

IN THE SUPREME COURT OF FLORIDA

FILED
SID J. WHITE
DEC 17 1990
CLERK, SUPREME COURT
By
Deputy Clerk

BRYAN JENNINGS,
Petitioner,

v.

CASE NO. 74,926

RICHARD L. DUGGER, etc.,
Respondent.

RESPONSE

Respondent, pursuant to this court's order, files the following response to Jennings' amended petition for extraordinary relief, for a writ of habeas corpus, requesting this court deny all relief, and as grounds therefor states:

PROCEDURAL HISTORY

Jennings was convicted following a jury trial in February, 1980, of first-degree murder, kidnapping, three counts of sexual battery, burglary, and aggravated battery, in connection with the 1979 abduction and death of six-year old Rebecca Kunash in Brevard County, Florida. He was sentenced to death for the murder conviction. Jennings' convictions and sentences were subsequently vacated by the Supreme Court of Florida, based upon a finding that Jennings was deprived of the benefit of cross-examination of a material witness, where defense counsel had refused to cross-examine the witness based on the ground that he previously represented him and to cross-examine him would violate the Code of Professional Responsibility. *Jennings v. State*, 413 So.2d 24 (Fla. 1982).

Following his retrial, Jennings was again convicted and sentenced to death, and the Supreme Court of Florida affirmed the convictions and sentences. *Jennings v. State*, 453 So.2d 1109 (Fla. 1984). On petition for writ of certiorari, the United States Supreme Court vacated the judgment and remanded to the Florida Supreme Court for further consideration in light of its holdings in *Shea v. Louisiana*, 470 U.S. 51 (1985), and *Smith v. Illinois*, 469 U.S. 91 (1985). *Jennings v. Florida*, 470 U.S. 1002, 105 S.Ct. 1351, 84 L.Ed.2d 374 (1984). Subsequently, the Supreme Court of Florida remanded for a third trial, *Jennings v. State*, 473 So.2d 204 (Fla. 1985), which was held March 24-28, 1986, in Bay County, Florida.

Jennings was convicted of first degree murder, two counts of felony first degree murder, kidnapping with intent to commit sexual battery, sexual battery and burglary, and again sentenced to death. He appealed to the Supreme Court of Florida,¹ which

¹On direct appeal, Jennings asserted sixteen claims for relief: (1) the trial court erred in admitting evidence (photographs of his penis) which was obtained as a direct result of his involuntary confession; (2) the trial court committed reversible error in improperly restricting Jennings' presentation of evidence (two motions for post-conviction relief filed by one of the state's witnesses wherein the witness alleged he was insane) where such evidence was crucial to Jennings' defense; (3) the trial court erred in allowing testimony concerning the victim; (4) the trial court erred in denying the motion to suppress and allowing into evidence items (shoes and fingerprint cards) seized as a result of a warrantless arrest; (5) the trial court erred in admitting into evidence photographs of the victim; (6) the trial court erred in denying a mistrial following a comment by the prosecutor during voir dire that referred to Jennings' failure to testify; (7) the trial court erred in admitting into evidence a letter purportedly written by Jennings; (8) the trial court erred in failing to modify a standard jury instruction which was skewed in favor of the state; (9) the trial court erred in denying Jennings' motion for mistrial at the penalty phase, excusing a juror at the state's request and seating an alternate juror; (10) Jennings was denied due process by the trial court's action in overruling a timely and specific objection and permitting the prosecutor to engage in improper argument at the penalty phase; (11) the trial court erred in denying the motion for mistrial when it became clear that the jury was considering improper matters during deliberations at the penalty phase; (12) the trial court committed fundamental error in failing to timely discharge an alternate juror and in allowing that juror to retire with the rest of the jury at the penalty phase; (13) the trial court erred in denying Jennings' requested jury instructions at the penalty phase; (14) the trial court erred in failing to certify Jennings as a mentally disordered sex offender; (15) the death sentence is not justified in that it is based upon inappropriate aggravating

affirmed his convictions and sentences, with the exception of his sentences for kidnapping and sexual battery. *Jennings v. State*, 512 So.2d 169 (Fla. 1987). Rehearing was denied on October 22, 1987, and on February 22, 1988, Jennings' petition for writ of certiorari was denied by the Supreme Court of the United States. *Jennings v. Florida*, 484 U.S. 1079 (1988).

On August 29, 1989, Governor Bob Martinez signed Jennings' first death warrant. On October 23, 1989, Jennings filed a motion for post-conviction relief in state court, raising 23 grounds for relief.² Following argument on October 26, 1989,

circumstances, additional mitigating circumstances should have been found, and the mitigating circumstances outweigh the aggravating circumstances; (16) the Florida capital sentencing statute is unconstitutional in its face and as applied.

