

IN THE SUPREME COURT OF FLORIDA

MICHAEL RIVERA,

Petitioner,

vs.

Case No. 02-1788

MICHAEL W. MOORE,

Respondent.

_____ /

STATE'S RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

RICHARD E. DORAN
ATTORNEY GENERAL

CELIA A. TERENCE
ASSISTANT ATTORNEY GENERAL
FLA. BAR NO. 0656879
1515 N. Flagler Dr.
SUITE 900
WEST PALM BEACH, FL. 33409
(561)-837-5000

ATTORNEY FOR RESPONDENT

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PROCEDURAL HISTORY

The state would make the following addition to the procedural history. This Court recounted the facts of the case as follows:

Eleven-year-old Staci Lynn Jazvac left her Lauderdale Lakes home on bicycle at about 5:30 p.m. on January 30, 1986, to purchase poster board at a nearby shopping center. A cashier recalled having sold her a poster board between 6:30 and 7:00 p.m. When Staci failed to return by dusk, her mother began to search. At about 7:30 p.m. the mother encountered a Broward County Deputy Sheriff, who had Staci's bicycle in the trunk of his car. The deputy found the bicycle abandoned in a field alongside the shopping center. A police investigation ensued.

Police first connected Michael Rivera to Staci's murder through a complaint filed by Starr Peck, a Pompano Beach resident. She testified that she had received approximately thirty telephone calls during September 1985 from a man who identified himself as "Tony." He would discuss his sexual fantasies and describe the women's clothing he wore, such as pantyhose and one-piece body suit. She received the last telephone call from "Tony" after Staci's murder. Ms. Peck testified that he said he had "done something very terrible.... I'm sure you've heard about the girl Staci.... I killed her and I didn't mean

to.... I had a notion to go out and expose myself. I saw this girl getting off her bike and I went up behind her." She testified that he had admitted putting ether over Staci and dragging her into the back of the van where he sexually assaulted her. Rivera had been employed by Starr Peck, and she identified him as "Tony."

On February 13, Detectives Richard Scheff and Phillip Amabile of the Broward County Sheriff's Department took Rivera into custody on unrelated outstanding warrants and transported him to headquarters where they told him that they wanted to speak to him. Detective Scheff testified that Rivera responded, "If I talk to you guys, I'll spend the next 20 years in jail." After reading Rivera his Miranda rights, (FN2) Detective Scheff told Rivera that someone had advised them that Rivera had information about the disappearance of Staci Jazvac. The detective testified that Rivera admitted making the obscene phone calls to Starr Peck but denied having abducted or murdered Staci.

In subsequent interviews, Rivera admitted that he liked exposing himself to girls between ten and twenty years of age. He preferred the Coral Springs area because its open fields reduced the likelihood of getting caught. He would often borrow a friend's van and commented that "every time I get in a vehicle, I do something terrible." Rivera then admitted to two incidents. In one, he said he had exposed himself to a girl

pushing a bike. When asked what he did with her, Rivera replied: "Tom, I can't tell you. I don't want to go to jail. They'll kill me for what I've done." In the other, he said he had grabbed another young girl and pulled her into some bushes near a Coral Springs apartment complex.

Staci's body was discovered on February 14 in an open field in the city of Coral Springs, several miles from the site of the abduction. Dr. Ronald Keith Wright, a forensic pathologist, testified that most of the upper part of the body had decomposed and that the body was undergoing early skeletonization. The doctor concluded that death was a homicide caused by asphyxiation, which he attributed to ether or choking.

Dr. Wright observed that the body was completely clothed, although the jeans were unzipped and partially pulled down about the hips, and the panties were partially torn. Dr. Wright opined that this could be the result of the expansion of gasses during decomposition and not sexual molestation. He was unable to determine whether she was sexually assaulted. He discovered a bruise on the middle of the forehead that occurred before death, but he could not testify with certainty as to the cause. He also observed a broken fingernail on her right hand index finger, which he could not interpret as evidence of a struggle. Dr. Wright believed that the body was carried to the field and dumped, and at that time Staci was either dead or

unconscious.

The jury heard testimony from several of Rivera's fellow inmates. Frank Zuccarello testified that Rivera admitted that he had choked another child, Jennifer Goetz, in the same way he had choked Staci; that Rivera said he had tried to kill Jennifer but was frightened away; and that Rivera said he had taken Staci to the field where she screamed and resisted, and he choked her to death after things got out of hand. Rivera also admitted that he told Starr Peck that he had murdered Staci, saying that confiding in her was the biggest mistake of his life. William Moyer testified that Rivera had stated to him: "You know, Bill, I didn't do it, but Tony did it." He later overheard Rivera call Starr Peck and identify himself as "Tony." Peter Salerno testified that Rivera told him: "I didn't mean to kill the little Staci girl. I just wanted to look at her and play with her."

