IN THE SUPREME COURT OF FLORIDA

NOLLIE LEE MARTIN,

Petitioner,

v.

LOUIE L. WAINWRIGHT,

Respondent.

CASE NO. 69608.

RESPONSE TO PETITION FOR HABEAS CORPUS

Comes now the Respondent, Louie L. Wainwright, through his undersigned counsel, and responds to the Petition for Habeas Corpus filed by the Petitioner, Nollie Lee Martin, and states:

I. INTRODUCTION

The Petitioner, Nollie Lee Martin, is a prisoner under sentence of death whose execution is presently set for November 18, 1986, at 7:00 a.m. This Court has scheduled oral argument for 9:00 a.m. on Thursday, November 13, 1986. At the present time, November 12, 1986, counsel for Respondent has not been served with any of the Petitioner's pleadings. Consequently, this response has been prepared in anticipation of the issues the Petitioner will raise.

II. PROCEDURAL HISTORY

Nollie Lee Martin was convicted of the capital crime of first degree murder in 1978. He appealed the conviction to the Florida Supreme Court, which affirmed the judgment and death sentence. Martin v. State, 420 So.2d 583 (Fla. 1982). The United States Supreme Court denied certiorari review. Martin v. Florida, 460 U.S. 1056 (1983).

On August 18, 1984, a death warrant was signed for Martin. He then filed a motion for post-conviction relief in the trial court. The motion was denied on August 23, 1984. The Florida Supreme Court affirmed this ruling. Martin v. State, 455 So.2d 370 (Fla. 1984).

Martin then filed an habeas corpus petition in the United States District Court, Southern District of Florida. The petition was denied in an unreported order entered September 5, 1984. On September 6, the United States Court of Appeals for the Eleventh Circuit granted a stay of execution. Subsequently, after a full appeal, the Court of Appeals affirmed the District Court's denial of habeas corpus relief. Martin v. Wainwright, 770 F.2d 918 (11th Cir. 1985), on rehearing, 781 F.2d 185 (11th Cir. 1986). Certiorari was denied by the United States Supreme Court. Martin v. Wainwright, ___ U.S. ___, No. 85-7204 (October 14, 1986).

On October 21, 1986, the Governor of Florida signed a second death warrant for Martin. It expires at noon on November 19, 1986, and the execution is scheduled for 7:00 a.m. on November 18, 1986.

III. ABUSE OF PROCEDURE, UNDER RULE 3.850, Fla.R.Crim.P.

Several of the defendant's claims, as will be pointed out in subsequent discussion on such points, infra, should be summarily denied by this Court, in this proceeding, because Martin has abused the post-conviction procedures outlined in Rule 3.850, Fla.R.Crim.P., and his successive petition should be barred.

Rule 3.850, Fla.R.Crim.P. (1985), governing dismissal of successive motions, states in pertinent part:

> A second or successive motion may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the movant or his attorney to assert those grounds in a prior motion constituted an abuse of the procedure governed by these rules.

This rule is extremely similar to Rule 9(b), of the Rules Governing 2254 Cases in the United States District Courts (28 U.S.C. §2254 foll. (1977)), and has been applied retroactively to those capital defendants, such as defendant, who filed their initial post-conviction motion prior to January 1, 1985. Stewart v. State, 11 FLW 509 (Fla., Oct. 1, 1986); Christopher v. State, 489 So.2d 22 (Fla. 1986); Witt v. State, 465 So.2d 510 (Fla. 1985); Florida Bar Amendment to Rules of Criminal Procedure (Rule 3.850), 460 So.2d 907, 908 (Fla. 1984). Under this doctrine, a capital defendant is barred from raising new

grounds or claims, not previously alleged in his initial post-conviction proceeding, unless such grounds were not known or conceivably discoverable at the time of the filing of the first motion, and there was demonstrable cause for the failure to initially file such a claim or ground. Stewart, supra, at 509; Christopher, supra, at 24; Witt, supra, at 512. Once a decision not to initially raise a claim is made, subsequent reliance on such claim in a second proceeding, is barred. Witt, at 512; Stewart v. State, 11 FLW 508 (Fla., Sept. 25, 1986); Funchess v. State, 487 So.2d 295 (Fla. 1986). As with first motions, those claims which should, could have or were raised on direct appeal, are procedurally barred from consideration on a successive post-conviction motion. Straight v. State, 488 So.2d 530 (Fla. 1986); Thomas v. State, 486 So.2d 577 (Fla. 1986); Thomas v. Wainwright, 486 So.2d 574 (Fla. 1986); Christopher, supra, at 24; Smith v. State, 453 So.2d 388 (Fla. 1984); State v. Washington, 453 So.2d 389 (Fla. 1984).

As to the initial aspect of Rule 3.850, those claims which have been previously addressed on their merits, and do not present new or different grounds, are subject to dismissal. Darden, 11 FLW, supra, at 540; Adams, supra, at 1217; Christopher, supra, at 24, 25; Straight, 488 So.2d, at 530; McCrae v. State, 437 So.2d 1388 (Fla. 1983). Under the new version of Rule 3.850, which applies retroactively, as noted,

supra, such successive petitions can be dismissed, if previously resolved on the merits, unless truly new grounds are raised, with a "cause" explanation as to why such grounds were not previously raised. Christopher, at 24, 25; Witt, supra.

Finally, it has also been consistently held, in extending the logic and rationale of "abuse of the process," as stated in Rule 3.850, that failure to raise a particular claim, in a prior post-conviction proceeding, operates as a procedural bar to subsequent raising of the issue, in a successive post-conviction motion. Darden, at 540; Witt, at 512; Stewart, 11 FLW, at 509; Stewart, 11 FLW, at 508; Funchess, 487 So.2d, at 295.

