IN THE SUPREME COURT OF FLORIDA
(Appeal From Post-conviction is CASE NO. SC06-615)
CASE NO. SC07-_____

PERRY ALEXANDER TAYLOR,
Petitioner,
v.
JAMES MCDONOUGH,
Secretary, Florida Department of Corrections
Respondent.

PETITION FOR WRIT OF HABEAS CORPUS
TO THE THIRTEENTH JUDICIAL CIRCUIT,
IN AND FOR HILLSBOROUGH, STATE OF FLORIDA

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. Taylor was denied a fair and reliable trial, sentencing hearing and effective appeal of the errors that occurred during trial and sentencing.

REQUEST FOR ORAL ARGUMENT

Mr. Taylor 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. Taylor.

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. Taylor'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. Taylor'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. Taylor 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. Taylor's claim.

This Petition is filed contemporaneously with the post-conviction appeal. The procedural history and facts are set out therein and adopted herein in the interest of brevity and to avoid redundancy.

CLAIM I

THE PRIOR CONVICTION USED TO SUPPORT THE FINDINGS OF A "PRIOR CONVICTION OF A VIOLENT FELONY" AS AN AGGRAVATING CIRCUMSTANCE WAS UNCONSTITUTIONALLY OBTAINED AND INADMISSIBLE UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

1. The prior conviction introduced to support the "prior conviction of a violent felony" was obtained in violation of the United States Constitution. It was used to support this aggravating circumstance in violation of the Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

2. The conviction for sexual battery, for which Mr. Taylor was sentenced as an adult, when he was 16 years old is unconstitutional. The conviction was based on a plea of nolo contendere which was invalid because of Mr. Taylor's inability to make a knowing, intelligent and voluntary waiver of his right to trial, due to his mental condition, caused by organic brain damage at the time.

3. In addition, Mr. Taylor was incapable of forming the specific intent which is an element of sexual battery because of his perinatal brain damage, and the resultant absence of inhibition of impulsive response.

4. This unconstitutional prior conviction cannot be used to support the sentence of death in this matter. Johnson v. Mississippi, 486 U.S. 578 (1988).

5. Mr. Taylor's prior conviction, having occurred almost seven years before the date of the capital trial, was too remote in time to be considered in aggravation. The Florida death penalty statute is silent as to the time or place of the previous convictions. Such silence, cannot, however, be interpreted as a carte blanche invitation by the sentencer to weigh any infraction, regardless of its

antiquity, in aggravation.

6. There must be some parameters by which to establish this aggravator. In non-capital case sentencing, "prior record" is limited to convictions committed less than 10 years prior to the date of the commission of the primary offense. Fla. R. Crim. P. 3.702(8)(A). In a case involving the death penalty, the ultimate punishment, there is a heightened need for reliability.

7. It would be cavalier to interpret silence as to this aspect of the aggravator as condoning admission of any and all prior offenses, irrespective of the age of the conviction. When interpreting a penal statute, the rule of lenity dictates that the court will generally resolve a genuine ambiguity in favor of the defendant.

8. This error cannot be deemed harmless because the sentence of death rests on the prior conviction. The resentencing court used the convictions to support its finding of an aggravating circumstance. 1992ROA Vol. V 813. The failure of trial counsel to effectively litigate this issue is a violation of Mr. Taylor's right to effective assistance of counsel.

9. The use of the prior conviction to support Mr. Taylor's sentence of death is a violation of the Eighth and Fourteenth Amendments to the United States Constitution.

10. The post-conviction court denied relief on this claim. It was raised as

Claim XIV in the Petitioner's 3.50 Fourth Amended Motion for Post-conviction Relief. The post-conviction court ruled that the issue should have been raised on direct appeal. To the extent that the evidence of brain damage on direct appeal was sufficient to support the incapacity to plead or to form the necessary culpable intent, the matter should have been raised on direct appeal. Should the evidence of brain damage be deemed insufficiently developed in the original trials, then the defendant respectfully urges that relief should be granted by virtue of the appeal from the denial of post-conviction relief filed contemporaneously with this Petition.

CLAIM II

FLORIDA'S STATUTE SETTING FORTH THE AGGRAVATING CIRCUMSTANCES TO BE CONSIDERED IN A CAPITAL CASE IS FACIALLY VAGUE AND WAS NOT CURED BY JURY INSTRUCTIONS, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND SIMILAR PROVISIONS OF THE FLORIDA CONSTITUTION.

10. At the time of Mr. Taylor's resentencing, the language of §921.141 (5), Fla. Stat. (1989), which defined "heinous, atrocious, or cruel," and "prior violent felony" as aggravating factors was facially vague and over broad.

11. The Supreme Court has held that "[I]n a 'weighing' state [such as Florida], where the aggravating and mitigating factors are balanced against each other, it is constitutional error for the sentencer to give weight to an unconstitutionally vague aggravating factor, even if other, valid aggravating factors [exist]." Richmond v. Lewis, 113 S. Ct. 528, 534 (1992). A facially vague and over broad

aggravating factor may be cured where "an adequate narrowing construction of the factor" is adopted and applied. Id. However, in order for the violation of the Eighth and Fourteenth Amendments to be cured, "the narrowing construction" must be applied during a "sentencing calculus" free from the taint of the facially vague and over broad factor. Id.

