IN THE SUPREME COURT OF FLORIDA

RUFUS E. STEVENS,

Petitioner,

VS. CASE NO. 70,955

RICHARD L. DUGGER, Secretary,
Department of Corrections,
State of Florida,

Respondent.

RESPONDENT'S RESPONSE TO AMENDED PETITION AND COURT ORDER

Pursuant to this Court's Order, counsel for Richard L. Dugger, Respondent, files the following, utilizing the same abbrevations cited in the State's Answer Brief in Case Nos. 68,581 and 69,112. All emphasis is supplied unless noted.

Petitioner's claim of ineffective appellate counsel is not supported by the record. In fact, Mr. Steven's appellate counsel convinced two Justices of this court that the trial court erroneously rejected the jury's recommended sentence of life imprisonment. Stevens v. State, 419 So.2d 1058, 1065 (Fla. 1982) (McDonald, Overton, concurring in part, dissenting in part). In fact, Mr. Forbes skillfully and persuasively argued this issue for 15 pages in his brief. Justices Overton and McDonald were so persuaded. No doubt, Florida's best appellate practicioners often fail to convince one member of this court, much less two. This successful persuasion of one-third of the members of this court demonstrates that Mr. Forbes' legal advocacy was professionally competent and that Petitioner suffered no prejudice from Mr. Forbes' appellate representation. See Strickland v. Washington, 466 U.S. 1267 (1984); Johnson v. Wainwright, 463 So.2d 207 (Fla. 1985). Petitioner's failure to address Mr. Forbes' success in persuading members of this court

demonstrates collateral counsel's reluctance to recognize that it is the record upon which a reviewing court judges an ineffective counsel claim. Mr. Forbes' success in convincing two justices is per se effective appellate representation.

Mr. Forbes obviously relied upon the trial court's rejection of the recommended sentence as petitioner's strongest argument on appeal. This was entirely proper. In Smith V. Murray, 477 U.S. ___, 91 L.Ed.2d 434, 106 S.Ct. ___ (1986), the Supreme Court recognized that "'winnowing out weaker arguments on appeal and focusing on' those more likely to prevail, far from being evidence of incompetence, is the hallmark of effective appellate advocacy." 91 L.Ed.2d at 445. Of course, Mr. Forbes had already distinguished himself by obtaining the life recommendation by the jury after Petitioner had been convicted of the brutal mutilation, rape, robbery, kidnapping and murder of Eleanor Kathy Tolin (T-851). This accomplishment at trial, and Mr. Forbes' emphasis of the jury recommendation on appeal, conclusively rebuts collateral counsel's arguments of ineffective assistance by Mr. Forbes at trial and on appeal.

Mr. Henry Coxe 111, who prosecuted Petitioner for the robbery, kidnapping, rape, mutilation, and murder of Ms. Tolin, indicated that Mr. Forbes pulled a major coup in obtaining the jury recommendation of life. (T-842-51). Of course, there is no doubt that Petitioner did in fact participate in killing Mrs. Tolin. 419 So.2d at 1061; Petitoner admitted this to Lieutenant Dedmon who was to conduct the polygraph examination of Petitioner (T-889-90). Again demonstrating his excellent trial skills, Mr. Forbes convinced the trial court to exclude this second confession which would have guaranteed a jury recommendation of death. This court recognized that the trial court "could also have ruled the statement admissible for use in the state's case-in-chief." 419 So.2d at 1062. This court also recognized that

Petitioner's culpability "was corroborated by several items of physical evidence," including expert testimony. Id. at 1061.

Petitioner argues that Mr. Forbes provided ineffective counsel by not preserving an alleged claim that the prosecution violated Brady v. Maryland, 373 U.S. 83 (1963). This argument is hollow for several compelling reasons. First, any alleged Brady violation was not preserved at trial. See Engle v. Issac, 456 U.S. 107 (1982); Wainwright v. Sykes, 433 U.S. 72 (1977). Second, Judge Santora found that no Brady violation occurred. (R-635; T-768-71; 776; 803; 807-10; 821-22):

> The allegation of a violation of Brady v. Maryland, 373 U.S. 83 (1963) is without merit; it is clear from all the facts and all of Detective Parmenter's notes that there was no violation. . . it is also clear that [petitioner] was not prejudiced by any failure to receive Detective Parmenter's notes prior to trial; furthermore, in a supplementary discover response the state disclosed the knife and contents of the confession surrounding the polygraph and this court finds credibile the testimony of the trial prosecutor. . . that trial defense counsel was informed regarding how the knife was located; consequently, there is no violation of Brady.

Id. at R-365.

