IN THE SUPREME COURT OF FLORIDA

JOHN MILLS,

Appellant,

v. Case No. 89,434

STATE OF FLORIDA,

Appellee.

_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE SECOND JUDICIAL CIRCUIT,
IN AND FOR WAKULLA COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

The State respectfully incorporates by reference the Procedural History filed in the circuit court.

SUMMARY OF THE ARGUMENT

On December 2, 1996, Mills filed a successive motion for postconviction relief in the state circuit court, raising three (3) claims for relief: (1) a claim of error under Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L. Ed. 2d 215 (1963), to the effect that the State withheld evidence that Michael Fredrick knew the victim, and, indeed, had supplied him with drugs and prostitutes; (2) a claim, again premised upon Brady, to the effect that Michael Fredrick provided false testimony, especially as to the absence of threats or promises in exchange for his testimony, and that the State allowed him to do so and (3) a claim that access to certain records and files, requested pursuant to Chapter 119, has allegedly been denied. The State filed a response on the same day, and legal arguments were presented to the circuit court. At the conclusion of the hearing, Judge McClure announced that he would deny all relief, and subsequently rendered an order finding all matters to be procedurally barred.

It is the State's position that Mills' two Brady claims are procedurally barred, and that no relief is warranted as to his speculative public records claim. Mills' convictions and sentence of death have been final since 1985, and he has already filed a prior postconviction motion, and has received an evidentiary

hearing thereon; significantly, in that prior proceeding, Mills' primary claim for relief was, as here, that the State had withheld evidence concerning Michael Fredrick and had allowed him to testify falsely. Because the matters presented herein could have been raised earlier (to the extent that they were not), the circuit court's finding of procedural bar should be affirmed in all respects. See e.g., White v. State, 664 So. 2d 242, 244 (Fla. 1995) (finding claims in successive postconviction motion barred, where collateral counsel, through due diligence, could have asserted them earlier, to the extent that they did not; claim which was re-presentation of prior rejected collateral claim likewise procedurally barred); Atkins v. State, 663 So. 2d 624, 627 (Fla. 1995) (findings of procedural bar affirmed in successive collateral appeal, with express holding, "Endless repetition of claims is not permitted"); Bolender v. State, 658 so. 2d 82 (Fla. 1995) (claims in successive motion, including claim that co-defendant testified falsely at trial, found procedurally barred, where no showing made that such could not have been raised earlier through due diligence; no evidentiary hearing allowed on latter matter); Zeigler v. State, 654 So. 2d 1163 (Fla. 1995) (defendant's claim that new technology such as DNA testing excused delay in raising claim rejected, where defendant waited more than two years to utilize such technology);

Foster v. State, 614 So. 2d 455 (Fla. 1992) (Brady claim raised for the first time in successive motion procedurally barred, where defendant had been continuously represented by collateral counsel for years, and no showing made as to why claim not raised earlier). Each claim will now be addressed.

ARGUMENT

ALL REQUESTED RELIEF SHOULD BE DENIED.

CLAIM I

As noted, Mills contends in this claim that the State withheld evidence that Fredrick procured prostitutes for the victim, Les Lawhon. The "basis" for this claim is a November 26, 1996 affidavit from Marsha Porter, a self-described prostitute and drug addict, who avers she saw the two together in Frenchtown, accompanied by Debra Mock; the affidavit stated that she "talked about" this matter with Charlie Ash, "a police officer." Collateral counsel have also obtained an affidavit from Bertha Earl, another former Frenchtown prostitute, who claimed that Fredrick was her pimp and who likewise stated that Lawhon, whom she referred to as "goofy pumpkin head," hung around with Fredrick and Mock (Attachments 1 and 2 to 1996 Motion to Vacate); there are also affidavits from Monica Hall and Tanya Lockhart, who offered testimony as to Frederick's relationship with Mock (Attachments 4 and 5 to 1996 Motion to Vacate). All these matters allegedly came to light when CCR utilized new computer technology called Auto-trak in its search for Tina Partin, a former defense witness. According to an affidavit from a CCR investigator, Partin was unable to provide Debra Mock's whereabouts, but allegedly provided the name

of Marsha Porter, who, in turn led CCR to Bertha Earl (There is no affidavit from Partin). Auto-trak likewise led CCR to Monica Hall, who had allegedly previously been designated as a potential state witness (Attachment 5 to 1996 Motion to Vacate). No explanation has been provided for Ms. Lockhart's affidavit, and there has been no allegation regarding her availability. Based on the above, CCR maintains that had the State not "withheld" Ms. Porter's name, the defense would have discovered all of the above matters, and in turn, could have presented such matters at trial and impeached the testimony of Michael Fredrick and presented testimony to the effect that Debra Mock could have been responsible for the blue bandana left behind at the crime scene. There are a number of problems with this argument.

