IN THE SUPREME COURT OF FLORIDA
(Appeal From Post-conviction is CASE NO. SC05-914)
CASE NO. SC06-40

ALLEN W. COX,
Appellant,

v.

STATE OF FLORIDA,
Appellee.

PETITION FOR WRIT OF HABEAS CORPUS TO THE FIFTH JUDICIAL CIRCUIT, IN AND FOR LAKE COUNTY, STATE OF FLORIDA

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PRELIMINARY STATEMENT

Article 1, Section 13 of the Florida Constitution provides: The writ of habeas corpus shall be grantable of right, freely and without costs." This petition for habeas corpus is filed to address substantial claims of error under the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the Unites States Constitution and the corresponding provisions of the Florida Constitution. This petition will show that Mr. Cox was denied a fair and reliable trial, sentencing hearing and effective appeal of the errors that occurred during trial and sentencing.

Citations will be as follows: The original record on appeal from trial will be referred to as "ROA.____" followed by appropriate page numbers. The post conviction record will be referred to as "PCR _____."

REQUEST FOR ORAL ARGUMENT

Mr. Cox has been sentenced to death. The resolution of the issues involved in this action will determine whether he lives or dies. This Court has not hesitated to allow oral argument in other capital cases in a similar procedural posture. A full opportunity to air the issues through oral argument is appropriate in this case because of the seriousness of the claims at issue and the penalty that the State seeks to impose on Mr. Cox.

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. This Court has original jurisdiction pursuant to Fla.R.App.P. 9.030 (a)(3) and Art. V, Sec. 3(b)(9), Fla. Const. This petition presents constitutional issues which directly concern the judgment of this Court during the appellate process and the legality of Mr. Cox's death sentence.

Jurisdiction for this petition lies with this Court because the fundamental constitutional errors raised occurred in a capital case in which this Court heard and denied Mr. Cox's direct appeal. see, e.g., Smith v. State, 400 So.2d 956, 960 (Fla. 1981) See Wilson v. Wainwright, 474 So.2d 1162, 1163 (Fla. 1985); 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. Cox 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. Justice requires this Court to grant the relief sought in this petition, as this Court has done in the past. This petition pleads claims involving fundamental constitutional error. See Dallas v.Wainwright,175 So. 2d 785 (Fla. 1984). This Court's exercise of its habeas

corpus relief jurisdiction, and of its authority to correct constitutional errors such as those herein pled, is warranted in this action. As the petition shows, habeas corpus relief would be more than proper on the basis of Mr. Cox's claim.

STATEMENT OF THE CASE AND FACTS

Mr. Cox has filed an initial brief in the appeal from his postconviction proceeding, Case No. SC05-914. Mr. Cox adopts the rendition of the prior proceedings and the facts presented in that brief, for all purposes herein.

SUMMARY OF THE ARGUMENT

Defense counsel admitted Mr. Cox committed the homicide in his opening statement, with no record waiver by Mr. Cox allowing the admission. Such an admission vitiated Mr. Cox's theory of defense, that a third party stepped in and inflicted the fatal wound on the victim. The trial record preserved a claim on its face which would have required relief under the law at the time of trial, Nixon v. State, 857 So. 2d 172 (Fla. 2003). Despite the subsequent refinement of the doctrine by the Supreme Court in Florida v. Nixon, 125 S.Ct. 551 (2004), the facts in this case still supported relief. Failure to raise the matter on appeal deprived Mr. Cox of his best hope to correct this error.

ARGUMENT

CLAIM

APPELLATE COUNSEL FAILED TO RAISE AND ARGUE THE FAILURE OF TRIAL COUNSEL TO OBTAIN CONSENT FROM MR. COX BEFORE ADMITTING IN THE OPENING STATEMENT THAT MR. COX COMMITTED THE HOMICIDE IN VIOLATION OF THE 5TH, 6TH, 8TH, AND 14TH AMENDMENTS OF THE UNITED STATES CONSTITUTION.

During opening statement, Mr. Cox's trial counsel stated the following:

> The purpose of correctional officers in many situations is to protect inmates from themselves and from each other. But, in this particular situation there wasn't a guard within sight of this crime. If there had been a guard there, quite possibly Venezuela would have lived. The fight could have been broken up before it escalated to the point where Venezuela ended up dying.....
>
> As Mr. McCune told you, there were two far less serious stab wounds to Venezuela's lower half; once in the groin area and once in the butt, on one side, I don't remember if it was the left side or the right side, but once in the butt. Certainly not a lethal wound. Neither one of them was particularly lethal.
>
> The one serious wound was the wound that Mr. McCune talked about, on the left-hand side, just below the shoulder blade, between the seventh and eighth ribs, one wound. Not a lot of blood.
>
> As far as the medical care goes, Venezuela was able to get up, and if Venezuela was able to get up, given the difference in size between the two men, it's only because Allen let him.