A manager of a Plantation restaurant testified that he had received over two hundred telephone calls during a two-year period from an anonymous male caller. On February 7, the Friday before Staci's body was discovered, the caller identified himself as "Tony" and said that he "had that Staci girl" while wearing pantyhose, and that he had put an ether rag over her face.

Rivera v. State, 561 So.2d 536, 537-538 (Fla. 1990). The trial court found the existence of four aggravating factors. Those

factors are, "prior violent felony"¹; the crime was "heinous, atrocious and cruel"², the killing was "cold, calculated, and premeditated"³, and the murder was committed during the course of an enumerated felony, sexual battery and kidnapping⁴. Rivera, 561 So. 2d at 538 n. 4.

On appeal River raised four issues: (1) the trial court erred in allowing the state to introduce "William's Rule"⁵ evidence; (2) the trial court erred in precluding the introduction of "reverse" William's Rule evidence; (3) the aggravating factors of "HAC" and "CCP" were not established by the evidence; and (4) the trial court erred in not finding that mitigating factors that River was acting under extreme duress or under the substantial domination⁶ , or that his capacity to appreciate the criminality of his conduct or conform his conduct to the requirements of the law was substantially impaired⁷. Rivera, 561 So. 2d at 538-540. This Court agreed with one of Rivera's claims when it found that there was insufficient

¹ 921.141 (5)(b)

² 921.141 (5)(h)

³ 921.141 95)(i)

⁴ 921.141 (5)(d)

⁵ Williams v. State, 110 So. 2d 654 (Fla. 1959)

⁶ 921.141 (6)(e)

⁷ 921.141 (6)(h)

evidence to sustain the aggravating factor of "CCP". Id.

However this Court also held that the any error was harmless:

We are left with three aggravating circumstances, which include previous convictions of violent crimes and a finding that this murder was heinous, atrocious, and cruel. On this record, we are persuaded that the one mitigating factor weighed against the magnitude of the aggravating factors would render the same result in the trial court below, absent the single invalidated aggravating circumstance.

Id.

In this pleading Rivera will be referred to as either "petitioner" of "Rivera" and the state will be referred to as "the state." The following symbols will be used: ROA denotes record on direct appeal; SROA denotes supplemental record on direct appeal; PCR-1 denotes litigation of the first postconviction motion and PCR-2 denotes the record in this appeal.

REASONS FOR DENYING THE WRIT

ISSUE I

PETITIONER'S CLAIM THAT HIS SENTENCE OF DEATH VIOLATES RING V. ARIZONA IS WITHOUT MERIT

Petitioner claims that based on the recent decision of the United States Supreme Court in Ring v. Arizona, 122 S.Ct. 2428 (2002), his sentence of death is unconstitutional. Summary denial of this claim is warranted for several reasons.

Petitioner's claim is not properly preserved for collateral review. It is well established that for an issue to be preserved for appeal, it must be presented to the lower court and "the specific legal argument or ground to be argued on appeal must be part of that presentation if it is to be considered preserved." Archer v. State, 613 So. 2d 446 (Fla. 1993), quoting Tillman v. State, 471 So. 2d 32, 35 (Fla. 1985); See also Steinhorst v. State, 412 So. 2d 332, 338 (Fla. 1982). In the instant case, petitioner never challenged the constitutionality of the death penalty statute in any manner at the time of trial. Since the issue was never preserved for appeal, he is not allowed to raise the claim in this collateral proceeding. See Parker v. State, 550 So. 2d 449 (Fla. 1989)(finding collateral challenge to Florida's capital sentencing scheme based on Booth v. Maryland, is procedurally

barred for failure to preserve the issue at trial or on direct appeal). Furthermore, at trial and on appeal, River conceded that there was sufficient evidence to sustain a finding regarding two of the four aggravating factors presented by the state. Petitioner admitted that he was previously convicted of a prior violent felony, and the murder was committed during the commission of a felony. Rivera v. State, 561 So. 2d 536, 540 (Fla. 199). Consequently, given Rivera's clear failure to preserve this issue for appeal, as well as his affirmative concession that two of the aggravating factors had been proven beyond a reasonable doubt, he is not entitled to application of Ring on collateral review.

