FILED
SID J. WHITE
SEP 17 1992
CLERK, SUPREME COURT

By Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

JOHN MILLS, JR.,

Petitioner,

v. CASE NO. 80,326

HARRY K. SINGLETARY,

Respondent.

RESPONSE TO FOURTH PETITION FOR WRIT OF HABEAS CORPUS

The Respondent answers as follows:

(1) The Petitioner is not entitled to habeas corpus relief on the strength of a fourth successive petition which, without citation to Kennedy v. Singletary, 17 F.L.W. 5464 (Fla. 1992), attempts to argue two procedurally barred claims.

(2) The Petitioner at bar has neglected to cite controlling law and has abused the writ of habeas corpus notwithstanding this Court's admonition in Mills v. Dugger, 574 So.2d 63, 65 (Fla. 1990):

> As we have stated numerous times, habeas corpus is not to be used "for obtaining additional appeals af 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 prior past-conviction filings.

(A) Procedural History

On March 5, 1992, the Petitioner and his accomplice (a person named Michael Frederick) kidnapped and murdered Les Lawhon. Later, Mills returned to Lawhon's home, burglarized it and set it on fire. Mills was indicted on May 19, 1982. (R 3).

Mills was found guilty of first degree murder, burglary, arson, kidnapping, grand theft and possession of a firearm by a convicted felon. (R 231-237).

By pretrial motion, Mills had challenged the application of the "heinous, atrocious and cruel" (HAC) and "cold, calculated and premeditated" (CCP) statutory aggravating factors to this case. (R 2259). The motion was noted during the penalty phase charge conference when Mills (again) alleged that HAC did not apply. (R 2259 et seq). At no time did Mills argue that the jury instruction itself was defective, nor did he suggest that the instruction was improper as later amended by the court to incorporate the definitional language of Dixon v. State, 283 So.2d 1 (Fla. 1973).

The approved instruction was given without objection. (R 2335).

Mills was eventually sentenced to death on the basis of five valid statutory aggravating factors[1] which were not offset by any mitigating factors. (R 268-73).

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[1] The five factors were: (1) murder during a felony; (2) murder by one under sentence; (3) murder for pecuniary gain; (4) cold, calculated and premeditated, and (5) heinous, atrocious or cruel.

Mills took a direct appeal to this Court. In Point VII, Mills argued that the HAC and CCP factors should not have been given to the jury or found by the court due to the insufficient evidence undergirding them. Mills did **not,** directly or indirectly, contest the jury instructions given by the trial court. Relief was denied. Mills v. State, 462 **So.2d 1075** (Fla. **1985),** cert. denied, **473** U.S. 911 **(1985).**

In response to his death warrant (signed March **11, 1987),** Mills filed a motion for post-conviction relief, pursuant to Fla.R.Crim.P. 3.850, and a petition for writ of habeas corpus. Neither petition raised a challenge to the HAC or CCP jury instructions. Relief was denied. Mills v. State, 507 So.2d 602 (Fla. 1987).

A second habeas corpus petition was filed in this Court on **the** eve of a scheduled evidentiary hearing, in **federal** court, on Mills' pending federal habeas carpus petition. The issues at bar **were,** again, not raised and relief was summarily denied. Mills v. Dugger, **523 So.2d** 578 (Fla. **1988).**

After Mills lost in federal court, he attempted a third habeas petition in this Court, to raise still other procedurally barred claims and to delay federal review. Here, **far** the first time, Mills raised a claim under Maynard v. Cartwright, **486** U.S. 356 (1988). **Relief was** denied on procedural grounds. This Court affirmed. Mills v. Dugger, 574 So.2d *63* **(Fla.** 1990).

Mills has filed this fourth petition, raising the procedurally **barred** jury instruction issues once again, with a collateral request to the federal Eleventh Circuit for yet another abatement of the four-year-old appeal in that court.

ARGUMENT

CLAIM I: THE "MAYNARD v. CARTWRIGHT" ISSUE IS PROCEDURALLY BARRED

Mr. Mills' challenge to the wording of the HAC and CCP jury instructions given, without objection, at his trial is procedurally barred today just as it was in his third habeas corpus petition.

Despite Mills' claim that this issue is not barred, the viability of our procedural defense was specifically upheld in Sochor v. Florida, 504 U.S. ____ (1992), when the Supreme Court noted its lack of jurisdiction over this unpreserved issue. Even after publication of Espinosa v. Florida, 505 U.S. ____ (1992), procedural bars relevant to this issue were upheld in Kennedy v. Singletary, 17 F.L.W. S464 (Fla. 1992), and again, federally, in Kennedy v. Singletary, 6 F.L.W. Fed. C945 (11th Cir. 1992). Mills' petition does not cite to these decisions and cannot overcome them.

Factually, this case is sufficiently similar to Kennedy to compel the same result. In both cases the "wording" of the jury instructions was not challenged at trial or on appeal. Neither defendant raised their claims in their initial collateral attacks.

