IN THE SUPREME COURT OF FLORIDA
CASE NO. SC04-1641

ROBERT EUGENE HENDRIX,

PETITIONER,

V.

JAMES V. CROSBY

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,

RESPONDENT

PETITION FOR WRIT OF HABEAS CORPUS

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PRELIMINARY STATEMENT

This is Mr. Hendrix's first petition for Writ of Habeus Corpus in this Court.

Article 1, Section 13 of the Florida Constitution provides:"The Writ of Habeus Corpus shall be grantable of right, fully and without cort."

This petition is being filed to address substantial claims of error under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, and the corresponding rights provided in the in the Florida Constitution, claims demonstrating that Mr. Hendrix has been deprived of said right and that his conviction and sentence, including the death sentence, violates fundamental Constitutional Imperitives.

Citation shall be as follows:

"R._____" The record on direct appeal;

"I._____" The transcript of first trial; and

"RCR._____" Post-Conviction Record.

All other references will be self-explainatory or otherwise clarified herein.

PROCEDURAL HISTORY

On September 19, 1990, the Grand Jury in Lake County, Florida indicted Mr. Hendrix for two counts of first-degree, premeditated murder, for two counts of conspiracy to commit first degree murder, and for armed burglary. (R. 3249-3250) Mr. Hendrix was, after a trial by jury, convicted as charged. (R. 3835-3849)

The jury, in the penalty-phase of the trial, recommended the sanction of death on both murder convictions. (R. 3851-3858)

In support of its death sentence for the death of Elmer Scott, the court found five aggravating factors; that the murder was cold, calculated, and premeditated, that the murder was commited to disrupt or hinder the lawful exercize of a governmental function or the enforcement of laws; that the murder was committed in the commission of a burglary; that the murder was especially heinous, atrocious, or cruel; and that Mr. Hendrix was convicted of a contemporaneous murder.

Similarly, in support of the death sentence for the murder of Ms. Scott, the court found the same five aggravating factors.

Further, although finding no statutory mitigating factors, the court found some non-statutory mitigating circumstances, including problems in his family history and juvenile history, a close relationship with his mother and sisters, and the life sentence given to co-defendant and witness, Denise Turbeyville.(R.3851-58)

On direct appeal, the Florida Supreme Court upheld the convictions and sentences. Hendrix v. State, 637 So. 2d 916 (Fla 1994) Subsequently, the United States Supreme Court denied a timely filed Petition for Writ of Certorari. Hendrix v. Florida, 115 S.Ct. 520 (1994)

Mr. Hendrix timely filed his Motion For Post-Conviction Relief, and amendments thereto, pursuant to Florida Rule of Criminal Procdure 3850. Judge Lockett, who had been the trial judge, denied some issues without a hearing and granted an evidentiary hearing, Judge Hill presided over the evidentiary hearing and, by Order dated December 11, 2003, denied relief on the claims of the motion.

Mr. Hendrix has appealed the lower court's Order denying his motion for post-conviction relief and an Order denying his request to take depositions, and now brings the instant petition.

INTRODUCTION

Significant Constitutional errors infected the reliability of Mr. Hendrix's capital trial conviction and sentencings, but these errors were not properly presented to this Court on direct appeal due to the ineffective assistance of appellate counsel. ("IAAC"), which constitutes fundamental error.

REQUEST FOR ORAL ARGUMENT

Mr. Hendrix requests that this Court hear oral argument from his counsel on the claim in this petition.

JURISDICTION TO ENTERTAIN PETITION AND TO GRANT HABEAS RELIEF

This Court has original jurisdiction of an original action under Fla. R. App. P., Rule 9.100(a)pursuant to Art.1, Sec. 13, Fla. Const. and Fla. R. App. P. Rule 9.030 (a)(3) and Art. V, sec. 3(b)(9), Fla. Const.

This petition presents Constitutional issues which directly invoke the judgment of this Court regarding the questionable viability of Mr. Hendrix's continued incarceration and the Constitutional infirmaties of that incarceration, as well as the of the State putting Mr. Hendrix to death.

