IN THE SUPREME COURT OF FLORIDA
NO. SC06-1380
LT NO. 87-1775CFAWS

SAMUEL JASON DERRICK, Petitioner

v.

JAMES R. MCDONOUGH,
SECRETARY
FLORIDA DEPARTMENT OF CORRECTIONS, Respondent

PETITION FOR WRIT OF HABEAS CORPUS

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PRELIMINARY STATEMENT

This is the Petitioner'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 Petitioner was deprived of the right to fair, reliable, and individualized trial and sentencing proceedings and that the proceedings resulting in his convictions and sentences, including his death sentence, violated fundamental Constitutional imperatives.

Citations shall be as follows: The record on appeal concerning the original court proceedings shall be referred to as "R. _____"followed by the appropriate page number. The record on appeal of the second penalty phase will be cited as "R2 ___". The transcript of the guilt-phase proceedings will be referred to as "T. _____" followed by the appropriate page number and the penalty-phase in 1991 will be "T2.____". The record on appeal from post-conviction proceedings shall be referred to as "PC-R. ____"

The Florida Supreme Court's opinion on Petitioner's initial direct appeal will be referred to as Derrick I, 381 So. 2d 31 (Fla. 1991). The Florida Supreme Court's opinion on Petitioner's direct appeal from his second Penalty Phase proceedings will be referred to as Derrick II, 641 So. 2d 1994 (Fla. 1994). All other references will be self-explanatory or otherwise explained herein.

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INTRODUCTION

Significant errors which occurred at Petitioner's capital trial and sentencing were not presented to this court on direct appeal due to the ineffective assistance of appellate counsel. See, Strickland v. Washington, 466 U.S. 668 (1984); Rutherford v. Moore, 774 So. 2d 637, 643 (Fla. 2000); Nixon v. Florida, SC 92006, SC 93992, p. 22 and SC01-2486 (Fla. 2006) (Claims of IAC of appellate counsel are properly raised in a habeas corpus petition in court which heard direct appeal.)

The gravity of the issues which appellate counsel did not raise demonstrate that appellate counsel's performance was deficient and that the deficiencies prejudiced Mr. Derrick, rendering his conviction and sentences unreliable. "[E]xtant legal principles… provided a clear basis for… compelling appellate argument[s]." Fitzpatrick v. Wainwright, 490 So. 2d 938, 940 (Fla. 1986). 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 v. Wainwright, 474 So. 2d at 1165 (emphasis in original).

As this petition will make manifest, Petitioner is entitled to habeas relief.

PROCEDURAL HISTORY

Petitioner was indicted by the grand jury in Pasco County, Florida on July 14, 1987 (R. 862-863). He was charged with the first-degree murder of Rama Sharma. (R. 994-996)

Trial commenced on May 9, 1988 and lasted four days. (R. 944) Petitioner was found guilty, and the penalty phase commenced on May 13, 1988, at the conclusion of which the jury recommended death by an 8-4 vote. (R. 955)

A "Spencer" hearing, or at least further argument, was held on July 25, 1988, and the trial court, the Honorable Edward H. Bergstrom presiding, sentenced Appellant to death. (R. 994-996).

On direct appeal, the Florida Supreme Court, affirming the conviction, overturned the sentence and remanded the case for a new penalty phase. Derrick v. State, 581 So. 2d 31 (Fla. 1991).

On remand, the Honorable Judge Stanley Mills presided over a three-day trial from November 4, 1991 until November 7, 1991. However, all evidence was taken and argument made on a single day, November 5, 1991. Subsequently, during deliberation, the jury advised the court that it was divided 6-6 (R2. 383). After an admonition from the court to proceed, the jury quickly came back with a 7-5 death recommendation.

On December 10, 1991, the court heard argument and entered its written findings in support of a death sentence (R2. 452-455). This time the Florida Supreme Court affirmed the sentence. Derrick v. State, 641 So. 2d 378 (Fla. 1994), and the United States Supreme Court denied certiorari on January 23, 1995. Thereafter, post-conviction proceedings commenced, pursuant to which the Second Amended Rule 3.850 motion was filed. The circuit court's order denying Rule 3.850/1 relief is on appeal concurrently herewith.

JURISDICTION TO ENTERTAIN PETITION

AND GRANT HABEAS CORPUS RELIEF

This is an original action under Fla. R. App. P. 9.100 (a). See Art. 1, Sec. 13, Fla. Const. Further, this Court has original jurisdiction pursuant to the Florida Rules of Appellate Procedure, Rule 9.030 (a) (3), and Art. V. Sec. 3 (b) (9), Fla. Const. Finally, the Petition presents Constitutional issues which directly concern the judgment of this Court during the pendency of the appellate process and regarding the legality of Petitioner's continued incarceration and of his 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 Constitutional errors challenged herein arise in the context of a capital case in which this Court heard and denied Mr. Derrick's direct appeal. See Wilson v. Wainwright, 474 So. 2d at 1163 (Fla. 1985); Baggett v. Wainwright, 229 So. 2d 239, 243 (Fla. 1969); and Brown v. Wainwright, 392 So. 2d 1327 (Fla. 1981)

A Petition for a Writ of Habeas Corpus is the proper means for Petitioner 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. l987); Riley v.

