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**IN THE SUPREME COURT OF FLORIDA**

**JAMES DENNIS FORD,**

**Petitioner,**

**CASE NO. SC14-2040**

**v.**

**PAM BONDI,**

**Attorney General of the  
State of Florida,**

**and**

**MICHAEL D. CREWS,**

**Secretary, Florida  
Department of Corrections,**

**Respondents.**

\_\_\_\_\_/

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

COME NOW, Respondents, Pam Bondi, Florida Attorney General, and Kenneth S. Tucker, Secretary, Florida Department of Corrections, by and through the undersigned counsel, and hereby respond to the Petition for Writ of Habeas Corpus filed herein, pursuant to this Court's Order of October 22, 2014. Respondents respectfully submit that the petition should be dismissed as untimely and, alternatively, denied as meritless.

**FACTS AND PROCEDURAL HISTORY**

Petitioner James Ford was convicted of two counts of first degree murder, sexual battery with a firearm, and child abuse,

and was sentenced to death on June 3, 1999. Ford killed a co-worker, Greg Malnory, and raped and killed Greg's wife, Kim Malnory; the Malnory's young daughter was left buckled into her car seat at the remote crime scene. On direct appeal, this Court affirmed the convictions and sentences. Ford v. State, 802 So. 2d 1121, 1125-26 (Fla. 2001), cert. denied, 535 U.S. 1103 (2002) [Florida Supreme Court Case No. SC95972].

In his appeal, Ford was represented by an experienced capital appeals litigator, Assistant Public Defender Robert F. Moeller. Mr. Moeller filed a 65-page brief, raising six issues:

ISSUE I: THE COURT BELOW SHOULD HAVE GRANTED A MISTRIAL DUE TO SEVERAL IMPROPER REMARKS MADE BY THE PROSECUTOR IN ARGUING TO THE JURY DURING THE GUILT PHASE OF JAMES FORD'S TRIAL.

ISSUE II: A MISTRIAL SHOULD HAVE BEEN GRANTED WHEN THE PROSECUTOR BELOW ASKED A HIGHLY INFLAMMATORY QUESTION OF A STATE WITNESS THAT WAS NOT SUPPORTED BY THE EVIDENCE.

ISSUE III: THE INDICTMENT HEREIN FAILED TO CHARGE JAMES DENNIS FORD WITH THE OFFENSE OF CHILD ABUSE, AND THE EVIDENCE ADDUCED AT TRIAL WAS INSUFFICIENT TO PROVE THAT FORD COMMITTED THE CRIME OF CHILD ABUSE.

ISSUE IV: THE PENALTY RECOMMENDATIONS OF JAMES FORD'S JURY WERE TAINTED BY IMPROPER PROSECUTORIAL ARGUMENTS AT THE SENTENCING PHASE OF HIS TRIAL.

ISSUE V: THE COURT BELOW ERRED IN SUBMITTING THE COLD, CALCULATED AND PREMEDITATED AGGRAVATING CIRCUMSTANCE TO JAMES FORD'S PENALTY PHASE JURY AND FINDING THIS FACTOR TO EXIST IN HER ORDER SENTENCING FORD TO DEATH, AS THE EVIDENCE WAS INSUFFICIENT TO SUPPORT IT.

ISSUE VI: THE COURT BELOW ERRED IN FAILING TO GIVE

PROPER CONSIDERATION TO ALL THE EVIDENCE APPELLANT OFFERED IN MITIGATION, AND DID NOT GIVE ANY WEIGHT TO SOME MITIGATORS WHICH THE COURT FOUND TO HAVE BEEN ESTABLISHED.

Ford's last claim, disputing the trial court's treatment of the evidence offered in mitigation, cited to a number of decisions from this Court, as well as Simmons v. South Carolina, 512 U.S. 154 (1994), and concluded that the trial court's failure to adequately consider mitigation "deprived him of due process of law and subjected him to cruel and/or unusual punishment in violation of the Eighth and Fourteenth Amendments to the Constitution of the United States and Article I, Sections 9 and 17 of the Constitution of the State of Florida." (State v. Ford, Case No. SC95972, Appellant's Initial Brief, pp. 57-64).

