IN THE SUPREME COURT OF FLORIDA

CASE NO. 81603

ROBERT DALE HENDERSON,

Petitioner,

v.

HARRY K. SINGLETARY,
Secretary, Florida Department *of* Corrections

Respondent.

PETITION FOR EXTRAORDINARY RELIEF AND FOR A WRIT OF HABEAS CORPUS

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INTRODUCTION

There can be no question that Mr. Henderson's death sentence stands in violation of the Eighth and Fourteenth Amendments. See Espinosa v. Florida, 112 S. Ct. 2926 (1992); James v. State, 18 Fla. L. Weekly 139 (Fla. March 4, 1993). The only question is whether this Court will address the merits of the fundamental constitutional error.

Mr. Henderson argued on direct appeal to this Court that the jury did not have sufficient guidance as to how to apply the facially vague and overbroad statutory language setting forth aggravating circumstances.[1] The jury was given the statutory language defining the "heinous, atrocious or cruel" and "cold, calculated and premeditated" aggravating factors without the narrowing constructions upon which Ms. Henderson's trial counsel sought to have the jury instructed.

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[1] Mr. Henderson's Initial brief argued:

> The statute, further, does not sufficiently define for the jury's consideration each of the aggravating Circumstances listed in the statute. See Godfrev v. Georgia, 446 U.S. 420 (1980).
>
> The aggravating circumstances in the Florida capital sentencing statute have been applied in a vague and inconsistent manner. See Godfrev v. Georgia, 446 U.S. 420 (1980); Witt v. State, 387 So. 2d 922, 931-932 (Fla. 1980)(England, J. concurring).

(Initial Brief at 38). The brief indicated the argument was in abbreviated form because Florida Supreme Court precedent had already rejected the argument as meritless.

Mr. Henderson has filed a Rule 3.850 motion raising his claim pursuant to Espinosa and James. The State did not contest that the jury instructions violated Espinosa or that Mr. Henderson's trial counsel adequately objected to the jury instructions under James. The State argued the claim was barred relying solely upon the adequacy of the phrasing of the issue in the Initial Brief on direct appeal. Because the circuit court ruled the claim was procedurally barred, Mr. Henderson now files this petition alleging ineffective assistance of appellate counsel.

PROCEDURAL HISTORY

1. The Circuit Court of the Fifth Judicial Circuit, in and for Hernando County, entered the judgments and sentences in question.

2. Mr. Henderson was charged by indictment in Hernando County, Florida, with three counts of first degree murder (R. 1662-63).

3. Mr. Henderson entered pleas of not guilty on all three counts.

4. After a change of venue to Lake County, Florida, trial commenced on November 16, 1982. On November 20, 1982, the jury returned guilty verdicts (R. 1533-34). Judgments of conviction were entered the same day (R. 1537).

5. The sentencing jury returned advisory sentences of death on all three counts (R. 1622-23), and the court sentenced Mr. Henderson to death (R. 1641, 2153-60).

6. Mr. Henderson did not testify at either the guilt-innocence or penalty phases of his trial.

7. Mr. Henderson appealed from the judgments of conviction and imposition of the death sentences. His convictions and sentences were affirmed on January 10, 1985. Henderson v. State, 463 So. 2d 196 (Fla. 1985).

8. In 1987, Mr. Henderson filed a Rule 3.850 motion. It was denied after an evidentiary hearing was held. The denial was affirmed on appeal. Henderson v. Dugger, 522 So. 2d 835 (Fla. 1988). Simultaneously, the Supreme Court of Florida denied Mr. Henderson's previous petition for a writ of habeas corpus.

9. Thereafter, Mr. Henderson petitioned the federal courts for federal habeas corpus relief. Mr. Henderson was denied relief by the federal district court and that ruling was affirmed on appeal. Henderson v. Dugger, 925 F.2d 1309 (11th Cir. 1991), opinion modified Henderson v. Singletary, 968 F.2d 1070 (11th Cir. 1992).

10. Mr. Henderson filed a Rule 3.850 motion on April 12, 1993. An evidentiary hearing was held on April 14, 1993, during which Mr. Henderson's direct appeal attorney testified regarding the preparation of Mr. Henderson's direct appeal brief.

11. On April. 14, 1993, the circuit court denied Mr. Henderson's motion to vacate. An appeal therefrom is currently pending before this Court.

12. In the instant motion, reference to the pages in the record on appeal will be "R. ____". All other references are self-explanatory or are otherwise explained.

JURISDICT TO ENTERTAIN PETITION AND GRANT HABEAS CORPUS RELIEF

This is an original action under Fla. R. App. P. 9.100(a). This Court has original jurisdiction pursuant to Fla. R. App. P. 9.030(a)(3) and Article V, sec. 3(b)(9), Fla. Const. The petition presents constitutional issues which directly concern the judgment of this Court during the appellate process, and the legality of Mr. Henderson's sentence of death.

