IN THE SUPREME COURT OF FLORIDA

MATTHEW MARSHALL,

Petitioner,

vs. Case No. SC02-420

MICHAEL W. MOORE,
Secretary, Florida Department
of Corrections,

Respondent.
______________________________/

AMENDED RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

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PRELIMINARY STATEMENT

Respondent accepts Petitioner's statement regarding Jurisdiction. The following symbols will be used in this Response: ROA denotes the record on appeal in Marshall v. State, 604 So.2d 799 (Fla. 1992) and PCR denotes the record on appeal in the pending 3.850 appeal.

PROCEDURAL HISTORY AND STATEMENT OF THE FACTS

Respondent accepts Petitioner's statement regarding the procedural history. A brief recitation of the facts is found in this Court's opinion on the direct appeal, Marshall v. State, 604 So.2d 799 (Fla. 1992):

> Marshall and the victim, Jeffrey Henry, were both incarcerated at the Martin Correction Institute on November 1, 1988, when witnesses heard muffled screams and moans emanating from Henry's cell and observed Marshall exiting the cell with what appeared to be blood on his chest and arms. Within a few minutes, Marshall reentered the cell, and similar noises were heard. After the cell became quiet, Marshall again emerged with blood on his person. Henry was found dead, lying in his cell facedown with his hands bound behind his back and his sweat pants pulled down around his ankles to restrain his legs. Death was caused by blows to the back of his head.
>
> Marshall was charged with first-degree murder. His defense at trial was that he killed Henry in self-defense. Marshall claimed that Henry was a "muscle man" for several inmates who operated a football pool. When Marshall tried to collect his

> winnings from the inmates, they told him to get the money from Henry. Marshall claims he entered Henry's cell only to collect his winnings but that Henry refused to pay, and that Henry then attacked him, so he fought back.
>
> The jury found Marshall guilty of first-degree murder and recommended a sentence of life imprisonment. The judge rejected the jury's recommendation and imposed a sentence of death, finding in aggravation: (1) that the murder was committed by a person under sentence of imprisonment; (2) that the defendant was previously convicted of violent felonies; (3) that the murder was committed while the defendant was engaged in the commission of or an attempt to commit a burglary; and (4) that the murder was especially heinous, atrocious, and cruel. The judge found in mitigation that the defendant's behavior at trial was acceptable and that the defendant entered prison at a young age. The judge specifically rejected as mitigation that the defendant's older brother influenced him and led him astray to run the streets and break the law, and that his mother caused him to believe he would suffer no negative consequences for his bad behavior. The judge concluded that facts supporting a conclusion that the mitigating circumstances did not outweigh the aggravating circumstances were "so clear and convincing that no reasonable person could differ.

Id. at 802. This Court also addressed the propriety of a jury override in this case:

> In this case, the record contains insufficient evidence to reasonably support the jury's recommendation of life. Marshall's father was unable to attend the trial, but the defense and prosecution stipulated that he would have testified that Marshall did well in school until his early teens when his older brother influenced him to run the streets and break the law; that

Marshall's mother did not discipline Marshall and allowed him to believe there would be no consequences for his behavior; and that Marshall's father loved him and requested a life sentence for his son. The trial court determined these facts were not mitigating, but did find Marshall's behavior at trial as well as his entering prison at a young age to be mitigating. We find no error in the court's assessment of this mitigation and conclude that it does not provide a reasonable basis for the jury's recommendation of life in this case. Even viewing this mitigation in the light most favorable to Marshall, it pales in significance when weighed against the four statutory aggravating circumstances, including Marshall's record of violent felonies consisting of kidnaping, sexual battery, and seven armed robberies.

Furthermore, defense counsel's argument composed largely of a negative characterization of the victim does not provide a reasonable basis for the jury's life recommendation. Moreover, contrary to Marshall's assertion, the facts surrounding the murder do not suggest that the murder was committed in self defense or in a fit of rage. The witnesses heard muffled screams and moans emanating from the victim's cell and observed Marshall leaving the cell with what appeared to be blood on his chest and arms. Within a few minutes, Marshall reentered the cell and similar noises were again heard. The victim was found lying face down with his hands bound behind his back and his ankles were restrained. The victim received no less than twenty-five separate wounds and blood was sprayed and splattered about the cell. Death was caused by blows to the back of his head. Nothing in these facts supports the notion that Marshall acted in self defense or that he simply killed the victim in the heat of a fight. We thus conclude that the trial court did not abuse its discretion in finding the facts supporting the death sentence to be "so clear and convincing that

> no reasonable person could differ." See *Tedder*, 322 So.2d at 910.
>
> Finally, we do not find the death sentence disproportionate in this case. The facts of this case, including the four strong aggravating circumstances compared to the weak mitigation, render the death sentence appropriate and proportional when compared to other cases. See, e.g., Freeman v. State, 563 So.2d 73 (Fla.1990); Lusk v. State, 446 So.2d 1038 (Fla.1984).
>
> Accordingly, we affirm Marshall's conviction for first-degree murder and the resulting death sentence.

