

IN THE SUPREME COURT OF FLORIDA

OLEN CLAY GORBY,

Petitioner,

v.

CASE NO. SC00-405

MICHAEL W. MOORE, Secretary,
Department of Corrections,

Respondent.

RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

COMES NOW Respondent, Michael W. Moore, by and through the undersigned counsel, pursuant to Fla.R.App.P. 9.100(h) and to this Court's order of May 16, 2000, and files the instant response to Gorby's Petition for Writ of Habeas Corpus, filed on or about February 28, 2000.

PROCEDURAL HISTORY

Gorby was convicted of premeditated murder, armed robbery with a deadly weapon, grand theft auto and burglary of a dwelling in which a battery occurred, in regard to the May 5, 1990, murder of W.J. Raborn. Following the jury's recommendation of death by a vote of 9 to 3, Gorby was sentenced to death on August 30, 1991, the sentencing judge finding the existence of four (4) statutory factors in aggravation -- that the homicide had been committed by one under sentence of imprisonment, pursuant to §921.141(5)(a), Fla. Stat. (1989); that the homicide had been committed by one with a prior conviction for a crime of violence,

pursuant to §921.141(5)(b), Fla. Stat. (1989); that the homicide had been committed for pecuniary gain, pursuant to §921.141(5)(f), Fla. Stat. (1989), and that the homicide had been especially heinous, atrocious and cruel, pursuant to §921.141(5)(h), Fla. Stat. (1989) -- which outweighed the non-statutory factors found in mitigation.

Gorby appealed his convictions and sentence of death to this Court, and, in the Initial Brief filed on or about July 24, 1992, raised thirteen (13) primary points on appeal. Gorby specifically contended that: (1) denial of his motion to continue trial had been error; (2) denial of his motion to exclude identification testimony from Cleo Calloway, on the grounds that such had been the result of an impermissibly suggestive line-up, had been error; (3) denial of Gorby's motion to appoint other counsel due to an alleged conflict on the part of defense counsel Komarek had been error; (4) impermissible prosecutorial argument had occurred during the guilt phase, when the prosecutor vouched for the credibility of a witness; (5) denial of Gorby's motion for mistrial in regard to the prosecutor's argument during the guilt phase concerning Gorby's lack of remorse had been error; (6) error in the admission of evidence regarding Gorby's prior release from prison; (7) denial of Gorby's motion for mistrial following testimony that he had attacked Robert Jackson had been error; (8) error in the admission of photographs and videotapes of the victim's body; (9) error in the court's requirement that

Gorby display his tattoos for the jury; (10) error in the court's finding that Gorby had prior convictions in Texas, under the name, "Freddie Banks;" (11) error in the court's instruction to the jury in the penalty phase on the heinous, atrocious and cruel aggravating factor, and subsequent finding of that factor, given that such factor did not apply as a matter of law; (12) error in the court's instruction on heinous, atrocious and cruel under Espinosa v. Florida, 505 U.S. 1079 (1992) and (13) error in the court's refusal to instruct the jury in the penalty phase regarding the penalties for the non-capital offenses. In its Answer Brief, filed on or about October 14, 1992, the State contended, inter alia, that point (12), asserting Espinosa error, was procedurally barred, in that trial counsel had interposed no contemporaneous objection, on constitutional grounds, to the jury instruction. (See, Appendix, Excerpt of Answer Brief, filed October 14, 1992, at pages 89-94).

In its opinion rendered December 9, 1993, Gorby v. State, 630 So.2d 544 (Fla. 1993), cert. denied, 513 U.S. 828 (1994), this Court affirmed Gorby's convictions and sentence of death in all respects. This Court addressed each claim presented. As to the claim of Espinosa error, this Court noted that an expanded instruction on heinous, atrocious and cruel factor had been given, and, further, that any instructional error would be harmless, "because the facts show this killing to be heinous,

atrocious or cruel under any definition of the terms." Gorby, 630 So.2d at 548, n.6.

