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IN THE SUPREME COURT OF FLORIDA

FRANK LEE SMITH,

Petitioner,

v. Case No. _____

RICHARD L. DUGGER,

Respondent.
_____/

EMERGENCY RESPONSE: DEATH WARRANT SIGNED; EXECUTION IMMINENT.

RESPONSE IN OPPOSITION TO PETITION FOR EXTRAORDINARY RELIEF, FOR A WRIT OF HABEAS CORPUS, REQUEST FOR STAY OF EXECUTION, AND APPLICATION FOR STAY OF EXECUTION PENDING DISPOSITION OF PETITION FOR WRIT OF CERTIORARI

COMES NOW respondent, Richard L. Dugger, Secretary, Department of Corrections, State of Florida, by and through the undersigned assistant: attorney general and hereby files its response in opposition to the petition for extraordinary relief, for a writ of habeas corpus, request for stay of execution, and application for stay of execution pendeing disposition of petition for writ of certiorari, and would show unto this Court:

I.

EDURAL HISTORY

The petitioner, Frank Lee Smith, was tried and convicted of first degree murder. The trial court followed a unanimous jury recommendation and imposed the sentence of death. Petitioner appealed and in an opinion reported at **Smith v. State**, 515 So.2d 182 (Fla. 1987), this Honorable Court affirmed the judgment and sentence. The issues raised in that appeal were the following:

POINT I

THE TRIAL COURT ERRED BY FAILING TO CONDUCT A FORMAL INQUIRY INTO THE DISCOVERY VIOLATION OF THE STATE, ACCORDING TO RICHARDSON V. STATE.

POINT II

APPELLANT'S RIGHT TO A FAIR TRIAL WAS DESTROYED BY REPEATED INSTANCES OF PROSECUTORIAL MISCONDUCT.

POINT III

THE TRIAL COURT ERRED BY CALLING GERALD DAVIS AS A COURT WITNESS AND BY ALLOWING THE PROSECUTOR TO CROSS EXAMINE AND IMPEACH DAVIS.

POINT IV

THE EVIDENCE PRODUCED AT TRIAL WAS INSUFFICIENT TO SUPPORT A CONVICTION, AND A NEW TRIAL IS REQUIRED IN THE INTEREST OF JUSTICE.

POINT V

THE CUMULATIVE EFFECT OF VARIOUS COURT RULINGS REQUIRES A NEW TRIAL TO BE GRANTED.

POINT VI

THE TRIAL COURT ERRED IN IMPOSING A DEPARTURE SENTENCE REGARDING COUNT III OF THE INDICTMENT.

POINT VII

THE TRIAL COURT ERRED IN IMPOSING THE DEATH SENTENCE ON APPELLANT.

The petitioner next filed a petition for writ of certiorari in the Supreme Court of the United States, said petition being denied on March 21, 1988.

A request by the petitioner for clemency was apparently denied when Governor Bob Martinez signed a death warrant in Smith's case on October 18, 1989. The warrant is in effect from noon on Monday, January 15, 1990, until noon on Monday, January 22, 1990, with the execution presently scheduled for Tuesday, January 16, 1990, at 7:00 a.m.

On or about November 17, 1989, the petitioner filed an emergency motion to vacate judgment of conviction and sentence pursuant to Rule 3.850, Florida Rules of Criminal Procedure. On or about Wednesday, December 13, 1989, the trial court summarily denied the 3.850 motion and denied an application for a stay. At the time of the preparation of the instant response, Smith had filed a motion for rehearing from the denial of the 3.850 motion which is pending before the Honorable Robert W. Tyson, Jr., Circuit Judge, Seventeenth Judicial Circuit, in and for Broward County, Florida. In accordance with Florida Rule of Criminal Procedure 3.851, Smith has also filed the instant habeas petition.

II.

ARGUMENT IN OPPOSITION TO REQUEST FOR STAY OF EXECUTION AND IN OPPOSITION TO APPLICATION FOR STAY OF EXECUTION PENDING DISPOSITION OF PETITION FOR WRIT OF CERTIORARI

Although this Honorable Court has the power to grant the stay of execution, the State of Florida submits that the instant cause is not one which should be stayed. In **Barefoot v. Estelle, 463 U.S. 880, 103 S.Ct. 3383, 77 L.Ed.2d 1090 (1983), rehearing**

denied, 104 S.Ct. 209, 78 L.Ed.2d 185 (1983), the Court addressed the issue of stays of execution and said:

> . . . It must remembered that direct appeal is the primary avenue for review of a conviction or sentence, and death penalty cases are no exception. When the process of direct review -- which, if a federal question is involved, includes the right to petition this Court for a writ of certiorari -- comes to an end, a presumption of finality and legality attaches to the conviction and sentence. The role of federal habeas proceedings, while important in assuring that constitutional rights are observed, it secondary and limited. Federal courts are not forums in which to relitigate state trials. Even less is federal habeas a means by which a defendant is entitled to delay an execution indefinitely.

