IN THE SUPREME COURT OF FLORIDA

GREGORY ALAN KOKAL,

Petitioner,

v. CASE NO. 73,102

RICHARD L. DUGGER,

Respondent.
_____/

RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

Pursuant to Florida Rule of Appellate Procedure 9.100(h), Harry K. Singletary, successor to Richard L. Dugger as Secretary of the Florida Department of Corrections, responds to Kokal's petition for writ of habeas corpus, by and through undersigned counsel, and asks this Court to deny all requested relief.

PROCEDURAL HISTORY

Kokal was found guilty of first degree murder, by a Duval County jury, in October of 1984 (TR2 228). Following a sentence hearing, the jury unanimously recommended a death sentence (TR2 236). The trial judge imposed a death sentence, finding four aggravators: (1) murder during a robbery, (2) murder committed to avoid arrest, (3) murder was heinous, atrocious or cruel (HAC), and (4) murder was cold, calculated and premeditated (CCP) (TR2 254-56, 258).

Kokal appealed, raising three issues: (1) a contention that three of the four aggravators found by the trial court were not

supported by the evidence and that two of Kokal's mitigators had been improperly rejected; (2) a contention that the trial court had erred in admitting a knife found near Kokal at the scene of his arrest; and (3) a contention that the trial judge erred in denying Kokal's motion to suppress evidence. This Court affirmed both conviction and sentence. Kokal v. State, 492 So.2d 1317 (Fla. 1986). As to the evidence in aggravation, this Court held that Kokal's own statement to the effect that dead men can't talk confirms that the murder was committed to avoid arrest; that the HAC aggravator was shown by the events preceding the victim's death--the murder was preceded by a violent robbery, a march at gunpoint to the murder site and a vicious and painful beating during which the victim, in anticipation of his fate, unsuccessfully pleaded for his life; and that the facts of the case demonstrated beyond a reasonable doubt the heightened premeditation necessary to establish CCP. As to the mitigation, this Court noted that although the trial court had heard testimony from Kokal and his mother that he had abused drugs and alcohol up to and during the murder, the "specificity with which Kokal recounted the details of the robbery and murder to his friend contradicts the notion that he did not know what he was doing, as does the testimony of his companion." Id. at 1319. Therefore, the trial court did not abuse its discretion in failing to give significant weight to this evidence. This Court also found no merit to the claim that the

trial court had erred in not finding as mitigation that Kokal was only 20 and was immature.

As to Kokal's second point on appeal, this Court held that the admission of the knife found in the closet where Kokal had been hiding prior to his arrest was relevant evidence of flight, but even if it was not, its admission was harmless. Id. at 1320. As to Kokal's third point on appeal, this Court found that Kokal had failed to preserve for appeal any issue of the denial of the motion to suppress the murder weapon found in the truck Kokal had been driving shortly after the murder. Furthermore, the gun had been properly seized pursuant to impoundment and inventory of the truck following Kokal's apprehension for theft of gas, where he had produced drivers' licenses from three different states for three different individuals, and where the truck itself had been titled in a fourth state and Kokal could not tell the police where the owner was. Ibid.

Finally, this Court addressed an issue not raised on appeal by Kokal: The trial court had refused to strike for cause two prospective jurors who had indicated an ability to be fair and impartial on the question of sentence (one would always have voted for life, the other, death). The trial court had planned to allow the two to serve at the guilt phase and then replace them with alternates for the penalty phase. Although both prospective jurors were peremptorily challenged, rendering moot any issue of the

refusal to challenge for cause, nevertheless, the Court announced that it would adopt Justice Ehrlich's concurring opinion in Toole v. State, 479 So.2d 731 (Fla. 1985), condemning the practice of allowing sentence-biased jurors to serve at the guilt phase of the case.

On September 26, 1988, Kokal filed in this Court the instant habeas petition and, as well, filed in the trial court a motion for postconviction relief pursuant to Rule 3.850.