In the instant Petition for Writ of Habeas Corpus, which is filed concurrently with the Initial Brief of Gorby's collateral appeal, Gorby's counsel presents eight (8) primary claims for relief: (I) a claim that appellate counsel was ineffective for failing to challenge the general jury qualification procedure employed by Bay County; (II) a claim that appellate counsel rendered ineffective assistance for failing to attack on appeal the prosecutor's argument at the penalty phase regarding the applicability of the heinous, atrocious and cruel aggravating factor; (III) a claim of ineffective assistance of appellate counsel for failing to attack on appeal five specific matters -- (a) the portion of the prosecutor's argument at the penalty phase in which he discussed point values; (b) an alleged discovery violation involving two witnesses; (c) the prosecutor's alleged impugning of defense counsel's ethics; (d) the prosecutor's alleged bolstering of state witnesses and (e) the prosecutor's personal references to Gorby in his opening statement; (IV) a claim of ineffective assistance of appellate counsel for failing to raise a point on appeal regarding the denial of individual and sequestered voir dire on the death penalty and "attitude" toward the case; (V) a claim of ineffective assistance of appellate counsel due to counsel's alleged failure to attack the jury instructions and applicability of the four aggravating

circumstances found; (VI) a claim of ineffective assistance of appellate counsel for failing to assert that the sentencing court refused to find and weigh mitigating circumstances set out in the record; (VII) a claim of ineffective assistant of appellate counsel for failing to attack alleged burden-shifting in the penalty phase instructions and (VIII) a claim that Florida's sentencing statute is unconstitutional on its face and as applied.

ARGUMENT

ALL REQUESTED RELIEF SHOULD BE DENIED

This Court has consistently held that a Petition for Writ of Habeas Corpus cannot be used for additional appeals of issues which could have been, should have been, or were, raised on appeal or in a Rule 3.850 motion, or for matters that were not objected to at trial. See, e.g., Teffeteller v. Dugger, 734 So.2d 1009, 1025 (Fla. 1999); Williamson v. Dugger, 651 So.2d 84, 86 (Fla. 1994); Parker v. Dugger, 550 So.2d 459, 460 (Fla. 1989); Blanco v. Wainwright, 507 So.2d 1377, 1384 (Fla. 1987). Further, it is not proper to re-present a previously-rejected appellate issue, utilizing a new or different argument, and allegations of ineffective assistance of counsel cannot be used to avoid the above procedural bars. See, e.g., Groover v. Singletary, 656 So.2d 424, 428 (Fla. 1995) ("An allegation of ineffective counsel will not be permitted to serve as a means of circumventing the rule that habeas corpus proceedings do not provide a second or

substitute appeal."); Bryan v. Dugger, 641 So.2d 61, 65 (Fla. 1994) (same); Breedlove v. Singletary, 595 So.2d 8, 10 (Fla. 1992) (where appellate counsel had raised certain issues and asserted specific legal arguments, the fact that "current counsel argues other grounds or facts than appellate counsel did [does] not save issues . . . from being procedurally barred."); Porter v. Dugger, 559 So.2d 201, 203 (Fla. 1990) (using different argument, including allegation of ineffective counsel, to re-litigate an issue in postconviction proceedings is inappropriate); Blanco, supra. Finally, this Court has increasingly condemned the practice of collateral counsel in presenting the identical collateral claims in both a 3.850 motion and habeas corpus petition. See, Thompson v. State, 25 Fla.L.Weekly S346, S352, n.5 (Fla. April 13, 2000) ("By raising the issues in the Petition for Writ of Habeas Corpus, in addition to the Rule 3.850 petition, collateral counsel has accomplished nothing except to unnecessarily burden this Court with redundant material."); State v. Riechmann, 25 Fla.L.Weekly S163, 171, n.21 (Fla. February 24, 2000); Blanco, supra.

Applying the above principles to this case, it is the State's position, as will be discussed in more detail infra, that claim VIII is procedurally barred, as a matter which should have been presented on appeal, and that a portion of claim V represents a re-presentation of a point raised on appeal, as well as of matters which should have been previously raised therein.

