IN THE SUPREME COURT OF FLORIDA

CASE NO. SC05-2021

CHADWICK WILLACY

Petitioner,

v.

JAMES V. CROSBY, Secretary,
Florida Department of Corrections

Respondent.

RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

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PROCEDURAL HISTORY

Marlys Sather was murdered September 5, 1990. On October 17, 1991, Willacy was convicted of first degree murder, burglary of a dwelling with assault, robbery with a deadly weapon, and first-degree arson. The jury recommended death by a vote of nine to three. Willacy raised the following guilt-phase issues on direct appeal:

> (1) The court committed reversible error when it refused the defense an opportunity to rehabilitate a prospective juror;
>
> (2) A prospective juror was improperly challenged based on his race;
>
> (3) The jury foreman was ineligible to serve;
>
> (4) The court improperly found that Willacy's statements were voluntarily made.

This Court affirmed the conviction but reversed the sentence because trial counsel was not afforded the opportunity to rehabilitate a venire person who was opposed to the death penalty. *Willacy v. State*, 640 So. 2d 1079, 1081 (Fla. 1994)(*"Willacy I").*

On retrial, the court followed the jury's eleven-to-one recommendation and sentenced Willacy to death, finding five aggravating circumstances:

> (1) The murder was committed in the course of a robbery, arson, and burglary;

(2) The murder was committed to avoid lawful arrest;

(3) The murder was committed for pecuniary gain;

(4) The murder was especially heinous, atrocious, or cruel (HAC);
and

(5) The murder was committed in a cold, calculated, and premeditated manner (CCP).

The trial judge found no statutory mitigating circumstances. Willacy proposed thirty-seven separate mitigating factors. The trial court rejected six factors, and gave the others little weight. Willacy was sentenced to death. He raised eleven issues on direct appeal:

(1) The denial of the motion for recusal of the judge;

(2) The admission of inflammatory evidence;

(3) The finding of heinous, atrocious, or cruel;

(4) The finding that the murder was committed to evade arrest;

(5) The finding of pecuniary gain;

(6) The finding of cold, calculated, and premeditated;

(7) The death sentence is disproportionate;

(8) The admission of victim impact evidence;

(9) The refusal to strike jurors for cause;

(10) Cumulative error; and

(11) The death penalty statute is unconstitutional.

Willacy v. State, 696 So. 2d 693, 694-695 (Fla. 1997)(*"Willacy II"*).

A petition for writ of certiorari to the United States Supreme Court was denied November 10, 1997. *Willacy v. Florida*, 522 U.S. 970 (1997). Willacy filed a "shell" Motion to Vacate on May 11, 1998. He filed an Amended Motion for Postconviction Relief on March 18, 2002. The State filed a Response on April 30, 2002. After legal argument, the trial court issued an order on December 19, 2002, outlining the claims on which there would be an evidentiary hearing. The trial court amended that order on September 24, 2003, summarily denying some claims and allowing an evidentiary hearing on others. An evidentiary hearing was allowed on Claims I, II, VII, X, XIII, XVII, XVIII, XIX, XXI, XXII, XXIII, XXIV, XXV, and XXXI. After hearing, the trial court entered an Order Denying Defendant's Amended Motion for Postconviction Relief. That order is currently on appeal before this Court. Case No. SC05-189.

ARGUMENT I

APPELLATE COUNSEL WAS NOT INEFECTIVE FOR FAILING TO RAISE LACK OF PROBABLE CAUSE TO ARREST.

