IN THE SUPREME COURT OF FLORIDA

JOHNNY WILLIAMSON,

Petitioner,

v. CASE NO. 74,973

RICHARD L. DUGGER,

Respondent.

_____/

RESPONSE TO PETITION FOR EXTRAORDINARY RELIEF, ETC.

COMES NOW Respondent, Richard L. Dugger, by and through the undersigned counsel, pursuant to Fla.R.App.P. 9.100(h), in response to Williamson's Petition for Extraordinary Relief, etc., filed on or about November 3, 1989, and respectfully moves this honorable court to deny such petition, as well as any and all requested relief, for the reasons set forth in the instant pleading.

Preliminary Statement

Williamson was indicted on one count of first-degree murder on October 22, 1985, and, following trial by jury in Dixie County Circuit Court, found guilty as charged on April 9, 1986; Williamson was also convicted of one count of possession of contraband in prison, in violation of §944.47(1)(c), in regard to his possession of the murder weapon, a knife. The next day, following a separate penalty phase, the jury voted to recommend the death sentence by a vote of eleven to one. Williamson was formally sentenced to death on May 8, 1986, and Judge Lawrence found the existence of three (3) aggravating circumstances and nothing in mitigation; the judge found that the homicide had been committed while Williamson had been under sentence of imprisonment, §921.141(5)(a), that the homicide had been committed by one with prior convictions for crimes of violence, §921.141(5)(b) and that the homicide had been committed in a cold, calculated and premeditated manner, §921.141(5)(i).

Williamson appealed his convictions and sentence to the Florida Supreme Court, and such appeal was styled, **Williamson v. State**, Florida Supreme Court Case Number 68,800. Williamson presented three claims on appeal: (1) that the court had erred in denying Williamson's motion for mistrial during the State's closing argument when mention was made of a codefendant's plea; (2) that the court had erred in sentencing Williamson to death when codefendant Omer Williamson had received a life sentence and (3) that the court had erred in finding that the homicide had been committed in a cold, calculated and premeditated manner, in that, allegedly, Williamson had a pretense of justification. On July 16, 1987, the Florida Supreme Court rendered its opinion, **Williamson v. State**, 511 So.2d 289 (Fla. 1987), in which it unanimously affirmed Williamson's convictions and sentence in all respects. The court expressly found that the prosecutorial comment at issue was "proper comment" in rebuttal, and further concluded that the sentence of death was proportionate vis-a-vis the codefendant's sentence. The court also found that the aggravating circumstance at issue had been proven beyond a reasonable doubt. Rehearing was denied on September 10, 1987, and the United States Supreme Court denied review on February 29, 1988. **See Williamson v. Florida**, ____ U.S. ____, 108 S.Ct. 1098, 99 L.Ed.2d 261 (1988).

On September 27, 1989, Governor Martinez signed a death warrant for Johnny Williamson, such warrant active between noon on December 5, 1989 and noon on December 12, 1989, with execution presently scheduled for 7:00 a.m. on December 6, 1989. Pursuant to the operation of Fla.R.Crim.P. 3.851 and an extension of time granted by the Florida Supreme Court, Williamson filed two pleadings on November 3, 1989 - a motion to vacate, pursuant to Fla.R.Crim.P. 3.850, in the circuit court, and a petition for extraordinary relief, etc., in the Supreme Court of Florida. In this latter pleading, Williamson presented four (4) claims for relief - (1) a claim that the jury had been incorrectly instructed as to Williamson's right to defend himself and appellate counsel rendered ineffective assistance in failing to

present such claim on appeal; (2) a claim that the "intense" security measures taken during trial prejudiced Williamson and that appellate counsel had rendered ineffective assistance in failing to present such claim on appeal; (3) a claim that the trial court had improperly asserted that sympathy for Williamson could not be considered and that appellate counsel rendered ineffective assistance in failing to present such claim on appeal and (4) a claim that the jury instructions at sentencing had improperly shifted the burden of proof onto Williamson and that appellate counsel rendered ineffective assistance in failing to present such claim on appeal.

