IN THE SUPREME COURT OF FLORIDA

LINROY BOTTOSON,

Petitioner,

vs. CASE NO. 87,694

HARRY K. SINGLETARY, JR., SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,

Respondent.
_____/

MR. BOTTOSON'S REPLY TO
RESPONDENT'S ANSWER TO PETITION FOR WRIT OF HABEAS CORPUS

Petitioner, **LINROY BOTTOSON**, through undersigned counsel and pursuant to this Court's order dated July 1, 1996, hereby replies to the Respondent's Answer to Petition for Writ of Habeas Corpus, dated July 24, 1996. **MR. BOTTOSON** will reply to the respondent's arguments in the order found in his answer.

I

THE PETITION IS TIMELY

First, the respondent argues that the petition for writ of habeas corpus must be denied because it was not timely filed (Answer at pp. 5-7). This contention must be rejected.

A. Non-applicability of Rule 3.850, Fla.R.Crim.P., as Amended December 19, 1985, 481 So.2d 480 (Fla. 1985)

First, the respondent claims that under "settled" Florida law, **MR. BOTTOSON** should have raised this claim by January 1, 1987 (Answer at p. 5). For that proposition, the respondent cites In re Rule 3.850 of the Florida Rules of Criminal Procedure, 481 So.2d 480 (Fla. 1985). That rule/decision is not applicable to the issue before this Court.

On November 30, 1984, this Court amended Rule 3.850 to provide, for the first time, for specific time limitations for the filing of a motion under that rule. The Florida Bar re Amendment to Rules of Criminal Procedure (Rule 3.850), 460 So.2d 907 (Fla. 1984). In that opinion, this Court amended Rule 3.850 to state, in pertinent part:

> Anyone adjudicated guilty prior to January 1, 1985, shall have until January 1, 1986, to file a motion in accordance with this rule.

Id. at 908. Subsequently, in In re Rule 3.850 of the Florida Rules of Criminal Procedure, 481 So.2d 480 (Fla. 1985), the Court amended that portion of Rule 3.850 to read

> Any person whose judgment and sentence became final prior to January 1, 1985, shall have until January 1, 1987, to file a motion in accordance with this rule.

Id. On its face, what this Court did in 1985 was to amend the time period for the filing of a Rule 3.850 motion. It did not, in any way, shape, or form, purport to set a time limit for the filing of a petition for writ of habeas corpus.[1/]

B. Non-applicability of Adams v. State, 543 So.2d 1244 (Fla. 1989)

As his second basis for arguing that **MR. BOTTOSON'S** petition is untimely, the respondent relies upon Adams v. State, 543 So.2d 1244 (Fla. 1989)(Answer at p. 6). However,

---

1/ It is questionable, and beyond the scope of this proceeding, as to whether any court could promulgate a rule attempting to set a time limit on a petition for writ of habeas corpus, in light of Art. I, § 13 of the Florida Constitution:

> **Habeas Corpus**. - The writ of habeas corpus shall be grantable of right, freely and without cost. Shall be returnable without delay, and shall never be suspended unless, in case of rebellion or invasion, suspension is essential to the public safety.

a review of Adams reveals that it does not stand for the proposition for which it is cited by respondent, and that it too is inapplicable to **MR. BOTTOSON'S** petition.

In Adams, this Court reiterated its holding that the United States Supreme Court's ruling in Hitchcock v. Dugger, 481 U.S. 393, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987), constituted a significant change in law to permit contentions based on its rationale to be raised in a motion for post-conviction relief more than two years after the defendant's judgment and sentence had become final. 543 So.2d at 1246. However, this Court ruled that the motion for post-conviction relief must be filed within two years of the "change of law," i.e., within two years of the date of the Hitchcock decision. Id. Again, the pleading at issue in Adams was a Rule 3.850 motion for post-conviction relief, and not a petition for writ of habeas corpus. The Court's opinion simply did not address such a petition. It is therefore inapplicable to the issue now before this Court.

* * *

Although the respondent does not claim that later amendments to Rule 3.850 and the creation of Rule 3.851 impact on the timeliness argument, **MR. BOTTOSON** will address those to demonstrate their inapplicability.