77 L.Ed.2d at 1100; emphasis supplied. The State of Florida submits that state habeas corpus proceedings, like the federal habeas proceedings discussed in **Barefoot v. Estelle**, are not vehicles to relitigate state trials. As will be demonstrated below, Smith is unable to show that any issue is likely to succeed on the merits. See **White v. Florida**, 458 U.S. 1301, 103 S.Ct. 1, 73 L.Ed.2d 1385 (1982); **O'Bryan v. Estelle**, 691 F.2d 706, 708 (5th Cir. 1982).

In **Autry v. Estelle**, 464 U.S. 1, 104 S.Ct. 20, 78 L.Ed.2d 1 (1983), the United States Supreme Court declined to implement a rule calling for an automatic stay of execution where a petitioner's first habeas corpus petition had been involved. Similarly, the State of Florida submits that there is no justification for an automatic stay of execution merely because a

a state habeas corpus petition has been filed. The state further submits that the instant case is not one which calls for the granting of a stay of execution.

III.

Your respondent does not contest the jurisdiction of this Honorable Court to entertain a petition for a writ of habeas corpus where such petition presents cognizable matters. However, the instant habeas petition prepared on behalf of Mr. Smith by the capital collateral representative presents mostly matters which this Honorable Court will not consider on habeas review. The instant petition for writ of habeas corpus is, as was the petition filed in **Blanco v. Wainwright**, 507 So.2d **1377** (Fla. 1987), "almost entirely a repetition of the issues raised in the Rule 3.850 proceeding." By including these types of claims within his petition for writ of habeas corpus, "collateral counsel has accomplished nothing except to unnecessarily burden this Court with redundant material." **Blanco v. Wainwright**, 507 So.2d at 1384. With respect to the issues properly raised under Rule 3.850, petitioner's remedy is not the instant habeas petition, but rather is a direct appeal from the denial of the Rule 3.850 motion. This Honorable Court need not nor should not "replough this ground once again." Ibid.

With respect to certain of the issues raised in this habeas petition, petitioner gratituously asserts that appellate counsel was ineffective for failing to raise the issues on direct

appeal.[1] In **McCrae v. Wainwright**, 439 So.2d 868 (Fla. 1983), this Court held that "[h]abeas corpus should not be used as a vehicle for presenting issues which should have been raised at trial and on appeal", citing **Hargrave v. Wainwright**, 388 So.2d 1021 (Fla. 1980), and **State ex rel. Copeland v. Mayo**, 87 So.2d 501 (Fla. 1956). In **McCrae**, this Court specifically opined that:

> . . . Allegations of ineffective appellate counsel therefore should not be allowed to serve as a means as circumventing the rule that habeas corpus proceedings do not provide a second or substitute appeal. (text at 870)

This type of admonition has been consistently followed by this Honorable Court and this Court has specifically admonished the office of the capital collateral counsel "that habeas corpus is not a vehicle for obtaining additional appeals of issues which were raised, or should have been raised, on direct appeal or which were waived at trial or which could have, should have, or have been, raised in Rule 3.850 proceedings." **White v. Duqqer**, 511 So.2d 554 (Fla. 1987), citing **Blanco**, supra, and **Copeland** v. **Wainwright**, 505 So.2d 425 (Fla. 1987). Thus, to the extent that petitioner is again asking this Court to exercise its jurisdiction over issues not legally cognizable on habeas review, this Court should decline to do *so.*

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[1] Your respondent will identify these issues in the body of this response. Nevertheless, it is advisable to set forth the basic premise that these issues are not cognizable on habeas review at the outset in an effort to give guidance to this Court's review of all issues presented.

Your respondent declines to address the merits of substantive claims asserted in this habeas petition which were, could have been or should have been asserted on direct appeal and urges this Court to continue to enforce its procedural default policy; otherwise, appeal will follow appeal and there will be no finality in capital litigation. Cf. Johnson v. State, 536 So.2d 1009 (Fla. 1988) (the credibility of the criminal justice system depends upon both fairness and finality).

