IN THE SUPREME COURT OF FLORIDA

CASE NO. 70471

JOHN MILLS, JR.,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT,
SECOND JUDICIAL CIRCUIT OF FLORIDA,
IN AND FOR WAKULLA COUNTY

BRIEF OF APPELLEE

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

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INTRODUCTION

This is an appeal by death row inmate John Mills, Jr. from the denial of his Motion for Post Conviction Relief filed under Rule 3.850, Florida Rules of Criminal Procedure. Execution is Scheduled for May 7, 1987.

The symbol "Tr" designates the transcript of pre-trial, trial, and sentencing hearings. The symbol "R" designates the record from the trial. The symbol "Sr" designates the record of the post-conviction proceeding. The symbol "St" designates the transcript of that hearing.

STATEMENT OF THE CASE

On March 5, 1982, John Mills, Jr. and Michael Fredrick kidnapped and murdered Lester Lawhon, returning later to burglarize and set fire to his mobile home.

On May 19, 1982, John Mills was charged by Indictment with first degree murder, burglary, grand theft, kidnapping, arson and possession of a firearm by a conviction felon. (R 1-3).

The public defender of the Second Judicial Circuit withdrew from the case due to a conflict, prompting the appointment of Roosevelt Randolph, Esq., as counsel. (R 5). After extensive discovery and argument over many pretrial motions, a trial was held from November 29 - December 4, 1982.

At the conclusion of the guilt phase, the defendant was found guilty as charged. (R 2007-2009). After the penalty phase, the jury recommended the death penalty. (R 2341). The vote was 10-2 for death. (R 242).

After denying Mills' motion for new trial (R 264), the court sentenced Mills to death. (R 273-274).

In support of the death penalty the court found the following statutory aggravating factors to apply:

(1) The murder was committed by a person under sentence (on parole).

(2) The murder was committed in the course of a kidnapping.

(3) The murder was committed for pecuniary gain.

(4) The crime was heinous, calculated and premeditated.

Mr. Mills filed an appeal to the Supreme Court of Florida (again represented by Mr. Randolph) raising the following claims:

(1) The trial court erred in denying Mills' Motion for Change of Venue and in denying his request for funds for hiring a pollster.

(2) The trial court failed to excuse venireman Byrne for cause.

(3) The trial court failed to grant Mills' Motion for a Mistrial based upon improper cross examination by the prosecutor.

(4) The trial court erred in allowing the victim's father to identify certain property.

(5) The trial court erred in admitting photograph B of exhibit 9 into evidence.

(6) The trial court erred in retaining jurisdiction over one half of Mills' other non-death sentences.

(7) The trial court erred in instructing the jury, and in finding, that two statutory aggravating factors applied.

(8) The trial court improperly doubled two aggravating factors.

(9) The trial court erred in rejecting statutory mitigating factors.

The Florida Supreme Court denied relief in Mills v. State, 462 So.2d 1075 (Fla. 1985). Claims 1, 2, 3, 4, and 5 (trial errors) were all decided exclusively on the basis of state law. All sentencing issues were also decided pursuant to state law.

The defendant petitioned the United States Supreme Court for certiorari review raising only two claims:

(1) The Florida Supreme Court violated due process in affirming the trial court's denial of funds for conducting a public opinion survey.

(2) The Florida Supreme Court violated Lockett v. Ohio, in holding that the trial judge need not accept low intelligence as a non-statutory mitigating factor.

Certiorari was denied on July 1, 1985.

A clemency hearing was conducted in September of 1986. After the hearing, counsel for Mr. Mills delivered his files to CCR. Pursuant to Ch. 119, Fla.Stat., CCR also obtained the files of the prosecutor.

A death warrant was signed on March 11, 1987, with execution being scheduled for May 7, 1987.

On April 28, 1987, CCR filed a massive motion for post-conviction relief. A hearing thereon was set for May 1, 1987.

On the eve of the hearing, CCR subpoenaed counsel for the State as witnesses and moved to disqualify them from the case in an effort to obstruct proceedings to be held May 1.

When the hearing commenced, CCR filed a large "amendment" to their 3.850 petition and another volume of appendized materials.

The court dimissed those claims not properly before it and ordered an immediate evidentiary hearing on the remaining counts. At the end of the hearing on Saturday, May 2, 1987, pursuant to a request by both parties, the Court directed both parties to submit proposed orders for signature.

On Monday, May 4, 1987, the Court signed the order proposed by the State.

