

IN THE SUPREME COURT OF FLORIDA

RICHARD COOPER,

Petitioner,

v.

Case No. SC02-623

MICHAEL W. MOORE,

Respondent.

_____ /

AMENDED RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

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

FACTS AND PROCEDURAL HISTORY

The facts of this case are recited in this Court's opinion on the direct appeal of Cooper's convictions and sentences, Cooper v. State, 492 So. 2d 1059, 1060 (Fla. 1986):

In the early morning of June 18, 1982, the Clearwater Police Department and the Pinellas County Sheriff's Department received calls from eight-year-old Chris Fridella, pursuant to which several officers

were dispatched to his residence. They found three men, one of whom was Chris's father, Steven, lying face down on the living room floor with duct tape binding their hands behind their backs. All were dead, apparently due to gunshot wounds. Medical testimony at trial established that the deaths had resulted from shotgun wounds in the range of three to six feet. The house had been ransacked, the victims' wallets had been emptied, and the television volume was turned to the maximum.

Information received on January 15, 1983, from Robin Fridella, Steven Fridella's ex-wife, led police to appellant and accomplices Terry Van Royal and Jason Dirk Walton. Police contacted appellant and interviewed him on January 20, 1983, at which time he confessed. According to appellant, he, Walton, Royal, and Walton's younger brother, Jeff McCoy, had planned the robbery for a week. On June 17, 1982, they set out with ski masks, gloves and firearms in the trunk of the car, including two shotguns. Upon arrival at the house, McCoy stayed in the car while the other three entered the residence. One of the victims was asleep on the couch, one was in a bedroom, and Steven and Christopher Fridella were sleeping in the back bedroom. The adult victims were put on the living room floor with their hands taped. Chris Fridella was put in the bathroom. Appellant and Royal guarded the victims while Walton ransacked the house. One of the victims recognized Walton, who told his co-perpetrators they therefore would have to kill the adults. Walton's own gun misfired, and he ordered the others to shoot.

After appellant and Royal fired their shotguns at the victims, the perpetrators ran out. Walton told appellant that one of the victims was not dead; appellant returned and shot Fridella a second time.

Appellant stated that he had been drinking and smoking marijuana the day of the murders, but that he was aware of what he was doing. In a second statement given January 24, 1983, appellant stated that McCoy accompanied the others into the house but was ordered to return to the car prior to the shootings.

The jury found appellant guilty of first-degree murder as charged and recommended the death penalty on all three counts. The trial court imposed sentences in accordance with the jury's recommendations, finding five aggravating and no mitigating factors.

Trial was conducted January 10 - 14, 1984, before the Honorable William Walker. In his initial direct appeal, Florida Supreme Court Case No. 66,088, Cooper was represented by John E. Swisher, Esquire. Mr. Swisher raised the following eight issues:

ISSUE I

THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION TO SUPPRESS THE SKI MASK RECOVERED FROM A CLOSED BOX LOCATED IN A CLOSET IN THE BEDROOM OF THE DEFENDANT'S MOTHER'S HOME WHERE HE RESIDED

ISSUE II

THE TRIAL COURT ERRED IN FINDING, AS AN AGGRAVATING CIRCUMSTANCE, THAT THE CAPITAL FELONY WAS COMMITTED IN THE COURSE OF A KIDNAPPING

ISSUE III

THE TRIAL COURT ERRED IN INSTRUCTING THE JURY AND FINDING, AS AN AGGRAVATING CIRCUMSTANCE, THAT THE CAPITAL FELONY WAS COMMITTED FOR THE PURPOSE OF AVOIDING ARREST

ISSUE IV

THE TRIAL COURT ERRED IN FINDING, AS AN AGGRAVATING CIRCUMSTANCE, THAT THE MURDER WAS ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL

ISSUE V

THE TRIAL COURT ERRED IN INSTRUCTING THE JURY AND FINDING, AS AN AGGRAVATING CIRCUMSTANCE, THAT THE MURDER WAS COMMITTED IN A COLD, CALCULATED, AND PREMEDITATED MANNER

