IN THE SUPREME COURT OF FLORIDA

CASE NO.

MARVIN FRANCOIS,)

Petitioner,)

vs.) RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

LOUIE L. WAINWRIGHT, Secretary, Florida Department of Corrections,)

Respondent.)

)

COMES NOW the Respondent, by and through his undersigned counsel, and submits this Response to the Petition for a Writ of Habeas Corpus, to wit:

I

JURISDICTION

This Court has jurisdiction to hear the present Application for a Writ of Habeas Corpus under Art. V., §3 (b)(9). See Knight v. State, 394 So.2d 997 (Fla. 1981).

II

STATEMENT OF THE CASE

On April 24, 1978, the Defendant was convicted of six counts of first degree murder, arising from the brutal execution type slayings in the so-called "Carol City" killings. See Francois v. State, 407 So.2d at 887; see also White v. State, 403 So.2d 331 (Fla. 1981); Ferguson v. State, 417 So.2d 639 (Fla. 1982). The evidence against the Defendant

was overwhelming consisting of three eyewitnesses, the Defendant's incriminating statements and physical evidence of crimes. 407 So.2d at 887-888. At trial, the State presented twelve witnesses. The eyewitness testimony of victims Wooden and Hall and the wheelman, Archie, were corroborated in every detail by the State's other witnesses and the physical evidence. The Defendant did not testify and offered no witnesses or evidence to question or contradict the evidence presented by the prosecution.

On May 8, 1978, after a jury recommendation of death, the trial court imposed six consecutive sentences of death upon the Defendant. Id. On direct appeal to the Florida Supreme Court the Defendant contended 1) that the evidence against him was insufficient; 2) that he should have been granted a new trial because of newly discovered evidence known to the State at the time of trial but not disclosed to Defendant; 3) that the judgement should be reversed because the Defendant was tried under an indictment returned by a grand jury from which persons of the negro race had been systematically excluded; 4) that §920.141 Florida Statutes (1977) arbitrarily imposes a presumption of death in a felony murder circumstances; 5) that the finding that the Defendant had been previously been convicted of violent felonies was not supported by sufficient evidence; 6) that the trial court improperly limited the Defendant's cross-examination of a State witness as to the facts and circumstances of a previous conviction; 7) that the crimes the Defendant committed were not especially "heinous, atrocious or cruel" and various other claims not relevant to the present appeal. See, 407 So.2d at 888-891. Oral argument was conducted by the Florida Supreme Court on February 8, 1980. On October 15, 1981, the Florida Supreme Court

affirmed the Defendant's judgment and sentences of death. Id.

On his petition for certiorari to the United States Supreme Court, the Defendant contended: 1) that the Supreme Court of Florida erred within the meaning of Castaneda v. Partida, 430 U.S. 482, 97 S.Ct. 1272, 51 L.Ed.2d 498 (1977) in refusing to permit litigation on the issue of the composition of grand juries in Dade County, Florida and 2) that under Stephens v. Zant, 631 F.2d 397 (5th Cir. 1980), cert. granted, __U.S.___, 102 S.Ct. 90 (1981), remanded on certified, Zant v. Stephens, ____U.S.____, 103 S.Ct. 2733 (1983), the Supreme Court of Florida erred in not vacating the present death penalties, where the Florida Supreme Court had struck three statutory aggravating circumstances from the total of seven statutory aggravating circumstances originally found by the Florida trial court. On July 2, 1982, the United States Supreme Court refused to entertain a writ of certiorari. Francois v. Florida, ___U.S.___, 102 S.Ct. 3511 (1982).

On November 5, 1982, the Governor of Florida signed a death warrant ordering the Defendant's execution. 432 So.2d at 359. The Defendant's execution was therefore scheduled for December 7, 1982. Id. On November 12, 1982, the Defendant filed a Motion to Vacate his judgement and convictions in the state trial court alleging that his counsel was ineffective for 1) failure to diligently pursue the motion to dismiss the indictment upon the ground of discriminatory selection of grand jurors; 2) an alleged failure to adequately investigate the Petitioner's character and background and to present non-statutory mitigating evidence at the sentencing phase, particularly with regard to the

Petitioner's character and background and to present non-statutory mitigating evidence at the sentencing phase, particularly with regard to the Petitioner's mental state, and 3) that counsel was ineffective upon the grounds of his failure to object to an instruction concerning the process of weighing the aggravating and mitigating circumstances and failure to request an alternative instruction on mitigation. Id. The Defendant simultaneously filed a petition for writ of habeas corpus in the Florida Supreme Court claiming that he was denied effective assistance of appellate counsel on direct appeal because 1) appellate counsel should have raised an issue as to the trial court's refusal to give jury instructions requested by defense counsel relative to the aggravating circumstance that the murder was heinous, atrocious or cruel and 2) that appellate counsel was ineffective in failing to raise an issue on appeal that the trial court's instruction on mitigation could have been interpreted as limiting the juries consideration of mitigating factors. 423 So.2d at 359-361. On December 1, 1982, the Florida Supreme Court rejected the Defendant's claims both as to his trial and appellate counsel. Francois v. State, 423 So.2d 357 (Fla. 1982).

