ORIGINAL

IN THE SUPREME COURT OF FLORIDA

JAMES DUPREE HENRY,

Appellant,

vs.

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

Appellee.

CASE NO. 65874

FILED
SID J. WHITE
SEP 14 1984
CLERK, SUPREME COURT
By _____ Chief Deputy Clerk

PETITION FOR WRIT OF HABEAS CORPUS

Petitioner, JAMES DUPREE HENRY, through his undersigned counsel, respectfully requests this Honorable Court to issue its writ of habeas corpus, and in support thereof states:

1. Jurisdiction of this Court is invoked pursuant to Article V, Sections 3 (b) (1), (7), (9), Florida Constitution and Rule 9.030 (a) (3), Florida Rules of Appellate Procedure.

STATEMENT OF THE CASE

Mr. Henry was charged with the first degree murder of Z. L. Riley for a death occurring during the commission of a robbery.

Mr. Henry was indicted for first degree murder and trial by jury began on June 24, 1974. The jury rendered a general verdict of guilty and the case proceeded to the sentencing trial on the same day.

During its deliberations the jury inquired whether "there [is] any way of a prisoner getting out of prison in less than 25 years, some way other than parole when sentenced to life imprisonment" (T414). The judge reread the instruction that one sentenced to life imprisonment is "required to spend no less than 25 calendar years before being eligible for parole...." Id.

By a 7 to 5 vote the jury reached an advisory verdict recommending the death sentence (T 416). The judge immediately imposed the death sentence (T 423).

Mr. Henry appealed his conviction and death sentence to this Court. In a per curiam, 4 to 2 decision the Court upheld Mr. Henry's conviction and death sentence. In ruling upon the death sentence the Court quoted the trial judge's findings of fact and concluded that "[w]e find that the judgment and sentence of the

lower court in this cause is in accordance with the justice of the cause." Henry v. State, 328 So.2d 430, 432 (Fla. 1976). The United States Supreme Court denied certiorari. Henry v. Florida, 429 U.S. 951 (1976).

Mr. Henry filed a motion to vacate his judgment and sentence, pursuant to Fla.R.Crim.P. 3.850, in the Circuit Court. This motion was denied on November 19, 1979 and affirmed by this Court on November 27, 1979. Henry v. State, 377 So.2d 692 (Fla. 1979).

Mr. Henry then, on November 27, 1979, filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 in the United States District Court for the Middle District of Florida. The federal district court granted the petition for writ of habeas corpus insofar as the death sentence and ordered that a new penalty trial be held, and denied relief as to all other grounds. Respondent Wainwright then appealed, and Mr. Henry filed a cross-appeal. The court of appeals affirmed the district court's order granting the writ of habeas corpus. Henry v. Wainwright, 661 F.2d 56 (5th Cir. 1981) (Unit B). The Supreme Court granted certiorari and remanded the cause for further consideration in light of Engle v. Isaac, 456 U.S. 107 (1982). Wainwright v. Henry, 457 U.S. 1114 (1982). The previous judgment was adhered to on remand by the court of appeals. Henry v. Wainwright, 686 F.2d 311 (5th Cir. 1982) (Unit B). Wainwright again applied for certiorari. The Supreme Court granted certiorari and remanded for further consideration in light of Barclay v. Florida, 103 S.Ct. 3418 (1983). Wainwright v. Henry, 103 S.Ct. 3566 (1983). On December 13, 1983, the court of appeals reversed the district court's order insofar as it had granted the writ of habeas corpus and affirmed the denial of habeas corpus relief on the issues raised by Mr. Henry on his cross-appeal. Henry v. Wainwright, 721 F.2d 990 (5th Cir. 1983) (Unit B). The Supreme Court denied certiorari on June 25, 1984. Henry v. Wainwright, 104 S.Ct. 3564 (1984).

On August 21, 1984, the Governor signed a Death Warrant for Mr. Henry, effective from noon September 13, 1984 through noon September 20, 1984. His execution has been scheduled for September 20, 1984 at 7:00 a.m. No stay of execution has been ordered.

GROUND FOR ISSUANCE OF THE WRIT

THIS COURT'S PRACTICE, UNAUTHORIZED AND UNANNOUNCED BY STATUTE OR RULE, OF REQUESTING AND RECEIVING EX PARTE INFORMATION CONCERNING APPELLANTS IN PENDING CAPITAL APPEALS, WITHOUT NOTICE TO THESE APPELLANTS OR THEIR ATTORNEYS, DENIED OR APPEARED TO DEPRIVE DEATH-SENTENCED APPELLANTS, INCLUDING MR. HENRY, DUE PROCESS OF LAW, THE EFFECTIVE ASSISTANCE OF COUNSEL, AND THE RIGHT OF CONFRONTATION, AND SUBJECTED THEM TO CRUEL AND RIGHT AND UNUSUAL PUNISHMENT AND TO COMPULSORY SELF-INCRIMINATION, IN VIOLATION OF THE FOURTEENTH AMENDMENT AND ITS INCORPORATED GUARANTEES.

