IN THE SUPREME COURT OF FLORIDA

JERRY WHITE,

Petitioner,

v. CASE NO. 86,907

HARRY K. SINGLETARY, Secretary, Department of Corrections, State of Florida,

Respondent.
_____/

RESPONSE TO CONSOLIDATED PETITION FOR EXTRAORDINARY RELIEF, FOR A WRIT OF HABEAS CORPUS, AND/OR MOTION TO REOPEN DIRECT APPEAL, AND/OR MOTION TO REOPEN 3.850 APPEAL AND REQUEST FOR STAY OF EXECUTION

COMES NOW Respondent, Harry K. Singletary, by and through the undersigned counsel, pursuant to Fla.R.App.P. 9.100(h), in response to White's Consolidated Petition For Extraordinary Relief, For a Writ of Habeas Corpus, And/Or Motion to Reopen Direct Appeal, and/or Motion to Reopen 3.850 Appeal and Request for Stay of Execution, filed on or about November 29, 1995, and respectfully moves this Honorable Court to deny any and all requested relief, including any stay of execution, for the reasons set forth below.

PROCEDURAL HISTORY

The State would adopt the procedural history set forth in its Answer Brief filed November 29, 1995, in the concurrent postconviction appeal, and would expressly note that this is White's second habeas corpus petition. White v. Dugger, 565 So.2d 700 (Fla. 1990).

ARGUMENT

ALL REQUESTED RELIEF, INCLUDING ANY STAY OF EXECUTION, SHOULD BE DENIED; ALL CLAIMS PRESENTED ARE PROCEDURALLY BARRED

This Court has consistently held that habeas corpus is not a vehicle for obtaining appeals of issues which were raised, should have been raised on direct appeal, or which were waived at trial or which could have, should have, or have been, raised in prior postconviction filings. Mills v. Singletary, 606 So.2d 622, 623 (Fla. 1992); Medina v. Dugger, 586 So.2d 317 (Fla. 1991); Francis v. Barton, 581 So.2d 583 (Fla. 1991); White v. Dugger, 511 So.2d 554 (Fla. 1987); Blanco v. Wainwright, 507 So.2d 1377 (Fla. 1987). Likewise, this Court has held that successive petitions for the same relief are improper. See Johnson v. Singletary, 647 So.2d 106 (Fla. 1995); Kennedy v. Singletary, 599 So.2d 991 (Fla. 1992); White v. Dugger, 511 So.2d 554 (Fla. 1987). All of the claims presented run afoul of the above provisions and are procedurally barred. Each claim will now be addressed, although it must be noted that two claims duplicate those in the concurrent postconviction appeal.

CLAIM I

In this claim, CCR contends that it is presently rendering ineffective assistance to White. In addition to the arguments previously rejected by this Court in In Re: Jerry White, Case No. 86,706, CCR accuses the State of "gamesmanship" (Petition at 12), apparently because the state attorney did not do more to secure Chapter 119 compliance from state agencies outside of the jurisdiction of the Ninth Judicial Circuit. This "claim" provides no basis for relief. The record reflects that within

the last month, CCR has more than fully investigated White's case and asserted all conceivable claims on his behalf. Any lack of success stems from the fact that, after a decade of postconviction litigation, there is literally nothing left to raise, rather than from any external impediment upon counsel. The State does not read this "claim" as specifically asserting any state agency's refusal to comply with a public records demand, but rather to be a complaint as to the speed of compliance. The simple answer to this is that Chapter 119 was on the books when CCR first assumed representation of White in 1985, and that all of these matters could have been resolved earlier. Cf. Demps v. State, 515 So.2d 196 (Fla. 1987); Agan v. State, 560 So.2d 222 (Fla. 1990); Zeigler v. State, 632 So.2d 48 (Fla. 1993); Bolender v. State, 658 So.2d 28 (Fla. 1995). No relief, including any stay of execution, is warranted, and the second volume of the appendix accompanying White's postconviction motion would seem to clearly indicate the access to prison records which collateral counsel presently have.

CLAIM II

In this claim, CCR re-presents its argument that White is mentally retarded and brain damaged and that his execution would be cruel and unusual punishment. The State incorporates by reference the arguments set forth in Claim II of its Answer Brief filed yesterday. This matter is clearly procedurally barred as a matter of law. See Oats v. Dugger, 638 So.2d 20 (Fla. 1994). Further, by all accounts, White knew of the basis for this claim at trial, given defense counsel's question to White's mother at

the penalty phase concerning his IQ of 74 (OR 1056); further, collateral counsel attempted to raise a related claim of ineffective assistance in this regard in the first postconviction motion and appeal (see Initial Brief, White v. State, Florida Supreme Court Case No. 62,144 at 79). Given these facts, this matter was clearly available earlier, and cannot be raised in a successive petition for writ of habeas corpus. Francis, supra; White, supra; Mills, supra. As previously asserted, White's alleged IQ of 74, or 72, is an insufficient basis for relief in and of itself. Cf. Penry v. Lynaugh, 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989); Thompson v. State, 648 So.2d 692 (Fla. 1994).

CLAIM III

In this claim, CCR contends that White is entitled to relief because, in November of 1995, the Florida Parole Commission and the Board of Executive Clemency denied requests for records under Chapter 119 and Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). This claim is barred. As noted earlier, Chapter 119 was in effect when CCR assumed representation of White in 1985, and Brady was rendered in 1967. White asserted a prior Brady claim in his first post-conviction motion, and should not now be allowed to change the basis for that claim. See Francis, supra; Mills, supra. Further, this claim is rather a transparent attempt to bring White within the class of inmates privy to the issue resolved by this Court in Asay v. Florida Parole Comm'n, 649 So.2d 859 (Fla. 1994), cert. pending, in which this Court rejected the identical claim for relief. The State

it is too late for White to join this class, as the Asay lawsuit began in April of 1993, which is more than two years ago, and White would have had the same ability to raise this claim, at that time, as did Asay. Cf. Adams v. State, 543 So.2d 1244 (Fla. 1989); Henderson v. Singletary, 617 So.2d 313 (Fla. 1993). Assuming procedural bar is not found, Asay controls, and no relief is warranted.

CLAIM IV

In this claim, CCR re-presents its argument relating to clemency counsel. This argument is unquestionably procedurally barred, see Sullivan v. Askew, 348 so.2d 312 (Fla. 1977), and the State incorporates by reference the argument set forth in Claim III of its brief.

CONCLUSION

WHEREFORE, for the aforementioned reasons, the instant petition should be denied in all respects, and no relief, including any stay of execution, should be granted.

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 fax Mr. Martin J. McClain, Esq., and Mr. Todd G. Scher, Esq., Office of the Capital Collateral Representative, Post Office Drawer 5498, Tallahassee, Florida, 32314-5498, this 30th day of November, 1995.

RICHARD B. MARTELL
Chief, Capital Appeals