STATEMENT OF THE FACTS

The State will rely upon the facts as set forth by the Court's order on all substantive issues.

The appellant attempted to make counsel for the State an issue throughout the proceedings with vile, ad hominem personal attacks and by using his subpoena power as a tactical weapon to remove government counsel.

The State engaged in no misconduct and none was found. While counsel for the state interviewed Mr. Fredrick prior to the hearing, Mr. Lohman from CCR also saw Mr. Fredrick that same evening. The State will not respond to further attacks, but would note similar tactics by CCR in Funchess v. State, 487 So.2d 295 (Fla. 1986). (Allegations that State Attorney Ed Austin of Jacksonville personally inflamed the jury by racist arguments rejected in summary fashion), in the event this Honorable Court wishes to take note of its own files.

POINTS RAISED ON APPEAL

I - Claim I of the petition fails to state a ground on which relief can be granted and should be dismissed on authority of Troedel v. State, 479 So.2d 736 (Fla. 1985).

II - The trial court did not err in refusing to disqualify the entire State Attorney's Office.

III - The trial court did not err in ruling that excepting the claims regarding: (1) Brady v. Maryland; (2) Prosecutorial misconduct; (3) The alleged ineffectiveness of trial counsel; and (4) CCR's ineffectiveness, all remanding legal claims were procedurally barred.

IV - The trial court did not err in denying relief on the claims of prosecutorial misconduct, witness tampering, Brady violations or related matters.

V - The trial court did not err in finding that Roosevelt Randolph rendered effective assistance to the appellant at all phases of trial.

SUMMARY OF ARGUMENT

In July of 1985 the United States Supreme Court declined to issue a writ of certiorari to this Court to review Mills v. State, 462 So.2d 1075 (Fla. 1985). In September of 1986, Mr. Mills attorney, Roosevelt Randolph, turned over his case file to the office of Capital Collateral Representative so as to assist them in the handling of a clemency petition. Mr. Mills then waited until a warrant had been signed for his execution to seek disclosure of the state attorney's file under public records law. Not content to focus on claims of arguable merit, Mr. Mills spent large amounts of time and effort drawing up a one hundred and forty-six (146) page motion to vacate in which he complained in detail about the Governor, CCR's lack of money, a number of direct appeal issues not cognizable under Rule 3.850 Florida Rules of Criminal Procedure, and the cultural history of Wakulla County. To give the motion added "weight" Mills attached a superfluous two volume appendix. At the beginning of the 3.850 hearing, Mills surprised the State with an additional appendix and new claims on an amended petition.

Now that the sound and fury of the evidentiary hearing have ended, certain matters have become clear. First, the prosecution did not violate Brady v. Maryland, or in any way deprive Mr. Mills of a fair trial by tampering with witnesses or otherwise engaging in misconduct. Second, Attorney Roosevelt Randolph, himself a former assistant state attorney in this circuit and a

seasoned defense attorney, who has handed many capital cases and, but for this case, has never had a client sentenced to death, was not deficient in his representation during the evidentiary hearing. Mr. Randolph candidly spoke of his own concern about how the trial court, or the prosecution, might have erred at trial but also admitted to his own actions in terms of strategy (St) and knowledge (St). One need only read Mr. Randolph's closing argument to the jury (Tr 1939), to see that he covered every single matter Mr. Mills now complains of at this eleventh hour. Lastly, Mr. Mills has consciously chosen to engage in a scatter-shot style of litigation, has chosen to "hide" claims inside other claims and has sought to delay justice by subpoening various attorneys for the state and then arguing that they have no role in the evidentiary portion of the proceedings under Rule 3.850.

No one has rushed this case to judgment. Rather, Mr. Mills has sought to litigate (or not litigate) in a style that has merely led to a detailed order from the trial court holding a majority of his claims are procedurally barred, that others lack any evidentiary support and that none exhibit any basis upon which relief could be granted. Mills does not deserve a stay of execution on these allegations and the State of Florida believes this court has seen enough of this style of advocacy from death row inmates in the past to realize this appeal is meritless. The State prays for an order denying a stay of execution and an order affirming the appeal for the reasons set forth herein.

ARGUMENT

I

CLAIM I OF THE PETITION FAILS TO STATE A GROUND ON WHICH RELIEF CAN BE GRANTED AND SHOULD BE DISMISSED ON AUTHORITY OF TROEDEL V. STATE, 470 SO.2D 736 (FLA. 1985).