Jurisdiction in this action lies in this Court, see, e.g., Smith v. State, 400 So. 2d 956, 960 (Fla. 1981), for the fundamental constitutional errors challenged herein involve the appellate review process. See Wilson v. Wainwrisht, 474 So. 2d 1163 (Fla. 1985); Baggett v. Wainwrisht, 229 So. 2d 239, 243 (Fla. 1969); cf. Brown v. Wainwright, 392 So. 2d 1327 (Fla. 1981). A petition for a writ of habeas corpus is the proper means for Mr. Henderson to raise the claims presented herein. See, e.g., Way v. Dugger, 568 So. 2d 1263 (Fla. 1990); Downs v. Dugger, 514 So. 2d 1069 (Fla. 1987); Riley v. Wainwright, 517 So. 2d 656 (Fla. 1987); Wilson.

This Court therefore has jurisdiction to entertain Mr. Henderson's claims and to grant habeas corpus relief. This and other Florida courts have consistently recognized that the writ must issue where fundamental error occurs on crucial and dispositive points, or where a defendant received ineffective

assistance of appellate counsel. See, e.g., Wilson v. Wainwright, supra, 474 So. 2d 1163; McCrae v. Wainwright, 439 So. 2d 768 (Fla. 1983); State v. Wooden, 246 So. 2d 755, 756 (Fla. 1971); Baggett v. Wainwright, 229 So. 2d 239, 243 (Fla. 1969); Ross v. State, 287 So. 2d 372, 374-75 (Fla. 2d DCA 1973); Davis v. State, 276 So. 2d 846, 849 (Fla. 2d DCA 1973), affirmed, 290 So. 2d 30 (Fla. 1974). The proper means of securing a hearing on such issues in this Court is a petition for writ of habeas corpus. Baggett, 287 So. 2d 374-75; Powell v. State, 216 So. 2d 446, 448 (Fla. 1968).

Mr. Henderson's claim is presented below. It demonstrates that habeas corpus relief is proper in this case. The claim Mr. Henderson presents is no less substantial than those involved in the cases cited above. He therefore respectfully urges that the Court grant habeas corpus relief.

II. GROUNDS FOR HABEAS CORPUS RELIEF

By his petition for a writ of habeas corpus, Petitioner asserts that his sentence of death was obtained and then affirmed during the Court's appellate review process in violation of his rights as guaranteed by the Fifth, sixth, Eighth and Fourteenth Amendments to the United States Constitution, and the corresponding provisions of the Florida Constitution, for each of the reasons set forth herein. In Mr. Henderson's case, substantial and fundamental errors occurred in his capital trial. These errors were uncorrected by the appellate review process. As shown below, relief is appropriate.

CLAIM

TO THE EXTENT THAT THE STATE ARGUES AND THIS COURT ACCEPTS THAT MR. HENDERSON'S DIRECT APPEAL COUNSEL FAILED TO ADEQUATELY PRESERVE HIS ESPINOSA CLAIM, APPELLATE COUNSEL RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL SINCE SHE KNEW THE CLAIH WAS PRESERVED AT TRIAL, SHE BELIEVED THE CLAIM HAD MERIT, SEE DECIDED TO RAISE THE ISSUE ON DIRECT APPEAL, SHE BELIEVED SHE HAD IN FACT RAISED THE ISSUE IN THE INITIAL BRIEF, SHE HAD NO TACTICAL OR STRATEGIC DECISION FOR NOT RAISING THE ISSUE, SHE DID NOT INTEND TO WAIVE THE ISSUE, AND IF THE ISSUE WAS NOT ADEQUATELY RAISED IT WAS DUE TO HER OWN IGNORANCE IN HER FIRST CAPITAL APPEAL AS TO HOW TO ADEQUATELY RAISE THE ISSUE IN ORDER TO PRESERVE IT.

In James v. State, 18 Fla. L. Weekly **139** (Fla. March **4, 1993),** this Court held that Essinosa **v.** Florida, 112 **S.** Ct. 2926. (1992) was a change in Florida law cognizable in postconviction proceedings under the principles of Witt v. State, 387 So. 2d 922 (Fla. **1980).** This Court held that, **where** an objection to the jury instructions was registered at trial and raised on appeal, **"it** would not be fair to deprive [the capital defendant] of the Espinosa **ruling."** James, 18 Fla. L. Weekly at 139.

Here, the State has not and cannot contest that the jury instructions given violated Espinosa v. Florida. Nor has the State contested that Mr. Henderson's trial counsel adequately objected and preserved the Espinosa issue. Instead, the State has simply maintained that appellate counsel did not adequately raise the issue. Accordingly, Mr. Henderson presented the testimony of Brynn Newton at the evidentiary hearing held on April 14, **1993,** in **circuit court.** Ms. Newton was Mr. Henderson's **direct** appeal counsel.

