IN THE SUPREME COURT OF FLORIDA

CLARENCE JONES,

Petitioner,

v. CASE NO. SC00-660

MICHAEL W. MOORE, etc.,

Respondent.
_____/

RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

Michael W. Moore, by and through undersigned counsel, responds to Jones' petition for writ of habeas corpus and states the following:

Procedural History

The Respondent accepts the Procedural History set out in Jones' habeas petition, with the following supplementation. First, the Respondent would note that trial counsel Clifford L. Davis also represented Jones on appeal. Jones v. State, 580 So.2d 143, 144 (Fla. 1991). Second, this Court affirmed the judgment of conviction and death sentence unanimously. Id. at 146. Third, in his 3.850 motion, Jones alleged ineffective assistance of trial counsel and a Brady claim. Judge Padovano, the original trial judge, also presided over the 3.850 proceedings by special assignment after having been elevated to the First District Court

of Appeal. Jones v. State, 732 So.2d 313, 315 (fn. 2)(Fla. 1999). Judge Padovano ruled that the ineffective assistance of counsel claim was without merit and that the Brady claim was both time-barred and meritless. This Court unanimously affirmed all aspects of Judge Padovano's order. Id. at 322.

Preliminary Statement

The issue of appellate counsel's effectiveness is appropriately raised in a petition for writ of habeas corpus. Teffeteller v. Dugger, 734 So.2d 1009 (Fla. 1999). The standard for reviewing claims of appellate counsel's ineffectiveness is set out in Strickland v. Washington, 466 U.S. 668 (1984). Williamson v. Dugger, 651 So.2d 84 (Fla. 1994). Thus, in evaluating a claim of appellate ineffectiveness, this Court must determine

> first, 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 in performance compromised the appellate process to such a degree as to undermine confidence in the correctness of the result.

Pope v. Wainwright, 496 So.2d 798, 800 (Fla 1986), cert. denied, 480 U.S. 951 (1987); Teffeteller; Haliburton v. Singletary, 691 So.2d 466 (Fla. 1997); Hardwick v. Dugger, 648 So.2d 100 (Fla. 1994). However, habeas corpus is "not to be used for additional appeals on questions which could have been, should have been, or

were raised on appeal or in a rule 3.850 motion, or on matters that were not objected to at trial." Parker v. Dugger, 550 So.2d 459, 460 (Fla. 1989); Teffeteller; Hardwick; Medina v. Dugger, 586 So.2d 317 (Fla. 1991). Allegations of ineffectiveness will not be allowed to abrogate the rule that habeas proceedings cannot be used as a second appeal. Breedlove v. Singletary, 595 So.2d 8 (Fla. 1992); Medina.

CLAIM I

WHETHER JONES WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL ON DIRECT APPEAL TO THIS COURT.

Jones contends his appellate counsel was ineffective for failing to raise issues on direct appeal which had been preserved for appeal by trial counsel. It is of course well settled that appellate counsel need not raise every conceivable claim to be effective. Hardwick; Provenzano v. Dugger, 561 So.2d 541 (Fla. 1990). As this Court has stated: "Most successful appellate counsel agree that from a tactical standpoint it is more advantageous to raise only the strongest points on appeal and that the assertion of every conceivable argument often has the effect of diluting the impact of the stronger points." Atkins v. Dugger, 541 So.2d 1165, 1167 (Fla. 1989). Moreover, appellate counsel in this case was especially well positioned to evaluate the strength of the various issues preserved for appeal, because in this case, trial counsel and appellate counsel were *the same attorney*. Moreover,

this Court has already determined that *this attorney* was not ineffective at either the guilt or sentencing phases of Jones' trial. Hence, this would seem to be an especially appropriate case to presume that appellate counsel was not ineffective simply because he declined to raise every single issue he *himself* had preserved for review on appeal. With the foregoing in mind, the Respondent will address the various omissions alleged.

A. THE ALLEGEDLY IRRELEVANT, PREJUDICIAL AND INFLAMMATORY EVIDENCE OF OTHER CRIMES AND BAD ACTS

Jones' complaints here center around (1) testimony about his escape from a Maryland prison, and (2) a photograph of Jones and his codefendants with guns and money.

Jones argues that this evidence was "irrelevant to any issue at trial" and that appellate counsel was ineffective for failing to raise this claim on direct appeal. Petition at 6. The remainder of his argument on this issue contains no further mention of ineffective assistance of counsel and fails to address how appellate counsel's omissions were "of such magnitude as to constitute a serious error or substantial deficiency falling measurably outside the range of professionally acceptable performance," or how any deficiency in the performance of appellate counsel "compromised the appellate process to such a degree as to undermine confidence in the correctness of the result." Pope v. Wainwright, supra. Instead, he merely argues the issue as if he is

being given a second direct appeal. But it is well settled that "proceedings under rule 3.850 are not to be used as a second appeal." Thompson v. State, 25 Fla.L.Weekly S346, S349 (Fla. April 13, 2000)(internal quotes and citations omitted). Thus, even if we assume, *arguendo*, that the trial court erred in admitting the evidence at issue here, Jones has failed to demonstrate deficient appellate attorney performance or to explain how that performance undermines confidence in the correctness of the result. Hence, relief should be denied here.