In this habeas petition, Kokal raises eight claims: (1) the trial court's refusal to excuse for cause jurors allegedly biased in favor of death, (2) the exclusion for cause of an allegedly qualified juror, (3) a claim that jurors were excused ostensibly on the basis of their attitudes about the death penalty, but in actuality on the basis or race, (4) the prosecutor argued lack of remorse, (5) a claim under Caldwell v. Mississippi, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985), (6) a complaint about the HAC instruction, (7) a claim that the jury was erroneously instructed that a life recommendation must be supported by majority vote, and (8) a claim that victim-impact evidence was improperly admitted.

In the 3.850 motion, as amended May 18, 1992, Kokal raised 14 claims: (1) noncompliance with Chapter 119, (2) a claim under Caldwell v. Mississippi, supra, (3) denial of effective assistance of counsel at the guilt and penalty phases of trial, (4) trial

counsel was ineffective for failing to develop and present mental health evidence, (5) the trial court failed properly to instruct the jury as to the definition of the aggravators, (6) victim-impact evidence was improperly admitted, (7) burden-shifting jury instructions at the penalty phase, (8) too many people sat on Kokal's grand jury, (9) improper prosecutorial argument, (10) judge erroneously instructed the jury that a life recommendation would have to be supported by majority vote, (11) prosecutor argued lack of remorse, (12) state withheld exculpatory evidence, (13) trial judge was not impartial, and (14) a claim of cumulative error.

Judge Carithers presided over the 3.850 proceedings. He found Claims 2, 5, 6, 7, 9, 10, 11, and so much of claim 3 as pertains to trial counsel's alleged failure to object to the HAC jury instruction to be procedurally barred. Order of July 30, 1996. Following a hearing, Judge Carithers found the remaining claims to be without merit. Judge Carithers' denial of 3.850 relief presently is on appeal to this Court (case no. 90,622), which will be argued simultaneously with the instant habeas.

ARGUMENT

CLAIM I: THE CLAIM THAT THE TRIAL JUDGE ERRONEOUSLY REFUSED TO EXCUSE FOR CAUSE JURORS WHO WERE BIASED IN FAVOR OF THE DEATH PENALTY

In his first claim for relief, Kokal contends that the trial court erred by denying his challenges for cause to three

prospective jurors (Thomas, Sutton, and Stafford) who, Kokal contends, were biased in favor of the death penalty. This is the kind of issue which could and should be raised on direct appeal, and is inappropriate for habeas. McCrae v. Wainwright, 439 So.2d 868, 870 (Fla. 1983) (habeas petition "should not be used as a vehicle for presenting issues which should have been raised at trial and on appeal"). In fact, this Court at least indirectly addressed this issue on direct appeal, sua sponte, when it addressed the fact that the trial court had announced its intention to seat jurors at the guilt phase who could not follow the law as to penalty (with the idea that the court would replace them for sentence). When this Court affirmed despite warning that such notion of seating and substituting sentence-biased jurors was "contrary to law," after noting that such jurors had been peremptorily challenged and, therefore, had not actually sat on the jury, this Court implicitly found that no prejudicial error had occurred. 492 So.2d at 1320. Thus, this claim is barred by the "rule that habeas corpus proceedings do not provide a second or substitute appeal" Johnson v. Wainwright, 463 So.2d 207, 209 (Fla. 1985).

Even if this claim was not effectively addressed on direct appeal, however, the claim would properly be before this Court on habeas, if at all, only to the extent that it presents a legitimate question of ineffectiveness of appellate counsel for failing to

present the issue properly on direct appeal. Kokal, however, cannot demonstrate such. He acknowledges that none of the three prospective jurors at issue here served on the jury, because, he alleges, trial counsel was "forced" to, and did, strike them peremptorily. Petition at 16 (citing to TR6 423).[1] An examination of the trial record shows that Kokal's trial counsel, Dale Westling, did in fact peremptorily strike prospective juror Sutton at TR6 420 and prospective juror Stafford at TR6 420-21. Prospective juror Thomas, however, actually was peremptorily struck by the state, at TR6 423. Nevertheless, although Kokal has misidentified who struck one of the prospective jurors (and, therefore, how many prospective jurors he was "forced" to strike), the record does support Kokal's acknowledgment that none of these three jurors actually sat on his jury.