C. Non-applicability of Rule 3.851, Fla.R.Crim.P., Created February 5, 1987, 503 So.2d 320 (Fla. 1987)

On February 5, 1987, this Court created Rule 3.851, Fla.R.Crim.P. In re Florida Rules of Criminal Procedure, Rule 3.851, 503 So.2d 320 (Fla. 1987). This Rule, which was titled "Collateral Relief After A Death Warrant Is Signed," provided in pertinent part:

> When a death warrant is signed for a prisoner and the warrant sets the execution for at least sixty days from the date of

> signing, all motions and petitions for any type of postconviction or collateral relief shall be filed within thirty days of the date of signing.

The newly created Rule 3.851, Fla.R.Crim.P., became effective at 12:01 a.m., April 1, 1987. As of the effective date of this newly created Rule 3.851, no death warrant existed for **MR. BOTTOSON**. Therefore, the newly created Rule of Criminal Procedure was inapplicable at that time to **MR. BOTTOSON**.

On January 31, 1990, Governor Martinez signed the only death warrant to date for **MR. BOTTOSON**. That warrant was filed in the Circuit Court, Ninth Judicial Circuit, Orange County, Florida, on February 6, 1990.

On December 23, 1985, **MR. BOTTOSON** had timely filed a motion in the circuit court to vacate the judgment and sentence pursuant to Rule 3.850, Fla.R.Crim.P. The peremptory challenge issue, which is the subject matter of this pending petition for writ of habeas corpus, was claimed in this 1985 motion. Due to the pendency of this 3.850 motion, a motion for stay of execution was filed in the circuit court on February 20, 1990. The order granting the stay was entered on February 28, 1990. Therefore, the 1987 Rule 3.851 was inapplicable at that time to **MR. BOTTOSON**.

D. Non-applicability of Rule 3.851, Fla.R.Crim.P. as Amended September 24, 1992, 606 So.2d 227 (Fla. 1992)

On September 24, 1992, Rule 3.851, Fla.R.Crim.P., was amended by this Court. In re Amendments to the Florida Rules of Criminal Procedure, 606 So.2d 227, 343 (Fla. 1992). The amendment contained no substantive changes to the original 1987 rule.

A hearing was held on **MR. BOTTOSON'S** Rule 3.850 motion to vacate judgment and sentence, as amended and supplemented, in the Circuit Court, Ninth Judicial Circuit, Orange

County, Florida, on April 8-12, 1991, November 13-15, November 18, and November 20, 1991. On February 5, 1993, the trial court entered an order denying **MR. BOTTOSON** all relief under his Rule 3.850 motion for post-conviction relief.

On March 8, 1993, **MR. BOTTOSON** timely filed his notice of appeal in this Court from the order denying his motion for post-conviction relief entered in the trial court. That case was docketed as Florida Supreme Court Case No. 81,411. This appeal included the peremptory challenge issue which is now the subject matter of the pending petition for writ of habeas corpus. On January 14, 1994, **MR. BOTTOSON** filed his initial brief in this Court, appealing the Orange County, Florida, Circuit Court order denying his motion for post-conviction relief. On January 14, 1994, the date on which **MR. BOTTOSON** filed his initial brief in the appeal of the Circuit Court's order on his Rule 3.850 motion for post-conviction relief, the current 1993 Rule 3.851, Fla.R.Crim.P., was in effect.

E. Non-applicability of Rule 3.851, Fla.R.Crim.P., Adopted October 21, 1993, 626 So.2d 198 (Fla. 1993)

The current Rule 3.851, Fla.R.Crim.P., was adopted by this Court on October 21, 1993. In re Rule of Criminal Procedure 3.851, etc., 626 So.2d 198 (Fla. 1993). It requires:

> All petitions for extraordinary relief in which the Supreme Court of Florida has original jurisdiction, including petitions for writ of habeas corpus, shall be filed simultaneously with the initial brief filed on behalf of the death-sentenced prisoner in the appeal of the circuit court's order on the Rule 3.850 motion.

