IN THE SUPREME COURT OF FLORIDA

RICHARD EUGENE HAMILTON,

Petitioner,

v. Case No. SC02-2409

STATE OF FLORIDA,

Defendant,
_____/

RESPONSE TO PETITION FOR HABEAS CORPUS AND MEMORANDUM OF LAW

COMES NOW, Respondent, the State of Florida (hereinafter "State"), by and through the undersigned Assistant Attorney General and hereby responds to the Petitioner's (hereinafter "Defendant") Petition for Writ of Habeas Corpus filed in the above-styled case. The State respectfully submits that the petition should be denied, and states as grounds therefor:

FACTS AND PROCEDURAL HISTORY

The facts of this case are recited in this Court's opinion on the direct appeal of the Defendant's conviction and sentence-

> Richard Hamilton and Anthony Wainwright escaped from a North Carolina prison, stole guns and a Cadillac, and headed for Florida. When the car overheated, April 27, 1994, in Lake City, Florida, they abducted Carmen Gayheart, a young mother of two, at gunpoint from a Winn-Dixie parking lot as she loaded groceries into her Ford Bronco. The men stole the Bronco and proceeded north on I-75. They raped, strangled, and executed Gayheart by shooting her twice in the back of the head. The men were arrested the next day in Mississippi following a shootout with a

trooper.

> Hamilton gave several statements to police wherein he admitted kidnapping, robbing, and raping Gayheart, but he claimed Wainwright strangled and shot her. Wainwright, on the other hand, admitted participating in the kidnapping and robbery, but asserted that Hamilton raped and killed her. Hamilton was charged with first-degree murder, sexual battery, robbery, and kidnapping, all with a firearm, and was found guilty as charged. During the penalty phase, Hamilton called two relatives and a friend, who testified that he grew up in a dysfunctional family in a poor neighborhood, and was shot in the eye with a BB gun as a child. The jury recommended death by a ten-to-two vote and the judge imposed a sentence of death based on six aggravating circumstances, [footnote omitted] no statutory mitigating circumstances, and five nonstatutory mitigating circumstances. [footnote omitted] Hamilton raises nine issues on appeal. [footnote omitted]

Hamilton v. State, 703 So.2d 1038 (Fla. 1997). A detailed recitation of the facts can also be found in the State's Answer Brief filed contemporaneously with this response.

The Defendant appealed his conviction to this Court raising nine issues. This Court fully affirmed the Defendant's conviction and sentence in Hamilton v. State, 703 So.2d 1038 (Fla. 1997), cert. denied, 524 U.S. 956, 118 S.Ct. 2377, 141 L.Ed.2d 744 (1998).

The Defendant next pursued post-conviction relief in a 3.850 motion and, after an evidentiary hearing, the lower court denied his motion. The Defendant appealed the lower court's denial and that appeal is currently pending in case no. SC02-1426. The

Defendant filed a habeas petition contemporaneously with his initial appellate brief. The State would respond to the arguments raised in that petition, as follows:

PRELIMINARY DISCUSSION OF APPLICABLE LAW

There are a number of well-settled principles applicable to habeas corpus proceedings filed in this Court.

First, this Court has repeatedly stated that capital habeas corpus proceedings were not intended as second appeals of issues which could have been or were presented on direct appeal or in a rule 3.850 proceeding. Jones v. Moore, 794 So.2d 579 (Fla. 2001); Teffeteller v. Dugger, 734 So.2d 1009 (Fla. 1999). "Habeas petitions *are* the proper vehicle to advance claims of ineffective assistance of appellate counsel." Rutherford v. Moore, 774 So.2d 637, 643 (Fla. 2000)(emphasis supplied).

To prevail on such a claim, a defendant must show that his attorney's performance was professionally deficient and that he was prejudiced by that deficiency. See Strickland v. Washington, 466 U.S. 668 (1984); Johnson v. Dugger, 523 So. 2d 161 (Fla. 1988). In other words, a petitioner must show

> 1) specific errors or omissions which show that appellate counsel's performance deviated from the norm or fell outside the range of professionally acceptable

> performance and 2) the deficiency of that performance compromised the appellate process to such a degree as to undermine confidence in the fairness and correctness of the appellate result.

