SUPREME COURT OF FLORIDA

WILLIAM H. KELLEY,

Petitioner,

v. CASE NO. 77,708

RICHARD L. DUGGER,

Respondent.

RESPONSE IN OPPOSITION TO PETITION FOR EXTRAORDINARY RELIEF AND FOR A WRIT OF HABEAS CORPUS

COMES NOW respondent, Harry K. Singletary, Secretary, Department of Corrections, State of Florida (successor to the named party respondent), by and through the undersigned Assistant Attorney General, and hereby files this response in opposition to the petition for extraordinary relief and for a writ of habeas corpus, and would show unto this Honorable Court:

I.

PROCEDURAL HISTORY

The petitioner, William Harold Kelley, was tried and convicted of first degree murder. The trial court followed an 8 - 3 jury recommendation and imposed a sentence of death (R 1248, 1238 - 1245).[1] Petitioner appealed and in an opinion

[1] Reference to the record of the direct appeal filed in this Court will be made by the symbol "R" followed by the appropriate page number.

reported at Kelley v. State, 486 So.2d 578 (Fla. 1986), this Honorable Court affirmed the judgment and sentence. The issues raised in that appeal were the following:

> I. THE TRIAL JUDGE ERRED IN REFUSING TO DISMISS THE INDICTMENT OR BAR THE PROSECUTOR BECAUSE OF THE STATE'S WILLFUL AND DELIBERATE DESTRUCTION OF THE EVIDENCE.
>
> II. THE TRIAL JUDGE ERRED IN PERMITTING THE WITNESS NAMIA TO TESTIFY TO AN ALLEGED CONVERSATION WITH JOHN J. SWEET IN 1967.
>
> III. THE TRIAL JUDGE ERRED IN REFUSING TO ANSWER A QUESTION BY THE JURY DURING ITS DELIBERATIONS AS TO WHETHER JOHN J. SWEET RECEIVED IMMUNITY IN FLORIDA FOR MURDER AND PERJURY.
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> IV. THE TRIAL JUDGE ERRED IN ENCOURAGING AND PERMITTING THE JURORS TO TAKE NOTES.
>
> V. THE TRIAL COURT ERRED IN ADMITTING DEFENDANT'S POST-ARREST STATEMENTS TO FBI AGENTS IN VIOLATION OF HIS MIRANDA RIGHTS.
>
> VI. FLORIDA STATUTE §921.141 WAS IMPROPERLY APPLIED TO DEFENDANT AND IS UNCONSTITUTIONAL ON ITS FACE.
>
> > A. The trial judge improperly found as two separate aggravating circumstances the fact that the murder was committed for hire.
> >
> > B. The trial court improperly allowed the jury to consider the state's claim of felony murder as an aggravating circumstance.
> >
> > C. The trial court erred in refusing to consider nonstatutory mitigating circumstances.
> >
> > D. The trial court erred in neglecting to consider as a mitigating circumstance the possibility that Sweet or Von Etter, and not Kelley, committed the actual murder.

E. Florida Statute §921.141(5)(H) is inapplicable to defendant.

F. The treatment by Florida courts of §921.141(5)(H) has been so arbitrary as to render the statute unconstitutionally vague.

G. The Florida Death Penalty Statute is unconstitutional because it is unevenly applied based on the race of the victim.

H. The application of a Florida death penalty provision not in existence at the time of the offense charged violates the constitutional prohibition against ex post facto laws.

I. Death by electrocution pursuant to §922.10 Florida Statute (1981) constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the Constitution of the United States and in violation of Article I, Sections 9, 17 of the constitution of the State of Florida.

J. The Governor of Florida selects those who are to die in an arbitrary and capricious manner.

Following a substitution of counsel, successor counsel filed a supplemental brief of appellant with the Florida Supreme Court on direct appeal. Although the issues were stated in a different manner, the content of the supplemental brief addressed the same issues raised by appellant in his initial brief.

The petitioner next filed a petition for writ of certiorari in the Supreme Court of the United States which was denied.

