IN THE SUPREME COURT OF FLORIDA

NO. 79,382

JERRY LEON HALIBURTON,

Petitioner,

v.

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

Respondent.

MEMORANDUM OF LAW IN SUPPORT OF PETITION FOR EXTRAORDINARY RELIEF AND FOR A WRIT OF HABEAS CORPUS

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INTRODUCTION

A petition for habeas corpus relief was filed on February 17, 1992, to address substantial claims of error under the Fifth, Sixth, Eighth, and Fourteenth Amendments -- claims demonstrating that Mr. Haliburton was deprived of the effective assistance of counsel on direct appeal and that the proceedings resulting in his capital conviction and death sentence violated fundamental constitutional requirements.

Since the original petition was filed under a pending death warrant, there have been numerous appellate opinions issued (e.g. Espinosa v. Florida, 112 S. Ct. 2926 (1992); Stringer v. Black, 112 S. Ct. 112 S. Ct. 1130 (1992); Richmond v. Lewis, 113 S. Ct. 528 (1992); James v. State, 615 So. 2d 668 (Fla. 1993)), which directly affect the issues raised in Mr. Haliburton's petition for writ of habeas corpus. This memorandum is necessary in order to discuss the new case law in an orderly fashion so as to aid this Court in addressing the issues. Moreover, counsel was unable to adequately brief some claims due to the fact that Mr. Haliburton's death warrant had been signed when the habeas petition was filed in this Court, and the undersigned only had three (3) weeks to become familiar with Mr. Haliburton's case, investigate the substantial issues involved, and prepare and file a postconviction motion. The instant memorandum is intended to supplement the original petition, and all matters contained in the original petition are expressly incorporated herein.

Though addressed in part on direct appeal, the issues raised

in Mr. Haliburton's state habeas petition and particularly the issue discussed in the instant memorandum, did not receive full review due to appellate counsel's ignorance of relevant law. To the extent this Court's longstanding jurisprudence repudiating certain claims brought about appellate counsel's failure to present an issue in its entirety or inadequately present an issue, counsel was rendered prejudicially ineffective. Starr v. Lockhart, 23 F. 3d 1280 (8th Cir. 1994); Blanco v. Singletary, 943 F.2d 1977 (11th Cir. 1991); United States v. Cronic, 466 U.S. 648 (1984). Counsel also overlooked a number of issues. Atkins v. Attorney General, 932 F.2d 1430 (11th Cir. 1991). Had appellate counsel raised these issues, or raised them in an adequate fashion, Mr. Haliburton would have been entitled to relief. Accordingly, Mr. Haliburton was prejudiced by appellate counsel's deficient performance. It simply cannot be said that Mr. Haliburton was not prejudiced as a result this ineffective assistance. Habeas relief is warranted.[1]

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[1]The following symbols will be used to designate references to the record in the instant memorandum:

"RI." -- record on appeal in Mr. Haliburton's first trial;
"RII." -- record on appeal in Mr. Haliburton's retrial;
"PC-R." -- record on 3.850 appeal to this Court;
"Supp. PC-R." -- supplemental record on 3.850 appeal;
"T." -- transcript of testimony at evidentiary hearing.

CLAIM V

MR. HALIBURTON'S RIGHT TO A RELIABLE CAPITAL SENTENCE WAS VIOLATED WHERE THE STATUTE WAS VAGUE AND OVERBROAD AND HIS SENTENCING JURY DID NOT RECEIVE INSTRUCTIONS GUIDING AND CHANNELING ITS SENTENCING DISCRETION BY EXPLAINING THE LIMITING CONSTRUCTIONS OF THE AGGRAVATING CIRCUMSTANCES SUBMITTED TO IT. AS A RESULT, THE JURY HAD UNBRIDLED DISCRETION TO DETERMINE WHETHER THE AGGRAVATING CIRCUMSTANCES EXISTED, WHETHER, IF THEY EXISTED, THEY WERE SUFFICIENT TO WARRANT A DEATH SENTENCE, AND WHETHER, BALANCING THE AGGRAVATING CIRCUMSTANCES AND THE EVIDENCE OFFERED IN MITIGATION, A DEATH SENTENCE SHOULD BE RECOMMENDED.

At the penalty phase of Mr. Haliburton's trial, the jury was instructed to consider five aggravating circumstances: under sentence of imprisonment, prior violent felony, during the course of a burglary, heinous, atrocious, or cruel, and cold, calculated, and premeditated (RII. 899-900). Despite instructing the jury on heinous, atrocious, or cruel, the trial court did not find this factor to exist.