² (1) the withholding of material exculpatory evidence violated Mr. Jennings' rights under the fifth, sixth, eighth and fourteenth amendments; (2) the state's intentional withholding of material and exculpatory evidence violated the constitutional rights of Bryan Jennings under the fifth, sixth, eighth and fourteenth amendments, as well as his rights under Chapter 119 of the Florida Statutes; (3) Bryan Jennings was denied the effective assistance of counsel at the guilt-innocence phase of his trial, in violation of the sixth, eighth and fourteenth amendments; (4) Mr. Jennings was deprived of his rights to due process and equal protection under the fourteenth amendment to the United States Constitution, as well as his rights under the fifth, sixth, and eighth amendments, because the mental health experts who saw him could not conduct a constitutionally adequate evaluation, because they were not provided with the necessary background information. Mr. Jennings was thus deprived of a constitutionally adequate mental health evaluation and was prejudiced at both the guilt and penalty phases of his trial; (5) Bryan Jennings was denied the effective assistance of counsel at the sentencing phase of his trial, in violation of the sixth, eighth and fourteenth amendments; (6) Mr. Jennings' rights to present a defense and to confront the witnesses against him were denied when the court limited the cross-examination of the state's key witness, Clarence Muszynski, and when the defendant was foreclosed from introducing evidence establishing that either Mr. Muszynski was insane, a perjurer, or both; (7) Mr. Jennings was deprived of his rights under the fifth, sixth, eighth and fourteenth amendments when jurors were advised of Mr. Jennings' previous convictions for the very crimes at issue; (8) in contravention of Mr. Jennings' constitutional rights under the fourth, fifth and fourteenth amendments, the trial court erred in denying the motion to suppress and allowing into evidence items that were seized as a result of a warrantless arrest; (9) Mr. Jennings' judge and jury considered and relied on the victim's personal characteristics, the impact of the offense on the victim's parents, and the prosecutor's and family members' characterizations of the offense over defense counsel's timely and repeated objection in violation of Mr. Jennings' eighth and fourteenth amendment rights, *Booth v. Maryland*, *South Carolina v. Gathers*, *Jackson v. Dugger*, and *Scull v. State*; (10) Mr. Jennings' sentencing jury was improperly instructed on the "especially heinous, atrocious, or cruel" aggravating circumstance, and the aggravator was improperly argued and imposed, in violation of *Maynard v. Cartwright*, *Hitchcock v. Dugger*, and the eighth and

the trial court entered an order denying all relief. On that same day, Jennings filed a petition for extraordinary and habeas corpus relief and application for stay of execution pending the disposition of the petition in the Supreme Court of Florida. The same day that court entered a stay of execution. Jennings then filed a motion for rehearing in the trial court on November 19, 1989. That same day he filed the instant amended petition for

fourteenth amendments; (11) the aggravating circumstance that the offense was cold, calculated and premeditated was improperly applied retroactively in violation of Article I, Section 10 of the United States Constitution, and the fifth, sixth, eighth and fourteenth amendments, and the corresponding provisions of the Florida Constitution; (12) the cold, calculated, and premeditated aggravating circumstance was applied to Mr. Jennings' case in violation of the eighth and fourteenth amendments; (13) Mr. Jennings' death sentence rests upon an unconstitutional automatic aggravating circumstance, in violation of *Maynard v. Cartwright*, *Lowenfield v. Phelps*, *Hitchcock v. Dugger*, and the eighth amendment; (14) the introduction of nonstatutory aggravating factors so perverted the sentencing phase of Mr. Jennings' trial that it resulted in the totally arbitrary and capricious imposition of the death penalty in violation of the eighth and fourteenth amendments of the United States Constitution; (15) Mr. Jennings' death sentence was imposed in violation of the eighth and fourteenth amendments because his jury was prevented from giving appropriate consideration to, and his trial judge refused to consider all evidence proffered in mitigation of punishment contrary to *Eddings v. Oklahoma*, *Mills v. Maryland*, and *Hitchcock v. Florida*; (16) Mr. Jennings' sentence of death violates the fifth, sixth, eighth and fourteenth amendments because the penalty phase jury instructions shifted the burden to Mr. Jennings to prove that death was inappropriate and because the sentencing judge himself employed this improper standard in sentencing Mr. Jennings to death; (17) during the course of Mr. Jennings' trial the court improperly asserted that sympathy and mercy toward Mr. Jennings were improper considerations, in violation of the eighth and fourteenth amendments; (18) Mr. Jennings' sentencing jury was repeatedly misled by instructions and arguments which unconstitutionally and inaccurately diluted their sense of responsibility for sentencing, contrary to *Hitchcock v. Dugger*, 107 S.Ct. 1821 (1987); *Caldwell v. Mississippi*, 105 S.Ct. 2633 (1985); and *Mann v. Dugger*, 844 F.2d 1446 (11th Cir. 1988), and in violation of the eighth and fourteenth amendments. Mr. Jennings received ineffective assistance of counsel when counsel failed to zealously advocate and litigate this issue; (19) the sentencing court erred by failing to independently weigh aggravating and mitigating circumstances, contrary to Mr. Jennings' fifth, sixth, eighth and fourteenth amendment rights; (20) the prosecution of Mr. Jennings by the Office of the State Attorney for the Eighteenth Judicial Circuit violated the fifth, sixth, eighth and fourteenth amendments because the State Attorney participated in the prosecution of Mr. Jennings despite the fact that he had been a senior public defender with the office that represented Mr. Jennings; (21) the present death warrant has violated Mr. Jennings' rights to due process and equal protection of law and denied him his rights to reasonable access to the courts; (22) the state's mental health experts relied on a statement made by Mr. Jennings which was unconstitutionally obtained by the state in violation of *Edwards v. Arizona*, *Estelle v. Smith*, *Powell v. Texas*, and the fifth, sixth, eighth and fourteenth amendments; and (23) Mr. Jennings' jury was improperly instructed resulting in fundamentally unfair convictions and sentences in violation of the fifth, eighth and fourteenth amendments.

extraordinary relief, for a writ of habeas corpus, in the Florida Supreme Court, wherein he has alleged sixteen grounds for relief.³ The trial court entered an order denying the motion

