IN THE SUPREME COURT OF FLORIDA

MARK ALLEN GERALDS,

Petitioner,

v. Case No.: SC07-716

JAMES R. MCDONOUGH,

Secretary, Florida Department of Corrections,

Respondent.
_____/

RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

COMES NOW, Respondent, JAMES R. MCDONOUGH, by and through the undersigned Assistant Attorney General, and hereby responds to the Petition for Writ of Habeas Corpus filed in the above-styled case. Respondent respectfully submits that the petition should be denied, and hereby submits the following.

STATEMENT OF THE FACTS AND OF THE CASE

Geralds' Petition for Writ of Habeas Corpus was filed in conjunction with his appeal from the denial of his motion for postconviction relief (Case No. SC06 761). The State has submitted an Answer Brief in that case outlining a detailed Statement of the Facts and of the Case; therefore, recitation of the underlying facts and procedural history will not be repeated herein.

Geralds' habeas petition raises several claims of

ineffective assistance of appellate counsel. It is well-understood that a habeas petition is the appropriate vehicle to raise a challenge to appellate counsel's performance. Ineffective assistance of appellate counsel claims are analyzed using the same framework employed in the review of ineffective assistance claims.

Geralds must demonstrate that his appellate counsel's failure to raise a claim on direct appeal was objectively unreasonable. *See Robbins v. Smith*, 528 U.S. 259, 285 (2000) (citing *Strickland v. Washington*, 466 U.S. at 687-91). If Geralds makes such a showing, he must then demonstrate that he was prejudiced by his appellate counsel's deficient performance. This simply means that "he must show a reasonable probability that but for counsel's failure to [raise a particular claim], he would have prevailed on appeal." *Robbins*, 528 U.S. at 285-86.

This Court has stated that the standard of review for claims of ineffective assistance of appellate counsel is as follows:

> 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.

Rivera v. State, 859 So. 2d 495, 509-10 (Fla. 2003) (quoting *Pope v. Wainright,* 496 So. 2d 798, 800 (Fla. 1986)).

However, the issues that may come before this Court within

the context of a habeas petition are somewhat circumscribed. "Post conviction motions cannot be used as a second appeal for issues that were or could have been raised on direct appeal." *Oats v. Dugger*, 638 So. 2d 20, 21 (Fla. 1994) (citation omitted); *accord Lopez v. Singletary*, 634 So. 2d 1054, 1056 (Fla. 1993) ("Issues that were, or could have been, raised on direct appeal are not cognizable on collateral attack.").

I. GERALDS' CONSTITUTIONAL RIGHTS UNDER THE SIXTH AMENDMENTS CONFRONTATION CLAUSE WERE NOT INFRINGED AND HIS APPELLATE COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO CHALLENGE THE FORMER TESTIMONY OF UNAVAILABLE WITNESSES WHOSE TESTIMONY WAS READ DURING HIS RESENTENCING HEARING

Geralds implicitly seeks to reargue the admissibility of testimony offered during his resentencing hearing. This Court has observed that the standard for the admissibility of evidence is typically much broader in penalty phase proceedings. *See, e.g., Coday v. State,* 946 So. 2d 988 (Fla. 2006). Similarly, this Court has observed that given the broad discretion afforded the trial court with regard to the admissibility of evidence during the penalty phase, "upon resentencing, the trial court may allow the jury to hear probative evidence to aid it in the understanding of facts of the case so that it may render an appropriate advisory sentence." *Lebron v. State*, 894 So. 2d 849, 854 (Fla. 2005) (internal and external citations omitted).

Geralds opines that the trial court improperly permitted the prior guilt phase testimony of Billy Danford and Vicky Ward to be

read into the record. Moreover, he asserts that the testimony of Invesigator Bob Jimmerson was inaccurate; and, moreover, he believes that some of the matters Jimmerson testified to were beyond his ken of knowledge and actually constituted impermissible hearsay.

Geralds argues that during the resentencing hearing his Sixth Amendment Confrontation Clause rights were unduly impinged; and, his appellate counsel was ineffective for failing to raise the issues related to the testimony of Danford, Ward, and Jimmerson during his direct appeal.

First, the State would note that Florida trial courts are permitted to consider the testimony of unavailable witnesses, such as Danford and Ward. As is well-recognized, under Florida law, the previous testimony of an unavailable witness may be read into the record in the same or different proceeding, provided the testimony being read was subjected to some means of cross-examination. *See* Fla. Stat. § 90.804(2)(a). Because Ward and Danford's testimony was subjected to cross-examination during the guilt phase, it was permissible for their testimony to be read during the resentencing hearing.

Moreover, the State would note that its is simply untrue to suggest that Jimmerson's testimony was inaccurate. Jimmerson testified during the penalty phase as follows:

STATE: Now, in your investigative capacity, have you worked in reviewing and looking at show prints and patterns like in sand or in blood in comparing them to the tracks that you

see on the bottom of shoes.