ISSUE VI

THE TRIAL COURT ERRED BY REJECTING THE REQUESTED MITIGATION INSTRUCTION AND BY NOT CONSIDERING THAT THE CAPACITY OF THE DEFENDANT TO APPRECIATE THE CRIMINALITY OF HIS CONDUCT OR TO CONFORM HIS CONDUCT TO THE REQUIREMENTS OF LAW WAS SUBSTANTIALLY IMPAIRED

ISSUE VII

THE TRIAL COURT ERRED IN ADMITTING OVER OBJECTION ANTICIPATORY REBUTTAL TESTIMONY THAT THE DEFENDANT WOULD CALL A PSYCHIATRIST TO TESTIFY WHEN THE DEFENSE DID NOT CALL A

PSYCHIATRIST TO TESTIFY CONCERNING WHETHER
THE DEFENDANT ACTED UNDER EXTREME DURESS OR
UNDER THE SUBSTANTIAL DOMINATION OF ANOTHER
PERSON

ISSUE VIII

THE TRIAL COURT ERRED IN NOT FINDING THAT
THE DEFENDANT'S AGE AT THE TIME OF THE
OFFENSE WAS A MITIGATING FACTOR

This Court affirmed the convictions and sentences. Petitioner then filed a petition for writ of certiorari to the United States Supreme Court, challenging the admission of the ski mask and the adequacy of this Court's appellate review on proportionality. His petition was denied on February 23, 1987. Cooper v. Florida, 479 So. 2d 1101 (1987).

Cooper pursued postconviction relief, and after conducting an evidentiary hearing, the lower court concluded that Cooper had failed to substantiate his claims. Relief was denied and the appeal is pending before this Court in Cooper v. State, Case No. SC01-2285. The instant habeas petition was timely filed contemporaneously with the initial brief in the direct appeal of the denial of postconviction relief.

ARGUMENT

CLAIM I

APPELLATE COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO RAISE A CLAIM THAT THE TRIAL COURT ERRED IN DENYING THE MOTION TO CONTINUE THE PENALTY PHASE.

Most of Cooper's petition is devoted to allegations that he was denied the effective assistance of appellate counsel. Such a claim requires an evaluation of whether counsel's performance was so deficient that it fell outside the range of professionally acceptable performance and, if so, whether the deficiency was so egregious that it undermined confidence in the correctness of the result. Thompson v. State, 759 So. 2d 650, 660 (Fla. 2000); Groover v. Singletary, 656 So. 2d 424, 425 (Fla. 1995); Byrd v. Singletary, 655 So. 2d 67, 68-69 (Fla. 1995), cert. denied, 516 U.S. 1175 (1996). A review of the record in this case demonstrates that neither deficiency nor prejudice has been shown by Cooper.

Cooper's first argument is based on his appellate counsel's failure to raise an issue regarding the trial court's denial of his motion for continuance, prior to the sentencing proceeding on March 14, 1983 (DA. V4/391-396). The record reflects that, at the beginning of a joint sentencing hearing for both Cooper and J.D. Walton, about two months after the jury recommendations had been returned against Cooper, the prosecutor notified the

court of a potential deal offered to codefendant Jeff McCoy (DA. V4/391-393). Counsel for Cooper requested a continuance in order to explore the possibility that McCoy may have some information that might assist the court with sentencing (DA. V4/393). The defense had been given provided copies of McCoy's taped statement months earlier, and the State did not intend to use McCoy as a witness in the Cooper penalty phase; on these facts, the trial court denied the motion to continue (DA. V4/396).

Cooper's petition offers no basis for relief; this issue would not have been successful if argued in Cooper's direct appeal. The relevant question is whether the trial judge abused his discretion in denying the motion to continue. Scott v. State, 717 So. 2d 908 (Fla. 1998). No abuse of discretion has been shown on the facts of the instant case. Contrary to Cooper's assertions, the State did not first make McCoy available and then withdraw him as a witness; the record reflects that McCoy had never been available at that time (DA. V4/391-396). In addition, McCoy's ultimate testimony in the Royal case, which Cooper uses to support his claim that McCoy could have provided additional mitigation for Cooper, was not available at the time of Cooper's direct appeal. This case did not involve the "haste" in sentencing which might lead to

finding an abuse of discretion. Absent some abuse, this issue had no merit, and therefore counsel was not ineffective for failing to present this claim. Mendyk v. Dugger, 592 So. 2d 1076, 1081-82 (Fla. 1992) (rejecting claim of ineffective assistance of counsel where defendant failed to demonstrate an abuse of discretion); Groover, 656 So. 2d at 425; Chandler v. Dugger, 634 So. 2d 1066, 1068 (Fla. 1994) (failure to raise nonmeritorious issues is not ineffective assistance of appellate counsel). On these facts, Cooper is not entitled to habeas relief.

