IN THE SUPREME COURT OF FLORIDA

ERNESTO SUAREZ, Petitioner, v. RICHARD L. DUGGER, Secretary, Department of Corrections, State of Florida, Respondent.	Case No. 72467 EMERGENCY RESPONSE: CAPITAL CASE, DEATH WARRANT SIGNED; EXECUTION IMMINENT.

RESPONSE IN OPPOSITION TO PETITION FOR EXTRAORDINARY RELIEF, THE PETITION FOR EXTRAORDINARY RELIEF, FOR A WRIT OF HABEAS CORPUS, REQUEST FOR STAY OF EXECUTION, AND APPLICATION FOR STAY OF EXECUTION PENDING DISPOSITION OF PETITION FOR A WRIT OF CERTIORARI

COMES NOW, the respondent, Richard L. Dugger, Secretary, Department of Corrections, State of Florida, by and through the undersigned assistant attorneys general, and hereby files this response in opposition to petition for extraordinary relief, for a writ of habeas corpus, request for stay of execution, and application for stay of execution pending disposition of petition for writ of certiorari, and respectfully requests this Honorable Court to deny the petitioner's request for relief. As grounds to support the denial of petitioner's requested relief, your respondent would show unto the Court:

I.

Your respondent does not contest the jurisdiction of this Honorable Court to entertain a petition for writ of habeas corpus where such petition presents cognizable matters. However, the instant habeas petition prepared on behalf of Mr. Suarez by the capital collateral representative presents mostly matters which this Honorable Court will not consider on habeas review. The instant petition for writ of habeas corpus is, as was the petition filed in Blanco v. Wainwright, 507 So.2d 1377 (Fla. 1987), "almost entirely a repetition of the issues raised in the Rule 3.850 proceeding." In addition to virtual reproductions of certain of the 3.850 claims, petitioner presents claims

predicated upon his disagreement with the decision rendered by this Honorable Court on direct appeal. By including these types of claims within his petition for writ of habeas corpus, "collateral counsel has accomplished nothing except to unnecessarily burden this Court with redundant material." Blanco v. Wainwright, 507 So.2d at 1384. With respect to the issues properly raised under Rule 3.850, petitioner's remedy is not the instant habeas petition, but rather is a direct appeal if his Rule 3.850 motion is denied by the trial court. This Honorable Court need not nor should not "replough this ground once again." Ibid.

With respect to certain of the issues raised in his habeas petition, petitioner gratuitously asserts that appellate counsel was ineffective for failing to raise the issues on direct appeal.[1] In McCrae v. Wainwright, 439 So.2d 868 (Fla. 1983), this Court held that "[h]abeas corpus should not be used as a vehicle for presenting issues which should have been raised at trial and on appeal", citing Hargrave v. Wainwright, 388 So.2d 1021 (Fla. 1980), and State ex rel. Copeland v. Mayo, 87 So.2d 501 (Fla. 1956). In McCrae, this Court specifically opined that:

> . . . Allegations of ineffective appellate counsel therefore should not be allowed to serve as a means of circumventing the rule that habeas corpus proceedings do not provide a second or substitute appeal. (text at 870)

This type of admonition has been consistently followed by this Honorable Court and has, in fact, specifically admonished the office of the capital collateral counsel "that habeas corpus is not a vehicle for obtaining additional appeals of issues which were raised, or should have been raised, on direct appeal or which were waived at trial or which could have, should have, or have been, raised in Rule 3.850 proceedings. White v. Dugger, 511 So.2d 554 (Fla. 1987), citing Blanco, supra, and Copeland v.

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[1]/ Your respondent will identify these issues in the body of this response. Nevertheless, it is advisable to set forth the basic premise that these issues are not cognizable on habeas review at the outset in an effort to give guidance to this Court's review of all issues presented.

Wainwright, 505 So.2d 425 (Fla. 1987). Thus, to the extent that petitioner is again asking this Court to exercise its jurisdiction over issues not legally cognizable on habeas review, this Court should decline to do so.

II.

