SUPREME COURT OF FLORIDA

JEFFREY ALLEN MUEHLEMAN,

Petitioner,

v. CASE NO. 74,270

HARRY K. SINGLETARY, JR.,

Respondent.

RESPONSE IN OPPOSITION TO PETITION FOR WRIT OF HABEAS CORPUS

COMES NOW Respondent, Harry K. Singletary, Jr., Secretary, Department of Corrections, State of Florida, by and through the undersigned Assistant Attorney General, and files his response to the petition for writ of habeas corpus, and would show unto the Court:

I.

PROCEDURAL HISTORY

Jeffrey Allen Muehleman was convicted of first degree murder pursuant to a plea of guilty and sentenced to death. The Florida Supreme Court affirmed the judgment and sentence. Muehleman v. State, 503 So.2d 310 (Fla. 1987), cert. denied, 484 U.S. 882, 98 L.Ed.2d 170 (1987).

On direct appeal, Muehleman raised the following issues:

> ISSUE I.A.
> THE COURT BELOW ERRED IN REFUSING TO SUPPRESS STATEMENTS JEFF MUEHLEMAN MADE TO LAW ENFORCEMENT AUTHORITIES, TO STATE AGENT RONALD REWIS, AND TO REPORTER CHRISTOPHER SMART, AS THE STATEMENTS WERE THE FRUIT OF AN

ILLEGAL WARRANTLESS ARREST, AND SOME WERE OBTAINED IN VIOLATION OF MUEHLEMAN'S RIGHT TO COUNSEL AND RIGHT TO REMAIN SILENT.

ISSUE I.B.
THE COURT BELOW ERRED IN REFUSING TO SUPPRESS PHYSICAL EVIDENCE OBTAINED FROM MUEHLEMAN AND HIS GARAGE APARTMENT, AS SUCH EVIDENCE WAS THE FRUIT OF AN ILLEGAL ARREST, AND WAS OBTAINED WITHOUT A WARRANT IN VIOLATION OF MUEHLEMAN'S RIGHT TO BE FREE FROM UNREASONABLE SEARCHES AND SEIZURES.

ISSUE II. JEFF MUEHLEMAN'S CONVICTION AND SENTENCE SHOULD BE VACATED, AS THEY WERE PREDICATED UPON INADMISSIBLE EVIDENCE.

ISSUE III. JEFF MUEHLEMAN'S ABSENCE FROM PORTIONS OF THE PROCEEDINGS BELOW VIOLATED HIS CONSTITUTIONAL RIGHT TO BE PRESENT.

ISSUE IV. THE COURT BELOW ERRED IN ALLOWING THE STATE TO INTRODUCE DURING THE DEFENSE CASE A DOCUMENT ENTITLED "JUVENILE SOCIAL HISTORY REPORT," WHICH WAS HEARSAY AND CONTAINED EXTREMELY PREJUDICIAL IRRELEVANT MATERIAL, INVADED THE PROVINCE OF THE JURY, AND VIOLATED THE COURT'S PRETRIAL RULING ON DISCOVERY.

ISSUE V. THE COURT BELOW ERRED IN ALLOWING THE STATE TO PRESENT DURING ITS CASE IN REBUTTAL EVIDENCE OF OTHER CRIMES ALLEGEDLY COMMITTED BY JEFF MUEHLEMAN.

ISSUE VI. THE COURT BELOW ERRED IN PERMITTING THE STATE TO INTRODUCE AS REBUTTAL EVIDENCE THE TRANSCRIPT OF A TAPED INTERVIEW WITH RICHARD WESLEY.

ISSUE VII. THE COURT BELOW ERRED IN RESTRICTING JEFF MUEHLEMAN'S PRESENTATION OF EVIDENCE IN MITIGATION AND EVIDENCE RELEVANT TO THE CREDIBILITY OF A KEY STATE WITNESS.

ISSUE VIII. THE COURT BELOW ERRED IN PERMITTING THE PROSECUTOR TO MAKE A NUMBER OF IMPROPER AND PREJUDICIAL COMMENTS TO THE JURY DURING HIS CLOSING ARGUMENT.

