IN THE SUPREME COURT OF FLORIDA

RALEIGH PORTER

Petitioner,

v. **Case No. 74,478**

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

Respondent.
_____/

RESPONSE TO ORDER TO SHOW CAUSE AND RESPONSE IN OPPOSITION TO PETITION FOR EXTRAORDINARY RELIEF AND FOR A WRIT OF HABEAS CORPUS

COMES NOW respondent, Richard **L.** Dugger, Secretary, Department of Corrections, State of Florida, by and through undersigned counsel, and hereby files its response in opposition to the petition for extradordinary relief and for a writ of habeas corpus pursuant to the Order to Show Cause entered by this Honorable Court on August 7, *1989,* and would show unto this Court:

I.

PROCEDURAL HISTORY

Raleigh Porter was tried and convicted of the first-degree murders of Mr. and Mrs. Walrath. Porter took a direct appeal and this Honorable Court affirmed the judgment but remanded for resentencing because of an irregularity in the original sentencing. **Porter** V. **State, 400** So.2d **5** (Fla. 1981). Following remand, the trial court again overrode the jury's life

recommendation and imposed a sentence of death. On appeal this Court affirmed. **Porter v. State,** 429 So.2d 293 (Fla. 1983).

Thereafter, the Governor signed a death warrant and Porter filed a 3.850 motion for post-conviction relief. The trial court denied relief and this Court affirmed the denial of post-conviction relief. **Porter v. State,** 478 So.2d 33 (Fla. 1985).

Petitioner then sought federal habeas corpus relief. The United States District Court denied the habeas corpus petition and on appeal the Eleventh Circuit Court of Appeals affirmed in part, reversed in part and remanded for an evidentiary hearing. **Porter v. Wainwright,** 805 F.2d 930 (11th Cir. 1986). An evidentiary hearing was conducted in October, 1988, and resolution is pending.

Petitioner Raleigh Porter now returns to the state courts to again seek collateral relief.

II.

IMINARY STATEMENT

It is quite apparent that petitioner is impermissibly attempting to utilize the habeas corpus vehicle because he knows that any attempt to relitigate such claims via **Rule** 3.850, **Florida Rules of Criminal Procedure,** would be met with defeat not only because 3.850 is not cognizable to entertain claims that could be urged on direct appeal but also because having previously sought 3.850 relief and having had his claims rejected then - see **Porter v. State,** 478 So.2d 33 (Fla. 1985) - he would now be facing the additional hurdle of explaining why his

petition should not be rejected as an abuse of the writ. See **Witt v. State**, 465 So.2d 510 (Fla. 1985); **Christopher** v. **State**, 489 So.2d 22 (Fla. 1986); **Tafero** v. **State**, 524 So.2d 987 (Fla. 1987).

Petitioner's ploy here also constitutes an effort to avoid compliance with the two year rule of **Rule** 3.850; the Court should not tolerate Porter's attempts to bypass state court procedures.

III.

Petitioner presents the following claims for habeas corpus relief:

> **I.** Whether the sentencing judge violated the eighth and fourteenth amendments under **Booth** v. **Maryland**, 482 **U.S.** 496, 96 L.Ed.2d 440 (1987) and **South Carolina** v. **Gathers**, __ U.S. __, 104 L.Ed.2d 876 (1989).
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> **II.** The jury override resulted in an arbitrary, capricious and unreliable death sentence.
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> **III.** The sentencing judge improperly found the aggravating circumstance of heinous, atrocious or cruel and appellate counsel was ineffective in failing to urge it.
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> **IV.** Whether the trial judge improperly shifted the burden to Porter.
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> **V.** Whether the trial court improperly asserted that sympathy was an improper consideration and appellate counsel was ineffective in failing to litigate the claim.

IV.

