IN THE SUPREME COURT OF FLORIDA

CASE NO.: ~~SC12-482~~
Lower Tribunal No.: 2004-01378 CFAWS

FILED
THOMAS D. HALL
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CLERK, SUPREME COURT
BY

TROY VICTORINO

Petitioner,

v.

KENNETH S. TUCKER,
SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,

Respondent.

PETITION FOR WRIT OF HABEAS CORPUS

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JURISDICTION FOR A WRIT OF HABEAS CORPUS

This is an original action under Fla. R. App. P. 9.100(a). This court has original jurisdiction pursuant to Fla. R. App. P. 9.030 (a) (3) and Article 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 Petitioner Troy Victorino's capital conviction and sentence of death. Petitioner is also sometimes referred to as the "Petitioner" and "Appellant" in this Petition.

Petitioner Troy Victorino, sometimes referred to by "Victorino" and "Defendant" in this Petition, has been sentenced to death. His original, "direct" appeal of his original Judgment and Sentence of Death has already been completed by this reviewing Florida Supreme Court. This Florida Supreme Court affirmed Petitioner's judgment and sentence of death. Victorino v. State, 23 So.3d 87 (Fla. 2009).

Jurisdiction for this Florida State Habeas Corpus Petition lies with this Florida Supreme Court because the fundamental constitutional errors alleged in this habeas corpus Petition involve the appellate review process. *see, e.g.* Smith v. State, 400 So.2d 956, 960 (Fla. 1981), Wilson v. Wainwright, 474 So.2d. 1163 (Fla. 1985), Baggett v. Wainwright, 229 So.2d. 239, 243 (Fla. 1969), *see also* Johnson v. Wainwright, 392 So.2d 1327 (Fla. 1981).

This Petition for a Writ of Habeas Corpus is the proper means for Petitioner Troy Victorino to raise the present claim. *See, e.g.* Downs v. Dugger, 514 So.2d 1069 (Fla. 1987), Riley v. Wainwright, 517 So.2d 656 (Fla. 1987); Wilson, supra.

This Florida Supreme Court has consistently maintained especially vigilant control over capital cases like this one, exercising a special scope of review. *See* Elledge v. State, 346 So. 998, 1002 (Fla. 1977) and Wilson v. Wainwright, supra. This Florida Supreme Court has not hesitated to exercise its inherent jurisdiction to remedy errors which undermine confidence in the fairness and correctness of capital case trial and sentencing proceedings. Wilson, Johnson, Downs, Riley, supra. This petition also presents substantial constitutional questions which go to the heart of the fundamental fairness and reliability of Petitioner Troy Victorino's capital conviction and sentence of death. Hence, this Petition merits serious consideration.

This Florida Supreme Court has the inherent power to do justice with individuals confined within its jurisdiction. The needs of justice call for this Florida Supreme Court to grant the relief sought in this Petition, as this Florida Supreme Court has granted in similar cases in the past. *See*, Wilson, Johnson, Downs, Riley, supra.

This habeas corpus Petition alleges fundamental constitutional error. *See*

Dallas v. Wainwright, 175 So.2d 785 (Fla. 1965), Palms v. Wainwright, 460 So.2d 362 (Fla. 1984). Fundamental error is, of course, reviewable on appeal even without objection or mistrial-motion or other action to "preserve" the issue below. The Florida legislature felt so strongly that certain especially egregious trial errors should be reviewable on appeal even without being preserved below that the Florida legislature codified the "fundamental error" concept as Florida Statutes Section 924.051 (5).

Appellate counsel can be deemed to have rendered ineffective assistance of appellate counsel even with respect to unpreserved errors, if the unpreserved errors rise to the level of "fundamental error." Owen v. Crosby, 354 So.2d 182 (Fla. 2003), Pittman v. State, 2011 WL 2566325.