Id. at 806.

REASONS FOR DENYING THE PETITION

ISSUE I

APPELLATE COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO ARGUE, ON DIRECT APPEAL, THAT THE TRIAL COURT ERRED BY DENYING DEFENSE COUNSEL'S REQUEST FOR AN ADDITIONAL MENTAL HEALTH EXPERT. (RESTATED).

Petitioner claims that appellate counsel was ineffective for failing to argue, on direct appeal, that the trial court erred by denying defense counsel's request for an additional mental health expert. See Downs v. Moore, 26 Fla.L.Weekly S632, S633 (Fla. Sept. 26, 2001), citing 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.'").

This claim is procedurally barred because it is nothing more than an attempt to re-litigate Petitioner's 3.850 claim the he

was denied his constitutional right to a competent mental health evaluation and that trial counsel was ineffective for failing to secure a competent mental health expert to assist in both the guilt and penalty phases. Petitioner cannot now re-hash the same claim in his habeas petition under the guise of alleged trial court error in refusing to appoint an additional mental health expert. See Parker v. Dugger, 550 So.2d 459, 460 (Fla.1989)("[H]abeas corpus petitions are 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."); Atwater v. State, 26 Fla. L. Weekly 395 (Fla. 2001) (same); Porter v. Dugger, 559 So.2d 201, 203 (Fla. 1990)("using a different argument to relitigate an issue in postconviction proceedings is not appropriate."). Hence, this claim should be denied as procedurally barred.

Even if this Court finds that the claim is not procedurally barred, appellate counsel was not ineffective for failing to raise the issue. The habeas corpus standard of review for ineffective assistance of appellate counsel mirrors the Strickland[1] standard for trial counsel ineffectiveness. Rutherford v. Moore, 774 So.2d 637, 643 (Fla.2000). In order to prevail on a claim of ineffective assistance of appellate

[1] Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

counsel, [p]etitioner must show specific errors or omissions that are "'of such magnitude as to constitute a serious error or substantial deficiency falling measurably outside the range of professionally acceptable performance' and second, that the petitioner was prejudiced because appellate counsel's deficiency 'compromised the appellate process to such a degree as to undermine confidence in the correctness of the result.'" Jones v. Moore, 794 So.2d 579, 583 (Fla. 2001), citing Rutherford, at 643; Pope v. Wainwright, 496 So.2d 798, 800 (Fla.1986), cert. denied, 480 U.S. 951 (1987); Suarez v. Dugger, 527 So.2d 190 (Fla. 1988).

A review of the record in this case shows that Petitioner's ineffectiveness claim is wholly without merit. On April 28, 1989, defense counsel filed a "Motion to Appoint Mental Health Expert," asking the Court to appoint Dr. Joel Klass, as a confidential expert, to examine the Petitioner "on the issues of his competence to stand trial, his sanity at the time of the alleged offense, [and] the existence of possible mitigating factors . . . ." (ROA 2937). A hearing was held after which the trial court entered an order appointing Dr. Klass as a confidential mental health expert ordering him to determine whether Petitioner was insane at the time of the alleged offense, whether he was competent to stand trial and whether there were any mitigating factors. (ROA 2945-47).

Thereafter, on September 19, 1989, defense counsel filed a "Motion for Additional Mental Health Expert," asking for the appointment of a second mental health expert because Dr. Klass spent only 1 hour examining Petitioner and provided only two (2) short letters containing his ultimate conclusions, but not describing what psychological tests he conducted, their results or the history he took from Petitioner. The motion also alleged that Dr. Klass's letters omitted discussion of what evidence might be gathered for mitigation. (ROA 3735-37).

