SUPREME COURT OF FLORIDA

OSCAR TORRES-ARBOLEDO,

Petitioner,

v. CASE NO. 75,751

STATE OF FLORIDA,

Respondent.

RESPONSE IN OPPOSITION TO PETITION FOR HABEAS CORPUS

COMES NOW, Richard L. Dugger, Secretary, Department of Corrections, by and through the undersigned Assistant Attorney General and would state:

I.

Procedural History

Petitioner Oscar Torres-Arboledo was tried and convicted of first degree murder and attempted armed robbery. Following a jury recommendation of life imprisonment the trial judge imposed a sentence of death. The Florida Supreme Court affirmed the judgments and sentences. Torres-Arboledo v. State, 524 So.2d 403 (Fla. 1988), cert. denied, 488 U.S. 901, 102 L.Ed.2d 239 (1988).

On his direct appeal, petitioner raised the following issues:

ISSUE I

THE COURT BELOW ERRED IN PERMITTING THE STATE TO ELICIT HEARSAY TESTIMONY FROM ITS WITNESSES CONCERNING WHAT THE VICTIM, PATRICIA LORENZO, SAID TO THEM.

ISSUE II

THE COURT BELOW ERRED IN IMPROPERLY RESTRICTING OSCAR TORRES-ARBOLEDO'S CROSS-EXAMINATION OF AN IMPORTANT PROSECUTION WITNESS, RAYMOND JACOBS.

ISSUE III

THE COURT BELOW ERRED IN PERMITTING THE VICTIM'S DAUGHTER TO TESTIFY FOR THE STATE AT OSCAR TORRES-ARBOLEDO'S TRIAL.

ISSUE IV

THE COURT BELOW ERRED IN REQUIRING OSCAR TORRES-ARBOLEDO TO STAND TRIAL IN IDENTIFIABLE JAIL CLOTHES.

ISSUE V

THE COURT BELOW ERRED IN FAILING TO CONDUCT AN INQUIRY ON THE RECORD TO ASCERTAIN WHETHER OSCAR TORRES-ARBOLEDO WAS VOLUNTARILY, KNOWINGLY, AND INTENTIONALLY RELINQUISHING HIS FUNDAMENTAL CONSTITUTIONAL RIGHT TO TESTIFY.

ISSUE VI

THE COURT BELOW ERRED IN REFUSING TO GRANT APPROPRIATE RELIEF TO OSCAR TORRES-ARBOLEDO WHEN THE PROSECUTOR MADE AN IMPROPER "GOLDEN RULE" ARGUMENT TO THE JURY DURING HIS FINAL ARGUMENT.

ISSUE VII

THE EVIDENCE ADDUCED BELOW WAS INSUFFICIENT TO ESTABLISH OSCAR TORRES-ARBOLEDO'S GUILT OF PREMEDITATED OR FELONY MURDER AND ATTEMPTED ARMED ROBBERY.

ISSUE VIII

THE COURT BELOW ERRED IN DENYING OSCAR TORRES-ARBOLEDO'S MOTION FOR DISCHARGE, AS HE WAS NOT BROUGHT TO TRIAL WITHIN THE TIME LIMITS SET FORTH IN THE INTERSTATE AGREEMENT ON DETAINERS.

ISSUE IX

THE TRIAL COURT ERRED IN SENTENCING OSCAR TORRES-ARBOLEDO TO DEATH OVER THE JURY'S RECOMMENDATION AS THE RECOMMENDATION WAS FULLY JUSTIFIED UNDER THE FACTS OF THIS CASE, AND TORRES-ARBOLEDO DOES NOT DESERVE THE DEATH PENALTY.

ISSUE X

IN SENTENCING OSCAR TORRES-ARBOLEDO ON THE CHARGE OF ATTEMPTED ROBBERY WITH A FIREARM, THE COURT BELOW ERRED IN USING A GUIDELINES SCORESHEET THAT ASSESSED POINTS FOR VICTIM INJURY, AND IN DEPARTING FROM THE RECOMMENDED GUIDELINES SENTENCE WITHOUT FILING PROPER REASONS FOR DOING SO.

Torres-Arboledo now seeks habeas corpus review, following the Governor's signing a death warrant.

II.

As a preliminary matter, respondent first asserts that it is unnecessary to address the substantive claims that have been procedurally defaulted by the failure to timely and properly object at trial and/or failure to urge on direct appeal, or that in fact have been considered on direct appeal and are now introduced for relitigation. This Court has consistently reminded capital defendants that habeas corpus is not a substitute for, nor does it constitute a second, appeal. See Porter v. Dugger, 559 So.2d 201 (Fla. 1990).; Blanco v. Wainwright, 507 So.2d 1377 (Fla. 1987); Kennedy v. Wainwright, 483 So.2d 424 (Fla. 1986); Steinhorst v. Wainwright, 477 So.2d 537 (Fla. 1985).