Mr. Mills deftly words his petition to make it appear that this Court denied his claims "on the merits" during his last petition - selectively quoting a portion of a sentence relating to the viability of Maynard v. Cartwright, 486 U.S. 356 (1988). The actual holding in Mills v. Dugger, 574 So.2d 63 (Fla. 1990), was that the issues were procedurally barred, with the reference

to Maynard merely being an aside relating to why the bar were Mills, if removed, would still not be entitled to relief.

Without waiving this procedural bar the State would offer these secondary arguments on the issues as briefed by Mr. Mills.

First, we would note that the decision in Espinosa is not yet final. The United States Supreme Court entered its decision without allowing the State to file a brief or address the issues which formed the basis of the opinian. Indeed, the issues addressed by the Court were substantially beyond the arguments made by Espinosa himself. Thus, the State has petitioned for rehearing.

Second, Espinosa is based upon a federal court interpretation of state law which is not binding on this Court and which is clearly erroneous. Notwithstanding Espinosa, the established constitutional law of the United States is that the federal courts can not substitute their own interpretations of state law for the pronouncements of the highest court of the state. Wainwright v. Goode, 464 U.S. 78 (1984); Gryger v. Burke, 334 U.S. 728 (1948); Moore v. Sims, 442 U.S. 415 (1979), see also Pennzoil v. Texaco, 481 U.S. 1 (1987) (federal reinterpretations of state law which differ from those of the state courts are "advisory only" and carry no weight).

This Court's explanation and interpretation of state capital sentencing law has been consistent. See Ross v. State, 386 So.2d 1191 (Fla. 1980); Combs v. State, 525 So.2d 853 (Fla. 1988); Groesman v. State, 525 So.2d 522 (Fla. 1988), and Smalley v. State, 546 So.2d 720 (Fla. 1989). Those decisions bind the

federal courts to the extent they explain the Florida capital sentencing process.

Florida utilizes judicial sentencing, not jury sentencing. Section **921.141** of the Florida Statutes clearly and unequivocally places the duty of sentencing in the hands of the trial judge "notwithstanding" any suggestion rendered by the jury. The jury is not, by statute or judicial ruling, a "co-sentencer" and its advisory ruling does not - if "for death", rise to the dignity of a statutory aggravating factor.

In Spaziano **v.** Florida, **468** U.S. **447 (1984),** the defendant, relying upon Tedder **v.** State, 322 So.2d 908 (Fla. 1975), alleged that the jury was either a co-sentencer or, at least, should be granted that status by judicial amendment to Florida law. This unconstitutional option was rejected by the Supreme Caurt, which explicitly held that the constitution does not require "jury sentencing" and that Florida juries are not actual sentencers. The only means by which Florida law can be changed to grant *any* sentencing authority to the jury is by legislative enactment. Until then, the actual wording of the statute controls, and the statute says that the judge is the actual sentencer "notwithstanding" the jury's recommendation.[2]

Espinosa operates under the assumption that the jury is a "co-sentencer". Espinosa then relies upon the notion that the trial judge's decision is "tainted" by an advisory opinion by

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[2] It should also be noted that the information received by the advisory jury is not as complete or expansive as the information received by **the** trial judge. Hoffman v. State, 474 **So.2d 1178** (Fla. **1985).**

said jury because he must give the opinion "great weight". Thus, the court said, even if the judge did not rely upon an "improper factor" himself, he would do so "indirectly" by relying on the jury's advice. This assumption is clearly in error, perhaps due to the absence of any briefing or argument.

A trial judge independently reviews the evidence both for the purpose of passing sentence and for the purpose of deciding whether to override the advisory jury. Therefore, a "tainted" suggestion from the jury is viewed appropriately. This fact was overlooked by the federal court.

A jury suggestion of "death" cannot support a death sentence by itself. The judge must independently identify applicable aggravating factors and assess their relative weight. The judge's findings are reviewed by this Court, on appeal. This process was not correctly described by the federal court.

Thus, Espinosa, et al., relate to a capital sentencing process unlike the one used in Florida, as defined by this Court. The Supreme Court's errors do not stop there, however.

Espinosa fails to reconcile its holding with Walton v. Arizona, 497 U.S. 639, 111 L.Ed.2d 511, 528 (1990), which held:

> But the logic of [Maynard, et al.] has no place in the context of sentencing by a trial judge. Trial judges are presumed to know the law and apply it in making their decisions. . . . Moreover, even if a trial judge fails to apply the narrowing construction or applies an improper construction, the Constitution does not necessarily require that a state appellate court vacate a death sentence based on that factor. Rather, as we held in Clemons v. Mississippi, 494 U.S. ___ . . . a state appellate court may itself determine whether the evidence supports the existence of the aggravating circumstances as properly defined.

