

IN THE SUPREME COURT OF FLORIDA

MARC JAMES ASAY,

Petitioner,

v.

CASE NO. SC01-2371

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

Respondent.

-----/

RESPONSE TO
PETITION FOR WRIT OF HABEAS CORPUS

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

CURTIS M. FRENCH
ASSISTANT ATTORNEY GENERAL

OFFICE OF THE ATTORNEY

GENERAL

PL-01, THE CAPITOL
TALLAHASSEE, FL 32399-1050

(850) 414-3300
(850) 487-0997 (FAX)

COUNSEL FOR RESPONDENT

PRELIMINARY STATEMENT

Asay asserts that this is his first habeas corpus petition in this Court. Actually, he filed a previous one, which was denied without written opinion. Asay v. Dugger, 562 So.2d 345 (Fla. 1990). This is, however, his first state habeas petition attacking his conviction and sentence. Respondent Moore (hereafter, the State) will cite to the trial record as "TR," the 3.850 postconviction record as "PCR," and the supplemental postconviction record as "PCRS."

RESPONSE IN OPPOSITION TO REQUEST FOR ORAL ARGUMENT

Asay's conviction and death sentence were affirmed on direct appeal. Asay v. State, 580 So.2d 610 (Fla. 1991). Asay thereafter filed a motion for postconviction relief in the trial court. Ultimately, postconviction relief was denied by the trial court, and on April 5, 1999, Asay filed his initial brief on appeal from that denial. This Court affirmed and, on October 26, 2000, denied Asay's motion for rehearing. Asay v. State, 769 So.2d 974 (Fla. 2000). One day less than a full year later, Asay has filed the instant habeas corpus petition, raising not a single claim that could not have been raised as soon as the direct appeal proceedings were final more than ten years ago. These claims certainly could have been lodged in this Court two and one half years ago, simultaneously with the initial brief

Asay filed in his 3.850 appeal, as the rules of appellate and criminal procedure now require. Mann v. Moore, 26 Fla. L. Weekly S490 (Fla. July 12, 2001) (interpreting the rules to require that "all petitions for extraordinary relief, including habeas corpus petitions, must be filed simultaneously with the initial brief appealing the denial of a rule 3.850 motion," but declining to enforce such rule before January 1, 2002).

The State acknowledges that because enforcement of the rules, as interpreted by this Court in Mann, will operate prospectively only, Asay's petition does not appear to be time barred. Nevertheless, if any of the claims presented in the instant habeas petition had sufficient merit to entitle Asay either to a new trial or at least a new sentencing, Asay was ill served by the delay in instituting these habeas proceedings, and would be ill served by further delay. In fact, however, Asay has presented no claims that are not either procedurally barred or meritless or both, and this entire proceeding has been initiated merely for the purpose of delay--designed not to obtain relief, but to further toll the time for commencing his federal habeas proceedings.

That being the case, there is no necessity for oral argument. The State opposes Asay's request for oral argument, and would ask this Court simply to review the claims raised by

Asay and the State's response thereto and deny the petition based on the written pleadings. By separate pleading, the State will file a motion to strike this case from the oral argument calendar.

PROCEDURAL HISTORY

On August 20, 1987, Asay was indicted on two counts of first degree murder (R 11). He was convicted by a jury on September 29, 1988. The penalty phase began not quite one month later, on October 28, 1988. The jury recommended death on each murder count by a 9-3 vote, and the trial court followed that recommendation (R 143-44, 156-59). Asay appealed to this Court raising seven claims; he contended the trial court erred in: (1) allowing the prosecutor to inject racial prejudice into the trial; (2) failing to conduct a Faretta inquiry; (3) denying Asay's motion for judgment of acquittal; (4) denying Asay's pro se motion for continuance to secure witnesses who could testify in mitigation and in rebuttal to any theory that racial prejudice motivated the murders; (5) finding that the murders were CCP; (6) sentencing Asay to death as such sentence was disproportionate to the crimes; and (7) failing to correct allegedly misleading prosecutorial remarks and argument diminishing the role of the jury in sentencing. Initial Brief of Appellant, case No. 73,432. This Court rejected claims 1, 2,

4 and 7 without discussion. 580 So.2d at 612 (fn. 1). The remaining claims were rejected with discussion.

Asay filed his first motion for postconviction relief in the trial court on March 16, 1993. He filed a 20-claim amended motion on November 24, 1993. This Court described those claims as being:

(I) state agencies withheld public records; (II) the judge presiding over the trial was biased and trial counsel was ineffective for failing to recuse him; (III) the original trial judge should have recused himself from presiding over the postconviction proceedings because he is biased; (IV) trial counsel was ineffective during the guilt phase; (V) the jury instructions for the CCP aggravator failed to limit the jury's consideration and it was not supported by the evidence; (VI) the CCP jury instruction was unconstitutional and counsel was ineffective for failing to object; (VII) Florida's sentencing scheme is unconstitutional; (VIII) aggravating circumstances were overbroadly argued by the State; (IX) the trial judge erred in failing to find mitigation present in the record; (X) the penalty phase jury instructions shifted the burden of proof to the defendant; (XI) the prosecutor's inflammatory comments rendered Asay's trial fundamentally unfair; (XII) Asay was denied his right to an adequate mental health evaluation under Ake v. Oklahoma, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985); (XIII) ineffective assistance in the penalty phase; (XIV) the denial of Asay's motion for a continuance before the penalty phase to secure additional mitigation witnesses denied him due process and rendered counsel ineffective; (XV) the trial court prevented Asay from presenting mitigation evidence in violation of Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978); (XVI) Asay's guilt phase counsel was ineffective for failing to present a voluntary intoxication defense; (XVII) the prosecutor improperly stated that sympathy could not be considered by the jury; (XVIII) the jury instructions unconstitutionally diluted the jury's sense of

sentencing responsibility and counsel was ineffective for failing to ensure that the jury received adequate instructions; (XIX) prosecutorial misconduct rendered Asay's conviction unreliable; and (XX) Asay's trial court proceedings were fraught with errors that cannot be considered harmless when considered as a whole.

769 So.2d at 990 (fn 5). The trial court summarily denied claims 1, 2, 5, 6, 7, 8, 9, 11, 12, 14, 15, 17, 18, 19 and 20, and denied the remaining claims following evidentiary hearing. This Court affirmed. Asay v. State, 769 So.2d 974 (Fla. 2000).

