SUPREME COURT OF FLORIDA

HECTOR SANCHEZ-TORRES,

Appellant/Petitioner,

v.

Case Nos. SC19-211; SC19-836

STATE OF FLORIDA,

Appellee,

MARK S. INCH, etc.,

Respondent.

_____/

MOTION TO PERMIT SUPPLEMENTAL BRIEFING AFTER APPEAL

On March 12, 2020, this Court affirmed the denial of Appellant Hector Sanchez-Torres's motion for postconviction relief and denied his accompanying petition for a writ of habeas corpus. Mr. Sanchez-Torres has filed a motion for rehearing of that decision under Fla. R. App. P. 9.330, based on factual inaccuracies and legal errors in the Court's opinion. Mr. Sanchez-Torres's rehearing motion is pending.

In this separate motion, Mr. Sanchez-Torres brings to the Court's attention a matter that may be outside the technical scope of a rehearing motion under Rule 9.330, but nevertheless calls for the exercise of this Court's inherent authority to correct miscarriages of justices on appeal. Mr. Sanchez-Torres respectfully requests

that this Court permit post-appeal supplemental briefing by Mr. Sanchez-Torres's undersigned counsel, who was assigned to the case only after Mr. Sanchez-Torres's prior appellate counsel, attorney Robert Berry, briefed and argued the case before the March 12 decision.

This Court should permit supplemental briefing because Mr. Berry, who briefed and argued the entire case by himself prior to the Court's March 12 opinion, failed to brief most of Mr. Sanchez-Torres's claims entirely and omitted other critical facts and arguments. After oral argument, but before the Court issued its March 12 opinion, Mr. Berry withdrew from the case and was replaced by the undersigned. Upon reviewing the briefing and argument conducted by Mr. Berry, particularly in light of the Court's March 12 opinion, the undersigned, Mr. Sanchez-Torres's current counsel, submits that supplemental briefing is appropriate because of Mr. Berry's inadequate briefing. This Court was led astray as to several points of law and fact that deserve reconsideration in order to avoid a miscarriage of justice in Mr. Sanchez-Torres's appeal.

Mr. Sanchez-Torres raised twelve claims in his amended supplemental 3.851 brief in the circuit court. This Court recited the preserved claims in its March 12 opinion as follows:

> Sanchez-Torres's motion raised the following ineffective assistance of counsel claims: (1) failure to investigate and present penalty phase witnesses to establish mitigating circumstances; (2) failure to investigate and present penalty phase testimony from a mental health

> expert to prove mitigating circumstances; (3) failure to ask that the penalty phase be held separately from the hearing held to comply with Spencer v. State, 615 So. 2d 688 (Fla. 1993); (4) failure to file a motion for continuance of trial; (5) failure to file a motion to suppress involuntary statements; and (6) failure to adequately prepare for trial and failure to advise Sanchez-Torres of his rights and the nature of the charges against him, resulting in a plea that was not knowing, intelligent, and voluntary. In addition, Sanchez-Torres alleged: (7) newly discovered evidence based on Hurst v. Florida, 136 S. Ct. 616 (2016); (8) newly discovered testimony by a codefendant asserting that Sanchez-Torres was not the shooter; (9) Sanchez-Torres's death sentence is unconstitutional under Hurst v. State, 202 So. 3d 40 (Fla. 2016); (10) cumulative error in counsel's guilt and penalty phase performance; (11) Sanchez-Torres may be incompetent at the time of execution; and (12) lethal injection is cruel and unusual.

Slip. Op., at 5, fn. 1. The circuit court dismissed the last two of those claims without prejudice. The circuit court ruled on the merits in its opinion denying Mr. Sanchez-Torres relief on the 10 remaining claims. *See* PCR 1066-1109.

After prior counsel submitted a notice of appeal divesting the circuit court of jurisdiction and withdrew from the case, Mr. Berry was assigned the case. In Mr. Sanchez-Torres's initial brief before this court, Mr. Berry only raised three of the ten claims that received a merits ruling in the circuit court. Mr. Berry raised the following claims: (1) The trial court erred in denying the Defendant's motion for post-conviction relief with regard to the issue of whether his plea was knowing and intelligent; (2) The trial court erred in denying the defendant's motion for post-conviction relief with regard to his whether his advisory jury waiver was knowing and intelligent; and (3) the trial court erred in denying the Defendant's motion for

post-conviction relief with regard to his claim a motion to suppress should have been filed on his behalf. *See* Initial Brief of Appellant (filed 5/20/2019). Other appellate issues were abandoned.