³ (1) Mr. Jennings' judge and jury considered and relied on the victim's personal characteristics, the impact of the offense on the victim's parents, and the prosecutor's and family members' characterizations of the offense over defense counsel's timely and repeated objections in violation of Mr. Jennings' eighth and fourteenth amendment rights, Booth v. Maryland, South Carolina v. Gathers, Jackson v. Dugger, and Scull v. State; (2) Mr. Jennings' sentencing jury was improperly instructed on the "especially heinous, atrocious, or cruel" aggravating circumstance, and the aggravator was improperly argued and imposed in violation of Maynard v. Cartwright, Hitchcock v. Dugger, and the eighth and fourteenth amendments; (3) the cold, calculated, and premeditated aggravating circumstance was improperly argued and applied to Mr. Jennings' case in violation of Maynard v. Cartwright, Hitchcock v. Dugger, and the eighth and fourteenth amendments; (4) Mr. Jennings' death sentence was imposed in violation of the eighth and fourteenth amendments because his jury was prevented from giving appropriate consideration to, and his trial judge refused to consider all evidence proffered in mitigation of punishment contrary to Eddings v. Oklahoma, Mills v. Maryland, and Hitchcock v. Florida. Moreover, appellate counsel was ineffective in not adequately arguing this on direct appeal; (5) the aggravating circumstance that the offense was cold, calculated and premeditated was improperly applied retroactively in violation of Article I, Section 10 of the United States constitution, and the fifth, sixth, eighth and fourteenth amendments, and the corresponding provisions of the Florida Constitution. Moreover, appellate counsel was ineffective in not raising this issue on direct appeal; (6) Mr. Jennings' rights to present a defense and to confront the witnesses against him were denied when the court limited cross-examination of the state's key witness, Clarence Muszynski, and when the defendant was foreclosed from introducing evidence establishing that either Mr. Muszynski was insane, a perjurer, or both; (7) Mr. Jennings' sentence of death violates the fifth, sixth, eighth and fourteenth amendments because the penalty phase jury instructions shifted the burden to Mr. Jennings to prove that death was inappropriate and because the sentencing judge himself employed this improper standard in sentencing Mr. Jennings to death. Moreover, appellate counsel was ineffective in not raising this issue on appeal; (8) the sentencing court erred by failing to independently weigh aggravating and mitigating circumstances, contrary to Mr. Jennings' fifth, sixth, eighth and fourteenth amendment rights. Moreover, appellate counsel was ineffective for not raising this issue on appeal; (9) the state's mental health experts relied on a statement made by Mr. Jennings which was unconstitutionally obtained by the state in violation of Edwards v. Arizona, Estelle v. Smith, Powell v. Texas, and the fifth, sixth, eighth and fourteenth amendments. Moreover, appellate counsel was ineffective for not raising this issue on appeal; (10) during the course of Mr. Jennings' trial the court improperly asserted that sympathy and mercy towards Mr. Jennings were improper considerations, in violation of the eighth and fourteenth amendments. Moreover, appellate counsel was ineffective in not raising this issue on direct appeal; (11) in contravention of Mr. Jennings' constitutional rights under the fourth, fifth, sixth and fourteenth amendments, the trial court erred in denying the motion to suppress and allowing into evidence items that were seized as a result of a warrantless arrest; (12) Mr. Jennings was deprived of his rights under the fifth, sixth, eighth and fourteenth amendments when jurors were advised of Mr. Jennings' previous convictions for the very crimes at issue. Counsel ineffectively argued this issue; (13) Mr. Jennings' death sentence rests upon an unconstitutional aggravating circumstance, in violation of Maynard v. Cartwright, Lowenfield v. Phelps, Hitchcock v. Dugger, and the eighth amendment; (14) the introduction of nonstatutory aggravating factors so perverted the sentencing phase of Mr. Jennings' trial that it resulted in the totally arbitrary and capricious imposition of the death penalty in violation of the eighth and fourteenth amendments of the United States constitution; (15) Mr. Jennings'

for rehearing on January 24, 1990, and a notice of appeal was filed February 20, 1990.

FACTS

On May 11, 1979, Robert and Patricia Kunash awakened to find that their daughter, Rebecca Kunash, age six, was missing from her bedroom. The right bedroom window, which had been left unlocked, was open and the window screen was lying in the yard (R 327-345, 354-355, 367-371). The police investigation at the home resulted in the discovery of latent palm and fingerprints in the bedroom window sill; a plaster cast of a footprint found in the lot adjacent to the Kunash home was made (R 373-79, 386-99). The victim's nude body was found floating in a nearby canal that afternoon (R 435, 460-62). The autopsy revealed that she had been sexually assaulted, that her skull had been fractured, and that the cause of her death was asphyxiation by drowning (R 543-44).

Prior to the victim's body being found, an extensive neighborhood investigation was conducted, and a woman reported seeing a man in a red shirt sitting on a bridge on North Banana River Drive around the previous midnight (R 2432, 2476-77). During the investigation Jennings and a friend were seen pushing a motorcycle in the area, and one of them was wearing a red shirt (R 1910, 1925, 2476-77). A deputy was sent to talk to them, and

sentencing jury was repeatedly misled by instructions and arguments which unconstitutionally and inaccurately diluted their sense of responsibility for sentencing, contrary to *Hitchcock v. Dugger*, *Caldwell v. Mississippi*, and *Mann v. Dugger*, and in violation of the eighth and fourteenth amendments. Mr. Jennings received ineffective assistance of counsel when counsel failed to zealously advocate and litigate this issue; (16) Mr. Jennings jury was improperly instructed resulting in fundamentally unfair convictions and sentences in violation of the fifth, eighth and fourteenth amendments.

obtained Jennings' name, address and date of birth (R 1925, 1946, 2575-76). After the victim's body was found, Jennings was considered a possible suspect or lead, among others, because of an awareness by deputies of his past history (R 1911-23, 1930-31, 1957). A records check revealed an outstanding Orange County, Florida arrest warrant, so he was arrested and taken to the police station (R 1916, 1928 1958, 2442, 2578, 1930-31, 2482). Jennings confessed after his arrest, but that was suppressed by the court's ruling in *Jennings*, 473 So.2d at 200.

Deputy Porter went to Jennings' aunt's house, where Jennings was staying, and spoke to the aunt and Jennings' mother (R 1931). Jennings' aunt told Porter that she had seen Jennings all wet that morning (R 1936). Jennings' wet shoes were turned over to Porter, and he noticed a distinctive pattern on the soles (R 2453). The shoes were later compared with the plaster cast of the shoeprint found at the scene, and they appeared to match (R 2459). Jennings' fingerprints also matched those found at the crime scene (R 1915, 1922, 1348, 2520). Jennings' penis was photographed, as it had several abrasions which could have been caused by raping the physically immature victim, and the photographs were admitted at trial. See *Jennings*, 512 So.2d at 171.