In November, 1987, petitioner filed a motion to vacate pursuant to *Florida Rules of Criminal Procedure 3.850*. Following an evidentiary hearing, the *Rule 3.850* motion was denied and an appeal was taken to this Honorable Court. This Court affirmed the denial of relief in an opinion reported at Kelley v. State, 569 So.2d 754 (Fla. 1990). The issues raised in that appeal are as follows:

> CLAIM I: THE STATE'S DESTRUCTION OF CRITICAL, MATERIAL EVIDENCE PRIOR TO MR. KELLEY'S FIRST DEGREE MURDER TRIAL DEPRIVED HIM OF HIS RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE ONE, SECTION NINE OF THE FLORIDA CONSTITUTION.
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> CLAIM II: MR. KELLEY WAS DENIED DUE PROCESS AND THE PROSECUTIONS GUARANTEED UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE FEDERAL CONSTITUTION AND ARTICLE ONE, SECTION NINE OF THE FLORIDA CONSTITUTION, WHEN THE PROSECUTION SUPPRESSED EVIDENCE FAVORABLE TO THE DEFENSE.
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> CLAIM III: MR. KELLEY WAS DENIED HIS FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS WHEN, AT A RECESS DURING THE DEFENSE'S CROSS-EXAMINATION, THE PROSECUTOR IMPROPERLY SHOWED AND DISCUSSED WITH AN IMPORTANT WITNESS RECORDS WHICH DEFENSE COUNSEL WAS USING TO IMPEACH THAT WITNESS.
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> CLAIM IV: MR. KELLEY WAS DENIED DUE PROCESS OF LAW, AND HIS RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS, AND ARTICLE ONE, SECTION NINE OF THE FLORIDA CONSTITUTION BY THE PROSECUTOR'S IMPROPER CLOSING ARGUMENT.
>
> CLAIM V: THE CIRCUIT COURT SHOULD HAVE DECLARED MR. KELLEY INDIGENT AS HE PROVIDED ALL STATUTORILY REQUIRED INFORMATION AN FLORIDA ALLOWS FOR FUNDING OF EXPERT WITNESSES WHERE A DEFENDANT IS INDIGENT.

CLAIM VI: THE CIRCUIT COURT SHOULD HAVE PROVIDED FUNDING FOR THE EXPERT WITNESSES REQUESTED BY THE DEFENSE, AS MR. KELLEY REQUIRED THEIR SERVICES FOR THE FULL AND FAIR LITIGATION OF HIS RULE AND THE COURT'S REFUSAL TO DISBURSE THE NECESSARY FUNDS VIOLATED DUE PROCESS AND EQUAL PROTECTION OF LAW.

CLAIM VII: MR. KELLEY WAS INEFFECTIVELY REPRESENTED BY HIS TRIAL COUNSEL IN THIS CAPITAL CASE, IN VIOLATION OF HIS RIGHTS TO EFFECTIVE ASSISTANCE OF COUNSEL AND DUE PROCESS OF LAW AS GUARANTEED BY THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE ONE, SECTIONS NINE AND SIXTEEN OF THE FLORIDA CONSTITUTION.

CLAIM VIII: MR. KELLEY'S TRIAL WAS TAINTED BY PREJUDICIAL JUROR MISCONDUCT, IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

CLAIM IX: THE JUDGE ERRED IN FAILING TO DISQUALIFY HIMSELF.

Petitioner filed the instant habeas petition and on Wednesday, June 5, 1991, this Honorable Court entered its order to show cause as to why the petition should not be granted. This response is filed in accordance with the order of this Honorable Court.

II.

Your respondent does not contest the jurisdiction of this Honorable Court to entertain a petition for writ of habeas corpus where such petition presents cognizable matters. However, the instant habeas petition prepared on behalf of Mr. Kelley presents 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), repetitive of the issues raised in the prior 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." Id. at 1384. With respect to the issues which have previously been considered in the prior Rule 3.850 proceedings and attendant appeal, this Honorable Court need not nor should not "replough this ground once again." Ibid.

