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IN THE SUPREME COURT OF FLORIDA

MICHAEL HERNANDEZ, JR.,

Petitioner,

v.

CASE NO. _____

MICHAEL D. CREWS,

Respondent.

PETITION FOR WRIT OF HABEAS CORPUS

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COUNSEL FOR PETITIONER

JURISDICTIONAL STATEMENT

This Court has original jurisdiction over Petitions for Writ of Habeas Corpus. Rules 9.03 (a) (3) and 9.100 (a), Fla.R.App.P.; Art. V, Section 3 (b) (9), Fla. Const. As required by Rule 9.142 (b) (4), Fla.R.App.P., the instant petition accompanies the initial brief filed by Mr. Hernandez on the appeal from the denial of his motion for postconviction relief, Case No. SC13-718. A habeas petition is the proper vehicle to raise claims of ineffective assistance of appellate counsel. Wickham v. State (SC11-1193, decided May 2, 2013).

PRELIMINARY STATEMENT

This petition raises a claim that appellate counsel in Petitioner's direct appeal from his conviction and death sentence was ineffective. The record on his direct appeal, Case No. SC07-647, includes seven numbered volumes of pleadings and orders, and fifteen separately numbered volumes of transcript. Petitioner will cite to this record in the same manner as he did in his appeal from the denial of postconviction relief, Case No. SC13-718: Petitioner will cite to the seven volumes of pleadings and orders as "TR," and to the fifteen volumes of transcript as "TT." Petitioner will cite to the record on his postconviction appeal as "R."

STANDARD OF REVIEW

The standard of review for ineffective appellate counsel claims mirrors the Strickland [v. Washington, 466 U.S. 668 (1984)] standard for ineffective assistance of trial counsel. *Id.* In order to grant habeas

relief on ineffectiveness of appellate counsel, this Court must determine:

first, 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) (citing Johnson v. Wainwright, 463 So. 2d 207, 209 (Fla. 1985)). And appellate counsel will not be deemed ineffective for failing to raise meritless issues or issues that were not properly raised in the trial court and are not fundamental error. Valle [v. Moore], 837 So. 2d [905] at 908 [Fla. 2002].

Wickham, slip opinion at 33-34.

FACTS AND PROCEDURAL HISTORY

On December 13, 2004, Hernandez was indicted for first degree murder and robbery (1TR 10-11). On February 6, 2007, a jury convicted him on both counts and also on a charge of burglary (2TR 323-25). By an 11-1 vote, the jury recommended a death sentence, and Judge Larry Swanson imposed a death sentence, finding four aggravators (prior violent felony, murder committed during a robbery, avoid arrest, and HAC), one statutory mitigator (no significant criminal history) and several nonstatutory mitigators (3TR 419, 459-79). This Court affirmed. Hernandez v. State, 4 So.3d 642 (Fla. 2009). A motion for reconsideration was denied, and the United States Supreme Court denied certiorari

on October 5, 2009. Hernandez v. Florida, 130 S.Ct. 160 (2009). On September 28, 2010, Hernandez filed a 65-page Motion to Vacate Conviction and Sentence (2R 201-65). The State filed its answer on November 29, 2010 (2R 275-323). Following evidentiary hearing and the submission of written argument, Judge David Rimmer issued an order denying relief on March 28, 2013 (7R 1290-1344). Petitioner perfected an appeal from that order, which is pending in this Court as Case No. SC13-718. Petitioner's brief in that case is filed contemporaneously with the instant petition.

This Court summarized the evidence in its opinion on direct appeal. Hernandez v. State, 4 So.3d 642, 647-54 (Fla. 2009). Stated briefly, Michael Hernandez, Jr., lived near his mother's first husband, Richard Hartman, Jr. and Richard's current wife Daveine Tammy Hartman, and worked with Shawn Arnold - the father of Tammy's granddaughter. One morning, Michael and Shawn smoked crack cocaine and Shawn drove them to the home of Ruth Everett, whose son was a drug dealer. Finding the son absent, Shawn directed Michael to push Mrs. Everett into the living room and into a recliner. Shawn retrieved a pillow and began smothering her. At some point her neck was broken, and then Michael cut her throat. Mr. Everett died from her broken neck, her cut throat, or both. Shawn grabbed the purse, and they left, using her ATM card to obtain money they spent on more cocaine. They turned themselves in the next day.

Forensic psychologist Dr. Harry McClaren testified for the State at sentencing. Inter alia, he "opined that Hernandez was not under extreme mental or emotional disturbance. McClaren explained that Hernandez was intoxicated on cocaine, which in McClaren's belief, did not give rise to the level of the statutory mitigating circumstance." 4 So.3d 654. The sentencing court rejected the statutory mental mitigators. *Id.*, footnote 8.