Moreover, Ring v. Arizona, 122 S. Ct. 2445 (2002) is not subject to retroactive application under the principles of Witt v. State, 387 So. 2d 922, 929-30 (Fla. 1980). Pursuant to Witt, Ring is only entitled to retroactive application if it is a decision of fundamental significance, which so drastically alters the underpinnings of Anderson's death sentence that "obvious injustice" exists. New v. State, 807 So. 2d 52 (Fla. 2001). In determining whether this standard has been met, this Court must consider three factors: the purpose served by the new case; the extent of reliance on the old law; and the effect on the administration of justice from retroactive application. Ferguson v. State, 789 So. 2d 306, 311 (Fla. 2001). Application

of these factors to Ring, which did not directly or indirectly address Florida law, provides no basis for consideration of Ring in this case. The United States Supreme Court recently held that an Apprendi⁸ claim is not plain error. United States v. Cotton, 122 S.Ct. 1781 (May 20, 2002) (holding an indictment's failure to include the quantity of drugs was an Apprendi error but it did not seriously affect fairness, integrity, or public reputation of judicial proceedings, and thus did not rise to level of plain error). If an error is not plain error cognizable on direct appeal, it is not of sufficient magnitude to be a candidate for retroactive application in collateral proceedings. United States v. Sanders, 247 F.3d 139, 150-151 (4th Cir 2002) (emphasizing that finding something to be a structural error would seem to be a necessary predicate for a new rule to apply retroactively and therefore, concluding that Apprendi is not retroactive). Every federal circuit that has addressed the issue had found that Apprendi is not retroactive. See, e.g., McCoy v. United States, 266 F.3d 1245 (11th Cir. 2001). The one state supreme court that has addressed the retroactivity of Apprendi has, likewise, determine that the decision is not retroactive. Whisler v. State, 36 P.3d 290 (Kan. 2001). Moreover, the United States Supreme Court has held that a violation of the right to a jury trial is not

⁸ Apprendi v. New Jersey, 530 U.S. 466 (2000).

retroactive. DeStefano v. Woods, 392 U.S. 631 (1968) (refusing to apply the right to a jury trial retroactively because there were no serious doubts about the fairness or the reliability of the factfinding process being done by the judge rather than the jury).

Irrespective of the procedural default, Rivera would still not be entitled to relief based on the merits. Petitioner's specific complains are as follow; the jury's advisory recommendation of death does not satisfy the rule of law announced in Apprendi; the recommendation is itself deficient since it is not required to be unanimous; the aggravating factors as elements of the offense were required to be charged in the indictment; and none of the constitutional errors implicated by Ring are subject to a harmless error analysis. Rivera recognizes that this Court has rejected Apprendi's, application to Florida's sentencing scheme. Mills v. Moore, 786 So. 2d 532 (Fla. 2001). However he claims that Mills is no longer viable in light of Ring. Petitioner is mistaken. Since Rivera filed this petition, this Court has rendered its decision in Bottoson v. Moore, 27 Fla. Law Weekly S891 (October 24, 2002). Therein this Court has clearly rejected the argument that Ring has implicitly overruled its earlier opinions upholding Florida's sentencing scheme. In Bottoson v. Moore, 27 Fla. L. Weekly S891 (Fla. October 24, 2002) this Court stated:

Although Bottoson contends that he is entitled to relief under Ring, we decline to so hold. The United States Supreme Court in February 2002 stayed Bottoson's execution and placed the present case in abeyance while it decided Ring. That Court then in June 2002 issued its decision in Ring, summarily denied Bottoson's petition for certiorari, and lifted the stay without mentioning Ring in the Bottoson order. The Court did not direct the Florida Supreme Court to reconsider Bottoson in light of Ring.

Consequently Rivera is not entitled to relief based on Ring.

The state asserts that even Ring was not procedurally barred, Rivera would not be entitled to relief. Ring does not apply to Florida's death penalty scheme. The Arizona statute at issue in Ring is different from Florida's death sentencing statute:

Based solely on the jury's verdict finding Ring guilty of first-degree felony murder, the maximum penalty he could have received was life imprisonment.

Ring v. Arizona, 122 S.Ct. at 2437. Under Arizona law, the determination of death eligibility takes place during the penalty phase proceedings, and requires that an aggravating factor exists. This Court has previously recognized that the statutory maximum for first degree murder in Florida is death, and has repeatedly rejected claims similar to those raised herein. Cox v. State, 27 Fla. L. Weekly S585 (Fla. May 23, 2002); Bottoson v. State, 813 So. 2d 31, 36 (Fla. 2002), cert. denied, Case No. 01-8099 (U.S. June 28, 2002); Hertz v. State,

803 So. 2d 629, 648 (Fla. 2001), cert. denied, Case No. 01-9154 (U.S. June 28, 2002); Looney v. State, 803 So. 2d 656, 675 (Fla. 2001), cert. denied, Case No. 01-9932 (U.S. June 28, 2002); Brown v. Moore, 800 So. 2d 223, 224-225 (Fla. 2001); Mann v. Moore, 794 So. 2d 595, 599 (Fla. 2001), cert. denied, Case No. 01-7092 (U.S. June 28, 2002); Mills, 786 So. 2d at 536-38. This interpretation of state law demands respect, and offers a pivotal distinction between Florida and Arizona. Ring, at *13; Mullaney v. Wilbur, 421 U.S. 684 (1975).