This is exactly the kind of deficient representation that this Court had gone out of its way to comment on in the past. In *Wilson v. Wainwright*, 474 So. 2d 1162 (Fla. 1985), this Court noted the constitutional and ethical responsibility of attorneys who represent death-sentenced inmates:

> We do not approve of counsel urging frivolous claims, nor do we require that every colorable claim, regardless of relative merit, be raised on appeal. However, the basic requirement of due process in our adversarial legal system is that a defendant be represented in court, at every level, by an advocate who represents his client zealously within the bounds of the law. Every attorney in Florida has taken an oath to do so and we will not lightly forgive a breach of this professional duty in any case; in a case involving the death penalty it is the very foundation of justice.

Id. At 1164. And in *Peede v. State*, 748 So. 2d 253, 256 n.5 (Fla. 1999), this Court went out of its way to "remind counsel of the ethical obligation to provide coherent and competent representation, especially in death penalty cases, and we urge the trial court, upon remand, to be certain that Peede receives effective representation." Mr. Sanchez-Torres did not receive effective representation and that basic requirement of due process was not met.

Appellant counsel, particularly in a death-penalty case, has an important and widely recognized ethical duty to do what is in the best interest of his client. There

is a constitutional requirement that appellate counsel, in order to provide effective assistance of counsel, raise all arguably meritorious claims during direct review. *See Smith v. Robbins*, 528 U.S. 259, 285–86 (2000). While this constitutional requirement has not been explicitly required of collateral appellate counsel, prevailing professional norms demand the exact same requirement, particularly in a death-penalty case, to argue all arguably meritorious issues. *See* American Bar Association, *Guidelines for the Appointment & Performance of Defense Counsel in Death Penalty Cases*, 10.5.1 (2003); *See also McLaughlin v. Steele*, 173 F. Supp. 3d 855, 864 (E.D. Mo. 2016) (noting that accompanying ABA commentary states that "postconviction counsel should seek to litigate all 'arguably meritorious' issues"). The decision by Mr. Berry to drop several meritorious claims was entirely unreasonable and without any possible strategy.

Because this Court did not have the opportunity to review the meritorious claims, due process has been denied for Mr. Sanchez-Torres. *See Spalding v. Dugger*, 526 So. 2d 71 (Fla. 1988). Under Fla. R. App. P. 9.330(a)(2)(A), a motion for rehearing shall address "points of law or fact" that "in the opinion of the movant, the court has overlooked or misapprehended in its order or decision." This rule covers claims that were briefed in front of this Court. Under Fla. R. App. P. 9.142(b)(3), a death-sentenced prisoner may file a petition for belated appeals if no appeal was ever filed during the collateral proceeding. *See Franqui v. State*, 81 So.

3d 414 (Fla. 2012) (granting a petition for belated appeal after no appeal was filed "due to collateral counsel's failure to properly comprehend the provisions of the rules of criminal procedure and the rules of appellate procedure"). Appellant is currently stuck in a vacuum between these two rules: there was an appeal filed in this case, but there were several claims that were not briefed in front of this Court. Therefore, Appellant is simply requesting something analogous to rehearing and clarification, while recognizing that this Court's erroneous decision in this case was based on deficient appellate representation that may not have been apparent to the Court at the time. This Court established a rehearing and clarification rule to correct erroneous decisions. Under Fla. R. App. P. 9.330(a)(2)(A), a motion for rehearing shall address "points of law or fact" that "in the opinion of the movant, the court has overlooked or misapprehended in its order or decision." Because of Mr. Berry, there are several points of law and fact that this Court overlooked or misapprehended through no fault of this Court. Because Mr. Berry failed to raise several meritorious claims, for no strategic or otherwise reasonable justification, this Court did not have the ability to address properly meritorious claims upon which Mr. Sanchez-Torres, who is facing a death sentence, could have received relief. But Rule 9.330(a)(2)(A) does not allow for newly raised claims in a rehearing motion, so Mr. Sanchez-Torres has filed this separate motion, with summaries of the claims herein, and instead requests that the proceeding be reopened and supplemental briefing of the claims

ordered. With supplemental briefing, the Court will have the information necessary to correct the March 12 opinion's errors that flowed from Mr. Berry's prior briefing and argument.