Claim I - The **Booth-Gathers** claim:

Citing **Jackson** v. **Dugger**, __ So.2d __, 14 F.L.W. 355, Porter contends that **Booth** v. **Maryland** and its progeny are new law

meriting initial consideration of this claim a decade after his trial. In **Jackson**, this Court recited:

> Under this Court's decision in *Witt v. State*, 387 So.2d 922 (Fla.), *cert. denied*, 449 U.S. 1067 (1980), *Booth* represents a fundamental change in the constitutional law of capital sentencing that, in the interests of fairness, requires the decision to be given retroactive application. We recognized in *Grossman v. State*, 525 So.2d 833 (Fla. 1988), however, that no language in the *Booth* decision suggests that *Booth* be applied retroactively to cases in which there was no objection to the victim impact evidence. In this case, trial counsel did institute a timely objection to the introduction of the sheriff's testimony in the lower court and also moved for a mistrial at the close of the testimony. Additionally, this issue was addressed on direct appeal. Therefore, Jackson is not procedurally barred from claiming relief under *Booth*.

(14 F.L.W. 355-356)

Respondent notes that the federal courts have not regarded **Booth** as new law. In **Thompson v. Lynaugh**, 821 F.2d 1080 (5th Cir. 1987), the Fifth Circuit concluded that Booth "does not create a sufficiently novel issue to excuse a procedural default for it merely reiterates what the Supreme Court has previously held.'' 821 F.2d at 1082.

Jackson affords petitioner no relief because the accused in that case did preserve the issue and urged it on appeal. Porter did not.[1] See also **Gilmore v. Armontrout**, 861 F.2d 1061, at

[1] On Porter's appeal from the resentence of death he raised the following issues:

I.

1068 fn. 15 (8th Cir. 1988). This Court should continue to enforce its procedural default policy. Cf. Atkins v. Dugger, 541 So.2d 1165 (Fla. 1989).

Relief should be denied for yet another reason - untimely presentation. Porter could have made his constitutional challenge at the time of his first Rule 3.850 motion to vacate

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> The trial court erred by finding three aggravating factors on the basis of circumstances which the state had not proved beyond a reasonable doubt.
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> II.
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> The trial court erred by rejecting appellant's youthful age and the fact that he is married and has two small children as mitigating circumstances and by using these circumstances as non-statutory aggravating circumstances to appellant's detriment.
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> III.
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> The trial court erred by failing to find as mitigating circumstances that appellant had no significant history of prior criminal activity and was gainfully employed.
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> IV.
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> The trial court erred by sentencing appellant to death after the jury recommended that he be sentenced to life imprisonment because the facts suggesting a sentence of death were not so clear and convincing that virtually no reasonable person could differ.
>
> V.
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> The imposition of the death sentences upon appellant after the jury recommended life imprisonment violated the constitutional guarantee against double jeopardy, deprived appellant of due process of law and subjected appellant to cruel and unusual punishment.

way back in **1985** and need not have waited until **1989** to do **so.** Thus, petitioner should be denied relief for the same reason as was the prisoner in **Marvin Johnson** v. **State, 536** So.2d **1009** (Fla. **1988).**

Finally, even if this Court were to reject the previous arguments, relief should be denied as the claim is meritless. Unlike **Booth** v. **Maryland,** neither the judge nor jury heard testimony from relatives concerning the degree of loss suffered by the victims' murders. Petitioner points only to the one sentence comment in the trial judge's sentencing order that:

> . . . It *so* happens that Raleigh Porter was tried by a Judge that has a lot more sympathy for the feelings of the victims than he does worry about the sensibilities of the murderer. (R **791).**

This ad hoc observation is nothing more than a truism and not substantially more infirm than the comments by the trial judge in **Barclay** v. **Florida, 463** U.S. **939, 77** L.Ed.2d **1134 (1983)** (comparing the crime to the judge's experience in viewing Nazi concentration camp victims). The trial judge's sentencing order weighing the aggravating and proffered mitigating factors constituted a reasoned judgment meriting this Court's approval and this Court should not on this occasion change its mind.

Claim 11: In Claim 11, Porter contends that his case resulted in an arbitrary, capricious and an unreliably imposed death sentence. This seems to be yet another attempt to convert a post-conviction habeas petition into a second appeal to urge grounds which either were or could have been or should have been

asserted on direct appeal. That is not the function of habeas corpus. See **Blanco v. Wainwright**, 407 So.2d 1377 (Fla. 1984); **Suarez v. Dugger**, 527 So.2d 190 (Fla. 1988) ("habeas corpus is not a vehicle for obtaining a second appeal of issues which would or should have been raised on direct appeal or which were raised at trial).

