

**IN THE SUPREME COURT OF FLORIDA
CASE NO. SC09-1859**

CHADWICK WILLACY

Petitioner,

v.

**WALTER A. McNEIL, Secretary,
Florida Department of Corrections, etc.,
Respondents.**

**RESPONSE TO SUCCESSIVE PETITION
FOR WRIT OF HABEAS CORPUS**

**BILL McCOLLUM
ATTORNEY GENERAL**

**BARBARA C. DAVIS
Fla. Bar No. 410519
ASSISTANT ATTORNEY GENERAL
444 SEABREEZE BLVD., SUITE 500
DAYTONA BEACH, FLORIDA 32114
(386)238-4990
FAX - (386) 226-0457
COUNSEL FOR RESPONDENTS**

PROCEDURAL HISTORY

This Court summarized the factual and procedural history in *Willacy v. State*, 967 So. 2d 131, 135-138, 145-146 (Fla. 2007):

I. FACTUAL AND PROCEDURAL BACKGROUND^{FN1}

^{FN1}. See *Willacy v. State*, 640 So. 2d 1079 (Fla. 1994) (hereinafter *Willacy I*) and *Willacy v. State*, 696 So. 2d 693 (Fla. 1997) (hereinafter *Willacy II*).

On September 5, 1990, Marlys Sather returned home unexpectedly to find Willacy, her next-door neighbor, burglarizing her house. Willacy bludgeoned Sather and bound her ankles with wire and duct tape. He choked and strangled her with a cord with a force so intense that a portion of her skull was dislodged. Willacy then obtained Sather's ATM pin number, her ATM card, and the keys to her car; drove to her bank; and withdrew money out of her account. Willacy hid Sather's car around the block while he made trips to and from the house. He placed stolen items on Sather's porch for later retrieval, took a significant amount of property from Sather's house to his house, and then drove the car to Lynbrook Plaza where he left it and jogged back to Sather's home. Upon his return, Willacy disabled the smoke detectors, doused Sather with gasoline he had taken from the garage, placed a fan from the guest room at her feet to provide more oxygen for the fire, and struck several matches as he set her on fire.

When Sather failed to return to work after lunch, her employer notified the Sather family of her absence. Sather's son-in-law went to her home and found a shotgun and several electronic items lying on the back porch. Inside the home, he found Sather's body. Medical testimony established that her death was caused by inhalation of smoke from her burning body.

Law enforcement officers conducted an investigation into Sather's murder, uncovering a large amount of evidence linking Willacy to the murder. Willacy's fingerprints were found on the fan at Sather's feet, the gas can, and a tape rewinder at Sather's house. Witnesses reported seeing a man matching Willacy's description near Sather's house and

driving Sather's car on the day of the murder. Further, Willacy's girlfriend, Marisa Walcott, telephoned law enforcement officers after discovering a woman's check register in Willacy's wastebasket. Law enforcement officers recognized the check register as belonging to Sather and subsequently arrested Willacy. While executing a search warrant on Willacy's home, law enforcement agents uncovered some of Sather's property, as well as several articles of clothing containing blood consistent with Sather's blood type.

Willacy was charged by indictment with first-degree premeditated murder, burglary, robbery, and arson. Judge Theron Yawn presided over the trial. On October 17, 1991, the jury convicted Willacy on all four counts. Following the penalty phase, the jury recommended death by a vote of nine to three, and Judge Yawn sentenced Willacy to death.FN2

FN2. Judge Yawn found four aggravating factors: the murder was committed (1) while engaged in the commission of arson; (2) for pecuniary gain; (3) in an especially heinous, atrocious, or cruel manner; and (4) to avoid arrest. The sole statutory mitigating factor was Willacy's lack of prior criminal activity, and the two nonstatutory mitigating factors were Willacy's history of nonviolence and his attempts at self-improvement while in jail.

Willacy appealed to this Court but subsequently moved for temporary relinquishment of jurisdiction in order for the trial court to hold an evidentiary hearing on his motion for a new trial. In his motion for a new trial, Willacy claimed that juror Clark, the foreman of Willacy's trial in 1991, was under prosecution for grand theft. Jurisdiction was relinquished and on October 12, 1992, Judge Yawn conducted a hearing on Willacy's motion. Among the witnesses at the hearing, the court heard testimony from Willacy's trial counsel, the prosecutors in his case, and juror Clark. The prosecutors testified that they became aware of Clark's status during Willacy's trial and immediately informed Willacy's trial counsel. Willacy's trial counsel denied receiving this information during trial. Following the hearing, Judge Yawn issued an order denying Willacy's motion for a new trial,

finding that the State informed Willacy's trial counsel of Clark's status during trial.