Argument

THE INSTANT PETITION FOR WRIT OF HABEAS CORPUS SHOULD BE DENIED, IN THAT WILLIAMSON HAS FAILED TO DEMONSTRATE THAT HE RECEIVED INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL; ALL OTHER CLAIMS ARE IMPROPERLY PRESENTED AND PROCEDURALLY BARRED

Of the four claims presented, only those portions of such claims which relate to ineffective assistance of appellate counsel are properly presented. As this court observed recently in **Parker v. Dugger**, 14 F.L.W. 557 (Fla. October 25, 1989), habeas corpus petitions are not to be used for additional appeals on questions that could have been, should have been, or were raised on appeal or in a Rule 3.850 motion, or on matters which were not objected to at trial. **See also Lightbourne v. Dugger**, 14 F.L.W. 540 (Fla. October 19, 1989); **Suarez v. Dugger**, 527 So.2d 190 (Fla. 1988); **White v. Dugger**, 511 So.2d 554 (Fla. 1987); **Blanco v. Dugger**, 507 So.2d 1377 (Fla. 1987); **Copeland v. Dugger**, 505 So.2d 425 (Fla. 1987). Accordingly, all claims, except those involving ineffective assistance of appellate counsel, should be expressly found to be procedurally barred, pursuant to the dictates of **Harris v. Reed**, ____ U.S. ____, 109 S.Ct. 1038, 103 L.Ed.2d 308 (1989).

CLAIM I: WILLIAMSON'S CLAIM IN REGARD TO THE DENIAL OF ANY REQUESTED JURY INSTRUCTION ON SELF-DEFENSE

In his first claim, Williamson argues that his convictions and sentence must be reversed because fundamental error occurred

in regard to the trial court's denial of a requested jury instruction on self-defense; Williamson also contends that appellate counsel rendered ineffective assistance in failing to present this claim on direct appeal, in that "the claim that the trial court erred was [ ] preserved for appeal to this court." (Petition at 3). As argued above, the State maintains that any "merits" claim in this regard is procedurally barred, in that, under Florida law, any claim of error in regard to the denial of a requested jury instruction is a matter which should have been presented on direct appeal and, thus, is not cognizable for the first time on habeas corpus. **See e.g., McCrae v. Wainwright**, 439 So.2d 868 (Fla. 1983) (issue of whether allegedly improper jury instructions denied the defendant due process not cognizable when raised for the first time on habeas corpus). Accordingly, the only issue properly before this court is whether appellate counsel rendered ineffective assistance in failing to raise this matter on appeal.

In resolving this inquiry, there are, essentially, two matters which must be considered - whether any claim of error was preserved for review and, if so, whether every reasonably competent appellate counsel would necessarily have raised this claim. It is well established that counsel cannot be deemed ineffective for failing to raise an issue on appeal which has not been preserved. **See Routly v. Wainwright**, 502 So.2d 901 (Fla. 1987); **Ruffin v. Wainwright**, 461 So.2d 109 (Fla. 1984). It is equally well established that one of appellate counsel's primary functions is to "winnow out" weaker arguments on appeal and to focus upon those most likely to prevail. **See Smith v. Murray**, 477 U.S. 527, 106 S.Ct. 2661, 91 L.Ed.2d 454 (1986). Counsel, in order to render effective assistance, need not raise on appeal every non-frivolous claim apparent from the record, **see Jones v. Barnes**, 463 U.S. 745, 103. S.Ct. 3308, 77 L.Ed.2d 987 (1983), and this court has specifically recognized that appellate counsel cannot be deemed ineffective for failing to present a legal argument which would, in all probability, have been found to be without merit. **See Thomas v. Wainwright**, 495 So.2d 172 (Fla.

1986). Applying these principles, it is clear that Williamson is entitled to no relief.