12. In Florida, the jury is a co-sentencer. By giving "great weight" to the jury recommendation, the trial court indirectly weighed the invalid aggravating factor this court must presume the jury found. The indirect weighing of the facially vague and over broad aggravators violates the Eighth and Fourteenth Amendments.

13. Mr. Taylor's sentence of death rests on fundamental error. Fundamental error occurs when the error is equivalent to a denial of due process. Fundamental error includes facial invalidity of a statute due to "overbreadth," which impinges upon a liberty interest. The failure to instruct on the necessary elements a jury must find constitutes fundamental error.

14. Under Florida law, aggravating circumstances must be proven beyond a reasonable doubt. The State, however, failed to prove these aggravating circumstances beyond a reasonable doubt. Florida law also establishes that limiting constructions of the aggravating circumstances are "elements" of the particular aggravating circumstance. The State must prove the elements beyond a reasonable doubt. Fundamental error occurred when Mr. Taylor's jury received wholly inadequate instructions regarding the elements of these aggravating circumstances.

15. The statute is facially vague and over broad in violation of the Eighth and Fourteenth Amendments and it impinges upon a liberty interest. Thus, the application of the statute violated Mr. Taylor's right to due process.

conclusively demonstrate that Mr. Taylor is not entitled to relief.

7. This claim was raised as Claim XV in the Petitioner's 3.50 Fourth Amended Motion for Post-conviction Relief. The post-conviction court ruled that the issue should have been raised on direct appeal. Appellate counsel was ineffective for failing to raise and preserve this issue on direct appeal.

CLAIM III

MR. TAYLOR'S RESENTENCING JURY WAS MISLED BY COMMENTS AND UNCONSTITUTIONAL INSTRUCTIONS WHICH DILUTED ITS SENSE OF RESPONSIBILITY FOR SENTENCING IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES AND FLORIDA CONSTITUTIONS.CLAIM III

MR. TAYLOR'S RESENTENCING JURY WAS MISLED BY COMMENTS AND UNCONSTITUTIONAL INSTRUCTIONS WHICH DILUTED ITS SENSE OF RESPONSIBILITY FOR SENTENCING IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES AND FLORIDA CONSTITUTIONS.

1. Mr. Taylor's resentencing jury was repeatedly and unconstitutionally instructed by the Court that its role was merely "advisory." 1992ROA Vol. IV 584-85, 589-92. Because great weight is given to the jury's recommendation, the jury is a sentencer in Florida. Here, however, the jury's sense of responsibility was diminished by the misleading comments and instructions regarding the jury's role. This diminution of the jury's sense of responsibility violated the Eighth Amendment.

2. A capital sentencing jury must be properly instructed as to its role in the sentencing process. Therefore, even instructional error not accompanied by a contemporaneous objection warrants reversal.

3. Throughout the proceedings in Mr. Taylor's case, the Court and the prosecutor frequently made statements about the difference between the jurors'

responsibility at the guilt-innocence phase of the trial and their non-responsibility at the sentencing phase. As to sentencing, however, they were told that they merely recommended a sentence to the judge, their recommendation was only advisory, and that the judge alone had the responsibility to determine the sentence to be imposed for first degree murder. The Court repeatedly informed the jurors that the Court had the responsibility for deciding what punishment shall be imposed. Counsel objected that that instruction and argument diluted the jury's sense of responsibility.

4. The Court failed to instruct the jury that their recommendation would carry great weight and would only be overridden in circumstances where no reasonable person could agree with it.

5. Mr. Taylor does not have to show that the effect of the comments was to unconstitutionally dilute the jury's sense of responsibility. The United States Supreme Court held that where there was a reasonable likelihood that a jury had understood an instruction to preclude them from considering mitigating evidence in violation of Lockett v. Ohio, 438 U.S. 586 (1978), then relief was warranted. In this case there was much more than a reasonable likelihood that Mr. Taylor's jury misunderstood the effect of its decision in the Florida sentencing calculus. The overall effect of this was to create a grave danger that the sentence which emerged

from Mr. Taylor's trial did not represent a decision that the State had demonstrated the appropriateness of the defendant's death.

6. Under Florida's capital statute, the jury has the primary responsibility for sentencing. Its decision is entitled to great weight. Suggestions and instructions that a capital sentencing judge has the sole responsibility for the imposition of sentence, or is free to impose whatever sentence he or she deems appropriate irrespective of the sentencing jury's decision, is inaccurate and is a misstatement of law.

7. To the extent counsel failed to object and litigate this issue, request curative instructions, and move for mistrial, counsel rendered deficient performance. Confidence in the outcome is undermined. However, the issue was raised as Claim XVI in Petitioner's 3.850 Fourth Amended Motion and denied on the ground that it should have been raised on direct appeal. Failure to do so is ineffective assistance of appellate counsel requiring relief.

