

IN THE SUPREME COURT OF FLORIDA

RICHARD HENYARD,

Petitioner,

v.

Case No. SC02-2538

Lower Court No. 93-159-CFA-

MH

JAMES V. CROSBY, JR.,
Secretary, Florida Department
of Corrections

Respondent.

_____ /

RESPONSE TO PETITION FOR HABEAS CORPUS

AND

MEMORANDUM OF LAW

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

I.

FACTS AND PROCEDURAL HISTORY

The facts of this case are recited in this Court's opinion on the direct appeal of Henyard's convictions and sentences, Henyard v. State, 689 So. 2d 239, 242-44 (Fla. 1996) (footnotes omitted):

The record reflects that one evening in January, 1993, eighteen-year-old Richard Henyard stayed at the home of a family friend, Luther Reed. While Reed was making dinner, Henyard went into his bedroom and took a gun that belonged to Reed. Later that month, on Friday, January 29, Dikeysha Johnson, a long-time acquaintance of Henyard, saw him in Eustis, Florida. While they were talking, Henyard lifted his shirt and displayed the butt of a gun in the front of his pants. Shenise Hayes also saw Henyard that same evening. Henyard told her he was going to a night club in Orlando and to see his father in South Florida. He showed Shenise a small black gun and said that, in order to make his trip, he would steal a car, kill the owner, and put the victim in the trunk.

William Pew also saw Henyard with a gun during the last week in January and Henyard tried to persuade Pew to participate in a robbery with him. Later that day, Pew saw Henyard with Alfonza Smalls, a fourteen-year-old friend of Henyard's. Henyard again displayed the gun, telling Pew that he needed a car and that he intended to commit a robbery at either the hospital or the Winn Dixie.

Around 10 p.m. on January 30, Lynette Tschida went to the Winn Dixie store in Eustis. She saw Henyard and a younger man sitting on a bench near the entrance of the store. When she left, Henyard and his companion got up from the bench; one of them walked ahead of her and the other behind her. As she approached her car, the one ahead of her went to the end of the bumper, turned around, and stood. Ms. Tschida quickly got into the car and locked the doors. As she drove away, she saw Henyard and the younger man walking back towards the store.

At the same time, the eventual survivor and victims in this case, Ms. Lewis and her daughters, Jasmine, age 3, and Jamilya, age 7, drove to the Winn Dixie store. Ms. Lewis noticed a few people sitting on a bench near the doors as she and her daughters entered the store. When Ms. Lewis left the store, she went to her car and put her daughters in the front passenger seat. As she walked behind the car to the

driver's side, Ms. Lewis noticed Alfonza Smalls coming towards her. As Smalls approached, he pulled up his shirt and revealed a gun in his waistband. Smalls ordered Ms. Lewis and her daughters into the back seat of the car, and then called to Henyard. Henyard drove the Lewis car out of town as Smalls gave him directions.

The Lewis girls were crying and upset, and Smalls repeatedly demanded that Ms. Lewis "shut the girls up." As they continued to drive out of town, Ms. Lewis beseeched Jesus for help, to which Henyard replied, "this ain't Jesus, this is Satan." Later, Henyard stopped the car at a deserted location and ordered Ms. Lewis out of the car. Henyard raped Ms. Lewis on the trunk of the car while her daughters remained in the back seat. Ms. Lewis attempted to reach for the gun that was lying nearby on the trunk. Smalls grabbed the gun from her and shouted, "you're not going to get the gun, bitch." Smalls also raped Ms. Lewis on the trunk of the car. Henyard then ordered her to sit on the ground near the edge of the road. When she hesitated, Henyard pushed her to the ground and shot her in the leg. Henyard shot her at close range three more times, wounding her in the neck, mouth, and the middle of the forehead between her eyes. Henyard and Smalls rolled Ms. Lewis's unconscious body off to the side of the road, and got back into the car. The last thing Ms. Lewis remembers before losing consciousness is a gun aimed at her face. Miraculously, Ms. Lewis survived and, upon regaining consciousness a few hours later, made her way to a nearby house for help. The occupants called the police and Ms. Lewis, who was covered in blood, collapsed on the front porch and waited for the officers to arrive.