In order to preserve for appeal an issue of the denial of a challenge for cause, a defendant must demonstrate, at a minimum, that a juror who was unsuccessfully challenged for cause "actually sat on the jury." Kearse v. State, 662 So.2d 677, 683 (Fla. 1995). This Kokal has not done. He acknowledges that none of the three prospective jurors at issue here actually sat on his jury, and he identifies no other prospective jurors who sat on the jury after having been unsuccessfully challenged for cause by the defense.

[1] For consistency, the State will cite to the original trial record by the same terminology as it did in its Answer brief in case no. 90,622 (the appeal from the denial of Kokal's 3.850 motion).

Therefore, this claim was not preserved for appellate review, and appellate counsel could not have been ineffective for failing to raise the issue on appeal. Chandler v. Dugger, 634 So.2d 1066 (Fla. 1994) (appellate counsel not ineffective for failing to raise nonmeritorious issue on appeal); Swafford v. Dugger, 569 So.2d 1264 (Fla. 1990) (same); King v. Dugger, 555 So.2d 355 (Fla. 1990) (same).

CLAIM II: THE CLAIM THAT THE TRIAL COURT ERRONEOUSLY EXCUSED FOR CAUSE A PROSPECTIVE JUROR WHO WAS OPPOSED TO CAPITAL PUNISHMENT BUT COULD FOLLOW THE LAW

Citing portions of the trial transcript out of their context, Kokal contends here that the trial court excused prospective juror Davis for cause merely because the juror "would think about the death penalty." Petition at p. 24. The State acknowledges that when the trial judge granted the State's challenge for cause, he stated: "I don't think he could put the death penalty out of his mind and I will sustain the challenge for cause." (TR5 159. However, when the court's ruling is considered in context, it is clear the court meant that the juror could not fairly decide the question of guilt because of his opposition to the death penalty; i.e., because Mr. Davis could not put his opposition to the death penalty out of his mind during the guilt phase, he could not follow the law at that phase of the trial. The record amply supports the trial court's conclusion.

At the outset, Mr. Davis stated that if given the choice, he would vote to abolish the death penalty (TR5 149). Moreover, he did not think he could vote to recommend a death sentence (TR5 152). He did state, initially, that he would "be able to return a verdict" of first-degree murder knowing the defendant would be exposed to the death penalty (TR5 150). However, he qualified that answer by stating that he would "rather" the State be required to "remove all doubt." In fact, upon consideration, he would "require" the state to remove all doubt (TR5 151). He stated that he just felt that "they could find ... another way, another doubt or whatever without having to use the death penalty" (TR5 152). On further examination, Mr. Davis reiterated that, at the guilt phase, he would hold the state to the burden of proving its case beyond all doubt, and his reason was that by doing so he might save the defendant from the electric chair (TR5 155). He was emphatic: he could not follow an instruction on reasonable doubt (TR5 155-56). Despite an attempt at rehabilitation by defense counsel, Mr. Davis did not waiver. In fact, he stated that, if the judge told him that the State had to do five things to convict, he would "try to put number six in there" (TR5 157). Asked why, he answered, "I just feel, you know, there could just be a possibility of proving, well, you know, that he not have to get the death chair" (TR5 158).

After all this, the trial court granted the State's challenge for cause. This ruling obviously was correct; because of his

opposition to the death penalty, the prospective juror could not apply the law properly at the guilt phase. Appellate counsel was not ineffective for failing to raise a nonmeritorious issue on direct appeal, and this claim provides no basis for habeas relief.

CLAIM III: THE CLAIM THAT THE TRIAL COURT DISMISSED PROSPECTIVE JURORS ON THE BASIS OF RACE

Here Kokal contends that the trial court excused prospective jurors on the basis of race, citing prospective jurors Babcock and Ashley, whose answers, he contends, cannot be explained on any basis other than race. This obviously is a matter that could and should have been raised on direct appeal. Habeas corpus is not an appropriate forum to litigate issues that could and should have been raised on direct appeal. E.g., Mills v. Dugger, 559 So.2d 578 (Fla. 1990). Kokal, however, contends that appellate counsel was ineffective for failing to raise this issue on direct appeal. But appellate counsel cannot be ineffective for not raising an issue that trial counsel did not preserve, and cannot be ineffective for failing to raise a nonmeritorious issue. Chandler v. Dugger, supra; Swafford v. Dugger, supra.

