Clemons ... did lie to you" (R XII 1258). Thus, in the passages contested in this claim, the prosecutor was fairly arguing that the State did not choose these as its witnesses, who were not angels; the Defendant, his own witness, was no angel either (See R XI 1088 et seq.).

Thus, defense counsel attacked the deals the State made with its witnesses, which resulted in the multitude of supposed lies. (See R XII 1256-62)

Defense counsel, having attacked the character of the State witnesses and the deals the State made with them, invited the prosecutor's rebuttal as a fair response. And, a fortiori, in the context of attempting to persuade the jury to believe Defendant rather than the State's witnesses and after characterizing Carlos Clemmons and Vincent Gaines (R XII 1254) as "the two little thugs who were toting guns through Grand Park that day" (R XII 1260) and almost immediately prior to the prosecutor's

rebuttal argument, Defense counsel in his argument, raised the specter to "angelic"⁹ proportions:

Thomas Moore is no angel. He has done wrong in the past. But Thomas Moore is still provided the protection that our society gives to all citizens.

(R XII 1260-61) Accordingly, defense counsel earlier argued:

These are not innocents in the streets. These are streetwise kids who carry guns and who have played the game.

(R XII 1255)

Thus, the prosecutor's argument would not have been the basis for relief on direct appeal. See Street v. State, 636 So.2d 1297, 1303 (Fla. 1994) (prosecutor argued: "Should we excuse the sinner? Should we thank the sinner? Is that our job; is that our obligation under the law?"; rejected claim that trial court improperly allowed these arguments; held that the prosecutor's argument was "in rebuttal" to defense counsel's argument). See also Holton v. State, 573 So.2d 284, 288-89 (Fla. 1990) (comments that defendant's mind was "twisted" and that no similar crime had been committed since defendant's arrest; held, harmless); Sochor v. State, 619 So.2d 285, 290, 290 n. 7 (Fla. 1993) (held that "claimed errors, taken individually or collectively, do not constitute fundamental error"; claimed errors included "prosecutorial comments on facts outside the evidence," "opinions of government witnesses as to Sochor's veracity and guilt," a comparison of Sochor to Ted Bundy, and perjured testimony from a jailhouse informant).

Cain v. Stegall, 111 F.3d 131 (6th Cir. 1997) (unpublished opinion), persuasively put it:

The remarks complained of here were hardly likely to persuade the jury that Mr. Cain was in fact the devil or was in league with the devil. The prosecutor's conduct did not render the trial fundamentally unfair. Cf. United States v. Frost, 914 F.2d 756, 771 (6th Cir.1990) (likening defendants to

⁹ It is a common belief among Christians that the devil is a fallen angel

Benedict Arnold and Judas Iscariot was not "so 'egregious' as to result in a miscarriage of justice").

Here, the evidence showing what Moore did in committing the crime proved the elements of the offense, and certainly, Moore cannot reasonably contend that the prosecutor persuaded the jury that he was, in fact, the devil. See also U.S. v. Victoria, 876 F.2d 1009, 1012 (1st Cir. 1989) (affirmed conviction; "prosecutor's reference to the odor of drugs as 'the stink of the rotten junk;' his warning of the threat to 'poison our children' posed by drug smuggling; and his statement that appellant was able 'to distinguish between good and evil ... [t]o see the way of God and the devil.'"; "[a]though this language, taken out of context, might seem strong, ... [a]fter reading these remarks in context, we have concluded that they could not have altered the outcome of the trial").

Moreover, even if the prosecutor's comments were error and even if they had been preserved, they would have been harmless in light of the totality of the record of the prosecutor's arguments, the trial court's jury instructions, and the evidence showing Moore's guilt. See State v. DiGuilio, 491 So.2d 1129, 1130 (Fla. 1986).

For each of these reasons, it was not unreasonable for appellate counsel to omit this claim. This would have been no "dead bang" or obvious winner, or anything close to it, on appeal. To the contrary, it would not have prevailed; Moore has failed to establish any prejudice by its omission. The Petition has failed to satisfy either Strickland prong.

CLAIM V
**WAS APPELLATE COUNSEL UNCONSTITUTIONALLY
INEFFECTIVE FOR FAILING TO ARGUE THAT THE
TRIAL COURT COMMITTED FUNDAMENTAL ERROR
IN ALLOWING THE PENALTY-PHASE JURY TO HEAR
ASPECTS OF MOORE'S PRIOR ARMED ROBBERY?
(Restated)**

As in other habeas claims, even armed with years of hindsight, Moore fails to cite to a case that would have established obviousness of including this claim to any reasonable appellate counsel.