CLAIM II

APPELLATE COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO RAISE A CLAIM OF IMPROPER CONSIDERATION OF COOPER'S LACK OF REMORSE.

Cooper next alleges that his appellate attorney failed to raise allegations relating to the alleged consideration of lack of remorse as an improper, nonstatutory aggravating factor. The record reflects that no improper evidence of Cooper's lack of remorse was admitted or argued at his penalty phase. Although Cooper asserts that Skalnik's testimony about Cooper's demeanor suggested that Cooper was not remorseful, Skalnik himself never made any reference to "remorse" (DA. V11/1431-1459). His testimony about Cooper's demeanor, and Cooper's bragging about

the offense, was relevant to rebut the mitigation argued by the defense based on Cooper's age and supposed domination by Walton during these murders. It also corroborated Skalnik's description of the circumstances of Cooper's statements, which was called into question at the trial as it has been in postconviction. The State never argued for the jury to consider any lack of remorse as part of its presentation of aggravating factors.

Cooper quotes from the sentencing order to suggest that the trial court improperly found lack of remorse as an aggravating factor, but the quote was taken from the part of the order discussing Cooper's mitigation of "any aspect of the defendant's character" (Petition, p. 11; DA. V2/248). This demonstrates that, to the extent that the judge may have considered any lack of remorse, it was only used as a way to rebut Cooper's mitigation. Testimony relating to Cooper's lack of remorse could have been admitted to refute Cooper's presentation of remorse during the mitigation phase of the trial. Cooper specifically admitted a letter, written by Cooper to his buddy Jeff McCoy, which expressed sorrow about the mess they were in (DA. V11/1481-87). The State would have been entitled to rebut this evidence with any testimony demonstrating that Cooper had no remorse.

Thus, Cooper's allegations in this claim are not supported by the record. No improper testimony or argument has been identified. Had counsel raised an issue of Skalnik's testimony about Cooper's demeanor, he would not have obtained any relief. Cooper has failed to show any deficiency in his appellate counsels' performance regarding any possible claim relating to his current allegations that the sentencers in his case improperly considered lack of remorse as an aggravating factor. No habeas relief is warranted.

CLAIM III

APPELLATE COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO RAISE A CLAIM OF PROSECUTORIAL MISCONDUCT.

Cooper next alleges that his sentences were tainted by prosecutorial misconduct. Once again, this claim would have been both procedurally barred and without merit if it had been raised in Cooper's appeal. Specifically, Cooper challenges statements from the prosecutor's closing penalty phase argument, claiming that the prosecutor improperly discussed the lack of mitigating evidence that had not been presented.

As Cooper admits, there was no objection to prosecutor's argument as now challenged. It is well established that counsel will not be deemed ineffective for failing to raise claims

pertaining to prosecutorial arguments which were not objected to at trial, Ferguson v. Singletary, 632 So. 2d 53, 58 (Fla. 1993); Kelley v. Dugger, 597 So. 2d 262, 263 (Fla. 1992); or any claim that was not preserved for review. Kokal v. Dugger, 718 So. 2d 138, 142-143 (Fla. 1998).

In addition, this issue would not have been successful if argued in Cooper's direct appeal, as no improper comments have been identified. A review of the prosecutor's closing argument, as a whole, demonstrates that the State properly discussed the aggravating and mitigating factors, and reviewed the testimony offered in support of both. Cooper has failed to show that any misconduct occurred.

