IN THE SUPREME COURT OF FLORIDA

CASE NO. SC

JOHN M. BUZIA
Petitioner,
v.

Walter A. McNeil
Secretary, Department of Corrections
Respondent.

PETITION FOR WRIT OF HABEAS CORPUS

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PRELIMINARY STATEMENT

Article l, Section 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 filed to address substantial claims of error under the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the Florida Constitution. These claims demonstrate that Mr. Buzia was deprived of his rights to fair, reliable, and individualized trial and sentencing proceedings, and that the proceedings resulting in his conviction and death sentence violated fundamental constitutional imperatives.

Citations shall be as follows: The record on appeal from Mr. Buzia's trial proceedings shall be referred to as "TR" followed by the appropriate volume and page numbers. The post conviction record on appeal shall be referred to as "ROA" followed by the appropriate volume and page numbers. All other references will be self-explanatory or otherwise explained herein.

REQUEST FOR ORAL ARGUMENT

Mr. Buzia has been sentenced to death. The resolution of the issues involved in this action will therefore determine whether he lives or dies. This Court has not hesitated to allow oral argument in other capital cases in a similar

procedural posture. Mr. Buzia, through counsel, requests the Court to permit oral argument.

INTRODUCTION

Significant errors which occurred at Mr. Buzia's capital trial and sentencing were not presented to this Court on direct appeal due to the ineffective assistance of appellate counsel. The issues, which appellate counsel neglected, demonstrate that counsel's performance was deficient and that the deficiencies prejudiced Mr. Buzia. "[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. Wainwriqht, 474 So.2d 1162, 1164 (Fla. 1985). Individually and "cumulatively," Barclay v. Wainwriqht, 444 So.2d 956, 959 (Fla. 1984), the claims appellate counsel omitted establish that "*confidence* in the correctness and fairness of the result has been undermined." Wilson, 474 So.2d at 1165 (emphasis in original). As this petition demonstrates, Mr. Buzia is entitled to habeas relief.

JURISDICTION TO ENTERTAIN PETITION AND GRANT HABEAS CORPUS RELIEF

This is an original action under Florida Rule of Appellate Procedure 9.l00(a). See Art. l, Sec. 13, Fla. Const. This Court has original jurisdiction

pursuant to Florida Rule of Appellate Procedure 9.030(a)(3) and Article V, Section 3(b)(9) of the Florida Constitution. This petition presents constitutional issues which directly concern the judgment of this Court during the appellate process and the legality of Mr. Buzia's death sentence.

This Court has jurisdiction, see, e.g., Smith v. State, 400 So.2d 956, 960 (Fla. 1981), because the fundamental constitutional errors challenged herein arise in the context of a capital case in which this Court heard and denied Mr. Buzia's direct appeal. See Wilson, 474 So.2d at 1163 (Fla. 1985); Baggett v. Wainwright, 229 So.2d 239, 243 (Fla. 1969); cf. Brown v. Wainwright, 392 So.2d 1327 (Fla. 1981).

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. The petition pleads claims involving fundamental constitutional error. See Dallas v. Wainwriqht, 175 So.2d 785 (Fla. 1965); Palmes v. Wainwright, 460 So.2d 362 (Fla. 1984). This Court's exercise of its habeas corpus jurisdiction and of its authority to correct constitutional errors is warranted in this action. As the petition shows, habeas corpus relief is proper on the basis of Mr. Buzia 's claims.

GROUNDS FOR HABEAS CORPUS RELIEF

By his petition for a writ of habeas corpus, Mr. Buzia 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 guaranteed by the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the Florida Constitution.

CLAIM I

APPELLATE COUNSEL FAILED TO RAISE ON APPEAL MERITORIOUS ISSUES WHICH WARRANT REVERSAL OF MR. BUZIA'S CONVICTIONS AND SENTENCES.