During oral argument on direct appeal, the parties thoroughly debated the issue of juror Clark's eligibility.^{FN3} Willacy's counsel asserted that Clark was under prosecution and, therefore, statutorily ineligible to serve as a juror until he entered into a pretrial intervention (PTI) agreement. According to Willacy's counsel, because Clark did not sign a PTI contract until after Willacy's trial, Clark was disqualified. The State countered that Clark was eligible to serve because he was approved for PTI prior to Willacy's trial. Alternatively, the State argued that because Willacy's trial counsel failed to object to Clark during trial, the matter was waived. This Court affirmed the convictions but vacated the death sentence and remanded the case for a new penalty phase based on Willacy's claim that the trial court did not give defense counsel an opportunity to rehabilitate a juror who said she was opposed to the death penalty. *Willacy I*, 640 So. 2d at 1082. As to the controversy regarding juror Clark, this Court held:

FN3. The eight issues raised on direct appeal were: (1) the court committed reversible error when it refused the defense an opportunity to rehabilitate a prospective juror; **(2) a prospective juror was improperly challenged based on his race;**¹ **(3) the jury foreman was ineligible to serve;**² (4) the court improperly found that Willacy's statements were voluntarily made; (5) the killing was not committed to avoid arrest; (6) the killing was not heinous, atrocious, or cruel; (7) the court improperly weighed the mitigating and aggravating factors; and (8) death is an inappropriate penalty. *Willacy I*, 640 So.2d at 1081 n. 2.

Since Clark was not under prosecution, Willacy's motion for a new trial was properly denied. Moreover, during the trial the State informed Willacy's counsel of Clark's status and his counsel voiced no objection. By failing to make a timely objection, Willacy

¹ Juror Payne

² Juror Clark

waived the claim he now seeks to assert. We affirm the trial court's decision. *Willacy I*, 640 So. 2d at 1083.

At resentencing, Willacy was represented by new counsel and Judge Yawn again presided. The State presented evidence of the crime and testimony of Sather's son and two daughters. Willacy presented the testimony of relatives and friends. The court followed the jury's eleven-to-one recommendation and sentenced Willacy to death, finding five aggravating factors,^{FN4} no statutory mitigating factors, and thirty-one nonstatutory mitigating factors of little weight.^{FN5} On direct appeal after resentencing, Willacy raised eleven issues.^{FN6} This Court denied each of those claims and affirmed Willacy's death sentence. *Willacy II*, 696 So. 2d at 694.

FN4. The five aggravating factors were: (1) the murder was committed in the course of a felony; (2) the murder was committed to avoid lawful arrest; (3) the murder was committed for pecuniary gain; (4) the murder was especially heinous, atrocious, or cruel (HAC); and (5) the murder was committed in a cold, calculated, and premeditated manner (CCP).

FN5. The nonstatutory mitigating factors were that Willacy (1)-(3) exhibited kindness, compassion, and concern for others; (4) enjoyed the love and affection of his family; (5)-(6) enjoyed the respect and admiration of his peers and his family; (7) demonstrated a desire and a willingness to help others; (8)-(9) was a leader and a role model to his peers; (10) maintained strong ties to his family; (11) exhibited appropriate demeanor and behavior during the resentencing hearing; (12) exhibited love for his family; (13)-(14) was a good and loyal friend and a good and obedient son; (15) was unselfish; (16) contributed to the lives of others; (17) showed the proper respect for his elders; (18)-(19) demonstrated honesty and responsibility; (20) was a hard worker; and (21) voluntarily sought help for his drug problem. While in school, Willacy (22) enjoyed the respect and confidence of his teachers and coaches; (23) did not experience any academic or disciplinary problems; (24) was a disciplined and dedicated member of his high school

track team; (25) demonstrated a willingness to help his teammates and otherwise be a team player; (26) was the captain of his high school track team and enjoyed numerous honors in connection with his talents as a runner; (27) had no history of previous violent conduct; and (28) had a good upbringing without serious disciplinary problems. Judge Yawn also considered (29)-(30) any other aspect of Willacy's character or background; and (31) any other factor deemed appropriate.

