76,307

IN THE SUPREME COURT OF FLORIDA'

JERRY WHITE,

Petitioner,

v. CASE NO. _____

RICHARD L. DUGGER,

Respondent.

_____/

RESPONSE TO PETITION
FOR WRIT OF HABEAS CORPUS, 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 White's Petition for Extraordinary Relief, Etc., filed on or about July 13, 1990, and respectfully moves this Honorable Court to deny such petition, including any and all requested relief, for the reasons set forth in the instant pleading.

Preliminary Statement

Jerry White was convicted of first degree murder and armed robbery, in Orange County Circuit Court on April 27, 1982, in regard to the March 8, 1981, murder of James Melson and armed robbery of Alex Alexander. Following a separate penalty proceeding on April 30, 1982, the jury, by a vote of eleven (11) to one (1), returned an advisory sentence of death. Judge Stroker formally sentenced White to death, finding nothing in

mitigation, and the presence of four (4) aggravating circumstances.

White immediately appealed such convictions and sentence to this Court, raising eleven (11) primary claims for relief. On January 19, 1984, this Court affirmed White's conviction and sentence of death. **See White** v. **State,** 446 So.2d 1031 (Fla. 1984). This specific points on appeal were: (1) error in the fact that Judge Stroker, as a county judge, had allegedly lacked jurisdiction to preside over the trial; (2) error in admission of evidence concerning Alexander's injuries; (3) alleged insufficiency of evidence; (4) error in denial of White's motion to suppress statement; (5) error in the trial court's instruction to the jury at the guilt phase; (6) error in excusal of prospective jurors opposed to the death penalty; (7) error in regard to allegedly improper prosecutorial argument; (8) error in the trial court's failure to dismiss the indictment; (9) error in admission of the State's exhibits; (10) error in imposition of the death penalty, and (11) error in separate sentences on robbery and murder. In the point involving the death penalty, White specifically contended: (a) that the finding of both the robbery and the pecuniary gain aggravating circumstances represented impermissible doubling; (b) that the cold, calculated and premeditated aggravating circumstance had been improperly found; (c) that the court had erred in failing to find mitigation; (d) that the court had allegedly impermissibly considered non-statutory aggravating circumstances; (e) that the court had erred in its instruction to the jury; (f) that

allegedly improper prosecutorial comments had been made; (g) that the court erred in allowing a chart to go back to the jury; (h) that the court erred in admitting into evidence the charging documents in regard to White's prior convictions, and (i) that 8921.141 was unconstitutional

In its opinion, this Court found that claims (3), (4) and (11) were without merit. This Court also specifically found that claims (1), (2), (5), (6), (7), (8), and (9) were procedurally-barred, given lack of objection at trial; in many instances, however, this Court noted, in the alternative, that no error, fundamental or otherwise, had been demonstrated. **White**, 446 So.2d at 1034-1036. Similarly, this Court also found that, as to claim (10), involving the death penalty, that the arguments concerning jury instructions, prosecutorial argument, the admission of certain exhibits and the fact that a chart had gone back to the jury were procedurally-barred, given the lack of contemporaneous objection; this Court likewise noted, in the alternative, that, as to three of these matters, no fundamental error had occurred. **White**, 446 So.2d at 1036. As to White's other claims involving sentencing, this Court agreed with White that two of the aggravating circumstances, involving both the commission of a robbery and the commission of the homicide for pecuniary gain, §§921.141(5)(d) & (f), constituted but one aggravating circumstance. **White**, 446 So.2d at 1037. This Court likewise agreed with White that the aggravating circumstance pertaining to the homicide having been committed in a cold, calculated and premeditated manner, §921.141(5)(i), had been

erroneously found. **White, 446** So.2d at **1037.** This Court concluded, however,

> The court found another aggravating circumstance which appellant does not contest: that the defendant was previously convicted of a felony involving the use or threat of violence to the person. The record supports this finding as well as the finding that the defendant was engaged in the commissioin of a robbery when he murdered Melson. When there are one or more valid aggravating factors which support a death sentence, in the absence of any mitigating factor(s) which might override the aggravating factors, death is presumed to be the appropriate penalty. **White** v. **State, 403** So.2d **331** (Fla. 1981), **cert. denied,** ____ U.S. ____, **103** S.Ct. **3571, 77** L.Ed.2d 1412 **(1983); State v. Dixon, 283** So.2d **1** (Fla. 1973), **cert. denied, 416** U.S. **943, 94** S.Ct. **1950, 40** L.Ed.2d **295 (1974).**

White, 446 So.2d at **1037.**

This Court also rejected, on the merits, White's attack upon the constitutionality of §921.141, as well as his contentions that the sentencing judge had considered non-statutory aggravation and had failed to consider all evidence presented in mitigation. **White, 446** So.2d at **1036-1037.** This Court denied rehearing on April **11, 1984,** and no petition for writ of certiorari was ever filed in the United States Supreme Court.