JIMMERSON: Yes, sir.

STATE: Did you see these particular tracks off these shoes in the Pettibone home?

JIMMERSON: Yes, sir.

STATE: Did you see one consistent shoe track throughout the home?

JIMMERSON: Correct.

STATE: That would be coming from the Nike type shoe?

JIMMERSON: That's correct.

STATE: Indication to you *as far as those particular shoe prints are concerned as far as the Nikes* and the blood track, is there is one set of footprints inside the home is that correct?

JIMMERSON: That's correct.

PP. 401-02 (emphasis added).

Thus, it is simply inaccurate to suggest that Jimmerson was testifying to matters beyond his realm of knowledge. He was asked a very narrow question to which answered. His testimony was corroborated by Ken Hoag, an FDLE latent fingerprint analyst. PP 486-91. Therefore, it is simply wrong to suggest that Jimmerson propounded inaccuracies during his testimony during the penalty phase.

Moreover, the State would also note that this claim is procedurally barred because it certainly was permissible for Geralds to have raised issues related to the testimony of Ward, Danford, and Jimmerson on direct appeal. *See generally King v.*

Dugger, 555 So. 2d 355, 359 (Fla. 1990) (failing to reconsider issues related to the admissibility of hearsay evidence given that the claim had been already been raised on direct appeal).

II. GERALDS' APPELLATE COUNSEL AS NOT INEFFECTIVE FOR FAILING TO RAISE ON DIRECT APPEAL THAT THE PROSECUTION RAISED IMPROPER ARGUMENTS DURING THE STATE'S CLOSING

First, Geralds argues that the prosecution made improper reference to potential aggravators that would be applicable to Geralds. Petitioner's Habeas at 17-21. The Respondent would again note that any issues related to statements made by the State, with regard to the applicability of statutory aggravators, could have been brought during his direct appeal, therefore it is inappropriate for these issues to be raised in the context of his habeas petition. *Lopez v. Singletary*, *supra*. Moreover, he appears to be arguing that the trial court permitted consideration of inapplicable aggravators.

The Respondent concedes that it is not entirely sure how Geralds' constitutional rights have been impinged. The resentencing hearing transcript clearly evidenced that the trial court instructed the jury as to three aggravators: 1) HAC; 2) CCP; and 3) whether the murder was committed during the course of a robbery.(PP. 888). As noted, this Court struck the CCP aggravator, but upheld the remaining two aggravators. *See Geralds*, 674 So. 2d 96, 104-05 (Fla. 1996). Moreover, given that Courts presume that jurors accurately follow the

instructions they receive, *see, e.g. Francis v. Franklin*, 471 U.S. 307, 324 n. 9(1985), it is doubtful that Geralds can assert that the jury considered inapplicable aggravators.

Additionally, Geralds argues that the prosecutor made improper comments during his closing arguments which were unduly prejudicial. Petitioner's Habeas at 21-32. Geralds concedes however that his trial counsel did not raise an objection to the State's closing argument. This Court has routinely recognized that absent fundamental error, a claim which has not been objected to, is not preserved, and therefore, may not be raised on appeal. *See, e.g., Rodgers v. State*, 934 So. 2d 1207, 1217 (Fla. 2006); *Archer v. State*, 934 So. 1187, 1205-06 (Fla. 2006) *Spann v. State*, 857 So. 2d 845, 852 (Fla. 2003); *Conahan v. State*, 844 So. 2d 629, 641 (Fla. 2003). As such, in order for an alleged error to be deemed fundamental in nature, "the error must reach down into the validity itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error." *Brown v. State*, 124 So. 2d 481, 484 (Fla. 1960). Given the large amount of evidence directly linking Geralds to this heinous crime including, but not limited to: 1) he pawned a necklace belonging to Pettibone which contained the presence of blood evidence consistent with Pettibone; 2) electric plastic ties found at the crime scene were also located in the trunk of Geralds car; 3) Geralds gave a pair of distinct Red

Bucci sunglasses – which had belonged to Pettibone – to Vicky Ward; 4) a shoeprint that was found at the crime scene was consistent in size and tread to sneakers belonging to Geralds.

Thus it is doubtful that comments made by the prosecution vitiated the reliability of the verdict.

III. THE TRIAL COURT DID NOT FAIL TO GIVE PROPER CONSIDERATION TO GERALDS' MITIGATION EVIDENCE

Geralds argues that the trial court failed to give proper consideration to his mitigation evidence. Again, the Respondent would note that this claim could have been brought on direct appeal. *Lopez, supra*. Neverhteless, his claim is without merit. The trial court afforded "very little weight" to Geralds' non-statutory mitigation, which included: 1) his love for his family; 2) the effect of his troubled relationship with his mother and his parents divorce; and 3) his antisocial personality disorder and his bipolar disorder. Geralds now opines that the trial court did not properly consider his mitigation claims. In actuality however, he is merely arguing that the trial court erred when it failed to accord greater weight to his non-statutory mitigation; without more however, this is not a basis for reversible error. *See, e.g., Porter v. State*, 429 So. 2d 293, 296 (Fla. 1983) (noting the "mere disagreement" with the trial court's findings will not support a claim of reversible error).