IV. COMPETENCY TO BE EXECUTED

STATEMENT OF THE FACTS

Nollie Lee Martin was convicted of first degree murder in 1978. Prior to the trial, a motion to determine competency was heard. (T. 156-437) Dr. Barnard testified for defense that Martin was a chronic paranoid schizophrenic who was incompetent for trial. (T. 177-178). A defense attorney, Greg Scott, testified he interviewed Martin twice. Based on their conversations, he thought Martin understood his situation but was incapable of aiding his counsel in his defense. (T. 243). The State presented the testimony of three doctors who testified Martin was competent. All three, Drs. Scherer, Fueyo, and Blackman, were of the opinion that Martin was, to some degree, malingering. (T. 249-263, 337, 382). The court ruled that Martin was compentent for trial. (T. 437; 4766).

At trial, Martin's defense was insanity. Dr. Vaughn, a psychiatrist, testified Martin was insane on June 25 and 26, 1977, the dates of the criminal acts. (T. 3654). There were moments when Martin, a paranoid schizophrenic, could not distinguish right from wrong. (T. 3655). Martin complained of headaches, and said outside forces caused him to do things. (T. 3664). He was preoccupied with death (T. 3664) and religion (T. 3670). His thoughts were not logical (T. 3666). Martin never clearly admitted committing the murder; he had blocked it out (T. 3689-3690).

Two lay witnesses also testified to support the

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insanity defense. Harry Lee Martin, the defendant's brother, testified that the defendant had behaved abnormally as a teenager (R. 3629). He would lock himself in his room and did not take his meals with the family (R. 3630-3631). He had terrible headaches and was depressed (T. 3631, 3633). Elizabeth Murray, an acquaintance of Nollie Lee Martin's for three months prior to his arrest, testified that during this period, Martin was depressed and drank alcohol (T. 3564).

The State called three doctors in rebuttal. Dr. Fueyo testified that Martin tried to convince him he was mentally ill. (T. 3756). Dr. Feuyo concluded Martin was of average intelligence and had a personality disorder but was not a psychopath. (T. 3764, 3800). Dr. Blackman testified Martin has an antisocial personality disorder (T. 3850). Martin had tried to convince Dr. Blackman that he was sick. (T. 3844). Dr. Scherer, a psychologist, testified Martin had no major mental illness (T. 3912).

During the penalty phase of the trial, Martin attempted to establish the mental statutory mitigating factors. Fla.Stat. §921.141 (6)(b)(f). Dr. Barnard testified that at the time of the murder, Martin was under extreme duress and his capacity impaired. (T. 4299). He was in a disassociated state during the crime (T. 4301). Dr. Vaughn testified Martin was emotionally disturbed and under extreme duress, unable to conform his conduct to the law, when the crime was committed. (T. 4376-4377).

The defense also produced a letter from Martin's brother

which was read to the jurors by the clerk (R. 4387). In the letter, it was said that Martins's family felt he was not in his right mind; he had serious mental problems and needed help (T. 4392, 4395). The defense also introduced some written psychiatric evaluations of Martin (T. 4404).

The state introduced a portion of Dr. Scherer's deposition. It stated that Martin could control his actions, and he would not have committed the crime in front of a policeman. He had a fear of being caught. (T. 4435).

The trial judge, following the jury's recommendation, imposed the death penalty. He expressly rejected the mental mitigating factors (R. 4649), stating the evidence was substantial and overwhelming that Martin was malingering about his sanity at the time of the crimes (R. 4662).

On direct appeal, Martin v. State. 420 So.2d 583 (Fla. 1982), the Florida Supreme Court discussed the trial evidence relating to the defendant's mental condition:

> He [Martin] had numerous psychiatric examinations, and conflicting opinions ensued from the doctors examining him... The reconciliation of these conflicts was the responsibility of the jury and, to the extent it concerned his sentencing responsibilities, the trial judge. When there is competent substantial evidence to support the conclusion reached, their determination is final.

Id. at 584. Without specific discussion, the Court rejected Martin's claim on direct appeal that the trial court erred in denying his motion to appoint an eighth expert, Dr. Theodore Blau, to examine him. The United States Supreme Court denied

certiorari. Martin v. Florida, 460 U.S. 1056 (1983).

A death warrant was signed for Martin on August 18, 1984. Martin filed a motion for post-conviction relief in which he claimed it was error to deny the request for appoint of an additional expert for a neurological examination. In support of the claim, Martin presented new evidence including a report from Dr. Theodore Blau, a lengthy evaluation prepared by Dr. Dorothy Lewis, and a review of test results by a Dr. Mark (who did not personally examine Martin). Dr. Blau found Martin had a severe brain disorder and would experience psychotic episodes when he did not know what is going on. Dr. Lewis stated she had personally examined Martin and also had him examined by a neurologist. They both concluded Martin was psychotic, brain damaged, and had severe neurological impariment. The trial court ruled this matter had been decided on direct appeal and could not be relitigated.

On appeal, the Florida Supreme Court affirmed. Martin v. State, 455 So.2d 370 (Fla. 1984). It held the claim that failure to appoint the expert precluded presentation of an adequate defense was merely speculative, as the testimony would have only given the trier of fact additional information to weigh along with the other experts' testimony. The court concluded, "We see no reason to abridge the doctrine of finality in this instance because we do not believe that this psychologist's testimony would have produced more fairness and uniformity." Id. at 372.