Mr. Haliburton's jury received no instructions regarding the elements of the aggravators even through defense counsel argued and proposed more detailed jury instructions. Over objection the standard instructions were read and it was implied that the aggravators had already been found to apply and that the jury was obligated to accept that finding (RII. 733). Appellate counsel raised these issues on direct appeal to the extent he believed required to preserve the issues, given this Court's longstanding practice of denying the identical claims. Based on the discussion below, Mr. Haliburton is entitled to habeas relief.

A. HEINOUS, ATROCIOUS, OR CRUEL.

The jury received the following instruction on the heinous, atrocious, or cruel aggravating circumstance:

> Four, the crime for which the defendant is to be sentenced was especially wicked, evil, atrocious, or cruel; atrocious means outrageously wicked and vile and cruel means designed to inflict a high degree of pain with utter indifference to or even enjoyment of the suffering of others.

(RII. 899). This instruction is unconstitutionally vague and violates the Eighth Amendment. State v. Breedlove, 20 Fla. L. Weekly S155 (Fla. Apr. 6, 1995). See also Espinosa v. Florida, 112 S.Ct. 2926 (1992); Shell v. Mississippi, 498 U.S. 1 (1990).

Defense counsel Musgrove submitted a proposed instruction on the heinousness factor to the trial court (RII. 734), and argued additionally that the facts of the case did not support a finding of heinous, atrocious, or cruel because "[i]t's just not unusually torturous" (RII. 737). The court declined to rule on the expanded instruction "until you've presented testimony on it and then I'll make the ruling at that time" (RII. 739).

Following the conclusion of the testimony, the court indicated that it was "seriously considering giving some type of definition along the lines set forth in State v. Davis, I think it is . . . defining heinous and cruel [because] those terms at least to me are vague enough so that I think some further definition would be appropriate" (RII. 859-60).[2] The court

[2]It is clear that the court was referring to State v. Dixon, rather than State v. Davis, a case which does not exist insofar as this issue is concerned.

noted that he "looked at your instruction, the first portion of which seems to be the actual definition which would be 'Heinous means extremely wicked or shockingly evil, atrocious means wicked and vile and cruel means infliction of a high degree of pain with utter indifference to or even enjoyment of the suffering of others.' That's the definition I'm contemplating giving. (RII. 860). Later, the court confirmed that he was working from "that portion right there" of counsel's proposed instruction.

Undersigned counsel had been unable to locate the proposed instruction discussed in the record. Inexplicably, it was not made part of the record on direct appeal. However, given the context of the discussion between the court and counsel, it is clear that the court only agreed to provide the jury with a portion of counsel's proposed instruction. Because the instruction was based on the language contained in State v. Dixon, it is apparent the remainder of the proposed instruction contained the additional language contained in that opinion, namely, that "the aggravating circumstances that the capital felony was especially heinous, atrocious, or cruel, applies only where the actual commission of the capital felony was accomplished by such additional acts as to set the crime apart from the norm of capital felonies -- the consciousless or pitiless crime which is unnecessarily tortuous to the victim." Dixon, 283 So. 2d at 9.[3] This language in Dixon appears

[3]Counsel's pretrial motion regarding the heinous, atrocious, or cruel aggravating factor cited Dixon numerous times and detailed that the "Florida Supreme Court has stated in Dixon, supra, that

immediately following the definitions of the terms heinous, atrocious, or cruel, giving further credence to the fact that when the court gave only the "first part" of counsel's proposed instruction, the "second part" was the second half of the Dixon definition. Of course, this Court has held that this additional language in Dixon is the language "deemed so critical to the validity of the aggravator in Proffitt v. Florida, 428 U.S. 242 (1976)." Breedlove, 20 Fla. L. Weekly at S156. Without that additional language to provide the jury with adequate guidance to channel its sentencing discretion, the instruction provided to Mr. Haliburton's jury was unconstitutionally vague. Breedlove; James v. State, 615 So. 2d 668 (Fla. 1993).

On direct appeal, counsel raised a general claim regarding the unconstitutionality of Florida's death penalty scheme, adding a specific argument regarding heinous, atrocious, or cruel:

> Appellant is aware that this Court has repeatedly affirmed validity of Florida's law, and will rely on the arguments below without further comment, except to note that the trial judge had trouble with (5)(h) himself, first letting it go to the jury and then rejecting it.