State v. Riechmann, 777 So.2d 342, 364 (Fla. 2000), quoting, Wilson v. Wainwright, 474 So. 1162, 1163 (Fla. 1985).

In interpreting this standard, this Court has also said that ineffective assistance of appellate counsel may not be used as a disguise to raise issues which should have been raised on direct appeal or in a postconviction motion. Freeman v. State, 761 So.2d 1055, 1069-70 (Fla. 2000). Also, appellate counsel cannot generally be considered ineffective for failing to raise issues that were not preserved by trial counsel. Page v. U.S., 884 F.2d 300, 302 (7th Cir. 1989). See e.g., Provenzano v. Dugger, 561 So.2d 541, 548 (Fla. 1990); Atkins v. Dugger, 541 So.2d 1165, 1166 (Fla. 1989). In addition, "appellate counsel is not ineffective for failing to raise a claim that would have been rejected on appeal." Downs v. State, 740 So.2d 506, 517 n. 18; Freeman v. State, 761 So.2d at 1069-70; Rutherford v. Moore, 774 So.2d at 643. In fact, appellate counsel is not necessarily ineffective for failing to raise a claim that might have had *some* possibility of success; effective appellate counsel need not raise every conceivable non-frivolous issue. Jones v. Barnes, 463 U.S. 745, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983);

Provenzano v. Dugger, 561 So.2d at 548-49; Atkins v. Dugger, 541 So.2d at 1167. Nor can appellate counsel be deemed ineffective if the habeas claim, or a variant thereof, was, in fact, "raised on direct appeal". Id. at 1166-67; Provenzano v. Dugger, 561 So.2d at 548; Jones v. Moore, 794 So.2d at 586. So long as the issue was raised on appeal, mere quibbling with the manner in which appellate counsel raised it is insufficient to state a habeas-cognizable issue. Id.; Thompson v. State, 759 So.2d 650, 657 n. 6 (Fla. 2000).

ARGUMENT

The Defendant raised seven grounds in his Petition for Writ of Habeas Corpus. The State will respond to each in turn.

I.

The Defendant's first ground is merely a brief restatement of ground three of his post-conviction appeal. That ground alleged that his trial counsel was ineffective for not arguing that because venue was charged in Hamilton "and/or" Columbia counties the Defendant can sever his charges from each other and from the co-defendant.

First, the State would contend that because this claim was raised in the contemporaneous post-conviction appeal it is redundant and inappropriately raised in this petition. Demps v. Dugger, 714 So.2d 365, 368 (Fla. 1998)("By raising the issue in the petition for writ of habeas corpus, in addition to the rule 3.850 petition, collateral counsel has accomplished nothing except to unnecessarily burden this Court with redundant material." quoting, Blanco v. Wainwright, 507 So.2d 1377, 1384 (Fla. 1987)).

Additionally, because the Defendant is attempting to incorporate an ineffective assistance of trial counsel argument instead of an ineffective appellate counsel argument, this issue is also inappropriate for a habeas petition. Rutherford v.

Moore, 774 So.2d 637, 643 (Fla. 2000)("Habeas petitions are the proper vehicle to advance claims of ineffective assistance of appellate counsel.").

Finally, this issue has been fully briefed and argued in the contemporaneous post-conviction appeal, and should also be denied for the reasons stated in the State's brief.

II.

In his second ground the Defendant attempts to incorporate the arguments from his post-conviction appeal into his habeas petition. The Defendant re-alleges his venue claim again as well as issues about not protecting his jury from inappropriate evidence, not preparing for the penalty phase, and miscellaneous breaches of duty. However, the Defendant only makes conclusory allegations, and raises these arguments as "described and documented in great detail in the contemporaneously filed appeal from the Petitioner's denial of relief pursuant to FlaRCrimP § 3.850 in this same case." (Amended Petition for Writ of Habeas Corpus at 6). To the extent that the Defendant is re-alleging the ineffective assistance of trial counsel arguments from his post-conviction appeal, these issues are not properly raised in a habeas petition. Rutherford v. Moore, 774 So.2d at 643.