Thus, jurisdiction is in this Court. Smith v. State, 400 So. 2d 956,960 (Fla. 1981); Wilson v. State, 474 So. 2d at 1163; Brown v. Wainwright, 392 So. 2d 1327 (Fla. 1981). Further, a habeas petition is the proper manner to prosecute these claims. Way v. Duggan, 568 So. 2d 1263 (Fla. 1990); Downs v. Duggan, 514 So. 2d 1019; Riley v. Wainwright, 517 So. 2d 656 (Fla. 1987); and Wilson, 474 So. 2d at 1162.

This Court has the inherent power to do justice, and the ends of justice call this Court to grant relief to Mr. Hendrix, a the Court, in the past, has done to remedy fundamental Constitutional Error. Nollan v. Wainwright, 175

So. 2d 785 (Fla. 1965); and Polmes v. Wainwright, 460 So. 2d 362 (Fla. 1984)

Exercise of its habeas corpus jurisdiction and its inherent authority to do Justice and to correct Constitutional errors is warranted in this action.

Robert Hendrix, the Petitioner herein, is entitled to the Habeas Corpus relief which he petitions this Court to provide.

GROUNDS FOR HABEAS CORPUS RELIEF

Mr. Hendrix's capital convictions and sentence of death were obtained in violation of his Constitutional rights to due process, the presumption of innocence, confrontation of witnesses and effective assistance of trial and appellate counsel as guaranteed to him by the Fifth, Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States and by the corresponding provisions of the Florida Constitution.

GROUND I

MR. HENDRIX'S RIGHT TO DUE PROCESS, THE PRESUMPTION OF INNOCENCE, CONFRONTATION OF WITNESSES, AND OTHER FUNDAMENTAL RIGHTS WERE INFRINGED AND VIOLATED BY THE STATE'S AD HOC IMPOSITION OF PHYSICAL RESTRAINTS AND THE COURT'S FAILURE TO MAKE THE NECESSARY FINDINGS TO JUSTIFY THE INFRINGEMENT OF MR. HENDRIX'S FUNDAMENTAL CONSTITUTIONAL RIGHTS; FURTHER, APPELLATE COUNSEL WAS PREJUDICIALLY INEFFECTIVE FOR FAILING TO RAISE THESE UNWARRANTED VIOLATIONS OF MR. HENDRIX'S FUNDAMENTAL RIGHTS ON DIRECT APPEAL.

Appellate counsel failed to raise on direct appeal the extensive due process burdens placed on Mr. Hendrix by shackling him during his capital murder trial.

Further, appellate counsel failed to raise the issue that these fundamental rights were burdened despite the fact that the court made no written or specific findings regarding the efficacy of utilizing physical restraints.

Appellate counsel's failure in the regards constitutes ineffective assistance of appellate counsel under the Strickland standard. Strickland v. Washington, 466 U.S. 668 (1984); Wilson v. Wainwright, 474 So 2d 1162, 1163 (Fla. 1985); Freeman v. State, 761 So. 2d 1055, 1069 (Fla. 2000);

Suarez v. Dugger, 527 So. 2d 190 (Fla. 1998); Randolph v. Florida, _____ So. 2d_____ (Fla. 2003)

Generally, the infringement of Mr. Hendrix's fundamental rights by placing him in restraints during trial and the trial court's failure to make the necessary findings to justify the use of physical restraint establish prejudice as a matter of law. U.S. v Durham, 287 F. 3d 1297 (11th Cir. 2002); Proffit v. Wainwright, 685 F. 2d 1227 (11th Cir. 1982); Allen v. Montgomery, 728 F. 2d 1409 (11th Cir. 1984) Zugaldo v. Wainwright, 720 F. 2d 1409 (11th Cir. 1983); U.S. v. Cronic, 466 U.S. 648 (1984); Stano v. Dugger, 921 F. 2d 1125 (11th Cir. 1991); Harvey v. State, ____ So. 2d _____ (Fla. 2003).

