IN THE SUPREME COURT OF FLORIDA

JOHN MILLS, JR.,

Petitioner,

v. CASE NO. 75,023

RICHARD L. DUGGER,

Respondent.

_____/

RESPONSE TO THIRD PETITION FOR WRIT OF HABEAS CORPUS

The Respondent answers as follows:

(1) Procedural History

On December 4, 1982, John Mills was properly convicted of first degree murder. (R 2007-2009). In keeping with the suggestion of the advisory jury, Mills was sentenced to death. (R 273-274).

Mr. Mills appealed to this Court, raising the following claims:

(1) Denial of his motion for change of venue.

(2) Failure to excuse venireman Byrne for cause.

(3) Denial of his motion for mistrial (improper cross-examination re: prior record).

(4) Error in allowing the victim's father to identify the deceased.

(5) Error in admitting a photograph into evidence.

(6) Error in retention of jurisdiction over one-half of the jail sentence.

(7) Error in instructing the jury that two aggravating factors were established.

(8) Improper "doubling" of aggravating factors.

(9) Error in not finding statutory mitigation under §921.141.

Mr. Mills' judgment and sentence were affirmed. Mills v. State, 462 So.2d 1075 (Fla. 1985). Mills' petition for certiorari was also denied on July 1, 1985.

In reaction to a death warrant, Mills petitioned for relief pursuant to Fla.R.Crim.P. 3.850, raising these claims:

(1) State suppression of exculpatory evidence.

(2) Ineffective trial counsel (for not discovering suppressed evidence).

(3) State presentation of false testimony.

(4) State use of Mills' girlfriend as its agent.

(5) State misconduct (prosecuting Mills for "being black").

(6) Mills' absence during portions of his trial.

(7) Improper jury instruction regarding its role at sentencing.

(8) Ineffective trial counsel (failure to object to state arguments).

(9) Denial of the motion to change venue.

(10) Ineffective counsel for not properly presenting "race" issues.

(11) State-racial-bias in selecting a jury.

(12) Ineffective counsel (failure to investigate).

(13) Trial court error in adopting the State's sentencing findings.

Mills had to withdraw the last claim as "untrue", as noted in this Court's opinion. Except for his claims of incompetent counsel and prosecutorial misconduct, the trial court:

> addressed all of the claims covered by the evidentiary hearing and found them to be based upon mere semantics, incompetent and incredible evidence, misrepresented quotations, unrelated events and unsworn summaries.

Mills v. Dugger, 507 So.2d **602** (Fla. 1987).

Mills' other claims were denied on their merits.

Mills appealed this decision to the Florida Supreme Court and, in addition, filed a petition for writ of habeas corpus. The new petition raised four claims of ineffective appellate counsel.

Relief was denied. **Mills** v. **Dugger,** 507 So.2d 602 (Fla. 1987).

Mr. Mills proceeded to federal court, seeking relief under the federal habeas corpus act (28 U.S.C. 82254). The federal court granted a stay of execution and ultimately ordered an evidentiary hearing of its own.[1]

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[1] The district court entered an order denying certain other issues while granting a limited hearing.

Mr. Mills obtained an extension of the scheduled hearing until January 9, 1988.

Mills tried to obtain an extension of the January 9th hearing without success.

On the eve of the January 9th hearing, CCR again tried to block resolution of this case, this time by filing a second "habeas corpus" petition in this Court and by seeking a federal continuance.

The second petition was a bad faith renewal of the "delegation" issue which this Court, in Mills v. **State, supra,** recognized as having been "withdrawn as untrue" by CCR previously.

This Honorable Court summarily denied relief and CCR (Mr. Mills) was forced to proceed in federal court.

Federal habeas corpus relief was denied and a certificate of probable cause for appeal was issued on August 26, 1988, and November 29, 1988, respectively.

Mr. Mills appealed to the Eleventh Circuit Court of Appeals in November of 1988.

On March 24, 1989, CCR moved for a 45-day extension of time for filing its brief. The motion was granted.

On May 12, 1989 an extension of time (30 days) was requested and again granted.