With respect to several of the issues raised in the habeas petition, petitioner gratuitously asserts that appellate counsel was ineffective for failing to raise the issues on direct appeal.[2] 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 that 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 (1956). In McCrae, this Court specifically opined:

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

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[2] 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 guideance of this Court's review of all issues presented.

This type of admonishment has been consistently followed by this Honorable Court and this Court has specifically admonished the Office of Capital Collateral Representative "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. Dugger, 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.

Your respondent respectfully declines to address the merit 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 grounds A-I, II, and IV and B-I and II 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. 255, 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, federal habeas courts should reach the merits:

> Faced with a common problem we adopt the 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.

The court added in footnote 12:

> . . . Additionally, the descents 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 proforma order can easily write that "relief is denied for reasons of procedural default."

Thus, your respondent respectfully requests this Honorable Court to find, where appropriate, that petitioner is barred from habeas relief by virtue of procedural default.

III.

STATEMENT REGARDING ORAL ARGUMENT

Your respondent respectfully submits that oral argument is neither desired nor necessary and this case may be decided upon the pleadings filed herein. The facts and legal arguments presented sub judice are adequately presented in the pleadings and, inasmuch as it appears that most of the claims raised by petitioner are not cognizable in a habeas proceeding, the decisional process of this Honorable Court will not be significantly aided by oral argument.

IV.

RESPONSE IN OPPOSITION TO CLAIMS RAISED BY PETITIONER

In his petition, Kelley raises two types of claims, alleged ineffectiveness of appellate counsel and claims which were raised on direct appeal but should allegedly now be reconsidered. As aforementioned, habeas petitions do not serve as additional appeals of issues which could have been raised, should have been raised, or were raised previously. As will be discussed below, appellant's allegations of ineffectiveness of appellate counsel do not satisfy the test set forth by this Court in Pope v. Wainwright, 496 So.2d 798, 800 (Fla. 1986), cert. denied, 107 S.Ct. 1617 (1987), wherein this Court held that the issue is limited to:

> [F]irst, whether the alleged omissions are of such magnitude as to constitute a serious error or substantial deficiency falling measurably outside the range of professionally acceptable performance and, second, whether the deficiency and performance compromised the appellate process to such a degree as to undermine confidence in the correctness of the result.

Petitioner offers four claims as to why appellate counsel was ineffective. Three of those claims should be summarily dismissed by this Honorable Court where there was no proper objection to the matters complained-of at trial and, hence, appellate counsel cannot be ineffective for failing to raise claims on direct appeal which were not properly preserved at trial. Suarez v. Dugger, 527 So.2d 190, 193 (Fla. 1988); Bertolotti v. Dugger, 514 So.2d 1095 (Fla. 1987). The remaining claim of ineffectiveness should be rejected by this Honorable Court where there is no

merit to the underlying claim. This Court has held that the failure of appellate counsel to brief an issue which was without merit was not a deficient performance falling outside the range of professionally acceptable performance. Suarez v. Dugger, supra; Card v. State, 497 So.2d 1169, 1177 (Fla. 1986), cert. denied, 107 S.Ct. 2213 (1987). Your respondent respectfully submits, therefore, that the ineffectiveness claims raised by petitioner should be rejected by this Honorable Court.

CLAIM A-I: As his first challenge to appellate counsel's effectiveness, petitioner submits a claim which is substantially identical to his claim IV in his brief from the denial of 3.850 relief. This Court rejected that claim, as did the trial court, on the basis that it is the type of claim that could have been and should have been raised on direct appeal. Having been denied relief on this same claim previously, petitioner now asserts that appellate counsel was ineffective for failing to raise this claim on direct appeal. However, it must be observed that no objection was made to any of the closing argument made by the prosecutor at trial. See 859 - 884. The failure of trial counsel to object to purportedly improper prosecutorial comment precludes a finding of appellate counsel ineffectiveness on this claim. As aforementioned, appellate counsel cannot be ineffective for failing to brief an unpreserved claim. Suarez, supra.