This Petition also properly sets forth a claim of ineffective assistance of appellate counsel within the Florida Supreme Court's jurisdiction. *See* Knight v. State, 394 So. 2d 997, 999 (Fla. 1981), Wilson v. Wainwright, supra., Johnson v. Wainwright, supra. *See also*, Freeman v. State, 701 So.2d 1055, 1069 (Fla. 2000) and Barwick v. State, 2011 WL 256 6310 (Fla. 2011). Such cases demonstrate that this Florida Supreme Court's exercise of habeas corpus jurisdiction and authority to correct constitutional errors of the type alleged in this Petition.

In Heath v. Jones, 941 F.2d 1126, 1130 (11th Cir. 1991) the Federal Circuit

Court held that the Strickland v. Washington, 466 U.S. 668 (1984) test of ineffective assistance of counsel applies to the work of appellate counsel too.

PARTIES

The Parties to this Petition are the Petitioner Troy Victorino, who is represented by his undersigned, court-appointed counsel, and also Kenneth S. Tucker, Secretary, Florida Department of Corrections, who is represented by the Florida Attorney General's Office identified in the Certificate of Service below.

REFERENCES TO THE JURY TRIAL RECORD AND TO THE FLORIDA SUPREME COURT APPEAL BRIEFS

This Petition comes after this Florida Supreme Court's disposition of Petitioner's first "direct" appeal of Defendant's Judgment and Sentence of Death. Victorino v. State, 23 So.3d 87 (Fla. 2009). This Florida Supreme Court assigned Appeal Number No. SC06-2090 to that appeal and then served its final Opinion ending it on November 25, 2009.

Petitioner's second Florida Supreme Court appeal is currently pending. It is Petitioner's appeal of the trial court's February 17, 2012 order denying Petitioner's motion for postconviction relief. Such "second" appeal is assigned Florida Supreme Court Appeal Number SC12-482. The Petitioner's Initial Brief for such second appeal is filed concurrently with this Petition.

References to the records on appeal for Defendant's same, two Florida Supreme Court appeals are made as follows: References to the record on appeal for Defendant's original "direct" appeal of Defendant's Judgment and Sentences of death are made with the letter "R," followed by the direct-appeal record volume number, followed by the applicable record page number(s). References to the second record on appeal subsequently created for Petitioner's currently pending Florida Supreme Court Appeal Number SC12-482 –the appeal of the trial court's denial of Petitioner's postconviction motion– are made with the letters "PCR," followed by the applicable record volume number, followed by the applicable record page number(s).

This Petition contains references to the appellate briefs filed for the same two Florida Supreme Court appeals.

PETITIONER SUFFERED FROM INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL BECAUSE HIS APPEAL LAWYER FAILED TO ARGUE ON DIRECT APPEAL THAT STATE WITNESS ROBERT ANTHONY CANNON'S REFUSAL TO BE CROSS-EXAMINED DURING PETITIONER'S JURY TRIAL WAS SO GREAT A VIOLATION OF DEFENDANT'S CONSTITUTIONAL RIGHT TO CONFRONT ADVERSE WITNESSES AS TO BE "FUNDAMENTAL ERROR," REVIEWABLE ON APPEAL EVEN WITHOUT A TIMELY MISTRIAL MOTION

This is a death-penalty case. Petitioner Troy Victorino was convicted of murdering six individuals in a house located on Telford Lane in Deltona, Florida.

R9, p. 1531-1555 & R9, p. 1558-1559. All six murders occurred in a single episode the evening of August 6, 2004. *See* Victorino v. State, 23 So.3d 87, 91 (Fla. 2009). The Petitioner remains incarcerated under sentences of death for four of the murders and sentences of life without the possibility of parole for the remaining two murders. R1, p. 29-34 & R9, p. 1531-1555. Victorino v. State, 23 So.3d 87 (Fla. 2009).

Petitioner along with three codefendants named Robert Anthony Cannon and Jerone Hunter and Michael Salas were tried together before the same jury.

