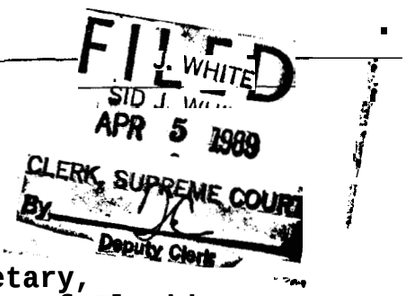
IN THE SUPREME COURT OF FLORIDA

NO. 73,360



AMOS LEE KING, JR.,

Petitioner,

v.

RICHARD L. DUGGER, Secretary,
Department of Corrections, State of Florida

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

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

ROBERT J. KRAUSS
Assistant Attorney General
Florida Bar #: 238538
1313 Tampa Street, Suite 804
Park Trammell Building
Tampa, Florida 33602
(813) 272-2670

COUNSEL FOR RESPONDENT

IN THE SUPREME COURT OF FLORIDA

AMOS LEE KING, JR.,

Petitioner,

v.

RICHARD L. DUGGER, Secretary, Department of Corrections, State of Florida,

Respondent.

Case No. 73,360

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

COMES NOW the respondent, Richard L. Dugger, Secretary, Department of Corrections, State of Florida, by and through the undersigned assistant attorney general, and hereby files this response in opposition to the petition for a writ of habeas corpus previously filed herein by petitioner, Amos Lee King, Jr., 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 o this Honorable Court to entertain a petition for a writ of habeas corpus where such petition presents cognizable matters. However, the instant habeas petition prepared on behalf of Mr. King 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 claim 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 from the denial of the Rule 3.850 motion. 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 this Court has 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. Wainwright, 505 So.2d 425 (Fla. 1987). Thus, to the extent that petitioner is again asking this Court to exercise its

---

[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.

jurisdiction over issues not legally cognizable on habeas review, this Court should decline to do so.

II.

In his petition for writ of habeas corpus, King raises six claims for relief. Each claim for relief will be discussed below in the order presented by petitioner:

Claim I: As his first claim for relief, petitioner contends that the precepts of Caldwell v. Mississippi, 472 U.S. 320 (1985), were violated by certain statements made by the trial judge and prosecutors during the course of trial. To the extent that petitioner is seeking relief on the merits of this claim, your respondent submits that this is inappropriate where this is the type of claim which could have been raised on direct appeal but was not. The United States Supreme Court has recently recognized that this Honorable Court has, with regard to Caldwell claims, faithfully applied its procedural bar rule to claims not raised on direct appeal. Dugger v. Adams, __ U.S. __, __ S.Ct. __, __ L.Ed.2d __ (Case No. 87-121, Opinion filed Feb. 28, 1989) [44 Cr.L. 3162, 3165, fn.6]. In addition, this claim has been raised in petitioner's 3.850 motion which is currently pending before the Sixth Judicial Circuit Court in and for Pinellas County. Thus, this claim, as to its merits, is inappropriate for habeas review. See authorities cited in paragraph I, supra.

The only properly cognizable matter with respect to the Caldwell claim which is presently before this Court via the habeas petition is the question of whether appellate counsel was ineffective by failing to raise the Caldwell claim on direct appeal. Your respondent acknowledges that objections were made at trial by Baya Harrison, Esquire, counsel for petitioner both at trial and on appeal, concerning statements made by the prosecutor which tended to lessen the role of the jury. Therefore, this issue was preserved for appellate review but was not briefed. Thus, the question to be resolved is whether reasonably effective appellate counsel would have briefed the Caldwell claim. For the various reasons expressed below, your

respondent submits that Mr. Harrison acted as reasonably effective counsel during the appellate proceedings before this Honorable Court.

Although there is a constitutional right of effective assistance of counsel on the first appeal taken as a matter of right, Evitts v. Lucey, 469 U.S. 387, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985), there is no constitutional duty to raise every non-frivolous issue. Jones v. Barnes, 463 U.S. 745, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983). The failure of appellate counsel to brief issues he reasonably considers to be without merit is not ineffective assistance of counsel. Alvord v. Wainwright, 725 F.2d 1282, 1291 (11th Cir.), cert. denied, 469 U.S. 956, 105 S.Ct. 355, 83 L.Ed.2d 291 (1984). An examination of the Caldwell claim in the instant case reveals that appellate counsel rendered reasonably effective assistance of counsel even with the omission of the Caldwell claim.

During the pendency of the most previous death warrant signed in petitioner's case, collateral counsel for petitioner requested Mr. Harrison to sign an affidavit concerning the Caldwell claim. That affidavit was attached to the petition for writ of habeas corpus and is presently filed with this Honorable Court. Upon your respondent being ordered to show cause why relief should not be granted in this matter, Mr. Harrison set forth his reasons why the Caldwell claim was not briefed on appeal via an affidavit which is attached herewith and incorporated herein. In paragraph 6 of that affidavit, Mr. Harrison advises that he signed the original affidavit propounded by capital collateral representative because such affidavit "was needed only to assure the review in court that the undersigned had not willfully declined to raise the issue in order to later set up a phoney ineffective claim." After further reflection, and as set forth in his affidavit, Mr. Harrison had several reasons for not including the Caldwell claim in his direct appeal from the resentencing of petitioner. An examination of the affidavit recently prepared by Mr. Harrison readily reveals that

a conscious choice not to raise the claim was made and that choice was reasonable.

Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), is particularly instructive when considering the choices that counsel has to make in representation of a particular client. Strickland makes it clear that where counsel reasonably investigates a particular matter and then, in the exercise of reasonable professional judgment, determines not to pursue the particular matter, counsel's decision is virtually unchallengeable. As can be seen from the affidavit prepared by Mr. Harrison, considered choices were made and a reasonable determination was reached that the Caldwell issue was not a viable one to present to this Court. Indeed, Mr. Harrison's choice is more than reasonable when the Caldwell claim is analyzed in historical perspective. As recently determined by the United States Supreme Court in Dugger v. Adams, supra, a claim under Florida law that the jury's role had been denigrated was available for many years and, therefore, was available at the time Mr. King was resentenced. Indeed, Mr. Harrison made several objections to comments made by the prosecutors which might have denigrated the jury's role. However, upon reflection of all that occurred at trial and as set forth in his affidavit, Mr. Harrison made a reasoned, considered decision not to raise the Caldwell claim. It would be fruitless for undersigned counsel to reiterate the precise reasons given by Mr. Harrison for they are included within his affidavit. Needless to say, your respondent adopts the affidavit of Mr. Harrison and the reasoning therein.

This Honorable Court has held that when dealing with the claim of ineffective assistance of appellate counsel, the first question to be considered is whether counsel made an error so serious as to constitute a substantial deficiency outside the range of professionally accepted performance and secondly whether that deficiency compromised the appellate process to such a degree as to undermine confidence in the correctness of the result. See Pope v. Wainwright, 496 So.2d 798 (Fla. 1986), cert.

denied, __ U.S. __, 107 S.Ct. 1617, 94 L.Ed.2d 801 (1987); Suarez v. Duqqer, 527 So.2d 190 (Fla. 1988); Strickland v. Washinqton, supra. Given the circumstances of the instant case, it is inconceivable that Mr. Harrison acted less than effectively. Even if the Caldwell claim was raised on the merits, this Honorable Court has previously held that the claim is without merit in Florida. Grossman v. State, 525 So.2d 833 (Fla. 1988), cert. denied, __ U.S. __, __ S.Ct. __, __ L.Ed.2d __ (Case No. 88-5136, filed March 6, 1989) [44 Cr.L. 41921; Combs v. State, 525 So.2d 853 (Fla. 1988). If, indeed, this Honorable Court found the Caldwell claim to have no merit, the failure of appellate counsel to brief an issue which is without merit is not a deficient performance which falls measurably outside the range of professionally acceptable performance. Suarez v. State, supra; Card v. State, 497 So.2d 1169 (Fla. 1986).

In conclusion, Mr. Harrison acted as an effective appellate advocate when he argued petitioner's cause before this Court. As noted in his affidavit attached herewith, Mr. Harrison deemed it advisable to focus on the issues which he thought might result in a better chance of reversal. This type of appellate advocacy is more than reasonable and, indeed, has been recognized as effective by the United States Supreme Court. See Jones v. Barnes, supra.

Claim II: Petitioner next raises a claim concerning the alleged violation of Hitchcock v. Dugger by virtue of the trial court's preclusion of petitioner from presenting evidence of "whimsical doubt" as a nonstatutory mitigating circumstance. By raising this claim, collateral counsel has chosen to disregard the admonition of this Court to capital collateral representative that habeas corpus in the appellate court is not to do service as a second or substitute appeal. White v. Duqqer, 511 So.2d 554, 555 (Fla. 1987); Blanco v. Wainwright, 507 So.2d 1377, 1384 (Fla. 1987). This issue concerning "whimsical doubt" was one of the issues relied upon by Mr. Harrison in his direct appeal from the resentencing proceedings. This claim has been litigated and petitioner is not entitled to a second bite of the apple.

Additionally, even if this claim were cognizable in this proceeding, petitioner's point would be rejected. Subsequent to this Honorable Court's decision rendered on appeal from the resentencing proceedings, the United States Supreme Court had occasion to consider the question of "whimsical", "residual", or "lingering" doubt in the context of mitigating circumstances. In Franklin v. Lynaugh, 487 U.S. 108 S.Ct. __, 101 L.Ed.2d 155 (1988), the plurality opinion authored by Justice White specifically rejects the notion that a capital defendant has a constitutional right to demand jury consideration of residual doubts in the sentencing phase. Justice White discussed the decision in Lockhart v. McCree, 476 U.S. 162, 106 S.Ct. 1758, 90 L.Ed.2d 137 (1986), and observed that where states permit consideration of residual doubts, such doubts will inure to that defendant's benefit. However, there is no constitutional requirement that states must accord capital defendants the benefit of residual doubt. To the contrary, the State of Florida has unequivocally established that lingering doubt is not to be considered a mitigating circumstance in this state. King v. State, 514 So.2d 354 (Fla. 1987), cert. denied, __ U.S. __ (June 30, 1988). Therefore, even if this claim were cognizable, petitioner would be entitled to no relief.

