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IN THE SUPREME COURT OF THE UNITED STATES

October Term 1991
Case No. 91-8111

EDWARD KENNEDY,

Petitioner,

v.

HARRY K. SINGLETARY,

Respondent.

_____/

RESPONSE TO APPLICATION FOR STAY OF EXECUTION AND/OR PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

To: The Honorable Anthony M. Kennedy, Justice of the United States Supreme Court and Circuit Justice of the Eleventh Circuit

COMES NOW Respondent, Harry K. Singletary, Secretary of the Florida Department of Correction, by and through the undersigned counsel, pursuant to Rule 44, Rules of the Supreme Court of the United States, and moves this Honorable Court to deny any requested application for stay of execution and/or any petition for writ of certiorari, filed in this cause, for the reasons set forth in the instant pleading, and incorporated by reference from all other lodged pleadings.

PROCEDURAL HISTORY

On April 24, 1981, Kennedy was indicted by the Duval County Grand Jury on two counts of premeditated murder, in regard to the April 11, 1981 murders of Floyd Cone and Trooper Robert McDermon. He was subsequently charged by information with one count of armed robbery, one count of armed burglary and one count of kidnapping and such charges were consolidated with the murder charges for trial. Upon Kennedy's motion, venue was changed from Duval to Volusia County and Kennedy was tried before a jury in that county on November 30 through December 4, 1981, being found guilty as charged on all counts. Following a penalty phase proceeding on the next day, the jury returned two unanimous verdicts recommending imposition of the death penalty for the murders of Cone and McDermon.

At a separate sentencing proceeding on January 12, 1982, Judge Mitchell formally sentenced Kennedy to death for the two murders. As to the murder of Floyd Cone, the judge found the existence of five (5) aggravating circumstances - that the homicide had been committed while Kennedy was under sentence of imprisonment, § 921.141(5)(a), that the homicide had been committed by one with prior convictions for crimes of violence - to-wit: robbery and murder, § 921.141(5)(b), that the homicide had been committed during the course of a felony, or flight thereafter, to-wit: armed robbery and armed burglary, § 921.141(5)(d), that the homicide had been committed for purposes of avoiding arrest or effecting an escape from custody, § 921.141(5)(e), and that the homicide had been committed to hinder

the lawful exercise of the enforcement of the law, § 921.141(5)(g). As to the murder of Trooper McDermon, the judge found the existence of seven (7) aggravating circumstances, the five listed above, as well as additional findings that the murder of Trooper McDermon had been especially heinous, atrocious or cruel, § 921.141(5)(h), and that it had been committed in a cold, calculated and premeditated manner, § 921.141(5)(i). In mitigation, the court noted that Kennedy had presented "some evidence that he acted under extreme duress," § 921.141(6)(e), but concluded that the aggravated circumstances "far outweighed" those in mitigation. The court imposed three consecutive sentences of life imprisonment as to the other felonies.

Kennedy appealed these judgments and sentences to the Supreme Court of Florida and presented eight (8) primary claims on appeal. Kennedy argued: (1) that the admission of his confession had violated the Fifth, Sixth and Fourteenth Amendments; (2) that he had been denied his Sixth and Fourteenth Amendment rights due to the excusal of a certain prospective juror based on his views on capital punishment, and due to the general death-qualification of the jury; (3) that the admission of the photograph of one of the victims had been improper; (4) that he had been deprived of due process by virtue of the court's instruction to the jury on felony murder (robbery); (5) that he had been deprived of due process due to the trial court's interruption of defense counsel's closing argument and delivery of a curative instruction; (6) that the prosecutor's closing arguments during the penalty phase had deprived him of a fair

trial; (7) that his Fourteenth and Eighth Amendment rights had been violated by the denial of certain requested penalty phase jury instructions; and (8) that the death sentences imposed violated the Eighth Amendment, given the finding of alleged improper aggravating circumstances, consideration of nonstatutory aggravating circumstances and failure to consider nonstatutory mitigating circumstances.