Wainwright,517 So. 2d 656 (Fla. 1987); and Wilson v. Wainwright, 474 So. 2d at 1162.

Finally, this Court has the inherent power to do justice, and the ends of justice call on this Court to grant Petitioner the relief sought by him before execution but after a substantial period of incarceration. This Court has "done justice" in similar cases in the past, and, as in those cases, this Petition pleads claims and alleges circumstances involving fundamental Constitutional error which this Court, in the exercise of its inherent authority, must remedy. See Dallas v. Wainwright, 175 So. 2d 785 (Fla. 1965); Palmes v. Wainwright, 460 So. 2d 362 (Fla. 1984).

GROUNDS FOR HABEAS CORPUS RELIEF

The Performance Of Appellate Counsel In Failing To Appeal Issues Which Were Preserved Or Which Constituted Fundamental Error Was Deficient Performance Which Prejudiced Petitioner In Violation Of His Constitutional Right To Effective Assistance Of Appellate Counsel

1. **STANDARD OF REVIEW**

Claims of ineffective assistance of appellate counsel are properly raised in a habeas petition before the court that heard the defendant's direct appeal. See Rutherford v. Moore, 774 So. 2d 637, 643 (Fla. 2000)

The standard to be applied to this claim parallels the standard applied to claims involving the effectiveness of trial counsel as set forth in Strickland v. Washington, 466 U.S. 668 (1984). Thus, Petitioner must demonstrate that appellate counsel's performance was deficient and that defendant was prejudiced by that deficient performance. Prejudice is demonstrated by showing that the appellate process was compromised to the degree that confidence in the correctness of the appeal result is undermined. Rutherford, 774 So. 2d at 643

Indeed, this court must presume that counsel's performance was effective, and appellate counsel cannot be ineffective for failing to raise an issue that has not been

preserved for appeal, that is not fundamental error, and that would not be supported by the record. Medina v. Dugger, 586 So. 2d 317, 138 (Fla. 1991); Nixon v. McDonough, SC-93192, p. 23 (Fla. 2006). Thus, although a specific claim of ineffectiveness of appellate counsel was not preserved by proper objection of trial counsel, that claim, Petitioner asserts, can constitute fundamental error. Finally, this Court has determined that a Petitioner may raise a claim that the appellate record is inadequate where the omissions are of a magnitude so as to constitute a serious error or substantial deficiency falling measurably outside the range of professionally acceptable performance, and second, whether the deficiency in performance compromised the appellate process to such a degree as to undermine confidence in the correctness of the result. See, Henry v. McDonough, SC04-1285 at 25-26 (Fla. 2006), Thomas v. State, 759 So. 2d 650, 660 (Fla. 2000); Groover v. Singletary, 656 So. 2d 424, 425 (Fla. 1995); and Ferguson v. Singletary, 632 So. 2d 53, 58 (Fla. 1993).

2. APPELLATE COUNSEL'S INEFFECTIVE ASSISTANCE OF COUNSEL

a. The Record and Randall James

In the guilt-phase of his trial, defendant's counsel called him to testify. (T. 510-531) At that time the prosecutor jumped to his feet and rushed to the bench, indicating that, if Defendant was going to testify, he would call Randall James, a jailhouse snitch not previously announced, to testify in rebuttal and blurted out what the witness would say, gravely prejudicing Mr. Derrick and within earshot of the jury.[1]

The record also does reflect that trial counsel called Mr. Derrick to testify and requested permission to approach the bench (T. 509).

Regarding the prosecutor's rush to the bench, counsel also states that, "The Court is well aware that during the guilt phase of this trial, Mr. Halkitis approached the bench just as we had called the defendant to testify." (T. 675).

[1] The prosecutor's remarks are not in the record. This is the part of the record which was not fully transcribed.

Petitioner further contends that everything in the transcript from page 510 to page 516 was said in the presence of the jury.

The record also reflects that defense counsel announced that Mr. Derrick would be the next witness and requested a bench conference to discuss the removal of shackles. The record next reflects that the State requested the removal of the jurors and then introduced Randall James after their removal. This is not accurate and appellate counsel took no steps to have an accurate record constructed to reflect that, immediately after Mr. Derrick was announced as the next witness, the prosecutor jumped up and ran to the bench announcing "Something just came up! I need to approach the bench" and, then, during a bench conference which occurred with the jurors still in attendance in the courtroom, the Prosecutor blurted out, "I've just been informed by an investigator from my office that an inmate named Randall James from the jail wants to testify against the defendant and say that he told him that he killed the motherfucker and would kill again…" There was then some discussion about late discovery and then a recess was taken and then the jury was removed.