Martin then sought relief in the United States District Court, Southern District of Florida, by filing a petition for habeas corpus pursuant to 28 U.S.C. §2254. Attached to the petition were copies of the experts' reports previously submitted in the state Fla.R.Crim.P. 3.850 proceedings. The state filed a response and a complete trial record. The District Court held that since at the time of trial, Martin had been seen by seven experts, he was able to present a defense. The trial court's refusal to appoint an eighth was an evidentiary ruling and not a denial of due process.

This ruling was affirmed by the Eleventh Circuit. Martin v. Wainwright, 770 F.2d 918 (11th Cir. 1985). Noting that "Martin's contention seems based on a theory that he was constitutionally entitled to the appointment of an expert who would agree to testify in accordance with his wishes," Id. at 934, the Court held there is no constitutional right to a favorable psychiatric opinion. The Court held constitutional standards were satisfied by the neurological examination performed by Dr. Wilson prior to trial. The United States Supreme Court denied certiorari Martin v. Wainwright, ___ U.S. ___, (October 14, 1986).

V. ARGUMENT

From the foregoing statement of the facts, it is evident that Martin's mental condition has been a continual subject of litigation. Insanity was his defense at trial. New evidence of his mental condition was introduced in conjunction with the prior collateral proceedings. The claim that Martin is presently insane is an abuse of the writ and the judicial process: (1) it could have been raised earlier; and (2) it is a matter which has previously been decided adversely to Martin. As such, it should be summarily be denied.

A. Abuse of the writ and judicial process

The instant case is clearly distinguishable from, and thus not controlled by, the United States Supreme Court's decision in Ford v. Wainwright, ___ U.S. ___, 91 L.Ed.2d 335 (1986). The facts in Ford were that there was never any suggestion Ford was incompentent at the time of his 1974 offense, at trial, or at sentencing. In 1982, there were gradual changes in Ford's behavior. Id. 91 L.Ed.2d at 341. When it granted Ford a stay of execution, the Eleventh Circuit reviewed the prior records of the case and determined the question of Ford's competency was not available in 1981 when Ford's prior habeas corpus petition was filed. Ford v. Strickland, 734 F.2d 538, 539 (11th Cir. 1984). The Court concluded there was no abuse of the writ. Based on the Eleventh Circuit's finding that the writ had not been abused, the United States Supreme Court denied the

state's application to vacate the stay of execution. Wainwright v. Ford, __ U.S. __, 81 L.Ed.2d 911 (1984).

The instant case is directly on point with the decision in Goode v. Wainwright, 448 So.2d 999 (Fla. 1984); Goode v. Wainwright, 731 F.2d 1482 (11th Cir. 1984); and Woodard v. Hutchins, 464 U.S. 377 (1984). In Goode, as in this case, the defendant's mental condition was "a continuous subject of litigation." Goode v. Wainwright, 448 So.2d 999 (Fla. 1984). Accordingly, Goode was executed, since, as the Eleventh Circuit held, he was barred from claiming present insanity because of abuse of the writ:

> Petitioner asserts that his substantive due process/Eighth Amendment claim is a newly ripened claim that could not be presented until the governor had gone through the §922.07 procedures. This theory assumes that the issue of insanity vel non barring execution is dependent upon the governor's implementation of the statutory procedures of §922.07. This is not so. If Goode contended on substantive due process and Eighth Amendment grounds, that he could not be executed because of post-conviction insanity, he was free to assert this contention in the state and federal courts from the time that the state court sentenced him to death; thereby he could secure an orderly determination of his then current mental condition. Certainly he could have raised the issue when the governor signed his first execution warrant in 1982. Goode has made no such contention in his state merits appeal, in his state collateral attack on his conviction, or in his first federal habeas corpus.
>
> If the substantive due process/eight amendment issue had been timely raised and determined in court, circumstances

> might thereafter have changed, and an updated determination of competency might thereafter have been made based on a showing of changed conditions. But this does not mean that post-conviction insanity could be held over as an issue until the eve of execution and then raised for the first time.

Goode v. Wainwright, 731 F.2d 1482, 1483-1484 (11th Cir. 1984).

Goode was executed in April 1984 and Ford was granted a stay upon the basis that he had not abused the writ in May, 1984. The first warrant signed for Martin was several months later, August 18, 1984. The existence of the Goode and Ford decisions certainly served as notice to Martin that any issue as to competency to be executed could be and should be raised in the collateral litigation that followed the first warrant. Nevertheless, the insanity claim in this context was not presented.

Martin's attempt to raise the claim now is precisely the type of eleventh-hour effort to avoid execution condemned in Woodard v. Hutchins, 464 U.S. 377 (1984). In that case, Hutchins raised an insanity for purposes of execution claim with no explanation for having failed to raise it in his earlier petition. Justice Powell, concurring in the decision to vacate a stay of execution, wrote:

> This case is a clear example of the abuse of the writ that §2254 (b) was designed to eliminate...A pattern seems to be developing in capital cases of multiple review in which claims that could have been presented years ago are brought forward--often in a piecemeal fashion--only after the execution date is set or becomes imminent. Federal courts

> **should not continue to tolerate--even in capital cases--this type of abuse of the writ of habeas corpus.**

Id. at 464 U.S. 379, 380.

Thus, unlike Ford, Martin had the factual basis available to articulate an insanity to be executed claim from the time of sentencing onward. He certainly could have raised the issue in the course of the August, 1984, litigation in the state and federal courts. The holding back of the claim until the eve of execution is a clear abuse of the writ and the judicial process which should not be countenanced.

B. Prior determinations of sanity.

Martin has, from the outset of the criminal proceedings against him, relied on his mental condition as a defense, as outlined in the statement of the facts preceding the argument. A pretrial determination of competency was made. Martin's defense at trial was that he was insane at the time of the crime. At the sentencing phase, he argued his mental state as a mitigating factor(s). On direct appeal, the Florida Supreme Court reviewed the evidence on this issue and determined that the judge's and jury's determinations were supported by competent, substantial evidence.