On July 12, 1984, the Supreme Court of Florida unanimously affirmed Kennedy's convictions and sentences. The court discussed all of the claims presented in its opinion, **Kennedy v. State**, 455 So.2d 351 (Fla.1984). As to Kennedy's point on appeal regarding his confession, the court expressly found,

> At the pretrial hearing on the motion to suppress, the detective who heard appellant confess to the crimes testified that he signed a written waiver after being advised of his rights. The officer testified that no threats or promises were made and that appellant appeared to be in full control of his faculties. His testimony was sufficient evidence to support the trial judge's ruling that appellant knowingly and intelligently waived his right to remain silent.
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> **Kennedy**, 455 So.2d at 353.

In resolving Kennedy's claim relating to the excusal of the venireman, the court found that such excusal had been in accordance with **Witherspoon v. Illinois**, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968), and further expressly found that the record disclosed,

> that although this particular venireman did state that he could consider all the penalties provided by law, he was adamant that he could never vote for a sentence of death under any circumstances.

Kennedy, 455 So.2d at 353.

The court found no merit in Kennedy's claim regarding the admission of the photograph, describing such as relevant, and similarly denied relief as to the claim involving the jury instruction on felony murder (robbery). As to the alleged denial of due process due to the court's interruption of defense counsel, the Florida Supreme Court found that there had been no prejudice stemming from this incident, given the overwhelming evidence of guilt, noting that the judge's instruction had been a "correct statement of the law." Id. at 354.

As to Kennedy's claims involving his sentences of death, the court summarily denied relief as to the trial court's failure to give the requested jury instructions, noting that the standard jury instructions had been proper. In regard to Kennedy's claim involving the prosecutor's closing argument, the court held,

> His first argument is that the prosecuting attorney made repeated inflammatory remarks during closing argument. He specifically refers to the prosecuting attorney's emphasis on the fact that one of the victims was a law enforcement officer and that appellant's prior life sentence had not deterred him from committing another murder. Though these statements might have been improper had they been made at the guilt phase of the trial, they were not improper at the penalty phase. The statements were relevant to the prosecuting attorney's arguments on the aggravating circumstances that appellant was under sentence of imprisonment and that the murders were committed to avoid arrest and hinder law enforcement.
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> Id. at 354.

In regard to Kennedy's challenges to the various aggravating circumstances, the court held that, as to both sentences, the

aggravating circumstances under § 921.141(5)(e) and (g) should have been considered as a single aggravating circumstance, in that they were supported by the same essential feature of Kennedy's crimes. As to the sentence for the murder of Trooper McDermon, the court struck the "extra" two aggravating circumstances, those under § 921.141(5)(h) and (i). Finally, the court concluded,

> Appellant does not contest, and there is sufficient evidence in the record to support, the trial judge's findings with respect to the remaining aggravating circumstances. The properly established aggravating circumstances applicable to both murders are: (1) they were committed by a person under sentence of imprisonment; (2) appellant had previously been convicted of a capital felony; (3) the capital felonies were committed in the course of the violent felonies; and (4) the murders were committed for the purpose of avoiding arrest during an attempted escape from custody. Even with the improper factors eliminated, the trial court's determination that the single mitigating factor did not outweigh the aggravating circumstances found to exist remains the appropriate result under the law. The erroneous findings did not prejudicially affect the weighing process and this was harmless error.
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> **Id.** at 355.

Finding no basis to reverse the trial court's reasoned judgment reached through the required process of weighing aggravating and mitigating circumstances, the court affirmed. Rehearing was denied on September 25, 1984, and the United States Supreme Court denied review on January 21, 1985. **See Kennedy v. Florida**, 469 U.S. 1197, 105 S.Ct. 981, 83 L.Ed.2d 983 (1985).

On January 16, 1986, Governor Graham signed a death warrant for Edward Kennedy, such warrant effective between February 12,

1986 and February 19, 1986. On February 3, 1986, Kennedy filed a petition for writ of habeas corpus in the Supreme Court of Florida, raising two claims for relief. Such claims included: (1) an allegation that the process of "death-qualifying" jurors had denied him due process; and (2) an allegation that he received ineffective assistance of appellate counsel. In its opinion, **Kennedy v. Wainwright**, 483 So.2d 424 (Fla.1986), the Florida Supreme Court denied all relief. The court found that the first claim, largely based upon **Grigsby v. Mabry**, 758 F.2d 226 (8th Cir.1985), **cert. granted sub nom and quashed, Lockhart v. McCree**, 476 U.S. 162, 106 S.Ct. 1758, 90 L.Ed.2d 137 (1986), was procedurally barred, given the fact that it had largely been raised and rejected on Kennedy's direct appeal. In the alternative, the court observed that even if the various studies and scholarly articles proffered were found to demonstrate the "phenomenon asserted," jury bias due to death qualification,