Collateral counsel note that the matters contained in claims I, V, VI, and VII were presented to the circuit court below in Gorby's 3.850 motion and found procedurally barred (Petition at 13, 27, 40, 41), and apparently are presented herein simply to circumvent this Court's page limitation for appellate briefs; on page 93 of the concurrently-filed brief in Gorby v. State, Case No. 95,153, collateral counsel noted that they had presented Gorby's jury qualification claim in the instant habeas petition and seek to incorporate by reference their arguments therein, because such arguments "cannot be presented . . . given the page limitation now arbitrarily applied by this Court to capital postconviction collateral defendants." Id. at pg. 93, n.69. While the State questions whether any of the allegations of ineffective assistance of appellate counsel are "true" claim of that nature, as opposed to impermissible attempts to avoid the procedural bar, each claim will be addressed, out of an abundance of caution.

A petitioner asserting ineffective assistance of appellate counsel must, of course, satisfy both "prongs" of Strickland v. Washington, 466 U.S. 668 (1984), and establish both deficient performance of counsel and resultant prejudice; this means that any serious error on the part of appellate counsel must have compromised the appellate process to such a degree that confidence in the correctness of the result has been undermined. See, e.g., Groover, 656 So.2d at 425; Williamson, 651 So.2d at

86. This Court has specifically, and repeatedly, held that appellate counsel cannot be deemed ineffective for failing to raise on appeal issues which have not been preserved for review, see Johnson v. Singletary, 695 So.2d 263, 266 (Fla. 1996), Teffeteller, 734 So.2d at 1028, or which are without merit. Groover, 656 So.2d at 425; Harvey v. Dugger, 656 So.2d 1253, 1258 (Fla. 1994). Likewise, counsel is not required to raise every conceivable appellate issue in order to render effective assistance, see Provenzano v. Dugger, 561 So.2d 541, 549 (Fla. 1990), Hardwick v. Dugger, 648 So.2d 100, 106 (Fla. 1994), and where counsel has raised a claim on appeal unsuccessfully, counsel's failure to convince this Court to render a favorable conclusion is not ineffectiveness. Swafford v. Dugger, 569 So.2d 1264, 1266 (Fla. 1990). Applying these standards, it is clear the Gorby merits no relief. Each of his claims will now be addressed.

CLAIM I

THE JURY QUALIFICATION CLAIM

In this claim, collateral counsel contend that Gorby's appellate counsel rendered ineffective assistance for failing to challenge the general jury qualification procedure employed in Bay County. Although conceding that this Court has previously held that a defendant need not be present at such proceeding, and that, in this case, no transcript exists of the jury qualification (Petition at 7-8), collateral counsel nevertheless

suggests that fundamental error occurred in the alleged absence of either Gorby or his counsel from this proceeding, as well as the alleged presence of an Assistant State Attorney.

The short answer to the above is that this "claim" is based upon sheer speculation. As collateral counsel concede, the general jury qualification in this case was not transcribed, and there is no concrete evidence as to the presence or absence of any of the participants. Although collateral counsel seek to glean a "common practice" from other published opinions involving Bay County, such as Mackey v. State, 548 So.2d 904 (Fla. 1st DCA 1989) or Bates v. State, 750 So.2d 6 (Fla. 1999), those cases cannot establish a record for this case. What is clear from the record, however, is that when Judge Sirmons announced on the record on June 24, 1991, that Judge Bower had already heard the jury excuses, and that the panel of prospective jurors had been divided into three, given the three scheduled trials, defense counsel, an experienced local practitioner, interposed no objection to this procedure (OR I 37). As previously noted, this Court has consistently held that appellate counsel cannot be held ineffective for failing to raise claims which have not been preserved for appeal. See, Johnson, supra; Teffeteller, supra. Further, Gorby's appellate counsel, an experienced capital attorney, would know that this Court cannot predicate reversible error on conjecture, see Sullivan v. State, 303 So.2d 632, 635 (Fla. 1976), and collateral counsel's reliance upon Delap v.