A hearing was held on September 21, 1989, at which defense counsel re-iterated the reasons laid out in his motion as to why he needed an additional mental health expert. (ROA 113-131). The trial court denied the motion **at that time**, noting that Dr. Klass's work must have been of some value because the defense submitted a request to pay Dr. Klass's $350 bill, which the court had agreed to and noting that the court's previous contact with Dr. Klass did not give it reason to believe he was incompetent. (ROA 125). The trial court did, however, order Dr. Klass to communicate by telephone with defense counsel for trial preparation and to submit a written report on the issues specified in the Court's original May 12, 1989 order, by October 11, 1989. (ROA 3745).[2]

[2] The trial court initially entered an Order requiring Dr. Klass to give an opinion about organic brain damage (R 3744); however, because that was not part of the court's original May

Importantly, defense counsel never complained thereafter that Dr. Klass did not contact him or issue a corrected written report as ordered. In fact, defense counsel admitted at the 3.850 evidentiary hearing that he received a follow-up letter from Dr. Klass (PCR 2357). The trial court's 3.850 order reflects that Dr. Klass diagnosed Petitioner as a paranoid schizophrenic in the follow-up letter (PCR 2711-15). Consequently, the trial court solved defense counsel's problem, even though it denied his request for an additional mental health expert. Appellate counsel cannot be deemed ineffective for not raising the issue because it had no merit. See Kokal v. Dugger, 718 So.2d 138, 142 (Fla.1998) ("Appellate counsel cannot be faulted for failing to raise a nonmeritorious claim."); Chandler v. Dugger, 634 So.2d 1066 (Fla.1994) (same).

A trial court's decision regarding the appointment of mental health experts in criminal cases is reviewed by the abuse of discretion standard. See Jackson v. State, 704 So. 2d 500, 508 (Fla. 1997) (explaining that appointment of an expert pursuant to the statute pertaining to expert witnesses in criminal cases, § 914.06, is discretionary and finding no abuse of discretion in denying Jackson's request where any additional information a second pathologist could have offered in this particular case was merely speculative and most likely cumulative); Martin v.

12, 1989 order, a corrected order was entered.

State, 455 So.2d 370 (Fla. 1984)(explaining that appointment of experts is within the trial court's discretion).

Here, it cannot be said that the trial court abused its discretion in denying defense counsel's motion for an additional expert. The trial court noted that it did not believe that Dr. Klass was incompetent based on its prior experiences with him. It also noted that it had ordered his $350 bill paid based upon the defense's request, who must have thought his work had some value. Finally, the trial court's ruling did not completely foreclose the possibility of granting an additional expert in the future. The trial court noted that it was denying the request **at that time** and acknowledged that another interview by Dr. Klass might be necessary (T 125, 128-29). Defense counsel did not make another request or ask for an additional interview. As such, this issue clearly had no merit and appellate counsel cannot be deemed ineffective for not raising it on appeal.

ISSUE II

APPRENDI DOES NOT APPLY TO FLORIDA'S OVERRIDE SCHEME.

Relying upon Apprendi v. New Jersey, 530 U.S. 466 (2000), Petitioner argues that Florida's capital sentencing scheme and in particular, its override provision, violates due process and the right to trial by jury.

Petitioner's claim must be denied because it is not cognizable in a habeas corpus petition. A collateral challenge to a judgment and sentence must be raised in a post-conviction motion under rule 3.850 and not in a petition for writ of habeas corpus. Rule 3.850 supplants the remedy of habeas corpus for raising collateral challenges to a judgment and sentence. Patterson v. State, 664 So.2d 31 (Fla. 4th DCA 1995).

This claim is also procedurally barred because it could have been, but was not, raised on direct appeal. See Parker v. Dugger, 550 So.2d 459, 460 (Fla.1989)("[H]abeas corpus petitions are 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."); Atwater v. State, 26 Fla. L. Weekly 395 (Fla. 2001) (same).

Even if this Court finds that the claim is cognizable and not procedurally barred, it is without merit. This Court has squarely rejected Petitioner's arguments and the notion that Apprendi applies to Florida's capital sentencing scheme in Mills v. Moore, 786 So.2d 532 (Fla. 2001), Mann v. Moore, 794 So.2d

595 (Fla. 2001), Bottoson v. State, 27 Fla. L. Weekly S119 (Fla. Jan 31, 2002), and Sireci v. Moore, 2002 WL 276292 (Fla. Feb 28, 2002).[3]

Petitioner contends that under Florida's capital sentencing scheme, the statutory maximum for capital crimes is life imprisonment because a defendant cannot be sentenced to death unless and until there is a finding, after a separate and distinct proceeding, that at least one statutory aggravating factor has been proven beyond a reasonable doubt. Therefore, Petitioner argues, under Apprendi "the jury must determine death eligibility," and its decision must be binding (i.e., no override by the judge) in order to comply with the constitutional protections of due process and right to trial by jury.