Subsequently, in his first Fla.R.Crim.P. 3.850 motion for post conviction relief, Martin attempted to reopen the sanity issue by claiming an additional expert should have examined him before trial. Martin's claim was supported by new evidence of his mental condition. The Florida Supreme Court affirmed the

trial court's denial of relief, holding the matter had been decided on direct appeal and the new evidence was insufficient to abridge the doctrine of finality. In Federal Court, both the district court and the Eleventh Circuit held the appointment of an eighth expert was not constitutionally required.

In view of the foregoing, it is clear the present claim of insanity to be executed is just a restatement, in different terms, of the insanity claims that have previously been rejected. Martin's sanity has been conclusively determined in the previous litigation, so the issue need not be reopened now.

The statutory standard for measuring sanity to be executed is whether the prisoner "understands the nature and effect of the death penalty and why it is to be imposed upon him." §922.07 Fla. Stat. (1985). Although this point was not discussed in the plurality opinion in Ford v. Wainwright _____ U.S. _____, 91 L.Ed.2d 335 (1986), Justice Powell approved the standard in his concurring opinion. The concurrence states, "the Eighth Amendment forbids the execution only of those who are unaware of the punishment they are about to suffer and why they are to suffer it." Ford, at 91 L.Ed.2d 354.

The prior sanity determinations that were made in this case are sufficient to encompass a determination that Martin is sane for purposes of execution. Martin's competency to stand trial necessarily involved a decision that he had a rational as well as factual understanding of the prcoeedings against him. Dusky v. United States, 362 U.S. 402 (1960). The jury's finding

that Martin was sane at the time he committed the criminal acts established that Martin had sufficient mental capacity when the crime was committed to understand what he was doing and to understand that his act was wrong. He was not, by reason of mental infirmity, disease, or defect, unable to understand the nature and quality of his act or its consequences. (T. 4145-4146); Wheeler v. State, 344 So.2d 244 (Fla. 1977). In sentencing Martin, the trial judge considered and rejected the applicability of the mental statutory mitigating factors. (R. 4649). By rejecting these factors the trial court found the capital crime was not committed while Martin was in a state of extreme mental or emotional disturbance, nor was he unable to appreciate the criminality of his conduct or conform it to the requirements of law. Fla. Stat. §921.141(6)(b), (f).

In the 1984 collateral proceedings, Martin's attorneys submitted new evidence of organic brain damage. The state and federal courts both held this evidence was insufficient to undermine the validity of the conviction and sentence.

The foregoing determinations conclusively establish that Martin is presently sane for pursposes of execution. No further determination is necessary. Justice Marshall's plurality opinion in Ford v. Wainwright ___U.S.___, 91 L.Ed.2d 335 (1986), recognizes that , "it may be that some high threshold showing on behalf of the prisoner will be found a necessary means to control the number of non meritorious or repetitive claims of insanity merely to trigger the hearing process." Ford, at 91 L.Ed.2d 357. (emphasis supplied)

In Ford, the threshold was found to be met because his sanity had not been at issue in prior litigation and he presented a substantial proffer establishing cause to believe he had become insane. Martin has not made this threshold showing, in view of the fact that his sanity has been determined in the prior proceedings.

The Fifth Circuit considered what would be the requisite showing to entitle a prisoner to a hearing to determine competency to be executed in the case of Gray v. Lucas, 710 F.2d 1084 (5th Cir.) cert. denied, 463 U.S. 1237 (1983). In Gray, the prisoner's claim was described by the Court as follows:

> In support of his claim that he is entitled at least to an evidentiary hearing on the issue of present insanity. Gray relies upon multiple affidavits pertaining to his most recent diagnosis of mental illness, the observations of those who knew him during his youth and later, the affidavits of his own attorneys and affidavits relating the the complete inadequacy of his pre-trial mental examinations. The substance of these is that Gray, due to severe child abuse when young, psychiatrically disturbed parentage, and head injuries while a child, has a deep-seated and serious mental impairment.

Gray v. Lucas, 710 F.2d at 1054-1055. [These affidavits included one from Dr. Dorothy Otnew Lewis, the same psychiatrist who examined Martin and prepared reports which were filed in the prior collateral proceedings.] After reviewing the materials, the Fifth Circuit concluded they were legally insufficient to require a hearing, for they did not establish that Gray's mental condition prevented him from being competent to be executed.

This was so even though Gray's "showing undoubtedly indicated that Gray has serious psyhcotic impairments that sometimes disturb his appreciation of reality, and the mental illness shown might impair his ability to secure adequate diagnosis of his mental deficiencies." Gray, 710 F.2d at 1056.

Similarly, in Roach v. Aiken, 781 F.2d 379 (4th DCA 1986), stay of execution, and cert denied, 89 L.Ed.2d 637, the Fourth Circuit held the mere diagnosis of Huntington's disease was not a sufficient reason to delay an execution, where there was no evidence the prisoner was insane.

Therefore, the present claim of insanity is not a new claim and it has been previously resolved in the State's favor. Martin is not entitled to a re-determination of this much-litigated issue.

VI. A "RACE OF VICTIM" CLAIM - ABUSE OF PROCESS, FLORIDA

Defendant has alleged that the imposition of the death penalty, in Florida, has been conducted in an arbitrary and racially discriminatory manner, based improperly on the race of the victim of a capital defendant's crime, in violation of his Eighth and Fourteenth Amendment rights. However, this claim is clearly barred by Martin's abuse of the rules governing post-conviction relief, in this context.