Moreover, to the extent that the merits are addressable[1] Judge Padovano did not err in admitting this evidence, because it was relevant to the crime on trial, and that relevance outweighed any potential prejudice.

1. The prison escape. It should be noted that by the time that Maryland prison guard Antoine Garrett testified about the escape, Beverly Harris had already testified, without objection, that although the defendants (whom she had met in St. Augustine) originally claimed to be tourists (TR 2407), she discovered otherwise when she walked into Jones' motel room and saw "guns and a lot of ammunition" on the bed (TR 2409-10). At that point,

[1] On habeas corpus, the "merits of the issues, however, are merely abstractions that will be considered only to the extent needed to dispose of the ineffectiveness claims." Chandler v. Dugger, 634 So.2d 1066, 1067 n. 2 (Fla. 1994) (citing Pope v. Wainwright, 496 So.2d 798 (Fla. 1986), cert. denied, 480 U.S. 951 (1987); Johnson v. Wainwright, 463 So.2d 207 (Fla. 1985)).

Griffin said "[s]he might as well know the truth" (TR 2411). Then they (all three of them–-Griffin, Goins and Jones) admitted to her that they had escaped from prison, and proclaimed, "we're not going back to prison alive" (TR 2412).

In addition, investigator Berkley Clayton had testified without objection that he had received fliers from a Maryland investigator about the persons who had escaped from the Maryland House of Corrections, and had identified the three defendants from these fliers (TR 2075-76).

Antoine Garrett, correctional officer at the Maryland House of Corrections, testified that, on June 25, 1988, Irvin Griffin pulled out a homemade knife and told him not to move or he would kill him. Another inmate took his radio. Garrett then saw Goins and another inmate at the fence. Using a pair of wirecutters and gloves, Goins cut the inner fence. Garrett tried to signal another guard, and was threatened again not to move or he would be killed. Then they "lit a bag" and threw it towards a shotgun post. One hollered "go," and five inmates ran through the hole and began climbing the outer fence. They all got away except for one named Robinson, who was soon captured near "the tree line" (TR 2549-2560).[2]

Objection was interposed to Garrett's testimony. Although Jones' counsel insisted that the escape was "totally irrelevant"

[2] In the State's proffer outside the presence of the jury, but not in testimony before the jury, Garrett testified that Robinson had been shot in the finger (TR 2542).

(TR 2527, 2545), Griffin's counsel conceded that testimony had already been presented that the defendants had been in custody in Maryland and had escaped, but argued that the "details" of the escape were irrelevant, and that any probative value was outweighed by the prejudice (TR 2531, 2543). The prosecutor responded:

> I think it does go to show the state of mind of these people not only at the time that they got out, but they were willing to take a lot of chances to get out. And they were willing to use violence to get out.
>
> It goes to show the state of mind not only when they went out but their continued state of mind when they killed Officer Ernie Ponce de Leon to prevent them from going back in. I don't think that the prejudicial impact of that outweighs the value. I think that's highly probative.

Judge Padovano agreed, concluding that the escape was admissible to show motive and intent, "particularly because we're dealing with a police officer in this case." He stated that if "it had not been a police officer, then the ... relevance of it would be seriously undercut or diminished" (TR 2533-34, 2544). Judge Padovano stated:

> I have considered this both from the point of view of your logical relevancy and also from the point of view of legal relevancy; that is, the issue of whether or not parts of it are so prejudicial that they outweigh the probative effect. I have concluded in both instances that the evidence is admissible.

(TR 2546). However, Judge Padovano did not think that the escape should become a feature of the trial, and saw no reason to refer to

the crimes for which the defendants were in custody in the first place (TR 2534, 2546).

Judge Padovano's determination clearly was correct. The escape and the defendants status as escapees were fundamental to an understanding of this crime. Officer Ponce de Leon's murder occurred less than two weeks after Jones and his codefendants had committed a violent escape from a Maryland prison. At the time of the murder, they were still driving the green Chevrolet they had stolen in Maryland shortly after the escape. Further, the murder occurred not long after Jones and his fellow escapees had been heard to say they would not be returned to prison alive, and immediately after officer Ponce de Leon had called in a tag check on the car (TR 1502) – an action which Jones had every reason to believe would disclose that the car was stolen and that they were escapees. The fact that the defendants were escapees, and their expressed determination not to go back alive, is precisely why Jones and Griffin shot at the police in Tallahassee after being asked for identification they were unable to provide and being subjected to a tag check which would have resulted in their arrest.