Contrary to collateral counsel's numerous claims, this finding is amply supported by competent, substantial, evidence, and therefore, is not subject to attack. Tibbs v. State, 397 So.2d 1120 (Fla. 1981), aff'd, 457 U.S. 31 (1982). See also Sumner v. Mata, 455 U.S. 591 (1982). Furthermore, collateral counsel's accusations of prosecutorial misconduct regarding trial discovery are baseless. See Petition for Habeas Corpus, (page six, note nine; T-855; 821-22; 829; 807-10).

Petitioner also argues that the "dull knife" which petitioner hid after stabbing the victim, (T-788-89; 880-82), should have been excluded as the police seized the knife in

violation of Petitioner's Fourth Amendment rights. This court has rejected this argument when it found all of Petitioner's statements at the polygraph session admissible. 419 So.2d at 1062; (T-874-84). Lieutenant Dedmon conclusively convinced the trial court that Petitioner voluntarily led police to the knife (T-880-84). Therefore, petitioner has utterly failed to demonstrate that had Mr. Forbes raised this claim, there is a reasonable probability this court would have reversed on direct appeal. Strickland v. Washington, supra; Johnson v. wainwright, 463 So.2d 207 (Fla. 1985). The issue is now proceedurally barred. Thomas v. Wainwright, 486 So.2d 574 (Fla. 1986).

Finally, Respondent notes that the prosecutor did not hide the witness September Jinks from Mr. Forbes (T-855-59). Therefore, Mr. Forbes was not ineffective on appeal for his wise decision not to argue this frivolous claim. In Jones v. Barnes, 463 U.S. 745, 752-53 (1983), the court aptly recognized that:

> There can hardly be any question about the importance of having the appellate advocate examine the record with a view to selecting the most promising issues for review. This has assumed a greater importance in an era when oral argument is strictly limited in most courts--often to as little as fifteen minutes--and when page limits on briefs are widely imposed. See e.g., Fed.R.App.P. 28(g); McKinnis (1982) New York Rules of Court §670.17(g) (20, 670.22. Even in a court that imposes no time or page limits, however, the new per se rule laid down by the court of appeals is contrary to all experience and logic. A brief that raises every colorable issue runs the risk of burying good arguments--those that, in the words of the great advocate John W. Davis, "go for the jugular," Davis, The Argument of An Appeal, 26 A.B.A.J. 895, 897 (1940)--in a verbal mound made up of strong and weak contentions. See generally, e.g., Godbold, Twenty Pages and Twenty Minutes--Affective Advocacy on Anneal, 30 Sw.L.J. 801 (1976).
>
> For judges to second guess reasonable professional judgments and impose on appointed counsel a duty to raise every "colorable" claim suggested by a client

> would disserve the very goal of vigorous and effective advocacy that underlines Anders. Nothing in the constitution or our interpretation of that document requires such a standard. (Footnotes omitted).

See Ruffin v. Wainwright, 461 So.2d 109 (Fla. 1984). Justice Jackson correctly observed that "[m]ost cases present only one, two or three significant questions. . ." Jones 463 U.S. at 752. Respondent respectfully asserts that Mr. Forbes had only one significant question to posit: whether Judge Santora properly sentenced Petitioner to death.

THE HAMILTON STATEMENT

Petitioner relies heavily upon the claim that the statement by witness Hamilton hat co-defendant Engle said "Rufus went crazy" was not admissable, and Mr. Forbes should have so argued. See Petition at pages 11-13. The Respondent notes this court has affirmed co-defendant's Engle's death sentence, imposed on remand without consideration of Steven's sttements. Engle v. State, 12 F.L.W. 314 (Fla June 26, 1987). Therefore, Petitioner cannot demonstrate any prejudice to Stevens from the admission of Hamilton's statements. Thus, Petitioner fails the second part of the test enunciated in Washington v. Strickland, supra, that any error caused "prejudicial impact on the appellant by compromising the appellate process to such a degree as to undermine confidence in the fairness and correctness of the outcome. . . ." Johnson v. Wainwright at 209. Even unreasonable errors of counsel are not grounds for relief, unless the claimant demonstrates prejudice. Downs v. Wainwright, 476 So.2d 654, 656 (Fla. 1985); Francois v. Wainwriqht, ___ U.S. ___, 86 L.Ed.2d 284 (1985); Middleton v. State, 465 So.2d 1218 (Fla. 1985). This court should reject Petitioner's claims that Mr. Forbes ineffectively failed to raise the issue.

Mr. Forbes did an excellent job in excluding some of petitioner's incriminating statements, and in obtaining a life recommendation for petitioner at trial, but Mr. Forbes had no likelihood of obtaining an acquittal (T-831). Therefore, Mr. Forbes quite properly focused on attacking Judge Santora's sentence. Certainly, collateral counsel cannot demonstrate any prejudice to petitioner by Mr. Forbes' appellate representation, which convinced one-third of the members of this court. Thus, collateral counsel fail to demonstrate petitioner satisfies the second part of the above test. Johnson, **463** So.2d at **209.** This court should deny the petition for relief.