The biggest factual issue that Petitioner's jury trial was who did what inside the Telford Lane House. Petitioner Victorino took the stand and testified in his own defense, giving essentially an "alibi" defense that he was at a convenience store and then at a nightclub called Papa Joes and elsewhere at the time of the subject murders. R39, p. 3223-3231. Codefendant Jerone Hunter testified that he and all of the codefendants, including Petitioner Victorino, entered the Telford Lane house and each and every one of the codefendants struck victims with baseball bats. R40, p. 3375-3383. Codefendant Michael Salas likewise testified that all of the codefendants entered the Telford Lane house and all participated significantly in the murders. R41, p. 3515-3556. Codefenant Robert Anthony Cannon ("Cannon") testified that Petitioner Victorino rode in Cannon's vehicle to

the Telford Lane house intending to kill the victims and intimidating the other codefendants into reluctantly going along with his plan to do it. R30, p. 1952. Cannon testified that he, Petitioner Victorino, codefendant Salas and codefendant Hunter all entered the Telford Lane house armed with baseball bats. R30, p. 1053. Cannon admitted he had entered into a negotiated plea agreement but also testified that he wanted out of the deal because he was not guilty. R30, p. 1941-1945, 1954-1063. Cannon then refused to answer any other cross-examination questions. R30, p. 941, 1954-1960. Victorino's trial counsel failed to move for mistrial following this shut-down by Cannon. R30, p. 1969-1973.

More information about Cannon's shut-down, its prejudicial effect and the failure of all of the involved attorneys to timely move for a mistrial in connection with it is set forth in detail in "Issue 2" of Petitioner's Initial Brief for Florida Supreme Court Appeal No. SC12-482 which is filed concurrently herewith. Indeed, Petitioner incorporates by reference herein all of the information and authority relevant to Cannon's shut-down as appears at pages 2-14 and 22-36 of such Initial Brief. The most important point is that Cannon *refused* to answer the following questions (among other questions) during Petitioner's jury trial:

- What he, Cannon, saw when he entered the Telford house. R30, p. 1952-1953.

- What happened when he, Cannon, entered the Telford house. R30, p. 1953.
- What Cannon himself did inside the Telford house. R30, p. 1953.
- How he, Cannon, got to the Telford house and what happened when he arrived there. R30, p. 1953.
- That he admit that he and Salas were involved in a street fight, got jumped by a group of people, prior to the subject murders. R30, p. 1956-1957
- That he admit that, after being attached, he and Salas came up wit a plan to avenge themselves for such attack. R30, p. 1957
- How long he has known Michael Salas. R30, p. 1958
- That he admit that he regards Michael Salas as a brother. R30, p. 1958.
- That he admit that he hardly knows Defendant Victorino. R30, p. 1959.
- That he admit that he, Cannon, and his Co-Defendant and friend, Salas, were the driving force that sought revenge against two individuals named "Abi G" and "Abi M, " whom Cannon and Salas believed were at the Telford house. R30, p. 1959.
- That he admit that he owned the gun that the other witnesses had spoken of. R30, p. 1960.
- That he admit that he and Salas routinely traveled armed with guns and bats. R30, p. 1960.
- How he, a "kid 18 years old" got the money to purchase a brand-new, 2004 Ford Expedition SUV." R30, p. 1961-1962.

- Whether he, Thomas Aichinger and Co-Defendant Salas got together and drafted some letters to fabricate a story blaming everything on Victorino, combined with a plan to escape from jail R30, p. 1965-1966.

- Whether it was his own writing on a letter identified as Defendant's Exhibit A. (apparently a communication regarding the same Aichinger and same scheme). as well as on an April 27, 2005 letter to Ms. Naomi Kogut. R30, p. 1966-1967.

- Who Ms. Naomi Kogut is and whether he wrote her a letter directing her to tell everyone she knew to blame Victorino for the crimes. R30, p. 1969.

As stated above, neither Defendant Victorino's trial counsel nor any other trial attorney made any timely objection or mistrial motion based on Cannon's refusal to be cross-examined constituting a violation of Victorino's right to confront and cross-examine adverse witnesses. Such rights are guaranteed by the 6th Amendment to the U.S. Constitution and by Article 1, Section 16 of the Florida Constitution. The mistrial motion should have been made promptly after Cannon's shut-down. No one did so. R30, p. 1970.