Moreover, contrary to petitioner's claim, Ring does not require jury sentencing in capital cases, rather it involves only the requirement that the jury find the defendant death-eligible. Id. at n.4. A clear understanding of what Ring does and does not say is essential to analyze any possible Ring implications to Florida's capital sentencing procedures. Recognized by this Court the Ring decision left intact all prior opinions upholding the constitutionality of Florida's death penalty scheme, including Spaziano v. Florida, 468 U.S. 447 (1984), and Hildwin v. Florida, 490 U.S. 638 (1989). Indeed it quotes Proffitt v. Florida, 428 U.S. 242, 252 (1976), acknowledging that ("[i]t has never [been] suggested that jury sentencing is constitutionally required."). Ring, at *9, n.4. In Florida, any death sentence which was imposed following a jury recommendation of death necessarily satisfies the Sixth

Amendment as construed in Ring, because the jury necessarily found beyond a reasonable doubt that at least one aggravating factor existed. Since the finding of an aggravating factor authorizes the imposition of a death sentence, the requirement that a jury determine the conviction to have been a capital offense has been fulfilled in any case in which the jury recommended a death sentence.

Additionally, the requirements of Apprendi and Ring were met in this case. Apprendi requires a jury rather than a judge make the determination of certain facts and that those facts be proven beyond a reasonable doubt rather than by the preponderance standard. Both requirements were met. The jury recommended a death sentence and the aggravators were proven beyond a reasonable doubt. Rivera cannot present a valid Apprendi challenge to Florida's death penalty statutes. He had a jury at sentencing. The jury was present during the penalty phase; heard the evidence of aggravators and mitigators; was instructed on aggravating circumstances and the requirement that they be proven beyond a reasonable doubt. Petitioner's jury then unanimously recommended a death sentence. A capital defendant who has had a jury recommend death simply cannot claim that his right to a jury trial was violated. There can be no violation of the right to a jury trial under these facts. Thus, the death penalty imposed in this case does not violate Apprendi

and Ring.

Moreover, not only did Rivera have a jury that recommended death but one of the aggravators that the judge relied on was found by the jury in the guilt phase. In this case, the trial court found and Rivera conceded that the prior violent felony aggravating circumstance. The judge's finding of the prior violent felony aggravator is exempted from the holding in Apprendi. Apprendi explicitly exempted recidivist factual findings from its holding. Apprendi, 530 U.S. at 490 (holding, other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt).⁹ Thus, a trial court may make factual findings regarding recidivism. Walker v. State, 790 So.2d 1200, 1201 (Fla. 5th DCA 2001)(noting that Florida courts, consistent with Apprendi's language excluding recidivism from its holding, have uniformly held that an habitual offender sentence is not subject to an Apprendi). Here, the trial court found the prior violent felony aggravator. This is a recidivist aggravator. Recidivist aggravators may be found by the judge even in the wake of Ring. Ring, 122 S.Ct. 2445 at n.4 (noting that none of

⁹ As already noted, Rivera has conceded his death eligibility when he admitted that two of the aggravating factors applied to him. Rivera v. State, 561 So. 2d 536, 540 (Fla. 1990).

the aggravators at issue related to past convictions and that therefore the holding in Almendarez-Torres v. United States, 523 U.S. 224 (1998), which allowed the judge to find the fact of prior conviction even if it increases the sentence beyond the statutory maximum was not being challenged).

Consequently, for all the reasons state above, Rivera is not entitled to relief based on Ring.

ISSUE II

APPELLATE COUNSEL DID NOT FAIL TO RAISE ANY MERITORIOUS ISSUES ON APPEAL

In this petition, Rivera advances several arguments in support of his claim that appellate counsel was ineffective. In response to petitioner's claims the state presents various arguments, chief among them is that the issues are legally insufficient as pled and in the alternative are without merit. The state asserts that the following legal principles are germane to resolution of this petition.

The issue of appellate counsel's effectiveness is appropriately raised in a petition for writ of habeas corpus. However, ineffective 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. In evaluating an ineffectiveness claim, the court must determine 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. Pope v. Wainwright, 496 So.2d 798, 800 (Fla.1986). See also Haliburton, 691 So.2d at 470; Hardwick, 648 So.2d at 104. 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. See Knight v. State, 394 So.2d 997 (Fla.1981). "In the case of appellate counsel, this means the deficiency must concern an issue which is error affecting the outcome, not simply harmless error."

