IN THE SUPREME COURT OF FLORIDA

HECTOR SANCHEZ-TORRES,

Appellant/Petitioner,

v.

CASE Nos. SC19-211, SC19-836
L.T. No. 102009CF000671000AMX

STATE OF FLORIDA,

DEATH PENALTY CASES

Appellee.

MARK S. INCH,

Respondent
_____/

STATE'S RESPONSE TO MOTION FOR REHEARING AND CLARIFICATION

I. CLAIMS RAISED IN POSTCONVICTION APPEAL

In his appeal of the denial of his postconviction motion, Appellant raised the following claims: (1) trial counsel misadvised Appellant to enter a guilty plea; (2) trial counsel misadvised Appellant to waive his right to a penalty phase jury; and, and (3) trial counsel failed to file a motion to suppress Appellant's confession. *See Sanchez-Torres v. State*, No. SC19-211, 2020 WL 1173750, at *3 (Fla. Mar. 12, 2020).

II. CLAIMS RAISED IN MOTION FOR REHEARING

In his Motion for Rehearing and Clarification, Appellant raises four claims: (1) this Court's opinion contains errors of fact regarding witnesses who never actually testified at the postconviction evidentiary hearing; (2) this Court's opinion contains errors of fact and law regarding Appellant's claims of ineffective assistance of trial counsel regarding counsel's advice to Appellant about the guilty plea and waiver of a penalty phase jury; (3) this Court's opinion contains errors of law and fact regarding Appellant's claim of ineffective assistance of trial counsel regarding counsel's decision not to file a motion to suppress; and, (4) this Court should address the appointment of counsel in Appellant's postconviction proceedings.

Claim #1

Motion claim #1 appears to involve clarification of facts alone. Consequently, the State respectfully declines to address this claim.

Claims #2 and #3

Motion claim #2 appears to combine claims one and two raised on appeal; and, motion claim #3 appears to involve claim three raised on appeal.

Under Florida Rule of Appellate Procedure 9.330, a motion for rehearing "shall state with particularity the points of law or fact that, in the opinion of the movant, the court has overlooked or misapprehended in its order or decision." Fla.

R. App. P. 9.330(a)(2)(A). A motion for rehearing "shall not reargue the merits of the Court's order." *Jacobs v. Wainwright*, 450 So.2d 200, 201 (Fla. 1984). And, a motion for rehearing should be clear and concise. *See Dep't of Revenue v. Leadership Hous., Inc.*, 322 So.2d 7, 9 (Fla. 1975) (quoting *Tex. Co. v. Davidson*, 76 Fla. 478, 80 So. 558, 559 (Fla. 1918)) ("The proper function of a [motion] for rehearing is to present to the court in clear and concise terms some point that it overlooked or failed to consider; only this and nothing more.").

The length of the motion for rehearing is often inversely proportional to its merit; for if the Court truly overlooked an important point of law or fact, then an appellant should not need pages upon pages to highlight that point with particularity. *Cf. Boardwalk at Daytona Dev., LLC v. Paspalakis*, 212 So.3d 1063 (Fla. 5th DCA. 2017):

> Appellees' "motion does what [Florida Rule of Appellate Procedure] 9.330(a) proscribes; it re-argues the merits of the case." *Lawyers Title Ins. Corp. v. Reitzes*, 631 So.2d 1100, 1100 (Fla. 4th DCA 1993) (citations omitted). "It appears that counsel are utilizing the motion for rehearing and/or clarification as a last resort to persuade this court to change its mind or to express their displeasure with this court's conclusion." *Id*. at 1101. "This is not the purpose of [r]ule 9.330. It should be noted that the filing of [r]ule 9.330 motions should be done under very limited circumstances, it is the exception to the norm." *Id*. (footnote omitted). "Motions for rehearing are strictly limited to calling an appellate court's attention—without argument—to something the court has overlooked or misapprehended. 'The motion for rehearing is not a vehicle for counsel or the party to continue its attempts at advocacy.'" *Cleveland v. State*, 887 So.2d 362, 364 (Fla. 5th DCA 2004) (quoting *Goter v. Brown*, 682 So.2d 155, 158 (Fla. 4th DCA 1996)).

Cf. also State ex rel. Jaytex Realty Co. v. Green, 105 So.2d 817, 818–19 (Fla. 1st DCA 1958):

> Certainly it is not the function of a petition for rehearing to furnish a medium through which counsel may advise the court that they disagree with its conclusion, to reargue matters already discussed in briefs and oral argument and necessarily considered by the court, or to request the court to change its mind as to a matter which has already received the careful attention of the judges, or to further delay the termination of litigation.

Cf. also Ayala v. Gonzalez, 984 So.2d 523, 526 (Fla. 5th DCA 2008):

> [W]e do not view the privilege to seek a rehearing pursuant to rule 9.330, Florida Rules of Appellate Procedure, as an open invitation for an unhappy litigant or attorney to reargue the same points previously presented, or to discuss the bottomless depth of the displeasure that one might feel toward this judicial body as a result of having unsuccessfully sought appellate relief.

Far from concise, the portions of Appellant's motion for rehearing pertaining to the three claims raised in the initial brief cover forty-four (44) pages. *See* motion, pp. 5-49. Instead of highlighting with particularity any overlooked points of law or fact, Appellant essentially argues that this Court incorrectly decided the appeal. In doing so, Appellant improperly uses the motion for rehearing as a means to continue his attempts at advocacy. *See Goter v. Brown*, 682 So.2d 155, 158 (Fla. 4th DCA 1996):

> Motions for rehearing are strictly limited to calling our attention - *without argument* - to something we have obviously overlooked or misapprehended. The motion for rehearing is not a vehicle for counsel or the party to continue its attempts at advocacy. It should be demonstrative only - i.e. merely point to the overlooked or

> misunderstood fact or circumstance. If we want additional argument, we know how to say so. (emphasis in original)

Therefore, this Court should deny the motion as to claims #2 and #3.

Claim #4

Motion claim #4 was not raised in the initial brief; therefore, motion claim #4 is unauthorized and the State will not address it. *See* Fla. R. App. P. 9.330(a)(2)(A) ("The motion shall not present issues not previously raised in the proceeding."); *see also Dabbs v. State*, 230 So.3d 475, 476 (Fla. 4th DCA. 2017), citing *Ayer v. Bush*, 775 So.2d 368, 370 (Fla. 4th DCA 2000); *Fiesta Fashions, Inc. v. Capin*, 450 So.2d 1128, 1129 (Fla. 1st DCA 1984) ("An issue not raised previously cannot be raised for the first time in a motion for rehearing.").

III. CONCLUSION

Clarification

To the extent this Court's opinion may have mischaracterized a fact, the State agrees that any such fact should be clarified.

Rehearing

Appellant's motion for rehearing should be denied. Instead of clearly and concisely highlighting points of law or fact overlooked by this Court, claims #2 and #3 represent improper attempts at continued advocacy. Because claim #4 was not raised in the initial brief, it cannot be raised on rehearing.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via the eportal to Karin L. Moore, Esq., Karin.Moore@ccrc-north.org, Counsel for Appellant, this 5th day of May, 2020.

/s/*Michael T. Kennett*
MICHAEL T. KENNETT