First of all, this matter is procedurally barred, and no showing has been made that, through due diligence, these matters could not have been asserted at a timely point in the proceedings. As noted, Mills raised a Brady claim in his 1987 motion to vacate relating to the State's alleged withholding of evidence concerning Fredrick and received an evidentiary hearing thereon. Mills v. State, 507 So. 2d 602 (Fla. 1987). These matters could have been raised at that time. Further, it must be noted that Tina Partin was called as a witness by Mills himself at his trial. At that

time, she testified that she had seen Fredrick and Debrah Mock together and that he had given her jewelry; she likewise testified that Mock had bleached blonde hair, with dark roots, and that she habitually wore a blue bandana (OR 1772-7)[1]. Obviously, Ms. Partin could have been closely questioned as to the matters now asserted, and could have provided the name of Ms. Porter. This is not an instance of a witness appearing totally "out of the blue". This is, rather, an example of a former defense witness providing more detailed information fourteen years after the trial. To allow this case to be re-opened on the basis of information always known to a defense witness would truly render the doctrine of finality a nullity, and the circuit court's finding of procedural bar should be affirmed.

In addition to the procedural bar, it is difficult to perceive any valid claim under Brady. As this Court recently held in Porter v. State, 653 So. 2d 374, 379 (Fla. 1995), a Brady claim cannot be constructed through the "stacking of inferences," and, likewise, as this Court observed in Swafford v. State, 679 So. 2d 736, 739 (Fla. 1996), the State is not required to present the defense with "every

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[1] (OR __) represents a citation to the original record on appeal, whereas (PCR ___) represents a citation to the 1987 state postconviction proceedings.

piece of information regarding other suspects"; this Court also observed in Provanzano v. State, 616 So. 2d 428 (Fla. 1993) that there is no Brady claim when the defense counsel either has equal access to the information in question or could have obtained such through due diligence. This Brady claim is not based upon any matter specifically obtained from the State's files. Rather, it is premised upon the fourteen-years-after-the-fact affidavit of Marsha Porter, a former drug addict (who only recently received treatment for her addiction, according to her affidavit), who claims that she told a police officer the matter at hand; as the police officer is now deceased, this matter cannot be litigated. There is, however, no allegation of any kind to the effect that the State possessed any information concerning Bertha Earl, Monica Hall or Tanya Lockhart. Even if the late Detective Ash possessed any information from Ms. Porter, the defense had equal access to such, as Ms. Porter was known to Tina Partin, a defense witness. Given the fact that Tina Partin provided Ms. Porter's name to Mills' 1996 counsel, it can only be assumed that she would have done likewise to Mills' 1982 counsel. Likewise, as defense counsel did elicit testimony from Partin concerning Fredrick's relationship with Mock, he could certainly, through due diligence, have obtained the names of other

witnesses who knew of this relationship, and no suppression of evidence has occurred. This claim fails under Provenzano.

This claim likewise fails due to lack of materiality. As to the additional testimony concerning Debra Mock and the bandana, this is largely cumulative to that offered at trial by defense witness Partin (OR 722-7); it is likewise unlikely that any more evidence on this subject would have changed the result below, given the fact that the FDLE analyst who examined the hair found in the blue bandana testified that it was not bleached, and that it was, in fact light brown in color, thus eliminating Ms. Mock as a potential source for such head hair (OR 1823-5). As to Fredrick's alleged unsavory link to the victim, it must be noted that Fredrick himself offers absolutely no corroboration for this allegation. Although collateral counsel obtained an affidavit from Fredrick on the same day that they obtained one from Ms. Porter, Fredrick says nary a word on this subject (Attachment #10 to 1996 Motion to Vacate). In gauging materiality, this Court must take into account the fact that the "only living witness" as to this matter fails to offer any support for the current allegation. Further, even if this scandalous allegation is true, it does not raise any specter of innocence on the part of John Mills. Indeed, the fact that Fredrick may have known Lawhon may simply have meant that Fredrick

knew that there were valuable items in his trailer, which could be stolen for the benefit of all concerned. No relief is warranted as to this claim.

