SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. 65853

AUBREY DENNIS ADAMS,

Petitioner,

vs.

LOUIE L. WAINWRIGHT, Secretary,
Department of Corrections of
the State of Florida,

Respondent.
_____/

PETITION FOR WRIT OF HABEAS CORPUS

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ATTORNEYS FOR PETITIONER

SUPREME COURT OF THE STATE OF FLORIDA

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PETITION FOR WRIT OF HABEAS CORPUS

Petitioner, AUBREY DENNIS ADAMS, by undersigned counsel, pursuant to Rules 9.030(a)(3) and 9.100, Fla. R. App. P., petitions this court to issue its Writ of Habeas Corpus.

Petitioner alleges he was convicted and sentenced to death in violation of his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, and under the constitutional, statutory and case law of the State of Florida, for the reason Petitioner was accorded ineffective assistance of counsel at the appellate level, on his direct appeal to this court from his conviction and sentence of death.

In support of this petition, in accordance with Rule 9.100(e), Fla. R. App. P., Petitioner states:

I.

JURISDICTION

This is an original action under Rule 9.100(a), Fla. R. App. P. This court has original jurisdiction pursuant to Rule 9.030(a)(3), and Article V, Section 3(b)(9) of the Florida Constitution.

As described more fully below, Petitioner was denied the effective assistance of appellate counsel in proceedings before this court at the time of his direct appeal. Counsel failed to raise or adequately address issues which, if raised or properly argued, would have required (1) the reversal of Petitioner's conviction and/or death sentence, and (2) a new trial and/or sentencing hearing.

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Since the ineffective assistance of counsel allegations stem from the acts or omissions before this court, this court has jurisdiction to hear Petitioner's habeas corpus petition. Barclay v. Wainwright, 444 So.2d 956 (Fla. 1984).

If this court finds Petitioner's appellate counsel was ineffective, it can and should consider, on the merits, appellate issues which should have been raised earlier. Florida law has consistently recognized that the appropriate remedy where the appellate right has been abrogated due to the ineffectiveness of appellate counsel, is a new review of the issues raised by petitioner. State v. Wooden, 246 So.2d 755, 756 (Fla. 1971); Baggett v. Wainwright, 229 So.2d 239, 243 (Fla. 1969).

The proper means of securing such a belated appeal is a Petition for Writ of Habeas Corpus, filed in the appellate court empowered to hear the direct appeal. See Barclay, supra; Baggett, supra, 229 So.2d at 244.

Accordingly, the habeas corpus jurisdiction of this court is properly invoked to review "all matters which should have been argued in the direct appeal," Ross v. State, 287 So.2d 372, 374-375, where such matters were originally overlooked or otherwise not adequately and effectively pursued by appellate counsel. Id. at 374.

II.

FACTS UPON WHICH PETITIONER RELIES

A statement of the facts in this case is set out in this court's opinion on the direct appeal in Adams v. State, 412 So.2d 850 (Fla. 1982). Copies of that opinion (A-119-126)[1/] and the trial court's Judgment and Sentence and Findings of Fact (A-1-7) can be found in the accompanying Appendix.

[1/] The following abbreviations will be used: A=Separately bound Appendix to the Petition; R=Original record on direct appeal; TT=Original trial court transcript.

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Petitioner was found guilty after a jury trial of First Degree Murder. The trial court sentenced petitioner to death on January 16, 1979.

Petitioner was adjudged insolvent and the public defender for the Second Judicial Circuit was appointed to represent him in appeal. A number of issues were raised. This court affirmed the judgment, and the sentence in a 4-2 decision. Adams, supra. Mr. Justice Boyd dissented from the part of the decision affirming the death sentence by stating that the comparison of the aggravating and mitigating circumstances warranted a reduction of the sentence to life. Mr. Justice McDonald dissented from that portion of the decision which affirmed the death penalty.

Petitioner's execution is presently scheduled for September 19, 1984 (A 127).

Petitioner asserts that various portions of the jury instructions given at trial when considered individually, or as a whole, violated Petitioner's constitutional rights. The complete charge to the jury can be found in the attached Appendix (A-8-45). Particular instructions are discussed in detail in the argument below. Trial counsel did not object to any of these instructions (TT-1366-67; A-29-30).

The issues presented below were not raised by appellate counsel, and when taken as a whole, these actions or omissions constitute ineffective assistance of counsel under the Sixth Amendment of the United States Constitution. See the Initial Brief and Reply Brief of appellate counsel in the attached Appendix (A-46-118).

