IN THE SUPREME COURT OF FLORIDA

WAYNE TOMPKINS,

Petitioner,

vs.

RICHARD L. DUGGER,
Secretary, Department of
Corrections,

Respondent.
_____/

Case No. 74098

EMERGENCY RESPONSE: DEATH WARRANT SIGNED; EXECUTION IMMINENT.

RESPONSE IN OPPOSITION TO PETITION FOR EXTRAORDINARY RELIEF, FOR A WRIT OF HABEAS CORPUS, REQUEST FOR STAY OF EXECUTION, AND APPLICATION FOR STAY OF EXECUTION PENDING DISPOSITION OF PETITION FOR WRIT OF CERTIORARI

COMES NOW respondent, Richard L. Dugger, Secretary, Department of Corrections, State of Florida, by and through undersigned counsel and hereby files its response in opposition to the petition for extraordinary relief, for a writ of habeas corpus, request for a stay of execution, and application for stay of execution pending disposition of petition for writ of certiorari, and would show unto this Court:

I.

PROCEDURAL HISTORY

The petitioner, Wayne Tompkins, was tried and convicted of first degree murder. The trial court followed a unanimous jury recommendation and imposed the sentence of death. Petitioner appealed and in an opinion reported at Tompkins v. State, 502 So.2d 415 (Fla. 1986), this Honorable Court affirmed the judgment

and sentence. The issues raised in that appeal were the following:

> ISSUE I: THE TRIAL COURT ERRED IN ADMITTING WAYNE TOMPKINS' CONFESSION INTO EVIDENCE, AS THE STATE FAILED TO PROVE THE CORPUS DELICTI FOR A HOMICIDE BY INDEPENDENT PROOF.
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> ISSUE 11: THE TRIAL COURT ERRED IN UNDULY RESTRICTING WAYNE TOMPKINS' CROSS-EXAMINATION OF TWO IMPORTANT STATE WITNESSES, DEPRIVING HIM OF HIS CONSTITUTIONAL RIGHT TO CONFRONT HIS ACCUSERS.
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> ISSUE 111: THE TRIAL COURT ERRED IN PERMITTING' THE PROSECUTOR TO ELICIT PREJUDICIAL HEARSAY TESTIMONY ON RE-DIRECT EXAMINATION OF BARBARA DECARR.
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> ISSUE IV: THE TRIAL COURT ERRED IN EXCLUDING SIX PROSPECTIVE JURORS FROM WAYNE TOMPKINS' TRIAL BECAUSE OF THEIR RESERVATIONS CONCERNING CAPITAL PUNISHMENT, AS A JURY SELECTED IN SUCH A MANNER IS NOT REPRESENTATIVE OF A CROSS-SECTION OF THE COMMUNITY, AND IS ALSO MORE PRONE TO CONVICT, IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.
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> ISSUE V: THE TRIAL COURT ERRED IN ADMITTING HEARSAY TESTIMONY DURING THE PENALTY PHASE OF WAYNE TOMPKINS' TRIAL WHICH COULD NOT BE CONFRONTED OR REBUTTED.
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> ISSUE VI: THE TRIAL COURT ERRED IN SENTENCING WAYNE TOMPKINS TO DEATH BECAUSE THE SENTENCING WEIGHING PROCESS INCLUDED IMPROPER AGGRAVATING CIRCUMSTANCES AND EXCLUDED EXISTING MITIGATING CIRCUMSTANCES, AND THE COURT GAVE UNDUE WEIGHT TO THE JURY'S DEATH RECOMMENDATION, RENDERING THE DEATH SENTENCE UNCONSTITUTIONAL UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The petitioner next filed a petition for writ of certiorari in the Supreme Court of the United States, said petition being denied on June 26, 1987.

At the time of the preparation of the instant response, Tompkins had filed a **3.850** motion which is pending before the Honorable Harry Lee Coe, 111, Circuit Judge, Thirteenth Judicial Circuit, in and for Hillsborough County, Florida. In accordance with **Florida Rule** of **Criminal Procedure 3.851,** Tompkins has also filed the instant habeas petition.

II.

Your respondent does not contest the jurisdiction of this Honorable Court to entertain a petition for a writ of habeas corpus where such petition presents cognizable matters. However, the instant habeas petition prepared on behalf of Mr. Tompkins by the capital collateral representative presents mostly matters which this Honorable Court will not consider on habeas review. The instant petition for writ of habeas corpus is, as was the petition filed in Blanco v. Wainwright, **507** So.2d **1377** (Fla. **1987),** "almost entirely a repetition of the issues raised in the Rule **3.850** proceeding." By including these types of claims within his petition for writ of habeas corpus, "collateral counsel has accomplished nothing except to unnecessarily burden this Court with redundant material." Blanco v. Wainwright, **507** So.2d at **1384.** With respect to the issues properly raised under Rule **3.850,** petitioner's remedy is not the instant habeas petition, but rather is a direct appeal from the denial of the Rule **3.850** motion. This Honorable Court need not nor should not "replough this ground once again." Ibid.