STATEMENT OF THE FACTS

In its opinion affirming the conviction and sentence, this Court summarized the relevant facts of the crime as follows:

According to testimony of Asay's brother, Robbie, and Robbie's friend, "Bubba" McQuinn [O'Quinn], on July 17, 1987, the three met at a local bar where they drank beer and shot pool. They left the bar around 12:00 a.m. and went to a second bar where they stayed until closing at 2:00 a.m. Although Asay drank a number of beers, both Bubba and Robbie testified that Asay did not appear drunk or otherwise impaired.

After the bar closed, Robbie said he wanted to try to "pick up a girl" he had seen at the bar, so Bubba and Asay drove around the corner in Asay's truck. They returned to discover that Robbie had been unsuccessful with the girl he had seen, so Bubba suggested that they go downtown to find some prostitutes and he would pay for oral sex for them all. Asay and Bubba left in Asay's truck and Robbie left in his. Once downtown, Asay and Bubba soon spotted Robbie who was inside his truck talking to a black man, Robert Lee Booker. Robbie was telling Booker who was standing at the driver's side window of

Robbie's truck that he and his friends were looking for prostitutes.

After spotting Booker standing by Robbie's truck, Asay told Bubba to pull up next to the truck. Asay immediately got out of his truck, proceeded to Robbie's truck, and told Robbie "You know you ain't got to take no s--t from these f---ing niggers." Although Robbie told Asay that "everything is cool," Asay began to point his finger in Booker's face and verbally attack him. When Booker told him "Don't put your finger in my face," Asay responded by saying "F--k you, nigger" and pulling his gun from his back pocket, shooting Booker once in the abdomen. Booker grabbed his side and ran. According to the medical examiner, the bullet perforated the intestines and an artery causing internal hemorrhaging. Booker's body was later found under the edge of a nearby house.

Robbie drove away immediately after the shooting. Asay jumped into the back of his truck, as Bubba drove off. When Asay got into the cab of the truck, Bubba asked him why he shot Booker. Asay responded, "Because you got to show a nigger who is boss." When asked if he thought he killed Booker, Asay replied, "No, I just scared the s--t out of him."

Bubba testified that after the shooting, Asay and Bubba continued to look for prostitutes. According to Bubba, he saw "Renee" who he knew would give them oral sex. It appears that at the time neither Bubba nor Asay was aware that "Renee" was actually Robert McDowell, a black man dressed as a woman. According to Bubba, he negotiated a deal for oral sex for them both. Bubba drove the truck into a nearby alley. McDowell followed. Bubba testified that McDowell refused to get into the truck with them both, so Asay left the truck and walked away to act as a lookout while Bubba and McDowell had sex. As McDowell started to get into the truck with Bubba, Asay returned, grabbed McDowell's arm, pulled him from the truck and began shooting him. McDowell was shot six times while he was backing up and attempting to get away. Asay jumped back in his truck and told Bubba to drive away. When asked why he shot McDowell, Asay told Bubba that he did it because "the bitch had beat him out of ten

dollars" on a "blow job." McDowell's body was found on the ground in the alley soon after the shots were heard. According to the medical examiner, any of three wounds to the chest cavity would have been fatal.

Asay later told Charlie Moore in the presence of Moore's cousin, Danny, that he shot McDowell because McDowell had cheated him out of ten dollars on a drug deal and that he had told McDowell, "if he ever got him that he would get even." Asay told Moore that he was out looking for "whores," when he came across McDowell. According to Moore's cousin, Danny, Asay also told Moore that his plan was to have Bubba get McDowell in the truck and they "would take her off and screw her and kill her." Moore testified that Asay told him that when Bubba "didn't have [McDowell] in the truck so they could go beat him up," Asay "grabbed [McDowell] by the arm and stuck the gun in his chest and shot him four times, and that when he hit the ground, he finished him off." As a result of tips received from Moore and his cousin after McDowell's murder was featured on a television Crime Watch segment, Asay was arrested and charged by indictment with two counts of first-degree murder.

Asay v. State, supra, 580 So.2d at 610-12 (Fla.1991).

PRELIMINARY DISCUSSION OF APPLICABLE LAW

There are a number of well-settled principles applicable to habeas corpus proceedings filed in this Court. The State will discuss them at this juncture and then elaborate to the extent necessary in its responses to specific claims.

First, this Court has repeatedly stated that capital habeas corpus proceedings were not intended as second appeals of issues which could have been or were presented on direct appeal or in a rule 3.850 proceeding. E.g., Jones v. Moore, 794 So.2d 579

(Fla. 2001); Teffeteller v. Dugger, 734 So.2d 1009 (Fla. 1999); Hildwin v. Dugger, 654 So.2d 107, 111 (Fla. 1995); Hardwick v. Dugger, 648 So.2d 100, 105 (Fla. 1994); Scott v. Dugger, 604 So.2d 465, 470 (Fla. 1992); Medina v. Dugger, 586 So.2d 317 (Fla. 1991).

"Habeas petitions are the proper vehicle to advance claims of ineffective assistance of appellate counsel." Rutherford v. Moore, 774 So.2d 637, 643 (Fla. 2000) (emphasis supplied). To prevail on such a claim, a defendant must show 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). In other words, "Petitioner must show 1) specific errors or omissions which show that appellate counsel's performance deviated from the norm or fell outside the range of professionally acceptable performance and 2) the deficiency of that performance compromised the appellate process to such a degree as to undermine confidence in the fairness and correctness of the appellate result." Wilson v. Wainwright, 474 So. 1162, 1163 (Fla. 1985). This Court recently summarized these principles:

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 [v. Singletary], 691 So. 2d 470 [(Fla. 1997)]; Hardwick v. Dugger, 648 So.2d 100 (Fla. 1994). 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, 1069-70 (Fla. 2000).

Generally, appellate counsel cannot be considered ineffective for failing to raise issues that were not preserved by trial counsel, unless "trial counsel was so obviously

inadequate that appellate counsel had to present that question to render adequate assistance." Page v. U.S., 884 F.2d 300, 302 (7th Cir. 1989). See e.g., Provenzano v. Dugger, 561 So.2d 541, 548 (Fla. 1990) ("Trial counsel did not object . . ., thereby precluding an effective argument on appeal"); Atkins v. Dugger, 541 So.2d 1165, 1166 (Fla. 1989) (appellate counsel not ineffective for failing to raise 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").

