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IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT,
IN AND FOR LEON COUNTY, FLORIDA

WITH VENUE

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT,
IN AND FOR DADE COUNTY, FLORIDA

CASE NUMBER 78-670

STATE OF FLORIDA,

Plaintiff,

vs.

THEODORE ROBERT BUNDY,

Defendant.

RESPONSE TO APPLICATION FOR STAY OF EXECUTION AND MOTION FOR THE PAYMENT OF REASONABLE EXPENSES AND FEES FOR THE EMPLOYMENT OF CONFIDENTIAL EXPERTS

COMES NOW THE STATE OF FLORIDA, by and through undersigned counsel, and files its Response to Application for Stay of Execution and Motion for the Payment of Reasonable Expenses and Fees for the Employment of Confidential Experts and says as follows:

1. The Defendant's suggestion that he is entitled to the appointment of experts, presumably to determine his mental state, is devoid of legal merit because the issue is not his present competency, Adams v. State, 456 So.2d 888 (Fla. 1984), and Adams v. Wainwright, 764 F.2d 1356 (11th Cir. 1985) (defendant must show more than evidence that he might have been incompetent), or even what experts in a collateral proceeding might wish to speculate was his competency in 1979, for that testimony would be irrelevant.

Indeed, the Supreme Court has recognized that a defendant is not entitled to a judicial determination of his competency to assist counsel either in preparing a 3.850 motion or a petition for writ of habeas corpus, as the State previously argued in the earlier hearing. Jackson v. State, 452 So.2d 533 (Fla. 1984). Counsels' reliance on Rule 3.010 as it pertains to Rule 3.850 is misplaced. The rules of criminal procedure do not apply to 3.850 proceedings. Jackson, supra. The Supreme Court promulgated the rule and the Supreme Court has defined it.

2. Inasmuch as Defendant has not filed a motion for post-conviction relief pursuant to Fla.R.Crim.P. 3.850, the State respectfully submits that this Court is without sufficient jurisdiction to afford Defendant the relief he seeks notwithstanding his argument to the contrary largely predicated upon the "all writs" language of Article V, Section 5(b) of the Florida Constitution and recent decisions of the Florida Supreme Court in State v. Beach, 466 So.2d 218 (Fla. 1985), and Russell v. Schaeffer, 467 So.2d 698 (Fla. 1985).

The "all writs" language, as a rule, cannot be used as an independent basis of jurisdiction. St. Paul Title Insurance Corporation v. Davis, 392 So.2d 1304 (Fla. 1980); Shevin ex rel. State v. Public Service Commission, 333 So.2d 9 (Fla. 1976); McCain v. Select Committee on Impeachment, Florida House of Representatives, 313 So.2d 722 (Fla. 1975). However, the Florida Supreme Court, in Russell v. Schaeffer, supra, appears to have modified this general rule under the narrow set of circumstances where a criminal defendant seeks a stay of execution from the trial court without having first filed a motion for post-conviction relief pursuant to Fla.R.Crim.P. 3.850. Specifically, the Court indicated that the trial court would have jurisdiction to entertain an application for a stay if the application, on its face, contained enough facts which would allow a court to consider that document as a colorable motion under Rule 3.850. Id. at 699. Since the defendant's application in Russell was found to be devoid of such facts, it was held that the trial court had no jurisdiction to entertain the application for a stay. Id. at 699. No different result should obtain here.

3. Initially, the State submits that Defendant's application for a stay cannot be viewed as a colorable Rule 3.850 motion since none of the factual allegations contained therein, or in the supporting memorandum and affidavits, are properly sworn to by Defendant. Scott v. State, 464 So.2d 1171, 1172 (Fla. 1985); Rowe v. State, 474 So.2d 898, 899 (Fla. 1st DCA 1985).

4. Moreover, Defendant's potential Rule 3.850 claims advanced in Exhibit I to Polly Nelson's affidavit in support of the stay application cannot be even remotely considered as constituting a colorable Rule 3.850 motion because they are issues which were either raised on Defendant's direct appeal and may not be relitigated, Hitchcock v. State, 432 So.2d 42, 43 n.1 (Fla. 1983); Carter v. State, 242 So.2d 737 (Fla. 1st DCA 1970), or are issues which could have and should have been raised at trial and if properly preserved, on direct appeal. Spinkellink v. State, 350 So.2d 85 (Fla. 1977); Meeks v. State, 382 So.2d 673 (Fla. 1980); Witt v. State, 387 So.2d 922 (Fla. 1980); Hargrave v. State, 396 So.2d 1127 (Fla. 1981); Demps v. State, 416 So.2d 808 (Fla. 1982); Downs v. State, 453 So.2d 1102 (Fla. 1984); Maxwell v. State, 11 F.L.W 219 (Fla. May 15, 1986). See also Fla.R.Crim.P. 3.850 providing that:

> This rule does not authorize relief based upon grounds which could have or should have been raised at trial and, if properly preserved, on direct appeal of the judgment and sentence.

