

IN THE SUPREME COURT OF FLORIDA

NO. _____

CHARLIE THOMPSON,

Petitioner,

v.

MICHAEL W. MOORE,
Secretary, Florida Department of Corrections,

Respondent.

PETITION FOR WRIT OF HABEAS CORPUS

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PRELIMINARY STATEMENT

This is Mr. Thompson's first habeas corpus petition in this Court. Art. 1, Sec. 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 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. Thompson was deprived of the right to a fair, reliable, and individualized sentencing proceeding and that the proceedings resulting in his conviction and death sentences violated fundamental constitutional imperatives.

Citations shall be as follows: The record on appeal concerning the trial court proceedings shall be referred to as "R. ____" followed by the appropriate page number. The post-conviction record on appeal will be referred to as "PC-R. ____".

All other references will be self-explanatory or otherwise explained herein.

INTRODUCTION

There were errors which occurred at Mr. Thompson's capital trial and sentencing which were not presented to this Court on direct appeal due to the ineffective assistance of appellate counsel. Appellate counsel failed to challenge the jury selection process which allowed a prejudicial juror to remain on

the jury panel that both convicted and sentenced the Petitioner to death. Thus, this argument was procedurally barred. Appellate counsel failed to present argument or allege grounds showing the trial courts error.

The issue which appellate counsel neglected demonstrates that counsel's performance was deficient and that the deficiencies prejudiced Mr. Thompson. "[E]xtant legal principles...provided a clear basis for ... compelling appellate argument[s]." Fitzpatrick, 490 So. 2d at 940. Neglecting to raise a fundamental issue 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. Wainwright, 474 So. 2d 1162, 1164 (Fla. 1985). Individually and "cumulatively," Barclay v. Wainwright, 444 So. 2d 956, 959 (Fla. 1984), the claim 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).

Additionally, this petition presents questions that should have been ruled on in the direct appeal, in order to correct error in the appeal process that denied fundamental constitutional rights. As this petition will demonstrate, Mr. Thompson is entitled to habeas relief.

PROCEDURAL HISTORY

The Circuit Court of the Thirteenth Judicial Circuit, Hillsborough County, Florida, entered the judgments and sentences.

Mr. Thompson was originally charged by indictment on September 17, 1986, and on January 14, 1987, the grand jury amended to first-degree murder (2 counts) by shooting with a firearm and/or stabbing with a knife or other sharp instrument (R. 24).

After a jury trial, Mr. Thompson was found guilty of Counts I, II, III and IV on March 16, 1987 (OR. 1064). On March 16, 1987, the jury rendered an advisory verdict of death by a vote of 9-3 (OR. 1064).

On April 6, 1987, the trial court sentenced Mr. Thompson to death for Counts I and II and imposed life sentences for Counts III and IV (OR. 1265-1266).

On July 20, 1989, the Florida Supreme Court reversed and remanded for a new trial. Thompson v. State, 548 So. 2d 198 (Fla. 1989). The Court reversed on two issues: 1. Prosecution's unlawful use of peremptory challenges to exclude blacks from the jury; and 2. Constitutional error based on the admission of the defendant's confession.

On remand, a jury again found Thompson guilty and recommended death by a vote of 7-5 on both murder counts. The

trial court imposed two death sentences and two consecutive life sentences for the kidnaping (R. 8-9).

On January, 30, 1992, the Florida Supreme Court again reversed and remanded for a new trial. Thompson v. State, 548 So.2d 198 (Fla. 1989).

On October 8, 1992, after the third jury trial, Mr. Thompson was found guilty of Counts I, II, III and IV. (R. 158-160; T. 438-439). On October 9, 1992, the jury recommended death by a vote of 7-5 (R. 168; T. 575).

The trial court found six aggravating factors: prior felony conviction; murder committed while engaged in a kidnaping; murder committed to avoid arrest; murder committed for pecuniary gain; murder especially heinous, atrocious, or cruel; and murder committed in a cold, calculated, and premeditated manner. The court also found that evidence failed to establish extreme mental or emotional disturbance and substantially impaired capacity, but did give some weight to non-statutory mitigating factors including chronic mental illness, moderate disturbance, symptoms of mental illness, family background, and mental retardation.

On December 28, 1992, Mr. Thompson was sentenced to death for the murders of William Swack and Nancy Walker and consecutive life sentences on each kidnaping. (R. 226).

On November 23, 1994, the Florida Supreme Court affirmed Mr. Thompson's convictions and sentences on direct appeal. Thompson

v. State, 648 So.2d 692 (Fla. 1994), cert. denied, 115 S. Ct. 2283 (1995).

On April 7, 1999, Mr. Thompson filed a motion to vacate judgments of conviction and sentence asserting that his conviction and sentence of death were obtained in violation of the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, and the corresponding provisions of the Florida Constitution.