This issue is similar to the claims raised in Brown v. Wainwright, 392 So.2d 1327 (Fla. 1981). Brown was an original action filed in this Court on behalf of one hundred twenty-two death-sentenced inmates in Florida. Mr. Henry was not a party to this action.

The Brown appellants argued that this Court, since at least as early as 1975, had engaged in the continuing practice of requesting and receiving information concerning capital appellants which was not presented at trial and was not a part of the trial record or record on appeal. The information included, but is not limited to: pre-sentence investigation reports concerning the capital offense under review or prior convictions unrelated to the capital offense; psychiatric evaluations or contact notes, psychological screening reports; recitations of a capital defendant's refusal to submit to a psychiatric examination from which a report could be prepared; post-sentence investigation reports concerning the capital offense under review or prior convictions unrelated to the capital offense; probation or parole violation reports; and state prison classification and admissions summaries. Except as to some of the pre-sentence investigations pertaining to the offense on appeal, the above information was requested and received without notice to the capital appellants or their attorneys. Upon information and belief, a quantity of the information received by the Court, and of records reflecting

the practice of requesting and receiving it, has, at the Court's direction been destroyed or purged from the Court's files. As a result, it is no longer possible to identify all of the cases in which such information was requested or received.

Mr. Henry recognizes, at the outset, that aspects of the practice were passed upon by this Court in Brown and by the eleventh circuit in Ford v. Strickland, 696 F.2d 804 (11th Cir. 1983) (en banc). However, two developments require a stay of execution pending reconsideration of the question.

First, the respondent in Wainwright v. Witt, cert. granted, 104 S.Ct. 2168 (1984) has raised before the United States Supreme Court this very issue: "whether the secret, systematic, ex parte solicitation and consideration of psychiatric, psychological and other sensitive materials by a state appellate court [the Florida Supreme Court in Witt] in connection with its review of capital convictions and sentences violates the Constitution?"

Second, the manner in which the eleventh circuit en banc court decided Ford is significant. This practice was held not to constitute a constitutional violation by a six to five vote in Ford. Of the six judges forming the majority, however, five joined in the plurality opinion, id. at 808-820, and the sixth, Judge Tjoflat, issued a separate opinion, concurring in part and dissenting in part. Id. at 824-844. Judge Tjoflat's opinion was thus essential to form a majority on the ultimate question of the constitutionality of this practice as it was presented by Mr. Ford. However, Judge Tjoflat reserved judgment concerning the possible unconstitutionality of this practice on another ground not raised in Ford. He stated:

> Although the premise that judges can and do disregard that which they must disregard is a basic and, indeed, an absolute notion in our system of justice, this premise may in some instances be overridden by the equally fundamental notion that 'justice must satisfy the appearance of justice.' Offutt v. United States, 348 U.S. 11, 14, 75 S.Ct. 11, 13, 99 L.Ed.11 (1954). There are circumstances in which the appearance of impropriety arising form the court's consideration of prejudicial evidence is so great that the judge must step down. The judge steps down not because the judicial system assumes he is incapable of performing but because the appearance of impropriety to society at large is too detrimental to the judicial system.

> Petitioner has never made this latter argument, however, rather, he has merely attacked the premise that judges can disregard nonrecord materials. Because petitioner makes no assertion that as a matter of federal constitutional law, members of the Florida Supreme Court should be forced to step down in this situation on the ground of appearance of impropriety, I intimate no view on this claim.

Id. at 833. Thus, the constitutionality of this Court's practice must be reconsidered, in light of the question of whether it raised an appearance of impropriety.

Unlike Mr. Ford, Mr. Henry does specifically assert that this Court's secret practice constituted an appearance of impropriety.

WHEREFORE, petitioner respectfully requests this Honorable Court grant this petition and:

1. Immediately issue this Court's order staying petitioner's execution;

2. Issue its order to show cause to respondent as to why this Court's writ should not be issued;

3. Issue its writ of habeas corpus;

4. Vacate petitioner's sentence of death; and/or

5. Grant such further relief as may be warranted by the justice of this cause.

Respectfully submitted,

RICHARD L. JORANDBY
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CRAIG S. BARNARD
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RICHARD H. BURR III
Of Counsel

MICHAEL A. MELLO
Assistant Public Defender

BY _____
Counsel for Defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished by Greyhound Bus, to EVELYN D. GOLDEN, Assistant Attorney General, 125 North Ridgewood Avenue, 4th Floor, Daytona Beach, Florida, 32014 this 13th day of September, 1984.

Of Counsel

V E R I F I C A T I O N

I, CRAIG S. BARNARD, being duly sworn do hereby verify that the facts set out in the foregoing Petition for Writ of Habeas Corpus are true and correct to the best of my knowledge.

DATED this 13th day of September, 1984.

CRAIG S. BARNARD

SWORN to and SUBSCRIBED before me
this 13th day of September, 1984

Florestine Wilson

NOTARY PUBLIC

My Commission Expires:

Notary Public, State of Florida
My Commission Expires Sept. 23, 1986
Bonded Thru [illegible] Insurance, Inc.