As Henyard and Smalls drove the Lewis girls away from the scene where their mother had been shot and abandoned, Jasmine and Jamilya continued to cry and plead: "I want my Mommy," "Mommy," "Mommy." Shortly thereafter, Henyard stopped the car on the side of the road, got out, and lifted Jasmine out of the back seat while Jamilya got out on her own. The Lewis girls were then taken into a grassy area along the roadside where they were each killed by a single bullet fired

into the head. Henyard and Smalls threw the bodies of Jasmine and Jamilya Lewis over a nearby fence into some underbrush.

Later that evening, Bryant Smith, a friend of Smalls, was at his home when Smalls, Henyard, and another individual appeared in a blue car. Henyard bragged about the rape, showed the gun to Smith, and said he had to "burn the bitch" because she tried to go for his gun. Shortly before midnight, Henyard also stopped at the Smalls' house. While he was there, Colinda Smalls, Alfonza's sister, noticed blood on his hands. When she asked Henyard about the blood, he explained that he had cut himself with a knife. The following morning, Sunday, January 31, Henyard had his "auntie," Linda Miller, drive him to the Smalls' home because he wanted to talk with Alfonza Smalls. Colinda Smalls saw Henyard shaking his finger at Smalls while they spoke, but she did not overhear their conversation.

That same Sunday, Henyard went to the Eustis Police Department and asked to talk to the police about the Lewis case. He indicated that he was present at the scene and knew what happened. Initially, Henyard told a story implicating Alfonza Smalls and another individual, Emmanuel Yon. However, after one of the officers noticed blood stains on his socks, Henyard eventually admitted that he helped abduct Ms. Lewis and her children, raped and shot her, and was present when the children were killed. Henyard continuously denied, however, that he shot the Lewis girls. After being implicated by Henyard, Smalls was also taken into custody. The gun used to shoot Ms. Lewis, Jasmine and Jamilya was discovered during a subsequent search of Smalls' bedroom.

The autopsies of Jasmine and Jamilya Lewis showed that they both died of gunshot wounds to the head and were shot at very close range. Powder stippling around Jasmine's left eye, the sight of her mortal wound, indicated that her eye was open when she was shot. One of the blood spots discovered on Henyard's socks matched the blood of Jasmine Lewis. "High speed" or "high velocity" blood splatters found on Henyard's jacket matched the blood of Jamilya Lewis

and showed that Henyard was less than four feet from her when she was killed. Smalls' trousers had "splashed" or "dropped blood" on them consistent with dragging a body. DNA evidence was also presented at trial indicating that Henyard raped Ms. Lewis.

Henyard was found guilty by the jury of three counts of armed kidnapping in violation of section 787.01, Florida Statutes (1995), one count of sexual battery with the use of a firearm in violation of section 794.011(3), Florida Statutes (1995), one count of attempted first-degree murder in violation of sections 782.04(1)(a)(1) and 777.04(1), Florida Statutes (1995), one count of robbery with a firearm in violation of section 812.13(2)(a), Florida Statutes (1995), and two counts of first-degree murder in violation of section 782.04(1)(a), Florida Statutes (1995).

After a penalty phase hearing, the jury recommended the death sentence for each murder by a vote of 12 to 0. The trial court followed this recommendation and sentenced Henyard to death. The court found in aggravation: (1) the defendant had been convicted of a prior violent felony, see section 921.141(5)(b); (2) the murder was committed in the course of a felony, see section 921.141(5)(d); (3) the murder was committed for pecuniary gain, see section 921.141(5)(f) and, (4) the murder was especially heinous, atrocious or cruel, see section 921.141(5)(h).

The court found Henyard's age of eighteen at the time of the crime as a statutory mitigating circumstance, see section 921.141(6)(g), and accorded it "some weight." The trial court also found that the defendant was acting under an extreme emotional disturbance and his capacity to conform his conduct to the requirements of law was impaired, see section 921.141(6)(b), (f), and accorded these mental mitigators "very little weight." As for nonstatutory mitigating circumstances, the trial court found the following circumstances but accorded them "little weight": (1) the defendant functions at the emotional level of a thirteen year old and is of low intelligence; (2) the defendant had an impoverished

upbringing; (3) the defendant was born into a dysfunctional family; (4) the defendant can adjust to prison life; and (5) the defendant could have received eight consecutive life sentences with a minimum mandatory fifty years. Finally, the trial court accorded "some weight" to the nonstatutory mitigating circumstance that Henyard's codefendant, Alfonza Smalls, could not receive the death penalty as a matter of law. The court concluded that the mitigating circumstances did not offset the aggravating circumstances.