The basis of petitioner's claim is that the prosecutor made comments based on facts known not to be true. Allegedly, the prosecutor was possessed of certain materials which were not

disclosed and, hence, the defense could not object. These are the same allegations made in the 3.850 proceedings in this cause and which were rejected by the trial court and by this Honorable Court on appeal. There simply was no basis in fact for petitioner's allegations and, therefore, even if this claim had been raised at trial relief would not have been forthcoming. Therefore, petitioner cannot show how appellate counsel's performance fell outside the wide range of professionally acceptable performance.

CLAIM A-II: Petitioner now presents, in the guise of appellate counsel ineffectiveness, the same claim raised previously as claim III of his 3.850 appeal. Again petitioner attempts to have this Court reach the merits of a claim under the guise of an ineffectiveness claim where such a claim will not lie. This Court previously rejected the claim on the basis that it was one that could have and should have been raised on direct appeal. However, as is the case with the previous sub-claim, there was no proper objection to preserve the point for appellate review. During the cross-examination of a state's witness, Abe Namia, defense counsel showed the witness reports of the witness made during an investigation (the witness was a private investigator). On direct examination, the witness had stated that certain information was gathered during an investigation that indicated that petitioner was the "hit man" in the Von Maxcy murder. Some reports were produced by defense counsel during cross-examination which did not contain this information.

However, at this point in trial, the prosecutor advised the court that he didn't "know what this stuff is" because it had never been disclosed to the state (R 796 - 797). At that point in the trial the Court suggested that a recess be taken in order to allow the state to examine the reports and "give the state an opportunity to voir dire the witness" (R 797). Defense counsel agreed with the court's position (R 797). Defense counsel, however, asked the court to forbid the prosecutor from conferring with the witness during the recess (R 798). The trial judge denied this request because it was clear that the state had a right to delve into the facts surrounding the undisclosed documents. Following the recess, the prosecutor advised that he had the opportunity to examine the documents and that the witness recognized them as his reports. The witness also did not know if the reports were complete or not but that the reports did not reflect the subject of defense counsel's impeachment (R 798 - 799) No objection was made by defense counsel at this point. In other words, if there had been concern over the propriety of the state discussing unfurnished documents with a witness during the recess it was incumbent upon defense counsel to make that objection known at that time. The failure to offer a timely objection precluded the possibility of raising this point on appeal. Appellate counsel was, therefore, not ineffective. See Suarez, supra.

Even if this claim was properly preserved and raised on direct appeal, no relief would have been forthcoming. The

defense was still able to impeach the witness in the manner desired. Somehow, petitioner contends that Mr. Namia was able to compose an explanation to the purported discrepancy between his testimony and the actual report and this did not permit the jury to accurately assess Namia's credibility. This in turn would have somehow implied that the main state witness, John Sweet, was lying and that this would have cast a shadow on Sweet's credibility. Petitioner further contends that this shadow might have produced a different result. Such a contention is absurd considering the strenuous cross-examination and attack on Sweet's credibility at trial by defense counsel. Also, there is certainly no showing that the prosecutor advised Mr. Namia how to testify on cross examination. Petitioner has failed to show how appellate relief would have been forthcoming based upon this claim. The failure to raise an unmeritorious claim does not result in ineffective assistance of appellate counsel. Suarez, supra.

CLAIM A-III: As his third facet of his ineffectiveness claim, petitioner contends that appellate counsel was deficient for failing to raise as an issue the fact that the offense was aggravated on the basis of a twenty-five year old robbery conviction. This is the only claim of ineffectiveness which is supported by defense objection at trial. This sub-claim is, therefore, the only matter contained within the instant habeas petition which is properly presentable to this Court. However, as aforementioned in this response, where an underlying issue has

no merit appellate counsel is not deemed ineffective for failing to raise it. Suarez, supra. In Thompson v. State, 553 So.2d 153, 156 (Fla. 1989), this Court considered whether or not a defendant's 1950 conviction in Illinois for rape was too remote in time and place to be considered a valid aggravating factor. This Court determined that the aggravating circumstance is valid where our capital sentencing statute is silent as to when or where a previous conviction for a violent felony must have taken place. Thus, even if this claim had been presented on direct appeal it would have been rejected by this Honorable Court. On this basis, appellate counsel cannot be deemed to be ineffective. It is not outside the wide range of professionally accepted performance to fail to brief a claim which is without merit and, in any even, the failure to raise an unmeritorious claim does not result in a performance which compromised the appellate process to such an extent as to undermine confidence in the correctness of the result. Thus, petitioner has failed to show that his appellate counsel was ineffective.