State, 350 So.2d 462 (Fla. 1977), in which this Court reversed a capital conviction and sentence due to the absence of any transcription of the voir dire, opening and closing arguments and jury charge, despite Delap's request for same, is completely misplaced. No relief is warranted as to this claim.

CLAIM II

THE "HAC" ARGUMENT CLAIM

In this claim, collateral counsel contend that appellate counsel rendered ineffective assistance for failing to attack on appeal the prosecutor's closing argument on the heinous, atrocious and cruel aggravating factor; collateral counsel contend that this argument was unsupported by the record, and that it contributed to the finding of this aggravating circumstance. Initially, the State would note that Gorby attacked the finding of this aggravating circumstance in his Initial Brief in the 1992 appeal (See Initial Brief, Gorby v. State, Florida Supreme Court Case No. 79,308, at pgs. 45-49). Gorby cannot now use habeas corpus to relitigate this attack under another theory. See, Breedlove, supra; Parker, supra. Further, trial counsel did not object to the argument in question, either at the guilt phase or the penalty phase (OR X 1551-2; XI 1796). As noted above, appellate counsel cannot be deemed ineffective for failing to present an unpreserved claim on appeal. See, Johnson, supra; Teffeteller, supra. To the extent that any further argument is necessary, the State would note that defense counsel's failure to object to the State's arguments is understandable, given the fact that Attorney Komarek used his own closing argument to clarify that, in fact, the victim had not been strangled with the cords in question (OR X 1653). At most, the prosecutor argued, logically, that the presence of the cords

indicated that Gorby had utilized such to immobilize the victim, and that, while the victim had not been strangled (a point which the prosecutor himself noted), the cords could have restricted the victim's airflow. This does not constitute a fundamental misstatement of the evidence, and collateral counsel gravely misread the sentencing order in this case (Petition at 16, n.3); at most, Judge Sirmons noted, correctly, the location of the cords, something that he clearly was entitled to do (OR XV 2623-4). No relief is warranted as to this claim.

CLAIM III

ASSERTED ALLEGED PROSECUTORIAL MISCONDUCT

In this claim, collateral counsel assemble five (5) alleged instances of prosecutorial misconduct which appellate counsel was allegedly ineffective for failing to present on direct appeal. Each will now be addressed.

A. The "Counting" Argument

Collateral counsel initially complain that appellate counsel failed to present on appeal a claim relating to the prosecutor's closing argument at the penalty phase relating to "point values" (OR XI 1799-1801). Again, trial counsel interposed no objection to this argument, and, hence, appellate counsel could not have asserted it on appeal. See, Johnson, supra; Teffeteller, supra. Further, the prosecutor himself made clear that his argument was simply for "demonstrative" purposes, and that the jury's function was to weigh, not count, the findings in aggravation and

mitigation (OR XI 1799, 1801), a fact reiterated by defense counsel (OR XI 1803), as well as by the standard instructions to the jury (OR XI 1826). No relief is warranted as to this matter.

B. The "Surprise" Witnesses

Collateral counsel next contend that appellate counsel should have raised on appeal the denial of a continuance requested due to the State's presentation of two "surprise" witnesses - Gwen Beck and Dale Skipper. The record clearly reflects why appellate counsel chose not to raise any claim of this nature, and it should be noted that counsel did in fact raise on appeal the denial of a pre-trial motion for continuance, which this Court found not to constitute reversible error. Gorby, 630 So.2d at 546.

The record reflects that when the State began its examination of Gwen Beck as a witness, defense counsel objected to her late disclosure as a witness, pointing out that he had not had the opportunity to depose her (OR VI 892). The prosecutor pointed out that he in fact had learned of the nature of the witness's testimony vary recently, and that defense counsel had been apprised of such as soon as possible (OR VI 892). Judge Sirmons held a full hearing on the matter, during which defense counsel moved for a continuance. Although the judge denied the motion, he found no discovery violation, and afforded defense counsel the opportunity to depose the witness prior to her testimony, an opportunity of which counsel availed himself (OR VI

