No. SC22-883

Lower Tribunal No. CF07-009613-XX

IN THE

Supreme Court of Florida

LEON DAVIS, JR.
Petitioner,

v.

RICKY D. DIXON,
SECRETARY, DEPARTMENT OF CORRECTIONS,
Respondent.

On Appeal from the Circuit Court, Tenth Judicial Circuit, in and for Polk County, Florida

Honorable Donald G. Jacobsen, Presiding Judge

REPLY PETITION FOR WRIT OF HABEAS CORPUS

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REPLY ON GROUNDS FOR HABEAS CORPUS

GROUND 1:

APPELLATE COUNSEL WAS INEFFECTIVE BECAUSE HE FAILED TO PRESENT ARGUMENTS ON APPEAL THAT INVOKED THE UNITED STATES CONSTITUTION AND THUS VIOLATED MR. DAVIS'S RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS AND WHICH AMOUNTS TO A SUSPENSION OF THE WRIT OF HABEAS CORPUS IN VIOLATION OF THE SUSPENSION CLAUSE OF ARTICLE 1, SECTION 9

As Mr. Davis argued in his state habeas petition, appellate counsel failed to present Issue V on direct appeal as a federal claim. (Petition, 16-20). Had appellate counsel's performance not been deficient, this Court would have been alerted to a federal constitutional issue that this Court needed to rule on in its role as the primary arbiter of claims of constitutional violation. As a result, Mr. Davis is precluded from raising this claim on federal review because the federal constitutional issue has not been exhausted in state court.

The State first argued that this claim was procedurally barred from consideration in a state habeas petition because it was raised, or should have been raised, on direct appeal. (Response, 5). The State misconstrued Mr. Davis's claim, and its reliance on *Lukehart v. State*,

70 So. 3d 503 (Fla. 2011), and its predecessors was misplaced. *Lukehart* refers to claims that either were or should have been raised on direct appeal. Mr. Davis could not have raised this claim on direct appeal because an ineffective assistance of appellate counsel claim for failure to federalize Issue V can only be raised in a state habeas petition.

If this Court considered Issue V on direct appeal as a federal issue, this Court needs to clarify that it did. If this Court did not consider this issue federally, it was because appellate counsel was ineffective and the only remedy is a full determination of the claim under the U.S. Constitution. While this Court is the primary decider of federal constitutional claims, Mr. Davis should have the fair opportunity to present this claim to the federal courts if he is denied a constitutionally prescribed remedy.

The State also argued that Mr. Davis is not entitled to habeas relief based on an allegation that appellate counsel failed to properly exhaust state court remedies thereby precluding federal habeas review. (Response, 6). The State relies on *Anderson v. State*, 313 So. 3d 1196 (Fla. 1st DCA 2021) which states: "To exhaust state remedies and preserve a claim for federal review, a defendant need only present

the substance of a federal claim to the state courts." *Id.* at 1198 (citing *Picard v. Connor*, 404 U.S. 270, 278 (1971)). This reliance on a non-capital case was misplaced, because *Picard* predates AEDPA by approximately 25 years. To proceed in federal court, Issue V needs to have been identified as a federal claim in the state court pleadings. *Baldwin v. Reese*, 541 U.S. 27, 29 (2004). If Mr. Davis tries to raise this claim as it is presented on appeal in federal court, the State will argue that this claim was not exhausted as a federal claim in state court because appellate counsel merely made a passing reference to the federal constitution. Indeed, the State foreshadowed its position in federal court by stating: "The State is not conceding that this passing reference to the U.S. Constitution is sufficient to exhaust Mr. Davis's federal claim in state court. That is a determination for a different court on another day." (Response, 6 n.1).

The State also relied on *Ward v. Hall*, 592 F.3d 1144 (11th Cir. 2010), yet that case supports Mr. Davis's position that he will only have the opportunity for federal habeas relief if his appellate attorney properly raised federal constitutional claims in state court first.

Finally, the State argued that whether appellate counsel failed to argue the federal constitutional dimensions of a claim was not a

violation of the suspension clause of the United States Constitution. (Response, 8). Once again, the cases cited by the State do not support its position. *Felker v. Turpin*, 518 U.S. 651 (1996), is a case about the restrictions on successive habeas petitions and a restraint on "abuse of the writ." *Id.* at 664.

In *Duckworth v. Serrano*, 454 U.S. 1 (1981), the Court of Appeals for the Seventh Circuit agreed to consider a claim that had not been exhausted in state court, and the Supreme Court reversed their decision because "[i]t has been settled for nearly a century that a state prisoner must normally exhaust available state remedies before a writ of habeas corpus can be granted by the federal courts." *Id.* at 3.

Thus, Issue V of Mr. Davis's direct appeal cannot be considered by the federal courts because his appellate counsel failed to exhaust the claim in state court. The United States Constitution demands relief. This Court should grant the writ.

CONCLUSION AND RELIEF SOUGHT

This Court should grant all relief requested in this petition for the reasons stated above. Moreover, this Court should grant any other relief that allows this Court to do justice.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Reply Petition for Writ of Habeas Corpus has been furnished via electronic service to Marilyn Beccue, Assistant Attorney General, on this 25th day of October, 2022.

s/ *Stacy R. Biggart*
STACY R. BIGGART

CERTIFICATE OF FONT

I hereby certify that the foregoing Reply Petition for Writ of Habeas Corpus was generated in Bookman Old Style 14-point font in compliance with Fla. R. App. P. 9.045(b).

s/ *Stacy R. Biggart*
STACY R. BIGGART