Even if the prosecutor's comments in this case were deemed to be improper, such comments are not reversible error, let alone fundamental, where the remarks did not become a feature of the trial. See Sims v. State, 602 So. 2d 1253, 1257 (Fla. 1992) (rejecting claim of ineffective assistance of counsel for failure to object to Golden Rule violation), cert. denied, 506 U.S. 1065 (1993); Bertolotti v. State, 476 So. 2d 130, 133 (Fla. 1985) (prosecutor's penalty phase closing argument not egregious enough to warrant new sentencing). In order to constitute fundamental error, the prosecutor's statements had to "reach down into the validity of the trial itself to the extent that a

verdict of guilty could not have been obtained without the assistance of the alleged error." State v. Delva, 575 So. 2d 643, 644-45 (Fla. 1991), quoting Brown v. State, 124 So. 2d 481, 484 (Fla. 1960). The complained-of comments herein clearly did not meet this standard. See Crump v. State, 622 So. 2d 963, 972 (Fla. 1993) (prosecutor's comments, including a narrative to gain sympathy for the victim, not so outrageous as to taint the jury recommendation); Jones v. Wainwright, 473 So. 2d 1244, 1245 (Fla. 1985) (rejecting ineffective assistance of appellate counsel claim based on failure to challenge prosecutorial comments). This was a deplorable offense involving five strong aggravating circumstances and no mitigating factors. The recommendations of death could surely have been obtained, followed, and upheld on appeal without the challenged comments.

On these facts, counsel cannot be deemed ineffective for failing to raise an issue challenging the prosecutor's closing argument. The issue would have been both barred and without merit, as no prosecutorial misconduct has been shown.

CLAIM IV

APPELLATE COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO RAISE A CLAIM INVOLVING THE FILING OF THE SENTENCING ORDER.

Cooper next alleges that his appellate attorney should have raised several issues involving the filing of the sentencing order. The record reflects that the court held a sentencing hearing on March 14, 1983, and after considering the evidence and argument presented, the court orally announced that each aggravating factor submitted to the jury had been proven, and that the mitigating factors had been considered but that there were no mitigating factors that outweighed the aggravation, either separately or in toto (DA. V4/467-68). The court indicated at the time that its findings would be reduced to writing, and on May 30, 1984, months before the record was certified for appeal in this case, a detailed written order was filed (DA. V2/243-248).

Cooper now claims that the lack of contemporaneous written order, filed at the time that sentence was pronounced, should have been alleged as error in his direct appeal. Cooper claims that, since such a claim was successful in his codefendant's case, Van Royal v. State, 497 So. 2d 625 (Fla. 1986), he would have had his death sentences reduced to life had this argument been presented.

Cooper's claim is without merit. The significant factors noted in Van Royal to compel the granting of relief in that case are not present in the instant case. For example, in Van Royal

the trial judge made no oral findings at all, but more importantly, the written order ultimately rendered in Van Royal was not filed until a year and a half after the commencement of the appeal, and six months after the record had been certified. The Van Royal Court recognized that written orders were sometimes not entered until "after" the oral sentence had been pronounced, noting that there was no problem with that procedure, "[p]rovided this is done on a timely basis before the trial court loses jurisdiction." 497 So. 2d at 628.

It was not until after Cooper's appeal that the law was clarified to require, prospectively only, that the sentencing order be filed contemporaneously with the oral pronouncement of sentencing. See Grossman v. State, 525 So. 2d 833, 841 (Fla. 1988). Relief on this issue was denied on the same facts presented herein in Grossman, as well as in Muehleman v. State, 503 So. 2d 310, 317 (Fla. 1987). These cases demonstrate that Cooper would not have benefitted from raising this claim in his direct appeal.

Cooper also suggests that the sentencing order rendered in this case was deficient because the drafting of the sentencing order was improperly delegated to the State Attorney's Office. Cooper bases this claim on the fact that his sentencing order was "similar" to the one filed in Van Royal's case, and on an

affidavit filed by his appellate attorney acknowledging that it was "common knowledge and practice" for the State Attorney's Office to draft the findings. These assertions are insufficient to establish that the State Attorney's Office had any involvement in the drafting of the sentencing order in this case. Indeed, Cooper seems to acknowledge that his facts are insufficient, as he suggests that appellate counsel should have at least filed a motion to relinquish jurisdiction for a determination as to whether any improper delegation had occurred (Petition, p. 17).