The testimony of Allen Kruger from the former trial was read into the record, as Kruger had since died. Jennings had been incarcerated with Kruger, and told Kruger that he picked the girl up over his head and threw her down on the pavement and that he held her head under water for ten minutes, then left her in

the water for the crabs, turtles and sharks (R 911-12). Clarence Muszynski, who was also incarcerated with Jennings, testified that Jennings told him how he had broken into the sleeping victim's room, taken her outside and bashed her head on the pavement, driven her to a canal, raped her, and then held her underwater until she drowned and where her body would be disposed of by "the sharks and the turtles and the fish and the animals of the sea..." See *Jennings*, 512 So.2d at 172. Jennings also admitted the commission of the crimes to Billy Crisco, another inmate (R 942-43).

At the penalty phase, Jennings presented the testimony of Dr. Gutman, a psychiatrist, and Dr. McMahon, a psychologist. Dr. Gutman called Jennings a mixed character in behavior disorder with passive-aggressive and antisocial personality traits, though he was legally sane and suffered from no type of psychotic or neurotic behavior nor any delusions or hallucinations, and knew right from wrong and the consequences of his acts (R 1363, 1379-80). Dr. Gutman opined that Jennings' alcohol consumption combined with the personality disorders resulted in an impairment of Jennings' ability to conform his conduct to the requirements of the law (R 1365-66). Gutman admitted that Jennings' disorders are not regarded as true mental illness (R 1376).

Dr. McMahon testified that Jennings had no organic brain disorder, but did exhibit a mixed character disorder, with antisocial traits and immaturity (R 1424, 1441). She further testified that Jennings' problems were more of an emotional than a mental disturbance (R 1452). Dr. McMahon's opinion was that

Jennings' ability to conform his conduct to the requirements of the law was impaired at the time of the offense (R 1447-50).

In rebuttal, the state presented the testimony of psychiatrists, Dr. Podnos and Dr. Wilder. Dr. Podnos diagnosed an antisocial personality disorder, but found Jennings to be alert and fully oriented, with above average intelligence and no severe anxiety or depression, nor hallucinations or delusions (R 1511-13). He further testified that Jennings was not acting under an extreme mental or emotional disturbance, and had the ability to conform his conduct to the requirements of the law (R 1513). Dr. Podnos believed that the crime may have started as an impulse but turned into a deliberate act (TR 1513-14).

Dr. Wilder described Jennings as a sociopath, but not mentally ill (R 1549-51). It was his opinion that Jennings was not acting under an extreme mental or emotional disturbance, nor was his capacity to appreciate the criminality of his conduct impaired, and he had the ability to conform his conduct to the requirements of the law (R 1551-52). Dr. Wilder believed that Jennings was not acting on impulse (R 1554). Based on Jennings' physical activity during the offenses as well as his ability to recall, Dr. Wilder concluded that Jennings was not significantly impaired by alcohol and drugs (R 1570-72).

Jennings also presented the testimony of his mother, his aunt, two friends, Russell Schneider and Raymond Facompre, and Mr. Facompre's father. The jury recommended death eleven to one. The trial court imposed the death penalty, and specifically addressed each aggravating and mitigating factor set forth in

§921.141, Florida Statutes, finding three aggravating factors and no mitigating circumstances. The trial court first found that the murder was committed during the commission of, or flight after the commission of burglary, kidnapping and rape, as Jennings unlawfully entered a dwelling, kidnapped Rebecca Kunash, and committed a sexual battery upon her, and the jury found him guilty of first-degree premeditated murder, first-degree felony murder (kidnapping), first-degree felony murder (sexual battery), kidnapping, sexual battery, and burglary (R 3460). The trial court next found that the murder was especially heinous, atrocious, or cruel. In support of this finding, the trial court stated:

In the early morning hours of May 11, 1979, Rebecca Kunash was asleep in her bed. A nightlight had been left on in her room and her parents were asleep in another part of the house. The Defendant went to her window and saw Rebecca asleep. He forcibly removed the screen, opened the window, and climbed into her bedroom. He put his hand over her mouth, took her to his car and proceeded to an area near the Girard Street Canal on Merritt Island. He raped Rebecca, severely bruising and lacerating her vaginal area, using such force that he bruised his penis. In the course of events, he lifted Rebecca by her legs, brought her back over his head, and swung her like a sledge hammer onto the ground fracturing her skull and causing extensive damage to her brain. While she was still alive, Defendant took her into the canal and held her head under the water until she drowned. At the time of her death, Rebecca Kunash was six (6) years of age.

(R 3460-61); *Jennings*, 512 So.2d at 175-76. The trial court next found the murder was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification, as Jennings had driven by the victim's home earlier in the evening, seen her asleep, returned a short time later, and made a conscious decision to enter her room and carry out his subsequent acts (R 3461).

The trial court next addressed all of the statutory mitigating factors, and found none were present. The trial court then addressed the existence of non-statutory mitigating factors, considering Jennings' social history as revealed during the penalty phase and presentence investigation. The trial court considered, among other things, but rejected as non-statutory mitigating factors that Jennings never knew his father, that Jennings had emotional problems as a child and adolescent, that Jennings did not relate favorably to his mother and aunt, and that Jennings had a history of alcohol abuse for which he was treated in the Marine Corps, as well as some drug abuse.

