IN THE SUPREME COURT OF FLORIDA

CASE NO. SC06-1533

CROSLEY ALEXANDER GREEN

Petitioner,

v.

JAMES McDONOUGH, Secretary,
Florida Department of Corrections

Respondent.

RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

CHARLES J. CRIST, JR.
ATTORNEY GENERAL

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PROCECURAL HISTORY

Green was convicted by a jury of first-degree felony murder, two counts of robbery with a firearm, and two counts of kidnapping. Green raised nine issues on direct appeal: (1) The trial court erred in admitting evidence of dog scent tracking; (2) The trial court erred in denying Green's motion to suppress Kim Hallock's photographic and in-court identifications; (3) The trial court erred in denying Green's motion for the jury to view the murder scene; (4) The trial court erred in instructing the jury on flight; (5) The trial court erred in considering as separate aggravating circumstances that Green committed the murder for pecuniary gain and Green committed the murder during a kidnapping; (6) The trial court erred in finding that the murder was heinous, atrocious, and cruel; (7) The trial court improperly refused to find mitigating circumstances; (8) The death penalty is disproportionate; and(9) The heinous, atrocious, or cruel aggravator is unconstitutionally vague. The convictions and sentences were affirmed. *Green v. State,* 641 So. 2d 391, 394 (Fla. 1994*).* Green's petition for writ of certiorari was denied on February 21, 1995. *Green v. Florida*, 513 U.S. 1159 (1995).

Green filed a "shell" Rule 3.850 motion on March 18, 1997. He filed an amended motion on November 30, 2001. (V13, R1791-1946). He raised twelve issues is the amended motion: (1)

Counsel was ineffective for failing to strike Juror Guiles; Juror Guiles committed misconduct; (2) Juror interviews; (3) Counsel was ineffective in the guilt phase; *Brady* violations; (4) Newly discovered evidence of recanting witnesses; (5) Ineffective assistance of counsel re: dog tracking evidence; *Brady; Giglio*; (6) Ineffective assistance of counsel regarding New York conviction as prior violent felony; *Brady*; (7) Ineffective assistance of counsel at the penalty phase; (8) *Ring v. Arizona;* (9) Jury instructions shift the burden; (10) Lethal injection is cruel and unusual; (11) Cumulative error; (12) Incompetence for execution. The trial judge held an evidentiary and denied relief on the guilt phase claims, but found counsel ineffective in the penalty phase and ordered a new penalty phase proceeding. The appeal and cross-appeal from this order are pending before this court. Case No. SC05-2265.

The relevant facts were summarized by this court as follows:

> Late in the evening of April 3, 1989, Kim Hallock and Flynn, whom she had dated, drove to a park in Flynn's pickup truck. They parked near dunes in a wooded area and smoked marijuana. As they smoked, a sheriff's car drove by and shined its spotlight, but did not stop at the truck. After the sheriff's car passed, a man walked in front of the truck and stopped at the driver's door. He warned Hallock and Flynn to watch out for the police, then walked on.
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> A few minutes later, Flynn stepped outside the truck to relieve himself. Hallock testified that she soon heard Flynn say nervously: "Hold on. Wait a minute,

> man. Hold on. Put it down." She retrieved a gun from the truck's glove compartment and put it under some jeans on the seat next to her. She testified that when she looked outside the truck, she saw the man she had seen earlier. He was now walking around Flynn and carrying a gun. The man ordered Flynn to the ground, then asked if either of them had any money. Hallock gave him five dollars, but Flynn said he had no money.
>
> The man then tied Flynn's hands behind his back with shoelaces. While tying Flynn's hands, the man's gun went off but did not injure Flynn. The man pulled Flynn off the ground, found a wallet in his pants, and threw it to Hallock, who counted $185. The man ordered Hallock to start the truck and to move to the center seat. He put Flynn in the passenger seat and started driving. He forced Flynn and Hallock to ride with their heads down and held a gun to Hallock's side. During the ride, Flynn found the gun Hallock had hidden under the jeans. The man stopped the truck at an orange grove and tried to pull Hallock from the truck. Hallock freed herself and ran around the truck, but the man caught her, threw her to the ground, put a gun to her head, and threatened to blow her brains out. Flynn got out of the truck and fired a shot, but missed the man. Hallock jumped into the truck and locked the doors. She testified that she saw the man fire a shot. Flynn yelled for her to escape, and Hallock drove to a friend's house and called the police.
>
> When police arrived at the orange grove, they found Flynn lying facedown with his hands tied behind his back. Authorities found a loaded .22-caliber revolver nearby. Flynn was alive when police arrived, but he stopped breathing several times and died of a single gunshot wound to the chest before paramedics arrived. Hallock later identified Green as the man she saw in the park.

Green v. State, 641 So. 2d 391, 393 (Fla. 1994*).*

ARGUMENT

CLAIM I

APPELLATE COUNSEL WAS NOT INEFECTIVE FOR FAILING TO RAISE THE VALIDITY OF THE NEW YORK CONVICTION.