The State would note, first of all, that Kokal has not indicated how or where trial counsel preserved any issue that the trial judge had excused any potential jurors on the basis of race. Although the record does show that trial counsel objected to the court's excusal of prospective juror Ashley, counsel did not object

on the basis of any racial issue. In fact, counsel did not mention race at all (TR 270-71). Furthermore, although the record does show that Mr. Ashley was black, Kokal has cited no portion of the record identifying Mrs. Babcock's race, and the State is aware of none. Obviously, if Mrs. Babcock also was black, race could not possibly have been the "only real difference between the two" prospective jurors, as Kokal contends. Petition at 33.

Nevertheless, even if we assume that Mrs. Babcock and Mr. Ashley were of different races, it is not accurate to state, as Kokal does, that "[t]he only real difference between the two was their race." As a review of the trial transcript shows, although Mrs. Babcock stated that she could never vote to recommend a death sentence (TR5 185), she unequivocally stated that she could follow the law at the guilt phase and adhere to the reasonable doubt standard (TR5 187). The trial court concluded that Mrs. Babcock's answers disqualified her from serving only at the penalty phase; he denied the State's motion to excuse her because--as noted above (Claim I)--he had the notion that anti-death jurors could serve at the guilt phase and then be substituted with an alternate at the penalty phase. (Two justices of this Court agreed with the trial judge on this point. Kokal v. State, supra, 492 So.2d at 1321.) Hence, the trial judge stated that he would "seat Mrs. Babcock during the guilt phase; she will be replaced with an alternate during the penalty phase" (TR5 188).

Mr. Ashley, on the other hand, apparently could not follow the law in either phase. Not only did he express his general inability to recommend a death sentence, stating that he would "vote for life or something like that but not for death" (TR5 269), but he was unable to say whether or not he could return a verdict of guilty, knowing the defendant might thereafter be sentenced to death (TR5 270). Although, as the trial court noted, Mr. Ashley's answers were equivocal (TR5 271), the Court was certainly authorized to conclude that his answers indicated that his opposition to the death penalty would interfere with his ability to be a fair and impartial juror at either phase of the trial. Wainwright v. Witt, 469 U.S. 412, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985).

Thus, Mr. Ashley's answers were not, as Kokal now contends for the first time, similar to Mrs. Babcock's. This issue is both unpreserved and nonmeritorious, and appellate counsel was not ineffective for failing to raise it on direct appeal. Groover v. Singletary, 656 So.2d 424, 425 (Fla. 1995). See, also, Blanco v. Wainwright, 507 So.2d 1377, 1384 (Fla. 1991) ("an allegation of ineffective counsel will not be permitted to serve as a means of circumventing the rule that habeas corpus proceedings do not provide a second or substitute appeal").

CLAIM IV: THE CLAIM THAT THE PROSECUTOR IMPROPERLY ARGUED REMORSE

Here, Kokal complains about brief references to his lack of remorse in the prosecutor's closing arguments at both the guilt phase and the penalty phase. There was no objection to the penalty-phase argument, and any issue as to the penalty-phase argument was not preserved for appellate review. Pangburn v. State, 661 So.2d 1182, 1187 (Fla. 1985). Appellate counsel could not have been ineffective for not raising an unpreserved issue. Moreover, the reference to remorse was very brief and, especially in light of evidence that Kokal had "wasted" a man for a dollar because "dead men can't tell lies," and that he planned to do it again to get enough money to flee to Canada, any reference to a lack of remorse was of minor consequence and was, at most, harmless error. Shellito v. State, 22 Fla. L. Weekly S554 (Fla. Sept. 11, 1997).

