IN THE SUPREME COURT OF FLORIDA

DANIEL MORRIS THOMAS, Petitioner,	)	
v.	)	Case No. 68,526
STATE OF FLORIDA, Respondent.	)	

RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

Respondent, The State of Florida, files the following response to Petitioner's application for a writ of habeas corpus:

I.

FACTS SURROUNDING THE OFFENSE

The facts of the crimes are summarized in Thomas v. State, 374 So.2d 508 (Fla. 1979).

II.

HISTORY OF THE CASE

Daniel Morris Thomas was indicted for first degree murder, sexual battery, robbery and burglary on December 21, 1976. He was found guilty on all charges following a jury trial which took place on April 4 - 9, 1977 in Polk County, Florida, Judge Edward F. Threadgill, presiding. In accordance with the jury recommendation, the trial judge imposed the death sentence. The judgments and sentences were affirmed by the Florida Supreme Court in Thomas v. State, 374 So.2d 508 (Fla. 1979). The court's opinion discussed the following issues: (1) the trial court erred in denying Appellant's motion for discharge under the speedy trial rule; (2) the evidence produced at trial failed to

identify Appellant as the ski mask intruder; (3) the trial court erred in denying Appellant's motion for change of venue and (4) Sec. 775.082(1), Fla. Stats. (1975), which requires a person convicted of a capital felony who is not sentenced to death, to be sentenced to life imprisonment, without possibility of parole is unconstitutional.[1/] Thomas then sought review by certiorari from the United States Supreme Court, but the petition was denied on April 14, 1980. Thomas v. Florida, 445 U.S. 972, 100 S.Ct. 1666 (1980). Thomas' first petition for certiorari raised these issues: (1) Whether the trial court erred in denying petitioner's motion for discharge under the speedy trial rule; (2) Whether the trial court erred in admitting in evidence petitioner's oral statements made at the time of his arrest; (3) Whether the trial court erred in rejecting evidence that was allegedly exculpatory; (4) Whether the trial court erred in refusing to grant a new trial; and (5) Whether the death sentence was unconstitutionally imposed upon petitioner.

Thomas also joined other death-sentenced inmates in the original class action habeas corpus proceeding in the Supreme Court of Florida challenging that court's alleged practice of reviewing, ex parte, non-record information

1/ In his brief before the Florida Supreme Court, Thomas raised sixteen issues on direct appeal. Those issues are as follows: (1) Whether the court erred in denying Appellant's motion to dismiss the indictment; (2) Whether the court erred in denying Appellant's motion for discharge under the speedy trial rule; (3) Whether the court erred in denying Appellant's motion for change of venue; (4) Whether the confession of a selected juror that she was a relative of a victim of the ski mask gang entitled the defendant to a mistrial; (5) Whether testimony by State witnesses concerning two unrelated burglaries committed in a different county entitled the defendant to a mistrial; (6) Whether the trial court erred in denying Appellant's motion to suppress statements made following his arrest; (7) Whether the court erred in denying Appellant's motion to suppress evidence seized from the defendant's residence; (8) Whether the court erred in denying the Public Defender's motion to withdraw; (9) Whether the court erred in denying the proffered testimony of defense witness, Don Dowdy; (10) Whether the court erred in denying Appellant's motion for continuance

concerning capital prisoners' mental health status and personal backgrounds. The Florida Supreme Court denied relief in Brown v. Wainwright, 392 So.2d 1327 (Fla. 1981), and the United States Supreme court declined review. Brown v. Wainwright, 454 U.S. 1000 (1981).

Thomas subsequently appeared before The Board of Executive Clemency, but on September 28, 1982, the Governor denied clemency and signed a death warrant. Thomas was originally scheduled to be executed on October 23, 1982. On October 6, 1982, Thomas filed in the state trial court his first motion for post-conviction relief pursuant to Florida Rule of Criminal Procedure, 3.850. Simultaneously with this motion, Thomas filed an application for stay of execution and request for an evidentiary hearing.