Green claims appellate counsel was ineffective for failing to raise the issue that his New York robbery conviction was not proven by the State. Green does not dispute the validity of the conviction, only the method used to prove the conviction. Similar issues were raised in the Rule 3.850 appeal filed concurrently with this habeas petition. Green's Exhibit 1 introduced at the evidentiary hearing and in the record on appeal in Case No. SC05-2265 pending before this Court is attached hereto.[1] Using the page cite from Case No. SC05-2265, these attachments show the following:

(1) Collateral counsel obtained a record unsealing Green's Youthful Offender conviction (R5891);

(2) Green was convicted of Robbery in the Third Degree (R5892);

(3) Green was adjudicated a youthful offender and committed to the State Department of Correctional Services (R5894);

(4) The State Attorney requested certified copies of Green's conviction, but the file was sealed (R5927, 5930);

(5) The New York Division of Parole provided the

[1] The State requests this Court take judicial notice of the record on appeal in Case No. SC05-2265.

> information to the Florida prosecutor that "Green was adjudicated a Youthful Offender and sentenced to an indeterminate term of 4 years." New York would not release any documents (R5931).

These documents illustrate Green's claim has no merit. Green was convicted of robbery and that conviction is valid. Appellate counsel is not ineffective for failing to raise a claim that has no merit. *Windom v. State,* 886 So. 2d 915 (Fla. 2004); *Moore v. State*, 820 So. 2d 199, 209 (Fla. 2002).

When evaluating an ineffective assistance of appellate counsel claim raised in a writ of habeas corpus, this Court must determine first, 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, second, whether the deficiency in performance compromised the appellate process to such a degree as to undermine confidence in the correctness of the result. *Pope v. Wainwright*, 496 So. 2d 798, 800 (Fla. 1986). The petitioner must allege a specific, serious omission or overt act upon which the claim of ineffective assistance can be based. *Freeman v. State,* 761 So. 2d 1055, 1069 (Fla. 2000). All that Green has shown is that claim was preserved and appellate counsel did not raise the issue on appeal. Green has not shown any deficiency with the New York conviction or the manner in which it was proven in the lower court.

Moreover, 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."). *Davis v. State*, 928 So. 2d 1089, 1127 (Fla. 2005).

CLAIM II

GREEN'S DEATH SENTENCE IS PROPORTIONATE.

Green claims his sentence is disproportionate because he was not convicted of a prior violent felony in New York. First, this claim is procedurally barred. This Court conducted proportionality analysis on direct appeal. Second, Green's argument is based on his unfounded claim that he was not convicted of a prior violent felony. As shown by the attached documents, Green was convicted of robbery in New York. Third, this issue was raised in a slightly different format in the Rule 3.851 motion, denial of which is pending before this Court. Case No. SC06-2265. This claim was raised in the postconviction motion and cannot be relitigated in a habeas petition. *See Knight v. State*, 923 So. 2d 387, 395 (Fla. 2005); *Baker v. State*, 878 So. 2d 1236, 1241 (Fla. 2004)("Nor can habeas corpus

be used as a means . . . to litigate issues that . . . were raised in a motion under rule 3.850."); *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 . . . in a rule 3.850 motion . . . .").

CLAIM III

EXECUTION BY LETHAL INJECTION IS NOT CRUEL AND UNUSUAL PUNISHMENT

This claim was raised as Claim 10 in Green's Rule 3.851 motion. Green did not appeal the denial of relief on this claim in his Rule 3.851 motion. Case No. 06-2265. This claim cannot be relitigated in a habeas petition. *See Knight v. State*, 923 So. 2d 387, 395 (Fla. 2005); *Baker v. State*, 878 So. 2d 1236, 1241 (Fla. 2004)("Nor can habeas corpus be used as a means . . . to litigate issues that . . . were raised in a motion under rule 3.850."); *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 . . . in a rule 3.850 motion . . . .").

Further, 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*, 913 So. 2d 514 (Fla. 2005).

CLAIM IV

WHETHER GREEN IS COMPETENT TO BE EXECUTED IS NOT REVIEWABLE AT THIS TIME SINCE THERE IS NO ACTIVE DEATH WARRANT.

Green alleges no facts in support of this allegation, nor did he offer any support of this claim at the trial court. In fact, he even concedes that this claim is not ripe for consideration at this time. (Habeas petition at 18). *See Thompson v. State*, 759 So. 2d 650, 668 (Fla. 2000); *Provenzano v. State,* 751 So. 2d 37 (Fla. 1999); Fla. R. Crim. P. 3.811(d). This claim has no merit. *Johnson v. State*, 804 So. 2d 1218, 1225-1226 (Fla. 2001).

CONCLUSION

Based upon the foregoing, the State requests respectfully 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: **Mark Gruber**, CCRC-Middle, Esq. Capital Collateral Regional Counsel, 3801 Corporex Park Dr., Suite 210, Tampa, Florida 33619, this _____ day of August, 2006.

_____
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