The post-conviction motion was summarily denied without an evidentiary hearing by order of the Honorable Judge Diana Allen dated the 18th of August, 1999. Presently, Mr. Thompson has prepared and filed this petition seeking habeas corpus relief which is filed simultaneously with his initial brief for the appeal of the trial court's summary denial of postconviction relief.

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 Article V, sec. 3(b)(9), Fla. Const. The petition presents constitutional issues which directly concern the judgment of this Court during the appellate process, and the legality of Mr. Thompson's sentence of death.

Jurisdiction in this action lies in this Court, see, e.g., Smith v. State, 400 So. 2d 956, 960 (Fla. 1981), for the fundamental constitutional error challenged herein arises in the context of a capital case in which this Court heard and denied Mr. Thompson's direct appeal. See Wilson, 474 So. 2d at 1163; Baqqett 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. Thompson to raise the claim 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. 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 a claim involving fundamental constitutional error. See Dallas v. Wainwright, 175 So. 2d 785 (Fla. 1965); Palmes v. Wainwright, 460 So. 2d 362 (Fla. 1984). The Court's exercise of its habeas corpus 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. Thompson's claims.

GROUND'S FOR HABEAS CORPUS RELIEF

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

CLAIM ONE

**MR. THOMPSON'S APPELLATE COUNSEL WAS
INEFFECTIVE FOR FAILING TO RAISE IN THE
DIRECT APPEAL A CLAIM THAT THE TRIAL COURT
ERRED IN ALLOWING A JUROR TO BE EMPANELED
WHO EXPRESSED DOUBTS DURING JURY SELECTION
ABOUT HER ABILITY TO AFFORD MR. THOMPSON HIS
CONSTITUTIONAL RIGHT NOT TO TESTIFY DURING
THE TRIAL**

During jury selection in Mr. Thompson's case the following dialog occurred between defense counsel and prospective jurors:
[R. 39, 40].

DEFENSE COUNSEL: Saying to you that this man and every criminal defendant in the State of Florida has the right to remain silent that he need not say anything to you. That is the law and the court will instruct you, more than likely, that that is the law. And if he chooses to remain silent you cannot say, heck, maybe he did it because he didn't speak, or maybe he knows something he didn't speak.

PROSPECTIVE JUROR NO. 32: I understand.

DEFENSE COUNSEL: It's his right to remain silent. Are we all together on that?

PROSPECTIVE JUROR NO. 32: Yes.

DEFENSE COUNSEL: Is there anyone else? Is there anybody else other than those two who might have difficulty with following the law? Tell me your name ma'am.

PROSPECTIVE JUROR NO. 13 LEONORA WALCOTT: I would have difficulty even if it's not the law. I would have difficulty because I would figure that he should speak for his life.

Later in the record a similar dialog took place between defense counsel Frank Johnson and the prospective jurors: [R. 49].

DEFENSE COUNSEL: Now, if the court tells us that the defendant in any criminal case has an absolute right to remain silent-

PROSPECTIVE JUROR NO. 15: I understand that.

DEFENSE COUNSEL: He need say nothing at all. He need say nothing and you cant imply anything by his right to remain silent putting anything forth or taking anything away. Would you still have difficulty with that?

PROSPECTIVE JUROR NO. 15: I'm having difficulty with it right now.

DEFENSE COUNSEL: Let's leave it like that. Would you say , Mr. Hebble, that you would have difficulty with that concept?

PROSPECTIVE JUROR NO. 15: You got that right.

DEFENSE COUNSEL: All right. Thank you. Anyone else have difficulty with that concept?

PROSPECTIVE JUROR NO. 13 (Leonora Walcott): I told you that I did.

DEFENSE COUNSEL: You told me yes.

Later in the jury selection process defense counsel Johnson moved for Prospective Juror number 15 to be removed for cause because he, Mr. Hebble, could not follow the law. [R. 57, 58]. Inexplicably, counsel did not move the court to remove Prospective Juror No. 13, Leonaora Walcott, for cause. The court accepted her as a juror. [R. 60, 61]. Appellate counsel for Mr. Thompson did not raise make a claim on direct appeal that the trial court erred in allowing juror Leonora Walcott to remain on the jury panel.

Under Florida law if there is a basis for any reasonable doubt as to any juror's possessing that state of mind which will enable him or her to render as impartial verdict based solely on the evidence submitted and the law announced at trial he or she should excused on motion of a party or by the court's own motion. As early as 1937 in Powell v. State, 175 So. 213 (Fla. 1937). The Florida Supreme Court addressed the issue of a juror who expressed doubts about the defendants right to remain silent. The Court stated:

The accused, guilty or innocent, is entitled to the presumption of innocense in the mind of every juror until every element of the offense charged against him has been proved by competent evidence adduced upon the trial beyond a reasonable doubt. This is not accomplished when a juror is taken upon a trial whose mind is in such condition that the accused must produce evidence of his innocense to avoid a conviction at the hands of that juror. It is not enough that a opinion will readily yield to the evidence,

for evidence of innocence is not required to be presented by the accused. [id. at 216, *emphasis added*]

Many subsequent Florida cases have followed the reasoning of the Court in Powell. In Singer v. State, 109 So.2d 7 (Fla. 1959), the Court found that a juror who stated he was not sure he could render a verdict without being influenced by opinion he had formed from what he had read about the case should have been dismissed by the court or upon request of defense counsel. [id at 23,24].