In Apprendi, the U.S. Supreme Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Apprendi, 530 U.S. at 490. In Florida, a defendant becomes eligible for the death penalty upon conviction for first-degree murder and the statutory maximum sentence he faces is death.

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[3] The State acknowledges that the United States Supreme Court has granted certiorari in Ring v. Arizona; however, as this Court has noted in King v. State, 27 Fla. L. Weekly S65 (Fla. Jan. 16, 2002), and Bottoson v. State, 27 Fla. L. Weekly S119 (Fla. Jan 31, 2002), Ring has not yet been decided and the law must be followed as it stands.

Mills v. Moore, 786 So. 2d 532, 537-38 (Fla. 2001), cert. denied, 121 S.Ct. 1752 (2001). Section 782.04(1), Florida Statute (1989) provides that either premeditated or felony murder constitutes a "capital felony, punishable as provided in s.775.082" and "[i]n all cases under this section, the procedure set forth in s.921.141 shall be followed in order to determine sentence of death or life imprisonment." Section 775.082(1), Florida Statute (1989) provides that the punishment shall be either life with the possibility of parole after 25 years or death.[4] Clearly, by statute, the maximum penalty is death, thus, Apprendi does not apply to capital cases.

As the U.S. Supreme Court noted:

> We should be clear that nothing in this history suggests that it is impermissible for judges to exercise discretion-taking into consideration various factors relating both to offense and offender-in imposing a judgment *within the range* prescribed by statute. We have often noted that judges in this country have long exercised discretion of this nature in imposing sentence *within the statutory limits* in the individual case.

Apprendi, 530 U.S. at 481 (emphasis in original). In fact a sentencer may be given "unbridled discretion" in determining the appropriate sentence so long as the jury has decided that the defendant is eligible for the death penalty, and in Florida that

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[4] Marshall argues that the statute in effect at the time of his trial, section 775.082(1), Florida Statutes (1989), made life the maximum sentence. This Court rejected the identical assertion in Mills at 537-38.

occurs upon conviction. As reasoned in Tuilaepa v. California, 512 U.S. 967, 979-80 (1994):

> Likewise, in *Proffitt v. Florida*, we upheld the Florida capital sentencing scheme even though "the various factors to be considered by the sentencing authorities [did] not have numerical weights assigned to them."....
>
> ... In sum, "discretion to evaluate and weigh the circumstances relevant to the particular defendant and the crime he committed" is not impermissible in the capital sentencing process.... **"Once the jury finds that the defendant falls within the legislatively defined category of persons eligible for the death penalty, ... the jury then is free to consider a myriad of factors to determine whether death is the appropriate punishment**."... **Indeed, the sentencer may be given "unbridled discretion in determining whether the death penalty should be imposed after it has found that the defendant is a member of the class made eligible for that penalty**." ....

Tuilaepa, 512 U.S. at 979-80 (citations omitted, emphasis added).

Florida's capital sentencing scheme, found in section 921.141, Florida Statutes (1975) affords the sentencer the guidelines to follow in determining the various factors related to the offense and the offender by providing accepted statutory aggravating factors and mitigating circumstances to be considered. Given the fact that a convicted defendant faces the statutory maximum sentence of death upon conviction, the employment of further proceedings to determine the "various factors relating both to offense and offender", i.e., to

determine "sentencing factors", does not violate due process.

Nothing in Apprendi suggests that this Court's prior precedent upholding Florida's capital sentencing statute has been eroded. In fact, the U.S. Supreme Court pointed to Walton v. Arizona, 497 U.S. 639 (1990) to underscore the fact that Apprendi does not render invalid state capital sentencing statutes. Apprendi, 530 U.S. at 496-97. In Walton, the U.S. Supreme Court noted that constitutional challenges to Florida's capital sentencing have been rejected repeatedly. See, Hildwin v. Florida, 490 U.S. 638 (1989)(stating case "presents us once again with the question whether the Sixth Amendment requires a jury to specify the aggravating factors that permit the imposition of capital punishment in Florida and concluding that the Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury"); Spaziano v. Florida, 468 U.S. 447 (1984); Proffitt v. Florida, 428 U.S. 242 (1976).

Petitioner argues that Apprendi effectively overrules Walton; however, Walton addressed a "judge only" sentencing system where the maximum sentence at time of conviction is life. In Florida, the maximum sentence is death upon conviction. Mills, 786 So. 2d at 537-38. Petitioner further argues that Spaziano must be re-visited in light of Apprendi; however, it is clear that it is the jury in Florida who decides beyond a

reasonable doubt all of the elements of the capital felony charged which subjects the defendant to the maximum penalty of death. As such, this claim must be denied.