Rule 3.851(b)(2). However, the Rule only governs cases of death-sentenced individuals whose convictions and sentences became final **after** January 1, 1994. Rule 3.851(b)(6). Because **MR. BOTTOSON'S** conviction and sentence became final **before** January 1, 1994, the current Rule

3.851, Fla.R.Crim.P., is inapplicable to him. Bottoson v. State, 443 So.2d 962 (Fla.), cert. denied, 469 U.S. 873 (1984).

F. Conclusion

It was the ruling by this Court on January 18, 1996, in Case No. 81,411, concerning the peremptory challenge issue which brought the effective assistance of appellate counsel into focus. In that opinion, this Court ruled that the Neil peremptory challenge issue was procedurally barred in the Rule 3.850 proceeding because of appellate counsel's failure to raise it on direct appeal. Bottoson v. State, 674 So.2d 621, 622 n.1 (Fla. 1996), cert. pending, U.S.S.Ct. Case No. 95-_____. Contrary to the respondent's argument (Answer at pp. 6-7), this position is not inconsistent with the petition itself. The Neil issue was presented to the trial court, and to this Court, in **MR. BOTTOSON'S** Rule 3.850 proceeding and the appeal therefrom. It was **MR. BOTTOSON'S** expectation that the Neil issue was not procedurally barred in the 3.850 proceeding. Until this Court so ruled in 1996, there was no need to resort to a petition for writ of habeas corpus to bring this issue before the Court. Since the ineffective assistance of appellate counsel issue was not procedurally clarified until this Court's decision and opinion issued on January 18, 1996, **MR. BOTTOSON'S** petition for writ of habeas corpus raising this ineffective assistance of appellate counsel issue is timely. The respondent's assertion that **MR. BOTTOSON'S** petition for writ of habeas corpus is untimely must be rejected.

II

MR. BOTTOSON WAS DENIED EFFECTIVE ASSISTANCE OF APPELLATE COUNSEL

A. The Peremptory Challenge Claim is Not Procedurally Barred

The respondent argues that the substantive peremptory challenge claim was not preserved at the trial level for review, and therefore **MR. BOTTOSON'S** appellate counsel did not render ineffective assistance in failing to raise it (Answer at pp. 8-10). That argument cannot survive scrutiny.

As **MR. BOTTOSON** demonstrated in his petition (Petition at pp. 12-13), on this issue trial counsel did what he was required to do under State v. Neil, 457 So.2d 481 (Fla. 1984), and therefore preserved this issue. Immediately upon the state's striking of Mr. Newton, trial counsel objected, moved to dismiss the panel, and moved for a mistrial. He pointed out that Mr. Newton was the sole black juror on the panel, and argued that the prosecutor's challenge was a deliberate racial exclusion meant to deprive **MR. BOTTOSON** of his right to a fair cross-representation of the community on the jury (R. 616). That was all that Neil required defense counsel to do. Under Neil, and its progeny, see e.g. State v. Slappy, 522 So.2d 18 (Fla.), cert. denied, 487 U.S. 1219 (1988), once counsel has made that objection, the burden shifted to opposing counsel (here the state prosecutor) to set forth his or her reasons for the strike. It was the trial court's duty, not objecting counsel's duty, to insure that the proper procedure was followed. State v. Johans, 613 So.2d 1319, 1322 (Fla. 1993)(upon Neil objection, trial court must conduct inquiry). Therefore, the respondent's attempt to pin the blame for the state's silence on **MR. BOTTOSON'S** trial counsel must be rejected as contrary to the law. Neither State v. Castillo, 486 So.2d 565 (Fla. 1986), State v. Safford, 484 So.2d 1244 (Fla. 1986), nor

Wright v. State, 491 So.2d 1100 (Fla. 1986), relied upon by the respondent (Answer at pp. 8-9), places any duty upon defense counsel to ask that the state be given an opportunity to demonstrate that the use of the peremptory was not motivated solely by race. Instead, that duty resided with the trial court.

