IN THE SUPREME COURT OF FLORIDA

NO.SC06-210

JOHNNY SHANE KORMONDY,

Petitioner,

v.

JAMES V. CROSBY, JR.,

Secretary, Florida Department of Corrections,

Respondent.

PETITION FOR WRIT OF HABEAS CORPUS

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PRELIMINARY STATEMENT

This is Johnny Shane Kormondy's first habeas corpus petition in this Court. Art. 1, Sec. 13 of the Florida Constitution provides: "The writ of habeas corpus shall be grantable of right, freely and without cost." This petition for habeas corpus relief is being filed in order to address substantial claims of error under the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, claims demonstrating that Mr. Kormondy was deprived of the right to a fair, reliable, and individualized sentencing proceeding and that the proceedings resulting in his conviction and death sentence violated fundamental constitutional imperatives.

Citations shall be as follows: The record on appeal concerning the original jury trial proceedings shall be referred to as "R1." for the record and "TT1." For the trial transcript, followed by the appropriate page number(s). The second record on appeal from resentencing proceedings shall be referred to as "R2." For the record and "TT2." For the evidentiary hearing, following by the appropriate page number, the postconviction record on appeal will be referred to as "PC-R." For the record and "PC-T" for the transcript, followed by the appropriate page number(s).

All other references will be self-explanatory or otherwise explained herein.

INTRODUCTION

Significant errors which occurred at Mr. Kormondy's capital trial and sentencing were not presented to this Court on direct appeal due to the ineffective assistance of appellate counsel. Further, trial counsel preserved numerous issues by objection and motion, which were not raised on appeal. In addition, appellate counsel failed to challenge numerous constitutionally flawed and vague penalty-phase issues, despite objections by trial counsel.

The issues which appellate counsel neglected demonstrate a deficient performance was deficient and these deficiencies prejudiced Mr. Kormondy. "[E]xtant legal principles...provided a clear basis for ... compelling appellate arguments[s]" Fitzpatrick, 490 So.2d at 940. Neglecting to raise fundamental issues such as those discussed herein "is far below the range of acceptable appellate performance and must undermine confidence in the fairness and correctness of the outcome" Wilson v. Wainwright, 474 So.2d 1162, 1164 (Fla. 1985). Individually and "cumulatively," Barclay v. Wainwright, 444 So.2d 956, 959 (Fla. 1984), the claims omitted by appellate counsel establish that "**confidence** in the correctness and fairness of the result has been undermined" Wilson, 474 So.2d at 1165 (emphasis in original).

Additionally, this petition presents questions that were ruled upon during direct appeal, but should now be revisited in light of subsequent case law, as well as correcting error in the appeal process that denied fundamental constitutional rights. As this petition will demonstrate, Mr. Kormondy is entitled to habeas relief.

PROCEDURAL HISTORY

On July 27, 1993, Petitioner was indicted for one count of first-degree felony murder, three counts of armed sexual battery, one count of burglary of a dwelling with an assault and an intent to commit a theft, and one count of armed robbery. Petitioner's trial began on July 5, 1994. Petitioner was found guilty on all charges, and a penalty phase trial began on July 8, 1994. The jury recommended death by a majority vote of 8 to 4. The trial court followed the jury recommendation and sentenced Petitioner to death on October 7, 1994.

On Appellant's first direct appeal to this Court, Petitioner's guilt was affirmed. However, this Court remanded the case of a new penalty phase trial on December 23, 1997. The new penalty phase trial began on May 3, 1999. The jury again recommended death by a majority vote of 8 to 4. The trial court followed the jury's recommendation and sentenced Petitioner to death on July 7,

1999. On Appellant's second direct appeal this Court affirmed Petitioner's death on February 13, 2003.

Petitioner filed a Petition for Writ of Certiorari to the United States Supreme Court, which was denied on October 23, 2003. Petitioner filed his postconviction 3.851 Motion on August 30, 2004, and Amendment to the 3.851 Motion on April 5, 2005. The trial court conducted a Huff hearing on January 18, 2005. An evidentiary hearing was conducted on April 18 and 19, 2005. The trial court entered its order denying Petitioner relief upon his 3.851 Motion on June 20, 2005. Petitioner filed his Notice of Appeal on July 7, 2005.