GROUNDINGS ALLEGED FOR HABEAS RELIEF

Jennings raised a number of these issues on direct appeal (Claims 1-6, 8, 11-13), and a side by side comparison of the instant petition with Jennings' 3.850 motion reveals that the claims now presented were presented in the 3.850 motion, virtually word for word. Compare Claim I with 3.850 Claim IX; Claim II with 3.850 Claim X; Claim III with 3.850 Claim XII; Claim IV with 3.850 Claim XV; Claim V with 3.850 Claim XI; Claim VI with 3.850 Claim VI; Claim VII with 3.850 Claim XVI; Claim

VIII with 3.850 Claim XIX; Claim IX with 3.850 Claim XXII; Claim X with 3.850 Claim XVII; Claim XI with 3.850 Claim VIII (though Jennings has added a sixth amendment claim, contending that the photos of his penis were obtained theoretically under an inventory search of his person and new law establishes that absent a warrant an inventory search cannot be justified unless it is proved to be pursuant to standardized procedure); Claim XII with 3.850 Claim VII; Claim XIII with 3.850 Claim XIII; Claim XIV with 3.850 Claim XIV; Claim XV with 3.850 Claim XVIII; Claim XVI with 3.850 Claim XXIII. Habeas corpus is not to be used for additional appeals of issues that could have been, should have been, or were raised on direct appeal or in other post-conviction motions. *Mills v. Dugger*, 559 So.2d 578 (Fla. 1990); *Porter v. Dugger*, 559 So.2d 201 (Fla. 1990). Thus, presentation of these claims in the instant petition is clearly improper. *Id.*

Claims IV, V, VII, VIII, IX, X, XII, XIII, XIV, XV, and XVI also contain an allegation that appellate counsel was ineffective for failing to raise these claims on direct appeal. As a general rule, claims alleging ineffective assistance of appellate counsel are cognizable on a petition for writ of habeas corpus. *Johnson v. Wainwright*, 463 So.2d 207 (Fla. 1985). However, Respondent contends that Jennings' allegations of ineffective assistance of appellate counsel are legally insufficient.

A person seeking relief on the basis of ineffective assistance of appellate counsel must first demonstrate that there were specific errors or omissions of such magnitude that it can be said that they deviated from the norm or fell outside the

range of professionally acceptable performance; and second that the failure or deficiency caused prejudicial impact on the appellant by compromising the appellate process to such a degree as to undermine the outcome. *Id.* at 209. "The burden is on the petitioner to show specific errors or omissions that 'deviated from the norm or fell outside the range of professionally acceptable performance' and also that the deficiency prejudiced the appeal to the extent that 'confidence in the fairness and correctness of the outcome' is undermined." *Thomas v. Wainwright*, 475 So.2d 172, 173 (Fla. 1986). As to most of the claims in which ineffective assistance of appellate counsel is alleged, the argument is limited to the following:

Moreover, the claim is now properly brought pursuant to the Court's habeas corpus authority for it involves substantial and prejudicially ineffective assistance of counsel on direct appeal. This issue involved a classic violation of longstanding principles of law. See *Lockett v. Ohio*, 438 U.S. 586 (1978); *Perri v. State*, 441 So.2d 606 (Fla. 1983). It "virtually leaped out upon even a casual reading of the transcript." *Matire v. Wainwright*, 811 F.2d 1430, 1438 (11th Cir. 1987). This clear claim of *per se* error required no elaborate presentation--counsel *only* had to direct this Court to the issue. The court would have done the rest, based on long-settled Florida and federal constitutional standards.

No tactical decision can be ascribed to counsel's failure to urge the claim. No procedural bar precluded review of this issue. See *Johnson v. Wainwright*, *supra*, 498 So.2d 938. However, counsel's failure, a failure which could not but have been based upon ignorance of the law, deprived Mr. Jennings of the appellate reversal to which he was constitutionally entitled. See *Wilson v.*

Wainwright, supra, 474 So.2d at 1164-65;
Matire, supra. Accordingly, habeas relief
must be accorded now.

See Petition, pp. 50, 57, 69-70, 77-8, 79-80, 88, 94-5, 110-11, 112. There is a slight variation in several of the allegations; for example, claims V and X refer only to "long-settled federal constitutional standards," while claim XV refers only to "longstanding principles of Florida law." As to claims XIII and XIV, Jennings has merely alleged:

Moreover, the claim is now properly brought pursuant to the Court's habeas corpus authority for it involves substantial and prejudicially ineffective assistance of counsel on direct appeal.

See petition, pp. 101, 105.

Such conclusory allegations fall far short of facially indicating that the specific act or omission complained of was a substantial and serious deficiency falling measurably below the standard of competent counsel, and that such acts or omissions were substantial enough, when considered under the circumstances of the case, to an extent likely to have affected the outcome of the court proceeding. *Strickland v. Washington*, 466 U.S. 664 (1984); *Johnson, supra*; *Thomas, supra*. In fact, such allegations are totally contrary to the arguments preceding them. Jennings first contends that such claims are cognizable under a change in the law, yet in the next breath claims that appellate counsel was ineffective for failing to raise these "classic violation[s] of longstanding principles of law" that virtually leaped out of the transcript. Using a different argument to relitigate an issue in

post-conviction proceedings is not appropriate, and an allegation of ineffective assistance of 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. *Porter v. Dugger*, 559 So.2d 201 (Fla. 1990). Out of an abundance of caution, respondent will briefly address each claim.

CLAIM I

MR. JENNINGS' JUDGE AND JURY CONSIDERED AND RELIED ON THE VICTIM'S PERSONAL CHARACTERISTICS, THE IMPACT OF THE OFFENSE ON THE VICTIM'S PARENTS, AND THE PROSECUTOR'S AND FAMILY MEMBERS' CHARACTERIZATIONS OF THE OFFENSE OVER DEFENSE COUNSEL'S TIMELY AND REPEATED OBJECTION IN VIOLATION OF MR. JENNINGS' EIGHTH AND FOURTEENTH AMENDMENT RIGHTS, *BOOTH V. MARYLAND*, *SOUTH CAROLINA V. GATHERS*, *JACKSON V. DUGGER*, AND *SCULL V. STATE*.