Petitioner Porter did raise on direct appeal, the contention that the lower court erred in rejecting the jury's life recommendation under the standard of **Tedder v. State**, 322 So.2d 908 (Fla. 1975) (Point IV in appellate brief) and this Honorable Court unanimously affirmed the sentence. **Porter v. State**, 429 So.2d 293 (Fla. 1983). Use of a different argument in post-conviction relief proceedings to relitigate the same issue is inappropriate. **Quince v. State**, 477 So.2d 535 (Fla. 1988).

Petitioner unfairly declares that "this Court then refused to apply its own settled standards and affirmed that sentence" (Petition, p.14). An examination of this Court's opinion demonstrates that this Court did recite the **Tedder** standard (In order to sustain a sentence of death following a jury recommendation of life, the facts suggesting a sentence of death should be *so* clear and convincing that virtually no reasonable person could differ). 429 So.2d at 296. The Court then concluded:

> "On the facts of this case, we find, even according the jury recommendation its due deference, that these sentences meet the Tedder standard."
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> (text at 296)

Porter's claim that this Court refused to apply its own standards must be emphatically rejected.

Porter now relies on Justice Shaw's specially concurring opinion in **Grossman v. State**, 525 So.2d 833, 850-851 (Fla. 1988). In the excerpt quoted in Porter's habeas petition at page 19, Justice Shaw is quoted as suggesting in criticism of **Tedder** that:

> For the reasons set forth above, I feel that the only forthright position is to recede from *Tedder* and announce to one and all that the only useful purpose of the advisory recommendation of the jury under our death penalty statute is to apprise the trial judge and appellate court of the jury's reaction to the evidence of aggravation and mitigation as a matter of information. Short of a revision of section 921.141 to place the sentencing responsibility upon the jury and to require factual findings on which to base appellate review, the jury recommendation does not carry the great weight assigned to it by *Tedder*. It is as its designation indicates, advisory only, nothing more, nothing less.

(525 So.2d at 851)

To the extent that Porter may be advocating along with Justice Shaw that the Court recede from **Tedder**, respondent finds no difficulty in joining approvingly with that suggestion.

The tactic of petitioner in simply returning to court again and again to urge recomparison of his case with newer decisions should be rejected as it was in **Spinkellink v. Wainwright**, 478 F.2d 582 (5th Cir. 1978):

> First, every criminal defendant sentenced to death under Section 921.141 could through federal habeas corpus proceedings attack the statute as applied by alleging that other convicted murderers, equally or more deserving to die, had been spared, and thus

that the death penalty was being applied arbitrarily and capriciously, as evidenced by his own case. The federal courts then would be compelled continuously to question every substantive decision of the Florida criminal justice system with regard to the imposition of the death penalty. The intrusion would not be limited to the Florida Supreme Court. It would be necessary also, in order to review properly the Florida Supreme Court's decisions, to review the determinations of the trial courts. And in order to review properly those determinations, a careful examination of every trial record would be in order. A thorough review would necessitate looking behind the decisions of jurors and prosecutors, as well. Additionally, unsuccessful litigants could, before their sentences were carried out, challenge their sentences again and again ~~as each~~ later-convicted murderer was given life imprisonment, because the circumstances of each additional defendant ~~so~~ sentenced would become additional factors ~~to be~~ considered. The process would be neverending and the benchmark for comparison would be chronically undefined. Further, there is no reason to believe that the federal judiciary can render better justice. As the Florida Supreme Court itself so candidly admits, ***see Prouence v. State, supra,*** **337** So.2d at **787,** reasonable persons can differ over the fate of every criminal defendant in every death penalty case. If the federal courts retried again and again the aggravating and mitigating circumstances in each of these cases, we may at times reach results different from those reached in the Florida state courts, but our conclusions would be no more, nor no less, accurate. Such is the human condition. *Cf.* ***Stone v. Powell,*** **428 U.S. 465, 493** n. **35, 96** S.Ct. **3037,** 3051=3052 n. **35, 49** L.Ed.2d **1067 (1976)** (condemning the respondents' "basic mistrust of the state courts as fair and competent forums for the adjudication of federal constitutional rights.").