Below is a summary of the meritorious claims—preserved below—upon which this Court should order supplement briefing in order to afford Mr. Sanchez-Torres the full opportunity to present the issues to this Court.

- Trial counsel was ineffective for failing to put on any mitigation from expert witnesses. Two expert witnesses testified during the postconviction proceedings below that Mr. Sanchez-Torres suffered from "severe" and "chronic" cognitive problems and that he had a "submissive" and "dependent" personality. This information would have properly informed the sentencer, whether judge or jury, and likely resulted in a sentence of life. However, trial counsel failed to provide critical information to the expert retained for trial, including a finding by another psychologist that Mr. Sanchez-Torres was acting under extreme emotional distress around the time of the murder.

- Trial counsel was ineffective for failing to investigate, develop, and present mitigation from lay witnesses. Trial counsel failed to conduct an adequate investigation. What investigation trial counsel did conduct began on the eve of trial and was conducted throughout the months-long penalty phase. Because of this, trial counsel failed to present testimony from several witnesses, some of whom were called but not asked about critical periods in Mr. Sanchez-Torres's life. This information would have humanized Mr. Sanchez-Torres for the sentencer, whether judge or jury, and likely resulted in a sentence of life.

- Trial counsel was ineffective for failing to request a separating hearing for the penalty phase and the *Spencer* hearing.[1]

- Trial counsel was ineffective for failing to file a motion to continue despite conducting no guilt phase preparation and admitting during the plea colloquy that trial counsel was not prepared to begin the penalty phase.

[1] *Spencer v. State*, 615 So. 2d 688 (Fla. 1993).

- The cumulative error resulting from trial counsel's ineffective assistance of counsel. Under *Strickland v. Washington*, 466 U.S. 668 (1984), IAC claims are considered cumulative as a matter of law. It is unfathomable that a reasonably competent attorney would ever appeal the denial of some ineffective assistance of counsel claims, but not the denial of the cumulative effect of all ineffective assistance of counsel claims.

- Mr. Sanchez-Torres's death sentence is unconstitutional in light of *Hurst v. Florida*, 136 S. Ct. 616 (2016). While Mr. Sanchez-Torres recognizes that the state of the law is currently in flux, Mr. Sanchez-Torres could not have waived his right to a unanimous jury recommendation knowingly, intelligently, and voluntarily. *See Halbert v. Michigan*, 545 U.S. 605 (2005).

- Mr. Sanchez-Torres's codefendant, Markeil Thomas, confessed to being the sole shooter. While Mr. Thomas recanted the confession, because of the materiality and reliability surrounding the sworn statement, it would be admissible at a new trial under *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973) and thus would result in a new trial under Florida's newly discovered evidence law. *See Jones v. State*, 591 So. 2d 911, 915 (Fla. 1991) (a new trial is required if newly discovered evidence would "probably produce an acquittal on retrial"); *See also Marek v. State*, 14 So. 3d 985, 990 (Fla. 2009) (a sentence can be vacated if newly discovered evidence would "probably yield a less severe sentence" on retrial).

Further light is shed on Mr. Berry's inadequate representation by reviewing the Petition for Writ of Habeas Corpus filed in this case. *See* Petition for the Writ of Habeas Corpus (filed May 20, 2019). In the habeas petition, Mr. Berry argued three claims summarized by this Court as follows: (1) The indictment was legally insufficient to charge a capital offense and more fundamentally the indictment, to the extent the government alleges it charges a capital offense, violates Article I, Section 15(A) of the Florida Constitution; (2) Appellate counsel was deficient in failing to argue fundamental error in the trial court not being bound by a jury

instruction requiring a presumption of life just as there is a presumption of innocence in the guilt phase; and (3) Appellate counsel failed to argue fundamental errors in the plea and jury waiver.