Accordingly, this claim should be rejected.

IV. GERALDS APPELLATE COUNSEL WAS NOT INEFFECTIVE FOR

FAILING TO RAISE, ON DIRECT APPEAL, THAT PICTURES DEPICTING THE VICTIM'S BODY WERE UNDULY PREJUDICIAL

Geralds argues that photographs depicting both, the crime scene, and Pettibone's body, were unduly prejudicial. The photos apparently displayed the manner in which Pettibone died, and showed blood throughout the area. Geralds' trial counsel, Joe Adams, objected to the photographs. PP. 383-84. But the issue was not raised on direct appeal; and, therefore issues related to the photograph are procedurally barred. *See, e.g., Arbelaez v. State*, 775 So. 2d 909, 919 (Fla. 2000) (observing that claims related to unduly prejudicial photographs which were not raised on direct appeal were procedurally barred).

Moreover, this issue is also without merit. The test for admissibility of photographs is their relevancy. *See Mansfield v. State*, 758 So. 2d 636, 648 (Fla. 2000). Crime scene photograph displaying, among other things, the manner in which the victim was killed have been deemed admissible. *See, e.g., England v. State,* 940 So. 2d 389, 399-400 (Fla. 2006)(photos were relevant to show the manner of death and the location of victim's wounds).

Additionally, even if it was erroneous to admit the photographs, this was merely harmless error. See *Dufour v. State,* 905 So. 2d 42, 74 (Fla. 2005) (recognizing that even if it was erroneous to admit photographs, this "would not have provided

a basis for reversible error on appeal because the admission was harmless and the photos [did] not create the circumstance that the risk of prejudice outweighed the relevancy").

Accordingly, this claim should be rejected.

V. GERALDS WAS NOT DENIED HIS RIGHTS UNDER THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS BECAUSE THE TRIAL COURT INSTRUCTED THE JURY THAT IT COULD CONSIDER FLIGHT AS EVIDENCE OF GUILT

Geralds claims the jury was improperly instructed that it could consider flight as evidence of guilt. Geralds' counsel did not raise this issue on direct appeal; and he now argues that his appellate counsel was ineffective for failing to raise the issue regarding the permissibility of the flight instruction. This claim is without merit.

Geralds relies on *Fenelon v. State*, 594 So. 2d 292 (Fla. 1992), for the proposition that the jury instruction was improper. *Fenelon* instructed state trial court that the standard jury instruction suggesting that flight was evidence of guilt should no longer be read to juries. *Fenelon's* holding was intended to be prospective, *id.* at 295; consequently, any case that had already been tried at the time *Fenelon* was rendered by the Florida Supreme Court, were not affected by Fenelon's holding. *See Taylor v. State*, 630 So. 2d 1038, 1041-42 (Fla. 1993).

Thus, because the jury instruction was read to Geralds' jury

on February 7, 1990; and, because, *Fenelon* was not decided until February 13, 1992, Fenelon has no applicability to Geralds' case. Moreover, in light of Geralds' overwhelming guilt, assuming arguendo it was erroneous to read the instruction, the error would only have been harmless. *See Lovette v. State*, 636 So. 2d 1304, 1306 (Fla. 1994).

Accordingly, this claim is without merit.

VI. THE FLORIDA SUPREME COURT WAS NOT REQUIRED TO REMAND FOR YET ANOTHER RESENTENCING HEARING AFTER IT STRUCK THE APPLICABILITY OF THE CCP AGGRAVATOR

Geralds argues that because the CCP aggravator was struck by the Florida Supreme Court following his resentencing hearing, he was entitled to a *third* penalty phase hearing. It must be noted that two statutory aggravators were found applicable to Geralds: 1) HAC, and 2) the murder was committed during the commission of a burglary. And as this Court has plainly recognized, the HAC aggravator is amongst "'the most serious aggravators set out in the statutory sentencing scheme.'" *Dessaure v. State,* 891 So. 2d 455, 473 (Fla. 2004) (quoting *Larkins v. State,* 739 So. 2d 90, 95 (Fla. 1999)). Because, Geralds has not referenced a case wherein a defendant was entitled to a remand in an instance where two substantive aggravators were found, and only minimal non-statutory mitigation was deemed applicable, this claim is simply without merit.

CONCLUSION

For the foregoing reasons, the Respondent respectfully requests that Geralds' petition for habeas relief be denied.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing ANSWER BRIEF has been furnished by U.S. Mail to Linda McDermott, McClain & McDermott, P.A., 141 N.E. 30th St., Wilton Manors, Florida 33334 this 21th day of December, 2007.

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CERTIFICATE OF FONT AND TYPE SIZE

Counsel certifies that this brief was typed using Courier New font 12 point.

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