A death warrant was signed for Jerry White on September **30, 1985,** such warrant effective between October **22-29, 1985.** On October **23, 1985,** White, represented by volunteer counsel and the Office of the Capital Collateral Representative, filed an application for stay of execution and a motion for post-conviction relief, pursuant to Fla.R.Crim.P. **3.850,** in the state circuit court; the circuit court granted a stay of execution the

next day. The motion for post-conviction relief raised nine (9) basic claims for relief - (1) ineffective assistance of counsel at both the trial and sentencing phases; (2) the alleged withholding of evidence by the State; (3) the alleged destruction of evidence by the State; (4) the alleged wrongful exclusion of jurors on the basis of race; (5) alleged violation of **Caldwell** v. **Mississippi, 472 U.S. 320, 105** S.Ct. **2633, 85** L.Ed.2d **231 (1985); (6)** an allegation that the death penalty was imposed due to racially-related factors; **(7)** an allegation that prospective jurors had been improperly excused for cause; **(8)** an allegation that there was an insufficient find ng of White's intent to kill, and **(8)** a contention that electrocution constitutes cruel and unusual punishment. The circuit court granted an immediate stay of execution, and later afforded White an evidentiary hearing on his claim of ineffective assistance of counsel. The circuit court rendered an order denying all relief on April **8, 1987**, with rehearing being denied on December **1, 1987**. White appealed such ruling to this Court, which affirmed on May **19**, 1990. **See White v. State, 559** So.2d **1097** (Fla. **1990).** Rehearing was denied on May **24, 1990.**

A second death warrant was signed for White on June **12, 1990**, such warrant between July **16, 1990**, and July **23,** 1990. On July **10, 1990**, White filed a second motion for post-conviction relief in the state circuit court, presenting two claims for relief: **(1)** a contention that White's scheduled would constitute cruel and unusual punishment, given the fact that Tafero's May 4, **1990**, electrocution had allegedly been "botched", and (2) a

contention that White's prior convictons that had been used in aggravation were invalid. The circuit court summarily denied relief, and an appeal of this ruling is presently pending before this Court.

Argument

THE INSTANT PETITION, WHICH CONSTITUTES AN ABUSE OF PROCEDURE, SHOULD BE SUMMARILY DENIED; ALL CLAIMS PRESENTED ARE PROCEDURALLY BARRED, OR, TO THE EXTENT PROPERLY PRESENTED, WITHOUT MERIT

On the eve of his second scheduled execution, Jerry White, in addition to filing a successive state post-conviction motion, has now filed with this Court a one hundred and twenty four **(124)** page, seven **(7)** claim petition for extraordinary relief. Although the State, as will be clear, contends that the specific claims presented are improperly raised, it is also the State's position that the instant petition is untimely. In **White** v. **Dugger, 511** So.2d **554, 555** (Fla. **1987),** this Court was confronted with a petition extremely similar to that **sub judice.** This Court held,

> We note that although the petition is labeled as a petition for writ of habeas corpus, the issues raised are of the type which should be properly be raised under Florida Rule of Criminal Procedure **3.850,** which by its terms procedurally bars an application for writ of habeas corpus. We note also that by its terms, Rule **3.850** procedurally bars motions for relief where the judgment and sentence, as here, have been final for more than two years or were final prior to **1** January **1985.**

In **White,** this Court concluded that the "eleventh hour petition [was] an abuse of process." The State respectfully suggests that these two cases have more in common than the surname of the defendant.