Id. at 1001. In addition, ineffective assistance of counsel cannot be argued where the issue was not preserved for appeal or where the appellate attorney chose not to argue the issue as a matter of strategy. See Medina v. Dugger, 586 So.2d 317 (Fla.1991); Atkins v. Dugger, 541 So.2d 1165, 1167 (Fla.1989) ("Most successful appellate counsel agree that from a tactical standpoint it is more advantageous to raise only the strongest points on appeal and that the assertion of every conceivable argument often has the effect of diluting the impact of the stronger points.").

Freeman v. State, 761 So. 2d 1055, 1070 (Fla. 2000); See also Rutherford v. Moore 774 So.2d 637, 643 (Fla. 2000). Nor is appellate counsel required to raise every preserved or nonfrivolous issue. Jones v. Barnes, 463 U.S. 745, 751-753 (1983); see also Provenzano v. Dugger, 561 So. 2d 541, 549 (Fla. 1990). Based on these stringent legal principles, it will become clear that Rivera will not be able to meet his burden of establishing that appellate counsel was ineffective. All relief must be denied.

In his first claim, sub-issue B, Rivera claims that appellate counsel failed to challenge on appeal the trial court's denial of his motion to suppress statements and physical evidence even though the issue was preserved for appeal. Initially the state would point out that the issue has not been properly presented to this Court. Rivera's argument consists of four or five disjointed statements unaccompanied by any argument or case law in support of his conclusory claim. **Brief at 34-35.**

As such the issue should be summarily denied. Cf. Duest v. State, 555 So.2d 849, 852 (Fla. 1990)(finding appellate issue waived for review when appellant merely references pleadings below)' Knight v. Dugger, 574 So. 2d 1066, 1073 (Fla. 1990)(same); Roberts v. State, 568 So. 2d 1255, 1260 (Fla. 1990)(same).

As for the merits, it is clear that an appeal of the trial court's denial of Rivera's motion to suppress would have been unsuccessful. A motion to suppress hearing was conducted on March 30, 1986. (ROA 4-97). Three law enforcement personnel from Broward Sheriff's Office testified on behalf of the state, Rivera did not present any witnesses at the hearing. The unrebutted testimony was as follows. Rivera was taken to police headquarters on February 13, 1986 based on outstanding warrants for other crimes. He was informed on the way to the station that the police wanted to discuss another crime with him once they got to police head quarters. (ROA 37, 61). At the station, Rivera was given his Miranda warnings and he waived them. (ROA 9-10, 19). At that time he was also told that he is being questioned about the disappearance of Staci Jazvac. (ROA 9-10, 19). Throughout the next several days/contacts, Rivera received his Miranda warnings on four separate occasions. (ROA 28, 33, 16, 40, 43, 52, 61 76) He signed a waiver form and he signed a search to consent form. (ROA 9-11, 17-18, 41, 81).

Rivera also drew the detectives a map of his home directing the officers were to look in his bedroom for certain items. (ROA 80-81). Rivera never appeared under the influence of any substances, he was never threatened or given promises of any kind. He repeatedly stated that he understood his rights. (ROA 8-9, 14, 21, 38, 44, 47, 54, 62-65, 78, 91, 38, 65, 85).

The trial court denied the motion to suppress and stated the following:

Well, the Court finds that the matters sought to be suppressed were freely and voluntarily made by the defendant after being advised several times of his rights, and the defendant being aware of his rights, and at no time-not seeking to cut off the interrogation.

In fact, the defendant several times seeked [sic]deliberately to prolong the interrogation. So the motion to suppress in its entirety is denied.

(ROA 97). The state asserts that based on the factual findings by the trial court, in conjunction with the presumption of correctness that attaches to those findings, petitioner is unable to explain how appellate counsel would overcome that high standard and obtain relief on appeal. See Owen v. State, 560 So. 2d 207, 211 (Fla. 1990)(reaffirming rule that factual findings of trial court enjoy a presumption of correctness on appeal); DeConingh v. State, 430 So. 2d 501 (4th DCA

1983)(explaining that state need only demonstrate voluntariness by a preponderance of the evidence). Because appellate counsel is not required to raise every preserved/conceivable issue, nor is counsel required to raise an issue that has no chance of success, this claim must be denied. Engle v. Dugger, 576 So. 2d 696 (Fla. 1991)(rejecting claim of ineffective assistance of appellate counsel as underlying claim is without merit); Jones, 463 U.S. at 751-753; Provenzano, 561 So. 2d at 549.