The first motion for post-conviction relief, filed on October 6, 1982, raised seven claims which included the following: (1) The Florida death penalty statute expressly restricts consideration of mitigating circumstances; (2) The instructions to the jury during the penalty phase of the trial unconstitutionally shifted the burden of proof to the defendant; (3) The Florida death penalty statute fails to provide for fully individualized sentencing and permits unguided resentencing by the Florida Supreme Court; (4) The defendant's death sentence "shocks the conscience" as it is based on wholly circumstantial evidence; (5) The defendant's confession was involuntarily obtained; (6) The Florida death

during the penalty phase of the trial in order to obtain the testimony of Wilbert Lee; (11) Whether the court erred in denying Appellant's requested jury instruction on attempted first degree murder; (12) Whether the verdict is contrary to the law; (13) Whether the verdict is contrary to the weight and sufficiency of the evidence; (14) Whether the court erred in denying Appellant's motion for a new trial; (15) Whether the court erred in sentencing the defendant to death and (16) Whether the court erred in denying a request for a pre-sentence investigation.

penalty statute is arbitrary and capricious as it is based on geographical differences, economic status of the defendant; sex of the defendant, and race of the victim; and (7) The defendant was deprived of reasonably effective assistance of counsel at both the guilt and penalty phases of the trial.[2/] The trial judge summarily denied the first five claims, he rejected the sixth claim on its merits and set the ineffective assistance of counsel claim for evidentiary hearing. On October 15, 1982, after hearing all the evidence, the trial court rejected the ineffective assistance of counsel claims and entered an order denying the motion for post-conviction relief.

Appeal of the order denying post-conviction relief was taken to the Florida Supreme Court. Thomas raised three issues before the Florida Supreme Court: (1) Whether defects in the present case are fundamental in nature, thus warranting an order setting aside defendant's conviction; (2) Whether Appellant was denied equal protection and due process by the resolution of his claim concerning the arbitrary application of the death penalty without first providing the expert assistance necessary for the full and fair consideration of this claim and (3) Whether Appellant was denied effective assistance of counsel. Simultaneous with this appeal, Thomas filed a petition for writ of habeas corpus in the same court alleging ineffective assistance of appellate counsel.[3/] On October 21, 1982, the Florida Supreme Court declined to stay the execution, affirmed the

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2/ Thomas pointed to several deficiencies on the part of trial counsel: (a) failure to request individualized voir dire examination; (b) inadequate voir dire examination of potential jurors concerning pretrial publicity; (c) failure to investigate and present non-statutory mitigating cicumstances; and (d) conflict of interest between defendant and his court-appointed attorney.

3/ Thomas alleged that appellate counsel was ineffective by reason of (1) failure to raise the question of trial court error in excluding proffered defense testimony that would have undermined the evidentiary link between the

denial of the motion for post-conviction relief and denied the petition for writ of habeas corpus. Thomas v. State, 421 So.2d 160 (Fla. 1982).

Prior to the rendition of the Florida Supreme Court opinion, Thomas filed in the United States District Court, Middle District of Tampa, Judge Wm. Terrell Hodges, a petition for writ of habeas corpus and an application for stay of execution. The District Court entered a stay on October 21, 1982, after issuance of the Florida Supreme Court opinion. The petition before the United States District Court raised the following issues: (1) the Florida Supreme Court received and considered non-record psychiatric reports in reviewing petitioner's case; (2) the jury was impermissibly restricted in its consideration of non-statutory mitigating circumstances; (3) the trial court's instructions to the jury during the penalty phase of the trial unconstitutionally shifted the burden of proof to the defendant; (4) the death penalty has historically been applied in a discriminatory manner; (5) Florida's death penalty statute fails to provide for fully individualized sentencing and permits unguided re-sentencing by the Florida Supreme Court; (6) the rape portion of aggravating circumstances listed in the Florida death penalty statute is so confusing and vague as to violate the right to due process; (7) the evidence presented at trial did not support imposition of the death sentence and (8) the defendant