Trial counsel did object to the guilt-phase reference to Kokal's lack of remorse. However, any issue concerning this portion of the prosecutor's argument should have been raised, if at all, on direct appeal. It was not. Kokal is not entitled to a second chance to appeal this issue unless he can demonstrate that appellate counsel's omission to raise this issue on appeal was "of such magnitude as to constitute a serious error or substantial deficiency falling measurably outside the range of professionally acceptable performance and, second, [that] the deficiency in

performance compromised the appellate process to such a degree as to undermine confidence in the correctness of the result." Pope v. Wainwright, 496 So.2d 798, 800 (Fla. 1986). Appellate counsel's failure to raise on appeal any issue about the prosecutor's lone, one-word mention of Kokal's lack of remorse, during an otherwise proper, lengthy guilt-phase argument, does not meet the above standard. "Although appellate counsel could have raised this point on direct appeal, he cannot be deemed ineffective for failing to do so. As this Court has noted, appellate counsel need not raise every conceivable claim." Hardwick v. State, 648 So.2d 100, 106 (Fla. 1994). As in Hardwick, in light of the totality of the evidence against Kokal, including his fingerprint on the murder weapon, the blood on his shoes, his possession of the victim's identification after the crime, his confession to a friend, and his plan to flee the area after committing the same kind of crime again, "appellate counsel could have reasonably concluded that the point had no merit." Ibid.

CLAIM V: THE CALDWELL CLAIM

In this claim, Kokal contends that his death sentence must be vacated because his sentencing jury allegedly was misadvised as to its role in sentencing, in violation of Caldwell v. Mississippi, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985). He acknowledges that trial counsel did not object to any of the

comments now at issue. Petition at 45. Therefore, this claim is procedurally defaulted. Bottoson v. State, 674 So.2d 621, 622 fn. 1 (Fla. 1996). Moreover, this Court has held repeatedly that claims of this nature are not cognizable on habeas. See, e.g., Squires v. Dugger, 564 So.2d 1074 (Fla. 1990); Correll v. Dugger, 558 So.2d 442 (Fla. 1990). Furthermore, when such claims have been raised on direct appeal, this Court has repeatedly rejected them. Johnson v. State, 660 So.2d 637, 647 (Fla. 1995).

Nothing raised here warrants the grant of habeas relief.

CLAIM VI: THE JURY INSTRUCTIONS AS TO THE HAC AGGRAVATOR

In this claim, Kokal contends that the trial court failed to instruct the jury properly as to the heinous, atrocious or cruel aggravator. Trial counsel, however, registered no objection to the wording of the HAC instruction. Therefore, this claim is procedurally barred. Hardwick v. Dugger, 648 So.2d 100, 103, 105 (Fla. 1994) (both 3.850 claim and identical habeas claim which challenged "the sufficiency of the jury instructions on the CCP and HAC aggravating factors, [were] procedurally barred because trial counsel raised no objections to the wording of the instructions"); Kennedy v. Singletary, 602 So.2d 1285 (Fla.), cert. denied, 505 U.S. 1233, 113 S.Ct. 2, 120 L.Ed.2d 931 (1992) (claim that HAC instruction was insufficient was procedurally barred when raised for first time on habeas); Lambrix v. Singletary, 641 So.2d 847

(1994). See also Lambrix v. Singletary, 137 L.Ed.2d 771 (1997) (holding that even if such claim is not procedurally barred, rule announced in Espinosa v. Florida, 505 U.S. 1079, 112 S.Ct. 2926, 120 L.Ed.2d 854 (1994), was a "new rule" that is not available to prisoner whose conviction was final before Espinosa was decided).

The State would suggest that this claim is procedurally barred not only because there was no objection at trial and it was not raised on direct appeal, but also because this claim should have been - and was - raised on 3.850 (Claim V). Habeas corpus petitions "are not to be used for additional appeals on questions which could have been, should have been, or were raised on appeal or in a rule 3.850 motion." Parker v. Dugger, 550 So.2d 459, 460 (Fla. 1989). This proposition applies with special force here because not only did the trial judge in the 3.850 hearing find this claim to be procedurally barred, Order Regarding Necessity of Evidentiary Hearing, dated July 30, 1996, but, as examination of the brief in the companion appeal from the denial of 3.850 (case no. 90,622) shows, Kokal has not appealed that determination. He is therefore in no position to argue in this habeas proceeding that this claim is not procedurally barred.