FN6. The eleven issues Willacy raised on direct appeal after resentencing were: (1) the denial of Willacy's motion for recusal of the judge; (2) the admission of inflammatory evidence; (3) the finding that the murder was heinous, atrocious, or cruel (HAC); (4) the finding that the murder was committed to evade arrest; (5) the finding that the murder was committed for pecuniary gain; (6) the finding that the murder was committed in a cold, calculated, and premeditated manner (CCP); (7) the proportionality of the death sentence; (8) the admission of victim impact evidence; (9) the refusal to strike jurors for cause; (10) cumulative error; and (11) the constitutionality of the death penalty statute.

On May 11, 1998, Willacy filed a motion to vacate judgment of conviction and sentence pursuant to Florida Rule of Criminal Procedure 3.850 with special request for leave to amend. On March 18, 2002, Willacy filed an amended motion for postconviction relief in which he raised thirty-one issues. Seventeen of Willacy's claims were summarily denied by order on September 24, 2003.FN7 An evidentiary hearing was granted on Willacy's remaining fourteen claims.FN8 The evidentiary hearing was held on December 3 through 5 and 19, 2003, and February 16, 2004. On November 23, 2004, the trial court issued an order denying the remaining fourteen claims. Willacy timely filed this appeal.

FN7. Willacy's claims that were summarily denied included:
(3) Willacy was denied a fair trial due to the State's failure to inform the court of juror Clark's statutory ineligibility;
(4) counsel was ineffective for waiving the appointment of

independent counsel to litigate the facts and circumstances regarding juror Clark's pending felony charges; (5) counsel was ineffective for failing to fully present to the trial court during the hearing on October 12, 1992, all aspects of the pretrial intervention program and juror Clark's status as pending prosecution at the time of his jury service; (6) counsel was ineffective for failing to object to juror Clark's ineligibility to serve as a juror; (8) the trial court applied an incorrect standard of review or law in denying Willacy's motion for a new trial; (9) Willacy was denied a fair trial due to juror misconduct; (11) counsel was ineffective for failing to timely move to disqualify Judge Yawn from presiding over the second penalty phase proceeding; (12) the trial court erred by failing to follow the procedure outlined in *Spencer v. State*, 615 So. 2d 688 (Fla.1993), in resentencing Willacy in 1995; (14) jurors were not sworn prior to voir dire in the original trial as required by Florida Rule of Criminal Procedure 3.300(a); (15) counsel was ineffective for failure to object to the trial court's failure to swear the jury prior to voir dire in the original trial; (16) the trial court erred in concluding that there was probable cause for Willacy's arrest and search of his home; (20) the trial court erred in failing to properly instruct the jury during the 1995 penalty phase proceeding on the distinction between regular premeditation and the higher standard of cold, calculated, and premeditated murder; (26) the indictment violated the Sixth Amendment and *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), because it failed to include aggravating circumstances; (27) Florida's death penalty statute is unconstitutional under the Sixth Amendment and *Apprendi* because the jury was not instructed that they must unanimously find beyond a reasonable doubt any aggravating circumstance; (28) the trial court's failure to instruct the jury that they must unanimously find that the aggravating circumstances outweigh the mitigating circumstances in order to recommend a death sentence violated the Sixth Amendment and *Apprendi*; (29) the trial court's failure to require a unanimous binding jury verdict as to the death penalty was unconstitutional under *Apprendi*; (30)

lethal injection and Florida's procedures implementing lethal injection constitute cruel or unusual punishment in violation of the Eighth Amendment and article I, section 17 of the Florida Constitution.

FN8. These claims all pertained to the ineffectiveness of trial counsel: (1) failure to raise an independent act defense; (2) failure to investigate potentially exculpatory evidence; **(7) failure to inquire of juror Clark during voir dire regarding his eligibility to serve;** (10) failure to prepare fully and adequately for trial by retaining a fingerprint or crime scene expert; (13) failure to seek to disqualify the trial judge based on the trial court's use of a sentencing order which had been prepared prior to the *Spencer* hearing; (17) failure to object to evidence introduced at trial; (18) failure to request a jury instruction on felony murder and the law of principals; (19) failure to request an *Enmund v. Florida*, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982), jury instruction; (21) failure to present evidence of a statutory mitigating circumstance pursuant to section 921.141(6)(f), Florida Statutes (Supp.1990); (22) failure to present statutory mitigating circumstances pursuant to section 921.141(6)(b), Florida Statutes (Supp.1990); (23) failure to present statutory mitigating circumstances pursuant to section 921.141(6)(h), Florida Statutes (Supp.1990); (24) failure to present mental health testimony to rebut the State's claim that the murder was committed in a cold, calculated, and premeditated manner; (25) waiver of the presentencing investigation report; and (31) cumulative error.