> We do not believe that petitioner would be able to demonstrate any prejudice to his own case. Only one prospective juror was excused on the ground that he could not consider recommending a sentence of death. At the trial, there was no question of the identity of the perpetrator of the two homicides, as the defendant was apprehended at the scene after taking and releasing two hostages. The evidence showed that the defendant was serving a life sentence for a capital felony when he escaped from prison, broke into two homes, killed two men, one of them a law enforcement officer who tried to apprehend him, then kidnapped a woman and her infant child before finally surrendering. The only conceivable issue on which to build a defense was whether the murders were first degree or second degree, and the state could prove them to be first degree murders either on a premeditation theory or a felony-murder theory. There was no possibility that any

> kind of pro-prosecution bias caused by the exclusion of one death penalty opponent could have affected the outcome of the guilt phase of petitioner's trial.
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> **Kennedy**, 483 So.2d at 424.

As to the second claim, the Florida Supreme Court found that Kennedy had failed to demonstrate either deficient performance or prejudice. The court observed,

> The specific act or omission identified as having been a substantial deficiency is appellate counsel's omission to cite as authority a particular reported decision of this Court. [**Elledge v. State**, 346 So.2d 998 (Fla.1977)].
>
> Id. at 427.

The court further stated,

> We ascribe no special significance to the lack of express reliance on that particular decision. It is clear that appellate counsel challenged the findings of the trial court that were subject to attack under the facts shown by the evidence, brought before the court the issue of the validity of the findings and the propriety of the death sentences, and sought whatever remedy the Court might be inclined to grant.
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> Id. at 428.

In conclusion, the court held,

> The single mitigating circumstance found by the trial court was that at the time of the murders, the defendant was under "extreme duress." Citation to **Elledge** in the appellant's brief or petition for rehearing would not have made a difference and was not required by the applicable standards of profession competence. It simply cannot be said that Petitioner's lawyer on appeal was not effectively functioning as legal counsel.
>
> **Id.**

On February 14, 1986, the United States Supreme Court afforded Kennedy a stay of execution in order to enable him to seek certiorari review of this decision. The Court ultimately denied review on October 14, 1986. **See Kennedy v. Wainwright**, 479 U.S. 890, 107 S.Ct. 291, 93 L.Ed.2d 265 (1986).

In accordance with the provisions of Fla.R.Crim.P. 3.850, Kennedy filed a motion for post-conviction relief in the state circuit court on January 2, 1987, subsequently amending such on April 13, 1987. Many of the claims presented in these two motions overlap, but Kennedy would seem to have presented the following basic claims on post-conviction motion: (1) alleged discriminatory selection of the grand jury foreman on the basis of race and sex; (2) alleged dilution of the jury's sense of responsibility in sentencing, due to argument and instruction, in violation of **Caldwell v. Mississippi**, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985); (3) a renewed attack upon the prosecutor's closing argument at the penalty phase; (4) alleged ineffective assistance of counsel at trial and sentencing; (5) alleged Sixth and Fourteenth Amendment violations in regard to the manner in which Kennedy's trial jury was selected, i.e., use of voter registration lists which allegedly discriminated on the basis of race and sex; (6) alleged deprivation of a fair trial due to pervasive publicity and prejudical trial atmosphere; (7) an allegation that insufficient evidence existed to the effect that Kennedy had intended to kill[1]; (8) an allegation that the

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[1] Kennedy failed to present this claim on the appeal from the denial of this motion, thus abandoning it.

death penalty was applied arbitrarily on the basis of race; (9) an allegation that an instruction given the jury at the guilt phase had improperly advised them that Kennedy had no right to defend himself; (10) an allegation that the circuit court had lacked jurisdiction to try Kennedy, following the change of venue;[1] and (11) an allegation that the prosecutor's closing argument during the guilt phase had violated the Fifth, Sixth, Eighth and Fourteenth Amendments. The claim involving ineffective assistance of counsel had a number of components, including counsel's alleged failure to investigate and present available evidence concerning Kennedy's background and concerning the prison conditions from which he escaped, as well as a contention that counsel had been ineffective for failing to show the jury a video tape of Kennedy's surrender.

