

IN THE SUPREME COURT OF FLORIDA

CHARLIE THOMPSON,

Petitioner,

v.

Case No. SC00-473

MICHAEL W. MOORE,

Respondent.

_____ /

RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

COMES NOW, Respondent, MICHAEL W. MOORE, by and through the undersigned Assistant Attorney General, and hereby responds to the Petition for Writ of Habeas Corpus filed in the above-styled case. Respondent respectfully submits that the petition should be denied, and states as grounds therefor:

FACTS AND PROCEDURAL HISTORY

This Court's opinion in Petitioner Thompson's direct appeal, Thompson v. State, 648 So. 2d 692 (Fla. 1994), cert. denied, 515 U.S. 1125 (1995), reflects the following facts:

The appellant, Charlie Thompson, was a groundskeeper at Myrtle Hill Cemetery in Tampa. Although he was a large man, about six feet tall and weighing 220 pounds, Thompson injured his back while digging a grave and began collecting workers' compensation benefits through the cemetery's office. After the workers' compensation benefits ran out, Thompson persisted in his belief that

the cemetery owed him \$150 more than he had collected. Thompson was fired from his job at the cemetery in July of 1986 for failing to show up for work.

In the early afternoon of August 27, 1986, the bodies of Russell Swack and Nancy Walker were found in a wooded area near the Myrtle Hill Cemetery. Swack was the bookkeeper for the cemetery and Walker was his assistant. A medical examination revealed that Swack had been stabbed nine times and shot once in the face. All of the injuries had been inflicted while Swack was alive. The medical examination of Walker established that she had been shot once in the back of the head. A watch and ring were missing from Swack's body.

One of the managers of the cemetery testified that he had last seen Swack and Walker at about ten o'clock on that same morning and that the victims were speaking with a large unidentified man in the cemetery's business office. The witness also stated that he left the office and that, when he returned about fifteen minutes later, the victims were gone and the office door was locked.

A search of the office revealed that Walker's purse was under her desk and her typewriter was still turned on. In addition, Swack's adding machine was left on and a bookkeeping ledger was on Swack's desk. The last entry in the ledger, dated that same day, was for a check payable to Charlie Thompson in the amount of \$1,500.

Several witnesses, including the mother of Thompson's children, testified that Thompson had a watch and a ring in his possession on the afternoon and evening of the crime. The watch and ring were recovered and identified as belonging to Swack. Two days after the crime, Thompson was arrested when an alert car salesman contacted the police after Thompson and three others attempted to purchase a used car with the \$1,500 check from Myrtle Hill Cemetery.

At Thompson's trial for the murders, the State presented this and other evidence to the jury, including the testimony of a jailhouse informant who stated that Thompson admitted killing Swack and Walker. Thompson presented no witnesses in his defense. The jury found Thompson guilty of two counts of first-degree murder and two counts of kidnapping. In the penalty phase of the trial, the defense presented two psychologists who

testified as to Thompson's mental deficiencies. Thompson's sister also testified to a history of mental illness in the family. After hearing this testimony, the jury recommended the death penalty for each murder by a 7-to-5 vote. The court found the following six aggravating factors: prior felony conviction; murder committed while engaged in a kidnapping; murder committed to avoid arrest; murder committed for pecuniary gain; murder especially heinous, atrocious, or cruel; and murder committed in a cold, calculated, and premeditated manner. The court found that the evidence failed to establish extreme mental or emotional disturbance and substantially impaired capacity, but did give some weight to nonstatutory mitigating factors including chronic mental illness, moderate disturbance, symptoms of mental illness, family background, and mental retardation.

648 So. 2d at 693-94.

In his initial direct appeal, Florida Supreme Court Case No. 70,401, Thompson was represented by Assistant Public Defender Stephen Krosschell. Mr. Krosschell raised the following eighteen issues for consideration:

ISSUE I

DESPITE HIS REPEATED "TEMPORARY" APPOINTMENTS TO THE CIRCUIT BENCH, COUNTY JUDGE BONANNO LACKED JURISDICTION TO PRESIDE OVER THIS CAPITAL CASE.

