

IN THE SUPREME COURT OF FLORIDA

NO. SC 01-775

GREGORY MILLS,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

**EMERGENCY MOTION: CAPITAL CASE,
DEATH WARRANT SIGNED; EXECUTION
SCHEDULED FOR MAY 2, 2001
AT 6:00 P.M.**

RESPONSE TO STATE'S MOTION TO STRIKE ET. AL.

COMES NOW THE APPELLANT, GREGORY MILLS, by and through his undersigned counsel, and herein files this response to the State's Motion to Strike Identified Portions of Initial Brief.

1. The State has moved to strike Argument II of Mr. Mills brief because it believes that because the Court's denial of Mr. Mills' motion to relinquish/clarification was denied, the inclusion of this argument was "improper." Mr. Mills submits that the State is incorrect.

2. In his motion filed yesterday, Mr. Mills requested a relinquishment so that the newly-discovered claims could be presented in a Rule 3.850 motion. The State vehemently opposed a relinquishment, arguing that there was no basis for relief on either of the claims. Mr. Mills also sought clarification in the event that the Court declined to relinquish, requesting specifically : "should the Court decline to relinquish, then Mr. Mills seeks clarification on whether to include this information in his brief or how to proceed at this point." The Court simply denied the motion without any explanation or clarification on how Mr. Mills was to proceed. Thus, Mr. Mills included the argument in his brief. This

Court has in the past entertained such new arguments under exigencies of a death warrant. See, e.g. Porter v. State, 653 So. 2d 374, 377 (Fla. 1995) ("We begin by addressing an issue raised in this appeal which was not presented to the judge in the motion"); Spaziano v. State, 660 So. 2d 1363, 1365 (Fla. 1995) ("The motions for rehearing filed in this cause are clearly not authorized. However, consistent with our constitutional responsibility to refrain from dismissing a cause solely because an improper remedy has been sought, we have considered the contents of these motions and the recently filed supplemental affidavit to determine whether they have any basis for relief under our jurisdiction. Under the unique circumstances of this cause, we conclude that these two out-of-time motions for rehearing, together with the supplemental affidavit of Anthony DiLisio, should be treated as a successive 3.850-3.851 motion").

3. As noted, the State yesterday vehemently opposed relinquishment because it took the position that these new claims had no merit. Now, the State takes the position that "Florida law is well-settled that a claim not raised in a rule 3.850 motion cannot be raised for the first time on appeal from the denial of Rule 3.850 relief" (Motion to Strike at 2). However, the law is also clear that the lower court presently has no jurisdiction to entertain a Rule 3.850 motion. See State v. Meneses, 392 So. 2d 905, 907 (Fla. 1981) ("while appeal proceedings or certiorari proceedings are pending in an appellate court, the trial court is without jurisdiction to entertain a motion to vacate"). This is why Mr. Mills sought relinquishment. However, the State was opposed to it. Now the State chides Mr. Mills for not filing a Rule 3.850 motion. The State's gamesmanship is remarkable. If the State opposes relinquishment, then under these circumstances, "it would be [] appropriate to simply reverse for a resentencing before the trial judge." Thompson v. State, 731 So. 2d 1235, 1236 (Fla. 1998).

4. The State also makes the argument that Mr. Mills' argument "with respect to the

standard to be applied in evaluating Claim I, which is set out on pages 23-27 of his Initial Brief, was not raised in the Circuit Court" (Motion to Strike at 2). This is, frankly, ludicrous. The standard espoused by Mr. Mills' counsel below is the standard he is arguing in his brief. Simply because his appellate brief cited additional cases in support of his argument once Judge Eaton had actually ruled does not translate into some "procedural bar." The State's brief filed this morning cites to cases it did not cite below to support Judge Eaton's order; Mr. Mills would not imagine arguing that this was improper. Obviously the State realizes that Mr. Mills is correct under the law and is now desperately seeking to invoke an imaginary "procedural bar" because, on the merits, it has no argument.

5. The State asks for additional time to file another brief on Monday to respond to Mr. Mills additional arguments. In fact, in his motion for clarification and relinquishment, Mr. Mills indicated that should the Court deny relinquishment, he requested an extension until today at 10 AM in part because of "this new and important information just came to light." The Court's order of April 19 gave the parties an extension of time. The State had clear notice of the issues that Mr. Mills was alleging to be new. The State routinely files anticipatory responses to matters it believes might be raised by a defendant; in fact, it did so in Mr. Mills' case below. Moreover, the State's position in opposing relinquishment is clear: it believes Mr. Mills' claims have no merit. Thus the State's request for additional briefing should be denied.

WHEREFORE, the State's motion should be denied in its entirety.

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by fax transmission to all counsel of record on April 20, 2001.

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