Additionally, as stated above, this issue is inappropriately

raised in this motion because it has been fully addressed in the post-conviction appeal. Demps v. Dugger, 714 So.2d at 368.

Finally, to the extent that this argument might require any response on the merits, the State would simply refer this Court to the arguments made in its brief.

III.

In his third argument, the Defendant claims that his appellate counsel was ineffective for not raising a potential Bruton claim on direct appeal. The basis for this argument is that the State called Robert Murphy (who was in Jail with the co-defendant) to testify in its rebuttal case. (R. 1798). During Murphy's testimony he said that the co-defendant told him "I strangled her." (R. 1801). The State then impeached Murphy with a prior statement where he said "We strangled her." (R. 1802).

The Defendant argues that the introduction of this statement was a violation of the rule in Bruton v. United State, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968). Bruton holds that a defendant's Sixth Amendment right to confrontation is violated when a co-defendant's confession is admitted at their joint trial. Id. at 126, 88 S.Ct. at 1622-22; Farina v. State, 679 So.2d 1151, 1155 (Fla. 1996). The Defendant claims that

Murphy's statement is a clear violation of the Bruton rule and that his appellate counsel was ineffective for not raising it on direct appeal.[1] However, appellant counsel was not ineffective for choosing not to raise this unpreserved and meritless claim.

First, appellate counsel was not ineffective because this issue was not preserved for appeal,[2] and "[a]ppellate counsel cannot be deemed ineffective for failing to raise an issue not preserved for review." Gorby v. State, 819 So.2d 664, 682 (Fla. 2002). The Defendant claims that this argument was preserved for appeal; however, the record is devoid of any objection on Bruton grounds. (R. 1798-1817). The Defendant makes other objections, i.e. when the State attempts to impeach its own witness, to leading questions, and to irrelevant testimony. (R. 1801, 1803, 1804-09). However, the Defendant did not object

[1] Defendant also claims that holding trials together with separate juries contributed to this alleged problem. However, this is not true. The evidence that the Defendant now complains of was not introduced to his jury because he was being tried with his co-defendant. Instead, it was admitted because he opened the door by introducing statements of the co-defendant which were beneficial to him. The Defendant does not refer to any instances in the record where evidence was introduced because he was being tried in the same proceeding as the co-defendant. Thus, his argument that being tried with his co-defendant contributed to this problem is without support.

[2] Ferguson v. State, 417 So.2d 639, 641 (Fla. 1982)(in order to preserve a point for appellate review, it is well settled that objections must be made with sufficient specificity).

when the State called Murphy and did not raise a contemporaneous Bruton objection. Thus, appellate counsel was not ineffective because this issue was not preserved.

Moreover, the issue is without merit. The Defendant presented two witnesses in this case, Dennis Givens and Bill Bispham, inmates who were confined with the co-defendant. (R. 1760-1765, 1780-1781). Both men testified that the co-defendant had made confessions to them consistent with the Defendant's confession. Each prisoner said that the co-defendant had taken sole credit for the killing, although they differed in whether the co-defendant admitted to raping the victim. (R. 1765-1798). By presenting the co-defendant's confessions to these two witnesses, the Defendant waived any Bruton objection to the State presenting rebuttal witnesses to whom the co-defendant had also confessed. See Pacheco v. State, 698 So.2d 593, 595 (Fla. 2nd DCA 1997); Walsh v. State, 596 So.2d 756, 757 (Fla. 4th DCA 1992); see also Ramirez v. State, 739 So.2d 568, 579-80 (Fla. 1999)(finding that "opening the door" rule and rule of completeness apply to Bruton). Thus, this issue is without merit and appellate counsel cannot be ineffective for not raising a meritless issue. Rutherford v. Moore, 774 So.2d 637, 643 (Fla. 2000).