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defendant and the murder weapon; inadequately presenting on appeal the issue of whether certain statments made by the defendant to the police should have been suppressed; (3) failure to brief the issue of whether the court had erred in denying defense counsel's motion to withdraw; (4) failure to raise on appeal the question of whether the trial court restricted the jury's and its own consideration of mitigating circumstances; (5) failure to argue that the trial court's instructions during sentencing shifted the burden of proof to the defendant; (6) failure to argue that the trial court erred in finding the capital felony heinous, atrocious, and cruel; and (7) failure to argue that Section 921.141(5)(d), Fla. Stat. (1975), was unconstitutionally vague due to statutory changes in the criminal laws pertaining to rape. Smith v. State, 421 So.2d 160, 164-166 (Fla. 1982).

received inadequate representation at trial and on direct appeal.[4/]

On November 30, 1983, the district court entered a Memorandum Opinion denying the petition and Thomas appealed. In his brief before the Eleventh Circuit Court of Appeals, Thomas raised the following issues: (1) Whether he was denied effective assistance of conflict free counsel; (2) Whether Florida law at the time of his sentencing discouraged his attorney from investigating and introducing evidence of non-statutory mitigating circumstances, depriving him of either due process or effective assistance of counsel (3) Whether the Brown issue as decided in Ford v. Strickland, 696 F.2d 804 (11th Cir.) (en banc), cert. denied, ___ U.S. ___, 104 S.Ct. 201, 78 L.Ed.2d 176 (1983), should be reconsidered; and (4) Whether the Florida death penalty statute is being administered in a racially or otherwise discriminatory manner. The Court affirmed the decision of the district court on July 17, 1985. Thomas v. Wainwright, 767 F.2d 738 (11th Cir. 1985). Thomas then sought review by certiorari from the United States Supreme Court, raising a single issue: Whether a criminal defendant who proceeds -- to trial and is sentenced to death, represented by court-appointed counsel with whom he has never communicated with, may be deemed by his silence to

4/ Thomas alleged the following deficiencies on the part of trial counsel: (a) failure to request individualized voir dire; (b) failure to conduct adequate voir dire of all potential jurors concerning the pretrial publicity of the "Ski Mask Gang"; (c) failure to investigate and present non-statutory mitigating evidence during the penalty phase of the trial; and (d) presence of an irreconcilable conflict between Thomas and his court-appointed attorney.

Thomas alleged that his appellate counsel was ineffective in the following ways: (a) failure to effectively appeal the trial court's refusal to admit the testimony of defense witness, Don Dowdy; (b) failure to effectively appeal the trial court's denial of the defendant's motion to suppress oral statements; and (c) failure to effectively appeal the trial court's denial of the public defender's motion to withdraw.

have waived his constitutional right to effective assistance of counsel, wherein the trial court fails to advise the defendant of the risks and dangers inherent in the lack of such communication and silence. The United States Supreme Court denied certiorari review on February 24, 1986. Thomas v. Wainwright, Case No. 85-6102.

On March 11, 1986, the Governor signed a second death warrant for Thomas. The warrant becomes effective at 12:00 noon, April 9, 1986, and expires by its own terms at 12:00 noon, April 16, 1986. Execution has been set for 7:00 a.m., April 15, 1986.

On April 1, 1986, Petitioner filed in the Florida Supreme Court a petition for writ of habeas corpus alleging a Lockhart/Grigsby violation. See, Lockhart v. McCree, ___ U.S. ___, 106 S.Ct. 59 (U.S.S.C. Case No. 84-1865, pending). The State submitted a response to the petition and oral argument is currently scheduled for Monday, April 7, 1986 at 8:30 a.m.

III.

