IN THE SUPREME COURT OF FLORIDA

CASE NO. SC04-1285

ROBERT L. HENRY,

Petitioner,

v.

James V. Crosby, JR., Secretary
Florida Department of Corrections,

Respondent.

CORRECTED REPLY TO STATE'S RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

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REPLY

CLAIM I

APPELLATE COUNSEL FAILED TO RAISE ON APPEAL NUMEROUS ISSUES WHICH WARRANT REVERSAL DUE To THE PAGE LIMITATION REQUIRED BY THIS COURT.

In his Petition for Writ of Habeas Corpus, Mr. Henry argued that appellate counsel was rendered ineffective by this Court's ruling that he excise fifty-nine (59) pages from his initial brief on direct appeal. Mr. Henry acknowledged that this Court has stated that even in capital cases, appellate counsel should choose to brief only the strongest issues, Cave v. State, 476 So. 2d 180 (Fla. 1985), a fact seized on by the State in its response to Mr. Henry's petition. The State cited a plethora of cases to support its position that Mr. Henry is not entitled to relief despite appellate counsel being forced to discard meritorious issues and arguments. However, the State notably fails to address Mr. Henry's contention that the constitutionally mandated American Bar Association (ABA) standards for performance of counsel in capital cases require that counsel present all arguable issues for reversal. As Mr. Henry noted, the ABA is emphatic in its insistence that counsel should seek to present all arguably meritorious issues. See ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases(ABA Guidelines)Guideline 11.9.2 (d).

> Traditional theories of appellate practice notwithstanding, appellate counsel in a capital case should not raise only the best of several potential issues. [footnote omitted.] Issues abandoned by counsel in one case, pursued by different counsel in another case and ultimately successful, cannot necessarily be reclaimed later. When a client will be killed if a case is lost, counsel (and the courts) should not let any possible ground for relief go unexplored or unexploited.

(ABA Guidelines, Guideline 11.9.2.D Commentary)

As Mr. Henry further noted, the United States Supreme Court has held that the ABA Guidelines set forth the prevailing professional norms for the performance of counsel in capital cases, including appellate counsel. See generally Wiggins v. Smith, 123 S. Ct. 2257 (2003). As the Sixth Circuit explained in Hamblin v. Mitchell, 354 F. 3d 482 (6th Cir. 2003):

> The Wiggins case now stands for the proposition that the ABA standards for counsel in death penalty cases provide the guiding rules and standards to be used in defining the "prevailing professional norms" in ineffective assistance cases. This principle adds clarity, detail and content to the more generalized and indefinite 20-year-old language of Strickland....[1]

Hamblin, 354 F. 3d at 486.

The 1989 ABA Guidelines were clearly applicable at the

[1]Strickland v. Washington, 466 U.S. 668 (1984)

time of Mr. Henry's direct appeal which became final in 1992, Henry v. State, 613 So. 2d 429 (Fla. 1992). As the Sixth Circuit further explained, the standards represent:

> ...a codification of long standing common sense principles of representation understood by diligent competent counsel in death penalty cases. The ABA standards are not aspirational in the sense that they represent norms newly discovered after Strickland. They are the same type of long-standing norms referred to in Strickland in 1984 as "prevailing professional norms...."

Hamblin 354 F. 3d 482, 487.

The State notably failed to address the constitutional requirement of appellate counsel to raise every meritorious issue in Mr. Henry's case.

Clearly appellate counsel believed that it was necessary to present the full, unexcised brief to this Court. The fact that he was prohibited from so doing rendered his representation ineffective. Mr. Henry was prejudiced because this Court failed to consider the full range of issues that counsel believed meritorious. Relief is warranted.

CLAIM II

INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL

A. INCOMPLETE RECORD

The State claims that summary denial is warranted because Mr. Henry does not "identify what errors occurred during the un-transcribed portions of the proceedings, nor does he identify what critical pleadings/documents have been omitted."

State's response at page six (6). The State again cites a string of this Court's opinions which, it asserts, supports its position. However, Mr. Henry would respond that the omissions by appellate counsel again fall short of the requirements relating to capital appeals in the ABA Guidelines constitutionalized by Wiggins v. Smith, 123 S. Ct. 2257 (2003)

As the Guidelines make plain:

> All issues even if they are only reflected partially in the record or are outside the record need to be explored.
>
> ***
>
> No possible ground for relief should go uninvestigated or unexploited, every issue needs to be presented, not only the best, because issues abandoned by one attorney will not be able to be later reclaimed by another.

(1989 Guideline 11.9.2 Duties of Appellate Counsel Commentary) Thus it is clear that appellate counsel could not be effective under the ABA Guidelines without a complete record, since the incomplete record precludes the exploitation of all issues available at that stage of the proceedings. The prejudice is also apparent. Appellate counsel's failure to ensure a complete appellate record not only compromised his ability to exploit all available avenues for appeal, but put Mr. Henry's post conviction counsel in a position of not knowing what issues were missed and hence of being ineffective in turn. Thus the prejudice is the very inability of post conviction counsel to plead prejudice with any specificity at this stage,

because counsel did not take appropriate steps to preserve the appellate record. Relief is warranted.

B. CHANGE OF VENUE

The State claims that Mr. Henry did not adequately plead that appellate counsel was ineffective for failing to raise the issue of venue change which was preserved in the trial court. However the record on appeal is replete with references to the pervasive prejudicial pretrial publicity that permeated this case in Broward county. Out of twelve jurors chosen for the jury at least six were already familiar with the outrageous and inflammatory media reporting surrounding Mr. Henry's trial. Having exhausted all of his peremptory challenges, counsel requested additional peremptories due to the extensive publicity (R. 989). However, counsel's request for additional challenges was denied by the trial court (R. 989). Due to the extensive nature of the prejudicial pretrial publicity the judge could have and should have moved for a change of venue *sua sponte* but failed to. Appellate counsel did not raise this issue and as such rendered deficient performance. Mr. Henry's trial was infected from the very beginning. He was convicted and sentenced to death in a proceeding so fundamentally and irreparably tainted by the all-pervasive pretrial media coverage as to deny him the fair trial and sentencing proceeding guaranteed by the Sixth, Eighth, and Fourteenth Amendments. His conviction and sentence must therefore fail.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Corrected Reply to State's Response to Petition for Writ of Habeas Corpus has been furnished by United States Mail, first class postage prepaid, to Celia A. Terenzio, Office of the Attorney General, 1515 N. Flagler Dr., 9th Floor, West Palm Beach, FL 33401-3432, on December 28, 2004, *nunc pro tunc*, December 22, 2004. Mr. Henry's original Reply was served on December 22, 2004, but the Certificate of Service was incorrectly dated.

CERTIFICATE OF COMPLIANCE

The undersigned counsel hereby certifies that this petition complies with the font requirements of rule 9.100(l), Fla. R. App. P.

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