(Brief of Appellant, Case No. 72,277, at 19).[4] At the

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this circumstance was limited to 'the conscienceless or pitiless crime which is unnecessarily torturous to the victim" (PC-R. 989). Counsel also argued that "capital sentencing discretion can be suitably directed and limited only if aggravating circumstances are sufficiently limited in their application. . . . [T]he limiting construction must, as a matter of Eighth Amendment law, be both instructed to sentencing juries and consistently applied from case to case" (PC-R. 986-87).

[4] 5(h) is the heinous, atrocious and cruel factor.

evidentiary hearing, appellate counsel testified that he requested the expanded instructions at trial, but did not make an "elaborate argument [on appeal] because the Supreme Court had rejected the challenge like time again" (T. 336). Given the circumstances of the Court's prior rulings on claims such as the instant one, Mr. Musgrove "thought that the purpose of what I did was employed to preserve for future, future purposes whatever they might be" (T. 337-38).

There is no doubt that the submission of the proposed expanded instruction adequately preserved the issue at trial, Breedlove; James; Atwater v. State, 626 So. 2d 1325 (Fla. 1993), and that counsel's argument on appeal sufficiently raised the issue for appellate purposes. See Breedlove, 20 Fla. L. Weekly at S156 ("[t]hough not mentioned in our opinion, we necessarily rejected this contention when we affirmed the conviction and sentence [on direct appeal]"). To the extent that the adequacy of appellate counsel's presentation of the issue on appeal is questioned, counsel testified that he reasonably relied on this Court's longstanding and habitual denial of this exact claim. If counsel should have done more, or if he was unaware of how to adequately preserve the issue on appeal, then Mr. Haliburton received the ineffective assistance of appellate counsel. See Starr v. Lockhart, 23 F.3d 1280, 1286 (8th Cir. 1994) ("To be effective, counsel in capital cases must at least recognize and object to those sentencing factors which cannot reasonably be argued to be valid under existing law").

The State cannot prove that the error in providing Mr. Haliburton's sentencing jury with an unconstitutionally vague instruction was harmless beyond a reasonable doubt.[5] This Court recently rejected this very argument in Kearse v. State, 20 Fla. L. Weekly S300 (Fla. June 22, 1995). In Kearse, the State argued that the error in failing to instruct the jury in a constitutional fashion on the cold, calculated, and premeditated aggravator was harmless "because the trial court did not find CCP after its independent review of the evidence." Id. at S303. The Court disagreed with the State's contention and held:

> [t]he fact that the court correctly determined that the murder was not CCP does not change the fact that the jury instruction was unconstitutionally vague. As the United States Supreme Court noted in Espinosa v. Florida, 112 S.Ct. 2926, 2929, 120 L.Ed.2d 854 (1992), 'if a weighing State decides to place capital-sentencing authority in two actors rather than one, neither actor must be permitted to weigh invalid aggravating circumstances.' While a jury is likely to disregard an aggravating factor upon which it has been properly instructed but which is unsupported by the evidence, the jury is 'unlikely to disregard a theory flawed in law.' Sochor v. Florida, 112 S.Ct. 2114, 2122, 119 L.Ed.2d 326 (1992); Jackson, 648 So. 2d at 90.

Id. at S303. To permit the jury to be improperly instructed on a factor which is subsequently found not to apply is contrary to the Eighth Amendment. Espinosa; Stringer v. Black, 112 S. Ct. 1130 (1992). See also Richmond v. Lewis, 113 S. Ct. 528 (1992).

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[5]The State has the burden of proving beyond a reasonable doubt that "the invalid instruction did not affect the jury's consideration or that its recommendation would have been the same if the requested expanded instruction had been given." James.

Moreover, there was mitigation presented to the jury upon which a properly instructed jury could have reasonably based a life recommendation. See Hall v. State, 541 So. 2d 1125 (Fla. 1989) (question of harmlessness of constitutional error is whether properly instructed jury could have recommended life). Defense counsel did present the testimony of many family members, all of whom testified to various positive attributes of Mr. Haliburton. This evidence constitutes valid mitigation upon which a jury could reasonably rely to justify a life recommendation. See, e.g., McCampbell v. State, 421 So. 2d 1072 (Fla. 1982); Washington v. State, 432 So. 2d 44 (Fla. 1983).

Because Mr. Haliburton's sentencing jury did not receive an instruction regarding the limiting construction of this aggravating circumstance, the Eighth Amendment was violated. The judge relied upon the jury's death recommendation; in fact, he gave it great weight. Yet, he ruled this aggravator factor was not present in the case. The State cannot prove harmlessness beyond a reasonable doubt. Relief is warranted.

