IN THE

SUPREME COURT OF FLORIDA

CASE NO. 75,023

JOHN MILLS, JR.,

Petitioner,

v.

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

Respondent.

FILED
SID J. WHITE
JAN 16 1990
CLERK, SUPREME COURT
By ____ Deputy Clerk

REPLY TO STATE'S RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

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PRELIMINARY STATEMENT

Counsel for Mr. Mills herein provide a reply to the Respondent's contentions regarding Mr. Mills' claims for habeas corpus relief. As a reasoned review of the State's submission would show, the State has said little to rebut this petitioner's entitlement to relief. This reply will therefore briefly discuss the state's assertions and demonstrate the errors in the Respondent's analysis.

CLAIM I

THE BOOTH V. MARYLAND/SOUTH CAROLINA V. GATHERS CLAIM

The State argues (1) that Mr. Mills' Booth claim is procedurally barred (Response at 6-7) and (2) that even if not barred, the errors at issue do not violate Booth (Response at 7-8). The State's arguments are contrary to the trial record, to the direct appeal and prior post-conviction proceedings in this case, and to Booth v. Maryland, 107 S. Ct. 2529 (1987), South Carolina v. Gathers, 109 S. Ct. 2207 (1989), Jackson v. Dugger, 547 So. 2d 1197 (Fla. 1989), and the eighth and fourteenth amendments. Mr. Mills' claim is properly before this Court on the merits, and the merits require relief.[1]

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[1]Petitioner notes at the outset his objection to the gross mischaracterization of this case's "procedural history" and "facts" as presented in the Attorney General's response. It should be noted, contrary to the Attorney General's suggestion, that the Eleventh Circuit Court of Appeals is not populated by

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The Respondent's argument that Mr. Mills' Booth claim is procedurally barred rests upon a misreading or failure to read the records of the direct appeal and prior post-conviction proceedings in this case and on a failure to once mention -- much less analyze -- the significance of this Court's opinion in Jackson, supra, to the issue presented in Mr. Mills' habeas corpus petition. In essence, the Respondent's first argument is that defense counsel's objection to the testimony of the victim's father (who purportedly testified in order to identify certain property taken from the victim's home) was insufficient to allow Mr. Mills to raise a Booth claim. According to the Respondent, "[a]t trial, and on appeal, defense counsel objected to this witness, not this evidence, as prejudicial under the general prohibition against using family members as 'identification witnesses'." (Response at 6)(emphasis in original). Thus, the Respondent argues, Mr. Mills "did not raise a 'Booth' claim [at trial] and cannot do so [now]" because "a general objection

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judges who lack in intellect. If Mr. Mills' Booth/Gathers claim was as frivolous as the Attorney General asserts, and if it was as procedurally barred as the Respondent cavalierly asserts, the Eleventh Circuit would not have allowed the opportunity for this Court to review the case post-Jackson. That the Eleventh Circuit did so speaks to the substantiality of Mr. Mills' claim. Indeed, in the case of the only other similarly-situated petitioner in which the Eleventh Circuit rendered a ruling such as the one rendered in Mr. Mills' case, the Respondent also argued procedural default and frivolity, but this Court granted resentencing. See Meeks v. Dugger, 548 So. 2d 184 (Fla. 1989).

cannot be used on collateral attack to justify any variation on a claim imaginable by successor counsel. . . . Mills did not make a 'victim impact' objection. . . ." (Response at 6). What the Respondent ignores is that trial counsel's objections were very specific, directed at the victim's father's characterizations of his relationship with his son and at his recitation of sympathetic anecdotes regarding that relationship. Defense counsel objected to the **"manner"** in which the testimony was given because it served no "useful purpose other than to evoke sympathy from the jury":

> Q Are you related to Les Lawhon?
>
> **A** Yes.
>
> Q And what was that relation?
>
> **A** He was my son.
>
> Q <u>How would you characterize that relationship with Your son</u>?
>
> A <u>We were always very close. He was a **boy** that never gave us anv trouble from the time he was born. I didn't set a chance to hunt . . .</u>
>
> MR. RANDOLPH [Defense Counsel]: Your Honor, I have to object to this. I don't see the relevancy of this.

(R. 1416)(emphasis added).

> Q Are you familiar at all with the [victim's] stereo equipment?
>
> A Yes. <u>As a matter of fact, I was the one that went with him when he Picked it out. He had more confidence in my judgment on that type of equipment than he did his own. So he paid for it with his money and I</u>

was the one advised him on what to buy and hooked it up for him.