II. 3.850 MOTION FOR POSTCONVICTION RELIEF

Willacy appeals the denial of his motion for postconviction relief, raising seven issues: (1) the trial court erred in denying an evidentiary hearing on claims 4, 6, and 15 of his motion for postconviction relief; (2) counsel was ineffective for failing to assert the independent act defense; (3) counsel was ineffective for failing to move to recuse the trial judge at the resentencing proceeding; (4) counsel was ineffective for failing to investigate and present evidence of statutory and nonstatutory mitigating factors; **(5) counsel was ineffective for**

failing to inquire regarding juror Clark's status; (6) the trial court erred in failing to retroactively apply this Court's decision in *Lowrey v. State*, 705 So. 2d 1367 (Fla. 1998); and (7) the trial court erred in denying Willacy's motion for postconviction DNA testing.

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III. PETITION FOR WRIT OF HABEAS CORPUS

In his petition for writ of habeas corpus, Willacy raises seven issues: (1) appellate counsel was ineffective for failing to raise on direct appeal lack of probable cause to arrest Willacy or to search Willacy's residence; **(2) Willacy was denied his constitutional right to a fair trial by having a juror who was pending prosecution serve as the foreman on his jury;** (3) appellate counsel was ineffective for failing to raise on direct appeal the fundamental error resulting from the trial court's failure to swear prospective jurors; (4) appellate counsel was ineffective for failing to argue that the jury was improperly instructed as to the aggravating circumstance of cold, calculated, and premeditated (CCP); (5) Willacy was sentenced to death in violation of *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002); (6) death by lethal injection violates article I, section 17 of the Florida Constitution and the Eighth Amendment of the United States Constitution; and (7) Willacy's Eighth Amendment right against cruel and unusual punishment may be violated as he may be incompetent at the time of execution. Issues (2), (5), (6), and (7) are either without merit or not yet ripe for review and need not be discussed in detail.FN14

FN14. **Because this Court determined on direct appeal that juror Clark was eligible to serve on Willacy's jury, issue (2) is without merit.** Issue (3) is essentially the same as claim 15 of Willacy's motion for postconviction relief and was already disposed of above. Willacy's *Ring* claim fails because *Ring* does not apply retroactively. See *Schriro v. Summerlin*, 542 U.S. 348, 124 S.Ct. 2519, 159 L.Ed.2d 442 (2004); *Johnson v. State*, 904 So.2d 400 (Fla.2005). Also without merit is Willacy's claim challenging Florida's procedure of execution by lethal injection. See *Sims v. State*, 754 So. 2d 657, 668 (Fla. 2000). Finally, Willacy's claim that he may be

incompetent at the time of execution is not yet ripe for review.
See Robinson v. State, 913 So. 2d 514, 524 n. 9 (Fla. 2005).

(Emphasis supplied)

ARGUMENT

The present petition for writ of habeas corpus is a successive petition and is procedurally barred because it was not filed simultaneously with the initial brief in the appeal from the denial of postconviction relief. Fla.R.Crim.P. 3.851(d)(3). Willacy's previous petition for writ of habeas corpus raised seven (7) claims and was denied by this Court in 2007. *Willacy v. State/McDonough*, 967 So. 2d 131 (Fla. 2007). Willacy appears to raise two separate issues which will be addressed separately.

Juror Payne. The claim regarding Juror Payne is procedurally barred and has no merit. The claim was not raised in the first petition for writ of habeas corpus and was abandoned. *See King v. State*, 808 So. 2d 1237, 1246 (Fla. 2002) *citing Johnson v. Singletary*, 647 So. 2d 106, 109 (Fla. 1994) (“Successive habeas corpus petitions seeking the same relief are not permitted nor can new claims be raised in a second petition when the circumstances upon which they are based were known or should have been known at the time the prior petition was filed.”).