On direct appeal, Jennings contended that the statements which had been objected to should not have been admitted because they had no relevance and served only to play upon the jurors' sympathies. This court specifically found that the testimony was relevant in that it tended to show that the victim was looking forward to her role in the school program and thus would not have left home willingly. *Jennings, supra* at 172. Consequently, the instant claim is procedurally barred, *Buenoano v. Dugger*, 559 So.2d 1116 (Fla. 1990), and without merit as well. *Bertolotti v. Dugger*, 565 So.2d 1343 (Fla. 1990) (*Booth* does not preclude evidence of characteristics of the victim which are relevant to the circumstances of the offense). Respondent would further note that *Booth v. Maryland*, 482 U.S. 496 (1987), upon which this claim

is predicated, was decided on June 15, 1987, while the instant case was pending on direct appeal, and any issue based upon it could have been presented at that time by way of either supplemental authority or supplemental briefing, neither of which was done. Consequently, the instant claim is clearly barred.

CLAIM II

MR. JENNINGS SENTENCING JURY WAS
IMPROPERLY INSTRUCTED ON THE "ESPECIALLY
HEINOUS, ATROCIOUS, OR CRUEL"
AGGRAVATING CIRCUMSTANCE, AND THE
AGGRAVATOR WAS IMPROPERLY ARGUED AND
IMPOSED IN VIOLATION OF MAYNARD V.
CARTWRIGHT, HITCHCOCK V. DUGGER, AND
THE EIGHTH AND FOURTEENTH AMENDMENTS.

The propriety of this aggravating factor was raised on direct appeal (Initial Brief pp. 78-82) and any argument could have been raised at that time. *Jones v. Dugger*, 533 So.2d 290 (Fla. 1988). This court specifically approved the findings with respect to this aggravating factor, *Jennings, supra* at 176, so the instant claim is procedurally barred. *Jones, supra*; *Squires v. Dugger*, 564 So.2d 1074 (Fla. 1990); *Correll v. Dugger*, 558 So.2d 422 (Fla. 1990). In any event, the claim is without merit. The United States Supreme Court recently stated that its decision in *Walton v. Arizona*, 110 S.Ct 3047 (1990):

thus makes clear that if a State has adopted a constitutionally narrow construction of a facially vague aggravating circumstance, and if the state has applied that construction to the facts of a particular case, then the 'fundamental constitutional requirement' of 'channeling and limiting...the sentencer's discretion in imposing the death penalty,' *Cartwright*, 486 U.S., at 362, has been satisfied.

Lewis v. Jeffers, 110 S.Ct. 3092, 3101 (1990). As this court, the Eleventh Circuit Court of Appeal, and the United States Supreme Court have all stated, Florida has adopted a narrow construction of this aggravating factor. See, *Proffitt v. Florida*, 428 U.S. 242, 255-56 (1976); *Bertolotti v. Dugger*, 883 F.2d 1503 (11th Cir. 1989); *Smalley v. State*, 546 So.2d 720 (Fla. 1989).

CLAIM III

THE COLD, CALCULATED, AND PREMEDITATED AGGRAVATING CIRCUMSTANCE WAS IMPROPERLY ARGUED AND APPLIED TO MR. JENNINGS' CASE IN VIOLATION OF *MAYNARD V. CARTWRIGHT*, *HITCHCOCK V. DUGGER*, AND THE EIGHTH AND FOURTEENTH AMENDMENTS

The propriety of this aggravating factor was raised on direct appeal (Initial Brief pp. 82-86) and any argument could have been raised at that time. *Jones, supra*. This court specifically approved the findings with respect to this aggravating factor, *Jennings, supra* at 176, so the instant claim is procedurally barred. *Jones, supra; Squires, supra; Correll, supra*. The claim that this factor should be reevaluated in light of *Rogers v. State*, 511 So.2d 526 (1987), was rejected in *Eutzy v. State*, 541 So.2d 1143 (1989), and would not be cognizable in the instant case in any event as *Rogers* was decided before the instant case.

CLAIM IV

MR. JENNINGS' DEATH SENTENCE WAS IMPOSED IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS BECAUSE HIS JURY WAS PREVENTED FROM GIVING APPROPRIATE CONSIDERATION TO, AND HIS TRIAL JUDGE REFUSED TO CONSIDER ALL EVIDENCE PROFFERED IN MITIGATION OF PUNISHMENT CONTRARY TO *EDDINGS V. OKLAHOMA*, *MILLS V. MARYLAND*, AND *HITCHCOCK V. FLORIDA*. MOREOVER, APPELLATE COUNSEL WAS

INEFFECTIVE IN NOT ADEQUATELY ARGUING
THIS ON DIRECT APPEAL.

Initially Jennings presents a claim that could have been presented on direct appeal and claims it is cognizable as a change in law under *Hitchcock v. Dugger*, 481 U.S. 393 (1987), then he claims that appellate counsel was ineffective for failing to raise such claim. Appellate counsel argued that the trial court erred in denying Jennings' requested penalty phase jury instructions and that additional mitigating circumstances should have been found. See Initial Brief, pp. 67-70, 88-97. This court found that the trial court committed no error in finding the absence of any statutory mitigating circumstances, and rejected without comment the claim regarding refusal to give requested jury instruction at the penalty phase. *Jennings*, 512 So.2d at 176. Consequently, the claim is procedurally barred and appellate counsel cannot be deemed ineffective. *White v. Dugger*, 565 So.2d 700 (Fla. 1990); *Correll, supra*; *Provenzano v. Dugger*, 561 So.2d 541 (Fla. 1990). Furthermore, this is not a true *Hitchcock* claim. See, *Adams v. State*, 543 So.2d 1244 (Fla. 1989).

