

IN THE SUPREME COURT OF FLORIDA

JAMES DENNIS FORD,

Petitioner,

v.

CASE NO. SC14-2040

PAM BONDI,

Attorney General of the  
State of Florida,

and,

TIMOTHY H. CANNON,

Interim Secretary,  
Department of Corrections,  
State of Florida,

Respondents.

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PETITIONER'S REPLY TO RESPONSE TO  
PETITION FOR WRIT OF HABEAS CORPUS

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## **REPLY TO FACTS AND PROCEDURAL HISTORY**

At the end of Facts and Procedural History section of the habeas response, the following false statement appears:

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.

(Response at 5). In fact, Mr. Ford's habeas petition presents one claim:

**MR. FORD WAS DEPRIVED OF HIS RIGHT TO PETITION THIS COURT FOR HABEAS RELIEF WHEN HIS REGISTRY ATTORNEYS IN 2005 AND 2006 WERE UNAWARE OF THE COLLATERAL RELIEF THAT COULD BE OBTAINED IN A HABEAS PROCEEDING IN WHICH APPELLATE INEFFECTIVE ASSISTANCE CLAIMS, NEW LAW CLAIMS, AND CLAIMS OF ERROR IN THE APPELLANT PROCESS ARE COGNIZABLE.**

(Petition at 31). To be clear, Mr. Ford's claim is that his registry attorneys, Mr. Mercurio and Mr. Truskoski failed to timely file a habeas petition with this Court on his behalf. The claim is that the legal principle adopted in Steele v. Kehoe, 747 So.2d 931 (Fla. 1999), applies with equal force to the circumstances here.

Not only do Respondents falsely represent Mr. Ford's claim, they do not cite, address or attempt to distinguish Steele v. Kehoe anywhere within the 17 page response. More than anything that shows that the circumstances presented here (Mr. Ford's registry attorneys against his wishes failed to file a timely

habeas petition in this Court and waived Mr. Ford's right to do so), are virtually identical to those in Steele v. Kehoe (collateral counsel failed to file a timely rule 3.850 motion) and thus Mr. Ford is entitled to the benefit of that ruling.

**REPLY TO MOTION TO DISMISS PETITION AS UNTIMELY**

The bedrock principal upon which the American justice system rests is the premise that an adversarial process in which the two sides advocate their competing arguments before an impartial tribunal is the best procedure for obtaining a reliable result.

Adversary proceedings are a major aspect of our system of criminal justice. Their superiority as a means for attaining justice in a given case is nowhere more evident than in those cases, such as the ones at bar, where an issue must be decided on the basis of a large volume of factual materials, and after consideration of the many and subtle interrelationships which may exist among the facts reflected by these records. As the need for adversary inquiry is increased by the complexity of the issues presented for adjudication, and by the consequent inadequacy of ex parte procedures as a means for their accurate resolution, the displacement of well-informed advocacy necessarily becomes less justifiable.

Alderman v. United States, 394 U.S. 165, 183-84 (1969).

The Constitution guarantees a fair trial through the Due Process Clauses, but it defines the basic elements of a fair trial largely through the several provisions of the Sixth Amendment, including the Counsel Clause:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by

law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

Thus, a fair trial is one in which evidence subject to adversarial testing is presented to an impartial tribunal for resolution of issues defined in advance of the proceeding. The right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel's skill and knowledge is necessary to accord defendants the "ample opportunity to meet the case of the prosecution" to which they are entitled.

\* \* \* The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results. An accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair.

Strickland v. Washington, 466 U.S. 668, 684-85 (1984).

Here, undersigned counsel filed a petition for a writ of habeas corpus with this Court on October 15, 2014. In the petition, Mr. Ford specifically noted: "his registry attorneys in 2005 and 2006 did not file a habeas petition with the initial brief." (Petition at 32). Mr. Ford also specifically noted that this failure to file the habeas petition with the initial brief in an appeal from the denial of a Rule 3.851 motion violated a procedural rule this Court first adopted in 1993:

In 1993, when establishing that Rule 3.851 would govern the manner in which death row prisoners could be heard in circuit courts (and that Rule 3.850 would only apply

in non-capital cases), this Court included a provision in Rule 3.851 requiring:

All petitions for extraordinary relief in which the Supreme Court of Florida has original jurisdiction, including petitions for writ of habeas corpus, shall be filed simultaneously with the initial brief filed on behalf of the death-sentenced prisoner in the appeal of the circuit court's order on the rule 3.851 motion.