In Martin's first post-conviction motion, filed in August, 1984 in the trial court, he challenged the imposition of the death penalty, expressly based on the "race of the victim" issue, maintaining that his claim was the same as the defendant in State v. Washington, 453 So.2d 389 (Fla. 1984). Defendant's Rule 3.850 Motion, August, 1984, at ppg 18-20. At the hearing on said motion, Martin expressly argued this claim, with the State responding thereto. Transcript, hearing, defendant's Rule 3.850 Motion, August 22, 1984, at 18-19. The trial court's order, denying relief, thus resolved this issue on the merits. Furthermore, this Court, in review of said order, expressly rejected defendant's "race of victim" claim, noting that Martin had presented nothing requiring reconsideration of this Court's prior rejection of the same claim, in other cases. Martin v. State, 455 So.2d 370, 372 (Fla. 1984).

Thus, under the first part of Rule 3.850,

Fla.R.Crim.P.(1985), it is clear that Martin's present "race of victim" claim fails to raise new or different grounds, and was determined adversely to defendant, on the merits, in his first post-conviction motion, by the trial court and this Court. Rule 3.850, supra; Darden, supra, at 540; Christopher, supra, at 24; Straight, supra, at 530; Adams, supra, at 1217; McCrae, supra, at 1390. Moreover, the pendency of Hitchcock and McClesky, before the U.S. Supreme Court, does not require re-examination or abeyance of consideration of this issue, or this proceeding, since the nature of the claim itself, does not meet the "ends of justice" test of Kuhlmann v. Wilson, 474 U.S.___, 106 S.Ct___, 91 L.Ed. 2d 364, 381 (1986), by presenting a "colorable showing of factual innocence." There is little question that Martin's generalized claim, challenging the application of the Florida death penalty, has no bearing whatsoever on the specific question of his guilt or innocence. Kuhlmann, supra, at 382. Acceptance of defendant's reliance on the pending nature of McClesky and Hitchcock, and subsequent merits consideration of the claim, would substantially frustrate the State's valid interest in the enforcement of its laws, finality of its judgements, and the fulfillment of its criminal justice goals of deterrence, punishment and rehabilitation. Kuhlmann, at 380-381; Engle, supra, at 127-128; Adams, 484 So.2d., supra, at 1217. The U.S. Supreme Court's refusal to block executions,

of capital defendants with "11th hour" successive petitions containing the McClesky-Hitchcock claim, Wicker v. McCotter, 798 F.2d 155 (5th Cir. 1986), application for stay denied, 39 Cr.L.Rptr 4184 (August 25, 1986); Rook v. Rice, 783 F.2d 401 (4th Cir. 1986), application for stay denied, ___U.S.___, ___S.Ct___, 92 L.Ed.2d 745 (1986), as well as this Court's similar refusal, in cases from successive litigants, despite the making of such a claim, further substantiate a finding that defendant has abused the writ. Darden, supra; Stewart, supra; Hardwick v. State, 11 FLW 544 (Fla., Oct. 23, 1986). In fact, this Court's express holding in Hardwick, supra, that the pendency of certiorari in McClesky and Hitchcock does not require "re-evaluation" of this Court's prior holdings on the issue, expressly resolves any "ends of justice" argument against Martin. Hardwick, at 544; Kuhlmann, supra.

Defendant's reliance on any "new" studies or case law, not previously raised in support of this claim, constitutes a clear abuse of the Rule 3.850 procedure. The Gross and Mauro studies presented now, when no proffer of statistical studies was apparently made by Martin in his first state post-conviction proceeding, surely do not comprise changes in the law, or facts, so as to avoid an abuse of procedure finding. Such studies were clearly available, in August, 1984, since they were cited by other defendants in other cases, well before this time, e.g. Sullivan; Adams;

Ford; Stephens, supra, and were in fact the focus of a stay entered by the Eleventh Circuit, and ultimately upheld by the U.S. Supreme Court, in Ford's case, in May, 1984, three months prior to Martin's initial filing. Ford v. Strickland, 734 F.2d 538 (11th Cir. 1984), stay granted, on other grounds, ___U.S.___, 104 S.Ct 3498, 82 L.Ed.2d 911 (1984). Mere amendment of the same claim and/or statistical studies, under the guise of new facts or law, which are merely cumulative or duplicative of other studies and cases which have been previously rejected, cannot avoid a conclusion that Martin has abused the writ. Hardwick; Darden, supra; Stewart, supra; Christopher, supra; Witt, 465 So.2d, at 512; Sullivan, 78 L.Ed.2d, supra, at 212. Such a conclusion is particularly appropriate, when Defendant's claim has been so firmly rejected on the merits, in other cases, on the basis of various empirical or statistical studies presented to this Court, to which defendant's present studies add nothing. Hardwick; Stewart; Smith, 457 So.2d 1380 (Fla. 1984); State v. Henry, 456 So.2d 466 (Fla. 1984); State v. Washington, supra, and cases cited therein; Adams v. State, 449 So.2d 819 (Fla. 1984); Sullivan v. State, 441 So.2d 614 (Fla. 1984); Henry v. State, 377 So.2d 692 (Fla. 1979). In Stewart, supra, this Court has specifically noted its recognition of the cognizability of the "race of the victim" claim, in a post-conviction motion, since its 1979 Henry decision. Stewart,

11 FLW, supra, at 509.

Thus, the claim that McClesky or Hitchcock constitutes a novel claim, must be rejected. Witt v. State, 387 So.2d 922 (Fla. 1980). Further, said decisions did not in any way contradict the continuous rejection of this claim, by various Federal and Florida panels, beginning with decisions like Henry and Spenkellink v. Wainwright, 578 F.2d 582 (5th Cir. 1978)(en banc), cert. denied, 442 U.S. 1301 (1979), and extending to post-McClesky-Hitchcock cases, such as Wicker, supra, and Hardwick. Therefore, Martin's claim should clearly be denied, based on his abuse of the process under Rule 3.850.

