

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

KENNY DAVIS,

Petitioner,

v.

FLORIDA DEPARTMENT OF CORRECTIONS, JULIE JONES, &
ATTORNEY GENERAL OF THE STATE OF FLORIDA, PAMELA BONDI

Respondents.

PETITIONER'S MOTION FOR LEAVE TO SUPPLEMENT HABEAS
PETITION

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COMES NOW the Petitioner, Kenny Davis (“Mr. Davis”), and respectfully files this motion for leave to supplement his previously filed 28 U.S.C. 2255, [writ of habeas corpus](#).

Preliminary Statement

1. On or about June 29, 2018, Davis filed his petition for writ of habeas corpus (the “Writ”) (D.E. 1).

2. In the Writ, Davis claimed ineffective assistance of appellate counsel based on the following factual basis:

Turning to the case here, it's critical to point out that prior to the start of trial in this case, defense counsel made numerous attempts over a three (3) year period (2008-2011) to depose state key witness BIBI WAHAB and JORGE CONDE. Although the defense scheduled and re-scheduled the date, due to these two (2) state witnesses continued failure to appear, state key witnesses BIBI WAHAB and JORGE CONDE intentionally failed to show up for depositions each time. Left with no other alternative on November 30, 2011, defense counsel filed a KCMOTION TO EXCLUDE" witnesses BIBI WAHAB and JORGE CONDE.

3. According to Davis, the Trial Court properly excluded witnesses, Ahab and Conde. However, during trial the court permitted such witnesses to testify against the Defendant, Davis. Later, during Davis’s direct appeal, appellate counsel failed to raise the issue either based on fundamental error or judicial error.

4. Davis recently procured additional evidence that will assist this court in determining if a constitutional violation occurred.

5. As part of this supplement, Davis submits the following exhibits for the Court's review:

- (A) The Motion to Exclude Witnesses, Wahab and Conde. Ex. A.
- (B) Affidavit from the Clerk of Court stating that the transcript of the hearing on the Motion to Exclude Witnesses was not recorded properly due to a technical defect (the "Affidavit of Non-Retrieveable Data"). Ex. B.

ARUGMENT

6. During his trial, Davis' trial counsel filed a Motion to Exclude Witnesses, Wahab and Conde.

7. The Motion to Exclude, dated November 30, 2011, stated that Wahab and Conde are the only two eyewitnesses to the alleged crime.

8. Davis added that there is no *corpus delicti* linking Davis to the crime such as a gun, fingerprints, or DNA.

9. The only evidence against Davis is Wahab and Conde, however, Davis was never fully able to depose such witnesses prior to trial. As a result, Davis sought exclusion of the witnesses under Florida Rule of Criminal Procedure 3.220.

10. Davis contended that the Trial Court properly excluded the witnesses

following the hearing, however, the witnesses were permitted to testify during trial.¹

11. However, Appellate Counsel failed to raise this critical issue on appeal. Davis' motion under 28 U.S.C. 2255, states:

In the case at bar, the trial court did in fact make a definitive ruling on the record excluding the evidence at issue here (Jorge Conde's testimony) before trial when the court "granted" the defense's Motion To Exclude Witness Jorge Conde, [...], there was no need to renew an objection and the issue was indeed preserved as a claim of error for appeal. Yet, Appellate counsel neglected to notice this fundamental error and failed to raise such on the Petitioner's direct appeal even though it was right there plain as day on the record on appeal. E.g., in Volume - 1 of the Record on Appeal at page 34, and at page 5 (Clerk Entry dated November 30, 2011). Had counsel raise this claim on direct appeal there is a reasonable probability that, but for counsel's unprofessional error, the result of the appellate proceeding would have been different in this case. This has [satisfied] the second prong (prejudice) of the [Strickland] analysis.

12. Recently the Petitioner procured an Affidavit of Non-Retrieveable. Ex. B. On or about November 4, 2018, the Court Reporter, Tamara Harden, completed an affidavit for the Petitioner, Davis, stating: that the hearing on the Motion to Exclude Witnesses, Conde and Wahab, dated November 30, 2011, was not able to be transcribed due to a malfunctioning SD Card. As a result, the audio file was not

¹ On November 30, 2011, the Honorable Victoria Brennan, Circuit judge, granted the Motion To Exclude state witnesses WAHAB and CONDE. Both WAHAB and CONDE were excluded from testifying at the Petitioner's trial; the State of Florida, however, placed both witnesses on the stand to testify at trial.

able to be retrieved.