ISSUE IX. THE COURT BELOW ERRED IN GIVING INCOMPLETE AND MISLEADING INSTRUCTIONS TO THE JURY.

ISSUE X. THE TRIAL COURT ERRED IN SENTENCING JEFF MUEHLEMAN TO DEATH BECAUSE THE SENTENCING WEIGHING PROCESS INCLUDED IMPROPER AGGRAVATING CIRCUMSTANCES AND EXCLUDED EXISTING MITIGATING CIRCUMSTANCES, RENDERING THE DEATH SENTENCE UNCONSTITUTIONAL UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS.

Muehleman presented an additional issue via supplemental brief:

JEFF MUEHLEMAN'S DEATH SENTENCE MUST BE VACATED BECAUSE THE RECORD DOES NOT REFLECT THAT THE COURT BELOW MADE THE REQUISITE FINDINGS OF FACT AS TO AGGRAVATING AND MITIGATING CIRCUMSTANCES PRIOR TO ORALLY IMPOSING THE DEATH SENTENCE, AND WRITTEN FINDINGS AS TO AGGRAVATING AND MITIGATING CIRCUMSTANCES WERE NOT FILED UNTIL AFTER THE COURT LOST JURISDICTION.

II.

Petitioner now presents a habeas corpus petition in this Court.

It is imperative for the state courts to continue to enforce its procedural default policy for if the state courts do not do so and instead rule on the merits of a claim that has been procedurally defaulted, the federal courts will be free to second-guess the state courts on the merits of a constitutional claim. See, e.g., County Court of Ulster County v. Allen, 442 U.S. 140, 60 L.Ed.2d 777 (1979); Harris v. Reed, 489 U.S. 255, 103 L.Ed.2d 308 (1989).

Petitioner may not permissibly attempt to litigate either ab initio or relitigate in the same or different form a claim cognizable on direct appeal since habeas corpus is not a second appeal vehicle. See Blanco v. Wainwright, 507 So.2d 1377 (Fla. 1987); White v. Dugger, 511 So.2d 554 (Fla. 1987); Copeland v. Wainwright, 505 So.2d 425 (Fla. 1987); Johnston v. Dugger, 583 So.2d 657 (1991); Francis v. Barton, 581 So.2d 583 (1991); Medina v. Dugger, 586 So.2d 317.

Petitioner is, thus, entitled to no relief; to avoid undue brevity, respondent will address each claim separately.

CLAIM I

> WHETHER MUEHLEMAN WAS DENIED HIS CONSTITUTIONAL RIGHTS BY PENALTY PHASE INSTRUCTIONS AND PROSECUTORIAL ARGUMENT WHICH ALLEGEDLY INCORRECTLY DESCRIBED THE LAW AS TO AGGRAVATING CIRCUMSTANCES TO BE CONSIDERED.

On his direct appeal, petitioner raised in Issue IX a claim that the trial court erred in giving incomplete and misleading instructions to the jury. Petitioner's attempt to litigate or relitigate this claim collaterally is unavailing. See Quince v. State, 477 So.2d 535 (Fla. 1985). See also Blanco v. Wainwright, 507 So.2d 1377, 1384 (Fla. 1987), wherein this Court observed:

> If the issue is raised on direct appeal, it will not be cognizable on collateral review. Appellate counsel cannot be faulted for preserving the more effective remedy and eschewing the less effective. By raising the issue in the petition for writ of habeas corpus, in addition to the rule 3.850 petition, collateral counsel has accomplished nothing except to unnecessarily burden this Court with redundant material. Our

> determination above on the rule 3.850 proceeding that trial counsel was effective negates any need to replough this ground once again.
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> * * *
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> [19, 20] In its answer brief to the issues raised on appeal of the denial of rule 3.850 relief, the state points out numerous instances of issues which are procedurally barred because they either were or should have been raised on direct appeal. In his reply brief, collateral counsel makes the representation to this Court that "[i]f direct appeal was the place to raise this, it is cognizable in the habeas petition." This is a totally incorrect statement of the law. As we have said many times, habeas corpus is not a vehicle for obtaining a second appeal of issues which were raised, or should have been raised, on direct appeal or which were waived at trial. Moreover, 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. *Steinhorst v. Wainwright*, 477 So.2d 537 (Fla. 1985); *Harris v. Wainwright*, 473 So.2d 246 (Fla. 1985); *McCrae v. Wainwright*, 439 So.2d 868 (Fla. 1983).

