IN THE SUPREME COURT OF FLORIDA

CASE NO. 70,781

WILLIAM LEE THOMPSON,

Appellant/Petitioner,

v.

THE STATE OF FLORIDA,

Appellee/Respondent.

* *

AN APPEAL FROM THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA FROM A DENIAL OF POST CONVICTION RELIEF

* *

BRIEF OF APPELLEE/RESPONDENT

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INTRODUCTION

Respondent/Appellee, the State of Florida was the Plaintiff/Respondent in the Eleventh Judicial Circuit Court.

Petitioner/Appellant was the Defendant/Petitioner in the Eleventh Judicial Circuit Court.

This is an appeal from the denial of a third Florida Rule Criminal Procedure 3.850 motion by a prisoner under a sentence of death.

STATEMENT OF THE CASE AND FACTS

The facts and procedural history of this case are succintly stated in the opinion of the Eleventh Circuit Court of Appeals in Thompson v. Wainwright, 787 F.2d 1447 (11th Cir. 1986) cert. den. _____ U.S. _____, (1987). Respondent adopts the Court's statement:

BACKGROUND

> The Florida Supreme Court summarized the facts of the crime in deciding Thompson's appeal:
>
> The appellant Thompson, Rocco Surace, Barbara Savage, and the victim Sally Ivester were staying in a motel room. The girls were instructed to contact their homes to

obtain money. The victim received only $25 after telling the others that she thought she could get $200 or $300. Both men became furious. Surace ordered the victim into the bedroom, where he took off his chain belt and began hitting her in the face. Surace then forced her to undress, after which the appellant Thompson began to strike her with the chain. Both men continued to beat and torture the victim. They rammed a chair leg into the victim's vagina, tearing the inner wall and causing internal bleeding. They repeated the process with a night stick. The victim was tortured with lit cigarettes and lighters, and was forced to eat her sanitary napkin and lick spilt beer off the floor. This was followed by further severe beatings with the chain, club, and chair leg. The beatings were interrupted only when the victim was taken to a phone booth, where she was instructed to call her mother and request additional funds. After the call, the men resumed battering the victim in the motel room. The victim died as a result of internal bleeding and multiple injuries. The murder had been witnessed by Barbara Savage, who apparently feared equivalent treatment had she tried to leave the motel room.

Thompson v. State, 389 So.2d 197, 198 (1980).

Thompson and Surace both pled guilty were sentenced to death, but these pleas and sentences were set aside by the Florida Supreme Court. Thompson v. State, 351 So.2d 701 (1977); Surace v. State, 351 So.2d 702 (1977). Upon remand, Thompson again pled guilty, and again was sentenced to death. The Florida Supreme Court affirmed, 389 So.2d 197 (1980); the state courts also denied collateral relief. 410 So.2d 500 (1982). Thompson then filed a petition for habeas relief in the federal district court

> raising numerous grounds. He subsequently sought to amend his petition to add claims based on ineffective assistance of counsel. Because these additional claims had not been presented to the Florida courts, the district court granted a continuance to allow Thompson to exhaust the claims in state court and the state appealed. This court affirmed the district court's continuance, but also stated that the district court, in its discretion, could have accepted the state's offer to waive exhaustion with respect to the new claims. Thompson v. Wainwright, 714 F.2d 1495 (11th Cir. 1983), cert. denied, 466 U.S. 962, 104 S.Ct. 2180, 80 L.Ed.2d 562 (1984). On remand, the district court accepted the waiver, and, after an evidentiary hearing, found all of Thompson's claims without merit.

Consistent with the State's unconditional wavier of exhaustion, the Defendant therefore withdrew this effort to seek a second rule 3.850 proceeding in state court thus:

> "**THE COURT:** What is the status on the appeal?
>
> "**MR. FOX:** Assistant [Attorney General] for the State in this matter.
>
> We are set for an evidentiary hearing in front of Judge Paine in West Palm Beach on July 9th, your Honor, so apparently we're going to proceed with the Federal habeas corpus proceeding and I think --
>
> "**MR. VANZAMFT:** The appellate issues dealing with this as it relates to the State case have been taken care of by the ruling of the Eleventh

Circuit in the case of Thompson versus Wainwright (phonetic).