This claim is procedurally barred. It does not rise to the level of fundamental error. See Sochor v. State, 580 So.2d 595, 602 (Fla. 1991) (rejected as procedurally barred, and alternatively on merits, "conten[tion] that the state introduced improper evidence of prior violent acts through the testimony of his ex-wife, Patricia Neal, and introduced improper hearsay testimony of, and his taped confession to, a rape in Michigan of which there was no conviction"), vacated on other ground, 504 U.S. 527, 112 S.Ct. 2114 (1992).

Moreover, here, the two-page testimony of the detective, including his passing description of the victim's age, sex, race, and name, was not a feature of the trial and was therefore proper under Rodriguez v. State, 753 So.2d 29, 44-45 (Fla. 2000), and the authorities cited in it:

Details of prior felony convictions involving the use or threat of violence to the victim are admissible in the penalty phase of a capital trial, provided the defendant has a fair opportunity to rebut any hearsay testimony. *See Rhodes v. State*, 547 So.2d 1201, 1204 (Fla. 1989); *Tompkins v. State*, 502 So.2d 415, 419 (Fla. 1986).

In the case of prior violent felony convictions, because those details are admissible, it is generally beneficial to the defendant for the jury to hear about those details from a neutral law enforcement official rather than from prior witnesses or victims. In fact, we have cautioned the State to ensure that the evidence of prior crimes does not become a feature of the penalty phase proceedings. *See Finney v. State*, 660 So.2d 674, 683-84 (Fla. 1995); *see also Duncan v. State*, 619 So.2d 279, 282 (Fla. 1993) (stating that details of prior felony convictions should not be made a feature of the penalty phase proceedings); *Stano v. State*, 473 So.2d 1282, 1289 (Fla. 1985) (same).

Here, there is nothing to suggest that detective's mention of the race of the victim was anything more than a passing and inconsequential reference, and Moore's speculation that there is a possibility that a juror might know Cynthia Hyman¹⁰ is not the stuff of

¹⁰ Indeed, it is common to introduce judgments and sentences into evidence, as was done here, and it is axiomatic

reversal, especially not fundamental error. If the "photographs of the body and the coroner's report" of a prior violent felony were admissible in Jones v. State, 748 So.2d 1012, 1026 (Fla. 1999), then certainly the brief description of the victim, including her name, sex, race, and age, were admissible. A fortiori, their extremely brief admission into evidence was not fundamental error, and, in light of the jury instructions and other evidence, any supposed error was harmless.

In conclusion, it was not unreasonable for appellate counsel to omit this claim, and its omission was non-prejudicial because it would not have prevailed. Neither Strickland prong has been demonstrated.

CLAIM VI
WAS APPELLATE COUNSEL UNCONSTITUTIONALLY
INEFFECTIVE FOR FAILING TO ARGUE THAT VICTIM-
IMPACT EVIDENCE AND THE ATTENDANT STATUTE
DEPRIVED MOORE OF A FAIR SENTENCING? (Restated)

No. This claim is a variation on the theme that this Court addressed on direct appeal. The following is the law of the case, constitutes a procedural bar to the claim here, and contains a sound analysis warranting the rejecting of this claim on its merits, if they were to be addressed:

Moore's sixth claim, that the judge admitted improper victim-impact evidence, is meritless. Doris Parrish, the victim's daughter, testified as to the impact of her father's death:

Q. Ms. Parrish, could you please tell these jurors what was unique about John Edward Parrish, what was unique about him in his community?

A. My dad was a good man. He never bothered nobody. And he was very free-hearted, you know. He loved everybody.

The judge ruled that the testimony would be allowed, after the State argued the evidence did show uniqueness in a community 'where shots are heard routinely and where crime occurs routinely.'

The United States Supreme Court has held that the Eighth Amendment to the United States Constitution does not bar the State from presenting evidence about the victim and the impact of the murder on the victim's family wherever state law permitted its admission. *Payne v. Tennessee*, 501 U.S. 808, 827, 111 S.Ct. 2597, 2609, 115 L.Ed.2d 720 (1991). Accordingly, the

that they frequently contain the victim's name.

legislature enacted section 921.141(7), Florida Statutes (1993), stating that victim-impact evidence would be allowed where it showed 'the victim's uniqueness as an individual human being and the resultant loss to the community's members by the victim's death.' *See* Ch. 92-81, § 1, Laws of Fla.

We find no abuse of discretion in allowing the evidence. As we said in *Bonifay v. State*, 680 So.2d 413 (Fla. 1996):

Clearly, the boundaries of relevance under the statute include evidence concerning the impact to family members. Family members are unique to each other by reason of the relationship and the role each has in the family. A loss to the family is a loss to both the community of the family and to the larger community outside the family.