In sub-issue C, Rivera alleges that appellate counsel should have appealed the trial court's rulings which allowed the state to introduce "inadmissible, irrelevant, inflammatory, and prejudicial" photographs of the crime scene and the victim. **Initial brief at 35.** Rivera alleges that because trial counsel had objected to the admissibility of some of the photographs the issue was preserved for review and therefore should have been raised on appeal. The state asserts that this claim is legally insufficient as pled as petitioner fails to present any relevant case law that would demonstrate success on appeal.

As for the merits, the state would initially note that only a portion of the issue as presented in this petition was properly preserved for appeal. During the testimony of the medical examiner Dr. Wright, the state sought to introduce crime scene photographs, depicting the location and condition of the body of Staci Jazvac. (ROA 849-851, 853-861). The photographs

were relevant to illustrate the difficulties encountered by the medical examiner when he attempted to determine identity and cause of death of the victim. Those difficulties were the result of decomposition and skeletalization of Staci Jazvac's body. (Id.). Trial counsel objected to the admissibility of those photos based on the fact that the witness was not the person who had taken the photographs. (ROA 863). Never was the objection now being raised ever presented at trial. Consequently a challenge to the admissibility of the photographs based on petitioner's argument advanced in this petition would not have been properly preserved for appeal. Occhincone v. State, 570 So. 2d 902 905, 906 (Fla. 1990)(reaffirming rule that to preserve an issue for review, the specific objection raised on appeal must also have been raised at trial). As such appellate counsel cannot be considered ineffective for failing to raise the claim on appeal. Groover v. Singletary, 656 So. 2d 424, 425 (Fla. 1995); Medina v. Dugger, 586 So. 2d 317, 318 (Fla. 1991).

Petitioner also claims that appellate counsel should have challenged the trial court's ruling regarding the admissibility of a crime scene video. This portion of the claim is procedurally barred as a variation of it was raised and rejected by this Court in Rivera' initial postconviction appeal. Rivera v. State, 717 So. 2d 477, 488 (Fla. 1998). Therein, Rivera

argued that trial counsel did not effectively argue that the video tape should not have been admitted.¹⁰ This Court rejected the claim finding:

Finally, Rivera cites eighteen separate instances where Malavenda's failure to object allegedly led to the introduction of "inadmissible and unduly prejudicial evidence." However, nowhere in this litany of sub-claims does Rivera demonstrate that any errors prejudiced him to the point where a reasonable probability existed that, but for those errors, his trial's outcome would have been different.

Rivera 717 So.2d at 488. Given that this issue has been rejected by this Court, Rivera's attempt to relitigate same is precluded. Parker v. State, 550 So. 2d 459, 460 (Fla. 1989)(reaffirming general rule that, "[i]t is important to note that habeas corpus petitions are not to be used for additional appeals on questions which could have been, should have been, or were raised on appeal or in a rule 3.850 motion, or on matters that were not objected to at trial.").

Additionally, petitioner's assertions that a challenge to the admissibility of the video-tape based on its cumulative nature was a proper issue for appeal is incorrect. In this petition, Rivera argues that the tape was cumulative to photographs already admitted. A review of the record reveals that trial counsel did not object to the tape's admission based

¹⁰ Please see page 78 of initial brief in Rivera v. State, Case No. 86528.

on the argument now advanced. Counsel objected to the tape's admissibility based on the allegation that the video had not been provided in discovery. (ROA 1061-1062). Counsel did mention to the court that a detective described the video as being similar to the photographs, however it is clear that defense counsel was arguing that the video was not revealed previously and therefore should not be admitted. (ROA 1062-1064, 1066-1067). Given that the issue was not properly preserved for review, appellate counsel cannot be deemed ineffective. Groover.

The only portion of this claim that was preserved for review involved the admissibility of photographs that were entered into evidence during the testimony of Detective Haarer. These were crime scene photographs of the body and surrounding area. Trial counsel objected to the admissibility of the photographs based on the claim that they were cumulative to other photographs already admitted. (ROA 924-925). The trial court allowed the photographs to be admitted because they aided the medical examiner in explaining how he determined identity and cause of death. Indeed, Rivera made an issue of the fact that the medical examiner admitted some difficulty in making these determinations because the body was so badly decomposed. (ROA 695-696, 924-926). The state asserts had appellate counsel raised this issue on appeal, it would not have afforded him any

relief. Based on the relevancy of the photographs, appellate counsel would not have been able to establish that the trial court abused its discretion. See Haliburton v. State, 561 So. 2d 248, 250 (Fla. 1990)(reaffirming standard that trial court has discretion in ruling on admissibility of photographs). Based on this record on appeal, counsel could not have met that standard. Haliburton, supra (explaining that the test for admissibility is not necessity but relevance); Mendyk v. Dugger, 592 So. 2d 1076, 1082-1082 (Fla. 1992)(rejecting claim of ineffective assistance of appellate counsel for failing to raise an issue on appeal regarding admission of photographs, slides, and videotapes); Finney v. Moore, 27 Fla. L. Weekly S785 (Fla. September 26, 2002)(finding no ineffective assistance of appellate counsel as admission of photograph was not an abuse of discretion).