Although this Honorable Court has the power to grant a stay of execution, the State of Florida submits that the instant cause is not one which should be stayed. In Barefoot v. Estelle, 463 U.S. 880, 103 S.Ct. 3383, 77 L.Ed.2d 1090 (1983), rehearing denied, 104 S.Ct. 209, 78 L.Ed.2d 185 (1983), the Court addressed the issue of stays of execution and said:

> . . . It must be remembered that direct appeal is the primary avenue for review of a conviction or sentence, and death penalty cases are not exception. When the process of direct review -- which, if a federal question is involved, includes the right to petition this Court for a writ of certiorari -- comes to an end, a presumption of finality and legality attaches to the conviction and sentence. The role of federal habeas proceedings, while important in assuring that constitutional rights are observed, is secondary and limited. Federal courts are not forums in which to relitigate state trials. Even less is federal habeas a means by which a defendant is entitled to delay an execution indefinitely.

77 L.Ed.2d at 1100. The State of Florida submits that 3.850 proceedings and state habeas proceedings, like the federal habeas proceedings discussed in Barefoot v. Estelle, are not vehicles to relitigate state trials. As will be demonstrated below, Suarez is unable to show that any issue is likely to succeed on the merits. See O'Bryan v. Estelle, 691 F.2d 706, 708 (5th Cir. 1982), and White v. Florida, 458 U.S. 1301, 103 S.Ct. 1, 73 L.Ed.2d 1385 (1982).

In Autry v. Estelle, 464 U.S. 1, 104 S.Ct. 20, 78 L.Ed.2d 1 (1983), the United States Supreme Court declined to implement a rule calling for an automatic stay of execution where a petitioner's first habeas corpus petition had been involved. Similarly, the State of Florida submits that there is no justification for an automatic stay of execution merely because a 3.850 motion and a habeas petition has been filed. The state

further submits that the instant case is not one which calls for the granting of a stay of execution.

III.

Pursuant to his first claim for relief, petitioner contends that appellate counsel was ineffective in failing to brief the trial court's denial of his motion for judgment of acquittal with regard to premeditated murder. Had counsel briefed the issue, he would have been wasting his time. Apparently, appellate counsel correctly recognized that the evidence to support petitioner's conviction of first degree murder was sufficient regardless of whether it was pursuant to a premeditated design or as a felony murder. This Court has repeatedly held that appellate counsel's not briefing an issue without merit is simply not a deficient performance for the purposes of Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) (establishing tests for the effective assistance of counsel); Evitts v. Lucy, ___ U.S. ___, 105 S.Ct. 830, ___ L.Ed.2d ___ (1985) (applying Strickland test to appellate counsel). See e.g. Card v. State, 497 So.2d 1169, 1177 (Fla. 1986); Jackson v. Wainwright, 421 So.2d 1385 (Fla. 1982), cert. denied, 463 U.S. 1229, 103 S.Ct 3572, 77 L.Ed.2d 1412 (1983). Petitioner explicitly stated in the Tico letter that it was his intent to "liquidate" the officer because the officer had fired directly at him with a desire to kill all of them (R.1087). The death shot was a perfect soldier's shot. Petitioner had been a soldier. He was using a weapon configured like the one he had used in battle. He had practiced with that very same weapon earlier in the day. And, presumably, Officer Howell was illuminated by the interior lights of his car that had come on when he opened the door and started to get out. The jury had every reason to check the premeditated box. Appellate counsel had absolutely no reason to pursue an issue that, in light of this record, would be at best frivolous.

To the extent that collateral counsel seeks to raise this claim as an independent claim separate and apart from his

ineffective assistance of appellate counsel claim, he has failed to heed the admonition of this Court to his office that habeas corpus in the appellate court is not to do service as a second or substitute appeal. White v. Dugger, 511 So.2d at 555; Blanco v. Wainwright, 507 So.2d at 1384.

IV.

As his second claim for habeas relief, petitioner presents a claim which is classically not available for habeas corpus review. He now asserts, as he has at trial, on direct appeal, and again in his 3.850 motion, that the trial court should not have permitted the jury to consider "doubled" aggravating circumstances. In essence, because petitioner quarrels with the result reached by this Honorable Court on direct appeal, he now attempts to invite this Court to revisit the claim. As this Court pointed out in Blanco, supra at 1384, "habeas corpus is not a vehicle for obtaining a second appeal of issues which were raised . . . on direct appeal . . . ."