It should be noted that in his order denying the Motion for Post Conviction Relief, Judge Edwards made it clear that if the issues addressed below were not raised by appellate counsel in the direct appeal, they should have been so raised. See the supplemental record at pages 296-300 in the currently pending companion case, Adams v. State, Sup. Ct. case No. _____, which is the appeal of the denial of Petitioner's Fla. R. Crim. P. 3.850 Motion for Post Conviction Relief.

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Had all of these points been raised and adequately presented by appellate counsel, the outcome of the appeal would have been that Petitioner's conviction would have been reversed or his sentence reduced to life imprisonment.

III.

NATURE OF THE RELIEF SOUGHT

In light of the undisputable constitutional and statutory violations set forth herein, Petitioner seeks an order of this court, vacating the judgment and conviction and remanding the case for a new trial. Alternatively, Petitioner seeks an order of this court, as in Ross v. State, 287 So.2d 372 (Fla. 2d DCA 1973), granting Petitioner belated appellate review from the death sentence imposed by the trial court, and permitting Petitioner full briefing of the issues presented herein.

IV.

BASIS FOR THE WRIT

The failure of Petitioner's appellate counsel to raise and effectively argue these critical issues on direct appeal to this court denied Petitioner his right to a full and meaningful direct appeal, and to effective assistance of appellate counsel guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments of the United States Constitution, Articles I and V of the Florida Constitution, and Florida statutory and case law. See Proffitt v. Florida, 428 U.S. 242, 253; State v. Dixon, 283 So.2d 1, 10 (Fla. 1973); Article V, Section 3(b)(1), Florida Constitution; Section 921.141, Fla. Stat. (1977).

To be effective, counsel must be "an active advocate," and must "support his client's appeal to the best of his ability." Anders v. California, 386 U.S. 738, 744 (1967). "The advocate's duty is to argue any point which may reasonably be argued...." Wright v. State, 269 So.2d 17, 18 (Fla. 2d DCA 1972). Thus, if appellate counsel fails to raise issues on direct appeal, the appellant is entitled to renewed appellate review if there

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existed "an arguable chance of success with respect to these contentions." Thor v. United States, 574 F.2d 215, 221 (5th Cir. 1978).

As noted above in the jurisdictional statement, Florida law requires an appellant who is deprived the effective assistance of appellate counsel be granted belated appellate review. See, e.g., Ross v. State, supra, 287 So.2d at 375.

In Knight v. State, 394 So.2d 997 (Fla. 1981), this court set forth the four-part test applied to a claim of ineffective assistance of appellate counsel: (1) a petitioner must specify the "omission or overt act upon which the claim of ineffective assistance of counsel is based"; (2) he must show that "this specific omission or overt act was a substantial and serious deficiency measurably below that of competent counsel," and "in applying this standard, death penalty cases are different, and consequently the performance of counsel must be judged in light of these circumstances"; (3) he must demonstrate that "this specific, serious deficiency, when considered under the circumstances of the individual case, was substantial enough to demonstrate a prejudice to the defendant to the extent that there is a likelihood that the deficient conduct affected the outcome of the court proceedings"; (4) the State still has an opportunity to rebut the above three assertions by showing beyond a reasonable doubt that there was no prejudice in fact. Id. at 1001.

In Strickland v. Washington, ___ U.S. ___ 80 L.Ed. 2d 674 (1984), the United States Supreme Court rejected the "outcome-determinative" test articulated in Knight (number 3 above) and found that "a defendant need not show that counsel's deficient conduct more likely than not altered the outcome of the case." Id. at 682 (emphasis added). Rather, a defendant must show that there is a reasonable probability that, but for counsel's unprofessional error, the result of the proceeding would have been different. A reasonable probability is a "probability sufficient to undermine confidence in the outcome." Id. In the instant case, there is "reasonable probability" that, but for

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counsel's error, the result of the proceeding in this case would have been different, either with regard to the trial, the sentencing phase, or both.

As demonstrated below, Petitioner has satisfied the parts of both the Strickland and the Knight tests imposed upon him, and has succeeded in establishing a prima facie case that he was denied the effective assistance of appellate counsel as guaranteed by the United States Constitution and the Constitutional laws of the State of Florida.

V.