Willacy argues that appellate counsel was ineffective for failing to raise an issue on direct appeal regarding probable cause to arrest. Trial counsel filed three motions to suppress: (1) Motion to Suppress Statements (DAR[1] 3308-09); (2) Motion to Suppress Identification (DAR 3307-07); and Motion to Suppress Physical Evidence (DAR 3303-05). The issue of probable cause was raised in both the first and third motions. The trial judge granted the motion to suppress statements because Willacy invoked his right to counsel, but found probable cause to arrest existed (DAR 3338-39). The trial judge found:

> This Court further finds that there was sufficient probable cause for the Defendant's arrest without the need for validity of the tainted identification. Probable cause exists if a reasonable man, having the specialized training of a police officer, in reviewing the facts known to him, would consider that a felony is being or had been committed by the person under suspicion. Mayo v. State, 382 So.2d 327 (Fla. 1st DCA 1980).

(R3339).

[1] "DAR" refers to the record on appeal from the 1991 trial, Florida Supreme Court Case No. 79,217. "R" refers to the current record on appeal which also contains the record from re-sentencing in 1995.

The trial judge granted the motion to suppress the identification (R3340). The judge denied the motion to suppress physical evidence, making a specific finding on probable cause:

> The Defendant complains that there was insufficient probable cause for the execution of the Search Warrant which disclosed the evidence in question, and complains further that the Affidavit in support of the Search Warrant contained knowingly false information.
>
> The Court finds that even after excising the Defendant's statement, and disregarding the improper show up identification, that there remains sufficient probable cause in the affidavit to support the Search Warrant.
>
> > "A magistrate's determination should be accorded a presumption of correctness and not disturbed absent a clear demonstration that the issuing magistrate abused his discretion. State v. Price, 564 So. 1239 (Fla. DCA 1990)."[sic]
>
> This Court further relies on the fact that the police officer in executing the Affidavit for Search Warrant acted in good faith, despite his reliance upon a defective identification, and the protected statement of the Defendant. State of Florida v. Van Pieterson, 550 So.2d 1162 (Fla. DCA 1989).

(DAR 3341).

Willacy's argument assumes there was no probable cause to arrest, thus the evidence obtained from the arrest (fingerprints) cannot be considered in the search warrant. Willacy's analysis also presumes bad faith on the part of law enforcement preparing the search warrant affidavit.

The trial court held a lengthy hearing on the motions to suppress. (DAR 2905-3217). Detective Santiago testified that, after they had roped off the scene and videotaped the inside of the victim's house, Willacy drove up (DAR 2983). Willacy was unable to pull in his driveway, because the police had roped off the victim's house and Willacy's house, which was next door (DAR 2984). Santiago explained that they were investigating a crime, and thought someone might have broken into Willacy's house because there was a broken window (DAR 2984). Willacy said the window was broken before and had cardboard covering it (DAR 2984). Santiago pointed out that there was no cardboard there, and asked if they could look inside Willacy's home to make certain nothing was missing; Willacy "wasn't too happy with th[e] idea" of having his house searched, but permitted it (DAR 2984). Santiago asked some general questions, and Willacy related that he had a girlfriend and where she worked (DAR 2985). Willacy also told Santiago that he had not seen the victim since Saturday, that his girlfriend and he were in Orlando on Sunday and did not return until early Tuesday morning, and that he worked on Tuesday, but not on Wednesday (DAR 2991-92). Willacy also stated that he cut the victim's lawn, used her mower and gasoline, had never been in the victim's house, but had been in the garage to get the mower, and had not argued with the victim about money (DAR 2993-94).

Santiago spoke with the victim's neighbor across the street, who stated that the victim and Willacy had an argument about Willacy wanting to be paid for mowing the victim's lawn before he had mowed the lawn (DAR 2986). A neighbor who lived behind the victim saw a muscular black male exit the wooded area next to the victim's house and get in a two toned, four-door car (DAR 2986-87). Several other neighborhood people stated that they saw a black male walking in the area and driving a two-toned car (DAR 2988).

Santiago instructed Detective Ciccone to interview Willacy's girlfriend at work. Walcott stated that Willacy went to Orlando on Monday and returned early Tuesday morning (DAR 2992). Walcott related that Willacy had cut the victim's lawn on Sunday (DAR 2992).