ISSUE II

THE TRIAL JUDGE POISONED THE RELATIONSHIP BETWEEN THOMPSON AND HIS PUBLIC DEFENDER AND THEN REFUSED TO APPOINT NEW COUNSEL.

ISSUE III

THE TRIAL COURT ERRED BY NOT HOLDING AN EVIDENTIARY HEARING ON WHETHER THE TELEVISION

CAMERA IN THE COURTROOM WOULD INHIBIT THE CANDOR OF PROSPECTIVE JURORS ABOUT THEIR RACIAL BIAS AND ON WHETHER THE CAMERA WOULD INCREASE THE CHANCE OF A GUILTY VERDICT.

ISSUE IV

THE PROSECUTOR DID NOT PROPERLY EXPLAIN WHY HE PEREMPTORILY CHALLENGED FOUR BLACK JURORS, BECAUSE (1) HE GAVE NO REASONS AT ALL FOR EXCLUDING ONE BLACK JUROR, (2) THE REASONS HE GAVE FOR CHALLENGING SOME BLACK JURORS ALSO APPLIED TO WHITE JURORS WHOM HE DID NOT CHALLENGE, AND (3) "WEAKNESS" ON THE DEATH PENALTY IS AN ILLEGAL REASON FOR EXCLUSION.

ISSUE V

THE COURT SHOULD HAVE EXCUSED THREE JURORS FOR CAUSE RATHER THAN FORCED THE DEFENSE TO USE PEREMPTORY CHALLENGES; ONE PROSPECTIVE JUROR HAD BUSINESS CONNECTIONS WITH THE VICTIMS WHICH WOULD HAVE INFLUENCED HER JUDGMENT, A SECOND JUROR WOULD AUTOMATICALLY HAVE BEEN IN FAVOR OF DEATH FOR ALL PERSONS CONVICTED OF PREMEDITATED MURDER, AND A THIRD JUROR WOULD HAVE BEEN IMPROPERLY INFLUENCED BY GORY PHOTOGRAPHS.

ISSUE VI

THE TRIAL COURT FAILED TO MAKE THE CONSTITUTIONALLY MANDATED INQUIRY WHEN THE DEFENDANT REQUESTED THAT HE BE ALLOWED TO REPRESENT HIMSELF OR, ALTERNATIVELY, THAT NEW COUNSEL BE APPOINTED FOR HIM.

ISSUE VII

THE TRIAL JUDGE IMPROPERLY FAILED TO DETERMINE WHETHER THOMPSON HAD GOOD CAUSE TO BE DISSATISFIED WITH HIS LAWYER.

ISSUE VIII

THE TRIAL COURT PREDICATED THE ORIGINAL COMPETENCY DECISION ON INVALID EVIDENCE; MOREOVER, THE COURT SHOULD HAVE HELD A SECOND COMPETENCY HEARING BECAUSE EVENTS AT TRIAL GAVE REASONABLE GROUNDS FOR BELIEVING THAT THOMPSON HAD BECOME INCOMPETENT DURING THE COURSE OF THE TRIAL.

ISSUE IX

THE TRIAL COURT IMPROPERLY ADMITTED AS EVIDENCE THOMPSON'S TAPED STATEMENT TO THE POLICE, BECAUSE THE POLICE (1) DID NOT INSURE THAT THOMPSON UNDERSTOOD HIS RIGHTS AND INTELLIGENTLY WAIVED THEM, (2) COERCED HIS CONFESSION BY USING A LASER ON HIM, AND (3) DID NOT SCRUPULOUSLY HONOR HIS DESIRE FOR THE ASSISTANCE OF COUNSEL.

ISSUE X

THE STATE IMPROPERLY COMMENTED ON THOMPSON'S RIGHT TO SILENCE AND RIGHT TO COUNSEL BY INTRODUCING THOMPSON'S STATEMENT THAT HE HAD ASKED FOR A LAWYER BUT COULD NOT AFFORD ONE.

