

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 and properly argued, would have required (1) the reversal of Petitioner's conviction and death sentence, and (2) a new trial and sentencing hearing.

Since the ineffective assistance of counsel allegations stem from acts or omissions before this Court, this Court has jurisdiction to hear Petitioner's habeas corpus petition. Arango v. State, 437 So. 2d 1099 (Fla. 1983); Buford v. Wainwright, 428 So. 2d 1389 (Fla. 1983), cert. denied, 104 S. Ct. 372 (1983); Knight v. State, 394 So. 2d 997, 999 (Fla. 1981).

If the Court finds that Petitioner's appellate counsel was ineffective, it can and should thereafter consider, on the merits, the appellate issues which should have been raised earlier. Florida law has consistently recognized that the appropriate remedy, where the appellate right has been thwarted due to the omissions or ineffectiveness of appellate counsel, is a new review of the issues raised by the Petitioner. State v. Wooden, 246 So. 2d 755, 756 (Fla. 1971); Baggett v. Wainwright, 229 So. 2d 239, 243 (Fla. 1969); Futch v. State, 420 So. 2d 905 (Fla. 3d DCA 1982); Ross v. State, 287 So. 2d 372, 374-75 (Fla. 2d DCA 1973); Davis v. State, 276 So. 3d 846, 849 (Fla. 2d DCA 1973), aff'd, 290 So. 2d 30 (Fla. 1974).

The proper means of securing such a belated appeal is a petition for a writ of habeas corpus, filed in the appellate court empowered to hear the direct appeal. See Baggett, supra, 229 So. 2d at 244; cf. Ross, supra, 287 So. 2d at 374-75; Powe v. State, 216 So. 2d 446, 448 (Fla. 1968).

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, supra, 287 So.

2d at 374-75, where such matters were originally overlooked or otherwise not adequately and effectively pursued by appellate counsel. See id. at 374; Kennedy v. State, 338 So. 2d 261, 262 (Fla. 4th DCA 1976); Davis; supra, 276 So. 2d at 849.

PROCEDURAL HISTORY¹

Appellant, Frank Smith, was convicted of first degree murder, kidnapping, armed robbery, and sexual battery in the Circuit Court of the Second Judicial Circuit in and for Jefferson County on August 30, 1979. The jury recommended that a death sentence be imposed on August 31, 1979. On September 10, 1979, the Court sentenced petitioner to death for the charge of first degree murder and sentenced him to life imprisonment for each of the remaining charges. This Court affirmed. Smith v. State, 424 So.2d 726 (Fla. 1982). A petition for rehearing was filed on November 11, 1982, and was denied on January 27, 1983. A petition for a writ of certiorari in the United States Supreme Court was denied on June 20, 1983, Justices Marshall and Brennan dissenting.

On April 25, 1984, petitioner appeared before the Board of Executive Clemency. On September 19, 1984, Governor Bob Graham denied clemency and signed a death warrant effective from noon on Wednesday, October 10, 1984, to noon on Wednesday, October 17, 1984. Mr. Smith's execution is scheduled for Tuesday, October 16, 1984 at 7:00 a.m.

At the time the warrant was signed appellant did not have counsel. From the time the death warrant was signed until present counsel were contacted, volunteer agencies tried arduously to obtain counsel for petitioner. Counsel was engaged to represent appellant as of Monday, September 24, 1984, and received the full record which comprises nearly 5000 pages on September 26, 1984. The record was

¹ The record before this Court in Smith v. State, No. 78-66-CF is hereby incorporated by reference.

incomplete and counsel had to spend his first day in Florida, October 2, 1984, attempting to put it in order. Ms. Sonenberg did not even see the record until reaching Florida on October 3, 1984.

A motion for relief pursuant to Fla.R.Crim.P. 3.850, together with motions, inter alia, for a stay of execution, for a continuance, and for payment of defense experts and costs, as well as an application for a stay of execution pending appeal were filed in the Circuit Court for the Second Judicial Circuit on October 8, 1984. The case was assigned to the original trial judge, the Honorable Kenneth E. Cooksey. Oral argument on the application for a stay of execution and on procedural matters regarding how to handle the motion was heard on October 8, 1984. On October 9, 1984, the Honorable Kenneth E. Cooksey denied the motion for a stay. An evidentiary hearing solely as to the issue of ineffective assistance of counsel at the penalty phase was held on October 9, 1984. Mr. Smith was not granted a continuance, over objections, in order to gather and present evidence on his ineffectiveness claim beyond that submitted in his exhibits. Judge Cooksey's orders denying Mr. Smith relief were not entered until the afternoon of October 10, 1984.

On October 10, 1984, petitioner filed an appeal of the denial of the Motion to Vacate with this Court. At the earliest possible hour on October 11, 1984, petitioner filed with this Court a Supplement and Reply Brief on his appeal and this Petition for a Writ of Habeas Corpus. The original habeas corpus petition raises a claim of ineffective assistance of counsel on appeal.

INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL

The failure of counsel for Petitioner to raise meritorious issues on direct appeal to this Court denied Petitioner his rights to a full and meaningful direct appeal and to the effective assistance of appellate counsel, as guaranteed by the Sixth, Eighth and Fourteenth Amendments to the United States Constitution and by Article I, Sections 2, 9, 16, 17

and 21 of the Florida Constitution.