Cooper has not offered a sufficient claim for his attorney to have presented on appeal. The record on appeal did not reflect that the sentencing order had been drafted by the State Attorney's Office, so there was no basis for such an appellate argument. This necessarily required the development of facts at an evidentiary hearing, and even if jurisdiction had been relinquished, the question might not be resolved. See Nixon v. State, 572 So. 2d 1336, 1340 (Fla. 1990) (remanding for an evidentiary hearing on same claim and then declining to address issue, identifying issue as one more appropriate for postconviction), cert. denied, 502 U.S. 854 (1991). At any rate, Cooper made no attempt to develop this claim factually in

his postconviction proceeding, and no basis for relief has been offered in this petition.

Cooper's final allegation within this claim is that counsel should have asserted an issue regarding the trial court's failure to separate its findings as outlined for each victim. He claims that some factors may have only applied to one victim, and therefore the entire sentencing order must be vacated.

Cooper has not offered any legal authority to demonstrate that he would have received any relief had this issue been presented in his appeal. He has not cited any case law to establish that the sentencing order rendered in his case was insufficient. At the most, presumably, his case may have been remanded for a new sentencing order, and clearly the same sentences would have been imposed. Since any possible error in this regard would clearly be harmless, no basis for a finding of ineffective assistance of appellate counsel has been offered in this claim.

CLAIM V

APPELLATE COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO RAISE A CLAIM THAT THE PENALTY PHASE JURY INSTRUCTIONS DEFINING AGGRAVATING FACTORS WERE UNCONSTITUTIONALLY VAGUE.

Cooper next asserts that appellate counsel should have challenged the adequacy of the jury instructions defining the

aggravating factors. This Court has repeatedly rejected such claims where, as here, no issue was preserved for appellate review. Byrd, 655 So. 2d at 69; Hardwick v. Dugger, 648 So. 2d 100, 106 (Fla. 1994). The record in the instant case reflects that this claim was not preserved for review; although counsel objected to the giving of some instructions as unsupported by the evidence, there was no objection on vagueness grounds and the defense did not offer its own instruction to clarify the definitions. Harvey v. Dugger, 656 So. 2d 1253, 1258 (Fla. 1995); Beltran-Lopez v. State, 626 So. 2d 163 (Fla. 1993), cert. denied, 511 U.S. 1115 (1994). Furthermore, this Court has rejected the failure to raise this claim as a basis for ineffective assistance of appellate counsel because, prior to Espinosa v. Florida, 505 U.S. 1079 (1992), the claim would have been rejected, even if raised. Doyle v. Singletary, 655 So. 2d 1120, 1121 (Fla. 1995); Lambrix v. Dugger, 641 So. 2d 847, 849 (Fla. 1994); Henderson v. Singletary, 617 So. 2d 313, 316-17 (Fla. 1993). Thus, the failure to raise this issue at the time of Cooper's 1986 appeal did not constitute ineffective assistance of appellate counsel.

CLAIM VI

APPELLATE COUNSEL WAS NOT INEFFECTIVE FOR
FAILING TO RAISE A CLAIMS REGARDING THE
CONSIDERATION OF MITIGATION AND
PROSECUTORIAL COMMENT ABOUT SYMPATHY.

Cooper's next allegation again attacks counsel's failure to raise an issue of prosecutorial misconduct with regard to the State's penalty phase closing argument. As with the prior claim presented on this basis, any possible argument related to the prosecutor's comments would have been found procedurally barred and without merit. Thus, no ineffective assistance of counsel is demonstrated.

Cooper's primary argument asserts that the prosecutor improperly told the jury that they should not consider sympathy in their penalty recommendation, and improperly recited his personal beliefs about the mitigating evidence that had been presented. A review of the closing argument, in context, fails to support any claim of improper statements. Ford v. State, 802 So. 2d 1121 (Fla. 2001). Other cases demonstrate that this Court has routinely denied relief on comments more egregious than those challenged in this case. Compare Knight v. State, 746 So. 2d 423, 433 (Fla. 1998) (improper comments about the value of defendant's and victims' lives not egregious enough to warrant voiding the entire proceeding); Chandler v. State, 702 So. 2d 186, 201 (Fla. 1997) (prosecutor's comments that Chandler