Ford's convictions and sentences were affirmed on September 13, 2001. Ford, 802 So. 2d at 1136. Ford filed a motion for rehearing, asserting that this Court's rejection of his mitigation issue violated the principles of Lockett v. Ohio, 438 U.S. 586 (1978), and Eddings v. Oklahoma, 455 U.S. 104 (1982). Rehearing was denied December 13, 2001 and the mandate issued that same day. Ford sought certiorari review in the United States Supreme Court, again questioning the constitutional adequacy of the consideration of the mitigating evidence by Judge Ellis. Review was denied on May 28, 2002. Ford v. Florida,

535 U.S. 1103 (2002).

Ford timely filed a motion for postconviction relief pursuant to Florida Rule of Criminal Procedure 3.851 on May 28, 2003. An evidentiary hearing was held in May, 2004. The motion was denied on July 14, 2004. This Court affirmed the denial of postconviction relief on April 12, 2007. Ford v. State, 955 So. 2d 550 (Fla. 2007). No petition for writ of habeas corpus was filed in this Court as part of Ford's initial collateral proceedings.

Ford then filed a petition for writ of habeas corpus in the United States District Court, Ft. Myers Division, on June 11, 2007. Ford's petition was dismissed as time barred on September 17, 2009. Although his case was returned to the district court for consideration of Holland v. Florida, 560 U.S. 631 (2010), see Ford v. Secretary, Dept. of Corrections, 614 F.3d 1241 (11th Cir. 2010), the district court determined that no relief was due under Holland. Ford v. Secretary, Dept. of Corrections, 2012 WL 113523 (M.D. Fla. Jan 13, 2012).

Ford obtained new postconviction counsel in 2012, and filed a successive postconviction motion in March, 2013. The motion was denied as untimely and that ruling is now pending in this Court on appeal. See Ford v. State, Florida Supreme Court Case No. SC14-1011. Ford filed his initial brief in the

postconviction appeal on October 15, 2014, and filed the instant habeas petition at the same time. The habeas petition presents claims asserting that Ford was denied the effective assistance of counsel in his direct appeal and that decisions of the United States Supreme Court issued after Ford's appeal demonstrate constitutional error in the sentencing order.

**MOTION TO DISMISS PETITION AS UNTIMELY**

This petition must be dismissed as time-barred. Pursuant to Florida Rule of Appellate Procedure 9.142(b)(4)(B), any petition for writ of habeas corpus alleging ineffective assistance of appellate counsel filed in this case was due by August 1, 2005, when Ford's initial brief in his postconviction appeal was filed (Ford v. State, Florida Supreme Court Case No. SC04-1611). See Mann v. Moore, 794 So. 2d 595, 598 (Fla. 2001). Although Ford's petition asserts that no petition was filed at that time due to poor representation by Ford's initial collateral counsel, there is no authority which permits an untimely habeas petition under those circumstances. Accordingly, Ford's petition must be dismissed.

### **ARGUMENT IN OPPOSITION TO CLAIMS RAISED**

Ford alleges that extraordinary relief is warranted because he was denied the effective assistance of counsel in his direct appeal. The standard applicable to ineffective assistance of appellate counsel claims mirrors the Strickland v. Washington, 466 U.S. 668 (1984), standard for claims of trial counsel ineffectiveness. See Valle v. Moore, 837 So. 2d 905 (Fla. 2002); Rutherford v. Moore, 774 So. 2d 637, 645 (Fla. 2000). 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 compromised the appellate process to such a degree that it undermines 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). A review of the record demonstrates that neither deficiency nor prejudice has been shown in this case.

Ford asserts that Mr. Moeller should have raised several issues which were not presented to this Court on direct appeal. However, the relevant issues identified were in fact subsumed in the appellate argument which was actually presented by Mr. Moeller. As counsel did raise the issues, and the claim was properly rejected as meritless, counsel was not ineffective for

failing to present these arguments. Lawrence v. State, 969 So. 2d 294, 315 (Fla. 2007) (finding ineffective assistance of appellate counsel claim to be procedurally barred where the claim is a variant of an issue presented on direct appeal) Groover, 656 So. 2d at 425; Chandler v. Dugger, 634 So. 2d 1066, 1068 (Fla. 1994) (failure to raise meritless issues is not ineffective assistance of appellate counsel).