JURISDICTION TO ENTERTAIN PETITION AND GRANT HABEAS CORPUS RELIEF

This is an original action under Fla. R. App. P. 9.100(a). See Art. I, Sec. 13, Fla. Const. This Court has original jurisdiction pursuant to Fla. R. App. P. 9.030(a)(3) and Article V, Sec. 3(b)(9), Fla. Const. The petition presents constitutional issues that directly concern the judgment of this Court during the appellate process, and the legality of Mr. Kormondy's convictions and sentence of death.

Jurisdiction in this action lies in this Court, see, e.g., Smith v. State, 400 So.2d 956, 960 (Fla. 1981). The fundamental errors challenged herein arise in the context of a capital case in which this Court heard and denied Petitioner's direct appeal. See Wilson, 474 So.2d at 1163;

Baggett v. Wainwright, 229 So.2d 239, 243 (Fla. 1969); cf. Brown v. Wainwright, 392 So.2d 1327 (Fla. 1981). A petition for a writ of habeas corpus is the proper means for Mr. Kormondy to raise the claims presented herein. See, e.g., Way v. Dugger, 568 So.2d 1263 (Fla. 1990); Downs v. Dugger, 514 So.2d 1069 (Fla. 1987); Riley v. Wainwright, 517 So.2d 656 (Fla. 1987); Wilson, 474 So.2d at 1162.

This Court has the inherent power to do justice. The ends of justice call on the Court to grant the relief sought in this case, as the Court has done in similar cases in the past. This petition pleads claims involving fundamental constitutional error. See Dallas v. Wainwright, 175 So.2d 785 (Fla. 1965); Palmes v. Wainwright, 460 So.2d 362 (Fla. 1984). The Court's exercise of its habeas corpus jurisdiction, and of its authority to correct constitutional errors such as these pled herein, is warranted in this action. As the petition shows, habeas corpus relief would be proper on the basis of Mr. Kormondy's claims.

GROUNDS FOR HABEAS CORPUS RELIEF

By his petition for a writ of habeas corpus, Mr. Kormondy asserts that his capital conviction and sentence of death were obtained and then affirmed during this Court's appellate review process in violation of his rights as guaranteed by the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the Florida Constitution.

ISSUE I

APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO ARGUE TO THIS COURT THAT THE TRIAL COURT'S ORDER FAILS TO CONSIDER RECORD MITIGATION IN VIOLATION OF FARR V. STATE

The standard of review for claims of ineffective assistance of appellate counsel is the same standard for trial counsel, as set out in Strickland v. Washington, 466 U.S. 668 (1984). Appellate counsel was ineffective for not arguing before this court record mitigation that the trial court failed to consider.

> Farr argues that the trial court was required to consider any evidence of mitigation in the record, including the psychiatric evaluation and presentence investigation. Our law is plain that such a requirement in fact exists. We repeatedly have stated that mitigating evidence must be considered and weighed when contained anywhere in the record, to the extent it is believable and uncontroverted. E.g., Santos v. State, 591 So.2d 160 (Fla. 1991); Campbell v. State, 571 So.2d 415 (Fla. 1990); Rogers v. State, 511 So.2d 526 (Fla. 1987), cert. denied, 484 U.S. 1020, 108 S.Ct. 733, 98 L.Ed.2d 681 (1988). That requirement applies with no less force when a defendant argues in favor of the death penalty, and even if the defendant asks the court not to consider mitigating evidence.

Farr v. State, 621 So.2d 368, 369 (Fla. 1993).

On March 23, 1999, a hearing was conducted before Judge Tarbuck wherein Mr. Arnold (Appellant's second penalty-phase counsel) informed the State and the Court his

intent not to present mitigation. At that hearing Mr. Edgar (assistant state attorney) informed the Court of its obligation regarding mitigation previously presented.