The state cites Neil for the proposition that the procedure whereby the defense requests that the state be required to state the reasons for its peremptory challenges had been specifically sought in Neil, citing 457 So.2d at 482-83 (Answer at p. 9). However, if one reads Neil and those pages, one finds that the defense objected to three peremptory challenges on black jurors, and moved to strike the entire pool. The trial court heard argument as to whether the state's challenges were discriminatory, and held that the state did not have to explain its challenges and denied the defense motion to strike. Id. at 482-83. At no time does the Neil opinion state that defense counsel requested that the state be required to state its reasons for the challenges. Id. at 486-87. That state-asserted "fact" is similarly missing from the District Court opinion. Neil v. State, 433 So.2d 51 (Fla. 3d DCA 1983). Unlike the respondent, this Court cannot rely on false "facts" to support a procedural bar argument. That argument must be rejected as meritless.

B. Appellate Counsel's Performance was Deficient

Next, the respondent claims that appellate counsel's performance did not fall below the standards set forth in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2050, 80 L.Ed.2d 674 (1984) (Answer at pp. 10-16). In his petition, **MR. BOTTOSON** set forth his argument as to why the two Washington prongs were met (Petition at pp. 6-16). Those arguments will not be reiterated herein. However, as additional authority in support of **MR. BOTTOSON'S** arguments, see Fitzpatrick v. Wainwright, 490 So.2d 938, 939-40 (Fla. 1986)(failure to raise

meritorious death sentence issue was ineffective assistance of appellate counsel and warranted a reversal for a new sentencing hearing); Barclay v. Wainwright, 444 So.2d 956, 959 (Fla. 1984)(numerous problems, including appellate counsel's failure to raise sentencing issues, warranted new appeal); Hernandez v. State, 501 So.2d 163 (Fla. 3d DCA 1987)(failure to appeal departure sentence where trial court failed to provide clear and convincing written reasons for departure constitutes ineffective assistance of appellate counsel).

The respondent argues that **MR. BOTTOSON'S** appellate counsel was not ineffective for failure to raise the Neil issue because there was no evidence in **MR. BOTTOSON'S** trial record that the Swain v. Alabama, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965), threshold could be met (Answer at pp. 12-13). He further argues that the Swain argument would have had "no chance of success" (Answer at p. 13). Again, that misses the point. This Court is not dealing with a failure to raise a Swain issue, but rather a failure to raise what has become known as a Neil issue. The argument that raising such an issue would have had "no chance" is belied by this Court's decision in Neil in September, 1984, just several months after its decision in Bottoson v. State, 443 So.2d 962 (Fla.), cert. denied, 469 U.S. 873 (1984).

So too the argument that appellate counsel cannot be ineffective for whittling out weaker arguments on appeal and focusing on those more likely to prevail misses the point (Answer at pp. 13-14). As discussed in **MR. BOTTOSON'S** petition (Petition at pp. 9-11), this racial peremptory challenge issue was a cutting edge issue in criminal law in the early to mid-1980's. Trial counsel had understood that and entered an objection intended to preserve that issue for appeal. Appellate counsel failed in his duty to bring that issue before this Court.

As to the argument that appellate counsel should have sought to have this Court recall its mandate once the Neil decision was released, the respondent merely argues that in Neil this Court stated that the decision would not apply retroactively or in a collateral proceeding, because it was not such a change in the law as to warrant those applications (Answer at p. 14). To have asked this Court to recall the mandate and apply Neil to Bottoson would not have constituted retroactive application, because Bottoson was still in the pipeline on direct appeal; nor would it have constituted application in a collateral proceeding.

Similarly, the argument that **MR. BOTTOSON'S** appellate counsel's actions were similar to those of someone who failed to pursue discretionary review or post-conviction proceedings (Answer at pp. 16-17) is erroneous. **MR. BOTTOSON** is not talking about the failure to raise this issue with the United States Supreme Court or in a Rule 3.850 motion. The sole issue is appellate counsel's failure to raise this issue while **MR. BOTTOSON'S** direct appeal was still in the pipeline.

