IN THE SUPREME COURT OF FLORIDA

ROBERT BEELER POWER,

Petitioner,

v.

James v. Crosby, Jr., ETC.

Respondent.

CASE NO. SC03-28

RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

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PRELIMINARY STATEMENT

Respondent, James v. Crosby, Jr., Secretary, Florida Department of Corrections, will be referenced in this brief as Respondent. Petitioner, Robert Beeler Power, the defendant in the trial court, will be referenced in this brief as Petitioner or Power.

The consecutively paginated direct appeal record will be referenced by the letter “R,” followed by any appropriate page number. The consecutively paginated postconviction record will be referenced by the letters "PC," followed by any appropriate page number. “Pet.” will designate Petitioner’s petition, followed by any appropriate page number.

All bold-type emphasis is supplied, and all other emphasis is contained within original quotations unless the contrary is indicated.

PROCEDURAL HISTORY

Respondent would make the following addition to the procedural history. This Court recounted the facts of the case as follows:

> The conviction arises from events occurring on October 6, 1987, when Frank Miller, a friend of the Bare family, arrived at the Bare home with his daughter to pick up twelve-year-old Angeli Bare for school. When he arrived, Miller honked the horn twice. He then glanced at the house where he saw a man standing inside the doorway with his back to the street. Miller assumed the man was Angeli's father because he was approximately the same build. The man made a gesture which Miller interpreted as meaning for him to wait. Miller remained in his car. When he next looked, he noticed the front door

was closed with no one in sight. At approximately 8:55 a.m., Angeli came out of her house and walked down to the sidewalk to Miller's car. She approached within three feet of the passenger side of the car (the side closest to the house), and stopped. At that point, Miller noticed that Angeli appeared very nervous.

Angeli told Miller that there was a man in the house who she believed wanted to rob her. Angeli refused Miller's repeated requests to get into the car because, she said, the man in the house would kill all three of them. Miller told Angeli that he would get help and immediately drove the four blocks back to his own house and called the Bares at work and 911. Miller then drove back and parked four or five houses away from the Bares' home.

At approximately 9:10 a.m., Deputy Richard Welty received a radio dispatch and drove to the Bare home. En route, he was flagged down by Miller who related what he saw. Miller described the man he had seen as a white male with reddish hair. Mr. and Mrs. Bare, who had just arrived, stated that Angeli's biological father, who lived in California, had reddish hair.

Deputy Welty went to the Bare home and searched it but found nothing. After another officer arrived, Welty went to check the field behind the Bare home. Welty walked west into an area filled with heavy brush and trees. He followed a path with his revolver drawn in one hand and his two-way radio in the other. When the footing became treacherous, Welty holstered his gun as a safety precaution, and proceeded down the path. Welty then noticed a white male with sandy blond hair walking casually through the field. The man, who was wearing worn blue jeans and a dungaree-style shirt, appeared to have a sandwich in his right hand and was "high-stepping" through the field toward a nearby construction site.

Because Welty was originally looking for a man with reddish hair, he called a fellow officer on the radio to ask for a better description from Frank Miller. While talking on the radio, Welty became unsure of his footing, looked down, and when he looked up again, found himself facing the man he had seen earlier now pointing a gun at him. Welty subsequently identified the man as Robert Power.

Power told Welty to hand over his sidearm. Welty thrust his hands into the air and then slowly reached for his pistol. Power then ordered Welty to put his hands into the air once again and retrieved Welty's pistol himself. Power asked Welty, "How many others are there?" Deputy Welty told Power that there were "six deputies on the scene." After a lengthy pause, Power asked for and received Welty's radio. Power then ordered the deputy to run in the direction of the construction site and warned him, "If you turn around, I will kill you." Welty jogged about thirty feet, stopped, looked back, and saw Power running west towards U.S. 441. Angeli Bare's body was found in the same general direction later that morning.

Welty ran back to the Bare home and reported that the culprit had his radio and service revolver. The police set up a perimeter but were unable to apprehend the fleeing suspect.