Santiago then scheduled an appointment with Willacy, based on the information he had, Willacy's admission that he had been in the victim's garage, and the fact that blood had been found in the garage (DAR 2994). Specifically, Santiago asked for Willacy's fingerprints to "eliminate [him] from the crime scene" (DAR 2994). Willacy refused, but admitted to having been arrested in New York (DAR 2995). Santiago said he did not understand "this silliness," and advised that he would have New York fax Willacy's prints to him (DAR 2995). They set an

appointment for Willacy to come to the police station, but Willacy did not keep the appointment (DAR 2996).

Willacy gave a voluntary statement at his house, which Santiago recorded (DAR 2997). After Santiago advised Willacy of his rights, Willacy said that he was in Orlando on Monday, came back on Tuesday, worked for Labor Force on Wednesday, and did not work on Thursday (DAR 2999). Willacy stated that, on Thursday, he was on the roof cleaning off shrubbery.

Santiago testified that Officer Williams took Willacy to the Palm Bay Police Department, while Santiago went to the station to complete an arrest form and search warrant (DAR 3014-15). Santiago received a phone call from the booking officer that Willacy refused to give his fingerprints; Santiago said he would be "right over" (DAR 3015-16). When Santiago arrived, Willacy was on the phone with the Public Defender's Office (DAR 3016-17).

Willacy testified that, after his arrest, he spoke with the public defender's office and was advised to give his fingerprints but not to speak with officers until he had spoken with a lawyer (DAR 3059-60). Willacy cooperated with the fingerprinting procedure, and informed Santiago that the public defender told him not to speak with anyone (DAR 3062). In the meantime, Santiago had fingerprints faxed from New York (DAR 3099). The prints Willacy voluntarily provided were compared to

prints found at the murder scene (DAR 3100). Willacy's prints matched a video rewinder on Mrs. Sather's back porch, a gas can in the kitchen, and a fan in the room in which Mrs. Sather was set on fire (DAR 3101). The fingerprints were compared after the arrest but before the search warrant (DAR 3103).

The information the police had at the time Willacy was arrested was that: the murder most likely occurred during a burglary because items were stacked on Mrs. Sather's porch for later retrieval; a maroon and beige Ford was stolen, a neighborhood canvass produced witnesses who saw a muscular black male in his twenties in the area, the vehicle was abandoned a mile away, Willacy failed to show for an appointment with police (DAR 2996), Willacy gives statement that he mows Mrs. Sather's lawn but has never been in the house (DAR 2993), Willacy was on his roof the day of the murder but never saw Rev. Stewart at Mrs. Sather's house (DAR 3002), Willacy refused to give fingerprints (DAR 2995), Marisa's father found Mrs. Sather's checkbook ledger in Willacy's trash can and called the police (DAR 3004), Willacy tried to get the ledger from Marisa (DAR 3005), the penmanship on the ledger was compared to Mrs. Sather's by Mr. Cockriel and Santiago (DAR 3009).

The evidence the officers placed in the affidavit for the search warrant included: items on the back porch, maroon and beige car missing, eyewitnesses describing a muscular black male

in his twenties, vehicle left at Lynbrook Plaza one mile from Willacy's residence, Willacy failed to show for interview, refusal to give fingerprints, sworn statement at Willacy's house, call from Marisa Walcott that her father found a check ledger in the bathroom waste basket, Willacy tried to obtain the book from Marisa, bank ledger identified by family members, Willacy fingerprint found within crime scene (DAR 3266-67).

