

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC02-420

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MATTHEW MARSHALL,

Petitioner,

v.

MICHAEL W. MOORE,

Secretary, Florida Department of Corrections,

Respondent,

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PETITIONER'S REPLY TO STATE'S RESPONSE REGARDING PETITION FOR WRIT OF  
HABEAS CORPUS

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## INTRODUCTION AND PRELIMINARY STATEMENT

This petition for habeas corpus relief is being filed in order to address substantial claims of error under the fourth, fifth, sixth, eighth and fourteenth amendments to the United States Constitution, claims demonstrating that Mr. Marshal was deprived of the effective assistance of counsel on direct appeal and that the proceedings that resulted in his conviction and death sentence violated fundamental constitutional guarantees. The following symbols will be used to designate references to the record in this appeal:

"R. \_\_\_\_" -- record on direct appeal to this Court;

References to other documents and pleadings will be self-explanatory.

## JURISDICTION

A writ of habeas corpus is an original proceeding in this Court governed by Fla. R. App. P. 9.100. This Court has original jurisdiction under Fla. R. App. P. 9.030(a)(3) and Article V, § 3(b)(9), Fla. Const. The Constitution of the State of Florida guarantees that "[t]he writ of habeas corpus shall be grantable of right, freely and without cost." Art. I, § 13, Fla. Const.

## REPLY TO ISSUE I

In his original petition, Petitioner argued that his appellate counsel provided ineffective assistance by failing to raise on direct

appeal the trial court's error of denying the defense Motion for Additional Mental Health Expert (R. 3744-45). In their Response, the State argues that Petitioner is "re-hashing" an issue raised in 3.850 proceedings and such "re-litigation" renders this issue procedurally barred. Although Petitioner did raise a 3.850 claim regarding the violation of his constitutional right to expert psychiatric assistance at trial<sup>1</sup>, Ake v. Oklahoma, 105 S. Ct. 1087 (1985), the present claim is wholly distinct. The instant claim deals with appellate's counsel failure to raise on direct appeal a meritorious claim, certainly cognizable in a petition for habeas corpus. See Freeman v. State, 761 So.2d 1055 (Fla. 2000). The State's attempt to argue a procedural bar fails to consider appellate counsel's duty to raise on direct appeal errors which occurred at trial. Here, the issue was clearly preserved at trial and appellate counsel inexplicably failed to raise it on appeal.

In the alternative to being procedurally barred, the State argues that this issue is without merit because the "trial court solved defense's counsel's problem, even though it denied his request for an additional mental health expert." (State's Response p. 6) In justifying their argument, the logic behind the State's position is that just because the defense's motion was denied, it does not mean that trial counsel was precluded from raising another motion for an

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<sup>1</sup> This issue is currently on appeal before this Court.

additional expert if the incompetent expert did not cooperate. In taking this position, the State speculates that the mental health expert cooperated with the defense after the judge ordered him to do so. Of course, this position was utterly refuted in the 3.850 proceedings where trial counsel clearly and conclusively testified that it was the expert's total lack of cooperation and lack of energy he spent on this matter that forced him not to rely upon and utterly be without expert assistance.<sup>2</sup> Moreover, the State's speculation whether trial counsel's problem was "solved" doesn't resolve why appellate counsel failed to raise this meritorious issue on direct appeal. What appellate counsel knew at the time of direct appeal was that trial counsel filed a motion for an additional expert while strongly expressing the complete lack of cooperation with the appointed expert. Appellate counsel also knew that trial counsel subsequently did not present a mental health expert in the penalty phase. Appellate counsel

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<sup>2</sup> Trial counsel testified to the following concerning the reasons he did not use the expert at trial: *"I remember -- my overwhelming memory is this doctor's total lack of cooperation, little bit of time he spent with him. And I wouldn't put anybody before a jury when the first question you would have asked, no matter what he said, how long did you spend with this gentlemen. I spent an hour. And based on one hour you're going to decide that this gentlemen is whatever the diagnosis is. He would have been blown out of the water, so I wouldn't have put him on no matter what conclusions he drew in his letter. (PC-R 2382-83)."* *"[M]y experience was atrocious. That's the worst experience I had until then or since then with any court appointed consultant of any type." (PC-R 2348).*

had a duty to raise this issue on direct appeal and was ineffective for failing to do so. Petitioner would also note that the State's reliance on what occurred at the 3.850 proceedings to justify their speculation that trial counsel's problems were "solved" is irrelevant to the present claim. Appellate counsel had the record before him and failed to raise this meritorious issue on direct appeal.

#### **REPLY TO ISSUE II and III**

Regarding the merits of issues II and III, Petitioner relies upon his arguments in his original petition. However, Petitioner notes that the State argues in both claims that these issues are not cognizable in a habeas corpus petition and are procedurally barred. This is incorrect. This Court has not found these issues to be non-cognizable nor procedurally barred. SEE Mills v. Moore, 786 So.2d 532 (Fla. 2001); Mann v. Moore, 794 So.2d 595 (Fla. 2001); Sereci v. Moore, 27 Fla. L. Weekly s183 (Fla. 2002); Bottoson v. State, 27 Fls. L. Weekly s119 (Fla. 2002).

#### **CONCLUSION AND RELIEF SOUGHT**

Meritorious arguments were available for direct appeal, yet appellate counsel unreasonably failed to assert them. These errors demonstrate that Mr. Marshall was denied the effective assistance of

appellate counsel. For all of the reasons discussed herein, Mr. Marshall respectfully urges the Court to grant habeas corpus relief.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by United States Mail, first class postage prepaid, to Debra Rescigno, Assistant Attorney General, 1655 Palm Beach Lakes Blvd. Suite 300, West Palm Beach, Florida 33401 on April 16, 2002.

**CERTIFICATE OF COMPLIANCE**

The undersigned counsel hereby certifies that this petition complies with the font requirements of rule 9.100(1), Fla. R. App. P.

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