893-7, 911-929). During this same hearing, defense counsel also objected to the State calling Dale Skipper, and, again, while the Court found no discovery violation, Judge Sirmons likewise afforded defense counsel the opportunity to depose Skipper prior to his testimony, which he did (OR VI 897-901, 930-939). Collateral counsel misconstrue the prosecutor's explanation for the belated disclosure of Skipper (Petition at 21-2), and likewise grossly overstate the importance of the testimony of either witness. At most, Gwen Beck testified that the victim had possessed an answering machine comparable to one later shown her, while Skipper testified that the victim had kept hammers in his garage. Given the fact, inter alia, that no discovery violation was found and that defense counsel was afforded the opportunity to depose both witnesses prior to their testimony, it is understandable that appellate counsel did not raise any claim of error in Judge Sirmons' handling of the matter. Counsel no doubt knew that this Court would not reverse Judge Sirmons' rulings in the absence of a showing of an abuse of discretion. See, Bouie v. State, 559 So.2d 1113 (Fla. 1990); State v. Tascarella, 580 So.2d 154 (Fla. 1991). As such clearly did not occur below, no relief is warranted as to this matter.

C. The "Impugning" of Defense Counsel's Integrity

Collateral counsel next contend that appellate counsel was ineffective for failing to raise on appeal any claim of error

relating to the prosecutor's alleged derogatory remarks about defense counsel (OR V 848-9; X 1559, 1569, 1578). Fatal to this claim is the fact that no objection was interposed to the last three matters, which occurred during the prosecutor's closing argument at the guilt phase, and it is well established that appellate counsel cannot be ineffective for failing to present unpreserved matters on appeal. See, Johnson, supra. While defense counsel did object to the first matter, his objection was sustained, and the witness's testimony stricken (OR V 848-9); as nothing further was requested of the trial court, appellate counsel had nothing to raise on appeal. No relief is warranted as to these rather picayune matters.

D. The Alleged "Bolstering" of State Witnesses

Collateral counsel next complain that appellate counsel should have argued on appeal that the prosecutor impermissibly "bolstered" the testimony of state witnesses Michael Bennett and Allen Brown (OR IV 702; V 831); it should be noted that appellate counsel did, in fact, complain on appeal that the prosecutor had impermissibly bolstered the testimony of Karen Smith, and this Court rejected such contention. Gorby, 630 So.2d at 547. As to the matters now asserted, no objection was interposed in regard to the first, and defense counsel's objection to the latter was sustained, with no additional relief requested or denied; accordingly, there was nothing for appellate counsel to raise on appeal. See, Johnson, supra; Teffeteller, supra. Further, as in

the matter presented on appeal, the prosecutor's remarks were only made after defense counsel had attacked the credibility of the witness, and no relief is warranted as to this matter.

E. The Alleged Introduction of Non-statutory Factors

Collateral counsel finally contend that appellate counsel rendered ineffective assistance for failing to raise on appeal allegedly disparaging remarks which the prosecutor made about Gorby during opening statement (OR IV 526, 528), and during examination of the first witness (OR V 540). As to the prosecutor's observation that his witnesses would not be church going people (OR IV 528), no objection was interposed in regard to such matter, precluding appellate counsel from raising it. Johnson, supra. As to the other two matters, while defense counsel did object, such objections were sustained, and no further relief requested, thus, leaving nothing for appellate counsel to raise. See, e.g., Riechmann v. State, 581 So.2d 133, 139 (Fla. 1991) (Where defense objection sustained, defendant did not indicate such action was insufficient by moving for a mistrial or other relief in order to preserve claim); Nixon v. State, 572 So.2d 1336, 1340 (Fla. 1990) (counsel's silence after sustaining of objection is waiver); Simpson v. State, 418 So.2d 984, 986 (Fla. 1982). Further, appellate counsel did, in fact raise those properly preserved claims of error on appeal, Gorby, 630 So.2d at 547, and this Court found no basis for reversal. No

relief is warranted as to this matter. See also Pope v. Wainwright, 496 So.2d 798, 802-4 (Fla. 1986) (appellate counsel's failure to argue on appeal unpreserved claim relating to prosecutorial argument as to lack of remorse insufficient basis for relief in case involving strong aggravation).