The office of the Capital Collateral Representative raised this claim in Troedel v. State, 479 So.2d 736 (Fla. 1985) where it was rejected outright by the Florida Supreme Court:

> It is argued on behalf of the appellant that the execution should be stayed because of the inability of his current legal counsel to adequately investigate and prepare to present legal arguments challenging the convictions and sentences of death. It is suggested that the enactment of chapter 85-332, Laws of Florida, creating the office of Capital Collateral Representative, conferred upon appellant a right to collateral representation that will be denied without a stay of execution to allow more time to prepare for the filing of collateral challenges to the judgments and sentences. While chapter 85-332 represents a state policy of proivding legal assistance for Ccollateral Representation on behalf of indigent persons under sentence of death, it did not add anything to the substantive state-law or constitutional rights of such persons.
>
> See Graham v. State, 372 So.2d 1363 (Fla. 1979). Moreover, the pleadings and papers we have before us belie the contention that appellant is not receiving the effective assistance of counsel in his collateral attack on his previously affirmed judgments and sentences.

The propriety of this decision is bolstered by the summary reversal of a finding of ineffective representation of counsel by

the United States Supreme Court in Wainwright v. Torna, 455 U.S. 586, 102 S.Ct. 1300, 71 L.Ed.2d 475 (1982):

> Since respondent had no constitutional right to counsel, he could not be deprived of the effective assistance of counsel by his retained counsel's failure to file this application [for discretionary review in the Florida Supreme Court] timely

Id., at 455 U.S. 477, 478.

Additionally, in footnote 4, the Supreme Court rejected any alleged denial of due process by stating:

> Respondent was not denied due process of law by the fact that counsel deprived him of his right to petition the Florida Supreme Court for review. SUch deprivation - if even implicating a due process interest - was caused by his counsel, and not by the state.

Id., at 478.

These cases clearly refute the entire premise that the appellant is being denied his "rights". To the contrary, no such rights exist. Article I Section 9, United States Constitution. Daniels v. Blackburn, 763 F.2d 703, 710 (5th Cir. 1985) aptly states the law: There is no established constitutional right to the assistance of legal counsel in a collateral attack on conviction. The Blackburn decision goes on to state that even if a petition for habeas corpus is filed without a lawyer being fully aware of all pertinent facts, the appellant is the one held accountable for an ommission not the lawyer. This view is shared by the Federal Circuits, see Mitchell v. Wyrick, 727 F.2d 773,

774 (8th Cir.) cert.denied, 105 S.Ct. 100 (1984) and Kirby v. Dutton, 794 F.2d 245 (6th Cir. 1986) and citing Stanley v. Wainwright, 406 F.2d 8 (5th Cir. 1969), wherein it is flatly stated that there is no right to effective assistance of counsel in a collateral civil proceeding such as habeas corpus. [1] Indeed, Kirby concluded the attack on prior counsel's effectiveness during a state post conviction proceeding (analogous to our rule 3.850 proceeding) was unrelated to the petitioner's detention and beyond the scope of the writ. Id., at 248. The court accordingly denied relief because it is not enough that the ultimate goal is release from detention or reduction of sentence.

The instant attack on appellant Mills' sentence is likewise his ultimate goal. However, his direct complaint regarding the Governor's method of signing death warrants[2] or lack of funding and manpower for the office of Capital Collateral Representative do not go directly to his conviction or sentence and therefore fail to state a legal ground upon which relief can be granted under Rule 3.850, Florida Rules of Criminal Procedure.

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[1] Rule 3.850 is a codification of habeas corpus.

[2] The signing of a death warrant is an executive function over which the courts have no control. Furthermore, the exercise of this execution function such as signing a death warrant at a particular time does not implicate concerns of constitutional due process. Sullivan v. Askew, 348 So.2d 312 (Fla. 1977) and Spinkellink v. Wainwright, 578 Fd.2d 582 (5th Cir. 1978).

II

THE TRIAL COURT DID NOT ERR IN REFUSING TO DISQUALIFY THE ENTIRE STATE ATTORNEY'S OFFICE.

It is a settled matter of law that a prosecutor does not, by being called as a witness, disqualify the entire State Attorney's Office for his circuit as a result. State v. Clausell , 474 So.2d 1189 (Fla. 1985); United States v. Cerone, 452 F.2d 274 (7th Cir. 1971), cert. denied, 405 U.S. 964; United States v. Hubbard, 493 F.Supp. 206 (D.C. Cir. 1979); aff'd United States v. Heldt, 668 F.2d 1238 (D.C. Cir. 1981), cert.denied, 456 U.S 926 (1982).