In any event, even if not procedurally barred, any jury instruction error as to HAC would be harmless beyond a reasonable doubt in light of the evidence. Kennedy v. Singletary, supra. As this Court noted on direct appeal, the murder was carried out with

a “high level of visceral viciousness;” the evidence shows that “the murder was preceded by a violent robbery, a march at gunpoint to the murder site, and a vicious and painful beating during which the victim in anticipation of his fate, unsuccessfully pleaded for his life.” Kokal v. State, supra, 492 So.2d at 1319.

This claim is both procedurally barred and without merit.

CLAIM VII: THE CLAIM THAT THE TRIAL COURT ERRED BY INSTRUCTING THE JURY THAT A LIFE RECOMMENDATION MUST BE BY MAJORITY VOTE

This is another procedurally barred claim, repetitive of a claim which was raised in Kokal’s 3.850 motion (Claim X) and found in the 3.850 proceedings to be procedurally barred. Order Regarding Necessity of Evidentiary Hearing, dated July 30, 1996. As in the preceding claim, the 3.850 court’s determination of procedural bar has not been appealed.

In any event, the record clearly shows that trial counsel did not object to the jury instructions at issue here and appellate counsel did not raise the issue on direct appeal; thus this claim is procedurally barred. Moreover, even if not barred, it is without merit. The premise of this claim is that, under Florida law, a tie vote of six to six by the jury on the penalty automatically results in a recommendation of life. Rose v. State, 425 So.2d 521, 525 (Fla. 1982). The trial court clearly stated to the jury that “if by six or more votes the jury determined that

Gregory Kokal should not be sentenced to death, your advisory sentence would be, the jury advises and recommends to the Court that it impose the sentence of life imprisonment upon Gregory Kokal" (TR9 913-14). The fact that the trial court thereafter told the jury that when "seven or more are in agreement as to what sentence should be recommended to the Court, that form of recommendation should be signed by your foreman and returned to the court" (TR9 915) was not so inconsistent with the court's previous instructions that the jury could have been misled to Kokal's prejudice. Moreover, it is notable that in Rose v. State, supra, the trial court had given an "Allen" charge to the jury after it had reported that it was tied six to six. In this case, there was no "Allen" charge, and the jury's death recommendation was unanimous (TR9 917). "Absent some evidence to suggest that petitioner's jury was confused or divided six to six, petitioner cannot prevail on his claim that the instructions improperly misled the jury to believe a majority vote was required to impose a life sentence." Bush v. Singletary, 988 F.2d 1082, 1089 (11th Cir. 1993).

This claim presents no basis for habeas relief.

CLAIM VIII: THE VICTIM IMPACT CLAIM

This claim is procedurally barred for failure to object at trial or raise it on direct appeal. Moreover, even before the

United States Supreme Court issued its decision in Payne v. Tennessee, 501 U.S. 808, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991), it was not error merely to mention the victim: "The fact that there is a victim, and facts about the victim properly developed during the course of the trial, are not so far outside the realm of 'circumstances of the crime' that mere mention will always be problematic. It is not necessary that the sentencing decision be made in a context in which the victim is a mere abstraction." Brooks v. Kemp, 762 F.2d 1383, 1409 (11th Cir. 1985). Furthermore, even if the prosecutor's argument had been objectionable under pre-Payne law, Kokal cannot demonstrate any prejudice unless the argument was objectionable under present law. Lockhart v. Fretwell, 506 U.S. 364, 113 S.Ct. 838, 122 L.Ed.2d 180 (1993). Under Payne, and under § 921.141 (7) Fla. Stat., evidence may be introduced, and the prosecutor may argue, concerning "the victim's uniqueness as an individual human being and the resultant loss to the community's members by the victim's death." No more than that occurred here, and appellate counsel could not have been ineffective for failing to raise this procedurally-barred and meritless issue on direct appeal.

This claim should be denied.

CONCLUSION

For all the foregoing reasons, Respondent would ask this Court to deny the petition for writ of habeas corpus and all relief requested therein.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Jefferson Morrow, 1301 Riverplace Boulevard, Suite 2600, Jacksonville, Florida 32207, this ___th day of December, 1997.

_____
CURTIS M. FRENCH
Assistant Attorney General