*In re Rule of Crim. Pro. 3.851*, 626 So.2d 198 (Fla. 1993).

(Petition at 5-6).

After acknowledging that his court-appointed, state-provided registry counsel failed to timely comply with this Court's procedural rule (Petition at 34), Mr. Ford presented his argument based upon this Court's decisions in Steele v. Kehoe, 747 So.2d 931 (Fla. 1999), and Williams v. State, 777 So.2d 947 (Fla. 2000). He argued that just as counsel's failure to timely file a rule 3.850 motion in Steele v. Kehoe violated due process and entitled the defendant there to consideration of a belated 3.850 motion, the failure of Mr. Ford's registry attorneys to file a habeas petition entitled Mr. Ford to consideration of a belated habeas petition.

In the section of the Response titled "Motion to Dismiss Petition as Untimely," Respondents do not address Mr. Ford's argument that registry counsel's failure to file a timely habeas petition violated due process for the reasons set forth in Steele

v. Kehoe. All that Respondents say is that:

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 these circumstances.

(Response at 5). That is the extent of Respondents's argument on the matter. Respondents do not acknowledge Mr. Ford's citation to Steele v. Kehoe and Williams v. State. Respondents's refusal to address the argument Mr. Ford made, indeed the entire legal theory upon which the habeas petition was based, means that the adversarial process cannot operate as designed. This Court is not presented advocacy by the parties on the issue before the Court. And perhaps more importantly, Mr. Ford does not have notice of arguments as to why Steele v. Kehoe does not apply, and without notice of those arguments cannot address them and demonstrate his argument that the case does apply is superior and should prevail.

This Court should require Respondents to either address Mr. Ford's claim that Steele v. Kehoe governs and present their arguments contesting the point, or they should concede and expressly acknowledge that Steele v. Kehoe does permit a belated habeas petition. Otherwise, the adversarial process cannot function properly.

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

In the section "Argument in Opposition to Claims Raised,"

Respondents again ***falsely represents*** Mr. Ford's claim in his habeas petition. Mr. Ford's claim in the habeas petition was whether his registry attorneys's failure to timely file a habeas petition in this Court on his behalf violated due process under Steele v. Kehoe, 747 So. 2d at 934, and under Williams v. State, 777 So.2d 947, 948-49 (Fla. 2000).

After stating "Ford alleges that extraordinary relied is warranted because he was denied the effective assistance of counsel in his direct appeal" (Response at 6), Respondents do an about face one page later and state "Claim I" of Mr. Ford's petition is "WHETHER FORD'S INITIAL COLLATERAL COUNSEL PROVIDED INEFFECTIVE REPRESENTATION WARRANTING THE CONSIDERATION OF AN UNTIMELY STATE HABEAS PETITION."<sup>1</sup> (Response at 7). While this later statement of Mr. Ford's claim is closer to the mark, it still fails to capture the fact that Mr. Ford claims that his due process rights were violated when he was deprived of his right to petition this Court for habeas relief under Steele v. Kehoe. In Steele v. Kehoe, this Court wrote:

In this Court's decision in *State v. Weeks*, 166 So.2d

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<sup>1</sup> The inconsistency between this statement and the earlier ones indicating that Mr. Ford's claim in his petition was simply one premised upon ineffective assistance of appellate counsel suggests that Respondents's confusion is feigned in order to avoid to addressing Mr. Ford's argument premised upon Steele v. Kehoe.

892, 896 (Fla. 1964), we made clear that "[postconviction] remedies are subject to the more flexible standards of due process announced in the Fifth Amendment, Constitution of the United States." For example, although a prisoner has no Sixth Amendment right to postconviction counsel, in *Weeks* and *Graham v. State*, 372 So.2d 1363 (Fla. 1979), we held that due process required the appointment of postconviction counsel when a prisoner filed a substantially meritorious postconviction motion and a hearing on the motion was potentially so complex that the assistance of counsel was needed.