VI. B "RACE OF VICTIM" CLAIM - MERITS

Assuming arguendo this Court reaches the merits of Martin's claim that the Florida death penalty is imposed in an arbitrary and racially discriminatory manner, based on the race of the victim of capital defendants, past and current decisions of the Florida Supreme Court, various Federal circuit panels, and the U.S. Supreme Court have consistently and universally rejected this claim on its merits, based on the statistical studies upon which Martin relies.

As reiterated most recently by the Florida Supreme Court in Hardwick v. State, 11 FLW 544 (Fla., Oct. 23, 1986); Darden v. State, 11 FLW 540 (Fla., Oct. 16, 1986), and Stewart v. State, 11 FLW 509 (Fla., Oct. 1, 1986), this Court has consistently and repeatedly rejected the claim, based on the same Gross & Mauro studies Martin relies upon, that the Florida death penalty is arbitrarily and/or discriminatorily imposed, based on the race of the victim, sex of the defendant or geographic locale of the homicide. Hardwick, supra; Darden, supra; Stewart, supra, at 509, n. 1; Harvard v. State, 486 So.2d 537, 540 (Fla. 1986); Sireci v. State, 469 So.2d 119 (Fla. 1985); O'Callaghan v. Wainwright, 461 So.2d 1354, 1355 (Fla. 1984); Tafero v. State, 459 So.2d 1037, 1037 (Fla. 1984); Smith v. State, 457 So.2d 1380 (Fla. 1984); State v. Washington, 453 So.2d 389 (Fla. 1986); Adams v. State, 449 So.2d 819 (Fla. 1984); Sullivan v. State, 441 So.

2d 609 (Fla. 1983); Meeks v. State, 382 So.2d 673 (Fla. 1980). Thus, given said Court's most recent treatment of the issue, the pendency of McClesky and Hitchcock, before the U.S. Supreme Court, has not altered the Florida Supreme Court's continuous rejection of the claim. Furthermore, these conclusions have been consistently reiterated by an uninterrupted series of Eleventh, Fifth and Fourth Circuit rulings, rejecting the claim. Wicker v. McCotter, 798 F.2d 155 (5th Cir. 1986); Berry v. Phelps, 795 F.2d 504 (5th Cir. 1986); Funchess v. Wainwright, 788 F.2d 1443 (11th Cir. 1985), stay vacated, ___U.S.___, ___S.Ct___, 90 L.Ed.2d 209 (1986); Rook v. Rice, 783 F.2d 401, 407 (4th Cir. 1986), stay denied, 92 L.Ed.2d 745 (1986); Thomas v. Wainwright, 767 F.2d 738 (11th Cir. 1985), cert. denied, ___U.S.___, 106 S.Ct 1241, 90 L.Ed.2d 173 (1986); Henry v. Wainwright, 743 F.2d 761 (11th Cir. 1984); Washington v. Wainwright, 737 F.2d 922 (11th Cir. 1984); Hitchcock v. Wainwright, 745 F.2d 1332, 1346 (11th Cir. 1984), reinstated as en banc opinion, 770 F.2d 1514, 1516 (11th Cir. 1985)(en banc); Sullivan v. Wainwright, 721 F.2d 316 (11th Cir. 1983); Adams v. Wainwright, 709 F.2d 1443 (11th Cir. 1983); Spenkellink v. Wainwright, 578 F.2d 582 (5th Cir. 1978)(en banc), application for stay denied, 442 U.S. 130 (1979). As noted recently in McClesky, supra, the existence of generalized statistical studies, which do not even pretend to demonstrate evidence that defendant herein

was the subject of discrimination, and a demonstration of mere general disparities, which could not possibly account for race-neutral variables, does not warrant an evidentiary hearing, or habeas relief. McClesky, 753 F.2d, supra, at 892-894; Ross v. Kemp, 756 F.2d 1483, 1491 (11th Cir. 1986) (en banc). Furthermore, the degree of disparity in the Gross and Mauro studies, as noted recently in McClesky, does not compel an inference of intent to discriminate. McClesky, at 897; Ross, supra, at 1491.

Significantly, the United States Supreme Court's rulings in Wainwright v. Adams, ___U.S.___, 104 S.Ct 2183, 80 L.Ed.2d 809 (1984); Wainwright v. Ford, ___U.S.___, 104 S.Ct 3498, 82 L.Ed.2d 911 (1984); and Sullivan v. Wainwright, 464 U.S. 109 (1983), indicate that Martin can draw no support, or demonstrate a substantial likelihood of success on the merits, from the Supreme Court's review of Hitchcock, supra. In Wainwright v. Ford, supra, a clear majority of the Court (5 justices in Adams; 6 justices in Ford), rejected the "race of the victim" discrimination claim, based on the same Gross and Mauro studies, that has been proffered herein. Adams, 80 L.Ed.2d, supra, at 809; Ford, supra, at 911. The Court specifically held in Ford, citing its prior rulings in Sullivan and Adams, that the Gross and Mauro studies were insufficient to raise a substantial ground upon which relief could be granted. Id. It is particularly significant that

in two of the three cases, the Court refused to grant stays of execution,[FN3] and allowed the executions in Sullivan and Adams to proceed, even when, in Adams, the decision in McClesky was pending. Adams, at 809; Sullivan, 82 L.Ed.2d, supra, at 111. In view of the consistent rejection of this claim, not only by several Eleventh Circuit panels, but by the United States Supreme Court at the "eleventh hour," preceding imminent executions, Martin's various claims for habeas relief, an evidentiary hearing, or a stay of execution, pending Hitchcock, should be denied.