Following arguments of counsel, the state circuit court summarily denied Kennedy's motion on September 4, 1987, finding, in accordance with the state's arguments, that all claims except those involving ineffective assistance of counsel were procedurally barred, as representing matters which could have been, should have been, or actually were presented under direct appeal. The court further noted that Kennedy had failed to demonstrate either deficient performance of counsel or prejudice, so as to merit relief. As to the claim involving the alleged failure to present background information, Judge Mitchell, who had presided over the trial, held,

> Since Kennedy himself testified about his personal history and background at the sentencing hearing this evidence was merely accumulative and not new.

The court similarly held that the evidence concerning Kennedy's stuttering and his learning disabilities was not new, and that Kennedy himself had presented this evidence during the penalty phase.

Kennedy, of course, appealed this ruling to the Supreme Court of Florida, and presented, essentially, nine (9) claims for relief: (1) that the court had erred in not affording him an evidentiary hearing; (2) that his conviction violated the Fourteenth Amendment due to alleged discrimination on the basis of race and sex as to the selection of the grand jury foreman; (3) that his death sentences violated the Eighth and Fourteenth Amendments due to comments by the court and prosecutor which allegedly diminished the jury's sense of responsibility; (4) that the prosecutor's closing argument at both the guilt and penalty phase had violated the Eighth and Fourteenth Amendments; (5) that an evidentiary hearing had been required as to Kennedy's claims of ineffective assistance of counsel, in regard to counsel's failure to investigate and present evidence as to Kennedy's background and the prison conditions from which he escaped; (6) that his convictions violated the Sixth, Eighth and Fourteenth Amendments, because his petit jury was not selected from a cross-section of the community; (7) that he was deprived of a fair trial due to prejudicial publicity and trial atmosphere; (8) that the jury was incorrectly instructed regarding Kennedy's alleged right to self defense; and (9) that trial counsel had been ineffective for failing to play for the jury a video tape of Kennedy's surrender. In its opinion rendered June 8, 1989,

Kennedy v. State, 547 So.2d 912 (Fla.1989), the Florida Supreme Court affirmed the circuit court's order in all respects. The court expressly held that the circuit court had been correct in finding all of the claims presented, except those involving ineffective assistance of counsel, to be procedurally barred. The Florida Supreme Court held that Judge Mitchell had been correct in concluding that neither deficient performance of counsel nor prejudice had been demonstrated, stating specifically, "We agree with the trial judge that counsel's decision not to present the video tape of Kennedy's surrender and arrest to the jury was a matter of trial strategy." Id. Rehearing was denied on August 30, 1989.

On October 4, 1989, Kennedy filed a successive petition for writ of habeas corpus in the Supreme Court of Florida, presenting eleven (11) claims, a number of them identical to those found procedurally barred in the prior 3.850 appeal; these claims included: (1) a renewed attack upon the prosecutor's closing argument; (2) a claim that the Florida Supreme Court had erred in its review of the sentences on direct appeal; (3) a claim that the sentencing judge's findings were vague; (4) a renewed attack upon the denial of the jury instruction as to mercy; (5) a renewed attack as to the alleged "burden-shifting" in jury instructions; (6) a renewed claim as to alleged misstatement in the jury instructions as to Kennedy's right to defend himself; (7) a renewed claim that the sentencer had failed to consider nonstatutory mitigating circumstances; (8) a renewed claim that the judge had considered nonstatutory aggravating circumstances;

(9) a claim that an "automatic" aggravating circumstance had been considered; (10) a claim that the jury had been misadvised as to the number of votes necessary for a life recommendation; and (11) a renewed claim that the trial jury had not been selected from a fair cross-section of the community. In its response, the State asserted that all these claims were procedurally barred, and the Florida Supreme Court summarily denied the petition on October 6, 1989.