Petitioner's trial was conducted between May 23 - June 3, 1994, before the Honorable Mark J. Hill. In his direct appeal, Florida Supreme Court Case No. 84,314, Petitioner was represented by Assistant Public Defender Michael S. Becker. Mr. Becker raised the following eleven issues in his 98-page brief:

POINT I: APPELLANT WAS DENIED A FAIR TRIAL BY AN IMPARTIAL JURY, GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 9 AND 16 OF THE FLORIDA CONSTITUTION, WHEN THE TRIAL COURT DENIED HIS TIMELY REQUEST FOR A CHANGE OF VENUE.

POINT II: APPELLANT'S CONVICTIONS AND SENTENCES MUST BE REVERSED UNDER THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 9, 16, 17 AND 22 OF THE FLORIDA CONSTITUTION DUE TO SERIOUS ERRORS WHICH UNDERMINE THE CONFIDENCE IN THE FAIRNESS AND IMPARTIALITY OF THE JURY.

POINT III: IN VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 9 OF THE FLORIDA CONSTITUTION, THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO SUPPRESS HIS STATEMENT WHERE THE EVIDENCE CLEARLY SHOWED THAT APPELLANT DESIRED TO STOP THE INTERROGATION, WHICH REQUEST WAS NEVER HONORED.

POINT IV: IN VIOLATION OF THE FIFTH, SIXTH, AND

FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 9, 16 AND 22 OF THE FLORIDA CONSTITUTION, THE TRIAL COURT ERRED IN PERMITTING THE STATE TO PRESENT EVIDENCE OF DNA TESTING.

POINT V: IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 9, 16, 17 AND 22 OF THE FLORIDA CONSTITUTION, APPELLANT IS ENTITLED TO A NEW TRIAL BECAUSE OF IMPROPER PROSECUTORIAL COMMENTS MADE TO THE JURY.

POINT VI: IN VIOLATION OF THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 9, AND 16 OF THE FLORIDA CONSTITUTION, THE TRIAL COURT ERRED IN PERMITTING A POLICE OFFICER TO TESTIFY AS TO STATEMENTS MADE TO HIM BY DOROTHY LEWIS WHERE SUCH STATEMENTS WERE INADMISSIBLE HEARSAY.

POINT VII: IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 9, 16, 17 AND 22 OF THE FLORIDA CONSTITUTION, THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S OBJECTIONS TO STANDARD JURY INSTRUCTIONS IN THE GUILT PHASE AND IN DENYING HIS REQUESTED JURY INSTRUCTIONS.

POINT VIII: IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 9, 16, 17 AND 22 OF THE FLORIDA CONSTITUTION, APPELLANT'S DEATH SENTENCE IS INVALID BECAUSE THE JURY HEARD AND THE TRIAL COURT EXPRESSLY CONSIDERED HIGHLY PREJUDICIAL TESTIMONY WHICH DID NOT RELATE TO ANY STATUTORY AGGRAVATING CIRCUMSTANCE.

POINT IX: IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 9, 16, 17 AND 22 OF THE FLORIDA CONSTITUTION, THE TRIAL COURT ERRED IN DENYING APPELLANT'S REQUESTED JURY INSTRUCTION ON HEINOUS, ATROCIOUS OR CRUEL, AND INSTEAD GIVING THE JURY AN UNCONSTITUTIONALLY VAGUE AND OVERBROAD INSTRUCTION THEREON.

POINT X: IN VIOLATION OF THE FIFTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 9 AND 17 OF THE FLORIDA CONSTITUTION, THE TRIAL COURT ERRED IN IMPOSING THE DEATH SENTENCE WHERE TWO OF THE AGGRAVATING CIRCUMSTANCES RELIED UPON BY THE TRIAL COURT WERE NOT PROVEN BEYOND A REASONABLE DOUBT.

POINT XI: IN VIOLATION OF THE FIFTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 9 AND 17 OF THE FLORIDA CONSTITUTION, THE DEATH PENALTY IS DISPROPORTIONATE AND MUST BE VACATED.

This Court affirmed Petitioner's convictions and sentences. Henyard v. State, 689 So. 2d 239 (Fla. 1996). Petitioner then filed a petition for writ of certiorari to the United States Supreme Court which was denied on October 6, 1997. Henyard v. Florida, 522 U.S. 846 (1997).