Additionally, assuming *arguendo* that there was some error,

Bruton issues are subject to a harmless error analysis and the facts of the present case demonstrate that even if some Bruton error could be found, it would be harmless. Farina v. State, 679 So.2d at 1155. The testimony in question here (Murphy's) was similar to other, uncontested testimony introduced by the State. That testimony consists of the co-defendant's confession to Deputy Mallory. (R. 1817). Deputy Mallory's testimony was not contested at trial, on appeal or by collateral counsel. It involves the same type of statements introduced through Murphy, but to an even greater extent, i.e. that the Defendant took part in the killing. Thus, State would argue that even if some error did occur, it would be harmless in light of Deputy Mallory's testimony.

Furthermore, this issue would also be harmless because the Murphy's testimony was a small part of the State's extensive and strong case. The State presented substantial evidence of guilt in the Defendant's trial. This evidence included his confessions, the fact that he led police to the murder weapon and body, the fact he was caught in the victim's vehicle, that his DNA was found mixed with hers in a semen stain, that his fingerprints were found near the body, and that he showed consciousness of guilt in attempting to avoid arrest by shooting at the Mississippi Highway Patrol. In light of all this

evidence, the State more than proved its case and rendered any minor errors harmless.

Thus, it cannot be said that appellate counsel was ineffective for failing to raise this claim, the claim was not preserved; it was not error because the Defendant had waived the Bruton issue by presenting the co-defendant's confessions in his defense case; and it would have been harmless error.

Finally, it should be noted that the first two grounds of appellate counsel's brief were based on Murphy's testimony. Thus, it is clear that appellate counsel specifically examined Murphy's testimony in great detail and sought to address any errors therein. However, the error that the Defendant is now alleging as the basis for ineffective assistance of appellate counsel is not error, and appellate counsel was not ineffective for focusing on other issues.

IV.

In his fourth argument, the Defendant claims that appellate counsel was ineffective for not raising on direct appeal a claim regarding statements made by the prosecutor in his closing argument. The statements that the Defendant is referring to are "that Petitioner had not taken affirmative action to prevent the killing of the victim." (Amended Petition for Writ of Habeas

Corpus at 9). However, because appellate counsel did raise this issue on direct appeal, the Defendant has failed to show ineffective assistance of counsel.

On direct appeal, appellate counsel's fifth issue dealt with statements of the prosecutor in closing argument. Appellate counsel pulled out several different statements that he considered to be objectionable and among them was the argument about the Defendant not taking affirmative action to prevent the victim's death. (Initial Brief of Appellant at 41). Thus, because the same statements that the Defendant now complains of were raised on direct appeal, appellate counsel was not ineffective. Gorby v. State, 819 So.2d at 682 (ineffective assistance of appellate counsel claim denied because "this issue was presented in the direct appeal of his sentence of death").

The Defendant also raises a second ground in this claim. In this second ground the Defendant "realleged that his trial counsel failed to accept the "independent acts" instruction offered by the State. . . ." (Amended Petition for Writ of Habeas Corpus at 10). This claim was argued in ground seven of the Defendant's post-conviction brief and he is simply trying to incorporate that argument into his habeas petition. As set forth in claims I and II above, this practice is unnecessary and improper. Demps v. Dugger, 714 So.2d at 368. However, the State

would also refer this Court to the arguments made in its brief which demonstrate it is without substantive merit.

V.

In his fifth claim, the Defendant first briefly restates the Ring argument from ground 9 of his post-conviction appeal. Because this ground is a restatement of a post-conviction claim it is improper and unnecessary in this motion. Demps v. Dugger, 714 So.2d at 368.

In addition to the Ring claim, the Defendant also adds two other claims. First, he argues that the Defendant was sentenced to death by electrocution and that the current statutory scheme which allows a defendant to elect electrocution or lethal injection is a violation of the ex post facto clause of the federal and state constitutions. This Court has already settled this issue and determined that the Defendant's claim is without merit. Sims v. State, 754 So.2d 657, 664 (Fla. 2000).