Jerry White's conviction and sentence were final in **1984.** Jerry White has been represented by the same counsel, the Office of the Capital Collateral Representative, since **1985.** CCR has previously familiarized themselves sufficiently with the facts and circumstances of this case, so as to be able to file two (2) post-conviction motions, pursuant to Rule **3.850** (one of which was timely). Jerry White can offer **no** good cause why these claims have not been raised earlier and why, in fact, they have been withheld until another execution has been scheduled. Because White could not raise these claims pursuant to post-conviction **motion** under Rule **3.850, see Witt v. State, 465** So.2d **510** (Fla. **1985),** the State can see no reason, in law or equity, why he should be allowed to use, or misuse, the great writ of habeas corpus in this regard. Post-conviction motions and post-conviction writs of habeas corpus are already governed by many of the same precedents and rules of procedure. **See Francois** v. **Wainwright, 470** So.2d **685** (Fla. **1985)** (rule barring successive **3.850** motions applied to post-conviction habeas petitions); Fla.R.Crim.P. **3.851** (in death warrants of certain duration, **all** post-conviction pleadings, motions and habeas corpus petitions, must be filed by certain date). Similarly, petitions for writ of habeas corpus, like motions for post-conviction relief, cannot present issues which could have been, should have been, or were raised on appeal or in a prior post-conviction proceeding, or which were not objected to at trial. **See Parker** v. **Dugger, 550** So.2d **459** (Fla. **1987); Suarez** v. **Dugger, 527** So.2d **190** (Fla. **1988); White, supra.** All claims presented herein are barred

because the instant petition constitutes an abuse of procedure, in that these matters were, **inter alia,** not raised prior to January 1, 1987. **Witt, supra.**

Assuming that this Court wishes, at all, to consider the claims presented, White is clearly entitled to no relief. These seven (7) claims presented in the instant petition are: (1) a renewed allegation of ineffective assistance of **trial** counsel, seemingly premised upon **United States** v. **Cronic,** 446 **U.S.** 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984), accompanied by an anemic suggestion of ineffective assistance of appellate counsel, for failure to raise this claim on appeal; (2) a convoluted contention that White was denied a meaningful appeal because trial counsel failed to preserve issues and because appellate counsel should have complained of this fact on appeal; (3) a claim allegedly premised upon **Clemons** v. **Mississippi,** ____ U.S. ____, 110 S.Ct. 1441, 108 L.Ed.2d 725 (1990); (4) a re-argument of the same claim, allegedly focused upon the jury instructions at the sentencing phase; (5) a claim that the sentencer failed to find mitigation clearly set forth in the record; (6) a claim that the jury instructions at the penalty phase allegedly shifted the burden of proof onto the defense, and (7) a claim that "unauthorized persons participated in the grand jury process", because, allegedly, more than the statutory number of grand jurors were present, as well as another anemic suggestion that appellate counsel rendered ineffective assistance for failing to present this issue on appeal. Each claim will now be addressed.

CLAIM I: When the history of abuse of the writ is compiled, this case, and this claim in particular, will hopefully receive the prominence which it deserves. In this "claim" collateral counsel has recycled every allegation of ineffective assistance of **trial** counsel, which this Court rejected in **White** v. **State,** 559 So.2d 1097 (Fla. 1990), and added a dollop of "ineffective assistance of appellate counsel". This type of "re-litigation" is not proper on habeas corpus. **See Porter** v. **Dugger,** 559 So.2d 201, 203 (Fla. 1990); **Quince** v. **State,** 477 So.2d 535 (Fla. 1985); **White** v. **Dugger, supra; Blanco v. Wainwright,** 507 So.2d 1377 (Fla. 1987). Accordingly, this claim is procedurally-barred, and the State would also note that this Court has specifically held that claims of ineffective assistance of **trial** counsel are not cognizable on habeas corpus. **See King** v. **Dugger,** 555 So.2d **355,** 358 (Fla. 1990). As to any subsidiary claim of ineffective assistance of appellate counsel, this claim is frivolous because: (1) the issue of trial counsel's ineffectiveness is generally not cognizable on direct appeal, **see Ventura** v. **State,** 560 So.2d 217, 220 (Fla. 1990), **Perri** v. **State,** 441 So.2d 606 (Fla. 1983); (2) the primary case upon which White relies, **United States** v. **Cronic,** was not decided until **after** the appeal was final, and appellate counsel need not anticipate changes in the law, **see Thomas** v. **State,** 421 So.2d 160, 165 (Fla. 1982), and (3) there can be no prejudice from counsel's failure to present this claim on appeal, given the fact that, when this identical claim was presented on post-conviction appeal, this Court found that White was entitled to no relief. (See Initial Brief of Appellant,

White v. State, Florida Supreme Court Case No. 71,679, filed May 3, 1988, at pages 55-57, 60-62, 78-84, 85-95). No relief is warranted as to this procedurally-barred claim.