#### **CLAIM I**

#### **WHETHER FORD'S INITIAL COLLATERAL COUNSEL PROVIDED INEFFECTIVE REPRESENTATION WARRANTING THE CONSIDERATION OF AN UNTIMELY STATE HABEAS PETITION.**

Ford first asserts that he is entitled to file this untimely habeas petition because his initial collateral attorney failed to do so. Ford submits that the failure amounts to a violation of collateral counsel's "obligation" to file a state habeas petition in every case. While Ford certainly could have filed a habeas petition in this Court in 2005, there is no requirement that every capital defendant pursue state habeas relief, even when there are no meritorious grounds to present. To the contrary, even attorneys representing capital defendants in collateral proceedings are ethically precluded from filing frivolous actions. See Rule 4-3.1, Rules Regulating the Florida Bar.

In the instant petition, Ford alleges that his appellate attorney was ineffective for failing to present a claim which was, in fact, presented on appeal. Ford's current claim is frivolous and there was no obligation under any constitution, statute, rule or case law which required prior collateral counsel to burden this Court with such a pleading. This petition should be dismissed as untimely.

Turning to the substantive claims presented, Ford contends that he is entitled to a new direct appeal due to Mr. Moeller's alleged failure to challenge Eighth Amendment error that purportedly "permeated" the trial judge's single-spaced, 18-page sentencing order (found in the direct appeal record at Vol. 15, pp. 2715-32). Specifically, Ford claims: (1) appellate counsel should have asserted that the sentencing order violated Eddings v. Oklahoma, 455 U.S. 104, 113 (1982), because the trial judge refused to consider relevant mitigating evidence; (2) appellate counsel should have asserted that the sentencing order violated Hitchcock v. Dugger, 481 U.S. 393 (1987), because the trial judge refused to weigh relevant mitigating evidence; (3) appellate counsel should have asserted that this Court's harmless error analysis was insufficient under Sochor v. Florida, 504 U.S. 527 (1992); (4) appellate counsel should have asserted factual error in the sentencing order violated the



Eighth Amendment and should have been considered in this Court's harmless error analysis pursuant to Parker v. Dugger, 498 U.S. 308 (1992). Ford also asserts that case law decided after his convictions and sentences became final establishes that constitutional error was committed in the imposition of his death sentences. As will be seen, none of his claims compel habeas relief.

#### **A. Ineffective Assistance of Appellate Counsel**

The four claims which Ford now asserts should have been presented on his direct appeal all relate to the propriety of the sentencing order rendered by Judge Ellis on June 3, 1999. Ford's petition faults appellate counsel for failing to argue that the sentencing order in this case violated Eddings and Hitchcock, but in fact appellate counsel did present the argument that the trial court's consideration of the mitigating evidence was constitutionally inadequate. Since counsel offered an argument that the judge's treatment of the mitigating evidence did not comport with the United States Constitution, the current complaint that Moeller did not cite specifically to Eddings and Hitchcock in the initial appellate brief is procedurally barred. Lawrence, 969 So. 2d at 315; Zack v. State, 911 So. 2d 1190, 1210 (Fla. 2005) (denying a claim as

procedurally barred where claim "simply refashions a claim that was unsuccessfully raised on direct appeal"); Rutherford v. Moore, 774 So. 2d 637, 645 (Fla. 2000) (holding that when a claim is actually raised on direct appeal, the Court will not consider a claim that appellate counsel was ineffective for failing to present additional arguments in support of the claim on appeal). Moreover, as explained more fully below, any claim of an Eddings or Hitchcock violation would be rejected as meritless.

As to Ford's dissatisfaction with this Court's harmless error analysis, he has not identified a claim which counsel could have raised in his initial brief, since this Court's analysis was part of the decision which resulted from the briefing and oral argument in the case. Moreover, even if the issue had been included in Ford's Motion for Rehearing, it would have been rejected because this Court's ruling was constitutionally sound.