CLAIM A-IV: As his last claim of appellate counsel ineffectiveness petitioner presents the "burden shifting" argument so often contained in collateral pleadings. This Court has consistently refused to address the merits of this type of claim based upon the procedural bar doctrine. See, e.g., Atkins v. State, 541 So.2d 1165, fn. 1 (3) (Fla. 1989). Indeed, petitioner acknowledges that this Honorable Court has rejected this claim in the past (petition at page 21). The failure to

object at trial precluded the possibility of raising this claim on appeal and, hence, appellate counsel cannot be deemed ineffective. Suarez, supra.

B-I: In the direct appeal of this cause, this Honorable Court rejected petitioner's ex post facto argument pertaining to the application of the present death penalty statute to a murder committed prior to that statute's enactment. In his habeas petition, Kelley invites this Court to reconsider this claim purportedly because the United States Supreme Court decision in Miller v. Florida, 482 U.S. 423, 107 S.Ct. 2446, 96 L.Ed.2d 351 (1987), alters the ex post facto analysis required of this Court. Petitioner's argument must be rejected. Application of the "new" Florida death penalty statute to a murder committed prior to that statute's enactment has been upheld against ex post facto attack. In Dobbert v. Florida, 432 U.S. 282, 97 S.Ct. 2290, 53 L.Ed.2d 344 (1977), the United States Supreme Court authoritatively determined that it is not unconstitutional to apply the Florida death penalty statute to a defendant who committed a murder prior to the enactment of that statute.

That Dobbert is unaffected by the decision in Miller v. Florida, 482 U.S. 423, 107 S.Ct. 2446, 96 L.Ed.2d 351 (1987), is evident by a clear reading of the Miller decision. In Miller, the United States Supreme Court contrasted the Florida sentencing guidelines issue with the issue of applying the death penalty statute to one who committed a murder prior to the statute's

enactment. In Dobbert the court held that the new Florida death penalty statute simply altered the methods employed in determining whether the death penalty was to be imposed and was not a change in the quantum of punishment attached to the crime. In contrast, the Miller court observed that Dobbert dealt with a procedural, rather than a substantive matter, unlike the sentencing guidelines which changed the nature of the punishment to be imposed. Indeed, the Miller opinion contrasts and distinguishes Dobbert throughout. Thus, a clear reading of Miller compels but one conclusion, that is, the holding in Dobbert is controlling and this Honorable Court need not revisit this claim which was correctly rejected on direct appeal.

CLAIM B-II: Petitioner contends that on direct appeal he raised an issue pertaining to the overbroadness of the cold, calculated and premeditated aggravating circumstance. This assertion is not correct. On appeal he argued that it was improper to "double" the aggravating circumstances of pecuniary gain with cold, calculated and premeditated. Therefore, where this claim has never been previously advanced, it is clearly procedurally barred. This claim was not raised either on direct appeal or in the 3.850 proceedings and this claim must be rejected as an attempt to create a new appeal of an issue not previously raised.

In any event, even if this claim were cognizable it should be rejected by this Honorable Court. Petitioner acknowledges that this Court has rejected similar claims in the past (petition

at page 27). Indeed, this Honorable Court has consistently maintained that the decision in Maynard v. Cartwright, has no applicability in the State of Florida. See e.g., Smalley v. State, 546 So.2d 720 (Fla. 1989); Brown v. State, 565 So.2d 304 (1990). This Honorable Court should once again reject this claim.

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

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, Billy H. Nolas and Julie D. Naylor, P.O. Box 7237 Tallahassee, Florida 32314-7237, and Barry P. Wilson, Zalkind & Sheketoff, 65 A Atlantic Avenue, Boston, MA 02110-3799, this 19th day of June, 1991.

Robert J. Krauss
OF COUNSEL FOR RESPONDENT.