SPECIFIC ERRORS AND OMISSIONS OF WHICH PETITIONER COMPLAINS

POINT ONE

APPELLATE COUNSEL FAILED TO OBJECT TO A DEATH PENALTY BASED ON A GENERAL VERDICT OF GUILT WHICH IN TURN IS BASED EITHER UPON A FINDING OF PREMEDITATED MURDER OR AN ALTERNATIVE THEORY UNDER THE FELONY MURDER RULE. SUCH A JURY INSTRUCTION VIOLATED PETITIONER'S RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.[2]

Although it is possible that the Petitioner was convicted on the basis of premeditated murder, it is also possible that he was convicted upon the alternative felony murder rule theory submitted to the jury. As shown below, felony murder cannot constitutionally support the imposition of the death penalty because there may not be any deliberate intent to kill. Here, since it cannot be determined which of the theories of guilt the jury accepted, Petitioner's sentence of death cannot be upheld.

In Gregg v. Georgia, 428 U.S. 153 (1976), it was held that the death penalty is an acceptable form of punishment for one convicted of premeditated murder. The court reasoned that the penalty of death is not disproportionate when imposed "for the crime of murder, and when a life has been taken deliberately by the offender. . . ." 428 U.S. at 187 (emphasis added).

The question of whether the death penalty could be applied to a defendant convicted on the basis of the felony murder rule

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[2] Throughout this Petition, statements in the headings, especially those regarding which constitutional violations are being asserted, are hereby incorporated by reference in the text of the argument, and will not be repeated in the text.

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consistent with the Eighth and Fourteenth Amendments was presented to the Court in Lockett v. Ohio, 438 U.S. 568 (1978), but the Court decided that case upon another ground reserving the question for future consideration. However, in a concurring opinion, Mr. Justice White specifically addressed the issue reasoning that:

> The infliction of death upon those who had no intent to bring about the death of the victim is not only grossly out of proportion to the severity of the crime but also fails to contribute significantly to acceptable, or indeed any, perceptible goals of punishment. . . .

Id. at 626.

Most recently, in Enmund v. Florida, 458 U.S. 782 (1982), the Court held that the imposition of the death penalty on a person who aids and abets a felony in the course of which murder is committed by others but who does not himself kill, attempt to kill, or intend to kill, constitutes a violation of the Eighth and Fourteenth Amendments.

In the instant case the jury could have found Mr. Adams guilty of murder by reason of a death which occurred during the commission of a felony (i.e. kidnapping). The jury could have believed Mr. Adams did not deliberately kill, but nevertheless found him guilty of murder based on the felony murder rule. Although the jury also could have found him guilty of premeditated murder, a sentence of death should not be upheld upon the mere "possibility" that it was based upon a constitutionally acceptable ground. Indeed, the possibility that the conviction was based upon a ground which cannot constitutionally support the imposition of death is all that is necessary to arrive at the conclusion that the sentence must be vacated. See Stromberg v. California, 283 U.S. 359 (1931), which held that if a case is submitted to a jury on alternative theories, the unconstitutionality of any of the theories requires that the conviction be set aside. Here, no less than in Stromberg, it is possible that the jury convicted the Petitioner on the constitutionally objectionable felony murder rule theory. Accordingly, the death sentence must be vacated.

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POINT TWO

APPELLATE COUNSEL FAILED TO OBJECT TO JURY INSTRUCTIONS IN THE PENALTY PHASE OF THE TRIAL WHICH REQUIRED THE JURY TO CONSIDER ALL THE AGGRAVATING CIRCUMSTANCES SPECIFIED IN THE DEATH PENALTY STATUTE AND THUS CREATED A SUBSTANTIAL RISK THAT DEATH WAS IMPOSED ON THE BASIS OF AGGRAVATING CIRCUMSTANCES NOT SUPPORTED BY THE EVIDENCE. SUCH A JURY INSTRUCTION VIOLATED PETITIONER'S RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

The issue involves the Florida requirement, as expressed in Straight v. Wainwright, 422 So.2d 830, 832 (Fla. 1982), that the jury be instructed in every capital case on all of the statutory aggravating circumstances, regardless of the lack of evidence to support them. This holding violates federal constitutional requirements and this Court should reconsider its holding in this case.

By instructing the jury to consider all the aggravating circumstances in the statute, the risk is created that the jury's sentencing verdict in a particular penalty trial will be based upon improperly considered factors. For example, in this case, there was no evidence to support several aggravating circumstances. Nevertheless, these circumstances may have appeared to be present because instructions to the jury to consider them could have led the jury to find one or more of the circumstances present, and hence, led the jury to base a sentence verdict on such findings.

Since the jury is not required to articulate the findings upon which its sentence recommendation is based, neither the trial court nor this court can know whether the advisory verdict is based upon properly guided discretion. A trial judge cannot disregard a jury's recommendation of death unless there are strong reasons to believe that reasonable persons cannot agree with the recommendation. Accordingly, there is a substantial risk that an unguided jury recommendation will critically infect the sentence imposed by the trial judge.