<u>ISSUE III</u>

THE HOLDING IN <u>KEEN</u> DOES NOT MEAN THAT <u>TEDDER</u> WAS ARBITRARILY APPLIED TO THIS CASE.

Relying upon <u>Keen v. State</u>, 775 So.2d 263 (Fla. 2000), Petitioner argues that the trial court arbitrarily applied <u>Tedder v. State</u>, 322 So.2d 908 (Fla. 1975), in overriding the jury's life recommendation and that this Court did the same in upholding the override.

Petitioner's claim must be denied because it is not cognizable in a habeas corpus petition. A collateral challenge to a judgment and sentence must be raised in a post-conviction motion under rule 3.850 and not in a petition for writ of habeas corpus. Rule 3.850 supplants the remedy of habeas corpus for raising collateral challenges to a judgment and sentence. <u>Patterson v. State</u>, 664 So.2d 31 (Fla. 4th DCA 1995).

The claim is also procedurally barred because it is nothing more than an attempt to re-litigate the propriety of the trial judge's override of the jury's life recommendation. This Court has already rejected Petitioner's argument, on direct appeal, that the trial court erred by overriding the jury's recommendation of life imprisonment. See Marshall v. State, 604 So.2d 799 (Fla. 1992). Petitioner now argues that Keen represents a change in the law, clarifying how Tedder is to be applied to override case. This Court, however, rejected that contention in Mills v. Moore, 786 So.2d 532 (Fla. 2001).

Thus, Petitioner's claim is simply a re-hash of his argument on direct appeal and should be denied as procedurally barred. See Parker v. Dugger, 550 So.2d 459, 460 (Fla.1989)("[H]abeas corpus petitions are 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."); Atwater v. State, 26 Fla. L. Weekly 395 (Fla. 2001) (same); Porter v. Dugger, 559 So.2d 201, 203 (Fla. 1990)("using a different argument to relitigate an issue in postconviction proceedings is not appropriate.").

Even if this Court finds that the claim is cognizable and not procedurally barred, it does not have merit. Petitioner argues that Keen v. State, 775 So.2d 263 (Fla. 2000), "conclusively establishes that the standard enunciated in Tedder

v. State, 322 So.2d 908 (Fla. 1975), was arbitrarily not applied to Mr. Marshall's case on direct appeal." *Petition* at 21. According to Petitioner, Keen represents a change in the law which must now be applied to his case. As noted above, however, this Court has already considered and rejected that precise argument, stating:

> Mills' second argument is that Tedder v. State, 322 So.2d 908 (Fla.1975), which allows the trial judge to override a jury recommendation in capital cases, was arbitrarily applied in this case based on the language used in Keen v. State, 775 So.2d 263 (Fla.2000). In Tedder we said, "In order to sustain a sentence of death following a jury recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ." Id. at 910. In Keen, on the defendant's direct appeal following his third trial, we applied the Tedder analysis. In applying Tedder we emphasized the fact that a trial court's analysis in an override situation should focus on the record evidence supporting the jury's recommendation and should not be the same weighing process that is used when the jury recommends death.
>
> While conceding that Keen is not new law, Mills nonetheless argues that Keen's application of Tedder constitutes a new standard by which jury override cases are reviewed. Keen is not a major constitutional change or jurisprudential upheaval of the law as it was espoused in Tedder. Keen offers no new or different standard for considering jury overrides on appeal. Thus, we disagree with Mills' contention that Keen offers a new standard of law and we reject the contention that Keen was anything more than an application of our long-standing Tedder analysis.

> Tedder is the seminal case in Florida on jury overrides and remains so after Keen. Tedder was applied to this case. Keen provides no basis for our reconsideration of this issue. For these reasons, we deny Mills' petition for writ of habeas corpus.

Mills at 539-40.

Similarly, here, Marshall's petition for writ of habeas corpus must be denied.

WHEREFORE, the State respectfully requests that this Honorable Court dismiss this petition based on procedural default, or in the alternative deny all relief based on the merits.

Respectfully submitted,
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AMENDED CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that a true copy of the foregoing Response to the Petition for Writ of Habeas Corpus has been furnished by United States mail to MELISSA MINSK DONOHO AND LEOR VELEANU,

Capital Collateral Regional Counsel- South, 101 N.E. 3rd Ave., Suite 400, Ft. Lauderdale, Fl. 33301, this 4th day of April, 2002.

____
DEBRA RESCIGNO

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY the size and style of type used in this brief is 12 point Courier New, a font that is not proportionally spaced.

____
DEBRA RESCIGNO