Q Okay.

MR. RANDOLPH: Your Honor, may we approach the bench?

THE COURT: Yes, sir.

(The following proceedings were held at the bench and outside the hearing of the Jury:)

MR. RANDOLPH: Your Honor, I would have to object to this testimony in the manner in which it is being given. It is only given in this manner to provoke sympathy from the jury.

MR. KIRWIN: That is not so.

MR. RANDOLPH: He is asking specific questions and doing so in a manner that will allow him to so on and keep telling thinss which are not necessarily relevant to this case. He was called, I thought, for identification. We have had all these items identified, and they have been moved in evidence, and it has been stated it is the same property. I don't see any useful purpose other than to evoke sympathy from the jury. That's what he is doing.

(R. **1464-65)** (emphasis added).

After these clear and specific objections to the content of the witness' testimony (not to the **"witness"** in general [cf. Response at **6]),** on direct appeal, appellate counsel argued:

During the course of the trial, the Court allowed the victim's father Reverend Glen Lawhon to testify over appellant's objection (R. **1461-1470).** The Prosecution alleges that the purpose for the testimony was for identification of property taken from Les Lawhon's residence. It is clear from the record, however, that the underlying purpose

> for the testimony was to evoke the sympathy of the jury. The prosecutor frames his questions in a way which allowed Glen Lawhon to interject to great deal of information showing the close relationship between he and his son (R. 1461-1470). This information was in no way relevant to any issue, in the case.

(Mills v. State, No. 63,092, Initial Brief of Appellant at 36). Appellate counsel further argued that this error was not harmless because "[m]ost of the jurors knew Glen Lawhon and his standing in the community. The testimony of Glen Lawhon in a community in which he is the pastor of the largest white church in the county where sympathy already was high would not constitute harmless error" (Id. at 38).[2] Mr. Mills is a black man, and this was a racially charged trial.

Pre-Booth, this Court rejected the claim, noting, "[t]he record does not indicate that this testimony had [the] underlying purpose of gaining the sympathy of the jury or of prejudicing it against Mills." Mills v. State, 462 So. 2d 1075, 1080 (Fla. 1985). The Court thus clearly identified the issue as involving the possibility that Rev. Lawhon's testimony engendered sympathy or prejudice. Pre-Booth, before the eighth amendment

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[2]Alternatively, appellate counsel argued that Rev. Lawhon's testimony was inadmissible because it was cumulative and because of the prohibition against family members giving identification testimony (Id. at 37). However, the focus of appellate counsel's argument (pre-Booth) was that Rev. Lawhon's testimony invoked sympathy because of its characterization of his relationship with the victim.

implications of such testimony were delineated, the Court found no merit to the issue.[3]

Contrary to the Respondent's assertions, trial counsel also objected to the prosecutor's guilt phase closing argument, which fashioned a comparable worth argument from the victim impact evidence and from evidence regarding Mr. Mills' race and religion:

> Ladies and gentlemen, the Defendant, John Mills, Jr., is consumed with hatred. And he hates the people who he thinks have been oppressing him. Listen to the testimony of Fawndretta Galimore. She said he called them devils. Major Hines --
>
> MR. RANDOLPH: Your Honor, I have to object. He has gone a long way in his closing argument. This closing statement he is making now is meant only for to show, to prejudice this jury against my client along those lines.
>
> THE COURT: Just stay with the facts, Counselor.
>
> MR. KIRWIN: Judge, I am staying with the facts, and I have no intention of prejudicing this jury or any other jury.
>
> He is consumed with hatred. He can't help but hate, and one man that he had no reason to hate, no reason to harm, the man that extended him a helping hand. the man that let him use the phone, the man that let him in his house, is dead at the hands of John Mills, Jr., this defendant.

[3]The effect of such testimony on a reasonable juror is no different from the effect of the sheriff's testimony in Jackson, supra.

(R. 1908-09)(emphasis added). Despite defense counsel's objection, the court allowed the prosecutor's plea to **the** exercise of passion and prejudice to continue.