Steele v. Kehoe, 747 So. 2d at 934. This Court concluded that:

due process entitled a prisoner to a hearing on a claim that he or she missed the deadline to file a rule 3.850 motion because his or her attorney had agreed to file the motion but failed to do so in a timely manner. We hold that, if the prisoner prevails at the hearing, he or she is authorized to belatedly file a rule 3.850 motion challenging his or her conviction or sentence.

Id.

In the one paragraph in the Argument section of the Response that addresses collateral counsel's failure to timely file a habeas petition, Respondents state:

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.

(Response at 7). That is the extent of Respondents's argument as to whether Mr. Ford was denied his right to file a habeas petition in violation of due process under Steele v. Kehoe.



First, Respondents's citation to Rule 4-3.1 of the Florida bar rules is a red herring. Rule 4-3.1 indicates that a "lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in the law and fact for doing so that is not frivolous." No where in the Response is it argued that there was no non-frivolous "bas[e]s in the law and fact" for filing a habeas petition on Mr. Ford's behalf. In fact at one point in the Response, the claims that Mr. Ford identified as habeas claims that should have been raised are called "substantive" (Response at 8).<sup>2</sup> Of course, this appears right after Respondents insert a pro forma statement that "Mr. 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."<sup>3</sup>

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<sup>2</sup> Of course by refusing to address Steele v. Kehoe and Williams v. State, Respondents do not have to explain how Rule 4-3.1 trumps the due process rights identified therein.

<sup>3</sup> Mr. Ford describes this statement as pro forma because Respondents do not address the statute cited by Mr. Ford as obligating court-appointed registry counsel to seek in all available postconviction proceedings. See § 27.711(2) ("After appointment by the trial court under s. 27.710, the attorney must immediately file a notice of appearance with the trial court indicating acceptance of the appointment to represent the capital defendant **throughout all postconviction capital collateral proceedings, including federal habeas corpus proceedings, in accordance with this section or until released by order of the trial court.**" Respondents do not address Mr. Ford's citation of Spalding v. Dugger, 526 So. 2d at 72 ("each defendant under sentence of death is entitled, as a statutory right, to effective

Since Mr. Ford's claims cannot both be substantive and frivolous by definition, the Response is spaghetti thrown at a wall in the hopes something sticks.

Also absent from Respondent's assertion that Rule 4-3.1 has some application here is any evidence or affidavit demonstrating that registry counsel relied upon Rule 4-3.1 when he failed to file a habeas petition on Mr. Ford's behalf. Since it is Mr. Ford's factual allegation that Mr. Mercurio and Mr. Truskoski did not file a habeas petition because neither was aware of the possibility or the requirement in the rule that, if one was to be filed, it needed to accompany the initial brief in the appeal of the denial of Rule 3.851 relief. If the State is contesting that factual allegation, then this Court should appoint a special master or a circuit judge to preside at an evidentiary hearing on that factual issue.

Additionally, Respondents refuse to address Mr. Ford's reliance upon § 27.711(2), Fla. Stat.:

Registry counsel is statutorily obligated under § 27.711(2) "to represent the capital defendant throughout all postconviction capital collateral proceedings, including federal habeas corpus

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legal representation by the capital collateral representative in all collateral relief proceedings."). Nor do Respondents address the fact that the right to waive collateral proceedings belongs to the condemned and the procedure for such a waiver is set forth in Rule 3.851(i).

proceedings, in accordance with this section or until released by order of the trial court." A capital habeas proceeding in this Court is one of the "postconviction capital collateral proceeding[]" in which registry counsel has an obligation to represent his death sentenced client. This obligation is no different than the one at issue in Steele v. Kehoe, 747 So.2d 931, 932 (Fla. 1999).