On October 9, 1989, Kennedy filed a petition for writ of habeas corpus in the United States District Court for the Middle District of Florida, Orlando Division. In the case, styled **Kennedy v. Dugger**, 89-829-Civ-Orl-19, Kennedy raised the following eighteen (18) claims: (1) denial of a jury instruction on self defense; (2) impermissible introduction of victim-impact evidence; (3) denial of jury instruction on mercy and improper prosecutorial argument thereon; (4) improper prosecutorial argument at the guilt and penalty phase; (5) improper failure of the Florida Supreme Court to remand for resentencing, after striking certain aggravating circumstances; (6) improper "burden-shifting" at the penalty phase; (7) an alleged violation of **Caldwell v. Mississippi**, 472 U.S. 320 (1985); (8) improper refusal of the sentencer to find mitigating circumstances "clearly set out in the record"; (9) ineffective assistance of counsel at the penalty phase; (10) improper admission of Kennedy's statements; (11) improper introduction of nonstatutory aggravating circumstances; (12) absence of factual basis to support the death sentences; (13) presence of unconstitutional

automatic aggravating circumstance; (14) improper jury instruction on felony murder (robbery); (15) improper exclusion of venireman Markley, due to his views on capital punishment; (16) improper interruption by the trial court during defense counsel's closing argument; (17) violation of Kennedy's Sixth, Eighth and Fourteenth Amendment rights, due to the fact that the jury was not selected from a fair cross-section of the community; and (18) erroneous jury instruction on jury majority. Following response by the state, and argument of counsel, Judge Fawsett entered a comprehensive order, summarily denying the petition in all respects.

The United States Court of Appeals for the Eleventh Circuit subsequently granted a certificate of probable cause and stay of execution. On appeal, Kennedy presented seven (7) primary claims for relief: (1) the district court's denial of an evidentiary hearing; (2) the Florida Supreme Court's failure to remand for resentencing; (3) ineffective assistance of counsel at the penalty phase; (4) improper closing argument by the prosecutor at the guilt and penalty phases; (5) alleged "burden-shifting" at the penalty phase; (6) lack of a factual basis for the death sentences; and (7) denial of a jury instruction on self defense. In its opinion rendered May 31, 1991, the Eleventh Circuit affirmed the District Court's ruling in all respects. **Kennedy v. Dugger**, 933 F.2d 905 (11th Cir.1991). As to the claim of ineffective assistance of counsel, the court found that Kennedy had failed to demonstrate prejudice. **Kennedy**, 933 F.2d at 909-911. As to the Florida Supreme Court's failure to remand for

resentencing, the court found no violation of **Clemons v. Mississippi**, ___ U.S. ___, 110 S.Ct. 1441 (1990), expressly holding, ". . . the Florida Supreme Court in the instant case clearly indicated that the basis of its decision was harmless error review." **Kennedy**, 933 F.2d at 912. The court concluded that Kennedy's claims in regard to the prosecutor's closing argument lacked merit. **Id.** at 912-915. The court found Kennedy's "burden-shifting" claim without merit in light of **Walton v. Arizona**, ___ U.S. ___, 110 S.Ct. 3047 (1990), and likewise concluded, in a footnote, that the other claims asserted on appeal lacked merit, **Kennedy**, 933 F.2d at 915-16. Kennedy subsequently sought rehearing **en banc**, and, in his petition, **inter alia**, drew the court's attention to **Parker v. Dugger**, ___ U.S. ___, 111 S.Ct. 731 (1991). The motion for rehearing was denied on August 27, 1991.

On or about October 23, 1991, Kennedy filed a petition for writ of certiorari in the Supreme Court of the United States, presenting two claims for relief - that the Florida Supreme Court's refusal to remand for resentencing, after striking certain aggravating circumstances, violated **Clemons** and **Parker**, and that Kennedy had been entitled to an evidentiary hearing on his claim of ineffective assistance of counsel. Following the filing of a brief in opposition, the Court denied the petition on January 21, 1992. **Kennedy v. Singletary**, ___ U.S. ___, 117 L.Ed.2d 124 (1992). On February 12, 1992, Kennedy filed a pleading entitled Petition for Rehearing and Consolidated Request for Review in Light of the Pendency of **Sochor v. Florida**, ___

U.S. ___, 115 L.Ed.2d 455 (1991). This motion was denied on March 23, 1992.