A trial court has reasonable discretion to determine when to physically restrain a criminal defendant. United States v. Mayes, 158 F. 3d 1215, 1255 (11th Cir. 1998) However, important Constitutional rights are implicated when the defendant is restrained during jury trial. U.S. v. Durham, 287 F. 3d 1297 (11th Cir. 2002)

The defendant's right to be present, right to confront witnesses, right to effective assistance of counsel, and the presumption of innocence, all fundamental due process rights are burdened by the court's actions in physically

restraining a defendant. U.S. v. Novation, 271 F. 3d 968 (11th Cir. 2001); Isreal v. State, 837 So 2d 381 (Fla. 2002); Asay v. Moore, 828 So. 2d 985 (Fla. 2001); Muhammed v. State, 782 So. 2d 343 (Fla. 2001); and Fla. Const., sect. 16(a).

Further, any state action which diminishes the presumption of innocence raises due process concerns. U.S. v. Durham, 219 F. Supp. 2d 1234 (USDC Northern District of Fla. 2001) Importantly, perhaps dispositively, to justify the restraint of the defendant at trial the court must make specific findings to justify the restraint and demonstrate that the restraint is the least burdensome available. Durham, 287 F. 3d at 1308 (new trial where no such findings were made so court to carefully scrutinize the action) Thereafter, the burden shifts to the state to prove that, where defendant's due process rights, which are fundamental rights, have been thus burdened, such burdens were harmless beyond a reasonable doubt. Id. Otherwise, the conviction is tainted and reversal is required. Id.; Profitt v. Washington, 685 F. 2d 1227, 1260 n. 49 (11th Cir. 1982)

The courts have long held that physical restraints should be used as rarely as possible. Allen v. Montgomery, 728 F. 2d 1409, 1413 (11th Cir. 1984)(handcuffs);and Zygaldo

v. Wainwright, 720 F. 2d 1221, 1223 (11th Cir. 19830 (shackles should rarely be employed as a security device).

The Supreme Court has held that the presumption of innocence is an integral part of a defendant's right to a fair trial. Estelle v. Williams, 425 U.S. 501, 503; 96 S. Ct. 1961; 48 L.Ed. 2d 126 (1976) The presence of shackles and other physical restraints on the defendant tend to erode the presumption of innocence. Mayes, 158 F. 3d at 1225. Of course, the trial judge is responsible for the safe, reasonable, orderly progress of trial, and shackling the defendant may occasionally be the only way to achieve this goal. U.S. v. Theriault, 531 F. 2d 281, 284 (5th Cir. 1976)(adopted by 11th upon split of circuits).

The Supreme Court has recognized that the jury's feelings about the defendant may be significantly impacted by the jury's knowledge that the court deems it necessary to shackle the defendant. Illinois v. Allen, 397 U.S. 337, 90 S. Ct. 1057, 25 L.Ed. 2d 353 (1970) The insidious nature and effect of shackles on a jury is not mitigated by lack of visibility. Zygaldo, 720 F. 2d at 1223.

Shackles and other restraints may make the defendant reluctant to move, making consultations with counsel

impossible, thus significantly affecting trial strategy. Allen, 397 U.S., at 244.

Because of the fundamental nature of the rights burdened and the coercive effect on a jury, shackles may be used in a trial only after specific, reviewable findings by the trial court that, first, the shackles are absolutely necessary to further an essential state interest, and, secondly, the trial court considered the least prejudicial method of restraint and made the determination that the least restrictive measure could be employed. Elledge v. Dugger, 823 F. 2d 1439, 1451 (11th Cir. 1987) This determination must be placed on the record. Theriault, 531 F. 2d at 285

As the court noted in Elledge, "The single major analytic thrust of all guilt-innocence phase cases is… whether the defendant's right to a presumption of innocence was infringed by the security measures of the trial court." Elledge, 843 F. 2d at 1454.