This case illustrates the risk of arbitrary imposition of the death penalty. The jury was instructed, for example, on aggravating circumstances relating to (1) committing a crime

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while under sentence of imprisonment; (2) having previously been convicted of another capital offense, or of a felony involving the use or threat of violence to some persons; (3) knowingly created a great risk of death to many persons; and (4) having committed the crime for the purpose of avoiding or preventing a lawful arrest. There was no evidentiary support for such aggravating circumstances; yet, the jury was instructed that they might consider the same. But Cf. Adams v. State, 412 So.2d 850 (Fla. 1982).

Hence, the instructions as given herein as required by Florida law created a substantial risk that the Petitioner was sentenced to death upon the recommendation of a jury whose discretion was not channelled by facts and evidence and was, therefore, arbitrarily permitted to recommend the death penalty.

POINT THREE

APPELLATE COUNSEL FAILED TO OBJECT TO ALLOWING THE JURY TO CONSIDER ALL DEGREES OF HOMICIDE REGARDLESS OF THE EVIDENTIARY BASIS FOR SAME. SUCH A JURY INSTRUCTION VIOLATED THE PETITIONER'S RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

Florida's unbroken practice, until October 1, 1981, of instructing the jury in a murder case on all degrees of homicide regardless of the evidence left, unchannelled the jury's guilt phase discretion, inevitably leading to arbitrary results on the question of guilt in first degree murder cases.

Beginning in 1939 and continuing until October 1, 1981, Florida law required jury instructions in a first degree murder case on all degrees of homicide and on attempted first degree murder regardless of the evidentiary basis for such instructions. Sections 919.14, 919.16, Fla. Stat. (1965), adopted as Fla.R.Crim.P. 3.490 and 3.510 (1968). On October 1, 1981, the Supreme Court of Florida ended this practice by approving amendments to the Rules of Criminal Procedure which, inter alia, prohibited instructions on lesser included offenses and attempts unless such instructions were supported by the evidence. In Re

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Florida Rules of Criminal Procedure, 403 So.2d 979 (Fla. 1981).

By requiring the jury to be instructed on lesser included offenses, for which there was no evidence to support verdicts on the lesser offenses, Florida law invited jurors to dispense mercy wherever they deemed mercy appropriate. Without question Florida juries did grant "jury pardon[s]," Bailey v. State, 224 So.2d 296, 297 (Fla. 1969), in capital murder cases prior to October 1, 1981. See, e.g., Killen v. State, 92 So.2d 825 (Fla. 1957).

Because the practice of instructing on lesser included offenses when there is no evidence to support verdicts on such offenses "inevitably lead[s] to arbitrary results," Hopper v. Evans, 456 U.S. 605, 611 (1982), the Florida death penalty scheme as applied to the conviction in this case is inherently unconstitutional.

Since the arbitrariness arising from this practice infects the "pool" of capital cases against which each capital case, including Defendant's, has been compared, the arbitrariness goes to the heart of the requirement of consistency and even-handedness underlying the validity of Florida's capital sentencing scheme. Accordingly, that entire scheme must be stricken as unconstitutional.

POINT FOUR

APPELLATE COUNSEL FAILED TO OBJECT TO REQUIRING THAT A RECOMMENDATION OF A LIFE SENTENCE BE AGREED UPON BY SEVEN OR MORE JURORS. SUCH A JURY INSTRUCTION VIOLATED THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

The defendant's Fifth, Sixth, Eighth, and Fourteenth Amendment rights under the United States Constitution were violated by application of the Florida death penalty statute in the instant case, insofar as the standard jury instructions for capital cases, between 1975 and 1981, provided that the jury be instructed that "[t]he law requires that seven or more members of the jury agree upon any recommendation advising either the death penalty or life imprisonment." Florida Standard Jury Instructions in Criminal Cases 80 (1975). Because such an

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instruction did not correctly state Florida law, juries may have been coerced unlawfully to reach majority verdicts, thereby depriving capital defendants of due process in capital sentencing proceedings.

In Rose v. State, 425 So.2d 521 (Fla. 1982), the Florida Supreme Court held that an "Allen charge" should not have been given where the jury reported to the judge that it was "tied six to six, and no one will change their mind at the moment."