CLAIM

APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE ANY ISSUE ON APPEAL ABOUT THE TESTIMONY OF THE STATE'S PSYCHOLOGIST, HARRY McCLAREN, THAT MENTAL IMPAIRMENTS MUST RISE TO THE LEVEL OF PSYCHOSIS BEFORE THEY CAN SATISFY THE EXTREME MENTAL OR EMOTIONAL DISTURBANCE STATUTORY MITIGATOR

At the penalty phase of Petitioner's trial, the State's psychologist, Dr. Harry McClaren, testified on direct examination that, in his opinion, Petitioner's mental state at the time of the murder did not rise to the level of the statutory mitigator of extreme mental or emotional disturbance (18TT 2471). Asked by the prosecutor what *would* rise to the level of that statutory mitigator, Dr. McClaren answered:

A person who was suffering from a psychosis, a break from reality, experiencing delusions, false beliefs that someone was poisoning him, controlling him with witchcraft, voodoo, cosmic rays, hearing voices or seeing things that were scaring him, urging him to do things that were wrong to the extent --

(18TT 2472). Petitioner's trial attorney Michael Rollo objected on the ground that this testimony was addressing "an insanity defense" rather than mitigation (18TT 2472). The trial court overruled the objection, believing Dr. McClaren's testimony to be a matter of "weight, not admissibility" (18TT 2473).

Dr. McClaren's testimony was a serious misstatement of law. In effect, he was saying that the mitigator of extreme mental or emotional disturbance could be established only if the defendant meets the standard for insanity. But such a defendant would be entitled to an acquittal by reason of insanity. Mental mitigation is that which diminishes a defendant's moral culpability for the murder for which he has been convicted. It most emphatically does not have to amount to a defense to the crime, or completely excuse the defendant's conduct. E.g., Penry v. Lynaugh, 492 U.S. 302 (1989) (the sentencer *must* be able to give mitigating effect to mental impairments falling short of an actual defense to the crime). While mental health experts are entitled to express their opinions about a defendant's mental acuity, they have no more right than any other witness to misstate the law. It has been the law in this State for the past 40 years that the extreme mental or emotional disturbance statutory mitigator means "*less than insanity* but more than the emotions of an average man, however inflamed." State v. Dixon, 283 So.2d 1, 10 (Fla., 1973) (emphasis supplied). Accord, Mines v. State, 390 So.2d 332, 337 (Fla., 1980) ("The finding of sanity . . . does not eliminate consideration of the

statutory mitigating factors concerning mental condition."); Campbell v. State, 571 So.2d 415, 418-19 (Fla., 1990) (trial court erred by rejecting statutory mental mitigator on the ground that the defendant was not insane; mental impairments falling short of insanity can be mitigating). Dr. McClaren, however, told the jury (and the trial judge, who ultimately imposed the death sentence) that one of the most important and weighty statutory mitigators¹ was established *only if the defendant was insane*. And that misstatement was picked up by the prosecutor in the State's closing argument, delivered only a few minutes later:

I'm not going to stand here and say that [the defendant] could not have [mental disorders]. Because there are things, you look at his behavior over the years. And you look at his behavior and you say, "Yes, anti-social. Impulsive." No question.

But you heard, I made sure that you heard from Dr. McClaren that these disorders are not what caused the murder of Ruth Everett. Their experts didn't say so either.

They are not what caused it. He was not under the influence of a severe mental disorder that caused it.

And Dr. McClaren explained to you what that means, a person who is suffering from a severe postpartum depression that borders on psychosis. Or he is suffering from a psychosis, and they are overcome by the mental disorder, that's what this mitigator applies to. And it does not apply to Michael Hernandez during the killing of Ruth Everett.

(18TT 2522).

¹Rose v. State, 675 So.2d 567, 573 (Fla. 1996) ("we have consistently recognized that severe mental disturbance is a mitigating factor of the most weighty order").

Florida capital juries do not identify what mitigators they have found, but the sentencing judge rejected the substantial impairment statutory mitigator (3TR 464-67). Since the only expert testimony presented on this issue other than that of Dr. McClaren was that Petitioner was suffering from extreme mental or emotional disturbance at the time of the murder, Dr. McClaren's testimony must have been *the* significant factor in the rejection of this statutory mitigator,

Trial counsel preserved the issue for appeal by objecting to Dr. McClaren's testimony. Appellate counsel should have raised an issue about this improper testimony and argument. Appellate counsel's failure to do so was deficient attorney performance. The deficient performance was prejudicial because, on appeal, the improper testimony would have been reversible error unless the State could have shown the error to be harmless beyond a reasonable doubt. Because the State could not have met this standard, this Court would have reversed and remanded for a resentencing. Habeas relief should be granted on this issue.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to Charmaine Millsaps, Assistant Attorney General, Office of the Attorney General, the Capitol, Tallahassee, FL 32399-1050, by electronic mail sent to capapp@myfloridalegal.com, this 3rd day of December, 2013.

/s/ _____
CURTIS M. FRENCH

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this computer-generated brief is filed in Times New Roman 14-point font in compliance with Rule 9.100 (a) (2), Fla.R.App.P.

/s/ _____
CURTIS M. FRENCH