Accord, Suarez v. Dugger, 527 So.2d 190, 192 (Fla. 1988) (habeas corpus is not a vehicle for obtaining a second appeal of issues which were raised or should have been raised on direct appeal or which were raised at trial). Respondent also denies any impropriety occurred. Petitioner's complaint about improper doubling up of aggravators is barred.

CLAIM II

> WHETHER THE "CCP" AGGRAVATING FACTOR INSTRUCTION GIVEN WAS UNCONSTITUTIONALLY VAGUE.

Petitioner complained on appeal about the premeditation instruction given to the jury at penalty phase and this Court affirmed. Muehleman v. State, 503 So.2d 310 (Fla. 1987) cert. denied, 484 U.S. 882, 98 L.Ed.2d 170 (1987). Habeas corpus is not a vehicle to be used as a second appeal. Blanco v. Wainright, supra.

In anticipation that petitioner may seek solace in Hodges v. Florida, ___ U.S. ___, 121 L.Ed.2d 6 (1992), wherein the United States Supreme Court summarily vacated a judgment and sentence and remanded for reconsideration in light of Espinosa v. Florida, 505 U.S. ___, 120 L.Ed.2d 854 (Fla. 1992), respondent contends first of all that the United States Supreme Court has not yet held that Florida's "CCP" jury instruction is violative of the Eighth Amendment; the Court has only asked this Court to reconsider in light of the recent Espinosa pronouncement. Neither this Court nor the United States Supreme Court has conducted an analysis as to whether the CCP instruction is unconstitutionally vague.

The question presented here is whether the summary ruling in Hodges supra, sufficiently constitutes new law under the standard articulated in Witt v. State, 387 So.2d 922 (Fla. 1980) to warrant this Honorable Court in revisiting the claim. Appellee submits that it does not. The Supreme Court's order in Hodges simply compels this Court to reconsider its decision in light of Espinosa v. Florida, 505 U.S. ___, 120 L.Ed.2d 854, wherein the Court determined that the statutory language of the HAC

aggravator was unconstitutionally vague. While the question presented in the Hodges' petition dealt with the CCP aggravating factor there is no discussion, analysis or conclusion by the Court that the CCP instruction is constitutionally infirm. It would appear only that the High Court is announcing its rejection of this Court's prior analysis that Maynard v. Cartwright, 486 U.S. 356, 100 L.Ed.2d 372 (1988), is inapplicable in Florida.

For purposes of this case we can assume that Maynard is applicable and still insist that the given CCP instruction is not unconstitutionally vague or violative of the Eight Amendment.

In the interest of brevity, the state incorporates by reference its argument in the accompanying brief from the 3.850 denial (Case No. 79,816) at pages 37 - 45.

CLAIM III

WHETHER PETITIONER'S RIGHTS WERE VIOLATED BY APPLICATION OF THE AGGRAVATING FACTOR OF INTENT TO AVOID ARREST.

As in the previous claims, this too may not be subject to relitigation. Quince; Blanco; Suarez.

CLAIM IV

WHETHER THE TRIAL COURT IMPERMISSIBLY SHIFTED THE BURDEN OF PROOF AT PENALTY PHASE.

Collateral review of this claim is not available. See Jones v. Dugger, 533 So.2d 290 (Fla. 1988); Clark v. State, 533 So.2d 1144 (Fla. 1988). Atkins v. Dugger, 541 So.2d 1165 (Fla. 1989).

CLAIM V

WHETHER THE INTRODUCTION OF NONSTATUTORY AGGRAVATING FACTORS PERVERTED THE SENTENCING PHASE.

It would appear that petitioner is simply attempting to relitigate Point X of his direct appeal brief. As previously stated, habeas corpus is not available to do so.