On June 12, 1989, a third extension of time (30 days) was requested and granted, but with the caveat that no additional extensions would be granted.

On July 6, 1989, a fourth extension of time was requested and was granted. The State's request for adherence to the Court's "no more extensions" order was denied.

When Mills' fourth extension expired he did not file a brief. Mills did, however, request "abatement" of the federal case so that he could file a **third** habeas corpus petition in this Court.

The motion did not toll the time for filing the brief. For **months** Mills' motion and a State request for dismissal sat in the appellate court.

Finally, Mr. Mills' request was granted on October 3, 1989, so that Mills could file a "**Booth**" claim in state court.

On November 15, 1989, the petitioner filed this third petition.

ARGUMENT

CLAIM I

Mr. Mills Is Not Entitled To Relief Under **Booth** v. **Maryland,** 482 **U.S.** 496 (1987)

Mr. Mills contends that he is entitled to relief under **Booth** v. **Maryland,** 482 **U.S.** 496 (1987), and **South Carolina** v. **Gathers,** 109 S.Ct. 2207 (1989).

Cutting through the vicious and personal attacks upon the prosecutor we find two "bases" for Mr. Mills' claim.

First, Mr. Mills alleges that "**Booth**" error was committed when the trial court allowed the victim's father to identify property stolen from the victim's home.

At 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". In so arguing, Mills relied upon **Welty** v. **State,** 402 So.2d **1159** (Fla. 1981), and noted his own willingness to stipulate to this testimony or at least accept the same testimony from another source.

We submit that "**Booth**" claims involve evidence which shifts the attention of the sentencer from the crime and the defendant to the victim or his family. "Booth" is not a prohibition against the use of any and all evidence of the details of a crime, the ownership of property or the identity of the deceased. Nevertheless, some have seized upon **Booth** as a vehicle for banning all evidence of guilt (beyond that expressly stipulated to be the defense) from a capital trial. That concept is absurd.

On direct appeal, this Court identified the claim as falling under **Welty** and as one going to identification (not victim impact). **Mills** v. **State,** 462 So.2d **1075** (Fla. 1985). Now, in a **third successive** habeas corpus petition Mr. Mills wants to redefine his claim as a "**Booth**" issue and reargue it.

We submit that a general objection cannot be used on collateral attack to justify any variation on a claim imaginable by successor counsel, just as a general objection cannot preserve any possible claim on appeal. Mills did not make a "victim impact" objection, he made a "source of identification" objection. Indeed, he even agreed that the **same** testimony, from another source, was acceptable. Thus, he did not raise a "**Booth**" claim and cannot do so now.

Mr. Mills' second source of "Booth" error stems from an emotional misstatement of "fact" regarding the prosecutor's closing guilt-phase and penalty phase arguments.

Mr. Kirwin did not ridicule any race or religion. He did discuss Mr. Mills' intense racial motives for "doing to [Lawhon]" that which "his people did to [Mills' ancestors]." Similarly, Mr. Kirwin **never** dropped "to his knees in an impassioned plea for mob retribution." (pg. 8). Such a scenario does not appear in the record and this attack upon Mr. Kirwin is entirely unfair and unprofessional.

Indeed, defense counsel never raised an objection at trial or raised such a claim on appeal. Absent any objection or appeal, the procedural bar is again obvious.

We submit that Mr. Mills did not raise (on appeal) a Booth claim at any time. As such, his claim is procedurally barred. **J.B. Parker** v. **Dugger,** Case **Nos.** 74,479 and 74,888 (Fla. 1989); **Grossman** v. **Dugger,** 525 So.2d **833** (Fla. 1988); **Jones v. Dugger, 533** So.2d 290 (Fla. 1988).

Even if it was not barred, Mr. Mills argument that the mere identification of stolen property (as belonging to a victim, with supporting anecdotal testimony where needed to supply an explanation as to "how" an item could be identified) somehow violates "**Booth**" is untenable. Neither **Booth** nor **Gathers** stands for this proposition. In fact, in **Gathers** the court **allowed** the State to identify certain biblical "tracts" as the victims, but merely prohibited the reading of those tracts to the jury. The stereo, television, rifle and other property at bar was less

"prejudicial" (in terms of being character evidence) than biblical tracts. Since the stolen gun had no serial number and since the State's burden could not be met by stipulation (of the defense) even if offered, see **Foster** v. **State,** 369 So.2d 928, 930 (Fla. 1979), "**Booth**" was not violated by using the testimony of Mr. Lawhon.