In sub-claim D, Rivera alleges that appellate counsel should have raised as an issue on direct appeal, that the trial court erred in denying his motion for change of venue. This claim is legally insufficient on its face and therefore appellate counsel was not ineffective for failing to raise it on appeal.

Rivera makes the following general and conclusory complaints; there was extensive media coverage; approximately twenty to thirty members of the venire had heard something about the case; six of those individuals, who are not identified by

name, sat on the jury; there were children in the courtroom¹¹; and the judge was already biased against appellate based on comments made to the media.¹² **Initial brief at 39-42.** Rivera claims that the trial counsel had properly preserved this issue below and therefore it would have entitled to him to relief on appeal. The record on appeal belies this contention.

Although Rivera field a motion for change of venue, and renewed same after jury selection was completed, Rivera could not establish that the trial court's refusal to change venue resulted in any prejudice to his trial. For instance, Rivera did not exhaust all his peremptory challenges, (ROA 685), he did not identify any specific juror whom he claims was unfit for service yet served on the jury, and he does not make that presentation in this petition.

The record reveals that during voir dire, trial counsel's argument for change of venue was as follows:

Judge, I would just like to point out -well,
first of all, I object to your ruling. I

¹¹ Rivera does not reference any portion of the record which supports his conclusory allegation that the jury was in some way influenced by the fact that children were sitting in the courtroom. The claim is therefore legally insufficient as pled. See Finney v. Moore, 27 Fla. L Weekly S785, 787 n.9 (Fla. September 26, 2002).

¹² The portion of this claim challenging the impartiality of the trial judge is procedurally barred as it is nothing more than a veiled attempt to relitigate an issue already rejected by this Court in Rivera's initial postconviction appeal. See Rivera v. State, 717 So. 2d 477, 481-485. (Fla. 1998).

believe a number of- a substantial number of these jurors have heard about this case and regardless of what they said in this room today, I still feel that they have formed certain opinions about this case and cannot be fair and impartial for my client.

(ROA 686). Simply because someone may have heard about the case does not establish that they are unfit to sit as jurors. To warrant relief on this claim this Court has stated:

The mere existence of extensive pretrial publicity is not enough to raise the presumption of unfairness of a constitutional magnitude. In Murphy v. Florida, 421 U.S. 794, 95 S. Ct. 2031, 44 L. Ed. 2d 589 (1975), . . . the United States Supreme Court recognized that qualified jurors need not be totally ignorant of the facts and issues involved in a case. The mere existence of a preconceived notion as to guilt or innocence is insufficient to rebut the presumption of a prospective jurors' [sic] impartiality. It is sufficient if the juror can lay aside his opinion or impression and render a verdict based on the evidence presented in court.

Bundy v. State, 471 So. 2d 9, 19-20 (Fla. 1985). The record on appeal nor this petition demonstrate that any of the jurors could not render an impartial verdict despite their general familiarity with the case. This claim would not have been successful if raised on appeal as there is now evidence of prejudice on this record. Rolling v. State, 695 So. 2d 278, 285 (Fla. 1997)(finding that review of the denial of motion to change venue includes whether there was difficulty in selecting impartial analysis); Hoy v. State, 353 So.2d 826 (Fla.

1977)(finding that review of the denial of motion to change venue includes whether defendant exhausted all his peremptory challenges); Wike v. State, 27 Fla. L. Weekly S95, S96 (Fla. January 24, 2002)(rejecting claim of ineffective assistance of counsel based on lack of prejudice as record demonstrates that no undue difficulty in selecting impartial jury); Patton v. State, 784 So. 2d 380, 389-390 (Fla. 2000)(finding no merit to claim that motion for change of venue would have been successful given that only few jurors heard about the case and had forgotten the details to which they had been exposed)

In sub-issue E, Rivera claims that the trial court erroneously denied petitioner's motion for mistrial based on misconduct of juror Thorton. Specifically, Rivera's claim that the trial court erred in failing to question juror Thorton regarding an alleged comment he made during trial. The alleged comment was, "I think he did this." The state asserts that Rivera would not have been granted relief on appeal, therefore appellate counsel was not ineffective for failing to raise the potential issue.¹³

The issue unfolded as follows. Prior to the commencement of the day's proceedings, the trial judge *sua sponte* admonished

¹³ A version of this claim was raised in Rivera's initial postconviction appeal. Therein, this Court found the claim to be procedurally barred for failing to raise it on appeal. **See initial brief at 61-62.** See Rivera v. State, 717 So.2d 477, 480 n.2 (Fla. 1998).