The record indicates that no request for any instruction on self-defense was made at the charge conference in this case, and that no formal written request to such effect was ever filed (R 710-712). It was only after the closing arguments as to this defendant occurred that trial counsel made an oral request for this instruction, immediately before the closing argument of co-counsel was to begin (R 774-775). Appellate counsel could quite well have questioned the preservation of any claim of error in this regard, given the lack of a written request, **see Taylor v. State**, 410 So.2d 1358 (Fla. 1st DCA 1982), and the fact that any request was made after the charge conference. **See Dean v. State**, 430 So.2d 491 (Fla. 3rd DCA 1983), **quashed on other grounds**, 478 So.2d 38 (Fla. 1985). Preservation aside, appellate counsel could quite reasonably have concluded that any argument in this vein would, in all probability, have been found to be without merit. **See Thomas, supra.**

In order for even an arguable issue to exist, there must have been **some** evidence to support this jury instruction. The State would respectfully suggest that there was none, and the State would further respectfully point out that Williamson himself has taken this identical position in the circuit court in his contemporaneously-filed motion to vacate. In that 3.850 motion, filed November 3, 1989, the same day that this habeas corpus petition was filed in this court, Williamson contends that **trial** counsel rendered ineffective assistance by, **inter alia**, failing to introduce evidence to justify the giving of a jury instruction on self-defense (See Emergency Motion to Vacate, etc., **State v. Williamson**, Dixie County Circuit Court Case No. 85-130F, at pages 4-35). Specifically, Williamson argues,

> The killing of Mr. Drew, the victim in this case, resulted from self-defense. Counsel, however, failed to introduce evidence, in his possession, and known to him, which would have unquestionably established this defense. By failing to introduce **any evidence** counsel lost not only the amply available defense of self-defense, but all attendant jury instructions as well. (emphasis supplied).

(Emergency Motion at 5).

Likewise, Williamson argues at another point in the motion,

> [Defense counsel] lost the instruction, however, because he failed to elicit, or introduce, **any evidence** of self-defense. It has long been the bright line, black letter rule in Florida that the defendant, putting forth a self-defense claim, must go forward with "some" evidence to show the facts of the defense. (citations and quotation omitted).
>
> In Mr. Williamson's case defense counsel produced no evidence of self-defense . . . (emphasis supplied).

(Emergency Motion at 34).

The State is respectfully unaware of any authority which would allow Williamson to take diametrically opposed inconsistent positions, simultaneously, in two levels of court - arguing in the circuit court on 3.850 that trial counsel was ineffective for failing to present **any** evidence to support a jury instruction on self-defense and arguing in this court, on habeas corpus, that appellate counsel was ineffective for failing to appeal the denial of this requested instruction, when, as per the prior argument, no evidence existed to support it! This "logic" would make even **Kafka** pause.

Additionally, the State would note that the testimony of those witnesses who observed the murder - Omer Williamson, Marvin Harris and Ronnie Presley - does not support any allegation of self-defense, and similarly, neither do any of Williamson's statements, which were introduced through various witnesses. These statements included Williamson's pre-murder remark to his codefendant that they were going to "have" to kill Daniel Drew (R 510); as well as remarks to various witnesses, as Williamson searched for a knife on the day of the murder, to the effect that he intended to use such to "kill somebody" (R 515, 600). Williamson also made various statements after the murder to effect that "the son-of-a-bitch wouldn't die" (R 612) and "I killed that mother-fucker" (R 627). Inasmuch as insufficient evidence existed to support any instruction of self-defense, appellate counsel did not render ineffective assistance in failing to raise any claim of error in this regard. **See Lambrix v. Dugger**, 529 So.2d 1110 (Fla. 1988) (appellate counsel not

ineffective for failing to raise claim on appeal in regard to denial of requested instruction on intoxication where evidence insufficient to support such). No relief is warranted as to this claim.

CLAIM II: WILLIAMSON'S CLAIM IN REGARD TO THE SECURITY MEASURES TAKEN AT TRIAL

In this claim, Williamson argues that his convictions and sentence of death must be reversed because of "intense" security measures at his trial which allegedly prejudiced him. The basis for this claim lies outside the record, in the form of a newspaper article from the Gainesville Sun. Such article relates that on April 7, 1986, the day on which voir dire was conducted and the trial began, two armed deputies and four armed corrections officers stood by the exits of the courtroom and armed corrections officers sat behind and next to Williamson and his codefendant. Additionally, the article states that Williamson and codefendant Robertson had their legs shackled together. In the instant petition, Williamson argues that these allegedly overly intense security measures constitute fundamental error. Williamson also contends that appellate counsel rendered ineffective assistance in failing to raise any claim of this nature on appeal.

