

76.306

IN THE SUPREME COURT OF FLORIDA

JERRY WHITE,

Appellant,

v.

CASE NO.

STATE OF FLORIDA,

Appellee.

FILED
 JUL 12 1990
 SUPREME COURT
 TALLAHASSEE, FLORIDA
 DEC

ON APPEAL FROM THE DENIAL OF POST-
CONVICTION RELIEF IN THE NINTH JUDICIAL
CIRCUIT, IN AND FOR ORANGE COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT/SUMMARY OF ARGUMENT

This appeal involves the summary denial of White's successive motion for post-conviction relief, filed pursuant to Fla.R.Crim.P. 3.850. This motion presented two (2) claims for relief: (1) a contention that White's electrocution would allegedly constitute cruel and unusual punishment, given what occurred at the May 1990 execution of Jesse Tafero, and (2) a contention that White's prior convictions should not have been used in aggravation at sentencing, given their alleged invalidity. White's motion was filed on July 10, 1990, and the State filed its response the next day. Circuit Judge Stroker denied White's motion on July 11, 1990, finding that the claim in regard to White's prior convictions was procedurally-barred. As to the first claim, the judge denied such claim in regard to this Court's precedents, but made an alternative finding of procedural bar. The State suggests that the circuit court's ruling was correct in all respects, and should be affirmed.

Argument

POINT I

THE CIRCUIT COURT'S DENIAL OF WHITE'S SPECULATIVE CLAIM, ALLEGEDLY PREMISED UPON THE MAY 1990 EXECUTION OF JESSE TAFERO, WAS NOT ERROR

As his first claim for relief, White, like so many others similarly situated, contends that his execution, if carried out, would constitute cruel and unusual punishment, given the allegedly "botched" execution of Jesse Tafero on May 4, 1990. In support of his claim, White, represented by the Office of the Capital Collateral Representative, proffers all the materials rejected by this Court in **Buenoano v. State**, 15 F.L.W. S355 (Fla. June 20, 1990), and **Squires v. State**, ___ So.2d ___ (Fla. July 5, 1990). Given this Court's clear holdings in the above cases, it is clear that White is entitled to no relief. This Court's holding in **Buenoano**, that the underlying issue regarding the competency of the Department of Corrections to carry out executions was, essentially, not a proper claim for review, remains correct. The execution of prisoners is clearly a matter within the exclusive province of the executive branch, and White has failed to demonstrate that further inquiry is required into this matter. **See also** 8922.09; **Blich v. Buchanan**, 100 Fla. 1202, 131 So. 151 (1930); **Goode v. Wainwright**, 448 So.2d 999 (Fla. 1984); **Christopher v. State**, 416 So.2d 450 (Fla. 1982). Further, the fact that one electrocution out of twenty-two has allegedly been "botched" hardly creates any presumption that all subsequent electrocutions will be similarly marred. **See Louisiana v. Resweber**, 329 U.S. 459, 463-464, 67 S.Ct. 374, 91

L.Ed.2d 422 (1947); **Estelle v. Gamble**, 429 U.S. 97, 105-106, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976); **Glass v. Louisiana**, 471 U.S. 1080, 105 S.Ct. 2159, 85 L.Ed.2d 514, 519 (1985) (Brennan, J., dissenting from denial of certiorari). This is particularly true, in light of **Buenoano v. Dugger**, ____ F.Supp. ____ (M.D. Fla. June 22, 1990) (following evidentiary hearing on claim, federal district court found evidence proffered by capital collateral representative "unreliable") (Appendix to Response, Attachment "B" at 80, n.34).