It was late morning or early afternoon before authorities found the body of Angeli Bare in the tall grass of the field behind her home. The body was lying on its right side, gagged and "hog-tied" by the wrists and ankles. The body was nude from the waist down. Lying nearby were her school books, jacket, purse, and an empty paper lunch bag. Officer Welty's service revolver was later found in a wooded area near the canal.

The autopsy revealed that the victim's left eye was blackened and that she had superficial contusions on her neck. In the medical examiner's opinion, the death of Angeli Bare resulted from shock following exsanguination due to the severance of the right carotid artery. The artery was cut by a stab wound on the right side of her neck. The autopsy also revealed injuries to the vaginal and anal area. The doctor estimated that these injuries were the result of the insertion of an oversized foreign object, perhaps a human penis. The doctor approximated the time of death as within thirty minutes of 9:15 a.m. The crime lab serologist found no semen on the victim's underwear. Vaginal, rectal, and oral swabs revealed no spermatozoa. Blood stains found on the victim's underwear were the same blood type as that of the victim.

Police conducted a thorough search of the Bare home. They found no signs of a struggle or forced entry. Angeli's bank had been pried open and a

screwdriver was found in the kitchen sink. None of the latent prints found by the crime scene technicians matched Robert Power. Latent fingerprints found on Officer Welty's service revolver also did not match Robert Power. Police found no latent fingerprints of any kind on the victim's body. According to the State's experts, however, three pubic hairs from Angeli's bedspread were indistinguishable from Power's known pubic hairs, and one pubic hair from Angeli's fitted bed sheet was indistinguishable from Power's. Additionally, a single hair recovered during the autopsy from Angeli's pubic area was indistinguishable from Power's pubic hair.

The State's experts agreed that a number of head hairs of unknown origin found in the sheets of Angeli's bedding did not match Power's. Numerous hairs recovered from the bedding and clothing remained unidentified at the time of trial.

Approximately ten days after the murder, Officer Welty identified a photograph of Robert Power as the man who robbed him in the field. A SWAT team executed a search warrant at the residence of Robert Power, who lived at the house with his mother, her youngest daughter, her eldest son, that son's wife, and their three children. Robert Power was found hiding in the attic and was arrested. Police seized a maroon duffle bag from the attic that was close to Power. The duffle bag contained a pistol, some ammunition, a pair of tan driving gloves, a red bandanna, at least three documents with Robert Power's name on them, and a folding knife.

Police also found a box in the front bedroom containing various electronic parts, one of which contained a serial number corresponding to the serial number of the radio that was taken from Deputy Welty. An exhaustive examination of the box revealed numerous latent fingerprints, none of which matched Robert Power's. The crime lab was unable to find any useful latent prints on the radio parts inside the box. Police seized some green, hooded sweatshirts and several denim work shirts from the front bedroom. According to the State's experts, two of three head hairs recovered from the sweatshirts were consistent with Angeli Bare's.

The jury found Power guilty of first-degree murder, sexual battery, kidnapping of a child under

> the age of thirteen, armed burglary of a dwelling, and armed robbery. The jury [unanimously] recommended death for the homicide.

Power v. State, 605 So.2d 856, 858-60 (Fla. 1992).

ARGUMENT

Jurisdiction

This Court has jurisdiction pursuant to Article V, section 3(b)(9) of the Florida Constitution.

CLAIM I

WHETHER POWER'S APPELLATE COUNSEL FAILED TO RAISE ON DIRECT APPEAL NUMEROUS MERITORIOUS ISSUES THAT WARRANT REVERSAL OF EITHER OR BOTH THE CONVICTION AND SENTENCE OF DEATH?

Standard of Review

This Court's habeas corpus standard of review for ineffective assistance of appellate counsel mirrors the Strickland standard for trial counsel ineffectiveness. See Rutherford v. Moore, 774 So.2d 637, 643 (Fla.2000). This Court said in Rutherford:

> [T]his Court's ability to grant habeas relief on the basis of appellate counsel's ineffectiveness is limited to those situations where the petitioner establishes first, that appellate counsel's performance was deficient because "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, 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."