Thus, petitioner's application for habeas relief on the substance of grounds I through VIII and IX through XV should be denied for reasons of procedural default or because the claim was previously raised and determined on direct appeal. In Harris v. Reed, 489 U.S. __, 109 S.Ct. 1083, 103 L.Ed.2d 308 (1989), the Supreme Court held that where a state court was ambiguous in its ruling denying relief on both procedural and substantive grounds, the federal habeas courts should reach the merits:

> Faced with a common problem, we adopt a common solution: a procedural default does not bar consideration of a federal claim on either direct or habeas review unless the last state court rendering a judgment in the case "clearly and expressly" states that its judgment rests on a state procedural bar. (44 Cr.L. 3122-23).

The court added in footnote 12:

> . . . Additionally, the dissent's fear, post, p.11-12 and n.6, that our holding will submerge courts in a flood of improper prisoner petitions is unrealistic: a state court that wishes to rely on a procedural bar rule in a one-line pro forma order can easily write that "relief is denied for reasons of procedural default."

IV.

RESPONSE IN OPPOSITION TO CLAIMS RAISED BY PETITIONER

As aforementioned herein, the claims raised in the instant habeas petition are merely repetitions of those issues raised in the Rule **3.850** proceeding. In fact, fourteen of petitioner's fifteen claims can be found in the **3.850** motion raised before the trial court. To assist this Honorable Court, the following chart is offered which identifies the habeas claims by number and cross-references to the number of that claim as set forth in the **3.850** motion:

Habeas Petition (Claim #)	**3.850 Motion** (Claim #)
I.	**X.**
II.	**XI.**
III.	XII.
IV.	**XIII.**
V.	XIV.
VI.	**XV.**
VII.	XVI.
VIII.	XVII.
IX.	XVIII.
X.	XIX.
XI.	XXI.
XII.	XXII.
XIII.	XXIII.
XIV.	XXIV.
XV.	----

Thus, it is apparent that collateral counsel has again unnecessarily burdened this Honorable Court with redundant material. Therefore, as was the case in **Blanco v. Wainwright**, supra, at 1384, these claims should be summarily denied by this Honorable Court.

In his "conclusion and relief sought" (pages 91-92 of the habeas petition), petitioner gratutiously asserts that many of the claims involve ineffective assistance of appellate counsel. Yet, in the body of his arguments, there is no reference or allegation of ineffective assistance of appellate counsel with respect to any of the claims raised. Indeed, it is not surprising that petitioner cannot even properly allege ineffective assistance of appellate counsel where the claims he now raises were not presented on appeal, nor could they be by virtue of the fact that they were not properly presented at trial. Appellate counsel could not have been ineffective for failing to raise claims on direct appeal which were not properly preserved. **Suarez v. Dugger**, 527 So.2d **190**, 193 (Fla. 1988); **Bertolotti v. Dugger**, 514 So.2d 1095 (Fla. 1987).

Although your respondent will address the claims in the order presented by petitioner, it should be noted at the outset that response to most of these claims will be extremely brief inasmuch as they are clearly not cognizable in this habeas proceeding for the reasons set forth above.

CLAIM I: Petitioner first contends that the precepts of Booth v. **Maryland**, 482 **U.S.** 496 (1987), were violated where the

victim's mother became emotionally distraught on the stand and where certain references were made in a presentence investigation allegedly implicating Booth-type statements. This claim was raised in the **3.850** proceedings below as Claim X and, on this basis alone, should be denied.

In any event, with respect to the emotional distress of the victim's mother and subsequent reference to same by the prosecutor in closing argument, it must be remembered that these matters occurred in the guilt phase of the trial and not in the sentencing phase. Booth and its progeny require that a sentence of death be imposed based upon permissible aggravating factors, and victim impact statements are not valid aggravating factors. There is simply no way to find that these matters now complained-of had any bearing on the weighing of the aggravating and mitigating circumstances as instructed by the trial judge at the penalty phase.

It should also be observed that objection was made to the victim's mother's testimony at trial as being unduly prejudicial due to the obvious emotional distress. These matters were raised on appeal to this Honorable Court and this Court held that this instance of prosecutorial misconduct was procedurally barred, but even if it was not procedurally barred, it had no merit. Smith v. State, **515** So.2d at **183.** Thus, to the extent that petitioner is seeking a second appeal concerning this facet of his claim, that attempt is unavailing. Habeas corpus is not a vehicle for presenting claims which were raised or should have been raised on

direct appeal. White v. Dugger, 511 So.2d 554 (Fla. 1987). In addition, no objection was made to the closing argument of the prosecutor concerning these statements and, hence, this Honorable Court on direct appeal correctly ruled that this matter was procedurally barred. In any event, inasmuch as these matters which occurred in the guilt phase of trial had no bearing on the weighing of aggravating and mitigating circumstances, petitioner's claim with respect to these matters should be summarily rejected by this Court.