> MR. EDGAR: Now, the Defense has indicated that it intends to not offer any mitigating evidence or any mitigating circumstances. Before that's done, Your Honor, it would be incumbent on the Court, in accordance with the Koon decision, to conduct an inquiry of the defendant to see that he knows the consequences of what he's doing in that matter and the results of it that could result from that.
>
> THE COURT: Well, were mitigating circumstances presented at the – on the penality phase at the original trial?
>
> MR. EDGAR: Yes, sir.
>
> MR. ARNOLD: Yes, sir.
>
> THE COURT: Now, see, I don't know what happened there. I don't know what mitigating factors were presented, so I don't know what to ask him.
>
> MR. EDGAR: Well, the Koon decision basically would require that you consider all the mitigating that was presented then anyway, and that the defendant understands that if he doesn't present any mitigation in these proceedings, that it could harm him in that respect. If you would like to address this before – right before we proceed.
>
> MR. ARNOLD: Why don't we do this. At this time, I'll withdraw the notice of intent not present evidence of mitigating circumstances. And if you and I could just get one afternoon sometime this next week, you know, I may have to refile the motion, but – and have it heard during April, but if we can just sit down for a few minutes and talk. Because I've not had a chance.

> You know, the few times I've called you, I've missed. And If I can talk to you briefly about a couple of matters, I'll see where we're at.
>
> THE COURT: And that will give me time for you to present to me the case law with regard to my obligation to the defendant –
>
> MR. EDGAR: It's right here.
>
> THE COURT: -- so I can review that. Is this it?
>
> MR. EGAR: That's it, sir.
>
> MR. ARNOLD: Yes, sir, in that Koon case, Judge.

(R2. Vol. I, p140-142).

At the close of the State's case during the second penalty phase, Mr. Arnold informed the court that Petitioner was resting his case without presenting any mitigation. Mr. Edgar requested an inquiry of Petitioner by the court. At that time Mr. Edgar informed the court of mitigation presented at the previous penalty phase proceedings (TT2. Vol. III, p482).

Mr. Arnold executed his Memorandum in Support of a Life Sentence on May 7, 1999 (filed November 1, 1999) (R2. Vol. II, p233). Mr. Arnold's memorandum makes no reference of prior record mitigation or the presentence investigation report (R1. Vol. III, p455).

At the Spencer hearing, held on June 30, 1999 (R2. Supp. Vol. II, p216), neither State nor Defense offered any

additional evidence, and no reference was made to record mitigation or the presentence investigation report. The trial court's sentencing order, entered July 7, 1999, (R2. Vol. II, p202-210) fails to refer to record mitigation or the presentence investigation report.

The only evidence presented and considered by the trial court in its order dated July 7, 1999, was: (1) good trial behavior, (2) disproportionate sentencing, and (3) cooperation with law enforcement (R2. Vol. II, p202-210).

However, record mitigation presented and considered at the first penalty phase was: (1) good trial behavior, (2) disproportionate sentencing, (3) cooperation with law enforcement, (4) deprived and traumatic childhood, (5) rejection by stepfather, (6) neglect and abuse, (7) learning disability, (8) addiction to drugs and alcohol since age 14, (9) habitual criminal behavior as a result of addiction, (10) maintained employment, (11) had a wife and child, (12) suffered from personality disorder, and (13) presentence investigation report.

Appellate counsel was ineffective for failing to raise this issue pursuant to Farr.

ISSUE II

APPELLATE COUNSEL WAS INEFFECTIVE FOR NOT

PRESENTING MRS. MCADAMS' PRIOR DEPOSITION TESTIMONY ON DIRECT APPEAL TO THIS COURT IN ORDER TO ESTABLISH THAT THE TRIAL COURT ERRED BY NOT ALLOWING PETITIONER TO CONFRONT MRS. MCADAMS.

The standard of review for claims of ineffective assistance of appellate counsel is the same standard for trial counsel, as set out in Strickland v. Washington.