Id. at 419-20. Here, the judge also found that because of the nature of the specific community in which the victim lived, the evidence was admissible to show a loss to that community. Therefore, we find no abuse of discretion in admitting the evidence.

701 So.2d 550-51. Thus, the statute provides for the legitimate and properly-regulated admission into evidence of victim-impact evidence. Anything that is "prejudicial" about this evidence to the defendant was wrought by his own crime and remains inherent in the proper consideration of the victim's uniqueness and his loss to the community, as approved by this Court and the United States Supreme Court.

Further, the fact that this claim was raised on direct appeal bars it here. Moore is quibbling with the manner in which appellate counsel raised it, which is not a ground for habeas relief.

See also *Burns v. State*, 699 So.2d 646, 653 (Fla. 1997) ("we have rejected Burns' argument that victim impact evidence is irrelevant under Florida's sentencing statute because it does not go to any aggravator or to rebut any mitigator"; "we find to be without merit Burns' contention that victim impact evidence violates equal protection because it may encourage the jury to give different weight to the value of different victims' lives"; "victim impact evidence which is admissible pursuant to section 921.141(7) in the resentencing proceeding"), citing, inter alia, *Bonifay v. State*, 680 So.2d 413, 419 (Fla. 1996), and *Windom v. State*, 656 So.2d 432, 439 (Fla. 1995); *Hardwick v. Dugger*, 648 So.2d 100, 105 (Fla. 1994) ("merits of ... Booth claim ... are not cognizable in this habeas corpus proceeding"; "Booth claims

are procedurally barred in postconviction proceedings if not objected to at trial or raised on direct appeal").

CLAIM VII
WAS APPELLATE COUNSEL UNCONSTITUTIONALLY
INEFFECTIVE FOR FAILING TO ARGUE THAT THE
STANDARD PENALTY-PHASE JURY INSTRUCTIONS
IMPROPERLY SHIFTED THE BURDEN OF PROOF TO
MOORE? (Restated)

No. Here, where the trial court gave the standard jury instructions, Compare R XIV 1543-49 with Fla. Std. Jury Instr. (Crim) Penalty Proceedings--Capital Cases F.S. 921.141, it was not an obvious "error" that any reasonable appellate counsel would have briefed.

Quite to the contrary, it is well-settled that the standard jury instructions used here do not improperly shift the burden of proof. They have been properly upheld many times. See San Martin v. State, 705 So.2d 1337, 1350 (Fla. 1997) (burden-shifting "claim has been rejected by both the United States Supreme Court and this Court"), citing Walton v. Arizona, 497 U.S. 639 (1990); Shellito v. State, 701 So.2d 837, 842 (Fla. 1997) ("we do not find that the standard instructions improperly shift the burden of proof"); Harvey v. Dugger, 656 So.2d 1253, 1257 n. 5 (Fla. 1995) ("claim 9 ["penalty-phase jury instructions improperly shifted the burden"] to the extent it pertains to ineffective assistance of counsel is without merit as a matter of law"); Preston v. State, 531 So.2d 154, 160 (Fla. 1988) ("instructions given by the court did not shift the burden of proof to the defendant"); Arango v. State, 411 So.2d 172, 174 (Fla. 1982) (upheld standard jury instruction and rejected burden-shifting claim).

The State disputes Claim VII's argument (Pet 43) that this case is distinguishable from Arango. Robinson v. State, 574 So.2d 108, 113 (Fla. 1991), made it "obvious" that any such claim would have failed, making it reasonable for appellate counsel not to brief it and its omission non-prejudicial:

This Court previously has ruled adversely to Robinson's additional claims that call into doubt the propriety of the standard jury instructions;⁶ that the trial court improperly rejected Robinson's requests for additional jury instructions;⁷ ***

⁶ Robinson claims that the instructions improperly instruct the jury that the mitigating circumstances must outweigh the aggravating circumstances to make appropriate a life recommendation, *see Arango v. State*, 411 So.2d 172, 174 (Fla.) (rejecting claim that the instructions impermissibly allocated the burden of proof in violation of due process and concluding that the standard jury instructions, taken as a whole, show no reversible error), ***

⁷ Robinson claims that he was entitled to instructions: to eliminate an asserted unconstitutional shifting of the burden of proof, *Preston v. State*, 531 So.2d 154, 160 (Fla. 1988); *Arango v. State*, 411 So.2d 172, 174 (Fla.), ***