Any "details" about the escape were relatively minimal, and simply corroborated other evidence presented establishing their willingness to use violence to stay out of prison, without in any manner becoming a "feature" of the case.

Jones now argues that evidence about the escape was inadmissible because it was not sufficiently "similar" to the crime on trial. But this evidence was not offered as "Williams" rule similar fact evidence, nor offered to prove identity by proving a distinctive *modus operandi*. See, e.g. Drake v. State, 400 So.2d 1217 (Fla. 1981). In fact, trial counsel never made a "Williams" rule objection, and Judge Padovano never referred to it as such.[3] Instead, the escape was "relevant" evidence to show motive and state of mind. Layman v. State, 652 So.2d 373 (1995). Compare Section 90.404(2), Florida Statutes (1999) (similar fact evidence), with Section 90.402, Florida Statutes (1999) (relevant evidence). The escape obviously was not "strikingly similar" to the murder of officer Ponce de Leon, but it certainly was logically connected to that murder, and highly relevant to an understanding of it. Ferrell v. State, 686 So.2d 1324 (Fla. 1996); Damren v. State, 696 So.2d 709 (Fla. 1997).

Moroever, any error in admitting the minimal "details" of the escape, in addition to that which was admitted without objection, was clearly harmless beyond a reasonable doubt, not only because the complained of evidence was largely cumulative to evidence admitted without objection,[4] but also because the evidence

[3] Judge Padovano did characterize this as "the first cousin" to "Williams" rule evidence (TR 2534).

[4] Because the jury was otherwise informed of the escape, without objection, the rule announced in Straight v. State, 397

establishing Jones' guilt was overwhelming.[5] Thus appellate counsel could not have been ineffective for not raising this issue on appeal.

2. The photographs. After the murder, police searched the green Chevrolet Jones and his co-escapees had been driving. They found Polaroid photographs showing the three defendants, Griffin, Goins and Jones, armed with what appeared to be the very guns used and/or found at the scene of officer Ponce de Leon's murder (TR 2082-83, 2086, 2108-09). Defense counsel for Griffin objected to the photographs on the ground of relevance (TR 2084). In addition to this objection, Jones' counsel objected that "there was *one* photograph that would seem to suggest evidence of an additional crime not charged here..." (TR 2092) (emphasis supplied).[6] Jones'

So.2d 903 (Fla. 1981) –- erroneous admission of irrelevant collateral crimes evidence "is presumed harmful error" –- is inapplicable. Consalvo v. State, 697 So.2d 805 (fn. 10) (Fla. 1996).

[5] That the evidence is overwhelming may not *per se* establish harmlessness, Goodwin v. State, 24 Fla. L. Weekly S583, S585 (Fla. December 6, 1999), but the strength of the evidence clearly is relevant to any analysis for harm. See, e.g., Gore v. State, 706 So.2d 1328, 1334 (Fla. 1997) (CCP instructional error harmless beyond a reasonable doubt in light of the overwhelming evidence of CCP as well as other circumstances of the case); Sager v. State, 699 So.2d 619, 622 (Fla. 1997) (error in excluding evidence favorable to defendant was harmless beyond a reasonable doubt where evidence of defendant's guilt was overwhelming); Consalvo v.State, supra, at 815 (jury instruction, if erroneous, would be harmless beyond a reasonable doubt where evidence against defendant was overwhelming).

[6] There was an additional objection to certain writing on the photos that was dealt with by cropping the photos to eliminate the

counsel then elaborated that "one" photograph "depicts money and guns and [suggests] the fruits of a robbery which is not charged here and is not relevant at this point in the trial" (TR 2096).

The State noted that these photographs included the three defendants and no other men; coupled with the fact that the guns in the photos looked like the same ones used in the murder and found at in or near the defendants' car, the photographs were relevant to identify them as the shooters and to contradict the defense claim that another man (a local Tallahassee alleged drug dealer) was the shooter (TR 2090-91).[7] Judge Padovano agreed, except as to certain photographs apparently made at a professional studio showing the defendants holding "what appear to be machine guns" (TR 2097). Judge Padovano excluded these photos, finding that even if they were relevant, "the prejudicial effect outweighs whatever arguable relevance it has," since there was no machine gun in this case (TR 2098).

It is apparent from a review of the record as a whole that, first, Judge Padovano did not, as Jones now suggests (Petition at 10), fail to evaluate whether the relevance of these photos was outweighed by unfair prejudice. Second, it is also apparent that Jones' defense counsel did not object that these photographs were

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writing (TR 2095).