CLAIM VI

WHETHER THE SENTENCE OF DEATH IMPOSED VIOLATES BOOTH V. MARYLAND, 482 U.S. 496, 96 L.ED.2D 440 (1987).

This claim is procedurally defaulted for not having been urged on direct appeal following appropriate objection in the trial court. See Grossman v. State, 525 So.2d 833 (Fla. 1988); Daugherty v. State, 533 So.2d 287 (Fla. 1988); Jones v. Dugger, 533 So.2d 290 (Fla. 1988).

Even if not defaulted, no relief is available since Booth v. Maryland is no longer the law. See Payne v. Tennessee, 501 U.S. ___, 115 L.Ed.2d 720 (1991).

CLAIM VII

WHETHER PETITIONER'S SENTENCE IS INVALID BECAUSE THE PROSECUTOR ALLEGEDLY URGED THAT SYMPATHY WAS NOT A PROPER FACTOR.

This claim is not cognizable collaterally; it is an issue that could have been or should have been urged on direct appeal and is procedurally defaulted if it was not. Atkins v. Dugger, supra.

To the extent that it is urged that appellate counsel was ineffective for having failed to argue the issue, the contention is meritless. The facts of the case showed a brutal beating-asphyxiation murder of a helpless ninety-seven year old victim by a young strong man. As stated in Atkins v. Dugger, 541 So.2d (Fla. 1989):

> "Most successful appellate counsel agree that from a tactical standpoint it is more advantageous to raise only the strongest points on appeal and that the assertion of every conceivable argument only has the effect of diluting the impact of the stronger points."

Petitioner poignantly relies on Parks v. Brown, 860 F.2d 1545 (10th Cir. 1988) and informs us that the Supreme Court granted a writ of certiorari to review the Parks decision in Saffle v. Parks. On March 5, 1990, the Supreme Court decided Saffle and held that habeas relief was unavailable because the claim that the Eighth Amendment was violated by an instruction that the jury avoid any influence of sympathy would involve a proposed new rule under Teague v. Lane, 489 U.S. 288, 103 L.Ed.2d 334 (1989) and its progeny. In Saffle v. Parks, 494 U.S. 484, 108 L.Ed.2d 415 (1990). Justice Kennedy also opined:

> "The objectives of fairness and accuracy are more likely to be threatened than promoted by a rule allowing the sentence to turn not on whether the defendant in the eyes of the community is morally deserving of the death sentence, but on whether the defendant can strike an emotional chord in a juror."

(108 L.Ed.2d at 429)

Saffle precludes relief. Accord, Hitchcock v. State, 578 So.2d 685 (Fla. 1990).[1]

CLAIM VIII

WHETHER THE JURY WAS IMPROPERLY INSTRUCTED REGARDING ITS RECOMMENDATION BY A MAJORITY VOTE.

As all the other issues, the claim is procedurally defaulted for not having been raised on direct appeal. See, Atkins v. Dugger, 541 So.2d 1165 (Fla. 1989), fn.1.[2]

CLAIM IX

WHETHER THE ADMISSION OF PRIOR CRIMES VIOLATED PETITIONER'S RIGHTS.

Petitioner acknowledges that this claim was raised and rejected on direct appeal, see Point V of brief on direct appeal; Muehleman v. State, 503 So.2d 310, 315-316. It is not subject to reconsideration. Quince; Suarez, Blanco.

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[1] Moreover, the trial court did not sub judice instruct the jury that sympathy could play no role. (R 2542 - 49) The court merely denied a proposed instruction seeking to invoke mere sympathy even when no mitigating circumstances could be discerned.

[2] Even if it could be advanced, the issue would be meritless since the jury recommended death by a vote of 10 to 2 (R 304, 1254).

CONCLUSION

For the foregoing reasons, the instant habeas petition should be denied.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

ROBERT J. LANDRY
Assistant Attorney General
Florida Bar ID# 0134101
2002 North Lois Avenue, Suite 700
Westwood Center
Tampa, Florida 33607
(813) 873-4739

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to the Office of the Capital Collateral Representative, 1533 South Monroe Street, Tallahassee, Florida 32301, this 20th day of January, 1993.

OF COUNSEL FOR RESPONDENT