Claim 111: Once again, petitioner seeks to obtain a second appeal in order to raise an issue which was not raised on direct appeal from the resentencing proceedings. Again, the attempt to acquire a second appeal is not sanctioned by this Honorable Court. See authorities cited in paragraph I, supra.

Nor could appellate counsel be deemed ineffective for failing to raise this claim. The precedent of this Court with respect to the question of age as a mitigating circumstance is numerous and will not be set forth herein. It is axiomatic beyond the need for citation that the age of 23 years is not, unless combined with some element of retardation or other mental deficiency, sufficient to support the statutory mitigating circumstance.

Your respondent submits that it is not legally significant that the original trial judge found age to be a mitigating circumstance. On resentencing, the successor judge had the duty to independently analyze the evidence before him to determine whether aggravating and mitigating circumstances existed and had a further duty to independently weigh the factors to determine the appropriateness of the sentence. A trial judge is not obliged to find mitigating circumstances. Suarez v. State, 481 So.2d 1201 (Fla. 1985), cert. denied, 476 U.S. 1178 (1986). Certainly, the defendant would not be arguing that a successor judge has to find aggravating circumstances if a previous judge had found them to exist. Here, the successor judge complied with the applicable provisions of law and independently determined whether a sentence of death was appropriate. Therefore, inasmuch as this claim would not have succeeded on appeal, appellate counsel cannot be ineffective for failing to raise it. Additionally, even had this claim been raised, it is clear that the five (reduced to four by this Court) aggravating circumstances would not have been outweighed by a finding of age as a mitigating factor. Therefore, the sentence of death is appropriate and no relief would have been forthcoming to petitioner.

Claim IV: Petitioner's next claim concerns the purported failure of the trial court to permit testimony from the executive director of the Florida Parole and Probation Commission pertaining to parole opportunities for petitioner. This claim is included within the 3.850 motion presently before the trial court and is, therefore, a claim which is not cognizable in a habeas proceeding. See Blanco v. Wainwright, supra. Additionally, this is the type of claim which should have been raised on direct appeal and the failure to do so precludes collateral review, either via 3.850 or habeas corpus. See, e.g., White v. Duqqer, supra.

Nor can appellate counsel be found to have rendered less than reasonably effective assistance of counsel by failing to

raise this claim on direct appeal. The jury was properly instructed concerning the alternative punishment to death, to wit: 25 years imprisonment without the possibility of parole. That jury instruction was accurate and adequately informed the jury of the permissible alternative sentence to death. On this basis alone, appellate counsel was correct in not raising this issue. Additionally, even if this claim had been raised it is clear that no relief would be forthcoming. The claim now raised by petitioner is, at best, speculative. Reversible error cannot be predicated on conjecture or speculation. Sullivan v. State, 303 So.2d 632 (Fla. 1974). Changes in law may affect petitioner's parole consideration, as could petitioner's performance and attitude while in prison. Your respondent submits that Mr. Harrison acted as reasonably effective counsel by failing to raise this speculative point and instead, concentrating on the few strong issues which he believed might lead to reversal.

Claim V: Again, petitioner raises a claim that was squarely presented and determined in the appeal from the resentencing proceedings. 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 . . . ."

Claim VI: Petitioner's final claim is one which is not cognizable in a habeas proceeding. A review of the record of the resentencing proceedings reveals that no objection was made to any of the matters now complained-of. Therefore, this point could not have been argued on appeal and, therefore, appellate counsel was not ineffective for failing to raise a claim which was clearly procedurally barred. Even if this claim had been properly preserved it is clear that petitioner would have been entitled to no relief. As aforementioned in this response, a trial judge is not obliged to find mitigating circumstances.

Petitioner complains that the trial court used non-record evidence yet this is not the case. The matters relied upon by the trial court occurred during the proceedings and indeed were commented upon by defense counsel (R 1230-1231). There does not appear to be any prohibition of a trial judge considering the character of the defendant as displayed during the course of the proceedings. Thus, because petitioner's claim has no merit, appellate counsel could not have been ineffective for failing to raise the claim. Collateral counsel's attempt to construct an ineffective assistance of appellate counsel claim based on this "non-record" evidence 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. There is no allegation in this claim that but for the trial court's discussion of petitioner's activities during trial the death sentence would be inappropriate. Thus, there is no basis for relief based upon this claim.

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

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

Robert J. Krauss

ROBERT J. KRAUSS
Assistant Attorney General
Florida Bar #: 238538
1313 Tampa Street, Suite 804
Park Trammell Building
Tampa, Florida 33602
(813) 272-2670

COUNSEL 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 Capital Collateral Representative, 1533 South Monroe Street, Tallahassee, Florida 32301, this 3rd day of April, 1989.

Robert J. Krauss

OF COUNSEL FOR RESPONDENT