[7] The photos also showed that the fourth person who successfully had escaped from the Maryland prison was no longer with Goins, Griffin and Jones.

inadmissible because they suggested additional crimes, except as to *one and only one* photograph. Thus, no collateral-crime objection was preserved as to the remaining photographs, and appellate counsel was not ineffective for raising an issue not preserved below.[8]

As to the one photograph showing that the defendants had money, any implication of the commission of an unrelated robbery from the mere fact that the defendants had money is pretty tenuous, but, in any event, the photograph was cumulative to testimony elicited on direct examination of Beverly Harris, without any objection, that, when she and the three defendants arrived in Tallahassee (on their way to New Orleans from St. Augustine), they had gone shopping at Governor's Square Mall and made several purchases, had eaten "a lot of food" at Quincy's Steakhouse, and had spent the night at a Travel Lodge motel (TR 2406, 2415-17). Obviously, the defendants had to have money to have done any of these things (or even to be traveling to New Orleans at all). Moreover, the fact that the defendants had money also was elicited on *cross-examination*, when Jones' defense counsel elicited from Harris that while in Tallahassee the defendants had bought marijuana, powder cocaine and crack cocaine (TR 2466-68). Thus,

[8] Furthermore, the fact that the defendants had guns was cumulative to testimony by Beverly Harris that they not only had guns (TR 2419-21), but "toted" these guns everywhere they went (TR 2509).

error, if any, in admitting one photograph showing the defendants in possession of money clearly did not contribute to the verdict and was harmless beyond a reasonable doubt. Appellate counsel was not ineffective in failing to raise on appeal a collateral-crime issue as to this photograph.

B. THE DENIAL OF SEVERANCE

At various points during the trial, Jones' counsel moved for a severance, on the ground that his codefendant had raised an antagonist defense. Judge Padovano reserved ruling on these motions initially, noting that Griffin's counsel had thus far done no more than point out the absence of evidence against Griffin (TR 1425-26, 2510). Judge Padovano's actual, final ruling on Jones' motion to sever immediately followed the testimony of Maryland police officer Lt. Lawrence Bennett, who testified that Griffin had shot him in 1978, after the officer had pulled him over and asked for identification (TR 2767-80).[9] The State's proffer of this evidence precipitated Jones' final attempt to seek severance (TR 2748-49, 2762, 2798-2800). Before ruling, Judge Padovano noted that it was questionable whether Jones had even moved for a severance in a timely manner, since the issue had not been raised before trial (TR 2802). Jones' counsel responded that he could not have known what Griffin's counsel was going to say in his opening

[9] Judge Padovano excluded Bennett's testimony that he subsequently found out the car had been stolen and the owner had been put into the trunk and shot (TR 2728, 2753).

statement. Judge Padovano, however, although accepting the premise that Jones' counsel did not know exactly what Griffin's counsel was going to say, still did not think there was "really any reason for surprise" (TR 2803-04).[10] In any event, Judge Padovano found no merit to the motion, noting that all Griffin's counsel had done was "to point out the absence of evidence against his client;" he had "never once during this trial suggested that Mr Jones is guilty of the offense" (TR 2800-01).

Jones' appellate counsel (who, as noted previously, was also his trial counsel) did not raise the denial of severance *per se*, but did contend in his Issue III that Judge Padovano had erred in admitting Bennett's testimony, and it is plain that the denial of severance was the real issue. First of all, appellate counsel noted that his motion for severance following Bennett's testimony had been denied. Initial Brief of Appellant, Case No. 74,866 at 24. Secondly, he conceded that the testimony was "clearly admissible against Griffin," but argued that it had no probative value against Jones, ibid., and that Jones was therefore placed in the same situation as the defendants in Rowe v. State, 404 So.2d 1176 (1st DCA 1981), and Crum v. State, 398 So.2d 810 (Fla. 1981) –- two cases involving denials of severance which trial counsel had cited to Judge Padovano in support of his motion for severance (TR

[10] Through pre-trial discovery, Jones' counsel surely understood that the State's evidence was going to show that Jones was the one who had shot officer Ponce de Leon.

2511). Initial Brief of Appellant, p. 25. Jones' appellate counsel also cited Tillman v. U.S., 406 F.2d 930, 935 (5th Cir.), vacated in part on other grounds, 395 U.S. 830, 89 S.Ct. 2143, 23 L.Ed.2d 742 (1969). Initial Brief at 25. The cited portion of this case, too, concerns the denial of severance.

Appellate counsel concluded his argument on this issue by contending that the "prejudicial spill-over of Williams rule evidence against the co-defendant, prevented [Jones] from enjoying a fair trial." Initial Brief of Appellant at 25.