CLAIM IV

FLORIDA'S CAPITAL SENTENCING STATUTE IS UNCONSTITUTIONAL ON ITS FACE AND AS APPLIED IN THIS CASE BECAUSE IT FAILS TO PREVENT THE ARBITRARY AND CAPRICIOUS IMPOSITION OF THE DEATH PENALTY, AND IT VIOLATES THE CONSTITUTIONAL GUARANTEES OF DUE PROCESS AND PROHIBITING CRUEL AND UNUSUAL PUNISHMENT.

1. Florida's capital sentencing scheme denies Mr. Taylor his right to due process of law, and constitutes cruel and unusual punishment on its face and as applied in this case. Florida's death penalty statute is constitutional only to the extent that it prevents arbitrary imposition of the death penalty and narrows application of the penalty to the worst offenders. The Florida death penalty statute, however, fails to meet these constitutional guarantees, and therefore violates the Eighth Amendment to the United States Constitution.

2. Execution by electrocution imposes physical and psychological torture without commensurate justification, and therefore constitutes cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution.

3. The capital sentencing statute in Florida fails to provide any standard of proof for determining that aggravating circumstances "outweigh" the mitigating factors, and does not define "sufficient aggravating circumstances." Further, the

statute does not sufficiently define for the consideration each of the aggravating circumstances listed in the statute. These deficiencies lead to the arbitrary and capricious imposition of the death penalty and violate the Eighth Amendment to the United States Constitution.

4. Florida's capital sentencing procedure does not have the independent reweighing of aggravating and mitigating circumstances.

5. The aggravating circumstances in the Florida capital sentencing statute have been applied in a vague and inconsistent manner, and juries receive unconstitutionally vague instructions on the aggravating circumstances. Florida law creates a presumption of death if a single aggravating circumstance is found. This creates a presumption of death in every felony- murder case, and in nearly every premeditated murder case.

6. Once an aggravating factor is found, Florida law provides that death is presumed to be the appropriate punishment, which can only be overcome by mitigating evidence so strong as to outweigh the aggravating factor. This systematic presumption of death does not satisfy the Eighth Amendment's requirement that the death penalty be applied only to the worst offenders.

7. Fla. Stat. § 921.141, (1983) is unconstitutional in that it concerns matters of court practice and procedures in violation of Art. V, § 2(a), Fla. Const.

which requires the Supreme Court of Florida to adopt all rules for practice and procedure in the courts of the State of Florida. The Legislature of the State of Florida has no constitutional power to enact the aforementioned law.

8. This issue was raised as Claim XVIII in Petitioner's Fourth Amended Motion. The post-conviction court denied relief on the ground that the claim should have been raised on direct appeal. Failure to raise the claim constitutes ineffective assistance of appellate counsel and should compel relief.

ADDITIONAL CLAIMS

1. Petitioner has simultaneously filed an appeal from denial of his Fourth Amended Motion for Post-conviction relief. To the extent that any of the matters raised in the appeal may be deemed by this Court to have been waived by failure to raise them on direct appeal, Petitioner respectfully urges this Court to consider and grant relief pursuant to the instant petition.

2. A capital defendant is required to file an appeal from the denial of his post-conviction 3.851 motion and, simultaneously, a petition for a writ of habeas corpus which would encompass any claims of ineffective assistance of appellate counsel.

3. A capital 3.851 post-conviction motion has its historic roots in

equitable habeas corpus relief. All equitable claims are deemed to include a general plea for relief. The equitable remedy of 3.851 is limited to those matters deemed cognizable under that rule, with all other forms of equitable relief falling outside the penumbra of the 3.851 equity umbrella to be raised under the larger umbrella which includes the old equitable writs. The appellate record provides all the Court needs to resolve any claims incorrectly made in the post-conviction appeal under aegis of the instant the habeas petition.

4. A habeas petition does not provide for an evidentiary hearing, so there is nothing which could be added to the record to resolve whether appellate counsel was ineffective for failing to raise a matter on appeal which was raised in the 3.851 motion, reached on the merits by the 3.851 trial court, and taken up on appeal in that stance. This Court should reach the merits of any claims determined to have been incorrectly raised in the contemporaneous appeal.

WHEREFORE the Petitioner respectfully urges this Court to grant any and all relief available under it original equitable jurisdiction.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of this Petition has been furnished by U.S. Mail to Kay Blanco on this June 21, 2007.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the font requirements of Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

David R. Gemmer
Assistant CCRC-Middle
Florida Bar Number 370541
Office of the Capital
Collateral Regional Counsel
3801 Corporex Park Drive
Suite 210
Tampa, Fl 33609-1004
(813) 740-3544
Counsel for Appellant

Copies furnished to:

Kay Blanco
Assistant Attorney General
Office of the Florida Attorney General
Concourse Center #4
3507 East Frontage Road, Suite 200
Tampa, Florida 33607-2366