With respect to those matters contained within the brief presentence investigation which may implicate Booth, it is clear from this record that no objection was made and, hence, this claim must be summarily denied. Petitioner's reliance upon Jackson v. Dugger, 547 So.2d 1197 (Fla. 1989), is clearly misplaced. In Jackson, this Court noted that objection was made at trial to the use of victim impact evidence and the issue was raised on appeal and was expressly addressed on appeal by this Court. In the instant case, however, no objection was made as to Booth-type statements which were contained in the presentence investigation, or were otherwise presented in the penalty phase of trial, was made. Therefore, this Honorable Court's recent decision in Parker v. Dugger, 14 F.L.W. 557 (Fla. Oct. 25, 1989), controls. In Parker, this Court distinguished Jackson and held, in accordance with various other precedents, that the failure to object to Booth-type statements results in a clear procedural bar obviating collateral review. The same is true in the instant

case and, therefore, this Honorable Court should reject this claim.

CLAIM 11: Petitioner's next claim concerns the contention that the jury was prevented from considering all evidence in mitigation. This claim was raised as Claim XI in the Rule 3.850 motion. Therefore, this claim should be rejected by this Honorable Court. If need be, your respondent respectfully refers this Honorable Court to the argument in opposition to Claim XI as contained within the Brief of Appellee filed in this cause from the denial of the Rule 3.850 motion.

CLAIM 111: Petitioner next contends that the trial judge failed to consider or find certain mitigating circumstances. This claim was raised as Claim XII in the Rule 3.850 motion. Therefore, this claim should be rejected by this Honorable Court. If need be, your respondent respectfully refers this Honorable Court to the argument in opposition to Claim XII as contained within the Brief of Appellee filed in this cause from the denial of the Rule 3.850 motion.

CLAIM IV: Petitioner's fourth claim concerns the trial court's denial of a requested defense instruction to the penalty phase informing the jury of its ability to exercise mercy. This claim was raised as Claim XIII in the Rule 3.850 motion. Therefore, this claim should be rejected by this Honorable Court. If need be, your respondent respectfully refers this Honorable Court to the argument in opposition to Claim XIII as contained within the Brief of Appellee filed in this cause from the denial of the Rule 3.850 motion.

CLAIM V: Petitioner next contends that the jury was improperly instructed on the "especially heinous, atrocious, or cruel" aggravating circumstance. This claim was raised as Claim XIV in the Rule **3.850** motion. Therefore, this claim should be rejected by this Honorable Court. If need be, your respondent respectfully refers this Honorable Court to the argument in opposition to Claim XIV as contained within the Brief of Appellee filed in this cause from the denial of the Rule **3.850** motion.

CLAIM VI: Petitioner next claims that the cold, calculated, and premeditated aggravating circumstance was applied unconstitutionally in petitioner's case. This claim was raised as Claim XV in the Rule **3.850** motion, Therefore, this claim should be rejected by this Honorable Court. If need be, your respondent respectfully refers this Honorable Court to the argument in opposition to Claim XV as contained within the Brief of Appellee filed in this cause from the denial of the Rule **3.850** motion.

CLAIM VII: Once again, petitioner presents a variation of his ***Maynard v. Cartwright*** claim and opines that the jury should have been given a limiting instruction as to the definition of pecuniary gain according to the appellate standards espoused by this Honorable Court. This claim was raised as Claim XVI in the Rule **3.850** motion. Therefore, this claim should be rejected by this Honorable Court. If need be, your respondent respectfully refers this Honorable Court to the argument in opposition to Claim XVI as contained within the Brief of Appellee filed in this cause from the denial of the Rule **3.850** motion.

CLAIM VIII: Again, petitioner raises a claim concerning the failure to give a limiting instruction, this time concerning the prior violent felony aggravating circumstance. This claim was raised as Claim XVII in the Rule 3.850 motion. Therefore, this claim should be rejected by this Honorable Court. If need be, your respondent respectfully refers this Honorable Court to the argument in opposition to Claim XVII as contained within the Brief of Appellee filed in this cause from the denial of the Rule 3.850 motion.