V.

For his third claim on the merits in this action, petitioner submits a claim that is virtually identical to the thirteenth claim he presented in his application for relief to the trial court pursuant to Rule 3.850. The state refers the Court to paragraph XII of its response in opposition to application for stay of execution and response in opposition to motion to vacate judgment and sentence commencing at page 16 thereof. A copy of which is attached as Exhibit A. Capital collateral counsel has failed to heed the lesson of Blanco that habeas corpus in the appellate court is not a form for litigating a claim that trial counsel was ineffective and that appellate counsel cannot be faulted for raising the claim and preserving the "more effective remedy" available pursuant to Rule 3.850. Id. at 1384.

VI.

Petitioner's fourth claim that this Honorable Court's opinion approving the finding of the aggravating factor that Suarez knowingly created a great risk of death to many persons, is yet another example of a claim which is clearly not cognizable on habeas review. Again, petitioner takes issue with the explicit findings of this Court rendered on direct appeal. As aforesaid, yet emphasized again because of the clear applicability of the precedent, "habeas corpus is not a vehicle for obtaining a second appeal of issues which were raised on direct appeal." Blanco, supra. Thus, it is clear that this Honorable Court should not entertain this claim on habeas review. See also Martin v. Wainwright, 497 So.2d 872, 873-874 (Fla. 1986).

VII.

As his fifth claim, petitioner asserts a claim which is classically available on direct appeal, to wit: the question of proportionality. Once again, your respondent asserts that this claim is not cognizable on habeas review. This is clearly a claim that could have and should have been raised on direct appeal and, therefore, habeas review is unavailable. Blanco, supra. In any event, it should be noted that this Honorable Court upheld the trial court's finding of three aggravating circumstances and also determined that the trial court, in finding no mitigating circumstances, was not obliged to do so. It is clear that, in accordance with established precedent of this Court, the death penalty imposed in the instant case was proportionally warranted.

VIII.

As his sixth claim, petitioner combines two claims which have been presented to the trial court in petitioner's 3.850 motion. This Court will not review on habeas those issues which are properly cognizable in 3.850 proceedings. Again, petitioner

overburdens this Court with paperwork where an available remedy is available, to wit: direct appeal of the denial of a 3.850 motion. In addition, these claims could have been presented on direct appeal and, to that extent, this Honorable Court will deny habeas relief. Blanco, supra.

With respect to the first part of his argument concerning the alleged failure of the trial court to independently weigh the aggravating and mitigating circumstances, it is clear that, were this issue cognizable for habeas review, no relief would be forthcoming. In King v. State, 390 So.2d 315 (Fla. 1980), cert. denied, 450 U.S. 989, 101 S.Ct. 1529, 67 L.Ed.2d 825 (1981), this Honorable Court held that there is no legal reason why the trial judge may not deliberate on sentencing concurrently with the jury. Here, as in King, the trial court entered its written findings specifically setting forth the aggravating and mitigating circumstances applicable in this case. See also, Randolph v. State, 463 So.2d 186, 192 (Fla. 1984).

As he did in his 3.850 motion, petitioner also contends that the trial court erred in failing to consider the lack of prior convictions in mitigation of the death penalty. This again is a claim that should have been raised on direct appeal and the failure to do so precludes habeas review. Contrary to the assertions of petitioner, this claim does not constitute fundamental error. Also, petitioner gratutiously asserts that this fundamental error was not raised on direct appeal due to the ineffective assistance of appellate counsel. This assertion is identical to the one rejected by this Court in Blanco, supra at 1384. An allegation of ineffective counsel does not circumvent the rule that habeas proceedings do not constitute a second or substitute appeal. In any event, petitioner's ineffective assistance of appellate counsel claim must fail for several reasons. First of all, trial counsel did not argue or request an instruction on the mitigating circumstance of no significant history of prior criminal activity. Therefore, this claim could not have been raised on appeal by appellate counsel. Secondly,