With respect to certain of the issues raised in this habeas petition, petitioner gratituously asserts that appellate counsel was ineffective for failing to raise the issues on direct appeal.[1] In McCrae v. Wainwright, 439 So.2d 868 (Fla. 1983), this Court held that "[h]abeas corpus should not be used as a vehicle for presenting issues which should have been raised at trial and on appeal", citing Hargrave v. Wainwright, 388 So.2d 1021 (Fla. 1980), and State ex rel. Copeland v. Mayo, 87 So.2d 501 (Fla. 1956). In McCrae, this Court specifically opined that:

> . . . Allegations of ineffective appellate counsel therefore should not be allowed to serve as a means as circumventing the rule that habeas corpus proceedings do not provide a second or substitute appeal. (text at 870)

This type of admonition has been consistently followed by this Honorable Court and this Court has specifically admonished the office of the capital collateral counsel "that habeas corpus is not a vehicle for obtaining additional appeals of issues which were raised, or should have been raised, on direct appeal or which were waived at trial or which could have, should have, or have been, raised in Rule 3.850 proceedings." White v. Dugger, 511 So.2d 554 (Fla. 1987), citing Blanco, supra, and Copeland v. Wainwright, 505 So.2d 425 (Fla. 1987). Thus, to the extent that petitioner is again asking this Court to exercise its

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[1] Your respondent will identify these issues in the body of this response. Nevertheless, it is advisable to set forth the basic premise that these issues are not cognizable on habeas review at the outset in an effort to give guidance to this Court's review of all issues presented.

jurisdiction over issues not legally cognizable on habeas review, this Court should decline to do *so.*

Your respondent declines to address the merits of substantive claims asserted in this habeas petition which were, could have been or should have been asserted on direct appeal and urges this Court to continue to enforce its procedural default policy; otherwise, appeal will follow appeal and there will be no finality in capital litigation. Cf. Johnson v. State, 13 F.L.W. 699 (Fla. Dec. 1, 1988) (the credibility of the criminal justice system depends upon both fairness and finality).

Thus, petitioner's application for habeas relief on the substance of grounds I through VI and VIII and IX should be denied for reasons of procedural default. In Harris v. Reed, __ U.S. __, **44** Cr.L. 3120 (Case No. 87-5677, opinion filed Feb. 22, 1989), the Supreme Court held that where a state court was ambiguous in its ruling denying relief on both procedural and substantive grounds, the federal habeas courts should reach the merits:

> Faced with a common problem, we adopt a common solution: a procedural default does not bar consideration of a federal claim on either direct or habeas review unless the last state court rendering a judgment in the case "clearly and expressly" states that its judgment rests on a state procedural bar. (44 Cr.L. 3122-23).

The court added in footnote 12:

> . . . Additionally, the dissent's fear, post, p.11-12 and n.6, that our holding will submerge courts in a flood of improper

> prisoner petitions is unrealistic: a state court that wishes to rely on a procedural bar rule in a one-line pro forma order can easily write that "relief is denied for reasons of procedural default."

111.

RESPONSE IN OPPOSITION TO CLAIMS RAISED BY PETITIONER

Petitioner raises nine claims in his pleading before this Honorable Court. Your respondent will address each in the order presented by petitioner. However, at the outset your respondent asserts, as aforestated, that eight of the nine claims raised herein are barred from consideration by this Court. In seven of the claims, petitioner asserts that appellate counsel was ineffective. However, appellate counsel cannot be considered ineffective for failing to raise issues which are procedurally barred because they were not properly presented at trial. Ruffin v. Wainwright, 461 So.2d 109 (Fla. 1984); Darden v. State, 475 So.2d 214 (Fla. 1985); Steinhorst v. Wainwright, 477 So.2d 537 (Fla. 1985); Bertolotti v. Dugger, 514 So.2d 1095 (Fla. 1987).

Claim I: Petitioner's first claim concerns the alleged improper burden-shifting instruction at the penalty phase. This claim is not cognizable in these habeas proceedings where it could have and should have been raised on direct appeal.