In State v. Victorino, 23 So.3d 97 (Fla. 2009) this Florida Supreme Court specifically *declined* to consider whether Cannon's shut-down violated Petitioner Victorino's constitutional right to confront adverse witnesses as follows:

> Victorino contends that the trial court's denial of his motion for mistrial was erroneous because Victorino's rights under the Sixth

> Amendment to confrontation and cross-examination were violated when a State witness, Cannon, the fourth perpetrator, refused to be cross-examined. Victorino argues that he was prejudiced as a result because Cannon implicated Victorino during his direct testimony. We reviewed and rejected a similar claim in *Hunter*. 8 So.3d at 1065-66. Here, as in *Hunter*, the Sixth Amendment argument was not presented to the trial court. Victorino is not entitled to relief on this unpreserved argument.

Trial counsel's failure to timely object and move for mistrial when Cannon refused to answer cross-examination questions was both "presumptive" ineffective assistance of counsel under United States v. Chronic, 466 U.S. 648 (1984) and "proven" ineffective assistance of counsel under Strickland v. Washington, 466 U.S. 668 (1984).

Under the Chronic, standard, the reviewing court examines the record and the circumstances of trial to determine whether the appellant has been "denied the right of effective cross-examination" which "`would be constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it." Id., at p. 645, citing Davis v. Alaska, 415 U.S. 308 (1974). If the record shows that the Defendant has experienced such a denial of effective cross-examination that there has been a "breakdown in the adversarial system," the conviction must be reversed.

Under the Strickland test of proven "ineffective assistance of counsel, the

appellate courts engage in a *de novo* review because the claim is a mixed question of law and fact. Stephens v. State, 748 So.2d 1028, 1032 (Fla. 1999). The appellate Courts give deference to trial court factual findings that are based on competent, substantial evidence while applying the *de novo* standard of review to both the "deficient performance" and "prejudice" prongs of test of ineffective assistance set forth in Strickland v. Washington, 466 U.S. 668 (1984). Julien v. State, 917 So.2d 213 (Fla. 4th DCA 2005).

Defendant Victorino received presumptive ineffective assistance of counsel under the United States v. Chronic, 466 U.S. 648 (1984) standard. Cannon's testimony against Victorino, followed by Cannon's refusal to answer the cross-examination questions of Victorino's defense counsel, left Victorino without any means of protecting himself from Cannon's accusations and claims. This left Victorino defenseless to his codefendants' efforts to falsely depict Victorino as the evil mastermind who bullied everyone else into participating in his murder scheme.

By extension, Petitioner Victorino suffered from ineffective assistance of appellate counsel when his direct-appeal counsel failed to argue on direct appeal that Cannon's shut-down was such an egregious violation of Victorino's right to confront adverse witnesses that it amounted to "fundamental error," which is

reviewable on appeal even though there was no timely objection or mistrial motion below. Petitioner Victorino's direct-appeal counsel was ineffective in not so raising the Cannon shut-down issue on direct appeal as "fundamental error."

PETTIONER HAD A "WINNING" DIRECT-APPEAL ISSUE OF CANNON'S SHUT-DOWN VIOLATING PETITIONER'S CONSTITUTIONAL RIGHT TO CONFRONT ADVERSE WITNESSES. HOWEVER, PETITIONER'S DIRECT-APPEAL COUNSEL WAS INEFFECTIVE IN FAILING TO PURSUE SUCH ISSUE ON DIRECT APPEAL AS "FUNDAMENTAL ERROR," REVIEWABLE ON APPEAL EVEN WITHOUT A TIMELY MISTRIAL MOTION

Victorino's chances of getting a fair trial ended the moment Cannon left the witness stand without answering Victorino's trial counsel's cross-examination questions. Victorino's trial counsel was ineffective in failing to immediately object and to timely move for mistrial. By extension, Victorino's appellate counsel was ineffective in not pursuing Cannon's shut-down as "fundamental error" reviewable on direct appeal even if the issue was not properly "preserved" by objection and mistrial motion below. As noted by the United States Supreme Court in Powell v. Alabama, 287 U.S. 45 (1932), circumstances of a Defendant's trial can result in denial of a defendant's right to effective counsel and cross-examination notwithstanding the good intentions of the judge and lawyers.