This Court identified the lack of conceivable merit of the claims. As to the grand-jury-indictment claim, this Court noted that "the failure to present a novel legal argument not established as meritorious in the jurisdiction of the court to whom one is arguing is simply not ineffectiveness of legal counsel." Slip Op., at 14. Thus, "because these novel arguments have never been established as meritorious, appellate counsel was not ineffective for failing to raise them on direct appeal." *Id*. at 15. Likewise, this Court rejected the jury-instruction claim because "as with Sanchez-Torres's previous habeas claim, we hold that appellate counsel was not ineffective for failing to raise a novel argument on direct appeal." *Id*. at 16. Mr. Berry raised this argument, even while expressly acknowledging that "[t]he issue of a jury instruction on the presumption of life does not appear to have been litigated in Florida." *Id*. at 15-16. Finally, the plea-and-jury-waiver claim was "meritless, for appellate counsel did in fact argue on direct appeal that Sanchez-Torres's plea was involuntary; counsel even argued that the plea was not intelligent and knowing on the grounds that Sanchez-Torres allegedly misunderstood what the State had to prove." *Id*. at 17. Thus, Mr. Berry raised two ineffective assistance of appellate counsel arguments that rested on entirely novel legal theories (as conceded by Mr.

Berry) and an ineffective assistance of appellate counsel argument that claimed counsel was ineffective for failing to raise a claim that appellate counsel did in fact raise. None of the habeas corpus claims Mr. Berry raised could reasonably succeed.

In addition to the sparse and idiosyncratic briefing, Mr. Berry chose to argue only one issue during oral argument: the grand jury indictment claim. *See* Oral Argument, November 7, 2019, SC19-211 & SC19-836 (available at https://www.floridasupremecourt.org/Oral-Arguments/Videos-of-Oral-Argument-Broadcasts (last visited April 23, 2020)). In Florida, death-row inmates are granted as a right oral argument in front of this Court. However, counsel has limited time and must focus on meritorious issues. Mr. Berry instead spent the entire argument on a claim with no chance of success, at the expense of meritorious claims upon which Mr. Sanchez-Torres could have been granted relief. In sum, this Court did not have sufficient advocacy from Mr. Sanchez-Torres's side of the appeal to render a fair determination on Mr. Sanchez-Torres's case

Prior appellate and habeas counsel's representation of Mr. Sanchez-Torres in these proceedings fell beyond the range of reasonable counsel, and as a direct result, this Court was forced to overlook and misconstrue meritorious claims. *See Shaw v. Wilson*, 721 F.3d 908, 915 (7th Cir.2013) (appellate counsel's performance fell below prevailing norms where he abandoned a nonfrivolous claim that was both "obvious" and "clearly stronger" than claim he actually presented). In *Arbalaez v.*

Butterworth, 738 So. 2d 326, 326 (Fla. 1999), this Court stated that courts have "a constitutional responsibility to ensure the death penalty is administered in a fair, consistent, and reliable manner." And yet, it is impossible to ensure that capital punishment is not imposed in an arbitrary and capricious manner and that no one who is innocent or who has been unconstitutionally convicted or sentenced to death is executed without that which this Court has called the "very foundation of justice," the zealous representation of death-sentenced individuals at every level in the process. *Id*. At 331, n. 12 (Anstead, J., concurring); and *Wilson v. Wainwright*, 474 So. 2d 1162, 1164 (Fla. 1985). Particularly because this is a capital case, this Court should order supplemental briefing on the claims that Mr. Sanchez-Torres raised in the circuit court below during this 3.851 proceeding, but were inexplicably and unreasonably omitted from the appeal by Mr. Berry. For the reasons stated above, supplemental briefing should be granted.

CERTIFICATION OF COUNSEL

I HEREBY CERTIFY I have discussed the contents of this motion fully with the Defendant and have complied with Rule 4-1.4 of the Rules of Professional Responsibility and furthermore certify this Motion is filed in good faith.

/s/ Karin L. Moore

_____

KARIN L. MOORE
Assistant Capital Collateral Regional Counsel – North

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished on this day, April 23, 2020, via electronic service to Michael Kennett, Assistant Attorney General, at Michael.kennett@myfloridalegal.com and capapp@myfloridalegal.com, and via US mail to Hector Sanchez-Torres DOC number J40507, Union Correctional Institution, 7819 NW 228th Street, Raiford, FL 32026.

Respectfully submitted,

ROBERT S. FRIEDMAN
Capital Collateral Regional Counsel – North

/s/ Karin L. Moore

_____

KARIN L. MOORE
Assistant Capital Collateral Regional Counsel – North
Florida Bar Number 351652
1004 DeSoto Park Drive
Tallahassee, FL 32301
850-487-0922 x. 104
Karin.Moore@ccrc-north.org