Mr. Mills' case fits squarely within this Court's reasoning in Jackson, supra. Defense counsel objected. His objections to the improper evidence and arguments were overruled, and the State's unconstitutional presentation was allowed to continue unabated. When the issue was raised on direct appeal, this Court declined to reverse, applying a pre-Booth, pre-Jackson standard of review. **See** Mills v. State, 462 So. 2d 1075 (Fla. 1985). In prior post-conviction proceedings, Mr. Mills again attempted to have the Court review the errors complained of herein, and the Court declined on the basis of its earlier, pre-Booth, direct appeal ruling. **See** Mills v. State, 507 So. 2d 602 (Fla. 1987). Under Jackson, this issue should now be revisited, for the errors appear of record and have been previously presented to this Court. Jackson, 547 So. 2d at 1199 n.2. Under Booth, Gathers, and Jackson, the constitutional errors at issue in this proceeding require relief.[4]

[4]The Respondent also makes much of former counsel's citation to Weltv v. State, 402 So. 2d 1159 (Fla. 1981), and argues that this is not enough to preserve Booth error. Of course, Weltv was a 1981 case, cited by an attorney in a pre-1987 (pre-Booth) trial, sentencing, and direct appeal. Counsel cited other cases as well, all of which condemned inflammatory prosecutorial presentations which inject irrelevant matters into the proceedings. In Weltv itself, the Court noted that the reason

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As this Court has explained in prior precedents, the question of procedural bar turns upon whether there is new precedent which establishes that this Court had failed to properly analyze in the past issues such as the one presented by Mr. Mills. For example, when Hitchcock v. Duaaer, 107 S. Ct 1821 (1987), was decided, this Court determined that Hitchcock found this Court's precedents interpreting Lockett v. Ohio, 438 U.S. 586 (1976), to be erroneous. **As** a result, this Court determined that no procedural bars would be applied to claims pursuant to Lockett which this Court had previously failed to analyze properly or which appellate counsel had failed to raise because of this Court's earlier erroneous precedents. **See** Downs v. Duaaer, 514 So. 2d 1069 (Fla. 1987); Thompson v. Dugger, 515 So. 2d 173 (Fla. 1987); Hall v. State, 541 So. 2d 1125, 1126 (Fla. **1989)("[A]s** we have stated on several occasions, Hitchcock is a significant change in law, permitting defendants to raise a claim under that case in post-conviction proceedings.") Hitchcock was

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for such rules **"is** to assure the defendant as dispassionate a trial as possible and to prevent interjection of matters not germane to the issue of guilt." 402 So. 2d at 1162. What else was an attorney to rely on, before Booth, to signal the Court to the errors? The issue previously raised was premised upon precisely the error which the Supreme Court discussed in Booth and Gathers. This case is thus no different than Jackson. The Attorney General's procedural default argument, in light of Jackson, simply does not hold up.

accordingly recognized as a change in law by this Court which defeated the usual procedural bar. See Hall, supra.

As to Claim I of Mr. Mills' habeas petition, the question is whether prior to Booth v. Maryland, 107 S. Ct. 2529 (1987), this Court had considered that the eighth amendment's guarantee of an individualized and reliable capital sentence was violated by the introduction of evidence or argument of victim impact, the victim's worth, and/or the comparable worth of the victim as opposed to the capital defendant. In other words, the question is whether this Court had prior to Booth properly analyzed such eighth amendment claims and recognized that an individualized and reliable sentencing decision precluded comparisons of the value of the victim's life to the value of the defendant's life. In Jackson (Andrea) v. Dugger, 547 So. 2d 1197 (Fla. 1989), this Court quite clearly determined that it had failed to conduct the correct analysis of such eighth amendment claims prior to Booth. Thus, in those cases in which the claim was presented (as here) or even in those cases in which the issue was preserved but not presented because appellate counsel relied on this Court's precedents that such claims were meritless, Jackson declared no procedural bar could be erected. Claims such as Mr. Mills' are thus now appropriately considered and decided on their merits in

post-conviction proceedings.[5] Mr. Mills' claim of Booth and Gathers error is not barred.