Finally, as the court in Zygaldo, *supra*, noted, visibility, or lack thereof, is not the issue. For instance, where a jury realizes a hidden device is being used, the device may become even more prejudicial because of the surreptitious nature of the concealment, suggesting the

defendant requires unique precautions, or that the juror is not being told of his true dangerousness. See, State v. Fleigler, 91 Wash. App. 236, 955 P. 2d 872, 874 (1998)

The fact that the defendant is represented by counsel does not cure the prejudice presumed from an unjustified infringement of the defendant's due process rights. Novation, *supra*. Further, the defendant is not required to prove what issues were not raised or what issues were presented because of the restraint. Id. at 1000. Rather, the state must prove that the infringement was minimal, such as, in the case of a brief absence from the courtroom, that the absence was *brief*. U.S. v. Boyd, 131 F. 3d 951, 953-4 (11th Cir 1997); U.S. v. Harris, 908 F. 2d 728, 739 (11th Cir. 1986); and Hall v. Wainwright, 805 F. 2d 945, 947-8 (11th Cir. 1986).

However, where the defendant's inability to participate meaningfully throughout the trial is implicated, there is almost a *de facto* presumption that the state cannot prove beyond a reasonable doubt that the defense was not harmed. Durham, *supra*.

Further, where the trial court did not articulate a rationale for the decision to use the specific, least intrusive restraint, the reviewing court's "careful

scrutiny" cannot be met. Id. At 1311 Interestingly, in Durham, as in the instant case, there were some vague hearsay comments about a vague "escape", and a handcuff key. This kind of talk did not contribute a justification when there was no evidence the court had seriously weighed the burden. Similarly, in the instant case, no weighing of options or evaluating what, if anything, was needed to be done had been undertaken, and certainly no judiciousness at all was utilized by the trial court in analyzing the burdens physical restraint would place on the defendant, or why they were necessary.

By 1991, the practice of shackling, particularly in such a callous, careless, and routine manner, had been thoroughly and expressly disapproved of. Elledge v. Dugger, *supra* (at no time was there any showing that the shackling was necessary to further an essential state interest… and the trial court never polled the jurors to determine if any one of them would be prejudiced by the fact the defendant was under restraints); see also, Woodard v. Perrin, 692 F. 2d 220, 221 (1st Cir. 1982)

The trial court further gave no cautionary instruction nor in any way acknowledged the infringement on the presumption of innocence. See, Billups v. Garrison, 718 F.

2d 665, 668 (4th Cir. 1983); Commonwealth v. Brown, 364 Mass. 471, 305 N.E. 2d 830, 834 (Mass. 1973)

By using shackles, the trial court could not have been more explicit in telling the jurors that this is a dangerous man capable of the crimes with which he is charged. Further, the message sent about the life or death decision facing the jurors is equally unsubtle. Appellant's presumption of innocence was summarily stripped away with no acknowledgement from the court that there could be a problem with routine shackling and with shackling in a trial at which the death penalty is sought, when no effort has been made to determine, even, whether such shackling was necessary or what other options were available.

Trial counsel failed to object to the shackling, failed to request the court to poll the jurors, and failed to propose cautionary instructions. Further, appellate counsel, in failing to raise this issue as fundamental error, rendered ineffective assistance of appellate counsel, as routine shackling was not proper and prejudice must be presumed where the court itself, as in Cronic, *supra*, denies due process by actions which are coercive and inculpatory and which do not address a specific statement problem requiring court action.

CONCLUSION AND RELIEF REQUESTED

The Constitutional Error that occurred in the proceedings below require this Court to vacate Mr. Hendrix convictions and sentences and order a new trial.

Mr. Hendrix respectfully urges this Court to do so.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT A TRUE COPY OF THIS PETITION HAS BEEN FURNISHED TO BARBARA C. DAVIS, ASSISTANT ATTORNEY GENERAL, 444 SEABREEZE BLVD., 5TH FLOOR, DAYTONA BEACH, FL 32118 BY FIRST CLASS MAIL ON AUGUST 31ST, 2004.

CERTIFICATE OF FONT SIZE AND TYPE

THIS IS TO CERTIFY THAT THE FOREGOING PETITION HAS BEEN REPRODUCED IN A 12 POINT COURIER TYPE, A FONT THAT IS NOT PROPORTIONATELY SPACED.

_____
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