CLAIM 11: In this claim, White goes even further, and seeks to present issues which this Court has **twice** rejected before. On direct appeal, White's appellate counsel sought to present a number of claims in regard to prosecutorial argument, jury instructions, admission of exhibits, and testimony concerning the condition of Alexander, at both the guilt and penalty phases. This Court expressly found the claims procedurally-barred, **see White,** 446 So.2d at 1034-1036, given the lack of contemporaneous objection, although, as noted, this Court often made alternative findings as to lack of merit, error or fundamental error. Not content with letting matters lie in that posture, in White's first 3.850 motion, collateral counsel re-alleged all of these defaulted claims as claims of ineffective assistance of trial counsel (See Initial Brief of Appellant, **White** v. **State,** Florida Supreme Court Case No. 71,679, filed May 3, 1988, at 62-69, 81-85). This Court again refused to address these matters, cf. **White,** 559 So.2d at 1099-1100, and/or found such not to constitute prejudicial ineffective assistance of counsel. White now presents these same claims, for the third time, in some sort of hybrid claim of ineffective assistance of trial/appellate counsel. This type of re-litigation is obviously improper, and this claim is procedurally-barred. **See White** v. **Dugger, supra; Mills v. Dugger,** 559 So.2d 578 (Fla. 1990); **Clark** v. **Dugger,** 559 So.2d 192 (Fla. 1990); **Parker, supra; Blanco, supra. No** relief is warranted as to this procedurally-barred claim.

CLAIM 111: In this claim, White contends in light of **Clemons** v. **Mississippi, supra,** and **Elledge v. State, 346** So.2d **998** (Fla. **1977),** that his sentence of death is invalid, because this Court did not remand for resentencing, following its striking of one aggravating circumstance and "merger" of two others on direct appeal. It would not appear that this claim contains any allegation of ineffective assistance of appellate counsel. Accordingly, it is procedurally-barred, in that, given **Elledge,** this claim was plainly available at the time of White's direct appeal. **Cf. White** v. **Dugger, supra; Clark v. Dugger, 559** So.2d at **194-195** (Fla. **1990)** (where aggravating circumstances "merged" on appeal, defendant cannot re-litigate issue on habeas corpus). This claim is, in any event, totally without merit. There was **no** mitigation found in this case. The sentencing order is particularly detailed, and indicates that the sentencer searched the record for both statutory, and non-statutory, mitigation, and found none (R **1995);** indeed, on direct appeal, this Court made a finding not only that all evidence in mitigation had been considered, but also that such had been rejected. **See White, 446** So.2d at **1036.** Accordingly, the striking of any aggravating circumstance on appeal had no effect upon the weighing process, and White is entitled to no relief. **See Mills** v. **Dugger, supra; Hamblen v. Dugger, 546** So.2d **1039** (Fla. **1989); Kennedy** v. **Wainwright, 483** So.2d **424, 427-428** (Fla. **1986); Barclay** v. **Florida, 463 U.S. 939, 103** S.Ct. **3418, 77** L.Ed.2d **1134 (1983).** No relief is warranted as to this procedurally-barred claim.

CLAIM IV: In this claim, White contends, for the first time, in 1990, that the instructions given his jury at his 1982 sentencing proceeding were not specific enough in certain regards. As this Court has previously found, no objection was interposed in regard to these instructions. **White,** 446 So.2d at 1036. Given, **inter alia,** the lack of contemporaneous objection, this claim is obviously not cognizable on habeas corpus. **See Parker, supra.** This Court has also specifically held that claims of this nature, **i.e.,** involving alleged "doubling" of aggravating circumstances and/or imprecise definition of such in the penalty phase jury instructions, are not cognizable when raised for the first time on habeas corpus. **See Suarez** v. **Dugger,** 527 So.2d at 192; **Harich** v. **State,** 542 So.2d 980, 981 (Fla. 1989). It would not appear that any claim of ineffective assistance of appellate counsel is alleged. Accordingly, this claim is procedurally barred. **See White, supra; Blanco, supra.**

CLAIM V: In this claim, White contends that the state sentencing judge failed to find evidence in mitigation "clearly set out in the record." This Court has previously held that this identical claim is not cognizable on habeas corpus. **See Duest** v. **Dugger,** 555 So.2d 849, 853 (Fla. 1990). Further, this claim was litigated, and rejected, on direct appeal. **See White,** 446 So.2d at 1036-1037. White has no right to re-litigate this issue, especially given the particular clarity of the sentencing order in this case. **See White** v. **Dugger, supra; Parker, supra; Blanco, supra. No** relief is warranted as to this procedurally-barred claim.