As a result of that and as a result of Judge Paine's now accepting the State's waiver of [Exhaustion] -- I know this sounds complicated, I'm trying to make the record clear -- the 3.850 motion that was filed on behalf of Mr. Thompson in this Court, which is really what was left to be heard, has no real validity at this point since all of those issues are being heard by the Federal Court.

As a result of that, I will withdraw the motion to vacate pursuant to 3.850 and ask this Court to withdraw without prejudice.

"**THE COURT:** Fine.

"**MR. FOX:** State is in agreement with that.

"**THE COURT:** With or without prejudice you can file them forever.

"**MR. VANZAMFT:** And I would ask the Court, there is no reason to keep this on the Court calender, so you can probably take it off.

"**THE COURT:** Do you agree. Mr. Fox?

"**MR. FOX:** Yes.

The parties will litigate the case on the merits in the Federal Court and that will serve as estoppel.

"**MR. VANZAMFT:** The only way we'll get back is if we're ordered back.

(Whereupon, this matter was concluded.)"

[Emphasis Added]. Exhibit A

"The Defendant raised, in the Federal District Court the following claims: 1) Ineffective assistance of counsel based upon the entry of a guilty plea, failure to investigate and present mitigating evidence, counsel's opening and closing argument; 2) the trial court alleged restriction of mitigating evidence; 3) the trial Court's failure to further inquire as to Defendant's competency to stand trial; 4) the trial courts denial of additional pyschiatric experts at sentencing; and 5) that his plea was coerced. The Federal District Court denied the issuance of the writ and the Eleventh Circuit affirmed 787 F.2d at 1461.

The Petitioner has filed a petition for a writ of certiorari based upon Hitchcock v. Wainwright, 770 F.2d 1514 (11th Cir. 1985) (en banc) reversed and remanded, Hitchcock v. Dugger, ____ U.S. ____, 41 Crim.L.Rep. 3071 (April 22, 1987). The petition was denied May 4, 1987 ____ U.S. (1987).

PRESENT PETITION

In his present petition, Petitioner's third, the Defendant claims, a.) again that the jury and proceedings were improper under Hitchcock/Lockett (claims "I" and "III"; b.) that under Caldwell the jury's duty was depreciated and this can be raised for the first time as "new" law ("II"); c.) that Surace's prior record of violence was omitted and that the eyewitness, Savage, "tailored" her testimony to

avoid prosecution (IV); d.) that the co-defendant Surace, was the dominant figure and the Defendant should have therefore also gotten a life sentence ("V") and e.) that counsel was ineffective 1.) for not objecting to Surace's confession; 2.) for failing to prove Surace's domination; 3.) for "allowing" the Defendant to testify at Surace's trial and 4.) for not objecting to the prosecutor's comments (claims VI and IX). The Defendant also claims that Rule 3.851 is unconstitutional and that he intends to raise three other claims: a.) that the Defendant was incompetent to either plead guilty or to testify; b.) that he should have had psychiatrists under Ake for sentencing and c.) that as yet unnamed "experts:" will find that the Defendant is "brain damaged."

The trial court for the Eleventh Judicial Circuit court denied petitioner's third Florida Rule Criminal Procedure 3.850 motion stating the claims had been previously raised in federal district court. Petitioner appeals from the denial of his third 3.850 Florida Rule Criminal Procedure motion.

ISSUE PRESENTED

WHETHER THE TRIAL COURT CORRECTLY DENIED THE PETITONER'S THIRD FLORIDA RULE CRIMINAL PROCEDURE 3.850 MOTION.

SUMMARY OF THE ARGUMENT

The trial court correctly denied petitioner's, successive, third Florida Rule Criminal Procedure 3.850 motion. Petitioner raised or could have raised all the claims in federal court based upon the State's unconditional waiver of exhaustion.

This Court should affirm.