The Williams rule issue Jones raised in Claim III of his brief on direct appeal was merely a surrogate for his denial of severance claim. Obviously this was not a straight Williams rule issue and could not have been, for Jones conceded the collateral crime evidence was admissible against Griffin, and the State did not and could not contend that this evidence was admissible against Jones. The *issue* on appeal, therefore, was not Williams rule itself, but the claimed prejudicial effect from the denial of severance, which just happened to be that Jones' jury had heard Williams rule evidence admissible only against Griffin.

It is therefore crystal clear that Jones' present argument as to severance is merely a variation of Issue III of his brief on direct appeal, which this Court has already considered and denied. 580 So.2d at 146. This claim is therefore procedurally barred. See, e.g., Thompson v. State, supra, 25 Fla.L.Weekly at S355, fn.

6 (“it is improper to relitigate issues asserting slightly different arguments”); Bryan v. Singletary, 641 So.2d 61 (Fla. 1994); Francis v. Barton, 581 So.2d 583 (Fla. 1991); Medina v. State, 573 So.2d 293, 295 (Fla. 1990).

Furthermore, Jones has failed to demonstrate that the manner in which his appellate counsel chose to raise this issue on appeal was deficient attorney performance. Finally, in any event, any issue of the denial of severance is without merit for the reasons stated by Judge Padovano in denying the severance. No relief is warranted on this claim.

C. THE AUTOPSY PHOTOS

Jones contends the State “introduced numerous autopsy photographs over defense objection” and that appellate counsel “failed to raise this issue despite trial counsel’s objections.” Petition at 18, 21. Jones fails to state in his petition just how many autopsy photos he is complaining about, or to identify which ones were admitted over defense objection, or which ones appellate counsel should have complained about on appeal. In the portions of the trial transcript cited by Jones, State’s exhibits 77-A through I are mentioned. However, 77-A is a bullet fragment, not an autopsy photo, and was admitted without objection (TR 2148). The autopsy photos were identified as State’s exhibits 77-C through I (2146-47). However, State’s exhibits 77-C and 77-F had both previously been admitted without objection (TR 2055, 2056).

State's exhibit 77-E had also been admitted much earlier, and although Jones objected to being presented with autopsy photos "piecemeal," it does not appear that Jones' counsel had any gruesomeness objection to 77-E (TR 1627-32).[11]

Judge Padovano excluded 77-I (TR 2155). That only leaves 77-D, G and H. States' exhibit 77-D is just a photograph of officer Ponce de Leon's left hand with "1918 Lake" written on it (TR 2156).[12] As for the two remaining photos, 77-G is a photo of officer Ponce de Leon's back showing a bruise and a lump under the skin where the nonfatal bullet lodged (TR 2566-67). State's exhibit 77-H is the same area after an incision revealed the bullet (TR 2566-67).

The photos of gunshot entry wounds to the chest came in without objection, or at least without the objection Jones is making now. Thus, as to these photos, no issue as to their admissibility was preserved for appeal, and appellate counsel was not ineffective for raising unpreserved claims. See, e.g.,

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[11] When 77-E was first offered, Jones' trial counsel stated, "I don't have a particular objection to this photo. I think it will ultimately come in" (TR 1627). He did state a preference for waiting for all the autopsy photos at one time rather than "piecemeal," because they might be repetitive (TR 1630). Judge Padovano admitted 77-E over trial counsel's "objection" (TR 1631).

[12] The crime scene address was 1918 Lake Bradford road (TR 2156); it apparently is common for officers to write notes on their hands if a notepad is not immediately available.

Williams v. Dugger, 651 So.2d 84 (Fla. 1994).[13] And appellate counsel could hardly be deemed ineffective for failing to raise on appeal any issue of the gruesomeness of the photos as to which objection was preserved at trial. Even now, Jones does not attempt to explain how a photograph of handwriting on officer Ponce de Leon's hand is prejudicially gruesome, bloody or inflammatory. Nor would it seem that the two photographs of officer Ponce de Leon's back would have been the kind of gory or shocking photographs whose admission would have led to reversal on appeal. If appellate counsel had raised this issue, this Court would not have granted any relief. Appellate counsel need not raise every conceivable claim to be effective. Provenzano v. Dugger, 561 So.2d 541 (Fla. 1990).

Moreover, even if objection to *all* the autopsy photographs had been preserved for appeal, and raised on appeal, this Court would not have granted any relief. This Court has addressed the admissibility of photographs many times and in Henderson v. State, 463 So.2d 196, 200 (Fla. 1986), stated: "Persons accused of crimes can generally expect that any relevant evidence against them will be presented in court. The test of admissibility is relevance. Those whose work products are murdered human beings should expect to be confronted by photographs of their accomplishments."