Consequently, the substantive issues in Claims I (suggestive photographic identification), II (victim impact evidence), III (nonstatutory aggravating factors), IV (jury override), V (improper prosecutorial argument), VI (hearsay statements), VII (an alleged unconstitutional prior conviction), VIII (prosecutor's improper comments on sympathy), IX (an unconstitutional automatic aggravating circumstance), X (alleged absence during critical stages) need not be addressed.

Respondent would respectfully urge this Court to continue to declare in a plain statement that relief will be denied on these claims for procedural reasons in order that the federal courts not be given an unfettered opportunity to assume that the merits have been addressed and that the state courts have declined to enforce its procedural default policy. Harris v. Reed, 489 U.S. 255, 103 L.Ed.2d 308 (1989).

III.

Because petitioner alludes generally in his pleadings to the point that some of these claims may well involve contentions of ineffective assistance of appellate counsel, respondent will add the following comments. Of the ten claims listed in his petition, only Claim I specifically asserts a claim that appellate counsel was ineffective in failing to raise the issue. To the extent that petitioner seeks to lump the substance of Claims II through X under the guise of ineffective appellate counsel, the Court should continue to announce that habeas is not a second appeal. Blanco, supra; Porter, supra.

Respondent will now address the claim of ineffective appellate counsel in Claim I and the Booth issue in Claim II.

Respondent would submit that appellate counsel cannot be deemed ineffective for failing to brief an issue which was not properly preserved for appellate review; Suarez v. Dugger, 527 So.2d 190 (Fla. 1988) or where the claim is meritless Doyle v. State, 526 So.2d 909 (Fla. 1988). Even if a claim has been properly preserved for appellate review, counsel may properly decide that it is more advantageous to raise only the strongest points, not every conceivable issue, lest the impact of stronger points be diluted. Atkins v. Dugger, 541 So.2d 1165 (Fla. 1989).

Petitioner's current counsel maintains that appellate counsel was deficient in failing to challenge the reliability of George Williams' identification.[1]

The record shows that trial counsel filed a motion to suppress photographic identification procedure and in-court testimony of eyewitness (R 247) and the motion was denied after the court heard the testimony of police officer George Peterson. (R 267 - 288)

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[1] Interestingly, petitioner comments that the issue was preserved at trial (Petition, p. 8) and virtually "leaped out" for appellate counsel to present it. (Petition, p. 17) In his Rule 3.850 motion to vacate, petitioner thinks trial counsel was ineffective in failing to properly litigate the motion to suppress.

Peterson essentially testified that he saw George Williams on June 27, 1981 and showed him a photopack for the witness to see if he could see anyone who worked at the restaurant. (R 268 - 270) Torres-Arboledo's photo was in the pack shown on June 27 (R 277) and no one was selected. (R 270)

George Williams testified at trial that on June 24, three guys came in, they wanted to talk to the victim Patricia Lorenzo He heard a shot, he saw the petitioner had a gun in his hand. (R 721) Torres-Arboledo also pointed a gun at the witness. (R 724 - 725) He gave a description of the gunmen to the police that day. (R 732) Days later, he looked at the photos at the police station with Detective Peterson. He subsequently selected in a photo from Exhibit 23 in the prosecutor's office and he had no doubt of his selection. (R 733 - 734)

On cross examination the witness stated that he was shown a number of photos the night he went to the police department with the family and he didn't pick anyone out that night. (R 736) He described the desire for vengeance he had. (R 737) He subsequently made an identification at the prosecutor's office. (R 737) On redirect, he added that he saw the person the first time in the photo display but did not tell the police. (R 742)

Torres-Arboledo's claim must fail. He is unable to demonstrate either a deficient performance by appellate counsel nor the likelihood of a different result had counsel argued on appeal that the trial court erred in failing to grant the motion to suppress pretrial photographic identification. Johnson v.

Dugger, 523 So.2d 161 (Fla. 1988). That current counsel simply disbelieves the testimony given by a witness at trial does not mean that appellate counsel was derelict in choosing to assert more compelling contentions in the hope of a successful result. Atkins, supra. See also Francois v. Wainwright, 470 So.2d 685 (Fla. 1985). And if there is no chance of convincingly arguing a particular issue, there is no substantive and serious deficiency. Ruffin v. Wainwright, 461 So.2d 109 (Fla. 1984).

This claim is without merit.

As to Torres-Arboledo's Claim II (a Booth argument), petitioner argues that the issue was raised on direct appeal and the court declined to reverse and the issue may now be revisited under Jackson v. Dugger, 547 So.2d 1197 (Fla. 1989).