Appellate counsel's failure to provide effective assistance was due to an inexcusable failure to raise meritorious legal claims.

Florida law establishes an absolute constitutional and statutory right to a direct appeal from a criminal conviction. See, Marshall v. State, 344 So.2d 646, 648 (Fla. 2d DCA 1977); Bannerman v. Wainwright, 283 So.2d 124, 125 (Fla. 1st DCA 1973). The right of Petitioner to a direct appeal from the judgment and sentence of death imposed by the trial court is further guaranteed by the Constitution of the United States and Florida statute. See, Proffitt v. Florida, 428 U.S. 242, 253 (1976); State v. Dixon, 283 So.2d 1, 10 (Fla. 1973); Fla. Stat §921.141.

The Right to Effective Appellate Counsel

The fact that an appeal is taken by counsel is obviously not dispositive of an ineffective assistance of counsel claim. "Perfection is half a loaf only"; appellate counsel must both perfect and prosecute an appeal. Foxworth v. Wainwright, 449 F. 2d 317, 320 (5th Cir. 1971). 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 petitioner is entitled to renewed appellate review if there existed "an arguable chance of success with respect to these contentions." Thor v. United States, 574 F.2d 215, 221 (5th Cir. 1978). Accord Ennis v. Le Fevre, 560 F.2d 1072 (2nd Cir. 1977); High v. Rhay, 519 F.2d 109 (9th Cir. 1965); Hooks v. Roberts, 480 F.2d 1196 (5th Cir. 1973).

The fact that this Court independently reviews the record in a capital case and reviews the evidence of aggravating and mitigating factors, (Proffitt v. Florida, supra, 428 U.S.

at 252-254, 258-260) does not diminish the significance of the deprivation of effective appellate representation or the need for relief in the form of a belated appeal. See Passmore v. Estelle, 607 F.2d 662, 663-664 (5th Cir. 1979); High v. Rhay, supra, 519 F.2d at 113; Ross v. State, 287 So.2d 372 (Fla. 2d DCA 1973); Wright v. State, 269 So.2d 17 (Fla. 2d DCA 1972).

An appellant who is deprived the effective assistance of appellate counsel is entitled to belated appellate review. The proper means of securing this belated review is pursuant to a petition for writ of habeas corpus in this Court. See, e.g., Smith v. State, 400 So.2d 956 (Fla. 1981); State v. Wooden, 246 So.2d 755 (Fla. 1971); Baggett v. Wainwright, 229 So. 2d 239 (Fla. 1969).

The habeas corpus jurisdiction of the appellate court is properly invoked to review "all matters which should have been argued in the direct appeal". Ross v. State, supra, 287 So.2d at 374-375.

In Passmore v. Estelle, supra, a textbook ineffective assistance of appellate counsel case, appellate counsel filed a one sentence brief on Passmore's behalf. We are all shocked to the point of disbelief by such slipshod representation. Yet, the appellate representation which Passmore received was one sentence better than the appellate representation that Frank Smith received on the crucial issues counsel failed to raise (even though Frank Smith's life was at stake).

THE MERITORIOUS CLAIMS

The substantial meritorious issues which appellate counsel ineffectively failed to raise are specifically in his Motion to Vacate Judgment and sentence submitted before Judge Cooksey pursuant to Fla.R.Crim.P.3.850.

Petitioner has submitted to this Court his Motion to Vacate Judgment and Sentence pursuant to Fla.R.Crim.P. 3.850 as an appendix to his Supplemental and Reply Brief (appealing the Second Judicial Circuit Court's denial of relief under Rule 3.850). The meritorious issues which petitioner herein

alleges counsel ineffectively failed to raise an appeal were presented in the Rule 3.850 proceeding. Petitioner argued therein, as he does on the appeal from denial of relief in that proceeding, that those issues were cognizable at the post-conviction level since they involved fundamental rights. Petitioner specifically reserves this argument herein. Judge Cooksey nevertheless found that these issues were not cognizable since they should have been presented on appeal. Petitioner submits that to the extent counsel should have presented those issues on appeal, as Judge Cooksey found, counsel was ineffective for failing to do so.

Petitioner will not herein specifically reiterate the arguments in support of those claims. Petitioner will indicate which claims he asserts counsel was ineffective for failing to pursue on appeal and specifically rests on the legal arguments supporting those claims which he raised in the Fla.R.Crim.P. 3.850 proceeding. Those arguments are herein specifically incorporated by reference. The specific issues which Petitioner claims his attorney ineffectively failed to present on appeal are²:

- a) that jurors with conscientious objections to the death penalty were impermissibly excused from the jury, see, Motion to Vacate, pages 32-43.
- b) that the burden was unconstitutionally shifted at the penalty phase, see, Motion to Vacate, page 44.
- c) that Mr. Smith was denied his Sixth Amendment right to confrontation and his Fourteenth Amendment right to due process of law through impermissible bolstering by the State of its own witness before he had been impeached, see, Motion to Vacate, pages 45-50.
- d) that Mr. Smith's Eighth Amendment rights were violated by the blanket jury instruction on all lesser included offenses at the guilt-innocence phase, see, Motion to Vacate, pages 56-59.
- e) that Mr. Smith's rights were abrogated when the jury was unconstitutionally instructed on aggravating circumstances, see, Motion to Vacate, pages 60-61.