On or about November 30, 1982, the Defendant filed an application for a writ of habeas corpus and a motion for a stay of execution in the United States District Court, in which he presented substantially a compendium of the foregoing issues. See, Francois v. Wainwright, 741 F.2d 1275 (11th Cir. 1984). On December 2, 1983, the district court granted a stay of execution. After receiving a Response from the state and conducting oral argument on October 13, 1983 the District Court denied the Defendant's petition for habeas corpus. See, Id. On August 31, 1984 the Eleventh

Circuit Court of Appeals affirmed the district court's judgment. Id.

On April 23, 1985, Governor Robert Graham signed a second death warrant. The Defendant's execution is presently scheduled for Tuesday, May 28, 1985 at 7:00 o'clock a.m. The warrant expires at noon on Wednesday, May 29, 1985.

On Tuesday, May 21, 1985, the Defendant served the undersigned with a copy of his Petition for a Writ of Habeas Corpus, which he filed on said date in this Court. In said petition the Defendant claims that he should be relieved of his six sentences of death because his appellate counsel failed to present complaints as to various remarks of the prosecutor. This Court has set argument in this cause for Wednesday, May 22, 1985 at 7:00 o'clock, a.m.

III

ARGUMENT

A.) Unwarranted Delay; Abuse of the Writ

The Defendant's present petition claims error by appellate counsel in not challenging six assorted remarks of the prosecutor variously characterized as: a) "vouching" for witnesses, T1077-T1080 and T1086-T1088; b) asserting a matter for which there was allegedly no evidence, T1086; c) using "golden rule" arguments, T1243-T1245; d) referring to the Defendant as an "animal", T1246; and e) generally referring to the "war on crime," and the jury's duty, T1245-T1247. See, Petition at pp. 5-6.

First of all, the present "complaints" are not new matters. The prosecutor's comments were made in April of 1978. The Defendant has had "new" counsel since November of 1982. Even the Defendant's present counsel, delayed presenting these claims until six-days before the present scheduled execution. In Arango v. State, 437 So.2d 1099, at 1104 (Fla. 1983) this Court condemned such eleventh hour tactics, thus:

> "We also take this opportunity to comment on what we consider to be the all too frequent and questionable practice of waiting until the eleventh hour to raise or prosecute issues which could have and should have been raised months or years before. The unverified motion for post-conviction relief was filed on January 3, 1983. The four-month delay in verifying the motion and scheduling it for hearing until just prior to the scheduled execution week can be described at best as dilatory and, at worst, as an abuse of process. Essentially, appellant appeared at the April 21, 1983, hearing unprepared to carry the Knight burden, demanding instead that he be granted a stay of execution and the appointment of investigators and experts in the speculative expectation that he might be able at some unknown future date to develop evidence to support the motion for post-conviction relief. We condemn such tactics as unworthy of the legal profession. Spenkelink v. Wainwright, 372 So.2d 927 (Fla. 1979)(Alderman, J., concurring specially)."

In the present cause, the Defendant's deliberate eleventh hour tactics frustrate and abuse the judicial process. Nothing the Defendant has presented could not have been presented years ago. Under Arango this Court should refuse to tolerate such dilatory tactics.

Secondly, in Francois v. State, 423 So.2d 357 (Fla. 1982) this Court was presented with the precise legal claim that appellate counsel was ineffective. In Witt v. State, 465 So.2d 510 (Fla. 1985) this Court was presented with a similar circumstance, wherein the defendant had presented successive motions under Rule 3.850, Florida Criminal Rules of Procedure, each alleging different facts, but the same legal claim. In rejecting the defendant's tactics an abuse of process, this Court explained the rule which is also applicable herein:

> "A second petition for post-conviction relief under Rule 3.850 may be dismissed as an abuse of procedure unless the petitioner shows justification for the failure to raise the issues in the first petition. This justification could be established by a showing in his petition that there has been a change in the law since the first petition or that there are facts relevant to issues in the cause that could not have been discovered at the time the first petition was filed. These two examples are not intended to set forth the exclusive means to justify a second petition."
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> 465 So.2d at 512.