(emphasis supplied) (text at **604-605**

This Court should forthrightly proclaim that in the interests of finality it will not accept the petitioners' invitation on collateral review to begin a never ending process of comparison. See **Witt v. State**, 387 So.2d 922 (Fla. 1980):

> The importance of finality in any justice system, including the criminal justice system, cannot be understated. It has long bene recognized that, for several reasons, litigation must, at some point, come to an end. In terms of the availability of judicial resources, cases must eventually become final simply to allow effective appellate review of other cases. There is no evidence that subsequent collateral review is generally better than contemporaneous appellate review for ensuring that a conviction or sentence is just. Moreover, an absence of finality casts a cloud of tentativeness over the criminal justice system, benefiting neither the person convicted nor society as a whole.

(text at 925)

See also **Johnson v. State**, 536 So.2d 1009, 1011 (Fla. 1988) (the credibility of the criminal justice system depends upon both fairness and finality).

We disagree with Porter's premise that this Court in petitioner's earlier appeal simply rubber-stamped overrides; we share the concern that total obeisance to the recommendation of the jury - be it life or death - has the potential of creating the appearance of a return to the vices condemned in **Furman v. Georgia**, 408 U.S. 238, 33 L.Ed.2d 346 (1972), especially where under the Florida statutory scheme the legislature did not choose to make the jury the sentencer nor provide any way for ascertaining the basis of their recommendation.

Petitioner refers to the concurring in part and dissenting in part opinion of Justice Ehrlich in **Cochran v. State**, __ So. 2d __, 14 F.L.W. 406 (July 27, 1989), rehearing pending. We do not interpret his opinion to be a ringing endorsement of the proposition that all **Tedder** overrides be in mechanistic fashion be reversed and the sentences be reduced to life imprisonment.[2] Reducing a well-deserved death sentence to life imprisonment when the jury has not explained its recommendation is as arbitrary as the reverse situation present at the time of **Furman**.

Claim 111: As to claim III dealing with the finding of heinous, atrocious or cruel homicide, respondent reiterates that Porter's failure to urge the claim on direct appeal from his resentencing constitutes a procedural default precluding collateral review. See, e.g., **Atkins v. Dugger**, 541 So.2d 1165 (Fla. 1989). We note parenthetically that the United States Court of Appeals for the Eleventh Circuit has already ruled that petitioner's challenge to this statutory aggravating factor **[F.S. 921.141(5)(h)]**, was procedurally barred under **Wainwright v. Sykes**, **433 U.S.** 72, 53 L.Ed.2d 594 (1977). **Porter v. Wainwright**, 805 F.2d 930, 942 (11th Cir. 1986). Repeated collateral attacks

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[2] There is no necessity, in this pleading, for the state to continue asserting that **Cochran** is an aberration, is wrong, and lacking in persuasiveness when it holds a jury override to be improper when the trial judge is aware of an additional homicide unknown to the jury. This Court affirmed under similar circumstances in **Torres-Arboledo** v. **State**, 524 So.2d 408 (Fla. 1988). Justice Ehrlich's dissent in **Cochran** is correct and we urge its adoption by the entire Court at the earliest opportunity.

on the same or similar grounds should not be entertained and this Court should as in **Atkins** reassert a procedural default basis for denying relief to be in conformity with **Harris** v. **Reed**, __ U.S. __, 103 L.Ed.2d 308 (1989).

Additionally, a federal court has held that **Maynard** v. **Cartwright**, __ U.S. __, 100 L.Ed.2d 372 (1988) does not constitute new law. See **Dauqherty** v. **Duqqer**, 699 F.Supp. 1517, 1520 fn. 3 (M.D. Fla. 1988). And this Honorable Court has recently articulated that **Maynard** did not change the earlier ruling in **Proffitt** v. **Florida**, 428 **U.S.** 242, 49 L.Ed.2d 913 (1976). **Smalley** v. **State**, __ **So.**2d __, 14 F.L.W. 342 (Fla. 1989).

Appellate counsel cannot be deemed to have been ineffective for failing to argue that the finding of this statutory aggravating factor was improper since the double beating-asphyxiation so obviously met the criteria and as stated in **Atkins** v. **Duqqer**, supra:

> "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 often has the effect of diluting the impact of the stronger points."