SENTENCING

All of petitioner's claims of ineffective appellate counsel regarding sentencing are without merit. For example, Mr. Forbes could not have relied upon Estelle v. Smith, **451** U.S. **454 (1981)** on appeal, as Mr. Forbes initiated the psychiatric examination of petitioner. In Estelle, the court ordered the examination without a request from defense counsel. Id at **468.** Thus, Mr. Forbes provided effective appellate representation by focusing upon the trial court's rejection of the life recommendation. In fact, this court addressed the sentencing issue extensively. **419** So.2d **1063-65.**

Respondent notes that collateral counsel's claim that only "two items of circumstantial evidence . . . tended to show some connection between Stevens and the actual killing of Eleanor Kathy Tolin" is rebutted by this court's opinion and Petitioner's confession. Surely, collateral counsel cannot seriously argue that Petitioner's confession to robbing, raping and abducting Ms. Tolin did not "tend" to show a connection to the killing!

Petitioner strenuously attacks Mr. Forbes for not presenting some hypothetical mitigating evidence to "preserve the record."

Yet at the 3.850 evidentiary hearing, Petitioner presented scant mitigating evidence which obviously would not have convinced this court to reverse the sentence. See Stoner V. State, 481 So.2d 478 (Fla. 1985); Henry v. Wainwright, 743 F.2d 761, 762 (11th Cir. 1984). Petitioner's other arguments, such as the claim that Mr. Forbes should have objected to any reliance upon September Jink's testimony, are procedurally barred. Wainwright v. Sykes, supra; Engle v. Issac, supra; Clark V. State, 363 So.2d 331 (Fla. 1978). Furthermore, Petitioner has utterly failed to demonstrate prejudice from any reliance upon Hamilton's statements. Engle v. State, 12 F.L.W. 314, supra; Washington v. Strickland, supra. Mr. Forbes performed admirably in convincing the jury to recommend life imprisonment for Petitioner's vicious mutilation and murder of Kathy Tolin. (T-851).

The prosecutor admitted Mr. Forbes had the "upper hand" once he obtained the life recommendation, and Mr. Forbes properly emphasized that recommendation on appeal (T-828-29). Furthermore, this court has held that "an appellant in a criminal case is not entitled to have this counsel press every conceivable claim upon appeal." Johnson v. Wainwright, 463 So.2d at 211. Petitioner's claims of ineffective appellate counsel fail to cross the threshold requirements deleneated in the above cases. The only legitimate question presented in Petitioner's habeas corpus claim is "whether appellate counsel's ommissions . . . on appeal was a serious deviation from professional norms and, if so, whether the defect undermines confidence in the outcome of the appellate process." Id. This court has aptly noted that where no prejudice is demonstrated, the first question is irrelevant. Id.

This Court stated in McCrae v. Wainwright, 439 So.2d 868 (Fla. 1983) that "[A]llegations of ineffective appellate counsel therefore should not be allowed to serve as a means of

circumventing the rule that habeas corpus proceedings do not provide a second or substitute appeal." Id. at 870. See Adams v. Wainwright, 484 So.2d 1211, 1212 (Fla. 1986); Thomas v. Wainwright, 486 So.2d 574 (Fla. 1986). Habeas Corpus is not an available remedy for the purpose of reviewing "arguments that could have been rasied but were not raised by timely objection at trial and argument on appeal. Thomas.

This Court should deny Petitioner's request for a writ of habeas corpus based upon ineffective appellate counsel for several reasons:

1. The petitioner's appellate counsel obviously provided effective representation as two justices of the court dissented from this court's affirmance in Steven v. State, 419 So.2d 1058 (Fla. 1982); and

2. Collateral counsel has failed to defer to the trial court's 3.850 ruling rejecting petitioner's Brady claim, and other claims, and that ruling vindicates Mr. Forbes' decision to decline to raise those issues; and

3. Petitioner's confession to raping and kidnapping the victim vindicates Mr. Forbes' professional strategy to emphasize the jury's recommended sentence of life imprisonment (which also vindicates Mr. Forbes' effective representation at trial); and

4. Collateral counsel have utterly failed to demonstrate any prejudice resulting from Mr. Forbes' allegedly ineffective appellate representation. See Engle v. State, 12 F.L.W. 314 (Fla. June 26, 1987), compare, Blake v. Kemp, 758 F.2d 523 (11th Cir. 1985), cert. denied, 88 L.Ed.2d 284 (1985).

Respondent respectfully urges this court to deny petitioner relief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been forwarded by U.S. Mail to Oren Root, Jr. Esq., and Patrick M. Wall, Esq., A Professional Corp., 36 West 44th Street, New York, NY, 10036 on this 11th day of September, 1987.

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