CLAIM VIII
WAS APPELLATE COUNSEL UNCONSTITUTIONALLY
INEFFECTIVE FOR FAILING TO ARGUE THAT THE
TRIAL COURT REVERSIBLY ERRED IN DENYING A
SPECIAL MERCY INSTRUCTION? (Restated)

Appellate counsel was not Strickland deficient by not arguing that the trial court erred in not giving a defense special instruction (R III 452 "T"), nor was the omission of any such claim Strickland prejudicial. Such a claim would have been meritless because the trial court gave the standard instruction, which has been repeatedly upheld and which covers the subject area of the special instruction. The trial court instructed the jury:

Among the mitigating circumstances you may consider if established by the evidence, are:

4. Any other aspects of the defendant's character or record, and any other circumstances of the offense.

(R XIV 1544) This Court has repeatedly upheld this standard instruction as covering other mitigation, such as "mercy" or sympathy claimed here. See, e.g., Elledge v. State, 706 So.2d 1340, 1346 (Fla. 1997) (upheld the trial court's rejection of a special instruction "address[ing] the nature and function of mitigating circumstances and describ[ing] several non-statutory mitigators" and upheld standard jury instruction given here as sufficient; "jury was given the standard instruction which states it should consider 'any other aspect of the defendant's character or record, and any

other circumstances of the offense"); Kilgore v. State, 688 So.2d 895, 901 (Fla. 1996) ("Kilgore argues that the trial court erred in denying his proposed jury instruction on nonstatutory mitigating factors. We have repeatedly ruled that the standard jury instructions are sufficient. The trial court was well within its discretion to deny a special instruction"); Jones v. State, 612 So.2d 1370, 1375 (Fla. 1992) (held "the standard jury instruction on nonstatutory mitigators is sufficient, and there is no need to give separate instructions on individual items of nonstatutory mitigation"); Mendyk v. State, 545 So.2d 846, 849 (Fla. 1989) (rejected a special jury instruction claim and thereby held that "there is no requirement that a jury be instructed on its pardon power"; "standard jury instructions on mitigation tell the jury that they may consider any significant aspect of the defendant's life and character urged by the defense"); Jackson v. State, 530 So.2d 269, 273 (Fla. 1988) (upheld rejection of special instruction on mitigation and upheld as adequate an instruction that jury "could consider any other aspect of the defendant's character or record, or any other circumstances of the offense"). Compare Harvey v. Dugger, 656 So.2d 1253, 1255, 1256 (Fla. 1995) (claims that "(8)(b) the penalty-phase jury instructions and the prosecutor's closing argument precluded the jury from considering sympathy in recommending a sentence" *** (8)(d) the trial court erred in denying Harvey's special requested penalty-phase instructions"; "claims 8(b), 8(d), *** are procedurally barred as these issues were raised on direct appeal"), with Harvey v. State, 529 So.2d 1083, 1084-85 n. 2 (Fla. 1988) (affirmed convictions and death sentence; "The remaining six issues which we find to be without merit are *** (6) refusing to give a special jury instruction").

In Teffeteller v. Dugger, 734 So.2d 1009, 1028 (Fla. 1999), the defendant contended

that appellate counsel was ineffective for failing to argue that the prosecutor improperly led the jury to believe that sympathy towards the defendant was an inappropriate consideration. However, appellate counsel was not

ineffective in this regard for two reasons. *** Second, this claim has been decided adversely to Teffeteller's contentions. *See Saffle v. Parks*, 494 U.S. 484, 110 S.Ct. 1257, 108 L.Ed.2d 415 (1990) (finding that defendant was not entitled to federal habeas relief based on claim that instruction during penalty phase telling the jury to avoid any influence of sympathy violated the Eighth Amendment).

If it would not have been error for the prosecutor to tell the jury not to consider sympathy, then it was not error to reject telling the jury that it may consider sympathy.

In contrast to Moore's claim based upon a special jury instruction that was **not given**, he (Pet 44-45) attempts to rely upon Cal. v. Brown, 479 U.S. 538, 107 S.Ct. 837 (1987), which upheld a jury instruction that **was given**. Thus, Brown does not require the instruction that was upheld. Further, here, as in Brown, "[r]eading the [standard] instruction as a whole," 479 U.S. at 543, the jury was allowed to consider sympathy and mercy.

In conclusion, it was not unreasonable for appellate counsel to omit this claim, and its omission was non-prejudicial because it would not have prevailed.