With regard to the Strickland v. Washington 466 U.S. 668 (1984) "proven"

test of ineffective assistance of counsel, it is noteworthy that Mr. Nielsen, Defendant's "second chair" defense attorney, admitted at the evidentiary hearing that failing to promptly move for mistrial following Cannon's shut-down would be a mistake that not even a first-year law student would make. (PCR2, p. 134).

Given the hectic circumstances of Defendant Victorino's trial, it may be impossible to blame any one person for the problems caused by Cannon. Nevertheless, the fact remains that Defendant Victorino received no effective cross-examination of Cannon. The record does not reflect any timely motion for mistrial.

Victorino did not receive any meaningful cross-examination of adverse witness and murder participant Cannon. Cannon unfairly depicted Victorino as ringleader and main killer.

By failing to timely and correctly object and move for mistrial in connection with Cannon's refusal to allow himself to be cross-examined, Defendant's trial lawyers provided ineffective assistance of counsel. This violated Victorino's rights to confront and cross-examine adverse witnesses, as secured by Sixth Amendment of the United States Constitution and by Article 1, Section 16 of the Florida Constitution. It also violated Victorino's right to a fair jury trial as secured by the Sixth and Fourteenth Amendments to the U.S. Constitution and by Article

1, Section 16 of the Florida Constitution. It also violated Victorino's right to due process of law secured by the Fifth and Fourteenth Amendments of the U.S. Constitution and Article 1, Section 9 of the Florida Constitution. It also denied Victorino the right to effective assistance of counsel secured by the Sixth and Fourteenth Amendments to the U.S. Constitution and Article 1, Section 16 of the Florida Constitution.

Likewise, all of the same constitutional protections were violated when Petitioner Victorino's appellate counsel failed to raise Cannon's shut-down as "fundamental error" reviewable on direct appeal without the need for the mistrial motion below.

As indicated in this Florida Supreme Court's online docket for Petitioner's original direct appeal, Florida Supreme Court Case No. SC06-2090, Petitioner's direct-appeal attorney was Mr. J. Jeffery Dowdy, Esquire. He is the same attorney J. Jeffery Dowdy, Esquire that represented Petitioner in the original jury trial proceedings and handled the cross-examination of Cannon. PCR 2, p. 105-120, 119-120. For Mr. Dowdy to then argue on appeal that Cannon's shut-down was "fundamental error" reviewable even without a timely mistrial motion by Mr. Dowdy, Mr. Dowdy would have to subject himself to the embarrassment of admitting he failed to make a timely mistrial motion. Because there is no mistrial

motion reflected in the typed-up jury trial transcripts, it can be argued that Mr Dowdy had a conflict of interest in representing Petitioner on direct appeal. For an attorney to continuing representing someone with whom he has a conflict of interest can be *per se* ineffective assistance of counsel. Cuyler v. Sullivan, 446 U.S. 335 (1980).

Mr. Dowdy testified at the evidentiary hearing on Defendant's postconviction motion that he thought the defense *had* filed a timely motion for mistrial following Cannon's shut-down. PCR 2, p. 105-106. During the evidentiary hearing on Defendant's postconviction motion, there were comments by both court and counsel about the chaotic conditions that existed in the jury courtroom at the time of Cannon's shut-down. PCR 2, p. 105-106, 120, 134, 137-139d, 166, 188, 192. However, insofar as the direct-appeal record on appeal reflects that no timely mistrial motion was made, and because Cannon's shut-down was such an egregious violation of Petitioner's right to confront adverse witnesses, Mr. Dowdy should have erred on the side of caution and should have withdrawn as Petitioner's direct-appeal counsel so that Petitioner could get another attorney who would be comfortable arguing that Cannon's shut-down was "fundamental error," reviewable notwithstanding the lack of a timely mistrial motion below.