and his counsel were thoughtless and petty, that counsel engaged in "cowardly" and "despicable" conduct and Chandler was "malevolent" were not so prejudicial as to vitiate the entire trial), cert. denied, 523 U.S. 1083 (1998); Davis v. State, 698 So. 2d 1182, 1192 (Fla. 1997), cert. denied, 522 U.S. 1127 (1998) (rejecting claim "that the prosecutor improperly misled the jurors into believing that they should not be swayed by any sympathy"). Thus, when the allegations of prosecutorial misconduct from the State's penalty phase argument are considered, no error has been demonstrated. Any impropriety in any of the challenged remarks discussed in this issue could not have affected the ultimate result. This Court has denied relief in a number of cases with comments more questionable than those presented herein, with death sentences imposed on less aggravating and involving more mitigation, and a closer jury recommendation for death. See Reese v. State, 694 So. 2d 678, 685 (Fla. 1997) (no error in prosecutor's use of story about a "cute little puppy" that "grew into a vicious dog"); Jackson v. State, 704 So. 2d 500, 507 (Fla. 1997) (no error in claim that prosecutor encouraged juror to send law and order message to the community). No relief is warranted.

CLAIM VII

APPELLATE COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO RAISE A CLAIM THAT THE ADMISSION OF VICTIM IMPACT EVIDENCE RENDERED COOPER'S SENTENCE UNCONSTITUTIONAL.

Cooper's next allegation attacks counsel's failure to raise an issue as to the admission of victim impact evidence. Specifically, Cooper claims that the admission of the 911 tape of Chris Fridella's phone call after the murders was evidence "from a victim" and therefore improper. Once again, no objection preserved this issue for appellate review, and it is well established that appellate counsel cannot be deemed to have been ineffective for failing to raise a claim that was not preserved for review. Kokal v. Dugger, 718 So. 2d 138, 142-143 (Fla. 1998).

In addition, this issue would not have been successful if argued in Cooper's direct appeal. The 911 tape was obviously relevant and was not offered to inflame the jury. It was not excludable simply because one of the voices recorded belonged to the child victim, who was not killed in the episode. No legal authority indicating that this tape should not have been admitted on this basis has been offered. Once again, no habeas relief is warranted.

CLAIM VIII

FLORIDA'S DEATH PENALTY STATUTE IS NOT
UNCONSTITUTIONAL.

Cooper's next allegation does not offer a claim of ineffective assistance of counsel, but attacks the validity of Florida's death penalty statute as applied in his case. Cooper relies on Apprendi v. New Jersey, (2001), to suggest that Florida's statute is unconstitutional. This argument is procedurally barred; it is not offered as a claim of ineffective assistance of counsel, and there is no indication that this issue was presented earlier. This Court has consistently rejected the application of Apprendi in Florida, and has rejected the failure to present this issue on direct appeal as a basis for ineffective assistance of appellate counsel. Brown v. State, 800 So. 2d 223 (Fla. 2001). Mills v. State, 786 So. 2d 532, 536-38 (Fla.), cert. denied, 121 S. Ct. 1752 (2001). Thus, no habeas relief is warranted.

CLAIM IX

APPELLATE COUNSEL WAS NOT INEFFECTIVE FOR
FAILING TO RAISE A CLAIM OF A CALDWELL
VIOLATION.

Cooper's next allegation attacks counsel's failure to raise an issue on appeal that the jury's sense of responsibility was unconstitutionally diminished by the prosecutor's comments in

violation of Caldwell v. Mississippi, 472 U.S. 320 (1985). Once again, this claim would have been both procedurally barred and without merit if it had been raised in Cooper's appeal. No legitimate claim of error regarding the comments challenged could have been argued on appeal.