ARGUMENT

Petitioner's procedural default bars the Grigsby/Lockhart claim and makes the United States Supreme Court decision in the pending Lockhart v. McCree case irrelevant to the outcome of this particular case.

Relying on Grigsby v. Mabry, 758 F.2d 226 (8th Cir. 1985)(en banc), petition for cert. filed sub nom, Lockhart v. McCree, cert. granted, ___ U.S. ___, 106 S.Ct. 59 (1985), Thomas argues that the exclusion from the jury of persons with scruples against the death penalty results in a death qualified jury that is bias in favor of the prosecution and does not represent a fair cross section of the community. This argument has been repeatedly rejected by this court as

well as the United States Supreme Court. See, Adams v. Wainwright, U.S. Case No. 85-6448 (A-653) (application for stay denied March 31, 1986); Jones v. Smith, U.S. Case No. 85-6557 (A-721) (application for stay denied March 20, 1986); Harich v. Wainwright, U.S. Case No. 85-6547 (A-711) (application for stay denied March 18, 1986); Witt v. Wainwright, ___ U.S. ___, 84 L.Ed.2d 801 (1985) (application for stay denied); Witt v. State, 465 So.2d 510 (Fla. 1985) (juror excluded for cause); Caruthers v. State, 465 So.2d 496 (1985) (juror excluded for cause); Dougan v. State, 470 So.2d 697 (Fla. 1985) (jurors excluded for cause); Adams v. Wainwright, ___ So.2d ___ (Florida Supreme Court #68,351, opinion filed February 26, 1986) [11 F.L.W. 79] (court refused to extend Grigsby to include peremptory challenges).

In the present case, one juror (Elo E. Bennett, Jr.) was excused for cause because of "irreconcilable reservations against the death penalty." (R.292, 345-346, 425). The defense made no objection at the time of trial (R.422,425) and the issue was not raised on direct appeal or in proceedings for post-conviction relief.

In Thomas' case, there was a "triple layer" procedural default. Thomas failed to raise and preserve this issue at the trial level, which under Florida law bars consideration of it on direct appeal. Williams v. State, 414 So.2d 509 (Fla. 1982); Steinhorst v. State, 412 So.2d 332 (Fla. 1982). Thomas falso failed to raise the issue on direct appeal, which under Florida law bars consideration of the issue in a subsequent state collateral proceeding. Armstrong v. State, 429 So.2d 287 (Fla.), cert. denied, 464 U.S. 865, 104 S.Ct. 203, 78 L.Ed.2d 177 (1983); Hitchcock v. State, 432 So.2d 42 (Fla. 1983); Jones v. State, 446 So.2d 1059 (Fla. 1984); Mikenas v. State, 460 So.2d 359 (Fla. 1984); Zeigler v. State, 452 So.2d 537 (Fla. 1984). This court has also held that a petition for habeas corpus is not to be used as a vehicle for obtaining a second appeal. Adams v. Wainwright,

____ So.2d ____ (Florida Supreme Court #68,351) [11 F.L.W. 79]; Steinhorst v. Wainwright, 477 So.2d 537 (Fla. 1985). Finally, Thomas failed to raise this issue in his first state court collateral proceeding, which under Florida law bars consideration of the issue in a subsequent state collateral proceeding. Witt v. State, 465 So.2d 510 (Fla. 1985). No matter how the United States Supreme Court decides Lockhart v. McCree, this defendant will not be entitled to relief because of procedural default.

Absent any procedural defaults, the record of the state court proceedings is clear that the juror was properly excluded under Wainwright v. Witt, 469 U.S. ___, 105 S.Ct. ___, 83 L.Ed.2d 841 (1985) and Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968). In Thomas' case, the juror was excused for cause because of "irreconcilable reservations against the death penalty." (R.292, 345-346, 425) During questioning by the prosecutor, Mr. Bennett stated that his reservations about the death penalty would override the instructions given him by the court. (R.299-301, 340) During an attempted rehabilitation by defense counsel the juror said he could not set aside his personal feelings and follow the law. (R.368) Later, during further questioning by the court, Mr. Bennett stated that he could not be impartial and could never, under any circumstances, find anyone guilty of an offense punishable by death. (R.424-425).