A review of the respondent's answer demonstrates that virtually each one of his arguments is procedural, and attempts to have this Court ignore the merits of the issue before it. Virtually the entire answer is an attempt to assert that **MR. BOTTOSON'S** appellate counsel was not deficient in failing to raise this issue, i.e., did not fail to meet the first prong of Washington. Should this Court find that the first prong in Washington was met, the respondent makes virtually no argument that the second prong of Washington, i.e., whether counsel's failings deprived **MR. BOTTOSON** of a meaningful appeal, is not met. That is because if this Court finds that **MR. BOTTOSON'S** appellate counsel was deficient in failing to raise this

issue, it is clear that **MR. BOTTOSON** would be entitled to relief, by way of a new trial, under Neil.

C. Neil Claim is Meritorious

Next, the respondent claims that the Neil claim is meritless anyway (Answer at pp. 17-21). Again, the Court is directed to **MR. BOTTOSON'S** petition (Petition at pp. 8-16).

In its effort to convince the Court of this, the respondent seeks to go back and review the record to determine whether or not the record reveals a possible non-discriminatory basis for striking juror Newton.[2/] That procedure is untenable. In effect, the respondent is asking this Court to allow his 1996 revisionary reasoning to substitute for the prosecuting attorney's silence in 1981. This Court has previously addressed and rejected that argument by the state in Bryant v. State, 565 So.2d 1298 (Fla. 1990), where it stated the following:

> Although the state proffered no reasons to justify its actions to the trial court, it now contends that the record shows reasons which were neutral and reasonable and not a pretext. By making this argument, the state is asking this Court to review the bare record and make a determination without the benefit of an inquiry and an independent evaluation by the trial judge. The purpose of the trial judge's Neil inquiry is to (1) obtain additional information about the challenge from the challenging counsel and (2) permit the trial judge to evaluate all of the information that he heard during voir dire with the reasons given by the challenging counsel. This process was established to assure that trial counsel gives his or her reasoning at or near the time the challenges are made and to permit the trial judge to evaluate those reasons in light of the jurors' responses to determine whether the reasons are neutral and reasonable and not a pretext.

2/ Contrary to the respondent's claim (Answer at p. 19), juror Nelson was not backstruck when juror Newton was (R. 504, 615-16).

Id. at 1301. Bryant thus makes clear that this Court may not, some fifteen years later, attempt to review the record to determine whether non-pretextual reasons for the striking of Mr. Newton arguably can be found.

CONCLUSION

Based on the arguments and authorities set forth in this reply, and in **MR. BOTTOSON'S** initial Petition for Writ of Habeas Corpus, this Court must grant the petition and enter an order vacating the judgment and sentence in the above-styled cause and requiring the trial court to conduct a new trial and sentencing hearing for **MR. BOTTOSON**.

Respectfully submitted this 5th day of August, 1996 at Orlando, Orange County, Florida.

LAW OFFICES OF TERRENCE E. KEHOE
Tinker Building
18 West Pine Street
Orlando, Florida 32801
407-422-4147
407-849-6059 (FAX)

TERRENCE E. KEHOE
Florida Bar # 330868

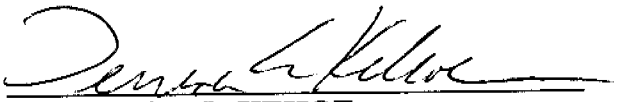
LAW OFFICES OF JAMES M. RUSS, P.A.
Tinker Building
18 West Pine Street
Orlando, Florida 32801
407-849-6050
407-849-6059 (FAX)

JAMES M. RUSS
Florida Bar #069585

TAD A. YATES
Florida Bar # 31010

I HEREBY CERTIFY that on this 5th day of August, 1996, a true copy of the foregoing was furnished by U.S. Mail to **KENNETH S. NUNNELLEY**, Assistant Attorney General, 444 Seabreeze Boulevard, 5th Floor, Daytona Beach, Florida 32118, with the original and seven

copies being sent by Federal Express to **HONORABLE SID J. WHITE**, Clerk, Supreme Court of Florida, 500 South Duval Street, Tallahassee, Florida 32399.



TERRENCE E. KEHOE
Florida Bar # 330868