Further, the claim was raised and rejected by this Court in 1994 as follows:

Three of Willacy's claims concern the voir dire examination of venirepersons Cruz, Payne, and Clark.

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When Payne, the sole African-American on the panel, was peremptorily challenged, Willacy objected to the challenge as racially motivated. *State v. Slappy*, 522 So. 2d 18 (Fla.), *cert. denied*, 487 U.S. 1219, 108 S.Ct. 2873, 101 L.Ed.2d 909 (1988); *State v. Neil*, 457 So.

2d 481 (Fla. 1984). The court conducted a *Neil* inquiry, and determined that Willacy's objection was groundless. We agree. The State put forth the following reasons for the Payne challenge: 1) his prior involvement with the criminal judicial system (he pled nolo contendere to disorderly conduct and resisting without violence); 2) his misrepresentation of prior employment (the employment discrepancy was later clarified); 3) misrepresentation of past criminal charges; and 4) the fact that he testified on behalf of a defendant in a drug trial. We find that the court conducted a proper *Neil* inquiry, that the State's criminal background check FN6 was not a contrived plan directed against the sole African-American on the jury panel, and that the State put forth legitimate non-racial reasons for its peremptory challenge. We find no *Neil* violation.

FN6. When Payne stated that he knew a State's witness, the State contacted the witness in an effort to determine the extent of the relationship. The witness was a police officer and a former high school classmate of Payne. On his own, the officer offered to run a criminal background check on Payne and give the results to the State.

Willacy v. State, 640 So. 2d 1079, 1082 (Fla. 1994). It is improper to argue in a habeas petition a variant to a claim previously decided. *Porter v. Crosby*, 840 So. 2d 981, 984 (Fla. 2003). *See also Thompson v. State*, 759 So. 2d 650, 657 n. 6 (Fla. 2000) (declining the petitioner's "invitation to utilize the writ of habeas as a vehicle for the reargument of issues which have been raised and ruled on by this Court").

Although Willacy relies on *Nowell v. State*, 998 So. 2d 597 (Fla. 2008), that case is distinguishable. In *Nowell*, this Court applied *Neil* and subsequent cases based on *Neil* and held:

First, the prosecutor justified his use of a peremptory challenge because he did not "particularly like" Mr. Ortega and did not "think

he [was] going to be the kind of juror that [he] would like.” However, Florida courts have consistently rejected a general feeling or “dislike” of a juror as a genuine race-neutral reason for exercising a peremptory challenge. See *State v. Holiday*, 682 So. 2d 1092, 1094 & n. 1 (Fla.1996) (affirming the trial court's refusal to allow a peremptory strike based on the defense counsel's “gut feeling” that the potential juror would favor the State); *Foster v. State*, 557 So. 2d 634, 635 (Fla. 3d DCA 1990) (“[A] ‘feeling’ about a juror does not satisfy the *Neil* test.”). This is especially so when the proponent of the strike points to nothing in the record, such as worrisome behavior or questionable answers given by the potential juror during voir dire, which supports a general distaste for a particular juror. *Id.*; see also *Dorsey*, 868 So. 2d at 1201-02 (emphasizing the need for record support for the race-neutral reason proffered for a peremptory challenge); *State v. Slappy*, 522 So. 2d 18, 24 (Fla. 1988), *receded from in part on other grounds by Melbourne v. State*, 679 So. 2d 759 (Fla. 1996) (noting that deference to the trial court's findings is diminished where the State fails to demonstrate that the alleged reason for the peremptory challenge actually existed).

Secondly, the prosecutor wanted to challenge Mr. Ortega because of his age, stating that “he appears young and of a similar age to the defendant. I would think that Mr. Ortega would relate to the defendant based on age.” Although this Court has never held that age is a legitimate race-neutral reason for a peremptory challenge, district courts have concluded that it is. See *Saffold v. State*, 911 So. 2d 255, 256 (Fla. 3d DCA 2005) (holding that peremptory challenge based on age of juror is permissible); *Daniels v. State*, 837 So. 2d 1008 (Fla. 3d DCA 2002) (same); *Cobb v. State*, 825 So. 2d 1080 (Fla. 4th DCA 2002) (concluding that it was not unreasonable to strike a prospective juror in a drug case when the State genuinely believed that the juror's youth and status as a student would cause her to be more lenient). However, the court's inquiry does not end when the proponent of the strike points to the potential juror's age; rather, the judge must consider all the relevant circumstances to determine whether the justification is genuine, including the reasonableness of the explanation and whether other jurors of a similar age were challenged for these reasons. See *Hoskins*, 965 So. 2d at 9; *Booker v. State*, 773 So. 2d 1079, 1089-90 (Fla. 2000) (acknowledging that a race-neutral

reason that applied to another juror who was not challenged could indicate pretext); *Melbourne*, 679 So. 2d at 764 & nn. 8-9. In this case, Mr. Ortega was struck from the jury panel based on his young age, which was a reason equally applicable to a white juror who was not challenged by the State.