Petitioner pursued postconviction relief, and after conducting an evidentiary hearing, the lower court concluded that Petitioner had failed to establish his claim of ineffective assistance of counsel at the penalty phase. Petitioner's appeal from the denial of his postconviction motion is currently pending before this Court in Henyard v. State, Case No. SC02-1105. Petitioner's habeas petition in this Court was timely filed contemporaneously with his initial brief in the appeal of the denial of his motion for postconviction relief.

ARGUMENT IN OPPOSITION TO CLAIMS RAISED

Petitioner alleges that extraordinary relief is warranted

because he was denied the effective assistance of appellate counsel. The standard of review applicable to ineffective assistance of counsel claims mirrors the Strickland v. Washington, 466 U.S. 668 (1984), standard for claims of trial counsel ineffectiveness. Valle v. Moore, 27 Fla. L. Weekly S713 (Fla. Aug. 29, 2002). Such a claim requires an evaluation of whether counsel's performance was so deficient that it fell outside the range of professionally acceptable performance and, if so, whether the deficiency was so egregious that it compromised the appellate process to such a degree that it undermined confidence in the correctness of the result. Groover v. Singletary, 656 So. 2d 424, 425 (Fla. 1995); Byrd v. Singletary, 655 So. 2d 67, 68-69 (Fla. 1995). A review of the record demonstrates that neither deficiency nor prejudice has been shown in this case.

Petitioner's arguments are based on appellate counsel's alleged failure to raise a number of issues, each of which will be addressed in turn. However, none of the issues now asserted would have been successful if argued in Petitioner's direct appeal. Therefore, counsel was not ineffective for failing to present these claims. Groover, 656 So. 2d at 425; Chandler v. Dugger, 634 So. 2d 1066, 1068 (Fla. 1994) (failure to raise meritless issues is not ineffective assistance of appellate

counsel). No extraordinary relief is warranted because Petitioner's current arguments were not preserved for appellate review and, even if preserved, no reversible error could be demonstrated. See also Teffeteller v. Dugger, 734 So. 2d 1009 (Fla. 1999); Hardwick v. Dugger, 648 So. 2d 100 (Fla. 1994); Breedlove v. Singletary, 595 So. 2d 8 (Fla. 1992). As noted above, to obtain relief it must be shown that appellate counsel's performance was both deficient and prejudicial. The failure to raise a meritless issue on direct appeal will not render counsel's performance ineffective, and this is also true regarding issues that would have been found to be procedurally barred had they been raised on direct appeal. See Rutherford v. Moore, 774 So. 2d 637 (Fla. 2000) (stating that although habeas petitions are a proper vehicle to advance claims of ineffective assistance of appellate counsel, such claims may not be used to camouflage issues that should have been raised on direct appeal or in a postconviction motion).

The United States Supreme Court recognized that "since time beyond memory" experienced advocates "have emphasized the importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues." Jones v. Barnes, 463 U.S. 745, 751-52 (1983). The failure of appellate counsel to brief an issue which is without

merit is not a deficient performance which falls measurably outside the range of professionally acceptable performance. See Card v. State, 497 So. 2d 1169, 1177 (Fla. 1986). Moreover, an appellate attorney will not be considered ineffective for failing to raise issues that "might have had some possibility of success; effective appellate counsel need not raise every conceivable nonfrivolous issue. Engle v. Dugger, 576 So. 2d 696 (Fla. 1991). Finally, appellate counsel is "not ineffective for failing to raise issues not preserved for appeal." Medina v. Dugger, 586 So. 2d 317, 318 (Fla. 1991).

CLAIM I: CONSTITUTIONALITY OF FLORIDA'S DEATH PENALTY STATUTE UNDER APPRENDI AND RING.

Petitioner claims that Florida's death penalty statute is unconstitutional under Apprendi v. New Jersey, 120 S. Ct. 2348 (2000) and Ring v. Arizona, 122 S. Ct. 2428 (2002). Although Henyard does not actually assert the basis of this Court's jurisdiction to review the claim, Petitioner makes a single assertion at the end of his claim that he "is entitled to the benefit of Apprendi and Ring under Witt v. State, 387 So. 2d 922, 929-30 (Fla. 1980)." This single reference to Witt, without argument or other supporting authority is not sufficient to properly raise this claim. Reaves v. Crosby, 28 Fla. L. Weekly S32 (Fla. Jan. 9, 2003) (claim that prior convictions should not have been considered as an aggravating factor not

properly before Court, where it is presented in one cursory sentence without any argument relative to this ground). Even if this claim is properly presented in the instant petition, Henyard is not entitled to relief.