Nor could appellate counsel be found to be ineffective based on this claim. The record reflects that no objection was made in the trial court preserving the issue for appellate review. Consequently, appellate counsel cannot be deemed ineffective for

having failed to urge an unpreserved issue. See Suarez v. Dugger, 527 So.2d 190, 193 (Fla. 1988); Martin v. Wainwright, 497 So.2d 872, 874 (Fla. 1986). In fact, this Honorable Court has recently rejected the burden-shifting argument raised on habeas where no objection was made at the trial level. Atkins v. State, 14 F.L.W. 207, 208, n. 2 (4) (Fla. April 13, 1989).

Claim 11: Petitioner next claims that the prosecution and the court improperly asserted that sympathy towards the defendant was an improper consideration. In Atkins v. State., supra, this Court held that this same claim would not support an ineffective assistance of appellate counsel claim where no objection was made at trial. The same is true in the instant case and, in fact, petitioner makes no claim that appellate counsel was ineffective for failing to raise this point. In any event, petitioner's attempt to raise this claim on its merits must fail where it is clear that it is procedurally barred because it could have and should have been raised on direct appeal.

Claim 111: Petitioner's claim III is one which is consistently being raised via 3.850 motions and via habeas corpus petitions and is a claim which has been consistently rejected by this Honorable Court. No claim is made that appellate counsel was ineffective, presumably because no objection was made in the trial court thereby precluding appellate review. This same claim was rejected by this Honorable Court in Atkins v. State, supra, because it should have been raised on direct appeal. See Atkins, n. 3 (1). The same result should obtain in the instant case.

Claim IV: Petitioner next presents a claim predicated upon an alleged improper golden rule argument during the prosecutor's closing argument in the penalty phase. Although tempted to do so, your respondent will refrain from commenting on the merits of this claim where it is clear that it is not cognizable in these proceedings. Appellate counsel could not have been ineffective where no objection was made in the trial court to the allegedly improper remarks. Consequently, appellate counsel cannot be deemed ineffective for having failed to urge an unpreserved issue. Suarez v. Dugger, supra.

Nor is this claim available on the merits to petitioner where this is a claim proper for presentation on a direct appeal. Inasmuch as habeas corpus does not serve as a second appeal for a defendant, this claim should be denied by this Honorable Court.

Claim V: The petitioner's next claim concerns the purported denial of the Sixth Amendment right to present a defense where the court sustained hearsay objections to questions asked during cross-examination of state witnesses. This claim is not cognizable in these proceedings where the same claim has been raised in petitioner's 3.850 motion. See Blanco v. Wainwright, supra.

Petitioner's claim of ineffective assistance of counsel based upon the failure to raise this point on appeal must also fail. No objection or argument was made to the trial court asserting that the clearly hearsay questions were proper. Therefore, appellate review was precluded, Lucas v. State, 376

So.2d **1149** (Fla. **1979**), and the issue could not have been raised on appeal. Suarez v. Dugger, supra.

Claim VI: Petitioner next contends that the precepts of Booth v. Maryland, **107** S.Ct. **2529** (**1987**), were violated by the introduction of "victim impact" evidence, This claim has been raised in the **3.850** motion filed by the petitioner and, therefore, this claim is not cognizable in these proceedings. With respect to the question of the effectiveness of appellate counsel, your respondent asserts that, again, this is a claim which could not have been raised on direct appeal due to the failure to object at trial. Suarez v. Dugger, supra. Therefore, this claim should be summarily denied.

Claim VII: As his seventh claim, the petitioner presents the only claim which is cognizable in these habeas proceedings. He alleges that appellate counsel was ineffective for failing to raise as an issue trial counsel's objections to the state's introduction and use in evidence of photographs of the victim. Your respondent submits that this claim is without merit as will be demonstrated below.

Your respondent does not contest the fact that defense counsel objected to the introduction into evidence of the four photographs depicting the skeletal remains of the victim. However, even if this claim was presented to this Honorable Court on direct appeal, your respondent submits that no relief would be warranted. In Straight v. State, **397** So.2d **903**, **910-11** (Fla.), cert. denied, **454** U.S. 1022 (**1981**), this Court held:

> . . . The basic test of admissibility of photographs, however, is not necessity, but relevance. *Bauldree v. State,* 284 So.2d 196 (Fla. 1973). Photographs can be relevant to a material issue either independently or by corroborating other evidence. *State u. Wright,* 265 So.2d 361 (Fla. 1972).
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> . . . Thus *Young u. Sfute* [234 So.2d 341 (Fla. 1970)] and the cited case of *Leach v. State* [132 So.2d 329 (Fla. 1961), *cert. denied,* 368 U.S. 1005, 82 S.Ct. 636, 7 L.Ed.2d 543 (1962)] recognized that even relevant photographs sometimes must be excluded if they are unduly prejudicial, but the pictures in the present case were not repetitive as in *Young* and were of greater relevance. We hold that all the photographs admitted were relevant either independently or as corroborative of other evidence, specifically, the testimony of witnesses. They were few in number and included only a very few gruesome ones which were relevant to corroborate testimony as to how death was inflicted. The photographs were properly admitted.

