IN THE SUPREME COURT OF FLORIDA

CASE NO. 68,580



WILLIAM MIDDLETON JR. )
Petitioner, )
vs. )
LOUIE L. WAINWRIGHT, )
Respondent. )
)

**RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS.**

COMES NOW the Respondent, **Louie L. Wainwright**, by and through undersigned counsel and files this Response to the instant Petition for Writ of Habeas Corpus and states the relief requested should not be granted on the following grounds:

## I

## CUSTODY

The Petitioner **William Middleton,** is in the lawful custody of the **State of Florida** pursuant to a valid judgment and sentence imposed by the Circuit Court of the Eleventh Judicial Circuit, in and for, Dade County, Florida.

## II

## HISTORY OF THE CASE

The Petitioner was convicted of first degree murder, grand theft and unlawful use of a firearm in the commission of a felony. The Petitioner was sentenced to death for the crime of first degree murder. This court affirmed the convictions and death sentence. Middleton v. State 426 So.2d 548 (Fla. 1982). A petition for review to the United States

Supreme Court was denied. Middleton v. Florida 460 U.S 1230, 103 S.Ct. 3573, 77 L.Ed. 2d 1413 (1983)

On February 8, 1985, a death warrant was issued. Thereafter, Petitioner filed a Rule 3.850 motion with the trial court. The trial court summarily denied the motion. Petitioner appealed such denial to this Court, which affirmed the trial court's summary denial. Middleton v. State 465 So.2d 1218 (Fla. 1985).

In conjunction with his appeal of the denial of the Rule 3.850 Motion, Petitioner also filed with this Court a Petition for Writ of Habeas Corpus. He alleged that his appellate counsel was ineffective for failing to raise issues on his direct appeal. The issues alleged to have been meritorious but not raised included the failure to challenge the flight instruction; the failure to challenge the admission of collateral crimes evidence; the failure to raise the issue of Petitioner's absence from the court room; the failure to raise the Lockett issue; the failure to challenge the prosecutor's comments corcerning the significance of the advisory sentence; and the failure to challenge the voluntariness of the confession. This Court denied the Petition. Middleton v. Wainwright 465 So.2d 1218 (Fla. 1985).

Thereafter, Petitioner filed a Petition for Writ of Habeas Corpus in the United States District Court for the Southern District of Florida. The District Court stayed the proceedings in order to determine the proper course of action. Subsequently, the District Court ordered an evidentiary hearing on the claim of ineffective assitance of trial counsel at the penalty phase and scheduled oral argument only on all other issues. Said hearing is presently scheduled for April 28 and 29, 1986.

Petitioner has now filed the instant Petition for Writ of Habeas Corpus. He alleges the his appellate counsel was ineffective for failing to raise the Grigsby issue.

## III

## ARGUMENT

### A

### SUCCESSIVE PETITION

In collateral proceedings by habeas corpus successive petitions for the same relief are not cognizable and may be summarily denied. Francois v. State 470 So.2d 687 (Fla. 1985). Once a claim of ineffective assistance of appellate counsel is raised, all facts supporting that claim must be raised in the petition. The fact that second petition raises somewhat different facts to support the legal claim does not compel a different result. Sullivan v. State 441 So.2d 609 (Fla. 1983).

In the instant case Petitioner's first Petition for Writ of Habeas Corpus filed in this Court raised the legal claim of ineffective assistance of appellate counsel and alleged numerous factual allegations to support said claim. The current petition also raises the legal claim of ineffective assistance of appellate counsel which legal claim in now supported by different factual allegations. As such it is clearly a successive petition not cognizable by this court and should be summarily denied.

B.

**APPELLATE COUNSEL WAS NOT INEFFECTIVE SINCE THE GRIGSBY ISSUE IS NOT MERITORIOUS.**

In order for appellate counsel to be ineffective for failing to raise an issue on derect appeal, it must be established that said issue is meritorious. Petitioner contends that appellate counsel was ineffective for failing to raise the issue that exclusion of absolute death-penalty opponents from his capital trial jury deprived Middleton of the right to be tried by jury drawn fron a representative cross-section of the community. Grigsby v. Mabry 758 F. 2d 226 (8th Cir.) (en banc) cert granted Sub. Nom., Lockhart v. McCree ___U.S.___106 S.Ct. 59, 88 L.Ed. 2d 48 (1985).

Petitioner's appellate counsel could not have been ineffective for failing to raise the foregoing issue since it is not meritorious. Kennedy v. Wainwright 483 So.2d 424 (Fla. 1980).

> [3] The practice followed under Florida law, of excluding from capital trial juries not only these prospective jurors whose beliefs would preclude them finding the defendant guilty regardless of the evidence, § 913.03(3), Fla. Stat. (1981), but also those who indicate that they would be unalterably biased against the state and for the defendant on the question of sentencing recommendation, is constitutional. It has been upheld against constitutional challenge on numerous occasions. This Court's decisions make clear that a capital defendant has no right to prevent the excusal of persons committed to voting against a sentence of death, either on the ground of denial of cross-sectional community representation or on the ground that the practice produces juries that are partial in favor of the prosecution. E.g., Copeland v. State, 457 So.2d 1012 (Fla. 1984), cert. denied___U.S.___, 105 S.Ct.2051, 85 L.Ed.2d 324 (1985); Sims v. State, 444 So.2d 922 (Fla. 1983), cert, denied, ____U.S.____,104 S.Ct. 3525, 82 L.Ed.2d 832 (1984); Maggard v. State, 399 So.2d

973 (Fla.), cert. denied, 454 U.S . 1059, 102 S.Ct. 610, 70 L.Ed.2d 598 (1981); Riley v. State, 366 So.2d 19 (Fla. 1978). Moreover this procedure has been upheld against constitutional challenge by the United States Court of Appeals for the Eleventh Circuit, In re Shrisner, 735 F.2d 1236 (11th Cir.1984), and the Fifth Circuit as previously constituted, Spinkellink v. Wainwright, 578 F.2d 582 (5th Cir. 1978), cert. denied, 440 U.S. 976,99 S.Ct. 1548, 59 L.Ed.2d 796 (1979).

Kennedy v. Wainwright 483 So.2d at. 426

C

**NOVEL ISSUE.**

The argument that the procedure for qualification of jurors to participate in making capital sentencing recomendation creates a "conviction prone" jury in violation of due process had not been recognized as meritorious under prevailing case law at the time of Petitioners appeal, nor has it been since then. Therefore the failure of appellate counsel to present a novel legal argument not established as meritorious in the jurisdiction of the court to whom one is arguing is simply not ineffectiveness of legal counsel. Steinhorst v. Wainwright 477 So.2d 537 (Fla. 1985).

## CONCLUSION

Based on the foregoing points and citations of authority, the Respondent respectfully urges this Court to deny all relief requested.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **Response** was furnished by mail to **Eugene F. Zenobis, Esq.**, 2153 Coral Way, Suite 401 Miami, Florida 33145, and to **Louis Jepaway Jr.** Suite 407 Biscayne Boulevard 19 West Flagler St. Miami, Florida 33130, Attorney for Petitioner on this 14 day of April, 1986.

MICHAEL J. NEIMAND
Assistant Attorney General
(Bureau Chief)

MJN/gp