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[5]In Jackson (Andrea) v. Dugger, this Court noted that on direct appeal Andrea Jackson had argued that victim impact evidence and argument was improperly introduced and considered at her capital trial. Ms. Jackson, like Mr. Mills, presented the issue on direct appeal in light of the pre-Booth precedents which were then available. However, on direct appeal, this Court failed to analyze the issue in light of the eighth amendment's requirement of an individualized and reliable sentencing:

> Appellant also takes issue with comments made by the prosecutor in both the conviction and guilt phases of the trial. Appellant argues that the egregious prosecutorial misconduct so infected the proceedings as to deny her due process of law and to deprive her of the constitutional rights to a fair trial and to an impartial jury.
>
> On several occasions this Court has admonished attorneys concerning the propriety of arguments in capital cases. **See**, e.g., Bertolotti v. State, 476 So.2d 130, 133-34 (Fla.1985); Jennings v. State, 453 So.2d 1109 (Fla.1984), vacated on other grounds, 470 U.S. 1002, 105 S. Ct. 1351, 84 L.Ed.2d 374 (1985); Teffeteller v. State, 439 So.2d 840 (Fla.1983), cert. denied, 465 U.S. 1074, 104 S. Ct. 1430, 79 L.Ed.2d 754 (1984). We have gone so far as to warn counsel that such misconduct may form the basis for disciplinary proceedings by The Florida Bar. Bertolotti. We note that the state attorney who prosecuted this case is a man of extensive experience who should be sensitive to the ethical restrictions governing the conduct of state prosecutors. The kind of argument complained of here is not such as this Court can approve. The comments shown in the record are not an appropriate model for young lawyers. However, after a complete review of the record we cannot say that the comments are so offensive as to warrant a new trial. As we stated in Davis v. State, 461

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Strangely, the State also complains that Mr. Mills did not raise a "Booth claim" at trial or on direct appeal (Response at 6, 7). The procedural posture of this case and the fact that it is virtually identical to that in Jackson has already been discussed. The State's specific complaint overlooks the obvious: trial counsel did object and the issue was raised on direct appeal. This case thus fits squarely into the holding of Jackson. The issue had been preserved, contrary to the

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> So.2d 67, 70 (Fla.1984), "[t]he control of comments in closing arguments is within a trial court's discretion, and a court's ruling will not be overturned unless a clear abuse is shown." The trial judge is in the best position to monitor the conduct of lawyers in the courtroom and the record shows that Judge Moran made continuing efforts to ensure that appellant was given a fair trial. Further, as in Valle v. State, 474 So.2d 796, 805 (Fla. 1985), vacated on other grounds, Valle v. Florida, ___ U.S. ___, 106 S. Ct. 1943, 90 L.Ed.2d 353 (1986), there is nothing to indicate that the trial judge relied on any of the prosecutor's comments in making his sentencing decision.

Jackson v. State, 498 So. 2d 406, 410-11 (Fla. 1986). In Mr. Mills' 1985 direct appeal, this Court also found no error, applying a pre-Booth analysis. In post-conviction proceedings in Ms. Jackson's case, this Court agreed that it had failed to consider the prosecutor's comments in light of the eighth amendment. Thus, on Ms. Jackson's habeas corpus petition, this Court recognized its prior error, and ordered a new sentencing proceeding untainted by Booth error. The result should be no different in Mr. Mills' case.

Respondent's bald allegation to the **contrary.**[6] If the Respondent's argument is that Mr. Mills should have called his claim a "Booth" claim in **1985,** before Booth even existed, that argument is nonsensical at best. This Court recognized as much in Jackson.

The State also argues that the fact much of the improper "evidence" came in during the guilt phase is somehow significant. However, that is precisely what occurred in South Carolina v. Gathers, **109** S. Ct. 2207 **(1989),** where eighth amendment error was found. All of the "evidence" at issue in Gathers came in at trial and purportedly came in for a proper purpose. The eighth amendment was violated because the evidence and the arguments founded on that evidence resulted in the jury's having before it issues of comparable worth. That is what rendered the death sentence unreliable and what denied the defendant an individualized capital sentence. Similarly, here, eighth amendment error resulted from the admission of the evidence and from the prosecutor's subsequent improper argument premised upon comparable worth. The State acknowledges that "in Gathers the court allowed the State to identify certain biblical tract's as the victims, but merely prohibited the reading of these tracts to the jury" (Respondent at 7)(emphasis in original).

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[6]**The** State cites virtually nothing from the actual record of these proceedings in support of its assertions.