Collateral counsel have simply used this petition for writ of habeas corpus to relitigate variations on claims raised and rejected on direct appeal or to present matters which appellate counsel clearly was precluded from raising due to lack of preservation or even arguable merit. No relief is warranted as to any of the matters asserted in this claim.

CLAIM IV

THE VOIR DIRE CLAIM

In this claim, collateral counsel contend that appellate counsel rendered ineffective assistance by failing to raise on appeal the trial court's denial of individual and sequestered voir dire on views on the death penalty and "attitude towards the case". As evidence of "prejudice," collateral counsel point to the fact that one prospective juror stated in front of the others that she knew one of the law enforcement officers who might testify, and that another prospective juror stated that he did not wish to sit on the jury because he was a lawyer (Petition at 26); neither prospective juror sat.

This claim is frivolous in the extreme, and while appellate counsel could have raised it, he was not constitutionally

required to do so. See, Hardwick, supra; Provenzano, supra. Judge Sirmons did in fact grant individual and sequestered voir dire of the prospective jurors as to their knowledge of any pretrial publicity, and such was conducted (OR I 10-12; 38-151; II 152-341; III 342-513). It should be noted that the defense counsel did not exhaust all of his peremptories (OR III 500), and it is clear that no "prejudice" stemmed from the judge's even handed ruling. Appellate counsel no doubt knew that the judge's ruling could only be reversed in the showing of an abuse of discretion, see, e.g., Randolph v. State, 562 So.2d 331, 332 (Fla. 1990), Davis v. State, 461 So.2d 67, 69 (Fla. 1984), and no relief is warranted as to this claim. See also Teffeteller, 734 So.2d at 1028-9 (appellate counsel not ineffective for failing to raise claim on appeal relating to denial of individual voir dire, given trial court's discretion).

CLAIM V

THE AGGRAVATING CIRCUMSTANCES CLAIM

Collateral counsel next present a multi-faceted attack upon the finding of the four aggravating circumstances below, attacking the jury instructions thereon, as well as the finding of each factor by the sentencing judge. Collateral counsel concede that these matters were presented in the 3.850 motion and found procedurally barred (Petition at 27), but contend that appellate counsel rendered ineffective assistance for failing to

raise these matters on direct appeal.¹ Further, appellate counsel did attack on direct appeal the finding of the HAC and prior violent felony aggravating factors, as well as the jury instruction on the former factor, and Gorby cannot relitigate these matters under a different theory at this juncture. See, Breedlove, supra; Parker, supra. Each of Gorby's claim will now be addressed.

A. The Under Sentence of Imprisonment Aggravator

Collateral counsel first contend that Gorby's jury should have been advised that the weight of this aggravator "was lessened because Mr. Gorby obtained his release from prison by legal and non-violent means." (Petition at 29). Unsurprisingly, collateral counsel cite no legal authority for this proposition, and, as the standard jury instruction on this aggravator has never been invalidated, appellate counsel cannot be deemed ineffective for failing to make this challenge. Cf. Mendyk v. State, 592 So.2d 1076, 1080 (Fla. 1992); Gaskin v. State, 737 So.2d 509, 513, n.7 (Fla. 1999). Further, given trial counsel's failure to object to this instruction or aggravator (OR XI 1731) appellate counsel had nothing to raise. See, Thompson, 25 Fla.L.Weekly at S351 (appellate counsel not ineffective for failing to challenge constitutionality of jury instruction on

¹ To the extent that collateral counsel also complain about trial counsel's failure to object to the instructions as alleged ineffectiveness of counsel (Petition at 31), such claims are not cognizable on habeas corpus. See, e.g., Thompson, 25 Fla.L.Weekly S352, n.13.

appeal, where trial counsel failed to preserve issue). Additionally, it should be noted, as this Court did on direct appeal, that Gorby committed this offense less than a month after being placed on parole. Gorby, 630 So.2d at 544, 547, n.4.