This conclusion is clearly reinforced by the Fifth Circuit's analysis in Wicker, supra. In Wicker, the Fifth Circuit noted the continuing vitality of binding precedent in the Eleventh Circuit, in rejection of the claim, and further observed that the mere pendency of Hitchcock and McClesky, without more, did not warrant any stay or habeas corpus relief:

> But even assuming that Wicker has stated a valid claim, the statistical evidence upon which he relies remains inadequate under current Fifth Circuit and Eleventh Circuit law (footnote omitted) to show that he has been the victim of discrimination.
>
> * * *
>
> In the absence of a declaration by the Supreme Court that executions should be stayed in cases presenting the issue

FN3 In Adams, the Court vacated the Eleventh Circuit's entry of a stay; in Ford, the Court granted a stay on different grounds, but expressly stated there was abuse of discretion by the 11th Circuit in granting a stay, on the "race of

> raised by Wicker, we must follow our circuit's precedents ... The grant of certiorari in Hitchcock and McClesky is insufficient per se to raise in this case the requisite to a certificate of probable cause ... the fact that the Court has agreed to consider these decisions does not alter the authority of our prior decisions.

Wicker, supra, at 157-158 (emphasis added). Most significantly, the denial of stay relief by the U.S. Supreme Court, in the Wicker case, and in Rook, supra; and Thomas, supra --- all cases involving the raising of McClesky-Hitchcock claims by capital defendants in successive petitions, under the pressure of renewed or additional death warrants, beyond a first one --- serve to underscore the absence of any merit to Martin's claim, even with the pending nature of Hitchcock and McClesky. Wicker v. McCotter, Case No. A-140, 39 Cr.L.R. 4184 (August 25, 1981)(application for stay denied); Rook v. Rice, 783 F.2d 401 (4th Cir. 1986), application for stay denied, 92 L.Ed.2d 745 (1986); Funchess, 90 L.Ed.2d, supra, at 209; Thomas, supra, 90 L.Ed.2d, at 173.

It is further significant that in relying on a statistically-based argument in support of this claim, Petitioner advocates the granting of habeas relief, in an Unconstitutional manner. As implicitly noted in McClesky, death penalty statutes, such as in Florida, were validated in decisions like Proffitt, Woodson v. North Carolina, 428 U.S. 280 (1976),

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victim" issue; in Sullivan, the Court noted no basis for contesting the rejection of said claim by the Florida Supreme Court, Federal District Court, and 11th Circuit in that case.

and Roberts v. Louisiana, 428 U.S. 325 (1976), on the express basis that sentencing discretion was exercised and appropriately channelled, by appropriate guidelines and circumstances. Proffitt, supra. Defendant challenges the results of the very exercise of the type of channelled discretion that makes such statutes Constitutionally valid. McClesky, at 898-899. The logical result of Martin's argument would be a mechanistic application of the death penalty, based on statistical showings, that would in effect make death penalty mandatory in certain statistical circumstances, and eliminate discretion, in a manner which violates the Constitution. Woodson, supra; Roberts, supra.

Finally, Martin's argument requires the absurd conclusion, in this case, that the jury somehow discriminated against defendant because his victim was white, yet did not so discriminate against him because of his white racial status. It would appear to be totally illogical to conclude, in order to find validity in Petitioner's claim, that the jury would effectively distinguish between the defendant and his victim, when of the same race, and apply racism to one and not the other. This inherent inconsistency compels the conclusion that if the jury in this case, advised that a white defendant be put to death, then both the jury, and the operation of the Florida death penalty in this case, cannot be considered racially discriminatory. This result, and the

rejection of Petitioner's claim, is further mandated by the complexity and existence of numerous race-neutral variables at work in the Florida death penalty legislative scheme, which cannot be statistically reduced. McClesky, at 896-899.

Finally, it is crucial that Martin and his victim were both white, which would make the McClesky case totally inapplicable, from a factual standpoint, to Martin. Wicker, supra; Berry, supra. Furthermore, Martin, like all other claimants on this issue before him, has completely failed to demonstrate, in both habeas proceedings, that the Florida death penalty was discriminatorily applied against him, at his trial, on the basis of the white race of his victim. Ross; McClesky; Wicker; Sullivan; Adams; Ford. Since Petitioner's argument presents nothing new or distinct, that would warrant any change in this Court's 1984 ruling in this proceeding, that this claim lacked merit. Order Denying Petition, Habeas Corpus, September 5, 1984, at 3.

VII

PETITIONER RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL ON HIS DIRECT APPEAL.

In the present habeas corpus petition, Petitioner alleges that his appellate counsel rendered ineffective assistance by not raising various issues on his appeal. As with a claim of ineffective assistance of trial counsel, this claim regarding appellate counsel's performance must be judged in light of the standards enunciated by the United States Supreme Court in Strickland v. Washington, 466 U.S.___, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Johnson v. Wainwright, 463 So.2d 207, 209 (Fla. 1985).

In Strickland v. Washington, supra, the United States Supreme Court held that there are two parts in determining a defendant's claim of ineffective assistance of counsel:

> First, the defendnat must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendnat of a fair trial, a trial whose result is reliable.
>
> 80 L.Ed.2d at 693.

In explaining the appropriate test for proving prejudice the Court held that "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." 80 L.Ed.2d at 698.

In reviewing the Strickland standards as it applies to ineffectiveness of counsel on appeal, this Court has held that a petitioner in a habeas corpus proceeding must show:

> . . . first, that there were specific errors of omissions of such magnitude that it can be said that they deviated from the norm or fell outside the range of professionally acceptable performance; and second, that the failure or deficiency 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 under the governing standards of decision.