5. Defendant's claim that he was denied a full and fair competency hearing as required by Pate v. Robinson, 383 U.S. 375 (1966), and Drope v. Missouri, 420 U.S. 162 (1975), is an issue not cognizable in a Rule 3.850 proceeding because the matter should have been determined on direct appeal. Adams v. State, 456 So.2d 888, 890 (Fla. 1984). See also the cases cited in Exhibit I to counsel's affidavit at page seven. Furthermore, the record refutes the allegations that Defendant is entitled to relief (R 3613-3650). The hearing was as complete as Defendant and his special attorney wished (R 3631). Indeed, the Court heard from Dr. Tanay before ruling on Defendant's competency (R 3650) as well as Dr. Cleckley (R 3621-3630; 3643-3647).

Mr. Minerva's proffer (R 3617-3619) raised no bona fide doubt concerning Defendant's competency to stand trial. It was nothing more than counsel's disagreement with Defendant's

decision respecting the defenses to be interposed, and his belief that Defendant was not capable of making the necessary decisions (R 3618-3619). Without questioning Mr. Minerva's opinions or motives, the decision was not Mr. Minerva's, it was Defendant's. Foster v. Strickland, 707 F.2d 1339, 1343 (11th Cir. 1983); Alvord v. Wainwright, 725 F.2d 1282, 1289 (11th Cir. 1984). Also, the trial judge found Dr. Tanay's testimony to be "speculation." The evidence and record supports that finding because Dr. Tanay said he was "not sure" on the issue. (R 3637).

It is incredible to suggest that Defendant could refuse to cooperate with counsel or participate in the hearing as he was free to do and years later be heard to complain that he was denied a full and fair hearing on the issue. To allow such trial tactics would be a perversion of justice. Curry v. Wilson, 405 F.2d 110 (9th Cir. 1968). Mr. Hayes who is now challenged as incompetent for representing Defendant according to the latter's explicit instructions was merely satisfying his ethical obligations. Foster and Alvord, supra. As the Eleventh Circuit Court of Appeals held in the Foster case where the defendant refused to allow counsel to challenge his competency or sanity, he could not thereafter challenge the effectiveness of counsel for not presenting the claim.

In Drope, post hoc evidence was presented to the state court in a collateral proceeding. The appellate court refused to consider that evidence in determining whether there was a Pate violation. The Supreme Court of the United States, in ruling Drope should have been given a hearing under the facts shown on the record at trial stated:

> In reaching this conclusion [that the trial court should have made further inquiry] we have not relied upon the testimony of the psychiatrists at the § 27.26 hearing, which, we agree with the Missouri Court of Appeals, is not relevant to the question before us. [Emphasis supplied.]

Id. at 181, n.12.

In Reese v. Wainwright, 600 F.2d 1085 (5th Cir. 1979), cert. den., 444 U.S. 983 (1979), cited with approval in Adams v. Wainwright, 764 F.2d 1356 (11th Cir. 1985), the Court correctly interpreted Pate, saying:

> When habeas relief is sought on grounds of a violation of the Pate procedural right to a competency hearing, a petitioner shoulders the burden of proving that objective facts known to the trial court were sufficient to raise a bona fide doubt as to the defendant's competency. Pedrero, supra, at 1387. The emphasis in a Pate analysis is on what the trial court did in light of what it then knew.
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> 600 F.2d at 1091.

See also Bowden v. Francis, 733 F.2d 740, 746-748 (11th Cir. 1984).

In this case, unlike the cases relied upon by counsel, a hearing was held and determination made. The State, unlike Defendant, submits that Pate and Drope and their progeny be followed. Irrelevant, non-record evidence to be secured if given time, is not to be considered. The record controls, and the record belies any hint of incompetence.

The Court heard the expert testimony and concluded that Mr. Bundy, an intelligent, articulate, and highly educated person was, in fact, competent to stand trial and thus the allegations are conclusively refuted by the record and cannot present a colorable claim.