On March 27, 1992, Governor Chiles signed a death warrant for Edward Kennedy, such warrant to be effective from noon April 28, 1992 through noon, May 5, 1992, with execution presently scheduled for 5:01 p.m. on May 1, 1992.

On April 27, 1992, Kennedy filed a second post-conviction motion in the state circuit court, pursuant to Fla.R.Crim.P. 3.850, raising two claims for relief: (1) a renewed claim of ineffective assistance of counsel at the penalty phase and (2) a renewed claim of error due to the presence of uniformed troopers at the state trial. The state filed a response, and, on April 27, 1992, the state circuit court denied all relief, finding the claims procedurally barred. Kennedy also filed a third Petition for Writ of Habeas Corpus in the Supreme Court of Florida, contending that he was entitled to a new sentencing hearing, in that the Florida Supreme Court had failed to perform a proper harmless error analysis, under **Clemons v. Mississippi**, 494 U.S. 738 (1990), **Parker v. Dugger**, ___ U.S. ___, 111 S.Ct. 731 (1991), **Stringer v. Black**, ___ U.S. ___, 117 L.Ed.2d 367 (1992); Kennedy also asked for a stay of execution, due to the pendency of **Sochor v. Florida, cert. granted**, ___ U.S. ___, 115 L.Ed.2d 445 (1991). It is anticipated that the Florida Supreme Court will deny all relief and find all claims presented procedurally barred.

ARGUMENT

ALL REQUESTED RELIEF SHOULD BE DENIED

Although Kennedy has already lodged a federal habeas corpus petition in the United States District Court for the Middle District of Florida, Orlando Division, in which the three claims presented herein are also raised, he has chosen to proceed directly to this Court, no doubt due to the entirely correct realization that all of his claims will be found to constitute an abuse of the writ in federal court, **see McCleskey v. Zant**, ___ U.S. ___, 111 S.Ct. 1454 (1991), and/or to be procedurally barred under **Wainwright v. Sykes**, 433 U.S. 72 (1977). Of the three claims presented, two merit little discussion. Kennedy's renewed claim of ineffective assistance of counsel is virtually identical to that presented in his first round of the federal litigation. This Court recently reviewed the Eleventh Circuit's disposition of this claim, **Kennedy v. Dugger**, 933 F.2d 905, 909-11 (11th Cir.1991), and failed to find any basis to grant relief. **See Kennedy v. Singletary**, ___ U.S. ___, 117 L.Ed.2d 124 (1992)(see Petition filed therein, **Kennedy v. Singletary**, United States Supreme Court Case No. 91-6199 at pgs. 27-47). Kennedy's claim in regard to the presence of uniformed troopers at his trial, largely premised upon a recent decision of the United States Court of Appeals for the Eleventh Circuit, **Woods v. Dugger**, 923 F.2d 1454 (11th Cir.), **cert. denied**, ___ U.S. ___, 116 L.Ed.2d 355 (1991), provides no basis for relief. The state courts have previously found this claim procedurally barred when it was presented in 1987, **see Kennedy v. State**, 547 So.2d 912

(Fla.1989), and, given this express finding, any subsequent unexplained denial of relief cannot serve so as to lift the bar. **See Ylst v. Nunnemaker**, ___ U.S. ___, 111 S.Ct. 2590 (1991). In any event, this claim does not call into question the fundamental fairness of Kennedy's trial, especially given, **inter alia**, the overwhelming evidence against him, including his own confession, nor does it affect his eligibility for the death penalty. **Cf. McCleskey, supra** (discussion of actual prejudice and fundamental miscarriage of justice exception). It cannot be said that an innocent man has been convicted of murder or an undeserving man sentenced to death.