On direct appeal appellate counsel presented to this Court Issue V: WHETHER KORMONDY WAS DENIED HIS RIGHT TO CROSS-EXAMINE AND CONFRONT STATE WINESS CECILIA MCADAMS CONCERNING HER ABILITY TO IDENTIFY AND DISTINGUISH THE PERPETRATORS (Initial Brief p68). Appellate counsel argued that trial counsel was abruptly cut off from confronting Mrs. McAdams regarding her certainty about identifying the last person who took her to the bedroom (Initial Brief p69).

However, appellate counsel failed to present Mrs. McAdams' deposition testimony to support the question presented by trial counsel that Mrs. McAdams wasn't sure who last took her back to the bedroom. Appellate counsel presented Mr. Arnold's question to Mrs. McAdams in his initial brief at page 68 as follows:

> Q. Okay. The – with regards to the individual who last took you back to the bedroom, you indicated a few minutes ago, when you were testifying, that you though the voice was the same as the first person. (Buffkin) Isn't it

really true that you don't really know which one it was?

A. No, sir. I feel very confident that I do know which one it was.

Q. Do you remember back in March the 29th of 1994 when these cases fist got started?

A. Yes, sir.

Q. And Mr. Edgar and several other attorneys were present when they took your deposition?

A. Yes, sir.

Q. Do you recall if – at that time, if you were asked with regard to the identity of the person who took you back?

(Initial brief p68).

It seems clear that the questions were about: (1) the identity of the last person who took Mrs. McAdams back to the bedroom, (2) Mrs. McAdams' uncertainty about who took her back to the bedroom last, and (3) her identification of that person at her deposition. Appellate counsel argued in his Reply Brief at page 16 that Mr. Arnold's questions were clear. However, Appellate counsel should have presented Mrs. McAdams' deposition testimony, wherein she was confused in her identification. This would have established more clarity for this Court, and made review possible.

A. And I reached out and took his hand and they – one of them said, "I didn't tell you you could touch him." So I let go and Gary never looked up at me; he just kept his head down.

> And I don’t know, they -- you want me to continue? They – they got a beer out of the refrigerator and put it down in between us and told us to drink it, and Gary said, “Which one?” and they said, “You.”
>
> And at that time the **third person**, well, the – another person – at that particular point in time **I didn’t know which one it was – said, “come with me.”** And I got up and he took me back to the back and his comment was, “I don’t know what the other two did to you but I think you’re going to like what I’m going to do.” And –
>
> Q. Now, was it your impression that that was—
>
> A. The first one that came in the door. And-
>
> Q. Were you able to look at that person, to see that person as you got up?
>
> **A. No.**

(Mrs. McAdams’ deposition p25).

Petitioner concedes this Court found that the question was unclear for review.

> **The defense did not indicate what was being sought from the witness by the question nor that there was evidence that would demonstrate that Mrs. McAdams had misidentified her assailants.** See Finney v. State, 660 So.2d. 674, 684 (Fla. 1995)(holding that without a proffer it is impossible for the appellate court to determine whether the trial court’s ruling was erroneous, and if erroneous, what effect the error may have had on the result). Therefore, it cannot be determined from the record that the Appellant was deprived of his opportunity to cross-examine or impeach the witness.

Kormondy v. State, 845 So.2d at 52 (Fla. 2003) (emphasis added).

However, Petitioner contends that had appellate counsel presented Mrs. McAdams' deposition testimony regarding her identification on direct appeal, this Court would have been better enlightened as to what counsel was trying to establish by his questions. The above citations clearly establish that Mr. Arnold's questions were attempting to impeach Mrs. McAdams about her prior statement regarding her ability to identify who last took her back to the bedroom. Appellate counsel's failure to present this evidence to this Court prejudiced Petitioner.