The State's simplistic reading of Gathers, however, overlooks what Gathers involved and what it held: that victim impact and comparable worth evidence and arguments violate the eighth amendment, irrespective of the reason why the evidence was introduced. The State's efforts to shy from Gathers are, to a certain extent, understandable: the proceedings at issue in Mr. Mills' case violated the eighth amendment in the same way as the proceedings at issue violated the eighth amendment in South Carolina v. Gathers. In Mr. Mills' case, the evidence itself (i.e., the victim's father's characterizations of his relationship with his son and the testimony regarding Mr. Mills' race and religion) was improper and then was used to fashion even more improper victim impact and comparable worth arguments.

Finally, the State contends that it is Mr. Mills' burden to show "that the jury or the sentencer based any sentencing decision on victim impact information" (Response at 15). The State simply mischaracterizes what the burden is under Booth and Gathers. Under Gathers and Booth, resentencing is required if **"contamination"** occurs, i.e., if the improper evidence gets to the jury. Booth requires that the Court disallow the **"risk"** that impermissible information **"may"** influence the capital sentencing determination, and mandates that the State bear the heavy burden of proving that the errors had **"no** effect" on the jury's sentencing decision. The State has not even attempted to make the requisite showing in this case, **see** Hitchcock, supra, 107 S.

Ct. 1821 (where State made no effort to argue harmless error, the question of harmlessness will not be considered and relief will be granted): Thompson, supra, 515 So. 2d 173 (where State makes little effort to show that eighth amendment error is harmless, but instead premises most of its argument on procedural default, harmless error will not be considered and relief will be granted), but would be unable to make such showing even if it had tried to -- the errors in Mr. Mills' case assuredly had an effect on his death sentence; they were at the core of the prosecutor's arguments.

In Mr. Mills' case, the risk condemned in Booth actualized -- his capital sentence was imposed in "violat[ion of the] principle that a sentence of death must be related to the moral culpability of the defendant." South Carolina v. Gathers, 109 S. Ct at 2210. See also Enmund v. Florida, 458 U.S. 782, 801 (1982)("[f]or purposes of imposing the death penalty . . . [the defendant's] punishment must be tailored to his personal responsibility and moral guilt.") Under both Booth and Gathers, Mr. Mills' sentence of death cannot stand. Under Jackson, Mr. Mills' claim is properly before this Court, as the Eleventh Circuit recognized, and resentencing is appropriate.

OTHER CLAIMS

The State's lack of familiarity with the record and prior proceedings in this case, as well as its apparent failure to even read Mr. Mills' petition, is painfully evident in the Response's

presentation regarding Claims II through **XII.**[7] This is particularly clear regarding the Respondent's procedural bar arguments, which fail to apprehend that numerous of Mr. Mills' claims were raised on direct appeal and prior proceedings and are presented in the petition because new case law established that the claims were previously erroneously decided (**See** Petition, Claims 111, IV, VI, and VIII). Numerous other of Mr. Mills' claims involve ineffective assistance of appellate counsel (e.g. Claims I, 11, V, VII, IX, X, XI, and XII), and thus are properly presented in a habeas corpus petition. All of these claims also involve fundamental error and substantial constitutional questions which go to the fundamental fairness and reliablility of Mr. Mills' capital conviction and death sentence, and of this Court's appellate review. The Respondent addresses none of these bases for Mr. Mills' claims. The claims should be determined on their merits. As Mr. Mills' petition demonstrates, he is entitled to the relief he seeks.

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[7]**For** some reason, the Respondent seizes upon a typographical error in Mr. Mills' petition as a jumping off point for irrelevant, inane attacks (Response at 8-10). Mr. Mills' petition contains twelve issues. Due to a typographical error, Claim V is mistakenly labeled Claim IV. The remaining claims are appropriately numbered sequentially. Perhaps because of the State's focus on this typographical error, it is difficult to tell which claims the Response addresses. It appears at least that the State has failed to address Claims V, VII, and IX.

CONCLUSION

The State has said nothing to rebut Mr. Mills' entitlement to relief. The relief sought is appropriate and should be granted.

Respectfully submitted,

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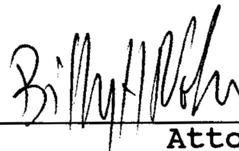
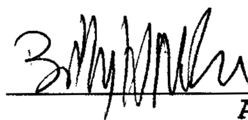
By: 
Attorney

CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT a true and correct copy of the foregoing has been furnished by United States Mail, first class, postage prepaid, to Mark Menser, Assistant Attorney General, Magnolia Park Courtyard, **111-29** North Magnolia Street, Tallahassee, Florida this 16th **day** of January, **1990.**


Attorney