ARGUMENT

THE TRIAL COURT CORRECTLY DENIED PETITIONER'S THIRD FLORIDA RULE CRIMINAL PROCEDURE 3.850 MOTION.

The State submits the trial court correctly denied petitoner's successive Florida Rule Criminal Procedure 3.850 motion. Petitioner raised a multitude of grounds of which the trial court held had been raised in Thompson v. Wainwright, 787 F.2d 1447 (11th Cir. 1986). Therefore, he was barred from relitigating them again.

The State raised in the Response and herein valid procedural grounds as bars to the Petitioner's claim. At the outset the State has noticed what appears to be an assault by the federal appellate court on the integrity of this Court's and the trial court's decisions. When this Court applies the purely state procedural grounds as a basis for denying relief, but none the less discusses the meritlessness of a claim, the federal court ignores this Court's application of procedural bar. Most recently in Mann v. Dugger, 817 F.2d 1471, 1475 (11th Cir. 1 F.L.W. Fed 682, 683 June 19, 1987) the integrity of this Court's decision was overlooked. The Eleventh Circuit in Mann, supra, held:

> Thus, "where the state court's opinions do not make it clear that a point is not passed on due to failure to preserve it by timely

> objection, the state must be presumed to have applied its own rules to reach and reject the claim on the merits." [Citation omitted] Consequently, we conclude that, by independently reviewing the record, the Florida Supreme Court waived Mann's failure to raise his presence claim on direct appeal. Although the state court in Caldwell discussed at length the merits of the issue it raised sua sponte, the Florida Supreme Court's opinion does not clearly rest on adequate and independent state ground; therefore, federal habeas review is not barred. [footnoted omitted]

As a precautionary measure in order to preserve the integrity of this Court's opinion the State urges that this Court unequivocally hold that the decision rests solely on the "adequate and independent state grounds" of bar.

It is well settled that any issue which a defendant could have and should have presented on direct appeal is barred from consideration in a subsequent collateral petition. See e.g., Stone v. State, 481 So.2d 478 (Fla. 1985); Hargrave v. Wainwright, 388 So.2d 1021 (Fla. 1980). Similarly, a successive collateral petition should be denied unless it can be shown that the grounds for relief were unavailable or unknown. See, e.g, Stewart v. State, 495 So.2d 164 (Fla. 1986); Witt v. State, 465 So.2d 510 (Fla. 1985). In the present cause, all of the Defendant's claims, with the exception of the constitutionality of Rule 3.851,

either could or should have been raised on direct appeal; were raised on direct appeal or should have been presented in the Defendant's collateral petitions. The Petitioner's claim should therefore be summarily rejected.

During the pendancy of Petitioner's initial Petition for Writ of Habeas Corpus in federal court he added unexhausted claims. The State, in order to avoid protracted state court litigation on constitutional claims unconditionally waived the exhaustion requirement and this waiver was ultimately accepted by the United States District Court. Thompson v. Wainwright, supra, at 1449, 1456. See, Granbery v. Green, 95 L.Ed.2d 119 (1987). Felder v. Estellee, 693 F.2d 549 (5th Cir. 1982). Based on the State's unconditional waiver of exhaustion, the State submits that Petitioner is estopped from litigating in this forum all constitutional cliams which were litigated or could have been litigated in Petitioner's first habeas corpus petition.

It is of course well settled that where a Court of competent jurisdiction has been presented with or the parties had an opportunity to litigate the same issue, the claim should be denied upon the ground of res judicata. See e.g., AGB Oil Co. v. Crystal Exploration and Production Co., 406 So.2d 1165 (Fla. 3d DCA 1981); see also, Migra v. Warren City School District, 465 U.S. 75, 104 S.Ct. 892, 79 L.ed.2d 56 (1984); Jaffee v. Grant, 793 F.2d 1182 (11th Cir. 1986);