The State respectfully contends that any "merits" issue in this regard is procedurally barred. Claims of this nature represent matters which must be preserved through objection at trial and presentation on direct appeal. **See Maxwell v. Wainwright**, 490 So.2d 927 (Fla. 1986) (claim that defendant's right to fair trial violated when venire saw defendant in custody of officers not cognizable when raised for the first time on 3.850). Accordingly, the only issue remaining is whether appellate counsel rendered ineffective assistance in this regard. Again, two preliminary inquiries remain - whether any claim of error was preserved for review and, if so, whether every reasonably competent attorney would have raised this claim on appeal. This claim fails on both counts.

As to preservation, the record indicates that a pretrial motion was filed to remove constraints and to provide appropriate courtroom attire; the motion stated that adequate measures could be taken to insure courtroom security without "the necessity of parading the defendant before the jury" while he was handcuffed (R 91-92). The record also indicates that, on April 4, 1986, Judge Lawrence ruled on this motion, granting the request that civilian clothing be provided, and, while denying the rest of the motion, directing,

> The Department of Corrections shall make appropriate arrangements for insuring that physical restraining devices placed upon the defendants, if any, during the trial of this cause, such as handcuffs, legcuffs, and similar restraints, shall be so placed as to avoid attracting undue attention thereto by the jury or prospective jurors.

(R 117).

The transcript of the trial contains no objection by defense counsel based on the "prominence" of any security device or based upon the presence or placement of any security personnel. On the basis of this record, the State would contend that no claim of error was preserved for review and that, accordingly, appellate counsel cannot be deemed ineffective for failing to raise a procedurally barred issue. **See Routly, supra; Ruffin, supra.** The State would again note that in the concurrently-filed Emergency Motion to Vacate, Williamson has taken the position that trial counsel was ineffective for failing to adequately litigate this matter. (See Emergency Motion to Vacate, etc., **State v. Williamson**, Dixie County Circuit Court case number 85-130F, at 123).

Additionally, to the extent that any further argument is required, the State would simply note that appellate counsel, in evaluating any potential point on appeal in the regard, would have been aware of the fact that Williamson, at the time of trial, was not only in custody as to this offense, but also was in continuing custody as to the underlying crime which had placed him in Cross City Correctional Institute in the first place. Counsel would also have been aware that the judge, prior to trial, had been advised by the State of Williamson's prior

convictions for escape (R 93, 94-95, 103-107). Likewise, counsel would have been aware of the fact that the jury would not necessarily reach the "wrong" conclusion from the presence of the various security personnel; because this was a prison killing, and because most of the witnesses were prison inmates, the jury could quite well have regarded the security measures taken as having little to do with Williamson himself. Further, appellate counsel would, of course, have been bound by the record on appeal, and, given his experience with this court, could quite reasonably have concluded that this court would look askance upon any point on appeal predicated upon an extra-record newspaper clipping. **Cf. Thomas, supra.** No relief is warranted as to this claim.

CLAIM III: WILLIAMSON'S CLAIM IN REGARD TO SYMPATHY AND MERCY

In this claim, Williamson argues that his sentence of death must be vacated because, during the trial, Judge Lawrence, in accordance with the standard jury instructions, advised the jury that, in their deliberations, they should not consider "feelings of prejudice, bias or sympathy", and, further, should not decide a case because they were angry with or sorry for anyone (R 829, 830). Williamson argues that these instructions, which were **not** given at the penalty phase, have the effect of preventing the jury from considering "sympathy" or "mercy" in mitigation. Williamson contends that this claim is one of fundamental error and that, additionally, appellate counsel was ineffective for failing to raise this claim on appeal.