This claim was without merit since the jury's role was properly described by the prosecutor and the judge. Archer v. State, 673 So. 2d 17, 21 (Fla.), cert. denied, 519 U.S. 876 (1996) (Florida standard jury instructions adequately describe role to jury); Johnson v. State, 660 So. 2d 637, 647 (Fla. 1995), cert. denied, 517 U.S. 1159 (1996); Hunter v. State, 660 So. 2d 244, 253 (Fla. 1995), cert. denied, 516 U.S. 1128 (1996); Fotopoulos v. State, 608 So. 2d 784, 794, n. 7 (Fla. 1992), cert. denied, 508 U.S. 924 (1993). Claims identical to the one presented herein have been repeatedly rejected. Johnston v. Dugger, 583 So. 2d 657, 662-663, n. 2; Rose v. State, 617 So. 2d 291, 297 (Fla. 1993). Cooper has not offered any authority to the contrary, and relief is not warranted on this basis.

CLAIM X

APPELLATE COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO RAISE A CLAIM THAT THE JURY INSTRUCTION ON MAJORITY VOTE VIOLATED COOPER'S CONSTITUTIONAL RIGHTS.

Cooper's next allegation attacks counsel's failure to raise an issue as to the jury instructions suggesting that a majority vote was necessary for its sentencing recommendation. This claim would also have been procedurally barred and meritless if presented on appeal, and no basis for finding counsel ineffective for failing to present this issue has been offered. The record reflects that the jury was specifically told that if "six" or more jurors recommended a sentence of life, this would constitute a life recommendation (DA. V11/1609). Once again, Cooper has cited no legal authority which compels relief in this case, and no habeas relief is warranted.

CLAIM XI

THE JURY INSTRUCTION GIVEN TO COOPER'S JURY
DID NOT UNCONSTITUTIONALLY SHIFT THE BURDEN
OF PROOF.

Cooper next alleges that his jury instructions improperly shifted the burden of proof. This claim was not preserved for appellate review as Cooper is not challenging the denial of a particular requested instruction. Furthermore, this Court has repeatedly recognized that the burden shifting claim is without merit. Freeman v. Singletary, 761 So. 2d 1055, 1072 (Fla. 2000); Demps v. Dugger, 714 So. 2d 365 (Fla. 1998); Shellito v. State, 701 So. 2d 837 (Fla. 1997). Counsel cannot be deemed

ineffective for failing to raise a barred, meritless claim. Thus, no habeas relief is warranted.

CLAIM XII

COOPER'S DEATH SENTENCE IS NOT IMPROPER OR UNCONSTITUTIONAL DUE TO THE LENGTH OF TIME COOPER HAS BEEN ON DEATH ROW.

Cooper's last allegation attacks his sentence on the basis of the difficult time he has had to endure while waiting for his death sentence to be carried out. Cooper's suggestion that he cannot be executed because of the length of time that he has spent on death row has been consistently rejected by this Court as well as the United States Supreme Court. Cooper cites no authority for rejection of the clear precedent for denying his claim. See Rose v. State, 787 So. 2d 786 (Fla. 2001); Booker v. State, 773 So. 2d 1079, 1096 (Fla. 2000); Knight v. State, 746 So. 2d 423, 427 (Fla. 1998), cert. denied, 120 S. Ct. 459 (1999); Elledge v. State, 706 So. 2d 1340, 1342, n.4 (Fla. 1997); Hitchcock v. State, 673 So. 2d 859, 863 (Fla. 1996); Hitchcock v. State, 578 So. 2d 685 (Fla. 1990).

If this court were to vacate a death sentence merely because of a delay caused by a defendant exercising his constitutional

rights, it would be the convicted felon controlling the judicial process, not the courts. Through no fault of its own, the State could be deprived of a lawful sentence. Accordingly, this Court must find that Cooper's constitutional rights have not been violated and deny relief on this issue.

WHEREFORE, Respondent respectfully requests that this Honorable Court DENY the Petition for Writ of Habeas Corpus filed in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to Mark S. Gruber, Capital Collateral Regional Counsel - Middle Region, 3801 Corporex Park Dr., Suite 210, Tampa, Florida, 33619; Robin L. Rosenberg, Esq. and Rachel E. Fugate, Esq., HOLLAND & KNIGHT LLP, Post Office Drawer 810, Tallahassee, Florida 32302-0810, this _____ day ~~CERTIFICATE OF SERVICE~~ **CERTIFICATE OF TYPE SIZE AND STYLE**

I HEREBY CERTIFY that the size and style of type used in this response is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

COUNSEL FOR APPELLEE