[13] It should be noted here that, in his 3.850 motion, Jones did not contend that trial counsel was ineffective for failing to preserve for appeal any issue of the admissibility of these photos.

Photographs are admissible if they assist a medical examiner in explaining the nature and manner in which wounds were inflicted. Bush v. State, 461 So.2d 936 (Fla. 1984), cert. denied, 475 U.S. 1031 (1986). They are also admissible when they "show the manner of death, the location of wounds, and identity of the victim." Larkins v. State, 655 So.2d 95, 98 (Fla. 1995). The fact that photographs are gruesome does not mean that they are inadmissible. Preston v. State, 607 So.2d 404 (Fla. 1992), cert. denied, 507 U.S. 999 (1993); Thompson v. State, 565 So.2d 1311 (Fla. 1990); Foster v. State, 369 So.2d 928 (Fla.), cert. denied, 444 U.S. 885 (1979).

The admission of photographs is within the trial court's discretion, Wilson v. State, 436 So.2d 908 (Fla. 1983), and a trial court's ruling will not be disturbed absent a clear abuse of discretion. Pangburn v. State, 661 So.2d 1182 (Fla. 1995); Wilson. In this case, Dr. Alexander testified that the autopsy photographs would assist him in explaining his testimony to the jury (TR 2564-66). Jones cannot show any abuse of discretion in the trial court's allowing the introduction of these photographs. This claim merits no relief.

D. PROSECUTORIAL ARGUMENT

Jones conceded that his trial counsel did not object to any of the prosecutorial argument he now complains about. Petition at 21. He contends that if appellate counsel had not been the same attorney as trial counsel, he could, under the law at the time,

have raised the issue of ineffective assistance of trial counsel for failing to object to this argument; however, since appellate counsel was the same attorney as trial counsel, and could not have raised his own ineffectiveness on appeal, the ineffectiveness of trial counsel for failing to object to prosecutorial argument is, he contends, cognizable in this petition. Petition at 27-28.

However, with rare exceptions, ineffective assistance of trial counsel is not cognizable on direct appeal, and this was the law at the time of Jones' appeal. Blanco v. Wainwright, 507 So.2d 1377, 1384 (Fla. 1987). Furthermore, in Blanco this Court rejected any contention that appellate counsel could be ineffective for failing to raise an issue of trial counsel's ineffectiveness on direct appeal, stating:

> A proper and more effective remedy is already available for ineffective assistance of trial counsel under rule 3.850. If the issue is raised on direct appeal, it will not be cognizable on collateral review. Appellate counsel cannot be faulted for preserving the more effective remedy and eschewing the less effective.

Ibid.

Although Jones implies that this is his first opportunity to have raised the issue of trial counsel's ineffectiveness for failing to object to prosecutorial closing argument, it is not. The appropriate time to have raised that issue was on 3.850. Any issue of trial counsel's ineffectiveness for this or any other reason is now procedurally barred, as any such issue could and

should have been raised in the already concluded 3.850 proceedings. Hardwick v. Dugger, supra, 648 So.2d at 105 (habeas corpus not to be used for additional appeals on questions which could have been, should have been, or were raised on appeal or in a rule 3.850 motion).

As for any claim that appellate counsel was ineffective because he failed to raise an issue of improper prosecutorial argument on direct appeal, it is well settled that appellate counsel is not ineffective for not raising an unpreserved issue. Johnson v. Wainwright, 463 So.2d 207 (Fla. 1985); Chandler v. Dugger, 634 So.2d 1066 (Fla. 1994). Since trial counsel did not object to any of the argument at issue now, no such issue was preserved for appeal, and appellate counsel was not ineffective for failing to raise it. Teffeteller v. Dugger, 734 So.2d 1009, 1028 (Fla. 1999).

Finally, Jones argues that even if the issue was not preserved, appellate counsel should have argued fundamental error. He cites no authority for the proposition that appellate counsel can be deemed ineffective for failing to present a fundamental error argument as to an unpreserved claim, but, in any event, Jones cannot prevail unless he can demonstrate, at a minimum, not merely that some of the prosecutors' argument was improper or objectionable, but that it was so egregiously improper as to amount to fundamental error. This he cannot do; even assuming that some

portion of the prosecutor's argument may have been objectionable under Florida law, it did not rise (or sink) to the level of fundamental error.