The State, as it did below, further questions whether White can even present this claim on the merits. In his 1985 post-conviction motion, White raised a claim that electrocution constituted cruel and unusual punishment (PC 523-532).¹ Most interestingly, in the appendix to the first 3.850 in 1985, White attached newspaper clippings and transcriptions of television programs concerning "botched" electrocutions (PC 534-536, 764, 808-819) (See Appendix). While the circuit court found this claim, in 1985, procedurally-barred, this Court, apparently, addressed it on the merits. **See White v. State**, 559 So.2d 1097, 1098 (Fla. 1990) (those claims other than ineffective assistance of counsel "were either addressed on direct appeal or are without merit"). White has no right to re-litigate this issue on a successive 3.850, simply by allegation of "new facts", **see Christopher v. State**, 489 So.2d 22 (Fla. 1986), **Stewart v. State**, 495 So.2d 164 (Fla. 1986), especially where there has been no

¹ (PC ____) represents a citation to the record on appeal in White's prior post-conviction appeal, **White v. State**, Florida Supreme Court Case No. 71,679.

showing that these facts could not have been discovered earlier through due diligence. It is clear that any alleged unavailability of recourse to the Public Records Act is an insufficient basis to excuse procedural default. See **Demps v. State**, 515 So.2d 196 (Fla. 1987); **Agan v. Dugger**, 560 So.2d 222 (Fla. 1990). Although this Court found this claim not to be procedurally-barred in **Buenoano**, the particular facts of this case dictate a different result.² The circuit court's order should be affirmed in all respects.

POINT II

THE CIRCUIT COURT'S DENIAL OF WHITE'S SPECULATIVE AND PROCEDURALLY-BARRED CLAIM IN REGARD TO THE USE OF HIS PRIOR CONVICTIONS IN AGGRAVATION WAS NOT ERROR

As his second claim for relief, White contended that his prior convictions, which were used in aggravation at the penalty phase, were allegedly invalid. In the 3.850 motion itself, however, White conceded that this claim was not "ripe for review" (Emergency Motion at 81). Accordingly, it is debatable whether

² White has inadvertently offered support for the availability of this claim prior to Tafero's execution, by virtue of the newly-proffered affidavits from the six inmates, which allegedly would demonstrate that there were defects in the electric chair **prior** to Tafero's execution. This Court, of course, rejected these affidavits in **Squires**. These affidavits, which are implausible and speculative in the extreme, are, presumably, offered to show that any "error" in Tafero's execution was "foreseeable". Cf. **Resweber, supra**. They can support no such contention. The evidence proffered by these inmates goes only toward alleged defects in the electrode in the headpiece; Judge Fawsett would seem to have expressly disbelieved any contention that the electrode in the headpiece had been at fault in Tafero's execution, finding instead that the substituted sponge very likely was responsible for any smoke or flames. (**Buenoano v. Dugger**, Appendix to Response, Attachment "B", at 80-81, n.34 & 35).

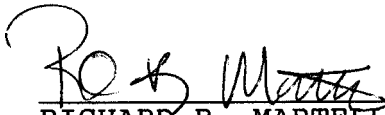
any claim for relief has even been alleged. See **Buenoano v. Dugger**, 559 So.2d 1116, 1120 (Fla. 1990); **Tafero v. State**, 15 F.L.W. S264 (Fla. April 30, 1990). Further, this claim is procedurally-barred, given the fact that White has failed to demonstrate why this claim was not raised in his first post-conviction motion and/or prior to January 1, 1987, given the fact that his conviction in this case was final in 1984. See **Eutzy v. State**, 541 So.2d 1143 (Fla. 1989); **Bundy v. Dugger**, 538 So.2d 445 (Fla. 1989). Considering the fact that some of these prior convictions are, literally, over two decades old, one can only wonder at what point collateral counsel would consider that "ripeness" had been achieved. The circuit court's denial of relief as to this procedurally-barred claim should be affirmed in all respects.

Conclusion

WHEREFORE, for the aforementioned reasons, Appellee moves this Honorable Court to affirm the circuit court's order in all respects.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

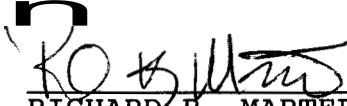

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Certificate of Service

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by hand delivery to Mr. Billy Horatio Nolas, Esq., Office of the Capital Collateral Representative, 1533 South Monroe Street, Tallahassee, Florida 32301, this 12th day of July, 1990.



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Appendix

Excerpts of Appendix to 1985
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