The trial court order was based on the facts and law, and is presumed correct on appeal. Appellate counsel raised eight strong issues on appeal, one of which resulted in reversal of the sentence. Appellate counsel cannot be deemed ineffective for failing to raise a claim which "would in all probability" have been without merit. *Rutherford v. Moore*, 774 So. 2d 637, 643 (Fla. 2000) (*quoting Williamson v. Dugger*, 651 So. 2d 84, 86 (Fla. 1994); *Mansfield v. State*, 911 So. 2d 1160 (Fla. 2005). Likewise, 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 nonfrivolous issue." *Valle v. Moore*, 837 So. 2d 905, 908 (Fla. 2002); *Zack v. State*, 911 So. 2d 1190(Fla. 2005). Appellate counsel is not required to present every conceivable claim. See *Atkins v. Dugger*, 541 So. 2d 1165, 1167 (Fla. 1989) ("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."). *See also Davis v. State*, 30 Fla. L. Weekly S709 (Fla. Oct. 20, 2005).

In evaluating a claim of ineffective assistance of appellate counsel, this Court determines 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 "whether the deficiency in performance compromised the appellate process to such a degree as to undermine confidence in the correctness of the result." *Groover v. Singletary*, 656 So. 2d 424, 425 (Fla. 1995) (*quoting Pope v. Wainwright*, 496 So. 2d 798, 800 (Fla. 1986)). When analyzing the merits of the claim, "the criteria for proving ineffective assistance of appellate counsel parallel the *Strickland*[2] standard for ineffective trial counsel." *Rutherford*, 774 So. 2d at 643 (*quoting Wilson v. Wainwright*, 474 So. 2d 1162, 1163 (Fla. 1985)). Thus, this 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 and second, that the petitioner was prejudiced because appellate counsel's deficiency compromised

[2] *Strickland v. Washington*, 466 U.S. 668 (1984).

the appellate process to such a degree as to undermine confidence in the correctness of the result. *See id.* Willacy has shown neither deficient performance nor prejudice.

ARGUMENT II

APPELLATE COUNSEL WAS NOT INEFFECTIVE IN HIS TREATMENT OF THE "JUROR CLARK" ISSUE ON APPEAL

Willacy claims that appellate counsel was ineffective for not raising the Juror Clark issue in the appropriate fashion on appeal. The first claim, regarding objections to the order, is based on a series of non-record information and is basically an effective-assistance-of-trial counsel issue because trial counsel failed to obtain a ruling on his objections to the order on the motion for new trial. The rest of the issues raised in this claim are repetitive of the issues raised in Willacy's 3.851 postconviction motion regarding whether Juror Clark was "under prosecution" or engaged in misconduct. Not only was this issue decided in *Willacy I*, but it was raised in a variety of ways in the 3.851 motion. Although Willacy has couched these claims in terms of ineffective assistance of appellate counsel, he cannot overcome a procedural default by recasting the argument in the guise of an ineffective assistance claim. *See Freeman v. State*, 761 So. 2d 1055, 1067 (Fla. 2000). Additionally, to the extent this issue is couched in different terms than those in *Willacy I* and the 3.851 appeal, habeas corpus petitions are not to be used for additional appeals on questions which could have been or were raised on appeal or in a rule 3.850 motion. *See Hardwick v. Dugger*, 648 So. 2d 100, 105

(Fla. 1994); *Rodriguez v. State*, 30 Fla. L. Weekly S385 (Fla. May 26, 2005).

It is well recognized that a defendant may not couch a claim decided adversely to him on direct appeal in terms of ineffective assistance of counsel in an attempt to circumvent the rule that post-conviction relief proceedings may not serve as a second appeal. *See Cherry v. State*, 659 So. 2d 1069, 1072 (Fla. 1995); *see also Parker v. Dugger*, 550 So. 2d 459, 460 (Fla. 1989) ("Habeas corpus petitions are not to be used for additional appeals on questions which . . . were raised on appeal or in a rule 3.850 motion . . . ."); *Rutherford v. Moore*, 774 So. 2d 637, 645 (Fla. 2000) (holding that when a claim is actually raised on direct appeal, the Court will not consider a claim that appellate counsel was ineffective for failing to present additional arguments in support of the claim on appeal). *See* also, *Zack v. State*, 911 So. 2d 1190 (Fla. 2005).