Id. at 643 (quoting Thompson v. State, 759 So.2d 650, 660 (Fla.2000)). Further, "Counsel cannot ordinarily be considered ineffective under this standard for failing to

raise issues that are procedurally barred because they were not properly raised during the trial court proceedings." Lawrence v. State, 27 Fla. L. Weekly S877 (Fla. Oct. 17, 2002). "Moreover, appellate counsel cannot be deemed ineffective for failing to raise non-meritorious claims on appeal." Id.

CLAIM I(B)

In Power's subsection B[1], he claims that appellate counsel's failure to raise prosecutorial misconduct was ineffective and he was prejudiced by these impermissible inflammatory remarks, and that relief is warranted. (Pet. at p. 11). Respondent respectfully disagrees.

On direct appeal, Power raised the issue of whether the prosecutor improperly commented on his failure to testify in violation of his constitutional right against self-incrimination. This Court found the error, if any, under the circumstances of this case, was harmless. Power, 605 So.2d at 861. Power acknowledges that appellate counsel raised the prosecutor's alleged reference to his right not to testify, but argues that it was not set in the context of the instances of misconduct alleged herein.

When analyzing claims that appellate counsel was ineffective for failing to raise additional arguments in

[1]Power's subsection A merely contains an introduction.

support of a claim raised on direct appeal, this Court has previously observed that:

> "petitioner's contention that [the point] was inadequately argued merely expresses dissatisfaction with the outcome of the argument in that it did not achieve a favorable result for petitioner." We therefore decline petitioner's invitation to utilize the writ of habeas as a vehicle for the re-argument of issues which have been raised and ruled on by this Court.
>
> *Routly v. Wainwright*, 502 So.2d 901, 903 (Fla.1987) (quoting *Steinhorst v. Wainwright*, 477 So.2d 537, 540 (Fla.1985)); *see also Grossman v. Dugger*, 708 So.2d 249, 252 (Fla.1997) (finding claim that appellate counsel was ineffective for failing to make arguments "more convincingly" to be procedurally barred in a habeas petition).

Rutherford v. Moore, 774 So.2d 637, 645 (Fla. 2000).

"Under these precedents, if an issue was actually raised on direct appeal, the Court will not consider a claim that appellate counsel was ineffective for failing to raise additional arguments in support of the claim on appeal." Id. In this case, a claim of prosecutorial misconduct was raised by counsel at trial and by appellate counsel on direct appeal. In this habeas petition, Power argues that the issue raised on direct appeal was not set in the context of the other instances of misconduct alleged herein. To the extent Power is simply raising additional arguments in support of the previously denied claim of prosecutorial misconduct, this Court should not consider the instant claim. Id.

To the extent Power is presenting an issue of prosecutorial misconduct independent of the prosecutorial

misconduct issue raised on direct appeal, Power does not address in any way whether these other alleged instances of prosecutorial misconduct were raised during the trial court proceedings. Despite failing to establish that the instant claim was raised during the trial proceedings, Power makes no claim that these allegedly improper comments or arguments constitute fundamental error. In the absence of a citation to the record where this claim was preserved, or a showing that this claim rose to the level of fundamental error, Power has not demonstrated entitlement to habeas relief because appellate counsel cannot be considered ineffective for failing to raise issues that were not properly raised during the trial court proceedings. Lawrence v. State, 27 Fla. L. Weekly S877 (Fla. Oct. 17, 2002).

As Power has neither shown that this claim was preserved or claimed, or shown, that this claim rises to the level of fundamental error, he is simply seeking to use the instant petition as a second appeal of an issue that was raised or should have been raised on appeal or in a rule 3.850 motion; however, such a claim is procedurally barred. Bottoson v. State, 813 So.2d 31, 35 (Fla. 2002).