CLAIM V

THE AGGRAVATING CIRCUMSTANCE THAT THE OFFENSE WAS COLD, CALCULATED AND PREMEDITATED WAS IMPROPERLY APPLIED RETROACTIVELY IN VIOLATION OF ARTICLE I, SECTION 10 OF THE UNITED STATES CONSTITUTION, THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS, AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION. MOREOVER, APPELLATE COUNSEL WAS INEFFECTIVE IN NOT RAISING THIS ISSUE ON APPEAL.

Appellate counsel specifically raised this issue, while properly acknowledging this court had previously rejected such claim in *Combs v. State*, 403 So.2d 418 (Fla. 1981). See Initial Brief, p. 85. Consequently, such claim is procedurally barred and appellate counsel cannot be deemed ineffective. *Buenoano, supra.*

CLAIM VI

MR. JENNINGS' RIGHTS TO PRESENT A DEFENSE AND TO CONFRONT THE WITNESSES AGAINST HIM WERE DENIED WHEN THE COURT LIMITED CROSS-EXAMINATION OF THE STATE'S KEY WITNESS, CLARENCE MUSZYNSKI, AND WHEN THE DEFENDANT WAS FORECLOSED FROM INTRODUCING EVIDENCE ESTABLISHING THAT EITHER MR. MUSZYNSKI WAS INSANE, A PERJURER, OR BOTH.

This claim was raised on direct appeal and is thus procedurally barred. *Mills, supra.*

CLAIM VII

MR. JENNINGS' SENTENCE OF DEATH VIOLATES THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS BECAUSE THE PENALTY PHASE JURY INSTRUCTIONS SHIFTED THE BURDEN TO MR. JENNINGS TO PROVE THAT DEATH WAS INAPPROPRIATE AND BECAUSE THE SENTENCING JUDGE HIMSELF EMPLOYED THIS IMPROPER STANDARD IN SENTENCING MR. JENNINGS TO DEATH. MOREOVER, APPELLATE COUNSEL WAS INEFFECTIVE IN NOT RAISING THIS ISSUE ON APPEAL.

This claim should have been raised on direct appeal had it been properly preserved, so it is procedurally barred. *White, supra; Provenzano, supra.* No such argument was presented to the trial court, despite Jennings contention that the alleged error virtually leaped out of the transcript, so appellate counsel cannot be faulted for failing to raise a claim that was not

preserved. *Preston v. Dugger*, 531 So.2d 154 (Fla. 1988); *Squires, supra*; *Duest v. Dugger*, 555 So.2d 849 (Fla. 1990). In addition, appellate counsel cannot be ineffective for failing to raise a claim that is without merit. *Atkins v. Dugger*, 541 So.2d 1165 (Fla. 1989) The cases which Jennings has cited as supporting his position that were pending before the United States Supreme Court have been decided contrary to the position taken by Jennings. *Walton v. Arizona*, 110 S.Ct. 3047 (1990); *Blystone v. Pennsylvania*, 110 S.Ct. 1078 (1990).

CLAIM VIII

THE SENTENCING COURT ERRED BY FAILING TO INDEPENDENTLY WEIGH AGGRAVATING AND MITIGATING CIRCUMSTANCES, CONTRARY TO MR. JENNINGS' FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS. MOREOVER, APPELLATE COUNSEL WAS INEFFECTIVE FOR NOT RAISING THIS ISSUE ON APPEAL.

Once again, a review of the brief submitted by appellate counsel demonstrates that this issue was raised. See Initial Brief, pp. 77-8. Consequently, the claim is procedurally barred and appellate counsel cannot be deemed ineffective.

CLAIM IX

THE STATE'S MENTAL HEALTH EXPERTS RELIED ON A STATEMENT MADE BY MR. JENNINGS WHICH WAS UNCONSTITUTIONALLY OBTAINED BY THE STATE IN VIOLATION OF *EDWARDS V. ARIZONA*, *ESTELLE V. SMITH*, *POWELL V. TEXAS*, AND THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS. MOREOVER, APPELLATE COUNSEL WAS INEFFECTIVE FOR NOT RAISING THIS ISSUE ON APPEAL.

This is a claim which should have been raised on direct appeal had it been preserved, so it is procedurally barred. *White, supra*. Further, no such argument was presented to the trial

court, despite Jennings contention that such claim virtually leaped out of the trial transcript, so appellate counsel cannot be deemed ineffective for failing to raise a claim that was not preserved. *Suarez v. Dugger*, 527 So.2d 190 (Fla. 1988).

CLAIM X

DURING THE COURSE OF MR. JENNINGS' TRIAL THE COURT IMPROPERLY ASSERTED THAT SYMPATHY AND MERCY TOWARDS MR. JENNINGS WERE IMPROPER CONSIDERATIONS, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS. MOREOVER, APPELLATE COUNSEL WAS INEFFECTIVE IN NOT RAISING THIS ISSUE ON DIRECT APPEAL.

There was no objection below to the instructions and the claim was not raised on direct appeal so it is procedurally barred. *Prouenzano, supra*. Appellate counsel was not deficient for raising this claim since it was not preserved and because it is without merit. *Smith v. Dugger*, 565 So.2d 1293 (Fla. 1990); *Duest, supra*. See also, *Porter v. Dugger*, 559 So.2d 201 (Fla. 1990). Further, the court gave the standard jury instructions with respect to sentencing, including the advice that the jury could consider any other aspect of the defendant's character or record and any other circumstances of the offense (R 1700). As such, counsel was not ineffective for failing to argue this point. *Correll v. Dugger*, 558 So.2d 422 (Fla. 1990).