In addition, "appellate counsel is not ineffective for failing to raise a claim that would have been rejected on appeal." Downs v. State, 740 So.2d 506, 517 n. 18. Accord, Freeman (appellate counsel not ineffective for failing to raise non-meritorious issues); Rutherford v. Moore, 774 So.2d 637, 643 (Fla. 2000) (same); Alvord v. Wainwright, 725 F.2d 1282, 1291 (11th Cir. 1984) (appellate counsel "need not brief issues reasonably considered to be without merit"). In fact, appellate counsel is not necessarily ineffective for failing to raise a claim that might have had some possibility of success; effective appellate counsel need not raise every conceivable non-frivolous

issue. Jones v. Barnes, 463 U.S. 745, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983) (appellate counsel not required to argue all non-frivolous issues, even at request of client). Accord, Provenzano, 561 So.2d at 548-49 ("it is well established that counsel need not raise every nonfrivolous issue revealed by the record"); Atkins v. Dugger, 541 So.2d at 1167 ("the assertion of every conceivable argument often has the effect of diluting the impact of the stronger points").

Nor can appellate counsel be deemed ineffective if the habeas claim, or a variant thereof, was, in fact, "raised on direct appeal," Atkins v. Dugger, supra, 541 So.2d at 1166-67. Accord, Provenzano, supra, 561 So.2d at 548 (no ineffective assistance where appellate counsel raised the claim on appeal, but it was rejected); Jones v. Moore, supra ("habeas is not proper to argue a variant of an already decided issue"). So long as appellate counsel raised the issue on appeal, mere quibbling with or criticism of the manner in which appellate counsel raised such issue on appeal is insufficient to state a habeas-cognizable issue. Jones; Thompson v. State, 759 So.2d 650, 657 n. 6 (Fla. 2000).

Finally, 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). Thus, claims properly

raised and rejected in a previous rule 3.850 motion for post-conviction relief cannot be raised again on habeas. See Scott v. Dugger, 604 So.2d 465, 469-70 (Fla. 1992).

SPECIFIC RESPONSE TO CLAIMS

CLAIM I

THE CLAIM THAT APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE THE ISSUE OF ASAY'S ALLEGED ABSENCES DURING CRITICAL STAGES OF THE PROCEEDINGS

Although Asay's statement of this claim begins with the allegation that he "was absent during critical stages of the proceedings," it should be noted that he does not contend that he was not in the courtroom during any part of his trial, nor that any portion of the jury selection proceedings took place outside the courtroom. His allegation is, rather, that he was not with his attorney at bench conferences when peremptory and cause challenges were made and ruled upon. In this habeas proceeding, the issue before this Court is whether or not appellate counsel was constitutionally ineffective for failing to raise and argue the issue of Asay's alleged absences from these bench conferences on appeal. The appellate ineffectiveness issue encompasses two pertinent questions: (1) Did appellate counsel perform deficiently (i.e., below minimum standards of acceptable appellate attorney performance); and (2) was the failure of appellate counsel to raise and argue this

issue prejudicial (i.e., is there a reasonable probability that the result of the appeal would have been different)? Although Asay nowhere acknowledges this, the substantive issue of Asay's alleged absences from bench conferences is itself procedurally barred and is addressable only to the extent that it is relevant to, and subsumed within, the appellate attorney effectiveness issue.

Facts of Record

Because the appellate attorney's decisions about what issues to raise would have been based upon his examination of the record on appeal, it is appropriate and necessary to examine the state of that record as to this issue.

Following voir dire examination of a number of jurors, a bench conference was conducted at which jury challenges, both peremptory and cause, were dealt with. The bench conference began with the court advising defense counsel that he was welcome to confer with his client at any time:

(And thereupon a bench conference was had out of the hearing of the jury as follows:)

THE COURT: Let the record reflect that we're at the bench outside the hearing of the jury.

And before we start Mr. David [trial counsel], if you need to confer with your client at anytime -

MR. DAVID: I think let's go through a little bit, and I'll go back and ask him if it's agreeable.

THE COURT: You are free to converse with him at anytime. And for the record, you have conferred with him a little before we started.

(TR 302-03). After dealing with one challenge for cause from each side (TR 303-07), the parties exercised peremptories, the defense exercising six and the state one (TR307-313). At this point, defense counsel again conferred with his client and, after doing so, exercised an additional peremptory:

MR. DAVID: I will need to go confer with my client, if that would be okay, just one moment? Can you give me a moment?

THE COURT: Okay

(Short pause)

THE COURT: Okay, for the record, defense counsel has conferred with his client.

MR. DAVID: Your Honor, we are going to strike Mr. Reid, No. 120.

(TR 313). The state then exercised its second peremptory on Mr. Miner (TR 313-14). There were now 11 jurors acceptable to both parties (TR 314). Additional jurors were examined on voir dire, in open court, and in Asay's presence (TR 316-351). Afterwards, additional challenges were exercised, again at a bench conference, and the jury selection was concluded (TR 351-56), with both the state and defense counsel on behalf of "the defendant" accepting the jury (TR 356).

Thereafter, following the presentation of opening statements

and testimony from five state's witnesses, Asay attempted (outside the presence of the jury) to "fire" his trial counsel (TR 537-39). He complained that his attorney was not being paid enough to justify making a full effort in the case, that counsel's cross-examination of witness O'Quinn was insufficient and showed that counsel had not read "those depositions," and that a member of the jury (Mr. Sands) was biased against Asay because he was a "close friend" of Asay's brother-in-law, with whom Asay had a conflict (TR 537-40).

The trial court denied Asay's motion to dismiss his trial counsel,¹ but told Asay if he wanted "to deal with the question of any of the jurors, we can do that at anytime during the trial," noting that "We do have alternate jurors we can call" (TR 544). The trial court also advised Asay that, so long as he did not disrupt the trial in the presence of the jury, "I will let you put anything on the record how he's handling the trial that you want to" (TR 548). The court told Asay, "at any time there is something going on in the trial that you want to object to, or you've got some feelings about it, and you want to make known, you want to put them on the record, I'll always be happy

¹ Trial counsel explained that as a matter of strategy, he did not want to be seen as "nitpicking" witness O'Quinn and, as well, wished to save some "loose ends" for closing argument rather than letting the State know ahead of time exactly where he was going or what he was going to argue (TR 545).

to . . . send the jury out . . . and we'll handle it" (T 546-47).

Late in the trial, Asay's trial counsel (after discussing the matter with Asay) moved to be allowed to exercise his final peremptory challenge on juror Sands (TR 735-37). Counsel explicitly noted that this belated request was based upon information learned by the defendant about the juror *after* the jury had been selected and sworn (TR 898). The court took the matter under advisement (TR 742), returning to the issue following the State's closing argument (TR 896). The court proposed removing Sands as a juror to alleviate any problem, and leaving him as a second alternate (TR 899-01). After conferring with his attorney, Asay explicitly agreed to this procedure, and it was done (TR 903).