(text at 1167)

And since this Court in **Smalley** has rejected Porter's **Maynard** argument, there can be neither a deficiency nor prejudice under **Strickland v. Washinqton**.

Claim IV: As to point IV, the claim of an alleged improper shifting of the burden by the trial judge, suffice it to say that petitioner Porter is simply attempting impermissibly to urge an issue collaterally which could have and/or should have been raised on direct appeal. Rather than string cite the legion of cases that prohibit this, respondent will simply refer to **Atkins v. Dugger**, 541 So.2d 1165 (Fla. 1989) wherein the court noted in its footnotes issues that procedurally could not be entertained because they were being urged in the wrong place at the wrong time for the first time.

To the extent that petitioner is urging that Florida law is inconsistent with **Adamson v. Ricketts**, 865 F.2d 1011 (9th Cir. 1988), this Court has previously declared that for a change of law to be cognizable on collateral review the change must emanate from either the United States Supreme Court or this Court. See **Witt v. State**, 387 So.2d 922 (Fla. 1988). **Adamson** is neither.[3]

Claim V: As to claim V, the alleged anti-sympathy consideration by the trial judge (petitioner does not make any reference to a citation in the record so we will assume he is referring to the comment at sentencing referred to in claim I at R 791), again relief must be denied. Petitioner's counsel understandably has utilized the capabilities of his word processor to attach the standard pro forma argument that the

[3] Finally, if the claim could be reached it is meritless as the remark at R 791 that the circumstances dictate the appropriateness of death is a proper emphatic non-ambiguous declaration.

judge or jury may have improperly refused to consider sympathy for the defendant.

First of all, respondent reiterates that issues not timely and properly urged on direct appeal may not be initiated via collateral attack such as habeas corpus or Rule 3.850. See **Atkins**, supra. As stated in **Blanco v. Wainwright, 507** So.2d **1377, 1384** (Fla. **1987):**

> 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).

It is understandable that Porter would like now to seek a second appeal (and even a third, fourth and fifth, etc.) until the sentence of electrocution is carried out but neither the Constitution nor the decisions of this Court (at least to date) compel such relief.

Even if this Court were to reject the respondent's procedural argument herein, Porter would still not be entitled to relief herein. The trial judge's comment in the sentencing order constituted an appropriate rejection of the argument suggested by Porter's counsel in his argument to the jury appealing for mercy to Mr. Porter (R 769) and to treat Porter's life "as a flame" "or a candle" that should not be extinguished (R 772). Thus, it can be seen in this light not that the trial court refused to consider sympathy but considered it and found it insufficient as a basis for an alternate sentence.

Appellate counsel cannot be deemed ineffective for not urging such a weak claim, especially where not preserved by appropriate objection. Atkins, supra.

Petitioner, in a footnote, makes reference to evidence presented at the federal court evidentiary hearing on the issue

of ineffective assistance of counsel. Respondent would merely point out that this Court previously and unanimously ruled that on its face the claim of ineffective assistance of counsel showed no grounds for relief. **Porter v. State, 478 So.2d 33, 35 (Fla. 1985).** It is unnecessary either to reconsider the correctness of the prior ruling or to anticipatorily consider and reject whatever may be pending in the federal court. But should be court be interested, trial counsel indicated in his testimony a desire that the jury not be made aware of Porter's criminal background. Respondent notes the similarity of such reasoning with this Court's observation previously that:

> ". . . . introducing this material [long history of juvenile delinquency and drug abuse] would have damaged Porter . . . ."
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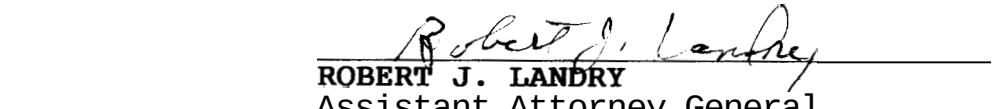
> **(Porter v. State, 478 So.2d at 35)**

The instant petition should be denied.

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 has been furnished by U.S. Mail to the Office of the Capital Collateral Representative, 1533 South Monroe Street, Tallahassee, Florida 32301, this 5TH day of September, 1989.

Robert D. Lander

OF COUNSEL FOR RESPONDENT/