"Fundamental error" is error that reaches "down into the validity of the trial

itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error," relief would not be warranted on appeal. Spencer v. State, 842 So.2d 52, 74 (Fla.2003) (quoting Brown v. State, 124 So.2d 481, 484 (Fla.1960)). In the present case, it is likely that the jury "life" and "death" sentence votes would have been different if Cannon had not shut down as he did.

Defendant has a constitutional right to *effective* appellate counsel. Alvord v. Wainwright, 725 F. 2d 1282, 1291 (11th Cir. 1984). The most important aspect of *effective* representation is adversarial testing, and effective cross-examination of witnesses is the key component of adversarial testing. *See e.g.* United States v. Chronic, 466 U.S. 645 (1984), Chavez v. State, 12 So.3d 199 (Fla. 2009).

In the present case, Cannon's shut-down thwarted Petitioner's right to cross-examine adverse witnesses. There is no judicial substitute for the truth-eliciting mechanism of cross-examination. As explained by the U.S. Supreme Court in Crawford v. Washington, 541 U.S. 36 (2004), admitting witness statements simply because they are deemed reliable by a judge is fundamentally at odds with the 6th Amendment, U.S. Constitution right to confrontation.

Wherefore, the Petitioner respectfully requests that this Florida Supreme Court grant the Petitioner habeas corpus relief including but not limited to a new direct appeal in which Petitioner can raise Cannon's shut-down as fundamental

error reviewable even without preservation below.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of this brief has been served to the Attorney General's Office to AAG Kenneth Nunnelley, Esquire, by email at

ken.nunnelley@myfloridalegal.com and

capapp@myfloridalegal.com

and a copy of this brief has been served by U.S. Mail addressed to:

Troy Victorino, DC# 898405
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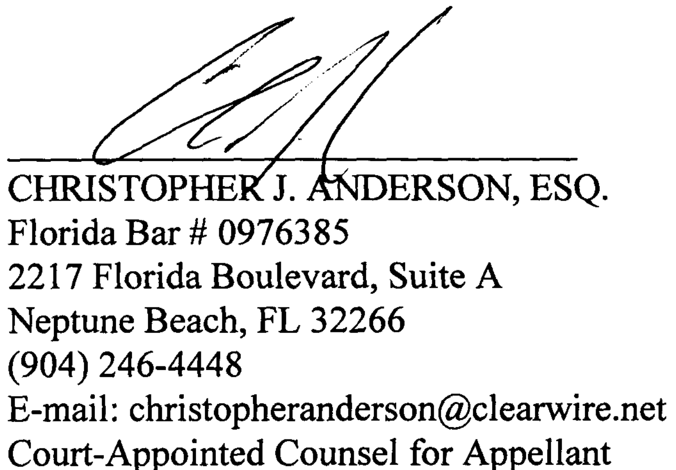
on this 3rd day of October, 2012.



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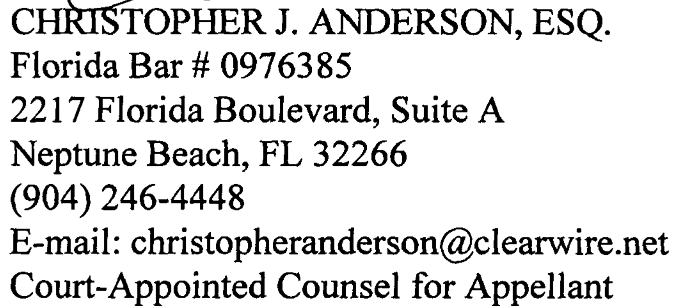
CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief is in Times New Roman 14-point font and thus complies with the font requirement of Rule 9.210, Fla. R. App. P.



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