Argument

Asay argues from this record that he was denied his right to attend these bench conferences, and that appellate counsel was ineffective for failing to raise and argue this issue on appeal. He concedes that trial counsel did not object to Asay's absence, but argues that Asay himself adequately preserved the issue "by raising it himself before the trial court." Petition at 8.

It is well settled that a criminal defendant has the right

to be present during the examination, challenging, impaneling, and swearing of the jury. Florida Rule of Criminal Procedure 3.180(a)(4). Francis v. State, 413 So.2d 1175 (Fla. 1982). This right may be waived, either explicitly, or by conduct. Ibid. Unlike Francis, however, Asay was in the same room as the judge and attorneys for both sides when jury challenges were made; he simply was not present at the immediate site of the bench conferences. In Coney v. State, 653 So.2d 1009 (Fla. 1995), this Court "expanded" its analysis from Francis v. State, and "held for the first time that a defendant has a right under Rule 3.180 to be physically present at the *immediate site* where challenges are exercised." Boyett v. State, 688 So.2d 308, 309-10 (Fla. 1996). The Coney rule was explicitly held to operate prospectively only. Boyett.

The Coney rule was unavailable to Asay's appellate counsel, as Coney was decided some four years after Asay's appeal was resolved by written decision. Asay's appellate counsel cannot be deemed constitutionally ineffective for failing to anticipate Coney. Cf. Thompson v. State, 759 So.2d 650, 665 (Fla. 2000) (trial counsel's failure to object to a standard jury instruction that had not been invalidated at the time of trial cannot amount to deficient attorney performance). Furthermore, because Coney was never applicable retroactively, it could never

have applied to Asay's trial. It now can never apply, as it has been superseded effective January 1, 1997 - the date the corrective amendment to Fla. R. Crim P. 3.180 became effective. State v. Mejia, 696 So.2d 339 (Fla. 1997). Under the new rule, the physical presence requirement is satisfied if the defendant is in the courtroom and has the opportunity to be heard through counsel.² Asay does not even suggest, much less demonstrate, that the record demonstrates any violation of the *present* rule, and Asay cannot establish prejudice from any failure of his original appellate counsel to raise an issue of noncompliance with a procedure set forth in Coney which is no longer applicable, or obtain a new trial at this juncture on the basis of a procedural right that defendants no longer have, and that Asay would not have at any retrial. Lockhart v. Fretwell, 506 U.S. 364, 113 S.Ct. 838, 122 L.Ed.2d 180 (1993) (court making prejudice determination of Strickland v. Washington may not consider the effect of an objection it knows to be wholly meritless under current governing law, even if the objection might have been considered meritorious at the time of its omission).

² Fla.R.Crim.Pro. rule 3.180 (b) now defines presence as: "A defendant is present for purposes of this rule if the defendant is physically in attendance for the courtroom proceedings, and has a meaningful opportunity to be heard through counsel on the issues being discussed."

In any event, appellate counsel could not have obtained relief even if Coney and its progeny had applied. It is obvious that trial counsel consulted with Asay immediately before and during the first bench conference, at which 11 jurors were selected. While it is not so clear that Asay consulted with counsel *during* the next conference, in which the final juror and two alternates were selected, it is clear that Asay was "not prevented or limited in any way from consulting with his counsel concerning the exercise of juror challenges." Gibson v. State, 661 So.2d 288, 290-91 (Fla. 1995). Nor had Asay or his trial counsel "expressed any interest" in Asay being present at the bench during jury selection. Carmichael v. State, 715 So.2d 247, 249 (Fla. 1998). "In short," Asay's appellate counsel could not have demonstrated either "error or prejudice" from the record before this Court on direct appeal. Gibson. Appellate counsel cannot be faulted for failing to raise unpreserved and nonmeritorious issues. E.g., Ventura v. State, 26 Fla. L. Weekly S361, fn. 12 (Fla. May 24, 2001) ("as we have noted on numerous occasions, appellate counsel cannot be deemed ineffective for failing to raise unpreserved issues"); Kokal v. Dugger, 718 So.2d 138, 142 (Fla. 1998) (appellate counsel "cannot be faulted for failing to raise a nonmeritorious claim").

Asay argues, however, that he personally raised the issue of his presence at bench conferences even if his trial counsel did not. But he can cite no part of the jury selection in support of this proposition; what he cites to is Asay's attempt to dismiss his trial counsel *after* the jury was selected and five witnesses had testified. Petition at 16 (citing TR 538). At the hearing on the motion to dismiss trial counsel, Asay voiced numerous complaints; *inter alia*, he stated that, based on information he learned *after the jury was selected*, he thought one of the jurors was biased against him. On its face, this does not seem to be a belated complaint about his absence from the jury selection bench conferences, and it is difficult to see how his presence at the conferences would have made any difference since he would not have had a basis for complaint about this juror at the time the juror was selected. In any event, Asay's complaint about this juror was satisfied when the trial court excused him from the jury--an action that was explicitly ratified by Asay personally.

Under the circumstances as shown by this record, no complaints about Asay's absence from bench conferences were preserved for appellate review by his attorney or by him personally; the one complaint he did make about the makeup of the jury was dealt with in a manner satisfactory to Asay. Thus,

appellate counsel did not perform deficiently in failing to raise such issue on appeal, and no prejudice occurred.

Asay finally contends, however, that **trial** counsel was ineffective for failing to "ensure Mr. Asay's presence or consult with him for the final round of voir dire and acceptance of the final panel," and that **appellate** counsel was ineffective for failing to raise ineffective assistance of **trial** counsel as in issue on appeal. Petition at 13. In Blanco v. Wainwright, this Court rejected any contention that appellate counsel could be ineffective for failing to raise an issue of trial counsel's ineffectiveness on direct appeal, stating:

A proper and more effective remedy is already available for ineffective assistance of trial counsel under rule 3.850. If the issue is raised on direct appeal, it will not be cognizable on collateral review. Appellate counsel cannot be faulted for preserving the more effective remedy and eschewing the less effective.

Id. at 1384. Thus, Asay's contention that appellate counsel was ineffective for failing to argued trial counsel's ineffectiveness is meritless. Further, any claim that **trial** counsel was ineffective for failing to protect Asay's right to attend jury-selection bench conferences is barred as such issue *clearly could and should have been raised on 3.850*. As discussed in the State's preliminary discussion of applicable law, it is well settled that habeas proceedings were never

intended to provide a second appeal of issues which could and should have been raised on 3.850, and Asay's attempt to litigate on the installment plan should be rejected.³

Asay's Claim I is procedurally barred and meritless in every way imaginable. It should be summarily denied.

