

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC09-____

**DEAN KILGORE,
Petitioner,**

v.

**STATE OF FLORIDA,
Respondent.**

PETITION FOR WRIT OF HABEAS CORPUS

**NEAL A. DUPREE
CCRC-SOUTH
Florida Bar No. 311545**

**WILLIAM M. HENNIS III
Litigation Director
Florida Bar No. 0066850**

**PAUL KALIL
Assistant CCRC-South
Florida Bar No. 0174114**

**CAPITAL COLLATERAL
REGIONAL COUNSEL -
SOUTH
101 N.E. 3rd Avenue, Suite 400
Fort Lauderdale, Florida 33301
(954) 713-1284
COUNSEL FOR PETITIONER**

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INTRODUCTION

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. Kilgore was deprived of the effective assistance of counsel on direct appeal and that the proceedings that resulted in his conviction and death sentence violated fundamental constitutional guarantees.

Citations to the Record on the Direct Appeal shall be as (R. page number).

(R.) -- Record on Direct appeal;

(PCR1) -- Record of Post-Conviction Appeal

All other citations shall be self-explanatory.

JURISDICTION

A writ of habeas corpus is an original proceeding in this Court governed by Fla. R. App. P. 9.100. This Court has original jurisdiction under Fla. R. App. P. 9.030(a)(3) and Article V, § 3(b)(9), Fla. Const. The Constitution of the State of Florida guarantees that "[t]he writ of habeas corpus shall be grantable of right, freely and without cost." Art. I, § 13, Fla. Const.

REQUEST FOR ORAL ARGUMENT

Mr. Kilgore requests oral argument on this petition.

PROCEDURAL HISTORY

STATEMENT OF THE CASE AND THE FACTS

The Circuit Court of the Tenth Judicial Circuit, Polk County, entered the judgments of convictions and sentences under consideration. On March 2, 1989, a Polk County grand jury indicted Mr. Kilgore for one count of first degree murder of Emerson Robert Jackson, a fellow inmate at Polk Correctional Institution, on February 13, 1989; and for one count of possession of contraband by an inmate. Mr. Kilgore was initially sentenced to death in 1990 by the Honorable Tim Strickland, after pleading *nolo contendere* to first degree murder. During the ensuing appeal, this Court returned jurisdiction to the circuit court when questions arose as to the validity of Mr. Kilgore's plea to first degree murder.

After a hearing before the Honorable Susan C. Bucklew, Mr. Kilgore was allowed to return to Circuit Court for a new disposition of his case. Mr. Kilgore filed a motion requesting that the Circuit Court impose a life sentence, which was denied, and Mr. Kilgore was instead retried in 1994. A jury returned a verdict of guilty and recommended a sentence of death by a vote of nine (9) to three (3).

On April 27, 1994, the Honorable Dennis P. Maloney sentenced Mr. Kilgore to death on a count of first degree murder. On direct appeal, this

Court affirmed Mr. Kilgore's convictions and sentences. *Kilgore v. State*, 688 So. 2d 895 (Fla. 1996), *cert. denied*, 139 L.Ed. 58 (1997). Paul Helm was appellate counsel. Kogan, C.J. concurred in part and dissented in part: “I concur in the majority’s affirmance of the conviction for first degree murder, but I would reverse the sentence of death and remand for the entry of a sentence of life imprisonment. Based upon the trial court’s finding that Kilgore was acting under the influence of an extreme mental or emotional disturbance and that his capacity to conform his conduct to the requirements of the law was substantially impaired, I find that the death penalty is disproportionate under our case law.”

Following post conviction review, The Honorable J. Rogers Padgett entered a final order denying all relief on November 26, 2008. An Initial Brief was served in Case No. SC09-257 on August 17, 2009.

CLAIM I

APPELLATE COUNSEL FAILED TO RAISE ON APPEAL NUMEROUS ISSUES WHICH WARRANT REVERSAL THAT WERE PRESERVED BY OBJECTIONS ENTERED BY RESENTENCING COUNSEL AT THE 1994 RESENTENCING PROCEEDING.

A. Introduction

Mr. Kilgore had the constitutional right to the effective assistance of counsel for purposes of presenting his direct appeal to this Court. Strickland v.

Washington, 466 U.S. 668 (1984). "A first appeal as of right [] is not adjudicated in accord with due process of law if the appellant does not have the effective assistance of an attorney." Evitts v. Lucey, 469 U.S. 387, 396 (1985). The Strickland test applies equally to ineffectiveness allegations of trial counsel and appellate counsel. See Orazio v. Dugger, 876 F. 2d 1508 (11th Cir. 1989).

Because the constitutional violations which occurred during Mr. Kilgore's resentencing were "obvious on the record" and "leaped out upon even a casual reading of transcript," it cannot be said that the "adversarial testing process worked in [Mr. Kilgore's] direct appeal." Matire v. Wainwright, 811 F. 2d 1430, 1438 (11th Cir. 1987). The lack of appellate advocacy on Mr. Kilgore's behalf is identical to the lack of advocacy present in other cases in which this Court has granted habeas corpus relief. Wilson v. Wainwright, 474 So.2d 1162 (Fla. 1985).