The two prosecutors at bar were called by the defense, not the state, to testify to pretrial preparation efforts and pre-3.850 hearing efforts. The prosecutors were subpoenaed, as indicated before, to remove them from the case. A similar attack was levelled against Mr. Hankerson. This strategic abuse of the process of the court to deny competent counsel to the people is objectionable. The process of the court should not be used to vex, harrass, or deny rights to the opposing party.

In United States v. Schwartzbaum, 527 F.2d 249 (2nd Cir. 1975), cert.denied, 424 U.S. 942 the court held that the defense could not call the prosecutor as a witness to inquire into memorandum that had been prepared to refresh the memory of a government witness. (That "memorandum" is analogous to the

question given to defense witnesses here to refresh their memory). In United States v. Newman, 476 F.2d 733 (3rd Cir. 1973) the court refused to permit the defense to call a prosecutor as a defense witness regarding a purported plea bargain for testimony extended to a government witness. The witness in question denied the existence of a bargain and there was no proof of same. Again, this is analogous to our case, except here we agreed to have the prosecutor testify.

A similar situation was found in Gajeiusley v. United States, 321 F.2d 261 (8th Cir. 1963), cert.denied 375 U.S. 968 (1964) where the court was found to have discretion in permitting the prosecutor to be called as a defense witness.

Out of an abundance of caution the prosecutors were allowed to be called in this capital case. However, the legal basis for this was unique and there was no basis, as a result of this decision, to disqualify the entire State Attorney's Office.

III

THE TRIAL COURT DID NOT ERR IN RULING THAT EXCEPTING THE CLAIMS REGARDING: (1) BRADY V. MARYLAND; (2) PROSECUTORIAL MISCONDUCT; (3) THE ALLEGED INEFFECTIVENESS OF TRIAL COUNSEL; AND (4) CCR'S INEFFECTIVENESS; ALL REMANDING LEGAL CLAIMS WERE PROCEDURALLY BARRED.

It is axiomatic under Florida Rule 3.850 that claims that, could or should have been raised on direct appeal and claims already argued on direct appeal cannot be argued under 3.850. If CCR had any doubt about the simple English in this rule, the repeated rejection of their voluminous pleadings by the Courts of this State as well as the Supreme Court should, by now, have informed CCR that they must obey the rules of pleading. Adams v. State, 11 F.L.W. 94 (1986); Harich v. State, 11 F.L.W. 119 (Fla. 1986); Thomas v. State, 11 F.L.W. 174 (Fla. 1986); Straight v. State, 11 F.L.W. 227 (Fla. 1986); Zeigler v. State, 11 F.L.W. 223 (Fla. 1986); Groover v. State, 11 F.L.W. 239 (Fla. 1986). Yet, the petition at bar is another example of CCR's disregard for the rules. Of the fifteen claims raised, all but two (the ineffective counsel and Brady claims) are procedurally barred.

Claim V (state use of a co-defendant as its agent) is an issue which could or should have been raised on direct appeal. Muhammad v. State, 426 so.2d 533 (Fla. 1982).

Claim VI (state's improper argument and use of evidence) is a claim which could or should have been raised on direct appeal. Booker v. State, 441 So.2d 148 (Fla. 1983); Adams v. State, 449 So.2d 819 (Fla. 1984).

Claim VII (Mills' and/or counsel's absence from "critical" proceedings) is again an issue which could or should have been raised on direct appeal. Johnson v. Wainwright, 463 So.2d 207 (Fla. 1985).

Claim VIII (the Court and prosecutor's misinforming the jury as to its role) could or should have been raised on appeal. Copeland v. State, 12 F.L.W. 178 (Fla. 1987).[3]

Claim IX (improper argument by prosecutor) again could or should have been raised on direct appeal. Booker, supra.

Claim X (improper argument) is a claim that could or should have been raised on direct appeal. Booker, supra.

Claim XI (change of venue) to the extent this claim is couched in federal terms it is barred as a claim that could or should have been raised on direct appeal. The venue issue was raised on direct appeal and was resolved under state, not federal

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[3] The claim is facially frivolous as an incorrect assessment of Florida law. Copeland v. State, 12 F.L.W. 178 (Fla. 1987); Spaziano v. Florida, 82 L.Ed.2d 340 (1984). Caldwell did not change Florida law. Copeland, supra.

law. To the extent this issue seeks to reargue the direct appeal it is also barred. McCrae v. State, 437 So.2d 1388 (Fla. 1983).