Jones cites numerous federal cases for the proposition that "[a]rguments such as those presented in Mr. Jones' case have been long-condemned as violative of due process and the Eighth Amendment." Petition at 23. These cases, however, do not stand for such proposition. The prosecutor in this case did not read to the jury a 19th-century Reconstruction-era Georgia appellate opinion describing mercy as a "sickly sentimentality," as did the prosecutors in Wilson v. Kemp, 777 F.2d 621 (11th Cir. 1985); Drake v. Kemp, 762 F.2d 1449 (11th Cir. 1985 (en banc); or Potts v. Zant, 734 F.2d 526 (11th Cir. 1984), affirmed on petition for rehearing, 764 F.2d 1369 (1985). Nor did the prosecutor argue that he was personally offended that the defendant had exercised his right to a jury trial, as did the prosecutor in Cunningham v. Zant, 928 F.2d 1006, 1019-20 (11th Cir. 1991).[14]

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[14] The prosecutor in Cunningham had argued: "[I]t's offensive to me to sit here and I don't say this for any personal reason, but to be in this courtroom having asked for recesses to get my body in shape to try a case for several days, when a man sits up here and tries to mislead you first of all, into believing he's not guilty. That's offensive, to me. That's trifling with the processes of this court. I personally dislike that, and I don't mind publicly saying it, and I will say it the next time I feel it. This system we have is too precious. It took too many lives to bring it here, to let somebody come in here and take his chances on killing a man, robbing a man, trying to escape and then beg and ask the jury, not him himself, but through cross-examination and casting reflections and dispersions on witnesses.... The case here, Ladies and

Jones characterizes the prosecutor's argument as urging the jury to vote for death because Jones had denied his victim his constitutional rights. Although it would be "improper to urge that a criminal defendant's exercise of constitutional rights is a ground for discrediting his defense," Brooks v. Kemp, 762 F.2d 1383, 1412 (11th Cir. 1985), here the prosecutor was simply contrasting the difference between the murder the defendant had committed with the death sentence the State was seeking against Jones. See id. (prosecutor's argument contrasting protections State afforded to defendant with lack of same afforded by defendant to victim was not constitutionally improper). This argument does not amount to fundamental error.

As for the remainder of the arguments quoted in the petition, again, no fundamental error has been shown. See, e.g., Young v. Bowersox, 161 F.3d 1159, 1162-63 (8th Cir. 1998) ("The argument did no more than invite the jury to consider that a life sentence might not be sufficient to deter this defendant, who had killed three people, from committing murders in the future. Juries are fully capable of properly weighing this kind of rhetoric."); Cargill v. Turpin, 120 F.3d 1366, 1384 (11th Cir. 1997) ("These comments

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Gentlemen of the Jury, is, find me guilty first, and then I'll take the stand and beg you to save my life." Because the 11th Circuit granted relief on other grounds, it did not determine whether this argument was prejudicial enough to require a new trial.

conveyed no prejudicial message to the jury – only that the mitigating evidence Cargill presented was of little force.").

Jones' claim that his appellate counsel was ineffective for failing to raise on appeal a prosecutorial argument issue that was not preserved for appeal is both procedurally barred and meritless.

CLAIM II

> THE CLAIM THAT THIS COURT ERRED ON DIRECT APPEAL IN REVIEWING THE TRIAL COURT'S FINDINGS AS TO MITIGATION.

Here, Jones asks this Court to reconsider an issue raised on direct appeal and ruled on by this Court. It is improper to use habeas corpus to relitigate an issue. Jones raised on direct appeal a claim that the trial court erred in finding no mitigation. This Court rejected that claim. 580 So.2d at 146.

> "The purpose of the writ of habeas corpus is to provide a means of judicial evaluation of the legality of a prisoner's detention. McCrae v. Wainwright, 439 So.2d 868 (Fla.1983). It is not properly used for purposes of raising issues that could have been raised on appeal, or for re-litigating questions that have been determined by means of a prior appeal. E.g., Armstrong v. State, 429 So.2d 287 (Fla.), cert. denied, 464 U.S. 865, 104 S.Ct. 203, 78 L.Ed.2d 177 (1983). 'Habeas corpus is not a vehicle for obtaining a second determination of matters previously decided on appeal.' Messer v. State, 439 So.2d 875, 879 (Fla.1983)."

Kennedy v. Wainwright, (Fla. 1986), 483 So.2d 424, 425-26. Jones simply is not entitled to a second appeal on this issue, and this

issue is procedurally barred. Thompson v. State, supra, 25 Fla.L.Weekly at S355, fn 6.

Furthermore, the issue is meritless. It is well settled that a sentencer must *be able* to consider and to give effect to evidence presented in mitigation. See, e.g. Buchanan v. Angelone, 522 U.S. 269, 118 S.Ct. 757, 139 L.Ed.2d 702 (1998)("Our consistent concern has been that restrictions on the jury's sentencing determination not preclude the jury from *being able* to give effect to mitigating evidence."). However, capital sentencing is an individualized process. Not only *may* a sentencer exercise independent judgment as to whether facts proffered in mitigation actually mitigate the defendant's conduct, the sentencer *must* be allowed to exercise that independent judgment. Mills v. Maryland, 486 U.S. 367, 108 S.Ct. 1860, 100 L.Ed.2d 384 (1988); McKoy v. North Carolina, 494 U.S. 433, 110 S.Ct. 1227, 108 L.Ed 369 (1990).