13. Davis procured this information recently. He did not possess the Affidavit of the Court Reporter at the time he filed his 3.850, F.R.Crim.Pro. Motion or his 28 U.S.C. 2255, Petition.

14. Davis contends that the State of Florida lacks corpus delicti of the alleged crimes and without the testimony of Conde and Wahab, Davis would never have been convicted.

15. Therefore, the Affidavit from the Court Reporter is material to Davis' case as he should be granted a hearing on his Habeas Corpus Petition to determine if appellate counsel was ineffective for failing to procure a similar affidavit as part of the record on appeal.

16. Davis contends the corpus delicti doctrine states that it is "a fundamental principle of law that no person be adjudged guilty of a crime until the state has shown that a crime has been committed." *Corona v. State*, 64 So. 3d 1232, 1243 (Fla. 2011) (citing *State v. Allen*, 335 So. 2d 823, 825 (Fla. 1976)). The traditional purpose of the corpus delicti rule was to ensure that a defendant would not be convicted solely on a mistaken confession to a crime that did not occur. *See Allen*, 335 So. 2d at 825. To demonstrate that a crime has been committed, the state "must show that a harm has been suffered of the type contemplated by the charges (for example, a death in the case of a murder charge or a loss of property

in the case of a theft charge), and that such harm was incurred due to the criminal agency of another . . . A person's confession to a crime is not sufficient evidence of a criminal act where no independent direct or circumstantial evidence exists to substantiate the occurrence of a crime.” *Corona*, 64 So. 3d at 1243.

17. Moreover, the “judicial quest for truth requires that no person be convicted out of derangement, mistake or official fabrication.” *Id.*

18. In order to ensure this quest for truth is satisfied, corpus delicti cannot be based solely on a defendant's extra-judicial statements.

19. The heaviest charge laid against Davis is pre-mediated murder. The State must provide additional evidence to support the elements of the offense pre-meditation. Such evidence may be presented before or after the admission of the statements, if any, by Wahab and Conde. *McIntosh v. State*, 532 So. 2d 1129, 1131 (Fla. 4th DCA 1988). The evidence against Davis shows a lack of support that the elements of the offense of murder can be sustained. The evidence shows: (a) A lack of a firearm; (b) No fingerprints; (C) No DNA; (D) No physical evidence connecting Davis to the crime.

20. Thus, the record shows no evidence that could be used to place Davis on the scene. Corpus delicti may not be established solely by the use of excluded witnesses such as Wahab and Conde. *Hodges v. State*, 176 So. 2d 91, 92 (Fla. 1965).

21. There is a lack of proof as to the murder in this matter. Without direct laboratory evidence or evidence of a physical nature, and only inferences made from insufficient testimonial evidence of Wahab and Conde.

22. In light of the above, Davis conviction was illegal; his appellate counsel should have raised the issues pertaining to Wahab and Conde on direct appeal.²

CONCLUSION

Defendant's petition for habeas corpus should be granted because the trial court's ruling that limited testimony of State of Florida's witnesses violated Fifth Amendment guarantee of fundamental fairness given that the evidence excluded was material to the defense and appellate counsel should have raised these issues on direct appeal.

² See, for example, *United States v. Seabury*, 507 Fed. Appx. 836 (11th Cir. Ct. Appeal 2013). When an appellant does not contemporaneously object to an evidentiary ruling in the district court, we are limited to review for plain error. *United States v. Turner*, 474 F.3d 1265, 1275 (11th Cir. 2007). Similarly, when the proper basis for admission is not presented to the district court, we review the district court's evidentiary ruling for plain error only. *United States v. King*, 73 F.3d 1564, 1571-72 (11th Cir. 1996). We have held that an error is not plain when the basis for admission of excluded evidence was not raised at trial. *Id.* at 1572 (addressing Federal Rule of Evidence 806 and explaining that to apply the plain error exception to the contemporaneous objection rule when trial counsel had an opportunity to assert the basis for admission would lead to "the exception swallowing the rule").

CERTIFICATE OF COMPLIANCE

I certify that this reply brief contains no more than 3,750 words, specifically 3,750 words, as counted by Microsoft Word 2010, and uses 14-point Times New Roman font.

/s/ Robert L. Sirianni, Jr.
Robert L. Sirianni, Jr.

Dated: December 19, 2018.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 19th day of December 2018, I filed the foregoing with the Clerk of the Court and served opposing counsel with a copy via CM/ECF filing system.

/s/ Robert L. Sirianni, Jr.
Robert L. Sirianni, Jr.