B. COLD, CALCULATED AND PREMEDITATED

As to the fifth aggravating factor submitted for the jury's consideration, the jury was simply told "the crime . . . was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification" (RII. 900). Defense counsel argued that this factor "requires heightened premeditation" because "every premeditated murder would automatically be considered cold and calculated" (RII. 754-55).

Mr. Haliburton was denied his Eighth and Fourteenth amendment rights to have aggravating circumstances properly limited for the jury's consideration. The instruction provided to Mr. Haliburton's jury was unconstitutionally vague. Jackson v. State, 648 So. 2d 85, 90 (Fla. 1994). To the extent that this Court determines that appellate counsel inadequately presented this issue on appeal, Mr. Haliburton received the ineffective assistance of counsel. Starr v. Lockhart, 23 F. 3d 1280 (8th Cir. 1994); Harrison v. Jones, 880 F.2d 1279 (11th Cir. 1989). This Court must vacate the sentence and remand for a new jury sentencing proceeding.

C. UNDER SENTENCE OF IMPRISONMENT

Mr. Haliburton's jury was instructed that it could consider that "the crime . . . was committed while under sentence of imprisonment" (RII. 899). The jury was not told that the weight of this aggravator was less if the defendant had not committed the homicide after escaping. In Songer v. State, 544 So. 2d 1010 (Fla. 1989), this Court indicated the gravity of this aggravator is diminished since the defendant "did not break out of prison but merely walked away from a work-release job." Id. at 1011.

In Mr. Haliburton's case, the jury did not receive an instruction regarding this limitation on the consideration of aggravating circumstances. As a result, the penalty phase instructions on aggravating circumstances "fail[ed] adequately to inform [Mr. Haliburton's] jur[y] what [it] must find to impose the death penalty." Maynard v. Cartwright, 108 S. Ct. at 1858.

To the extent that this Court determines that the issue was inadequately presented on appeal, Mr. Haliburton received the ineffective assistance of counsel. Starr v. Lockhart, 23 F. 3d 1280 (8th Cir. 1994); Harrison v. Jones, 880 F.2d 1279 (11th Cir. 1989). This Court must vacate the sentence and remand for a new jury sentencing proceeding.

D. IN THE COURSE OF A BURGLARY

As to the third aggravating factor submitted to the jury, the jury was simply told "the crime . . . was committed while he was engaged in the commission of the crime of burglary" (RII. 899). However, the jury was not told that this aggravating factor standing alone was insufficient to support a death sentence. Proffitt v. State, 510 So. 2d 896 (Fla. 1987). As a result, the penalty phase instruction on this aggravating circumstance "fail[ed] adequately to inform [Mr. Haliburton's] jur[y] what [it] must find to impose the death penalty." Maynard v. Cartwright, 108 S. Ct. at 1858. Accordingly, this factor must be stricken.

Moreover, the "during the course of a felony" aggravating factor constitutes an impermissible automatic aggravating circumstance, in violation of Stringer v. Black. Upon finding Mr. Haliburton guilty of burglary, the jury was automatically required to find that this aggravating circumstance existed. This violates the Eighth Amendment. To the extent that this Court determines that the issue was inadequately presented on appeal, Mr. Haliburton received the ineffective assistance of

counsel. Starr v. Lockhart, 23 F. 3d 1280 (8th Cir. 1994); Harrison v. Jones, 880 F.2d 1279 (11th Cir. 1989). This Court must vacate the sentence and remand for a new jury sentencing proceeding.

E. CONCLUSION.

Based on the foregoing discussion, it is clear that Eighth Amendment error permeated Mr. Haliburton's capital sentencing proceedings. The jury was provided with unconstitutionally vague instructions, and in the case of the heinousness factor, was improperly instructed on a factor which was found not to exist and the issue was raised adequately on direct appeal. Because Mr. Haliburton properly presented his claim during his direct appeal proceedings, fairness dictates that he be afforded relief under Espinosa. James v. State, 615 So. 2d 668 (Fla. 1993). Eighth Amendment error clearly occurred at Mr. Haliburton's capital sentencing proceedings, and the State cannot meet its burden of proving harmlessness beyond a reasonable doubt. Habeas relief is warranted.

CONCLUSION

For all of the reasons discussed in his petition and herein, Petitioner Jerry Leon Haliburton respectfully urges that the Court grant habeas corpus relief.

I HEREBY CERTIFY that a true copy of the foregoing Memorandum has been furnished by United States Mail, first class postage prepaid, to all counsel of record on July 27, 1995.

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