IN THE
SUPREME COURT OF FLORIDA

FILED

CHESTER MAXWELL,
Petitioner,
v.
LOUIE L. WAINWRIGHT,
Respondent.

CASE NO. _____

PETITION FOR WRIT OF HABEAS CORPUS

Chester Maxwell, confined at Florida State Prison in the custody of respondent Louie L. Wainwright, under a sentence of death imposed by the Circuit Court in and for Broward County, respectfully petitions this Court for a Writ of Habeas Corpus on the grounds set forth below.

BASIS FOR JURISDICTION

Petitioner's Writ of Habeas Corpus is filed pursuant to Article V, Section 3(b)(1), (7) and (9), Florida Constitution, and Rule 9.030 (a)(3) and 9.100, Florida Rules of Appellate Procedure. The issues raised involved appellate review of Petitioner's case by this Court.

FACTS ON WHICH PETITIONER RELIES

Chester Maxwell is under a sentence of death that was not even challenged by his appellate attorney. In a 27-page brief filed with this Court, appointed counsel raised no challenges to the trial court's finding of five aggravating circumstances, three of which were found to be invalid, anyway. Maxwell v. State, 443 So.2d 967 (Fla. 1984). He failed to identify major issues involving restriction of consideration of mitigating circumstances, failure of the trial court to consider nonstatutory mitigating circumstances, the improper removal of a juror under Witherspoon, and the exposure to the jury of the defendant while in custody.

This case involves a robbery murder on a golf course in Ft. Lauderdale, Florida. (R. 570, 613, 657). The victim died of a single shot to the chest with a .22 bullet, resulting in the collapse of the heart and lungs (R. 772). The killing occurred when two black men, one with a knife, the other with a gun, approached the victim and three other golfers at Palm Aire Country Club. (R. 570, 613, 657). The man with the knife held and robbed two of the golfers, while the other held and robbed the other two with the gun (R. 570, 631, 630, 652). One of the golfers was shot when he made a statement while removing his ring (R. 657). The eyewitness identification was confused, and was a major issue at trial (R. 570-657). The defense was alibi (R. 1045-1053).

During voir dire, prospective juror Jackson was improperly removed for cause after making an equivocal response to a Witherspoon inquiry. (Tr. 500-01). The issue was not raised on appeal. The defendant was brought before the venire during voir dire, in the custory of two bailiffs and a deputy from the Broward Sheriff's Office. Trial counsel moved to strike the venire, and the motion was denied. (Tr. 367-68) The issue was not raised on appeal.

No sentencing errors were raised, even though the Court and the State indicated throughout voir dire and the jury instructions that mitigating circumstances were limited to those listed in the statute. Specifically, the Court and State made repeated reference to the "list" of mitigating circumstances, and the "seven" mitigating circumstances. (Tr. 232-33, 426, 1386, 1410, 1424.) Similarly, the trial court's sentencing order reflects a consideration of only statutory mitigating circumstances (R. 1396-1408, 1907-08), even though nonstatutory mitigating testimony was elicited at the penalty phase. (R. 1395-1408). Neither point was raised on appeal, even though they are obviously crucial in light of this Court's finding that three of the five aggravating circumstances found were invalid.

Attached as an appendix is a proffer in support of this claim. The group of documents, under Tab 1, are the briefs filed in the only other death penalty case petitioner's appellate attorney has handled, and that is Wilson v. State, 436 So.2d 908 (Fla. 1983). This Court's case number is 61.635. In Wilson, as in this case, appellate counsel failed to raise any issue with respect to sentencing, until ordered to do so by this Court.

Tab 2 contains an affidavit of appellate counsel for the co-defendant which recounts a conversation with appellate counsel in this case during the course of the appeal. The conversation revealed a lack of knowledge of basic sentencing issues on the part of petitioner's attorney.

Under Tab 3 are affidavits attesting to the difficulty petitioner encountered in obtaining counsel to represent him in these proceedings, and the extremely short period of time petitioner's counsel has had to prepare these documents.

NATURE OF RELIEF SOUGHT

The petitioner seeks by his petition an order reducing his sentence to life imprisonment or allowing a new appeal to this Court on all issues in this case. Further, petitioner seeks an evidentiary hearing by commissioner or otherwise if there is any dispute as to an issue of fact, and a stay of execution pending such a hearing. Petitioner seeks such other and further relief as this Court deems just.

ARGUMENT

Petitioner has identified specific omissions of appellate counsel measurably below the standard of effective assistance of counsel which resulted in his prejudice. Knight v. State, 394 So.2d 997 (Fla. 1981); Strickland v. Washington, ____ U.S. ___, 104 S.Ct. 1384 (1984).

As a preliminary note, petitioner asks this Court to peruse appellate counsel's twenty-seven page brief. Notably, there is no statement of facts, there are no record references, and argu-

ments are truncated with few or no case citations. More notably, appellate counsel offers no discussion whatsoever of sentencing. The following is a cursory review of relevant issues which, if raised, are likely to have resulted in reversal of the conviction or sentence.

A. Exclusion of a prospective juror for cause was violative of the Defendant's Sixth, Eighth and Fourteenth Amendment rights.