(1) As to petitioner's complaint regarding the testimony of the victim's daughter Marie Ferrer, this Court on direct appeal declared " . . . that much of the testimony now challenged went unobjected to at trial." Torres-Arboledo v. State, 524 So.2d at 409. And since there was no motion for mistrial, ". . . we agree with the state that this claim has not been properly preserved for our review." 524 So.2d at 409.

(2) There was no issue raised on direct appeal concerning George Williams' testimony and therefore nothing to revisit under a Jackson analysis.

On his direct appeal, petitioner did argue in Issue VI that the prosecutor had made an improper "Golden Rule" argument at R 853 during the guilt phase. This Court found the claim

meritless. 524 So.2d at 411. No contention was ever made that there had been improper "Booth" type arguments in penalty phase and therefore petitioner's reliance on Jackson is inappropriate. Rather, this case is governed by decisions such as Porter v. Dugger, supra; Clark v. Dugger, 559 So.2d 192, 15 F.L.W. S50 (February 1, 1990); Frank Lee Smith v. Dugger, 565 So.2d 1293 Fla. 1990) wherein this Court refused to abandon its procedural default policy and give collateral relief to a Booth claim not preserved for direct appeal. See also Adams v. State, 543 So.2d 1244 (Fla. 19898); Parker v. Dugger, 550 So.2d 459 (Fla. 1989); Eutzy v. State, 541 So.2d 1143 (Fla. 1989); Grossman v. State, 525 So.2d 833 (Fla. 1988).[2]

Finally, and most significantly, even if a Booth issue could be revisited, appellant can not be awarded relief since Booth has been overturned by Payne v. Tennessee, 501 U.S. ___, 115 L.Ed.2d 720 (1991).

ISSUE III

WHETHER THE INTRODUCTION OF NONSTATUTORY AGGRAVATING FACTORS PERVERTED THE SENTENCING PROCESS.

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[2] Respondent assumes that ineffective appellate counsel claims are not advanced in grounds II through X since no specific assertion of ineffectiveness is alleged under those points. A cover-all non-specific comment of possible ineffectiveness in a concluding page does not suffice. Cf. Duest v. Dugger, 555 So.2d 849 (Fla. 1990)(general mention of other claims in 3.850 appeal insufficient and claim is deemed waived).

This is an issue for direct appeal not for misuse of the habeas vehicle seeking a second appeal. See Kennedy v. Wainwright, 483 So.2d 424 (Fla. 1986); Blanco v. Wainwright, 507 So.2d 1377 (Fla. 1987).

ISSUE IV

WHETHER THE JURY OVERRIDE WAS ARBITRARY AND CAPRICIOUS.

This claim is not cognizable in habeas corpus. See Porter v. Dugger, 559 So.2d 201 (Fla. 1990).

ISSUE V

PROSECUTORIAL COMMENTS DURING THE GUILT AND PENALTY PHASES.

The issue is one for direct appeal and is not cognizable on habeas review.

ISSUE VI

THE ALLEGED USE OF HEARSAY STATEMENTS AT PENALTY PHASE.

The issue is cognizable only on direct appeal and the habeas vehicle may not be used as a substitute for appeal.

ISSUE VII

THE DEATH SENTENCES ALLEGEDLY BASED UPON AN UNCONSTITUTIONALLY OBTAINED PRIOR CONVICTION.

This too is an issue petitioner could have advanced previously on his direct appeal. In any event, this claim cannot

form the basis for relief since petitioner has failed to demonstrate that an alleged unconstitutionally-obtained prior conviction has been so declared and set aside. See Tafero v. State, 561 So.2d 557 (Fla. 1990); Eutzy v. State, 541 So.2d 1143 (Fla. 1989); Henderson v. Singletary, 617 So.2d 313, 18 Fla. Law Weekly S 256 (April 19, 1983).

ISSUE VIII

PROSECUTORIAL COMMENT RE: SYMPATHY AND MERCY.

This was an issue to be urged on direct appeal; habeas corpus does not serve as a second appeal. Moreover, capital decisions should not be predicated on undue sympathy. See Saffle v. Parks, 494 U.S. 484, 108 L.Ed.2d 415 (1990).

ISSUE IX

THE ALLEGED UNCONSTITUTIONAL AUTOMATIC AGGRAVATING CIRCUMSTANCES.

This issue should have been presented on direct appeal (it is meritless) and habeas corpus may not circumvent the appellate route.

ISSUE X

THE TRIAL COURT'S FAILURE TO ASSURE PETITIONER' PRESENCE AT ALL TIMES.

This was an issue cognizable for direct appeal, not habeas.

CONCLUSION

For the foregoing reasons, the petition for writ of habeas corpus should be denied.

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. Regular Mail to the Office of the Capital Collateral Representative, 1533 South Monroe Street, Tallahassee, Florida 32301, this 30th day of July, 1993.

OF COUNSEL FOR RESPONDENT.