CLAIM II

THE CLAIM THAT ASAY'S DEATH SENTENCES ARE UNCONSTITUTIONAL BECAUSE OF LIMITATIONS ON ASAY'S PRESENTATION OF MITIGATION, THE TRIAL COURT'S ALLEGED FAILURE TO CONSIDER AND WEIGH MITIGATION, AND ALLEGEDLY IMPROPER PROSECUTORIAL CLOSING ARGUMENT

Asay argues here that his death sentences are "unconstitutional because of numerous factors." Petition at 20. As noted previously, this habeas proceeding is not meant to provide Asay a second chance to appeal issues that could and should have been or were raised previously. Instead, such issues are addressable here only to the extent they are subsumed in a valid claim of ineffective assistance of appellate counsel. Asay's Claim II is divided into four parts: A, B and two C's. The State is not sure what the connection is supposed to be

³ To the extent that any claim of fundamental error is not barred, see Downs v. Moore, 26 Fla. L. Weekly S632 (Fla. September 26, 2001), it is meritless, as Asay has utterly failed to demonstrate any violation of current criminal procedure rule 3.180, let alone fundamental error reaching "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." Rutherford v. Moore, 774 So.2d 637, 648 (Fla. 2000).

between these various subclaims, or why they are combined into one Claim II, but will address them in the order presented, except that the second subclaim "C" will be redesignated as "D."

A. THE TRIAL COURT'S ALLEGED REFUSAL TO ALLOW ASAY TO PRESENT MITIGATING EVIDENCE

Asay's caption is misleading; the trial court really did not refuse to allow Asay to present any mitigation, but simply denied Asay's pro se motion to continue the penalty phase for a week to obtain additional unnamed mitigation witnesses some of whose whereabouts was unknown. Regardless of how this subclaim is described, Asay concedes (Petition at 20) that it was presented on direct appeal. Asay contends, however, that the claim should be reconsidered because the lower court only addressed part of the reasons Asay sought a continuance, and ignored "important reasons" why Asay sought to call additional mitigation witnesses. In addition, he contends the trial court ignored the fact that evidence of racial motivation for the murders was presented at the guilt phase and that guilt-phase evidence was considered by the jury at the penalty phase.

Asay presents no new arguments here. These same arguments were presented by Asay's appellate counsel on direct appeal, wherein he argued:

Furthermore, the court's basis for denying the continuance - that the mitigation evidence was irrelevant - was blatantly wrong. The witnesses' testimony would have been admissible to rebut the State's argument that the murders were racially motivated and as evidence of good character. Even though the trial court correctly ruled that the State could not argue that the murders were racially motivated as aggravation [cite], that did not erase the State's guilt phase argument that racial prejudice was a motivation for the murders. Mark [Asay] was entitled to rebut these inferences even though not reasserted during the penalty phase. This need is vividly emphasized by the fact that the trial judge, himself, improperly relied on the alleged racial motivation for the murders to find the premeditation aggravating circumstance. (TR 161)(See, Issue V, *infra*.) Moreover, Mark also stated the witnesses would testify to his good character and specific acts of good conduct towards blacks. Such evidence is admissible in mitigation regardless of the State's position concerning the racial motivation for the homicide.

Initial Brief of Appellant, Case No. 73,342, pp 35-36.

The State's response included the observation that the motion for continuance had been made by Asay *pro se* and that, since Asay had been represented by counsel who did not join this motion, it was a "nullity." Answer Brief of Appellee, Case no. 73,342, at 40. The State noted that, before denying the *pro se* motion for continuance, the trial court had assured itself that trial counsel had subpoenaed witnesses in accordance with counsel's theory of mitigation and suggested that trial counsel (who of course at that time was disinclined to disclose his strategic and tactical decisions) might reasonably have felt

that calling inmate character witnesses on Asay's behalf might have been more harmful than helpful. Answer Brief at 41-42.

The State further argued that, even if Asay's *pro se* motion for continuance were sufficient to preserve the issue for appeal, the trial court committed no abuse of discretion in denying it. As the State noted in its brief, Asay's trial counsel had ample time to prepare for the penalty phase; Asay's trial began more than a year after indictment (having been continued twice), and the penalty phase began *twenty-nine* days following the conclusion of the guilt phase. Answer Brief at 36. At the outset of the penalty phase, Asay sought an additional seven-day continuance to obtain witnesses he could not name, whose whereabouts he did not know. Answer Brief at 36. The State argued that: given the length of time the defense had to prepare for the penalty phase; Asay's failure to name any of the proposed witnesses; his failure to establish due diligence in seeking the witnesses; the vagueness of his proffer of their expected testimony; the lack of any indication that the substance of their testimony could not have been secured through other witnesses who did testify; and the lack of any showing that any of these witnesses could have been within the additional time he sought - the trial court's denial of Asay's

pro se motion for continuance was not an abuse of discretion. Answer Brief at 37-40.

This Court summarily rejected this issue on direct appeal. Asay v. State, supra, 580 So.2d at 612 (fn. 1).

Asay again raised this claim on 3.850, as Claim XIV of his amended 3.850 motion (PCR 172-73). It was summarily denied by the trial court on the ground that it had already been raised and rejected (PCRS 70). This Court affirmed the summary denial, noting that the claim had been raised and rejected on direct appeal, and that it was inappropriate to use a different argument to relitigate the same issue - even if couched in "ineffective assistance language." 769 So.2d at 989.

This issue has been raised and rejected more than once. It is therefore procedurally barred from being re-presented once again on habeas. Freeman v. State, supra, 761 So.2d at 1071; Mann v. Moore, 26 Fla. L. Weekly S490 (Fla. July 12, 2001). Furthermore, appellate counsel did not fail to raise this issue, and cannot be deemed ineffective for failing to persuade this Court to rule in Asay's favor. Ibid. Asay has presented no valid reason to revisit the issue of the trial court's denial of his pro se motion for continuance, and this subclaim should be summarily denied.

B. PROSECUTORIAL ARGUMENT THAT ALLEGEDLY PREVENTED THE JURY FROM CONSIDERING VALID MITIGATION

Asay claims here that appellate counsel was ineffective for failing to raise a claim of fundamental error resulting from two instances of prosecutorial argument at the penalty phase that trial counsel did not object to: (a) the prosecutor told the jury that defense counsel could argue "some statutory mitigation," and (b) the prosecutor told the jury not to consider sympathy. As Asay acknowledges explicitly and by necessary inference from his claim that appellate counsel should have argued "fundamental" error on appeal (Petition at 30, 31), trial counsel objected to neither of these arguments.