First, it is procedurally barred since Henyard failed to assert at the time of trial or on appeal that it would violate his Sixth Amendment right to trial by jury for the jury not to determine the appropriate aggravating factors.¹ This Court has applied the procedural bar doctrine to claims brought under the predecessor decision of Apprendi v. New Jersey, 530 U.S. 466 (2000). See McGregor v. State, 789 So. 2d 976, 977 (Fla. 2001) (Apprendi claim procedurally barred for failure to raise in trial court); Barnes v. State, 794 So. 2d 590 (Fla. 2001) (Apprendi error not preserved for appellate review).

Moreover, this Court has consistently upheld Florida's death penalty statute in response to challenges under Ring, holding that unlike the situation in Arizona, the maximum sentence for first degree murder in Florida is death. Porter v. Crosby, 28 Fla. L. Weekly S33, 34 (Fla. Jan. 9, 2003) (stating that "we have repeatedly held that the maximum penalty under the statute

¹No claim of ineffective assistance of appellate counsel has been presented as to this issue. Even if such a claim had been presented it is without merit as ineffective assistance can not be used to circumvent the procedural bar.

is death and have rejected the other Apprendi arguments" [that aggravators need to be charged in the indictment, submitted to jury and individually found by unanimous jury]]; see also Anderson v. State, 28 Fla. L. Weekly S51 (Fla. Jan. 16, 2003); Cole v. State/Crosby, 28 Fla. L. Weekly S58, 64 (Fla. Jan. 16, 2003); Conahan v. State, 28 Fla. L. Weekly S70, 57 n.9 (Fla. Jan. 16, 2003); Lucas v. State/Moore, 28 Fla. L. Weekly S29, 32 (Fla. Jan. 9, 2003); Spencer v. State/Crosby, 28 Fla. L. Weekly S35, 41 (Fla. Jan. 9, 2003); Fotopoulos v. State/Moore, 28 Fla. L. Weekly S1, 5 (Fla. Dec. 19, 2002); Bruno v. Moore, 27 Fla. L. Weekly S1026, 1028 (Fla. Dec. 5, 2002); Marquard v. State/Moore, 27 Fla. L. Weekly S973, 978 n. 12 (Fla. Nov. 21, 2002); Chavez v. State, 832 So. 2d 730 (Fla. 2002); King v. Moore, 831 So. 2d 143 (Fla. 2002); Bottoson v. Moore, 833 So. 2d 693 (Fla. 2002). Since Florida's death penalty statute does not suffer from the constitutional infirmities that resulted in the remand to Arizona in Ring, Henyard is not entitled to relief.

In addition, the Ring decision is not subject to retroactive application under the principles of Witt v. State, 387 So. 2d 922, 929-30 (Fla. 1980). Pursuant to Witt, Ring is only entitled to retroactive application if it is a decision of fundamental significance, which so drastically alters the underpinnings of Henyard's death sentence that "obvious

injustice" exists. New v. State, 807 So. 2d 52 (Fla. 2001). In determining whether this standard has been met, this Court must consider three factors: the purpose served by the new case; the extent of reliance on the old law; and the effect on the administration of justice from retroactive application. Ferguson v. State, 789 So. 2d 306, 311 (Fla. 2001). Application of these factors to Ring, which did not directly or indirectly address Florida law, offers no basis for consideration of Ring in this case. Compare Cannon v. Mullin, 297 F.3d 989 (10th Cir. 2002) (rejecting the claim that Ring is retroactive in federal courts).

Finally, any error must be regarded as harmless. The record establishes that Henyard was indicted and a jury found him guilty as charged of two counts of first-degree murder, three counts of armed kidnapping, one count of sexual battery with the use of a firearm, one count of attempted first-degree murder, and one count of robbery with a firearm. The jury also unanimously recommended a sentence of death for each murder. (DAR:1345-46). Accordingly, no relief is warranted.

CLAIM II: POTENTIAL INCOMPETENCY AT TIME OF EXECUTION.