Because, as previously argued, this is actually an ineffective-assistance-of-trial-counsel claim because he failed to obtain a ruling on his objections, appellate counsel cannot be deemed ineffective for failing to raise an unpreserved issue on appeal. *See Randolph v. State*, 853 So. 2d 1051, 1066 (Fla. 2003). *Zack v. State*, 911 So. 2d 1190 (Fla. 2005).

ARGUMENT III

APPELLATE COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO RAISE ISSUES ON WHICH THERE WERE NO OBJECTIONS AND WHICH HAD NO MERIT.

In this claim Willacy argues that counsel was ineffective for failing to raise whether Lucille Rich, Clerk of Court, swore the jurors. Not only was this issue raised in the Rule 3.851 motion, but also it is procedurally barred and has no merit. When this Court relinquished jurisdiction during the original direct appeal, the trial court conducted a hearing on October 12, 1992. This transcript was before this court in *Willacy I*. In the trial court's order for Claim XIV on the amended motion for postconviction relief, the judge notes that Lucille Rich, the jury clerk, testified on October 12, 1992, that she *did, in fact*, swear the jury. (R2601-2602). The trial judge attached that hearing to his order. (R2677-79).

The fact of the matter is there was no objection to the procedure used and Willacy acknowledges that the district courts of appeal have approved the procedure of qualifying and swearing the jury out of the presence of the trial judge. To avoid the procedural bar for the lack of objection, Willacy couches this claim as fundamental error. Appellate counsel is not ineffective for failing to raise an issue that has not been preserved for appellate review. The only exception to this procedural bar is if the issue constitutes fundamental error. *See Urbin v. State*,

714 So. 2d 411, 418 n.8 (Fla. 1998); *Bonifay v. State*, 680 So. 2d 413, 418 n.9 (Fla. 1996). Fundamental error is defined as the type of error which "reaches down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error." *Urbin*, 714 So. 2d at 418 n.8 (quoting *Kilgore*, 688 So. 2d at 898). *Zack v. State*, 911 So. 2d 1190 (Fla. 2005); *Davis v. State*, 30 Fla. L. Weekly S709 (Fla. Oct. 20, 2005). Willacy admits there was no such error under prevailing case law, but urges this Court not only to change established law, but also to apply it retroactively.

Furthermore, this issue was raised in the Rule 3.851 motion and is currently pending before this Court on appeal. Case No. SC05-189. Habeas corpus petitions are not to be used for additional appeals on questions which could have been or were raised on appeal or in a rule 3.850 motion. *See Hardwick v. Dugger*, 648 So. 2d 100, 105 (Fla. 1994); *Rodriguez v. State*, 30 Fla. L. Weekly S385 (Fla. May, 26, 2005).

ARGUMENT IV

APPELLATE COUNSEL WAS NOT INEFFECTIVE IN FAILING TO RAISE THE ISSUE REGARDING THE INSTRUCTION ON THE COLD, CALCULATED, PREMEDITATED AGGRAVATING CIRCUMSTANCE.

Willacy claims the aggravating circumstance on cold, calculated, and premeditated did not properly inform the jury of the degree of premeditation required. Willacy admits the trial judge gave the standard jury instruction. He also states that re-sentencing counsel requested an instruction. Willacy's first cite is to the following request by counsel: "I think you need to define premeditated murder and felony murder so they know the difference." (1991R 2984). The second cite is to a discussion in which counsel requested full instructions on both felony and premeditated murder, with the caveat that the "verdict form did not specify whether he was guilty of premeditated murder, felony murder or both." (1991R 2991). The third cite refers to an instruction that Willacy was a principal (1991R 2992-93).

The issue Willacy now argues on appeal was not argued at the trial level and was not preserved for appellate review. Therefore, appellate counsel is not ineffective. Furthermore, this issue has no merit. The trial judge gave the standard instruction which explains the heightened premeditation required for cold, calculated, and premeditated aggravating circumstance.