During the trial, the defense and the State agreed that Mr. Collins was both white and the only remaining member of the jury who was young. According to defense counsel, Mr. Collins appeared to be younger than Mr. Ortega, and during voir dire, Mr. Collins confirmed that he worked as a web designer for a corporation and had one son who lived separately with the mother. Similarly, Mr. Ortega was identified as being in his mid-to late twenties, worked in retail at a 7-Eleven, was married and had three children. The record confirms that both of these potential jurors were around the same age, were fathers, and were neither asked questions nor gave any responses during voir dire indicating they would identify with the defendant. Therefore, the State's age-based justification for striking Mr. Ortega, a Hispanic male, was clearly applicable to Mr. Collins, a similarly aged white male whom the State failed to challenge. *See Booker*, 773 So. 2d at 1089-90; *Davis v. State*, 691 So. 2d 1180 (Fla. 3d DCA 1997) (holding that pretext may exist when a juror is struck from the jury panel based on a reason equally applicable to an unchallenged juror); *cf. Dorsey*, 868 So. 2d at 1201-02 (holding that a juror's nonverbal behavior, which is both disputed by the parties and not evident in the record because counsel failed to ask any questions concerning the behavior, cannot be a genuine race-neutral reason to sustain a peremptory challenge). In addition, the victim in this case was also in her mid-twenties, which further undermines the genuineness of the State's asserted justification-if Mr. Ortega was going to identify with someone in this case based solely on his age, he was just as likely to identify with the victim, which would clearly favor the State's position.

Thirdly, the prosecutor stated that he was worried about Mr. Ortega's ability to follow the law based on his wife's job at a daycare center and his philosophy on the death penalty. Certainly, a juror's inability to follow the law could be a viable concern for either a cause challenge or a peremptory strike. *See Morrison v. State*, 818 So. 2d

432, 443-44 (Fla. 2002) (stating that “unequivocal discomfort” with the death penalty is a valid race-neutral reason for a peremptory strike); *Hartley v. State*, 686 So. 2d 1316, 1322 (Fla. 1996) (same). However, when the prosecutor initially stated that he believed Mr. Ortega's philosophy on the death penalty would prevent him from following the law, the trial court immediately asked what answers given by Mr. Ortega would raise such a concern, and the prosecutor confirmed that “[t]here [were] no specific answers.” In fact, the prosecutor first admitted that Mr. Ortega confirmed he would follow the law and then contended that a juror's inability to follow the law was really only relevant for a cause challenge. Thus, the prosecutor seemed to abandon Mr. Ortega's alleged inability to follow the law and ultimately rested his race-neutral reason on the fact that he just did not “particularly like” Mr. Ortega. Moreover, the record confirms that Mr. Ortega would fairly consider the imposition of the death penalty depending on the evidence he heard in the courtroom, could impose a death sentence in a murder case depending on the circumstances presented, only had “mixed feelings” about capital punishment, and never expressed uncertainty about his ability to vote for it in a proper case according to the appropriate legal standards. In fact, he stated he would follow the law.FN6

FN6. Although the State relied upon his wife's job at a daycare center to support his inability to follow the law, we note that Mr. Ortega also had a sister-in-law who worked in law enforcement. In addition, Mr. Ortega worked in retail at a 7-Eleven and admitted that he had incidents of theft at his job. Importantly, as noted by defense counsel, these are two characteristics that the State would typically prefer in a juror, which further supports the pretextual nature of this challenge.