B. The Prior Conviction Aggravator

Collateral counsel next contend that appellate counsel should have attacked the jury instruction on this aggravating circumstance as "commanding" the jury to find it, and, further, that appellate counsel should have asserted on appeal that the State should have been required to establish each element of the prior Texas offenses as they "related to Florida law" (Petition at 30). As trial counsel did not object to the jury instruction below, appellate counsel had nothing to raise, see Thompson, supra; further, the jury instruction has never been invalidated, and counsel would have had no basis to challenge it. See, Mendyk, supra; Gaskin, supra. While trial counsel did, in fact, argue that the State should have had to prove the elements of the Texas offenses (OR XI 1731-4), appellate counsel chose instead to attack this aggravator on the grounds that the State had not proven identity, an argument which this Court objected on appeal. Gorby, 630 So.2d at 548. Gorby cannot now use habeas corpus as a vehicle to attack this aggravator on other bases. See, Breedlove, supra; Parker, supra. Finally, as to the argument now proposed by collateral counsel, such clearly would have been meritless, as this Court noted on direct appeal that Gorby's prior convictions involved convictions for robbery, armed robbery, attempted homicide, as well as burglary, all offenses which plainly qualify. Gorby, 630 So.2d at 545, n.1.

C. The Pecuniary Gain Aggravator

Collateral counsel next argued that appellate counsel should have attacked the jury instruction on this aggravating circumstance, as well as its finding. As this jury instruction has never been invalidated, see Gaskin, supra, and, as trial counsel interposed no objection to it on constitutional grounds (counsel did succeed in having the State elect between this aggravator and that involving the homicide having been committed during a robbery) (OR XI 1734-8), nothing was preserved for counsel to raise. See, Thompson, supra. Further, as the sentencing order makes plain, this was truly a crime committed for pecuniary gain, as Gorby murdered the victim so as to be able to take his vehicle, his credit cards, and other items of value, so as to return to Texas (OR XV 2622).

D. The Heinous, Atrocious and Cruel Aggravator

Finally, collateral counsel contend that appellate counsel ineffectively challenged the HAC instruction on appeal, and that this Court failed to set forth "any discussion of the constitutional infirmity of the instruction given at Mr. Gorby's trial" or the effect of such error (Petition at 33, 36). Collateral counsel contend that the instruction violated Espinosa v. Florida, supra, and additionally was lacking any language pertaining to Gorby's intent to inflict torture. Collateral counsel maintain that, in the interests of justice, this Court should revisit the issue. The State disagrees with any contention that Gorby is entitled to relief on this score, but

would not oppose revisiting this matter, so as to clarify that, in fact, no Espinosa claim was properly preserved for review at trial.

The record reflects the following. During the charge conference, trial counsel objected to any instruction on this factor, on the grounds that there was no evidence to support such; given this position, he stated, "We don't get to the definitions, they aren't necessary." (OR XI 1739). The Court overruled this objection, and, at the State's request, gave an expanded definition of the terms of this aggravator (OR XI 1738-9, 1825). On appeal, appellate counsel did contend that this instruction violated Espinosa, and in its Answer Brief filed on October 14, 1992, the State specifically contended, inter alia, that the claim was not preserved for review due to lack of objection (See Appendix). In its December 9, 1993 opinion, this Court did not discuss the State's procedural argument, but found the claim without merit, stating, "The trial court gave the expanded instruction on this aggravator as requested by the State." Gorby, 630 So.2d at 548. In a footnote apparently overlooked by collateral counsel, this Court also stated, "Even if there were error in the instruction, it would be harmless because the facts show this killing to be heinous, atrocious or cruel under any definition of the terms. (Citation omitted)" Gorby, 630 So.2d at 548, n.6.