CLAIM IX
WAS APPELLATE COUNSEL UNCONSTITUTIONALLY
INEFFECTIVE FOR FAILING TO ARGUE THAT
MOORE'S PENALTY PHASE VIEWED AS A WHOLE
VIOLATED MOORE'S RIGHTS UNDER THE FEDERAL
CONSTITUTION? (Restated)

This claim reiterates other claims, which for the reasons discussed supra are not the basis of ineffective assistance of appellate counsel. Each claim fails to meet each of the Strickland prongs. *See, e.g., U.S v. Rivera*, 900 F.2d 1462, 1468-71 (10th Cir.1990)("evaluate only the effect of matters determined to be error, not the cumulative effect [of non-errors]"); Mullen v. Blackburn, 808 F.2d 1143, 1147 (5th Cir. 1987)(20 times zero equals zero).

In addition, Claim IX contends (Pet 47-49) that a State argument to the jury "constituted impermissible use of non-statutory aggravating factors" and prohibited the jury from considering mitigation. Citing Moore v. State, 701 So.2d 545 (Fla.

1997), Claim IX candidly concedes (Pet 47)¹¹ that "this issue" was "briefed and argued" but rejected in the direct appeal.

More specifically, this Court held:

As his final issue, Moore argues that the State improperly asked the jury to use mitigation as aggravation in its penalty-phase closing argument. We find no merit to this issue. Moore questions the following statement from the State's closing argument:

I would submit to you that the Defense put on a lot of mitigation. They brought in, as I told you, all of the wonderful people who had known this defendant his entire life, who had nurtured him, who loved him, who spent holidays with him, who said that he was treated just like their son, their brother, their cousin. That he did well in school. That he played football. That he had a normal life. And, ladies and gentlemen, it may sound like mitigation, but to me it's the most--well, I would submit to you that it's the most aggravating factor of all.

Defense counsel objected to the content of the statement at the close of the arguments, but the judge overruled the objection.

Wide latitude is permitted in arguing to a jury. *Breedlove v. State*, 413 So.2d 1, 8 (Fla. 1982). It is within the judge's discretion to control the comments made to a jury, and we will not interfere unless an abuse of discretion is shown. *Occhicone v. State*, 570 So.2d 902, 904 (Fla. 1990); *Breedlove*, 413 So.2d at 8. The judge properly instructed the jury that closing argument should not be considered as evidence in the case or as the instruction on the law. He went on to instruct the jury that the only aggravating factors it was allowed to consider were those specifically defined by him; the judge also gave the correct instruction on mitigation. We do not find that prosecutor's comments to be of such a nature as to taint the jury's recommendation of death; accordingly there was no abuse of discretion. See *Crump v. State*, 622 So.2d 963, 972 (Fla. 1993); *Bertolotti v. State*, 476 So.2d 130, 133 (Fla. 1985).

¹¹ Indeed, appellate counsel raised this point again in his Petition for Rehearing.

The State also notes that there was no objection to the second paragraph of the prosecutor's argument block-quoted in the Petition (Pet 47), rendering any claim based on that portion procedurally barred from the direct appeal. See Sochor, 580 So.2d at 602 ("Sochor's first claim ... that the trial court improperly allowed the state to present and argue nonstatutory aggravating circumstances" barred due to lack of objection). In any event, the analysis in this Court's direct-appeal opinion would apply to it as well. A fortiori, the second block-quoted excerpt was a valid argument addressing the weight of tendered mitigation, as the prosecutor concluded the paragraph by listing valid aggravators and stating "that [listed] aggravation outweighs the mitigation" (R XIV 1528).

701 So.2d at 551.

Thus, the law of the case bars the instant claim, and further, for the reasons this Court gave, the issue was correctly decided. And yet further, to the degree that the instant Petition's argument varies from the argument raised on direct appeal, it quibbles over the manner in which the claim was previously presented, which is not a ground for ineffective assistance of appellate counsel.

CONCLUSION

Appellate counsel was not constitutionally ineffective. Based on the foregoing discussions, the State respectfully requests this Honorable Court deny the Petition for Writ of Habeas Corpus.

SIGNATURE OF ATTORNEY AND CERTIFICATE OF SERVICE

I certify that a copy of this RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS has been furnished to John M. Jackson, Capital Collateral Regional Counsel, Northern Region, P.O. Drawer 5498, Tallahassee, FL 32314-5498, by MAIL on May 17, 2001.

Respectfully submitted and served,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

By: STEPHEN R. WHITE
Attorney for State of Florida/Respondent

Assistant Attorney General
Office of the Attorney General
PI-01, the Capitol
Tallahassee, Fl 32399-1050
(850) 414-3300 Ext 4579
(850) 487-0997 (Fax)

Florida Bar No. 159089

CERTIFICATE OF COMPLIANCE

I certify that this Response complies with the font requirements of Fla. R. App. P.
9.100(1).

Stephen R. White
Attorney for State of Florida