Attorney Brynn Newton testified that she represented Mr. Henderson in his direct appeal to this Court.[2] Ms. Newton testified that in reviewing the record of Mr. Henderson's trial, she became aware that trial counsel had objected to the jury instructions on the "heinous, atrocious or cruel" and "cold, calculated and premeditated" aggravating factors and had proposed expanded instructions on these factors. Ms. Newton believed that the trial court's overruling of trial counsel's objections and proposed instructions raised a meritorious issue which should be presented in the direct appeal.

Ms. Newton testified that she recognized that at the time of Mr. Henderson's direct appeal, this Court had held that the standard jury instructions on aggravating factors were adequate.[3] Ms. Newton also recognized that the jury

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[2]As this petition is being prepared, a transcript of the evidentiary hearing conducted on April 14, 1993, is not available. Counsel represents that this nevertheless was the substance of Ms. Newton's testimony.

[3]On cross-examination, Ms. Newton testified that at the time of Mr. Henderson's direct appeal, no Florida Supreme Court decision had granted relief based on a improper jury instruction regarding "heinous, atrocious or cruel" or "cold, calculated and premeditated." In fact, Ms. Newton testified, she was unaware of any such grant of relief prior to Espinosa. During cross-examination, Ms. Newton further testified that at the time of Mr. Henderson's direct appeal, there was no Florida Supreme Court case law holding that it was per se reversible error to "do what the Court said it was okay to do."

Ms. Newton's testimony in this regard is corroborated by Chandler v. State, 442 So. 2d 171 (Fla. 1983), issued five days before Mr. Henderson's Initial Brief was filed. Chandler held that a challenge to the vagueness of the jury instruction was meritless. See also, Vauaht v. State, 410 So. 2d 147 (Fla. 1982).

instructions on these aggravating factors tracked the statutory language setting forth these factors. Thus, despite this Court's rulings that the jury instructions were adequate, Ms. Newton argued in Mr. Henderson's direct appeal brief that the capital sentencing statute did not sufficiently define the aggravating factors for the jury's consideration, citing Godfrev v. Georgia, 446 U.S. 420 (1980). Ms. Newton believed that this argument and citation was all she could do and needed to do at the time to raise the issue regarding the sufficiency of the jury instructions on aggravating factors.[4] Ms. Newton testified that she believed at the time that the issue should be raised on direct appeal and believed that she in fact raised the issue on direct appeal.

Ms. Newton testified that she certainly intended to raise the issue regarding the sufficiency of the jury instructions on aggravating factors, that Mr. Henderson did not waive the issue, and that she had no strategic or tactical reason for not raising the issue. Ms. Newton was aware of Espinosa v. Florida, 112 S. Ct. 2926 (1992), and testified that she believes her direct appeal argument in Mr. Henderson's case raised the Espinosa

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[4]In the circuit court, the State suggested that the citation to Godfrev was inadequate to raise the jury instruction issue. Ms. Newton testified that Godfrev dealt with an inadequate jury instruction on an aggravating factor and that she believed her citation to Godfrev raised the jury instructional issue. She testified that it is standard practice for an appellate attorney to rely on a case citation to explain the proposition which the attorney is attempting to argue.

issue. If she failed to raise that issue, Ms. Newton testified, it was "my mistake."[5]

Clearly, Ms. Newton's testimony establishes that to the extent that this Court finds the Espinosa issue was inadequately raised, it was due to Ms. Newton's ignorance as to what else was necessary to preserve the issue. Ignorance constitutes deficient performance. Harrison v. Jones, 880 F.2d 1279 (11th Cir. 1989). The deficient performance prejudiced Mr. Henderson under this Court's decision in James v. State. In fact, James for the first time held that appellate attorneys had a duty to raise and preserve Essinosa claims. It was not until James was decided that Mr. Henderson had a claim to present that Ms. Newton rendered ineffective assistance during the direct appeal. Mr. Henderson hereby presents that claim as soon as it became available to him.

Moreover, Mr. Henderson is entitled to relief. The Espinosa error was not harmless beyond a reasonable doubt. Hitchcock v. State, 18 Fla. L. Weekly 87 (Fla. January 28, 1993). Relief must issue.

CONCLUSION

For each of the foregoing reasons, Petitioner asks this Court to vacate hi's unconstitutional death sentence, and grant all other relief which is just and equitable.

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[5]On cross-examination, Ms. Newton testified that Mr. Henderson's direct appeal was the first capital direct appeal she had done.

I HEREBY CERTIFY that a true copy of the foregoing petition has been furnished by hand delivery, to all counsel of record on April 15, 1993.

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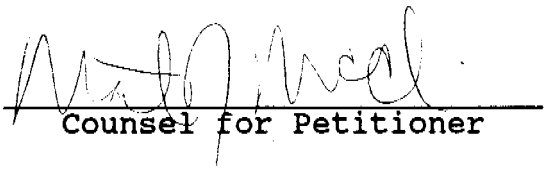
By: 
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