B. Failure to raise the following issues on direct appeal.

Trial counsel raised 14 issues raised in his motion for new trial at the conclusion of the proceedings below:

1. Failure to grant motion for a directed verdict/premeditation was not proven
2. Failure to instruct on 3rd degree lesser
3. Admission of Mr. Kilgore's pre-arrest statement/5th amend
4. Court disallowed defendant to argue the victim had AIDS
5. Denial of motion for jury visit to view prison crime scene

6. Denial of mistrial after defendant's outburst (related due process claim concerning failure to request competency evaluation denied on direct appeal)
7. Admission of exhibit 7 (bag from shower area) – not relevant or connected to crime
8. Admission of exhibit 2 (floor plan diagram) w/out predicate
9. Overruling of objections to DOC witness Downs' testimony regarding defendant's state of mind
10. Admission of exhibit 8 (substance from locker containing petroleum distillate) - not relevant or connected to crime
11. Admission of exhibit 9 (can of mineral spirits) - not relevant or connected to crime
12. Admission of exhibits 27 and 28 (audiotapes) – improper impeachment, improper predicate
13. Denial of special instructions requested regarding mental impairment and “other aspects” of mitigation
14. Due process re: “death qualified” jury does not represent cross-section of community

Trial counsel made several objections below that were also included and preserved in his motion for new trial and that were not carried forward by appellate counsel. This failure on the part of appellate counsel prejudiced Mr. Kilgore.

1. The trial court allowed evidence that the victim had been ingesting marijuana but denied allowing in evidence regarding victim Emerson Jackson's HIV status. R. 643. Trial counsel argued that the HIV status of the victim implies there was homosexual behavior. R. 642-643. Trial counsel preserved this issue in his motion for a new trial, but appellate counsel failed to include the issue in his direct appeal briefing.

2. The lower court denied trial counsel's motion to allow jury viewing of the prison crime scene. R. 1211-1214. In denying the motion the lower court deemed photos of the scene were sufficient and also allowed the admission of exhibit 2 (a floor plan diagram) over trial counsel's objection that no predicate had been laid for admission. Appellate counsel failed to carry forward the issue on appeal. Trial counsel did include a version of this claim in his motion for a new trial.

3. Trial counsel objected below to a lesser included offense instruction including 3rd degree not being included. The theory was that the alleged plan or action to "nick" Emerson Jackson by Mr. Kilgore was an aggravated battery, touching with a knife, which could have been found by the jury. R. 1216-1226. Trial counsel preserved this objection by including it in his motion for a new trial based on the trial court's failure to grant his motion for a directed verdict because on the facts presented at trial premeditation by Mr. Kilgore was not proven and also preserving his objection based on failure to instruct on 3rd degree lesser.

4. Defendant Kilgore created an outburst and turned over counsel table during the proceedings outburst when audio tapes were played in open court concerning Correctional officers Ore's and Williams's testimony about allegations that Mr. Kilgore used matches and allegedly attempted to set

victim Emerson Johnson alight after pouring flammable liquid on him to burn victim were played into the record. Trial counsel's motion for mistrial was denied . R 1242-52. Trial counsel also made a comment contemporaneously in which he called into question Mr. Kilgore's competency. R. 1248. The denial of the mistrial was preserved in trial counsel's motion for a new trial. Direct appeal counsel carried forward only the related issue concerning whether the trial court violated Appellant's right to due process of law by ignoring defense counsel's comment implying that Defendant was possibly incompetent to proceed after Appellant disrupted the trial.

5. Trial counsel below filed a motion for directed verdict, claiming that count 1 charging premeditated murder should actually be second degree murder. The motion was denied . R. 1256-1257. Trial counsel preserved this issue by including it in a motion for new trial, but appellate counsel failed to include it in his direct appeal brief.

6. On the morning of the penalty phase, trial counsel objected to Barbara Ann Jackson testifying at the penalty phase because he had not been given the opportunity to depose her. The State says on the record that they only located her the day before but she had been on the witness list all along. No deposition was allowed. R. 1403.

7. Trial counsel objected to the presentation of CO Downes's testimony regarding the Defendant's state of mind after the Kilgore began crying when he found out that EJ was dead; to the effect that Mr. Kilgore began wailing and flailing his arms; so upset that he had to be physically confined and restrained when he saw Emerson Jackson dead on gurney; hysterical. R. 753. Trial counsel preserved this issue in his motion for new trial but appellate counsel failed to carry it forward.

Appellate counsel's failure to present the meritorious issues discussed *supra* in this petition demonstrates that his representation of Mr. Kilgore involved "serious and substantial deficiencies." Fitzpatrick v. Wainwright, 490 So. 2d 938, 940 (Fla. 1986). 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). In light of the serious reversible error that appellate counsel never raised, there is more than a reasonable probability that the outcome of the appeal would have been different, and a new direct appeal must be ordered.

CONCLUSION AND RELIEF SOUGHT

Based upon the foregoing and the record, Mr. Kilgore respectfully urges this Court to reverse the lower court order, grant a new trial and/or penalty phase proceeding, and grant such other relief as the Court deems just and proper.

NEAL A. DUPREE
CCRC-SOUTH
Florida Bar No. 311545

WILLIAM M. HENNIS III
Litigation Director
Florida Bar No. 0066850

PAUL KALIL
Assistant CCRC-South
Florida Bar No. 0174114

CAPITAL COLLATERAL
REGIONAL COUNSEL - SOUTH
101 N.E. 3rd Avenue, Suite 400
Fort Lauderdale, Florida 33301
(954) 713-1284

COUNSEL FOR APPELLANT

CERTIFICATE OF SERVICE AND FONT COMPLIANCE

I HEREBY CERTIFY that a true copy of the foregoing PETITION FOR WRIT of HABEAS CORPUS has been furnished by United States Mail, first class postage prepaid, on Monday, August 17, 2009, to Katherine Blanco, Esq., Office of the Attorney General, Department of Legal Affairs, 13507 East Frontage Road, Suite 200, Tampa, FL 33607.

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

WILLIAM M. HENNIS III
Litigation Director
Florida Bar No. 0066850