ISSUE XI

THOMPSON WANTED TO BE ABSENT FROM THE COURTROOM ONLY DURING CLOSING ARGUMENTS; HE DID NOT WAIVE HIS RIGHT TO BE PRESENT WHEN THE JURY RETURNED ITS VERDICT AND WAS POLLED.

ISSUE XII

DURING THE PENALTY PHASE, THE TRIAL COURT IMPROPERLY REFUSED TO ALLOW THOMPSON TO REBUT AND TO MITIGATE THE ADVERSE INFERENCES THAT THE JURY AND THE COURT MIGHT HAVE DRAWN FROM HIS COURTROOM CONDUCT.

ISSUE XIII

FLORIDA'S STANDARD JURY INSTRUCTIONS

IMPROPERLY MINIMIZE THE CAPITAL SENTENCING JURY'S ROLE DURING THE PENALTY PHASE, AND, THEREFORE, THE TRIAL COURT SHOULD HAVE READ TO THE JURY A REQUESTED INSTRUCTION WHICH WOULD HAVE EMPHASIZED THE JURY'S IMPORTANT ROLE.

ISSUE XIV

THE KILLINGS WERE NOT COLD AND CALCULATED, BECAUSE (1) THE EVIDENCE WAS SUSCEPTIBLE TO THE CONCLUSION THAT THE KILLINGS WERE NOT COLD AND CALCULATED, (2) THE KILLINGS WERE COMMITTED WITH A PRETENSE OF LEGAL JUSTIFICATION, AND (3) THE INTENT NECESSARY FOR THE KIDNAPPINGS COULD NOT JUSTIFY A FINDING OF THIS AGGRAVATING FACTOR.

ISSUE XV

THE KILLINGS WERE NOT HEINOUS, ATROCIOUS, OR CRUEL, BECAUSE THE EVIDENCE DID NOT SATISFY A CORRECT UNDERSTANDING OF THE VAGUELY DEFINED AGGRAVATING CIRCUMSTANCE.

ISSUE XVI

THE SCORESHEET WAS INCORRECT AND THE REASON FOR DEPARTURE INVALID.

ISSUE XVII

EXECUTING THE MENTALLY RETARDED IS CRUEL AND UNUSUAL PUNISHMENT.

ISSUE XVIII

THE SENTENCES OF DEATH IN THIS CASE ARE DISPROPORTIONATE BECAUSE THOMPSON SUFFERED FROM MENTAL RETARDATION, BRAIN DAMAGE, MENTAL ILLNESS, A LOW EMOTIONAL CAPACITY, AND AN IMPOVERISHED UPBRINGING; IN ADDITION, THE KILLING PROBABLY OCCURRED UPON REFLECTION OF ONLY A SHORT DURATION.

This Court reversed and remanded the case for a new trial due to the trial court's failure to adequately inquire about the State's exercise of peremptory challenges during jury selection. Thompson v. State, 548 So. 2d 198 (Fla. 1989). This Court also held that, during the retrial, the State could not admit those portions of Thompson's statement to law enforcement which followed an equivocal request for counsel.

The new trial again resulted in guilty verdicts and two sentences of death. On appeal, Florida Supreme Court Case No. 76,147, Thompson was again represented by Stephen Krosschell; thirteen issues were raised:

ISSUE I

THE TRIAL COURT IMPROPERLY ADMITTED AS EVIDENCE THOMPSON'S STATEMENT TO THE POLICE, BECAUSE THE POLICE DID NOT TELL HIM HE HAD A RIGHT TO A LAWYER AT NO COST AND DID NOT INSURE THAT HE UNDERSTOOD HIS RIGHTS AND INTELLIGENTLY WAIVED THEM.

ISSUE II

THE COURT IMPROPERLY ALLOWED THE POLICE OFFICER TO INVADE THE PROVINCE OF THE JURY BY GIVING HIS OPINION THAT THOMPSON WAS GUILTY.

