#80520

91-04055

No._____

IN THE DISTRICT COURT OF APPEAL
SECOND DISTRICT, STATE OF FLORIDA

ALPHONSO GREEN,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

INITIAL BRIEF OF APPELLANT

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Counsel for Appellant

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STATEMENT OF THE CASE AND OF THE FACTS

Statement of the Case

Defendant/Appellant Alphonso Green was indicted on two counts of first-degree murder on October 29, 1986. Defendant was convicted on both counts and sentenced to death. The Honorable Manuel Menendez, Jr., Circuit Court Judge, appointed Robert Fraser, Esquire, for Mr. Green's direct appeal to the Supreme Court of Florida. (R 24) The Supreme Court of Florida affirmed Mr. Green's convictions on appeal. (R 5-23) It also denied Mr. Green's Motion for Rehearing (R 26).

Mr. Fraser filed a motion seeking appointment as Mr. Green's counsel for petitioning the Supreme Court of the United States for the writ of certiorari at public expense. (R 24-25). Judge Menendez denied the motion. (R 27) Appellant filed timely notices of appeal from Judge Menendez' order. (R 28, 31)

Mr. Fraser filed the petition for the writ. It was denied by the Supreme Court of the United States. Green v. Florida, ____ U.S. ____, 112 S.Ct. 1191 (1992)

Statement of The Facts

During a hearing before Judge Menendez on September 20, 1991, Mr. Green called Doug Connor, Esquire, an Assistant Public Defender in the Tenth Judicial Circuit, as a witness. Mr. Connor provided representation as an Assistant Public Defender in capital appellate cases. He testified that his office seeks certiorari review by the Supreme Court of the United States in every case in which the Supreme Court of Florida affirms a death penalty. (R 40-41)

The policy for seeking certiorari review of every affirmed death penalty had been in place for as long as Mr. Connor could remember. He was under the impression that every Public Defender's Office providing appellate representation for death penalty cases followed the same policy. (R 41)

Judge Menendez relied upon Wainwright v. Torna, 455 U.S. 586 (1982) and Ross v. Moffitt, 417 U.S. 600 (1974). (R 42) The trial court denied the motion. (R 27, 44)

SUMMARY OF THE ARGUMENT

The trial court erred by refusing to continue the appointment of Mr. Green's counsel to seek review by the Supreme Court of the United States in light of the Public Defender's policy to seek such review in all death penalty cases. To treat Mr. Green differently under the circumstances of this case violated the equal protection clause of Article I, §2, Fla. Const. No justification exists for such disparate treatment. The trial court's denial of court-appointed counsel for certiorari review deprives Mr. Green of the same procedure routinely afforded his fellow death row inmates. It also places his attorney in a quandary since the attorney must proceed without payment of a reasonable fee and costs or not proceed at all. Accordingly, the trial court should have appointed Mr. Green's attorney to petition for certiorari review.

ARGUMENT

THE TRIAL COURT ERRED BY DENYING AN INDIGENT DEFENDANT REPRESENTED BY COURT-APPOINTED COUNSEL CERTIORARI REVIEW BY THE SUPREME COURT OF THE UNITED STATES WHEN INDIGENTS REPRESENTED BY THE PUBLIC DEFENDER ROUTINELY RECEIVED IT.

The trial court denied Alphonso Green the services of court-appointed counsel for seeking certiorari review by the Supreme Court of the United States of his murder convictions and death penalties. Unlike the argument raised by Hillsborough County and evidently accepted by the trial court, Mr. Green's entitlement to court-appointed counsel for certiorari review does not necessarily implicate the due process clause of the Fourteenth Amendment. Instead, it involves a common-sense application of the equal protection clause of Article I, §2, Fla. Const.

As observed in Haag v. State, 591 So.2d 614, 617 (Fla. 1992), all persons have a right of equal access to the courts and equal protection of the laws. Haag involved the application of the "mailbox rule" to the filing of petitions for post-conviction relief under Fla.R.Crim.P. 3.850. The Supreme Court of Florida found that the even-handed administration of justice required the "mailbox rule" to control the filing date of such petitions to avoid happenstance denial of review when petitions were not timely received by clerks.

The same reasoning applies here. No reason exists for capital defendants represented by a Public Defender to obtain certiorari review while capital defendants represented by a substitute for the Public Defender are denied it.

Appellee Hillsborough County relied on two cases in persuading the trial court that Mr. Green was not entitled to court-appointed counsel, Wainwright v. Torna, 455 U.S. 586 (1982) and Ross v. Moffitt, 417 U.S. 600 (1974). Both cases hold that a convicted Defendant has no constitutional right to counsel for seeking discretionary review by the Supreme Court of the United States, Ross, or the Supreme Court of Florida, Torna. Neither case applies here, where an indigent Defendant sought court-appointed counsel for discretionary review while indigent Defendants represented by the Public Defender routinely and automatically received it. (R 41)

Hillsborough County did not raise the application of §925.035, Fla. Stats. (1990). It controls the appointment of Public Defenders and court-appointed counsel in capital cases. It makes no provision for seeking certiorari review by the Supreme Court of the United States.

Since Public Defenders routinely seek certiorari review, though, a construction of the statute to prohibit payment of court-appointed counsel violates the basic tenet of equal protection -- that all persons similarly situated be treated alike. State v. Lee, 356 So.2d 276, 279 (Fla. 1978)

Whether viewed in a constitutional or statutory context, the trial court manifestly failed to treat Mr. Green like those of his brethren convicted of first-degree murder and sentenced to death. The result leaves attorney and client facing two unattractive alternatives.

First, no petition for the writ of certiorari will be filed in the Supreme Court of the United States, depriving the Defendant of the same review probably obtained by an adjacent death row inmate. Second, if court-appointed counsel files a petition for the writ of certiorari, he or she must do so without expectation of recovering a fee or costs, violating the holding of Makemson v. Martin County, 491 So.2d 1109 (Fla. 1986). Makemson, 491 So.2d at 1115, held that an attorney who represents the indigent accused should not be "compensated in an amount which is confiscatory of his or her time, energy and talents." Nor should the appointed attorney be required to turn his or her back on those clients facing the death penalty.

CONCLUSION

For the foregoing reasons, Appellant Alphonso Green moves this Honorable Court to reverse the order denying him representation by court-appointed counsel for certiorari review by the Supreme Court of the United States and to remand the case to the trial court for a hearing on fees and costs.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been sent by U.S. Mail to Angela B. Wright, Esquire, Assistant County Attorney, Office of the County Attorney, 725 East Kennedy Blvd., 3rd Floor, Tampa, Florida 33602 and the Office of the Attorney General, 2002 North Lois Avenue, Suite 700, Tampa, Florida 33607, on this 19th day of June, 1992.

Respectfully submitted,

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