A. Introduction:

The "duty to bring to bear such skill and knowledge as will render the [appeal] a reliable adversarial testing process." Strickland v. Washington, 466 U.S. 668 (1984). To establish that counsel was ineffective, Strickland requires a defendant to demonstrate (1) specific errors or omissions which show that appellate counsel's performance deviated from the norm or fell outside the range of professionally acceptable performance, and (2) the deficiency of that performance compromised the appellate process to such a degree as to undermine confidence in the fairness and correctness of the appellate result. Wilson v. Wainwright, 474 So.2d 1162, 1163 (Fla. 1985).

In order to grant habeas relief based on ineffectiveness of appellate counsel, this Court must determine "whether the alleged omissions are of such magnitude 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." Pope v. Wainwright, 496 So.2d 798, 800 (Fla. 1986).

This Court has explained that when a petitioner alleges ineffective assistance of appellate counsel for failing to raise a preserved evidentiary issue, a harmless error analysis will be conducted. Jones v. Moore, 774 So. 2d 637, 643 (Fla. 2000).

Appellate counsel's failure to raise the meritorious issues addressed in this petition prove his advocacy involved "serious and substantial deficiencies" which individually and "cumulatively" establish that "confidence in the outcome is undermined". Fitzpatrick v. Wainwright, 490 So.2d 938, 940 (Fla.1986); Barclay v. Wainwright, 444 So.2d 956, 959 (Fla. 1984); Wilson v. Wainwright, 474 So.2d 1162 (Fla. 1985).

This Court had held that "constitutional errors, with rare exceptions, are subject to harmless error analysis". State v. DiGuilio, 491 So.2d 1129, 1134 (Fla. 1986). This Court had also held that harmless error analysis:

> requires an examination of the entire record by the appellate court including a close examination of the permissible evidence on which

> the jury could have legitimately relied, and in addition an even closer examination of the impermissible evidence which might have possibly influenced the verdict.

Id. at 1135. Once error is found, it is presumed harmful unless the state can prove beyond a reasonable doubt that the error "did not contribute to the verdict or, alternatively stated, that there is no reasonable probability that the error contributed to the [verdict]". DiGuilio, 491 So.2d at 1138.

Mr. Buzia recognizes that both this Court and the United States Supreme Court have held that appellate counsel need not file every available colorable claim and that space considerations may require counsel to winnow down his arguments. Wilson v. Wainwright, 474 So.2d 1162,1164 (Fla. 1985); Darden v. State, 475 So.2d 214,217 (Fla. 1985); Smith v. Murray, 477 U.S. 527, 535-536 (1986). This is not a case where because of space considerations appellate counsel was forced to winnow down his arguments. Instead, appellate counsel's brief represents a lackluster effort. The Initial Brief was 58 pages in length (despite a 100 page limit) and included large, sometimes full page, spaces in between each of the issues raised.

B. Appellate counsel was ineffective for failing to raise on appeal the trial court's denial of Mr. Buzia's motion of judgment of acquittal on the Burglary charge.

Mr. Buzia was indicted on charges of first-degree murder, attempted first-degree murder, armed burglary of a dwelling with an assault or battery, and

robbery with a deadly weapon. Trial counsel argued extensively that a judgment of acquittal should be granted as to the Burglary count because Mrs. Kersch had given Mr. Buzia consent to enter the house. TR Vol. 13, p. 1256-1322. Trial counsel argued that this Court's ruling in Delgado v. State offered Mr. Buzia a complete defense to the charge of burglary, since he was given consent to enter and his "remaining in" was not done surreptitiously. Delgado v. State, 776 So.2d 233, 236 (Fla. 2000). After hearing argument from the State and Defense, the trial court ultimately ruled, "I think the State's got enough in there to where I'm not gonna take it away from the jury, so I'm gonna deny the motion for judgment of acquittal as to Count Three at this time." TR Vol. 13, p. 1322.

The Burglary statute states in pertinent part:

> For offenses committed on or before July 1, 2001, "burglary" means entering or remaining in a dwelling, a structure, or a conveyance with the intent to commit an offense therein, unless the premises are at the time open to the public or the defendant is licensed or *invited to enter* or remain.