(Petition at 32-33). For Respondents's citation to Rule 4-3.1 to be anything but a red herring, they would have to assert that a court-appointed registry attorney can rely on Rule 4-3.1 to refuse to file a Rule 3.851, a state habeas petition, and/or a federal habeas petition. However, Rule 3.851(i) would suggest that only the condemned has the authority to decide not to have court-appointed counsel pursue "postconviction proceedings." There is no authority for the proposition that an attorney appointed under § 27.711 can announce that under Rule 4-3.1 he is waiving the condemned's right to seek collateral relief. And certainly, this Court would not permit that to happen.<sup>4</sup>

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<sup>4</sup> This Court in Peede v. State, 748 So.2d 253, 256 n.5 (Fla. 1999), addressed court-appointed capital collateral counsel's obligations in death penalty cases to present the condemn's argument for collateral relief cogently:

We are also constrained to comment on the representation afforded Peede in these proceedings. Peede's brief on appeal raised nine issues, but was only 24 pages in length. While we are cognizant that quantity does not reflect quality, the majority of the issues raised were conclusory in nature and made it very difficult and burdensome for this Court to conduct a meaningful review. In all of his postconviction

As court-appointed registry counsel under § 27.711 and this Court's decision in Spalding v. Dugger, 526 So.2d 71 (Fla. 1988),

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proceedings, Peede has been represented by Capital Collateral Representative (CCR) and Capital Collateral Regional Council-Middle District (CCRC). His initial and amended 3.850 motions were filed by CCR attorneys in the Tallahassee office and his brief on appeal was filed by an attorney in the CCRC Tampa office. His reply brief was actually filed "pro se" with the help of a separate ghost attorney. In many respects, this brief was more helpful and comprehensive than the initial brief filed. In addition to the poor quality of the initial brief, this Court has received several complaints concerning counsel's representation, including complaints by Peede himself. We note that in this past legislative session, the legislature amended section 27.710, Florida Statutes (Supp.1998), by adding subsection (12) which states: **"The court shall monitor the performance of assigned counsel to ensure that the capital defendant is receiving quality representation."** Fla. CS for SB 2054 § 5 (1999).

Most of Peede's issues on appeal rely on the substance of the motions filed at the trial level or are simply conclusory in nature. In response to this exact type of practice, this Court has stated: "[T]he purpose of an appellate brief is to present arguments in support of the points on appeal. Merely making reference to arguments below without further elucidation does not suffice to preserve issues, and these claims are deemed to have been waived." *Duest v. Dugger*, 555 So.2d 849, 852 (Fla.1990). In an abundance of caution, we have tried our best to phrase the issues raised on appeal as they correspond to the issues raised below and as they were addressed by the trial court. **Nevertheless, we remind counsel of the ethical obligation to provide coherent and competent representation, especially in death penalty cases, and we urge the trial court, upon remand, to be certain that Peede receives effective representation.**

(Emphasis added).

Mr. Mercurio, and later, Mr. Truskoski, were obligated to represent Mr. Ford "in all collateral relief proceedings." When the right to capital collateral representation was established in 1985, it was recognized that in state court the two proceedings by which a condemned could seek collateral relief were 1) motions filed under Rule 3.850 (later Rule 3.851) in circuit courts, and 2) petitions for writs of habeas corpus filed in this Court. Just as the attorney in Steele v. Kehoe failed to file a timely Rule 3.850 for a non-capital defendant as he had obligated himself to do, Mr. Mercurio here failed to file a timely habeas petition in this Court as he was obligated to do under § 27.711 and Spalding v. Dugger.<sup>5</sup> Just as the defendant in Steele v. Kehoe was entitled to file a belated Rule 3.850 motion as a result, Mr. Ford should be given the opportunity to file a belated habeas petition.

After its pro forma statement that "Ford's current claim is frivolous," most of the Response is then spent addressing the "substantive" (Response at 8) claims that Mr. Ford cited in his petition as claims that should have been presented in a timely habeas petition by Mr. Ford's registry counsel. Clearly, the claims identified by Mr. Ford are not frivolous and registry counsel had an obligation to file a habeas petition raising them.

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<sup>5</sup> Mr. Ford did not at any time waive his rights to seek postconviction relief and discharge counsel under Rule 3.851(i).