ISSUE III

THE COURT IMPROPERLY ALLOWED THE PROSECUTOR TO THREATEN TO USE THOMPSON'S TESTIMONY AT THE FIRST TRIAL AS SUBSTANTIVE EVIDENCE, IN ORDER TO OBTAIN A DEFENSE STIPULATION THAT THOMPSON SOLD THE WATCH AND RING TO THE STATE WITNESSES.

ISSUE IV

FUNDAMENTAL ERROR OCCURRED WHEN, DURING DELIBERATIONS, THE ATTORNEYS PLAYED THE TAPE FOR THE JURORS AND THE BAILIFF COMMUNICATED WITH THE JURORS WHILE THE COURT WAS NOT PRESENT IN THE DELIBERATIONS ROOM.

ISSUE V

THE KILLINGS WERE NOT COLD AND CALCULATED BECAUSE A REASONABLE HYPOTHESIS WAS THAT THEY WERE COMMITTED IN A RAGE WITH A PRETENSE OF LEGAL JUSTIFICATION AND BECAUSE THE INTENT NECESSARY TO PROVE KIDNAPPING COULD NOT JUSTIFY A FINDING OF THIS AGGRAVATING CIRCUMSTANCE.

ISSUE VI

THE HEINOUS, ATROCIOUS OR CRUEL AGGRAVATING CIRCUMSTANCE AND COLD, CALCULATED, AND PREMEDITATED AGGRAVATING CIRCUMSTANCE ARE UNCONSTITUTIONALLY APPLIED IN FLORIDA AND THE JURY INSTRUCTIONS ON THESE AGGRAVATORS ARE UNCONSTITUTIONALLY VAGUE.

ISSUE VII

THE KILLINGS WERE NOT HEINOUS, ATROCIOUS, OR CRUEL.

ISSUE VIII

THE TRIAL JUDGE FAILED TO FILE A PROPER WRITTEN ORDER AND THE ORDER HE DID FILE VIOLATED THE DOUBLE JEOPARDY DOCTRINE.

ISSUE IX

THE TRIAL COURT FAILED TO CONSIDER THOMPSON'S MENTAL RETARDATION AND OTHER NONSTATUTORY MITIGATION.

ISSUE X

EXECUTING THE MENTALLY RETARDED IS CRUEL AND UNUSUAL PUNISHMENT.

ISSUE XI

THE DEATH SENTENCES WERE DISPROPORTIONATE BECAUSE THOMPSON SUFFERED FROM MENTAL RETARDATION, BRAIN DAMAGE, MENTAL ILLNESS, AND AN IMPOVERISHED BACKGROUND; IN ADDITION, THE KILLINGS PROBABLY OCCURRED UPON REFLECTION OF ONLY A SHORT DURATION.

ISSUE XII

FLORIDA'S STANDARD JURY INSTRUCTIONS IMPROPERLY MINIMIZE THE CAPITAL SENTENCING JURY'S ROLE DURING THE PENALTY PHASE.

ISSUE XIII

THE REASON FOR DEPARTURE FROM THE GUIDELINES WAS INVALID.

This Court again reversed and remanded for a new trial due to a Miranda violation which invalidated those portions of Thompson's statement to law enforcement that had survived the initial appeal. Thompson v. State, 595 So. 2d 16 (Fla. 1992). Once again, however, Thompson was convicted as charged and sentenced to death.

In the third direct appeal, Florida Supreme Court Case No. 81,039, Thompson was represented by Assistant Public Defender Paul Helm. Mr. Helm raised one guilt phase issue and six sentencing issues:

ISSUE I

THE TRIAL COURT ERRED BY DENYING APPELLANT'S MOTION FOR MISTRIAL WHEN STATE WITNESS HERMAN SMITH TESTIFIED THAT MEMBERS OF HIS WORK CREW TOLD HIM THEY SAW APPELLANT REMOVE THE VICTIMS FROM THE CEMETERY OFFICE WITH A GUN IN HIS POCKET.