This Court determined that the trial court's conclusions that some of the evidence presented during the penalty phase was "not mitigating in nature," was erroneous, since the evidence was relevant as possible mitigation, but concluded that any error was harmless because the evidence was minor and tangential; the case was highly aggravated; and the trial court

had recognized and weighed numerous other mitigating factors. Ford, 802 So. 2d at 1136. The record in this case clearly establishes that, even if the trial judge had provided minimal weight to Ford's learning disability and low developmental age as Ford claims she should have, the death sentences still would have been imposed. As this Court provided reasoning and analysis to support the conclusion that any possible error in the trial court's treatment of mitigation was harmless beyond any reasonable doubt, Ford's challenge to this Court's ruling is without merit. Accordingly, appellate counsel did not perform deficiently and there was no prejudice from the failure to contest this Court's harmless error conclusion as part of Ford's rehearing.

#### **B. Newly Decided Case Law**

The three decisions which Ford cites, issued after his convictions and sentences became final, do not compel habeas relief. Ford claims that Tennard v. Dretke, 542 U.S. 274 (2004), establishes that Judge Ellis committed Eighth Amendment error by requiring a nexus between Ford's mitigation and the commission of the Malnory murders. He also asserts that Roper v. Simmons, 543 U.S. 551 (2005), "in conjunction with" Atkins v. Virginia, 536 U.S. 304 (2002), establishes that Ford's culpability is

reduced by virtue of his young developmental age to the extent that his death sentence violates the Eighth Amendment. None of these cases demonstrate that Ford's death sentences must be vacated.

Tennard is one of several cases where the United States Supreme Court considers the constitutional adequacy of capital sentencing in the State of Texas, specifically with regard to the jury's ability to consider mitigating evidence. See generally Smith v. Texas, 543 U.S. 37 (2004). Tennard rejected a screening test applied by the United States Court of Appeals for the Fifth Circuit, which required habeas petitioners to show the mitigation evidence they presented was "constitutionally relevant," which required "evidence of a 'uniquely severe permanent handicap with which the defendant was burdened through no fault of his own,' and evidence that 'the criminal act was attributable to this severe permanent condition.'" Tennard, 542 U.S. at 281. The fundamental issue is whether the jury has been given an effective vehicle with which to weigh the mitigating evidence. Smith, 543 U.S. at 44.

It should be noted initially that Tennard is not a decision which can be applied retroactively. In Witt v. State, 387 So. 2d 922, 929 (Fla. 1980), this Court held that only major constitutional changes are cognizable in claims seeking

retroactive application of case law. The Tennard case offers only a refinement of United States Supreme Court law with regard to the consideration of mitigation in Texas, which is insufficient for retroactive application under Witt. Walton v. State, 77 So. 3d 639, 643 (Fla. 2011) (rejecting retroactivity where new decision was merely an evolutionary refinement of the law); In re Kunkle, 398 F.3d 683, 685 (5th Cir. 2005) (noting that the holding in Tennard was plain under precedents predating that decision). Accordingly, this Court should decline to address Ford's Tennard claim.

Even if Tennard is considered substantively, no relief is due. Ford's case did not involve any prohibition on the admission of mitigating evidence, or any instruction to the jury directing that a threshold showing of relevance be satisfied before the mitigating evidence could be considered. Although the Constitution forbids a sentencer from refusing to consider any proffered mitigating circumstance, it does not dictate that all mitigating evidence be treated the same. Nor does it require, as a necessary component of "considering" proffered mitigating evidence, that any such evidence be found and weighed in every case. Under Florida law, it is axiomatic that "the relative weight given each mitigating factor is within the province of the sentencing court." Campbell v. State, 571 So. 2d 415, 420

(Fla. 1990). Sentencers may give no weight to a particular factor, since the Constitution does not require a sentencer to accept, but only to *consider* relevant mitigating evidence. Blystone v. Pennsylvania, 494 U.S. 299 (1990). A state is not required to ascribe any specific weight to any particular evidence considered by the sentencer. Harris v. Alabama, 513 U.S. 504, 512 (1995).