Johnson v. wainwright, supra, 463 So.2d at 209. See also Wilson v. Wainwright, 474 So.2d 1162, 1163 (Fla. 1985).

Recently this Court addressed allegations of ineffective assistance of appellate counsel raised by a prisoner under sentence of death and stated:

> As recenlty noted in Johnson v. Wainwright, 463 So.2d 207 (Fla. 1985), the issue before us when entertaining a petition for writ of habeas corpus based on a challenge of ineffective assitance of appellate counsel is limited to, first, whether the alleged omissions are of such magnitude as to constitute a serious error or substantial deficiency falling measurably outside the range of professionally acceptable performance and, second, whether the deficiency in performance compromised the appellate process to such a degree as to undermine confidence in the correctness of the result. Id. at 209. We further noted in Johnson that although an ineffective assistance of appellate counsel claim is logically based on the premise that the omitted argument, if raised, would have been considered meritorious, the merits of the underlying

> legal issue are not before us. The merits of the omitted argument are 'cognizable only by means of specific objection at trial and presentation on appeal and we will not allow [a] habeas corpus proceeding to become a direct vehicle for belated appellate review.' Id. at 210.

Pope v. Wainwright, 11 F.L.W. 533 (Fla. October 16, 1986). This Court also noted that merits of the legal points which were the basis of the claim of ineffective assistance of appellate counsel were "mere abstractions" in a habeas corpus proceeding. Id. at 533. It is thus clear that when claims of ineffective assistance of appellate counsel are raised, this Court will consider the merits of those claims only as they relate to whether counsel was ineffective for raising those claims on direct appeal. Pope, supra.

Specifically, in reviewing claims of ineffective assistance of appellate counsel, it is recognized that in a habeas corpus petitioner's allegations of ineffective assistance of counsel should not be allowed to serve as a means for circumventing the rule that habeas corpus proceedings do not provide a second or substitute appeal. Steinhorst v. Wainwright, 477 So.2d 537, 539 (Fla. 1985); Harris v. Wainwright, 473 So.2d 1246, 1247 (Fla. 1985); McCrae v. Wainwright, 439 So.2d 868, 870 (Fla. 1983). See also Smith v. State, 457 So.2d 1380, 1384 (Fla. 1984). Appellate counsel is not required to press every conceivable claim under appeal. Jones v. Barnes, 463 U.S. 745, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983). The Supreme Court recognized that experienced advocates "have emphasized the importance of winnowing out weaker arguments

on appeal and focusing on one control issue if possible, or at most on a few key issues..." A brief that raises every colorable issue runs the risk of burying good arguments ... in a verbal mound made up of strong and weak contentions. 77 L.Ed.2d at 994. Thus, the Court held that "for judges to second-guess reasonable professional judgments and impose on counsel a duty to raise very colorable claim suggested by a client would disserve the very goal of vigorous and effective advocacy that underlies Anders v. California, 386 U.S. 738 (1967)." 77 L.Ed.2d at 995. See also Johnson v. Wainwright, supra; Cave v. State, 476 So.2d 180, 180 n. 1 (Fla. 1985).

Counsel is also not required to raise issues which are not properly preserved by trial counsel for appellate review, Jackson v. State, 452 So.2d 533, 536 (Fla. 1984), or raise issues reasonably considered to be without merit. Francois v. Wainwright, 741 F.2d 1275, 1285 (11th Cir. 1984); Funchess v. State, 449 So.2d 1283, 1286 (Fla. 1984). Because of the presumption of competence and the required deference to counsel's strategic choices, where appellate counsel's failure to raise certain issues on direct appeal could have been a tactical choice based on the need to concentrate the arguments on those issues likely to achieve success, counsel's performance will not be deemed ineffective. See Smith v. State, supra; McCrae v. Wainwright, supra; Demps v. State, 416 So.2d 808, 809 (Fla. 1982).

In the instant case, it must be noted that Petitioner's

present claim on ineffective counsel on appeal was not brought, in any respect, in any of Petitioner's prior pleadings. Additionally, at the hearing held before the state trial court in August, 1984, Petitioner's counsel acknowledged the absence of such a claim, as well as asserting that all known or discoverable claims, then available to Martin, had been raised. Transcript, Hearing, Martin's Rule 3.850 Motion, August 22, 1984, at 2, 3. Clearly, any claims of ineffective counsel, necessarily based on review of trial and/or a state direct appeal record, was clearly "available" at said time, and at the time Martin first sought federal habeas relief. Thus, since such claims were certainly available and discoverable by Martin and counsel in 1984, and are not now the result of new facts or law not otherwise available at said time, Martin has clearly abused the process on claims of ineffective assistance of counsel, by failing to initially raise these claims. Woodard, supra; Antone, supra; Shriver, supra; Moore, supra; Jones, supra; Potts, supra.

The State does not waive any more specific procedural and/or substantive arguments with respect to this claim; however due to the anticipatory nature of this pleading, more specific argument cannot presently be made. Respondent will address more specifically claims of ineffective assistance of counsel by supplemental response, once the Respondent is put on notice of Petitioner's specific claims.

CONCLUSION

Wherefore, based on the foregoing reasons and authorities, the Respondent respectfully requests that the Petitioner's Petition for Habeas Corpus be denied and dismissed by this Honorable Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Response to Petition for Habeas Corpus has been furnished to Michael A. Mello, Esquire, Office of the Capital Collateral Representative, Independent Life Building, 225 West Jefferson Street, Tallahassee, FL 32301, this 12th day of November, 1986.

Of Counsel