A prospective juror whose views on the death penalty would "prevent or substantially impair the performance of his duties as a juror" was held subject to exclusion for cause under Wainwright v. Witt, 83 L.Ed.2d at 851-852. This standard does not require that the juror's bias be proved with "unmistakable clarity". Id. at 852, and deference must be paid to the trial judge who sees and hears the juror. Id. at 853. Witt defines two types of jurors: (1) jurors

whose opposition to capital punishment will not allow them to apply the law or view the facts impartially and (2) jurors who, though opposed to capital punishment, will nevertheless conscientiously apply the law to the facts adduced at trial. The juror in Thomas' case, Elo E. Bennett, Jr., clearly stated that he could not set aside his personal feelings and follow the law. (R.340, 368, 424-425). Mr. Bennett's responses to the questions posed clearly brought him within the first category of jurors and he was properly excluded for cause under Wainwright v. Witt.

IV.

Apart from the Lockhart claim, there were adequate independent grounds for excusal of the juror.

No matter how the United States Supreme Court decides the Lockhart issue, Petitioner will not be entitled to relief because there were adequate independent grounds for excusal of the juror.

Mr. Bennett stated during voir dire examination that he had formed an opinion as to guilt or innocence and could not sit as a fair and impartial juror. (R.311, 405-406).

The test for determining juror competency is whether the juror can lay aside any bias or prejudice and render his verdict solely upon the evidence presented and the instructions on the law given to him by the court. Dobbert v. Florida, 432 U.S. 282, 97 S.Ct. 2290, 53 L.Ed.2d 344 (1977); Murphy v. Florida, 421 U.S. 794, 95 S.Ct. 2031, 44 L.Ed.2d 589 (1975); Lusk v. State, 446 So.2d 1038 (Fla.), cert. denied, ___ U.S. ___, 105 S.Ct. 229, 83 L.Ed.2d 158 (1984); Singer v. State, 109 So.2d 7 (Fla. 1959).

In Singer v. State, supra, the defendant challenged for cause a prospective juror whose statements during voir dire revealed he had preconceived ideas regarding the guilt of

the defendant. After concluding that there was reasonable doubt as to whether the prospective juror would be able to render a fair and impartial verdict on the evidence, this court determined that he should have been excused for cause. See also, Hill v. State, 477 So.2d 553 (Fla. 1985). In Thomas' case, the juror stated that he had formed an opinion as to guilt or innocence and could not sit as a fair and impartial juror. Mr. Bennett's response certainly justified excusal under Singer.

V.

STATE'S USE OF PEREMPTORY CHALLENGES

Thomas attempts to extend the Grigsby holding to include peremptory challenges. This argument has been rejected by this court as well as the United States Supreme Court. Adams v. Wainwright, U.S. Case No. 85-6448 (A-653) (stay of execution denied March 31, 1986); Adams v. Wainwright, Florida Supreme Court #68,351, opinion filed February 26, 1986. It is also clear that the Grigsby court itself refused to go so far, explicitly limiting its holding to the exclusion of jurors excused for cause. Grigsby v. Mabry, 758 F.2d 226, 230 (8th Cir. 1985). The Supreme Court decision in Grigsby, deciding whether the exclusion of jurors for cause who hold scruples against the death penalty creates a conviction-prone jury, will have no bearing in a case where it is alleged that the state used its peremptory challenges towards this end.