In the case of Huber v. State, 669 So.2d 1079 (Fla. 4th DCA 1996) the Fourth District Court of Appeals held, in a case with facts strikingly similar to the case at bar, that it was error to fail to dismiss a prospective jurors who expressed doubts as to whether they could follow the law on presumption of innocence, proof beyond a reasonable doubt, and a intoxication. In that case the questioning of the jurors went as follows:

COURT: Okay. Mr. Kethman, let ask you, can you look at the defendant as he sits here today and presume him to be innocent of the charge?

MR. KETHMAN: No.

COURT: Why not? Do you believe because he is here - -

MR. KETHMAN: I had a lot of children and I would be prejudiced that way.

COURT: Okay. Just because he is a defendant in a criminal case?

MR. KETHMAN: Right, with that type of - -
COURT: Now, you indicated a moment ago that you could follow my instructions on what the law is. Okay. If I told you that you have to presume the defendant innocent, as he sits here before you now, to be innocent of the charge, would you have a problem with that?

MR. Kethman: No.

In finding that the juror should have been dismissed for cause the Court stated:

This court has held that it is error not to grant a challenge for cause when there is a basis for any reasonable doubt as to the juror's ability to render an impartial verdict, and that close cases should be resolved in favor of excusing the juror rather than leaving doubt. Langshore v. Fronrath Chevrolet Inc., 527 So.2d 922 (Fla. 4th DCA 1988). Further, when a juror admits that he "probably" would be prejudiced, but says he "probably" could follow the judges instructions, it is error for the trial judge to refuse to dismiss him for cause. Imbimbo v. State, 555 So.2d 954 (Fla. 4th DCA 1990). Finally, in Street v. State, 592 So.2d 369, 372 (Fla. 4th DCA 1992), we found it was error not to excuse for cause a juror whose responses "were sufficiently equivocal to raise a concern that reasonable people could differ as to whether [the juror] would have been able to lay aside any biases or render a verdict solely on the evidence." Thus, on the above authority, it was error for the trial court in the case at bar to refuse to dismiss prospective juror Kethman for cause. [id 1081].

The Court in Huber also found error in the trial court empaneling a juror based of the following exchange during jury selection:

DEFENSE: Are these the words that you used. Let me follow that up. Do you believe that the fact that there has been an arrest made of my client is an indication that my client did something wrong?

MR. STAGLIANO: There's doubt in my mind, yeah you know. Im not saying yeah, there's a doubt in my mind.

DEFENSE: Now, there is doubt in your mind as to whether you can presume him a hundred percent innocent right now, is that what your saying?

MR. STAGLIANO: Right.

In finding reversible error in the trial court empaneling this juror the Court stated:

Even though prospective juror Stagliano eventually said he would be able to follow the law and require the state to prove its case beyond a reasonable doubt, his original expression of doubt about his ability to presume the defendant innocent because he believes that police don't arrest innocent people is a basis for reasonable doubt that he might not be able to render an impartial verdict. This was not overcome by his subsequent capitulation and agreement that he would follow the law as given by the trial court, and it was error not to dismiss Mr. Stagliano for cause. [id at 1081].

The trial court committed reversible error for allowing Leonora Walcott to be empaneled on the jury to hear Mr. Thompson's case. She had clearly expressed doubts about her abilities to afford Mr. Thompson the presumption of innocence and his right to remain silent during the trial. Her mind was of a condition that Mr. Thompson would have had to produce evidence of

his innocence to avoid a conviction at her hands. Most assuredly, her responses were sufficiently equivocal to raise a concern that reasonable people could differ as to whether she could lay aside any bias or prejudice or render a verdict solely on the evidence. Under Florida law, the trial court had the legal responsibility to dismiss her for cause either at request of defense counsel, or in the court's own motion. Appellate counsel for Mr. Thompson was ineffective for failing to raise this claim on direct appeal. A properly pled direct appeal claim including this claim would have led to reversal of Mr. Thompson's conviction and sentence.

CONCLUSION AND RELIEF SOUGHT

For all the reasons discussed herein, Mr. Thompson respectfully urges this Court to grant habeas corpus relief and grant a new trial and/or sentencing.

CERTIFICATE OF SERVICE

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, to all counsel of record on **March 6, 2000.**

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