the jury that they should not make comments during the trial. The court made it very clear that such comments would be improper and they were obligated to refrain from such activity. At that point, defense counsel requested a sidebar conference. Defense counsel advised the judge the judge that Rivera heard an unidentified juror say, I think he did it." (ROA 1076-1077). The prosecutor pointed out that he was much closer to the jury than the defendant and he did not hear anything. The trial judge and the defense attorney both stated that they did not hear the alleged comment. (ROA 1079). At that point, appellate requested a mistrial. The court denied the motion but all parties were in agreement that if anything else should arise it should be brought to the court's attention. (ROA 1078- 1079).

Prior to the lunch break, the court again admonished the jury not to discuss the case with each other or anyone else. (ROA 1113). At the commencement of the afternoon session, trial counsel advised the judge that Rivera thought that the person he heard say something was juror number 10, Mr. Thorton. (ROA 1113-1114). Again trial counsel asked for a mistrial. That motion was denied. (ROA 1114). The trial court also refused to single out Thorton for questioning as it would just bring more attention to this matter. The court reasoned that because the jury had been admonished twice since the initial sidebar conference with no further incident and it was only the

defendant who heard the alleged comment, no further remedial action was necessary. The trial court left open the possibility that he would re-address the issue if further discussions among the jurors was taking place. (ROA 1115-1116). No further incident was brought to the judge's attention.

The state asserts that had this issue been raised on direct appeal, relief would have been denied. The court was well within its discretion and authority to assess the situation and determine if there was sufficient evidence to warrant an inquiry. Unlike the facts of Amazon v. State, 487 So., 2d 8, 11 (Fla. 1986) or Scott v. State, 619 So. 2d 508, 509 (Fla. 5th DCA 1993) where there was sufficient reason to warrant an inquiry, no such factual predicate existed in the instant case. No one, including the judge and defense counsel, heard the alleged comment. The trial court did not err in denying the request. This claim would not have provided Rivera with appellate relief. See generally Herman v. State, 396 So. 2d 222 (4th DCA 1981)(finding claim that juror believed that defendant was guilty based on all his past troubles was insufficient to find misconduct); Cf. Bundy, 471 So. 2d at 20 ("The mere existence of a preconceived notion as to guilt or innocence is insufficient to rebut the presumption of a prospective jurors' [sic] impartiality.").

Rivera attempts to augment this claim with an allegation

that this same juror, Mr. Thorton, gave false information regarding his relationship/affiliation with Sheriff Navarro during voir dire.¹⁴ This portion of the claim is procedurally barred as a variation of it was raised and rejected by this Court in Rivera's initial postconviction appeal.¹⁵ Rivera 717 So.2d at 482 (Fla. 1998) Use of this habeas petition as a second appeal is precluded. Parker, 550 So. 2d at 460.

As for the merits, the record does not support Rivera's claim. Defense counsel brought the matter to the court's attention and inquiry was made. (ROA 310, 1233-1234,, 1237-1239). After some discussion, it was agreed that Mr. Thorton did not lie to the court and he answered questions honestly. (ROA 310, 1233, 1237). The court invited defense counsel to check into the situation more thoroughly and advise the judge accordingly. (ROA 1237-1239). Rivera did not present any additional facts to the court's attention. Absent any support for Rivera' claim, the trial court did not err in refusing to question the juror or in denying a motion for mistrial. In summary, appellate counsel would not have bene granted relief on appeal had he raised any of the issues.

¹⁴ Thorton at one time belonged to a Broward Sheriff's advisory counsel. A focus of the group was to rid the community of drugs. The group was not a part of the Sheriff's Office. (ROA 1235-1236).

¹⁵ The identical allegations are presented in Rivera v. State, Case No. 85528, initial brief at pgs. 8-9.

CONCLUSION

Wherefore, based on the foregoing arguments and authorities, Respondent respectfully requests that this Honorable Court deny Petitioner's request for writ of habeas corpus relief

Respectfully submitted,

RICHARD E.DORAN
Attorney General

CELIA A. TERENCE
Assistant Attorney General
Fla. Bar No. 0656879
1515 Flagler Drive
Suite 900
West Palm Beach, FL 33401
(561) 837-5000

CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was sent by United States mail, postage prepaid, to Martin McClain, Esq. & Suzanne Myers, Esq. 101 N.E. 3rd Ave. Suite 400, Fort Lauderdale, Florida 33301, this ____ day of November, 2002.

CELIA A. TERENCE

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the instant brief has been prepared with 12 point Courier New type, a font that is not spaced proportionately on November 12, 2002.

CELIA A. TERENCE