Although the trial court revisited this issue the next morning and the prosecutor espoused yet another reason for the strike, namely, that Mr. Ortega felt he was judging the person, the defense attorney pointed out that these reasons were equally applicable to other jurors that were not challenged. FN7 Further, the prosecutor only offered this “afterthought” justification after an entire day of reflection, which we have previously viewed with some skepticism. *See Franqui v. State*, 699 So. 2d 1332, 1335 (Fla. 1997) (affirming the trial court's decision

to deny a peremptory challenge where the defense first stated that it did not “like” the juror and later attempted to justify the strike, after several pages of questioning, with additional reasons as an “afterthought”). Not only does the record contradict the State's belief that Mr. Ortega would not have an ability to follow the law, we simply cannot ignore that the prosecutor's initial response when asked for a race-neutral reason was essentially that he did not particularly like the juror.

FN7. In fact, in comparing Mr. Ortega's responses to questions about his feelings on the death penalty with those of Mr. Collins, the similarity is quite striking. Both potential jurors stated that they believed the death penalty should be reserved for the most serious crimes. However, as previously noted, the prosecutor in this case challenged Mr. Ortega but had no issue with Mr. Collins.

Based upon the foregoing, we find that the trial court's decision to allow the peremptory challenge of Mr. Ortega was clearly erroneous because the State's explanations, which may have appeared to be race-neutral, were pretextual. The State's asserted reasons for the peremptory challenge were insufficient to satisfy equal protection because the challenge was unsupported by the record, directly contradicted by defense counsel, and based upon reasons that were not genuine. *See Dorsey*, 868 So. 2d at 1202. We therefore find merit in Nowell's claim that the trial court erred in allowing the State's peremptory strike of Mr. Ortega because the State failed to provide a sufficient race-neutral reason for the strike.

Nowell v. State, 998 So. 2d 597, 604 -606 (Fla. 2008).

Willacy fails to explain how *Nowell* implicates his case. *Nowell* did not change the law, was fact-specific, and is factually distinguishable.

Last, the facts underlying this claim were known at the time of the prior petition for writ of habeas corpus. The issue was not raised in the prior petition for and was abandoned. *See Johnson, supra*.

Juror Clark. On pages 16-20, Willacy appears to re-assert his claim regarding Juror Clark. This issue is procedurally barred and has no merit. *See Johnson v. Singletary*, 647 So. 2d 106, 109 (Fla. 1994) (“Successive habeas corpus petitions seeking the same relief are not permitted nor can new claims be raised in a second petition when the circumstances upon which they are based were known or should have been known at the time the prior petition was filed.”). This claim was raised on direct appeal and rejected. *Willacy v. State*, 640 So. 2d 1079, 1082-1083 (Fla. 1994).³ The issue was raised in various forms as a claim of ineffective assistance of counsel in the Rule 3.850 postconviction proceedings, and the trial judge denied an evidentiary hearing on the claim. This Court affirmed that decision. *Willacy v. State*, 967 So. 2d 131, 139-140 (Fla. 2007). The issue was also raised in the prior petition for writ of habeas corpus and denied. *Willacy v. State*, 967 So. 2d 131, 146 (Fla. 2007). It is improper to argue in a habeas petition a variant to a claim previously decided. *Porter v. Crosby*, 840 So. 2d 981, 984 (Fla. 2003). *See also Thompson v. State*, 759 So. 2d 650, 657 n. 6 (Fla. 2000) (declining

³ The complete quotes on Juror Clark are contained herein and highlighted under the section titled Procedural History.

the petitioner's "invitation to utilize the writ of habeas as a vehicle for the reargument of issues which have been raised and ruled on by this Court").

CONCLUSION

Based upon the foregoing, the State respectfully requests that this Court deny the successive petition for writ habeas corpus relief.

Respectfully submitted,
BILL McCOLLUM
ATTORNEY GENERAL

BARBARA C. DAVIS
Fla. Bar No. 410519
ASSISTANT ATTORNEY GENERAL
444 SEABREEZE BLVD., SUITE 500
DAYTONA BEACH, FLORIDA 32114
(386)238-4990
COUNSEL FOR RESPONDENTS

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Response has been furnished by U.S. Mail to Linda McDermott, 151 N.E. 30th Street, Wilton Manors, FL 33334 this 15th day of October, 2009.

BARBARA C. DAVIS

CERTIFICATE OF COMPLIANCE

I hereby certify that a true copy of the foregoing Response to Successive Petition for Writ of Habeas Corpus was generated in a Times New Roman, 14 point font, pursuant to Florida Rule of Appellate Procedure 9.210.

Attorney for Respondents