ISSUE II

THE TRIAL COURT ERRED BY FINDING AND INSTRUCTING THE JURY UPON AGGRAVATING CIRCUMSTANCES WHICH WERE NOT PROVED BEYOND A REASONABLE DOUBT - AVOID ARREST, PECUNIARY GAIN, HEINOUS, ATROCIOUS, OR CRUEL, AND COLD, CALCULATED, AND PREMEDITATED.

ISSUE III

THE TRIAL COURT VIOLATED THE EIGHTH AND FOURTEENTH AMENDMENTS BY INSTRUCTING THE JURY UPON AND FINDING UNCONSTITUTIONALLY OVERBROAD AGGRAVATING CIRCUMSTANCES - FELONY MURDER AND COLD, CALCULATED, AND PREMEDITATED.

ISSUE IV

THE TRIAL COURT ERRED BY FAILING TO FIND AND WEIGH MITIGATING CIRCUMSTANCES ESTABLISHED BY UNREFUTED EVIDENCE - MENTAL OR EMOTIONAL DISTURBANCE, IMPAIRED CAPACITY TO CONFORM CONDUCT TO THE REQUIREMENTS OF LAW, BRAIN DAMAGE, AND A HISTORY OF DRUG ABUSE.

ISSUE V

THE TRIAL COURT VIOLATED THE UNUSUAL PUNISHMENT PROHIBITION OF THE FLORIDA CONSTITUTION BY IMPOSING DEATH SENTENCES WHICH ARE DISPROPORTIONATE TO THE CIRCUMSTANCES OF THIS CASE AND IN COMPARISON WITH OTHER CASES.

ISSUE VI

THE IMPOSITION OF THE DEATH PENALTY UPON A MENTALLY RETARDED DEFENDANT LIKE APPELLANT VIOLATES THE CRUEL AND/OR UNUSUAL PUNISHMENT PROHIBITIONS OF THE STATE AND FEDERAL CONSTITUTIONS.

ISSUE VII

THE STATUTORY PROVISION ALLOWING THE JURY TO RECOMMEND DEATH BY A SIMPLE MAJORITY VOTE VIOLATES THE STATE AND FEDERAL CONSTITUTIONS.

This Court affirmed the judgments and sentences. Thompson v. State, 648 So. 2d 692 (Fla. 1994). Certiorari review was sought in the United States Supreme Court; Thompson framed the questions presented as (1) Did the sentencing judge violate the Eighth and Fourteenth Amendments by rejecting relevant mitigating circumstances established by petitioner's unrefuted evidence in deciding to impose the death penalty; and (2) Did the Florida Supreme Court violate the Eighth and Fourteenth Amendments by holding that the sentencing judge did not err in rejecting relevant mitigating circumstances established by petitioner's unrefuted evidence. Review was denied on June 5, 1995. Thompson v. Florida, 515 U.S. 1125 (1995).

Thereafter, Thompson filed a motion for postconviction relief, which was summarily denied on August 18, 1999. The instant habeas petition was timely filed contemporaneously with the initial brief in the direct appeal of the denial of postconviction relief.

ARGUMENT

MR. THOMPSON'S APPELLATE COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO RAISE IN THE DIRECT APPEAL A CLAIM THAT THE TRIAL COURT ERRED IN ALLOWING A JUROR TO BE EMPANELED WHO EXPRESSED DOUBTS DURING JURY SELECTION ABOUT HER ABILITY TO AFFORD MR. THOMPSON HIS CONSTITUTIONAL RIGHT NOT TO TESTIFY DURING THE TRIAL.

Petitioner Thompson alleges that extraordinary relief is warranted because he was denied the effective assistance of appellate counsel. Of course, such a claim requires an evaluation of whether counsel's performance was so deficient that it fell outside the range of professionally acceptable performance and, if so, whether the deficiency was so egregious that it undermined confidence in the correctness of the result. Groover v. Singletary, 656 So. 2d 424, 425 (Fla. 1995); Byrd v. Singletary, 655 So. 2d 67, 68-69 (Fla. 1995), cert. denied, 516 U.S. 1175 (1996). A review of the record in this case demonstrates that neither deficiency nor prejudice has been shown by Thompson.