Claim XII (pervasive bias) is a claim that could or should have been raised on direct appeal. Stone v. State, 481 So.2d 478 (Fla. 1985).

Claim XIII (the claim that the jury selection process was racially motivated) could or should have been raised on direct appeal. Lightbourne v. State, 471 So.2d 27 (Fla. 1985); James v. State, 489 So.2d 737 (Fla. 1986)

Claim XV (the claim that the court improperly accepted the state attorney's sentencing recommendations) could or should have been raised on direct appeal. This issue was abandoned by Mills prior to the evidentiary hearing.

The appellee would also point out that none of these claims are fundamental in nature so as to excuse the failure to litigate them on direct appeal. Accordingly appellee urges this Court to affirm the trial court on these claims.

IV

THE TRIAL COURT DID NOT ERR IN DENYING RELIEF ON THE CLAIMS OF PROSECUTORIAL MISCONDUCT, WITNESS TAMPERING, BRADY VIOLATIONS OR RELATED MATTERS.

Appellant has raised a number of allegations suggesting the prosecutors in this case withheld evidence of critical importance to the defense and that in other instances they knowingly used false or altered testimony to achieve the verdict they desired. Appellant asserts that suppression of evidence or tampering with evidence violates the due process clause. (Motion to Vacate, pg. 45). He contends that had he been aware of the facts alleged in his motion, the result of his trial would have been different because the nature of the State's case was such that the testimony of the two critical witnesses (Fredrick and Galimore) would have been completely discredited. Appellee's argument shall discuss relevant caselaw and show why none of these points has the slightest merit.

A good overview of this area of law appears in United States v. Benz, 740 F.2d 903, 915 (11th Cir. 1984):

> Brady asserts that the "suppression by the prosecution of evidence favorable to the accused upon request violates due process where the evidence is material either to guilt or punishment". Brady, 373 U.S. at 87, 83 S.Ct. at 1196, 1197. The former Fifth Circuit addressed extensively the application of Brady in United States v. Anderson, 574 F.2d 1347 (5th Cir. 1978). The court described the four distinct categories of Brady problems:

> (1) the prosecutor has not disclosed information despite a specific defense request; (2) the prosecutor has not disclosed information despite a general defense request for all exculpatory information or without any defense request at all; (3) the prosecutor knows or should know that the conviction is based on false evidence . . . [4] the prosecutor fails to disclose purely impeaching evidence not concerning a substantive issue, in the absence of a specific defense request.
>
> Id., at 1353. The court went on to note that each category required the application of a distinct test in order to assess whether the defendant's due process right to a fair trial had been violated.

Appellant states in his 3.850 motion that the State should have revealed to defense counsel a number of matters regarding physical evidence; threats and promises to Fredrick; Fredrick's fear of electrocution and possible mental problems; Fredrick's attempts to change his testimony; the "rehearsal" of Fredrick's "scripted" testimony; Fredrick's prior criminal actions; Fawndretta Galimore's alleged "deal" - her testimony in exchange for freedom; Galimore "script" for her rehearsed testimony; Galimore's reference to Petitioner as "Boone" and not "Ans Serene" during normal conversation; Fredrick's agreement to testify in concert with his May 8, 1982 typed statement; and every statement about the offense made to law enforcement officers by Fredrick and Galimore. These matters, if proved to be true, fall under catagory (2) of Brady as discussed above.

Claim IV involves alleged matters of the type seen in catatory (3). The specifics of Claim IV are that the State argued to the jury that its witnesses were not coached; that the State falsely argued that Fredrick did not find the shirt; that the State failed to reveal the "deals" with Fredrick and Galimore to the jury; that the State allowed Fredrick to testify falsely about his psychiatric treatments; that the State "coached" Fredrick to omit a critical fact; that the State knew Galimore lied but argued she was truthful to the jury; that the State allowed untrue testimony from witness Turner to go to the jury; that the State made Galimore speak of Mills as "Ans Serene".