In the present cause, there has been no relevant "change in the law" and the "facts" have been well known to the Defendant for many years. There is also no other "justification" for the Defendant's successive petitions. Under Witt the Defendant's claims should therefore be rejected as an abuse of the great writ. See, also, Jones v. Estelle, 722 F.2d 159 (5th Cir. 1983)(en banc); Witt v. Wainwright, 755 F.2d 1396 (11th Cir. 1985).

B) Claim of Ineffective Appellate Counsel is barred by the doctrine of res judicata

In a similar manner to Witt, in Sullivan v. State, 441 So.2d 609 (Fla. 1983), the defendant claimed in successive

petitions that his counsel was ineffective. With each successive claim, the Defendant merely altered the factual basis for his claim of ineffective counsel. 441 So.2d at 612. In rejecting the defendant's claims this Court succinctly held that:

> "Most recently in McCrae v. State, 437 So.2d 1388 (Fla. 1983), we reiterated that matters that were raised on appeal of a conviction and sentence and decided adversely to the movant and matters which could have been presented on that appeal are not cognizable under a Rule 3.850 motion. We also stated that a motion under Rule 3.850 may be summarily denied when it is based on grounds that have been raised in prior post-conviction motions and have been decided adversely to the movant on their merits. Sullivan's claim of ineffective assistance of counsel was clearly raised in his previous motion and was decided against him on the merits. The fact that he may raise somewhat different facts to support his legal claim does not compel a different result." [Emphasis added].
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> Id.

In the present cause, the Defendant's claim that his appellate counsel was ineffective has plainly been decided against the Defendant on the merits on both in state and federal courts. Under Sullivan the Defendant's repetitious, successive legal claim that his appellate counsel was ineffective should be rejected as barred under the doctrine of res judicata. See, also, Barclay v. State, 411 So.2d 1310 (Fla. 1981), affirmed on unrelated grounds, ___U.S.___, 103 S.Ct. 3418, 77 L.Ed.2d 1134 (1983).

C) Counsel Not Ineffective

The standard for review of ineffective assistance of counsel claims is contained in Strickland v. Washington,

____U.S.____, 104 S.Ct. 2052 (1984). In Strickland, the court delineated a two-part test for claims of ineffective assistance of counsel. First of all, the court determined that a defendant must make a showing that his counsel's conduct was so far removed from the norm that:

> "[C]ounsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result."
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> 104 S.Ct. at 2064.

See, also, Knight v. State, 394 So.2d 997 (Fla. 1981), affirmed sub nom, Strickland v. Washington, supra. Secondly, a defendant must show that even with his counsel's deficient conduct that there was a "reasonable" probability that the outcome was affected by counsel's deficient conduct:

> "Defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine the confidence in the outcome."
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> Id. at 2068.

Accord, Knight v. State, supra. In particular, decisions as to what arguments to make is a proper tactical choice within the standard of expected competency of counsel. See, Middleton v. State, Case Nos. 66,629 and 66,652 (Fla. March 4, 1985); Tafero v. State, 459 So.2d 1034 (Fla. 1984); Magill v. State, 457 So.2d 1367 (Fla. 1984); Funchess v. State, 449 So.2d 1283 (Fla. 1984); Straight v. Wainwright, 422 So.2d 827 (Fla. 1982). Where there is any reasonable basis for counsel's decisions they will not support a claim of ineffective assistance of counsel. See, Id.

In the present circumstance, the Defendant's claims do not meet either test under Strickland. First of all, for the remarks at T1077-1080; T1086-T1088 ("vouching"); T1086 ("no evidence"); T1246 ("animal") and T1245-T1247 ("war on crime"), there was no relevant objection, request for a curative instruction or motion for a mistrial. Complaints as to these remarks even if objectionable, were not preserved for review. See, e.g., Ferguson v. State, 417 So.2d 639, at 641-642 (Fla. 1982); Clark v. State, 363 So.2d 331 (Fla. 1978). Therefore, appellate counsel can hardly be faulted for not asserting these "comments" as error. See, Johnson v. Wainwright, 463 So.2d 207, at 210 (Fla. 1985); Francois v. State, 423 So.2d at 361.