Thompson's argument is based on appellate counsel's failure to raise an issue regarding the trial court's failure to sua sponte exclude prospective juror Leonora Walcott from service. The transcript from Thompson's jury selection reflects that defense counsel's questions to the prospective panel focused initially on the presumption of innocence and the defendant's right to remain silent (DA-R. III/36-39). All of the prospective jurors agreed that they would follow the law and find Thompson not guilty if the State did not meet its burden of proving guilt beyond a reasonable doubt (DA-R. III/41). All agreed that the defendant had the right

to face his accusers and not testify (DA-R. III/43).

At one point, prospective juror Richard Hebble indicated that he had problem with a defendant not testifying; although he understood that there was a right to remain silent, he had difficulty because he felt like an innocent defendant "would be able to get up there and speak his piece" (DA-R. III/48-49). Prospective juror Lenora Walcott indicated that she also had difficulty with the concept (DA-R. III/49). Thereafter, the panel indicated that they understood that the case would be decided on the strength of the State's case, and nothing more (DA-R. III/51).

Following the questioning, the defense asked for a cause excusal on Mr. Hebble. The court responded that Hebble had not indicated that he could not follow the law; but when the prosecutor stated that he would not object to excusing Hebble, the court granted the challenge (DA-R. III/57-58). There was no discussion pertaining to Ms. Walcott.

Clearly, any issue about the trial court's failure to excuse juror Walcott for cause was not preserved for appellate review. Defense counsel did not request that Walcott be excused for cause, and in fact did not excuse her peremptorily, although he had sufficient challenges to do so. Unless a defendant requests a challenge for cause, then is forced to use a peremptory challenge, exhausting all of his peremptory challenges and identifying an objectionable juror that he was unable to peremptorily excuse, he has not preserved this issue. Bryant v. State, 656 So. 2d 426, 428

(Fla. 1995). Appellate counsel cannot be deemed to have been ineffective for failing to raise the claim that a juror should have been excused for cause when the issue has not been preserved for review. Kokal v. Dugger, 718 So. 2d 138, 142-143 (Fla. 1998).

In addition, this issue would not have been successful if argued in Thompson's direct appeal. The test for determining juror competency is whether the juror can lay aside any bias or prejudice and render a verdict solely on the evidence presented and the instructions on the law given by the court. Smith v. State, 699 So. 2d 629 (Fla. 1997), cert. denied, 118 S. Ct. 1194, 1300 (1998); Lusk v. State, 446 So. 2d 1038 (Fla.), cert. denied, 469 U.S. 873 (1984). Although juror Walcott expressed difficulty with the idea that an innocent defendant may choose not to take the stand, she never indicated that she could not put aside this concern and follow the law. To the contrary, she acknowledged that she understood that the case would be decided on the strength of the State's case, and nothing more (DA-R. III/51). She was also repeatedly reminded during the trial not to draw any negative inference from Thompson's failure to testify (DA-R. IV/78-79; VI/430). There is no indication in the record that she could not, or would not, follow this instruction.

A trial judge has great discretion in determining juror competency. Van Poyck v. Singletary, 715 So. 2d 930, 931 (Fla. 1998). No abuse of discretion has been demonstrated with regard to the trial court's failure to sua sponte remove juror Walcott.

Absent some abuse, this issue had no merit, and therefore counsel was not ineffective for failing to present this claim. Van Poyck, 715 So. 2d at 934; Groover, 656 So. 2d at 425; Chandler v. Dugger, 634 So. 2d 1066, 1068 (Fla. 1994) (failure to raise nonmeritorious issues is not ineffective assistance of appellate counsel). On these facts, Thompson is not entitled to relief.

WHEREFORE, Respondent respectfully requests that this Honorable Court DENY the Petition for Writ of Habeas Corpus filed in this case.

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 JACK CROOKS and ERIC PINKARD, Capital Collateral Regional Counsel - Middle Region, 3801 Corporex Park Drive, Suite 210, Tampa, Florida 33619, this _____ day of April, 2000.

COUNSEL FOR RESPONDENT