Johnson v. United States, 576 F.2d 606 (5th Cir. 1978). This rule precludes claims, which were raised or could have been raised in either a federal or state forum, when the same claims are then asserted in the other forum. Similarly, collateral estoppel by record also precludes successive claims where a matter between the same parties has been litigated and determined by a competent court. See Coral Realty v. Peacock Holding Co., 103 Fla. 916, 138 So. 622 (1931); Gray v. Gray, 91 Fla. 103, 107 So. 261 (1926); United States Gypsum v. Columbia Casualty, 124 Fla. 633, 169 So. 532 (1936); see also, Ashe v. Swenson, 397 U.S. 436, at 443, 90 S.Ct. 1189, at 1194, 25 L.Ed.2d 469 (1970). Whether barred by res judicata or principles of collateral estoppel, it is clear that the State's unconditional waiver of exhaustion allowed the Petitioner to have a full and fair determination on all of his constitutional claims by a competent court. Therefore, he is now estopped from litigating in this forum all constitutional claims that either were or could have been litigated in his petition in for Writ of Habeas Corpus.

The following discussion refers to the number as assigned to the claims as set forth in the "present petition" section of this brief.

Petitioner is only entitled to litigate these claims if he can establish that there was a fundamental change in the law, the facts could not have been discovered before or the

claim represents a novel issue. Reed v. Ross, 468 U.S. 82 L.Ed.2d 1, 104 S.Ct. 2901 (1984). Witt v. State, 465 So.2d 510 (Fla. 1985). The State submits that none of the standards can be met and all claims are barred by estoppal.

Petitioner in claims I and III alleges that the trial courts procedures and instructions limited the presentation of mitigating evidence under Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978) and that this is fundamental error under Hitchcock v. Dugger, 41 Crim.L.Rep. 3071 (April 22, 1987). As the Eleventh Judicial Circuit Court correctly held this claim was specifically litigated in the federal habeas. Thompson v. Wainwright, supra 1456-57. Further, Hitchcock does not represent a fundamental change in the law. Aldridge v. State, 503 So.2d 1257 (Fla. 1987); Agan v. Dugger, 12 F.L.W. 255 (Fla. June 8, 1987).

The Petitioner in claim II attempts to raise claim for the first time in any forum, that his sentence should be stayed and set aside because the sentencing responsibility of the jury was depreciated by the prosecutor's repeated advice to the venire that the decision would only be a recommendation and that the trial judge was the ultimate sentencing authority. See, Caldwell v. Mississippi, ____ ____ U.S. ____, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985). The Defendant's reasoning is that this is a "new" claim under Witt v. State, 387 So.2d 922 (Fla. 1986).

To the contrary, this claim has been around for many years and was made as early as 1918 in Florida. See, Caldwell v. Mississippi, 105 S.Ct,. at 2642, n 5; Blackwell v. State, 76 Fla. 124, 79 So. 731 at 735-736 (1918); Pait v. State, 112 So.2d 380, at 383-384 (Fla. 1959); Corn v. Zant, 708 F.2d 549 (11 th Cir. 1983); McCorquodale v. Balkom, 705 F.2d 1553, at 1556 (11th Cir. 1983), overruled on other grounds, 721 F.2d 1493 (11th Cir. 1984) (en banc).

Based on the foregoing citations of authority, it is abundantly clear that his Caldwell claim could have been constructed when Petitioner was litigating in the United States District Court. Since the claim could have been constructed it is not a novel claim. Reed v. Ross, supra. Copeland v. Wainwright, ____ So.2d ____ (12 F.L.W. 178, 179 April 17, 1987). Therefore, Petitioner is estopped from litigating the claim.

In claims VI, VII, VIII and IX , Petitioner claims that counsel was ineffective. Since he had a full evidentiary hearing on the claim of ineffective assistance of counsel in federal court, the specific factual circumstances now brought forth can only be heard if they could not have be ascertained previously. See Thompson v. Wainwright, supra 1449-1456. As will be shown, all claims were litigated or could have been litigated and therefore Petitioner is estopped from raising them herein.

Claim VI alleges counsel was ineffective for allowing Surace's confession to be used against Petitioner during the sentencing hearing. Clearly this was known during the federal hearing inasmuch as it was raised but rejected. Thompson v. Wainwright, supra at 1450 n 1.