CLAIM XI

IN CONTRAVENTION OF MR. JENNINGS' CONSTITUTIONAL RIGHTS UNDER THE FOURTH, FIFTH, SIXTH AND FOURTEENTH AMENDMENTS, THE TRIAL COURT ERRED IN DENYING THE MOTION TO SUPPRESS AND ALLOWING INTO EVIDENCE ITEMS THAT WERE SEIZED AS A RESULT OF A WARRANTLESS ARREST.

This claim was raised on direct appeal (Initial Brief, pp. 33-39) and rejected by this court without comment. *Jennings*, 512 So.2d at 176. As such it is procedurally barred. *Mills, supra*.

CLAIM XII

MR. JENNINGS WAS DEPRIVED OF HIS RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS WHEN JURORS WERE ADVISED OF MR. JENNINGS' PREVIOUS CONVICTIONS FOR THE VERY CRIMES AT ISSUE. COUNSEL INEFFECTIVELY ARGUED THIS ISSUE.

On direct appeal, appellate counsel argued that the letter was improperly admitted as it was not an original and the destruction of the original was not sufficiently documented; appellate counsel also argued that error occurred since the jurors became aware that Jennings had been tried before. *See*, Initial Brief, pp. 44-45, 59-63. Any additional arguments concerning the contents of the letter should have been raised at that time. *Jones, supra*. Since there was no objection below to the admission of the letter on the grounds now asserted, appellate counsel cannot be deemed ineffective as such claim was not preserved. *Suarez, supra*. Further, this court determined on direct appeal that there was no error in denying Jennings' motion for mistrial when it became known that the jurors were aware that Jennings had been previously tried. *Jennings*, 512 So.2d at 174. As such, even if appellate counsel had raised this issue and it was found to be somehow preserved and error, such error would had to have been harmless at worst and appellate counsel cannot be found ineffective for failing to argue a claim which even if error is harmless. *Duest, supra*.

CLAIM XIII

MR. JENNINGS' DEATH SENTENCE RESTS UPON AN UNCONSTITUTIONAL AGGRAVATING CIRCUMSTANCE, IN VIOLATION OF *MAYNARD V. CARTWRIGHT*, *LOWENFIELD V. PHELPS*, *HITCHCOCK V. DUGGER*, AND THE EIGHTH AMENDMENT.

This claim was raised and rejected on direct appeal (Initial Brief, pp 86-88) so it is procedurally barred and appellate counsel cannot be deemed ineffective. *Squires, supra*.

CLAIM XIV

THE INTRODUCTION OF NONSTATUTORY AGGRAVATING FACTORS SO PERVERTED THE SENTENCING PHASE OF MR. JENNINGS TRIAL THAT IT RESULTED IN THE TOTALLY ARBITRARY AND CAPRICIOUS IMPOSITION OF THE DEATH PENALTY IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION.

This is a claim which could have been raised on direct appeal if preserved so it is procedurally barred, and since it was not preserved appellate counsel cannot be deemed ineffective for failing to raise it. *Duest, supra; Correll, supra*.

CLAIM XV

MR. JENNINGS' SENTENCING JURY WAS REPEATEDLY MISLED BY INSTRUCTIONS AND ARGUMENTS WHICH UNCONSTITUTIONALLY AND INACCURATELY DILUTED THEIR SENSE OF RESPONSIBILITY FOR SENTENCING, CONTRARY TO *HITCHCOCK V. DUGGER*, *CALDWELL V. MISSISSIPPI*, AND *MANN V. DUGGER*, AND IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS. MR. JENNINGS RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL WHEN COUNSEL FAILED TO ZEALOUSLY ADVOCATE AND LITIGATE THIS ISSUE.

This claim is procedurally barred since it was not raised on direct appeal. *Squires, supra*. Since there was no objection

below, appellate counsel cannot be found ineffective for failing to raise such claim. *Duest, supra; Provenzano, supra.*

CLAIM XVI

MR. JENNINGS JURY WAS IMPROPERLY INSTRUCTED RESULTING IN FUNDAMENTALLY UNFAIR CONVICTIONS AND SENTENCES IN VIOLATION OF THE FIFTH, EIGHTH AND FOURTEENTH AMENDMENTS.

This claim is procedurally barred as it was not raised on direct appeal. *Squires, supra.* Since there was no objection below, appellate counsel cannot be deemed ineffective for failing to raise this issue. *Duest, supra; Provenzano, supra.* In any event, the claim is without merit, because *Stromberg v. California*, 283 U.S. 359 (1931), provides no basis for relief since it has not and cannot be demonstrated that one of the grounds of conviction was actually infirm in the first place. *Muszynski v. State*, 392 So.2d 63 (Fla. 5th DCA 1981) is likewise inapplicable as that case involved convictions for both first and second degree murder for a single murder, and the court found the evidence was sufficient to sustain both and upheld the conviction for the more serious crime. Further, while Jennings states that it is impossible to tell which count the jury convicted him of, a review of the verdict forms makes clear that the jury found him guilty of all three counts (R 3393-94). Appellate counsel cannot be deemed ineffective for failing to raise a claim that is without merit. *Correll, supra.*

CONCLUSION

For the aforementioned reasons, respondent requests this court deny the instant petition in all respects. Most of the

claims are procedurally barred due to their improper presentation; of the remaining claims, which raise ineffective assistance of appellate counsel, Jennings has failed to demonstrate that he merits relief.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

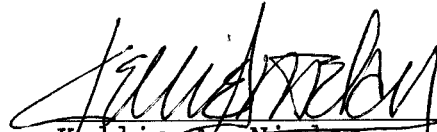


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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Response has been furnished by U.S. Mail to Martin J. McClain, Special Assistant CCR, 28 E. Broadway Village Drive, Columbia, Missouri 65201; and Larry Helm Spalding, Office of the Capital Collateral Representative, 1533 South Monroe Street, Tallahassee, Florida 32301, this 13th day of December, 1990.



~~Kellie A. Nielan~~
Of Counsel