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Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

TERRY MELVIN SIMS, )  
 )  
 Petitioner, )  
 )  
 v. )  
 )  
 HARRY SINGLETARY, Secretary, )  
 Department of Corrections, )  
 State of Florida, )  
 )  
 Respondent. )  
 \_\_\_\_\_ )

CASE NO. 81,330

PETITIONER'S REPLY  
TO STATE'S RESPONSE TO  
PETITION FOR WRIT OF HABEAS CORPUS

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ATTORNEYS FOR PETITIONER

TABLE OF CONTENTS

	<u>Page</u>
GROUNDS FOR HABEAS CORPUS RELIEF . . . . .	1
I.        MR. SIMS WAS DENIED THE "RIGHT TO COMPLETE REVIEW" IN VIOLATION OF THE MANDATORY RULE, STATE STATUTE, AND THE STATE AND FEDERAL CONSTITUTIONS. . . . .	1
VIII.     MR. SIMS WAS DEPRIVED OF HIS RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL ON DIRECT APPEAL. . . . .	3
CONCLUSION . . . . .	6
CERTIFICATE OF SERVICE . . . . .	6

GROUND'S FOR HABEAS CORPUS RELIEF

I. MR. SIMS WAS DENIED THE "RIGHT TO COMPLETE REVIEW" IN VIOLATION OF THE MANDATORY RULE, STATE STATUTE, AND THE STATE AND FEDERAL CONSTITUTIONS.

The State's assertion that this claim "could and should have been raised on direct appeal" (Response at 6)<sup>1</sup>, actually supports Mr. Sims' arguments in Issue VIII that his appellate attorney's performance was deficient (Petition at 73) and directly refutes the State's later assertion (Response at 16-17) that there was no deficiency in counsel's performance. In addition, this issue could only have been raised on direct appeal -- as Mr. Sims argues (Petition at 14) -- had appellate counsel not affirmatively proceeded with the appeal before the record was complete, had this Court not subsequently denied appellate counsel's request for reconstruction of the record on appeal (and Mr. Sims' fundamental right to a complete record), and had appellate counsel not then neglected to file a supplemental brief.

To the extent, then, that counsel failed to take the steps necessary to raise this issue on direct appeal, counsel's performance was deficient. Alternatively, the issue was raised through Mr. Sims' motion for reconstruction of the record, which was denied by this Court, thereby depriving Mr. Sims of his right to complete review. Particularly in a capital case, that right

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<sup>1</sup>Mr. Sims' Petition for Writ of Habeas Corpus and the State's Response to Petition for Writ of Habeas Corpus will be respectively referred to herein as "Petition" and "Response," followed by the appropriate page numbers, all in parentheses.

is fundamental. See, e.g., Parker v. Dugger, 111 S. Ct. 731, 112 L.Ed.2d 826 (1991); Proffitt v. Florida, 428 U.S. 242 (1976); Delap v. State, 350 So. 2d 462 (Fla. 1977). This Court has consistently exercised its habeas corpus jurisdiction to correct fundamental errors that occurred in the direct appeal process. When this Court is presented with an issue on direct appeal, and its disposition of the issue is shown to be fundamentally erroneous, the Court will not hesitate to correct such errors in habeas corpus proceedings. As this Court has explained, the Court will "revisit a matter previously settled by the affirmance," if what is involved is a claim of "error that prejudicially denies fundamental constitutional rights . . . ." Kennedy v. Wainwright, 483 So. 2d 424, 426 (Fla. 1986). Accordingly, Issue I is properly presented to this Court by Mr. Sims' Petition for Writ of Habeas Corpus, and no procedural bar applies.

VIII. MR. SIMS WAS DEPRIVED OF HIS RIGHT  
TO THE EFFECTIVE ASSISTANCE OF COUNSEL  
ON DIRECT APPEAL.

Contrary to the State's assertions (Response at 17), Mr. Sims detailed in his habeas petition the specific ways in which appellate counsel's performance was deficient. (Petition at 75-82)

Alternatively, the State argues that Mr. Sims has failed to demonstrate prejudice resulting from the acts and omissions of appellate counsel. (Response at 17) In particular, the State faults Mr. Sims for failing to identify in greater detail what he would have argued had he been allowed a complete record and supplemental briefing.

In part, the prejudice is demonstrated by the State's Response itself. For example, the State argues that trial counsel failed to preserve an objection to the constitutionality of the instruction on the "especially heinous, atrocious or cruel" aggravating factor. (Response at 10) In the absence of a complete record, however, that fact cannot be determined. If this Court were to accept the State's argument and find the claim barred, then clearly Mr. Sims will have been prejudiced by counsel's failure to ensure a complete record. Other specific examples of prejudice flowing from the lack of a complete record are set forth in Issue I, see, e.g., Petition at 20-21, which is incorporated by specific reference into Issue VIII. See Petition at 77 and n.27.

To some extent, however, the prejudice resulting from appellate counsel's failure to ensure a complete record must be presumed. In the absence of a complete record, it is impossible for appellate counsel to perform effectively, because counsel cannot know what errors occurred and/or what errors were preserved for appeal. As a result, the finest appellate counsel in the world, presented with an incomplete record, cannot subject the State's case to meaningful adversarial testing on direct appeal. Thus, the lack of a complete record constitutes "circumstances surrounding [Mr. Sims'] representation" that justify applying a presumption of prejudice. United States v. Cronin, 466 U.S. 648, 662 (1984).

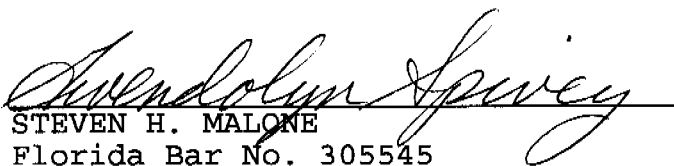
The lack of a complete record precluded this Court from carrying out its statutory and constitutional responsibility of reviewing the "entire record" of Mr. Sims' conviction and death sentence. Section 921.141(4), Fla. Stat.; Parker, 111 S. Ct. 731; Proffitt, 428 U.S. 242. It also precluded counsel from carrying out his "unique role" of discovering and presenting error to this Court. Wilson v. Wainwright, 474 So. 2d 1162, 1165 (Fla. 1985). Thus here, as in Parker, "there is a sense in which the [Florida Supreme Court] did not review" Mr. Sims' sentence at Parker, 112 L.Ed.2d at 826.

As demonstrated in Issue I, the absence of a complete record for appeal deprives a defendant of due process in any criminal case. In a capital case, review of an incomplete or erroneous record also violates the Eighth Amendment. Parker, id. Where

the lack of a complete record results from counsel's deficient performance, prejudice must be presumed.

CONCLUSION

Mr. Sims did not receive the careful appellate review required by state law and the state and federal constitutions. This Court should set aside its prior affirmance of his convictions and death sentence, conduct a full appellate review, and order a new trial.



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CERTIFICATE OF SERVICE

I CERTIFY that a copy of the foregoing has been furnished by U. S. Mail/hand delivery/facsimile transmission to Kellie A. Nielan, Assistant Attorney General, Department of Legal Affairs, 210 North Palmetto Avenue, Suite 447, Daytona Beach, Florida 32114, this 2nd day of April, 1993.

  
GWENDOLYN SPIVEY