Henyard next argues that it would violate the Eighth Amendment's prohibition against cruel and unusual punishment to execute him since he may be incompetent at the time of

execution. Henyard concedes, however, that this issue is premature and that he cannot legally raise the issue of his competency to be executed until after a death warrant is issued. Thus, this claim is without merit. See Cole v. State/Crosby, 28 Fla. L. Weekly S58, 64 (Fla. Jan. 16, 2003); Hunter v. State, 817 So. 2d 786 (Fla. 2002); Hall v. Moore, 792 So. 2d 447, 450 (Fla. 2001).

CLAIM III: INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL FOR FAILING TO RAISE CLAIM REGARDING TRIAL COURT'S RULING ON TRIAL COUNSELS' MOTION TO WITHDRAW.

Petitioner's argument that his appellate counsel was ineffective for failing to raise an issue on direct appeal regarding the trial court's denial of defense counsels' motion to withdraw is without merit. Prior to trial, defense counsel filed a motion to withdraw because the Public Defender's Office had previously represented a witness listed on the State's witness list. (DAR:560-61). Trial counsel subsequently filed an addendum to the motion listing an additional nine potential State witnesses that the Public Defender's Office had represented.

At the hearing on the motion, defense counsel made the trial court aware of this Court's opinion in Bouie v. State, 559 So. 2d 1113 (Fla. 1990), and simply stated that the court should

grant his motion.² (DAR:2744-46). The State argued that because the Public Defender Office's representation of the single witness referenced in the original motion had concluded years ago, there was no conflict pursuant to the rule of law announced in Bouie. Because the State had only recently been given the addendum, it was not in a position to make the same representations as to the other nine witnesses. The trial court indicated that it would take the motion under advisement and allow the State the opportunity to check the status of the other cases. (DAR:2747-48). However, defense counsel interjected and informed the court that the Public Defender Office's representation of these other nine witnesses had concluded and there was no active cases for any of the witnesses. Once informed of this information, the trial court promptly denied the motion. (DAR:2748).

In Bouie, this Court addressed a similar situation where a member of the Public Defender's Office moved to withdraw based on the office's prior representation of a State witness. This Court stated that in order for a defendant to show a violation of the right to conflict-free counsel, "a defendant must

²Surprisingly, defense counsel did not immediately argue the motion to withdraw, but presented over twenty-six other defense motions for the court to rule on prior to arguing the motion to withdraw. (DAR:2562-2748).

establish that an actual conflict of interest adversely affected his lawyer's performance." Id. at 1115 (quoting Cuyler v. Sullivan, 446 U.S. 335, 350 (1980)). This Court found that the defendant failed to meet this burden because the public defender's representation of the State witness concluded prior to the witness' testimony. Id. Additionally, Bouie's counsel conducted an extensive cross-examination of the State witness at trial, and zealously guarded Bouie's interests at the expense of the witness/prior client. Id.

In the instant case, of the ten witnesses cited in trial counsel's motion to withdraw, only one of the witnesses, Wilbert Pew, testified at trial. (DAR:1344-68). As conceded by Petitioner's counsel at the motion hearing, the public defender's representation of this witness had concluded prior to Petitioner's trial. Furthermore, as in Bouie, Petitioner's counsel conducted an extensive cross-examination of this witness at trial. Clearly, trial counsel did not have an actual conflict of interest that adversely affected his performance at Petitioners' trial. Accordingly, this issue lacked any merit and appellate counsel cannot be deemed ineffective for failing to raise a non-meritorious issue on direct appeal. See Chandler v. Dugger, 634 So. 2d 1066, 1068 (Fla. 1994) (failure to raise meritless issues on appeal is not ineffective

assistance of appellate counsel).

WHEREFORE, based on the foregoing arguments and authorities,
the instant Petition for Writ of Habeas Corpus should be denied.

Respectfully submitted,

CHARLES J. CRIST, JR.
ATTORNEY GENERAL

STEPHEN D. AKE
Assistant Attorney General
Florida Bar No. 14087
Westwood Center
2002 North Lois Avenue, Suite 700
Tampa, Florida 33607-2366
Telephone: (813) 801-0600
Facsimile: (813) 356-1292

COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to Robert T. Strain, Assistant Capital Collateral Counsel, Capital Collateral Regional Counsel - Middle Region, 3801 Corporex Park Drive, Suite 210, Tampa, Florida 33619, on this 6th day of March, 2003.

COUNSEL FOR RESPONDENT

CERTIFICATE OF FONT COMPLIANCE

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

COUNSEL FOR RESPONDENT