had this claim been preserved for appellate review and raised on appeal, it is clear that Suarez would not have prevailed on appeal. In support of this assertion we respectfully refer this Honorable Court to a review of paragraph XXVII, at page 44 of our response to the 3.850 motion (attached herewith as Exhibit A). Had trial counsel asserted the mitigating circumstance of no significant history of criminal activity, the state would have been permitted to offer evidence of the other crimes committed by Suarez. To this extent, trial counsel acted reasonably by keeping these other armed robberies from the jury. Inasmuch as there was evidence available to the state to negate the statutory mitigating circumstance, appellate counsel could not have been ineffective for failing to raise the claim.

IX.

Under his seventh claim for relief before this Court, petitioner does not even characterize it as a deficiency on the part of appellate counsel but rather seeks to have the court address the statements that this Court found were given voluntarily and then used as impeachment in terms of the Sixth Amendment to the United States Constitution. Collateral review is the first time that the matter has been raised in terms of a Sixth Amendment claim. When the matter was first raised in the trial court, it was raised only in the most general terms by the Monaco motion to suppress (R.128-129) and as a violation of the disciplinary rule in the Martin motion to suppress (R.162). On appeal, counsel briefed the issue in terms of the disciplinary rule. See, Issue II in Appellant's Brief on direct appeal. It is, therefore, clear that the issue urged here, that statements of a defendant may not be used for impeachment purposes in the absence of a waiver of Sixth Amendment rights that meets the Johnson v. Zerbst, 304 U.S. 458 at 464 standard. The claim has been procedurally defaulted.

To the extent that the issue is properly raisable at all, it is raisable in the application for Rule 3.850 relief. And,

indeed, petitioner has raised virtually the identical issue in his application for relief pursuant to Rule 3.850. It was his sixth claim for relief in that pleading. The state's response to it in the trial court appears in Exhibit A, paragraph X, commencing at page 15 of the state's response. As with previous and succeeding issues in his application for relief, it is clear that capital collateral counsel has failed to heed this Court's admonitions as they were set out in White and Blanco. Collateral counsel's actions in this regard show that he continues to squander his resources at the very time he is claiming poverty in another proceeding before this Court.

X.

For his eighth claim in support of his application for habeas corpus, petitioner asserts yet another claim that he set forth in his application for relief to the trial court pursuant to Rule 3.850. He claims that he was forced to take the stand in violation of his Fifth Amendment right not to be compelled to testify against himself. Petitioner does not even try to assert that counsel was ineffective for not raising it but simply tries to get a second appeal and raise the issue here. It is not appropriate for habeas corpus relief as this Court has clearly ruled in Blanco and White. Furthermore, as the state explained in the trial court, the record doesn't even support the existence of the claim. See, Exhibit A, paragraph XI, at page 16. Cf. Luce v. United States, 469 U.S. 38, 105 S.Ct. 460, 83 L.Ed.2d 443 (1984) (defendant not permitted to raise on appeal question presented to the trial court by way of motion in limine where he had failed to take the stand and thus set the predicate for the claim he had made in limine).

XI.

For his ninth claim in his application for habeas corpus relief, petitioner repeats the ninth point he urged in his application for relief to the trial court in his Rule 3.850

motion. With this claim, as with others, collateral counsel demonstrates his contempt for this Court's teachings in White and Blanco, that habeas corpus on appeal is not a substitute for an application for relief pursuant to Rule 3.850. The state's response to the Rule 3.850 is contained in Exhibit A at paragraph XIII, page 18 thereof.

Curiously, petitioner faults appellate counsel for failing to obtain a proper and correct instruction. Petitioner fails to explain how appellate counsel can obtain instructions. To the extent that counsel raises the matter as a claim that appellate counsel was ineffective for not briefing the issue, it is clear as set out in the response to the Rule 3.850 pleading that the matter was procedurally defaulted by trial counsel's failure to request an instruction and, as previously mentioned in this pleading, not pursuing an issue that is without merit (e.g. an issue that has been procedurally defaulted in the trial court, and can be pursued in the trial court by way of an attack on the effectiveness of trial counsel's representation) is not ineffective assistance of appellate counsel. See, e.g. Martin v. Wainwright, 497 So.2d 872, 874 (Fla. 1986). Here, as in Martin, the trial court gave the standard instruction and there was no objection or a request for a different instruction. Just as the failure to raise the change in the insanity instruction in Martin was not ineffective assistance of appellate counsel, the failure to raise the changed instruction on self-defense in this case did not render appellate counsel ineffective.