In sum, however, the fact remains that the **Booth** issue is procedurally barred[2] and should be denied on that basis alone. **Harris** v. **Reed,** 489 U.S. ____, 103 S.Ct. 308 (1989).

CLAIMS 11, III, IV, "IV", "VII", "X", XI, XII

Mr. Mills' Remaining Claims Are Procedurally Barred.

Mr. Mills obtained leave to return to state court to advance a "**Booth**" claim. In addition to raising the "**Booth**" claim, Mills has chosen to include boilerplate, "chic", issues without even bothering to properly or sequentially number them.

We note that in **White** v. **State,** 511 So.2d 984 (Fla. 1987), this Court, two years and many abuses ago, held:

> We again point out to the office of collateral counsel that failure to follow rules 3.850 and 3.851 procedurally bars relief. The fact that we are dealing with a death sentence does not excuse appellant's failure to abide by the Florida Rules of Criminal Procedure.

[2] Since **Booth** has been around for over two years, it should actually be raised by motion under Rule 3.850, not habeas corpus. **J.B. Parker** v. **Dugger, supra.**

The same should hold true in this case. Habeas corpus cannot be used to raise procedurally barred claims either. Habeas corpus is not a substitute for appeal, a second appeal or a substitute for a timely Rule 3.850 petition. **Eutzy** v. **Dugger,** 14 F.L.W. 176 (Fla. 1989); **Parker** v. **Dugger,** 537 So.2d 967 (Fla. 1988); **Steinhorst** v. **State,** 477 So.2d 537 (Fla. 1985); **Jones** v. **Dugger,** 503 So.2d 290 (Fla. 1988).

Claim II is a **Furman** based claim that should, if preserved, have been raised on appeal.

Claim **III** is a **Maynard** v. **Cartwright,** 108 S.Ct. 1853 (1988) claim that is procedurally barred as well. **Eutzy** v. **Dugger, supra.**

Claim **IV** is an extension of the procedurally barred **Maynard** claim is also barred.

Claim **IV** (#2) is an untimely **Hitchcock** v. **Dugger,** 107 S.Ct. 1821 (1987), which, if proper at all, should have been raised by 3.850 petition prior to August 1, 1989.

Claim **VI** is an issue that should have been raised on appeal. (Use of same facts to support two aggravating factors).

Claim **VIII:** The sufficiency of the sentencing order could have been raised on appeal, if preserved.

Claim **X:** The "burden shifting" issue was not preserved or appealed and is barred. **Jones** v. **State, supra.**

Claim **XI:** The "no mercy" argument could, if objected to, have been appealed and the issue is now barred.

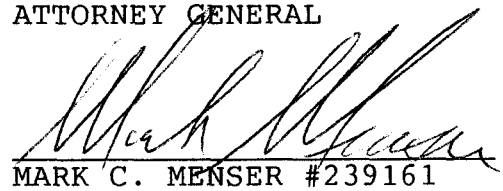
Claim **XII:** The challenge to the jury instruction is, again, procedurally barred as an appellate issue.

CONCLUSION

Mr. Mills use of these numerous, obviously "borrowed", issues is rendered even more objectionable by their appearance in a **third successive** petition for habeas corpus. Mr. Mills filed his **second** petition, deliberately abusing the writ, in a vain effort to obstruct his federal evidentiary hearing. Now, unable to support an appeal after **four extensions** in the Eleventh Circuit, he is again exploiting this Honorable Court as a vehicle for simple delay of his execution. Mr. Mills is not entitled to relief and has seriously abused the writ.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Mr. Billy H. Nolas, Esq., Office of the Capital Collateral Representative, 1533 South Monroe Street, Tallahassee, Florida 32301, this 30th day of November, 1989.

MARK C. MENSER
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