The United States Supreme Court has recognized that "specific standards for balancing aggravating against mitigating circumstances are not constitutionally required." Zant v. Stephens, 462 U.S. 862, 875 n.13 (1983); Jurek v. Texas, 428 U.S. 262 (1976). A fair reading of Eddings does not support Ford's suggestion that it does not permit a sentencer to "find" a mitigating factor to exist but then decline to weigh the mitigator against the aggravating circumstances. Although Eddings states that a sentencer may not give a mitigating factor "no weight by *excluding such evidence from consideration*," (emphasis added), this is no impediment to giving a mitigating factor no weight simply because it is not mitigating in the case at hand. To the contrary, Eddings acknowledges that a sentencer may refuse to weigh mitigation which is found, factually, not to exist; the constitutional offense in Eddings' case was the sentencer's conclusion in that case that he could not, as a

matter of law, consider Eddings' background in mitigation. A determination that a fact has been proven but need not be weighed against the aggravating factors because it is not mitigating in the particular case at hand is not prohibited by Eddings.

Hitchcock and Eddings stand only for the proposition that a state may not absolutely preclude the presentation or consideration of mitigating evidence. They do not speak to the manner by which the jury must consider the evidence, only that it must be considered. The United States Supreme Court has expressly recognized the difference between rules that govern what factors a jury must be permitted to consider and rules that govern how the state may guide the jury's consideration; the first has constitutional implications under Lockett and its progeny but the second does not. Saffle v. Parks, 494 U.S. 484, 490-91 (1990). Ford's current claim challenges only the manner of consideration and is therefore outside the scope of constitutional concerns.

In the direct appeal opinion, this Court acknowledges the obvious truth that particular "mitigating" facts are entitled to more weight under some circumstances than the same facts under different circumstances. For example, a defendant who establishes in mitigation that he is a "good family man," may

benefit from such testimony after killing a convenience store clerk more than a "good family man" who has killed his own wife and children. It was reasonable to conclude that the mitigating value of an alternative sentence of life imprisonment might be more for a defendant well-suited to imprisonment than for a defendant who poses a threat to prison personnel and fellow inmates. Ford, 802 So. 2d at 1136, n.37. It is for the sentencer, as trier of fact, to determine not only that a mitigating factor exists, but also whether the factor is truly mitigating in the particular case at hand. This is again consistent with United States Supreme Court precedent and the repeated recognition that the weight to be assigned any particular aggravating or mitigating evidence is a question of fact for the sentencer. Eddings, 455 U.S. at 114-15.

The Tennard decision does not add appreciably to the decisional law regarding the sentencer's consideration of mitigating evidence. As this Court's opinion is consistent with the United States Supreme Court's holdings on the issue, Ford's petition must be denied, even if Tennard is substantively, retroactively applied in his case.

As to Ford's hybrid Roper/Atkins claim, this Court has repeatedly rejected Ford's argument. Frances v. State, 143 So. 3d 340, 357-58 (Fla. 2014); McCoy v. State, 132 So. 3d 756, 775



(Fla. 2013); Muhammad v. State, 132 So. 3d 176, 207 (Fla. 2013); Carroll v. State, 114 So. 3d 883, 886-87 (Fla. 2013); Barwick v. State, 88 So. 3d 85, 106 (Fla. 2011); Schoenwetter v. State, 46 So. 3d 535, 562-63 (Fla. 2010); Henyard v. State, 992 So. 2d 120, 130-31 (Fla. 2008). Since Ford was well over the age of majority and is not intellectually disabled, he is not entitled to any relief under Roper or Atkins.

### **CONCLUSION**

Respondent respectfully requests that this Honorable Court DISMISS the instant petition for writ of habeas corpus as time-barred and/or DENY the petition as meritless.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 31st day of October, 2014, I electronically filed the foregoing with the Clerk of the Court by using the e-filing portal which will send a notice of electronic filing to the following: Martin J. McClain, Esquire, McClain & McDermott, P.A., 141 NE 30th Street, Wilton Manors, Florida 33334, **`martymcclain@earthlink.net`**.

**CERTIFICATE OF FONT COMPLIANCE**

I HEREBY CERTIFY that the size and style of type used in this response is 12-point Courier New, in compliance with Fla. R. App. P. 9.100(1).

Respectfully submitted,

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