Fl. Stat. 810.02(1)(a)(2010)(emphasis added). In Delgado, this Court construed the statute to mean that in order to establish an affirmative defense to Burglary, "the defendant can establish that: (1) the premises were open to the public, (2) the defendant was a licensee, or (3) the defendant was an invitee." Delgado at 236. It is undisputed that Mr. Buzia was given consent from Mrs. Kersch to enter the enclosed patio and pool area to wait for Mr. Kersch. There was no evidence that

Mr. Buzia gained entry through fraud or trick. On the contrary, Mr. Buzia was employed by the Kersch's and was expected to arrive for work on the day of the crime.

The Burglary statute defines "dwelling" as "a building or conveyance of any kind, including any attached porch…and the curtilage thereof." Fl. Stat. 810.011(2). As a result, the patio area at the Kersch home is considered the same part of the "dwelling" as the family area of the home. Once Mr. Buzia was invited into the enclosed patio area of the home, he was treated as an invitee to the entire dwelling. While Mr. Buzia may not have had Mrs. Kersch's explicit consent to enter particular areas of the home, under its plain language, the burglary statute is designed to prevent unauthorized *entry* into a dwelling, not unauthorized movement between areas of the dwelling.

> In the context of an occupied dwelling, burglary was not intended to cover the situation where an invited guest turns criminal or violent. Rather, burglary was intended to criminalize the conduct of a suspect who terrorizes, shocks, or surprises the unknowing occupant.

Delgado at 240. In Mr. Buzia's case, it is a "situation where an invited guest turn[ed] criminal or violent." Mr. Buzia had been working for the Kersch's for some time. He was familiar to both Mr. and Mrs. Kersch, and it was not unusual for him to arrive at their house to do work. He had gotten advances in pay from

them before, a fact that was evident when Mrs. Kersch told him to wait on the patio for her husband, who handled those matters. TR Vol. 8, p. 717,720.

Moreover, there is no indication that Mr. Buzia remained in the home surreptitiously. Surreptitiously remaining in has been interpreted as requiring some sort of concealment. Dixon v. State, 855 So.2d 1245,1247 (Fla. 4th DCA 2003); See also Johnekins v. State, 823 So.2d 253,256(Fla. 3rd DCA 2002). Mr. Buzia was wandering around the house in a daze after the attack on Mrs. Kersch when Mr. Kersch came home. TR Vol. 8, p. 704. While Mr. Buzia had placed Mrs. Kersch in a back bedroom and put a blanket over her, there was no evidence presented at trial that he had done so in an attempt to conceal his presence in the house. Mr. Buzia left blood and other evidence in the home, including his shirt and the murder weapon. His disorganized and frenzied actions at the crime scene do not support a finding that his "remaining in" was done surreptitiously.

As such, under Delgado, because Mr. Buzia had consent to enter the dwelling and did not have an intent to commit an offense therein, he should not have been found guilty of Burglary. The trial court's rulings violated Mr. Buzia's Fifth and Sixth Amendment federal constitutional rights. The lower court's rulings were also a violation of the ex post facto clause of the federal constitution. United States Constitution, Art. I, §10, par. 1; Beazell v. Ohio, 269 U.S. 167,169-70, 46 S.Ct. 68 (1925). The Burglary charge was also an underlying felony to support a

finding of Felony Murder. Therefore, the conviction for Felony Murder is also improper.

This issue was properly preserved below and appellate counsel's failure to raise it on appeal constitutes ineffective assistance of appellate counsel. This error is not harmless. Confidence in the outcome of the appellate process is undermined because had appellate counsel raised this issue on appeal, there is a reasonable probability that Mr. Buzia's convictions for Burglary and Felony Murder would have been reversed and he would have been granted a new trial.

C. Appellate counsel was ineffective for failing to raise on appeal that Mr. Buzia's jury was instructed on an uncharged crime, Kidnapping, in order to support an aggravating circumstance.