Appellate counsel did complain about other portions of the prosecutor's penalty phase argument (also not objected to by trial counsel), in his Issue VII on direct appeal. Initial Brief of Appellant, Case No. 73,432, at pp. 45-48. Thus, this subclaim in Asay's habeas petition is simply a variant of a claim that his appellate counsel raised on direct appeal. Appellate counsel cannot be deemed ineffective for failing to complain about additional portions of the prosecutor's penalty phase argument that likewise were not preserved for appeal by contemporaneous objection. E.g., Atkins v. Dugger, supra.

This subclaim is also procedurally barred because any issue of trial counsel's ineffectiveness in failing to preserve this argument for appeal could and should have been raised on 3.850.

In fact, Asay did complain about the prosecutor's argument not to consider sympathy, in Claim XVII of his amended 3.850 motion (PCR 180-82). This claim was summarily rejected because: (1) the substantive issue was procedurally barred as one that could and should have been raised at trial and on direct appeal, and (2) Asay's incidental claim that trial counsel was ineffective for failing to object was insufficient to avoid the procedural bar (PCSR 70-71). On appeal, this Court affirmed the summary denial of Claim XVII, noting that although this claim included "one sentence making a conclusory allegation that [trial] counsel was ineffective with regard to these claims, this 'is just an attempt to relitigate procedurally barred claims by couching them in terms of ineffective assistance of counsel.' [cites omitted]" 769 So.2d at 989.

In any event, there is no merit to Asay's claim that appellate counsel was ineffective for failing to complain about the two portions of the prosecutor's argument at issue here. As for the sympathy argument, this Court has repeatedly held that the prosecutor "may properly argue that . . . the jury should not be swayed by sympathy." Ford v. State, 26 Fla. L. Weekly S602 (Fla. September 13, 2001) (fn. 24) (quoting Valle v. State, 581 So.2d 40, 47 (Fla. 1991)). Appellate counsel was not ineffective for failing to raise a nonmeritorious issue. As for

the argument that defense counsel could argue "some statutory mitigation," no fundamental error occurred. Of course, the jury could also consider nonstatutory mitigation, but it is hardly surprising that the prosecutor's lone reference to consideration of "statutory mitigation," considered in isolation, does not completely set forth the applicable law, as single statements seldom are seldom sufficient to accomplish that task. Moreover, the inclusion of the word "statutory" was likely a mere slip of the tongue, as it is obvious from the totality of the prosecutor's argument, in which the prosecutor explicitly addressed nonstatutory mitigation offered by the defense, that the prosecutor did not intend to and did not preclude the jury's consideration of nonstatutory mitigation. See Donnelly v. De Christoforo, 416 U.S. 637, 647, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974) ("a court should not lightly infer that a prosecutor intends an ambiguous remark to have its most damaging meaning or that a jury, sitting through a lengthy exhortation, will draw that meaning from the plethora of less damaging interpretations"). The prosecutor's comments, considered *in toto*, "conveyed no prejudicial message to the jury - only that the mitigating evidence [Asay] presented was of little force." Cargill v. Turpin, 120 F.2d 1366, 1384 (11th Cir. 1997). Appellate counsel was not ineffective for failing to make an

appellate issue of the prosecutor's unobjected-to single reference to "statutory" mitigation. Downs v. Moore, 26 Fla. L. Weekly S632 (Fla. September 26, 2001) ("Trial counsel did not object to this comment. Therefore, appellate counsel cannot be deemed ineffective for failing to raise an unpreserved issue on appeal.").

C. THE PROSECUTOR'S ALLEGED OVERBROAD ARGUMENT REGARDING AGGRAVATION

Asay argues here that the prosecutor "over broadly argued otherwise permissible statutory aggravating factors," Petition at 33, and also argued nonstatutory aggravation. Petition at 34-36. Asay does not argue that appellate counsel was ineffective for failing to raise this issue on appeal. Instead, he is simply attacking the prosecutor's arguments directly, in a "thinly veiled attempt to have an appeal on the merits, which is clearly not the purpose of a habeas petition." Freeman, supra, 761 So.2d at 1070. Thus, this claim should be summarily denied. Moreover, even if Asay were making a claim of ineffectiveness of appellate counsel, he could not prevail, as trial counsel did not object to any of the arguments at issue here, and this claim was therefore not preserved for appeal. Appellate counsel cannot be deemed ineffective for failing to raise this unpreserved claim on direct appeal. Id. at 1072.

Furthermore, Asay's claim that the prosecutor urged the jury to apply aggravating factors in a vague and overbroad fashion is barred because this same claim was raised on 3.850, and rejected by the trial court, which found:

Claim VIII attacks comments during closing argument by the Assistant State Attorney, arguing application of statutory aggravating circumstances. These issues are properly raised on direct appeal, and are part and parcel of the record of the trial. The allegation of ineffective assistance of [trial] counsel as raised in Claim VIII is a cursory and improper attempt to avoid the procedural bar. The defendant is entitled to no relief, and hence no evidentiary hearing on this claim.

(PCRS 68). This Court summarily affirmed the denial of this claim. 769 So.2d at 989. The appropriate time and place for Asay to have raised a substantive claim that trial counsel was ineffective for failing to object to the prosecutor's argument allegedly applying aggravating factors in an unconstitutionally vague and over broad fashion was in his 3.850 motion. Instead, Asay made only a cursory allegation of ineffectiveness of trial counsel. Having failed to demonstrate that trial counsel was ineffective for failing to object to this argument, he should now be precluded from attempting to show that appellate counsel was ineffective for failing to raise an issue that was not preserved by a trial counsel who was not demonstrably ineffective. Downs v. Moore, supra, 26 Fla. L. Weekly S632 (Wells, Chief Justice, concurring).

In any event, this portion of Asay's claim is insufficiently pled, as he does not identify the argument or the aggravators allegedly overbroadly interpreted by the prosecutor, or explain how the prosecutor misinterpreted any aggravator.

As for the portion of this claim attacking the prosecutor's explanation of why the under-sentence-of-imprisonment aggravator was aggravating, the State's response is that not only is the claim procedurally barred, but it is meritless, as no fundamental error occurred. Jones v. Moore, 26 Fla. L. Weekly S459 (Fla. July 5, 2001) (not fundamental error, in case in which one of the aggravators was "under sentence of imprisonment," to argue: "How many is enough, I guess is the question. How many times do people have to be put at risk? How many times is it okay for Clarence Jones to threaten people with weapons and then to kill them?").