Finally, the Defendant claims that the jury's vote in the penalty phase was 10-12, meaning the verdict was either incorrect or implies a life recommendation. This matter arose as follows-

When the jury returned its advisory sentence, the clerk read

it as “a majority of the jury voted ten to twelve advised to recommend to the Court that it impose the death penalty ”. (R. 2148). However, the verdict actually read,

> A majority of the jury, by a vote of 10 ***of*** 12, advise and recommend to the court that it impose the death penalty upon Richard Eugene Hamilton.

(R. 4106)(emphasis added).

The trial court, realizing that the clerk had misread the verdict then inquired of each juror as to whether a majority of the jury voted to impose the death penalty. (R. 2150). Each juror then affirmed that a majority of the jury voted for death. (R. 2150-51). The Defendant did not object to this procedure and the trial court accepted the verdict as written on the verdict form. Also this Court specifically found that “[t]he jury recommended death by a ten-to-two vote” in its direct appeal review of the Defendant’s case. Hamilton v. State, 703 So.2d at 1040.

The Defendant now argues that the advisory verdict is in doubt because it is unclear what the jury’s vote was. First, the State would contend that if the Defendant wished to raise this argument on the merits, as it appears he is trying to do here, it should have been raised on direct appeal. Rutherford v. Moore, 774 So.2d at 643. If the Defendant is raising it as a

ineffective assistance of trial counsel claim (based on his statement about there being no "proper or adequate objection"), the claim is barred because it should have been raised in his post-conviction motion and appeal. Id.

The only proper claim here would be an ineffective assistance of appellate counsel claim. Id. However, the Defendant has not made that argument. To the extent that his argument may be construed as a valid ineffective assistance of appellate counsel argument, the Defendant has failed to establish ineffectiveness because the issue was not preserved for direct appeal. Gorby v. State, 819 So.2d 664, 682 (Fla. 2002). The Defendant has also failed to show ineffective assistance of appellate counsel because this issue is without merit and appellate counsel cannot be ineffective for not raising a meritless issue. Rutherford v. Moore, 774 So.2d 637, 643 (Fla. 2000). The State would contend that any confusion in this matter is cleared up by examining the written verdict, the context of the matter and the trial court's inquiry to the jury. The Defendant contends that the inquiry was inadequate because the vote as to the death sentence is by secret ballot. However, this argument lacks merit. Although, the vote is secret, the jurors are the ones who tally the ballots and fill out the verdict form. Thus, the jurors would be aware of the number of

jury members who voted for death and against it. Accordingly, the trial court's measures ensured that the written verdict was correct. Thus, the Defendant is incorrect in asserting that there is any error here.

VI.

The Defendant's sixth claim appears to be another argument which merely re-alleges prior grounds. Because the State cannot discern from this claim an argument which has not been raised elsewhere in the 3.850 brief or in this habeas petition, the State will contend that this claim is improper and rely on its prior arguments.

VII.

In his final habeas ground, the Defendant argues that the cumulative effect of these errors warrant relief. First, the State would contend that this claim is insufficiently pled because the Defendant "points to no specific claim of error; instead, he only generally asserts there were errors". Porter v. Moore, 2002 WL 1338528 *3, 27 Fla. L. Weekly S606 (Fla. June 20, 2002).

The State would also contend that among the nine issues raised in the post-conviction appeal and the six prior issues in

this habeas petition there has been no demonstrable error. The claims are either "meritless or procedurally barred, [thus] there is no cumulative effect to consider." Id. Accordingly, this ground is without merit.

WHEREFORE, based on the foregoing arguments and authorities, the instant Petition for Writ of Habeas Corpus should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to Charles E. Lykes, Jr., Attorney for Appellant, 501 S. Ft. Harrison Ave., Suite 101, Clearwater, Florida 33756, by U.S. Mail on this ____ day of February, 2003.

_____
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