In Thomas' case, the prosecutor exercised thirteen peremptory challenges. Four of those jurors, Mr. Lane, Mr. Burgess, Mrs. Anderson and Ms. Smallwood, were in favor of capital punishment (R.334, 481, 544, 695); two jurors, Ms. Calvin and Mr. Clark, were categorically opposed to capital punishment and for that reason expressed an unwillingness to follow the law (R.449-452, 727-749); two jurors, Ms. Ritter

and Ms. McCall expressed only general reservations about the death penalty but also indicated an unwillingness to follow the law (R.470, 706); three jurors, Ms. Gray, Ms. Booth and Ms. Watkins, had general reservations about the death penalty but indicated a willingness to follow the law (R.329, 609, 658); one juror, Mrs. Cobb, stated that she had medical problems which might interfere with her ability to sit as a juror (R.734) and another juror, Mrs. Anderson, stated that she might be influenced by the fact that she and the victim have the same last name (R.525).

As previously noted, the Grigsby decision expressly recognizes the right of the state to exercise peremptory challenges. To establish a rule limiting the use of such challenges would be "impossible and limits the right of a party to eliminate jurors who appear to be biased." 758 F.2d at 230. Petitioner's argument that the prosecutor's use of peremptory challenges to exclude death-scrupled jurors is violative of the United States Constitution is without merit.

VI.

ABUSE OF THE WRIT

This is Thomas' second petition to this court for a writ of habeas corpus. The first petition, filed in 1982, raised ineffective assistance of appellate counsel. Thomas v. State, 421 So.2d 1609 (Fla. 1984).

In his present petition, Thomas raises a new claim, a challenge to the jury selection process as unconstitutional. The petition should be dismissed because Thomas has failed to show any justification for failure to raise this issue in the first petition.

In determining that successive habeas petitions for the same relief are not cognizable, this court in Francois v. Wainwright, 470 So.2d 685 (Fla. 1985) relied on Florida Rule

of Criminal Procedure 3.850. Rule 3.850 is similar to Rule 9(b), Rules Governing §2254 cases in the United States District Court, and cases may be dismissed as an abuse of the writ when issues which are raised could have been presented in a previous petition. Raulerson v. Wainwright, 753 F.2d 869, 873 (11th Cir. 1985). This court found such an abuse of the writ in Witt v. State, 465 So.2d 510 (Fla. 1985).

> Further, we reject his contention that the Eighth Circuit Court of Appeals' decision in Grigsby, holding that the excusal for cause of jurors who oppose the death penalty violates the sixth amendment right to an impartial jury, constitutes a change of law which justifies a reconsideration of the issue in this cause. The United States Supreme Court recently rejected this argument in Sullivan v. Wainwright, 464 U.S. 109, 104 S.Ct. 450, 78 L.Ed.2d 210 (1983), and this Court has also specifically rejected this argument. Caruthers v. State, 465 So.2d 496 (Fla., 1985); Copeland v. State, 457 So.2d 1012 (Fla. 1984); Gafford v. State, 387 So.2d 333 (Fla. 1980).

Witt v. State, supra, at 512.

At the time, Thomas failed to raise the "death qualified jury" issue in his 1982 collateral proceeding, there was in existence a large body of caselaw which supported the claim. See, Spinkellink v. Wainwright, 578 F.2d 582, 593-594 n.15 (5th Cir. 1978), cert. denied, 440 U.S. 976 (1979); Smith v. Balkcom, 660 F.2d 573, 577 n.8, 588-584 n.28 (5th Cir. Unit B 1981). Thomas has presented no satisfactory explanation for his failure to raise the claim in his first habeas petition and the petition should be dismissed as an abuse of the writ.

VII.

For the reasons and authority cited in the above Response, The State of Florida respectfully requests that this Honorable Court deny the Petition for Writ of Habeas Corpus.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to Larry Helm Spalding, Capital Collateral Representative, Michael A. Mellow, Assistant Capital Collateral Representative, Office of the Capital Collateral Representative, 225 W. Jefferson Street, Tallahassee, Florida 32301, this 2nd day of April, 1986.

Theda R. James

OF COUNSEL FOR RESPONDENT