CLAIM VI: In this claim, White contends that the jury instructions at the penalty phase allegedly improperly shifted the burden of proof onto the defense to prove mitigation. No contemporaneous objection was interposed in regard to these instructions, as this Court so found on direct appeal, **see White,** 446 So.2d at 1036, and no allegation of ineffective assistance of appellate counsel has been set forth. This Court, under identical circumstances, has held that this claim is not cognizable on habeas corpus. **See Jones** v. **Dugger,** 533 So.2d 290 (Fla. 1988); **Tompkins** v. **Dugger,** 549 So.2d 1370, 1371 (Fla. 1989). No relief is warranted as to this procedurally barred claim.

CLAIM VII: In this claim, White alleges for the first time, that his conviction and sentence of death must be reversed, because, allegedly, the grand jury which indicted him had twenty-three, as opposed to eighteen, members. White notes that trial counsel filed a motion to dismiss the indictment on this basis (R 1885), and contends that appellate counsel rendered ineffective assistance in failing to present this claim on appeal. As a "merits" claim, this issue is clearly not cognizable on habeas corpus. **See, e.g., Zeigler v. State,** 452 So.2d 537 (Fla. 1984); **Porter** v. **State,** 478 So.2d 33 (Fla. 1985); **Mattson v. Hall,** 48 So.2d 753 (Fla. 1950) (attacks on validity of indictment, on grounds involving, **inter alia,** number of grand jurors, not cognizable when raised on collateral attack). Accordingly, this claim is procedurally barred, **see White** v. **Dugger, supra; Parker, supra,** and it is also clear that White cannot use any allegation

of ineffective assistance of counsel as a means of circumventing the rule that habeas corpus proceedings do not provide a substitute appeal. **See Clark, supra; King, supra.** Assuming that any valid allegation of ineffective assistance of appellate counsel is presented, such is without merit. It is well established that counsel cannot be deemed ineffective for failing to raise a claim which is not preserved for review. **See Duest, supra; Tompkins, supra.** Here, while trial counsel did move to dismiss the indictment, such motion was untimely, in that it was made after the jury had been impaneled and sworn. 8905.05; **Seay** v. **State,** 286 So.2d 532 (Fla. 1973). Further, collateral counsel would not seem to have demonstrated that counsel ever secured an adverse ruling on his motion, meaning that such point could not be presented on appeal. **See Oliva** v. **State,** 354 So.2d 1264, 1265 (Fla. 3rd DCA 1978) (appellate court must confine its review to questions which were before the trial court and upon which a ruling adverse to the appealing party was made). It should be noted that despite the plethora of allegations against trial counsel, White has never alleged that trial counsel rendered ineffective assistance in failing to fully litigate this matter, and any such claim would be procedurally barred at this juncture. **See Christopher** v. **State,** 489 So.2d 22 (Fla. 1986). Assuming, for any reason, that the merits of this claim must be reached, it would appear that this Court has specifically rejected White's contentions. **See Lightfoot** v. **State,** 64 So.2d 261 (Fla. 1952) (on rehearing); **Lewis** v. **Mathis,** 345 So.2d 1066 (Fla. 1977); **Thompson** v. **State,** 15 F.L.W S347, 350, n.2 (Fla. June 14, 1990).

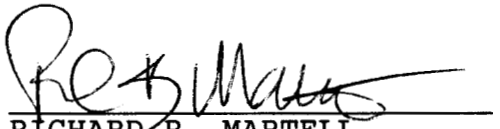
No relief is warranted as to this procedurally-barred claim; assuming that this Court finds any sufficient allegation of ineffective assistance of appellate counsel, White has still failed to demonstrate why this claim was not presented prior to January 1, **1987.** See **White, supra.**

CONCLUSION

WHEREFORE, for the aforementioned reasons, the State respectfully moves this Honorable Court to deny the instant petition for extraordinary relief, as well as any and all requested relief.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



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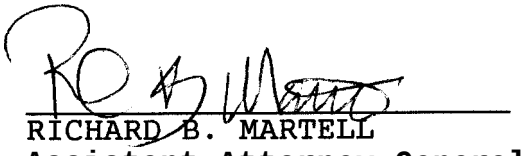
COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by hand delivery to Mr. Billy Horatio Nolas, Esq., Office of the Capital Collateral Representative, 1533 South Monroe Street, Tallahassee, Florida 32301, this 13th day of July, 1990.



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