IN THE SUPREME COURT OF FLORIDA

WILLIAM THOMAS ZEIGLER, JR.,

Petitioner,

v. CASE NO. ~~50,355~~ 68765

STATE OF FLORIDA,

Respondent.

RESPONSE TO PETITION FOR WRIT OF ERROR CORAM NOBIS AND MOTION FOR STAY OF EXECUTION

Respondent, State of Florida, respectfully requests the court to deny both the petition for writ of error coram nobis and motion for stay of execution and as grounds therefor would show as follows.

Petitioner seeks a writ of error coram nobis permitting him to return to the trial court ". . . to determine the truth of the facts alleged in this petition in order to set aside the judgment. . ." He presents two essential grounds for the petition and they will be discussed as follows.

Regarding the witness Edward Williams, petitioner states that since a test which the defense had conducted on Williams' trousers showed no sign of gunshot residue, it would have tended to "conclusively support the defense theory" that Williams was a participant in the murder and had changed his clothing thereafter. That Edward Williams' pants, according to a defense conducted test, failed to show the presence of gunshot residue was previously made known to this court during direct appeal of

the judgment and sentence. See, Zeigler v. State, Case No. 50,355, Appellant's point on appeal II. It is nothing "newly discovered." Moreover, as we observed in response to that point on appeal, there was not then, nor is there now any fact or proffer of fact which indicates that "gunshot residue" is in the first place "depositable ", and in the second place, if so, whether a test conducted some nine months after the deposit is capable of even detecting its existence.

Petitioner also raises a question about Edward Williams with regard to some sort of alleged relationship with Mary Ellen Stewart. With "facts" and/or "evidence" of an absolutely untested and questionable nature, petitioner seeks to prove the existence of a relationship between such that the unsavory conclusion is drawn that a lie was told by Williams "about his involvement with a critical state witness to bolster his credibility." Frankly, we do not understand the significance of this allegation, but in any event we quickly note that our review of Williams' testimony at trial does not reveal that Williams testified that he did not know Mary Stewart very well, nor does it reveal that he testified that he was dating her daughter, Pam Williams. The testimony both on direct and cross-examination is silent as to how well he knew Mary Stewart whatsoever. The fact remains, whatever the relationship between the two, bolstering of credibility has little if anything to do with conclusively preventing the entry of a verdict.

As his second ground for relief, petitioner brings to light "new evidence". This "evidence" is in the form of affidavits

from two people who have recently sworn that they made observations in front of the furniture store on the night of the murder, and of a gentleman who swore on March 8, 1982, regarding statements made by someone who is supposed to be Charles Mays' son.

The contents of the affidavits presented by the Kenneth and Linda Roach were ostensibly known to the defense as early as 1979. This information and the identity of those who possessed it has been deliberately withheld, we are told, because of the ". . .defense's firm belief that the murderers in the case are still at large." (Pet. at pg. 7) Such an assertion is incredible. We suggest that the information has been withheld only to provoke the granting of this petition and the concurrent request for a stay of execution.

The same holds true for the affidavit of Ed Rowe, which in certain part is contradicted by the petition itself. The petition, at page 12, indicates that after an interview with the authorities, Ernie Mays admitted making the statements, but stated that the facts contained therein were not true.

Repeating the test enunciated in Hallman v. State, 371 So.2d 482 (Fla. 1979), this court in Smith v. State, 400 So.2d 956 (Fla. 1981), reaffirmed that allegations of fact must have evidence which can serve the basis for proving the facts and the source of the evidence must be asserted. The alleged facts must not have been known by counsel at the time of trial and it must be made clear that the defendant or his counsel could not have discovered the facts through the use of due diligence. While it

is assumed as true that the facts made the basis of the this petition were not known to counsel at the time of trial, we suggest that the standard of due diligence applies with equal force to the timing of this particular petition seeking relief on this basis. It is unconscionable that this so-called new evidence, if it exists, has not been presented until this late hour. This extraordinary writ is just as subject to abuse as are other post-trial efforts.

We opine that the reason for this late attempt to return to the trial court is because these facts, even when viewed in a most charitable light, simply cannot pass the conclusiveness test which this court has and does require. In insisting on conclusiveness, this court quite obviously recognized that given a sufficient passage of time, practically any theory, or argument or assertion based even loosely on sworn facts can always raise some degree of doubt, question, or even considerable concern. However, unless the level of facts and evidence offered in support can meet the conclusiveness test, there simply will be not finality to any criminal case, especially those involving the penalty of death.

Petitioner has failed to show that any of his factual allegations, even if perfectly true, would conclusively have prevented the entry of the verdict of guilt. Indeed, in Smith, supra, and Riley v State, 433 So.2d 976 (Fla. 1983) the evidence presented was totally exculpatory. In Smith, presented was an affidavit of one of the murderers that the defendant was not even with him when the murders occurred. In Riley, an affidavit was

presented to the affect that another person had committed the murders for which Riley stood convicted. Similarly, in Williams v. State, Case No. 66,883, order denying petition for writ of error coram nobis entered September 9, 1985, a state witness recanted trial testimony and provided an affidavit that someone else was responsible for the murder. See also, Tafero v. State, 406 So.2d 89 (Fla. 3d DCA 1981) and Rolle v. State, 451 So.2d 497 (Fla. 4th DCA 1981).

The "facts" petitioner presents are questionable and in some instances are simply not supported by the trial record. The law is squarely against petitioner and his argument that conclusiveness should not apply to death penalty cases attempts to prove far too much. Death cases, while admittedly unique in terms of penalty, are nonetheless subjected to exhaustive judicial attention, effort and review. For the above and foregoing, respondent respectfully requests the court to deny the petition for a writ of error coram nobis and the motion for stay of execution based thereupon.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Response to Petition for Writ of Error Coram Nobis has been furnished by express mail to H. Vernon Davids, Esquire, Attorney for Petitioner, 3821 South Access Road, Englewood, Florida, 33537, this 16 day of May, 1986.

Of Counsel