Indeed, even assuming proper preservation none of the remarks now cited by the Defendant rises to a level where appellate counsel may be faulted for not raising them nor to a level where the outcome of the appeal would be in doubt. Any complaint as to the prosecutor "vouching" for the credibility of the witness, Rolle, is unfounded. See, T1077-T1080; T1086-T1088. The prosecutor was plainly only properly commenting on the evidence presented, see, State v. Rucker, 330 So.2d 470 (Fla. 1976) and responding to defense counsel's onslaught against the credibility of Rolle, see Brown v. State, 367 So.2d 616 (Fla. 1979). Similarly, the prosecutor's reference to the removal of fingerprints was in response to counsel's claim that no prints of the Defendant, were found and a fair argument based upon the evidence of the use of oil to conceal prints.

In a similar vein, if any of the prosecutor's remarks to the sentencing jury were violative of a "golden rule" argument, they were overborn by and reasonably in anticipation of counsel's announced intent to read a description of

an electrocution to the jury. See, Id; Williams v. State, 110 So.2d 624, 663 (Fla. 1959)(response to "anticipated defense"). Indeed, defense counsel did not disappoint anyone, as he made flagrant golden rule arguments, attempting inter alia, to place the jurors in the electric chair. See, T1248-T1249; T1253-T1254; see, also, T1052.

Similarly, the prosecutor's reference to the common experience of the jurors and the community is no grounds for a mistrial in this cause. See, Barclay v. Florida, 103 S.Ct. at 3424. In Barclay the Court explained the controlling principles herein:

> "The United States Constitution does not prohibit a trial judge from taking into account the elements of racial hatred in this murder. The judge in this case found Barclay's desire to start a race war relevant to several statutory aggravating factors. The judge's discussion is neither irrational nor arbitrary. In particular, the comparison between this case and the Nazi concentration camps does not offend the United States Constitution. Such a comparison is not an inappropriate way of weighing the 'especially heinous, atrocious and cruel' statutory aggravating circumstance in an attempt to determine whether it warrants imposition of the death penalty.
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> Any sentencing decision calls for the exercise of judgment. It is neither possible nor desirable for a person to whom the state entrusts an important judgment to decide in a vacuum, as if he had no experiences."

Similarly, had appellate counsel complained about the "animal" remark it would have had no effect whatsoever upon the outcome of the appeal. Such a comment is not reversible error in the present circumstance. See, Darden v. State, 329 So.2d 287 (Fla. 1978); see, also, Darden v. Wainwright,

699 F.2d 1031 (11th Cir. 1983), affirmed, Darden v. Wainwright, 725 F.2d 1526, at 1532 (11th Cir. 1984)(en banc). Indeed, the State would note that defense counsel also characterized the Defendant as an "animal". See, T1254.

In the final analysis, any decision as to whether appellate counsel's "failure" to raise claims as to the comments of counsel must rest on a harmless error/preju dice analysis. See, State v. Murray, 443 So.2d 955 (Fla. 1984); see, e.g., Davis v. State, 461 So.2d 67 (Fla. 1984) ("golden rule" argument harmless); see, also Strickland v. Washington. In the present cause, the Defendant's convictions are based upon overwhelming evidence of guilt from more than twenty-six (26) exhibits and twelve (12) witnesses, including three (3) eyewitnesses to the particular facts and circumstances of the six execution/murders herein. The record before this Court is utterly devoid of any statutory or non-statutory mitigating circumstance as to why the death penalty should not be imposed for these truly heinous, atrocious, and cruel crimes. The State of Florida, proved beyond a reasonable doubt, the presence of four (4) statutory aggravating circumstances warranting the imposition of the death penalty.

The jury below after due deliberation recommended the death penalty for each of the six execution/murders and the trial court in a thorough, articulate and well reasoned opinion, lawfully imposed the penalty of death under Section 921.141. The ends of justice do not require that a new appeal be awarded and the judgment and sentence of the trial court is soundly in accordance with the justice of the cause. In the present circumstance, the Defendant has

failed to show either that the appeal in this court did not produce a just result or that any confidence in this court's consideration of the Defendant's appeal was undermined. Under Strickland and Knight the Defendant's complaints should therefore be rejected and his application for a stay of execution denied.

WHEREFORE, based upon the foregoing Respondent, LOUIE L. WAINWRIGHT, prays that this Honorable Court will deny the Petition for Writ of Habeas Corpus.

RESPECTFULLY SUBMITTED, on this 22nd day of May, 1985, at Miami, Dade County, Florida.

JIM SMITH
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing RESPONSE was hand-delivered in Tallahassee to ALTON G. PITTS, Counsel for the Petitioner, on this 22nd day of May, 1985.

CALVIN L. FOX, Esquire
Assistant Attorney General

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