As for other arguments complained about for the first time in these habeas proceedings: the prosecutor's remarks about rehabilitation were in response to testimony by Asay's mother that Asay could be rehabilitated; the comment about the "last" photo of one of the victim was merely a compelling statement of the victim's death and its significance;⁴ and the comment about

⁴See Payne v. Tennessee, 501 U.S. 808 (1991) (state not required to turn victim into "faceless stranger;" state has legitimate interest in reminding jury that "just as the

there being no "justification whatsoever" for murdering one of the victims was appropriate argument addressing the applicability of the CCP aggravator, one of whose elements is "without any pretense of moral or legal justification." Section 921.141(i), Fla. Stat. None of these arguments, if objectionable at all, "reached the level of fundamental error." Jones. Asay has presented no basis for the grant of habeas relief here.

D. THE TRIAL COURT'S ALLEGED REFUSAL TO CONSIDER AND WEIGH MITIGATION IN THE RECORD

Asay contends here that the trial court failed to "consider" a "variety" of mitigating evidence presented by Asay's trial counsel and that appellate counsel was ineffective for failing to complain about the trial court's alleged failure on appeal.

Asay's reliance on cases such as Eddings v. Oklahoma, 455 U.S. 104 (1982), in which the trial court had been precluded as a matter of state law from giving mitigating effect to a defendant's deprived and abused childhood and the like, is misplaced. Florida law explicitly authorizes trial judges to consider *and weigh* nonstatutory mitigating circumstances, but

murderer should be considered as an individual, so too the victim is an individual whose death represents a unique loss to society").

nothing in Eddings or any other federal case holds that, having considered proposed mitigation, the sentencer *must* find it.⁵ Under Florida law, the trial court has broad discretion in determining the applicability of mitigating circumstances, and the weight to be given to them. Bonifay v. State, 680 So.2d 413 (Fla. 1996); Arbelaez v. State, 626 So.2d 169 (Fla. 1993). Proposed nonstatutory mitigation that is established factually and is mitigating in general nature may nevertheless be rejected if it is not shown to have been mitigating in the case at hand. Ford v. State, 26 Fla. L. Weekly S602 (Fla. September 13, 2001).

Although the trial court's sentencing order does not explicitly address some of the nonstatutory mitigating circumstances Asay now identifies as being supported by the record, trial counsel did not submit a sentencing memorandum or otherwise explicitly "identify for the court the specific nonstatutory mitigating circumstances" he contended were established. Lucas v. State, 568 So.2d 18, 24 (Fla. 1990).

⁵ See, e.g., Harris v. Alabama, 513 U.S. 504 (1995) (the Constitution "does not require a State to ascribe any specific weight to particular factors, either in aggravation or mitigation, to be considered by the sentencer"); Blystone v. Pennsylvania, 494 U.S. 299, 307 (1990) ("requirement of individualized sentencing in capital cases is satisfied by allowing the jury to consider all relevant mitigating evidence"); Buchanan v. Angelone, 522 U.S. 269 (1998) (our decisions "suggest that complete jury discretion is constitutionally permissible"); Burger v. Kemp, 483 U.S. 794 ("mitigation may be in the eye of the beholder").

Given the open-ended nature of potential nonstatutory mitigation, the nearly infinite range of possible characterizations of the evidence, and the "individualized" presentation and consideration of potential mitigation, "the defense must share the burden and identify for the court the specific nonstatutory mitigating circumstances it is attempting to establish." Id. at 24. Trial counsel failed to do so, and the sentencing judge's order cannot be faulted for failing explicitly to address mitigators never explicitly proposed. That being the case, appellate counsel cannot be faulted for failing to complain about the trial court's sentencing order on appeal.

Moreover, Asay cannot establish a reasonable probability that appellate counsel could have prevailed on this issue even if he could have overcome any lack of preservation of this issue by trial counsel. The mitigation Asay identifies as established by the record, in addition to the statutory age mitigator which was found by the trial court, was: Asay was affectionate toward and protective of his family; he assisted his family financially; he had been gainfully employed; he was good and kind to children; he remodeled his mother's house; he helped fellow inmates; he received his GED in prison; and he had rehabilitation potential. Petition at 36-37. This is hardly

compelling mitigation.⁶ In fact, Asay's complaint in Claim XIII of his 3.850 motion was that trial counsel was ineffective for failing to investigate, develop and present additional mitigation. Although the circuit court did not find that trial counsel's performance was deficient, the circuit court also rejected this claim on the ground that, even if trial counsel's investigation had been deficient, Asay could not establish prejudice because there was no possibility that the additional mitigation he presented at the 3.850 evidentiary hearing would have outweighed the aggravating circumstances. This Court affirmed, noting that "when examining whether the defendant was prejudiced by the failure of counsel to present this nonstatutory mitigation, the Court must consider the nature of the aggravating and mitigating evidence presented in the penalty phase." 769 So.2d at 988. In Asay's case, the trial court had found that the two murders had been committed while Asay was on parole and that Asay had a prior violent felony conviction (for the contemporaneous murder). In addition, the one of the

⁶Notably lacking from this list is any mental mitigation or any childhood abuse or deprivation. Moreover, some of it is redundant (protective of family/assisted family financially/remodeled mother's house; latter two are specific examples of former), and other proposed mitigators tend to be contradicted or at least diminished by the State's evidence (he was kind to children, but murdered two adults; he had rehabilitation potential, but murdered two people while on parole).

murders was found to have been cold, calculated and premeditated. This Court concluded that, in light of these multiple, substantial aggravators, "there is no reasonable probability that mitigation evidence of the defendant's abusive childhood and history of substance abuse [presented at the postconviction evidentiary hearing] would have led to the imposition of a life sentence." Ibid.

Similarly, even assuming, *arguendo*, that the trial court erred in failing to find the less-than-compelling mitigating circumstances Asay now identifies as having been established at the original sentencing, any error would have been deemed harmless beyond a reasonable doubt by this Court on direct appeal, given the strong aggravation present in this case. Henry v. State, 649 So.2d 1366, 1369 (Fla. 1994) ("There is no indication that the trial court failed to consider any nonstatutory mitigation evidence brought to his attention by the defense, and the minimal evidence Henry now points to as mitigating could hardly ameliorate the enormity of his guilt."); Wickham v. State, 593 So.2d 191 (Fla. 1991) (in light of strong aggravation, any error in finding mitigation was harmless beyond a reasonable doubt); Miller v. State, 770 So.2d 1144 (Fla. 2000) (error in failing to find and give weight to long-term alcohol and substance abuse was harmless given weight

aggravating factors of prior violent felony and murder committed during robbery); Thomas v. State, 693 So.2d 951 (Fla. 1997) (where defendant murdered two persons and aggravators included CCP, HAC, prior violent felony and murder during burglary, error in failing to address and find in mitigation that Thomas was a good worker, a good person, very loving and good with children was harmless).