² The claim that the trial court violated petitioner's fundamental rights by failing to instruct on the preferred defense of withdrawal was raised on appeal as it was in the Rule 3.850 proceeding.

- f) that Mr. Smith's rights were violated by the unconstitutional jury instructions at the sentencing phase, see, Motion to Vacate, pages 62-65.
- g) that it was unconstitutional to preclude the jury from considering non-statutory mitigating circumstances, see, Motion to Vacate, pages 66-71.

THE SIXTH AMENDMENT STANDARD

The Sixth amendment right to counsel includes the right to effective representation of counsel on appeal. In Strickland v. Washington ___ U.S. ___, 104 S.Ct. 2052 (1984), the United States Supreme Court stated that the "benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the [proceeding] cannot be relied on as having produced a just result." This determination, according to the Court in Strickland, supra, requires a two part inquiry, first a showing of deficient performance such that the Sixth Amendment right to counsel was denied, and second, that the deficient was prejudicial.

In the instant case the allegations made clearly make out a showing that appellate counsel's performance was deficient. The arguments he failed to make, as enumerated above, are serious omissions from his appellate efforts on behalf of his client. Those arguments were meritorious and warranted presentation. A good number of them involved constitutional violations of the most basic sort which were suffered by petitioner.

Secondly, appellate counsel's deficient performance prejudiced petitioner in the most serious way possible: it resulted in an affirmance of his conviction and his sentence to death. The magnitude of this prejudice is unparalleled and has been so recognized by the Supreme Court. See, Beck v. Alabama, 447 U.S. 625 (1980).

Under Knight v. State, 394 So.2d 997 (Fla. 1981) a determination as to whether a client was rendered effective assistance of counsel rests on a three-part showing:

- 1) a detailed explanation of the specific acts or omission which are claimed to have resulted in the ineffective assistance of counsel;
- 2) that the specific act or omission constituted a substantial and serious deficiency falling measurably below that of competent counsel; and
- 3) that the deficiency was substantial enough to demonstrate a prejudice likely to have affected outcome of the proceedings.

In the instant case the specific omissions are the failures to present the crucial issues enumerated above and present in the Motion to Vacate filed pursuant to Fla.R.Cr.P. 3.850. In aggregate, these failures by appellate counsel constitute a serious and substantial deficiency measurably below that of competent counsel. Finally it is unmistakable that taken together the omissions by appellate counsel seriously prejudiced petitioner as they resulted in an affirmance of his conviction and his death sentence. There is no more serious prejudice petitioner could have suffered. Cf., Beck v. Alabama, supra.

Under either the Standard in Knight, supra or that in Strickland, supra, which makes reference to the Knight test, petitioner's request for a writ of habeas corpus must be granted in order to ensure that substantial meritorious constitutional claims under the Sixth, Eighth and Fourteenth Amendments to the United States Constitution will be heard by this Court.

EVIDENTIARY HEARING

Petitioner's verification of this Petition is being submitted to this Court along with this Petition. Should any of the facts contained in this Petition be disputed, Petitioner moves that this Court refer this case to a Special Master for hearing and resolution of evidentiary matters.

CONCLUSION

WHEREFORE,

a) as to the ineffective assistance of appellate counsel, Petitioner requests that this Court issue the Writ of Habeas Corpus and grant Frank Smith a new appeal of his conviction and sentence in which his counsel may raise and fully brief all points deemed appropriate;

b) that this Court enter a stay of execution pending disposition of the matters raised herein; and

c) that this Court should grant such further relief as may be deemed proper.

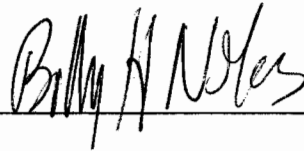
Respectfully submitted,

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BY



ATTORNEYS FOR DEFENDANT

VERIFICATION

STATE OF FLORIDA :
 :
COUNTY OF BRADFORD :

Before me, the undersigned, personally appeared FRANK SMITH, who, being first duly sworn, says that he has personal knowledge of the allegations contained in the foregoing PETITION FOR WRIT OF HABEAS CORPUS and that the allegations and statements contained therein are true and correct to the best of his knowledge.



FRANK SMITH

Sworn to and subscribed to before me
this 3rd day of October, 1984.



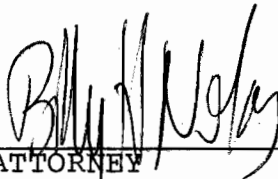
~~NOTARY PUBLIC~~

My Commission Expires:

NOTARY PUBLIC, STATE OF FLORIDA
My Commission Expires Mar. 24, 1987

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by hand to Lawrence Kaden, Office of the Attorney General, The Elliot Building, 40] South Monroe Street, Tallahassee, Florida, this 11th day of October, 1984.



ATTORNEY