Because Gorby has already secured review of his Espinosa challenge, he cannot re-present the claim on habeas corpus. See, Thompson, 25 Fla.L.Weekly at S351; Swafford, supra.² Nevertheless, this Court has, on occasion, clarified the basis for its disposition of Espinosa claims in subsequent collateral opinions. See, e.g., Brown v. State, 755 So.2d 616, 621-3 (Fla. 2000) (Court revisits direct appeal disposition of Espinosa claim, in collateral claim opinion, and makes express finding of procedural bar, despite fact that claim addressed on the merits in direct appeal opinion); Johnson v. Singletary, 640 So.2d 1102 (Fla. 1994 (same)). Here, Gorby's Espinosa claim should have been found procedurally barred on direct appeal; indeed, in the concurrently filed Initial Brief, collateral counsel contend that trial counsel was ineffective for failing to preserve this point (See Initial Brief, Gorby v. State, FSC Case No. 95, 153, at pg. 96) (" . . . counsel failed to object to either the vague statutory language or vague jury instruction regarding heinous, atrocious or cruel"). Gorby merits no relief as to these matters.

CLAIM VI

THE MITIGATION CLAIM

In this claim, collateral counsel contend that appellate counsel rendered ineffective assistance for failing to assert on

² As to Gorby's "intent" argument, this Court clarified the prerequisites for the HAC aggravator in Brown v. State, 721 So.2d 274, 277, n.7 (Fla. 1998).

appeal that the sentencer had failed to find and weigh mitigation set forth in the record, noting that evidence had been presented "showing Mr. Gorby's abusive upbringing, his poverty as a child, his history of alcoholism and his brain damage." (Petition at 38).

While appellate counsel could have raised this claim, he was not constitutionally required to do so. See, Hardwick, supra; Provenzano, supra. The sentencing order in case clearly indicates that Judge Sirmons found and weighed such factors as Gorby's organic personality syndrome (a syndrome in conformity with brain damage), his alcohol dependence, his poor background and the fact that he had an abusive father (OR XV 2625-6). As this claim is without merit, appellate counsel was not ineffective, see, Groover, supra; Harvey, supra, and Gorby merits no relief.

CLAIM VII

THE "BURDEN-SHIFTING" CLAIM

Collateral counsel next contend that appellate counsel was ineffective for failing to assert on appeal that the standard jury instruction shifted the burden of proof onto the defense at the penalty phase. As trial counsel did not preserve this matter, appellate counsel had nothing to argue. See, Teffeteller, 734 So.2d at 1025-7, n.23 (appellate counsel not ineffective for failing to raise unpreserved "burden-shifting"

claims); Groover, 656 So.2d at 425-6 (same); Williamson, 651 So.2d at 86-7 (same). No relief is warranted as to this claim.

CLAIM VIII

THE STATUTORY CLAIM

Collateral counsel last contend that Florida's capital sentencing statute is unconstitutional on its face and as applied in a number of respects; no allegation of ineffective assistance of appellate counsel is presented. All of these matters represent matters which should have been preserved through objection, or motion, in the trial court, and then presented on direct appeal. Accordingly this claim is procedurally barred in its entirety when raised for the first time on habeas corpus. See, e.g., Johnson v. Singletary, 612 So.2d 575, 576, n.1 (Fla. 1993) (claim that Florida's capital sentencing statute unconstitutionally vague procedurally barred on habeas corpus); Hall v. State, 742 So.2d 225, 226 (Fla. 1999) (challenge to constitutionality of electrocution procedurally barred on collateral attack). Blanco, supra.

CONCLUSION

WHEREFORE, for the aforementioned reasons, all of Gorby's claims for relief in the instant petition for writ of habeas corpus should be denied in all respects.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

RICHARD B. MARTELL
SPECIAL ASSISTANT ATTORNEY GENERAL
FLORIDA BAR NO. 300179

OFFICE OF THE ATTORNEY GENERAL
THE CAPITOL
TALLAHASSEE, FL 32399-1050
(850) 414-3300

COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Motion has been furnished by U.S. Mail to Andrew Thomas, Capital Collateral Regional Counsel, Northern Region, Post Office Box 5498, Tallahassee, Florida 32314-5498, this ____ day of August, 2000.

Richard B. Martell
Special Assistant Attorney General