Finally, should Power attempt to satisfy his burden of showing that this claim was raised during the trial proceedings or that this claim rises to the level of fundamental error in his reply, Respondent respectfully requests that he be permitted to respond to those assertions

as they ought to have been included in the petition this Court has ordered addressed by Respondent.

CLAIM I(C)

In Power's subsection C, he claims, noting the objection raised in the circuit court, that appellate counsel's failure to raise the State's introduction of details of his prior violent felonies[2] constituted deficient performance and resulted in substantial prejudice. (Pet. at p. 11 & 13). Respondent respectfully disagrees.

Power's argument addresses the relevance of the objected to testimony to the establishment of the prior violent felony aggravator for his death sentence, and whether the prejudicial effect of the evidence outweighed its probative value as to that aggravator. (Pet. at pp. 11-13). However, this testimony was used by the State to argue that the murder was cold, calculated, and premeditated (R, 2546-47, & 2579-80), and used by the trial court to find the aggravator that the murder was cold, calculated, and premeditated without any pretense of moral or legal justification (R, 3266-67). The use of this testimony to find CCP was successfully challenged by appellate counsel on direct appeal. Power, 605 So.2d at 864 (finding that the evidence could establish a plan to rape, not necessarily a plan to kill).

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[2]"At trial, the State unsuccessfully attempted to introduce evidence that Power was convicted of committing five other sexual batteries the month before the present killing." Power, 605 So.2d at 861 n7.

In the circuit court, when Power objected to this testimony, the State relied on this Court's ruling in Stewart v. State, 558 So.2d 416 (Fla. 1990), to argue that this evidence went to Power's propensity to commit violent crimes, a valid consideration for the jury and the judge. (R, 2385). In Stewart, this Court upheld its earlier ruling in Elledge v. State, 346 So.2d 998, 1001 (Fla. 1977), that "'[p]ropensity to commit violent crimes surely must be a valid consideration for the jury and the judge,'" to find no error. Id. at 419. Thus, Power cannot show that it was professionally unreasonable not to challenge the admission of the testimony in light of this authority for its admission. Accordingly, the winnowing out of this weaker argument in favor of the successful challenge to the finding of CCP, does not comprise an omission of such magnitude to constitute a serious error or substantial deficiency falling outside the range of professionally acceptable performance.

Finally, it cannot be contested that this testimony had a far less prejudicial effect on the jury than the prejudicial effect of the evidence they heard concerning the abduction, rape, and murder of twelve year old Angeli Bare, as these victim's survived Power's attacks.

CLAIM I(D)

In Power's subsection D, he claims that appellate counsel was ineffective for failing to raise a cumulative

error claim. (Pet. at p. 15). Respondent's respectfully disagree.

In Porter v. Moore, 27 Fla. L. Weekly S606 (Fla. June 20, 2002), this Court found that:

> Porter's claim four and subclaim (f) of claim two, the cumulative error claims, are insufficiently pled under *Strickland* because Porter points to no specific claim of error; instead, he only generally asserts there were errors revealed in the direct appeal, the rule 3.850 motion, the appeal of the denial of the rule 3.850 motion, and this habeas petition. *See Freeman v. State*, 761 So.2d 1055, 1069 (Fla.2000) ("The defendant has the burden of alleging a specific, serious omission or overt act upon which the claim of ineffective assistance of counsel can be based.").

In support of the instant claim, Power asserts that "these errors cannot be harmless." (Pet. at 15). However, he does not point to any specific error; therefore, this claim is insufficiently pled under Strickland. Id.

Regardless of the insufficiency of the pleading, as all of his claims are either meritless or procedurally barred, there is no cumulative effect to consider.

CLAIM II

> WHETHER POWER CAN USE THE INSTANT HABEAS PETITION TO RELITIGATE THIS COURT'S PROPORTIONALITY REVIEW OF HIS DEATH SENTENCE?