Thus, the record does not reflect what happened or what was said. The prejudice to Mr. Derrick of the prosecutor making the statement, allegedly made by the defendant to Randall James, in front of the jury would have contaminated both the guilt-phase and penalty-phases, as he sounds like the coldest of cold killers who would kill again (in fact this compact sentence seems designed to have maximum impact on the jury.)

Thus, appellate counsel needed to move for the record to be reconstructed so that this Court, or the circuit court, could determine what happened. The prejudice to Appellant's conviction and sentence is clear and the implications to Mr. Derrick's Fifth Amendment right to testify, to his Sixth Amendment right to conflict-free, effective counsel, and to his Eighth and Fourteenth Amendment rights are also clear.

Ultimately, the Defendant did not testify, but the damage was done with the jury. Randall James did testify in the penalty phase and this was a basis for the remand. However, by bringing Randall James into play as a potential witness, the State sought to keep Petitioner from testifying. Further, knowing James was also represented by the Public Defender, the State

was, in effect, intentionally creating a conflict of interest.

Petitioner was forced to rely on his counsel's advice, but he had no way now of knowing whether he was being told not to testify to protect Mr. James or whether his counsel's loyalties were to him. He did not waive his right to conflict-free counsel.

In any event, the Prosecutor, by his actions, unilaterally created what should have been a mistrial had counsel protected Mr. Derrick's rights. At the same time, by announcing the substance of Mr. Derrick's alleged incriminating statements to Mr. James, the Prosecutor improperly tainted the jury, which heard the statements, and infringed on Mr. Derrick's right to testify and to receive advice from conflict-free counsel. The record, however, does not accurately reflect what occurred.

Appellate counsel failed to raise the issues, beyond the sufficiency of the Richardson hearing, of the insufficiency and inaccuracy of the record, and, on the partial record, failed to assert the prosecutor's improper conduct in creating a conflict-of-interest for Mr. Derrick. See Guzman v. State, 644 So. 2d 996 (Fla. 1994) Thus, in its Order denying

3.850/1 relief the lower court erroneously concluded that the Public Defender's withdrawal from representing James cured the problem. However, the waiver required would have to be from Mr. Derrick.

Had appellate counsel sought to correct the record, and had counsel appealed the prosecutor's improper conduct and the conflict created thereby, which infringed on Mr. Derricks' right to testify and to rely on the advice of conflict-free counsel, this Court would have remanded the case for a hearing to correct the record, at a minimum or more likely, have granted Mr. Derrick a new trial, as it did the defendant, in Guzman.

Appellate counsel's failure to appeal the state of the record and the prosecutor's actions before the jury constitute fundamental error, and appellate counsel's failure to fully protect appellant's rights by asserting the full scope of the harm done to appellant by the prosecutor's conduct and by failing to secure an accurate record on appeal constitute prejudicial ineffective assistance of appellant counsel.

b. **Improper Prosecutorial Argument**

The prosecutor argued in closing to the jury that the medical examiner mistakenly testified that the murder weapon was a single-edged knife. (R. 598) Further, he refuted the medical examiner's opinion about the time of death. Id.

The prosecutor, was providing testimony and mis-characterizing his own witness's testimony. (R. 598-599)

By arguing facts not in evidence and telling the jury that his own witness made a mistake and then offering his own opinion to explain the error, the prosecutor prejudiced appellant's right to have the jury decide the case on the testimony from the witness stand, not on the prosecutor's version of events, which is not evidence for the jury to properly consider.

The prosecutor's improper arguments constituted fundamental error which appellate counsel should have raised on appeal. Both the time of death and the State's failure to connect Petitioner to the murder weapon were issues upon which the guilty verdict hinged. However, it was the prosecutor who provided "testimony" implicating the Petitioner on both issues.

The jury's request, during deliberation, for the ME's testimony shows how crucial this issue was.

c. **Comment on Concession**

The prosecutor argued in closing that defense counsel conceded that appellant was guilty of second-degree murder. (R. 509-510)

There was no concession and the prosecutor's mis-characterization of counsel's argument constitutes fundamental error. Again, the prosecutor is advising the jury to consider evidence that is not there, instead of what is actually in the record.

3. **CONCLUSION**

Based on the foregoing, Appellant prays that this Court grant his Petition, vacate his convictions and sentences, and remand the case for a new trial. Further, to the extent that the Court determines that a hearing on the content of the record is required, Petitioner requests that this Court order the circuit court to conduct the hearing or take such other remedial measures as this Court deems proper to address the Constitutional infirmities upon which his continued incarceration and pending execution precariously rest.

CERTIFICATE OF FONT AND SERVICE

Below signed counsel certifies that this Petition was generated in Courier New 12 point font pursuant to Fla. R. App. P. 9.210 and was served on all parties hereto by first-class U.S. mail on this 6th day of July, 2006.

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