

**FILED**

SID J. WHITE

FEB 8 1995

IN THE SUPREME COURT OF FLORIDA

CASE NO. 85,028

CLERK, SUPREME COURT

By                       
Chief Deputy Clerk

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TERRELL M. JOHNSON,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

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SUPPLEMENT TO PETITION WRIT OF HABEAS CORPUS

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defined and that failure to do is fundamental error which can be raised for the first time on direct appeal.

In Mr. Johnson's case, the State sought convictions under both the premeditation and felony murder theories of first degree murder. The trial court instructed the jury on both theories and gave an incomplete instruction on robbery (R.302-4). The jury was told that robbery was "the taking of money or other property of any value whatsoever from the person or custody of another by force, violence or putting in fear" (R.304). The instruction failed to accurately or completely define the robbery as a specific intent offense.

The result of the incomplete instruction given to the jury was that the elements of robbery were never accurately explained. This was fundamental error which cannot be determined to have been harmless. The jury in Mr. Johnson's case returned a general verdict of first degree murder as to Count I and an acquittal of first degree murder as to Count II. The jury did not specify whether it found Mr. Johnson guilty of premeditated or felony murder as to Count I.

The effect of the instructional error cannot be harmless because it is more likely that the jury relied on a theory of felony murder than premeditation when it convicted Mr. Johnson of first degree murder as to count I. The jury did not find Mr. Johnson guilty of either premeditated or felony murder as to the bar patron in Count II.

Despite the state's dual argument, the evidence in Count I and Mr. Johnson's acquittal of first degree murder as to Count II indicate that a strong likelihood exists that the jury considered and relied upon a theory of felony murder rather than premeditation when returning a conviction of first degree murder as to Count I.

Mr. Johnson's trial counsel testified at the 3.850 hearing that he would have objected to the incomplete instruction containing no element of intent (PC-R 244). No such objection appears in the record on appeal. Mr. Johnson maintains that the record remains inaccurate and incomplete and asks this court to consider this further instance of the record's unreliability in review of Claim VII of the pending Petition for Writ of Habeas Corpus.

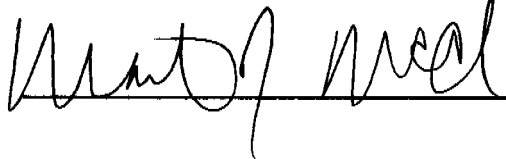
Counsel failed to raise this fundamental error on direct appeal. To the extent that the record is inaccurate and incomplete, counsel was rendered further ineffective. Mr. Johnson was denied the opportunity to relief on direct appeal because this fundamental error was not raised. Mr. Johnson was denied a reliable direct appeal because appellate counsel failed to urge this Court to reverse Mr. Johnson's conviction based upon this fundamental error. Mr. Johnson is entitled to habeas corpus relief.

#### CONCLUSION

This claim should have resulted in a reversal on direct appeal. Mr. Johnson did not have meaningful appellate review.

For the reasons discussed herein, Mr. Johnson respectfully requests that the Court grant habeas corpus relief.

I HEREBY CERTIFY that a true copy of the foregoing Supplement to Petition for Extraordinary Relief and for a Writ of Habeas Corpus has been furnished by United States Mail, first class postage prepaid, to all counsel of record on **February 8, 1995.**



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