The referenced juror's response to the Witherspoon inquiry was not an unambiguous indication he could not fairly try the guilt phase of trial, and his excusal for cause is violative of the principle of Witherspoon v. Illinois, 391 U.S. 510 (1968), as elucidated in cases such as Adams v. Texas, 448 U.S. 38 (1980), Davis v. Georgia, 429 U.S. 122 (1976), Granviel v. Estella, 655 F.2d 673 (5th Cir. 1981) and Burns v. Estella, 626 F.2d 398 (5th Cir. 1980) (en banc).

B. The Prejudicial display of the defendant in custody before the jury panel was in violation of the Sixth, Eighth and Fourteenth Amendments.

The petitioner was paraded before the venire in the custody of two bailiffs and a deputy from the Broward Sheriff's Office during voir dire proceedings. (R. 367-68). A defendant has a due process right not to be displayed before the jury in circumstances which clearly establish his custodial status, lest the presumption of innocence be diluted. See, Estelle v. Williams, 425 U.S. 514 (1976); Illinois v. Allen, 397 U.S. 337 (1970). Petitioner's display is thus a due process violation.

C. The unlawful Limitation of Mitigating Circumstances was violative of Petitioner's rights under the Sixth, Eighth and Fourteenth Amendments.

The trial court's repeated admonitions to the jury that the mitigating circumstances were limited to those set forth in the statute, reinforced by the prosecutor's similar statements to the jury in his closing argument, denied petitioner full consideration of the nonstatutory mitigating evidence which was presented to the jury at the sentencing proceedings (R. 232-33, 426, 1380, 1396-408, 1410-12). In addition, the trial court restricted its consideration of mitigating evidence to that deemed to fall with-

in the parameters of the statutory mitigating circumstances (R. 1437-39; see also R. 1907-08).

Lockett v. Ohio, 438 U.S. 586, 604 (1978), established the constitutional principle that the sentencer in a capital case may "not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." (footnote omitted; original emphasis). Limiting jury instructions violate this rule, since such fail to provide adequate guidance to the jury as to its role of affording the accused an individualized and reliable sentencing determination. Washington v. Watkins, 655 F.2d 1346 (5th Cir. 1981), cert. denied, 456 U.S. 949 (1982), Chenault v. Stynchcombe, 581 F.2d 444, 448 (5th Cir. 1978).

Similarly, limited consideration of mitigating circumstances by a trial judge violates the rule of Lockett. Eddings v. Oklahoma, 455 U.S. 104 (1982). Eddings establishes that a sentencer may not "refuse to consider, as a matter of law, any relevant mitigating evidence." Id. at 114-15 (original emphasis). The Eighth Amendment requirement of reliability in the death-sentencing process, as endorsed by Lockett and Eddings, requires a reviewing court "to remove any legitimate basis for finding ambiguity concerning the factors actually considered by the trial court." Id. at 118-19 (O'Connor, J. concurring). Significantly, this Court has vacated a death sentence imposed by the same judge as in the case at bar in an opinion noting his failure to consider nonstatutory mitigating circumstances, in Herzog v. State, 439 So.2d 1372, 1381 (Fla. 1983).

As a result of these two errors, the petitioner was denied a fair and reliable sentencing proceeding in the state trial court. The failure to raise this issue on appeal is all the more significant in light of this Court's rejection of three aggravating circumstances, which would have resulted in resentencing but for the lack of a finding of mitigating circumstances. Elledge v. State, 408 So.2d 1021 (Fla. 1982).

CONCLUSION

It is respectfully submitted that the petition for Habeas Corpus should be granted, and the petitioner should be granted the relief requested.

VERIFICATION

STATE OF FLORIDA)
:
COUNTY OF ~~BRADFORD~~ DADE)

BEFORE ME, the undersigned authority, personally appeared Steven H. Malone, who, being first duly sworn, says that he has personal knowledge of the allegations 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.

STEVEN H. MALONE

SWORN to and SUBSCRIBED to before me this 4th day of November, 1984.

NOTARY PUBLIC

My Commission Expires:
NOTARY PUBLIC STATE OF FLORIDA
MY COMMISS.ON EXPIRES MAY 15 1987
BONDED THRU GENERAL INSURANCE UND

CONCLUSION

It is respectfully submitted the petition for a writ of habeas corpus should be granted, and the petitioner should be granted the relief requested.

Respectfully submitted,

STEVEN H. MALONE
233 Third Street North
St. Petersburg, Florida
(813) 823-4191

ATTORNEY FOR DEFENDANT

Steven H. Malone

VERIFICATION

STATE OF FLORIDA)

COUNTY OF BRADFORD)

Before me, the undersigned authority, this day personally appeared CHESTER MAXWELL who, first being duly sworn, said that the allegations of the foregoing ORIGINAL APPLICATION are true and correct.

Chester Maxwell
CHESTER MAXWELL

Sworn to and subscribed before me this 4 day of November, 1984.

Susan Cary.
NOTARY PUBLIC

Notary Public, State Of Florida At Large
My Commission Expires April 17, 1987
Bonded By SAFECO Insurance Company of America

PET FOR WRIT OF H.C.