ISSUE III

APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO ARGUE THAT PETIONER'S WAIVER OF MITIGATION WAS INVALID BECAUSE THE TRIAL COURT ERRED BY NOT INQUIRING OF TRIAL COUNSEL AS TO WHAT INVESTIGATION FOR MITIGATION WAS DONE AND WHAT MITIGATION WAS AVAILABLE IN VIOLATION OF KOON v. DUGGER

The standard of review for claims of ineffective assistance of appellate counsel is the same standard for trial counsel, as set out in Strickland v. Washington. At the close of the State's case, defense counsel rested without presentation of mitigation witnesses. The State requested the trial court to ask the Petitioner about his voluntary waiver. However, defense counsel questioned Petitioner about each statutory mitigation and generally

about nonstatutory mitigation (R2. Vol. III, p483-489). This colloquy suggested that this decision was based upon mutual agreement between counsel and Petitioner. The trial court was required to determine the knowing and voluntariness of Petitioner's suggested waiver of presentation of mitigation by inquiring of defense counsel, pursuant to Koon v. Dugger, 619 So.2d 246, 250 (Fla. 1993).

> Accordingly, we establish the following prospective rule to be applied in such a situation. When a defendant, against his counsel's advice, refuses to permit the presentation of mitigating evidence in the penalty phase, counsel must inform the court on the record of the defendant's decision. Counsel must indicate whether, based on his investigation, he reasonably believes there to be mitigating evidence that could be presented and what that evidence would be. The court should then require the defendant to confirm on the record that his counsel has discussed these matters with him, and despite counsel's recommendation, he wishes to waive presentation of penalty phase evidence.

The trial court made no inquiry of defense counsel as to what investigation he performed and what mitigation was discovered.

> MR. ARNOLD: Judge, I think that I've covered the mitigators. I hope I have. Does that satisfy you?
>
> MR. EDGAR: Yes, sir, Your Honor. And I have jury instructions that conforms to that. Does Your Honor desire to inquire of the defendant?
>
> THE COURT: I do not. I think it's been adequately covered. What I propose is to bring

the jury in now and tell them what stage of the trial we're at. Then you will argue the case this morning. We will then take a break for lunch and send them out to deliberate.

(R2. Vol. III, p489).

On March 23, 1999, a hearing was conducted wherein Mr. Arnold informed the trial court that he was not ready to proceed.

> MR. ARNOLD: Thank you. Judge, the next motion I filed was a motion to continue. I simply cannot be ready by the 5th of April. I think that I could be ready the following month with no problem, but at this stage, I just don't think that I can be ready.
>
> **I have reviewed most of the file and spent some time with Mr. Kormondy, going through things…**
>
> But just frankly, I will not be prepared by the 5th of April, and I've tried diligently to be prepared. I had a number of trials set for this month. In fact, in the motion I indicated that I had 11 set. I ended up with 13 set. Fortunately, I haven't had to try all of those. Most of them have gone away. I still have two set for the following week, but I think I'm hoping that they will go away. But I'm just not ready for the 5th, Judge. I can be ready three weeks after that, but I won't be ready by the 5th of April.
>
> (R2. Vol. I, p123-124)(emphasis added).

* * * *

> MR. ARNOLD: Judge, I think that encapsulates in a nutshell my need for the continuance, because right now Mr. Edgar's correct. He does have to provide me now with another list of names of individuals who he intends to call as witnesses. We have discovery, but it consists of four boxes, and **I simply have not been**

> **able to read each and every page of the testimony of all of those various witnesses**.

(R2. Vol. I, p131)(emphasis added).

The second penalty phase began on May 3, 1999, slightly longer than one month from the hearing wherein Mr. Arnold informed the trial court he wasn't ready and had not read all of the materials. The trial court should have inquired of defense counsel as to what investigation he had performed, what mitigation was available, and whether the decision not to present mitigation was a strategy or refusal by Petitioner. The trial court failed to inquire of defense counsel at all. Therefore, the waiver of presentation of mitigation was invalid and appellate counsel was ineffective for failing to argue this issue to this Court.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Petition for Habeas Corpus has been furnished by hand delivery to Meredith Charbula, Office of the Attorney General, Department of Legal Affairs, The Capitol, PL01, Tallahassee, FL 32399, on February 6, 2006.

CERTIFICATE OF COMPLIANCE

Undersigned counsel certifies that the type used in this Petition is Courier New 12 point

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