In addition to those matters addressed to the trial court in Exhibit A, the state feels compelled to point out that appellate counsel apparently correctly recognized that the jury's return of a verdict of guilty on the robbery rendered the absence of an instruction like that adopted in Florida Bar Re Standard Jury Instructions (Criminal Cases), 477 So.2d 985, 1000 (Fla. 1985), was harmless beyond a reasonable doubt. Section 776.041, Florida Statutes (1983), like the current version of the statute, precludes a person who is escaping from the commission of a

forcible felony, a robbery, from claiming the benefit of a self-defense as justification for any force he may choose to use. The court instructed the jury on this issue of law (R.211). Accordingly, it is clear that the absence of the instruction he now urges should have been given not only did not prejudice petitioner but was harmless beyond a reasonable doubt. The jury's finding of robbery precluded any finding of justification on account of self-defense.

XII.

Once again in his claim ten, petitioner presents an issue which should have and could have been raised on direct appeal and in any event, was raised in his 3.850 motion. It is once again clear that habeas relief is unavailable for this type of claim. Blanco v. State, supra. Petitioner basically contends that the trial court should have, on its own motion, granted a mistrial when severence was granted to the co-defendants. Even if this claim was properly before this Court, it is clear that there is no authority for the proposition that a mistrial is automatically warranted upon severence. Indeed, collateral counsel offers no authority in support of his proposition. In any event, it is clear that this is an issue which could have and should have been raised on direct appeal and habeas review is, therefore, procedurally barred.

XIII.

For his eleventh claim in his application for habeas corpus relief, petitioner reiterates the thirteenth claim of his application for relief to the trial court pursuant to Rule 3.850 of the Florida Rules of Criminal Procedure. The state's response is contained in Exhibit A, at paragraph XVII, page 23 thereof. There, it was styled as a claim for relief as ineffective assistance of counsel. Here, apparently the claim is urged in the nature of a claim trying to get a second appeal. As with other issues, capital counsel flaunts the teaching of Blanco and

White that habeas corpus on appeal is not to do service as a second appeal.

XIV.

As his twelfth and last claim for habeas relief, petitioner asserts a claim that is identical to his claim XV of his 3.850 motion. The habeas claim and the 3.850 claim are identical with the exception of the last sentences thereof. In the trial court, petitioner requests an evidentiary hearing and 3.850 relief whereas before this Court petitioner gratuitously asserts that it was ineffective assistance of appellate counsel when counsel failed to raise on appeal the failure to change venue. This claim concerning the denial by the trial court of a motion for a change of venue is a classic issue for presentation on direct appeal. Therefore, pursuant to Blanco v. State, supra, and the other authorities cited herein, it is clear that this issue is not cognizable for habeas review. Collateral counsel's attempt to construct an ineffective assistance of appellate counsel claim based on this venue issue must fail. The teachings of Blanco, supra, and McCrae, supra, are clear that allegations of ineffective assistance of appellate counsel will not be permitted to serve as a means of circumventing the rule that habeas proceedings do not provide a second or substitute appeal. In any event, it is clear that a claim of ineffective assistance of counsel based on the failure to brief and argue the venue issue is not supported by the allegations of the pleadings filed herein. There is no claim that the jury, as constituted, was unable to accord Suarez a fair and reliable trial. Clearly, this claim must also fail.

WHEREFORE, your respondent respectfully requests this Honorable Court to deny all requests of petitioner for extraordinary relief.

Respectfully submitted,

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COUNSELS FOR RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to the Capital Collateral Representative, Independent Life Building, 225 W. Jefferson Street, Tallahassee, Florida 32301, this 31st day of May, 1988.

Robert J. Krauss

OF COUNSEL FOR RESPONDENT