It is expected that Kennedy will primarily rely upon his claim based upon **Clemons, Parker, Stringer** and **Sochor**. This claim should be very familiar to this Court, inasmuch as the ink is barely dry upon the denial of rehearing from Kennedy's latest petition for writ of certiorari, such ruling entered by this Court on March 23, 1992; such pleading was premised upon the pendency of **Sochor**. When Kennedy filed his first federal petition in 1989, he contended that he was entitled to relief under **Clemons**; the Eleventh Circuit expressly rejected this claim, in affirming the district court's denial of relief, and held that the Florida Supreme Court had applied a proper harmless error analysis under **Clemons**. **Kennedy**, 933 F.2d at 911-12. Subsequently, the Eleventh Circuit denied Kennedy's petition for rehearing, which had been largely premised upon this Court's decision in **Parker**. When this Court denied Kennedy's latest petition for writ of certiorari on January 20, 1992, it did so,

with full knowledge that Kennedy was contending that he was entitled to be resentenced under Clemons and Parker (see Petition for Writ of Certiorari, Kennedy v. Singletary, United States Supreme Court Case No. 91-6199, at pgs. 10-27). As noted, Kennedy's petition for rehearing, which this Court denied on March 23, 1992, was predicated upon the potential applicability of Sochor to his case.

Thus, the only matter which Kennedy can now assert as "new" is this Court's decision Stringer v. Black, ___ U.S. ___, 117 L.Ed.2d 367 (1992), which was decided on March 9, 1992. The state respectfully contends that it cannot see any way that Stringer can afford Kennedy relief. In Stringer, this Court found that the Mississippi Supreme Court had erred in failing to apply the very harmless error analysis which all courts to review this case have concluded that the Florida Supreme Court correctly applied, i.e., that set forth in Barclay v. Florida, 463 U.S. 939 (1983). Further, Stringer would simply seem to represent a more recent application of Clemons to the facts before it, and, as noted above, every court which was reviewed this case has concluded that the harmless error analysis applied by the Florida Supreme Court sub judice complies with Clemons. Kennedy's continued dissatisfaction with these results does not provide any basis for this Court's review.

The salient facts of this case cannot be obscured by Kennedy's rhetoric. There are cases in which the propriety of the imposition of the death penalty is open to some debate. This is not one of them. Kennedy was already a convicted murderer at

the time that he escaped from prison and murdered the two victims in this case who had unsuccessfully sought to recapture him. At his penalty phase in 1982, Kennedy himself took the stand and testified extensively as to the matters in his own background and the conditions at his prison which he regarded as mitigating his offense; the judge and jury, with more than a little justification, rejected these factors. After the passage of a decade, Kennedy essentially asks this Court for judicial clemency, based upon the fact that he now objects to a jury instruction given as to one of the aggravating circumstances, which was not even found as to one of the two death sentences imposed upon him. This argument is frivolous. His two sentences of death are premised upon four valid and unchallenged aggravating circumstances. The claims which he belatedly, and abusively, presents do not involve any allegation of actual or factual innocence, Cf. **McCleskey, supra,** or any lack of eligibility for the death penalty, however that phrase is defined. The pendency of **Sawyer v. Whitley,** 945 F.2d 812 (5th Cir.), **cert. granted,** ___ U.S. ___, 112 S.Ct. 434 (1991), can serve as no basis for relief for Kennedy, inasmuch as it is difficult to see how any resolution of that case could cast into question the underlying reliability of these sentences of death.

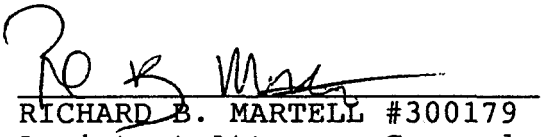
The state would also incorporate by reference the contents of all the pleadings previously lodged with this Court, which have been filed in the courts below. Because no justiciable issue is presented, no stay of execution or petition for writ of certiorari should issue. **See Delo v. Stokes,** 495 U.S. ___, 110

S.Ct. 18, 109 L.Ed.2d 235 (1990); **Antone v. Dugger**, 465 U.S. 200, 104 S.Ct. 962, 79 L.Ed.2d 147 (184); **Barefoot v. Estelle**, 463 U.S. 880, 103 S.Ct. 3383, 77 L.Ed.2d 1090 (1983); **Autry v. Estelle**, 461 U.S. 1, 104 S.Ct. 20, 78 L.Ed.2d 1 (1985).

WHEREFORE, for the aforementioned reasons, all requested relief should be denied.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



RICHARD B. MARTELL #300179
Assistant 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 Billy H. Nolas, Esq., Post Office Box 4905, Ocala, Florida 32678, this ____ day of April, 1992.

RICHARD B. MARTELL
Assistant Attorney General