Appellate counsel cannot be deemed ineffective for failing to raise a claim which "would in all probability" have been without merit or would have been procedurally barred on direct appeal. *Rutherford v. Moore*, 774 So. 2d 637, 643 (Fla. 2000) (quoting *Williamson v. Dugger*, 651 So. 2d 84, 86 (Fla. 1994)). *Mansfield v. State*, 911 So. 2d 1160 (Fla. 2005).

ARGUMENT V

RING V. ARIZONA DID NOT RENDER FLORIDA'S DEATH PENALTY STATUTE UNCONSTITUTIONAL.

Willacy, without challenging appellate counsel's effectiveness, makes a direct challenge to his death sentence on the grounds it violates *Ring v. Arizona*, 536 U.S. 584 (2002) and *Apprendi v. New Jersey*, 530 U.S. 466 (2000). The claim now raised was not argued on direct appeal and is procedurally barred. *Dufour v. Crosby*, 905 So.2d 42 (Fla. 2005). Moreover, neither *Apprendi* nor *Ring* are retroactive. *Johnson v. State*, 904 So. 2d 400 (Fla. 2005). Furthermore, the trial court found the murder was committed during robbery, burglary and arson, - crimes for which the jury found Willacy guilty beyond a reasonable doubt - thus taking Willacy outside the application of *Ring*.

This Court has repeatedly rejected *Ring* challenges to death sentences. *Mills v. Moore*, 786 So.2d 532 (Fla.), *cert. denied*, 532 U.S. 1015 (2001); *Johnston v. State*, 863 So. 2d 271, 286 (Fla. 2003).

ARGUMENT VI

DEATH BY LETHAL INJECTION IS NOT CRUEL AND UNUSUAL PUNISHMENT.

Willacy acknowledges this Court's adverse authority on this issue. This Court has repeatedly rejected this claim as being without merit. *See Sims v. State,* 754 So. 2d 657, 668 (Fla. 2000) (holding that execution by lethal injection is not cruel and unusual punishment); *Provenzano v. State,* 761 So. 2d 1097, 1099 (Fla. 2000) (holding that execution by lethal injection is not cruel and unusual punishment); *Johnson v. State,* 904 So. 2d 400, 412 (Fla. 2005); *Robinson v. State/Crosby*, 913 So. 2d 514 (Fla. 2005). This Court's precedent is established, and Willacy has afforded no reason to revisit that precedent.

ARGUMENT VII

WHETHER WILLACY IS COMPETENT TO BE EXECUTED IS NOT RIPE UNTIL A WARRANT IS SIGNED

Willacy claims he is incompetent to be executed. He acknowledges this claim is not ripe for review since no death warrant has been signed. In order to invoke judicial review of a competency to be executed claim, a defendant must file a motion for stay of execution pursuant to Florida Rule of Criminal Procedure 3.811(d). Such motion can only be considered after a defendant has pursued an administrative determination of competency under Florida Statutes 922.07, and the Governor of Florida, subsequent to the signing of a death warrant, has determined that the defendant is sane to be executed. Since the prerequisites for judicial review of this claim have not occurred in this case, there is no basis for consideration of this issue in appellant's present habeas petition.

CONCLUSION

Based upon the foregoing, the State respectfully requests that this Court deny habeas corpus relief.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Response has been furnished by U.S. Mail to **Brian N. Onek**, Balgo, Onek & Mawn, 1329 Bedford Drive, Suite 1, Melbourne, FL 32940 and **Elizabeth Siano Harris**, Stadler & Harris, 1820 Garden Street, Titusvile, FL 32796 this 21st day of December, 2005.

_____
BARBARA C. DAVIS

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the instant brief has been prepared with 12 point Courier New type, a font that is not spaced proportionately.

_____
BARBARA C. DAVIS