On its face, Claim II is meritless. The first assertion (subpoint 3(a)) is untrue. Even if true, it was a matter trial counsel could have reasonably discovered on his own by means of pre-trial discovery under Rule 3.220 of the Florida Rules of Criminal Procedure. The same is true of subpoints 3(b)(c)(d)(e)(f)(g)(h)(i)(j)(k) and (l). "Brady does not require the government to turn over information which, with any reasonable diligence [the defendant] can obtain himself". Lewis v. State, 497 So.2d 1162, 1163 (Fla. 3d DCA 1986) (Jorgenson J. concurring), quoting Halliwell v. Strickland, 747 F.2d 607, 609 (11th Cir. 1984). See also State v. Crawford, 257 So.2d 898 (Fla. 1972) (Prosecution under no constitutional obligation to build or prepare defendant's case for him). As Judge Jorgenson notes in his concurrence "[A defendant] may not lament his own

dissatisfaction with his pretrial strategies under the guise of assigning culpability to the State. Because the evidence was equally available to [defendant], it is apparent that no suppression existed". Lewis, at 1164. The same conclusion should be reached here regarding the matters raised in Claim II. There was no suppression by the State and hence no Brady violation. United States v. Torres, 719 F.2d 549, 555 (2nd Cir. 1983).

This conclusion is apparent from a review of the evidentiary hearing transcript, as well as the trial court's order. The trial court has found:

> 1. The allegation that Fredrick "did not lead them to the shirt" was a semantic exercise and not worthy of belief given the conceded fact that everyone was aware that Michael Fredrick did lead the police to the crime scene where, among other evidence, the shirt was found.
>
> 2. No evidence existed to show Michael Fredrick did anything but told the truth at trial.
>
> 3. The lack of disclosure of Fredrick's medical records to Roosevelt Randolph could never be characterized as a Brady violation, given the confidential nature of those records. Furthermore, Mr. Randolph knew of Fredrick's treatment but decided, as a strategic manuever, not to focus on the point.
>
> 4. Fredrick never gave any inconsistent statement regarding the crime after May 8, 1982. Appellant mislead the court in pleading this

claim by intentionally omitting the first portion of a sentence made by Mr. Landrum in his deposition.

5. The State did not direct what answers were to be given by its witnesses. This matter was also raised at trial by Mr. Randolph in his closing arguments.

6. There was no evidence that the State dropped burgarly charges against Michael Fredrick as part of any deal.

7. The two year old comment prior to trial from Fredrick to an investigator that Fredrick had stolen "a .357 to blow somebody away" was not relevant or material.

8. There was no evidence of any preset deal between Fawndretta Galimore and the State.

9. The matter of Mills use of this Muslim name was refuted by the record and was not critical to the question of guilt.

10. Michael Fredrick's guilty plea ws made on the records, in open court and no undisclosed deal ever existed.

11. Interview notes or memeorandum in this case were not "statements". Other materials were state attorney work product.

12. The State never produced false testimony at trial.

13. There was no evidence of misconduct by the State in contacting Mr. Tucker or Mr. Vause regarding jury jury selection background information.

Even assuming that certain matters in Claim II were "suppressed" the claim fails for lack of proof the matters are

both "favorable" and "material". Lewis, at 1163. Taking materiality first, it is clear that these matters do not meet the standard set out in United States v. Bagley, 473 U.S ____, 87 L.Ed.2d 481, 105 S.Ct. _____ (1985):

> The evidence is material only if there is a reasonable probability that, if the evidence had been disclosed to the defense the result of the proceeding would have been different.

Id., at 87 L.Ed.2d 494.

The jury in this case knew that Michael Fredrick had confessed to involvement in the murder, but only after initially telling lies to the police. (Tr 1250-1251). They also knew he was testifying in exchange for a reduced charge of murder which got him out of the electric chair. (Tr 1173). The jury knew the same was true about Fawndretta Galimore, Mills' girlfriend. (Tr 1172). She told the jury she did not like Fredrick (Tr 1578) and that she was charged in this case and awaiting sentencing. (Tr 1591-1592). These motivations were known and used by trial counsel in his closing argument. For example, trial counsel argued in closing:

(1) That the jury should not be swayed by the prosecutors racial inferences in judging the case. (Tr 1911).

(2) That Fredrick was a liar, a thief and "a probable murderer" who used drugs and lied eleven times at trial. (Tr 1919).

(3) That Fredrick was "a well-coached liar" (Tr 1919). [He even gave examples of coaching]. (Tr 1920, 1921-1922, 1936).

(4) That Fredrick was a self-styled "hit" man, (Tr 1920) and argued a hit was a killing not a burglary as Fredrick claimed. (Tr 1921).

(5) That Fredrick was always armed and had used cocaine and marijuana the night before the murder. (Tr 1922).

(6) That Fredrick did not come and testify for fun. He had a pre-set deal already made. (Tr 1936).

(7) That Fredrick did lie about who took the shotgun from the trialer. (Tr 1937).