The facts of the instant case are similar to those in Straight. Only four photographs were introduced into evidence in the instant case. There was a reason for the introduction of each photograph. State's Exhibit 8 depicted the skeletal remains as situated in the grave and showed the pink bathrobe encasing the remains to corroborate testimony. State's Exhibit 9 showed the excavation process of the entire skeleton and corroborated the testimony of a state's witness as to the process used to remove the body. State's Exhibit 10 showed the skull that was taken out of the grave. It was highly relevant for showing the tooth that the victim had growing behind her two front teeth, certainly

significant in identification of the victim. State's Exhibit 11 was relevant where it was the only photograph which showed the ligature which was used to murder the victim. See R 148-150. Your respondent submits that the law of the State of Florida would have permitted the introduction of four highly relevant photographs which were not unduly gruesome. See also Mills v. State, 462 So.2d 1075, 1080 (Fla. 1985) (no error in admitting a photograph of the skeletal remains of the victim); Henderson v. State, 463 So.2d 196, 200 (Fla. 1985) (introduction into evidence of photographs depicting victims' partially decomposed bodies not error).

Your respondent submits that had this issue been raised on appeal no relief would have been forthcoming; thus, appellate counsel could not have been ineffective for failing to raise the claim.

In any event, although there is a constitutional right of effective assistance of counsel on the first appeal taken as a matter of right, Evitts v. Lucey, 469 U.S. 387, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985), there is no constitutional duty to raise every nonfrivolous issue. Jones v. Barnes, 463 U.S. 745, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983). The failure of appellate counsel to brief issues he reasonable considers to be without merit is not ineffective assistance of counsel. Alvord v. Wainwright, 725 F.2d 1282, 1291 (11th Cir.) cert. denied, 469 U.S. 956, 105 S.Ct. 355, 83 L.Ed.2d 291 (1984). This Honorable Court has recently recognized that "[m]ost 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." Atkins v. State, supra at 14 F.L.W. 208. In the instant case, appellate counsel raised six issues and the focusing on the issues which he thought might result in a better chance of reversal is effective appellate advocacy as recognized by this Honorable Court and by the United States Supreme Court. See, Atkins v. State, supra, and Jones v. Barnes, supra.

For the several reasons expressed above, petitioner's seventh point should be rejected by this Honorable Court.

Claim VIII: As his eighth claim, the petitioner again presents a claim which has been consistently denied for several reasons. Tompkins contends that his death sentence rests on an unconstitutional automatic aggravating circumstance. This claim has been raised in the 3.850 motion and, therefore, is not cognizable in these habeas proceedings. Additionally, this Honorable Court in Atkins v. State, supra, has recently rejected an identical claim where that claim could have been raised on direct appeal but was not. Atkins, n. 3, (2).

Once again, petitioner attempts to raise this claim as a facet of an ineffective assistance of counsel claim. As with most of the claims in the instant habeas petition, this claim was unavailable to appellate counsel where no objection was made in the trial court. Thus, appellate counsel could not have been

ineffective for failing to include this claim on direct appeal. Suarez v. State, supra. For these reasons, this Honorable Court should deny Claim VIII.

Claim IX: As his final claim for relief, petitioner raises the Caldwell v. Mississippi claim, a claim included within all collateral proceedings regardless of the fact that it is clearly unavailable to capital defendants who fail to raise the claim at trial. Once again, petitioner presents a claim which has been presented to the trial court via the 3.850 motion. Therefore, on this basis alone, this claim is not available in habeas corpus proceedings.

Of course, this claim is also unavailable as a facet of ineffective assistance of counsel where there was no objection in the trial court to purportedly improper remarks allegedly denigrating the role of the jury. Thus, because this claim is clearly defaulted, relief is unavailable either on the merits or as an element of appellate counsel's alleged ineffectiveness. This Honorable Court should deny Claim IX.

WHEREFORE, your respondent respectfully requests this Honorable Court to deny all request of petitioner for extraordinary or habeas relief.

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 the Office of the Capital Collateral Representative, 1533 South Monroe Street, Tallahassee, Florida 32301, this 9th day of May, 1989

Robert J. Krauss

OF COUNSEL FOR RESPONDENT