In this claim, Power relies primarily on this Court's holding in Muhammed v. State, 782 So.2d 343 (Fla. 2001), to argue that "[t]his Court's ability to conduct a proper proportionality review on the record of Mr. Power's capital trial [due to Power's waiver of the presentation of evidence

on mitigation] taints the entire harmless error analysis." (Pet. at pp. 17-18). Here, as in Williams v. Wainwright, 503 So.2d 890, 891-2 (Fla. 1987), Power is attempting to relitigate the proportionality issue by directing this Court's attention to a case decided subsequent to this Court's decision in Power's case. However, "[i]t is clear that Muhammad is not applicable to the instant case because it was decided on January 18, 2001 - [over ten years] after [Power's] sentencing on November [8, 1990]." Ocha v. State, 826 So.2d 956, 962 (Fla. 2002)(noting that the Muhammad opinion specified that its requirements were prospective only).

Further, "to accept petitioner's suggestion would render a proportionality analysis on direct appeal a futile exercise. Cases where the death penalty is affirmed on direct appeal would thus be capable of being relitigated under the guise of a petition for habeas corpus, as evolutionary refinements in the case law would undoubtedly produce enough variant results to at least arguably present an avenue of attack on proportionality grounds." Williams, 503 So.2d at 891.

CLAIM III

WHETHER POWER CAN USE THE INSTANT HABEAS PETITION TO CHALLENGE THE CONSTITUTIONALITY OF FLORIDA'S DEATH PENALTY STATUTE UNDER APPRENDI/RING?

Power argues that the applicability of Ring to the Florida death penalty statute is plain and that he should be granted relief. Respondent respectfully disagrees.

Initially, Respondent would note that Power's reliance on Ring is misplaced, because Ring has no application to cases not on direct review.

> Decided in June 2002, Ring, and its holding that a jury, not a judge, must make any factual findings which increase a sentence from imprisonment to death, is not implicated in this case. The Supreme Court did not, and has not, expressly made the ruling in Ring retroactive. See, e.g., Ring, 122 S.Ct. at 2449-50 (O'Connor, J., dissenting) (noting that current state death row inmates will not be able to invoke the principles of Ring and citing Teague v. Lane, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989)). Absent an express pronouncement on retroactivity from the Supreme Court, the rule from Ring is not retroactive. See Tyler v. Cain, 533 U.S. 656, 663, 121 S.Ct. 2478, 150 L.Ed.2d 632 (2001) (holding that "a new rule is not 'made retroactive to cases on collateral review' unless the Supreme Court holds it to be retroactive") (quoting 28 U.S.C. S 2244(b)(2)(A)).

Moore v. Kinney, 320 F.3d 767, 771 n3 (3rd Cir. 2003).

Next, Respondent would note that Ring, an extension of the Supreme Court's holding in Apprendi v. New Jersey, 530 U.S. 466 (1999), to death penalty cases, is not implicated in Florida, because the maximum penalty for a capital felony in Florida is death. See e.g., Porter v. Moore, 27 Fla. L. Weekly S606 (Fla. June 20, 2002)(noting that this Court has repeatedly held that the maximum penalty under the statute is death).

Finally, Respondent would note that Ring, should it ever be applied retroactively, has no application to the facts of this case. Power's death sentence was based in part on his previous conviction(s) for a felony involving the use or threat of violence. Power, 605 So.2d at 860. Clearly, these convictions were based on unanimous findings of a jury. Further, Power's death sentence was based in part on the murder being committed while he was engaged in the commission of the crimes of sexual battery, burglary, and kidnapping. Id. This aggravator was charged in the indictment (R, 2676-77), and found unanimously by the jury. Id. Finally, Power's jury recommended his death unanimously. (R, 3258).

CONCLUSION

Wherefore, the State, based on the foregoing arguments and authorities, respectfully requests that this Honorable Court deny the Petition for Writ of Habeas Corpus.

SIGNATURE OF ATTORNEY AND CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to: Pamela H. Izakowitz, CCRC - South, P. O. Box 3294, 303 S. Westland Ave., Tampa, FL 33601-3294, by MAIL on April ____, 2003.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the font requirements of Fla. R. App. P. 9.210.

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