6. Defendant's claim that he was denied his Sixth Amendment right to counsel also leaves him without support for his position. Put simply, all of the sub-issues presented under this general claim are not the proper subject matter of a Rule 3.850 motion. First, the "Millard Farmer" issue was raised and resolved adversely to Defendant on his direct appeal (see Bundy v. State, 455 So.2d 330, 347, 348 (Fla. 1984)) and therefore may not now be relitigated in a collateral proceeding. Hitchcock v. State, supra; Carter v. State, supra.

Second, while ineffective assistance of trial counsel, Defendant's next sub-issue, is a claim normally cognizable in a Rule 3.850 proceeding, Hitchcock and Carter preclude it from being raised in any Rule 3.850 motion filed herein because Defendant, on direct appeal, challenged the trial court's denial of his motion for a new trial which raised as a ground therefor the ineffective assistance of trial counsel. The Florida Supreme Court concluded that Defendant had not proved the ineffectiveness issue. Bundy v. State, supra at 349.

Next, to the extent Defendant, as a potential 3.850 claim, would suggest that appellate counsel rendered ineffective assistance, he would be employing the wrong procedural vehicle in the wrong forum. A claim of relief predicated on the assertion of ineffective assistance of appellate counsel can only be granted by habeas corpus in the appellate court. Smith v. State, 400 So.2d 956, 960 (Fla. 1981).

Finally, Defendant's claim going to the trial court's failure to conduct a proper Farretta inquiry is but yet another matter that could or should have been raised on direct appeal and therefore would not be cognizable in a Rule 3.850 proceeding. Spinkellink v. State, supra; Meeks v. State, supra; Witt v. State, supra; Hargrave v. State, supra; Demps v. State, supra; Downs v. State, supra; Maxwell v. State, supra; Fla.R.Crim.P. 3.850.

7. Similarly, the above-cited line of cases would operate to preclude Defendant from raising the following claims in Rule 3.850 motion because thewere matters which could and should have been raised on direct appeal:

A. The State failed to properly preserve exculpating evidence.

B. Defendant was denied his right to a fair hearing because of the presence of a sleeping juror.

C. The jury's recommendation of death was based on an erroneous instruction as to the effect of a tie vote.

Indeed, concerning claims going to penalty phase jury instructions, the Florida Supreme Court has clearly held that those are matters which could be raised on direct appeal and will not support collateral attack. Antone v. State, 410 So.2d 157, 163 (Fla. 1982).

8. Defendant's potential claims concerning press intrusion and the admission of the bite mark evidence are also impotent in terms of their ability to support a collateral attack herein because these claims were raised and decided adversely to Defendant on direct appeal, Bundy v. State, supra at 337-339, 348, 349, and consequently cannot be raised in Rule 3.850 motion. Hitchcock v. State, supra; Carter v. State, supra.

9. Counsels' own allegations within their motion and affidavits belie their claim that they have had insufficient time to properly prepare a Rule 3.850 motion. The affidavit is replete with references to the transcript in making allegations of ineffective assistance of counsel, competency, "bite mark" evidence admissibility, a dozing juror, etc. A fair review of the documents filed by counsel gives rise to the conclusion that the pending motion for stay before the court is nothing more than a tactical decision to get at least a temporary stay on the pending motion while preserving the opportunity to file a proper Rule 3.850 at some future date. Similar tactics have met with disapproval by the Supreme Court of Florida in both Arango v. State, 437 So.2d 1099 (Fla. 1983), and Spinkellink v. Wainwright, 372 So.2d 927 (Fla. 1979) (Alderman, J., concurring specially). Defendant has had sufficient time to explore any remedy he may have had and to file a proper motion. The materials Defendant's counsel have filed are the best evidence in refuting his claim for relief.

WHEREFORE, for the above-stated reasons, the State of Florida respectfully requests this Honorable Court deny Defendant's Application for Stay of Execution and Motion for the

Payment of Reasonable Expenses and Fees for the Employment of Confidential Experts.

Respectfully submitted,

WILLIAM N. MEGGS
State Attorney

ROBERT L. CUMMINGS
Assistant State Attorney

GREGORY G. COSTAS
Assistant Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing was forwarded to James E. Coleman, Jr., on this the 25 day of June, 1986.

ROBERT L. CUMMINGS
Assistant State Attorney