Claim VII alleges counsel was ineffective for failing to discover and present evidence that Petitioner was under Surace's domination during the offense, guilty plea and sentencing proceeding. Once again these facts were known at the time of the federal hearing. Specifically, the issue of dominace was known since Petitoner's second full direct appeal. Thompson v. State, 389 So.2d 197, 200 (Fla. 1980). It was also reiterated in his first Rule 3.850 motion Thompson v. State, 410 So.2d 500, 501 (Fla. 1982).

Claim VIII alleges counsel was ineffective for allowing Petitioner to testify falsely at Surace's trial. Once again the facts underlying the claim were known at the time of the federal hearing, inasmuch as the facts were the basis of the first Rule 3.850 Motion. Thompson v. State, 410 So.2d 500 (Fla. 1982).

His last claim, IX, alleges counsel was ineffective for allowing the State to present improper argument to the sentencing jury. These facts were known at the time of the federal hearing inasmuch as they were raised therein. Thompson v. Wainwright, supra at 1450 n. 1.

In claim V he alleges that his sentence is disproportionate to that of Surace. Once again this deals with the domination theory and was known previously to the federal hearing. Since it was available but not raised, Petitioner is estopped from raising it herein.

In Claim IV, he alleges Brady violation because the State did not provide him with evidence of Surace's past criminal history. The facts underlying this claim was also known to Petitioner at the time of the federal hearing inasmuch as there he used these facts to attempt to establish that trial counsel was ineffective for failing to investigate. Thompson v. Wainwright, supra 1453. He also contends that evidence of a deal with Garritz was suppressed by the State. This allegation is supported by Garritz' affidavit which affidavit does not explain why this information could not have been obtained earlier. Without a showing of due dilegence or that the information was not available previously the claim is barred.

Regarding Claim X, as amended, the trial court correctly denied the claim. Petitioner is barred from asserting his amended claim. The facts of this claim were previously litigated in his direct appeal. Thompson v. State, 389 So.2d 197, 199 (Fla. 1980). This his attempt to relitigate the claim under a different guise should be barred. Fla.R.Cr.P. 3.850. See e.g., Stone v. State, 481 So.2d 478 (Fla. 1980).

Furthermore, the principles of res judicata, and collateral estoppel by record apply to the insant claim. This issue was litigated in Federal Court based upon the State's unconditional wavier of exhaustion. Thompson v. Wainwright, 787 F.2d 1147, 1458-9 (11th Cir. 1986).

Even if the exact nature of the claim was not litigated, the facts to support the claim were recognizable during that litigation and therefore he is estopped from litigated herein.

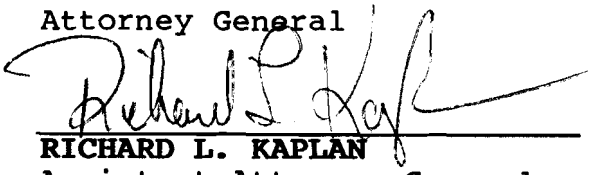
Finally , regarding the constitutionality of 3.851 Fla.R.Cr.P the imposition of time limits upon a state rule of collateral procedure is without constitutional impact. Cf., United States v. Zelinsky, 689 F.2d 435 (3d Cir. 1982).

CONCLUSION

Based upon the above authorities, facts and discussion this Court should affirm the denial of petitioner's collateral relief motion.

Respectfully submitted,

ROBERT A. BUTTERWORTH
Attorney General



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **RESPONSE AND RESPONSE IN OPPOSITION TO MOTION FOR STAY OF EXECUTION** was furnished by hand to **OFFICE OF THE CAPITAL COLLATERAL REPRESENTATIVE** Independent Life Building, 225 West Jefferson Street, Tallahassee, Florida 32303 and **MICHAEL L. VON ZAMFT**, (in Tallahassee) Kubicki Brady Draper Gallagher & McGrane, 701 City National Bank Building, 25 West Flagler Street, Miami, Florida 33130 on this 2 nd day of July, 1987.

RICHARD L. KAPLAN
Assistant Attorney General

/dmc