Under Walton, no matter what instruction the nonsentencing jury was given regarding HAC or CCP, the death sentence at bar would be proper if the sentencer (the judge) and later this Court found those factors appropriate as defined by law. By extrapolation, a valid aggravating factor is not rendered "invalid" (i.e., the evidence does not change) just because a jury instruction to a nonsentencer is defective. Here, the HAC and CCP factors were properly applied and upheld on appeal. Thus, any "error" in advising the nonsentencing jury was **de minimus**.

Godfrey **v.** Georgia, 446 U.S. 420 (1980), only applies to jurisdictions where the jury is the actual sentencer, while in Maynard v. Cartwright, supra, the court noted that (in that state) the jury **was** the sentencer and the appellate court had no power to "correct" the sentencer's consideration of an improper **factor.** Neither of these cases is relevant to Florida, as this Court noted earlier in this case.

Finally, Espinosa never addressed its direct conflict with Barclay v. Florida, 463 U.S. **939** (1983). In Barclay, unlike this case, the petitioner's sentence of death was based upon an actual, invalid, nonstatutory aggravating factor. This fact is in stark contrast to the valid, though (allegedly) "incorrectly described" factor at bar. Despite the existence of an actual error in Barclay, relief was denied:

> Barclay's brief is interlarded with rhetorical references to '[l]awless findings of statutory aggravating circumstances.' Brief for Petitioner **33,** 'protective pronouncements which . . , seem to be turned on and off from case to case without notice

> or explanation,' id at **93,** and others in a similar vein. These varied assertions seem to suggest that the Florida Supreme Court failed to properly **apply** its own **cases** in upholding petitioners death sentence. The obvious answer to this question, **as** indicated in the previous discussion, is that mere errors of state law are not the concern of this Court. Gryger v. Burke . . . unless they rise for some other reason to the level of denial of rights protected by the United States Constitution.

Barclay would clearly seem to refute Mr. Mills' assertion that the error at bar, if it exists, qualifies as some fundamental error so serious as to compel relief notwithstanding any procedural bar. If, under Barclay, the actual reliance, by the actual sentencer, upon an invalid aggravating factor is "merely an error of state law" which can be corrected by this Court on appeal, then clearly the "vague" instruction, to a nonsentencer, on a valid factor, correctly applied by the sentencer and upheld on appeal, is trivial error (at most) by comparison.

In sum, the issue at bar is procedurally barred under Sochor and Kennedy. In addition, it is grounded upon a federal court's error in failing to adhere to this Court's interpretations of state law as set forth in Ross, supra; Combs, supra; Smalley, supra; Grossman v. State, 525 So.2d **833** (Fla. **1988),** and Christopher v. State, 583 **So.2d 642** (Fla. **1991),** and the federal court's subsequent misinterpretation of state law and entry of a decision which clearly departed from its awn precedents.

As a result, Mr. Mills has offered no basis for this Court to depart from its prior decision in this case OK from its holding in Kennedy. This petition is procedurally barred and an abuse of the writ.

CLAIM 11: THE "FELONY MURDER" ISSUE IS PROCEDURALLY BARRED

Mr. Mills' final argument is a highly improper refiling of a "felony **murder**" argument from a prior habeas petition. The issue was not raised an appeal and has already been identified as **barred by** this Court. Mills v. Dugger, **574** So.2d **63** (Fla. **1990).**

Mills attempts **to** overcome this **bar** by suggesting that the issue was preserved **by** virtue of having been improperly raised in an earlier habeas petition. Just as "two wrongs do not make a right", two abuses of the writ do not make a right to merits review.

Mills goes on to misstate Florida law (i.e., "murder during a felony cannot support a death sentence" and "life recommendations are binding") and combines these errors with a state court case out of Wyoming to suggest the right to merits review. None of these arguments can support the abandonment of the valid procedural bars attending this case.

Without waiving this defense, we would note the fact-specific nature of Rembert v. State, 445 So.2d **337** (Fla. 1984), which did not say that "murder during a felony" is always insufficient as alleged by Mills. Similarly, Stringer v. Black, 112 S.Ct. **1130 (1992),** did not address Florida's procedure which enables the judge, as actual sentencer, to independently weigh aggravating factors by relying upon existing legal precedents unavailable to a mere jury.

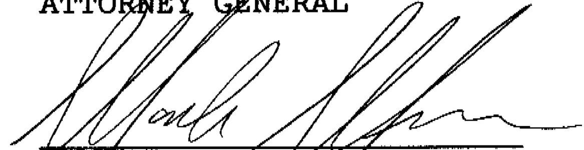
Again, however, the Respondent notes that Mr. Mills is not entitled to merits argument or merits review. His claim is procedurally **barred** and must, yet again, be denied on that basis.

CONCLUSION

The Petitioner is not entitled to relief.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



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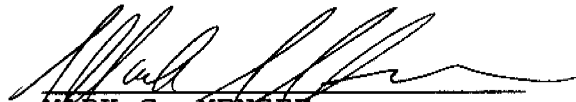
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Ms. Gail E. Anderson, Esq., Office of the Collateral Representative, 1533 South Monroe Street, Tallahassee, Florida 32301, this 17 day of September, 1992.



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