(8) That Fawndretta Galimore was inconsistent in her testimony and that the prosecutor tried to cover over that fact. (Tr 1936-1937).[4]

These few record excerpts conclusively rebut any possibility that based on the allegations in subpoint (3) of Claim II the result of this trial would probably been different if this information was known to the jury. Of course certain matters like 3(f) and 3 (g) would not even be admissible at trial.

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[4] A copy of the closing argument of defensive counsel is attached to this brief as an appendix.

Still, appellant pleads "the coaching is chilling". (Motion to Vacate, pg. 47). The jury heard the same cry but didn't believe it mattered. None of this can possibly change that decision. This case is analogous to Francis v. State, 473 So.2d 672 (Fla. 1985) wherein it was held:

> Francis also challenges his conviction on the basis that the State knowingly used false tesimony of Charlene Duncan relating to an agreement she had made with the State to testify at Francis' trial. He states that Duncan ultimately received more than what she had bargained for in her agreement dated August 9, 1979, and that the State failed to inform the defendant of the full extent of the consideration promised and received. He contends tha he was not aware until the hearing on the motion for new trial that a motion for post-conviction relief not contemplated by the original agreement had been filed on behalf of Duncan seeking to have her conviction vacated and that this motion was notarized and actively supported by an assistant state attorney. He argues that because the jury was not informed of the exact details of what the State was doing for Duncan in exchange for her testimony, he was deprived of a fair trial.
>
> At trial, Duncan testified that she was presently serving a mandatory twenty-five year sentence for her participation in the murder of Titus Walters; that in 1979 she agreed to testify as a witness for the State; that in return for her truthful testimony, she would either receive a new trial, be allowed to plead guilty to third-degree murder and get ten years, or get a pardon; that she was presently awaiting resentencing on this matter; that a hearing; on this matter was set for April 4, 1983 (the next Monday after

> she testified); and that when asked if she had thus far been pardoned in any way, she answered, "No, but I can get one". In closing argument, defense counsel emphasized to the jury that Duncan was a convicted murderess who expected to go home because of her testimony at trial.
>
> * * *
>
> The State argues that the material fact in the present case was the preferred treatment to be given Duncan by the State, that the non-disclosed evidence of the exact details of how Duncan was to be rewarded for her assistance did not deprive Francis of due process of law or a fair trial, and that the relevant facts that Duncan had made a deal with the State were made known to the jury. We agree. The record reveals that it was made abundantly clear to the jury that Duncan was otivated by her own self-interest to testify.

See also United States v. Antone, 603 F.2d 566 (5th Cir. 1979).

> In any event it was quite apparent to the jury that [the witness] was motivated primarily by self-interest.f The relevation that the attorney's fees were paid by the state would not have been especially significant as it would only have further revealed Haskew's self-interest motivation, already amply shown. [emphasis added]

Id., at 570. See also Parker v. State, 491 So.2d 532 (Fla. 1986).

Clearly, Claim II fails to overcome the overwhelming record proof that the materials were neither "suppressed" nor "material" as required under Brady. Accordingly, no discussions will follow

on whether these matters are "favorable". One out of three is not enough to justify granting relief in this case or staying the proceedings (or execution). The record conclusively refutes Claim II in its entirety and justifies a summary affirmance of the trial court's order on the claim.

The allegations in Claim IV concerning prosecution misconduct, or knowing use of false evidence, were shown to be specious. To accept the premise raised by Mr. Mills' current lawyers, the State Attorney targeted Mr. Mills for the electric chair, scripted the trial and mislead the jury will lies and false argument for no reason except possibly a desire to plunge Wakulla County back into the lynch mob days of the Reconstruction South. The State waited to hear strict proof from the CCR on this matter at the evidentiary hearing but got nothing from appellant but new allegations of misconduct by the current lawyers for the State. It became embrrassingly clear that the whole notion that Mr. Mills was "set up" was pure fiction when Micheal Fredrick told Judge Harper all about CCR's handling of his affidavit-the keystone to appellant's entire premise:

Furthermore, if, as appellant insists, it was wrong for the State's attorney to visit Michael Fredrick the night before his testimony in order to briefly disclose the nature of his testimony, what can be said of the conduct of appellant's counsel who visited Michael Fredrick after the State Attorney? Undersigned counsel knows full well the theory that "death is different" has certain acceptable parameters. It is suggested tha undocumented, frivolous attacks on the integrity of state prosecutors falls far outside that range, particularly in this factually setting.