The State respectfully suggests that this claim does not merit extended discussion. This court has specifically held that any claim "that the trial court and prosecutor improperly asserted that sympathy towards the defendant was an improper consideration in the jury's recommendation" cannot be raised for the first time on habeas corpus, when no contemporaneous objection has been interposed at trial. **See Tompkins v. Dugger,** 14 F.L.W. 455 (Fla. September 14, 1989). Inasmuch as no contemporaneous objection was interposed **sub judice, Tompkins**

controls, and any "merits" claim in this regard is procedurally barred. Likewise, this court held in **Tompkins** that appellate counsel could not be deemed ineffective for failing to raise a procedurally barred claim in this regard. **See also Atkins v. Dugger,** 541 So.2d 1165 (Fla. 1989) (appellate counsel not ineffective for failing to raise unpreserved claim regarding prosecutor telling jury that it could not consider sympathy). No relief is warranted as to this claim.

CLAIM IV: WILLIAMSON'S CLAIM IN REGARD TO ALLEGED BURDEN-SHIFTING IN THE PENALTY PHASE JURY INSTRUCTIONS

In his final claim, Williamson argues that his sentence of death must be vacated because the jury instructions at the penalty phase allegedly shifted the burden onto him to prove that death was inappropriate. Williamson bases this claim upon the fact that the standard jury instructions given the jury at the penalty phase advised them, at one point, that they were to determine whether the mitigating circumstances outweighed the aggravating (R 944); Williamson also seems to suggest that the sentencing judge applied an allegedly wrongful standard in formally sentencing Williamson to death. Williamson presents this claim as a matter of fundamental error and, additionally, contends that appellate counsel rendered ineffective assistance in failing to raise any claim in this regard.

The State again respectfully suggests that this claim does not merit extended discussion. This court has repeatedly and consistently held that claims involving alleged burden-shifting in the penalty phase jury instructions cannot be raised for the first time on habeas corpus, in the absence of contemporaneous objection at trial. **See Jones v. Dugger,** 533 So.2d 290 (Fla. 1988); **Tompkins, supra; Lightbourne, supra.** Accordingly, any "merits" claim in regard to the jury instructions is procedurally barred, given the fact that no objection was interposed below. The State would also note that in the contemporaneously-filed Emergency Motion to Vacate, Williamson similarly contends that trial counsel was ineffective for failing "to properly litigate this matter at the time of the original proceeding", thus

preserving it for review. (See Emergency Motion to Vacate, etc., **State v. Williamson**, Dixie County Circuit Court case number 85-130F, at 166).

Likewise, given the absence of objection below as to the jury instructions, no ineffective assistance of appellate counsel can be demonstrated. **See Preston v. State**, 531 So.2d 154 (Fla. 1988) (appellate counsel not ineffective for failing to raise procedurally barred claim in regard to burden-shifting in jury instructions); **Atkins** (same); **Tompkins** (same); **Lightbourne, supra**. As to any claim involving ineffective assistance of appellate counsel for failing to raise a claim involving the sentencing judge's alleged error in this regard, no basis exists in the record for any contention of this nature. At the time that the judge orally imposed sentence, he stated that he had found that the aggravating circumstances outweighed the mitigating (R 958); his written sentencing order contains identical language (R 150). In **Hamblen v. Dugger**, 546 So.2d 1039 (Fla. 1989), this court rejected a claim of ineffective assistance of appellate counsel, where counsel had not argued that the sentencer had applied a presumption of death; the sentencing order in that case had included the language that the mitigating circumstances did not outweigh the aggravating. In light of this court's holding in **Hamblen**, it can hardly be said that ineffective assistance of appellate counsel has been demonstrated **sub judice**. No relief is warranted as to this claim.

Conclusion

WHEREFORE, for the aforementioned reasons, the State of Florida respectfully moves this honorable court to deny any and all requested relief in this cause, including any stay of execution, in all respects.

Respectfully submitted,

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Certificate of Service

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Mr. Billy H. Nolas, Esq., Office of the Capital Collateral Representative, 1533 South Monroe Street, Tallahassee, Florida 32301, this 20 day of November, 1989.

RICHARD B. MARTELL
Assistant Attorney General