In this case, Judge Padovano found that Jones' culturally deprived childhood was relevant, but did not rise to the level of a nonstatutory mitigating circumstance, given its remoteness to the murder of officer Ponce de Leon (R 220). This Court, noting that sentencing is an individualized process, found no error in this determination. 580 So.2d at 146. Jones has offered no reason for this Court to allow him to relitigate that conclusion.

This claim is procedurally barred and meritless.

CLAIM III

THE CLAIM THAT THIS COURT FAILED TO ADDRESS AN ISSUE RAISED ON DIRECT APPEAL

Jones concedes that appellate counsel raised an issue concerning whether his jury should have been instructed on the "great risk" aggravator. However, he contends this Court failed to consider that issue and that he should therefore be able to reargue it. He is incorrect. This Court considers all issues raised on appeal, whether or not it specifically mentions them in its opinions. Thus, in Jackson v. State, 452 So.2d 533, 536 (Fla. 1984), this Court stated:

> Appellant also alleges in his petition for writ of habeas corpus that this Court failed to consider an issue properly raised by him in his direct appeal in Jackson I, to wit, that the trial court erred in overruling Jackson's trial counsel's objection to the prosecutor's statements that unless strong mitigating circumstances were demonstrated, the jury must return death verdicts.
>
> Our capital sentencing statute, section 921.141, Florida Statutes (1983), requires this Court to review the entire record in each capital case to determine if the judgment of conviction and sentence was proper. The absence of discussion in our written opinion in this case is not an indication that we did not carefully review the entire record and each argument made by appellate counsel in the direct appeal. We did not abrogate our duty in this case; therefore, we see no reason to disturb appellant's conviction and sentence on this basis.

Thus, this issue is procedurally barred as having already been raised and decided on direct appeal. Kennedy; Thompson. See also

Kight v. Dugger, 574 So.2d 1066 (Fla. 1990) (this Court refused to reconsider on habeas claim raised on direct appeal, despite claim that this Court had "misconstrued" the error).

Furthermore, the claim is meritless. Although Jones attempts to cast his objection to the great risk aggravator in legal terms, he does not contend that the jury was improperly instructed; he merely contends the evidence does not support such a finding. But the trial court ultimately rejected the aggravator, and juries may be presumed to have disregarded an aggravator unsupported by the evidence. Sochor v. Florida, 504 U.S. 527, 538, 112 S.Ct.2114, 119 L.Ed.2d 527 (1992) (presuming jury rejected CCP aggravator unsupported by sufficient evidence, even where trial court erroneously found such aggravator). Thus there was no constitutional error by either the jury or the trial court.

This claim is procedurally barred and meritless, and should be rejected.

CLAIM IV

THE CLAIM THAT THIS COURT CONDUCTED AN INVALID HARMLESS ERROR ANALYSIS ON DIRECT APPEAL

This claim is answered in major part by the response to Claim III. It is barred because he is simply attempting to relitigate an issue already resolved on direct appeal. Furthermore it is meritless. Again, there was and is no contention that the jury was improperly instructed. Thus, there could have been no jury error. As for possible "judge error," Sochor, it is true that while Judge

Padovano had rejected the "great risk" aggravator, he found that the murder had occurred during the commission of a robbery. It is also true that this Court found that this finding was not supported by the evidence because the taking was only incidental to the killing, not the reason for it. However, Judge Padovano also had stated in his sentencing order: "This circumstance is not determinative; the sentence of death would be imposed even if it were not applied." 580 So.2d 143, 146. Hence, the question of the possible impact of the erroneous finding is answered clearly in Judge Padovano's order; the finding made no difference to his conclusion that death was the appropriate sentence. Therefore, this Court did not err in concluding that reversal was not warranted. See White v. Dugger, 565 So.2d 700, 702 (Fla. 1990); Demps v. Dugger, 714 So.2d 365, 367-68 (Fla. 1998).

This claim is procedurally barred and meritless.

CONCLUSION

For the foregoing reasons, the Respondent asks this Court to deny Jones' petition for writ of habeas corpus.

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. Mail to Steven L. Seliger, Garcia and Seliger, 16 North Adams Street, Quincy, Florida 32351, Gregory C. Smith, Capital Collateral Regional Counsel, Northern Region, Post Office Drawer 5498, Tallahassee, Florida 32314-5498, and Gail E. Anderson, Special Assistant CCC-NR, P.O. Box 9, Greensboro, Florida 32330, this 15th day of May, 2000.

_____
CURTIS M. FRENCH
Assistant Attorney General