Accordingly any and all issues raising Brady issues or issues of prosecutorial misconduct should be affirmed.

V

THE TRIAL COURT DID NOT ERR IN FINDING THAT ROOSEVELT RANDOLPH RENDERED EFFECTIVE ASSISTANCE TO THE APPELLANT AT ALL PHASES OF TRIAL.

The appellant alleges that he received the ineffective assistance of trial counsel. However, an examination of Roosevelt Randolph's closing argument shows that most, if not all, of the issues argued therein are simply repeated by CCR in its petition. Apparently, CCR took every issue Mr. Randolph argued and, by hindsight and speculation, simply tried to show how it "could have been done better". (A copy of Randolph's closing argument is attached as an appendix to to this brief).

Strickland v. Washington, 466 U.S. 688, 80 L.Ed.2d 674 (1984) sets the standard of review for ineffective counsel claims. There, the Court particularly held:

(1) That counsel need not try a perfect case or call every possible witness in order to be effective.

(2) Only conduct so incompetent as to be the equivalent of "no counsel at all", thus calling into question the very reliability of the verdict, shall establish ineffectiveness.

(3) We shall not have a system of justice wherein we "try the case and then try the lawyer". If claims are frivolous on their face, they may be disposed of summarily. Strickland notes the danger to all defendants of this chronic "lawyer-bashing" by

death row inmates. Competent attorneys are increasingly reluctant to undertake death litigation.

The fact that Mr. Randolph may have made errors at trial is not proof of ineffectiveness. In United States v. Cronic, U.S. ____, 80 L.Ed.2d 657, 666 (1984), the Court held:

> When a true adversarial criminal trial has been conducted - even if defense counsel made demonstrable errors - the kind of testing envisioned by the Sixth Amendment has occurred.

The claims against Mr. Randolph key largely upon a general "failure to investigate" his case and a failure to raise objections. The trial court rejected these claims based on Mr. Randolph's testimony (St.) regarding his theory of defense and attendant strategies. Reference to appellee's statement of facts and appendix should lead to affirmance on this issue. The following case authority supports appellee's argument.

The "failure to investigate" claim involves a list of cumulative witnesses and exhibits counsel "could have" produced. In Aldrich v. Wainwright, 777 F.2d 630 (11th Cir. 1985), the court held that cousel could not be proven ineffective on the basis of "speculation" as to "what further investigation would have revealed". Cf. Stewart v. Wainwright, 481 So.2d 1210 (Fla. 1985). (Argument that cumulative evidence would overcome "prejudice" burden was mere speculation).

In Stanley v. Zant, 697 F.2d 955 (11th Cir. 1983), the court

held that counsel was not ineffective for failing to do intensive investigation into character evidence. In Tucker v. Kemp, 776 F.2d 1487 (11th Cir. 1985) the court refused to fault counsel for not calling character witnesses, especially when the defendant failed to tell his lawyer about them.

In Winfrey v. Maggio, 664 F.2d 550 (5th Cir. 1980), the court held that counsel's performance is to be judged by viewing the case from "his shoes, at the time". Strickland, supra, also forbids "hindsight" review.

A bad strategic decision does not equate with ineffectiveness either. Willis v. Newsome, 747 F.2d 605 (11th Cir. 1985); Beckham v. Wainwright, 639 F.2d 262 (5th Cir. 1981). Thus, a failure to seek out a conflicting psychiatric opinion if one's client is deemed "sane" is not required. Washington v. State, 397 So.2d 285 (Fla. 1981).

In Anderson v. State, 467 So.2d 781 (Fla. 3d DCA 1985), the court held:

(1) "Failure to object" will not be accepted as a basis to review unpreserved claims. The substitution of such a claim against counsel for our contemporaneous objection rule would utterly destroy the rule.

(2) Counsel, in any event, need not raise every possible objection - even to improper argument, if he believes (even

incorrectly) it would be better strategy not to object.

Thus, any claim based upon a "failure to object" need not be considered. Claims based upon either "strategy" or the "quantity of effort" are totally insufficient to justify relief.

Accordingly, this Court should affirm the trial court's ruling, based on the testimony given at the evidentiary hearing and the records and files of the trial, that Mr. Roosevelt Randolph was not constitutionally ineffective in his repesentation of appellant.

CONCLUSION

The State of Florida, by and through undersigned counsel, prays this Honorable Court affirm the Order of the Circuit Court based on the citations to legal authority and arguments contained herein. The State also prays the Court deny a stay of execution or other request to delay.

Respectfully submitted,

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