The State sought to prove the aggravator that the murder was committed while the defendant was engaged in the commission of a robbery, burglary, or kidnapping. To avoid any improper doubling problems with the robbery and burglary, the State argued, and the trial court allowed, the jury to be instructed on the kidnapping of Mrs. Kersch, a crime for which Mr. Buzia was never charged. TR Vol. 15, p. 1947.

This Court has held that in order to uphold a conviction for Kidnapping under those circumstances, the movement or confinement:

> (a)Must not be slight, inconsequential and merely incidental to the other crime;
> (b)Must not be of the kind inherent in the nature of the other crime; and

> (c)Must have some significance independent of the other crime in that it makes the other crime substantially easier of commission or substantially lessens the risk of detection.

Faison v. State, 426 So.2d 963 (Fla. 1983).

This Court applied the Faison test in

v. State, 668 So.2d 967 (Fla. 1996). In Berry, this Court hypothesized that if during the commission of a robbery a defendant "confined the victims by simply holding them at gunpoint" or "moved the victims to a different room in the apartment, closed the door, and ordered them not to come out, the kidnapping conviction could not stand. In both hypotheticals, any confinement accompanying the robbery would naturally cease with the robbery" Berry, 668 So. 2d at 969.

Mr. Buzia's actions are analogous to the hypotheticals in Berry. Mr. Buzia put Mrs. Kersch in an unlocked bedroom. She was barely conscious. While there is some evidence that he tried to put duct tape on the door, the record reflects that it was done in an illogical fashion and was in no way securing the door. TR Vol. 15, p. 1937, 1973. There was also another unsecured door in the room which Mrs. Kersch ultimately left from in order to call the police. Id. at 1937.

The trial court found "this aggravating circumstance has been proven beyond all reasonable doubt." TR Vol. 4, p. 660. However, the trial court gave it no weight. The trial court stated:

> The circumstances associated with the use of this aggravating circumstance as an alternative theory to avoid impermissible

> doubling troubles the Court. The Court does not have the benefit of a unanimous finding by the jury on the subject of a predicate offense. The Court is not willing to constitutionally find the aggravating circumstance independent of the jury.

Id. The fact that the trial court gave the aggravating circumstance no weight does not diminish the prejudicial effect. The jury was instructed and likely believed that Mr. Buzia was guilty of Kidnapping. The State spent significant time in its closing argument emphasizing why the jury should find that Mr. Buzia committed a kidnapping. The State argued that Mr. Buzia moved Mrs. Kersch so that he could carrying out his plan of murdering Mr. Kersch. The state argued, "And he executed that plan. I mean, in essence, he executed Mr. Kersch." TR Vol. 15, p. 1972. By allowing the jury to consider an uncharged crime as an aggravating factor, the trial court violated Mr. Buzia's federal due process and Sixth Amendment rights.

This issue was properly preserved below and appellate counsel's failure to raise it on appeal constitutes ineffective assistance of appellate counsel. This error is not harmless. Confidence in the outcome of the appellate process is undermined because had appellate counsel raised this issue on appeal, there is a reasonable probability that Mr. Buzia would not have been sentenced to death.

CONCLUSION AND RELIEF SOUGHT

For all the reasons discussed herein, Mr. Buzia respectfully urges this Honorable Court to grant habeas relief.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Petition for Writ of Habeas Corpus has been furnished by U.S. Mail to Barbara Davis, Assistant Attorney General, 444 Seabreeze Blvd., 5th Floor, Daytona Beach, FL 32118 and John M. Buzia, DOC #E11617, Union Correctional Institution, 7819 NW 228th Street, Raiford, FL 32026 on this ____ day of August, 2010.

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CERTIFICATE OF COMPLIANCE

I hereby certify that a true copy of the foregoing Petition for Writ of Habeas Corpus, was generated in a Times New Roman, 14 point font, pursuant to Fla. R. App. P. 9.210**.**

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