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APR 16 1993

CLERK, SUPREME COURT

By _____
Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

CASE NO. 81603

ROBERT DALE HENDERSON,

Petitioner,

v.

HARRY K. SINGLETARY,
Secretary, Florida Department of Corrections

Respondent.

REPLY TO STATE'S RESPONSE TO
PETITION FOR EXTRAORDINARY RELIEF
AND FOR A WRIT OF HABEAS CORPUS

LARRY HELM SPALDING
Capital Collateral Representative
Florida Bar No. 0125540

MARTIN J. MCCLAIN
Chief Assistant CCR
Florida Bar No. 0754773

TERRI L. BACKHUS
Assistant CCR
Florida Bar No. 0946427

OFFICE OF THE CAPITAL COLLATERAL
REPRESENTATIVE
1533 South Monroe Street
Tallahassee, FL 32301
(904) 487-4376

COUNSEL FOR PETITIONER

Mr. Henderson's habeas corpus petition argues that appellate counsel was ineffective in failing to raise an issue regarding the jury instructions on aggravating factors on direct appeal. In **its** Response, **the** State contends that this claim is procedurally barred because it was not raised in Mr. Henderson's first habeas corpus proceedings. The State is wrong. In 1988, Mr. Henderson argued:

As discussed in the introduction to the instant pleading, it was not Mr. Henderson's original intent to frame this issue in terms of ineffective assistance of appellate counsel. It is Mr. Henderson's position that the issue was raised on appeal (See Initial Brief of Appellant at 37 [constitutional argument regarding the application of "heinous, atrocious, or **cruel**" and "**cold, calculated, and premeditated**" aggravating circumstances to Mr. Henderson's case]; id. at 38-41 [constitutional attack of Fla. Stat. 921.141 facially and as applied]) and resolved by this Court, *Henderson v. State*, 463 So. 2d at 200, and he asks this Court to exercise its inherent jurisdiction to revisit this issue in this proceeding. See Kennedy v. Wainwright, 483 So. 2d 429 (Fla. 1986) ("in the case of error that prejudicially denies fundamental constitutional rights . . . this Court will revisit a matter previously settled."); Cf. Smith v. State, 400 So. 2d 956, 961 (Fla. 1981). If and to the extent that this issue was not adequately raised on appeal, Mr. Henderson would also assert that he was also deprived of his sixth and fourteenth amendment rights to the effective assistance of appellate counsel.

The precise question presented in Mr. Henderson's initial petition with respect to this issue is now before the United States Supreme Court in *Maynard v. Cartwright*, 822 F.2d 1477 (10th cir. 1987), cert. granted 56 U.S.L.W. 3459 (Jan. 11, 1988). It is important to note that the Oklahoma courts are ultimately tied to the Florida courts on this issue, and consequently certiorari

review of the Oklahoma statute and the Supreme Court's ultimate decision in Cartwright will directly affect Florida and the decision *in this* case. See Cartwright v. Maynard, 802 F.2d 1203, 1217 (10th Cir. 1986) ("Oklahoma has clearly adopted the unnecessarily tortuous element through its wholesale adoption of the Florida Supreme Court's construction of 'heinous, atrocious, or cruel' in *State v. Dixon* . . .").

(Henderson v. Dusser, Fla. Sup. Ct. No. 71,981, Reply to State's Response to Petition for Extraordinary Relief, etc., filed March 21, 1988, pp. 31-32) (emphasis added).

Mr. Henderson thus previously presented this claim which was rejected on the merits. No procedural bar applies. The decisions in *James v. State*, 18 Fla. L. Weekly 139 (Fla. Mar. 4, 1993), and Espinosa v. Florida, 112 S. Ct. 2926 (1992), have now established that this **claim** was wrongly decided and that Mr. Henderson is now entitled to relief. Espinosa establishes **that** the substance of Mr. Henderson's claim was correct. *James* establishes that appellate counsel had a duty to raise this claim. Her failure to do so was deficient performance which prejudiced Mr. Henderson. **A stay of execution and relief are warranted.**

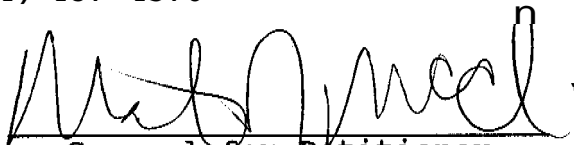
I HEREBY CERTIFY that a true copy of the foregoing petition has been furnished by hand delivery, to all counsel of record on April 16, 1993.

LARRY HELM SPALDING
Capital Collateral Representative
Florida Bar No. 0125540

MARTIN J. MCCLAIN
Chief Assistant CCR
Florida Bar No. 0754773

TERRI L. BACKHUS
Assistant CCR
Florida Bar No. 0946427

OFFICE OF THE CAPITAL COLLATERAL
REPRESENTATIVE
1533 South Monroe Street
Tallahassee, Florida 32301
(904) 487-4376

By: 
Counsel for Petitioner

Copies furnished to:

Richard Martell
Assistant Attorney General
Department of Legal Affairs
The Capitol
Tallahassee, FL 32399-1050