CLAIM II

In this claim, collateral counsel contend that the State withheld evidence that Fredrick was threatened and/or promised benefits in exchange for his trial testimony, and the basis of this claim is a 1996 affidavit from Fredrick to this effect. It is the State's position that this matter is procedurally barred, not only because a comparable claim was raised and rejected earlier, see Mills, 507 So. 2d at 602-5, but also because collateral counsel have had the uncontrovertible ability to raise this claim for the last eight years, and have inexcusably failed to do so. The following chronology is relevant.

> 12/1/82: Fredrick testifies as a state witness at Mills' trial (OR 1171-1311).
>
> 4/24/87: Fredrick signs an affidavit for CCR stating that his trial testimony was the product of threats and/or promises (PCR 457-461, 479-480).
>
> 5/1/87: Fredrick testifies as a defense witness at the first postconviction hearing, and recants his affidavit and affirms that his trial testimony was true (PCR 1244-1299).
>
> 1/7/88: Fredrick signs an affidavit for CCR stating that his 1987 affidavit was true and

that his postconviction testimony disavowing such was not (see Appendix to State Response to 1996 Motion to Vacate).

11/26/96: Fredrick signs an affidavit for CCR to the same effect (Attachment #10 to 1996 Motion to Vacate).

This claim is procedurally barred because Mills' counsel had the obligation to raise this matter by 1990, at the very latest, and failed to do so. See Henderson v. Singletary, 617 So. 2d 313, 316 (Fla. 1993); White, supra; Zeigler, supra; Bolender, supra. It is difficult to conceive of a clearer abuse of process. Collateral counsel cannot excuse this omission on the grounds that Mills' case was in federal court from 1988 to 1996, given the fact that collateral counsel three times returned to this Court during such time to present "new" legal issues. See Mills v. Dugger, 523 So. 2d 578 (Fla. 1988); Mills v. Dugger, 574 So. 2d 63 (Fla. 1990); Mills v. Singletary, 622 So. 2d 943 (Fla. 1993). Any minor variation between the 1988 and 1996 affidavits does not excuse this lack of due diligence, and no relief is warranted.

To the extent that any further argument is necessary, the State maintains its position that no valid "recantation" has occurred, and would note that Fredrick stood behind his trial testimony when he testified under oath at the 1987 hearing. Alternatively, the allegations in the instant affidavit are

conclusively refuted by the testimony of the prosecutors at the 1987 hearing, to the effect that no threats or promises were made to Fredrick (PCR 1299-1411; 2265-2308; 2366-2370). In its review of this case, the Eleventh Circuit not only noted this testimony, but also Fredrick's 1988 affidavit, and stated that it concluded that there was no credible evidence that Fredrick had been threatened, coerced or secretly induced to testify for the state. Mills v. Singletary, 63 F.3d 999, 1016-17 (11th Cir. 1995). It is worth noting that there is simply no way that the State "induced" Fredrick to admit culpability in a crime of which he was totally ignorant, given the fact that Fredrick led the authorities to the victim's body! Likewise, Fredrick has never identified any specific aspect of his trial testimony which allegedly was untrue, and he has never asserted that Mills is, in fact, innocent. No relief is warranted as to this claim.

CLAIM III

The State primarily relies upon its response and argument below, and would suggest that this claim should be resolved in accordance with Bush v. State, 21 Fla. L. Weekly S455, 456 (Fla. Oct. 16, 1996). This matter in any event does not constitute an actual claim for relief, and provides no basis for any stay of execution or postconviction relief

CONCLUSION

WHEREFORE, Appellee moves this Honorable Court to affirm the circuit court's order in all respects, and to deny any requested stay of execution.

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 delivery to Ms. Terri Backhus, Esq., Office of the Capital Collateral Representative, Post Office Drawer 5498, Tallahassee, Florida, this 3rd day of December 1996.

RICHARD B. MARTELL
Chief, Capital Appeals