CLAIM IX: Petitioner's claim IX, concerning this Honorable Court's failure to remand for resentencing after striking the cold, calculated aggravating circumstance on direct appeal, was presented in the Rule 3.850 motion as Claim XVIII. This type of claim was clearly not cognizable in a 3.850 proceeding where petitioner was asking the trial court to overrule the decision of this Honorable Court. However, this claim is also not cognizable in a habeas corpus proceeding where petitioner is asking this Court to return to the direct appeal and render a different ruling. In that direct appeal, cited at Smith v. State, 515 So.2d 182 (Fla. 1987), this Court held as follows:

> Although we find that one of the five aggravating circumstances relied on by the trial court was invalid, we approve the death sentence on the basis that a jury recommendation of death is entitled to great weight and there were no mitigating circumstances to counterbalance the four valid aggravating circumstances. *Spaziano v. Florida,* 468 U.S. 447, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984); *Clark v. State,* 443 So.2d 973 (Fla. 1983), *cert. denied,* 467 U.S. 1210,

104 S.Ct. 2400, 81 L.Ed.2d 356 (1984); *Ross u. State*, 386 So.2d 1191, 1197 (Fla. 1980); *LeDuc v. State*, 365 So.2d 149, 151 (Fla. 1978), *cert. denied*, 444 U.S. 885, 100 S.Ct. 175, 62 L.Ed.2d 114 (1979). (text at 185).

As can be seen from the above quoted portions of **Smith**, this Court relied upon well-established precedent and determined that the death sentence was constitutionally imposed irregardless of the striking of one aggravating circumstance. This Court observed that there were still four aggravating circumstances and no mitigation upon which to require resentencing. Petitioner's attempt to quarrel with the opinion of this Honorable Court is unavailing and this claim should be denied.

CLAIM X: Petitioner next contends that the trial judge, by virtue of his jury instructions, shifted the burden to the petitioner to prove that death was inappropriate. This claim was raised as Claim XIX in the Rule 3.850 motion. Therefore, this claim should be rejected by this Honorable Court. If need be, your respondent respectfully refers this Honorable Court to the argument in opposition to Claim XIX as contained within the Brief of Appellee filed in this cause from the denial of the Rule 3.850 motion.

CLAIM XI: Petitioner next contends that his death sentence is improper because it rests upon an unconstitutional automatic aggravating circumstance. This claim was raised as Claim XXI in the Rule 3,850 motion. Therefore, this claim should be rejected by this Honorable Court. If need be, your respondent

respectfully refers this Honorable Court to the argument in opposition to Claim XXI as contained within the Brief of Appellee filed in this cause from the denial of the Rule 3.850 motion.

CLAIM XII: In his twelfth claim, the petitioner attempts to resurrect a claim which has previously been decided adversely to him on direct appeal. He contends that government interference deprived him of the effective assistance of counsel due to a purported discovery violation. This claim was raised as Claim XXII in the Rule 3.850 motion. Therefore, this claim should be rejected by this Honorable Court. If need be, your respondent respectfully refers this Honorable Court to the argument in opposition to Claim XXII as contained within the Brief of Appellee filed in this cause from the denial of the Rule 3.850 motion. Inasmuch as petitioner is attempting to have this Court revisit a claim which was raised on direct appeal, and inasmuch as habeas corpus proceedings do not serve as a second direct appeal, this claim should be denied by this Court.

CLAIM XIII: In a claim similar to that set forth under Claim X, petitioner contend that the burden of proof was shifted to petitioner, this time in the guilt phase of trial. However, this is a claim which clearly, because it is of record, could have been and should have been raised at trial and on direct appeal. Also, this claim was presented in the 3.850 proceedings as Claim XXIII, For these reasons, this claim should be denied.

CLAIM XIV: Petitioner next complains that the state adduced certain irrelevant evidence at the guilt phase of trial thereby

depriving petitioner of his constitutional rights. This claim, like so many others presented collaterally by petitioner, is one which, because it appears of record, could have been and should have been raised at trial and on appeal. The failure to do so precludes collateral relief.

CLAIM XV: Petitioner's last claim, concerning the alleged insufficiency of the evidence of guilt, is the only claim which was not raised in the 3.850 proceedings herein. Instead, petitioner chooses to present a claim which he knows is not cognizable in a habeas corpus proceeding. Petitioner correctly acknowledged that this "claim was vigorously urged on direct appeal, but the Court declined to reverse. Smith v. State, 515 So.2d 182, 184 (Fla. 1987)." (Petition for Writ of Habeas Corpus at p. 89). Petitioner again attempts to invite this Honorable Court to revisit a matter which was clearly raised and determined on direct appeal. This he cannot do. Habeas proceedings do not serve as an opportunity to have a second direct appeal in a case. This claim should be denied by this Honorable Court.

WHEREFORE, your respondent respectfully request this Honorable Court to deny all requests of petitioner for extraordinary or habeas relief.

Respectfully submitted,

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COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to the Office of the Capital Collateral Representative, **1533** South Monroe Street, Tallahassee, Florida **32301**, this 22nd day of December, **1989**.

OF COUNSEL FOR RESPONDENT