ROA XV at 962, 963 (*emphasis added*)

In the above statements, trial counsel conceded that there was a fight between Mr. Cox and victim Venezuela which "escalated" to the point where Venezuela ended up dying, and Mr. Cox had "let" Venezuela up after the stabbing. The state recognized these statements were concessions of constitutional dimension:

> MR. GROSS(Assistant State Attorney): Judge, I don't know if you remember, but a couple of weeks ago you brought to our attention and sent us a copy of, I believe, the Nixon case. In light of the opening statement given yesterday, I don't know, but it may be appropriate to do a Nixon inquiry of the defendant.
>
> THE COURT: Based on what I heard, I am trying to remember everything I heard.
>
> Mr. Stone, do you think that is an issue at this point?
>
> MR. STONE: I don't know what he is referring to in the opening statements. It's not an issue, as far as I am concerned.
>
> THE COURT: Could you be specific if you think it's appropriate, Mr. Gross?
>
> MR. GROSS: I can tell you that as I understood Mr. Higgins' argument, the Defense conceded that the defendant was the person who attacked and killed Mr. Baker.
>
> MR. STONE: Not at all.
>
> MR. GROSS: If that's not true, then I must not have been listening very carefully.

> MR. STONE: No, sir. That wasn't the gist of the opening statement.
>
> MR. GROSS: I guess, my bad, as they say.
>
> THE COURT: I heard him talk about what lack of evidence and what prison folks saw, et cetera, et cetera. But I never heard him admit that Mr. Cox stabbed the victim.

TR. 1111, 1112

Mr. Cox concedes that the United States Supreme Court in *Florida v. Nixon* 125 S.Ct. 551 (U.S. 2004), reversed this Court's decision, *Nixon v. State*, 857 So. 2d 172 (Fla. 2003), and found that in cases where counsel admits guilt, the claim should be judged under *Strickland* not *Chronic*. (*Id*. at 560). The Court in *Nixon,* in applying the *Strickland* standard, found counsel's concession of guilt to be reasonable because there was no viable defense and concessions are sometimes reasonable in death penalty cases in order to attempt to save the clients life. (*Id.* at 562, 563).

This was not the "strategy' utilized by counsel for Mr. Cox in admitting in the opening statement that Mr. Cox stabbed and killed Baker. Rather, Higgins' concessions appear to be errors made by inexperienced counsel not qualified to handle death penalty cases. The claim that these errors are the result of ineffective assistance of trial counsel has been raised in the appeal from the

postconviction hearing filed contemporaneously with this Petition. However, to the extent that the above-quoted record excerpts may have established the *Nixon* claim on the face of the record, appellate counsel was ineffective in the direct appeal for failing to raise the issue. Relief would have been forthcoming.

The admission of guilt was not discussed with Mr. Cox. The trial record clearly indicates that the court did not obtain the required record waiver from Mr. Cox, despite the effort of the state to raise the issue and either have the waiver entered on the record or declare a mistrial for the impermissible actions of counsel.

The prejudice is clear. The theory of the case was that Mr. Cox was not the person who inflicted the fatal stab wound, in direct conflict with the admission in the opening statement.

The trial record establishes that Mr. Higgins admitted that Mr. Cox killed Mr. Baker, that Mr. Cox never agreed to this, and that the admission was entirely *inconsistent* with the defense theory of the case. This is in sharp contrast with the permitted concession in *Nixon*, in which there was no viable defense and the concession was made in an attempt to avoid a death sentence. Therefore, unlike *Nixon*, the concession was not permitted, it vitiated the viable defense that another

prisoner stepped in and administered the fatal stab wound, and it was apparent in the record.

Competent appellate counsel would have raised the issue, preserving the matter and also likely prevailing. This Court's *Nixon* analysis was more defense friendly and would have compelled relief in this case on appeal. Presuming the state would have taken the matter to the United States Supreme Court, that Court's *Strickland* analysis would still have compelled relief.

This ineffectiveness should also be considered cumulatively with other instances of ineffective assistance of trial counsel in assessing the prejudice prong of *Strickland*.

CONCLUSION

Based on the arguments herein, this Court should issue the writ to the lower tribunal, allowing Mr. Cox a fair and constitutionally sound trial without counsel admitting his guilt and vitiating his defense.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing INITIAL BRIEF Has been furnished by U. S. Mail, first-class, to all counsel of record on this 12th, day of January, 2006.

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CERTIFICATE OF COMPLIANCE

I hereby certify that a true copy of the foregoing INITIAL BRIEF OF APPELLANT, was generated in a Times New Roman, 14 point font, pursuant to Fla. R. App. P. 9.210.

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