As to “substantive” claim of ineffective assistance of appellate counsel, Respondents do not address Mr. Ford’s reliance on Wilson v. Wainwright, 474 So.2d 1162, 1164-65 (Fla. 1985), regarding this Court discussion of the importance of effective appellate representation in a capital case. Respondents do not address the four separate claims that Mr. Ford asserted appellate counsel was deficient in failing to raise. Instead, Respondent submits a jumble of statements in three paragraphs in which reference is made to Eddings v. Oklahoma, 455 U.S. 104 (1982), and to Hitchcock v. Dugger, 481 U.S. 393 (1987):

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 argument that the trial court’s consideration of the mitigating evidence was constitutionally inadequate.

(Response at 9). However, Respondents assertion is wrong. The argument presented by appellate counsel concerning the sentencing court’s order did not rely on either Eddings v. Oklahoma or Hitchcock v. Dugger.<sup>6</sup> The argument presented only discussed state law and whether the order comported with cases like Campbell v. State, 571 So.2d 415 (Fla. 1990), and Van Royal, 497 So.2d 625 (Fla. 1986). See Initial Brief in Case No. SC60-95,972, at 57.

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<sup>6</sup> The table of cases appearing in the Initial Brief in Case No. SC60-95,972, shows that neither Eddings v. Oklahoma nor Hitchcock v. Dugger were cited at any point in that brief.

Recognizing the flaw in their assertion that appellate counsel raised the claims Mr. Ford identified in his pending habeas petition (Eddings error and separately identified Hitchcock error), Respondents do an immediate about face and say:

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.

(Response at 9).<sup>7</sup> But, this is in fact the basis of Mr. Ford's appellate ineffectiveness claim. Counsel's failure to present the issue and cite the correct and controlling case law constituted deficient performance, and the State's argument of a resulting procedural bar is by definition the prejudice that Mr. Ford suffers. This is what constitutes appellate ineffectiveness.

Within the section of the Response addressing "Ineffective Assistance of Counsel," Respondents do not address Mr. Ford's specific arguments regarding the Eddings error that Mr. Ford identified in his Petition (Petition at 35-37), nor his specific arguments regarding the separate and distinct Hitchcock error

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<sup>7</sup> Respondents do cite where in Argument VI of the Initial Brief "the United States Constitution" was cited So, it is not clear to what Respondents are referring. Moreover, citing the various amendments or components of the US Constitution does not constitute a citation to all provisions with the constitution. For example, a party cannot cite to the Fourth Amendment and say that is an adequate way of presenting an Eighth Amendment claim.

identified in the Petition (Petition at 37-38). Respondents do not cite Sochor v. Florida, 504 U.S. 527 (1992), in this section, nor address the specific requirements contained therein that this Court did not comply with, as detailed in the Petition (Petition at 39-42). Respondents do not cite Parker v. Dugger, 498 U.S. 308 (1991), in this section either, and do not address Mr. Ford's specific argument in his Petition that direct appeal should have challenged the sentencing order on the basis of Parker.

Respondents then turn to "Newly Decided Case Law (Response at 11). The State falsely argues that Tennard v. Dretke, 542 U.S. 274, 284 (2004), does not apply retroactively. In fact, it does. The rejection of the nexus requirement in Tennard was because it violated the Eighth Amendment under McCoy v. North Carolina, 494 U.S.433 (1990), a decision well-before Mr. Ford's trial. As to Roper v. Simmons, 543 U.S. 551 (2005), the State relies upon decisions from this Court in 2008 through 2014, as somehow relevant to whether registry counsel should have file Mr. Ford's claim in a habeas petition in 2005.

#### **CONCLUSION AND RELIEF SOUGHT**

For all the reasons discussed herein, Mr. Ford respectfully urges this Court to grant him a belated opportunity to present the habeas corpus claims for relief that his registry counsel improperly failed to present in 2005.



**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true copy of the foregoing REPLY TO RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS has been to Carol Dittmar, Assistant Attorney General, at her primary email address Carol.Dittmar@myfloridalegal.com, this 3<sup>rd</sup> day of December, 2014.

**CERTIFICATE OF FONT**

This is to certify that the Petition has been reproduced in 12 point Courier type, a font that is not proportionately spaced.

*/s/ Martin J. McClain*

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