On the basis of Rose, the instruction given in the instant case, that seven or more jurors must agree on the life or death recommendation, was an erroneous statement of Florida law. Such an instruction creates a substantial risk that death can be imposed when life is properly the verdict reached by the jury. Pursuant to this instruction, a jury which is equally divided has not reached a verdict. Accordingly, a juror might surrender an honest conviction and belief under such circumstances upon the mistaken belief that is necessary to reach a verdict.

POINT FIVE

APPELLATE COUNSEL FAILED TO OBJECT TO JURY INSTRUCTIONS WHICH FAILED TO CLEARLY EXPLAIN THE NATURE AND FUNCTION OF MITIGATING CIRCUMSTANCES AND WHICH FAILED TO INFORM THE JURY THEY COULD RECOMMEND LIFE EVEN THOUGH THEY FOUND AGGRAVATING CIRCUMSTANCES. SUCH JURY INSTRUCTIONS VIOLATED PETITIONER'S RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

Petitioner's constitutional rights were violated by the jury instructions given in the penalty phase of this case because they failed to clearly define or provide clear instructions on the function and nature of mitigating circumstances. See, e.g., Tucker v. Zant, 724 F.2d 882, 890-92 (11th Cir. 1984); Goodwin v. Balkcom, 684 F.2d 794, 798-803 (11th Cir. 1982), cert. denied 103 S.Ct. 1798 (1983); Spivey v. Zant, 661 F.2d 464, 467-72 (5th Cir. 1981), cert. denied 458 U.S. 1111 (1982).

Further, the jury instructions failed altogether to make it clear the jurors' ability to recommend that the Petitioner be sentenced to life imprisonment, even if they found aggravating

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circumstances. See Westbrook v. Zant, 704 F.2d 1487, 1503 (11th Cir. 1983).

POINT SIX

APPELLATE COUNSEL FAILED TO OBJECT TO THE JURY INSTRUCTIONS WHICH, WHEN TAKEN AS A WHOLE ARE FUNDAMENTALLY FLAWED AND THEREFORE VIOLATED PETITIONER'S RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

In addition to the errors in the jury instructions set forth above, two additional errors were presented and argued on direct appeal. In its original opinion this Court noted:

> Defendant correctly points out that the instruction included references to two crimes which do not exist, to wit: rape and an abominable and detestable crime against nature. Defendant argues that it is an indispensable requisite to a fair trial to instruct the jury on all essential elements of a crime, but the jury was not instructed on the essential elements of sexual battery and kidnapping, the only possible applicable felonies with which the state could have sought a conviction for felony murder.

Adams v. State, 412 So.2d 850, 852 (Fla. 1982). The Court disposed of these errors by finding them to be harmless.

> Although an erroneous or uninvited felony murder instruction was given, the evidence of premeditation was sufficient to render the erroneous instruction harmless.

Id. at 853.

This Court should now, however, reexamine this holding because when these errors must be considered together with those set forth above. Such an examination shows that the jury instructions as a whole are fundamentally flawed. They charged the jury that it could find the defendant guilty of first degree murder for crimes which do not exist, that it could consider aggravating circumstances which did not exist, and that seven jurors had to agree to recommend life. Furthermore, they failed to adequately explain the role of mitigating factors.

VI.

CONCLUSION

The issues referenced above are fundamental and could have undoubtedly been raised on appeal even absent the objection of trial counsel. The courts of this state have consistently held fundamental error committed at trial may be raised on

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appeal notwithstanding trial counsel's failure to preserve the issue. See, e.g., Rhay v. State, 403 So.2d 956 (Fla. 1981).

Appellate counsel failed to present critical issues which individually, or when taken together, would have resulted in reversal. Failure of appellate counsel to do so in Petitioner's direct appeal deprived him of a meaningful direct appeal in contravention of the Fifth, Sixth, Eighth and Fourteenth Amendments of the United States Constitution, and of effective assistance of counsel under those provisions.

WHEREFORE, Petitioner requests this court issue its Writ of Habeas Corpus and direct the death sentence to be vacated and that Petitioner receive a new trial; alternatively, this court should allow full briefing of the issues presented and grant petitioner belated appellate review of this conviction.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Petition and accompanying Appendix have been furnished by HAND DELIVERY to: Margene Roper, Assistant Attorney General, Office of the Attorney General, Criminal Division, Tallahassee, Florida 32301; by U. S. MAIL to Ben Ayres, N.W. Pine Avenue, Ocala, Florida 32670 and by HAND DELIVERY to Honorable Jim Smith, Attorney General, State of Florida, The Capitol, Tallahassee, Florida 32301 this 10th day of September, 1984.

Kenneth Hart
ATTORNEY