Appellate counsel was not ineffective for failing to complain about the trial court's sentencing order on appeal.

CLAIM III

THE CLAIM THAT THE CCP INSTRUCTIONS DELIVERED IN THIS CASE WERE UNCONSTITUTIONALLY VAGUE

This is the same claim as Claim V of Asay's 3.850 motion (PCR 118-24). It was summarily denied as procedurally barred because the CCP instruction delivered was essentially the one requested by Asay's trial counsel and was (therefore) not objected to by trial counsel, and no complaint about the CCP instruction was raised on appeal (PCRS 67). This Court affirmed noting that many of the claim denied summarily (including this one, PCR 122) included "one sentence making a conclusory allegation that [trial] counsel was ineffective with regard to these claims." 769 So.2d at 974.

As in the 3.850, Asay is attempting to relitigate a procedurally barred claim by throwing in a conclusory allegation of ineffective assistance of (now appellate) counsel. This attempt should be again denied.

Moreover, the CCP instruction delivered in this case was not the then standard instruction later invalidated in Jackson v. State, 648 So.2d 85 (Fla. 1994). It was, rather, essentially the instruction proposed by trial counsel (TR 995, 1067). While trial counsel did object to the applicability of the CCP aggravator, trial counsel did not object to the instruction as delivered. Thus, the issue of the validity of the CCP instruction itself was not preserved for appeal. See, e.g., Pope v. State, 702 So.2d 221, 223-24 (Fla.1997) ("However, we have made it clear that claims that the CCP instruction is unconstitutionally vague are procedurally barred unless a specific objection is made at trial and pursued on appeal. The objection at trial must attack the instruction itself, either by submitting a limiting instruction or making an objection to the instruction as worded."). Appellate counsel cannot be faulted for failing to raise an unpreserved issue.

Nor can appellate counsel be faulted for failing to anticipate this Court's subsequent Jackson decision. Waterhouse v. State, 26 Fla. L. Weekly S375 (Fla. May 31, 2001) (trial

counsel not ineffective for failing to object to pre-Jackson CCP instruction). In fact, any contention by Asay's appellate counsel that the CCP jury instruction was invalid would have been summarily rejected under then existing precedent. Brown v. State, 565 So.2d 304, 308 (Fla. 1990). Appellate counsel vigorously argued that the CCP aggravator was unsupported by the evidence. Initial Brief of Appellant, case no. 73,432, at pp. 37-41. He did not perform in a constitutionally deficient manner by failing to raise, in addition, what would then have been a meritless and unpreserved attack on the CCP jury instruction.

Moreover, Asay cannot demonstrate prejudice, as any CCP instructional error would be harmless. Only the second murder was CCP. Thus, Asay's death sentence for the first murder would not have been affected by any CCP instructional error. Further, The second murder occurred 20 minutes after the first, after Asay had ample time to contemplate and reflect on his actions in committing the first murder. During this 20 minute period, Asay announced his intention to commit a second murder. He thereafter did so, shooting an unarmed victim multiple times. This murder was cold, calculated and premeditated by any standard. E.g., Fennie v. State, 648 So.2d 95 (Fla. 1994) (CCP

instructional error harmless where murder was CCP under any definition its terms).

Asay's claim that appellate counsel was ineffective for failing to attack the CCP instruction on appeal should be denied.

CLAIM IV

THE CLAIM THAT PENALTY PHASE JURY INSTRUCTIONS AND PROSECUTORIAL COMMENT SHIFTED THE BURDEN OF PROVING THE APPROPRIATENESS OF A LIFE SENTENCE TO THE DEFENDANT

This claim is meritless. Trial counsel did not object to any of the instructions or comments at issue here, so the issue was not preserved for appeal. Furthermore, it is well settled that the standard jury instructions as given in this case do not improperly shift the burden of proof, and the failure to object to same cannot amount to deficient attorney performance. E.g., Downs v. State, 740 So.2d 506, 517 (fn. 5) (Fla. 1999); San Martin v. State, 705 So.2d 1337, 1350 (Fla. 1997); Shellito v. State, 701 So.2d 837, 842 (Fla. 1997); Harvey v. Dugger, 656 So.2d 1253, 1257 (fn. 5) (Fla. 1995).

The only prosecutorial comment at issue was one question asked by the prosecutor during the jury voir dire examination, in which he asked if any of the jurors supported the death penalty so strongly that they would vote for it even if the

aggravating factors were outweighed by the mitigating factors. There was no objection to this question, so any issue about the propriety of this question was not preserved for appeal. Furthermore, it is difficult to imagine what might be improper about this death-qualification question, which seems properly designed to ferret out those jurors who might have been impermissibly biased in favor of a death sentence, rather than to say anything one way or the other about any burden of proof. It cannot be said that appellate counsel's failure to complain about this unobjected-to question on appeal was deficient attorney performance, or that such failure could have been in any way prejudicial.

No ineffective assistance of appellate counsel has been shown here, and this claim should be summarily denied.

CLAIM V

THE CLAIM THAT FLORIDA'S CAPITAL SENTENCING STATUTE IS
UNCONSTITUTIONALLY VAGUE AND OVERBROAD

Asay does not even pretend to raise any issue of ineffective assistance of appellate counsel here; he simply contends that various named aggravators (CCP, under sentence of imprisonment, and prior conviction of a violent felony) are either unconstitutionally vague or unconstitutionally overbroad. Such a claim obviously should have been raised at trial and on direct

appeal. As noted previously, it is well settled that habeas proceedings in this Court are not a second appeal of matters that could have been, should have been, or were raised previously. This claim is procedurally barred and should be summarily denied.

CONCLUSION

Asay has failed to demonstrate that his appellate counsel was constitutionally ineffective, and he presents no other issues that are cognizable in these habeas proceedings. Asay's Petition for Writ of Habeas Corpus should be denied in its totality.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

CURTIS M. FRENCH
Assistant Attorney General
Florida Bar No. 291692

OFFICE OF THE ATTORNEY GENERAL
The Capitol
Tallahassee, FL 32399-1050
(850) 414-3300
FAX: (850) 487-0997

Certificate of Service

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Heidi E. Brewer, Assistant CCC- Northern Region, Office of the Capital Collateral Counsel-Northern Region, 1533-B South Monroe Street, Tallahassee, Florida, this 5th day of December, 2001.

Curtis M. French
Assistant Attorney General

CERTIFICATE OF FONT AND TYPE SIZE

Counsel certifies that this pleading was typed using 12 point Courier New.

Curtis M. French
Assistant Attorney General